Court File Nos. CA42488 and 42490
Vancouver Registry

BRITISH COLUMBIA COURT OF APPEAL

(ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA FROM THE JUDGMENT OF THE HONOURABLE MADAM JUSTICE WEDGE PRONOUNCED THE 2ND DAY OF OCTOBER, 2014 AT VANCOUVER, B.C.)

BETWEEN:

REGINA

RESPONDENT

AND:

MATTHEW JAMES JOHNSTON AND CODY RAE HAEVISCHER

APPELLANTS

APPELLANTS' JOINT FACTUM #1: SECTION 650 AND *VETROVEC* GROUNDS

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PART I: OVERVIEW AND STATEMENT OF FACTS

I. OVERVIEW

1. The appellants were convicted of murdering six people in suite 1505 of the Balmoral Tower in Surrey on October 19, 2007. The Crown's theory was that the killings were payback for an unpaid debt between rival gangs. The Crown's case became entirely circumstantial when, in advance of trial, Person X was excluded as a witness. This ruling—which excluded the Crown's only eyewitness—was very significant. Person X had already pleaded guilty to murdering three people in suite 1505, and presumably had direct evidence of what had occurred inside. Person X's exclusion came after roughly 40 days of *ex parte* proceedings (initially scheduled for four days) on the issue of informer privilege. The hearing was held *ex parte* over the appellants' protest, and neither appellant was permitted to make submissions. Moreover, the trial judge's reasons for excluding Person X as a witness were never released to the appellants. To this day, neither appellant knows why the most important Crown witness was excluded from his trial. Neither knows what occurred during roughly 40 days of court time before the judge in their judge-alone trial. Neither knows what evidence and submissions were advanced, or what credibility assessments and factual findings were made by the trial judge that led her to grant such an order.

2. The appellants jointly advance two grounds of appeal in this factum. First, the "second stage" of the informer privilege hearing was "part of the trial," and thus the appellants' exclusion from the hearing contravened s. 650(1) of the *Criminal Code*,[1] at least from the point in time when the proceedings moved on to consider the admissibility of Person X's anticipated evidence. This is not how a criminal trial is supposed to work. An accused person has a statutory and constitutional right to be present at proceedings that affect his or her vital interests. By completely excluding the appellants from the process, the trial judge created unfairness.

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[1] *Criminal Code***,** R.S.C., 1985, c. C-46, as amended (the "*Code*"),

3. Secondly, the convictions turned largely on circumstantial evidence from two of the *Vetrovec*[2] witnesses: Person Y and K.M.. The trial judge erred in her assessment of the reliability of the evidence from these witnesses. The trial judge was obliged to identify independent, confirmatory evidence that restored her faith in those aspects of the witnesses' evidence that implicated the appellants. She failed to apply this rigorous standard. The material evidence she considered was not independently verified, and it was contradicted by independent evidence. In other instances, the source of the material aspects of the *Vetrovec* evidence was, in large part, the witnesses' own evidence. Hence, the trial judge misapplied the principles in *Vetrovec*.

4. For these reasons, this Court should allow the appeal and order a new trial.

II. BACKGROUND FACTS

A. The Events of October 19, 2007

5. We rely on the Agreed Statement of Facts and wish to highlight the following aspects of the evidence. The police identified two eyewitnesses who described seeing three men wearing hoodies,[3] entering the Balmoral through the parking garage, using a building key fob to gain entrance, and departing about 20 minutes later. The three men drove off in a black BMW. By coincidence, a drug unit within the Surrey RCMP had been conducting surveillance at a nearby apartment building ("the Stanley") where K.M. and Mr. Haevischer lived. The drug unit had acquired surveillance footage showing three men in hoodies coming and going from the Stanley close in time with when the eyewitnesses saw three men in hoodies arriving and departing from the Balmoral.

B. Person Y and Person X

6. A week and a half after the killings, the police had identified suspects, including the appellants, but the police did not have enough evidence to charge anyone. The police discovered that a black BMW was taken to a car-detailing service in the days after the killings. The police seized the car to search for evidence before the vehicle was

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[2] ***R. v. Vetrovec***, [1982] 1 S.C.R. 811.
[3] Transcript ("Trans.") Vol. 2, 7 October 2013, p. 407, ll. 26-34 (407, 26-34).

cleaned. The police obtained phone records with a view of situating suspects at certain places at relevant times. The police searched the Stanley apartment. The investigation continued but did not yield further evidence that would support charges being brought against any suspect. This changed when Person Y and Person X got involved.

7. Person Y—a long-standing criminal immersed in violence and gangs for many years—reached out to senior homicide investigators, whom he knew from his own trial for murder some years before.[4] By his own admission, Person Y knew of, and for a time was part of, a plan to kill Corey Lal.[5] By his own admission, he was privy to incriminating conversations that allegedly took place in the lead-up to, and in the time after, the killings. And by his own admission, Person Y became a police agent solely to capture confessions from the appellants on audio or video wiretap.[6] He became "the biggest rat ever" (his words)[7] after having an "epiphany" while enjoying the breathtaking view of Sugarloaf Mountain, the pristine sand and the gorgeous women at Rio de Janeiro's Ipanema Beach. He was also paid by the RCMP in exchange for his testimony. By the time of his guilty pleas in 2010, the trial judge concluded that the amount given to Person Y or spent directly for his benefit exceeded $1.3 million.[8]

8. Person X, also a gang member, was one of the killers who shot at least three of the victims in suite 1505. Person X had direct knowledge of what happened inside, and who did what. In April 2009, Person X cut a deal with the Crown and pleaded guilty to three counts of *second*-degree murder, becoming the star witness against the appellants.[9] The appellants were arrested the same day that Person X pleaded guilty, along with Jamie Bacon and Michael Le, each charged with first-degree murder and conspiracy to commit murder.

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[4] Reasons for Judgment, para. 470 ("RFJ").
[5] RFJ, at para. 187.
[6] RFJ, at para. 430.
[7] RFJ, at para. 473.
[8] RFJ, at paras. 475-476.
[9] RFJ, at para. 5.

III. KEY FACTS ON EXCLUDING THE APPELLANTS FROM THE TRIAL

A. Pre-Trial Rulings and Applications 64 and 65

9. All four co-accused (at this point) brought a series of pre-trial applications, dealing with a range of issues including disclosure, privilege claims, and the admissibility of evidence. As the pre-trial applications were being heard, the Crown elected to separate the four accused from each other. The Crown proceeded separately against Mr. Bacon. At the time of writing, Mr. Bacon's charges have been stayed.[10]

10. The pre-trial applications continued, now with three co-accused. Applications 64 and 65 led to the single most important pre-trial ruling. In these applications, the appellants requested disclosure related to two confidential informants, and challenged the privilege claims. The Crown objected to the disclosure based on informer privilege—the evidence may have been relevant, but it was obtained in the course of privileged communications and could not be disclosed. The Crown's assertion of privilege led to an application to move the proceedings *in camera* and *ex parte*, putatively following the two-step framework laid out in ***Named Person v. Vancouver Sun***[11] and ***R. v. Basi***.[12] The appellants brought an application alleging a violation of their entitlement under s. 650(1) of the *Code* to be present at all stages of their trial.

11. The trial judge dismissed the application,[13] ruling that the Crown could pursue its claims of privilege *ex parte*, effectively excluding the appellants. She appointed *amicus curiae* to provide an adversarial context in Application 65. The appellants were not present for the roughly 40 days of court time that followed.

12. In July 2013, the appellants filed Application 97, seeking information about the *ex parte* hearing and, hopefully, a redacted report summarizing those parts of the hearing that would not tend to identify the identity of the informant(s).[14] The Crown's Reply to

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[10] ***R. v. Bacon***, 2017 BCSC 2207 (Crown appeal to BCCA heard on December 2, 2019; reserved).
[11] ***Named Person v. Vancouver Sun***, 2007 SCC 43.
[12] ***R. v. Basi***, 2009 SCC 52.
[13] ***R. v. Haevischer***, 2013 BCSC 1735.
[14] "Notice of Application and Submissions: Ongoing Exclusion of Accused and Report to Accused (Application #65)," at paras 19, 20 and 25 (to be added to Appeal Book ("AB")).

that application indicated that the Crown supported disclosure of some sort of report about what went on during the *ex parte* portion of the proceedings.[15] No such report was *ever* received by the appellants. Instead, when the *ex parte* hearing ended, the trial judge, in abbreviated reasons indexed at 2013 BCSC 1526, upheld the Crown's assertion of privilege in relation to the confidential informer. In response to concerns raised by *amicus* about the impact of the privilege ruling, in particular the non-disclosure of privileged information on the fairness of the trial, the judge held that Person X could not be called as a witness by the Crown, stating only that Person X's evidence was "inadmissible for the reasons stated in the ruling, which is in writing and has been sealed in the Court record",[16] but providing no further detail.

13. The appellants have never been told the reason for this startling decision. The appellants will never understand the connection between the privilege issue concerning E5 and why the star Crown witness was excluded. The appellants were denied any opportunity to make submissions on whether their ability to make full answer and defence was irreparably impaired without Person X's testimony such that a stay of proceedings would be appropriate. Nor were the appellants permitted to make submissions on other remedies such as exclusion of other witnesses whose evidence was derivative or connected to the evidence of Person X or E5. The appellants simply learned from the trial judge's ruling that Person X's evidence was inadmissible for reasons set out in a sealed ruling that the appellants were not allowed to see.

B. Commencement of the Trial

14. The ruling that excluded Person X as a witness came approximately a month before the date scheduled for the commencement of trial. Despite the late plot twist, the trial began with little delay, with three co-accused. It took place over 80 days, with a number of days consumed by mid-trial applications. It involved some 73 witnesses. Neither appellant testified nor led evidence. The Crown's case was largely circumstantial, since Person X could not testify. The case proceeded before a judge

[15] "Redacted Crown Reply Submissions" (to be added to AB), at para. 10.
[16] ***R. v. Haevischer***, 2013 BCSC 1526 (Ruling on E5) at para. 6.

alone—the same judge who had sat for 40 days *in camera* in the absence of the appellants, listening to evidence that went to the very heart of the allegations.

15. The Crown's theory of the case was that the *motive* for the killings related to an inter-gang "tax", that only the appellants had the *means and opportunity* to carry out the killings, and that this was corroborated by *admissions* allegedly made by Mr. Johnston to Person Y, after the fact, implicating himself (and others) in the killings. While the evidence of motive was not seriously contested, the evidence of means and opportunity was vigorously contested, with the most important prosecution evidence coming almost exclusively from *Vetrovec* witnesses.

IV. KEY FACTS ON THE MISAPPLICATION OF *VETROVEC*

A. Person Y's Evidence

16. Person Y was a repeat killer. He had killed in the past by shooting, by strangling, and by stabbing.[17] He had shot and killed his own best friend, a man whose named he had later tattooed on his body.[18] The trial judge referred to Person Y as a "career gangster".[19] Person Y referred to himself as "despicable" and "a monster".[20] Person Y was involved in the plan to kill Corey Lal before the appellants were alleged to have joined. Person Y had volunteered to kill Corey Lal, but on the condition that he do it alone.[21] Person Y's evidence was important in several ways.

17. First, Person Y's DNA was found on one of the guns in suite 1505.[22] Person Y was not there, but the gun was in his possession before the killings. He had stuffed the gun in his pants and worn it, of all places, at the gym.[23] Person Y told police that he had given his gun to Person X, one of the shooters, on October 19, 2007, before the killings. No other DNA was found on either gun.

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[17] RFJ, at para. 468.
[18] Trans., Vol. 11, March 24, 2014, p. 3745, ll. 10-20.
[19] RFJ, at para. 21.
[20] RFJ, at para. 468.
[21] RFJ, at para. 196.
[22] RFJ, at para. 238.
[23] Trans., Vol. 11, March 11, 2014, p. 3643, ll. 19-42.

18. Second, Person Y testified to a conversation with Mr. Johnston, shortly after the killings, in the back of Jamie Bacon's car. Mr. Bacon's car was under surveillance that afternoon. According to Person Y, some time after Mr. Bacon left the vehicle, Mr. Johnston jumped into Mr. Bacon's car and told Person Y what happened at the Balmoral. Mr. Johnston then got out of Mr. Bacon's car.[24]

19. Third, once Person Y had agreed to be a police agent, he conducted two scenarios involving Mr. Johnston. In the first, he brought up the gun. Mr. Johnston denied that he knew anything about Person Y's gun. Person Y then brought up Person X. Mr. Johnston replied that he had watched Person X clean the gun with Windex, but that's all he knew. In the second scenario, Person Y again brought up the gun.[25] The Crown relied heavily on Mr. Johnston's alleged gestures to establish guilt.

B. K.M.'s Evidence

20. K.M. testified that the three men were at her apartment, and she helped clean guns and bullets with Windex and paper towel. The men didn't tell her what they were planning to do. She didn't see where the guns came from. She turned around and there they were, sitting on her coffee table.[26] She denied knowing the men would be leaving in her BMW.[27] She denied using her fob to allow the men egress out of the secured parking area when they left her apartment in her BMW.[28] When they returned, she described Mr. Johnston carrying a black garbage bag. When the contents were emptied, she counted money with Mr. Johnston. She observed Cody Haevischer boiling cell phones in a pot of water.[29] Cody Haevischer's brother, Justin, was also in the apartment. She saw Cody Haevischer write "people died" on a white board to Justin. Mr. Haevischer then told K.M. to assist Justin. She accompanied Justin to a location in South Surrey. There, they burned a laundry bag filled with items.[30] Later that evening, she witnessed two events. At a house in Richmond, she observed Mr. Haevischer write

[24] RFJ, at para. 404.
[25] RFJ, at paras. 426-454.
[26] RFJ, at paras. 282-284.
[27] RFJ, at para. 286.
[28] RFJ, at paras. 306-308.
[29] RFJ, at paras. 348-350.
[30] RFJ, at para. 356.

a whiteboard message that read, “six people died;”[31] later, she observed a white board message that read, “Burnt it all, all gone.”[32]

C. The Trial Judge’s Reasons for Judgment

21. The trial judge instructed herself at the outset that the *Vetrovec* principles apply to four witnesses—K.M., D.Y., Person Y, and Mr. Le. She noted that each was unsavoury “as a matter of law and that they present with numerous trustworthiness issues that will require the Court to turn to compelling confirmatory evidence to restore faith in material aspects of their testimony.”[33]

22. The trial judge recounted the evidence of each witness as it fit into or touched upon the factual narrative.[34] In doing so, she made many findings of fact and many favourable findings of credibility about each of the witnesses (except Mr. Le, whose evidence she largely rejected). Then, she gave a brief self-instruction on the *Vetrovec* principles[35] before providing an overall assessment of each *Vetrovec* witness in turn.[36]

23. In the first part of her reasons—the recounting of the evidence—and starting at paragraph 213, the trial judge made the following findings of fact: (1) K.M. assisted Mr. Johnston and Person X with the cleaning of guns and bullets before the killings; (2) upon the appellants’ return to K.M.’s apartment, K.M. counted money with Mr. Johnston, observed Mr. Haevischer boiling phones, and assisted Mr. Haevischer’s brother, Justin, in burning the evidence; (3) K.M. observed incriminating “whiteboard” conversations involving Mr. Haevischer; and (4) Person Y received a full confession from Mr. Johnston in the back seat of Mr. Bacon’s car shortly after the killings.

24. Only *after* making these findings of fact, and passing favourably on the credibility and reliability of three of the four *Vetrovec* witnesses, starting at paragraph 463, did the trial judge turn to the principles from *Vetrovec*. After stating the principles, the trial judge

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[31] RFJ, at para 374.
[32] RFJ, at para 380.
[33] RFJ, at para. 22.
[34] RFJ, at paras 182-462.
[35] RFJ, at paras 463-464.
[36] RFJ, at paras 465-566.

turned to each of the witnesses, summarized the appellants' arguments against relying on their evidence, and then found that each of these witnesses, except for Mr. Le, was credible. For instance, on Person Y's credibility, the trial judge stated the following:

> In my view, Person Y's actions do speak for him. His actions answer many of the issues raised by Mr. Johnston in challenging Person Y's credibility. Considering the evidence of Person Y as a whole, as well as the circumstances that have brought him before the Court, I am satisfied that his intention was to tell a true story to the Court. I would note that even Mr. Haevischer argues that Person Y's shortcomings relate more to his reliability than credibility and that the Court ought not to reject his evidence in total. Importantly, Person Y's evidence is corroborated in many respects by independent evidence, and I have accepted it on many of its essential points.[37]

25. In addressing K.M.'s evidence, the trial judge said this:

> As with Person Y, there are areas of K.M.'s evidence with respect to which she is honestly mistaken, or where her memory was unclear. However, many key aspects of her evidence are in accordance with the "preponderance of probabilities" in this case. Further, there is evidence from other sources tending to show that K.M. is telling the truth in the material aspects of her testimony.[38]

PART II: ERRORS IN JUDGMENT

26. This joint factum raises the following issues:

1. Did the trial judge err by adopting a procedure that excluded the appellants from a part of their trial that affected their vital interests, in contravention of s. 650(1) of the *Code*?

2. Did the trial judge err in her application of the principles from *Vetrovec* in failing to identify independent, confirmatory evidence capable of restoring faith in the material aspects of the *Vetrovec* witnesses' testimony?

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[37] RFJ, at para 481 (emphasis added).
[38] RFJ, at para 508 (emphasis added).

PART III: ARGUMENT

I. EXCLUDING THE APPELLANTS CONTRAVENED SECTION 650(1)

27. Unable to peek into the void of the informer privilege hearing in this case, the appellants were hobbled by enforced ignorance. The trial judge erred by completely excluding the appellants from participating in the "second stage" of the privilege hearing—that is, litigating the *effect* of the judge's finding that informer privilege existed. Without providing any redacted information to the appellants or inviting submissions from them, the trial judge pushed ahead to the "second stage" of the hearing *ex parte* and *in camera*, and held that Person X's testimony was inadmissible. By excluding—without any input from the appellants—an entire body of evidence from someone who directly participated in the shootings, and whose evidence could have helped or hurt the defence, the trial judge violated s. 650(1) of the *Code*.

A. Section 650(1) and its Underlying Purposes

28. Section 650(1) requires that trial proceedings occur with the accused present:

> 650. (1) Subject to subsections (1.1) and (2) and section 650.01, an accused, other than an organization, shall be present in court during the whole of his or her trial.

29. The provision is written in mandatory language ("shall") and provides that not only is an accused entitled to be present throughout the whole of the trial, the accused is obliged to be there.[39] The provision has exceptions. For instance, the provision allows for remote appearances, the exclusion of a disruptive accused, the exclusion of an accused during a fitness hearing, or the exclusion of the accused by consent. But none of these exceptions applied in these proceedings, as the appellants clearly asserted their rights under s. 650(1) and did not consent to an *ex parte* hearing.[40]

30. Section 650(1) is a statutory reflection of the long experience of the common law and embodies at least two main purposes. The first purpose is to ensure that an accused understands what the trier-of-fact is told by the Crown in order to meet the

[39] See ***R. v. Grimba*** (1980), 570 C.C.C. (3d) 570 (Ont. C.A.) at 573.
[40] See ***R. v. Haevischer***, 2014 BCSC 521 at para 7.

Crown's case. This is the cornerstone of the right to make full answer and defence. Martin J.A. expressed this proposition as follows in the oft-cited case of ***R. v. Hertrich***:[41]

> The essential reason the accused is entitled to be present at his trial is that he may hear the case made out against him and, having heard it, have the opportunity of answering it. The right of the accused to be present at his trial, however, also gives effect to another principle. Fairness and openness are fundamental values in our criminal justice system. The presence of the accused at all stages of his trial affords him the opportunity of acquiring first-hand knowledge of the proceedings leading to the eventual result of the trial. The denial of that opportunity to an accused may well leave him with a justifiable sense of injustice. Indeed, in my view, an examination of the Canadian decisions shows that the latter principle is, in fact, the implicit and overriding principle underlying those decisions.[42]

31. As noted by the leading jurist G. A. Martin J.A., there is a second implicit and overriding purpose: the open-court principle, particularly as it relates to the accused, ensures that potential injustices are laid bare and cannot be obfuscated by fog or secrecy. An accused must not, by virtue of his or her exclusion from the trial, be deprived of an ability to understand what led to the ultimate result, and therefore be left with a sense that his or her trial has been conducted unfairly. Section 650(1) ensures that when convictions are entered, there has been a rigorously fair process, in which the accused was, *through first-hand knowledge*, aware of the information, evidence, and submissions that affected him or her. The accused's presence at all stages of the trial ensures every opportunity to answer the allegations. Hence, s. 650(1) is a statutory codification of the constitutional entitlement to a fair and public trial.[43]

32. In sum, s. 650(1) has two main rationales: (1) to ensure an accused can properly exercise the right to make full answer and defence, and (2) to bring transparency and the appearance of fairness whenever matters vital to the accused's interests are at stake.[44] These purposes are important. They cannot be swept aside. Parliament is presumed to intend for its provisions to be read harmoniously and to be interpreted and

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[41] ***R. v. Hertrich***, (1992) 67 C.C.C. (2d) 510, 1992 CanLII 3307 (ONCA).
[42] *Ibid* at para 81 (emphasis added; citations omitted).
[43] ***R. v. Laws*** (1998), 128 C.C.C. (3d) 516, 1998 CanLII 7157 at para. 79.
[44] ***R v. Poulous***, 2015 ONCA 182 at para 24.

applied so they fit together in a way that respects the provision's objectives.[45] The burden falls to the Crown, or the Court, to justify any departure from the requirement that the accused be present.

B. The "Second Stage" of a Privilege Hearing

33. In addition to defeating the purposes underpinning s. 650(1), the trial judge's chosen procedure has no real precedent in the case law. There is no support for the notion that an accused can be excluded *entirely* from proceedings that affect his or her vital interests, such as where the trial judge is considering excluding a central witness from an accused's trial for first-degree murder. Even if informer privilege restricts the information that the court can disseminate to an accused, the court must nevertheless ensure that as much information as possible is disclosed, even in redacted form, to allow the accused the opportunity to advance meaningful submissions.

34. The "first stage" of a privilege hearing involves resolving the question of whether the claimed privilege exists.[46] This first-stage hearing (the ***Basi*** hearing) is *in camera* and usually involves only the putative informant and the Crown, although the court may appoint an *amicus curiae* where necessary.[47] The hearing judge must be satisfied, on a balance of probabilities, that the person is a confidential informant, and if so, must give the claim of privilege full effect.[48]

35. The appellants are *not* arguing that s. 650(1) provides an accused a right to be present at the first stage. That issue was resolved in ***Basi***. Rather, the appellants take issue with the judge's decision to exclude them entirely at the *second* stage, where the issue shifted to the admissibility of a key witness's evidence. We emphasize: ***Basi*** did not specifically address the scope of an accused's participation at the second stage of the hearing.

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[45] ***R. v. Rafilovich***, 2019 SCC 51 at para 20.
[46] ***Basi***, *supra* note 12, at para 38; ***Named Person***, *supra* note 11, at paras 46-49.
[47] ***Basi***, *supra* note 12, at para 38.
[48] *Ibid* at para 39.

36. According to ***Named Person***, the "second stage"—which forms the controversy in this ground of appeal—requires the court to determine how best to protect the privilege[49] while simultaneously protecting and promoting the values of the open court principle.[50] The court must concern itself with "minimal intrusion."[51] This may involve permitting parties other than the informer and Crown to provide submissions:

> Restricted disclosure will of course be necessary to protect the privileged information, but the protection of the open court principle demands that all information necessary to ensure that meaningful submissions, which can be disclosed without breaching the privilege, ought to be disclosed. Therefore, standing may be given at this stage to individuals or organizations who will make submissions regarding the importance of ensuring that the informer privilege not be overextended and the way in which that can be accomplished in the context of the case.[52]

37. The Supreme Court of Canada decided ***Named Person*** in the context of third-party media rights. The competing interest to informer privilege was the "open court principle" for the media in that case, not an accused's participation in litigating his or her vital interests in a criminal trial. In that case, the issue on the "second stage" was for the court to determine, after a finding of informer privilege, the extent of the need for *in camera* proceedings: "[i]t is at this point that the media is granted standing to present arguments on how informer privilege can be respected with minimal effect on the open court principle."[53]

38. Similarly, at this second stage (from the perspective of an accused in a criminal trial seeking disclosure), the accused should have standing to present "meaningful submissions" on how informer privilege can be protected with minimal effect on the vital interests of the accused. To achieve that end, the court should disclose to the accused all relevant information in redacted form to permit full answer and defence while simultaneously protecting informer privilege.

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[49] ***R. v. Haevischer***, *supra* note 13, at para 28.
[50] ***Named Person***, *supra* note 11 at para 50.
[51] *Ibid* at para 51.
[52] *Ibid* (emphasis added).
[53] *Ibid* at para 54.

39. In this appeal, unlike in ***Basi,*** the accused's participation at the second stage of an informer privilege hearing *is* squarely before the Court. The trial judge in this case not only proceeded as if the common law authorized an entirely *ex parte* two-step informer privilege hearing, but also sanctioned an *ex parte* hearing even as the subject matter turned to the anticipated evidence of a witness, Person X, who was not a confidential informant. Here, the appellants submit that the trial judge's approach to the two-step informer privilege framework developed in ***Named Person*** and ***Basi*** was incompatible with s. 650(1) and irreconcilable with an accused's fair trial rights.

C. A Violation of Section 650(1) Does Not Require Actual Prejudice

40. A court violates an accused's right to be present at trial under s. 650(1) when an accused is excluded from a part of his or her trial "which affected his or her vital interests."[54] The accused "need not demonstrate any actual prejudice flowing from his or her exclusion from the trial—i.e., that he or she was in fact impeded in his or her ability to make full answer and defence."[55]

41. Moreover, the two rationales for s. 650(1) in ***Hertrich*** need not overlap: the accused's right to make full answer and defence may not be prejudiced, yet the accused's right to "first-hand knowledge of proceedings affecting his or her vital interests is negatively effected."[56] Thus, in order to establish that their rights under s. 650(1) were breached, the appellants need only demonstrate that they were excluded from part of the trial that affected their vital interests.

1) The Second Stage was "Part of the Trial"

42. The term "trial" for the purposes of s. 650(1) includes anything that transpires that involves an accused's vital interests.[57] This includes events that occur beyond the

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[54] ***R. v. Tran***, [1994] 2 S.C.R. 951 at 974.
[55] *Ibid* (emphasis in original); See also ***R. v. Shayesteh***, 1996 CanLII 882 (ONCA); ***R. v. Mid Valley Tractor Sales Ltd.***, 1995 CanLII 6282 (NBCA).
[56] ***Tran***, *supra* note 56, at 974 (emphasis added).
[57] ***Hertrich***, *supra* note 42, at paras 82 and 86.

proceedings whose purpose is to determine guilt or innocence, and extends to anything that may have occurred outside the proceedings but may affect their fairness.[58]

43. Hence, while the term "trial" is not defined in s. 2 of the *Code*, case law makes clear that where there are matters of substance that affect the "vital interests" of the accused, the accused *must* be present. In ***Laws***, the Court of Appeal for Ontario held that s. 650(1) codifies an accused's constitutional right to a fair and public trial, and the term "trial" consequently should receive an expansive interpretation, including all proceedings which are part of the normal trial process.[59] This would include the second stage of the privilege hearing at issue in this appeal, which the appellants submit affected their vital interests because it became a *voir dire* on the admissibility of Person X's testimony, and a hearing at which *remedies* for non-disclosure and trial fairness problems were being adjudicated.

2) The Admissibility of Evidence Engages "Vital Interests"

44. The appellants submit that the "second stage" of the privilege hearing in this case engaged their "vital interests," as it had evolved into a hearing on the admissibility of evidence and the appropriate remedy for non-disclosure of information that affected their fair trial rights.

45. In ***Vézina and Côté v. The Queen***,[60] Lamer J. (as he then was) endorsed the reasons in ***Hertrich***, where Martin J.A. explained that parts of a trial that involve an accused's "vital interests" include "the reception of evidence (including *voir dire* proceedings with respect to the admissibility of evidence), rulings on evidence, arguments of counsel…"[61] Lamer J. went further to observe that these parts can include proceedings the judge conducts "during the trial for the purpose of investigating matters which have occurred outside the trial but which may affect its fairness."[62]

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[58] ***R. v. Simon***, 2010 ONCA 754 at para 115 citing ***Hertrich***.
[59] ***Laws***, *supra* note 44, at para 79.
[60] ***Vézina and Côté v. The Queen***, [1986] 1 S.C.R. 2.
[61] *Ibid* at 10.
[62] *Ibid*; See also ***R. v. Rosebush***, 1992 ABCA 293 at para 26: Vital interests "include any inquiry that might affect the fairness of the trial."

46. A *voir dire* to determine the admissibility of evidence under the *Charter* is also "part of the trial" that affects an accused's vital interests.[63] An accused has the same right to be present for the evidence led on a *voir dire* for the exclusion of evidence as he or she has for any part of the trial.[64]

47. In ***R. v. X and Y***,[65] the Court decided whether "the Source" in that case was a confidential informant, whether he had waived privilege, and whether he was a compellable witness at trial. In narrating the unusual circumstances of that case (where the accused knew the informer's identity), the Court noted that there were *in camera* proceedings that were conducted in part with defence counsel present in their clients' absence (with the accused's consent).[66] Citing both ***Basi*** and ***Named Person***, the Court explained the process it had followed and specifically noted that "the interests of the accused are vitally affected by the ruling as to whether the Source can now be compelled to testify," and that allowing defence counsel to participate permitted the Court to determine them "on a wholly adversarial basis."[67]

48. Hence, in this case, on the authority of ***Basi***,[68] the "first stage" hearing to determine whether the claim of informer privilege was valid may not have been "part of the trial" that engaged s. 650(1).

49. However, when the "first stage" hearing completed and the judge concluded that informer privilege existed in the circumstances, the trial judge embarked on the "second stage," which was to determine how best to protect that privilege and yet account for the impact of non-disclosure on the fairness of the trial for the appellants. Here, the trial judge went further and made a determination about the admissibility of key evidence in the absence of the appellants. ***Basi*** did not envision or sanction the blanket exclusion of an accused person from participating in the second stage of a privilege hearing, and certainly not when it directly impacts the substantive aspects of a trial. Regardless of

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[63] ***R. v. Gibbs***, 2018 NLCA 26 at paras 22 and 23; ***R. v. Amell***, 2013 SKCA 48 at para 43.
[64] ***R. v. Edwardsen***, 2019 BCCA 259 at para 9.
[65] ***R. v. X and Y***, 2012 BCSC 325.
[66] *Ibid* at para 134.
[67] *Ibid* at para 131 (emphasis added).
[68] ***Basi***, *supra* note 12, at para 50.

whether the Crown proceeded under s. 37 of the *Canada Evidence Act* or under the common law, there is no authority for the proposition that the Crown can proceed entirely *ex parte* in privilege hearings where the accused's vital interests are affected.

D. Application of Principles to this Case

50. In the present case, the trial judge's decision to exclude the appellants at the second stage cannot be reconciled with the purposes underpinning s. 650(1). In particular, the chosen procedure ran afoul of the appellants' right to be present when questions emerged at the second stage of the privilege hearing in relation to potential remedies, impact on trial fairness, and the admissibility of Person X's evidence (who, we would emphasize, was a *non-informer*). The trial judge aggravated this error by failing to provide relevant redacted information to allow the appellants' counsel an opportunity to make meaningful submissions regarding remedy.

51. On September 4, 2012 the appellants filed Notice of Application 65 seeking disclosure and challenging the Crown's assertion of informer privilege.[69] Arguments on the application were held on February 12, 2013 and the trial judge gave brief oral reasons on the same day (and later released written reasons), concluding that s. 650(1) did not bar the Crown from proceeding *ex parte* to litigate claims of informer privilege, without the consent of the appellants.[70]

52. On July 30, 2013, counsel for Mr. Johnston filed an application (Application 97) to attend and participate in Application 65, and asked for a "detailed report about what [had] been occurring in the Application," as contemplated by ***Basi***, noting that he did not anticipate the Crown opposing the release of such a report.[71] By that time, the anticipated four-day *ex parte* privilege hearing had ballooned to 36 court days. And Mr. Johnston indicated in the notice that he was "particularly concerned that the putative informer [was] in fact a potential witness at trial."[72]

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[69] Statement of Facts at para 122.
[70] ***R. v. Haevischer***, *supra* note 13, at para 5.
[71] "Notice of Application and Submissions: Ongoing Exclusion of Accused and Report to Accused (Application #65)," *supra* note 14, at paras 19, 20 and 25 (to be added to AB).
[72] *Ibid* at para 21.

53. The next day, counsel for Mr. Johnston sent to the Crown a two-page document titled, "Informer E5 / Application #65: What we'd like to see in a report."[73] In that document, he set out a list of questions, asking for a report that would "set out as much information as possible" about the content of and manner in which the evidence was led, whether the application related to or involved other court proceedings, whether any other parties (other than *amicus* and E5) and their counsel have participated, whether any reasons or materials could be provided in redacted form, and *whether any remedies or orders were being contemplated that may implicate or involve the defence*.[74]

54. Neither Application 97 nor Mr. Johnson's requests were resolved because the trial judge released her decision (under seal) on Application 65 on August 14, 2013, and the abbreviated ruling on August 23, 2013. The trial judge had ruled that informer privilege applied to E5, and *without hearing from the appellants*, ruled that Person X could not be called by the Crown as a witness.[75]

1) The Trial Judge Failed to Permit "Meaningful Submissions"

55. In the context of this case, the trial judge had a duty to release relevant information to the appellants to allow meaningful submissions because the second stage directly impacted their vital interests. Indeed, in her abbreviated reasons, the trial judge noted that *amici* had raised an issue about "trial fairness" arising from non-disclosure of privileged information, and that the issue had been *litigated*.[76] Here, the trial judge breached s. 650(1) when the hearing on informer privilege (stage one) evolved into a hearing on remedies and the admissibility of evidence (stage two), over the course of more than 36 court days, and culminated in the exclusion of evidence—all in the absence of the appellants.[77] As we have argued, a hearing on the admissibility of evidence is part of the trial because it engages the accused's "vital interests." And the appellants do not have to prove actual prejudice to establish a breach of s. 650(1).

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[73] "Informer E5 / Application #65: What we'd like to see in a report" (employed in Application 97 hearing; to be added to AB).
[74] *Ibid*.
[75] ***R. v. Haevischer***, *supra* note 16.
[76] *Ibid* at para 6 (emphasis added).
[77] *Ibid* at para 4.

56. Upon concluding that the informer privilege claim was upheld, the trial judge had a positive duty to invite the appellants back into the courtroom, and to ask them to state their positions on potential remedies. The trial judge could have held such a hearing without breaching privilege, of course, by restricting what information the defence was given. But this way, the appellants would have had the opportunity to say if they wanted a witness excluded, or not, or only for certain purposes/uses. Or they could apply for a *different* remedy, whether a judicial stay of proceedings, or a deferral of the overall remedy to a later stage. They may have wanted the exclusion of a different witness. Perhaps the two appellants would have given different answers. But they never had the chance to say a thing. They were simply told what had already happened.

57. In ***R. v. Welsh***,[78] while the Crown conceded the point on appeal, the Ontario Court of Appeal did not disagree that "when the *in camera* hearing went beyond the issue of work product privilege into consideration of the merits of the application for a stay of proceedings or exclusion of Brown's evidence, there was a violation of s. 650(1) of the *Criminal Code.*"[79]

58. In the case at bar, Application 65 went beyond the issue of informer privilege and mutated into an application for the exclusion of evidence based on trial fairness. Indeed, the title of the trial judge's ruling was "Abbreviated Ruling re: Application No. 65 – Witness Issue."[80] Yet, when the appellants had filed and advanced Application 65, it had nothing to do with any *witnesses*. It was an application to challenge the Crown's claim of informer privilege over otherwise disclosable material.

59. In ***Basi***, Fish J. emphasized that an accused and defence counsel should be excluded from an informer privilege hearing only when the identity of the informer cannot be otherwise protected, and "only to the necessary extent" *without compromising the ability of the accused to make full answer and defence*.[81]

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[78] ***R. v. Welsh***, 2013 ONCA 190.
[79] *Ibid* at para 135.
[80] ***R. v. Haevischer***, *supra* note 16 (emphasis added).
[81] ***Basi***, *supra* note 12, at para 53.

60. The trial judge in this case had a *duty* to alert the appellants that the admissibility of Person X's evidence was at issue, that very serious remedies were contemplated, and that the non-disclosure of information may affect the fairness of their trial. That duty arises "even where s. 650, by its very terms, has no application" because *ex parte* hearings are "particularly troubling when the person excluded from the proceeding faces criminal conviction and its consequences."[82] In ***Basi***, Fish J. went further to suggest that the trial judge had the responsibility to protect the accused's interests where the accused has been in the dark: "[i]n order to protect these interests of the accused, trial judges should adopt all reasonable measures to permit defence counsel to make meaningful submissions regarding what occurs in their absence."[83] This includes inviting submissions on the scope of the privilege, receiving proposed questions to be put to any witnesses, and providing a redacted or summarized version of the evidence presented at the hearing.[84]

61. Put simply, the appellants had the right to advance submissions and positions on remedies, evidentiary issues and trial fairness *in open court* as contemplated under s. 650(1).[85] They were in the best position to know the nuances of what evidence might be relevant to their defence and what would render their trial unfair. It was *unfair* to deny the appellants a full opportunity to make submissions before the trial judge decided issues that impacted their vital interests. Indeed, on its own, such a failure in the course of a trial will constitute an error of law.[86]

62. Lastly, not only did the trial judge bear the burden of providing guidance, communication and information in redacted form to facilitate meaningful submissions from the appellants, but the trial judge had the onus of justifying the exclusion of the appellants from litigating this issue. Since the appellants were at the mercy of a considerable power imbalance, having received nothing but silence over the course of 36 court days, they had no obligation to seek justification for the Court's extraordinary step of barring their presence from part of their trial.

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[82] ***Ibid*** at para 54.
[83] *Ibid* at para 55 (emphasis added).
[84] *Ibid* at paras 56 and 57.
[85] See ***R. v. Giuliano***, (1984), 14 C.C.C. (3d) 20, 1984 CanLII 3600 (ONCA) at para 14.
[86] ***R. v. Al-Fartossy***, 2007 ABCA 427 at paras 24 and 25.

63. Thus, the trial judge erred by failing to provide the appellants the opportunity—armed with relevant but redacted information—to advance meaningful submissions on whether Person X should be excluded as a witness and request any other remedies that might have been available in the circumstances.

2) *Amici Curiae* Were Not Defence Counsel

64. In this case, the *amici* were appointed to provide "broad adversarial context" in Application 65. However, their appointment was for the purposes of *determining the claim of privilege*, that is, the "first stage" of the privilege claim.[87] While this adversarial context included making submissions about the "appropriate steps for the court to take to protect the privilege, challenging the submissions of [the Crown], and making any further submissions that may assist the Court,"[88] it was clear that the *amici* did not have a solicitor-client relationship with the appellants and could not receive instructions from them.[89] ***Named Person*** envisioned the possibility of an *amicus curiae* assisting in "the determination of whether or not the evidence supports the conclusion that the person is a confidential informer," but that the mandate of the *amicus* "must be precise, and the role of the *amicus* must be limited to this factual task."[90]

65. Yet at stage two of the proceedings in this case, when the *amici* "raised a further issue based on trial fairness concerns arising from the non-disclosure to the Accused of privileged information resulting from the Crown's successful privilege claim,"[91] the trial judge proceeded with litigation affecting *the appellants' fair trial rights* without seeking input from the appellants. This despite the appellants knocking on the courtroom door by way of Application 97.

66. While the trial judge appointed *amici* to provide "an adversarial context", they could not *in law* perform the role of defence counsel for the appellants. *Amici* are "friends of the court" whose obligations are *to the court* and who bear no fealty to the

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[87] See "Consent Order" appointing *amici curiae* at para 1 (AB).
[88] *Ibid* at para 1(f).
[89] *Ibid* at para 2.
[90] ***Named Person***, *supra* note 11, at para 48 (emphasis added).
[91] ***R. v. Haevischer***, *supra* note 16, at para 6.

accused. Indeed, at times, the submissions from an *amicus* lawyer may conflict with the interests of the accused and be detrimental. As Karakatsanis J. stated in ***Ontario v. Criminal Lawyers' Association of Ontario***,[92] "to the extent that the terms for the appointment of *amici* mirror the responsibilities of defence counsel, they blur the lines between those two roles, and are fraught with complexity and bristle with danger."[93] She said plainly that an "*amicus* who takes on the role of defence counsel is no longer a friend of the court."[94]

67. In this case, *amici* no doubt provided highly competent and considerable assistance to the trial judge. However, the key fact is that *amici* did not have a solicitor-client relationship with the appellants. There was no circle of privilege that could protect any communications with *amici*, whose duties were tethered to the Court. As such, *amici* could not be intimately aware of the fine distinctions of the appellants' defences, the complexity of the (sometimes opposing) theories of each appellant, and the defence strategies that might have informed the submissions on the appropriate remedy at the second stage of the hearing. Hence, the appearance of unfairness in the proceedings cannot be cured by the trial judge having relied heavily, or even solely, on *amici* to advance positions on behalf of the appellants on issues that affected their vital interests.

3) The Appellants' Absence Created an Appearance of Unfairness

68. Even with the assistance of *amici*, the trial judge created an appearance of unfairness by releasing no redacted information about the *in camera* proceedings, receiving no submissions from the appellants, and deciding on the admissibility of Person X's evidence in the appellants' absence. ***Basi*** does not stand for the proposition that the proper role for the accused at the second stage is to have *zero* input and be entirely outside the room. To the contrary, while recognizing the exigencies presented by informer privilege, ***Basi*** envisions *some* role for the accused at the second stage.

69. Moreover, the appellants took proactive steps with Application 97 to participate in the *in camera* hearing, or at the very least, receive relevant information including a

[92] ***Ontario v. Criminal Lawyers' Association of Ontario***, 2013 SCC 43.
[93] *Ibid* at para 50.
[94] *Ibid* at para 56.

redacted report. In return, they received no notice that the admissibility of evidence was at issue and could not protect their fair trial interests. For example, in her abbreviated ruling on Application 65, the trial judge noted there was no evidence or information suggesting that the innocence at stake exception applied.[95] How could the appellants have provided any evidence about *their* innocence being at stake? They had no context and, more significantly, no audience.

70. With respect to Mr. Johnston, Person X's anticipated evidence was that Mr. Johnston was *not* in the room when the shootings occurred.[96] Yet, in her reasons for conviction, the trial judge found as a fact that Mr. Johnston *was* "present during the murders."[97] Although the appellants need not prove actual prejudice or demonstrate the verdict would have been different had they been present at the second stage of the privilege hearing, fairness demanded that submissions about Person X's evidence and its impact on the defence should have come from the mouths of the appellants. Only they could have properly assessed what remedy to seek, whether to exclude Person X, or perhaps other witnesses such as Person Y or K.M., or some other remedy.

71. Lastly, in ***R. v. Bacon***,[98] Ker J. also excluded Person X as a witness in Mr. Bacon's trial *to protect Mr. Bacon's fair trial rights* and specifically relied on *the same reasons* as the trial judge in this case.[99] In other words, it appears that the foundation to exclude Person X in Mr. Bacon's trial was no different than in the case at bar.

72. However, the final remedy in the Bacon case, as it turned out, was different. Ker J. entered a stay of proceedings based on an application *brought by Mr. Bacon*.[100] Counsel for Mr. Bacon participated in certain *in camera* proceedings because they "had come into possession of privileged information that they cannot use in [Mr. Bacon's]

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[95] ***R. v. Haevischer****, supra* note 16*,* at para 9.
[96] This was set out in Exhibit 212, Tab 2, in a document titled "[Person X] Willsay, dated Oct 24, 2011 (AB, p. 2028, at para. 93). The appellants expect the evidence led in closed hearings in Application No. 65 must likewise have included Person X's anticipated evidence for trial.
[97] *RFJ* at para 614.
[98] ***R. v. Bacon***, 2017 BCSC 2207.
[99] *Ibid* at para 13.
[100] *Ibid* at para 14.

defence which impacts upon Mr. Bacon's fair trial rights."[101] It was Mr. Bacon's counsel—and not *amici curiae* appointed to assist the Court "by providing an adversarial context"[102]—who advanced arguments on the impact of Person X's exclusion on Mr. Bacon's fair trial rights, if any.

73. The appellants cannot confidently say that, had they been present at the privilege hearing, they would have persuaded the trial judge to enter a stay of proceedings. What matters is that, unlike in this case, Mr. Bacon came into possession of privileged information by the charity of chance and he was afforded the full opportunity to *ask* for a remedy. That opportunity, however, never came to pass in this trial.

74. Therefore, when the second stage of the privilege hearing stretched in time and form, and the fairness of the trial was imperilled, justice called upon the trial judge to carefully unveil relevant information and offer a measure of enlightenment to the appellants. The appellants, at the mercy of the harshest of indictments, surely had the right to voice their interests against any assumptions about the proper remedy in the circumstances. But when the trial judge abruptly excluded evidence without hearing from the appellants, she violated s. 650(1) and created an appearance of unfairness in the proceedings. This was a significant legal error that cannot survive appellate review.

II. THE TRIAL JUDGE MISAPPLIED THE PRINCIPLES IN *VETROVEC*

75. The appellants submit that the trial judge did not identify independent, confirmatory evidence capable of restoring faith in those aspects of the *Vetrovec* witnesses' evidence that implicated the appellants. The trial judge's analytical approach was flawed in two main respects: first, the trial judge accepted a body of evidence that was contradicted by the independent evidence that was available; second, the trial judge accepted a body of evidence that, while not contradicted by independent evidence, effectively found its only source in the *Vetrovec* witnesses themselves.

76. The appellants also allege a second, interrelated error in the way that the trial judge analyzed the evidence of Person Y and K.M.: the judge inappropriately

[101] *Ibid* at paras 2 and 11; See also ***R. v. X & Y***, 2012 BCSC 1526.
[102] *Ibid* at para 11.

rehabilitated their evidence on the basis that they *could* have further implicated the appellants but chose not to do so; and, in the case of Person Y, on the basis that he would suffer negative consequences in relation to an unrelated guilty plea and consequently had no motive to lie.

A. Credibility and the *Vetrovec* Framework

77. The appellants do not quarrel with the trial judge's articulation of the law regarding the treatment of *Vetrovec* witnesses. Before a trier-of-fact can rely on the evidence proffered by a *Vetrovec* witness, the trier of law must attend to the following four elements: (1) drawing the trier of fact's attention to the testimonial evidence requiring special scrutiny; (2) explaining *why* this evidence is subject to special scrutiny; (3) cautioning that it is dangerous to convict on unconfirmed evidence of this sort (though the trier of fact is entitled to do so if satisfied that the evidence is true); and (4) that the trier of fact, 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.[103] The fourth element is at issue in this appeal.

78. Not all evidence is capable of confirming the testimony of a *Vetrovec* witness. Where evidence is "tainted" by connection to the *Vetrovec* witness it cannot serve to confirm his or her testimony.[104] The trier of fact must find confirmation in some other source (the independence requirement) that the witness is telling the truth about the accused being implicated in the offence charged (the materiality requirement).[105]

79. The appellants also submit that the learned judge committed a legal error in finding that "Person Y had no motive to falsify his evidence" and in using that finding to bolster his credibility.[106] The case law distinguishes between a lack of motive to lie, and a *lack of evidence* of a motive to lie. This error was articulated in ***R. v. M.S.***:[107]

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[103] ***R. v. Khela***, 2009 SCC 4, at para. 37; ***R. v. Kehler***, 2004 SCC 11, at paras. 17-19.
[104] ***R. v. Khela****, supra,* at para. 39.
[105] See ***R. v. Roks***, 2011 ONCA 526 at paras 64 and 65.
[106] RFJ, at para 479.
[107] ***R. v. M.S.***, 2019 ONCA 869 at paras 13 and 14 (emphasis added; citations omitted; quotation is to ***R. v. Sanchez***, 2017 ONCA 994, at para. 25).

> The trial judge erred by using the evidence to enhance his assessment of the complainant's credibility. He fell into the error articulated in *R. v. Bartholomew*, 2019 ONCA 377, at para. 23 and "transformed" the absence of a proven motive to fabricate into a proven lack of motive. A proven absence of motive may provide a "platform to assert that the complainant must be telling the truth": *Bartholomew*, at para. 21. But, the absence of evidence of motive does not mean that the complainant must be telling the truth.
>
> The danger in relying on this factor to bolster the complainant's credibility is that an absence of proved motive is often unreliable. This court has raised this concern repeatedly:
>
> > There are simply too many reasons why a person might not tell the truth, most of which will be unknown except to the person her/himself, to use it as a foundation to enhance the witness' credibility. Consequently, [a motive to fabricate] is an unhelpful factor in assessing credibility.

80. Moreover, even if there was a proven lack of motive to lie, it was not appropriate for the learned judge to rehabilitate the evidence of a witness of such as Person Y in this way. *Vetrovec* witnesses are inherently untrustworthy.[108] A lack of motive to lie could not displace this baseline approach to Person Y's credibility.

B. Errors in Assessing the Evidence of Person Y

81. Person Y was undoubtedly the most important Crown witness: although not present for the killings, he was, by his own admission, intimately involved in the planning (in the very early stages, he had volunteered his considerable skills as an assassin to strangle Corey Lal in the parking lot of the Balmoral); it was Person Y who provided the Crown with evidence of gang motive, testifying that there was never any plan to rob Corey Lal but rather that the plan had always been to kill him as retribution for his refusal to pay a "tax" imposed on him by Jamie Bacon; and it was Person Y who described receiving a confession from Mr. Johnston on the day of the killings and later observing Mr. Johnston making incriminating gestures in two agent scenarios that implicated himself (and others) in the killings.

82. Person Y was a complicated, intelligent, and manipulative witness. He was experienced in giving evidence, having previously testified, dishonestly, in his own

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[108] ***R. v. Khela**, supra* note 108, at para 3.

defence for the murder of his former criminal associate, John Lahn. On one hand, he presented himself as a crusader, committed at all costs to seeing that justice was done in order to somehow atone for his many past sins.[109] On the other hand, he was an admitted murderer (and repeat killer) with a demonstrated ability to rationalize perjury by virtue of the fact that he received legal advice to the effect that he did not have to answer certain questions put to him about his criminal past. He admitted (startlingly) he *would have* committed perjury even without that advice to suit his own purposes.[110]

83. The appellants submit that the learned judge erred in her assessment of Person Y's testimony. She failed to find truly independent evidence capable of confirming the material aspects of his evidence in relation to the admissions made by the appellant Mr. Johnston. She also erred by subtly shifting the evidentiary burden to the appellants to somehow prove that Person Y had a motive to be dishonest.

1) No Independent Corroboration About Mr. Johnston's "Admission"

84. One of the most critical pieces of evidence against Mr. Johnston was Person Y's description of a statement he received from Mr. Johnston while seated in a vehicle in front of Person X's residence. Person Y testified that on the night of the shootings, he drove with Jamie Bacon to Person X's apartment in Coquitlam. Mr. Bacon got out of the car, and Person Y stayed in the vehicle. Mr. Johnston then "rolled up" in his vehicle with his girlfriend and jumped inside the vehicle. His girlfriend was with him. Mr. Johnston told Person Y there "was lots of bodies" and that "it was like one after the other" and "somebody had to get pulled in". He was using hand signals to describe how many people died. He mentioned "something about a fireplace". Mr. Johnston got out of the car. About ten minutes later, Mr. Bacon got back into the car and they drove away.[111]

85. The independent evidence does not support Person Y's testimony that, while waiting for Mr. Bacon, Mr. Johnston arrived in his VW Touraeg, got into the car with Person Y, and described through words and gestures how six people died. Person Y

[109] See Trans., Vol. 12, April 1, 2014, p 4213, ll. 8-30, where Person Y says: "… I'm doing this because I made a commitment to do this and this is the one right thing I'm doing in my life, period."
[110] Trans., Vol. 11, March 26, 2014, p. 3926, ll. 4-20.
[111] Trans., Vol. 11, March 11, 2014, p. 3647-52, ll. 17-47; 1-15.

and Jamie Bacon were under surveillance on that day. Cst. McLachlan was one of the officers on the surveillance team. She testified that she started following the vehicle at 6:58 p.m. as it left Jamie Bacon's residence at 295 Guildford Way in Port Moody, and travelled westbound on St. John's. She followed the vehicle until "losing the eye" while the vehicle was traveling southbound on North Road in Coquitlam.[112]

86. Cst. White was also a member of the surveillance team that followed the vehicle from the Bacon residence to the Foggy Dew parking lot, and saw the vehicle a couple of times *en route*.[113] He testified that he received information from other members of his surveillance team at 7:10 p.m. that the vehicle had pulled into the parking lot of the Foggy Dew at 405 North Road in Coquitlam.[114] He confirmed that surveillance was "continuous" from the time that it was first under observation leaving the residence until the time that it entered the Foggy Dew parking lot. He also agreed in cross-examination that his observations of the vehicle occurred over a ten minute period between 7:10 and 7:20 p.m.[115] The only movement observed by Cst. White was when a male approached the driver's side of the vehicle and entered. The vehicle then drove off.[116] The trial judge accepted that this person was Mr. Bacon and not Mr. Johnston.[117] Cst. White did not see any other person in the area. Cst. White did not see anyone else enter and exit Mr. Bacon's vehicle. Nor did Cst. White see a grey Touraeg in the area, even though Mr. Johnston's Touraeg was one of the target vehicles identified in advance for that surveillance detail.[118] Cst. McLachlan also confirmed the Touraeg was on her target list.

87. In analyzing the evidence of an unsavoury witness, a fact finder must look for *independent* evidence that actually confirms the witness's testimony. But the trial judge did not. Rather, the trial judge assessed whether Person Y's account was "possible", *despite* the surveillance evidence refuting Person Y's account. The trial judge theorized, contrary to the evidence of the surveillance officers, that the surveillance was not in fact

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[112] Trans., Vol. 7, November 14, 2013, pp. 2131-2, ll. 3-47; 1-14; see also AB, Part II, p. 747, Exhibit 46A.
[113] Trans., Vol. 7, November 15, 2013, p. 2210, ll. 5 to 21.
[114] Trans., Vol. 7, Nov. 15, 2013, p. 2207, l. 18-22.
[115] Trans., Vol. 7, Nov. 15, 2013, pp. 2219-20; ll. 34-47; 1-39.
[116] Trans., Vol. 7, November 15, 2013, p. 2208, ll. 17-21.
[117] RFJ, at paras. 412 and 419.
[118] Trans., Vol. 7, November 15, 2013, p. 2214, ll. 8-41.

"continuous", as Cst. White never observed Mr. Bacon exit the vehicle in the first place. Because this detail was missing, she felt it *possible* the encounter with Mr. Johnston had occurred prior to Cst. White setting up surveillance on Mr. Bacon's vehicle.

88. The appellants submit the trial judge erred in her analytical approach to this critical area of the evidence. The "possibility" that Mr. Johnston could have eluded surveillance in the exceedingly brief time that the vehicle may have been lost by surveillance was not capable of providing the type of independent, confirmatory evidence that could restore faith in the material aspects of Person Y's account. This is not how the warning from *Vetrovec* is supposed to work. On the facts before the court, any time interval in which Mr. Bacon's vehicle was not under direct surveillance would have been *extremely* brief; and it is highly unlikely that brief period of time would have been sufficient for Mr. Bacon to exit the vehicle, and then for Mr. Johnston to drive into the parking lot, exit his car, enter Mr. Bacon's vehicle, provide an admission to Person Y, and exit the vehicle, all without Cst. White (or any other officer) seeing his vehicle, or him, in the area. Cst. McLachlan lost the "eye" on the vehicle only a few blocks from the Foggy Dew. Cst. White received notification at 7:10 that the vehicle was entering the lot. There was simply no time for the events Person Y described to have unfolded, unseen.

89. The second source of independent evidence that could provide confirmation of Person Y's account are the cell phone records. The trial judge found that Mr. Johnston's cell activity indicated five communications on his phone between 7:15 and 7:30 p.m. using a cell site in Coquitlam.[119] This was around the time Cst. White noted the Bacon vehicle was under his surveillance. The expert evidence placed the residence within the expected coverage area of this cell site. Although this is circumstantial evidence consistent with Mr. Johnston being in the area at a particular time, it goes no farther than that. As the Crown experts on cell site records confirmed, cell site evidence is not capable of pinpointing the location of the cell phone with any degree of accuracy.[120] The evidence could not place Mr. Johnston in the vehicle with Person Y, and certainly could not restore faith that Person Y was telling the truth about the *contents* of Mr. Johnston's

[119] RFJ, at para. 420.
[120] Trans., Vol. 16, May 14, 2014, p. 5429, ll. 4-15.

admission. Furthermore, the cell activity placing Mr. Johnston in the Coquitlam area must be weighed against the fact that no surveilling officer saw his car in the Foggy Dew parking lot at the material times, despite the fact that it was a target vehicle.

90. The third source of independent evidence could be other evidence of Person Y's activities in the afternoon of October 19. Person Y testified that he bought skin cream from a London Drugs store in Surrey earlier that afternoon. It was admitted at trial that a cash purchase was made at a London Drugs store in Surrey. Person Y testified that earlier in the day, he and Mr. Bacon attended a tanning salon in Maple Ridge and he gave the name "Menno Menorrio". It was admitted at trial that a customer gave that name at a tanning salon in Maple Ridge on the day of the killings.[121] These aspects of Person Y's evidence were not material to the appellants' guilt and could not restore faith in the material aspects of Person Y's testimony, when it was so thoroughly contradicted by the independent evidence of the surveilling officers.

91. The appellants submit that both the fact of, and the contents of, the statement attributed to Mr. Johnston in the Foggy Dew parking lot, are not independently confirmable. The only other potential source of confirmation would have been Person X (whose evidence was excluded) and the crime scene evidence. However, it is important to note that Person Y confirmed in cross-examination that he had a conversation with Person X about what happened at the Balmoral in the days following his encounter with Mr. Johnston. Person X told him about "putting the bodies in the fireplace" and that "it was just one after the other", the exact words he attributed to Mr. Johnston.[122] Thus, the fact that bodies were recovered near a fireplace, or that the victims appeared to have been killed "one after the other", could not be truly independent evidence as Person Y would have to first be believed as to the source of the information he received.[123]

92. Finally, the contents of the alleged "confession" must be contrasted with the transcript from the two agent scenarios that occurred later. In those scenarios, where independent evidence *does* exist to confirm the contents of those conversations, Mr.

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[121] RFJ, at para. 401.
[122] Trans., Vol. 12, March 28, 2014, pp. 4035-6, ll. 10-47; 1-32.
[123] See ***R. v. Sanderson****,* 2003 MBCA 109, at para. 61.

Johnston is highly reluctant to share any details with Person Y, and indicates in no uncertain terms that he was not present for, and has no knowledge of, all of the details of the plan or what occurred in the suite.

2) No Independent Corroboration About "the Gestures"

93. We turn next to Person Y's evidence that Mr. Johnston made incriminating gestures during two agent scenarios. Person Y was acting as an undercover police agent and his conversations with Mr. Johnston were tape recorded. These recordings confirm and memorialize the words actually spoken by Mr. Johnston to Person Y on those occasions. The alleged gestures, of course, were not picked up. Each conversation began with Person Y commenting that his own DNA was found on a gun left at the crime scene. We submit that the gestures, and Person Y's interpretation of the gestures, cannot be confirmed by any independent evidence and, in certain respects, they are contradicted by Mr. Johnston's own words in the recordings.

94. In the first scenario on February 17, 2008, which occurred following the arrest of Mr. Johnston and Person Y, Person Y questioned Mr. Johnston about the firearm that he provided to Person X. He asked Mr. Johnston why the police recovered DNA from the gun. Mr. Johnston said that he never touched the gun, did not know where it was left, and denied watching Person X "boil" the guns.[124] Later on, he said that he watched somebody clean something (presumably a gun or guns) with Windex.[125]

95. The second scenario occurred on 23 March 2008. In this intercept, Mr. Johnston said a variety of things which might be about guns, including that he never had one in his hand ("I don't know who had which—which one. I just can tell you that that one—I can tell you who didn't … and that was me");[126] that he didn't know the "whole story" or the "plan";[127] and that he couldn't say why six people ended up being killed because he was not "inside", presumably referring to the suite.[128]

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[124] AB, Exhibit 182, p. 1437-8.
[125] AB, Exhibit 182, p. 1458-9.
[126] AB, Exhibit 183, p. 1638-9;
[127] AB, Exhibit 183, p. 1639.
[128] AB, Exhibit 183, p. 1644.

96. Person Y testified that Johnston made a "gun gesture" while saying "and this person was supposed to do this."[129] While saying "I was told to do something," Mr. Johnston pointed to his eyes, which Person Y interpreted to mean that it was Mr. Johnston's job to "keep point" and "go look for the spots."[130] Later, Mr. Johnston said: "I watched them do this … both of them" while making a gun gesture pointing downward. Person Y interpreted this gun gesture to mean "shooting downward".[131] The learned judge held that this latter comment, with its accompanying gesture, "supports the inference that Mr. Johnston saw the killings as they occurred, and was therefore present at the scene at that time." The trial judge also took from these comments that Mr. Johnston "was aware the plan involved the shooting of someone."[132]

97. First, the source of the gesture evidence incriminating Mr. Johnston was Person Y alone. The judge did not identify any independent evidence capable of confirming either the gestures, or Y's interpretation of the gestures, nor was any independent confirmation possible. Where the source of the proposed confirmatory evidence is the *Vetrovec* witness himself or herself, the evidence cannot be properly described as confirmatory in the sense envisioned by the case law.

98. The appellants submit that this is exactly what happened in this case. The only witness who could, in theory, provide evidence to confirm the material aspects of Person Y's recollection of the gestures was Person X. Without Person X's testimony, the only independent evidence left is the sparse transcript of the conversation. Far from confirming Person Y's interpretation of the gestures, the transcript actually contradicts that interpretation. What remains is only Person Y's interpretation of the gestures.

3) Erroneously Enhancing Credibility with "No Motive to Fabricate"

99. Rather than turning to independent evidence to seek comfort in the veracity of Person Y's testimony, the trial judge rehabilitated his evidence in an erroneous way: by

[129] Trans., Vol. 11, March 12, 2014, p. 3685, ll. 31-46.
[130] Trans., Vol. 11, March 12, 2014, p. 3686, ll. 3-9.
[131] Trans., Vol. 11, March 12, 2014, p. 3687, ll. 2-16.
[132] RFJ, at para 459.

examining whether Person Y had a "motive to lie" and taking into account his evidence about the consequences that would befall him as a result of providing that testimony.

100. After accepting Person Y's interpretation of the gestures, and drawing certain inferences from those interpretations, the learned judge made some favourable comments about Person Y's credibility: he pleaded guilty to murder, resulting in a sentence of life in jail without parole for 25 years;[133] he made no plea agreement with the Crown in return for his testimony that would affect his period of imprisonment;[134] he pleaded guilty knowing he faced 25 years of "very hard time" in jail;[135] and he did not flee to Brazil to escape prosecution when he had the opportunity.[136]

101. The judge also observed that Person Y did not attempt to minimize his criminal past, and where he "could easily have implicated one or both of the accused without contradiction, he declined to do so."[137] In addition, she found that Person Y "had no motive to falsify his evidence… he had nothing to gain by implicating either accused."[138]

102. It was an error in law for the judge to bolster Person Y's credibility on the basis that he *could have* further implicated the appellants but chose not to do so. While embellishment can serve as evidence of a lack of credibility, the opposite is not also true. *A lack of embellishment serves no evidentiary purpose.*[139] This error was repeated by the judge in her assessment of K.M.'s credibility, as discussed below.

103. The judge also erred in finding that Person Y had "no motive" to falsify his evidence. First, it is trite law that an accused has no onus to demonstrate that a complainant or witness has a motive to fabricate evidence.[140] Second, the law distinguishes between an absence of motive to lie, and an absence of an *apparent* motive to lie.[141] The trial judge did not refer to any particular body of evidence in

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[133] RFJ, para 471.
[134] RFJ, para 473.
[135] RFJ, para. 473.
[136] RFJ, para. 474.
[137] RFJ, para. 478.
[138] RFJ, para. 479.
[139] ***R. v. Kiss***, 2018 ONCA 184 at para. 52.
[140] ***R. v. Batte*** (2000), 145 C.C.C. (3d) 449 (Ont. C.A.) at para. 121.
[141] ***R. v. R.W.B.***, [1993] B.C.J. No. 758 (B.C.C.A.), at para. 28.

drawing this conclusion. The case law offers little guidance on what might constitute positive evidence of a motive to lie (evidence, for instance, of a positive relationship between the witness and the prospective accused does no more than reinforce the absence of evidence of a proven motive)[142]. In this case, the Crown did not prove a lack of motive to lie. At best, there was an absence of any *apparent* motive to lie.[143]

104. Perhaps more importantly, the lack of any motive to lie, even if it could be established on the evidence that was before the Court, could not provide comfort that the evidence of Person Y was credible, because it lacked the essential feature of independence.[144] So, too, did the fact that Person Y was likely to do "hard time" as a result of providing his testimony. It is an error to overemphasize the "potential long-term negative life consequences" to a complainant resulting from making an allegation as a reason *not* to lie, as it invites the trier of fact to reason that in the absence of a motive to lie the witness must be telling the truth.[145] This is what the learned judge did in this case. The excerpt the learned judge referred to in support of her finding that Person Y had "no motive to falsify his evidence" was his answer in cross-examination to an allegation that he was motivated by revenge. As he told the Court, he would be sitting "in a hole" for the rest of his life.[146] This answer clearly left a strong impression on the trial judge as evidenced by her comment that "Person Y's actions do speak for him."[147]

C. Errors in Assessing the Evidence of K.M.

105. K.M.'s evidence was on a different footing than Person Y's. The trial judge acknowledged as much:[148] K.M. only reluctantly cooperated with police; there were obvious internal and external inconsistencies in her evidence; she was not candid with police in her initial interactions with them; she assessed her own position and withheld information until it was clear police had evidence implicating her in the murders; and she

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[142] ***R. v. John****,* [2017] O.J. No. 3866, at para. 94.
[143] As the appellants allege in a separate joint factum, some information relating to Person Y's anticipated conditions of confinement, which could potentially have served as a motive to lie, was not disclosed to the defence at trial.
[144] See, for example, ***R. v. John****, supra,* note 147, at para. 97.
[145] ***R. v. L.* (*L.*)**, 96 O.R. (3d) 412 at para. 50.
[146] RFJ, para. 479.
[147] RFJ, para. 481.
[148] RFJ, beginning at para. 482.

omitted to tell police certain things, and conflated events, until she was convinced that she had to tell police all she knew.

106. K.M.'s evidence—ultimately accepted by the trial judge—was that she cleaned bullets, counted bundles of cash, witnessed the boiling of phones, saw incriminating messages written on white boards, and then assisted in destroying evidence. Her vehicle was also used to get to and from the killings.[149] These were the material aspects of her evidence that required independent confirmation to be relied upon. With Person X excluded, she became an important Crown witness. In accepting K.M.'s evidence on these points, the trial judge fell into three interrelated errors that, viewed as a whole, affect the foundation of the *Vetrovec* analysis.

1) Uncritically Presuming the Crown's Evidence to be True

107. During the recounting of the evidence section of her reasons, and indeed at certain points thereafter, the trial judge effectively chose faulty recollection over deliberate falsehood as a "default" position from which to assess K.M.'s evidence. This amounted to uncritically presuming the Crown's evidence to be reliable, and forgiving the witness in a lopsided way.

108. On numerous occasions, K.M. was obviously mistaken about key facts. K.M. was completely wrong in her description of Mr. Johnston's appearance on October 19, 2007. She testified that Mr. Johnston was wearing a man-bag when he first arrived at the Stanley that day. In cross-examination, after having viewed a video clip of Mr. Johnston arriving at the Stanley, she acknowledged that Mr. Johnston did not appear to have a man-bag. K.M. was also wrong about Justin Haevischer being in the suite when Mr. Johnston returned to the apartment. She was challenged many times over days of cross-examination, but was adamant that her memory was correct. When the time-stamped video footage was played for her showing clearly that Justin Haevischer and Mr. Johnston were never in the suite at the same time, *she refused to resile* from her earlier evidence. When confronted with another inconsistency related to Justin

[149] RFJ, at para. 482.

Haevischer, she claimed: “Justin’s always been fuzzy for me.”[150] She was incorrect in her description of the gun she allegedly helped clean. Most troublingly, these inconsistencies occurred where police had *not* shown her the evidence in relation to that event. That is, she was more likely to be accurate in a “fact” where she had been shown evidence by the police.

109. K.M. had a shifting narrative on key events. This occurred most acutely in her description of cleaning the gun and bullets. In four police statements, and in two Crown interviews, she made no mention of Mr. Johnston cleaning a gun. At trial, and *for the first time*, K.M. testified that Mr. Johnston did handle one of the guns because he was the one who put the bullets into the gun. The trial judge found that K.M.’s shifting evidence was not a gratuitous comment designed to incriminate Mr. Johnston. We say this conclusion is untenable given the trial judge’s observation that there were obvious internal and external inconsistences in K.M.’s evidence.

110. The starting point for assessing the evidence of a *Vetrovec* witness is that they are untrustworthy,[151] which is why that case directs that the trier of fact must look to evidence from other sources before faith can be restored in the *Vetrovec* witness’s evidence. The trial judge’s approach effectively reversed this. The trial judge found that K.M. was a trustworthy witness, notwithstanding the many gaps and contradictions in her testimony, so long as her narrative of events was “plausible”.[152]

2) Applying “Bootstrap” Logic in Assessing K.M.’s Evidence

111. This error in the trial judge’s analytical approach to K.M.’s evidence led her to “bootstrap” K.M.’s reliability through impermissible lines of reasoning. The trial judge made two errors.

112. First, the trial judge erred by finding that K.M.’s lack of embellishment enhanced her reliability and credibility as a witness. The trial judge appeared to reason that K.M.’s evidence could be accepted on its material aspects because she “could have”

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[150] Trans., Vol. 7, December 6, 2013, p. 2452, ll. 37-38.
[151] ***R. v. Khela****, supra note* 108, at para 3.
[152] RFJ, para. 361.

significantly implicated both appellants even more than she did, but chose not to. As she did not implicate the appellants in a more direct way, even where there existed no danger of contradiction, her reliability was enhanced.[153] This is erroneous. Paciocco J.A., in ***Kiss***, recently confirmed that lack of embellishment does not enhance a witness's reliability or credibility.[154]

113. Secondly, the trial judge used an unsafe and erroneous building block—that K.M. had "no motive to lie"—to go on to accept the material aspects of K.M.'s evidence. A *Vetrovec* witness is, by definition, unsavoury and untrustworthy. There were two instances in K.M.'s evidence where the trial judge engaged in such reasoning. In the first, she found that K.M. had no motive to lie about her asserted lack of knowledge in the appellants' use of her BMW to drive to and from the killings.[155] In the second, she found that K.M. had no motive to lie about the contents of the different whiteboard conversations she allegedly witnessed.[156] This is the same error the judge made in her evaluation of the evidence of Person Y.

114. Moreover, K.M. clearly *did* have a big motive to present a narrative that minimized her role and maximized the involvement of others. K.M. acknowledged that she was concerned the police wanted to arrest her. On her evidence, she had cleaned bullets, burned evidence, and her car was used in the killings. She was heavily implicated. The police, through their evidence presentation, painted a picture of a case that was open and shut. Sergeant Tewfik's words were: "Circumstantially pretty powerful, [K.M.]. This is over."[157] In addition, in a police interview on April 1, 2009, she was told she could be charged with murder. She was told that in addition to getting 15 years in jail on the Surrey Six, she would receive a 15-year sentence on a different matter, a forcible confinement. After the arrest of the appellants, K.M. was told by police she would be killed by the Red Scorpions, or go to jail for a long time, if she did not cooperate with police. The pressure on her was immense. She really had no choice but to tell the police what they wanted to hear: an account implicating the appellants.

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[153] RFJ, at para. 505.
[154] ***Kiss***, *supra* note 144, at para 52 (emphasis added).
[155] RFJ, at para. 311.
[156] RFJ, at para. 397.
[157] Trans, Vol. 8, December 12, 2013, p. 2641, ll. 12-13.

3) Material Contradictions from Independent Evidence

115. Despite these reliability concerns, the trial judge was ultimately satisfied that there was evidence from other sources tending to show that K.M. was telling the truth in the material aspects of her testimony.[158] We submit that three critical features of her evidence were contradicted by the available independent evidence.

116. The first was her recollection of the use of her BMW on October 19. She maintained in her testimony that she had no idea her BMW would be used that day. This was significant as two eyewitnesses at the Balmoral saw a black BMW being used. K.M.'s asserted lack of knowledge of Mr. Haevischer's plan to take her BMW to do whatever task he was embarking upon must be untrue, and in any event, is contradicted by the available evidence. The evidence of Ray Weldon, along with the surveillance footage from inside the parking garage at the Stanley, literally show that she knowingly gave Mr. Haevischer the BMW, and she personally used her fob when the car left the garage. Why she lied about this fact is known only to her, but the independent evidence plainly contradicts her version of events. The trial judge failed to come to grips with this glaring contradiction.

117. The second was her recollection that when the appellants returned to her apartment later in the afternoon on October 19, Mr. Johnston was carrying a black garbage bag. He then dumped the contents out and, on her evidence, she assisted him to count bundles of cash. This is contradicted by the independent evidence. Surveillance footage taken within the Stanley shows Mr. Johnston carrying a small, white bag. The surveillance footage also shows that Mr. Johnston could not have been in K.M.'s apartment for longer than five minutes.

118. The third was her assertion that Justin was present at the time she witnessed cell phones being boiled on the stove. K.M. said that after Mr. Johnston left the apartment, she was in her kitchen and saw a whiteboard message from Mr. Haevischer to Justin that read, "people died." She said Justin was present in the apartment, but the

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[158] RFJ, at para. 508.

surveillance footage plainly showed otherwise. Justin did not arrive at the Stanley until at least 45 minutes later.

119. As with Person Y, if evidence gathered from other sources cannot provide confirmation of the material aspects of K.M.'s evidence, then the material aspects are on too shaky a foundation to rely upon to establish the appellants' guilt. The appellants submit that three interrelated problems—uncritically presuming the Crown's evidence to be true; bootstrapping; and lack of independent confirmation—demonstrated errors in the trial judge's approach to the evidence proffered by K.M.

III. CONCLUSION

120. In conclusion, the trial judge's *Vetrovec* analysis of the key witnesses was flawed. She did not have sufficient confirmation in the independent evidence to restore faith in those aspects of their testimony that implicated the appellants. Person X's evidence became even more pivotal as it was frequently the potential confirmation of, or contradiction of, the *Vetrovec* evidence. And the decision to exclude Person X as a witness without any submissions from the appellants contravened s. 650(1) of the *Code*.

121. This was highly problematic. Person X's evidence was excluded for reasons that remain shrouded in mystery to both the appellants and the general public. If experienced Crown counsel and police took such care to cultivate Person X as a witness and structure a deal with him, how were they unable to anticipate the privilege issues that rendered him incapable of testifying? Something must have been so deeply and fundamentally wrong in this case that the Crown lost its one eyewitness to the killings. If something was so far amiss, why was the Crown allowed to continue with the prosecution at all? And why was neither appellant entitled to make submissions or see any redacted records from the proceedings?

122. "Justice is not a cloistered virtue. Publicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity."[159] Cloistered

[159] ***Named Person***, *supra* note 11, at para. 31, citing ***Ambard v. Attorney-General for Trinidad and Tobago***, 1936 CanLII 385 (UK JCPC), and J. H. Burton, ed., *Benthamiana: or, Select Extracts from the Works of Jeremy Bentham* (1843), at p. 115.

away, both appellants are serving life sentences for six murders in circumstances where something of singular importance in their trial remains impenetrable and inscrutable. This is not how a criminal trial ought to deliver justice.

PART IV: NATURE OF ORDER SOUGHT

123. The appellants ask this Court to set aside the convictions and order a new trial.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28th day of January 2020.

_____	_____
BROCK MARTLAND, Q.C. **JONATHAN P.R. DESBARATS** **DANIEL J. SONG** **ELLIOT HOLZMAN**	**SIMON R. A. BUCK** **ROGER THIRKELL** **DAGMAR DLAB**
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LIST OF AUTHORITIES

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