No. CA42488 and CA042490,
Vancouver Registry

COURT OF APPEAL

BETWEEN:

REGINA

RESPONDENT

AND:

MATTHEW JOHNSTON & CODY HAEVISCHER

APPELLANTS

APPELLANTS' JOINT FACTUM IN REPLY

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

OVERVIEW

1) It will be recalled that the appellants' basic complaint is that the trial judge applied too strict a test on the ***Vukelich*** hearing. They argue that once she recognized that the appellants passed the threshold of demonstrating that two of the allegations of abuse "could be found to constitute conduct offensive to notions of fair play and decency"[1], she ought to have ordered an evidentiary hearing to explore the full scope of the identified abuse. The appellants argue that, because the ***Babos*** test involves or a weighing or balancing exercise, carrying out that balancing exercise without giving the appellants an opportunity to demonstrate the full scope of the abuse is fundamentally unfair (and illogical). The appellants argue that the application of too stringent a test on a ***Vukelich*** hearing is an error in principle entitling this court to exercise its appellate jurisdiction and order a new hearing.

2) The Crown's response reduces to the proposition that any errors the trial judge committed in her application of ***Vukelich*** can be overlooked by this court. The Crown's theory is premised on an argument which reasons that, even though the trial judge held that two of the allegations "could be found to constitute conduct offensive to notions of fair play and decency", there is simply no way that the appellants could lead enough evidence about those allegations to tip the balance in favour of a stay at the third stage of the ***Babos*** test. As the Crown puts it in its introduction, "[a] stay of proceedings could never be reasonably be granted for the alleged abuse..."[2]. It is, in effect, an argument that a judicial stay is never available in a multiple murder case, no matter how severe and disturbing the state misconduct.

3) The Crown also seems to argue that there were shortcomings in the scope of the information put before the trial judge by defence counsel. Stated differently, the Crown seems to suggest that, rather than faulting the trial judge for failing to hold an evidentiary

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[1] Reasons at para 129

[2] Respondent's factum at para 6

hearing, it is, instead, appropriate to fault defence counsel for failing to put more "submissions and ...supporting materials" before the trial court.[3]

4) For the reasons set out below, the appellants submit that the Crown's arguments are flawed. The Crown's arguments require this court to overlook the nature of a ***Vukelich*** hearing in the context of an abuse application. Moreover, if accepted, the Crown's arguments will inevitably lead to longer and more complex ***Vukelich*** hearings as defence counsel make lengthier submissions and present more materials to ensure that they cannot be faulted for failing to fully advance their case.

ANALYSIS

a. The complexity of the appellants' arguments:

5) As the Crown points out at paragraph 16 of its factum, the appellants' arguments in their factum on this ground of appeal are "detailed and labyrinthine". It is not clear whether that is meant to be a compliment, an insult, or simply a statement of fact – and it likely does not matter. The appellant's argument were made necessary by that fact that no appellate court has ever addressed the nature of a ***Vukelich*** hearing in a case involving an abuse of process[4].

6) As the appellants emphasized in their factum, the nature of ***Vukelich*** hearings is context specific. The appellants' arguments were structed to demonstrate how the ***Vukelich*** jurisprudence can be applied in the context of claims of abuse process. The appellants emphasized that each of the three stages of the ***Babos*** test raises distinct questions on a ***Vukelich*** hearing, and they emphasized that while a ***Vukelich*** hearing is meant to be somewhat informal and expedient, it must still be fair.

7) The appellants respectfully submit that the Crown's response urges the court to step around the details and nuances of a fair ***Vukelich*** hearing and focus on the third stage of the ***Babos*** test and more particularly focus on the sole question of the seriousness of the offences for which the appellants were convicted. The appellants urge the court to instead focus on a principled analysis of what a ***Vukelich*** hearing on an

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[3] See for example Respondent's factum at para 56

[4] So far as the appellants can determine, no trial court has ever considered the question either.

abuse of process entails, and to focus on the question of whether the trial judge ultimately applied too stringent a test.

b. The seriousness of the offences:

8) As noted, the Crown focuses quite heavily on the seriousness of the offences in urging the court to dismiss this ground of appeal. The Crown's approach reflects the trial judge's approach. As an example, the Crown says this in its factum:

> 42. As to the final two balancing factors, the seriousness of the offences and the interest of society in having the convictions entered, the judge found the former to be "of the highest order". **The circumstances of the offences – execution-style murders of six defenceless men – <u>could not have been "more shocking".</u>** She described society's interest as "profound", weighing "all the more heavily in the context of this case because the carnage was the result of gang members fighting for turf in the illicit drug trade" (*Vukelich* Ruling, at pars. 148-150).
>
> (emphasis added)

9) Without intending to in any way diminish the seriousness of the offences at issue, the appellants respectfully submit that any effort to objectively quantify the offences is a fruitless task and is ultimately unhelpful. The appellants ask whether it is true to say, for example, that the six murders committed in this case were "more shocking" than the so-called "Shedden Massacre" of 8 members of the Bandito motorcycle gang committed in Ontario in 2006? Similarly, were these offences actually "more shocking" than the six murders for which Robert Pickton was convicted? Would the addition of one more victim, or evidence of torture, not have made it "more shocking"? Again, the appellants' goal is not to minimize the seriousness of the offences; they intend only to bring a principled analysis to bear. Their position reflects the comments of Justice Wood in his reasons in this court's decision in ***R. v. C.A.M.,*** 1994 CanLII 8741[5]

> [23] Much time was spent by counsel in their submissions in the court below, and by the trial judge in his reasons for sentence, struggling with the questions whether this appellant was the worst of all offenders, and whether his crimes were the worst of all crimes. With respect, that form of analysis is of little assistance when one is attempting to determine a fit sentence in a case

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[5] While this court's decision in C.A.M. was overturned (***R. v. M. (C.A.)***, 1996 CanLII 230 (SCC), [1996] 1 SCR 500), the Supreme Court of Canada did not suggests that Justice Wood in any way erred in suggesting that courts need to focus on principle rather than emotion.

> such as this, **for it invites the court to attempt the impossible by comparing the incomparable, and it offers the pretence that there is some objective scale against which such impossible measurement can be made**. In the end, the purely subjective evaluation which it provokes demeans the suffering of the victims of those crimes adjudged less serious and, in a case such as this, where the potential for consecutive sentences eliminates the constraining effect of statutory maximums, it serves only to en-courage an unprincipled escalation in punishment.
>
> [24] The reality is that the horror and outrage we experience in response to crimes such as those committed by this appellant leads easily to the conclusion that they must be the worst of crimes and he the worst of offenders. But the strength of those emotions wanes with the passage of time, and when the next such case comes along the horror and outrage which it provokes leads to the conclusion that it must be the worst of cases committed by the worst of offenders, a conclusion which dictates the imposition of a more severe punishment than that imposed in this case. **And so it is that the "worst offender/worst offence" form an analysis leads inevitably to the imposition of longer and longer sentences of imprisonment, a trend driven not by principle but by emotion**. (emphasis added)

10) While Justice Wood's comments were made in the context of a sentence appeal, the appellants respectfully submit that they are of more universal application. His comments underscore the need for all aspects of the criminal law to involve a principled, rather than emotional, analysis.

11) In the instant case, and with the greatest of respect, the phrase: "[t]he circumstances of the offences could not be more shocking", as used by the trial judge, and as emphasized by the Crown in its factum, represents an emotional value-judgement, not a principled analysis. The phrase has a built-in bias against a principled analysis of the third stage of the ***Babos*** test.

12) When the offences are situated at the ultimate level of seriousness – i.e. the most shocking level possible - it necessarily follows that only a similarly shocking level of abuse could ever justify a remedy. On that approach, instead of actually being a balancing exercise, the third stage of the ***Babos*** test reduces to only the question of whether the <u>abuse</u> at issue "could not be more shocking".

13) It bears repeating that the third stage of the ***Babos*** test is actually quite broad. Justice Moldaver described it this way:

> [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.[5] 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)

14) Justice Moldaver's comments leave no doubt that, while the offences at issue are always important, they are only one consideration in a multi-faceted balancing exercise. Moreover, Justice Moldaver's comments clearly contemplate a trial judge having a complete understanding "of the impugned [abusive] conduct". As the appellants emphasized in their factum, the trial judge stopped far short of achieving a full understanding of the impugned conduct.

c. The meaning of *Pires*:

15) In her reasons on behalf of the Court in ***R. v. Pires and Lising***, 2005 SCC 66 (CanLII), Justice Charron held that in order to be entitled to an evidentiary hearing, "the accused is required to show a reasonable likelihood that the requested *voir dire* can assist in determining the issues before the court" (at para 35). In his reasons in **M.B.**, Chief Justice Bauman noted that, while the ruling in ***Pires*** was given in the context of a challenge to a wiretap authorization, Justice Charron's "test is applicable to ***Charter*** applications more broadly" (at para 45).

16) In their factum, the appellants identified the "issues before the court" on a ***Vukelich*** hearing in an abuse of process case. They did so by undertaking the sort of contextual analysis contemplated by Justice Fisher's reasons for this court in ***Frederickson***. The appellant's contextual analysis examined each stage of the ***Babos*** test, and the issues arising at each stage. Within that analysis, the appellants identified the relationship between the issues arising at each stage of the test, and the overall three-stage ***Babos*** test. The appellant's demonstrated for example, that the third stage

involves a balancing exercise that cannot be undertaken if the applicant is prevented from presenting a compendious case at the first stage. As another example, the appellants demonstrated that the second stage of the ***Babos*** test involves asking whether the abuse would continue, and in the context of the instant case, the information regarding the efforts of the police to ensure there was no further damage to the integrity of justice flowing from police malfeasance was entirely in the Crown's control and could only be understood through an evidentiary hearing.

17) In its factum, the Crown argues that the "appellants interpret the quoted phrase from ***Pires*** too expansively" (RF at para 65). The Crown argues that "[f]or the purposes of the screening function fulfilled by the ***Vukelich*** process, there was only one issue before the judge – was there a reasonable possibility of a stay being granted if an evidentiary hearing was held?" (RF at para 68).

18) As the appellants understand the Crown's approach to a ***Vukelich*** hearing in a ***Babos*** case, it reduces to objectively quantifying the offences – here it says the conduct is the "most shocking" – and then deciding if anything could ever justify setting aside a conviction for that "most shocking" conduct. On the Crown's approach, the individual elements of the ***Babos*** test are irrelevant; all that matters is a single, all-encompassing final question.

19) The appellants respectfully submit that their approach is the correct one. They have put forward a principled analysis of the elements of the ***Babos*** test in light of the plain wording of Justice Charron's ruling in ***Pires***. They have identified "the issues before the court" on the ***Babos*** test. They have demonstrated how the trial judge failed to recognize those issues, and they have identified how an evidentiary hearing would "assist in determining the issues".

d. This is not a *Garofoli* hearing:

20) At the risk of excessive repetition, the appellants arguments on this ground of appeal have highlighted the importance of a contextual approach to ***Vukelich*** hearings. With that in mind, the appellant made the point in their factum "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" (AF at para 45). Taking a moment to consider the

difference between the ***Garofoli*** test and the ***Babos*** test will illustrate why the Crown's "one issue before the judge"[6] approach reflects ***Garofoli,*** and is the wrong approach.

21) The ***Garofoli*** test is something of an inward-looking test which starts with a body of sworn testimony – the ITO or affidavit – and which then asks whether the applicant has been able to attack that sworn testimony to the point that what remains of it fails to satisfy the statutory preconditions for the issuance of the warrant or wiretap at issue. As Justice Charron noted in ***Pires***, on a ***Vukelich*** hearing, the "reason that the [***Vukelich***] test will generally leave just a narrow window for cross-examination is not because the test is onerous — it is because there is just a narrow basis upon which an authorization can be set aside" (at para 40).

22) The ***Babos*** test, in contrast, is very much an outward-looking test which considers whether the applicant has been able to put forward a body of evidence that establishes "the state has engaged in conduct that is offensive to societal notions of fair play and decency" and that "proceeding in light of the impugned conduct would do further harm to the integrity of the justice system" (***Babos*** at paras 35 and 38). If the applicant meets that burden the court determines whether the remedy of a stay of proceedings is appropriate.

23) One obvious key difference between the ***Garofoli*** and ***Babos*** tests is that the ***Garofoli*** test involves the narrow focus of a statutory standard – i.e. the grounds for the issuance of a warrant or order, while the ***Babos*** test, in contrast, includes no such internal limitations. The basic proposition is that the ***Vukelich*** test for each of the ***Garofoli*** and ***Babos*** tests will reflect the breadth of the ultimate test to be applied. The Crown's "one issue" approach is appropriate for the ***Garofoli*** test because there is "one issue" in play. That approach is entirely unsuited to the ***Babos*** test where, as the appellants demonstrated in their factum, there are a multitude of issues at play.

24) Before moving on it is worth emphasizing that even on a ***Vukelich*** hearing on the narrowly focused ***Garofoli*** test the applicant still does <u>not</u> face an onerous test. Justice Charon put it this way:

> [40] ... if the proposed cross-examination falls within the narrow confines of this review, it is not necessary for the defence to go further and demonstrate

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[6] (RF at para 68)

> that cross-examination will be successful in discrediting one or more of the statutory preconditions for the authorization. Such a strict standard was rejected in *Garofoli*. **A reasonable likelihood that it will assist the court to determine a material issue is <u>all</u> that must be shown**. (all emphasis added)

25) As they highlight in their factum, the appellants respectfully submit that an evidentiary hearing in the instant case would have "assist[ed] the court to determine [several] material issue[s]".

e. The scope of a *Vukelich* hearing:

26) The final point the appellants want to address in reply to the Crown's factum is the not so subtle suggestion that the appellants could or should have put even more submissions and materials before the trial judge. As an example, the Crown makes this submission:

> 56. Why counsel, through submissions and reference to supporting materials, could not outline the "life-long debilitating mental-health issues" the appellants allegedly suffer from and which are prejudicial to their reintegration into society on parole (AF, 116) has never been adequately explained. Neither is it clear why only *viva voce* testimony would suffice "to properly measure the impact of that abuse" (AF, 120). Defence counsel were unable to explain, for *Vukelich* purposes, why and how the taking of the cases advanced at their highest was in any way deficient despite being given every opportunity to do so in the trial court. Based on the appellants' factum, these explanations are still absent.

27) The Crown's submission raises a "Catch-22" type of dilemma. It is always the case that counsel could pile on more material, and make more submissions, and lengthen a ***Vukelich*** hearing. It must be remembered, however, that a ***Vukelich*** hearing is meant to be a somewhat informal process which examines whether *viva voce* testimony will help the court determine the relevant issues. If, as the Crown's argument requires, defence counsel must put <u>everything</u> before the judge on the ***Vukelich*** hearing, the informal process will inevitably turn into a dry run of the ultimate hearing.

28) It must also be remembered that the entire point of the ***Vukelich*** hearing was to determine if there should be an evidentiary hearing. The Crown seems to be arguing that counsel should put before the trial judge something like an entire script of what the accused, and all other witnesses, would actually say when they testify .

29) In answer to the Crown's specific question, "only *viva voce* testimony would suffice" because that is the best evidence. The best that counsel can do is merely

summarize or outline what the testimony would be. For the purposes of the ***Babos*** test, the trial judge accepted that the mistreatment of the men could amount to an abuse of process. Defence counsel very clearly met their burden on the ***Vukelich*** hearing; they presented submissions and materials demonstrating that an evidentiary hearing would assist the court in determining the true extent and nature of the abusive conduct as prerequisite to the third stage of the ***Babos*** test.

SECTION TWO:

THE CROWN FAILED TO MEET ITS DISCLOSURE OBLIGATIONS:

30) As the appellants noted in their factum, their "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" (AF at para 129). The arguments were accompanied by an Application to Adduce Fresh Evidence which put the recently disclosed information before the court.

31) The appellants' basic submission was coupled with an analysis of the cases from the Supreme Court of Canada that set out the test this court will apply when granting the appellants a new trial to remedy the Crown's failure to meet its disclosure obligations. Those cases – ***Dixon***, ***Taillefer***, and ***Illes*** – establish that when the Crown fails to meet its ***Stinchcombe*** disclosure obligations, the appellants' right to make full answer and defence will have been breached if there is "[t]he mere existence"[7] of a "reasonable possibility that, on its face, the undisclosed information affects the reliability of the conviction ... [or] impaired the right to make full answer and defence"[8]. As Justice LeBel noted in ***Illes***, "the issue here is <u>not</u> whether the undisclosed evidence would have made a difference to the trial outcome, but rather whether it <u>could</u> have made a difference" (underlining added)[9]. 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 <u>realistic</u> opportunities to explore possible uses of the undisclosed information for purposes of investigation and gathering evidence"

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[7] ***R. v. Taillefer; R. v. Duguay***, [2003] 3 SCR 307 at para 78
[8] ***R. v. Dixon***, [1998] 1 SCR 244 at para 36
[9] ***R. v. Illes***, 2008 SCC 57 at para 25

(underlining Justice Cory's)[10].

32) The appellants began their analysis began with what now seems to have been the naïve assumption that the Crown would "acknowledge that all of the evidence at issue on this ground of appeal is relevant and ought to have been disclosed" (AF at para 132). As it turns out, the Crown quite vigorously disputes the suggestion that it breached its ***Stinchcombe*** disclosure obligations. The Crown argues, instead, that the appellants have failed to meet the technical requirements of "the formal admissibility issues"[11] associated with the admission of fresh evidence on appeal. The appellants respectfully submit that the Crown is wrongly treating the fresh evidence as if the appellants were attempting to prove some factual point on some element of the offences in an effort to set aside some finding of fact made by the trial judge.

33) The appellants assumed that the Crown would readily acknowledge that the information at issue represents a body of relevant information, that was known to the state before the convictions were entered, and that the information is what is commonly referred to as "***Stinchcombe*** disclosure" that ought to have been disclosed. The appellants assumed that the real fight lies in the second stage of the ***Dixon*** test – i.e. did the non-disclosure affect the outcome of the trial, or did it impair trial fairness by preventing the appellants from making full answer and defence.

34) The appellants' assumption that the Crown would acknowledge that the information was captured by its ***Stinchcombe*** disclosure obligation was premised on this reasoning (dealing only with the information in the Brassington interview):

a) All of the events described in Brassington interview pre-date conviction – three examples illustrate the point:

   i) as the Crown points out in its factum, Cpl. Dadwal's last dealings with Ms. M. were in February 2010 (4 years before conviction – during the "moving witnesses phase of the investigation), so the things that happened between him and KM that he described to Mr. Brassington all happened pre-conviction,

   ii) Cpl. Dadwal's confession to Mr. Brassington also occurred several

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[10] ***R. v. Dixon***, [1998] 1 SCR 244 at para 36

[11] RF at para 107 – and see paragraphs 99-107

years before the convictions, and

iii) According to Mr. Brassington, Superintendent John Robin was told about the situation involving Cpl. Dadwal and KM in real-time –"you got to get me out"[12].

b) None of the information could be withheld by the Crown on the basis that it was "clearly irrelevant" as explained in ***Stinchcombe***,

c) The information was in the hands of the police. Even though he was under investigation, Mr. Brassington (then Cpl. Brassington) had a positive obligation to disclose what Cpl. Dadwal told him. As the Crown concedes at para 106 of its factum, "the ***Stinchcombe*** duty can be breached when the police fail to provide relevant information". Notwithstanding that concession, the Crown seems unwilling to make the further concession that what Cpl. Dadwal told Mr. Brassington amounted to a confession that Mr. Brassington had to pass along to the Crown, and

d) The information in the Brassington interview was given under oath, as part of a plea agreement, where Mr. Brassington knew that if he lied he could be prosecuted for perjury and that he could face further prosecution for the substantive offences he committed.

35) Perhaps the simplest way of illustrating that the information in the Brassington Interview was ***Stinchcombe*** disclosure is to pose this question for the Crown: "If Mr. Brassington had given his interview before the convictions were entered, would the Crown have disclosed it to the appellants?". The obvious, and determinative answer is "of course". Again, this ground of appeal is not about ***Stinchcombe***; it is about the second part of the ***Dixon*** test.

36) Turning to the ***Dixon*** test, and dealing first with the question of whether the information at issue raises "[t]he mere existence" of a "reasonable possibility that ... the undisclosed information affects the reliability of the conviction", the appellants argued in their factum that the key to this question lies in the fact that the information is directly relevant to the creditably of KM, one of the Crown's key witnesses. The Crown concedes

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[12] See AF at paragraphs 148-151 where Mr. Brassington's statement is reviewed in more detail.

the point (RF at para 120). Notwithstanding that concession, the Crown suggests that the information relating to KM's credibility could have had no effect on the verdict. In making its arguments, the Crown relies on two decisions from this court (***Kehoe*** and ***Smith***). The decision in ***Kehoe*** pre-dates the Supreme Court of Canada's decision in ***Dixon***. The decision in ***Smith*** post-dates ***Dixon,*** but it does not refer to it. Importantly, both cases consider the issue from the perspective of the more stringent test of whether the non-disclosed information "would have" affected the verdict rather than the far less stringent ***Dixon*** test of whether it "could have" affected the verdict.

37) Turning to the second stage of the ***Dixon*** test, and the question of whether the non-disclosure presents a "mere reasonable possibility" that the non-disclosure impaired the fairness of the trial process, it is worth recalling that in their joint reasons for the majority in ***Illes***, Justices LeBel and Fish held that the appellants burden "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)". As the appellants noted in their factum, "each of these three examples applies in the instant case", and as they also noted, "these are simply examples and not an exhaustive list of potential factors" (AF at para 157). The appellants then suggested several ways in which trial fairness might have been affected in the instant case (AF paragraphs 157-161).

38) In its factum, the Crown's response focusses on just one question – whether the non-disclosure "prevented the appellants from pursuing a reasonably possible avenue of investigation that was closed as a result of the Crown's non-disclosure: *Taillefer* at para. 84" (RF at para 146). The Crown's response points out that the appellants did receive a considerable amount of other disclosure relevant to the relationship between KM and Cpl. Dadwal, and the Crown points out that defence counsel at trial were able to cross-examine Ms. M. on those issues. In short, the thrust of the Crown's argument is that because the appellants had ample opportunity through other means to at least pursue the issues raised by the new information in the Brassington interview, they were not deprived of the right to make full answer and defence. The appellants respectfully submit that the Crown's focus is far too narrow.

39) The very recent decision of the Nova Scotia Court of Appeal in ***R. v. Sandeson***, 2020 NSCA 47 (June 17, 2020), emphasizes that the notion of trial fairness in the second stage of the ***Dixon*** test is quite broad. In ***Sandeson***, a retired police officer acting as private investigator for defence counsel in a murder prosecution secretly assisted the police by locating certain witnesses and arranging for them to give statements prejudicial to the defence. The police tried to keep the investigator's actions confidential, and it was not until late in the trial that the Crown disclosed what the investigator had done. The trial judge denied a mistrial application brought by the accused; he also rejected the submission that the failure of the police to disclose what had been done could amount to an abuse of process. In his reasons for the court allowing the appeal, Justice Farrar made these comments about the ***Dixon*** test:

> [66] Trial fairness includes concerns about the integrity of the justice system. In *R. v. Rajalingam*, [2003] O.J. No. 530 (Ont. Sup. Ct. J.), aff'd [2004] O.J. No. 3920 (Ont. C.A.) the court held "[a] breach of section 7 of the *Charter* occurs if the late disclosure either impairs the ability of the accused to make full answer and defence or where the integrity of the administration of justice is threatened by an unfair trial" (¶22). A corollary to this is that **examining the impact of the late disclosure also includes considering the appearance of fairness** (*Bjelland*, ¶22 citing *R. v. Harrer*, 1995 CanLII 70 (SCC), [1995] 3 S.C.R. 562, ¶45).
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> [76] In my view, such limiting is a legal error. The right to make full answer and defence **includes not only the ability to challenge the Crown's case on the merits but also the ability to advance reasonable *Charter* and/or other process-oriented responses to the charges**. (emphasis added)

40) In the instant case, the appellants submit that Mr. Brassington's decision to withhold the information told to him by Cpl. Dadwal manifestly engages concerns about the "appearance" of trial fairness. For whatever selfish personal reasons he might have had, Mr. Brassington withheld relevant, important information for a decade.

41) Leaving aside the appearance of fairness, there is no doubt that the information withheld by Mr. Brassington impacted the appellants' "ability to advance reasonable Charter and/or **other process-oriented responses to the charges**" (emphasis added). As an example, the non-disclosure "impacted" their "ability to advance ... [the] process-oriented response to the charges" of seeking to have KM's testimony excluded as a remedy for an abuse of process.

42) Recalling the submissions relating to the ***Vukelich*** ground of appeal, had Cpl. Brassington disclosed what Cpl. Dadwal said to him back in 2009, the trial judge would have accepted that allegation as true when the appellants advanced an application for the exclusion of KM's evidence. She would have also accepted as true all of the other disclosure on the issue that the Crown has helpfully pointed to in its factum, and she would have granted an evidentiary hearing to determine whether there was an abuse of process justifying the exclusion of evidence as an appropriate remedy short of a stay of proceedings – i.e. the second stage of the ***Babos*** test (the balancing exercise at the third stage would not come into play).

43) Importantly, Justice Farrar clearly addressed the test that applies when an appeal court is considering the impact of late disclosure on the ability to advance "process-oriented responses" such as an abuse of process application:

> [81] In my view, such an inference cannot be made [that the trial judge considered process-oriented responses]. **When the judge was considering abuse of process, he asked whether the appellant would ever be successful in an abuse of process claim** (VD7 Decision, ¶124). With respect, **this is not the correct question. The question should have been whether the defence lost a realistic opportunity to investigate and advance a process-oriented response** – a response directed at trial fairness and abuse of process considerations.
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> [82] **In failing to ask the latter question, he imposed on Sandeson a higher threshold than was required by law**, similar to what the Supreme Court of Canada found the Court of Appeal of Quebec did in *R. v. Taillefer*, 2003 SCC 70. ... [quotation from Taillefer omitted]. (all emphasis added).

44) In the instant case, and using the example of an application to exclude KM's testimony, it would be wrong to consider "whether the appellant[s] would ever be successful in that application. The correct question is whether they were denied the opportunity to advance that process-oriented response. They obviously were and a new trial should be ordered to permit them to pursue the newly disclosed evidence.

45) The court will have recognized that Justice Farrar's statement of the applicable test applies not just to the impact of the non-disclosure on issues relating to the testimony of KM, but also to the appellants' separate application for a stay of proceedings. When considering the fresh evidence, it would be wrong to ask whether the appellants "would ever be successful in an abuse of process claim [seeking a stay of proceedings]". The

correct question is whether the appellants "lost a realistic opportunity to investigate and advance [that] process-oriented response". As the appellants pointed out in their factum, the Crown was in complete control of the information about the steps taken by the police to ameliorate the impact of the extreme malfeasance of the corrupt police officers. By withholding the information that Superintendent Robin was aware of the allegations about the true nature of the relationship between Cpl. Dadwal and KM, the Crown (through Mr. Brassington) deprived the appellants of the opportunity to "investigate and advance" their abuse of process claims.

46) The court will have also recognized that the foregoing submissions apply with equal force to the WPP fresh evidence. Again, the question is not whether the appellants "would ever be successful" in any "reasonable Charter and/or other process-oriented responses to the charges". The correct question is whether they were denied the "ability to advance reasonable Charter and/or other process-oriented responses". The appellants reply to the Crown submissions on the fresh evidence application relating to the WPP materials will be addressed in the oral hearing.

47) The final point of note is that the appellants again emphasize that they are completely in the dark about what happened during the portions of the trial where they were excluded. As they emphasised throughout their four factums, they are forced to rely on the *amici* to make these same arguments as needed in response to anything arising in the so-called "closed" proceedings.

PART IV ~ NATURE OF ORDER SOUGHT

48) 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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PART V
AUTHORITIES