No. CA42488 and CA042490,
Vancouver Registry

COURT OF APPEAL

BETWEEN:

REGINA

RESPONDENT

AND:

MATTHEW JOHNSTON & CODY HAEVISCHER

APPELLANTS

APPELLANTS' JOINT FACTUM

Abuse of process & Crown's failure to disclose evidence

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SECTION ONE:

THE TRIAL JUDGE ERRED IN GRANTING THE CROWN'S *VUKELICH* APPLICATION AND SHE ERRED IN DISMISSING THE APPELLANTS' APPLICATION FOR A STAY OF PROCEEDINGS

OVERVIEW

1) The appellants were found guilty of six counts of first-degree murder and a single count of conspiracy to commit murder. Prior to those verdicts being entered, the appellants applied to have all charges stayed. The applications were based on claims that entry of the verdicts would result in an abuse of process in breach of their rights under s.7 of the *Charter*. The allegations of abuse were based primarily on the effect of three related factors: police misconduct during the underlying investigation, police misconduct in improperly directing corrections officials to engage in the inhumane treatment of the appellants while held in pre-trial custody, and the inhumane treatment of the appellants while held in pre-trial custody as a result of the direct actions of correctional officials (in addition to, and apart from the actions directed by the police).

2) In an effort to forestall the applications, the Crown sought and was granted, a so-called "***Vukelich***[1] hearing" during which the Crown argued that an evidentiary hearing should be refused and the applications for stays of proceedings ought to be summarily dismissed. The premise of the Crown's application was, essentially, that even if the allegations of abuse were made out, the remedy of a stay of proceeding could not be justified. The trial judge accepted the Crown's arguments. She refused an evidentiary hearing, and she dismissed the applications for stays of proceedings.

3) The appellants' basic complaint on appeal is that the trial judge applied too stringent a test on the preliminary question of whether to order an evidentiary hearing. By applying too stringent a test the judge erred in principle. That error resulted in her committing further error by deciding the abuse of process application in the absence of the necessary evidentiary record. These errors relieve this court of any need to pay deference to the judge's ruling on either the ***Vukelich*** ruling, or the ultimate ruling on the abuse of process application.

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[1] *R. v. Vukelich* (1996), 108 C.C.C. (3d) 193 (B.C.C.A.)

STATEMENT OF FACTS

1. Nature of the applications:

a. The pleadings ~ relief sought:[2]

4) On June 09, 2014, each of the appellants filed a Notice of Application for a stay of proceedings. Mr. Haevischer's application is referred to as Application 136, while Mr. Johnston's is Application 137.

b. Basic factual allegations:

5) The basic factual allegations on which the stays were sought were described this way in the trial judge's Ruling:

> [27] The state misconduct alleged by the Applicants falls into two general categories: first, systemic misconduct by the police in the course of investigating the Surrey Six murders; and, second, harsh and inhumane conditions of confinement upon arrest. The second category is essentially a subset of the first, as the allegation is that the Applicants' custodial circumstances were improperly directed by the police for investigative purposes, and thus also a further incidence of police misconduct. (AB136 – 287)

2. The hearing:

a. Appointment of *Amicus*:

6) The trial judge provides this explanation of why *amici curiae* were appointed, and the nature of their role in the proceedings on Applications 136/137:

> [4] A portion of this *Vukelich* application was held *in camera* and *ex parte* the Applicants. *Amici curiae* were appointed to assist the Court by providing an adversarial context to that aspect of the hearing and addressing information disclosed to them on Application 65 that might augment or aggregate the Applicants' assertion of abusive conduct by the police in the course of the investigation. Application 65 arose from Crown resistance to disclosure on the grounds of informer privilege. It ultimately resulted in the exclusion of the evidence of Person X from the trial of the Applicants. (AB136 – 281)

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2 In this portion of the factum, transcript references denoted by "T136", refer to the transcript on applications 136 & 137, which is found in the electronic "Main Menu" under the bookmark for "Applications 136 and 137"; references to the Appeal Book will be denoted by "AB136".

7) This is an appropriate point to remind the Court that significant portions of the trial proceeding in the court below were conducted in the absence of the accused. Application 65 involved 38 days during which the appellants were excluded, and applications 136 & 137 involved at least ½ a day of exclusion. The appellants know nothing about what transpired in their absence during the *in camera* proceedings. There have been no judicial summaries of the evidence heard during the *in camera* proceedings, nor were the appellants invited to provide any input on any defence-oriented steps or proceedings in the *in camera* proceedings.

8) Without intending any disrespect to counsel acting as *amici* in these proceedings, the appellants are left in the very difficult and unfortunate position of advancing their appeals without access to the entire record and without the ability to know what factual or legal submissions the *amici* might be making. While the *amici* are meant to provide the court with an adversarial context, they must do so without the instructions of the appellants on either factual or legal matters. This is a continuation of the situation at trial, and it is a situation that is fundamentally unfair to the appellants.

b. Submissions of counsel:

i. Crown:

9) The Crown offered this summary of its overall position on the applications at the outset of the ***Vukelich*** hearing:

> At its most basic level, today's application is about this. Assuming for the purposes of today's hearing that these allegations advanced by the applicants are true, the question is will the applicants be in a better position, after a full evidentiary hearing with weeks of evidence and submissions, to convince this court that their verdicts ought not to be entered and that they ought not to be sentenced? That is the question.
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> • • •
>
> Now, it's the Crown's position that the applicants cannot establish that an evidentiary hearing will assist with the trial of the real issues raised in their applications and that is because -- there's several reasons but first and foremost is this. Not entering the verdicts and not sentencing them for their involvement in what can only be described as the most serious offences known in our criminal law, multiplied times six, would be a grossly disproportionate response to their allegations of state misconduct. We make that point in paragraph seven.

> Put another way, the price for a stay is not worth the gain to the integrity of the justice system. Society will not tolerate the applicants' windfall if the verdicts are not recorded and the applicants not sentenced when balanced when their allegations of state misconduct. (T136 – pg. 17, ll 1-31).

10) At the risk of oversimplification, the bulk of the Crown's remaining submissions centered around elaborating on the points made in its introduction.

ii. Submissions of counsel for the applicants:

11) The trial judge summarizes the submissions of defence counsel on the key issues throughout her ruling. The only submissions of counsel that need to be specifically addressed here relate to the scope of the evidence the defence would call on an evidentiary hearing. The submissions of defence counsel on that point were made in response this question from the court:

> ... What further evidence [do the defence] wish to call, other than the evidence that the allegations of fact that I'm -- that you've already advanced in your written submissions that I am to take at their highest? (T136 – 222, ll. 23-28)

12) Mr. Haevischer's counsel's response to the question included these points:

> MS. DLAB: Well, I believe, My Lady, I did answer that, I -- I advised you that we would be calling Mr. Haevischer, and I can repeat it, but I -- I -- he would be giving details about his conditions of confinement, and the impact on him, emotional, physical, all of that --
>
> THE COURT: Yes, I --
>
> MS. DLAB: -- his interaction with Corrections.
>
> THE COURT: Yes, all right.
>
> MS. DLAB: Medical evidence, Dr. Lawson, I think I mentioned that in my original submissions already. I was pretty clear about Dr. Lawson, we looked at his notes, and what I expect to hear from him. There's also the piece with Dr. Lawson about something that we found in the [Justice] McEwan judgment concerning what he told Mr. Bacon, and that is that the police are running the show, and so I would like to explore with Dr. Lawson what he meant by that and so on.
>
> There's our expert[3], who will testify about the impact on Mr. Haevischer from a psychological, psychiatric point of view. Well, I think it will be a psychologist. So those -- that's pretty clear what -

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[3] The Legal Services Society had refused a request from defence counsel for funding for a psychological assessment – although counsel was invited to reapply if an evidentiary hearing was granted. A letter to that effect from the Society was filed as an exhibit on the

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> MS. DLAB: And -- and then the B.C. Corrections, I've identified three names in my materials based on the documents I've reviewed so far. Now, as I mentioned, we're expecting more documents from B.C. Corrections, I may find someone else I may need to call based on those documents, but based on what we have now these are the people we think will assist the court --
>
> THE COURT: All right.
>
> • • •
>
> MS. DLAB: -- ... With respect to the other misconduct by the officers, it's -- it's Sobotin [*sic* Robin] that would be the key witness. And possibly Attew.
>
> THE COURT: -- how will that evidence assist me?
>
> MS. DLAB: Attew's evidence?
>
> THE COURT: Yes.
>
> MS. DLAB: Well, I expect that if we're permitted to cross-examine him, we'd find out more about who knew about what was going on, whether it was limited to just these four officers, and there would be a better indication of how -- how widespread the knowledge was. Because at this point we see it as four officers were engaged in this partying and sexual misconduct, but Staff Sergeant Attew as the leader had more of a responsibility in bringing it to the attention of his -- of his superiors, and he didn't do so, so that the exploration would be surrounding –
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> • • •
>
> MS. DLAB: And -- and the idea of -- of having Robin on the stand is to inquire about the circumstances on which -- under which he learned about the misconduct, and whether in fact he knew about it beforehand. (T136 – 260, ll. 20-43; 261, ll. 34-45; 262, ll. 16-20)

3. The ruling at issue:

13) The ruling at issue is divided into three parts: a review of the governing legal principles, a review of the allegations of abuse, and finally an application of the law to the facts. Only the allegations of abuse will be addressed in this Statement of Fact.

a. Police misconduct:

14) The judge began her analysis of the allegations of police misconduct by addressing the allegations of misconduct committed throughout the actual investigation. The first allegation of misconduct was this:

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application (AB136 – 276)

> [29] The Applicants submit that in its desperation to gather evidence in this very high-profile case, the Surrey Six investigation (Project E-Peseta) adopted an extremely aggressive investigative strategy known as "moving witnesses". This strategy, they say, employed unorthodox measures and ignored the ordinary ground rules for an investigation as set out in the Integrated Homicide Investigation Team's own "Business Rules and Protocol".

15) The basic goal of the "moving witnesses" strategy was to move potential witnesses away from (perceived) loyalty to the Red Scorpions, and towards loyalty towards, or at least cooperation with, the police. The appellants filed a copy of the so-called "Moving Witnesses" document is support of their applications (AB136, pg. 30) That document, which was authored by Inspector Don Adam, describes the police witness strategy in detail, and the judge reviews it at paragraph 34 of her ruling. As the judge notes at paragraph 36 of her ruling, the defence presented material demonstrating that at least one witness gave what appeared to be false statements as a result of the pressure of the "moving witnesses strategy".

16) In paragraphs 38 through 47 of her ruling the trial judge describes two further categories of misconduct that the defence were alleging against four police officers. The first involved officers misusing government funds and engaging in "exploitative sexual relationships with two female protected witnesses close to the heart of the investigation" (reasons at para 38). The second category involved the failure of the individual officers to report on their knowledge of the misconduct of the others, as well as lies told by the officers to their superiors about the misconduct.

17) Importantly, what were simply allegations in 2014 are now proven facts in 2020. In 2019, three of the four officers involved pleaded guilty to offences relating to their conduct (the appellants understand that a stay of proceedings was entered against the fourth, who was suffering health issues). [4]

18) Mr. Derek Brassington (formerly Sgt. Brassington) pleaded guilty to two criminal offences. The first was breach of trust. Justice Silverman described the conduct at issue in his Reasons for Sentence:

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[4] ***R. v Brassington***, 2019 BCSC 265 (sentencing of Brassington); ***R. v Brassington***, 2019 BCSC 695 (sentencing of Attew), and ***R. v Brassington***, 2019 BCSC 694 (sentencing of Michaud).

> [9] The breach of trust charge involves the use of the airplanes, hotels, and indirectly funds that I have previously referred to from the government, and in addition, involves a breach of the following standard requirements that witness managers and police officers generally are supposed to refrain from being involved in:
>
> 1. spending time alone with witnesses, particularly those of the opposite sex;
> 2. engaging in intimate or sexual relationships with witnesses;
> 3. consuming alcohol to the point of intoxication with witnesses;
> 4. inducing witnesses to become intoxicated;
> 5. disclosing to third parties the locations of relocated witnesses;
> 6. lying to fellow officers about their activities with a witness; and
> 7. violating the safety protocols of the Witness Protection Program.

19) The second offence that Mr. Brassington pleaded guilty to was attempted obstruction of justice, which Justice Silverman described this way:

> [11] The attempted obstruction of justice charge involves the potential harm and the harm that was caused to the investigation. **The witness was potentially a useful and important witness in the investigation. The circumstances that were created by Mr. Brassington ruined her for those purposes.** Her credibility would have been, as a witness, completely undermined. (emphasis added)

20) The misconduct of Staff Sgt. Attew, Mr. Brassington's superior officer, was described this way by the trial judge in her ruling on the ***Vukelich*** application:

> [40] S/Sgt. Attew was, at the time, Sgt. Brassington's immediate superior and investigative partner. S/Sgt. Attew learned of the relationship between Sgt. Brassington and the witness, but instead of putting an end to it or reporting the misconduct to his supervisor, he condoned and participated in it. During a weekend in November 2009, he partied with Sgt. Brassington and the witness, and engaged in sexual activity with a friend of hers.
>
> [41] S/Sgt. Attew also had sexual contact with the second of the two female protected Crown witnesses.

21) The trial judge described the allegations against the other two officers this way:

> [44] Cpl. Paul Johnston and Cpl. Danny Michaud were investigators under the supervision of Sgt. Brassington and S/Sgt. Attew. They were aware of Sgt. Brassington's relationship but took no action. Both engaged in sexual activities with the witness under Sgt. Brassington's protection.
>
> [45] All four officers made false statements to their commanding officers about their misconduct. Both Sgt. Brassington and S/Sgt. Attew submitted false overtime and expense claims.

22) Of note, in his sentencing of Mr. Michaud, Justice Silverman made a point of emphasizing that the "lies" Mr. Michaud told to the Ontario Provincial Police ("OPP")

officers investigating his misconduct "were clearly made with the intent of deceiving the OPP investigators with respect to the investigation that they were conducting" (at para 11).

23) In addition to the allegations of misconduct noted above, the accused alleged that the police inappropriately directed corrections to house them in what amounted to inhumane conditions (while they were detained awaiting trial).

24) The foregoing comments about the misconduct of the four officers is meant to represent only a summary of the major forms of police misconduct at issue, and its impact on the underlying investigation. The factual allegations of police misconduct will be considered in greater detail on the hearing of this appeal.

25) This is an appropriate point to return again to the involvement of the *amici*. It will be recalled that the *amici* were appointed for the ***Vukelich*** hearing, in part, for the purpose of "addressing information disclosed to them on Application 65 that might augment or aggregate the Applicants' assertion of abusive conduct by the police in the course of the investigation" (ruling at para 4). Hearing 65 involved issues related to informant privilege and "Person X". Again, the appellants have no knowledge of the information in the hands of the *amici* and they have no way of knowing what further submissions they might have made on this case had they been aware of the information. As also noted, there were no judicial summaries of the information and the appellants were not invited to offer any suggestions on how the ***Vukelich*** hearing could have been conducted to ameliorate the impact of the involvement of *amici* on the appellant's presentation of their case.

b. Conditions of confinement:

26) As the judge notes at paragraph 58 of her ruling, both appellants alleged that the police misconduct in this case extended to improperly interfering "in directing their custodial circumstances following their arrests". The judge's summary of the appellant's submission was this:

> [58] Notwithstanding all of the foregoing, the Applicants allege that the most troubling manifestation of police misconduct in this case was E-Peseta's interference in directing their custodial circumstances following their arrests. They say that the police exceeded their proper role by punitively requiring the

> Applicants to be housed in solitary confinement for 14 months in harsh and inhumane conditions contrary to the *Charter* and to international human rights treaties to which Canada is a signatory. ... The Applicants additionally submit that B.C. Corrections officials inappropriately bowed to this pressure from the police and failed in their duty to keep the Applicants safe while in their custody.

27) In advancing their arguments, each appellant filed a Book of Materials; Mr. Haevischer's book contained six documents (AB136, pg. 27), Mr. Johnston's book included documents grouped in 16 tabs (AB136, pg. 54). They also relied heavily on the findings of fact of Justice McEwan in ***Bacon v. Surrey Pretrial Services Centre (Warden)***, 2010 BCSC 805. Mr. Bacon was originally an accused on the same indictment as the appellants and was housed in conditions of pre-trial custody similar to those of the appellants. Mr. Bacon advanced a *habeas corpus* application before Justice McEwan seeking relief for the improper conditions of his confinement.

28) In paragraphs 60-79 of her ruling the judge addressed the specific complaints of each appellant in relation to the nature of their confinement and the impact of the conditions of confinement on their health. It is difficult to summarize either the complaints about the conditions of confinement, or their impact, without trivializing them. For the purposes of this appeal it is enough to note the conclusions of the trial judge on these issues.

29) Dealing first with the conditions of confinement, the judge said this:

> [114] For purposes of this *Vukelich* application, I accept all of the factual allegations of Mr. Haevischer and Mr. Johnston, as described above, with respect to the custodial conditions under which they lived for the 14 months of their segregation from the general population. I also accept, for purposes of this application, the findings of fact and conclusions of law made by McEwen J. in *Bacon* on which the Applicants rely.
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> • • •
>
> [116] I accept that for at least the first several months, both Mr. Haevischer and Mr. Johnston were kept, again in the words of McEwen J. (at para. 292) "in physical circumstances that have been condemned internationally" and which "reflect a distressing level of neglect". There was no systematic attempt to provide them with the standard of treatment of ordinary remand prisoners to which they were entitled despite being housed in segregation. Thereafter, their continued segregation for many more months contravened both international and Canadian norms for the treatment of prisoners. As inmates in segregation, they did not receive the systematic review and medical support contemplated by the *Correction Act and Correction Act Regulation*, B.C. Reg. 58/2005

> amplified by the Adult Custody Policy Manual, the terms of which were set out by McEwan J. in *Bacon* at para. 218.

30) Turning to the impact of the conditions of confinement on the appellants, the judge made these findings:

> [117] Further, I accept that because of the conditions of their confinement over those 14 months, both Applicants suffered physically, emotionally and psychologically in the manner and to the extent they have described in their application materials.

31) While the judge accepted that the appellants "suffered physically, emotionally and psychologically in the manner and to the extent they have described in their application materials", it will be recalled that defence counsel suggested at the hearing of the abuse application that if an evidentiary hearing was granted "…we would be calling Mr. Haevischer, … he would be giving details about his conditions of confinement, and the impact on him, emotional, physical, all of that". Moreover, defence counsel told the judge that the defence also wanted to call expert opinion evidence on the issue of the impact of the conditions of confinement on the appellants. The simple point is that the trial judge's use of the phrase "to the extent they have described in their application materials" does not capture anywhere near the full flavour of the evidence that the appellants wanted to put before the Court.

32) As with the review of the evidence relating to the police misconduct, the foregoing is meant to represent only a summary of the conditions of confinement and their effect on the appellants. The factual allegations will be considered in greater detail on the hearing of this appeal.

PART II ~ ERRORS IN JUDGMENT

A. The trial judge erred in applying too stringent a test on the ***Vukelich*** hearing and she erred in dismissing the applications for stays of proceedings.

PART III ~ ARGUMENT

1. A *Vukelich* hearing:

a. Standard of Review:

33) The trial judge made two rulings in this case, and each attracts a standard of

review which, although they are often stated differently, are likely equivalent as a matter of practice.

34) The first decision the judge made was her finding that it was unnecessary to hold an evidentiary hearing – the ***Vukelcih*** issue. In ***R. v. M.B.*** 2016 BCCA 476, Chief Justice Bauman described the limited circumstances under which an appeal court may interfere with a trial judge's decision to refuse to hold a *voir dire*:

> [47] Accordingly, a trial judge's decision to decline to hold a *voir dire* is entitled to deference. To succeed in this appeal, M.B. **must establish that the trial judge failed to exercise her discretion judicially**. (emphasis added)

35) Chief Justice Bauman gave this example of a failure to exercise a discretion judicially:

> [48] A trial judge who exercises her discretion on the basis of an incorrect legal conclusion does **not** exercise that discretion judicially... (emphasis added)

36) The second decision the trial judge made was her dismissal of the applications for stays of proceedings. That decision represented an express denial of relief under s.24(1) of the ***Charter***. The standard of review for s.24(1) decisions was described this way in the reasons of Justice Moldaver for the majority in ***R. v. Babos***, [2014] 1 SCR 309:

> [48] The standard of review for a remedy ordered under s. 24(1) of the *Charter* is well established. Appellate intervention is warranted only where a trial judge misdirects him or herself in law, commits a reviewable error of fact, or renders a decision that is "so clearly wrong as to amount to an injustice" (*Bellusci*, at para. 19; *Regan*, at para. 117; *Tobiass*, at para. 87; *R. v. Bjelland*, 2009 SCC 38 (CanLII), [2009] 2 S.C.R. 651, at paras. 15 and 51).

37) The decision of Justice Rothstein for the majority in ***R. v. Bjelland***, 2009 SCC 38, reveals that the phrase "exercise ... discretion judicially" used by Chief Justice Bauman in ***M.B.*** seems to encompass the standard of review expressed by the majority in ***Babos***:

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

38) The appellants submit that, regardless of which standard of review applies, or precisely how it might be worded, they are entitled to relief on any of these standards if

they can demonstrate that the trial judge misdirected herself on the threshold test she applied on the ***Vukelich*** hearing (and her consequent error in dismissing the abuse applications).

b. The purpose of a *Vukelich* hearing:

39) As Chief Justice Bauman noted in ***M.B.*** (supra), the fundamental purpose of a ***Vukelich*** hearing is to maximize the efficient use of court time. He said this:

> [45] ... **The discretion to decline to hold a *voir dire* is founded in the need for trial judges to control the course of proceedings** and not embark upon enquiries that will not assist the proper trial of the real issues (*Vukelich* at paras. 30-31). Madam Justice Charron, speaking for the Supreme Court of Canada in *R. v. Lising*, 2005 SCC 66 (CanLII), said **the accused is required to show a reasonable likelihood that the requested *voir dire* can assist in determining the issues before the court**. ***Lising*** **took place in the context of an application seeking cross-examination of an affiant according to the threshold test in *R. v. Garofoli*, 1990 CanLII 52 (SCC), [1990] 2 S.C.R. 1421, but this test is applicable to *Charter* applications more broadly** (see, for example, *United States v. Ranga*, 2012 BCCA 81 (CanLII) at para. 15). (all emphasis added)

40) There are two key points to take from Chief Justice Bauman's comments: The first is that in order to achieve the goal of the efficient use of court time, the fundamental question in issue on a ***Vukelich*** hearing is whether a *voir dire* (evidentiary hearing) would "assist in determining the issues before the court".

41) The second key point to take from Chief Justice Bauman's comments is that the question of whether an evidentiary hearing would assist the court is one that is asked on a variety of ***Charter*** applications – not just applications to exclude evidence. In other words, concerns about the efficient use of court time apply equally to applications for stays of proceedings brought on the basis that there has been an abuse of process. The net result of the shared concern for the efficient use of court time is that the fundamental question in issue remains the same – i.e. would an evidentiary hearing "assist in determining" whether there has been an abuse of process warranting a stay.

c. How a judge is to decide whether a hearing would assist the court:

42) The obvious question that arises is how is a judge to determine whether an evidentiary hearing would "assist in determining the issues before the court". The answer is that there is simply no one-size-fits-all threshold test that can be applied to all ***Charter***

applications. Instead, the threshold test is necessarily contextual; it must take into account both the test that will ultimately be applied, and also the nature of the factual matters in issue. Justice Fisher noted the contextual nature of the test in her reasons for the court in ***R. v. Frederickson*** 2018 BCCA 2:

> [26] There is no absolute right to a *voir dire*. The purpose of a *Vukelich* hearing is to filter out proposed pre-trial applications where the remedy sought could not reasonably be granted, as shown by submissions of counsel, assuming the allegations could be proven: *M.B.* at para. 45. **Whether an appropriate foundation can be laid in any given case is contextual.** Generally, to justify a *voir dire* alleging a breach of the *Charter*, the applicant must be able to demonstrate a reasonable basis on which the court could find a breach: *R. v. McDonald*, 2013 BCSC 314 (CanLII) at para. 18; *R. v. Malik*, 2002 BCSC 484 (CanLII) at para. 4.
>
> [27] **The context in an application under s. 8 of the *Charter* to challenge a search warrant is the test set out in *R. v. Garofoli***, 1990 CanLII 52 (SCC), [1990] 2 S.C.R. 1421 at 1452:
>
> (***Garofoli*** test omitted)
>
> • • •
>
> [32] While the defence does **not** have to meet the *Garofoli* test in a *Vukelich* hearing, a trial judge must consider it in order to determine whether the defence has shown a reasonable basis on which the search warrant can be challenged and the court could find a breach of s. 8 of the *Charter*. (emphasis added)

43) The nature of the test in the context of an application for a stay as a remedy for an abuse of process will be considered in detail below. The important point to keep in mind at present is that the very familiar ***Garofoli*** test does not provide the context for the threshold test in a ***Vukelich*** hearing in an abuse of process application such as the one at issue in the instant case.

d. The nature of a *Vukelich* hearing:

44) Keeping in mind that the purpose of a ***Vukelich*** hearing is the efficient use of court time, it is fair to say that, by nature, ***Vukelich*** hearings are meant to be "expeditious". Chief Justice McEachern said as much in his reasons for the court in ***Vukelich***:

> 17 Generally speaking, I believe that both the reason for having, or not having, a *voir dire,* and the conduct of such proceedings, **should, if possible, be based and determined upon the statements of counsel. This is the most expeditious way to resolve these problems**: see ***R. v. Dietrich*** (1970), 1970 CanLII 377 (ON CA), 1 C.C.C. (2d) 49 at 62 (Ont. H.C.); ***R. v.***

> ***Hamill*** (1984), 1984 CanLII 39 (BC CA), 14 C.C.C. (3d) 338 (B.C.C.A.); and ***R. v. Kutynec*** (1991), 1992 CanLII 7751 (ON CA), 70 C.C.C. (3d) 289 at 301 (Ont. C.A.). I suggest that judges must be more decisive in this connection than they have been in the past because far too much judicial time is consumed by the conduct of these kinds of enquiries. (emphasis added)

45) As Chief Justice McEachern noted in ***Vukelich***, the starting premise is that the hearing "should ... be based and determined upon the statements of counsel". Chief Justice McEachern recognized, however, that the statements of counsel might not be "sufficient to dispose properly of the question" (para 18), in which case something more will be needed. After reviewing several cases on the point, he offered this summary of what else counsel might put before the court:

> 23 My conclusions on the foregoing, briefly stated, are that counsel's statements, possibly supported by an affidavit, are a useful first step in persuading the judge to order a *voir dire.* **If these are found to be insufficient, a more formal approach, involving affidavits and possibly an undertaking to adduce evidence (including calling the deponent as a witness), may be required. In other words, I would opt for the flexible approach** recommended by the Ontario Court of Appeal in ***Kutynec***, rather than the formal procedure described on the earlier appeal in that case. In doing so, **I do not purport to have exhaustively mentioned all the possible steps that should, or may, be taken in this flexible approach**. (emphasis added)

46) Dealing specifically with Chief Justice McEachern's statement that about the use of affidavits, it is worth noting that he also pointed out (para 22) that "there is nothing to suggest that the accused cannot file his or her own affidavit". That would not apply, however, where the purpose of the ***Vukelich*** hearing is to determine whether there should be an evidentiary hearing as it was in the instant case.

47) The simple point is that where the ***Vukelich*** hearing is held to determine if there should be an evidentiary hearing, counsel are necessarily constrained in the extent to which they can put forward formal evidence to meet the threshold test. The obvious implication of that situation is that the test which the judge applies on the ***Vukelich*** hearing must not be one that could only be met if the accused tendered the very evidence in issue. As will be highlighted in the argument that follows, in the instant case, the judge applied a test which could only have been met if the accused had been permitted to lead all of the evidence they wanted to present.

48) Although a ***Vukelich*** hearing might involve a record that is more complex than

simply the submissions of counsel, it is clear that it is still meant to be an expeditious hearing aimed at efficiency. As Justice Fisher put it in ***Frederickson*** (*supra*), "[a] *Vukelich* hearing should not involve a protracted examination of the issues". The hearing in the instant case took six days which, the appellants respectfully submit, was not expeditious.

49) The final point to note before moving on is that there was no suggestion during the hearing itself that the submissions of counsel and materials put forward were "insufficient", (***Vukelich*** at 23) and that something more was needed.

e. The threshold on a *Vukelich* hearing is "low":

50) As Justice Fisher noted in ***Frederickson***, the threshold on a ***Vukelich*** hearing is "low" (para 33). This is undoubtedly a reflection of the somewhat informal nature of a ***Vukelich*** hearing; a hearing that is expressly designed to prevent the accused from presenting a complete evidentiary record to meet the threshold. It would obviously be unfair to preclude an accused from presenting a complete record but nevertheless require them to meet a threshold that could only be met on the presentation of a complete record. That was, essentially, the central error committed by the judge in the instant case; she applied the test for an abuse of process in a way that could only have been met if the accused had been permitted to present a complete evidentiary record. This point will be discussed and illustrated in greater detail below.

f. Evidentiary issues in a *Vukelich* hearing:

51) As noted, the Supreme Court of Canada held in ***Pires*** that the evidential burden on an accused in a ***Vukelich*** hearing is "to show a reasonable likelihood that the requested *voir dire* can assist in determining the issues before the court." As Justice Fisher held in ***Frederickson***, the "issues before the court" are defined by the context of the application – i.e., the nature of the application that is ultimately at issue.

52) Turning to the persuasive burden, the accused does <u>not</u> have to prove beyond a reasonable doubt that a hearing will assist the court; nor does the accused even have to demonstrate it on a balance of probabilities. Instead, as Justice Fisher noted in ***Frederickson***, the persuasive burden on an accused is "low".

53) A further evidentiary question that naturally arises relates to how much weight a

judge hearing a ***Vukelich*** application can give to the submissions and materials put before the court. For example, will the submissions of counsel; an affidavit; or an unsworn document all carry the same weight? A related question is whether the hearing judge should engage in any truth-finding in the sense of deciding whether a submission or document is true. As far as the applicants can determine, the truth-finding question has been addressed but the question of assigning weight to submissions of counsel and documents has not.

54) Dealing first with the truth-finding issue, it is commonly understood that a judge hearing a ***Vukelich*** application will simply assume that certain things are true. The word "things" is used here as the cases reveal varying descriptions about precisely what will be assumed to be true. In ***Frederickson***, for example, Justice Fisher used the phrase "assuming the allegations could be proven" (at para 26) – which, as she noted, is what Chief Justice Bauman said in ***M.B.***. In contrast, in her reasons for the Court in ***R. v. Armstrong*** 2012 BCCA 242, Justice Newbury noted at paragraph 8 that the trial judge had "assumed the alleged facts to be true in accordance with ***R. v. Vukelich***". The trial judge in the instant case relied on ***Armstrong***, and she used the phrase "assume ... the facts alleged by the applicants are true" (para 9)[5].

55) There is an obvious difference between "facts" and "allegations". In some cases, the difference might not matter, while in other cases the difference might determine the outcome of the application. Given the fact that ***Vukelich*** hearings can cover a wide variety of legal issues, and they can involve varying degrees of formality, it would be impossible for this Court to make a final declaration on the issue of whether judges should assume the truth of facts vs. allegations on all ***Vukelich*** applications.

56) The appellants submit that the question of what will be assumed to be true must necessarily be determined by the context of the broader *Charter* application. If the legal test that would ultimately be applied on the *Charter* application requires the accused to prove some point that is, or might be material, the judge hearing the ***Vukelich*** application should do one of the following:

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[5] ***M.B.*** was decided in 2016, approximately three years after the ruling at issue on this appeal.

a) Rely on the submissions of counsel and simply assume that the accused could prove the material point,

b) Require the accused to put something before the court to demonstrate that he or she is capable of proving the material point, or

c) Permit the accused an opportunity to actually prove the material point, or some lesser point from which the material point could be inferred.

57) While the ***Garofoli*** test is not the test that will ultimately be applied in the instant case, it can serve to illustrate these principles in action. In practice, when the ***Garofoli*** test is ultimately applied after an evidentiary hearing, it involves the reviewing judge asking whether the warrant at issue could have been granted "on the basis of what is left in the ITO after excising what is contended to be incorrect information and adding what is contended ought to be included" (per Justice Fisher at para 54 in ***Frederickson)***. The ITO serves as a body of sworn testimony, as amended by the additions and deletions called for by the evidence led by the accused. The reviewing judge asks the simple question of whether, on the strength of the ITO as amended, the warrant or order at issue could have been granted. The nature of the ***Garofoli*** test that is ultimately applied is what governs how a judge on a ***Vukelich*** hearing deals with the facts and allegations advanced by the accused.

58) Counsel's first task on a ***Vukelich*** hearing in a ***Garofoli*** application is to identify for the court what they allege are the material point(s) which need to be deleted or amended in the ITO in question. The judge might simply accept that counsel could present evidence justifying the suggested deletions or amendments to the ITO, and thereafter move on to the question of whether the point or points in issue are actually material in the sense that the authorizing judge could not have issued the warrant in question on the strength of the amended ITO. In this scenario, the bulk of the ***Vukelich*** hearing is devoted to argument on the materiality of the point in issue.

59) Alternatively, the judge hearing the ***Vukelich*** application might assume that the point in issue is truly material, and put counsel to the task of offering a means of proving the material point – perhaps by filing materials from the disclosure package, or perhaps through an affidavit. In this scenario, the bulk of the ***Vukelich*** hearing is devoted to the question of whether the accused could justify the suggested deletions or amendments to

the ITO. This scenario squarely raises the question of what the judge should assume to be true, but it also raises a further critical question of how much weighing of the material put forward the judge should engage in.

60) A brief example helps to illustrate how a judge is to decide what to assume is true, and it will also help to illustrate the importance of the weighing process. Consider the situation that would arise if counsel for an accused on a ***Vukelich*** hearing in a ***Garofoli*** application made a submission to the effect that the police officer who obtained the ITO in issue knew that the accused was never seen in the house that was ultimately searched. If the judge was satisfied that the point is truly material, in the sense that the warrant might stand or fall on that point, the judge would ask counsel to put forward some means of proving that point. Counsel could put forward disclosure materials such as police officer notes, or counsel might put forward an affidavit from the accused's wife alleging that they were out of the country during the entire period in question. The judge would assume the truth of whatever facts or allegations were put forward, and would then engage in a limited weighing of the assumed to be true facts and allegations to determine whether they are enough to meet the "low" threshold of justifying an evidentiary hearing to "assist the court in determining" whether the officer knew the accused was never seen in the house.

61) This example illustrates why fairness dictates that the weighing process engaged in by the judge on a ***Vukelich*** hearing must be limited. In this example, the affidavit to the effect that the accused was out of the country is, at the very least, capable of calling into question the officer's state of knowledge about whether the accused was seen in the house. Importantly, however, in this example, only an evidentiary hearing would answer the questions of what the officer knew – but the accused can offer no evidence on that point without the evidentiary hearing. Very simply, the weighing process, and indeed the entire ***Vukelich*** hearing must respect the limitations imposed on the accused. Put another way, if there is a material point in play, the outcome of the ***Vukelich*** hearing should never turn on something the accused could only put forward through an evidentiary hearing which has been denied. That is, again, the central problem in the instant case.

g. The *Vukelich* hearing in the context of an abuse application:

62) With an appreciation of the purpose of a ***Vukelich*** hearing and the evidentiary issues raised by a ***Vukelich*** hearing in mind, it is now appropriate to consider the nature of a ***Vukelich*** hearing in an abuse of process application. Again as Justice Fisher noted in ***Frederickson***, "whether an appropriate foundation [for an evidentiary hearing] can be laid in any given case is contextual" (para 26). In the instant case, the context is defined by two things: the underlying factual complaints (police misconduct and mistreatment by corrections), and the test for determining whether an abuse of process warrants a stay of proceedings as described by Justice Moldaver in his reasons for the majority in ***R. v. Babos***, 2014 SCC 16.

63) The relationship between the factual complaints and the ***Vukelich*** hearing in the instant case will be considered below in the analysis of the trial judge's ruling.

64) Turning to the elements of the ***Babos*** test as the context for the test on a ***Vukelich*** hearing in an abuse of process case, Justice Moldaver described the basic elements of the test in his reasons for the court:

> [31] Nonetheless, this Court has recognized that there are rare occasions —the "clearest of cases" — when a stay of proceedings for an abuse of process will be warranted (*R. v. O'Connor*, 1995 CanLII 51 (SCC), [1995] 4 S.C.R. 411, at para. 68). **These cases generally fall into two categories: (1) where state conduct compromises the fairness of an accused's trial (the "main" category); and (2) where state conduct creates no threat to trial fairness but risks undermining the integrity of the judicial process (the "residual" category)** (*O'Connor*, at para. 73). The impugned conduct in this case does not implicate the main category. Rather, it falls squarely within the latter category.
>
> [32] The test used to determine whether a stay of proceedings is warranted is the same for both categories and consists of three requirements:
>
> (1) There must be prejudice to the accused's right to a fair trial or the integrity of the justice system that "will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome" (*Regan*, at para. 54);
>
> (2) There **must be no alternative remedy** capable of redressing the prejudice; **and**
>
> (3) Where there is still uncertainty over whether a stay is warranted after steps (1) and (2), **the court is required to balance the interests in favour of granting a stay**, such as denouncing misconduct and preserving the integrity of the justice system, against "the interest that society has in having

> a final decision on the merits" (*ibid.*, at para. 57). (emphasis added)

65) As noted earlier, the appellants in the instant case did not rely on the trial fairness branch of the first stage; they relied on the residual category. The appellants will, however, file a fresh evidence application that includes an application to adduce fresh evidence that would have inevitably led the appellants to advance a claim of abuse on the trial fairness branch. This will be addressed further below.

66) Justice Moldaver described the test that applies at the first stage in a "residual category" case:

> [35] By contrast, when the residual category is invoked, **the question is whether the state has engaged in conduct that is offensive to societal notions of fair play and decency and whether proceeding with a trial in the face of that conduct would be harmful to the integrity of the justice system.** To put it in simpler terms, there are limits on the type of conduct society will tolerate in the prosecution of offences. At times, state conduct will be so troublesome that having a trial — even a fair one — will leave the impression that the justice system condones conduct that offends society's sense of fair play and decency. This harms the integrity of the justice system. In these kinds of cases, the first stage of the test is met.
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>
> [38] Second, in a residual category case, regardless of the type of conduct complained of, **the question to be answered at the first stage of the test is the same: whether proceeding in light of the impugned conduct would do <u>further</u> harm to the integrity of the justice system**. While I do not question the distinction between ongoing and past misconduct, it does not completely resolve the question of whether carrying on with a trial occasions further harm to the justice system. The court must still consider whether proceeding would lend judicial condonation to the impugned conduct. (all emphasis added)

67) It is important to note that Justice Moldaver did <u>not</u> attempt to quantify the amount of "further harm to the integrity of the justice system" that must be demonstrated at the first stage of the test. As an example, he did not suggest that there had to be significant or serious harm. Quantifying the harm is part of the <u>third stage</u> of the test. It is also important to note that Justice Moldaver pointed out that even where it has stopped, "past misconduct" can still continue to do "harm to the integrity of the justice system".

68) Moving to the second stage of the test, it asks simply whether there is an available remedy short of a stay of proceedings. Obviously, the range of available remedies will

vary according to the stage of proceedings, and what is sought by the applicants.

69) Finally, Justice Moldaver described what is at stake at the third stage of the ***Babos*** test:

> [41] However, when the residual category is invoked, the balancing stage takes on added importance. Where prejudice to the integrity of the justice system is alleged, the court is asked to decide which of two options better protects the integrity of the system: staying the proceedings, or having a trial despite the impugned conduct. **This inquiry necessarily demands balancing**. **The court must consider such things as the nature and seriousness of the impugned conduct, whether the conduct is isolated or reflects a systemic and ongoing problem, the circumstances of the accused, the charges he or she faces, and the interests of society in having the charges disposed of on the merits.**[Clearly, the more egregious the state conduct, the greater the need for the court to dissociate itself from it. When the conduct in question shocks the community's conscience and/or offends its sense of fair play and decency, it becomes less likely that society's interest in a full trial on the merits will prevail in the balancing process. But in residual category cases, balance must always be considered. (emphasis added, footnote omitted)

70) Distilled to its essence, the ***Babos*** test raises two broad questions: whether proceeding in light of the impugned conduct would do further harm to the integrity of the justice system, and if so, whether the remedy of a stay of proceedings should be granted. Each broad question has several sub-questions or factors to consider, each of which needs to be addressed on a ***Vukelich*** hearing.

i. Stage one of *Babos* in a *Vukelich* hearing:

71) The first stage of the ***Babos*** test has two components: "whether the state has engaged in conduct that is offensive to societal notions of fair play and decency" – either past misconduct or ongoing misconduct (***Babos*** at para 35), and if so, "whether proceeding in light of the impugned conduct would do further harm to the integrity of the justice system." (***Babos*** at para 38). It is self-evident that, on the ultimate application of the ***Babos*** test, each of these questions involves a weighing of evidence, and a subjective assessment of the impact of the totality of the evidence. It is this weighing of the evidence and the subjective assessment of the evidence which complicates a ***Vukelich*** hearing in an abuse case. An appropriate approach to developing a ***Vukelich*** test is to assess each component of the first stage of the ***Babos*** test in the order they would be assessed by the judge.

A. Societal notions of fair play and decency:

72) Creating a ***Vukelich*** test for determining whether "conduct ... is offensive to societal notions of fair play and decency" presents a challenge because, like art, it is a concept that is difficult to define in advance, but you know when you see it. It is manifestly a subjective notion, and in any particular case, reasonable people could reasonably disagree about whether the conduct at issue rises to the offending level.

73) The impugned conduct in any case will exist along a spectrum. At one end of the spectrum is conduct that might be offensive, but which would not meet the test. As an example, if an officer is rude and insulting to a suspect, the public might agree that the conduct is generally offensive, but the conduct would not offend "societal notions of fair play and decency". At the other end of the spectrum, conduct amounting to torture would easily meet the test. At the outer ends of the spectrum a simple binary question requiring a limited weighing of the facts will answer the question of whether the impugned conduct is or *could* amount to an abuse of process. The difficulty on a ***Vukelich*** application lies in the middle of the spectrum where, instead of a binary yes-no answer, the answer might be "maybe".

74) On the ultimate application of the ***Babos*** test the accused would have to demonstrate, on a balance of probabilities, that the conduct does offend societal notions of fair play and decency. On a ***Vukelich*** application, however, the accused is not required to meet the ultimate test. In a ***Vukelich*** hearing, a judge would ask himself or herself if an evidentiary hearing would assist in determining whether the impugned conduct which might be an abuse of process is actually an abuse. To answer that question, the judge would look to what further evidence the accused proposes to call on an evidentiary hearing. If the accused has nothing to offer beyond the facts and allegations that have been assumed to be true, the judge would rightly conclude that an evidentiary hearing would not assist as the accused could do no better than demonstrating that the conduct might be abusive. In cases like the instant case, however, where the accused has more to offer on an evidentiary hearing, the "low" threshold of a ***Vukelich*** hearing will be met.

75) This is an appropriate point to consider notions of fairness on the ***Vukelich*** hearing itself. To repeat a point made earlier, it would be manifestly unfair to dismiss an

application for an evidentiary hearing on the basis that the accused failed to present the evidence needed to meet the test. A judge hearing a ***Vukelich*** application would have to consider whether the accused has offered to call evidence that could (not would) move the needle from "maybe" the conduct is abusive, to "yes" the conduct is offensive at a level amounting to abuse.

76) If an accused can demonstrate, at the least, that the impugned conduct might be an abuse, they should be given the opportunity to lead evidence to demonstrate both the full extent of the impugned conduct, and the impact of that conduct. It is only once the judge knows both the full extent of the impugned conduct, and the impact of that conduct, that it is possible to determine if the first component of the first stage of the ***Babos*** test has been met. As will be seen, understanding the full extent of the impugned conduct and its impact are also critical to all other elements of the ***Babos*** test.

B. Further harm to the integrity of the justice system:

77) Understanding the full extent of the impugned conduct, and its impact, is critical to determining "whether proceeding in light of the impugned conduct would do further harm to the integrity of the justice system". Quite obviously, if a judge does not know the full extent of the impugned conduct, or does not know the full impact of the conduct, it is simply impossible to know whether proceeding in the face of it would imperil the integrity of the justice system.

78) The fact that the second component of the first stage of the ***Babos*** test cannot be addressed until the full extent of the impugned conduct and its impact are known has implications for the ***Vukelich*** hearing. Very simply, if an accused has already demonstrated a need for an evidentiary hearing aimed at establishing whether the impugned conduct <u>does</u> offend societal notions of fair play and decency, he or she can not be expected to also justify an evidentiary hearing to demonstrate that proceeding in the face of the impugned conduct would imperil the integrity of the justice system. The opposite is equally obvious; if the conduct at issue has no impact on societal notions of fair play and decency the second component of the first stage of the ***Babos*** test does not come into play.

79) The next obvious question is what happens if the full extent and impact of the

impugned conduct are known, and the judge hearing the ***Vukelich*** application is satisfied that the conduct does offend societal notions of fair play and decency? At first glance it might seem that the obvious answer is that the judge will decide whether an evidentiary hearing is needed to determine if proceeding in the face of the impugned conduct would imperil the integrity of the justice system. While that might seem like the obvious step, there are other concerns that come into play. More particularly, there are concerns about onus and the burden of proof on this issue that need to be addressed.

80) The appellants submit that if the full extent and impact of the impugned conduct are known, and if the impugned conduct does offend societal notions of fair play and decency, it should simply be assumed that proceeding in the face of the conduct will cause "further harm to the integrity of the justice system" (emphasis added). The word "further" is emphasized because it recognizes that the conduct itself has already caused "harm to the integrity of the justice system". That is simply the nature of any conduct which offends society's sense of fair play and decency.

81) Logically then, if the state is responsible for the impugned conduct that has already harmed the integrity of the justice system, it must also be responsible for doing something about it to ensure there is no further risk to the integrity of the justice system. Fairness dictates that it will be for the Crown to demonstrate, on a balance of probabilities, that there is no further risk to the integrity of the justice system from its conduct.

82) Moreover, it will be the Crown that is actually in the position to demonstrate that the risk to the integrity of the justice system has somehow been eliminated or ameliorated. The Crown can lead evidence demonstrating what steps have been taken to correct the misconduct or ameliorate its impact. The accused has no, or at least imperfect access to the information he or she would need to demonstrate that the Crown has failed to ensure that there no risk of further harm to the integrity of the justice system. In short, if the accused can demonstrate that the state is responsible for offensive conduct, the state should have the burden of demonstrating there is no "further" risk to the integrity of the justice system.

83) There is a further practical question that needs to be addressed. If the Crown does present information or materials on ***Vukelich*** hearing aimed at demonstrating there is no

further risk to the justice system, how should that information be treated? More particularly, is it fair to simply assume it is true without permitting the accused an opportunity to test it through an evidentiary hearing? The answer to these questions lies in the overall approach to ***Vukelich*** hearings, which, as Justice Romilly noted in ***R. v. Wilder*** 2004 BCSC 304, is for the accused's case to be "taken at its highest" (para 32). Taking the accused's case "at its highest" on this issue means that it will be assumed the Crown cannot meet the burden of demonstrating there is no further risk to the integrity of the justice system. If the Crown wants to meet the burden of demonstrating that the conduct for which it is responsible presents no further risk to the justice system, there should be an evidentiary hearing.

ii. Stage three of *Babos* in a *Vukelich* hearing:

84) As with the first stage of the ***Babos*** test, the third stage raises issues that are, ultimately, entirely subjective. The judge hearing the ultimate application must "balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against "the interest that society has in having a final decision on the merits"" (***Babos*** at para 32). As Justice Moldaver noted, in carrying out that balancing exercise, "[t]he court must consider such things as the nature and seriousness of the impugned conduct, whether the conduct is isolated or reflects a systemic and ongoing problem, the circumstances of the accused, the charges he or she faces, and the interests of society in having the charges disposed of on the merits" (***Babos*** at para 41).

85) Again quite obviously, the true "nature and seriousness of the impugned conduct" must actually be known for a judge to take them into account in the balancing process. Similarly, "whether the conduct is isolated or reflects a systemic and ongoing problem" are things that must be known if they are to be taken into account. Finally, "the circumstances of the accused" must also be known if they are to be taken into account. While these statements are all simple, if somewhat trite propositions, they are nevertheless crucial to a fair ***Vukelich*** hearing.

86) To return again to the language of ***Pires***, the question for the judge at the third stage of the ***Babos*** test on a ***Vukelich*** hearing is whether an evidentiary hearing would "assist in determining", for example, the "seriousness of the impugned conduct". The

appellants submit that an evidentiary hearing will be required in any case where an evidentiary hearing is needed to understand the full extent and impact of the offending conduct at the first stage of the ***Babos*** test. In other words, if an evidentiary hearing is needed at the first stage, the accused should not also have to justify one at the third stage. Indeed, the third stage of the test cannot be addressed until the first stage has been dealt with.

87) Once again, the nature of the proceedings adopted on the ***Vukelich*** hearing cannot operate to unfairly prevent an accused from meeting the "low" threshold at the third stage. An accused should not be faulted for failing to satisfy the third stage of the ***Babos*** test if the only way to satisfy the test is through an evidentiary hearing that has been denied. A trial judge should not weigh, for example, the seriousness of the offending conduct if the true extent of the conduct is unknown and could only be known through the evidentiary hearing sought by the accused.

h. The nature of the *Vukelich* hearing relied on by the judge in <u>this</u> case:

88) In developing and applying a threshold test in the instant case, the trial judge began her analysis (at para 5) by referring to ***Pires*** in support of the proposition that "trial judges must have some ability to control the course of proceedings before them". She then referred to ***Vukelich*** and the proposition that a judge has "the discretion to decline to embark upon an evidentiary hearing at the request of a party unless satisfied that it will assist in the "proper trial of the real issues". In developing her test, the judge also relied on the decision of Justice Romilly in ***Wilder*** (*supra*), and this court's decision in ***Armstrong*** (*supra*). The judge then said this:

> [9] As authorities such as *Wilder* and *Armstrong* make clear, **the Court must assume for the purposes of the present application that the facts as alleged by the Applicants are true**. Having done that, if satisfied that the grounds advanced by the Applicants could not support a stay of proceedings, the Court may dismiss the applications without hearing evidence. (emphasis added)

89) While the judge did refer to ***Wilder,*** which involved an allegation of an abuse of process under the "trial fairness" branch of the first stage of what is now recognized as the ***Babos*** test, she did <u>not</u> engage in any analysis of the ***Babos*** test as the context for the ***Vukelich*** hearing.

i. The errors in the *Vukelich* hearing in this case:

90) The appellants' basic complaint is that while the judge recognized that the impugned conduct at issue could be conduct that rises to the level of being "offensive to societal notions of fair play and decency", she erred in failing to order an evidentiary hearing to determine the full extent and the impact of the offending conduct. Instead, the judge wrongly went on to address the question of whether there was a risk of further harm to the justice system. In doing so, she erred by failing to require an evidentiary hearing allowing the accused to test the information and materials relied on by the Crown. Finally, the judge also erred in engaging in the third stage balancing exercise without knowing the complete extent of the offending conduct and without knowing its full impact.

i. Stage one of *Babos* in the *Vukelich* hearing:

A. Societal notions of fair play and decency:

91) The trial judge began her analysis of the first stage at para 121 of her reasons by restating the first stage test, and by briefly reiterating the appellants' complaints about the conditions of confinement and the police misconduct. The judge concluded that the conditions of confinement and the police misconduct could amount to an abuse of process. She said this:

> [129] Thus, the state misconduct which could be found to constitute conduct offensive to notions of fair play and decency consists of that relating to (i) the Applicants' conditions of confinement and (ii) the misconduct of the four investigating officers.

92) Rather than ordering an evidentiary hearing to permit the accused to lead evidence on these or any other factual matters, the judge immediately launched into an assessment of the second component of the first stage of test. She found that there was no further risk to the integrity of the justice system and then moved on to the balancing exercise required in the third stage of the ***Babos*** test.

93) The appellants submit that the judge erred in failing to order an evidentiary hearing after concluding that at least some of the impugned conduct could amount to an abuse of process. As was highlighted above, all of the remaining steps in the ***Babos*** test turn on a complete understanding of the extent and impact of the offending conduct.

94) In the instant case, two of the key points on which the accused wanted to tender evidence were the extent of the police misconduct, and the impact of the conditions of confinement on the accused. The lack of an evidentiary hearing left the court with an inadequate understanding of the underlying facts on either of these issues.

95) The most important point is that the nature of the ***Vukelich*** hearing was such that the accused were prevented from putting the information the judge needed before the court – in any form. The Crown was in complete control of the information that would have shed light on the extent of the police misconduct. The accused could hardly be expected to address factual matters related to the internal workings of the R.C.M.P. Turing to the conditions of confinement, the accused could not present either their own evidence about the impact of their mistreatment, or expert evidence on the point.

96) This is an appropriate point to again address the involvement of the *amicus*. As has been repeatedly noted, the accused have no way of knowing what information the *amicus* or the Crown put before the court on the ***Vukelich*** hearing on the abuse of process application. The appellants urge the same analysis in relation to the information presented by the *amicus*; if the information disclosed conduct that could offend society's sense of fair play and decency, there ought to have been an evidentiary hearing.

B. Further harm to the integrity of the justice system:

97) Having found that the complained of conduct "could ... constitute conduct offensive to notions of fair play and decency", the trial judge went on to consider the second part of the question – i.e. "whether proceeding in light of the impugned conduct would do further harm to the integrity of the justice system". She came to this conclusion:

> [130] I am satisfied that there is no basis to conclude that either category of misconduct would be manifested, perpetuated or aggravated through the entering of the Applicants' convictions in this case.

98) The judge went on to explain that conclusion (at para 131). She noted first that Justice McEwan's decision in the ***Bacon*** *habeas corpus* case had the "intended effect" of ameliorating the impact of the conditions of confinement on the appellants, and she found (at para 132) that "the state has taken decisive action to disassociate itself from" the misconduct of the police.

99) Dealing first with the misconduct of the police, both the Court and the accused had

to rely on information provided by the police to understand whether, and to what extent, the police had actually dissociated themselves from their own misconduct. To put it bluntly, the court had to take it on faith that the very agency that was tainted by the misconduct did anything other than sweep all but the most visible parts of the misconduct under a very big rug.

100) It has to be kept in mind that the conduct at issue was not simply one or two isolated incidents that came as a surprise to everyone once revealed. The conduct at issue included individual officers lying to each other, lying to superiors and ultimately lying to the Ontario Provincial Police who were tasked with investigating the misconduct – and these are just the offences of dishonesty.

101) This is an appropriate time to also note that the fresh evidence the appellants seek to tender on this appeal very clearly suggests that, in addition to the officers who were prosecuted, other officers engaged in misconduct and their superiors also covered up the misconduct. This point will be addressed further below.

102) The appellants' simple point is that the very nature of the complaint – police misconduct – called out for an evidentiary hearing to ensure the court actually knew the full extent of that conduct. Only then could the judge properly gauge the risk of further harm to the integrity of the justice system (to say nothing of trial fairness).

103) Turning next to the risk of further harm from the misconduct of the state in relation to the conditions of the appellants' confinement, the appellants readily acknowledge that Justice McEwan's decision in the ***Bacon*** *habeas corpus* case went some distance toward shining a light on the nature of the misconduct and its known effects. What Justice McEwan's decision did not address, however, was the continuing impact of that misconduct on the appellants. Again, that was an evidentiary matter that the appellants wanted to pursue through testimony.

104) Moreover, Justice McEwan's decision in the ***Bacon*** *habeas corpus* case addressed a completely different legal test than the appellants were pursuing in their abuse of process application. They ought to have been permitted to supplement the record with evidence aimed at demonstrating an abuse of process, not just the breach of one prisoner's rights.

105) The appellants submit that the trial judge's conclusion that there was no further risk to the integrity of the justice system is flawed. It is flawed for the simple reason that it fails to acknowledge that once an abuse of process was found, the appellants ought to have been granted an evidentiary hearing aimed at exposing the true scope of the abuse and its impact.

106) The appellants acknowledge that, notwithstanding her conclusions on stage one of the ***Babos*** test, the judge ultimately assumed the appellants had met the stage one test. She said this:

> [133] Nevertheless, as Moldaver J. observed in *Babos* (at para. 38), the distinction between ongoing and past misconduct does not completely resolve the question of whether proceeding with the prosecution will occasion further harm to the justice system. The question therefore remains whether proceeding to enter the convictions of the Applicants in light of the conduct as alleged would be harmful to the integrity of the justice system. **For the purposes of the *Vukelich* application, I am prepared to accept that the answer to this stage one question is "yes".** (emphasis added)

107) While it might appear that by assuming the first stage of the ***Babos*** test had been met the judge was taking the accuseds' case "at its highest". That is an illusion. The accused were entitled to have their entire case considered in the balancing exercise. They were entitled to an evidentiary hearing that would have revealed the full scope of the offending police conduct and which would have revealed the full impact of that conduct. A balancing exercise conducted on anything less is a balancing exercise that is unfairly weighted against the accused.

ii. Stage three of *Babos* in the *Vukelich* hearing:

108) Moving on to the judge's analysis of the third stage of the ***Babos*** test, it will be recalled that it involves a balancing which Justice Moldaver described this way:

> [41] ... The court must consider such things as the nature and seriousness of the impugned conduct, whether the conduct is isolated or reflects a systemic and ongoing problem, the circumstances of the accused, the charges he or she faces, and the interests of society in having the charges disposed of on the merits. ...

109) The appellants submit that at least three of the factors described in this passage require a court to have made determinative factual findings if they are to be incorporated into the balancing process. First, once it was recognized at the first stage that the

impugned police misconduct could constitute an abuse, the true "seriousness" of that conduct for the purposes of the third stage could only be gauged by means of an evidentiary hearing.

110) Similarly, whether the "conduct is isolated or reflects a systemic and ongoing problem" is something that can only be determined after a hearing – again keeping in mind that the appellants made it clear that one of the purposes of the proposed evidentiary hearing was to examine exactly that issue. Once the appellants succeeded in demonstrating that the conduct could amount to an abuse the judge ought to have held a hearing to determine its full scope.

111) Finally, to fully appreciate "the circumstances of the accused", the judge ought to have permitted them to testify. While there were submissions of counsel and a body of documentary evidence before the Court demonstrating that the conditions of confinement had serious negative consequences for the appellants, that was just the starting point – the true measure of the impact of the confinement on the appellants could only come through an evidentiary hearing. The judge did acknowledge at para 144 of her ruling that the conduct relating to the confinement of the appellants was "serious, prolonged, and systemic". She also made these findings:

> [147] While the criminal misconduct of the four investigating officers had no direct impact on the Applicants, it goes without saying that the deprivations they suffered for the many months they were in segregation had an immediate and significant detrimental impact on the physical and mental health of both men. Some of those effects have ***continued*** since their release into the general population. (all emphasis added)

112) In this passage the judge has clearly acknowledged a causal nexus between the continuing "significant detrimental impact on the physical and mental health of both men", and the "serious, prolonged, and systemic" mistreatment of the men by the state. Unfortunately, the judge failed to take the obvious step of holding an evidentiary hearing to determine the full extent of the continued suffering of the appellants. Instead, the judge moved on, and she effectively held that the seriousness of the charges outweighed all other considerations – paragraphs 148-153.

113) The appellants readily acknowledge that the offences were undoubtedly serious, and they should not be taken as in any way attempting to minimize or lessen the serious

of the crimes. Their simple position is that once the judge recognized that they continued to suffer the ill effects of abuse at the hands of state actors, they ought to have been provided an opportunity to present evidence quantifying the full extent of the continuing effects of their mistreatment. The balancing in the third stage of the ***Babos*** test process demanded no less.

114) Another passage from para 41 of Justice Moldaver's ruling in ***Babos*** illustrates why it is so important to know the full extent of the continuing suffering inflicted on the accused:

> [41] ... When the conduct in question shocks the community's conscience and/or offends its sense of fair play and decency, it becomes less likely that society's interest in a full trial on the merits will prevail in the balancing process. ...

115) The unspoken, yet critical assumption in this passage is that the community might actually learn or know the true scope of the conduct in question. In the instant case, the judge expressly found that the full scope of the impact of the conduct in question had not yet been determined – it "continued"; there was no way to know whether the community would find that conduct to be shocking.

116) A simple question illustrates the point: "would Canadians find it shocking if the intentional conduct of state actors towards men who are presumed to be innocent resulted in those men suffering life-long debilitating mental-health issues; mental-health issues of a sort that might preclude any possibility of reintegration into the community at any time in the future on any sort of parole?" That question could only be answered if the full extent of the impact of the conduct at issue was known, and that could only happen if there were an evidentiary hearing. In the words of Justice Charron in ***Pires***, the evidentiary hearing would clearly "assist in determining the issues before the court".

117) It is important to recognize that the appellants are not merely grasping at straws on this issue. The judge found there were continuing mental health issues caused by the conduct at issue. As an example, the judge made this finding about the health impacts of the abusive treatment on Mr. Haevischer:

> [71] Mr. Haevischer experienced high anxiety, stress and insomnia **due to the extreme conditions of his confinement**. He was particularly affected

> by being cut off from the world with no idea when his isolation would end. Medications were not effective in controlling his symptoms.
>
> [72] Mr. Haevischer continues to suffer from anxiety as a result of the time he spent in segregation. He also suffers from various side effects of his anti-anxiety medication, including painful gynecomastia. (emphasis added)

118) In addition to the specific impact of the abuse on the appellants, the trial judge also noted and accepted the broader findings of Justice McEwan in the ***Bacon*** case on the issue of the impacts of the sort of abuse the appellants suffered in the instant case. In short, there was an ample basis in the information and materials before the court for the trial judge to recognize that an evidentiary hearing was needed to determine the full scope of the impact of the abuse on the appellants.

119) To return one last time to a point made earlier, the threshold test applied in a ***Vukelich*** test must be one that the applicants can actually meet. It will not be enough for the Crown to respond to the appellants' arguments with the suggestion that it was up to the appellants to put enough material before the court to permit the judge to assume the truth of some particular fact or allegation. The reality is that when it comes to matters such as the effects of abuse on a person, the only way to properly measure the impact of that abuse is to let the person testify. Again, once the judge found that the conduct of the police (on any issue) could amount to an abuse of process, she ought to have permitted an evidentiary hearing to allow the appellants the opportunity to demonstrate the outer limits of the abuse. Instead, the judge imposed too stringent a test and simply moved on to the balancing exercise at the third stage of the test.

120) In summary on the third stage of the ***Babos*** test, the trial judge effectively drew determinative factual inferences in relation to at least three important factors relevant to carrying out the required balancing exercise, First, she determined the "seriousness of the impugned conduct" even though its full extent was not known. Next, she assumed that the impugned conduct was isolated and no longer ongoing - again without a proper evidentiary inquiry. Finally, she made determinative factual findings about the impact of the impugned conduct on the health of the appellants even though she recognized that the effects were ongoing and thus unquantified. The appellants respectfully submit that, either alone, or together, these factors deserved an evidentiary hearing and the trial judge erred in refusing one.

j. A very rare and exceptional case:

121) The final point to note about the ***Babos*** test is that a stay of proceedings will rarely be granted. Justice Moldaver made the point this way:

> [44] Undoubtedly, the balancing of societal interests that must take place and the "clearest of cases" threshold presents an accused who seeks a stay under the residual category with an onerous burden. Indeed, in the residual category, cases warranting a stay of proceedings will be "exceptional" and "very rare" (*Tobiass*, at para. 91). But this is as it should be. It is only where the "affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases" that a stay of proceedings will be warranted (*R. v. Conway*, 1989 CanLII 66 (SCC), [1989] 1 S.C.R. 1659, at p. 1667).

122) For present purposes, there are two key points to take from paragraph 44 of ***Babos***: First, and as the appellants readily accept, on the ultimate application of the ***Babos*** test, an applicant faces an "onerous burden".

123) The second point to note from paragraph 44 of ***Babos*** is that the "onerous burden" relates to the obligation on an applicant to demonstrate that the case before the court is "the clearest of cases". While it might seem self-evident, the only way for a court to know whether a case is "the clearest of cases" is for the court to fully appreciate the factual underpinnings of the case – where the factual underpinnings relate to both the conduct at issue and the impact of that conduct. Stated in the language used by Justice Charon at para 35 in ***Pires and Lising*** (supra), the question for the court in a ***Vukelich*** hearing in an abuse of process case is whether there is a "reasonable likelihood that [an evidentiary] hearing [would] assist [the court] in determining" whether the factual underpinnings of the application make the case "the clearest of cases".

124) The final point to note is that, from a factual point of view, the instant case is the rarest of cases. It the rarest of cases to have senior police officers lie, cheat, steal, and have sex with critical witnesses, while at the same time, the police are also manipulating the correctional system to the point that the accused before the court are kept in conditions of confinement that offend international standards of fair play and decency, and which caused the accused lasting harm. And yet, here we are.

2. Fresh evidence and the abuse application:

125) As noted, the appellants have filed a separate application to adduce fresh

evidence in which they seek the admission of a wide body of evidence on a number of issues. For present purposes, the focus is on the sworn statement made by Mr. Brassington in fulfillment of his plea agreement (the Brassington Interview").

126) To understand the relevance of the Brassington Interview it is important to recall that, in her ruling on the abuse application, the trial judge took the view that the offending conduct of the four police officers was fully known, and the Crown had effectively mitigated the impact of that conduct on the trial by not calling the officers and by not calling the female civilians witnesses who were caught up in the misbehaviour of the officers. The judge said this:

> [142] As observed by Moldaver J. in *Babos* (at para. 64), context is essential in considering the seriousness of the misconduct. In the context of the present case, the seriousness of the misconduct is tempered in this respect: **once their actions were discovered, the officers were suspended from the RCMP. None of the officers continued to be involved in the E-Peseta investigation and none testified at trial. Nor did the Crown call either of the protected female witnesses at trial.** Whether or not the misconduct could be described as systemic, in that it went beyond a rogue officer and implicated four, **these steps indicate that the misconduct is not ongoing; rather, it was promptly and severely dealt with**. (emphasis added)

127) The Brassington Interview reveals that, contrary to the comments of the trial judge in para 142 of her ruling, the police misconduct may have been worse than thought, and it may have involved improper sexual activities between a police officer and a witness who did testify. Moreover, on the basis of the things sworn to by Mr. Brassington, the additional misconduct was known to the police, it was not revealed to the accused or their counsel, and it was, effectively, covered up (swept under the large rug).

128) The appellants respectfully submit that the proposed fresh evidence meets any applicable test for admission on this appeal. It is self-evident that had the trial judge been aware of the proposed fresh evidence she almost certainly would have ordered an evidentiary hearing to explore the issue on the abuse hearing. Moreover, the fresh evidence would have led the accused to arguing for a stay of proceedings under the trial fairness branch of the ***Babos*** test. The Brassington Interview will be considered in greater detail in the analysis of the Crown's failure to meet its disclosure obligations that follows in Section Two.

SECTION TWO:

The crown failed to meet its disclosure obligations:

PART I ~ STATEMENT OF FACTS

OVERVIEW

129) The appellants' basic submission is that the Crown failed to meet its fundamental disclosure obligations as set out in ***Stinchcombe*** and the multitude of cases that have applied its principles. Since the convictions at issue were entered, the Crown has disclosed a considerable body of additional evidence. At the risk of oversimplification, the evidence disclosed post-conviction falls into these general categories:

a) A transcript of an "Interview" given under affirmation by Mr. Brassington to members of the Ontario Provincial Police in January 2019 as a condition of his plea agreement (the "Brassington Interview"),

b) Pre-conviction witness management evidence – including the management of Person Y in the months leading up to his trial testimony,

c) Pre-conviction "administrative" documents / evidence, and

d) Post-conviction witness management evidence – including the formal entry of Person Y into the actual Witness Protection Program (WPP) just a few days after his testimony.

130) For the purposes of this appeal, the appellants are concerned with only the Brassington Interview, and the evidence relating to Person Y's entry into the WPP.

131) The appellants will present a separate omnibus application to adduce fresh evidence which will include the evidence relevant to this ground of appeal.

PART II ~ POINTS IN ISSUE

A. The Crown failed to meet its disclosure obligations.

PART III ~ ARGUMENT

1. The Law:

a. The Crown's disclosure obligation:

132) The Crown's ongoing disclosure obligations are well understood. If any reference is needed, the burden on the Crown was most recently restated by the Supreme Court of

Canada in ***R. v. Gubbins***, 2018 SCC 44. The appellants anticipate that the Crown will acknowledge that all of the evidence at issue on this ground of appeal is relevant and ought to have been disclosed.

b. The legal test where there has been a failure to disclose:

133) There are three decisions from the Supreme Court of Canada that establish the framework for analysis in appeals involving the Crown's failure to meet its disclosure obligations.

134) The first is the decision of Justice Cory on behalf of the court in ***R. v. Dixon***, [1998] 1 SCR 244. In that case the Crown inadvertently failed to disclose four witness statements (only two of which were ultimately found to be relevant). Justice Cory began his analysis by reminding that, because of these sorts of appeals involve an allegation of a *Charter* breach, the burden on appellant is to establish the breach on a balance of probabilities (para 32), he then said this:

> 34 **This burden is discharged where an accused demonstrates that there is a <u>reasonable possibility</u> the non-disclosure affected the outcome at trial or the overall fairness of the trial process**. ... However, the reasonable possibility to be shown under this test must not be entirely speculative. It must be based on <u>reasonably</u> possible uses of the non-disclosed evidence or <u>reasonably</u> possible avenues of investigation that were closed to the accused as a result of the non-disclosure**. If this possibility is shown to exist, then the right to make full answer and defence was impaired**. (bold emphasis added, underlining Justice Cory's)

135) It is worth pausing to emphasize Justice Cory's reliance on the phrase "reasonable possibility" rather than "reasonable probability" which was the test that had been adopted by the majority of the Nova Scotia Court of Appeal in ***Dixon***.

136) Justice Cory made these further comments about applicable test:

> 36 Thus, in order to determine whether the right to make full answer and defence was impaired, **it is necessary to undertake a two-step analysis based on these considerations**. First, in order to assess the reliability of the result, the undisclosed information must be examined to determine the impact it might have had on the decision to convict. Obviously this will be an easier task if the accused was tried before a judge alone, and reasons were given for the conviction. **If at the first stage an appellate court is persuaded that there is a reasonable possibility that, <u>on its face</u>, the**

> **undisclosed information affects the reliability of the conviction, a new trial should be ordered.** Even if the undisclosed information does not itself affect the reliability of the result at trial, the effect of the non-disclosure on the overall fairness of the trial process must be considered at the second stage of analysis. This will be done by assessing, **on the basis of a reasonable possibility**, the lines of inquiry with witnesses or the opportunities to garner additional evidence that could have been available to the defence if the relevant information had been disclosed. **In short, the reasonable possibility that the undisclosed information impaired the right to make full answer and defence relates not only to the content of the information itself, but also to the realistic opportunities to explore possible uses of the undisclosed information for purposes of investigation and gathering evidence**. (bold emphasis added, underlining Justice Cory's)

137) The next important decision is the decision of Justice LeBel on behalf of the court in ***R. v. Taillefer; R. v. Duguay***, [2003] 3 SCR 307. In his reasons for the Court in ***Taillefer***, Justice LeBel commented on the "reasonable possibility test". He said this:

> *78* ... The **mere** existence of such a possibility constitutes an infringement of the right to make full answer and defence. ... (emphasis added)

138) Justice LeBel's use of the word "mere" in paragraph 78 of his reasons in ***Taillefer*** emphasizes the fact that there is no balancing of countervailing factors. Once a breach of the right to make full answer and defence has been demonstrated, the inquiry is over; there is no consideration of, for example, the seriousness of the charges or the inconvenience of a new trial.

139) The third decision of interest is found in the joint reasons of Justices LeBel and Fish for the majority in ***R. v. Illes***, 2008 SCC 57, where they said this:

> [25] With respect to the first prong of the *Dixon* test, it is important to note that **the issue here is not whether the undisclosed evidence *would* have made a difference to the trial outcome, but rather whether it *could* have made a difference**. More precisely, the issue the appellate court must determine is whether there is a reasonable possibility that the additional evidence could have created a reasonable doubt in the jury's mind. See *R. v. Taillefer*, [2003] 3 S.C.R. 307, 2003 SCC 70, at para. 82.
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> • • •
>
> [27] With respect to the second prong of the *Dixon* test, an appellant need only establish a reasonable possibility that the overall fairness of the trial process was impaired. **This burden can be discharged by showing, for example, that the undisclosed evidence could have been used to impeach the credibility of a prosecution witness (see *Taillefer*, at para. 84), or could have assisted the defence in its pre-trial investigations and preparations,**

> **or in its tactical decisions at trial** (see *R. v. Skinner*, [1998] 1 S.C.R. 298, at para. 12 (Cory J., for the Court)). (**bold emphasis and underlining added**, *italics in SCR*)

140) As will be seen, the application of these principles to the instant case will inevitably result in a finding that the appellants' right to make full answer and defence was breached and a new trial must be ordered.

2. The Brassington Interview:

a. The nature of the interview:

141) On January 15, 2019, the Crown and Derek Brassington entered into a "Memorandum of Agreement" for "the purpose of resolving criminal charges against" Mr. Brassington.[6] Pursuant to that Agreement, Mr. Brassington was to "provide a truthful statement under oath to members of the Ontario Provincial Police concerning his knowledge of all matters pertaining to the Indictment [on which he was charged]". Under the terms of the Agreement, "[i]f the Crown [was] not satisfied that DEREK BRASSINGTON ... provided a full and truthful statement lo the Ontario Provincial Police, the Crown reserve[d] the right to void the remainder of [the] agreement" (underlining in original).

142) On January 15, 2019, Mr. Brassington provided a statement under solemn affirmation to an Inspector, a Sergeant Major, and a Detective Sergeant of the Ontario Provincial Police. The statement was in the format of an interview which lasted approximately 10 hours. The statement was of a sort that is commonly referred to as a "warned" statement in that Mr. Brassington was told he did not have to give the statement, he was told that the statement could be used against him in his sentencing proceedings, and he was told of his right to contact counsel should he wish. Importantly, he acknowledged he was aware that if he "deliberately misl[ed]" the investigators he would be "committing a criminal offence".[7]

143) After giving his statement, and with the agreement of the Crown, Mr. Brassington entered his guilty pleas on January 18, 2019.

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[6] Application to adduce fresh evidence at Tab 1

[7] Application to adduce fresh evidence at Tab 1 pp. 1-3.

b. The content of the Brassington Interview:

144) The first part of the Brassington Interview involved Mr. Brassington relating his personal history and his background with the R.C.M.P. The interview moved from there to his involvement in the Surrey 6 investigation. The focus of that part of the interview was on his role as, effectively, a keeper, a minder, a confidant, or best buddy for Person X, who was then viewed by the police and the Crown as the only possible route to a conviction for the offences at issue.

145) The Interview moved on to Mr. Brassington's involvement with other witnesses. He described the general approach the R.C.M.P. took in the so-called "moving witnesses" strategy:

> ... that is isolate them, cripple them, take away their financial means, take away their emotional support. Make them, if they're valuable enough -- put them in a position where they rely on the RCMP so that -- and not only rely on them for emotional support, but rely on them in terms of to -- not to function but to cut them off at the knee so that they have no option really but to be a cooperative witness, not a hostile witness.
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> • • •
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> ... it was to remove them or isolate them from friends and family, remove or isolate or ostracize them from their own gang. Put them in a position where if they're obtaining their finances through gang life or being supported by gang life, take that financing away so that we can own them better as a witness and that they -- they really are put between a rock and a hard place in terms of cooperating with us as a witness. (Interview at pg. 91)

146) The bulk of the balance of the interview involves Mr. Brassington's dealings with Ms. [REDACTED] (then in her very early twenties). She was targeted as an important witness because she had been romantically involved with both Jamie Bacon and Kevin LeClair[8]. Without putting too fine a point on it, the interview relates the salacious details of the very sordid relationship that developed between Mr. Brassington and Ms. [REDACTED]. While it is unnecessary to relate all of those details, it is important to understand the true nature of the relationship that developed.

147) Mr. Brassington told the investigators that, even though he was married and had children, he "fell in love" with Mr. [REDACTED]. He went so far as to reveal that fact to

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8 An associate of Jamie Bacon who was killed in early 2009

his parents, and he arranged a meeting with Ms. [REDACTED]'s mother to tell her that fact as well.[9] The relationship developed into a sexual relationship very soon after Mr. Brassington was assigned to manage Ms. [REDACTED] as witness. Again without going into excess detail, in order to continue the relationship, Mr. Brassington concealed it from his superiors, and he engaged in a variety of fraudulent acts aimed at getting compensated by the R.C.M.P. for expenses incurred in carrying on the relationship.

148) With that background in mind, it is appropriate to turn to the elements of the Brassington statement that are most pertinent to this appeal, i.e. the portions of the interview that touch on misconduct in the way that one of the Crown's key witness - KM - was managed by Paul Dadwal, Paul Johnston, and Ross Joaquin. In essence, Mr. Brassington told the investigators that Cpl. Paul Dadwal had effectively confessed to him that he (Dadwal) had acted inappropriately with KM. Mr. Brassington introduced the topic this way:

> There is no -- I have no doubt that shady stuff happened with KM. And **I say that in part because of things Paul Dadwal told me**, and I will get into this later, when he met with me in the Cactus Club in South Surrey after I had been suspended. And he was her prime handler for a time. (Brassington Interview at pp.185-6) (emphasis added)

149) Mr. Brassington returned to the topic towards the end of the interview. His next comments on the topic came immediately after noting that his superior officer, Mr. David Attew, told him that he (Attew) "had dirt on Ross Joaquin, Paul Johnston, Paul Dadwal, all these people". Mr. Attew told Mr. Brassington that "it's good to have dirt on people because then you can trust them." Mr. Brassington's next statement of interest was this:

> Nobody had dirt on me until all of this. Like KM, the dealings with her, ... After I was either suspended with payor on the medical leave from my doctor ordered off work, Paul Dadwal contacted me and wanted to meet with me at Cactus Club in south Surrey.
>
> So I met with him at the Cactus Club in south Surrey. And he met with me there more of as a hang in there buddy-type thing. It's tough, but he also met with me to explain, and **he told me that <u>the same thing happened to him with KM that happened to me</u> and [REDACTED], that she was falling for him. He recognized that she was falling for him. <u>Some shady stuff happened he says with her</u>**, and she was calling him at all hours of the night

[9] Brassington Interview pp.117-120

> and it got to point where his wife eventually said Paul, it's either me or [KM] what's it going to be.
>
> So Paul Dadwal then went to John Robin and said you got to get me out. I can't deal with this. But **Ross Joaquin was involved with that Paul Johnston was involved in that. And John Robin certainly had knowledge of that**. (Brassington Interview at pp.424-5) (emphasis added)

150) Mr. Brassington had earlier given this example of what is undoubtedly "shady stuff":

> So KM I told you was Cody Haevischer's girlfriend and she was done before [REDACTED]. And so whatever the hell they did with KM, and I suspect that it was just a massive amount of drinking and partying and things like this truth or dare, because at some point **I was told**, and I don't know if it was by [REDACTED] or by Dave or by -- I believe it was by **Paul Dadwal though, that <u>they</u> had done the truth or dare game with KM as well**[10]. (emphasis added) (Brassington Interview at pp.185-6)

151) In summary, the Brassington interview reveals allegations of misconduct by, at the very least, Cpl. Paul Dadwal in the sense of a relationship at some "shady" level with the key Crown witness KM. It also reveals that Mr. Attew, a senior, supervisory officer, had "dirt" on quite a number of his fellow officers who were all central to this case. Finally, it also reveals that senior officers at the RCMP were aware of these previously undisclosed problems but did nothing.

c. The impact of the Brassington Interview:

152) As the cases cited earlier make clear, the appellants' right to make full answer and defence will have been breached if the previously undisclosed Brassington Interview "could", <u>not</u> "would", have "made a difference to the trial outcome", or if the non-disclosure "affected ... the overall fairness of the trial process".

i.) The trial outcome <u>could</u> have been affected:

153) The appellants' simple proposition is that anything that even remotely touched on the credibility or reliability of KM could have affected the outcome of the trial. It is very difficult to overstate the importance of her evidence to the Crown's case and ultimately to

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[10] Mr. Brassington related that he and Cpl. Johnston played "truth or dare" with Ms. [REDACTED] on at least one occasion – an event which involved, at the very least, Ms [REDACTED] exposing herself to the men and a "dare" that she masturbate in front of them.

the verdicts. She provided key evidence linking the appellants to guns and linking them to the events that allegedly happened in the hours before and after the killings. Without her evidence the Crown's case would not have included any meaningful evidence about the unfolding of the events.

154) As the trial judge notes in her Reasons for Judgment, KM was extensively cross-examined on matters relating to her credibility and reliability. There is no doubt, however, that if defence counsel were aware of the allegation that she played "truth or dare" with Cpl. Dadwal, her cross-examination would have been much different. If she acknowledged that she had engaged in a relationship with Paul Dadwal of the same sort that Mr. Brassington had with Ms. [REDACTED], the trial judge could have found her credibility was so lacking that she could place no weight on KM's evidence – which quite obviously calls into question the verdicts.

155) Moreover, it has to be remembered that Cpl. Dadwal was directly involved in the management of KM as a witness, and he was directly involved in obtaining various statements from her. As is pointed out in the discussion of the ***Vetrovec*** ground of appeal in the other Joint Factum filed on these appeals, KM's statements had an evolutionary quality in that she tended to adopt things told to her by the police as she was questioned. The involvement of Cpl. Dadwal in that process could well have impacted the judge's willingness to overlook inconsistencies between KM's statements and her testimony.

156) Again, the simple point is that the new information disclosed in the Brassington Interview had a direct bearing on the credibility and reliability of a key Crown witness. The trial outcome could have been affected by the non-disclosure of the evidence.

ii. The overall fairness of the trial process was impaired:

157) As Justices LeBel and Fish noted in ***Illes*** (*supra*), the burden on an appellant to show a "mere reasonable possibility" that the fairness of the trial process was impaired "can be discharged by showing, for example, that the undisclosed evidence could have been used to impeach the credibility of a prosecution witness ... or could have assisted the defence in its pre-trial investigations and preparations, or in its tactical decisions at trial" (para 27). Each of these three examples applies in the instant case. It is of course very important to note that these are simply examples and not an exhaustive list of

potential factors.

158) As already noted, the material information in the Brassington Interview could have been used to impeach the credibility of KM.

159) It is patently obvious that if defence counsel had been aware that Cpl. Dadwal confessed to playing "truth or dare" with KM, they would have undertaken a variety of "pre-trial investigations and preparations". They would have, for example, ensured that they had received sufficient information to identify all of the occasions on which KM and Cpl. Dadwal had any sort of interaction.

160) As for tactical decisions at trial, one such example is that the appellants could have asked the trial judge to exercise his inherent jurisdiction call witnesses, such as Cpl. Dadwal or Inspector Robin if the Crown declined to call them.

161) Perhaps most importantly, the newly disclosed information contained in the Brassington Interview was directly relevant to the ***Vukelich*** hearing on the abuse of process applications. As has already been argued, the Brassington Interview reveals both further police misconduct and the involvement of additional officers in the misconduct. The outcome of the ***Vukelich*** hearing would almost certainly been different for the simple reason that the second component of the first stage of the ***Babos*** test could not be addressed if the scope of the misconduct was unknown. As argued above, it is impossible to determine whether there is a further risk to the integrity of the justice system if the full scope of the offending state conduct is unknown. Holding the ***Vukelich*** hearing in the absence of the information revealed by the Brassington Interview undeniably affected the fairness of the trial process.

3.) The witness protection evidence:

a. Overview:

162) The appellants' basic complaint is that the Crown failed to disclose that Person Y had applied for and had been (effectively) accepted into to the Witness Protection Program (WPP) before he completed his testimony. Entry into the WPP constituted an undisclosed benefit to him, and the fact that he was even being considered for entry into the WPP tended to contradict his testimony, thereby impeaching his credibility.

b. The undisclosed information and its relevance:

163) The relevance of the witness protection evidence has its roots in an obvious tension between Person Y's supposedly altruistic motives in testifying against the appellants, and his familiarity with the savage consequences of breaching the so-called "convict code" by assisting the police. Person Y would have known from the very earliest moments of his thoughts about cooperating with the police that if he testified for the Crown in a case of this magnitude, he would be in violation of the well-known and well understood "convict code". This proposition is not new; it undoubtedly underlies virtually all of the steps taken by the Crown and the police to shelter and protect Person Y. That said, it is nevertheless important for the court to understand the magnitude of the situation Person Y faced when he began to cooperate with the police. There is no better description of the convict code than the one provided by Justice Muldoon in ***Gill v. Canada (Correctional Service)*** [1988] F.C.J. No. 253, [1988] F.C. 361:

> That **fear of retaliation is so well known and its realistic, factual basis is such that the Court would be wilfully blind not to take judicial notice of that savage, unwritten "code" of conduct which is kept alive by the dominant inmates in those "aggressive [inmate] communities" in Canadian prisons**. The so-called "convict code" was in no way ameliorated by the State's adoption of either the Canadian Bill of Rights or of the Canadian Charter of Rights and Freedoms. **That abominable "code" makes an offence of seeking protection from, or co-operating with, the prison administration; and even though Parliament has eschewed capital punishment, the supporters and enforcers of the "convict code" do not flinch at murder, maiming, wounding, beating, or sometimes sexual indignities according to "culpability" in the administration of their brand of rotten injustice**.
>
> • • •
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> ... **the "convict code" is an attempt to establish, to honor and to exact fearing tribute, and obedience, to the savagery of <u>the barbarian princes among the inmate population</u>.** How often in Courts of criminal jurisdiction does an inmate choose an additional term of imprisonment, rather than give incriminating testimony about a fellow inmate!
>
> So, for this reason, ultimately the probability of retribution, have Courts defined, developed and upheld the rule of non-disclosure of the identity of informants**. In so doing, the judiciary, including the Supreme Court of Canada, have taken, and do take, judicial notice of the so-called "code" and the high risk of the infliction of savage vengeance upon the identified, or purportedly identified, informer.** It is that risk of vengeance which could be inflicted on the informers or on the merely rumoured informers among Kent's inmate population which motivates the appellant Deputy

> Commissioner to move for a stay of Mr. Justice Dube's order pending appeal." (all emphasis added)

164) Very simply, when Person Y pleaded guilty and entered federal custody in April 2010, he knew to a certainty that he faced the consequences of breaching the convict code. In anticipation of precisely that problem, the police and the correctional authorities had taken steps to shield Person Y's identity within the correctional system following his guilty pleas. Unfortunately, the measures taken were inadequate, and not long after he entered the correctional system, Person Y was identified as a "rat", and he had to be moved into segregation. That led to the police and correctional authorities looking at (involuntarily) transferring Person Y to another penitentiary.

165) As is well known, segregation involves extended periods of being confined to a cell with little time out for exercise or socializing. As Justice Griffin noted at paragraph 96 in her Reasons on a disclosure application brought by the appellants in 2018, (2019 BCCA 107), the stated goal of the police, the Crown, and the correctional authorities was to ensure that Person Y ultimately served his sentence in conditions that were similar to those of other similarly placed inmates. Segregation was obviously inconsistent with that goal, yet it seems clear that segregation was a realistic outcome for Person Y.

166) Quite apart from failing to achieve the goal of housing Person Y in less restrictive conditions, housing him in segregation had a significant negative impact on his physical and mental health (similar to that suffered by the appellants at the hands of the police and BC Correctional authorities as noted above). The negative impacts of segregation imperiled the prosecution of this case.

167) The newly disclosed evidence reveals that Person Y told correctional officials that if he was involuntarily transferred to another institution "he would become an "uncooperative witness"".[11] The newly disclosed evidence also reveals that by October 15, 2010, "Melissa Gillespie, [Crown counsel responsible for the prosecution] ... believed that if [Person Y] was plac[ed] in segregation [it would] result in further deterioration of his mental state and ultimately his ability to provide meaningful evidence as a witness".[12]

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[11] Document 0020990 at pg. 68 of 91

[12] Document 0020990 at pg. 2 of 91

168) Documents disclosed in October 2018 (4 years post-conviction) suggest that in late May 2013, Superintendent Robin of the R.C.M.P. was taking the lead in having Person Y admitted into the WPP[13]. The word "suggest" was used in the preceding sentence because the document, like many others, is extensively redacted. The appellants will again have to rely on the *amicus* to ensure that the redacted content is properly put before the court on this and all other grounds of appeal.

169) The documents disclosed in October 2018, also reveal that, in correspondence dated September 26, 2013, Superintendent Robin noted that "[Person Y] and his counsel [had] reminded [him] that [Person y's] cooperation [was] unlikely to continue if segregation was considered as a protection option"[14].

170) In summary, by the spring of 2014, when the trial was well underway and Person Y was scheduled to testify, the correctional service appeared unable to reliably protect him, and he faced two equally bleak alternatives: a life in segregation, or, in the words of Justice Muldoon in ***Gill***, he faced "the savagery of the barbarian princes among the inmate population". He had every motive to do what he could to get into the WPP, a program which held the prospect of a third, far more palatable alternative. He had every motive to do what he needed to do to get the police to help him enter the WPP. The police, in turn, had every motive to do what was necessary to secure his critical testimony.

171) With the foregoing in mind, it is appropriate to now turn to the events of 2014. The first event of note is that Cpl. Boucher obtained a so-called "spring order" allowing Person Y to be held in the custody of the R.C.M.P. rather that the CSC. His affidavit in support of that application, (the Boucher Affidavit)[15] includes the observation that Person Y was held in the custody of the R.C.M.P. since August 2013, under "conditions ... reasonably

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[13] Document 0044247 at pg. 1 of 44

[14] Document 0044247 at pg. 17 of 44

[15] That affidavit was disclosed to defence counsel in February 2016. The Crown's response to Mr. Johnston's materials on the disclosure application brought by the appellants includes "footnote 15", that reveals that the redacted Boucher Affidavit and an unredacted version were both before the court on the hearing of the disclosure application.

close to living conditions [Person Y] would experience in CSC."[16] The actual location where Person Y was held is redacted. Quite obviously, it is impossible for the appellants to gauge the accuracy of the statement about Person Y's living conditions. Once again, the appellants must rely on the *amicus* to ensure that this issue is fully canvassed.

172) More importantly, by withholding the Boucher Affidavit until after conviction, the Crown prevented the accused from applying to know more about the information over which the Crown claims privilege. The accused were prevented from seeking information about the conditions of confinement Person Y endured (or enjoyed) in R.C.M.P. custody. They were denied the opportunity to apply to know whether anything in the redacted portions of the Boucher Affidavit reveal Person Y's entry to the WPP (keeping in mind that Cpl. Boucher swore the affidavit before Mr. Loucks, who was one of the prosecutors on this case, which means that if the affidavit reveals information about Person Y's entry in the WPP, the Crown knew about it before Person Y testified).

173) The appellants now rely on the *amicus* to press these issues on the appeal.

174) The version of the Boucher Affidavit disclosed to the appellants includes further redacted information about the way that Person Y was managed as a witness during 2014 (paragraphs 11, 12, 16, 18, 19, 20 and 21 (e)). The appellants again rely on the *amicus* to address the issues raised by the redacted portions of the affidavit. As an example of what the *amicus* might address, the dangers presented to informers is so significant, and the police and Crown rely on them so often, that it seems both logical and reasonable for CSC to have a designated facility where it can house cooperating witnesses. Person Y revealed that he was aware of, and at least being considered for, transfer to such a specialized facility. He testified about the "prison that's set up for – witnesses, agents ..."(T3849, ll. 16-18; and see T3931, ll. 46-47; T4042, ll. 8 - 42). If Person Y was being transferred to a special facility, and if he needed to be in the WPP to be housed there, it definitely alters the perception of just how beneficial it would be for Person Y to enter the WPP. It will be for the *amicus* to address this point and any information relating to it in the Boucher Affidavit.

175) The next significant event in 2014 is Person Y's testimony at trial. The most

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[16] Boucher Affidavit at para 10

significant portions of his testimony for the purposes of this ground of appeal are reproduced by the trial judge in paragraphs 477-479 of her Reasons for Judgment. In those paragraphs of her Reasons, the judge finds that Person Y had no motive to lie, and he was not lacking credibility. The portions of Person Y's testimony of particular interest include:

a) his assertion that by the end of his life he would be "living ... in segregation at the very end alone because I can't go anywhere else because I'm less than a child molester" (Reasons at para 477),

b) his assertion that he was "never leaving solitary confinement or protective -- super-duper protective custody" (Reasons at para 479), and

c) his assertion that he would "sit in a hole for the rest of [his] life" (Reasons at para 479).

c. The impact of the undisclosed WPP information:

i.) The trial outcome <u>could</u> have been affected:

176) As with the witness KM, it is no understatement to say that Person Y's evidence was critical to the verdicts. As was emphasized in the other joint factum, Person Y is undeniably a true ***Vetrovec*** witness. Everything he says about anything is necessarily suspect. Anything that called into question his credibility had the potential to affect the outcome of the trial. Again, the test is whether the undisclosed information "could" have affected the outcome, <u>not</u> whether it "would" have affected the outcome. The fact that Person Y seems to have intentionally misled the court about his future in the correctional system, and the fact that entry into the WPP represented such a clear benefit to him, are both matters calling into question his credibility.

177) It is impossible for this court to discount the possibility that the trial judge ***<u>could</u>*** have found that the undisclosed information took Person Y's credibility just beyond the breaking point, with the result that she "would have had even greater reservations about [Person Y's] evidence"[17]. The judge ***<u>could</u>*** have found that Person Y could not be believed on some or all material parts of his evidence. In other words, the trial outcome

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[17] per Justice Frankel in ***R. v. Bowering***, 2008 BCCA 347, at para 20

could have been affected by non-disclosed information.

ii. The overall fairness of the trial process was impaired:

178) To repeat a point made earlier, the appellants do not have to demonstrate that the non-disclosure of the WPP documents affected both the potential outcome of the trial and the fairness of the trial process – it is a disjunctive test. That point is important because the simple fact that the appellants were prevented from attempting to impeach Person Y's credibility on the basis of the non-disclosed information affected the fairness of the trial process; as does the limitation that non-disclosure of the Boucher Affidavit imposed on the ability of the appellants to apply for further information. The appellants do not need to show anything more than either of these "mere reasonable possibili[es]" that the trial process was unfair.

PART IV ~ NATURE OF ORDER SOUGHT

179) That this Appeal be granted, that the conviction be quashed or, alternatively, that a new trial be ordered, or in the further alternative, that a new hearing be ordered to determine whether stays of proceedings should be entered as a result of an abuse of process.

October 12, 2020

_____	_____
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