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COURT OF APPEAL
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ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA,
BEFORE THE HONOURABLE MADAM JUSTICE WEDGE
FROM THE VERDICT PRONOUNCED ON THE 2nd DAY OF OCTOBER 2014

Court of Appeal No. CA042490

BETWEEN:

REGINA

v.

AND:

CODY RAE HAEVISCHER

Court of Appeal No. CA042488

REGINA

v.

MATTHEW JAMES JOHNSTON

Respondent's factum #1

Responding to appellants' joint factum on s. 650 and *Vetrovec* issues

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PART I – OVERVIEW AND STATEMENT OF FACTS

1. This factum is the response to the appellants' joint factum #1 raising two issues: their exclusion from an application to protect informer privilege; and the judge's assessment of the evidence of two *Vetrovec* witnesses.

2. With respect to the exclusion issue, the appellants were excluded from a pre-trial application (Application 65), in order to protect informer privilege. The significant result of Application 65 was the ruling that Person X, who killed three of the six victims, could not be called as a witness by the Crown. The appellants rely on s. 650(1) of the *Code* to argue the judge erred by excluding them from a part of their trial that affected their vital interests.

3. The judge did not err in excluding the appellants because they did not have a right to be present when information which could tend to identify an informer was revealed. Where a judge excludes an accused from a hearing in order to protect informer privilege, s. 650(1) has not been violated even if the accused's vital interests are at stake. The question is not whether the appellants' vital interests were at stake, but whether including the appellants in the *ex parte* hearings would have violated informer privilege.

4. The appellants also argue the judge erred in law by not allowing them to make submissions on further remedies arising from Application 65. However, at trial they never sought to do so. Further, a trial judge has a broad discretion to craft safeguards when an accused must be excluded. Here, the judge appointed an *amici* with a broad adversarial mandate to mitigate any impacts on the appellants, and they have not shown that the discretionary safeguards imposed by the judge were an error.

5. Although the appellants argue that Person X's evidence could have helped their defence, this argument is disingenuous. Person X was expected to testify that as he shot and killed three of the victims, Haevischer shot and killed the other three, and Johnston actively participated in the unlawful confinement and directed the murder of all six victims. Person X's exclusion from the case inured only to the appellants' benefit.

6. Alternatively, if this Court finds the judge erred in excluding the appellants such that s. 650(1) was violated, the curative provision of s. 686(1)(b)(iv) ought to apply because there was no prejudice. Accordingly, this Court ought to dismiss ground four of

Johnston's amended notice of appeal and ground 15 of Haevischer's amended notice of appeal.

7. With respect to the *Vetrovec* issue, the appellants argue that the judge erred in her assessment of the evidence of two Crown witnesses, Person Y and K.M. They say she wrongly considered factors in assessing their credibility and reliability, and misapplied the principles set out in *R. v. Vetrovec*, [1982] 1 S.C.R. 811 for assessing the evidence of unsavoury witnesses. The essence of their argument is that the judge was required to find independent confirmation on all material aspects of Person Y's and K.M.'s evidence. There is no support in law to this proposition. A judge can accept evidence that finds its only source in the *Vetrovec* witness so long as the judge considers the danger in doing so, but is satisfied that the witness is telling the truth.

8. The judge did not err in assessing their evidence. The judge was acutely aware that they were important Crown witnesses, that they were unsavoury witnesses, and that she had to be exceedingly cautious in approaching their evidence. The judge followed the *Vetrovec* framework in her comprehensive analysis of their evidence. She looked for and indeed found independent confirmation on various materials aspects of their evidence.

9. The appellants essentially are inviting this Court to reassess the judge's credibility findings. But it is not for this Court to second guess the judge's findings. It is well settled that the standard of review calls for deference in assessing a witness's evidence and that a trial judge's conclusions on credibility will not be interfered with short of palpable and overriding error. The appellants have not alleged the judge made any such errors. Accordingly, this Court ought to dismiss ground one of Johnston's amended notice of appeal and grounds eight and nine of Haevischer's amended notice of appeal.

10. The facts that pertain to these grounds of appeal are set out in the arguments responding to the two issues.

PART II – RESPONDENT'S POSITION ON THE POINTS IN ISSUE

11. The judge did not err by excluding the appellants from a pre-trial application in order to protect informer privilege.

12. The judge did not err in assessing the evidence of Person Y. and K.M.

PART III – ARGUMENT

Issue #1: The judge did not err by excluding the appellants from Application 65 in order to protect informer privilege

Background of the Application 65 proceedings

13. On September 4, 2012, Johnston filed Application 65 challenging the Crown's assertion of informer privilege with respect to materials withheld from disclosure on the basis that they would tend to identify a confidential informer designated E5. Haevischer joined the application: *R. v. Haevischer*, 2013 BCSC 1735, para. 1 [*650 Ruling*].

14. Following the filing of Application 65, on November 6, 2012, *amici* were appointed by consent at the request of Johnston with a mandate of providing an adversarial context to ensure the appellants were able to participate in the application to the extent possible: *650 Ruling*, para. 2.

15. The Crown indicated it would proceed under the common law to establish its claim of privilege. Johnston objected and took the position the Crown was required to proceed under s. 37 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5 [*CEA*] by virtue of s. 650(1): *650 Ruling*, para. 3.

16. On February 12, 2013, the judge decided the Crown was entitled to proceed *ex parte* at common law, with or without the consent of the accused, in order to prevent disclosure of information that may tend to identify the putative informer: *650 Ruling*, para. 5, 31. The appellants are not challenging this ruling on appeal.

17. The *in camera*, *ex parte* Application 65 proceedings began on February 12, 2013. On May 31, 2013, the judge issued a memorandum providing counsel with the following information about the proceedings:

> As defence counsel are aware, the *ex parte in camera* proceedings relating to Application No. 65 are ongoing. Given the *ex parte* nature of the proceedings, and

> their length, I wish to advise counsel that the *Amici* have participated fully in the proceedings, and continue to do so, to provide an adversarial context in accordance with the terms of the Consent Order.

18. The *in camera* proceedings continued. On July 30, 2013, Johnston filed Application 97 seeking an order allowing the accused to attend the Application 65 proceedings as well as a report advising them of what had occurred in their absence.

19. Less than one month later, on August 23, 2013, the judge issued the *Abbreviated Ruling re: Witness Issue*, *R. v. Haevischer*, 2013 BCSC 1526 (the "*Abbreviated Ruling*"). This ruling made Johnston's request for a report redundant. In the *Abbreviated Ruling*, the court ruled that the Crown's claim of informer privilege had been upheld and:

> The *Amici* raised a further issue based on trial fairness concerns arising from the non-disclosure to the Accused of privileged information resulting from the Crown's successful privilege claim. That issue has been litigated. As a result, on August 14, 2013, I ruled that an important witness, [Person X], cannot be called by the Crown in the trial of this matter. His evidence is inadmissible for the reasons stated in the ruling, which is in writing and has been sealed in the Court record: para. 6.

20. The Court further held:

> My full written ruling in this important matter is under seal because its contents, if published, would disclose the identity of the Informer. I am bound by the law as I have described it, and accordingly <u>I am not at liberty to provide any further information</u> concerning the ruling of the reasons underlying it: para. 10 (emphasis added).

21. Details of the *in camera, ex parte* portions of Application 65 that are relevant to this ground are set out in the appendix in the response to the *amici's* sealed factum.

<u>The law - s. 650</u>

22. The law with respect to s. 650(1) is not contentious. Subject to exceptions in s. 650(1.1) and (2) (none of which apply here) an accused *"shall be present in court during the whole of his or her trial"*. An accused is entitled to be present for all proceedings which affect their "vital interests". The leading cases hold that if an accused is absent for part of the trial which affects their "vital interests", without the accused's consent, s. 650 is violated: *R. v. Dedam*, 2018 NBCA 52, para. 19; *R. v. Lucas*, 2014 ONCA 561, para. 50; *R. v. Hertrich*, (1982) 67 C.C.C. (2d) 510 (Ont. C.A.), paras. 81-82.

23. While the law with respect to s. 650(1) is not contentious, what *is* contentious in this case is the relationship between s. 650(1) and the principles of informer privilege.

Informer privilege – anything that tends to identify an informer is protected by the privilege

24. Informer privilege is a broad and powerful protection granted to persons who provide information to police on a promise of confidentiality. It is a class privilege, meaning once it has been established, a court cannot balance it against other interests: the court must protect the privilege absent a showing of "innocence at stake": *R. v. Leipert*, [1997] 1 S.C.R. 281, paras. 17-22.

25. The breadth of informer privilege is apparent from the Supreme Court of Canada's seminal rulings on the topic: the Court has sanctioned the withholding of relevant information, which is vital to an accused making full answer and defence, on the basis of informer privilege: *R. v. Gubbins*, 2018 SCC 44 at paras. 18-19. The only exception to the privilege is "innocence at stake": *R. v. Brassington*, 2018 SCC 37, para. 36. The Court has ruled that anything that tends to identify an informer is protected by the privilege, and the Court, Crown, and police are required to protect that information: *Liepert*, para. 19.

Exclusion to protect informer privilege does not violate s. 650(1)

26. In *Lucas*, the Ontario Court of Appeal held that a common law *ex parte* hearing to determine whether two individuals were confidential informers was not "part of the trial" for the purposes of s. 650(1). While referring to the "vital interests" test from *Hertrich*, the Court held that where the accused is excluded further to the principles of informer privilege "…the point of departure is to recognize the extent and importance of the privilege protecting the identity of the confidential informants. Informer privilege has been described as 'nearly absolute'": para. 52.

27. Relying on *R. v. Basi*, 2009 SCC 52, the Court in *Lucas* stated "the accused and defence counsel will be excluded from the proceeding when the identity of the putative informer cannot be otherwise protected": *Lucas*, para. 61. In commenting on the applicability of *Basi* to a claim of privilege under the common law, rather than under s. 37 of the *CEA*, the Court in *Lucas* held the distinction was irrelevant, and that the basis for excluding the accused is "the absolute need to protect the identity of the confidential

informants, and the reality that information relating to their identity could be revealed in such a hearing": para. 63.

28. Thus, where the accused is excluded from a hearing in order to protect informer privilege, the Court is acting with jurisdiction and there is no violation of s. 650(1): *Lucas*, paras. 62, 70. While *Basi* and *Lucas* deal with the "first stage" of an informer hearing, this rationale applies equally at the "second stage", where informer privilege has been upheld and must be given full effect.

Informer privilege trumps full answer and defence and the open court principle

29. The appellants stress that their exclusion from the Application 65 proceedings was inconsistent with their fair trial rights and the open court principle. The respondent does not quarrel with the notion that s. 650(1) is anchored in protecting an accused's right to make full answer and defence: *R. v. Tran*, [1994] 2 S.C.R. 951, paras. 29-32. Similarly, it is clear that s. 650(1) codifies the open court principle: *R. v. Laws*, (1998), 128 C.C.C. (3d) 516 (Ont. C.A.), at para. 79 [no para numbers].

30. However, the Court in *Lucas*, citing *Basi*, held that informer privilege trumps the right to make full answer and defence, even though it is constitutionally guaranteed:

> Thus, even though the right to make full answer and defence is constitutionally guaranteed, the hearing to determine privilege must proceed "on the assumption that [the privilege] does apply". No one beyond the Crown and the putative informer may access information over which the privilege has been claimed until a judge has determined that the privilege does not exist or that an exception applies: *R. v. Basi*, at para. 44. Thus, the accused and defence counsel will be excluded from the proceeding when the identity of the putative informer cannot be otherwise protected: *R. v. Basi*, at para. 53: *Lucas*, para. 61.

31. The Supreme Court of Canada in *Named Person v. Vancouver Sun*, 2007 SCC 43, at paras. 36-40, was clear that informer privilege trumps the open court principle.

An accused can be excluded from proceedings that affect their "vital interests" in order to protect informer privilege

32. The appellants argue that in order to establish that their rights under s. 650(1) were breached, they need only demonstrate that they were excluded from part of the trial that affected their vital interests. They rely on a distinction between the first and second stages

of a privilege hearing and urge this court to limit the principles from *Basi* to the "first-stage" of an informer privilege hearing, where the Court determines whether to uphold the privilege claim. The respondent disagrees with these submissions.

33. First, there is no legal significance to whether the court is at the "first stage", "second stage", or some other stage of a hearing involving informer privilege. While *Basi* and *Lucas* specifically address exclusion from the "first stage" hearing, the fundamental principle from these cases is that no one outside of the circle of privilege is entitled to access information which could tend to identify a confidential informer absent a showing of the "innocence at stake" exception. A court must exclude the accused from a hearing which would tend to identify the putative informer: *Basi*, paras. 44, 53; *Lucas*, paras. 61-62. Once established, the privilege must be given full effect.

34. The appellants rely on *R. v. X and Y*, 2012 BCSC 325 to support their position that an accused cannot be excluded from proceedings which affect their vital interests. However, in *X and Y* the identity of the informer was known to defence counsel, and the judge still excluded the accused from portions of the proceedings which affected the accused's vital interests in order to protect informer privilege: paras. 135-136.

35. The appellants also refer to *R. v. Welsh*, 2013 ONCA 190, where the Crown conceded a violation of s. 650(1) because an *ex parte* hearing to determine a claim of work product privilege "went beyond the issue of work product privilege". However, none of the information at issue there was protected by informer privilege, as such the case does not assist. Further, the curative *proviso* was applied in the absence of significant damage to the appearance of fairness or actual prejudice, as is the case here.

36. Second, there is ample authority for the proposition that an accused must be excluded from hearings which may tend to identify a confidential informer, even where those proceedings affect the accused's vital interests.

37. An example is the *McClure* procedure: *R. v. McClure*, 2001 SCC 14, paras. 52-60. This procedure is to be followed where an accused asserts that informer privilege should be set aside because the accused's innocence is at stake. At stage one of that procedure, a judge determines whether it is likely that a privileged document may contain information

that could raise a reasonable doubt. The accused is excluded from this first stage, even though their vital interests are clearly engaged.

38. After a judge is satisfied a document may contain information which could raise a reasonable doubt, stage two requires the Court to review the information in the accused's absence. If the trial judge does not form the opinion that the information is likely to raise a reasonable doubt, *the accused is never entitled to see that information*.

39. The accused's vital interests are obviously at stake in the "second stage" of the *McClure* procedure, but the Supreme Court of Canada has nevertheless determined that this procedure is fair and appropriate in light of the supremacy of informer (and solicitor-client) privilege.

40. Further, Hubbard's *The Law of Privilege in Canada*, states that a judge must always protect the privilege at the expense of the accused's presence in court:

> The ability of a trial judge to view information not available to the accused and his or her counsel is frequently necessary to permit the trial judge to make a reasoned judgment about matters of privilege or relevance. In respect of informer privilege, the trial judge must be placed in a position to give effect to the protection afforded by a class privilege. Some material may have to be read or evidence heard in the accused's absence in order to appreciate or enforce *bona fide* claims of privilege. The absolute nature of informer privilege justifies this extraordinary procedure: *R.W. Hubbard, S. Magotiaux, S.M. Duncan, The Law of Privilege in Canada* (2017), vol. 2, at s. 84.2

Judge was not required to hear "meaningful submissions" before embarking on stage 2

41. The appellants contend that their exclusion during the "second stage" of Application 65 created unfairness. They say the judge erred in law and denied them due process by not providing them with an opportunity to make submissions on (i) how informer privilege could be protected with minimal effect on their vital interests, and (ii) remedies other than the exclusion of Person X.

42. The appellants rely on *R. v. Giuliano* (1984), 14 C.C.C. (3d) 20 and *R. v. Al-Fartossy*, 2007 ABCA 427 for the proposition that when a litigant is denied an opportunity to make submissions, the judge commits an error in law. In those cases, litigants were denied an opportunity to be heard in situations where they had a right to be heard.

However, individuals outside the circle of privilege have no right to attend or make submissions at an *ex parte* hearing that may identify an informer: *Lucas*, para. 62.

43. Rather, a judge presiding over an *ex parte* hearing has a broad discretion to craft appropriate safeguards to minimize the impact of the exclusion on the accused: *Basi*, paras. 55-56, 58; *Lucas*, para. 69. In order for this Court to intervene in the trial judge's exercise of that discretion, the appellants must establish that the safeguards she put in place were "so clearly wrong as to amount to an injustice" or that the judge "misdirected (her)self": *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, para. 95; *R. v. Bjelland*, 2009 SCC 38, para. 15.

44. For two reasons, it cannot be said that the judge's decision to appoint an *amici* with a broad adversarial mandate during the *ex parte* hearing, and to provide the appellants with as much information as possible, was "so clearly wrong as to amount to an injustice".

45. First, any measures put in place by a trial judge to enhance the transparency of *ex parte* proceedings are limited by the court's obligation to protect the identity of the confidential informer: *Named Person*, para. 51, 55. It was not possible to provide the appellants with further information without violating informer privilege: *Abbreviated Ruling*, para. 10.

46. Second, in this case the judge's safeguards worked exactly as they were intended. At the appellants' request, *amici* were appointed to act in an adversarial position. When the privilege claim was upheld, *amici* applied to exclude Person X, and the judge granted that application in order to protect the appellants' fair trial rights.

47. This safeguard not only minimized the negative impact of the appellants' exclusion from the *ex parte* portions of Application 65, the appointment of *amici* eliminated any unfairness because it led to Person X's exclusion from the Crown's case.

48. The appellants appear to argue the appointment of *amici* did not provide them with sufficient safeguards, because the *amici* did not have a solicitor-client relationship with the appellants, and because the *amici* went beyond their proper role. They rely on *Named Person* for the proposition that *amici's* role is limited to the "first stage" hearing:

determining whether the person is a confidential informer.

49. However, the portion of *Named Person* relied on by the appellants was in response to the situation before the Court, where the only issue was participation at the "first stage" hearing. At no point in *Named Person* does the Court prohibit an *amicus* from assisting a judge at the "second stage" of an informer privilege hearing.

50. Further, in this case the appellants agreed to appoint *amici* to a broad adversarial mandate. The *amici's* appointment included:

> …making legal submissions about the attachment of the privilege and/or the appropriate steps for the court to take to protect the privilege, challenging the submissions of the Respondent, and making any further submissions that may assist the Court: *amici terms of appointment*, para. 1(f).[1]

51. Finally, with respect to the judge's duty to involve the appellants as much as possible without breaching the privilege, the judge provided the appellants with as much information as she was able: *Abbreviated Ruling*, para. 10.

52. It cannot be said that the trial judge's safeguards – the appointment of *amici* with a broad adversarial mandate, and release of as much information as possible without violating the privilege – was "so clearly wrong as to amount to an injustice".

<u>Defence conduct relevant to assessment of appearance of unfairness: defence did not seek any remedies</u>

53. The appellants contend they were not <u>permitted</u> to seek other remedies arising from Application 65, outlined at AF, para. 56. They effectively assert that the judge deprived them of due process. This is an unsupportable submission.

54. The appellants did not need an invitation from the judge to pursue further remedies arising from Application 65. The pre-trial and trial proceedings continued for over one year after the judge ordered that Person X could not be a Crown witness, yet the appellants never sought any additional remedies, such as applying to have Person X's evidence adduced through alternate means, or applying for a mistrial due to the alleged loss of jurisdiction which underlies this ground of appeal. The decision to not pursue these

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[1] App. 65 A.B., p.1.

remedies at trial belies their argument that there was any unfairness.

55. The judge found the "innocence at stake" exception was not engaged: *Abbreviated Ruling*, para. 9. The appellants argue they had "no audience" to hear their argument that the exception was engaged. However, this was never raised with the trial judge, the obvious audience for such an assertion. If counsel were in possession of information that indicated innocence at stake was a relevant consideration on Application 65, it was incumbent upon them to raise it with the trial judge or *amici*.

56. As stated at paras. **37-38**, in any case where the "innocence at stake" exception may be in play, it is for the judge to determine, in the absence of the accused, whether the information would be capable of raising a reasonable doubt. As the judge had all of the information before her, she was properly placed to evaluate whether the "innocence at stake" exception applied.

57. Notably, while complaining they did not have an opportunity to assert "innocence at stake", on this appeal, the appellants have not presented any evidence or argument supporting such an assertion.

The respondent's sealed response to *amici* outlines what occurred in Application 65

58. As stated, details outlining what occurred in Application 65 are set out in the response to the *amici's* sealed factum. This will respond to the appellants' characterisation of the Application 65 proceedings as "a *voir dire* on the admissibility of Person X's testimony…" and that during the 40 days of *in camera* hearings, the judge listened "to evidence that went to the very heart of the allegations". The respondent disagrees that this is what occurred *in camera* during Application 65.

59. The *Abbreviated Ruling* does not refer to a *voir dire* on the admissibility of Person X's testimony, or to hearing 40 days of evidence.

A violation of s. 650(1) can be cured on appeal

60. The appellants argue that s. 650(1) was violated and assert they were prejudiced by their exclusion from Application 65. However, they make no submission on the remedy for this alleged violation.

61. Should this Court conclude that s. 650(1) was infringed by the exclusion of the appellants from Application 65, s. 686(1)(b)(iv) allows this court to dismiss this ground of appeal if (i) the judge retained jurisdiction over the offence and (ii) this Court is of the opinion that the appellants suffered no prejudice.

62. While s. 686(1)(b)(iii) may have some application, that provision generally applies to "minor irregularities in procedure that do not result in a loss of jurisdiction in the trial courts": *R. v. Simon*, 2010 ONCA 754 at para. 121. As a violation of s. 650(1) results in a loss of jurisdiction over the accused, s. 686(1)(b)(iv) is the appropriate curative provision.

63. This Court in *R. v. Bagadiong*, 2013 BCCA 538, at para. 39 relied on *Simon* for its approach to determining whether a violation of s. 650(1) can be saved by s. 686(1)(b)(iv). In *Simon*, the Ontario Court of Appeal set out six non-exhaustive factors for the court to consider: para. 123.

64. In *R. v. F.E.E.*, 2011 ONCA 783, the Court explained that "prejudice" under s. 686(1)(b)(iv) includes both prejudice to the accused and prejudice to the due administration of justice: para. 33. Upon finding a violation of s. 650(1), the Court is to presume prejudice, however the Crown can rebut that presumption: para. 34.

Any violation of s. 650(1) is saved by s. 686(1)(b)(iv)

65. Even were this Court to find that s. 650(1) was violated by the exclusion of the appellants from Application 65, it should apply the curative provision of s. 686(1)(b)(iv) as there was no prejudice to the appellants. On the contrary, the *ex parte* proceedings inured entirely to the appellants' benefit, because Person X was not allowed to testify.

66. While this Court is to presume prejudice upon a finding of a violation of s. 650(1), in this case the exclusion of Person X was not prejudicial to the appellants. The impact of Person X's exclusion from the Crown's case more than rebuts any presumed prejudice arising from the exclusion of the appellants from the Application 65 hearings.

Simon factors have limited application

67. While the s. 686(1)(b)(iv) factors from *Simon* are helpful, here, two factors drive the analysis of whether the alleged violation of s. 650(1) can be saved by s. 686(1)(b)(iv): the operation of informer privilege and the anticipated evidence of Person X.

(i) Informer privilege required the appellants' exclusion

68. First, as argued above at paras **32-40**, informer privilege <u>required</u> the exclusion of the appellants in order to protect the identity of the informer. Should this Court conclude that s. 650(1) was violated by their exclusion, the fact that the trial judge acted pursuant to a common law duty weighs in favour of finding there was no prejudice, either to the appellants or to the appearance of the due administration of justice.

69. This is not like the majority of the cases where violations of s. 650(1) arose out of legal errors by the trial judge or counsel; rather, the trial judge properly followed the law in excluding the appellants.

(ii) Anticipated testimony of Person X would establish the appellants' guilt

70. Second, any impact on the appellants' right to make full answer and defence due to the Application 65 *ex parte* proceedings was not prejudicial. As set out in the respondent's factum #4 at paras. 73-74, Person X's anticipated evidence overwhelmingly established that both appellants were guilty as charged. His exclusion was an overwhelmingly positive windfall for the appellants. Further, Johnston suffered no prejudice from the exclusion of Person X (respondent's factum #4 at para. 60)

<u>Application of the *Simon* factors</u>

71. In addition to the two significant factors outlined above, a consideration of the *Simon* factors should also lead this Court to apply the curative provision in s. 686(1)(b)(iv).

72. Although the Court in *Lucas* held there was no violation of s. 650(1), the Court concluded any violation would be saved by s. 686(1)(b)(iv). There, the Court relied on factors analogous to the case at bar: the appellants were informed of what occurred *ex parte* and only information that might reveal the identity of the informer was withheld; and despite having an ability to apply for re-consideration of the privilege claim, the appellants in *Lucas* never took advantage of the opportunity. Likewise, the appellants in this case took no steps following the *Abbreviated Ruling* to remedy prejudice they now claim they suffered (see paras. **53-57** above).

73. The fifth factor from *Simon* is particularly important in this case: whether the exclusion of the appellants led to an appearance of unfairness. Here, there is no

appearance of unfairness: the appellants were excluded pursuant to a mandatory rule of privilege and an *amici* was present throughout the *ex parte* proceedings to provide an adversarial context. There was no prejudice to the due administration of justice: the informer privilege rule was properly invoked to protect the informer, and the robust protection of an adversarial *amici* was provided to the appellants. There was similarly no prejudice to the appellants, as the *ex parte* proceedings led to highly inculpatory evidence being excluded from the Crown's case against them.

74. The lack of any appearance of unfairness, or actual unfairness, is underscored by the appellants' decision not to seek any further orders or remedies arising from the Application 65 proceedings.

Issue #2: The judge did not err in assessing the evidence of Person Y and K.M.

The judge's acceptance of Person Y's and K.M.'s evidence is owed appellate deference

75. The appellants argue that the judge erred in her assessment of the evidence of Person Y and K.M. by wrongly considering factors such as absence of a motive to lie in assessing their credibility and reliability, and by misapplying the principles in *R. v. Vetrovec*, [1982] 1 S.C.R. 811 for assessing the evidence of unsavoury witnesses. As will be explained, the judge did not err.

76. The appellants are making some of the same arguments made at trial and essentially are inviting this Court to reassess the judge's findings on credibility and reliability. But it is not for this Court to second guess the judge's findings. The well settled standard of review calls for deference in assessing a witness's evidence and a trial judge's conclusions on credibility and reliability will not be interfered with short of palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 23; *R. v. Gagnon*, 2006 SCC 17 at para. 10; *R. v. Plehanov*, 2019 BCCA 462 at paras. 52-54. The appellants have not alleged the judge made any palpable and overriding errors or misapprehended the evidence in assessing Person Y's or K.M.'s evidence. Nor, as will be seen, did the judge make any legal errors.

Legal principles the judge followed in assessing the evidence of Person Y and K.M.

77. The judge acknowledged that Person Y, K.M. and two other witnesses, whose evidence is not at issue on this appeal, "presented numerous trustworthiness issues" that required her, as per the *Vetrovec* framework, "to turn to compelling confirmatory evidence to restore faith in material aspects of their testimony". (*R. v. Haevischer*, 2014 BCSC 1863 "RJ" at para. 22)

78. The essence of the *Vetrovec* framework is the need for the trier of fact to be cautious about the danger of accepting evidence that finds its only source in an unsavoury witness. In *R. v. Roks*, 2011 ONCA 526 at para. 63 (followed by *R. v. Khan*, 2011 BCCA 382 at para. 43, and referred to by the judge in her *Vetrovec* analysis (RJ 463)), Watt J.A. referred to the well-settled requirement that the trier of fact should look for confirmatory evidence before accepting the evidence of an unsavoury witness. Watt J.A. followed the seminal cases from the Supreme Court of Canada on this issue, including *R. v. Khela*,

2009 SCC 4 and *R. v. Kehler*, 2004 SCC 11. The principles emanating from these cases include:

- A trier of fact should look for evidence from another source (the independence requirement) tending to show that the untrustworthy witness is telling the truth about the guilt of the accused (the implicative quality or materiality requirement). (*Roks* at para. 63).

- Evidence must not be "tainted" by connection to the *Vetrovec* witness to be confirmatory. (*Roks* at para. 64)

- Confirmatory evidence need not implicate the accused to satisfy the materiality requirement. The materiality requirement is met where the confirmatory evidence, in the context of the case as a whole, gives comfort to the trier of fact that the *Vetrovec* witness can be trusted in his or her *assertion* that the accused is the person who committed the offence. Where the only issue in dispute is whether the accused committed the offence, to be confirmatory, evidence must comfort the trier of fact that the *Vetrovec* witness is telling the truth in that regard before convicting on the basis of the *Vetrovec* witness' evidence. (*Khela* at paras. 41-42, *Roks* at para. 65)

79. Significant to the issues raised on these appeals and contrary to the effect of the appellants' submissions, it is well settled that a trier of fact is entitled to convict on the evidence of a *Vetrovec* witness in the absence of confirmatory evidence where the trier of fact, cautioned about the danger of doing so, is satisfied that the witness is telling the truth: *Khela*, at para. 37; *Kehler*, at para. 22; *Roks* at para. 66.

Person Y

Person Y's importance to the trial and the judge's assessment of his credibility

80. Person Y was a unique witness as evident by his antecedents, his subsequent involvement as a police agent, and his guilty pleas to two counts of first degree murder unrelated to the Surrey Six, detailed in para. **89** below.

81. Person Y was one of 73 Crown witnesses. He was an important witness because he was one of the early conspirators to murder Corey Lal and subsequently became a police agent. He obtained three admissions from Johnston, two of which were recorded. His evidence was one of the pieces of evidence the judge considered in finding that: Johnston conspired to murder Mr. Lal and was a participant in the murder of the six victims; and the alternative inference posited by the defence that the conspiracy was

limited to a robbery was implausible. See respondent's factum #4 at paras. 27-30 for details.

The judge approached Person Y's evidence with caution

82. The judge treated Person Y as an unsavoury witness, whose evidence ought to be approached with caution in accordance with *Vetrovec*. (RJ 463) She looked for and found confirmatory evidence and relied on the confirmatory evidence together with many other factors in assessing Person Y's credibility and reliability. Considering his evidence and the circumstances that brought him before the court, the judge found that Person Y intended to "tell a true story to the Court." Thus, she accepted Person Y's evidence on "many of its essential points" as set out below. (RJ 481)

83. As the appellants challenge the judge's analysis of Person Y's evidence, a review of the judge's analysis is necessary in order to show that she did not make any errors. The judge considered Person Y's evidence first as she thoroughly went through the narrative (RJ 25-462); and later under the *Vetrovec* framework for assessing the evidence of unsavoury witnesses. (RJ 463-481) One of the appellants' complaints is that the judge made favourable findings of credibility before turning to her *Vetrovec* analysis. To give effect to the appellants' position, one would have to read one section of the reasons in isolation from the reasons for judgment as a whole, which would be wrong: *R. v. Robertson*, 2019 BCCA 116 at para. 75.

84. In going through the narrative, the judge made many factual findings that were based in part on Person Y's evidence, much of which related to motive which the appellants acknowledge was not seriously contested. These factual findings included:

- Drug trafficking was the main activity of the Red Scorpions ("RS"), which business the group advanced and expanded through violence and intimidation. (RJ 132, 133, 138, 140, 143, 144, 145, 147, 148, 163, 169)
- Person Y participated in a meeting at a McDonald's between Jamie Bacon, the co-leader of the RS, and Corey Lal arising from a dispute between the two. At the meeting a tax of $100,000 was imposed on Mr. Lal, and Person Y confiscated Mr. Lal's Glock handgun. (RJ 171-181)
- Mr. Lal failed to pay the tax so Bacon saw this as a RS problem because the gang would look weak if the failure to pay went unanswered. Thus Bacon wanted Mr. Lal killed. This was decided at a RS dinner at a hot pot restaurant in the

evening after the meeting with Mr. Lal. Person Y was originally the person who alone was supposed to kill Mr. Lal in a parking lot, until plans changed to one which RS members would break into Mr. Lal's drug stash house in order to kill Mr. Lal and take his money and drugs. Under the new plan Bacon would use Johnston and Person X and maybe one other to carry out the murder.[2] (RJ 182 - 187, 192, 199-212)

- Several persons including Person Y, Johnston and Michael Le (the other co-leader of the RS) met at a Korean restaurant in Surrey at approximately 1:00 p.m. on the day of the murders. Johnston arrived after Person Y. Outside the restaurant Person Y provided Person X with the Glock handgun Person Y confiscated from Mr. Lal. The Glock was one of the two guns seized by the police at the crime scene. Person Y's DNA was on the Glock, and it was used to kill three out of the six victims. (RJ 231-257)

85. Relevant to the issues raised on this appeal, Johnston spoke with Person Y about the murders a few hours after they occurred; and Person Y, in his capacity as a police agent, obtained two recorded admissions from Johnston on February 17 and March 23, 2008. These admissions are discussed at paras. **91-102** below.

86. Person Y did not implicate Haevischer in the murders. Although Person Y said that Haevischer was one of several persons present at the hot pot restaurant when the conspiracy to murder Mr. Lal was hatched, Person Y, as the judge found, was frank to acknowledge that Haevischer may not have been involved in the discussion. (RJ 184, 478) Consequently, Haevischer's trial counsel argued that Person Y's shortcomings related more to his reliability than credibility and that the judge ought not to reject his evidence in total. (RJ 481)

87. Later in her reasons, under the *Vetrovec* framework, the judge considered many factors in assessing Person Y's credibility and reliability, including independent confirmation. The independent confirmatory evidence which the judge found in connection with Person Y included:

- Surveillance evidence confirming that on the morning of the murders Person Y was at the World Gym in Port Coquitlam with Bacon. (RJ 231)
- Cell phone evidence confirming that Person Y received a call from Le, summoning him to the Korean restaurant in Surrey. (RJ 246)

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[2] As the judge pointed out, neither accused appeared to challenge the existence of some sort of plan against Mr. Lal. (RJ 593)

- Cell phone evidence and D.Y.'s evidence[3] confirming that Johnston arrived at the Korean restaurant after Person Y arrived. (RJ 247, 249, 250, 254, 255)
- The Glock handgun which the police recovered at the crime scene bore Person Y's DNA, confirming that Person Y provided the Glock to Person X outside the Korean restaurant.
    - Significantly the police did not reveal this fact to Person Y until after he told them about seizing the gun from Mr. Lal and later giving it to Person X. (RJ 238)
- Documentary evidence confirming that Person Y drove from the Korean restaurant to a London Drugs to purchase skin cream, and an agreed admission of fact confirming that later that afternoon he and Bacon drove to a tanning salon in Pitt Meadows where he paid cash using the name Menno Menorrio. (RJ 400, 401)
- Surveillance evidence confirming Person Y's attendance at the location of the meeting with Johnston on October 19 (see paras.**105-106** below for details). (RJ 418, 420)
- Cell phone evidence which placed Johnston in the vicinity at the very time of the meeting with Person Y. (RJ 420)
- Recordings of the February 17 and March 23 admissions confirming the verbal parts of Johnston's admissions. (RJ 431)
    - The appellants acknowledge that these recordings confirm the words actually spoken by Johnston to Person Y (AF at para. 93).

88. These were the types of confirmatory evidence that satisfied: (i) the independent requirement from sources not tainted by connection to Person Y (*Roks* at para. 64); and (ii) the materiality requirement as the evidence, when looked at in the context of the case as a whole, could give comfort to the judge that Person Y could be trusted in the relevant aspects of his testimony (*Khela* at paras. 40-43).

89. The other factors the judge considered in assessing Person Y's evidence (see summary in *R. v. Johnston*, 2019 BCCA 107 at para. 24) included:

a) Person Y had a history of serious and horrific violent criminal behaviour which led him to describe himself as a "monster" and a "despicable human being". His degree of self-awareness made him "rather unique" as a *Vetrovec* witness (RJ 468, 469);

[3] D.Y, a RS associate and resident of the Balmoral, in the early afternoon of October 19 provided Johnston with his fob giving Johnston access into the Balmoral. See RJ 262-277.

b) He went to police of his own volition, and his cooperation was not the result of an arrest for his part in the offences. Notably, he volunteered that he gave the Glock handgun to Person X prior to the police telling him that they discovered a Glock bearing his DNA at the crime scene (RJ 470);

c) He provided information with the understanding that, as a consequence of providing his statements, he would be charged with two counts of first degree murder for crimes unrelated to the Surrey Six murders and he agreed to plead guilty to these charges (RJ 471);

d) He spent periods of time in South America in 2009 living free beyond the reach of Canadian law enforcement. He could have walked away from any commitments made to the police about his guilty pleas on these two murders and testimony (RJ 474);

e) He made no plea agreement with the Crown that would, in return for his testimony, affect his period of imprisonment. He entered his guilty pleas knowing that, as a former police agent and current justice system cooperator, he was facing "25 years of very hard time" in prison (RJ 473);

f) The RCMP paid him significant monies for his work as an agent. However, the judge did not find these payments to influence or shape Person Y's evidence in favour of the Crown because: (i) none of it was paid as an incentive to tell police about his involvement in the murders; (ii) one must consider the benefits comparatively, as Person Y acknowledged earning substantial sums as a criminal in the drug business; and (iii) it was unlikely the money constituted a substantial benefit when serving 25 years to life of hard time (RJ 476, 477);

g) During his nearly ten days under cross-examination, Person Y did not attempt to minimize his past criminal activities or his role in the conspiracy to kill Mr. Lal and when uncertain about aspects of his evidence, Person Y declined to implicate the appellants (RJ 478);

h) Person Y had no motive to falsify his evidence (RJ 479, see paras. **125-130** below).

90. Ultimately the judge accepted Person Y’s evidence on many of its essential points,

concluding her analysis of his evidence as follows:

> **481** In my view, Person Y's actions do speak for him. His actions answer many of the issues raised by Mr. Johnston in challenging Person Y's credibility. Considering the evidence of Person Y as a whole, as well as the circumstances that have brought him before the Court, I am satisfied that his intention was to tell a true story to the Court. I would note that even Mr. Haevischer argues that Person Y's shortcomings relate more to his reliability than credibility and that the Court ought not to reject his evidence in total. Importantly, Person Y's evidence is corroborated in many respects by independent evidence, and I have accepted it on many of its essential points. (emphasis added)

Johnston admitted he was involved in the murders

91. The judge made factual findings that Johnston's comments to Person Y on the night of the murders and in the two subsequent recorded admissions were an acknowledgment that Johnston (i) was aware of the plan involving a shooting and that he had a specific role to play in it; (ii) was present for the cleaning of the guns in preparation of carrying out the plan[4]; (iii) was present at the crime scene during the murders; and (iv) provided assistance in carrying out the plan. (RJ 462) As the appellants take issue with the judge's analysis of Person Y's evidence with respect to these admissions, it may be helpful to set out the applicable factual matrix.

October 19, 2007 admission

92. Johnston's October 19 admission was made shortly after the murders occurred. See RJ 400-425, and respondent's factum #4 at para. 37 for details. Johnston told Person Y about the murders, stating there were lots of bodies, using hand signals to indicate six; mentioned that they put bodies by a fireplace (the crime scene evidence established that three of the six victims were laying by the fireplace); and stated that he had to pull someone in from outside the apartment. Aspects of Person Y's evidence was corroborated by surveillance and cell phone evidence. See paras. **103-111** below.

February 17 and March 23, 2008 admissions

93. Person Y was acting as a police agent when he obtained two recorded admissions

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[4] The judge found as a fact that Johnston and Person X arrived at Haevischer's apartment in the Stanley at approximately 1:48 p.m. on October 19. They brought at least one gun, the Glock. With the assistance of K.M., they cleaned two guns and bullets. (RJ 300)

from Johnston, the first on February 17, 2008 and the second on March 23, 2008.

94. The details of Johnston's February 17 admission are set out in RJ 432-437. Person Y brought up the gun he had given to Person X. He told Johnston that he knew the gun was left at the crime scene and had Person Y's DNA on it. Johnston responded "I never touched it". Johnston later said "I watched him clean them. They cleaned it" with Windex. He repeated "I watched him clean them. They cleaned them the same way as they do every time. They do a really good job" (see K.M.'s evidence summarized at para. **137** that the two guns were cleaned with Windex). The judge concluded that it was contextually apparent that Johnston was referring to Person X. (RJ 437) The judge pointed out that Johnston never denied his involvement in the murders despite being pressed for information by Person Y. (RJ 458) The appellants do not appear to challenge the judge's analysis with respect to this admission.

95. The details of the March 23 admission are set out in RJ 438-455, and respondent's factum #4 at paras. 26, 39, 44. The issue raised by the appellants pertains to the gestures Johnston made in two separate interactions with Person Y. In the first interaction, Person Y asked Johnston why guns were used. Johnston responded that he did not know and added "all I know is I was told to do somethin'". Person Y testified that Johnston pointed to his eye indicating that he was keeping point as the lookout. Person Y later corrected himself and said that Johnston rubbed his fingers together to indicate money (but Person Y was 80 to 90 percent certain Johnston also had pointed to his eye). Person Y also testified that Johnston said the other person was supposed to "do this", and made a gun gesture with cocked thumb and forefinger and middle fingers extended, and said "like I did what I had to do".

96. In the second interaction Johnston attempted to answer Person Y's questions about the gun found at the crime scene which had on it Person Y's DNA. Johnston said that there were some things he could not answer but then said "I watched — I watched him do this on. Both of them". Person Y said Johnston was using a gun gesture shooting downwards with thumb cocked and forefinger and middle finger extended.

97. Person Y asked why his gun with his DNA was left at the scene and Johnston replied "I was just told to get this [rubbing his fingers together to indicate money] and

everybody else like" [making a hand gesture with his fingers cocked like a gun.]

98. The judge was satisfied that these admissions "significantly implicate Johnston as a co-conspirator and participant in the murders". (RJ 456)

The judge did not err in assessing the evidence of Johnston's admissions

99. The appellants argue that the judge erred in applying the *Vetrovec* framework because neither the October 19 admission nor the gestures made by Johnston on March 23 can be independently confirmed. The crux of their argument must be that all material aspects of a *Vetrovec* witness's testimony must be confirmed by independent evidence.

100. The judge did not err. As already stated, there is no support in law that a trier of fact must find (as opposed to look for) independent confirmatory evidence to support all or any major aspect of an unsavoury witness's testimony. The judge could still accept these aspects of Person Y's evidence even in the absence of such confirmatory evidence.

101. Ultimately the judge had to be and was satisfied that she could have faith in Person Y's testimony. In so finding, the judge did not err in law: she followed the *Vetrovec* framework; considered Person Y's evidence as a whole; and looked for and found independent confirmatory evidence in determining that he could be trusted in his assertions on material aspects of his evidence. The judge's credibility and reliability findings are owed appellate deference.

102. The appellants take issue with the judge's approach to the surveillance and cell phone evidence as well as evidence confirming Person Y's activities during the afternoon of October 19 in her assessment of Person Y's testimony regarding Johnston's October 19 admissions. As will be seen, the appellants advance their arguments by taking a piecemeal approach to their assessment of the materiality of the confirmatory evidence. This is not the proper approach. As stated, the materiality requirement is met where the confirmatory evidence, in the context of the case as a whole, gives comfort to the trier of fact that the *Vetrovec* witness is telling the truth.

(i) The judge did not err in her assessment of the October 19 surveillance

103. The appellants say that the surveillance evidence undermines Person Y's account of Johnston's October 19 admission. This same argument was made at trial and now

again on appeal that the surveillance evidence does not support Person Y's account of Johnston arriving in his Touareg[5] at a parking lot where the two met. (RJ 409-420, T. July 9, 2014, pp. 6004-6009) As detailed below, the judge did not agree. (RJ 418)

104. The appellants also seem to suggest that the judge erred in relying on the surveillance as independent confirmatory evidence in finding that it was "possible" that Person Y's meet with Johnston occurred before the police had set up surveillance in the parking lot. But the judge did not rely upon this possibility as confirmatory evidence. Rather, and as will be explained, she referred to it in the context of rejecting an argument made by Johnston's trial counsel.

105. To put these arguments in context, it is necessary to compare Person Y's testimony with the surveillance evidence. Person Y testified that he and Jamie Bacon drove from Bacon's residence to Person X's apartment building next to the Foggy Dew pub where they parked in a fire lane in front of the building. Bacon had exited the car to go to speak with Person X. As Person Y remained in the car waiting for Bacon's return, Johnston unexpectedly entered the car and made the admission. (RJ 402, 404)

106. The surveillance evidence established that Bacon's vehicle with two occupants was observed leaving his residence at 6:57 p.m. The vehicle was surveilled to the area of the Foggy Dew pub in Coquitlam. Cst. White was responsible for observing the parking lot. Cst. White testified that at 7:10 p.m. he was alerted that Bacon's vehicle had entered the Foggy Dew parking lot. The vehicle was already parked and stationary by the time he set up surveillance.[6] Cst. White could not see into Bacon's vehicle due to darkness. He did not see anyone exit the vehicle. After about ten minutes, he saw a male person approach the driver's side and enter the vehicle. The vehicle then drove off. He did not see a grey Touareg (the vehicle associated with Johnston) anywhere in the parking lot

[5] Person Y did not mention in his testimony having seen the type of vehicle Johnston arrived in at the parking lot. (T. March 11, 2014, p.3649(4-9), p.3652(1-5); T. March 27, 2014, p. 4000(22)-4001(26))

[6] The observations attributed to Cst. White in the master surveillance report stated that it was after "continuous surveillance" Bacon's vehicle entered the Foggy Dew parking lot. (RJ 410) The surveillance report did not capture the driver of Bacon's vehicle exit the car but later did capture the driver entering the car. The judge found that this "belies the accuracy of the observation in the master surveillance report that Mr. Bacon's vehicle had been under continuous surveillance." (RJ 418)

although it was listed on the target sheet, but he did not look around for other vehicles as he was focused on Bacon's vehicle. (RJ 410-413, 418, 419)

107. The judge found that the surveillance evidence "certainly" corroborated Person Y in so far as it had Bacon's vehicle leaving and returning to his residence after a brief stop in the area of Person X's apartment. (RJ 418)

108. The appellants can point to no error in the judge's factual finding. But, under the guise of a legal error, they take issue with her finding that the surveillance evidence corroborated Person Y in this way. They would have preferred her to favour their position So they say that on the facts before the judge, any time interval in which Bacon's vehicle was not under direct surveillance would have been extremely brief and that it would be unlikely that the comings and goings Person Y described could have occurred without being seen by Cst. White.

109. The judge rejected that argument, finding that the surveillance of Bacon's vehicle was not continuous, and "[i]n the circumstances, it is entirely *possible* that Person Y's exchange with Mr. Johnston took place before Cst. White set up his surveillance." (RJ 419) The judge also noted that this possibility was consistent with the call detail records for Johnston's cell phone which placed him in the area around this very time. (RJ 420)

110. Contrary to the appellants' assertion, the judge did <u>not</u> rely on this possibility as confirmatory of Person Y. Rather, she simply pointed out that it was "possible", but that it was only one possibility. Ultimately the judge made a factual finding regarding the corroborative aspect of the surveillance for which she is owed deference.

(ii) Cell phone evidence is confirmatory

111. The appellants acknowledge that the cell phone evidence was consistent with Johnston being in the area at a particular time, but they say it is not the type of evidence which could confirm Person Y's testimony. Again, the appellants seem to argue that the *Vetrovec* materiality requirement is not met because the evidence does not directly confirm Person Y's account of Johnston's admission. To be material the evidence need not directly confirm Person Y's account of that admission. Rather, it was a material piece of evidence the judge properly could - and did - consider in determining Person Y's <u>overall</u>

veracity. See *R. v. Brass*, 2007 SKCA 94 at paras. 52, 55, 56; leave to appeal refused [2007] S.C.C.A. No. 559.

(iii) Person Y's activities during the afternoon of October 19 is confirmatory

112. The appellants also argue that the independent evidence confirming Person Y's activities in the afternoon of October 19 (see para. **87 (fifth bullet**) above) did not meet the *Vetrovec* materiality requirement. The respondent disagrees. This was evidence the judge referenced when setting out the evidence regarding the October 19 admissions (RJ 400, 401), and, to repeat, was a piece of evidence the judge could properly have considered in determining Person Y's overall veracity.

113. The appellants also refer to the crime scene evidence not being independent of Person Y's testimony. The judge did not rely on it as independent evidence confirming Person Y's testimony except for his DNA being on the Glock which unquestionably is independent confirmatory evidence.

The judge did not err in her assessment of Person Y's evidence of the gestures

114. The appellants point out that the judge did not identify any independent evidence capable of confirming Johnston's gestures or Person Y's interpretation of the gestures during the March 23 recorded admission. While this assertion is correct, the appellants have not articulated any legal or factual error in the judge's assessment of Person Y's evidence about the gestures.[7] As already stated, the judge was not required to find confirmatory evidence on each piece of material evidence including the gestures before accepting that Person Y was telling the truth.

115. The judge was satisfied that Person Y was firm in his recollection of Johnston's gestures (with the exception of one gesture noted at para. **95** above). (RJ 457)

116. Significantly, the defence, as the judge noted, did not challenge Person Y's evidence concerning the gestures. (RJ 461) The cross-examination on the gestures was

[7] The appellants point out that Person X was the only witness in theory who could confirm the material aspects of Person Y's recollection of the gestures. As stated in para. 5 above, Person X's anticipated evidence was that Johnston played an integral role in the murders together with Person X and Haevischer. See also respondent's factum #4 at para. 73.

brief and was limited to questions about Person Y's uncertainty expressed in direct whether one of the gestures was about Johnston being the lookout; and the suggestion, which Person Y flatly denied, that it was difficult for him to remember which specific hand gestures were made on which occasion. (See T. March 24, 2014, pp. 3713(41)-3714(44))

117. Rather than strongly challenging Person Y's evidence on the gestures, Johnston's trial counsel argued that the gesture of shooting downwards accompanied by the comment "watched him do this on. Both of them" is as consistent with two people cleaning guns with Windex as it is with two people shooting guns. The judge rejected this argument for two reasons. First, cleaning the gun with Windex was a topic openly discussed in the February 17 scenario when Johnston did not find it necessary to use a gesture to convey the cleaning as opposed to discussing it verbally. Second, the gesture Person Y demonstrated was clearly that of a person cocking and firing a gun in a downward direction. The judge noted that Person Y was not cross-examined that about mistaking the gun gesture for someone cleaning the gun with Windex. (RJ 461)

118. The appellants now assert that the transcript contradicts Person Y's interpretation, presumably referring to Johnston's explanation "I wasn't inside (ph), man. The -- you know that" made in response to Person Y's question how six people ended up being killed and whether Person X panicked. (RJ 449) As stated in respondent's factum #4 at para.6, this explanation is only contradictory if the judge credited it as such - she was entitled to accept all, some or none of Johnston's explanations.

The judge did not err in referring to Person Y declining to implicate the appellants where he could have done so without contradiction

119. The appellants argue it was an error in law for the judge to bolster Person Y's credibility on the basis that he could have further implicated the appellants but chose not to do so. They say that a lack of embellishment serves no evidentiary purpose. The judge did not err as she did not inappropriately add weight to Person Y's credibility as the appellants would seem to suggest.

120. As detailed in paras. **87-89** above, the judge considered many factors in assessing Person Y's credibility and reliability. As part of her analysis, the judge at RJ 478 discussed how Person Y presented himself during his 12 days of testimony, and pointed out that he

conceded he was uncertain about certain aspects of his evidence. She also pointed out at RJ 478 the following, which the appellants say is an error:

> Where he could easily have implicated one or both of the accused without contradiction, he declined to do so. For example, he testified that while he was certain Mr. Haevischer was present at the hot pot restaurant where the conspiracy to kill Mr. Lal was discussed, he was frank to acknowledge that Mr. Haevischer may not have been involved in the discussion. Nor did he testify that Mr. Johnston, while present at the restaurant, played any part in the discussion. Person Y implicated only himself in the plan at that stage, testifying that he had volunteered to kill Mr. Lal on his own if someone could get him to a parking lot.

121. Neither in this passage or elsewhere in her reasons did the judge rely on Person Y's lack of embellishment as proof of Person Y's credibility. Rather, the judge is merely pointing out what might otherwise have diminished Person Y's credibility was absent.

122. In *R. v. Kiss*, 2018 ONCA 184, a case relied upon by the appellants, Paciocco, J.A. at paras. 52-53 summarizes how lack of embellishment can be used in assessing credibility. He finds that there is nothing wrong with a trial judge noting that things that might have diminished credibility are absent as long as it is not being used as a makeweight in favour of credibility.

123. Like what the trial judge in *Kiss* did (see *Kiss* at para. 54), the judge in the present case, based on a fair reading of her reasons, was simply recording that Person Y's evidence did not suffer from a problem of embellishment that could have diminished its weight. This comment was particularly apt in response to the defence theory that Person Y's cooperation was driven by his hatred for Bacon, and that the two appellants were simply collateral damage in his desire to seek revenge.

124. In any event, the judge's reference that Person Y could have easily implicated the appellants but declined to do so was hardly a key factor in her credibility findings to justify appellate intervention. See *R. v. A.J.S.*, 2019 MBCA 93 at paras. 18-22.

The judge did not err in referring to Person Y as having no motive to lie

125. The appellants also argue that the judge rehabilitated Person Y's testimony by erroneously examining whether he had a motive to lie and by taking into account his evidence about the consequences that would befall him as a result of providing that

testimony. The judge did not err given the context in which she considered motive.

126. Person Y vehemently denied the suggestion that his cooperation was driven by his hatred for Bacon, and that the two appellants were simply collateral damage in his desire to seek revenge. It was in this context that the judge found that Person Y had no motive to falsify his evidence. In so finding, the judge pointed to Person Y's evidence acknowledging his disdain for Johnston. She also accepted his evidence that he had nothing to gain by implicating either appellant in that he will be in jail for the rest of his life as a prisoner, considered a "rat" by the jail population. (RJ 479)[8]

127. The absence of motive to fabricate can be a significant factor in assessing credibility. In *R. v. Brown*, 2006 BCCA 100, Donald J.A. at para. 14 quoted from *R. v. Batte*, 2000 O.J. No. 2184 (Ont. C.A.) in which Doherty J.A. stated at para. 120:

> …Juries are told to use their common sense and combined life experience in assessing credibility. It is difficult to think of a factor which, as a matter of common sense and life experience, would be more germane to a witness' credibility than the existence of a motive to fabricate evidence. Similarly, the absence of any reason to make a false allegation is a factor which juries, using their common sense, will and should consider in assessing a witness' credibility.

128. What the judge could not do, and did not do, was: put an onus on the appellants to demonstrate that Person Y had a motive to fabricate evidence; find that the absence of a demonstrated motive to fabricate necessarily meant that Person Y had no motive; or find that the absence of a motive to fabricate conclusively established that Person Y was telling the truth: *Brown* at para. 14 referring to *Batte* at para. 121.

129. The appellants are wrong to suggest that the judge did not consider any particular body of evidence to support her finding that Person Y had no motive to lie. As stated above, she considered and accepted Person Y's evidence that he had nothing to gain as he will be in jail for the rest of his life.

130. No doubt anticipating this response to their argument, the appellants go on to argue that the judge erred by overemphasizing the potential long-term negative life

[8] The judge did not, as the appellants seem to suggest, rely on absence of motive to lie to corroborate Person Y's evidence.

consequences resulting from making an allegation as a reason not to lie. They rely on *R. v. L. (L.)* (2009), 96 O.R. (3d) 412 (ONCA), a case readily distinguishable. The Crown virtually invited the jury to reason that in the absence of a demonstrated motive to fabricate, the child complainant must be telling the truth: (*L. (L.)* at para. 50). By way of contrast, the judge in the present case did not assert that Person Y's absence of motive meant he was telling the truth. Rather, she referred to the absence of motive to fabricate as one of many factors in assessing Person Y's credibility, particularly relevant in the context of the defence theory that Person Y's motive was revenge.

K.M.

131. The appellants argue that there were material aspects of K.M.'s evidence which required independent confirmation to be relied upon. As already stated, a trier of fact is not required to find independent confirmation on the material aspects of an unsavoury witness's evidence before accepting it as true. The appellants also argue that the judge made three interrelated errors that when viewed as a whole affected the foundation of her *Vetrovec* analysis and demonstrate errors in her approach to K.M.'s evidence. Yet the appellants have not suggested that the judge made palpable and overriding errors. Accordingly, the judge's acceptance of K.M.'s evidence is owed appellate deference.

132. Upon reviewing the judge's reasons as a whole, it is clear that she followed the *Vetrovec* framework in analysing K.M.'s evidence. The judge did find confirmation which she relied upon in finding that K.M. was telling the truth in the material aspects of her testimony. (RJ 508) In order to demonstrate this, it is helpful to summarize the judge's findings relating to K.M.'s evidence and her analysis of K.M.'s credibility and reliability.

<u>K.M.'s role in the trial and the judge's assessment of her credibility and reliability</u>

133. K.M. was Haevischer's girlfriend and a RS associate. She and Haevischer lived together in suite 1601 at the Stanley apartment building in Surrey.

134. Significant to K.M.'s evidence, the Stanley had a CCTV video surveillance system, and the police coincidentally were conducting unrelated surveillance of the building on

the day of the murders.[9] This evidence is significant because it confirms material parts of K.M.'s testimony including the movements of Haevischer, Johnston and Person X immediately before and after the murders and her role in the destruction of evidence.[10]

135. Similar to the way the judge considered Person Y's evidence, she considered K.M.'s evidence in two sections of her reasons. First, the judge considered K.M.'s evidence as she went through the narrative of the events; and later under the *Vetrovec* framework for assessing the evidence of unsavoury witnesses.

136. In going through the narrative, the judge relied on K.M.'s evidence in several areas. K.M provided evidence about the origins of the RS. The judge noted that this evidence was, for the most part, uncontroversial. K.M.'s evidence on this subject included: the RS used violence to further their drug dealing objectives and built a reputation as a group that was not to be messed with (RJ 126); and being a RS member meant being loyal to the family and members had to always be there for their brothers. (RJ 127) K.M. also gave evidence about the role of Johnston and Haevischer in the RS. She testified that Johnston's role was to assist in resolving problems, usually by fighting. (RJ 152) She testified that Haevischer first started to work on drug lines and then began his own drug line with another RS member. (RJ 154) She testified that Haevischer's relationship with Johnston was "like brothers almost", and it was Johnston who vouched for Haevischer and got him his RS tattoo (signifying membership in the RS). (RJ 159) This evidence was relevant to the Crown's theory of **group motive**, which was one of the pieces of circumstantial evidence from which the judge concluded that Haevischer would have been told of the plan to murder Corey Lal and would have been willing to have participated in a RS gang hit with his fellow RS gang members Johnston and Person X. See respondent's factum #3 at paras. 49-51 for details.

137. The crux of K.M.'s evidence was with respect to what occurred in the Stanley just before and after the murders. K.M. testified that Johnston and Person X arrived

[9] The surveillance and CCTV evidence is summarized in ASF 52-55, 58-61, 81-84, 87-89, 92, 96; and RJ 218-222, 278, 303, 315-316, 345-347, 354, 357, 371, 377.
[10] On April 6, 2009 the police showed K.M. an evidence presentation consisting of audio clips, videos and slides (Exhibit SS) which included slides referencing these comings and goings. See T. December 10, 2013, pp.2534(44)-2546(36); T. December 12, 2013, 2621(46)-2641(29).

unannounced at the apartment. Their arrival was confirmed by surveillance. They produced two guns on the living room coffee table and asked if she could clean them. The judge noted that K.M.'s evidence was not challenged on this point. (RJ 298) K.M. testified that she got paper towels and Windex. She sat next to Johnston while Person X was sitting on another couch. She dealt with the silver gun and cleaned the bullets from that gun, while Person X dealt with the other gun which was black. She said that Johnston put the bullets back into the silver gun. (RJ 280-282, T. December 3, 2013, pp. 2335(8)-2337(40))

138. K.M. testified that while the guns were being cleaned, Haevischer was puttering around the apartment, and going back and forth between the rooms. As the judge pointed out, that part of her evidence also was not challenged in cross-examination. (RJ 285, 297) Given the size and layout of the apartment, the judge concluded that this evidence established that Haevischer knew the guns were being cleaned in his living room. (RJ 292-299) The judge's conclusion is not challenged on appeal.

139. K.M testified that once the guns were cleaned, Haevischer left the apartment with Johnston and Person X. Johnston asked her to move his Touareg from the front visitor parking area to the rear of the building, which she did. (RJ 286) Her evidence was confirmed by: (i) the surveillance observed the Touareg leave the front of the Stanley and park at the rear of the building, and a blonde female leaving the vehicle and entering the Stanley. (RJ 316); (ii) when the police searched the apartment several days after the murders, they found two rolls of paper towels on the living room table and a bottle of Windex on the kitchen counter.[11] (RJ 283)

140. K.M. also testified about the return of Haevischer and Johnston to the Stanley after the murders. She said that they returned about an hour after they left. Person X was not with them. Johnston emptied the contents of a black garbage bag onto the living room floor, containing bundles of cash and cell phones. As the judge pointed out, K.M.'s

[11] The evidence presentation referenced in footnote # **9** included a slide referencing Johnston's February 17, 2008 admission to Person Y that guns had been cleaned with Windex, and another slide stating that K.M. moved the Touareg to the rear of the building. K.M. testified that she did not recall having been shown these slides. (T. December 12, 2013, pp. 2626(3-24), 2640(14-30))

evidence about the cell phones was confirmed by the fact that no cell phones were found on the victims, yet the evidence established that five of the victims had cell phones, and several had used their phones a short time before the murders. This is independent evidence as K.M. was unaware of these facts when she told the police about the bag's contents. (RJ 348, 349) K.M.'s evidence regarding the cash in the bag is also confirmed by the evidence from the March 23, 2008 recorded admission wherein Person Y and Johnston discuss the cash taken from the Balmoral.[12]

141. K.M. testified that Haevischer boiled the phones in a pot on the stove. Haevischer asked her to get a bag. She retrieved an old laundry bag and watched as items were thrown into it, including the cell phones, the clothes Haevischer had been wearing, and a towel they used to wipe down the bag. (RJ 350-352)

142. K.M also observed Haevischer writing things on a white board for his brother, Justin, who had by then arrived at the apartment. He wrote **"People died".** (RJ 355)

143. K.M. testified that once the items were thrown into the laundry bag, Haevischer told her to do whatever his brother instructed. K.M. and Justin Haevischer left the Stanley and ended up at a burn site where the items were set on fire with gasoline purchased on the way at a gas station. K.M.'s evidence is confirmed by CCTV video capturing her and Justin carrying a large cloth bag leaving the Stanley parkade, returning about two hours later. About 18 months later, when K.M. began cooperating, she took police to where the laundry bag had been burned. Confirming K.M.'s evidence, a police officer testified that despite the passage of time the area was charred and showed signs of burning. (RJ 359)

144. K.M testified that upon her return to the Stanley, Haevischer told her to pack some bags. They went to the Richmond apartment of Haevischer's drug line partner, Windsor Nguyen. K.M. testified that Haevischer told Windsor in a white board conversation that **"six people died"**. (RJ 370-379)

145. On the day following the murders, there was a third white board conversation when several RS members were present. At some point Haevischer called K.M over to the

[12] The evidence presentation referenced in footnote # **9** included a slide referencing that discussion.

whiteboard on which was written **"Burnt it all, all gone".** K.M testified that Haevischer was tapping on the white board making sure that she and Justin had burnt everything, and she shook her head, indicating yes. (RJ 380)

146. The night of the murders K.M asked Haevischer where her BMW was (the vehicle the appellants and Person X used to drive to the Balmoral). Haevischer told her that it was going to get cleaned. A few days later Haevischer told her that Mike Nguyen, Windsor's brother, was supposed to stay with the BMW until it was finished being cleaned but that he had left. As the judge pointed out, this conversation was corroborated by the Stanley CCTV video which depicted Mike Nguyen and another RS associate arriving at the Stanley on October 21. Shortly after their arrival, K.M.'s BMW left the parkade. It was admitted that on the following day the BMW eventually was driven to Soundworks where an Asian male driver asked an employee of Soundworks to have the BMW fully detailed. The driver then left. The police seized the vehicle the same day. (RJ 376-377) This is independent corroboration as there is no evidence to suggest that the police informed K.M. of the CCTV video or that her car had been driven to Soundworks before she disclosed the above information to them

The judge followed the *Vetrovec* framework in assessing K.M.'s evidence

147. As already stated, the judge was acutely aware K.M. presented numerous trustworthiness issues that required her, as *per* the *Vetrovec* framework, to look for compelling confirmatory evidence to restore faith in material aspects of K.M.'s testimony. (RJ 22) In assessing K.M.'s evidence under the *Vetrovec* framework, the judge considered K.M.'s past background – an admitted gangster and drug dealer. (RJ 482) The judge considered how K.M came to cooperate, being told by the police if she did not cooperate, she would be charged with respect to her involvement in the murders, and she could not count on Haevischer's loyalty as he was seeing another woman. (RJ 483)

148. The judge also considered the many arguments advanced by the appellants including that K.M.'s evidence was tainted by information presented to her by the police (RJ 492-497), that the police aggressively cultivated an unusually close and familiar relationship with her such that she stood firmly in the corner of the prosecution (RJ 498-499), as well as other challenges which the judge detailed in her reasons at para. 500.

149. On the tainting issue and as already stated, on April 6, 2009 the police showed K.M. an evidence presentation consisting of audio clips, videos and slides (Exhibit SS) which included evidence of her own movements and those of the appellants, in and around the Stanley before and after the murders. The judge was satisfied that the information did not influence or alter K.M.'s memory in any significant way. (RJ 494)

150. The judge disagreed with the defence assertion that K.M. appeared to favour the Crown's case. The judge found that K.M. was a reluctant Crown witness who continued to have emotional ties to Haevischer, that she did not appear to display any animosity towards the appellants. (RJ 504) The judge noted that the defence attempted to paint a picture of a jilted girlfriend seeking revenge and a person bent only on saving her own skin by falsely implicating the appellants. But the judge found that K.M was, if anything, reticent, almost withholding evidence, when giving evidence implicating Haevischer. The judge pointed out that if K.M was lying to protect herself why did she not implicate either appellant in a more direct way**,** noting that she could have significantly implicated both appellants without danger of contradiction. (RJ 504, 505) The appellants take issue with these comments (see paras. **161-162** below).

151. The judge found that K.M. did not attempt to place herself in a favourable light as she was forthright about her criminal activates and associations, and about the reasons she decided to cooperate with the police. (RJ 506)

152. In accepting the many key aspects of K.M.'s evidence, the judge noted that there was corroboration that K.M was telling the truth in the materials aspects of her testimony. The judge concluded her assessment of K.M's evidence at RJ 508:

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

Argument: the judge did not err in assessing K.M.'s evidence

153. The appellants argue that the material aspects of K.M.'s evidence required independent confirmation to be relied upon. As already stated, there is no requirement for finding corroboration on the materials aspects of a *Vetrovec* witness's testimony.

Nevertheless, in the present case there was substantial corroboration including independent corroboration which the judge relied upon in finding that K.M. was telling the truth in the material aspects of her testimony. (RJ 508)

154. The appellants also argue that the judge made three interrelated errors that affected the foundation of her *Vetrovec* analysis. But they do not argue that the judge made any reviewable factual errors which would justify appellate intervention.

(i) The judge did not uncritically assume the Crown's evidence to be true

155. First, the appellants argue that the judge "effectively" chose faulty recollection over deliberate falsehood as a "default" position to assess K.M.'s evidence when K.M. was mistaken about: Johnston wearing a man bag when arriving at the Stanley (Person X was, not Johnston); the timing of Justin Haevischer arriving at the Stanley compared to the times established by the CCTV (see paras. **171-172** below); and her description of the gun which she had cleaned (both guns found at the scene were black).

156. The defence at trial raised these mistakes when challenging K.M.'s reliability. The judge found that K.M.'s faulty recollection was plausible given the passage of time and noted that nothing turned on these inconsistencies. (RJ 282, 287-288, 360, 361)

157. The appellants also argue that it was untenable for the judge to find that K.M.'s late recollection of Johnston putting the bullets into one of the guns was not a gratuitous comment to incriminate Johnston.[13] At trial Johnston argued that K.M simply made that up on the witness stand to incriminate him.[14] The judge disagreed, pointing out that K.M. had ample opportunity to offer incriminating evidence on much more significant matters and did not do so. The judge said that K.M.'s late recollection could simply be explained by K.M. recalling the event by process of elimination, but that, in any event, who loaded the bullets into the gun was not a material aspect of K.M.'s evidence. (RJ 291)

158. In each of these arguments, under the guise of alleged *Vetrovec* errors, the appellants are effectively challenging the judge's credibility findings, yet they have not

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[13] The appellants seem to suggest that K.M. testified that Johnston participated in cleaning the guns. (AF 109) She did not specifically say that Johnston cleaned the guns. Rather, she said he put bullets into one of the guns. (T. December 3, 2013, pp. 2335(8)-2337(40))

[14] T. July 11, 2014, p.6111(1-15)

established that the judge made any reviewable errors in assessing K.M.'s credibility and reliability. These are classic credibility findings that are owed appellate deference.

159. Not content that the judge rejected their view of K.M.'s credibility, the appellants would suggest that the judge erred in her reasoning process. They say the starting point for assessing a *Vetrovec* witness is untrustworthiness which is why *Vetrovec* directs the trier of fact to look for evidence from other sources. They argue that the judge's approach effectively reversed this in that she found K.M. trustworthy, notwithstanding the contradictions in her testimony, so long as her narrative was plausible.

160. Upon considering her reasons as a whole, the judge did not err in her reasoning process and properly applied the *Vetrovec* framework in assessing K.M.'s testimony. Early on in her reasons the judge acknowledged that K.M. and the other *Vetrovec* witnesses were unsavoury, and that they presented with numerous trustworthiness issues that required the judge to turn to compelling confirmatory evidence to restore faith in material aspects of their testimony. (RJ 22) In analysing K.M.'s evidence in this context, the judge considered the inconsistencies and mistakes and many of the other trustworthiness issues that affected K.M.'s evidence. The judge also considered the various pieces of evidence which confirmed K.M.'s testimony and found that there was corroboration that K.M was telling the truth in the materials aspects of her testimony. Ultimately the judge accepted that K.M intended to be truthful in her evidence. (RJ 22) Once again, the judge's findings are owed appellate deference.

(ii) The judge did not apply "bootstrap" logic in assessing K.M.'s evidence

161. Under the heading of applying bootstrap logic, the appellants make two arguments. First, and similar to their argument with respect to the judge's treatment of Person Y's evidence, they say that the judge erred in finding K.M.'s lack of embellishment enhanced her reliability and credibility. They argue, again relying on *Kiss*, that lack of embellishment does not enhance a witness's reliability or credibility.

162. The judge did not rely on K.M.'s lack of embellishment as a makeweight for assessing credibility. Rather, the judge considered K.M.'s lack of embellishment in response to two defence arguments: that K.M.'s testimony about Johnston putting bullets into the silver gun was a gratuitous comment to incriminate Johnston (para. **157** above);

and that K.M. was a jilted girlfriend seeking revenge and a person bent only on saving her own skin by falsely implicating the appellants (para. **150** above). In responding to these arguments, the judge pointed out that K.M. could have significantly implicated both appellants without danger of contradiction, yet K.M. testified that she did not receive any admissions from Johnston, or any direct admissions from Haevischer. (RJ 505) It was in this context that the judge noted that factors which might otherwise have diminished K.M.'s credibility were absent. As per *Kiss*, there is nothing wrong with the way the judge approached this issue in analyzing K.M.'s credibility.

163. Second, the appellants argue that the judge used "no motive to lie" to go on to accept K.M.'s evidence about whether she knew the appellants and Person X used her BMW when they left the Stanley (she testified that she did not remember them asking her to take her car[15]); and about the contents of the white board conversations. The appellants state that K.M. had a big motive to lie. As will be explained, the judge did not err in her analysis of K.M.'s evidence in referring to no motive to lie.

164. The defence argued that K.M. lied about her knowledge of the appellants' and Person X's use of her BMW. In dealing with this argument, the judge noted that the force of K.M.'s evidence was not that she was unaware the BMW was being used, but she did not know why it was used and was angry when she discovered it had been used to carry out the murders. The judge also noted that it was not disputed that K.M. was unaware of the plan to kill Mr. Lal on October 19, and thus the fact that K.M.'s BMW was used to travel to and from the Balmoral did not increase her culpability as an accessory. (RJ 310-311) It was in response to this defence argument that the judge said that K.M. had no reason to lie about her knowledge of the use of the BMW. In this context, the absence of any reason for K.M. to lie was a proper factor which the judge could consider in assessing K.M.'s credibility: *Batte* at para. 120.

165. With respect to K.M.'s evidence about the white board conversations, one of the defence arguments was that K.M. confused her evidence about what Haevischer wrote at the Stanley (people dying) and the white board at Windsor's apartment (burning of the evidence) with a white board conversation she had with Jamie Bacon's brother. The

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[15] T. December 9, 2013, pp. 2516(43)-2517(3)

Bacon conversation occurred just after Haevischer had been arrested in April 2009 for the Surrey Six murders. K.M. testified that Bacon's brother gave her details about what he knew of the murders and he asked her if they had burned everything. K.M. explained that she conflated aspects of the white board conversations in her initial statements to the police in order to protect Mr. Bacon's brother, but that she had sorted them out over time. (RJ 393, T. December 9, 2013, pp. 2460-2476(29-29))

166. The judge was satisfied for several reasons that K.M. gave truthful and reliable evidence about the white board conversations. One of her reasons, applicable to this issue on appeal, was that even in her initial statements to the police, K.M was clear that she was twice asked about the destruction of the evidence, once at the time of the murders (at Windsor's apartment) and again when Haevischer and other RS members were being arrested on the Surrey Six murders. It was in this context that the judge was satisfied that K.M would have had no reason to lie about having been asked about destruction of evidence immediately following the murders and again at the time of arrests. (RJ 397)

167. In neither of the two circumstances did the judge cross the line from what was permissible – using the absence of motive to lie as a factor in assessing K.M.'s credibility – to what was impermissible – using the absence of such a motive to conclusively establish that K.M. was telling the truth: See *Batte* at paras. 120-121.

(iii) The judge considered the contradictions from independent evidence

168. The appellants say that there are three pieces of K.M.'s evidence which were contradicted by independent evidence. They seem to say that in such circumstances the judge erred in relying on the material aspects of K.M.'s evidence in the absence of independent confirmation. The appellants are repeating the same argument about requiring independent evidence, which has no support in law. In any event, one of the so-called contradictions is not a contradiction, and nothing turned on the other two.

169. The first of the three pieces of K.M.'s evidence the appellants say was contradicted by independent evidence was her evidence regarding the use of her BMW. The evidence which established that the appellants and Person X took her BMW did not contradict K.M.'s evidence. As explained above at paras. **163-164**, K.M. testified that she did not

remember them asking her to take her car. As the judge noted, the force of K.M.'s evidence was not that she was unaware the BMW was being used, but she did not know why it was used and was angry when she discovered it had been used to carry out the murders. (RJ 310)

170. The second was K.M.'s testimony that Johnston was carrying a black garbage bag when he returned to the Stanley (from the Balmoral). In fact, surveillance and CCTV depict Johnston carrying a white plastic bag, hardly a material contradiction.

171. The third was about K.M.'s testimony of the timing of Justin Haevischer's presence in the Stanley apartment compared to the times established by the CCTV.

172. As the judge pointed out, nothing turned on these contradictions. (RJ 361) The evidence of the Stanley CCTV videos confirmed material aspects of K.M.'s evidence: that Johnston returned to the Stanley carrying a bag containing the cell phones and money; and that she and Justin Haevischer left the Stanley with a laundry bag, and returned approximately two hours later after having burnt the bag and its contents.

173. In conclusion, the judge made no errors in her consideration of the contradictions. The judge followed the *Vetrovec* framework, looked for independent confirmation and found some. She considered the two contradictions, found them inconsequential and attributed K.M.'s faulty recollection to the18-month passage of time from the events of October 19 to when K.M. first gave statements to the police. (RJ 361) Once again the judge's assessment of K.M.'s credibility and reliability is entitled to appellate deference.

PART IV – NATURE OF ORDER SOUGHT

174. The respondent submits that this Court ought to dismiss grounds 1 and 4 of Johnston's amended notice of appeal and grounds 8, 9 and 15 of Haevischer's amended notice of appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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Mark K. Levitz, Q.C.
Counsel for the Respondent

July 30, 2020

Vancouver, B.C.

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