

COURT OF APPEAL

ON APPEAL FROM THE PROVINCIAL COURT OF BRITISH COLUMBIA, FROM
JUDGMENT OF THE HONOURABLE JUDGE RIDEOUT PRONOUNCED ON THE
26TH DAY OF NOVEMBER 2020.

REGINA

RESPONDENT

v.

PATRICK HENRY FOX

APPELLANT

RESPONDENT'S BOOK OF AUTHORITIES

The Appellant:

PATRICK HENRY FOX
c/o North Fraser Pretrial Centre
1451 Kingsway Ave
Port Coquitlam, BC
V3C 1S2

IN-PERSON

Counsel for the Respondent:

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COUNSEL

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COUNSEL

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Tab 1:

R. v. Anderson, 2014 SCC 41

Her Majesty The Queen *Appellant*

v.

Frederick Anderson *Respondent*

and

**Director of Public Prosecutions of Canada,
Attorney General of Ontario,
Attorney General of New Brunswick,
Attorney General of British Columbia,
David Asper Centre for Constitutional
Rights and Aboriginal Legal Services of
Toronto Inc.** *Interveners*

INDEXED AS: R. v. ANDERSON

2014 SCC 41

File No.: 35246.

2014: March 19; 2014: June 6.

Present: McLachlin C.J. and LeBel, Abella, Cromwell,
Moldaver, Karakatsanis and Wagner JJ.

**ON APPEAL FROM THE COURT OF APPEAL FOR
NEWFOUNDLAND AND LABRADOR**

Constitutional law — Charter of Rights — Right to life, liberty and security of the person — Criminal law — Sentencing — Aboriginal offenders — Mandatory minimum sentence — Accused convicted of impaired driving for fifth time — Crown prosecutor seeking mandatory minimum sentence — Whether s. 7 of the Charter requires the Crown to consider Aboriginal status of accused when seeking minimum sentence for impaired driving — Whether consideration of Aboriginal status is a principle of fundamental justice — Whether decision to seek mandatory minimum sentence is a matter of core prosecutorial discretion — Standard of review for Crown decision making — Canadian Charter of Rights and Freedoms, s. 7 — Criminal Code, R.S.C. 1985, c. C-46, ss. 253(1)(b), 255(1)(a)(iii), 727(1).

Sa Majesté la Reine *Appelante*

c.

Frederick Anderson *Intimé*

et

**Directeur des poursuites pénales du Canada,
procureur général de l'Ontario,
procureur général du Nouveau-Brunswick,
procureur général de la Colombie-
Britannique, David Asper Centre for
Constitutional Rights et Aboriginal Legal
Services of Toronto Inc.** *Intervenants*

RÉPERTORIÉ : R. c. ANDERSON

2014 CSC 41

N° du greffe : 35246.

2014 : 19 mars; 2014 : 6 juin.

Présents : La juge en chef McLachlin et les juges LeBel,
Abella, Cromwell, Moldaver, Karakatsanis et Wagner.

**EN APPEL DE LA COUR D'APPEL DE TERRE-
NEUVE-ET-LABRADOR**

Droit constitutionnel — Charte des droits — Droit à la vie, à la liberté et à la sécurité de la personne — Droit criminel — Détermination de la peine — Délinquants autochtones — Peine minimale obligatoire — Accusé reconnu coupable une cinquième fois de conduite avec facultés affaiblies — Demande d'une peine minimale obligatoire par le procureur du ministère public — Lorsque le ministère public demande une peine minimale obligatoire pour conduite avec facultés affaiblies, l'art. 7 de la Charte exige-t-il qu'il prenne en considération le statut d'Autochtone d'un accusé? — La prise en considération du statut d'Autochtone est-elle un principe de justice fondamentale? — La décision de demander une peine minimale obligatoire relève-t-elle du pouvoir discrétionnaire essentiel en matière de poursuites? — Norme de contrôle applicable aux décisions du ministère public — Charte canadienne des droits et libertés, art. 7 — Code criminel, L.R.C. 1985, ch. C-46, art. 253(1)b), 255(1)a)(iii), 727(1).

The accused was convicted of impaired driving. The offence of impaired driving carries with it a minimum sentence of 30 days' imprisonment for a second offence and 120 days' imprisonment for a subsequent offence. These mandatory minimum sentences apply only if the Crown notifies the accused of its intention to seek a greater punishment prior to any plea. Crown counsel served a Notice of intent to seek greater punishment by reason of the accused's four previous impaired driving convictions. The trial judge held that Crown counsel breached s. 7 of the *Canadian Charter of Rights and Freedoms* by tendering the Notice without considering the accused's Aboriginal status. The accused was sentenced to a 90-day intermittent sentence. The Court of Appeal dismissed an appeal from sentence.

Held: The appeal should be allowed and a term of imprisonment of 120 days should be substituted, with service of the remainder of the sentence stayed in accordance with the concession of the Crown.

This appeal raises two issues: (1) whether s. 7 of the *Charter* requires the Crown to consider an accused's Aboriginal status when making decisions that limit the sentencing options available to a judge — here, the decision to seek a mandatory minimum sentence for impaired driving; and (2) whether the decision to tender the Notice is a matter of “core” prosecutorial discretion, and if so, the standard by which it may be reviewed.

No constitutional obligation

Crown prosecutors are not constitutionally required to consider the Aboriginal status of an accused when deciding whether or not to seek a mandatory minimum sentence for impaired driving for two reasons.

First, while it is a principle of fundamental justice that a sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender, the duty to impose a proportionate sentence rests upon judges, *not* Crown prosecutors. The proportionality principle requires judges to consider systemic and background factors, including Aboriginal status, which may bear on the culpability of the offender. There is no basis in law to support equating the distinct roles of the judge and the prosecutor in the sentencing process.

L'accusé a été reconnu coupable de conduite avec facultés affaiblies. Une peine minimale de 30 jours d'emprisonnement est infligée pour une deuxième infraction, et pour une infraction subséquente la peine minimale est de 120 jours d'emprisonnement. Ces peines minimales obligatoires ne sont infligées que si le ministère public avise l'accusé, avant tout plaidoyer, de son intention de demander une peine plus sévère. Le procureur du ministère public a signifié un avis de son intention de demander une peine plus sévère puisque l'accusé avait déjà été reconnu coupable de conduite avec facultés affaiblies à quatre reprises. Le juge du procès a estimé qu'en signifiant l'avis à l'accusé sans prendre en considération son statut d'Autochtone, le procureur du ministère public avait contrevenu à l'art. 7 de la *Charte canadienne des droits et libertés*. L'accusé a été condamné à une peine discontinue de 90 jours d'emprisonnement. La Cour d'appel a rejeté l'appel interjeté contre la peine.

Arrêt : Le pourvoi est accueilli et une peine d'emprisonnement de 120 jours est substituée à la peine infligée, avec sursis de ce qui reste à courir de la peine conformément à la concession du ministère public.

Le pourvoi soulève deux questions. (1) L'art. 7 de la *Charte* oblige-t-il le ministère public à prendre en considération le statut d'Autochtone d'un accusé lorsqu'il prend des décisions qui limitent l'éventail des peines que peut infliger un juge — en l'espèce, la décision de demander une peine minimale obligatoire pour conduite avec facultés affaiblies? (2) La décision de produire l'avis relève-t-elle du pouvoir discrétionnaire « essentiel » en matière de poursuites et, dans l'affirmative, quelle est la norme selon laquelle elle peut être révisée?

Aucune obligation constitutionnelle

Les procureurs du ministère public ne sont pas tenus par la Constitution de prendre en considération le statut d'Autochtone d'un accusé lorsqu'ils décident s'il y a lieu de demander une peine minimale obligatoire pour conduite avec facultés affaiblies, et ce, pour deux raisons.

Premièrement, même si, selon le principe de justice fondamentale, une peine doit être proportionnelle à la gravité de l'infraction et au degré de responsabilité du délinquant, le devoir d'infliger une peine proportionnée incombe aux juges et *non* aux procureurs du ministère public. Le principe de la proportionnalité exige du juge qu'il prenne en considération les facteurs systémiques ou historiques, y compris le statut d'Autochtone, qui peuvent influencer sur la culpabilité du délinquant. Aucun principe de droit ne permet d'assimiler les rôles distincts du juge et du procureur dans le processus de détermination de la peine.

Second, the principle of fundamental justice that the accused asks this Court to recognize does not meet the test which governs principles of fundamental justice. A principle of fundamental justice must be a legal principle, enjoy consensus that the rule or principle is fundamental to the way in which the legal system ought fairly to operate, and be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person. The principle advanced by the accused does not meet the second requirement as it is contrary to a long-standing and deeply-rooted approach to the division of responsibility between the Crown prosecutor and the courts. It would greatly expand the scope of judicial review of discretionary decisions made by prosecutors and put at risk the adversarial nature of our criminal justice system by inviting judicial oversight of the numerous decisions that Crown prosecutors make on a daily basis.

Prosecutorial discretion

Decisions by Crown prosecutors are either exercises of prosecutorial discretion or tactics and conduct before the court. Subsequent to this Court's decision in *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372, confusion has arisen as to what is meant by "prosecutorial discretion" and the law has become cloudy. In particular, the use of the word "core" in *Krieger* has led to a narrow definition of prosecutorial discretion. The present appeal provides an opportunity for clarification.

"Prosecutorial discretion" is an expansive term. It covers all decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it. Prosecutorial discretion is entitled to considerable deference. It must not be subjected to routine second-guessing by the courts. Judicial non-interference is a matter of principle based on the doctrine of separation of powers. In contrast, tactics and conduct before the court are governed by the inherent jurisdiction of the court to control its own processes. Deference is not owed to counsel who behave inappropriately in the courtroom, but a high degree of deference is accorded to the tactical decisions of counsel. Abuse of process is not a

Deuxièmement, le principe de justice fondamentale que l'accusé demande à notre Cour de reconnaître ne respecte pas le critère qui régit les principes de justice fondamentale. Un principe de justice fondamentale doit satisfaire aux conditions suivantes : il doit s'agir d'un principe juridique; il doit exister un consensus sur le fait que cette règle ou ce principe est essentiel au bon fonctionnement du système de justice, et il doit être défini avec suffisamment de précision pour constituer une norme fonctionnelle permettant d'évaluer l'atteinte à la vie, à la liberté ou à la sécurité de la personne. Le principe que propose l'accusé ne satisfait pas à la deuxième condition puisqu'il est contraire à une approche reconnue depuis longtemps et fortement enracinée en ce qui concerne le partage de la responsabilité entre le procureur du ministère public et les tribunaux. Ce principe élargirait considérablement la portée du contrôle judiciaire des décisions discrétionnaires des poursuivants et mettrait en danger le caractère accusatoire de notre système de justice pénale en ouvrant la porte à la surveillance judiciaire des nombreuses décisions que prennent quotidiennement les procureurs du ministère public.

Pouvoir discrétionnaire en matière de poursuites

Les décisions des procureurs du ministère public visent soit l'exercice du pouvoir discrétionnaire en matière de poursuites, soit la stratégie ou la conduite devant le tribunal. Après l'arrêt de notre Cour dans *Krieger c. Law Society of Alberta*, 2002 CSC 65, [2002] 3 R.C.S. 372, il y a eu une certaine confusion quant au sens à donner à l'expression « pouvoir discrétionnaire en matière de poursuites » et le droit est devenu nébuleux à cet égard. En particulier, l'emploi de l'expression « au cœur de » dans *Krieger* a donné lieu à une définition étroite du pouvoir discrétionnaire en matière de poursuites. Le présent pourvoi nous donne l'occasion de le clarifier.

L'expression « pouvoir discrétionnaire en matière de poursuites » est une expression large. Elle renvoie à toutes les décisions concernant la nature et l'étendue des poursuites ainsi que la participation du procureur général à celles-ci. Le pouvoir discrétionnaire en matière de poursuites justifie une grande déférence. Il ne doit pas être susceptible d'une remise en cause systématique par les tribunaux. Par principe, compte tenu du partage des pouvoirs, les tribunaux n'interviennent pas dans le pouvoir discrétionnaire en matière de poursuites. Par contre, la stratégie et la conduite du procureur du ministère public devant le tribunal sont assujetties à la compétence inhérente du tribunal de contrôler sa propre procédure. La

precondition for judicial intervention in relation to a party's tactics and conduct before the court.

Prosecutorial discretion is reviewable for abuse of process. The abuse of process doctrine is available where there is evidence that the Crown's conduct is egregious and seriously compromises trial fairness or the integrity of the justice system. The burden of proof lies on the accused to establish, on a balance of probabilities, a proper evidentiary foundation to proceed with an abuse of process claim, before requiring the Crown to provide reasons justifying its decision.

Tendering the Notice was a matter of prosecutorial discretion. In the complete absence of any evidence to support it, the accused's abuse of process argument must fail.

Cases Cited

Applied: *R. v. D.B.*, 2008 SCC 25, [2008] 2 S.C.R. 3; **explained:** *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372; *R. v. Gill*, 2012 ONCA 607, 112 O.R. (3d) 423; **distinguished:** *R. v. Gladue*, [1999] 1 S.C.R. 688; *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433; *United States of America v. Leonard*, 2012 ONCA 622, 112 O.R. (3d) 496, leave to appeal refused, [2013] 1 S.C.R. v; **referred to:** *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76; *R. v. Beare*, [1988] 2 S.C.R. 387; *R. v. Power*, [1994] 1 S.C.R. 601; *R. v. T. (V.)*, [1992] 1 S.C.R. 749; *R. v. Cook*, [1997] 1 S.C.R. 1113; *Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339; *Sriskandarajah v. United States of America*, 2012 SCC 70, [2012] 3 S.C.R. 609; *R. v. Nixon*, 2011 SCC 34, [2011] 2 S.C.R. 566; *R. v. O'Connor*, [1995] 4 S.C.R. 411; *R. v. Jolivet*, 2000 SCC 29, [2000] 1 S.C.R. 751; *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 S.C.R. 248; *R. v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190; *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331; *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3; *R. v. S.G.T.*, 2010 SCC 20, [2010] 1 S.C.R. 688; *R. v. Auclair*, 2014 SCC 6, [2014] 1 S.C.R. 83.

déférence ne s'impose pas envers les avocats qui se comportent de façon inopportune dans la salle d'audience, mais notre système fait preuve d'une grande retenue envers les décisions tactiques des avocats. L'abus de procédure n'est pas une condition préalable à l'intervention du juge relativement à la stratégie ou à la conduite d'une partie devant le tribunal.

Le pouvoir discrétionnaire en matière de poursuites est susceptible de contrôle judiciaire s'il y a eu abus de procédure. La règle de l'abus de procédure s'applique en présence d'éléments de preuve démontrant que la conduite du ministère public est inacceptable et compromet sérieusement l'équité du procès ou l'intégrité du système de justice. Avant que le ministère public soit tenu de justifier sa décision, il incombe à l'accusé d'établir, par prépondérance des probabilités, l'existence d'une preuve suffisante qu'une allégation relative à l'abus de procédure peut être examinée.

La production de l'avis relevait du pouvoir discrétionnaire en matière de poursuites. En l'absence totale de preuve pour l'étayer, l'argument de l'accusé fondé sur l'abus de procédure doit être rejeté.

Jurisprudence

Arrêt appliqué : *R. c. D.B.*, 2008 CSC 25, [2008] 2 R.C.S. 3; **arrêts expliqués :** *Krieger c. Law Society of Alberta*, 2002 CSC 65, [2002] 3 R.C.S. 372; *R. c. Gill*, 2012 ONCA 607, 112 O.R. (3d) 423; **distinction d'avec les arrêts :** *R. c. Gladue*, [1999] 1 R.C.S. 688; *R. c. Ipeelee*, 2012 CSC 13, [2012] 1 R.C.S. 433; *United States of America c. Leonard*, 2012 ONCA 622, 112 O.R. (3d) 496, autorisation d'appel refusée, [2013] 1 R.C.S. v; **arrêts mentionnés :** *Canadian Foundation for Children, Youth and the Law c. Canada (Procureur général)*, 2004 CSC 4, [2004] 1 R.C.S. 76; *R. c. Beare*, [1988] 2 R.C.S. 387; *R. c. Power*, [1994] 1 R.C.S. 601; *R. c. T. (V.)*, [1992] 1 R.C.S. 749; *R. c. Cook*, [1997] 1 R.C.S. 1113; *Miazga c. Kvello (Succession)*, 2009 CSC 51, [2009] 3 R.C.S. 339; *Sriskandarajah c. États-Unis d'Amérique*, 2012 CSC 70, [2012] 3 R.C.S. 609; *R. c. Nixon*, 2011 CSC 34, [2011] 2 R.C.S. 566; *R. c. O'Connor*, [1995] 4 R.C.S. 411; *R. c. Jolivet*, 2000 CSC 29, [2000] 1 R.C.S. 751; *Demande fondée sur l'art. 83.28 du Code criminel (Re)*, 2004 CSC 42, [2004] 2 R.C.S. 248; *R. c. Beaudry*, 2007 CSC 5, [2007] 1 R.C.S. 190; *R. c. Cunningham*, 2010 CSC 10, [2010] 1 R.C.S. 331; *Ontario c. Criminal Lawyers' Association of Ontario*, 2013 CSC 43, [2013] 3 R.C.S. 3; *R. c. S.G.T.*, 2010 CSC 20, [2010] 1 R.C.S. 688; *R. c. Auclair*, 2014 CSC 6, [2014] 1 R.C.S. 83.

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Canadian Charter of Rights and Freedoms, ss. 1, 7, 15(1).
Controlled Drugs and Substances Act, S.C. 1996, c. 19, ss. 5, 6.
Criminal Code, R.S.C. 1985, c. C-46, ss. 92, 94, 95, 151, 152, 253(1), 255, 267(b), 271, 344, 718.1, 718.2, 727(1).
Extradition Act, S.C. 1999, c. 18, s. 44(1)(a).

Authors Cited

Code, Michael. "Judicial Review of Prosecutorial Decisions: A Short History of Costs and Benefits, in Response to Justice Rosenberg" (2009), 34 *Queen's L.J.* 863.
 Frater, Robert J. *Prosecutorial Misconduct*. Aurora, Ont.: Canada Law Book, 2009.
 Vanek, David. "Prosecutorial Discretion" (1988), 30 *Crim. L.Q.* 219.

APPEAL from a judgment of the Newfoundland and Labrador Court of Appeal (Green C.J.N.L. and Welsh and Rowe JJ.A.), 2013 NLCA 2, 331 Nfld. & P.E.I.R. 308, 1027 A.P.R. 308, 41 M.V.R. (6th) 194, 275 C.R.R. (2d) 127, 295 C.C.C. (3d) 262, [2013] 4 C.N.L.R. 209, [2013] N.J. No. 13 (QL), 2013 CarswellNfld 11, affirming a sentencing decision of English Prov. Ct. J., 2011 NLPC 1709A00569. Appeal allowed.

Iain R. W. Hollett, for the appellant.

Derek Hogan and Darlene Neville, for the respondent.

David Schermbrucker and Carole Sheppard, for the intervener the Director of Public Prosecutions of Canada.

Philip Perlmutter and Lorna Bolton, for the intervener the Attorney General of Ontario.

Kathryn A. Gregory and Cameron Gunn, Q.C., for the intervener the Attorney General of New Brunswick.

Joyce DeWitt-Van Oosten, Q.C., for the intervener the Attorney General of British Columbia.

Lois et règlements cités

Charte canadienne des droits et libertés, art. 1, 7, 15(1).
Code criminel, L.R.C. 1985, ch. C-46, art. 92, 94, 95, 151, 152, 253(1), 255, 267b), 271, 344, 718.1, 718.2, 727(1).
Loi réglementant certaines drogues et autres substances, L.C. 1996, ch. 19, art. 5, 6.
Loi sur l'extradition, L.C. 1999, ch. 18, art. 44(1)a).

Doctrine et autres documents cités

Code, Michael. « Judicial Review of Prosecutorial Decisions : A Short History of Costs and Benefits, in Response to Justice Rosenberg » (2009), 34 *Queen's L.J.* 863.
 Frater, Robert J. *Prosecutorial Misconduct*. Aurora, Ont. : Canada Law Book, 2009.
 Vanek, David. « Prosecutorial Discretion » (1988), 30 *Crim. L.Q.* 219.

POURVOI contre un arrêt de la Cour d'appel de Terre-Neuve-et-Labrador (le juge en chef Green et les juges Welsh et Rowe), 2013 NLCA 2, 331 Nfld. & P.E.I.R. 308, 1027 A.P.R. 308, 41 M.V.R. (6th) 194, 275 C.R.R. (2d) 127, 295 C.C.C. (3d) 262, [2013] 4 C.N.L.R. 209, [2013] N.J. No. 13 (QL), 2013 CarswellNfld 11, qui a confirmé une décision du juge English de la Cour provinciale relative à la détermination de la peine, 2011 NLPC 1709A00569. Pourvoi accueilli.

Iain R. W. Hollett, pour l'appelante.

Derek Hogan et Darlene Neville, pour l'intimé.

David Schermbrucker et Carole Sheppard, pour l'intervenant le directeur des poursuites pénales du Canada.

Philip Perlmutter et Lorna Bolton, pour l'intervenant le procureur général de l'Ontario.

Kathryn A. Gregory et Cameron Gunn, c.r., pour l'intervenant le procureur général du Nouveau-Brunswick.

Joyce DeWitt-Van Oosten, c.r., pour l'intervenant le procureur général de la Colombie-Britannique.

Kent Roach and Cheryl Milne, for the intervener the David Asper Centre for Constitutional Rights.

Jonathan Rudin and Emily Hill, for the intervener the Aboriginal Legal Services of Toronto Inc.

The judgment of the Court was delivered by

MOLDAVER J. —

I. Introduction

[1] This appeal raises the following question: Are Crown prosecutors constitutionally required to consider the Aboriginal status of an accused when deciding whether or not to seek a mandatory minimum sentence for impaired driving? The answer, in my view, must be no. There is no principle of fundamental justice that supports the existence of such a constitutional obligation. Absent such an obligation, the prosecutor's decision is a matter of prosecutorial discretion which is reviewable by the courts only for abuse of process.

[2] The present appeal involves a scheme of escalating, mandatory minimum sentences for impaired driving convictions. These mandatory minimums are set out in s. 255 of the *Criminal Code*, R.S.C. 1985, c. C-46 (“*Code*”). Section 727(1) of the *Code* states that the mandatory minimums set out in s. 255 are applicable only if the Crown, in advance of any plea, notifies the accused of its intention to seek a greater punishment by reason of previous convictions (the “Notice”) and tenders proof at the sentencing hearing that the Notice was served. It is the Crown's discretionary decision to tender the Notice at the sentencing hearing that is the subject of the current debate.

[3] The respondent, Mr. Anderson, submits that the Crown is constitutionally obligated under s. 7

Kent Roach et Cheryl Milne, pour l'intervenant David Asper Centre for Constitutional Rights.

Jonathan Rudin et Emily Hill, pour l'intervenante Aboriginal Legal Services of Toronto Inc.

Version française du jugement de la Cour rendu par

LE JUGE MOLDAVER —

I. Introduction

[1] Le présent pourvoi soulève la question suivante : les procureurs du ministère public sont-ils tenus par la Constitution de prendre en considération le statut d'Autochtone d'un accusé lorsqu'ils décident s'il y a lieu de demander une peine minimale obligatoire pour conduite avec facultés affaiblies? À mon avis, il faut répondre à cette question par la négative. Aucun principe de justice fondamentale n'appuie l'existence d'une telle obligation constitutionnelle. En l'absence d'une telle obligation, la décision du poursuivant est une question de pouvoir discrétionnaire en matière de poursuites et les tribunaux ne peuvent contrôler cette décision que s'il y a eu abus de procédure.

[2] Le pourvoi dont nous sommes saisis a pour objet un régime de peines minimales obligatoires de sévérité croissante pour les infractions de conduite avec facultés affaiblies. Ces peines minimales obligatoires sont prévues à l'art. 255 du *Code criminel*, L.R.C. 1985, ch. C-46 (« *Code* »). Selon le par. 727(1) du *Code*, les peines minimales obligatoires prévues à l'art. 255 ne sont infligées que si le ministère public avise l'accusé, avant tout plaidoyer, de son intention de demander une peine plus sévère du fait de condamnations antérieures (l'« avis ») et présente, à l'audience de détermination de la peine, une preuve de la signification de l'avis. En l'espèce, le débat porte sur la décision discrétionnaire du ministère public de produire l'avis à l'audience de détermination de la peine.

[3] L'intimé, M. Anderson, plaide que le ministère public a l'obligation constitutionnelle, aux

of the *Canadian Charter of Rights and Freedoms* to consider the accused's Aboriginal status in deciding whether or not to tender the Notice. According to Mr. Anderson, for sentencing purposes, consideration of Aboriginal status is a principle of fundamental justice. It follows that the Crown must consider it when making decisions that limit the sentencing options available to a judge.

[4] The Crown denies the existence of any such obligation. The Crown submits that the decision to tender the Notice is a matter of prosecutorial discretion. As such, it can only be reviewed for abuse of process. The Crown further submits that if mandatory minimum sentences within a statutory scheme prevent a judge from imposing a fit and just sentence that accords with the fundamental principle of proportionality, it is the scheme that should be challenged, not the exercise of prosecutorial discretion that has triggered it.

[5] For the reasons that follow, I conclude that Crown prosecutors are under no constitutional duty to consider the accused's Aboriginal status when tendering the Notice. As a matter of prosecutorial discretion, the decision is only reviewable for abuse of process.

II. Background

[6] Mr. Anderson was charged with the offence of driving with more than 80 milligrams of alcohol in 100 millilitres of blood contrary to s. 253(1)(b) of the *Code*. Before pleading guilty, he was served with a Notice. He later learned that the Crown intended to prove the Notice at the sentencing hearing. As this was Mr. Anderson's fifth impaired driving-related conviction, tendering the Notice meant that he would be subject to a mandatory minimum sentence of not less than 120 days' imprisonment under s. 255(1)(a)(iii) of the *Code*.

termes de l'art. 7 de la *Charte canadienne des droits et libertés*, de prendre en considération le statut d'Autochtone de l'accusé lorsqu'il décide de produire ou non l'avis. Selon M. Anderson, pour les besoins de la détermination de la peine, la prise en considération du statut d'Autochtone est un principe de justice fondamentale. Il s'ensuit que le ministère public doit prendre en considération ce statut lorsqu'il prend des décisions qui limitent l'éventail des peines que peut infliger un juge.

[4] Le ministère public nie l'existence d'une telle obligation. Il plaide que la décision de produire l'avis relève du pouvoir discrétionnaire en matière de poursuites. En conséquence, la décision ne peut être révisée que s'il y a eu abus de procédure. Le ministère public plaide en outre que si les peines minimales obligatoires prévues dans un régime législatif empêchent un juge d'infliger une peine appropriée et juste qui soit conforme au principe fondamental de proportionnalité, il y a lieu de contester le régime en tant que tel et non l'exercice du pouvoir discrétionnaire en matière de poursuites qui l'a fait entrer en jeu.

[5] Pour les motifs qui suivent, je conclus que la Constitution n'oblige aucunement les procureurs du ministère public à prendre en considération le statut d'Autochtone lorsqu'ils produisent l'avis. S'agissant d'une question de pouvoir discrétionnaire en matière de poursuite, la décision ne peut être révisée que pour abus de procédure.

II. Contexte

[6] Monsieur Anderson a été accusé de conduite avec une alcoolémie supérieure à 80 milligrammes par 100 millilitres de sang, une infraction prévue à l'al. 253(1)b) du *Code*. Avant de plaider coupable, il s'est vu signifier un avis. Il a appris par la suite que le ministère public entendait faire la preuve de l'avis à l'audience de détermination de la peine. Puisqu'il s'agissait pour M. Anderson d'une cinquième condamnation pour conduite avec facultés affaiblies, la production de l'avis signifiait qu'il allait être passible, aux termes du sous-al. 255(1)a)(iii) du *Code*, d'une peine minimale obligatoire d'au moins 120 jours d'emprisonnement.

A. *Provincial Court of Newfoundland and Labrador, 2011 NLPC 1709A00569*

[7] Prior to the sentencing hearing, Mr. Anderson filed a *Charter* application in which he argued that ss. 255(1) and 727(1) of the *Code* violate s. 7 of the *Charter* because “the combined effect of the [provisions] is to transfer what is a judicial function to the prosecutor, namely, the setting of the floor or minimum sentence in a given case” (motion judgment, at para. 21). He also argued that the statutory scheme violated s. 15(1) of the *Charter* because it deprived an Aboriginal person of the opportunity to argue for a non-custodial sentence in an appropriate case.

[8] The trial judge, English Prov. Ct. J., accepted Mr. Anderson’s *Charter* arguments and concluded that the infringements of ss. 7 and 15(1) were not saved by s. 1 of the *Charter*. In order to ensure compliance with s. 7 of the *Charter*, he held that the Crown must in all cases, including those involving non-Aboriginal offenders, provide justification for relying on the Notice. As for the violation of s. 15(1), he declared the statutory scheme to be of no force and effect as it applied to Aboriginal offenders. Having determined that he was not bound by the minimums set out in s. 255(1), the trial judge sentenced Mr. Anderson to a 90-day intermittent sentence followed by two years’ probation. A five-year driving prohibition was also imposed.

B. *Newfoundland and Labrador Court of Appeal, 2013 NLCA 2, 331 Nfld. & P.E.I.R. 308*

[9] The Newfoundland and Labrador Court of Appeal rejected the Crown’s appeal. All members of the court held that where the Crown tenders the Notice at the sentencing hearing without considering the accused’s Aboriginal status, this renders the sentencing hearing fundamentally unfair, leading to a s. 7 *Charter* breach. According to the court, there would

A. *Cour provinciale de Terre-Neuve-et-Labrador, 2011 NLPC 1709A00569*

[7] Avant l’audience de détermination de la peine, M. Anderson a déposé une requête fondée sur la *Charte* dans laquelle il a plaidé que les par. 255(1) et 727(1) du *Code* violent l’art. 7 de la *Charte* parce que [TRADUCTION] « [les dispositions] ont pour effet conjugué de transférer au poursuivant une fonction judiciaire, à savoir l’établissement d’une peine minimale dans une affaire donnée » (jugement sur la requête, par. 21). Il a également plaidé que le régime législatif violait le par. 15(1) de la *Charte* parce qu’il privait un Autochtone de la possibilité de plaider en faveur d’une sanction autre que l’incarcération dans un cas approprié.

[8] En première instance, le juge English de la Cour provinciale a accueilli les arguments fondés sur la *Charte* soulevés par M. Anderson et a conclu que les atteintes à l’art. 7 et au par. 15(1) ne pouvaient se justifier au sens de l’article premier de la *Charte*. Le juge a statué que, pour assurer la conformité à l’art. 7 de la *Charte*, le ministère public devait dans tous les cas, y compris ceux mettant en cause des délinquants non autochtones, justifier pourquoi il s’appuyait sur l’avis. Pour ce qui est de la violation du par. 15(1), il a déclaré que le régime législatif était inopérant à l’égard des délinquants autochtones. Ayant jugé qu’il n’était pas lié par les peines minimales énoncées au par. 255(1), le juge du procès a condamné M. Anderson à une peine discontinue de 90 jours d’emprisonnement, suivie de deux ans de probation. Une interdiction de conduire durant cinq ans a également été imposée.

B. *Cour d’appel de Terre-Neuve-et-Labrador, 2013 NLCA 2, 331 Nfld. & P.E.I.R. 308*

[9] La Cour d’appel de Terre-Neuve-et-Labrador a rejeté l’appel du ministère public. À l’unanimité, la cour a statué que la production de l’avis par le ministère public à l’audience de détermination de la peine, sans que soit pris en considération le statut d’Autochtone de l’accusé, rendait l’audience de détermination de la peine fondamentalement injuste, entraînant une

be no breach of s. 7 if the Crown's policy statement¹ regarding the decision to tender the Notice included a *specific* direction to consider the offender's Aboriginal status. The absence of such a direction, and the lack of explanation on the part of the Crown for its decision to tender the Notice in this case, led the court to conclude that s. 7 of the *Charter* had been breached.

[10] The court split on how the Crown's decision to tender the Notice should be characterized. Welsh J.A. considered it to be a matter of "core" prosecutorial discretion; Green C.J.N.L. and Rowe J.A. maintained that it was "outside a core prosecutorial function": para. 49 (emphasis deleted). In the end, this difference of opinion did not affect the result and the Crown's appeal was dismissed.

III. Relevant Statutory Provisions

[11] Section 253(1) of the *Code* sets out the offence of impaired driving:

253. (1) [Operation while impaired] Every one commits an offence who operates a motor vehicle or vessel or operates or assists in the operation of an aircraft or of railway equipment or has the care or control of a motor vehicle, vessel, aircraft or railway equipment, whether it is in motion or not,

(a) while the person's ability to operate the vehicle, vessel, aircraft or railway equipment is impaired by alcohol or a drug; or

¹ Crown policy statements are designed to assist Crown prosecutors in the performance of their functions. In this case, there was a Crown policy statement pertaining to the decision of whether or not to tender the Notice. The policy statement stated that "service of the notice should be considered in all cases, in light of all circumstances of the offence and the background and circumstances of the offender" (Court of Appeal decision, at para. 19 (emphasis deleted)). The policy statement did not specifically reference Aboriginal status.

violation de l'art. 7 de la *Charte*. Selon la cour, il n'y aurait aucune violation de l'art. 7 si l'énoncé de politique du ministère public¹ relatif à la décision de produire l'avis renfermait une directive *particulière* indiquant que le statut d'Autochtone du délinquant doit être pris en considération. L'absence d'une telle directive et le fait que le ministère public n'avait pas expliqué sa décision de produire l'avis en l'espèce ont amené la cour à conclure à une violation de l'art. 7 de la *Charte*.

[10] La cour était partagée quant à la manière de qualifier la décision de produire l'avis. La juge Welsh estimait qu'il s'agissait d'un pouvoir discrétionnaire « essentiel » du poursuivant; selon le juge en chef Green et le juge Rowe, cette décision [TRADUCTION] « ne relevait pas d'une fonction essentielle du poursuivant » : par. 49 (soulignement omis). En définitive, cette divergence de vues n'a pas eu d'incidence sur l'issue de l'affaire et l'appel du ministère public a été rejeté.

III. Dispositions législatives applicables

[11] Le paragraphe 253(1) du *Code* énonce l'infraction de conduite avec facultés affaiblies :

253. (1) [Capacité de conduite affaiblie] Commet une infraction quiconque conduit un véhicule à moteur, un bateau, un aéronef ou du matériel ferroviaire, ou aide à conduire un aéronef ou du matériel ferroviaire, ou a la garde ou le contrôle d'un véhicule à moteur, d'un bateau, d'un aéronef ou de matériel ferroviaire, que ceux-ci soient en mouvement ou non, dans les cas suivants :

a) lorsque sa capacité de conduire ce véhicule, ce bateau, cet aéronef ou ce matériel ferroviaire est affaiblie par l'effet de l'alcool ou d'une drogue;

¹ Les énoncés de politique visent à aider les procureurs du ministère public dans l'exercice de leurs fonctions. En l'espèce, un énoncé de politique du ministère public traitait de la décision de produire ou non l'avis. L'énoncé de politique prévoyait que [TRADUCTION] « la signification de l'avis doit être prise en considération dans tous les cas, à la lumière de toutes les circonstances de l'infraction et des antécédents et de la situation du délinquant » (motifs de la Cour d'appel, par. 19 (soulignement omis)). L'énoncé de politique ne mentionnait pas particulièrement le statut d'Autochtone.

(b) having consumed alcohol in such a quantity that the concentration in the person's blood exceeds eighty milligrams of alcohol in one hundred millilitres of blood.

[12] Section 255 of the *Code* sets out the escalating mandatory minimum penalties for impaired driving. For the purposes of this appeal, the relevant portion of s. 255 is the following:

255. (1) [Punishment] Every one who commits an offence under section 253 or 254 is guilty of an indictable offence or an offence punishable on summary conviction and is liable,

(a) whether the offence is prosecuted by indictment or punishable on summary conviction, to the following minimum punishment, namely,

(i) for a first offence, to a fine of not less than \$1,000,

(ii) for a second offence, to imprisonment for not less than 30 days, and

(iii) for each subsequent offence, to imprisonment for not less than 120 days;

[13] Section 727(1) of the *Code* sets out the requirement to give notice to the accused of the Crown's intention to seek the mandatory minimum punishment:

727. (1) [Previous conviction] Subject to subsections (3) and (4), where an offender is convicted of an offence for which a greater punishment may be imposed by reason of previous convictions, no greater punishment shall be imposed on the offender by reason thereof unless the prosecutor satisfies the court that the offender, before making a plea, was notified that a greater punishment would be sought by reason thereof.

[14] Section 718.2(e) of the *Code* states:

718.2 [Other sentencing principles] A court that imposes a sentence shall also take into consideration the following principles:

. . . .

b) lorsqu'il a consommé une quantité d'alcool telle que son alcoolémie dépasse quatre-vingts milligrammes d'alcool par cent millilitres de sang.

[12] L'article 255 du *Code* prévoit les peines minimales obligatoires de sévérité croissante dans les cas de conduite avec facultés affaiblies. Pour les besoins du présent pourvoi, la partie pertinente de l'art. 255 est la suivante :

255. (1) [Peine] Quiconque commet une infraction prévue à l'article 253 ou 254 est coupable d'une infraction punissable sur déclaration de culpabilité par procédure sommaire ou par mise en accusation et est passible :

a) que l'infraction soit poursuivie par mise en accusation ou par procédure sommaire, des peines minimales suivantes :

(i) pour la première infraction, une amende minimale de mille dollars,

(ii) pour la seconde infraction, un emprisonnement minimal de trente jours,

(iii) pour chaque infraction subséquente, un emprisonnement minimal de cent vingt jours;

[13] Le paragraphe 727(1) du *Code* énonce l'obligation d'aviser l'accusé de l'intention du ministère public de demander la peine minimale obligatoire :

727. (1) [Condamnations antérieures] Sous réserve des paragraphes (3) et (4), lorsque le délinquant est déclaré coupable d'une infraction pour laquelle une peine plus sévère peut être infligée du fait de condamnations antérieures, aucune peine plus sévère ne peut lui être infligée de ce fait à moins que le poursuivant ne convainque le tribunal que le délinquant, avant d'enregistrer son plaidoyer, a reçu avis qu'une peine plus sévère serait demandée de ce fait.

[14] L'alinéa 718.2e) du *Code* dispose :

718.2 [Principes de détermination de la peine] Le tribunal détermine la peine à infliger compte tenu également des principes suivants :

. . . .

(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

[15] Lastly, s. 7 of the *Charter* states:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

IV. Issues

[16] This appeal raises two issues: (1) whether s. 7 of the *Charter* requires the Crown to consider an accused's Aboriginal status when making decisions that limit the sentencing options available to a judge — here, the decision to seek a mandatory minimum sentence for impaired driving; and (2) whether the decision to tender the Notice is a matter of “core” prosecutorial discretion, and if so, the standard by which it may be reviewed.

[17] Before analyzing these two issues, a brief explanation of how they are connected is warranted. The respondent argues that all state actors (including Crown prosecutors) must consider Aboriginal status where a decision affects the liberty interest of an Aboriginal person. He maintains that this is a principle of fundamental justice. If this argument is accepted, it matters not whether the decision is one of prosecutorial discretion. The principle of fundamental justice — perhaps more aptly described as a constitutional duty — would apply regardless. As will be discussed in greater detail, prosecutorial discretion provides no answer to the breach of a constitutional duty. If, on the other hand, the respondent's argument is rejected, the distinction between prosecutorial discretion and tactics and conduct before the Court becomes important, as the categorization affects the standard of review to be applied to the decision.

e) l'examen de toutes les sanctions substitutives applicables qui sont justifiées dans les circonstances, plus particulièrement en ce qui concerne les délinquants autochtones.

[15] Enfin, l'art. 7 de la *Charte* est libellé ainsi :

7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

IV. Questions en litige

[16] Le présent pourvoi soulève deux questions. (1) L'art. 7 de la *Charte* oblige-t-il le ministère public à prendre en considération le statut d'Autochtone d'un accusé lorsqu'il prend des décisions qui limitent l'éventail des peines que peut infliger un juge — en l'espèce, la décision de demander une peine minimale obligatoire pour conduite avec facultés affaiblies? (2) La décision de produire l'avis relève-t-elle du pouvoir discrétionnaire « essentiel » en matière de poursuites et, dans l'affirmative, quelle est la norme selon laquelle elle peut être révisée?

[17] Il convient d'expliquer brièvement le lien qui unit ces deux questions avant de les analyser. L'intimé soutient que tous les représentants de l'État (y compris les procureurs du ministère public) doivent prendre en considération le statut d'Autochtone lorsqu'une décision porte atteinte à la liberté d'un Autochtone. Il s'agit selon lui d'un principe de justice fondamentale. Si cet argument est retenu, il n'importe pas que la décision relève du pouvoir discrétionnaire en matière de poursuites. Le principe de justice fondamentale — qu'il convient peut-être mieux de qualifier d'obligation constitutionnelle — s'appliquerait en tout état de cause. Comme nous le verrons plus en détail, le pouvoir discrétionnaire en matière de poursuites n'est pas la solution au manquement à une obligation constitutionnelle. Si, par contre, l'argument de l'intimé est rejeté, la distinction entre, d'une part, le pouvoir discrétionnaire en matière de poursuites et, d'autre part, la stratégie et la conduite devant la cour, revêt de l'importance car la qualification influe sur la norme de contrôle applicable à la décision.

V. Analysis

- A. *Does Section 7 of the Charter Require the Crown to Consider an Accused's Aboriginal Status When Making Decisions That Limit the Sentencing Options Available to a Judge?*

[18] Mr. Anderson submits that consideration of Aboriginal status in sentencing is a principle of fundamental justice that applies to all state actors, including Crown prosecutors. It follows that Crown prosecutors are constitutionally required to consider an accused's Aboriginal status when making a discretionary decision that limits the sentencing options available to a judge, including the decision to tender the Notice. In support of this argument, Mr. Anderson relies on s. 718.2(e) of the *Code*, as well as this Court's decisions in *R. v. Gladue*, [1999] 1 S.C.R. 688, and *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433.

[19] The Crown submits that Mr. Anderson's argument stretches s. 718.2(e) of the *Code* beyond its intended purpose. According to the Crown, a statutory direction to sentencing judges cannot be transformed into a constitutional obligation on the Crown to take Aboriginal status into account when making a discretionary decision that limits a judge's sentencing options.

[20] In my view, there are two reasons why Mr. Anderson's argument must fail. First, it conflates the role of the prosecutor and the sentencing judge by imposing on prosecutors a duty that applies only to judges — the duty to impose a proportionate sentence. Second, the principle of fundamental justice that Mr. Anderson seeks does not meet the test that governs such principles, set out in *R. v. D.B.*, 2008 SCC 25, [2008] 2 S.C.R. 3.

V. Analyse

- A. *L'article 7 de la Charte oblige-t-il le ministère public à prendre en considération le statut d'Autochtone d'un accusé lorsqu'il prend des décisions qui limitent l'éventail des peines que peut infliger un juge?*

[18] Monsieur Anderson plaide que la prise en considération du statut d'Autochtone dans la détermination de la peine est un principe de justice fondamentale qui s'applique à tous les représentants de l'État, y compris les procureurs du ministère public. Il s'ensuit que les procureurs du ministère public sont tenus par la Constitution de prendre en considération le statut d'Autochtone d'un accusé lorsqu'ils prennent une décision discrétionnaire qui limite l'éventail des peines que peut infliger un juge, y compris la décision de produire l'avis. Au soutien de cet argument, M. Anderson invoque l'al. 718.2e) du *Code*, ainsi que les décisions de notre Cour dans *R. c. Gladue*, [1999] 1 R.C.S. 688, et *R. c. Ipeelee*, 2012 CSC 13, [2012] 1 R.C.S. 433.

[19] Le ministère public plaide que l'argument de M. Anderson étend la portée de l'al. 718.2e) du *Code* au-delà des fins qu'il est censé servir. Selon le ministère public, une directive législative adressée aux juges chargés de la détermination de la peine ne saurait être transformée en une obligation constitutionnelle imposée au ministère public de prendre en considération le statut d'Autochtone lorsqu'il prend une décision discrétionnaire qui limite l'éventail des peines que peut infliger un juge.

[20] À mon avis, l'argument de M. Anderson doit être rejeté pour deux raisons. Premièrement, cet argument confond le rôle du poursuivant et celui du juge chargé de déterminer la peine car il impose au poursuivant un devoir qui n'appartient qu'au juge — le devoir d'infliger une peine proportionnée. Deuxièmement, le principe de justice fondamentale que M. Anderson cherche à faire reconnaître ne satisfait pas au critère énoncé dans *R. c. D.B.*, 2008 CSC 25, [2008] 2 R.C.S. 3, qui régit les principes de ce genre.

(1) Imposing a Proportionate Sentence Is the Judge's Responsibility

[21] As LeBel J., for the majority of this Court, stated in *Ipeelee*, “[p]roportionality is the *sine qua non* of a just sanction” and a principle of fundamental justice: paras. 36-37. Proportionality means that the sentence must be “proportionate to both the gravity of the offence and the degree of responsibility of the offender” (*Ipeelee*, at para. 39 (emphasis deleted); see also s. 718.1 of the *Code*). “[S]ystemic and background factors [which include Aboriginal status] may bear on the culpability of the offender, [that is, the degree of responsibility of the offender,] to the extent that they shed light on his or her level of moral blameworthiness”: *Ipeelee*, at para. 73.

[22] The fundamental principle of proportionality has been codified. Section 718.1 of the *Code* states that “[a] sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.” Section 718.2 of the *Code* lists numerous factors that sentencing judges must consider when crafting a fair and just sentence that accords with the fundamental principle of proportionality. Aboriginal status is one of these factors and is found in s. 718.2(e).

[23] In *Gladue*, this Court discussed s. 718.2(e) of the *Code* at length, noting that it was enacted to ameliorate the serious problem of overrepresentation of Aboriginal people in Canadian prisons and to encourage a restorative approach to sentencing: para. 93. The Court explained that “sentencing judges should pay particular attention to the circumstances of aboriginal offenders because those circumstances are unique, and different from those of non-aboriginal offenders” (*Gladue*, at para. 37 (emphasis deleted)). The Court held that, pursuant to s. 718.2(e), a judge must consider: “(A) The unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and (B) [t]he types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender

(1) Il appartient au juge d’infliger une peine proportionnée

[21] Comme l’a indiqué le juge LeBel au nom des juges majoritaires de notre Cour dans *Ipeelee*, « [l]a proportionnalité représente la condition *sine qua non* d’une sanction juste » et un principe de justice fondamentale : par. 36-37. La proportionnalité signifie que la peine doit être « proportionnelle à la fois à la gravité de l’infraction et au degré de responsabilité du délinquant » (*Ipeelee*, par. 39 (italiques omis); voir également l’art. 718.1 du *Code*). « [L]es facteurs systémiques et historiques [notamment le statut d’Autochtone] peuvent influencer sur la culpabilité du délinquant, [c’est-à-dire le degré de responsabilité du délinquant] dans la mesure où ils mettent en lumière son degré de culpabilité morale » : *Ipeelee*, par. 73.

[22] Le principe fondamental de la proportionnalité a été codifié. L’article 718.1 du *Code* prévoit que « [l]a peine est proportionnelle à la gravité de l’infraction et au degré de responsabilité du délinquant. » L’article 718.2 du *Code* énumère les nombreux facteurs que doivent prendre en considération les juges chargés de la détermination de la peine pour que celle-ci soit juste et équitable, en accord avec le principe fondamental de la proportionnalité. Le statut d’Autochtone constitue l’un de ces facteurs et il est mentionné à l’al. 718.2e).

[23] Dans l’arrêt *Gladue*, notre Cour a examiné en détail l’al. 718.2e) du *Code*, notant qu’il a été édicté pour remédier au grave problème de la surreprésentation des Autochtones dans les prisons canadiennes et encourager les juges à aborder la détermination de la peine selon une approche corrective : par. 93. La Cour a expliqué que « les juges devraient porter une attention particulière aux circonstances dans lesquelles se trouvent les délinquants autochtones parce que ces circonstances sont particulières, et différentes de celles dans lesquelles se trouvent les non-autochtones » (*Gladue*, par. 37 (soulignement omis)). La Cour a estimé que, aux termes de l’al. 718.2e), un juge doit prendre en considération « (A) les facteurs systémiques ou historiques distinctifs qui peuvent être une des raisons pour lesquelles le délinquant autochtone se retrouve devant les tribunaux, [et] (B)

because of his or her particular aboriginal heritage or connection”: *Gladue*, at para. 66.

[24] Section 718.2(e) was also central to the discussion in *Ipeelee*. In that case, the Court noted that the *Gladue* principles bear on the ultimate question of what is a fit and proper sentence and assist the judge in crafting a sentence that accords with the fundamental principle of proportionality. The failure of a sentencing judge to consider the unique circumstances of Aboriginal offenders thus breaches both the judge’s statutory obligations, under ss. 718.1 and 718.2 of the *Code*, and the principle of fundamental justice that sentences be proportionate: *Ipeelee*, at para. 87.

[25] Importantly, both *Gladue* and *Ipeelee* speak to the sentencing obligations of *judges* to craft a proportionate sentence for Aboriginal offenders. They make no mention of prosecutorial discretion and do not support Mr. Anderson’s argument that *prosecutors* must consider Aboriginal status when making a decision that limits the sentencing options available to a judge. Mr. Anderson’s argument in effect equates the duty of the judge and the prosecutor, but there is no basis in law to support equating their distinct roles in the sentencing process. It is *the judge’s* responsibility to impose sentence; likewise, it is *the judge’s* responsibility, within the applicable legal parameters, to craft a proportionate sentence. If a mandatory minimum regime requires a judge to impose a disproportionate sentence, the regime should be challenged.

[26] In so concluding, I have not ignored *United States of America v. Leonard*, 2012 ONCA 622, 112 O.R. (3d) 496, leave to appeal refused, [2013] 1 S.C.R. v, a case upon which Mr. Anderson relies. In *Leonard*, the United States sought the extradition

les types de procédures de détermination de la peine et de sanctions qui, dans les circonstances, peuvent être appropriées à l’égard du délinquant en raison de son héritage ou ses attaches autochtones » : *Gladue*, par. 66.

[24] L’alinéa 718.2e) est également au cœur de l’analyse dans *Ipeelee*. Dans cet arrêt, la Cour a fait remarquer que les principes énoncés dans *Gladue* se rapportent à la question ultime de savoir en quoi consiste une peine juste et appropriée et aident le juge à établir une peine conforme au principe fondamental de la proportionnalité. L’omission du juge chargé de déterminer la peine de tenir compte des circonstances particulières propres aux délinquants autochtones viole donc à la fois les obligations légales qui incombent au juge aux termes des art. 718.1 et 718.2 du *Code*, et le principe de justice fondamentale suivant lequel les peines doivent être proportionnées : *Ipeelee*, par. 87.

[25] Fait important, il est question, dans *Gladue* et *Ipeelee*, des obligations qui incombent aux *juges* chargés de la détermination de la peine d’établir une peine proportionnée à l’égard des délinquants autochtones. Dans ces arrêts, il n’est nullement fait mention du pouvoir discrétionnaire en matière de poursuites et ces arrêts n’étaient pas l’argument de M. Anderson selon lequel les *poursuivants* doivent prendre en considération le statut d’Autochtone lorsqu’ils prennent une décision qui limite l’éventail des peines que peut infliger un juge. L’argument de M. Anderson assimile le devoir du juge à celui du poursuivant, mais aucun principe de droit ne permet d’assimiler leurs rôles distincts dans le processus de détermination de la peine. Il appartient *au juge* d’infliger la peine; il *lui* appartient également d’établir une peine proportionnée, sans s’écarter des paramètres juridiques applicables. Si un régime de peine minimale obligatoire oblige un juge à infliger une peine disproportionnée, il y aurait lieu de contester le régime.

[26] Je ne suis pas arrivé à cette conclusion sans tenir compte de l’arrêt *United States of America c. Leonard*, 2012 ONCA 622, 112 O.R. (3d) 496, autorisation d’appel refusée, [2013] 1 R.C.S. v, un arrêt invoqué par M. Anderson. Dans cette affaire, les

of two Aboriginal Canadians. Sharpe J.A. held that in deciding whether or not to surrender the accused, the Minister of Justice was required to consider their Aboriginal status, noting that

the *Gladue* factors are not limited to criminal sentencing but . . . should be considered by all “decision-makers who have the power to influence the treatment of aboriginal offenders in the justice system” (*Gladue*, at para. 65) whenever an Aboriginal person’s liberty is at stake in criminal and related proceedings. That category includes extradition. [para. 85]

[27] Mr. Anderson submits that, like the Minister of Justice in *Leonard*, Crown prosecutors should be required to consider Aboriginal status as they are “decision-makers” who “have the power to influence the treatment of aboriginal offenders in the justice system” (*Gladue*, at para. 65). With respect, I cannot agree. The excerpt from *Leonard* upon which Mr. Anderson relies should not be taken out of context. Pursuant to s. 44(1)(a) of the *Extradition Act*, S.C. 1999, c. 18, the Minister of Justice must refuse to surrender an individual if “the surrender would be unjust or oppressive having regard to all the relevant circumstances”. As Sharpe J.A. notes, determining whether the surrender would be unjust or oppressive requires the Minister of Justice to compare the likely sentence that would be imposed in a foreign state *with the likely sentence that would be imposed in Canada* — a task which is impossible to do without reference to the *Gladue* principles. As Sharpe J.A. explained, the proper exercise of the Minister’s discretion in this context

requires an assessment of the likely result if the case were prosecuted domestically and a comparison of that result to the likely outcome in the foreign state if the individual sought were surrender[ed]. In the case of an Aboriginal offender, I fail to see how that assessment and comparison could be accomplished without reference to the *Gladue* principles. [para. 87]

États-Unis demandaient l’extradition de deux Canadiens autochtones. Le juge Sharpe a conclu qu’avant de décider d’extrader ou non les accusés, le ministre de la Justice était tenu de prendre en considération leur statut d’Autochtone, et il a fait remarquer que

[TRADUCTION] les facteurs énoncés dans l’arrêt *Gladue* ne se limitent pas à la détermination de la peine en matière pénale mais doivent être pris en considération par tous « les décideurs qui ont le pouvoir d’influer sur le traitement des délinquants autochtones dans le système de justice » (*Gladue*, par. 65) chaque fois que la liberté d’un Autochtone est en jeu dans un procès criminel et des instances connexes, notamment une procédure d’extradition. [par. 85]

[27] M. Anderson prétend que, tout comme le ministre de la Justice dans *Leonard*, les procureurs du ministère public devraient être tenus de prendre en considération le statut d’Autochtone parce que ce sont des « décideurs qui ont le pouvoir d’influer sur le traitement des délinquants autochtones dans le système de justice » (*Gladue*, par. 65). En toute déférence, je ne saurais être d’accord. L’extrait de *Leonard* sur lequel s’appuie M. Anderson ne doit pas être pris hors contexte. Aux termes de l’al. 44(1)a) de la *Loi sur l’extradition*, L.C. 1999, ch. 18, le ministre de la Justice doit refuser d’extrader une personne si « l’extradition serait injuste ou tyrannique compte tenu de toutes les circonstances ». Comme le fait remarquer le juge Sharpe, le fait de décider si l’extradition serait injuste ou tyrannique oblige le ministre de la Justice à comparer la peine qui serait vraisemblablement infligée dans un autre pays *et la peine qui serait vraisemblablement imposée au Canada*, une tâche qu’il est impossible d’accomplir sans se reporter aux principes établis dans *Gladue*. Comme l’a expliqué le juge Sharpe, l’exercice légitime du pouvoir discrétionnaire du ministre dans ce contexte

[TRADUCTION] requiert la détermination du résultat que donneraient vraisemblablement des poursuites intentées au pays et la comparaison de ce résultat avec l’issue probable dans le pays étranger si la personne recherchée était extradée. Dans le cas d’un délinquant autochtone, je ne vois pas comment l’on peut faire cette détermination et cette comparaison sans se reporter aux principes établis dans *Gladue*. [par. 87]

[28] It follows, in my view, that *Leonard* does not support the much broader application of *Gladue* that Mr. Anderson seeks.

(2) The R. v. D.B. Test Is Not Satisfied

[29] There is a further reason why Mr. Anderson's s. 7 argument must fail. The principle of fundamental justice that Mr. Anderson asks this Court to recognize — that Crown prosecutors must consider the Aboriginal status of the accused prior to making decisions that limit a judge's sentencing options — does not meet the test which governs principles of fundamental justice. As Abella J. observed for the majority in *D.B.*, at para. 46, a principle of fundamental justice must (1) be a legal principle, (2) enjoy consensus that the rule or principle is fundamental to the way in which the legal system ought fairly to operate, and (3) be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person. See also *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76, at para. 8.

[30] The principle contended for by Mr. Anderson does not meet the second requirement that it enjoy consensus as a principle that is fundamental to the way in which the legal system ought to fairly operate. In fact, the principle is contrary to a long-standing and deeply rooted approach to the division of responsibility between the Crown prosecutor and the courts.

[31] We must begin by acknowledging that the principle advanced by Mr. Anderson would enormously expand the scope of judicial review of discretionary decisions made by prosecutors. In doing so, it puts at risk the adversarial nature of our criminal justice system by hobbling Crown prosecutors in the performance of their work and by inviting

[28] Par conséquent, je suis d'avis que l'arrêt *Leonard* n'étaye pas l'application beaucoup plus large de l'arrêt *Gladue* que M. Anderson cherche à obtenir.

(2) Le critère de l'arrêt R. c. D.B. n'est pas respecté

[29] Une autre raison explique pourquoi l'argument avancé par M. Anderson sur le fondement de l'art. 7 doit être rejeté. Le principe de justice fondamentale que M. Anderson demande à notre Cour de reconnaître — à savoir que les procureurs du ministère public doivent prendre en considération le statut d'Autochtone de l'accusé avant de prendre des décisions qui limitent l'éventail des peines que peut infliger un juge — ne respecte pas le critère qui régit les principes de justice fondamentale. Comme la juge Abella l'a fait remarquer au nom des juges majoritaires dans *D.B.*, par. 46, un principe de justice fondamentale doit satisfaire aux conditions suivantes : (1) il doit s'agir d'un principe juridique; (2) il doit exister un consensus sur le fait que cette règle ou ce principe est essentiel au bon fonctionnement du système de justice; (3) il doit être défini avec suffisamment de précision pour constituer une norme fonctionnelle permettant d'évaluer l'atteinte à la vie, à la liberté ou à la sécurité de la personne. Voir aussi *Canadian Foundation for Children, Youth and the Law c. Canada (Procureur général)*, 2004 CSC 4, [2004] 1 R.C.S. 76, par. 8.

[30] Le principe que propose M. Anderson ne satisfait pas à la deuxième condition selon laquelle il doit exister un consensus sur le fait que ce principe est essentiel au bon fonctionnement du système de justice. En fait, le principe proposé est contraire à une approche reconnue depuis longtemps et fortement enracinée en ce qui concerne le partage de la responsabilité entre le procureur du ministère public et les tribunaux.

[31] Il faut d'abord reconnaître que le principe que propose M. Anderson élargirait énormément la portée du contrôle judiciaire des décisions des poursuivants. Ce faisant, il met en danger le caractère accusatoire de notre système de justice pénale en entravant les procureurs du ministère public dans l'exécution de leur travail et en ouvrant la porte

judicial oversight of the numerous decisions that Crown prosecutors make on a daily basis. As the Crown has pointed out, the situations where Crown decisions have the potential to limit the sentencing judge's options and therefore the judge's ability to take s. 718.2(e) into account are many: A.F., at para. 145. These decisions include: proceeding with charges that attract a mandatory minimum sentence when other related offences have no mandatory minimum sentence (e.g. s. 95 as opposed to s. 92 or s. 94 of the *Code*); proceeding by indictment rather than summary conviction when different mandatory minimum sentences are required (e.g. ss. 151, 152 and 271 of the *Code*); and proceeding by indictment rather than by summary conviction when that decision precludes the possibility of a conditional sentence (e.g. s. 267(b) of the *Code*). Moreover, there are several provisions of the *Code* and the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, where a mandatory minimum is triggered by the Crown's decision to prove a particular aggravating factor — such as evidence of a firearm used in the commission of the offence (e.g. s. 344 of the *Code*; ss. 5 and 6 of the *Controlled Drugs and Substances Act*). As with the other examples provided, the decision to prove the aggravating factor limits the sentencing judge's options.

[32] Apart from the sheer volume of decisions that would be opened up for review, the Crown's decision to seek the mandatory minimum penalty — as we shall see — is a matter of prosecutorial discretion. There has been a long-standing and deeply engrained reluctance to permit routine judicial review of the exercise of that discretion. As affirmed in *R. v. Beare*, [1988] 2 S.C.R. 387, at p. 411, the Court “has already recognized that the existence of prosecutorial discretion does not offend the principles of fundamental justice”. And, as L'Heureux-Dubé J., for the majority of this Court,

à la surveillance judiciaire des nombreuses décisions que prennent quotidiennement les procureurs du ministère public. Comme l'a fait remarquer le ministère public, les situations où les décisions du ministère public peuvent limiter l'éventail des sanctions que peut infliger le juge chargé de la détermination de la peine — et donc sa faculté de prendre en compte l'al. 718.2e) — sont nombreuses : m.a., par. 145. C'est le cas notamment des décisions suivantes : porter des accusations qui entraînent une peine minimale obligatoire alors que d'autres infractions connexes n'entraînent aucune peine minimale obligatoire (p. ex., invoquer l'art. 95 plutôt que les art. 92 ou 94 du *Code*); intenter une poursuite par voie de mise en accusation plutôt que par procédure sommaire lorsque des peines minimales obligatoires sont prescrites (p. ex. les infractions prévues aux art. 151, 152 et 271 du *Code*); intenter une poursuite par voie de mise en accusation, plutôt que par procédure sommaire, lorsque cette décision exclut la possibilité d'une condamnation avec sursis (p. ex. l'infraction prévue à l'al. 267b) du *Code*). En outre, plusieurs dispositions du *Code* et de la *Loi réglementant certaines drogues et autres substances*, L.C. 1996, ch. 19, entraînent l'application d'une peine minimale obligatoire lorsque le ministère public décide de faire la preuve d'une circonstance aggravante — c'est le cas de la preuve qu'une arme à feu a été utilisée dans la perpétration de l'infraction (p. ex. l'art. 344 du *Code*; les art. 5 et 6 de la *Loi réglementant certaines drogues et autres substances*). À l'instar des autres exemples susmentionnés, la décision de faire la preuve de la circonstance aggravante limite l'éventail des peines que peut infliger le juge.

[32] Indépendamment du nombre considérable de décisions qui donneraient ouverture au contrôle judiciaire, la décision du ministère public de demander une peine minimale obligatoire — comme nous le verrons — est une question qui relève du pouvoir discrétionnaire en matière de poursuites. Il existe depuis longtemps une réticence fortement enracinée à permettre le contrôle judiciaire automatique de l'exercice de ce pouvoir discrétionnaire. Comme elle l'a affirmé dans *R. c. Beare*, [1988] 2 R.C.S. 387, p. 411, la Cour « a déjà reconnu que le pouvoir discrétionnaire de la poursuite ne porte pas atteinte

noted in *R. v. Power*, [1994] 1 S.C.R. 601, “the Crown cannot function as a prosecutor before the court while also serving under its general supervision. The court, in turn, cannot both supervise the exercise of prosecutorial discretion and act as an impartial arbitrator of the case presented to it” (p. 627). The imposition of a sweeping duty that opens up for routine judicial review all of the aforementioned decisions is contrary to our constitutional traditions. It cannot be a principle that is considered fundamental to the way in which our legal system ought fairly to operate.

[33] In sum, the principle of fundamental justice sought by Mr. Anderson must be rejected.

B. *Is the Crown’s Decision to Tender the Notice Against an Aboriginal Offender Reviewable?*

[34] Having concluded that the Crown is not under a constitutional obligation to consider the accused’s Aboriginal status when making a decision that limits the sentencing options available to a judge, the next question is whether the Crown’s decision to tender the Notice is reviewable in some other way, and if so, under what standard.

Review of Crown Decision Making

[35] There are two distinct avenues for judicial review of Crown decision making. The analysis will differ depending on which of the following is at issue: (1) exercises of prosecutorial discretion; or (2) tactics and conduct before the court.

[36] All Crown decision making is reviewable for abuse of process. However, as I will explain, exercises of prosecutorial discretion are *only* reviewable for abuse of process. In contrast, tactics and conduct before the court are subject to a wider range of review. The court may exercise its inherent

aux principes de justice fondamentale ». Et comme la juge L’Heureux-Dubé l’a fait remarquer au nom des juges majoritaires de la Cour dans *R. c. Power*, [1994] 1 R.C.S. 601, « le ministère public ne peut fonctionner à titre de poursuivant devant le tribunal tout en étant également assujéti à sa surveillance générale. Pour sa part, le tribunal ne peut à la fois superviser l’exercice du pouvoir discrétionnaire de la poursuite et agir à titre d’arbitre impartial de l’affaire qui lui est soumise » (p. 627). L’imposition d’une obligation très générale qui donne ouverture à la révision automatique de toutes les décisions susmentionnées va à l’encontre de nos traditions constitutionnelles. Il ne peut s’agir là d’un principe considéré comme essentiel au bon fonctionnement de notre système de justice.

[33] En résumé, le principe de justice fondamentale que fait valoir M. Anderson doit être rejeté.

B. *La décision du ministère public de produire l’avis à l’égard d’un délinquant autochtone peut-elle être révisée?*

[34] Ayant conclu que la Constitution n’oblige pas le ministère public à prendre en considération le statut d’Autochtone de l’accusé lorsqu’il prend une décision qui limite l’éventail des peines que peut infliger un juge, il s’agit maintenant de déterminer si la décision du ministère public de produire l’avis peut être révisée d’une autre façon et, dans l’affirmative, selon quelle norme.

Contrôle des décisions du ministère public

[35] Le contrôle judiciaire des décisions du ministère public peut se faire suivant deux voies distinctes. L’analyse différera selon qu’il s’agit de contrôler (1) l’exercice du pouvoir discrétionnaire en matière de poursuites, ou (2) la stratégie ou la conduite devant le tribunal.

[36] Toutes les décisions du ministère public sont susceptibles de révision s’il y a eu abus de procédure. Toutefois, ainsi que je vais l’expliquer, l’exercice du pouvoir discrétionnaire en matière de poursuites peut être révisé en cas d’abus de procédure *seulement*. Par contre, la stratégie ou la

jurisdiction to control its own processes even in the absence of abuse of process.

(a) *Prosecutorial Discretion*

[37] This Court has repeatedly affirmed that prosecutorial discretion is a necessary part of a properly functioning criminal justice system: *Beare*, at p. 410; *R. v. T. (V.)*, [1992] 1 S.C.R. 749, at pp. 758-62; *R. v. Cook*, [1997] 1 S.C.R. 1113, at para. 19. In *Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339, at para. 47, the fundamental importance of prosecutorial discretion was said to lie, “not in protecting the interests of individual Crown attorneys, but in advancing the public interest by enabling prosecutors to make discretionary decisions in fulfilment of their professional obligations without fear of judicial or political interference, thus fulfilling their *quasi*-judicial role as ‘ministers of justice’”. More recently, in *Sriskandarajah v. United States of America*, 2012 SCC 70, [2012] 3 S.C.R. 609, at para. 27, this Court observed that “[n]ot only does prosecutorial discretion accord with the principles of fundamental justice — it constitutes an indispensable device for the effective enforcement of the criminal law”.

[38] Unfortunately, subsequent to this Court’s decision in *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372, confusion has arisen as to what is meant by “prosecutorial discretion” and the law has become cloudy. The present appeal provides an opportunity for clarification.

[39] In *Krieger*, this Court provided the following description of prosecutorial discretion:

“Prosecutorial discretion” is a term of art. It does not simply refer to any discretionary decision made by a Crown prosecutor. Prosecutorial discretion refers to

conduite devant le tribunal peut être l’objet d’un contrôle plus large. La cour peut exercer sa compétence inhérente en vue de faire respecter sa propre procédure, même en l’absence d’abus de procédure.

a) *Le pouvoir discrétionnaire en matière de poursuites*

[37] Notre Cour a affirmé à maintes reprises que le pouvoir discrétionnaire en matière de poursuites est un élément essentiel au bon fonctionnement de la justice criminelle : *Beare*, p. 410; *R. c. T. (V.)*, [1992] 1 R.C.S. 749, p. 758-762; *R. c. Cook*, [1997] 1 R.C.S. 1113, par. 19. Dans *Miazga c. Kvello (Succession)*, 2009 CSC 51, [2009] 3 R.C.S. 339, par. 47, notre Cour a estimé que l’importance fondamentale du pouvoir discrétionnaire en matière de poursuites « tient à la défense de l’intérêt public, et non à la protection des droits individuels des procureurs de la Couronne, car elle permet à ces derniers de prendre des décisions discrétionnaires dans l’exécution de leurs obligations professionnelles sans craindre d’ingérence judiciaire ou politique et de s’acquitter ainsi de leur rôle *quasi* judiciaire de [TRADUCTION] “représentants de la justice” ». Plus récemment, dans *Sriskandarajah c. États-Unis d’Amérique*, 2012 CSC 70, [2012] 3 R.C.S. 609, par. 27, la Cour a fait remarquer que « [l]e pouvoir discrétionnaire du poursuivant est non seulement conforme aux principes de justice fondamentale, mais il représente un mécanisme essentiel d’application efficace du droit criminel ».

[38] Malheureusement, après l’arrêt de notre Cour dans *Krieger c. Law Society of Alberta*, 2002 CSC 65, [2002] 3 R.C.S. 372, il y a eu une certaine confusion quant au sens à donner à l’expression « pouvoir discrétionnaire en matière de poursuites » et le droit est devenu nébuleux à cet égard. Le présent pourvoi nous donne l’occasion de le clarifier.

[39] Dans *Krieger*, notre Cour a décrit de la façon suivante le pouvoir discrétionnaire en matière de poursuites :

L’expression « pouvoir discrétionnaire en matière de poursuites » est une expression technique. Elle ne désigne pas simplement la décision discrétionnaire d’un procureur

the use of those powers that constitute the core of the Attorney General's office and which are protected from the influence of improper political and other vitiating factors by the principle of independence. [para. 43]

[40] The Court went on to provide the following examples of prosecutorial discretion: whether to bring the prosecution of a charge laid by police; whether to enter a stay of proceedings in either a private or public prosecution; whether to accept a guilty plea to a lesser charge; whether to withdraw from criminal proceedings altogether; and whether to take control of a private prosecution (para. 46). The Court continued:

Significantly, what is common to the various elements of prosecutorial discretion is that they involve the ultimate decisions as to whether a prosecution should be brought, continued or ceased, and what the prosecution ought to be for. Put differently, prosecutorial discretion refers to decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it. Decisions that do not go to the nature and extent of the prosecution, i.e., the decisions that govern a Crown prosecutor's tactics or conduct before the court, do not fall within the scope of prosecutorial discretion. Rather, such decisions are governed by the inherent jurisdiction of the court to control its own processes once the Attorney General has elected to enter into that forum. [Emphasis added; emphasis in original deleted; para. 47.]

[41] Since *Krieger*, courts have struggled with the distinction between prosecutorial discretion, and tactics and conduct. The use of the word "core" in *Krieger* has led to a narrow definition of prosecutorial discretion, notwithstanding the expansive language used in *Krieger* to define the term, namely: "... decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it" (para. 47). Difficulty in defining the term has also led to confusion regarding the standard of review by which particular Crown decisions are to be assessed.

du ministère public, mais vise l'exercice des pouvoirs qui sont au cœur de la charge de procureur général et que le principe de l'indépendance protège contre l'influence de considérations politiques inappropriées et d'autres vices. [par. 43]

[40] La Cour donne ensuite les exemples suivants du pouvoir discrétionnaire en matière de poursuites : intenter ou non des poursuites relativement à une accusation portée par la police; ordonner un arrêt des procédures dans le cadre de poursuites privées ou publiques; accepter un plaidoyer de culpabilité relativement à une accusation moins grave; se retirer complètement de procédures criminelles; prendre en charge des poursuites privées (par. 46). La Cour ajoute ce qui suit :

Fait important, le point commun entre les divers éléments du pouvoir discrétionnaire en matière de poursuites est le fait qu'ils comportent la prise d'une décision finale quant à savoir s'il y a lieu d'intenter ou de continuer des poursuites ou encore d'y mettre fin, d'une part, et quant à l'objet des poursuites, d'autre part. Autrement dit, le pouvoir discrétionnaire en matière de poursuites vise les décisions concernant la nature et l'étendue des poursuites ainsi que la participation du procureur général à celles-ci. Les décisions qui ne portent pas sur la nature et l'étendue des poursuites, c'est-à-dire celles qui ont trait à la stratégie ou à la conduite du procureur du ministère public devant le tribunal, ne relèvent pas du pouvoir discrétionnaire en matière de poursuites. Ces décisions relèvent plutôt de la compétence inhérente du tribunal de contrôler sa propre procédure une fois que le procureur général a choisi de se présenter devant lui. [Je souligne; soulignements dans l'original omis; par. 47.]

[41] Depuis l'arrêt *Krieger*, la distinction entre le pouvoir discrétionnaire en matière de poursuites, d'une part, et la stratégie et la conduite, d'autre part, a donné du fil à retordre aux tribunaux. L'emploi de l'expression « au cœur de » dans *Krieger* a donné lieu à une définition étroite du pouvoir discrétionnaire en matière de poursuites, malgré la formulation libérale employée dans *Krieger* pour définir l'expression, à savoir : « ... les décisions concernant la nature et l'étendue des poursuites ainsi que la participation du procureur général à celles-ci » (par. 47). La difficulté à définir l'expression a également semé la confusion quant à la norme de contrôle applicable à l'appréciation de décisions données du ministère public.

[42] The current appeal presents a good illustration of both problems. As noted earlier, the Newfoundland and Labrador Court of Appeal split on the issue of how to characterize the Crown's decision to tender the Notice. Welsh J.A. held that it was a matter of "core" prosecutorial discretion, whereas Green C.J.N.L. and Rowe J.A. (following *R. v. Gill*, 2012 ONCA 607, 112 O.R. (3d) 423, at paras. 54-56), considered it to be a tactical decision and thus "outside [the] core" (para. 49).

[43] The court also diverged on the applicable standard of review. Welsh J.A. held that the distinction between core decisions and decisions falling outside the core was of no consequence as both types of decisions were reviewable on the same standard — the standard articulated in *Gill*, in which the Ontario Court of Appeal held that the decision to tender the Notice was reviewable if it (1) undermined the integrity of the administration of justice; (2) operated in a manner that rendered the sentencing proceedings fundamentally unfair; (3) was arbitrary; or (4) resulted in a limit on the accused's liberty that was grossly disproportionate to the state interest in pursuing a particular course of action (*Gill*, at para. 59). Green C.J.N.L. and Rowe J.A. disagreed. In their view, tactical decisions (decisions "outside the core") were reviewable according to the *Gill* standard, whereas "core" prosecutorial discretion was reviewable solely for abuse of process. The diverging views present in this case, and in many others, demonstrate the unsatisfactory state of the law.

[44] In an effort to clarify, I think we should start by recognizing that the term "prosecutorial discretion" is an expansive term that covers all "decisions regarding the nature and extent of the

[42] Le présent pourvoi illustre bien les deux problèmes. Rappelons que la Cour d'appel de Terre-Neuve-et-Labrador était partagée quant à la manière de qualifier la décision du ministère public de produire l'avis. La juge Welsh a statué que la décision en cause relevait du pouvoir discrétionnaire [TRADUCTION] « essentiel » en matière de poursuites, alors que le juge en chef Green et le juge Rowe (s'appuyant sur l'arrêt *R. c. Gill*, 2012 ONCA 607, 112 O.R. (3d) 423, par. 54-56), ont estimé qu'il s'agissait d'une décision stratégique qui [TRADUCTION] « ne relevait donc pas de ce pouvoir essentiel » (par. 49).

[43] La cour était également divisée quant à la norme de contrôle applicable. La juge Welsh a statué que la distinction entre les décisions essentielles et celles qui ne l'étaient pas n'avait pas de conséquences, puisque, dans les deux cas, les décisions pouvaient être révisées selon la même norme de contrôle — la norme énoncée dans *Gill*, où la Cour d'appel de l'Ontario a statué que la décision de produire l'avis pouvait être révisée si l'une des conditions suivantes était remplie : (1) la décision a porté atteinte à l'intégrité de l'administration de la justice; (2) elle a eu pour effet de rendre la procédure de détermination de la peine fondamentalement inéquitable; (3) elle était arbitraire; (4) elle a donné lieu à une restriction de la liberté de l'accusé qui était exagérément disproportionnée à l'intérêt qu'a l'État à prendre une mesure donnée (*Gill*, par. 59). Le juge en chef Green et le juge Rowe n'étaient pas de cet avis. Selon eux, les décisions stratégiques (les décisions « non essentielles ») pouvaient être révisées selon la norme énoncée dans *Gill*, alors que le pouvoir discrétionnaire « essentiel » en matière de poursuites n'était susceptible de révision que s'il y avait eu abus de procédure. Les points de vue divergents en l'espèce, et dans beaucoup d'autres affaires, montrent bien que la règle de droit en la matière laisse à désirer.

[44] En vue de clarifier la règle, je crois que nous devons d'abord reconnaître que l'expression « pouvoir discrétionnaire en matière de poursuites » est une expression large qui renvoie à toutes « les

prosecution and the Attorney General's participation in it" (*Krieger*, at para. 47). As this Court has repeatedly noted, "[p]rosecutorial discretion refers to the discretion exercised by the Attorney-General in matters within his authority in relation to the prosecution of criminal offences" (*Krieger*, at para. 44, citing *Power*, at p. 622, quoting D. Vanek, "Prosecutorial Discretion" (1988), 30 *Crim. L.Q.* 219, at p. 219 (emphasis added)). While it is likely impossible to create an exhaustive list of the decisions that fall within the nature and extent of a prosecution, further examples to those in *Krieger* include: the decision to repudiate a plea agreement (as in *R. v. Nixon*, 2011 SCC 34, [2011] 2 S.C.R. 566); the decision to pursue a dangerous offender application; the decision to prefer a direct indictment; the decision to charge multiple offences; the decision to negotiate a plea; the decision to proceed summarily or by indictment; and the decision to initiate an appeal. All pertain to the nature and extent of the prosecution. As can be seen, many stem from the provisions of the *Code* itself, including the decision in this case to tender the Notice.

[45] In sum, prosecutorial discretion applies to a wide range of prosecutorial decision making. That said, care must be taken to distinguish matters of prosecutorial discretion from constitutional obligations. The distinction between prosecutorial discretion and the constitutional obligations of the Crown was made in *Krieger*, where the prosecutor's duty to disclose relevant evidence to the accused was at issue:

In *Stinchcombe*, *supra*, the Court held that the Crown has an obligation to disclose all relevant information to the defence. While the Crown Attorney retains the discretion not to disclose irrelevant information, disclosure of relevant evidence is not, therefore, a matter of

décisions concernant la nature et l'étendue des poursuites ainsi que la participation du procureur général à celles-ci » (*Krieger*, par. 47). Comme notre Cour l'a fait remarquer à maintes reprises, « [l]e pouvoir discrétionnaire [en matière de poursuites] renvoie à la discrétion exercée par le procureur général dans les affaires qui relèvent de sa compétence relativement à la poursuite d'infractions criminelles » (*Krieger*, par. 44, citant *Power*, p. 622, citant D. Vanek, « Prosecutorial Discretion » (1988), 30 *Crim. L.Q.* 219, p. 219 (je souligne)). Bien qu'il soit sans doute impossible de dresser une liste exhaustive des décisions qui relèvent de la nature et de l'étendue des poursuites, nous pouvons ajouter, outre ceux donnés dans *Krieger*, les exemples suivants : la décision de répudier une entente sur le plaidoyer (comme dans *R. c. Nixon*, 2011 CSC 34, [2011] 2 R.C.S. 566); la décision d'introduire une demande de déclaration de délinquant dangereux; la décision de procéder par voie de mise en accusation directe; la décision de porter des accusations alléguant la perpétration de plusieurs infractions; la décision de négocier sur un plaidoyer; la décision de procéder par voie sommaire ou par voie de mise en accusation; la décision d'interjeter appel. Toutes ces décisions ont trait à la nature et à l'étendue des poursuites. Comme on peut le voir, plusieurs découlent de dispositions du *Code* même, y compris la décision en l'espèce de produire l'avis.

[45] En résumé, l'expression « pouvoir discrétionnaire en matière de poursuites » renvoie à un vaste éventail de décisions que peut prendre un poursuivant. Cela dit, il faut prendre soin de faire la distinction entre les questions qui relèvent de ce pouvoir et les obligations constitutionnelles. La distinction entre le pouvoir discrétionnaire en matière de poursuites et les obligations constitutionnelles du ministère public a été faite dans *Krieger*, où était en cause l'obligation du poursuivant de communiquer la preuve pertinente à l'accusé :

Dans l'arrêt *Stinchcombe*, précité, notre Cour a conclu que le ministère public est tenu de communiquer à la défense tous les renseignements pertinents. Par conséquent, bien que le procureur du ministère public conserve le pouvoir discrétionnaire de ne pas communiquer

prosecutorial discretion but, rather, is a prosecutorial duty. [Emphasis added; para. 54.]

Manifestly, the Crown possesses no discretion to breach the *Charter* rights of an accused. In other words, prosecutorial discretion provides no shield to a Crown prosecutor who has failed to fulfill his or her constitutional obligations such as the duty to provide proper disclosure to the defence.

(i) The Standard of Review for Prosecutorial Discretion

[46] The many decisions that Crown prosecutors are called upon to make in the exercise of their prosecutorial discretion must not be subjected to routine second-guessing by the courts. The courts have long recognized that decisions involving prosecutorial discretion are unlike other decisions made by the executive: see M. Code, “Judicial Review of Prosecutorial Decisions: A Short History of Costs and Benefits, in Response to Justice Rosenberg” (2009), 34 *Queen’s L.J.* 863, at p. 867. Judicial non-interference with prosecutorial discretion has been referred to as a “matter of principle based on the doctrine of separation of powers as well as a matter of policy founded on the efficiency of the system of criminal justice” which also recognizes that prosecutorial discretion is “especially ill-suited to judicial review”: *Power*, at p. 623. In *Krieger*, the Court discussed the separation of powers doctrine as a basis for judicial deference to prosecutorial discretion:

In our theory of government, it is the sovereign who holds the power to prosecute his or her subjects. A decision of the Attorney General, or of his or her agents, within the authority delegated to him or her by the sovereign is not subject to interference by other arms of government. An exercise of prosecutorial discretion will, therefore, be treated with deference by the courts and by other members of the executive . . . [para. 45]

des renseignements non pertinents, la communication d’éléments de preuve pertinents est affaire non pas de pouvoir discrétionnaire mais plutôt d’obligation de sa part. [Je souligne; par. 54.]

Manifestement, le ministère public n’a pas le pouvoir discrétionnaire de porter atteinte aux droits que la *Charte* garantit à un accusé. Autrement dit, le pouvoir discrétionnaire en matière de poursuites ne protège aucunement le procureur du ministère public qui ne s’est pas acquitté de ses obligations constitutionnelles, par exemple celle de communiquer adéquatement la preuve à la défense.

(i) La norme de contrôle du pouvoir discrétionnaire en matière de poursuites

[46] Les nombreuses décisions que sont appelés à prendre les procureurs du ministère public dans l’exercice de leur pouvoir discrétionnaire en matière de poursuites ne doivent pas être susceptibles d’une remise en cause systématique par les tribunaux. Les tribunaux reconnaissent depuis longtemps que les décisions prises dans l’exercice du pouvoir discrétionnaire en matière de poursuites sont différentes de celles prises par l’exécutif : voir M. Code, « Judicial Review of Prosecutorial Decisions : A Short History of Costs and Benefits, in Response to Justice Rosenberg » (2009), 34 *Queen’s L.J.* 863, p. 867. Si les tribunaux n’interviennent pas dans le pouvoir discrétionnaire en matière de poursuites, c’est « par principe, compte tenu du partage des pouvoirs, de l’efficacité du système de justice criminelle », et parce qu’ils reconnaissent que ce pouvoir discrétionnaire « se prête particulièrement mal au contrôle judiciaire » : *Power*, p. 623. Dans *Krieger*, la Cour a examiné la théorie du partage des pouvoirs en tant que fondement de la retenue dont les tribunaux font preuve à l’égard du pouvoir discrétionnaire en matière de poursuites :

Dans notre système gouvernemental, c’est le souverain qui a le pouvoir de poursuivre ses sujets. Les autres organes du gouvernement ne peuvent pas modifier une décision que le procureur général ou l’un de ses mandataires a prise dans l’exercice du pouvoir que le souverain lui a délégué. Par conséquent, les tribunaux [et] les autres membres de l’exécutif [. . .] font preuve de retenue à l’égard de l’exercice du pouvoir discrétionnaire en matière de poursuites. [par. 45]

[47] The Court also noted the more practical problems associated with regular review of prosecutorial discretion:

The quasi-judicial function of the Attorney General cannot be subjected to interference from parties who are not as competent to consider the various factors involved in making a decision to prosecute. To subject such decisions to political interference, or to judicial supervision, could erode the integrity of our system of prosecution. [para. 32]

[48] Manifestly, prosecutorial discretion is entitled to considerable deference. It is not, however, immune from all judicial oversight. This Court has repeatedly affirmed that prosecutorial discretion is reviewable for abuse of process: *Krieger*, at para. 32; *Nixon*, at para. 31; *Miazga*, at para. 46.

[49] The jurisprudence pertaining to the review of prosecutorial discretion has employed a range of terminology to describe the type of prosecutorial conduct that constitutes abuse of process. In *Krieger*, this Court used the term “flagrant impropriety” (para. 49). In *Nixon*, the Court held that the abuse of process doctrine is available where there is evidence that the Crown’s decision “undermines the integrity of the judicial process” or “results in trial unfairness” (para. 64). The Court also referred to “improper motive[s]” and “bad faith” in its discussion (para. 68).

[50] Regardless of the precise language used, the key point is this: abuse of process refers to Crown conduct that is egregious and seriously compromises trial fairness and/or the integrity of the justice system. Crown decisions motivated by prejudice against Aboriginal persons would certainly meet this standard.

[51] In sum, prosecutorial discretion is reviewable solely for abuse of process. The *Gill* test applied by the Newfoundland and Labrador Court of Appeal was developed at a time when courts were struggling with the post-*Krieger* “core” versus “outside the

[47] Notre Cour a aussi souligné les problèmes pratiques particuliers liés à la révision systématique du pouvoir discrétionnaire en matière de poursuites :

La fonction quasi judiciaire du procureur général ne saurait faire l’objet d’une ingérence de la part de parties qui ne sont pas aussi compétentes que lui pour analyser les divers facteurs à l’origine de la décision de poursuivre. Assujettir ce genre de décisions à une ingérence politique ou à la supervision des tribunaux pourrait miner l’intégrité de notre système de poursuites. [par. 32]

[48] Manifestement, le pouvoir discrétionnaire en matière de poursuites justifie une grande déférence. Toutefois, il n’est pas à l’abri de toute surveillance judiciaire. Notre Cour a affirmé à maintes reprises que le pouvoir discrétionnaire en matière de poursuites est susceptible de contrôle judiciaire s’il y a eu abus de procédure : *Krieger*, par. 32; *Nixon*, par. 31; *Miazga*, par. 46.

[49] Dans la jurisprudence portant sur le contrôle du pouvoir discrétionnaire en matière de poursuites, le type de comportement de la poursuite qui constitue un abus de procédure a été décrit de diverses façons. Dans *Krieger*, notre Cour a employé l’expression « conduite répréhensible flagrante » (par. 49). Dans *Nixon*, la Cour a estimé que la règle de l’abus de procédure s’applique en présence d’éléments de preuve démontrant que la décision du ministère public « min[e] l’intégrité du processus judiciaire » ou « rend le procès inéquitable » (par. 64). La Cour a également fait état, dans son analyse, de « motif illégitime » et de « mauvaise foi » (par. 68).

[50] Indépendamment des termes employés, l’abus de procédure s’entend essentiellement d’une conduite du ministère public qui est inacceptable et qui compromet sérieusement l’équité du procès ou l’intégrité du système de justice. Les décisions du ministère public motivées par des préjugés à l’égard des Autochtones répondraient certainement à ce critère.

[51] En résumé, le pouvoir discrétionnaire en matière de poursuites est susceptible de contrôle judiciaire seulement s’il y a eu abus de procédure. Le critère énoncé dans *Gill* qu’a appliqué la Cour d’appel de Terre-Neuve-et-Labrador a été élaboré à

core” dichotomy. To the extent the *Gill* test suggests that conduct falling short of abuse of process may form a basis for reviewing prosecutorial discretion, respectfully, it should not be followed.

(ii) The Threshold Evidentiary Burden

[52] The burden of proof for establishing abuse of process lies on the claimant, who must prove it on a balance of probabilities: *Cook*, at para. 62; *R. v. O'Connor*, [1995] 4 S.C.R. 411, at para. 69, *per* L'Heureux-Dubé J.; *R. v. Jolivet*, 2000 SCC 29, [2000] 1 S.C.R. 751, at para. 19. However, given the unique nature of prosecutorial discretion — specifically, the fact that the Crown will typically (if not always) be the only party who will know *why* a particular decision was made — this Court in *Nixon* recognized that where prosecutorial discretion is challenged, the Crown may be required to provide reasons justifying its decision where the claimant establishes a proper evidentiary foundation: para. 60.

[53] In *Nixon*, this Court noted the following reasons as to why there must be a “proper evidentiary foundation” before the abuse of process claim should proceed:

... mandating a preliminary determination on the utility of a *Charter*-based inquiry is not new: *R. v. Pires*, 2005 SCC 66, [2005] 3 S.C.R. 343. Similar thresholds are also imposed in other areas of the criminal law, they are not an anomaly. Threshold requirements may be imposed for pragmatic reasons alone. As this Court observed in *Pires* (at para. 35):

For our justice system to operate, trial judges must have some ability to control the course of proceedings before them. One such mechanism is the power to decline to embark upon an evidentiary hearing at the request of one of the parties when that party is unable

une époque où, après l'arrêt *Krieger*, la distinction entre ce qui relève du pouvoir discrétionnaire « essentiel » et ce qui relève du pouvoir « non essentiel » n'allait pas de soi pour les tribunaux. Avec égards, il n'y a pas lieu de retenir le critère énoncé dans *Gill* dans la mesure où il laisse entendre qu'une conduite qui ne va pas jusqu'à l'abus de procédure peut justifier le contrôle judiciaire du pouvoir discrétionnaire en matière de poursuites.

(ii) Le fardeau initial de preuve

[52] Il incombe au demandeur de prouver par prépondérance des probabilités qu'il y a eu abus de procédure : *Cook*, par. 62; *R. c. O'Connor*, [1995] 4 R.C.S. 411, par. 69, la juge L'Heureux-Dubé; *R. c. Jolivet*, 2000 CSC 29, [2000] 1 R.C.S. 751, par. 19. Toutefois, en raison de la nature unique du pouvoir discrétionnaire en matière de poursuites — notamment le fait que le ministère public sera habituellement (voire toujours) la seule partie qui saura *pourquoi* une décision donnée a été prise — notre Cour a reconnu dans *Nixon* que lorsque le pouvoir discrétionnaire en matière de poursuites est contesté, le ministère public peut être tenu de justifier sa décision lorsque le demandeur établit l'existence d'une preuve suffisante : par. 60.

[53] Dans *Nixon*, notre Cour énonce les raisons suivantes pour lesquelles il doit exister « une preuve suffisante » avant que l'allégation relative à l'abus de procédure puisse être examinée :

... l'imposition aux tribunaux d'une exigence selon laquelle ils doivent d'abord se prononcer quant à l'utilité de la tenue d'une enquête fondée sur la *Charte* n'a rien de nouveau : *R. c. Pires*, 2005 CSC 66, [2005] 3 R.C.S. 343. Il faut également satisfaire à des critères préliminaires semblables dans d'autres domaines du droit criminel; ils ne constituent pas une anomalie. Des conditions préliminaires peuvent être imposées uniquement pour des raisons pragmatiques. Comme la Cour l'a fait remarquer dans *Pires* (par. 35) :

Pour que notre système de justice fonctionne, les juges qui président les procès doivent être en mesure de veiller au bon déroulement des instances. L'un des mécanismes leur permettant d'y arriver est le pouvoir de refuser de procéder à une audition de la preuve

to show a reasonable likelihood that the hearing can assist in determining the issues before the court.

Quite apart from any such pragmatic considerations, there is good reason to impose a threshold burden on the applicant who alleges that an act of prosecutorial discretion constitutes an abuse of process. Given that such decisions are generally beyond the reach of the court, it is not sufficient to launch an inquiry for an applicant to make a bare allegation of abuse of process. [Emphasis added; paras. 61-62.]

[54] *Nixon* involved the Crown's repudiation of a plea agreement. The Court held that the repudiation of a plea agreement was "a rare and exceptional event" that met the evidentiary threshold and justified an inquiry into the propriety of the Crown's decision: *Nixon*, at para. 63. Indeed, the evidence in *Nixon* was that only two other plea agreements had been repudiated in Alberta's history. As a result, the Court held that

to the extent that the Crown is the only party who is privy to the information, the evidentiary burden shifts to the Crown to enlighten the court on the circumstances and reasons behind its decision to resile from the agreement. That is, the Crown must explain why and how it made the decision not to honour the plea agreement. The ultimate burden of proving abuse of process remains on the applicant and, as discussed earlier, the test is a stringent one. However, if the Crown provides little or no explanation to the court, this factor should weigh heavily in favour of the applicant in successfully making out an abuse of process claim. [para. 63]

[55] Requiring the claimant to establish a proper evidentiary foundation before embarking on an inquiry into the reasons behind the exercise of prosecutorial discretion respects the presumption that prosecutorial discretion is exercised in good faith: *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 S.C.R. 248, at para. 95. It also accords with this Court's statement in *Sriskandarajah*, at para. 27, that "prosecutorial

lorsque la partie qui en fait la demande est incapable de démontrer qu'il est raisonnablement probable que cette audience aidera à résoudre les questions sou-mises au tribunal.

Hormis de telles considérations pragmatiques, il existe de bonnes raisons d'imposer un fardeau initial au demandeur qui prétend qu'un acte résultant de l'exercice du pouvoir discrétionnaire en matière de poursuites constitue un abus de procédure. Comme de telles décisions échappent généralement à la compétence du tribunal, il ne suffit pas d'entreprendre un examen pour qu'un demandeur puisse faire une simple allégation d'abus de procédure. [Je souligne; par. 61-62.]

[54] L'arrêt *Nixon* portait sur la répudiation d'une entente sur le plaidoyer par le ministère public. Notre Cour a affirmé que la répudiation d'une entente sur le plaidoyer est « un événement rare et exceptionnel » qui répond au critère préliminaire de preuve et justifie un examen du bien-fondé de la décision du ministère public : *Nixon*, par. 63. En fait, il ressortait de la preuve dans *Nixon* que seulement deux autres ententes sur le plaidoyer avaient déjà été répudiées en Alberta. En conséquence, la Cour a affirmé ce qui suit :

. . . dans la mesure où la Couronne est la seule partie au courant de l'information, c'est à elle qu'il incombe d'exposer au tribunal les circonstances et les motifs qui sous-tendent sa décision de répudier l'entente. En d'autres termes, la Couronne doit expliquer au tribunal pourquoi et comment elle est parvenue à la décision de ne pas respecter l'entente qu'elle avait pourtant conclue. En bout de ligne, c'est au demandeur qu'il revient d'établir qu'il y a eu abus de procédure et, comme il a déjà été discuté, il doit satisfaire à un critère rigoureux. Cependant, le peu, voire l'absence d'explications de la Couronne, le cas échéant, constitue un facteur qui milite fortement en faveur de la thèse du demandeur qui cherche à établir qu'il y a eu abus de procédure. [par. 63]

[55] Le fait d'obliger le demandeur à établir l'existence d'une preuve suffisante avant que la cour entreprenne l'examen des motifs qui sous-tendent l'exercice du pouvoir discrétionnaire en matière de poursuites respecte la présomption selon laquelle ce pouvoir est exercé de bonne foi : *Demande fondée sur l'art. 83.28 du Code criminel (Re)*, 2004 CSC 42, [2004] 2 R.C.S. 248, par. 95. Notre Cour a confirmé cette approche dans *Sriskandarajah*,

authorities are not bound to provide reasons for their decisions, absent evidence of bad faith or improper motives” (emphasis added).

[56] Finally, I note that the content of a Crown policy or guideline may be relevant when a court is considering a challenge to the exercise of prosecutorial discretion. Policy statements or guidelines are capable of informing the debate as to whether a Crown prosecutor’s conduct was appropriate in the particular circumstances. See R. J. Frater, *Prosecutorial Misconduct* (2009), at p. 259. For example, a decision by a Crown prosecutor that appears to contravene a Crown policy or guideline may provide some evidence that assists the claimant in establishing the threshold evidentiary foundation. However, as the intervener the Director of Public Prosecutions of Canada submits, Crown policies and guidelines do not have the force of law, and cannot themselves be subjected to *Charter* scrutiny in the abstract: see *R. v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190, at para. 45 (discussing police practices manuals).

(b) *Tactics and Conduct Before the Court*

[57] The second category in the framework for review of Crown activity was referred to in *Krieger* as “tactics or conduct before the court”: para. 47. As stated in *Krieger*, “such decisions are governed by the inherent jurisdiction of the court to control its own processes once the Attorney General has elected to enter into that forum” (para. 47).

[58] Superior courts possess inherent jurisdiction to ensure that the machinery of the court functions in an orderly and effective manner: *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331, at para. 18; *Ontario v. Criminal Lawyers’ Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, at para. 26. Similarly, in order to function as courts of law, statutory courts have implicit powers that

par. 27, où elle a dit que « sauf preuve de sa mauvaise foi ou du caractère inapproprié de ce qui l’a animé, le poursuivant n’est pas tenu de motiver sa décision » (je souligne).

[56] Enfin, je note que la teneur d’une politique ou d’une ligne directrice du ministère public peut être pertinente lorsqu’une cour examine une contestation de l’exercice du pouvoir discrétionnaire en matière de poursuites. Les énoncés de politique ou les lignes directrices peuvent éclairer le débat sur la question de savoir si la conduite d’un procureur du ministère public était appropriée dans les circonstances particulières. Voir R. J. Frater, *Prosecutorial Misconduct* (2009), p. 259. Par exemple, la décision d’un procureur du ministère public qui semble contrevenir à une politique ou à une ligne directrice du ministère public peut fournir une preuve susceptible d’aider le demandeur à satisfaire le critère préliminaire de preuve. Toutefois, comme le souligne dans ses observations le directeur des poursuites pénales du Canada, intervenant, les politiques et les lignes directrices du ministère public n’ont pas force de loi et ne peuvent elles-mêmes faire l’objet, dans l’abstrait, d’un examen fondé sur la *Charte* : voir *R. c. Beaudry*, 2007 CSC 5, [2007] 1 R.C.S. 190, par. 45 (traitant des guides de pratiques policières).

b) *Stratégie et conduite devant le tribunal*

[57] Selon l’arrêt *Krieger*, la deuxième catégorie de décisions du ministère public susceptibles de contrôle judiciaire a trait « à la stratégie ou à la conduite du procureur du ministère public devant le tribunal » : para. 47. Comme la Cour l’affirme dans *Krieger*, « [c]es décisions relèvent [. . .] de la compétence inhérente du tribunal de contrôler sa propre procédure une fois que le procureur général a choisi de se présenter devant lui » (para. 47).

[58] Une cour supérieure possède la compétence inhérente de veiller au bon fonctionnement des rouages de la cour : *R. c. Cunningham*, 2010 CSC 10, [2010] 1 R.C.S. 331, par. 18; *Ontario c. Criminal Lawyers’ Association of Ontario*, 2013 CSC 43, [2013] 3 R.C.S. 3, par. 26. De même, afin d’exercer sa fonction judiciaire, un tribunal d’origine législative possède des pouvoirs inhérents qui découlent

derive from the court's authority to control its own process: *Cunningham*, at para.18. This jurisdiction includes the power to penalize counsel for ignoring rulings or orders, or for inappropriate behaviour such as tardiness, incivility, abusive cross-examination, improper opening or closing addresses or inappropriate attire. Sanctions may include orders to comply, adjournments, extensions of time, warnings, cost awards, dismissals, and contempt proceedings.

[59] While deference is not owed to counsel who are behaving inappropriately in the courtroom, our adversarial system *does* accord a high degree of deference to the tactical decisions of counsel. In other words, while courts may sanction the conduct of the *litigants*, they should generally refrain from interfering with the conduct of the *litigation* itself. In *R. v. S.G.T.*, 2010 SCC 20, [2010] 1 S.C.R. 688, at paras. 36-37, this Court explained why judges should be very cautious before interfering with tactical decisions:

In an adversarial system of criminal trials, trial judges must, barring exceptional circumstances, defer to the tactical decisions of counsel . . . [C]ounsel will generally be in a better position to assess the wisdom, in light of their overall trial strategy, of a particular tactical decision than is the trial judge. By contrast, trial judges are expected to be impartial arbiters of the dispute before them; the more a trial judge second-guesses or overrides the decisions of counsel, the greater is the risk that the trial judge will, in either appearance or reality, cease being a neutral arbiter and instead become an advocate for one party. . . .

The corollary of the preceding is that trial judges should seldom take it upon themselves, let alone be required, to second-guess the tactical decisions of counsel. Of course, trial judges are still required to “make sure that [the trial] remains fair and is conducted in accordance with the relevant laws and the principles of fundamental justice”: *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, [2002] 3 S.C.R. 209, at para. 68.

du pouvoir de la cour de maîtriser sa propre procédure : *Cunningham*, par. 18. Cette compétence comprend le pouvoir de sanctionner les avocats qui font fi des décisions ou des ordonnances, ou qui affichent un comportement inacceptable, par exemple des retards, l'incivilité, le contre-interrogatoire abusif, un exposé introductif ou une plaidoirie finale inopportuns, ou une entorse au code vestimentaire. Les sanctions peuvent inclure l'ordonnance de se conformer, l'ajournement, la prorogation de délai, la mise en garde, la condamnation aux dépens, le rejet de demandes et les procédures d'outrage au tribunal.

[59] Bien que la déférence ne s'impose pas envers les avocats qui se comportent de façon inopportune dans la salle d'audience, notre système accusatoire fait *effectivement* preuve d'une grande retenue envers les décisions tactiques des avocats. Autrement dit, bien que les tribunaux puissent sanctionner la conduite des *parties au litige*, ils doivent généralement s'abstenir de s'immiscer dans la conduite du *litige* en tant que tel. Dans *R. c. S.G.T.*, 2010 CSC 20, [2010] 1 R.C.S. 688, par. 36-37, notre Cour explique pourquoi les juges doivent être très prudents avant de s'immiscer dans des décisions tactiques :

Dans un système de justice criminelle accusatoire, les juges instruisant les procès doivent, à moins de circonstances exceptionnelles, déférer aux décisions tactiques des avocats [. . .] [L]'avocat sera habituellement mieux placé que le juge du procès pour apprécier l'opportunité d'une décision tactique particulière en fonction de sa stratégie globale. Le juge du procès, lui, doit agir en arbitre impartial du litige dont il est saisi; plus un juge remet en question ou annule les décisions d'un avocat, plus il risque de s'écarter, en apparence ou dans les faits, de son rôle d'arbitre neutre et de devenir l'avocat de l'une des parties. . . .

Il en résulte que le juge du procès devrait rarement décider de son propre chef de remettre en question les décisions tactiques d'un avocat, et encore moins être tenu de le faire. Bien sûr, il doit toujours « s'assure[r] que le procès reste équitable et se déroule conformément aux lois pertinentes et aux principes de justice fondamentale » : *Lavallee, Rackel & Heintz c. Canada (Procureur général)*, 2002 CSC 61, [2002] 3 R.C.S. 209, par. 68.

[60] Crown counsel is entitled to have a trial strategy and to modify it as the trial unfolds, provided that the modification does not result in unfairness to the accused: *Jolivet*, at para. 21. Likewise, as this Court recently held in *R. v. Auclair*, 2014 SCC 6, [2014] 1 S.C.R. 83, a judge may exceptionally override a Crown tactical decision in order to prevent a *Charter* violation.

[61] Finally, as with all Crown decision making, courtroom tactics or conduct may amount to abuse of process, but abuse of process is not a precondition for judicial intervention as it is for matters of prosecutorial discretion.

VI. Conclusion

[62] Parliament has expressly conferred on the Crown the discretion to tender the Notice at the sentencing hearing through the governing provisions of the *Code*. This discretion is consistent with our constitutional traditions. As the Crown points out, tendering the Notice is not simply a decision as to what submissions will be made at a sentencing hearing (A.F., at para. 119). Tendering the Notice fundamentally alters the *extent* of prosecution — specifically, the extent of the jeopardy facing the accused. In this respect, the Crown's decision to tender the Notice is analogous to the decision to proceed with charges that attract a mandatory minimum sentence when other related offences have no mandatory minimum sentence; the decision to proceed by indictment rather than summary conviction when different mandatory minimum sentences are involved; and the decision to proceed by indictment rather than by summary conviction when that decision precludes certain sentencing options.

[63] For these reasons, I conclude that tendering the Notice is a matter of prosecutorial discretion. As a result, it is reviewable only for abuse of process.

[60] Le procureur du ministère public a le droit d'avoir une stratégie de procès et de la modifier en cours de route, pourvu que la modification n'entraîne aucune iniquité pour l'accusé : *Jolivet*, par. 21. De même, comme notre Cour l'a affirmé récemment dans *R. c. Auclair*, 2014 CSC 6, [2014] 1 R.C.S. 83, un juge peut exceptionnellement passer outre à une décision stratégique du ministère public afin d'empêcher une violation de la *Charte*.

[61] Enfin, comme pour toute prise de décision du ministère public, les stratégies ou la conduite dans la salle d'audience peuvent équivaloir à un abus de procédure, mais l'abus de procédure n'est pas une condition préalable à l'intervention du juge comme c'est le cas pour les décisions qui relèvent du pouvoir discrétionnaire en matière de poursuites.

VI. Conclusion

[62] Dans les dispositions applicables du *Code*, le législateur a expressément conféré au ministère public le pouvoir discrétionnaire de produire l'avis à l'audience de détermination de la peine. Ce pouvoir discrétionnaire est conforme à nos traditions constitutionnelles. Comme le souligne le ministère public, la production de l'avis n'est pas simplement une décision quant aux observations qui seront faites à l'audience de détermination de la peine (m.a., par. 119). La production de l'avis modifie fondamentalement l'*étendue* de la poursuite — particulièrement l'*étendue* du risque auquel l'accusé est exposé. À cet égard, la décision du ministère public de produire l'avis est analogue à la décision de porter des accusations qui entraînent une peine minimale obligatoire alors que d'autres infractions connexes n'entraînent aucune peine minimale obligatoire, à la décision d'intenter une poursuite par mise en accusation, plutôt que par procédure sommaire, lorsque diverses peines minimales obligatoires sont prescrites, et à la décision d'intenter une poursuite par mise en accusation plutôt que par procédure sommaire, lorsque cette décision exclut la possibilité d'infliger certaines peines.

[63] Pour ces motifs, je conclus que la production de l'avis relève du pouvoir discrétionnaire en matière de poursuites. Par conséquent, elle n'est susceptible

In the complete absence of any evidence to support it, Mr. Anderson's abuse of process argument must fail.

[64] As a final matter, I note that the s. 15(1) *Charter* challenge to the constitutionality of the statutory scheme was not pursued before this Court. These reasons should not be taken as endorsing the trial judge's analysis or conclusion with respect to that issue.

[65] Accordingly, I would allow the appeal. The order of the Newfoundland and Labrador Court of Appeal is set aside and a term of imprisonment of 120 days is substituted, with service of the remainder of the sentence stayed in accordance with the concession of the Crown.

Appeal allowed.

Solicitor for the appellant: Attorney General of Newfoundland and Labrador, St. John's.

Solicitor for the respondent: Newfoundland and Labrador Legal Aid Commission, St. John's.

Solicitor for the intervener the Director of Public Prosecutions of Canada: Public Prosecution Service of Canada, Halifax.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of New Brunswick: Attorney General of New Brunswick, Fredericton.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Vancouver.

Solicitor for the intervener the David Asper Centre for Constitutional Rights: University of Toronto, Toronto.

Solicitor for the intervener the Aboriginal Legal Services of Toronto Inc.: Aboriginal Legal Services of Toronto Legal Clinic, Toronto.

de contrôle judiciaire que s'il y a eu abus de procédure. En l'absence totale de preuve pour l'étayer, l'argument fondé sur l'abus de procédure invoqué par M. Anderson doit être rejeté.

[64] Enfin, je note que la contestation de la constitutionnalité du régime législatif sur le fondement du par. 15(1) de la *Charte* n'a pas été avancée devant notre Cour. Les présents motifs ne signifient pas que j'accepte l'analyse ou la conclusion du juge de première instance à l'égard de cette question.

[65] Je suis en conséquence d'avis d'accueillir le pourvoi. L'ordonnance de la Cour d'appel de Terre-Neuve-et-Labrador est annulée et une peine d'emprisonnement de 120 jours est substituée à la peine infligée, avec sursis de ce qui reste à courir de la peine conformément à la concession du ministère public.

Pourvoi accueilli.

Procureur de l'appelante : Procureur général de Terre-Neuve-et-Labrador, St. John's.

Procureur de l'intimé : Newfoundland and Labrador Legal Aid Commission, St. John's.

Procureur de l'intervenant le directeur des poursuites pénales du Canada : Service des poursuites pénales du Canada, Halifax.

Procureur de l'intervenant le procureur général de l'Ontario : Procureur général de l'Ontario, Toronto.

Procureur de l'intervenant le procureur général du Nouveau-Brunswick : Procureur général du Nouveau-Brunswick, Fredericton.

Procureur de l'intervenant le procureur général de la Colombie-Britannique : Procureur général de la Colombie-Britannique, Vancouver.

Procureur de l'intervenant David Asper Centre for Constitutional Rights : Université de Toronto, Toronto.

Procureur de l'intervenante Aboriginal Legal Services of Toronto Inc. : Aboriginal Legal Services of Toronto Legal Clinic, Toronto.

Tab 2:

R. v. Banks, 2022 NSSC 77

SUPREME COURT OF NOVA SCOTIA

Citation: *R v. Banks*, 2022 NSSC 77

Date: 20220315

Docket: *Yarmouth*, No. 480653 and 480665

Registry: Yarmouth

Between:

Her Majesty the Queen

Plaintiff

v.

Terry Dale Banks and Wayne Lawrence Banks

Respondent

Judge: The Honourable Justice Pierre L. Muise

Heard: By correspondence

**Final Written
Submissions:** February 22, 2022

Counsel: Richard B. Miller and Peter Dostal, for the Plaintiff
Michael Power, Q.C., for the Defendant, Terry Banks
Paul Niefer, for the Defendant, Wayne Banks

APPLICATION FOR DISCLOSURE OF CROWN WITNESS LIST AND SCHEDULE

(Decision rendered orally February 28, 2022)

[1] Wayne Banks brought this application seeking an order directing the Crown to provide the Defence with a non-binding list of witnesses and a tentative schedule for the calling of those witnesses, along with timely notice of any changes to the intended witnesses or the order in which they will be called. In the alternative, he seeks severance of the Counts in the Indictment. Terry Banks joins in Wayne's request, but only provides reasons for the alternative remedy.

[2] I will deal first with the request for a witness list and schedule.

[3] In the event I release a written version of this decision, I reserve the right to edit it for grammar, ease of reading, organization, structure and complete references, without changing the reasoning or the result.

[4] Wayne Banks advances the following reasons for his witness list and schedule request:

1. Though the Crown is not required to disclose it, it is preferable that it do so, as it minimizes delay by promoting fairness, efficiency and effectiveness, and the Court may order it as part of its trial management function, provided it does not "unfairly or irreparably damage the

prosecution”: **R. v. Fiddler**, 2012 ONSC 2539; **R. v. Browne**, 2017 ONSC 5047; and, **R. v. Felderhof**, 2003 CarswellOnt 4943 (C.A.).

2. “Trial judges should take a proactive approach in managing trials to minimize delay, improve efficiency, and change the ‘courtroom culture’”, especially where it impacts trial fairness: **R. v. Cody**, 2017 SCC 31; **R. v. Potter**, 2020 NSCA 9; and, **R. v. Pickton**, 2007 BCSC 2027.
3. Though the Crown stated it was of the view that “it would make sense to start with police then Independent [Fisheries] staff”, it did not present that as its plan, and it added that it did not “want to give the impression there is no need to be ready to deal with other witnesses in the first week as well”.
4. He faces a seven-count indictment, covering four separate complainants, incidents and timeframes, with some overlap of timeframe between two of the incidents only. The Crown has subpoenaed about 45 witnesses. The trial is split in five chunks of time spread out over roughly one-half year. Without knowing which witnesses are expected to be called during each chunk, he will have to

review and prepare for all potential witnesses. That is a waste of time and expense.

5. It may result in disclosure and evidentiary issues being overlooked, causing inefficiency and delay, in a trial that is already scheduled to finish close to the Jordan deadline.
6. The list and schedule will help him prepare and plan for trial, thus promoting trial fairness.
7. The **Cook** decision, relied on by the Crown, must be read in light of the much more recent Supreme Court of Canada decision in **Krieger v. Law Society (Alberta)**, [2002] 3 S.C.R. 372, where it was stated that “decisions that govern a Crown prosecutor’s tactics or conduct before the court, do not fall within the scope of prosecutorial discretion” and “are governed by the inherent jurisdiction of the court to control its own process”: **R. v. Felderhof**, *supra*.
8. He is not seeking an exceptional remedy. He is merely asking for an anticipated order of witnesses to ensure the smooth, efficient and fair running of the trial, recognizing that the witnesses may not be called in that order, and some may not be called at all. That is especially important when dealing with complications arising from a pandemic

and a strained court system. Proceeding without a plan creates a significant risk of serious repercussions for the management of the trial.

9. The Defence invited discussions as to “admissibility of evidence or potential agreed facts”. The Crown responded that it did not see “much opportunity for economy since there aren’t any witnesses who are strictly continuity or particularly peripheral”. That is inconsistent with its brief, where it suggests that the Defence is withholding such agreement.

[5] The Crown opposes both requests. The reasons it provides for opposing the witness list and schedule request include the following:

1. It has no obligation to call any particular witness: **R. v. Cook**, [1997] S.C.J. No. 22.
2. It has no obligation to disclose the witnesses it will call: **Mississauga (City) v. Ciocan**, [2015] O.J. No. 2871 (Ont. Ct. Jus.).
3. Even disclosure under **R. v. Stinchcombe**, [1991] S.C.J. No. 83, has its limits.
4. Though the requested disclosure is good practice, being ordered to do so fetters the Crown’s discretion to decide which witnesses to call and

in which order: *R. v. Pinkus*, [1999] O.J. No. 5464 (Ont. Sup. Ct. of J.).
It effectively trumps “the exercise of Crown discretion”.

5. Protecting prosecutorial discretion advances the public interest by freeing prosecutors of judicial or political interference: **R. v. Anderson**, 2014 SCC 41.
6. Prosecutorial discretion should only be interfered with in “extraordinary and unique circumstances” amounting to “an abuse of process”: **R. v. Auclair**, 2014 SCC 6; **R. v. Power**, [1994] 1 S.C.R. 601.
7. Directing “the Crown as to which witnesses it should call or in what order” is not an acceptable exercise of court authority, except possibly in unusual circumstances: **R. v. Pickton**, *supra*.
8. The **Felderhof** and **Pickton** cases upon which the Defence relies involved unique and extreme circumstances, including lengthier and more complex proceedings.
9. The Crown has not yet prepared a witness list, and cannot produce what it does not have, but it did advise the Defence, in its December 21, 2021 email, that it planned to start with the police witnesses then proceed to present evidence from the staff of Independent Fisheries.

10. Though the Crown exercises a public duty, free of any notion of winning or losing, as described in **Boucher v. R.**, [1955] S.C.R. 16, “the adversarial process is an important part of our judicial system and an accepted tool in our search for the truth” and the Crown must be allowed to vigorously pursue justice within that process: **R. v. Cook**, *supra*.
11. The Crown, having been satisfied with the testimony of one of its witnesses, may properly decide not to call another witness it previously intended to call to avoid the possibility of inconsistent statements. It need not provide the Defence with an opportunity to exploit such potential inconsistencies. It may modify its trial strategy, “provided that the modification does not result in unfairness to the accused”: **R. v. Jolivet**, 2000 SCC 29.
12. Warning the Defence that it should be prepared to respond to the whole case preserves the Crown’s discretion to choose and modify the ordering of witnesses, which is of increased importance because there are reluctant and international witnesses and Covid issues to deal with.
13. The order requested provides an extraordinary remedy and should only be made in lengthy and complex cases. This case is not overly complex

and could be heard in two weeks if agreements were reached regarding the voluminous documentary evidence. The core of the case will be the evidence of the nineteen witnesses who provided formal statements. Ten of those are associated with Independent Fisheries, a complainant, and three are associated with D-Light Seafoods, the company Wayne Banks worked for. The remaining witnesses will provide evidence of “continuity, authenticity and background”.

14. The Defence has had the disclosure for years and presumably would already have prepared for the initial trial dates. It should be ready to cross-examine any witness. The Crown routinely does so with no disclosure and no notice of who the witnesses will be.

[6] I agree with the points made by the Crown except the following points for the following reasons:

1. I disagree that being directed to advise the Defence of the witnesses who are expected to be called, and the order they are expected to be called in, fetters or trumps the Crown’s discretion to decide which witnesses to call and the order to call them in. The Crown still decides those points and it is still free to change its mind, and modify its trial strategy, at any time. Requiring timely notice of intention to change the

witness list or schedule, similarly, does not fetter or trump Crown discretion. Both merely require the Crown to inform the Defence in advance of how it intends to exercise its discretion.

2. The Court in **R. v. Pinkus**, at paragraph 9, stated: “One cannot be said to have discretion if one is ordered to disclose how discretion will be exercised.” I agree with that statement to the extent that it describes a situation where, once the Crown has disclosed how it intends to exercise its discretion, the Crown is bound to exercise its discretion in the way that it said it intended to. However, if the Crown remains free to adjust its presentation of witnesses, it maintains its discretion to determine which witnesses to call and when.
3. The Crown suggests that changing its intended order of witnesses after disclosing it, may prompt adjournment requests, and that possibility may pressure the Crown to refrain from altering its witnesses or witness schedule, thus effectively limiting its exercise of discretion. As will be referenced further later, the authorities presented highlight the greater risk that the Defence will be put in a position where it needs to request an adjournment to properly prepare for cross-examination if it has no notice of the intended witnesses and witness schedule. The

Crown is opposing disclosure of a witness list and schedule, despite that elevated risk. Consequently, the lesser risk of an adjournment resulting from a witness change ought not cause it sufficient concern to pressure it into maintaining its planned witness schedule. Furthermore, the possibility of a trial tactic causing delay always looms in the background as a factor which may influence the Crown's exercise of discretion. That potential delay informs the Crown's exercise of discretion. It does not fetter it. Therefore, the potential for a change in the witness schedule, and the accompanying possibility it might prompt an adjournment request, does not provide reasonable grounds to refuse to make the order requested.

4. I disagree that the order requested provides an extraordinary remedy and should only be made in lengthy and complex cases. The **Felderhof** and **Pickton** cases referred to in support of that submission were lengthy and complex cases in which the order was made. However, the remedy which was referred to as being exceptional was directing the manner or order in which evidence was to be called. Neither case described the witness list and schedule remedy as being extraordinary. Rather, as submitted by the Defence, it is merely part of the trial judge's inherent trial management power. As noted in **Felderhof**, that power

must be exercised with care to avoid an overly interventionist approach that could raise a reasonable apprehension of bias. However, that does not make it an extraordinary remedy to require disclosure of a list of intended witnesses and when they are expected to testify.

5. I disagree that the Crown's email of December 14, 2021, to the Defence, communicated that it planned to start with the police witnesses then proceed to present evidence from the staff of Independent Fisheries. As noted by the Defence, the Crown merely stated that made sense, then proceeded to warn the Defence that it should prepare for the other witnesses as well for the first week of the trial. That is not notice of a witness plan. In addition, the Crown brief acknowledges that it does not yet have a witness list. So, it could not have presented it as a plan.

[7] In relation to other points raised by the Crown, I make the following comments:

1. There is no dispute that the Defence has had the disclosure for years and presumably would already have prepared for the initial trial. However, that trial was scheduled to start June 24, 2019, which is over two years and eight months before the now scheduled start date of

March 7, 2022. It is unlikely that that the Defence would be ready to cross-examine the witnesses without significant additional trial preparation.

2. The Crown suggests that it is fair to expect the Defence to be ready for any potential witness revealed in the disclosure, at any time, because the Crown routinely cross-examines defence witnesses with no advance disclosure and no notice of intended witnesses. That submission ignores the fact that, unlike an accused person, the Crown is not at jeopardy of being wrongfully convicted. In addition, absent certain established exceptions, requiring the defence to disclose intended witnesses in advance would risk breaching the accused's right to silence and their right to not be forced to provide information for the Crown to use against them. Since the Crown already has a duty to disclose all relevant information, requiring it to provide a list of witnesses, and the order in which they will be called, does not have a similar prejudicial effect upon the Crown. It only sets a deadline for the Crown to make its initial assessment on how it will exercise its discretion to present its case. Plus, like the defence, if the Crown is of the view that it has been unable to properly prepare for cross-examination, it may request an adjournment.

3. It is true that the Crown cannot disclose a witness list if it does not have one. However, as part of its case management function, the court routinely directs timelines for certain steps, such as filing of briefs. Therefore, it is within the proper scope of a trial judge's case management function to set a deadline for the Crown to prepare and disclose a witness list and schedule.

[8] I also note the points which follow.

[9] As already stated, I rejected the Crown submission that the **Felderhof** and **Pickton** cases directed that orders to disclose a witness list and schedule were to be reserved for exceptional situations such as long and complex trials. Even if I had accepted that submission, I am not bound by either of those cases, and there are subsequent decisions binding me which, as stated by the Defence, direct that “trial judges should take a proactive approach in managing trials to minimize delay, improve efficiency, and change the ‘courtroom culture’”. The **Cody** and **Potter** decisions advanced by the Defence for that principle both follow the direction to that effect in **R. v. Jordan**, 2016 SCC 27. As stated at paragraph 752 of **Potter**, after referencing pre-*Jordan* decisions dealing with trial management issues: “The scope of a trial judge’s case management functions must also be viewed in light of *Jordan*’s

direction that the culture of complacency in criminal proceedings is not to be tolerated.”

[10] There are *Jordan* issues in the case at hand, in relation to Wayne Banks, which heighten the Court’s need to be vigilant and take reasonable measures to avoid any further delay. The September 2021 trial dates were adjourned because Terry Banks’ previous lawyer withdrew and his current lawyer could not be ready in time. At that time, the Court raised concerns regarding s. 11(b) delay issues relating to Wayne Banks. His lawyer correctly pointed out that, after deducting the waiver periods, the new trial dates would still be within the *Jordan* timelines. However, the scheduled end of trial approaches those deadlines. That makes it even more important to take steps to help prevent any further delay. Ordering the Crown to provide a tentative witness list and schedule would be such a step.

[11] Even though only 19 witnesses are identified as being core Crown witnesses, over 40 Crown witnesses have been subpoenaed. I agree with the Defence that having to prepare for the beginning of trial without having any tentative schedule as to who will be called first would be a tremendous waste of the Defence’s legal resources. It would create a heightened risk of the Defence needing to request adjournments to properly prepare for cross-examination.

[12] Also, the trial is not scheduled to run continuously. There are gaps between blocks of trial days. Therefore, the Defence would have to review its preparation for all remaining witnesses in advance of each new block of trial days. It would also have to review all documents it sees as potentially relating to all those witnesses. Thus, some of the waste of legal resources would be repeated for each block of trial time.

[13] The Crown noted the case was document heavy. That increases the risk of needing extra time to find relevant documents to use on cross-examination, for fear of overlooking documents required to make full answer and defence. The Crown noted that some of the witnesses were reluctant witnesses. That increases the chance that their evidence will not be completely consistent with the statements they have given. That, in turn, further increases the chance that there may be documents useful to the Defence for cross-examination, that it did not consider to be useful during trial preparation. That factor augments the risks of needing extra time to find documents for fear of overlooking them.

[14] In a document heavy case, spreading your preparation attention amongst a large number of witnesses can easily lead to transposing of documents as relating to one individual, when they relate to another. That can result in time being wasted searching for useful documents, or, worse yet, overlooking significant documents

and losing the opportunity to cross-examine on them. Also, as noted by the Defence, it can result in overlooking disclosure and evidentiary issues.

[15] It could be argued that these risks could be eliminated through thorough trial preparation. However, it is often the case, even where the Crown witnesses are fully cooperative, that the importance of particular documents does not surface until the witness to which they relate actually testifies. With the expectation of reluctant witnesses, as already noted, there is an even higher risk of that occurring.

[16] The more the Defence can focus on the witnesses that will be called, as the various blocks of trial time approach, the better prepared it will be. That promotes an efficient use of trial time and minimizes the chance that adjournments may be needed.

[17] If the Crown is not directed to provide a tentative witness schedule in advance, only the Crown will have the luxury of focusing more narrowly on the witnesses that will be presented in the coming days or block of days. The Defence will have to spread its focus on all potential witnesses. In the circumstances, that would diminish the fairness of the trial.

[18] Crown Prosecutors routinely inform the Court, on the record, of the intended order of calling of witnesses and when they are expected to testify. It assists in

making the best use of Court time and in best accommodating the witnesses. For example, it allows the Court to pre-arrange staff to work outside regular hours when reasonably required to accommodate the witnesses. A collateral benefit is that it also facilitates the Defence trial preparation. Often, the Crown will already have informed the Defence for that purpose.

[19] Even in **Pinkus**, where the Court refused to “order the Crown to inform the defence as to whether a particular witness would be called”, the Court, at paragraph 11, stated: “it would be helpful, indeed advisable, for the Crown to inform the defence in advance of its intention to call particular witnesses, and generally inform the defence of the anticipated list and timeframes of witnesses”, and, “[t]he failure to do so would inevitably lead to numerous adjournments being sought so that defence counsel might properly prepare to defend the case from hour to hour and day to day” which “is not in the best interests of the administration of justice”. Those same sentiments are echoed in other decisions. I agree with them.

[20] In the circumstances of the case at hand we do not have the luxury of risking such unnecessary delay.

[21] All justice system participants, including the courts, have a responsibility to take all reasonable steps to avoid unnecessary delay and promote reasonably fair, efficient and expeditious trials.

[22] Being required to disclose the witnesses and witness schedule does not damage the prosecution. Arguably, it assists the prosecution by setting a deadline for some of its trial preparation, which helps overcome natural tendencies to put it off.

[23] It also promotes the search for the truth by better facilitating Defence preparation so that it can conduct an effective cross-examination to test the evidence. Since a *Boucher* Crown is not to concern itself with the notion of winning or losing, that result is consistent with the Crown's duty to the public.

[24] Considering these circumstances, factors and points, I conclude that it is proper to, and do, order that the Crown provide the Defence with a list of the witnesses it intends to call, and the order in which they are expected to be called, for each block of trial days, as follows: at least 5 calendar days before the first day of the first block of trial days (which is only 2 days from now, but since it is so close to the beginning of the trial it is to be provided by noon on that day); and, at least 12 calendar days before the first day of each subsequent block of trial days, by 4:00 PM on those days.

[25] Also, should there be any change to the intended list of witnesses, or to when they are expected to be called, the Crown shall inform the Defence as soon as reasonably practicable of that change.

[26] Given my conclusion on the witness list issue, it is unnecessary to deal with the severance issue and I will not do so.

Pierre L. Muise, J.

Tab 3:

R. v. Basi, 2009 BCSC 1685

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *R. v. Basi*,
2009 BCSC 1685

Date: 20091125
Docket: 23299
Registry: Vancouver

Regina

v.

**Udhe Singh (Dave) Basi, Bobby Singh Virk
& Aneal Basi**

Before: The Honourable Madam Justice MacKenzie

**Ruling on Timing
November 25, 2009**

Counsel for the Crown:

W.S. Berardino, Q.C.,
J. Winteringham, Q.C.
& A.N. MacKay

Counsel for the Accused, Dave Basi:

P.M. Bolton, Q.C.
& C. Hatcher

Counsel for the Accused, Bobby Virk:

K. G. McCullough
& T.J. Russell

Counsel for the Accused, Aneal Basi:

J. Doyle
& E. Dance

Place of Hearing:

Vancouver, B.C.

Introduction

[1] The accused are charged with corruption, fraud, and breach of trust in relation to the sale of BC Rail's freight railway operations.

[2] The accused intend to bring an application pursuant to s. 7 and s. 24 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") alleging that certain conduct on the part of the RCMP and the special prosecutor (collectively, the "Crown") constitutes an abuse of process. The subject of the application is the manner in which the Crown entered into an immunity agreement with an important Crown witness, Erik Bornmann. The defence will seek a stay of proceedings or, in the alternative, the exclusion of Mr. Bornmann's evidence from the trial.

[3] The only issue before me now is the timing of this application. The defence submits that the interests of justice require that it be heard in advance of trial. The Crown, however, contends that it is properly heard at the close of its case.

[4] On November 25, 2009, I ruled, with reasons to follow, that I would not hear the abuse of process application before trial and that the defence had leave to bring it at the close of the Crown's case. These are those reasons.

Background

[5] It is common ground that the Crown entered into an immunity agreement with Mr. Bornmann whereby the Crown agreed not to prosecute him if he was truthful. The Crown then took an audio-recorded statement from Mr. Bornmann in which he described making cash payments to certain of the accused in exchange for government documents and information.

[6] This immunity agreement is at the heart of the proposed abuse of process application. The accused assert that the Crown offered Mr. Bornmann immunity from prosecution in a manner contrary to law and in violation of the principles of fundamental justice guaranteed by s. 7 of the *Charter*. They advance two bases for this position.

[7] First, the accused submit the Crown made Mr. Bornmann the offer of immunity prior to ever receiving a statement of the evidence he could provide. This, they say, was contrary to law, practice and the applicable Crown policy, as set out in the *Crown Counsel Policy Manual*. Under the heading “Immunity from Prosecution – Informants”, the manual states that “[p]olice should know in advance what type of information and evidence the informant can provide prior to a potential informant receiving a grant of immunity.” The defence assert that the Crown instead entered into the impugned arrangement with Mr. Bornmann before it knew the nature and extent of the conduct regarding which it was granting immunity.

[8] The second basis upon which the accused submit that the Crown’s conduct constitutes an abuse of process is that the grant of immunity is not complete, as it is conditional upon Mr. Bornmann giving evidence at trial that is truthful. Mr. Bornmann has thus been placed in a position whereby his grant of immunity is effectively held “in abeyance” until after the Crown assesses his evidence at trial. The accused submit that this is contrary to the authorities, which mandate that an agreement not to prosecute be finalized before the witness testifies so as to remove any inducement for the witness to provide false evidence to suit the Crown’s case.

[9] The accused submit that prior to the immunity agreement, Mr. Bornmann did not freely offer a narrative statement to the Crown. They say that the manner in which he was dealt with by the Crown and the unusual benefits he received, constitute an inducement of such gravity and effect that the entirety of his evidence has been irreparably tainted and rendered inadmissible by virtue of its inherent unreliability. The accused characterize the impugned Crown conduct as a departure from ordinary and reasonable standards of prosecutorial practice such as to shock the conscience of informed members of the public and to amount to an abuse of process.

[10] The accused say that the abuse of process they allege is sufficiently egregious as to warrant a stay of proceedings. In the event the Court finds a stay too severe a remedy in the circumstances, they will seek the exclusion of Mr.

Bornmann's testimony from the evidence at trial pursuant to either ss. 24(1) or (2) of the *Charter*.

[11] The Crown will take the position on the abuse of process application that the arrangement with Mr. Bornmann was proper and provident, and that his evidence will be tendered in full compliance with the rights of the accused under the *Charter*.

Positions of the Parties Regarding Timing

Defence

[12] The defence submits that the interests of justice require that the abuse of process application be heard before the commencement of trial.

[13] The abuse of process that the accused allege lies in the manner in which the Crown obtained Mr. Bornmann's cooperation. Thus, they say that the resultant prejudice is plain and will only be perpetuated should the trial proceed. According to the accused, none of the evidence the Crown intends to call at trial will have any bearing on the Court's assessment of the seriousness of the impugned conduct or the appropriate remedy. The evidence of Mr. Bornmann, for instance, will not disclose any relevant circumstances in this regard. The accused say that the evidence they will call on the application exists independently of that which will be led at trial, and it is therefore in the interests of judicial economy to hear the application in advance.

[14] The accused further submit that the remedies they intend to seek on the application inform when it should be heard. Should the Court conclude that an abuse of process has occurred and enter a stay of proceeding, the administration of justice and the public will be spared significant expense and time by having that determination made at the earliest opportunity. Alternatively, the exclusion of Mr. Bornmann's evidence will have a substantial effect on the very nature of the case against the accused and will materially affect the conduct of both the prosecution and the defence at trial. The accused say that it would be impossible for either

party, and grossly unfair to them, to embark upon the trial when the admissibility of Mr. Bornmann's evidence is uncertain.

[15] The accused add that it would be problematic to exclude Mr. Bornmann's evidence at the end of the Crown's case. There is a possibility that the trial may be conducted before a jury. Even if it is not, the remedy would likely be inadequate and ineffective, as the Court would be too affected by Mr. Bornmann's evidence to be able to completely ignore it in analyzing the other evidence. Given the extent to which his evidence permeates that of other witnesses, it would be virtually impossible to extricate it all at the end of the proceedings.

Crown

[16] The Crown responds that neither the existence of a s. 7 *Charter* breach nor the appropriate remedy for any such breach can be properly determined until the end of the Crown's case at trial.

[17] The Crown submits that there is no evidentiary record upon which the Court is able to make the ruling sought by the defence in advance of trial. The alleged s. 7 violation is made up of two components: the credibility of Mr. Bornmann and the standards of the community in relation to the securing of evidence. The Crown says the Court cannot assess whether Mr. Bornmann is credible and whether his evidence is irreparably tainted or inherently reliable until after he has testified. Moreover, the Court may ultimately find Mr. Bornmann's evidence to be reliable on the basis of corroborating evidence tendered by the Crown. The extent to which the Crown corroborates his evidence, and its attendant impact on the assessment of his credibility, simply cannot be assessed until trial.

[18] With respect to the second component, that is, whether the standards of the community have been violated by the manner in which Mr. Bornmann's evidence was secured, the Crown submits this issue simply does not arise until there has been a finding that his evidence is tainted.

[19] The Crown additionally argues that it is not possible to determine, before trial, whether the accused have suffered any prejudice arising from the allegedly improper immunity agreement. On its face, the agreement compels Mr. Bornmann to tell the truth. Should the Court conclude that he has been truthful, there is no prejudice arising from the agreement and no unfairness to the trial process. The Crown similarly submits the question of remedy also cannot be determined without the proper factual context to be elicited during trial.

[20] An additional reason the Crown posits for hearing the application at the close of its case is that tainted evidence is a matter that goes to weight, as opposed to admissibility. Consequently, Mr. Bornmann must be given the opportunity to testify at trial, and arguments with respect to any tainting of his evidence will go to its weight.

Analysis

[21] Courts have considerable discretion whether to rule on an application or to reserve to a later stage in the proceedings. As Sopinka J. explained in *R. v. DeSousa*, [1992] 2 S.C.R. 944, at para. 17, this discretion is to be exercised having regard to two policy considerations:

- a. Criminal proceedings should not be fragmented by interlocutory proceedings which take on a life of their own; and
- b. Constitutional issues should not be adjudicated without a factual foundation.

[22] Both of these policies favour disposition of applications at the end of the case. Further, courts should not depart from these policies unless there is a strong reason for doing so. For instance, in some cases the interests of justice may necessitate an immediate decision. Examples of such necessitous circumstances offered by Sopinka J. were cases in which the trial court itself is implicated in a constitutional violation or where substantial on-going constitutional violations require immediate attention. He added that in some cases it will be expedient to decide constitutional

questions before proceeding to trial on the evidence; for example, an apparently meritorious *Charter* challenge of the law under which an accused person is charged which is not dependent on facts to be elicited during the trial. This latter exception is particularly pertinent where the trial is expected to be of considerable duration.

[23] Where the resolution of a *Charter* application depends on an assessment of the effect of the breach on the trial process, the authorities favour resolution after the evidence on the trial has been heard: *R. v. Steadman*, 2007 BCSC 1803. Even where the relief sought is a stay of proceedings, the court retains discretion as to when to hear the application: *Steadman*, citing *R. v. La*, [1997] 2 S.C.R. 680. As Sopinka J. discussed in *La*, a decision involving evidence lost by the Crown, the appropriateness of a stay will depend upon the effect of the conduct amounting to an abuse of process or other prejudice on the fairness of the trial. At para. 27, he wrote:

The appropriateness of a stay of proceedings depends upon the effect of the conduct amounting to an abuse of process or other prejudice on the fairness of the trial. This is often best assessed in the context of the trial as it unfolds. Accordingly, the trial judge has a discretion as to whether to rule on the application for a stay immediately or after hearing some or all of the evidence. Unless it is clear that no other course of action will cure the prejudice that is occasioned by the conduct giving rise to the abuse, it will usually be preferable to reserve on the application. This will enable the judge to assess the degree of prejudice and as well to determine whether measures to minimize the prejudice have borne fruit. ...

[24] The accused in the present case say that I must, for the purposes of this application, assume their factual assertions are true and consider how the abuse of process application will play out. However, as they made only oblique references to the evidence they intend to lead on the application, it is not entirely clear to me what factual assertions I am being asked to assume. I further note that the Crown quite strenuously denies the serious allegations of improper conduct. Nevertheless, for the purposes of the present application, I will accept that the defence will tender evidence as described in para. 1 of their reply submissions:

The Applicants will tender evidence that the Crown in this case offered the witness, Erik Bornman, immunity from prosecution in a manner contrary to law and in violation of an accused person's right to fundamental justice. This

occurred when: (1) the Crown made an offer of immunity prior to ever receiving a proffer of the evidence that Mr. Bornman could provide; and (2) in placing the witness Mr. Bornman in the position where his grant of immunity is held in abeyance until after the prosecutor assesses his evidence given at trial.

[25] In arguing that the application should be heard before the trial, the accused contend that Mr. Bornmann's evidence is irrelevant to the question of whether the foregoing conduct on the part of the Crown amounts to an abuse of process. I do not agree.

[26] In my view, it is not possible to discretely consider the alleged abuse of process without regard to whether the Crown's conduct has had the effect alleged. As summarized earlier, the thrust of the defence submission is that the manner in which the Crown misused the grant of immunity has irreparably tainted the entirety of Mr. Bornmann's evidence, thus corrupting the trial process. However, this cannot be known until Mr. Bornmann is examined and, in particular, cross-examined during the Crown's case at trial. What Mr. Bornmann says under what I anticipate will be rigorous cross-examination is quite relevant in this regard. So, too, is any evidence the Crown may call in support of his testimony. If, at the end of the Crown's case, I am not satisfied that the impugned Crown conduct had any improper effect on Mr. Bornmann's evidence, this will necessarily have a bearing on the abuse of process analysis. The converse is also true.

[27] The British Columbia Court of Appeal recently cautioned against making *Charter* determinations in the absence of a factual record in *R. v. Hooites-Meursing*, 2008 BCCA 264, 257 B.C.A.C. 76. There, the accused sought a stay of proceedings on the basis of a letter the Crown had sent to a potential Crown rebuttal witness. The trial judge found that the letter had adversely affected the willingness of two defence witnesses to testify, thereby compromising the defence and rendering the trial irreparably unfair. As a consequence, she ordered a stay. The Court of Appeal allowed the Crown's appeal and set aside the stay. On behalf of the Court, Low J.A. wrote, at para. 21:

In my opinion, the underlying finding of the judge that trial fairness had been irreparably compromised could not, in the circumstances of this case, rise above speculation until the defence evidence was presented at the second trial and anticipated problems became real problems. The proceedings did not progress to that stage. The ruling was premature. I agree with the Crown that the stay of proceedings was entered without the benefit of an evidentiary record. Until there is such a record, the prejudice, if any, to the respondent cannot be known, and it cannot be determined if that prejudice has caused irreparable unfairness to the trial process. The trial judge should have reserved on the defence application until later in the trial, or should have dismissed the application with leave to the defence to renew it at the appropriate time.

[28] In the present case, were I to decide the abuse of process application without assessing the impugned conduct in the context of the evidence as it unfolds at trial, any determination regarding trial fairness would be similarly premature and speculative.

[29] The nature of the relief the accused seek on the application is another factor that militates in favour of hearing it at the end of the Crown's case. As earlier noted, they seek a stay of proceedings or, in the alternative, the exclusion of Mr. Bornmann's evidence from the trial.

[30] The seminal authority with respect to abuse of process is *R. v. O'Connor*, [1995] 4 S.C.R. 411. L'Heureux-Dubé J., on behalf of a unanimous Court on this point, held that the common law doctrine of abuse of process was subsumed under the principles of fundamental justice guaranteed by s. 7 of the *Charter*, except in rare cases where the *Charter* did not apply. Thus, in considering whether the judicial process has been abused, the analysis under the common law and the *Charter* now dovetail.

[31] The most drastic and "ultimate" remedy for an abuse of process is a stay of proceedings. It is appropriate only in the "clearest of cases" where the prejudice to the accused's right to make full answer and defence cannot be remedied or where irreparable prejudice would be caused to the integrity of the judicial system if the prosecution were continued: *O'Connor*, at para. 82; *R. v. Jewitt*, [1985] 2 S.C.R. 128, at para. 25. Whether the abuse of process occasions prejudice to the accused or to

the integrity of the justice system, a stay of proceedings will only be appropriate when the following two criteria are met:

- a. The prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and
- b. No other remedy is reasonably capable of removing that prejudice.

O'Connor, at para. 75.

[32] Where uncertainty persists about whether the abuse is sufficient to warrant the drastic remedy of a stay, it will be appropriate for the trial judge to consider a third criterion by balancing the interests that would be served by the granting of a stay against the interest that society has in having a final decision on the merits: *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, at para. 57.

[33] Now that the abuse of process doctrine has merged with the *Charter*, courts have come to recognize that the balancing of individual and societal interests requires a consideration of lesser remedies as well: *O'Connor*, at para. 69; *R. v. Caster*, 2001 BCCA 633, 158 B.C.A.C. 285, at para. 13. Remedies less drastic than a stay of proceedings are available under s. 24(1) of the *Charter* in situations where the “clearest of cases” threshold is not met but where it is proven, on a balance of probabilities, that s. 7 has been violated. As L’Heureux-Dubé J. wrote in *O'Connor*, at para. 69:

It is important to recognize that the *Charter* has now put into judges’ hands a scalpel instead of an axe – a tool that may fashion, more carefully than ever, solutions taking into account the sometimes complementary and sometimes opposing concerns of fairness to the individual, societal interests and the integrity of the judicial system.

[34] L’Heureux-Dubé J.’s observations in *O'Connor* were echoed by Huddart J.A. in *Caster*, at para. 21, where she held that the discretion to provide a remedy under s. 24(1) of the *Charter* was sufficiently broad to permit the exclusion of evidence

where the accused had established that its admission would violate his rights under s. 7, even if the evidence had not been obtained in breach of the *Charter*.

[35] Ultimately, the appropriate remedy will depend on the degree of impairment or prejudice to the accused's rights: *R. v. Dixon*, [1998] 1 S.C.R. 244, at para. 35.

[36] Lesser remedies should always be considered before the ultimate remedy of a stay of proceedings. Although the exclusion of evidence is a lesser remedy as compared to a stay, it is, nevertheless, an extraordinary remedy and one that requires a balancing of important interests. Those interests are the seriousness of the *Charter*-infringing state conduct, the impact of the breach on the *Charter*-protected interests of the accused, and society's interests in the adjudication of the case on its merits: *R. v. Grant*, 2009 SCC 32, at para. 71.

[37] A court is precluded from granting a remedy under s. 24 of the *Charter* until it has determined that the accused's *Charter* rights have actually been violated. When the constitutional violation on which the accused relies for a remedy under s. 24 is that state conduct has deprived him of his right to a fair trial, or that he has been deprived of his liberty in a manner not in accordance with fundamental justice, he must establish actual prejudice. Rarely will the assertion of prejudice suffice: *Caster*, at para. 48. Accordingly, it is preferable for the court to reserve on such applications until after all evidence has been called so that it is able to determine whether the accused has suffered actual prejudice.

[38] It follows from the foregoing authorities that the threshold for a stay of proceedings for an abuse of process is exceedingly high. However, lesser remedies are available in situations where an accused nevertheless establishes a breach of his rights under s. 7 of the *Charter*. The accused must demonstrate that prejudice flows from the breach. Further, fashioning an appropriate remedy under s. 24, including the exclusion of evidence, requires the court to engage in a balancing of interests.

[39] Having regard to these principles, it is quite clearly premature to hear the abuse of process application at this time. A fuller evidentiary foundation is necessary to determine whether there has been an abuse of process or a lesser breach of s. 7 of the *Charter*, as alleged, and what the appropriate remedy should be. Particularly with respect to the accused's alternative remedy, I find the comments of the Ontario Court of Appeal in *R. v. Buric* (1996), 28 O.R. (3d) 737, aff'd [1997] 1 S.C.R. 535, to be apposite.

[40] In *Buric*, a key Crown witness was shown the statements of other witnesses before giving a statement implicating the accused in a murder. There was no recorded account of the witness's knowledge prior to his being shown the other statements. Before the witness testified, the accused argued that the witness's evidence was tainted and that its admission would violate his rights under the *Charter*. Following a *voir dire* during which the witness testified, the trial judge found that the provision of the statements had tainted the witness's evidence. He further held that where tainting reaches the level of affecting the fairness of the trial because it is present to the extent of making the evidence manifestly unreliable, the matter becomes one of admissibility, rather than weight. The trial judge declined to enter a stay of proceedings but ordered that the witness be prevented from testifying at trial.

[41] Labrosse J.A. held that the trial judge had erred in excluding the Crown witness and in prematurely concluding that the fairness of the trial had been affected. He wrote, at pp. 747-8:

The trial judge did not have the benefit of the decision of this court in *R. v. Dikah* (1994), 18 O.R. (3d) 302, 20 C.R.R. (2d) 193, affirmed sub nom. *Naoufal v. R.*, [1994] 3 S.C.R. 1020, 25 C.R.R. (2d) 375, where the trial judge, before the informer had testified, had granted a stay of proceedings on the basis that an agreement for the payment of money between the informer and the police constituted an abuse of process and a violation of the accused's rights under s. 7 of the *Charter*. At p. 311 O.R., I stated:

It must be the rare case indeed where a witness is found to be completely untrustworthy before he or she had even given evidence.

My colleague Doherty J.A., in a concurring judgment, went further. He stated at p. 314:

I would add that judicial concerns with respect to the ultimate reliability of an as yet unheard witness are not, standing alone, a proper basis upon which to impose a judicial stay of proceedings. We depend on triers of fact to assess the reliability of evidence and the credibility of witnesses. Where the defence had a full opportunity to explore factors relevant to reliability and credibility before the trier of fact, I see no constitutional or supervisory authority for a trial judge pre-empting the trier of fact's assessment by entering a stay of proceedings: *R. v. D'Amico* (1993), 19 C.R.R. (2d) 309, 16 O.R. (3d) 125 (C.A.); *United States v. Hodge*, 594 F.2d 1163 at p. 1167 (U.S.C.A. 8th Circ. 1979).

These words are appropriate where, as in the present case, the exclusion of evidence of a witness would have the same practical effect as a stay of proceedings. I also see a certain analogy between a paid informer and a witness who is induced to testify for the state and in return is given favourable treatment. Their evidence should generally receive the same treatment.

[42] It is difficult to foresee, Labrosse J.A. further wrote, how a trial will unfold when the witness has not yet been heard.

[43] I recognize that the central issue facing the trial judge in *Buric* was not Crown or police misconduct but the tainted evidence of the witness. However, as I earlier explained, there is overlap between the two concepts in the case at bar.

[44] Defence counsel rely on the following cases in support of their position: *R. v. Byron*, 2001 MBCA 81, 156 Man. R. (2d) 154; *R. v. Pioneer Construction Inc.* (2006), 79 O.R. (3d) 641, 209 O.A.C. 379; *R. v. Nunziata*, 2005 ONCJ 292, 78 O.R. (3d) 285; *R. v. Coldwell*, [1994] Y.J. No. 54 (S.C.); *R. v. Xenos* (1991), 43 Q.A.C. 212, 70 C.C.C. (3d) 362 (Que. C.A.); *R. v. McDonald*, [1983] N.Z.L.R. 252 (Privy Council); and *Steadman*.

[45] In my view, these cases are all distinguishable from that at bar. *Byron*, *Pioneer Construction* and *Steadman* all involved applications for a stay of proceedings on the basis of unreasonable delay under s. 11(b) of the *Charter*. It is well-settled that such applications are properly heard before trial. They require an evidentiary foundation based upon the chronology of events before trial, an identification of specific segments of time, and attribution of responsibility under the categories outlined in *R. v. Morin*, [1992] 1 S.C.R. 771, 71 C.C.C. (3d) 1. That is all information that is independent of the evidence to be heard at trial.

[46] *Nunziata* was a constitutional challenge to a provision of the *Canada Elections Act*, S.C. 2000, c. 9. At para. 19, Fairgrieve J. quoted *R. v. Martin* (1991), 63 C.C.C. (3d) 71; aff'd (1992), 71 C.C.C. (3d) 572 (S.C.C.), a decision in which the Ontario Court of Appeal expressed its concern about the propriety of the lower court dealing with a challenge to the constitutionality of a section of the *Export and Import Permits Act*, R.S.C. 1970, c. E-17, on a pre-motion hearing, before any plea had been entered or any evidence adduced. The Court expressed the view that the lower court should not, at that early stage, entertain or dispose of an application to enforce a remedy under the *Charter*, except in those cases where it was abundantly clear that a constitutional right had been infringed or threatened. Citing *DeSousa*, Fairgrieve J. went on to observe that the Supreme Court of Canada had stated a general rule consistent with the foregoing opinion of Ontario Court of Appeal.

[47] In Fairgrieve J.'s view, it was apparent that the constitutional issue pursued by Mr. Nunziata was not dependent on the evidence to be called at trial. Thus, the most sensible course was to resolve the constitutional issue before trial since it could conveniently be done on the basis of the ample evidentiary record already produced.

[48] That is not the case here, since Mr. Bornmann's evidence is indeed relevant to the abuse of process application. This is so whether the remedy under consideration is a stay of proceedings, or the exclusion of his evidence.

[49] The defence also relies on *Coldwell*. However, this case too is distinguishable since counsel there agreed that all the material to support the motion was available before trial. That is not the situation here, as the Crown does not agree. Moreover, *Coldwell* was decided well before *Buric* and *Hooites-Meursing*.

[50] Another decision the defence cites is *Xenos*. The accused had been charged with arson and attempted fraud. It emerged in cross-examination that the Crown's key witness had arranged with the insurers of the destroyed premises to be paid \$50,000 if the accused was convicted. The trial judge found an abuse of process, but declined to order a stay. He rejected the evidence of the witness but found the

accused guilty on the basis of other evidence at trial. The Court of Appeal agreed in principle with the trial judge that a stay was not the only remedy for an abuse of process. It went on to rule that the appropriate remedy was to exclude the witness's testimony in a new trial before a different judge.

[51] *Xenos* is of limited assistance since the application for relief on the basis of an abuse of process was made after the court had heard the witness's evidence.

[52] For the foregoing reasons, I conclude it is not appropriate to hear the abuse of process application at this time. In reaching this conclusion, I have not overlooked the defence submission that the Crown misconduct has already occurred such that the abuse of process is complete. Nevertheless, I exercise my discretion in all the circumstances to have the benefit of a full factual foundation upon which to determine the effect of the alleged Crown misconduct on the trial. I prefer to make that determination with the benefit of all the Crown's evidence, including direct and cross-examination of Mr. Bornmann, and evidence that, according to the Crown, would support his testimony. Should I find then that the Crown's conduct in the manner in which it entered into the immunity agreement with Mr. Bornmann amounts to an abuse of process, or to a lesser breach of s. 7 of the *Charter*, I will fashion an appropriate remedy.

Disposition

[53] I decline to hear the abuse of process application before trial. The defence has leave to bring the application at the close of the Crown's case.

"A. MacKenzie J."

The Honourable Madam Justice MacKenzie

Tab 4:

R. v. Bjelland, 2009 SCC 38

Jason Chester Bjelland *Appellant*

v.

Her Majesty The Queen *Respondent***INDEXED AS: R. v. BJELLAND****Neutral citation: 2009 SCC 38.**

File No.: 32446.

2008: November 20; 2009: July 30.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella and Rothstein JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Constitutional law — Charter of Rights — Remedy — Crown disclosing relevant information to accused a few weeks prior to trial — Late disclosure prejudicial to accused's right to make full answer and defence — Whether trial judge erred in excluding late disclosed evidence under s. 24(1) of Canadian Charter of Rights and Freedoms — Whether prejudice to accused could have been cured by adjournment and disclosure order.

Constitutional law — Charter of Rights — Fundamental justice — Right to make full answer and defence — Crown disclosing relevant information to accused a few weeks prior to trial — Whether accused's rights to fair trial and to make full answer and defence prejudiced by denial of opportunity to cross-examine witnesses at preliminary hearing — Canadian Charter of Rights and Freedoms, s. 7.

The accused was charged with importing cocaine and possession of cocaine for the purpose of trafficking. After pre-preliminary hearing conferences, the Crown indicated that disclosure was substantially complete. A preliminary hearing was subsequently held and a trial date set for May 1, 2006. In March and April 2006, the Crown provided the accused with evidence from two alleged accomplices, both of whom were to be called at trial. The accused moved for a stay of proceedings or, alternately, for the exclusion of the evidence on the grounds that his right to make full answer and defence had been prejudiced by the late disclosure. The

Jason Chester Bjelland *Appellant*

c.

Sa Majesté la Reine *Intimée***RÉPERTORIÉ : R. c. BJELLAND****Référence neutre : 2009 CSC 38.**

N° du greffe : 32446.

2008 : 20 novembre; 2009 : 30 juillet.

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Abella et Rothstein.

EN APPEL DE LA COUR D'APPEL DE L'ALBERTA

Droit constitutionnel — Charte des droits — Réparation — Ministère public communiquant des renseignements pertinents à l'accusé quelques semaines avant le procès — Communication tardive portant atteinte au droit de l'accusé de présenter une défense pleine et entière — Le juge du procès a-t-il commis une erreur en excluant les éléments de preuve communiqués tardivement en application de l'art. 24(1) de la Charte canadienne des droits et libertés? — L'atteinte aux droits de l'accusé pouvait-elle être réparée en ordonnant un ajournement et la communication de la preuve?

Droit constitutionnel — Charte des droits — Justice fondamentale — Droit de présenter une défense pleine et entière — Ministère public communiquant des renseignements pertinents à l'accusé quelques semaines avant le procès — A-t-il été porté atteinte aux droits de l'accusé de subir un procès équitable et de présenter une défense pleine et entière parce qu'il a été privé du droit de contre-interroger des témoins à l'enquête préliminaire? — Charte canadienne des droits et libertés, art. 7.

L'accusé a été inculpé d'importation et de possession de cocaïne en vue d'en faire le trafic. Après les conférences préalables à l'enquête préliminaire, le ministère public a fait savoir que la communication de la preuve était pour ainsi dire achevée. Par la suite, une enquête préliminaire a été tenue et la date du procès a été fixée au 1^{er} mai 2006. En mars et en avril 2006, le ministère public a transmis à l'accusé des éléments de preuve relatifs à deux présumés complices qui allaient tous deux être appelés à témoigner au procès. L'accusé a sollicité l'arrêt des procédures ou, subsidiairement, l'exclusion des éléments de preuve en cause faisant valoir que

trial judge ordered the exclusion of the late disclosed evidence under s. 24(1) of the *Canadian Charter of Rights and Freedoms*. At trial, the accused was acquitted. The Court of Appeal, in a majority decision, set aside the acquittal and ordered a new trial, finding that the trial judge committed a reviewable error by failing to consider whether a less severe remedy than exclusion of evidence could have cured the prejudice to the accused.

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

Per McLachlin C.J. and LeBel, Deschamps and Rothstein JJ.: Exclusion of evidence obtained in conformity with the *Charter* is only available as a remedy under s. 24(1) of the *Charter* where (a) late disclosure renders the trial process unfair and this unfairness cannot be remedied through an adjournment and disclosure order or (b) exclusion is necessary to maintain the integrity of the justice system. The integrity of the justice system requires that the accused receive a trial that is fair in that it satisfies the public interest in getting at the truth, while preserving basic procedural fairness for the accused. Because the exclusion of evidence impacts on trial fairness from society's perspective, insofar as it impairs the truth-seeking function of trials, it will not be appropriate and just to exclude evidence under s. 24(1) where a trial judge can fashion an appropriate remedy for late disclosure that does not deny procedural fairness to the accused and where admission of the evidence does not otherwise compromise the integrity of the justice system. [3] [22] [24]

The trial judge committed a reviewable error by failing to consider whether the prejudice to the accused's right to a fair trial could be remedied without excluding the evidence. The Crown provided the accused with disclosure, albeit late, and there is no suggestion that the Crown had engaged in deliberate misconduct. In the circumstances of this case, an adjournment and a disclosure order would have sufficiently addressed the prejudice to the accused while preserving society's interest in a fair trial. By ordering the exclusion of the evidence, the trial judge misdirected himself and did not impose an appropriate and just remedy. [3] [29] [37] [39]

leur communication tardive avait porté atteinte à son droit de présenter une défense pleine et entière. Le juge du procès a ordonné, en application du par. 24(1) de la *Charte canadienne des droits et libertés*, l'exclusion des éléments de preuve communiqués tardivement. Au terme du procès, l'accusé a été acquitté. La Cour d'appel, dans une décision majoritaire, a annulé le verdict d'acquiescement et ordonné la tenue d'un nouveau procès estimant que le juge du procès a commis une erreur donnant lieu à révision en omettant de se demander si une réparation moins draconienne que l'exclusion d'éléments de preuve aurait pu corriger le préjudice causé à l'accusé.

Arrêt (les juges Binnie, Fish et Abella sont dissidents) : Le pourvoi est rejeté.

La juge en chef McLachlin et les juges LeBel, Deschamps et Rothstein : L'exclusion d'éléments de preuve qui ont été obtenus conformément à la *Charte* ne peut être ordonnée à titre de réparation en application du par. 24(1) de la *Charte* que a) lorsque la communication tardive rend le procès inéquitable et qu'il ne peut être remédié à cette iniquité grâce à un ajournement et à une ordonnance de communication ou b) lorsque l'exclusion est nécessaire pour maintenir l'intégrité du système de justice. L'intégrité du système de justice requiert que l'accusé subisse un procès équitable, c'est-à-dire un procès qui répond à l'intérêt qu'a le public à connaître la vérité, tout en préservant l'équité fondamentale en matière de procédure pour l'accusé. Puisque l'exclusion d'éléments de preuve a une incidence sur l'équité du procès du point de vue de la société, dans la mesure où elle entrave la fonction de recherche de la vérité du procès, il ne sera ni convenable ni juste de l'ordonner en application du par. 24(1) lorsque le juge du procès peut concevoir une réparation convenable — pour pallier la communication tardive — qui ne prive pas l'accusé de l'équité procédurale et lorsque l'utilisation des éléments de preuve ne porte par autrement atteinte à l'intégrité du système de justice. [3] [22] [24]

Le juge du procès a commis une erreur donnant lieu à révision en omettant de se demander si l'atteinte au droit de l'accusé de subir un procès équitable pouvait être corrigée sans exclure les éléments de preuve. Même s'il l'a fait tardivement, le ministère public a communiqué la preuve à l'accusé et rien ne donne à penser que le ministère public a fait preuve d'une conduite délibérée. En l'espèce, un ajournement et une ordonnance de communication auraient suffisamment réparé le préjudice causé à l'accusé tout en préservant l'intérêt de la société à ce que soit tenu un procès équitable. En ordonnant l'exclusion des éléments de preuve, le juge du procès a commis une erreur de droit et n'a pas accordé une réparation convenable et juste. [3] [29] [37] [39]

The accused's s. 7 *Charter* right to make full answer and defence was not infringed by his inability to cross-examine the potential Crown witnesses at a preliminary hearing. The material provided to the accused was sufficient disclosure of the Crown's case against him, and cross-examining a witness at a preliminary hearing is not a component of the s. 7 right to make full answer and defence. [32] [37]

Per Binnie, Fish and Abella JJ. (dissenting): The trial judge's order excluding evidence is subject to appellate interference only if the Court abandons the governing principles it adopted nearly a quarter-century ago and, since then, has repeatedly and consistently applied. Under s. 24(1), the *Charter* entitles anyone whose rights or freedoms have been infringed "to obtain such remedy as the court considers appropriate and just in the circumstances". This "widest possible discretion", as the Court has framed it, is subject to appellate interference only if the trial judge misdirects himself or if his decision is so clearly wrong as to amount to an injustice. Here, the Court of Appeal should not have interfered with the trial judge's exercise of discretion. He reviewed the evidence carefully and accurately, considered and rejected alternative remedies, including a stay of proceedings and an adjournment. He found that exclusion of the tardily disclosed evidence was not a particularly drastic remedy in this case and, balancing the accused's rights and society's interests, concluded that to place both the accused and the Crown in the position they occupied before the Crown attempted to introduce this new evidence was the proper remedy in the circumstances. The trial judge committed no reviewable error. He exercised his discretion reasonably and well within the broad limits fixed by the *Charter* and the governing principles. [41] [48] [56] [66-68]

Confining the trial judge's broad and unfettered discretion to exclude evidence under s. 24(1) to two narrow circumstances is a change in the law that is unwarranted, inconsistent with prior decisions of the Court and incompatible with the plain language and evident purpose of s. 24(1). Furthermore, the new proposed limitation introduces the same exacting standard for exclusion of evidence as a remedy under s. 24(1) as, until now, has been uniquely reserved for a stay of proceedings. The remedy of exclusion granted by the trial

Le droit de l'accusé garanti à l'art. 7 de la *Charte* de présenter une défense pleine et entière n'a pas été violé du fait qu'il n'a pas pu contre-interroger les témoins potentiels du ministère public lors de l'enquête préliminaire. Les documents fournis à l'accusé constituaient une communication suffisante de la preuve que le ministère public entendait présenter contre lui. En outre, le droit de contre-interroger un témoin lors d'une enquête préliminaire n'est pas une composante du droit garanti à l'art. 7 de présenter une défense pleine et entière. [32] [37]

Les juges Binnie, Fish et Abella (dissidents): L'ordonnance du juge du procès visant l'exclusion d'éléments de preuve ne peut être modifiée en appel que si la Cour abandonne les principes applicables qu'elle a elle-même établis il y a près d'un quart de siècle — et qu'elle a depuis lors appliqués invariablement et à maintes reprises. Suivant le par. 24(1), la *Charte* permet à toute personne dont les droits ou les libertés ont été violés d'« obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances ». Un tribunal d'appel ne sera justifié d'intervenir dans l'exercice de ce que la Cour a qualifié de « plus vaste pouvoir discrétionnaire possible » que si le juge du procès s'est fondé sur des considérations erronées en droit ou si sa décision est erronée au point de créer une injustice. En l'espèce, la Cour d'appel n'aurait pas dû modifier la décision rendue par le juge du procès qui a exercé son pouvoir discrétionnaire. Le juge du procès a examiné la preuve soigneusement et correctement. Il a aussi envisagé et écarté d'autres mesures réparatrices, dont l'arrêt des procédures et l'ajournement. Il a jugé que l'exclusion des éléments de preuve communiqués tardivement n'était pas une mesure particulièrement draconienne en l'espèce et, après avoir mis en balance les droits de l'accusé et les intérêts de la société, a conclu que la réparation appropriée dans les circonstances consistait à placer tant l'accusé que le ministère public dans la situation où ils se trouvaient avant que le ministère public tente de présenter ces nouveaux éléments de preuve. Le juge du procès n'a commis aucune erreur susceptible de contrôle judiciaire. Il a exercé son pouvoir discrétionnaire raisonnablement et bien à l'intérieur des larges limites fixées par la *Charte* et par les principes applicables. [41] [48] [56] [66-68]

Limiter à deux cas précis le pouvoir discrétionnaire général et absolu que le par. 24(1) confère aux juges du procès d'exclure des éléments de preuve constitue un changement au droit qui n'est pas justifié et qui est incompatible avec la jurisprudence de notre Cour ainsi qu'avec le libellé clair et l'objet évident du par. 24(1). En outre, les nouvelles limites proposées soumettent l'exclusion d'éléments de preuve — en tant que mesure réparatrice accordée en application du par. 24(1) — aux normes exigeantes ayant jusqu'à maintenant été réservées à

judge was not equivalent to a stay of proceedings and should not be made subject to the same constraints. To restrict exclusion as a remedy under s. 24(1) to those limited circumstances in which a stay would be warranted exaggerates the severity of exclusion as a remedy and minimizes the importance attached by our system of justice to objectives other than truth-finding. The new standard also fails to take account of the nature of the constitutional violation or infringement. Finally, it regulates the exclusion under s. 24(1) more closely, and more intrusively, than the same remedy under s. 24(2) even though the plain language of these provisions grants the trial judge a broader discretion under s. 24(1). The new standard, as well, would preclude trial courts from granting exclusion as a remedy under s. 24(1), but, in analogous circumstances, require exclusion under s. 24(2). [43-47] [64-65]

Cases Cited

By Rothstein J.

Referred to: *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3; *R. v. Stinchcombe*, [1991] 3 S.C.R. 326; *R. v. Horan*, 2008 ONCA 589, 237 C.C.C. (3d) 514; *R. v. O'Connor*, [1995] 4 S.C.R. 411; *R. v. Harrer*, [1995] 3 S.C.R. 562; *Re Regina and Arviv* (1985), 51 O.R. (2d) 551; *R. v. Sterling* (1993), 113 Sask. R. 81.

By Fish J. (dissenting)

R. v. Grant, 2009 SCC 32, [2009] 2 S.C.R. 353; *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297; *Mills v. The Queen*, [1986] 1 S.C.R. 863; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3; *R. v. Rahey*, [1987] 1 S.C.R. 588; *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575; *Friends of the Oldman River Society v. Canada (Ministry of Transport)*, [1992] 1 S.C.R. 3; *Charles Oseinton and Co. v. Johnston*, [1942] A.C. 130; *R. v. O'Connor*, [1995] 4 S.C.R. 411; *R. v. Harrer*, [1995] 3 S.C.R. 562; *R. v. Genest*, [1989] 1 S.C.R. 59; *R. v. Collins*, [1987] 1 S.C.R. 265; *Pearse v. Pearse* (1846), 1 De G. & Sm. 12, 63 E.R. 950.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 7, 24(1), (2).

l'arrêt des procédures. L'ordonnance du juge du procès visant l'exclusion d'éléments de preuve n'équivalait pas à un arrêt des procédures et ne devrait pas être assujettie aux mêmes contraintes. Limiter le recours à l'exclusion d'éléments de preuve dans le contexte de l'application du par. 24(1) aux seuls cas où un arrêt des procédures serait justifié confère à cette mesure une trop grande gravité et minimise l'importance que notre système de justice accorde aux objectifs autres que la recherche de la vérité. Le nouveau test omet en outre de tenir compte de la nature de l'atteinte ou de la violation constitutionnelle. Finalement, il assujettit l'exclusion ordonnée en application du par. 24(1) à des règles plus précises et plus envahissantes que celles auxquelles est assujettie l'exclusion ordonnée en application du par. 24(2) même s'il ressort du libellé clair de ces dispositions que le par. 24(1) confère un pouvoir discrétionnaire plus large au juge du procès. De plus, le nouveau test aurait pour effet d'empêcher les tribunaux de première instance d'ordonner l'exclusion d'éléments de preuve à titre de réparation en application du par. 24(1), même si, dans des circonstances similaires, l'exclusion serait nécessaire en application du par. 24(2). [43-47] [64-65]

Jurisprudence

Citée par le juge Rothstein

Arrêts mentionnés : *R. c. Regan*, 2002 CSC 12, [2002] 1 R.C.S. 297; *Doucet-Boudreau c. Nouvelle-Écosse (Ministre de l'Éducation)*, 2003 CSC 62, [2003] 3 R.C.S. 3; *R. c. Stinchcombe*, [1991] 3 R.C.S. 326; *R. c. Horan*, 2008 ONCA 589, 237 C.C.C. (3d) 514; *R. c. O'Connor*, [1995] 4 R.C.S. 411; *R. c. Harrer*, [1995] 3 R.C.S. 562; *Re Regina and Arviv* (1985), 51 O.R. (2d) 551; *R. c. Sterling* (1993), 113 Sask. R. 81.

Citée par le juge Fish (dissident)

R. c. Grant, 2009 CSC 32, [2009] 2 R.C.S. 353; *R. c. Regan*, 2002 CSC 12, [2002] 1 R.C.S. 297; *Mills c. La Reine*, [1986] 1 R.C.S. 863; *Doucet-Boudreau c. Nouvelle-Écosse (Ministre de l'Éducation)*, 2003 CSC 62, [2003] 3 R.C.S. 3; *R. c. Rahey*, [1987] 1 R.C.S. 588; *R. c. 974649 Ontario Inc.*, 2001 CSC 81, [2001] 3 R.C.S. 575; *Friends of the Oldman River Society c. Canada (Ministre des Transports)*, [1992] 1 R.C.S. 3; *Charles Oseinton and Co. c. Johnston*, [1942] A.C. 130; *R. c. O'Connor*, [1995] 4 R.C.S. 411; *R. c. Harrer*, [1995] 3 R.C.S. 562; *R. c. Genest*, [1989] 1 R.C.S. 59; *R. c. Collins*, [1987] 1 R.C.S. 265; *Pearse c. Pearse* (1846), 1 De G. & Sm. 12, 63 E.R. 950.

Lois et règlements cités

Charte canadienne des droits et libertés, art. 7, 24(1), (2).

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

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APPEAL from a judgment of the Alberta Court of Appeal (Hunt and Martin JJ.A. and Brooker J. (*ad hoc*)), 2007 ABCA 425, 83 Alta. L.R. (4th) 4, 53 C.R. (6th) 241, 425 A.R. 293, 418 W.A.C. 293, 165 C.R.R. (2d) 92, [2008] 4 W.W.R. 208, 2007 CarswellAlta 1754, [2007] A.J. No. 1445 (QL), setting aside the accused's acquittal and ordering a new trial. Appeal dismissed, Binnie, Fish and Abella JJ. dissenting.

C. John Hooker, for the appellant.

Croft Michaelson and Robert A. Sigurdson, for the respondent.

The judgment of McLachlin C.J. and LeBel, Deschamps and Rothstein JJ. was delivered by

ROTHSTEIN J. —

1. Introduction

[1] By reason of the Crown's failure to disclose information in a timely way, the Crown breached the appellant's right to make full answer and defence guaranteed by s. 7 of the *Canadian Charter of Rights and Freedoms*. The issue in this appeal as of right is whether the trial judge misdirected himself by ordering the exclusion of the late disclosed evidence as a remedy under s. 24(1) of the *Charter*.

[2] The majority in the Court of Appeal found that the trial judge committed a reviewable error by failing to consider whether a less severe remedy than exclusion of evidence could cure the prejudice to the appellant by the late disclosure while still

Loi réglementant certaines drogues et autres substances, L.C. 1996, ch. 19.

Doctrine citée

Freedman, Samuel. « Admissions and Confessions », in Roger E. Salhany and Robert J. Carter, eds., *Studies in Canadian Criminal Evidence*. Toronto : Butterworths, 1972, 95.

POURVOI contre un arrêt de la Cour d'appel de l'Alberta (les juges Hunt, Martin et Brooker (*ad hoc*)), 2007 ABCA 425, 83 Alta. L.R. (4th) 4, 53 C.R. (6th) 241, 425 A.R. 293, 418 W.A.C. 293, 165 C.R.R. (2d) 92, [2008] 4 W.W.R. 208, 2007 CarswellAlta 1754, [2007] A.J. No. 1445 (QL), qui a annulé la déclaration de culpabilité de l'accusé et ordonné la tenue d'un nouveau procès. Pourvoi rejeté, les juges Binnie, Fish et Abella sont dissidents.

C. John Hooker, pour l'appellant.

Croft Michaelson et Robert A. Sigurdson, pour l'intimée.

Version française du jugement de la juge en chef McLachlin et des juges LeBel, Deschamps et Rothstein rendu par

LE JUGE ROTHSTEIN —

1. Introduction

[1] Comme il a omis de communiquer des renseignements en temps utile, le ministère public a porté atteinte au droit de l'appellant de présenter une défense pleine et entière garanti par l'art. 7 de la *Charte canadienne des droits et libertés*. Dans le présent pourvoi de plein droit, la Cour doit décider si le juge du procès s'est fondé sur des considérations erronées en droit en ordonnant, à titre de réparation en application du par. 24(1) de la *Charte*, l'exclusion des éléments de preuve communiqués tardivement.

[2] Les juges majoritaires de la Cour d'appel ont conclu que le juge du procès a commis une erreur donnant lieu à révision en omettant de se demander si une réparation moins draconienne que l'exclusion d'éléments de preuve pouvait corriger le préjudice

preserving the integrity of the justice system (2007 ABCA 425, 83 Alta. L.R. (4th) 4, at para. 30).

[3] I agree with the result of the majority in the Court of Appeal. In my view, the trial judge committed a reviewable error by failing to consider whether the prejudice to the appellant could be remedied without excluding the evidence and the resulting distortion of the truth-seeking function of the criminal trial process. Under s. 24(1), where the evidence was obtained in conformity with the *Charter*, its exclusion is only available as a remedy where its admission would result in an unfair trial or would otherwise undermine the integrity of the justice system. In this case, the prejudice to the appellant's right to make full answer and defence could be remedied through an adjournment and disclosure order and there was nothing that otherwise compromised the fairness of the trial process or the integrity of the justice system.

[4] I would therefore dismiss the appeal.

2. Facts

[5] On December 23, 2003, the appellant was driving a motor vehicle which entered Canada from the United States at the border crossing at Del Bonita, Alberta. Upon a search of the vehicle and the utility trailer that it was towing, customs officials discovered approximately 22 kilograms of cocaine hidden in two metal drawers concealed behind the trailer's bumper. The appellant and his passenger were charged with importing cocaine and possession of cocaine for the purpose of trafficking, contrary to the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19.

[6] After pre-preliminary hearing conferences, the Crown indicated that disclosure was substantially complete. Following the preliminary hearing, the appellant pleaded not guilty and elected trial by judge and jury on February 28, 2005. A trial date was originally set for November 14, 2005, but

causé à l'appelant par la communication tardive tout en préservant l'intégrité du système de justice (2007 ABCA 425, 83 Alta. L.R. (4th) 4, par. 30).

[3] Je suis d'accord avec la décision des juges majoritaires de la Cour d'appel. À mon avis, le juge du procès a commis une erreur donnant lieu à révision en omettant de se demander si le préjudice causé à l'appelant pouvait être corrigé sans exclure les éléments de preuve et dénaturer ainsi la fonction de recherche de vérité des procès criminels. Selon le par. 24(1), lorsque les éléments de preuve ont été obtenus conformément à la *Charte*, ils ne peuvent être exclus à titre de réparation que lorsque leur utilisation rendrait le procès inéquitable ou minerait autrement l'intégrité du système de justice. En l'espèce, l'atteinte au droit de l'appelant de présenter une défense pleine et entière pouvait être réparée en ordonnant un ajournement et la communication de la preuve. En outre, rien ne minait par ailleurs l'équité du procès ou l'intégrité du système de justice.

[4] Par conséquent, je suis d'avis de rejeter le pourvoi.

2. Les faits

[5] Le 23 décembre 2003, l'appelant est entré au Canada en provenance des États-Unis au volant d'un véhicule automobile. Il est passé par le poste frontalier de Del Bonita, en Alberta. Lors de la fouille du véhicule et de la remorque utilitaire qu'il tirait, les douaniers ont découvert environ 22 kilogrammes de cocaïne cachés dans deux tiroirs métalliques dissimulés derrière le pare-chocs de la remorque. L'appelant et son passager ont été accusés d'importation et de possession de cocaïne en vue d'en faire le trafic, infractions prévues par la *Loi réglementant certaines drogues et autres substances*, L.C. 1996, ch. 19.

[6] Après les conférences préalables à l'enquête préliminaire, le ministère public a fait savoir que la communication de la preuve était pour ainsi dire achevée. Au terme de l'enquête préliminaire, l'appelant a plaidé non coupable et a choisi, le 28 février 2005, d'être jugé par un juge et un jury. La date du

the trial was adjourned at the request of the appellant because he had changed counsel. On February 14, 2006, a trial date of March 20, 2006, was also adjourned as neither counsel was ready to proceed. A new trial date of May 1, 2006, was set.

[7] On March 21, 2006, the Crown advised the appellant's counsel that disclosure of evidence concerning an accomplice was to be forthcoming. On March 24, 2006, the appellant re-elected for trial by judge alone. On March 29, 2006, the Crown disclosed a transcript of a videotaped *KGB* statement, taken on December 16, 2004, from one Robert Friedman, and indicated that Friedman would be called as a witness. On April 6, 2006, counsel for the appellant requested additional information pertaining to Friedman and the notes of the officers who dealt with Friedman, including the notes of Constable Semo and Constable Gillespie. On April 19, 2006, the Crown advised that it was aware of information concerning Constable Gillespie that was potentially relevant to the officer's credibility, character and ability to perform his duties during his involvement in the investigation of this matter and invited the appellant to bring an *O'Connor* application for access to this information.

[8] Also on April 19, 2006, the Crown provided the appellant with a five-page agreed statement of facts from another proceeding signed by another alleged accomplice, one Todd Holland, that was to be used in Holland's guilty plea and sentencing hearing. The Crown advised that it intended to call Holland as a witness at trial. Some further information was disclosed on April 22, 2006.

[9] By notice of motion before the trial judge, the appellant sought an order for a stay of proceedings on the grounds that his right to make full answer and defence had been prejudiced by the late disclosure of the evidence relating to Friedman and

procès a initialement été fixée au 14 novembre 2005. Le procès a toutefois été ajourné à la demande de l'appelant, parce qu'il avait changé d'avocat. Le 14 février 2006, le procès alors prévu pour le 20 mars 2006 a été reporté au 1^{er} mai 2006, car aucun des avocats n'était prêt à procéder.

[7] Le 21 mars 2006, le ministère public a avisé l'avocat de l'appelant du fait que d'autres éléments de preuve allaient être communiqués relativement à un complice. Le 24 mars 2006, l'appelant a informé la cour qu'il choisissait désormais de subir son procès devant un juge seul. Le 29 mars 2006, le ministère public a communiqué la transcription d'une déclaration de type *KGB*, faite par un certain Robert Friedman et enregistrée sur bande vidéo le 16 décembre 2004 puis, a précisé que M. Friedman serait assigné comme témoin. Le 6 avril 2006, l'avocat de l'appelant a demandé des renseignements supplémentaires au sujet de M. Friedman ainsi que les notes des policiers qui l'ont rencontré, y compris celles des agents Semo et Gillespie. Le 19 avril 2006, le ministère public a fait savoir qu'il était au courant de l'existence de renseignements concernant l'agent Gillespie, susceptibles d'être pertinents quant à sa crédibilité, à son caractère et à sa capacité de s'acquitter de ses fonctions pendant l'enquête en cause en l'espèce, et a invité l'appelant à présenter une demande de type *O'Connor* afin d'y avoir accès.

[8] Toujours le 19 avril 2006, le ministère public a transmis à l'appelant un exposé conjoint des faits de cinq pages produit dans une autre instance et signé par un autre présumé complice, un certain Todd Holland. Le document devait être utilisé durant le procès de ce dernier, lors de l'audience consacrée à son plaidoyer de culpabilité et à la détermination de sa peine. Le ministère public a fait savoir qu'il avait l'intention de citer M. Holland comme témoin. D'autres renseignements ont été communiqués le 22 avril 2006.

[9] Par avis de requête déposé auprès du juge du procès, l'appelant a sollicité l'arrêt des procédures, faisant valoir que la communication tardive des éléments de preuve concernant MM. Friedman et Holland avait porté atteinte à son droit de présenter

Holland. The appellant asked, in the alternative, that the evidence of Friedman and Holland be excluded from the trial.

3. Decision of the Trial Judge

[10] On April 25, 2006, the trial judge ordered the exclusion of the evidence of Friedman and Holland. He held that the prejudice to the appellant resulted from the fact that,

on the eve of trial, counsel for the accused is left to speculate on what will be provided to him by way of final disclosure and how to mount a defence against an ever moving prosecution. . . .

. . . .

The simple fact is, that on the eve of trial the applicant has been confronted with partial disclosure in relation to two potentially damaging witnesses. . . . A preliminary hearing has been held, the accused has been committed to stand trial, and elections and re-elections have been made.

. . . .

. . . The use of this evidence [of Friedman and Holland] at trial is unfair and prejudicial to the accused. It renders the process unfair.

[11] The trial judge found that the late disclosure of evidence did not result from misconduct by the Crown.

[12] On the issue of the appropriate remedy, the trial judge stated:

An adjournment of the matter is nothing more than a reward for the Crown's tardiness. . . .

. . . .

. . . The proper remedy which address [*sic*] the accused's rights and balances those rights with the interest of society, is to place both the accused and the Crown in the position they occupied before the Crown attempted to introduce this new evidence.

une défense pleine et entière. À titre subsidiaire, l'appelant a demandé que les témoignages de MM. Friedman et Holland soient écartés du procès.

3. La décision du juge de première instance

[10] Le 25 avril 2006, le juge du procès a ordonné l'exclusion des témoignages de MM. Friedman et Holland. Il a conclu que le préjudice causé à l'appelant découlait du fait que,

[TRADUCTION] à la veille du procès, l'avocat de l'accusé ne peut que spéculer sur ce qui lui sera communiqué en définitive et sur la façon dont il pourra élaborer une défense pour répondre à une poursuite qui change sans cesse. . . .

. . . .

Le fait est que, à la veille du procès, le demandeur a été aux prises avec la communication partielle des éléments de preuve relatifs à deux témoins susceptibles de lui nuire. [. . .] Une enquête préliminaire a eu lieu, l'accusé a été renvoyé à procès et des choix quant au mode du procès ont été faits, puis modifiés.

. . . .

. . . Le recours aux témoignages [de MM. Friedman et Holland] au procès est inéquitable et préjudiciable à l'accusé. Cela rend le processus injuste.

[11] Le juge du procès a conclu que la communication tardive d'éléments de preuve n'était pas le fruit d'une inconduite du ministère public.

[12] Sur la question de la réparation convenable, le juge du procès a tenu les propos suivants :

[TRADUCTION] Un ajournement de l'instance n'est rien de plus qu'une récompense offerte au ministère public pour avoir agi tardivement. . . .

. . . .

. . . La réparation convenable, qui prend en considération les droits de l'accusé et qui les met en balance avec les intérêts de la société, consiste à remettre tant l'accusé que le ministère public dans la situation dans laquelle ils se trouvaient avant que le ministère public tente d'introduire les nouveaux éléments de preuve.

The trial proceeded and the appellant was acquitted.

4. Decision of the Court of Appeal, 2007 ABCA 425, 83 Alta. L.R. (4th) 4

[13] The majority of the Court of Appeal held that the trial judge “committed a reviewable error . . . by failing to consider whether a less severe remedy than the exclusion of significant evidence could cure the harm done to the respondent by the late disclosure, while still preserving the integrity of the justice system” (para. 30). In this case, exclusion was not required to cure the harm to the appellant. It set aside the acquittal and ordered a new trial.

[14] Brooker J. (*ad hoc*), in dissent, held that the choice of the appropriate remedy under s. 24(1) of the *Charter* falls within the wide discretion of the trial judge. Absent the trial judge misdirecting himself or being so clearly wrong in his decision that it amounts to an injustice, there was no basis for appellate intervention in this case. He found that the trial judge considered the evidence and granted a remedy that balanced the rights of the appellant with the interests of society. He would have dismissed the appeal.

5. Standard of Review

[15] The trial judge’s choice of remedy under s. 24(1) of the *Charter* is discretionary. However, the trial judge must exercise that discretion judicially. An appellate court will intervene where the trial judge has misdirected him or herself or where the trial judge’s decision is so clearly wrong as to amount to an injustice (see *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, at paras. 117-18).

6. Determining an Appropriate Remedy Under Section 24(1)

[16] This appeal raises the issue of when the exclusion of evidence will be an appropriate remedy

Le procès a suivi son cours et l’appelant a été acquitté.

4. La décision de la Cour d’appel, 2007 ABCA 425, 83 Alta. L.R. (4th) 4

[13] Les juges majoritaires de la Cour d’appel ont conclu que le juge du procès a [TRADUCTION] « commis une erreur donnant lieu à révision [. . .] en omettant de se demander si une réparation moins draconienne que l’exclusion d’éléments de preuve importants pouvait réparer le tort causé à l’intimé par la communication tardive tout en préservant l’intégrité du système de justice » (par. 30). En l’espèce, il n’était pas nécessaire d’écarter les éléments de preuve pour réparer le tort causé à l’appelant. Les juges majoritaires ont annulé le verdict d’acquiescement et ordonné la tenue d’un nouveau procès.

[14] Dans ses motifs dissidents, le juge Brooker (*ad hoc*) a affirmé que le choix de la réparation convenable visée au par. 24(1) de la *Charte* relève du vaste pouvoir discrétionnaire conféré au juge du procès. En l’absence d’une décision du juge du procès fondée sur des considérations erronées en droit ou erronée au point de créer une injustice, rien ne justifiait l’intervention en appel en l’espèce. Il a conclu que le juge du procès avait pris la preuve en considération et avait accordé une réparation qui mettait en balance les droits de l’appelant et les intérêts de la société. Il aurait rejeté l’appel.

5. La norme de contrôle

[15] Le choix de la réparation accordée en application du par. 24(1) de la *Charte* relève du pouvoir discrétionnaire du juge du procès, qui doit toutefois exercer ce pouvoir judiciairement. Une cour d’appel intervient lorsque le juge du procès s’est fondé sur des considérations erronées en droit ou lorsque sa décision est erronée au point de créer une injustice (voir *R. c. Regan*, 2002 CSC 12, [2002] 1 R.C.S. 297, par. 117-118).

6. La détermination d’une réparation convenable pour l’application du par. 24(1)

[16] Le présent pourvoi soulève la question de savoir quand l’exclusion d’éléments de preuve

under s. 24(1) of the *Charter* for late disclosure by the Crown.

[17] The remedy of exclusion of evidence will normally arise under s. 24(2) of the *Charter*. Section 24(2) applies to evidence obtained in a manner that infringes or denies a person the rights or freedoms granted by the *Charter*. But such evidence will only be excluded if its admission would bring the administration of justice into disrepute. Section 24(2) provides:

24. . . .

(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.

[18] Remedies under s. 24(1) of the *Charter* are flexible and contextual: *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at paras. 41, 52 and 54-56. They address the most varied situations. Different considerations may come into play in the search for a proper balance between competing interests. Section 24(1) provides:

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

[19] Here, we are concerned with aspects of the conduct of a criminal trial and of the operation of the justice system, where the courts have to pass upon the guilt or innocence of an accused. While the exclusion of evidence will normally be a remedy under s. 24(2), it cannot be ruled out as a remedy under s. 24(1). However, such a remedy will only be available in those cases where a less intrusive remedy cannot be fashioned to safeguard

constitue une réparation convenable pour l'application du par. 24(1) de la *Charte* pour remédier au tort causé lorsque le ministère public procède à une communication tardive d'éléments de preuve.

[17] La réparation qui consiste à écarter des éléments de preuve découlera normalement de l'application du par. 24(2) de la *Charte* qui s'applique aux éléments de preuve obtenus dans des conditions qui portent atteinte aux droits ou libertés garantis par la *Charte*. Cependant, la preuve obtenue de la sorte ne sera écartée que si son utilisation est susceptible de déconsidérer l'administration de la justice. Le paragraphe 24(2) prévoit :

24. . . .

(2) Lorsque, dans une instance visée au paragraphe (1), le tribunal a conclu que des éléments de preuve ont été obtenus dans des conditions qui portent atteinte aux droits et libertés garantis par la présente charte, ces éléments de preuve sont écartés s'il est établi, eu égard aux circonstances, que leur utilisation est susceptible de déconsidérer l'administration de la justice.

[18] Les réparations fondées sur le par. 24(1) de la *Charte* sont flexibles et contextuelles : *Doucet-Boudreau c. Nouvelle-Écosse (Ministre de l'Éducation)*, 2003 CSC 62, [2003] 3 R.C.S. 3, par. 41, 52 et 54-56. Elles visent à résoudre des situations on ne peut plus variées. Divers facteurs peuvent entrer en ligne de compte lorsqu'il s'agit de mettre convenablement en balance des intérêts opposés. Le paragraphe 24(1) prévoit :

24. (1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

[19] En l'espèce, nous sommes appelés à nous pencher sur la conduite d'un procès criminel et sur le fonctionnement du système de justice, dans le contexte où les tribunaux doivent se prononcer sur la culpabilité ou l'innocence d'un accusé. Bien que l'exclusion d'éléments de preuve soit une réparation découlant normalement de l'application du par. 24(2), elle ne peut être écarté d'emblée comme réparation pouvant être accordée en application du

the fairness of the trial process and the integrity of the justice system.

[20] Before being entitled to a remedy under s. 24(1), the party seeking such a remedy must establish a breach of his or her *Charter* rights. In a case of late disclosure, the underlying *Charter* infringement will normally be to s. 7. Section 7 of the *Charter* protects the right of the accused to make full answer and defence. In order to make full answer and defence, the Crown must provide the accused with complete and timely disclosure: see *R. v. Stinchcombe*, [1991] 3 S.C.R. 326. The purpose underlying the Crown's obligation to disclose is explained by Rosenberg J.A. in *R. v. Horan*, 2008 ONCA 589, 237 C.C.C. (3d) 514, at para. 26:

Put simply, disclosure is a means to an end. Full prosecution disclosure is to ensure that the accused receives a fair trial, that the accused has an adequate opportunity to respond to the prosecution case and that in the result the verdict is a reliable one.

[21] However, the Crown's failure to disclose evidence does not, in and of itself, constitute a violation of s. 7. Rather, an accused must generally show "actual prejudice to [his or her] ability to make full answer and defence" (*R. v. O'Connor*, [1995] 4 S.C.R. 411, at para. 74) in order to be entitled to a remedy under s. 24(1).

[22] While the accused must receive a fair trial, the trial must be fair from both the perspective of the accused and of society more broadly. In *R. v. Harrer*, [1995] 3 S.C.R. 562, McLachlin J. (as she then was) provided guidance on what is meant by trial fairness. She stated, at para. 45, that:

At base, a fair trial is a trial that appears fair, both from the perspective of the accused and the perspective of the community. A fair trial must not be confused with the most advantageous trial possible from

par. 24(1). Cependant, seules les circonstances où il est impossible de concevoir une réparation moins draconienne pour sauvegarder l'équité du procès et l'intégrité du système de justice donnent ouverture à une telle réparation.

[20] Avant d'avoir droit à une réparation visée au par. 24(1), la partie qui la demande doit prouver une violation de ses droits garantis par la *Charte*. En cas de communication tardive, il y a normalement atteinte sous-jacente aux droits garantis par l'art. 7 de la *Charte* qui protège le droit de l'accusé de présenter une défense pleine et entière. Pour que l'accusé puisse se prévaloir de ce droit, le ministère public doit lui communiquer l'ensemble de la preuve en temps utile : voir *R. c. Stinchcombe*, [1991] 3 R.C.S. 326. Au paragraphe 26 de l'arrêt *R. c. Horan*, 2008 ONCA 589, 237 C.C.C. (3d) 514, le juge Rosenberg explique l'objectif sous-jacent de l'obligation de communiquer qui incombe au ministère public :

[TRADUCTION] En termes simples, la communication est un moyen de parvenir à une fin. En effet, la communication intégrale par le ministère public sert à garantir que l'accusé subit un procès équitable, qu'il a une chance réelle de répondre à la preuve de la poursuite et que, en définitive, le verdict est fiable.

[21] Toutefois, l'omission par le ministère public de communiquer des éléments de preuve ne constitue pas, en soi, une violation de l'art. 7. En effet, pour avoir droit à une réparation en application du par. 24(1), l'accusé devra généralement faire la preuve d'« un préjudice véritable quant à la possibilité pour [lui] de présenter une défense pleine et entière » (*R. c. O'Connor*, [1995] 4 R.C.S. 411, par. 74).

[22] S'il est vrai que l'accusé doit subir un procès équitable, le procès doit être équitable tant du point de vue de l'accusé que de celui de la société dans son ensemble. Au paragraphe 45 de l'arrêt *R. c. Harrer*, [1995] 3 R.C.S. 562, la juge McLachlin (maintenant Juge en chef) a indiqué ce qu'on entend par procès équitable :

Au départ, un procès équitable est un procès qui paraît équitable, tant du point de vue de l'accusé que de celui de la collectivité. Il ne faut pas confondre un procès équitable avec le procès le plus avantageux possible du point de

the accused's point of view: *R. v. Lyons*, [1987] 2 S.C.R. 309, at p. 362, *per* La Forest J. Nor must it be conflated with the perfect trial; in the real world, perfection is seldom attained. A fair trial is one which satisfies the public interest in getting at the truth, while preserving basic procedural fairness for the accused. [Emphasis added.]

[23] Apart from ensuring trial fairness, there is one other circumstance in which late disclosed evidence might be excluded. That is where to admit the evidence would compromise the integrity of the justice system.

[24] Thus, a trial judge should only exclude evidence for late disclosure in exceptional cases: (a) where the late disclosure renders the trial process unfair and this unfairness cannot be remedied through an adjournment and disclosure order or (b) where exclusion is necessary to maintain the integrity of the justice system. Because the exclusion of evidence impacts on trial fairness from society's perspective insofar as it impairs the truth-seeking function of trials, where a trial judge can fashion an appropriate remedy for late disclosure that does not deny procedural fairness to the accused and where admission of the evidence does not otherwise compromise the integrity of the justice system, it will not be appropriate and just to exclude evidence under s. 24(1).

[25] This view is reflected in cases such as *O'Connor* that have considered whether a stay is the appropriate remedy for late or insufficient disclosure under s. 24(1). As *L'Heureux-Dubé J.*, for the majority, stated in *O'Connor*, at para. 83:

In such circumstances [of late or insufficient Crown disclosure and a consequent s. 7 breach], the court must fashion a just and appropriate remedy, pursuant to s. 24(1). Although the remedy for such a violation will typically be a disclosure order and adjournment, there may be some extreme cases where the prejudice to the accused's ability to make full answer and defence or to

vue de l'accusé : *R. c. Lyons*, [1987] 2 R.C.S. 309, à la p. 362, le juge La Forest. Il ne faut pas l'assimiler non plus au procès parfait; dans la réalité, la perfection est rarement atteinte. Le procès équitable est celui qui répond à l'intérêt qu'a le public à connaître la vérité, tout en préservant l'équité fondamentale en matière de procédure pour l'accusé. [Je souligne.]

[23] Mis à part les cas où elle sert à garantir l'équité du procès, l'exclusion d'éléments de preuve communiqués tardivement peut être ordonnée pour un autre motif : si leur utilisation portait atteinte à l'intégrité du système de justice.

[24] Ainsi, un juge de première instance ne devrait écarter des éléments de preuve communiqués tardivement que dans des cas exceptionnels : a) lorsque la communication tardive rend le procès inéquitable et qu'il ne peut être remédié à cette iniquité grâce à un ajournement et à une ordonnance de communication ou b) lorsque l'exclusion est nécessaire pour maintenir l'intégrité du système de justice. Puisque l'exclusion d'éléments de preuve a une incidence sur l'équité du procès du point de vue de la société, dans la mesure où elle entrave la fonction de recherche de la vérité du procès, lorsque le juge du procès peut concevoir une réparation convenable — pour pallier la communication tardive — qui ne prive pas l'accusé de l'équité procédurale et lorsque l'utilisation des éléments de preuve ne porte par autrement atteinte à l'intégrité du système de justice, il ne sera ni convenable ni juste de les exclure en application du par. 24(1).

[25] Ce point de vue ressort de certains jugements, tel *O'Connor*, où les tribunaux se sont demandé si l'arrêt des procédures constitue la réparation convenable visée au par. 24(1) lorsque le ministère public procède à une communication tardive ou insuffisante. Comme l'a affirmé la juge *L'Heureux-Dubé*, au nom des juges majoritaires, au par. 83 de l'arrêt *O'Connor* :

Dans ces circonstances [où la communication tardive ou insuffisante d'éléments de preuve par le ministère public entraîne une violation de l'art. 7], la cour doit façonner une réparation convenable et juste, conformément au par. 24(1). Bien que, dans le cas d'une telle violation, la réparation soit typiquement une ordonnance de divulgation et un ajournement, il peut y avoir des cas extrêmes où le

the integrity of the justice system is irremediable. In those “clearest of cases”, a stay of proceedings will be appropriate.

[26] This statement recognized that the appropriate focus in most cases of late or insufficient disclosure under s. 24(1) is the remediation of prejudice to the accused, but that safeguarding of the integrity of the justice system will also be a relevant concern. Of course the prejudice complained of must be material and not trivial. For example, the exclusion of evidence may be warranted where the evidence is produced mid-trial after important and irrevocable decisions about the defence have been made by the accused. Even then, it is for the accused to demonstrate how the late disclosed evidence would have affected the decisions that were made. For purposes of trial fairness, only where prejudice cannot be remedied by an adjournment and disclosure order will exclusion of evidence be an appropriate and just remedy.

[27] There may also be instances where an adjournment and disclosure order may not be appropriate because admission of evidence compromises the integrity of the justice system. For example, as Rosenberg J.A. stated in *Horan*, at para. 31:

In some cases, an adjournment may not be an appropriate or just remedy if the result would be to unreasonably delay the trial of an in-custody accused. In such a case, an appropriate remedy could be exclusion of the undisclosed evidence. However, the burden is on the accused to demonstrate that exclusion of the evidence was appropriate.

In other words, where an accused is in pre-trial custody, an adjournment that significantly prolongs the custody before trial may be seen as compromising the integrity of the justice system. The exclusion of evidence may also be an appropriate and just

préjudice causé à la possibilité pour l'accusé de présenter une défense pleine et entière ou à l'intégrité du système judiciaire soit irréparable. Dans ces « cas les plus manifestes », l'arrêt des procédures sera approprié.

[26] Cette affirmation reconnaît que, dans la plupart des cas de communication tardive ou insuffisante, l'analyse fondée sur le par. 24(1) doit être centrée sur la réparation du préjudice causé à l'accusé, même si la sauvegarde de l'intégrité du système de justice est aussi un facteur pertinent. Bien entendu, le préjudice allégué doit être important et non pas insignifiant. Par exemple, l'exclusion de certains éléments de preuve peut être justifiée lorsqu'ils sont produits à mi-procès, après que l'accusé a pris des décisions importantes et irrévocables quant à sa défense. Toutefois, même dans ces cas, c'est à l'accusé que revient le fardeau de démontrer comment les éléments de preuve communiqués tardivement auraient influé sur les décisions qui ont été prises s'ils avaient été communiqués en temps utile. Pour assurer l'équité des procès, ce n'est que lorsqu'il ne peut être remédié au préjudice en ordonnant l'ajournement de l'instance et la communication de la preuve que l'exclusion des éléments de preuve constituera une réparation convenable et juste.

[27] Il se pourrait aussi que, dans certains cas, ordonner l'ajournement de l'instance et la communication de la preuve ne constitue pas une réparation convenable parce que l'utilisation des éléments de preuve compromettrait l'intégrité du système de justice. À titre d'exemple, comme l'a affirmé le juge Rosenberg de la Cour d'appel au par. 31 de l'arrêt *Horan* :

[TRADUCTION] Dans certains cas, un ajournement pourrait ne pas constituer une réparation convenable et juste si le procès d'un accusé placé sous garde subissait pour cette raison un retard déraisonnable. Dans un tel cas, l'exclusion des éléments de preuve non communiqués pourrait constituer une réparation convenable. Cependant, il incombe à l'accusé de prouver que l'exclusion est convenable.

Autrement dit, lorsque l'accusé est placé sous garde avant procès, un ajournement qui prolonge considérablement la détention avant procès pourrait sembler compromettre l'intégrité du système de justice. L'exclusion d'éléments de preuve peut aussi

remedy where the Crown has withheld evidence through deliberate misconduct amounting to an abuse of process. Yet even in such circumstances, society's interest in a fair trial that reaches a reliable determination of the accused's guilt or innocence based on all of the available evidence cannot be ignored. This will especially be true where the underlying offense is a serious one: see *O'Connor*, at para. 78. In clear cases, however, the exclusion of evidence may be an appropriate and just remedy under s. 24(1) in order to preserve the integrity of the justice system.

7. Application to the Facts

[28] There is no doubt that the late disclosure to the appellant in this case was prejudicial to his right to make full answer and defence. However, there is no suggestion that the police in this case obtained the impugned evidence in breach of the *Charter*. Section 24(1), and not s. 24(2), was therefore the appropriate remedial provision through which to remedy the prejudice to the appellant.

[29] There was also no finding of deliberate Crown misconduct or any other reason to believe that the integrity of the justice system was compromised. In this case, on the motion before the trial judge, the Crown submitted that the impugned evidence was not disclosed to the appellant earlier because of concerns that to do so would imperil a witness and compromise an ongoing investigation. While the trial judge did not accept that the Crown's concerns were well-founded in this case, he did not find that the Crown had engaged in deliberate misconduct. Rather, he stated clearly, "I do not suggest the Crown has been unethical or malicious." There is no suggestion that the appellant was held in pre-trial custody.

[30] The question is, having regard to the interest of society in a fair trial, whether the prejudice to

constituer une réparation convenable et juste lorsque le ministère public a retenu les éléments de preuve par suite d'une inconduite délibérée équivalant à un abus de procédure. Il n'empêche que, même dans de telles circonstances, on ne peut ignorer l'intérêt de la société à ce qu'un procès équitable détermine de manière fiable la culpabilité ou l'innocence de l'accusé sur la foi de tous les éléments de preuve existants. Cela s'avère, surtout lorsque l'infraction sous-jacente est grave : voir *O'Connor*, par. 78. Toutefois, dans les cas clairs, l'exclusion d'éléments de preuve peut constituer une réparation convenable et juste en l'application du par. 24(1) afin de préserver l'intégrité du système de justice.

7. L'application aux faits

[28] Il ne fait aucun doute que la communication tardive d'éléments de preuve à l'appelant était préjudiciable à son droit de présenter une défense pleine et entière. Toutefois, en l'espèce, rien n'indique que les policiers ont obtenu ces éléments de preuve en contravention de la *Charte*. Le paragraphe 24(1), et non le par. 24(2), était donc la disposition réparatrice à appliquer pour remédier au préjudice causé à l'appelant.

[29] Le juge du procès n'a pas non plus conclu à une inconduite délibérée du ministère public ou à l'existence d'un autre motif de croire que l'intégrité du système de justice était compromise. En l'espèce, en réponse à la requête dont a été saisi le juge du procès, le ministère public a fait valoir que les éléments de preuve en cause n'avaient pas été communiqués plus tôt à l'appelant de crainte qu'une telle communication ne mette un témoin en danger et ne compromette une enquête en cours. Même si le juge du procès a conclu que les préoccupations du ministère public n'étaient pas fondées en l'espèce, il n'a pas conclu à une inconduite délibérée de ce dernier. Il a plutôt affirmé clairement : [TRADUCTION] « Je ne suggère pas que le ministère public ait agi sans éthique ou malicieusement. » Rien ne laisse croire par ailleurs que l'appelant ait été mis sous garde avant procès.

[30] La question à trancher est celle de savoir si, compte tenu de l'intérêt de la société pour que soit

the appellant could have been cured by an adjournment and disclosure order. The trial judge's concern was that an adjournment would simply be a reward to the Crown for its late disclosure. However, the integrity of the justice system was not at issue. Therefore, the trial judge had only to consider whether an adjournment and disclosure order was an appropriate remedy to cure the actual prejudice to the appellant's right to a fair trial. This the trial judge did not do.

[31] The appellant argued that his right to a fair trial was prejudiced because he obtained disclosure only after he elected trial by judge alone. As pointed out by the majority in the Court of Appeal however, he knew that disclosure would be forthcoming before he elected and, in any event, the opportunity to re-elect could have formed part of the s. 24(1) remedial order.

[32] The appellant also says that his right to a fair trial was prejudiced because he was denied the right to cross-examine Friedman and Holland at a preliminary hearing. Cross-examining a witness at a preliminary hearing, however, is not a component of the right to make full answer and defence. What is protected under s. 7 is the right to make full answer and defence at trial, not the right to cross-examine a witness at a preliminary hearing.

[33] In *Re Regina and Arviv* (1985), 51 O.R. (2d) 551 (C.A.), Martin J.A. considered whether the *Charter* afforded the accused a right to question a witness at a preliminary inquiry. The case against the accused was proceeding by direct indictment. As a result, no preliminary inquiry was held and the accused had no opportunity to cross-examine a "key witness" (p. 562). The Crown had provided the accused with the testimony of this witness at the preliminary inquiry of an accomplice of the accused as well as that same witness's testimony from the accomplices' trial. The Crown had further provided the accused with other statements that had

tenu un procès équitable, il aurait pu être remédié au préjudice causé à l'appellant en ordonnant un ajournement de l'instance et la communication de la preuve. Le juge du procès craignait qu'un ajournement constitue en fait une récompense offerte au ministère public pour la communication tardive. Pourtant, l'intégrité du système de justice n'était pas en cause. Le juge du procès devait donc se contenter de se demander si un ajournement de l'instance et une ordonnance de communication de la preuve constituaient une réparation convenable pour pallier l'atteinte réelle au droit de l'appellant à un procès équitable. Le juge du procès ne l'a pas fait.

[31] L'appellant a soutenu qu'il a été porté atteinte à son droit à un procès équitable parce qu'il a obtenu la communication des éléments de preuve seulement après avoir opté pour un procès devant un juge seul. Toutefois, comme l'ont souligné les juges majoritaires de la Cour d'appel, il savait avant de faire son choix que des renseignements lui seraient communiqués sous peu et, de toute façon, l'ordonnance réparatrice fondée sur le par. 24(1) aurait pu prévoir la possibilité de faire un nouveau choix.

[32] L'appellant prétend également qu'il a été porté atteinte à son droit à un procès équitable parce qu'il a été privé du droit de contre-interroger MM. Friedman et Holland à l'enquête préliminaire. Or, ce droit n'est pas une composante du droit de présenter une défense pleine et entière. L'article 7 protège le droit de présenter une défense pleine et entière au procès, et non le droit de contre-interroger un témoin à l'enquête préliminaire.

[33] Dans *Re Regina and Arviv* (1985), 51 O.R. (2d) 551 (C.A.), le juge Martin s'est demandé si la *Charte* accordait à l'accusé le droit d'interroger un témoin à l'enquête préliminaire. Dans cette affaire, comme le ministère public avait procédé par voie de mise en accusation directe, aucune enquête préliminaire n'avait été tenue et l'accusé n'avait pas eu l'occasion de contre-interroger un [TRADUCTION] « témoin clé » (p. 562). Le ministère public avait fourni à l'accusé la déposition de ce témoin à l'enquête préliminaire d'un de ses complices ainsi que le témoignage livré par ce même témoin lors du procès des complices. Le ministère public avait également

been made by the witness, including a videotaped statement that the witness had made to the police (pp. 561-62).

[34] Martin J.A. stated, at pp. 560 and 562:

The constitutional standard which a criminal trial must satisfy under s. 7 of the Charter is the standard encompassed by the concept “the principles of fundamental justice”. The so-called “right” to a preliminary hearing is not elevated to a constitutional right under the Charter. . . .

. . .

. . . We are not prepared to hold and, in our view, are not entitled to hold, that the failure to provide the opportunity to cross-examine, even a key witness, prior to the giving of evidence by that witness at the trial, *per se*, contravenes the Charter, where full disclosure of the Crown’s case and of the witness’s evidence has been made.

I agree with the principle expressed by Martin J.A. There is no independent *Charter* right to cross-examine a witness at a preliminary inquiry. As stated above, s. 7 of the *Charter* protects the right of the accused to make full answer and defence. As indicated, in order to make full answer and defence, the Crown must provide the accused with disclosure (see *Stinchcombe*). However, this does not mean that the accused has a *Charter* right to a particular method of disclosure.

[35] In *R. v. Sterling* (1993), 113 Sask. R. 81, the Saskatchewan Court of Appeal considered whether, in light of this Court’s decision in *Stinchcombe*, the accused had a *Charter* right to cross-examine a witness at a preliminary inquiry. After endorsing the judgment of Martin J.A. in *Arviv*, Wakeling J.A., concurring, said, at para. 77:

The principle appears to have been established that production of witnesses, which is what a preliminary hearing produces, is not an essential component of fundamental justice so long as full disclosure is otherwise given by the Crown.

remis à l’accusé d’autres déclarations faites par le témoin, y compris une déclaration enregistrée sur bande vidéo faite aux policiers (p. 561-562).

[34] Le juge Martin s’est exprimé ainsi aux p. 560 et 562 :

[TRADUCTION] Aux termes de l’art. 7 de la Charte, la norme constitutionnelle que doit respecter un procès en matière criminel est celle visée par les « principes de justice fondamentale ». Le soi-disant « droit » à une enquête préliminaire n’est pas élevé au rang de droit constitutionnel garanti par la Charte. . . .

. . .

. . . Nous ne sommes pas prêts à conclure — et, à notre avis, nous ne sommes pas autorisés à conclure — que le défaut de fournir la possibilité de contre-interroger, même un témoin clé, avant sa déposition au procès viole en soi la Charte, lorsqu’il y a eu communication complète de la preuve du ministère public et du témoin.

Je suis d’accord avec le principe exprimé par le juge Martin. Il n’existe aucun droit distinct conféré par la *Charte* de contre-interroger un témoin à l’enquête préliminaire. Je le répète, l’art. 7 de la *Charte* protège le droit de l’accusé de présenter une défense pleine et entière et, pour que l’accusé puisse se prévaloir de ce droit, le ministère public est tenu de lui communiquer la preuve (voir *Stinchcombe*). Cela ne signifie pas pour autant que la *Charte* garantit à l’accusé le droit à une méthode particulière de communication.

[35] Dans *R. c. Sterling* (1993), 113 Sask. R. 81, la Cour d’appel de la Saskatchewan a examiné la question de savoir si, compte tenu de l’arrêt *Stinchcombe*, de notre Cour, la *Charte* garantissait à l’accusé le droit de contre-interroger un témoin à l’enquête préliminaire. Après avoir souscrit au jugement du juge Martin dans *Arviv*, le juge Wakeling — rédisant des motifs concordants — a écrit ce qui suit au par. 77 :

[TRADUCTION] Il semble avoir été établi que la comparaison de témoins, ce à quoi donnent lieu les enquêtes préliminaires, n’est pas un élément essentiel de la justice fondamentale pour autant que le ministère public communique par ailleurs toute la preuve.

[36] Although the primary purpose of the preliminary inquiry is to enable a provincial court judge to determine whether an accused should be committed for trial, as noted by Martin J.A. in *Arviv*, at p. 560, “the preliminary hearing does serve the ancillary purpose of providing a discovery of the Crown’s case”. However, if Crown disclosures are otherwise complete, then the accused’s s. 7 right has not been infringed by his not being able to cross-examine a witness at a preliminary hearing. The discovery purpose of the preliminary inquiry has been met through other means, such as providing the accused with witness statements.

[37] In the present case, the Crown provided the appellant with disclosure, albeit late. In light of the fact that disclosure was ultimately provided to the appellant, the appellant’s s. 7 right to make full answer and defence was not infringed by his inability to cross-examine the potential Crown witnesses at a preliminary hearing. The appellant was provided with a transcript of a videotaped *KGB* statement of one accomplice, as well as an agreed statement of facts that formed the basis for a guilty plea and sentencing of the other accomplice. This material provided the appellant with sufficient disclosure of the Crown’s case against him. The appellant could make full answer and defence as guaranteed by s. 7 of the *Charter* without the need to cross-examine these witnesses at a preliminary inquiry. The prejudice resulting to the appellant from this late Crown disclosure would therefore have been cured by an adjournment to provide the appellant with an opportunity to consider this new evidence against him.

[38] Unlike the exclusion of the impugned evidence ordered by the trial judge, an adjournment would have preserved society’s interest in a fair trial while still curing the prejudice to the accused. Had he properly directed himself, this should have been the remedy ordered.

[36] Bien que l’objectif premier de l’enquête préliminaire soit de permettre au juge d’une cour provinciale de décider si un accusé devrait être renvoyé à procès, comme l’a souligné le juge Martin dans *Arviv*, à la p. 560, [TRADUCTION] « l’enquête préliminaire sert accessoirement à communiquer la preuve du ministère public ». Toutefois, si la communication de la preuve du ministère public est par ailleurs complète, le droit de l’accusé garanti par l’art. 7 n’a pas été violé du fait qu’il n’a pas pu contre-interroger un témoin à l’enquête préliminaire. L’objectif de la communication à l’enquête préliminaire a été atteint par d’autres moyens, notamment par la fourniture de déclarations des témoins à l’accusé.

[37] En l’espèce, même s’il l’a fait tardivement, le ministère public a communiqué la preuve à l’appellant. Comme ce dernier a finalement obtenu cette communication, son droit garanti à l’art. 7 de présenter une défense pleine et entière n’a pas été violé du fait qu’il n’a pas pu contre-interroger les témoins potentiels du ministère public lors de l’enquête préliminaire. L’appellant a reçu la transcription d’une déclaration de type *KGB* enregistrée sur bande vidéo faite par un de ses complices ainsi qu’un exposé conjoint des faits sur lequel est fondé le plaidoyer de culpabilité et la peine de l’autre complice. Ces documents fournis à l’appellant constituaient une communication suffisante de la preuve que le ministère public entendait présenter contre lui. L’appellant pouvait présenter une défense pleine et entière, comme le garantit l’art. 7 de la *Charte*, sans avoir besoin de contre-interroger ces témoins à l’enquête préliminaire. Le préjudice causé à l’appellant en raison de la communication tardive de la preuve par le ministère public aurait donc pu être réparé par un ajournement. Une telle mesure aurait permis à l’appellant d’examiner les nouveaux éléments de preuve présentés contre lui.

[38] Contrairement à l’exclusion des éléments de preuve en cause ordonnée par le juge du procès, un ajournement aurait protégé l’intérêt de la société à ce que soit tenu un procès équitable tout en réparant le préjudice causé à l’accusé. Si le juge du procès ne s’était pas fondé sur des considérations erronées, il aurait ordonné cette réparation.

8. Conclusion

[39] By ordering exclusion of evidence, the trial judge did not impose an appropriate and just remedy when an adjournment and disclosure order would have sufficiently addressed the prejudice to the appellant while preserving society's interest in a fair trial. I am of the respectful opinion that, in doing so, the trial judge misdirected himself.

[40] I would dismiss the appeal and confirm the order of the Court of Appeal for a new trial.

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

FISH J. (dissenting) —

I

[41] The order of the trial judge that concerns us here is subject to appellate interference only if the Court abandons the governing principles adopted by the Court itself nearly a quarter-century ago — and has since then repeatedly and consistently applied. I would decline to do so.

[42] Briefly stated, these are the governing principles. On an application under s. 24(1) of the *Canadian Charter of Rights and Freedoms*, once an infringement has been established, the trial judge must grant “such remedy as [is] appropriate and just in the circumstances”. The remedy granted must vindicate the rights of the claimant, be fair to the party against whom it is ordered, and consider all other relevant circumstances. Appellate courts may interfere with a trial judge's exercise of discretion only if the trial judge has erred in law or rendered an unjust decision. This is particularly true of remedies granted by trial judges under s. 24(1) of the *Charter*, which by its very terms confers on trial judges the *widest possible discretion*. Finally, appellate courts must take particular care not to substitute their own exercise of discretion for that of the trial judge merely because they would

8. Conclusion

[39] En ordonnant l'exclusion des éléments de preuve, le juge du procès n'a pas accordé une réparation convenable et juste puisqu'un ajournement et une ordonnance de communication auraient suffisamment réparé le préjudice causé à l'appelant tout en préservant l'intérêt de la société à ce que soit tenu un procès équitable. Avec égards, j'estime que le juge du procès a ainsi commis une erreur de droit.

[40] Je suis d'avis de rejeter le pourvoi et de confirmer l'ordonnance de la Cour d'appel visant la tenue d'un nouveau procès.

Version française des motifs des juges Binnie, Fish et Abella rendus par

LE JUGE FISH (dissident) —

I

[41] L'ordonnance du juge de première instance faisant l'objet du présent pourvoi ne peut être modifiée en appel que si la Cour abandonne les principes applicables qu'elle a elle-même établis il y a près d'un quart de siècle — et qu'elle a depuis lors appliqués invariablement et à maintes reprises. Je m'abstiendrai de le faire.

[42] Voici un résumé des principes en question. Sur présentation d'une demande fondée sur le par. 24(1) de la *Charte canadienne des droits et libertés*, dès lors qu'une violation a été établie, le juge du procès doit accorder « la réparation que le tribunal estime convenable et juste eu égard aux circonstances ». La réparation doit assurer la protection des droits du demandeur, être équitable pour la partie visée par l'ordonnance et tenir compte de toutes les autres circonstances pertinentes. Un tribunal d'appel peut modifier la décision rendue par un juge du procès qui a exercé son pouvoir discrétionnaire uniquement si ce dernier a commis une erreur de droit ou rendu une décision injuste. Cela est particulièrement vrai s'il s'agit d'une réparation accordée par un juge de première instance sur le fondement du par. 24(1) de la *Charte* dont le libellé même confère le *plus vaste pouvoir discrétionnaire possible* à ce

have granted a more generous or more limited remedy.

[43] Justice Rothstein would confine the broad and unfettered discretion of trial judges under s. 24(1) of the *Charter* to two narrow circumstances. In my respectful view, this proposed change in the law is unwarranted, inconsistent with prior decisions of the Court and incompatible with the plain language and evident purpose of s. 24(1) of the *Charter*.

[44] With respect, moreover, the new standard proposed by my colleague is inappropriate for other reasons as well.

[45] First, it introduces for exclusion of evidence as a remedy under s. 24(1) of the *Charter* the same exacting standard that until now has been uniquely reserved for a far more drastic remedy — a stay of proceedings. At best, this fusion of the formerly distinct tests invites confusion regarding their application to the two distinct remedies. At worst, the fused test eliminates exclusion of evidence as a live option under s. 24(1).

[46] Second, the test for exclusion proposed by my colleague takes no account of the *nature* of the constitutional violation or infringement, limiting the remedy of exclusion without regard to which *Charter* right or freedom has been abridged.

[47] Third, the proposed test regulates the discretionary remedy of exclusion under s. 24(1) of the *Charter* more closely, and more intrusively, than an order of exclusion under s. 24(2). This strikes me as particularly incongruous: The plain language of both provisions makes it perfectly clear that a trial judge's discretion under s. 24(1) is *broad*er, not *narrow*er, than under s. 24(2). Moreover, under

dernier. Enfin, les tribunaux d'appel doivent tout particulièrement se garder de substituer l'exercice de leur propre pouvoir discrétionnaire à celui déjà exercé par le juge du procès simplement parce qu'ils auraient accordé une réparation plus généreuse ou plus limitée.

[43] Le juge Rothstein limiterait à deux cas précis l'exercice du pouvoir discrétionnaire général et absolu que le par. 24(1) de la *Charte* confère aux juges de première instance. Avec égards, j'estime que le changement proposé au droit n'est pas justifié et est incompatible avec la jurisprudence de notre Cour ainsi qu'avec le libellé clair et l'objet évident du par. 24(1) de la *Charte*.

[44] En outre, selon moi, d'autres raisons permettent de conclure que le nouveau critère proposé par mon collègue est inapproprié.

[45] Premièrement, le test proposé soumet l'exclusion d'éléments de preuve — en tant que mesure réparatrice accordée en application du par. 24(1) de la *Charte* — aux normes exigeantes ayant jusqu'à maintenant été réservées à une mesure réparatrice beaucoup plus draconienne : l'arrêt des procédures. Dans le meilleur scénario, la fusion de deux critères auparavant distincts jette de la confusion quant à l'application de deux mesures réparatrices distinctes. Dans le pire scénario, les critères amalgamés écartent l'exclusion d'éléments de preuve en tant que mesure réparatrice visée par le par. 24(1).

[46] Deuxièmement, le test applicable pour décider de l'exclusion d'éléments de preuve proposé par mon collègue ne tient pas compte de la *nature* de l'atteinte ou de la violation constitutionnelle, en ce qu'il restreint son application sans égard au droit ou à la liberté garanti par la *Charte* ayant été violé.

[47] Troisièmement, le test proposé assujettit la mesure réparatrice discrétionnaire consistant à exclure des éléments de preuve en application du par. 24(1) de la *Charte* à des règles plus précises et plus envahissantes que celles qui régissent une ordonnance d'exclusion rendue en application du par. 24(2). Cela me paraît particulièrement incongru : en effet, il est parfaitement clair suivant le

the narrow test proposed by my colleague, trial courts would be *precluded* from granting exclusion as a remedy under s. 24(1), yet *required* by the panoply of factors just recently set out in *Grant* to order exclusion under s. 24(2) in analogous circumstances. See *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, particularly at para. 71.

[48] For these reasons and for the reasons that follow, I agree with Brooker J. (*ad hoc*), dissenting in the Court of Appeal (2007 ABCA 425, 83 Alta. L.R. (4th) 4), that the trial judge committed no reviewable error in exercising his discretion as he did.

[49] With respect for those who are of a different view, I would therefore allow the appeal, set aside the order for a new trial, and restore the verdict at trial.

II

[50] It is undisputed that the appellant's constitutional right to timely disclosure, guaranteed by s. 7 of the *Charter*, was infringed by the Crown in this case. And it is undisputed as well that the appellant was therefore entitled to a remedy under s. 24(1) of the *Charter*.

[51] The Court has made it clear, time and time again, that orders under s. 24(1) should be disturbed on appeal "only if the trial judge misdirects himself or if his decision is so clearly wrong as to amount to an injustice": *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, at para. 117. Justice Rothstein, at para. 15, reaffirms this standard of review.

libellé des deux dispositions que le pouvoir discrétionnaire du juge du procès visé au par. 24(1) est *plus large*, et non *plus restreint*, que celui que lui confère le par. 24(2). De plus, le test étroit proposé par mon collègue aurait pour effet *d'empêcher* les tribunaux de première instance d'ordonner l'exclusion d'éléments de preuve à titre de réparation en application du par. 24(1), bien que cette mesure soit *nécessaire* compte tenu de la panoplie des facteurs tout récemment énoncés dans l'arrêt *Grant* pour ordonner l'exclusion d'éléments de preuve en application du par. 24(2) dans des circonstances similaires. Voir *R. c. Grant*, 2009 CSC 32, [2009] 2 R.C.S. 353, plus particulièrement au par. 71.

[48] Pour ces motifs et pour les motifs qui suivent, je souscris à l'opinion du juge Brooker (*ad hoc*), dissident en Cour d'appel (2007 ABCA 425, 83 Alta. L.R. (4th) 4), selon laquelle le juge du procès n'a commis aucune erreur susceptible de contrôle judiciaire dans l'exercice de son pouvoir discrétionnaire.

[49] Avec égards pour les tenants de l'opinion contraire, je serais donc d'avis d'accueillir le pourvoi, d'annuler l'ordonnance visant la tenue d'un nouveau procès et de rétablir le verdict prononcé au procès.

II

[50] Nul ne conteste que, en l'espèce, le ministère public a porté atteinte au droit fondamental de l'appellant, garanti par l'art. 7 de la *Charte*, d'obtenir communication de la preuve en temps utile. Personne ne conteste non plus que l'appellant avait donc droit à une réparation fondée sur le par. 24(1) de la *Charte*.

[51] À maintes reprises, notre Cour a clairement indiqué que les ordonnances rendues en application du par. 24(1) ne devraient être modifiées en appel « que si [le juge du procès] s'est fondé sur des considérations erronées en droit ou si sa décision est erronée au point de créer une injustice » : *R. c. Regan*, 2002 CSC 12, [2002] 1 R.C.S. 297, par. 117. Le juge Rothstein, au par. 15, confirme cette norme de contrôle.

[52] There is no suggestion in Justice Rothstein's reasons that the trial judge in this case exercised his discretion unreasonably or in a manner that amounted to an injustice. Rather, my colleague finds that the trial judge, in excluding the previously undisclosed evidence, erred in law. As I stated at the outset, the trial judge's exercise of discretion in this regard can properly be characterized as an error of law *only if we change the law*. And with the greatest of respect, as likewise stated at the outset, I believe the change in the law proposed by Justice Rothstein is unwarranted, inconsistent with prior decisions of the Court and incompatible with the plain language and evident purpose of s. 24(1) of the *Charter*.

[53] The full extent of a trial judge's discretion in crafting a remedy under s. 24(1) was recognized by the Court in the earliest days of the *Charter*, and has since then been reaffirmed in the clearest of terms:

It is difficult to imagine language which could give the court a wider and less fettered discretion [than that of s. 24(1)]. It is impossible to reduce this wide discretion to some sort of binding formula for general application in all cases, and it is not for appellate courts to pre-empt or cut down this wide discretion.

(*Mills v. The Queen*, [1986] 1 S.C.R. 863, at p. 965. Cited with approval in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at paras. 24, 50 and 52; in *R. v. Rahey*, [1987] 1 S.C.R. 588, *per* La Forest J., at p. 640; and again in *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575.)

[54] As if for added emphasis, McLachlin C.J., speaking for the Court in *974649 Ontario*, at para. 18, described s. 24(1) as "confer[ring] the widest possible discretion on a court to craft remedies for violations of *Charter* rights".

[52] Rien dans les motifs du juge Rothstein ne donne à penser que, en l'espèce, le juge du procès a exercé son pouvoir discrétionnaire de manière déraisonnable ou de façon à créer une injustice. Mon collègue a plutôt conclu que le juge du procès a commis une erreur en excluant les éléments de preuve que le ministère public n'avait pas communiqués antérieurement. Comme je l'ai dit au départ, *ce n'est que si nous modifions le droit* que la façon dont le juge du procès a exercé son pouvoir discrétionnaire peut être considérée comme une erreur de droit. Et, en toute déférence, comme je l'ai également signalé au début des présents motifs, j'estime que le changement proposé au droit par le juge Rothstein n'est pas justifié et est incompatible avec la jurisprudence de notre Cour ainsi qu'avec le libellé clair et l'objet évident du par. 24(1) de la *Charte*.

[53] Dès les premiers jours d'existence de la *Charte* et depuis, en termes on ne peut plus clairs, notre Cour a reconnu l'existence du vaste pouvoir discrétionnaire dont disposent les juges du procès afin de concevoir une réparation pour l'application du par. 24(1) :

Il est difficile de concevoir comment on pourrait donner au tribunal un pouvoir discrétionnaire plus large et plus absolu [que celui qui est conféré par le par. 24(1)]. Ce large pouvoir discrétionnaire n'est tout simplement pas réductible à une espèce de formule obligatoire d'application générale à tous les cas, et les tribunaux d'appel ne sont nullement autorisés à s'approprier ce large pouvoir discrétionnaire ni à en restreindre la portée.

(*Mills c. La Reine*, [1986] 1 R.C.S. 863, p. 965-966. Cité avec approbation dans *Doucet-Boudreau c. Nouvelle-Écosse (Ministre de l'Éducation)*, 2003 CSC 62, [2003] 3 R.C.S. 3, par. 24, 50 et 52; dans *R. c. Rahey*, [1987] 1 R.C.S. 588, le juge La Forest, p. 640; et également dans *R. c. 974649 Ontario Inc.*, 2001 CSC 81, [2001] 3 R.C.S. 575.)

[54] Comme si elle souhaitait insister sur ce point, la juge en chef McLachlin, qui s'exprimait au nom de la Cour dans *974649 Ontario*, a indiqué au par. 18 de ses motifs que le par. 24(1) « accord[e] au tribunal le plus vaste pouvoir discrétionnaire possible aux fins d'élaboration des réparations applicables en cas de violations des droits garantis par la *Charte* ».

[55] Justice Rothstein proposes that this broad and unfettered discretion be henceforth narrowly constrained. Under my colleague's novel approach — I say "novel" because it is entirely unsupported by precedent — evidence may be excluded as a remedy under s. 24(1) of the *Charter in two circumstances only*: (1) where its admission would result in an unfair trial and the unfairness cannot be remedied by any lesser remedy; or (2) where exclusion of the evidence is necessary to preserve the integrity of the justice system (paras. 23, 24 and 27). And this second exceptional circumstance is itself limited to "clear cases" where countervailing interests — such as society's interest in having all available evidence presented at trial — are outweighed (para. 27).

[56] In short, the *Charter* entitles anyone whose rights or freedoms have been infringed "to obtain such remedy as the court considers appropriate and just in the circumstances". This "widest possible discretion" is subject to appellate interference, as we have seen, "only if the trial judge misdirects himself or if his decision is so clearly wrong as to amount to an injustice" (*Regan*, at para. 117). There is no suggestion, I repeat, that the trial judge's decision in this case amounted to an injustice. On the contrary, the trial judge exercised his discretion reasonably, and well within the broad limits fixed by the *Charter* and the governing principles set out in *Mills* and its progeny.

[57] Accordingly, my purpose here is not to defend the trial judge's choice of remedy. It requires no further defence. My purpose, rather, is to uphold the trial judge's constitutional authority, under s. 24(1) of the *Charter*, to make that choice. If the discretion were theirs to exercise, some judges might well have chosen instead to order disclosure and adjourn the proceedings. But we are not entitled to intervene for that reason:

[55] Le juge Rothstein propose que ce pouvoir discrétionnaire large et absolu soit à l'avenir étroitement circonscrit. Suivant la nouvelle approche proposée par mon collègue, — je la qualifie de « nouvelle » parce qu'elle ne trouve aucun appui dans la jurisprudence — des éléments de preuve peuvent être exclus à titre de réparation en application du par. 24(1) de la *Charte dans deux cas seulement* : (1) si leur utilisation en preuve est susceptible de rendre le procès inéquitable et que l'iniquité ne peut être corrigée en accordant une réparation moins draconienne ou (2) lorsque l'exclusion des éléments de preuve est nécessaire pour maintenir l'intégrité du système de justice (par. 23, 24 et 27). En outre, cette deuxième situation exceptionnelle ne vise que les « cas clairs » dans lesquels des intérêts opposés — comme l'intérêt qu'a la société à ce que tous les éléments de preuve disponibles soient présentés lors du procès — l'emportent (par. 27).

[56] En bref, la *Charte* permet à toute personne dont les droits ou les libertés ont été violés d'« obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances ». Comme nous l'avons vu, une cour d'appel ne sera justifiée d'intervenir dans l'exercice du « plus vaste pouvoir discrétionnaire possible » que « si [le juge de première instance] s'est fondé sur des considérations erronées en droit ou si sa décision est erronée au point de créer une injustice » (*Regan*, par. 117). Je le répète, rien ne donne à penser que, en l'espèce, la décision du juge du procès a créé une injustice. Au contraire, le juge du procès a exercé son pouvoir discrétionnaire raisonnablement et bien à l'intérieur des larges limites fixées par la *Charte* et par les principes applicables énoncés dans *Mills* et dans les arrêts qui l'ont suivi.

[57] Par conséquent, je ne cherche pas à défendre la mesure réparatrice que le juge du procès a choisie et qu'il n'est nul besoin de défendre davantage. Je cherche plutôt à maintenir le pouvoir que la *Charte* lui confère au moyen du par. 24(1), d'effectuer un tel choix. S'ils avaient été appelés à exercer leur pouvoir discrétionnaire, certains juges auraient fort bien pu plutôt choisir d'ajourner le procès et d'ordonner la communication des éléments de preuve. Mais nous n'avons pas le droit d'intervenir sur ce fondement :

The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way.

(*Friends of the Oldman River Society v. Canada (Ministry of Transport)*, [1992] 1 S.C.R. 3, at p. 76, quoting *Charles Osenton and Co. v. Johnston*, [1942] A.C. 130 (H.L.), at p. 138.)

[58] An appellate court that would have exercised original discretion as the trial judge did will rarely be tempted to tamper with the law as it stands. The temptation, I fear, is far greater, where the appellate court might have been inclined to exercise its discretion differently. Disagreement, particularly strong disagreement, invites caution: A reviewing court must not, on account of its disagreement alone, place trial judges offside by redrawing the established boundaries of their discretion.

[59] I think it better by far for an appellate court to affirm a discretionary decision with which it disagrees than to reverse it impermissibly by adopting, *ex post facto*, a more regimented framework that might have resulted in what it regards as a preferable result at trial. In the context that concerns us here, the law as it stands does not authorize us to intervene in the impugned decision of the trial judge. And the proposed change in the law, while it would prevent trial judges in future cases from exercising their discretion as the trial judge did here, would at the same time hypothecate their constitutional duty, under s. 24(1) of the *Charter*, to fashion appropriate and just remedies in circumstances we cannot anticipate.

III

[60] It is true that in *R. v. O'Connor*, [1995] 4 S.C.R. 411, the Court limited access to a particular

[TRADUCTION] Le tribunal d'appel n'a pas la liberté de simplement substituer l'exercice de son propre pouvoir discrétionnaire à celui déjà exercé par le juge. En d'autres termes, les juridictions d'appel ne devraient pas annuler une ordonnance pour la simple raison qu'elles auraient exercé le pouvoir discrétionnaire original, s'il leur avait appartenu, d'une manière différente.

(*Friends of the Oldman River Society c. Canada (Ministre des Transports)*, [1992] 1 R.C.S. 3, p. 76, citant *Charles Osenton and Co. c. Johnston*, [1942] A.C. 130 (H.L.), p. 138.)

[58] Un tribunal d'appel qui aurait exercé le pouvoir discrétionnaire original comme le juge du procès l'a fait sera rarement tenté de modifier le droit applicable. La tentation, je le crains, est beaucoup plus forte dans les situations où le tribunal d'appel aurait probablement exercé son pouvoir discrétionnaire différemment. En cas de désaccord, particulièrement s'il est profond, il faut redoubler de prudence : les tribunaux d'appel ne doivent pas, du simple fait qu'ils diffèrent d'opinion, écarter les conclusions des juges de première instance en redéfinissant les frontières de leur pouvoir discrétionnaire.

[59] Je crois qu'il est nettement préférable qu'un tribunal d'appel confirme une décision découlant de l'exercice d'un pouvoir discrétionnaire à laquelle il ne souscrit pas plutôt qu'il l'infirmé sans y être autorisé en adoptant, *a posteriori*, un cadre plus rigide qui aurait mené à l'adoption d'une solution qu'il juge préférable. Dans le contexte qui nous occupe, le droit en l'état actuel ne nous permet pas de modifier la décision contestée du juge du procès. Si la modification proposée est susceptible d'empêcher à l'avenir les juges du procès d'exercer leur pouvoir discrétionnaire comme le juge du procès l'a fait dans la présente affaire, reste qu'elle grèvera pour autant l'obligation constitutionnelle qui leur incombe en vertu du par. 24(1) de la *Charte* de concevoir des mesures réparatrices convenables et justes dans des circonstances que nous ne pouvons prévoir.

III

[60] Certes, dans *R. c. O'Connor*, [1995] 4 R.C.S. 411, la Cour a restreint l'accès à une mesure

remedy under s. 24(1) by imposing essentially the same stringent test that Justice Rothstein would adopt here. But that case dealt with a stay of proceedings and has no application here.

[61] The stringent limits placed on the issuance of stays are a function of the severity and finality of that remedy. Unlike a stay of proceedings, the exclusion of impugned evidence rarely terminates the proceedings — and, more rarely still, terminates the proceedings *definitively*. On the contrary, probative evidence is often excluded under the common law of evidence or under s. 24(2) of the *Charter* in trials that nonetheless proceed and routinely result in convictions.

[62] At the very least, the exclusion of evidence as a s. 24(1) remedy should not be subject to the same demanding criteria as a stay of proceedings unless exclusion will preclude a trial, which is not our case. Here, Mr. Bjelland was committed to trial at the conclusion of a preliminary inquiry that proceeded without the tardily disclosed evidence. Moreover, after that evidence was excluded by the trial judge, the Crown was evidently satisfied that the remaining evidence was capable of supporting a conviction. In the absence of a reasonable prospect of conviction, Crown counsel could not reasonably have proceeded with the trial.

[63] The Crown did have an option. Instead of proceeding on the strength of the remaining evidence in its possession, the Crown, if it considered the excluded evidence of central importance to its case, could have declared its proof closed and appealed the inevitable acquittal on the very ground that it now invokes. On the other hand, if the Crown did not attach great importance to the evidence then, it can hardly ask us to do so now. And yet, having opted to place Mr. Bjelland in jeopardy

réparatrice particulière pour l'application du par. 24(1) en appliquant essentiellement le même critère exigeant que le juge Rothstein adopterait en l'espèce. Or, dans cette affaire, il était question d'un arrêt des procédures. Cette décision n'est donc d'aucune utilité en l'espèce.

[61] Les limites rigoureuses applicables au prononcé d'arrêts des procédures sont fonction de la gravité et du caractère définitif de cette mesure. Or, contrairement à un arrêt des procédures, l'exclusion d'éléments de preuve met rarement fin à une procédure — et, plus rarement encore, y met fin de façon *définitive*. Au contraire, des éléments de preuve probants sont souvent exclus en application des règles de common law en matière de preuve ou du par. 24(2) de la *Charte* dans le cadre de procès qui suivent néanmoins leur cours et qui, fréquemment, donnent lieu à des condamnations.

[62] À tout le moins, l'exclusion d'éléments de preuve en tant que réparation accordée en application du par. 24(1) ne devrait pas être assujettie aux critères exigeants applicables aux arrêts de procédures sauf si l'exclusion fait obstacle à la tenue d'un procès, ce qui n'est pas le cas en l'espèce. Dans la présente affaire, M. Bjelland a été cité à procès après la tenue d'une enquête préliminaire au cours de laquelle la preuve communiquée tardivement n'était pas en cause. De plus, le ministère public a de toute évidence estimé, après l'exclusion des éléments de preuve en question, que la preuve restante était susceptible de justifier une condamnation. En l'absence d'une probabilité raisonnable d'obtenir une déclaration de culpabilité, l'avocat du ministère public n'aurait pas pu raisonnablement choisir de poursuivre le procès.

[63] Le ministère public disposait d'une solution de rechange. En effet, plutôt que de s'appuyer sur les autres éléments de preuve, il aurait pu, s'il estimait que les éléments exclus étaient cruciaux, déclarer sa preuve close et interjeter appel à l'encontre de l'acquittement alors inévitable, en invoquant les arguments qui nous sont soumis. Par contre, si le ministère public ne jugeait pas la preuve essentielle, il peut difficilement demander qu'on lui accorde une telle importance à ce stade. Après avoir choisi

of conviction at one trial on evidence it considered sufficient, the Crown now seeks a “second kick at the can”.

[64] On any view of the matter, the remedy of exclusion granted by the trial judge was hardly equivalent to a stay of proceedings and should not be made subject to the same constraints.

[65] Finally, we have long accepted that an acquittal that results from the exclusion of evidence is warranted by overriding considerations of justice. See *R. v. Harrer*, [1995] 3 S.C.R. 562, at para. 42 (*per* McLachlin J., as she then was, concurring); *R. v. Genest*, [1989] 1 S.C.R. 59, at pp. 82, 91 and 92 (*per* Dickson C.J., for the unanimous Court); *R. v. Collins*, [1987] 1 S.C.R. 265, at pp. 282-86. The policy of the law in this regard was well put by Samuel Freedman, then Chief Justice of Manitoba, in this well-known passage:

The objective of a criminal trial is justice. Is the quest of justice synonymous with the search for truth? In most cases, yes. Truth and justice will emerge in a happy coincidence. But not always. Nor should it be thought that the judicial process has necessarily failed if justice and truth do not end up in perfect harmony. . . . [T]he law makes its choice between competing values and declares that it is better to close the case without all the available evidence being put on the record. We place a ceiling price on truth. It is glorious to possess, but not at an unlimited cost. “Truth, like all other good things, may be loved unwisely — may be pursued too keenly — may cost too much.”

(“Admissions and Confessions”, in R. E. Salhany and R. J. Carter, eds., *Studies in Canadian Criminal Evidence* (1972), 95, at p. 99, quoting *Pearse v. Pearse* (1846), 1 De G. & Sm. 12, 63 E.R. 950, at p. 957.)

Restricting exclusion as a remedy under s. 24(1) of the *Charter* to those limited circumstances in which a stay would be warranted at once exaggerates the severity of exclusion as a remedy and minimizes

de faire courir le risque d’une condamnation à M. Bjelland sur le fondement d’une preuve qu’il jugeait suffisante, le ministère public sollicite « une seconde chance ».

[64] Quel que soit l’angle sous lequel on examine la question, l’ordonnance du juge du procès visant l’exclusion d’éléments de preuve ne s’apparentait guère à un arrêt des procédures et ne devrait pas être assujettie aux mêmes contraintes.

[65] Enfin, nous reconnaissons depuis longtemps que des considérations de justice fondamentales justifient les acquittements résultant de l’exclusion d’éléments de preuve. Voir *R. c. Harrer*, [1995] 3 R.C.S. 562, par. 42 (opinion concordante de la juge McLachlin, maintenant Juge en chef); *R. c. Genest*, [1989] 1 R.C.S. 59, p. 82, 91 et 92 (le juge en chef Dickson, dans un jugement unanime); *R. c. Collins*, [1987] 1 R.C.S. 265, p. 282 à 286. L’idée maîtresse du droit applicable ressort clairement des propos suivants de Samuel Freedman, Juge en chef du Manitoba, figurant dans un extrait bien connu :

[TRADUCTION] Le but d’un procès criminel est de faire régner la justice. La recherche de la justice est-elle synonyme de recherche de la vérité? Il semblerait que oui dans la plupart des cas. La vérité et la justice finissent fort heureusement par émerger de façon simultanée. Mais ce n’est pas toujours le cas. Il ne faut pas non plus conclure à l’échec du processus judiciaire si celui-ci n’aboutit pas en même temps à la justice et à la vérité. [. . .] [L]e droit opte pour le moindre de deux maux et permet de clore l’affaire en l’absence de certains éléments de preuve. Il est certes admirable d’atteindre la vérité, mais pas à n’importe quel prix. « La vérité est comme toute bonne chose : parfois on la chérit à l’excès, on la recherche trop ardemment, on la paie trop cher. »

(« Admissions and Confessions », dans R. E. Salhany et R. J. Carter, dir., *Studies in Canadian Criminal Evidence* (1972), 95, p. 99, citant *Pearse c. Pearse* (1846), 1 De G. & Sm. 12, 63 E.R. 950, p. 957.)

Limiter le recours à l’exclusion d’éléments de preuve dans le contexte de l’application du par. 24(1) de la *Charte* aux seuls cas où un arrêt des procédures serait justifié confère à cette mesure une trop

the importance attached by our system of justice to objectives other than truth-finding.

IV

[66] The trial judge reviewed the evidence carefully and accurately. He considered and rejected alternative remedies, including a stay of proceedings and an adjournment.

[67] Understandably, the trial judge considered as well that exclusion of the tardily disclosed evidence was not a particularly drastic remedy in this case. He noted that the remaining evidence had been found sufficient by a Provincial Court Judge at the conclusion of a preliminary inquiry, to permit a reasonable jury, properly instructed, to find the appellant guilty as charged.

[68] Ultimately, the trial judge concluded that “[t]he proper remedy which address[es] the accused’s rights and balances those rights with the interest[s] of society, is to place both the accused and the Crown in the position they occupied before the Crown attempted to introduce this new evidence.” Manifestly, the trial judge was guided in his exercise of discretion by the established principles governing applications for a remedy under s. 24(1) of the *Charter*.

[69] On the whole of the record, I am thus satisfied that the trial judge’s decision under this standard was neither erroneous in law nor so clearly wrong as to amount to an injustice.

V

[70] For all of these reasons, as mentioned at the outset, I would allow the appeal, set aside the order for a new trial, and restore the verdict at trial.

grande gravité et minimise l’importance que notre système de justice accorde aux objectifs autres que la recherche de la vérité.

IV

[66] Le juge du procès a examiné la preuve soigneusement et correctement. Il a envisagé et écarté d’autres mesures réparatrices, dont l’arrêt des procédures et l’ajournement.

[67] Il n’est pas surprenant d’ailleurs que le juge du procès ait également jugé que l’exclusion des éléments de preuve communiqués tardivement n’était pas une mesure particulièrement draconienne en l’espèce. Il s’est appuyé sur le fait que, au terme de l’enquête préliminaire, un juge de la Cour provinciale avait estimé que les autres éléments de preuve permettraient à un jury raisonnable, ayant reçu des directives appropriées, de déclarer l’appelant coupable de l’infraction reprochée.

[68] Ultimement, le juge du procès a conclu que [TRADUCTION] « [l]a réparation convenable, qui prend en considération les droits de l’accusé et qui les met en balance avec les intérêts de la société, consiste à remettre tant l’accusé que le ministère public dans la situation dans laquelle ils se trouvaient avant que le ministère public tente d’introduire les nouveaux éléments de preuve. » De toute évidence, le juge du procès a tenu compte dans l’exercice de son pouvoir discrétionnaire des principes régissant les demandes de réparation fondées sur le par. 24(1) de la *Charte*.

[69] Au vu de l’ensemble du dossier, je suis donc convaincu que, suivant le test susmentionné, la décision du juge du procès n’était ni erronée en droit ni erronée au point de créer une injustice.

V

[70] Pour tous ces motifs, comme je l’ai mentionné au départ, j’accueillerais le pourvoi, j’annulerais l’ordonnance visant la tenue d’un nouveau procès et je rétablirais le verdict prononcé au procès.

Appeal dismissed, BINNIE, FISH and ABELLA JJ. dissenting.

Solicitors for the appellant: Lord, Russell, Tyndale, Hoare, Calgary.

Solicitor for the respondent: Public Prosecution Service of Canada, Calgary.

Pourvoi rejeté, les juges BINNIE, FISH et ABELLA sont dissidents.

Procureurs de l'appelant : Lord, Russell, Tyndale, Hoare, Calgary.

Procureur de l'intimée : Service des poursuites pénales du Canada, Calgary.

Tab 5:

R. v. Browne, 2017 ONSC 5047

R. v. Browne

Ontario Judgments

Ontario Superior Court of Justice

S.A. Coroza J.

June 23, 2016.

Court File No.: CRIM J (P) 469/14

[2016] O.J. No. 7176 | 2017 ONSC 5047

RE: Her Majesty the Queen, and Steven Browne, Amal Greensword and Adrian Williams

(12 paras.)

Counsel

Greg Hendry, for the Crown.

Anne Marie Morphew, for Mr. Browne.

Nicole Rozier, for Mr. Greensword.

Maureen Addie, for Mr. Williams.

ENDORSEMENT

S.A. COROZA J.

- 1 The accused face a charge of first degree murder. The trial will begin with jury selection during the week of September 12, 2016. The trial estimate is three to four months.
- 2 Counsel for the accused seek an order directing Crown counsel to provide the following:
 1. A draft list of proposed witnesses on or before July 8, 2016; and
 2. A draft order of proposed witnesses on or before August 19, 2016.
- 3 The disclosure is voluminous. Counsel for the accused would like a list of proposed witnesses so they can prepare for trial. They argue that having a list will provide them with an opportunity to ensure that all disclosure regarding the proposed witnesses has been received and to address any outstanding issues prior to the start of trial.
- 4 The Crown argues that they should not be directed by the Court to produce a witness list by a

specific day. As I understand his argument, Mr. Hendry submits that a witness list will be provided once it is finalized, meaning the Crown has confirmed the witnesses have relevant evidence to give at trial and it has been confirmed that the witnesses have been subpoenaed.

5 For reasons that follow, I agree with counsel for the accused. Accordingly, a draft list of proposed witnesses shall be produced to counsel for the accused on or before July 8, 2016 and a draft order of proposed witnesses shall be produced on or before August 19, 2016.¹

6 The parties agree that I have jurisdiction to make the orders. That is because the production of a witness list and proposed order for calling the witnesses properly falls within the prosecutor's "tactics or conduct before the Court" and is reviewable as part of the court's trial management function: see *R. v. Felderhof* (2003), 68 O.R. (3d) 481 (C.A.).

7 In my view, the list and order should be produced for the following reasons.

8 First, given the length of the trial, focus, efficiency and fairness are live concerns. The most important ingredient for an efficient, focused and fair jury trial is well prepared lawyering. The production of a witness list and a proposed batting order of witnesses will go a long way to ensuring that all counsel are well prepared for trial.

9 Second, I see no prejudice to the Crown in providing this list or order. The list and order requested is only a draft. The list and order can be provided, without prejudice, to the best of the ability of the Crown to predict its case. Therefore, I am not persuaded that a "sunset" date to produce a draft witness list and order is unfair to the Crown. Furthermore, I am not persuaded by Mr. Hendry's argument that there is a link between production of the items requested and ensuring that the Crown can subpoena certain potentially hostile witnesses or vigorously prosecute the case to the best of their ability.

10 Finally, in my view, production of the items requested is a tool that I can utilize to ensure that this jury trial runs smoothly. Frequent interruptions during a jury trial are difficult. In that regard, a trial judge has a responsibility to ensure that a jury trial proceeds without these interruptions.² A common cause for interrupting proceedings during a lengthy trial is the late breaking motion which should have been brought as a pre-trial proceeding. In order to prevent these late breaking motions, I am persuaded by Ms. Addie's submission that an advance witness list will ensure that counsel for the accused have turned their mind to and identified any potential issues which can be brought to the attention to the trial judge before the jury is selected or the trial starts. Of course, production of these items also puts counsel on notice that I expect counsel to be prepared during the trial and that counsel should do their very best to assess whether there are any motions that arise as a result of the receipt of these items and to notify the Court as soon as possible.

11 I recognize and accept Mr. Hendry's argument that identification of material witnesses is not a skill in the exclusive possession of the Crown. However, in my view, the request being made here is reasonable. There is nothing on this record that would suggest that an order directing the Crown to produce the items sought will be unfair or damage the position of the Crown in presenting this case.

12 It is for these reasons that I make the order.

S.A. COROZA J.

- 1 I recognize that the parties are waiting for rulings on a number of motions that could affect a witness list and the proposed order for calling these witnesses. However, this does not preclude the Crown from producing an "anticipated" list that can be edited once they receive my rulings. There is a trial management meeting scheduled for August 22, 2016. I anticipate that all of my pre-trial rulings will be delivered by that date.
- 2 The responsibilities of a trial judge in case managing complex cases and the various tools at their disposal to achieve the goal of efficiency have been set out exhaustively by the Honourable Patrick J. Lesage and Professor Michael Code (now the Honourable Justice Code) in their *Report of the Review of Large and Complex Criminal Case Procedures*.

End of Document

Tab 6:

R. v. Cathcart, 2019 SKCA 90

Court of Appeal for Saskatchewan

Citation: *R v Cathcart*, 2019 SKCA 90

Docket: CACR3154

Date: 2019-09-18

Between:

Christopher Douglas Cathcart

Appellant

And

Her Majesty the Queen

Respondent

Before: Richards C.J.S., Barrington-Foote and Kalmakoff JJ.A.

Disposition: Appeal allowed

Written reasons by: The Honourable Mr. Justice Kalmakoff
In concurrence: The Honourable Chief Justice Richards
The Honourable Mr. Justice Barrington-Foote

On Appeal From: CRM 136 of 2017, Saskatoon
Appeal Heard: June 11, 2019

Counsel: Christopher Douglas Cathcart appearing on his own behalf
Andrew S. Davis for the Respondent

Kalmakoff J.A.

I. INTRODUCTION

[1] After a trial, Christopher Cathcart was convicted of two counts of unlawful confinement, contrary to s. 279(2) of the *Criminal Code*, two counts of attempted robbery, contrary to s. 344(1), and one count of breaching a bail undertaking, contrary to s. 145(3). He was acquitted on charges of dangerous driving and flight from police (*R v Caisse* (9 March 2018) Saskatoon, CRM 137/2018 (Sask QB)).

[2] Mr. Cathcart was sentenced to 18 months' imprisonment for the unlawful confinement charges, three years consecutive for the attempted robberies, and three months consecutive for the breach of undertaking, for a total of four years and nine months, which was reduced by 18 months for the time he spent in custody prior to sentencing.

[3] Mr. Cathcart appeals his convictions. He argues that the trial judge erred by finding the Crown's evidence to be credible, and also by admitting certain evidence.

[4] Mr. Cathcart also argues that the Crown failed to make full disclosure, in violation of his right to make full answer and defence, guaranteed by s. 7 of the *Charter*, and that the trial judge erred by failing to make such a finding.

[5] Finally, Mr. Cathcart argues that the Crown's failure to make full disclosure was part of a deliberate and calculated course of conduct on the part of both the prosecutor and the police to bring spurious charges against him and deprive him of a fair trial. This, he says, amounts to an abuse of process, the appropriate remedy for which is a stay of proceedings.

[6] Mr. Cathcart's arguments relating to abuse of process and some of his arguments relating to disclosure rely on fresh evidence. In that regard, Mr. Cathcart applies under s. 683(1) for orders (a) compelling the production of certain material by way of disclosure; (b) directing that various witnesses be compelled to attend and be examined before this Court; and (c) permitting him to adduce fresh evidence.

[7] For the reasons that follow, I would allow Mr. Cathcart's appeal, set aside his convictions, and order a new trial.

II. FACTUAL BACKGROUND

[8] Mr. Cathcart was tried in the Court of Queen's Bench, along with Robert Caisse and Garry Cote. They were jointly charged with two counts of unlawful confinement and two counts of attempted robbery. Mr. Cathcart was also individually charged with the offences of dangerous driving, flight from police and breach of undertaking. Mr. Caisse was represented by a lawyer at the trial, Mr. Cote and Mr. Cathcart were not.

[9] The incident that led to the charges occurred in Saskatoon during the early morning hours of September 4, 2016. At around 2:00 a.m. that morning, Mr. Cathcart went to the residence of Tamara Simpson. Ms. Simpson and Mr. Cathcart had not met in person prior to this but had communicated over the internet.

[10] Ms. Simpson told Mr. Cathcart, during their online communications, that she and her cousin Thalia Wedawin, who was staying at the same residence, wanted to buy some marijuana and go drinking. Mr. Cathcart drove to Ms. Simpson's house in his SUV to pick them up. Ms. Simpson and Ms. Wedawin got into Mr. Cathcart's vehicle. Two other women were in the vehicle at that time. Mr. Cathcart then drove to various locations in the city. At some point, Ms. Simpson purchased a bottle of vodka, which those in the vehicle shared as they drove around.

[11] Eventually, Ms. Simpson told Mr. Cathcart that she needed to use a bathroom and he stopped at a house so she could do so. At this house, Ms. Simpson purchased a small amount of cocaine from someone. Ms. Wedawin also entered the residence to use the bathroom. While Ms. Simpson and Ms. Wedawin were in the residence, the woman from whom Ms. Simpson had purchased the cocaine accused her of not paying for it. A tense exchange followed, while the woman demanded money or clothing from Ms. Simpson and Ms. Wedawin to satisfy the "debt".

[12] Ms. Simpson and Ms. Wedawin left the residence, but noticed two men, who turned out to be Mr. Caisse and Mr. Cote, speaking to the woman who had been demanding payment for the

cocaine. Mr. Caisse and Mr. Cote ordered Ms. Simpson and Ms. Wedawin to get into Mr. Cathcart's vehicle. Ms. Simpson and Ms. Wedawin got into the back seat, flanked by Mr. Caisse and Mr. Cote. Mr. Cathcart was in the driver's seat, and another woman was in the front passenger seat.

[13] Ms. Simpson and Ms. Wedawin said they wanted to get out of Mr. Cathcart's vehicle, but were blocked from exiting by Mr. Caisse and Mr. Cote. The trial judge accepted that Mr. Cathcart drove the vehicle around the city while Mr. Caisse and Mr. Cote assaulted and threatened Ms. Simpson and Ms. Wedawin and demanded that they turn over their money and belongings. The trial judge also accepted that, while this was taking place, there was communication between Messrs. Caisse, Cote and Cathcart regarding money that they believed Ms. Simpson and Ms. Wedawin had in their possession.

[14] The incident came to an end when the vehicle was stopped by the police on the outskirts of Saskatoon. Ms. Wedawin and Ms. Simpson left the vehicle and approached the officers. Messrs. Caisse, Cote and Cathcart were arrested immediately thereafter. The trial judge accepted the evidence of the complainants and found that the three accused had acted in concert in committing the offences of unlawful confinement and attempted robbery. In that respect, he said:

[14] It is clear from this evidence that Mr. Cote and Mr. Caisse acted in concert to get the complainants into the back seat of the SUV, the purpose of which was to obtain the money and anything else of value from the complainants. Clearly Mr. Cathcart had to be involved. The information Mr. Cote and Mr. Caisse had could have only come from Mr. Cathcart. As well, Mr. Cathcart was the driver of the vehicle as it moved around the city during which time Mr. Caisse and Mr. Cote were attempting to get the complainants' possessions. The evidence of the complainants regarding the altercation and the yelling by everyone in the back seat could not have gone unnoticed by Mr. Cathcart. Ms. Simpson requested Mr. Cathcart to take them home or stop and let them out, and he refused to do so. Mr. Cathcart by driving the vehicle in these circumstances with Mr. Caisse and Mr. Cote, who had not been in the vehicle before and not invited in by the complainants, was clearly part of the overall scheme to take the complainants' property.

[15] I am not certain as to which of Mr. Caisse and Mr. Cote slapped each of the complainants and how many times, but they were clearly both involved in the physical altercation with the complainants in the back seat of the SUV. They both positioned themselves to prevent the complainants from leaving the vehicle at any time. They both were demanding the complainants' possessions. It is not necessary to have preciseness with respect to who put Ms. Simpson in the chokehold, who punched each complainant and when, the exact number of slaps that occurred as all three of them were clearly involved in the effort to obtain both complainants' personal possessions.

[16] The inconsistency in the details from the complainants is understandable. They were young women in a situation not of their making in which complete strangers were

driving them around in a vehicle and refusing to take them home. They were in unfamiliar geographic and emotional territory. The back seat of the vehicle was dark.

[17] Their testimony on the stand was unshaken with respect to the issues of unlawful confinement and attempted robbery. Ms. Simpson's testimony was at times given in a dramatic fashion. Ms. Wedawin's testimony reflected her inexperience with drugs, alcohol and life in the big city. They were both compelling.

[18] The defence asked many questions to show that there was opportunity for the complainants to fabricate a story as they were left alone without police supervision at various times. Opportunity does not equate with action. The opportunity to discuss and come up with a fabricated story between the complainants does not in my opinion detract from the truthfulness of their description of what occurred. I find that there was no collusion or fabrication with respect to creating a story in an attempt to get the accused convicted.

[19] The charge of forcible confinement is different and distinct from the charge of kidnapping under s. 279(1) of the *Criminal Code*. For unlawful confinement it is necessary that the Crown prove beyond a reasonable doubt that for a significant period of time the complainants are forcibly restrained or directed contrary to their wishes so that they cannot move contrary to their inclination and desire. See *R v Pritchard*, 2008 SCC 59, [2008] 3 SCR 195. There is no question that Mr. Caisse and Mr. Cote physically restrained the complainants from leaving the vehicle and from moving freely about in the vehicle while they attempted to search them for possessions to take. The restraint here was both physical and psychological in that Mr. Caisse and Mr. Cote were yelling and threatening and striking the complainants while ensuring that they remained in the moving vehicle. Mr. Cathcart was fully aware of what was occurring in the back seat and participated and aided Mr. Cote and Mr. Caisse by continuing to drive the vehicle in a fashion that would not allow them to leave or return to their home.

[20] Under s. 21 of the *Criminal Code* they were all parties to the offence that has been charged, that is unlawfully confine the complainants and attempt to commit robbery against the complainants. As such I find each of Mr. Cote, Mr. Cathcart and Mr. Caisse guilty of counts 1 to 4 in the Indictment.

[15] Although the trial judge accepted that Mr. Cathcart was the driver of his vehicle at the relevant times, he concluded that the charges of dangerous driving and flight from police had not been proven beyond a reasonable doubt.

[16] As is apparent from the trial judge's reasons, the credibility of the complainants' evidence was a central issue. The decision as to whether the Crown had proven its case against the three accused turned on whether the trial judge accepted the complainants' testimony regarding the events that took place inside Mr. Cathcart's vehicle.

III. GROUNDS OF APPEAL

[17] Mr. Cathcart was not represented by counsel at trial, or on the appeal. Portions of his written materials were difficult to follow, and his grounds of appeal were not perfectly defined, but his arguments can be organized into six grounds of appeal. Four of these relate to things that occurred during the trial or matters that were raised before the trial judge; two are arguments that Mr. Cathcart is raising for the first time on appeal.

[18] The four grounds of appeal Mr. Cathcart advances relating to matters addressed during the trial are as follows:

- (a) the trial judge erred by failing to properly assess the credibility and reliability of the evidence identifying Mr. Cathcart as one of the persons involved in the offences;
- (b) the trial judge erred by admitting as evidence on the trial testimony given at the preliminary inquiry by a Crown witness, Cst. Forsyth, pursuant to s. 715 of the *Criminal Code*;
- (c) the trial judge erred by permitting the trial to proceed, even though Mr. Cathcart was not in physical possession of his disclosure material or notes during a portion of the trial; and
- (d) the trial judge erred by failing to find that the Crown had breached its disclosure obligations.

[19] The grounds of appeal based on new arguments are these:

- (a) the Crown deliberately revoked and disposed of relevant disclosure material that had been in Mr. Cathcart's possession prior to trial, resulting in a breach of its disclosure obligations and an abuse of process; and
- (b) the police officers engaged in a course of action towards Mr. Cathcart which constituted an abuse of process. This course of action included using improper

methods to gather evidence, influencing witnesses, and intimidating him and his co-accused.

[20] As I will discuss, the trial judge made errors in the way that he dealt with Mr. Cathcart's applications relating to disclosure. Those errors affected the fairness of the proceedings and, accordingly, Mr. Cathcart is entitled to a new trial. Because of that, it is not necessary to deal with Mr. Cathcart's arguments relating to the trial judge's assessment of the credibility and reliability of the evidence and the admission of Cst. Forsyth's testimony from the preliminary inquiry.

[21] The grounds of appeal that require analysis can be grouped into two subject areas: (a) disclosure; and (b) abuse of process. Mr. Cathcart's application for orders compelling the production of material, the attendance of witnesses for examination, and permitting him to adduce fresh evidence relate, in some respects, to the disclosure issues but are more pertinent to the arguments relating to abuse of process. I turn now to those issues.

IV. ANALYSIS

A. Disclosure

[22] On this appeal, Mr. Cathcart raised a number of disclosure issues. He says his right to disclosure was breached in the following ways:

- (a) he was forced to begin the trial without having his disclosure material present with him in court; and
- (b) the Crown failed to disclose relevant material to him, failed to preserve relevant material for disclosure, and removed relevant disclosure material from his possession so that he could not use it at trial.

[23] Before analysing these arguments, it is useful to review the general legal principles relating to disclosure.

1. General principles

[24] The Crown has a broad duty to disclose relevant evidence and information in its possession to a person charged with a criminal offence. This duty is well established at common law, and is constitutionally entrenched in the right to make full answer and defence under the *Charter*: *R v Stinchcombe*, [1991] 3 SCR 326 [*Stinchcombe*]; *R v McNeil*, 2009 SCC 3, [2009] 1 SCR 66 [*McNeil*]; *R v Dixon*, [1998] 1 SCR 244 [*Dixon*]; *R v Spackman*, 2012 ONCA 905, 295 CCC (3d) 177 [*Spackman*].

[25] The Crown's disclosure obligation is not absolute, but there are very few exceptions. The Crown is required to disclose all material in its possession to the defence, except that which is clearly irrelevant, privileged, or for which disclosure is otherwise governed by law: *McNeil* at para 18; *R v Anderson*, 2013 SKCA 92, 423 Sask R 61 [*Anderson*]. Where the Crown refuses to disclose information in its possession on the basis of such an exception, the Crown bears the burden of proving that it fits within the exception: *R v Egger*, [1993] 2 SCR 451 [*Egger*]; *Stinchcombe*; *Anderson*. This burden also applies to irrelevance. Where the Crown refuses disclosure on the basis that the requested material is irrelevant, the Crown must demonstrate that it is irrelevant, rather than requiring the defence to demonstrate relevance: *R v Chu*, 2016 SKCA 156 at paras 44–46, 344 CCC (3d) 51.

[26] The Crown is not required to disclose irrelevant information, but the threshold for relevance is quite low. The duty to disclose is triggered whenever there is a reasonable possibility that the information in the Crown's possession will be useful to the accused in making full answer and defence. This includes evidence that helps the accused in exploring issues of credibility, properly investigating the case, and making tactical decisions such as whether to call evidence: *R v Chaplin*, [1995] 1 SCR 727; *Egger*.

[27] The right to disclosure is just one component of full answer and defence. Infringement of the accused's right to disclosure is not always a violation of the right to make full answer and defence. In order to demonstrate constitutional infringement, and thus entitlement to an appropriate and just remedy under the *Charter*, an accused must generally show that actual prejudice to his or her right to make full answer and defence resulted from the non-disclosure: *R*

v O'Connor, [1995] 4 SCR 411 at para 74 [*O'Connor*]; *R v Bjelland*, 2009 SCC 38 at para 21, [2009] 2 SCR 651 [*Bjelland*]; *Spackman* at para 111.

2. The Crown's obligation to preserve relevant evidence

[28] The Crown has no obligation to create evidence for disclosure, or to disclose that which does not exist, but the disclosure obligation includes a duty to preserve relevant evidence in its possession once it comes into existence.

[29] Where an accused establishes on a balance of probabilities that relevant evidence once in the Crown's possession has been lost or destroyed, the onus shifts to the Crown to provide an explanation for the loss or destruction: *R v Berner*, 2012 BCCA 466, 329 BCAC 275 [*Berner*]. If the Crown's explanation satisfies the trial judge that the evidence has not been destroyed or lost through unacceptable negligence or deliberate malfeasance, the duty to disclose has not been breached.

[30] If the explanation offered by the Crown for the loss or destruction of evidence is insufficient to absolve it of unacceptable negligence or deliberate malfeasance, then a breach of s. 7 of the *Charter* is established: *R v La*, [1997] 2 SCR 680 [*La*]; *Berner*. In such circumstances, there is no additional requirement that the accused establish actual prejudice resulting from the loss of the evidence: *R v Carosella*, [1997] 1 SCR 80 at para 40.

[31] In assessing the adequacy of the Crown's explanation, the court must analyse the circumstances surrounding the loss of the evidence. The main consideration is whether the Crown or the police (as the case may be) took reasonable steps in the circumstances to preserve the evidence for disclosure. A key factor in that consideration is the relevance the evidence was perceived to have at the time, as the police cannot be expected to preserve everything that comes into their hands on the off-chance it will be relevant in the future. Even the loss of relevant evidence may not result in a breach of the duty to disclose if the conduct of the police is reasonable. But the degree of care expected in the preservation of evidence will generally be commensurate with its relevance: *La* at para 21.

[32] Where the actions of the Crown or the police in failing to preserve evidence involve conduct that violates those fundamental principles underlying the community's sense of decency

and fair play, the loss or destruction of evidence is an abuse of process and violates s. 7 of the *Charter*. This may include, but is not limited to, such actions as deliberate destruction of material for the purpose of defeating the disclosure obligation: *Berner* at para 80. Abuse of process may also be found in other serious departures from the Crown's duty to preserve material for disclosure purposes. In some cases, an unacceptable degree of negligent conduct may suffice: *La* at para 22.

[33] Where a breach of s. 7 is established, the question becomes one of remedy. A stay of proceedings is an exceptional remedy, limited to the clearest of cases, where the prejudice to the accused's right to make full answer and defence cannot otherwise be remedied or where irreparable prejudice would be caused to the integrity of the judicial system if the prosecution were permitted to continue: *R v Regan*, 2002 SCC 12, [2002] 1 SCR 297 [*Regan*]; *O'Connor; Canada (Minister of Citizenship & Immigration) v Tobiass*, [1997] 3 SCR 391 [*Tobiass*].

[34] Irremediable prejudice to the accused's right to make full answer and defence may result, in extraordinary cases, even where the Crown has given an adequate explanation for the loss or destruction of evidence. This will occur where, notwithstanding the adequacy of the Crown's explanation, the loss of the evidence in question is so prejudicial to the ability to make full answer and defence that it impairs the accused's right to receive a fair trial. In such circumstances, where the accused establishes that the loss or destruction of the evidence has caused actual prejudice to his or her right to make full answer and defence, a stay of proceedings may be the appropriate remedy: *La* at paras 24–25.

3. Disclosure issues raised on appeal, rather than at trial

[35] In most instances, disclosure issues are dealt with at trial, as that is the most appropriate stage to assess whether a breach has occurred and, if so, what remedy is required. Many times, the appropriate remedy will be an adjournment and an order for disclosure: *Dixon* at para 33. In very limited circumstances, where a failure to provide disclosure amounts to a s. 7 *Charter* breach, the appropriate remedy may be exclusion of evidence: *Bjelland* at paras 21–24; *Spackman* at paras 112–114. And, where the “clearest of cases” criterion set out in *Regan*, *O'Connor* and *Tobiass* is met, a stay of proceedings may be the appropriate remedy.

[36] Disclosure issues are dealt with in a slightly different fashion when raised at the appeal stage. Where an issue of non-disclosure is raised on a conviction appeal, the appellant must, as a threshold matter, establish that there was a violation of his right to disclosure. This requires persuading the appellate court that there exists (or existed) information which the Crown was obligated, but failed, to disclose: *Dixon* at para 34.

[37] There may be instances where non-disclosed material meets the *Stinchcombe* standard, but has only marginal value to the issues at trial: *R v Taillefer*; *R v Duguay*, 2003 SCC 70 at para 71, [2003] 3 SCR 307 [*Taillefer*]. For this reason, when non-disclosure is raised as an issue on an appeal from conviction, the appellant also bears the additional burden of establishing, on a balance of probabilities, that the right to full answer and defence was impaired as a result of the failure to disclose: *Dixon* at para 34; *Taillefer*. The accused may discharge this burden by showing that there is a reasonable possibility that the non-disclosure affected either (i) the outcome at trial, or (ii) the overall fairness of the trial process: *Dixon* at para 34; *Taillefer* at para 71; *R v Illes*, 2008 SCC 57 at para 24, [2008] 3 SCR 134 [*Illes*].

[38] In *Illes*, the Supreme Court described the application of the test set out in *Dixon* as follows:

[25] With respect to the first prong of the *Dixon* test, it is important to note that the issue here is not whether the undisclosed evidence *would* have made a difference to the trial outcome, but rather whether it *could* have made a difference. More precisely, the issue the appellate court must determine is whether there is a reasonable possibility that the additional evidence could have created a reasonable doubt in the jury's mind. See *R. v. Taillefer*, [2003] 3 S.C.R. 307, 2003 SCC 70, at para. 82.

...

[27] With respect to the second prong of the *Dixon* test, an appellant need only establish a reasonable possibility that the overall fairness of the trial process was impaired. This burden can be discharged by showing, for example, that the undisclosed evidence could have been used to impeach the credibility of a prosecution witness (see *Taillefer*, at para. 84), or could have assisted the defence in its pre-trial investigations and preparations, or in its tactical decisions at trial (see *R. v. Skinner*, [1998] 1 S.C.R. 298, at para. 12 (Cory J., for the Court)).

[39] Assessment of the impact of non-disclosure on the fairness of the trial process also calls for consideration of the diligence – or lack of diligence – on the part of the defence in pursuing disclosure. If the defence was not diligent in pursuing disclosure, or chose not to pursue it for

tactical reasons, that may weigh against a finding that non-disclosure affected the fairness of the trial process: *Dixon* at paras 36–38.

[40] In terms of remedy, once an accused establishes that the Crown’s failure to disclose has impaired the right to make full answer and defence, he or she is entitled to a remedy under s. 24(1). Determining the nature of the remedy requires that the degree of impairment or prejudice to the accused’s rights be considered in relation to the remedy sought. To obtain a new trial, the accused need only persuade the appellate court of the reasonable possibility that the failure to disclose affected either the outcome of the trial or the overall fairness of the process: *Dixon* at para 35; *Illes* at para 24.

[41] To obtain the more drastic remedy of a stay of proceedings, the accused must establish irreparable prejudice to the right to make full answer and defence: *Dixon* at para 35. Stays of proceedings as a remedy for non-disclosure will be limited to those rare cases where all other acceptable avenues of protecting the accused’s right to full answer and defence are exhausted, and the prejudice to the accused’s ability to make full answer and defence is irremediable: *O’Connor* at paras 77–82.

4. Application to this case

a. Starting the trial without Mr. Cathcart having his copy of disclosure material present

[42] In this case Mr. Cathcart raised disclosure issues from the outset. When the trial began, the trial judge addressed Mr. Cathcart regarding his application for disclosure of the police in-car camera system [ICCS] video, which I will discuss shortly. After dealing with that issue, the trial judge asked if there was anything else that Mr. Cathcart wished to raise regarding disclosure. Mr. Cathcart then advised the trial judge that he did not have his disclosure material with him. He explained that he was being held in custody at the Prince Albert Provincial Correctional Centre prior to trial and that, when he was transferred to the Saskatoon Correctional Centre for the start of the trial, he did not initially make arrangements to have his disclosure material sent with him. Mr. Cathcart said that once he arrived in Saskatoon, he had tried to make the necessary arrangements but that the material had not yet arrived.

[43] Rather than adjourning proceedings to await the arrival of Mr. Cathcart's disclosure materials, the trial judge addressed this issue by suggesting Mr. Cathcart could access the disclosure material of one of his co-accused, Mr. Caisse, which was located at the Saskatoon Correctional Centre, as long as Mr. Caisse agreed to permit that. Mr. Caisse agreed, and Mr. Cathcart said that would suffice.

[44] With that agreement, the trial began. Direct examination of the first Crown witness took up most of the first morning of the trial. After a lunch break, the trial judge asked Mr. Cathcart if he had obtained the USB drive containing the disclosure. When Mr. Cathcart said he had not, the trial judge attempted to find out what Mr. Cathcart required from the disclosure material. Mr. Cathcart indicated that he wished to be able to cross examine Ms. Wedawin, who was testifying that day, about certain things she said in the video-recorded statement she had provided.

[45] The trial judge addressed the matter by saying that Mr. Cathcart could simply use the Crown's copy of the video recorded statement for his cross-examination. The Crown agreed to this procedure and, once again, Mr. Cathcart indicated that would suffice.

[46] Once the Crown completed its examination-in-chief of Ms. Wedawin, Mr. Caisse's lawyer cross-examined her. Mr. Cathcart then conducted an extensive cross-examination, which included referring Ms. Wedawin to, and confronting her with, various portions of her video statement and her testimony at the preliminary inquiry.

[47] After Mr. Cathcart completed his cross-examination of Ms. Wedawin, there was brief re-examination by the Crown, following which court was adjourned for the day. The next morning, when court reconvened, Mr. Cathcart confirmed that he was ready to continue with the trial.

[48] Mr. Cathcart argues the trial was not fair because he was forced to begin without his disclosure material or the notes he had prepared while reviewing it. He says this led to him being unable to effectively cross-examine Crown witnesses. With respect, I cannot give effect to this argument.

[49] When the issue was raised at the outset, one option available to the trial judge would have been to adjourn the trial to make sure that Mr. Cathcart had all of his disclosure material and

notes available to him, but there was no requirement that he do so, in the circumstances of this case. Mr. Cathcart advised the trial judge that he had all the disclosure material (except for the three minutes of ICCS video that he requested) in his possession prior to the trial. Mr. Cathcart's description of the material and the way in which he conducted his cross-examination showed that he had a good understanding of what was in the disclosure. The trial judge made efforts to ensure that Mr. Cathcart would have access to necessary material while in court, and that he would be able to use the disclosure material to assist in his cross-examination.

[50] Furthermore, I see no evidence that there was any unfairness created by Mr. Cathcart not being in possession of the material during the trial. First, Mr. Cathcart agreed to proceed in that fashion. Second, it is apparent from the record that he was well versed in what the material contained. He was able to conduct thorough cross-examinations, which included referring witnesses to specific portions of statements and recordings, confronting them with apparent contradictions, and drawing out portions that he thought were relevant. In short, I am not satisfied that Mr. Cathcart's ability to defend the charges was adversely affected by the fashion in which the trial judge dealt with this issue.

b. The failure to disclose relevant material, preserve relevant material, or permit Mr. Cathcart to remain in possession of relevant material

[51] During the hearing of the appeal, Mr. Cathcart acknowledged that by January of 2018, well before the trial began, he was in possession of all the relevant disclosure, with the exception of four items:

- (i) three minutes of ICCS video recording from one of the police cars involved in pursuit of Mr. Cathcart's vehicle at the time of the incident;
- (ii) eleven minutes of audio recordings from the body microphone worn by Sgt. Aaron Moser at the time of the incident;
- (iii) the video/audio recording of the front service area of the Saskatoon Police Service station [service area recording], during the time that the complainants were present prior to providing formal statements to the police; and

- (iv) a USB storage device, which contained disclosure material relating to charges Mr. Cathcart had faced in relation to a previous incident (Mr. Cathcart referred to these as the “Provincial Court charges”).

[52] Mr. Cathcart argues that the Crown failed to disclose – or failed to preserve for disclosure – the first three items, and that this failure amounts to a breach of his right to make full answer and defence.

[53] With respect the fourth item, namely the USB storage device containing disclosure material relating to the Provincial Court charges [PC disclosure], Mr. Cathcart says this item was in his possession while he was remanded to the Prince Albert Correctional Centre. He intended to use it, he says, in the defence of the Queen’s Bench charges because it contained information that would assist him in challenging the credibility of various police witnesses. He says the Crown, knowing this, ordered a Provincial Correctional Centre employee to remove the USB device from his possession, without his consent, and that it was not returned.

[54] Mr. Cathcart argues that the removal of the PC disclosure from his possession, in these circumstances, amounts to both a breach of his right to make full answer and defence and an abuse of process. In light of all this, Mr. Cathcart argues that the appropriate remedy is a stay of proceedings.

i. The missing three minutes of ICCS video

[55] Mr. Cathcart raised the issue with respect to the ICCS video at the outset, when the trial judge sought clarification of an application that Mr. Cathcart had filed. In that application, Mr. Cathcart alleged that the Crown failed to disclose three minutes of video from an ICCS in the police car driven by Cst. Andrew Dubnyk. The three minutes in question were part of the time frame shortly before the police stopped Mr. Cathcart’s vehicle. The prosecutor advised that no video of the time frame of interest to Mr. Cathcart had ever existed. The trial judge, accepting that answer, then advised Mr. Cathcart he could not order disclosure of something that did not exist, but explained that Mr. Cathcart would have the opportunity to cross-examine Cst. Dubnyk, and to probe the issue of why that portion of the pursuit was not recorded.

[56] Mr. Cathcart also accepted that response.

[57] When Cst. Dubnyk testified, he said that, in this instance, the ICCS was activated automatically when he engaged his emergency lights. It produced a retrievable recording of the video information the camera captured, beginning at a point 30 seconds prior to automatic activation, and continuing until the recording was manually stopped.

[58] As I understand Mr. Cathcart's argument, the portion of the ICCS recording he says was not disclosed was the period during which Cst. Dubnyk was pursuing his vehicle *before* engaging the emergency lights on the police car. According to Cst. Dubnyk's testimony, the ICCS would not have created a video recording during that time frame. To put that another way, based on the evidence before the trial judge, the material which Mr. Cathcart alleges that the Crown failed to disclose had never existed. As such, the trial judge made no error in failing to find a breach of the Crown's disclosure obligations in relation to this item.

ii. The missing 11 minutes of Sgt. Moser's body microphone recording

[59] Mr. Cathcart alleges that the Crown failed to disclose 11 minutes of audio recording from a body microphone worn by Sgt. Moser. The 11-minute period in question was time Sgt. Moser had spent in the presence of the complainants in the front service area of the Saskatoon Police Service Headquarters, prior to the complainants providing formal statements.

[60] The Crown points out that Mr. Cathcart had the opportunity to address this issue before the trial judge, and failed to do so. Mr. Cathcart cross-examined Sgt. Moser, and asked him nothing about what may have been recorded on his body microphone. The Crown also says that Sgt. Moser had little, if any, contact with the complainants at the relevant times, and there was no other evidence to suggest that the body microphone recording would have had any probative value.

[61] Mr. Cathcart did not raise this argument at trial. Accordingly, it falls to be assessed by applying the *Dixon* test. In that regard, he must first establish that there was a violation of his right to receive disclosure. That requires evidence from which this Court can conclude there was actually material in existence which the Crown was obligated, and failed, to disclose.

[62] In this case, there was no such evidence. Mr. Cathcart questioned Sgt. Moser about the body microphone at trial. This was the extent of that questioning:

Q Sergeant Moser, are you aware that you were equipped with a microphone that night; is that correct?

A That's correct.

[63] Sergeant Moser confirmed that he was equipped with a microphone that night; Mr. Cathcart did not pursue the line of questioning any further.

[64] The only other mention in the evidence of Sgt. Moser's body microphone occurred during Mr. Cathcart's cross-examination of Cst. Cole Janett. It went as follows:

Q All right, Constable. I assume you're aware that everything in the back of your patrol car is audio and video recorded, and that the audio recording equipment is quite capable of recording the contents of conversations directly outside of your patrol car, if the door were to be opened, or a window were to be rolled down, would you agree?

A I would agree, as well as we wear body worn microphones, which would record conversations like that.

Q Were you wearing one this night?

A I can't recall. Sometimes they aren't available. I can't recall if I had one on during this occurrence or not.

...

Q All right, Constable. Are you aware of the fact that Sergeant Moser was equipped with a body microphone?

A Possibly. Again, he's in the same situation as I am, as where they are available at times, and other times not.

[65] These are the only references in the evidence to a body microphone worn by Sgt. Moser. There was no evidence as to whether or not the microphone was in use at the relevant time, or whether any recording of the 11-minute time frame Mr. Cathcart now refers to was ever made.

[66] Even if I were to consider Mr. Cathcart's written material on this appeal as fresh evidence, there is nothing from which I would be able to conclude that the portion of the recording he alleges was not disclosed ever existed, as his material contains nothing more than speculation on that point.

[67] Accordingly, Mr. Cathcart has not met the threshold requirement to establish that there was a breach of the Crown's disclosure obligation as it relates to this item.

iii. The service area recording

[68] Mr. Cathcart argues the Crown failed to disclose or preserve the service area recording for the purposes of disclosure. The service area recording pertains to the period during which the complainants were present in that area with various police officers as they waited to give formal statements. Mr. Cathcart says the service area recording is relevant because it would have captured conversations between the complainants and the officers and recorded their interactions as the complainants wrote out their statements and prepared to be interviewed. Mr. Cathcart argues that, given the way in which the versions of events provided by the complainants evolved from their first interaction with police at the scene of the vehicle stop to the final version given in their formal statements, having the opportunity to view and listen to the service area recording was important to his defence. He says it would have assisted him in cross-examining the complainants and the officers involved, identifying inconsistencies and contradictions in their evidence, and drawing those matters to the attention of the trial judge. It was vital, he says, to his ability to challenge the credibility and reliability of the Crown's witnesses. Without it, argues Mr. Cathcart, the fairness of his trial was affected, because his ability to mount a full defence was compromised.

[69] Mr. Cathcart raised the issue of the Crown's failure to preserve and disclose the service area recording for the purposes of disclosure near the end of the trial, after the Crown had closed its case, and the trial judge was about to put him to his decision as to whether he would call evidence. At that point in the trial, this exchange took place:

THE COURT: All right. Mr. Cathcart, you've come to a decision about whether or not you wish to call evidence?

THE ACCUSED CATHCART: Yes, Your Honour. Back on October 3rd, 2017, I'd submitted an application for additional disclosure, right? And in that application, I'd been requesting the Saskatoon Police to release audio and visual of the detention recordings of both alleged victims while they were in the police custody for four hours before conducting the video statements. I was given -- I was told by the Crown that the videos that I requested are recorded over after ten days, and at 17 months later, the Crown was able to pull up videos overnight in the detention area. And I also have an application here, Your Honour.

THE COURT: I'm sorry, back-up. So what -- are you saying you didn't get the videos? Because I understood that the videos --

THE ACCUSED CATHCART: No, I did not.

THE COURT: -- hold on. I understood that the videos that were available, you received?

THE ACCUSED CATHCART: Yes, these are the videos from the detention where the victims would have been in the front service area, right?

THE COURT: Okay, go on.

THE ACCUSED CATHCART: And, like I said, essentially I had asked the Crown to provide with this. And I was only -- I was given a -- how do I say this? I was told that I'd received everything that the Crown has, right? And I know, under right of accused, I have the right to examine everything that the Crown has, right? But in all honesty, I believe that goal is toward the fairness of a trial that, if I can -- if I was able to prove that these victims were in police custody with -- you know? They -- one of them testified -- one of the victims -- complainants testified that they were sitting quite close to each other while filling out their statements, and that they had not talked or nothing. But I don't have anything to suggest that they did not talk, they did not speak. Because the in-car recordings, from the when the two -- two complainants were in the back of the police car, those version of events are different from the version of events that they put on their statement while in the front service area with this constable, right? And if I were to have those, that would -- I believe that would satisfy the reasoning behind the request for that, to simply prove, like whether or not they were there by themselves with this officer, or if there were other officers present, because the constable already testified that the part of the police station they were in was closed due to hours of operation. So -- and I'd -- while we're still on that, that is, yeah, that's basically what I'm saying is in regards to that, that I had filed this application back in October, right? And I was told that the video is recorded over after ten days, the part that I was requesting, right? But it's clear that we were given -- the officer testified, Detective Kiesman, said we have 800 days to secure videos, right? So I'm not sure how the --

THE COURT: Well, okay, on that -- that video, Mr. Bliss, what's the situation from the Crown's perspective?

MR. BLISS: The video that he's talking about does not exist, because there are different retention periods for different areas of the police station, and that was what was pointed out to him back in -- if his application was on October 23rd, that was pointed out at the -- the pretrial soon thereafter. I wanted to find my notes of that. But there are different retention periods for different areas of the police station. And so, his request for the victims that were not in detention, but were in some other area, was recorded over quite quickly and was not available when he requested it.

THE COURT: Okay. So -- and that -- that's what the Crown says in relation to this one, that it doesn't exist. What other -- and I'm -- and I'm not ruling anything yet. I want to know what else you want to deal with, or if you want to call evidence. We're talking about now, is calling evidence. And, it sounds like --

THE ACCUSED CATHCART: Yes.

THE COURT: -- it sounds like what did you want to do, you wanted to file that interview -- or not interview, you wanted to file the four hours of them in detention witness area, so that I could look at that, and -- and -- or you could look at that, I'm -- I'm not sure.

THE ACCUSED CATHCART: Yes, because -- like I said, their initial verbal statement with the officer that's recorded in the vehicle, is different from their events that they give on their written statement and in their video statement with Detective Kiesman, right?

THE COURT: When they were on the stand, you had the opportunity to question them about what they said.

THE ACCUSED CATHCART: And they don't recall, Your Honour, so it's kind of --

THE COURT: Right.

THE ACCUSED CATHCART: -- not one consistent thing throughout the trial, right? ...

[70] In this discussion, Mr. Cathcart was clearly raising a disclosure issue. He advised the trial judge that he made a request for disclosure of the service area recording. From the way it was described, that recording was something that appeared to meet the *Stinchcombe* standard for relevance, because it recorded audio and video of the complainants, in the presence of police officers, while the investigation was ongoing, and shortly before they provided formal statements.

[71] The Crown acknowledged that the service area recording was made and had been in the possession of the police at one time, but was not retained; it had been overwritten.

[72] The trial judge, by saying "I'm not ruling anything yet", appeared to acknowledge that Mr. Cathcart had raised a point that would require a ruling. No such ruling was made, however, and the trial judge never returned to the issue. Instead, he continued on, putting Mr. Cathcart to his decision as to whether or not to call evidence. Mr. Cathcart advised the trial judge of the evidence that he wished to have entered as part of his defence, and closed his case. The disclosure issue with respect to the service area recording was never resolved.

[73] As I will discuss, the failure by the trial judge to adequately deal with this disclosure issue was an error that requires a new trial be ordered.

[74] On this point, the Crown notes that Mr. Cathcart did not mention the non-disclosure of the service area recording at the start of the trial, when he raised the issue regarding the ICCS recording. After dealing with the ICCS issue, the trial judge asked Mr. Cathcart if he wanted to deal with anything else, and Mr. Cathcart raised only the concern with respect to his disclosure material not being present with him at court; he said nothing about his concern regarding the service area recording. Nor did Mr. Cathcart raise the issue during the trial when he attempted to cross-examine various witnesses about what occurred during the period that would have been recorded on the service area recording. He did not raise the issue until after the Crown had closed its case.

[75] In light of all this, the Crown argues that Mr. Cathcart was not diligent in pursuing disclosure and, as such, this Court should conclude that any non-disclosure did not have an impact on the fairness of the trial, especially in light of the fact that Mr. Cathcart had the opportunity to cross-examine all of the witnesses who were present during the relevant time about what they may have done or discussed. With respect, I cannot accept the Crown's argument in the circumstances of this case.

[76] In part, this is because Mr. Cathcart's diligence, or lack thereof, in raising and pursuing this disclosure issue must be considered in light of the fact that he represented himself at trial. While it is clear that an accused who decides to proceed without the assistance of a lawyer cannot, after the fact, attack a conviction on the basis that he or she did not have representation as effective as what might have been provided by counsel, a trial judge has an obligation to ensure that a trial is fair and that there is no miscarriage of justice: *R v Harris*, 2009 SKCA 96, 331 Sask R 283 [*Harris*]. Part of a trial judge's duty in that respect is to render some assistance to those who are self-represented so that defences available to such individuals are presented with full force and effect: *R v Bialski*, 2018 SKCA 71 at para 65, 364 CCC (3d) 485 [*Bialski*]; *R v Candido*, 2015 SKCA 104 at para 13, 467 Sask R 128.

[77] Deciding how much assistance a judge should give to a self-represented accused person is an exercise in discretion. A trial judge is not counsel for the accused, and cannot provide assistance of the sort that counsel would furnish, but there is a duty to ensure that the accused has a fair trial. This duty is circumscribed by a standard of reasonableness: *R v Richards*, 2017 ONCA 424, 349 CCC (3d) 284 [*Richards*]. What this standard requires from a trial judge will vary from case to case. It will depend on the dynamics of the trial in question, the circumstances of the particular accused, and the nature of the charges: *Harris* at para 29.

[78] A trial judge's exercise of discretion in deciding how much assistance is necessary to a self-represented person is entitled to deference on appeal. The appeal court will only intervene if the trial judge proceeded on a wrong principle, or if a miscarriage of justice resulted. There will be a miscarriage of justice if trial fairness is compromised: *R v Wyatt*, 2018 BCCA 162.

[79] In this case, Mr. Cathcart raised a potential *Charter* issue for the trial judge to consider. On its face, the service area recording appeared to be something containing relevant information

that could assist Mr. Cathcart in cross-examining witnesses and challenging the credibility and reliability of their evidence. It could also have assisted him in making other strategic decisions about his defence. A failure to disclose that evidence (or failure to preserve it for disclosure) was potentially a violation of Mr. Cathcart's rights under s. 7 of the *Charter*.

[80] It is true that Mr. Cathcart did not give notice, prior to trial, of his intention to bring a *Charter* application but, as was noted in *Bialski*, the absence of such a notice is not necessarily fatal. Mr. Cathcart had clearly raised an issue of importance to his defence, and one which involved a potential breach of his *Charter* rights. In the circumstances, the trial judge was obligated to provide some assistance to ensure that the issue was properly dealt with. If this required an adjournment to allow Mr. Cathcart the opportunity to make a formal application and give proper notice, and to permit the Crown to respond, then an adjournment should have been granted.

[81] Furthermore, the Crown did not dispute the relevance of the service area recording. Crown counsel answered Mr. Cathcart's assertion about non-disclosure by saying that the service area recording, although it once existed, was no longer available to be disclosed because it had been overwritten ten days after it was made. In the circumstances, the trial judge was required to dig deeper. Mr. Cathcart had identified relevant material, which the Crown had not preserved for disclosure purposes. There was, therefore, evidence of a potential breach of Mr. Cathcart's rights under s. 7 of the *Charter*. Whether or not a breach could have been established would have required the trial judge to consider the adequacy of the Crown's explanation for the loss or destruction of the evidence, and also whether or not Mr. Cathcart's ability to make full answer and defence was prejudiced. In the circumstances, the trial judge had an obligation to provide reasonable assistance to Mr. Cathcart to raise the issue, invite full submissions and inquire into whether there was a breach. The failure to do so was an error.

[82] The trial judge's responses to Mr. Cathcart's submissions – inviting the Crown to explain its position with respect to the existence of the service area recording, inquiring as to how Mr. Cathcart intended to use it, and commenting on the fact that Mr. Cathcart had questioned witnesses about the conversations that may have been captured on the recording – reflect that he was aware Mr. Cathcart had raised a potentially important issue. As noted above, by saying that

he was “not ruling anything yet”, the trial judge also recognized that the issue required a ruling. However, instead of making a ruling, the trial judge brushed past the issue, and never returned to deal with it. The failure to make a ruling was, in my view, also an error.

[83] All of that said, not every error requires that a new trial be ordered. Some errors – for instance ones that do not lead to an unreasonable verdict, a wrong decision on a question of law or a miscarriage of justice – have no legal effect: *R v Jaw*, 2009 SCC 42 at para 29, [2009] 3 SCR 26. In such circumstances, the curative proviso in s. 686(1)(b)(iii) of the *Criminal Code* may permit a conviction to be sustained despite the error. The curative proviso reads as follows:

Powers

686(1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal

...

(b) may dismiss the appeal where

...

(iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (a)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred[.]

[84] Resort to the curative proviso to uphold a conviction will be relatively rare; it can only be used where a wrong decision on a question of law has not resulted in a substantial wrong or miscarriage of justice. The Crown bears the burden of showing the appellate court that the provision is applicable, and satisfying the court that the conviction should stand, notwithstanding the error. To do so, the Crown must establish that the error falls into one of two categories: (i) an error so harmless, or of such a minor nature that it could not have had an impact on the verdict; or (ii) an error which has prejudiced the accused and would justify a new trial but where, nonetheless, the evidence overall is so overwhelming that a conviction would have been inevitable: *R v Van*, 2009 SCC 22 at para 34, [2009] 1 SCR 716; *R v Anderson*, 2019 SKCA 27 at para 36, 53 CR (7th) 51; *R v Montague-Mitchell*, 2018 SKCA 78 at para 40, 368 CCC (3d) 322.

[85] As to the scope of the two categories of errors to which the curative proviso applies, in *R v Trotchie*, 2019 SKCA 43, Ottenbreit J.A. wrote:

[71] In *R v Van*, 2009 SCC 22, [2009] 1 SCR 716, LeBel J. explained what constitutes the first category of errors caught by the proviso, i.e., those which are harmless or minor:

[35] ... The question of whether an error or its effect is minor should be answered without reference to the strength of the other evidence presented at trial. The overriding question is whether the error on its face or in its effect was so minor, so irrelevant to the ultimate issue in the trial, or so clearly non-prejudicial, that any reasonable judge or jury could not possibly have rendered a different verdict if the error had not been made.

[72] With respect to the second category of errors, the Court in *R v Trochym*, 2007 SCC 6, [2007] 1 SCR 239, stated:

[82] The instant case is one that falls squarely within the second category of serious errors that will justify a new trial unless the properly adduced evidence is so overwhelming that a conviction is inevitable, or would invariably result. This standard should not be equated with the ordinary standard in a criminal trial of proof beyond a reasonable doubt. The application of the proviso to serious errors reflects a higher standard appropriate to appellate review. The standard applied by an appellate court, namely that the evidence against an accused is so overwhelming that conviction is inevitable or would invariably result, is a substantially higher one than the requirement that the Crown prove its case “beyond a reasonable doubt” at trial. This higher standard reflects the fact that it is difficult for an appellate court, in particular when considering a jury trial, since no detailed findings of fact will have been made, to consider retroactively the effect that, for example, excluding certain evidence could reasonably have had on the outcome.

[86] Where a reviewing court concludes, however, that a legal error led to a denial of a fair trial, there has been a miscarriage of justice to which no remedial provision applies: *R v Khan*, 2001 SCC 86, [2001] 3 SCR 823.

[87] In my view, the curative proviso cannot be applied in this case. The errors I have identified related to a failure by the trial judge to properly address an issue Mr. Cathcart raised with respect to whether the Crown had breached its disclosure obligations. By failing to fully hear and rule on this issue, the trial judge precluded the possibility of Mr. Cathcart seeking a remedy under s. 24(1) of the *Charter* if he had succeeded in establishing a violation of his s. 7 rights.

[88] If Mr. Cathcart had been able to establish a *Charter* violation, the trial judge would have been required to fashion an appropriate and just remedy. Such a remedy could have ranged from a mere adjournment, to permitting Mr. Cathcart to recall witnesses for further cross-examination, or even more extreme measures such as exclusion of evidence or a stay of proceedings,

depending on the pertinence of the evidence, the damage done to Mr. Cathcart's ability to defend the charges as a result of the non-disclosure, and the conduct of the Crown in failing to preserve the evidence. On the other hand, the Crown may well have had an adequate explanation for the loss of the evidence in question, and Mr. Cathcart may not have succeeded in demonstrating a breach. But it is not possible to determine that on the basis of the evidentiary record from the trial.

[89] Moreover, even though Mr. Cathcart had the opportunity to cross-examine each of the complainants and the police officers whose activities would have been captured by the service area recording, and they were all consistent in saying there was no conversation between the complainants during the time they prepared their written statements, I am unable to determine that lack of access to the service area recording did not prejudice Mr. Cathcart's defence. It must be remembered that credibility was the main issue at trial. Mr. Cathcart raised an issue with respect to disclosure, and argued his ability to challenge the complainants' credibility was prejudiced because a recording that could have assisted him in cross-examining the complainants and/or impeaching their credibility was not preserved for disclosure purposes. The trial judge failed in his duty to provide reasonable assistance to Mr. Cathcart, as a self-represented accused, in making the necessary application once the issue became apparent. The trial judge also failed to rule on the issue once it had been raised. In my view, those errors affected the fairness of Mr. Cathcart's trial. As such, there was a miscarriage of justice, and the curative proviso cannot be applied.

[90] In the result, a new trial must be ordered.

iv. The USB storage device containing disclosure material relating to Mr. Cathcart's Provincial Court charges

[91] In the written material filed in support of his appeal, and in his oral submissions, Mr. Cathcart alleges that, while he was in custody awaiting trial on his Queen's Bench charges, he had in his possession a USB device containing the PC disclosure. Even though the Provincial Court charges were not directly related to the Queen's Bench charges, Mr. Cathcart says the PC disclosure was relevant. He alleges that the Crown intentionally and wrongfully removed this material from his possession without his knowledge or consent. He argues that this amounts to

not only a violation of his right to receive disclosure, but an abuse of process. He says the appropriate remedy is a stay of proceedings.

[92] Mr. Cathcart says that, during a pretrial conference in relation to the Queen's Bench charges, he made the judge aware that he had disclosure with respect to both sets of charges in his possession. The Provincial Court charges had already been concluded by this point. The discussion regarding disclosure occurred after Mr. Cathcart advised Crown counsel that he was unable to access the files on the USB drive pertaining to the Queen's Bench charges, because the digital files were corrupted. He says Crown counsel requested that he return the USB drive relating to the Queen's Bench charges so that a functional copy could be provided. Mr. Cathcart agreed to do that. Crown counsel, says Mr. Cathcart, also requested that he return the PC disclosure. Mr. Cathcart says he advised Crown counsel that he would not agree to do so, because the PC disclosure was relevant to the Queen's Bench charges. He took the position that some police officers were involved in the investigation of both sets of charges, and he intended to use the PC disclosure in the defence of the Queen's Bench charges because, he said, it would prove that the officers were involved in "fabricating" evidence against him.

[93] Mr. Cathcart says that, after this discussion at the pretrial conference, someone from the Crown's office contacted the Prince Albert Correctional Centre, where Mr. Cathcart was being held, and requested return of both USB drives. Mr. Cathcart says he had a discussion with Crown counsel and a correctional officer in which he explained his reason for wanting to retain the USB drive containing the PC disclosure, and restated his objection to returning it to the Crown. Two days later, he says, he learned that in spite of his clear request, the PC disclosure material was sent back to the Crown, and never returned to him.

[94] The argument Mr. Cathcart makes in relation to this item raises the possibility of something that may be a mere disclosure breach, or the possibility of something more ominous, namely, the deliberate removal of disclosure material to prevent him from being able to shed light on police misconduct.

[95] The Crown counters by arguing that Mr. Cathcart has failed to demonstrate the PC disclosure contained anything of relevance. The Crown also notes that, despite the serious nature of Mr. Cathcart's allegation, he failed to raise the issue before the trial judge. The trial

judge addressed Mr. Cathcart prior to the trial beginning, to see if he was ready to proceed. Mr. Cathcart raised an issue about not having brought his disclosure material with him but told the trial judge that he was otherwise ready for trial. The Crown points out that, even though the events about which Mr. Cathcart now complains all occurred before the trial began, he said nothing about the alleged actions of Crown counsel or the missing disclosure material related to the Provincial Court charges when given the opportunity. As such, argues the Crown, even if Mr. Cathcart was able to establish that the PC disclosure was taken from him under the circumstances he alleges, he has failed to demonstrate that he was diligent in pursuing it. As such, the Crown asserts that no remedy is warranted.

[96] In light of the fact that I have determined a new trial must be ordered because of the trial judge's errors in dealing with Mr. Cathcart's application with respect to the non-preservation of the service area recording, it is not necessary that I address his argument with respect to the PC disclosure.

[97] Moreover, Mr. Cathcart's written materials provided few details about the nature of what the PC disclosure contained, apart from making vague references to improper conduct by unspecified police officers. Even if this material was accepted as fresh evidence, it would not provide an adequate evidentiary basis to determine whether there was anything relevant to the Queen's Bench charges in the PC disclosure material, such that removal of it from Mr. Cathcart's possession amounted to a breach of the Crown's disclosure obligations. Nor would it provide an adequate evidentiary basis to determine the question of appropriate remedy, should a breach be established.

[98] As such, this is an issue best left for trial, where it can be argued and determined on the basis of a proper evidentiary record.

B. Abuse of process – general course of improper conduct by police and Crown

[99] At trial, Mr. Cathcart did not raise the issue of abuse of process, even though the conduct of which he accuses the police officers and prosecutors all occurred – and was something of which he would have been aware – before the trial began.

[100] As a general rule, an issue not raised at trial cannot be raised for the first time on appeal: *Perka v The Queen*, [1984] 2 SCR 232; *R v Warsing*, [1998] 3 SCR 579. This general rule is “preclusive but not unyielding”: *R v Reid*, 2016 ONCA 524 at para 38, 338 CCC (3d) 47 [*Reid*] (leave to appeal to SCC denied 2017 CanLII 5367).

[101] In *R v Ahmed*, 2019 SKCA 47, Barrington-Foote J.A. described the discretionary nature of the decision whether to permit a new argument on appeal, and the criteria to be applied in exercising that discretion. In that regard, he wrote:

[15] ... As a rule, an issue not raised at trial cannot be raised for the first time on appeal. There are, however, exceptions to this rule. The decision as to whether to entertain a new argument on appeal is discretionary and is “to be guided by the balancing of the interests of justice as they affect all parties” (*Kaiman v Graham*, 2009 ONCA 77 at para 18, 245 OAC 130); see also *R v Reid*, 2016 ONCA 524 at para 44, 338 CCC (3d) 47 [*Reid*] (leave to appeal to the SCC denied 2017 CanLII 5367). In *R v Gill*, 2018 BCCA 144, 26 MVR (7th) 138, Fitch J.A. usefully summarized the issue as follows:

[12] In *Quan v. Cusson*, 2009 SCC 62 at paras. 36–38, the majority of the Court laid out a framework for determining whether to permit a party to raise a new issue on appeal. The first question is whether the issue is new. If so, the second question is whether the evidentiary record and the interests of justice support granting an exception to the general rule against raising new issues on appeal. In determining whether the interests of justice warrant an exception to the general rule, it is appropriate to consider whether entertaining the issue for the first time on appeal might lead to a different ultimate outcome for the parties: *L.S. v. G.S.* at para. 112. As Binnie J. said in *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19 at para. 33, a court may hear a new issue on appeal if refusing leave would risk an injustice.

[16] There is authority for the proposition that a failure to raise the proposed new issue at trial for tactical reasons should weigh heavily in the interests of justice analysis, against the party who seeks to change course on appeal: *R v Brown*, [1993] 2 SCR 918 at 927 per L’Heureux (Dubé J. dissenting, but not on this point); *Reid* at para 43; *R v Dignard*, 2017 MBCA 123 at para 7; and *R v Downey*, 2015 NBCA 25 at para 12, 435 NBR (2d) 315.

[102] In *Reid* at para 42, Watt J.A. wrote:

[42] The burden is on the party who seeks to raise the new issue on appeal to bring the argument to be advanced within the exception to the general prohibition. It is incumbent on that party to demonstrate that all the facts necessary to address the proposed issue are as fully before the appellate court as they would have been had the issue been argued at trial: *Kaiman*, at para. 18. As the evidentiary disputes generated by the materials first filed on appeal mount, the likelihood that an appellate court will hear the argument diminishes: *Roach*, at paras. 7-8.

[103] I agree with the description of the onus set out in *Reid*. That is, Mr. Cathcart bears the burden of establishing that this Court should depart from the general rule and consider his new argument relating to abuse of process. In my view, Mr. Cathcart has not met the onus.

[104] I say that because, in the circumstances of this case, neither the evidentiary record nor the interests of justice support granting an exception to the rule against raising new arguments on appeal. There is no evidentiary basis in the trial record alone to support Mr. Cathcart's claim of abuse of process. As for Mr. Cathcart's application to adduce fresh evidence, his material contains little more than bare allegations of improper conduct on the part of the police, and a reference to the removal from his possession of disclosure material relating to a separate set of charges, the relevance of which is not clear. In addition, I have determined there must be a new trial because of the errors previously identified. At that trial, Mr. Cathcart will have the opportunity to make an application relating to abuse of process, if he chooses, and adduce the necessary evidence to have the issue determined on the basis of a proper record. In light of that, there is no risk that an injustice will result from the refusal to entertain this issue on appeal.

[105] Given that conclusion, it is not necessary to delve further into Mr. Cathcart's application to adduce fresh evidence.

V. CONCLUSION

[106] Mr. Cathcart's appeal is allowed. His convictions are set aside. A new trial is ordered.

“Kalmakoff J.A.”

Kalmakoff J.A.

I concur.

“Kalmakoff J.A.”

for Richards C.J.S. per authorization

I concur.

“Barrington-Foote J.A.”

Barrington-Foote J.A.

Tab 7:

R. v. Ceal, 2012 BCCA 19

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *R. v. Ceal*,
2012 BCCA 19

Date: 20120116
Docket: CA038653

Between:

Regina

Respondent

And

Walter Albert Ceal

Appellant

**RESTRICTION ON PUBLICATION: AN ORDER HAS BEEN MADE IN THIS CASE
PURSUANT TO S. 486.4(1) AND S. 486.4(2) OF THE *CRIMINAL CODE*
THAT PROHIBITS ANY INFORMATION THAT COULD IDENTIFY THE
COMPLAINANT[S] OR WITNESS[ES] BEING PUBLISHED, BROADCAST OR
TRANSMITTED.**

Before: The Honourable Madam Justice D. Smith
The Honourable Madam Justice Garson
The Honourable Mr. Justice Hinkson

On appeal from: Supreme Court of British Columbia, June 4, 2010
(*R. v. Ceal*, Prince George Docket No. 27955-4)

Counsel for the Appellant: R.C. Gibbs, Q.C.

Counsel for the Respondent: G. McKinnon, Q.C.
M. Street

Place and Date of Hearing: Vancouver, British Columbia
November 21, 2011

Place and Date of Judgment: Vancouver, British Columbia
January 16, 2012

Written Reasons by:

The Honourable Madam Justice D. Smith

Concurred in by:

The Honourable Madam Justice Garson

The Honourable Mr. Justice Hinkson

Reasons for Judgment of the Honourable Madam Justice D. Smith:

[1] Walter Albert Ceal appeals his June 4, 2010 conviction, by judge alone, on one count each of the following *Criminal Code*, R.S.C. 1985 c. C-46 offences: sexual assault (s. 271), touching for a sexual purpose (s. 151), and inviting, counselling, or inciting touching for a sexual purpose (s. 152). The offences involved numerous and progressive instances of masturbation, fellatio, and anal intercourse over a seven year period. The victim, C.W., was between the ages of 9 and 16 when the offences were committed. The offending ended when C.W. attempted suicide and made his first disclosure while under psychiatric care following his admission to hospital.

[2] At trial, the appellant testified in his own defence. He denied the alleged offences although he admitted to having had a close “platonic” relationship with C.W. The trial judge rejected his evidence as to the non-sexual nature of their relationship. The trial judge’s rejection of this aspect of the appellant’s evidence is not challenged on appeal.

[3] The trial judge then considered C.W.’s evidence. C.W. was 18 at trial. He testified about events that occurred when he was between the ages of 9 and 16. The trial judge concluded that, despite numerous inconsistencies, C.W.’s evidence was credible and reliable. He attributed the inconsistencies to C.W.’s young age when the offences occurred, his relative immaturity, his reluctance to talk about the offences out of embarrassment, and his exhaustion after two-and-a-half days of testimony. He also found that C.W.’s evidence was corroborated in part by the appellant’s evidence and significantly by emails sent by the appellant to C.W. Those emails supported a finding that the appellant and C.W. were involved in an intimate, sexual relationship.

[4] On appeal, the appellant submits the verdict was unreasonable. He contends that the trial judge’s finding that C.W.’s evidence was credible and reliable was based on palpable and overriding errors of fact. In particular, he submits there was no evidence to support the findings that C.W. demonstrated embarrassment when speaking with police or testifying, and that C.W. was worn down by defence

counsel's cross-examination to the point that he simply agreed with his suggestions. The appellant also relies on a number of inconsistencies between C.W.'s testimony at trial and three prior statements he made to the police, to support his position that the trial judge erred in his assessment of the reliability of C.W.'s evidence.

[5] For the reasons set out below, I would dismiss the appeal. In my view, the trial judge's reasons for finding C.W.'s evidence credible and reliable do not demonstrate any palpable and overriding error. The verdict flowed logically from those findings and in my opinion is reasonable and supported by the evidence.

Background

[6] The appellant was born on January 30, 1968. He met C.W. when the child was 9 years old and living alone with his mother, who is cognitively impaired. During the first two years of their seven-year relationship, the appellant babysit C.W. two or three times a week while his mother attended night school. The trial judge found that the first time the appellant babysat C.W. he removed C.W.'s clothes and touched his penis to the point of ejaculation. Thereafter, the trial judge found, the incidents progressed to include the appellant committing fellatio on C.W. and the two taking showers together and touching each other's genitals.

[7] From the age of 11 on, after C.W.'s mother ceased attending night school, the appellant became a family friend and would regularly visit C.W. at his mother's trailer. He frequently stayed overnight. The trial judge found that, during this period, the appellant would sleep with C.W. in his bed and they would engage in sexual activity. He also found that their sexual activity progressed to include C.W., on the appellant's instruction, anally penetrating the appellant, and on one occasion the appellant attempting to anally penetrate C.W. until C.W.'s complaint of pain ended the activity.

[8] In the summer of 2006, when C.W. was 15, the appellant, with the mother's consent, moved in with C.W. and his mother and built a wooden fort in the backyard to sleep in. He lived in the fort for several months. It was a large structure in which

an adult could stand up. It had an electrical extension and held a desk, queen size bed, computer and oil heater. The trial judge found that C.W. and the appellant spent a lot of time together in the fort. C.W. would sleep overnight with the appellant and they would engage in sexual activity. During this period, the trial judge found that the appellant supplied C.W. with computer pornography, including child and lesbian pornography, and that they watched and played sexual computer games.

[9] The appellant moved out of the fort when C.W. was still 15 and moved in with his parents. C.W. visited him at his parent's residence and they would watch pornography on a computer in the basement.

[10] The appellant eventually moved into his brother's house and lived there first with his brother's family and later by himself. The appellant and C.W. would smoke marijuana together at that residence. The trial judge also found they would watch pornography on the computer and that they continued their sexual relationship at that residence.

[11] In June 2007, following an incident in which his mother bit him, C.W. decided to move out of his mother's trailer and went to live with his grandparents. His grandmother described C.W. as very immature and childish at the time. She observed that his school friends were all younger than him. He was failing grade 9 for the second time.

[12] Shortly before his 16th birthday, C.W. began to feel uncomfortable with the sexual aspect of his relationship with the appellant. However, while living at his grandparents' house, he continued to maintain contact with the appellant by email between June and August 2007. On one occasion while C.W. was visiting with the appellant, the trial judge found that the appellant made a webcam video of himself performing fellatio on C.W. The appellant also took pictures of C.W. naked.

[13] The appellant testified on his own behalf at trial. He denied any sexual activity with C.W., denied that he showed C.W. any pornography, denied that he ever showered with C.W. and denied that C.W. ever saw him naked. He testified that he

stopped babysitting C.W. when C.W. was 10 years old and thereafter had very limited contact with him until he was 12 years old, when he resumed contact at the mother's request. He said that when he visited their home he slept on the floor of C.W.'s bedroom and only began sharing a bed with him when the fort was built. He acknowledged that when he lived at his brother's house C.W. slept in his bed. He also admitted smoking marijuana with C.W. and sending him "mushy" emails. He admitted making a webcam video of C.W. on August 5, 2007, but said that C.W. had his clothes on and that he took a picture of C.W. at that time and used it as a screensaver on his computer. He acknowledged that he had a close, affectionate relationship with C.W. but denied any sexual activity with the child.

[14] The appellant called two additional witnesses on his behalf. One was a friend of the appellant's who occasionally visited him at his brother's residence. That individual said that the three of them would smoke marijuana together and C.W. spoke to him about problems he had living with his mother. On cross-examination C.W. denied he ever spoke to this individual about his problems at home.

[15] The other witness called by the appellant was his family doctor. His doctor testified about scarring and hyperpigmentation (where the skin is more brown than it is elsewhere) in the appellant's genital area from surgeries performed on the appellant shortly after birth. On cross-examination the doctor acknowledged that the scarring was "not particularly raised", it would not be "obviously bumpy or lumpy" to the touch, and the pigmentation was "not very dark". He also acknowledged that there was no pubic hair in the appellant's genital area when he examined him. On cross-examination C.W. said that he had no recollection of any unique features of the appellant's genital area.

[16] On September 9, 2007, the appellant attempted suicide by overdosing on his mother's medication. He was admitted to hospital and placed under psychiatric care. Initially he was hesitant to talk. His treating psychiatrist found that C.W. did not look depressed but more ashamed and embarrassed, "like he was hiding things". When questioned about why he overdosed, C.W. changed his story several times. This

gave rise to suspicions that he was lying and C.W. was advised that he would remain in hospital until a satisfactory explanation for the overdose was revealed. On September 14, 2007, upon further questioning, C.W. broke down crying and disclosed the lengthy history of the sexual activity between himself and the appellant. His psychiatrist concluded that this abuse was the underlying reason for C.W.'s overdose because "he was not able to cope anymore with what was going on" and had likely turned to marijuana as a "control mechanism... to make the confusing thoughts go away".

[17] Shortly thereafter, C.W. provided three statements to the police on September 17, 2007, October 3, 2007, and May 20, 2008, respectively. All three statements were entered as exhibits at trial at the request of the appellant's counsel (who was not his counsel on appeal). Each statement was taken by a different officer.

[18] The trial judge rejected the appellant's denial of a sexual relationship with C.W. He found that "[t]he accused's demeanour in the witness box was one of confidence until it came to cross-examination, when his answers became glib." He found that the accused's innocent explanations for his emails and admitted questionable conduct (such as sharing a bed with C.W.) were "absurd". He also found many consistencies between the appellant's evidence and C.W.'s evidence regarding the timeline of when and where the alleged sexual activity had occurred.

[19] Turning to C.W.'s evidence, the trial judge found that while there were many inconsistencies and some discrepancies in his evidence (which I will address below), his evidence was credible and reliable. He summarized his assessment of C.W.'s evidence as follows:

[200] My assessment of [C.W.] at trial is that growing up he developed no ability to determine for himself what was proper conduct and what was not because he lacked the maturity and guidance to do so. He did not have the same maturity other young teenage boys have and did not begin to recognize the wrongness of his conduct until he approached age 16.

[201] [C.W.] was in the stand for approximately two and a half days and of that time under cross-examination for approximately two of those days. I am sure he was exhausted by the end of it, and I have no doubt that towards the

end he found it easier to just agree with defence counsel rather than dispute everything counsel suggested.

[202] Where [C.W.] did say previous statements were not true, I interpret that he was saying he made a mistake at that time and was not agreeing that he was intentionally lying at the time. It is my impression from his police statements that he was still reluctant to talk about these incidents out of embarrassment.

[203] A lot of the inconsistencies concerned his age at which certain identifiable assaults took place, the places where certain assaults took place, and how many times a certain type of assault took place. I do not think these inconsistencies impair his reliability as to the sexual assaults by the accused. These are inconsistencies to be expected of a child recalling years prior, of a child who at the time would not have been concerned to remember the details of what and where something happened on a particular day, when he had no concerns about them at the time.

[204] What is clear, however, is that all of the alleged sexual assaults took place in the places that I have mentioned through the years from ages nine to 16, and these places were occupied by the accused in those same time periods.

...

[206] In answer to the defendant's submission that [C.W.] had a motive to lie about these allegations in order to get out of the hospital, I accept the Crown's submission that he would have had no motive to lie thereafter, right through to trial, because any motive to lie would have been satisfied once he was discharged from hospital. I therefore conclude that he has not been lying about the sexual allegations at trial.

[Emphasis added.]

[20] The trial judge found corroboration for C.W.'s allegations, in part, from the testimony of the appellant, including his admission that he and C.W. had slept together in the same bed on many occasions. He found more significant corroboration in the appellant's email communications to C.W., which included a number of suggestive and intimate comments. For example, on July 26, 2007, the appellant wrote to C.W. "Will you have a few minutes to stay and visit with me though? I really, really, really want to hug you!!!" On August 7, 2007, the appellant wrote: "I'm watching a very interesting video clip I made earlier this week... maybe sometime you'll be around again and I can show it to you. It's definitely the best filming I've ever done... I will probably watch it over and over tonight [while] working on [the website]...". On August 27, 2007, he wrote: "I miss you the moment you leave the fort...and I can hardly wait until I get to see you and spend a few precious

minutes with you again. I had a really [weird] dream about you and I building a spaceship together and exploring Mars... you had a really cute spacesuit too!" He wrote further: "I'll be online tonight sometime after I get home from work... I miss you terribly and can't wait to give you some real kisses and all my love in person...". On August 31, 2007, he wrote: "Your braces make you look even cuter... although I don't know how that could be possible".

[21] The trial judge concluded "on the basis of all the evidence that the charges have all been made out beyond any reasonable doubt". [Emphasis added.]

Discussion

[22] The appellant submits that the verdict is unreasonable pursuant to s. 686(1)(a)(i) of the *Criminal Code*. The central issue he raises on appeal relates to how the trial judge considered C.W.'s evidence. In particular, the appellant submits that the numerous admitted inconsistencies and discrepancies in C.W.'s evidence should have raised a reasonable doubt about his credibility. The appellant further contends that the trial judge's findings (as underlined in para. 19 above), in support of his determination that C.W.'s evidence was reliable, amount to palpable and overriding error as there was no evidentiary basis to support them.

(i) *The appellate review jurisdiction under s. 686(1)(a)(i)*

[23] The test for appellate review under s. 686(1)(a)(i), where a verdict is challenged as unreasonable or not supported by the evidence, is whether the verdict is one that a properly instructed jury acting judicially could reasonably have rendered: *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381 at paras. 36-37. The scope of that review is limited because of the "special position of the trier of fact on matters of credibility" and the appellate disadvantage in reweighing the evidence: *Biniaris* at para. 36 and *R. v. W.(R.)*, [1992] 2 S.C.R. 122 at 131.

[24] It is trite law that the assessment of credibility involves not only an assessment of the inconsistencies and discrepancies of a witness's evidence but

also includes an assessment of his or her demeanor in the witness stand. In other words it is not just “what was said, but how it was said”: *R. v. Howe* (2005), 192 C.C.C. (3d) 480 at para. 46 (Ont. C.A.). The opportunity to observe how a witness delivers his or testimony is the “advantage” of the trier of fact and the corresponding “disadvantage” of the appellate court: see *W.(R.)* at 131-32; *R. v. François*, [1994] 2 S.C.R. 827; *R. v. Horton*, 1999 BCCA 150; and *R. v. McLean*, 2010 BCCA 341 at para. 51.

[25] In determining whether a verdict is unreasonable or cannot be supported by the evidence, the focus of the inquiry is on whether there is any evidence to support the trial judge’s findings based on the totality of the evidence before him or her, and whether the verdict logically flows from those findings. An appellate court will not interfere with a trial judge’s assessment of credibility absent palpable and overriding error in the findings that support his or her assessment. As was noted in *R. v. Gagnon*, 2006 SCC 17, [2006] 1 S.C.R. 621:

[20] Assessing credibility is not a science. It is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events. That is why this court decided, most recently, in *H.L.*, that in the absence of a palpable and overriding error by the trial judge, his or her perceptions should be respected.

[26] This approach to appellate review under s. 686(1)(a)(i) was succinctly summarized by Mr. Justice Doherty in *Howe* at para. 47, cited with approval by this Court in *R. v. Turner*, 2010 BCCA 76 at para. 25:

[47] Some arguments on appeal, ostensibly directed at the trial judge’s reasoning process, are in reality thinly veiled invitations to the Court of Appeal to substitute its own credibility assessments for those made at trial. Where the essence of the argument advanced on appeal comes down to an assertion that the trial judge was wrong in accepting the evidence of the complainant and rejecting the evidence of the accused, this submission should be treated for what it is, an assertion that the verdict is unreasonable. The success of that assertion turns, ultimately, not on the reasoning process of the trial judge, although that process is relevant, but on whether the verdict can withstand the limited review contemplated by s. 686(1)(a)(i) of the *Criminal Code*: *R. v. Biniaris* (2000), 143 C.C.C. (3d) 1 (S.C.C.) at 20-24.

[27] Thus, absent palpable and overriding error in the findings that support a trial judge's assessment of a witness's credibility, appellate deference must be given to that assessment.

(ii) *Was palpable and overriding error demonstrated in the trial judge's assessment of the credibility and reliability of C.W.'s evidence?*

A. The inconsistencies in C.W.'s evidence

[28] The appellant identifies seven areas of inconsistencies between the appellant's evidence at trial and his statements to the police. In the course of a detailed review of C.W.'s cross-examination, the trial judge referred to each of these areas of inconsistencies, as well as others, and nonetheless concluded that C.W.'s evidence was credible and reliable.

[29] C.W. testified that the first incident occurred on the first occasion the appellant babysat him. He recalled that when he was 9 years old the appellant took off his (C.W.'s) clothes and masturbated him. He said this form of sexual activity was repeated on numerous occasions over the next two years when his mother was at night school. In his September 17, 2007 police statement, however, he said that on the first occasion the appellant performed fellatio on him. At trial he agreed that this portion of his statement to the police was incorrect. Later in that statement he told the officer that the appellant first fellated him when he was about 11. In cross-examination he agreed that he was not sure of his age when the appellant began performing fellatio on him but he thought he was 11.

[30] In his October 3, 2007 statement, C.W. also said that the first incident of sexual activity occurred the second time the appellant babysat. Again, on cross-examination he agreed that this was in error and that it had occurred the first time the appellant babysat him.

[31] The trial judge was not troubled by these inconsistencies because of the young age of C.W. at the time and the numerous occasions on which this manner of sexual activity occurred over the following two years when his mother was attending

night school. He also found that C.W. was consistent in his evidence as to the nature of the sexual activity that transpired during the first two years of his relationship with the appellant.

[32] C.W. said that the nature of the sexual activity changed after the appellant stopped babysitting him and became a regular visitor at his mother's house. Between the ages of 11 and 13 it progressed to include other sexual acts. In his September 17, 2007 statement, however, he said that there was a gap in his memory of the incidents between the ages of 9 and 13. On cross-examination he agreed that portion of his statement was incorrect. He also agreed that his answer to the next question, "A big gap meaning he, it continued but you don't remember specific incidents?", to which he replied, "Yeah", was also not true because he did remember some specific incidents.

[33] Again, the trial judge did not appear troubled by this inconsistency. At para. 202 of his reasons (cited at para. 19 above) he stated that it was his impression from the police statements that C.W. was at that time (shortly after his first disclosure on September 14, 2007), still reluctant to talk about these incidents out of embarrassment. This is one of the findings the appellant challenges.

[34] C.W. testified that the appellant did not start to remove his own clothes until after he had masturbated C.W. about five or six times during the period the appellant was babysitting him. In his May 20, 2008 statement, however, he said that that both he and the appellant were disrobed on the first occasion. On cross-examination C.W. agreed that statement was incorrect.

[35] The trial judge did not find this inconsistency of concern. The context in which C.W. made this comment was during his third police statement on May 20, 2008. The officer questioning him was different from each of the previous two interviewers. From the record of the interview, the officer observed that C.W. was still uncomfortable discussing these matters, stating to him, "[t]his is the first time that you've told me about this, you've talked to me about this okay?... this is a little bit uncomfortable for you. I can see your face turnin' red and I understand that. Okay?"

The passage in which C.W. made the impugned comment also reflected his discomfort and embarrassment:

Ah ... and as we were watching the movies...he...started to touch me and he started by rubbing me...and...then...he started to take off my clothes. Pretty soon we were both out of our clothes...he was touching me...ahm...(sigh) wow this is kinda hard. (Chuckle) And I've done it twice before. [Emphasis added.]

[36] The impugned comment was also inconsistent with C.W.'s account of the first incident in his first two statements to the police. The trial judge inferred that the inconsistency in C.W.'s third police statement was an inadvertent slip or arose from his discomfort and embarrassment with repeating the details of their sexual activity to another stranger. In my view these inferences were open to him based on the totality of the evidence.

[37] C.W. also acknowledged that his statement during the May 20, 2008 interview concerning when he first smoked marijuana with the appellant (at that time he said when he was 9 years old) differed from his evidence at trial (when he said it occurred at the residence of the appellant's brother when he was about 13 or 14). However, when the officer asked him to provide details of the incident C.W. provided a description of visiting the appellant at his brother's house, where the appellant did not live until C.W. was older. Again, the trial judge was again not troubled by this inconsistency. Later in the statement C.W. corrected his evidence on the timing of this incident. The inconsistency also concerned a peripheral matter that the appellant admitted had occurred at his brother's house.

[38] C.W. testified that anal intercourse (in which he penetrated the appellant) occurred several times in three locations: at his mother's trailer, in the fort, and at the residence of the appellant's brother. In his September 17, 2007 statement he stated that only one such incident had occurred, at the house of the appellant's brother when C.W. was 14 or 15. At trial C.W. acknowledged that the statement was incorrect in that anal intercourse had occurred on more than one occasion and at three different places. Again the trial judge noted the inconsistency but was not

troubled by it finding that C.W. was never inconsistent in his evidence as to the nature of the sexual activity between himself and the appellant, only in regard to the frequency and the location of the activity over a seven year period in which several hundred incidents of various forms of sexual activity had occurred.

[39] A further inconsistency was demonstrated over the timing of the webcam video. After he was shown the August 7, 2007 email from the appellant, C.W. testified that he believed it was filmed before August 7, 2007. In his first and second police statements he had said the event occurred either on the August 25 weekend or the previous weekend. On cross-examination C.W. admitted that the dates in his police statements were incorrect, however, when C.W. was given a context for when the incident occurred at trial (the appellant's August 7, 2007 email) C.W. was able to refresh his memory as to the date on which the event occurred. More significantly, the appellant acknowledged that he made a webcam video of C.W. on August 5, 2007, albeit he denied its sexual nature.

B. The discrepancies in C.W.'s evidence

[40] The appellant identified two areas in which there was a discrepancy in the evidence of C.W. and that of another witness. In particular, he referred to the evidence of the appellant's friend and the conversation he had with C.W. where he said C.W. talked about the problems he was having at home. C.W. denied that he had talked with this individual about the problems he was having at his mother's home. The other instance involved the evidence of the appellant's family physician about the scarring and hyperpigmentation in the appellant's genital area. C.W. said that he had no recollection of any unusual features in this area of the appellant's anatomy.

[41] The first discrepancy was not addressed by the trial judge. However, as this was a collateral matter the discrepancy did not have to be resolved by the trial judge. The second discrepancy was noted by the trial judge but again not expressly addressed by him in his reasons. However, given his summary of the physician's

evidence that the scars were not particularly raised and “not obviously so by touch” it could be inferred that he did not have any concern about this discrepancy.

[42] Again, it is trite law that a trial judge is not required to give detailed findings on every piece of evidence or disputed fact: *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3 at para. 20, and *R. v. Lonegren*, 2011 BCCA 329 at para. 23.

C. The trial judge’s approach to the inconsistencies and discrepancies in C.W.’s evidence

[43] In addressing the issue of the inconsistencies and discrepancies in C.W.’s evidence, the trial judge referred to *R. v. B.G.*, [1990] 2 S.C.R. 30 and *Horton*. In *B.G.* at 54-55, Madam Justice Wilson expressed the view that a common sense approach should be taken when assessing the credibility of children as witnesses as they “may not be able to recount precise details and communicate the when and where of an event with exactitude”. This does not mean that they have misconceived what has happened to them but simply that their experience of an event is different from that of an adult. Similarly, in *Horton* at para. 20a, Mr. Justice Esson, for the Court, said that when assessing the credibility of children, the trier of fact should take into account “the intelligence, maturity, experience and cultural background of the child” in determining the significance of any inconsistencies or discrepancies in his or her evidence. Both cases reiterate that inconsistencies and discrepancies in a witness’s evidence, be it child or adult, must still be weighed carefully in light of all of the evidence, but that their significance if the witness is a child may be lessened by considering the intelligence, age, maturity and background of the child. As Esson J.A. aptly stated:

[20] It is not a question of asking “why would the complainant lie?” or “which witness do I prefer?” In the circumstances here, where there is no finding against the truthfulness of the complainant, the ultimate question becomes “having regard to all of the evidence, or the lack of it, can the trier of fact be satisfied of guilt beyond a reasonable doubt?”

[44] In this case, while C.W. was still a “child” in the sense that at age 18 when he testified he was not over the age of majority, he was close to being an adult. However, he was also described as relatively immature for his age. Therefore the

instruction from Madam Justice McLachlin (as she then was), for the Court in *R. v. W.(R.)* at 134 is apposite in reviewing the approach taken by the trial judge in assessing C.W.'s credibility:

It is neither desirable nor possible to state hard and fast rules as to when a witness's evidence should be assessed by reference to "adult" or "child" standards - to do so would be to create anew stereotypes potentially as rigid and unjust as those which the recent developments in the law's approach to children's evidence have been designed to dispel. Every person giving testimony in court, of whatever age, is an individual, whose credibility and evidence must be assessed by reference to criteria appropriate to her mental development, understanding and ability to communicate. But I would add this. In general, where an adult is testifying as to events which occurred when she was a child, her credibility should be assessed according to criteria applicable to her as an adult witness. Yet in regard to her evidence pertaining to events which occurred in childhood, the presence of inconsistencies, particularly as to peripheral matters such as time and location, should be considered in the context of the age of the witness at the time of the events to which she is testifying.

[45] What is clear from the trial judge's reasons is that he accepted C.W.'s evidence about the numerous occasions on which the appellant masturbated and fellated him and had him perform anal intercourse on the appellant, and that the inconsistencies in C.W.'s evidence as to the timing or location of the offences did not detract from the credibility and reliability of his evidence as to the occurrence of those offences over a seven-year period.

[46] More significantly, C.W. never resiled from, nor was his credibility impeached in regard to his description of the form of the sexual abuse. Each instance of masturbation, fellatio, and anal intercourse was an independent offence. The sheer number of occasions on which each of the offences occurred, beginning when C.W. was only 9 years old, and continuing for the next seven years, clearly overshadowed the explainable inconsistencies between C.W.'s police statements and testimony, and any discrepancies between his evidence and the two defence witnesses on matters that were relatively minor or collateral. Moreover, the appellant's evidence corroborated and was consistent with much of C.W.'s evidence as to the timing and location of the sexual offences and his emails were corroborative of C.W.'s evidence

on the sexual nature of their relationship. I find no error in the trial judge's approach to the assessment of the credibility and reliability of C.W.

D. The trial judge's finding that C.W. was exhausted by the end of his testimony

[47] The appellant submits that there was no evidence to support the trial judge's statement, at para. 201 of his reasons (quoted in para. 19 above), that after two-and-a-half days on the witness stand C.W. was exhausted and found it easier to simply agree with defence counsel's suggestions rather than dispute them. I do not agree. The trial judge was in the best position to observe the effect on C.W. of a lengthy cross-examination on events of a sexual nature that had occurred on numerous occasions over a seven-year period when C.W. was still a child. This observation might not be one that is evident from "[a] lifeless transcript of the testimony" (*Howe* at para. 46), but would be made based on a witness's "responses to questions, including the tone of his voice, the look on his face, and any hesitation he had in answering the questions" (*McLean* at para. 51). This is the manner in which trial judges assess a witness's demeanor and falls uniquely within their area of expertise.

[48] In this case, however, the transcript also provides some support for this finding. On the second day of C.W.'s cross-examination, just before the lunch break, an issue arose that required C.W. to review his 67-page preliminary inquiry transcript. There was a discussion between Crown counsel and the trial judge about the need for C.W. to be given a reasonable time in which to read the transcript and whether the lunch break would be sufficient. In this context, Crown counsel said to the trial judge:

MS. AHRENS: That's putting the witness in a very difficult position. He's been on the stand since late Tuesday morning, and my sense is that he's probably tired, as we all are, and would like some lunch and a bit of a break.

COURT: I agree.

[49] The transcript also indicates that immediately before the lunch break C.W. was giving one word answers to defence counsel's questions, from which one could infer that he was becoming tired, while after the lunch break he appeared more

robust in the answers he gave in which he disagreed with many of defence counsel's suggestions.

[50] Similarly, the appellant argues that there is no evidence to support the trial judge's finding at para. 202 of his reasons (quoted in para. 19 above) that his impression from the police statements was that C.W., at that time, was still reluctant to talk about the incidents out of embarrassment. I do not agree. It must be remembered that C.W. had only a short time earlier disclosed the sexual abuse to his psychiatrist. This was a traumatic experience for him in which he broke down crying. His embarrassment and difficulty in discussing these events was apparent in his May 20, 2008 police statement (see the passage quoted in para. 35 above).

[51] Based on the totality of the evidence, I am satisfied there existed an evidentiary basis for the trial judge's assessment of the credibility and reliability of C.W.'s evidence and find no error in his approach to that assessment.

Conclusion

[52] An assertion that a verdict is unreasonable turns, ultimately, not on the reasoning process of the trial judge, but on whether the verdict can withstand the limited review contemplated by s. 686(1)(a)(i) of the *Criminal Code*, namely, whether a properly instructed jury, acting judicially, could reasonably have rendered the verdict. It is the totality of the evidence that must be considered in determining if the verdict is unreasonable. In my view the totality of the evidence in this case clearly demonstrated an evidentiary basis for the verdict rendered by the trial judge. Accordingly, I would dismiss the appeal.

"The Honourable Madam Justice D. Smith"

I AGREE:

"The Honourable Madam Justice Garson"

I AGREE:

"The Honourable Mr. Justice Hinkson"

Tab 8:

R. v. Choi, 2021 BCCA 410

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *R. v. Choi*,
2021 BCCA 410

Date: 20211101
Docket: CA46522

Between:

Regina

Respondent

And

Sung Hwan Choi

Appellant

Before: The Honourable Madam Justice Dickson
The Honourable Madam Justice Fisher
The Honourable Mr. Justice Voith

On appeal from: An order of the Provincial Court of British Columbia, dated
May 23, 2019 (*R. v. Choi*, 2019 BCPC 283, Vernon Docket 50863-1).

Counsel for the Appellant, appearing via
videoconference:

J.M. van der Walle

Counsel for the Respondent, appearing via
videoconference:

E. Laurie

Place and Date of Hearing:

Vancouver, British Columbia
December 3, 2020

Place and Date of Judgment:

Vancouver, British Columbia
November 1, 2021

Written Reasons by:

The Honourable Madam Justice Dickson

Concurred in by:

The Honourable Madam Justice Fisher
The Honourable Mr. Justice Voith

Summary:

The appellant challenges his conviction for possession of fentanyl and heroin for the purpose of trafficking. At trial the judge admitted the evidence of some drugs as well as the appellant's statement to police, despite finding that his s. 10(b) Charter rights were breached when he was questioned on arrest and s. 8 Charter rights were breached when he was strip searched. The appellant argues the judge erred by ruling that the drugs and police statement were admissible and that the verdict was unreasonable. The Crown responds that the judge erred by finding the appellant was strip searched and by characterizing the s. 10(b) breaches as moderately serious and impactful, and that his decision to admit the impugned evidence and convict the appellant should be sustained on appeal. Held: Appeal dismissed. There is no reason to interfere with the trial judge's decision to admit the drugs and the statement, and the verdict was not unreasonable. In addition, the search was not a strip search given that strip searches are limited to situations where the area of the body inspected is inherently private, whether exposed or covered by an undergarment.

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Reasons for Judgment of the Honourable Madam Justice Dickson:

[1] Sung Hwan Choi appeals his conviction for possession of a single package of fentanyl and heroin for the purpose of trafficking in the context of a dial-a-dope operation. The trial judge admitted the drugs and Mr. Choi's statement to police despite having found that his s. 10(b) *Charter* rights were breached when he was questioned on arrest and his s. 8 *Charter* rights were breached when he was strip searched at the police station. The appeal raises issues concerning the definition of a strip search articulated by the Supreme Court of Canada in *R. v. Golden*, 2001 SCC 83 and the application of recent jurisprudence on s. 24(2) of the *Charter*. It also requires this Court to decide if the verdict was reasonable given an alleged gap in the evidence regarding the single package of drugs seized by police.

[2] For the reasons that follow, I would dismiss the appeal.

Background

[3] On October 27, 2017, police were involved in an investigation into dial-a-dope drug trafficking in Vernon, B.C. As part of that investigation, they conducted surveillance of a vehicle occupied by a driver and a front seat passenger apparently engaged in such activity. Based on their observations, they decided to arrest the occupants of the vehicle. Cpl. Pollock arrested the driver, Dawn Larson. Cpl. Fradette arrested the passenger, Mr. Choi.

[4] As Cpl. Fradette approached the passenger side of the vehicle to make the arrest, Cpl. Pollock noticed Mr. Choi manipulating something around his pocket or pants. He pointed this out to Cpl. Fradette, who saw a small package he believed to be drugs located between Mr. Choi's legs on the car seat. Cpl. Fradette told Mr. Choi that he was under arrest, directed him to get out of the car and handcuffed him, then asked Cst. Catton to watch him while he retrieved his notebook. When he returned, Cpl. Fradette provided Mr. Choi with his *Charter* rights and the police caution. In response, Mr. Choi asked to speak to a lawyer.

[5] Cst. Catton conducted a pat-down search of Mr. Choi incidental to the arrest after Cpl. Fradette had advised him of his *Charter* rights. He confirmed that Mr. Choi was aware of his rights, but did not ask if he wanted to speak to a lawyer. Nor did Cpl. Fradette tell Cst. Catton that Mr. Choi had already asserted his right to consult counsel.

[6] When he was conducting the pat-down search, Cst. Catton felt a bulge in Mr. Choi's jacket pocket and asked "what is that?" Mr. Choi replied that it was "more stuff". Suspecting he meant drugs, Cst. Catton removed a sandwich bag from the jacket pocket. The bag contained 44 colour-coded packages of cocaine, methamphetamine and a heroin and fentanyl mixture, commonly referred to as a "dealer pack". The jacket also contained a wallet, \$70 in cash (not in the wallet) and some marijuana.

[7] Cpl. Pollock transported Mr. Choi and Ms. Larson to the police station and Cst. Catton and Cpl. Fradette searched the vehicle. Several cellphones and other items related to the investigation were located and seized, including a small package the Crown argued at trial was the same package Cpl. Fradette saw between Mr. Choi's legs on the car seat. The package contained a 0.29 gram mixture of heroin and fentanyl.

[8] At the police station, Cpl. Pollock searched Mr. Choi as part of the booking-in process. The search occurred in the booking-in area, which is monitored by a video-recording camera that broadcast to another room containing several screen monitors. A female guard was working at a computer behind the desk at the time. After obtaining Mr. Choi's personal information, Cpl. Pollock followed his usual booking-in practice, which is designed to minimize physical contact while ensuring that individuals placed into police cells have no means of harming themselves and no access to consuming drugs.

[9] Cpl. Pollock began the search by removing Mr. Choi's handcuffs. He had Mr. Choi remove his own shoes and jacket, and, after offering him others, cut the drawstring on his pants for safety reasons. Next, he directed Mr. Choi to stand

facing the wall and place his hands on the wall to steady himself. Cpl. Pollock then lifted up Mr. Choi's shirt to the mid-chest area to see if there was anything in it. When he did so, a small part of the waistband of Mr. Choi's underwear was visible above the waistband of his pants.

[10] Cpl. Pollock pulled the elastic waistband of Mr. Choi's pants away from his body and examined it for weapons and drugs. In doing so, he was able to see the top of Mr. Choi's underwear all the way around his waist. Holding the waistband of Mr. Choi's pants back slightly, Cpl. Pollock ran his fingers around it and visually inspected the waistband of his underwear to check for hidden items. Next, after letting the waistband of the pants go, he felt down each of Mr. Choi's legs and inspected the pants pockets, at which point the search was over. The entire booking-in process took about six minutes. The waistband aspect of the search lasted about ten seconds. Nothing was located in the course of the search.

[11] When the booking-in process was complete, Mr. Choi spoke to counsel. Shortly thereafter, he provided a warned statement to Cpl. Pollock. In the statement, Mr. Choi admitted that he was selling drugs that day, that one of the seized cell phones was a drug phone and that he had made one sale of \$50, so \$20 of \$70 in his jacket pocket belonged to him. He also told Cpl. Pollock that he used marijuana and cocaine.

At Trial

[12] Mr. Choi and Ms. Larson were jointly charged with three counts of possession for the purposes of trafficking in relation to the seized cocaine, heroin and fentanyl mixture and methamphetamine. At the outset of the trial, they applied for the exclusion of the evidence on the basis that the police lacked reasonable grounds for their arrests. Mr. Choi also alleged that Cst. Catton breached his s. 10(b) *Charter* rights when he questioned him during the pat-down search and that Cpl. Pollock unlawfully strip searched him at the police station. He admitted that he made his warned statement to Cpl. Pollock voluntarily.

[13] The parties agreed that the evidence of Cpl. Pollock, Cpl. Fradette and Cst. Catton would be heard in the *voir dire* on the alleged *Charter* breaches, including their trial evidence. As to exhibits, Crown counsel advised that Cst. Catton was the exhibits officer and he understood that neither accused took issue with the care and continuity of the exhibits. He also advised that he intended to lead Cst. Catton through his evidence and “if my friends have any concern with what I am doing I am quite confident they’ll let me know”. Following these introductory remarks, he called the Crown witnesses, each of whom testified about their observations and beliefs in connection with their dealings with Mr. Choi.

Voir Dire

[14] Cpl. Pollock was the first Crown witness. After describing the investigation and arrests, he testified regarding his search of Mr. Choi at the police station. In doing so, he played the video of the search, which was marked as an exhibit. The video shows that those parts of Mr. Choi’s underwear covering his buttocks and groin areas were not rendered visible in the course of the search.

[15] Cpl. Pollock began this part of his testimony by explaining the purpose of the search, namely, to ensure that Mr. Choi had no means to harm himself and no access to further drugs. He also stated that, as a matter of policy, he had followed the same procedure throughout his 15-year career when booking-in prisoners. Specifically, he stated, “we have to search everybody coming into cells for any contraband, weapons, anything that can harm them, and to—in cells and get them down to one layer of clothing and it’s a regular ... I do a thorough search, checking anywhere where something could be hidden ...” He went on to state that it was common for people to bring drugs and needles into the cells and that the waistband is a common place in which to hide such things, which is why he pulled the waistband of Mr. Choi’s pants away from his body during the search. He stated further that “needles are a very common thing in Vernon and I don’t like sticking my hands anywhere I can’t see for my own safety. I don’t want to get poked.”

[16] On cross-examination, Cpl. Pollock testified that he did not believe Mr. Choi had hidden drugs in his underwear, nor did he believe that he was conducting a strip search. Rather, “[t]o me this was a standard search, part of the booking-in process. I mean I considered it still to be a search incidental to arrest”. However, he accepted that the search could be interpreted as a strip search under the R.C.M.P. National Guidelines definition, namely, “the removal or rearrangement of some or all of the clothing of a person ... so as to permit a visual inspection of their private areas, genitals, buttocks, breasts, or undergarments”. He went on to state that, while he did not mean “to split hairs,” he did not “pull [Mr. Choi’s] pants down and have a good look at the underwear”. Rather, he said, he visually inspected “the area of the waistline to make sure there was nothing there and in doing so I exposed some of the underwear. If that’s a strip search, it’s a strip search, and I didn’t intend it to be ... I never pulled the underwear away.”

[17] Cpl. Pollock also testified that he did not seek authorization for the search from a senior officer, as is required for a strip search because he did not believe that he was conducting a strip search. He acknowledged that, while he did not recall receiving specific training on strip searches, he would have read the R.C.M.P. policy at some point. However, he stated “[t]he exposure of the undergarment – obviously I missed something in there, Your Honour. I – I see the – I see the issue. I didn’t believe it to be a strip search at the time.”

[18] Cpl. Fradette was the next Crown witness. He described arresting Mr. Choi, at which point, he said, “I could see a little baggy between his ... legs on the seat ... that I believed was ... drugs”. He also confirmed that he assisted Cst. Catton with the search of the vehicle “for evidence in relation to the ... offence”.

[19] Cst. Catton was the final Crown witness. He testified that he joined Cpl. Pollock and Cpl. Fradette at the scene of the arrest and briefly took custody of Mr. Choi. Cst. Catton confirmed that he conducted a pat-down search of Mr. Choi incidental to the arrest and, after feeling a bulge in his jacket pocket, retrieved a sandwich bag full of drugs from his jacket before returning him to Cpl. Fradette’s

custody. He also confirmed that prior to retrieving the drugs he asked Mr. Choi about the bulge in his pocket, but did not determine whether Mr. Choi wanted to speak to a lawyer before questioning him about the bulge.

[20] Cst. Catton went on to say that he was designated the exhibit officer for the investigation. He testified that, as such, his task was to formally seize and catalogue any exhibits believed to be important to the investigation that he or other officers located and to take photographs of the seized exhibits at the detachment. On direct examination, he had this exchange with Crown counsel regarding photograph 32:

Q: ... Constable, if you could turn to page 16, please, and photograph 32, now this is a photograph of a single individually-prepackaged quantity of heroin and Fentanyl that was located on the passenger seat between the legs of Mr. Choi?

A: Yes, Your Honour, that's what I was made aware of. I wasn't the one that located it, but I was advised that.

Q: And – but you – and then you formally seized it and had a sample of that sent off as well?

A: Yes, that's correct, Your Honour.

[21] Neither defence counsel objected to these questions or answers. Neither Mr. Choi nor Ms. Larson testified on the *voir dire*.

[22] At the conclusion of the *voir dire*, Mr. Choi argued that he was unlawfully arrested and unlawfully searched incidental to the arrest, and thus that his rights under ss. 8 and 9 of the *Charter* were violated. He also argued that his s. 10(b) *Charter* rights were violated when Cst. Catton asked him about the bulge in his jacket. In his submission, the police did not have reasonable and probable grounds to arrest him and Cst. Catton was not entitled to search or question him. Nor, he submitted, was Cpl. Pollock entitled to strip search him at the station, which he did in an unreasonable way.

***Voir Dire* Ruling on *Charter* Violations**

[23] The judge found that the police had reasonable and probable grounds to arrest Mr. Choi and he was not detained arbitrarily. However, he concluded the search at the police station fell within the definition of a strip search articulated by

the Supreme Court of Canada in *Golden*. In reaching this conclusion, he cited the definition in *Golden* set out at para. 47 of the reasons: “the removal or rearrangement of some or all of the clothing of a person so as to permit a visual inspection of a person’s private areas, namely genitals, buttocks, breasts (in the case of a female), or undergarments”. He also noted that, in *Golden*, the Court distinguished strip searches from less intrusive “frisk” or “pat-down” searches, “which do not involve the removal of clothing, and from more intrusive body cavity searches, which involve a physical inspection of the detainee’s genital or anal regions”: at paras. 53–54.

[24] The judge observed that the reference in *Golden* to the removal of clothing could mean that what occurred in Mr. Choi’s case was closer to a pat-down search than a strip search. However, he noted there was no argument on that point, so he did not rely on it: at para. 55. He went on to conclude that the search Cpl. Pollock conducted was a strip search:

[55] ... I accept that a strip search includes the re-arrangement of clothing to allow a visual inspection of underwear and does not require that clothing be removed. A lawful strip search can only be done incident to a lawful arrest for the purpose of discovering weapons or evidence related to the arrest and police must establish reasonable and probable grounds justifying the strip search itself. This was a search incident to a lawful arrest. I find that this was a strip search.

[56] I find that Cpl. Pollock purposefully inspected the entire waistline including the waistline of Mr. Choi’s underwear in his search because the purpose of the search was to find anything that might be concealed. A belt or elastic waist of pants created “tension”, as he described it. He felt he had to inspect that as a place where items might be hidden. The waistband of underwear also creates “tension”. Visually inspecting the underwear fulfils the purpose of the search and is consistent with inspecting the waistband of pants. I am sure that is why he testified that his intention was to visually inspect the waistline and that it did not look like there was anything in the underwear.

[25] The judge also concluded that Cst. Catton violated Mr. Choi’s s. 10(b) *Charter* rights when he asked him about the bulge in his jacket pocket after Mr. Choi had told Cpl. Fradette he wanted to speak to a lawyer. In doing so, he found “the police officers were careless in not communicating with each other clearly,” Cst. Catton “expected an inculpatory response” and, while he tried to ensure that Mr. Choi was

fully informed of his *Charter* rights, had he known that Mr. Choi had asserted his right to counsel, Cst. Catton may have been more diligent about respecting his obligation to hold off asking potentially incriminating questions: at paras. 63, 66.

[26] After the judge delivered his ruling, the parties made their arguments on s. 24(2) of the *Charter*. Mr. Choi submitted that the connection between the ss. 8 and 10(b) *Charter* breaches and the discovery of the evidence, together with the circumstances, warranted its exclusion. His counsel also advised the judge that he would not be making any arguments in the trial if the evidence, or part of it, was ruled admissible. In response, the judge suggested it was possible that he might exclude the drugs, but admit Mr. Choi's statement to Cpl. Pollock. His counsel replied that was "a nuance that I hadn't really considered," but made no further submissions with respect to the possibility.

[27] Crown counsel argued that the drugs found in the pat-down and vehicle searches were admissible. However, he did not seek the admission of Mr. Choi's statement to Cst. Catton made during the pat-down search.

[28] The judge delivered his ruling on s. 24(2) of the *Charter* the same day counsel made their arguments, with written reasons to follow. He found that the drugs in the car and the drugs on Mr. Choi were sufficiently connected to the *Charter* violations to engage s. 24(2), but that his statement to Cpl. Pollock at the police station was not obtained in a *Charter*-infringing manner. Then, "balancing the various factors," he excluded the drugs found on Mr. Choi, but admitted the package of drugs found in the car. After the judge announced the ruling, Mr. Choi's statement was marked as a trial exhibit and the proceedings were adjourned.

Voir Dire* Ruling on s. 24(2) of the *Charter

[29] The judge began his written reasons by summarizing his conclusions on the ss. 8 and 10(b) *Charter* breaches and outlining his factual findings. In describing the search at the station, he stated that the video showed "more than the waistband of Mr. Choi's underwear became visible" during the search, but did not say how much of the underwear could be seen. He also stated that Cpl. Pollock testified he could

see the top of the underwear going all the way around but did not have a good look at it and that he did not believe, or have reason to believe, Mr. Choi had hidden drugs in his crotch or underwear: at paras. 11–12. He stated further that Cpl. Pollock regularly conducted such searches for anyone going into cells, he was aware of *Golden* but did not think it applied and he knew that a number of additional steps were required to conduct a strip search: at paras. 12–14.

[30] Next, the judge reviewed and applied the salient legal principles. On the threshold question of whether the *Charter* breaches were too remote from the evidence to justify its exclusion, he found there was a temporal and contextual connection between the drugs located on the front passenger seat and the s. 10(b) violation, which was part of the arrest and occurred a few minutes later: at para. 18. He also found the s. 10(b) violation related directly to the drugs located on Mr. Choi “temporally, contextually and causally”: at para. 19. As to the search at the police station, he said this:

[20] With respect to the strip search, there was no causal connection to the drugs and other evidence, but there was a temporal connection. It followed as a matter of course after police found the drugs and other items. There is a temporal and contextual connection between the strip search and the seized items.

[31] Turning to Mr. Choi’s statement to Cpl. Pollock, the judge found that it was entirely disconnected from the *Charter* breaches:

[21] Mr. Choi’s voluntary statement, Exhibit 3 in the *voir dire*, was obtained after he had been at the police detachment for some time and received legal advice. There was no argument advanced that it was obtained in violation of the *Charter*. There is nothing in it that suggests it may have been influenced by the prior *Charter* violations. It was not caused by the prior *Charter* violations and I find the legal advice and passage of time both serve to entirely disconnect it from the prior *Charter* violations. It was too remote and not obtained in a manner that violated his rights. The threshold test is not met for it. It is admissible at trial.

[32] The judge went on to consider the three factors identified in *R. v. Grant*, 2009 SCC 32, namely, the seriousness of the *Charter*-infringing conduct, the impact of the breach on the *Charter*-protected interests of the accused and society’s interest in the adjudication of the case on its merits. He described Cst. Catton’s failure to hold off

questioning Mr. Choi as “careless” and exhibiting neither good faith nor bad faith, and he characterized the breach as moderately serious misconduct: at para. 26. As to the search conducted by Cpl. Pollock, the judge found it was “at the lowest end of strip searches,” but nevertheless “very serious *Charter* infringing conduct”: at paras. 30–31.

[33] The judge stated that the aggravating aspects of the search included its recording and potential visibility to others, Cpl. Pollock’s failure to obtain prior authorization, the lack of independent grounds and its conduct as a matter of policy. He found the fact that many arrestees were subjected to the same kind of search in the preceding 15 years made it a more serious violation and that Cpl. Pollock’s lack of training on strip searches made it a very serious systemic problem. On the other hand, he noted, the search was brief and not intended as a strip search, “the intrusion was as minimal as possible” and it was part of an otherwise lawful search conducted for a proper purpose. In addition, he found, there was no visual or physical inspection of exposed buttocks or genitals and no intentional misconduct or bad faith, and Cpl. Pollock was otherwise a diligent officer respectful of *Charter* values: at paras. 27–30. In sum, he concluded, the very serious nature of the *Charter* infringing strip search strongly supported exclusion of the evidence despite the absence of a causal connection: at para. 31.

[34] As to the impact of the breaches on Mr. Choi’s *Charter*-protected interests, the judge found that Cst. Catton’s *Charter*-infringing question significantly impacted those interests and tended to favour exclusion of some evidence. He also found that Cpl. Pollock’s search of Mr. Choi “was a moderately significant invasion of his privacy interests”: at para. 44. In reaching this conclusion, the judge rejected Crown counsel’s submission that lifting up Mr. Choi’s shirt to inspect the waistband of his pants and visually inspect his underwear was a legally “gray area”. Citing paras. 47 and 94 of *Golden*, he considered it clear that searches should generally be limited to searching over the top of clothing:

[38] [Paragraph 94 of *Golden*] makes it clear that searches should generally be limited to a search over top of clothes that does not involve lifting or re-arranging clothing. Police may only go further where circumstances

require it. There was no evidence in this case that anything more than a frisk search was required. Although the officer did it to increase his safety in case there was a sharp object in that area, he did not even suspect that he might encounter such an object. Cpl. Pollock's strip search was part of his usual routine with every person he booked into custody. The court in *Golden* also differentiated between those entering a prison, where a more intrusive search may be justified, and those who are detained at a police station - even overnight - who should not be so searched as a matter of routine.

[35] The judge went on to say that, even if visually inspecting Mr. Choi's underwear was a "gray area," Cpl. Pollock should have erred on the side of caution and treated the search as a strip search: at para. 39. He stated that in *Golden* the Court "seems to suggest that [strip searches] are inherently humiliating, degrading and will always be serious infringement of privacy and personal dignity," but "if those statements are considered to be categorical, they would preclude an assessment of the impact of a wrongful strip search on a person's protected interests in a particular case", which must be done under s. 24(2): at para. 40. He also observed that some people wear clothing that exposes their underwear, some undergarments are meant for public display and some people may find others viewing their underwear a significant intrusion on their privacy, but others may find it of little or no consequence:

[42] For most people, having others view, let alone inspect, their underwear - even the waistband - will be a significant intrusion on their privacy. For some it may be highly invasive. For others it may be of little or no consequence. Inspection of undergarments should not be an area of uncertainty, leaving police to guess whether lifting a shirt to conduct an otherwise lawful search might expose underwear and whether it is permissible in the circumstances. The violation of *Charter* rights should be prevented.

[36] Because having others view their underwear could provoke differing responses in different people, the judge considered a "bright line" approach to be desirable. In his view, such an approach would create certainty and promote *Charter* values:

[43] A bright line creates certainty and promotes *Charter* values by ensuring that privacy will be protected rather than requiring a review of judgment calls by police after the fact - a standard set decades ago. It helps protect all citizens and it protects police and the state from possibly being deprived of otherwise probative evidence. The result for police is not novel

and is fairly simple: follow the guidelines set out in *Golden*, unless the person clearly waives their rights in accordance with the law, and err on the side of caution. The Crown had ample opportunity to call evidence to support a submission that following *Golden* would create havoc or be overly burdensome for police. No evidence was led on the issue. Following the law and erring on the side of caution when in doubt may take more time, but that is part of the role of police - to respect *Charter* values and protect everyone's privacy.

[37] Applying a bright line approach, the judge found that the search was a moderately significant invasion of Mr. Choi's privacy interests. In reaching this conclusion, he noted that it had no visible impact on Mr. Choi, but occurred when he would have felt compelled to follow police directions. He also noted that, while the search was brief, it was broadcast elsewhere in the station: at para. 44.

[38] The third *Grant* factor that the judge considered was society's interest in an adjudication of the case on the merits, which clearly favoured the admission of the evidence:

[45] All of the evidence sought to be tendered is real, reliable and probative of the charges. Drug trafficking is pernicious and harms society in many ways, directly and indirectly. These are serious charges, especially Count 2 where the substance includes fentanyl. The importance of the evidence to the prosecution's case is also a factor: excluding highly reliable evidence that will, in effect, terminate or eviscerate the state's case would likely have a negative impact on the repute of the administration of justice. Excluding such evidence would significantly hinder, if not preclude, a trial on the merits. As conceded by Mr. Choi, this line of inquiry favours admission of the evidence.

[39] Finally, the judge conducted the requisite balancing exercise. In doing so, he acknowledged Mr. Choi's submission that the analysis in *R. v. McGuffie*, 2016 ONCA 365, mandated exclusion of the evidence because the first two *Grant* factors pulled in that direction: at para. 47. However, he remarked, the comments in *McGuffie* that he relied upon were made in the context of numerous and significant *Charter* violations before and leading to the discovery of the evidence, which differed from this case:

[48] [The comments at paras. 62 and 63 of *McGuffie*] were made in the context of numerous and very significant *Charter* violations that occurred before and led to the discovery of the evidence against the accused and the

reasons must be read in that light. In this case, the factual matrix is different. The Crown does not seek to have Mr. Choi's reply to Cst. Catton admitted. That was the only evidence obtained as a result of a *Charter* breach.

[40] The judge concluded his reasons by explaining his view that the drugs found on Mr. Choi should be excluded and the drug package found in the car should be admitted. As to the latter, he said this:

[50] The drug package in the car was in plain view. Mr. Choi had a minimal expectation of privacy in the vehicle. There was no causal connection between the evidence and the *Charter* violations. Excluding it would effectively terminate his prosecution. On balance, he has not met the test for its exclusion. For similar reasons, he has not met the test for exclusion of other items that are not controlled substances. They are pieces of evidence that may assist in proof of possession for the purpose of trafficking. In and of themselves, Mr. Choi has little or no privacy interest in them and there was no significant impact on his privacy rights. They were all properly obtained pursuant to lawful arrests. They are admissible.

Trial Proceedings

[41] When the trial resumed, the admissible exhibits from the *voir dire* were marked as trial exhibits. Then counsel made their closing submissions.

[42] Crown counsel invited the judge to convict Mr. Choi of simple possession of the single package of 0.29 grams of heroin and fentanyl depicted in photograph 32, which had been marked a trial exhibit. He submitted that, while Mr. Choi's statement to Cpl. Pollock suggested the package was possessed for purposes of trafficking, it was possible he possessed it for a different reason and, therefore, a conviction for possession for the purpose of trafficking would not be justified. In response, the judge challenged the proposition that there were other reasonable possibilities for which Mr. Choi could have possessed the single package of heroin and fentanyl. He emphasized there was concrete evidence that Mr. Choi did not use heroin, then asked, rhetorically, "what, on the evidence or the absence of evidence, is there to say it would be other than [the small package] was for sale?"

[43] Defence counsel submitted that the Crown case on possession was unproven because Cpl. Fradette did not testify that he picked up the small package he saw between Mr. Choi's legs and passed it to Cst. Catton and Cst. Catton testified only

that an unnamed police officer told him the package depicted in photograph 32 was located between Mr. Choi's legs, which was hearsay. Accordingly, he argued, the Crown had failed to prove that Mr. Choi had knowledge and control of that particular package of drugs, which could have been found elsewhere in the vehicle. In other words, he argued, "the continuity issue comes into play ... at the initial stages of the analysis" because, while Cpl. Fradette testified that he saw what he believed to be drugs, there was "no evidence whatsoever of him actually finding that [package] and passing it to Catton" and "no admissible evidence of any officer actually finding what looked to be drugs on the seat and then sending it over to the lab."

[44] Defence counsel made no submissions on the issue raised by the judge, namely, whether, if possession was established, the Crown had proven that Mr. Choi possessed the single package of heroin and fentanyl for the purpose of trafficking. Rather, at the conclusion of his submissions defence counsel stated "I don't intend to go to the statement to try to raise a doubt about the trafficking."

Trial Reasons

[45] After summarizing the positions of the parties and the key evidence on the question of possession, the judge identified the "real issue" as "the effect of [Cst. Catton's] testimony in response to the leading question about where the package shown in photograph 32 was found": at para. 15. In analysing that issue, he noted that Cst. Catton and Cpl. Fradette were the only officers who searched the vehicle, Cst. Fradette was the officer who knew about the package on the seat and Cst. Catton was the exhibit officer whose task it was to seize any items. He also noted there was no suggestion "that somehow the package moved from where [Cpl.] Fradette saw it before it was seized": at para. 16.

[46] The judge had no doubt that Cpl. Fradette pointed out the package he saw between Mr. Choi's legs to Cst. Catton when they were searching the vehicle so that Cst. Catton could formally seize it: at para. 17. He also had no doubt that Cst. Catton seized the package from where Cpl. Fradette pointed it out to him. He rejected the defence proposition that other drugs seized by police could have been

depicted in the photograph, which he characterized as speculation. Rather, he stated, “[o]n all of the evidence, including gaps in the evidence, there is no reasonable inference other than the photographs in Exhibit 3 show the package [Cpl.] Fradette saw between Mr. Choi’s legs at the time of arrest; and Exhibit 4 is the results of that package’s analysis”: at para. 19.

[47] The judge observed that Mr. Choi admitted to having just sold heroin, to having just started his shift that day and to using marijuana and cocaine. Given the manner in which dial-a-dope drug trafficking operates and Mr. Choi’s admission that he was actively engaged in such trafficking, he found that Mr. Choi “would have drugs ready for the next sale”: at paras. 20–21. All things considered, the judge was left with no doubt that Mr. Choi was in possession of the small package of heroin and fentanyl in question. Referring back to the “real issue”, he stated:

[22] ... Cst. Catton’s testimony does not contradict or exclude that possibility. I find that is what he meant in testifying as he did: he did not locate it but was told it had been located between Mr. Choi’s legs on the passenger seat. He then seized it from where it lay.

[48] As to the purpose of Mr. Choi’s possession, the judge observed that he was not bound by Crown counsel’s position on whether the Crown had met its burden: at para. 23. He summarized the Crown’s submission that there were plausible explanations other than Mr. Choi possessing the small package of drugs for the purpose of trafficking and noted that defence counsel “did not make any submissions at the hearing on this issue and declined to make any submissions afterwards when provided the opportunity”: at para. 24. Then he asked what other reasonable possibilities there could be in light of all of the evidence and the gaps in the evidence, but could not identify any such possibility: at paras. 25–33.

[49] The judge expressed his final conclusion like this:

[34] In the context of all of the evidence, I conclude that the package of drugs was for sale. People usually keep their own money in their wallet. There would be no reason why Mr. Choi did not have his own personal money, \$20 as he claimed, in his empty wallet, as opposed to intermingled with drug sale money. That would keep personal money and business money separate and easier to account for. The shift had just started and

Mr. Choi expected to make a significant amount of money. For him, that would not be \$50, or even \$70. He had stayed at a hotel for a few days. He had travelled from the lower mainland. Those expenses would be more than \$70. I conclude he had sold drugs that shift more than once. I repeat the evidence: the car had gone to three known 'hot spots' at the start of a selling shift, he admitted to one sale, he went directly to another 'hot spot', the Blue Moon Esso, where the Ford parked near a fence line on the south side of the parking lot, before police boxed it in. Given all of the admissible evidence and gaps in evidence, including the operation of dial-a-dope drug trafficking and his admission that he was actively engaged in trafficking different drugs in a dial-a-dope operation, I conclude Mr. Choi would have drugs ready for the next sale. That is why he had the package of drugs out that [Cpl.] Fradette saw between his legs on the passenger seat. I convict Mr. Choi of Count 2 on Information 50863-1.

On Appeal

[50] Mr. Choi raises two grounds of appeal within which several issues arise for determination:

- A. Did the judge err in law and in fact in his s. 24(2) *Charter* analysis?
 - i. Did the judge err in admitting the single package of fentanyl and heroin upon which Mr. Choi's conviction was based under the *Grant* test?
 - ii. Did the judge err in concluding that Mr. Choi's statement to Cpl. Pollock was too remote from the *Charter* breaches to engage s. 24(2)?
- B. Did the judge render an unreasonable verdict?

[51] In respect of the first ground of appeal, Mr. Choi contends that the judge relied heavily on the absence of a causal connection between the discovery of the single package of drugs and the *Charter* breaches in the balancing exercise under s. 24(2), essentially treating it as determinative. In his submission, this was a legal error. In support of his submission, Mr. Choi cites *R. v. Robertson*, 2019 BCCA 116, which he says establishes that the requirement of a connection between evidence and a *Charter* breach is unique to the threshold stage of the inquiry, and erroneously focused on his minimal privacy expectation in the vehicle, which was

irrelevant because the privacy interest at issue did not relate to the vehicle. He erred further, he says, by declining to exclude the drugs despite having assessed the breaches as serious and impactful, as mandated by *R. v. Le*, 2019 SCC 34 and *McGuffie*.

[52] Mr. Choi contends further that the judge erred in ruling his statement to Cpl. Pollock was not sufficiently connected to the *Charter* breaches to satisfy the threshold component of s. 24(2) of the *Charter*. In his submission, the judge overlooked Cpl. Pollock's many references in the statement to the inadmissible bag of colour-coded drug packages when those references carried the conversation forward and were temporally connected to his self-incriminating admissions. He also says the judge erred in finding the *Charter* breaches were disconnected from the statement by his consultation with counsel when they were obviously connected. Further, he submits, the judge's reasoning is so drastically at odds with cases such as *R. v. Flintoff*, 1998 CanLII 632 (ONCA), *R. v. Coderre*, 2016 ONCA 276 and *R. v. Lauriente*, 2010 BCCA 72, that it amounts to a severable error of law.

[53] Based on these alleged errors, Mr. Choi asks this Court to conduct its own s. 24(2) *Charter* analysis, staying faithful to the judge's untainted factual findings. In his submission, the judge's well-founded findings that Cpl. Pollock conducted a strip search, that the strip search was a serious systemic problem and that both officers lacked good faith clearly render the *Charter* breaches serious, which weighs in favour of exclusion. The same is true, he says, of the judge's findings that both *Charter* breaches significantly impacted his *Charter*-protected interests. Citing *Le* and *McGuffie*, he notes that where the first two *Grant* factors pull strongly in favour of exclusion, the third factor will "seldom, if ever" tip the balance in favour of admissibility and argues that, in this case, given the judge's findings on the serious and impactful nature of the breaches, the evidence must be excluded.

[54] In respect of the second ground of appeal, Mr. Choi contends that the judge's reasoning was fundamentally flawed because it was based on a misapprehension of Cst. Catton's evidence, namely, his meaning when he referred to "formally seizing"

exhibits. According to Mr. Choi, properly understood, Cst. Catton's evidence was that, as exhibits officer, he "formally seized" and catalogued items located by others which he did not necessarily pick up himself, so the judge was not entitled to find that Cst. Catton picked up the package of drugs from "where it lay." Nor, he says, was there any evidence of what happened to the small package that Cpl. Fradette saw between his legs in the car. Given this evidentiary gap and the Crown's burden of proof, Mr. Choi submits there was no proper basis for the judge's finding that the package of drugs upon which the conviction was based was the package observed by Cpl. Fradette and, therefore, its possession was not proved beyond a reasonable doubt.

[55] Crown counsel responds that, while she does not endorse the whole of the judge's analysis, he did not err in admitting the single package of drugs or Mr. Choi's statement to Cpl. Pollock. In particular, in her submission, the judge erred in concluding that Mr. Choi was strip searched and in characterizing Cst. Catton's s. 10(b) *Charter* violation as moderately serious and significantly impactful. However, she says, those errors did not compromise his finding that admitting the package of drugs and the statement would not bring the administration of justice into disrepute, which was reasonable and fully supported on the evidence. On the contrary, she says, recognizing both as errors underscores the solid basis upon which their admission rests. Nor, she submits, was the guilty verdict unreasonable. Rather, for the reasons expressed by the judge, the verdict was available and one that a properly instructed jury could have reached on the evidence.

Discussion

Standard of Review

[56] The standard of review to be applied to a s. 24(2) determination on whether to admit or exclude unconstitutionally obtained evidence is well-settled. Where the trial judge has considered the proper factors under *Grant* and made no unreasonable findings, the determination is owed considerable deference on appeal. However, where a s. 24(2) determination is based on a legal error, unreasonable findings or an

improper assessment of the evidence, it is not entitled to appellate deference. In such circumstances, an appellate court may conduct the s. 24(2) analysis afresh, but must do so with due regard to the judge's untainted findings of fact: *R. v. Côté*, 2011 SCC 46 at paras. 44, 51–52; *R. v. Pawar*, 2020 BCCA 251 at paras. 42, 60; *R. v. Vu*, 2013 SCC 60 at para. 67.

[57] The factual findings of a judge are subject to a standard of review of palpable and overriding error. In *Côté*, such errors were described in the s. 24(2) context as “clear and determinative” errors: *Côté* at paras. 51–52; *Pawar*, at para. 42.

[58] The standard of review to be applied when an appellate court decides whether to set aside a verdict under s. 686(1)(a)(i) of the *Criminal Code* as unreasonable or unsupported by the evidence is also well-established. The role of the appellate court is not to substitute its own view for that of the trial judge. Rather, the role of the appellate court is to re-examine and, to a limited extent, re-weigh and consider the effect of the evidence, viewed through the lens of judicial experience: *R. v. Biniaris*, 2000 SCC 15 at paras. 36–42; *R. v. Kwok*, 2002 BCCA 177 at para. 27. As Justice Cromwell explained in *R. v. Villaroman*, 2016 SCC 33, a verdict is reasonable if a properly instructed jury acting judicially could reasonably have rendered that verdict. As he also explained, where the Crown's case depends on circumstantial evidence, the question for determination is whether the trier of fact, acting judicially, could reasonably be satisfied that the guilt of the accused was the only reasonable conclusion available on the totality of the evidence: *Villaroman* at para. 55.

Section 24(2) of the *Charter*

[59] Pursuant to s. 24(2) of the *Charter*, where evidence was obtained in a *Charter*-infringing manner, it must be excluded if, having regard to all the circumstances, its admission would bring the administration of justice into disrepute. In such circumstances, exclusion is required to maintain the integrity of, and public confidence in, the justice system: *Le* at para. 139; *Grant* at paras. 68–70. In assessing whether the administration of justice would be brought into disrepute by

admitting evidence, courts focus on the overall reputé of the justice system, viewed in the long term by a reasonable person familiar with all relevant circumstances and the importance of *Charter* rights: *Le* at para. 140. In doing so, they recognize that the term “administration of justice” applies to “the processes by which those who break the law are investigated, charged and tried” and it “embraces maintaining the rule of law”, a necessary component of which is the existence of a safe and ordered community: *R. v. Omar*, 2018 ONCA 975 at para. 135, Brown, J.A. dissenting (*Omar ONCA*); rev’d 2019 SCC 32 substantially for the reasons of Brown, J.A. (*Omar SCC*).

[60] A s. 24(2) *Charter* analysis has two components. The first engages a threshold determination of whether the evidence was obtained in a manner that infringed or denied a *Charter* right; the second, an evaluation of whether the admission of the evidence obtained in a *Charter*-infringing manner would bring the administration of justice into disrepute: *Robertson* at para. 50.

[61] At the threshold stage, in determining whether evidence was obtained in a *Charter*-infringing manner courts assess the nature of the connection between the violation and the evidence obtained employing a purposive and generous approach. Evidence will be found to be tainted if the breach and the discovery of the evidence are part of the same transaction or course of conduct. A causal relationship between the breach and the discovery is unnecessary; the required connection may be temporal, contextual, causal, or a combination of the three. However, a connection that is too tenuous or too remote is insufficient. A finding on the strength of the connection between impugned evidence and a *Charter* breach is a finding of fact: *R. v. Mack*, 2014 SCC 58 at paras. 38–39; *R. v. Pino*, 2016 ONCA 389 at para. 72.

[62] At the evaluative stage, courts conduct an objective assessment of whether the admission of evidence found to have been obtained in a *Charter*-infringing manner would, having regard to all the circumstances, bring the administration of justice into disrepute. As established in *Grant*, this exercise involves three lines of

inquiry: the seriousness of the *Charter*-infringing conduct, the impact of the breach on the *Charter*-protected interests of the accused and society's interest in an adjudication on the merits. The first two lines of inquiry typically pull toward exclusion of the evidence, although they need not do so with identical degrees of force to compel its exclusion. It is their sum, not their average, that determines the extent of the pull towards exclusion. The third line of inquiry typically pulls in the opposite direction, towards admissibility: *Le* at paras. 141–142.

[63] In *McGuffie*, Justice Doherty discussed the manner in which the three lines of inquiry operate:

[62] The first two inquiries work in tandem in the sense that both pull toward exclusion of the evidence. The more serious the state-infringing conduct and the greater the impact on the *Charter*-protected interests, the stronger the pull for exclusion. The strength of the claim for exclusion under s. 24(2) equals the sum of the first two inquiries identified in *Grant*. The third inquiry, society's interests in an adjudication on the merits, pulls in the opposite direction toward the inclusion of evidence. That pull is particularly strong where the evidence is reliable and critical to the Crown's case: see *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494, at paras. 33-34.

[63] In practical terms, the third inquiry becomes important when one, but not both, of the first two inquiries pushes strongly toward the exclusion of the evidence: see e.g. *Harrison*, at paras. 35-42; *Spencer*, at paras. 75-80; *R. v. Jones*, 2011 ONCA 632, 107 O.R. (3d) 241, at paras. 75-103; *Aucoin*, at paras. 45-55. If the first and second inquiries make a strong case for exclusion, the third inquiry will seldom, if ever, tip the balance in favour of admissibility: see e.g. *R. v. Côté*, 2011 SCC 46, [2011] 3 S.C.R. 215, at paras. 81-89; *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253, at paras. 98-112. Similarly, if both of the first two inquiries provide weaker support for exclusion of the evidence, the third inquiry will almost certainly confirm the admissibility of the evidence: see e.g. *Grant*, at para. 140.

[64] In *Le*, the Supreme Court of Canada affirmed the foregoing passages from *McGuffie* in the majority discussion of the three *Grant* lines of inquiry: at paras. 141–142. In *Omar ONCA*, Justice Brown, speaking in dissent, emphasized that no overarching rule governs how the balance is to be struck and that all the circumstances must be considered in the s. 24(2) balancing exercise. He also observed that Justice Doherty's statement in *McGuffie* that "[i]f the first and second inquiries make a strong case for exclusion, the third inquiry will seldom, if ever, tip the balance in favour of admissibility" should be read in the context of the very

serious *Charter* breaches at issue and expressed concern that his statements might risk being turned into a kind of “two-strikes-and-the-evidence-is-out” rule if taken out of context: at paras. 112–121. A majority of the Court in *Omar* SCC allowed the appeal from *Omar* ONCA substantially for the dissenting reasons of Justice Brown: see also, *Pawar* at para. 98.

Did the judge err in finding that Cpl. Pollock strip searched Mr. Choi?

[65] The judge’s finding that Cpl. Pollock conducted a strip search in the booking room forms part of the basis for Mr. Choi’s argument that the judge erred in admitting the single pack of drugs and his statement. However, as noted, the Crown contends that the judge erred in finding the search amounted to a strip search. Although the issue was not raised directly by Mr. Choi as a ground of appeal, in these circumstances I consider it necessary to assess whether, as the Crown argues, the judge erred in his interpretation and application of the principles discussed in *Golden*. In my view, he did.

[66] The leading authority in Canada on strip searches incident to arrest is *Golden*. In *Golden*, the search in question occurred as an incident of the appellant’s arrest for trafficking in cocaine in a sandwich shop. After conducting a “pat-down” search and finding no weapons or drugs, the arresting officer took the appellant into a stairwell area, undid his pants and looked inside his underwear, where he saw a package protruding from his buttocks. The officer tried to retrieve the package, but a scuffle ensued and, for safety reasons, he escorted the appellant to a booth at the back of the shop, where he was forced to bend over a table. Thereafter, an officer pulled down the appellant’s underwear, exposing his buttocks and genitalia, and tried unsuccessfully to remove the package, then placed him face-down on the floor until another officer removed the package when the appellant unclenched the muscles of his buttocks. The package contained 10.1 grams of crack cocaine. At the police station, the appellant was strip searched again.

[67] The appellant applied to have the evidence obtained from the search excluded under ss. 8 and 24(2) of the *Charter*. However, it was admitted at trial and

the appellant was convicted of possession of cocaine for the purpose of trafficking. On appeal, the Supreme Court of Canada concluded that the search did not meet the common law requirements for a valid strip search, it was unreasonable and the courts below erred in finding the impugned evidence was admissible.

[68] In *Golden*, the Court emphasized the need to strike an appropriate balance between the privacy interests of the accused and the realities of law enforcement, as well as a balance between the interests of citizens “to be free from unjustified, excessive and humiliating strip searches” and those of police and society in ensuring that arrestees “are not armed with weapons that they may use against the police, themselves or others, and in finding and preserving relevant evidence”: at para. 46. It also accepted the definition of a “strip search” proposed by the appellant: “the removal or rearrangement of some or all of the clothing of a person so as to permit a visual inspection of a person’s private areas, namely genitals, buttocks, breasts (in the case of a female), or undergarments”. In doing so, the Court stated that this definition distinguished strip searches “from less intrusive ‘frisk’ or ‘pat-down’ searches, which do not involve the removal of clothing, and from more intrusive body cavity searches, which involve a physical inspection of the detainee’s genital or anal regions”: at para. 47. Applying this definition to the facts, the Court found the appellant was subjected to three separate strip searches.

[69] The Court went on to consider whether the scope of the common law power to search incident to arrest included the power to strip search. Following an extensive review of English, American and Canadian law, it answered that question in the affirmative. In conducting its review, the Court noted the four categories of searches set out in English legislation, namely, the “superficial” search, “full” search, “strip” search and “intimate” search, which it explained like this:

[57] ... Superficial searches do not require the suspect to remove any indoor clothing, while a full search may involve the removal of clothing but does not involve the removal of underclothing.

[58] A strip search, which is defined in [the English legislation] as “a search involving the removal of more than outer clothing” may only be carried out in compliance with the rules relating to strip searches set out in the [legislation] ... Although the search involves the removal of all clothing, it

should be done in such a way that the person is never completely undressed and ... [w]hile a visual inspection of genital and anal areas may be conducted, no physical contact may be made ...

[59] An “intimate” search under the [legislation] is analogous to a body cavity search ...

[70] Throughout its discussion in *Golden*, the Court placed considerable emphasis on the highly intrusive and humiliating nature of strip searches. For example, it stated, strip searches “represent a significant invasion of privacy,” are “highly intrusive” and involve “one of the most extreme exercises of police power”: at paras. 83, 89. In addition, it stated, regardless of the manner in which they are carried out, strip searches are “inherently humiliating and degrading” and have even been described by some commentators as “visual rape”: at para. 90.

[71] Ultimately, the Court held that, to be constitutionally valid, strip searches must be: incident to a lawful arrest; conducted for the purpose of discovering weapons or evidence related to the reason for the arrest; based on reasonable and probable grounds; and conducted in a reasonable manner in accordance with prescribed guidelines. Except in exigent circumstances, they should be conducted at a police station and not “in the field”: at paras. 99–102. Importantly, the Court also found that the guidelines on the conduct of strip searches in the English legislation accord with the constitutional requirements of s. 8 of the *Charter* and provide a framework for police in deciding how to conduct a *Charter*-compliant strip search:

[101] ... The following questions, which draw upon the common law principles as well as the statutory requirements set out in the English legislation, provide a framework for the police in deciding how best to conduct a strip search incident to arrest in compliance with the *Charter*:

1. Can the strip search be conducted at the police station and, if not, why not?
2. Will the strip search be conducted in a manner that ensures the health and safety of all involved?
3. Will the strip search be authorized by a police officer acting in a supervisory capacity?
4. Has it been ensured that the police officer(s) carrying out the strip search are of the same gender as the individual being searched?
5. Will the number of police officers involved in the search be no more than is reasonably necessary in the circumstances?

6. What is the minimum of force necessary to conduct the strip search?
7. Will the strip search be carried out in a private area such that no one other than the individuals engaged in the search can observe the search?
8. Will the strip search be conducted as quickly as possible and in a way that ensures that the person is not completely undressed at any one time?
9. Will the strip search involve *only* a visual inspection of the arrestee's genital and anal areas without any physical contact?
10. If the visual inspection reveals the presence of a weapon or evidence in a body cavity (not including the mouth), will the detainee be given the option of removing the object himself or of having the object removed by a trained medical professional?
11. Will a proper record be kept of the reasons for and the manner in which the strip search was conducted?

[Emphasis added.]

[72] Notably, for present purposes, the searches at issue in *Golden* were plainly strip searches. Given that context, it is perhaps unsurprising that the Court focused its analysis on the constitutional requirements of s. 8 of the *Charter* when strip searches are conducted and spent relatively limited time on the precise parameters and nuances of the definition of a strip search. That being so, it is particularly important to bear in mind the purpose and animating concerns of the *Golden* definition when that definition is interpreted and applied.

[73] In my view, Cpl. Pollock's search of Mr. Choi fell outside the *Golden* definition of a strip search, interpreted purposively, in the context of the reasons read as a whole. As I see it, to fall within the *Golden* definition a search must involve the removal or rearrangement of clothing so as to permit an inspection of the private areas of the body of an arrestee, whether those areas are fully exposed or they are covered by undergarments alone. The Court's discussion of the four English categories of searches makes it clear that the purpose of a strip search is to enable police to inspect private areas of the body, which is inherently humiliating and thus requires additional safeguards to protect personal privacy and dignity. As discussed in *Golden*, the related English guidelines set out those additional safeguards. In using the word "only" with respect to a visual inspection of an arrestee's genital and

anal areas, question 9 of the guidelines suggests that a search of this kind falls at the low end of intrusiveness for strip searches.

[74] As I have explained, the Court in *Golden* endorsed and adopted the English guidelines for the *Charter*-compliant conduct of strip searches. It also adopted counsel's definition of a strip search for purposes of its analysis. In doing so, the Court implicitly extended the English categorization of strip searches, which contemplates the removal of undergarments. Under the extended *Golden* definition of a strip search, in Canada the additional safeguards also apply where the private areas of the body to be visually searched (including female breasts) remain covered by undergarments.

[75] In this case, Cpl. Pollock rearranged Mr. Choi's clothing and visually inspected the waistband of his underwear, but not his genital or anal area, either covered or uncovered. There was nothing inherently humiliating or degrading about the search given its limited nature and the context in which it took place, namely, as part of a standard booking-in procedure at police cells. Nor was there anything to suggest that Mr. Choi found it humiliating or degrading for the officer to see the exposed waistband of his underwear. On the contrary, he was apparently and predictably unfazed by that aspect of the search. As the judge recognized, in modern times the waistband of underwear may be displayed in public in an overt and intentional way.

[76] I agree with Crown counsel that the judge erred by employing an unduly literal interpretation of the *Golden* definition of a strip search disconnected from its underlying purpose and context. In my view, the reference in that definition to undergarments must be read in the context of the preceding phrase. To repeat, the definition of a strip search articulated in *Golden* is: "the removal or rearrangement of some or all of the clothing of a person so as to permit a visual inspection of a person's private areas, namely genitals, buttocks, breasts (in the case of a female), or undergarments": at para. 47, emphasis added.

[77] Undergarments may well cover private areas of a person's body, but they are not, in and of themselves, "a person's private areas". In my view, when the reasons in *Golden* are read as a whole, it is apparent that the visual inspection contemplated by the definition is an inspection of private areas of the body, whether those body areas are exposed or covered by undergarments. It follows that the salient consideration when a court determines whether a search falls within the definition of a strip search is the private nature of the body area in question, not the nature of a garment worn under an outer layer of clothing.

[78] I also agree with Crown counsel that the cases upon which Mr. Choi relied below are distinguishable from this case. In *R. v. Pilon*, 2018 ONCA 959, the Court found that the arresting officer conducted two searches that constituted strip searches. In the first search, the officer looked inside the appellant's second pair of shorts, discovered he was not wearing underwear and observed the top of his buttocks and an elastic band attached to his penis. In the second, the officer pulled back the waistband of the appellant's shorts in an effort to visually inspect his genital area. The targeted area of the appellant's body for inspection in both searches was inherently private and, accordingly, the Court characterized the conduct as minimally intrusive strip searches. Similarly, in *R. v. Byfield*, 2020 ONCA 515, an arresting officer reached into the appellant's underwear and retrieved a package of cocaine from his groin, which the Court found was a strip search because, while the appellant's clothes were not removed, they were rearranged and his groin area was "inspected".

[79] The important point for present purposes is that the searches in both *Pilon* and *Byfield* pertained to private areas of the body of the arrestee. Neither concerned a visual inspection of a non-private area of the body covered by an undergarment. In contrast, in this case, Cpl. Pollock intentionally limited his visual inspection of Mr. Choi's body to his waistline area, which is not a private area. As I have explained, the elasticized waistband of his underwear inspected by Cpl. Pollock covered only this area of the body.

[80] In my view, the judge made a clear and determinative error in concluding that the search conducted by Cpl. Pollock was a strip search as defined in *Golden*. While I agree with the judge that, to the extent reasonably possible, a “bright line” approach to strip searches is desirable to provide certainty and promote *Charter* values, that line should be drawn when the search is categorized as a strip search, not when the s. 24(2) balancing exercise is conducted, as seemingly occurred in this case. Unless the area of the body inspected is inherently private, whether exposed or covered by an undergarment, the search will not fall into the category of a strip search and the additional safeguards will not apply.

[81] Adopting the foregoing approach strikes an appropriate balance between the privacy interests of citizens “to be free from unjustified, excessive and humiliating strip searches” and those of police and society “in ensuring that persons who are arrested are not armed with weapons ... and finding and preserving relevant evidence,” while accommodating the realities of effective law enforcement: *Golden* at para. 46. In my view, it would be impractical to require arresting officers to seek prior authorization from a senior officer or risk committing a s. 8 *Charter* violation whenever they conduct a search incident to an arrest that may expose any part of an arrestee’s underwear. It is also unnecessary to treat every search in which any part of an arrestee’s underwear is rendered visible as a strip search and apply the additional safeguards described in *Golden* in order to protect Canadian citizens from undue exposure to inherently humiliating and degrading searches at the hands of police.

Did the judge err in characterizing the s. 10(b) *Charter* violation as moderately serious and significantly impactful?

[82] In addition to erring by categorizing Cpl. Pollock’s booking-in search as a strip search, the Crown contends the judge erred in characterizing Cst. Catton’s failure to hold off questioning Mr. Choi at the arrest scene as a moderately serious s. 10(b) *Charter* violation that was significantly impactful. In its submission, recognition of this error also lends support to the judge’s conclusion that the single package of drugs and Mr. Choi’s statement were admissible under the *Grant* test, properly

applied. Again, although Mr. Choi did not raise this issue directly in his grounds of appeal, given the position of the Crown I consider it desirable to address the issue.

[83] In the Crown's submission, given the judge's findings that Cst. Catton attempted to ensure Mr. Choi was fully informed of his rights and was simply careless in communicating with Cpl. Fradette, the breach of his s. 10(b) rights fell at the low end of seriousness. In other words, the Crown says, as in *R. v. Ashby*, 2013 BCCA 334, the s. 10(b) breach in this case was merely technical and thus not moderately serious in nature. In addition, it submits, the impact of the breach on Mr. Choi's *Charter*-protected rights was insignificant given that Crown counsel did not seek to introduce his response to the impugned question as evidence and that the drug evidence was independently discoverable.

[84] In my view, the Crown's submission on this point lacks merit. I see no error in the judge's assessment of the seriousness of the s. 10(b) *Charter* breach or its impact on Mr. Choi's *Charter*-protected rights bearing in mind his related findings of fact. The judge found that, in addition to exhibiting carelessness by failing to ascertain that Mr. Choi had already asserted his right to counsel, Cst. Catton expected an inculpatory answer when he questioned him about the bulge in his jacket. His findings and assessments in this regard are reasonable and grounded in the evidence. They are entitled to deference on appeal.

Did the judge err in admitting Mr. Choi's statement?

[85] Mr. Choi contends that the judge erred in concluding his statement to Cpl. Pollock was too remote from the *Charter* breaches to satisfy the threshold component of s. 24(2) of the *Charter* and, therefore, was admissible. In his submission, the judge's findings in this regard are fraught with error. In particular, he says, the judge misapprehended the content of the statement in which Cpl. Pollock repeatedly referred to the dealer pack of drugs, which was obtained in breach of the *Charter* and ruled inadmissible. Like the officer in *R. v. Wittwer*, 2008 SCC 33, he says, Cpl. Pollock used references to that inadmissible evidence to help carry the conversation, thus leading to his incriminating admissions. Accordingly, the

connection between the *Charter* breaches and the statement was direct and obvious.

[86] In addition, Mr. Choi argues, as in *Wittwer*, contrary to the judge's finding, his intervening consultation with counsel did not disconnect the statement from the *Charter* breaches. On the contrary, they were obviously connected, temporally and contextually, particularly the strip search, which took place only an hour before. Accordingly, he says, the judge failed to give effect to binding authorities such as *Flintoff*, *Coderre* and *Lauriente*, which required him to take a generous approach to the threshold component of s. 24(2) and find a sufficient contextual connection in the circumstances of this case.

[87] I am not persuaded by these submissions.

[88] First, Mr. Choi did not make these arguments to the trial judge. Rather, as the judge noted, the defence made no submissions on the connection between the *Charter* breaches and Mr. Choi's statement to Cpl. Pollock.

[89] Second, I have concluded that the search at the station was not a strip search. Accordingly, the only *Charter* breach was the s. 10(b) breach committed by Cst. Catton at the scene of the arrest.

[90] Third, and most importantly, there is nothing to indicate that the judge misapprehended the content of the statement. Rather, in my view, he interpreted the evidence differently than Mr. Choi urges us to do.

[91] As Justice Doherty explained in *R. v. Morrissey*, (1995) 22 O.R. (3d) 514 (C.A.), a misapprehension of evidence "may refer to a failure to consider evidence relevant to a material issue, a mistake as to the substance of the evidence, or a failure to give proper effect to evidence": at 538. However, as Justice Stromberg-Stein explained in *R. v. Swales*, 2014 BCCA 350, it is not enough for an appellant to suggest a different interpretation of the evidence or point to evidence that arguably weighs against a trial judge's finding to justify appellate intervention based on a material misapprehension. Mere differences in the interpretation of the evidence do

not demonstrate that the evidence was misapprehended. They simply reflect an appellant's disagreement with the judge's different view of the evidence.

[92] The judge's finding that the content of Mr. Choi's voluntary statement to Cpl. Pollock did not suggest that he was influenced by the prior *Charter* violation was an available interpretation of the evidence. The facts are significantly different than those at issue in *Wittwer*, where an interviewing officer deliberately used a prior statement obtained in breach of the appellant's *Charter* rights to obtain incriminating admissions in the statement at issue. In contrast, in this case, unlike the statement in *Wittwer*, though connected to a *Charter* breach, the drugs did not result from that breach, nor did Cpl. Pollock know when he spoke with Mr. Choi that the dealer pack would be found inadmissible. Further, and in any event, the influential effect alleged by Mr. Choi is not obvious on the face of the statement.

[93] It is not for this Court to impose a different interpretation of the evidence than the interpretation of the judge. The judge's finding on the disconnection between the *Charter* breaches and Mr. Choi's voluntary statement is a factual finding driven by the particular circumstances of the case. It is entitled to appellate deference: *Mack* at para. 39.

Did the judge err in admitting the single package of drugs?

[94] Next, Mr. Choi contends that the judge erred in admitting the single package of fentanyl and heroin. In his submission, read closely, his reasons show the judge used the phrase "obtaining evidence as a result of" a *Charter* breach interchangeably with the concept of "causal connection" and treated the lack of a causal connection as essentially determinative. According to Mr. Choi, the judge relied heavily on the lack of a causal connection between the breaches and the package of drugs to distinguish *McGuffie*, where the impugned evidence was causally connected with the breaches at issue. However, he argues, given his conclusions that s. 24(2) was engaged and that the breaches were serious and impactful, the lack of a causal connection was no longer of any moment and the judge erred in law by considering it in the final balancing exercise.

[95] Mr. Choi goes on to argue that the judge erred in failing to apply Justice Doherty's reasoning in *McGuffie*, which, read together with *Le*, practically mandates exclusion where, as here, the first two *Grant* factors pull strongly in that direction. In addition, he argues, the judge erred in the final s. 24(2) balancing analysis by attempting to justify excluding the majority of the drugs but admitting the single package by pointing out the single package was in plain view in the vehicle, where he had a minimal expectation of privacy. However, he says, his minimal privacy interest in the vehicle was irrelevant to the final balancing exercise, given that his arrest was lawful and the privacy interest impacted by the breaches was otherwise derived.

[96] In support of his submission, Mr. Choi relies on Justice Fitch's statement in *Robertson* at para. 56 that the requirement of a connection between evidence and a *Charter* breach is unique to and at the heart of the threshold stage of the 24(2) inquiry and should not be similarly incorporated into the evaluative stage. He also relies on the Supreme Court of Canada's endorsement in *Le* of Justice Doherty's reasoning in *McGuffie*. In his submission, in upholding Justice Brown's dissent in *Omar SCC*, the Court should not be taken to have endorsed his narrow view of *McGuffie*, which view was expressed in *obiter* and does not align with *Le* or the well-established principle that the third *Grant* factor cannot be permitted to overwhelm a s. 24(2) analysis.

[97] I am not persuaded by these submissions.

[98] The judge was required to consider all the circumstances in his s. 24(2) analysis. He did not err in taking the lack of a causal connection between the breaches and the discovery of the package into account at the evaluative stage of the analysis. While not required, the lack of a causal connection was one aspect of the overall circumstances for consideration in the final balancing exercise: see *R. v. Perjalian*, 2011 BCCA 323 at para. 66.

[99] Contrary to Mr. Choi's submission, *Robertson* does not suggest the nature and extent of the connection between impugned evidence and a *Charter* breach is

irrelevant at the evaluative stage of a s. 24(2) analysis. In *Robertson*, this Court simply held that the judge erred by incorporating an additional requirement of a connection between the breach of a third party's *Charter* rights and the appellant at the evaluative stage. As to Mr. Choi's submission on the combined effect of *Le*, *Omar SCC* and *McGuffie*, I do not accept that their practical effect is to mandate the admission of evidence whenever *Charter* breaches are found to be serious and impactful. On the contrary, as Justice Brown emphasized in *Omar ONCA*, *McGuffie* did not purport to establish an inflexible "two-strikes-and-the-evidence-is-out" rule. The Court in *Le* did not hold otherwise.

[100] In this case, the judge considered the proper factors under *Grant* and made no unreasonable findings. His determination is owed appellate deference. I would not accede to this ground of appeal.

Was the verdict unreasonable?

[101] Finally, Mr. Choi contends that the verdict is unreasonable. In his submission, there was an unbridgeable gap in the evidence regarding the single package of fentanyl and heroin that the judge found was in his possession. In particular, Mr. Choi says, there was no admissible evidence that the package of fentanyl and heroin "seized" by Cst. Catton was the same package that Cpl. Fradette saw between his legs in the vehicle, nor was the inference that they were one and the same the only reasonable inference available on the evidence.

[102] In support of his submission, Mr. Choi argues that it is clear from a close examination of Cst. Catton's testimony that he did not mean to suggest he would invariably pick up items from where they were found by the locating officer when he spoke of formally "seizing" them. Rather, he says, properly understood, Cst. Catton's testimony was that, in his capacity as exhibits officer, he formally "seized" and catalogued exhibits that he did not necessarily pick up personally. According to Mr. Choi, the judge misapprehended his evidence on this critical point. In addition, he says, the evidence was that Cst. Catton did not locate the package of drugs in question. Rather, the evidence was that he was told where the package was located

by an unnamed officer, which was inadmissible hearsay as to the location of the package.

[103] Mr. Choi goes on to submit that the only admissible evidence that he possessed the package of fentanyl and heroin formally seized by Cst. Catton was circumstantial in nature. However, he says, there were other reasonable inferences that were also available on the evidence. For example, he says, the small package Cpl. Fradette saw between his legs could have contained candy or pills, not fentanyl and heroin. Further, the “mysterious” origin of the small package, as the judge described it, weighed in favour of the defence and not the Crown, which bore the burden of proving possession beyond a reasonable doubt.

[104] According to Mr. Choi, when the judge’s misapprehension of Cst. Catton’s evidence is cleared away and the record is re-examined it becomes apparent that the totality of the evidence did not eliminate reasonable possibilities inconsistent with his guilt. In particular, he says, the totality of the evidence did not and could not prove to the criminal standard that the small package Cpl. Fradette saw between Mr. Choi’s legs was the same package seized by Cst. Catton, which was later found to contain fentanyl and heroin. In his submission, it follows that the verdict was unreasonable and this Court should enter an acquittal.

[105] I do not accept this submission.

[106] The judge’s finding that the small package Cpl. Fradette saw between Mr. Choi’s legs was the same package that Cst. Catton seized was reasonable and available on the evidence for the detailed reasons that he articulated. Although the evidence connecting the two was not adduced as fully and directly as it might have been by the Crown, the explanation for this approach is clear. As noted near the outset of these reasons, Crown counsel was essentially invited by defence counsel to lead Cst. Catton through his testimony on the “care and continuity” of the exhibits and no objection was taken to the hearsay aspect of his testimony to the effect that the small package “was located on the passenger seat between the legs of Mr. Choi.” While this did not relieve the Crown of its burden to prove the case

beyond a reasonable doubt on admissible evidence, it does place the purported evidentiary gap of which Mr. Choi now complains into its proper context.

[107] As the Court explained in *Villaroman*, circumstantial evidence need not totally exclude all other conceivable inferences and a verdict is not unreasonable simply because alternative possibilities do not raise a doubt for a trier of fact. It is for the trier of fact to decide whether “any proposed alternative way of looking at the case is reasonable enough to raise a doubt”: at para. 56. In this case, in my view, the judge was entitled to find on the admissible evidence that Cst. Catton seized the package from where Cpl. Fradette pointed it out to him and to infer that the package later found to contain fentanyl and heroin was the same package that Cpl. Fradette saw between Mr. Choi’s legs.

[108] On this ground of appeal, Mr. Choi is largely repeating his trial arguments and inviting this Court to interpret the evidence differently than did the trial judge. As previously discussed, that is not the role of this Court. I would not accede to this ground of appeal.

Conclusion

[109] For all of the foregoing reasons, I would dismiss the appeal.

“The Honourable Madam Justice Dickson”

I AGREE:

“The Honourable Madam Justice Fisher”

I AGREE:

“The Honourable Mr. Justice Voith”

Tab 9:

R. v. Clark, 2005 SCC 2

Daryl Milland Clark *Appellant*

v.

Her Majesty The Queen *Respondent*

and

Attorney General of Ontario *Intervener*

INDEXED AS: R. v. CLARK

Neutral citation: 2005 SCC 2.

File No.: 29976.

2004: November 2; 2005: January 27.

Present: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR
BRITISH COLUMBIA

Criminal law — Disorderly conduct — Indecent acts — Public place — Criminal Code prohibits wilfully doing indecent act in public place — Whether masturbating in illuminated room before uncovered window while unknowingly being observed by neighbours is indecent act in public place — Whether living room “public place” within meaning of ss. 150 and 173(1)(a) of Criminal Code — Meaning of word “access” in definition of “public place” in s. 150 of Criminal Code.

The accused was observed masturbating near the uncovered window of his illuminated living room by neighbours from the privacy of their darkened bedroom, across contiguous back yards, from a distance of 90 to 150 feet. The police were summoned. They observed the accused from “just below the navel up” from the neighbour’s bedroom and “from about maybe the neck or the shoulders up” from street level. The accused was charged under ss. 173(1)(a) and 173(1)(b) of the *Criminal Code*. Section 173(1) makes it an offence to wilfully do an indecent act (a) “in a public place in the presence of one or more persons”, or (b) “in any place, with intent thereby to insult or offend any person”. The trial judge convicted the accused under s. 173(1)(a) after finding he had converted his living room into a “public place” but acquitted him under s. 173(1)(b) after finding that it did not appear the

Daryl Milland Clark *Appelant*

c.

Sa Majesté la Reine *Intimée*

et

Procureur général de l’Ontario *Intervenant*

RÉPERTORIÉ : R. c. CLARK

Référence neutre : 2005 CSC 2.

N° du greffe : 29976.

2004 : 2 novembre; 2005 : 27 janvier.

Présents : La juge en chef McLachlin et les juges Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella et Charron.

EN APPEL DE LA COUR D’APPEL DE LA
COLOMBIE-BRITANNIQUE

Droit criminel — Inconduite — Actions indécentes — Endroit public — Code criminel interdisant de commettre volontairement une action indécente dans un endroit public — La personne qui, sans savoir que des voisins l’observent, se masturbe dans une pièce éclairée, près d’une fenêtre dont les rideaux sont ouverts, commet-elle une action indécente dans un endroit public? — Un salon est-il un « endroit public » au sens de l’art. 150 et de l’art. 173(1)a) du Code criminel? — Sens du mot « accès » dans la définition de l’expression « endroit public » à l’art. 150 du Code criminel.

À partir de leur chambre à coucher non éclairée qui était située à une distance de 90 à 150 pieds de l’endroit où se trouvait l’accusé et qui donnait sur leurs arrière-cours contiguës, des voisins ont vu l’accusé se masturber près de sa fenêtre de salon alors que les rideaux étaient ouverts et que la pièce était éclairée. Les policiers appelés sur les lieux ont pu apercevoir l’accusé « jusqu’en dessous du nombril » lorsqu’ils se trouvaient dans la chambre à coucher des voisins en question, et d’« à peu près à partir du cou ou des épaules en montant » lorsqu’ils étaient au niveau de la rue. Des accusations fondées sur les al. 173(1)a) et 173(1)b) du *Code criminel* ont été portées contre l’accusé. Aux termes du par. 173(1), est coupable d’une infraction quiconque commet volontairement une action indécente a) « dans un endroit public en présence d’une ou de plusieurs

accused knew he was being watched or intended to insult or offend any person. The Supreme Court and the Court of Appeal of British Columbia upheld the conviction. The Court of Appeal concluded that the accused had “intentionally conducted himself in an indecent way, seeking to draw the attention of others”.

Held: The appeal should be allowed. The accused’s conviction is vacated and an acquittal entered.

The facts as found by the trial judge do not support the accused’s conviction. The accused’s act was not committed in a “public place” within the meaning of ss. 150 and 173(1)(a) of the *Criminal Code*. A “public place” is defined in s. 150 as “any place to which the public have access as of right or by invitation, express or implied”. “Access” means “the right or opportunity to reach or use or visit” and not the ability of those who are neither entitled nor invited to enter a place to see or hear from the outside, through uncovered windows or open doors, what is transpiring within. Interpreting “public place” as contemplating physical as opposed to visual access renders the whole of s. 173(1) more coherent and is consistent with Parliament’s legislative distinction in the *Criminal Code* between conduct that is criminal because it occurs “in a public place” and conduct that is criminal because it is “exposed to public view” or “open to public view”. [11-14] [42-51]

The Court of Appeal erred by departing from the trial judge’s appreciation of the evidence in the absence of a finding that he had committed a palpable and overriding error. It also erred in finding that the conviction was supported by case law that expands the meaning of a “public place” to include the place where the witnesses to an indecent act are physically situated. Even if correctly decided, this case law does not support the conviction since the accused’s act did not occur in a public place within the expanded meaning. [9-10] [24-32]

Although the definition of “*endroit public*” in the French version of s. 150 contains no equivalent of the

personnes », ou b) « dans un endroit quelconque avec l’intention d’ainsi insulter ou offenser quelqu’un ». Le juge du procès a déclaré l’accusé coupable quant à l’accusation fondée sur l’al. 173(1)a), après avoir conclu qu’il avait converti son salon en « endroit public », mais il l’a acquitté relativement à celle fondée sur l’al. 173(1)b), après avoir conclu qu’il ne paraissait ni avoir su qu’on l’observait et ni avoir eu l’intention d’insulter ou offenser quelqu’un. La Cour suprême et la Cour d’appel de la Colombie-Britannique ont confirmé la déclaration de culpabilité. La Cour d’appel a décidé que l’accusé s’était « volontairement conduit d’une manière indécente, cherchant à attirer l’attention d’autrui ».

Arrêt : Le pourvoi est accueilli. La déclaration de culpabilité de l’accusé est annulée et un acquittement est inscrit.

Les faits constatés par le juge du procès n’étaient pas la déclaration de culpabilité de l’accusé. L’action de l’accusé n’a pas été commise dans un « endroit public » au sens de l’art. 150 et de l’al. 173(1)a) du *Code criminel*. À l’article 150, l’expression « endroit public » est définie comme étant « [t]out lieu auquel le public a accès de droit ou sur invitation, expresse ou implicite ». Le terme « accès » désigne la « [p]ossibilité d’aller, de pénétrer dans (un lieu), d’entrer », et non la capacité d’une personne qui n’a pas accès, de droit ou sur invitation, à un lieu de voir ou d’entendre de l’extérieur — par une fenêtre dont les rideaux sont ouverts ou par une porte ouverte — ce qui se passe à l’intérieur. L’ensemble du par. 173(1) devient plus cohérent si on rattache l’expression « endroit public » à l’accès physique plutôt que visuel, et cette interprétation s’harmonise avec la distinction que le législateur établit, dans le *Code criminel*, entre la conduite qui est criminelle parce qu’elle est adoptée « dans un endroit public » et celle qui est criminelle parce qu’elle est adoptée « à la vue du public ». [11-14] [42-51]

La Cour d’appel a eu tort de s’écarter de l’appréciation que le juge du procès a faite de la preuve, en l’absence de conclusion que ce dernier avait commis une erreur manifeste et dominante en la faisant. Elle a également eu tort de conclure que la déclaration de culpabilité était étayée par la jurisprudence qui élargit le sens de l’expression « endroit public » en considérant qu’elle vise l’endroit où se trouvent les personnes qui sont témoins d’une action indécente. Même si elle était correcte, cette jurisprudence n’étaye aucunement la déclaration de culpabilité étant donné que l’action de l’accusé n’a pas été commise dans un endroit public au sens élargi. [9-10] [24-32]

Même si la définition de l’expression « endroit public » contenue dans la version française de l’art. 150

word “includes” found in the definition of “public place” in the English version, there is no need to choose between versions because both contemplate physical as opposed to visual access. [39-41]

Cases Cited

Explained: *R. v. Keir* (1919), 34 C.C.C. 164; *R. v. Buhay* (1986), 30 C.C.C. (3d) 30; *R. v. Thallman* (1863), 9 Cox C.C. 388; **referred to:** *Stein v. The Ship “Kathy K”*, [1976] 2 S.C.R. 802; *Lensen v. Lensen*, [1987] 2 S.C.R. 672; *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377; *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 1 S.C.R. 114; *Schwartz v. Canada*, [1996] 1 S.C.R. 254; *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33; *R. v. Clifford* (1916), 26 D.L.R. 754; *R. v. Daoust*, [2004] 1 S.C.R. 217, 2004 SCC 6; *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Hutt v. The Queen*, [1978] 2 S.C.R. 476.

Statutes and Regulations Cited

An Act to amend the Criminal Code and the Canada Evidence Act, R.S.C. 1985, c. 19 (3rd Supp.), s. 7.
An Act to amend the Criminal Code (prostitution), R.S.C. 1985, c. 51 (1st Supp.), s. 1.
Criminal Code, R.S.C. 1985, c. C-46, ss. 150, 173, 174, 213.
Criminal Code, S.C. 1953-54, c. 51, ss. 158, 159.

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 Driedger, Elmer A. *Construction of Statutes*, 2nd ed. Toronto: Butterworths, 1983.

APPEAL from a judgment of the British Columbia Court of Appeal (Huddart, Hall and Saunders JJ.A.) (2003), 185 B.C.A.C. 87, 303 W.A.C. 87, [2003] B.C.J. No. 1594 (QL), 2003 BCCA 408, affirming a decision of Lander J. upholding the accused’s conviction for wilfully committing an indecent act in a public place in the presence of one or more persons. Appeal allowed.

Gil D. McKinnon, Q.C., for the appellant.

ne comporte aucun terme équivalent au verbe « includes » figurant dans la définition de l’expression « public place » contenue dans la version anglaise de cet article, il n’est pas nécessaire de choisir entre ces versions étant donné qu’elles visent toutes les deux l’accès physique plutôt que visuel. [39-41]

Jurisprudence

Arrêts interprétés : *R. c. Keir* (1919), 34 C.C.C. 164; *R. c. Buhay* (1986), 30 C.C.C. (3d) 30; *R. c. Thallman* (1863), 9 Cox C.C. 388; **arrêts mentionnés :** *Stein c. Le navire « Kathy K »*, [1976] 2 R.C.S. 802; *Lensen c. Lensen*, [1987] 2 R.C.S. 672; *Geffen c. Succession Goodman*, [1991] 2 R.C.S. 353; *Hodgkinson c. Simms*, [1994] 3 R.C.S. 377; *Toneguzzo-Norvell (Tutrice à l’instance de) c. Burnaby Hospital*, [1994] 1 R.C.S. 114; *Schwartz c. Canada*, [1996] 1 R.C.S. 254; *Housen c. Nikolaisen*, [2002] 2 R.C.S. 235, 2002 CSC 33; *R. c. Clifford* (1916), 26 D.L.R. 754; *R. c. Daoust*, [2004] 1 R.C.S. 217, 2004 CSC 6; *Bell ExpressVu Limited Partnership c. Rex*, [2002] 2 R.C.S. 559, 2002 CSC 42; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27; *Hutt c. La Reine*, [1978] 2 R.C.S. 476.

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Code criminel, L.R.C. 1985, ch. C-46, art. 150, 173, 174, 213.
Code criminel, S.C. 1953-54, ch. 51, art. 158, 159.
Loi modifiant le Code criminel et la Loi sur la preuve au Canada, L.R.C. 1985, ch. 19 (3^e suppl.), art. 7.
Loi modifiant le Code criminel (prostitution), L.R.C. 1985, ch. 51 (1^{er} suppl.), art. 1.

Doctrine citée

Driedger, Elmer A. *Construction of Statutes*, 2nd ed. Toronto : Butterworths, 1983.
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POURVOI contre un arrêt de la Cour d’appel de la Colombie-Britannique (les juges Huddart, Hall et Saunders) (2003), 185 B.C.A.C. 87, 303 W.A.C. 87, [2003] B.C.J. No. 1594 (QL), 2003 BCCA 408, qui a confirmé une décision du juge Lander qui avait confirmé la déclaration de culpabilité d’avoir commis volontairement une action indécente dans un endroit public en présence d’une ou de plusieurs personnes, prononcée contre l’accusé. Pourvoi accueilli.

Gil D. McKinnon, c.r., pour l’appelant.

M. Joyce DeWitt-Van Oosten and Kenneth D. Madsen, for the respondent.

Christine Bartlett-Hughes, for the intervener.

The judgment of the Court was delivered by

FISH J. —

I

The appellant stands convicted for having masturbated near the uncovered window of his illuminated living room.

He was first noticed by Mrs. S., a neighbour who was watching television with her two young daughters in their partially lit family room. Mrs. S. moved to another room for a better view and then alerted her husband. Together, they observed the appellant for 10 to 15 minutes from the privacy of their darkened bedroom, across contiguous backyards, from a distance of 90 to 150 feet.

The police were summoned and the appellant was charged under both s. 173(1)(a) and s. 173(1)(b) of the *Criminal Code*, R.S.C. 1985, c. C-46.

Section 173(1)(a) makes it an offence to wilfully perform an indecent act “in a public place in the presence of one or more persons”; s. 173(1)(b), on the other hand, makes it an offence to wilfully commit an indecent act “in any place, with intent thereby to insult or offend any person”.

According to the trial judge, it did not appear that the appellant knew he was being watched. Nor did the appellant intend “to insult or offend any person”. Indeed, the trial judge found that there was “an escalation of [the appellant’s] activity” when Mrs. S. left her partially illuminated family room, from which she could presumably be seen by the appellant. “[A]nd”, the trial judge added, “there is nothing to suggest . . ., in fact, to the contrary, that [the

M. Joyce DeWitt-Van Oosten et Kenneth D. Madsen, pour l’intimée.

Christine Bartlett-Hughes, pour l’intervenant.

Version française du jugement de la Cour rendu par

LE JUGE FISH —

I

L’appelant a été reconnu coupable de s’être masturbé près de sa fenêtre de salon alors que les rideaux étaient ouverts et que la pièce était éclairée.

M^{me} S. — une voisine qui regardait la télévision avec ses deux fillettes dans leur salle familiale à demi éclairée — a été la première à l’apercevoir. Celle-ci a alerté son mari après s’être rendue dans une autre pièce pour mieux voir. À partir de leur chambre à coucher non éclairée qui était située à une distance de 90 à 150 pieds de l’endroit où se trouvait l’appelant et qui donnait sur leurs arrière-cours contiguës, ils ont tous les deux observé l’appelant, à son insu, pendant 10 à 15 minutes.

La police, appelée sur les lieux, a porté contre l’appelant des accusations fondées sur les al. 173(1)(a) et 173(1)(b) du *Code criminel*, L.R.C. 1985, ch. C-46.

Aux termes de l’al. 173(1)(a), est coupable d’une infraction quiconque commet volontairement une action indécente « dans un endroit public en présence d’une ou de plusieurs personnes »; par ailleurs, aux termes de l’al. 173(1)(b), est coupable d’une infraction quiconque commet volontairement une action indécente « dans un endroit quelconque avec l’intention d’ainsi insulter ou offenser quelqu’un ».

Selon le juge du procès, l’appelant paraissait ignorer qu’on l’observait. Il n’avait pas non plus l’intention d’« insulter ou offenser quelqu’un ». En fait, le juge du procès a conclu qu’il y avait eu [TRADUCTION] « une intensification de l’activité » de l’appelant lorsque M^{me} S. a quitté la salle familiale à demi éclairée où l’appelant aurait vraisemblablement pu l’apercevoir. Le juge du procès a ajouté que [TRADUCTION] « rien n’indique [. . .] — et, en

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appellant] was aware that [Mrs. S.] was watching from the darkened bedroom window”.

6 The trial judge was satisfied, however, that the appellant had “converted” his living room into a public place and had, in that “public place”, wilfully committed an indecent act in the presence of one or more persons.

7 On these findings, the trial judge acquitted the appellant under s. 173(1)(b) but found him guilty under s. 173(1)(a). His appeals to the Supreme Court and Court of Appeal of British Columbia were dismissed.

8 In affirming the appellant’s conviction, the Court of Appeal nonetheless concluded that the appellant “intentionally conducted himself in an indecent way, seeking to draw the attention of others (members of the public) to himself on the evening in question” ((2003), 185 B.C.A.C. 87, 2003 BCCA 408, at para. 10). It was “an inescapable inference from the facts”, said the Court of Appeal, “that what the appellant was doing here was acting in an exhibitionist manner and seeking to draw attention to himself in a residential neighbourhood while he was in view of other residents” (para. 5).

9 The appellant submits that the Court of Appeal, in this regard and in other respects as well, departed impermissibly from the trial judge’s appreciation of the evidence. With respect, I agree. But since I would in any event allow the appeal on other grounds, I find it sufficient for present purposes simply to reaffirm the governing principles. Appellate courts may not interfere with the findings of fact made and the factual inferences drawn by the trial judge, unless they are clearly wrong, unsupported by the evidence or otherwise unreasonable. The imputed error must, moreover, be plainly identified. And it must be shown to have affected the result. “Palpable and overriding error” is a resonant and compendious expression of this well-established norm: see *Stein v. The Ship “Kathy K”*, [1976] 2 S.C.R. 802; *Lensen v. Lensen*, [1987] 2 S.C.R. 672; *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377; *Toneguzzo-Norvell (Guardian*

fait, c’est plutôt le contraire — que [l’appellant] savait que [M^{me} S.] l’observait par la fenêtre de sa chambre à coucher non éclairée ».

Toutefois, le juge du procès était persuadé que l’appellant avait « converti » son salon en endroit public et qu’il avait, dans cet « endroit public », commis volontairement une action indécente en présence d’une seule ou de plusieurs personnes.

Après avoir tiré ces conclusions, le juge du procès a acquitté l’appellant relativement à l’accusation fondée sur l’al. 173(1)(b), mais l’a déclaré coupable quant à celle fondée sur l’al. 173(1)(a). Ses appels devant la Cour suprême et la Cour d’appel de la Colombie-Britannique ont été rejetés.

En confirmant la déclaration de culpabilité de l’appellant, la Cour d’appel a néanmoins décidé que celui-ci [TRADUCTION] « s’[était] volontairement conduit d’une manière indécente, cherchant à attirer l’attention d’autrui (les membres du public) au cours de la soirée en question » ((2003), 185 B.C.A.C. 87, 2003 BCCA 408, par. 10). Selon la Cour d’appel, [TRADUCTION] « on peut seulement inférer des faits de la présente affaire que l’appellant a adopté un comportement exhibitionniste et qu’il cherchait à s’attirer l’attention du voisinage en s’exposant à la vue d’autres résidents » (par. 5).

L’appellant soutient qu’à cet égard, notamment, la Cour d’appel s’est écartée à tort de l’appréciation que le juge du procès a faite de la preuve. En toute déférence, je suis d’accord avec lui. Mais puisque, de toute manière, je suis d’avis d’accueillir le pourvoi pour d’autres motifs, j’estime qu’il suffit simplement, en l’espèce, de réaffirmer les principes applicables. Les cours d’appel ne peuvent pas modifier les inférences et conclusions de fait du juge du procès, à moins qu’elles soient manifestement erronées, non étayées par la preuve ou par ailleurs déraisonnables. De plus, l’erreur imputée doit être clairement relevée. Il faut aussi démontrer qu’elle a influé sur le résultat. Les mots « erreur manifeste et dominante » expriment de manière concise et éloquente cette norme bien établie : voir *Stein c. Le navire « Kathy K »*, [1976] 2 R.C.S. 802; *Lensen c. Lensen*, [1987] 2 R.C.S. 672; *Geffen c. Succession Goodman*, [1991] 2 R.C.S. 353; *Hodgkinson c. Simms*, [1994] 3 R.C.S.

ad litem of) v. Burnaby Hospital, [1994] 1 S.C.R. 114; *Schwartz v. Canada*, [1996] 1 S.C.R. 254; *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33.

It has not been suggested that the trial judge in this case committed a palpable and overriding error in his appreciation of the evidence. This appeal therefore falls to be decided by applying the law as set out by Parliament to the facts as found by the trial judge.

Section 173(1)(a) of the *Code* makes it an offence to wilfully perform an indecent act “in a public place in the presence of one or more persons”. In virtue of s. 150, “‘public place’ includes any place to which the public have access as of right or by invitation, express or implied”. Parliament has distinguished legislatively in Part V of the *Criminal Code* — the context that concerns us here — between conduct that is prohibited “in a public place” and conduct that is prohibited if it is “exposed to public view”. We should not by judicial interpretation frustrate Parliament’s manifest intention by merging these two different foundations of criminal liability.

Parliament has also created two different offences in ss. 173(1)(a) and 173(1)(b) of the *Criminal Code*. The former concerns indecent acts committed in a public place in the presence of one or more persons; the latter, indecent acts committed in any place, public or private, with intent to insult or offend any person. Here, the appellant was acquitted under s. 173(1)(b). His conviction under s. 173(1)(a) can therefore not be supported, as it was to some extent in the Court of Appeal, on grounds that were resolved finally and in the appellant’s favour when he was acquitted by the trial judge under s. 173(1)(b).

I agree with the appellant’s submission that his living room was not a public place within the meaning of s. 173(1)(a). The living room of his private home

377; *Toneguzzo-Norvell (Tutrice à l’instance de) c. Burnaby Hospital*, [1994] 1 R.C.S. 114; *Schwartz c. Canada*, [1996] 1 R.C.S. 254; *Housen c. Nikolaisen*, [2002] 2 R.C.S. 235, 2002 CSC 33.

Personne n’a laissé entendre que le juge du procès avait commis, en l’espèce, une erreur manifeste et dominante dans son appréciation de la preuve. Le présent pourvoi doit donc être tranché par l’application des règles de droit énoncées par le législateur aux faits constatés par le juge du procès.

L’alinéa 173(1)a) du *Code* interdit à quiconque de commettre volontairement une action indécente « dans un endroit public en présence d’une ou de plusieurs personnes ». À l’article 150, l’expression « endroit public » est définie comme étant « [t]out lieu auquel le public a accès de droit ou sur invitation, expresse ou implicite ». Dans le contexte qui nous occupe en l’espèce, à savoir la partie V du *Code criminel*, le législateur établit une distinction entre la conduite prohibée « dans un endroit public » et la conduite prohibée si elle est adoptée « à la vue du public ». Les tribunaux doivent éviter de contre-carrer l’intention manifeste du législateur au moyen d’une interprétation confondant ces deux différents fondements de responsabilité criminelle.

Le législateur a également créé deux infractions distinctes aux al. 173(1)a) et 173(1)b) du *Code criminel*. Le premier alinéa porte sur les actions indécentes commises dans un endroit public en présence d’une seule ou de plusieurs personnes, et le second, sur les actions indécentes commises dans un endroit quelconque, public ou privé, avec l’intention d’insulter ou offenser quelqu’un. Dans le cas qui nous occupe, l’appelant a été acquitté relativement à l’accusation portée en vertu de l’al. 173(1)b). Sa déclaration de culpabilité fondée sur l’al. 173(1)a) ne saurait donc être justifiée, comme l’a fait dans une certaine mesure la Cour d’appel, par des motifs sur lesquels le juge du procès s’est prononcé de manière définitive et en faveur de l’appelant en examinant l’accusation portée contre lui en vertu de l’al. 173(1)b).

Je retiens l’argument de l’appelant voulant que son salon ne soit pas un endroit public au sens de l’al. 173(1)a). Le salon de sa résidence privée n’était

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was not a place “to which the public [had] access as of right or by invitation, express or implied”. From both the text and the context, it seems obvious to me that “access”, as used here, means “the right or opportunity to reach or use or visit”: *The Canadian Oxford Dictionary* (2001), at p. 7. I do not believe it contemplates the ability of those who are neither entitled nor invited to enter a place to see or hear from the outside, through uncovered windows or open doors, what is transpiring within.

14 In my respectful view, the trial judge thus erred in concluding that the appellant’s living room had been “converted” by him into a public place simply because he could be seen through his living room window and, though he did not know this, was being watched by Mr. and Mrs. S. from the privacy of their own bedroom 90 to 150 feet away.

15 I shall explain more fully below why I would allow the appeal on this ground alone. First, however, a closer look at the facts and the proceedings below.

II

16 The appellant was first noticed by Mrs. S. while she was watching television with her two young daughters in their family room, which was lit up only by the television screen and by light from the adjoining kitchen. Mrs. S. agreed with counsel’s suggestion that, from there, she “didn’t really see anything untoward other than some movement”. But for reasons that she explained at trial, Mrs. S. was troubled and, to get “a better angle to view”, she “ran” to her bedroom and then summoned her husband.

17 From that vantage point, Mr. and Mrs. S. observed the appellant for 10 or 15 minutes. Taking care to escape his notice, they looked out through the uncovered part of their bedroom window, below their partially lowered blinds. And, to ensure that the appellant was in fact doing what he appeared to

pas un lieu « auquel le public a[vait] accès de droit ou sur invitation, expresse ou implicite ». D’après le texte et le contexte, il me paraît évident que le terme « accès », utilisé dans cette phrase, signifie « [p]ossibilité d’aller, de pénétrer dans (un lieu), d’entrer » : *Le Nouveau Petit Robert* (2003), p. 15. Cette disposition n’envisage pas, selon moi, la capacité d’une personne qui n’a pas accès, de droit ou sur invitation, à un lieu de voir ou d’entendre de l’extérieur — par une fenêtre dont les rideaux sont ouverts ou par une porte ouverte — ce qui se passe à l’intérieur.

J’estime donc, en toute déférence, que le juge du procès a commis une erreur en concluant que l’appelant avait « converti » son salon en endroit public du seul fait qu’on pouvait l’apercevoir par la fenêtre de son salon et que, même s’il ne se doutait de rien, M. et M^{me} S. l’observaient à partir de leur chambre à coucher située à une distance de 90 à 150 pieds de là.

J’expliquerai davantage plus loin les raisons pour lesquelles je suis d’avis d’accueillir le pourvoi pour ce seul motif. Cependant, je vais commencer par examiner de plus près les faits et les décisions des instances inférieures.

II

La première à apercevoir l’appelant a été M^{me} S. qui regardait la télévision avec ses deux fillettes dans leur salle familiale éclairée uniquement par l’écran du téléviseur et la lumière provenant de la cuisine. M^{me} S. s’est dite d’accord avec l’avocat lorsqu’il a indiqué qu’à partir de cet endroit elle [TRADUCTION] « n’avait vraiment rien remarqué d’anormal, sauf un mouvement ». Mais, pour les motifs que M^{me} S. a expliqués au procès, tracassée, elle [TRADUCTION] « a couru » jusqu’à sa chambre à coucher pour « mieux voir » et a ensuite demandé à son mari de l’y rejoindre.

À partir de cet endroit, M. et M^{me} S. ont observé l’appelant pendant 10 à 15 minutes. Prenant garde d’être aperçus, ils ont regardé par la fenêtre de leur chambre, en dessous du store partiellement baissé. Pour confirmer ce que l’appelant leur paraissait être en train de faire, M. S. est allé chercher des

them to be doing, Mr. S. fetched a pair of binoculars and a telescope. He also tried, unsuccessfully, to videotape the appellant in action.

Mr. and Mrs. S. were understandably concerned. In the words of Mr. S., they feared that the appellant was “masturbating to our children”. They therefore called the police.

The first officer arrived within five minutes. From the bedroom of Mr. and Mrs. S., the officer could see the appellant from “just below the navel up”. The appellant had his hand in front of him “and there was a hand motion consistent with somebody masturbating”. At the back of the house, looking up to the appellant’s living room from street level, the officer could only see the appellant “from about maybe the neck or the shoulders up because of the angle”.

It did not appear to the trial judge “that [the appellant] actually knew he was being watched”. There was nothing to suggest, the trial judge said, “that [the appellant] was aware that [Mrs. S.] was watching from the darkened bedroom window”. He found that the evidence in fact indicated the contrary. The appellant was, however, seen by Mrs. S. and “could easily have been seen by the children, but apparently was not”.

On these facts, the trial judge concluded that the appellant had wilfully committed “an indecent act . . . in a public place in the presence of one or more persons”, thereby committing the offence set out in s. 173(1)(a) of the *Criminal Code*.

The trial judge was not satisfied, however, that the appellant had committed this indecent act “with intent thereby to insult or offend any person”, as required by s. 173(1)(b) of the *Code*. He therefore acquitted the appellant of the charge laid against him under that section.

The appellant’s conviction under s. 173(1)(a) was affirmed by the Court of Appeal for British Columbia. He now appeals to this Court, with leave, from the decision of the Court of Appeal.

jumelles et un télescope. Il a également tenté, en vain, de filmer l’appelant à l’aide d’un caméscope.

M. et M^{me} S. étaient, bien entendu, inquiets. Pour reprendre les termes de M. S., ils craignaient que l’appelant se [TRADUCTION] « masturbe en regardant dans la direction de [leurs] enfants ». Ils ont donc appelé la police.

Le premier policier est arrivé en moins de cinq minutes. De la chambre à coucher de M. et M^{me} S., le policier était en mesure d’apercevoir l’appelant [TRADUCTION] « jusqu’en dessous du nombril ». L’appelant avait la main devant lui [TRADUCTION] « et paraissait se masturber ». De l’endroit où il se trouvait dans l’arrière-cour de l’appelant, au niveau de la rue, le policier ne pouvait voir ce dernier qu’[TRADUCTION] « à peu près à partir du cou ou des épaules en montant, vu l’angle de son regard ».

Selon le juge du procès, [TRADUCTION] « [l’appelant] paraissait ignorer qu’on l’observait ». Le juge a ajouté que rien ne permettait de croire que [TRADUCTION] « [l’appelant] savait que [M^{me} S.] l’observait par la fenêtre de sa chambre à coucher non éclairée ». Il a conclu qu’en fait la preuve indiquait le contraire. M^{me} S. a toutefois observé l’appelant et [TRADUCTION] « les enfants auraient pu aisément le voir, mais il semble que non ».

Compte tenu de ces faits, le juge a décidé que l’appelant avait commis volontairement « une action indécente [. . .] dans un endroit public en présence d’une ou de plusieurs personnes », perpétrant ainsi l’infraction créée à l’al. 173(1)a) du *Code criminel*.

Cependant, il n’était pas convaincu que l’appelant avait commis cette action indécente « avec l’intention d’ainsi insulter ou offenser quelqu’un », comme l’exige l’al. 173(1)b) du *Code*. Il a donc acquitté l’appelant relativement à l’accusation portée contre lui en vertu de cette disposition.

La Cour d’appel de la Colombie-Britannique a confirmé la déclaration de culpabilité de l’appelant fondée sur l’al. 173(1)a). Il se pourvoit maintenant, avec l’autorisation de notre Cour, contre l’arrêt de la Cour d’appel.

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III

24 In affirming the appellant's conviction, the Court of Appeal relied primarily on *R. v. Keir* (1919), 34 C.C.C. 164 (N.S.S.C.), and *R. v. Buhay* (1986), 30 C.C.C. (3d) 30 (Man. C.A.).

25 The accused in *Keir* had exposed himself while standing in a private lane next to a public street, from which he was seen by passing girls. Harris C.J., in separate but concurring reasons, held that "[i]t was always the law that if this offence was committed in a place visible to any one passing along the streets it was punishable" (p. 166). For this proposition, Harris C.J. relied entirely on English case law, notably *R. v. Thallman* (1863), 9 Cox C.C. 388.

26 *Thallman*, however, merely underlines the differences between the English common law and the offence set out in s. 173(1)(a) of the *Criminal Code*. This distinction was well explained, albeit with some regret, by Middleton J., dealing with the predecessor to s. 173(1)(a) in *R. v. Clifford* (1916), 26 D.L.R. 754 (Ont. S.C.), at pp. 755-56:

In numerous English cases the offence was committed on private property, but in such a place as to be easily visible to passers-by or the occupants of adjacent houses: e.g., *Thallman's Case* (1863), L. & C. 326.

Unfortunately, in our statute this element of visibility to the public seems to have been lost sight of, and the act is punishable only when committed in any place to which the public have or are permitted to have access.

27 Harris C.J., relying in *Keir* on the English common law relating to indecent exposure, failed to appreciate this distinction.

28 Speaking for the other four judges in *Keir*, Mellish J. approached the matter differently, at p. 167:

III

En confirmant la déclaration de culpabilité de l'appelant, la Cour d'appel s'est principalement fondée sur la décision *R. c. Keir* (1919), 34 C.C.C. 164 (C.S.N.-É.), et l'arrêt *R. c. Buhay* (1986), 30 C.C.C. (3d) 30 (C.A. Man.).

Dans l'affaire *Keir*, l'accusé s'était exhibé debout dans une allée privée adjacente à la voie publique, où de jeunes passantes l'avaient aperçu. Dans des motifs distincts mais concordants, le juge en chef Harris a statué qu'[TRADUCTION] « [i]l est bien établi en droit qu'une telle infraction est toujours punissable si elle est commise à la vue de tous les passants dans une rue » (p. 166). Ce faisant, le juge en chef Harris s'est entièrement fondé sur la jurisprudence anglaise, plus particulièrement sur l'affaire *R. c. Thallman* (1863), 9 Cox C.C. 388.

Toutefois, l'affaire *Thallman* fait simplement ressortir les différences entre la common law anglaise et l'infraction créée à l'al. 173(1)a) du *Code criminel*. En examinant la disposition antérieure à l'al. 173(1)a), dans la décision *R. c. Clifford* (1916), 26 D.L.R. 754 (C.S. Ont.), p. 755-756, le juge Middleton a bien expliqué cette distinction, en en regrettant quelque peu l'existence :

[TRADUCTION] Dans de nombreuses affaires survenues en Angleterre, l'infraction a été commise sur une propriété privée, mais dans un endroit bien à la vue des passants ou des occupants des maisons adjacentes : prenons l'exemple de l'affaire *Thallman* (1863), L. & C. 326.

Malheureusement, cet élément d'exposition à la vue du public semble avoir été oublié dans notre loi, et l'action n'est punissable que si elle a été commise dans un lieu auquel le public a accès ou auquel il est autorisé à avoir accès.

Dans la décision *Keir*, le juge en chef Harris ne s'est pas rendu compte de cette distinction en appliquant la common law anglaise en matière d'exhibitionnisme.

S'exprimant au nom des quatre autres juges, dans la décision *Keir*, le juge Mellish a abordé la question différemment, à la p. 167 :

I think this was an indecent act done in the street, a place to which the public have access and that the accused was properly convicted. . . . The gist of the offence is the exposure and if the exposure is wilful and in sight of persons then in a public place, I think it is an exposure in such place and in the presence of such persons within the meaning of sec. 205 of the Code. [Emphasis added.]

For Mellish J., an indecent act is thus committed not only where the offender is performing it, but also in the place where the witnesses to it are physically situate. I am not at all persuaded that *Keir* was correctly decided. But even if it was, *Keir* affords no support for the conviction in this case, since the appellant's indecent act did not occur in a public place, even within the expanded meaning of *Keir*.

In *Buhay* the accused was charged under the predecessor to s. 173(1)(a). Standing in the front doorway to his house, he had exposed himself to two boys on the street. The trial judge acquitted Mr. Buhay on the ground that he had been charged under the wrong provision: while a lewd comment uttered by the accused in that case afforded sufficient evidence of his intent to insult or offend, warranting a conviction under the predecessor to s. 173(1)(b), the indecent act did not occur in a public place and was therefore not caught by what is now s. 173(1)(a).

The Court of Appeal allowed the Crown's appeal, relying essentially on *Keir*. For the reasons explained, I find that *Keir* does not support a conviction in the present case. Neither does *Buhay*, since it rests on the same inapplicable considerations.

With respect, the authorities relied on here by the Court of Appeal in affirming the appellant's conviction are thus of no comfort to its conclusion.

[TRADUCTION] J'estime qu'il s'agissait d'une action indécente commise dans la rue, un lieu auquel le public a accès, et que l'accusé a été déclaré coupable à juste titre. [. . .] L'exhibitionnisme est l'élément essentiel de l'infraction et je crois que la personne qui s'exhibe volontairement devant des personnes qui se trouvent alors dans un endroit public se rend coupable d'exhibitionnisme dans un endroit et en présence de personnes, au sens de l'art. 205 du Code. [Je souligne.]

Selon le juge Mellish, l'action indécente est donc commise non seulement là où le contrevenant l'accomplit, mais également là où se trouvent les personnes qui en sont témoins. Je ne suis pas du tout convaincu que la décision *Keir* est correcte. Toutefois, même si elle l'était, elle n'étaye aucune-ment la déclaration de culpabilité en l'espèce, étant donné que l'action indécente de l'appelant n'a pas été commise dans un endroit public, même au sens élargi que lui donne cette décision.

Dans l'arrêt *Buhay*, l'accusé a été inculpé en vertu de la disposition antérieure à l'al. 173(1)(a). Debout dans l'embrasure de la porte d'entrée de sa résidence, il s'était exhibé devant deux garçons dans la rue. Le juge du procès a acquitté M. Buhay parce que l'accusation portée contre lui n'était pas fondée sur la disposition applicable : même si un commentaire obscène de l'accusé dans cette affaire était une preuve suffisante de son intention d'insulter ou d'offenser, laquelle preuve justifiait une déclaration de culpabilité fondée sur la disposition antérieure à l'al. 173(1)(b), l'action indécente n'avait pas été commise dans un endroit public et n'était donc pas visée par ce qui est devenu l'al. 173(1)(a).

Se fondant essentiellement sur la décision *Keir*, la Cour d'appel a accueilli l'appel du ministère public. Pour les raisons déjà expliquées, je conclus que la décision *Keir* n'étaye pas une déclaration de culpabilité en l'espèce, pas plus que l'arrêt *Buhay*, étant donné qu'il repose sur les mêmes considérations inapplicables.

En toute déférence, la jurisprudence que la Cour d'appel a invoquée en l'espèce pour confirmer la déclaration de culpabilité de l'appelant n'étaye donc aucunement la conclusion à laquelle elle est parvenue.

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IV

33 The appellant does not contest the trial judge's finding that he committed an "indecent act" within the meaning of s. 173(1)(a) of the *Criminal Code*. He concedes, at least implicitly, that masturbating in an illuminated room near an uncovered window visible to neighbours can be "indecent" within the meaning of that section.

34 The appellant contends, however, that he did not wilfully commit this indecent act "in a public place in the presence of one or more persons", as required by s. 173(1)(a). He raises three grounds: first, that his living room was not a "public place" within the meaning of s. 173(1)(a); second, that the complainants were "surreptitiously watching him from beneath the blinds of a window in their own private bedroom some distance away" — and, therefore, not "in his presence", as likewise required by s. 173(1)(a); third, that he cannot be said to have wilfully committed an indecent act in the presence of anyone, since the trial judge found there was no evidence that he knew he was being observed.

35 The appellant argues, in addition, that the Court of Appeal erred in resting its conclusion of guilt on its own view of the evidence, which differed in important respects from the findings of the trial judge. I find it unnecessary to add here to what I have said earlier concerning this branch of the matter.

36 The appellant submits that his appeal succeeds if any one of his grounds is maintained. I agree and, as mentioned earlier, I would allow the appeal on the first ground — that the act imputed to him was not committed "in a public place", within the meaning of ss. 150 and 173(1)(a) of the *Criminal Code*. While there is thus no need to canvass the remaining grounds, I should not be understood to have concluded that they are without merit.

V

37 It is common ground that the appeal must succeed if the appellant did not commit an indecent act

IV

L'appellant ne conteste pas la conclusion du juge du procès voulant qu'il ait commis une « action indécente » au sens de l'al. 173(1)a) du *Code criminel*. Il reconnaît, à tout le moins implicitement, qu'il peut être « indécent », au sens de cette disposition, de se masturber dans une pièce éclairée, près d'une fenêtre aux rideaux ouverts et à la vue de ses voisins.

L'appellant prétend, toutefois, qu'il n'a pas commis volontairement cette action indécente « dans un endroit public en présence d'une ou de plusieurs personnes », comme l'exige l'al. 173(1)a). Il soulevé trois moyens : premièrement, son salon n'est pas un « endroit public » au sens de l'al. 173(1)a); deuxièmement, les plaignants [TRADUCTION] « l'observaient subrepticement, de loin, par l'ouverture en dessous du store de leur fenêtre de chambre à coucher », et non « en sa présence », comme l'exige également l'al. 173(1)a); troisièmement, on ne peut pas lui reprocher d'avoir commis volontairement une action indécente en présence de quelqu'un, vu que le juge du procès a conclu que rien ne prouvait qu'il se savait observé.

L'appellant ajoute que la Cour d'appel a commis une erreur en fondant sa conclusion de culpabilité sur sa propre appréciation de la preuve, laquelle diffère à d'importants égards des conclusions du juge du procès. J'estime qu'il n'est pas nécessaire ici d'ajouter quoi que ce soit à ce qui a déjà été dit au sujet de cet aspect de l'affaire.

L'appellant prétend qu'il aura gain de cause si l'un ou l'autre des moyens qu'il soulève est retenu. Je suis d'accord avec lui et, comme nous l'avons vu, je suis d'avis d'accueillir le pourvoi pour le premier motif qu'il invoque, à savoir que l'action qui lui est reprochée n'a pas été commise « dans un endroit public », au sens de l'art. 150 et de l'al. 173(1)a) du *Code criminel*. Bien qu'il ne soit donc pas nécessaire d'examiner les autres moyens, je ne veux pas que l'on croie que je les ai considérés non fondés.

V

Nul ne conteste que le pourvoi doit être accueilli si l'appellant n'a pas commis une action indécente

in a public place within the meaning of ss. 150 and 173(1)(a) of the *Criminal Code*.

These provisions read:

150. In this Part,

. . .

“public place” includes any place to which the public have access as of right or by invitation, express or implied;

150. Les définitions qui suivent s’appliquent à la présente partie.

« endroit public » Tout lieu auquel le public a accès de droit ou sur invitation, expresse ou implicite.

173. (1) Every one who wilfully does an indecent act

(a) in a public place in the presence of one or more persons, or

(b) in any place, with intent thereby to insult or offend any person,

is guilty of an offence punishable on summary conviction.

173. (1) Est coupable d’une infraction punissable sur déclaration de culpabilité par procédure sommaire quiconque volontairement commet une action indécente:

a) soit dans un endroit public en présence d’une ou de plusieurs personnes;

b) soit dans un endroit quelconque avec l’intention d’ainsi insulter ou offenser quelqu’un.

It will be immediately noticed that the French version of s. 150 contains no equivalent of “includes” in the English text. The appellant submits that the French definition is thus exhaustive in its terms, narrower than the English and common to both versions. The French definition, in the appellant’s view, must therefore prevail: *R. v. Daoust*, [2004] 1 S.C.R. 217, 2004 SCC 6, at paras. 26-37.

The respondent considers that there is “no discordance between the French and English text on the characteristics that make a place “public”

dans un endroit public au sens de l’art. 150 et de l’al. 173(1)a) du *Code criminel*.

Voici le texte de ces dispositions :

150. Les définitions qui suivent s’appliquent à la présente partie.

« endroit public » Tout lieu auquel le public a accès de droit ou sur invitation, expresse ou implicite.

150. In this Part,

. . .

“public place” includes any place to which the public have access as of right or by invitation, express or implied;

173. (1) Est coupable d’une infraction punissable sur déclaration de culpabilité par procédure sommaire quiconque volontairement commet une action indécente :

a) soit dans un endroit public en présence d’une ou de plusieurs personnes;

b) soit dans un endroit quelconque avec l’intention d’ainsi insulter ou offenser quelqu’un.

173. (1) Every one who wilfully does an indecent act

(a) in a public place in the presence of one or more persons, or

(b) in any place, with intent thereby to insult or offend any person,

is guilty of an offence punishable on summary conviction.

D’emblée, on constate que la version française de l’art. 150 ne comporte aucun terme équivalent au verbe « *includes* » de la version anglaise. L’appelant soutient que la définition française est donc formulée de manière exhaustive, plus restrictive que la définition anglaise et commune aux deux versions. La définition française doit donc, selon lui, avoir préséance : *R. c. Daoust*, [2004] 1 R.C.S. 217, 2004 CSC 6, par. 26-37.

L’intimée considère qu’il n’existe [TRADUCTION] « aucune antinomie entre les textes français et anglais quant aux caractéristiques qui rendent un endroit

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(emphasis in original). In the respondent's words, the issue is whether "private property, when exposed to public view, is a 'place' to which the 'public have access as of right or by invitation, express or implied'".

41 There is thus no need to choose in this case between the English and French versions of s. 150. The parties agree that both versions require public access by right or invitation: their disagreement is limited to the meaning of "access" in this context.

42 On that issue, which is decisive in this case, the appellant submits that ss. 150 and 173(1)(a) contemplate physical access to the place in which the impugned act was committed; the respondent, that visual access is sufficient. In my view, the appellant's position is supported by the prevailing rules of statutory construction. The respondent's position is not.

43 It is now well established that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, at para. 26, quoting E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21.

44 As a matter of semantics, the "ordinary" meaning of a disputed term will, of course, often vary with the context in which it is being used. Thus, for example, "access" has one "ordinary meaning" in relation to the rights of non-custodial parents, another as regards on-line computing, and yet another with respect to a place.

45 Section 150 of the *Criminal Code* uses the word "access" in reference to a "place" — in this case, a private home. And our concern is with access to that place "as of right or by invitation". In common usage, "access" to a place to which one is invited or where one has a right to be refers to entering, visiting or using that place — and not, as I said earlier,

"public" » (souligné dans l'original). Pour reprendre les termes de l'intimée, la question est de savoir si [TRADUCTION] « une propriété privée, exposée à la vue du public, constitue un "lieu" auquel le "public a accès de droit ou sur invitation, expresse ou implicite" ».

Dans le cas qui nous occupe, il n'est donc pas nécessaire de choisir entre la version française et la version anglaise de l'art. 150. Les parties s'accordent pour dire que les deux versions exigent l'accès du public, de droit ou sur invitation; leur désaccord est limité au sens du mot « accès » dans ce contexte.

Au sujet de cette question déterminante en l'espèce, l'appellant fait valoir que l'art. 150 et l'al. 173(1)a visent l'accès physique au lieu où l'action reprochée a été accomplie; pour l'intimée, l'accès visuel suffit. À mon avis, la thèse de l'appellant est étayée par les règles ordinaires d'interprétation législative. Celle de l'intimée ne l'est pas.

Il est maintenant bien établi qu'« il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur » : *Bell ExpressVu Limited Partnership c. Rex*, [2002] 2 R.C.S. 559, 2002 CSC 42, par. 26, où la Cour cite E. A. Driedger, *Construction of Statutes* (2^e éd. 1983), p. 87; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, par. 21.

Du point de vue sémantique, il va sans dire que le sens « ordinaire » d'un terme litigieux dépend souvent du contexte dans lequel ce terme est utilisé. Par exemple, le mot « accès » a un « sens ordinaire » dans le cas des droits des parents non gardiens, un autre dans le domaine de la téléinformatique et encore un autre lorsqu'il est question d'un lieu.

L'article 150 du *Code criminel* emploie le mot « accès » relativement à un « lieu » — en l'espèce, une résidence privée. Et c'est l'accès « de droit ou sur invitation » à ce lieu qui nous intéresse. Dans la langue courante, l'« accès », de droit ou sur invitation, qu'une personne a à un lieu signifie qu'elle peut y pénétrer, le visiter ou l'utiliser — et non, comme

to looking or listening in from the outside. When we are told that someone has access, as of right or by invitation, to an apartment, a workshop, an office, or a garage, this does not signify to us a mere opportunity or ability to look through a window or doorway and to see what is happening inside.

This “grammatical and ordinary sense” of “access” in relation to a place must, of course, be read harmoniously with the legislative context that concerns us here and the intention of Parliament as it appears from the *Criminal Code: Bell ExpressVu* and *Rizzo & Rizzo Shoes*.

I begin with the immediate legislative context.

First, interpreting “public place” in a manner consistent with physical as opposed to visual access, renders the whole of s. 173(1) more coherent. The offences under ss. 173(1)(a) and 173(1)(b) are circumscribed in distinct ways. Section 173(1)(a) prohibits indecent acts in public places, while s. 173(1)(b) prohibits indecent acts in any place — public or private — when they are committed with intent to insult or offend.

Moreover, as I mentioned earlier, Parliament has distinguished in the *Code* between conduct that is criminal because it occurs in a public place and conduct that is criminal because it is exposed to public view. Section 173(1)(a), as we have seen, grounds liability in the fact that the prohibited act is committed in a public place. The offence of nudity is set out in the very next section of the *Code*:

174. (1) Every one who, without lawful excuse,

(a) is nude in a public place, or

(b) is nude and exposed to public view while on private property, whether or not the property is his own,

is guilty of an offence punishable on summary conviction.

Section 174(1) makes it perfectly clear that the definition of “public place” in s. 150 of the *Criminal Code* was not meant to cover private places exposed

je l’ai mentionné précédemment, qu’elle peut, de l’extérieur, voir ou entendre ce qui se passe à l’intérieur de ce lieu. Lorsqu’on nous dit qu’une personne a accès, de droit ou sur invitation, à un appartement, à un atelier, à un bureau ou à un garage, nous ne comprenons pas qu’elle a simplement la possibilité ou la capacité de voir, par la fenêtre ou par la porte, ce qui se passe à l’intérieur de ces lieux.

Il va de soi que ce « sens ordinaire et grammatical » du mot « accès » utilisé relativement à un lieu doit s’harmoniser avec le contexte législatif qui nous intéresse en l’espèce et avec l’intention du législateur qui se dégage du *Code criminel : Bell ExpressVu* et *Rizzo & Rizzo Shoes*.

Je commence par le contexte législatif immédiat.

Premièrement, l’ensemble du par. 173(1) devient plus cohérent si on rattache l’expression « endroit public » à l’accès physique plutôt que visuel. Les infractions créées aux al. 173(1)(a) et 173(1)(b) sont définies différemment. L’alinéa 173(1)(a) interdit les actions indécentes dans un endroit public, alors que l’al. 173(1)(b) les interdit dans un endroit quelconque — public ou privé — lorsqu’elles ont pour but d’insulter ou d’offenser.

De plus, comme je l’ai déjà mentionné, le législateur établit dans le *Code* une distinction entre la conduite qui est criminelle parce qu’elle est adoptée dans un endroit public et celle qui est criminelle parce qu’elle est adoptée à la vue du public. Comme nous l’avons vu, c’est le fait de commettre l’action prohibée dans un endroit public qui engage la responsabilité à l’al. 173(1)(a). L’infraction de nudité est créée par la disposition suivante du *Code* :

174. (1) Est coupable d’une infraction punissable sur déclaration de culpabilité par procédure sommaire quiconque, sans excuse légitime, selon le cas :

a) est nu dans un endroit public;

b) est nu et exposé à la vue du public sur une propriété privée, que la propriété soit la sienne ou non.

Le paragraphe 174(1) montre clairement que l’expression « endroit public » définie à l’art. 150 du *Code criminel* n’est pas censée viser les endroits

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to public view. Were it otherwise, s. 174(1)(b) would be entirely superfluous.

51 Section 150 applies equally to s. 174(1) and s. 173(1)(a). If “public place” does not, for the purposes of s. 174(1), include private places exposed to public view, this must surely be the case as well for s. 173(1)(a). And I hasten to emphasize that ss. 173(1) and 174 of the *Criminal Code* were enacted in their present form simultaneously, as ss. 158 and 159, when the present *Code* was revised and enacted as S.C. 1953-54, c. 51. Parliament could not have intended that identical words should have different meanings in two consecutive and related provisions of the very same enactment.

52 Section 213(1) of the *Code* provides further support, if any were needed, for the proposition that the grammatical and ordinary meaning I have ascribed to “access” is consistent with its legislative context and with Parliament’s intention in enacting s. 150. Section 213(1) makes it an offence for anyone “in a public place or in any place open to public view” to commit certain specified acts for the purposes of prostitution.

53 The underlined, alternative route to liability in s. 213 was added by R.S.C. 1985, c. 51 (1st Supp.), s. 1. Parliament shortly thereafter directed its attention to s. 173, adding subs. (2): see R.S.C. 1985, c. 19 (3rd Supp.), s. 7. The respondent notes, correctly, that s. 213, unlike s. 173, is not in Part V of the *Criminal Code* and suggests that it was amended in response to comments by this Court in *Hutt v. The Queen*, [1978] 2 S.C.R. 476. This may well be so, but Parliament is deemed to act deliberately. It is therefore not unreasonable to suppose that Parliament, when it expanded s. 213 to include places open to public view, did not add similar language to s. 173(1)(a) because it did not intend acts committed in such places to be caught under the latter section.

54 I think it inappropriate for this Court to do now what Parliament declined to do then and remains free in its wisdom to do still.

privés exposés à la vue du public. S’il en était autrement, l’al. 174(1)(b) serait complètement superflu.

L’article 150 s’applique aussi bien au par. 174(1) qu’à l’al. 173(1)(a). Si, pour les besoins du par. 174(1), l’expression « endroit public » n’englobe pas les endroits privés exposés à la vue du public, il doit sûrement en être de même en ce qui concerne l’al. 173(1)(a). Je m’empresse de souligner que le par. 173(1) et l’art. 174 du *Code criminel* ont été adoptés en même temps sous leur forme actuelle, en tant qu’art. 158 et 159, lorsque le *Code* a été modifié et adopté comme S.C. 1953-54, ch. 51. Le législateur ne peut pas avoir voulu que des mots identiques aient des sens différents dans deux dispositions consécutives et connexes du même texte législatif.

Le paragraphe 213(1) du *Code* renforce — à supposer que ce soit nécessaire — la proposition selon laquelle le sens ordinaire et grammatical que j’ai attribué au mot « accès » s’harmonise avec son contexte législatif et avec l’intention qu’avait le législateur en adoptant l’art. 150. Aux termes du par. 213(1), est coupable d’une infraction quiconque commet, « dans un endroit soit public soit situé à la vue du public », certaines actions précises dans le but de se livrer à la prostitution.

L’autre fondement souligné de la responsabilité a été ajouté à l’art. 213 par L.R.C. 1985, ch. 51 (1^{er} suppl.), art. 1. Peu après, le législateur a ajouté le par. (2) à l’art. 173 : voir L.R.C. 1985, ch. 19 (3^e suppl.), art. 7. L’intimée fait remarquer, à juste titre, que, contrairement à l’art. 173, l’art. 213 ne figure pas dans la partie V du *Code criminel*, et elle indique qu’il a été modifié à la suite des observations de notre Cour dans l’arrêt *Hutt c. La Reine*, [1978] 2 R.C.S. 476. Quoiqu’il puisse bien en être ainsi, le législateur est réputé agir de propos délibéré. Il n’est donc pas déraisonnable de supposer que, en élargissant l’art. 213 de manière à inclure les endroits exposés à la vue du public, le législateur n’a pas ajouté des termes semblables à l’al. 173(1)(a) parce qu’il ne voulait pas que cet alinéa s’applique aux actions commises à ces endroits.

J’estime qu’il n’appartient pas à notre Cour de faire ici ce que le législateur, dans sa sagesse, s’est librement abstenu de faire jusqu’à maintenant.

VI

For all of these reasons, as indicated at the outset, I would allow the appeal, vacate the appellant's conviction and enter an acquittal.

Appeal allowed.

Solicitor for the appellant: Gil D. McKinnon, Vancouver.

Solicitor for the respondent: Ministry of the Attorney General of British Columbia, Vancouver.

Solicitor for the intervener: Ministry of the Attorney General of Ontario, Toronto.

VI

Pour tous ces motifs, comme je l'ai indiqué au départ, je suis d'avis d'accueillir le pourvoi, d'annuler la déclaration de culpabilité de l'appelant et d'inscrire un acquittement.

Pourvoi accueilli.

Procureur de l'appelant : Gil D. McKinnon, Vancouver.

Procureur de l'intimée : Ministère du Procureur général de la Colombie-Britannique, Vancouver.

Procureur de l'intervenant : Ministère du Procureur général de l'Ontario, Toronto.

Tab 10:

R. v. Dhaliwal, 2021 BCCA 479

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *R. v. Dhaliwal*,
2021 BCCA 479

Date: 20211217
Docket: CA47139

Between:

Regina

Respondent

And:

Taranvir Singh Dhaliwal

Appellant

Restriction on publication: A publication ban has been mandatorily imposed under s. 486.4 of the *Criminal Code* restricting the publication, broadcasting or transmission in any way of evidence that could identify a complainant or witness. This publication ban applies indefinitely unless otherwise ordered.

Corrected Judgment: The signature line of the judgment was corrected on December 24, 2021.

Before: The Honourable Madam Justice Griffin
The Honourable Mr. Justice Butler
The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Provincial Court of British Columbia, dated September 3, 2020 (conviction) (*R. v. Dhaliwal*, Western Communities Docket 20445-1).

Oral Reasons for Judgment

Counsel for the Appellant: P.A. Blokmanis

Counsel for the Respondent: L.Y. Bantourakis

Place and Date of Hearing: Victoria, British Columbia
December 17, 2021

Place and Date of Judgment: Victoria, British Columbia
December 17, 2021

Summary:

Appeal from conviction for sexual assault. The appellant alleges three errors: (a) misapprehensions of the evidence; (b) uneven scrutiny; and (c) speculative reasoning. Held: Appeal dismissed. The appellant has not established any of these errors. The judge's factual findings and assessments of credibility were reasonably open to him on the evidence, considered as a whole. There is no principled basis for intervention with the verdict.

[1] **DEWITT-VAN OOSTEN J.A.:** This is an appeal from a conviction for sexual assault contrary to s. 271 of the *Criminal Code*, R.S.C. 1985, c. C-46.

[2] The appellant, Taranvir Singh Dhaliwal, was found guilty of the offence following a trial in the provincial court. Only the complainant and appellant testified. The fact of sexual activity was admitted. Identity was not in issue. The central issue at the trial was whether the Crown proved the absence of consent.

[3] The judge accepted the complainant's evidence that she did not consent. He did not believe the appellant's testimony on "crucial aspects of the case", including the issue of consent.

[4] The appellant says his conviction reflects three material errors: (a) misapprehensions of the evidence; (b) uneven scrutiny; and (c) speculative reasoning. I am not persuaded the judge committed any of these errors.

[5] Accordingly, I would dismiss the appeal.

Background

[6] Reasons for judgment were delivered on September 3, 2020.

[7] It is not necessary to set out the whole of the trial evidence. Rather, I will highlight the main parts of it, as referred to in the reasons.

[8] The offence occurred in August 2017. The complainant was 16 years old. The appellant was 20. Prior to the offence, they had met once or twice socially.

[9] On the day in question, the complainant was spending time with friends and took a small amount of “Molly”. A toxicology report described this drug as a stimulant with psychoactive properties. In “normal doses” it does not typically interfere with thinking processes or distort reality. Rather, it “imparts a sense of peacefulness ... and allows people to trust one another”.

[10] The complainant testified that after taking the drug she became anxious and upset. She decided to go home. She lived about a 10-minute drive away. It would take her 45 minutes to walk home. It was late and she thought it unsafe to walk. Consequently, she called various people to arrange for a ride. She was unsuccessful. Eventually, one of her friends suggested that she call the appellant.

[11] By this time, it was about 3:00 a.m. The appellant agreed to give the complainant a ride. He picked her up. They began driving to the complainant’s home. Part way there, the appellant pulled into a parking lot next to a closed grocery store.

[12] The complainant said the appellant told her she would have to perform fellatio or he would leave her in the parking lot. She reached for the door handle to get out of the car. The appellant grabbed her by the collar. They argued about what he had demanded of her. He told her it was no big deal and would be quick. She again tried to get out of the car. The appellant locked the door and said something that the complainant construed as a threat. He grabbed her by the hair and forced her head down to his erect penis. The complainant performed oral sex and the appellant ejaculated in her mouth. She said the fellatio lasted for five or six minutes.

[13] The complaint testified that the appellant told her to get out of his car, called her a derogatory name and said she was wasting his time. She pleaded with him to not leave her alone in the parking lot. He relented and drove her closer to her home. She walked the rest of the way. Before she went into the house, she sat outside, crying. She received a message from the appellant on her phone. They exchanged comments. Later, she told her friend and guardian about the incident. Eventually, she told the police.

[14] The appellant had a different version of what happened in his car.

[15] He testified that when he agreed to give the complainant a ride, he knew she was upset. He said he asked her during the initial exchange if she would be okay with sexual intimacy and she agreed. The complainant denied any such discussion. He said that when he picked her up, she was crying and upset. She continued to cry while he drove her home. He stopped at the parking lot to talk to her and to make sure she was okay to go home.

[16] The appellant said the complainant got out of the car to get some fresh air or to calm down. When she got back in, she seemed calmer and he asked if he could kiss her. She agreed. They kissed. He then asked if she would be okay with oral sex. She agreed and performed fellatio. He denied that he forced the complainant to do anything. After the oral sex, he continued driving. When he dropped the complainant off, he told her that if she ever needed anything, she could call him.

[17] The appellant acknowledged later texting the complainant. He said he wanted to see if she was alright and got home safely. Part of that exchange was before the judge. It came from a screen shot taken of the complainant's phone. The time at the top of the exchange read 3:52 a.m.:

THE COMPLAINANT: i never want to see you again unless youre *[sic]* on the ground getting your ribs kicked in.

THE ACCUSED: lol what's ur *[sic]* problem I just drove you home at three am. Lmao. Ungrateful ass.

Trial Judge's Reasons

[18] The judge began his analysis by reminding himself of various "bedrock principles of criminal law", including: the presumption of innocence; Crown's burden of proof; *R. v. W.(D.)*, [1991] 1 S.C.R. 742, principles; and his obligation to consider the evidence as a whole. On appeal, the appellant does not take issue with the correctness of the self-instruction.

[19] The judge then reviewed the evidence and assessed credibility.

[20] He found that the complainant testified in a restrained and careful manner. She was focused in her answers and responsive to questions. She provided an appropriate level of detail and was not shaken in cross-examination “to any significant extent.” She testified “without rancour or bitterness toward the [appellant].” Based on the complainant’s evidence, the judge thought the Crown “presented a strong case.”

[21] Specific to the appellant, the judge found that he too gave his testimony in a “straightforward fashion”. He was responsive and provided an appropriate level of detail when describing the relevant events. The appellant “was not contradicted to any significant extent.”

[22] However, the judge found that “crucial parts” of the appellant’s testimony were “totally implausible.”

[23] For one, his evidence suggested that “the complainant completed a total metamorphosis in the very few minutes between the departure from her [friend’s] house and the time when she got back into the car in the [grocery store] parking lot.”

[24] The appellant acknowledged that when he picked up the complainant, she was “crying hysterically” and “appeared to desperately need his help.” She continued to cry while he drove her home. However, he testified that after stepping out of the car in the parking lot, her demeanour changed and she “was positively consenting to agree to a sexual encounter that included not just kissing, but fellatio as well.” The judge found this to be a “remarkable proposition”.

[25] The appellant’s trial counsel suggested that the complainant’s use of Molly could explain the change in behaviour and reduced inhibitions. However, the judge rejected that submission. There was “absolutely no evidence to suggest that the drug had any such impact on the complainant.” (The toxicologist who prepared the report tendered at the trial did not interview or assess the complainant or offer an opinion specific to the drug’s likely effect on her.)

[26] The judge also found as a fact that the complainant did not agree to engage in sexual intimacy when she first spoke with the appellant about a ride home. Among other things, the appellant's stated reason for having raised that issue struck the judge as "lame indeed"; the appellant said he was "just wondering" what her response might be. In the context of the other evidence, the judge found this part of the appellant's testimony to be "deceptive" and that it reflected an "attempt to bolster his argument that the complainant was consenting to sexual activity from the outset."

[27] The judge also had concerns about the appellant's explanation for why he pulled into the parking lot at the grocery store, describing it as "suspect". The notion that he wanted to talk to the complainant and to make sure she was okay to go home "made no sense". The fact that she was "not fit" to do anything because of her emotional condition was the "very reason" why the appellant was driving her home.

[28] Finally, in rejecting the appellant's testimony, the judge placed reliance on the text exchange that occurred after the offence. He found the appellant's use of the phrase "laughing my ass off" demonstrated a level of "arrogance and disrespect" towards the complainant that was consistent with her description of how he behaved in the car. Moreover, that language was "totally inexplicable" from someone who said he had engaged in consensual activity with the complainant "just hours before."

[29] Based on his credibility assessment, the judge did not believe the appellant's testimony on "crucial aspects of the case." Nor did the evidence leave the judge with a reasonable doubt about the "essential outline of what happened in the ... parking lot." He concluded that the complainant's evidence was "sufficient to meet the high standard required for a criminal conviction." Her testimony established beyond a reasonable doubt that she did not consent and that the appellant committed a sexual assault.

Grounds of Appeal

[30] As noted, the appellant says the guilty verdict reflects three errors.

[31] First, the judge misapprehended the evidence about the amount of time the complainant and appellant spent together, erroneously describing the sexual activity as having occurred within a “very few minutes” of the appellant picking her up. He also wrongly thought the complainant was not cross-examined on whether she agreed to sexual intimacy in the first text exchange and he unfairly rejected the appellant’s testimony on that basis.

[32] Second, the judge is said to have taken an unbalanced (or “uneven”) approach to his assessment of credibility.

[33] Third, the appellant says the judge improperly engaged in speculative reasoning.

Discussion

[34] To succeed on his appeal, the appellant must “demonstrate either error or the frustration of appellate review”: *R. v. G.F.*, 2021 SCC 20 at para. 79, citing *R. v. Sheppard*, 2002 SCC 26 at para. 54. Neither burden will be met by “merely pointing to ambiguous aspects of the trial decision”: *G.F.* at para. 79.

[35] This Court must take a functional and contextual approach in its review of the reasons for conviction, “with sensitivity to the trial judge’s role and advantage in making findings of fact and credibility”: *G.F.* at para. 5. The appellant alleges legal error that is reviewable on a correctness standard. However, to the extent his complaints invite us to interfere with findings of fact or credibility, a deferential standard of review applies: *G.F.* at para. 81; *R. v. M.D.*, 2021 BCCA 339 at para. 54.

[36] As explained in *M.D.*:

[55] Appellate deference to credibility determinations is appropriate for obvious reasons. Trial judges enjoy the distinct advantage of having seen and heard the witnesses testify firsthand and, therefore, are in the best position to assess the truthfulness of their accounts. Assessing credibility involves a complex process of watching and listening to the witnesses, distilling the impressions that emerge from their testimony and reconciling the various versions of events as recounted: *R. v. Gagnon*, 2006 SCC 17 at para. 20; *R. v. Wright*, 2019 BCCA 327 at paras. 23–25. Accordingly, appellate courts have been repeatedly cautioned against substituting their

own assessment of credibility for that of the trial judge when there is a reasonable basis for the trial judge's conclusions on credibility: *Gagnon* at paras. 22–23; *R. v. R.E.M.*, 2008 SCC 51 at para. 48.

[37] With these principles in mind, I turn to the grounds of appeal.

The Judge Did Not Misapprehend the Evidence

[38] The appellant alleges the judge misapprehended the evidence in two ways: (a) he believed the complainant and appellant spent much less time together than allowed for by the evidence; and (b) he thought the complainant was not cross-examined on whether she agreed to sexual intimacy when first texting with the appellant. The appellant says these were material mistakes that significantly impacted the judge's assessment of credibility and they resulted in flawed reasoning.

[39] The respondent argues there were no material misapprehensions. Instead, this ground of appeal is really about the judge's *interpretation* of the record. The appellant takes issue with the inferences drawn by the judge. The fact that the judge did not see the evidence the same way as the appellant, or could have taken a different view of things, does not mean he misapprehended the record. Considerably more is required to justify appellate intervention on the basis of this first alleged error: *R. v. Bidesi*, 2021 BCCA 227 at para. 29; *R. v. Osinde*, 2021 BCCA 124 at paras. 17–20.

[40] I agree with the Crown. After reviewing the reasons for conviction, as a whole and in context, I am satisfied the judge did not misapprehend the evidence as alleged.

Amount of Time Spent Together

[41] There was evidence the complainant did not reach out to the appellant until 3:00 a.m. Indeed, this was the time the appellant said he received a first message from her. He testified that after she contacted him they texted for five to ten minutes. It took him another 15 to 20 minutes to drive to where the complainant was. He picked her up at about 3:30 a.m. It then took ten minutes to reach the grocery store

parking lot. After the events there, the appellant drove for another ten minutes before he dropped her off. He drove home and was back at his residence by 4:00 a.m.

[42] In her testimony, the complainant agreed with defence counsel that she was still with her friends at 3:00 a.m. and she contacted the appellant at that time. Once he picked her up, it took them five to seven minutes to get to the parking lot. After the events in the car, the appellant drove her to a place from which it took another seven to ten minutes to walk home. She was home by 4:00 a.m. The screen shot of her phone showed an exchange with the appellant at 3:52 a.m.

[43] The appellant testified that when he first saw the complainant, she was “a little bit frazzled” and a “little bit hysterical”. She was “crying loudly.” He agreed with Crown counsel that she remained in that condition for most of the drive to the parking lot. When the appellant pulled into the lot, the complainant was still crying. However, she was “calming down”. She got out of the car for “a few minutes” (emphasis added). He thought she “needed some air,” was claustrophobic or “needed to settle down for a bit.” She was “walking around in circles and ... a little bit upset still.” But, when she got back into the car, she was “visibly calm.” She was “warming up.” They began to kiss, he asked her if she was okay with performing oral sex, she said she was, and she proceeded to do so.

[44] The complainant testified that the Molly triggered her anxiety, causing her to be “very upset and emotional, crying, having a hard time breathing or breathing really [fast].” She was “definitely hysterical” when she first got into the appellant’s car. She was not able to “form words properly, breathing really fast, hyperventilating, crying really hard to the point when [she was] gasping for air.” The appellant hugged her and told her she was safe and that he would take her straight home. She calmed down a bit, “not crying so hard,” but continued to cry and breathe fast and gasp for air. She was crying while the appellant drove towards the grocery store. She was “leaning up against the door facing away from [the appellant] and ... closed off”. She was like that until the appellant pulled into the parking lot. She asked what he was

doing and he said, “You’re going to have to perform oral or I’m going to leave you here”. That’s when the sexual assault occurred.

[45] On the entirety of this evidence, the judge could find that the sexual activity occurred within a short time of the appellant picking up the complainant *and* while she remained upset. On the appellant’s evidence alone, the fellatio occurred less than 15 minutes after the complainant first got into his car. Given the descriptions of her emotional demeanour and mental state to that point, it was not unreasonable for the judge to conclude that the suggestion the complainant had calmed down and almost immediately thereafter agreed to engage in oral sex lacked plausibility.

Text Exchange About Sexual Intimacy

[46] The judge expressly noted the complainant denied that she discussed sexual intimacy with the appellant in their first text exchange. She gave this evidence in cross-examination. As I read the judge’s subsequent impugned comment that “she was not cross-examined on this part of her evidence” (emphasis added), he was not referring to whether the complainant was *asked* about the matter, but rather, that her denial was not explored or challenged in any substantive way. In other words, neither the credibility nor reliability of her denial was tested. The judge was right about that. The appellant’s trial counsel simply elicited the fact that the complainant disagreed with the appellant’s testimony.

[47] Moreover, the absence of substantive cross-examination was but only one factor considered in rejecting this aspect of the appellant’s testimony. The judge also had concerns about the rationale provided for why the appellant asked about sexual intimacy; doing so did not make sense given his acknowledgment that the complainant was upset and in “serious need of his assistance”; and the complainant’s evidence about having assured her concerned friend that the appellant was simply giving her a ride home was inconsistent with an understanding, on her part, that sexual intimacy was likely to occur.

[48] Misapprehensions of evidence are assessed applying a “high standard”: *Osinde* at para. 20. In my view, the appellant has not met this burden. He has not

established an actual mistake “as to the substance of material parts of the evidence”: *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 at 221, 1995 CanLII 3498 (Ont. C.A.); *R. v. Lohrer*, 2004 SCC 80 at para. 1. Nor has he shown that the judge failed to consider evidence relevant to a material issue or failed to give proper effect to it. Finally, the appellant has not demonstrated that any such mistake, if it does exist, played an “essential role in the reasoning process underlying [the] conviction”: *Osinde* at para. 18.

[49] Even had I found the judge’s comment about the absence of cross-examination amounted to a misapprehension of the record, I am not convinced excising this error would leave the conviction on “unsteady ground”: *Osinde* at para. 20, citing *R. v. Sinclair*, 2011 SCC 40 at para. 56. The judge had other bases for rejecting the appellant’s testimony and finding that it did not raise a reasonable doubt.

There Was No Uneven Scrutiny

[50] Relying on *R. v. Kiss*, 2018 ONCA 184, and *R. v. Roth*, 2020 BCCA 240, the appellant says the judge erred by applying a “higher degree of scrutiny in assessing the credibility or reliability of defence evidence than Crown evidence.”

[51] He identifies three errors in principle specific to the assessment of the appellant’s testimony: the two misapprehensions addressed above and the judge’s conclusion that the appellant’s explanation for why he pulled into the parking lot made no sense. The appellant says this aspect of his testimony was reasonable and, importantly, consistent with a caring and empathic attitude towards the complainant.

[52] The appellant says the judge under-scrutinized the complainant’s evidence. In particular, he failed to consider reliability concerns arising from the fact that she was under the influence of a drug when interacting with the appellant.

[53] The Crown correctly points out that uneven scrutiny claims are “notoriously difficult” to establish: *R. v. Steen*, 2021 BCCA 448 at paras. 5–6; *Roth* at paras. 49,

143. Not infrequently, they amount to little more than a request to reassess credibility findings. Those findings attract considerable deference on appeal. To establish a level of uneven scrutiny that properly justifies intervention with a credibility finding, an appellant must “persuade the appeal court of a demonstrably flawed assessment methodology or reasoning process that affected the credibility determination”: *Roth* at para. 50 (emphasis added). Only then can it be said there is reversible error: *Steen* at para. 6; *R. v. Wright*, 2019 BCCA 327 at para. 23.

[54] I see no such error here.

[55] I have already addressed the alleged misapprehensions of evidence, which I find are without substance.

[56] The rejection of the appellant’s explanation for why he pulled into the parking lot was open to the judge. The appellant acknowledged that the complainant contacted him for a ride because she was distraught and wanted to go home. He confirmed that she was in a bad state when he picked her up and that her emotional distress continued while he drove in the direction of the parking lot. The purpose of the ride was to get her home *because of how she was feeling*. In that context, it was legitimate for the judge to question the plausibility of the appellant pulling over to ensure the complainant was okay to go home. That explanation was illogical given the objective of the car ride.

[57] I also note that in his direct examination, the appellant said the complainant told him she was “okay with going home” *before* they got to the grocery store. And, it was his position that by the time they reached the parking lot, she was “calming down”. On his own evidence, this suggested she was okay to go home and there was no need to stop the vehicle, have a discussion with her, and check on her emotional well-being. I am not surprised the judge found that this aspect of the appellant’s testimony lacked credulity.

[58] Specific to the complaint about under scrutinizing the complainant’s evidence, this contention is also without merit. The judge understood that the complainant had

consumed Molly. He understood she experienced a “negative drug reaction”. In other words, the drug affected her. He reviewed the toxicology report addressing the drug’s psychoactive properties and its generally expected effects. He was alive to the relevant evidence and he took it into consideration in reaching his conclusions.

[59] At the same time, the report acknowledged that the actual effects of Molly can be impacted by the content of the substance ingested, the precise amount taken, and the individual’s tolerance for the drug. There was no evidence addressing those issues specific to the complainant. The report was generic and its discussion about the effects of the drug was not connected in any substantive way to the facts of this case. The judge found that “on the basis of the general comments in the toxicology report”, it “would be totally inappropriate for [him] to speculate” that the drug caused the complainant to feel amorous and uninhibited towards the appellant (emphasis added). In my view, that conclusion was open to him. Indeed, the limited probative value of the report was acknowledged by appellant’s trial counsel in his closing submissions:

... the report can’t be used to draw any direct conclusions about what happened that evening because of the unknowns involved in terms of the quantity, really how many times she’s used it in the past, and whether there was any insulting [*sic*] other chemicals in the powder that she took

[Emphasis added.]

[60] On the record in this case, there was nothing that prevented the judge from accepting the complainant’s description of her reaction to the drug. Indeed, it was confirmed by the appellant’s evidence. This was a decision for the judge to make, informed by the entirety of the evidence. Finally, the judge was not obliged to expressly address the issue of reliability in his reasons and the absence of its mention does not constitute error: *G.F.* at para. 82.

[61] I would not accede to this ground of appeal. The appellant has not established an error in principle, let alone one of sufficient gravity to advance an uneven scrutiny argument.

The Judge Did Not Engage in Speculative Reasoning

[62] Finally, again citing *Roth*, the appellant complains that the judge rejected his testimony on the basis of speculative reasoning. In particular, the judge is said to have erroneously assumed that: (a) a young man would not raise the topic of sexual intimacy during a text exchange in circumstances such as these; (b) had there been any such discussion, the complainant would likely have told her friend about it before accepting the ride; and (c) the use of the term “Lmao” after the fact reflected a mindset of arrogance and disrespect.

[63] As recently noted by this Court in *R. v. Conway*, 2021 BCCA 460:

[44] It is an error in principle to assess the credibility of a complainant or accused relying on “inappropriate behavioural assumptions and stereotypes”: *R. v. Pastro*, 2021 BCCA 149 at para. 42. Where demonstrated to exist, this error will displace the highly deferential standard of review that governs credibility findings: *R. v. S.S.S.*, 2020 BCCA 180 at paras. 24–26.

[45] Credibility findings, whether favourable or adverse, cannot be grounded in “assumptions about the type of behaviour that would ‘normally’ be expected of a person without engaging with the evidence, including the context in which contentious events arose”: *Pastro* at para. 43, citing *R. v. Roth*, 2020 BCCA 240 at paras. 64–65, 71–73. See also *R. v. Greif*, 2021 BCCA 187 at paras. 60–61; *R. v. C.M.M.*, 2020 BCCA 56 at paras. 138–139; *R. v. Kodwat*, 2017 YKCA 11 at para. 41.

[64] In my view, the judge’s reasons for finding the appellant not credible in his assertion of consent do not reflect reliance on stereotypes, generalized or ungrounded assumptions about human behaviour, or speculative reasoning. Instead, I agree with the Crown that the adverse credibility findings are anchored in the evidence about *this* complainant and *this* appellant and the context of *their* interaction.

[65] There was considerable evidence surrounding the complainant’s emotional and mental state when she reached out to the appellant, the reasons she provided to him for requiring a ride home, and the appellant’s understanding of her distress. The judge’s conclusion that asking about sexual activity during their first exchange was at odds with the nature of the dialogue then underway, was specific to *these* parties and the context of *their* conversation. It was not based on what a hypothetical

person would be expected to say or do in the circumstances: *R. v. Pastro*, 2021 BCCA 149 at para. 42.

[66] The same is true of the second of the appellant's complaints. The judge's conclusion that had sexual intimacy been raised, the complainant would have likely said something about it to her friend was informed by the nature of the conversation between the complainant and her friend and its focus—namely, safety risks associated with accepting a ride from someone the complainant barely knew.

[67] Finally, the finding of inconsistency between the appellant's description of consensual sexual activity and his post-event response by text was also grounded in the evidence. In his testimony, the appellant was adamant that he was concerned for the complainant's well-being, gave her a ride because he wanted to help her out, and considered it important to ensure she was okay. He said she willingly performed fellatio. And yet, when he received a text from her indicating that she was upset with him, he responded with language that, on its face, appeared flippant and dismissive.

[68] The judge found that the response, sent shortly after the events in the car, was not consistent with the appellant's description of the dynamics before he dropped the complainant off. To the contrary, it was consistent with the complainant's testimony that he forced sexual activity on her, ignored the fact that she did not want to engage in the act, and treated her in a demeaning fashion. I see nothing wrong with drawing that inference. Again, it was not an inference based on an ungrounded assumption about the meaning or use of "Lmao" generally or what the judge would have expected from a hypothetical person standing in the appellant's shoes. It was based on the juxtaposition between *this* appellant's description of how he treated the complainant and the language that *he* then used in a text. There is no reversible error here.

Disposition

[69] Accordingly, I would dismiss the appeal from conviction.

[70] **GRIFFIN J.A.:** I agree.

[71] **BUTLER J.A.:** I agree.

[72] **GRIFFIN J.A.:** The appeal from conviction is dismissed.

“The Honourable Madam Justice DeWitt-Van Oosten”

Tab 11:

R. v. Dixon, [1998] 1 S.C.R. 244

Spencer Dixon Appellant

v.

Her Majesty The Queen Respondent

INDEXED AS: R. v. DIXON

File No.: 25834.

1997: December 5; 1998: February 19.

Present: Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR NOVA SCOTIA

Constitutional law — Charter of Rights — Fundamental justice — Duty to disclose — Accused convicted of aggravated assault — Crown not disclosing statements made by four individuals — Summary of statements included in police reports provided to defence counsel at trial — Appropriate test for determining whether Crown's inadvertent failure to disclose relevant material violated accused's right to disclosure — If right to disclosure violated, appropriate test for determining whether constitutional right to make full answer and defence impaired — Effect to be given to defence counsel's lack of due diligence — Canadian Charter of Rights and Freedoms, ss. 7, 24(1).

Three persons were injured in a brawl where the attackers surrounded their victims in turn and kicked and pummelled them. Two victims (Gillis and Charman) were badly injured and a third (Watts) was permanently and very seriously injured. The accused, who was tried with four others, was convicted of aggravated assault of Watts. Significantly, he was found guilty both as a principal and as a party (aiding or abetting) under s. 21 of the *Criminal Code*. During the course of the trial, counsel for all the accused were provided with copies of police occurrence reports which included summaries of statements given by four individuals. Two statements indicated that the persons making them had not witnessed the assaults. The third (Tynes') stated that the person was with the Crown's main identification witness in the vicinity of the assaults. It also described that witness' clothing that night. The fourth (Daye's) indicated that the person witnessed two of the assaults, identified the location of some of the accused during the assaults and identified some of the assailants. It impli-

Spencer Dixon Appellant

c.

Sa Majesté la Reine Intimée

RÉPERTOIRÉ: R. c. DIXON

Nº du greffe: 25834.

1997: 5 décembre; 1998: 19 février.

Présents: Les juges Gonthier, Cory, McLachlin, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL DE LA NOUVELLE-ÉCOSSE

Droit constitutionnel — Charte des droits — Justice fondamentale — Obligation de divulguer — Accusé déclaré coupable de voies de fait graves — Omission du ministère public de divulguer les déclarations de quatre personnes — Résumé des déclarations contenu dans les rapports de police remis à l'avocat de la défense au procès — Critère à utiliser pour déterminer si l'omission par inadvertance du ministère public de communiquer des documents pertinents a violé le droit de l'accusé à la divulgation — En cas de violation du droit à la divulgation, critère à utiliser pour déterminer s'il y a eu atteinte au droit à une défense pleine et entière garanti par la Constitution — Importance à accorder au manque de diligence raisonnable d'un avocat de la défense — Charte canadienne des droits et libertés, art. 7, 24(1).

Trois personnes ont été blessées lors d'une bagarre au cours de laquelle les agresseurs ont encerclé leurs victimes à tour de rôle et les ont battues à coups de pied et à coups de poing. Deux des victimes (Gillis et Charman) ont été blessées grièvement et la troisième (Watts) a subi des blessures très graves et permanentes. L'accusé, qui a subi son procès en même temps que quatre autres personnes, a été reconnu coupable de voies de fait graves contre Watts. Fait révélateur, il a été déclaré coupable à la fois comme auteur principal de l'infraction et comme participant à celle-ci (aider ou encourager), au sens de l'art. 21 du *Code criminel*. Au cours du procès, les avocats de tous les accusés ont obtenu copie des rapports de police qui comprenaient des résumés des déclarations de quatre personnes. Deux des déclarations indiquaient que leurs auteurs n'avaient pas été témoins des voies de fait. La troisième (celle de Tynes) révélait que son auteur était en compagnie du principal témoin à charge en matière d'identification, près de l'endroit où les voies de fait ont été commises. Elle décrivait aussi les vêtements

cated the accused in an assault for which he was neither charged nor convicted and contradicted the evidence of the main identification witness in certain respects.

None of the four statements was produced by the Crown and this gave rise to a ground of appeal based on the Crown's failure to disclose information as required by s. 7 of the *Canadian Charter of Rights and Freedoms*. The Court of Appeal dismissed the appeals. It admitted fresh evidence, however, which indicated that counsel had not only transcripts and statements that made reference to some of the persons whose statements were not disclosed but also a chart and cross-reference sheet. The accused's counsel also reviewed the police occurrence reports and decided that nothing in the four statements referred to in those reports would assist the accused in making full answer and defence. The other counsel came to the same conclusion on the basis of the summaries. At issue were: (1) what was the appropriate test to be used in determining whether the Crown's inadvertent failure to disclose relevant material violated the accused's right to disclosure; (2) if the right to disclosure were violated, what was the appropriate test to determine whether the *Charter* right to make full answer and defence was impaired; and (3) in determining whether that right had been impaired, what was the effect to be given to defence counsel's lack of due diligence.

Held: The appeal should be dismissed.

(1) *The Crown's Duty to Disclose*

Where an accused demonstrates a reasonable possibility that the undisclosed information could have been used in meeting the case for the Crown, advancing a defence or otherwise making a decision which could have affected the conduct of the defence, he or she has also established the impairment of his or her *Charter* right to disclosure. The right to disclosure of all relevant material has a broad scope and includes material which may have only marginal value to the ultimate issues at trial. The Crown accordingly may fail to disclose information which meets the *Stinchcombe* threshold but which could not possibly affect the reliability of the result reached or the overall fairness of the trial process.

que ce témoin portait le soir en question. La quatrième (celle de Daye) indiquait que son auteur avait été témoin de deux cas de voies de fait, précisait l'endroit où certains accusés se trouvaient pendant que les voies de fait étaient commises et identifiait certains des agresseurs. Elle impliquait l'accusé dans des voies de fait dont il n'a été ni inculpé ni reconnu coupable, et contredisait, à certains égards, la déposition du principal témoin en matière d'identification.

Aucune des quatre déclarations n'a été produite par le ministère public, ce qui a donné lieu à un moyen d'appel fondé sur l'omission du ministère public de divulguer des renseignements comme il est tenu de le faire en vertu de l'art. 7 de la *Charte canadienne des droits et libertés*. La Cour d'appel a rejeté les appels. Elle a toutefois admis une nouvelle preuve qui indiquait que les avocats disposaient non seulement de transcriptions et de déclarations qui mentionnaient certaines personnes dont les déclarations n'ont pas été divulguées, mais encore d'un plan et d'une feuille de renvoi. L'avocat de l'accusé a aussi examiné les rapports de police et a estimé qu'il n'y avait rien dans les quatre déclarations mentionnées dans ces rapports qui aiderait l'accusé à présenter une défense pleine et entière. Les autres avocats sont arrivés à la même conclusion, sur la foi des résumés. Il s'agit de déterminer: (1) le critère à appliquer pour déterminer si l'omission par inadvertance du ministère public de communiquer tous les documents pertinents a violé le droit de l'accusé à la divulgation, (2) en cas de violation du droit à la divulgation, le critère à appliquer pour déterminer s'il y a eu atteinte au droit à une défense pleine et entière garanti par la *Charte*, et (3) pour établir s'il y a eu atteinte à ce droit, l'importance à accorder au manque de diligence raisonnable de l'avocat de la défense.

Arrêt: Le pourvoi est rejeté.

(1) *L'obligation de divulguer du ministère public*

Lorsqu'un accusé démontre l'existence d'une possibilité raisonnable que les renseignements non divulgués auraient été utilisés pour réfuter la preuve du ministère public, pour présenter un moyen de défense ou, par ailleurs, pour prendre une décision qui aurait pu avoir une incidence sur la façon de présenter la défense, il se trouve également à établir l'existence d'une atteinte au droit à la divulgation que lui garantit la *Charte*. Le droit à la communication de tous les documents pertinents est large et vise les documents qui peuvent n'avoir qu'une importance secondaire par rapport aux questions fondamentales en litige. Le ministère public peut donc omettre de divulguer des renseignements qui satisfont au cri-

A court may well find that an accused's *Charter* right to disclosure has been breached, and yet deny the remedy of a new trial if it is found that the trial process was fundamentally fair and that there was no reasonable possibility that the result at trial might have been different had the undisclosed material been produced. The right to full disclosure is just one component of the right to make full answer and defence. The *Charter* right to make full answer and defence is not necessarily impaired solely because the right to disclosure was violated.

The Crown need not produce what is clearly irrelevant. Here, the first two statements had no relevant information at all and there was no reasonable possibility that they could have been of any use to the accused at trial. Both the third (Tynes') and fourth (Daye's) statements met the low threshold for disclosure and should have been disclosed.

(2) *Impairment of the Right to Make Full Answer and Defence and the Remedy to Be Granted under Section 24(1) of the Charter*

In order to determine whether the right to make full answer and defence was impaired, a two-step analysis must be undertaken. First, to assess the reliability of the result, the undisclosed information must be examined to determine the impact it might have had on the decision to convict. If an appellate court is persuaded that there is a reasonable possibility that, on its face, the undisclosed information affects the reliability of the conviction, a new trial should be ordered. Even if the undisclosed information does not itself affect the reliability of the result at trial, the effect of the non-disclosure on the overall fairness of the trial process must be considered at the second stage of analysis. This will be done by assessing, on the basis of a reasonable possibility, the lines of inquiry with witnesses or the opportunities to garner additional evidence that could have been available to the defence if the relevant information had been disclosed.

In considering the overall fairness of the trial process, defence counsel's diligence in pursuing disclosure from the Crown must be taken into account. A lack of due

tère préliminaire de l'arrêt *Stinchcombe*, mais qui ne pourraient absolument pas compromettre le bien-fondé du résultat atteint ou l'équité globale du procès. Une cour peut bien conclure à la violation du droit à la divulgation que la *Charte* garantit à un accusé, tout en refusant d'accorder un nouveau procès à titre de réparation si elle juge que le procès a été foncièrement équitable et qu'il n'y avait aucune possibilité raisonnable que le résultat au procès aurait été différent si la documentation non communiquée avait été produite. Le droit à la divulgation complète n'est qu'une composante du droit à une défense pleine et entière. Il n'y a pas nécessairement atteinte au droit à une défense pleine et entière garanti par la *Charte*, du seul fait qu'il y a eu violation du droit à la divulgation.

Le ministère public n'est pas tenu de produire ce qui n'a manifestement aucune pertinence. En l'espèce, les deux premières déclarations ne contenaient aucun renseignement pertinent, et il n'y avait aucune possibilité raisonnable qu'elles aient été de quelque utilité à l'accusé au procès. Les troisième et quatrième déclarations (celles de Tynes et de Daye, respectivement) satisfaisaient toutes les deux au critère préliminaire peu élevé fixé pour la divulgation et auraient dû être divulguées.

(2) *L'atteinte au droit à une défense pleine et entière et la réparation à accorder en vertu du par. 24(1) de la Charte*

Pour déterminer s'il y a eu atteinte au droit à une défense pleine et entière, il faut entreprendre une analyse en deux étapes. Premièrement, pour évaluer le bien-fondé du résultat, il faut examiner les renseignements non divulgués pour déterminer l'incidence qu'ils auraient pu avoir sur la décision de rendre un verdict de culpabilité. Si une cour d'appel est convaincue qu'il y a une possibilité raisonnable que les renseignements non divulgués influent, à première vue, sur le bien-fondé de la déclaration de culpabilité, un nouveau procès devrait être ordonné. Même si les renseignements non divulgués n'influencent pas eux-mêmes sur le bien-fondé du résultat atteint au procès, l'incidence de la non-divulgation sur l'équité globale du procès doit être prise en considération à la deuxième étape de l'analyse. On le fera en évaluant, sous l'angle d'une possibilité raisonnable, les questions qui auraient pu être posées aux témoins ou les possibilités de recueillir d'autres éléments de preuve que la défense aurait pu avoir si les renseignements pertinents avaient été divulgués.

Pour examiner l'équité globale du procès, il faut tenir compte de la diligence dont l'avocat de la défense a fait preuve en tentant d'obtenir la divulgation par le minis-

diligence is a significant factor in determining whether the Crown's non-disclosure affected the fairness of the trial process. When counsel becomes or ought to become aware, from other relevant material produced by the Crown, of a failure to disclose further material, counsel must not remain passive. Rather, they must diligently pursue disclosure.

Whether a new trial should be ordered on the basis that the Crown's non-disclosure rendered the trial process unfair involves a process of weighing and balancing. If defence counsel knew or ought to have known on the basis of other disclosures that the Crown through inadvertence had failed to disclose information and yet remained passive as a result of a tactical decision or lack of due diligence, it would be difficult to accept a submission that the failure to disclose affected the fairness of the trial process.

All these factors must be appropriately balanced. In situations where the materiality of the undisclosed evidence is, on its face, very high, a new trial should be ordered on this basis alone. In these circumstances, it will not be necessary to consider the impact of lost opportunities to garner additional evidence flowing from the failure to disclose. However, where the materiality of the undisclosed information is relatively low, an appellate court will have to determine whether any realistic opportunities were lost to the defence. To that end, the due diligence or lack of due diligence of defence counsel in pursuing disclosure will be a very significant factor in deciding whether to order a new trial.

Here, the accused had the burden of demonstrating that either (i) it is reasonably possible the non-disclosed statements affected the reliability of his conviction as a principal in the aggravated assault and his conviction for aiding or abetting the assault; or (ii) that it is reasonably possible the non-disclosure of the statements affected the overall fairness of the trial process. First, the accused did not demonstrate that the non-disclosure of the statements affected each of the alternative conclusions referred to in s. 21(1) of the *Code* — that he either kicked or beat the victim, helped to administer the beating or encouraged the beating. Second, the non-disclosure did not affect the overall fairness of the trial. The third statement (Tynes') and the fourth (Daye's), on their faces, would have had no impact on the reliability

of the Crown's case. The lack of diligence is a significant factor in determining whether the Crown's non-disclosure affected the fairness of the trial process. When counsel becomes or ought to become aware, from other relevant material produced by the Crown, of a failure to disclose further material, counsel must not remain passive. Rather, they must diligently pursue disclosure.

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Here, the accused had the burden of demonstrating that either (i) it is reasonably possible the non-disclosed statements affected the reliability of his conviction as a principal in the aggravated assault and his conviction for aiding or abetting the assault; or (ii) that it is reasonably possible the non-disclosure of the statements affected the overall fairness of the trial process. First, the accused did not demonstrate that the non-disclosure of the statements affected each of the alternative conclusions referred to in s. 21(1) of the *Code* — that he either kicked or beat the victim, helped to administer the beating or encouraged the beating. Second, the non-disclosure did not affect the overall fairness of the trial. The third statement (Tynes') and the fourth (Daye's), on their faces, would have had no impact on the reliability

of the conviction. The Crown's failure to disclose did not deprive the defence of opportunities to pursue additional lines of inquiry with witnesses or garner additional evidence flowing from the undisclosed material. A significant factor in reaching this conclusion was defence counsel's lack of due diligence in pursuing disclosure.

Defence counsel is not entitled to assume at any point that all relevant information has been disclosed to the defence. Just as the Crown's disclosure obligations are ongoing, and persist throughout the trial process, so too does defence counsel's obligation to be duly diligent in pursuing disclosure. To do nothing in the face of knowledge that relevant information has not been disclosed will, at a minimum, often justify a finding of lack of due diligence, and may, in certain circumstances, support an inference that counsel made a strategic decision not to pursue disclosure.

Cases Cited

Referred to: *R. v. Stinchcombe*, [1991] 3 S.C.R. 326; *R. v. Egger*, [1993] 2 S.C.R. 451; *R. v. Chaplin*, [1995] 1 S.C.R. 727; *R. v. Carosella*, [1997] 1 S.C.R. 80; *R. v. Collins*, [1987] 1 S.C.R. 265; *R. v. C. (M.H.)*, [1991] 1 S.C.R. 763; *R. v. Bramwell* (1996), 106 C.C.C. (3d) 365, aff'd [1996] 3 S.C.R. 1126; *R. v. S.E.S.* (1992), 100 Sask. R. 110; *R. v. McAnespie*, [1993] 4 S.C.R. 501.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 7, 24(1).
Criminal Code, R.S.C., 1985, c. C-46, s. 21(1).

APPEAL from a judgment of the Nova Scotia Court of Appeal (1997), 156 N.S.R. (2d) 81, 461 A.P.R. 81, [1997] N.S.J. No. 20 (QL) (*sub nom. R. v. McQuaid (Dixon Appeal)*), dismissing the accused's appeal from his conviction for aggravated assault (1996), 148 N.S.R. (2d) 321 (*sub nom. R. v. McQuaid*), 429 A.P.R. 321, [1996] N.S.J. No. 81 (QL). Appeal dismissed.

quatrième déclarations (celles de Tynes et de Daye, respectivement) n'auraient eu, à première vue, aucune incidence sur le bien-fondé de la déclaration de culpabilité. L'omission de divulguer du ministère public n'a pas privé la défense de la possibilité de poser d'autres questions aux témoins ou de recueillir d'autres éléments de preuve découlant des documents non communiqués. Un facteur important qui a été pris en considération pour tirer cette conclusion est le manque de diligence raisonnable dont l'avocat de la défense a fait preuve en tentant d'obtenir la divulgation.

L'avocat de la défense n'a, en aucun temps, le droit de supposer que tous les renseignements pertinents ont été divulgués à la défense. Tout comme l'obligation de divulguer du ministère public est constante, et continue d'exister durant tout le procès, il en est de même de l'obligation de l'avocat de la défense de faire preuve de diligence raisonnable en tentant d'obtenir la divulgation. Si l'avocat de la défense ne fait rien lorsqu'il sait que des renseignements pertinents n'ont pas été divulgués, cela justifiera souvent, à tout le moins, une conclusion à un manque de diligence raisonnable et pourra, dans certains cas, justifier une déduction que l'avocat a pris une décision stratégique de ne pas tenter d'obtenir la divulgation.

Jurisprudence

Arrêts mentionnés: *R. c. Stinchcombe*, [1991] 3 R.C.S. 326; *R. c. Egger*, [1993] 2 R.C.S. 451; *R. c. Chaplin*, [1995] 1 R.C.S. 727; *R. c. Carosella*, [1997] 1 R.C.S. 80; *R. c. Collins*, [1987] 1 R.C.S. 265; *R. c. C. (M.H.)*, [1991] 1 R.C.S. 763; *R. c. Bramwell* (1996), 106 C.C.C. (3d) 365, conf. par [1996] 3 R.C.S. 1126; *R. c. S.E.S.* (1992), 100 Sask. R. 110; *R. c. McAnespie*, [1993] 4 R.C.S. 501.

Lois et règlements cités

Charte canadienne des droits et libertés, art. 7, 24(1).
Code criminel, L.R.C. (1985), ch. C-46, art. 21(1).

POURVOI contre un arrêt de la Cour d'appel de la Nouvelle-Écosse (1997), 156 N.S.R. (2d) 81, 461 A.P.R. 81, [1997] N.S.J. No. 20 (QL) (*sub nom. R. c. McQuaid (Dixon Appeal)*), qui a rejeté l'appel interjeté par l'accusé contre sa déclaration de culpabilité de voies de fait graves (1996), 148 N.S.R. (2d) 321 (*sub nom. R. c. McQuaid*), 429 A.P.R. 321, [1996] N.S.J. No. 81 (QL). Pourvoi rejeté.

L. W. Scaravelli, for the appellant.

Kenneth W. F. Fiske, Q.C., and *Richard B. Miller*, for the respondent.

The judgment of the Court was delivered by

CORY J. — Three issues arise in this appeal:

- (1) What is the appropriate test to be used to determine whether the Crown's inadvertent failure to disclose relevant material constituted a violation of the appellant's right to disclosure under s. 7 of the *Canadian Charter of Rights and Freedoms*?
- (2) Where an appellant's right to disclosure is violated, what is the appropriate test to be used to determine whether his or her *Charter* right to make full answer and defence was also thereby impaired?
- (3) In determining whether an appellant's right to make full answer and defence was impaired, what effect is to be given to defence counsel's lack of due diligence?

Several aspects of these issues are common to the appeals of Spencer Dixon, Herman McQuaid, Guy Leaman Robart, Cyril Joseph Smith and Stacey Skinner, all of whom were tried together on charges of aggravated assault arising out of the same factual circumstances. All five appeals were heard together by this Court. These reasons will address the common aspects, and separate reasons will deal with any issues that are unique to the other appeals.

I. Factual Background

On September 10, 1994, a fraternity hosted a party in Halifax. The evening was uneventful until a young woman named Shannon Burke became involved in a physical confrontation with Terrence Dixon, a young man whom she claimed was the father of her child. Terrence Dixon dragged Burke out of the fraternity house with others following. Two young men who had attended the party —

L. W. Scaravelli, pour l'appelant.

Kenneth W. F. Fiske, c.r., et *Richard B. Miller*, pour l'intimée.

Version française du jugement de la Cour rendu par

LE JUGE CORY — Le présent pourvoi soulève trois questions:

- (1) Quel critère faut-il appliquer pour déterminer si l'omission par inadvertance du ministère public de communiquer tous les documents pertinents a constitué une violation du droit à la divulgation, garanti à l'appellant par l'art. 7 de la *Charte canadienne des droits et libertés*?
- (2) En cas de violation du droit d'un appellant à la divulgation, quel critère faut-il appliquer pour déterminer s'il y a eu également, de ce fait, une atteinte au droit à une défense pleine et entière que lui garantit la *Charte*?
- (3) Pour déterminer s'il y a eu une atteinte au droit d'un appellant à une défense pleine et entière, quelle importance faut-il accorder au manque de diligence raisonnable de l'avocat de la défense?

Plusieurs aspects de ces questions sont communs aux pourvois de Spencer Dixon, Herman McQuaid, Guy Leaman Robart, Cyril Joseph Smith et Stacey Skinner, qui ont tous été jugés ensemble relativement à des accusations de voies de fait graves découlant des mêmes circonstances. Les cinq pourvois ont été entendus simultanément par notre Cour. Les présents motifs traiteront de ces aspects communs, et des motifs distincts porteront sur les questions propres aux autres pourvois.

I. Les faits

Le 10 septembre 1994, une confrérie d'étudiants donnait une fête à Halifax. La soirée s'était déroulée sans incident jusqu'à ce qu'une jeune femme du nom de Shannon Burke en vienne aux coups avec Terrence Dixon, un jeune homme qu'elle prétendait être le père de son enfant. Terrence Dixon a traîné Burke à l'extérieur de la maison de la confrérie et ils ont été suivis par d'autres personnes.

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Rob Gillis and John Charman — attempted to intervene and help Burke. This confrontation escalated and expanded to include a number of young men who attacked Gillis and Charman. Gillis fell to the ground, hit the back of his head and began bleeding badly. A circle formed around Charman, he was hit from behind and had his teeth knocked out.

Deux jeunes hommes qui avaient participé à la fête — Rob Gillis et John Charman — ont essayé d'intervenir et d'aider Burke. L'affrontement s'est envenimé et a pris de l'ampleur au point d'inclure un certain nombre de jeunes gens qui ont attaqué Gillis et Charman. Gillis s'est affaissé, sa tête a heurté le sol et il s'est mis à saigner abondamment. Un cercle s'est formé autour de Charman, qui a été frappé par derrière et a eu les dents brisées.

⁴ Darren Watts went to the aid of his friend Charman. As soon as he did, the circle of men that had formed around Charman switched its attention to Watts. One from that group knocked him to the ground with a single punch. The men in the group kicked him and continued to do so repeatedly until they fled across the street. The vicious beating left Watts permanently disabled. He underwent two operations including the partial removal of the frontal lobe of his brain. He had to undertake extensive rehabilitation treatment, and has lost the use of his left side. His cognitive and motor skills have not returned to the levels he enjoyed before the assault.

Darren Watts est allé au secours de son ami Charman. Aussitôt, les hommes qui avaient encerclé Charman se sont tournés vers Watts. L'un de ceux-ci l'a envoyé au sol d'un seul coup de poing. Les membres de ce groupe lui ont donné des coups de pied et ont continué à le faire jusqu'au moment où ils se sont enfuis de l'autre côté de la rue. Watts s'est retrouvé handicapé de façon permanente à la suite de cette violente raclée. Il a subi deux opérations, dont l'ablation partielle du lobe frontal de son cerveau. Il a dû se soumettre à des traitements intensifs de réadaptation et a perdu l'usage du côté gauche. Il n'a pas retrouvé les capacités cognitives et motrices qu'il avait avant de subir les voies de fait en cause.

⁵ Six men, including the five appellants, were convicted of committing an aggravated assault on Darren Watts. At the same trial, the appellant Cyril Smith was also convicted of the aggravated assault of Rob Gillis. The appellants Herman McQuaid and Stacey Skinner were convicted of the aggravated assault of John Charman.

Six hommes, dont les cinq appelants, ont été reconnus coupables de voies de fait graves contre Darren Watts. Lors du même procès, l'appellant Cyril Smith a également été reconnu coupable de voies de fait graves contre Rob Gillis. Les appelants Herman McQuaid et Stacey Skinner ont été reconnus coupables des voies de fait graves dont a été victime John Charman.

⁶ During the course of the trial, counsel for all the accused were provided with copies of police occurrence reports. The reports included summaries of statements given by Terris Daye, Terrance Tynes, Travia Carvery and Edmond Levia, none of which had been produced by the Crown. After conviction and sentencing, trial counsel for all of the accused except Skinner met to discuss appeal issues. The statements were produced by the Crown after this meeting at the request of counsel for one of the accused. One of the grounds raised in the appeal pertained to the Crown's failure to disclose these statements.

Au cours du procès, les avocats de tous les accusés ont obtenu copie des rapports de police. Ces rapports comprenaient des résumés des déclarations de Terris Daye, Terrance Tynes, Travia Carvery et Edmond Levia, qui n'avaient pas été produites par le ministère public. Après les déclarations de culpabilité et le prononcé des sentences, les avocats de tous les accusés à l'exception de Skinner se sont rencontrés pour discuter des questions d'appel. Les déclarations ont été produites par le ministère public après cette rencontre, à la demande de l'avocat de l'un des accusés. L'un des moyens d'appel concernait l'omission du ministère public de divulguer ces déclarations.

The Nova Scotia Court of Appeal admitted fresh evidence by way of counsel's affidavits as to their conduct in pursuing disclosure prior to and during the trial. The affidavits reveal that by the time the preliminary inquiry was held during the week of June 5, 1995, counsel for all accused determined that the same material had been disclosed to all of them. This disclosure did not include the four missing statements or any reference to the fact that these statements had been taken. However, counsel had received a transcript of the sworn statement given by Danny Clayton — the Crown's main identification witness — in which Clayton identified Terris Daye and Terrance Tynes as eyewitnesses to the assaults. Counsel also received the statements of Stephen (Dee) Nelson, Nathaniel Robart and Michael Barton, all of whom referred to three of the four individuals whose statements were not disclosed, including Terris Daye. The Court of Appeal observed that all counsel also received a chart dated October 13, 1994 and a cross-reference sheet dated October 14, 1994. While it is not clear exactly when these documents were received, the Court of Appeal found that defence counsel probably had them prior to the preliminary inquiry, and certainly prior to trial. The chart indicates that Tynes, Daye, Carvery and Levia were in the immediate vicinity when the assaults took place. The cross-reference sheet also suggests that a statement was taken from Terris Daye.

Counsel for all accused met for a pre-trial conference with Crown counsel, Mr. Craig Botterill, on January 4, 1996. At that time, Mr. Botterill invited all counsel to attend at his office and copy any of the material in the Crown's file. Counsel representing Cyril Smith attended on behalf of counsel for Spencer Dixon and counsel for Herman McQuaid. Counsel for Guy Robart and counsel for Stacey Skinner attended separately. All three counsel who attended Mr. Botterill's office stated in their affidavits that the four undisclosed

La Cour d'appel de la Nouvelle-Écosse a admis une nouvelle preuve sous forme d'affidavits des avocats au sujet de ce qu'ils avaient fait pour tenter d'obtenir la divulgation avant et pendant le procès. Les affidavits révèlent qu'au moment où l'enquête préliminaire a eu lieu durant la semaine du 5 juin 1995, les avocats de tous les accusés ont estimé qu'ils s'étaient tous vu communiquer la même documentation. Cette divulgation ne comprenait pas les quatre déclarations manquantes ni aucune mention du fait que ces déclarations avaient été recueillies. Cependant, les avocats avaient reçu une transcription de la déclaration sous serment de Danny Clayton, le principal témoin à charge en matière d'identification, dans laquelle celui-ci identifiait Terris Daye et Terrance Tynes comme étant des témoins oculaires des voies de fait. Les avocats ont aussi reçu les déclarations de Stephen (Dee) Nelson, Nathaniel Robart et Michael Barton, qui parlaient tous de trois des quatre individus dont les déclarations n'ont pas été divulguées, y compris Terris Daye. La Cour d'appel a fait observer que tous les avocats avaient reçu un plan daté du 13 octobre 1994 et une feuille de renvoi datée du 14 octobre 1994. Bien qu'on ne sache pas exactement quand ces documents ont été reçus, la Cour d'appel a conclu que les avocats de la défense les avaient probablement en leur possession avant l'enquête préliminaire, et sûrement avant le procès. Le plan montre que Tynes, Daye, Carvery et Levia se trouvaient dans les environs immédiats lorsque les voies de fait ont été commises. La feuille de renvoi laisse également supposer qu'une déclaration a été obtenue de Terris Daye.

Le 4 janvier 1996, les avocats de tous les accusés ont tenu une conférence préparatoire au procès avec le substitut du procureur général, M^e Craig Botterill. Maître Botterill a alors invité tous les avocats à se rendre à son bureau et à reproduire l'un ou l'autre des documents contenus dans le dossier du ministère public. L'avocat qui représentait Cyril Smith s'y est rendu pour le compte des avocats de Spencer Dixon et de Herman McQuaid. L'avocat de Guy Robart et celui de Stacey Skinner s'y sont rendus séparément. Les trois avocats qui se sont rendus au bureau de M^e Botterill ont déclaré, dans leurs affidavits, que les quatre déclara-

statements were not in the Crown's file when they reviewed it prior to trial.

rations non divulguées ne se trouvaient pas dans le dossier du ministère public lorsqu'ils l'ont examiné avant le procès.

⁹ The trial began on Monday, February 5, 1996. At some point after the trial commenced, Mr. Scaravelli, counsel for Spencer Dixon, asked a police constable for copies of the occurrence reports. Approximately 160 pages of original reports were produced a short time later. Mr. Scaravelli brought these reports to the attention of other counsel, and by Thursday, February 8, 1996, all counsel had copies of the police occurrence reports, which made reference to the four undisclosed statements.

Le procès a débuté le lundi 5 février 1996. Quelque temps après l'ouverture du procès, M^e Scaravelli, l'avocat de Spencer Dixon, a demandé à un policier des copies des rapports de police. Environ 160 pages de rapports originaux ont été produites peu après. Maître Scaravelli a soumis ces rapports à l'attention des autres avocats et, le jeudi 8 février 1996, tous les avocats avaient des copies des rapports de police, qui faisaient état des quatre déclarations non divulguées.

¹⁰ By Monday, February 12, 1996, when he had completed his review of the police occurrence reports, Mr. Scaravelli was aware that four statements had been taken by the police and had not been disclosed by the Crown. However, based on summaries of the statements included in the occurrence reports, he decided there was nothing in the statements that would assist the accused in making full answer and defence. He stated in his affidavit that he was confident that all relevant information had been disclosed by the Crown, and he therefore did not pursue the matter further. By that same date three other defence counsel, Mr. Katsihtis, Mr. O'Neill and Mr. Coady, representing Cyril Smith, Herman McQuaid and Guy Robart respectively, were also aware that four witness statements had not been disclosed by the Crown. They too decided, on the basis of the summaries, not to request disclosure of the statements. Ms. Cain-Grant, counsel for the appellant Skinner, had acted in only one other criminal trial. She believed the summaries in the occurrence reports to be the complete statements given to police and as a result did not seek further disclosure.

Le lundi 12 février 1996, après avoir examiné les rapports de police, M^e Scaravelli savait que le ministère public n'avait pas divulgué quatre déclarations recueillies par la police. Toutefois, se fondant sur les résumés des déclarations contenus dans les rapports de police, il a estimé qu'il n'y avait rien dans ces déclarations qui aiderait l'accusé à présenter une défense pleine et entière. Il a dit, dans son affidavit, qu'il était persuadé que le ministère public avait divulgué tous les renseignements pertinents, et n'est donc pas allé plus loin. À ce moment-là, trois autres avocats de la défense, M^{es} Katsihtis, O'Neill et Coady, qui représentaient Cyril Smith, Herman McQuaid et Guy Robart respectivement, savaient également que le ministère public n'avait pas divulgué quatre déclarations de témoins. Ils ont eux aussi décidé, sur la foi des résumés, de ne pas demander la divulgation des déclarations. Maître Cain-Grant, l'avocate de l'appelant Skinner, n'avait participé qu'à un seul autre procès criminel. Elle croyait que les résumés contenus dans les rapports de police étaient les déclarations complètes faites à la police et n'a donc pas tenté d'obtenir la communication d'autres documents.

II. Decisions Below

A. *Nova Scotia Supreme Court* (1996), 148 N.S.R. (2d) 321

II. Les juridictions inférieures

A. *Cour suprême de la Nouvelle-Écosse* (1996), 148 N.S.R. (2d) 321

¹¹ At the trial for the assault on Darren Watts, Saunders J. made very careful and comprehensive

Lors du procès pour voies de fait contre Darren Watts, le juge Saunders a tiré des conclusions de

findings of fact. He found that the five appellants were part of the group of men who surrounded Watts and were responsible for his beating. Saunders J. found that the appellants, as part of the group around Watts, were there either to beat Watts, to encourage the beating or to stand shoulder to shoulder to entrap him. Applying s. 21(1) of the *Criminal Code*, R.S.C., 1985, c. C-46, he found all were guilty of committing an aggravated assault on Darren Watts.

The Crown relied heavily on the testimony of Danny Clayton, who admitted to participating in the aggravated assault on Darren Watts and who testified in return for immunity. Clayton was the only Crown witness to identify Watts's assailants. His character was questioned. Further, he was an accomplice. Saunders J. very carefully scrutinized his evidence. He fully recognized the frailties of eyewitness testimony, but found that they were minimized by Clayton's presence at and participation in the assault. Clayton also knew the appellants personally, and had grown up with them and lived with them in the same community. These factors were found to have strengthened his evidence of identification. Further, Saunders J. found that Clayton's evidence was supported, in material respects, by the other evidence adduced. As a result, he was not left with the sense that it would be unsafe to convict the appellants of the aggravated assault of Darren Watts. On the basis of Clayton's testimony and all the evidence presented he was satisfied beyond a reasonable doubt of their guilt.

Saunders J. also accepted Clayton's testimony that Cyril Smith struck Rob Gillis, and found Smith guilty of the aggravated assault on Gillis. Saunders J. further noted that both Stacey Skinner and Herman McQuaid admitted to striking John Charman in their police statements. These admissions supported Clayton's testimony that Stacey Skinner and a man whom Clayton tentatively identified as Stephen (Dee) Nelson struck John

fait très minutieuses et détaillées. Il a conclu que les cinq appelants faisaient partie du groupe d'hommes qui avaient entouré Watts et qui étaient responsables de la raclée qu'il avait reçue. Le juge Saunders a conclu que les appelants, en tant que membres du groupe qui avait entouré Watts, avaient été là pour battre Watts ou pour encourager d'autres à le faire, ou encore pour se serrer les coudes afin de l'empêcher de s'échapper. Appliquant le par. 21(1) du *Code criminel*, L.R.C. (1985), ch. C-46, il les a tous reconnus coupables de voies de fait graves contre Darren Watts.

Le ministère public s'est fortement appuyé sur le témoignage de Danny Clayton, qui a admis avoir participé aux voies de fait graves contre Darren Watts et a témoigné en échange de l'immunité. Clayton est le seul témoin à charge qui a identifié les agresseurs de Watts. Sa moralité a été mise en doute. De plus, il était complice. Le juge Saunders a examiné très attentivement son témoignage. Il a parfaitement reconnu les faiblesses de la déposition du témoin oculaire, mais il a conclu que celles-ci étaient minimisées par le fait que Clayton avait assisté et participé aux voies de fait. Clayton connaissait aussi les appelants personnellement et avait grandi et vécu avec eux dans la même collectivité. Il a été jugé que ces facteurs avaient renforcé sa preuve d'identification. En outre, le juge Saunders a conclu que le témoignage de Clayton était étayé, à certains égards importants, par d'autres éléments de preuve. Par conséquent, il n'avait pas le sentiment qu'il serait risqué de déclarer les appelants coupables de voies de fait graves contre Darren Watts. Compte tenu du témoignage de Clayton et de tous les éléments de preuve présentés, il était convaincu hors de tout doute raisonnable qu'ils étaient coupables.

Le juge Saunders a également accepté le témoignage de Clayton selon lequel Cyril Smith avait frappé Rob Gillis, et il a reconnu Smith coupable des voies de fait graves dont Gillis a été victime. Le juge Saunders a souligné de plus que, dans leurs déclarations à la police, Stacey Skinner et Herman McQuaid avaient tous deux admis avoir attaqué John Charman. Ces aveux étayaient le témoignage de Clayton voulant que Stacey Skinner

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Charman. The trial judge concluded that Skinner and McQuaid had committed an aggravated assault on Charman.

B. *Nova Scotia Court of Appeal* (1997), 156 N.S.R. (2d) 81

¹⁴ The principal issue before the Court of Appeal was whether the failure to disclose the four witness statements impaired the appellant's right to make full answer and defence. Chipman J.A., writing for the majority, noted that the parties agreed there was no improper motive in the Crown's failure to disclose the statements, and that the only potentially material statement was that of Terris Daye.

¹⁵ Chipman J.A. found that trial counsel for the appellant did not seek the missing statements or bring the failure to disclose the statements to the attention of the trial judge at the earliest opportunity as they were required to do. It was his opinion that once the Crown produced the police occurrence reports during the course of the trial, defence counsel must have known that four statements had been taken by the police and had not been produced by the Crown. In his view, counsel had a choice at that point — "call for the statements or live without them" (p. 93). He found that certain contradictions between the summary of Daye's statement and Clayton's testimony would have prompted counsel who had any interest in the statements to investigate these discrepancies further. Chipman J.A. concluded that a tactical decision had been made at trial not to pursue disclosure of these statements, and that a contrary position was only taken following conviction. He observed that a lack of due diligence on the part of defence counsel is an important factor in determining whether to order a new trial.

¹⁶ However, the majority went on to dismiss the appeal on the basis that the undisclosed material was of no weight. Chipman J.A. held that on appeal from a conviction, where the Crown has

et un homme que Clayton a identifié non sans hésitation comme étant Stephen (Dee) Nelson aient attaqué John Charman. Le juge du procès a conclu que Skinner et McQuaid avaient commis des voies de fait graves contre Charman.

B. *Cour d'appel de la Nouvelle-Écosse* (1997), 156 N.S.R. (2d) 81

La principale question dont était saisie la Cour d'appel était de savoir si l'omission de divulguer les quatre déclarations de témoins avait porté atteinte au droit de l'appelant à une défense pleine et entière. Le juge Chipman a fait remarquer, au nom de la cour à la majorité, que les parties ont convenu qu'aucun motif répréhensible ne sous-tendait l'omission du ministère public de divulguer les déclarations et que la seule déclaration susceptible d'être pertinente était celle de Terris Daye.

Le juge Chipman a conclu que l'avocat de l'appelant n'a pas réclamé les déclarations manquantes ni porté à l'attention du juge du procès l'omission de divulguer ces déclarations, dès que possible comme il était tenu de le faire. Il était d'avis que, dès que le ministère public eut produit les rapports de police au cours du procès, l'avocat de la défense devait savoir qu'il n'avait pas produit quatre déclarations recueillies par la police. À son avis, l'avocat devait alors faire un choix: [TRADUCTION] «demander les déclarations ou s'en passer» (p. 93). Il a jugé que certaines contradictions entre le résumé de la déclaration de Daye et le témoignage de Clayton auraient dû inciter tout avocat qui avait un intérêt dans les déclarations à examiner davantage ces divergences. Le juge Chipman a conclu qu'une décision tactique de ne pas tenter d'obtenir la divulgation de ces déclarations avait été prise au procès et qu'un point de vue contraire n'a été adopté qu'après la déclaration de culpabilité. Il a fait observer que le manque de diligence raisonnable de l'avocat de la défense est un facteur important pour déterminer s'il y a lieu d'ordonner la tenue d'un nouveau procès.

Toutefois, les juges majoritaires ont rejeté l'appel pour le motif que la documentation non communiquée n'avait aucune valeur probante. Le juge Chipman a statué que, lors d'un appel contre une

failed to provide full disclosure, an appellant must show “that there is a reasonable probability that had the non-disclosed material been disclosed, the result might have been different” (p. 104). He then considered the materiality of Terris Daye’s statement in light of this test and concluded that it did not undermine “the overwhelming body of evidence indicat[ing] that there was a circle of black males surrounding and beating Watts” (p. 111). Though Chipman J.A. recognized that there were inconsistencies among the witnesses, he found a surprising unanimity about this circle, which was described from various different vantage points. He further found that Daye either did not see or was unwilling to admit to seeing who attacked Watts, and concluded that there was no reasonable probability that had this statement been available at or prior to the trial, the result might have been different.

Chipman J.A. therefore rejected the appellant’s argument that because Daye’s statement contradicted Clayton’s testimony as to the location of some of the accused during the attack on Watts, it could have been used to weaken Clayton’s credibility. He similarly rejected the argument that Daye’s description of inner and outer circles surrounding Darren Watts supported evidence given by other Crown witnesses suggesting that the number of Watts’s attackers was limited to three or four men. Chipman J.A. further noted that the summary of Daye’s statement in the police occurrence report included this description of two circles around Watts, and thus counsel did not lose a realistic opportunity to garner and present evidence flowing from this statement. Chipman J.A. held that there was nothing in the statement that opened any avenue of pre-trial investigation not already available to diligent counsel.

Bateman J.A., in dissent, disagreed with the majority’s conclusion that to merit a new trial, an appellant must show a reasonable probability that the result might have been different had the non-disclosed material been produced. She held that

déclaration de culpabilité, si le ministère public n’a pas effectué une divulgation complète, l’appellant doit montrer [TRADUCTION] «qu’il y a une probabilité raisonnable que le résultat aurait été différent si la documentation non communiquée avait été produite» (p. 104). Il a ensuite examiné la pertinence de la déclaration de Terris Daye en fonction de ce critère et a conclu qu’elle ne minait pas [TRADUCTION] «la preuve accablante que des noirs avaient entouré et battu Watts» (p. 111). Tout en reconnaissant que les témoins se contredisaient sur certains points, le juge Chipman a constaté une surprenante unanimité au sujet de ce cercle de gens, qui a été décrit à partir de points d’observation différents. Il a également conclu que Daye n’avait pas vu ou ne voulait pas admettre avoir vu ceux qui avaient attaqué Watts et il a statué qu’il n’y avait aucune probabilité raisonnable que le résultat aurait été différent si cette déclaration avait été disponible pendant ou avant le procès.

Le juge Chipman a donc rejeté l’argument de l’appellant selon lequel, parce que la déclaration de Daye contredisait le témoignage de Clayton quant à l’endroit où certains accusés se trouvaient pendant que Watts était attaqué, on aurait pu s’en servir pour miner la crédibilité de Clayton. Il a rejeté de la même façon l’argument selon lequel la description que Daye a donnée des cercles intérieur et extérieur formés autour de Darren Watts était les dépositions d’autres témoins à charge qui laissaient entendre que Watts n’avait été attaqué que par trois ou quatre hommes. Le juge Chipman a aussi noté que le résumé de la déclaration de Daye, contenu dans le rapport de police, comportait cette description de deux cercles autour de Watts, et ainsi, que l’avocat n’avait pas perdu une possibilité réaliste de recueillir et de présenter des éléments de preuve découlant de cette déclaration. Le juge Chipman a décidé que la déclaration ne contenait rien qui donnait ouverture à une enquête préliminaire et dont n’aurait pas déjà disposé un avocat diligent.

Le juge Bateman, dissidente, a exprimé son désaccord avec la conclusion des juges majoritaires que, pour mériter un nouveau procès, un appellant doit établir l’existence d’une probabilité raisonnable que le résultat aurait été différent si la

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any inquiry into the materiality of undisclosed information must include a generous assessment of the reasonable possibility that the non-disclosure impaired the preparation of the defence and fairness of the trial process, and that this inquiry encompassed more than a consideration of the reliability of the result. It was her opinion that there was enough information in Daye's statement to make it a potentially important resource in assisting with the preparation and presentation of the defence. She could not say that had Daye's statement been available to the defence, there was no reasonable possibility that the result might have been different, nor could she find that the fairness of the trial was not affected. She thus held that the right of the appellant to make full answer and defence was impaired by the Crown's non-disclosure.

documentation non communiquée avait été produite. Elle a statué que tout examen de la pertinence de renseignements non divulgués doit comprendre une évaluation généreuse de la possibilité raisonnable que la non-divulgaration ait nui à la préparation de la défense et à l'équité du procès, et que cet examen va plus loin que le bien-fondé du résultat. Elle était d'avis que la déclaration de Daye contenait assez de renseignements pour pouvoir être sensiblement utile à la préparation et à la présentation de la défense. Elle ne pouvait pas dire que, si la défense avait disposé de la déclaration de Daye, il n'y aurait eu aucune possibilité raisonnable que le résultat soit différent, et elle ne pouvait pas non plus conclure que l'équité du procès n'avait pas été compromise. Elle a donc jugé que l'omission de divulguer du ministère public avait porté atteinte au droit de l'appellant à une défense pleine et entière.

19 Bateman J.A. also disagreed with her colleagues' conclusion that trial counsel for the appellant had failed to exercise due diligence. She shared the majority's concerns that failure by counsel for the various appellants to provide answers to questions posed at the appeal hearings, the lack of information in the affidavits of defence counsel as to their knowledge of the statement, and the unexplained interest in the statements subsequent to trial gave rise to suspicions that some or all of them may have made a strategic decision not to pursue disclosure. However, she did not conclude that trial counsel for the appellant had made a tactical choice to ignore the Crown's non-disclosure. She would have granted the appellant's request for a new trial.

Le juge Bateman n'était pas d'accord non plus avec la conclusion de ses collègues que l'avocat de l'appellant au procès n'avait pas fait preuve de diligence raisonnable. Elle partageait les craintes des juges majoritaires que l'omission des avocats des divers appelants de répondre aux questions posées lors des audiences en appel, l'absence d'information dans les affidavits des avocats de la défense relativement à leur connaissance de la déclaration et leur intérêt inexpliqué dans les déclarations à la suite du procès ne fassent soupçonner que certains ou la totalité d'entre eux avaient pris la décision stratégique de ne pas tenter d'obtenir la divulgation. Cependant, elle n'a pas conclu que l'avocat de l'appellant au procès avait adopté comme tactique de passer sous silence l'omission de divulguer du ministère public. Elle aurait fait droit à la demande de nouveau procès de l'appellant.

III. Analysis

A. *The Crown's Duty to Disclose*

III. Analyse

A. *L'obligation de divulguer du ministère public*

20 In *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, it was held that the Crown has an obligation to disclose all relevant material in its possession, so long as the material is not privileged. Material is relevant if it could reasonably be used by the defence in meeting the case for the Crown. Relevance was

Dans l'arrêt *R. c. Stinchcombe*, [1991] 3 R.C.S. 326, il a été jugé que le ministère public est tenu de communiquer tous les documents pertinents qu'il a en sa possession, pourvu qu'ils ne soient pas protégés. Un document est pertinent si la défense peut raisonnablement s'en servir pour

described in *R. v. Egger*, [1993] 2 S.C.R. 451, at p. 467, in this way:

One measure of the relevance of information in the Crown's hands is its usefulness to the defence: if it is of some use, it is relevant and should be disclosed — *Stinchcombe*, *supra*, at p. 345. This requires a determination by the reviewing judge that production of the information can reasonably be used by the accused either in meeting the case for the Crown, advancing a defence or otherwise in making a decision which may affect the conduct of the defence such as, for example, whether to call evidence.

Clearly the threshold requirement for disclosure is set quite low. As a result, a broad range of material, whether exculpatory or inculpatory, is subject to disclosure. See *Stinchcombe*, *supra*, at p. 343. In particular, "all statements obtained from persons who have provided relevant information to the authorities should be produced notwithstanding that they are not proposed as Crown witnesses" (p. 345). The Crown's duty to disclose is therefore triggered whenever there is a reasonable possibility of the information being useful to the accused in making full answer and defence. See *R. v. Chaplin*, [1995] 1 S.C.R. 727, at p. 742.

The obligation resting upon the Crown to disclose material gives rise to a corresponding constitutional right of the accused to the disclosure of all material which meets the *Stinchcombe* threshold. As Sopinka J. recently wrote for the majority of this Court in *R. v. Carosella*, [1997] 1 S.C.R. 80, at p. 106:

The right to disclosure of material which meets the *Stinchcombe* threshold is one of the components of the right to make full answer and defence which in turn is a principle of fundamental justice embraced by s. 7 of the *Charter*. Breach of that obligation is a breach of the accused's constitutional rights without the requirement of an additional showing of prejudice.

réfuter la preuve du ministère public. L'arrêt *R. c. Egger*, [1993] 2 R.C.S. 451, décrit ainsi la question de la pertinence, à la p. 467:

Une façon de mesurer la pertinence d'un renseignement dont dispose le ministère public est de déterminer son utilité pour la défense: s'il a une certaine utilité, il est pertinent et devrait être divulgué — *Stinchcombe*, précité, à la p. 345. Le juge qui effectue le contrôle doit déterminer si l'accusé peut raisonnablement utiliser la communication des renseignements pour réfuter la preuve et les arguments du ministère public, pour présenter un moyen de défense ou autrement pour parvenir à une décision susceptible d'avoir un effet sur le déroulement de la défense comme, par exemple, de présenter ou non une preuve.

Manifestement, le critère préliminaire fixé pour la divulgation est fort peu élevé. Par conséquent, une vaste gamme de documents, qu'ils soient disculpatoires ou inculpatatoires, sont assujettis à la communication. Voir l'arrêt *Stinchcombe*, précité, à la p. 343. En particulier, «toute déclaration obtenue de personnes qui ont fourni des renseignements pertinents aux autorités devrait être produite, même si le ministère public n'a pas l'intention de citer ces personnes comme témoins à charge» (p. 345). L'obligation de divulguer du ministère public est donc déclenchée chaque fois qu'il y a une possibilité raisonnable que le renseignement soit utile à l'accusé pour présenter une défense pleine et entière. Voir *R. c. Chaplin*, [1995] 1 R.C.S. 727, à la p. 742.

L'obligation qui incombe au ministère public de communiquer des documents engendre un droit constitutionnel correspondant de l'accusé à la communication de tous les documents qui satisfont au critère préliminaire de l'arrêt *Stinchcombe*. Comme l'écrivait récemment le juge Sopinka au nom de notre Cour à la majorité dans l'arrêt *R. c. Carosella*, [1997] 1 R.C.S. 80, à la p. 106:

Le droit à la communication de documents qui satisfont au critère préliminaire établi dans *Stinchcombe* est l'un des éléments du droit de présenter une défense pleine et entière qui est lui un principe de justice fondamentale visé à l'art. 7 de la *Charte*. Le fait de manquer à cette obligation constitue une atteinte aux droits constitutionnels de l'accusé, sans qu'il soit nécessaire de prouver l'existence d'un préjudice additionnel.

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Thus, where an accused demonstrates a reasonable possibility that the undisclosed information could have been used in meeting the case for the Crown, advancing a defence or otherwise making a decision which could have affected the conduct of the defence, he has also established the impairment of his *Charter* right to disclosure.

Ainsi, lorsqu'un accusé démontre l'existence d'une possibilité raisonnable que les renseignements non divulgués auraient été utilisés pour réfuter la preuve du ministère public, pour présenter un moyen de défense ou, par ailleurs, pour prendre une décision qui aurait pu avoir une incidence sur la façon de présenter la défense, il se trouve également à établir l'existence d'une atteinte au droit à la divulgation que lui garantit la *Charte*.

23 However, a finding that an accused's right to disclosure has been violated does not end the analysis. As Sopinka J. wisely observed in *Carosella*, *supra*, at p. 100, an appellate court must be careful not to "confus[e] the obligation to establish a breach of the right [to full answer and defence] with the burden resting on the appellant in seeking a stay". Similarly, the initial test which must be met in order to establish a breach of the right to disclosure is analytically distinct from the burden to be discharged to merit the remedy of a new trial. The right to disclosure of all relevant material has a broad scope and includes material which may have only marginal value to the ultimate issues at trial. It follows that the Crown may fail to disclose information which meets the *Stinchcombe* threshold, but which could not possibly affect the reliability of the result reached or the overall fairness of the trial process. In those circumstances there would be no basis for granting the remedy of a new trial under s. 24(1) of the *Charter*, since no harm has been suffered by the accused.

Toutefois, la conclusion qu'il y a eu violation du droit d'un accusé à la divulgation ne met pas fin à l'analyse. Comme le juge Sopinka l'a fait observer judicieusement dans *Carosella*, précité, à la p. 100, une cour d'appel doit se garder de «confond[re] l'obligation d'établir la violation du droit [à une défense pleine et entière] avec l'obligation qui incombe à l'appelant lorsqu'il sollicite l'arrêt des procédures». De même, le critère initial auquel il faut satisfaire pour établir la violation du droit à la divulgation est distinct, sur le plan de l'analyse, de l'obligation dont il faut s'acquitter pour mériter un nouveau procès à titre de réparation. Le droit à la communication de tous les documents pertinents est large et vise les documents qui peuvent n'avoir qu'une importance secondaire par rapport aux questions fondamentales en litige. Il s'ensuit que le ministère public peut omettre de divulguer des renseignements qui satisfont au critère préliminaire de l'arrêt *Stinchcombe*, mais qui ne pourraient absolument pas compromettre le bien-fondé du résultat atteint ou l'équité globale du procès. Dans ces circonstances, rien ne justifierait d'accorder un nouveau procès à titre de réparation en vertu du par. 24(1) de la *Charte*, puisque l'accusé n'a subi aucun préjudice.

24 It will be necessary later to explore in greater depth the nature of the burden to be discharged to merit a new trial. Now it will suffice to observe that for the purposes of this first stage of the analysis, an appellate court may well find that an accused's *Charter* right to disclosure has been breached, and yet deny the remedy of a new trial if it is found that the trial process was fundamentally fair and that there was no reasonable possibility the result at trial might have been different had the undisclosed material been produced. The right to

Il sera nécessaire plus tard d'examiner plus en profondeur la nature de l'obligation dont il faut s'acquitter pour mériter un nouveau procès. Il suffit, pour l'instant, de faire observer qu'aux fins de cette première étape de l'analyse une cour d'appel peut bien conclure à la violation du droit à la divulgation que la *Charte* garantit à un accusé, tout en refusant d'accorder un nouveau procès à titre de réparation si elle juge que le procès a été foncièrement équitable et qu'il n'y avait aucune possibilité raisonnable que le résultat du procès aurait été dif-

full disclosure is just one component of the right to make full answer and defence. It does not automatically follow that solely because the right to disclosure was violated, the *Charter* right to make full answer and defence was impaired.

Was the Appellant's Right to Disclosure
Breached at Trial?

The appellant has based his appeal on the failure to disclose all four witness statements, despite the finding of the Nova Scotia Court of Appeal that "[i]t was apparent from the argument that Daye's statement is the only one of the four non-disclosed statements relied on as material to the issue of full answer and defence" (p. 88). Both the majority and dissenting reasons were restricted to a consideration of Daye's statement. However, the majority evaluated the undisclosed statements solely in relation to their impact on the result reached at trial, and did not consider each statement in relation to the threshold issue as to whether there had been a breach of the appellant's *Charter* right to disclosure, although both issues may well have been collapsed into one. As a result, it will be appropriate to consider whether the failure to disclose each of the four statements violated the appellant's right to disclosure of relevant material.

The four statements may be briefly summarized as follows:

- (1) The statement of Travia Carvery dated September 16, 1994, indicates that he was inside the fraternity house when the assaults took place and that he did not witness any of the beatings;
- (2) The statement of Edmond ("T.J.") Levia dated September 22, 1994, indicates that he was inside the fraternity house when the assaults took place and that he did not witness any of the beatings;
- (3) The statement of Terrance Tynes dated September 21, 1994, reveals that he was in the

férent si la documentation non communiquée avait été produite. Le droit à la divulgation complète n'est qu'une composante du droit à une défense pleine et entière. Il ne s'ensuit pas automatiquement qu'il y a atteinte au droit à une défense pleine et entière garanti par la *Charte*, du seul fait qu'il y a eu violation du droit à la divulgation.

Le droit de l'appellant à la divulgation
a-t-il été violé au procès?

L'appellant a fondé son pourvoi sur l'omission de divulguer les quatre déclarations de témoins, malgré la conclusion de la Cour d'appel de la Nouvelle-Écosse [TRADUCTION] «qu'il ressortait de cet argument que la déclaration de Daye est la seule des quatre déclarations non divulguées à être invoquée comme étant pertinente relativement à la question de la défense pleine et entière» (p. 88). Tant les motifs majoritaires que les motifs de dissidence se limitaient à un examen de la déclaration de Daye. Cependant, les juges majoritaires ont évalué les déclarations non divulguées uniquement en fonction de leur incidence sur le résultat atteint au procès et n'ont pas étudié chaque déclaration en fonction de la question préliminaire de savoir s'il y avait eu violation du droit à la divulgation garanti à l'appellant par la *Charte*, même si les deux questions avaient bien pu être ramenées à une seule. Par conséquent, il conviendra de se demander si l'omission de divulguer chacune des quatre déclarations a violé le droit de l'appellant à la communication des documents pertinents.

Les quatre déclarations peuvent se résumer brièvement ainsi:

- (1) La déclaration de Travia Carvery, en date du 16 septembre 1994, indique qu'il était dans la maison de la confrérie d'étudiants lorsque les voies de fait ont été commises et qu'il n'a été témoin d'aucune des raclées.
- (2) La déclaration d'Edmond («T.J.») Levia, en date du 22 septembre 1994, indique qu'il était dans la maison de la confrérie d'étudiants lorsque les voies de fait ont été commises et qu'il n'a été témoin d'aucune des raclées.
- (3) La déclaration de Terrance Tynes, en date du 21 septembre 1994, révèle qu'il se trouvait

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vicinity of the assaults. He also states that he was with Danny Clayton, the Crown's main identification witness, while Shannon Burke and Terrence Dixon were arguing, and that he left the scene with Clayton. Tynes also describes the clothing he was wearing that night;

- (4) The statement of Terris Daye dated September 19, 1994, indicates that he witnessed two of the assaults. Daye identifies the location of some of the accused during these assaults, and identifies some of the assailants. Daye specifically implicates the appellant in the assault of John Charman, though it is possible that Daye was referring to the assault of Rob Gillis. The appellant was convicted of the assault on Darren Watts only.

près de l'endroit où les voies de fait ont été commises. Il déclare également qu'il était en compagnie de Danny Clayton, le principal témoin à charge en matière d'identification, pendant que Shannon Burke et Terrence Dixon se querellaient, et qu'il a quitté les lieux avec Clayton. Tynes décrit aussi les vêtements qu'il portait ce soir-là.

- (4) La déclaration de Terris Daye, en date du 19 septembre 1994, indique qu'il a été témoin de deux des cas de voies de fait. Daye précise où certains des accusés se trouvaient pendant que ces voies de fait étaient commises et identifie certains des agresseurs. Daye implique expressément l'appelant dans les voies de fait contre John Charman, même s'il est possible qu'il parlait alors des voies de fait contre Rob Gillis. L'appelant n'a été reconnu coupable que des voies de fait contre Darren Watts.

²⁷ The Crown has an obligation to disclose all information, whether inculpatory or exculpatory, that could "reasonably be used by the accused either in meeting the case for the Crown, advancing a defence or otherwise in making a decision which may affect the conduct of the defence such as, for example, whether to call evidence" (*Egger, supra*, at p. 467). Even so, "[w]hile the Crown must err on the side of inclusion, it need not produce what is clearly irrelevant" (*Stinchcombe, supra*, at p. 339). The statements of Carvery and Levia contain no relevant information at all, and there is no reasonable possibility that their statements could have been of any use to the appellant at trial.

Le ministère public est tenu de divulguer tous les renseignements, inculpataires ou disculpatoires, que «l'accusé [pourrait] raisonnablement utiliser [...] pour réfuter la preuve et les arguments du ministère public, pour présenter un moyen de défense ou autrement pour parvenir à une décision susceptible d'avoir un effet sur le déroulement de la défense comme, par exemple, de présenter ou non une preuve» (*Egger*, précité, à la p. 467). Même là, «[s]i le ministère public pêche, ce doit être par inclusion. Il n'est toutefois pas tenu de produire ce qui n'a manifestement aucune pertinence» (*Stinchcombe*, précité, à la p. 339). Les déclarations de Carvery et Levia ne contiennent aucun renseignement pertinent, et il n'y a aucune possibilité raisonnable que leurs déclarations aient été de quelque utilité à l'appelant au procès.

²⁸ To minimize the risk of inadvertent non-disclosure, the Crown might well choose to disclose even those witness statements that do not initially appear to be relevant. The defence obviously knows its case better than the Crown, and something which seems irrelevant could have significance to the defence. However it is clear that neither Carvery nor Levia had any further participation in the incident or in the investigation or prosecution of the appellant. Their statements were

Pour réduire au minimum le risque de non-divulgaration par inadvertance, le ministère public pourrait bien choisir de divulguer même les déclarations de témoins qui ne semblent pas pertinentes au départ. Évidemment, la défense connaît mieux sa preuve que le ministère public, et quelque chose qui semble non pertinent au ministère public pourrait avoir de l'importance pour la défense. Il est clair, toutefois, que ni Carvery ni Levia n'ont participé davantage à l'incident ou encore à l'enquête

irrelevant and the Crown did not breach its obligation to disclose relevant material by failing to produce them.

However, the same thing cannot be said of the statement of Terrance Tynes, even though it seems to contain very little relevant information. It is significant that Tynes places himself in the vicinity of the assaults, though he does not identify any of the assailants. He also states he was with Danny Clayton for some part of the evening. Though Tynes does not contradict or add anything to Clayton's evidence, the fact that Tynes was with Clayton at some point during the assaults may have been of some use to the defence. Tynes's description of his clothing on the night in question may also have been of some use to the defence in cross-examining those Crown witnesses who could not identify Watts's assailants by name and who had to describe the appearance of the men they saw. Although the statement is of marginal value, it does meet the threshold articulated in *Stinchcombe* and should have been disclosed.

The statement of Terris Daye should also have been disclosed. Daye implicates the appellant in the assault of Rob Gillis, for which he was neither indicted nor convicted. Daye also makes certain incriminating remarks about the appellant in the course of his statement, such as "Spencer punched and kicked this guy. He likes to kick." Daye's statement also contradicts the evidence given by Clayton in certain respects, and as a result it could possibly have been of some use in challenging Clayton's credibility. These aspects of Daye's statement will have to be considered in greater detail in considering whether the appellant's *Charter* right to make full answer and defence was impaired by the Crown's non-disclosure of this statement. Once again, this statement meets the threshold set out in *Stinchcombe* and should have been disclosed. It follows that the appellant's right

ou aux poursuites concernant l'appelant. Leurs déclarations n'étaient pas pertinentes et le ministère public n'a pas manqué à son obligation de communiquer tous les documents pertinents en omettant de les produire.

Cependant, on ne peut pas en dire autant de la déclaration de Terrance Tynes, même si elle semble contenir très peu de renseignements pertinents. Il est révélateur que Tynes affirme qu'il se trouvait à proximité de l'endroit où les voies de fait ont été commises, et qu'il n'identifie aucun des agresseurs. Il déclare également avoir été en compagnie de Danny Clayton pendant une partie de la soirée. Quoique Tynes ne contredise pas le témoignage de Clayton ou n'y ajoute rien, le fait qu'il ait été en compagnie de Clayton à un certain moment, pendant que les voies de fait étaient commises, aurait pu être d'une certaine utilité pour la défense. La description que Tynes donne des vêtements qu'il portait le soir en question aurait pu également être utile à la défense lors du contre-interrogatoire des témoins à charge qui ne pouvaient pas identifier les agresseurs de Watts par leur nom et qui devaient décrire l'apparence des hommes qu'ils avaient vus. Bien que cette déclaration n'ait qu'une importance secondaire, elle satisfait effectivement au critère préliminaire de l'arrêt *Stinchcombe* et aurait dû être divulguée.

La déclaration de Terris Daye aurait dû elle aussi être divulguée. Daye implique l'appelant dans les voies de fait commises contre Rob Gillis, au sujet desquelles il n'a été ni mis en accusation ni reconnu coupable. Daye a aussi fait, dans sa déclaration, certaines remarques incriminantes au sujet de l'appelant, comme par exemple: [TRADUCTION] «Spencer a frappé cet homme à coups de poing et à coups de pied. Il aime donner des coups de pied.» La déclaration de Daye contredit également le témoignage de Clayton à certains égards et, par conséquent, elle aurait pu être utile pour attaquer la crédibilité de Clayton. Ces aspects de la déclaration de Daye devront être étudiés de plus près en examinant la question de savoir si l'omission du ministère public de divulguer cette déclaration a porté atteinte au droit à une défense pleine et entière que la *Charte* garantit à l'appelant. Encore

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to disclosure was infringed by the Crown's inadvertent failure to produce these two statements.

B. *Impairment of the Right to Make Full Answer and Defence and the Remedy to Be Granted under Section 24(1)*

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The right to disclosure is but one component of the right to make full answer and defence. Although the right to disclosure may be violated, the right to make full answer and defence may not be impaired as a result of that violation. Indeed, different principles and standards apply in determining whether disclosure should be made before conviction and in determining the effect of a failure to disclose after conviction. For instance, where the undisclosed material is available for review at trial, the presiding judge will evaluate it in relation to the *Stinchcombe* threshold to determine whether the Crown breached its obligation to disclose by withholding the material. If it has, an order for production or perhaps an adjournment will be the appropriate remedy. Obviously, these remedies are no longer available after conviction. At this stage, an appellate court must determine not only whether the undisclosed information meets the *Stinchcombe* threshold, but also whether the Crown's failure to disclose impaired the accused's right to make full answer and defence. Where an appellate court finds that the right to make full answer and defence was breached by the Crown's failure to disclose, the appropriate remedy will depend on the extent to which the right was impaired. Where, as here, the accused was tried before a judge alone, the judge has provided thorough reasons for the decision, and the undisclosed evidence is available for review, an appellate court is particularly well placed to assess the impact of the failure to disclose on the accused's ability to make full answer and defence at trial.

une fois, cette déclaration satisfait au critère préliminaire de l'arrêt *Stinchcombe* et aurait dû être divulguée. Il s'ensuit qu'il y a eu atteinte au droit de l'appelant à la divulgation, du fait que le ministère public a omis par inadvertance de produire ces deux déclarations.

B. *L'atteinte au droit à une défense pleine et entière et la réparation à accorder en vertu du par. 24(1)*

Le droit à la divulgation n'est qu'une composante du droit à une défense pleine et entière. Bien qu'il puisse y avoir violation du droit à la divulgation, il se peut qu'il n'y ait aucune atteinte au droit à une défense pleine et entière par suite de cette violation. En fait, différents principes et normes s'appliquent pour déterminer si la divulgation devrait avoir lieu avant la déclaration de culpabilité et pour déterminer l'effet d'une omission de divulguer après la déclaration de culpabilité. Par exemple, lorsque la documentation non communiquée peut être examinée au procès, le juge qui préside l'audience l'évaluera en fonction du critère préliminaire de l'arrêt *Stinchcombe* pour déterminer si, en dissimulant cette documentation, le ministère public a manqué à son obligation de divulguer. Dans l'affirmative, une ordonnance de production ou peut-être l'ajournement sera la réparation appropriée. Il est évident que ces réparations ne sont plus disponibles après une déclaration de culpabilité. Une cour d'appel doit alors déterminer non seulement si les renseignements non divulgués satisfont au critère préliminaire de *Stinchcombe*, mais encore si l'omission de divulguer du ministère public a porté atteinte au droit de l'accusé à une défense pleine et entière. Si une cour d'appel conclut que l'omission de divulguer du ministère public a porté atteinte au droit à une défense pleine et entière, la réparation à accorder dépendra de la gravité de l'atteinte à ce droit. Lorsque, comme en l'espèce, l'accusé a subi son procès devant un juge seul, qui a fourni des motifs détaillés à l'appui de sa décision, et que les éléments de preuve non divulgués peuvent être examinés, une cour d'appel est particulièrement bien placée pour évaluer l'incidence de l'omission de divulguer sur la capacité de l'accusé de présenter une défense pleine et entière à son procès.

At this point, something should also be said about the standard to be met by an accused who asserts that the right to make full answer and defence was impaired. It is trite but worth repeating that in all cases where a person claims that a *Charter* right has been violated, he or she must prove on a balance of probabilities that the violation occurred. Thus, before granting any sort of remedy under s. 24(1), it must be found that it was more likely than not that the *Charter* right in question was infringed or denied. See *R. v. Collins*, [1987] 1 S.C.R. 265, at p. 277.

The evidence required to meet this burden and the factors to be considered will differ according to the particular right at issue and the particular remedy sought. For example, where a court is persuaded that undisclosed information meets the *Stinchcombe* threshold, an accused has met his burden to establish a violation of his *Charter* right to disclosure. As noted above, the appropriate remedy for such a violation is, at trial, an order for production or an adjournment. Where non-disclosure is raised on an appeal from a conviction, an accused must, as a threshold matter, establish a violation of the right to disclosure. Further, the accused bears the additional burden of demonstrating on a balance of probabilities that the right to make full answer and defence was impaired as a result of the failure to disclose.

This burden is discharged where an accused demonstrates that there is a reasonable possibility the non-disclosure affected the outcome at trial or the overall fairness of the trial process. See *R. v. C. (M.H.)*, [1991] 1 S.C.R. 763, at p. 776; *Stinchcombe*, *supra*, at p. 348. Imposing a test based on a reasonable possibility strikes a fair balance between an accused's interest in a fair trial and the public's interest in the efficient administration of justice. It recognizes the difficulty of reconstructing accurately the trial process, and avoids the undesirable effect of undermining the Crown's

À ce moment-ci, il faudrait aussi parler de la norme à laquelle doit satisfaire l'accusé qui soutient qu'il y a eu atteinte à son droit à une défense pleine et entière. Même si cela peut sembler banal, il vaut la peine de répéter que, dans toutes les affaires où une personne allègue une violation d'un droit garanti par la *Charte*, elle doit prouver l'existence de cette violation selon la prépondérance des probabilités. Donc, avant d'accorder quelque réparation que ce soit en vertu du par. 24(1), il faut conclure qu'il était davantage probable qu'il y avait eu violation ou négation du droit en question garanti par la *Charte*. Voir *R. c. Collins*, [1987] 1 R.C.S. 265, à la p. 277.

La preuve requise pour s'acquitter de cette obligation et les facteurs à prendre en considération différeront selon le droit en cause et la réparation réclamée. Par exemple, lorsqu'un tribunal est convaincu que les renseignements non divulgués satisfont au critère préliminaire de l'arrêt *Stinchcombe*, l'accusé s'est acquitté de son obligation d'établir l'existence d'une violation du droit à la divulgation que lui garantit la *Charte*. Comme nous l'avons vu, une ordonnance de production ou l'ajournement est la réparation qu'il convient d'accorder pour une telle violation au procès. Lorsque la question de la non-divulgence est soulevée dans le cadre d'un appel contre une déclaration de culpabilité, l'accusé doit commencer par établir l'existence d'une violation du droit à la divulgation. De plus, il incombe à l'accusé de démontrer, selon la prépondérance des probabilités, que l'omission de divulguer a porté atteinte à son droit à une défense pleine et entière.

Il est satisfait à cette obligation lorsque l'accusé démontre qu'il y a une possibilité raisonnable que la non-divulgence ait influé sur l'issue ou l'équité globale du procès. Voir les arrêts *R. c. C. (M.H.)*, [1991] 1 R.C.S. 763, à la p. 776; *Stinchcombe*, *précité*, à la p. 348. Imposer un critère fondé sur une possibilité raisonnable permet d'établir un juste équilibre entre l'intérêt qu'a l'accusé à subir un procès équitable et l'intérêt qu'a le public dans l'administration efficace de la justice. On reconnaît ainsi la difficulté qu'il y a à reconstituer fidèlement le procès et on évite l'effet non souhaitable de

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disclosure obligations. This would be the result if the Crown were placed in a better position by withholding rather than disclosing information of relatively low probative value. However, the reasonable possibility to be shown under this test must not be entirely speculative. It must be based on reasonably possible uses of the non-disclosed evidence or reasonably possible avenues of investigation that were closed to the accused as a result of the non-disclosure. If this possibility is shown to exist, then the right to make full answer and defence was impaired.

miner les obligations de divulgation du ministère public. C'est le résultat auquel on arriverait si, en dissimulant des renseignements ayant relativement peu de valeur probante, le ministère public se trouvait dans une meilleure situation qu'en les divulguant. Cependant, la possibilité raisonnable, dont l'existence doit être démontrée selon ce critère, ne doit pas être purement hypothétique. Elle doit se fonder sur les utilisations raisonnablement possibles de la preuve non divulguée ou sur les moyens d'enquête raisonnablement possibles dont l'accusé a été privé à la suite de la non-divulgation. S'il est prouvé qu'une telle possibilité existe, il y a alors eu atteinte au droit à une défense pleine et entière.

35 Once an accused establishes impairment of the right to make full answer and defence as a result of the Crown's failure to disclose, he or she is entitled to a remedy under s. 24(1). Again, it is at this stage that the degree of impairment or prejudice to the accused's rights must be assessed and considered in relation to the remedy sought. For example, an accused who seeks the extraordinary remedy of a stay of proceedings must not only establish, on a balance of probabilities, that the right to make full answer and defence was impaired, but must also demonstrate irreparable prejudice to that right. See *Carosella, supra*, at p. 112. By contrast, where the remedy sought is a new trial, an accused need only persuade the appellate court of the reasonable possibility that the failure to disclose affected either the outcome at trial or the overall fairness of the trial process, and nothing more.

L'accusé qui établit que l'omission de divulguer du ministère public a porté atteinte à son droit à une défense pleine et entière a droit à une réparation fondée sur le par. 24(1). Encore une fois, c'est à cette étape que la gravité de l'atteinte portée aux droits de l'accusé ou du préjudice causé à ceux-ci doit être évaluée et examinée en fonction de la réparation demandée. Par exemple, l'accusé qui réclame la réparation exceptionnelle qu'est l'arrêt des procédures doit non seulement établir, selon la prépondérance des probabilités, qu'il y a eu atteinte à son droit à une défense pleine et entière, mais encore qu'un préjudice irréparable a été causé à ce droit. Voir *Carosella*, précité, à la p. 112. Par contre, lorsque la réparation demandée est un nouveau procès, l'accusé a seulement besoin de convaincre la cour d'appel de la possibilité raisonnable que l'omission de divulguer ait influé sur l'issue ou l'équité globale du procès, rien de plus.

36 Thus, in order to determine whether the right to make full answer and defence was impaired, it is necessary to undertake a two-step analysis based on these considerations. First, in order to assess the reliability of the result, the undisclosed information must be examined to determine the impact it might have had on the decision to convict. Obviously this will be an easier task if the accused was tried before a judge alone, and reasons were given for the conviction. If at the first stage an appellate court is persuaded that there is a reasonable possibility that, on its face, the undisclosed information

Donc, pour déterminer s'il y a eu atteinte au droit à une défense pleine et entière, il faut entreprendre une analyse en deux étapes fondée sur ces considérations. Premièrement, pour évaluer le bien-fondé du résultat, il faut examiner les renseignements non divulgués pour déterminer l'incidence qu'ils auraient pu avoir sur la décision de rendre un verdict de culpabilité. Évidemment, la tâche sera plus facile si l'accusé a subi son procès devant un juge seul et si des motifs ont été exposés à l'appui de la déclaration de culpabilité. Si, à la première étape, une cour d'appel est convaincue

affects the reliability of the conviction, a new trial should be ordered. Even if the undisclosed information does not itself affect the reliability of the result at trial, the effect of the non-disclosure on the overall fairness of the trial process must be considered at the second stage of analysis. This will be done by assessing, on the basis of a reasonable possibility, the lines of inquiry with witnesses or the opportunities to garner additional evidence that could have been available to the defence if the relevant information had been disclosed. In short, the reasonable possibility that the undisclosed information impaired the right to make full answer and defence relates not only to the content of the information itself, but also to the realistic opportunities to explore possible uses of the undisclosed information for purposes of investigation and gathering evidence.

In considering the overall fairness of the trial process, defence counsel's diligence in pursuing disclosure from the Crown must be taken into account. A lack of due diligence is a significant factor in determining whether the Crown's non-disclosure affected the fairness of the trial process. In *Stinchcombe, supra*, at p. 341, defence counsel's duty to be duly diligent was described in this way:

Counsel for the accused must bring to the attention of the trial judge at the earliest opportunity any failure of the Crown to comply with its duty to disclose of which counsel becomes aware. Observance of this rule will enable the trial judge to remedy any prejudice to the accused if possible and thus avoid a new trial. See *Caccamo v. The Queen*, [1976] 1 S.C.R. 786. Failure to do so by counsel for the defence will be an important factor in determining on appeal whether a new trial should be ordered.

The fair and efficient functioning of the criminal justice system requires that defence counsel exercise due diligence in actively seeking and pursuing Crown disclosure. The very nature of the disclo-

qu'il y a une possibilité raisonnable que les renseignements non divulgués influent, à première vue, sur le bien-fondé de la déclaration de culpabilité, un nouveau procès devrait être ordonné. Même si les renseignements non divulgués n'influencent pas eux-mêmes sur le bien-fondé du résultat atteint au procès, l'incidence de la non-divulgaration sur l'équité globale du procès doit être prise en considération à la deuxième étape de l'analyse. On le fera en évaluant, sous l'angle d'une possibilité raisonnable, les questions qui auraient pu être posées aux témoins ou les possibilités de recueillir d'autres éléments de preuve que la défense aurait pu avoir si les renseignements pertinents avaient été divulgués. Bref, la possibilité raisonnable que les renseignements non divulgués aient porté atteinte au droit à une défense pleine et entière a trait non seulement au contenu des renseignements eux-mêmes, mais encore aux possibilités réalistes d'examiner les utilisations possibles des renseignements non divulgués aux fins de l'enquête et de la cueillette d'éléments de preuve.

Pour examiner l'équité globale du procès, il faut tenir compte de la diligence dont l'avocat de la défense a fait preuve en tentant d'obtenir la divulgation par le ministère public. Le manque de diligence raisonnable est un facteur important pour déterminer si la non-divulgaration par le ministère public a nui à l'équité du procès. Dans l'arrêt *Stinchcombe*, précité, à la p. 341, l'obligation qu'a l'avocat de la défense de faire preuve de diligence raisonnable est ainsi décrite:

Quand l'avocat de l'accusé prend connaissance d'une omission du ministère public de respecter son obligation de divulguer, celui-ci doit, dès que possible, signaler cette omission au juge du procès. L'observation de cette règle permettra au juge du procès de remédier, autant que faire se peut, à tout préjudice causé à l'accusé et d'éviter ainsi un nouveau procès. Voir *Caccamo c. La Reine*, [1976] 1 R.C.S. 786. L'omission de l'avocat de la défense de ce faire constituera un facteur important à retenir pour déterminer, lors d'un appel, s'il y a lieu d'ordonner la tenue d'un nouveau procès.

Pour que le système de justice pénale fonctionne efficacement et équitablement, l'avocat de la défense doit faire preuve de diligence raisonnable en réclamant activement la divulgation par le

sure process makes it prone to human error and vulnerable to attack. As officers of the court, defence counsel have an obligation to pursue disclosure diligently. When counsel becomes or ought to become aware, from other relevant material produced by the Crown, of a failure to disclose further material, counsel must not remain passive. Rather, they must diligently pursue disclosure. This was aptly stated by the British Columbia Court of Appeal in *R. v. Bramwell* (1996), 106 C.C.C. (3d) 365 (aff'd [1996] 3 S.C.R. 1126), at p. 374:

... the disclosure process is one which engages both the Crown and the defence. It is not one in which defence counsel has no role to play except as passive receiver of information. The goal of the disclosure process is to ensure that the accused is not denied a fair trial. To that end, Crown counsel must disclose everything in its possession which is not clearly irrelevant to the defence, but the defence must also play its part by diligently pursuing disclosure from Crown counsel in a timely manner. Further, where, as here, defence counsel makes a tactical decision not to pursue disclosure of certain documents, the court will generally be unsympathetic to a plea that full disclosure of those documents was not made.

See also *R. v. S.E.S.* (1992), 100 Sask. R. 110 (C.A.), at p. 121.

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Whether a new trial should be ordered on the basis that the Crown's non-disclosure rendered the trial process unfair involves a process of weighing and balancing. If defence counsel knew or ought to have known on the basis of other disclosures that the Crown through inadvertence had failed to disclose information yet remained passive as a result of a tactical decision or lack of due diligence it would be difficult to accept a submission that the failure to disclose affected the fairness of the trial. See *R. v. McAnespie*, [1993] 4 S.C.R. 501, at pp. 502-3.

ministère public. La nature même du processus de divulgation l'expose à l'erreur humaine et à la contestation. En tant qu'officier de justice, l'avocat de la défense est tenu de faire preuve de diligence en tentant d'obtenir la divulgation. Lorsque l'avocat prend ou devrait prendre connaissance, à partir de documents pertinents produits par le ministère public, d'une omission de communiquer d'autres documents, il ne doit pas rester passif. Il doit plutôt tenter diligemment d'en obtenir la communication. Ce principe est bien énoncé par la Cour d'appel de la Colombie-Britannique dans l'arrêt *R. c. Bramwell* (1996), 106 C.C.C. (3d) 365 (conf. par [1996] 3 R.C.S. 1126), à la p. 374:

[TRADUCTION] ... le processus de divulgation met en cause à la fois le ministère public et la défense. Ce n'est pas un processus dans lequel l'avocat de la défense n'a aucun rôle à jouer, si ce n'est de recevoir l'information de façon passive. Le processus de divulgation vise à assurer que l'accusé ne soit pas privé d'un procès équitable. À cette fin, le substitut du procureur général doit divulguer tout ce qui est en sa possession et qui n'est pas manifestement non pertinent pour la défense, mais la défense doit également jouer son rôle en réclamant de manière diligente au substitut du procureur général la divulgation en temps opportun. De plus, lorsque, comme en l'espèce, l'avocat de la défense prend une décision tactique de ne pas tenter d'obtenir la communication de certains documents, le tribunal sera généralement indifférent à un plaidoyer selon lequel il n'y a pas eu communication complète de ces documents.

Voir également *R. c. S.E.S.* (1992), 100 Sask. R. 110 (C.A.), à la p. 121.

La réponse à la question de savoir s'il y a lieu d'ordonner la tenue d'un nouveau procès pour le motif que l'omission de divulguer du ministère public a rendu le procès inéquitable comporte un processus d'évaluation et de pondération. Si l'avocat de la défense savait ou aurait dû savoir, sur la foi d'autres renseignements divulgués, que le ministère public avait omis par inadvertance de divulguer de l'information, et qu'il n'a rien fait en raison d'une décision tactique ou d'un manque de diligence raisonnable, il serait difficile de retenir un argument selon lequel l'omission de divulguer a nui à l'équité du procès. Voir l'arrêt *R. c. McAnespie*, [1993] 4 R.C.S. 501, aux pp. 502 et 503.

In sum, all these factors must be appropriately balanced. In situations where the materiality of the undisclosed evidence is, on its face, very high, a new trial should be ordered on this basis alone. In these circumstances, it will not be necessary to consider the impact of lost opportunities to garner additional evidence flowing from the failure to disclose. However, where the materiality of the undisclosed information is relatively low, an appellate court will have to determine whether any realistic opportunities were lost to the defence. To that end, the due diligence or lack of due diligence of defence counsel in pursuing disclosure will be a very significant factor in deciding whether to order a new trial. This balancing process must now be applied to this appeal.

Application to this Appeal

(a) *The Appellant's Conviction under Section 21(1) of the Criminal Code*

It is significant to the disposition of this appeal that the trial judge found that the appellant was guilty both as a principal and as a party under s. 21(1) of the *Criminal Code*. That section provides:

- 21. (1)** Every one is a party to an offence who
- (a) actually commits it;
 - (b) does or omits to do anything for the purpose of aiding any person to commit it; or
 - (c) abets any person in committing it.

The trial judge's reasons for convicting the appellant for the aggravated assault of Darren Watts under s. 21(1) of the *Code* were expressed forcefully and with great clarity. He stated (at p. 324):

The identity of the man or men who jumped up and down on Darren Watts, and the identity of the man who pushed away his friends so as to get a better angle, or more space, to take a vicious three step kick at his head, described at various times as a "soccer", "grey cup", or "killer kick", cannot be affirmed. I find that the group

Somme toute, il convient de bien pondérer tous ces facteurs. Dans les cas où la pertinence de la preuve non divulguée est très élevée à première vue, la tenue d'un nouveau procès devrait être ordonnée pour ce motif seulement. Dans ces circonstances, il ne sera pas nécessaire d'examiner l'incidence des possibilités perdues de recueillir d'autres éléments de preuve par suite de l'omission de divulguer. Cependant, si la pertinence des renseignements non divulgués est relativement peu élevée, une cour d'appel devra déterminer si la défense a perdu des possibilités réalistes. À cette fin, la diligence raisonnable ou le manque de diligence raisonnable dont l'avocat de la défense aura fait preuve en tentant d'obtenir la divulgation constituera un facteur très important à retenir pour décider d'ordonner ou non la tenue d'un nouveau procès. Ce processus de pondération doit maintenant être appliqué au présent pourvoi.

Application au présent pourvoi

a) *La déclaration de culpabilité de l'appellant fondée sur le par. 21(1) du Code criminel*

Il importe de souligner, pour trancher le présent pourvoi, que le juge du procès a déclaré l'appellant coupable à la fois comme auteur principal de l'infraction et comme participant à celle-ci, au sens du par. 21(1) du *Code criminel*. Ce paragraphe se lit ainsi:

- 21. (1)** Participant à une infraction:
- a) quiconque la commet réellement;
 - b) quiconque accomplit ou omet d'accomplir quelque chose en vue d'aider quelqu'un à la commettre;
 - c) quiconque encourage quelqu'un à la commettre.

Le juge du procès a exposé avec vigueur et grande clarté les raisons pour lesquelles il a déclaré l'appellant coupable de voies de fait graves contre Darren Watts, en vertu du par. 21(1) du *Code*. Il a dit (à la p. 324):

[TRADUCTION] On ne peut pas confirmer l'identité de l'homme ou des hommes qui ont sauté sur Darren Watts ni celle de l'homme qui a écarté ses amis afin de jouir d'un meilleur angle, ou de plus d'espace, pour reculer de trois pas et lui donner un violent coup de pied à la tête, qui a été décrit à maintes reprises comme un «botté

that formed a circle around Darren Watts and were responsible for his savage beating comprised at least seven black males, those being these six accused and the Crown witness, Danny Clayton. There were possibly others in that circle which surrounded Mr. Watts, whose identities are best known to his assailants. However, their names and level of participation that night are irrelevant for the purposes of this trial, as I am satisfied beyond a reasonable doubt of the guilt of each of these six accused in the aggravated assault of Darren Watts.

It is well settled that mere presence at the scene of a crime is not sufficient to support a finding of culpability. (*Dunlop and Sylvester v. The Queen* [[1979] 2 S.C.R. 881]). Something more is required. Here, the Crown relies upon s. 21(1) of the *Criminal Code*, the effect of which is to make equally culpable the person who actually commits the offense, and any person who aids or abets in committing the offense. While I am convinced beyond a reasonable doubt as to the guilt of these six accused on all counts based on the testimony of their accomplice, Danny Clayton, were it necessary, I would also be prepared to say that each of the accused and Danny Clayton were parties to the aggravated assault of Darren Watts as charged on the Indictment, within the meaning of s. 21(1). I am satisfied the men in the circle were all there for the same reasons: to kick or beat Darren Watts; or help in administering the beating; or encourage it; or stand — as observed by others — shoulder to shoulder so as to form a circle thereby ensnaring Darren Watts and preventing him from getting away or stopping others from coming to his rescue. [Emphasis added.]

de soccer», un «botté de Coupe Grey» ou un «méchant coup de pied». Je conclus que le groupe qui a encerclé Darren Watts et qui a été responsable de la raclée sauvage qu'il a reçue comprenait au moins sept noirs, soit les six accusés et le témoin à charge, Danny Clayton. Il y avait peut-être d'autres personnes dans ce cercle qui s'est formé autour de M. Watts, dont les agresseurs connaissent mieux l'identité. Cependant, leurs noms et leur degré de participation ce soir-là ne sont pas pertinents pour les fins du présent procès, car je suis convaincu hors de tout doute raisonnable que chacun de ces six accusés est coupable des voies de fait graves dont a été victime Darren Watts.

Il est bien établi que la seule présence sur les lieux d'un crime ne suffit pas à justifier une déclaration de culpabilité. (*Dunlop et Sylvester c. La Reine* [[1979] 2 R.C.S. 881]). Il faut quelque chose de plus. En l'espèce, le ministère public s'appuie sur le par. 21(1) du *Code criminel*, qui a pour effet de rendre aussi coupables l'une que l'autre la personne qui commet réellement l'infraction et celle qui aide ou encourage la perpétration de l'infraction. Bien que je sois convaincu hors de tout doute raisonnable de la culpabilité de ces six accusés relativement à tous les chefs d'accusation, en raison du témoignage de leur complice, Danny Clayton, je serais également disposé à dire, si cela était nécessaire, que chacun des accusés et Danny Clayton ont participé, au sens du par. 21(1), aux voies de fait graves contre Darren Watts, tel que mentionné dans l'acte d'accusation. Je suis persuadé que les hommes qui formaient le cercle étaient tous là pour les mêmes raisons: donner des coups de pied à Darren Watts ou le battre, ou aider à le battre ou encourager d'autres à le faire, ou encore — comme d'autres l'ont fait observer — se serrer les coudes de manière à former un cercle afin d'empêcher Darren Watts de s'échapper ou d'empêcher d'autres personnes de venir à sa rescousse. [Je souligne.]

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The appellant bears the burden of demonstrating that either (i) it is reasonably possible the non-disclosed statements affect the reliability of his conviction as a principal in the aggravated assault on Darren Watts, and the conviction for aiding or abetting the assault on Watts; or (ii) that it is reasonably possible the non-disclosure of the statements affected the overall fairness of the trial process. It must be remembered that as a result of the appellant's conviction under s. 21(1) of the *Code*, he must show that the undisclosed statements affected each of the alternative conclusions referred to in the subsection, specifically, that the

Il incombe à l'appelant de démontrer (i) qu'il est raisonnablement possible que les déclarations non divulguées influent sur le bien-fondé de sa déclaration de culpabilité en tant qu'auteur principal des voies de fait graves contre Darren Watts, et de sa déclaration de culpabilité d'avoir aidé ou encouragé à perpétrer les voies de fait contre Watts, ou (ii) qu'il est raisonnablement possible que la non-divulgaration des déclarations ait nui à l'équité globale du procès. Il faut se rappeler que, par suite de sa déclaration de culpabilité fondée sur le par. 21(1) du *Code*, l'appelant doit prouver que l'omission de divulguer les déclarations a influé

appellant either kicked or beat Darren Watts; helped to administer the beating; or encouraged the beating. In my opinion, the appellant has not discharged this burden.

(b) *Materiality of Tynes's Statement*

There is little to say in relation to the materiality of Tynes's statement. It neither adds to nor contradicts the identification evidence given by Danny Clayton. Tynes makes no reference to the appellant at all. Neither does his description of his own clothing and appearance that night have any impact on the appellant's conviction. It is apparent that, on its face, Tynes's statement could not have had any impact on the reliability of the appellant's conviction at trial. The possibility that Tynes's statement could have been used to garner additional evidence will be considered later in relation to the fairness of the trial process.

(c) *Materiality of Daye's Statement*

It is significant that Daye states very clearly that he only witnessed two of the assaults that took place on the night in question, and definitely implies that he did not witness the assault of Darren Watts. Indeed, he has little to offer in relation to the assault on Watts, beyond the description of two circles of people around the victim and the location of the assault. This paucity of detail stands in stark contrast to Daye's description of the other two assaults, in which he implicates the appellant.

Thus, in terms of direct impact on the appellant's conviction, the statement is of no consequence. Daye not only has little to say about the assault on Watts, he in fact makes highly incriminating statements about the appellant. It follows that there is no reasonable possibility that Daye's statement, on its face, could directly affect the reliability of the result reached at trial.

sur chacune des autres conclusions mentionnées dans le paragraphe, plus précisément celles qu'il a donné des coups de pied à Darren Watts ou l'a battu, qu'il a aidé à le battre ou qu'il a encouragé à le faire. À mon avis, l'appelant ne s'est pas acquitté de cette obligation.

(b) *La pertinence de la déclaration de Tynes*

Il y a peu de choses à dire au sujet de la pertinence de la déclaration de Tynes. Elle n'ajoute rien à la preuve d'identification présentée par Danny Clayton et elle ne la contredit pas non plus. Tynes ne mentionne aucunement l'appelant. La description de ses propres vêtements et de son apparence ce soir-là n'a également aucune incidence sur la déclaration de culpabilité de l'appelant. Il appert qu'à première vue la déclaration de Tynes n'aurait pu avoir aucune incidence sur le bien-fondé de la déclaration de culpabilité de l'appelant prononcée au procès. La possibilité que la déclaration de Tynes aurait été utilisée pour recueillir d'autres éléments de preuve sera examinée plus loin en fonction de l'équité du procès.

(c) *La pertinence de la déclaration de Daye*

Il est révélateur que Daye déclare très clairement qu'il n'a été témoin que de deux des cas de voies de fait qui ont été commises le soir en question et qu'il laisse nettement entendre qu'il n'a pas été témoin des voies de fait contre Darren Watts. En réalité, il a peu à offrir au sujet des voies de fait contre Watts, outre sa description de deux cercles de personnes autour de la victime et de l'endroit où les voies de fait ont été commises. Ce manque de détails contraste vivement avec la description que Daye donne des deux autres cas de voies de fait, dans laquelle il implique l'appelant.

Ainsi, la déclaration n'a aucune incidence directe sur la déclaration de culpabilité de l'appelant. Non seulement Daye a-t-il peu de choses à dire au sujet des voies de fait contre Watts, mais encore il fait, en réalité, des déclarations très incriminantes au sujet de l'appelant. Il s'ensuit qu'il n'y a aucune possibilité raisonnable que la déclaration de Daye aurait, à première vue, influé directement sur le bien-fondé du résultat atteint au procès.

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It now must be considered whether the statement could have had some indirect impact. The identification of the appellant as one of the men who assaulted Darren Watts rested to a large extent on Clayton's credibility. As a result, any contradictions that exist between Daye's statement and the evidence given by Clayton are relevant to the appellant's defence and could potentially affect the reliability of the conviction. The significant contradictions may be summarized in this way:

- i. Daye stated that the appellant and Damon Cole assaulted "#1 guy" (it appears Daye was referring to the assault on Rob Gillis). Clayton testified that Cyril Smith and Damon Cole assaulted Rob Gillis.
- ii. When asked whether he saw Cyril Smith punch, hit or kick anyone, Daye responded, "No". Clayton testified that Cyril Smith assaulted Rob Gillis.
- iii. Daye stated that he did not see Stacey Skinner hit anyone, though he knew that Skinner had admitted to an assault in his own statement to police. Clayton testified that Skinner assaulted Charman and Watts. It should also be noted that Skinner admitted to the assault on Charman in his statement to the police.
- iv. Daye stated that he could not remember Guy Robart hitting anyone. Clayton testified that Robart assaulted Watts.
- v. Daye stated that one group of men ran toward the hospital across from the fraternity house, and then another group joined them. Clayton testified that there was a single group — the one that assaulted Darren Watts — that ran to the hospital. This was supported by the testimony of another

Il faut maintenant se demander si la déclaration aurait pu avoir une incidence indirecte. L'identification de l'appellant comme étant l'un des hommes qui ont commis des voies de fait contre Darren Watts reposait en grande partie sur la crédibilité de Clayton. Par conséquent, toute contradiction qui existe entre la déclaration de Daye et le témoignage de Clayton est pertinente relativement à la défense de l'appellant et est susceptible d'influer sur le bien-fondé de la déclaration de culpabilité. Les contradictions importantes peuvent se résumer ainsi:

- i. Daye a déclaré que l'appellant et Damon Cole ont commis des voies de fait contre le «premier homme» (il semble que Daye faisait allusion aux voies de fait contre Rob Gillis). Clayton a témoigné que Cyril Smith et Damon Cole ont commis des voies de fait contre Rob Gillis.
- ii. Lorsqu'on lui a demandé s'il avait vu Cyril Smith battre quelqu'un ou frapper quelqu'un à coups de poing ou à coups de pied, Daye a répondu «Non». Clayton a témoigné que Cyril Smith a commis des voies de fait contre Rob Gillis.
- iii. Daye a déclaré ne pas avoir vu Stacey Skinner frapper quelqu'un, même s'il savait que Skinner avait admis avoir commis des voies de fait dans sa propre déclaration à la police. Clayton a témoigné que Skinner a commis des voies de fait contre Charman et Watts. Il y a lieu également de noter que Skinner a admis avoir commis des voies de fait contre Charman dans sa déclaration à la police.
- iv. Daye a déclaré ne pas pouvoir se rappeler si Guy Robart avait frappé quelqu'un. Clayton a témoigné que Robart a commis des voies de fait contre Watts.
- v. Daye a déclaré qu'un seul groupe d'hommes s'est dirigé en courant vers l'hôpital situé en face de la maison de la confrérie et qu'un autre groupe l'a ensuite rejoint. Clayton a témoigné qu'un seul groupe — celui qui avait commis des voies de fait contre Darren Watts — avait couru vers l'hôpital. Cela a

Crown witness, Blaine McQueen. The “single cohesive group” theory was a significant part of the Crown’s theory at trial.

It seems to me that these relatively insignificant contradictions could not possibly affect the reliability of the appellant’s conviction under s. 21(1) for the assault on Darren Watts. As to (i), it is not reasonably possible that Daye’s identification of the appellant as one of Gillis’s assailants would undermine the credibility of Clayton’s identification of the appellant as one of Watts’s assailants. This very minor contradiction on a peripheral issue could not raise a doubt in the trial judge’s mind regarding the appellant’s conviction for the assault on Watts. The contradictions referred to in (ii), (iii) and (iv) are based on Daye’s recollection and observation of the events in question. Once again, it is not reasonably possible that these gaps in Daye’s memory and observations would undermine Clayton’s credibility in the mind of the trial judge regarding the appellant’s participation in the assault on Watts. It must be remembered that the trial judge carefully scrutinized all of Clayton’s evidence and was convinced of his credibility. On this aspect he stated (at pp. 327-28):

I was impressed by the way he conducted himself while testifying. I watched him listened to him intently. Nothing of what he said or how he said it caused me to be left with any reasonable doubt of his positive identification of these six accused as being responsible for the aggravated assault of Darren Watts. . . .

While testifying Mr. Clayton left me with the clear impression that he was responding carefully and honestly to questions posed by counsel. Simply to illustrate, I noted that occasionally he asked questions of the cross-examiner to be sure that he understood the question before responding. He never appeared evasive, or argumentative, or attempting to cast himself or his answers in the best possible light. He acknowledged the

été étayé par le témoignage d’un autre témoin à charge, Blaine McQueen. La thèse d’«un seul groupe cohésif» a constitué une partie importante de l’argumentation du ministère public au procès.

Il me semble que ces contradictions relativement peu importantes ne pouvaient absolument pas influencer sur le bien-fondé de la déclaration de culpabilité qui a été prononcée contre l’appelant, en application du par. 21(1), relativement aux voies de fait contre Darren Watts. Quant à l’alinéa (i), il n’est pas raisonnablement possible que l’identification par Daye de l’appelant comme étant l’un des agresseurs de Gillis minerait la crédibilité de Clayton quand il identifie l’appelant comme étant l’un des agresseurs de Watts. Cette contradiction très mineure concernant une question secondaire ne pouvait pas susciter un doute dans l’esprit du juge du procès quant à la déclaration de culpabilité de l’appelant relative aux voies de fait contre Watts. Les contradictions mentionnées aux alinéas (ii), (iii) et (iv) sont fondées sur le souvenir que Daye avait des événements en question et sur l’observation qu’il en avait faite. Encore une fois, il n’est pas raisonnablement possible que ces lacunes dans les souvenirs et les observations de Daye mineraient la crédibilité de Clayton dans l’esprit du juge du procès en ce qui concerne la participation de l’appelant aux voies de fait contre Watts. Il faut se rappeler que le juge du procès a examiné attentivement toute la preuve de Clayton et qu’il était convaincu de sa crédibilité. À cet égard, il a dit (aux pp. 327 et 328):

[TRADUCTION] J’ai été impressionné par la façon dont il s’est comporté pendant son témoignage. Je l’ai observé et écouté attentivement. Rien dans ses propos ou dans sa façon de les tenir n’a suscité chez moi un doute raisonnable quant à son identification positive de ces six accusés comme étant responsables des voies de fait graves contre Darren Watts. . .

Pendant son témoignage, M. Clayton m’a donné nettement l’impression de répondre minutieusement et honnêtement aux questions des avocats. Simplement à titre d’exemple, j’ai noté qu’il a parfois posé des questions au contre-interrogateur pour s’assurer qu’il avait bien compris la question avant d’y répondre. Il ne s’est jamais montré évasif ni belliqueux ou encore soucieux de se présenter ou de présenter ses réponses sous le

obvious. Sometimes the form of the question posed resulted in an unsolicited response which, in my eyes, bolstered Clayton's credibility. When referred to previous statements where questions were asked using compound phrases like "kicking and punching" Clayton attempted to carefully draw a distinction. His answers to difficult questions were reasonable. He met them head on. . . .

In light of these comments it is unrealistic to think that the minor contradictions apparent in Daye's statement would have had the effect of undermining Clayton's credibility. Quite simply, they do not render the appellant's conviction unreliable.

47 As to (v), the Crown's theory of a single cohesive group is only significant in its application to the group of men who assaulted John Charman and then turned on Watts. Daye's statement that two groups of men left the scene does nothing to contradict this theory. This contradiction does not suggest in any way that the appellant's conviction is unreliable.

48 Lastly, Daye's description of an inner and outer circle around Watts indirectly supports the evidence of Lloyd Finter, the commissioner at the hospital across the street from the fraternity house. Mr. Finter testified that he saw a group of about 12 people surrounding Watts, and that four men were administering the beating. The majority of the Court of Appeal noted that Mr. Finter differed from the majority of the other witnesses who testified as to the number of attackers, but that Mr. Finter left his vantage point or turned away from the attacks on at least six separate occasions.

49 No less than 12 other Crown witnesses described a group comprised of some 7 to 10 men around Watts. Moreover, the actual number of men who struck Watts that night is immaterial to the appellant's conviction, based on s. 21(1) of the *Code*. Thus, even if it were to be assumed that

meilleur jour possible. Il admettait ce qui était évident. Parfois, la forme de la question posée entraînait une réponse non sollicitée, ce qui, à mes yeux, donnait de la crédibilité à Clayton. Lorsqu'on le ramenait à des déclarations antérieures dans lesquelles des questions avaient été posées à l'aide d'expressions comme «donner des coups de pied et des coups de poing», Clayton essayait d'établir soigneusement une distinction. Les réponses qu'il a données à des questions difficiles étaient raisonnables. Il était direct. . .

Compte tenu de ces observations, il est irréaliste de penser que les contradictions mineures qui ressortent de la déclaration de Daye auraient eu pour effet de miner la crédibilité de Clayton. Tout simplement, elles ne rendent pas douteuse la déclaration de culpabilité de l'appellant.

Quant à l'alinéa (v), la thèse d'un seul groupe cohésif préconisée par le ministère public n'est importante que dans son application au groupe d'hommes qui ont commis des voies de fait contre John Charman et qui se sont ensuite tournés vers Watts. La déclaration de Daye selon laquelle deux groupes d'hommes ont quitté les lieux ne contredit aucunement cette thèse. Cette contradiction ne laisse nullement entendre que la déclaration de culpabilité de l'appellant est douteuse.

Enfin, la description que Daye a donné des cercles intérieur et extérieur formés autour de Watts étaye indirectement le témoignage de Lloyd Finter, le commissionnaire de l'hôpital situé de l'autre côté de la rue, en face de la maison de la confrérie. Monsieur Finter a témoigné qu'il avait vu un groupe d'environ 12 personnes entourer Watts et que quatre hommes étaient en train de donner la raclée. La Cour d'appel a noté, à la majorité, que le témoignage de M. Finter différait de celui de la majorité des autres personnes qui ont témoigné quant au nombre d'agresseurs, mais que M. Finter avait quitté son point d'observation ou tourné le dos aux attaques à au moins six reprises.

Pas moins de 12 autres témoins à charge ont parlé d'un groupe composé d'environ 7 à 10 hommes qui entouraient Watts. De plus, le nombre réel d'hommes qui ont frappé Watts ce soir-là n'est pas pertinent relativement à la déclaration de culpabilité de l'appellant, fondée sur le par. 21(1) du

Daye's description of an inner circle of some undefined number of men around Darren Watts could affect the trial judge's conclusion based on Clayton's identification testimony that the appellant was one of the men who actually struck Darren Watts, this still would have no impact on the trial judge's conclusion that the appellant aided or abetted the assault on Watts. It is thus clear that there is no reasonable possibility that these statements affect the reliability of the result reached at trial, particularly since the appellant was convicted as both a principal and a party to the assault on Darren Watts.

(d) *Fairness of the Trial Process*

Though both Daye's and Tynes's statements, on their face, have little, if any, impact on the reliability of the result reached at trial, the appellant would nevertheless be entitled to a new trial if he were to show that the failure to disclose these statements affected the overall fairness of the trial process. This would be the result if the Crown's failure to disclose deprived the defence of opportunities to pursue additional lines of inquiry with witnesses or garner additional evidence flowing from the undisclosed material. In the circumstances of this case, the fairness of the trial process was not affected by the Crown's failure to disclose. A significant factor in reaching this conclusion is defence counsel's lack of due diligence in pursuing disclosure.

In order to place the Crown's failure to disclose in the proper context, it is necessary to review the disclosure process followed in this case. First, prior to the preliminary inquiry, the Crown provided counsel with a transcript of the videotaped deposition of Danny Clayton. The following passage is included in this statement:

Code. Ainsi, même si on devait présumer que la description que Daye a donnée d'un cercle intérieur formé autour de Darren Watts par un nombre indéterminé d'hommes pourrait influencer sur la conclusion du juge du procès fondée sur le témoignage d'identification de Clayton, selon lequel l'appellant était l'un des hommes qui ont vraiment frappé Darren Watts, cela n'aurait encore aucune incidence sur la conclusion du juge du procès que l'appellant a aidé ou encouragé la perpétration des voies de fait contre Watts. Il est donc clair qu'il n'y a aucune possibilité raisonnable que ces déclarations influent sur le bien-fondé du résultat atteint au procès, étant donné particulièrement que l'appellant a été reconnu coupable à la fois à titre d'auteur principal des voies de fait contre Darren Watts et à titre de participant à ces voies de fait.

d) *L'équité du procès*

Même si, à première vue, les déclarations de Daye et de Tynes ne peuvent avoir que peu d'incidence sur le bien-fondé du résultat atteint au procès, l'appellant aurait néanmoins droit à un nouveau procès s'il démontrait que l'omission de divulguer ces déclarations a nui à l'équité globale du procès. Ce serait le cas si l'omission de divulguer du ministère public avait privé la défense de la possibilité de poser d'autres questions aux témoins ou de recueillir d'autres éléments de preuve découlant des documents non communiqués. Dans les circonstances de la présente affaire, l'omission de divulguer du ministère public n'a pas nui à l'équité du procès. Un facteur important qui a été pris en considération pour tirer cette conclusion est le manque de diligence raisonnable dont l'avocat de la défense a fait preuve en tentant d'obtenir la divulgation.

Pour situer dans le contexte approprié l'omission de divulguer du ministère public, il est nécessaire d'examiner le processus de divulgation suivi en l'espèce. Premièrement, avant l'enquête préliminaire, le ministère public a fourni aux avocats une transcription de la déposition sur vidéocassette de Danny Clayton. Le passage suivant figure dans cette déclaration:

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Q. Could Terrance Tynes, Terrence Day [sic], Nathaniel Robart and Michael Barton see the beating taking place on Darren Watts?

A. Most likely, yeah. Most likely, yeah.

Q. Do you recall where they were standing when Mr. Watts was being beaten?

A. I really can't recall where they were standing though, but I know they were on the corner.

Q. They were right there?

A. Um.

Q. Were they there all — were they present also when the other frat guys were beaten?

A. Yeah.

Q. Were they? Okay. . . . [Emphasis added.]

Moreover, as Bateman J.A. noted in the Court of Appeal (at p. 137):

There is no suggestion that defence counsel were unaware, well in advance of trial, that Terris Daye was a possible eyewitness to all or some of the events that evening. He was clearly shown as such by the police material provided to the defence; Guy Robart, in his statement to the police, identified Terris Daye as one of the people who was kicking Darren Watts; counsel for at least one of the accused cross-examined the key Crown witness, Danny Clayton, about Terris Daye's role in the assault; Mr. Daye's name arises more than 20 times in the evidence of the proceedings.

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Indeed, on direct examination, Clayton testified that he attended the party with Tynes and Daye and left with them after the assaults took place. Counsel for the accused Guy Robart, on cross-examination, specifically asked Clayton about Daye's and Tynes's involvement in the assaults. In addition, in his own statement to the police, the appellant stated five times that he was with Tynes at the fraternity party, and that Tynes came out of the house with him when he followed Terrence Dixon and Shannon Burke onto the street. Clearly, defence counsel was well aware that both Daye and Tynes took some part in the events outside the fraternity

[TRANSDUCTION]

Q. Terrance Tynes, Terrence Day (sic), Nathaniel Robart et Michael Barton pouvaient-ils voir Darren Watts subir une raclée?

R. Fort probablement, ouais. Fort probablement, ouais.

Q. Vous rappelez-vous où ils se tenaient pendant que M. Watts était battu?

R. Je ne peux vraiment pas me rappeler où ils se trouvaient, mais je sais qu'ils étaient au coin.

Q. C'est là qu'ils étaient?

R. Hum.

Q. Étaient-ils tous là — étaient-ils présents également au moment où les autres gars de la confrérie étaient battus?

R. Ouais.

Q. Ils y étaient? D'accord. . . [Je souligne.]

En outre, le juge Bateman a fait remarquer en Cour d'appel (à la p. 137):

[TRANSDUCTION] Rien ne laisse supposer que les avocats de la défense ne savaient pas, bien avant le procès, que Terris Daye pouvait être un témoin oculaire de la totalité ou d'une partie des événements survenus ce soir-là. Il était nettement décrit comme tel dans les documents de la police fournis à la défense; dans sa déclaration à la police, Guy Robart a identifié Terris Daye comme étant l'un de ceux qui donnaient des coups de pied à Darren Watts; l'avocat d'au moins un des accusés a contre-interrogé le principal témoin à charge, Danny Clayton, au sujet du rôle de Terris Daye dans les voies de fait commises; le nom de M. Daye revient plus de 20 fois dans la preuve en l'espèce.

En réalité, lors de son interrogatoire principal, Clayton a témoigné avoir assisté à la fête en compagnie de Tynes et Daye, et être parti avec eux après que les voies de fait eurent été commises. L'avocat de l'accusé Guy Robart a expressément contre-interrogé Clayton au sujet de la participation de Daye et de Tynes aux voies de fait. De plus, dans sa propre déclaration à la police, l'appelant a mentionné à cinq reprises qu'il était avec Tynes à la fête de la confrérie et que Tynes est sorti de la maison avec lui quand il a suivi Terrence Dixon et Shannon Burke dans la rue. De toute évidence, l'avocat de la défense était bien au courant que

house that evening, and knew that they might have witnessed the assaults.

In light of this background, it is surprising that when he became aware of the Crown's non-disclosure of Daye's and Tynes's statements, defence counsel did not request them. Instead, defence counsel maintains he had no interest in receiving the police statements of named eyewitnesses, including the man who accompanied the appellant into the fray outside the fraternity house. This position assumes even greater significance in light of the summary of the statements included in the police occurrence reports. The material parts of the summary of Daye's statement read as follows:

After being given young offender caution and explained [*sic*] in detail, it was decided by Terris Daye that he would give a statement. He places himself and the other players at the Frat party, 1770 Robie Street he cannot describe the clothing being worn by others that night. He states he seen [*sic*] four white guys walking south on Robie Street following Terry Dixon and Shannon Burke who were arguing. He reviewed the four pictures of the victims and identified John Charman as the first guy who got hit and went down. He stated Damon Cole punched him first and Spencer Dixon kicked him when he was down, because that's what Spencer likes to do. He points out Dennis MacDonald as the second man being punched and he states Spencer Dixon did the punch and the kicking. Then he was unable to ID Robert Gillis' photo, but he knew Darren Watts' face from seeing it in the news. But he couldn't ID Watts as the man getting the beating that night. As it turns out Darren Watts was a friend of his brother Troy Daye.

Terris Daye after some questioning places himself on the outer circle surrounding Darren Watts. It is quite clear that he does not want to ID the key players as he is scared of them. Terris Daye places Cyril Smith, Danny Clayton, Terrance Tynes running west on Cedar Street after Guy Robart screams police. When questioned about the assault on the police officer he described that

Daye et Tynes avaient tous deux joué un rôle dans les événements survenus à l'extérieur de la maison de la confrérie ce soir-là, et il savait qu'ils pouvaient avoir été témoins des voies de fait.

Compte tenu de ces faits, il est étonnant que l'avocat de la défense n'ait pas demandé les déclarations de Daye et Tynes, lorsqu'il a pris connaissance de l'omission du ministère public de les divulguer. Il maintient plutôt qu'il n'avait pas intérêt à recevoir les déclarations faites à la police par des témoins oculaires nommément désignés, dont l'homme qui accompagnait l'appelant dans la bagarre survenue à l'extérieur de la maison de la confrérie. Ce point de vue revêt encore plus d'importance à la lumière du résumé des déclarations figurant dans les rapports de police. Les passages pertinents du résumé de la déclaration de Daye se lisent ainsi:

[TRADUCTION] Après avoir reçu la mise en garde destinée aux jeunes contrevenants et des explications détaillées, Terris Daye décide de faire une déclaration. Il dit que lui et les autres intervenants se trouvaient à la fête de la confrérie, au 1770, rue Robie; il ne peut pas décrire les vêtements portés par les autres ce soir-là. Il déclare avoir vu quatre blancs marcher en direction sud dans la rue Robie, derrière Terry Dixon et Shannon Burke qui se querellaient. Il a examiné les quatre photos des victimes et a identifié John Charman comme étant le premier gars à avoir été frappé et à s'être affaissé. Il a déclaré que Damon Cole lui a d'abord donné des coups de poing et que Spencer Dixon lui a donné des coups de pied lorsqu'il était par terre, parce que c'est ce que Spencer aime faire. Il désigne Dennis MacDonald comme étant le deuxième homme à recevoir des coups de poing et il déclare que c'est Spencer Dixon qui a donné les coups de poing et les coups de pied. Puis, il n'a pas pu identifier la photo de Robert Gillis, mais il connaissait le visage de Darren Watts parce qu'il l'avait vu au bulletin d'informations. Mais il ne pouvait pas identifier Watts comme étant l'homme qui avait reçu la raclée ce soir-là. Il s'est avéré que Darren Watts était un ami de son frère Troy Daye.

Après quelques questions, Terris Daye dit qu'il se trouvait dans le cercle extérieur formé autour de Darren Watts. Il est tout à fait évident qu'il ne veut pas identifier les principaux intervenants, car il les craint. Terris Daye affirme que Cyril Smith, Danny Clayton, Terrance Tynes couraient en direction ouest dans la rue Cedar après que Guy Robart eut crié «Police». Interrogé au

Guy and Nathaniel Robart ran in the same direction and were chased by the policeman. He described the police car as a burgundy shadow. . . . The writers were unable to get Daye to name any of the persons in the inner circle around Darren Watts. The mother seems to know more and if interviewed away from her son might give some useful information.

The occurrence reports were given to all defence counsel during the trial some days before Clayton testified.

54 In light of the damaging information about the appellant disclosed in the summary, it is not difficult to imagine that defence counsel might have made a tactical decision not to pursue disclosure. Nevertheless, defence counsel maintains in his affidavit filed with the Court of Appeal that he did not see anything in the summary that would help the accused in making full answer and defence and that “the reason [he] did not pursue the matter further is that [he] was confident at the time of trial, after having gone through the preliminary, that all relevant information was disclosed to the defence”.

55 It must be remembered that defence counsel is not entitled to assume at any point that all relevant information has been disclosed to the defence. Just as the Crown’s disclosure obligations are ongoing, and persist throughout the trial process, so too does defence counsel’s obligation to be duly diligent in pursuing disclosure. To do nothing in the face of knowledge that relevant information has not been disclosed will, at a minimum, often justify a finding of lack of due diligence, and may, in certain circumstances, support an inference that counsel made a strategic decision not to pursue disclosure. In this case, the summary in the occurrence report indicates that Daye’s statement would very likely meet the test for relevance set out in *Stinchcombe*. When defence counsel reviewed the occurrence report, he knew or should have known that the Crown had failed in its disclosure obligations. When this became apparent, defence counsel should have brought this matter to the attention of

sujet des voies de fait contre le policier, il a dit que Guy et Nathaniel Robart couraient dans la même direction et étaient poursuivis par le policier. Il a affirmé que la voiture de police était de couleur bourgogne. [. . .] Les rédacteurs n’ont pas pu obtenir de Daye qu’il nomme l’une ou l’autre des personnes qui formaient le cercle intérieur autour de Darren Watts. La mère semble en savoir plus et, si elle était interrogée en l’absence de son fils, elle pourrait peut-être donner des renseignements utiles.

Les rapports de police ont été remis à tous les avocats de la défense durant le procès, quelques jours avant le témoignage de Clayton.

Compte tenu des renseignements préjudiciables divulgués au sujet de l’appelant dans le résumé, il n’est pas difficile d’imaginer que l’avocat de la défense ait pu prendre une décision tactique de ne pas tenter d’obtenir la divulgation. Néanmoins, l’avocat de la défense maintient, dans son affidavit déposé en Cour d’appel, qu’il ne voyait rien dans le résumé qui aiderait l’accusé à présenter une défense pleine et entière et que [TRADUCTION] «la raison pour laquelle [il] n’a pas donné suite d’avantage à l’affaire est qu’[il] était persuadé au moment du procès, après le déroulement de l’enquête préliminaire, que tous les renseignements pertinents avaient été divulgués à la défense».

Il faut se rappeler que l’avocat de la défense n’a, en aucun temps, le droit de supposer que tous les renseignements pertinents ont été divulgués à la défense. Tout comme l’obligation de divulguer du ministère public est constante, et continue d’exister durant tout le procès; il en est de même de l’obligation de l’avocat de la défense de faire preuve de diligence raisonnable en tentant d’obtenir la divulgation. Si l’avocat de la défense ne fait rien lorsqu’il sait que des renseignements pertinents n’ont pas été divulgués, cela justifiera souvent, à tout le moins, une conclusion à un manque de diligence raisonnable et pourra, dans certains cas, justifier une déduction que l’avocat a pris une décision stratégique de ne pas tenter d’obtenir la divulgation. En l’espèce, le résumé contenu dans le rapport de police indique que la déclaration de Daye satisfierait fort probablement au critère de pertinence énoncé dans l’arrêt *Stinchcombe*. Lorsque l’avocat de la défense a examiné le rapport de

the trial judge at the earliest opportunity. In the circumstances of this case, the Court of Appeal was right to conclude that at this point, defence counsel was faced with a choice: “call for the statements or live without them” (p. 93).

When he was aware or should have been aware of the Crown’s failure to disclose Tynes’s statement, defence counsel was obliged to take appropriate steps. He failed to do so and thereby failed to exercise due diligence in pursuing disclosure. The appellant is in no position to argue that he lost an opportunity to garner evidence flowing from Tynes’s statement, since the failure to disclose it is to a significant extent attributable to defence counsel’s inaction. Similarly, the appellant cannot now complain that Daye’s statement was not disclosed. Indeed, his position is even less compelling in relation to this statement. The summary in the occurrence report, which was disclosed, refers to Daye’s description of an inner and outer circle around Watts. When the summary was disclosed, before Clayton testified, counsel could have requested disclosure, sought an adjournment, and would then have had sufficient opportunity to investigate this aspect of Daye’s statement. The summary also indicates a contradiction between Daye and Clayton as to who assaulted John Charman. Once again, counsel had the opportunity to pursue this apparent contradiction. The appellant cannot now claim the trial process was rendered unfair by virtue of the Crown’s failure to disclose.

IV. Disposition

I would dismiss the appeal.

police, il savait ou aurait dû savoir que le ministère public avait manqué à ses obligations en matière de divulgation. Lorsque cela est devenu évident, l’avocat de la défense aurait dû porter cette affaire à l’attention du juge du procès à la toute première occasion. Dans les circonstances de la présente affaire, la Cour d’appel a eu raison de conclure qu’à ce moment-là l’avocat de la défense devait faire un choix: [TRADUCTION] «demander les déclarations ou s’en passer» (p. 93).

Lorsqu’il s’est rendu compte ou aurait dû se rendre compte de l’omission du ministère public de divulguer la déclaration de Tynes, l’avocat de la défense était tenu de prendre les mesures appropriées. Il ne l’a pas fait et n’a donc pas fait preuve de diligence raisonnable en tentant d’obtenir la divulgation. L’appellant n’est pas en mesure de soutenir qu’il a perdu une possibilité de recueillir des éléments de preuve découlant de la déclaration de Tynes, puisque l’omission de la divulguer est en grande partie attribuable à l’inaction de l’avocat de la défense. De même, l’appellant ne peut pas maintenant se plaindre du fait que la déclaration de Daye n’a pas été divulguée. En réalité, le point de vue qu’il avance s’impose encore moins relativement à cette déclaration. Le résumé contenu dans le rapport de police, qui a été divulgué, mentionne la description que Daye a donnée des cercles intérieur et extérieur formés autour de Watts. Lorsque le résumé a été divulgué, avant le témoignage de Clayton, l’avocat aurait pu demander la divulgation et solliciter un ajournement, et il aurait eu alors une possibilité suffisante d’enquêter sur cet aspect de la déclaration de Daye. Le résumé révèle également une contradiction entre Daye et Clayton quant à l’identité de ceux qui ont commis des voies de fait contre John Charman. Encore là, l’avocat avait la possibilité d’exploiter cette contradiction apparente. L’appellant ne peut pas prétendre maintenant que l’omission de divulguer du ministère public a rendu le procès inéquitable.

IV. Dispositif

Je suis d’avis de rejeter le pourvoi.

Appeal dismissed.

Pourvoi rejeté.

Solicitors for the appellant: Scaravelli & Associates, Halifax.

Procureurs de l'appelant: Scaravelli & Associates, Halifax.

Solicitor for the respondent: The Nova Scotia Public Prosecution Service, Halifax.

Procureur de l'intimée: The Nova Scotia Public Prosecution Service, Halifax.

Tab 12:

R. v. Fiddler, 2012 ONSC 2539

DATE: 2012-05-07

[2] In the alternative, the defendant requests an order that the Crown disclose various records and documents allegedly in the Crown's possession or control and relevant to the Crown's case against the defendant.

Background

[3] The defendant was arrested by Nishnawbe-Aski Police Services (“NAPS”) in Sandy Lake First Nations on July 2, 2010. The defendant is charged that between March 1 and 31, 2007 he sexually assaulted the complainant, C.K., contrary to s. 271 of the Criminal Code of Canada (the “Code”). The defendant was released from custody on July 12, 2010 on an undertaking requiring him to reside at a supportive housing facility in Kenora, Ontario and not to attend Sandy Lake First Nations except for court purposes.

[4] On August 11, 2010, counsel for the defendant received the initial disclosure package from the Crown. Counsel for the defendant, in his review of the disclosure, noted reference to a 2007 complaint by C.K. to the Sandy Lake First Nations NAPS detachment, apparently about the same incident. A request for further disclosure was made. The Crown provided the defendant with further disclosure on September 22, 2010.

[5] The contents of the second disclosure package received by the defendant confirmed that some form of a police investigation was commenced by the Sandy Lake First Nations NAPS detachment on April 4, 2007 as a result of a complaint being made by C.K. against the defendant. This complaint was received by NAPS Sergeant Sawanas (“Sawanas”) in Sandy Lake First Nations on April 4, 2007. A copy of Sawanas’ notebook entries for April 4, 2007 was included in the second disclosure package provided to counsel for the defendant.

[6] Sergeant Sawanas testified at the hearing of this application. Sawanas testified that he was working alone in Sandy Lake First Nations on April 4, 2007 and on “light duty” as a result of a hand injury. Due to the fact that it was Sawanas’ writing hand that was injured, he chose to

tape record the complainant's statement on a cassette recorder that was in the detachment. After recording the complainant's statement, Sawanas also recorded, from memory and not contemporaneously, the content of C.K.'s statement in his notebook.

[7] Sawanas tested the tape to ensure it had recorded the statement, which it had. Sawanas marked the tape in some fashion and placed it in an unlocked drawer of a desk in the general office. Later that day, Sawanas took photographs of the complainant's alleged injuries using a disposable camera.

[8] Sawanas, as required, contacted the NAPS crime unit in Sioux Lookout, Ontario in order to file a Major Occurrence Notification. This call was received in Sioux Lookout on April 4, 2007 at approximately 2:10 p.m. CST by Detective Alana Morrison ("Morrison"), who at the time was the Sexual Assault Coordinator for NAPS in the North West Region.

[9] Morrison testified at the hearing of this application. Morrison confirmed that she received this call from Sawanas. Morrison completed and filed the Major Occurrence Notification on behalf of Sawanas and instructed him to take photographs of the complainant. Morrison recalled some reference to an audio taped statement being taken. Morrison had no further recollection of this matter.

[10] Sawanas' evidence as to what happened to the tape and photographs was inconsistent and unreliable. At one point, he testified that the tape and the photographs were packaged in some fashion the next day and "sent out" to the NAPS detachment in Sioux Lookout. He then testified that he had no specific recollection as to how this evidence was packaged or marked or whether he even had sent the package out.

[11] Unfortunately, the tape and photographs have been lost. The investigation of the April 4, 2007 complaint by C.K. did not proceed beyond that referred to herein, but for an attempt by a Sandy Lake First Nations NAPS officer to interview an alleged witness, John Goodman. When located, Mr. Goodman was intoxicated. He was not interviewed at that time. The investigation was reopened in 2010 when a victim/witness support worker assisting C.K. inquired about the truncated 2007 investigation.

[12] In November 2011, Officer Jason Gatto (“Gatto”), a member of the NAPS crime unit in Sioux Lookout was assigned to search for any information pertaining to the 2007 investigation. Gatto testified at the hearing of this application. Gatto made some inquiries, conducted a perfunctory search and found nothing.

[13] The April 4, 2007 tape recorded statement of the complainant and the photographs taken of her that day are admitted by the Crown to be relevant to this prosecution of the defendant. The Crown concedes that this evidence was lost as a result of unacceptable negligence on the part of investigating authorities.

The Lost April 4, 2007 Audio Tape Statement of The Complainant

The Applicant’s Position

[14] The applicant submits that the appropriate remedy where highly relevant evidence is lost as a result of unacceptable negligence is a stay of proceedings. Mr. Fiddler denies the allegations of the complainant. The defendant submits that the credibility of the complainant at trial will therefore be crucial. It is submitted that the complainant’s 2007 statement is highly relevant,

representing the substance of her allegations against the defendant at a point in time proximate to when the assault is alleged to have occurred. The defendant will be denied an opportunity to cross examine the complainant on any inconsistencies between the April 4, 2007 statement, a video statement taken in 2010, the complainant's evidence at the preliminary inquiry and the complainant's evidence at trial.

[15] The applicant acknowledges that Sawanas, after tape recording the complainant's statement, entered his recollection of it in his notebook. The applicant submits that this version of the complainant's statement is materially different from her 2010 statement. It is submitted that the ability to effectively cross examine the complainant on material differences in the two statements is compromised due to the absence of a verbatim version of the 2007 statement. It is submitted that Sawanas' notebook entries were not made contemporaneously with the taking of the complainant's statement. It is further submitted that the complainant could simply testify that Sawanas recorded her allegations incorrectly. It is submitted that the effect of the defendant's cross examination of the complainant is dulled as a result.

[16] The applicant submits that the loss of this statement and the resultant limits placed on cross examination has denied him the opportunity to make full answer and defence, contrary to section 7 of the Canadian Charter of Rights and Freedoms. The applicant submits that allowing the trial to proceed in a situation where he is denied the opportunity to make full answer and defence results in actual prejudice to him. It is submitted that an adjournment is of no assistance and that the only appropriate remedy is a stay of proceedings.

The Position of the Crown

[17] The Crown submits that the loss of the tape, while admittedly the result of unacceptable negligence, was inadvertent. It is submitted that the 2010 investigation of C.K.'s 2007 complaint includes a video tape statement of her allegations against the accused. This is suggested to be a detailed account of the alleged offence and a sufficient substitute for the lost statement. The Crown submits that the 2010 video statement allows the defendant to fully cross examine the complainant at trial.

[18] The Crown further submits that a stay of proceedings is a drastic remedy of last resort. It is submitted that a stay of proceedings is not an appropriate remedy in a situation of lost disclosure as a result of inadvertence.

Discussion

[19] A thorough discussion regarding lost evidence and whether a stay of proceedings is the appropriate remedy is found in *R. v. Bradford* [2001] O.J. No. 107 (Ont. C.A.) at paragraphs 4 to 7:

4. The current state of the law respecting the impact of lost evidence and when a stay should be granted is succinctly summarized in *R. V. B. (F.C.)* (2000), 142 C.C.C. (3d) 540 at 547-8, leave to appeal to the Supreme Court of Canada denied, [2000] S.C.C.A. No. 194:

The basic principles...were summarized by Sopinka J. in *R. v. La*, supra, commencing at para. 16. Those principles derived from *R. v. Stinchcombe* (No.1), [1991] 3 S.C.R. 325, 68 C.C.C. (3d), 1; *R. v. Egger*, [1993] 2 S.C.R. 451, 82 C.C.C. (3d) 193; *R. v. Stinchcombe* (No. 2), supra; *R. v. Chaplin*, [1995] 1 S.C.R. 727, 96 C.C.C. (3d) 225; *R. v. O'Connor* [(1995), 103 C.C.C. (3d) 1 (S.C.C.)]; and *R. v. Carosella*, supra, and further developed in *La*, are:

- (1) The Crown has an obligation to disclose all relevant information in its possession.

- (2) The Crown's duty to disclose gives rise to a duty to preserve the relevant evidence.
- (3) There is no absolute right to have originals of documents produced. If the Crown no longer has original documents in its possession, it must explain their absence.
- (4) If the explanation establishes that the evidence has not been destroyed or lost owing to unacceptable negligence, the duty to disclose has not been breached.
- (5) In its determination of whether there is a satisfactory explanation by the Crown, the Court should consider the circumstances surrounding its loss, including whether the evidence was perceived to be relevant at the time it was lost and whether the police acted reasonably in attempting to preserve it. The more relevant the evidence, the more care that should be taken to preserve it.
- (6) If the Crown does not establish that the file was not lost through unacceptable negligence, there has been a breach of the accused's s. 7 Charter rights.
- (7) In addition to a breach of s. 7 of the Charter, a failure to produce evidence may be found to be an abuse of process, if for example, the conduct leading to the destruction of evidence was deliberately for the purpose of defeating the disclosure obligation.
- (8) In either case, a s. 7 breach because of failure to disclose, or an abuse of process, a stay is the appropriate remedy, only if it is one of those rare cases that meets the criteria set out in O'Connor.
- (9) Even if the Crown has shown that there was no unacceptable negligence resulting in the loss of evidence, in some extraordinary case, there may still be a s. 7 breach if the loss can be shown to be so prejudicial to the right to make a full answer and defence that it impairs the right to a fair trial. In this case, a stay may be an appropriate remedy.
- (10) In order to assess the degree of prejudice resulting from the lost evidence, it is usually preferable to rule on the stay application after hearing all of the evidence.

The O'Connor criteria referred to in the eighth point are as stated by Justice L'Heureux-Dube at para. 82 of O'Connor:

It must always be remembered that a stay of proceedings is only appropriate "in the clearest of cases", where the prejudice to the accused's

right to make full answer and defence cannot be remedied or where irreparable prejudice would be caused to the integrity of the judicial system if the prosecution were continued.

5. Earlier, in O'Connor, supra, the two criteria for a stay referred to in the eighth point are expressed by Professor Paciocco and adopted by L'Heaumeux-Dube J., at p. 41, as comprising:
 - (1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and
 - (2) no other remedy is capable of removing the prejudice.
6. In assessing the prejudice to the accused's right to make full answer and defence as secured by s. 7 of the Charter, it is important to bear in mind that the accused is entitled to a trial that is fundamentally fair and not the fairest of all possible trials. As stated by McLachlin J. in O'Connor, supra, at pp. 78-79:

...the Canadian Charter of Rights and Freedoms guarantees not the fairest of all possible trials, but rather a trial that is fundamentally fair; R. v. Harrer, [1995] 3 S.C.R. 562. What constitutes a fair trial takes into account not only the perspective of the accused, but the practical limits of the system of justice and the lawful interests of others involved in the process, like complainants and the agencies which assist them in dealing with the trauma they may have suffered. Perfection in justice is as chimeric as perfection in any other social agency. What the law demands is not perfect justice but fundamentally fair justice.

7. In a similar vein, Justices McLachlin and Iacobucci commented in R. v. Mills, [1999] 3 S.C.R. 668 at 718 that fundamental justice embraces more than the rights of the accused and that the assessment concerning a fair trial must not only be made from the point of view of the accused but the community and the complainant. The fact that an accused is deprived of relevant information does not mean that the accused's right to make full answer and defence is automatically breached. Actual prejudice must be established; Mills, supra, 719-720, citing R. v. La, [1997] 2 S.C.R. 680 at 693.

[20] I accept that the credibility of the complainant will be crucial in the defendant's trial. The complainant's credibility will be assessed based on the content of both her direct examination and cross examination as well as on her demeanour while testifying. The more "tools" available to counsel on cross examination of a complainant in a sexual assault case, the

more effective the cross examination can potentially be. One of the tools which is relevant and very useful for the cross examination of a complainant in a sexual assault case is a prior statement of the complainant wherein she recites her allegations against the accused. In this case, such a statement was given by the complainant shortly after the incident is alleged to have occurred. This statement has been lost and the defendant is therefore denied the use of this statement during cross examination.

[21] However, this alone does not establish that irreparable harm to the right to make full answer and defence has occurred. In this case, the defendant has available to him Sawanas' notebook entries detailing the officer's recollection of the complainant's statement, recorded shortly after the statement was given. Presumably, Sawanas would be available for questioning at trial. The defendant also has available to him the complainant's 2010 video statement. This can be used to challenge the complainant's credibility at trial. The defendant will have both the direct and cross examination of the complainant from the preliminary inquiry available to him to challenge the credibility of the complainant at trial.

[22] It would obviously be preferable for the defence to have the complainant's April 4, 2007 audio statement. While the job of defence counsel is made more difficult because of the missing statement, I do not see that the defendant will be deprived of the ability to make full answer and defence, if what is available to him to challenge the credibility of the complainant is utilized effectively. This is not one of those "clearest of cases" in which a stay of proceedings, effectively acquitting the defendant, is necessary in the interests of justice.

[23] The defendant's application for a stay of proceedings due to the loss of the complainant's April 4, 2007 audio statement is dismissed.

Additional Material The Applicant Seeks To Have Disclosed

[24] At the hearing of the application, the Crown undertook to disclose the following:

1. Any occurrence report from April 4, 2007;
2. The occurrence log from the NAPS Sandy Lake First Nations detachment, dated April 4, 2007;
3. The Major Occurrence Notification Report from the Sioux Lookout NAPS detachment, dated April 4, 2007;
4. Any relevant notebook entries of Detective Morrisson;
5. Any email correspondence between Sawanas and Gatto which relates to this matter;
6. A redacted version of a Crown brief for a Richard Linklater in which C.K. is the complainant.

[25] Disclosure of the following material, resisted by the Crown, is sought by the applicant on this application:

1. Copy of all materials in the possession of the Crown and NAPS touching upon the credibility and character of the complainant including disclosure of CPIC/Occurrence/RMS reports and criminal record;
2. Written confirmation that the Crown has made reasonable inquiries to NAPS and within its own office with respect to other complaints of the complainant, and to

the extent that any may exist, disclosure of their existence to permit counsel to decide what if any further request to make;

3. Copy of all materials in the possession of the Crown or NAPS touching upon the credibility and character of the other material witnesses in this matter including witnesses the Crown intends to call, witnesses the defence intends to call and the defendant;
4. Copy of the Crown witness list.

Position of the Applicant

[26] The applicant submits that material relating to the complainant (items 1 and 2 above), but unrelated to the current case, is subject to the broad *Stinchcombe* disclosure obligations. The applicant submits that these reports, if any exist, are relevant in the context of disclosure, as they may impact on the credibility of the complainant. The applicant submits that this information is first-party disclosure and not “records” as defined in s. 278.1 of the Code. The applicant submits that this information should not be the subject of a third party records application. The applicant submits that they must therefore be disclosed by the Crown upon request.

[27] The applicant submits that they are entitled to disclosure of all information in the possession or control of the Crown or NAPS touching upon the issues of character and credibility of all material witnesses, Crown and defence, including the defendant. The applicant submits that the material relates to the character and credibility of witnesses, is of obvious relevance and is required by the defence to prepare for trial. The applicant submits that this information will either be in the Crown’s possession or readily obtainable through NAPS. The applicant disputes that any of this materials is “records” as defined in s.278.1 of the Code.

[28] The applicant seeks disclosure of a list of witnesses the Crown intends to call at trial, submitting that this information is relevant and promotes effective case management. The applicant submits that disclosure of this information advances the interests of justice generally and helps to minimize unnecessary adjournments and delay.

Position of the Crown

[29] The Crown submits that the material relating to the complainant, but unrelated to the case against the defendant, falls under the definition of “records” in s. 278.1 of the Criminal Code and is not subject to the *Stinchcombe* disclosure regime. The Crown submits that the disclosure of these “third party” records must be sought pursuant to section 278.2 of the Criminal Code.

[30] The Crown submits that police occurrence reports and related information regarding potential witnesses have not been shown to be of “likely relevance” and are therefore not required to be disclosed. The Crown submits that these documents are not in the possession or control of the “prosecuting Crown” and are not within the scope of *Stinchcombe*. Finally, the Crown submits that such documents are also “records” as defined in the Code and that they are therefore outside the ambit of *Stinchcombe* first-party disclosure.

[31] The Crown submits that they are under no legal obligation to disclose a list of the witnesses they intend to call at trial. The Crown submits that they have provided statements of all potential witnesses to the defendant. The Crown submits that the decision as to which of its potential witnesses it will call at trial is a matter of Crown discretion and they are not, and should not be, required to disclose this information to the defendant.

Discussion

Information Pertaining to the Complainant Unrelated to the Subject Investigation

[32] The defendant has requested disclosure of “all material in the possession of the Crown or NAPS touching upon the credibility...of the complainant including...CPIC/Occurrence/RMS reports and criminal record”.

[33] The Crown is the prosecuting authority and NAPS is the investigative body for the charge against the defendant. This request for disclosure is limited in physical scope to these two bodies. The material sought is readily obtainable by the Crown and is in their possession and control in the context of a disclosure request.

[34] The issue to be determined is whether, in the circumstances, this information is within the *Stinchcombe* first party disclosure regime, which would compel the Crown to obtain and disclose it, or whether its disclosure is otherwise governed by law, in this case, s. 278.3 of the Code, requiring the defendant to proceed with a third party records application. As noted by Stinson J. in *R. v. McAdam* [2008] O.J. No. 1740, at paragraph 8, the issue is not whether the records should or should not be produced to the applicant, but rather whether the applicant must comply with section 278.3 of the Code in order to compel production.

[35] The Supreme Court of Canada discussed the application of the third party records provisions of the Code to a disputed disclosure application in *R. v. McNeil*, [2009] 1 S.C.R., at paragraph 21:

“As this court concluded in *Mills*, it was open to Parliament to enact, as it did, a statutory regime for the disclosure of records containing personal information of complainants and witnesses in proceedings for sexual offences under ss. 278.1 to 278.91 of the Criminal Code, R.S.C. 1985, c. C-46. Absent an express waiver from the complainant or witness to whom the record relates, production of all records falling within the *Mills* regime, whether in the possession or control of a third party *or of the prosecutor in the proceedings*, can only be made on application to the court and in accordance with the balancing test set out in the Code provisions. This statutory regime therefore constitutes an exception to the common law regime of Crown disclosure under *Stinchombe*.”

[36] The issue of whether occurrence and related reports generated in unrelated investigations falls within the definition of “record” was addressed by Spies J. in *R. v. R.L.* [2007] O.J. No. 4095 and followed by Stinson J. in *McAdam* in the context of offences within s.278.2(1)(a) of the Code:

“The definition of “personal information” in the Municipal Freedom of Information and Protection of Privacy Act is sufficiently broad to encompass police occurrence reports. As such, they are susceptible of protection under that statute. I hasten to note that this does not automatically mean that their production or disclosure is prohibited, rather that the person responsible for those records must comply with that statute before producing them. As a result, in my view, such records do fall within the scope of records whose disclosure is protected by an act of a provincial legislature. As such they fall within the scope of s. 278.1.”

[37] Stinson J., in *McAdam*, considered the case of *R. v. Bottineau*, [2005] O.J. No. 4034 (S.C.J.) in which Watt J. ordered the disclosure of occurrence reports that had to do with misconduct of Crown witnesses largely unrelated to the circumstances that gave rise to the prosecution. Stinson J. distinguished *Bottineau*, finding that the decision did not address the

potential application of the definition of “record” in s. 278.1 because the charges in that case did not come within the scope of s. 278.2(1).

[38] Police occurrence reports and related records pertaining to the complainant in regard to unrelated investigations contain “personal information” as defined in the Municipal Freedom of Information and Protection of Privacy Act, R.S.O. 1990, Chapter F. 31. The production or disclosure of same is protected by this statute. This brings this information within the definition of “record” in section 278.1 of the Code. Their production or disclosure is not necessarily prohibited. However, their production must be sought pursuant to section 278.3 of the Code. The applicant’s request for disclosure of this material is dismissed.

The Complainant’s Criminal Record

[39] I do not accept that the complainant’s criminal record is a record for which there is a “reasonable expectation of privacy”. It does not fall within the definition of “record” in s. 278.1 of the Code. It is relevant information in the case against the defendant and the Crown is ordered to disclose it to the defendant.

Disclosure by the Crown of the Existence of Other Complaints of the Complainant

[40] The applicant requests an order compelling the Crown to make “reasonable inquiries” to NAPS and within its own office with respect to other complaints of the complainant. If any exist, the applicant requests the Crown be ordered to disclose their existence in order that he may determine if a further request is warranted.

[41] As stated by Charron J. in *McNeil*, the Crown is not simply a passive recipient of relevant information with no obligation of its own to seek out and obtain relevant information. Crown counsel who is put on notice of the existence of relevant information cannot simply disregard the matter. Unless the notice appears unfounded, Crown counsel will not be able to fully assess the merits of the case and fulfill its duty as an officer of the court without inquiring further and obtaining the information if it is reasonably feasible to do so. See *McNeil*, paragraphs 48 and 49.

[42] In the case of the defendant, the Crown has been put on notice that defence counsel has been contacted by members of the defendant's community and advised that the complainant had been involved in similar prosecutions in which her veracity was in question. In these circumstances, the information sought by the applicant is of obvious relevance. One would also assume that this information would be of interest to the Crown in order to fully assess the merits of this case.

[43] The Crown is ordered to inquire of NAPS and within its own office to determine the existence of other complaints of sexual offences made by C.K. If any should exist, the Crown is ordered to disclose their existence to defence counsel.

Information Pertaining to Material Witnesses, Crown and Defence, and the Defendant

[44] The applicant seeks disclosure of "all materials in possession of the Crown or NAPS touching upon the credibility of the other material witnesses in this matter including..." Crown and defence witnesses and the defendant.

[45] For the reasons stated above, I find that occurrence reports in unrelated investigations which involve witnesses in this prosecution, Crown or defence, fall within s. 278.1 of the Code. The defendant must therefore follow the statutory regime set out in s. 278.3 of the Code in order to obtain those records. Should the defendant intend to call defence witnesses, presumably they would be prepared to provide an express waiver to the Crown, as suggested in *McNeil*, allowing for the disclosure of any records impacting on their credibility. Upon receipt of such a waiver, the Crown would have no grounds upon which to refuse disclosure of this information.

[46] The CPIC/criminal records of any witnesses, Crown or defence, for the reasons stated above, are not records within the definition set out in s. 278.1 of the Code. This information is relevant and I order that it be disclosed to the defendant.

Crown Witness List

[47] There is no authority requiring the Crown to disclose to the defence a list of which of its potential witnesses it intends to call at trial. This issue was dealt with in a clear and concise fashion in *R. v. Pinkus* [1999] O.J. 5464, at paragraphs 8 and 9:

8. The “information” which the defence seeks is, in my view, not the kind of information which is subject to an order for disclosure. What the defence claims to be entitled to is the Crown “plan” for the presentation of its case. This, undoubtedly, is information in the possession of the Crown. It is, however, not subject to disclosure for the very reason that the Crown plan is something which is in its own discretion, which is unfettered, and properly so, absent bad faith or oblique motive. See *Cook* (1997) 114 C.C.C. (3d) 481 (S.C.C.).
9. The law relating to Crown disclosure should not be confused with the law relating to Crown discretion. The decision whether to call a witness is solely

within the discretion of the Crown. The decision whether to call a witness may change, given the dynamics of the trial process. Discretion is therefore an evolving concept, just as the trial itself. Discretion cannot be interfered with by the Court. For the Court to order the Crown to inform defence as to whether a particular witness will be called would effectively trump Crown discretion. One cannot be said to have discretion if one is ordered to disclose how discretion will be exercised.

[48] While the Crown is not under a legal obligation to inform the defence in advance its intention to call particular witnesses, it is certainly preferable that they do so. This would contribute to efficient and effective case management and minimize potential delays.

The Hon. Mr. Justice J.S. Fregeau

Released: May 7, 2012

CITATION: R. v. Fiddler 2012 ONSC 2539
COURT FILE NO.: CR-11-024
DATE: 2012-05-07

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

HER MAJESTY THE QUEEN

- and -

Jimmy Fiddler

REASONS ON APPLICATION

Fregeau J.

Released: May 7, 2012

/sf

Tab 13:

R. v. Fox, 2018 BCCA 431

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *R. v. Fox*,
2018 BCCA 431

Date: 20181109
Docket: CA44915

Between:

Regina

Respondent

And

Patrick Henry Fox

Appellant

Restriction on publication: A publication ban has been imposed under s. 486.5(1) of the *Criminal Code* restricting the publication, broadcasting or transmission in any way of evidence that could identify a victim/witness/undercover officer, referred to in this judgment by the initials G. and S. This publication ban applies indefinitely unless otherwise ordered.

Before: The Honourable Madam Justice Garson
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated June 20, 2017 (conviction) and November 10, 2017 (sentence) (*R. v. Fox*, 2017 BCSC 2665 (conviction) and 2017 BCSC 2361 (sentence), Vancouver Docket 27178).

Oral Reasons for Judgment

Counsel for the Appellant
(appointed for limited s. 684):

T.B. Magder

The Appellant, appearing in person
(via teleconference):

P.H. Fox

Counsel for the Respondent:

S. E. Elliott

Place and Date of Hearing:

Vancouver, British Columbia
November 5, 2018

Place and Date of Judgment:

Vancouver, British Columbia
November 9, 2018

Summary:

The appellant seeks appointment of counsel pursuant to s. 684(1) of the Criminal Code, R.S.C. 1985, c. C-46 in his appeals from conviction and sentence (though these reasons concern only the application in respect to the conviction appeal). He seeks a limited s. 684 appointment for the purpose of procedural assistance in his appeal. Held: application dismissed in part. Counsel will not be appointed pursuant to s. 684 to provide procedural assistance to a client. The application was granted for the limited purpose of complying with certain aspects of the Court of Appeal practice direction concerning appeals based on allegations of ineffective assistance of counsel.

Introduction

[1] **GARSON J.A.:** Mr. Fox applies for the appointment of counsel pursuant to s. 684(1) of the *Criminal Code*, R.S.C. 1985, c. C-46 in his appeals from his conviction and sentence. He was convicted of criminal harassment and possession of a firearm in a place not authorized, and sentenced to a total of three years' and ten months' imprisonment, less credit for time served, plus three years of probation. These reasons concern only the application in respect to the conviction appeal.

Background – Trial and Conviction

[2] Mr. Fox was tried before Madam Justice Holmes and a jury in a five-day trial. He was self-represented. Upon application by the Crown pursuant to s. 486.3 of the *Criminal Code*, a lawyer, Mr. T. Lagemaat, was appointed to cross-examine the complainant. Mr. Fox was opposed to the appointment of counsel. However, he subsequently retained Mr. Lagemaat to make closing submissions to the jury.

[3] The facts underlying the offences may be briefly stated. Although Mr. Fox's citizenship is in question, at the outset of these events he was living in the United States and holding himself out as an American. He was briefly married to the complainant and they had a son, G., together. In 2012, Mr. Fox informed the complainant that he was thinking of moving to Vancouver with G. She refused her consent and he commenced court proceedings. She then informed the U.S. immigration authorities on two occasions that Mr. Fox was living and working illegally in the U.S. Both times, Mr. Fox was removed from the U.S. without G. Since his

second removal in 2013, Mr. Fox has resided in Canada and G. has visited him on school breaks.

[4] After his second removal, Mr. Fox informed the complainant that if she did not return G. to him, he would devote the rest of his life to destroying her, with the hope of driving her to suicide, but would only act within the confines of the law. In her Reasons for Sentence, indexed as 2017 BCSC 2361, the judge described Mr. Fox's campaign to harass the complainant as follows:

[12] ... In or around early 2014, he created the website in [the complainant's] name containing a very large amount of private information about her and the people associated with her. The website includes a "welcome" message that includes the following:

The goal of this website is to increase awareness of [the complainant], by informing the public of the atrocious, the despicable, and the downright evil things [the complainant] has done.

We hope that by publishing the truth, together with hard proof (e.g. police reports, court testimony, recordings) of the countless horrendous acts [the complainant] has been committing all her life, we may help others to avoid being manipulated, exploited and harmed by this seemingly charming and sweet sociopath.

[13] The website includes personal details about [the complainant], as well as purportedly biographical details and information about her character, preferences, and history. It includes dozens, probably hundreds, of photographs of [the complainant] in various aspects of her life, sometimes also showing her children (including her younger son in his underwear), her current partner and her previous partners, and the interior of her home. The website details the location of the home, with maps.

...

[15] Another section of the website focuses, individual by individual, on the people associated with [the complainant]. These include her younger son (S.), her mother and her father, her current partner and his mother, and dozens of her friends and work associates. A photograph of each person is shown, together with contact information and a description in, it seems, as much detail as Mr. Fox was able to gather.

...

[17] Finally, a series of dozens of blogs or posts, most of them purportedly written by [the complainant], contains content designed to humiliate and degrade her. For example, one post has [the complainant] purportedly declaring, in some detail, raging hatred of people of non-white ethnic background. Another post, entitled, "An Open Letter to All Prospective Employers: Why You Should Hire Me", speaks sarcastically and in vulgar language (purportedly in [the complainant's] voice) about why she should be hired, the given "reasons" all weighing heavily against her (e.g. "I've never

accepted responsibility for anything -- which is okay because so far there's always been someone else to blame it on").

[18] In an email in March 2014, Mr. Fox told [the complainant] about the website. He told her that he had sent a link to the website to her colleagues at work, as, in fact, he had, and he taunted her that colleagues would read about what a fool and a poor parent she was, and would see her in her underwear. He sent generally similar emails and many others on countless other subjects over the course of the next several years. I will highlight a few examples.

...

[20] Over the period of the indictment (as well as before that period) Mr. Fox sent [the complainant] a vast number of emails in which he told her about the various steps he was taking to humiliate her, to damage her reputation, to undermine her relationships with her children, her spouse, her friends, and her employer, and, he stated he hoped, to make her unemployable and homeless.

[21] He was always explicit about his intentions. In an email on July 23, 2014, before the period of the indictment, he said: "I will destroy you - slowly and incrementally ... [e]very moment of my life is focused on the single goal". He said similar things through the period of the indictment. In a blog post on May 23, 2016, near the end of the period of the indictment, he struck out at critics of his website, and gloated that their criticism had increased the website's public profile. He concluded that, "every day this website continues to make [the complainant's] life a little more dreary", and that, "[e]very day [the complainant] gets a few steps closer to that inevitable rock bottom". He made similar comments to the RCMP officer who interviewed him after his arrest.

[22] Mr. Fox succeeded in many of his appalling objectives.

...

[31] In various of his emails, Mr. Fox reminded [the complainant] that he had firearms, and the ability to cross the border (into the USA) surreptitiously. In one email, he detailed the logistics of bringing his firearms into the USA and using them to kill [the complainant], while also adding that he would never do so – despite his wish to – because to kill would be illegal and immoral.

...

There can be no doubt that these communications were meant to intimidate [the complainant], despite the caveat Mr. Fox always included about remaining within the confines of the law.

[5] The judge noted the "life-altering effect" the harassment had on the complainant and that it had caused psychological harm to G. as well: paras. 25, 70.

[6] As for the firearms offence, Mr. Fox had a license in Canada to acquire and possess firearms, including restricted ones, as well as an authorization to transport the restricted firearms to certain places under certain conditions. He violated those conditions when he shipped the firearms, concealed in boxes of household items, into the U.S.

The Appeal and Grounds of Appeal

[7] Annexed to his affidavit in support of his application for the appointment of counsel, Mr. Fox details the basis of his appeal in a memorandum exceeding 50 pages. Notwithstanding the length and detail of the grounds he proposes to advance on appeal, they may fairly be summarized as relating to three main assertions. Those are that counsel appointed for him failed to cross-examine the complainant on a number of topics and on a number of documents as detailed in the memorandum; that his appointed counsel colluded with the Crown to conceal evidence; and that fresh evidence should be admitted on appeal that will challenge the complainant's evidence. He says she perjured herself in her testimony.

Background to This Application

[8] On June 7, 2018, Mr. Fox applied for appointment of counsel to conduct his conviction and sentence appeals. Justice Groberman made the following order on July 5, 2018:

IT IS ORDERED THAT counsel be appointed for the limited purpose of:

- (1) assisting the appellant in preparing, filing and serving a s. 684 application for the appointment of counsel to act on his conviction appeal;
- (2) appearing as counsel for the appellant at the hearing of the s. 684 application, provided he or she is of the view that doing so will assist the appellant on the application; and
- (3) ordering selected portions of the transcripts only if and as is reasonably necessary to carry out the specific tasks mentioned above.

[9] This then is the application made with the assistance of counsel appointed pursuant to the order of Justice Groberman, Ms. T. Magder.

Appellant's Position on This Application

[10] In his written submissions on this application (prepared with the assistance of Ms. Magder), Mr. Fox says that it is in the interests of justice to appoint counsel for the limited purpose of providing procedural assistance in his conviction appeal. He says that he intends to pursue the appeal with or without the assistance of counsel. While he says he is competent to present the appeal himself, he submits he would benefit from assistance with:

- 1) complying with the Practice Directive for an ineffective assistance of counsel appeal issued by this Court;
- 2) ordering appeal books and transcripts;
- 3) assistance with computer research; and
- 4) procedural assistance with drafting and filing a factum.

[11] I note that since filing the application, transcripts have been ordered by Legal Aid.

[12] At the hearing of the application I heard from both Ms. Magder and Mr. Fox. In oral submissions, Mr. Fox was clear that he would only permit counsel to argue his appeal if they did so at his direction. In other words, if counsel exercising his or her professional judgment declined to advance a position that counsel at trial was ineffective, or colluded with the Crown, or some other ground, Mr. Fox would make those submissions on his own behalf.

[13] Mr. Fox says that complying with the Court of Appeal Practice Directive, *Ineffective Assistance of Trial Counsel* (Criminal Practice Directive, 12 November 2013), is a complex process. He is currently in custody and the probation order which will come into effect upon his release will not permit him to use a computer for purposes other than work.

[14] As to the merits, he submits that his appeal is arguable and this is all that is required for a s. 684 application to succeed: *R. v. Donald*, 2008 BCCA 316 at para. 15 (Saunders J.A. in Chambers). He submits, "Without further investigation

(exchange of affidavits) and assistance of counsel, this Court cannot determine that this appeal is not arguable.”

[15] Ms. Magder advanced an alternative position to that contained in the written submissions. She says that she is not yet in a position to clearly articulate meritorious grounds of appeal because in order to do so she requires the ability to obtain affidavit material from Mr. Lagemaat. She indicated that she did not believe the terms of Justice Groberman’s order contemplated her proceeding to that step of the process. Moreover, she understood Mr. Lagemaat refused to provide affidavit evidence in response to Mr. Fox’s assertions of his ineffective assistance at trial without a waiver of privilege. She essentially seeks directions from the court as to the scope of her s. 684 appointment.

Respondent’s Position on This Application

[16] The Crown submits that the limited s. 684 appointment being sought is not authorized by s. 684 and would be contrary to the jurisprudence of this Court: *R. v. Kim*, 2002 BCCA 133 (Donald J.A. in Chambers) and *R. v. McDiarmid*, 2015 YKCA 19 (Bennett J.A. in Chambers). The Crown contends that these cases are authority for the proposition that this Court will not appoint counsel to provide only logistic and legal support services to an otherwise self-represented appellant.

[17] The Crown suggests that, like Mr. Kim and Mr. McDiarmid, Mr. Fox is seeking the appointment of counsel, at least in part, as a means of covering disbursements.

[18] The Crown in its memorandum of argument submits that Mr. Fox has not identified an arguable ground of appeal, stating: “the fact that court-appointed counsel has not identified a potentially arguable ground of appeal leads to the irresistible inference that one does not exist”. The Crown points out that Mr. Fox has wrongly inverted the legal burden by suggesting that, in the face of his assertion that he has an arguable appeal, further investigation is required to show that the appeal is *not* arguable. The Crown’s position is there must be a reasonable basis to impugn the integrity and competence of counsel, either Crown or defence, before such an argument may be advanced, and that Mr. Fox has not demonstrated such a

reasonable basis: *Groia v. Law Society of Upper Canada*, 2018 SCC 27 at paras. 85-86.

Analysis

[19] The principles applicable to a s. 684 application are set out in *R. v. Silcoff*, 2012 BCCA 463:

[20] The overriding purpose of s. 684 of the *Code* is to protect the right to be heard and to ensure the fairness of the proceedings: *R. v. Barton and Federici*, 2001 BCCA 477 at para. 7.

[21] Appointment of counsel under s. 684 is subject to a two-part test, generally considered in the following order:

1. The accused must have insufficient means to obtain legal assistance; and
2. Appointment of counsel must be in the interests of justice.

[22] According to *Applications for a Court-Appointed Lawyer Under Section 684 of the Criminal Code* (Criminal Practice Directive, 19 September 2011), applicants should generally be able to show that 1) they cannot afford to retain counsel for the appeal; and 2) they applied to the Legal Services Society for legal aid and were refused.

[23] The factors to be considered under the requirement of “interests of justice” were summarized in *International Forest Products Ltd. v. Wolfe*, 2001 BCCA 632 at para. 6 and 13, 94 B.C.L.R. (3d) 67 (Levine J.A. in Chambers). They are as follows:

- a. The points to be argued on appeal;
- b. The complexity of the case;
- c. Any point of general importance in the appeal;
- d. The applicant's competency to present the appeal;
- e. The need for counsel to find facts, research law or make argument;
- f. The nature and extent of the penalty imposed; and
- g. The merits of the appeal.

[24] As to the merits of the appeal, the threshold requirement is an arguable appeal: *R. v. Donald*, 2008 BCCA 316 at para. 15, 258 B.C.A.C. 117 (Saunders J.A. in Chambers).

[25] In determining whether an appeal is arguable, regard must be had to the applicable standard of review on the proposed appeal: *Lin v. British Columbia (Adult Forensic Psychiatric Services)*, 2008 BCCA 518 at paras. 17-18 (Frankel J.A. in Chambers).

[26] Even where other factors favour the appointment of counsel, it will not be in the interests of justice to appoint counsel where an appeal has no

merit: *R. v. Hoskins*, 2012 BCCA 51 at paras. 30-32, 315 B.C.A.C. 238 (Garson J.A. in Chambers).

[27] The Court may consider the opinion of the Legal Services Society that an appeal has no prospect of success, however, the opinion of the Legal Services Society is only one factor: *R. v. Chan*, 2001 BCCA 138 at para. 8 (Finch J.A., as he was then, in Chambers); *R. v. Butler*, 2006 BCCA 476 at paras. 7 and 10 (Rowles J.A. in Chambers).

[20] I am satisfied that Mr. Fox does not have the financial means to pursue an appeal. He deposes that he has no income and debts of \$13,000 and is currently incarcerated. He was denied funding by the Legal Services Society but not on the basis of financial ineligibility. He therefore meets the financial criterion of s. 684. However, for the reasons that follow, with a limited exception, I am not satisfied that it is in the interests of justice to appoint counsel to act for Mr. Fox on the terms described in his submissions, regardless of the merits of the appeal.

[21] The interests of justice were described as follows by Justice Doherty in *R. v. Bernardo* (1997), 121 C.C.C. (3d) 123:

20. The “interests of justice” referred to in s. 684(1) must take cognizance of the broad access to appellate review contemplated by s. 675 and the wide remedial powers of the court of appeal set out in s. 686. Justice demands that an accused who appeals under s. 675 be afforded a meaningful opportunity to establish the merits of the grounds of appeal advanced by that appellant. That same interest also insists that the court be able to fully and properly exercise its broad jurisdiction at the conclusion of the appeal. Anything less is inconsistent with the statutory scheme created by Part XXI of the *Criminal Code*.

[22] As previously stated, Mr. Fox’s position is that he will only accept counsel’s assistance in arguing his appeal if counsel acts under his direction. If counsel, in his or her professional judgment, declines to advance a position, Mr. Fox will make those submissions on his own behalf.

[23] What Mr. Fox is asking for is not “a meaningful opportunity to establish the merits of the grounds of appeal”, but what amounts to logistical support to be carried out under his own direction. The plain language of s. 684 indicates that its purpose is to “assign counsel to act on behalf of an accused” to provide him or her with “legal

assistance” – not what amounts to administrative support for an appellant acting on his own behalf: *McDiarmid* at para. 18.

[24] *Kim* involved an appellant who, like Mr. Fox, requested the appointment of counsel to help him with “support services” such as legal research, drafting the factum, and organizing the appeal book. His request was denied, primarily for financial reasons but also because of the limited basis of the retainer being sought. Justice Donald stated:

[9] Apart from the financial issue, I would not entertain a request for funding under s. 684 in the terms proposed by Mr. Kim. He has fixed and certain ideas on how he wants to present his appeal. I would not want to burden a lawyer with such a limited retainer. Counsel must have the power to exercise professional judgment in the preparation and presentation of an appeal. Moreover, Mr. Kim sees s. 684 as a means of covering disbursements; but of course disbursements are ancillary to the principal purpose of the section which is to provide counsel.

[25] In *McDiarmid*, the appellant sought counsel to help him order transcripts. Justice Bennett stated that s. 684 could not be used to assist appellants in paying disbursement-like fees such as transcripts without appointing counsel: para. 18.

[26] I agree with the Crown that s. 684(1) would not seem to contemplate an appointment for the support services being sought here. *Kim* and *McDiarmid* support this interpretation.

[27] Mr. Fox is emphatic in saying that he wishes to maintain full control over the grounds advanced on appeal. He is not prepared to abide by counsel’s professional judgment as to whether there is a basis upon which to advance the arguments of ineffective assistance or collusion with the Crown. Given Mr. Fox’s steadfast position in this regard, it would seem to me that appointing counsel to act in such a potentially untenable position is not in the interests of justice. To paraphrase what Justice Donald said in *Kim*, I would not burden a lawyer with such a limited retainer. In these circumstances, I do not see any point in extending Ms. Magder’s appointment under Justice Groberman’s order, with one exception that I shall explain shortly.

[28] By his own submission, Mr. Fox is competent to present the appeal. He is well-educated and intelligent. He impressed the trial judge with his conduct of the trial. She noted in her Reasons for Sentence that he “presented his defence in a polite, organized, and capable manner”: para. 75.

[29] Mr. Fox is capable of researching and marshalling evidence, researching the law, and making arguments on his own behalf. His intellectual capability, and his ability to make arguments and anticipate and respond to counter-arguments, is demonstrated in the meticulous and carefully organized documents he has put together before the court on this application, with one limited exception.

[30] Stage Two of the Court of Appeal Practice Directive, *Ineffective Assistance of Trial Counsel* (Criminal Practice Directive, 12 November 2013) step 9 concerns the review by counsel of trial counsel’s affidavit in order to determine if the waiver of privilege has been exceeded. Mr. Fox will require, in my opinion, the assistance of counsel to complete steps 9 and 10 of this process. I would extend Justice Groberman’s order to the limited extent of enabling Ms. Magder (or other counsel) to assist Mr. Fox with steps 9 and 10 of Stage Two.

Disposition

[31] I dismiss the application under s. 684, but extend Justice Groberman’s appointment for the limited purpose of complying with the Practice Directive as described in these reasons. I refer the appeal to case management.

“The Honourable Madam Justice Garson”

Tab 14:

R. v. Fox, 2019 BCCA 211

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *R. v. Fox*,
2019 BCCA 211

Date: 20190606
Docket: CA44915

Between:

Regina

Respondent

And

Patrick Henry Fox

Appellant

Restriction on publication: A publication ban has been imposed under s. 486.5(1) of the *Criminal Code* restricting the publication, broadcasting or transmission in any way of evidence that could identify a victim/witness/undercover officer, referred to in this judgment by the initials G. and S. This publication ban applies indefinitely unless otherwise ordered.

Before: The Honourable Madam Justice Newbury
The Honourable Madam Justice D. Smith
The Honourable Madam Justice Griffin

On appeal from: Orders of the Supreme Court of British Columbia, dated
June 20, 2017 (conviction) and November 10, 2017 (sentence)
(*R. v. Fox*, 2017 BCSC 2665 (conviction) and 2017 BCSC 2361 (sentence),
Vancouver Docket 27178).

Oral Reasons for Judgment

The Appellant, appearing in person
(via videoconference):

P.H. Fox

Counsel for the Respondent:

D.M. Layton, Q.C.

Place and Date of Hearing:

Vancouver, British Columbia
June 6, 2019

Place and Date of Judgment:

Vancouver, British Columbia
June 6, 2019

Summary:

Crown application for dismissal of appeals against conviction and sentence dismissed for lack of due diligence in prosecution of appeals and for respondent's flouting of the jurisdiction of the Court.

[1] **NEWBURY J.A.:** The Crown applies for the dismissal of appeals brought by Mr. Fox (or the person who calls himself Patrick H. Fox) against his conviction and sentence on charges of criminal harassment and possession of firearms at an unauthorized place; and for other orders relating to the publication and dissemination of filed materials and information.

[2] Mr. Fox was convicted by a jury on June 28, 2017 at a trial where he was self-represented, although a lawyer, Mr. Lagemaat, was provided to cross-examine the complainant, Ms. Capuano (Mr. Fox's former common law wife), on the harassment charge. On November 10, 2017, Mr. Fox was sentenced to three years' imprisonment on the harassment charge and 10 months concurrent on the firearms charge, with credit for time already served.

[3] Mr. Fox filed a notice of appeal on November 22, 2017 in respect of his convictions and sentence. The primary ground of appeal was that Mr. Lagemaat had provided "ineffective assistance" in a deliberate effort to cover-up perjury on Ms. Capuano's part in collaboration or collusion with Crown counsel.

[4] An application made by Mr. Fox under s. 684 of the *Criminal Code*, R.S.C. 1985, c. C-46 for the appointment of counsel in this court was dismissed on November 9, 2018.

[5] A series of case management hearings before Fitch J.A. took place over the ensuing months. Mr. Fox was told repeatedly that he had to provide the transcript and appeal books for his appeal, but he was unable to do so because of financial circumstances. At the fifth case management conference, Fitch J.A. warned that he had to have a plan for pursuing his appeal by March 25, 2019, failing which the Crown could apply to have the appeals dismissed for want of prosecution.

[6] Around this time — March 2019 — also, Mr. Fox would appear to have participated in launching a new website devoted to attacks on Ms. Capuano's reputation and asserting that his convictions were bogus. Various materials that had been included in the Crown's disclosure materials in his case, as well as excerpts from trial transcripts and Ms. Capuano's victim impact statement, were mounted on the website, which of course attracted responses from members of the public whose toxicity matched that of Mr. Fox. All of this conduct violated the terms of Mr. Fox's probation order, which had prohibited the dissemination of materials referring to Ms. Capuano; as well as the terms of a Provincial Court order limiting his use of disclosure materials he had received; and the implied undertaking attached to materials disclosed to him as a self-represented litigant. In summary, Mr. Fox engaged in conduct he knew to be unlawful, and in doing so continued his harassment of Ms. Capuano.

[7] In addition, he attempted to travel to the United States, without the approval of his probation officer and contrary to the terms of the probation order. After this attempt he was transported back to the Canadian border and placed in the custody of the Burnaby RCMP on a warrant issued on an information that charged him with breaches of his probation order. He is to be tried on those three charges in August 2019.

[8] Today Mr. Fox has confirmed that he is unable to obtain the transcript and prepare the appeal books that would be required for any appeal. He has also repeated arguments made before Holmes A.C.J. concerning his citizenship and has effectively admitted he is responsible for the new website. He has also expressed eagerness to be charged on further harassment counts.

[9] I am persuaded that Mr. Fox's appeals against conviction and sentence must now be dismissed for lack of diligent prosecution of the appeal. The Crown has adduced evidence that appears to strongly support its contention that Mr. Fox has intentionally violated orders of the Provincial Court and Supreme Court of British Columbia. Today, he effectively admitted responsibility for the new website and

raised only a technical objection to the Crown's assertion that in publishing the disclosure materials, he breached the order of Burgess P.C.J. Without deciding that particular issue, I will say that the evidence strongly suggests that the orders were breached and that Mr. Fox's primary goal was to harass his ex-wife yet again.

[10] I would grant an order dismissing Mr. Fox's conviction and sentence appeals for want of prosecution and for repudiating the jurisdiction of this court. I would also grant an order prohibiting Mr. Fox from disseminating, distributing, publishing, broadcasting or transmitting in any way any materials filed on this application, or any part or excerpt thereof, except insofar as dissemination or distribution is necessary for the purposes of his participating in this or any other legal proceeding in British Columbia. Also, an order directing that none of the information regarding any breaches by Mr. Fox of his probation order, whether contained in the materials filed on this application, or in the information given or representations made at the hearing of this application, be published, broadcast or transmitted in any way before such time as: (i) if a preliminary hearing is held, Mr. Fox is discharged; or (ii) if Mr. Fox is tried or ordered to stand trial, the trial is ended.

[11] **D. SMITH J.A.:** I agree.

[12] **GRIFFIN J.A.:** I agree.

"The Honourable Madam Justice Newbury"

Tab 15:

**R. c. Gagnon,
2005 CanLII 18415 (Q.C. C.Q.)**

COUR DU QUÉBEC

CANADA
PROVINCE DE QUÉBEC
DISTRICT DE ROUYN-NORANDA
LOCALITÉ DE ROUYN-NORANDA
« Chambre criminelle & pénale »

N° : 600-01-006739-044

DATE : 3 mai 2005

SOUS LA PRÉSIDENTE DE L'HONORABLE RICHARD LAFLAMME, J.C.Q.

MARCEL GAGNON
Accusé - Requérant

c.

SA MAJESTÉ LA REINE
Poursuivante - Intimée

JUGEMENT SUR LA REQUÊTE EN DIVULGATION DE PREUVE SUPPLÉMENTAIRE
(Art. 7 et 24(2) de la Charte canadienne des droits et libertés)

[1] L'accusé fait face à une accusation de vol et de recel de pièces d'automobiles poursuivie sur déclaration sommaire de culpabilité. Au début de son procès, il présente une requête en vue d'obtenir une divulgation de preuve supplémentaire et, à défaut, un arrêt des procédures. La requête est basée sur les articles 7 et 24(2) de la Charte canadienne des droits et libertés. L'accusé exige obtenir plus particulièrement la liste des témoins que la couronne entend assigner ainsi que les antécédents judiciaires de ces témoins.

LES QUESTIONS EN LITIGE

[2] L'omission de communiquer la liste des témoins que la poursuite entend produire au procès contrevient-elle au droit de l'accusé à une défense pleine et entière?

[3] L'omission de divulguer les antécédents judiciaires des témoins que la poursuite compte assigner au procès viole-t-elle le droit de l'accusé à une défense pleine et entière?

[4] Le cas échéant, quel est le remède approprié afin de corriger la violation du droit constitutionnel prévu à l'article 7?

LES FAITS

[5] Lors de la comparution de l'accusé et conformément à son obligation, la poursuite a communiqué la preuve à la défense le 8 mars 2004. C'est ainsi que la défense a obtenu les déclarations écrites de tous les témoins. Il appert que les coordonnées des témoins n'apparaissent pas à la déclaration. Mais il est également admis que les adresses des témoins n'ont pas été demandées par la défense. Elles sont par ailleurs disponibles et la poursuite est prête à les fournir sur demande.

[6] Le 22 novembre 2004, le procureur de la défense écrit au bureau des substituts du procureur général afin d'obtenir les noms des témoins qui sont assignés en vue du procès qui doit se tenir le 17 février 2005. La substitut du procureur général refuse aux motifs que la communication de la preuve a déjà été effectuée, qu'elle n'a aucune obligation de transmettre une liste des témoins que la défense peut par ailleurs assigner si elle le juge nécessaire.

[7] Quant au second objet du litige, ce n'est qu'à l'occasion de la présente requête que la défense requiert du ministère public les antécédents judiciaires des témoins. La poursuite refuse de transmettre cette information qu'elle prétend ne pas détenir systématiquement dans tous les dossiers. Elle soutient que l'information utilisée provient du plumitif de la Cour auquel l'avocat de l'accusé a accès.

[8] À l'audience, la procureure de la poursuite déclare néanmoins avoir vérifié les antécédents judiciaires des témoins suite à la réception de la requête. Un seul témoin posséderait un casier judiciaire et ce, en matière de recel. Malgré la possession d'une telle information, elle refuse de la remettre prétextant ne pas avoir une telle obligation. Toutefois, si le Tribunal rend une ordonnance à cet effet, l'information sera divulguée.

LE DROIT

L'omission de communiquer la liste des témoins que la poursuite entend produire au procès contrevient-elle au droit de l'accusé à une défense pleine et entière?

[9] D'aucuns reconnaissent que la divulgation de la preuve fait partie intégrante du droit d'un accusé à une défense pleine et entière. C'est ainsi que la poursuite est tenue de divulguer à la défense tous les renseignements pertinents, qu'ils soient inculpatatoires ou disculpatoires, et que la poursuite ait l'intention de les présenter ou non lors du

procès¹. La jurisprudence a développé certaines exceptions à ce devoir de divulgation des renseignements : s'ils échappent à son contrôle, s'ils sont manifestement sans pertinence ou s'ils font l'objet d'un privilège. La pertinence se détermine par l'usage que la défense compte faire des renseignements. Cela signifie qu'il y a une possibilité raisonnable que le renseignement sera utile à la présentation d'une défense pleine et entière².

[10] Pour qu'il y ait atteinte au droit à une défense pleine et entière, il faut examiner la nature des renseignements non-divulgués pour déterminer l'incidence qu'ils pourraient avoir sur le verdict. Il doit y avoir une possibilité raisonnable que les renseignements non-divulgués influent, à première vue, sur l'issue du litige³ ou qu'ils aient une valeur logiquement probante relativement à une question en litige ou à l'habileté à témoigner d'un témoin⁴. L'incidence de la non-divulgation sur l'équité du procès doit également être prise en considération⁵.

[11] L'accusé n'a qu'à établir selon la balance des probabilités une "possibilité raisonnable" d'atteinte à son droit de présenter une défense pleine et entière⁶.

[12] Les tribunaux du pays ont eu à appliquer ces principes généraux aux demandes de divulgation de la liste des témoins de la poursuite. La jurisprudence majoritaire s'appuie sur une décision de la Cour suprême qui reconnaît un large pouvoir discrétionnaire au ministère public quant au choix des témoins qu'il entend produire⁷. Bien que le contexte de l'arrêt *Cook* diffère substantiellement de la présente affaire, les principes adoptés par la Cour suprême constituent un guide précieux dans l'analyse du litige. La Cour rappelle le rôle spécial dévolu au ministère public. En raison de sa fonction, il ne peut adopter une attitude purement contradictoire à l'égard de la défense. Mais elle reconnaît que le pouvoir discrétionnaire s'exerce en partie par le choix des témoins cités à témoigner. Madame la juge L'Heureux-Dubé s'exprime ainsi :

"Étant donné la préférence marquée de notre Cour en faveur de la reconnaissance du pouvoir discrétionnaire du ministère public, il faudrait, quant à moi, une raison primordiale pour aller à l'encontre de cette préférence et justifier la création d'une obligation qui empiéterait si manifestement sur ce pouvoir."⁸

¹ *R. c. Stinchcombe*, [1991] 3 R.C.S. 326; *R. c. Chaplin*, [1995] 1 R.C.S. 727; *R. c. Dixon*, [1998] 1 R.C.S. 244; *R. c. Taillefer*; *R. c. Duguay*, [2003] 3 R.C.S. 307.

² *R. c. Stinchcombe*, précité; *R. Chaplin* précité; *Leipert c. R.*, [1997] 1 R.C.S. 281; *R. c. Khela*, [1995] 4 R.C.S. 201; *R. c. Egger*, [1993] 2 R.C.S. 451.

³ *R. c. Durette et al.*, [1994] 1 R.C.S., 469 à la page 498.

⁴ *R. c. O'Connor*, [1995], 4 R.C.S. 411 (au paragraphe 22).

⁵ *R. c. Dixon*, précité.

⁶ *R. c. Carosella*, [1997] 1 R.C.S., 80 ; *R. c. Chaplin*, précité.

⁷ *R. c. Cook*, [1997] 1 R.C.S. 1113.

⁸ *R. c. Cook*, précité à la page 1129.

[13] Ce large pouvoir discrétionnaire dans la conduite des procès criminels a été réitéré à quelques reprises par la Cour suprême⁹.

[14] Quant à la conduite du procès, la Cour suprême a précisé que le droit à une défense pleine et entière n'implique pas le droit à l'application des règles et des procédures les plus favorables à un acquittement, mais plutôt celles qui sont les plus équitables¹⁰.

[15] C'est ainsi que la Cour supérieure du Québec a déjà déterminé que la demande de la liste des témoins peut être utile à la défense "mais qu'elle n'est pas essentielle et ne fait pas partie des droits fondamentaux pour une défense pleine et entière."¹¹ La Cour supérieure de l'Ontario a rendu une décision au même effet¹². Dans cette affaire, la défense voulait savoir si la poursuite était pour faire témoigner une personne en particulier. Le juge McKinnon s'exprime ainsi :

"The "information" which the defence seeks is, in my view, not the kind of information which is subject to an order for disclosure. What the defence claims to be entitled to is the Crown "plan" for the presentation of its case. This, undoubtedly, is information in the possession of the Crown. It is, however, not subject to disclosure for the very reason that the Crown plan is something which is in its own discretion, which is unfettered, and properly so, absent bad faith or oblique motive." (paragraphe 8)

[16] Et le juge de conclure :

"...it would be helpful, indeed advisable, for the Crown to inform the defence in advance of its intention to call particular witnesses, and generally inform the defence of the anticipated list and time frames of witnesses. They are not, in law, bound to do so. It is merely good practice." (paragraphe 11)

[17] La Cour suprême de la Colombie-Britannique adopte la même position dans l'arrêt *R. c. Michaels*¹³. Au surplus, la Cour suprême du Yukon considère que l'obligation de divulgation de la preuve ne va pas jusqu'à indiquer à la défense comment la preuve sera utilisée¹⁴.

[18] Par contre, la Cour provinciale de Terre-Neuve a déjà décidé que lorsqu'une liste des témoins est fournie à la défense, la couronne indique son intention de faire entendre ces témoins. À défaut de donner un avis à l'effet qu'elle n'entend pas

⁹ *R. c. V.T.*, [1992] 749; *R. c. Beare*, [1988] 2 R.C.S. 387.

¹⁰ *R. c. Rose*, [1998] 3 R.C.S. 262.

¹¹ *R. c. Morneau*, [2000] J.Q. no 1078, (460-01-002486-987, district de Bedford, 25 février 2000, juge Paul-Marcel Bellavance, au paragraphe 10.

¹² *R. c. Pinkus*, [1999] O.J. No. 5464, (Court file no. 95-00724).

¹³ *R. c. Michaels*, [2000] B.C.J. No. 2705 (Vancouver Registry No. CC981577).

¹⁴ *R. c. T.H.S.*, [1995] Y.J. No. 166 (Whitehorse Registry No. 94-11148).

présenter l'un des témoins, elle a l'obligation de permettre le contre-interrogatoire d'un témoin qu'elle n'entend pas appeler¹⁵.

[19] La poursuite ne pourrait toutefois cacher l'existence d'un témoin, tout comme elle devrait dévoiler à la défense l'existence de tout témoin ayant fourni une déclaration écrite ou verbale. Notre Cour d'appel a déjà conclu à la violation du droit à une défense pleine et entière lorsque la couronne ne communique pas en temps utile son intention de faire témoigner un ou plusieurs témoins¹⁶. Dans cet arrêt, deux témoins ont été entendus. La couronne ne détenait aucune déclaration et ignorait que les témoins témoigneraient comme ils l'ont fait. Bien que les témoins étaient connus, même de la défense, tous ignoraient le contenu de leurs témoignages éventuels. L'accusé a été privé de son droit de rencontrer ces témoins au préalable, et de préparer tant son contre-interrogatoire que son propre témoignage.

[20] Certaines décisions ordonnent la transmission de la liste des témoins¹⁷. Dans chacun des cas, l'équité du procès en dépendait. Dans l'arrêt *R. c. Finck*, les noms des témoins du crime n'ont pas été divulgués à la défense. Le refus de divulguer constituait une violation du droit à une défense pleine et entière. Dans l'affaire *R. c. Hutter*, la couronne refusait de remettre la liste des témoins malgré que certains d'entre eux apportaient des informations quant à la personnalité ou la réputation de l'accusé. On a déterminé que le refus de divulgation avait pour conséquence d'empêcher l'accusé d'évaluer la défense à produire notamment l'opportunité de présenter une preuve de bonne réputation.

[21] Le Tribunal n'a recensé qu'une seule décision où l'on a conclu au droit absolu pour la défense d'obtenir la liste des témoins¹⁸. Le jugement se base sur le fait qu'une saine administration de la justice commande que la couronne démontre ouverture et candeur quant à cette information de base que constitue la liste des témoins. Il en va de l'efficacité de l'administration de la justice, notamment pour éviter la multiplicité des actes d'assignation pour un même témoin. Cette décision, rendue avant les arrêts *Cook*, *Rose*, *V.T* et *Beare*, précités, ne représente pas l'état du droit sur la question.

L'omission de divulguer les antécédents judiciaires des témoins que la poursuite compte assigner au procès viole-t-elle le droit de l'accusé à une défense pleine et entière?

[22] Les principes généraux portant sur la divulgation de la preuve énoncés précédemment s'appliquent intégralement à cet aspect du litige.

¹⁵ *R. c. Raymond*, [1995] N.J. No. 221.

¹⁶ *Fortin c. R.*, C.A.Q. 200-10-000134-945, 4 février 1998, AZ-98011168.

¹⁷ *R. c. Finck*, [1996] O.J. No. 3962 (Cour de Justice de l'Ontario, Division Générale siégeant en appel); *Regina c. Hutter*, 16 O.R. (3d) 145 (Req. pour permission d'en appeler devant la C.S.C. rejetée le 28 avril 1994).

¹⁸ *R. c. Willis*, [1996] A.J. No. 811 (Cour provinciale de l'Alberta).

[23] Si la situation est limpide pour le casier judiciaire d'un accusé, il en est autrement pour la divulgation des antécédents judiciaires des témoins. Aucune disposition législative ne prévoit spécifiquement une telle possibilité sauf les dispositions relatives à l'accès au dossier d'un adolescent au sens de la Loi sur le système de justice pénale pour les adolescents¹⁹.

[24] Il peut être fort utile d'obtenir de tels renseignements. Ils peuvent permettre d'évaluer la crédibilité d'un témoin ou, plus important encore, donner ouverture à une défense spécifique.

[25] Deux courants jurisprudentiels s'affrontent. L'un à la faveur d'une divulgation systématique et intégrale des antécédents judiciaires de tout témoin et, d'autre part, une approche basée sur l'analyse de la pertinence telle que définie dans *Stinchcombe* et *Egger* précités.

[26] La Cour d'appel de la Colombie-Britannique a déjà déterminé que l'absence de divulgation des antécédents d'un témoin ne constituait pas un abus de procédure de la part de la couronne. La Cour précise que l'accusé n'a pas démontré de préjudice ou de fondement quant à la pertinence de la demande²⁰.

[27] Cette Cour accorde également une grande importance à la diligence de la défense relativement à une telle demande. Lorsque la crédibilité de la victime est au centre d'une affaire, l'absence de divulgation des antécédents judiciaires peut priver l'accusé d'une défense pleine et entière et du droit à un procès équitable²¹. Dans le contexte de l'affaire, la Cour arrive néanmoins à la conclusion que la divulgation aurait eu une portée fort limitée et n'aurait pas nier les droits de l'accusé.

[28] La Cour du Banc de la Reine du Nouveau-Brunswick, siégeant en appel, opine que :

"I do not think it is necessary for the Prosecution to check and verify all possible sources to obtain information that might assist the Defence in the presentation of its case. Defence counsel surely must avail itself of information that is readily available to prepare for and present its case²². In the case of *R. v. Carosella* (1997), 112 C.C.C. 3(d) 289 (S.C.C.) at page 314 Justice L'Heureux-Dubé said:"

"....Nor does it impose an obligation upon the Crown to comb the world for information which might be of possible relevance to the defence"

¹⁹ *Loi concernant le système de justice pénale pour les adolescents*, et modifiant et abrogeant certaines lois en conséquence, L.C. 2002, ch. 1, telle que modifiée par L.C. 2002, ch. 7, art. 274; 2002, ch. 13, art. 91; 2004, ch. 11, art. 48, 49.

²⁰ *R. c. Thomas*, 170 C.C.C. (3d) 81.

²¹ *R. c. Sauvé*, 121 C.C.C. (3d) 225.

²² *R. c. Kitchen*, [1999] N.B.J. No.9. paragraphe 19.

[29] Le juge Riordon souligne que la défense pouvait obtenir facilement les informations recherchées sur le système d'information de justice du Nouveau-Brunswick en vue de la préparation du procès. La demande de divulgation a été rejetée.

[30] Au même effet, la Cour d'appel de l'Alberta a refusé d'imposer au ministère public l'obligation de fournir les antécédents carcéraux d'un témoin²³. La Cour était d'avis que les autorités pénitentiaires étaient étrangères aux procédures et que la couronne ne pouvait se voir imposer l'obligation de rechercher des informations qui n'ont rien à voir avec le crime, avec les questions en litige ou avec l'accusé. On reconnaît que la crédibilité aurait pu être un enjeu mais rien dans la preuve ne le laissait entrevoir. Ayant été rendue avant l'arrêt Carosella précité, cette cause est néanmoins pertinente ne serait-ce que pour illustrer la nécessité d'établir une certaine pertinence quant à l'information recherchée.

[31] Ce principe a été suivi dans les affaires *R. c. I.J.L.* et *R. c. D.M.B.*²⁴. Dans cette dernière cause, le juge Daniel s'exprimait ainsi :

"I am of the view the Supreme Court of Canada did not intend the *stinchcombe* (*sic*) decision to require the Crown to seek out and discover additional information that does not form part of either the police or the Crown investigation and which is not required by the Crown for the prosecution of their case."

[32] Lorsque l'information est en possession de la poursuite, la tendance majoritaire, sinon unanime, est à l'effet que l'information doit être divulguée particulièrement si les policiers ont effectué des vérifications en ce sens dans le cadre de leur enquête²⁵.

[33] À l'effet contraire, la Cour provinciale d'Alberta est d'avis que les antécédents judiciaires des témoins doivent faire partie des informations que la poursuite devrait normalement posséder. En conséquence, ces informations devraient être divulguées à la défense si elles existent²⁶. La Cour d'appel de la Saskatchewan a opiné en ce sens en 1987²⁷, soit bien avant *Stinchcombe*.

En cas de violation de l'article 7 de la Charte, qu'elle est le remède approprié?

[34] Le paragraphe 24(1) de la Charte prévoit que :

"24. (1) **Recours en cas d'atteinte aux droits et libertés** – Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la

²³ *R. c. Gingras*, 71 C.C.C. (3d) 53.

²⁴ *R. c. I.J.L.*, [1992] B.C.J. No. 2976; *R. c. D.M.B.*, [1992] A.J. No. 519.

²⁵ *R. c. Shalala*, [1997] N.B.J. No. 556.

²⁶ *R. c. Toth*, [1998] A.J. No. 123.

²⁷ *R. c. Bahinipaty*, [1987] S.J. No. 281.

réparation que le tribunal estime convenable et juste eu égard aux circonstances."

[35] Pour avoir droit à une réparation, le requérant doit établir, par prépondérance de preuve, l'atteinte au droit à une défense pleine et entière. Une fois la violation établie, le tribunal doit déterminer la réparation juste et convenable.

[36] Pour paraphraser la Cour suprême²⁸, c'est à cette étape que la gravité de l'atteinte portée aux droits de l'accusé doit être évaluée et examinée en fonction de la réparation demandée.

[37] La jurisprudence reconnaît que, normalement, une ordonnance de divulgation et un ajournement seront suffisants. Ce n'est que dans les cas les plus manifestes, où il n'est pas possible de remédier au préjudice, qu'un arrêt des procédures constituera un remède approprié²⁹.

APPLICATION À LA PRÉSENTE AFFAIRE

La liste des témoins de la poursuite

[38] Le procureur de l'accusé prétend avoir droit à la communication de la liste des témoins que le ministère public va assigner en vue du procès. Une telle liste permettrait une meilleure préparation des contre-interrogatoires et de la défense à présenter. Il convient par ailleurs du bien-fondé des exceptions reconnues par la jurisprudence. Il propose également que l'administration de la justice serait mieux servie par une telle divulgation évitant des ajournements ou la multiplicité des actes d'assignation. Il fait également l'analogie avec les nouvelles dispositions portant sur l'enquête préliminaire. L'article 536.3 C.cr. prévoit que la partie qui demande une enquête préliminaire doit fournir au tribunal une déclaration énonçant les noms des témoins que la demande veut faire entendre à l'enquête préliminaire. Le Tribunal rejette d'emblée ce dernier argument puisqu'il appuie davantage la thèse opposée. En effet, le législateur est présumé cohérent. S'il avait voulu créer une telle obligation à l'occasion du procès, il se serait exprimé clairement. À titre subsidiaire, il faut replacer l'amendement législatif dans son contexte; circonscrire les débats au stade de l'enquête préliminaire où l'enjeu est fort différent de celui du procès. D'ailleurs, les dispositions relatives au procès n'ont subi aucune modification. Il faut y voir là une intention du législateur ne pas intervenir à ce niveau et de laisser les tribunaux interpréter le principe du droit à une défense pleine et entière.

[39] La poursuite prétend plutôt qu'elle n'a aucune obligation à cet égard puisqu'une liste de témoins ne constitue pas de la preuve, non plus que des renseignements au sens entendu par la Cour suprême.

²⁸ R. c. Dixon, précité, paragraphe 35.

²⁹ R. c. O'Connor, précité ; R. c. Dixon, précité, R. c. Carosella, précité, R. c. Taillefer & Duguay, précité.

[40] En l'espèce, il importe de souligner que l'ensemble des déclarations des témoins a été transmis à la défense. Certes, les coordonnées de chacun des déclarants n'apparaissent pas, toutefois la défense n'a jamais requis de telles informations. La défense ne veut que connaître les noms des témoins qui seront assignés.

[41] Le Tribunal fait sien le principe qui émerge de la jurisprudence majoritaire selon lequel la liste des témoins, dans le contexte proposé par l'accusé, ne constitue pas des renseignements utiles ou pertinents en vue d'une défense pleine et entière. Il concourt au propos du juge Bellavance dans l'affaire *Morneau* précitée ainsi qu'à ceux du juge McKinnon dans l'affaire *Pinkus* précitée. Par sa demande l'accusé tente de s'immiscer dans le plan de conduite du procès de la poursuite. En l'absence de mauvaise foi ou de motifs obliques, les tribunaux ne devraient pas intervenir dans la vaste discrétion du procureur général dans le choix des témoins qu'il entend produire au procès. Les motifs invoqués par la défense au soutien de sa demande ne revêtent pas le caractère primordial exigé par la Cour suprême dans l'arrêt *Cook* précité.

[42] Quant à la préoccupation de l'avocat de l'accusé à l'effet que la couronne pourrait omettre d'appeler un témoin essentiel, la Cour suprême y a déjà répondu dans l'arrêt *R. c. Yebes*³⁰ où le juge McIntyre s'exprimait comme suit :

"Le ministère public a le pouvoir discrétionnaire de choisir les témoins qui seront citée (*sic*) lorsqu'il présentera sa preuve à la cour. On ne doit pas intervenir à cet égard à moins que le ministère public ne l'ait exercé pour une raison détournée ou inappropriée [...]. Bien que le ministère public ne puisse être tenu de citer un témoin donné [sauf pour ce qui est de l'exception précitée], l'omission de le faire peut créer une faille dans sa preuve, ce qui fera en sorte qu'il ne se sera pas déchargé de son fardeau de la preuve et permettra à l'accusé de demander un acquittement. C'est en ce sens que l'on peut s'attendre que le ministère public cite tous les témoins essentiels à la narration des événements sur lesquels sa preuve est fondée."

[43] Permettre un ajournement à la défense afin qu'elle assigne un témoin que la poursuite juge peu fiable ou pas essentiel répondrait au droit à un procès juste et équitable ainsi qu'au droit à une défense pleine et entière.

[44] Il y a donc lieu de conclure que l'omission de fournir préalablement au procès la liste des témoins de la poursuite, ne viole pas le principe fondamental du droit à une défense pleine et entière.

Les antécédents judiciaires des témoins que la couronne entend présenter

[45] La demande de l'accusé s'appuie essentiellement sur l'importance de pouvoir contre-interroger efficacement les témoins de la poursuite.

³⁰ *R. c. Yebes* [1987] 2 R.C.S. 168; au même effet, *V.(J.) c. R.*, C.A.Q., 500-10-000023-927, 2 mai 1994, AZ-94011503.

[46] La couronne indique que généralement ces informations ne sont pas en sa possession. Reconnaisant qu'il peut exister une certaine pertinence quant à la crédibilité, l'exercice peut facilement devenir une expédition de pêche. Par surcroît, l'information est disponible sur le système informatisé du ministère de la justice du Québec (plumitif).

[47] Ce dernier argument est réfuté avec raison par le procureur de l'accusé puisque les antécédents des adolescents ainsi que les condamnations hors du Québec n'y apparaissent pas. Pour un district limitrophe à l'Ontario comme le district de Rouyn-Noranda, l'argument n'est pas sans importance. Bien que grandement utile, l'outil peut se révéler insuffisant.

[48] La déclaration de la procureure de la poursuite, faite séance tenante, à l'effet qu'un de ses témoins a un antécédent en matière de possession de biens criminellement obtenus, est déterminante. Elle dispose donc de l'information mais refuse de la divulguer. Le renseignement est en lien direct avec l'accusation et possède une pertinence probable. On ne peut raisonnablement prétendre que la défense est à la recherche d'informations qui n'ont rien à voir avec le crime ou avec les questions en litige. Dans ce contexte particulier où la crédibilité risque d'être un enjeu important, l'impossibilité de contre-interroger un témoin à charge ayant un antécédent en matière de recel dans une cause en semblable matière brimerait le droit de l'accusé à une défense pleine et entière.

Le remède applicable

[49] Le remède demandé par l'accusé est une ordonnance de divulgation. Ce n'est qu'en cas de refus du ministère public qu'il demande un arrêt des procédures. Le ministère public déclare, séance tenante, qu'il ne communiquera l'information que si une ordonnance est émise à cet effet.

[50] Considérant que l'audition des témoins au procès n'est pas commencée, le préjudice n'est pas, pour l'instant, irréparable. Il n'y a pas lieu de s'écarter de la jurisprudence quant au remède à appliquer. Une ordonnance de divulgation permettra, dans le contexte bien particulier de la présente affaire, de corriger la violation constatée.

[51] **POUR CES MOTIFS, LE TRIBUNAL :**

[52] **ACCUEILLE** partiellement la requête de l'accusé;

[53] **REJETTE** la requête de l'accusé quant à sa demande de divulgation de la liste des témoins de la poursuivante;

[54] **ORDONNE** à la poursuite de communiquer au procureur de l'accusé, le nom du témoin ayant un antécédent judiciaire, la nature du crime, la date de sa commission, la date de la condamnation et la peine imposée à ce témoin et ce, dans les trente (30) jours de la présente décision;

RICHARD LAFLAMME, J.C.Q.

M^e Denis Harvey
Aide juridique Rouyn-Noranda
Procureur pour l'accusé - requérant

M^e Annik Harbour
Substitut du procureur général
Procureure pour la poursuivante - intimée

Date d'audience : 17 février 2005

Tab 16:

R. v. Leno, 2021 BCCA 200

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *R. v. Leno*,
2021 BCCA 200

Date: 20210520
Docket: CA46082

Between:

Regina

Respondent

And

Peter Charles Leno

Appellant

Restriction on publication: Pursuant to orders made under ss. 486.4(2.2) and 486.5(1) of the *Criminal Code*, no information that could identify the complainant may be published in any document or broadcast or transmitted in any way. This publication ban applies indefinitely unless otherwise ordered.

Before: The Honourable Madam Justice Stromberg-Stein
The Honourable Mr. Justice Willcock
The Honourable Mr. Justice Fitch

On appeal from: An order of the Supreme Court of British Columbia, dated June 27, 2018 (conviction) (*R. v. Leno*, Duncan Docket 39173-2).

Counsel for the Appellant
(via videoconference):

T. Bulmer

Counsel for the Respondent
(via videoconference):

J.A.M. Dickie

Place and Date of Hearing:

Vancouver, British Columbia
April 21, 2021

Place and Date of Judgment:

Vancouver, British Columbia
May 20, 2021

Written Reasons by:

The Honourable Mr. Justice Fitch

Concurred in by:

The Honourable Madam Justice Stromberg-Stein

The Honourable Mr. Justice Willcock

Summary:

Appeal from conviction by a jury of sexual assault. The offence occurred in 2003, when three unidentified men gang-raped the complainant. In 2016, semen previously identified on the complainant's underwear was matched to the DNA profile of the appellant. He was charged with sexual assault in January 2017. The appellant chose to represent himself at trial. The defence theory at trial was that the complainant fabricated the allegation. The appellant did not testify nor did he call any evidence. On appeal, the appellant argued he was not provided with timely and accessible disclosure before and during the trial, and that the trial judge failed to assist him, as a self-represented accused, to bring out his defence with full force and effect. Held: Appeal dismissed. The appellant received timely disclosure, and in a format he was able to access prior to the trial. At no point did the appellant complain that he had not received disclosure, nor did he apply for a mistrial or seek other disclosure-related relief. The trial judge did not fail to discharge his duty to lend a "helping hand" to the self-represented appellant. The defence the appellant elected to pursue was squarely before the jury. The appellant failed to establish on either ground that the trial resulted in a miscarriage of justice.

Reasons for Judgment of the Honourable Mr. Justice Fitch:**I. Introduction and Overview**

[1] The appellant was convicted by a jury of one count of sexual assault contrary to s. 271 of the *Criminal Code*, R.S.C. 1985, c. C-46. He was found to have participated with two other men in the gang rape of a 15-year-old girl.

[2] The offence was committed in June 2003. The complainant was unable to identify her attackers. Clothing she was wearing at the time of the attack was submitted for forensic examination. Blood and semen were identified in five places on her undergarments. Two DNA profiles were obtained. The first matched the complainant. The second matched an unknown male. In 2016, the male DNA profile was matched to the appellant. The probability of selecting an unrelated individual at random from the Canadian Caucasian population with the same DNA profile was determined to be 1 in 1.1 trillion.

[3] Despite repeated judicial suggestions that it would be foolish not to avail himself of the services of counsel, the appellant chose to represent himself at trial.

[4] The case against the appellant was formidable. Unless the reliability of the DNA evidence could be undermined, it established to a virtual certainty that the appellant had engaged in sexual relations with the complainant. Although consent was a defence to the charge—the age of consent was 14 at the relevant time—the complainant was described by independent witnesses after the incident as “crying and shaking”, “in shock” and “scared”. She was missing one shoe. Her clothing was dirty. The complainant directed investigating officers to the scene of the offence from which personal possessions belonging to her were recovered—her missing shoe, some make-up and a pair of sunglasses. A sexual assault nurse examiner observed significant injuries to the complainant, including: abrasions, bruising and swelling of her labia; a tear just below her vaginal opening; diffuse bruising in her vaginal vault; minor bleeding of the cervix; and scratches and bruises on both of her arms. This evidence confirmed the complainant’s account and stood as a significant obstacle to the advancement of a defence that the complainant consented to the activity in question.

[5] The appellant, who was in custody pending trial, did not testify nor did he call any evidence. His theory at trial was that the complainant fabricated the allegation either at the urging of her ex-boyfriend or to avoid the consequences of missing her curfew that evening. The appellant also sought to undermine the reliability of the DNA evidence, including by pointing to the possibility that the complainant’s undergarments had been washed before being tested or that the DNA samples had been contaminated.

[6] The appellant argues on appeal that he was not provided with timely disclosure in a format he could access and manage either before or during the trial. Second, he argues that the trial judge failed to give him the “helping hand” to which he was entitled as a self-represented accused during the course of the trial. Among other things, he submits that the judge failed to assist him in bringing out his defence with full force and effect. He seeks a stay of proceedings on grounds not clearly articulated in his factum or in oral argument. In the alternative, he seeks an order for a new trial.

[7] The appellant applies to adduce as fresh evidence on appeal an affidavit sworn by him on September 27, 2020. The appellant's affidavit speaks to both grounds of appeal. Among other things, the appellant deposes that disclosure materials were unavailable to him after he was detained in custody pending trial, he was not given access to a computer until a few days before the trial, he could not take his disclosure materials to court, and he was not allowed access to this material while he was in his cell.

[8] The Crown also applies to adduce two affidavits as fresh evidence on appeal. The first was sworn February 22, 2021, by Steve Bosence, Acting Assistant Deputy Warden of Vancouver Island Regional Correctional Centre ("VIRCC"). It responds to the appellant's fresh evidence application by addressing the institutional arrangements in place at VIRCC to assist self-represented accused in managing disclosure, including disclosure made in an electronic format. The second was sworn by Crown counsel on February 25, 2021. This affidavit addresses information provided or disclosed to the appellant in advance of the trial. It is responsive to the appellant's application only in part. Regardless of the disposition of the appellant's application to adduce fresh evidence, the Crown seeks to have admitted a document it says was provided to the appellant by the trial judge. The judge called this document "*Notes for Self-Represented Accused*", but never marked it for identification. The Crown relies on this document in support of its assertion that the judge afforded adequate assistance to the appellant at trial.

[9] Neither counsel sought leave to cross-examine the fresh evidence affiants.

[10] Following our usual practice, we received the fresh evidence tendered by the parties at the outset of the hearing to evaluate the appellant's grounds of appeal, his contention that he was unable to make full answer and defence to the charge, and his assertion that the verdict is, on both grounds of appeal, the product of a miscarriage of justice.

[11] In my respectful view, there is no merit in either of these grounds. I would dismiss the appellant's application for leave to adduce fresh evidence, and I would dismiss the appeal.

II. Background

[12] The appellant was charged with sexually assaulting the complainant in January 2017—approximately 13 years after the incident. He was released on bail pending trial.

[13] The appellant was initially represented and the Crown made disclosure to his counsel.

[14] The appellant elected trial by judge and jury. He failed to appear for the preliminary inquiry. His counsel, Mr. Drury, withdrew as counsel of record. The appellant was committed to stand trial.

[15] Despite repeated judicial encouragement to retain counsel, the appellant decided to represent himself.

[16] At a fix date appearance on January 8, 2018, the appellant confirmed that his "paperwork" had been given to him by Mr. Drury. An order was made under s. 486.3(2) of the *Code* appointing counsel to cross-examine the complainant at trial. The trial was set to commence on June 4, 2018.

[17] On March 10, 2018, the appellant was arrested on new charges. At a bail hearing held on March 20, 2018, the appellant, who was again offered but declined the assistance of a lawyer, said that he engaged in consensual sexual activity with the complainant before she got into a car with him and three other men. He identified the other men as J.M., G.B., and M.D. He said, "I don't know why I'm the only person being charged if it wasn't consensual." If admitted at trial, the appellant's statement amounted to an admission by him that he was present at the scene of the offence and participated, along with the other men, in having sexual relations with

the complainant. A detention order was made and the appellant remained in custody until after the conclusion of the trial.

[18] At a pre-trial conference on March 28, 2018, the Crown confirmed it had made full disclosure to Mr. Drury when he was counsel of record and that any subsequent disclosure had been provided directly to the appellant. The appellant confirmed with the presiding judge that he had the capacity to play video evidence while incarcerated at VIRCC. Given that the appellant had been returned to custody, the Crown agreed to provide a new set of the disclosure materials to him. At the same pre-trial conference, the Crown gave notice that it would seek to have admitted at trial the statement made by the appellant at the March 20, 2018 bail hearing.

[19] Also on March 28, 2018, the appellant said, "I need to make application for some witnesses that I would like at my court case and I pretty much need them there." When the presiding judge attempted to pursue this issue with the appellant, he said that he would be seeking to lay criminal charges against Crown counsel. He sought the issuance of a subpoena to another Crown counsel. The judge advised the appellant that the normal procedure an in-custody accused would follow is to provide a list of witnesses who have relevant evidence to give, along with information regarding their whereabouts, so that arrangements could be made for subpoenas to issue. The appellant responded that he was aware of this requirement. He then told the judge, "That's all I have to say to the court." The appellant did not produce a list of additional witnesses he was seeking to have subpoenaed. Rather, he became interruptive, confrontational, sarcastic and profane. He eventually asked that the pre-trial conference be adjourned.

[20] At a fix date appearance on April 12, 2018, the appellant appeared to confirm that outstanding disclosure issues had been addressed. The appellant said, "I would like to put in a list of -- of witnesses I want at this time, or can I wait until the pretrial." The presiding judge suggested that this wait until the next pre-trial conference which was scheduled to take place before the trial judge six days later.

[21] At the pre-trial conference on April 18, 2018, Crown counsel advised that it would be providing the appellant, and counsel appointed to conduct the cross-examination of the complainant, with a disc containing about 800 pages of disclosure. The Crown also noted that transcripts of some earlier pre-trial appearances had been prepared and provided to the appellant.

[22] When the judge attempted to explain to the appellant that a package of materials would be made available to him that would explain the trial process and assist him in conducting the defence, the appellant said, "I don't have a problem with that", but went on to complain that people were trying to force him to get counsel and that it was "getting really rude". The judge said to the appellant that he could represent himself, but that "if you want to have someone to assist you that is available to you as well." The appellant responded, "No, I don't".

[23] The judge confirmed with the appellant that the alleged sexual assault concerned the gang rape of the complainant after she had been driven away from the 7-Eleven, not any sexual conduct the complainant may have engaged in with anyone behind the 7-Eleven before she was driven away from the store. The judge cautioned the appellant against making any statements concerning the offence, but confirmed that it was the appellant's position he had nothing to do with the offence.

[24] The appellant said that he wanted to make an application to get a couple of witnesses brought to court. He said he was thinking of three witnesses. The Crown advised the judge that the Crown was not prepared to assist the appellant in subpoenaing witnesses because legal assistance was available to the appellant on this issue through the Legal Services Society. The judge asked the appellant to write on a piece of paper the names of the witnesses he wanted subpoenaed for trial and hand it to the clerk. He said, "I may be able to assist you with getting the subpoenas." The appellant said that he did not have a pen and that he was a poor speller. The pre-trial conference proceeded to address other matters, including the appellant's primary concern that a bail review be held. The hearing was adjourned

without the judge being supplied with the names of the witnesses the appellant wanted subpoenaed for trial.

[25] At a further pre-trial conference on May 23, 2018, the judge provided the appellant with the document entitled "*Notes for Self-Represented Accused*". I reproduce below the exchange between the judge and the appellant on this occasion:

THE COURT: All right. ... I've got a -- a book that one of our law clerks has put together, and she has summarized in a binder for you notes for self-represented accused. It's got a subtitle "Comments and Cautions". The big caution is maybe you shouldn't be self-represented, but that's your choice.

THE ACCUSED: Hey, Your Honour --

THE COURT: And -- and the --

THE ACCUSED: -- Your Honour --

THE COURT: And I want you to read it.

THE ACCUSED: Your Honour, can I comment to the 100th time you've commented to me on being self-representative? I've made it this far. It's been two years since I was charged on this now. You know what I mean. Two years I've been running this down the road, and every single time I get a Crown taken off the case, I get a stay of the trial. I've been doing pretty damn good for just a not a lawyer, right?

THE COURT: All right. This book might help you. Read it, if you like. It's up to you. There may be --

THE ACCUSED: I'll take it.

THE COURT: -- maybe some helpful comments in it.

THE ACCUSED: Yeah ...

[Emphasis added.]

[26] In her fresh evidence affidavit, Crown counsel deposes that she retrieved from the Crown's trial file an unsealed envelope marked "LENO Notes for self-rep". Two documents were found inside the envelope.

[27] The first document, 48 pages long, is entitled "*Notes for Self-Represented Accused*". The document is subtitled "*Comments and Cautions*". It contains guidance for self-represented accused on a broad range of procedural and substantive issues, including: cross-examining Crown witnesses for the purposes of

putting to them the defence theory of the case; the accused's decision about whether to testify and some case-specific considerations that could conceivably inform that decision; that submissions made by a party are not evidence and may not be relied on as such; and that evidence can only be given by an accused from the witness box.

[28] On the difference between evidence and submissions, the document advises self-represented accused that:

Evidence is different from submissions. Submissions will be explained below. However, it is important to remember that there is a difference; what the lawyers say to the judge and/or jury are submissions. What witnesses and documents say are evidence.

You can refer to the evidence that has been given or that will be given when you make your submissions, but you cannot give evidence yourself when you are making a submission.

The opening [remarks to the jury] will also set out the procedure for calling evidence, including examination in chief and cross-examination. I will caution the jury that anything that counsel or you say during any opening remarks or final submissions ... is not evidence. As described above, only what the witnesses say ... exhibits, and any admissions that may be made, are evidence.

After the evidence is concluded, each party will have an opportunity to make closing submissions. Your closing submissions are your opportunity to briefly summarize the evidence and to try to persuade the court to decide the case in your favour. What you say is not evidence but you can refer to the evidence that was heard during the trial provided you do so correctly.

It is often useful to put the defence theory of the case to Crown witnesses. Your theory of the case is your over-arching explanation for the events. Of course, you are not required to develop a theory of the case ... However, it is common for the defence to have developed a theory of the case when presenting evidence or challenging the Crown's case. If you choose to do this, it may be wise to put your theory of the case to the Crown witnesses.

After the close of the Crown[s] case, I will ask you if you choose to present any defence evidence.

...

You are not required to call any evidence but if you choose to testify or to call any witnesses, the evidence must be given under oath or affirmation.

... [Y]ou cannot give evidence yourself when you are making a submission. You can only give evidence from the witness box in your role as a witness.

... [Y]ou will be heard by the court in only two ways: either as a witness giving evidence from the witness box, or as an unrepresented accused making submissions from the counsel table. For good and obvious reasons, you cannot combine the two and must at all times maintain this distinction.

[29] The document also provides guidance on subpoenaing defence witnesses:

Witnesses may be compelled to attend court. If you are concerned that any of your witnesses will not attend court, you should subpoena them. If you are having problems subpoenaing your witnesses please advise me, and I will direct the Crown to subpoena witnesses on your behalf.

If you have reason to believe that a witness who has already been subpoenaed will not attend court when required to do so, you should raise the matter with me as soon as possible. It is best to raise this matter when the jury is not present.

If your defence witnesses are absent when it is time for you to call them, you may apply for an adjournment in order to subpoena the witnesses. However, let me caution you that I am not likely to adjourn this trial to wait for a witness that you did not try to subpoena in advance. The inconvenience of bringing a jury back together after an adjournment are simply too great to permit that.

[30] The second document retrieved from the same envelope found in the Crown's trial file is a 38-page excerpt from *R. v. Ewanchuk*, [1999] 1 S.C.R. 330. It is not particularly relevant to this appeal.

[31] I am satisfied that the first mentioned document was provided to the appellant by the trial judge on May 23, 2018. The appellant conceded as much on appeal.

[32] Also on May 23, 2018, the Crown advised that some additional disclosure was being provided to the appellant. For his part, the appellant successfully made application for subpoenas to issue to four witnesses: two Crown counsel; a police officer who had no substantive involvement in the investigation; and an administrative person who appears to have managed a freedom of information

request made by the appellant. All of these subpoenas were subsequently quashed. The appellant continued to be interruptive, confrontational and profane throughout this appearance.

[33] Jury selection took place on May 29, 2018. After 12 jurors and two alternates had been selected, the presiding judge gave the jury some general instructions including that cases must be decided on the basis of the evidence presented in court.

[34] The trial commenced on June 4, 2018. The appellant confirmed that he was ready to proceed with the trial.

[35] In his opening instructions to the jury, the trial judge told the jury that their verdict must be based only on the evidence presented in the courtroom. He defined “the evidence” as the testimony of witnesses, exhibits entered at trial and admissions made by the parties.

[36] The jury began hearing evidence on June 6, 2018. The trial occupied 17 court days. It concluded on June 27, 2018.

[37] The complainant testified that on the day of the offence she was living in a group home for teenagers in Duncan, British Columbia. She went to the local 7-Eleven to meet her friend, Candace Miller. She met up with three men outside the 7-Eleven. She said they drove her to a secluded area where they took turns orally and vaginally sexually assaulting her. She recalled two of the perpetrators ejaculating on her.

[38] In cross-examination, the complainant acknowledged kissing one of the men behind the 7-Eleven before getting in the car with him and the other two men. At no point was it suggested to the complainant in cross-examination that she engaged in any further sexual relations with the man she was kissing behind the 7-Eleven, and it was not put to her that semen was or could have been left on her underwear as a consequence of this encounter. Near the end of the complainant’s evidence,

court-appointed counsel had the appellant confirm on the record that he was satisfied his instructions had been followed in the cross-examination of the complainant. It is not alleged on appeal that court-appointed counsel provided ineffective assistance.

[39] On June 12, 2018, the appellant asked for a hard copy of the Crown's disclosure materials. He said the computer he was given for in-court use would not play the disc containing the disclosure he was given by Mr. Drury. The appellant had raised similar concerns, including on June 8 and June 11, 2018. The judge said efforts were being made to resolve the issue. In any event, on June 12, 2018, the Crown printed all of the disclosure and provided it to the appellant in a box at the end of the day.

[40] On June 13, 2018, the judge appointed *amicus curiae* to assist with the DNA evidence, including by cross-examining the Crown's expert witness. The terms of the appointment order authorized *amicus* to bring an application for the production or disclosure of further evidence.

[41] The appellant was also permitted to ask the Crown's DNA expert questions on the qualifications *voir dire* and in cross-examination.

[42] On June 14, 2018, the appellant said to the judge, "I'm going to need a couple of witnesses added to my list before it's too late." He then applied for the issuance of subpoenas to the three other people he identified at the bail hearing on March 20, 2018, as being present at the time of the offence, and to the identification officer assigned to this investigation in 2003.

[43] This was the first occasion on which the appellant formally applied for the issuance of subpoenas to J.M., G.B., and M.D. The application was made on the ninth day of trial, three weeks after the appellant had made successful application for the issuance of subpoenas to witnesses he considered to be necessary to support his conspiracy theories. The appellant said the three civilian witnesses lived in the

area and were on Facebook. He said that one of the witnesses he wanted subpoenaed might be incarcerated.

[44] On June 18, 2018, the appellant applied to subpoena Ms. Miller, the person the complainant identified in her statement to the police and in her evidence as someone she was waiting for when she encountered the appellant and his friends outside the 7-Eleven.

[45] On June 19, 2018, the trial judge ruled that the statement made by the appellant at the March 20, 2018 bail hearing was admissible. The Crown did not seek to have this statement admitted as part of its case, but gave notice that it would use the statement for cross-examination purposes if the appellant testified. The trial judge told the appellant that it was open to the Crown to cross-examine him on this statement if he testified.

[46] On June 19, 2018, the Crown initiated an application pursuant to *R. v. Corbett*, [1988] 1 S.C.R. 670, and *R. v. Underwood*, [1998] 1 S.C.R. 77, about whether it would be permitted to cross-examine the appellant on his previous convictions if he testified.

[47] That same day, the judge explained to the appellant that if he testified, he would be subject to cross-examination not only on the statement he made at the bail hearing, but on previous convictions relevant to the jury's assessment of his credibility. The judge explained to the appellant the limited use the jury could make of his prior convictions. The following exchange occurred between the judge and the appellant:

THE COURT: ... Mr. Leno, at some point over the next day or so, you have a decision to make. That decision is whether or not you wish to give evidence yourself or call any evidence. You've indicated you want to. You must understand that you have absolutely no obligation to give any evidence or to call any evidence. Even if you call evidence, you have no obligation to testify on your own behalf.

THE ACCUSED: I know.

THE COURT: If you do give evidence, then you will be cross-examined and in the course of that cross-examination, Mr. Blazina or Ms. Pace [Crown counsel at trial] will ask you questions about no doubt what happened, but they may also ask you questions about your criminal record.

[48] On June 21, 2018, the judge ruled that the Crown could cross-examine the appellant on his previous convictions for false pretenses and theft.

[49] The same day, the appellant sought leave to recall a witness for the purpose of adducing evidence that the complainant's blood and urine were not screened for the presence of drugs. The Crown agreed to make an admission to this effect.

[50] Also on June 21, 2018, the judge further addressed the appellant on the right to testify and call evidence:

THE COURT: And once the Crown closes its case, then you will have a decision to make. And I know you've already talked about this, but just listen to me.

You have the right to call evidence if you wish to. You have the right to call witnesses. You have the right to give evidence yourself. You also have the right to stay silent. You have no obligations to give any evidence, call any evidence, or present any evidence to this court. The Crown has all of the obligations to prove your guilt beyond a reasonable doubt, and you don't have to prove or disprove anything.

If you do testify, then the Crown undoubtedly will cross-examine you and ask you questions, and that may or may not be a helpful experience from your point of view.

The other thing you should know is that if you do not call evidence, the Crown is obliged to address the jury first in its closing address. If you do call evidence you lose the right to give the last address to the jury and you must give your closing address first. Then the Crown will present their situa -- their closing address.

So those are issues that you need to think about. We will call the jury in and we will deal with the admissions. We will invite Mr. Blazina to advise us that he is no longer going to -- well, he's going to close his case and call no further evidence. Then you'll have a break and you'll be able to make your decision. And when we come back in we'll expect you to either tell us you're not going to call any evidence, or start calling the evidence you have available, or give evidence yourself. All right?

THE ACCUSED: Your Honour?

THE COURT: Yes.

THE ACCUSED: When [J.M.] gets here I'll -- after break will I have time to cross -- or ask him -- will I have time to talk to [J.M.] before he comes on the stand?

THE COURT: If he wishes to talk to you, that can be arranged.

THE ACCUSED: Okay. So that's my most important thing.

THE COURT: If you don't testify, your record does not go before the jury at all.

THE ACCUSED: Okay. Well, I'm going to say right now I don't need to testify. I'm not going to. I'm going to cross-examine [J.M.]. [J.M.] is going to say that four guys pulled up in a car at the gas station, [the complainant's] lying.

[51] J.M. was the only civilian witness the appellant identified on June 14, 2018, who was found and served with a subpoena. The appellant spoke with J.M. over the lunch recess on June 21, 2018. After the break, the appellant advised the judge that he would not be calling J.M.

[52] In his affidavit, the appellant says he was not allowed to speak with J.M. in private. He says, "I did not feel I could jog his memory with details nor properly prepare him." The appellant raises this concern for the first time on appeal. He did not advise the trial judge that he felt constrained by the circumstances when he interviewed J.M. Further, there is nothing before us as to what J.M. (or the other two civilian witnesses) could have said that would have been helpful to the appellant had they been called as witnesses at trial.

[53] Crown counsel and the appellant provided their closing addresses to the jury on June 22, 2018. On June 26, 2018, the judge gave his final instructions to the jury. On June 27, 2018, the jury found the appellant guilty of sexual assault.

[54] At no point during the trial did the appellant apply for a mistrial or make formal application for relief on grounds that the Crown had failed to meet its disclosure obligation.

III. Analysis of the Fresh Evidence and Grounds of Appeal

(1) The Disclosure Issue

[55] The appellant deposes in his affidavit that the disclosure made by the Crown arrived in pieces over time, including the day before jury selection. He says that the disclosure was not available to him after he had been detained in custody prior to the trial. He deposes that he was only allowed access to a computer at VIRCC “a few days before [the] trial”. In addition, he says that he could not take the computer VIRCC assigned to him into court and was not allowed to review the disclosure in his cell.

[56] The appellant also says the computer given to him in court could only play the transcript of the complainant’s initial interview with the police and that many other documents could not be accessed. He complains that “[w]ell into the trial I was given a box of paper that was not bound.” The appellant refers here to the hard copy of the disclosure materials reproduced for him at his request on June 12, 2018. The appellant does not suggest that the materials provided to him in hard copy form that day contained any new information.

[57] The appellant deposes that it was only after he was moved to a minimum security institution following the trial that the disclosure was made available to him and he could carefully review it. He says that in the course of that review he found several documents he had never seen before, including a police officer’s notes “that would have been useful”. The appellant does not identify the officer nor does he explain how the notes would have assisted him in making full answer and defence.

[58] The appellant also complains in his affidavit that: he only discovered the name Candace Miller during the trial; that he did not know he could ask for an adjournment if his witnesses could not be located; and, he thought he could tell “[his] side of the story” in closing submissions.

[59] The appellant argues on appeal the judge should have declared a mistrial when it became apparent he could not make full answer and defence due to the “institutional impediments” he faced in accessing and managing the disclosure materials.

[60] As noted earlier, at no point during the trial did the appellant apply for a mistrial on this ground or seek any other disclosure-related relief from the judge. Further, no disclosure-related concerns were raised by *amicus*.

[61] In my view, the appellant’s affidavit evidence is wholly unreliable on the material points it addresses.

[62] First, it is clear from the affidavit of Mr. Bosence that the appellant was provided with and signed for an E-Disclosure laptop while incarcerated at VIRCC. The laptop was assigned to the appellant on March 27, 2018, more than two months before the trial and a week after he was detained in custody. Quite apart from the affidavit evidence of Mr. Bosence, the appellant acknowledged at the pre-trial conference on March 28, 2018, that he had a computer at VIRCC. Institutional records establish that the appellant retained possession of this laptop throughout the pre-trial period. In addition, there is credible evidence before us that the appellant was often observed in the common area of his unit at VIRCC with his E-Disclosure laptop “talking loudly about his court case to anyone who would listen.”

[63] The affidavit of Mr. Bosence, which is supported to a significant extent by institutional records, undermines the appellant’s contentions that: disclosure materials were unavailable to him after he was incarcerated prior to trial; he was only allowed access to a computer “a few days before trial”; he was not permitted to take any of the disclosure to court; and that he could not access disclosure materials and prepare for trial from his cell. On all of these issues, I conclude that the appellant’s affidavit evidence is incapable of belief.

[64] I would note, as well, that VIRCC has no record of the appellant complaining that his E-Disclosure laptop was not functioning properly or that he could not search for or access information disclosed in an electronic format.

[65] Further, I cannot credit the appellant's contention that he first learned of Ms. Miller's name during the trial. Although Ms. Miller could not be located prior to trial, her identity was disclosed in the Report to Crown Counsel which had been provided to the appellant.

[66] Similarly, I cannot credit the appellant's contentions that he did not know he could ask for an adjournment and mistakenly thought "[his] side of the story" could be expressed in closing submissions. Both of these issues were covered in the *Notes for Self-Represented Accused*. The latter issue was addressed repeatedly during the trial and the appellant could not possibly have been operating under the misapprehension that his version of events could be presented to the jury outside the witness box.

[67] In essence, the appellant asks on appeal for relief not sought at trial on an evidentiary foundation that falls far short of establishing an impairment of the right to make full answer and defence. I would not give effect to this ground of appeal.

(2) Failure to Assist the Appellant

[68] The appellant argues that the judge failed in his duty to provide to him assistance in the conduct of the defence. He particularizes this ground of appeal by arguing that the judge failed to ensure:

- a) that he had received all of the relevant disclosure materials in an accessible format;
- b) that he understood the need to put his version of events to the Crown witnesses if he intended to call evidence to contradict the complainant's account;
- c) that adequate steps had been taken to locate the witnesses he identified;

- d) that he knew he could apply for an adjournment so that further steps could be taken to locate these witnesses;
- e) that he had an opportunity to speak with J.M. in private before determining whether to call him as a witness; and
- f) that he understood the implications of his decision not to testify or call any defence evidence.

[69] The duty of the judge to assist a self-represented accused in a criminal case was thoroughly summarized by Justice Frankel in *R. v. Neidig*, 2018 BCCA 485:

[90] Mr. Neidig contends the trial judge failed in his duty to provide an unrepresented accused with sufficient assistance to ensure a fair trial; what Justice O'Halloran in *R. v. Darlyn*, [1947] 3 D.L.R. 480 at 482 (B.C.C.A.) described as a "helping hand to guide [the accused] through the trial". This is not a free-standing ground of appeal. Rather, the question is whether there was a failure that gave rise to a miscarriage of justice within the meaning of s. 686(1)(a)(iii) of the *Criminal Code*: *R. v. Schiel*, 2012 BCCA 440 at para. 55; *R. v. Dixon*, 2018 BCCA 181 at para. 44; *R. v. Bialski*, 2018 SKCA 71 at para. 50.

[91] The *Statement of Principles on Self-represented Litigants and Accused Persons* issued by the Canadian Judicial Council in 2006 provides advice to judges on how to meet their obligations to self-represented litigants in the courtroom. The following appears under the heading "For the Judiciary":

1. Judges have a responsibility to inquire whether self-represented persons are aware of their procedural options, and to direct them to available information if they are not. Depending on the circumstances and nature of the case, judges may explain the relevant law in the case and its implications, before the self-represented person makes critical choices.
2. In appropriate circumstances, judges should consider providing self-represented persons with information to assist them in understanding and asserting their rights, or to raise arguments before the court.
3. Judges should ensure that procedural and evidentiary rules are not used to unjustly hinder the legal interests of self-represented persons.

The *Statement of Principles* has been endorsed by the Supreme Court of Canada: *Pintea v. Jones*, 2017 SCC 23 at para. 4, [2017] 1 S.C.R. 470; *Mazraani v. Industrial Alliance Insurance and Financial Services Inc.*, 2018 SCC 50 at para. 39.

[92] When assisting an unrepresented accused, a trial judge must exercise caution to avoid becoming an advocate for, or legal advisor to, the accused. As Justice Griffin recently stated in *R. v. Wyatt*, 2018 BCCA 162 at para. 12, “A judge presiding over a criminal trial with a self-represented accused must remain neutral and cannot become the lawyer for the accused.” Also germane is the following from the judgment of Justice Watt in *R. v. Richards*, 2017 ONCA 424, 349 C.C.C. (3d) 284:

[110] Where an accused is self-represented, a trial judge has a duty to ensure that the accused has a fair trial. To fulfill this duty, the trial judge must provide guidance to the accused to the extent the circumstances of the case and accused may require. Within reason, the trial judge must provide assistance to aid the accused in the proper conduct of his defence and to guide him as the trial unfolds in such a way that the defence is brought out with its full force and effect: *R. v. Chemama*, 2016 ONCA 579, 351 O.A.C. 381, at para. 13; *R. v. Tran* (2001), 156 C.C.C. (3d) 1 (Ont. C.A.), at para. 22; *R. v. McGibbon* (1988), 45 C.C.C. (3d) 334 (Ont. C.A.), at p. 347.

[111] The duty owed by trial judges to self-represented litigants is circumscribed by a standard of reasonableness. The trial judge is not, and must not become, counsel for the accused. The judge is not entitled, indeed prohibited, from providing the assistance of the kind counsel would furnish when retained to do so: *Chemama*, at para. 14; *R. v. Taubler* (1987), 20 O.A.C. 64 (C.A.), at para. 30; *R. v. Turlon* (1989), 49 C.C.C. (3d) 186 (Ont. C.A.), at p. 191; *McGibbon*, at p. 349. A standard of reasonableness accommodates a range of options to ensure the necessary degree of assistance and eschews a single exclusive response.

[Emphasis added.]

See also: *R. v. Martin*, 2010 BCCA 526 at para. 15, 266 C.C.C. (3d) 510; *R. v. Phillips*, 2003 ABCA 4 at para. 24, 172 C.C.C. (3d) 285, aff'd 2003 SCC 57, [2003] 2 S.C.R. 623.

[93] It is important to keep in mind that trial fairness does not require that an unrepresented litigant be able to present their case as effectively as a competent lawyer. Rather, they must be given a fair opportunity to present their case to the best of their ability. In providing assistance to an unrepresented litigant, a trial judge must respect the rights of the other parties: *Burnaby (City) v. Oh*, 2011 BCCA 222 at paras. 35-36, 84 M.P.L.R. (4th) 221, leave to appeal ref'd [2011] 3 S.C.R. ix.

[94] Whether a trial judge adequately assisted an unrepresented accused requires “a careful and detailed examination of the complete trial record” and “an evaluation of the judge’s action in light of the facts and circumstances of the particular case”: *R. v. Phillips*, 2003 ABCA 4 at para. 26, 172 C.C.C. (3d) 285, aff'd 2003 SCC 57, [2003] 2 S.C.R. 623; *R. v. Moghaddam*, 2006 BCCA 136 at para. 52, 206 C.C.C. (3d) 497. In this case, Mr. Neidig asserts the trial

judge should have provided him with more assistance because he was unprepared for trial and lacked the ability to defend himself.

[Emphasis added in *Neidig*.]

[70] Where, as in this case, a self-represented accused is interruptive, combative, suspicious of any assistance offered and disinclined to accept it, discharging the judicial duty to lend a “helping hand” will be challenging. In my view, the trial judge exhibited remarkable patience throughout this proceeding and provided assistance to the appellant that was more than sufficient to ensure the fairness of the trial.

[71] With respect to the appellant’s contention that the trial judge ought to have done more to satisfy himself that the appellant received disclosure in an accessible format, the status of the disclosure and the form in which it was being made was canvassed extensively during the pre-trial conferences. At no point in the pre-trial period did the appellant suggest that the trial judge’s intervention was required on this issue.

[72] When in-court access to electronic disclosure was raised as an issue at trial, including on June 13, 2018, a solution was found. Even before this date, it is apparent from the record that the appellant had and was using for cross-examination purposes disclosure materials—what he referred to as his “mess” of paperwork. The affidavit evidence of Mr. Bosence establishes that the appellant was free to bring hard copies of the disclosure to and from court. The record makes it clear that he did so.

[73] Similarly, I cannot credit the appellant’s assertion that a failure of judicial assistance left him with a misunderstanding about the difference between evidence and submissions, or unaware of the implications of not testifying. The evidence upon which the verdict would be based was mentioned at the time of jury selection. The difference between evidence and submissions was emphasized by the judge in his opening instructions, and thoroughly explained in the *Notes for Self-Represented Accused* provided to the appellant in advance of the trial. In my view, the many interchanges between the appellant and the judge at trial support a conclusion that

the appellant understood he needed to testify to have his version of events go before the jury. Armed with this knowledge, and with judicial assistance in assessing the risks and benefits of testifying, the appellant made an informed decision not to take the stand.

[74] Further, the record establishes that the appellant actively participated in the trial, either on his own behalf, or through counsel appointed to cross-examine the complainant, to elicit evidence that could contradict the complainant's version of events and support his theory that she was lying to avoid the consequences of her curfew breach. He sought to undermine the reliability of the DNA evidence by suggesting that the complainant's underwear may have been washed before testing. To do so, he obtained from the judge an order directing that a witness the Crown had determined not to call attend and give evidence. He applied to have another witness recalled and sought to adduce evidence on a variety of issues he considered to be important to his defence. On these occasions, the Crown formally admitted the evidence the appellant sought to adduce by preparing and filing agreed statements of fact. All of this suggests the appellant knew the difference between evidence and submissions.

[75] I turn next to the appellant's contention that the trial judge did not take steps to ensure his defence was brought out with full force and effect.

[76] First, the *Notes for Self-Represented Accused* provided guidance to the appellant on the utility of putting the theory of the defence to Crown witnesses.

[77] Second, it is of some considerable significance that the complainant was cross-examined by court-appointed counsel. If there was an alternative defence theory—that the appellant had consensual sexual relations with the complainant behind the 7-Eleven before she was driven away and assaulted by other men, thus accounting for the presence of his semen on her underwear—it was not put to her in cross-examination. As I have noted, the appellant confirmed on the record he was content with the cross-examination conducted by court-appointed counsel.

[78] The appellant does not suggest in his affidavit that court-appointed counsel failed to put to the complainant a defence theory he wanted in play. As noted earlier, no suggestion has been made on appeal that court-appointed counsel provided ineffective assistance to the appellant at trial.

[79] The appellant's argument on appeal that the trial judge had an obligation to ensure that all potential defence theories were brought out during the trial, including in the cross-examination of the complainant, goes too far. While the judge had an obligation to ensure that the appellant's defence was brought out with full force and effect, he was not obliged to determine what that defence would be. Indeed, the judge would have overstepped his bounds had he attempted to do so.

[80] The appellant's defence was that the complainant's version of events was a concoction designed to placate her ex-boyfriend and account for the fact that she missed her curfew. The appellant sought to account for the presence of his semen on her underwear by suggesting that the DNA samples had been contaminated, and by advancing before the jury a completely speculative submission that the complainant was wearing undergarments previously worn by someone with whom he had been sexually intimate. In his closing address, the appellant told the jury he had no recollection of meeting up with the complainant behind the 7-Eleven. Put simply, the appellant did not pursue a defence based on a consensual sexual encounter he had with the complainant behind the 7-Eleven before she was sexually assaulted by others.

[81] More importantly, the appellant's suggestion that the trial judge should have taken unspecified steps to ensure this defence was brought out would have required the judge to interpose himself between the appellant and his court-appointed counsel. In my view, the trial judge could not have undertaken the role the appellant now says he should have played without interfering with the conduct of the defence and with the solicitor-client relationship that existed between the appellant and court-appointed counsel.

[82] There is, in my respectful view, no merit in the notion that the trial judge had a duty to ensure arrangements were in place for the appellant to speak with J.M. in private. A trial judge cannot possibly foresee all of the potential difficulties that might arise during the trial of an incarcerated self-represented accused. The obligation rested with the appellant in this instance to raise his concerns with the trial judge so an alternative arrangement could be considered. He did not do so. Significantly, as mentioned earlier, there is nothing before us as to what J.M. could have said that would have assisted the appellant at trial.

[83] Finally, I cannot accept the appellant's position that the judge failed to provide him with reasonable assistance by: (1) making inquiries concerning the efforts that had been made to locate defence witnesses for which subpoenas had issued; and (2) advising him of the right to make an application for an adjournment to allow additional time for these witnesses to be located.

[84] The appellant knew full well how to apply for the issuance of subpoenas for defence witnesses. He applied for and obtained subpoenas on May 23, 2018, for witnesses he considered to be necessary to pursue his conspiracy theories. The *Notes for Self-Represented Accused* informed the appellant of his obligations and rights concerning the issuance of subpoenas and his entitlement to apply for an adjournment if defence witnesses were not available to him at trial. This document also gave fair warning to the appellant of the challenges he would face in attempting to adjourn a jury trial to facilitate an eleventh hour request that witnesses to an event that occurred 15 years earlier be located and made available to him at trial. With this knowledge, the appellant waited until he was in the middle of a jury trial to make application for the issuance of subpoenas to the three witnesses he identified.

[85] The appellant has put nothing before us to explain this delay. Moreover, the appellant has put nothing before us concerning efforts he has made since the trial to locate these witnesses, what those witnesses might have been able to say, and how their evidence could have assisted him at trial.

[86] Taking all the circumstances into consideration, it is my view that the appellant has fallen far short of establishing a miscarriage of justice.

[87] I close with this observation. In my view, the record demonstrates that the judge was at pains to ensure that the trial was fair despite the interruptive, confrontational and disrespectful behaviour the appellant displayed throughout the trial. Those steps included: asking the appellant if he was ready to proceed at the outset of the trial and various stages thereafter, including before giving his closing address to the jury; appointing *amicus* to conduct the cross-examination of the Crown's DNA expert and authorizing counsel so appointed to make disclosure applications that would assist the court in preserving trial fairness; providing the appellant with the *Notes For Self-Represented Accused*; advising the appellant of his right to testify at trial and alerting him to the issues he would likely be cross-examined on if he chose to testify; advising the appellant of the limited use the jury could make of his criminal record if he did testify; providing the appellant with considerable leeway in his cross-examinations and closing address; and, where they could be found, directing the attendance of witnesses the appellant considered necessary for the presentation of his defence.

[88] In a case of this kind and with the benefit of hindsight, it will always be possible to identify areas in respect of which the trial judge might have said or done something more. But an accused is entitled to a fair trial, not a perfect one. On a review of the record as a whole, I am satisfied that the steps taken by the judge provided the appellant with a fair opportunity to present his defence to the best of his ability. Indeed, I am of the view that the judge discharged his responsibilities in this case with great patience and care. I would not give effect to this ground of appeal.

IV. Disposition

[89] I would dismiss the appellant's application to adduce fresh evidence and, save for the admission of the *Notes for Self-Represented Accused*, I would dismiss the Crown's application to adduce fresh evidence in response.

[90] I would also dismiss the appeal from conviction.

“The Honourable Mr. Justice Fitch”

I AGREE:

“The Honourable Madam Justice Stromberg-Stein”

I AGREE:

“The Honourable Mr. Justice Willcock”

Tab 17:

**R. v. Lilgert, 2014 BCCA 493;
leave refd , [2015] SCCA No. 52**

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *R. v. Lilgert*,
2014 BCCA 493

Date: 20141216
Docket: CA040990

Between:

Regina

Respondent

And

Karl-Heinz Arthur Lilgert

Appellant

Before: The Honourable Mr. Justice Donald
The Honourable Madam Justice Newbury
The Honourable Madam Justice MacKenzie

On appeal from: An order of the Supreme Court of British Columbia,
dated May 13, 2013 (*R. v. Lilgert*, Vancouver Docket 25634).

Counsel for the Appellant: G. Orris, Q.C. and A. M. Latimer

Counsel for the (Crown) Respondent: M. T. Ainslie, Q.C., D. Wiedemann
and C. E. Richardson

Place and Date of Hearing: Vancouver, British Columbia
November 18 and 19, 2014

Place and Date of Judgment: Vancouver, British Columbia
December 16, 2014

Written Reasons by:

The Honourable Mr. Justice Donald

Concurred in by:

The Honourable Madam Justice Newbury
The Honourable Madam Justice MacKenzie

Summary:

The appellant appeals from a conviction by jury on criminal negligence causing death connected to the sinking of the Queen of the North ferry off Gil Island. The appellant was in charge of navigation of the vessel when it struck Gil Island and sank; two passengers were killed. The appellant appeals on the following grounds: 1) the judge erred by stating in her charge to the jury that the appellant had a duty to “safely” navigate the vessel, as opposed to simply “navigate the vessel”; 2) the judge erred by suggesting to the jury that the Collision Regulations were mandatory elements of the standard of care; 3) the judge erred by conflating the actus reus and mens rea elements of the offence in her charge to the jury; and 4) the judge erred by failing to properly charge the jury on the defence of mistake of fact as part of the modified objective test or as a separate defence. Held: appeal dismissed. The judge’s charge to the jury was appropriate in all respects. Using the word “safely” to describe the duty of care has no material difference from using the language of “reasonable knowledge, skill and care”. The charge as a whole made clear that the appellant was not required to follow the Collision Regulations strictly, but had reasonable discretion. The actus reus and mens rea elements were not conflated by the trial judge, and the jury would have understood that both elements must be found. The judge properly instructed the jury that they were to consider the appellant’s testimony and must acquit if they were left with a reasonable doubt as to whether the appellant engaged in a marked and substantial departure from the standard of care of a reasonable mariner in the circumstances of the appellant.

Reasons for Judgment of the Honourable Mr. Justice Donald:

[1] The *Queen of the North* was en route from Prince Rupert to Port Hardy when the vessel ran aground and sank on 22 March 2006. Two lives were lost. Karl-Heinz Lilgert, the officer of the watch, and thus in control of operating and navigating the vessel, was charged in separate counts with causing the death of Gerald Foisy and Shirley Rosette by criminal negligence contrary to s. 220(b) of the *Criminal Code*.

[2] The case for the Crown was based in part on evidence captured by an electronic recorder that the vessel sailed at a cruising speed of just over 17 knots from the end of Grenville Channel across Wright Sound directly onto Gil Island without changing course in accordance with the normal route. The Crown asserted that for a period of 12 to 14 minutes there was no meaningful navigation of the vessel.

[3] In his own defence, the appellant testified that he did not neglect his duties; rather, he did his best in difficult conditions to operate the vessel. He could not explain why the vessel ended up on Gil Island.

[4] On 13 May 2013, a jury returned a verdict of guilty on both counts. The appellant was sentenced to a term of imprisonment of four years.

[5] The appellant appeals from those convictions on the following grounds:

Ground 1: The learned trial judge erred by failing to properly instruct the jury with respect to the legal duty that the appellant was under and with respect to the standard of care against which the appellant's conduct was to be assessed.

Ground 2: The learned trial judge erred in her instruction to the jury as to what were the essential elements that the Crown must prove to establish the offence of criminal negligence.

Ground 3: The learned trial judge erred when she refused to instruct the jury on the defence of mistake of fact when the appellant's evidence, confirmed by other evidence during the course of the trial, formed the basis of such a defence.

[6] I am unable to accede to these grounds, and I would accordingly dismiss the appeal. In my respectful view, the jury was properly instructed on the appellant's legal duty of care, the appropriate standard of care, the elements of the offence, and there was no mistake of fact defence to be left with the jury.

[7] On a pre-hearing motion, the appellant applied to add a constitutional question to the appeal, which was framed in this way:

TAKE NOTICE, pursuant to Section 8(2)(a) of the *Constitutional Question Act*, an application will be made by the applicant to the presiding judge at the courthouse at 800 Smithe Street, in the City of Vancouver, in the Province of British Columbia on 18 Nov 2014 and 19 Nov 2014 at 10:00 am, questioning the constitutional validity of:

1. Sections 219, 220 and 222(5)(b) of the *Criminal Code*, R.S.C. 1985, c. C-46.

And seeking a remedy pursuant to ss. 24 and 52 of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 as set out in the Appellant's Factum attached to this Notice of Constitutional Question as Schedule A.

[8] The division refused the motion with reasons to follow. The foregoing are those reasons.

[9] The appellant sought to challenge the constitutional validity of ss. 219, 220 and 222(5)(b) of the *Criminal Code*, and sought remedies pursuant to ss. 24 and 52 of the *Constitution Act, 1982*. In summary, the appellant submits that the provisions of the *Criminal Code* pertaining to criminal negligence causing death are in contravention of s. 7 of the *Charter*, as they allow for a defendant to be convicted and sentenced to incarceration without a finding of subjective *mens rea*. The appellant submits that it is a principle of fundamental justice that criminal negligence causing death is a crime with sufficient stigma such that a subjective *mens rea* is required in order to be *Charter* compliant. Further, the appellant submits that the impugned provisions are unconstitutionally vague and offend the presumption of innocence, since they allow a finder of fact to convict without a separate finding of the necessary *mens rea*.

[10] The respondent Crown opposes the appellant's application on the basis that the issue was not raised at trial and it would be inappropriate to allow the *Charter* claim to be first advanced on appeal.

[11] The Crown's primary objection to the issue being raised on appeal is founded on an insufficient evidentiary record. The Crown argues that it could have led evidence at trial pertaining to the legislative history of the criminal negligence provisions in order to establish that criminal negligence as it currently exists is a basic tenet of our legal system. The Crown could have also adduced statistical evidence showing the inherent limitations in applying the impugned provisions, and how such limitations prevent *Charter* breaches. Should a breach of s. 7 have been found, the Crown could have adduced evidence showing how the breach was justified under s. 1, such as evidence addressing the need for a punishment of incarceration when death is a consequence of criminally negligent behaviour in order to prevent harm from individuals duty bound to perform their jobs safely.

[12] In response, the appellant maintains there is a sufficient evidentiary record before this Court with which to determine the constitutional question. According to the appellant, the onus of showing a *Charter* breach lies initially on the party alleging such, and the appellant is comfortable with the record as it currently exists. The Crown would only bear the onus of justifying a supposed breach of s. 7, should one be found, under s. 1. What's more, the appellant submits there is no previous case where an infringement of s. 7 has been justified under s. 1, and it is very unlikely that such a breach could ever be justified: see *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46 at para. 99.

[13] The appellant submits that it is in the interests of justice for the argument to be heard, because no court can be required to apply unconstitutional legislative provisions, and it is contrary to the public interest to permit the appellant to stand convicted of an offence which is not constitutionally valid.

[14] Generally, an appellant will not be permitted to raise issues that were not pled or argued at trial unless all relevant evidence is already in the record: see *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 51. Leave is required when a party seeks to advance a new issue on appeal, and this Court will only allow a new *Charter*-based defence to be raised on appeal in exceptional circumstances: see *R v. K.R.J.*, 2014 BCCA 382 at paras. 48-56; *R. v. Ullrich* (1991), 69 C.C.C. (3d) 473 at 477; *R. v. Ubhi* (1996), 81 B.C.A.C. 161.

[15] An accused must advance his or her entire defence at trial. If an accused fails to raise all relevant defences at trial, there cannot be an automatic right of “do-over” triggered when the defence is raised on appeal: see *R. v. Vidulich* (1989), 37 B.C.L.R. (2d) 391 at 398. When a new issue raised on appeal may lead to the striking down of legislation, this Court should be especially cautious of making such a determination without a complete evidentiary record, which could have serious implications beyond the immediate action.

[16] In *R v. Olson* (1993), 28 B.C.A.C. 288 at para. 16, this Court emphasized such reasoning, saying: “The striking down of otherwise validly enacted legislation is

a serious matter which should not be approached in a casual or off-hand manner. Where a litigant seeks this extreme remedy, which goes to the heart of the division of powers between the legislature and the judiciary, the issue must be raised properly at trial.”

[17] It is only in circumstances where “balancing the interests of justice to all parties leads to the conclusion that an injustice has been done”, that a new ground may be raised on appeal: *R. v. Vidulich* at 399 [emphasis added].

[18] In my opinion, this appeal is not an exceptional circumstance in which the interests of justice demand that the new *Charter* issue be heard. The appellant has given no explanation for why the *Charter* issue was not raised at trial. This is not a circumstance where, as in *R. v. K.R.J.*, the issue has been fully canvassed at trial in a different context. In that case, this Court granted leave to advance the new argument since “the matter [reached] this Court in precisely the same state as it would have if a formal constitutional challenge had been made in the court below”: at para. 56. Here, there is no such assurance. The issue was not presented to the trial judge; since it was a jury trial, there is a complete absence of any reasons or analysis from the court below. The appellant essentially asks for this Court to opine on the constitutionality of multiple provisions of the *Criminal Code* in the abstract, without sufficient factual context.

[19] The Crown was given no opportunity to adduce evidence at the trial level in response to the constitutional question. I do not agree with the appellant that the Crown would only have been expected to adduce evidence at the s. 1 stage of a *Charter* analysis. Even if the onus was initially on the appellant to show a breach of s. 7, the Crown may have been expected to have adduced some evidence in support of its position that the provision does not breach s. 7. Further, the appellant’s assertion that a successful s. 1 defence of a s. 7 breach is unprecedented does not lead to a finding that s. 1 becomes a mere formality.

[20] It would be inappropriate for this Court to make a determination on the constitutionality of key components of the *Criminal Code*, with far-reaching

consequences, without the Crown having been given a proper opportunity, according to the usual process adhered to by our judicial system, to adduce supporting evidence.

[21] In my opinion, it is not apparent that refusing to hear the new *Charter* issues would lead to an injustice. The Crown has directed this Court to numerous precedents where the Supreme Court of Canada has given careful and considered thought to the *mens rea* and *actus reus* component of criminal negligence causing death: see e.g., *R. v. J.F.*, 2008 SCC 60 at paras. 7-11; *R. v. A.D.H.*, 2013 SCC 28 at para. 61; and *R. v. Morrisey*, 2000 SCC 39 at para. 19. The fact that the *mens rea* requirement of this offence, and with it much of the alleged vagueness and objectivity components impugned by the appellant, has developed through numerous case precedents at the highest level of our judicial system, is all the more reason for any reconsideration to be made through the proper process.

[22] In this case, the interests of the judicial system in maintaining the principle of finality, as well as the interests of the Crown and the public in ensuring that this Court only consider striking down legislation where a proper evidentiary foundation exists, weigh in favour of denying leave to argue the *Charter* issue on appeal. I would therefore not grant such leave.

Relevant Enactments

[23] Sections 219 and 220 of the *Criminal Code* state:

219. (1) Every one is criminally negligent who

- (a) in doing anything, or
- (b) in omitting to do anything that it is his duty to do,

shows wanton or reckless disregard for the lives or safety of other persons.

(2) For the purposes of this section, “duty” means a duty imposed by law.

220. Every person who by criminal negligence causes death to another person is guilty of an indictable offence and liable

- (a) where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and
- (b) in any other case, to imprisonment for life.

Factual Background

[24] The *Queen of the North* was a car and passenger ferry, one of two in the B.C. Ferry fleet serving the northern route connecting Prince Rupert, Skidegate, and Port Hardy. The bridge of the vessel was fully equipped with navigational instruments such as radar, GPS, compass, and a device known as the Electronic Chart System (ECS), which records navigational data from the other instruments and from which could be determined the speed, direction, and position of the vessel during a voyage at any given time.

[25] On the night of the accident, the appellant was on the bridge as the officer of the watch with Karen Briker as the quartermaster or helmsman. They were alone. They had previously been in a sexual relationship but broke it off some weeks prior. This trip was the first occasion since the breakup that they had worked together.

[26] The appellant, as fourth officer and, at the material time, officer of the watch, and Ms. Briker, as quartermaster, were qualified and experienced in their respective duties. The appellant was “on the con”, an expression meaning he was in charge of operating and navigating the vessel.

[27] The established route for the vessel was to proceed through Grenville Channel and, on entering Wright Sound, to make a significant course change at or near Sainty Point at the end of the channel. The ECS data was recovered from the wreck and analyzed by Dr. Lee Alexander, a navigational expert with particular expertise with the ECS. His opinion was that the ECS showed the vessel made no course change until immediately prior to the crash and proceeded in a straight line from Grenville Channel to Gil Island at a cruising speed of 17.1 knots.

[28] The appellant testified that after leaving Grenville Channel, he encountered squally weather, radar problems, and the presence of another vessel in the vicinity, all of which made navigation difficult. He said he did make some course changes and he was shocked to encounter Gil Island at the point of collision. Ms. Briker confirmed that the appellant was actively involved in the navigation of the vessel.

[29] The Crown challenged the appellant's narrative as a concoction made up to answer the allegation that he failed to navigate the vessel at all. From the Crown's perspective, the issue was not that the appellant performed his navigational duties badly but that he neglected the vessel for 12 to 14 critical minutes. His cross-examination took the line that what he said he did in the period was preposterous – that no mariner with his experience, training, and qualifications would have performed as he testified. The Crown did not allege that the appellant's explanation constituted criminal negligence, but rather, that the appellant's explanation was false. The trial judge instructed the jury according to *R. v. W.(D.)*, [1991] 1 S.C.R. 1436, including that if they believed the appellant or his testimony raised a reasonable doubt, they were to acquit him.

Analysis

Ground 1: The learned trial judge erred by failing to properly instruct the jury with respect to the legal duty that the appellant was under and with respect to the standard of care against which the appellant's conduct was to be assessed.

Duty of Care

[30] The appellant submits the trial judge charged the jury with a description of his duty in terms that would make him responsible for any mishap regardless of fault or for any deviation from what might be considered safe or proper. This is said to arise by the use of "safe" or "proper" as adjectives modifying "operation" or "navigation" in the course of telling the jury about the three essential elements of the offence. The relevant language in the jury charge is as follows:

You must find Mr. Lilgert not guilty of criminal negligence causing death unless the Crown has proved beyond a reasonable doubt that Mr. Lilgert is the person who committed the offences on the date and in the place described in the indictment. Specifically, the Crown must prove each of the following essential elements beyond reasonable doubt:

One, that Mr. Lilgert improperly operated or navigated a vessel, the *Queen of the North*, or that Mr. Lilgert failed to safely operate or navigate a vessel, the *Queen of the North*, which as the officer of the watch he had a legal duty to do.

Two, that in improperly operating or navigating a vessel or failing to safely operate or navigate the vessel, Mr. Lilgert showed wanton or reckless disregard for the lives or safety of others.

And three, that Mr. Lilgert's conduct caused Gerald Foisy's and Shirley Rosette's death.

Unless you are satisfied beyond a reasonable doubt that the Crown has proved all these essential elements, you must find Mr. Lilgert not guilty of criminal negligence causing death.

[Emphasis added.]

[31] I do not accept that the words complained of carry the implication argued by the appellant. They are forms of speech commonly used to describe one's obligation to be careful, for example, to drive safely or to behave properly, and, put that way, the words are not taken to fix liability regardless of the circumstances or to heighten the duty. As the Crown observed on appeal, this was not an issue raised at trial, despite many opportunities for the defence to object to the language in the extensive pre-charge discussions among counsel and the judge. The objection taken now is inconsistent with the Crown's marine expert, Captain Flotre, who was not challenged on his testimony regarding the duty:

Q And what is the duty of the officer with the con?

A The duty of the officer that -- of the -- the officer with the con is safe navigation of the vessel, that's the primary duty.

[Emphasis added.]

[32] The point is also contrary to the appellant's cross-examination:

Q So you're keenly aware, sir, when you take the con of the vessel exactly who you're responsible for and who has put their lives in your hand when you're navigating the vessel?

A I am, yes.

Q And you realize that those people have put their lives in your hand?

A I feel responsible, yes.

Q And you realize how important it is when you have the con to safely navigate the vessel?

A Yes, I'm responsible for that, yes.

[Emphasis added.]

[33] The appellant also submits that the instruction on duty may have conflated duty with the legal standard of care, and this could have been avoided by

defining the duty by the words “to use reasonable knowledge, skill and care in so doing”.

[34] I am unable to find any significant difference between these words and those chosen by the judge; in the context of the extensive marine navigation evidence developed in this case, I can see no relevant difference between safe or proper navigation or operation and the expression now offered as a preferred substitute.

Standard of Care

[35] The appellant makes two points on standard of care. The first is that the charge was deficient in failing to describe the applicable standard of care in terms which express the discretionary nature of the professional mariner’s duties in carrying out his duties prudently, in having to make choices within a reasonable range of alternatives. This is said to be necessary so the jury could, in measuring the appellant’s conduct against the standard, determine whether it was a marked and substantial departure from the norm, the fault requirement for criminal negligence: *R. v. J.F.*, 2008 SCC 60 at para. 9.

[36] The second point is an objection to that part of the judge’s instruction in which she said that the appellant was bound to follow the *Canada Shipping Act, 2001*, *Collision Regulations*, C.R.C., c. 1416, as the officer of the watch. The appellant’s argument is that the evidence was that the *Collision Regulations* were guidelines and, accordingly, it was inappropriate for the judge to speak of the Collision Regulations as invariable rules or laws, the breach of which is always unreasonable.

[37] I am unable to give effect to either point on the standard of care. There was no real controversy in the trial about the scope of duties of a professional mariner. This is another argument that arises for the first time on appeal. As mentioned, the defence had an ample opportunity to make these views known in the pre-charge discussions and after the charge was given. In deciding whether the jury was properly instructed, the position of defence counsel at trial will assist in determining the adequacy of the charge. The following passage from the majority judgment in *R. v. Allen*, 2009 ABCA 341, is most helpful in this regard:

62 A jury is entitled to a correct instruction on matters of law including those relating to the purposes for which evidence is legally admissible or is not... In determining if the charge was correct, the charge should be assessed functionally and according to how the jury could be reasonably expected to understand and act upon the instruction given... The charge is also assessed in the trial's actual context and not against some inexorable ideal of the perfect charge...

63 The assistance of counsel in preparation of the charge is relevant to whether the jury charge was functionally appropriate to the case. In this case, both counsel had the opportunity to review the draft charge in advance of it going to the jury, and they took up that opportunity... Counsel also made submissions after the charge ... resulting in followup instructions... It is reasonable for trial judges to expect timely comment of counsel about matters of concern to counsel as counsel are not mere bystanders at that stage...

64 The position taken by counsel before the jury can also be taken to be revealing about what was important to the defence and whether, on the whole, any direction, especially one for which correction is not sought by counsel, produced a substantial wrong or miscarriage of justice... The addresses of counsel may also remedy an alleged deficiency in judicial comment about the evidence... Indeed, some points of argument might be better left to counsel...

[Citations omitted.]

[38] As to the content of the standard, the judge extensively reviewed the testimony of experts as to what was expected of a professional mariner acting as officer of the watch. The judge summarized the evidence over more than 22 pages of transcript, under useful topic headings such as "Standard practice: making a turn", "Standard practice: course checks", "Standard practice: restricted visibility", "weather", and certain collision regulations, all relevant to the circumstances that arose in the trial. The body of the evidence would have left the jury with no doubt that they were to compare the appellant's conduct against the standard of a reasonably prudent mariner in charge of the navigation and operation of the vessel. The evidence makes it plain that the task of navigation involves judgment and discretion according to well-established rules of good seamanship, and accordingly I do not accept the contention that the jury needed to be told more about that aspect.

[39] As to the contention that the *Collision Regulations* were treated as rigid rules rather than guidelines, this complaint cannot be supported when the evidence review of the judge is examined. For example, the judge reminded the jury what Captain Flotre said about Collision Regulation 9:

Collision Regulation 9, Narrow Channels, states that a vessel shall be kept as near to the outer limit of the channel on her starboard side as is safe and practicable. Mr. Flotre said that the BC Ferries route for the *Queen of the North*, as shown on the ECS, does not seem to comply with Rule 9 of the *Collision Regulations*. He said that ultimately it is the decision of the navigator to decide what is safe and practicable, depending on the prevailing conditions and circumstances. [Emphasis added.]

[40] In my view, the jury would not have taken from the charge that any breach of the *Collision Regulations* would establish wanton or reckless disregard or a marked and substantial departure from the norm.

Ground 2: The learned trial judge erred in her instruction to the jury as to what were the essential elements that the Crown must prove to establish the offence of criminal negligence.

[41] The passage cited at para. 30 of these reasons is the judge's direction on the three elements of the offence. In order to understand the second ground of appeal, it is also necessary to set out what she said after her lengthy review of the evidence:

Unless you are satisfied beyond a reasonable doubt that Mr. Lilgert either improperly operated or navigated the vessel or failed to operate or navigate the vessel which, as officer of the watch, he had a legal duty to do, you must find Mr. Lilgert not guilty. Your deliberations would be over for the offence of criminal negligence, but you will still have to consider the included offence of dangerous operation of a vessel, which I will explain in a moment.

If you are satisfied beyond a reasonable doubt that Mr. Lilgert either improperly operated or navigated the vessel or failed to operate or navigate the vessel which, as the officer of the watch, he had a legal duty to do, then you must go on to the next question.

...

THE COURT: Okay, we are on page 98 then [the judge was referring to the written charge given to the jury], the second question. Did Mr. Lilgert, in operating or navigating a vessel, show wanton or reckless disregard for the lives or safety of others?

So paragraph 110, "wanton" means "heedlessly" or "ungoverned" and "undisciplined" or an "unrestrained disregard for consequences". "Reckless" means "heedless of consequences, headlong, irresponsible".

To prove that Mr. Lilgert showed a wanton or reckless disregard for the lives or safety of others, the Crown does not have to establish that Mr. Lilgert meant to kill or seriously harm Gerald Foisy and Shirley Rosette, or anybody else. Rather, the Crown must prove

beyond a reasonable doubt: (1) that Mr. Lilgert's conduct showed a marked and substantial departure from the conduct of a reasonable person in the circumstances; and (2) that a reasonable person in the same circumstances would have foreseen that this conduct posed a risk of bodily harm. "Bodily harm" is any hurt or injury that interferes with a person's health or comfort and is more than brief or minor.

In deciding what a reasonable person would have done or foreseen, you must not take into account Mr. Lilgert's individual characteristics or experiences.

One, did Mr. Lilgert's conduct show a marked and substantial departure from the conduct of a reasonable person in the circumstances?

Did Mr. Lilgert either recognize and run an obvious and serious risk to the lives and safety of others, or, alternatively, give no thought to the risk involved. Do not leap to conclusions based on the consequences. It is the risk of injury created by the manner of Mr. Lilgert's operation of the vessel that is relevant, not the consequences of the subsequent accident.

[42] The appellant argues the judge made the following errors:

1. in conflating the *actus reus* with the *mens rea* of the offence when the authorities require separate inquiries of the conduct and fault elements of the offence;
2. the judge did not tell the jury that in considering the *mens rea* of the conduct they should consider, along with all the other evidence, the evidence of the appellant's actual state of mind;
3. the instruction failed to mention the explanation offered by the appellant and that in order to convict, the jury must be satisfied beyond a reasonable doubt that a reasonable mariner in similar circumstances ought to have been aware of the risk and the danger involved in the conduct manifested by the appellant.

Conflation of Conduct and Fault

[43] The judge's charge in this area closely followed the model instruction prepared under the auspices of the Canadian Judicial Council, which reads, in relevant part, as follows:

To prove that NOA [name of accused] showed a wanton or reckless disregard for the lives or safety of others, the Crown does not have to establish that NOA meant to kill or seriously harm NOC [name of

complainant], or anybody else. Rather, the Crown must prove beyond a reasonable doubt:

1. that NOA's conduct showed a marked and substantial departure from the conduct of a reasonable person in the circumstances; and
2. that a reasonable person in the same circumstances would have foreseen that this conduct posed a risk of bodily harm. "Bodily harm" is any hurt or injury that interferes with a person's health or comfort and is more than brief or minor.

In deciding what a reasonable person would have done or foreseen, you must not take into account NOA's individual characteristics or experiences.

[Canadian Judicial Council, IV. Criminal Negligence Causing Death, Offence 220 at para. 5.]

[44] This mirrors the analysis in *R. v. J.F.*, which applied the phrase "marked and substantial departure" to the *mens rea* or fault element of the offence in question: see *R. v. J.F.* at paras. 9 and 11.

[45] But the law of penal negligence has not been entirely clear and recent cases from the Supreme Court of Canada are not always easy to reconcile: see Hamish Stewart, "Beatty: Towards a Coherent Law of Penal Negligence" (2008), 54 C.R. (6th) 45, discussing *R. v. Beatty*, 2008 SCC 5.

[46] However, in *R. v. A.D.H.*, 2013 SCC 28, what might be said is now the orthodox view of the elements was summarized by Mr. Justice Cromwell:

[61] I should also refer to the offences based on criminal negligence: see, e.g., ss. 219, 220 and 221. Criminal negligence is defined as conduct that "shows wanton or reckless disregard for the lives or safety of other persons" (s. 219). The text of this provision has fueled much debate about the required fault element. The use of the word "negligence" in the name of the offence suggests an objectively defined standard consistent with the meaning of the word "negligence" in the common law of torts. On the other hand, the words "wanton and reckless disregard" could be taken as describing actual knowledge of the risk created by the conduct and therefore a subjective fault element: see *R. v. Anderson*, [1990] 1 S.C.R. 265, at pp. 269-70. Ultimately, the Court decided that proof of intention or actual foresight of a prohibited consequence is not required. Rather, criminal negligence requires a marked and substantial departure from the conduct of a reasonably prudent person in circumstances in which the accused either recognized and ran an obvious and serious risk or, alternatively, gave no thought to that risk: *R. v. J.F.*, 2008 SCC 60, [2008] 3 S.C.R. 215, at paras. 7-11.

[47] As quoted previously, the trial judge at one point instructed the jury that “[t]o prove that Mr. Lilgert showed a wanton or reckless disregard for the lives or safety of others, the Crown does not have to establish that Mr. Lilgert meant to kill or seriously harm [the victims] or anybody else. Rather, the Crown must prove beyond a reasonable doubt ... that Mr. Lilgert’s conduct showed a marked and substantial departure from the conduct of a reasonable person in the circumstances...” The danger said by the appellant to arise from the judge’s charge is that the jury may have run what should have been two distinct inquiries together and inferred fault from conduct or vice versa. The Crown’s response, with which I agree, is that the instructions captured the essential elements of the offence, however characterized, and nothing important was left out.

[48] The judge correctly made clear to the jury that they must find both the *actus reus* and *mens rea* elements of the offence; there is no additional requirement that these elements must be satisfied independently from one another. Just as a person is presumed to intend the consequences of his or her actions, *mens rea* must always be inferred from conduct to some extent. This is not similar to a case like *Beatty*, where the error was a suggestion that an objective finding of the *actus reus* being satisfied was enough to ground culpability on its own; the judge in this case expressly made clear that the jury needed to go further and find that the necessary fault element existed. The jury would have understood that in order to convict they had to find a high degree of negligence.

[49] A similar charge was approved by this Court in *R. v. Kerr*, 2013 BCCA 506:

[37] I am satisfied the trial judge’s instructions adequately conveyed the objective fault element of criminal negligence causing death. The gravamen of the offence is conduct that shows a wanton or reckless disregard for the life or safety of others, as demonstrated by a marked and substantial departure from the conduct of a reasonable person in the circumstances, that has caused death. I discern nothing in the trial judge’s charge that justifies intervention by this Court.

The Appellant's State of Mind

[50] As I apprehend the appellant's submission on this point, where, as here, the appellant gave an explanation, the judge is required to instruct the jury that when making an objective assessment of the conduct, they are to consider all the evidence "including evidence about the accused's actual state of mind": *Beatty* at paras. 43, 47 and 49.

[51] Defence counsel raised this issue with the trial judge in submissions following the jury charge. Defence counsel requested a charge that expressly told the jury that, in deciding whether the Crown has proven a marked and substantial departure, the jury must consider the appellant's evidence as to what he believed the vessel was doing. While the trial judge did not recharge the jury and incorporate the language requested, she did respond to defence counsel's request by expressly reiterating to the jury that when it was considering the issue of a marked and substantial departure it should consider the appellant's testimony; just as the appellant's evidence should be considered at every stage of the analysis.

[52] As well, the judge said this to the jury before summarizing the appellant's evidence:

Turning to the next question then: Would a reasonable person in the same circumstances as Mr. Lilgert have foreseen that this conduct posed a risk of bodily harm?

Care must be taken to distinguish negligence for imposing civil liability and that necessary for the imposition of criminal punishment. Simple carelessness or honest mistake is generally not criminal. Consider, was Mr. Lilgert's conduct a mere departure from the standard of care expected of a reasonable person in Mr. Lilgert's circumstances, which may support civil liability; or went markedly beyond mere carelessness and is a marked departure from the standard of care expected of a reasonable person in Mr. Lilgert's circumstances, which is required for criminal fault for dangerous operation of a vessel, which I will discuss in a moment; or was Mr. Lilgert's conduct a marked and substantial departure from the standard of care expected of a reasonable person in Mr. Lilgert's circumstances, which is required -- I am sorry, is required for criminal fault for criminal negligence, which you are dealing with at this point in my charge.

So do not take into account Mr. Lilgert's individual characteristics or experiences. The focus is on the failure to direct the mind to a risk which the reasonable person would have appreciated. The focus is not what was

actually in his mind, but what should have been there had he acted reasonably in all the circumstances in which he found himself.

[53] The judge extensively reviewed the appellant's narrative about his efforts at navigation while the vessel was travelling in Wright Sound and, as mentioned, gave an appropriate *W.(D.)* instruction. In my opinion, the judge's charge, taken as a whole, made it clear to the jury that they were to consider the appellant's evidence, including his testimony as to what he believed the vessel was doing, at all stages of the analysis. The jury members were aware that if any aspect of the appellant's testimony gave them a reasonable doubt as to whether he showed wanton or reckless disregard and a marked and substantial departure from what a reasonable mariner would have done in the circumstances of the appellant, they must acquit. There was no further reiteration necessary.

[54] The difficulty with the appellant's argument is that there was nothing to say about his state of mind if the jury accepted the Crown's theory that there was no navigation taking place, and hence nothing to add to what a reasonable mariner in the circumstances ought to have been aware of. As I will explain in greater detail below when discussing the appellant's third ground of appeal, much of this case came down to conflicting narratives: the appellant and Ms. Briker described a sequence of events where the appellant allegedly navigated reasonably while inputting various course changes; the Crown theorized that no navigation took place and adduced evidence of a lack of course changes to support this theory. If the appellant's testimony raised no reasonable doubt in the minds of the jury that no navigation of the vessel took place, the jury had no evidence to suggest that what was in the appellant's mind reasonably explained this lack of navigation and exculpated the appellant. The Crown did not argue that the appellant's narrative also constituted criminal negligence causing death, and the jury members were instructed to acquit if they accepted the appellant's narrative. The jury must therefore have rejected the appellant's version of events, and with it the appellant's alleged state of mind.

[55] In my view, the judge instructed the jury properly with respect to the modified objective test of awareness of risk, and appropriately dealt with the appellant's testimony as a defence to the claim that he did nothing.

Ground 3: The learned trial judge erred when she refused to instruct the jury on the defence of mistake of fact when the appellant's evidence, confirmed by other evidence during the course of the trial, formed the basis of such a defence.

[56] The appellant contends that his evidence about his activities and the steps he took to navigate the vessel support a defence of mistake of fact that should have been put before the jury as such.

[57] This issue overlaps with the previous issue raised by the appellant pertaining to an insufficient charge on how the appellant's state of mind was to be considered under the modified objective test of awareness of risk.

[58] On appeal, the appellant alleges that the jury was required to be charged with mistake of fact as a separate defence, independent of a proper instruction on the modified objective test. I do not agree. As the Supreme Court of Canada stated in *Beatty* at para. 38, "a reasonably held mistake of fact may provide a complete defence if, based on the accused's reasonable perception of the facts, the conduct measured up to the requisite standard of care. It is therefore important to apply the modified objective test in the context of the events surrounding the incident." [emphasis added]. As acknowledged by the Supreme Court of Canada, a consideration of whether the accused's reasonably held mistake of fact satisfactorily characterizes his or her conduct as meeting the requisite standard of care *constitutes* the defence of mistake of fact. The defence was therefore part of the instructions of the judge when explaining the modified objective test and was properly put to the jury.

[59] Nevertheless, as I will explain, even if a separate charge could be required in some contexts, there was no need for one in this case. A brief synopsis of the key elements of the appellant's testimony will be of some assistance.

[60] The appellant testified that he took control of the navigation of the vessel shortly before midnight. At that time, there was only himself and Ms. Briker on the bridge. Ms. Briker was the quartermaster.

[61] The appellant and Ms. Briker both testified that they had been romantically involved previously, from September 2005 to shortly before the accident in early March 2006. They had mutually ended their affair in order to prevent further damage to their respective long-term relationships with other partners. Both the appellant and Ms. Briker testified that there were no ill-feelings between them at the time of the accident. Both the appellant and Ms. Briker testified that there was very little communication between them, aside from brief small-talk regarding Ms. Briker's recent purchase of a house, from the time that the appellant took control of the navigation until the ferry struck Gil Island.

[62] The appellant admitted that the pre-determined course of the ferry required a significant course change at "Sandy Point", shortly after he took control of the navigation. The appellant testified that he had been informed by the previous navigator that there was a small vessel on the port side and ahead of the ferry. As such, the appellant decided to delay the required course change in order to create extra space for the other vessel. The appellant testified that he eventually gave Ms. Briker a course change.

[63] The appellant testified that, after the initial course change, there was a strong "squall" (collection of heavy winds) that was "cluttering" the radar and looked like land. The appellant testified that he believed the ferry was being "set" to port by this wind; he gave Ms. Briker further course alterations to compensate.

[64] As the appellant was attempting to compensate for "clutter" in the radar, he saw the trees of Gil Island. He immediately gave Ms. Briker an order of "hard to port"; however, the ferry struck the island and sank.

[65] The evidence of the Crown did not support the appellant's testimony that he made course changes prior to his order of "hard to port" immediately preceding the impact.

[66] After giving a much longer recital of his evidence, the judge said, in concluding:

Mr. Lilgert explained he was keenly aware that upon taking the con he was responsible for the lives of the people on the ship. Mr. Lilgert does not know why, despite his alterations and the conditions, the *Queen of the North* hit the same impact point it would have hit had he never changed course coming out of Grenville Channel. He does not know why he did not end up three cables off Gil Island.

He did not fully agree he failed to follow any of the principles of ordinary seamanship. He agreed he lost a target, both visually and on the ARPA, and did not slow down or attempt to make radar contact with the vessel. He explained he did not slow down because nothing was giving him any concern that required him to slow down. He agreed that he did not attempt to hail the other vessel. He did not radio Mr. Hilton, because the situation did not warrant the need to call him, and if he did, he knew Keven was only a moment away. He did not call the master, because he believed the squall was moving through quickly, and by the time the master arrived the squall would have passed. He did not radio the *Castle Lake* tug because he believed it was far enough away.

[67] As stated, the Crown did not argue that the appellant's conduct as he described it constituted an offence. The judge's charge left it open to the jury to acquit on his testimony (*R. v. W.(D.)*):

Dealing with the testimony of Mr. Lilgert. You have heard Karl Lilgert testify. When a person charged with an offence testifies, you must assess that evidence as you would assess the testimony of any other witness, keeping in mind my instructions to you earlier about the credibility of witnesses. You may accept all, part, or none of Karl Lilgert's evidence.

Of course, if you believe the testimony of Karl Lilgert that he did not commit the offences charged or an included offence, which I will tell you about shortly, you must find him not guilty.

However, even if you do not believe the testimony of Karl Lilgert, if it leaves you with a reasonable doubt about his guilt, or about an essential element of the offence charged or an included offence, you must find him not guilty of that offence. If you do not know whom to believe, it means you have a reasonable doubt and you must find Karl Lilgert not guilty.

Even if the testimony of Karl Lilgert does not raise a reasonable doubt about his guilt or about an essential element of the offence charged or an

included offence, if after considering all the evidence you are not satisfied beyond a reasonable doubt of his guilt, then you must acquit.

[68] As discussed previously in this judgment, the jury members had no evidence pertaining to “mistake of fact” if they did not accept the narrative of the appellant. The judge, as part of the *W.(D.)* charge, instructed the jury that, if they believed the appellant’s narrative of events, or it raised a reasonable doubt, they must find him not guilty. It would have been illogical and confusing for the judge to go on and instruct the jury that if they believed the appellant’s narrative and they had a reasonable doubt as to whether he had made a reasonable mistake of fact, they could find him not guilty. The appellant is asking for a charge that would not have assisted him, and may have been detrimental to his cause.

[69] The Crown presented a powerful case to answer. The data collected by the Electronic Chart System had the vessel travelling in a straight line from the time that the appellant took control until it struck the island. The appellant’s defence was that he did his best in difficult circumstances, he inputted various course changes in a reasonable manner, he does not know why the vessel struck Gil Island, and he denies the allegation that he neglected his navigational duties. The jury must have accepted the Crown’s navigational evidence and found that the appellant’s account gave them no reasonable doubt about his guilt.

Conclusion

[70] Having rejected the appellant’s grounds, I would dismiss the appeal.

“The Honourable Mr. Justice Donald”

I agree:

“The Honourable Madam Justice Newbury”

I agree:

“The Honourable Madam Justice MacKenzie”

Tab 18:

R. v. Michaels, 2000 BCSC 1785

Citation: HMTQ v. Michaels and Toth
2000 BCSC 1785

Date: 20001211
Docket: CC981577
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

HER MAJESTY THE QUEEN

AGAINST

**WARREN MICHAELS and
IMRE TOTH**

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE THACKRAY

Counsel for the Crown:

Geordie C. Proulx/
Daniel Porte

Counsel for the Accused: Michaels

Richard M. Brooks/
Victoria M. Desroches

Counsel for the Accused: Toth

Ian Donaldson, Q.C.

Date and Place of Hearing:

December 5 and 8, 2000
Vancouver, B.C.

[1] The Crown wants to call the evidence of a witness by the name of Manalastas. Defence counsel for Mr. Michaels objects on the basis that he has not had proper notice of the Crown's intention to call this witness. He takes the position that if he had known earlier that the Crown was intending to call Ms. Manalastas he would have done many things in preparation therefore.

[2] This trial commenced on November 27, 2000. Crown counsel on November 2 delivered a witness list to defence counsel and this was still the list as of the opening of the trial. On December 1 Crown counsel had brought to his attention the significance of the potential importance of the known evidence available from Ms. Manalastas. Mr. Proulx considered the matter, decided that her evidence should be produced and so informed defence counsel on December 4. It would appear that Mr. Brooks had objections and on December 5 I was informed that there was a matter requiring a decision by the Court.

[3] On December 5 I heard submissions. I voiced some preliminary views but said that further submissions might be in order. As well, I wanted to review *R. v. Antinello* (1995), 97 C.C.C.(3d) 126 (Alta. C.A.) that had been supplied to me by Mr. Brooks.

[4] On December 7 I informed Mr. Brooks that I expected him to continue to make efforts to complete his preparation for this witness. I was fearful that some of my remarks on December 5 might have led him to think that I was either not going to allow the evidence to be called or allow the evidence but sever the case against Mr. Michaels.

[5] On December 8 I heard further submissions, initiated by Crown counsel. On December 5 Mr. Brooks' objections seemed to be based upon not having transcripts of evidence from earlier hearings in which Ms. Manalastas testified. Apparently they had been produced and the Crown immediately supplied them to Mr. Brooks. However, Mr. Brooks would not withdraw his objection and consequently Mr. Proulx wished to be heard more extensively.

[6] Mr. Proulx noted that the objections taken by Mr. Brooks on December 5 had been eliminated by production of the transcripts. Mr. Proulx submitted that this was not a case of failure to disclose, but rather of late notice of the Crown's intention regarding one witness.

[7] I will note here that I agree that this is a fair description of the objection. Throughout this trial it has been clear that disclosure has been not only adequate but exceptional. The co-operation that Mr. Proulx has shown to

defence counsel and his disclosure has been commented upon favourably many times by Mr. Brooks.

[8] Mr. Proulx submitted, and once again I say correctly, that there was no legal requirement to keep defence counsel informed of his witness list nor when or if it changed. He said that it is his practice to do so because "that is the right practice." Mr. Proulx frankly admitted that he was in error in his earlier decision not to call Ms. Manalastas. However, he contended that the existence of Ms. Manalastas, her relationship with Mr. Michaels, what she has to say about this case, and her character, are all well known to Mr. Michaels and have been for years.

[9] Mr. Proulx provided the Court with a Chronology outlining relevant events commencing on December 7, 1998 in the trial against Mr. Dhaliwal and Mr. Michaels in which they were charged with the second degree murder of Gary Li and robbery. Ms. Manalastas was charged as an accessory after the fact on both counts.

[10] Mr. Dhaliwal plead guilty. On December 16 Ms. Manalastas gave a KGB statement to the police under an immunity agreement. The Crown immediately disclosed the transcript of the statement and the video thereof to Mr. Michael's counsel, Mr. Simon Buck.

[11] The trial against Mr. Michaels commenced on January 9, 1999 and Ms. Manalastas testified. On January 13 a mistrial was declared. The trial recommenced on January 18 and on January 19 Ms. Manalastas again testified. She was extensively cross-examined by defence counsel on her character and her use of drugs. Mr. Michaels was found guilty of manslaughter and robbery.

[12] The first date fixed for trial in the case at bar was January 17, 2000. Mr. Buck was counsel for Mr. Michaels. On June 24, 2000 Mr. Michaels was sentenced on the manslaughter and robbery convictions. Mr. Buck was his counsel on the sentencing and was still his counsel in the case at bar.

[13] Crown counsel believe it was in about August of this year that Mr. Buck was discharged as counsel for Mr. Michaels. Subsequently, Mr. Michaels was represented in the case at bar by Mr. Tammen and by Mr. Fowler. Two trial dates were lost. I was not informed why but the suggestion is that it had something to do with Mr. Michaels changing counsel.

[14] In the hearing before me on December 8, Mr. Brooks said that he wants to talk to Mr. Dhaliwal, Mr. Buck and Mr. Tammen before cross-examining Ms. Manalastas. I have not been informed of any problem in locating and interviewing these

people. Indeed, Mr. Dhaliwal is in jail. It might be that these interviews might have been held over the week-end, particularly in that Mr. Brooks has competent co-counsel.

[15] Mr. Brooks also said he would like to know Ms. Manalastas' criminal record. Mr. Proulx informed him that she has no criminal record.

[16] Mr. Proulx submitted that not only did Mr. Michaels have intimate knowledge of Ms. Manalastas' testimony but he was her boyfriend for a long time, he thinks as long as two years. His point being that he knows all about her character and can so inform his counsel.

[17] The law that Mr. Brooks relies upon is in ***R. v. Antinello***, *supra*. In it, an inmate of a jail, some 11 weeks before the trial, offered to testify concerning jailhouse admissions. Lengthy negotiations were held regarding charges that were pending against the inmate. Two weeks before the trial the Crown decided to call him. Defence counsel was not told of the existence of this witness until three days after the trial started.

[18] The witness was called nine days after defence counsel was informed of his existence.

[19] The Court of Appeal pointed to the evidence of the witness as being such that if believed could result in a conviction. It noted that careful inquiry would be required to uncover information to impeach such a person. The nine days was held to be insufficient in the circumstances. It said that the trial should never have started in that the Crown dealt with the disputed evidence in an "unhurried manner" and should have accorded to the accused the same amount of time as was available to the Crown.

[20] The Court found that there was a "lack of disclosure". It further held that there was no burden on the accused to establish on a balance of probabilities that he suffered actual prejudice in making full answer and defence. The accused must only show on a balance of probabilities that he lost a realistic opportunity to garner evidence or to make decisions about the defence. The defence need show only a reasonable possibility of impairment of the right to full answer and defence.

[21] The Court said that any idea that "Crown preparation is in the public interest and must be accommodated, but defence preparation is a game to be deprecated" is unacceptable. That, of course, must be accepted but I cannot in the case at bar be unaware that defence counsel for Mr.

Michaels has no hesitancy to sever the case and proceed at some distant time in the future with the case against Mr. Michaels. I must be realistic in viewing the difficulties that will face the Crown, and indeed the whole judicial system, in trying to resurrect, again, witnesses who are under immunity and whose part of the agreement might have been fulfilled and to again bring to this courthouse witnesses who were clearly reluctant to be here at all, plus one witness who is quite ill.

[22] I must further not lose sight of the fact that the events in the case at bar happened over four years ago and that some of that delay seems to be attributable to Mr. Michaels.

[23] However, those are but realities and do not form the substantive reason why I am not prepared to sever this case in order to allow the Crown to call the evidence. The substantive reasons for ruling in favour of the Crown going ahead with this evidence are that there has been no lack of disclosure, there has been exemplary disclosure, the testimony to be expected from Ms. Manalastas is known and has been well known for two years by the accused and by at least some of his counsel, that the criminal record and character of the witness is better known to Mr. Michaels than to the Crown and that the

time needed to prepare to cross-examine her has been sufficient.

[24] In coming to the conclusion that I have, I have been influenced by the reasoning of Goldie J.A. in **R. v. Jacob**, [1997] B.C.J. No 2270, Vancouver Registry No. CA018948 (B.C.C.A.). The accused claimed that the trial judge erred in failing to grant an adjournment when a witness statement was delivered shortly before the jury was selected.

[25] At the preliminary hearing a witness recanted information that she had given the police about inculpatory statements from the accused. The trial was to commence on April 11 but on April 7 counsel for one of the accused applied for an adjournment on the basis of being informed, only three days earlier, that this witness had returned to the statements that she had earlier made to the police.

[26] The Court referred to **Antinello**, *supra*, but said that it was distinguishable. It pointed out that in **Jacobs** the defence knew of the witness statement well before the preliminary hearing. He therefore knew of the potential of the witness being called at the trial. Further, the witness "was not a stranger to the appellant."

[27] The Court held that the appellant "has not demonstrated that he was hindered in making full answer and defence." That reasoning can be applied to the case at bar and I do so. I will allow the Crown to call the evidence if and when it chooses. There will be no severance of Mr. Michaels' case.

"A.D. Thackray, J."
The Honourable Mr. Justice A.D. Thackray

Tab 19:

R. v. Mills, 2020 BCCA 228

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *R. v. Mills*,
2020 BCCA 228

Date: 20200813
Docket: CA46100

Between:

Regina

Respondent

And

Gary Kenneth Mills

Appellant

Before: The Honourable Mr. Justice Willcock
The Honourable Madam Justice Griffin
The Honourable Mr. Justice Abrioux

On appeal from: Orders of the Supreme Court of British Columbia, dated
December 5, 2018 (conviction) and April 15, 2019 (sentence) (*R. v. Mills*,
2019 BCSC 713 (sentence), Nanaimo Docket 84465-3).

Counsel for the Appellant
(via videoconference):

D.J. McKay

Counsel for the Respondent
(via videoconference):

L.T. Phipps

Place and Date of Hearing:

Vancouver, British Columbia
June 12, 2020

Place and Date of Judgment:

Vancouver, British Columbia
August 13, 2020

Written Reasons by:

The Honourable Mr. Justice Abrioux

Concurred in by:

The Honourable Mr. Justice Willcock
The Honourable Madam Justice Griffin

Summary:

The appellant appeals from his convictions on three counts related to possession of a loaded, restricted firearm without a license, and contrary to a weapons prohibition. He submits that: (1) the judge erred in instructing the jury on the essential element of knowledge necessary to prove possession under the Criminal Code; and, in the alternative, (2) the verdict is unreasonable. Held: Appeal allowed but only to the extent that based on R. v. Kienapple, [1975] 1 S.C.R. 729 (S.C.C.), a judicial stay of proceedings should be entered with respect to count 3. The jury charge, read as a whole, and the judge's answers to the jury's questions, adequately explained the elements of constructive possession and guarded against impermissible reasoning. Furthermore, the verdict is one that a properly instructed jury acting judicially could have rendered.

Reasons for Judgment of the Honourable Mr. Justice Abrioux:**Introduction**

[1] This appeal arises from the appellant's conviction by a judge sitting with a jury of certain firearms offences. Specifically, Mr. Mills was charged on an indictment containing three counts:

- 1: possession of a loaded restricted firearm, without being the holder of a license and/or authorization, contrary to s. 95(1) of the *Criminal Code*, R.S.C. 1985, c. C-46;
- 2: possession of a firearm while prohibited from doing so, contrary to s. 117.01(1) of the *Criminal Code*; and
- 3: possession of a restricted firearm without being the holder of a licence and/or a registration certificate, contrary to s. 91(1) of the *Criminal Code*.

[2] Mr. Mills challenges his convictions on the basis that the trial judge erred in her instructions to the jury on the essential element of knowledge, which is required to prove possession in relation to each of the counts. Specifically, he argues that the jury misunderstood the elements of constructive possession and whether knowledge could be inferred from certain admissions of fact. In the alternative, he submits the verdict was unreasonable.

[3] For the reasons that follow, I would not accede to the grounds of appeal from conviction on counts 1 and 2 but would allow the appeal and enter a stay of

proceedings with respect to count 3 on the basis of *R. v. Kienapple*, [1975] 1 S.C.R. 729 (S.C.C.).

Background

[4] On March 30, 2018, Mr. Mills was driving a pickup truck in which he was the sole occupant near Errington, British Columbia. A police officer, Corporal Obodzinski, who was investigating driving infractions signalled for him to stop, which he did. Mr. Mills initially gave a false name. After obtaining his real name and date of birth, the officer ascertained that Mr. Mills was prohibited from driving under the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318. He then advised Mr. Mills that he was under arrest for driving while prohibited and conducted a search incidental to arrest.

[5] During the search, the officer had Mr. Mills empty his pockets and found a small container with drugs, as well as alcohol in a small flask. He issued Mr. Mills a traffic violation ticket for having an open bottle of liquor in the vehicle and arrested him for possession of methamphetamine. He then placed Mr. Mills, then in handcuffs, in the back of the police vehicle.

[6] Corporal Obodzinski returned to the truck and conducted a search incidental to the arrest on drug possession. While searching for drugs or drug paraphernalia, the officer located a handgun under the driver's seat of the vehicle, which was loosely wrapped in a brown paper towel. Corporal Obodzinski testified at the trial that he believed the driver could reach the gun from the driver's seat, although he did not sit in the seat to test his theory. The officer removed the gun from under the seat with his bare hands. When he realized it was a real gun, he utilized a pair of gloves in an attempt to prevent contamination.

The Trial Proceedings

[7] Admissions at trial included that on March 30, 2018:

- (a) the 0.45-calibre handgun found under the driver's seat of the vehicle driven by Mr. Mills was a fully functional, loaded, and restricted firearm;

- (b) the firearm was not registered or licensed;
- (c) Mr. Mills was not licensed to possess a firearm of any kind, and is not currently licensed to possess a firearm of any kind;
- (d) Mr. Mills was prohibited from possessing a firearm of any kind; and
- (e) Mr. Mills was a prohibited driver.

[8] After their seizure, the gun, ammunition, and magazine were swabbed for DNA, and Mr. Mills provided a DNA sample. The forensic analyst, Ms. Christy Sanderson, found DNA linking Mr. Mills to the gun, specifically, on the handle, muzzle, and certain operating parts.

[9] The central issue for the jury to decide in relation to each of the counts was whether the Crown had established beyond a reasonable doubt that Mr. Mills was in possession of the handgun including, in particular, the essential element of knowledge.

[10] An initial pre-charge conference occurred at the close of the Crown's case. Mr. Mills' trial counsel stated that the case was about constructive possession. He agreed that *R. v. Morelli*, 2010 SCC 8, was the relevant authority for instructing the jury regarding constructive possession.

[11] A second pre-charge conference was held following the close of the defence case. On this occasion, the trial judge provided the parties with draft written instructions. Counsel and the trial judge reviewed the draft instructions, including the portions relating to the issue of constructive possession. Defence counsel agreed, in part, with how the issue was presented by the trial judge in her draft, but suggested some changes to better reflect the elements of the offence, which the judge was prepared to accept.

[12] Following closing submissions by both parties, there was a third pre-charge conference. Final revisions were discussed, including the changes regarding

possession, and neither counsel indicated opposition to the proposed final draft of the written instructions.

[13] In the segment of her written instructions on the offences, which the judge read to the jury, she defined constructive possession as follows:

[76] ... Constructive possession is thus established where the accused: (1) has knowledge of the character of the object, (2) knowingly puts or keeps the object in a particular place, whether or not that place belongs to him, and (3) intends to have the object in the particular place for his use or benefit or for the use or benefit of another person.

[14] The judge went on to say:

[77] Here, because of the admission made that the handgun is a restricted firearm, Mr. Mills' knowledge of the character of the object has been proved. However, the Crown must prove the other two elements in order to prove that Mr. Mills had constructive possession, namely:

- (1) that Mr. Mills knowingly put or kept the handgun in the Dodge truck; and
- (2) that Mr. Mills intended to have the handgun in the Dodge truck for his use or benefit, or for the use or benefit of another person.

...

[81] You must not assume or conclude that, merely because the handgun was found in the Dodge truck when Mr. Mills was the driver, it was in Mr. Mills' possession. On the other hand, the fact that a person is the operator with control of the vehicle, together with other evidence, may enable you to infer knowledge and control in this case.

[Emphasis added.]

[15] Shortly thereafter, the morning adjournment was taken.

[16] Prior to the jury returning for the continuation of the judge's instructions, defence counsel advised the judge that he was concerned about para. 77 of the instructions, which I have set out at para. 14 above.

[17] In particular, he submitted that the statement "because of the admission made that the handgun is a restricted firearm, Mr. Mills' knowledge of the character of the object has been proved" suggested a certain level of knowledge, which the jury may confuse as satisfying the knowledge element of the offence. Defence

counsel clarified that Mr. Mills' admission that the gun was a functional, loaded, and restricted firearm "only becomes a potential issue after the finding of possession".

[18] Following an exchange with the judge, defence counsel's concern was resolved to the satisfaction of both counsel as follows:

THE COURT: So if, in the first sentence of paragraph 77, it said "an admission has been made that the handgun is a restricted firearm" period.

MR. MORINO: Correct.

THE COURT: And cross out the rest?

MR. MORINO: Absolutely. In fact, you could even say, Mr. Mills is making an admission that the handgun is a restricted firearm. Does My Lady --

THE COURT: All right, just a moment, please. Suppose redraft then -- this to say here "An admission has been made that the handgun is a restricted firearm." Cross out the rest of that sentence.

MR. MORINO: Yes, because I --

THE COURT: I --

MR. MORINO: -- completely agree with -- My Lady then goes on to say, "however the Crown must prove" -- which of course is cutting to the crux of the issue which is the one of possession.

THE COURT: I may be getting myself into trouble here but I could go on to add "that does not constitute an admission of knowledge for the purposes of possession."

MR. MORINO: Absolutely, My Lady, that would completely eliminate any possibility for any confusion.

MR. BARBER: And then we don't need to edit anything, too. We can just ... I think that's probably better, My Lady. Then we don't need to edit anything and sort of backtrack on the jury, and instead it can just be dealt with by way of a verbal warning. I think that's probably sufficient in the Crown's respectful submission.

THE COURT: All right. So when the jury comes back, then I'll take them back to paragraph 77, and tell them that I'm going to make some revisions to that paragraph.

MR. MORINO: Thank you, My Lady.

THE COURT: To the first sentence in that paragraph.

MR. MORINO: Thank you.

[Emphasis added.]

[19] The judge then re-charged the jury as follows:

All right, you may be seated. All right, members of the jury, just before we continue, I am going to take you back to page 22 of the charge and paragraph 77. And I have concluded that the first sentence in that paragraph needs to be revised, so I am going to ask you to cross out that first sentence, and here is what it should say instead.

Mr. Mills has made an admission that the handgun is a restricted firearm, although that does not constitute an admission of knowledge for the purposes of possession.

[20] During its deliberations, the jury initially asked one question being:

Are the Admission of Facts based on knowledge at the time of arrest?

[21] After submissions from counsel, the following occurred:

THE COURT: Yes. Well, that's why I think I do need to tell them that the short answer to the question is no. They can't infer anything in terms of knowledge and control for purposes of possession, the fact of the Admissions.

MR. MORINO: Yes, thank you. I think that --

MR. BARBER: I agree with that.

MR. MORINO: -- that specifically addresses it. Thank you, My Lady.

[22] Before the jury returned to the courtroom, a second question was received:

Under para 76 of the Charge how many of the 3 items are required to proof [sic] possession?

[23] The following then transpired in the absence of the jury:

THE COURT: Well, this is what I was going to say in relation to this question. And, Madam Registrar, I'm just going to read this -- the second question into the record. The question is, "Under paragraph 76 of the charge, how many of the three items are required to" -- it says "proof." It should, I think, read "prove possession?" I can give the very short answer that all three items must be proved. I could go on to say, really give them -- repeat the new instruction that I gave them with respect to the first sentence in paragraph 77.

MR. MORINO: See, I think -- My Lady, what I think they're getting at is, number one, "has knowledge of the character of the object" is the reason they asked the first question.

THE COURT: Yes, that may be correct. So do counsel have a view whether I should simply tell them all three elements must be proved, and stop there, or I would tell them all three elements must be proved. With

respect to the first element, Mr. Mills had made an admission that the handgun is a restricted firearm although that admission does not constitute an admission of knowledge for the purposes of possession. That's basically the revised instruction I gave them this morning.

MR. MORINO: Yes, thank you.

MR. BARBER: Yes, thank you, My Lady.

MR. MORINO: I think that addresses it.

MR. BARBER: I believe so, My Lady.

THE COURT: All right.

MR. BARBER: I'm just trying to think it through. I'm not sure that more than repeating the original instruction is helpful.

THE COURT: Well, that's what I propose to do.

MR. BARBER: Thank you, My Lady.

MR. MORINO: -- still missing the point on the Admissions of Fact.

THE COURT: All right. Well, hopefully I'll actually be able to answer these two questions without getting another question. All right. So we'll just again, stand down briefly and I'm going to add to the brief notes I was typing up and then we'll reconvene with the jury.

[24] Upon the jury being reconvened, the judge then answered the first two questions as follows:

You may be seated. All right, members of the jury, I have received two questions from you. I am going to deal with them one by one. The first question... I assume by "knowledge" in this question, you mean Mr. Mills' knowledge... Then assuming I am correct, the short answer to your question is no. You should not draw any inference that the facts admitted were based on knowledge at the time of arrest. Moreover, you cannot infer anything about knowledge and control for the purposes of the element of possession from the fact that the admissions were made.

Certain facts were admitted for the purpose of dispensing with proof at trial. As I said in my charge, and this is at paragraph 52 of the charge in the section where I discuss admissions, you should consider these facts to be conclusively proven.

And that is my answer to question – the first question.

The second question... my answer is this: all three elements must be proved. With respect to the first element, Mr. Mills has made an admission that the handgun is a restricted firearm, although that does not constitute an admission of knowledge for the purposes of possession.

And that completes my answer to the second question. If, in respect of either question, I have not fully responded to the question that you have, you will need to submit another note to the -- to the sheriff accordingly. But those -- those, at this time, are my answers to your questions. All right.

[Emphasis added.]

[25] The jury returned with a third question, which stated:

The jury is locked at 11:1. Do you have any suggestions on how to progress the conversation?

[26] The trial judge responded to the third question as follows:

My answer is this: I think it is a good time for the jury to take a break. You should take time now for dinner. You can come back from dinner, hopefully refreshed after you have had a meal, and then you can continue deliberations. I have had some discussion with the sheriff about how long deliberations might continue today, and I would not be inclined, in any event, to go beyond 9:30. If you wish to stop earlier than that, say at nine o'clock, that would be fine too...

[27] After the dinner break, the judge further instructed the jury on their roles as jurors and what occurs when a jury cannot reach a unanimous verdict. The jury continued deliberations for some time that evening, and then adjourned to the following day, at which time the jury deliberations continued from the morning into the afternoon. Ultimately, the jury convicted Mr. Mills on all three counts.

Issues on Appeal

1. Did the judge err in instructing the jury on the essential element of knowledge, as distinct from control, to prove possession under the *Criminal Code*?
2. In the alternative, was the verdict unreasonable?

Analysis

The Jury Instructions

[28] At the initial pre-charge conference with the judge, both parties agreed that the sole issue at trial was whether the evidence was sufficient to establish Mr. Mills'

constructive possession of the firearm in accordance with the principles articulated in *Morelli*.

[29] Mr. Mills submits that in light of what transpired with respect to para. 77 (set out at para. 14 above):

- it is likely that the jury was under the erroneous impression that knowledge of the presence of the item must accompany knowledge of the nature of the item, the latter of which was admitted;
- this likelihood is evidenced by the jury's questions concerning whether knowledge in the admissions represented knowledge at the time, and how many of the three elements of constructive possession were necessary to find guilt; and
- while the trial judge clearly endeavoured to address this issue, when considered in its totality, the charge compounded confusion on the issue.

[30] The Crown's position is that the instructions, the specific recharge in relation to para. 77, and the judge's answer to the jury's first two questions clearly conveyed the correct legal principles and identified the proper factual issues relevant to the jury's decision regarding constructive possession. Accordingly, the jury would not have been confused as alleged by the appellant.

[31] An accused is entitled to a proper—that is to say adequate, not perfect—jury charge: *R. v. Araya*, 2015 SCC 11 at para. 39. As this court recognized in *R. v. Robinson*, 2016 BCCA 192 at para. 16, a charge is adequate if it fulfills the function of explaining:

- (a) the factual issues to be determined;
- (b) the legal principles applicable to the issues and the evidence adduced at trial;
- (c) the positions of the parties; and

- (d) the evidence relevant to the positions of the parties on the issues to be decided.

[32] In the end, the jury must understand the issues they are called on to decide. On appeal, this is determined by considering the charge in its entirety and in the context of the trial as a whole: *R. v. Jaw*, 2009 SCC 42 at para. 32; *R. v. Ruff*, 2019 BCCA 412 at paras. 3–6.

[33] In *R. v. Williams*, 2019 BCCA 49, Justice Fitch explained the importance to be attached to questions from the jury:

[50] Jury questions indicate that at least some jurors are having a problem with an issue in the case. By asking a question, the jury seeks such clarification and guidance it considers to be necessary to push its deliberations forward to a verdict. The jurors will rely on the answer given by the judge to resolve the confusion or uncertainty that motivated the question: *R. v. Naglik*, [1993] 3 S.C.R. 122 at 139.

[51] As noted in *R. v. S. (W.D.)*, [1994] 3 S.C.R. 521 at 530:

There can be no doubt about the significance which must be attached to questions from the jury and the fundamental importance of giving correct and comprehensive responses to those questions. With the question the jury has identified the issues upon which it requires direction. It is this issue upon which the jury has focused. No matter how exemplary the original charge may have been, it is essential that the recharge on the issue presented by the question be correct and comprehensive. No less will suffice. The jury has said in effect, on this issue there is confusion, please help us. That help must be provided.

[34] When I consider the initial jury instructions, the recharge, and the judge's answer to the jury's first two questions, I would not accede to the first ground of appeal for several reasons.

[35] First of all, in my view, the judge correctly set out the legal test relating to constructive possession as set out in *Morelli*. In particular, the three elements of constructive possession were expressly stated to the jury in the trial judge's oral and written instructions, as outlined in *Morelli* at para. 17, which provides:

[17] ... Constructive possession is thus complete where the accused:
(1) has knowledge of the character of the object, (2) knowingly puts or keeps the object in a particular place, whether or not that place belongs to him, and

(3) intends to have the object in the particular place for his “use or benefit” or that of another person.

[36] The jury charge set out these elements of constructive possession in para. 76, which is reproduced at para. 13 of these reasons. In those instructions, the jury was told that that “knowledge of the character of the object” was a distinct element from “knowingly puts or keeps the object in a particular place”. Moreover, the distinct nature of the three elements was later reaffirmed when the trial judge answered the jury’s second question by reaffirming that “all three elements must be proved”. Thus, Mr. Mills’ submission that the jury instructions wrongly left the jury with the impression that proof of one of the knowledge elements of constructive possession (nature of the object) would be sufficient proof of the other (presence of the object) is contradicted by the judge’s instructions and answers.

[37] Mr. Mills also argues that the trial judge did not define knowledge in the context of possession. And yet she expressly articulated the knowledge elements of constructive possession in the instructions set out at para. 13 of these reasons.

[38] I accept that the impugned portion of the original instructions, para. 77 as set out at para. 14 of these reasons, was unclear. That portion of the jury instructions did not properly delineate between the admission that the firearm was a fully functional, loaded, restricted firearm, and the appellant’s knowledge that such a firearm was present in the vehicle at the relevant time; the latter constitutes the essential element of knowledge, which the Crown had to establish beyond a reasonable doubt.

[39] Notwithstanding the judge’s unclear statement, this instruction was not the final word left by the trial judge with the jury on the issue of constructive possession. Rather, as is evident from the excerpts of the jury charge set out at paras. 13–14 above, at defence counsel’s suggestion, the judge explained to the jury that the admission that the firearm was a restricted firearm did not constitute proof of knowledge for the purposes of establishing possession.

[40] Furthermore, the trial judge's answer to the jury's first question correctly and expressly stated that the jury could not infer anything about knowledge from the fact that the admissions were made. In response to the jury's second question, the trial judge reiterated that the admission that the handgun is a restricted firearm does not constitute an admission of knowledge for the purposes of possession. I would add that elsewhere in the written instructions, the jury had been told that the admission that the handgun was a restricted weapon was made to dispense with proof a necessary element of the three offences in the indictment.

[41] Accordingly, in my view, the judge properly explained the use and limits of the admission to the jury.

[42] Defence counsel's agreement with the instructions is also relevant to assessing the adequacy of the jury charge. As articulated by Justice Bastarache in *R. v. Daley*, 2007 SCC 53:

[58] ... it is expected of counsel that they will assist the trial judge and identify what in their opinion is problematic with the judge's instructions to the jury. While not decisive, failure of counsel to object is a factor in appellate review. The failure to register a complaint about the aspect of the charge that later becomes the ground for the appeal may be indicative of the seriousness of the alleged violation. See *Jacquard*, at para. 38: "In my opinion, defence counsel's failure to object to the charge says something about both the overall accuracy of the jury instructions and the seriousness of the alleged misdirections."

[Emphasis added.]

[43] In this case, defence counsel expressly endorsed the trial judge's recharge regarding para. 77 on the issue of constructive possession, stating in relation to the proposed recharge, "that would completely eliminate any possibility for any confusion". In my view, this response is an indicator of defence counsel's view as to the adequacy of the jury charge and the gravity of any deficiency: *R. v. Calnen*, 2019 SCC 6 at para. 38.

[44] Defence counsel also agreed with the proposed answer to the first jury question. Furthermore, the jury did not "submit another note" with respect to the

answer provided to this question, as it had been invited to do by the judge in the event further assistance were required (see para. 24 of these reasons).

[45] Notwithstanding the agreement of counsel, it is for this court to consider and decide if the instructions and the answers given to the jury's questions, could have confused the jury or invited improper reasoning: *Araya* at para. 51. For the reasons I have identified, I would conclude that did not occur in this case.

[46] Accordingly, I would not accede to this first ground of appeal.

Was the Verdict Unreasonable?

[47] In the alternative, Mr. Mills submits that the verdict was unreasonable in light of the evidence. Specifically, he points to alleged deficiencies in the DNA evidence and the number of individuals associated with the vehicle.

[48] This ground of appeal attracts a deferential standard of review. As was recently stated by Justice Butler in *R. v. Nguyen*, 2020 BCCA 166:

[14] A verdict is reasonable under s. 686(1)(a)(i) of the *Criminal Code*, R.S.C. 1985, c. C-46, if it is one that a properly instructed jury acting judicially could have rendered: *R. v. Biniaris*, 2000 SCC 15. In order to consider if a verdict is reasonable, an appellate court may re-examine, and to some extent reweigh and consider the effect of evidence. The limited weighing of evidence is done in light of the standard of proof in criminal cases: *R. v. Villaroman*, 2016 SCC 33 at para. 55.

[15] Where the Crown's case depends on circumstantial evidence, the question is whether the trier of fact, acting judicially, could be satisfied that guilt is the only reasonable conclusion based on the totality of the evidence: *Villaroman* at para. 55. Importantly, it is fundamentally the role of the trier of fact to decide if any alternative conclusion is reasonable enough to raise a doubt: *Villaroman* at para. 56.

See also *R. v. Bransford*, 2019 BCCA 408 at para. 31.

[49] The judge reviewed in some detail the DNA evidence in her instructions to the jury. This included the evidence of:

- Corporal Obodzinski who initially observed the handgun and removed it from under the driver's seat of the vehicle; and

- Ms. Christy Sanderson, a civilian member of the RCMP attached to its Forensic Laboratory in Vancouver, British Columbia. She testified that Mr. Mills' DNA was found on the handgun's grip, trigger or guard, muzzle, and action. She also testified as to the manner in which DNA can be transferred from one surface to another.

[50] The judge also referred the jury to the evidence of Patrick Hanlon, who was called as part of the defence case. Mr. Hanlon testified that the truck was briefly owned by his deceased roommate, at some point in January, February, or March 2018, during which it was parked at his residence. Mr. Hanlon testified that the truck was sold after his roommate died, but he was unable to say who the truck was purchased from or to whom it was ultimately sold. He stated that during the period the truck was parked at his residence, he saw a gun under the seat. However, he did not give any real consideration as to whether it was a replica or a real gun. Instead, he left the gun under the seat and did not remove the gun before the truck was sold.

[51] Crown counsel challenged Mr. Hanlon's credibility, in part, on the basis that:

- he knew Mr. Mills;
- he had difficulty identifying the truck in question;
- he had difficulty describing the gun he claimed to have seen, nor did he mention that it was wrapped in paper towel; and
- his evidence appeared to be contradictory to a prior statement he provided to the police as to whether or not he believed the gun was real when he left it in the vehicle.

[52] The thrust of Mr. Mills' argument on this ground of appeal is that Corporal Obodzinski's handling of the gun at the scene, in particular the handle, together with "the multiplicity of individuals associated to the vehicle" does not rule out the possibility that Mr. Mills was unaware that the gun was in the vehicle.

[53] Mr. Mills points to what he alleges were ambiguities arising from the DNA evidence. He argues that Corporal Obodzinski testified that the handgun was wrapped in paper when he located it, and that while he put on gloves before handling it further, he may have “clipped the handle” before putting on gloves. Furthermore, he points to Ms. Sanderson’s evidence concerning contamination and DNA transfer as supporting his position that Corporal Obodzinski could have transferred Mr. Mills’ DNA from elsewhere in the vehicle onto his gloves when he put them on and subsequently onto the handgun. In Mr. Mills’ submission, this evidence cumulatively should raise a reasonable doubt, as the DNA evidence was crucial to support a finding that Mr. Mills had constructive knowledge of the gun in the vehicle.

[54] Accordingly, Mr. Mills argues that his guilt was not the only reasonable conclusion available on the totality of the evidence.

[55] I disagree. In my view, there was an abundance of evidence upon which a properly instructed jury acting judicially could have rendered the verdicts in question.

[56] Had the only evidence of Mr. Mills’ constructive possession of the restricted firearm been the presence of his DNA on its handle, then the verdicts may have been different. However, circumstantial evidence does not have to eliminate all possible inferences and a verdict is not unreasonable solely because the trier of fact concluded that the alternatives were not reasonable enough to raise a doubt:

R. v. Villaroman, 2016 SCC 33 at para. 56.

[57] Corporal Obodzinski’s evidence was that he slid the gun out from under the driver’s seat by pulling the paper towel wrapped around it, at which point he touched the handle of the gun. He then went to get latex gloves upon realizing that it was a real gun. He testified that he was careful not to contaminate the gun, although he admitted on cross-examination that he used his bare hands to open the scrunched up gloves and to slide his hands inside. During cross-examination, he also indicated that he minimally handled the gun at roadside stating that he

clipped it with my two fingers...I pinched it and I lifted it up, I pulled it out and, of course, that’s when I actually got a visual of the fact that it is a gun.

[58] Although Corporal Obodzinski wore different gloves when he handled the gun more extensively back at the police detachment, this evidence forms the basis of the defence position that there is a strong possibility that he touched the gun itself with his hands at roadside.

[59] Ms. Sanderson, on cross-examination, testified that it would be possible to transfer DNA from an object picked up with bare hands onto an object picked up with gloves on if, while putting on those gloves, the exterior of the gloves were contaminated with the DNA. Nonetheless, she qualified her response, stating that she hopes if one were putting on gloves, they would be careful not to contaminate the exterior of the gloves.

[60] In my view, it was open to the jury to find that the defence contamination theory did not raise a reasonable doubt. It would not have been unreasonable for the jury to conclude that at least some of Mr. Mills' DNA on the various surfaces of the gun came from Mr. Mills directly.

[61] In conclusion, I am of the opinion that, taken as a whole, the evidence in this case was reasonably capable of supporting guilty verdicts in that:

- (a) the appellant was the sole occupant of the truck at the time it was stopped;
- (b) the gun was not stored or hidden away, but rather was located immediately below the driver's seat with its butt just protruding;
- (c) the appellant's DNA was found on the gun's grip, guard or trigger, action, and muzzle;
- (d) there was no evidence connecting the gun to any of the owners of the truck identified by Corporal Obodzinski; and
- (e) Mr. Hanlon's credibility was seriously in issue and a reasonable fact-finder would be entitled to reject his evidence.

[62] Accordingly, I would not accede to this ground of appeal.

The Application of *Kienapple*

[63] After the jury pronounced its verdicts and prior to adjourning the trial to the sentencing hearing, Crown counsel advised the judge that he would be considering the principles in *Kienapple* and, if they applied, would be seeking a stay of proceedings in relation to count 3.

[64] On the date set for the sentencing hearing, the issue as to whether count 3 should be stayed was not raised by counsel and the judge did not provide a ruling on that issue.

[65] In her reasons for sentence, the judge imposed a sentence of six years' imprisonment on count 1, and one year served concurrently on each of counts 2 and 3.

[66] It appears to have been an oversight that the issue of *Kienapple* and count 3 was not addressed on the date set for the sentencing hearing as originally anticipated by Crown counsel.

[67] Mr. Mills' Notice of Application for Leave to Appeal Sentence contains the ground:

2. That the *Kienapple* principle ought to have been applied in this matter to counts 1 and 3.

[68] Although no submissions were made to the Court on this issue at the hearing of the conviction appeal, counsel were subsequently advised of the decision in *R. v. Naples*, 2009 BCCA 141 and were invited to provide a response.

[69] Counsel are now in agreement that:

- consideration of the application of *Kienapple* is to be addressed at the conviction appeal; and
- if the conviction appeal is dismissed then a stay of proceedings should be entered with respect to count 3.

[70] In my view *R. v. Naples* is directly on point. Counts 1 and 3 on the indictment are similar in nature as those before the Court in *R. v. Naples* where Justice Rowles stated at para. 3:

[3] The Crown concedes that the appeal ought to be allowed to the extent of granting a judicial stay of proceedings on Count 3 of the indictment. Count 4 charges an offence under s. 95(1) of the *Criminal Code* which is both more serious and requires more elements to be proven than the s. 91(1) *Code* offence charged under Count 3. As there are no additional elements to the lesser offence charged in s. 91(1), a judicial stay ought to have been entered on Count 3.

[71] Accordingly, I would direct that a judicial stay of proceedings be entered with respect to count 3.

Disposition

[72] I would allow the appeal but only to the extent of directing that a judicial stay of proceedings be entered with respect to the offence charged in count 3.

“The Honourable Mr. Justice Abrioux”

I AGREE:

“The Honourable Mr. Justice Willcock”

I AGREE:

“The Honourable Madam Justice Griffin”

Tab 20:

R. v. Moazami, 2021 BCCA 328

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *R. v. Moazami*,
2021 BCCA 328

Date: 20210908
Docket: CA43308

Between:

Regina

Respondent

And

Reza Moazami

Appellant

Restriction on publication: A publication ban has been mandatorily imposed under s. 486.4 of the *Criminal Code* restricting the publication, broadcasting or transmission in any way of evidence that could identify a complainant referred to in this judgment, and in particular, M.N., E.B., S.W., S.H., C.B., I.T., J.C., H.W., T.H., S.K., and J.C.H.; and the witnesses identified as E.S., L.D., E.V., L.G., L.M., and M.R., and the individuals known as Z.C., CH2, and N.V. This publication ban applies indefinitely unless otherwise ordered.

FILE SEALED IN PART

Before: The Honourable Madam Justice Saunders
The Honourable Madam Justice Bennett
The Honourable Mr. Justice Hunter

On appeal from: An order of the Supreme Court of British Columbia, dated September 15, 2014 (*R. v. Moazami*, 2014 BCSC 1727, Vancouver Docket 26108).

Counsel for the Appellant in CA43308:

T.M. Arbogast
A. Grewal
K.A. Kirkpatrick
E. Wyllie

The Appellant, appearing in person
in CA43857:

R. Moazami

Counsel for the Respondent:

T.A. Shaw
M.G. Scott
S. Harvey, Articled Student
A. Greig, Articled Student

Place and Date of Hearing:

Vancouver, British Columbia
December 14–15, 2020
January 25–29, 2021

Place and Date of Judgment:

Vancouver, British Columbia
September 8, 2021

Written Reasons of the Court

Summary:

The appellant was convicted of 30 counts of prostitution-related, sexual, and human-trafficking offences against eleven complainants between the ages of 14 and 19. This appeal engages fresh evidence, alleging misconduct of the lead investigator, Detective James Fisher, in the case, resulting in an abuse of process leading to a miscarriage of justice. The appellant also alleges ineffective assistance of trial counsel, which engages further fresh evidence. Held: Appeal dismissed; the applications to admit fresh evidence are dismissed. The proposed fresh evidence does not meet the test in Dixon and Taillefer. There is no admissible evidence capable of demonstrating that Mr. Fisher did, or could have, interfered with the evidence of the complainants or witnesses in the appellant's trial. Despite the repugnant behaviour of Mr. Fisher, there is no reasonable possibility that the fairness of the appellant's trial was affected. The appellant's complaints of ineffective assistance of counsel, individually and together, do not meet the legal criteria to establish a miscarriage of justice. The appellant failed to demonstrate that trial counsel's representation fell below the standard of reasonable professional judgment expected from a lawyer.

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Reasons for Judgment of the Court:

Introduction

[1] By notice of appeal filed December 9, 2015, Reza Moazami appeals from convictions by Madam Justice Bruce on September 15, 2014, on a 36-count indictment, of 30 prostitution-related, sexual, and human trafficking offences against eleven female complainants between the ages of 14 and 19, committed between February 2009 and October 7, 2011 (the “Avails trial”). Nine of the complainants were under the age of 18 years at the time of the offences.

[2] The appeal is dismissed for the following reasons.

[3] This appeal has reduced to two areas of dispute unrelated to the reasons for judgment. Both engage fresh evidence, the admissibility of which we address in our discussion of the issues on appeal. The two new areas of dispute are:

1. the effect of misconduct of the lead investigator in the case against Mr. Moazami on trial fairness and the administration of justice; and
2. an allegation by Mr. Moazami of ineffective assistance of trial counsel.

[4] In a separate appeal, CA43857, answered in separate reasons for judgment released today and indexed as 2021 BCCA 329, Mr. Moazami also appeals from

convictions on February 11, 2016, of attempting to obstruct justice and breach of a no-contact order (the “Obstruct trial”). These reasons for judgment are independent of the reasons in CA43857, but the converse is not true; in CA43857, Mr. Moazami relies upon submissions made here in respect of the issue of police misconduct.

[5] A brief description of the offences and the trial will set these issues in context. We refer to the complainants, as did the judge, by initials. For the reader’s convenience, we attach as Appendix A a chart setting out the counts and the trial results on each. The complainants are known in these reasons as M.N., E.B., S.W., S.H., C.B., I.T., J.C., H.W., T.H., S.K., and J.C.H.

a) The Charges and Convictions

[6] The convictions engage eight provisions of the *Criminal Code* in effect at the time:

- s. 151(a) – sexual interference of a person under the age of 16 years (three convictions);
- s. 153(1)(a) – sexual exploitation of a young person (16 or 17 years old) (four convictions);
- s. 212(1)(d) – procuring a person to become a prostitute (four convictions);
- s. 212(1)(j) – living on the avails of prostitution (five convictions);
- s. 212(2) – living on the avails of prostitution of a person under the age of 18 years (five convictions);
- s. 212(2.1) – living on the avails of prostitution of a person under the age of 18 years with coercion (three convictions);
- s. 271(1)(a) – sexual assault (five convictions); and
- s. 279.01(1)(b) – controlling the movements of a person for the purpose of exploiting her (human trafficking) (one conviction).

[7] The five convictions under s. 212(2)—living on the avails of prostitution of a person under the age of 18 years—are included offences of charges under

s. 212(2.1)—living on the avails of prostitution of a person under the age of 18 years with coercion. These five convictions of the lesser included offence were entered on the judge's reasonable doubt that Mr. Moazami used, threatened to use, or attempted to use violence, intimidation or coercion before those complainants turned 18. Mr. Moazami was convicted of three offences of the greater s. 212(2.1) offence and was acquitted of one count under s. 212(2.1) on the judge's reasonable doubt that the complainant worked for him as a prostitute before she turned 18.

[8] In all, Mr. Moazami was convicted of 13 offences of some form of living on the avails of prostitution, relating to *all* eleven complainants; he was convicted twice in relation to two of the complainants (S.H. and T.H.) as they turned 18 during the relevant period.

[9] Of seven counts of procuring a person to become a prostitute contrary to s. 212(1)(d), Mr. Moazami was acquitted on three, on the judge's reasonable doubt that the complainants had worked or had intended to work as a prostitute before meeting Mr. Moazami.

[10] In respect of human trafficking contrary to s. 279.01(1)(b), Mr. Moazami was convicted of trafficking the complainant J.C. by transporting her to Calgary and Edmonton, Alberta, from British Columbia for the purpose of exploiting her. The judge found Mr. Moazami's violence, intimidation, and exploitation of this complainant created a relationship of fear and dependence such that J.C. felt unable to decline to work as a prostitute for him. Mr. Moazami was acquitted of trafficking H.W., a person under the age of 18, contrary to s. 279.01(1)(b) on the judge's reasonable doubt that H.W. feared for her safety or the safety of another if she declined to work as a prostitute for him.

[11] On the three counts of sexual interference with a person under the age of 16 years (s. 151(a)), the judge found that Mr. Moazami either knew that each complainant was underage or failed to take reasonable steps to ascertain the complainant's age and likewise in respect of the four counts of sexual exploitation of

a young person aged 16 or 17 (s. 153(1)(a)). Furthermore, the judge found for the purposes of s. 153(1)(a) that each relationship was exploitative.

[12] Mr. Moazami also was convicted of five of the six counts of sexual assault (s. 271(1)(a)). The sole acquittal on this offence was on a count concerning H.W. wherein the Crown conceded, after testimony, that the evidence did not prove the offence beyond a reasonable doubt. Three of the five convictions under s. 271(1)(a) related to sexual intercourse with a complainant under the age of 16 years. In respect of a fourth conviction, the judge found that the complainant J.C. ingested the drug gamma hydroxybutyrate (“GHB”) and awoke to find Mr. Moazami having sexual intercourse with her. In respect of the fifth conviction, the judge found that Mr. Moazami had persisted in a form of sexual intercourse with S.W. against her expressed wishes.

b) The Trial

[13] The key issues at trial were the exploitative character of Mr. Moazami’s behaviours to the complainants and his knowledge or steps taken by him to determine the ages of the complainants.

[14] The trial itself was lengthy, taking place over 61 days. It started on September 25, 2013, with Mr. Moazami represented by two counsel, Mr. Markovitz and Ms. Bastow. It ended on June 23, 2014, with Mr. Moazami represented only by Ms. Bastow. Mr. Moazami made extensive admissions including these noted by the judge:

- the ages of the complainants on the relevant dates;
- addresses of residential apartments in Vancouver and Richmond, British Columbia where the complainants worked as prostitutes;
- travel he undertook with certain of the complainants outside of the Lower Mainland, including to Calgary and Edmonton, Alberta;
- that several of the complainants worked as prostitutes out of hotels located in Vancouver, North Vancouver, Richmond, and Nanaimo, British

Columbia; Calgary and Edmonton, Alberta; and Montreal, Quebec, with registered guest names including himself, C.B., I.T. and T.H.;

- a laptop computer and seven smart phones were seized from him or from addresses associated with him;
- the analysis of the electronic devices performed by Detective Yingling;
- the authenticity of a volume of prostitution advertisements found on searching internet sites;
- credit card records and photographs; and
- certain Facebook records and accounts, but not Facebook messages that purported to be conversations between himself and individual complainants.

[15] In addition to the admissions, the Crown called each complainant, seven lay persons, and certain police officers as witnesses.

[16] The defence elected to call evidence. Three lay persons testified, led in chief by Mr. Markovitz. The fourth witness for the defence was Mr. Moazami.

Mr. Markovitz withdrew as counsel before Mr. Moazami commenced his evidence. Ms. Bastow then assumed sole conduct of the defence for the balance of the trial.

[17] In his testimony, Mr. Moazami presented himself as providing protection and security to the complainants. He denied elements of the offences, denied engaging in parasitic relationships, said that complainants had consented to sexual activity with him, and said he reasonably thought the underage complainants were not underage.

[18] The judge found Mr. Moazami was not credible and, in general, that the other witnesses were credible. She said:

[4] As described in detail below, I concluded that Mr. Moazami was not a credible witness and, apart from his admissions against interest and where corroborated by other independent testimony, I do not believe his evidence and it does not raise a reasonable doubt. In contrast, I found the

complainants, as well as the other Crown witnesses and the witnesses called by the defence to be generally credible witnesses. Their evidence, for the most part, was internally and externally consistent. There are a few exceptions and these are addressed in detail below. The main exception is the evidence of H.W., who I found was not a credible witness generally.

[19] In comprehensive reasons for judgment, the judge found, and it is not disputed, that Mr. Moazami: took provocative pictures of complainants and posted them on web-based advertising sites; supplied some of the complainants with unlawful drugs, usually without charge; travelled with certain complainants outside of British Columbia to hotels for the purpose of their prostitution; obtained locations, including apartments, where prostitution of the complainants took place; fixed rates of the complainants for sexual services; and retained some or all of the income earned in these transactions, he said for providing food, lodging, and clothing. The judge found Mr. Moazami's actions to some of the complainants were cruel and coercive, and met the predatory standards demanded by the offences on which she convicted, as we have earlier described.

c) The New Issues on Appeal

[20] The issues on appeal arose after trial, and the resulting disclosure required heavy case management. The first issue concerns the effect of misconduct of the lead investigator in the Moazami investigation, former Detective James Fisher, through his actions and relationships with certain of the complainants and witnesses at Mr. Moazami's trial.

[21] The Moazami investigation was handled by the Special Investigation Section – Counter Exploitation Unit ("CEU") of the Vancouver Police Department ("VPD"). The mandate of the CEU prioritizes intervention in situations involving violence, exploitation, youth, and human trafficking, and states that "[t]he safety of sex workers...is of paramount importance." The role of the police officers in the CEU is to befriend, and "build a bond" with, the women and girls in the sex trade, creating and maintaining trust and confidence, in the effort to assist them in exiting the trade.

[22] From December 2011 through the trial, Mr. Fisher was the lead investigator. He also acted in a support role for certain of the complainants during the investigation and at trial. The extent of that role is in issue. What is not contested is that in March 2016, the VPD opened an investigation into the conduct of Mr. Fisher in response to a complaint by Z.C., a witness in another prostitution-related investigation unrelated to the charges against Mr. Moazami. Mr. Fisher was arrested on December 28, 2016, on charges arising from that investigation, and was suspended from his employment. He retired as a police officer in January 2017.

[23] The charges against Mr. Fisher evolved. They first included a charge of attempting to obstruct justice by providing false or misleading information relating to a stabbing incident involving the complainant H.W. in 2015. That charge did not proceed. Over time, Mr. Fisher was also charged with engaging in sexual misconduct with H.W., with the complainant M.N., with a witness at Mr. Moazami's trial referred to as E.S., and with Z.C.

[24] Mr. Fisher pleaded guilty to one count of breach of trust by kissing H.W. between December 3 and December 6, 2015, one count of sexual exploitation against Z.C., and one count of breach of trust involving Z.C. Although Mr. Fisher has not admitted to misconduct that was the subject of the charges naming M.N. and E.S. as complainants and those charges have been stayed, the Crown does not dispute the substance of those charges for purposes of this ground of appeal.

[25] In August 2017, a special prosecutor, Mr. Doyle, Q.C., was appointed to assist an investigation into the conduct of three VPD officers who had been involved in the Fisher investigation. In May 2020, it was determined that the charge approval standard was not met; no charges have been laid in respect of that investigation.

[26] The complaints against Mr. Fisher have resulted in voluminous disclosure concerning his actions and role with the complainants in the Moazami investigation and trial. Much of this is presented to us on a fresh evidence application addressed below.

[27] The second issue raised on appeal is Mr. Moazami's allegation of ineffective assistance of trial counsel which, he says, created an unfair trial and miscarriage of justice that must be remedied by a new trial.

[28] This issue engaged this Court's Practice Directive (Criminal) issued November 12, 2013, designed to ensure presentation of a complete picture to the court and protection of counsel's professional (solicitor-client) obligations in appeals engaging complaints against trial counsel. As required, Mr. Moazami waived solicitor-client privilege for the purposes of determining this ground of appeal. Both counsel then were asked to respond to his allegations. Mr. Markovitz filed affidavits addressing Mr. Moazami's affidavits; Ms. Bastow was questioned under oath on the allegations before Mr. Justice Frankel, sitting as a special commissioner. On December 7, 2020, for reasons indexed as 2020 BCCA 357, on the Crown's motion for directions on the scope of issues raised in the ineffective assistance of counsel complaint, the issues of ineffective assistance of counsel were identified as a lack of cross-examination of J.C. and S.W. on certain aspects of their evidence on the two counts of sexual assault relating to them.

[29] With that overview, we turn to the substantive issues before us.

Miscarriage of Justice and Abuse of Process

[30] Disgraced Vancouver City Police Detective, James Fisher, is the centre of this ground of appeal. As noted, Mr. Moazami was convicted of multiple counts relating to prostitution and related sexual offences that had been investigated by Mr. Fisher.

[31] Several years after Mr. Moazami's conviction, it came to light that Mr. Fisher had sexually assaulted some of the women who were complainants, and a witness at Mr. Moazami's trial. Mr. Moazami argues that the conduct of Mr. Fisher resulted in a miscarriage of justice and an abuse of process vis-à-vis his trial rights, and generally as a result of impugning the integrity of the justice system.

[32] Mr. Moazami seeks to adduce fresh evidence to demonstrate the extent and impact of Mr. Fisher's conduct on his trial.

a) Legal Framework

i) Miscarriage of Justice

[33] The power of the Court of Appeal to interfere with a conviction on the basis of a miscarriage of justice is found in s. 686(1)(a)(iii) of the *Criminal Code*:

686 (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal

(a) may allow the appeal where it is of the opinion that

...

(iii) on any ground there was a miscarriage of justice;

[34] In *R. v. Fanjoy*, [1985] 2 S.C.R. 233 at 240, the Court, in considering the provisions of s. 613(1)(a)(iii) [now s. 686(1)(a)(iii)] said:

... A person charged with the commission of a crime is entitled to a fair trial according to law. Any error which occurs at trial that deprives the accused of that entitlement is a miscarriage of justice. It is not every error which will result in a miscarriage of justice, the very existence of the proviso to relieve against errors of law which do not cause a miscarriage of justice recognizes that fact. However, I am not able to say that an error which, in the words of Brooke J.A., "could only unfairly prejudice", would not by itself cause a miscarriage of justice. It would be wholly inconsistent with a finding of unfair prejudice in a trial to find, nonetheless, that no miscarriage of justice occurred. In my opinion, the Court of Appeal, having found as it did, ought to have allowed the appeal under s. 613(1)(a) (iii) of the *Criminal Code*...

[35] In *R. v. Guyatt* (1997), 119 C.C.C. (3d) 304 (B.C.C.A.), leave to appeal ref'd [1997] S.C.C.A. No. 601, this Court said, at para. 70, that the focus under s. 686(1)(a)(iii) is not the verdict itself, but the process by which the verdict was reached. Section 686(1)(a)(iii) is concerned with the *impact* of an error on the trial proceedings that results in an unfair trial: *R. v. Morrissey* (1995), 22 O.R. (3d) 514 (C.A.).

[36] In *Morrissey*, Doherty J.A. wrote the following, at 539–541:

While s. 686(1)(a) provides three distinct bases upon which this court may quash a conviction, each shares the same underlying rationale. A conviction which is the product of a miscarriage of justice cannot stand. Section 686(1)(a)(i) is concerned with the most obvious example of a miscarriage of justice, a conviction which no reasonable trier of fact properly instructed could have returned on the evidence adduced at trial. Section 686(1)(a)(ii) read along with s. 686(1)(b) (iii) presumes that an error in law produces a miscarriage of justice unless the Crown can demonstrate the contrary with the requisite degree of certainty. Section 686(1)(a)(iii) addresses all other miscarriages of justice not caught by the two preceding subsections. In so far as the operation of s. 686(1)(a) is concerned, the distinction between errors of law and all other types of error has only one significance. Where the error is one of law the Crown bears the burden of demonstrating that the error did not result in a miscarriage of justice. Where the error is not one of law alone the appellant bears that burden.

...

I turn next to s. 686(1)(a)(iii). This subsection is not concerned with the characterization of an error as one of law, fact, mixed fact and law or something else, but rather with the impact of the error on the trial proceedings. It reaches all errors resulting in a miscarriage of justice and vindicates the wide jurisdiction vested in this court by s. 675(1). The long reach of s. 686(1)(a)(iii) was described by McIntyre J., for a unanimous court, in *Fanjoy v. R.*, [1985] 2 S.C.R. 233 at p. 240, 21 C.C.C. (3d) 312 at pp. 317-18:

A person charged with the commission of a crime is entitled to a fair trial according to law. Any error which occurs at trial that deprives the accused of that entitlement is a miscarriage of justice.

[37] What is meant by a miscarriage of justice was discussed in *R. v. Davey*, 2012 SCC 75:

[50] In his concurring opinion in *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823, LeBel J. considered the scope of the miscarriages of justice contemplated by s. 686(1)(a)(iii). He concluded, at para. 69, that when considering whether an irregularity that occurred during a trial rises to the level of a miscarriage of justice, “[t]he essential question in that regard is whether the irregularity was severe enough to render the trial unfair or to create the appearance of unfairness.”

[51] In *R. v. Wolkins*, 2005 NSCA 2, 229 N.S.R. (2d) 222, at para. 89, Cromwell J.A. provided a helpful summary of the two types of unfairness contemplated within the meaning of miscarriage of justice under s. 686(1)(a)(iii):

. . . the courts have generally grouped miscarriages of justice under two headings. The first is concerned with whether the

trial was fair in fact. A conviction entered after an unfair trial is in general a miscarriage of justice The second is concerned with the integrity of the administration of justice. A miscarriage of justice may be found where anything happens in the course of a trial, including the appearance of unfairness, which is so serious that it shakes public confidence in the administration of justice [Citations omitted.]

[38] In *R. v. Masuda* (1953), 106 C.C.C. 122 (B.C.C.A), a case where three police witnesses had dinner with the jury during the trial, this Court said, at 124:

Moreover, if Crown witnesses are permitted to join the jury in an atmosphere of sociability during the adjournment of a murder trial, the confidence of the public in our present system of trial by jury would be shaken. The Courts are the custodians of that confidence and it must be upheld and not weakened. Thus it appears to us that the opportunity for communication, while a factor for consideration, is not the whole test to be applied in the circumstances. The test, in our opinion, is that enunciated by Lord Hewart C.J. in *R. v. Sussex Justices, Ex p. McCarthy* (1923), 93 L.J.K.B. 129 at p. 131, wherein he said: "Nothing is to be done which so much as creates even a suspicion that there has been an improper interference with the course of justice", and "it is ... of fundamental importance, that justice should not only be done, but be manifestly and undoubtedly be [sic] seen to be done".

[39] In *R. v. Cameron* (1991), 2 O.R. (3d) 633 (C.A.), a case where a number of sheriffs and police officers ate dinner with the jury, the Court in reconciling cases in relation to whether actual prejudice to the accused was required said this, at 638–639:

The reconciliation of these apparently conflicting approaches lies in identifying the concern raised by the offending circumstance. If, as in *Gilson* and *Labelle*, the offensive conduct is not such as to taint the administration of justice, then the concern is properly directed to whether actual prejudice was occasioned to the accused. Where the events in question are so serious as to affect the administration of justice, as they were in *Hertrich*, then the focus turns upon the justice system and the miscarriage of justice occurs whenever the confidence of the public in the system is shaken; that confidence is equally shaken by the appearance as by the fact of an unfair trial.

...

The inquiry established that no actual prejudice had been demonstrated, but it did little, if anything, with respect to the appearance of unfairness which in my view, is incontrovertible. The conviction cannot be allowed to stand.

[40] In brief, in the circumstances of police misconduct on the issue of whether there was a miscarriage of justice requiring a new trial, the question before us is

whether the conduct of Mr. Fisher rendered the trial unfair, or whether his conduct shook the confidence of the public in the administration of justice.

ii) Abuse of Process

[41] The common law doctrine of abuse of process and the concomitant remedy were merged into the *Charter* in *R. v. O'Connor*, [1995] 4 S.C.R. 411 at paras. 69–71. Justice L’Heureux-Dubé discussed the various *Charter* sections in which an abuse of process might arise; for example, where there is trial unfairness, s. 11(d) would be engaged, or a lengthy delay, invoking s. 11(b). She also discussed the residual category of conduct that falls within s. 7 of the *Charter*. That category addresses “the panoply of diverse and sometimes unforeseeable circumstances” that may occur in the context of the prosecution that are so vexatious or unfair that fundamental notions of justice are contravened and the integrity of the judicial process is undermined: at para. 73.

[42] The remedy for a violation is found in s. 24(1) of the *Charter*, which allows for “such remedy as the court considers appropriate and just in the circumstances”. Adopting criteria recommended by Professor Paciocco (as he then was), Justice L’Heureux-Dubé concluded, at para. 75, that a stay of proceedings, involving both prejudice to the accused and to the integrity of the judicial system, was only appropriate when:

- (1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and
- (2) no other remedy is reasonably capable of removing that prejudice.

[43] Other remedies are available under s. 24(1), and a stay of proceedings is considered the last resort when all other options for protecting an accused’s rights are extinguished. It is imposed only in the “clearest of cases”: *O'Connor* at para. 68. Consideration is given to the “seriousness of the violation and to the societal and individual interests in obtaining a determination of guilt or innocence”: *O'Connor* at paras. 77–78.

[44] The common law doctrine of abuse of process was not extinguished in *O'Connor*. As noted in *United States of America v. Cobb*, 2001 SCC 19 at paras. 36–37, Canadian courts have an inherent jurisdiction and residual discretion at common law to control their own process and prevent its abuse.

[45] In *R. v. Babos*, 2014 SCC 16, the Court considered the residual category of abuse of process. The Court, refining the requirements for both categories, set out three requirements for a stay of proceedings:

[32] The test used to determine whether a stay of proceedings is warranted is the same for both categories and consists of three requirements:

- (1) There must be prejudice to the accused's right to a fair trial or the integrity of the justice system that "will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome" (*Regan*, at para. 54);
- (2) There must be no alternative remedy capable of redressing the prejudice; and
- (3) Where there is still uncertainty over whether a stay is warranted after steps (1) and (2), the court is required to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against "the interest that society has in having a final decision on the merits" (*ibid.*, at para. 57).

[46] The first or main category relates to ongoing trial fairness, asking whether the accused's right to a fair trial has been prejudiced, and whether that prejudice will be carried through the conduct of the trial: *Babos* at para. 34.

[47] The residual category is concerned with "whether the state has engaged in conduct that is offensive to societal notions of fair play and decency and whether proceeding with a trial in the face of that conduct would be harmful to the integrity of the justice system": *Babos* at para. 35.

[48] When considering trial fairness, the remedy of ordering a new trial will often be sufficient to redress the prejudice to the accused. In the case of the residual category, where the prejudice is to the integrity of the justice system, the focus is not on remedying the wrong to the accused, but whether a remedy short of a stay of

proceedings “will adequately dissociate the justice system from the impugned state conduct going forward”: *Babos* at para. 39.

[49] The third requirement, the balancing stage, is of primary importance with the residual category. As noted at para. 41 of *Babos*:

However, when the residual category is invoked, the balancing stage takes on added importance. Where prejudice to the integrity of the justice system is alleged, the court is asked to decide which of two options better protects the integrity of the system: staying the proceedings, or having a trial despite the impugned conduct. This inquiry necessarily demands balancing. The court must consider such things as the nature and seriousness of the impugned conduct, whether the conduct is isolated or reflects a systemic and ongoing problem, the circumstances of the accused, the charges he or she faces, and the interests of society in having the charges disposed of on the merits. Clearly, the more egregious the state conduct, the greater the need for the court to dissociate itself from it. When the conduct in question shocks the community’s conscience and/or offends its sense of fair play and decency, it becomes less likely that society’s interest in a full trial on the merits will prevail in the balancing process. But in residual category cases, balance must always be considered.

[50] Generally, the balancing is considered in the full context of the case: *Babos* at para. 73.

[51] As noted in *R. v. Nixon*, 2011 SCC 34, prejudice to the accused’s interests, although relevant, is not determinative. The residual category focusses on “society’s expectations of fairness in the administration of justice”: *Nixon* at para. 41.

[52] Mr. Moazami invokes both the trial fairness and residual category of abuse of process, and submits that Mr. Fisher’s conduct was such to amount to a miscarriage of justice.

[53] At the outset of the appeal, Mr. Moazami indicated that the remedy he seeks is a new trial. He does not seek a stay of proceedings.

iii) Fresh Evidence

[54] An appellate court has the power to admit fresh evidence pursuant to s. 683(1)(d) of the *Criminal Code*:

683 (1) For the purposes of an appeal under this Part, the court of appeal may, where it considers it in the interests of justice,

...

(d) receive the evidence, if tendered, of any witness, including the appellant, who is a competent but not compellable witness;

[55] The leading case in terms of adducing fresh evidence on appeal remains *Palmer v. The Queen*, [1980] 1 S.C.R. 759 at 775:

Parliament has given the Court of Appeal a broad discretion in s. 610(1)(d). The overriding consideration must be in the words of the enactment "the interests of justice" ... [T]he following principles have emerged:

- (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen*.
- (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
- (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
- (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[56] The procedure for the consideration of fresh evidence was reaffirmed in *R. v Stolar*, [1988] 1 S.C.R. 480 at 491–492:

The procedure which should be followed when an application is made to the Court of Appeal for the admission of fresh evidence is that the motion should be heard and, if not dismissed, judgment should be reserved and the appeal heard. In this way, the Court of Appeal has the opportunity to consider the question of fresh evidence against the whole background of the case and all the other evidence in the case. It is then in a position where it can decide realistically whether the proffered evidence could reasonably have been expected to affect the result of the case. If, then, having heard the appeal, the court should be of the opinion that the evidence could not reasonably have affected the result, it would dismiss the application for the introduction of fresh evidence and proceed to a disposition of the appeal. On the other hand, if it should be of the view that the fresh evidence is of such nature and effect

that, taken with the other evidence, it would be conclusive of the issues in the case, the Court of Appeal could dispose of the matter then and there. Where, however, the fresh evidence does not possess that decisive character which would allow an immediate disposition of the appeal but, nevertheless, has sufficient weight or probative force that if accepted by the trier of fact, when considered with the other evidence in the case, it might have altered the result at trial, the Court of Appeal should admit the proffered evidence and direct a new trial where the evidence could be heard and the issues determined by the trier of fact...

[57] When an appellant alleges a breach of the *Charter* based on non-disclosure by the Crown or police, the test for the admission of fresh evidence is modified, as found in *R. v. Dixon*, [1998] 1 S.C.R. 244, and *R. v. Taillefer*, 2003 SCC 70.

[58] In *Taillefer*, the Court was dealing with the question of whether the test set out in *Palmer* applied to the admission of fresh evidence in the context of a breach by the Crown of its duty to disclose, or whether it was the *Dixon* rules that were properly applicable.

[59] The Court in *Taillefer* considered *R. v. Creamer* (1995), 97 C.C.C. (3d) 108 (B.C.C.A), a case where this Court held that the *Palmer* test must be modified when the fresh evidence sought to be entered on an appeal related to non-disclosure of relevant information. A line of cases emerged where the test to be applied, in situations of state misconduct, was whether the right to a fair trial may have been affected. The new evidence in those cases was not evidence that related to an issue decided at trial, but rather new evidence which put in question the trial process itself. This change reflected the reality that, unlike a *Palmer* situation, the purpose of the new evidence was to challenge the very validity of the trial process. The Court in *Taillefer* accepted *Creamer* and the various authorities that aligned with it.

[60] In *Taillefer*, the Court recognized that since the new evidence raised issues relating to the validity of the trial itself, the applicable principles were the ones established by the Court in *Dixon*, not *Palmer*: at para. 77. In *Dixon*, the Court held that an accused seeking to have fresh evidence admitted by alleging a breach of his or her right to disclosure must demonstrate that there is a reasonable possibility the non-disclosure affected the outcome at trial or the overall fairness of the trial

process: at para. 34, emphasis in original. The *Palmer* test, by comparison, requires that the new evidence reasonably be expected to have affected the result: at 775.

[61] Importantly, in *Taillefer*, the Court noted that the *Dixon* test was “much more flexible”, requiring an assessment not only of the impact of the fresh evidence on the result of the trial, but on its overall fairness: at para. 77. The adoption of the flexible approach in cases of non-disclosure reflected the Court’s resistance to imposing a high burden on an accused seeking to admit fresh evidence “where the accused was deprived of that evidence because of a breach by the Crown of its duty to disclose”: at para. 78.

[62] The Court in *Taillefer* summarized the relevant principles from *Dixon*:

First, in order to assess the reliability of the result, the undisclosed information must be examined to determine the impact it might have had on the decision to convict. Obviously this will be an easier task if the accused was tried before a judge alone, and reasons were given for the conviction. If at the first stage an appellate court is persuaded that there is a reasonable possibility that, on its face, the undisclosed information affects the reliability of the conviction, a new trial should be ordered. Even if the undisclosed information does not itself affect the reliability of the result at trial, the effect of the non-disclosure on the overall fairness of the trial process must be considered at the second stage of analysis. This will be done by assessing, on the basis of a reasonable possibility, the lines of inquiry with witnesses or the opportunities to garner additional evidence that could have been available to the defence if the relevant information had been disclosed. In short, the reasonable possibility that the undisclosed information impaired the right to make full answer and defence relates not only to the content of the information itself, but also to the realistic opportunities to explore possible uses of the undisclosed information for purposes of investigation and gathering evidence.

[63] *Taillefer* and *Dixon* are clear that the applicable test is made up of two steps.

[64] First, where there is undisclosed information by Crown, or otherwise misconduct by the state, the onus is on the accused to demonstrate that there is a reasonable possibility that the verdict might have been different but for the Crown’s failure to disclose all of the relevant evidence, or other misconduct, as the case may be. In *Dixon*, the Court held that: “[i]mposing a test based on a reasonable possibility

strikes a fair balance between an accused's interest in a fair trial and the public's interest in the efficient administration of justice": at para. 34.

[65] Application of the first branch of the *Dixon* test requires that "the appellate court determine that there was a reasonable possibility that the [trier of fact], with the benefit of all of the relevant evidence, might have had a reasonable doubt as to the accused's guilt": *Taillefer* at para. 82. This means constructing an "overall picture of the evidence...that would have been presented to the [trier of fact]", having regard to the evidence in its entirety: *ibid.*

[66] Second, and regardless of whether there is no reasonable possibility of a different verdict at the first stage of the test, the appellate court must inquire as to whether there is a reasonable possibility that the failure to disclose affected the overall fairness of the trial process: *Taillefer* at para. 83. This means a reviewing court must consider the potential usefulness of the fresh evidence to the defence, which "must be based on reasonably possible uses of the non-disclosed evidence or reasonably possible avenues of investigation that were closed to the accused as a result of the non-disclosure": *Taillefer* at para. 84, citing *Dixon* at para. 34, emphasis in original. The appellate court must assess whether the failure to disclose deprived the accused of certain evidential or investigative resources: *Taillefer* at para. 84.

[67] In summary, when fresh evidence is tendered that addresses trial fairness, a modified *Palmer* test is applied. The fourth *Palmer* element, that the evidence "must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result" is replaced with "a reasonable possibility the non-disclosure [or other conduct] affected the outcome at trial or the overall fairness of the trial process": *Palmer* at 775; *Taillefer* para. 78, emphasis in original. Thus, if the fresh evidence, being reliable and relevant, demonstrates a reasonable possibility that the outcome or overall fairness of the trial process was affected, then the evidence will be admitted.

Hearsay

[68] The Supreme Court of Canada, in *R. v. O'Brien*, [1978] 1 S.C.R. 591 at 602, clearly stated that in order for fresh evidence to be adduced, it must be admissible evidence. The Court said:

Section 610 of the *Criminal Code* lends no assistance to respondent's case. It is a prerequisite that any evidence sought to be adduced under the discretion granted by that section be admissible evidence. The section manifestly does not authorize a Court of Appeal to dispense with the law of hearsay evidence. If that were so we would have the anomalous situation in which counsel could seek to adduce on appeal that which the common law prohibits at trial. The section is not operative until the threshold for admissibility as defined by common law and statute is crossed. That threshold has not been crossed in the instant case.

[69] This Court reaffirmed the inadmissibility of hearsay on an application to adduce fresh evidence in *R. v. Teneycke* (1996), 108 C.C.C. (3d) 53 at para. 18 (B.C.C.A.), where it refused to admit the affidavit of a lawyer appending an unsworn statement of an inmate.

[70] More recently, this Court has held that in order to be admissible as fresh evidence, the evidence must be in a form that would admit the evidence. Hearsay evidence, unless it meets one of the principled exceptions, is not admissible: *R. v. Jia*, 2016 BCCA 475. In *Jia*, this Court wrote:

[37] As with any other evidence, fresh evidence must be in admissible form. Fresh evidence is not admissible if it is hearsay evidence and does not fall within any of the exceptions to the hearsay rule: see *The Queen v. O'Brien*, [1978] 1 S.C.R. 591 (or, if it does not potentially fall within one of the established exceptions, it is not admissible on the principled approach to hearsay as set out in *R. v. Khan*, [1990] 2 S.C.R. 531, and subsequent decisions).

b) Position of the Parties

[71] Mr. Moazami submits that Mr. Fisher's conduct affected the credibility of the complainants and the integrity of the trial. He submits that had he been aware of the misconduct, he could have cross-examined the complainants on the incidents with Mr. Fisher, and that would have made them less credible. Furthermore, he would have chosen trial by jury, and would have considered not testifying. In addition, he submits that Mr. Fisher created a private Facebook account so he and the

complainants could communicate with each other, and that account has never been disclosed to him. He says that thus, there is a reasonable possibility that the overall fairness of the trial was affected. Additionally, he says that even if trial fairness was not affected, the integrity of the justice system has been called into question by the conduct of Mr. Fisher to the degree that a new trial must be ordered.

[72] Mr. Moazami submits that the time frame to consider whether a miscarriage of justice or an abuse of process was engaged continued throughout his trial to the imposition of his sentence.

[73] Mr. Moazami says that the fresh evidence is admissible. As the evidence he filed is hearsay, he relies on a category of evidence referred to as “investigative hearsay”, in relation to police reports and Crown counsel reports. In *R. v. Van*, 2009 SCC 22, the Court considered so-called “investigative hearsay” in the context of the Crown tendering inadmissible hearsay of the police investigation and the officer’s opinion that Mr. Van committed the offence. The Court concluded that the evidence was inadmissible, and a limiting instruction to the jury was required with respect to its use. Mr. Moazami says that the evidence is admissible as investigative hearsay, as he has filed Reports to Crown Counsel and the fruits of the police investigation into Mr. Fisher.

[74] The Crown submits that, with one exception, all of the conduct of Mr. Fisher occurred after the complainants or witnesses testified, and that therefore the evidence tendered does not and could not affect the fairness of Mr. Moazami’s trial. The Crown says that granting Mr. Moazami a new trial on the basis that Mr. Fisher’s conduct was so egregious that the integrity of the justice system was brought into disrepute would simply punish the complainants who have been victimized by both Mr. Moazami and Mr. Fisher. The Crown submits that the appropriate time frame to consider Mr. Fisher’s conduct is before each witness testified.

[75] The Crown says that there is no evidence that Mr. Fisher had a Facebook account where the complainants could communicate with each other.

[76] The Crown submits, with the exception of certain evidence in relation to the complainants and witnesses who were the subject of Mr. Fisher's criminal charges, that none of the fresh evidence is admissible. The evidence was submitted as exhibits appended to an articling student's affidavit. Other than Mr. Moazami's affidavit, it is all hearsay. There are no other first person affidavits filed. It submits that there is no reasonable possibility that the fairness of the trial was affected, nor that the administration of justice has been impugned. Therefore, the fresh evidence application must be dismissed.

c) Scope of Misconduct

[77] It is first necessary to examine the scope of the misconduct by Mr. Fisher. The Crown and Mr. Moazami agree on some of the conduct, but there is significant disagreement with respect to much of what is alleged.

[78] In terms of trial fairness, in this case, we agree with the Crown submission, that the appropriate time frame to consider Mr. Fisher's misconduct is prior to the testimony of each impugned witness. Conduct by Mr. Fisher after they testified could not affect Mr. Moazami's fair trial rights. We also agree, again, in this case, that when considering the "cumulative effect" of Mr. Fisher's conduct, to assess whether the integrity to the administration of justice has been impugned, it is when Mr. Fisher's conduct became known.

[79] As noted above, the investigation into Mr. Fisher began as a result of a complaint made on March 25, 2016, to the VPD by Z.C.

[80] A task force was established to investigate Mr. Fisher and question every willing complainant. Several witnesses involved in Mr. Moazami's case were interviewed. Criminal charges were laid against Mr. Fisher with respect to four women: Z.C., H.W., M.N. and E.S. H.W. and M.N. were complainants in the Avails trial, and E.S. was a witness. Z.C. was not involved in the prosecutions against Mr. Moazami.

[81] Mr. Fisher eventually pleaded guilty to offences in relation to Z.C. and H.W.

[82] The Crown accepts the evidence as stated in the court proceedings involving Z.C and H.W. and the sworn statements of M.N. and E.S. The Crown submits that otherwise, the evidence is double, triple and quadruple hearsay, which it is.

[83] It is important to examine the claims of Mr. Moazami in the context of the actual evidence that has been filed. The fresh evidence has been sorted into four categories based on the type of document. Category One are the Reports to Crown Counsel, Informations, agreed facts, and reasons for sentence in relation to Mr. Fisher. Category Two are the police investigation documents (including witness statements) into Mr. Fisher's conduct. Category Three are thousands of text messages. Category Four documents are the pleadings in a civil action by two individuals brought against Mr. Fisher and the VPD. The evidence is appended to the affidavit of an articling student. Other than Mr. Moazami's affidavit, there are no first-person affidavits. Mr. Moazami deposed that if he were aware of Mr. Fisher's misconduct, he would have elected a trial by jury, and considered not testifying.

[84] Mr. Moazami places some emphasis on the evidence Mr. Fisher gave at trial. Mr. Fisher was one of five police officers who testified on *voir dire* #16, relating to H.W.'s statements. He was cross-examined about his interviewing practices and specific aspects of some witness statements, and he explained the manner in which he approached interviews with the complainants. During cross-examination, defence counsel suggested that Mr. Fisher had an *animus* against Mr. Moazami, and that he was an advocate for the girls, both of which Mr. Fisher denied. His credibility was not at issue on the *voir dire*. In admitting H.W.'s videotaped statement to the police, the judge accepted the evidence of Mr. Fisher that H.W.'s statements were provided voluntarily and without threat or promise: *R. v. Moazami*, 2013 BCSC 2399 at para. 22. Mr. Fisher did not testify at any other point in the Avails trial.

[85] Mr. Moazami argues that Mr. Fisher's overall inappropriate conduct with nine of the eleven complainants, cumulatively, is sufficient to require a new trial. Mr. Moazami concedes there is no misconduct by Mr. Fisher in relation to S.K. or T.H.

[86] We will address the evidence in relation to the four women (M.N., H.W., E.S. and Z.C.) in which charges were laid against Mr. Fisher last. In addition to those four, Mr. Moazami claims that Mr. Fisher misconducted himself sexually with E.B., S.W. and I.T.

[87] He submits that Mr. Fisher had other improper conduct with complainants C.B., S.H., J.C., J.C.H., and witnesses L.D., E.V., and M.R.

[88] We will address the allegations more or less from the least egregious to the most serious.

[89] The complainant J.C. testified on September 30, 2013 and October 1, 2013. The only allegation regarding J.C. is that she asked Mr. Fisher for a job reference on December 8, 2014, and he agreed. There is no evidence as to whether he actually provided a reference. J.C. advised, through her mother, that Mr. Fisher did not act inappropriately with her. There is no evidence that Mr. Fisher's conduct affected or could have affected her evidence.

[90] The complainant C.B. testified on October 23, 2013. The only allegation regarding C.B. is that she contacted Mr. Fisher on March 23, 2016, to see whether her American boyfriend would be able to visit her in Canada. She gave Mr. Fisher the dates of his United States convictions. Mr. Fisher did checks and stressed it was important that the boyfriend tell the truth at the border and told her that he "can now apply for a temporary resident permit by contacting the Canadian consulate in Los Angeles. There is a fee". When interviewed by the investigators, C.B. said that Mr. Fisher never asked her to lie or change her evidence. She said he was never unprofessional with her. There is no evidence that Mr. Fisher affected or could have affected her evidence.

[91] The complainant S.H. testified on November 28 and November 29, 2013. The only evidence in relation to S.H., found in statements and investigation reports, is the hearsay evidence of L.M. (H.W.'s victim worker), that H.W. told her that Mr. Fisher told H.W. that H.W.'s "tits looked nice", in front of S.H. L.M. also said that Mr. Fisher

“may possibly” have had an inappropriate relationship with S.H. S.H. denied this, and said there was nothing inappropriate in Mr. Fisher’s conduct towards her. In her police interview, she said Mr. Fisher never asked her to change her evidence or lie. She said she had never met with Mr. Fisher alone, and there was nothing sexual about their relationship. In our view, there is no admissible evidence that Mr. Fisher affected or could have affected her evidence.

[92] E.V. was a witness at the trial. She testified on October 24, 2013. She told the investigators that Mr. Fisher was always professional with her, and there was no sexual contact. There is no evidence that Mr. Fisher’s conduct affected or could have affected her evidence.

[93] M.R. was a witness at trial, testifying for the defence on March 5, 2014. She told investigators that she had only met Mr. Fisher twice. There is no evidence that Mr. Fisher’s conduct affected or could have affected her evidence.

[94] The complainant J.C.H. testified on October 2 and October 3, 2013. The allegations made with respect to J.C.H. are from the Report to Crown Counsel, other investigatory statements, and text messages. The text messages revealed that on September 26, 2014, J.C.H. asked Mr. Fisher to run her boyfriend’s name as the police were looking for him. On October 24, 2014, J.C.H. again asked Mr. Fisher to run her boyfriend’s name for the same reason.

[95] The details, revealed in other texts messages, of that allegation of “misconduct” related to J.C.H. telling Mr. Fisher about an outstanding warrant and subpoena for her boyfriend who wanted to work out attending court. Mr. Fisher looked into it and texted: “His lawyer should arrange it with the Crown” and recommended he “go to the Crown office and they can serve him” with the subpoena. Later, J.C.H. had difficulty understanding why, after the substantive charge against her boyfriend was dropped, he still had court dates for a related breach charge. Mr. Fisher texted: “I can talk speak [sic] to ... Crown”.

[96] On October 28, 2015, Mr. Fisher told J.C.H. that they had arrested another “pimp”, and that “Damienne” [Ms. Damienne Darby was the senior prosecutor at Mr. Moazami’s trial] was prosecuting again. He told her the age range of the complainants, how many there were and that they were using drugs. On December 23, 2015, J.C.H. asked Mr. Fisher to help her boyfriend regarding a warrant out for his arrest, and Mr. Fisher said he would speak with Crown. It is unknown if he did so. In December 2016, Mr. Fisher dropped off a Christmas hamper to J.C.H. Also in December 2016, there are texts between Mr. Fisher and J.C.H. regarding helping her with a problem, which appears to be in relation to helping her with the Christmas hamper for her children. In 2016, he helped J.C.H. remove a sexual picture of herself from Facebook. Texts reveal that Mr. Fisher was worried that the post constituted child pornography. On December 25, 2016, Mr. Fisher texted J.C.H. and says he will explain the “Earl’s experience”, which appears to be in relation to going to Earl’s restaurant.

[97] When interviewed, J.C.H. told the investigators that Mr. Fisher picked her up and dropped her off at the courthouse a couple of times. J.C.H. told investigators that Fisher told her to be 100% honest at trial. She said that Mr. Fisher was always professional, and nothing sexual or inappropriate occurred between them. There is no evidence that Mr. Fisher’s conduct affected or could have affected J.C.H.’s testimony.

[98] L.D. was a witness in the trial, not a complainant. She testified on November 1, 2013. She testified that she used drugs with Mr. Moazami, knew him as a pimp, knew him by certain names, and exchanged Facebook messages with him. She was not cross-examined, and was referred to only briefly in the judge’s reasons.

[99] Mr. Moazami alleged that: L.D. met with Mr. Fisher alone, Mr. Fisher told L.D. background information about H.W., Mr. Fisher told L.D. that I.T. was not doing well, Mr. Fisher explained to L.D. what “babysitting” the complainants meant before she testified, and provided updates about L.D.’s ex-boyfriend.

[100] There is no evidence as to the timing of the information Mr. Fisher gave to L.D. about H.W. and I.T. (whether it was before she testified), and whether it even related to the matters about which she gave evidence.

[101] There was evidence that Mr. Fisher told L.D. about Mr. Moazami's breach conviction, but that took place more than two years after she gave her evidence, in February 2016.

[102] There is also no direct evidence from L.D. about whether L.D. previously knew what the term "babysitting" meant. The updates Mr. Fisher provided regarding L.D.'s ex-boyfriend were in relation to a peace bond L.D. had in respect of her ex-boyfriend, to protect her daughter. Mr. Fisher took a recorded statement from L.D. for the peace bond and gave her information about the court system online.

[103] In her statement to the investigators, L.D. said that Mr. Fisher never asked her to change her testimony, that he was "nice" to her, and that there was no sexual relationship. There is no evidence that Mr. Fisher's conduct affected or could have affected L.D.'s evidence.

[104] I.T. was interviewed by Mr. Fisher on January 27, 2012, and testified as a complainant at trial on October 31, 2013. Other than rumour and innuendo, there is no actual evidence that Mr. Fisher had sexual contact with I.T.

[105] Again, in statements to the police, in 2014, L.G. (a counsellor at RainCity Housing) says she confronted I.T. about Mr. Fisher. She said that I.T. said she did not want to get "cut-off" and needed money to support her drug habit. On February 28, 2014, Mr. Fisher took I.T. to a hair salon. The salon staff called the police as they were concerned about her condition, and that an older man was with her. Mr. Fisher lied to the officers who attended, as he told them he was "boosting her confidence" for testifying and that she was in witness protection (I.T. had already testified at this point). On August 16, 2016, Detective King told Sergeant Burchart he was aware of allegations of sexual misconduct by Mr. Fisher against I.T. On September 14, 2016, I.T. texted Mr. Fisher for money.

[106] On March 23, 2107, I.T. denied (through a worker) that Mr. Fisher had done anything inappropriate with her; she only had good things to say about him. There is no admissible evidence supporting the allegations regarding Mr. Fisher and I.T. There is no evidence that Mr. Fisher's conduct affected or could have affected I.T.'s evidence.

[107] S.W. was a complainant and testified at the Avails trial on November 12 to 15, 2013, and at the Obstruct trial on July 7 and 8, 2015. The evidence in relation to S.W. is that L.M. (H.W.'s victim worker) told the police that H.W. told her that S.W. told H.W. that Mr. Fisher had "asked to fuck her". H.W. told the police that Mr. Fisher kissed S.W. and had tried to sleep with her a few times. Mr. Fisher gave S.W. travel money, which was documented as proper Crown travel. S.W., when interviewed, denied that Mr. Fisher did anything to her. However, S.W. is one of two complainants who filed a civil suit against Mr. Fisher alleging sexual offences. Nevertheless, no affidavit was obtained from S.W. (or H.W.). Thus, in our view, there is no admissible evidence that Mr. Fisher engaged in misconduct with S.W. Nor is there any evidence that her evidence was affected or could have been affected by Mr. Fisher's conduct.

[108] E.B. was interviewed by video by Detective Constable McLachlan and Mr. Fisher on September 13, 2011. The interview continued by video with Mr. Fisher on October 7, 2011. It is not entirely clear from the transcript, but other police officers may have also been present. The videos were entered into evidence pursuant to s. 715.1, which permits the evidence of a witness under the age of 18 years taken by video to be tendered as the evidence, provided the witness adopts the statement on the witness stand. E.B. testified on October 28 to 30, 2013.

[109] According to a police statement, E.B.'s boyfriend said that E.B. told him that she had been giving Mr. Fisher "hand jobs" in exchange for money. This triple (or perhaps quadruple) hearsay statement is countermanded by E.B.'s statement to the police that Mr. Fisher had done nothing to her, and had always been professional.

[110] One year after giving her evidence, E.B. asked Mr. Fisher for money via text messages a number of times between October 2014 and December 2015. She received \$1,395 from Mr. Fisher via Western Union wire transfers, with the first payment sent in October 2014, and the last in 2015. The text messages show E.B. asked Mr. Fisher for money for various things, including to pay her bills and for a hotel room when she needed a place to stay. In March 2015, there are text messages seemingly arranging a meeting. E.B. called Mr. Fisher “babe” in the texts. None of the above constitutes evidence of conduct by Mr. Fisher that affected or could have affected E.B.’s evidence.

[111] I turn now to the more serious of the complaints made in relation to Mr. Fisher.

[112] M.N. was a complainant at the Avails trial, and testified on November 27, 2013. On March 3, 2014, she was recalled by Mr. Moazami to give evidence in relation to bank records and accounts (this recall evidence was ultimately uncontroversial).

[113] The Crown accepts what M.N. said in her statement. The sexual assaults against M.N. occurred between December 2013, and February and March, 2014. Mr. Fisher’s charges in relation to M.N. did not proceed.

[114] M.N. was clear in her statement that the sexual activity with Mr. Fisher first occurred about a month after she first testified. He asked her for a “hand job” in exchange for money. She did not want to, but she did because she was “dope sick” and needed the money. Similar acts occurred 3 to 4 times. He once took her to a hotel where he wanted to have sex with her, but she refused, so he masturbated in her presence. He gave her \$275 for her rent before they went into the hotel. On one occasion, he went to her hotel room to give her some money, and tried to entice her into sexual activity, but she refused. Between February 2014 and February 2016, M.N. texted Mr. Fisher at least 18 times asking for money.

[115] The bulk of M.N.'s evidence against Mr. Moazami was given prior to the commencement of Mr. Fisher's offences against her. M.N. also said in her statement to police that Mr. Fisher never asked her to lie or change her testimony. On the whole, the evidence demonstrates that Mr. Fisher's conduct, though egregious, did not affect, nor could have affected, M.N.'s evidence at the Avails trial.

[116] E.S. was a witness, not a complainant, in the Avails trial. She was interviewed by Mr. Fisher on January 27, 2012, and by both Mr. Fisher and Detective Tchang on January 8, 2013. E.S. testified on November 18, 2013. She knew Mr. Moazami as a drug dealer, and was his friend at one point. She recruited girls for Mr. Moazami, and placed ads for him.

[117] At the Avails trial, E.S. also gave evidence about a violent incident in Victoria (the "Victoria bear-spray incident"), corroborating E.B.'s evidence. E.S. had travelled with Mr. Moazami and E.B. to Victoria, where they worked out of a hotel room downtown. E.B. had received a substantial tip from one of the "johns", and E.B. and E.S. hid the extra money, giving the rest to Mr. Moazami. E.S. testified that she and E.B. then left the hotel to grab food, and ended up purchasing alcohol and cocaine, arriving back to the hotel hours later. During this time, Mr. Moazami had been calling and texting E.S. and E.B., sending them angry messages to return to the hotel. Eventually, they did. E.S. said that she went to take a shower, and when she emerged, Mr. Moazami was "screaming" and "raging". Mr. Moazami kicked E.S. and E.B. out of the hotel room, and began throwing their things from the balcony. At this point, E.S. was still dressed only in a bath towel. E.S. managed to get back into the hotel and up to the room, where she testified that Mr. Moazami had maced the hallway with bear-spray to prevent them from returning. E.S. testified that the bear-spray burned her eyes and skin. A Facebook message sent by Mr. Moazami later corroborated his use of the bear-spray. After managing to grab some of her things from the room, E.S. testified that she ran back to the elevator. She stated that Mr. Moazami jumped in the elevator with her and punched her in the back of the head. E.B. testified that she saw Mr. Moazami punch E.S.

[118] Mr. Fisher was charged with sexually assaulting E.S. between October 22, 2011 and June 15, 2012. Mr. Fisher was charged with breach of trust in relation to E.S. between October 22, 2011, and June 15, 2012. These charges were stayed. The Crown accepts E.S.'s sworn statement as described below. The Crown does not accept E.S.'s unsworn statement. The Crown admits that Mr. Fisher kissed E.S. at some point before the Avails trial ended.

[119] On January 3, 2017, E.S. was interviewed by the investigators. This is the statement the Crown emphasises was unsworn. She told them that the first time she met Mr. Fisher, he offered her weed. She told them the second time he met her, he took her to Earl's and it "felt like...a date". She explained, during this statement, that the meeting at Earl's took place prior to Mr. Moazami's trial. In 2012, he arrived at her house to speak with her. She had just gotten out of the shower and was wrapped in a towel. He wanted to interview her right away, but her mother intervened, and said that she would change first. She went out and sat in his car, and he kissed her on the lips and gave her money. Afterwards, he texted and apologized to her. The next time she met him, he took her to the Grouse Mountain parking lot, and asked her to give him a blow job, which she reluctantly did. She said Mr. Fisher told her that he would help her with the "court stuff", as she was afraid that Mr. Moazami was going to be released.

[120] On January 11, 2017, E.S. gave the police a "KGB" statement, a statement where she was under oath, and warned of the criminal consequences of making a false statement: *R. v. B(K.G.)*, [1993] 1 SCR 740. In addition to the kissing incident referred to above, she told the police that Mr. Fisher added her to his Facebook account, and requested naked photos of her. She did not send him naked pictures. She recounted going to Earl's, but was not as clear in terms of the chronology. Bank records and a receipt show that Mr. Fisher visited the Earl's location E.S. spoke about on June 15, 2012. Mr. Fisher gave E.S. money, and her friend suggested she blackmail him. E.S. said Mr. Fisher gave her \$20 the day of the kiss, and around \$200 another time because she told him she needed it to pay a debt or she would be killed.

[121] E.S. refused to recount the incident she had disclosed at the Grouse Mountain parking lot during the *KGB* statement. She told the police that Mr. Fisher never asked her to lie or change her evidence. She said, “[Mr. Fisher] never told me what to say or make [Mr. Moazami] look worse than he already did, like I don’t think he really could have anyways He looked pretty bad anyway”.

[122] E.S. provided the police with her Facebook password, but they could not find anything in relation to Mr. Fisher as he had already deleted his account.

[123] E.S. has also filed a civil suit against Mr. Fisher, the City of Vancouver, the VPD, the Province, and Jane and John Doe (alleged to be Mr. Fisher’s supervisors).

[124] In order to assess the effect of whether Mr. Fisher’s conduct in some way affected her evidence at trial (or whether there was a reasonable possibility), it is necessary to examine carefully the prior statement given by E.S. in respect of Mr. Moazami on January 8, 2013, which was primarily taken by Detective Tchang, although Mr. Fisher was present, and her testimony at trial.

[125] In her statement from January 8, 2013, E.S. told the police that she met Mr. Moazami when she was 15 years old. She said they were good friends, and he would give her free drugs. Sometimes they would do drugs together, often at his various residences. She confirmed these details in her testimony.

[126] E.S. told police that she figured out that Mr. Moazami was making money through the prostitution of the complainants. E.S. explained that Mr. Moazami would pretend to be the girls’ boyfriend, and that they would believe it. She said that when she started hanging around the girls more, she started to figure out that they were not “working” for themselves, but for Mr. Moazami. She told police that Mr. Moazami told her he was “taking care” of the girls, so they would not work on the street. She noticed, however, that they never had money, and they were never allowed to leave. E.S. also told police that despite Mr. Moazami’s assurances that he was protecting the girls, she would notice things that made her believe differently (for example, threatening to make them pay for anything, mocking their drug habits, etc.). Each of

these details were confirmed and restated in her testimony. E.S. told the police, in her statement, that Mr. Moazami would always ask the girls “where’s my money” in Farsi, or “poolan coo” [phonetic]. E.S. said that “poolan coo” was also his caller I.D. name. This exact detail she confirmed in her evidence at trial.

[127] She told police that she knew that men were coming to the apartment to have sex with the girls, for example, S.W. She said that Mr. Moazami never tried to get her to “work” for him, but did ask her to write the online ads, which she occasionally did. E.S. told police in her statement that she was “[Mr. Moazami’s] spy pretty much on these girls”. Her testimony detailed the portion of her statement about her role in the online ads and her role in “watch[ing] the other girls”, stating, however, that it was “not necessarily to spy”. Her testimony also confirmed that she knew why men were frequenting the apartment.

[128] In her statement, E.S. told the police about how she and Mr. Moazami hid in the laundry room of the apartment “twice” when the complainants were meeting with “johns”. She confirmed this in cross-examination, stating that while she and Mr. Moazami would typically leave the apartment, “only maybe once or twice” she and Mr. Moazami hid in the back room (which was a “laundry room or a storage room”). In her statement to police, she explained that Mr. Moazami had set up surreptitious cameras in stuffed animals to film the complainants while they were working, which she confirmed in her testimony. In her statement, she told police that when a “date” came over, she would stay in the laundry room or she would go “like outside”, but did not mention being in the bedroom during this time. In her testimony, she stated that there were occasions where she was in the bedroom while a complainant would be working.

[129] Also in her statement, E.S. told the police about Mr. Moazami’s methods of dealing with the girls’ menstruation while working, including the use of sponges and red condoms. E.S. subsequently testified to these exact details.

[130] E.S. told the police in her statement about Mr. Moazami’s violence towards the girls’ pets. She was not asked about this at trial. E.S. said in her statement that

on a couple of occasions she visited Mr. Moazami's mother's house, but never met his mother. She was also not asked about this at trial.

[131] The most contentious portion of E.S.'s evidence concerned the Victoria bear-spray incident. As mentioned earlier, E.S.'s evidence on this particular incident was corroborated by the testimony of E.B., and by Facebook messages sent by Mr. Moazami. In her police statement on January 8, 2013, E.S. reports substantially the same details regarding the Victoria bear-spray incident as she did in her testimony.

[132] In her statement, E.S. said she and E.B. went to Victoria with Mr. Moazami when E.S. was 16 years old. E.S. told police the purpose of the trip was for Mr. Moazami to make money from "E.B. turning tricks"; this was confirmed in her evidence at trial. She told police they stayed in a hotel on Douglas Street, by the Shark Club. She recounted that she and E.B. had left the hotel at one point, and got lost drinking and "looking for dope". She told police that when they got back to the hotel, Mr. Moazami punched her in the head and bear maced the hallway, so "[she] couldn't get back in". She told police that the bear spray "[stuck] in the air". She also said that Mr. Moazami cut E.B.'s cheek. In the end, she said her mum came and picked her up and took her home. She testified consistently to all these details, as canvassed in para. 117 of these reasons.

[133] In E.S.'s sworn statement, she told investigators that Mr. Fisher never asked her to lie or change her evidence. Mr. Moazami has not demonstrated anything to suggest that Mr. Fisher's admitted misconduct with respect to E.S. altered or affected her testimony. Thus, in our view, there is no evidence that Mr. Fisher's misconduct in relation to E.S. affected or could have affected her evidence against Mr. Moazami in the Avails trial.

[134] On October 26, 2015, Z.C. gave a sworn statement to Mr. Fisher in an unrelated trial. She was a complainant in a case involving another "pimp" by the name of Bannon.

[135] Mr. Fisher was charged with sexually assaulting Z.C., and committing breach of trust in relation to Z.C., between August 22, 2015 and December 7, 2015. The agreed statement of facts in Mr. Fisher's trial reveals that there were three assaults against Z.C. Between August 22 and 30, 2015, Mr. Fisher kissed Z.C.; on November 21, 2015, Mr. Fisher kissed Z.C.; and on December 7, 2015, Mr. Fisher kissed Z.C. She was 17 years old at the time of these offences against her.

[136] On March 25, 2016, Z.C. was at a rave party in Vancouver and she was apprehended by security for drug possession. She was taken to the police, and subsequently disclosed the kissing incidents with Mr. Fisher. As a result, an investigation into Mr. Fisher's conduct commenced.

[137] The VPD investigation into Mr. Fisher's conduct included engaging Z.C. and H.W. (discussed below) as police agents (on June 15, 2016, and September 23, 2016, respectively), and intercepting phone calls and recorded meetings with Mr. Fisher.

[138] Though Z.C. was not involved in Mr. Moazami's case, Mr. Fisher's conduct in relation to her is relevant to the overall picture of what occurred. However, Mr. Fisher's misconduct towards Z.C. could not have affected the fairness of Mr. Moazami's trial.

[139] In relation to H.W., Mr. Fisher was initially charged with sexual assault of H.W., and obstructing justice by misleading a police officer in relation to an offence committed by H.W. (referred to as the "Burnaby stabbing incident"). Mr. Fisher pleaded guilty to committing a breach of trust by kissing H.W. for a sexual purpose between December 3 and December 6, 2015.

[140] H.W. first gave three videotaped statements concerning Mr. Moazami to the police: on March 17, August 26 and December 14, 2011. She admittedly lied to the police in the first statement, identifying herself as S.W., and answering the questions as if she were S.W. The second statement was made when she was in a "safe" house in Calgary. Detective McLachlan and Mr. Fisher interviewed her, and she

gave details regarding her dealings with Mr. Moazami. The third statement was in relation to her dog, Gucci. H.W. was aiding the police in identifying Gucci. H.W. explained how Mr. Moazami had possession of Gucci, and was refusing to give Gucci back until H.W. paid Mr. Moazami \$11,000.

[141] H.W. testified on October 15 to 18, and October 22, 2013. Her videotaped statements were first tendered by the Crown as admissible pursuant to s. 715.1 of the *Criminal Code* (allowing admission of a videotaped statement given by a person under age 18 if adopted as true). H.W. did not adopt the statements as true: she had significant memory loss, to the point the trial judge permitted the Crown to cross-examine H.W. as an adverse witness. The Crown called the officers who took the statement, including Mr. Fisher. The second statement was ultimately admitted under the principled exception to the hearsay rule, as meeting the necessity and reliability test: see the Oral Ruling re Admissibility of Statements of H.W., indexed as 2013 BCSC 2399 (the “Ruling”). The trial judge stated, at para. 15 of the Ruling, that it was “difficult to imagine a less credible witness than H.W.”, and held that she would only give weight to the parts of H.W.’s evidence that were corroborated by other evidence.

[142] Mr. Moazami was charged with five counts in relation to H.W.: procuring to become a prostitute (Count 24), living on the avails of prostitution with coercion (Count 25), controlling her for the purpose of exploitation (Count 26), sexual exploitation of a young person (Count 27) and sexual assault (Count 28). The trial judge concluded as follows: Count 24, acquitted; Count 25, acquitted of coercion, but convicted of included offence of living on the avails of prostitution of a person under the age of 18 years; Count 26, acquitted; Count 27, convicted; and Count 28, acquitted.

[143] Mr. Moazami alleges that Mr. Fisher began acting inappropriately with H.W. in 2011. We will address each complaint to ascertain the true scope of Mr. Fisher’s misconduct in relation to H.W.

[144] The complaint to the police in relation to H.W. was through a victim worker, L.M., on May 27, 2016. L.M. reported a number of incidents apparently told to her by H.W.; however, they had occurred within the previous year.

[145] Mr. Moazami alleges that Mr. Fisher did favours for H.W. as an underage sex worker, including: tracking down “johns” to apologise for assaulting her; giving her money; obtaining a no-contact order for her against a person who threatened that she would “be exposed”; and taking her to detox. Mr. Moazami also alleges that Mr. Fisher engaged in misconduct relating to H.W., including making inappropriate comments to her; and touching her breasts.

[146] The following is from the Agreed Statement of Facts filed in Mr. Fisher’s sentencing:

81. Fisher helped [H.W.] in many ways:
 - a. She had phoned him 3 times in applying for jobs, to find out what her SIN number was. He finally started keeping her SIN in his phone so he could provide it to her when she needed it;
 - b. He served a warning letter to a male who was sending her threatening text messages. That male then left her alone;
 - c. He tracked down a man with whom she had had a “bad date”;
 - d. He (and the CEU) worked with her for 5 years. They took her to the emergency room and detox when she was dope sick. She called Fisher when she felt overwhelmed by her drug addiction;
 - e. He worked with American authorities in an attempt to have a photo posting of [H.W.] removed from the internet. A male had posted this photo without [H.W.]’s consent and [H.W.] wanted it taken down; and
 - f. He responded to her questions about the laws surrounding prostitution related offences.

[147] The evidence does not disclose that Mr. Fisher conducted himself inappropriately until, at the earliest, 2014. The only evidence of Mr. Fisher touching H.W.’s breasts prior to 2014 was in the double hearsay police statement provided by

L.M., who said that H.W. told her that Mr. Fisher touched her breasts when she was 17. The offence Mr. Fisher pleaded guilty to occurred in December 2015.

[148] The evidence does disclose that Mr. Fisher made supportive efforts for H.W. early on. H.W. told investigators that, in the beginning, Mr. Fisher was always professional, and she became close to him. He was “like a father” to her, which is why his breach of trust was aggravated.

[149] Mr. Moazami alleges that on October 22, 2013, H.W. testified that Mr. Fisher promised her \$50,000. This is evidence that was canvassed at trial. On appeal, Mr. Moazami tried to characterize it as Mr. Fisher offering H.W. money to testify, when it was nothing of the sort. H.W. testified that Mr. Fisher called her and told her that he was getting two million dollars and that she would get \$50,000 for testifying; she should see one of the Crown counsel to receive it. H.W. testified that she found out that the \$50,000 “was a joke”. In 2012, prior to trial, as a matter of public record, the federal government had announced two million dollars in funding for federal, provincial and municipal police departments aimed at anti-human trafficking measures.

[150] Mr. Moazami alleges that in October 2014, the investigation showed an unusual level of familiarity between Mr. Fisher and H.W., including communication on both “work” and personal Facebook accounts. This is a mischaracterization of the evidence. H.W. knew that Mr. Fisher had two accounts, and he asked her to use his work Facebook account for purposes of communication.

[151] On January 22, 2015, H.W. texted Mr. Fisher for advice about seeing an underage client. Mr. Moazami says that Mr. Fisher gave her advice. The evidence demonstrates that what Mr. Fisher did was tell her what the law said, and that he could not “give her permission”.

[152] On January 29, 2015, Mr. Fisher told H.W. about other unrelated investigations. H.W. said that an individual (it is unclear who this person was) was sending her death threats. Mr. Fisher told H.W. to keep all the messages. H.W. was

asking Mr. Fisher to help her to delete something this individual had posted on Facebook. That same day, H.W. asked Mr. Fisher if CH2 was a missing person; Mr. Fisher did not reply.

[153] Mr. Moazami alleges that on June 8, 2015, Mr. Fisher advised H.W. how to cover up the Burnaby stabbing incident. On that date, a physical altercation took place in Burnaby between the male victim and another male, and the victim was stabbed. A female was seen trying to jump on the victim's back. The male suspect and the female left in a car, later determined to be stolen. The victim told police he had met with the female to buy drugs.

[154] H.W. admitted to being involved in the Burnaby stabbing incident, but was given immunity when she cooperated in the investigation into, and prosecution of, Mr. Fisher. The Agreed Statement of Facts in Mr. Fisher's sentencing sets out in detail what occurred, and is summarized below.

[155] H.W. gave a statement to police on September 16, 2016. She told investigators that, on the day of the Burnaby stabbing incident, she and her ex-boyfriend travelled to Burnaby to sell the victim Suboxone. She said that after selling the Suboxone, a physical altercation began between her ex-boyfriend and the victim, and she believed the victim was going to kill her ex-boyfriend. In defence of her ex-boyfriend, she stabbed the victim with a knife, and then fled the scene.

[156] In her statement, H.W. explained her communications with Mr. Fisher subsequent to the Burnaby stabbing incident. The day after the incident, on June 9, 2015, H.W. texted Mr. Fisher and asked him to meet her that day, in private. By way of text message, Mr. Fisher agreed to meet but wrote: "Adam will be with me. We can still talk in private though ..." They met that day and discussed the Burnaby stabbing incident. H.W. learned from Mr. Fisher that: the victim's injuries were not life-threatening, the police did not know who the female at the scene was, and the victim knew details about H.W.'s ex-boyfriend.

[157] Then, on June 10, 2015, Mr. Fisher called the Burnaby RCMP and spoke with Constable Grant. He advised that he had received a phone call from H.W. who had witnessed the stabbing, and provided the Burnaby RCMP with H.W.'s information. Constable Grant attempted to text message H.W., but she did not respond.

[158] That same day, Mr. Fisher texted H.W., telling her that he had spoken with Burnaby RCMP and that they wanted to meet with her. He provided H.W. with contact information for Constable Grant. H.W. expressed to Mr. Fisher hesitation about reaching out to the Burnaby RCMP, and Mr. Fisher responded: "They will definitely be calling you. Going to them is way better for you. Get ahead of it instead of it chasing you".

[159] On June 14, 2015, Constable Von Ferson emailed Mr. Fisher to request his assistance in contacting H.W. Mr. Fisher responded on June 25, 2015.

[160] On June 15, 2015, H.W. began using a new phone number. From June 16, 2015 onwards, the text messages between H.W. and Mr. Fisher used only her new number. Between June 16 and June 18, 2015, H.W. and Mr. Fisher exchanged 15 text messages. Between June 15 and June 24, 2015, H.W. and Mr. Fisher exchanged 7 phone calls. The last of these lasted more than 22 minutes.

[161] Mr. Fisher's reply email to Constable Von Ferson, dated June 25, 2015, stated that Mr. Fisher had been trying to reach H.W. by various means, and that H.W. had called him and left him a message. Mr. Fisher provided Constable Von Ferson with the phone number Mr. Fisher claimed H.W. had called him from when she left the message—but provided H.W.'s *old* phone number. Mr. Fisher said he had tried calling that number, but had been unable to reach H.W. He said that he did not know where H.W. resided, but stated: "If I find a way to reach her I will pass on your information and ask her (again) to call you".

[162] Mr. Fisher never provided the Burnaby RCMP with H.W.'s new number, and H.W. never spoke with the Burnaby RCMP regarding the Burnaby stabbing incident.

[163] Mr. Moazami alleges that Mr. Fisher deleted information from the police report to “cover up” the Burnaby stabbing incident. There does not appear to be any admissible evidence that this actually occurred. Rather, the evidence is from the investigator’s report. That report was based on the support worker’s statement, which in turn was based on what the support worker said she was told by H.W. about what Mr. Fisher told H.W. he would do.

[164] On November 3, 2015, H.W. texted Mr. Fisher and asked for advice regarding a rental for an in-call (sex trade work). Mr. Moazami suggests that Mr. Fisher then provided her advice on what to do. The actual texts are as follows:

FISHER: I’m not giving permission for anything. Just advice. Be careful who you deal with. Make sure they can be trusted.

H.W.: That’s not to [sic] bad

H.W.: Oh okay

FISHER: They would be legally responsible for rent and any damages.

H.W.: If I am putting it in my friends [sic] name because they won’t rent to me. Whould [sic] that person be liable for anything?

FISHER: It’s a risk but not big.

...

FISHER: There will be condo rules about running a business from the unit. Most don’t allow business in the place. The only criminal law Would be receiving a benefit from prostitution but there are exemptions to that law. We aren’t sure if renting out a place by the hour is illegal. Also there much interest [sic] in investigation unless a woman is being exploited.

H.W.: Am I breaking a law, or am I like liable for anything, if I rent a condo, & then rent it out as an Incall to my gfs? Like for a daily rate?

[165] Mr. Moazami says that Mr. Fisher on two occasions told H.W. about in-call locations that were about to be “busted”. One of the in-call locations was run by H.W., and one by C.D.

[166] In respect of the first occasion, on November 3, 2015, H.W. asked Mr. Fisher about renting out a condo. Immediately after, H.W. was working out of a condo owned by C.D. On November 19 and 25, 2015, H.W. and Mr. Fisher exchanged text messages about an underage girl (“S2”) working there. It was during this time that H.W. informed C.D. that the police would be investigating the condo, and S2 was

kicked out. At one point, M.N. confirmed with Sergeant Jette that “S2” was one of her working names.

[167] Concerning the second occasion, H.W. told investigators that an underage girl (N.V.) was working and that, as a result of Mr. Fisher’s tip about a possible “bust”, she kicked N.V. out. H.W. said that, on March 21 and March 22, 2016, Mr. Fisher provided her with further information about N.V. This is therefore likely when the second in-call incident took place.

[168] As the Crown points out, both incidents arose years after H.W. gave her police statements in relation to Mr. Moazami and testified at trial.

[169] Mr. Moazami also says that Mr. Fisher helped H.W. recruit girls to work in the sex trade. Mr. Moazami points to “CH2” as an example. However, text messages between Mr. Fisher and H.W. suggest that Mr. Fisher did not introduce H.W. and CH2, but rather that they already knew each other. Those text messages do not evince any misconduct on the part of Mr. Fisher in relation to either H.W. or CH2.

[170] On January 31, 2016, H.W. asked Mr. Fisher for help to find her father.

[171] On October 2, 2016, H.W. told investigators that Mr. Fisher was, at some point, instructed by his superior not to meet H.W. in the absence of his partner because of rumours at CEU that they were having sex. H.W. said, however, that she continued to meet up with Mr. Fisher alone. H.W. told investigators that even if Mr. Fisher’s partner was present, Mr. Fisher and H.W. would “still talk privately”, for example, “around the corner”.

[172] On December 6, 2016, Mr. Fisher told H.W. to delete all texts and Facebook messages between them. By this time, H.W. was a police agent, and did not delete the information.

[173] Thus, it is clear that the misconduct with H.W. commenced after she testified. In any event, the trial judge clearly did not rely on her evidence, except where it was corroborated by other witnesses.

[174] The facts, which the Crown accepts in the absence of an affidavit of H.W., in relation to Mr. Fisher's plea are set out in the provincial court judge's reasons for sentence, indexed as 2018 BCPC 210:

[27] On December 3, 2015 (after the Moazami trial), [H.W.] sent a text message to Mr. Fisher. Mr. Fisher responded asking [H.W.] to meet with him to discuss an investigation into a pimp. Mr. Fisher met [H.W.] in his personal vehicle alone.

[28] While in his vehicle with [H.W.], Mr. Fisher complimented her on her physical appearance calling her attractive. They chatted for about fifteen minutes and as they were saying goodbye they hugged. Mr. Fisher asked [H.W.] for a goodnight kiss and he kissed her on her lips.

[29] [H.W.] exited Mr. Fisher's vehicle and began to cry. She was upset over the kiss in his vehicle. She called her ex-boyfriend to pick her up. Following the kissing incident, [H.W.] told the police that she began to drink every day. At the time of this incident [H.W.] felt that she and Mr. Fisher were very close. She viewed him as a father figure. She trusted him more than anyone else in her life.

Analysis

[175] The issues in this case have been raised, for obvious reasons, for the first time on appeal. Thus, this Court is addressing the issues of miscarriage of justice and abuse of process in the first instance. Both carry similar tests, invoking trial fairness and the integrity of the administration of justice.

[176] It was not argued by either party that the abuse of process doctrine falls within the miscarriage of justice power of the appellate court (s. 686(1)(a)(iii)), but was argued as a separate doctrine giving rise to a separate remedy, as it would had it been considered in the trial court. We do not think that is the correct approach when the appellate court is considering the issue for the first time on appeal, nor have we found a case that has addressed this issue. It seems to us that when the issue of abuse of process is raised for the first time on appeal, this Court's ability to give a remedy lies in whether there is a miscarriage of justice pursuant to s. 686(1)(a)(iii). The tests are similar (or perhaps identical in the appeal context), so that the conclusion on one would follow the other. Thus, if this Court found an abuse of process, then it follows that there has been a miscarriage of justice and the remedy falls within s. 686(1)(a)(iii).

[177] Given that we would reach the same conclusion regardless of the analytical approach to the issues, and there was no issue raised or argument on the point, we will say no more regarding the interplay between the statutory provision and the doctrine of abuse of process.

[178] Mr. Moazami submits that the cumulative effect of the evidence in relation to Mr. Fisher's misconduct satisfied the "reasonable possibility" test set out in *Taillefer*. He says that in a new trial he would be able to cross-examine the complainants, and Mr. Fisher, on the text messages and other allegations, undermining their credibility. The test, however, is not whether there is a reasonable possibility that the fresh evidence would be useful in a new trial, but whether it could have affected the outcome or the fairness of the trial under appeal.

[179] Mr. Moazami submits that all the evidence meets the test in *Taillefer* as it is reliable on the basis of "investigative hearsay".

[180] The Crown says that none of the evidence, other than that which has been conceded, is admissible. It is all otherwise hearsay, and therefore inadmissible at the outset.

[181] In our view, the Crown is correct. Mr. Moazami's fresh evidence has been submitted as appended to the affidavit of an articling student. No one can be cross-examined on the evidence provided, except for Mr. Moazami on his affidavit (and he was cross-examined before this Court on that affidavit). In our view, the evidence does not meet the bare threshold of admissibility.

[182] Investigative hearsay is evidence that can set out the narrative of a police investigation. As noted above, it does not make the evidence admissible for the truth of the contents, which is what is required for the evidence to assist Mr. Moazami. Mr. Moazami argued that he was not tendering the evidence for the truth, but to show that had the evidence been available before or at trial, Mr. Moazami would have been able to cross-examine, and pursue the potential for undue influence. As already shown, only one witness, E.S., could have been cross-examined at trial as

all of the other alleged conduct occurred after the complainants had given their evidence. In our view, the fresh evidence is not admissible as “investigative hearsay”: see *Van* at paras. 26 and 38.

[183] However, it is not necessary to decide the case solely on that basis. Assuming that the evidence is in an admissible form, the best that could be determined for Mr. Moazami based on the evidence filed (including that filed by the Crown) is that Mr. Fisher’s impugned conduct with any of the complainants occurred after they testified. The one exception was M.N., who was recalled and gave uncontroversial evidence in relation to financial records.

[184] In *R. v. Johnston*, 2019 BCCA 107, in an application for disclosure in this Court, the Court concluded that there was no reasonable possibility that events that occurred after a witness testified could have affected his credibility, and were therefore not relevant:

[85] To begin with, I see no basis for concluding that post-trial management of Person Y within the corrections system after he was admitted into the WPP [witness protection program] could be relevant in the prosecution of the appeal. I do not see a reasonable possibility that this could have affected Person Y’s testimony or challenges to his credibility, nor could it have been disclosed prior to trial. In my view, the records relating to Person Y’s WPP status and time in custody after he testified and following his acceptance into the WPP are irrelevant. The appellants’ applications for these records must be dismissed.

[185] Even if the evidence were admissible, it is clear that the only witness whose evidence could have been compromised by Mr. Fisher’s odious actions was that of E.S. Her evidence required careful scrutiny. Her detailed statement, albeit given in 2013, was consistent with her trial evidence. The most contentious part of her evidence, relating to the bear-spray incident, was corroborated by E.B. and Mr. Moazami. She was clear in her sworn statement to the investigators that Mr. Fisher never asked her to change or alter her evidence.

[186] Whether there was a miscarriage of justice, or an abuse of process, in this case is fact-driven. No one disputes that Mr. Fisher’s conduct was abhorrent, and breached the highest of trusts in terms of the women whom he offended against.

However, based on the timing of his actions, it is clear that his conduct did not in any way affect the fair trial rights of Mr. Moazami. There is no evidence that supports the argument that such rights were affected. Save for E.S., all of the conduct alleged occurred after the testimony was given at trial. There is no evidence capable of supporting the allegation that the evidence of any of the complainants or witnesses was changed to the prejudice of Mr. Moazami.

[187] We have addressed E.S.'s testimony above. In our view, her evidence was not tainted by Mr. Fisher's conduct. And even if it were, her evidence was of little significance in the overall trial. She was not a complainant, and the gist of her evidence was repeated by a number of other witnesses.

[188] Mr. Moazami's arguments on trial fairness that he would cross-examine the complainants on Mr. Fisher's contact with them at a new trial, or impugn their credibility somehow, are irrelevant. Similarly irrelevant is his evidence that he would have elected a trial by jury, or considered not testifying. The question is not what Mr. Moazami would do if he had a new trial, it is whether there was a reasonable possibility that Mr. Moazami's trial was unfair. The answer is a resounding no.

[189] Turning to the residual category, which is concerned with the repute of the administration of justice, the question is whether, cumulatively, Mr. Fisher's conduct was so egregious that a new trial is required to restore the public's faith in the administration of justice.

[190] In our view, when balancing the prejudice to the integrity of the justice system, the answer again is a resounding no. Mr. Fisher's conduct was appalling. Nothing we say in any way condones his actions as revealed in this case. Mr. Fisher has been convicted and punished for his conduct, and lost his career. To give the benefit of a new trial to Mr. Moazami, requiring the complainants to testify again, would, in our view, bring the administration of justice into disrepute and impugn the integrity of the justice system. H.W., E.S., M.N. and Z.C. were abused by Mr. Fisher *and* Mr. Moazami. It defies logic to conclude that the administration of justice requires that Mr. Moazami receive a new trial based on Mr. Fisher's conduct.

d) Disclosure of the Facebook Accounts

[191] Mr. Moazami complains that Mr. Fisher deleted his Facebook account that had been set up for the complainants. He submits that this was important information, and tantamount to the destruction of evidence by the police.

[192] Mr. Moazami has been aware that Mr. Fisher had a Facebook account since 2015. Indeed, Mr. Fisher testified about his Facebook account during the Obstruct trial. He testified that he set up an account so he could communicate with the complainants, not so the complainants could communicate with each other.

[193] In March 2014, the defence made an application relating to Facebook evidence, namely “accidental captures”, which are messages unexpectedly gathered by the police in the course of the investigation. In an *in camera* proceeding on March 10, 2014, the judge dismissed the application due to the lengthy delay and because Mr. Moazami had “failed to establish the likely relevance of the records, because the accused [had] failed to demonstrate that the records are necessary to permit him to make full answer and defence”, and that it was not in the interests of justice to grant the application. No appeal is taken from that ruling.

[194] The failure of the police to seek an order producing documents from Facebook pursuant to the *Mutual Legal Assistance in Criminal Matters Act*, R.S.C. 1985, c. 30 (4th Supp.), was raised before this Court during an application for further disclosure, but this Court accepted the Crown’s explanation that there were insufficient grounds for such a request: *R. v. Moazami*, 2020 BCCA 3 at paras. 54, 58–59. In addition, this Court did not find it necessary to appoint a special commissioner to investigate the disclosure issues: at para. 60.

[195] The evidence suggests that Mr. Fisher had two Facebook accounts. One was a work account, and the other may have been a personal account. Mr. Moazami argues that he should obtain a new trial on the basis that he should be entitled to explore the issue of Mr. Fisher’s Facebook accounts. There is no evidence that the complainants were communicating with each other through the Fisher Facebook accounts. This Court has already concluded that there was insufficient relevance to

order further disclosure. Mr. Moazami was invited by this Court in his earlier application to make further applications for records, but did not pursue that avenue of disclosure.

[196] There is nothing beyond speculation that there were Facebook accounts by which surreptitious communication between the complainants was occurring. It appears to us that Mr. Moazami is looking for something that *might* have undermined the evidence of the complainants as a result of what *might* have been found on the Facebook account. There is no evidence, for instance, that the Facebook accounts were set up before the complainants gave their initial statements.

[197] In our view, the fresh evidence does not meet the test in *Dixon* and *Taillefer*, or *O'Brien*, *Teneycke* or *Jia*.

[198] It follows that we do not give effect to this ground of appeal and we refuse to admit the fresh evidence.

Ineffective Assistance of Trial Counsel

[199] The second issue on appeal concerns Mr. Moazami's allegation of ineffective assistance of trial counsel.

a) Legal Framework

[200] Ineffective assistance of counsel is capable of producing a miscarriage of justice that undermines the verdicts reached. Usually a submission of this ground of appeal requires the admission of fresh evidence as provided for in s. 683(1)(d) of the *Criminal Code*.

[201] In this case, Mr. Moazami's complaints of ineffective assistance of counsel rely on the record, and it is the Crown's application before us to adduce fresh evidence from trial counsel in answer. That application, too, is assessed on the general principles regarding fresh evidence discussed above. In respect of an issue

of ineffective assistance of counsel, this Court in *R. v. Hamzehali*, 2017 BCCA 290, analyzed the issue this way:

[34] The evidence tendered does not relate to a factual matter in terms of an element of the offence. ...

...

[36] ... In *R v Dunbar, Pollard, Leiding and Kravit*, 2003 BCCA 667, this Court said:

[35] The most significant modification of the *Palmer* principles, where the fresh evidence goes to the integrity of the trial process, is the relaxation of the due diligence criteria: *R. v. Appleton* (2001), 156 C.C.C. (3d) 321, 55 O.R. (3d) 321 ¶16-17 (C.A.).

[36] Where the fresh evidence goes to the integrity of the trial process, appellate courts also have not rigidly adhered to the procedure for admitting fresh evidence on appeal set out in *R. v. Stolar*, [1988] 1 S.C.R. 480, 62 C.R. (3d) 313, 40 C.C.C. (3d) 1: see, e.g., [*R. v. Joannis*, [1995] O.J. No. 2003 (C.A.)] at 43-44; *R. v. W.W.*, (1995), 25 O.R. (3d) 161, 100 C.C.C. (3d) 225 at 233-34 (C.A.); *R. v. Peterson* (1996), 27 O.R. (3d) 739, 106 C.C.C. (3d) 64 at 80 (C.A.); *R. v. Dean* (1997), 95 B.C.A.C. 278, 39 B.C.L.R. (3d) 287 ¶73. In each of these cases, the court admitted fresh evidence so that it could properly evaluate the integrity of the trial process. This inquiry differs from the usual situation contemplated in *Stolar* where the fresh evidence goes to a substantive issue at trial and a ruling that it is admissible means, according to the fourth *Palmer* criterion, that the fresh evidence could reasonably be expected to have affected the result at trial. Instead, where the fresh evidence is adduced to challenge the integrity of the trial process, the fresh evidence can be admitted and the question of whether a miscarriage of justice occurred then assessed to determine whether a new trial is required.

[37] Although the due diligence factor and strict *Stolar* procedure may be disregarded in the context of the present case, the other *Palmer* criteria remain applicable. In particular, the relevance of the fresh evidence and its credibility are important factors to consider: *R. v. Hector* (2000), 146 C.C.C. (3d) 81 ¶20-21, 132 O.A.C. 152 [*Hector*]; *Joannis*, *supra* at 48-49. In addition, it is clear that the fresh evidence must be otherwise admissible in the sense that it complies with the generally applicable rules of evidence: *R. v. O'Brien*, [1978] 1 S.C.R. 591, 35 C.C.C. (2d) 209 at 216-17; *W.W.*, *supra* at 234; *R. v. Gumbly* (1996), 112 C.C.C. (3d) 61 at 71-72, 155 N.S.R. (2d) 117 (C.A.); *R. v. P.(T.)* (2002), 165 C.C.C. (3d) 281, 4 C.R. (6th) 369, 59 O.R. (3d) 577 at 582 (C.A.). Evidence comprised of hearsay, speculation, opinion or mere argument is no more admissible as fresh evidence on appeal than it is at

trial: *R. v. Teneycke* (1996), 77 B.C.A.C. 138, 108 C.C.C. (3d) 53 ¶18; *R. v. I.B.* (2001), N.B.R. (2d) 195, [2001] N.B.J. No. 199 ¶8 (C.A.).

[37] This approach was reaffirmed in *R. v. Aulakh*, 2012 BCCA 340.

...

[39] The way to approach the admissibility issue is to determine whether, based on the fresh evidence, there was a miscarriage of justice as a result of counsel's conduct in the context of the applicable legal framework. If so, the evidence should be admitted and the appeal allowed.

[202] What is meant by a miscarriage of justice is discussed in *Davey* at paras. 50–51, as quoted above.

[203] Whether there has been a miscarriage of justice by reason of ineffective assistance of counsel engages the legal principles set out in *R. v. G.D.B.*, 2000 SCC 22. Justice Major explained that there are two components to such a claim—a prejudice component and a performance component:

[26] The approach to an ineffectiveness claim is explained in *Strickland v. Washington*, 466 U.S. 668 (1984), *per* O'Connor J. The reasons contain a performance component and a prejudice component. For an appeal to succeed, it must be established, first, that counsel's acts or omissions constituted incompetence and second, that a miscarriage of justice resulted.

[27] Incompetence is determined by a reasonableness standard. The analysis proceeds upon a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. The onus is on the appellant to establish the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The wisdom of hindsight has no place in this assessment.

[28] Miscarriages of justice may take many forms in this context. In some instances, counsel's performance may have resulted in procedural unfairness. In others, the reliability of the trial's result may have been compromised.

Further, the onus is on the appellant to draw a link between the alleged incompetence and the prejudice suffered: *R. v. Dunbar*, 2003 BCCA 667 at para. 24.

[204] *G.D.B.* generally directed appellate courts to address first the prejudice component of the claim of ineffective assistance, and to dispose of the claim on that basis if it is possible to do so.

[205] The prejudice component was described by this Court in *Dunbar* by referring to Justice Doherty in *R. v. Joannis* (1995), 102 C.C.C. (3d) 35 (Ont. C.A.):

[26] ... He explained that a miscarriage of justice can result where the appellant establishes a reasonable probability that but for counsel's errors, the result of the proceedings would have been different. A reasonable probability is one that is "sufficient to undermine confidence in the outcome" and "lies somewhere between a mere possibility and a likelihood": *Joannis*, *supra* at 62; *R. v. Strauss* (1995), 61 B.C.A.C. 241, 100 C.C.C. (3d) 303 at 319. Alternatively, a reliable outcome may still constitute a miscarriage of justice where the process through which that verdict was reached was unfair: *Joannis*, *supra* at 62; *D.B. v. British Columbia (Director of Child, Family & Community Services)*, *supra* ¶¶63-64.

[206] As to the performance component, the test is deferential, and recognizes that different counsel may have different views on how the Crown's case may be challenged: *R. v. White* (1997), 114 C.C.C. (3d) 225 at 297 (Ont. C.A.), approved in *R. v. Mehl*, 2021 BCCA 264 at para. 136. See also, in respect of ineffective assistance of counsel, *R. v. Yellowhead*, 2015 BCCA 389, *R. v. Atzenberger*, 2018 BCCA 296, *R. v. Ball*, 2019 BCCA 32, and *R. v. Tallio*, 2021 BCCA 314.

b) The Allegations of Ineffective Assistance of Counsel

[207] The allegations of ineffective assistance of counsel pursued before us, as explained in *R. v. Moazami*, 2020 BCCA 357, relate to two counts of sexual assault: Count 12 naming S.W., and Count 23 naming J.C.

[208] In answer to the complaints of Mr. Moazami, expressed initially in affidavits, the Crown has applied to admit the affidavits of Mr. Markovitz and transcripts of the examination of Ms. Bastow before the special commissioner. Mr. Moazami applied to cross-examine counsel on that evidence. The Crown applied to cross-examine Mr. Moazami. Those cross-examinations of counsel and cross-examination of Mr. Moazami took place before us.

[209] Mr. Moazami's complaints rely upon the judge's references to an absence of cross-examination of J.C. and S.W. on the issue of consent on the charges of sexual assault, and to the absence of confrontation of both complainants with the version of events that Mr. Moazami described when he testified at trial. Mr. Moazami does not

say the judge erred in referring adversely to the absence of cross-examination or confrontation. Instead, he says the judge took a view pursuant to *Browne v. Dunn* (1893), 6 R. 67 (H.L.), of the lack of confrontation that would not have been available to her had his trial counsel met the well-known standard of competence of ensuring alternative versions of central events were put to earlier-called witnesses. He says the judge's references to the absence of cross-examination and confrontation establish the prejudice component described in *G.D.B.*, and that the absence in turn establishes the performance component.

[210] In our view, the complaints of ineffective assistance of counsel, individually and together, do not meet the criteria described in *G.D.B.*; these complaints do not establish a miscarriage of justice.

i) The Complaint Concerning J.C.

[211] J.C. was the named complainant in counts of procuring a person to become a prostitute (Count 20), living on the avails of prostitution (Count 21), human trafficking (Count 22), and sexual assault (Count 23). Mr. Moazami was convicted on all four counts.

[212] This ground of appeal concerns the conviction on Count 23, sexual assault. It was not disputed that Mr. Moazami had sexual intercourse with the complainant "on the first night that he introduced her to prostitution". The judge described the issue on this count as one of consent, with the defence saying J.C. was capable of consenting to sexual intercourse notwithstanding she had consumed cocaine and GHB, and the Crown contending that she was not capable of consenting because, due to the consumption of drugs, she was not sufficiently conscious to appreciate consent. This issue engaged the extent of J.C.'s drug consumption.

[213] The judge accepted the evidence of J.C. and found the evidence of Mr. Moazami did not raise a reasonable doubt. She said:

[565] The evidence is uncontradicted that Mr. Moazami provided J.C. with GHB and cocaine, which made her feel more inebriated. While J.C. testified that she received five or six doses, Mr. Moazami testified that it was only one dose. J.C. was not cross-examined about the amount of GHB she consumed

that night. J.C. testified that she began to lose consciousness due to the GHB and she became more intoxicated when Mr. Moazami subsequently provided her with cocaine. After having sex with Mr. Moazami's friend in the shower, J.C. recalled that she blacked out and woke up with Mr. Moazami having sex with her in the living room. Mr. Moazami testified that J.C. invited him to have sex in the shower, which was not put to J.C. in cross-examination. Further, Mr. Moazami testified that she consented to having sex with him in the living room, which was also not put to J.C. in cross-examination. Mr. Moazami also testified that they talked "fully about it" without providing any of the content of their conversation. This version of the events was also not put to J.C. in cross-examination. I find Mr. Moazami's evidence to be incredible; I do not believe it and it does not raise a reasonable doubt. None of his testimony concerning J.C.'s consumption of GHB or her consent to having sex was put to her in cross-examination. As stated earlier, Mr. Moazami's evidence was in general improbable, illogical and contrived.

[566] On the other hand, J.C.'s testimony that she was very high from the drugs and barely conscious was also unchallenged. J.C.'s evidence that she blacked out from the GHB and next recalled having sex with Mr. Moazami while they were in the living room was unchallenged. I accept this evidence as credible. While there are blanks in J.C.'s testimony concerning the events that occurred between getting out of the shower and waking up having sex with Mr. Moazami, it is apparent that J.C. could not have been capable of consenting to sexual intercourse with Mr. Moazami throughout the sexual act because she was unconscious for at least part of that time. Thus even if J.C. had consented to sex at the outset, that consent could not have continued to operate after she became unconscious. As the Supreme Court of Canada said in *J.A.*, consent must be "ongoing, conscious and present" to be effective. A person cannot consent if there is no conscious, operating mind capable of granting consent throughout the sexual act: *J.A.* at paras. 44 and 65. Accordingly, I am satisfied beyond a reasonable doubt that J.C. was incapable of giving her consent to sexual intercourse throughout the sexual intercourse.

[214] Mr. Moazami's complaints against his counsel in respect of the conviction of sexual assault of J.C. are:

1. Mr. Markovitz asked no questions of J.C. in cross-examination on the issue of consent;
2. Mr. Markovitz never cross-examined J.C. on a *KGB* statement she had made, which Mr. Moazami says casts doubt on J.C.'s evidence that she did not consent, and

3. Mr. Markovitz never put to J.C. the version of events related by Mr. Moazami in his testimony, causing the judge to comment adversely on the omissions in cross-examination of J.C.

[215] In making these submissions, Mr. Moazami relies heavily on Mr. Markovitz's acknowledgement before us that J.C.'s direct evidence of ingesting drugs given to her by Mr. Moazami, of having sexual intercourse with another man in the shower, and of blacking out and awaking to Mr. Moazami having sexual intercourse with her, on its face, and without "testing" for credibility, met the elements of sexual assault. He says that being so, it was incumbent on Mr. Markovitz to directly challenge J.C. on consent as well as on the version of evidence Mr. Moazami was going to give denying the encounter was non-consensual and challenging the amount of drugs J.C. said she was given by Mr. Moazami.

[216] The Crown rests its response entirely on the performance component. It urges us to consider the complex case against Mr. Moazami and the interrelationship of the counts against him. The Crown makes several submissions. It observes first that the finding of an absence of consent was reliant on the evidence J.C. had "blacked out" and could not have been consenting during the black out—a feature that makes the question of the amount of drugs J.C. had received and consumed a matter carrying significant risk given Mr. Moazami's role in providing them. The Crown says these circumstances required the application of professional judgment which we should not second guess. Second, the Crown says that counsel cannot be found to be incompetent in failing to put an accused's version of events to a witness when the accused's account has not been disclosed in a timely way: *Yellowhead* at para. 61. They say this approach applies equally to a situation in which the accused is inconstant. Third, on the issue of the *KGB* statement, the Crown refers us to Mr. Markovitz's testimony that the statement was ambiguous, and says that the reference in the statement, as best as can be seen on the record, related to the amount of drugs J.C. had consumed. This is a matter that was within trial counsel's discretion to let lie quiet. Finally, the Crown says that the judge made all sentences in respect of J.C. concurrent by applying the totality principle, with the

result that this offence produced no additional incarceration. The concurrency of the sentences, says the Crown, further demonstrates the intertwining of the counts and vindicates Mr. Markovitz's defence of the case through a comprehensive approach.

[217] Given the Crown's response on the issue of ineffective assistance of counsel with respect to J.C., we will address only the performance component. The Crown's submissions, in our view, are well supported by counsels' evidence, which we accept.

[218] Both counsels' evidence included a description of Mr. Moazami as heavily involved in the defence, and inconstant in his accounts of events. Mr. Markovitz described his task as seeing to it that Mr. Moazami "had a path towards reasonable doubt", and said that he considered, and still considers, the line of cross-examination proposed in this appeal would not have assisted Mr. Moazami's case. With reference to *Browne v. Dunn*, Mr. Markovitz did not agree he was obliged to put the questions suggested in this ground of appeal to J.C. He testified that he considered aspects of J.C.'s evidence, beyond the assertion of non-consensual sexual intercourse, made her evidence weak enough that Mr. Moazami had "an opening", and said any such questions would not have put Mr. Moazami in a better position were he to testify, an event that was expected but not firmly decided when J.C. testified. In respect of the *KGB* statement, Mr. Markovitz said J.C. had been ambiguous, and that questioning on the statement would be at "the risk of her amplifying [Mr. Moazami's] behaviour on that night, at the risk of her amplifying even more the manner in which he administered the drugs, at the risk of many things". He considered that features of J.C.'s evidence, including that she met with Mr. Moazami to get into prostitution and had sexual intercourse with Mr. Moazami's friend, left it open to Mr. Moazami to testify that the sexual intercourse was consensual. He characterized J.C.'s answers up to then as not "as bad as what could have been", and in the context of the whole case said, "it didn't seem to be wise for me to pursue that at that point in time".

[219] The performance component requires that counsel's representation fell below the standard of reasonable professional judgment expected from a lawyer: *R. v. Aulakh*, 2012 BCCA 340 at para. 44; *G.D.B.* at para. 27. This is a stern standard and we accord high deference to counsel in assessing his or her performance. The standard recognizes that different reasonable counsel may hold different views on the conduct of a case and the handling of witnesses, and reasonable representation of an accused allows for a broad range of decisions and styles, informed by the differing experiences of counsel and the complexity of each case. What may be effective for one counsel or in one case may not be transferrable to other counsel or another case, and advocacy being incapable of certainty, not every well considered and reasonable strategy or examination will produce the desired result.

[220] We accept Mr. Markovitz's explanation of his approach to cross-examining J.C. as being to preserve a path to reasonable doubt for Mr. Moazami, and in the context of this case, we should not second guess his view that examination of J.C. on the issues now proposed would not have been wise, and could have led to reinforcement of the case against his client.

[221] Nor should we second guess counsel's view that the now proposed line of cross-examination of this witness risked damaging the defence, taken as a whole.

[222] As to cross-examination on the *KGB* statement, the statement itself is not before us. The scanty information we have concerning it is that it was ambiguous, likely on the issue of the amount of drugs provided by Mr. Moazami to J.C. We can find no fault in counsel's view that cross-examination on the statement would not have been helpful.

[223] The last consideration is the failure to confront J.C. with Mr. Moazami's version of events, or to cross-examine her on the issue of consent.

[224] The rule in *Browne v. Dunn* was described in *R. v. Podolski*, 2018 BCCA 96, as “the confrontation principle”, to which this Court said:

[145] ... It is rooted in fairness. Its object is to prevent the “ambush” of a witness on an essential matter. The rule does not “require counsel to ask contradicting questions about straightforward matters of fact on which the witness has already given evidence that he or she is very unlikely to change”: *R. v. Khuc*, 2000 BCCA 20 at para. 44. Nor does it compel counsel to cross-examine on insignificant details: *R. v. Verney* (1993), 87 C.C.C. (3d) 363 at 376 (Ont. C.A.).

[225] At paras. 160–62, this Court in *Podolski* confirmed that the principle can be applied to challenges to a witness’s evidence not only through calling subsequent contradictory evidence not put to that witness, but also through closing submissions.

[226] The risk that *Browne v. Dunn* applies can be vexing for trial counsel, and requires counsel to apply professional judgment as to whether a witness must be confronted to prevent the “ambush” that the principle is designed to avoid. Yet a trial judge is given broad latitude in applying a *Browne v. Dunn* approach, and it will not always be evident to counsel how that latitude may apply in a given circumstance. Balanced against a *Browne v. Dunn* concern may be a reasonable concern that more harm may result from certain questioning than not.

[227] Much as in *Yellowhead*, we do not consider that counsel can be faulted for failing to put details of events to a witness that are subsequently proffered by the accused when the accused himself was changeable in his account of events to counsel.

[228] Defence of this count was fraught with risks. We cannot say counsel stepped outside the bounds of reasonable counsel in his handling of this charge. In our view, Mr. Moazami has not satisfied the performance component of ineffective assistance of counsel on the subject of cross-examining J.C. on the count of sexual assault; no miscarriage of justice has been established in respect of Count 23.

ii) The Complaint Concerning S.W.

[229] S.W. was the named complainant on charges of living on the avails of prostitution of a person under the age of 18, with coercion (Count 10), sexual exploitation of a young person (Count 11), and sexual assault (Count 12). The conviction of sexual assault was stayed on the basis of the *Kienapple* principle (*Kienapple v. R.*, [1975] 1 S.C.R. 729) and his conviction of sexual exploitation of S.W.: see *R. v. Moazami*, 2015 BCSC 2055 at para. 4.

[230] It was not disputed that Mr. Moazami had anal intercourse with S.W. on the identified occasion. The judge described the issue as one of consent or honest but mistaken belief of consent. The defence said that S.W. had consented to anal intercourse, or that Mr. Moazami honestly but mistakenly believed she had consented. The Crown agreed S.W. had consented to sexual intercourse with Mr. Moazami but contended she had, expressly, not consented to anal intercourse. The Crown theory was that Mr. Moazami engaged in this activity as readying S.W. for similar activity in her prostitution work. The judge accepted the evidence of S.W. and found the evidence of Mr. Moazami did not raise a reasonable doubt. The judge said:

[569] S.W. testified that she had argued with Mr. Moazami about having anal sexual intercourse with clients. She refused and he insisted that she provide this service. When Mr. Moazami attempted to have anal sexual intercourse with S.W. after they had begun having “normal sex”, she said no but he continued to engage in this type of sex against her wishes. This incident occurred when they lived at 888 Hamilton Street. Regarding this incident, S.W. testified:

Q And how did you feel afterwards?

A I wasn't ... like, I was a little angry. I wasn't scared or anything. It was okay after the initial first part of it, and then I was upset because, later, I discovered that the reason why was not really for his pleasure, but so that I could start doing it with clients.

[570] Mr. Moazami testified that S.W. preferred anal sex to regular sex and they engaged in consensual anal sex almost every time they had sex. It was Mr. Moazami who was shy about having anal sex. None of Mr. Moazami's evidence was put to S.W. in cross-examination. Further, Mr. Moazami did not dispute that S.W. refused to have anal sex with clients. Again, Mr. Moazami's testimony on this point is far-fetched and exaggerated. Mr. Moazami testified that he engaged in anal sex with several of the other complainants. He could

hardly have been “shy” about engaging in this type of behaviour. I find his testimony is not believable and does not raise a reasonable doubt.

[571] Turning to S.W.’s evidence, the fact that she was only angry about Mr. Moazami’s actions because he forced anal sex on her to ready her for doing this with clients is not inconsistent with saying no. S.W. was a young, naïve girl in an exploitative relationship with an older man who dominated her. It is unlikely that S.W. believed she was entitled to be angry with Mr. Moazami for having anal sex with her without her consent. I accept S.W.’s evidence that she did not consent to anal sex. It is uncontradicted that S.W. did not want to perform this service on clients and Mr. Moazami argued with her about this matter. Her version of the events is consistent with these surrounding circumstances and with the exploitative relationship between S.W. and Mr. Moazami. Forcing her to have anal sex against her wishes is consistent with the other types of coercive and intimidating behaviour Mr. Moazami used to control S.W. and ensure she continued to obey his demands.

[572] Lastly, there is nothing in Mr. Moazami’s testimony that would lead me to conclude that there is a reasonable doubt concerning his honest but mistaken belief that S.W. consented to anal sexual intercourse. I reject his evidence entirely and find that it does not raise a reasonable doubt for the reasons described earlier. Further, there is no evidence that he took any steps to ascertain whether S.W. was consenting at the time to anal sexual intercourse. Instead, I find that S.W. said no and he continued despite her wishes.

[231] Mr. Moazami complains that Mr. Markovitz did not cross-examine S.W. on her allegation that she did not consent to anal intercourse with Mr. Moazami, and so allowed the judge to rely upon an absence of confrontation—the *Browne v. Dunn* approach.

[232] Mr. Markovitz gave as his reason for declining to challenge S.W. on the issue of consent, his view that S.W.’s evidence of absence of consent was sufficiently weak that, absent Mr. Moazami’s evidence, he should not have been convicted.

[233] In our view, the judge’s reasons reveal a path to conviction that is not dependent on a failure to cross-examine S.W. on Mr. Moazami’s version of events, and we need not address the performance component in respect of this complaint. The judge found that S.W. refused to have anal intercourse with clients, consistent with refusing such intercourse with Mr. Moazami. The judge’s reasons, at para. 571, negate the prejudicial component required to establish this ground of appeal. The prejudicial component is further negated by the stay of the count of sexual assault

under the *Kienapple* principle, which left the count of sexual exploitation the effective conviction, a conviction that was not reliant on an incident of non-consensual anal intercourse.

[234] Accordingly, Mr. Moazami has not established a miscarriage of justice in respect of Count 12.

c) The Fresh Evidence Application

[235] Given our conclusions on the substance of the complaint of ineffective assistance of counsel, the proposed fresh evidence on this ground of appeal is not admissible because it could not affect the trial result.

[236] We would like to make an observation regarding how fresh evidence is addressed in the context of ineffective assistance of counsel (or any issue affecting the integrity of a trial). The test for the admission of such evidence is a modified *Palmer* test, as outlined in both this section and in the abuse of process section of these reasons. The jurisprudence from this Court frames the issue in two ways, once the evidence has been found to be reliable and relevant: i) the evidence is “admitted” for the limited purpose of determining the issue at hand: *Aulakh* at para. 68, and cases that have followed it such as *Ball* at para. 103 and *R. v. Jerace* 2021 BCCA 94 at para. 108; and ii) the Court “receives” the evidence (per the language in s. 683(1)(d) set out above), and “admits” the evidence only if a miscarriage of justice is shown. Once admitted, a remedy (usually a new trial), is granted: *Mehl* at para. 23, *Hamzehali* at para. 39

[237] In our view, the two approaches are not different in substance, only language. The language used in the second approach is perhaps more consistent with the *Criminal Code* and *Stolar* at para. 14, but both have the same end result. In this case, we have received and considered all of the evidence submitted, but have dismissed the applications to adduce fresh evidence.

Conclusion

[238] The appeal is dismissed, as are the applications to adduce fresh evidence.

“The Honourable Madam Justice Saunders”

“The Honourable Madam Justice Bennett”

“The Honourable Mr. Justice Hunter”

Appendix A

	212(2.1) Avails under 18 with coercion (Included : 212(2) Avails under 18)	151(a) Sexual interf. under 16	153(1)(a) Sexually exploit. young person (16 or 17)	271(1)(a) Sexual assault	212(1)(d) Procure	212(1)(j) Avails	279.01 (1)(b) Traffick person	279.011 (1)(b) Traffick person under 18
M.N.	1	2	3	4				
E.B.	6	7	8	9	5			
S.W.	10		11	12				
S.H.	14					13		
C.B.					15	16		
I.T.	19				17	18		
J.C.				23	20	21	22	
H.W.	25		27	28	24			26
T.H.	31				29	30		
S.K.	33				32			
J.C.H.	34	35		36				
Total (Conv./ Incl./Acq.)	9 (3/5/1)	3 (3/0/0)	4 (4/0/0)	6 (5/0/1)	7 (4/0/3)	5 (5/0/0)	1 (1/0/0)	1 (0/0/1)

Convicted as charged	
Convicted of lesser included offence	
Acquitted	
Not charged	

Numbers in cells represent the

count number on the indictment.

Tab 21:

R. v. Nixon, 2011 SCC 34

Olga Maria Nixon *Appellant*

v.

Her Majesty The Queen *Respondent*

and

Attorney General of Ontario, Attorney General of Manitoba, Attorney General of British Columbia, Criminal Trial Lawyers' Association and Criminal Lawyers' Association (Ontario) *Interveners*

INDEXED AS: **R. v. NIXON**

2011 SCC 34

File No.: 33476.

2010: December 15; 2011: June 24.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Constitutional law — Charter of Rights — Right to life, liberty and security of person — Accused charged with dangerous driving causing death, dangerous driving causing bodily harm and parallel charges for impaired driving — Crown and accused entering into plea agreement — Crown subsequently repudiating plea agreement — Whether repudiation amounting to breach of accused's s. 7 Charter rights — Canadian Charter of Rights and Freedoms, s. 7.

Criminal law — Plea agreement — Repudiation — Accused charged with dangerous driving causing death, dangerous driving causing bodily harm and parallel charges for impaired driving — Crown and accused entering into plea agreement — Crown subsequently repudiating plea agreement — Whether act of repudiation matter of tactics or conduct before court or matter of prosecutorial discretion — Whether act of repudiation reviewable on grounds of abuse of process.

Olga Maria Nixon *Appelante*

c.

Sa Majesté la Reine *Intimée*

et

Procureur général de l'Ontario, procureur général du Manitoba, procureur général de la Colombie-Britannique, Criminal Trial Lawyers' Association et Criminal Lawyers' Association (Ontario) *Intervenants*

RÉPERTORIÉ : **R. c. NIXON**

2011 CSC 34

N° du greffe : 33476.

2010 : 15 décembre; 2011 : 24 juin.

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein et Cromwell.

EN APPEL DE LA COUR D'APPEL DE L'ALBERTA

Droit constitutionnel — Charte des droits — Droit à la vie, à la liberté et à la sécurité de la personne — Accusée inculpée de conduite dangereuse ayant causé la mort, de conduite dangereuse ayant causé des lésions corporelles, et d'accusations parallèles de conduite avec facultés affaiblies — La Couronne et l'accusée concluent une entente sur le plaidoyer — Par la suite, la Couronne répudie l'entente — La répudiation porte-t-elle atteinte aux droits garantis à l'accusée par l'art. 7 de la Charte? — Charte canadienne des droits et libertés, art. 7.

Droit criminel — Entente sur le plaidoyer — Répudiation — Accusée inculpée de conduite dangereuse ayant causé la mort, de conduite dangereuse ayant causé des lésions corporelles, et d'accusations parallèles de conduite avec facultés affaiblies — La Couronne et l'accusée concluent une entente sur le plaidoyer — Par la suite, la Couronne répudie l'entente — La répudiation constitue-t-elle un élément de stratégie ou de conduite devant le tribunal ou relève-t-elle du pouvoir discrétionnaire en matière de poursuites? — La répudiation peut-elle faire l'objet d'un contrôle judiciaire au motif qu'elle constitue un abus de procédure?

The accused drove her motor home through an intersection and struck another vehicle, killing a husband and wife and injuring their young son. She was charged with several *Criminal Code* offences, including dangerous driving causing death, dangerous driving causing bodily harm, and parallel charges for impaired driving. Counsel initially entered into a plea agreement according to which the accused would plead guilty to a charge of careless driving under the provincial *Traffic Safety Act* with a joint sentence recommendation for an \$1,800 fine in return for which the Crown agreed to withdraw the *Criminal Code* charges. When the Acting Assistant Deputy Minister of the Criminal Justice Division of the Office of the Attorney General saw the proposed resolution, he initiated an inquiry which led him to conclude that Crown counsel's assessment of the strength of the case was flawed. In his view, a plea to careless driving in the circumstances was contrary to the interests of justice and would bring the administration of justice into disrepute. Crown counsel was thus instructed to withdraw the plea agreement and to proceed to trial. In response, the accused brought a s. 7 *Charter* application alleging abuse of process and seeking a court direction requiring the Crown to complete the plea agreement. The application judge held that negotiations between counsel after charges are laid are matters of tactics or conduct which are subject to review by the court, and that the repudiation of the plea agreement, in this case, was not justified. He concluded that the accused's s. 7 *Charter* right to security of the person had been breached and he directed the Crown to proceed with the agreement. The Court of Appeal allowed the Crown's appeal, finding that the repudiation of a plea agreement is a matter of prosecutorial discretion not reviewable by the courts, subject to the doctrine of abuse of process.

Held: The appeal should be dismissed.

The crucial importance of the distinction between prosecutorial discretion reviewable only for abuse of process and matters of tactics or conduct before the court governed by the inherent jurisdiction of the criminal trial court to control its own process was fully canvassed and explained in *Krieger v. Law Society of*

L'accusée a franchi une intersection avec son auto-caravane sans faire d'arrêt et a heurté un autre véhicule, tuant un homme et son épouse et blessant leur jeune fils. Elle a été accusée de plusieurs infractions au *Code criminel*, notamment de conduite dangereuse ayant causé la mort, de conduite dangereuse ayant causé des lésions corporelles, et d'accusations parallèles de conduite avec facultés affaiblies. Les avocats ont d'abord conclu une entente sur le plaidoyer, assortie d'une recommandation conjointe qu'une amende de 1 800 \$ soit imposée à l'accusée. Selon l'entente, l'accusée devait inscrire un plaidoyer de culpabilité à une accusation de conduite imprudente au sens de la *Traffic Safety Act* de la province; en contrepartie, la Couronne consentait à retirer les accusations fondées sur le *Code criminel*. Quand le sous-ministre adjoint par intérim de la section de la justice pénale du bureau du procureur général a vu le projet d'entente, il a entrepris une enquête qui l'a amené à conclure que l'appréciation de la solidité de la preuve par le procureur de la Couronne comportait des lacunes. Selon lui, un plaidoyer relatif à une accusation de conduite imprudente dans les circonstances était contraire aux intérêts de la justice et susceptible de déconsidérer l'administration de celle-ci. Il a donc été ordonné au procureur de la Couronne de répudier l'entente sur le plaidoyer et de procéder à l'instruction de l'affaire. En réponse, l'accusée a présenté une requête fondée sur l'art. 7 de la *Charte* dans laquelle elle a allégué l'abus de procédure et demandé au tribunal d'ordonner à la Couronne d'exécuter l'entente. Le juge de première instance a conclu que les négociations entre les avocats survenues après le dépôt des accusations constituaient des éléments de la stratégie ou de la conduite du poursuivant pouvant faire l'objet d'un contrôle par le tribunal, et que la répudiation de l'entente sur le plaidoyer n'était pas justifiée en l'espèce. Il a conclu qu'il avait été porté atteinte au droit à la sécurité de la personne garanti à l'accusée par l'art. 7 de la *Charte* et ordonné à la Couronne de soumettre l'entente à un autre juge. La Cour d'appel a accueilli l'appel interjeté par la Couronne après avoir conclu que la répudiation d'une entente sur le plaidoyer était une question relevant du pouvoir discrétionnaire en matière de poursuites qui ne pouvait faire l'objet d'un contrôle de la part des tribunaux, sous réserve de la règle de l'abus de procédure.

Arrêt : Le pourvoi est rejeté.

L'importance cruciale de la distinction entre l'exercice du pouvoir discrétionnaire en matière de poursuites ne pouvant faire l'objet d'un contrôle qu'en cas d'abus de procédure et les éléments de stratégie ou de conduite devant le tribunal assujettis à la compétence inhérente de la cour de juridiction criminelle de contrôler sa

Alberta, 2002 SCC 65, [2002] 3 S.C.R. 372. Subject to the abuse of process doctrine, supervising one litigant's decision-making process — rather than the conduct of litigants before the court — is beyond the legitimate reach of the court. The Crown's decision in this case to resile from the plea agreement and to continue the prosecution clearly constituted an act of prosecutorial discretion subject to the principles set out in *Krieger*: it is only reviewable for abuse of process. Prosecutorial discretion is not spent with the decision to initiate the proceedings, nor does it terminate with a plea agreement. So long as the proceedings are ongoing, the Crown may be required to make further decisions about whether the prosecution should be continued, and if so, in respect of what charges.

There are two categories of abuse of process under s. 7 of the *Charter*: (1) prosecutorial conduct affecting the fairness of the trial; and (2) prosecutorial conduct that contravenes fundamental notions of justice and thus undermines the integrity of the judicial process. While s. 24(1) of the *Charter* allows for a wide range of remedies, this does not mean that abuse of process can be made out by demonstrating a lesser degree of harm, either to the accused's fair trial interests or to the integrity of the justice system. Achieving the appropriate balance between societal and individual concerns defines the essential character of abuse of process.

The repudiation of a plea agreement may well constitute an abuse of process, either because it results in trial unfairness or meets the narrow residual category of abuse that undermines the integrity of the judicial process. The more difficult question in this appeal is how the initial exercise of prosecutorial discretion — Crown counsel's offer to resolve the matter on the basis of a plea to a lesser charge — should figure in the analysis regarding abuse of process. A plea agreement should not be regarded as a contractual undertaking. Vitiating factors, such as mistake, misrepresentation or fraud, which usually inform a private party's right to resile from a bargain, do not fully capture the public interest considerations which are at play. However, the analogy can usefully underscore the utmost importance of honouring the agreement. The situations in which the Crown can properly repudiate a plea agreement are, and must remain, very rare. Moreover, the reasonably defensible test applied by the application judge to Crown counsel's

propre procédure a été examinée et expliquée à fond dans *Krieger c. Law Society of Alberta*, 2002 CSC 65, [2002] 3 R.C.S. 372. Sous réserve de la règle de l'abus de procédure, il ne relève pas de la compétence légitime du tribunal de superviser le processus décisionnel d'une partie plutôt que la conduite des parties comparaissant devant lui. La décision de la Couronne de répudier l'entente sur le plaidoyer et de continuer la poursuite constituait manifestement un acte résultant de l'exercice du pouvoir discrétionnaire en matière de poursuites visé par les principes énoncés dans *Krieger* : il est susceptible de contrôle judiciaire seulement s'il y a eu abus de procédure. Ni la décision d'entamer des procédures, ni la conclusion d'une entente sur le plaidoyer ne signifie que ce pouvoir ne peut plus être exercé. Tant que les procédures sont en cours, la Couronne peut être tenue de prendre d'autres décisions quant à savoir si la poursuite doit être continuée et, le cas échéant, à l'égard de quelles accusations.

Il existe deux catégories d'abus de procédure auxquelles s'applique l'art. 7 de la *Charte* : (1) les cas où la conduite du poursuivant porte atteinte à l'équité du procès; et (2) les cas où la conduite du poursuivant contrevient aux notions fondamentales de justice et mine ainsi l'intégrité du processus judiciaire. Même si le par. 24(1) de la *Charte* permet d'octroyer une vaste gamme de réparations, cela ne signifie pas pour autant que l'on puisse faire la preuve d'un abus de procédure en établissant une atteinte moins grave soit au droit de l'accusé à un procès équitable, soit à l'intégrité du système de justice. Trouver le juste équilibre entre les préoccupations des individus et celles de la société : voilà le caractère essentiel de l'analyse relative à l'abus de procédure.

La répudiation d'une entente sur le plaidoyer peut fort bien constituer un abus de procédure, soit parce qu'elle rend le procès inéquitable, soit parce qu'elle est visée par l'étroite catégorie résiduelle de cas qui minent l'intégrité du processus judiciaire. La question plus difficile à trancher dans le présent pourvoi est de savoir dans quelle mesure il faut, dans l'analyse relative à l'abus de procédure, tenir compte de l'exercice initial du pouvoir discrétionnaire en matière de poursuites, à savoir l'offre du procureur de la Couronne de régler l'affaire sur la base d'un plaidoyer de culpabilité relativement à une accusation moins grave. Il ne faut pas considérer l'entente sur le plaidoyer comme un engagement contractuel. Les facteurs susceptibles de vicier une entente — tels l'erreur, la déclaration inexacte et la fraude — et qui permettent habituellement à une partie privée de répudier une entente ne rendent pas pleinement compte des considérations d'intérêt public qui entrent en jeu. Toutefois, l'analogie fait utilement ressortir l'importance capitale de respecter

decision to enter into a plea agreement is not the appropriate measure to determine whether there is an abuse of process. Indeed, it is the circumstances surrounding the repudiation of a plea agreement which should be reviewed to determine whether that decision amounts to an abuse of process. Reviewing for “reasonableness” a decision made in the exercise of prosecutorial discretion runs contrary to the constitutionally separate role of the Attorney General in the initiation and pursuit of criminal prosecutions as well as the principles set out in *Krieger*.

Given that acts of prosecutorial discretion are generally beyond the reach of the court, there is good reason to impose a threshold burden on the applicant who alleges abuse of process. A court should not embark on an inquiry into the reasons behind the exercise of prosecutorial discretion without a proper evidentiary foundation. However, evidence that a plea agreement has been entered into and subsequently reneged by the Crown meets the requisite threshold. Further, to the extent that the Crown is the only party who is privy to the information, the evidentiary burden shifts to the Crown to enlighten the court on the circumstances and reasons behind its decision to resile from the agreement. The ultimate burden of proving abuse of process, however, remains on the applicant.

In this case, the Crown’s repudiation conduct cannot be considered so unfair or oppressive to the accused, or so tainted by bad faith or improper motive, that to allow the Crown to now proceed on the dangerous driving *Criminal Code* charges would tarnish the integrity of the judicial system and thus constitute an abuse of process. Indeed, the Acting Assistant Deputy Minister, in good faith, determined that Crown counsel’s assessment of the strength of the evidence was erroneous and, on that basis, having regard to the seriousness of the offences, concluded that it would not be in the public interest to terminate the prosecution on the criminal charges. This can hardly be regarded as evidence of misconduct. Finally, the accused was returned to the position she was in at the conclusion of the preliminary hearing before the plea agreement was entered into and thus suffered no prejudice as a result of the repudiation.

l’entente. Les cas dans lesquels la Couronne peut à juste titre répudier une entente sur le plaidoyer sont — et doivent demeurer — très rares. En outre, le critère de la décision raisonnablement défendable que le juge de première instance a appliqué pour apprécier la décision du procureur de la Couronne de conclure une entente sur le plaidoyer n’est pas la norme qu’il convient d’appliquer pour décider s’il y a eu abus de procédure. En effet, il faut plutôt analyser les circonstances de la décision de répudier l’entente pour établir si cette décision-là constitue un abus de procédure. L’appréciation du « caractère raisonnable » d’une décision prise dans l’exercice du pouvoir discrétionnaire en matière de poursuites va à l’encontre du rôle distinct du procureur général sur le plan constitutionnel quant aux décisions d’engager et de continuer des poursuites pénales, ainsi que des principes énoncés dans *Krieger*.

Comme les actes résultant de l’exercice du pouvoir discrétionnaire en matière de poursuites échappent généralement à la compétence du tribunal, il existe de bonnes raisons d’imposer un fardeau initial au demandeur qui allègue l’abus de procédure. Les tribunaux ne doivent pas examiner les motifs qui sous-tendent les actes résultant de l’exercice du pouvoir discrétionnaire en matière de poursuites s’ils ne peuvent s’appuyer sur une preuve suffisante. Toutefois, la preuve que la Couronne a conclu une entente sur le plaidoyer qu’elle a par la suite répudiée est conforme à la norme préliminaire à laquelle il doit être satisfait. En outre, dans la mesure où la Couronne est la seule partie au courant de l’information, c’est à elle qu’il incombe d’exposer au tribunal les circonstances et les motifs qui sous-tendent sa décision de répudier l’entente. En bout de ligne, cependant, c’est au demandeur qu’il revient d’établir qu’il y a eu abus de procédure.

En l’espèce, le fait que la Couronne ait répudié l’entente n’était pas à ce point injuste ou oppressif pour l’accusée, ou à ce point entaché de mauvaise foi ou d’un motif illégitime, que permettre à la Couronne de tenir un procès relativement à l’accusation de conduite dangereuse prévue au *Code criminel* porterait atteinte à l’intégrité du système judiciaire et, partant, constituerait un abus de procédure. En effet, le sous-ministre adjoint par intérim a conclu de bonne foi que le procureur de la Couronne avait mal évalué la force probante de la preuve, et, sur ce fondement, il a jugé que, compte tenu de la gravité des infractions reprochées, il ne serait pas dans l’intérêt public de mettre fin à la poursuite. On ne saurait guère considérer cela comme la preuve d’une inconduite. Enfin, l’accusée a été rétablie dans la situation dans laquelle elle se trouvait à la fin de l’enquête préliminaire, avant que l’entente sur le plaidoyer ne soit conclue, et n’a donc pas subi de préjudice par suite de la répudiation.

Cases Cited

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Traffic Safety Act, R.S.A. 2000, c. T-6.

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 Ontario. *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions*. Toronto: The Committee, 1993.

APPEAL from a judgment of the Alberta Court of Appeal (Côté, Paperny and Slatter JJ.A.), 2009 ABCA 269, 8 Alta. L.R. (5th) 384, 464 A.R. 1, 246 C.C.C. (3d) 149, 195 C.R.R. (2d) 352, [2009] 10 W.W.R. 641, 82 M.V.R. (5th) 191, [2009] A.J. No. 871 (QL), 2009 CarswellAlta 1221, setting aside an order of Ayotte Prov. Ct. J., 2008 ABPC 20, 89 Alta. L.R. (4th) 156, 445 A.R. 111, 233 C.C.C. (3d) 539, [2008] 8 W.W.R. 740, 61 M.V.R. (5th) 287, [2008] A.J. No. 129 (QL), 2008 CarswellAlta 162, directing the Crown to honour the plea agreement. Appeal dismissed.

Marvin R. Bloos, Q.C., for the appellant.

Goran Tomljanovic, Q.C., and *Christine Rideout*, for the respondent.

Michal Fairburn and *Frank Au*, for the intervenor the Attorney General of Ontario.

Ami Kotler, for the intervenor the Attorney General of Manitoba.

M. Joyce DeWitt-Van Oosten, Q.C., for the intervenor the Attorney General of British Columbia.

Jurisprudence

Arrêt appliqué : *Krieger c. Law Society of Alberta*, 2002 CSC 65, [2002] 3 R.C.S. 372; **arrêt critiqué :** *R. c. M. (R.)* (2006), 83 O.R. (3d) 349; **arrêts mentionnés :** *R. c. Jewitt*, [1985] 2 R.C.S. 128; *R. c. O'Connor*, [1995] 4 R.C.S. 411; *R. c. Keyowski*, [1988] 1 R.C.S. 657; *R. c. Conway*, [1989] 1 R.C.S. 1659; *Canada (Ministre de la Citoyenneté et de l'Immigration) c. Tobias*, [1997] 3 R.C.S. 391; *R. c. Regan*, 2002 CSC 12, [2002] 1 R.C.S. 297; *R. c. Pires*, 2005 CSC 66, [2005] 3 R.C.S. 343.

Lois et règlements cités

Charte canadienne des droits et libertés, art. 7, 24(1).
Code criminel, L.R.C. 1985, ch. C-46.
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Doctrine citée

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POURVOI contre un arrêt de la Cour d'appel de l'Alberta (les juges Côté, Paperny et Slatter), 2009 ABCA 269, 8 Alta. L.R. (5th) 384, 464 A.R. 1, 246 C.C.C. (3d) 149, 195 C.R.R. (2d) 352, [2009] 10 W.W.R. 641, 82 M.V.R. (5th) 191, [2009] A.J. No. 871 (QL), 2009 CarswellAlta 1221, qui a infirmé l'ordonnance du juge Ayotte, 2008 ABPC 20, 89 Alta. L.R. (4th) 156, 445 A.R. 111, 233 C.C.C. (3d) 539, [2008] 8 W.W.R. 740, 61 M.V.R. (5th) 287, [2008] A.J. No. 129 (QL), 2008 CarswellAlta 162, enjoignant à la Couronne de respecter l'entente sur le plaidoyer. Pourvoi rejeté.

Marvin R. Bloos, c.r., pour l'appelante.

Goran Tomljanovic, c.r., et *Christine Rideout*, pour l'intimée.

Michal Fairburn et *Frank Au*, pour l'intervenant le procureur général de l'Ontario.

Ami Kotler, pour l'intervenant le procureur général du Manitoba.

M. Joyce DeWitt-Van Oosten, c.r., pour l'intervenant le procureur général de la Colombie-Britannique.

D'Arcy DePoe, for the intervener the Criminal Trial Lawyers' Association.

Marie Henein, Matthew Gourlay and Lou Strezos, for the intervener the Criminal Lawyers' Association (Ontario).

The judgment of the Court was delivered by

CHARRON J. —

1. Introduction

[1] The question on this appeal is whether the trial judge erred in concluding that the Crown's repudiation of a plea agreement was an abuse of process in breach of the appellant's rights under s. 7 of the *Canadian Charter of Rights and Freedoms*. More specifically, the courts below were divided on the appropriate standard against which to measure the repudiation conduct.

[2] The application judge held that the repudiation of a plea agreement is a matter of conduct or tactics which is subject to the usual control of the criminal trial court (2008 ABPC 20, 89 Alta. L.R. (4th) 156). In the case at bar, the repudiation of the plea agreement by the Assistant Deputy Minister of the Criminal Justice Division was not justified, as Crown counsel's decision to enter into a plea agreement was "reasonably defensible". Thus, he concluded that the repudiation of the plea agreement was an abuse of process in breach of the accused's s. 7 security and liberty interests and directed the Crown to honour the agreement. The appellant subsequently pleaded guilty to a lesser offence and was acquitted on the more serious charges.

[3] The Alberta Court of Appeal overturned the application judge's decision, holding that the repudiation of a plea agreement is a matter of prosecutorial discretion, reviewable only for abuse of process

D'Arcy DePoe, pour l'intervenante Criminal Trial Lawyers' Association.

Marie Henein, Matthew Gourlay et Lou Strezos, pour l'intervenante Criminal Lawyers' Association (Ontario).

Version française du jugement de la Cour rendu par

LA JUGE CHARRON —

1. Introduction

[1] La question que soulève le présent pourvoi est de savoir si le juge de première instance a commis une erreur en concluant que la répudiation, par la Couronne, d'une entente sur le plaidoyer constituait un abus de procédure portant atteinte aux droits garantis à l'appelante par l'art. 7 de la *Charte canadienne des droits et libertés*. Plus précisément, les juridictions inférieures étaient partagées quant à la norme au regard de laquelle il convient de juger la conduite des représentants de la Couronne.

[2] Le juge de première instance a conclu que la répudiation d'une entente sur le plaidoyer constituait un élément de conduite ou de stratégie susceptible de faire l'objet du contrôle habituellement exercé par la cour de juridiction criminelle (2008 ABPC 20, 89 Alta. L.R. (4th) 156). En l'espèce, la répudiation de l'entente par le sous-ministre adjoint de la section de la justice pénale n'était pas justifiée, car la décision du procureur de la Couronne de conclure une telle entente était [TRADUCTION] « raisonnablement défendable ». Par conséquent, le juge a conclu que la répudiation de l'entente constituait un abus de procédure portant atteinte au droit à la liberté et à la sécurité de l'accusée que garantit l'art. 7 de la *Charte*, et il a ordonné à la Couronne de respecter l'entente. L'appelante a par la suite plaidé coupable à une infraction moindre et été acquittée des accusations les plus graves.

[3] La Cour d'appel de l'Alberta a infirmé la décision du juge de première instance après avoir conclu que la répudiation d'une entente sur le plaidoyer relevait du pouvoir discrétionnaire en matière de

(2009 ABCA 269, 8 Alta. L.R. (5th) 384). It held that the application judge erred in testing Crown counsel's decision against a "reasonably defensible" standard. Rather, he should have reviewed the circumstances surrounding the subsequent decision to repudiate. The relevant inquiry for abuse of process under s. 7 of the *Charter* is whether there is conduct which either causes prejudice to the accused by rendering the trial unfair, or affects the integrity of the justice system itself. In the absence of prejudice which renders the trial unfair, there must be proof of "prosecutorial misconduct, improper motive or bad faith in the approach, circumstances or ultimate decision to repudiate" (para. 49). Applying this test, the Court of Appeal found no evidence to support a finding of abuse of process in the circumstances of this case. The application judge's order, the resulting plea and the acquittals were set aside, and a new trial was ordered.

[4] The appellant, Olga Maria Nixon, appeals to this Court.

[5] For the reasons that follow, I agree with the Court of Appeal that the application judge applied the incorrect test for abuse of process. I also agree that there is no basis for finding that the appellant's s. 7 rights were breached in the circumstances of this case. I would dismiss the appeal.

2. The Proceedings Below

[6] The appellant, Ms. Nixon, was charged with several *Criminal Code*, R.S.C. 1985, c. C-46, offences, including dangerous driving causing death, dangerous driving causing bodily harm, and parallel charges for impaired driving. The charges arose as a result of a motor vehicle accident which

poursuites et ne pouvait faire l'objet d'un contrôle judiciaire qu'en cas d'abus de procédure (2009 ABCA 269, 8 Alta. L.R. (5th) 384). Elle a conclu que le juge de première instance avait commis une erreur en appréciant la décision du procureur de la Couronne en fonction de la norme de la décision « raisonnablement défendable ». Selon elle, il aurait plutôt dû examiner les circonstances dans lesquelles la décision de répudier l'entente a été prise. Pour établir s'il y a eu abus de procédure au regard de l'art. 7 de la *Charte*, il faut se demander si la conduite du poursuivant a causé un préjudice à l'accusé, rendant ainsi le procès inéquitable, ou porté atteinte à l'intégrité du système de justice lui-même. Si aucun préjudice n'a rendu le procès inéquitable, il faut faire la preuve [TRADUCTION] « d'une conduite répréhensible de la part du poursuivant, d'un motif illégitime, ou de mauvaise foi entachant la démarche, les circonstances ou la décision finale de répudier [l'entente] » (par. 49). Appliquant ce critère, la Cour d'appel a jugé qu'aucun élément de preuve ne permettait de conclure à l'abus de procédure dans les circonstances de l'espèce. Elle a donc annulé l'ordonnance du juge de première instance, le plaidoyer qui en avait résulté ainsi que les acquittements qui avaient été prononcés, et ordonné la tenue d'un nouveau procès.

[4] L'appelante, Olga Maria Nixon, se pourvoit maintenant devant la Cour.

[5] Pour les motifs qui suivent, je suis d'accord avec la Cour d'appel que le juge de première instance a appliqué le mauvais critère pour établir s'il y avait eu abus de procédure. J'estime moi aussi que rien ne permet de conclure, dans les circonstances de l'espèce, qu'il a été porté atteinte aux droits garantis à l'appelante par l'art. 7 de la *Charte*. Je suis donc d'avis de rejeter le pourvoi.

2. Les juridictions inférieures

[6] L'appelante, M^{me} Nixon, a été accusée de plusieurs infractions au *Code criminel*, L.R.C. 1985, ch. C-46, notamment de conduite dangereuse ayant causé la mort, de conduite dangereuse ayant causé des lésions corporelles, et d'accusations parallèles de conduite avec facultés affaiblies. Les

occurred on September 2, 2006. The Crown alleged that Ms. Nixon drove her motor home through an intersection without stopping and struck another vehicle, killing a husband and wife and injuring their young son. A roadside screening test was administered at the scene, followed by breath samples which resulted in readings of 200 mg of alcohol in 100 mL of blood. Expert extrapolation concluded that Ms. Nixon's blood alcohol level would have been between 225 and 250 mg per 100 mL at the time of the accident.

[7] Given that Ms. Nixon elected trial by judge and jury, the matter proceeded to a preliminary inquiry on March 1, 2007. Crown counsel who had carriage of the case at the time had concerns about some of the evidence, in particular the admissibility of the breathalyzer results and the probative value of the eyewitness evidence that a motor home had been seen driving erratically some time before the accident. Based on his assessment, Crown counsel did not adduce the breath sample results at the preliminary hearing, although he specifically reserved the right to call this evidence at trial. He also informed the presiding judge that the Crown would not be seeking a committal on any charge other than the dangerous driving counts. Ms. Nixon consented to a committal order on the dangerous driving charges.

[8] Following the preliminary inquiry, additional discussions were held between counsel during the first weeks of May 2007 regarding a plea to a charge of careless driving under the *Traffic Safety Act*, R.S.A. 2000, c. T-6, with a joint sentence recommendation for a \$1,800 fine. Counsel ultimately entered into a written agreement to that effect on May 22, and Ms. Nixon re-elected her mode of trial in anticipation of entering a guilty plea to the lesser charge on June 5.

accusations ont été portées par suite d'un accident de la route qui s'est produit le 2 septembre 2006. Selon la Couronne, M^{me} Nixon a franchi une intersection avec son autocaravane sans faire d'arrêt et a heurté un autre véhicule, tuant un homme et son épouse et blessant leur jeune fils. Un test de détection routier a été effectué sur les lieux de l'accident, puis des échantillons d'haleine ont été recueillis : ceux-ci renfermaient 200 mg d'alcool par 100 ml de sang. Une extrapolation d'expert a permis de conclure que, au moment de l'accident, le taux d'alcool dans le sang de M^{me} Nixon se situait entre 225 et 250 mg par 100 ml de sang.

[7] M^{me} Nixon ayant choisi le procès devant juge et jury, une enquête préliminaire a eu lieu le 1^{er} mars 2007. Le procureur de la Couronne chargé du dossier à l'époque avait des réserves au sujet de certains éléments de preuve, notamment quant à l'admissibilité des résultats de l'alcootest et à la valeur probante des dépositions des témoins oculaires, qui avaient déclaré avoir vu une autocaravane conduite de façon irrégulière quelque temps avant l'accident. Se fondant sur sa propre appréciation, le procureur de la Couronne a décidé de ne pas produire les résultats de l'analyse des échantillons d'haleine à l'enquête préliminaire, mais il s'est expressément réservé le droit de présenter cet élément de preuve au procès. Il a également dit au juge qui présidait l'audience que la Couronne ne chercherait à obtenir l'incarcération de l'accusée que relativement aux chefs d'accusation de conduite dangereuse. M^{me} Nixon a consenti à ce qu'une ordonnance d'incarcération soit prononcée eu égard à ces chefs d'accusation.

[8] À la suite de l'enquête préliminaire, d'autres discussions ont eu lieu entre les avocats, au cours des premières semaines de mai 2007, au sujet d'un plaidoyer relatif à une accusation de conduite imprudente au sens de la *Traffic Safety Act*, R.S.A. 2000, ch. T-6, et d'une recommandation conjointe qu'une amende de 1 800 \$ soit imposée à l'accusée. Le 22 mai, les avocats ont finalement conclu une entente écrite à cet effet et M^{me} Nixon a choisi un nouveau mode de procès en prévision du plaidoyer de culpabilité relativement à une accusation moins grave, qu'elle entendait inscrire le 5 juin.

[9] Before making the offer for a plea resolution, Crown counsel had discussed the matter in general terms with some of his colleagues in the Crown's office, including his immediate supervisor who reluctantly agreed with the terms of the proposed agreement. Due to the sensitive nature of the case, a report was also prepared for senior officials in the justice department. When the Acting Assistant Deputy Minister ("ADM") of the Criminal Justice Division of the office of the Attorney General saw the report and the proposed resolution scheduled to be perfected a few days later, he became concerned and initiated an inquiry. This in turn prompted an adjournment of the June 5 date to June 26. The defence was not informed of the reason for the adjournment at the time.

[10] The ADM obtained additional legal opinions about the merits of the Nixon prosecution and about the repudiation of plea agreements. Based on the results of this research, the ADM concluded that Crown counsel's assessment of the strength of the case was flawed as he had failed to consider the totality of the evidence. In his view, a plea to careless driving in the circumstances was contrary to the interests of justice and would bring the administration of justice into disrepute. The ADM also concluded that Ms. Nixon could be restored without prejudice to the position she had been in prior to entering into the plea agreement. Thus, it was resolved that the decision by Crown counsel at the preliminary hearing not to proceed on the impaired driving counts would be maintained. However, the ADM instructed Crown counsel to withdraw the May 22 resolution agreement and to proceed to trial on the dangerous driving charges in accordance with the committal order.

[11] In response to this turn of events, Ms. Nixon brought an application under s. 7 of the *Charter*, alleging abuse of process and seeking a court direction requiring the Crown to complete the agreement. Ayotte Prov. Ct. J. of the Provincial Court

[9] Avant d'offrir à l'accusée de conclure une entente sur le plaidoyer, le procureur de la Couronne avait discuté du dossier de façon générale avec certains de ses collègues, notamment son supérieur immédiat, qui avait accepté à contrecoeur les modalités de l'entente projetée. Vu le caractère délicat du dossier, un rapport a aussi été rédigé à l'intention de hauts fonctionnaires du ministère de la Justice. Quand le sous-ministre adjoint par intérim (« SMA ») de la section de la justice pénale du bureau du procureur général a vu le rapport et le projet d'entente à perfectionner quelques jours plus tard, il a commencé à s'inquiéter et entrepris une enquête. Il s'en est suivi un report de l'audience du 5 juin au 26 juin. La défense n'a pas été informée à l'époque du motif de l'ajournement.

[10] Le SMA a obtenu des avis juridiques supplémentaires sur le bien-fondé de la poursuite contre M^{me} Nixon et la répudiation de l'entente sur le plaidoyer qui l'ont amené à conclure que l'appréciation que le procureur de la Couronne avait faite de la solidité de la preuve comportait des lacunes, car ce dernier avait omis d'examiner l'ensemble des éléments de preuve. Selon lui, un plaidoyer relatif à une accusation de conduite imprudente dans les circonstances était contraire aux intérêts de la justice et susceptible de déconsidérer l'administration de celle-ci. Le SMA a également conclu que M^{me} Nixon pouvait être rétablie sans préjudice dans la situation où elle se trouvait avant de conclure l'entente sur le plaidoyer. Par conséquent, il a été résolu que la décision du procureur de la Couronne au stade de l'enquête préliminaire de ne pas poursuivre l'accusée relativement aux chefs d'accusation de conduite avec facultés affaiblies serait maintenue. Toutefois, le SMA a ordonné au procureur de la Couronne de répudier l'entente du 22 mai et de poursuivre l'accusée relativement aux chefs d'accusation de conduite dangereuse conformément à l'ordonnance d'incarcération.

[11] En réponse à cette tournure des événements, M^{me} Nixon a présenté une requête fondée sur l'art. 7 de la *Charte* dans laquelle elle a allégué l'abus de procédure et demandé au tribunal d'ordonner à la Couronne d'exécuter l'entente.

of Alberta embarked on an inquiry into the matter, at the conclusion of which he reserved judgment. At the outset of his written reasons, the application judge noted that the Attorney General has the ultimate power to initiate, conduct and terminate prosecutions, as affirmed by this Court in *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372. He also acknowledged that the courts will rarely interfere with the exercise of prosecutorial discretion. In his view, however, “when that discretion is exercised in favour of proceeding, the matter becomes subject to the processes and procedures sanctioned by the court” (para. 12). Thus, he held that negotiations between counsel after charges are laid were matters of tactics or conduct which were subject to review by the court.

[12] The application judge then discussed the standard against which to measure the Crown’s conduct. He concluded that the Crown’s ability to repudiate a plea agreement is akin to the discretion of a trial judge to reject a joint submission on sentence: the determinative test was whether the plea agreement was “reasonably defensible”. Before delving into that issue, however, the application judge dealt with Ms. Nixon’s concern that the decision to repudiate was motivated by political considerations. After reviewing the relevant evidence, he concluded that “there is absolutely no evidence” of political interference (para. 22) and “nothing to suggest that [the ADM’s] action was taken in bad faith or to accommodate a real or perceived political stance of his Minister of Justice” (para. 25).

[13] The application judge emphasized that the relevant test is whether the plea agreement was “reasonably defensible”. In his view, if the Crown

Le juge Ayotte de la Cour provinciale de l’Alberta a entrepris une enquête sur la question, à la fin de laquelle il a pris l’affaire en délibéré. Au début de ses motifs écrits, le juge de première instance a souligné que le procureur général avait le pouvoir ultime d’entreprendre, de diriger et de mettre fin à des poursuites, comme l’a confirmé la Cour dans *Krieger c. Law Society of Alberta*, 2002 CSC 65, [2002] 3 R.C.S. 372. Il a également reconnu que les tribunaux intervenaient rarement dans l’exercice du pouvoir discrétionnaire en matière de poursuites. Il s’est cependant dit d’avis que [TRADUCTION] « lorsque, dans l’exercice de ce pouvoir discrétionnaire, on décide d’intenter une poursuite, l’affaire est dès lors assujettie aux processus et aux procédures sanctionnés par le tribunal » (par. 12). Par conséquent, il a conclu que les négociations entre les avocats survenues après le dépôt des accusations constituaient des éléments de la stratégie ou de la conduite du poursuivant pouvant faire l’objet d’un contrôle par le tribunal.

[12] Le juge de première instance a ensuite discuté de la norme qu’il convenait d’appliquer pour apprécier la conduite de la Couronne. Il a conclu que la capacité de la Couronne de répudier une entente sur le plaidoyer s’apparentait au pouvoir discrétionnaire d’un juge de première instance de rejeter des observations conjointes au sujet de la peine : le critère déterminant était de savoir si l’entente était « raisonnablement défendable ». Toutefois, avant d’approfondir cette question, le juge s’est penché sur les inquiétudes exprimées par M^{me} Nixon, qui estimait que la décision de répudier l’entente était le produit de considérations politiques. Après avoir examiné les éléments de preuve pertinents, il a conclu qu’[TRADUCTION] « il n’y [avait] absolument aucune preuve » d’ingérence politique (par. 22) et que « rien ne donnait à penser que [le SMA] avait agi de mauvaise foi ou en vue de donner suite à une décision politique — réelle ou perçue — de son ministre de la Justice » (par. 25).

[13] Le juge de première instance a souligné que le critère pertinent consistait à savoir si l’entente était « raisonnablement défendable ».

is to justify its course of action to repudiate the agreement, then it must do more than establish that others would have reached a different conclusion. In the case at bar, he concluded that the repudiation of the plea agreement was not justified, as Crown counsel's assessment of the case was "reasonably defensible". The application judge held further that where the court is satisfied that the original bargain, if honoured, would not be contrary to the public interest and would not bring the administration of justice into disrepute, it is irrelevant whether the accused suffered prejudice. He added that if he were required to find prejudice, he would do so here. In his view, Ms. Nixon was prejudiced because defence counsel was led to believe that the evidence of breath samples would not be adduced at trial and, consequently, did not explore that issue at the preliminary hearing.

[14] The application judge concluded that Ms. Nixon's s. 7 right to security of the person was breached and, by way of remedy, he directed the Crown to proceed with the agreement before another judge. Ms. Nixon subsequently pleaded guilty to the offence of careless driving, was sentenced to a fine of \$1,800, and was acquitted of the *Criminal Code* offences.

[15] The Crown appealed the acquittals. The Court of Appeal of Alberta allowed the appeal, holding that the application judge erred in law by finding that Ms. Nixon's s. 7 *Charter* rights were violated. Paperny J.A. (Côté and Slatter J.J.A. concurring) found that the application judge used the wrong test to distinguish between matters that fall within the scope of prosecutorial discretion and those more properly characterized as a prosecutor's tactics and conduct before the court. The line cannot be artificially drawn at the courtroom door. Paperny J.A. stated: "Rather, the relevant inquiry is whether the impugned decision falls within the core of the prosecutor's discretion: is it a decision as to whether a prosecution should be brought,

Selon lui, la Couronne devait, pour justifier la démarche qu'elle avait suivie pour répudier l'entente, faire davantage que simplement établir que d'aucuns auraient tiré une conclusion différente. Il a conclu que la répudiation de l'entente n'était pas justifiée, car l'appréciation que le procureur de la Couronne avait faite du dossier était « raisonnablement défendable ». Il a en outre jugé que lorsque le tribunal est convaincu que le respect de l'entente conclue ne serait ni contraire à l'intérêt public, ni susceptible de déconsidérer l'administration de la justice, il n'est pas pertinent de savoir si l'accusé a subi ou non un préjudice. Il a ajouté que s'il devait conclure qu'il y a eu préjudice, c'est à ce stade-ci qu'il le ferait. À son avis, M^{me} Nixon a subi un préjudice parce que l'avocat de la défense avait été amené à croire que la preuve constituée par les échantillons d'haleine ne serait pas produite au procès et qu'en conséquence il n'avait pas étudié cette question à l'enquête préliminaire.

[14] Le juge de première instance a conclu qu'il avait été porté atteinte au droit à la sécurité de la personne garanti à M^{me} Nixon par l'art. 7 de la *Charte* et il a ordonné, à titre de réparation, que la Couronne soumette l'entente à un autre juge. M^{me} Nixon a par la suite plaidé coupable à l'infraction de conduite imprudente, été condamnée à payer une amende de 1 800 \$, et été acquittée des infractions au *Code criminel*.

[15] La Couronne a interjeté appel des acquittements. La Cour d'appel de l'Alberta a accueilli l'appel, jugeant que le juge de première instance avait commis une erreur de droit en concluant qu'il avait été porté atteinte aux droits garantis à M^{me} Nixon par l'art. 7 de la *Charte*. La juge Paperny (les juges Côté et Slatter souscrivant à ses motifs) a conclu que le juge de première instance avait appliqué le mauvais critère pour distinguer les questions relevant du pouvoir discrétionnaire en matière de poursuites de celles plus justement qualifiées de stratégie ou de conduite du procureur de la Couronne devant le tribunal. Il faut se garder de tracer une ligne de démarcation artificielle devant la porte de la salle d'audience. La juge Paperny a

continued or ceased, and if so, what it should be for?” (para. 32). Here, the decision to continue the prosecution is a matter of prosecutorial discretion which is not reviewable by the courts, subject to the doctrine of abuse of process.

[16] Paperny J.A. held that the application judge further erred in finding that a plea agreement can only be repudiated if the original decision is unreasonable or not “reasonably defensible”. Instead of reviewing the initial decision of Crown counsel, he should have reviewed the circumstances surrounding the ADM’s decision to repudiate the plea agreement to determine whether that decision amounted to an abuse of process. The relevant inquiry under s. 7 of the *Charter* is whether there is conduct which either causes prejudice to the accused by rendering the trial unfair, or affects the integrity of the justice system itself. As she put it, “Due regard to the constitutional role occupied by the Crown demands a deferential standard of review” (para. 49). Absent prejudice which renders the trial unfair, there must be proof of “prosecutorial misconduct, improper motive or bad faith in the approach, circumstances or ultimate decision to repudiate” (para. 49). Applying this test, Paperny J.A. concluded that there was no evidence to support a finding of abuse of process in the circumstances of this case. The acquittals were set aside and a new trial was ordered on the dangerous driving charges.

[17] Ms. Nixon appeals to this Court.

déclaré ce qui suit : [TRADUCTION] « [l]a question pertinente est plutôt de savoir si la décision contestée relève du pouvoir discrétionnaire essentiel du poursuivant : s’agit-il d’une décision quant à savoir si une poursuite devrait être intentée, continuée ou abandonnée et, le cas échéant, sur quoi doit-elle porter? » (par. 32). En l’espèce, la décision de maintenir la poursuite est une question relevant du pouvoir discrétionnaire en matière de poursuites qui ne peut faire l’objet d’un contrôle de la part des tribunaux, sous réserve de la règle de l’abus de procédure.

[16] Selon la juge Paperny, le juge de première instance a commis une autre erreur en concluant qu’une entente sur le plaidoyer ne pouvait être répudiée que si la décision originale était déraisonnable ou n’était pas « raisonnablement défendable ». Plutôt que d’examiner la décision initiale du procureur de la Couronne, il aurait dû examiner les circonstances dans lesquelles le SMA a pris sa décision de répudier l’entente afin de décider si cette décision constituait un abus de procédure. L’enquête qu’il convient de faire au regard de l’art. 7 de la *Charte* consiste à se demander si la conduite du poursuivant a causé un préjudice à l’accusé, rendant ainsi le procès inéquitable, ou porté atteinte à l’intégrité du système de justice lui-même. Comme elle l’a dit, [TRADUCTION] « [l]a prise en compte du rôle constitutionnel joué par la Couronne appelle une norme de contrôle empreinte de déférence » (par. 49). Si aucun préjudice n’a rendu le procès inéquitable, il faut faire la preuve « d’une conduite répréhensible de la part du poursuivant, d’un motif illégitime, ou de mauvaise foi entachant la démarche, les circonstances ou la décision finale de répudier [l’entente] » (par. 49). Appliquant ce critère, la juge Paperny en est venue à la conclusion qu’aucun élément de preuve ne permettait de conclure à l’abus de procédure dans les circonstances de l’espèce. Elle a donc annulé les acquittements qui avaient été prononcés et ordonné la tenue d’un nouveau procès relativement aux accusations de conduite dangereuse.

[17] M^{me} Nixon se pourvoit maintenant devant la Cour.

3. Analysis

3.1 *The Scope of Prosecutorial Discretion*

[18] Much of the debate between the parties in this Court was centred on whether the Crown's repudiation of a plea agreement is a matter of "prosecutorial discretion" reviewable only for abuse of process, or a matter of "tactics or conduct before the court" governed by the inherent jurisdiction of the criminal trial court to control its own process. The crucial importance of this distinction was fully canvassed and explained in *Krieger*.

[19] In *Krieger*, the Law Society of Alberta claimed that it had jurisdiction over all members of the profession within the province, including those employed by the Attorney General of Alberta. Thus, it purported to investigate an allegation of bad faith or dishonesty against Crown counsel in connection with a failure to disclose relevant information to the accused as required by law. The Attorney General and *Krieger*, who was Crown counsel, challenged the Law Society's jurisdiction, arguing that decisions made by an agent of the Attorney General in the conduct of a prosecution were immune from review under the doctrine of prosecutorial discretion.

[20] Iacobucci and Major JJ., writing for the Court, reviewed the nature and development of the Attorney General's office in Canada and affirmed the independence of the office as "a constitutional principle in this country" (para. 30). The Court explained that the principle of independence requires that the Attorney General "act independently of partisan concerns when supervising prosecutorial decisions" and how it "finds further form in the principle that courts will not interfere with his exercise of executive authority, as reflected in the prosecutorial decision-making process" (paras. 30 and 31). The Court stressed the fundamental

3. Analyse

3.1 *La portée du pouvoir discrétionnaire en matière de poursuites*

[18] Une bonne partie du débat entre les parties devant la Cour a porté sur la question de savoir si la répudiation, par la Couronne, d'une entente sur le plaidoyer relevait du « pouvoir discrétionnaire en matière de poursuites » et ne pouvait faire l'objet d'un contrôle qu'en cas d'abus de procédure, ou s'il s'agissait plutôt d'un élément de « stratégie ou de conduite devant le tribunal » assujéti à la compétence inhérente de la cour de juridiction criminelle de contrôler sa propre procédure. L'importance cruciale de cette distinction a été examinée et expliquée à fond dans *Krieger*.

[19] Dans *Krieger*, le Barreau de l'Alberta prétendait avoir compétence à l'égard de l'ensemble des avocats dans la province, y compris ceux employés par le procureur général de l'Alberta. Il se proposait donc d'enquêter sur une allégation de mauvaise foi ou de malhonnêteté dont un procureur de la Couronne faisait l'objet parce qu'il avait omis de communiquer des renseignements pertinents à l'accusé comme l'exigeait la loi. Le procureur général et *Krieger*, qui était le procureur de la Couronne, ont contesté la compétence du Barreau de l'Alberta, faisant valoir que, suivant la règle du pouvoir discrétionnaire en matière de poursuites, les décisions d'un mandataire du procureur général en matière de poursuites ne pouvaient pas faire l'objet d'un contrôle.

[20] Les juges Iacobucci et Major, s'exprimant au nom de la Cour, ont examiné la nature et l'évolution de la charge de procureur général au Canada et confirmé que l'indépendance de celui-ci était « [d]ans notre pays, un principe constitutionnel » (par. 30). La Cour a expliqué que le principe de l'indépendance exige que le procureur général « agisse indépendamment de toute considération partisane lorsqu'il supervise les décisions d'un procureur du ministère public » et que ce principe « se reflète également dans le principe selon lequel les tribunaux n'interviennent pas dans la façon dont celui-ci exerce son pouvoir exécutif, comme l'illustre le

importance of the principle of independence in these terms (at para 32):

The court's acknowledgment of the Attorney General's independence from judicial review in the sphere of prosecutorial discretion has its strongest source in the fundamental principle of the rule of law under our Constitution. Subject to the abuse of process doctrine, supervising one litigant's decision-making process — rather than the conduct of litigants before the court — is beyond the legitimate reach of the court. . . . The quasi-judicial function of the Attorney General cannot be subjected to interference from parties who are not as competent to consider the various factors involved in making a decision to prosecute. To subject such decisions to political interference, or to judicial supervision, could erode the integrity of our system of prosecution. Clearly drawn constitutional lines are necessary in areas subject to such grave potential conflict. [Emphasis added.]

[21] The Court ultimately concluded, however, that the Law Society retained jurisdiction over Krieger's alleged misconduct, as it was a matter that fell outside the scope of the doctrine. In explaining the proper contours of prosecutorial discretion, the Court drew the distinction between acts of prosecutorial discretion, and tactics or conduct. This distinction is now at the heart of the division in this appeal. Iacobucci and Major JJ. explained the difference as follows:

"Prosecutorial discretion" is a term of art. It does not simply refer to any discretionary decision made by a Crown prosecutor. Prosecutorial discretion refers to the use of those powers that constitute the core of the Attorney General's office and which are protected from the influence of improper political and other vitiating factors by the principle of independence.

. . .

Without being exhaustive, we believe the core elements of prosecutorial discretion encompass the following: (a) the discretion whether to bring the prosecution

processus décisionnel en matière de poursuites » (par. 30 et 31). La Cour a souligné en ces termes l'importance fondamentale du principe de l'indépendance, au par. 32 :

La reconnaissance par la cour que l'exercice du pouvoir discrétionnaire du procureur général en matière de poursuites ne peut pas faire l'objet d'un contrôle judiciaire repose avant tout sur le principe fondamental de la primauté du droit consacré par notre Constitution. Sous réserve de la règle de l'abus de procédure, il ne relève pas de la compétence légitime du tribunal de superviser le processus décisionnel d'une partie plutôt que la conduite des parties comparaisant devant lui. [. . .] La fonction quasi judiciaire du procureur général ne saurait faire l'objet d'une ingérence de la part de parties qui ne sont pas aussi compétentes que lui pour analyser les divers facteurs à l'origine de la décision de poursuivre. Assujettir ce genre de décisions à une ingérence politique ou à la supervision des tribunaux pourrait miner l'intégrité de notre système de poursuites. Il faut établir des lignes de démarcation constitutionnelles claires dans des domaines où un conflit aussi grave risque de survenir. [Je souligne.]

[21] En définitive, la Cour a cependant conclu que le Barreau de l'Alberta conservait sa compétence à l'égard de l'inconduite alléguée de Krieger, car celle-ci n'était pas visée par la règle. En expliquant les limites qu'il convenait d'imposer au pouvoir discrétionnaire en matière de poursuites, la Cour a distingué les actes qui relevaient du pouvoir discrétionnaire en matière de poursuites de la stratégie ou la conduite. Il s'agit de la distinction au cœur du présent litige. Les juges Iacobucci et Major ont expliqué la différence dans les termes suivants :

L'expression « pouvoir discrétionnaire en matière de poursuites » est une expression technique. Elle ne désigne pas simplement la décision discrétionnaire d'un procureur du ministère public, mais vise l'exercice des pouvoirs qui sont au cœur de la charge de procureur général et que le principe de l'indépendance protège contre l'influence de considérations politiques inappropriées et d'autres vices.

. . .

Sans vouloir être exhaustifs, nous croyons que le pouvoir discrétionnaire en matière de poursuites comprend essentiellement les éléments suivants : a) le

of a charge laid by police; (b) the discretion to enter a stay of proceedings in either a private or public prosecution, as codified in the *Criminal Code*, R.S.C. 1985, c. C-46, ss. 579 and 579.1; (c) the discretion to accept a guilty plea to a lesser charge; (d) the discretion to withdraw from criminal proceedings altogether: *R. v. Osborne* (1975), 25 C.C.C. (2d) 405 (N.B.C.A.); and (e) the discretion to take control of a private prosecution: *R. v. Osiowy* (1989), 50 C.C.C. (3d) 189 (Sask. C.A.). While there are other discretionary decisions, these are the core of the delegated sovereign authority peculiar to the office of the Attorney General.

Significantly, what is common to the various elements of prosecutorial discretion is that they involve the ultimate decisions as to whether a prosecution should be brought, continued or ceased, and what the prosecution ought to be for. Put differently, prosecutorial discretion refers to decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it. Decisions that do not go to the nature and extent of the prosecution, i.e., the decisions that govern a Crown prosecutor's tactics or conduct before the court, do not fall within the scope of prosecutorial discretion. Rather, such decisions are governed by the inherent jurisdiction of the court to control its own processes once the Attorney General has elected to enter into that forum. [First emphasis added; second and third emphases in original; paras. 43 and 46-47.]

3.2 Submissions of the Parties

[22] On the one hand, Ms. Nixon submits that the Court of Appeal erred when it concluded that the Crown's decision to renege on its agreement with the defence was an aspect of its traditional, constitutionally protected, core discretionary powers. She contends that the Crown's decision to resile from the agreement constitutes a reversal in tactic subject to broader review. Given that Crown counsel's offer had been accepted by the defence, the resulting plea agreement is akin to a contractual undertaking. A bargain is a bargain, it is argued. Absent some vitiating flaw in the negotiating process, such as mistake, misrepresentation or fraud,

pouvoir discrétionnaire d'intenter ou non des poursuites relativement à une accusation portée par la police; b) le pouvoir discrétionnaire d'ordonner un arrêt des procédures dans le cadre de poursuites privées ou publiques, au sens des art. 579 et 579.1 du *Code criminel*, L.R.C. 1985, ch. C-46; c) le pouvoir discrétionnaire d'accepter un plaidoyer de culpabilité relativement à une accusation moins grave; d) le pouvoir discrétionnaire de se retirer complètement de procédures criminelles : *R. c. Osborne* (1975), 25 C.C.C. (2d) 405 (C.A.N.-B.); e) le pouvoir discrétionnaire de prendre en charge des poursuites privées : *R. c. Osiowy* (1989), 50 C.C.C. (3d) 189 (C.A. Sask.). Même s'il existe d'autres décisions discrétionnaires, celles-ci constituent l'essentiel du pouvoir souverain délégué qui caractérise la charge de procureur général.

Fait important, le point commun entre les divers éléments du pouvoir discrétionnaire en matière de poursuites est le fait qu'ils comportent la prise d'une décision finale quant à savoir s'il y a lieu d'intenter ou de continuer des poursuites ou encore d'y mettre fin, d'une part, et quant à l'objet des poursuites, d'autre part. Autrement dit, le pouvoir discrétionnaire en matière de poursuites vise les décisions concernant la nature et l'étendue des poursuites ainsi que la participation du procureur général à celles-ci. Les décisions qui ne portent pas sur la nature et l'étendue des poursuites, c'est-à-dire celles qui ont trait à la stratégie ou à la conduite du procureur du ministère public devant le tribunal, ne relèvent pas du pouvoir discrétionnaire en matière de poursuites. Ces décisions relèvent plutôt de la compétence inhérente du tribunal de contrôler sa propre procédure une fois que le procureur général a choisi de se présenter devant lui. [Premier soulignement ajouté; deuxième et troisième soulignements dans l'original; par. 43 et 46-47.]

3.2 Les prétentions des parties

[22] D'une part, M^{me} Nixon soutient que la Cour d'appel a commis une erreur en concluant que la décision de la Couronne de répudier l'entente qu'elle avait conclue avec la défense relevait de ses pouvoirs discrétionnaires essentiels traditionnellement protégés par la Constitution. Elle prétend que la décision de la Couronne de mettre fin à l'entente constituait un changement de stratégie pouvant faire l'objet d'un examen plus large. L'offre du procureur de la Couronne ayant été acceptée par la défense, l'entente sur le plaidoyer qui en a résulté s'apparentait à un engagement contractuel. Un marché est un marché, prétend-elle. À défaut d'une

the Crown should be held strictly to its word. It is not necessary for the applicant to show that she has been prejudiced, or to establish independent acts of “bad faith” or “flagrant impropriety”. Unless the Crown can satisfy the court that implementing the plea agreement would itself bring the administration of justice into disrepute, the repudiation of a valid plea agreement, in and of itself, constitutes an abuse of process. In short, Ms. Nixon argues that the application judge adopted the correct approach and urges the Court to restore his decision.

[23] The intervener Criminal Trial Lawyers’ Association (“CTLA”) supports Ms. Nixon’s argument that the Crown’s promise to enter into a plea agreement is an undertaking “like any other given by a lawyer”. It argues that the undertaking “must be strictly and scrupulously fulfilled” and that an abuse of process need not be shown before the agreement may be summarily enforced by a court (Factum of the CTLA, at para. 2).

[24] The Criminal Lawyers’ Association (Ontario) (“CLA”) also supports Ms. Nixon’s position that the repudiation of a plea agreement does not fall within “core” Crown discretion identified in *Krieger*. Thus, the CLA submits that judicial review of a repudiation decision is warranted even in the absence of “flagrant impropriety” or bad faith. Rather, the test for allowing Crown repudiation of a plea agreement should be essentially the same as the test applied for allowing a sentencing judge to reject a joint submission: would the proposed resolution bring the administration of justice into disrepute? The CLA submits that “[r]epudiation is an abuse of process unless the Crown discharges its onus of demonstrating that the contemplated agreement would have brought the administration of justice into disrepute and the accused can be restored

quelconque lacune qui aurait vicié le processus de négociation, telle une erreur, une fausse déclaration ou une fraude, la Couronne devrait être rigoureusement tenue de respecter son engagement. Selon elle, le demandeur n’est pas tenu d’établir qu’il a subi un préjudice ou que le représentant de la Couronne a commis des actes distincts empreints de « mauvaise foi » ou que ce dernier a eu une « conduite répréhensible flagrante ». À moins que la Couronne puisse convaincre le tribunal que la mise en œuvre même de l’entente sur le plaidoyer serait susceptible de déconsidérer l’administration de la justice, la répudiation d’une entente sur le plaidoyer valable est, en soi, un abus de procédure. En somme, M^{me} Nixon prétend que le juge de première instance a suivi la bonne démarche et elle exhorte la Cour à rétablir sa décision.

[23] L’intervenante Criminal Trial Lawyers’ Association (« CTLA ») souscrit à l’argument de M^{me} Nixon selon lequel la promesse de la Couronne de conclure une entente sur le plaidoyer constituait un engagement [TRADUCTION] « comme tout autre engagement pris par un avocat ». Elle soutient que l’engagement « doit être strictement et scrupuleusement respecté » et qu’il n’est pas nécessaire de démontrer qu’il y a eu abus de procédure pour qu’un tribunal puisse faire respecter sommairement l’entente (mémoire de la CTLA, par. 2).

[24] La Criminal Lawyers’ Association (Ontario) (« CLA ») souscrit également au point de vue de M^{me} Nixon selon lequel la répudiation d’une entente sur le plaidoyer ne relève pas de l’un ou l’autre des éléments composant « essentiellement » le pouvoir discrétionnaire du ministère public mentionnés dans *Krieger*. Par conséquent, la CLA prétend que le contrôle judiciaire d’une décision de répudier une entente sur le plaidoyer est justifié même en l’absence d’une « conduite répréhensible flagrante » ou de mauvaise foi. En fait, le critère pour décider s’il convient d’accepter la répudiation d’une telle entente par la Couronne doit être essentiellement le même que celui qui sert à apprécier le bien-fondé de la décision du juge qui impose la peine de rejeter une proposition conjointe des parties : la résolution proposée serait-elle susceptible

to his or her initial position” (Factum of the CLA, at para. 1 (emphasis in original)).

[25] On the other hand, the respondent, the Attorney General of Alberta, takes the position that both the plea agreement and the repudiation are acts that fall within the scope of the doctrine of prosecutorial discretion. As such, neither is open to review or supervision by the courts, except through an allegation of abuse of process. The respondent argues that the test advocated by Ms. Nixon and by the supporting interveners does not meet the high threshold for proving abuse of process. Abuse of process that involves core prosecutorial discretion requires proof of bad faith or flagrant impropriety by the Crown. Here, there was no evidence of any such conduct by the Crown officials in their review and repudiation of the plea agreement. Nor did Ms. Nixon suffer any prejudice as a result of the repudiation, given that she was restored to the position she was in at the conclusion of the preliminary inquiry, before the plea agreement was struck. Therefore, the Court of Appeal rightly concluded that there was no basis for finding a breach of her s. 7 rights.

[26] Attorneys General from three provinces intervened in support of the respondent’s position. In particular, they submit that the approach adopted by the application judge runs afoul with the principle of independence affirmed in *Krieger*. The Attorney General of Ontario submits that this Court’s decision in *Krieger* has been misinterpreted by lower courts. It asks this Court to confirm that *Krieger* was never intended to narrow the area of

de déconsidérer l’administration de la justice? Selon la CLA, [TRADUCTION] « [l]a répudiation est un abus de procédure à moins que la Couronne ne s’acquitte de son obligation d’établir que l’entente proposée aurait été susceptible de déconsidérer l’administration de la justice et que l’accusé peut être rétabli dans la situation où il se trouvait au départ » (mémoire de la CLA, par. 1 (soulignement dans l’original)).

[25] D’autre part, l’intimé, le procureur général de l’Alberta, soutient que tant l’entente sur le plaidoyer que la répudiation de celle-ci sont des actes visés par la règle du pouvoir discrétionnaire en matière de poursuites. Ainsi, ni l’une ni l’autre n’est susceptible de contrôle ou de supervision par les tribunaux, sauf si l’abus de procédure est allégué. L’intimé avance que le critère préconisé par M^{me} Nixon et les intervenants appuyant sa cause ne convient pas à la norme préliminaire exigeante à laquelle il doit être satisfait pour établir qu’il y a eu abus de procédure. Pour prouver que l’exercice du pouvoir discrétionnaire essentiel en matière de poursuites a donné lieu à un abus de procédure, il faut démontrer que les représentants de la Couronne ont agi de mauvaise foi ou qu’ils ont eu une conduite répréhensible flagrante. En l’espèce, rien ne prouvait qu’ils avaient agi de mauvaise foi ou eu une telle conduite en examinant, puis, en répudiant l’entente sur le plaidoyer. M^{me} Nixon n’a pas non plus subi de préjudice par suite de la répudiation, car elle avait été rétablie dans la situation où elle s’était trouvée à la fin de l’enquête préliminaire, avant que l’entente ne soit conclue. Par conséquent, la Cour d’appel a jugé à juste titre que rien ne permettait de conclure qu’il avait été porté atteinte aux droits garantis à M^{me} Nixon par l’art. 7 de la *Charte*.

[26] Les procureurs généraux de trois provinces sont intervenus pour appuyer la position de l’intimé. Ils soutiennent notamment que la démarche suivie par le juge de première instance va à l’encontre du principe de l’indépendance confirmé dans *Krieger*. Le procureur général de l’Ontario fait valoir que la décision de la Cour dans *Krieger* a été mal interprétée par les juridictions inférieures. Il demande à la Cour de confirmer que *Krieger*

protected prosecutorial discretion, or to create a schism in threshold tests for finding an abuse of process depending on whether a decision is considered “core” or “non-core”. All acts of prosecutorial discretion are immune from judicial supervision, subject only to the same high threshold for abuse of process.

[27] Along the same lines, the Attorney General of British Columbia (“AGBC”) emphasizes the importance of criminal trial courts not proceeding with a review of prosecutorial discretion in the absence of a “threshold determination” that the inquiry is warranted. In the absence of evidence of irremediable impairment to the fair trial interests of the accused, a criminal trial court should only proceed with an application for relief challenging prosecutorial discretion under the residual category of abuse of process if there is an evidentiary record capable of supporting the claim. This approach helps to avoid scenarios such as the case at bar, where the trial judge engaged in a full examination of the reasons behind the decision to renege on the plea agreement, even though there was nothing to suggest that the decision was motivated by improper considerations, or was made in bad faith.

[28] Finally, the Attorney General of Manitoba (“AGM”) intervenes to underscore the importance of the Attorney General’s supervisory role over the exercise of prosecutorial discretion. Acknowledging that the repudiation of plea agreements is and should be rare, it argues that “when the Attorney General, or a senior delegate, makes a *bona fide* decision to overturn a plea agreement that he or she determines is contrary to the public interest, that decision is part of the proper and usual institutional checks and balances necessary for the

ne visait aucunement à restreindre le domaine de protection du pouvoir discrétionnaire en matière de poursuites ou à départager les critères préliminaires qu’il convient d’appliquer pour décider s’il y a eu abus de procédure selon que la décision en cause est considérée comme résultant de l’exercice d’un élément composant essentiellement ce pouvoir ou non. Tous les actes posés dans l’exercice du pouvoir discrétionnaire en matière de poursuites échappent au contrôle judiciaire, sous réserve uniquement de la norme préliminaire exigeante à laquelle il doit être satisfait pour démontrer l’abus de procédure.

[27] Dans le même ordre d’idée, le procureur général de la Colombie-Britannique (« PGCB ») insiste sur l’importance que les cours de juridiction criminelle s’abstiennent de contrôler l’exercice du pouvoir discrétionnaire en matière de poursuites avant d’avoir d’abord décidé que l’examen est justifié. En l’absence de preuve démontrant qu’il a été irrémédiablement porté atteinte au droit de l’accusé à un procès équitable, les cours de juridiction criminelle ne doivent traiter des demandes de réparation contestant l’exercice du pouvoir discrétionnaire en matière de poursuites dans la catégorie résiduelle d’abus de procédure que s’il existe un dossier de preuve pouvant étayer l’allégation. Cette démarche permet d’éviter des scénarios comme celui en l’espèce, où le juge de première instance a fait un examen complet des motifs qui sous-tendaient la décision de répudier l’entente sur le plaidoyer, même si rien ne portait à croire que la décision avait été prise sur la base de considérations non pertinentes ou de mauvaise foi.

[28] Enfin, le procureur général du Manitoba (« PGM ») intervient pour souligner l’importance du rôle de surveillance du procureur général sur l’exercice du pouvoir discrétionnaire en matière de poursuites. Reconnaisant que la répudiation d’une entente sur le plaidoyer est — et devrait être — quelque chose de rare, il avance que [TRADUCTION] « lorsque le procureur général, ou un délégué principal, décide de bonne foi de répudier une entente sur le plaidoyer qui, selon lui, va à l’encontre de l’intérêt public, il prend une décision qui fait partie

justice system to function properly” (Factum of the AGM, at para. 3).

3.3 *The Plea Agreement and Its Repudiation Are Acts of Prosecutorial Discretion*

[29] None of the participants in this appeal disputes that Crown counsel’s decision to resolve the proceedings by accepting a plea to a lesser offence falls within the scope of prosecutorial discretion as defined in *Krieger*. To the extent that the application judge’s analysis suggests that anything occurring after the charges are laid falls outside the scope of prosecutorial discretion, it cannot be sustained. If the line were to be drawn at the point seemingly chosen by the application judge, namely “when [the] discretion is exercised in favour of proceeding” (para. 12), Crown counsel’s decision to enter into a plea agreement would itself be subject to review by the court as a matter of conduct or tactic without regard to the principles of judicial restraint set out in *Krieger*. As noted by Paperny J.A., to artificially draw the line at the courtroom door “effectively neuters some of the primary purposes of prosecutorial discretion, to resolve cases by accepting pleas to lesser charges and to discontinue prosecutions” (para. 32).

[30] In my view, the question of whether the ADM’s decision to repudiate the plea agreement is an act of prosecutorial discretion, although disputed in this appeal, is just as easily resolved. As aptly put by Paperny J.A., in determining whether any impugned decision falls within the core of prosecutorial discretion, it is useful to ask: “. . . is it a decision as to whether a prosecution should be brought, continued or ceased, and if so, what it

des freins et contrepois institutionnels habituels qui sont essentiels au bon fonctionnement du système de justice » (mémoire du PGM, par. 3).

3.3 *L’entente sur le plaidoyer et sa répudiation relèvent du pouvoir discrétionnaire en matière de poursuites*

[29] Aucun des participants au présent pourvoi ne conteste que la décision du procureur de la Couronne de résoudre l’affaire en acceptant un plaidoyer de culpabilité relativement à une infraction moins grave relève du pouvoir discrétionnaire en matière de poursuites au sens de l’arrêt *Krieger*. Dans la mesure où elle donne à penser que tout ce qui survient après que les accusations ont été portées n’est pas visé par le pouvoir discrétionnaire en matière de poursuites, l’analyse du juge de première instance ne peut être retenue. S’il fallait tracer la ligne de démarcation là où le juge de première instance semble estimer qu’il est indiqué de le faire, à savoir [TRADUCTION] « lorsque l’exercice du pouvoir discrétionnaire est favorable à la poursuite des procédures » (par. 12), la décision du procureur de la Couronne de conclure une entente sur le plaidoyer serait elle-même susceptible de contrôle par le tribunal en tant qu’élément de la conduite ou la stratégie de ce dernier, et ce sans égard aux principes de retenue judiciaire énoncés dans *Krieger*. Comme l’a souligné la juge Paperny, tracer artificiellement la ligne de démarcation devant la porte de la salle d’audience [TRADUCTION] « revient à neutraliser certains des objectifs principaux du pouvoir discrétionnaire en matière de poursuites, c’est-à-dire régler des dossiers par l’acceptation de plaidoyers de culpabilité relativement à des accusations moins graves, et mettre fin à des poursuites » (par. 32).

[30] Selon moi, la question de savoir si la décision du SMA de répudier l’entente sur le plaidoyer est un acte résultant de l’exercice du pouvoir discrétionnaire en matière de poursuites, bien qu’elle soit contestée dans le présent pourvoi, est tout aussi facilement réglée. Comme l’a si bien dit la juge Paperny, pour décider si une décision contestée a été prise dans l’exercice du pouvoir discrétionnaire essentiel en matière de poursuites, il est utile de se

should be for?” (para. 32). Applying this test, she held that the ADM’s decision to repudiate the plea agreement “fell squarely within the core elements of prosecutorial discretion” (para. 33). I agree. In my respectful view, it is difficult to see how the ADM’s decision could otherwise be characterized. The ADM effectively decided that the prosecution against Ms. Nixon should be continued and that it should be for the *Criminal Code* offences of dangerous driving, not for the traffic infraction of careless driving. Clearly, the ADM’s decision to repudiate the plea agreement also constitutes an act of prosecutorial discretion. Prosecutorial discretion was not spent with the decision to initiate the proceedings, nor did it terminate with the plea agreement. So long as the proceedings are ongoing, the Crown may be required to make further decisions about whether the prosecution should be continued and, if so, in respect of what charges.

[31] Thus, it follows that the Crown’s ultimate decision to resile from the plea agreement and to continue the prosecution is subject to the principles set out in *Krieger*: it is *only* subject to judicial review for abuse of process.

[32] The more difficult question in this appeal is how the initial exercise of prosecutorial discretion — Crown counsel’s offer to resolve the matter on the basis of a plea to a lesser charge — should figure in the analysis regarding abuse of process. As outlined earlier, the parties and interveners present very divergent views on how this question should be answered. Before dealing with these arguments, I will review the law on abuse of process.

poser la question suivante : [TRADUCTION] « . . . s’agit-il d’une décision quant à savoir si une poursuite devrait être intentée, continuée ou abandonnée et, le cas échéant, sur quoi doit-elle porter? » (par. 32). Appliquant ce critère, elle a conclu que la décision du SMA de répudier l’entente « relevait directement du pouvoir discrétionnaire essentiel en matière de poursuites » (par. 33). Je souscris à cette opinion. À mon humble avis, il est difficile de voir comment on pourrait qualifier autrement la décision du SMA. Le SMA a en effet décidé que la poursuite contre M^{me} Nixon devrait être continuée et qu’elle devrait porter sur les infractions de conduite dangereuse prévues au *Code criminel*, et non sur l’infraction de conduite imprudente visée par les règles de la circulation. De toute évidence, la décision du SMA de répudier l’entente constitue également un acte résultant de l’exercice du pouvoir discrétionnaire en matière de poursuites. Ni la décision d’entamer les procédures, ni la conclusion de l’entente ne signifiait que ce pouvoir ne pouvait plus être exercé. En effet, tant que les procédures sont en cours, la Couronne peut être tenue de prendre d’autres décisions quant à savoir si la poursuite doit être continuée et, le cas échéant, à l’égard de quelles accusations.

[31] Par conséquent, il s’ensuit que la décision finale de la Couronne de répudier l’entente sur le plaider et de continuer la poursuite est visée par les principes énoncés dans *Krieger* : elle est susceptible de contrôle judiciaire *seulement* s’il y a eu abus de procédure.

[32] La question plus difficile à trancher dans le présent pourvoi est de savoir dans quelle mesure il faut, dans l’analyse relative à l’abus de procédure, tenir compte de l’exercice initial du pouvoir discrétionnaire en matière de poursuites, à savoir l’offre du procureur de la Couronne de régler l’affaire sur la base d’un plaider de culpabilité relativement à une accusation moins grave. Comme il a déjà été souligné, les parties et les intervenants font état d’opinions très divergentes sur la manière dont il convient de répondre à cette question, mais avant de considérer ces arguments, je vais examiner le droit applicable en matière d’abus de procédure.

3.4 *The Doctrine of Abuse of Process*

[33] Until this Court's decision in *R. v. Jewitt*, [1985] 2 S.C.R. 128, there was much controversy about whether a court had the power to stay validly instituted criminal proceedings for abuse of process. The inherent jurisdiction of a superior court to control its own process by staying abusive proceedings had long been recognized in Canada. However, it remained uncertain whether criminal courts had the discretion to stay proceedings for abuse of process, or whether this was a power reserved for the Attorney General under s. 508 (now s. 579) of the *Criminal Code* (pp. 131-32).

[34] *Jewitt* put an end to the uncertainty by recognizing that a trial court judge had a "residual discretion" to stay proceedings to remedy abuse of process. The Court held that the common law doctrine could be applied in narrow circumstances "where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings" (pp. 136-37).

[35] Initially, the common law doctrine of abuse of process was viewed as analytically distinct from *Charter* considerations since its focus was more on maintaining confidence in the integrity of the judicial system than on protecting individual rights. The common law and *Charter* analyses were also kept separate because of the different burdens of proof to successfully make out an abuse of process claim under the two regimes. For an applicant to establish a violation under the *Charter*, the burden of proof was the balance of probabilities standard. For an applicant to successfully invoke the court's common law power to stay proceedings for abuse of process, the burden

3.4 *La règle de l'abus de procédure*

[33] La question de savoir si les tribunaux peuvent, pour cause d'abus de procédure, suspendre des procédures criminelles valablement intentées, était fort controversée avant l'arrêt de notre Cour dans l'affaire *R. c. Jewitt*, [1985] 2 R.C.S. 128. Le pouvoir inhérent d'une cour supérieure de contrôler sa propre procédure en suspendant des poursuites abusives avait été reconnu depuis longtemps au Canada, mais la question de savoir si les cours criminelles avaient le pouvoir discrétionnaire de suspendre des procédures pour cause d'abus de procédure, ou si, en vertu de l'art. 508 (l'actuel art. 579) du *Code criminel*, l'exercice d'un tel pouvoir relevait plutôt uniquement du procureur général, demeurait incertaine (p. 131-132).

[34] L'arrêt *Jewitt* a mis fin à cette incertitude en indiquant que les juges de première instance avaient le « pouvoir discrétionnaire résiduel » de suspendre des procédures afin de remédier à des abus de procédure. La Cour a affirmé qu'il était possible, dans certains cas particuliers, d'appliquer la règle de common law en matière d'abus de procédure « lorsque forcer le prévenu à subir son procès violerait les principes de justice fondamentaux qui sous-tendent le sens du franc-jeu et de la décence qu'a la société, ainsi que d'empêcher l'abus des procédures de la cour par une procédure oppressive ou vexatoire » (p. 136-137).

[35] Sur le plan analytique, la règle de common law en matière d'abus de procédure était perçue au départ comme distincte des considérations fondées sur la *Charte*, car elle visait davantage à maintenir la confiance du public dans l'intégrité du système judiciaire qu'à protéger les droits individuels. En outre, la distinction entre l'analyse applicable en common law et celle fondée sur la *Charte* était maintenue parce que les deux régimes prévoyaient des fardeaux de preuve différents en matière d'abus de procédure. En effet, pour démontrer qu'il avait été porté atteinte aux droits que lui garantit la *Charte*, l'intéressé devait satisfaire à la norme de la prépondérance des probabilités, alors que pour

of proof was the more onerous “clearest of cases” standard.

[36] Ten years later in *R. v. O’Connor*, [1995] 4 S.C.R. 411, the Court noted that there was much overlap between the *Charter* and the common law doctrine of abuse of process, as the latter had found application in circumstances involving state conduct touching upon both “the integrity of the judicial system and the fairness of the individual accused’s trial” (para. 73). Consequently, L’Heureux-Dubé J., writing for a unanimous Court on this point, held that the two regimes should be merged under s. 7 of the *Charter*. Depending on the circumstances, different *Charter* guarantees may be engaged by the alleged abuse of process and thus some claims may be better addressed by reference to the specific procedural guarantee. For example, “where the accused claims that the Crown’s conduct has prejudiced his ability to have a trial within a reasonable time, abuses may be best addressed by reference to s. 11(b)” (para. 73). The Court identified two categories of abuse of process which would be caught by s. 7 of the *Charter*: (1) prosecutorial conduct affecting the fairness of the trial; and (2) prosecutorial conduct that “contravenes fundamental notions of justice and thus undermines the integrity of the judicial process” (para. 73).

[37] The Court held further that there was no practical utility in maintaining two distinct analytic regimes based on the different burdens of proof. Even if a violation of s. 7 is proved on a balance of probabilities, the court would still have to determine the appropriate remedy under s. 24(1) of the *Charter* and the “clearest of cases” burden would still apply to justify the remedy of a judicial stay of proceedings (para. 69). The Court made clear, however, that the fusion of common law and *Charter* claims of abuse of process under s. 7 of

obtenir que le tribunal exerce le pouvoir qu’il tenait de la common law de suspendre une instance pour abus de procédure, l’intéressé se voyait imposer un fardeau de preuve plus exigeant, à savoir la norme des « cas les plus manifestes ».

[36] Dix ans plus tard, dans *R. c. O’Connor*, [1995] 4 R.C.S. 411, la Cour a fait remarquer qu’il y avait beaucoup de points communs entre la règle de l’abus de procédure fondée sur la *Charte* et celle de la common law, cette dernière ayant été appliquée dans un certain nombre de circonstances mettant en cause la conduite de l’État en ce qui concerne à la fois « l’intégrité du système judiciaire et l’équité du procès de la personne accusée » (par. 73). C’est pourquoi la juge L’Heureux-Dubé, rédigeant l’opinion unanime de la Cour sur ce point, a mentionné qu’il était nécessaire de fusionner les deux régimes pour n’en faire qu’une seule analyse fondée sur l’art. 7 de la *Charte*. Selon les circonstances, l’allégation d’abus de procédure peut faire intervenir différentes garanties prévues par la *Charte*; par conséquent, la solution la plus opportune pour traiter d’une telle allégation consiste parfois à s’appuyer sur la garantie procédurale particulière en cause. Par exemple, « lorsque l’accusé prétend que la conduite du ministère public l’a empêché d’être jugé dans un délai raisonnable, on peut mieux attaquer ces abus en ayant recours à l’al. 11b) » (par. 73). La Cour a relevé deux catégories d’abus de procédure auxquelles s’applique l’art. 7 de la *Charte* : (1) les cas où la conduite du poursuivant porte atteinte à l’équité du procès; (2) les cas où la conduite du poursuivant « contre[vient] aux notions fondamentales de justice et [mine] ainsi l’intégrité du processus judiciaire » (par. 73).

[37] La Cour a ajouté qu’il n’y avait aucune utilité concrète à conserver deux régimes d’analyse distincts fondés sur des fardeaux de preuve différents. Même si une atteinte à l’art. 7 de la *Charte* est établie selon la prépondérance des probabilités, le tribunal doit tout de même choisir la réparation qu’il convient d’accorder sous le régime du par. 24(1) de la *Charte*, et il faut toujours s’acquitter du fardeau des « cas les plus manifestes » pour justifier une suspension judiciaire des procédures (par. 69). La Cour a toutefois clairement indiqué que la fusion

the *Charter* does not alter “the essential balancing character of abuse of process”. L’Heureux-Dubé J. explained as follows (at para. 69):

Remedies less drastic than a stay of proceedings are of course available under s. 24(1) in situations where the “clearest of cases” threshold is not met but where it is proved, on a balance of probabilities, that s. 7 has been violated. In this respect the *Charter* regime is more flexible than the common law doctrine of abuse of process. However, this is not a reason to retain a separate common law regime. It is important to recognize that the *Charter* has now put into judges’ hands a scalpel instead of an axe — a tool that may fashion, more carefully than ever, solutions taking into account the sometimes complementary and sometimes opposing concerns of fairness to the individual, societal interests, and the integrity of the judicial system. Even at common law, courts have given consideration to the societal (not to mention individual) interests in obtaining a final adjudication of guilt or innocence in cases involving serious offences. . . . I see no reason why such balancing cannot be performed equally, if not more, effectively under the *Charter*, both in terms of defining violations and in terms of selecting the appropriate remedy to perceived violations. [Emphasis added.]

[38] Thus, in defining what constitutes a *violation*, it is important to recall what kind of harm the common law doctrine of abuse of process was intended to address and, in turn, why this degree of harm called for a stay of proceedings as the *appropriate remedy*. In other words, while s. 24(1) of the *Charter* allows for a wide range of remedies, this does not mean that abuse of process can be made out by demonstrating a lesser degree of harm, either to the accused’s fair trial interests or to the integrity of the justice system. Achieving the appropriate balance between societal and individual concerns defines the essential character of abuse of process.

du régime de common law en matière d’abus de procédure et des recours prévus par la *Charte* pour n’en faire qu’une seule analyse fondée sur l’art. 7 de celle-ci ne modifie pas « le caractère essentiel de la balance qui doit s’opérer en matière d’abus de procédure ». La juge L’Heureux-Dubé a donné les explications suivantes à ce sujet (par. 69) :

Le paragraphe 24(1) autorise, de toute évidence, des réparations moins draconiennes qu’un arrêt des procédures lorsque le test « des cas les plus manifestes » n’est pas satisfait, mais que l’on établit, selon la balance des probabilités, qu’il y a eu violation de l’art. 7. À cet égard, le régime de la *Charte* est plus souple que la doctrine de l’abus de procédure en common law. Ceci n’est, toutefois, pas là la raison de conserver un régime de common law distinct. Il est important de reconnaître que la *Charte* a remplacé, entre les mains des juges, la hache par le scalpel et leur a donné un outil qui permet de façonner mieux que jamais des solutions qui tiennent compte des préoccupations parfois complémentaires et parfois contraires que sont l’équité envers les individus, les intérêts de la société et l’intégrité du système judiciaire. Même en common law, les tribunaux ont tenu compte des intérêts de la société (pour ne pas mentionner les intérêts individuels) à obtenir une déclaration définitive de culpabilité ou de non-culpabilité dans les affaires mettant en cause des infractions graves. [. . .] Je ne vois pas pourquoi une telle pondération ne pourrait s’effectuer aussi efficacement, sinon plus, en vertu de la *Charte*, tant en ce qui concerne la définition des violations qu’en ce qui concerne le choix de la réparation appropriée aux violations identifiées. [Je souligne.]

[38] Ainsi, pour déterminer ce qui constitue une *violation*, il importe de se rappeler le genre de préjudice auquel la règle de common law en matière d’abus de procédure était censée s’attaquer et, par tant, la raison pour laquelle un préjudice aussi grave justifiait une suspension de l’instance comme *réparation appropriée*. Autrement dit, même si le par. 24(1) de la *Charte* permet d’octroyer une vaste gamme de réparations, cela ne signifie pas pour autant que l’on puisse faire la preuve d’un abus de procédure en établissant une atteinte moins grave soit au droit de l’accusé à un procès équitable, soit à l’intégrité du système de justice. Trouver le juste équilibre entre les préoccupations des individus et celles de la société : voilà le caractère essentiel de l’analyse relative à l’abus de procédure.

[39] Under the first category of cases, the concern is about the fairness of the accused's trial. Establishing prejudice of the requisite degree is key to meeting the test; proof of prosecutorial misconduct, while relevant, is not a prerequisite: *R. v. Keyowski*, [1988] 1 S.C.R. 657. In *Keyowski*, the accused's first two trials ended with the jury failing to agree on a verdict; his third trial was stayed by the trial judge for abuse of process. The narrow issue on appeal was whether a series of trials could, in and of itself, constitute an abuse of process, or whether it was necessary for the accused to show prosecutorial misconduct.

[40] The Court reiterated that the test for abuse of process was whether "compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency", or where the proceedings are "oppressive or vexatious" (pp. 658-59, quoting from *Jewitt*, at pp. 136-37). While the Court concluded that the Crown's exercise of discretion to proceed with a third trial did not constitute an abuse of process in the circumstances of the case, the Court held that the test could be made out in the absence of prosecutorial discretion. Wilson J. explained as follows (at p. 659):

To define "oppressive" as requiring misconduct or an improper motive would, in my view, unduly restrict the operation of the doctrine. In this case, for example, where there is no suggestion of misconduct, such a definition would prevent any limit being placed on the number of trials that could take place. Prosecutorial misconduct and improper motivation are but two of many factors to be taken into account when a court is called upon to consider whether or not in a particular case the Crown's exercise of its discretion to re-lay the indictment amounts to an abuse of process.

[41] Under the residual category of cases, prejudice to the accused's interests, although relevant, is not determinative. Of course, in most cases, the

[39] Dans la première catégorie de cas, on se préoccupe de l'équité du procès de l'accusé. L'élément clé pour remplir le critère consiste à établir que l'intéressé a subi un préjudice suffisamment grave; la preuve d'une conduite répréhensible du poursuivant, quoique pertinente, n'est pas une condition préalable : *R. c. Keyowski*, [1988] 1 R.C.S. 657. Dans cette affaire, les jurés n'étaient pas parvenus à s'entendre sur un verdict au terme des deux premiers procès de l'accusé; le juge du troisième procès a suspendu celui-ci pour abus de procédure. La question précise à trancher en appel était de savoir si une série de procès pouvait constituer en soi un abus de procédure ou si l'accusé devait démontrer que le poursuivant avait agi de manière répréhensible.

[40] La Cour a répété que le critère à appliquer pour décider s'il y a eu abus de procédure est de savoir si « forcer le prévenu à subir son procès violerait les principes de justice fondamentaux qui sous-tendent le sens du franc-jeu et de la décence qu'a la société » ou s'il s'agit d'une procédure « oppressive ou vexatoire » (p. 659, citant *Jewitt*, p. 136-137). Bien qu'elle ait conclu que la Couronne n'avait pas commis d'abus de procédure dans les circonstances de l'espèce en exerçant son pouvoir discrétionnaire d'intenter un troisième procès, la Cour a affirmé qu'il pouvait être satisfait au critère en l'absence d'un pouvoir discrétionnaire en matière de poursuites. Comme l'explique la juge Wilson (p. 659) :

À mon avis, donner au mot « oppressive » une définition exigeant qu'il y ait une conduite blâmable ou un motif illégitime limiterait indûment l'application du principe. Dans le cas présent, par exemple, où il n'y a pas d'allégation de conduite blâmable, cette définition viendrait empêcher qu'une limite quelconque soit imposée au nombre de procès qui pourraient avoir lieu. La conduite blâmable de la poursuite et l'existence d'un motif illégitime ne sont que deux des nombreux facteurs qu'un tribunal doit prendre en considération lorsqu'il est appelé à examiner si, dans un cas donné, l'exercice par le ministère public de son pouvoir discrétionnaire de présenter de nouveau l'acte d'accusation équivaut à un abus de procédure.

[41] Dans la catégorie résiduelle de cas, l'atteinte aux droits de l'accusé est pertinente mais non déterminante. Bien entendu, dans la plupart

accused will need to demonstrate that he or she was prejudiced by the prosecutorial conduct in some significant way to successfully make out an abuse of process claim. But prejudice under the residual category of cases is better conceptualized as an act tending to undermine society's expectations of fairness in the administration of justice. This essential balancing character of abuse of process under the residual category of cases was well captured by the words of L'Heureux-Dubé J. in *R. v. Conway*, [1989] 1 S.C.R. 1659. She stated the following:

Under the doctrine of abuse of process, the unfair or oppressive treatment of an appellant disentitles the Crown to carry on with the prosecution of the charge. The prosecution is set aside, not on the merits (see *Jewitt*, *supra*, at p. 148), but because it is tainted to such a degree that to allow it to proceed would tarnish the integrity of the court. The doctrine is one of the safeguards designed to ensure "that the repression of crime through the conviction of the guilty is done in a way which reflects our fundamental values as a society" (*Rothman v. The Queen*, [1981] 1 S.C.R. 640, at p. 689, *per* Lamer J.) It acknowledges that courts must have the respect and support of the community in order that the administration of criminal justice may properly fulfil its function. Consequently, where the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases, then the administration of justice is best served by staying the proceedings. [Emphasis added; p. 1667.]

[42] The test for granting a stay of proceedings for abuse of process, regardless of whether the abuse causes prejudice to the accused's fair trial interests or to the integrity of the justice system, is that set out in *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391, and *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297. A stay of proceedings will only be appropriate when: "(1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and (2) no other remedy is reasonably capable of removing that

des cas, l'accusé n'établira le bien-fondé de son allégation d'abus de procédure que s'il parvient à démontrer que la conduite du poursuivant lui a causé un certain préjudice. Cependant, en ce qui concerne cette catégorie de cas, il est préférable de concevoir le préjudice subi comme un acte tendant à miner les attentes de la société sur le plan de l'équité en matière d'administration de la justice. Les propos suivants de la juge L'Heureux-Dubé dans *R. c. Conway*, [1989] 1 R.C.S. 1659, expriment bien le caractère essentiel de l'équilibre à atteindre en matière d'abus de procédure en ce qui concerne la catégorie résiduelle de cas :

Suivant la doctrine de l'abus de procédure, le traitement injuste ou oppressif d'un accusé prive le ministère public du droit de continuer les poursuites relatives à l'accusation. Les poursuites sont suspendues, non à la suite d'une décision sur le fond (voir *Jewitt*, précité, à la p. 148), mais parce qu'elles sont à ce point viciées que leur permettre de suivre leur cours compromettrait l'intégrité du tribunal. Cette doctrine est l'une des garanties destinées à assurer « que la répression du crime par la condamnation du coupable se fait d'une façon qui reflète nos valeurs fondamentales en tant que société » (*Rothman c. La Reine*, [1981] 1 R.C.S. 640, à la p. 689, le juge Lamer). C'est là reconnaître que les tribunaux doivent avoir le respect et le soutien de la collectivité pour que l'administration de la justice criminelle puisse adéquatement remplir sa fonction. Par conséquent, lorsque l'atteinte au franc-jeu et à la décence est disproportionnée à l'intérêt de la société [de veiller à ce] que les infractions criminelles soient efficacement poursuivies, l'administration de la justice est mieux servie par l'arrêt des procédures. [Je souligne; p. 1667.]

[42] Le critère à appliquer pour décider s'il y a lieu d'accorder une suspension de l'instance pour abus de procédure, peu importe qu'il y ait eu ou non atteinte au droit de l'accusé à un procès équitable ou à l'intégrité du système de justice, est celui qui a été exposé dans *Canada (Ministre de la Citoyenneté et de l'Immigration) c. Tobiass*, [1997] 3 R.C.S. 391, et *R. c. Regan*, 2002 CSC 12, [2002] 1 R.C.S. 297. Il ne conviendra d'ordonner la suspension de l'instance que lorsque les deux critères suivants seront remplis : « (1) le préjudice causé par l'abus en question sera révélé, perpétué ou aggravé par le déroulement du procès ou par son issue; (2) aucune autre

prejudice” (*Regan*, at para. 54, citing *O’Connor*, at para. 75).

[43] Before applying this framework of analysis to this case, I will address some of the arguments advanced in this appeal on how the plea agreement should impact the analysis of abuse of process.

3.5 *The Contractual Undertaking Analogy*

[44] As stated earlier, it is argued that a plea agreement should be regarded as a contractual undertaking and enforced just as any other lawyers’ undertaking. This argument cannot be sustained. It completely ignores the public dimension of a plea agreement. Indeed, contrary to Ms. Nixon’s contention, the Law Society of Alberta specifically recognizes in the comment to Rule 27 of its *Code of Professional Conduct* that “[a]n agreement between the prosecution and defence regarding the plea to be entered is not considered a usual lawyers’ undertaking due to the policy considerations involved” (updated 2009 (online)). Vitiating factors, such as mistake, misrepresentation or fraud, which usually inform a private party’s right to resile from a bargain, do not fully capture the public interest considerations which are at play in any decision to repudiate a plea agreement.

[45] A plea agreement cannot be summarily enforced by the court as any other lawyers’ undertaking, as Ms. Nixon contends. It is also wrong to suggest that repudiation, in and of itself, warrants a judicial remedy even in the absence of prejudice (as the application judge concluded, at para. 55), or in the absence of conduct amounting to an abuse of process. This argument is founded on the erroneous premise that the decision to repudiate a plea agreement falls outside the scope of prosecutorial discretion and, as such, is not

réparation ne peut raisonnablement faire disparaître ce préjudice » (*Regan*, par. 54, citant *O’Connor*, par. 75).

[43] Avant d’appliquer ce cadre d’analyse à la présente affaire, je traiterai de certains des arguments avancés dans le cadre du présent pourvoi en ce qui concerne l’incidence que l’entente sur le plaidoyer devrait avoir sur l’analyse relative à l’abus de procédure.

3.5 *L’analogie avec l’engagement contractuel*

[44] Comme je l’ai dit précédemment, on fait valoir qu’il faut considérer toute entente sur le plaidoyer comme un engagement contractuel et l’exécuter comme s’il s’agissait de n’importe quel autre engagement d’un avocat. Cet argument ne saurait être retenu, car il fait complètement abstraction de l’aspect public des ententes sur le plaidoyer. En fait, contrairement à ce que prétend M^{me} Nixon, le Barreau de l’Alberta reconnaît expressément, dans le commentaire sur la règle 27 de son *Code of Professional Conduct*, qu’[TRADUCTION] « [u]ne entente entre la poursuite et la défense au sujet du plaidoyer qui sera inscrit n’est pas considérée comme un engagement ordinaire d’un avocat, et ce en raison des considérations de principe en cause » (mis à jour 2009 (en ligne)). Les facteurs susceptibles de vicier une entente — tels l’erreur, la déclaration inexacte et la fraude — et qui permettent habituellement à une partie privée de répudier une entente ne rendent pas pleinement compte des considérations d’intérêt public qui entrent en jeu dans la décision de répudier une entente sur le plaidoyer.

[45] Contrairement à ce que prétend M^{me} Nixon, le tribunal ne peut ordonner sommairement l’exécution d’une entente sur le plaidoyer comme s’il s’agissait de n’importe quel autre engagement d’un avocat. Il est également erroné de soutenir que la répudiation justifie en soi l’octroi d’une réparation judiciaire, et ce même en l’absence d’un préjudice (comme le juge de première instance l’a conclu au par. 55 de ses motifs) ou d’une conduite constituant un abus de procédure. Cet argument repose sur la prémisse erronée que la décision de répudier une

subject to the constitutional principles set out in *Krieger*.

[46] However, to the extent that the lawyers' undertaking analogy underscores the importance of honouring plea agreements, it can usefully contribute to the analysis. Indeed, in the oft-quoted Ontario *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions* (1993) (the "*Martin Committee Report*"), the Committee found resolution agreements in criminal proceedings to be "in the nature of undertakings". The duty of counsel to honour resolution agreements was regarded as "a particular example of the duties of integrity and responsibility" that lie "at the heart of counsel's professional obligations". Honouring resolution agreements was not only "ethically imperative", but also a "practical necessity", as these agreements "dispose of the great bulk of the contentious issues that come before the criminal courts in Ontario" (commentary to Recommendation 53, at pp. 312-13 of the *Martin Committee Report*).

[47] In light of this practical necessity, the *binding effect* of plea agreements is a matter of utmost importance to the administration of justice. It goes without saying that plea resolutions help to resolve the vast majority of criminal cases in Canada and, in doing so, contribute to a fair and efficient criminal justice system.

[48] Of course, there may be instances where different Crown counsel will invariably disagree about the appropriate plea agreement in a particular case. Given the number of complex factors that must be weighed over the course of plea resolution discussions, this reality is unsurprising. However, the vital importance of upholding such agreements means that, in those instances where there is disagreement, the Crown may simply have to live with

telle entente ne relève pas du pouvoir discrétionnaire en matière de poursuites et qu'elle n'est donc pas assujettie aux principes de droit constitutionnel énoncés dans *Krieger*.

[46] Il est toutefois utile de prendre cet argument en considération dans l'analyse, dans la mesure où l'analogie avec l'engagement d'un avocat fait ressortir l'importance de respecter les ententes sur le plaider. En effet, dans le rapport ontarien souvent cité qui s'intitule *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions* (1993) (le « *Rapport du Comité Martin* »), le comité en question juge que l'entente sur le plaider conclue dans le cadre de procédures criminelles est [TRADUCTION] « de la nature d'un engagement ». L'obligation de l'avocat de respecter toute entente sur le plaider y est décrite comme « un exemple précis des devoirs d'intégrité et de responsabilité » qui se trouvent « au cœur des obligations professionnelles de l'avocat ». Le respect des ententes sur le plaider y est perçu non seulement comme « un impératif sur le plan déontologique », mais aussi comme « une nécessité pratique », car ces dernières permettent de « régler la grande majorité des questions litigieuses soumises aux cours criminelles de l'Ontario » (*Rapport du Comité Martin*, commentaire sur la recommandation 53, p. 312-313).

[47] Compte tenu de cette nécessité pratique, l'*effet obligatoire* des ententes sur le plaider est une question d'importance capitale en ce qui a trait à l'administration de la justice. Il va sans dire que c'est par le biais de telles ententes que l'on règle la grande majorité des affaires pénales au Canada, et qu'elles contribuent donc à rendre le système de justice pénale équitable et efficace.

[48] Bien entendu, il peut y avoir des cas où des procureurs de la Couronne ne parviennent pas à s'entendre en ce qui concerne l'entente sur le plaider qui convient dans les circonstances. Compte tenu des nombreux facteurs complexes à prendre en considération lors des discussions menant à la conclusion d'une telle entente, cette réalité n'est pas étonnante. Toutefois, l'importance primordiale de respecter les ententes sur le plaider fait en sorte

the initial decision that has been made. To hold otherwise would mean that defence lawyers would no longer have confidence in the finality of negotiated agreements reached with front-line Crown counsel, with whom they work on a daily basis. Further, if agreements arrived at over the course of resolution discussions cannot be relied upon by the accused, the benefits that resolutions produce for *both* the accused and the administration of justice cannot be achieved. As a result, I reiterate that the situations in which the Crown can properly repudiate a resolution agreement are, and must remain, very rare.

[49] All Attorneys General who have participated in this appeal agree that a plea agreement should only be repudiated in exceptional and rare circumstances. However, the lawyers' undertaking analogy can only go so far on the question that occupies us. The analogy can usefully underscore the importance of honouring plea agreements, but it cannot inform the standard against which any repudiation conduct is to be measured. The *Martin Committee Report* made this clear in the same commentary quoted above, stating the following:

Thus, it is plain that resolution agreements must not undermine the integrity of the court, or otherwise bring the administration of justice into disrepute. While the sanctity of agreements entered into is an important principle of the administration of justice, Crown counsel's primary duty is to the integrity of the system. Accordingly, in the rare cases where these two values clash, the latter must prevail. [p. 314]

As a result, the argument that a plea agreement can simply be characterized as a contractual undertaking must fail.

3.6 *The Reasonably Defensible Test*

[50] This Court was also urged, as was the application judge, "to equate the ability of the Attorney General to resile from a plea agreement to the

qu'en cas de désaccord il arrivera que la Couronne doive tout simplement composer avec la décision initiale. En décider autrement minerait la confiance des avocats de la défense dans le caractère définitif des ententes conclues avec les procureurs de la Couronne avec qui ils travaillent quotidiennement. En outre, si les accusés ne peuvent se fier aux ententes conclues au terme de discussions visant à régler l'affaire, on se privera des avantages que les règlements procurent *à la fois* aux accusés et à l'administration de la justice. Par conséquent, je répète que les cas dans lesquels la Couronne peut à juste titre répudier une entente sur le plaidoyer sont — et doivent demeurer — très rares.

[49] Tous les procureurs généraux qui ont pris part au présent pourvoi s'entendent pour dire que les ententes sur le plaidoyer ne doivent être répudiées que dans des circonstances rares et exceptionnelles. Cependant, l'analogie avec l'engagement d'un avocat se révèle d'une utilité limitée pour trancher la question qui nous occupe. L'analogie peut s'avérer utile dans la mesure où elle fait ressortir l'importance de respecter de telles ententes, mais elle ne saurait servir à définir la norme qu'il convient d'appliquer en cas de répudiation. Le *Rapport du Comité Martin* a indiqué clairement cela dans le commentaire précité :

[TRADUCTION] Il est donc évident que les ententes sur le plaidoyer ne doivent pas miner l'intégrité du tribunal ou autrement déconsidérer l'administration de la justice. Le caractère sacré des ententes qui ont été conclues est certes un principe clé de l'administration de la justice, mais l'obligation première du procureur de la Couronne est de veiller à l'intégrité du système. Par conséquent, c'est cette obligation qui doit prévaloir dans les rares cas où ces deux valeurs entrent en conflit. [p. 314]

Par conséquent, il faut rejeter l'argument qu'une entente sur le plaidoyer peut être qualifiée de simple engagement contractuel.

3.6 *Le critère de la décision raisonnablement défendable*

[50] À l'instar du juge de première instance, notre Cour a également été invitée [TRADUCTION] « à établir un parallèle entre le pouvoir du procureur

ability of a trial judge to reject a joint submission on sentence since both are predicated on the concept of bringing the administration of justice into disrepute” (trial decision, at para. 17). The Crown advanced this argument in first instance but subsequently resiled from this position. The application judge accepted this argument and, based on his review of the appellate jurisprudence on joint submissions, crafted the “reasonably defensible test” as the appropriate measure to determine whether there had been an abuse of process in this case. The central question became whether Crown counsel’s plea agreement was “reasonably defensible”. Having determined that it was, and without further considering the circumstances surrounding the ADM’s decision to repudiate, the application judge concluded that the repudiation of the plea agreement amounted to an abuse of process.

[51] The Court of Appeal held that the application judge erred in multiple ways by adopting this approach. I agree with Paperny J.A.’s analysis on this point. As she noted, the application judge’s mistaken approach not only had the effect of reversing the onus of proof, his “selected framework for analysis caused him to ask the wrong question”. Instead of reviewing Crown counsel’s decision to enter into the plea agreement to see if it was defensible, he should have reviewed the circumstances surrounding the repudiation to determine whether *that* decision amounted to an abuse of process (para. 45).

[52] The selected framework of analysis also occasioned a more fundamental error. The application judge’s assessment of a decision made in the exercise of prosecutorial discretion for “reasonableness” runs contrary to the principles set out in *Krieger*. Paperny J.A. reiterated these principles, and explained that it is not the role of the court to look behind a prosecutor’s discretionary

général de répudier une entente sur le plaidoyer et celui d’un juge de première instance de rejeter une recommandation conjointe relative à la peine, ces deux pouvoirs étant fondés sur l’idée d’éviter que l’administration de la justice soit déconsidérée » (décision du juge de première instance, par. 17). La Couronne a avancé cet argument en première instance, mais elle est ensuite revenue sur sa position. Le juge de première instance l’a toutefois retenu, et, se fondant sur son examen des arrêts des cours d’appel portant sur des recommandations conjointes, il a statué que le « critère de la décision raisonnablement défendable » était la norme qu’il convenait d’appliquer pour décider s’il y avait eu abus de procédure en l’espèce. La question principale est devenue celle de savoir si l’entente sur le plaidoyer conclue par le procureur de la Couronne était « raisonnablement défendable ». Ayant décidé qu’elle l’était, et sans avoir examiné plus à fond les circonstances dans lesquelles le SMA a pris sa décision de répudier l’entente, le juge de première instance a conclu que cette décision constituait un abus de procédure.

[51] La Cour d’appel a affirmé que le juge de première instance avait fait erreur à bien des égards en s’y prenant de la sorte. Je souscris à l’analyse de la juge Paperny sur ce point. Comme elle l’a fait remarquer, la démarche erronée du juge de première instance a non seulement eu pour effet d’inverser le fardeau de la preuve, mais [TRADUCTION] « le cadre d’analyse qu’il a choisi l’a [aussi] amené à se poser la mauvaise question ». Ainsi, au lieu d’examiner la décision du procureur de la Couronne de conclure l’entente sur le plaidoyer en vue de décider si elle était défendable, il aurait plutôt dû analyser les circonstances de la décision de répudier l’entente pour établir si *cette décision-là* constituait un abus de procédure (par. 45).

[52] Le cadre d’analyse choisi par le juge de première instance a aussi amené ce dernier à commettre une erreur encore plus fondamentale. En effet, la façon dont il a apprécié le « caractère raisonnable » d’une décision prise dans l’exercice du pouvoir discrétionnaire en matière de poursuites va à l’encontre des principes énoncés dans *Krieger*. La juge Paperny a repris ces principes et expliqué qu’il

decision to see if it is justified or reasonable in itself (paras. 46-49). By straying into the arena and second-guessing the decision, the reviewing court effectively becomes a supervising prosecutor and risks losing its independence and impartiality. Due regard to the constitutionally separate role of the Attorney General in the initiation and pursuit of criminal prosecutions puts such decisions “beyond the legitimate reach of the court” (*Krieger*, at para. 32). Thus, the court does not assess the reasonableness or correctness of the decision itself; it only looks behind the decision for “proof of the requisite prosecutorial misconduct, improper motive or bad faith in the approach, circumstances or ultimate decision to repudiate” (Court of Appeal decision, at para. 49).

n'appartient pas au tribunal d'examiner le fondement d'une décision discrétionnaire prise par le procureur de la Couronne pour savoir si celle-ci est justifiée ou raisonnable en soi (par. 46 à 49). En s'immisçant dans ce domaine et en remettant en cause le bien-fondé de la décision, le tribunal de révision devient effectivement un poursuivant superviseur et il risque de perdre son indépendance et son impartialité. La prise en compte adéquate du rôle distinct du procureur général sur le plan constitutionnel quant aux décisions d'engager et de continuer des poursuites pénales fait en sorte que ces décisions « ne relève[nt] pas de la compétence légitime du tribunal » (*Krieger*, par. 32). Le tribunal n'examine donc pas le caractère raisonnable ou la justesse de la décision elle-même; il ne fait que vérifier s'il y a [TRADUCTION] « preuve d'une conduite répréhensible de la part du poursuivant, d'un motif illégitime, ou de mauvaise foi entachant la démarche, les circonstances ou la décision finale de répudier [l'entente] » (décision de la Cour d'appel, par. 49).

[53] Quite apart from this fundamental difficulty with the reasonably defensible test, I would add that, conceptually, the analogy to the trial judge's rejection of a joint submission on sentencing is not particularly helpful in determining the standard against which to measure the repudiation conduct. The sentencing judge who is faced with a joint submission is engaged in a qualitatively different process than the prosecutorial authority faced with the decision of whether or not to resile from a plea agreement. The role of the sentencing judge is to impose a fit sentence, that is, one that “fits” the circumstances of the offence and of the offender as presented to the court. When there is a trial, these circumstances are largely defined by the findings of the court based on the evidence adduced at trial and at the sentence hearing. When the accused pleads guilty, the circumstances of the offence and of the offender are generally determined on the basis of agreed facts. This is particularly so if the plea of guilty is entered pursuant to a resolution agreement. All contentious issues will usually have been ironed out between the Crown and the defence prior to the plea. Counsel certainly have an ethical obligation not to mislead the court about those

[53] Indépendamment de cette difficulté fondamentale que soulève le critère de la décision raisonnablement défendable, j'ajouterais que, sur le plan conceptuel, l'analogie avec le rejet, par le juge de première instance, d'une recommandation conjointe relative à la peine n'est guère utile pour établir la norme qu'il convient d'appliquer pour apprécier la répudiation d'une entente sur le plaidoyer. Le juge chargé de la détermination de la peine qui reçoit une recommandation conjointe procède à une analyse différente sur le plan qualitatif de celle que fait le responsable des poursuites appelé à décider s'il faut répudier ou non une telle entente. Le juge chargé de la détermination de la peine a pour tâche d'infliger une peine juste, c'est-à-dire une peine « adaptée » aux circonstances de l'infraction et à la situation du délinquant qui ont été exposées au tribunal. Lorsqu'il y a un procès, ces circonstances sont largement tributaires des conclusions que le tribunal a tirées sur la base de la preuve produite au procès et à l'audience de détermination de la peine. Lorsque l'accusé plaide coupable, les circonstances de l'infraction et la situation de l'accusé sont habituellement établies sur la base de l'exposé conjoint des faits. Cela est d'autant

circumstances, but the fact remains that the judge is presented with the *end product* of the plea negotiations, not with the entire set of circumstances or considerations that went into the mix. By contrast, the prosecuting authority who is faced with the decision whether to honour or to resile from a plea agreement must consider the entirety of circumstances, including the public interest, in proceeding to trial. Thus, sentencing principles relating to joint submissions cannot usefully be transposed in this context.

[54] I now turn to the circumstances of this case.

4. Application of the Doctrine of Abuse of Process to This Case

[55] Although it is not entirely clear, Ms. Nixon's claim of abuse of process does not appear to be grounded in an alleged prejudice to her fair trial interests. She certainly alleges that she was prejudiced in various ways by the course of events, but most of the alleged prejudice has nothing to do with trial fairness.

[56] First, she describes in an affidavit the emotional and psychological trauma she suffered following the incident and laying of the criminal charges, and then explains how she suffered increased anxiety as a result of the Crown's change of position. There is no reason to doubt that Ms. Nixon was affected by the course of events as she describes in her affidavit. However, this has no bearing on the fairness of her trial.

[57] In addition, Ms. Nixon relies on the application judge's finding that she was prejudiced

plus vrai dans les cas où le plaidoyer de culpabilité est inscrit conformément à une entente sur le plaidoyer. En règle générale, la Couronne et la défense auront réglé toutes les questions litigieuses avant l'inscription du plaidoyer. Les avocats ont certes l'obligation déontologique de ne pas induire le tribunal en erreur au sujet de ces circonstances, mais il demeure que le juge n'est saisi que du *résultat final* des négociations qui ont abouti au plaidoyer, et non de l'ensemble des circonstances ou des considérations qui ont été soupesées. En revanche, l'autorité poursuivante qui doit décider de respecter une entente sur le plaidoyer ou de la répudier est tenue de prendre en compte l'ensemble des circonstances, y compris l'intérêt public, dans la tenue d'un procès. Il est donc impossible de transposer utilement dans ce contexte les principes de détermination de la peine qui s'appliquent en cas de recommandations conjointes.

[54] Passons maintenant aux circonstances de l'espèce.

4. Application à l'espèce de la règle de l'abus de procédure

[55] Bien que cela ne soit pas tout à fait clair, l'allégation de M^{me} Nixon qu'il y aurait eu abus de procédure ne semble pas être fondée sur le fait qu'il aurait été porté atteinte à son droit à un procès équitable. Elle prétend certes que la tournure des événements lui a été préjudiciable sous plusieurs aspects, mais la plus grande partie du préjudice qu'elle dit avoir subi n'a rien à voir avec l'équité du procès.

[56] Premièrement, elle décrit dans un affidavit le traumatisme psychologique et émotionnel qu'elle a subi par suite de l'incident et du fait que des accusations criminelles ont été portées contre elle, et y déclare qu'elle est devenue encore plus anxieuse après que la Couronne a modifié sa position. Il n'y a aucune raison de douter que M^{me} Nixon a été touchée par la tournure des événements, comme elle le décrit dans son affidavit. Toutefois, cela n'a aucune incidence sur le caractère équitable de son procès.

[57] En outre, M^{me} Nixon invoque la conclusion du juge de première instance selon laquelle elle a

because her counsel was led to believe that the evidence of breath samples would not be adduced at trial and, consequently, did not explore that issue at the preliminary hearing. I agree with the Court of Appeal that this finding constitutes a palpable and overriding error, as Crown counsel at the preliminary hearing specifically reserved the right to call the evidence at trial. In any event, as Paperny J.A. rightly noted, there is no obligation on the Crown to present all of its evidence at the preliminary hearing and the evidence can still be tested at trial (para. 51).

[58] Finally, Ms. Nixon argues that, if the criminal charges were to proceed to trial, “the giving up of her right to silence would seriously compromise and diminish her defence because of her admission of identity as the driver and that she drove her vehicle carelessly”. She argues further that those admissions would “also restrict the ability of her present counsel to defend her, perhaps ultimately affecting her right to her choice of counsel” (A.F., at para. 139). I see no merit to this argument. The plea agreement was repudiated before Ms. Nixon entered her plea to the reduced charge. Further, the judgment of the Court of Appeal sets aside not only the application judge’s order, but also the resulting plea. Finally, the alleged effect on her counsel’s ability to defend her is entirely speculative.

[59] The question, therefore, is whether this case falls in the residual category of cases identified in *O’Connor*. Did the repudiation of the plea agreement, based on all of the circumstances, amount to an abuse of process? In other words, was the Crown’s repudiation conduct so unfair or oppressive to Ms. Nixon, or so tainted by bad faith or improper motive, that to allow the Crown to now proceed on the dangerous driving *Criminal Code*

subi un préjudice parce que son avocat a été amené à croire que la preuve constituée par les échantillons d’haleine ne serait pas produite au procès et qu’en conséquence il n’avait pas étudié cette question à l’enquête préliminaire. Je suis d’accord avec la Cour d’appel que cette conclusion constitue une erreur manifeste et dominante, car le procureur de la Couronne s’était expressément réservé le droit, à l’enquête préliminaire, de présenter cette preuve au procès. Quoi qu’il en soit, comme la juge Paperny l’a souligné à juste titre, rien n’oblige la Couronne à présenter l’ensemble de sa preuve au stade de l’enquête préliminaire, et le bien-fondé d’une preuve peut toujours être apprécié au procès (par. 51).

[58] Enfin, M^{me} Nixon soutient que si les accusations criminelles devaient être instruites, [TRADUCTION] « la renonciation à son droit de garder le silence compromettrait et affaiblirait grandement sa défense parce qu’elle avait admis que c’est elle qui était au volant du véhicule et qu’elle avait conduit celui-ci de façon imprudente ». Elle soutient en outre que ces admissions « limiteraient aussi la capacité de son avocat actuel d’assumer sa défense et, en bout de ligne, porteraient peut-être atteinte à son droit de retenir les services de l’avocat de son choix » (m.a., par. 139). À mon avis, cet argument est sans fondement. En effet, l’entente sur le plaidoyer a été répudiée avant même que M^{me} Nixon n’inscrive son plaidoyer de culpabilité à l’infraction réduite. De plus, le jugement de la Cour d’appel annule non seulement l’ordonnance du juge de première instance, mais également le plaidoyer qui en a résulté. Enfin, l’effet que cela aurait eu sur la capacité de son avocat à assumer sa défense n’est que pure conjecture.

[59] La question est donc de savoir si la présente affaire est visée par la catégorie résiduelle de cas mentionnée dans *O’Connor*. La répudiation de l’entente sur le plaidoyer, compte tenu de l’ensemble des circonstances, constitue-t-elle un abus de procédure? Autrement dit, le fait que la Couronne ait répudié l’entente était-il à ce point injuste ou oppressif pour M^{me} Nixon, ou à ce point entaché de mauvaise foi ou d’un motif illégitime, que permettre à

charges would tarnish the integrity of the judicial system?

[60] Before discussing the merits of the application, I want to address an important preliminary issue. As stated earlier, the AGBC intervened in this case to emphasize the importance of criminal trial courts not proceeding with a review of prosecutorial discretion in the absence of a “threshold determination” that the inquiry is warranted. I agree that a court should not embark on an inquiry into the reasons behind an act of prosecutorial discretion without a proper evidentiary foundation. However, it is my view that evidence that a plea agreement has been entered into and subsequently reneged by the Crown meets the requisite threshold. I will explain.

[61] As the AGBC rightly points out, mandating a preliminary determination on the utility of a *Charter*-based inquiry is not new: *R. v. Pires*, 2005 SCC 66, [2005] 3 S.C.R. 343. Similar thresholds are also imposed in other areas of the criminal law, they are not an anomaly. Threshold requirements may be imposed for pragmatic reasons alone. As this Court observed in *Pires* (at para. 35):

For our justice system to operate, trial judges must have some ability to control the course of proceedings before them. One such mechanism is the power to decline to embark upon an evidentiary hearing at the request of one of the parties when that party is unable to show a reasonable likelihood that the hearing can assist in determining the issues before the court.

[62] Quite apart from any such pragmatic considerations, there is good reason to impose a threshold burden on the applicant who alleges that an act of prosecutorial discretion constitutes an abuse of

la Couronne de tenir un procès relativement à l'accusation de conduite dangereuse prévue au *Code criminel* porterait atteinte à l'intégrité du système judiciaire?

[60] Avant de discuter du bien-fondé de la demande, je veux traiter d'une question préliminaire importante. Comme il a déjà été mentionné, le PGCB est intervenu dans le présent pourvoi pour insister sur l'importance que les cours de juridiction criminelle s'abstiennent de contrôler l'exercice du pouvoir discrétionnaire en matière de poursuites avant d'avoir d'abord pris la « décision préliminaire » que l'examen est justifié. Je suis d'accord que les tribunaux ne doivent pas examiner les motifs qui sous-tendent les actes résultant de l'exercice du pouvoir discrétionnaire en matière de poursuites s'ils ne peuvent s'appuyer sur une preuve suffisante. Toutefois, selon moi, la preuve qu'une entente sur le plaidoyer a été conclue et, par la suite, répudiée par la Couronne satisfait au critère préliminaire. Je m'explique.

[61] Comme le PGCB le souligne à juste titre, l'imposition aux tribunaux d'une exigence selon laquelle ils doivent d'abord se prononcer quant à l'utilité de la tenue d'une enquête fondée sur la *Charte* n'a rien de nouveau : *R. c. Pires*, 2005 CSC 66, [2005] 3 R.C.S. 343. Il faut également satisfaire à des critères préliminaires semblables dans d'autres domaines du droit criminel; ils ne constituent pas une anomalie. Des conditions préliminaires peuvent être imposées uniquement pour des raisons pragmatiques. Comme la Cour l'a fait remarquer dans *Pires* (par. 35) :

Pour que notre système de justice fonctionne, les juges qui président les procès doivent être en mesure de veiller au bon déroulement des instances. L'un des mécanismes leur permettant d'y arriver est le pouvoir de refuser de procéder à une audition de la preuve lorsque la partie qui en fait la demande est incapable de démontrer qu'il est raisonnablement probable que cette audience aidera à résoudre les questions soumises au tribunal.

[62] Hormis de telles considérations pragmatiques, il existe de bonnes raisons d'imposer un fardeau initial au demandeur qui prétend qu'un acte résultant de l'exercice du pouvoir discrétionnaire

process. Given that such decisions are generally beyond the reach of the court, it is not sufficient to launch an inquiry for an applicant to make a bare allegation of abuse of process. For example, it would not suffice for an applicant to allege abuse of process based on the fact that the Crown decided to pursue the charges against him but withdrew similar charges against a co-accused. Without more, there would be no basis for the court to look behind the exercise of prosecutorial discretion.

[63] However, the repudiation of a plea agreement is not just a bare allegation. It is evidence that the Crown has gone back on its word. As everyone agrees, it is of crucial importance to the proper and fair administration of criminal justice that plea agreements be honoured. The repudiation of a plea agreement is a rare and exceptional event. In my view, evidence that a plea agreement was entered into with the Crown, and subsequently reneged by the Crown, provides the requisite evidentiary threshold to embark on a review of the decision for abuse of process. Further, to the extent that the Crown is the only party who is privy to the information, the evidentiary burden shifts to the Crown to enlighten the court on the circumstances and reasons behind its decision to resile from the agreement. That is, the Crown must explain why and how it made the decision not to honour the plea agreement. The ultimate burden of proving abuse of process remains on the applicant and, as discussed earlier, the test is a stringent one. However, if the Crown provides little or no explanation to the court, this factor should weigh heavily in favour of the applicant in successfully making out an abuse of process claim.

[64] This approach is consistent with the principles set out in *Krieger*. Acts of prosecutorial discretion are not immune from judicial review. Rather,

en matière de poursuites constitue un abus de procédure. Comme de telles décisions échappent généralement à la compétence du tribunal, il ne suffit pas d'entreprendre un examen pour qu'un demandeur puisse faire une simple allégation d'abus de procédure. Par exemple, un demandeur ne saurait prétendre qu'il y a eu abus de procédure au simple motif que la Couronne a décidé de donner suite aux accusations portées contre lui mais retiré des accusations similaires portées contre un coaccusé. En l'absence de tout autre élément, rien ne justifierait que le tribunal examine les motifs qui sous-tendent l'exercice du pouvoir discrétionnaire en matière de poursuites.

[63] Toutefois, la répudiation d'une entente sur le plaider n'est pas qu'une simple allégation. C'est une preuve que la Couronne n'a pas tenu parole. Tout le monde en convient : le respect des ententes sur le plaider revêt une importance cruciale pour l'administration saine et équitable de la justice criminelle. La répudiation d'une telle entente est un événement rare et exceptionnel. Selon moi, la preuve que la Couronne a conclu une entente sur le plaider qu'elle a par la suite répudiée est conforme à la norme préliminaire à laquelle il doit être satisfait pour entreprendre un examen de la décision en vue de décider si elle constitue un abus de procédure. En outre, dans la mesure où la Couronne est la seule partie au courant de l'information, c'est à elle qu'il incombe d'exposer au tribunal les circonstances et les motifs qui sous-tendent sa décision de répudier l'entente. En d'autres termes, la Couronne doit expliquer au tribunal pourquoi et comment elle est parvenue à la décision de ne pas respecter l'entente qu'elle avait pourtant conclue. En bout de ligne, c'est au demandeur qu'il revient d'établir qu'il y a eu abus de procédure et, comme il a déjà été discuté, il doit satisfaire à un critère rigoureux. Cependant, le peu, voire l'absence d'explications de la Couronne, le cas échéant, constitue un facteur qui milite fortement en faveur de la thèse du demandeur qui cherche à établir qu'il y a eu abus de procédure.

[64] Cette démarche est conforme aux principes énoncés dans *Krieger*. Les actes qui résultent de l'exercice du pouvoir discrétionnaire en matière de

they are subject to judicial review for abuse of process. Depending on the circumstances, the repudiation of a plea agreement may well constitute an abuse of process, either because it results in trial unfairness or meets the narrow residual category of abuse that undermines the integrity of the judicial process. In applying the *Krieger* standard to the repudiation of plea agreements, the principles set out in these reasons, notably at paras. 46-48, on the importance of honouring resolution agreements must be kept in mind. Consider, for example, if the repudiation was made arbitrarily, without inquiry into the circumstances leading to the plea agreement, and without regard to any resulting prejudice to the accused. Alternatively, consider if there was evidence of a systemic problem in a particular jurisdiction where Crown counsel regularly and summarily overruled the preceding Crown counsel's exercise of discretion whenever they disagreed with the terms of the agreed upon plea resolution. In my view, an application judge may well be persuaded in such circumstances that the Crown acted in bad faith or with flagrant impropriety to a degree sufficient to constitute an abuse of process.

[65] Thus, it is my view that a threshold showing must be made before the court embarks on a judicial review of an exercise of prosecutorial discretion. Evidence of repudiation meets that threshold.

[66] In this case, I agree with the Court of Appeal that there is no evidence to support a finding of abuse of process. While the application judge asked the wrong question and applied the wrong test for abuse of process, he did inquire into the considerations that informed the decision to repudiate, the process adopted, and the conduct of all Crown actors who were involved. In rejecting Ms. Nixon's claim that the ADM's decision was made

poursuites n'échappent pas au contrôle judiciaire. Ils sont plutôt susceptibles de contrôle judiciaire pour le motif d'abus de procédure. Selon les circonstances, la répudiation d'une entente sur le plaider peut fort bien constituer un abus de procédure, soit parce qu'elle rend le procès inéquitable, soit parce qu'elle est visée par l'étroite catégorie résiduelle de cas qui minent l'intégrité du processus judiciaire. Lorsqu'on applique la norme de *Krieger* à une telle répudiation, il faut avoir à l'esprit les principes exposés dans les présents motifs, notamment aux par. 46 à 48, en ce qui concerne l'importance de respecter les ententes conclues en vue de régler une affaire. À titre d'exemple, supposons que la répudiation ait été faite de façon arbitraire, sans la tenue d'un examen des circonstances ayant mené à la conclusion de l'entente et sans que le préjudice qu'elle pourrait causer à l'accusé ait été pris en compte. Ou alors supposons qu'une preuve établisse l'existence d'un problème systémique dans un ressort particulier où les procureurs de la Couronne s'écartent régulièrement et sommairement des décisions prises par leurs prédécesseurs dans l'exercice de leur pouvoir discrétionnaire lorsqu'ils ne souscrivent pas aux modalités des ententes sur le plaider conclues par ces derniers. Selon moi, il peut arriver dans de telles circonstances que le juge de première instance soit convaincu que le représentant de la Couronne a agi de mauvaise foi ou qu'il a eu une conduite répréhensible flagrante au point de commettre un abus de procédure.

[65] J'estime donc qu'il doit être satisfait à un critère préliminaire avant que le tribunal n'entreprenne le contrôle judiciaire d'un exercice du pouvoir discrétionnaire en matière de poursuites. La preuve de la répudiation satisfait à ce critère.

[66] Dans la présente affaire, je suis d'accord avec la Cour d'appel que la preuve ne permet pas de conclure à l'abus de procédure. Le juge de première instance a certes posé la mauvaise question et appliqué le mauvais critère pour décider s'il y avait eu abus de procédure, mais il a tout de même examiné les considérations qui ont servi de fondement à la décision de répudier l'entente, le processus qui a été suivi, et la conduite de l'ensemble des

for an improper motive, he concluded that “there is absolutely no evidence” of political interference (para. 22) and “nothing to suggest that [the ADM’s] action was taken in bad faith or to accommodate a real or perceived political stance of his Minister of Justice” (para. 25). There was also nothing improper in the considerations that informed the ADM’s decision to resile from the agreement. The application judge described these considerations as follows (at para. 26):

Those who influenced [the ADM’s] decision to repudiate the resolution agreement took exception to a pair of [Crown counsel’s] conclusions: first, that the analyses of the breath samples provided by Ms. Nixon would be inadmissible at trial and second, that the evidence of Ryan Galloway, who had earlier observed erratic driving by a van with the same licence plate as hers, was too remote in the circumstances to be relevant to the prosecution. In view of those two mistakes, the Assistant Deputy Minister was persuaded that any agreement which permitted Ms. Nixon to escape *Criminal Code* convictions was contrary to the public interest, especially considering that two people had died and another had been orphaned as the result of her driving. He therefore concluded that to honour it would bring the administration of justice into disrepute. [Emphasis added.]

[67] The application judge erred by summarily dismissing the ADM’s considered opinion on the ground that the Crown had to show more than “establish that other, even more senior counsel, have reached a different conclusion” than Crown counsel did (para. 27). On this point, the application judge adopted the reasoning of Hill J. in *R. v. M. (R.)* (2006), 83 O.R. (3d) 349 (S.C.J.). However, the approach adopted in *M. (R.)* is based on the erroneous view that “the act of *repudiation* is not an exercise of core prosecutorial discretion” (*M. (R.)*, at para. 65 (emphasis in original)). Hill J. was thus of the view that, while the plea agreement is not reviewable subject only to abuse of process, the

intervenants de la Couronne qui ont participé à ce processus. En rejetant la prétention de M^{me} Nixon selon laquelle la décision du SMA a été prise pour un motif illégitime, il a conclu qu’[TRADUCTION] « il n’y [avait] absolument aucune preuve » d’ingérence politique (par. 22) et que « rien ne donnait à penser que [le SMA] avait agi de mauvaise foi ou en vue de donner suite à une décision politique — réelle ou perçue — de son ministre de la Justice » (par. 25). Par ailleurs, les considérations qui ont servi de fondement à la décision du SMA de répudier l’entente n’avaient rien d’irrégulier. Voici comment le juge de première instance a décrit ces considérations (par. 26) :

[TRADUCTION] Ceux qui ont influencé la décision [du SMA] de répudier l’entente sur le plaidoyer ont contesté deux conclusions du [procureur de la Couronne] : premièrement, que les analyses des échantillons d’haleine fournis par M^{me} Nixon seraient inadmissibles au procès, et, deuxièmement, que le témoignage de Ryan Galloway, qui avait vu plus tôt une fourgonnette conduite de façon irrégulière dont les plaques d’immatriculation correspondaient à celles de l’accusée, était trop éloigné des circonstances de l’affaire pour être pertinent quant à la poursuite. Au vu de ces deux erreurs, le sous-ministre adjoint était convaincu que toute entente qui permettrait à M^{me} Nixon d’éviter d’être reconnue coupable des infractions au *Code criminel* qui lui étaient reprochées était contraire à l’intérêt public, surtout compte tenu du fait que deux personnes avaient été tuées et qu’une troisième personne était devenue orpheline en raison de sa façon de conduire son véhicule. Il a donc conclu que respecter l’entente serait susceptible de déconsidérer l’administration de la justice. [Je souligne.]

[67] Le juge de première instance a commis une erreur en rejetant sommairement l’opinion réfléchie du SMA au motif que la Couronne ne pouvait pas se contenter de simplement [TRADUCTION] « établir que d’autres avocats, mêmes des avocats encore plus chevronnés, ont tiré une conclusion différente » de celle du procureur de la Couronne (par. 27). Sur ce point, le juge de première instance a fait sien le raisonnement du juge Hill dans *R. c. M. (R.)* (2006), 83 O.R. (3d) 349 (C.S.J.). Toutefois, la démarche suivie dans *M. (R.)* repose sur le point de vue erroné selon lequel [TRADUCTION] « le fait de *répudier* une entente ne relève pas du pouvoir discrétionnaire essentiel en matière de poursuites »

repudiation is governed by the inherent jurisdiction of the court to control its own process (para. 62).

[68] As discussed earlier, the ADM's decision to resile from the plea agreement falls within the scope of prosecutorial discretion. In the absence of any prosecutorial misconduct, improper motive or bad faith in the approach, circumstances, or ultimate decision to repudiate, the decision to proceed with the prosecution is the Crown's alone to make. Reasonable counsel may indeed, and often do, differ on whether a particular disposition is in the public interest in the circumstances of the case. The ADM, in good faith, determined that Crown counsel's assessment of the strength of the evidence was erroneous and, on that basis, having regard to the seriousness of the offences, concluded that it would not be in the public interest to terminate the prosecution on the criminal charges. This can hardly be regarded as evidence of misconduct.

[69] This does not mean that plea agreements can be overturned on a whim. The method by which the decision was reached can itself reveal misconduct of a sufficient degree to amount to abuse of process. But that is not what occurred here. The act of repudiation was indeed a rare and exceptional occurrence. The evidence revealed that there have been only two prior occurrences in Alberta, "one in the 1980s and one within the year prior to the trial in this matter" (Court of Appeal decision, at para. 48). There was also no evidence of abusive conduct in the process leading to the decision to repudiate. I agree with the analysis of Paperny J.A. in this regard (at para. 50):

Further, this is not a case where the repudiation was done "unfairly" or when the discretion of the Attorney General was exercised "irrationally, unreasonably or

(*M. (R.)*, par. 65 (en italique dans l'original)). Le juge Hill était donc d'avis que même si l'entente sur le plaidoyer ne peut faire l'objet d'un contrôle qu'en cas d'abus de procédure, la répudiation, elle, est assujettie à la compétence inhérente du tribunal de contrôler sa propre procédure (par. 62).

[68] Comme je l'ai expliqué, la décision du SMA de répudier l'entente sur le plaidoyer relève du pouvoir discrétionnaire en matière de poursuites. En l'absence de conduite répréhensible de la part du poursuivant, de motif illégitime, ou de mauvaise foi entachant la démarche, les circonstances ou la décision finale de répudier l'entente, la décision d'engager une poursuite appartient exclusivement à la Couronne. Il arrive souvent que des avocats raisonnables ne parviennent pas à s'entendre sur la question de savoir si une décision particulière est dans l'intérêt public dans les circonstances de l'espèce. Le SMA a conclu de bonne foi que le procureur de la Couronne avait mal évalué la force probante de la preuve, et, sur ce fondement, il a jugé que, compte tenu de la gravité des infractions reprochées, il ne serait pas dans l'intérêt public de mettre fin à la poursuite. On ne saurait guère considérer cela comme la preuve d'une inconduite.

[69] Cela ne signifie pas que l'on puisse répudier des ententes sur le plaidoyer par simple caprice. La méthode qu'on a suivie pour en arriver à la décision peut elle-même révéler l'existence d'une inconduite telle qu'elle équivaut à un abus de procédure. Ce n'est cependant pas ce qui s'est produit en l'espèce. La répudiation d'une entente sur le plaidoyer est en effet un événement rare et exceptionnel. La preuve a révélé que cela ne s'était produit qu'à deux reprises en Alberta, [TRADUCTION] « une fois dans les années 80, et une autre fois dans l'année qui a précédé le procès dans la présente affaire » (décision de la Cour d'appel, par. 48). En outre, aucune preuve n'a établi qu'on s'était comporté de façon abusive dans le processus ayant mené à la décision de répudier l'entente. Je souscris à l'analyse faite par la juge Paperny à cet égard (par. 50) :

[TRADUCTION] De plus, il ne s'agit pas en l'espèce d'un cas où la répudiation a été faite « de façon inéquitable » ou par suite d'un exercice « irrationnel,

oppressively”. The ADM carefully reviewed the evidence that was the subject of concern and relied on legal opinions and took guidance from the Ontario Attorney General’s policy to instruct himself on the relevant considerations. Having satisfied himself that the original view of the trial prosecutor was incorrect and that the resulting plea resolution agreement would bring the administration of justice into disrepute, he acted expeditiously in communicating the decision to withdraw the plea resolution agreement to the respondent. He also considered possible prejudice to the respondent and concluded that there would be no such prejudice. The ADM’s conduct, viewed in its totality, cannot be characterized as unfair, unreasonable, oppressive or irrational. The high threshold to find abuse of process has not been met here.

[70] Finally, Ms. Nixon was returned to the position she was in at the conclusion of the preliminary hearing before the plea agreement was entered into. There is no merit to the contention that she suffered prejudice as a result of the repudiation.

5. Disposition

[71] For these reasons, the appeal is dismissed.

Appeal dismissed.

Solicitors for the appellant: Beresh Cunningham Aloneissi O’Neill Hurley, Edmonton.

Solicitor for the respondent: Attorney General of Alberta, Calgary.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of Manitoba: Attorney General of Manitoba, Winnipeg.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Victoria.

déraisonnable ou oppressif » du pouvoir discrétionnaire du procureur général. Le SMA a examiné attentivement la preuve qui était source de préoccupation et s’est appuyé sur des avis juridiques ainsi que sur la politique du procureur général de l’Ontario pour bien saisir les considérations pertinentes. Après avoir conclu que le point de vue original du procureur de la Couronne était erroné et que l’entente sur le plaidoyer qui en avait résulté était susceptible de déconsidérer l’administration de la justice, il s’est empressé de faire part à l’intimée de sa décision de répudier l’entente sur le plaidoyer. Il a également examiné la possibilité que sa décision fasse subir un préjudice à l’intimée et conclu que ce n’était pas le cas. La conduite du SMA, prise dans son ensemble, ne peut être qualifiée d’inéquitable, de déraisonnable, d’oppressive ou d’irrationnelle. Il n’a pas été satisfait à la norme préliminaire exigeante qu’il convient d’appliquer pour décider s’il y a eu abus de procédure.

[70] Enfin, M^{me} Nixon a été rétablie dans la situation dans laquelle elle se trouvait à la fin de l’enquête préliminaire, avant que l’entente sur le plaidoyer ne soit conclue. La prétention selon laquelle elle a subi un préjudice par suite de la répudiation de l’entente n’est pas fondée.

5. Dispositif

[71] Pour ces motifs, le pourvoi est rejeté.

Pourvoi rejeté.

Procureurs de l’appelante : Beresh Cunningham Aloneissi O’Neill Hurley, Edmonton.

Procureur de l’intimée : Procureur général de l’Alberta, Calgary.

Procureur de l’intervenant le procureur général de l’Ontario : Procureur général de l’Ontario, Toronto.

Procureur de l’intervenant le procureur général du Manitoba : Procureur général du Manitoba, Winnipeg.

Procureur de l’intervenant le procureur général de la Colombie-Britannique : Procureur général de la Colombie-Britannique, Victoria.

Solicitors for the intervener the Criminal Trial Lawyers' Association: Fleming DePoe Lieslar, Edmonton.

Solicitors for the intervener the Criminal Lawyers' Association (Ontario): Henein & Associate, Toronto.

Procureurs de l'intervenante Criminal Trial Lawyers' Association : Fleming DePoe Lieslar, Edmonton.

Procureurs de l'intervenante Criminal Lawyers' Association (Ontario): Henein & Associate, Toronto.

Tab 22:

R. v. Pinkus, [1999] O.J. No. 5464 (S.C.J.)

R. v. Pinkus

Ontario Judgments

Ontario Superior Court of Justice

Ottawa, Ontario

McKinnon J.

Oral judgment: October 1, 1999.

Court File No. 95-00724

[1999] O.J. No. 5464

Between Her Majesty the Queen, and Martin Pinkus

(11 paras.)

Case Summary

Criminal Law — Procedure — Trial, special duties of Crown — Duty to provide list of Crown witnesses and a summary of their evidence.

Application by Pinkus for an order requiring the Crown to disclose the specific witnesses it intended to call as part of the Crown's case. A list of potential witnesses was provided as required. The Crown resisted the application on the grounds of prosecutorial discretion. Pinkus wished to know specifically whether the Crown would be calling the solicitor who acted for another accused who was implicated in the same offences of manslaughter and aggravated assault. The particular accused waived solicitor and client privilege, and the solicitor was available to be interviewed by the defence.

HELD: Application dismissed.

The information as to whether the Crown intended to call a particular witness was not subject to an order for disclosure. It remained entirely within the Crown's discretion as to whether it would call a particular witness or not in light of the dynamics of the trial process. The Crown's discretion could not be interfered with by the court.

Statutes, Regulations and Rules Cited:

Criminal Code, ss. 235(1), 239, 268.

Court Note:

Charges: Section 235(1) Criminal Code of Canada -- Section 239 Criminal Code of Canada -- Section 268 Criminal Code of Canada

Counsel

A. Berzins, Q.C. and M. Moors, for the Crown. L. Greenspon and A. McNaughton, for the accused.

McKINNON J. (orally)

1 This is an application by counsel for the defence seeking various orders which relate to witnesses who may be called during the course of this trial.

2 Defence counsel relies on various authorities, including Stinchcombe [\(1991\) 68 C.C.C. \(3d\) 1.](#); Chaplin [\(1995\) 96 C.C.C. \(3d\) 225](#); Carosella [\(1997\), 112 C.C.C. \(3d\) 289](#); and Dixon [\(1998\) 122 C.C.C. \(3d\) 1.](#), all decisions of the Supreme Court of Canada, in support of the proposition that the Crown has an obligation to inform him as to whether a particular witness will be called during the course of the trial.

3 It is argued that this is information known to the Crown and that it should be disclosed so that defence can make full answer in defence to the charges, particularly in planning the cross-examination of other witnesses.

4 The Crown takes the position that it may or may not call a particular witness depending upon how the trial evolves and the approach the defence takes to various witnesses. There is no issue whatever that with respect to the evidence of the witnesses who may or may not be called by the Crown, disclosure of their evidence has been made in accordance with the rule in Stinchcombe.

5 In the instant situation, defence counsel wishes to know whether or not the Crown shall be calling Patrick McCann as a witness. He acted as counsel for one of the main Crown witnesses, Wyman Hadley, and acted for Mr. Hadley when Mr. Hadley pleaded guilty to manslaughter and aggravated assault, arising out of the same facts as the case involving Mr. Pinkus, who is now being tried.

6 The Crown has assured that Wyman Hadley has waived any privilege in the evidence Mr. McCann might give, and Mr. McCann has been made available for interview by the defence, if they so wish. Notes of dealings with Mr. McCann by the Crown in the possession of the Crown have been made available to the defence.

7 The Crown asserts that it does not know whether or not Mr. McCann will be called as a witness, saying that it is a decision which will be made following the cross-examination of Mr. Hadley and as the trial evolves. Defence argues that it is deprived of its fundamental right to make full answer in defence in that the cross-examination of Mr. Hadley will be conducted somewhat in the dark, because defence is unaware of whether or not Mr. McCann will be a witness.

8 The "information" which the defence seeks is, in my view, not the kind of information which is subject to an order for disclosure. What the defence claims to be entitled to is the Crown "plan"

for the presentation of its case. This, undoubtedly, is information in the possession of the Crown. It is, however, not subject to disclosure for the very reason that the Crown plan is something which is in its own discretion, which is unfettered, and properly so, absent bad faith or oblique motive. See Cook [*\(1997\) 114 C.C.C. \(3d\) 481*](#). (S.C.C.).

9 The law relating to Crown disclosure should not be confused with the law relating to Crown discretion. The decision whether to call a witness is solely within the discretion of the Crown. The decision whether to call a witness may change, given the dynamics of the trial process. Discretion is therefore an evolving concept, just as the trial itself. Discretion cannot be interfered with by the Court. For the Court to order the Crown to inform defence as to whether a particular witness will be called would effectively trump Crown discretion. One cannot be said to have discretion if one is ordered to disclose how discretion will be exercised.

10 In my view, the reasons of the Supreme Court of Canada in Cook (supra) fully dispose of the argument raised by defence counsel and no order shall be made requiring the Crown to disclose whether or not Mr. McCann will be called as a witness.

11 I have stated during the course of the trial that in order to ensure respect for the jury and the integrity of the trial process, its orderliness and its fairness, it would be helpful, indeed advisable, for the Crown to inform the defence in advance of its intention to call particular witnesses, and generally inform the defence of the anticipated list and time frames of witnesses. They are not, in law, bound to do so. It is merely good practice. The failure to do so would inevitably lead to numerous adjournments being sought so that defence counsel might properly prepare to defend the case from hour to hour and day to day. This is not in the best interests of the due administration of justice.

McKINNON J.

Tab 23:

R. v. Romanowiz, 1999 CanLII 1315

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@1@Z19990827
@2

Regina v. Romanowicz*

[Indexed as: R. v. Romanowicz]

@3

45 O.R. (3d) 506
[1999] O.J. No. 3191
Docket No. C28943

@4

Court of Appeal for Ontario
Carthy, Doherty and Laskin JJ.A.
August 27, 1999

@6

*Vous trouverez traduction française de la décision ci-dessus
... 45 O.R. (3d) 532.

Charter of Rights and Freedoms -- Fair and public hearing --
No constitutional right to effective representation existing
where accused chooses to be represented by agent who is not
lawyer -- Accused retaining constitutional right to fair trial
-- Trial judge should be satisfied that accused's choice of
representation by agent informed -- Trial judge not obliged to
conduct hearing into competency of agent -- Trial judge having
authority to refuse to permit agent to represent accused in
summary conviction proceedings where appearance of agent would
undermine integrity of proceedings -- Canadian Charter of
Rights and Freedoms, s. 11(d).

Criminal law -- Representation -- Non-lawyer agents
-- Summary conviction proceedings -- Part XXVII of Criminal
Code permitting non-lawyer agents to represent accused in
summary conviction proceedings -- Provisions intra vires of
Parliament -- Trial judge should satisfy self that accused's
choice of representation by agent is informed -- Trial judge
not obligated to conduct hearing into competency of agent
-- Trial judge has jurisdiction to refuse to permit agent to
represent accused in summary conviction proceedings where
appearance of agent would undermine integrity of proceedings
-- Criminal Code, R.S.C. 1985, c. C-45, ss. 800, 802.

The accused was charged with the hybrid offence of failing to
remain at the scene of an accident. The Crown elected to
proceed summarily. The accused chose to be represented by an
agent who was not a lawyer. The trial judge questioned the
accused about his use of an agent and satisfied himself that
the accused understood the agent's status and the consequences
of being represented by a non-lawyer. The trial proceeded and
the accused was convicted. The conviction was affirmed on

appeal. The accused appealed.

Held, the appeal should be dismissed.

Sections 800 and 802 of the Criminal Code permit agents who are not lawyers to represent accused in summary criminal proceedings brought under Part XXVII of the Code. Sections 800 and 802 are intra vires Parliament.

The intervenors submitted that the term "agent" should be interpreted to include only friends or relatives of the accused and not paid agents. This argument is not accepted. There is no bar to an accused choosing to pay an agent for representation in summary conviction proceedings. Second, there is no principled basis on which to accept the intervenors' argument that an agent's role should be limited to examining and cross-examining witnesses. Agents may carry out any function normally included as part of a defence. Finally, the argument that hybrid charges remain, in effect, indictable offences even after the prosecutor has elected to proceed summarily cannot be accepted. Once the election to proceed summarily is made, Part XXVII of the Criminal Code applies.

There is no constitutional right to effective assistance when an accused has chosen to be represented by an agent who is not a lawyer. By deciding to proceed without counsel, an accused elects to forgo the right to the effective representation of counsel. An accused cannot at the same time exercise the right to proceed without the assistance of counsel and yet demand the right to the effective assistance of counsel. The accused does, however, retain the constitutional right to a fair trial. Where an accused is represented by an agent who is not a lawyer, the trial judge should satisfy himself or herself that the accused's choice of representation was an informed one. However, there is no mandatory obligation on a trial judge to conduct a competency inquiry where an agent represents an accused in summary conviction proceedings. To impose such an obligation on trial judges would raise insurmountable difficulties, such as determining the standard of competence to be applied and how competence could be determined in the abstract. A mandatory competency test would be inconsistent with the right of accused persons to choose their mode of representation and could undermine the accused's confidence in the agent and destroy the appearance of a fair trial. Mandatory competency inquiries could become extensive and would inevitably be time-consuming. Delays would occur, resulting in added inconvenience and cost and, in extreme cases, resulting in adjournments which might render a trial on the merits impossible.

A trial judge has authority, founded in the court's power to control its own process, to refuse to permit an agent to represent an accused in summary conviction proceedings where the appearance of the agent would undermine the integrity of

the proceedings. Circumstances in which representation by a particular agent would imperil the administration of justice and properly call for an order disqualifying that agent include representation by an agent facing criminal charges involving interference with the administration of justice and representation by an agent whose background demonstrates pervasive dishonesty or a blatant disrespect for the law. In addition to cases where the agent's ability or character would disqualify the agent from acting, there may be other situations where disqualification is appropriate. Representation by an agent who has a conflict of interest, for example, where the agent has a special relationship with the complainant or other witness, could well interfere with the proper administration of justice. The power to disqualify agents, like any other facet of the court's power to control its processes, must be exercised judicially on the basis of the circumstances present in a given case. A presumption that all agents are incompetent to represent accused persons charged with certain summary conviction offences is not a proper basis on which to exercise that discretion. Trial judges are not at liberty to adopt a rule that no agents can appear on criminal matters.

@5

Milligan (Re) (1991), 1 C.P.C. (3d) 12 (Ont. Gen. Div.); R. v. Lemonides (1997), 35 O.R. (3d) 611, 151 D.L.R. (4th) 546, 46 C.R.R. (2d) D-5, 10 C.R. (5th) 135 (Gen. Div.); R. v. Maher (1986), 59 Nfld. & P.E.I.R. 91, 178 A.P.R. 91, 27 C.C.C. (3d) 476 (Nfld. C.A.), consd

Other cases referred to

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Canadian Charter of Rights and Freedoms, s. 11(d)
 Coroners Act, R.S.O. 1990, c. C.37, s. 50(3)
 Courts of Justice Act, R.S.O. 1990, c. C.43, s. 26
 Criminal Code, R.S.C. 1985, c. C-46 (am. 1997, c. 18, s. 111), ss. 252(1)(b), 800, 802
 Law Society Act, R.S.O. 1980, c. 233, s. 50(1) - now R.S.O. 1990, c. L.8
 Provincial Offences Act, now R.S.O. 1990, c. P.33, s. 50(3)
 Solicitors Act, R.S.O. 1990, c. S.15, s. 1
 Statutory Powers Procedure Act, R.S.O. 1990, c. S.22, s. 23(3)

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Report of the Task Force on Paralegals (Ontario Ministry of the Attorney General, 1990)

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APPEAL from a judgment of Hill J. (1998), 14 C.R. (5th) 100 (Ont. Gen. Div.) affirming a conviction on a charge of failing to remain at the scene of an accident.

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Christopher J. Thiesenhausen, Irvin Van Otterlo and Richard Sherman, for appellant.

Graeme Cameron, for respondent.

David Allan Harris and Michelle K. Fuerst, for intervenor, Canadian Bar Association.

Dean D. Paquette, for intervenor, Ontario Criminal Lawyers' Association.

Robert W. Hubbard, for intervenor, Attorney General of Canada.

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BY THE COURT: --

Overview

[1] In 1990, the Ontario Ministry of the Attorney General published the Report of the Task Force on Paralegals. The report recognized public acceptance of a wide range of paralegal services and recommended legislative action to establish educational standards and other controls over the activities of paralegals. No legislation has been passed in response to the report.

[2] The absence of any regulatory control over paralegals has become particularly problematic in the criminal courts. In Ontario, paralegals and other non-lawyers represent persons charged with crimes that are prosecuted by way of summary conviction proceedings. Historically, charges prosecuted in that manner were relatively minor. However, since 1990, the Criminal Code, R.S.C. 1985, c. C-46 has been amended to create new hybrid offences which may, at the option of the Crown, be prosecuted in summary proceedings. These hybrid offences include some very serious crimes such as assault with a weapon, forcible confinement, sexual assault, breaking and entering, uttering threats and forgery. Some of these crimes (e.g., sexual assault) are punishable by up to 18 months' imprisonment and significant terms of incarceration are not unusual following conviction. Furthermore, prosecution of some of these crimes will routinely involve complex evidentiary and procedural issues. Finally, all signs suggest that Parliament will continue to expand the number of hybrid offences and increase the penalties for some offences punishable by summary proceedings (e.g., drinking and driving offences).

[3] The obvious concerns associated with untrained and unregulated paralegals representing accused charged with serious crimes have not moved the province or the federal government to exercise any control over the appearance of paralegals in summary proceedings. These concerns have, however, precipitated the intervention of the Canadian Bar Association and the Criminal Lawyers' Association in this appeal. [See Note 1 at end of document] The intervenors ask the court to fill the void created by the legislative inactivity and to declare that paralegals cannot represent persons charged with criminal

offences, even when those offences are prosecuted by way of summary proceedings. Alternatively, the intervenors submit that the court should assume the de facto role of regulator and control the appearance of paralegals in criminal courts on a case-by-case basis.

[4] There are five issues raised in this appeal:

- Assuming Part XXVII of the Criminal Code and specifically ss. 800 and 802 permit representation in criminal proceedings by an agent who is not a lawyer, are those provisions within the legislative competence of Parliament?
- Assuming the legislation is intra vires Parliament, does it permit agents who are not lawyers to represent persons on criminal offences prosecuted by way of summary proceedings?
- Is there a constitutional right to effective representation where an accused is represented by an agent who is not a lawyer?
- What duties, if any, are imposed on a trial judge where an accused is represented by an agent who is not a lawyer in proceedings governed by Part XXVII of the Criminal Code. In particular, is the trial judge required to inquire into the competence of the agent?
- Does a trial judge have the authority to refuse to permit an agent who is not a lawyer to represent an accused person in a summary proceeding governed by Part XXVII of the Code?

The Factual Background

[5] The appellant drove his car into the rear of a vehicle driven by an off-duty police officer. The officer put in a call for on-duty police and then spoke briefly with the appellant, telling him not to leave the scene. She believed the appellant was impaired. In some ensuing confusion she lost track of the appellant. However, another witness saw him walk away from the scene about 30 minutes after the accident "at a quick, fairly quick, pace". The witnesses who testified did not see the appellant give his name and address to anyone at the scene. The police could not find him at his home, but five days later the appellant surrendered and admitted being the driver in the accident. He was charged with failing to remain at the scene of an accident contrary to s. 252(1)(b). "Fail to remain" is a hybrid offence and the Crown elected to proceed summarily. If convicted, the appellant faced a possible maximum jail term of six months and an automatic suspension of his driving licence.

[6] At the outset of the proceedings, Mr. L. Carter appeared and indicated that he had been retained to represent the appellant. Mr. Carter is not a lawyer. The trial judge questioned the accused about his use of an agent and eventually

satisfied himself that the accused understood Mr. Carter's status and the consequence of being represented by an agent who is not a lawyer. The trial proceeded.

[7] The agent cross-examined witnesses and obtained admissions that they could not know for certain whether the accused had left his name and address with someone else at the scene. He did not call the accused or introduce evidence of intoxication but argued that the police officer's evidence in that respect was sufficient to rebut the presumption of intent to leave the scene. The accused was found guilty and appealed, retaining counsel for that purpose.

The Appeal Before Hill J.

[8] On the summary conviction appeal (R. v. Romanowicz (1998), 14 C.R. (5th) 100 (Ont. Gen. Div.)), it was argued that intent to escape civil or criminal liability had not been established, that the agent should not have been permitted to appear in the absence of proper assurance of his competency and that, on the basis of fresh evidence and a review of the trial transcript, the appellant had been denied competent representation.

[9] Hill J. concluded on the appeal that there was evidence to support the finding of intent to leave the scene and thus no grounds for appellate interference. That conclusion has not been challenged on the appeal to this court.

[10] The "fresh evidence" introduced before Hill J. consisted of the appellant's affidavit and certain telephone records allegedly showing attempts to contact the police to report the accident. Hill J. was not satisfied that this evidence could affect the verdict or that it demonstrated Mr. Carter's incompetence.

[11] Hill J. framed the issue involving the trial judge's obligation to inquire into the competence of the agent in these terms at p. 107:

The appellant submits that the trial judge committed an error of jurisdictional dimension in permitting the chosen agent to appear in the absence of a proper assurance of the competency of the agent to defend the criminal charge. No constitutional arguments have been advanced to suggest that a defendant cannot be represented by an agent in summary conviction trial proceedings.

[12] He then went on to summarize the trial judge's opening inquiry in these terms at pp. 107-08:

Some five or six pages of the transcript record of the trial date relate to the issue of Mr. Carter's status or authority to appear to defend the case. In summary, the

following matters were canvassed on the record in the presence of the appellant before the trial commenced:

- (1) The agent was not a lawyer or a member of the Law Society.
- (2) The agent was not accountable to the Law Society and the client would not be in a position to sue the agent as he would a lawyer.
- (3) The agent had a letter of understanding from his client indicating the client's understanding that he held the status of an agent.
- (4) The appellant understood he was facing a serious charge with potential jeopardy to liberty and the suspension of his driver's licence upon conviction.
- (5) The agent had previously appeared as agent before summary conviction trial courts.
- (6) The appellant wanted the agent to represent him at trial.

With scrupulous care, the trial judge addressed many of these issues directly with Mr. Romanowicz.

[13] The appellant argued that the trial judge was obligated to conduct a mini-test of the agent's legal understanding of the elements of the offence and of his previous experience.

[14] Hill J., at p. 110, reviewed the authorities and concluded that where an accused elects to appear by an agent, the court's discretion to question the soundness of that choice is limited. It should be exercised "consistent with the ordered control of its own process and the constitutional obligation to ensure that an accused, unrepresented by counsel, receives a fair trial."

Issue 1: The Vires of the Criminal Code Provisions

[15] Upon notice to the Attorney General of Canada, the appellant and the intervenors raise the following constitutional issue:

Are sections 800(2) and 802(2) ultra vires the authority of the federal government to enact, as the provincial legislature has exclusive jurisdiction to enact legislation relating to the persons entitled to appear in the criminal courts in the role of counsel to the party litigants?

[16] The vires of the relevant provisions was addressed by Wein J. in *R. v. Lemonides* (1997), 35 O.R. (3d) 611, 10 C.R. (5th) 135 (Gen. Div.). That was an appeal from a conviction

for dangerous driving where the Crown proceeded summarily and the accused was represented by an agent. The Ontario Criminal Lawyers' Association intervened, the same constitutional arguments were raised, and Wein J. wrote very extensive reasons on the subject. She found ss. 800(2) and 802(2) of the Criminal Code to be valid federal legislation and we agree. As we cannot improve upon the analysis of the law found at pp. 616-21 of her reasons, we need only set out our analysis of this issue in summary form.

[17] Sections 800 and 802 are contained in Part XXVII of the Criminal Code, relating to summary convictions:

800(1) Where the prosecutor and defendant appear for the trial, the summary conviction court shall proceed to hold the trial.

(2) A defendant may appear personally or by counsel or agent, but the summary conviction court may require the defendant to appear personally and may, if it thinks fit, issue a warrant in Form 7 for the arrest of the defendant and adjourn the trial to await his appearance pursuant thereto.

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(3) Where the defendant is a corporation, it shall appear by counsel or agent, and if it does not appear, the summary conviction court may, on proof of service of the summons, proceed ex parte to hold the trial.

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802(1) The prosecutor is entitled personally to conduct his case and the defendant is entitled to make his full answer and defence.

(2) The prosecutor or defendant, as the case may be, may examine and cross-examine witnesses personally or by counsel or agent.

(3) Every witness at a trial in proceedings to which this Part applies shall be examined under oath.

[18] There can be no question that criminal procedure lies within federal jurisdiction. This was articulated by Laskin C.J.C. in *Canada (Attorney General) v. Canadian National Transportation Ltd.*, [1983] 2 S.C.R. 206 at p. 223, 3 D.L.R. (4th) 16:

Language and logic inform constitutional interpretation, and they are applicable in considering the alleged reach of s. 92(14) and the allegedly correlative limitation of criminal procedure in s. 91(27). I find it difficult, indeed impossible, to read s. 92(14) as not only embracing

prosecutorial authority respecting the enforcement of federal criminal law but diminishing the ex facie impact of s. 91(27) which includes procedure in criminal matters. As a matter of language, there is nothing in s. 92(14) which embraces prosecutorial authority in respect of federal criminal matters. Section 92(14) grants jurisdiction over the administration of justice, including procedure in civil matters and including also the constitution, maintenance and organization of civil and criminal provincial courts. The section thus narrows the scope of the criminal law power under s. 91, but only with respect to what is embraced within "the Constitution, Maintenance, and Organization of Provincial Courts . . . of Criminal Jurisdiction." By no stretch of language can these words be construed to include jurisdiction over the conduct of criminal prosecutions. Moreover, as a matter of conjunctive assessment of the two constitutional provisions, the express inclusion of procedure in civil matters in provincial Courts points to an express provincial exclusion of procedure in criminal matters specified in s. 91(27).

(Emphasis added)

[19] This reasoning was confirmed and elaborated upon in *Knox Contracting Ltd. v. Canada*, [1990] 2 S.C.R. 338, 73 D.L.R. (4th) 110 and *Kourtesis v. M.N.R.*, [1993] 2 S.C.R. 53, 102 D.L.R. (4th) 456.

[20] Each item referred to in ss. 800 and 802 is a matter of criminal procedure. A reading of these sections, informed by the language of *Laskin C.J.C.*, leaves no doubt that the legislation is within the competence of the federal government.

Issue 2: The Interpretation of the Relevant Criminal Code Provisions

[21] The intervenors advanced several arguments in support of their contention that ss. 800(2) and 802(2) do not provide for representation by agents who are not lawyers and who are paid for that representation.

[22] First, it was suggested that "agents" should be restricted to relatives and friends of the defendant and should not include those paid for their services. This argument flows from the restrictions in the Solicitors Act, R.S.O. 1990, c. S.15, allegedly preventing non-lawyers from presenting legal arguments on behalf of a client for compensation. Section 1 of the Solicitors Act provides that it is unlawful for a person who is not a solicitor or a party to the action to prosecute or defend an action for a fee.

[23] The position taken is that this is valid provincial legislation related to the practice of law and is operative to prevent the appearance of paid agents in summary conviction

proceedings. In *R. v. Lawrie* (1987), 59 O.R. (2d) 161, 32 C.C.C. (3d) 549 (C.A.), a similar argument was turned aside by this court in respect of agents appearing pursuant to the Provincial Offences Act, R.S.O. 1980, c. 400 (now R.S.O. 1990, c. P.33), which specifically permitted the appearance of agents. The court reasoned that s. 1 of the Solicitors Act must be read in conjunction with s. 50(1) of the Law Society Act, R.S.O. 1980, c. 233 (now R.S.O. 1990, c. L.8). The latter section provides that no person who is not registered as a member of the Law Society shall act in the role of barrister or solicitor, "except as provided by law". The court concluded that an appearance authorized by the Provincial Offences Act was "provided by law". This conclusion, which applies to the operation of two provincial statutes, must also apply where the Criminal Code authorizes the appearance of agents in criminal summary conviction proceedings.

[24] The word "agent" is not defined in the Criminal Code. Its meaning is found in ordinary parlance and the dictionary -- in the most general terms, a "representative". The relevant provincial legislation does not limit the language of the Code (assuming it could) to unpaid agents. Thus the fact that the representative is a hireling is irrelevant to the accused's right to a representative of his or her choice to assist in the defence of a summary conviction proceeding.

[25] Another argument advanced to this court was to the effect that s. 802(2), on a strict reading, permits an agent only to examine or cross-examine. This interpretation does not bear up under analysis. Section 800(2) permits the appearance of an agent and contemplates a hearing without the attendance of the defendant. In this circumstance the agent must be capable of performing all defence functions. Likewise, a police constable appearing as agent for the prosecutor gains authority from these same sections and could not sensibly be limited to examination of witnesses: see *R. v. Maher* (1986), 27 C.C.C. (3d) 476, 59 Nfld. & P.E.I.R. 91 (Nfld. C.A.). In addition, the limitation suggested by the intervenors would also apply to counsel, who is referred to in s. 802 alongside an agent.

[26] Finally, it was argued in the factum of the Canadian Bar Association that ss. 800 and 802 do not apply to hybrid offences, which remain in effect indictable offences even after the Crown has chosen to proceed by way of summary conviction. This argument has enjoyed some success in the Provincial Division: see *R. v. Wilson* (1997), 44 C.R.R. (2d) 346, [1997] O.J. No. 459 (Prov. Div.). In our view, it must be rejected. The summary conviction procedures described in Part XXVII of the Criminal Code are a package and apply to all offences that are prosecuted by way of summary proceedings, whether they are straight summary conviction offences or hybrid offences. This court has expressly held that Part XXVII applies once the Crown has elected to proceed summarily: *R. v. Gougeon* (1980), 55 C.C.C. (2d) 218 at pp. 234-35 .

Issue 3: Is There a Constitutional Right to Effective Assistance Where an Accused is Represented by an Agent who is not a Lawyer?

[27] Every accused is owed a fair trial. That right is guaranteed by s. 11(d) of the Canadian Charter of Rights and Freedoms. Representation by professionals trained in the law and bound by the ethics and obligations of their profession serves that right. In some cases, legal representation is essential to the securing of a fair trial and an accused who wants counsel must be provided with counsel: *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 at p. 66, 35 C.R.R. 207 (Ont. C.A.). If an accused retains counsel, she is constitutionally entitled to competent representation by that counsel: *R. v. B. (L.C.)* (1996), 27 O.R. (3d) 686 at p. 699, 104 C.C.C. (3d) 353 at p. 367 (C.A.); *R. v. Joanisse* (1995), 102 C.C.C. (3d) 35 at pp. 56-58, 44 C.R. (4th) 364 (Ont. C.A.). The constitutional right to the effective assistance of counsel recognizes that counsel, by virtue of their professional training, will bring to their task an expertise which others, including the accused, do not possess. An accused who chooses to seek the assistance of legally trained counsel is entitled to assistance which reflects that expertise.

[28] An accused is also entitled to proceed without counsel. The accused may choose self-representation, or if the Crown has proceeded summarily, the accused may choose to be represented by an agent: *R. v. Vescio*, [1949] S.C.R. 139 at p. 142, 92 C.C.C. 161; *R. v. Littlejohn* (1978), 41 C.C.C. (2d) 161 (Ont. C.A.) at p. 173. By choosing to proceed without counsel, an accused elects to forgo the right to the effective assistance of counsel. An accused cannot at the same time exercise the right to proceed without the assistance of counsel and yet demand the right to the effective assistance of counsel.

[29] If an accused chooses self-representation, he or she cannot be heard to complain that the conduct of the trial did not rise to the level of a competent counsel. We see no reason why the same conclusion would not follow when an accused chooses to be represented by an agent who is not a lawyer. Nor does the fact that the agent is paid create any presumption as to the agent's competence. Just as where an accused chooses self-representation, an accused who chooses to be represented by an agent who is not a lawyer has decided against exercising the right to effective assistance of counsel, and cannot be heard to contend that the agent's performance should be tested against the standard reserved to counsel trained in the law: *Harrison v. Canada*, [1998] A.J. No. 109 (Q.B.) at paras. 15-17.

[30] In holding that an accused who chooses to be represented by an agent and not a lawyer has no constitutional right to competent representation, we do not suggest that the accused's right to a fair trial is diminished. That right remains in full

force and the absence of legally trained counsel puts an added obligation on the trial judge to protect that right: R. v. McGibbon (1988), 45 C.C.C. (3d) 334 at p. 347, 31 O.A.C. 10.

[31] Nor do we suggest that an accused who is represented by an agent who is not a lawyer is foreclosed from raising the conduct of that agent on appeal in support of a submission that the conviction constitutes a miscarriage of justice. Any such submission cannot, however, be made on the basis that the miscarriage arises because the agent failed to meet the competent lawyer standard. Rather, the accused must demonstrate that the agent's conduct, perhaps combined with other events, produced a miscarriage of justice.

[32] An example will help clarify this distinction. In R. v. Sumbler, [1997] O.J. No. 1953 (Gen. Div.), the appellant argued that he had pleaded guilty because of information given to him by his agent concerning the length of the licence suspension that would be imposed on conviction. The information provided by the agent was wrong. The mandatory suspension was twice as long as the appellant had anticipated. Quinn J. allowed an appeal from conviction, permitted the accused to withdraw his guilty plea and directed a new trial on the basis that the misinformation provided by the agent had invalidated the guilty plea and resulted in a miscarriage of justice. Although the agent's conduct in Sumbler clearly fell below the level expected of competent counsel, that was not the basis for the finding that a miscarriage of justice occurred. The miscarriage flowed from the erroneous information provided by the agent which, in the view of Quinn J., made the guilty plea an uninformed one.

[33] The situation in Sumbler can be usefully compared to an argument advanced by this appellant to the Summary Conviction Appeal Court. The appellant, following his agent's advice, did not testify. On appeal he argued that his defence of lack of intent could not hope to succeed absent his testimony and that the advice that he should not testify effectively doomed his case. This argument rests on the assumption that the appellant was entitled to competent legal advice and an informed legal opinion on whether he should testify. For the reasons outlined above, that assumption is misplaced where the appellant has chosen to be represented by someone who is not a lawyer. The appellant, having decided he did not want a lawyer and wished to be represented by Mr. Carter, cannot be heard to complain that Mr. Carter in advising him not to testify did not exercise the judgment expected of a lawyer.

Issue 4: What Obligations, if any, Does a Trial Judge Have when an Accused Is Represented by an Agent who is not a Lawyer?

[34] This issue is directed to the trial judge's responsibilities at the outset of a trial where an accused appears represented by an agent who is not a lawyer. There are

essentially two questions to be answered:

- Are trial judges obligated to make inquiries to determine whether the accused has made an informed choice to forgo representation by counsel in favour of representation by an agent?
- Are trial judges obligated to make inquiries to satisfy themselves that the agent is competent to represent the accused in the proceedings?

[35] The inquiries suggested by these two questions serve fundamentally different purposes. The first is aimed at ensuring that the accused has made an informed choice; it is not concerned with the sagacity of that choice. The second inquiry assumes that the accused has made an informed choice and calls upon the court to assess the wisdom of that choice in the light of its assessment of the agent's competence.

[36] All of the parties to this appeal accept that trial judges should make some inquiry to satisfy themselves that an accused has made an informed decision to proceed without counsel and with representation by an agent. We agree. Our analysis of the effect of the accused's decision to be represented by an agent assumes that the decision is an informed one.

[37] The kind of inquiry expected of a trial judge where an accused chooses to proceed without any representation provides guidance in cases where an accused chooses to be represented by an agent who is not a lawyer. In *R. v. McGibbon*, *supra*, Griffiths J.A. commented on the duty of a judge at the opening of a trial where the accused is unrepresented. At p. 346 he stated:

The trial judge, of course, has a duty to the accused to see that he or she has a fair hearing and that duty will generally cast upon the judge an obligation to point out to the accused that he or she would be at a distinct disadvantage in proceeding without the assistance of competent counsel and that the accused is entitled to have such counsel. Where the accused expressly desires counsel, it is clear that unless the accused has deliberately failed to retain counsel, or has discharged counsel, with the intent of delaying the process of the court, the trial judge should afford the accused an opportunity to retain counsel either at his expense or through the services of Legal Aid. If Legal Aid will not fund counsel it may be necessary at least in long complicated trials to stay the proceedings until counsel is funded.

[38] In *R. v. Hardy* (1990), 62 C.C.C. (3d) 28, 6 C.R.R. (2d) 164 (Alta. Q.B.), McDonald J. provided a checklist of issues which a trial judge should address before proceeding with a

trial where the accused was unrepresented by counsel. These included informing the accused of the right to be represented by counsel, explaining the assistance that counsel might provide, and ensuring that the accused did not wish to be represented by counsel. McDonald J. held that the failure to take these steps would infringe the accused's rights under s. 7 of the Charter.

[39] The result in Hardy was affirmed on appeal (1991), 69 C.C.C. (3d) 190, 7 C.R.R. (2d) 382. However, the court did not agree that an accused's rights under s. 7 of the Charter were implicated. Major J.A., for the court, referred to the checklist provided by McDonald J. as a useful and instructive guide to trial judges.

[40] We agree with Major J.A. that an accused's s. 7 rights are not affected by the trial judge's failure to make the necessary inquiries of an unrepresented accused. Certainly, Griffiths J.A. in *R. v. McGibbon*, supra, did not suggest that an accused's s. 7 rights were implicated. The right which is important here is the right to a fair trial. Inquiries like those described in *R. v. Hardy*, supra, protect the right to a fair trial by ensuring that when the trial commences the accused is aware of the significance of the decision to proceed without counsel. The appearance of the fairness of the proceedings is preserved by inquiries which assure the trial judge that the accused is not proceeding in ignorance of his rights or of the potential effect his choice may have on the proceedings. A failure to appreciate either could result in a miscarriage of justice.

[41] We think that a trial judge faced with an accused who has chosen to be represented by an agent should ensure that the choice is an informed one. The trial judge should be satisfied that the accused is aware that the agent is not a lawyer and that the accused will not have recourse to various remedies which might be available to him if the agent were a lawyer and performed inadequately.

[42] Where it appears that the accused is represented by a paid agent, the trial judge would do well to inform the accused that the laws of Ontario do not require that persons receive any training or demonstrate any level of expertise before being allowed to take money in return for representing persons in criminal matters. It is also advisable that the trial judge advise the accused that while the law expects certain minimum standards of competence from lawyers it imposes no such standards on those who are not lawyers.

[43] The exact details of the requisite inquiry will depend on the circumstances of each case. The trial judge in this case conducted the following inquiry:

THE COURT: All right. You've gone over these things with your

client . . .

MR. CARTER: I have.

THE COURT: . . . and has he executed a waiver or a letter of understanding to that effect?

MR. CARTER: I've got a letter of understanding to the effect that he understands that we are agents. We are not members of any Law Society and the fact that he understands the charge and the penalty that may be imposed against him.

.

THE COURT: . . . Madam Crown, you're content that Mr. Carter appear today?

MS. CAPONECCHIA: Provided the accused knows his status. The difficulty I have is that this individual has a language barrier problem. Perhaps Your Honour can canvas with him, with the aid of the interpreter, whether he understood the discussion that he had with the agent and the Crown does want to proceed because we have all our witnesses here.

THE COURT: Are you content I address your client, then?

MR. CARTER: In fact I would request that you address my client, Your Honour.

THE COURT: Mr. Romanowicz, how old are you, sir?

ACCUSED ROMANOWICZ (through Polish interpreter): Thirty seven.

THE COURT: All right. And you have retained Mr. Carter here to act for you on this trial?

A. Yes.

THE COURT: Are you aware that Mr. Carter is not a lawyer?

A. Yes I am.

THE COURT: And, of course, not a member of the Law Society?

A. Yes.

THE COURT: If for some reason he should do something wrong today, you would have no recourse to sue him as a lawyer.

A. Yes. I'm aware of it.

THE COURT: And you're aware that you would have no right to complain to the Law Society about any of his conduct?

A. Yes I know.

THE COURT: You're aware that you're facing a serious charge here that may, and I know nothing about the case, but it may possibly result in a jail sentence for you?

A. Yes I was informed. I know about this.

THE COURT: All right. And under those circumstances you're content to have Mr. Carter act for you?

A. Yes.

THE COURT: All right.

[44] We agree with Hill J. that the trial judge's inquiry was adequate in the circumstances. We also find nothing in the record presented on appeal to suggest that the accused's choice to be represented by an agent who was not a lawyer was not a fully informed one. His real complaint is that with the benefit of hindsight he now believes that he made a bad choice.

[45] A difficult problem is raised by the further question of whether a trial judge, having been satisfied that the accused has made an informed choice to be represented by an agent, must also inquire into the competence of that agent. Obviously, all interests, particularly those of the accused, are served by competent representation. However, imposing a mandatory obligation on the trial judge to inquire into the competency of agents in all criminal cases where an accused chooses to be represented by an agent raises insurmountable difficulties. First and, perhaps, foremost, how is the trial judge to know what standard of competency to apply? Is there to be a different standard for each trial judge and for each case depending on the seriousness of the charge and the complexity of the proceedings? Neither Parliament nor the legislature has seen fit to impose any standard on agents who are authorized to appear in summary conviction proceedings. The involvement of unregulated agents in summary conviction proceedings must be accepted as a fact of life. Judges cannot become regulators and restrict the appearance of agents on a case-by-case basis based on their personal assessment of the competence of each agent.

[46] Second, even if a competence standard could be established, competence is hard, if not impossible, to determine in the abstract. To conduct an effective competence inquiry, the trial judge would have to know a lot more about the particulars of the case than the judge knows or, indeed, should know at the outset of the trial. An attempt to conduct a meaningful inquiry into competence could well take the trial judge into confidential discussions between the accused and the agent or reveal defence strategies and tactics to the prosecution. Either result could render the trial unfair.

[47] Third, a mandatory competence inquiry suggests a paternalistic role for the court, which is inconsistent with the adversarial process and the autonomy of the accused. In summary conviction proceedings the law presently allows the accused to choose among self-representation, representation by an agent who is not a lawyer and representation by counsel. The exercise of that choice is part of the accused's constitutional right to control his or her own defence: *R. v. Swain*, [1991] 1 S.C.R. 933 at p. 972, 63 C.C.C. (3d) 481 at p. 505. The words of *Lacourcière J.A.* in *R. v. Taylor* (1992), 11 O.R. (3d) 323 at p. 338, 77 C.C.C. (3d) 551 at p. 567 (Ont. C.A.) are apposite:

An accused who has not been found unfit to stand trial must be permitted to conduct his own defence, even if this means that the accused may act to his own detriment in doing so. The autonomy of the accused in the adversarial system requires that the accused should be able to make such fundamental decisions and assume the risks involved.

[48] In our opinion, it would be inconsistent with the right of accused persons to choose their mode of representation if courts were obligated to scrutinize those choices and veto them if it were concluded that the chosen representative was not up to the task. The emphasis must be on the accused's right to choose and not on the merits of that choice.

[49] Fourth, a mandatory inquiry into the competence of the agent at the outset of the proceedings could undermine the accused's confidence in that agent and destroy the appearance of a fair trial. An accused who watches a chosen representative undergo a competency examination by the trial judge might reasonably conclude that the trial judge regards that representative as a "second-class citizen" in the courtroom. The accused might well conclude that the agent's presence is regarded with suspicion by the trial judge and that any arguments made by the agent will not carry the weight afforded to those made by Crown counsel.

[50] Fifth, mandatory competency inquiries could become extensive and would inevitably be time-consuming. Summary conviction courts are busy places. Often, several trials are listed for the same day. A significant delay in the completion of any one of those trials will inconvenience those involved in that case and in any of the cases scheduled to be heard after it.

[51] If trial judges are required in every case where an accused is represented by an agent to satisfy themselves that the agent is competent, scheduling of trials in summary conviction court will become an even more difficult task. Delay will no doubt occur. That delay will at least result in added inconvenience and cost both to individuals and to the administration of justice as a whole. In extreme cases, delays

which result in adjournments may render a trial on the merits impossible.

[52] These considerations compel us to hold, as Hill J. did, that the trial judge is not obliged to inquire into the competence of all agents who represent accused charged with criminal offences.

Issue 5: Does a Trial Judge Have the Authority to Refuse to Permit an Agent to Represent an Accused in Summary Conviction Proceedings?

[53] As we interpret the relevant provisions of the Criminal Code, they permit an accused to be represented by an agent in all summary conviction proceedings. The Code does not expressly give the trial judge any power to prohibit a specific agent from appearing in a particular case.

[54] Several provincial statutes that provide for representation by agents before various tribunals recognize the tribunal's power to exclude agents. For example, s. 50 of the Provincial Offences Act, R.S.O. 1990, c. P.33 permits persons charged with provincial offences to be represented by agents. Section 50(3) goes on to provide:

50(3) The court may bar any person from appearing as an agent who is not a barrister and solicitor entitled to practise in Ontario if the court finds that the person is not competent properly to represent or advise the person for whom he or she appears as agent or does not understand and comply with the duties and responsibilities of an agent.

(Emphasis added)

[55] This section and similar provisions in other provincial statutes [See Note 2 at end of document] protect both the individual and the tribunal from the incompetent or unscrupulous agent. The power to disqualify agents extends to those whose forensic skills are so wanting as to render their participation in the proceedings a real hindrance both to the party for whom they act and to the tribunal. The power to disqualify also reaches those who can be described as ethically incompetent. In *Codina v. Law Society of Upper Canada* (1996), 93 O.A.C. 214, 39 C.R.R. (2d) 146 (Div. Ct.), the appellant, Codina, wished to be represented before a discipline committee of the Law Society by Mr. Harry Kopyto, a recently disbarred lawyer. Counsel for the Law Society objected and asked the panel to exercise its power under s. 23(3) of the Statutory Powers Procedure Act, R.S.O. 1990, c. S.22 to refuse to permit Kopyto to appear. Section 23(3) of the Statutory Powers Procedure Act is virtually identical to s. 50(3) of the Provincial Offences Act.

[56] The Law Society apparently did not challenge Kopyto's forensic skills, but rather contended that his recent

disbarment for acts of "pervasive dishonesty" rendered him "incompetent" in that he could not be relied on to conduct Codina's representation in an honest and ethical manner. After hearing extensive evidence, including testimony from Kopyto, the discipline committee disqualified him, holding at p. 216:

We are satisfied . . . that the tribunal could not rely on Mr. Kopyto's integrity, honesty and forthrightness, and that therefore he is not competent properly to represent or to advise Ms. Codina before it.

[57] Ms. Codina's application for judicial review from the order refusing to allow Kopyto to appear was dismissed in the Divisional Court: see also *Kopyto v. Ontario (Attorney General)* (1997), 152 D.L.R. (4th) 572, 14 C.P.C. (4th) 169 (Ont. Div. Ct.).

[58] The Criminal Code does not expressly authorize the court to disqualify agents in summary conviction proceedings. Nonetheless, we are satisfied that the power to do so along the lines found in the provincial legislation exists by virtue of the court's power to control its own process in order to maintain the integrity of that process. The power of the criminal trial court to control its process was described as a fundamental value of the criminal justice system by La Forest J. in *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 at p. 502, 110 C.C.C. (3d) 193 at p. 208. In describing the power, he said:

The first such value is the power vested in courts of criminal jurisdiction to control their own process in furtherance of the rule of law. This was recognized in *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901, where McLachlin J. noted that "[t]he rule of law is directly dependant on the ability of the courts to enforce their process and maintain their dignity and respect" (p. 931).

[59] The authority of the criminal trial court to control its own process has been recognized both where the court exercises a discretionary power granted by the Criminal Code and where there is no statutory authority for the court's action. For example, it has been held that criminal courts have the power to appoint counsel, to exclude persons from the court room, to prohibit publication of proceedings, to control access to court records and to prohibit the publication of information identifying a witness or a party to criminal proceedings: *R. v. Rowbotham*, supra, at p. 69; *R. v. Laws* (1998), 41 O.R. (3d) 499 at p. 508, 128 C.C.C. (3d) 516 at p. 528 (C.A.); *Nova Scotia (Attorney General) v. MacIntyre*, [1982] 1 S.C.R. 175 at p. 189, 65 C.C.C. (2d) 129 at p. 149; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, supra; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, 94 C.C.C. (3d) 289.

[60] The now well-established authority of a criminal trial court to stay proceedings that constitute an abuse of process is perhaps the most dramatic example of the court's power to control its own process so as to maintain the rule of law and the integrity of the court: see *R. v. Young* (1984), 46 O.R. (2d) 520 at pp. 545-51, 13 C.C.C. (3d) 1 at pp. 26-32 (C.A.); *R. v. Jewitt*, [1985] 2 S.C.R. 128 at pp. 136-37, 21 C.C.C. (3d) 7 at p. 14; *R. v. Keyowski*, [1988] 1 S.C.R. 657 at pp. 658-59, 40 C.C.C. (3d) 481 at p. 482. The power to stay proceedings as an abuse is not found in the Criminal Code, but is instead inherent in the role played by the courts as the ultimate guardians of the rule of law and the integrity of the criminal justice system.

[61] A power to deny audience to an agent whose participation in proceedings would either damage the fairness of those proceedings, impair the ability of the tribunal to perform its function or otherwise undermine the integrity of the process is entirely consistent with the exercise of the power recognized in the authorities referred to above. Surely, representation by an agent who has been shown to be incompetent or disreputable can imperil the accused's right to a fair trial and can undermine the integrity of the proceedings just as much as if an accused who was incapable of representing himself were required to proceed without counsel.

[62] Both Hill J. in this case and Wein J. in *R. v. Lemonides*, *supra*, were satisfied that trial judges in the exercise of their power to control proceedings before them could refuse to permit an accused to be represented by an agent in summary conviction court. Wein J. framed the discretion in a manner suggesting a proactive role for trial judges, especially where the allegations are serious. She said at p. 631:

In my view, the potential problems associated with allowing unregulated agents to appear necessitate the exercise of a very broad discretion in the trial judge, who may well determine that the agent should not appear. . . .

. . . trial judges in my view should be cautious before allowing agents to appear and actively represent persons charged with summary offences under the Criminal Code.

[63] Hill J., while recognizing that a trial judge could disqualify an agent in any given case, described that power in these terms, at p. 110:

. . . the court enjoys a limited discretion to question the soundness of the accused's choice to appear by an agent -- a discretion to be exercised consistent with the ordered control of its own process and the constitutional obligation to ensure that an accused, unrepresented by counsel, receives a fair trial.

[64] The approach favoured by Hill J. encompasses both the accused's right to a fair trial and the need to preserve the integrity of the process. It is consistent with the approach we take and strikes the balance between the trial judge's obligation to protect the integrity of the proceedings, including the accused's right to a fair trial and the accused's right, within the limits of the law, to choose a representative.

[65] We were referred to two authorities which might be taken to deny the power of the summary proceedings court to control its own proceedings by refusing to permit representation by a particular person. In *R. v. Maher*, *supra*, the Newfoundland Court of Appeal, in holding that agents properly appointed by the Attorney General were entitled to appear as prosecutors in summary conviction proceedings, said at p. 478:

Counsel for the respondent contends that Provincial Court judges have the inherent jurisdiction to decide who shall be granted a right of audience as prosecutor in a given case. We do not accept that argument . . .

[66] In rejecting that argument, the court cited the well-known words of Ritchie J. in *Doyle v. R.*, [1977] 1 S.C.R. 597 at p. 602, 29 C.C.C. (2d) 177 at p. 181, where he said:

. . . the powers and functions of a Magistrate acting under the Criminal Code are circumscribed by the provisions of that statute and must be found to have been thereby conferred either expressly or by necessary implication.

[67] *Doyle* was not concerned with the powers of a trial judge, but rather with the powers of a magistrate or a justice prior to trial. Furthermore, the broad language used by Ritchie J. in the above-quoted passage has been circumscribed in subsequent cases, which have recognized that all criminal trial courts have the power to control their own processes in ways that are not provided for by statute: *R. v. Jewitt*, *supra*; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, *supra*.

[68] In our view, the real ratio in *Maher* appears in the paragraph preceding that quoted above. Morgan J.A. for the court said at p. 478:

The decision of this court in *Hart* [(1986), 26 C.C.C. (3d) 438] is, of course, binding on all Provincial Court judges and it is not open to them to determine whether the granting of the right of audience to a police officer, properly appointed as agent of the Attorney-General to act as prosecutor in a summary conviction matter, is constitutional or not.

[69] It would seem that the Newfoundland Court of Appeal felt the need to remind provincial court judges that they were bound by decisions of the Court of Appeal and that they had no "inherent jurisdiction" to adopt procedures inconsistent with those decisions.

[70] The second decision, *Re Milligan* (1991), 1 C.P.C. (3d) 12 (Ont. Gen. Div.), arises out of unusual circumstances. A judge of the Provincial Division refused to proceed with a trial as long as Mr. Milligan appeared for the Crown. The judge took this position because, in his view, Mr. Milligan had made improper comments before another judge concerning a ruling the Provincial Court judge had made in another case.

[71] In deciding that the court could not bar Mr. Milligan, Diks J. said at p. 15:

The inherent right of a trial judge to control his own court process does not carry with it the right to choose which counsel are to appear before him. He must take them as they come; the good with the bad; the competent with the incompetent; the articulate with the inarticulate; the polite with the impolite; the succinct with the prolix. The luxury of picking and choosing is not his to enjoy.

[72] *Re Milligan* involved counsel and not an agent who was not a lawyer. The court's power to deny audience to a lawyer raises different considerations from those raised in this case. We do not address that issue in these reasons, but should not be taken as agreeing with Diks J.'s observation that trial judges are powerless to prevent representation by incompetent counsel.

[73] The power to refuse audience to an agent must be invoked whenever it is necessary to do so to protect the proper administration of justice. The proper administration of justice requires that the accused's constitutional rights, particularly the right to a fair trial, be protected. It also requires the fair treatment of other participants in the process (e.g., witnesses) and that the proceedings be conducted in a manner that will command the respect of the community.

[74] It is impossible to catalogue all of the circumstances in which representation by a particular agent would imperil the administration of justice and properly call for an order disqualifying that agent. Obviously, representation by agents lacking the ability to competently represent an accused endangers all aspects of the proper administration of justice, particularly the accused's right to a fair trial. Other examples where the administration of justice would suffer irreparable harm if an agent were allowed to appear are found in the material filed on this appeal. They include representation by an agent facing criminal charges involving interference with the administration of justice and

representation by an agent whose background demonstrates pervasive dishonesty or a blatant disrespect for the law. Representation by persons who have convictions for crimes of dishonesty or who have otherwise demonstrated a lack of good character can only bring the administration of justice into disrepute in the eyes of reasonable members of the public. This is so even if those agents have the requisite forensic ability. We emphasize, however, that we do not suggest that a criminal record or some discreditable conduct automatically disqualifies someone from representing an accused. We are referring to situations in which the agent's criminal record or other discreditable acts are such as to permit the conclusion that the agent cannot be relied on to conduct a trial ethically and honourably.

[75] In addition to the cases where the agent's ability or character would disqualify the agent from acting, there may be other situations where disqualification is appropriate. Representation by an agent who has a conflict of interest, for example, where the agent has a special relationship with the complainant or other witness, could well interfere with the proper administration of justice. An accused should not be represented by a relative of the complainant in a sexual assault case, or by a person who is charged in a separate information with an offence against that complainant. Similarly, representation by an agent who has demonstrated an intention not to be bound by the rules and procedures governing criminal trials would also be inconsistent with the proper administration of justice.

[76] These are only examples of circumstances which could result in an order disqualifying an agent. They are provided to demonstrate that disqualification is justified only where representation would clearly be inconsistent with the proper administration of justice. It is not enough that the trial judge believes that the accused would be better off with other representation or that the process would operate more smoothly and effectively if the accused were represented by someone else. Disqualification of an accused's chosen representative is a serious matter and is warranted only where it is necessary to protect the proper administration of justice.

[77] The power to disqualify agents, like any other facet of the court's power to control its processes, must be exercised judicially on the basis of the circumstances present in a given case. Those circumstances may include the seriousness of the charge and the complexity of the issues raised in a particular case. A presumption, however, that all agents are incompetent to represent accused persons charged with certain summary conviction offences is not a proper basis on which to exercise that discretion. Trial judges are not at liberty, as we are told at least one Provincial Division judge does, to adopt a rule that no agents can appear on criminal matters. That approach is arbitrary and contrary to the Criminal Code. Judges

cannot ignore the letter of the law while purporting to control the process of the court so as to maintain the rule of law and the integrity of the proceedings.

[78] Where there is a concern that a particular agent should not act for an accused in a given case, it should be raised with the court before trial. Crown counsel may raise that concern or third parties (e.g., the Law Society of Upper Canada) may be given leave by the trial judge to raise the issue. The trial judge may also raise the question of the propriety of the agent appearing, although he or she should only do so based on some specific concern referable to the particular agent and not on a general disapproval of the law permitting agents to appear for accused in summary conviction proceedings.

[79] When the issue is raised, the grounds for the potential disqualification of the agent should be clearly articulated. The trial judge should first decide whether those grounds provide any basis upon which to disqualify the agent. If satisfied that they do, the trial judge should then conduct an inquiry in which all interested parties are given a full opportunity to present their positions on the issue. Although the rules of evidence would not necessarily apply to this inquiry, the dictates of procedural fairness must.

[80] If the trial judge is satisfied that representation by the agent would interfere with the proper administration of justice the agent must be disqualified. We stress that the trial judge must be able to make that finding. Judicial unease about representation by a particular agent will not suffice. The accused's right to choose representation by an agent must be respected unless that choice is clearly incompatible with the proper administration of justice.

[81] Despite the best efforts of all involved, there will be cases where the basis for a motion to disqualify does not become apparent until the proceedings are underway. If the trial judge is satisfied that proper grounds for the inquiry exist, he or she must interrupt the trial and proceed with the necessary inquiry. A decision to disqualify the agent will, in many cases, produce a mistrial.

[82] The inquiry directed by these reasons may be a cumbersome one. At the minimum, it will prolong the proceedings and, given the reality of scheduling in summary conviction courts, result in the adjournment of other trials. We take some comfort in the fact that other tribunals which have the statutory power to make the kind of inquiries we anticipate do not appear to have encountered significant problems.

[83] The inquiry we have set out carries with it the risks inherent in the mandatory competence inquiry discussed earlier in these reasons. Our holding that there is no obligation to

conduct a competence hearing in every case seems somewhat in conflict with our holding that a trial judge must in appropriate cases inquire into the competence of an agent. We acknowledge the inconsistency. In our view, the different conclusions are justified because a mandatory competence inquiry strikes more directly at the accused's right to control his own defence whereas an inquiry arising from specific circumstances can be seen more as a legitimate defence of the integrity of the process.

[84] Despite the difficulties associated with the inquiry we have described, we see no alternative given the need to honour both the accused's right to choose his or her mode of representation and the obligation to protect the fairness and integrity of the trial proceedings. The trial court cannot be powerless to prevent representation by an agent where that representation would destroy the fairness of the trial or otherwise bring the administration of justice into disrepute. Surely, an accused's right to choose to be represented by an agent does not compel trial judges to preside over travesties and leave them helpless to prevent a miscarriage of justice.

Conclusion

[85] In answer to the five issues posed at the outset of these reasons, we conclude:

- Sections 800 and 802 of the Criminal Code are intra vires Parliament.
- Sections 800 and 802 permit agents who are not lawyers to represent accused in summary criminal proceedings brought under Part XXVII of the Code.
- There is no constitutional right to effective representation where an accused chooses to be represented by an agent who is not a lawyer. The accused does, however, retain the constitutional right to a fair trial.
- Where an accused is represented by an agent who is not a lawyer, the trial judge should satisfy herself that the accused's choice of representation was an informed one. However, there is no mandatory obligation on a trial judge to conduct a competency inquiry where an agent represents an accused in summary conviction proceedings.
- A trial judge has authority to refuse to permit an agent to represent an accused in summary conviction proceedings where the appearance of the agent would undermine the integrity of the proceedings. Indeed, the trial judge's authority to disqualify an agent must be invoked whenever it is necessary to do so to protect the proper administration of justice.

[86] Applying these conclusions to the appellant's case, we agree with Hill J.'s conclusion that the trial judge properly satisfied himself that the appellant's decision to be represented by an agent was an informed one. We also find that the agent's performance in this case did not compromise the appellant's right to a fair trial and conclude that the evidence does not suggest that the agent's conduct of the trial was such that the trial judge was required to act on his authority to disqualify the agent. There was no evidence whatsoever of discreditable conduct on the part of the agent such as would warrant a competency inquiry.

[87] For these reasons, the appeal is dismissed.

A Closing Word

[88] A person who decides to sell t-shirts on the sidewalk needs a licence and is subject to government regulation. That same person can, however, without any form of government regulation, represent a person in a complicated criminal case where that person may be sentenced to up to 18 months' imprisonment. Unregulated representation by agents who are not required to have any particular training or ability in complex and difficult criminal proceedings where a person's liberty and livelihood are at stake invites miscarriages of justice. Nor are de facto attempts to regulate the appearance of agents on a case-by-case basis likely to prevent miscarriages of justice.

[89] Some 13 years ago in *R. v. Lawrie*, supra, at p. 166, this court indicated that legislative attention to the status of agents and other paralegals appearing on behalf of accused persons was a matter of importance. The government of the day commissioned a report and draft legislation followed. Unfortunately, however, no legislation was enacted. Since that time other courts have echoed the same concerns. Indeed, as the jurisdiction of the summary conviction court has expanded, the concern has increased. The matter has been thoroughly studied, debated and various options set out. Continued legislative inaction suggests indifference to the proper administration of criminal justice in summary conviction proceedings. The cynics among us will suggest that only some serious and highly publicized miscarriage of justice will overcome that indifference. We hope not.

Appeal dismissed.

Notes

Note 1: The federal government has also intervened but only the question of the vires of the relevant sections of the Criminal Code.

Note 2: E.g., see Coroners Act, R.S.O. 1990, c. C.37, s. 50(3); Courts of Justice Act, R.S.O. 1990, c. C.43, s. 26;

Statutory Powers Procedure Act, R.S.O. 1990, c. S.22, s.
23(3).

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Tab 24:

R. v. Tossounian, 2017 ONCA 618

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Tossounian, 2017 ONCA 618

DATE: 20170725

DOCKET: C57314

Juriansz, Pepall and Trotter JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Jeannette Tossounian

Appellant

Kristin L. Bailey, for the appellant

Jessica Smith Joy, for the respondent

Heard: May 30, 2017

On appeal from the conviction entered on July 5, 2012, and the sentence imposed on August 27, 2012, by Justice Barry Herriot Matheson of the Superior Court of Justice.

Juriansz J.A:

A. OVERVIEW

[1] This appeal raises issues about the Crown's disclosure obligations to an unrepresented accused in custody, and a trial judge's duty to assist an unrepresented accused, particularly in ensuring that the accused's right to full disclosure has been fulfilled.

[2] On February 15, 2012, a fire took place on premises which the appellant rented and where she operated an unsuccessful art gallery. Three people in a passing car, all of whom were unknown to the appellant, noticed the blaze, and saw a female walking away from the site of the fire carrying a gas can. They called the police and followed the woman. The police arrived and arrested the appellant. The police found an empty gas can along the route the appellant had taken. On her arrest, she was in possession of two lighters and smelled of gasoline.

[3] The appellant was in custody for some 191 days at the Vanier Institute before and during the trial. She was unrepresented throughout the proceedings.

[4] After a two-day trial by judge alone, she was convicted of arson and possession of incendiary material for the purpose of committing arson. The Crown called 16 witnesses. The appellant did not call a defence. The only issue at trial was identity. In her closing argument, the appellant submitted the evidence of the three civilian witnesses who identified her was not reliable.

[5] On appeal, the appellant advances two main issues: (i) that her right to a fair trial and the right to make full answer and defence was compromised by the Crown's failure to provide disclosure; and (ii) that the trial judge failed to provide adequate assistance to her, particularly by failing to ensure she understood her right to full disclosure.

[6] For the reasons that follow, I would allow the appeal, set aside the finding of guilt, and order a new trial.

B. FACTS OF DISCLOSURE MADE

[7] The Crown made disclosure in three stages.

[8] On March 27, 2012, an in-court judicial pre-trial was held. Although urged by the pre-trial judge to talk to a lawyer, the appellant indicated she would be representing herself as she had "never received good advice from a lawyer once in my life". She also stated that she would definitely not be applying for Legal Aid because she did not "want to waste the taxpayer's money", and that she would be pleading not guilty. She acknowledged that she had received and already read a 144-page disclosure package, but understood that there was more evidence coming. The Crown provided a synopsis of its anticipated evidence and indicated that summaries of the witness statements were included in the 144-page disclosure package. The Crown advised that the police had put a rush on the transcripts of the witness statements that were being prepared and they were

expected to be done in a few weeks. The pre-trial judge confirmed that as soon as they were ready, the transcripts would be made available to the appellant. The Crown also indicated that samples from the site had been sent to the Centre for Forensic Sciences (“CFS”) to test for accelerant, and that a CFS report would be forthcoming. In two to three months. As well, the Crown anticipated a Fire Marshal’s report within the next couple of weeks. The pre-trial judge inquired whether, subject to receiving the further disclosure, the appellant was ready for trial and she indicated that she was. The pre-trial judge reiterated that the appellant should speak to a lawyer. He remanded the case to an April 17 Assignment Court but indicated that he was unsure whether the Crown would be ready to proceed because it was still awaiting forensic evidence which might take months to receive. The pre-trial judge made the following endorsement:

Accused is in custody but claims to be ready for trial, however, the Crown is awaiting forensic evidence, which it does not anticipate receiving for several months. The accused intends to plead not guilty to the charges and intends to testify on her own behalf. The Crown expects its evidence to take two to three days, the accused does not plan to call any evidence other than her own evidence.

[9] On April 17, a trial date of July 3 was set by another judge, who made no inquiries nor comments on the state of the Crown’s disclosure. On June 13, 2012, the Crown personally served the appellant with the expert report of the CFS chemist.

[10] The Crown couriered a disclosure package of over 500 pages¹ to the appellant which was received by the Vanier Institute, scanned through its security, and lodged into the appellant's property by June 25, 2012. This package included the Fire Investigation Report containing some 165 photographs taken by the author of the report, and the transcripts of the witness statements; both of which had not been previously disclosed.

[11] The trial began on July 3, 2012. At the outset, the Crown alerted the judge to the fact that the CFS report had not been served on the appellant within the requisite 30 days' notice. The Crown proposed three options: (i) adjourning the trial, (ii) calling all of the evidence but for the expert testimony and adjourning to allow the appellant adequate time to review the expert report, or (iii) proceeding with the trial with the appellant's consent. The trial judge explained each of these options to the appellant. The appellant confirmed that she had read the CFS report, that she had understood it, that she would not be calling contrary expert evidence, and that she consented to the admission of the CFS report on short notice.

[12] Early in the trial, the Crown indicated she would like to approach one of the three civilian witnesses to show her some photographs of the crime scene taken

¹ Within this package, some of the pages were duplicates. However, the majority were unique pages that differed in substance from the initial 144-page disclosure.

by the Ontario Fire Marshal. The judge asked the appellant if she had seen the pictures and she indicated that she had not. On a further inquiry by the judge, the appellant confirmed the photographs had not been “served on” her. The Crown protested that she had couriered all materials to the appellant properly and that she had confirmed with the Vanier Institute that they were all placed in the appellant’s property for her access and that she would have had access to all these documents. The judge asked if the Crown would be calling a witness from the Vanier Institute to confirm that, and the Crown indicated they would not be. The trial judge stated: “Well she denies receiving it.” The Crown proceeded by asking questions on the description of the building without showing the witness the photographs.

[13] At the opening of the second day of trial, the Crown advised that the police had followed up and had obtained confirmation from the Vanier Institute that it had received the Crown’s material and it had been lodged in the appellant’s property by June 25, 2012. The Crown also had obtained confirmation from the courier that the material had been delivered to the Vanier Institute. Although the Crown accepted that the appellant had not seen the photographs, she did wish to introduce six photographs as exhibits and suggested a brief recess to allow the appellant to look at them. The appellant agreed and, after the recess, the trial continued.

[14] The appellant brought a motion to file fresh evidence relating in part to the issue of disclosure. The Crown consented to the motion.

C. ANALYSIS

(1) Right to disclosure

[15] The appellant has the constitutional right to disclosure of all material that could reasonably be of use in making full answer and defence of the case against her as guaranteed by s. 7 of the *Canadian Charter of Rights and Freedoms*. At this stage, in order to be entitled to a remedy under s. 24 (1) of the *Charter*, the appellant bears the onus of establishing two things. First, she must establish on a balance of probability that the Crown breached its obligation to make proper disclosure. Second, if she does so, she must go on to establish that the Crown's failure to disclose impaired her right to make full answer and defence: *R. v. Dixon*, [1998] 1 S.C.R. 244, at para 31.

[16] I am satisfied that the appellant has established both stages and is entitled to a new trial as a remedy under s. 24 (1) of the *Charter*.

(a) Violation of the appellant's right to disclosure

[17] The Crown attempted to make full disclosure of all materials but, in my view, did not take adequate steps to ensure that the appellant received them. The Crown ensured the appellant received the initial 144-page package of disclosure by handing it to her in court in March 2012. The Crown also ensured

that the appellant received the expert report of the CFS chemist by personally serving it on her on June 13, 2012. However, the Crown delivered an additional package of over 500 pages of disclosure to the Vanier Institute and instructed the Institute to place the package in her property. This material was received by the Vanier Institute by June 25, 2012 and differed from the 144-page disclosure previously made by the Crown. It consisted of transcripts of the witness statements of three civilian witnesses, a transcript of the appellant's statement to the police, reports from the Centre of Forensic Sciences and notices to tender expert evidence. The fresh evidence establishes that the Vanier Institute did not advise the appellant of its receipt, and, although it was placed in her property, the appellant was not aware of it until after trial.

[18] The Crown submits that the appellant was told at the pre-trial that additional material would be forthcoming and that she should be found to have not exercised due diligence because she did not ask the Crown if it had been sent and did not ask the jail if it had been received.

[19] Although the courts have recognized that diligence on the part of defence counsel is relevant in determining whether there has been a breach of the right to disclosure (see, *Dixon*, at para. 37 and *R. v. Bero* (2000), 151 C.C.C. (3d) 545 (Ont. C.A.), at para. 29), neither party provided the court with any authority discussing the standard of due diligence imposed on an unrepresented accused in custody. Because pre-trial custody may involve institutional rules that are

inhospitable to accessing disclosure, as well as unpredictable events, such as lockdowns, an accused person has little scope for exercising initiative in relation to disclosure. Consequently, the standard of diligence expected in the circumstances must necessarily be minimal. This case serves as a good example of some of these restrictions. In cross-examination on the appellant's December 17, 2015 affidavit in the fresh evidence admitted on consent, the appellant testified that the Vanier Institute did not even permit her to take the 144-page disclosure package with her to trial. That said, the Crown again gave her a copy of that package to use at trial and she acknowledged that she had reviewed it again in preparation for trial.

[20] The fresh evidence establishes the appellant's disclosure materials were kept in the manager's office and were only available to her on request. She did request the disclosure materials when she prepared for trial, but that was before the second disclosure package arrived. She explains that when she was personally served with the report of the CFS expert on June 13, 2012, she believed she had received the material she had been told at the pre-trial would be forthcoming. This was a reasonable assumption on the appellant's part.

[21] In all of the circumstances, the appellant acted diligently in relation to the incremental disclosure made by the Crown.

[22] I would conclude the Crown failed to make full disclosure. I appreciate the complications in making disclosure to an unrepresented accused person who is in custody. The Crown must resolve these complications in order to fulfil its responsibility to ensure the relevant materials make it into the hands of an in-custody accused. This may involve personal service of materials. It may involve further court appearances including videoconferences, to ensure that disclosure is complete and the case is ready for trial. It will depend on the circumstances of each case. In this case, the problem might have been diminished had the set-date judge made further inquiries on the state of Crown disclosure and expected delivery dates. Similarly, a readiness hearing held reasonably in advance of the trial could have served to alleviate or eliminate the inadequate disclosure.

(b) Impaired ability to make full answer and defence affected the overall fairness of the trial

[23] Appellant's counsel frankly concedes it would be a difficult task to persuade the court that there is a reasonable possibility that, on its face, the undisclosed information affects the reliability of the conviction. However, she relies on the second branch of the test Corey J. set out in para. 36 of *Dixon*:

Even if the undisclosed information does not *itself* affect the reliability of the result at trial, the effect of the non-disclosure on the overall fairness of the trial process must be considered at the second stage of analysis. This will be done by assessing, on the basis of a reasonable possibility, the lines of inquiry with witnesses

or the opportunities to garner additional evidence that could have been available to the defence if the relevant information had been disclosed. In short, the reasonable possibility that the undisclosed information impaired the right to make full answer and defence relates not only to the content of the information itself, but to the *realistic* opportunities to explore possible uses of the undisclosed information for purposes of investigation and gathering evidence. [Emphasis in original.]

[24] To meet the onus of showing there is a reasonable possibility that undisclosed information impaired the right to make full answer and defence, appellant's counsel puts forward two categories of materials in the second disclosure package of which the appellant was not aware at trial.

[25] Appellant's counsel acknowledges that the appellant was given a fair opportunity to review the six photographs that the Crown put into evidence. However, pointing out that those six photographs were drawn from among the 165 photographs taken by the Fire Marshal's office, she submits the appellant might have made use of some of the other photographs for the defence. Appellant's counsel did not draw the court's attention to any particular photograph to show how there was a reasonable possibility it might have been of use in the appellant's defence. I would not give effect to this argument.

[26] The other category of materials on which the appellant relies are the transcripts of the witness statements. The appellant had disclosure only of the brief summaries of the statements that were included in the initial 144-page package of disclosure. Appellant's counsel points out discrepancies between the

statements of certain witnesses and their testimony at trial. There are a number of discrepancies about which effective cross-examination might have been possible.

[27] The interview summary of the witness who was the front passenger of the passing car indicated that the woman seen walking away from the fire “came across the street toward their vehicle, she didn’t say anything or make a motion to them but appeared calm and began to walk east”. The transcript of the interview of the witness indicates she said, “... she crossed the street in front of us and when she noticed that we had pulled into the plaza she looked somewhat shocked and distraught she looked at us and then turned around and walked in a circle and looked at us and turned around and walked in a circle”. At trial, the witness testified that the woman “started casually walking down the street. She turned to look back at us a few times. At one point she shrugged at us and continued casually walking down the street” (emphasis added).

[28] Appellant’s counsel combines the testimony of this witness with that of the witness who was the driver of the passing car. The interview summary that the appellant had reviewed indicated that the driver “saw the female and described her as white, with brown, long hair, wearing a dark jacket. He could not see her face. He described her demeanour as calm, not in a hurry.” The transcript of the driver’s statement indicates that he said, “well like I said I caught, I saw her face for maybe 10 seconds not enough to really grasp anything but she wasn’t erratic

she wasn't running she was walking there was nothing that really jumped out at me that said you know this was a really agitated or upset individual." At trial, the driver testified: "Initially, I noticed that the reaction seemed very calm. When the person looked at us in the vehicle, it appeared to me that they made a kind of shrugging motion, and then proceeded to turn around and walk away very calmly" (emphasis added).

[29] There are inconsistencies in these testimonies that could have been explored at trial. For example, the passenger, after telling the police that the woman made no gestures, testified at trial that the woman shrugged. Appellant's counsel emphasizes that the first time that both the passenger and the driver testified the woman shrugged was at trial. The appellant could have made use of this to suggest inadvertent collusion between the witnesses was possible, that it showed they had discussed their evidence and that discussion influenced their testimony. This was a line of inquiry that the failure of disclosure foreclosed to the appellant.

[30] Appellant's counsel points out that the Supreme Court of Canada in *R. v. Taillefer*, 2003 SCC 70, [2003] 3 S.C.R. 307, at para. 103, found that the "mere reasonable possibility" that the discrepancies could be used to impeach the credibility of witnesses "is all that is needed for it to be possible to hold that there was a reasonable possibility that the failure to disclose impaired the overall fairness of the trial."

[31] I am satisfied there is a reasonable possibility that the failure of disclosure in this case foreclosed lines of inquiry that could have been available to the appellant had disclosure been made, thus impairing her right to make full answer and defence. The only issue at trial was her identification as the woman seen walking away from the fire. The failure of disclosure detrimentally affected her ability to cross-examine and to diminish the reliability of the witnesses who identified her. Hence I am satisfied the inadequate disclosure negatively affected the overall fairness of the appellant's trial. The remedy for the infringement of the appellant's right is a new trial.

(2) Inadequate assistance by the trial judge

[32] Further, I am persuaded that the trial judge failed to provide the requisite assistance to the unrepresented appellant during the trial, particularly on the issue of disclosure.

[33] Early in the trial it became apparent the appellant had not seen the photographs the Crown wished to show to the second witness. It was at that point obvious there had been a failure of disclosure. The trial continued, and later that day, the Crown noted the appellant did not have a copy of the warrant to search her premises and provided her with a second copy. The warrant had been included in the initial 144-page disclosure package, and the appellant acknowledged having received that package. At the beginning of the second day

of trial, the Crown advised the court that a subsequent package of disclosure that enclosed the photographs had been couriered to the Vanier Institute. The court afforded the appellant a recess to look at the six photographs tendered and then the trial continued.

[34] The Crown points out that the appellant did not raise any concerns about her receipt or review of disclosure. That seems to me to be beside the point.

[35] As soon as it seemed there was a problem with disclosure, it was the duty of the trial judge to make the necessary inquiries and to take the necessary steps to ensure that the unrepresented accused received full disclosure, and that she fully understood her rights to disclosure and the available remedies for infringement of those rights.

[36] This court described the duty of a trial judge when dealing with an unrepresented accused in *R. v. McGibbon* (1988), 45 C.C.C. (3d) 334 (Ont. C.A.), at p. 347, as follows:

Consistent with the duty to ensure that the accused has a fair trial, the trial judge is required within reason to provide assistance to the unrepresented accused, to aid him in the proper conduct of his defence, and to guide him throughout the trial in such a way that his defence is brought out with its full force and effect.

[37] The responsibilities of judges in respect of unrepresented accused persons are also described in the Statement of Principles on Self-represented Litigants and Accused Persons (the “Statement”) issued by the Canadian Judicial

Council in September 2006. The Supreme Court of Canada endorsed the Statement in *Pintea v. Johns*, 2017 SCC 23, at para. 4, as did this court in *Moore v. Apollo Health & Beauty Care*, 2017 ONCA 383, at paras. 42-45.

[38] The *Statement*, at p. 7, offers specific advice to judges about how to meet their duties to self-represented persons in the courtroom environment:

Judges have a responsibility to inquire whether self-represented persons are aware of their procedural options, and to direct them to available information if they are not. Depending on the circumstances and nature of the case, judges may explain the relevant law in the case and its implications, before the self-represented person makes critical choices.

In appropriate circumstances, judges should consider providing self-represented persons with information to assist them in understanding and asserting their rights, or to raise arguments before the court.

Judges should ensure that procedural and evidentiary rules are not used to unjustly hinder the legal interests of self-represented persons.

[39] The trial judge in this case failed to carry out these duties to the unrepresented accused. On this ground too, a new trial is necessary.

(3) Other issues

[40] The appellant raises three additional issues in her factum: (i) the trial judge erred in using the demeanour evidence relating to the appellant's appearance in finding her guilty of the offence; (ii) the fairness of the trial was compromised by having the same trial judge preside who had previously found

the appellant guilty; and (iii) the trial judge materially misapprehended the evidence and used that evidence in grounding the findings of guilt. Having determined a new trial is required due to a violation of the appellant's right to disclosure and inadequate assistance by the trial judge, I find it unnecessary to address these issues.

D. CONCLUSION

[41] For these reasons, I would allow the appeal, set aside the finding of guilt, and order a new trial.

Released: "SP" July 25, 2017

"R.G. Juriansz J.A."
"I agree. S.E. Pepall J.A."
"I agree. Trotter J.A."

Tab 25:

R. v. Trieu, 2010 BCCA 540

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *R. v. Trieu*,
2010 BCCA 540

Date: 20101202
Docket: CA036309

Between:

Regina

Respondent

And

Phu Dat Trieu

Appellant

Before: The Honourable Madam Justice Prowse
The Honourable Mr. Justice Chiasson
The Honourable Mr. Justice Hinkson

On appeal from the Provincial Court of British Columbia, September 10, 2007
(Port Coquitlam Registry, Docket No. 74294)

Counsel for the Appellant: K.S. Westlake. Q.C.

Counsel for the Respondent: W.P. Riley

Place and Date of Hearing: Vancouver, British Columbia
September 21, 2010

Place and Date of Judgment: Vancouver, British Columbia
December 2, 2010

Written Reasons by:

The Honourable Madam Justice Prowse

Concurred in by:

The Honourable Mr. Justice Chiasson
The Honourable Mr. Justice Hinkson

Reasons for Judgment of the Honourable Madam Justice Prowse:

I. INTRODUCTION

[1] On September 10, 2007, a provincial court judge convicted Mr. Trieu of production of marijuana, and possession of marijuana for the purpose of trafficking, contrary to ss. 7(1) and 5(2), respectively, of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19. Mr. Trieu is appealing from conviction.

II. ISSUES ON APPEAL

[2] Mr. Trieu raises several issues on appeal. He submits that:

- (1) the trial judge erred in failing to find that the entry of a BC Hydro employee onto property owned by Mr. Trieu (the “property”) on January 10, 2006 constituted a trespass and an unlawful search contrary to s. 8 of *Canadian Charter of Rights and Freedoms* (the “*Charter*”), as did the subsequent search of Mr. Trieu’s residence on January 12, 2006 which was founded on a search warrant based on information obtained as a result of the trespass;
- (2) the roadside detention of Mr. Trieu prior to the execution of the search warrant was contrary to s. 9 of the *Charter*, both because it was not based on proper legal grounds, and because it was too lengthy;
- (3) the search and seizure of Mr. Trieu’s cell phone, car keys and garage door opener at the time of his roadside detention, but prior to his arrest, was contrary to s. 8 of the *Charter*;
- (4) as a result of these, and other, breaches of Mr. Trieu’s *Charter* rights, the evidence obtained should be excluded pursuant to s. 24(2) of the *Charter*, and an acquittal entered on both counts.

[3] Counsel for the Crown submits that the Court should not consider the second and third grounds of appeal on the basis that these issues are raised and/or argued for the first time on appeal. He also submits that Mr. Trieu should not be heard to argue breaches of his rights under s. 8 of the *Charter* in relation to the property since he testified at trial that he was merely acting as a landlord of the property and, as such, had no effective control over the property. The Crown submits that his

evidence, although rejected by the trial judge, is inconsistent with Mr. Trieu having standing to pursue breaches of his rights under s. 8.

III. BACKGROUND

[4] On January 12, 2006, the RCMP obtained and executed a search warrant relating to a suspected theft of hydroelectricity at a residence in Mr. Trieu's name in Port Coquitlam, B.C. The Information to Obtain the Warrant (the "ITO") was based largely on information obtained from meter tests conducted on and off the property on January 10, 2006 by a BC Hydro meter technician, Richard Condrashoff. Mr. Condrashoff provided his report to Mr. Rick Ogilvie at Accenture (the agency responsible for BC Hydro security and loss prevention). Mr. Ogilvie forwarded that report with other documents substantiating a diversion of electricity at the property in a fax sent January 11, 2006 to the Coquitlam RCMP.

[5] Based primarily on the information obtained by Mr. Condrashoff and provided by Accenture, Cst. Stanford, of the Coquitlam RCMP, obtained a search warrant for the property. Members of the RCMP attended with the search warrant and set up surveillance in unmarked vehicles along the street in which Mr. Trieu's home was located at approximately 9 a.m. on January 12, 2006. At that time, RCMP members also had warrants to search three additional homes along that street for suspected theft of electricity.

[6] At 12:15 p.m. on January 12, a car driven by a person subsequently identified as Mr. Trieu was seen leaving the garage of the property. Shortly thereafter, Sgt. Smith (then a constable) stopped that car and detained Mr. Trieu. Sgt. Smith advised Mr. Trieu that he was being detained for "theft of hydro investigation" pending execution of a search warrant at the home he had just left. Sgt. Smith advised Mr. Trieu of his right to counsel, but did not permit him to contact counsel at that time.

[7] At the time of Mr. Trieu's initial detention, Sgt. Smith took possession of Mr. Trieu's car keys and cell phone. Shortly thereafter, Cst. Pons attended and took

possession of the keys and also of Mr. Trieu's garage door opener which he observed on the driver's-side visor. The garage door opener and keys were used to gain access to the residence when the RCMP executed the search warrant several minutes later.

[8] Upon entry to the home, the RCMP discovered a large marijuana grow operation and several documents linking Mr. Trieu with the residence.

[9] Within eight or nine minutes of entry to the residence, Sgt. Smith was advised of the preliminary results of the search. He immediately placed Mr. Trieu under arrest for production of marijuana and again advised him of his *Charter* rights, including the right to consult counsel. Mr. Trieu was then taken to the nearby RCMP detachment where he was permitted to contact counsel. Approximately 25 minutes elapsed from his initial detention until his arrest; approximately 45-50 minutes elapsed before he was given an opportunity to contact counsel. He was released from custody on a Promise to Appear on January 13, 2006 at 12:25 a.m.

IV. THE VOIR DIRE

[10] At the outset of the trial, defence counsel (who was not counsel on appeal) advised the trial judge that he was going to raise the following *Charter* arguments:

- (1) that the search warrant should be set aside on the basis that Mr. Condrashoff had failed to utilize proper procedures in reading the Hydro meter on the property; therefore, there was no valid evidentiary base for the warrant, and the ensuing search was in breach of Mr. Trieu's s. 8 *Charter* rights;
- (2) there were no reasonable grounds for detaining Mr. Trieu at the roadside, with the result that his detention was unlawful and in breach of s. 9 of the *Charter*;
- (3) Mr. Trieu's s. 10(b) right to counsel was breached by failing to allow him to contact counsel until he was taken to the police station following the search.

[11] At the conclusion of the *voir dire*, defence counsel relied on the first and third grounds set out above, but did not pursue the second ground. His submissions at that time included the following:

- (1) that Mr. Condrashoff had trespassed on the property at the time he took the meter readings, because 10:15 p.m. was not a reasonable time to conduct a meter inspection within the meaning of the BC Hydro and Power Authority Electrical Tariff (the "Tariff");
- (2) the fact that the Hydro meter removed during the search had been lost prior to trial precluded Mr. Trieu from making full answer and defence, thereby breaching his rights under s. 7 of the *Charter*;
- (3) the overall detention of Mr. Trieu from the time he was arrested until the time he was released on a Promise to Appear over 12 hours later was unreasonable and in breach of s. 9 of the *Charter*;
- (4) as a result of the combination of these breaches, the evidence obtained as a result of the breaches should be excluded and the charges against Mr. Trieu dismissed.

V. THE RULING ON THE VOIR DIRE

[12] In brief, the trial judge found that there had been a breach of Mr. Trieu's s. 10(b) *Charter* rights by reason of the delay in permitting him to contact counsel, but that no evidence had been obtained as a result of that breach. In all the circumstances, she concluded that there was no justification for the exclusion of evidence under s. 24(2) of the *Charter*.

[13] The trial judge also found that there had been a breach of Mr. Trieu's right to make full answer and defence to the charge of theft of electricity under s. 7 of the *Charter* as a result of the loss of the hydro meter. Therefore, she excluded the results of the meter readings taken by Mr. Condrashoff during the search on January 12, 2006. The Crown then stayed the charge of theft of electricity. The trial judge did not exclude Mr. Condrashoff's January 10 meter readings since they did not relate to the loss of the meter.

[14] The trial judge rejected all of Mr. Trieu's other *Charter* challenges. Amongst other things, she found that Mr. Condrashoff's entry on the property to conduct meter readings at 10:15 p.m. on January 10, 2006 was at a reasonable time and not in breach of the Tariff. In reaching that conclusion, the trial judge placed considerable reliance on Mr. Condrashoff's handwritten report which was included in

Exhibit E on the *voir dire*. The trial judge found that Mr. Condrashoff had adopted that report in his evidence on the *voir dire*.

[15] I will elaborate on these rulings later in these reasons.

VI. CONCLUSION

[16] I would dismiss the appeal.

[17] Regarding the first ground of appeal, I conclude that the trial judge erred in finding that Mr. Condrashoff adopted his written report in his evidence on the *voir dire*. Since the trial judge relied on a portion of that report as the principal basis for her conclusion that 10:15 p.m. was a reasonable time for conducting meter readings on the property on January 10, 2006, this aspect of her reasons does not withstand scrutiny. Further, I am not persuaded that there was significant evidence apart from a statement contained in Mr. Condrashoff's report, which would justify her conclusion that 10:15 p.m. was a reasonable time for entering on Mr. Trieu's property on that date. It follows that Mr. Condrashoff was in breach of the Tariff and a trespasser on the property when he took the meter readings on January 10. These readings formed the foundation for the ITO and the search warrant which was executed on January 12, 2006. The Crown does not dispute that, if Mr. Condrashoff was a trespasser on the property on January 10, the critical information he obtained thereby was the product of an unlawful search, and that the search conducted on January 12 based on the warrant obtained largely as a result of that unlawful search also breached Mr. Trieu's s. 8 *Charter* rights.

[18] Regarding the second ground of appeal, I am not persuaded that the initial roadside detention of Mr. Trieu on January 12, 2006, or his ongoing detention for a further 25 minutes pending the execution of the search warrant, amounted to arbitrary detentions constituting a breach of his rights under s. 9 of the *Charter*.

[19] Regarding the third ground of appeal, I am not persuaded that it would be appropriate, or in the interests of justice, to allow Mr. Trieu to raise a further breach of his s. 8 *Charter* rights based on an alleged unlawful search and/or seizure of his

keys, garage door opener, and cell phone during his roadside detention. This argument was not raised in any form at trial; there are no findings of the trial judge regarding it; and I am satisfied further evidence could have been called on this issue had it been raised at trial.

[20] Although I have found additional breaches of Mr. Trieu's *Charter* rights resulting from Mr. Condrashoff's trespass on the property and the ensuing search of his home based on evidence obtained during that trespass, I agree with the trial judge, in the result, that the evidence obtained as a result of the ensuing searches should not be excluded under s. 24(2) of the *Charter*. In my view, the admission of that evidence would not bring the administration of justice into disrepute.

VII. DISCUSSION

1. Section 8 of the *Charter* – Entry onto the Property on January 10, 2006

(a) The Tariff

[21] There is no dispute that Mr. Condrashoff's right to attend on private property to check Hydro equipment is found in the Tariff, enacted pursuant to regulatory powers found in s. 125 of the *Utilities Commission Act*, R.S.B.C. 1996, c. 473. The relevant provision of the Tariff at the time was as follows:

The Authority's agents and employees shall have at all reasonable times, free access to the equipment supplied with electricity and to the Authority's meters and apparatus and the wires leading therefrom on the customer's premises to ascertain the quantity or method of use of service. [Emphasis added.]

[22] In *R. v. Benham*, 2003 BCCA 341, 175 C.C.C. (3d) 231, this Court found the Tariff to be constitutionally sound, adopting in large part the analysis of Madam Justice Neilson in *R. v. Bourque*, 2001 BCSC 621, 50 W.C.B. (2d) 344. In both cases, the courts determined that the Tariff did not breach the s. 8 *Charter* rights of occupants of property to which BC Hydro provided electrical utility services.

[23] The narrow issue relating to the application of the Tariff in this case is whether Mr. Condrashoff's entry onto the property on January 10, 2006 at 10:15 p.m. fell within the words "at all reasonable times". The resolution of that issue turns largely on the question of whether, in his evidence on the *voir dire*, Mr. Condrashoff adopted the contents of his report, which formed part of Exhibit E on the *voir dire*.

(b) Adoption of the Report

[24] It is common ground that Mr. Condrashoff went onto Mr. Trieu's property on January 10, 2006 to do what he referred to as a "service check". He described that process as one involving reading the meter which, in this case, was on the outside of Mr. Trieu's attached garage. He then compared those readings with the electrical load on the underground service box located approximately ten feet off the property. Mr. Condrashoff stated that he went back and forth between the meter and the service box 4-6 times in making this comparison. Notably, he did not testify as to what triggered his decision to conduct the service check that evening.

[25] The only reference to Mr. Condrashoff's reason for attending at Mr. Trieu's property on January 10 is in his handwritten report, which is one of several documents contained in a collection of documents marked as Exhibit E on the *voir dire*. At p. 1 of his report, Mr. Condrashoff wrote:

I was doing routine electric load checks in the 1600 block of Plateau Crs. Coquitlam, Jan 10/06. One of BC Hydro's electrical single phase transformer (PMT) was being overloaded and caused flickering lights in the neighbouring houses. I discovered at 1626 Plateau Crs. premises a discrepancy in wattage-load between the service conductors in the service box and the electric meter.

[26] This note in the report is followed by a series of readings which Mr. Condrashoff referred to in his testimony on the *voir dire*, together with his conclusion that this discrepancy indicated a theft of electricity.

[27] In his evidence on the *voir dire*, when asked by Crown counsel what he was doing at Mr. Trieu's residence on January 10, Mr. Condrashoff replied:

A. I was trying to compare the electrical service load at the underground service box and compare it to the electrical meter which was on the northeast wall of the garage.

[28] Later in his direct examination, Mr. Condrashoff agreed with the Crown that he was conducting “what’s a service check”. In cross-examination, he testified to his belief that Hydro employees could go on to private property at any time “[i]f [they] believe there’s any mischief”. He was not asked what constituted mischief, and he did not testify that his attendance at the property on this occasion was sparked by any form of mischief, an overloaded transformer, or a suspected theft of electricity. Rather, he continued to refer to his attendance there as being in the nature of a service check. (I note that one of the hearsay documents in Exhibit E, apparently signed by Mr. Ogilvie of Accenture, refers to the nature of a “service check”, but this document was not referred to at trial, or in the reasons of the trial judge and, in my view, has no evidential value.)

[29] If Mr. Condrashoff had testified that he had conducted the service check at Mr. Trieu’s residence on January 10, 2006 at 10:15 p.m. in response to a report of a transformer overload and flickering lights in the neighbourhood, I would have no hesitation in accepting the trial judge’s conclusion that Mr. Condrashoff’s entry on to Mr. Trieu’s property at 10:15 p.m. in response to that situation was at a reasonable time and in accordance with the Tariff. In my view, the prospect of an overloaded transformer, or the threat of a power failure, would justify entry onto private property to address public concerns. I do not understand counsel for Mr. Trieu to argue otherwise.

[30] Mr. Trieu’s position, taken before the trial judge, and again on appeal, is that there was no evidence that Mr. Condrashoff’s “routine” service check was anything other than “routine”, and that the trial judge erred in finding that Mr. Condrashoff adopted his report with respect to his reason for entering onto the property.

[31] The reference in the trial judge’s reasons on the *voir dire* to Mr. Condrashoff adopting his report is found at paras. 41 and 42, where she states:

There is no evidence at all here that Mr. Condrashoff was on the property for the purpose of investigating a theft allegation or was acting as a police agent in any way. His report, which he adopted, says he was at that street to check out an overloaded transformer that was causing lights to flicker. His entry onto the property was restricted to the area immediately adjacent to the electric meter, about 10 or 12 feet onto the property and in an area that was completely open to public view.

In all the circumstances, I am satisfied that 10:15 p.m. was not an unreasonable time for Mr. Condrashoff to go onto the property. In view of the evidence about an overloaded transformer and flickering lights, it seems to me that Hydro's customers, including the defendant, might well be expecting something to be done to fix the situation. If the lights are flickering at 9:00 p.m. or at 10:15 p.m., people rely on their power continuing without interruption, particularly on a January evening, when power use may be expected to be high for heating purposes. [Emphasis added.]

[32] It is apparent from these passages from her reasons that the trial judge was relying on Mr. Condrashoff's report (as opposed to his *viva voce* evidence) as proof of the reason he was at the property, and to found her conclusion that his attendance for that purpose was reasonable.

[33] The Crown refers to two passages from Mr. Condrashoff's evidence as supporting the trial judge's conclusion that Mr. Condrashoff adopted his report. The first passage is found in Mr. Condrashoff's examination in chief, when he is describing the various calculations he made after attending with the police on January 12 to assist in dismantling the electrical hook-ups used in the grow operation. After referring to several of his calculations, Mr. Condrashoff was questioned as follows:

Q. Okay. And do you recall what that amount was?

A. I think it was near \$1700.

Q. Okay. Did you make a note of what the actual amount was?

A. Yes. It's right in my report here.

Q. Right. And when did you make your report as to the amount?

A. On the day that I was there. It was, of course, after we left the place and I went back to my office in Burnaby.

[Crown Counsel]: I don't know if my friend has any objection, Your Honour, to Mr. Condrashoff referring to the report that he wrote shortly after he attended the residence? Perhaps Mr. Condrashoff, you could refer to your report and refresh your memory.

A. Okay.

The Court: The witness is referring to his own copy, is he?

[The Crown]: Yes.

Q. Is that your own copy?

A. Yes. This is my copy that I came here with. And on page 6 of 6 of what I wrote, I worked out the loss for \$1,369.41.

Q. That's for the period from September 20th --

A. -- '05 --

Q. -- '05 to --

A. -- January 12th, 06.

Q. -- January 12th, 06.

A. Yes.

[Emphasis added.]

[34] It is apparent from this reference that Mr. Condrashoff was simply referring to the report to refresh his memory, with particular reference to the total loss he calculated that BC Hydro had suffered up to the date of the search on January 12, 2006. He is not referring to his attendance at the property on January 10.

[35] The next reference Mr. Condrashoff made to his report related to Exhibit E, as follows:

[Crown counsel]: ... Do you recognize that document [Exhibit E]?

A. Yes.

Q. All right. And what does it contain?

A. It -- this will contain my report and what was filled out by Accenture and plus the hydro document for electrical consumption.

Q. All right. So it's got hydro subscriber records, the report prepared by Accenture and also your report that you prepared --

A. Yes.

Q. -- in this investigation?

A. Yes.

Q. And your part of the report that you prepared is which part?

A. That was handwritten. I usually labelled --

Q. The handwritten note?

A. Yes. The handwritten notes.

Q. Those are your notes?

A. Yes. Go from 1 to 6.

Q. All right. ...

[36] In my view, neither of these passages supports the trial judge's finding that Mr. Condrashoff adopted his report. In these passages, Mr. Condrashoff does no more than identify his report and use it to refresh his memory. The critical aspects of the report setting forth his readings and his conclusion that there had been a theft of electricity at the premises were contained in his oral evidence. He was qualified as an expert in that respect. A brief reference in the transcript indicates that Crown counsel had given notice to defence counsel under s. 657.3(3) of the *Criminal Code*, R.S.C. 1985, c. C-46 (the "*Code*") that he intended to elicit expert evidence from Mr. Condrashoff at trial. The report, itself, does not appear to have been drafted as an expert report, although it contains expert opinion. Rather, it reads as a narrative of events occurring on January 10, when Mr. Condrashoff first attended the property, and on January 12, when he attended again at the request of the police to assist them in dismantling the electrical hook-ups associated with the grow operation. The reason for Mr. Condrashoff's attendance at the property on January 10 does not form part of his expert opinion, but is simply narrative to which Mr. Condrashoff did not refer in evidence.

[37] On appeal, Crown counsel did not suggest that Mr. Condrashoff's report could be relied on as proof of Mr. Condrashoff's reason for being on the property simply because it was one of the documents contained in Exhibit E. In that regard, the manner in which this group of documents came to be marked as an exhibit on the *voir dire* was casual, at best. Exhibit E was tendered through the evidence of the first Crown witness, Cst. Stanford, who prepared the ITO. The evidence indicates that the exhibit was entered as a matter of convenience at that point, in anticipation that Mr. Condrashoff would testify later and be asked questions concerning its contents.

[38] It is apparent that the trial judge did not rely on the mere fact that Mr. Condrashoff's report was found in Exhibit E as a basis for finding that its contents

could be accepted as proven on the *voir dire*. Rather, she founded her conclusion that 10:15 p.m. was a reasonable time to be on the property almost entirely on the basis that Mr. Condrashoff had adopted his report in his evidence on the *voir dire*.

[39] If Mr. Condrashoff had been referred on the *voir dire* to the explanation set out in his report for entering onto the property on January 10, and if he had confirmed that that explanation was true, there is little doubt that the trial judge could have relied on his explanation in drawing her conclusions on the *voir dire*. But, the unsworn statement was simply entered as part of Exhibit E, without any verification or confirmation of its contents beyond Mr. Condrashoff saying the report was his. In my view, it cannot be said that he adopted his report or in any way confirmed in his evidence the critical statement as to his reason for being on the property.

(c) Was 10:15 p.m. a Reasonable Time?

[40] Because the trial judge found that Mr. Condrashoff adopted his report, which set forth the reason for his entry on the property, she did not have to resolve the issue of whether, in the absence of that explanation, his entry on the property at 10:15 p.m. was otherwise reasonable. Since I have found he did not adopt his report, that question remains.

[41] At trial, and on appeal, Mr. Trieu submitted that a reasonable time within the meaning of the Tariff should be between the hours of 6 a.m. and 9 p.m., by analogy with the provisions for execution of a search warrant under s. 488 of the *Code* which provides:

488. A [search] warrant issued under section 487 or 487.1 shall be executed by day, unless

- (a) the justice is satisfied that there are reasonable grounds for it to be executed by night;
- (b) the reasonable grounds are included in the information; and
- (c) the warrant authorizes that it be executed by night.

“Day” is defined in s. 2 of the *Code* as “the period between six o’clock in the forenoon and nine o’clock in the afternoon of the same day”. “Night” is defined as

“the period between nine o’clock in the afternoon and six o’clock in the forenoon of the following day”.

[42] In my view, the analogy with s. 488 of the *Code* is unhelpful, not the least because entry into premises pursuant to a search warrant is a much greater invasion of privacy than the limited entry onto private property accompanying service checks of the type conducted by Mr. Condrashoff in this case. The more limited nature of the invasion of privacy involved in such checks was referred to in *Bourque* where, unlike here, it was clear that the Hydro employee was investigating a theft of electricity when he entered onto the private property in question. At para. 89 of *Bourque*, Madam Justice Neilson stated:

[BC Hydro employees’] entry is limited to investigating equipment which belongs to B.C. Hydro, and matters relevant to the commodity which it sells. Their activities on the property, and the information they obtain, are minimally intrusive in terms of privacy concerns of the residents. The customers have imputed knowledge of this right of entry, and of B.C. Hydro’s right to investigate whether its customers are paying for electricity and using its equipment properly. [Emphasis added.]

[43] Further, the Tariff itself defines the circumstances in which BC Hydro employees can enter upon private property; they can do so “at all reasonable times”. This wording indicates that it was not considered necessary to define reasonable times, but to leave that to be decided in the context of the particular circumstances of each case. There is no limitation in the Tariff as to what constitutes a reasonable time; rather, it must be determined on a case by case basis.

[44] The only authority to which the Court was referred in terms of what constitutes a reasonable time under the Tariff, is the decision of this Court in *R. v. Pham*, 2002 BCCA 503, 174 B.C.A.C. 161, in which this Court did not interfere with the finding of the trial judge that 1:30 a.m. was not a reasonable time within the meaning of the Tariff for a Hydro employee (also Mr. Condrashoff) to be conducting a service check on private property. In that case, the trial judge found that Mr. Condrashoff was attending at that time more as a convenience to himself given his working schedule, than due to any particular concern about any mischief relating to the electrical consumption on the property. In finding that 1:30 a.m. was not a

reasonable time in the circumstances before her, the trial judge in *Pham* made the following comments, with which I agree:

Now, what is “at all reasonable times” must depend upon the particular circumstances of the case. If there is some emergency, if it is clear that the Hydro equipment, because of some tampering or for some other reason, whether it is due to a natural cause or as a result of some interference by the residents in the home where the hydro is being provided, there is some reason to believe that there is a danger to the community, then, of course, what is a reasonable time for entry is going to be expanded. If it is just a routine check of the meter to find out what amount of service to bill for, then, of course, it would be reasonable to expect that the Hydro staff would attend during a more restrictive timeframe. So it really is the circumstances surrounding the entry that would give rise to the proper determination as to whether to [sic] the time was reasonable. It is not that I can say that 9:00 to 5:00 is reasonable in every case or 9:00 to 10:00 p.m. is reasonable in every case. It has to depend upon the particular circumstances.

[45] In *Pham*, although the trial judge found that Mr. Condrashoff’s entry on the premises was in breach of the Tariff such that he was a trespasser on the property, and that the warrant obtained on the basis of that illegal entry could not stand, she admitted the evidence obtained as a result of the ensuing search under s. 24(2) of the *Charter*.

[46] The Crown submits that, given the limited expectation of privacy in electrical readings on the side of a house (or garage), the regulatory context in which Mr. Condrashoff was performing his duties, and the extremely brief and un-intrusive nature of Mr. Condrashoff’s actions, it was open to the trial judge to find, in these circumstances, that 10:15 p.m. was a reasonable time within the meaning of the Tariff to enter onto the property. The Crown does not dispute (for the purposes of this appeal) that, “inasmuch as Mr. Condrashoff relied on the [Tariff] as authority to go onto private property to conduct the meter reading, Mr. Condrashoff’s actions were subject to scrutiny under the *Charter*”.

[47] As earlier stated, I am satisfied that indications of overloaded transformers and signs of potential power failures would be examples of situations which would justify Hydro employees attending at any time of the day or night on private property in order to determine the cause of the problem with a view to averting it. There may

well be other examples. I would not be inclined to find that a suspicion of theft of electricity would be sufficient, in itself, to justify entry at all times, but it is unnecessary to decide that point here, since Mr. Condrashoff did not testify that he was attending at the premises to investigate a possible theft of electricity, and the trial judge expressly found that he was not attending for that purpose.

[48] The fact that entry is restricted under the Tariff to reasonable times is a clear indication that not all times are considered reasonable, and that Hydro employees cannot attend on private property at will, regardless of the circumstances. In my view, reasonable residents of private property are likely to conclude that strangers entering onto their property at 10:15 at night without invitation are up to no good. The presence of an apparent intruder on their property might dispose them to call 911, or, in a worst-case scenario, take matters into their own hands. In other words, unannounced entry onto private property late at night could well result in breaches of the peace, or in emergency services being deployed and public expense incurred, without good reason.

[49] In my view, for the reasons just mentioned, Mr. Condrashoff's attendance on the property in these circumstances was not at a reasonable time.

[50] There is some suggestion in Mr. Condrashoff's evidence that Hydro does not have sufficient employees to attend to all Hydro business during daylight hours. If so, I do not consider it to be a basis for finding that any hour of the night or day is a reasonable time for checking meters on private property. Mr. Condrashoff indicated that the latest he would attend at a property for a service check would be 11 p.m., but that appears to be solely because his shift ends at midnight. Absent situations calling for immediate attention, such as the examples to which I have referred, mere convenience cannot justify attendance on private property late at night.

(d) Section 8 of the *Charter* – Conclusion

[51] It follows that I am satisfied that Mr. Trieu's rights under s. 8 of the *Charter* were breached by Mr. Condrashoff's unjustified entry on the premises on January 10

and his ensuing search of the meter by which he obtained evidence of theft of electricity. Absent this evidence, the search warrant for the residence would not have been issued, and the subsequent search on January 12 which resulted in the seizure of substantial evidence of a marijuana grow operation would not have occurred.

[52] I will return to a s. 24(2) analysis relating to the admissibility of this evidence after analyzing the other issues on appeal. The only other point I will address in relation to these searches is the Crown's submission that Mr. Trieu should not be permitted to pursue breaches of his s. 8 *Charter* rights in relation to the property in circumstances where, following the ruling on the *voir dire*, he testified to the effect that he was only a landlord of the property at the relevant time and thus lacked control over the premises. The Crown submits that, if his evidence had been accepted by the trial judge, arguably he would have lacked a sufficient privacy interest in the property to give him standing to argue a breach of his s. 8 *Charter* rights.

[53] Apart from the fact that the Crown does not appear to have raised this argument at trial, I find it unpersuasive on the facts of this case. The Crown at all times took the position that Mr. Trieu had a privacy interest in the property and the trial judge was clearly of the same view. It is apparent that she rejected Mr. Trieu's evidence that he lacked sufficient control over the property to justify convictions on both counts. In any event, I do not believe that the law is such that an owner/landlord could never have a sufficient privacy interest in premises to provide standing to make a s. 8 *Charter* argument. In any event, I do not find it useful to pursue this argument for the first time on appeal with the limited argument directed to the point.

2. Section 9 of the Charter – Arbitrary Detention

(a) Failure to Argue Issues at Trial

[54] On appeal, Mr. Trieu submits that his roadside detention was unlawful on two bases: (1) that the RCMP did not have reasonable suspicion on which to base the initial roadside detention; and (2) that the roadside detention was, in any event, unjustifiably prolonged.

[55] Although counsel for Mr. Trieu alerted the trial judge to the first issue at the outset of the *voir dire*, he did not argue it at the conclusion of the evidence. There are, therefore, no findings or ruling of the trial judge to review. The second issue was not raised at trial and so again, there are no findings or ruling of the trial judge in relation to it.

[56] The Court has discretion to hear new issues not raised at trial, but this discretion is generally exercised sparingly and only where the interests of justice require it. (See, for example, *R. v. Olson* (1993), 28 B.C.A.C. 288 at paras. 18-20, 47 W.A.C. 288; and *R. v. Vidulich* (1989), 37 B.C.L.R. (2d) 391 at 398, 3 C.N.L.R. 167 (B.C.C.A.).) The reasons for exercising the discretion sparingly are nicely summarized by Crown counsel at para. 50 of his factum, as follows:

First, the appellate function is compromised where the evidentiary record does not allow for a proper legal analysis. Thus the court has refused to grant leave where the facts necessary to decide the issue are not contained within the record of the case: *R. v. Vidulich* at p. 398-99; *R. v. Olson* at para. 10, 14-15. Second, the appellate function often if not invariably involves the assessment or review of decisions made by courts of first instance. Where the court of first instance is deprived of the opportunity to make relevant findings of fact and undertake an analysis of the issue, the appellate function is compromised: *R. v. [R. (R.)]* (1994), 91 C.C.C. (3d) 193 (Ont. C.A.) at para. 15. Third, appellate courts should not be forced to sit as courts of first instance by entertaining arguments that could have been made at trial, but for reasons of professional judgment, efficiency or tactics were not pursued: *R. v. Vidulich* at p. 398-99.

[57] In my view, the evidentiary foundation for the s. 9 arguments was laid at trial. The Crown does not submit that the evidence would have been any different had the unlawful detention issue been broken down and framed at trial as it is on appeal.

While the lack of reasons for judgment on these points compromises the appellate function to some extent, the issues are not such that it would prejudice the Crown, or otherwise be inappropriate, to consider them on appeal as currently framed. It is unclear why defence counsel did not pursue the unlawful detention issue in his submissions at trial, but I see no indication that it was for tactical reasons such that Mr. Trieu should be required to live with the result. In all of the circumstances, I am persuaded that it is appropriate to engage in an analysis of the s. 9 issues on appeal.

(b) The Initial Detention

[58] As earlier stated, a male later identified as Mr. Trieu was seen driving a car out of the garage of the residence on the property at 12:15 p.m. on January 12, 2006. Sgt. Smith pulled him over shortly thereafter. Sgt. Smith approached Mr. Trieu, who was alone in the car, and advised him that the police had a search warrant for electrical theft at the property he had just left. Sgt. Smith asked for, and obtained, Mr. Trieu's driver's license, which showed his address as the one for which the search warrant had been obtained. Sgt. Smith advised Mr. Trieu that he was "being detained" for "theft of hydro investigation" pending the execution of the search warrant. Sgt. Smith also advised Mr. Trieu of his right to counsel. In response to Mr. Trieu's request to contact counsel, Sgt. Smith advised that he did not want Mr. Trieu to make any phone calls until the warrant was executed. Sgt. Smith also advised that he could not provide Mr. Trieu with privacy at the roadside.

[59] Prior to Mr. Trieu being detained at approximately 12:20 p.m., his residence had been under surveillance for approximately four hours. No one else had been seen coming or going. For at least two hours of that period, the front door and garage had been under continuous surveillance, such that anyone coming or going would have been seen. The question is whether, in those circumstances, the requisite objective and subjective grounds existed for Sgt. Smith to detain Mr. Trieu.

[60] Mr. Trieu submits that the evidence discloses that he was detained simply as a result of a policy determined at the outset of the investigation to detain any person

or persons seen leaving this residence (and three other residences on the same block which were also under investigation for suspected theft of electricity, and also subjected to searches on January 12, 2006). In that regard, Mr. Trieu refers to Sgt. Smith's evidence as to his role in the surveillance and detention as follows:

Q. And what was it that Corporal Pons directed you to do that day?

A. That day he requested I assist in surveillance of four residences that were under investigation of theft of hydro and to assist in surveillance and a possible take-down of suspects, detaining them leaving the residences.

[61] Later in cross-examination, Sgt. Smith stated:

A. No. No, I wasn't surveying [*sic*] that house. I was on the - my assigned duties was [*sic*] being on the street to pick up any vehicles leaving that area. But I was - I was - sorry. I was requested - I followed direction of Corporal Pons and he would tell me which vehicle to go after and for what reason.

[62] Mr. Trieu submits that the mere fact that he was seen leaving the residence, and that the residence was associated with an apparent theft of electricity, without more, was an insufficient basis to detain him at that time, and amounted to nothing more than a police hunch that he had some involvement in the suspected theft.

[63] The leading case with respect to the circumstances justifying the police placing an individual under investigative detention is *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59. At paras. 34-35 of *Mann*, Mr. Justice Iacobucci, speaking for the majority, stated:

The case law raises several guiding principles governing the use of a police power to detain for investigative purposes. The evolution of the *Waterfield* test, along with the *Simpson* articulable cause requirement, calls for investigative detentions to be premised upon reasonable grounds. The detention must be viewed as reasonably necessary on an objective view of the totality of the circumstances, informing the officer's suspicion that there is a clear nexus between the individual to be detained and a recent or on-going criminal offence. Reasonable grounds figures at the front-end of such an assessment, underlying the officer's reasonable suspicion that the particular individual is implicated in the criminal activity under investigation. The overall reasonableness of the decision to detain, however, must further be assessed against all of the circumstances, most notably the extent to which the interference with individual liberty is necessary to perform the officer's duty, the liberty interfered with, and the nature and extent of that interference, in order to meet the second prong of the *Waterfield* test.

Police powers and police duties are not necessarily correlative. While the police have a common law duty to investigate crime, they are not empowered to undertake any and all action in the exercise of that duty. Individual liberty interests are fundamental to the Canadian constitutional order.

Consequently, any intrusion upon them must not be taken lightly and, as a result, police officers do not have *carte blanche* to detain. The power to detain cannot be exercised on the basis of a hunch, nor can it become a *de facto* arrest. [Emphasis added.]

[64] In this case, while it is not suggested that the information available to the police constituted reasonable grounds for arresting Mr. Trieu, I am satisfied that it constituted reasonable grounds for suspecting that he was involved in the criminal offence of theft of electricity in the residence he was seen leaving. He was the only individual seen in relation to this single family residence over the course of approximately four hours of surveillance, during the last two hours of which both the front door and garage door were under constant surveillance. This was not a fleeting connection. Nor was this a case where many individuals were connected with the residence, and all were arrested simply by virtue of that connection, as in *R. v. Whitaker*, 2008 BCCA 174, 254 B.C.A.C. 234, upon which Mr. Trieu relies. Here, the police did not purport to arrest Mr. Trieu when they first detained him; rather they placed him under what amounted to investigative detention.

[65] Nor do I accept that what occurred here amounted to a “standardless sweep” based on a blanket policy adopted to simply detain everyone seen leaving any of the four residences under investigation for electrical theft, without regard to any other circumstances. Sgt. Smith referred to a “possible takedown” of “suspects”; not the automatic detention or arrest of anyone seen leaving the premises. The evidence does not go as far in this respect as to amount to an automatic and indiscriminate policy whereby mere presence for any length of time at or near the premises triggered automatic detention or arrest. Here there was evidence of theft of electricity at the property, and Mr. Trieu was seen leaving the property in the circumstances I have described, which involved his presence there for a considerable period of time, and the absence of any other persons associated with the residence.

[66] In the result, while the circumstances here are not as compelling as in some cases, I am not satisfied that the evidence establishes, on balance, that the initial

roadside detention of Mr. Trieu was arbitrary or in breach of his rights under s. 9 of the *Charter*.

(c) Duration of Continued Detention

[67] In his factum, Mr. Trieu stated that his “primary submission” was that the initial roadside investigative detention “was unauthorized, because of a lack of proper grounds” (para. 67). His alternative submission is that, if the original investigative detention was justified, it became arbitrary when Mr. Trieu was held for approximately 25 minutes after he was first stopped, pending the execution of the search warrant which resulted in his arrest. By that time, his identity had been ascertained and the evidence indicates that police checks turned up no previous criminal record. In effect, Mr. Trieu says that his further detention pending execution of the search warrant amounted to a *de facto* arrest.

[68] Mr. Trieu relies on the decision of this Court in *R. v. Greaves*, 2004 BCCA 484, 189 C.C.C. (3d) 305, in support of his submission that his continued detention pending execution of the search warrant was arbitrary. In that case, the accused was initially stopped by police solely to determine his identity. Because of misleading answers and suspicious behaviour exhibited by the accused at that time, his detention was prolonged, and he was searched. As a result of the search, evidence was obtained implicating the accused in criminal offences for which he was then arrested. Forty minutes elapsed between his original detention and his arrest. In the result, this Court determined that the extent of the detention in that case was justified because of the accused’s behaviour. In so doing, this Court referred to the analysis set forth in *Mann* in the following passage at para. 33 of *Greaves*:

The Supreme Court held in *Mann* that a common law investigative detention power does exist. This flows from the ancillary powers doctrine and the duties of police to preserve the peace, prevent crime and protect life and property: see *R. v. Waterfield*, [1963] 3 All E.R. 659 at 661 (C.C.A.); and *R. v. Dedman*, [1985] 2 S.C.R. 2 at 32-34, 20 C.C.C. (3d) 97 at 119-20. The power is not, however, a general power to detain whenever such a detention will assist the police in the execution of their duties: *Mann*, ¶ 17. In order that an investigative detention not be arbitrary and thereby offend s. 9 of the *Charter*, it must fulfill two conditions. First, the police must have “reasonable

grounds to detain” in the sense that they reasonably suspect that the individual detained was involved in a crime under investigation. There must be both a subjective and objective basis for that belief. Second, the detention must be “reasonably necessary” in all the circumstances, including the nature of the liberty interfered with and the public purpose the interference serves.

[69] After discussing the first condition, the Court turned to the second condition, which is raised by Mr. Trieu in this aspect of his appeal. At para. 37 of its reasons, this Court stated:

With respect to the second question, *Mann* establishes that reasonable grounds to detain alone are insufficient to justify an investigative detention. The detention must also be reasonably necessary in all the circumstances. Iacobucci J. indicated that, generally, this means an investigative detention will be “of brief duration” (¶ 22) and cannot become a “*de facto*” arrest (¶ 35). In *Simpson*, at 503, Doherty J.A. provided examples of situations in which an investigative detention would and would not be justified:

... [A] reasonably based suspicion that a person committed some property-related offence at a distant point in the past, while an articulable cause, would not, standing alone, justify the detention of that person on a public street to question him or her about that offence. On the other hand, a reasonable suspicion that a person had just committed a violent crime and was in flight from the scene of that crime could well justify some detention of that individual in an effort to quickly confirm or refute that suspicion. Similarly, the existence of an articulable cause that justified a brief detention, perhaps to ask the person detained for identification, would not necessarily justify a more intrusive detention complete with physical restraint and a more extensive interrogation.

[70] Mr. Trieu submits that nothing in his actions, or otherwise, justified his further detention after he had produced evidence of his identity. He says his continued detention was no longer reasonably necessary in all the circumstances.

[71] The Crown submits that the continued detention of Mr. Trieu was necessary both to enable the orderly execution of the search warrant, which was conducted immediately following Mr. Trieu’s detention, and because the police were involved in parallel investigations of three other residences on the same block at the same time, such that the immediate release of Mr. Trieu could have imperilled all of the investigations. More importantly, Mr. Trieu’s release could have endangered the

officers involved in executing the warrants, since Mr. Trieu could have alerted any occupants of those premises of the police presence.

[72] The Crown also points to the fact that the police did not handcuff Mr. Trieu, as a clear indication that they did not regard him as being under arrest, and says that, in light of all the circumstances, the 25-minute lapse from detention to arrest cannot turn a lawful detention into one which was arbitrary or otherwise unlawful.

[73] In the result, primarily for the reasons relied on by the Crown, I am not persuaded, on the requisite balance of probabilities, that the continued detention of Mr. Trieu gave rise to an arbitrary detention in these circumstances, or that it amounted to a *de facto* arrest. In my view, the further relatively short period of detention was necessary to ensure that the police were not placed in jeopardy should Mr. Trieu alert any occupants of either his own or the other residences of the impending searches. It is also significant that his further detention was only until the police safely entered and secured the residence. At that point, given their discovery of an active grow operation, Mr. Trieu was arrested.

3. Section 8 of the Charter – Search and Seizure of Keys, Garage Door Opener and Cell Phone

[74] Following Mr. Trieu's detention, Sgt. Smith obtained Mr. Trieu's keys and cell phone, and Cst. Pons obtained his garage door opener, in circumstances which Mr. Trieu now submits amounted to a wrongful search and/or seizure and a breach of his rights under s. 8 of the *Charter*.

[75] The Crown emphasizes the fact that this argument was not raised at trial, either prior to the *voir dire*, or following the evidence called on the *voir dire*. Consequently, there is no finding of the trial judge with respect to it. More significantly, the evidence is unclear as to the full circumstances leading to all of these items coming into the possession of the police. There is evidence that Sgt. Smith originally took the cell phone because he did not want Mr. Trieu to contact anyone, and that he took the keys to avoid having to damage Mr. Trieu's property

when the police entered his premises pursuant to the warrant. He stated that he turned these items over to Cpl. Pons, who also took the garage door opener that was apparently in plain view on the driver's side visor. Counsel did not attempt to elaborate on the reasons for these searches and/or seizures, or the legal justification, if any, relied on by the police in that regard.

[76] I agree with Crown counsel that the search and seizure in relation to these items was an issue which required a proper and complete evidentiary foundation to be laid at trial, on proper notice, to ensure a correct ruling. In my view, the Crown was entitled to notice of this issue so that they could lead evidence establishing a basis for an argument that the search and/or seizure of these items was justified at law in the circumstances. I do not consider it to be appropriate to decide this issue on the basis of the limited evidence available and for the first time on appeal. It may well be that the defence had a tactical reason for not raising this as an issue at trial. In any event, I am satisfied the Crown would suffer prejudice if this issue were decided on the basis of the existing record and for the first time on appeal. In short, I would not give leave to Mr. Trieu to pursue this issue on appeal.

4. Section 24(2) Analysis

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

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.

[78] Here, the trial judge found that Mr. Trieu's rights under ss. 10(b) and 7 of the *Charter* had been breached by virtue of the delay in providing him with access to counsel, and the loss of the hydro meter, respectively. Those findings are not in dispute on this appeal.

[79] In these reasons, I have also found that Mr. Trieu's rights under s. 8 of the *Charter* were breached as a result of Mr. Condrashoff's trespass to the property on January 10, the ensuing search of the meter, and the ultimate search of his property

on January 12, based on a warrant obtained primarily as a result of the trespass. The latter search led to the discovery of the grow operation and the evidence which led to Mr. Trieu's ultimate conviction on both counts.

[80] On appeal, Mr. Trieu submits that the cumulative effect of these breaches should result in the exclusion of the evidence obtained in the January 10 and January 12 searches of his property, and an acquittal on both counts.

[81] The trial judge's ruling on the application of s. 24(2) of the *Charter* predated the release of *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353; *R. v. Suberu*, 2009 SCC 33, [2009] 2 S.C.R. 460; and *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494. Those decisions reformulated and clarified, to some extent, the test for the application of s. 24(2) of the *Charter*, as previously set out in the leading cases of *R. v. Collins*, [1987] 1 S.C.R. 265, 33 C.C.C. (3d) 1, and *R. v. Stillman*, [1997] 1 S.C.R. 607, 113 C.C.C. (3d) 321. I will, therefore, approach the s. 24(2) analysis by considering each breach in light of *Grant*, and then considering their cumulative effect.

[82] In *Grant*, the majority provided a summary of the "revised approach" to s. 24(2) at para. 71:

A review of the authorities suggests that whether the admission of evidence obtained in breach of the *Charter* would bring the administration of justice into disrepute engages three avenues of inquiry, each rooted in the public interests engaged by s. 24(2), viewed in a long-term, forward-looking and societal perspective. When faced with an application for exclusion under s. 24(2), a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the *Charter*-infringing state conduct (admission may send the message the justice system condones serious state misconduct), (2) the impact of the breach on the *Charter*-protected interests of the accused (admission may send the message that individual's rights count for little), and (3) society's interest in the adjudication of the case on its merits. The court's role on a s. 24(2) application is to balance the assessments under each of these lines of inquiry to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute. These concerns, while not precisely tracking the categories of considerations set out in *Collins*, capture the factors relevant to the s. 24(2) determination as enunciated in *Collins* and subsequent jurisprudence.

(a) Section 10(b) Breach

[83] The trial judge found that Mr. Trieu's right to counsel had been breached by virtue of the delay in providing him with access to counsel, despite his request to contact counsel shortly after his initial detention, and in circumstances where the police station was only two blocks away.

[84] The trial judge described the breach of Mr. Trieu's s. 10(b) right to counsel as serious, but observed that it was only temporally, and not causally, connected to the discovery of the evidence of the grow operation. She further noted that no conscriptive evidence was obtained as a result of the breach. She concluded that the admission of the evidence would not affect the fairness of the trial in any way as a result of this breach. On appeal, Mr. Trieu does not challenge her conclusion in that respect, except to say that the result should differ, taking into account the cumulative effect of all *Charter* breaches.

(b) Section 7 Breach

[85] At trial, defence counsel simply asked the trial judge to consider the breach of Mr. Trieu's right to make full answer and defence resulting from the loss of the Hydro meter as a factor in the s. 24(2) analysis. The trial judge concluded, however, that this breach was sufficiently serious, albeit, unintentional, that it should result in an exclusion of the meter readings taken by Mr. Condrashoff on January 12, 2006. At para. 84 of her reasons, she stated:

It is true that the Hydro theft charge is a serious charge, but this is also a serious breach. If the Crown is prevented from using Mr. Condrashoff's evidence about the meter's condition at the time of the search [on January 12], that charge will inevitably be dismissed. However, if the evidence is admitted at trial, it will adversely affect the fairness of the trial in such a way that the administration of justice could well be brought into disrepute. Overall, the factors favouring admission are outweighed by the factors favouring the exclusion of the evidence.

[86] Following this ruling, Crown counsel stayed the charge of theft of electricity. No one has suggested that this was an inappropriate remedy with respect to the s. 7 breach. Therefore, I find it unnecessary to engage in a further s. 24(2) analysis with

respect to this breach, standing alone. I will, however, consider it as a relevant factor in assessing the cumulative effect of all of the *Charter* breaches.

(c) Section 8 Breaches

[87] I have found that there were effectively two closely related breaches of Mr. Trieu's rights under s. 8 of the *Charter* arising from Mr. Condrashoff's trespass on Mr. Trieu's property on January 10, 2006. The trespass resulted in a "search" consisting of the readings that Mr. Condrashoff took from the meter attached to the garage which, in turn, led to issuance of the warrant which culminated in the search of Mr. Trieu's residence on January 12.

[88] In *Pham*, in circumstances similar to those here, the trial judge found that the trespass on the property to obtain meter readings and the subsequent search of the residence pursuant to a warrant based on those readings were not sufficiently serious to justify the exclusion of the evidence of the grow operation. This Court upheld that decision, albeit on a *Collins* analysis, rather than a *Grant* analysis.

[89] In my view, there is no principled basis for distinguishing the circumstances in this case from those in *Pham* with respect to the s. 8 breaches. I cannot see that an analysis under *Grant* would lead to any different conclusion. It is necessary to consider those breaches, however, in terms of their cumulative effect.

(d) Cumulative Effect of *Charter* Breaches

[90] As earlier noted, the trial judge granted a remedy for breach of s. 7 of the *Charter*, but she concluded that the circumstances of the s. 10(b) breach did not justify the exclusion of the evidence of the grow operation under s. 24(2). In reaching that conclusion, she distinguished the decision of *R. v. Bohn*, 2000 BCCA 239, 145 C.C.C. (3d) 320, where this Court concluded that the cumulative effect of two serious *Charter* breaches warranted the exclusion of evidence because the breaches evidenced a pattern of disregard for the accused's rights. Here, the trial judge was not satisfied that the two breaches of *Charter* rights under ss. 10(b) and 7 constituted an analogous pattern of disregard for Mr. Trieu's rights. The question is

whether her conclusion should be overturned given my finding that there were two additional breaches of Mr. Trieu's rights under s. 8 of the *Charter*.

[91] This Court recently considered the *Bohn* decision in relation to the cumulative effect of serial *Charter* breaches during the course of one investigation involving a marijuana grow operation in *R. v. Lauriente*, 2010 BCCA 72, 251 C.C.C. (3d) 492. In *Bohn*, the Court referred to the impact of multiple breaches of Mr. Bohn's *Charter* rights as indicative of "the inattention of the police to the rights of the appellant" and as "a part of a larger pattern of disregard for *Charter* rights" (citing *R. v. Strachan*, [1988] 2 S.C.R. 980, 56 D.L.R. (4th) 673 (S.C.C.)). In *Lauriente*, this Court concluded that, although *Bohn* was decided prior to *Grant*, its articulation of the impact of multiple *Charter* breaches on the long-term administration of justice remained good law. In so doing, this Court adopted as applicable the comments of Mr. Justice Doherty, writing for the court, in *R. v. Golub* (1997), 117 C.C.C. (3d) 193, 9 C.R. (5th) 98 (Ont. C.A.). At paras. 60 and 61 of that decision, Doherty J.A. emphasized the importance of respect for constitutional rights in the context of s. 24(2) of the *Charter*:

In addressing the effect of the exclusion of the evidence on the repute of the administration of justice, I bear in mind the comments of Iacobucci J. in *R. v. Burlingham* (1995), 97 C.C.C. (3d) 385 (S.C.C.) at 408:

... we should never lose sight of the fact that even a person accused of the most heinous crime, and no matter the likelihood that he actually committed those crimes, is entitled to the full protection of the *Charter*. Short-cutting or short-circuiting those rights affects not only the accused, but also the entire reputation of the criminal justice system. It must be emphasized that the goals of preserving the integrity of the criminal justice system as well as promoting the decency of investigatory techniques, are of fundamental importance in applying s. 24(2).

Iacobucci J. reveals the heart of the third part of the s. 24(2) inquiry in this passage. The moral authority to apprehend and punish those who commit crimes rests on the community's commitment to the rule of law. Convictions procured by state violations of our most fundamental law lack that moral authority. Respect for the rule of law and the long-term viability of the justice system suffers where the police engage in "short cuts" or fail to respect the constitutional rights of those they encounter in the course of the exercise of their duties. The long-term harm to the justice system is not worth the short-

term gain made by the admission of evidence which was obtained in a manner that ignores the rule of law.

[92] In *Lauriente*, this Court concluded that the cumulative effect of the *Charter* breaches present there was sufficiently serious that the admission of evidence of the grow operation could bring the administration of justice into disrepute. There, the police overstepped the law in several instances evidencing a pattern of disregard of *Charter* rights. The trial judge found that each individual *Charter* breach was serious, albeit not at the extreme end of the range or reflecting bad faith on the part of the police. This Court noted that, if the trial judge had considered the breaches individually, as if they had occurred in a vacuum, or in circumstances which were otherwise unremarkable, she may have concluded that the serious remedy of the exclusion of evidence was not warranted; that is, that the admission of the evidence obtained thereby could not have brought the administration of justice into disrepute. But, because the breaches occurred in the context of a relatively brief investigation where each step built on the one before, ultimately culminating in the obtaining and execution of the search warrant that led to the respondents' (and a third party's) arrest, and the further breach of another individual's right to counsel, the trial judge was found entitled to have regard to all of these breaches, both in placing the seriousness of the individual breaches in context, and, more particularly, in determining whether this pattern of disregard of the *Charter* by the authorities could bring the administration of justice into disrepute.

[93] By way of contrast, this Court in *R. v. Crocker*, 2009 BCCA 388, 247 C.C.C. (3d) 193, found that the cumulative effect of the *Charter* breaches upheld on appeal did not justify the exclusion of evidence under s. 24(2). Thus, the fact of cumulative breaches will not necessarily result in the exclusion of evidence.

[94] In this case, the breach of Mr. Trieu's right to counsel was serious, although there was no suggestion that the officer who detained him had acted in bad faith or otherwise in flagrant disregard of his rights. The loss of the Hydro meter was also serious, albeit inadvertent, since it precluded Mr. Trieu from marshalling any effective defence to the charge of theft of electricity. An effective remedy was

provided for this breach through the exclusion of the meter readings, and the ultimate staying of that charge. As earlier noted, I do not understand Mr. Trieu to argue that the cumulative effect of these two breaches, *per se*, would justify the exclusion of evidence of the grow operation.

[95] The ultimate question, therefore, is whether the additional breaches of Mr. Trieu's s. 8 *Charter* rights tip the balance in favour of excluding the evidence.

[96] In considering this question, I note that Mr. Condrashoff entered onto the property believing in good faith he had the right to do so under the Tariff; that the extent of the trespass, and therefore the invasion of privacy, was extremely limited in duration (less than three minutes); that the Hydro meter was on the garage, not the house; that it was only a few feet from the property line; and that the privacy interest at stake has been found to be relatively minor (in both *Bourke* and *Bentham*). Further, although Mr. Condrashoff was operating as an employee of Hydro, which is an agent of government pursuant to s. 3(1) of the *Hydro and Power Authority Act*, R.S.B.C. 1996, c. 212, there was no finding that he was operating in this case as an agent of the police or that his actions were directed in any way by them. In other words, his actions cannot be seen to be part of a pattern of police conduct revealing a disregard for *Charter* rights.

[97] Further, there is no question that the police executing the search warrant on Mr. Trieu's residence had no reason to believe that the warrant was based on suspect information or otherwise defective. On the contrary, the warrant appeared to be based on highly reliable and cogent information evidencing an ongoing theft of electricity on the property, in circumstances where the evidence clearly relates theft of electricity to marijuana grow operations. In the result, I am unable to find that these searches demonstrated a pattern or attitude of disregard for *Charter* rights or for the law generally.

[98] In these somewhat unusual circumstances, I am not persuaded that the further breaches of Mr. Trieu's *Charter* rights, or their cumulative effect, mandate a

different conclusion as to the admission of evidence than that reached by the trial judge.

[99] I would not give effect to this ground of appeal.

VIII. RESULT

[100] I would dismiss the appeal.

“The Honourable Madam Justice Prowse”

I Agree:

“The Honourable Mr. Justice Chiasson”

I Agree:

“The Honourable Mr. Justice Hinkson”

Tab 26:

R. v. Vallee, 2022 BCCA 11

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *R. v. Vallee*,
2022 BCCA 11

Date: 20220113
Docket: CA45829

Between:

Regina

Respondent

And

Cory Vallee

Appellant

Restriction on publication: A publication ban has been imposed under s. 486.5 of the *Criminal Code* restricting the publication, broadcasting or transmission in any way of any information including evidence, submissions, and rulings disclosed during any *voir dres* or pretrial conferences in these proceedings (*R. v. Vallee*, BCSC Vancouver No. 25023–81) prior to November 14, 2016, or any information that could identify or reveal the safety and protection measures of undercover police officers and witnesses, including, without limitation, the persons referred to in this judgment as “Witness A”, “Witness B”, “Witness C”, and “Witness D”.
This publication ban applies indefinitely unless otherwise ordered.

FILE SEALED IN PART

Before: The Honourable Madam Justice Saunders
The Honourable Mr. Justice Abrioux
The Honourable Mr. Justice Voith

On appeal from: An order of the Supreme Court of British Columbia, dated June 1, 2018 (conviction) (*R. v. Vallee*, 2018 BCSC 892, Vancouver Docket 25023).

Counsel for the Appellant:

E.V. Gottardi, Q.C.
T.C. Paisana
R.A. McConchie

Counsel for the Respondent:

M.A. Mereigh
J.R.W. Caldwell
S. Wan

Place and Date of Hearing:

Vancouver, British Columbia
May 11–14, 2021

Place and Date of Judgment:

Vancouver, British Columbia
January 13, 2022

Written Reasons of the Court

Summary:

The appellant was convicted of murder and conspiracy to commit murder after a judge-alone trial. The judge held that the appellant was part of a gang-related conspiracy to commit the murder of several rival gang members, and that the appellant was the shooter of an AR-15 automatic rifle who carried out a murder in a Langley mall parking lot. Midway through trial, the Crown realized that surveillance videos that had been disclosed showed the appellant at a restaurant with other gang members on the date of the murder, in the general vicinity of the murder. This late-discovered information was treated as fresh disclosure. Defence sought a stay or a mistrial as a result, but the judge rejected this application and instead provided an adjournment and the option to recall certain witnesses. The Crown case rested heavily on the testimony of four disreputable witnesses to which the case *R. v. Vetrovec* applied. They gave evidence of the appellant's involvement in the conspiracy, which required linking the appellant to the nickname "Frankie", and evidence of the appellant's role as the AR-15 shooter. The appellant advanced four grounds of appeal, asserting that the trial judge erred in: (1) declining to grant a mistrial; (2) failing to properly analyze the evidence of the Vetrovec witnesses; (3) concluding that the appellant was "Frankie"; and (4) applying uneven scrutiny to evidence supporting the defence theory.

Held: Appeal dismissed. The judge did not make the errors alleged by the appellant on any of the four grounds of appeal. (1) The judge demonstrated no error in law or in principle in declining to grant a mistrial, nor did she misdirect herself or exercise her discretion in a manner resulting in a miscarriage of justice. Mistrials are discretionary remedies of last resort where other remedial options are insufficient to preserve an accused's rights. This court's role where late disclosure occurs mid-trial is assessing whether the judge's exercise of discretion demonstrates reversible error. In this case, it does not. (2) The judge canvassed the histories of the Vetrovec witnesses in detail, and specified which portions of their evidence she accepted, which portions she rejected, and her reasoning for doing so, with reference to confirmatory evidence. The judge applied the accepted approach to Vetrovec witnesses and did not err in her analysis. The appellant's suggestion that this court should adopt a heightened test for "extreme" Vetrovec witnesses is rejected. (3) The judge's analysis of the evidence tying the appellant to the name "Frankie" was comprehensive. She was clear on the inferences she drew and her basis for doing so. The judge did not misapprehend evidence, speculate impermissibly, or reverse the burden of proof. (4) While the judge expressed caution about the evidence of the witness purported to be subject to uneven scrutiny, she had a basis for her assessment of it. Even if uneven scrutiny is a standalone ground of appeal, which is unclear on the jurisprudence, the judge made no such error.

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Reasons for Judgment of the Court:

I. Introduction and Overview

[1] Cory Vallee appeals from convictions on June 1, 2018, of conspiracy to murder the three Bacon brothers (Jonathan, Jarrod, and James) and their associates between January 1, 2008 and February 8, 2009, and the murder of Kevin Leclair, mid-afternoon on February 6, 2009, in his truck in the parking lot of a shopping mall in Langley, British Columbia.

[2] That there was such a conspiracy to murder was admitted at trial, as was the fact the murder of Kevin Leclair was in furtherance of the conspiracy. The issue at trial on both counts was identity: was Cory Vallee a member of the conspiracy, and did he commit the murder of Kevin Leclair?

[3] The reasons for conviction include detailed discussions of meetings, conversations, messages, and movements of a multitude of persons. In these reasons, we have in general kept to condensed versions of the circumstances for the purpose of discussing the relatively discrete issues raised on appeal. Consistent with the reasons for judgment and counsels' predominant style in the appeal, we generally refer to the members of the gangs, the witnesses, and the victim of the murder by their surname, and Cory Vallee by his surname or as the appellant.

[4] This conspiracy to murder and the shooting of Leclair were part of multi-year violent conduct that included many murders and non-fatal shootings. The conflict concerned turf for the illegal supply of drugs, and was between the United Nations gang, also referred to as the UN gang, on one side and the Bacon Brothers and Red

Scorpions gangs on the other. Leclair was a former member of the UN gang who had crossed over to the Bacon Brothers.

[5] The UN gang was a criminal organization that came to police attention in the 1990's. The judge described the UN gang as running drug lines and supplying drug lines run by independent drug dealers. She described the gang's drug dealing as expanding throughout British Columbia, with connections to Calgary, the United States, and Mexico. The gang also had business in firearms. Most UN gang members had guns. The judge found that a member of the UN gang referred to as Witness D in these proceedings "sold semi-automatic pistols, sub-machine guns, and assault rifles, including the AR-15, within the gang."

[6] The Bacon Brothers and Red Scorpion gangs were criminal organizations also active in British Columbia during the period of the indictment. They began cooperating together around 2007, and through that cooperation expanded their size and control over illegal drug activity in the Lower Mainland.

[7] It was not controversial at trial that interference by the Bacon Brothers gang in the UN gang's dial-a-dope operations and supply lines led to bloody and lethal conflict between the adversaries. Included in the years' long violence were two incidents particularly germane to this case: the September 2006 shooting of Jonathan Bacon, and the May 2008 murder of Jonathan Barber. The shooting of Jonathan Bacon gave notice to the Bacon Brothers gang that there "was a hit out on them". The murder of Jonathan Barber was thought by police to be mistaken retaliation by UN gang members for the murder by the Bacon Brothers gang of a close friend of the UN gang's leader.

[8] The judge accepted that during the relevant period the UN gang had a program of intelligence gathering on the Bacon Brothers/Red Scorpions, that the UN leadership developed a "hit list", and that bounties were attached to various persons in the Bacon Brothers/Red Scorpions, with the largest attaching to the three Bacon brothers, said to have grown from an initial amount of \$100,000 to perhaps as much as \$300,000.

[9] The killing of Leclair was brazen, occurring in the afternoon in the Langley shopping mall parking lot. When Leclair returned to his truck mid-afternoon February 6, 2009, from a mall restaurant, two gunmen approached. One held a handgun; one held an AR-15 automatic rifle, sometimes described in the proceedings as a machine gun. Leclair attempted to drive away. Both shooters commenced firing. The handgun jammed. At least twenty-two rounds were fired from the AR-15, at least fourteen striking the truck. Leclair was fatally wounded in the head. The essential question on the murder count was whether Vallee was the AR-15 shooter.

[10] The theory of the Crown was that Vallee was a hired hitman of the UN gang, and was culpable in both the conspiracy to murder and the murder of Leclair. Several eyewitnesses to the murder of Leclair testified, and although they gave general descriptions, none could identify the shooters from a photo line-up.

[11] The case for the Crown rested largely upon the evidence of four witnesses, all of whom had been highly involved members of the UN gang. They are referred to as Witnesses A, B, C, and D. They were all members of the conspiracy, and all gave evidence implicating Vallee in the conspiracy. Witnesses B and C implicated Vallee in the murder. All four witnesses fit easily into the description of *Vetrovec* witnesses (*Vetrovec v. The Queen*, [1982] 1 S.C.R. 811) whose evidence is inherently untrustworthy and attracts special scrutiny.

[12] Witness D was the first of the *Vetrovec* witnesses to cooperate with the police. He had risen quickly through the ranks of the UN gang, ran the supply to the Abbotsford/Mission drug lines, and acted as a “sort of secretary and assistant in all things”. His role in the gang began to diminish in 2008, and he began to cooperate with the police in 2009.

[13] Witness A was a respected member of the UN gang’s “upper echelon” until 2008, when he began to lower his profile with the gang. He was arrested in 2009 and faced a series of charges before cooperating with the police beginning in 2013.

[14] Witnesses B and C are twin brothers who professed to being “very close”, and “above best friends”. Witness C described Witness B as the “closest person in my life”. Witness B was a respected member of the UN gang but left it around 2011–2012 and, apart from his brother, had no gang ties by the time of his arrest. Witness C was a member of the UN gang from 2000 until his arrest, led the Vancouver group of the gang, and became head of the gang in 2011. Witness B and Witness C began to cooperate with the police when they were arrested in 2016.

[15] The defence’s position was that the evidence of the four *Vetrovec* witnesses was so flawed, so unreliable, that it must be rejected on both the count of conspiracy to murder and the count of murder. The defence theorized that all four *Vetrovec* witnesses had concocted a story – from rumours, access to disclosure, and the media – that Vallee was a hired hitman nicknamed “Frankie” or “Panther”. The defence further theorized that Witnesses B and C had fabricated the story of Vallee as the shooter of Leclair to protect the real shooter, Witness C, and that Vallee was, at most, a drug dealer for the UN gang.

[16] Vallee was charged by direct indictment, and tried by judge alone, Madam Justice Dillon. The trial was lengthy, lasting over a year and a half from beginning to delivery of the verdicts. Thirty-six witnesses testified. The four *Vetrovec* witnesses were in the witness box for approximately 49 days, 21 in cross-examination. Sixty-five exhibits were admitted, some themselves multifid. Those exhibits include: admissions; documents; forensic evidence including ammunition, casings, and firearms; wiretap intercepts; DNA evidence; and video and photographic evidence including three video recordings from the day of the murder that are significant to this appeal. Two of those video recordings were made at a Tim Hortons restaurant near the Langley shopping mall in the hours before the murder, one an interior video showing Vallee and others, and the other an exterior video. The third significant video was made at a Telus store in the mall at the time of the shooting. It shows what are conceded to be the two gunmen running away.

[17] Because of the admissions, the evidence at trial was focused almost entirely on the issue of the identity of Vallee as a member of the admitted conspiracy and as the shooter of the AR-15.

[18] In her reasons for judgment, in addition to discussion of the evidence of the murder of Leclair, the judge discussed in some detail evidence of the culture, organization, and practices of the UN gang; documentary and other evidence connecting Vallee to members of the UN gang; the UN gang's practice of referring to persons working for it only by nicknames; surveillance evidence of other incidents associated to the inter-gang conflict and related to the conspiracy; and evidence associating Vallee with participation in the conspiracy. A key issue in Vallee's membership in the conspiracy was whether he was the person referred to by UN gang members as "Frankie" or "Panther".

[19] The judge discussed the principles applying to *Vetrovec* witnesses and addressed the evidence of each of the four *Vetrovec* witnesses in detail. At the end of that analysis, she concluded that "Vallee was an outsider who was brought into the group by [Ian] Kroitoru"; that there was "no evidence that Vallee was involved in drug dealing before [the introduction]"; and that "[f]rom the beginning, he interacted at a high level within the [UN] gang".

[20] The judge concluded on the count of conspiracy to murder:

[546] Considering the evidence as a whole, the only logical inference to be drawn from Vallee's participation as described is that he was a member of the conspiracy.

[547] Vallee was introduced to high level members of the gang by Roueche as "Frankie" and given the role as a hit man in the search to kill members of the Bacon group. Vallee changed his nickname to Panther and participated in the search as described. He received a UN ring for his service.

[548] There is no reason to doubt that Vallee was a member of the conspiracy. I find Cory Vallee guilty on count 1.

[21] On the count of murder of Leclair, the judge concluded:

[691] The decision to kill Leclair was planned and deliberate, with time to assess the situation. Cory Vallee was a member of the conspiracy to kill members of the Bacon group. Leclair was a target with a price on his head.

Vallee was at the Thunderbird Centre intending to kill the Leclair target and he achieved that goal.

[692] The murder of Leclair was a contracted killing. While it was not established that Vallee did receive money for the killing of Leclair, it was intended that he would receive payment from D'Monte as bounty for the murder.

[693] It is established beyond a reasonable doubt that Cory Vallee is guilty of the first degree murder of Kevin Leclair. Cory Vallee is guilty of first degree murder as set out in count 4 of the indictment.

[22] In addition to the comprehensive reasons for judgment, the judge issued as “Appendix A” an Executive Summary of the decision. In it, she explained the summary’s import:

[2] The reasons for judgment following the trial of Cory Vallee for conspiracy to murder and first degree murder are lengthy and detailed such that counsel for the Crown and for Mr. Vallee have consented to an executive summary of the findings being presented with the verdict on this day. This summary does not supplement the reasons for judgment and the reasons for judgment prevail if in conflict with anything that is stated here. The substantive reasons for judgment will be released immediately following the verdict and this executive summary will be Appendix A.

II. Grounds of Appeal

[23] Vallee advances four grounds of appeal. He says the judge erred in law:

1. by failing to grant a mistrial as a result of late disclosure;
2. by failing to properly analyze the evidence of *Vetrovec* witnesses;
3. in concluding that he was the person nicknamed “Frankie” by relying on misapprehensions of the evidence, speculation, and reversing the burden of proof; and
4. by applying different levels of scrutiny to the evidence that supported the defence theory as opposed to that which supported the Crown theory.

[24] We turn now to the grounds of appeal.

III. Discussion

1. The Mistrial Issue

[25] Vallee contends the judge erred in law in failing to declare a mistrial as a remedy for late Crown disclosure.

[26] The late disclosure said by Vallee to require a mistrial was made during the Crown's case. It consisted of several videos, some of which were found to place Vallee and other witnesses at a Tim Hortons restaurant near the scene of the crime three hours before Leclair was murdered. Soon after that disclosure, the Crown advised that it intended to lead evidence from an alibi witness, Peter Redekopp, relating to the defence's alternate suspect theory that Witness C had been the AR-15 shooter. This theory had emerged during the defence's cross-examination of Witness C.

[27] These two events caused the defence to file an application for an order declaring that Vallee's right to make full answer and defence under ss. 7 and 11(d) of the *Canadian Charter of Rights and Freedoms* had been infringed. Vallee sought a stay of the trial pursuant to s. 24(1) of the *Charter* or, alternatively, a declaration of mistrial.

[28] The Crown conceded, and the judge agreed, that the Crown's failure to disclose the Tim Hortons videos to the defence in a timely manner constituted a breach of Vallee's s. 7 *Charter* rights. In her reasons denying a stay and a declaration of mistrial, indexed as 2017 BCSC 1224, the judge determined that the "exceptional remedy of a stay" was not appropriate in the circumstances. She also declined to order a mistrial and considered that Vallee's fair trial rights could be otherwise addressed and protected. Finally, the judge concluded that the Crown's decision to call Redekopp did not give rise to a s. 7 breach. This ground of appeal challenges the ruling denying a declaration of mistrial as a remedy for the late disclosure.

[29] Neither the judge's refusal to grant a stay, nor her conclusions in relation to the Crown's decision to call Redekopp are at issue in this appeal, and we have not addressed these matters further.

a) Background and the Ruling

[30] In her mistrial reasons, the judge reviewed the history of the proceedings leading up to the application. She also reviewed the chronology pertaining to the Tim Hortons videos in detail. A brief summary of the history will suffice here.

[31] In February 2009, as part of the investigation into the murder of Leclair, the police obtained video surveillance from numerous locations near the scene, including from a Tim Hortons restaurant. The videos from the Tim Hortons came from six interior cameras and one exterior camera, with images taken from 07:00 to 17:00 on the day of the murder. One interior video showing Vallee inside the Tim Hortons and the exterior video are significant to this ground of appeal.

[32] The existence of the Tim Hortons videos was disclosed in the first disclosure package provided to the defence. However, the videos themselves were not disclosed until partway through the trial, on April 18, 2017, after various eyewitnesses had testified and on the first day of Witness D's evidence. The Crown acknowledged that the videos should have been disclosed after February 2016, when Witnesses B and C provided police statements indicating they had attended the Tim Hortons on the day of the murder with Vallee. The police had erroneously assumed, for various reasons, that the videos had already been disclosed to the Crown, and did not do so until April 4, 2017.

[33] Based on two separate reviews of the videos undertaken by the police in November and December 2016, the summaries of which were provided to the defence, the Crown advised the defence that the videos contained nothing of significance, except a possible sighting of Witness B at around 15:00. At that time, both the Crown and the defence were content to rely on the police reviews and did not independently review the videos.

[34] Witnesses D and C finished testifying by May 18, 2017. As Witness B began testifying, the defence sought an admission from the Crown on the limited nature of the evidence in the Tim Hortons videos. Before agreeing to the admission, the Crown decided to review the videos to ensure the police analysis was accurate. On June 1, 2017, the Crown reviewed some of the videos and discovered on one of the interior videos an image of what appeared to be Vallee using the bathroom at the Tim Hortons shortly before 13:00. The Crown advised the defence of their observations the next morning. In further reviews of the videos, the Crown observed in the exterior video a grey Nissan Murano parked nearby. On June 3, Witness B gave a police statement after he had finished his examination in chief. He identified Vallee in the interior Tim Hortons video and said he believed he was the driver in the Murano in the exterior Tim Hortons video.

[35] The defence was provided with a video recording of that interview of Witness B on June 6. Two days later, the defence notified the Crown that it intended to bring its application for a stay of proceedings or a mistrial. The application was heard over six days commencing on June 26, 2017.

[36] In the mistrial hearing, the defence contended that the only way to address the prejudice created by the late disclosure of the Tim Hortons videos was to order a stay of proceedings or to declare a mistrial. The defence said that prejudice to Vallee and to the fairness of his trial could not be resolved by adjournments, recalling witnesses, or the exclusion of evidence. The defence indicated, in the further alternative, that if the trial was to proceed and no evidence was excluded, it would require an adjournment of 8–12 weeks.

[37] In her mistrial reasons issued July 14, 2017, the judge recorded the Crown's concession that there had been a breach of the Crown's duty to disclose and that Vallee had been prejudiced by the late disclosure in his right to make full answer and defence. She observed that the "videos cut both ways in terms of benefit" and that "[t]he videos did not disclose completely new information".

[38] The judge addressed the legal framework for the application. She determined that the exceptional remedy of a stay was not warranted in the circumstances, the Tim Hortons video evidence should not be excluded, and she would not declare a mistrial because, in her view, the trial could be repaired.

[39] As a remedy for the late disclosure, the judge ordered the trial be adjourned for a period of time to be determined at a subsequent trial management conference. She further directed that the defence could recall a number of witnesses, including four eyewitnesses, Witness B who had just completed his direct evidence when the trial adjourned, and Witness C.

b) Standard of Review on the Mistrial Issue

[40] Whether to declare the remedy of a mistrial as a response to events emerging at trial is a decision engaging the exercise of judicial discretion. In *R. v. Cawthorne*, 2016 SCC 32, Chief Justice McLachlin reaffirmed the discretionary nature of a judge's decision whether to declare a mistrial, referring to *R. v. Khan*, 2001 SCC 86:

[39] The legal principles on the granting of a mistrial were discussed by LeBel J. in his reasons in *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823. Once an error has occurred at trial, a trial judge may, in deciding whether to grant a mistrial, consider whether the error has been or can be remedied at trial: para. 79. The decision of whether to grant a mistrial “falls within the discretion of the judge, who must assess whether there is a real danger that trial fairness has been compromised”: *ibid.* That discretion is not absolute, but “its exercise must not be routinely second-guessed by the court of appeal”: *ibid.*

[41] Mistrials are a species of remedy available under s. 24(1) of the *Charter*. In *R. v. Babos*, 2014 SCC 16, Justice Moldaver for the majority described the standard of review in respect of s. 24(1) remedies, referring to cases including *R. v. Regan*, 2002 SCC 12, and the late disclosure case *R. v. Bjelland*, 2009 SCC 38, using the classic descriptions applied to the exercise of judicial discretion:

[48] The standard of review for a remedy ordered under s. 24(1) of the *Charter* is well established. Appellate intervention is warranted only where a trial judge misdirects him or herself in law, commits a reviewable error of fact, or renders a decision that is “so clearly wrong as to amount to an injustice” (*Bellusci*, at para. 19; *Regan*, at para. 117; *Tobiass*, at para. 87; *R. v. Bjelland*, 2009 SCC 38, [2009] 2 S.C.R. 651, at paras. 15 and 51).

[42] In other words, on a s. 24(1) remedy case, deference must be accorded the judge in the exercise of her judicial discretion, just as it must in all other cases reviewing a judge's exercise of discretion. The deference recognizes, in particular, that the judge has broad latitude to find the balance between competing interests. We have approached this ground of appeal, and other issues in the appeal challenging the judge's exercise of discretion, from that lens.

c) *The Law of Mistrial*

[43] The remedy of a mistrial has its origins in an accused's right to a fair trial. In *Bjelland*, Justice Rothstein for the majority, considering the appropriate approach to a problem of late disclosure, addressed the meaning of a "fair trial":

[22] While the accused must receive a fair trial, the trial must be fair from both the perspective of the accused and of society more broadly. In *R. v. Harrer*, [1995] 3 S.C.R. 562, McLachlin J. (as she then was) provided guidance on what is meant by trial fairness. She stated, at para. 45, that:

At base, a fair trial is a trial that appears fair, both from the perspective of the accused and the perspective of the community. A fair trial must not be confused with the most advantageous trial possible from the accused's point of view: *R. v. Lyons*, [1987] 2 S.C.R. 309, at p. 362, per La Forest J. Nor must it be conflated with the perfect trial; in the real world, perfection is seldom attained. A fair trial is one which satisfies the public interest in getting at the truth, while preserving basic procedural fairness for the accused. [Emphasis added in *Bjelland*.]

[44] In her mistrial reasons, the judge discussed the circumstances in which a mistrial is an appropriate remedy for late disclosure:

[66] A mistrial must be necessary to prevent a miscarriage of justice where nothing short of a new trial can repair the late disclosure (*R. v. Burke*, 2002 SCC 55 at paras. 74-75; *R. v. Ryan*, 2012 NLCA 9 at para. 134; *McKinnon* at paras. 73-76). A mistrial can only be granted in the "clearest of cases" where there is a "fatal wounding of the trial process" (*R. v. Arnold*, 2001 BCCA 374 at para. 18; *McKinnon* at para. 74). It is a remedy of last resort which should not be granted unless other less extreme measures are incapable of preventing a miscarriage of justice (*R. v. Muller*, 2013 BCCA 528 at para. 66).

[67] In most cases, the appropriate remedy will be to adjourn the trial to allow defence to prepare for the disclosure. However, this may not be appropriate if the result would be to unreasonably delay the trial of an

in-custody accused (*Horan* at para. 32). In such cases, exclusion of the evidence may be more appropriate.

[45] There is a bounty of largely consistent cases describing the criteria for a mistrial. These recognize that a mistrial should only be declared where lesser remedies will not adequately preserve the accused's right to a fair trial or will not remedy the prejudice suffered by the accused: The comments of Madam Justice Newbury in *R. v. Pires*, 2004 BCCA 33, aff'd 2005 SCC 66, are apposite:

[59] It is not necessary for me to decide whether the Court's comments in *Khan* are entirely consistent with the standard referred to in *Lawson* [(1991), 1 B.C.A.C. 204] and *Paterson* [(1998), 122 C.C.C. (3d) 254 (B.C.C.A.)] ... It may be that the requirement for a "fatal wounding of the trial process" in the "clearest of cases" is simply a more colourful expression of the principle enunciated in *Khan* that if it was "likely that the exposure by the jury to the tainted information could have affected the jury to the point that the entire trial was compromised and that no remedy other than a new trial was available", the mistrial must be granted.

[46] In *R. v. Muller*, 2013 BCCA 528, Madam Justice Stromberg-Stein (in dissent) provided this summary, in a passage adopted in *R. v. Montgomery*, 2016 BCCA 379:

[66] Having regard to the authorities, I conclude a mistrial is a discretionary remedy of last resort that should not be granted unless other, less extreme, corrective measures are incapable of preventing a miscarriage of justice: *Chiasson* [2009 ONCA 789] at para. 14. A mistrial should only be granted "in the clearest of cases", where there is a "fatal wounding of the trial process". A "fatal wounding of the trial process" is "a wounding to the administration of justice which cannot be cured by remedial measures": *Paterson* at para. 93, citing *Lawson* at 209 (emphasis added).

[47] Several descriptions of the standard for a mistrial have been employed over the years, including that a mistrial is a "last resort": *Muller*, *Montgomery*, and *R. v. J.H.*, 2020 ONCA 165; a mistrial is reserved for the "clearest of cases" where there has been a "fatal wounding" of the trial that cannot be cured by other remedial measures: *Lawson* at 209; *Paterson*, *Muller*, and *Montgomery*; and a mistrial should be ordered where there is a "real danger" of prejudice to the accused or danger of a miscarriage of justice: *R. v. Burke*, 2002 SCC 55, *Cawthorne*, and *R. v. Ryan*, 2012 NLCA 9.

[48] A mistrial is certainly an exceptional remedy. In *R. v. O'Connor*, [1995] 4 S.C.R. 411, Justice L'Heureux-Dubé discussed the principles for fashioning a remedy for a breach of an accused's right to disclosure under the *Charter*, in the context of mid-trial disclosure. She described a mistrial as a remedy that may be appropriate in "extreme circumstances", where measures such as permitting the defence to recall certain witnesses, or adjournments to permit the defence to subpoena additional witnesses would be inadequate.

[49] In *Burke*, the court gave examples of a variety of situations which may merit a declaration of a mistrial, including late disclosure. In *Bjelland*, Justice Rothstein concluded that failure to disclose evidence, itself, was not sufficient to obtain a mistrial – the accused must show actual prejudice to his s. 7 right to make full answer and defence. If there is such prejudice, the court must consider whether less extreme remedies will adequately preserve the accused's right to basic procedural fairness, balanced with the public's interest in getting at the truth, always recognizing that admission of the late disclosed evidence must not compromise the integrity of the justice system.

[50] The impact on the accused's ability to make full answer and defence, as well as the remedial options available to the court, will vary depending on the circumstances of the error or defect in proceedings: *R. v. Dixon*, [1998] 1 S.C.R. 244. Where, as in *Bjelland*, the incident and application arise prior to trial, the options available to a judge to remedy any prejudice to the accused's *Charter* rights may be broad. Where the issue arises at or near the conclusion of the trial, such as in *R. v. Burgar*, 2018 BCCA 291, and *Burke*, the remedial options available to the judge to save the trial may be limited.

[51] Vallee refers to various authorities, including *Ryan*, *Cawthorne*, *Muller*, *Burke*, and *Khan*, that have applied the "extreme remedy" or "last resort" or "real danger" standards. At the same time, relying on *Ryan*, *R. v. Arnold*, 2001 BCCA 374, and *R. v. Jiang*, 2018 ONCA 1081, he says the judge in this case should have relied on

Dixon and asked whether there is a “reasonable possibility” that the right to a fair trial was impaired.

[52] Each of the three cases just mentioned arose from instances of late disclosure but are, in our view, distinguishable from the present case in several ways.

[53] *Arnold* and *Jiang* rely on *Dixon*. *Dixon* is a case of *post-conviction* disclosure of various police statements in a case of five accused. The existence of the statements had been disclosed by the Crown prior to trial but, for lack of due diligence on the part of counsel, the statements were not produced to the accused until after trial. The Nova Scotia Court of Appeal and the Supreme Court of Canada dismissed *Dixon*’s appeal. The Supreme Court in the other four cases dismissed two appeals, allowed one appeal in part, and allowed one appeal where the accused’s counsel was found to have exercised due diligence: *R. v. McQuaid*, [1998] 1 S.C.R. 285; *R. v. Robart*, [1998] 1 S.C.R. 279; *R. v. Smith*, [1998] 1 S.C.R. 291; *R. v. Skinner*, [1998] 1 S.C.R. 298.

[54] *Dixon* provides guidance on analyzing and remedying instances of late Crown disclosure, in light of the broad right to disclosure stated in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326. In *Dixon*, the court distinguishes the right to disclosure from the s. 7 *Charter* right to make full answer and defence – a breach of the former does not mean impairment of the latter. The court explains that impairment of the right to make full answer and defence is established where the accused demonstrates, on a balance of probabilities, a “reasonable possibility the non-disclosure affected the outcome at trial or the overall fairness of the trial process” (emphasis in original), in which case the accused is entitled to a remedy under s. 24(1) of the *Charter*. The court then notes that “where the remedy sought is a new trial, an accused need only persuade the appellate court of the reasonable possibility that the failure to disclose affected either the outcome at trial or the overall fairness of the trial process, and nothing more”.

[55] The court in *Dixon* never uses the term “mistrial”, and the remedy of a mistrial was never available because the late disclosure was post-conviction. Rather, the question was whether, looking back at the trial in light of the post-conviction disclosure, the breach of the accused’s right to disclosure amounted to a breach of his s. 7 right to make full answer and defence requiring the remedy of a new trial under s. 24(1) of the *Charter*.

[56] The court noted the post-conviction timing of the late disclosure:

[31] The right to disclosure is but one component of the right to make full answer and defence. Although the right to disclosure may be violated, the right to make full answer and defence may not be impaired as a result of that violation. Indeed, different principles and standards apply in determining whether disclosure should be made before conviction and in determining the effect of a failure to disclose after conviction. For instance, where the undisclosed material is available for review at trial, the presiding judge will evaluate it in relation to the *Stinchcombe* threshold to determine whether the Crown breached its obligation to disclose by withholding the material. If it has, an order for production or perhaps an adjournment will be the appropriate remedy. Obviously, these remedies are no longer available after conviction. At this stage, an appellate court must determine not only whether the undisclosed information meets the *Stinchcombe* threshold, but also whether the Crown’s failure to disclose impaired the accused’s right to make full answer and defence. Where an appellate court finds that the right to make full answer and defence was breached by the Crown’s failure to disclose, the appropriate remedy will depend on the extent to which the right was impaired.

[Italic emphasis in original; underline emphasis added.]

[57] A trial judge faced with undisclosed evidence that emerges *during* the trial is required to take a prospective approach to consider whether there is a real danger that less extreme remedies, such as an adjournment and the recalling of witnesses, will be inadequate to safeguard the accused’s right to a fair trial.

[58] Vallee’s case, of course, is a case of mid-trial disclosure and so the more speculative question asked in *Dixon* of the potential impact of the post-conviction disclosure on the trial does not arise for us. Rather, we are asked to review the approach of the trial judge who occupied the best judicial position to assess the impact of the disclosure and the available opportunity to provide a remedy for it.

[59] Because the late-disclosed evidence in this case was before the judge, our task is to determine whether the judge's exercise of discretion in fashioning an appropriate remedy demonstrates a reversible error. This invites the highly deferential approach described by the majority in *Khan*:

[7] In my view, if the [irregularity giving rise to the mistrial application] had not been detected until after the trial, it might have been possible to view this ground of appeal as falling under s. 686(1)(a)(iii) [miscarriage of justice]. However, this matter was raised at trial, and the possibility of a mistrial was considered by the trial judge on two occasions. A proper characterization of the issue before us, in my opinion, is whether or not the trial judge made an error of law in refusing to declare a mistrial ...

[60] We turn now to the three cases relied upon by Vallee: *Arnold*, *Ryan* and *Jiang*.

[61] The circumstances in *Ryan* are significantly different than those before us. In *Ryan*, the accused represented himself against a charge of second degree murder. The Crown provided late, mid-trial, disclosure. The judge considered whether a mistrial was warranted but, for several reasons, did not declare one. Some of these reasons included Ryan's opposition to a mistrial and the court's concern of further trial delay.

[62] Finding that the appellant "was not able to conduct his own defence without the assistance of legal counsel and that the trial judge should have taken steps, on her own motion, even though [the appellant] at the time opposed it, to declare a mistrial", the Court of Appeal allowed the appeal and ordered a new trial, Justice Rowe, dissenting. In particular, the court emphasized that the trial judge had noted Ryan's inability to conduct a proper defence more than 60 times. The majority referred to the "reasonable possibility" standard but also said at para. 134: "[t]he test for determining whether a declaration of a mistrial is indicated is, therefore, whether: (i) there is a real danger of prejudice to the accused; or (ii) it is necessary to prevent a miscarriage of justice".

[63] *Arnold* is also a different case than the one before us. Unusually, it concerned a second application for a mistrial to remedy late disclosure. The judge declined to

engage an analysis on that application and said that only the Court of Appeal could determine the effect of the disclosure issues on the trial process. The trial proceeded and Arnold was convicted. On appeal, this court set the verdict aside and ordered a new trial, observing that the judge's approach had put this court into the position of determining for the first time the potential effect of the late disclosure. As did Justice Stromberg-Stein in *Muller*, we consider *Arnold* is, at its heart, a case of a trial judge misunderstanding his role and failing to perform the analysis required on the issue presented, thereby reducing the deference a mistrial decision would normally attract.

[64] Finally, it is also our view that *Jiang* presents materially different circumstances than the case before us. Although it employs the “reasonable possibility” standard to a case of mid-trial disclosure in finding that the trial judge had erred in not declaring a mistrial, it does not provide a guide to the standard the judge in this case should have applied. The late disclosure in *Jiang* came partway through the appellant's cross-examination, and it was expected by all involved – the appellant, the Crown, and the judge – that any unfairness from the late disclosure could be neutralized before the jury by an upcoming expert witness who had testified at the hearing of the mistrial application. That expert's evidence, however, was different before the jury than expected, and the expert said it was beyond his competence to express an opinion on the relevant issue. The Court of Appeal concluded those circumstances raised a reasonable possibility that the non-disclosure affected the overall fairness of the trial process. In the present case there is no alteration of the landscape as there was in *Jiang* – we are not called on to consider different circumstances than were evident to the judge when the ruling was made.

[65] The present case is, then, markedly different from *Ryan*, *Arnold*, and *Jiang*. Vallee's position before us is not based on post-trial disclosure or on events after the mistrial ruling. We would not adopt the arguably lower standard of “reasonable possibility” to the contested mistrial ruling in this appeal.

d) Did the Judge Err?

[66] Whether a mistrial, as opposed to some other remedy, was necessary to avoid a miscarriage of justice engages the pertinent surrounding circumstances. The trial was conducted before a judge without a jury. To some degree this both simplified and broadened the realistic remedial options available to the judge.

[67] The judge had managed the case before trial for some time and so was familiar with the history of the proceedings, the progress and extent of disclosure by the Crown, some of the choices made by counsel before the trial, various applications that had preceded and punctuated the trial, and the evidence that had been led. She knew a great deal about the case.

[68] The police investigation leading to the trial had spanned years. The trial itself was long. We are advised the Crown disclosed the astonishing volume of more than one million documents. The materials on appeal indicate that the Crown and defence exchanged more than 500 letters and had ongoing necessary communications to advance the case to a focused trial. Concerning the great effort made in respect of disclosure, the judge observed:

[62] The disclosure process is, by its nature, prone to human error and vulnerable to attack (*Dixon* at para. 37). The standard is not one of perfection (*O'Connor* at para. 194; *R. v. Trang*, 2001 ABQB 1091, [2001] A.J. No. 1694 at paras. 17-22). As stated in *R. v. Cody*, 2017 SCC 31 at para. 58, “[m]istakes happen”. ...

[69] In considering potential remedies for the late mid-trial disclosure and the possibility of adjournment, the judge observed that the trial “proceeded much as scheduled, with the exception of witnesses taking longer than expected in testimony, resulting in some rescheduling. This would be the first significant adjournment, if such a remedy [were] granted.” She was entitled to consider this feature; the number and nature of adjournments attributable to the Crown is relevant to determining an appropriate remedy under s. 24(1): *O'Connor* at paras. 79–81.

[70] As we have discussed, the timing of the late disclosure is both relevant and important. The disclosure of the Tim Hortons videos here occurred mid-trial, opening the enquiry into the available remedies.

[71] Vallee accepted that the late disclosure of the Tim Hortons videos was not the product of Crown *mala fides*. He did say it reflected gross negligence or indifference on the part of the police and he proposed that for the purposes of disclosure, the police and Crown were indivisible. The judge did not accept this submission. While she said that the “large volume of material to review [did] not explain the error in failing to identify Mr. Vallee” made by the police, she was satisfied there was nothing in the behaviour of the police that elevated these mistakes, and she found that the mistakes were attributable to inadvertence and oversight.

[72] Ultimately, however, the reason for late disclosure by the Crown is of limited, if any, relevance absent behaviour that compromises the integrity of the justice system: *R. v. T.(L.A.)* (1993), 14 O.R. (3d) 378 (C.A.); *Khan*. Vallee does not say that late disclosure of the Tim Hortons videos compromised the integrity of the justice system.

[73] Vallee raises numerous concerns with the judge’s decision not to order a mistrial. Some are couched in terms of misapprehension by the judge of evidence. For example, Vallee points to the judge’s finding that the “videos did not disclose completely new information” and says this statement is not accurate because the video was the only real evidence of his physical presence near the location of the murder close to the time of the shooting, and the video presented new objective evidence of what he and Witness B wore that day.

[74] We do not agree with this characterization of the reasons or the evidence. It seems to us that the judge was correct to observe that the videos did not disclose “completely new information”, as demonstrated by two examples. First, the presence of Vallee at the Tim Hortons restaurant and meeting with Witness B in a grey Murano had been disclosed in the statements of Witnesses B and C that were provided to the defence in August 2016. Second, the Crown, in its brief opening

statement at the outset of the trial, specifically referred to a meeting with the accused at a “food location” on the day of the murder as part of the anticipated evidence from Witnesses B and C.

[75] The judge was also correct, on the other hand, in recognizing that the videos had changed the trial landscape in some respects. She expressly recognized that the video evidence is real evidence of the physical presence of Vallee near the location of the Leclair murder some hours before the shooting. She also said, “[w]hile the Crown did not favour recall of eyewitnesses given that their observations were fleeting and scarce, some did provide evidence of clothing worn by the suspects and it cannot be said that cross-examination would have been the same if the clothing worn by Mr. Vallee three hours before the shooting had been known.” It was this latter conclusion that caused her to allow four eyewitnesses to be recalled for cross-examination. Having directly addressed the very issues that are now raised by Vallee, it cannot be said that she misapprehended either the evidence before her or the significance of the Tim Hortons videos.

[76] Vallee also contends that the judge failed to consider how the video would have altered important defence decisions had it been disclosed before trial, and gives several examples. He says, for example, that he might have elected a different mode of trial.

[77] Vallee did not seek a new trial by jury in his notice of appeal as permitted under s. 686(5)(a) of the *Criminal Code*. Nor does he suggest anywhere in his factum that he wishes to be re-tried by a jury in the event this court should order a new trial.

[78] In any case, the trial judge indirectly addressed this issue. She said, “[i]n all discussions, counsel contemplated breaking the trial into segments that would make a jury trial unworkable. In December 2015, defence requested Crown consent to a judge alone trial and this was confirmed at a pre-trial appearance on December 11, 2015.” As of December 2015, the likely start of the trial was nearly a year away and the Crown’s disclosure was ongoing.

[79] A similar proposition was advanced in *Bjelland*. Bjelland had submitted that his right to a fair trial was prejudiced because he obtained disclosure only after he elected to be tried by judge alone. Justice Rothstein did not accept the complaint and said that the appellant knew that disclosure would be forthcoming before he elected. That is the circumstance here – Vallee knew disclosure was not complete when he elected to be tried by judge alone.

[80] Vallee also contends that he was prejudiced by various formal admissions he made prior to receiving the Tim Hortons videos. He has not, however, identified any particular admission that subsequently gave rise to difficulty or that he would abandon. Those admissions were made at a time when Vallee was aware of the existence of the videos and the anticipated evidence of Witnesses B and C about a meeting with him at a Tim Hortons on the day of the murder.

[81] Notably, Vallee never sought to withdraw any of his admissions after the Tim Hortons videos were disclosed. An accused may always apply to withdraw an admission and the court may allow withdrawal of an admission made prior to the late disclosure: C. Hill, D.M. Tanovich & L.P. Strezos, *McWilliams' Canadian Criminal Evidence*, 5th ed (Toronto: Carswell, 2013) at 25:60, cited with approval in *Montgomery* at para. 295.

[82] Vallee suggests that if the Tim Hortons videos had been disclosed earlier, he might not have brought his successful application to exclude his cell plant statement made when he was arrested in 2014. That application was brought in November and early December 2016, several months before the start of the trial proper: *R. v. Vallee*, 2017 BCSC 268. The cell plant statement included both inculpatory and exculpatory statements. In the mistrial hearing, Vallee submitted to the judge that, in the changed landscape resulting from production of the Tim Hortons videos, certain exculpatory statements within the cell plant evidence would have been important to his defence. Vallee does not say that the judge's mistrial reasons were insufficient on the subject of his cell plant statement, but he does submit that the judge "erred by

failing to consider” or “failed to appreciate” or “failed to grapple with” various issues, including the issue of the cell plant evidence.

[83] A judge is not required to respond to every submission made by counsel or to verbalize her entire reasoning process, so long as the basis for the conclusion is intelligible and the reasons are capable of meaningful appellate review: *R. v. Dinardo*, 2008 SCC 24 at para. 30; *R. v. J.F.D.*, 2017 BCCA 162 at para. 39. We consider this principle applies to the issue of the cell plant statement.

[84] We observe that the mistrial application occupied a week. The defence filed a nearly 70-page-long submission in advance of the hearing, and raised numerous issues, some of which have now been abandoned. When the application to exclude the cell plant statement was made, Vallee was aware of the existence of the Tim Hortons videos and the anticipated evidence from Witnesses B and C. He was also aware that the Crown’s disclosure was ongoing. Then, when the late disclosure was made, Vallee did not ask the judge to revisit her cell plant ruling. A judge has jurisdiction to revisit a ruling on the admissibility of evidence. Although it would have remained at the discretion of the judge to determine whether the prior ruling should be varied, she could have revisited the ruling any time before the trial ended, subject to rules of fairness.

[85] The detailed considerations that underlie the strategies and tactical decisions of defence counsel are never known to a trial judge. Nevertheless, it falls to trial judges to ascertain, as best they can and based on their knowledge of the case, the extent to which late disclosure by the Crown may have impacted earlier decisions made by the defence and whether such concerns can be addressed in a way that protects an accused’s fair trial rights going forward.

[86] The judge was familiar with the contents of the cell plant statement and it was she who ruled on its admissibility. At the time of the mistrial application, she had also heard many weeks of evidence, and of course she heard Vallee’s submissions on the mistrial. There is no reason to think that she did not appreciate the issues that had been raised.

[87] Ultimately, although Vallee contends that he might have elected a different mode of trial, or that he might not have made various admissions, or that he might not have applied to exclude the cell plant evidence, or that he would have undertaken the cross-examinations of various witnesses differently, he did not seek to revisit or otherwise address any of these decisions after the late disclosure. Nor have any particular items been identified to us that could amount, in our view, to such a wounding of the trial process that we would interfere with the mistrial ruling or the judge's choice of remedy for it.

[88] Next, Vallee contends that the judge failed to appreciate the significance of other ongoing issues with the Crown's disclosure by focusing exclusively on the late disclosure of the Tim Hortons videos. In her mistrial ruling, the judge said:

[86] While the defence asks that this conduct be placed within an overall context of indifference in disclosure generally and had specifically referred to alleged late disclosure regarding DNA evidence, disclosure of the personal circumstances of Witness D, disclosure of the cell plant evidence, disclosure of email server data, and other disclosure issues, this is not the application to decide upon the quantitative or qualitative state of disclosure generally or whether there exist exceptional events that reasonably affected disclosure. This application is essentially about whether Cory Vallee can obtain a fair trial after breach of his s. 7 rights for failure to disclose the Tim Horton's videos in a timely way.

[89] The judge noted that, at the commencement of the trial proper on February 7, 2017, the Crown had indicated that it was not relying on any new pieces of evidence and that disclosure was "substantially complete". The Crown's obligation to disclose is an ongoing one, and in a highly complex trial some degree of ongoing disclosure is to be expected. In a trial of this length and complexity and with this volume of disclosure, the reality is that disclosure is not likely to be complete before trial.

[90] Such ongoing disclosure, depending on its degree, engages somewhat different considerations than the disclosure of the Tim Hortons videos. As observed in *Dixon*, not every instance of late disclosure impairs the right to make full answer and defence. Here, the defence did not suggest to the judge that the ongoing disclosure, for example, had impacted Vallee's earlier strategic decisions or his earlier applications. Instead, the defence complained that ongoing disclosure

created an additional and significant burden of reviewing the disclosure as the trial was ongoing. That is not a basis, in this case, to interfere with the mistrial ruling.

[91] Finally, Vallee contends the judge gave excessive weight to concerns that a new trial would perpetuate prejudice to the justice system and the fact that the case was near the borderline for unreasonable delay. He submits, citing *Ryan*, that the judge wrongly prioritized society's interests over his interests and so erred in principle by allowing consideration of the right to be tried within a reasonable time to overcome his right to a fair trial.

[92] We do not agree. As the court explained in *R. v. Jordan*, 2016 SCC 27, the timeliness of trials is important both to individuals and society as a whole.

[93] Vallee acknowledges that the question of whether a mistrial is needed to prevent a miscarriage of justice includes a balancing of injustice to the accused with other relevant factors such as the seriousness of the offence, protection of the public and bringing the guilty to justice: *Burke* at para. 75. He acknowledges that the trial judge is in the best position to assess the circumstances of each individual case and select the most appropriate remedy. There is no indication that the judge gave undue weight to public concerns, or that she prioritized society's interests at the expense of Vallee's.

[94] On our review of the record, we are not persuaded that the judge erred in law or principle, or that she misdirected herself, or that her exercise of discretion has resulted in a miscarriage of justice. We do not accede to this ground of appeal.

2. The Vetrovec Based Challenges

[95] It is unquestioned that Witnesses A, B, C, and D were *Vetrovec* witnesses. Vallee contends they had so many and such deep unsavoury flaws that they are properly described as "extreme" *Vetrovec* witnesses. He says the judge erred in law in her application of *Vetrovec* to the circumstances of the case, based in part on a misapprehension of the evidence. Centrally, he urges on us a view of *Vetrovec* that would preclude the judge from relying on the evidence of the *Vetrovec* witnesses on

the issue of identity, proposing, if necessary, augmentation of the *Vetrovec* approach for such “extreme” witnesses.

[96] The *Vetrovec* submission is directed at all of the *Vetrovec* witnesses’ evidence that factored into the convictions, but aims its sharpest point at the murder conviction by honing in on certain aspects relevant to the judge’s conclusion that, beyond a reasonable doubt, Vallee was the AR-15 shooter of Leclair.

[97] Before we turn to the law on *Vetrovec* witnesses, it is useful to describe some of that evidence relating to the murder of Leclair, and some of the judge’s findings of fact and comments on the evidence.

a) Evidence of the Count of Murder

[98] The issue of identity required the judge to assess, in particular, evidence of Witnesses B and C concerning the events of February 6, 2009, the details of their movements and association to guns used by the assailants, and conversations they said they had participated in with Vallee and others after Leclair’s murder, all in the context of the balance of evidence including the video recordings, eyewitness evidence, and forensic evidence.

[99] We start with the evidence of the video recording of the interior of the Tim Hortons restaurant made on February 6, 2009, discussed above on the mistrial ground. This video recording was made around 13:00. It revealed an image of a person who appeared to be Vallee going to the washroom and exiting the restaurant shortly after. He was wearing a black shirt, blue top, white shoes, blue jeans, and glasses. Another video of the exterior of Tim Hortons revealed a vehicle arriving around 13:00 with a driver, identified by Witness B as himself, who exited the vehicle and returned to it at about the time Vallee left the restaurant. The vehicle drove away a few seconds later. The judge concluded that Vallee met with Witness B at Tim Hortons at about 13:00.

[100] Now to the events surrounding the murder. Leclair exited the Langley shopping mall restaurant mid-afternoon and went to his parked grey Lincoln pickup

truck where he was approached by two men. Two eyewitnesses to the shooting, Florentin Pirvu and Scott Gothard, had, in the judge's words, "the longest and best opportunity to view events" and "reasonably good memories" of the events.

[101] The judge found that Pirvu was parking his vehicle when the shooting started. She described what Pirvu saw and did:

[572] ... As [Pirvu] passed the truck, he observed a man, agreed to be the handgun man, trying to open the door of a pick-up that was backed into a parking spot and that the driver had just entered. As Pirvu was about to turn into the parking spot next to the truck, another man came in front of his car through parked vehicles to the left with a gym bag, took a machine gun out of the bag, and threw the bag about five meters from Pirvu's car close to the central walkway. Pirvu stopped. The machine gunman touched Pirvu's car as he passed in front towards the right side of the truck. He pointed the gun at the side passenger window of the pick-up and pulled the trigger. It clicked but didn't shoot anything. Pirvu thought that the gunman then armed the gun. ... The driver of the truck then turned on his engine and sped left towards the IGA. The machine gunman started shooting and running towards the rear of the truck. Pirvu ducked down in his car and stayed there for about 20 seconds before the shooting stopped. Pirvu thought that the handgun man also shot at the truck. Pirvu had observed all of this for about five to seven seconds before he ducked down. After the shots, the gunmen ran away on foot. Pirvu saw a small car like a Honda speed away in the direction of the Colossus Theatre. He did not see the shooters get into a car.

[102] Gothard, too, saw the shooting close up. The judge described what Gothard saw and did:

[573] Gothard had just returned from the IGA to his red Chevy van that was parked facing south towards the central walkway and immediately opposite the grey Lincoln pick-up. He was seated in the driver's seat facing Leclair's pick-up with an unobstructed view when these events occurred. He noticed two men running towards the pick-up. The one on the left beside Gothard in front of the vehicle beside him held a handgun. He fired at the front driver's side of the pick-up, the first shot coming when the man was on the central walkway. The other man who came from one or two cars over on his passenger side, consistent with where the duffle bag was found, held an automatic weapon. Gothard said that the automatic weapon jammed twice before it started to release bullets. From the one live rifle casing found, it is concluded that the gun probably jammed only once and that the gunman had a second issue with the gun. He saw the gunman at the side door of the pick-up try to fire the machine gun and then the gunman discharged the bullet and cleared the round. The man then fired multiple continuous shots as the pick-up started moving away from the parking spot. Gothard said that both males moved with the truck as it turned towards the IGA but Gothard's focus was on the man with the automatic weapon. They then ran past his vehicle headed

towards the Colossus Theatre. The man with the machine gun ran past Gothard's passenger side headed north. The incident had lasted about 20 seconds. Gothard immediately got out of his van and ran in the same direction as the men. He was about 40-50 meters in behind the machine gunman. He saw the gunman jump into a van that was parked facing north between the Taco del Mar and the Rogers store near the crosswalk. He saw a second man get in ...

[103] In addition, nine other eyewitnesses from the parking lot testified. None could identify the gunmen, but Pirvu and Gothard provided these descriptions:

[585] Pirvu described the handgun man that he saw for one or two seconds as a 25 year old Caucasian, 70-75 kilograms in weight, and 175 cm in height. In his statement to police immediately after the event, he said that this shooter was in his 30's. ...

[586] Gothard could not recall the clothing that the handgun man wore. ...

[587] Pirvu described the machine gun man whose face he saw for three to four seconds as Caucasian with a strong build, short hair, between 175-180 cm. in height, and about 80 kilograms in weight (although he had said 70 kilograms in a previous statement). Gothard described this man as Caucasian, stocky and well built. Gothard had also told police 13 months after the event that the machine gunman had darker, olive skin. In direct examination, he thought that the man was more than six feet in height but agreed in cross-examination with a police statement that the gunman could have been five foot seven to ten. ...

[588] Pirvu thought that the machine gun man was probably wearing gym clothing, like gym pants and a long sleeve T-shirt. He said that he wore no gloves, sunglasses, or hat. He could not remember whether he wore a jacket. Gothard could only remember that he wore a black shirt. ...

[104] Other eyewitnesses gave more vague descriptions that did not feature in the judge's reasoning.

[105] The handgun was a 9 millimeter semi-automatic. It and a machine gun (the AR-15) were found in the areas described by Pirvu and Gothard, as was a gym bag. The handgun had a live round jammed in it. Bullet casings were also found – twenty-two expended rifle casings, one live rifle casing, two expended 9 millimeter cartridges (for a handgun), and two live 9 millimeter rounds. The handgun was capable of having its barrel removed and replaced with one for different calibre bullets. No fingerprints were found on either gun, their magazines, or the casings.

[106] Mitochondrial DNA (“mtDNA”) samples were obtained from exhibits. In respect of Vallee in particular, he was not excluded as the source of mtDNA in a hair shaft found on or in the duffle bag. He was excluded as the source of three hairs found on or in the duffle bag, and from the mtDNA found on swabs of the live rounds, all spent rifle casings, the handgun, and on the inside pocket of the duffle bag. Results were inconclusive for a mixed mtDNA profile obtained from the rifle stock/shoulder rest/butt. The judge found that the mtDNA of the hair shaft in the duffle bag consistent with Vallee’s “has no probative value for the purpose of identifying him as a shooter”. Likewise, a hair on or in the duffle bag had no probative value for the purpose of identifying the shooter.

[107] We now turn to the movements of certain gang members and guns. The evidence, mainly from Witnesses B and C, was not entirely conforming. In addition to the persons already mentioned, evidence was adduced concerning Jesse Adkins, said by the judge to have been “presumably murdered in Mexico in 2011”. Adkins was a mid-level member of the UN gang, under Witness C in hierarchy. Witnesses D and C testified that Adkins had become “Frankie’s” driver shortly after a murder of a UN gang member in May 2008.

[108] Both Witness B and C named Adkins as a person involved in gun storage and in the events of February 6, 2009. Witness C testified that he kept his weapons in a large safe at Adkins’ house; Witness B testified he and Witness C kept a number of guns at the Adkins’ residence.

[109] Witness C testified he had arranged to meet Vallee and Adkins on the day of the murder, and had parked his vehicle and entered a van carrying Vallee and Adkins. They received a message to meet Witness B and Ismailaj Kreshnik, which they did at the Tim Hortons. Witness C testified that during the drive to meet Witness B and Kreshnik, Vallee spoke about a gun he had in the vehicle, given to him by Witness D, that had an interchangeable barrel. Witness C said he looked briefly at a handgun in a bag under either the driver’s seat or the passenger seat. He said he had not noticed an AR-15, that he saw only the handgun, and that he did not

know there was another gun in the vehicle. Witness C testified that he was driven back to his vehicle from the Tim Hortons by Vallee and Adkins, and he then drove to Richmond and met with Redekopp at about 14:00–14:30 for two to three hours.

[110] Witness B testified. The defence did not contest Witness B's presence at the murder and agreed that his role was as a driver. The defence did, however, contest his identification of Vallee as the AR-15 shooter.

[111] Unlike Witness C, Witness B did not place Adkins at Tim Hortons. Witness B testified that he and Kreshnik met with Vallee and Witness C at Tim Hortons. Vallee and Witness C were in a van. He said that Vallee showed him an AR-15 in a black gym bag on the rear floor of the van. The gun was similar to one he had seen at Adkins' house some time earlier that he knew belonged to another member of the UN gang, Trung Nguyen, who had said it could be used in the Bacon conflict. The judge accepted that the van referred to here by Witness B was the one used in the Leclair shooting.

[112] Witness B testified that he and Kreshnik left the Tim Hortons in a Murano and that Vallee and Witness C left in the van. Witness B testified as to details of the gang's vehicle movements. The uncertain and contradictory evidence of the movements of these various persons was described by the judge in her reasons. The judge said in respect to a portion of the defence's theory – that Vallee had left the Tim Hortons in his own black van after meeting the others for a social lunch and that a blue van later present at Tim Hortons, likely driven by Adkins, was the van used in the murder:

[633] This theory is rejected as implausible, lacking in credibility, and undermined by independent evidence. There is no evidence that Vallee or anyone lunched while at Tim Hortons. It has been accepted that Vallee was in search of the Bacons with Witness C on that day and had shown him Moe Amarhoun's house. Vallee was "Frankie" and "Panther". It is unlikely that Vallee would have left for no apparent reason when others were still engaged in the search on that day. The van used in the Leclair murder was either dark blue or black and, as concluded at paragraph 616, quite probably was Vallee's vehicle. The images taken from the Tim Hortons that the defence asserted supported the theory are so distorted in colour and blurred that little can be taken from them. No witness was asked about a second black or dark

blue van. In any event, the fact that there may have been a dark coloured minivan at Tim Hortons doesn't mean that there were two such minivans at 13:00, as defence seeks to conclude. If Vallee did leave as defence theorized, then it is assumed that the inference sought to be drawn is that Witness C, now without a vehicle, stayed and travelled with Witness B and Kreshnik in the Nissan Murano, continuing with their activity. This is speculative and unsupported in the evidence. Witness B was not contradicted in his testimony about meeting with Adkins later and that Adkins was driving a light coloured Cadillac. Witness C was not contradicted that he arrived at Tim Hortons with Vallee in the van, having left his vehicle at a Starbucks.

[113] Witness B testified that after he and Kreshnik left Tim Hortons in the Murano and Witness C and Vallee left Tim Hortons in the van, the two vehicles drove off in separate directions. He and Kreshnik drove around for a while in the Murano. He testified that he then communicated with Witness C because Witness C "had to go to work" packaging drugs for shipment internationally. He testified further that he then met up with Vallee at a pub. Vallee left his vehicle and entered into the Murano. They continued to search for the Bacon group. Witness B testified that he spotted Leclair in a truck and followed him to the shopping mall where he saw it park facing out. He said he saw Leclair leave the vehicle and enter a mall restaurant. He contacted Connor D'Monte and told him "Traitor" had been spotted. At some time, he learned that Adkins was on his way to meet them. Witness B testified that he, Kreshnik, and Vallee decided to go and get the weapon from Vallee's vehicle. They returned to the pub and there was discussion about the plan. Vallee said he would be the one to do it, Witness B would drive the van, and Kreshnik would drive the Murano as a blocker car. Witness B testified that he and Vallee left in the van, and Kreshnik followed in the Murano. They changed licence plates on the van and proceeded back to the mall with Witness B driving the van and Vallee seated in the back seat. Witness B testified that they met with Adkins near the theatre in the mall. Adkins sat in the passenger seat of the van, and they proceeded to the mall with Kreshnik following. Witness B testified that he had only a vague memory of a handgun held by Adkins on his lap.

[114] Witness B gave a physical description of Adkins, saying he thought Vallee and Adkins were dressed about the same. He described Adkins as being about the

same height as Vallee but slimmer. Witness B described himself as wearing a black hoodie, black pants, a black hat, and white shoes.

[115] Witness B testified that he, Vallee and Adkins discussed the plan as they waited in the van. Kreshnik was to let them know when Leclair left the restaurant. Witness B was to give Vallee a “Go” and he, Witness B, was to wait close by. When Leclair exited the restaurant, Kreshnik sent the message to Witness B and Witness B told Vallee and Adkins it was time to go. Vallee and Adkins jumped out, Vallee with the AR-15 and Adkins with the handgun. Witness B testified that he then lost sight of Vallee and Adkins as they turned into the parking lot.

[116] Witness B testified that he heard rapid gunshots. He testified that he pulled the vehicle out and waited. Witness B said Adkins arrived first from the direction of the IGA, and Vallee arrived shortly after, jumping into the rear passenger seat and closing the door, after which he (Witness B) sped off as fast as he could given speed bumps. The judge found:

[645] Witness B’s narrative of events is confirmed in large and significant measure by the video and photo evidence, the exhibits from the scene, and the eyewitness testimony.

[117] With reference to the Telus video showing the two gunmen running after shots were fired, referred to earlier, Witness B denied the suggestion that he left the van, ran in front of the Telus store, and then fled. The judge found Witness B was not the person on the Telus video running in front of the store. She said:

[643] ... From the location of the dropped handgun and the accepted testimony that Adkins left the van with the handgun, it most reasonable to conclude that it was Adkins seen running from the murder scene in the Telus video.

[118] We return to the evidence of Witness C. He testified that he was in Richmond with Redekopp readying drugs for shipment when he received an email from a gang member saying “Traitor got it”. He testified he told Redekopp that one of their enemies had just been shot. He testified further that he had some discussion with Redekopp about the possibility of Redekopp acting as a false alibi for Witness B.

[119] Redekopp testified that he had no recollection of meeting Witness C or of hearing from Witness C that an enemy had been killed. Redekopp denied discussing being an alibi for Witnesses B or C. The judge described Redekopp as a reluctant witness, a “drug dealer’s lackey”, and rejected Redekopp’s testimony on the alibi issue. More is said below about the judge’s treatment of Redekopp’s evidence in the discussion of the fourth ground of appeal.

[120] The judge concluded that Witness C had left the others to meet with Redekopp as Witness C testified, and gave reasons for the conclusion.

[121] Witness B testified that after the murder of Leclair, they all went to Kreshnik’s house where they disposed of their clothes and discussed events. He testified that he discussed the shooting with Adkins, Vallee, and Kreshnik immediately after the killing. He testified that he recalled Adkins telling him the handgun had jammed. He also testified that Vallee had described trying to fire at Leclair’s vehicle, Leclair putting his hands up, that he clicked the gun over to off of safety and by then Leclair was driving away so he “unloaded the gun through the back window of Leclair’s vehicle”. The judge concluded on this:

[671] It is accepted that this conversation with Vallee occurred as stated at Kreshnik’s house after the Leclair murder. Witness B gave the same recollection of the substance of the conversation to police and at trial after a long interval of time from the event. The narrative of what Vallee said is in harmony with the general picture of events and was not fabricated as defence suggested. The eyewitness evidence confirmed that the machine gun shooter had a problem with the weapon. Witness B would not have known about such a problem if not told by the shooter. ... It is reasonable and makes sense that these men would have talked about this sensational killing immediately after it happened, especially in the immediate aftermath with adrenalin still high and Witness B not knowing exactly what happened as the driver of the vehicle. ...

[122] Witness B also testified he spoke later with Witness C about the events.

[123] Witness C testified that he spoke with Vallee and Adkins about the murder two or three days later and that Vallee had enthused over the AR-15 saying, in

particular, “that thing was awesome”. Of this evidence, the judge accepted only that Vallee had said to Witness C that the AR-15 was “awesome”. She said:

[268] From all of this, it is concluded that Witness C was truthful about a conversation between Witness C, Vallee and Adkins within a week after the murder of Leclair. Witness C likely conflated what he heard from Witness B and from Vallee and Adkins. He could not distinguish what Vallee told him from what Adkins told him. Without any context, it cannot be found that Vallee adopted any of this admission, except for the sole statement attributed to him. That statement was to the effect that the AR-15 was “awesome”.

...

[675] Witness C denied in cross-examination that this conversation never occurred. Although he denied that his recollection of this conversation had been inconsistent, it was indeed found to be so at paragraphs 265-268. There were also reliability concerns about this testimony such that it was accepted only that Witness C had a routine conversation with Vallee and Adkins within a week after the murder of Leclair. In that conversation, Vallee told Witness C that the AR-15 was “awesome”.

[124] The judge addressed inconsistencies in the evidence of Witnesses B and C on the subject of Adkins’ participation, resolving it thus:

[680] It was established that Adkins participated in the Leclair murder as a shooter, particularly as the shooter with the handgun. He was certainly present. The only question is when he arrived on the scene. The defence theorized that Adkins could have arrived at 13:52 at the Tim Hortons in a blue minivan. This theory has been rejected. The evidence of Witness B is the most plausible and reasonable given all of the circumstances. He had particular reason to recollect events of that day and his memory is more precise as to Adkins movements. He assumed that Vallee had contacted Adkins after Vallee, Kreshnik, and Witness B had spotted Leclair near the Gold’s Gym. This is reasonable given that Adkins and Vallee were teamed in the search for the Bacons. Aside from recalling Adkins driving the van, Witness C had no specific recollection of anything that Adkins did on that day, in contrast to his recollection of interaction with Vallee. He knew Vallee and Adkins to drive around together most of the time in a van and likely was mistaken on this usual day as to Adkins presence.

[125] The accounts of Witnesses B and C on the location and timing of post-murder conversations, and content, were not entirely in accord. The judge resolved any inconsistency in favour of Witness B, and accepted the fact of the conversation about the murder (but not its content, which she did not rely upon). She said the fact of the conversation was significant because “it needn’t have taken place if Witness C had participated in the shooting of Leclair”.

[126] One of the many factual issues at trial concerned the prospect of payment to Vallee for the murder of Leclair. The judge found it was intended Vallee be paid but there was no evidence he was in fact paid. On this subject, Witness C provided some hearsay evidence to the effect that a payment had been made. The defence suggested Witnesses B and C were inconsistent as to their contribution to a payment, but the judge rejected that submission and found the witnesses were consistent that they did not pay Vallee for the murder.

[127] In passages discussed below, the judge found Vallee guilty of the murder of Leclair.

b) The Vetrovec Legal Framework

[128] *Vetrovec* addressed the need for special caution in considering the evidence of unsavoury witnesses and established the current practical approach for jury instructions with respect to corroboration of accomplices by abandoning, as unnecessarily complex and formalistic, the requirement of corroboration for the evidence of accomplices. Having abandoned the old rules, it then addressed concerns about the truthfulness of an unsavoury witness – the faith the trier of fact may have in the witness’s commitment to the truth of the evidence under consideration. It did this by speaking of the need for special caution in considering the evidence of unsavoury witnesses, establishing a framework in which a “clear and sharp warning” is given to alert the trier of fact of the risks of relying upon a witness of “demonstrated moral lack” and the need for prudent scrutiny of all of the evidence. *Vetrovec* recognizes that circumstances in which this approach must be applied are myriad and says at 831:

Because of the infinite range of circumstance which will arise in the criminal trial process it is not sensible to attempt to compress into a rule, a formula, or a direction the concept of the need for prudent scrutiny of the testimony of any witness. What may be appropriate, however, in some circumstances, is a clear and sharp warning to attract the attention of the juror to the risks of adopting, without more, the evidence of the witness.

[129] In *R. v. Khela*, 2009 SCC 4, Justice Fish for the majority described the dual purpose of *Vetrovec* as alerting jurors to the danger of relying on unsupported

evidence of unsavoury witnesses and, in appropriate cases, providing them the tools necessary to identify evidence capable of enhancing the trustworthiness of those witnesses: at para. 47. The same careful approach is required of judges sitting alone (*R. v. Kehler*, 2004 SCC 11), although a formal self-instruction in the judge's reasons may not be necessary: *R. v. Snyder*, 2011 ONCA 445 at para. 24.

[130] Two issues emerge in *Vetrovec*, both of which require the exercise of judicial discretion: when should a *Vetrovec* caution be given, and what should be the content of it? These discretionary issues attract the same standard of review discussed at para. 42 above: has the judge misdirected herself in law, committed a reviewable error of fact, or come to a decision that is so clearly wrong it amounts to an injustice?

[131] This case concerns the second of the *Vetrovec* issues, and the application of the caution required.

[132] *Khela* is a leading authority on the content of a *Vetrovec* caution. In it, Justice Fish observed as to our role:

[13] The crafting of a caution appropriate to the circumstances of the case is best left to the judge who has conducted the trial. No particular set of words is mandatory. In evaluating its adequacy, appellate courts will focus on the content of the instruction and not on its form. Intervention on appeal will not be warranted unless a cautionary instruction should have been given but was not, or the cautionary instruction that was given failed to serve its intended purpose.

[133] Justice Fish then took guidance from previous cases, in particular *R. v. Brooks*, 2000 SCC 11, and *Kehler*, and described the content of a *Vetrovec* caution this way:

[37] In *Sauvé* [(2004), 182 C.C.C. (3d) 321 (Ont. C.A.)], at para. 82, the Ontario Court of Appeal set out a principled framework that will assist trial judges in constructing *Vetrovec* warnings appropriate to the circumstances of each case. That proposed framework, which I adopt and amplify here, is composed of four main foundation elements: (1) drawing the attention of the jury to the testimonial evidence requiring special scrutiny; (2) explaining why this evidence is subject to special scrutiny; (3) cautioning the jury that it is dangerous to convict on unconfirmed evidence of this sort, though the jury is entitled to do so if satisfied that the evidence is true; and (4) that the jury, in

determining the veracity of the suspect evidence, should look for evidence from another source tending to show that the untrustworthy witness is telling the truth as to the guilt of the accused (*R. v. Kehler*, 2004 SCC 11, [2004] 1 S.C.R. 328, at paras. 17-19).

[38] While this summary should not be applied in a rigid and formulaic fashion, it accurately captures the elements that should guide trial judges in crafting their instructions on potentially untrustworthy witnesses. The fourth component, of particular interest on this appeal, provides guidance on the kind of evidence that is capable of confirming the suspect testimony of an impugned witness.

[39] Common sense dictates that not all evidence presented at trial is capable of confirming the testimony of an impugned witness. The attribute of independence defines the kind of evidence that can provide comfort to the trier of fact that the witness is telling the truth. Where evidence is “tainted” by connection to the *Vetrovec* witness it can not serve to confirm his or her testimony (N. Harris, “*Vetrovec* Cautions and Confirmatory Evidence: A Necessarily Complex Relationship” (2005), 31 C.R. (6th) 216, at p. 225; *R. v. Sanderson*, 2003 MBCA 109, 180 C.C.C. (3d) 53, at para. 61).

[40] Materiality is a more difficult concept. In *Vetrovec*, the Court did away with the requirement that corroborating evidence implicate the accused. As Dickson J. noted, such evidence is not the only type capable of convincing a jury that a witness is telling the truth. In *Kehler*, the Court confirmed that evidence, to be considered confirmatory, does not have to implicate the accused. We maintain that position here.

[41] Individual items of confirmatory evidence need not implicate the accused. ...

[42] However, when looked at in the context of the case as a whole, the items of confirmatory evidence should give comfort to the jury that the witness can be trusted in his or her assertion that the accused is the person who committed the offence. ...

[43] This passage was cited with approval in this Court’s unanimous judgment in *Kehler*, where the Court concluded that confirmatory evidence must be capable of restoring the trier’s faith in relevant aspects of the witness’ account (para. 15). As a matter of logic, where the only issue in dispute is whether the accused committed the offence, the trier of fact must be comforted that the impugned witness is telling the truth in that regard before convicting on the strength of that witness’s testimony.

[Emphasis added.]

[134] It happens in this case that the only evidence on the identity of the accused as perpetrator of the murder is given by a *Vetrovec* witness. This also was the case

in *Kehler*, a judge alone trial referred to in the passages from *Khela*, above. In *Kehler*, Justice Fish for the court wrote:

[15] The appellant wrongly equates “relevant” with “disputed”. Mr. Greenwood’s detailed account of the robbery, though undisputed, was no less “relevant” to the offences charged than his implication of the appellant in their commission. And while confirmatory evidence should be capable of restoring the trier’s faith in relevant aspects of the witness’s account, it hardly follows that the confirmatory evidence must, as a matter of law, implicate the accused where the only disputed issue at trial is whether the accused was a participant in the crimes alleged.

[16] As the appellant himself concedes, it is clear from *Vetrovec, supra*, that independent evidence, to be considered confirmatory, does not have to implicate the accused. There is no separate rule in this regard for cases where the only evidence of the accused’s participation in the offence is that of a tainted witness.

...

[20] Where a particular risk attaches to one critical element of the evidence of “an accomplice, or a disreputable witness of demonstrated moral lack” (*Vetrovec, supra*, at p. 832), the trier of fact must be satisfied that the “potentially unreliable” evidence of the witness can be relied upon as truthful *in that regard*.

[21] Such a risk may arise, for example, where there is any basis in the record for suggesting that the unsupported evidence of an accomplice, though evidently truthful as to his own participation in the offence charged, is for any reason subject to particular caution as regards his implication of the accused.

[22] However, even then, having considered the totality of the evidence, the trier of fact is entitled to believe the evidence of the disreputable witness — even on disputed facts that are not otherwise confirmed — if the trier is satisfied that the witness, despite his or her frailties or shortcomings, is truthful.

...

[27] Mr. Greenwood’s credibility was a matter for the trial judge alone to determine.

[Italic emphasis in original; underline emphasis added.]

c) *Discussion of the Content of the Caution in this Case*

[135] The principles expanded on in *Kehler* and *Khela* have been applied repeatedly across Canada in cases too many to name. Vallee would have us say that there is a subset of *Vetrovec* witnesses who have such a host of indicia of unsavoury character that they should be considered irredeemable witnesses whose

evidence, in words his counsel used at trial, “cannot be believed absent extremely significant and confirmatory evidence on the material issue”. He calls such witnesses “extreme” *Vetrovec* witnesses. At trial, Vallee said it was open to the court to find that use of evidence of the four *Vetrovec* witnesses was not in the public interest. He submitted that where the question is identity of the accused as perpetrator of the crime, the confirmatory evidence must restore confidence that the accused was the perpetrator. Vallee submitted there was no such evidence and urged the judge to reject the evidence of him as the AR-15 shooter, particularly the evidence of Witness B.

[136] On appeal, Vallee advances the same submission and he also advocates for an augmented approach in which there is a legal requirement of corroborating evidence on the issue of identity – a framework whereby once a *Vetrovec* witness is identified as extreme, the Crown must establish that there is independent corroborative evidence to confirm material aspects of the *Vetrovec* witness’s testimony. That is, Vallee proposes that the independent evidence must implicate the accused, and absent such evidence, the *Vetrovec* witness’s testimony on the point should be withdrawn from consideration.

[137] In support of this augmented approach, Vallee refers to a passage in *Khela* at para. 7 that *Vetrovec* “was not intended to deprive an accused of the protection that the warning has historically been meant to provide”, and the observation at paras. 39–40 that the search for confirmatory evidence engages both independence of the evidence and materiality. He also refers to *Khela*’s description at para. 43 of the materiality of the evidence that may suffice to restore faith in the *Vetrovec* witness’s evidence where the only issue is identity. Here Justice Fish said that “the trier of fact must be comforted that the impugned witness is telling the truth *in that regard* before convicting on the strength of that witness’s testimony.” Vallee says that statement leaves open the possibility that corroboration on the issue of identity is required.

[138] Vallee submits that his approach will address a current significant risk of a miscarriage of justice in a case of contested identity. He relies upon *R. v. Hay*, 2013 SCC 61, *R. v. Hart*, 2014 SCC 52, and *R. v. Bradshaw*, 2017 SCC 35, as examples of circumstances that warranted special rules to protect against wrongful conviction, and for support in principle of his submission that such corroboration is necessary.

[139] The Crown objects to our hearing this submission. Relying on *R. v. Gill*, 2018 BCCA 144, the Crown says Vallee's submission is made for the first time on appeal, is contrary to his position at trial, and contradicts his reliance at trial on evidence admitted on the premise of the current jurisprudence. The Crown says the judge was within her purview as trier of fact to accept the *Vetrovec* witnesses' identification of Vallee as the AR-15 shooter.

[140] In our view, Vallee is entitled to raise with us the correct approach to what he would term extreme *Vetrovec* witnesses, but we would not give effect to the submission. On our review of the trial record, the general theme of his submissions in this court is not new: at trial, Vallee protested the use of Witness B's evidence to prove he was the shooter on the basis there was not sufficient confirmatory evidence presented by the Crown. His proposal for an augmented approach is an extension of his trial submission, but could reasonably be seen to be caught in his broad submission that the judge lacked a reliable non-*Vetrovec* basis for finding he was the AR-15 shooter.

[141] We do not agree, however, with the substance of Vallee's submission that there must be independent evidence that implicates him in the offence before the judge may rely upon the *Vetrovec* evidence. Such a conclusion usurps the role of the trier of fact.

[142] The authorities require a judge to instruct a jury to look for independent evidence that will restore faith in the witness's testimony. The importance of such independent evidence increases with the centrality of the disputed issue to the crime alleged and to the degree of disrepute of the witness. However, in respect of a trial by jury, we know of no cases that require more than instructions warning the jury of

the danger of convicting on a *Vetrovec* witness's identification alone, so as to prohibit a conviction.

[143] Nor do we accept Vallee's submission that the statement in *Khela* made by Justice Fish "the trier of fact must be comforted that the impugned witness is telling the truth *in that regard* before convicting on the strength of that witness's testimony" means that corroboration is required on the disputed issue. The phrase "in that regard" comes straight from para. 20 of *Kehler*, which affirms the ability of the trier of fact to believe the evidence of a disreputable witness, even on disputed facts that are not confirmed if the trier of fact considers the witness is telling the truth. In other words, we read "in that regard" as applying to the contentious evidence – is the trier of fact satisfied that the witness is truthful on that factual issue in contention?

[144] It happens that serious crimes occur where the only evidence of the commission of the offence comes from a highly disreputable witness, or from a nest of such people. With the aid of an appropriately fashioned *Vetrovec* caution, such cases are left to a jury tasked with determining whether the facts essential to conviction are established. Credibility assessments belong to the jury. In a judge alone case, credibility assessments belong to the judge as trier of fact. The approach proposed, in our view, is contrary to paras. 15 and 22 of *Khela* and contrary to the proper role of a trier of fact.

[145] We decline to adopt the proposition that the judge here was unable to accept the evidence of Witness B for the sole reason of lack of confirmatory evidence (corroboration) on the issue of identity. It follows we do not accept the augmented approach advanced before us.

[146] Vallee raises *Hay*, *Hart*, and *Bradshaw* as cases in which the Supreme Court of Canada applied a principled, not rule-based, approach and modified the law to reduce the potential for a miscarriage of justice arising from frailties of evidence. Those three cases, however, address zones of evidence in which reliability of evidence is the central issue, respectively: eyewitness identification, confessions obtained during a Mr. Big operation, and hearsay evidence from accomplices who

will not testify. In *Hart* and *Bradshaw* the evidence was second-hand, without cross-examination to assist the judge in assessing the source's commitment to the truth. In a different way, *Hay* also did not concern the issue of commitment to telling the truth. Instead, it addressed the inherently suspect nature of eye witness identification. None of these cases, then, address the *Vetrovec* question, which is the faith a trier of fact may have in the truthfulness of a witness – to put it another way, the faith a trier of fact may have that a witness is not playing false in respect to their evidence. While Vallee says this distinction is a rule-based approach to different types of evidence, we see it as distinguishing between faith in the witness's commitment to the truth and the reliability of evidence tendered, whoever may be the witness.

[147] The new approach advocated by Vallee appears to us to return to some of the formalism regarding corroboration that *Vetrovec* replaced. We consider the proposal is beyond us; we are bound by *Vetrovec* and its progeny.

[148] We do not accede to these submissions.

d) Application of the Vetrovec Warning

[149] The issue we have just addressed concerns the approach the jurisprudence requires the judge to take to the *Vetrovec* evidence. Vallee also raises discrete concerns. He says the judge erred in her application of *Vetrovec* on certain aspects of the evidence that required corroboration because of the discreditable character of Witnesses B and C. This submission relates in particular to the conviction for the Leclair murder.

[150] At trial, the defence advanced the alternative theory that Witness C was the AR-15 shooter. The evidence of Witnesses B and C, both implicating Vallee, was key to this theory. Vallee says to rely on the evidence of Witnesses B and C implicating him in the Leclair murder, the judge was required to seek out evidence confirming that:

- 1) witness C had an alibi for the time of the murder;

- 2) he, Vallee, was at the scene of the murder;
- 3) it was intended that he, Vallee, be paid for the murder; and
- 4) he, Vallee, described killing Leclair to Witnesses B and C after the murder.

He says there was no confirmatory evidence on any of these matters, and so the judge erred in accepting the accounts of Witnesses B and C of events material to the issue of identity.

[151] Vallee expanded on each of the four points he said were essential to a finding of guilt:

- 1) In respect of ruling out Witness C as the shooter, Vallee says there was no objective evidence confirming Witness C's testimony that he had an alibi. Here he was referring to Witness C's evidence that he was in Richmond with Redekopp when the murder occurred. But, he says, Redekopp was not a witness for purposes of an alibi;
- 2) In respect of Vallee's presence at the scene of the murder, Vallee says the only evidence that he was there was from Witness B, a person admittedly at the scene and who, therefore, would have had knowledge of the scene from his role as an accomplice. Facts that Witness B gathered from his own presence at the scene, in Vallee's submission, cannot make Witness B's testimony that Vallee was the shooter more believable because Witness B would need to have added only Vallee's participation "to an otherwise truthful, and potentially confirmable story" to create a plausible version that Vallee had participated: *R. v. Smith*, 2009 SCC 5 at para. 15;
- 3) On the issue of paying Vallee for the murder, Vallee says there were material inconsistencies in the evidence of Witnesses B and C, and insufficient confirmatory evidence to support the judge's conclusion that it was intended Vallee be paid for the "hit"; and

- 4) In respect to Vallee's statements after the murder, Witnesses B and C testified that Vallee made several admissions, including describing the AR-15 firearm as "awesome". Vallee says the judge erred in accepting that he had made those admissions, absent confirmatory evidence. He refers to the dissenting reasons of Justice Major in *Brooks*, in turn referring to *The Report of the Kaufman Commission on Proceedings Involving Guy Paul Morin*, which identified as a danger that an informer's "claim that the accused said 'I killed A.B.' is easy to make but extremely difficult for any accused to disprove". In relation to Witness C's evidence of Vallee's admissions to him of being at the scene, Vallee contends that the judge erred in referring to consistencies between Witness C's in-court testimony and his previous police statements. In sum, Vallee contends that there was "insufficient confirmatory evidence with respect to whether any such conversation took place and the details of that discussion".

[152] The Crown takes the position that Vallee's submissions effectively invite this court to re-assess and second guess the judge's conclusions on credibility. The Crown says it was open to the judge to rely on the evidence of the *Vetrovec* witnesses that she accepted, after her review of the witnesses' disreputable features and careful scrutiny of all the evidence. The Crown says that the judge was meticulous in her sorting of the evidence. It notes she rejected large portions of the evidence helpful to the Crown and then focused properly on the essential questions before her with a keen appreciation of the evidence.

[153] We start with a review of the judge's approach. She first recognized that each witness was an accomplice to the conspiracy and that Witness B, and arguably Witness C, were accomplices to the Leclair murder. She acknowledged that each was "in a particularly compelling position to provide a story that falsely implicates" the appellant. She then said:

[160] According to the principled framework established in *R. v. Sauvé*, (2004), 182 C.C.C. (3d) 321 (Ont. C.A.), this evidence, having been identified as requiring special scrutiny, then requires identification of the characteristics of each witness that brings his evidence into serious question and then an

appropriate caution to be brought to mind that it is dangerous and unsafe to act upon his unconfirmed evidence (*Sauvé* at para. 82; *Smith* [2007 NSCA 19] at para. 111; *R. v. Khela*, 2009 SCC 4 at para. 37). While it may be dangerous to convict without confirmatory evidence, the trier of fact may still do so if satisfied that the *Vetrovec* witness is telling the truth.

[154] In a comprehensive 6-page discussion on the approach to evidence from *Vetrovec* witnesses (paras. 160–172), the judge identified characteristics that may attract special scrutiny and discussed at length, with detailed reference to binding and persuasive jurisprudence, the nature of independent confirmatory evidence that is capable of “restoring the trier’s faith in relevant aspects of the witness’s account” (referring to paras. 12 and 15 of *Kehler*). She addressed some of the impediments to the independence of evidence relied upon “to show that the untrustworthy witness is telling the truth as to the guilt of the accused” (referring to *Khela* at para. 37, *R. v. Hurley*, 2010 SCC 18 at para. 19, and *R. v. Roks*, 2011 ONCA 526 at para. 63). The discussion is complete and compact. She recognized the distinction between credibility and reliability. Included in her self-instruction are these concluding passages:

[169] Confirmatory evidence need not incriminate an accused in the criminal activity charged to be confirmatory, even when the only evidence of the accused’s participation in an offence is that of a tainted witness (*Vetrovec* at 826; *Kehler* at paras. 15-16; *Khela* at para. 40; *R. v. Khan*, 2011 BCCA 382 at para. 52; *Labossiere* at para. 44; *Illes* at para. 37; *Magno* at para. 115; *Takeeway* at para. 6). However, the facts of a case are significant to the common sense approach as stated in *Khela* at para. 42:

[42] ... when looked at in the context of the case as a whole, the items of confirmatory evidence should give comfort to the jury that the witness can be trusted in his or her assertion that the accused is the person who committed the offence. Again in *Vetrovec*, Dickson J. thus noted, with respect to evidence capable of being confirmatory:

All of this incriminating evidence, when considered together, strongly strengthens the belief that Langvand was telling the truth regarding the participation of Vetrovec and Gaja. It rebuts any suggestion that he is falsely implicating innocent individuals. [Emphasis added [in *Khela*]; p.833]

[170] When the only issue is whether the accused committed or participated in the offence, there must be comfort provided that the witness is telling the truth “in that regard” (*Khela* at para. 43; *R. v. Seruhungo*, 2015 ABCA 189 at paras. 59-60 per O’Ferrall J.A., dissenting, rev’d 2016 SCC 2 substantially for

the reasons of O’Ferrall J.A.). Voith J. put the question this way in *Paterson* [2017 BCSC 536] at para. 220: “Does this confirmatory evidence ‘rebut any suggestion’ that [the unsavoury witness] is falsely implicating [the accused]”? To rebut the suggestion, it has been said that the confirmatory evidence need not speak directly to the issue of, for example, whether the accused was the shooter, but should support the evidence of the witness, even if weak (*Kehler* at para. 15; *Labossiere* at para. 44; *Keeweway* at para. 6). As stated in *MacIsaac* at para. 44, the confirmatory evidence “need not cut a direct path to guilt: it need only be capable of assuring the trier of fact that it is safe to rely upon the word of a disreputable witness”. However, a more cautious approach could be taken where a particular risk attaches to the testimony of an accomplice who, though truthful as to his own participation, is subject to a particular caution as regards his implication of the accused (*Kehler* at paras. 20-21). In *Seruhungo*, the trial judge had rejected certain confirmatory evidence as weak and the *Vetrovec* witness’s testimony that was confirmed by what actually happened was either notorious or capable of apprehension (*Seruhungo* at para. 64).

[171] A trial judge is required to consider pieces of alleged confirmatory evidence individually to see if it is independent, material and relevant to the portion of testimony alleged (*Seruhungo* at paras. 63-65). Circumstantial evidence can be confirmatory. However, it is the combined strength of the totality of the confirmatory evidence that matters in the end (*Khan* at para. 55; *Seruhungo* at para. 65). As stated in *Vetrovec* at 828, the question is ultimately not how trust is restored, but whether it is restored at all.

[172] Of course, as with all witnesses, rejection of some of the evidence of a witness does not necessarily mean that other evidence of that witness need be rejected (*R. v. Sanderson*, 2003 MBCA 109 at para. 32; *Drabinsky* at paras. 71 and 136; *Najafi-Chaghabori* at para. 28). Assessment of credibility and reliability is not a global exercise but is related to specific events and issues (*Drabinsky* at para. 38). The distinction between credibility and reliability was aptly described in *Paterson* at paras. 115-118 and need not be repeated here.

[155] The judge analyzed each witness, starting with Witness D:

[182] There are many reasons to be concerned about Witness D’s trustworthiness. The Crown said that Witness D’s evidence should be approached with “extreme” caution.

[156] Witness D’s evidence included details of the operations of the UN gang, the conspiracy, and his cooperation with police. He testified that Vallee had made a statement, in his presence, which he took to be confirmation of Vallee’s participation in the murder. He testified he knew the police were looking for “Frankie” and “Panther”, he identified Vallee as “Frankie”, and he said Vallee had other nicknames

including “Panther”. The judge rejected a significant portion of Witness D’s evidence due to “lack of confirmation or inconsistency or unlikely timing”:

[199] ... his testimony about a conversation with D'Monte about Adkins acting as a get away driver for Vallee, his description of specific searches for Bacon locations with Vallee, his sighting of Jamie Bacon and Leclair with Vallee, his evidence that D'Monte had asked him for “eyes” in Langley on the day of the Leclair murder, his denial that he had supplied the handgun used in the Leclair murder, and his tale of meeting at his home when Vallee and Adkins showed him an AR-15 assault rifle are rejected.

[157] The judge, however, did accept the evidence of Witness D as to how he met Vallee and that Vallee was “Frankie”:

[200] Witness D’s testimony at trial about how he first met Vallee was substantially consistent throughout except for details that are not memorable and not significant such as whether it was Kroitoru or Witness D that suggested that Witness D meet Vallee at the Lonsdale quay for their second meeting. Vallee was introduced to the gang by Kroitoru. Vallee was introduced to Roueche. Vallee was introduced to Witness D. This must have occurred somehow as it is not denied that Vallee knew Witness D and Witness D was able to set up a meeting with Vallee after he cooperated with police. Witness D consistently described the circumstances in which he met Vallee. This evidence is accepted.

[201] It is also accepted that Witness D did not cobble together information and make up the story about Vallee being “Frankie”, as opposed to choosing someone else within the UN gang. While it is true that Vallee was an outsider whom Witness D thought was “expendable” at the time of the February 25, 2008 police stop, by the time that Witness D cooperated just over a year later, Vallee was entrenched into the gang. Witness D was the first witness to cooperate and had many “poker chips” to play. He had not been involved in the Barber or Leclair murders and his communications were not intercepted.

[158] The judge applied the same framework for consideration of the evidence of Witness A. She identified Witness A’s background with the UN gang and the process by which he became cooperative with police. Here, too, the judge’s review of Witness A’s credibility was complete and discerning. In respect of Witness A’s testimony that Vallee confessed to the Leclair murder, she explained why she rejected it:

[223] Witness A’s testimony about Vallee admitting his involvement in the Leclair murder to him is rejected not only as unreliable as tainted from disclosure and media, but also unreliable as a potent example of bad memory, feigned or not. He could not remember: when the conversation occurred, how the conversation unfolded, who raised the topic, or what

exactly was said except that Vallee felt bad about it. In direct examination, he said that Vallee told him that he was with Adkins and that “they shot him”. His memory was not refreshed in direct examination by reference to a prior statement.

[159] The judge, on the other hand, accepted that Witness A knew Vallee and had communications with him through an encrypted Blackberry in which Vallee did not use his own name. She said:

[231] ... Some of his evidence is accepted, particularly if it is uncontested or otherwise independently confirmed or if it is accepted as reasonable and truthful in all of the circumstances. It is accepted as reasonable and truthful that Witness A did not concoct a story about Vallee’ introduction and role within the UN gang.

[160] The judge then turned to Witness C; twin brother to Witness B. She described his role in the UN gang, his arrest, and his cooperation with police. She found caution was required in respect of his evidence:

[250] Witness C is an important witness for the Crown because he was with Vallee on the day of the killing of Leclair and testified as to Vallee’s movements on that day. He is also important to the defence which asserts that Witness C’s alibi evidence that he left the scene on the day of the Leclair murder to do other work is fabricated and that he was a shooter of Leclair and not Vallee. There is also the factor that Witness C is in a particularly compelling position to falsely implicate Vallee because of his close relationship as the twin brother to Witness B, who participated in the murder of Leclair.

[251] There are many factors that give rise to caution before accepting any of the evidence of Witness C. This general caution prevails here as specific aspects of his evidence are discussed.

[161] The judge discussed in detail aspects of Witness C’s disreputable conduct and character, identifying particular events or actions that warranted treating his evidence with great skepticism. She ended with a long discussion of the cautionary approach she brought to his evidence (at paras. 250–272), resolving the testimony that she accepted and that which she rejected. In particular, the judge considered the relationship between Witnesses B and C in weighing the evidence of both men. Figuring in her conclusions in relation to Witness C were the confessions of

Witnesses B and C to the murder of Jonathan Barber, and their exculpation of Vallee in that crime. The judge's important conclusions include:

[260] After consideration of the evidence of Witness B in the context of whether Witness C and Witness B colluded in their testimony to implicate Vallee, it has been decided that they did not. Witness C appreciated that his deal with police would vanish if he and Witness B contrived their evidence. Although Witness C is cunning and smart, he implicated the one person most important in the world to him in the murder of Leclair, his brother, Witness B. He did so at a time when both he and Witness B thought that the evidence against them was weak. Did he do so at the price of Vallee or to save himself? Probably not, because he was already facing a life sentence for the Barber killing. As well, the testimony established that the brothers talked together to strategize their cooperation and deal, but not directly to falsely implicate Vallee. While it is appreciated that a false implication would be difficult to prove because it is unlikely that anyone would ever admit to it, the testimony of Witness C and especially Witness B fit with the preponderance of probabilities which neither witness could have fully realized.

...

[268] From all of this, it is concluded that Witness C was truthful about a conversation between Witness C, Vallee and Adkins within a week after the murder of Leclair. Witness C likely conflated what he heard from Witness B and from Vallee and Adkins. He could not distinguish what Vallee told him from what Adkins told him. Without any context, it cannot be found that Vallee adopted any of this admission, except for the sole statement attributed to him. That statement was to the effect that the AR-15 was "awesome".

...

[271] After reflection upon Witness C's evidence, it appears that he was inconsistent with prior statements with respect to how he was first introduced to Vallee and with respect to the content of an admission by Vallee regarding the Leclair murder. It is accepted that he did not remember Vallee using "Frankie" at first because this was not how Witness C usually referred to him. But, the general credibility of Witness C's evidence is established primarily through his testimony about his and Witness B's participation in the Barber murder and through his implication of Witness B in the Leclair murder. The testimony about the Barber murder was remarkably consistent between Witness B and Witness C except for insignificant and unmemorable details given the length of time since the event. Given the close relationship between these two witnesses, it is unlikely that Witness C would have implicated Witness B to police in the Leclair murder at a time when the content of the Tim Hortons video was unknown, if that implication was not true. Given the time that the brothers had to construct their evidence, and given that neither knew about the Tim Hortons video, and given that police did not know the identity of the shooters when they interviewed Witness B and Witness C, they could have identified others as involved in the Leclair shooting and exonerated themselves if they intended to be dishonest about it. The acceptance of honesty about these events is bolstered by the fact that Witness C did not implicate Vallee in the Barber murder even though he knew

that police had charged Vallee and had reason to believe that he was there because of the false identifications of Witness D and Witness A.

[162] In the same fashion, the judge reviewed the characteristics of Witness B, his background with the UN gang, his extensive criminal activities, and his involvement with violence. Her discussion of him and his evidence was comprehensive. She noted his inconsistencies and mistakes on details but, for the extensive reasons provided (at paras. 291–309), she concluded that his evidence on particular aspects was reliable. Here, too, she checked his evidence on the Barber murder (to which he admitted and exonerated Vallee) against objective evidence:

[305] Witness B was consistent overall at trial in his recollection about events of the Barber murder, despite some minimization. ... Despite these limitations, Witness B's description of events in the Barber murder was consistent and fit with the objective evidence and the evidence of Witness C.

[163] In reaching her conclusion that much of Witness B's evidence was reliable, she said (in addition to her para. 260 above):

[307] Witness B's evidence was consistent overall regarding the Leclair murder both internally and externally. He was not substantially challenged in his recollections as to the events themselves but as to details regarding when Adkins arrived on the scene, when the handgun appeared, the colour of Vallee's minivan, and the alibi evidence. The suggestion that he was a shooter was not supported in evidence other than not being excluded as a source of one of the hairs found on or in the duffle bag for which a reasonable explanation was given and not challenged, namely, that he had looked into the duffle bag in the van at the Tim Hortons. His recollection of the AR-15 being in a black bag in the van, of the presence of a handgun, of the sequence of events at the Thunderbird Centre and of the vehicles used is consistent with the eyewitness and objective evidence. There is no doubt that Witness B participated in the murder of Leclair as he described.

[308] After considering Witness B's evidence as a whole and the preponderance of probabilities arising from objective and other evidence, and particularly after factoring in the benefits that he received from immunity, it is accepted that Witness B strove to tell a true story to this Court. ...

[309] There was no DNA from Witness B or Witness C found "on the murder weapon". Witness B withstood this significant challenge to his credibility. Even the defence did not seek to reject Witness B's evidence in total.

[164] It is in the context of the judge's detailed analysis of each of the *Vetrovec* witnesses and the entire body of evidence that we must consider the four complaints made by Vallee, above at para. 150.

[165] As we do not agree with the proposition advanced by Vallee that the judge needed confirmatory evidence on specific points of the *Vetrovec* witnesses' testimony, we do not agree that any of the four particular complaints (of a lack of confirmatory evidence) demonstrate error on the part of the judge. The judge's recognition and discussion of the many indicia of disreputability of each of the *Vetrovec* witnesses, and rigorous culling of their evidence to that body of evidence she accepted, is the exercise expected of a trier of fact. The reasons show the judge was acutely aware of the risks associated with *Vetrovec* witnesses generally, and these *Vetrovec* witnesses in particular, within the framework of the law she was required to apply.

e) Misapprehension of Evidence Found to be Confirmatory

[166] Vallee also contends that the judge misapprehended evidence she said confirmed the testimony of the *Vetrovec* witnesses that he was the AR-15 shooter.

[167] These challenges are aimed at the summary paragraph of the judge:

[686] The eyewitness Gothard had the best view of the machine gunman because he didn't duck down for safety as had Pirvu, he had an unobstructed view, and he ran after the gunman. He remembered the machine gunman as stocky and well built and wearing a black shirt. The second person seen running towards the Thunderbird Apartments in the Telus video is wearing dark clothes and white shoes. Vallee was wearing a black shirt and white shoes at Tim Hortons. The description of the machine gunman is consistent with Vallee's appearance on that day. There is no evidence of what Witness C was wearing on that day and the fact that he may have sometimes worn gym pants, consistent with Pirvu's recollection of the machine gunman, does not lead to a reasonable inference that Witness C was the shooter, given the balance of the other evidence about the machine gunman.

[168] Echoes of that paragraph are found in the Executive Summary, which is to be read bearing in mind the limited import she expected it to have (at para. 22 above):

[48] It was not contested that Witness B drove the van as he described and then waited as the two gunmen left the vehicle and headed towards

Leclair's truck. The description of the machine gunman by the eyewitness who got the best unobstructed view and the pictures from the Telus store of the two gunmen running, when combined with the appearance of Vallee at the Tim Hortons earlier on that day, establish a consistency between the appearance of the machine gunman and Cory Vallee.

[169] Vallee says the judge demonstrated three misapprehensions of evidence in her para. 686:

- 1) in saying that the description of the gunman was consistent with Vallee's appearance that day;
- 2) in concluding that Vallee matched the person seen in the Telus video running from the scene, whereas that person was the handgun shooter, found earlier to be Adkins; and
- 3) in failing to appreciate the inconsistency between Pirvu's description of the clothing of the AR-15 shooter – gym pants – and the clothing worn by Vallee in the Tim Hortons video – blue jeans.

[170] He says these misapprehensions fatally undermine the judge's conclusion that there was confirmatory evidence that gave credit to the truthfulness of Witness B's account of certain events on critical matters.

[171] Contrary to Vallee's submissions, we do not consider a misapprehension of evidence is demonstrated.

[172] The most important of the three points is the second alleged misapprehension – the "white shoes" references.

[173] Vallee says that the effect of para. 686 is to find that the video corroborated Gothard's description of the machine gunman or otherwise is confused whether Vallee was the man running near the Telus store because he wore white shoes at Tim Hortons and the running man wore white shoes. This demonstrates, Vallee says, a fatal confusion in the evidentiary analysis leading to the conclusion he was the AR-15 shooter.

[174] Paragraph 686 is one of the several summary paragraphs of the judge's conclusions. It must be read in context:

O. Conclusions

[684] The crime scene evidence established that there were two shooters and two drive away vehicles involved in the killing of Kevin Leclair. It has not been contested that Kreshnik was the driver of the Silver or grey Nissan Murano that followed the van into and out of the Thunderbird Centre. It has been established that Adkins was present as the handgun shooter at the scene of the murder.

[685] Cory Vallee had no reason to be anywhere else on that day. He had no legitimate employment for three months. He had been actively engaged in the search for the Bacons with Witness C, Witness B, and Adkins at least since Meyer's death. He was being paid by D'Monte to fully engage in the Bacon conflict. He was so engaged earlier in the day when he went with Adkins and Witness C to evaluate an attack on the house of Moe Amarhoun.

[686] The eyewitness Gothard had the best view of the machine gunman because he didn't duck down for safety as had Pirvu, he had an unobstructed view, and he ran after the gunman. He remembered the machine gunman as stocky and well built and wearing a black shirt. The second person seen running towards the Thunderbird Apartments in the Telus video is wearing dark clothes and white shoes. Vallee was wearing a black shirt and white shoes at Tim Hortons. The description of the machine gunman is consistent with Vallee's appearance on that day. There is no evidence of what Witness C was wearing on that day and the fact that he may have sometimes worn gym pants, consistent with Pirvu's recollection of the machine gunman, does not lead to a reasonable inference that Witness C was the shooter, given the balance of the other evidence about the machine gunman.

[687] Disposal of the van by Vallee immediately following the Leclair murder is some evidence of involvement, although minimal given some equivocation as to whether the van used was dark blue or black. It is speculative as to other reasons why Vallee may have disposed of the van after owning it for just over three months. It is considered, however, that the disposal transaction was in Vallee's own name using his own address. This is in contrast to the planned disposal of the Tahoe after the Barber murder.

[688] The mtDNA evidence is given very limited weight to link Vallee, Witness B and/or Witness C to the duffle bag at some point. However, when combined with Vallee's statement to Witness C that the AR-15 was "awesome", the link between Vallee, the AR-15, and the duffle bag found at the scene gains weight.

[689] While the assessment of the evidence of Witness B and Witness C has been particularly challenging and subject to special scrutiny because an accomplice can easily falsify his evidence, the final determination about their credibility and reliability rested upon consideration of the preponderance of the evidence as a whole. Contrary to the position of the defence, it has not been accepted that all of the *Vetrovec* witnesses lied to implicate Vallee. The overwhelming evidence established beyond any reason to doubt that Vallee

was “Frankie” and he was “Panther”. Vallee was at the Tim Hortons on February 6, 2009, just hours before Leclair was gunned down. The AR-15 was in the van that Vallee was in and he showed it to Witness B. The most likely scenario is that it was Witness C who left the scene as he described: it was not his job to stay.

[690] Vallee was teamed with Adkins following the Meyer murder and it makes sense that he would have contacted Adkins after Leclair was spotted rather than go it alone. The crime scene and eyewitness evidence supports Witness B’s narrative from his own perspective and as told by Vallee afterwards at Kreshnik’s house.

[691] The decision to kill Leclair was planned and deliberate, with time to assess the situation. Cory Vallee was a member of the conspiracy to kill members of the Bacon group. Leclair was a target with a price on his head. Vallee was at the Thunderbird Centre intending to kill the Leclair target and he achieved that goal.

[Emphasis added.]

[175] We do not read the reference in para. 686 to white shoes as the judge saying this observation corroborates Gothard’s description of the machine gunman. However, it may be that, separated from the entirety of the reasons for judgment and read in isolation, one could interpret the passage as the judge drawing a conclusion that Vallee was the man running closest to the Telus store. Such an interpretation, however, is contrary to the judge’s conclusion that the handgun shooter, who she found to be Adkins, was that runner. This possible interpretation, then, would be at odds with the judge’s detailed analysis of the evidence and her findings of fact, and is out of step with her conclusions replicated above. It simply would not accord with the balance of her reasons, and there is no indication elsewhere of the judge losing track of her findings of fact.

[176] The Supreme Court of Canada directs us to consider the judge’s language not only with care, but also in context: *R. v. Gagnon*, 2006 SCC 17. In *R. v. Stirling*, 2008 SCC 10, Justice Bastarache for the court said:

[4] In my view, this appeal ought to be dismissed. Although the passages above contain some ambiguous comments about the use the trial judge made of the prior consistent statements, these remarks must be read in the context of the reasons as a whole. It is clear from this judgment that the trial judge was very aware of the limited use of the prior consistent statements, and he correctly instructed himself on this point repeatedly.

...

[13] I also do not agree that paras. 59 and 95 of the trial judge's reasons indicate clearly that he used Mr. Harding's prior consistent statements for an inappropriate purpose. The precise meaning of these passages is ambiguous, and that ambiguity must be resolved by looking at the remainder of the judgment. As this Court held in *R. v. Davis*, [1999] 3 S.C.R. 759, at para. 103, it is inappropriate for an appellate court to read a single passage out of context, and the reasons as a whole must be evaluated in order to determine whether an error has occurred: [quote omitted]

[Emphasis added.]

[177] We adopt the same approach. The inference we are asked to draw on para. 686's meaning is not ineluctable. It does not have to be made and should not be made, given the entirety of the reasons, the judge's earlier undisputed conclusion that the runner closest to the Telus store was the handgun shooter, and para. 686's location right below the restatement of her conclusion that Adkins was the handgun shooter.

[178] Vallee also submits that the judge was wrong to say that the eyewitnesses' description of the person with the AR-15 was consistent with Vallee's appearance in the Tim Hortons video, and in failing to give weight to the inconsistency in Pirvu's description of the AR-15 shooter's pants and those Vallee is seen wearing on the Tim Horton's video. In making this submission, Vallee presumes the witness to be given primacy is Pirvu, and that the significant aspect of the description is the clothing. We do not find this error. In para. 686, the judge referred only to Gothard and said that earlier she considered that Gothard's evidence was more reliable than Pirvu's; Pirvu had, understandably, ducked for many critical seconds, raising his head after the shooting stopped. Gothard, on the other hand, watched the events unfold and ran after the AR-15 shooter.

[179] As to the evidence, Pirvu described the AR-15 shooter as Caucasian, having a "strong build", and being about 80 kilograms in weight and 175–180 cm in height. Gothard described him as Caucasian, stocky and well built, and around six feet (direct examination) or possibly around five foot seven to ten (cross-examination). Pirvu did not describe the colour of the AR-15 shooter's clothing, but thought he wore gym pants. Gothard remembered a dark shirt. The judge had the Tim Hortons

video of Vallee before her, and Vallee was in the courtroom. It was open for her to conclude that Gothard's physical description was consistent with Vallee's appearance. Likewise, Gothard's sole description of his garments – a dark shirt – was consistent with the Tim Hortons video. It was for the judge as trier of fact to assess these points of evidence, and interference with her assessment of the evidence and conclusions would be impermissible.

[180] In conclusion, we would not give effect to these submissions concerning misapprehension of evidence.

f) Conclusion on Vetrovec

[181] In our view, the judge did not demonstrate error in any fashion in considering the evidence of the *Vetrovec* witnesses. We do not accede to this ground of appeal.

3. The Identity of Frankie

[182] This issue addressed primarily the charge of conspiracy to murder in which the identity of Vallee as a conspirator was the key issue. It played a less significant role in Vallee's conviction for the murder of Leclair.

[183] At the outset of her reasons, the judge identified a key factual question was whether Vallee was a hitman for the UN gang known as "Frankie" or "Panther". The evidence on this issue relied in part on the evidence of the *Vetrovec* witnesses.

[184] On appeal, Vallee says that the judge committed various errors in finding that the nickname "Frankie" referred to him, including misapprehending the evidence, speculating impermissibly, and reversing the burden of proof. To put these issues in context, we review first the structure of the judge's reasons and the breadth of the evidence on the issue of Vallee's membership in the conspiracy.

a) *Structure of the Judge's Reasons on the Conspiracy Charge*

[185] The judge began her analysis with a detailed description of the legal principles and rules of evidence in the law of conspiracy, adopting the three-step analysis applied in *R. v. Tran*, 2014 BCCA 343:

[78] In *Carter*, Mr. Justice McIntyre held that to reach a verdict in a case in which the Crown relies on the co-conspirator exception to the hearsay rule a trier of fact must proceed in three steps. He reiterated those steps in *R. v. Barrow*, [1987] 2 S.C.R. 694 at 740. They are:

- (1) The trier of fact must consider all of the evidence to determine whether the alleged conspiracy has been proven beyond a reasonable doubt.
- (2) If the alleged conspiracy is found to exist, then the trier of fact is to consider the evidence directly admissible against each accused and unindicted conspirators to decide, on a balance of probabilities, whether that person is a member of the conspiracy.
- (3) If the trier of fact is satisfied that an accused is probably a member of the conspiracy, then it must go on to decide whether that accused's membership has been established beyond a reasonable doubt. At this step, the trier of fact must consider all of the evidence, including hearsay acts and declarations made in furtherance of the conspiracy by those who have been found to be probable members of the conspiracy.

See also: *R. v. Wang*, 2013 BCCA 311 at para. 48, 299 C.C.C. (3d) 431, leave to appeal ref'd, [2013] 3 S.C.R. xi.

[186] The judge then discussed the content and requirements of each of the three steps. No issue is taken with any aspect of this analysis.

[187] At the first step, which requires consideration of all the evidence, the judge described the general background, largely uncontroversial, of the conflict between the Bacon Brothers and the UN gang, and she further detailed the underlying evidence pertaining to eight different "key events in the conspiracy".

[188] The judge turned then to step two, engaging the balance of probabilities. Vallee contended that the evidence at trial established only that he was associated with some members or associates of the UN gang, and that the evidence did not establish that he probably was a member of the conspiracy. The judge rejected that submission on the basis of four broad categories of evidence, some subdivided into

further categories. No issue is taken on any aspect of the findings she made in this part of her analysis.

[189] The judge last turned to the third step in the analysis – was Vallee’s membership in the admitted conspiracy established beyond a reasonable doubt? Here she considered six further categories of evidence, some of which contained multiple discrete items.

[190] One of these six categories of evidence is titled “Is Cory Vallee ‘Frankie’?” Another is headed “Is Cory Vallee ‘Panther’?” Under the “Frankie” heading, the judge addressed more than 20 separate statements or intercepted communications, including from the W Hotel, a hotel in Montreal that members of the UN gang visited in 2008. The judge also addressed evidence of each of the four *Vetrovec* witnesses.

[191] Under the “Panther” heading, the judge dealt with further intercepted communications and the evidence of the four *Vetrovec* witnesses, and she noted that Vallee had a black tattoo of a panther on his right leg.

[192] Vallee’s concerns and identification of purported errors is limited to the single body of evidence that relates to him as “Frankie”, and he seeks to impugn only a relatively modest subset of the judge’s conclusions. Vallee takes no issue with her findings that he was likely Panther, apart from the relationship of that nickname with Frankie. Nor does he take issue with any of the other findings made under any other heading or body of evidence relevant to membership in the conspiracy.

[193] In the Executive Summary, the judge summarized her conclusions:

[31] The Crown also proved beyond a reasonable doubt that Vallee actually was a member of the conspiracy to murder the Bacon Brothers/RS. This conclusion flowed from detailed analysis of the intercepted communications of Kroitoru and Roueche at the W Hotel in April 2008 and later in May 2008 to determine whether reference to “Frankie” was a reference to Cory Vallee or to someone else, from examination of the evidence as to who was “Panther”, from review of the intercepted call from Kroitoru to someone named “Sky” on June 5, 2008, from Vallee’s involvement in the search for the Bacons as accepted evidence from the key witnesses, from certain admissions of Vallee, and from circumstances including the sale

of vehicles close in time to the Meyer and Leclair murders and receipt of a UN ring.

b) Witness D's Access to the W Hotel Intercepts

[194] Much of Vallee's submission on misapprehension of the "Frankie" evidence focuses on the W Hotel intercepted communications and Witness D's evidence concerning them.

[195] Vallee advanced the theory that Witness D's testimony about Vallee as Frankie was a complete fabrication. Ultimately the judge did not accept Vallee's theory of this fabrication on the part of Witness D.

[196] Vallee's submission on misapprehension of evidence in respect of the Frankie issue addresses the judge's statement that there was "no evidence that Witness D was aware of the W Hotel intercepts when he first cooperated." On this, Vallee says the judge misapprehended the evidence and shifted the burden of proof onto him, a proposition that would have seriously undercut Witness D's evidence. Vallee accepts that there was no such direct evidence, but he says that there was a significant body of evidence supporting an inference that Witness D had such access from other gang members. He also says that the judge's finding that there was "no evidence" indicates a failure to understand the significance of the evidence as a whole. Still further, he says that the judge's finding that Witness D knew the police were looking for Frankie and Panther "was based upon gang rumour and not from access to disclosure documents" is unsupported by any evidence.

[197] In our view, Vallee has not established the misapprehensions of evidence asserted.

[198] The judge addressed Witness D's evidence that Vallee was Frankie twice in her reasons, first when she dealt with Witness D as a *Vetrovec* witness whose evidence required "extreme caution":

[194] Witness D knew, however, before he began to cooperate, that police were looking for "Frankie" and "Panther". This was based upon gang rumour and not from access to disclosure documents. It was not established that

Witness D had ever seen the executive summary of the police investigation or that he had access to the W Hotel intercepts before he cooperated with police. While he did access the media reports of the W Hotel intercepts at some point, it was not established when this was or how they influenced Witness D's testimony. After review of all of the evidence on this point, but primarily because he did not have access to disclosure regarding the W Hotel intercepts and did not have context to the McDonald's video stills, it is concluded that revelation of who was "Frankie" was not a card that he otherwise played.

[195] The analysis regarding "Frankie" and "Panther" at paragraphs 496-522, Vallee's introduction to the UN gang at paragraphs 123-150, and whether Vallee was a drug dealer for the UN gang at paragraphs 151-155, leads to the conclusion that Witness D did not fabricate the existence of Vallee as "Frankie" based upon rumour, access to disclosure, and the media. The idea of "Frankie" as rumour only was not suggested to Witness D. Witness D was not shown to have disclosure that resulted in the moulding of his evidence. In particular, it was not established as likely that Witness D had access to the executive summary that gave an overview of the W Hotel intercepts based upon the fact that he had heard about other disclosure and may have known of the name of the police investigation. It was not established when he listened to portions of the W Hotel intercepts online through the media.

[196] There are some reasons why Witness D's evidence has particular credibility, despite the indicia of untrustworthiness. He came to police without any assurances and set up a meeting so that police could identify Vallee whom Witness D had said was "Frankie". He did not have access to and did not review any relevant disclosure before identifying Vallee as "Frankie". Much of his evidence was uncontested or confirmed by other witnesses or independent evidence. Given the level of dishonesty that Witness D exercised over courts in the past and all of the other negative trustworthy factors, his evidence should not be accepted unless it is uncontested or confirmed by other independent evidence that significantly implicates the accused.

[199] The judge returned to this issue when she more directly addressed the conspiracy charge and the evidence relating to Frankie. In particular, she discussed Witness D's evidence that Frankie had been introduced to him as having previously worked "back east" for a notorious gangster:

[511] It is concluded that this background story was constructed by either Kroitoru or Roueche to give instant credibility to Vallee within the gang and to inspire Witness D and others to give Vallee respect. The theory that this was a complete fabrication of Witness D does not stand in face of the W Hotel intercepts. There is no evidence that Witness D was aware of the W Hotel intercepts when he first cooperated. Roueche was pressured at the time as leader of the gang to appear to be doing something about the Bacon problem. ...

[200] The judge recognized that the defence considered Witness D an unsavoury witness whose evidence had been tainted by the disclosure he had seen, and accepted that Witness D's evidence required extreme caution. She also acknowledged that there was a general sharing of disclosure and information within the gang, expressly addressing this issue several times. Her reasons also dealt directly with access to disclosure of the other *Vetrovec* witnesses.

[201] The judge declined, however, to draw the inference that the defence urged upon her in relation to Witness D's access to the W Hotel intercepts or other disclosure about Frankie or Panther before he spoke to the police. Witness D accepted that gang members would sometimes exchange or provide "paperwork" or disclosure to other gang members. He testified, however, that he had no recollection or knowledge of the gang having seen a police executive summary that provided an overview of the W Hotel intercepts, and said he did not know what the executive summary was. Witness D said that he did not know whether the gang became aware of the W Hotel intercepts from other disclosure, and he had no recollection of having received information from the disclosure of another gang member. He did not know when he became aware of the W Hotel intercepts but accepted that he had listened to them at some point after they were disclosed to the public and made available online. We see no basis to conclude that the judge misapprehended any of this evidence.

[202] We reach the same conclusion on Vallee's contention that the judge lacked an evidentiary foundation to conclude that Witness D was aware of police interest in Frankie through gang rumour. In cross-examination, Witness D agreed the UN gang had learned about a police investigation into the gang, named Project E-Prada, from D'Monte (nicknamed "Benzo"). Witness D testified:

Q ... [D]o you recall Benzo learning about the—the project name of the police investigation into the UN Gang?

A I believe you're referring to Project E-Prada?

Q Yes, that's right. Tell me about that.

- A I don't recall the particulars, other than there was some word on the street, if you will, of the—a police investigation called E-Prada and it was—it had something to do with our gang.
- I don't—I don't really have a ton of information about it. He had—he told—he told me and—and others in the gang, I don't recall exactly who, that he—or I should say he spread it in the gang, that it should be talked about a lot, that we had knowledge of this operation to, I don't know, get the message across to the police that we were—that we were aware of it or something along those lines.
- Q Okay. And then at some point the gang learned in particular that the police [were] looking for Frankie and Panther, is that right?
- A I believe so, yes.
- Q And the gang learned that—through a letter that Benzo obtained from a lawyer, is that correct?
- A It may—that may have happened like that. I don't recall exactly.
- Q That sounds familiar to you, though?
- A I wouldn't say it sounds familiar, but it would make sense.
- Q The gang learned that the police believed that Frankie and Panther were separate people, correct?
- A Yes, that—that—that I recall, yes.
- Q And it was only after you came forward that this police theory changed from Frankie and Panther being the same person, is that right?
- A I don't know what exactly the police believed at which time, but I do recall telling them that at some point, I believe, that they were the same person.

[203] The foregoing excerpt is consistent with the judge's conclusions and provided a basis on which to infer Witness D was aware, through gang rumor, of police interest in Frankie. There is no basis to find the misapprehension propounded by Vallee.

i) Reversing the Burden of Proof

[204] Vallee also contends in respect of the W Hotel intercepts that the judge reversed the burden of proof. In making this submission, he relies upon the judge's use of the phrases "it was not established" and "it was not established as likely" (at paras. 194 and 195). Vallee says this demonstrates the judge was looking to the defence to establish as likely that Witness D had access to the W Hotel intercepts before he spoke to police.

[205] As previously discussed, a judgment must be read as a whole:

R. v. Villaroman, 2016 SCC 33. The judge's reasons amply demonstrate a correct understanding of the burden of proof at each stage of the conspiracy analysis, and she considered each of these stages in turn. The impugned references in paras. 194 and 195, and her return to the issue of Witness D's access to the W Hotel intercepts at para. 511 (all replicated above) in the context of the reasons as a whole, are part of her proper assessment of and weighing of the entire body of evidence on the issue.

[206] We do not accede to this submission.

c) Characteristics of Vallee and Frankie

[207] These challenges to the reasons address the issue of Vallee's identity as Frankie, apart from issues just discussed concerning the W Hotel intercepts.

i) Background and Findings

[208] Vallee contends that the judge speculated and drew impermissible inferences when concluding that he was likely Frankie and that she placed a burden on him to disprove the *Vetrovec* narrative.

[209] Vallee has, to some degree, shifted the issues that were before the judge in making this submission, and has not recognized that portions of the judge's reasons were made in response to theories Vallee advanced.

[210] In the W Hotel intercepts, the police captured a series of conversations between Clayton Roueche and Kroitoru in which they mentioned both Frankie and Panther. The judge found that either Roueche or Kroitoru had constructed the story about Frankie being a hitman who had previously worked "back east" for a notorious gangster.

[211] This fiction, she found, was developed to provide Vallee with instant credibility within the gang and to inspire others to give him respect. She concluded that both Roueche and Kroitoru were "big talkers, full of bravado and flare". She concluded

that “Roueché was known to be boastful, to exaggerate and to ‘play things up’.” The judge noted that “[i]n the W Hotel intercepts, Kroitoru described himself as having blown Frankie up as ‘the best guy to have’ and warned Roueché that he made up stories and that Roueché might hear ‘weird...crazy shit’ but to ‘just go with it’.”

[212] The Crown contended that Vallee was both Frankie and Panther. Vallee said Frankie and Panther were two different people and it was not established he was Frankie. Vallee suggested that Frankie was likely a drug dealer called Frank Misiti who was arrested after meeting with Kroitoru on June 4, 2008. The defence based this submission, in large measure, on Misiti’s name, the fact Misiti was from Ontario, and that Misiti had a girlfriend there.

[213] Responding to this submission, the judge reviewed more than 20 excerpts from the W Hotel intercepts and considered whether each of the intercepts was consistent with Frankie being Vallee, or Misiti. She found some of the intercepts were equivocal, many were generally consistent with Frankie being Vallee, and a few were more consistent with Frankie being Misiti.

[214] Ultimately, having reviewed the evidence concerning the identity of Frankie, and recognizing that this was only one part of her “Frankie” analysis, she found it was “improbable that Frank Misiti is the ‘Frankie’ referred to in these conversations” and rejected the inference that Frankie was Misiti. This was well within her purview as trier of fact.

[215] The judge then reviewed the Panther evidence and rejected the theory that Panther and Frankie were two separate people. Vallee does not challenge this finding, or the reasons she found that he was probably Panther, although they bolstered the judge’s conclusion that he was likely Frankie.

[216] We see no basis to say the judge drew impermissible inferences in finding Vallee was Frankie.

ii) Speculation

[217] Vallee contends that the judge engaged in impermissible speculation in finding that certain references to Frankie in the W Hotel intercepts were consistent or inconsistent with a reference to him. An inference of fact is speculative where there are no proven facts from which the inference can reasonably be drawn: *R. v. Clark*, 2015 BCCA 488, *aff'd* 2017 SCC 3, and such a factual finding is most commonly seen as a palpable and overriding error of fact: *Clark* BCCA at paras. 42–43. To be a reversible error, the speculative inference of fact must be clearly identified and shown to have affected the result: *R. v. Clark*, 2005 SCC 2:

9 ... Appellate courts may not interfere with the findings of fact made and the factual inferences drawn by the trial judge, unless they are clearly wrong, unsupported by the evidence or otherwise unreasonable. The imputed error must, moreover, be plainly identified. And it must be shown to have affected the result. “Palpable and overriding error” is a resonant and compendious expression of this well-established norm

[218] In our view, Vallee has not demonstrated impermissible speculation and his submission obscures the relevant inquiry. The question before the judge was not whether every use of the name Frankie in the W Hotel intercepts was consistent with a reference to Vallee – the question was whether she was convinced beyond a reasonable doubt, based on the whole of the evidence, that Vallee was a member of the conspiracy.

[219] In any case, the judge’s inferential reasoning of which Vallee complains (inferences from the W Hotel intercepts) responded to the defence’s submissions that various references to Frankie in the intercepts were inconsistent with a reference to Vallee and were consistent with a reference to Misiti. Vallee said this should raise a reasonable doubt on Vallee’s identity as Frankie and, consequently, his membership in the conspiracy. The judge fully addressed this proposition. She said not every reference to Frankie in the W Hotel intercepts, taken literally, was consistent with Vallee, nor would such a conclusion have been necessary to support a conviction. Indeed, the judge recognized that certain references to Frankie in the intercepts “appear[ed] wrong” or “equivocal in relation to” the known circumstances

of Vallee. Ultimately, having addressed the whole of the evidence, she did not have a reasonable doubt that Vallee was a member of the conspiracy.

[220] Vallee refers to several instances where he asserts that the judge's findings arising from her review of the excerpts from the W Hotel intercepts were speculative.

[221] The alleged speculation falls into two broad categories. The first relates to excerpts from the intercepts that discuss, for example, Frankie being "out here now" or how Frankie was supposed to "make his money and go home". They are based on Frankie's apparent lack of connection to Vancouver, although we know Vallee had resided in Vancouver and North Vancouver for some time.

[222] On this, the trial judge said:

- Frankie had been "out here now" for two months by April 19, 2008 – While "out here now" may suggest that Frankie came from somewhere else, it could also refer to the fact that Frankie had been newly involved with the gang for that period of time. Given that it was Kroitoru who said "out here", it may have been a play into Kroitoru's story to Roueche about how he came to bring Frankie into the gang, the details of which are not known except for rumours heard by Witness D and others. Vallee was known to have been involved with Witness A, Witness D, and others by February 28, 2008 when he was stopped by police at 8 Rinks. Misiti appears to have been headed east on Highway 1 when he was stopped by police on June 4, 2008, well after the W Hotel conversations. He had lived in Ontario since 1996 and the June 4, 2008 stop was the only evidence of his being in British Columbia.
- Frankie has a new girlfriend in North Vancouver After Kroitoru was released from arrest on June 5, 2008, he called someone named "Sky" and told him that it was important to contact "Cory" and told Sky that "Cory" had a "new broad". This evidence is a direct link to establish that it is Vallee with the "new broad" who is talked about by Kroitoru at the W Hotel. More will be said about this conversation below. The evidence is that Misiti had a dispute in 2008 in Ontario with a woman who had his child. This was not, therefore, a new relationship.

[223] This analysis generally mirrors the judge's treatment of the intercept excerpts she particularly mentioned, which she addressed in bullet form, following the pattern of focus on the language used, discussion of other pertinent evidence, and

consideration of the circumstances of each of Vallee and Misiti in relation to that evidence.

[224] In making this submission, Vallee advocates a different, and more literal, interpretation than the conclusion the judge reached.

[225] In like vein, the judge said:

- Frankie was suppose[d] to “make his money and go home” and “the job was supposed to be done in a week or two” – This could refer to Vallee if he was introduced by Kroitoru for the purpose of being a hit man for the UN. There is no suggestion that this was to be a permanent position within the UN whose business was drug dealing. Misiti was only in Vancouver once according to the evidence and it can be inferred that he was on his way back to Ontario when he was arrested.

[226] Vallee seeks to revisit the submissions made to the judge and to advance a literal, as opposed to more colloquial, interpretation of the phrase “go home”. This is in circumstances where, as noted by the judge, the communications between Kroitoru and Roueche are infused with a distinct and highly exaggerated vernacular.

[227] We do not accept these complaints as to the judge’s interpretation of the intercepts – it was for the trial judge to determine what was meant by the words spoken, not this court.

[228] The second category of impermissible speculative inferences alleged by Vallee relate to his personal circumstances. Vallee was once married to a woman who resided in Vancouver. He had recently become involved with another who also resided in Vancouver and had one child. Vallee contends that these personal circumstances did not accord entirely with Frankie’s circumstances as described in the intercepted communications. The judge addressed a number of these mis-matches as she worked her way through the intercept excerpts, and Vallee raises no concern with respect to several of her conclusions.

[229] Vallee does say, however, that certain conclusions are speculative, for example:

- Frankie expressed to Kroitoru that he loved “our kids” – Vallee does not have any children. However, he had a close relationship with Lockart who had a small child that Vallee was seen with in police surveillance. In relation to Vallee, the use of “our” could be a colloquial use by Kroitoru. Misiti had a child in Ontario. But, there is no evidence that he had a relationship with Kroitoru in April 2008 or at any time when he would have discussed loving his child.

[Emphasis added.]

[230] Vallee says the underlined words are speculation and do not adequately reconcile the intercept with his parental circumstances. We consider that Vallee takes too much from these words on this small point of evidence. The phrase seems to be simply part of the judge’s exploration of evidence which was unclear; couched in the indefinite words of “could be”, they are not a finding. They are, in any case, of no consequence in the context of the reasons as a whole.

[231] We have reviewed many other examples Vallee relies on to challenge the judge’s findings as speculative. We do not consider them to have merit. It is apparent that the judge’s consideration of each of the intercept excerpts was, by virtue of their number, necessarily succinct. In our view, the isolated examples identified by Vallee do not undermine her conclusions on the W Hotel intercepts or the “Frankie” issue more generally.

iii) Reversing the Burden of Proof

[232] Vallee submits that the judge reversed the burden of proof on the issue of his identity as Frankie. He says the judge should have asked whether the evidence about Frankie’s circumstances, when compared to the appellant’s circumstances, raised a reasonable doubt on the issue, not whether the defence could conclusively *disprove* that the appellant matched Frankie’s circumstances.

[233] This submission simply misreads the reasons for judgment. The judge did not require the defence to disprove that Vallee matched Frankie’s circumstances.

Rather, the judge responded to Vallee's theory that Frankie was likely Misiti, and to exculpatory inferences that were urged upon her.

[234] Exculpatory inferences need not be based on proven facts, but a reasonable doubt cannot be founded on alternative theories that are mere speculation or conjecture. The defence's alternative inferences must be reasonable, not just possible: *Villaroman* at paras. 37, 42; *R. v. Paquette*, 2019 BCCA 396 at para. 26; *R. v. Duong*, 2019 BCCA 299 at para. 84.

[235] It is the role of the trier of fact to assess whether alternative inferences are reasonable, and it is not open to this court to revive an exculpatory inference that the judge reasonably rejected. Importantly, when reviewing the judge's inferences drawn from circumstantial evidence, the evidence and the judge's reasons must be assessed as a whole and not in a piecemeal fashion: *Duong* at para. 64.

[236] Further, it is not a reversal of the burden of proof to reject the defence's alternative theories or inferences because they are speculative or are not reasonable. The standard of reasonable doubt applies to consideration of the evidence as a whole and not to individual pieces of evidence: *Villaroman* at para. 15; *Paquette* at para. 35; *Duong* at para. 65.

d) Conclusion on the Identity of Frankie

[237] We see no error in the judge's finding that Vallee was Frankie. We do not accede to Vallee's third ground of appeal.

4. The Evidence of Peter Redekopp: Uneven Scrutiny

[238] In this ground of appeal, Vallee contends that the judge applied different standards of scrutiny to evidence that supported the defence theory than she did to evidence that supported the Crown theory.

[239] A key factual issue on the Leclair murder was whether Vallee had left the shopping mall area before the murder and Witness C had remained and participated as the AR-15 shooter. This was the main alternate suspect theory.

[240] Witness C denied participation in the murder of Leclair and advanced Redekopp as his alibi for the time of the murder. Redekopp's evidence about that alibi was inconsistent with the evidence of Witness C. The judge rejected the evidence given by Redekopp.

a) Legal Framework

[241] Whether "uneven scrutiny" is a standalone ground of appeal is uncertain. In *R. v. G.F.*, 2021 SCC 20, Justice Karakatsanis for the majority expressed "serious reservations" as to whether uneven scrutiny is a helpful analytical tool to demonstrate error in credibility findings. Uneven scrutiny is, however, a doctrine that has been applied or considered by this and other appellate courts: *R. v. Roth*, 2020 BCCA 240; *R. v. Murray*, 2020 BCCA 42; *R. v. Aird*, 2013 ONCA 447; *R. v. Kiss*, 2018 ONCA 184; *R. v. Wanihadie*, 2019 ABCA 402; *R. v. Willis*, 2019 NSCA 64.

[242] Credibility findings are the purview of trial judges. A submission of uneven scrutiny, if it be a ground of appeal, is notoriously difficult to make out because of that high degree of deference given to credibility determinations. At para. 99, *G.F.* notes this comment by Justice Doherty in *R. v. Howe* (2005), 192 C.C.C. (3d) 480 (C.A.):

[59] ... It is not enough to show that a different trial judge could have reached a different credibility assessment, or that the trial judge failed to say something that he could have said in assessing the respective credibility of the complainant and the accused, or that he failed to expressly set out legal principles relevant to that credibility assessment. To succeed in this kind of argument, the appellant must point to something in the reasons of the trial judge or perhaps elsewhere in the record that make it clear that the trial judge had applied different standards in assessing the evidence of the appellant and the complainant.

b) Discussion

[243] For convenience, we briefly digest again the "Redekopp" evidence. In this case, Witness C said he was with Redekopp when Leclair was killed. Witness C said he and Redekopp were building furniture they planned to use to hide drugs for shipment to Mexico. Witness C said that when he was with Redekopp, he received a message saying "Traitor got it", he told Redekopp one of their enemies just got shot,

and Redekopp replied it was “a good thing you’re with me, you have an alibi”.

Witness C said Redekopp confirmed that he would be willing to act as a false alibi for Witness B. Witness C also testified that he later told Witness B that he could use Redekopp as a false alibi. Witness B, however, gave different evidence and said his brother never spoke to him about Redekopp being a false alibi.

[244] In his evidence, Redekopp professed a poor memory of events. He did not recall meeting Witness C close to the time of Leclair’s murder, or having a conversation with Witness C about “an enemy” being killed, or Witness C speaking to him about Leclair’s murder. Redekopp expressly denied ever having discussed being Witness C’s alibi or about being Witness B’s false alibi. He said he would have remembered either discussion.

[245] The judge said, assessing Redekopp’s evidence:

[650] Peter Redekopp was a reluctant witness with professed little memory and vagueness and ambiguity on significant matters. He was a big user of crack cocaine in 2007-2008 but was “trying to get away from it”. He also had undiagnosed neurological problems. He was a drug dealer’s lackey, packaging drugs for shipment and transporting large quantities of illicit drugs throughout the Lower Mainland.

...

[655] Redekopp obviously knew a lot more than he was willing to tell. He purposefully did not remember many matters. I reject his testimony that he would have remembered being asked to be a false alibi for Witness B. Redekopp was not about to admit to anything in this regard. Also, his criminal lifestyle at the time and his dependence upon Witness C was such that it is concluded that he would have readily agreed to be a false alibi and such a discussion would not have been at all remarkable.

[656] After consideration of all of the evidence about alibi, it is concluded that Witness C left the others following the meeting at Tim Hortons to work with Redekopp on packaging drugs for shipment. Witness C was working with Redekopp at this time as described by Redekopp and Witness B.

[246] Vallee agrees it was open to the judge to reject Redekopp’s evidence and accept the evidence of Witnesses B and C. He contends, however, that the judge failed to apply equal scrutiny to the evidence of Redekopp on one hand and Witnesses B and C on the other. The submission is that the judge applied a more

forgiving eye to the evidence of the Crown's other witnesses than to the evidence of Redekopp.

[247] We do not accede to this argument. In his short testimony, Redekopp expressed ignorance or a lack of memory over 60 times. He gave evidence only on a finite issue relevant to an incident with which he was not directly involved. The judge addressed Redekopp's purported lack of memory and found he was not a forthright witness. It was open to her to make such a finding.

[248] We do not agree, either, that the judge treated other witnesses with a more forgiving eye than Redekopp. It was open to the judge to accept none, some, or all of the evidence she heard from any number or combination of witnesses: *R. v. Najafi-Chaghabouri*, 2014 BCCA 278. The fact that Redekopp and the *Vetrovec* witnesses were all, to some degree, imperfect witnesses did not require the judge to accept or reject their evidence equally.

[249] A review of the judge's reasons shows she provided a detailed and separate consideration of each of the witnesses. The judge expressed "caution" or "extreme caution" in approaching the *Vetrovec* evidence and looked for confirmation. She rejected significant portions of their evidence. She found, for example, that "Witness A often had a poor memory", and that his evidence in respect of several issues was affected by the disclosure that he had seen. She similarly rejected evidence of Witness D. Conversely, she found that "Witness C had a reasonably good memory and was clear when he did not". Even then, she found that "he was mistaken in his recollection of some events" and she addressed those issues. This was discussed above on the second ground of appeal, the *Vetrovec* issue.

[250] More generally, Vallee seeks to use uneven scrutiny to revisit the judge's credibility findings. He does this in relation to general topics and in relation to specific and detailed evidence.

[251] For example, Vallee addresses the "criminal lifestyles" of each of Witnesses B and C. So too did the judge. Vallee comments on the fraternal relationship of

Witnesses B and C and their communications with each other prior to testifying at trial. So too did the judge. Vallee identifies inconsistencies in the evidence given by each of Witnesses B and C. So too did the judge. Vallee contends that evidence given by Witness B in his cross-examination about his alibi was inconsistent with his police statements. The judge addressed this issue and referred to the cross-examination.

[252] The judge made extensive and detailed credibility findings based on the mountain of evidence she heard. We find no error demonstrated on which to interfere with her findings. We do not consider that there is any merit to this ground of appeal.

IV. Conclusion

[253] The appeal is dismissed.

“The Honourable Madam Justice Saunders”

“The Honourable Mr. Justice Abrioux”

“The Honourable Mr. Justice Voith”

Tab 27:

R. v. Wiens, 2016 BCCA 34

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *R. v. Wiens*,
2016 BCCA 34

Date: 20160126
Docket: CA41140

Between:

Regina

Respondent

And

Keith Gregory Wiens

Appellant

Corrected Judgment: The text of the judgment was corrected at paragraph 51 on
March 3, 2016.

Before: The Honourable Mr. Justice Frankel
The Honourable Madam Justice D. Smith
The Honourable Mr. Justice Savage

On appeal from: An order of the Supreme Court of British Columbia, dated
July 23, 2013 (*R. v. Wiens*, Penticton Docket 40090-K).

Counsel for the Appellant:

R.S. Fowler, Q.C.
E. Purtzki

Counsel for the Respondent:

M.T. Ainslie, Q.C.
T.A. Livingston

Place and Date of Hearing:

Kelowna, British Columbia
October 6, 2015

Place and Date of Judgment:

Vancouver, British Columbia
January 26, 2016

Written Reasons by:

The Honourable Mr. Justice Frankel

Concurred in by:

The Honourable Madam Justice D. Smith
The Honourable Mr. Justice Savage

Summary:

Appeal by W., a retired member of the RCMP, from his conviction for second degree murder. At trial, W. testified that he shot and killed his common law spouse in self-defence. On appeal, W. argued evidence of his spouse's peaceful disposition was improperly admitted at trial and, in the alternative, that the jury was improperly instructed with respect to the use of that evidence. W. also argued that the trial judge applied the wrong test in ruling inadmissible expert evidence on police firearms training tendered by the defence. Held: Appeal dismissed. The peaceful disposition evidence was properly admitted. The test is whether the disposition evidence is relevant and whether its probative value outweighs its prejudicial effect; it is not necessary for the disposition evidence to have "exceptional" probative value. It was unnecessary for the trial judge to instruct the jury on peaceful-disposition evidence with the degree of detail W. suggested. The expert evidence on firearms training was properly ruled inadmissible; the prejudicial effect of that evidence outweighed its limited probative value.

Reasons for Judgment of the Honourable Mr. Justice Frankel:**Introduction**

[1] Keith Gregory Wiens appeals his conviction on a charge of second degree murder following a trial in the Supreme Court of British Columbia before Mr. Justice Barrow sitting with a jury. The victim was Lynn Kalmring, Mr. Wiens's common law spouse. She died as a result of a single shot from a pistol fired by Mr. Wiens, which struck her in the face. The shooting occurred in the couple's bedroom. In convicting, the jury rejected Mr. Wiens's evidence that he acted in self-defence.

[2] Mr. Wiens contends that the trial judge erred in three respects, namely:

- (a) admitting evidence of Ms. Kalmring's "peaceful disposition";
- (b) inadequately instructing the jury with respect to that evidence; and
- (c) refusing to allow him to call opinion evidence to the effect that when he shot Ms. Kalmring he was acting in a manner consistent with his training as a police officer. (Mr. Wiens is a retired member of the Royal Canadian Mounted Police.)

[3] For the reasons that follow, I would dismiss this appeal.

Background

[4] In August of 2011, Mr. Wiens and Ms. Kalmring were living in a home he had purchased in a gated retirement community in Penticton, British Columbia. They had been in a relationship for about eight years. Mr. Wiens was 57 years old, five feet ten inches tall, and weighed 200 pounds. Ms. Kalmring was 55 years old, five feet six inches tall, and weighed about 150 pounds. He was employed as a school bus driver; she was not then working.

[5] The couple owned a home in Arizona that Mr. Wiens had purchased. He placed the title to that home in both of their names.

[6] At approximately 11:45 p.m. on August 15, 2011, Ms. Kalmring spoke to her sister, Shelley Pertelson on the telephone. Ms. Kalmring was sobbing and told Ms. Pertelson she and Mr. Wiens had been arguing and that she had thrown \$2,000 (U.S.) at him, along with a ring he had given her. She said Mr. Wiens told her to get a job and had gone to bed. Ms. Kalmring said she tried to find a motel room, but nothing was available. Ms. Pertelson suggested Ms. Kalmring sleep in the spare bedroom. Ms. Kalmring said she loved Mr. Wiens and did not want to leave.

[7] Shortly after midnight on August 16, 2011, Mr. Wiens called 9-1-1 to report he had shot his wife two minutes before. He told the 9-1-1 operator he was an ex-policeman and that what happened “is just a huge mistake” and that “something got out of hand here tonight”.

[8] At around 12:30 a.m. the police arrived at the residence. They found Ms. Kalmring’s body on the floor in the master bedroom. She was lying on her back having been shot once in the face at close range, i.e., less than 30 inches. That shot came from a nine millimetre semi-automatic pistol belonging to Mr. Wiens. The police located the pistol in a holster on the bed.

[9] Ms. Kalmring’s left arm was extended at almost a 90 degree angle from her body. There was a large knife in her left hand, pointing downwards. At trial, the Crown’s position was that the knife had been planted, i.e., placed in Ms. Kalmring’s

hand after she was shot. The Crown called expert medical evidence to support that position. Mr. Wiens called expert medical evidence to support his position that the knife had not been planted.

[10] An examination of the residence by the police revealed:

- The sheets on the bed in the master bedroom had been turned down on one side.
- A bathrobe lying on the bed in the master bedroom had a large blood stain. There was a beige hand towel on the bed.
- There were sex toys and a bottle of lubricant on a bedside table in the master bedroom.
- The sheets on the bed in the guest bedroom had been turned down.
- Ms. Kalmring's ring and about \$2,000 (U.S.) were on an island in the kitchen together with handwritten documents which appeared to record payments Ms. Kalmring made to Mr. Wiens towards household expenses in January, February, March, April, and May of 2011.
- A brown wooden box, in which Ms. Kalmring kept personal possessions, was near the door of the master bedroom.
- A letter written by Mr. Wiens to Ms. Kalmring shortly after midnight on January 1, 2011, in which he states: (a) he does not take kindly to being told "fuck you"; (b) is no longer prepared to pay all the expenses for a home they own in Arizona; (c) suggests they sell that home thereby giving her "a very nice profit for doing fuck all. (financially speaking!); (d) "starting January, 2011 it will be a two way street regarding financial matters"; and (e) if she wants them to stay together and get married "we each start paying our way ... as of today". [Emphasis in original.]

[11] Ms. Kalmring's daughter, Brandy Cummings, testified that at a family picnic about ten days before her mother was killed, Mr. Wiens complained to her that

Ms. Kalmring was not working. Using derogatory language, he stated that while he has a pension Ms. Kalmring has no money and needed to get back to work.

Ms. Cummings testified Mr. Wiens also told her he had lost money when the stock market crashed.

[12] Over Mr. Wiens's objection, the Crown called three former husbands of Ms. Kalmring to give evidence with respect to her peaceful disposition. That evidence and the trial judge's ruling permitting it to be called are discussed below.

[13] Mr. Wiens gave evidence. He began by relating the details of his service in the RCMP. He was a member of that force for approximately 26 years, from June 1975 until January 2001, retiring as a corporal.

[14] Mr. Wiens said he received basic training in the use of a revolver and a rifle during his initial six-month training period at the RCMP depot in Regina, Saskatchewan. He graduated from the depot in January 1976. In cross-examination, he said the following about the basic training he received:

[S]o the way I was taught is, if you're in a physical confrontation not including a weapon being used against you, you use self-defence techniques. If somebody's coming at you with a weapon, you shoot to kill, is how I was instructed, and this is 1975.

[15] In the mid-1980s, Mr. Wiens became a member of the emergency response team ("ERT"). He received specialized training in Ottawa and, on several occasions, at an RCMP training facility in Carleton Place, Ontario. In Ottawa, Mr. Wiens received expert marksmanship rifle (i.e., sniper) training. The training at Carleton Place dealt with hostage-taking situations. Those training exercises took place in what he referred to as the "killing house". Trainees would enter a three-bedroom house and be confronted with situations requiring them to make instantaneous decisions with respect to whether to fire their weapons in close quarters.

[16] Mr. Wiens said most of his ERT training involved firing a pistol similar to the one with which Ms. Kalmring was killed. He purchased the pistol he used to shoot Ms. Kalmring in the mid-1980s, when he was stationed in Yellowknife, Northwest

Territories. One of the reasons he bought it was so his late wife, who passed away in 1997, could use it for protection. He said that since acquiring that pistol he had always kept it at home loaded. The last time he fired it was in the Northwest Territories on December 31, 1989, when he used it to kill some rabid coyotes. He said that during the course of his duties as a police officer he never drew his service firearm other than to shoot an injured animal.

[17] When asked by his counsel to explain the type of shooting he did at Carleton Place, Mr. Wiens stated:

It was all what's referred to as instinctive shooting which is very close range shooting, you don't aim, you point and shoot in very rapid succession and the shooting that they taught us to do was two shots to the head.

[18] In his examination-in-chief, Mr. Wiens related how he and Ms. Kalmring met and started dating in February 2006. They began living together in June 2009. In September 2010, he purchased a home in Penticton. He also purchased a home in Arizona for their impending retirements, which he put in both their names. He said he and Ms. Kalmring were generally happy and that there were new employment opportunities for both of them.

[19] Mr. Wiens denied using the pejorative language attributed to him by Ms. Cummings, but agreed he had said something about Ms. Kalmring having to go back to work.

[20] Mr. Wiens said that on the evening of August 15, 2011, he and Ms. Kalmring had been drinking at home. They played a video game and had a bet of a sexual nature. Ms. Kalmring won the bet and put some sex toys on his pillow in the master bedroom. However, he did not want to have sex with her because he had a golf game the next morning; he put the sex toys on a bedside table. She was very upset with him; they argued and she left the bedroom. When she came back into the bedroom she was still upset and agitated. He told her he wanted to go to sleep and asked her to sleep in the guest room. She went to the guest room, but returned a few minutes later.

[21] When Ms. Kalmring came back to the bedroom she was madder than before. He told her to leave, which she did. He then heard what he took to be her looking through a telephone book; he presumed she was looking for a motel. He fell asleep.

[22] He testified that he was awakened by Ms. Kalmring hitting him. She was very mad and was screaming. They argued and she left the bedroom. He had never seen her act in this manner before. As the bedroom door did not have a lock he took a wooden box in which Ms. Kalmring kept some items and placed it behind the closed door; he wanted to be alerted if she came back into the room.

[23] Mr. Wiens said that within a minute Ms. Kalmring came back into the bedroom. She was extremely upset and screamed at him. He described her as having “snapped”. Her eyes were “bugging out”, she was “purple”, and she spit on him. She yelled, “I’ll f... die, I’m not f... leaving and I’m not f... living with my f... kids. I’m f... not doing that. I’ll f... die”. He said she repeated “I’ll f... die” about six times. In cross-examination, he said they stood nose-to-nose yelling at each other for one-and-one-half to two minutes. He described it as the worst confrontation of his life.

[24] Mr. Wiens said Ms. Kalmring left the bedroom and he heard her move down the hall towards the kitchen. He felt fearful. He closed the door and then took his pistol from a dresser drawer. He removed the pistol from its holster, threw the holster on the bed, and racked the pistol’s magazine to load a bullet into the pistol’s chamber. He did this,

Because I feared Lynn. She was not Lynn, she was crazy, and she had just assaulted me while I was sound asleep, and I was worried about what was coming next.

[25] He said Ms. Kalmring came “flying through the door”, which he was unable to hold shut. She was screaming and had a knife in her left hand. She advanced towards him. He backed away, hitting a bedpost. She was two to three feet away from him and he believed she was going to strike him in the throat or heart. Even as a police officer, he had never been in such a situation. With his elbow towards his

chest and the pistol at the height of his head, he fired a single shot at Ms. Kalmring. Her knees buckled and she fell into a seated position and then backwards on to the floor.

[26] In cross-examination, when asked whether he intended to kill Ms. Kalmring, Mr. Wiens stated:

I can't answer that. I mean, I -- I know enough about weapons to say that when you point a weapon at somebody and pull a trigger that bad things are going to happen. I mean, I did basically what I did, what I was trained to do, and it took one and a half seconds, and I did what I did because if I didn't do it I would have died. I mean, I felt my life was in danger when I saw a 15 inch butcher knife coming at my throat. So did I intend to kill her? I -- I intended to protect my life.

[27] The trial judge would not permit Mr. Wiens to call opinion evidence on how a police officer would be expected to react in the sort of confrontation Mr. Wiens described. That proposed evidence and the judge's ruling are discussed below.

[28] Whether Mr. Wiens shot Ms. Kalmring in self-defence was the critical issue that the jury had to decide. Mr. Wiens's counsel submitted to the jury that on the whole of the evidence there could be no other conclusion. Crown counsel asked the jury to reject Mr. Wiens's evidence of the altercation and to find that he intentionally shot Ms. Kalmring following an argument over money, and then planted a knife in her hand to make it look like self-defence.

Analysis

Admissibility of the Peaceful-Disposition Evidence

[29] A *voir dire* was held to determine whether the Crown would be permitted to call Ms. Kalmring's former husbands to give evidence that she had a peaceful, non-violent, disposition; that evidence reached back to 1974. It was not necessary for the former husbands to testify on the *voir dire*, as counsel agreed the admissibility question could be decided on the basis of statements the husbands had given to the police. During submissions, Mr. Wiens's counsel stated that the defence did not

intend to attack Ms. Kalmring's character by leading evidence she had acted aggressively on other occasions.

[30] The statements of the former husbands contained the following:

Robin Kuraoka: He and Ms. Kalmring were married from 1973 until 1984. When they married she was 17 and he was 23. She was never violent towards him. He never saw Ms. Kalmring being violent towards anyone, even when she had been drinking. She would get affectionate when she had been drinking.

Elmer Leroy Marchant: He and Ms. Kalmring were married from 1985 until 1993. She was not violent, even when she had been drinking. He never saw her hit anyone. Ms. Kalmring was bad with finances and money; she spent a lot of money.

Blaine Richard Kalmring: He and Ms. Kalmring were married for about six years. When they argued it was basically over finances. She never showed any physical aggression towards him. He never saw her be violent towards anyone. She did not have a drinking problem.

[31] In ruling the evidence admissible, the trial judge said this:

[32] I am satisfied the evidence is relevant in this case on the basis that, as the authors of the [*Report of the Federal Provincial Task Force on Uniform Rules of Evidence*, (Toronto: Carswell, 1982)] noted, self-defence has been raised and by necessary implication the issue of whether the deceased was the aggressor arises. Evidence of the disposition of the victim, whether towards violence or otherwise, is relevant to the resolution of that issue.

[33] Next, I find that the evidence in this case has significant probative value. I recognize that it spans a period that begins some 40 years before the events in question and ends some 10 years before the events. Its probative force lies in part in the duration of the aspect of the deceased's character to which it relates. Evidence of a disposition or inclination based on an isolated event years ago will likely be of little value. Evidence of a disposition over the course of a few years many years ago is also likely of little value. Evidence of a persistent trait over the course of most of the adult life of the deceased may, however, have significant probative value. Evidence of that trait in the context of intimate relationships, all of which ended in divorce, is the more probative, given the circumstances in the matter at bar.

...

[41] The greater the tendency of the evidence to evoke sympathy, the less likely it is that any prophylactic instruction given to constrain that risk will be effective. The tendency of the evidence to give rise to this kind of prejudice in this case is, in my view, reasonably low. Although the three former spouses may have some lingering attachment to the deceased, it is nothing like the attachment and hence the emotional quality that accompanies a parent giving evidence about his or her deceased child.

[42] Related to this concept is the risk that the jury might “conclude that the respondent was a repugnant individual deserving of punishment and a conviction would, as a matter of rough equivalence, give him his just deserts”: from [*R. v. Handy*, 2002 SCC 56, [2002] 2 S.C.R. 908] at paragraph 25. Although this comment was made in the context of evidence about an accused person as opposed to a complainant or victim, the risk identified may operate not because the jury is improperly prejudiced against the accused, but rather because they are moved to sympathy towards the victim. It seems to me unlikely that a properly-instructed jury would fall into such an error in this case. The evidence itself does not give rise to anything approaching a “rough equivalency” or the equivalent of a rough equivalency in this context, and thus the tendency to that end is relatively low.

[43] On balance, I am satisfied that the probative value of this evidence significantly outweighs any potential it has to work prejudice, and in the result I am satisfied it is admissible.

[32] The testimony of the former husbands before the jury was consistent with their statements, save for the following:

- (a) Mr. Kuraoka described Ms. Kalmring as a “loving, kind, gentle person”; they would argue about “day-to-day things” like grocery money, or relationship issues. They married in 1974 not 1973.
- (b) Mr. Marchant said he and Ms. Kalmring would argue about money once in a while.
- (c) Mr. Kalmring stated he and Ms. Kalmring were married from 1993 until 2001.

Their testimony with respect to Ms. Kalmring having a peaceful disposition was not challenged in cross-examination.

[33] Mr. Wiens accepts that when self-defence is raised in a murder case, the Crown can tender evidence of the victim’s peaceful disposition. However, he says where an accused is not suggesting the victim had a violent disposition or character,

evidence of peaceful disposition can be admitted only if it has “significant” or “exceptional” probative value. He says that in the present case the trial judge erred in admitting the evidence because its probative value was tenuous at best and outweighed by its prejudicial effect, as it could garner sympathy from the jury. In advancing his position, Mr. Wiens submits greater care and caution must be exercised before admitting peaceful-disposition evidence in what he describes as a “simple” self-defence case, i.e., one in which the accused is not alleging that the victim had a violent disposition. I do not agree.

[34] It is settled that it is open to the Crown to lead evidence of a deceased victim’s peaceful disposition when that evidence is relevant to the issue of whether the accused acted in self-defence, e.g., whether the deceased was the aggressor. The Crown’s ability to lead such evidence is not contingent upon the accused attacking the deceased’s character. However, the probative value of such evidence must outweigh its prejudicial effect: *R. v. Dejong* (1998), 125 C.C.C. (3d) 302 at paras. 49, 77, 79 (B.C.C.A); *R. v. Diu* (2000), 144 C.C.C. (3d) 481 at paras. 49-51 (Ont. C.A.); *R. v. Krasniqi*, 2012 ONCA 561 at paras. 61-63, 291 C.C.C. (3d) 236.

[35] I reject Mr. Wiens’s contention that evidence of peaceful disposition must have “significant” or “exceptional” probative value to be admissible; a proposition for which he cites no direct authority. The decision whether to admit evidence of peaceful disposition requires a trial judge to determine the relevancy of such evidence to the issues raised and, if the evidence is relevant, to assess whether its probative value outweighs its prejudicial effect. It is not a precondition to the making of that assessment that evidence which is relevant also be “significantly” or “exceptionally” probative. Rather, the cogency of the evidence is a factor to be weighed in making that assessment.

[36] The concept of relevance was discussed in *R. v. Chahley* (1992), 72 C.C.C. (3d) 193 (B.C.C.A.). In that case, Mr. Justice Wood said (at 204):

Evidence is relevant if it is probative of either a fact in issue or a fact which itself is probative of a fact in issue. In *Morris v. The Queen*, [1983] 2 S.C.R. 190, the Supreme Court of Canada rejected Wigmore’s concept of “legal

relevancy”, which requires something more than “merely probative” value as a condition of admissibility. In his dissenting judgment, with which other members of the court concurred on this point, Lamer, J. (as he then was) confirmed Thayer’s analysis which applies principles of logic and common sense to determine relevance, and which, subject to the exclusionary rules, admits all evidence logically probative of some matter required to be proved, reserving for the court only a narrowly defined discretion to exclude.

Evidence which tends to make the existence of a fact in issue either more or less probable is logically probative of that fact: *Regina v. P.(R.)* (1990), 58 C.C.C. (3d) 334 (Ont. H.C.), *Cross on Evidence* (7th ed.), p. 51.

In *R. v. Watson* (1996), 108 C.C.C. (3d) 310 at 323 (Ont. C.A.), Mr. Justice Doherty stated:

Relevance as explained in these authorities requires a determination of whether as a matter of human experience and logic the existence of “Fact A” makes the existence or non-existence of “Fact B” more probable than it would be without the existence of “Fact A.” If it does then “Fact A” is relevant to “Fact B”. As long as “Fact B” is itself a material fact in issue or is relevant to a material fact in issue in the litigation then “Fact A” is relevant and *prima facie* admissible.

[37] In the case at bar, evidence that in three previous relationships Ms. Kalmring never displayed violent tendencies towards either her partners or third parties was relevant to one of the principal issues the jury had to decide, namely, whether Ms. Kalmring attacked Mr. Wiens with a knife. Put otherwise, evidence of Ms. Kalmring’s lack of propensity for violence over a 27-year period was probative of whether on the night in question she had been the aggressor. That the last of those relationships ended about ten years before the events in issue was, in the context of this case, a matter going to the weight to be given to the evidence, not its admissibility. Although the Crown was not aware of precisely what defence evidence would be called, it was apparent from the outset of the trial that Mr. Wiens would be asserting Ms. Kalmring came at him with a knife and that he shot her in self-defence.

[38] Mr. Wiens further submits that while the peaceful disposition evidence was of minimal probative value, its prejudicial effect was significant as it was likely to garner sympathy from the jury. Once again, I disagree. For the reasons just stated, I am of the view that the evidence was more than minimally probative.

[39] With respect to prejudice arising from sympathy, as the trial judge noted in para. 41 of his ruling, this was far less a concern than it would have been had the witnesses been the parents of the victim or, I would add, a person with a recent and close personal relationship with the victim. It should be noted that Mr. Kuraoka's statement during his examination-in-chief that Ms. Kalmring was a "loving, kind, gentle person" was not in his statement and appears to have been an unprompted and unanticipated comment. It should also be noted that immediately after Ms. Kalmring's daughter testified and shortly before Mr. Kuraoka and the other former husbands testified, the judge instructed the jurors, as he had prior to any evidence being called, that they should not be influenced by sympathy for or prejudice against anyone involved in the case.

[40] The task of determining whether the probative value of evidence outweighs its prejudicial effects is an exercise of judicial discretion entitled to appellate deference: *R. v. Oseguera*, 2014 BCCA 352 at para. 19, 315 C.C.C. (3d) 542; *R. v. McCotter*, 2012 BCCA 54 at para. 50, 287 C.C.C. (3d) 423. In this case, Mr. Wiens has not been shown that in exercising that discretion the trial judge made any error in principle or that his decision to admit the evidence was plainly unreasonable.

[41] I would not accede to this ground of appeal.

Jury Charge with respect to the Peaceful-Disposition Evidence

[42] In his closing submissions to the jury, Mr. Wiens's counsel accepted Ms. Kalmring had been a person who normally had a peaceful disposition. He asked the jury to find that on the night in question a confluence of circumstances—what he described as a "perfect storm"—caused her to act completely out of character. In advancing that position, counsel stated, in part:

Through Lynn's life she had experienced many difficulties with a number of failed relationships. In fact we've heard from a number of these relationships. This is not to disrespect her in any way, but as is true for all of us, our current makeup is a function of our past experience. We heard evidence of her peaceful disposition. We don't dispute this, nor did Keith when you heard him on the witness stand. But the factors that led to the perfect storm that I will talk about, started long before August 16th, 2011, ladies and gentlemen. It

started with her failed relationships. Past relationships can scar you forever. I can certainly identify with this, and I'm sure many of you can.

...

In the weeks leading up to August 19th [sic], 2011, you heard the evidence about a number of things that were on the mind of the deceased. Any single one of us -- any single one of which would cause us all hardship. There were multiple things on her mind. Her son had been charged with a serious sexual assault in Grande Prairie. Any mother would be mortified by that. She talked about her daughter Brandy and the abortion of her twins. She talked about her growing older and the fact she didn't like being 55 years of age. There was her inability to go back to work because of the enrolment at the place that she was instructing at, and the fact that Keith was going to leave her -- perhaps leave her side to journey to Grande Prairie. Was Keith going to leave her like everyone else had in her life? We'll never know. Ladies and gentlemen, all of these factors, her past relationships, everything that was on her mind at the time leading up to August 16th, 2011, led to the perfect storm.

...

Keith described his wife during these confrontations. He described the intensity of these -- of these confrontations, and he was quite fair when he said, "It wasn't just her, I was getting angry too. She kept coming into the room, she kept making these allegations. She kept" -- and as he said, she started to get crazy. Now, ladies and gentlemen, the only evidence you've heard about what happened that night is from Keith. There is nothing else in the evidence before you that can refute that. Nothing.

[Emphasis added.]

[43] Crown counsel, in asking the jury to reject Mr. Wiens's version of what happened relied on the peaceful-disposition evidence. In part, counsel stated:

The point is, I suggest, how likely is it that a woman never known to be violent, and openly expressive of a dislike of weapons, would arm herself with a knife for an offensive purpose following a fight? And why would she advance with that knife towards someone who has a gun in their hand? It simply does not make sense.

...

These men established that for the whole of Lynn Kalmring's adult life in relationships of some duration she was never violent. She got over fights quickly, she didn't stew over things. She was a person of peaceable disposition whether sober or even after she had been drinking alcohol.

Now, it might be suggested that people change, and to some extent that's true, but I suggest to you, ladies and gentlemen, that people's character, their essential disposition, the core of who they are doesn't change over time. So the person described to you by Keith Wiens on the fatal evening bears no relationship to the Lynn Kalmring that was described by others. The description of her spitting, eyes bulging out, turning purple is just not true.

[44] Mr. Wiens's objection to the jury charge relates to para. 117 of the written version of the charge provided to the jury. That paragraph appears in the following section of the charge:

- a) Has the Crown proved beyond a reasonable doubt that Ms. Kalmring did not assault Mr. Wiens?

[114] The question is whether Ms. Kalmring assaulted Mr. Wiens and, if she did, whether Mr. Wiens killed Ms. Kalmring in repelling that assault.

[115] Assault includes the application of force or the threat to apply force. To put this another way, it is not necessary that a person apply force to another to constitute an assault; a threat to apply force made by a person who has the present ability to carry out the threat is sufficient. You should consider all the evidence when determining whether Ms. Kalmring applied force to Mr. Wiens or threatened to apply force to Mr. Wiens in circumstances in which she had the present ability to carry out that threat.

[116] The evidence in relation to this issue comes from a number of sources. There is the evidence from Ms. Kalmring's former spouses. You will recall that each of them testified that in their experience with her and whether in the course of their experience with her they saw her resort to violence. They all said that from time to time they argued with Ms. Kalmring during the course of their relationship with her and they all said that finances was a subject that they argued about, they all said that she was never violent towards them or anyone else either when the [sic] argued or otherwise. They said that alcohol did not seem to have a negative effect on her; both Mr. Kuraoka and Mr. Kalmring said that when she drank she tended to become happy. Their collective experience with Ms. Kalmring was from about 1974 when she married Mr. Kuraoka to 2001 when she separated from Mr. Kalmring. Thus their most recent experience with Ms. Kalmring was 10 years before August 2011.

[117] The evidence of Ms. Kalmring's disposition may be used by you in deciding whether the Crown has proved beyond a reasonable doubt that she did not assault Mr. Wiens. This evidence and other evidence in this case, may evoke feelings of sympathy for Ms. Kalmring. As I have instructed you already, your decision is not to be based on sympathy for or prejudice against anyone involved in this case.

[Emphasis added.]

[45] The trial judge went on to summarize the other evidence in the case, at the conclusion of which he stated:

[143] You should consider Mr. Wiens's evidence on this issue in the context of all of the evidence. If, in the context of all the evidence, you believe Mr. Wiens's evidence on this issue then you will conclude that the Crown has not disproven this element of the defence of self-defence beyond a reasonable doubt. Even if you do not believe Mr. Wiens's evidence that

Ms. Kalmring assaulted him, if his evidence leaves you in a state of reasonable doubt about whether she did, then you will conclude that the Crown has not disproven this aspect of the defence of self-defence beyond a reasonable doubt. Finally, even if you do not believe Mr. Wiens's evidence on this point and even if his evidence does not leave you in a state of reasonable doubt about this aspect of the defence of self-defence, you must still ask yourself whether, on all the other evidence, you are satisfied beyond a reasonable doubt that Ms. Kalmring did not assault Mr. Wiens.

[144] If the Crown has proved beyond a reasonable doubt that Ms. Kalmring did not assault Mr. Wiens then the defence of self-defence fails.

[46] In the course of summarizing the Crown's position, the trial judge said:

[200] Finally, the Crown argues that from this evidence you should conclude that Ms. Kalmring was not a violent person, either when drinking or not. Support for that proposition comes from the evidence of her former spouses. In addition the Crown says that Ms. Kalmring was not angry on the night she was killed. She was upset to be sure but, at least according to her sister, she was upset in the sense that her heart was hurting. Further, the Crown says that from all of this evidence you can and should conclude that Ms. Kalmring disliked weapons of all kinds but guns in particular.

[47] In the course of summarizing Mr. Wiens's position, the judge said:

[209] As I understand the submissions of Mr. McKay on behalf of Mr. Wiens they are these. First, he argues there is simply no reason why Mr. Wiens would shoot Ms. Kalmring other than to defend himself in precisely the manner he told you. The evidence supports the conclusion that theirs was a happy relationship. Mr. McKay asks rhetorically if money issues were a concern why it is that Ms. Pertelson seemed unaware of that? Even if money was a concern it does not begin to explain why Mr. Wiens would deliberately shoot his spouse. On the other hand, there are reasons for why Ms. Kalmring behaved in the manner Mr. Wiens described. The reasons can be found in her background, a background that came to the fore with the prospect of Mr. Wiens travelling to Grand Prairie to work. Mr. McKay argues that Ms. Kalmring was fearful of losing her relationship with Mr. Wiens. The prospect of returning to live with one of her children, an alternative which she saw as the only realistic short term outcome, was completely unpalatable to her. She did not want to start over in another relationship at her age.

[210] These concerns were percolating in her life. They had a significance informed by her life experiences. She had been in past relationships some of which ended sadly from her point of view. On top of that she had other issues. One related to her work and the fact that the course she hoped to teach was not going to be offered and another related to her son's legal situation. This all came to the fore on August 15 when, after the video game, Mr. Wiens wanted to go to bed rather than pay the bet, a payment which involved sexual relations with Ms. Kalmring. This is what caused Ms. Kalmring to react in the manner that Mr. Wiens said she did.

[48] Before charging the jury the trial judge provided counsel with a draft of his proposed instructions for discussion. As those discussions proceeded, the draft went through a number of revisions. The initial draft did not contain the paragraph which is now impugned. That paragraph appeared for the first time in the final draft given to counsel. The trial judge's decision to include it was not based on any submissions made to him. Counsel for Mr. Wiens (who are not counsel on this appeal) had an opportunity to review the final draft before the jury was instructed and did not object to this paragraph. Further, in the post-charge discussions, Mr. Wiens's counsel did not object to it.

[49] Mr. Wiens now contends the charge was deficient. He says the trial judge should have instructed the jury to exercise caution in relying on the peaceful-disposition evidence because people do not always act in a manner consistent with their past behaviour; in other words, people sometimes act out of character. In addition, Mr. Wiens says the jury should have been told to consider the temporal proximity of the evidence of peaceful disposition to the events in issue and any differences between the nature of Ms. Kalmring's past circumstances and her present situation when assessing the weight to be given the peaceful-disposition evidence. He submits that in the absence of such an instruction there is a significant risk that the jury reached its verdict without scrutinizing the peaceful-disposition evidence.

[50] In discussing the jury instructions and the peaceful-disposition evidence, Mr. Wiens cites *R. v. Handy*, 2002 SCC 56 at paras. 31, 35, 39, [2002] 2 S.C.R. 908, and *R. v. Last*, 2009 SCC 45 at para. 40, [2009] 3 S.C.R. 146, cases which discuss the dangers associated with propensity reasoning in the context of evidence with respect to the character of the accused. He says since it is dangerous to base a finding of guilt on the character of an accused it is equally dangerous to base a finding of guilt on the disposition of a victim.

[51] In considering Mr. Wiens's objection to the jury charge it is important to keep in mind, as discussed in *R. v. Jacquard*, [1997] 1 S.C.R. 314 at para. 32, that an

appellate court must take a “functional approach” in reviewing a jury charge. Further, as stated in *Jacquard* at para. 38, “defence counsel’s failure to object to the charge says something about both the overall accuracy of the jury instructions and the seriousness of the alleged misdirection.” See also: *R. v. Rodgerson*, 2015 SCC 38 at para. 50, [2015] 2 S.C.R. 760; *R. v. Daley*, 2007 SCC 53 at para. 58, [2007] 3 S.C.R. 523.

[52] More recently in *R. v. Alexander*, 2015 BCCA 484, Madam Justice Stromberg-Stein, succinctly described the approach to be taken in reviewing a jury charge:

[110] An appellate court, when reviewing a jury charge, must consider the alleged error in the context of the charge and the trial as a whole. A trial judge is allowed flexibility in instructing the jury. The precise words used in the jury charge are a matter of discretion for the trial judge and will depend on the circumstances of the case. It is the overall effect of the instructions that matters: *R. v. Araya*, 2015 SCC 11 at para. 39.

[111] An accused is entitled to a properly instructed jury, not a perfectly instructed one. If perfection were the standard, no jury charge would pass appellate review: *R. v. Jacquard*, [1997] 1 S.C.R. 314 at paras. 1-2.

[112] It is the trial judge’s obligation to properly instruct the jury; however, it is expected that counsel will assist the trial judge and identify aspects that may be problematic in the charge. A failure to object to a jury charge is not determinative; however, trial counsel’s position at trial is an important factor to consider when evaluating complaints raised on appeal: *Jacquard* at paras. 35-38; *R. v. Purchase*, 2015 BCCA 211 at paras. 3-4.

Also apposite is the judgment of Mr. Justice Doherty in *R. v. MacKinnon* (1999), 132 C.C.C. (3d) 545 (Ont. C.A.):

[27] In *Jacquard*, Lamer C.J.C. stressed that a functional approach must be taken when assessing the adequacy of jury instructions. I take this to mean that instructions must be tested against their ability to fulfil the purposes for which they are given and not by reference to whether any particular approach or formula has been used. By the end of the instructions, whatever approach is used, the jury must understand:

- the factual issues which had to be resolved;
- the law to be applied to those issues and the evidence;
- the positions of the parties; and
- the evidence relevant to the positions taken by the parties on the various issues.

[53] In my view, having regard to the submissions of counsel and the charge as a whole, there was no need for the jury to be instructed to exercise special caution in considering the peaceful-disposition evidence. Mr. Wiens did not take issue with the fact that ordinarily Ms. Kalmring was a non-violent person. His defence was founded on her having acted completely out of character on the night in question. Based on his counsel's closing submissions and the summary of those submissions provided by the trial judge, the jurors would have been aware of Mr. Wiens's position. More particularly, they would have been aware that to reject self-defence they had to be satisfied beyond a reasonable doubt, on all the evidence, that Ms. Kalmring had not acted in the manner Mr. Wiens described. The unchallenged evidence of her peaceful disposition was just one of the pieces of evidence the jurors had to consider in making that determination. I am, accordingly, unable to find that Mr. Wiens was prejudiced by the trial judge's failure to instruct the jury to exercise special caution in considering the peaceful-disposition evidence.

[54] I would not accede to this ground.

Admissibility of Expert Evidence

[55] Mr. Wiens sought to call Murray Charlton to give opinion evidence. Mr. Charlton had been a member of the RCMP from 1964 to 1977. In the 1970s he served as a firearms instructor at the RCMP depot in Regina, Saskatchewan. Since leaving the RCMP he has been involved in training peace officers in the use of firearms. Part of the training he administers involves placing trainees in stressful situations. Mr. Charlton had not trained RCMP ERT members in the handling of firearms, nor had he visited or participated in training at the RCMP facility in Carleton Place, Ontario. He did not interview, test, or otherwise assess Mr. Wiens.

[56] Mr. Wiens sought to place before the jury Mr. Charlton's opinion in response to the following questions:

1. Was Mr. Wiens's response to the alleged knife attack reasonable and expected considering his background?

2. How would Mr. Wiens's past training have affected his reaction?
3. What is "muscle memory" in this context?
4. What is significant about the fact of one shot being fired?
5. In terms of self-defence, was Mr. Wiens's response proportionate?

[57] A *voir dire* was held to determine the admissibility of Mr. Charlton's evidence. Mr. Charlton testified on the *voir dire* and a written report prepared by him was filed as a *voir dire* exhibit. The opinions expressed in that report are based on a summary of the facts that is consistent with Mr. Wiens's description of the events on the night in question. The report is silent with respect to Mr. Charlton's knowledge of the firearms training Mr. Wiens received.

[58] The trial judge would not permit Mr. Charlton to express an opinion on any of the five questions. On appeal, Mr. Wiens contends the judge erred in refusing to permit Mr. Charlton to opine on question 4 and, to the extent it is related, question 2. He does not challenge the judge's refusal with respect to questions 1, 3, and 5.

[59] As set out in Mr. Charlton's written report, if permitted to testify before the jury, he would have answered Questions 2 and 4 as follows:

Question 2:

With his past training, it would be more than reasonable for him to pull the firearm close to his body before discharging it. This would have been part of his training for what is call [*sic*] "Close Quarter Drills." Extending ones [*sic*] firearm out at arm's length when the threat is within 30 inches is not practical with the possibility of your duty sidearm being pushed aside or grabbed is too real.

Question 4:

With respect to one shot being fired this is not unusual in that with training, officers at [*sic*] taught to use deadly force to prevent grievous bodily harm and once any threat is removed or neutralized, there is no more need to continue firing.

[60] In his ruling, which is indexed as 2013 BCSC 1579, the trial judge considered the four criteria set out in *R. v. Mohan*, [1994] 2 S.C.R. 9 for determining the admissibility of opinion evidence, namely: (a) relevance; (b) necessity in assisting

the trier of fact; (c) the absence of any exclusionary rule; and (d) a properly qualified expert.

[61] The trial judge held the answers to questions 2 and 4 were inadmissible for four reasons. The first was that those answers were only marginally relevant. In reaching this conclusion, the judge began by noting that the events in issue occurred years after Mr. Wiens retired from the RCMP. He also noted that although Mr. Charlton was a highly qualified firearms instructor, he had no knowledge of the ERT firearms training Mr. Wiens received. The judge then stated:

[23] Mr. Wiens did not testify about whether he was trained to fire a single shot or fire multiple shots when faced with a deadly threat. He merely testified that he was taught to shoot to kill. Mr. Charlton testified on the *voir dire* about what constitutes an acceptable “course of fire”. He said that has changed or evolved over time. “Course of fire” involves a number of shots that peace officers are trained to discharge and where they are trained to hit their targets. Initially, they were trained to empty their weapons into the torso of the threat. Next, they were taught to fire once at the torso, once at the head, and once again at the torso. Mr. Wiens did not testify which of these approaches he was taught. Thus, in a general sense, Mr. Charlton’s opinion about the significance of Mr. Wiens’ decision to fire a single shot at his spouse is of some relevance, but not great relevance.

[24] In *[R. v. Mohan, [1994] 2 S.C.R. 9]*, Sopinka [J.] pointed out that subsumed within the notion of relevance as a criterion for the admission of expert opinion evidence is the notion of the cost of the admission of such evidence to the trial process. In that respect, the criteria of relevance involves an assessment of the probative value of the evidence and its potentially prejudicial effect. While I accept that Mr. Charlton’s evidence has some relevance, its probative value is not high for the reasons indicated. His evidence has the potential to operate prejudicially. That is so, in part, because of his impressive credentials. Those credentials do not necessarily translate to the circumstances of this case. This is the second overarching objection that the Crown raises. As Mr. Charlton pointed out, the training he administered and with which he is familiar is training used by police officers in the course of their duties as police officers. He pointed out that the training is administered to and expected to be utilized by peace officers who are on duty and sober. Mr. Wiens was neither. He was 12 years post-retirement and was not sober at the time of the events in question. He testified that he did not think he could operate a vehicle legally given the amount of alcohol he had consumed. These features, that is, the consumption of alcohol, the fact that Mr. Wiens was not employed as a police officer at the time in question, the fact that he was some 11 or 12 years into his retirement, and the fact that there is no evidence as to the training he received in terms of “course of fire” all serve to diminish the probative value of the evidence. The prejudicial effect lies in a combination of the impressive credentials of the witness and the substance of his opinion which must necessarily be advanced from the

perspective of an individual employed as a peace officer and sober. These two things in combination serve to tip the balance in favour of exclusion.

[25] A further consideration in relation to question 4 involves an assessment of what the opinion is relevant to. It is not clear to me whether the opinion is offered to account for the fact that only one shot was fired, and yet one might expect that faced with a homicidal attack, someone acting in self-defence would fire repeatedly. If that is the basis upon which the evidence is proffered, it has limited value and would not assist the trier of fact. I say that because, on the evidence, the wound that Ms. Kalmring sustained rendered her instantly unconscious and killed her almost instantly. She would have dropped to the floor more or less immediately. That would have been apparent to anyone, including Mr. Wiens given his proximity to her and where he knew the bullet had struck her. Whether his training caused him to fire only a single shot is something he did not allude to in his evidence. It seems to me that Mr. Charlton's opinion on this point would be of limited assistance at best.

...

[28] The proffered evidence from Mr. Charlton is evidence which, in my view, should attract a strict application of the relevance and necessity criterion. As to the former, I find the evidence is not particularly probative. I note that relevance in this context means something more than merely helpful. As to the latter, it seems to me that whether a particular response is proportionate in the context of the fact situation presented by this case is a matter within the knowledge of the average juror. In fact, it is a matter which jurors are well suited to assess based on their life experiences and the application of their common sense. Finally, there is some risk that given Mr. Charlton's impressive qualifications, his opinion would be afforded more weight than it warrants in these circumstances.

[62] In deciding whether to admit opinion evidence, trial judges exercise a gatekeeper function. As those judges are in the best position to make such determinations, their decisions are entitled to appellate deference. Apt in that regard is the following from the judgment of Mr. Justice Mainella in *R. v. Pearce*, 2014 MBCA 70, 318 C.C.C. (3d) 372, recently cited with approval by this Court in *R. v. Orr*, 2015 BCCA 88 at para. 65, 18 C.R. (7th) 158:

[74] Appellate deference will be afforded to determinations as to the admissibility of expert opinion evidence. The balancing of its potential probative value, reliability, significance to the trial, necessity and its potential prejudicial effect to the trial process, if admitted, in the context of the particular case "does not involve the application of bright line rules, but instead requires an exercise of judicial discretion" [(*R. v. Abbey*, 2009 ONCA 624, 246 C.C.C. (3d) 301] at para. 79). Therefore, absent an error in law, a misapprehension of evidence, a failure to consider relevant evidence or abdication by the trial judge of his or her gatekeeper function, an appellate court should decline to interfere with a trial judge's admissibility decision

([*R. v. K.(A.)* (1999), 45 O.R. (3d) 641 (C.A.)] at para. 93; [*R. v. D.D.*, 2000 SCC 43, [2000] 2 S.C.R. 275] at paras. 12-13, 70; [*R. v. J.-L.J.*, 2000 SCC 51, [2000] 2 S.C.R. 600] at para. 61; and *R. v. Woodard (J.)*, 2009 MBCA 42 at para. 14, 240 Man. R. (2d) 24).

[63] In the present case, Mr. Wiens submits that the trial judge erred in law because he applied the wrong test in considering whether the probative value of Mr. Charlton's evidence was outweighed by its prejudicial effects. He says that because Mr. Charlton was called as a defence witness, the judge was required to consider whether the prejudicial effect of his evidence substantially outweighed its probative value. In support of this argument, Mr. Wiens cites *R. v. Seaboyer*, [1991] 2 S.C.R. 577 at 621; *R. v. Grant*, 2015 SCC 9 at para. 44, [2015] 1 S.C.R. 475; *R. v. Bell* (1997), 115 C.C.C. (3d) 107 at para. 28 (N.W.T.C.A.); *R. v. Doodnaught*, 2013 ONSC 4534 at paras. 30-33; and *R. v. Al-Rassi*, 2013 NSSC 211 at para. 24, 331 N.S.R. (2d) 328. See also: *R. v. M.(B.)* (1998), 130 C.C.C. (3d) 353 at paras. 88-89 (Ont. C.A.).

[64] In light of the record in this case, it is unnecessary to decide whether the test for the admission of opinion evidence at the behest of an accused is different from the test that applies when such evidence is sought to be tendered by the Crown.

[65] The first difficulty with Mr. Wiens's argument is that the test he says the trial judge should have applied is not the test he advanced at trial. At trial he relied on *Mohan*, in which Mr. Justice Sopinka, in discussing the relevance criterion, stated (at 21) that, "Evidence that is otherwise logically relevant may be excluded on [the cost benefit analysis] basis, if its probative value is overborne by its prejudicial effect". At no point did Mr. Wiens suggest to the trial judge that a different standard applied when the defence seeks to tender opinion evidence. Of note, is that *Mohan* is a case in which the Supreme Court of Canada affirmed a trial judge's decision to exclude the evidence of a defence expert.

[66] The second difficulty with Mr. Wiens's argument is that it is apparent from the trial judge's ruling that had he applied the test now being propounded, he would have reached the same conclusion. The judge found Mr. Charlton's opinion had

some relevance but that it was of limited probative value. However, the judge found numerous factors caused the prejudicial effect of Mr. Charlton's opinion evidence to outweigh its probative value including: (a) Mr. Wiens not having testified he fired a single shot because he had been trained to do so; (b) Mr. Charlton's limited knowledge of the training Mr. Wiens received; and (c) the events in issue did not involve a sober police officer acting in the course of his or her duties. In addition, the trial judge found Mr. Charlton's opinion with respect to only one shot being fired would not be of assistance to the jury because it would have been apparent to Mr. Wiens as soon as he fired that single shot, that Ms. Kalmring had been killed.

[67] In this case, the trial judge exercised his gatekeeper function having regard to the facts of the case before him. He was in the best position to determine whether the jury would be able to reach a proper verdict in the absence of Mr. Charlton's opinion. While another judge might have exercised his or her discretion differently, I am unable to say that in making what amounted to a judgment call, the trial judge committed a reversible error.

[68] I would not accede to this ground.

Disposition

[69] I would dismiss this appeal.

"The Honourable Mr. Justice Frankel"

I AGREE:

"The Honourable Madam Justice D. Smith"

I AGREE:

"The Honourable Mr. Justice Savage"

Tab 28:

R. v. Wolkins, 2005 NSCA 2

NOVA SCOTIA COURT OF APPEAL

Citation: *R. v Wolkins*, 2005 NSCA 2

Date: 20050105

Docket: CAC 216712

Registry: Halifax

Between:

Ronald D. Wolkins

Appellant

v.

Her Majesty the Queen

Respondent

Judges:

Glube, C.J.N.S.; Cromwell and Fichaud, JJ.A.

Appeal Heard:

November 10, 2004, in Halifax, Nova Scotia

Held:

Leave to appeal is granted but the appeal is dismissed per reasons for judgment of Cromwell, J.A.; Glube, C.J.N.S. and Fichaud, J.A. concurring.

Counsel:

Elaine Cumming, for the appellant
Paul Adams and Shaun O'Leary, for the respondent

Reasons for judgment:

I. Introduction:

[1] Mr. Wolkins was charged with lobster fishing outside his licence area. He chose to be represented at trial by an agent rather than a lawyer. After his conviction, he appealed to the Summary Conviction Appeal Court (“SCAC”) on the basis that his agent had represented him with such incompetence that the conviction was a miscarriage of justice. The SCAC dismissed the appeal, holding that this was not a case of a miscarriage of justice but of unsuccessful trial tactics. Mr. Wolkins now seeks leave to appeal to this Court raising essentially the same issues as he did in the SCAC.

[2] The appeal involves a tension between the individual’s right to make choices about his or her defence and the right to a fair trial. Stripped to its essentials, Mr. Wolkins says that there was evidence available at trial which, if it had been called, might have resulted in an acquittal. Mr. Wolkins tries to blame the failure to call the evidence on both his agent and the trial judge. However, his efforts to avoid his own responsibility for this decision, as well as its consequences, are, in my view, completely unsuccessful.

[3] The decision not to call evidence or to testify was a decision Mr. Wolkins was entitled to make. He has not shown that anyone misled him or misinformed him about how to make that choice. Mr. Wolkins does not suggest that his agent advised him not to call the evidence or in any way prevented him from doing so. He does not suggest that he failed to understand the trial judge’s explanation of the risks of not calling evidence or the clear direction to call evidence or forgo that right. In his affidavit advanced on appeal, although it appears he now wishes that he had testified at trial, he does not set out what his evidence would have been in relation to this charge. He advances the transcript of his evidence given at the trial of another charge for the same offence, but his evidence at that trial is far from compelling evidence in relation to this one. What we are left with at the end of the day, as the SCAC decided, was a trial tactic that did not work and an attempt, by way of appeal, to try something else.

[4] I would dismiss the appeal.

II. Facts and Judicial History:

[5] Mr. Wolkins says that his agent was incompetent and the conviction is a miscarriage of justice. Proper analysis of these submissions requires a detailed review of the facts.

1. The proceedings leading to trial:

[6] Mr. Wolkins is the captain of a lobster boat and has a licence permitting him to fish in area LFA 33. In April of 1999, fisheries officers pulled some lobster traps with Mr. Wolkins' tag numbers on them from the water in an adjoining area, area LFA 34, in which he was not licensed to fish. He was charged with contravening a condition specified in his license by fishing out of his permitted area contrary to The Fisheries (General) Regulations and s. 78(a) of the **Fisheries Act**, R.S. 1985, F-14.

[7] The road to trial was long and rocky. Mr. Wolkins pleaded not guilty to the charge in June of 1999 and a trial date was set for September 9th. Mr. Wolkins did not object to the date. In fact, he confirmed at a subsequent appearance on another charge that the September 9th date was a good date and that he would be representing himself.

[8] The Crown appeared with its witnesses on September 9th but Mr. Wolkins, having given no notice, requested the matter be adjourned. He said he was not ready for trial. He told the Court that he was consulting with "legal advisers" and needed more time. The Crown did not oppose the adjournment. The judge, Prince, P.C.J., set a new trial date for October 27. Mr. Wolkins confirmed that was a good date for him. The judge drew attention to his concern that the matter move ahead and told Mr. Wolkins that he would have to be ready for trial on October 27. It was unclear at this point whether or not Mr. Wolkins intended to be represented at trial.

[9] From the transcripts in the record, it appears that Mr. Wolkins thereafter appeared with his agent, Mr. Grady. Mr. Grady appeared on his behalf on October 15 and confirmed the trial date of October 27. On that date, Mr. Wolkins

appeared with Mr. Grady for trial. It appears the case was not reached until early afternoon. Mr. Grady advised the Court that he expected a full day would be needed and that it would be best to put the trial over to a date that would permit “a morning start.” After discussion, the trial (as well as the trial of another charge not before us) was put over until March 8 and 9, 2000.

[10] On March 2, 2000, Mr. Grady appeared to speak to a notice he had delivered on behalf of Mr. Wolkins apparently concerning a **Charter** application he intended to make. The judge decided that: the **Charter** application would proceed first; Mr. Grady would provide a list of his witnesses and will-say statements on the **Charter** issues; the matter would return to Court on June 8th, 2000; and that the trial would be adjourned to November 2 and 3.

[11] Mr. Grady sent a letter to the Court dated June 6, 2000 in purported compliance with this direction. The letter asserted that the case was important not only for the defendant, but “for the future” of the Southwest Fisherman’s Rights Association. However, the letter shed no light on the nature of the so-called “**Charter** defence” or its factual foundation. Subsequently, the trial was adjourned to March 29 and 30, 2001, and adjourned again before finally starting on September 6, 2001, two years after the initial trial date.

[12] From the transcripts in the record, it appears that the trial judge was presiding over other cases in which Mr. Grady was also appearing as agent, one in relation to another fisher charged with fisheries offences and another involving Mr. Wolkins on other charges.

2. The trial:

[13] On September 5, 2001, the day before the trial was to begin, the judge received a fax from the Southwest Fisherman’s Rights Association. The letter requested that the Association be permitted to intervene in Mr. Wolkins’ case and identified him as its president.

[14] At the opening of the trial on September 6, the judge referred to this fax. Mr. Grady indicated that he could appear on behalf of the application. He confirmed that the Association was seeking additional time to get representation to make its intervention application. The case for delay was hardly compelling. It is

obvious from Mr. Grady's June 6th, 2000, letter to which I referred earlier, that the alleged importance of the case to that Association had been identified well over a year earlier. Mr. Grady indicated that he "...had no indication that the application should be ... placed before the Court with the appropriate evidentiary context." Mr. Grady said he could have his witnesses "tomorrow". The judge was obviously and rightly disturbed by this attempt to further delay the trial. An exchange between the Court and Mr. Grady ensued:

THE COURT: The problem is, is that the obligation is counsel and in your case, the agent, to make themselves aware of the requirements of the law with respect to these matters so that number one, appropriate notice can be given to all parties, so that all necessary evidence can be marshalled and presented at a time which won't interfere with the progress of the trial. As I've said, this matter's been ongoing for several years without any progress being made. The trial time was booked to ensure that the matter was dealt with in a timely - as timely as we can now, with the passage of two years, and that's the Court's ruling, so we'll move on.

MR. GRADY: If I may, Your Honour, ah, if it pleases the Court and the interest of justice, we would be prepared to bring those witnesses before the Court tomorrow.

THE COURT: I've already ...

MR. GRADY: Our understanding ...

THE COURT: I've already made my ruling. This was something that should've been done beforehand. Is the Crown ready to proceed with its case?

MR. DIPERSIO: It is, Your Honour.

THE COURT: Call your first witness please. Okay.

[15] Mr. Grady then indicated that the defence had several preliminary motions to make. The first related to disclosure. Upon questioning the Crown and the Crown's confirmation of certain facts with the fisheries officers, the judge was

satisfied that proper disclosure had been made. Mr. Grady then indicated that “..we’d like to note for the record, an exception to that rule.”

[16] Mr. Grady sought, and the judge granted, an order excluding witnesses. He then sought instruction from the Court regarding the elements of the offence which had to be proved by the Crown which the judge provided.

[17] The Crown then called its case. Mr. Grady cross-examined the Crown witnesses at some length, at times “noting exceptions” to adverse rulings by the judge in relation to some of his questions.

[18] In brief, the case for the Crown was this. Fisheries officers were patrolling the line between areas 33 and 34. They pulled some baited traps from area 34 and, by the tag numbers, discovered they belonged to Mr. Wolkins who was licensed only for area 33.

[19] After the Crown’s second witness, at about 1:30 in the afternoon, Mr. Grady indicated that the next day would be “too soon” to start the trial on the second charge against Mr. Wolkins because of the **Charter** arguments he intended to make. It became clear that, contrary to the judge’s clear direction, Mr. Grady had failed to serve material setting out in any meaningful way the evidentiary basis of his application. The judge made it crystal clear that the defence would have to be ready to go at the close of the Crown’s case. The following exchange between the judge and Mr. Grady ensued:

THE COURT: Now, my point is and we’ll move on from here with the Crown’s case, is that we’ve got to be ready to argue this in the appropriate stages in the time frame that - that’s shaping up right now ...

MR. GRADY: Yes, Your Honour.

THE COURT: ... so, we gotta be prepared if the Crown’s case finishes today, we gotta be prepared to start the defence’s case. Okay.

MR. GRADY: With all due respect Your Honour, the defence is in no position to call witnesses and evidence - call

witnesses and evidence ah, in connection with its **Charter of Rights** challenge.

THE COURT: Well, how come?

MR. GRADY: Tomo ...

THE COURT: How come?

MR. GRADY: Because Your Honour, ah, we've only - in fact at this moment, we've - we're only a certain distance into the Crown's case and it's already 1:30 p.m.

THE COURT: How many more - how many more witnesses do you have?

MR. GRADY: On the 6th or 7th.

MR. DIPERSIO: Two Your Honour, one of which will be brief, and then the individual we'll be seeking to qualify to give opinion evidence with respect to marine navigation.

THE COURT: Even thinking that the rest of the Crown's case will take today, which it may not if the Crown's assessment of the witness and the number of witnesses is accurate, you have to be ready to go by tomorrow. That's - that's what I'm insisting on, and if you're not ready to go tomorrow, ah, in my view it's inappropriate, because we've booked this time to deal with these matters and you had many many months to prepare and many many months to have the witnesses ready to go.

MR. GRADY: Forgive me Your Honour, if I sound as though I'm puzzled, but the defence understood that it had given notice as required onto the **Act**, that there would be constitutional questions arising. The defence also gave notice that it would be calling certain categories of witnesses and the defence did not name those categories or state tht it was prepared to carry it forward on that defence.

THE COURT: Well, it doesn't matter whether the - whether the defendant says that. I - I'm the one who has to manage these - these cases ...

MR. GRADY: Yes, Sir.

THE COURT: ... and I have to manage them in an appropriate way ...

MR. GRADY: Yes, Sir.

THE COURT: ... and in my view, with the length of time that's intervened between the first appearance and today, it would seem to me that it would not have been a big stretch to be prepared to deal with the evidence on the days that we'd set, so that there wouldn't be a necessity to adjourn matters for months and months and this matter's gone on for several years.

MR. GRADY: With all due respect, Your Honour, ah, in order to have evidence for presentation in court tomorrow, the defence would have had to subpoena its witnesses and inform the Crown of the substance of the testimony to be provided by these witnesses and again, I do make apology Your Honour, but it does not seem likely that we'll be able to do that, namely name the witnesses and inform the Crown of the substance of the evidence that these witnesses would give until we've heard the witnesses and had an opportunity to review their testimonies.

THE COURT: It's not the way - it's not the way it's going to work, and all I'm telling you is if the **Charter** - if you have the **Charter** application to proceed, okay.

MR. GRADY: Yes.

THE COURT: It's going to have to proceed when the Crown's finished the case. It's as simple as that. If - if you have witnesses, you have witnesses, if you don't, you don't, because as I say, it's the responsibility of the applicant to make sure that the application can proceed. It's the responsibility of the applicant to ensure that witnesses are subpoenaed if witnesses are - are required for the application. It's the responsibility of the applicant to

ensure that the Crown has received notice and a disclosure of the type of evidence that's expected from each witness, so that there can be preparation. If that hasn't happened here, I'll deal with that when we're through with - with this. That's the way it's going to be.

[20] By 1:30 on the first day of trial no one, including Mr. Grady and Mr. Wolkins, could have been in any doubt that the defence would have to be ready to proceed the next day.

[21] The Crown then called its remaining two witnesses, including an expert. The judge instructed Mr. Grady on the process and legal test for the admissibility of expert witnesses. Mr. Grady cross-examined the expert on the qualifications *voir dire* and presented arguments concerning the inadmissibility of the proposed expert's testimony. The judge found the witness qualified to give opinion evidence concerning "... marine navigation in the plotting of boundaries and locations on marine charts." The witness testified that he plotted the location of the traps and found that they were just over half a mile inside the boundary of area 34.

[22] The Crown closed its case and Mr. Grady once again said he had **Charter** matters to raise but that he would not be ready to proceed with them the next day. This exchange ensued:

THE COURT: ... Well, then you'll be in a position to call evidence then tomorrow and we'll deal with those issues at that time.

MR. GRADY: Yes, Sir, but if I may say so, so that I go away understanding, we are not prepared to call witnesses and evidence on the constitutional issues arising from this matter until the defence has had a reasonable opportunity to review the evidence presented by the Crown and it's side of the case today, and to prepare the necessary materials, including the names of the final witnesses.

THE COURT: Well, you're going to have to do something between now and tomorrow, because that's going to have to be argued by tomorrow.

MR. GRADY: Your Honour.

THE COURT: And, that's my ruling.

MR. GRADY: Yes, Sir. You've been very very kind to me, and I appreciate your kindness, but I'm, with all due respect, I can hardly see how it's possible for us to review the evidence of today and the exhibits of today, in time to begin tomorrow morning.

...

THE COURT: Okay. I'm - I'm not going to debate this anymore. What I've told you is the position that the Court's taken. You - you must be prepared to do something with your case tomorrow morning.

MR. GRADY: With our case, with pleasure, Your Honour. With the constitutional questions, with all due respect ...

THE COURT: What - you're going to have to deal with this case tomorrow and as far as the - if we have time to deal with all issues tomorrow, we're going to deal with them one way or another. ...

[23] By the end of the first day of trial, the judge had directed, at least seven times, that the defence be ready to proceed the next day.

[24] When Court resumed the next morning, Mr. Grady moved for a directed verdict of acquittal. The judge explained the nature of a directed verdict motion and specifically mentioned on two occasions that if there was "some" evidence, then the accused had to decide whether to present evidence. He stated:

THE COURT: ... the motion for directed verdict has nothing to do with proof beyond a reasonable doubt. It's simply whether or not there is sufficient evidence, so that a properly instructed jury, acting judicially, could return a verdict of guilt. So, that in relation to that test, which is the test that always has to

be applied in a motion for directed verdict, what - what the Court has to do is to determine if there's some evidence, and not even weighing the quality of the evidence, I'm not permitted to do so. If there's some evidence, the matter has to go - to - to the point where the defendant has to choose whether or not he wishes to call evidence.

In addition, if the case is a circumstantial case, I'm not permitted to weigh what inferences the trier of fact, the jury might draw from the facts, so that if there is some circumstantial evidence from which some inference may be possible, then I'm bound to call upon the defendant to present their case or to announce whether they want to present their case. So, I tell you that, so you can have some background ah, on which to frame your arguments.

[25] Mr. Grady advanced three main points in support of his directed verdict motion. First, he submitted that there was no evidence that Mr. Wolkins intended to place his traps in the wrong area; second, the Crown evidence did not show that Mr. Wolkins had been the person responsible for placing the traps where they were discovered; and third, the Crown evidence did not establish that the traps were, in fact, outside the correct area. During these submissions, the judge explained to Mr. Grady that the finding of baited traps bearing Mr. Wolkins' tags in the wrong area was circumstantial evidence which could support an inference that Mr. Wolkins placed them there.

[26] Following submissions, the judge dismissed the motion, holding that there was some evidence on each of the essential elements of the charge. The judge then called on Mr. Grady to proceed with the case. Mr. Grady again attempted to delay the trial. He did not succeed.

THE COURT: Thank you. I'm satisfied that there exists some evidence on the essential ingredients of the offence so that a properly instructed jury acting judicially could return a verdict of guilt. Call your first witness, please.

MR. GRADY: I'm sorry Your Honour.

THE COURT: Call your first witness, please.

MR. GRADY: I believe, Your Honour, we - we did briefly canvass - I assume you're asking us to call our first witness in the substantive defence Mr. Wolkins wishes to make in reply.

THE COURT: I'm just asking you to call a witness, so that we can use the time that we've allotted for this matter.

MR. GRADY: Thank you, Your Honour. As we explained to the Court yesterday, we are not in a position to call witnesses today, because as Your Honour, I hope will recall, some months ago we indicated to Your Honour that we would have to hear, assess and review the Crown's case before we would be able to make a substantive reply and defence.

THE COURT: Okay. Well, I'm gonna deal with that issue at some point today, whether or not the motion has to proceed, but what I want you to do now, is to announce whether or not you have a witness to call, and if you do have witnesses to call, to call them.

MR. GRADY: Your Honour, I hope you - I hope you will not be - you'll not find what I'm saying inappropriate in any way, but we have indicated prior to the calling of this trial and yesterday afternoon, that while we are perfectly prepared to ...

THE COURT: Okay. Well, if you're pre ...

MR. GRADY: ... make a defence, we are not in a position - sorry Your Honour.

THE COURT: Okay. Well, I'm gonna deal with that issue.

MR. GRADY: We are not in a position to make that - to make that defence today.

THE COURT: You're not in a position to make the defence to the substantive charge today?

MR. GRADY: We're not in a position to call witnesses today in respect to the - to the case of the Crown. However, Your Honour, if it is of any assistance to the Court, we are prepared to

call those witnesses within a reasonable period of time, necessary for us to review the record of the - of the case made by the prosecution and to issue Summonses to our contemplated witnesses, and we would respectfully request that the Court provide us with that reasonable period of time.

THE COURT: Well, you've had three years to be in a position to defend this case.

[27] The judge canvassed with Mr. Grady the reasons why he was not prepared. The judge, obviously (and in my view appropriately) was concerned with the long delays. He reviewed the chronology of the matter. He then recessed for 15 minutes with a direction to Mr. Grady to be ready to say whether he was in a position to proceed with the defence. Following the recess, another lengthy discussion ensued which, as the judge prudently remarked, was "getting us nowhere." The judge then directed that argument on the trial issues would take place and it did.

[28] During Mr. Grady's submissions on the guilt or innocence of the accused, the issue of defence evidence was raised once again. The judge gave the defence another opportunity to call evidence:

THE COURT: Well, I'll give you the chance, despite the fact that I've let the Crown argue their case, I'll give you the chance to call that evidence, but it's gotta be called today.

MR. GRADY: It's the "but it's gotta be called today," that poses a problem, Your Honour.

THE COURT: Well, he's here. Your client's here. He's - he's right in front of us.

MR. GRADY: Yes, Your Honour.

THE COURT: Is there - if you wanted to call him you could. I'm gonna give you that - that opportunity - that even despite the fact that the Crown has closed their case and argued their case, I'm still - I'm still willing to let you call that evidence.

MR. GRADY: We would be most willing to do that ...

THE COURT: Well, do it - do it now.

MR. GRADY: ... if Your - if - if, forgive me, Your Honour, I like the end of sentences too, if Your Honour would permit us a reasonable time to assemble the witnesses necessary to make this portion of the case.

THE COURT: No. What I'm going to do ...

MR. GRADY: To force Mr. Wolkins to - to force the defence to call Mr. - Mr. Wolkins today is already a settled matter at law in the Supreme Court of Canada ...

THE COURT: No. I'm not forcing you to do anything.

MR. GRADY: ... and the Supreme Court of Canada says ...

THE COURT: I'm giving you the - listen to me.

MR. GRADY: ... according - the Supreme Court ... - I will, Sir.

THE COURT: I'm giving you the opportunity to call evidence today. The witness is here. If you want to call the witness, I'll give you the opportunity to do so. To make out whatever defence you can - you can possibly make out. ...

...

THE COURT: I'm gonna make it abundantly clear. Despite the fact that the Crown has closed their case and argued it and in view of the suggestion that there might have been evidence which may be available today before the Court to call, I'm giving you that further opportunity. If you don't want to take it, fine, you can continue with the argument, but I just wanted to give you that opportunity, that's all.

MR. GRADY: Thank you, Your Honour, but we ...

THE COURT: So, if you don't want to take that opportunity, I'll - I'll hear the rest of your argument.

MR. GRADY: We - we wouldn't expect the Court to call witnesses for us, and we do appreciate that the Court is making, as we understand it, an offer that if we wish, we may call Mr. Wolkins today.

THE COURT: No. You can call anybody you want.

MR. GRADY: That we may call anyone we want today.

THE COURT: Okay. So, you don't want to do that. Continue with your argument, please.

MR. GRADY: We're in no position to - to make those calls today, however, when we've had an opportunity to review the Crown evidence and an opportunity to subpoena witnesses in a proper way under the rules of procedure, we are prepared to do that, and we hope ...

THE COURT: Okay. Con - continue with your argument then. Thank you.

[29] The judge then heard the conclusion of the submissions and gave reasons in which he found Mr. Wolkins guilty. He reserved entering the conviction in order to afford Mr. Grady an opportunity to present the much discussed **Charter** application.

[30] The judge then turned to that matter. He ruled that he would afford Mr. Wolkins 15 days to show that there was an evidentiary basis for the proposed **Charter** application.

[31] The **Charter** matter came back to court on January 31, 2002 with Mr. Wolkins appearing with his agent, Mr. Grady. In the meantime, Mr. Grady had filed a letter dated 20 September, 2001 relating to the **Charter** application. The Crown submitted that it did not clearly articulate the nature of the **Charter** application or provide an evidentiary or legal basis for it. Ultimately the judge agreed.

[32] At one point during submissions, Mr. Grady referred to two cases and the judge asked to see them. Mr. Grady said initially he could provide them within three days. He then asked for a 15 minute recess to get the cases, saying to the Court, "... if you'd give me a 15 minute recess, I'll give you the cases." The judge granted the requested recess. On resumption, Mr. Grady raised other matters. The judge inquired directly of him, more than once, whether he had the cases he had said he would obtain. Finally, after giving a series of evasive or non-responsive answers to the judge's question, Mr. Grady finally admitted he still did not have the cases.

THE COURT: Do you - do you have the cases here, yes or no?

MR. GRADY: Do I have the cases to support our response to Mr. Dipersio's motion for summary dismissal?

THE COURT: Yes.

MR. GRADY: I do have those cases, Your Honour.

THE COURT: Okay. Where are they?

MR. GRADY: They are at home where they belong.

[33] The judge canvassed in detail, at length and unsuccessfully with Mr. Grady what his proposed **Charter** application was really about. The judge finally concluded that there was no rational or factual basis for any of the allegations of breach and that it was unnecessary to have an evidentiary hearing. He accordingly dismissed the **Charter** application and entered a conviction.

[34] Mr. Grady continued to represent Mr. Wolkins at the trial of the second charge, which ended in an acquittal, and filed a notice of a summary conviction appeal from the first conviction on Mr. Wolkins' behalf.

3. The Summary Conviction Appeal:

- (a) Fresh evidence:

[35] Mr. Wolkins retained counsel to appear on the summary conviction appeal which was heard by Coughlan, J.

[36] Before the SCAC, the focus of the case shifted from the location of Mr. Wolkins' fishing to the competence of Mr. Grady's advocacy. It was submitted that Mr. Grady's acts or omissions constituted incompetence which resulted in a miscarriage of justice and that the trial judge had failed in various ways to protect Mr. Wolkins from his incompetent agent.

[37] To support these submissions, Mr. Wolkins proffered fresh evidence: an affidavit of Mr. Grady and an affidavit of Mr. Wolkins to which was annexed the transcript of his second trial. In response, the Crown filed an affidavit from the trial Crown, Mr. DiPersio. Both the Crown and the defence were content to have the fresh evidence issue decided without cross-examination on any of these affidavits.

(i) The affidavits:

[38] The defence affidavits set out the background of the relationship between Mr. Grady and Mr. Wolkins, refer to Mr. Grady's experience appearing as agent for fishers charged with fisheries offences, the history of the relationship between Mr. Grady and Mr. Wolkins and the defence evidence leading to his acquittal at the second trial which Mr. Wolkins said could have been called at the first. The Crown affidavit responds to some of the factual assertions made in Mr. Grady's affidavit.

[39] The affidavits show that the appellant was and is president of the Southwest Fisherman's Rights Association. He got to know Mr. Grady after he wrote a letter of support for the association following the Association's occupation of DFO offices in Barrington in 1996. Mr. Grady "... offered advice and support to [the Association's] membership on numerous occasions". When Mr. Wolkins was charged in April of 1999, Mr. Grady offered to act as his "legal representative." Mr. Wolkins says in his affidavit that he believed Mr. Grady to be a very intelligent and well educated man and felt that he would be able to competently represent him at trial.

[40] The affidavits of Mr. Wolkins and Mr. Grady are more significant for what they do not say. Mr. Wolkins does not suggest that Mr. Grady did anything outside the express and implied authority of his agency. Mr. Wolkins does not suggest that either he or his witnesses were unavailable to be called at the time the judge directed the defence to proceed. Mr. Wolkins does not suggest that he misunderstood the judge's clear direction that the defence would have to proceed with its witnesses. He does not depose that Mr. Grady advised him not to call these witnesses or that Mr. Grady was acting otherwise than in accordance with his instructions. Significantly, while it appears Mr. Wolkins now wishes that he had testified, he does not set out the details of what his evidence would have been on this charge.

[41] Mr. Grady's affidavit does not indicate that he made any effort to call evidence, notwithstanding the clear direction of the judge that he should be prepared to do so. He does not assert that the witnesses who he says were willing to testify and to whom he had spoken were not available. In fact, his affidavit states that he spoke with Messrs. Atkinson, Nickerson and Cunningham who all indicated they were available to testify on September 6th and 7th. Although they were not under subpoena, the affidavit does not state any attempts were made to have them appear on September 7th, even though it was clear by 1:30 on September 6th that the defence would have to be ready to proceed the next day.

[42] Some parts of Mr. Grady's affidavit make interesting reading in light of the trial record. Mr. Grady swore as follows:

23. At the close of the Crown's case on September 6, 2000, I expected the trial would be adjourned to allow me to prepare the Appellant's case, including reviewing the Crown's evidence, preparing my argument and calling witnesses. As a result I had no witnesses present in Court, nor was I prepared at all to argue the Appellant's case. I therefore advised the Court that I was seeking an adjournment on the Appellant's behalf.

...

25. I was flabbergasted that I was being ordered to call Defence witnesses or otherwise present the Defence's case without being granted an adjournment during which to prepare.

(Emphasis added)

[43] In light of the judge's clear direction around 1:30 on September 6th that the defence would have to be ready to go at the close of the Crown's case, it is hard to understand how Mr. Grady could have expected the trial to be adjourned at the close of the Crown's case as he says he did in paragraph 23 of his affidavit.

[44] Three paragraphs in Mr. Wolkins' affidavit are also particularly noteworthy. In essence, they state that both Mr. Wolkins and the trial judge knew that Mr. Grady had been responsible for many of the delays during trials of other fisherman whom he had represented before the trial judge over the preceding five years:

38. Mr. Grady advised me that the Honourable Judge Prince would not allow the adjournment because he was concerned about delaying the trial. Mr. Grady advised me that he had been responsible for many of the delays during the trials of other fishermen he had represented before the Honourable Judge Prince over the course of the preceding five years.
39. Mr. Grady advised me that he had delayed the previous trials in an effort to gather more facts and to garner more public support for the Southwest Fishermen's Rights Organization.
40. I do not think that Mr. Grady had done anything wrong in his representation of me, and was informed by Mr. Grady that the judge had made errors in his conduct of my trial.

[45] Mr. Wolkins also says that he also knew that Mr. Grady had deliberately delayed these trials for the purpose of garnering more public support for the Southwest Fisherman's Rights Association. Mr. Wolkins, of course, had been president of the Association since 1996. In other words, Mr. Wolkins knew that the delay of those trials was a deliberate tactic on the part of Mr. Grady to serve the interests of the Association of which Mr. Wolkins was president.

(ii) The transcript

[46] As noted earlier, Mr. Wolkins had also been charged with fishing out of his area on May 27, 1999. The trial took place immediately after the disposition of the **Charter** application in the trial of the charge giving rise to this appeal. As fresh evidence on appeal, Mr. Wolkins proffers the trial transcript of the second charge. He says this shows that the defence evidence, which was available but not called at the first trial, resulted in an acquittal at the second trial. That evidence consisted of the testimony of six witnesses including Mr. Wolkins. What is most relied on is testimony from Mr. Wolkins and two other witnesses, Mr. Atkinson and Captain Cunningham, relating to Mr. Wolkins' due diligence as a lobster fisherman and the variety of ways in which his tags could have ended up in the wrong area even with due diligence.

[47] Mr. Atkinson, who fished with Mr. Wolkins in April and May of 1999, testified that he was a very careful captain, but that he had problems with people emptying and even taking his traps. He said that Mr. Wolkins had a lot of enemies and thought that the traps "probably" got over the line in the same way others went missing, that someone probably put them there to frame him. Captain Cunningham testified that traps could be moved by the tide, accidentally towed by other boats or deliberately moved by competing fishermen. He also said that the Loran device relied on by fishermen for positioning can often be wrong. Mr. Wolkins testified that in 1999 his gear was continually being tampered with and spoke of the steps he took to ensure he placed his traps in the right area. However, he conceded in cross-examination that he was not saying that his navigation equipment was responsible. He simply maintained that he didn't know how they got there and suspected somebody else must have put them there.

[48] Some of Mr. Wolkins' testimony in the second trial related to the facts giving rise to the first charge. While he at one point asserted that he never set pots in district 34, he also testified that, following the first charge, he was concerned that some of his pots might be "quite close" to the line. He spoke to Fisheries Officer d'Entremont, asking whether he could tell Mr. Wolkins whether his pots were over the line. He testified that shortly after the first charge he moved some other pots from the position where he had set them. He thought they were not over the line, but was obviously concerned enough to ask about whether they were or not to speak with a fisheries officer and to move the pots.

[49] The judge acquitted Mr. Wolkins on the second charge, saying that on of all of the evidence, he was not satisfied that the circumstantial evidence of the pots being found in the wrong area demonstrated that there was no other rational conclusion except guilt.

(b) Decision of the SCAC:

[50] The SCAC (now reported at (2004), 220 N.S.R. (2d) 393; N.S.J. No 45 (Q.L.)(S.C.)) held that the proposed fresh evidence was not admissible, that there had been no miscarriage of justice and that the accused had not been denied the right to make full answer and defence.

III. Issues:

[51] The appeal in my view raises two related issues:

Did the SCAC err in law:

1. by refusing to admit the fresh evidence?
2. by failing to find that the conviction was a miscarriage of justice as a result of Mr. Grady's conduct, the judge's failure to conduct an inquiry about Mr. Wolkins' choice of agent, the judge's failure to remove Mr. Grady as agent or the trial judge's refusal of an adjournment?

IV. Analysis:

[52] Analysis of these issues requires consideration of the legal principles relating to five topics: the standard of review on appeal, the judicial discretion respecting adjournments, the admissibility of fresh evidence on appeal, the role of a non-lawyer agent appearing on behalf of an accused person and the law relating to what constitutes a miscarriage of justice. I will briefly set out these principles and then apply them to this case.

1. Standard of Review:

[53] On the appeal to the SCAC, s. 686(1)(a) applied. The SCAC, therefore, was entitled to allow the appeal if the trial verdict was unreasonable, the trial court erred on a question of law or (under s. 686(1)(a)(iii)) "... on any ground there was a miscarriage of justice."

[54] It is common ground that the appeal to this Court is governed by s. 839 of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46; the appeal may be taken with leave on a question of law alone: see s. 78 of the **Fisheries Act**, s. 34(1)(b) of the **Interpretation Act**, R.S. 1985, c. I-21 and s. 822 of the **Criminal Code**. The question, therefore, is whether the SCAC made a legal error: **R. v. Croft** (2003), 218 N.S.R. (2d) 184 (C.A.) at para. 8.

[55] In my view, all of the appellant's arguments amount to this: the SCAC should have set aside the conviction as a miscarriage of justice under s. 686(1)(a)(iii). The issue on appeal to this Court, therefore, is whether the SCAC erred in law by failing to find this conviction was a miscarriage of justice. The standard of review on that question of law is correctness.

2. Fresh evidence:

[56] Mr. Wolkins submits that the SCAC erred by failing to admit the fresh evidence. To consider that submission, I must review briefly the principles governing admission of fresh evidence on appeal. In my view, these principles lead to the conclusion that the fresh evidence should be admitted if it, in light of the trial record, shows that the conviction was a miscarriage of justice.

[57] Both the SCAC and this Court have a wide discretion to admit new evidence on appeal where it is in the interests of justice: **Criminal Code**, s. 683(1). Case law has structured the exercise of this discretion in the various contexts in which new evidence may be advanced.

[58] Fresh evidence tends to be of two main types: first, evidence directed to an issue decided at trial; and second, evidence directed to other matters that go to the regularity of the process or to a request for an original remedy in the appellate court. The legal rules differ somewhat according to the type of fresh evidence to be adduced. Mr. Wolkins advances evidence of both types.

[59] Fresh evidence on appeal which is directed to issues decided at trial generally must meet the so-called **Palmer** test. A key component of that test requires that the proposed fresh evidence could not have been available with due diligence at trial: **R. v. Palmer**, [1980] 1 S.C.R. 759 at 775. This rule makes it clear that the place for the parties to present their evidence is the trial. If evidence that with due diligence could have been called at trial were admitted routinely on appeal, finality would be lost and there would be less incentive on the parties to put forward their best case at trial. The rule requiring due diligence at trial is therefore important because it helps to ensure finality and order, two features which are essential to the integrity of the criminal process: **R. v. G.D.B.**, [2000] 1 S.C.R. 520 at para. 19. In that paragraph of **G.D.B.**, the Supreme Court adopted these words of Doherty, J.A. in **R. v. M.(P.S.)** (1992), 77 C.C.C. (3d) 402 at 411:

While the failure to exercise due diligence is not determinative, it cannot be ignored in deciding whether to admit "fresh" evidence. The interests of justice referred to in s. 683 of the *Criminal Code* encompass not only an accused's interest in having his or her guilt determined upon all of the available evidence, but also the integrity of the criminal process. Finality and order are essential to that integrity. The criminal justice system is arranged so that the trial will provide the opportunity to the parties to present their respective cases and the appeal will provide the opportunity to challenge the correctness of what happened at the trial. Section 683(1)(d) of the *Code* recognizes that the appellate function can be expanded in exceptional cases, but it cannot be that the appellate process should be used routinely to augment the trial record. Were it otherwise, the finality of the trial process would be lost and cases would be retried on appeal whenever more evidence was secured by a party prior to the hearing of the appeal. For this reason, the exceptional nature of the admission of "fresh" evidence on appeal has been stressed: *McMartin v. The Queen, supra*, at p. 148.

The due diligence criterion is designed to preserve the integrity of the process and it must be accorded due weight in assessing the admissibility of "fresh" evidence on appeal.

In my view, these considerations are equally relevant in the context of an appeal from sentence. Accordingly, due diligence in producing fresh evidence is a factor that must be taken into account in an appeal from sentence, on the same basis as the other three criteria set out in *Palmer*.

[60] But finality and order, important as they are, must give way in the interests of justice. Accordingly, the due diligence criteria is not applied inflexibly and yields where its application might lead to a miscarriage of justice: **R. v. G.D.B.**, *supra* at paras. 17 - 21; **R. v. Lévesque**, *supra* at para. 15. The due diligence requirement is one factor to be considered in the “totality of circumstances”: **G.D.B.** at para. 19. In considering whether the due diligence requirement has been met, the appellate court should determine the reason why the evidence was not available or was not used: **G.D.B.** at para. 20. The absence of an explanation or the fact that the failure to call the evidence was a deliberate tactical choice will weigh against its admission: **R. v. Warsing**, [1998] 3 S.C.R. 579 at para. 51.

[61] The other category of fresh evidence concerns evidence directed to the validity of the trial process itself or to obtaining an original remedy in the appellate court. In these sorts of cases, the **Palmer** test cannot be applied and the admissibility of the evidence depends on the nature of the issue raised. For example, where it is alleged on appeal that there has been a failure of disclosure by the Crown, the focus is on whether the new evidence shows that the failure may have compromised trial fairness: see **R. v. Taillefer**; **R. v. Duguay**, [2003] 3 S.C.R. 307 at paras. 73 - 77. Where the appellant seeks an original remedy on appeal, such as a stay based on abuse of process, the evidence must be credible and sufficient, if uncontradicted, to justify the appellate court making the order sought: see e.g. **United States of America v. Shulman**, [2001] 1 S.C.R. 616 at paras. 43 - 46. Where the appellant alleges that his trial counsel was incompetent, the fresh evidence will be received where it shows that counsel’s conduct fell below the standard of reasonable professional judgment and a miscarriage of justice resulted: see **R. v. G.D.B.**, *supra*.

[62] The fresh evidence put forward by Mr. Wolkins is of both types. On the one hand, the transcript of evidence given at the second trial is directed to showing that there was evidence available that, if adduced at the trial of this charge, may have resulted in an acquittal. This evidence goes to an issue decided at trial and is therefore subject to the **Palmer** due diligence requirement, which may be relaxed to prevent a miscarriage of justice. The evidence called by the defence at the second trial was available to be called at the first. Therefore, Mr. Wolkins cannot meet the

due diligence requirement. The issue is whether that requirement should be relaxed and the evidence admitted to prevent a miscarriage of justice.

[63] On the other hand, the affidavits of Mr. Grady and Mr. Wolkins (apart from the paragraphs relating to the second trial and the transcript of that trial which is annexed to Mr. Wolkins' affidavit) relate to the trial process and Mr. Grady's representation of Mr. Wolkins at the trial. This evidence is not directed to an issue resolved at trial and the **Palmer** due diligence requirement does not apply to it. The key issue relating to its admissibility is therefore whether it shows that Mr. Grady's representation led to a miscarriage of justice.

[64] I conclude that the key issue in relation to the admissibility of all of the fresh evidence is whether it should be admitted to prevent a miscarriage of justice.

3. The judicial discretion respecting adjournments:

[65] Adjournments are within the discretion of the presiding judge: **R. v. Rose (C.A.)** (1995), 140 N.S.R. (2d) 151 (S.C.). Of course, this discretion must be exercised judicially and according to correct legal principles. Where material witnesses are absent, an adjournment ordinarily should be granted if the party requesting the adjournment has not been guilty of neglect in procuring their attendance and there is a reasonable expectation that the witnesses can be procured at the future time to which it is sought to put off the trial: **Darville v. The Queen** (1956), 116 C.C.C. 113 (S.C.C.).

4. Representation by Agent:

[66] It is submitted that Mr. Grady was incompetent in his representation of Mr. Wolkins and that the trial judge failed in his duty in two respects. First, it is submitted that the judge failed to conduct an inquiry to satisfy himself that Mr. Wolkins' decision to be represented by an agent was an informed one. Second, Mr. Wolkins says that the judge failed to exercise his discretion to remove Mr. Grady as agent once his incompetence became apparent.

[67] These submissions bring into play the legal principles about representation by agent. Both parties rely on the judgment of the Ontario Court of Appeal in **R. v. Romanowicz** (2000), 45 O.R. (3d) 506; O.J. No. 3191 (Q.L.)(C.A.). In my view, **Romanowicz** correctly establishes four principles which apply to this case. First,

an accused has the right to choose how he or she will defend a charge. Second, an accused who chooses to be represented by an agent waives the right to effective assistance of counsel. Third, the fact that an agent is not a competent lawyer is not a ground of appeal. Fourth, the presiding judge has certain duties to an accused represented by agent which are similar to the duties owed to a self-represented person. I will deal with each in turn.

[68] In what follows, I am discussing the situation in which the accused has a statutory right to appear by agent subject to judicial discretion not to permit the agent to appear. In this case, s. 800(2), 802(2) and 802.1 of the **Criminal Code** apply by virtue of s. 34 (2) of the **Interpretation Act**. (I mention s. 802.1 simply because its application may have been overlooked at the second trial).

(a) An accused has the right to choose how he or she will defend a charge:

[69] The criminal law places great emphasis on personal responsibility. It also respects individual autonomy. Accused persons are entitled to decide many things in the course of a prosecution. These include whether to co-operate with the investigation, what mode of trial to choose, whether or not to plead guilty and whether or not to testify. These decisions will be respected by the Court and binding on the accused so long as he or she is fit to stand trial and the decisions are not tainted by the breach of any right of or duty owed to the accused. Thus an accused person's choice of representation, subject to applicable laws, will be respected. So, for example, a person's choice to represent him or herself, even if unwise and manifestly not in the person's best interests, will not be interfered with: see e.g., **Vescio v. The King**, [1949] S.C.R. 139; **R. v. Swain**, [1991] 1 S.C.R. 933 at 970 - 972; 63 C.C.C. (3d) 481 at 505 - 6; **R. v. Mian**, (1998), 172 N.S.R. (2d) 162 (C.A.) at paras. 6 - 7.

[70] At times, the principle respecting individual autonomy may appear to conflict with the right to a fair trial. For example, an accused may insist on representing him or herself even in situations in which, the court would appoint counsel for the accused, if asked, because a fair trial would not be possible otherwise. But this apparent conflict is resolved very simply: an accused cannot complain about his or her decision not to be represented by counsel provided that it is not tainted by the breach of any right of or duty owed to the accused: see, e.g., **R.**

v. Howell (1995), 146 N.S.R. (2d) 1; N.S.J. No 483 (Q.L.)(C.A.) at para. 49; aff'd [1996] 3 S.C.R. 604. As the Alberta Court of Appeal aptly put it in **R. v. Cai** (2002), 170 C.C.C. (3d) 1; A.J. No 1521(Q.L.)(C.A.) at para. 42, "To allow an accused ... to spurn counsel and plead for mercy on grounds of lack of counsel would set a very dangerous precedent. To do so in the name of fairness would be very contrary."

- (b) A person who chooses to be represented by an agent waives the right to the effective assistance of counsel:

[71] In **Romanowicz**, the Court found that an accused who elects to be represented by an agent waives the right to effective assistance of counsel. It follows that the fact that an agent does not meet the standard of competence expected of counsel cannot, on its own, support an argument that the trial was unfair or that a miscarriage of justice has occurred: see paras. 27 - 31. This conclusion rests on the common sense proposition referred to at para. 28 of the judgment: "[a]n accused cannot at the same time exercise the right to proceed without the assistance of counsel and yet demand the right of effective assistance of counsel."

- (c) An agent's incompetence is not a ground of appeal:

[72] A person who retains counsel expects that counsel to be competent -- that his or her actions and advice will be based on reasonable, professional and ethical judgment. This is a reasonable expectation. Lawyers are licensed under the authority of statute and held out to the public to be competent to practice law. Lawyers are taken "... by virtue of their professional training, [to] bring to their task an expertise which others, including the accused, do not possess," (**Romanowicz**, para. 27). An accused who retains counsel is constitutionally entitled to competent representation: *Ibid*.

[73] It follows that when a lawyer does not provide competent representation, the courts will intervene to prevent any resulting miscarriage of justice. The individual's choice of counsel does not mean that the individual is stuck with the consequences of unreasonable legal advice; the freedom to choose counsel is not

taken as waiver of counsel's duty to be competent. To the contrary, the accused is entitled to assistance which reflects the expertise rightly expected of lawyers: **Romanowicz** at para. 27.

[74] A lawyer is the client's agent. That agency relationship, coupled with the lawyer's assumed expertise, mean that "... where counsel makes a decision in good faith and in the best interests of his client, a court should not look behind it save only to prevent a miscarriage of justice.": **R. v. G.D.B., supra** at para. 533. In other words, an accused who chooses to be represented by a lawyer is taken to have accepted his or her professional judgment, but only to the point that the judgment displays reasonable professional competence and ethics. Where the judgment is shown to have been otherwise, the courts protect the client from the lawyer's actions to prevent a miscarriage of justice.

[75] A person who chooses to be represented by a non-lawyer agent is in a completely different situation. Agents are not licensed or held out to the public by the state as being competent nor do they owe professional obligations to the courts in which they may appear. There is no constitutional right to effective assistance by an agent. The choice to be represented by an agent, therefore, carries with it no reasonable expectation of competent representation such as exists in the case of representation by a lawyer. An accused has to live with the consequences of his or her informed choice to be represented by an agent. An accused is not entitled to complain on appeal simply that the agent did not perform like a competent lawyer.

[76] When an accused has chosen to be represented by an agent, the agent acts in the place of the accused and those acts will be taken to be the acts of the accused represented. By electing representation by agent, the accused indicates to the Court that the agent speaks on his or her behalf. That, after all, is what an agent is. It follows that the accused, generally, is bound by the acts of the agent and will not be able to complain that those acts were unwise. While incompetent acts of a lawyer are presumed to have been without the client's understanding or authority, there can be no similar presumption in relation to an agent. The non-lawyer agent, in the eyes of the court, is not a professional adviser, but rather simply someone who stands in the shoes of the accused and whose acts are the acts of the accused.

[77] There may be circumstances, however, in which the accused will be permitted to show that this was not the case. Unauthorized acts of the agent cannot

be attributed fairly to the accused and some relief should be available if those unauthorized acts give rise to a miscarriage of justice. While an accused cannot complain on appeal about simple incompetence of an agent, unauthorized acts by the agent which the accused could not correct and which give rise to a miscarriage of justice might well justify appellate intervention.

[78] A person who chooses to be represented by an agent, therefore, is in a closely analogous situation to a person who chooses to represent him or herself. In either situation, the person has elected to forgo the right to the effective assistance of counsel: **Romanowicz** at para. 28. That choice will be respected by the courts, but, of course, the person cannot thereafter complain that the agent did not perform with the competence of a lawyer. The following remarks from **Dauids v. Dauids**, [1999] O.J. No. 3930 (Q.L.)(C.A.) at para. 36 are apposite:

[36] ... The fairness of this trial is not measured by comparing the appellant's conduct of his own case with the conduct of that case by a competent lawyer. If that were the measure of fairness, trial judges could only require persons to proceed to trial without counsel in those rare cases where an unrepresented person could present his or her case as effectively as counsel. Fairness does not demand that the unrepresented litigant be able to present his case as effectively as a competent lawyer. Rather, it demands that he have a fair opportunity to present his case to the best of his ability. Nor does fairness dictate that the unrepresented litigant have a lawyer's familiarity with procedures and forensic tactics. It does require that the trial judge treat the litigant fairly and attempt to accommodate unrepresented litigants' unfamiliarity with the process so as to permit them to present their case. ...

(d) The judge's duty to a person represented by an agent:

[79] As noted, persons appearing by agent are in many ways in the same situation as persons who choose to represent themselves. The similarity of their situations suggests that the well-recognized duties of a trial judge to provide reasonable assistance to self-represented litigants should in general apply to those appearing by agent as well. There are three main areas in which these duties of the trial judge come into play.

[80] Just as the judge will ensure that an accused has chosen to forgo legal assistance, the judge should generally take steps to ensure that the accused's choice of representation by agent is an informed one. For example, it will usually be appropriate for the judge to tell the accused that: agents, unlike lawyers, do not have to demonstrate any level of competence or professional accomplishment; the law in relation to the conduct of a criminal trial imposes no standard of competence upon agents; and that the acts of the agent will generally be taken to be the acts of the accused and be binding on the accused.

[81] Just as the judge will take all reasonable steps to assist a self-represented person, the same approach should be taken in respect of persons appearing by agent.

[82] Just as the judge has the authority to ensure that a self-represented person does not abuse the court's process or undermine the trial process, the judge has the authority to prevent an agent from appearing or continuing to appear where his or conduct merits taking that step.

[83] How the judge discharges these obligations must be left to the sound judicial discretion of the presiding judge. Providing that the discretion is exercised in accordance with the correct legal principles, a failure by the judge to discharge these obligations is not, of itself, a free-standing ground of appeal. The question is whether the failure has occasioned a miscarriage of justice.

[84] This last point is made in **Romanowicz** and it bears repeating. As the court made clear in para. 40, the overriding concern is the fairness of the trial. The sorts of steps just discussed will help ensure a fair trial both in fact and in appearance. But as the Court emphasized, the important question on appeal is not simply whether these steps were or should have been taken, but whether any failure to take them has given rise to a miscarriage of justice.

[85] The nature of the advice and assistance provided by the judge can only be assessed in light of the requirement for a fair trial in the particular case and cannot be captured by any specific, binding guidelines as to what that advice and assistance ought to consist of. The fairness of a trial is a matter of fact in each case. The question on appeal is the fairness of the trial and that must be determined in light of the specific facts of each case: **Romanowicz** at paras. 36 - 41; **R. v. Hardy**

(1991), 69 C.C.C. (3d) 190 (Alta. C.A.) *per* Major, J.A. (as he then was) at 191; **R. v. Landry** (2003), 174 C.C.C. (3d) 326 (N.S.C.A.) at para. 39; and, **R. v. Phillips** (2003), 172 C.C.C. (3d) 285; A.J. No. 14 (Q.L.)(C.A.) at para. 26.

[86] I conclude that a trial judge generally should: (i) satisfy him or herself that the accused's choice to be represented by an agent is an informed one; (ii) provide the sort of assistance given to self-represented persons; and, (iii) in appropriate circumstances, exercise the discretion to remove an agent. But where it is alleged after the fact that there has been a failure to do any of these things, the question is whether the alleged failure resulted in trial unfairness. As McIntyre, J. said in **R. v. Fanjoy**, [1985] 2 S.C.R. 233 at 240, if the accused is deprived of a fair trial, the conviction is a miscarriage of justice. That is the proper focus on appeal. The inquiry on appeal cannot be simply on whether certain desirable steps were not taken by the trial judge but whether as a result the accused was deprived of a fair trial such that the conviction is a miscarriage of justice.

4. Miscarriage of justice:

[87] In my view, all of the appellant's submissions boil down to this: Mr. Grady's incompetence and the judge's alleged failings gave rise to a miscarriage of justice.

[88] But what is a miscarriage of justice?

[89] The clearest example is the conviction of an innocent person. There can be no greater miscarriage of justice. Beyond that, it is much easier to give examples than a definition; there can be no "strict formula .. to determine whether a miscarriage of justice has occurred": **R. v. Khan**, [2001] 3 S.C.R. 823 *per* LeBel, J. at para. 74. However, the courts have generally grouped miscarriages of justice under two headings. The first is concerned with whether the trial was fair in fact. A conviction entered after an unfair trial is in general a miscarriage of justice: **Fanjoy supra**; **R. v. Morrissey** (1995), C.C.C. (3d) 193 (Ont. C.A.) at 220 - 221. The second is concerned with the integrity of the administration of justice. A miscarriage of justice may be found where anything happens in the course of a trial, including the appearance of unfairness, which is so serious that it shakes public confidence in the administration of justice: **R. v. Cameron** (1991), 64 C.C.C. (3d) 96 (Ont. C.A.) at 102; leave to appeal ref'd [1991] 3 S.C.R. x.

[90] What the interests of justice require must be assessed in light of the demands of the adversary process as well as the soundness of its results: see **R. v. M.(P.S.)**. Absent legal error, there should generally be one trial not a series of trials pursuing different trial strategies with different evidence. Justice results from an appropriate balance between the goals of finality and order and the assurance of right results.

5. Application of the principles:

[91] Did any of the things Mr. Wolkins complains about result in an unfair trial or otherwise give rise to a conviction that is a miscarriage of justice? In my view, they did not.

[92] The fresh evidence, had it been called at the trial, might have affected the result. However, Mr. Wolkins had the right to decide whether to call that evidence or not. Provided his decision was not tainted by any improper action by his agent or by any failing on the part of the trial judge, he cannot now seek to undo it simply on the basis that the result might have been different.

[93] To permit this would give rise to a succession of trials in which, on the basis of different evidence, the accused could advance different positions while deciding which evidence to “save” for the next trial. The deliberate choice not to call available evidence or to testify, which is not explained by incompetent advice or misapprehension of rights, must generally bind the accused. While this is only one of the relevant circumstances, it is one weighing heavily against the admission of the “fresh” evidence in this case.

[94] Although Mr. Wolkins asserts he should have testified, nowhere in his affidavit does he set out his proposed testimony in relation to the charge. In fact, the evidence which he gave at the second trial was to the effect that, after the first charge was laid, he was concerned enough about the position of some of his other pots that he sought the advice of a fisheries officer and moved some of them to ensure compliance. That testimony, had it been given on the trial of the first charge, might have undermined any reasonable doubt about whether he was responsible for setting the pots in the wrong area.

[95] The appellant makes much of Mr. Grady’s alleged incompetence. However, these submissions are not persuasive for several reasons.

[96] According to Mr. Wolkins, Mr. Grady in the past had intentionally delayed trials for the purpose of garnering more public support for the Association of which Mr. Wolkins was president. The trial record in this case is much more consistent with Mr. Grady again pursuing this objective than with his incompetence. A reading of the record suggests that Mr. Grady attempted to delay this trial and, at times, to bait the trial judge. It was an illegitimate strategy. But as Mr. Wolkins says in his affidavit, he saw nothing wrong with Mr. Grady's approach. He can hardly complain that the judge rightly, if belatedly, put an end to it.

[97] Mr. Wolkins cannot be heard to complain that Mr. Grady did not act with the competence of a lawyer. By selecting representation by agent, Mr. Wolkins waived the effective assistance of a lawyer.

[98] It is said that the judge should have told Mr. Wolkins about the difference between representation by an agent and representation by a lawyer. In my view, that submission should be rejected for two reasons.

[99] First, we know from the record and the fresh evidence that the judge was well aware of the relationship between Mr. Wolkins and his Association and Mr. Grady. We also know that the Association was apparently content that Mr. Grady had delayed previous trials in what was perceived to be the interests of the Association during the time Mr. Wolkins was its president. The judge could rightly have concluded that any inquiry into Mr. Wolkins' choice of Mr. Grady as agent was superfluous in these circumstances. I do not think that exercise of discretion in all of the circumstances was wrong.

[100] Second, but most importantly, there is no evidence that Mr. Wolkins relied on any advice from Mr. Grady with respect to calling evidence or that Mr. Wolkins misunderstood the judge's direction as to when evidence would be called. There is simply no link between any failure on the part of the judge to make the inquiry and the failure to call the evidence.

[101] In my view, the same analysis applies to the appellant's submission that the judge erred in failing to remove Mr. Grady as agent. I agree entirely that, subject to the applicable statutory provisions, the trial judge, as part of the authority to control the trial process, has a broad discretion to control the conduct of agents

before the Court including the authority to prevent agents from acting. As the Ontario Court of Appeal said in **Romanowicz** at para. 77, this authority, like any other facet of the court's power to control its processes, must be exercised judicially on the basis of the circumstances present in a given case and with due regard to the rights of interested persons to be heard before that discretion is exercised. The failure to exercise that discretion in a particular case will only constitute reversible error where it results in an unfair trial.

[102] While there may have been grounds to justify Mr. Grady's removal, I cannot fault the judge for his restraint. One can well imagine that had he done so and a conviction been entered, we would now be hearing on appeal about the judge's interference with Mr. Wolkins' right to his choice of representative. But more importantly, there is simply no link in the record between the decision not to call evidence and Mr. Grady. In light of the judge's clear direction repeatedly given in Mr. Wolkins' presence, I do not accept that the decision not to call evidence was other than an informed decision made by Mr. Wolkins. At no point in the proposed fresh evidence does he suggest otherwise. It was a decision he was entitled to make and having made it, he should generally be bound by it.

[103] The judge's refusal of the adjournment is, with respect, a non-issue. It is not suggested that the evidence now relied on was not available on the day of trial or that an adjournment was needed to secure the attendance of witnesses. The judge obviously drew the conclusion, and on this record that conclusion is inescapable, that the strategy was one of delay and that the time had come to put an end to it.

[104] In summary, the appellant's claim of a miscarriage of justice in this case centres on the failure to call evidence which might have resulted in an acquittal as it did in his trial on the second charge. This submission rests on the proposition that it was Mr. Grady's fault that the defence evidence was not called.

[105] I do not in the slightest accept that proposition. Nowhere in the 139 paragraphs of the two fresh evidence affidavits is it suggested that Mr. Grady advised Mr. Wolkins not to call evidence. Mr. Wolkins does not allege that he misunderstood the trial judge's direction, clearly given, that the defence would proceed at the close of the Crown's case. Mr. Wolkins does not suggest that he failed to understand what the judge meant when he said that the fact his tags were found on traps in the wrong area was circumstantial evidence of guilt and that it

was therefore necessary for the defence to decide whether to call evidence. Mr. Wolkins cannot claim, of course, that he was not available to testify as he was present in court; the judge told Mr. Grady that if he wanted to call evidence the accused was “sitting right there.” Mr. Wolkins does not suggest that the other witnesses he now relies on were not available to testify. Mr. Wolkins cannot and does not suggest that the judge failed to provide every opportunity to him to call evidence had he wished to do so. The judge would even have permitted the defence to call evidence in the middle of submissions. Mr. Wolkins does not suggest that Mr. Grady was acting beyond his authority as agent or in any way contrary to his instructions. The record simply does not support the proposition that Mr. Wolkins relied on Mr. Grady’s advice about calling evidence or that the failure to call evidence was the result of anything other than his own choice.

[106] The submission also rests on the proposition that the evidence called at the second trial would have led to an acquittal if called at the first. However, nowhere in his lengthy affidavit does Mr. Wolkins set out his proposed evidence on the first charge. In fact, his evidence given at the second trial was to the effect that, after the first charge, he was concerned that he might have other pots in the wrong area which led him to seek the advice of a fisheries officer and to move some of them. This testimony is in marked contrast to Mr. Wolkins’ evidence about the events giving rise to the second charge.

[107] In summary, the evidence advanced on appeal does not show that Mr. Wolkins’ decision not to testify resulted from any failing of his agent or of the trial judge. Mr. Wolkins does not set out in his affidavit what his testimony would have been in relation to the first charge and his testimony at the second trial which bears most directly on the facts giving rise to the first is to the effect that he was concerned that he might have pots in the wrong area. Considering the totality of the circumstances, the “fresh” evidence does not persuade me that there has been a miscarriage of justice.

V. Disposition:

[108] The fresh evidence does not show that a miscarriage of justice has occurred. It should not, therefore, be admitted. I would grant leave to appeal but dismiss the appeal.

Cromwell, J.A.

Concurred in:

Glube, C.J.N.S.

Fichaud, J.A.

[109]

Tab 29:

**Criminal Code of Canada,
R.S.C. 1985, c. C-46, s. 486.4**

R.S.C. 1985, c. C-46, s. 486.4 | [L.R.C. 1985, ch. C-46, art. 486.4](#)

Canada Statutes > Criminal Code [ss. 1-849] > PART XV SPECIAL PROCEDURE AND POWERS [ss. 483-492.2] > General Powers of Certain Officials [ss. 483-487.03]

Notice

 Current Version: Effective 21-06-2019

SECTION 486.4

Order restricting publication- sexual offences

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read at any time before the day on which this subparagraph comes into force, if the conduct alleged involves a violation of the complainant's sexual integrity and that conduct would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(iii) REPEALED: S.C. 2014, c. 25, s. 22(2), effective December 6, 2014 (Act, s. 49).

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

Mandatory order on application

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and

(b) on application made by the victim, the prosecutor or any such witness, make the order.

Victim under 18-other offences

(2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or

justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

Mandatory order on application

(2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall

- (a) as soon as feasible, inform the victim of their right to make an application for the order; and
- (b) on application of the victim or the prosecutor, make the order.

Child pornography

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

Limitation

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community.

Tab 30:

**Criminal Code of Canada,
R.S.C. 1985, c. C-46, s. 686**

R.S.C. 1985, c. C-46, s. 686 | [L.R.C. 1985, ch. C-46, art. 686](#)

**Canada Statutes > Criminal Code [ss. 1-849] > PART XXI APPEALS-INDICTABLE OFFENCES
[ss. 673-696] > Powers of the Court of Appeal [ss. 686-689]**

Notice

 Current Version: Effective 19-09-2019

Powers of the Court of Appeal

SECTION 686.

Powers

686. (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal

(a) may allow the appeal where it is of the opinion that

- (i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,
- (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or
- (iii) on any ground there was a miscarriage of justice;

(b) may dismiss the appeal where

- (i) the court is of the opinion that the appellant, although he was not properly convicted on a count or part of the indictment, was properly convicted on another count or part of the indictment,
- (ii) the appeal is not decided in favour of the appellant on any ground mentioned in paragraph (a),
- (iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (a)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred, or
- (iv) notwithstanding any procedural irregularity at trial, the trial court had jurisdiction over the class of offence of which the appellant was convicted and the court of appeal is of the opinion that the appellant suffered no prejudice thereby;

Criminal Code

(c) may refuse to allow the appeal where it is of the opinion that the trial court arrived at a wrong conclusion respecting the effect of a special verdict, may order the conclusion to be recorded that appears to the court to be required by the verdict and may pass a sentence that is warranted in law in substitution for the sentence passed by the trial court; or

(d) may set aside a conviction and find the appellant unfit to stand trial or not criminally responsible on account of mental disorder and may exercise any of the powers of the trial court conferred by or referred to in section 672.45 in any manner deemed appropriate to the court of appeal in the circumstances.

(e) [Repealed, 1991, c. 43, s. 9]

Order to be made

(2) Where a court of appeal allows an appeal under paragraph (1)(a), it shall quash the conviction and

(a) direct a judgment or verdict of acquittal to be entered; or

(b) order a new trial.

Substituting verdict

(3) Where a court of appeal dismisses an appeal under subparagraph (1)(b)(i), it may substitute the verdict that in its opinion should have been found and

(a) affirm the sentence passed by the trial court; or

(b) impose a sentence that is warranted in law or remit the matter to the trial court and direct the trial court to impose a sentence that is warranted in law.

Appeal from acquittal

(4) If an appeal is from an acquittal or verdict that the appellant or respondent was unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal may

(a) dismiss the appeal; or

(b) allow the appeal, set aside the verdict and

(i) order a new trial, or

(ii) except where the verdict is that of a court composed of a judge and jury, enter a verdict of guilty with respect to the offence of which, in its opinion, the accused should have been found guilty but for the error in law, and pass a sentence that is warranted in law, or remit the matter to the trial court and direct the trial court to impose a sentence that is warranted in law.

New trial under Part XIX

(5) Subject to subsection (5.01), if an appeal is taken in respect of proceedings under Part XIX and the court of appeal orders a new trial under this Part, the following provisions apply:

(a) if the accused, in his notice of appeal or notice of application for leave to appeal, requested that the new trial, if ordered, should be held before a court composed of a judge and jury, the new trial shall be held accordingly;

(b) if the accused, in his notice of appeal or notice of application for leave to appeal, did not request that the new trial, if ordered, should be held before a court composed of a

judge and jury, the new trial shall, without further election by the accused, be held before a judge or provincial court judge, as the case may be, acting under Part XIX, other than a judge or provincial court judge who tried the accused in the first instance, unless the court of appeal directs that the new trial be held before the judge or provincial court judge who tried the accused in the first instance;

(c) if the court of appeal orders that the new trial shall be held before a court composed of a judge and jury, the new trial shall be commenced by an indictment in writing setting forth the offence in respect of which the new trial was ordered; and

(d) notwithstanding paragraph (a), if the conviction against which the accused appealed was for an offence mentioned in section 553 and was made by a provincial court judge, the new trial shall be held before a provincial court judge acting under Part XIX, other than the provincial court judge who tried the accused in the first instance, unless the court of appeal directs that the new trial be held before the provincial court judge who tried the accused in the first instance.

New trial under Part XIX - Nunavut

(5.01) If an appeal is taken in respect of proceedings under Part XIX and the Court of Appeal of Nunavut orders a new trial under Part XXI, the following provisions apply:

(a) if the accused, in the notice of appeal or notice of application for leave to appeal, requested that the new trial, if ordered, should be held before a court composed of a judge and jury, the new trial shall be held accordingly;

(b) if the accused, in the notice of appeal or notice of application for leave to appeal, did not request that the new trial, if ordered, should be held before a court composed of a judge and jury, the new trial shall, without further election by the accused, and without a preliminary inquiry, be held before a judge, acting under Part XIX, other than a judge who tried the accused in the first instance, unless the Court of Appeal of Nunavut directs that the new trial be held before the judge who tried the accused in the first instance;

(c) if the Court of Appeal of Nunavut orders that the new trial shall be held before a court composed of a judge and jury, the new trial shall be commenced by an indictment in writing setting forth the offence in respect of which the new trial was ordered; and

(d) despite paragraph (a), if the conviction against which the accused appealed was for an indictable offence mentioned in section 553, the new trial shall be held before a judge acting under Part XIX, other than the judge who tried the accused in the first instance, unless the Court of Appeal of Nunavut directs that the new trial be held before the judge who tried the accused in the first instance.

Election if new trial a jury trial

(5.1) Subject to subsection (5.2), if a new trial ordered by the court of appeal is to be held before a court composed of a judge and jury,

(a) the accused may, with the consent of the prosecutor, elect to have the trial heard before a judge without a jury or a provincial court judge;

(b) the election shall be deemed to be a re-election within the meaning of subsection 561(5); and

(c) subsection 561(5) applies, with such modifications as the circumstances require, to the election.

Election if new trial a jury trial - Nunavut

(5.2) If a new trial ordered by the Court of Appeal of Nunavut is to be held before a court composed of a judge and jury, the accused may, with the consent of the prosecutor, elect to have the trial heard before a judge without a jury. The election shall be deemed to be a re-election within the meaning of subsection 561.1(1), and subsection 561.1(6) applies, with any modifications that the circumstances require, to the election.

Where appeal allowed against verdict of unfit to stand trial

(6) Where a court of appeal allows an appeal against a verdict that the accused is unfit to stand trial, it shall, subject to subsection (7), order a new trial.

Appeal court may set aside verdict of unfit to stand trial

(7) Where the verdict that the accused is unfit to stand trial was returned after the close of the case for the prosecution, the court of appeal may, notwithstanding that the verdict is proper, if it is of the opinion that the accused should have been acquitted at the close of the case for the prosecution, allow the appeal, set aside the verdict and direct a judgment or verdict of acquittal to be entered.

Additional powers

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