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COURT OF APPEAL

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 #2

Responding to appellants' joint factum on abuse of process & disclosure issues

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INTRODUCTION

1. This factum is in response to the appellants' joint factum pertaining to two very different issues: the judge's summary dismissal of their applications for a stay of proceedings for abuse of process; and two discreet disclosure issues. Consequently, this document will effectively contain two factums.

A. THE ABUSE OF PROCESS ISSUE

PART I – OVERVIEW AND STATEMENT OF FACTS

Overview

2. The appellants jointly challenge the judge's decision to accede to the Crown's application for summary dismissal of their individual applications for a stay of proceedings for abuse of process. This summary process is known as a *Vukelich* hearing (*R. v. Vukelich* (1996), 108 C.C.C. (3d) 193 (B.C.C.A.), leave to appeal refused [1996] S.C.C.A. No. 461).

3. Prior to it being heard, the judge released her reasons for judgment convicting both appellants of conspiring to commit the murder of Corey Lal and six counts of first degree murder.

4. Were the appellants to succeed on this ground of appeal, even if all the other grounds advanced, both jointly and individually, were dismissed, their cases would be remitted to the judge for their applications for a stay to be heard, on the merits.

5. The appellants failed to discharge the onus they bore on the *Vukelich* hearing, namely, to demonstrate that their applications had a reasonable prospect of success. Their failure was not due to the judge failing to exercise her discretion judicially. She did. Their failure was not due to any deficiencies in defence counsel's presentation of their case. There were none. Their failure was due to the judge's eminently reasonable finding that granting them what can only be described as a windfall would be a disproportionate response in light of the seriousness of the offences they committed and the profound interest of society and the victims' families in seeing justice done through the entry of the convictions. She made this finding notwithstanding the nature and seriousness of the

state conduct she found to constitute abuses of process for the purposes of the *Vukelich* hearing and the immediate and significantly detrimental and, in some respects, ongoing impact on the appellants of their lengthy placement in segregation.

6. A stay of proceedings could never reasonably be granted for the alleged abuse of process in the circumstances of this case. The application of the requisite deferential standard of review applicable to discretionary rulings mandates the dismissal of this ground of appeal.

7. This factum must be read in conjunction with the *amici's* factum addressing the *in camera* portion of the *Vukelich* hearing, together with the response to it.

Facts and proceedings

8. After the Crown closed its case and on the date they elected to call no evidence (June 9, 2014), both appellants filed individual notices of application seeking a judicial stay of proceedings as a remedy for abuse of process. The alleged abuses related to (i) the conditions of confinement they endured during the first 14 months of their detention pending trial, allegations implicating both the responsible provincial corrections officials and the RCMP; and (ii) the misconduct of four police officers in the course of the investigation into the Surrey Six murders.

9. Haevischer's notice of application was four pages in length. His outline of submissions, dated October 26, 2014, was 24 pages in length and was supported by approximately 22 pages of materials.

10. Johnston's notice of application was 13 pages in length. His outline of submissions, dated October 10, 2014, was 16 pages in length and was supported by approximately 26 pages of materials.

11. On August 6, 2014, the Crown responded with an application for a *Vukelich* hearing, seeking the summary dismissal of the abuse of process applications.

12. On October 2, 2014, the judge handed down her reserved reasons for judgment, convicting both appellants of all charges.

13. The *Vukelich* hearing took place, with a component held *in camera* and *ex parte* the appellants and their counsel and with *amici* appearing, over six court days in late October and early November, 2014.

14. On November 19, 2014, the trial judge issued her open ruling, *R. v. Haevischer*, 2014 BCSC 2172 (the "*Vukelich* Ruling"). The trial judge found, for the purposes of the screening process she was engaged in where she assumed the facts alleged to be true, that both instances of impugned conduct amounted to an abuse of process harming the integrity of the justice system, thereby satisfying stage one of the three stage *Babos* framework. She also found, at stage two, that there was no suitable remedy alternative to a stay of proceeding for this abusive conduct. At the third stage, she found that the factors militating against a stay of proceedings outweighed the factors militating in favour. The three concluding paragraphs read as follows:

> [154] The issue to be determined on this *Vukelich* application is whether the [appellants] have established that an evidentiary hearing will assist the Court in determining the merits of their application for a stay of proceedings.
>
> [155] I have assumed for the purposes of the *Vukelich* application that the facts as alleged by the [appellants] are true. Having done so, I conclude that the grounds advanced by the [appellants] could not support a stay of proceedings. An evidentiary hearing is unnecessary, as I am satisfied that even if the [appellants'] case is taken at its highest, a stay of proceedings would be a disproportionate response in light of the seriousness of the offences committed by the [appellants] and the interest of the community in the entry of their convictions.
>
> [156] Accordingly, the applications for a stay of proceedings are dismissed. The convictions of the [appellants] will now be entered, and a date will be set for their sentencing.

PART II – RESPONDENT'S POSITION ON ISSUE ON APPEAL

15. The judge exercised her discretion judicially in declining to embark upon an evidentiary hearing into the appellants' respective applications for a stay of proceedings for abuse of process.

PART III – ARGUMENT

16. In appealing their convictions in this Court, the appellants jointly advance a ground of appeal challenging the *Vukelich* Ruling declining to order a full evidentiary hearing. The argument is detailed and labyrinthine. It can, however, in essence, be distilled to these propositions:

i. In the exercise of her discretion to decline to hold an evidentiary hearing, the judge erred in principle by applying too stringent a test (discussed below at paras. **59-70**);

ii. She erred in failing to order an evidentiary hearing on the basis of her stage one finding alone (paras. **71-72** below); and

iii. She erred in proceeding to the balancing stage without having an appreciation or understanding of (i) the full extent of the conduct found to constitute abuses of process and (ii) the full impact of that misconduct upon the appellants, which could only result from an evidentiary hearing (paras. **45-58** below).

17. Before responding to these points, the respondent sets out the following general propositions applicable to this appeal.

The *Vukelich* hearing

18. There is no automatic right to an evidentiary hearing in a criminal proceeding: *Vukelich*, at para. 26. Grounded in their trial management powers, and to assist in the constructive use of judicial resources, a trial judge may decline to conduct a *voir dire* or similar evidentiary hearing: *Vukelich*, at para. 25; *R. v. Pires*, 2005 SCC 66, at para. 35; *R. v. Vickerson*, 2018 BCCA 39, at para. 61.

19. Before permitting an application to proceed, a trial judge should consider whether it has a reasonable prospect of success. The purpose of a *Vukelich* hearing is to filter out proposed applications where the remedy sought could not reasonably be granted, as shown by the submissions of counsel. The defence bears the onus of establishing that an evidentiary hearing is necessary. The threshold is low. By summarizing the evidence it anticipates eliciting, counsel must demonstrate that there is a reasonable likelihood that the remedy in question will be granted. For the purposes of this threshold hearing, the

trial judge must assume that the facts as alleged by the applicant are true. Where counsel's summary reveals no basis upon which the application could succeed, the judge should summarily dismiss it: *R. v. Cody*, 2017 SCC 31, at para. 38; *R. v. Edwardsen*, 2019 BCCA 259, at para. 62; *R. v. Frederickson*, 2018 BCCA 2, at paras. 26, 33; *R. v. M.B.*, 2016 BCCA 476, at para. 45.

20. The appellants acknowledge at AF, 41, that a *Vukelich* hearing is appropriate in an abuse of process case. For example, see *R. v. Bains*, 2010 BCCA 178, at para. 4; *R. v. Armstrong*, 2011 BCCA 274, at para. 6. Further, the appellants correctly state "the fundamental question" in such circumstances: "would an evidentiary hearing 'assist in determining' whether there has been an abuse of process warranting a stay" (at AF, 41; underlining added).

Remedy for abuse of process: the *Babos* framework

21. Whether an appropriate foundation can be laid for the remedy sought in any given case is contextual: *Frederickson*, at para. 26. The leading case which sets out the analytical framework in respect of the granting of a stay of proceedings for an abuse of process is *R. v. Babos*, 2014 SCC 16. The trial judge must consider it to determine whether the defence has shown a reasonable basis upon which the exceptional remedy of a stay of proceedings could be granted: *Frederickson*, at para. 32.

22. *Babos* recognizes that a stay of proceedings "is the most drastic remedy a criminal court can order" (para. 30). On rare occasions, a stay will be warranted because of an abuse of process. There are two categories of abuse of process: the main category where the state conduct compromises the fairness of the trial; and the residual category where the state conduct has no effect on trial fairness but risks undermining the integrity of the justice system (para. 31). In bringing their respective applications for a stay for abuse of process, both appellants relied exclusively on the residual category.

23. Under *Babos*, a stay of proceedings to redress an abuse of process in the residual category engages three stages which pose the following questions respectively:

1. whether the state has engaged in conduct that is offensive to societal notions of fair play and decency and whether proceeding with a trial in the face of that conduct would do further harm to the integrity of the justice system (para. 35);

2. whether an alternate remedy short of a stay of proceedings will adequately dissociate the justice system from the impugned state conduct going forward (para. 39); and

3. which of two options better protects the integrity of the justice system: staying the proceedings, or having a trial despite the impugned conduct (para. 41).

24. The third stage involves a balancing of competing factors (para. 41). These factors are:

(1) the nature and seriousness of the impugned conduct;

(2) whether the conduct is isolated or reflects a systemic and ongoing problem;

(3) the circumstances of the accused;

(4) the charges the accused faces; and

(5) the interests of society in having the charges disposed of on the merits.

25. *Babos* makes it clear that in residual category cases, the balancing stage takes on "added significance" (para. 40) and "must always be considered" (para. 41).

The applicable standard of appellate review is a deferential one

26. A trial judge's ruling on a *Vukelich* hearing is discretionary in nature. Accordingly, the decision to decline to hold an evidentiary hearing is entitled to deference. The standard of review of such decisions proscribes appellate intervention to cases in which the discretion has not been judicially exercised. This is a high threshold to overcome: *R. v. Mastronardi*, 2015 BCCA 338 at para. 63; *M.B.*, at paras. 46-47; *Edwardsen*, at para. 75; *Vickerson*, at para. 60, 62; *Frederickson*, at para. 24.

Preliminary observation - one ruling or two?

27. The appellants attempt at AF, 33-38 to divide the trial judge's *Vukelich* Ruling into two discrete rulings – one to decline to hold an evidentiary hearing *per Vukelich* and a second to dismiss the applications for stays of proceedings *per Babos* – subject to different but similar standards of review. This approach is misguided and unhelpful. The appellants themselves acknowledge that the standards of review "are likely equivalent as a matter of practice" (AF, 33).

28. To be clear, the discretion the trial judge exercised, and the sole decision under review in this Court, was whether or not to hold an evidentiary hearing for the abuse of process applications seeking stays of proceedings. Consideration of the *Babos* framework was necessary to the *Vukelich* hearing but does not transform the nature of the ruling at issue. The judge did not make a second, independent ruling dismissing the stay applications on their merits. The summary dismissal of the stay applications followed as a matter of law.

The judge's consideration of the three stages of *Babos*

29. In advance of addressing the three essential points raised set out in para. **16** above, the respondent proposes to set out, in some detail, the judge's *Babos* framework findings. This is to facilitate consideration of the allegations of a non-judicial exercise of discretion.

Stage One

30. The question is whether the state has engaged in conduct that is offensive to societal notions of fair play and decency such that proceeding with a trial – even a fair one (or, in this case, with the entry of the convictions) – in the face of that conduct would be harmful to the integrity of the justice system (*Vukelich* Ruling, at para. 16, citing *Babos*, at para. 35).

31. The judge made strong findings favourable to the appellants at stage one. The appellants' factum, at times, appears to pay scant regard to them. For example, contrary to the appellants' characterization, para. 122 of the *Vukelich* Ruling is not a "brief[ ] reiteration of the appellants' complaints about the conditions of confinement". On this issue, the judge accepted for the purposes of this application everything the appellants described (*Vukelich* Ruling, para. 114-118). She concluded:

> [122] As I have already indicated, I accept for the purposes of this application that the length and conditions of the [appellant]s' segregated confinement from April 2009 until June 2010 violated their rights under the *Charter* for the reasons set forth in McEwan J.'s judgment upon which the [appellant]s rely.[1] As McEwan J. found, B.C. Corrections officials abdicated their responsibility for the proper placement of the [appellants] by taking directions from the RCMP. Both [appellants] suffered physically, emotionally and psychologically in the manner and to the extent they have described in their materials. There is certainly a basis to conclude that state conduct in relation to the [appellant]s' conditions of confinement was offensive to notions of fair play and decency, and an abuse of process.

32. As they did in the court below, in their factum the appellants ascribe great importance to the impact of the conditions of confinement on their health, both physical and mental. Their contention that the judge did not have enough information about this impact is critical to their argument in this Court. It is therefore useful to examine what was placed before her. They are found in that part of her *Vukelich* Ruling wherein she sets out the alleged particulars of the state misconduct, allegations the judge, as previously noted, accepted as true (*Vukelich* Ruling, at para. 28).

33. With respect to Haevischer:

> [71] Mr. Haevischer experienced high anxiety, stress and insomnia due to the extreme conditions of his confinement. He was particularly affected by being cut off from the world with no idea when his isolation would end. Medications were not effective in controlling his symptoms.
>
> [72] [He] continues to suffer from anxiety as a result of the time he spent in segregation. He also suffers from various side effects of his anti-anxiety medication, including painful gynecomastia".[2]

34. With respect to Johnston, at *Vukelich* Ruling, para. 79, the judge found that as a result of his prolonged placement in segregation, he:

> … suffered rapid declines in both his psychological and physical health. He was overcome by feelings of hopelessness, depression, panic attacks, and a sense that he was losing his grip on sanity. At times he would find himself singing and talking to himself. [He] sought medical care and received medication

[1] *Bacon v. Surrey Pretrial Services Centre (Warden)*, 2010 BCSC 805, examined in detail by the trial judge in her *Vukelich* Ruling at para. 97-109

[2] enlargement of the breasts

> for depression and mood disorder. He also deteriorated physically, losing a total of 40 pounds. He was monitored for unusually high blood pressure, and was placed on medication as a result.

35. With respect to the misconduct of the four IHIT officers, at para. 124 of the *Vukelich* Ruling the judge found:

> [124]…The misconduct of the officers was unquestionably egregious. They engaged in exploitative sexual relationships with protected female witnesses, endangered their safety by revealing protected information about them to others, lied to their superiors, and manipulated overtime and expense claims to cover up their conduct. The misconduct of these officers as alleged could constitute an abuse of process and conduct offensive to fair play and decency.[3]

36. The judge concluded her consideration of stage one stating, "the state misconduct which could be found to constitute conduct offensive to notions of fair play and decency consists of that relating to (i) the [appellants'] conditions of confinement and (ii) the misconduct of the four investigating officers" (*Vukelich* Ruling, at para. 129). At para. 133, the judge then noted:

> The question therefore remains whether proceeding to enter the convictions of the [appellants] in light of the conduct as alleged would be harmful to the integrity of the justice system. For the purposes of the *Vukelich* application, I am prepared to accept that the answer to this stage one question is "yes".

Stage Two

37. The judge's consideration of stage two was brief: "[f]or the purposes of the *Vukelich* application, I accept that no remedy short of a stay is capable of redressing the prejudice to the justice system from the alleged misconduct" (*Vukelich* Ruling, at para. 136).

Stage Three

38. The judge asked herself the correct question: "is the seriousness of the state misconduct disproportionate to the societal interest in having the [appellant]s' convictions entered" (*Vukelich* Ruling, at para. 137). This was her determination to make. As she

[3] For further references to the factual allegations advanced concerning the impugned police misconduct in the *Vukelich* Ruling, see paras. 38-50 and 80-96.

noted at para. 139, the weight to be ascribed to the stage three balancing factors is for the trial judge: *R. v. S.B.*, 2014 ONCA 527.

39. The first two balancing factors prescribed in *Babos*, at para. 41 are the nature and seriousness of the impugned conduct and whether the conduct is isolated, or systemic and ongoing. The judge observed that notwithstanding the egregious nature of the misconduct involving the four officers, its seriousness was "tempered" (*Vukelich* Ruling, at para. 142). Upon the discovery of their actions, all four were suspended from the RCMP in 2010. None of them testified at trial. None of the protected female witnesses concerned testified at trial. "[T]he misconduct is not ongoing; rather, it was promptly and severely dealt with" (*Vukelich* Ruling, at para. 142). All four officers were criminally charged in relation to their conduct. All in all, "the state has taken decisive action to dissociate itself from their behaviour" (*Vukelich* Ruling, at para. 132).

40. In terms of the conditions of the appellants' confinement, at para. 131 of the Ruling the judge noted that McEwan J.'s judgment had its intended effect, bringing about a swift response from Corrections officials. The appellants were immediately removed from segregation and placed in the general population where they have remained within their respective institutions (*Vukelich* Ruling, para. 131). As the judge commented, "[t]he misconduct was serious, prolonged and systemic" but not ongoing. Together, the McEwan judgment and this *Vukelich* Ruling have the effect of dissociating the Court from the misconduct (*Vukelich* Ruling, at para. 145).

41. Turning to the third factor, the circumstances of the appellants, the judge stated, "the deprivations they suffered for the many months they were in segregation had an immediate and significant detrimental impact on the physical and mental health of both men. Some of those effects have continued since their release into the general population" (*Vukelich* Ruling, at para. 147).

42. As to the final two balancing factors, the seriousness of the offences and the interest of society in having the convictions entered, the judge found the former to be "of the highest order". The circumstances of the offences – execution-style murders of six defenceless men – could not have been "more shocking". She described society's interest

as "profound", weighing "all the more heavily in the context of this case because the carnage was the result of gang members fighting for turf in the illicit drug trade" (*Vukelich* Ruling, at pars. 148-150).

43. The judge concluded her consideration of the balancing stage is this manner:

> [153] In the circumstances of this case, the seriousness of the charges and society's interest in seeing justice done are the factors that weigh most heavily in the balance. I am satisfied that the price of staying these convictions could not be worth the gain to our justice system. When the impugned state misconduct is weighed against society's interest in entering the convictions in this case, this is not one of the "clearest of cases" where the exceptional remedy of a stay of proceedings would be warranted.

44. The respondent now turns to the three essential points of the appellants' argument (see para. **16** above).

The judge appreciated the full scope and impact of both branches of the misconduct (Essential Point #3)

45. The respondent has tracked the judge's *Vukelich* Ruling in some detail as a counterpoint to a primary component, or theme, of the appellants' argument that the judge lacked the necessary understanding of the full scope and impact of both branches of the misconduct found to constitute, for *Vukelich* purposes, an abuse of process (see point # 3 in para. **16** above). This essential proposition is stated in a number of ways in the appellants' factum.[4] On the face of the *Vukelich* Ruling, exactly what is lacking from the judge's understanding is not apparent.

46. Manifestly, the judge's consideration of the evidence was both comprehensive and fitting to the purpose, by assuming that evidence to be proven and taking the case for the defence "at its highest". The appellants do not complain that she somehow misapprehended their respective cases. She did not. Nor do they contend that she did not recount them accurately and fully in her reasons. Clearly, she did. Further, they do

[4] For example, at AF, 31: "full flavour"; at AF, 76: "full extent and impact"; and at AF, 84: "true nature and seriousness of the impugned conduct".

not complain that the judge was wrong to exclude from her *Babos* stage one consideration other alleged instances of misconduct (see *Vukelich* Ruling, at paras. 29-37 and 48-57).

47. The appellants point out, at AF, 49, "there was no suggestion during the hearing itself that the submissions of counsel and materials put forward were 'insufficient' . . . and that something more was needed". It is up to defence counsel to describe the full or "true" extent of the conduct so it is known to the judge. Defence counsel did so in this case. A trial judge can "actually know" whether the impugned conduct is isolated or reflects a systemic and ongoing problem because counsel can equip her to make that determination. To the extent defence counsel failed to do so, that is their responsibility, not the trial judge's.

48. Respectfully, the judge had a more than adequate understanding. Nothing more was required for *Vukelich* purposes.

49. Defence counsel were not constrained in putting forward their respective cases. A six-day hearing is more indicative of a protracted examination[5], not constraint. The appellants do not say how they were "prevented from putting the information the judge needed" (AF, 95). The transcript of the *Vukelich* hearing demonstrates otherwise.

50. Before calling on the Crown for reply submissions, the judge posed this question:

> On the *Vukelich*, I am to accept the assertions of fact. So I take your submissions on the facts at their highest. … What further evidence does Mr. Johnston wish to call, other than . . . that you've already advanced in your written submissions . . .? … I have, it seems to me, a pretty full record in terms of the allegations of fact, I would like some assistance in terms of what further factual basis the applicants say they require to argue this fully…. (App.136-137 T. Nov. 3, 2014, p.204 (20-42))

[5] A *Vukelich* hearing should not involve a protracted examination of the issues but there must be sufficient substance put before the court to enable the trial judge to properly exercise his or her discretion: *Frederickson*, at para. 33.

51. Counsel for Haevischer was the first to respond. Addressing the conditions of confinement, counsel said:

> . . . what we've outlined for Your Ladyship are some of the aspects of [his] confinement, and some of the impact on [him], and we expect that if we are able to proceed to a full hearing, you will hear evidence from [him] in great more (sic) detail. (App.136-137 T. Nov. 3, 2014, p.237 (42-47))

52. With respect to the RCMP, counsel for Haevischer submitted that, on a full hearing, they would call other investigators or managers because "we are entitled to test their justifications for directing prison authorities to impose such restrictive conditions on [him]". (App.136-137 T. Nov. 3, 2014, p.238 (16-19)) And with respect to provincial corrections officials, "we say that we should be entitled to explore the nature of the connection with the RCMP…". (App.136-137 T. Nov. 3, 2014, p.239 (19-20))

53. The judge made a second attempt: "if I accept at its highest all the factual allegations that have been put before … the court … how will that evidence assist me?" (App.136-137 Nov. 3, 2014, T. p.243 (27-31))

54. Counsel for Johnston, with respect, did not fare much better in his response:

> …we feel that hearing would assist us in rounding out the allegations and getting to the bottom of some of those things. . . . a hearing could generate new facts that would form part of our overall allegations of misconduct, but having said that, the basic allegations that we know are in our written submissions. . . . there will be some evidence [concerning the conditions of confinement] and obviously Mr. Johnston would testify to his conditions of confinement in detail. (App.136-137 Nov. 3, 2014, T. p.244 (43)-245(13))

55. With respect, it is speculative to suggest that an evidentiary hearing "could generate new facts" to support the underlying application. The *Vukelich* threshold is not surpassed by the prospect of the type of fishing expedition contemplated by this submission.

56. Why counsel, through submissions and reference to supporting materials, could not outline the "life-long debilitating mental-health issues" the appellants allegedly suffer from and which are prejudicial to their reintegration into society on parole (AF, 116) has

never been adequately explained. Neither is it clear why only *viva voce* testimony would suffice "to properly measure the impact of that abuse" (AF, 120). Defence counsel were unable to explain, for *Vukelich* purposes, why and how the taking of the cases advanced at their highest was in any way deficient despite being given every opportunity to do so in the trial court. Based on the appellants' factum, these explanations are still absent.

57. The problem for the appellants was not that the judge lacked the full picture. Looking at her reasons, she demonstrably had it. She took it at its highest. An evidentiary hearing was not going to make the case for stays stronger from the defence perspective. As previously stated, the *Vukelich* process is intended to screen out applications "where the remedy sought could not reasonably be granted" (*Frederickson*, at para. 26). Through their written and oral submissions, counsel had comprehensively shown what there was to be shown.

58. The judge treated the facts alleged as proven for screening purposes. To repeat, the absence of the "full flavour of the evidence the appellants wanted to put before the Court" (AF, 31), if there was such an absence, was not the problem for the appellants. The problem for the appellants was the murders they committed, together with the "why", the "where" and the "how" they committed them. This translates into the factors militating against a stay being given more weight by the judge and thereby prevailing over the factors militating in favour. This problem will not go away or be overcome. An evidentiary hearing now will not change matters. For the appellants, it remains insoluble.

The judge exercised her discretion judicially

(a) By asking herself the correct threshold question (Essential Point #1)

59. As will be abundantly clear by now, the respondent's position is that the judge properly understood the purpose of the *Vukelich* hearing itself and the question she was required to pose: will an evidentiary hearing assist in deciding whether the appellants are entitled to the remedy they seek. The judge did not err in principle by applying too stringent a test, however described.

60. The appellants devote a great deal of attention to their entitlement to an evidentiary hearing, an entitlement they say was triggered at various points in the *Babos* analysis for

various purposes. For example, they would have the judge decide the *Vukelich* hearing effectively at the point described at para. 129 of the *Vukelich* Ruling. There, the judge found that the two components of impugned state misconduct "could be found to constitute conduct offensive to notions of fair play and decency". Returning to their theme of the need for the full picture, the appellants contend at AF, 72-76 that an evidentiary hearing became necessary in order to determine whether proceeding to enter the convictions in light of the impugned conduct would cause further harm to the integrity of the justice system.

61. The appellants' "basic complaint" (AF, 90) is another example (numerals added by the respondent):

> . . . while the judge recognized that the impugned conduct at issue could be conduct that rises to the level of being "offensive to societal notions of fair play and decency", she erred (1) in failing to order an evidentiary hearing to determine the full extent and the impact of the offending conduct. Instead, the judge (2) wrongly went on to address the question of whether there was a risk of further harm to the justice system. In doing so, she (3) erred by failing to require an evidentiary hearing allowing the accused to test the information and materials relied on by the Crown. Finally, the judge (4) also erred in engaging in the third stage balancing exercise without knowing the complete extent of the offending conduct and without knowing its full impact.

62. The respondent has addressed errors (1) and (4) above at paras. **45-58.**

63. With respect to error (2), the appellants' complaint is curious given that the judge did find that "entering the convictions . . . in light of the conduct as alleged would be harmful to the integrity of the justice system". This was the judge's conclusion at stage one of *Babos* (*Vukelich* Ruling, para. 133). For *Vukelich* purposes, both branches of the impugned conduct constituted an abuse of process. It is therefore difficult to credit the appellants' assertion that the "central error" the judge committed was to "appl[y] the test for an abuse of process in a way that could only have been met if the accused had been permitted to present a complete evidentiary record" (AF, 50).

64. The appellants acknowledge this finding at para. 133 but take no comfort in it. In fact, they call it "an illusion" (AF, 107). They do not accept that the judge took their case "at its highest" despite her express statement at para. 154 of the *Vukelich* Ruling.

> [107] . . . The accused were entitled to an evidentiary hearing to have their entire case considered in the balancing process. They were entitled to an evidentiary hearing that would have revealed the full scope of the offending police conduct and which would have revealed the full impact of that conduct. A balancing exercise conducted on anything less is a balancing exercise that is unfairly weighted against the accused. (underlining in original)

65. The respondent rejects the appellants' explicit contention that the full scope and the full impact of the misconduct were the "issues before the court". The appellants interpret the quoted phrase from *Pires* too expansively.[6] This results in them asking the wrong questions in terms of the *Vukelich* threshold as applied to the circumstances of this case. In essence, as is evident from defence counsels' submissions quoted at paras. **51-54** above and their factum, the appellants consider themselves entitled to an evidentiary hearing in order to "assist" the judge to determine virtually every element of the *Babos* framework such as whether there was an abuse of process (AF, 74), the seriousness of the conduct found to constitute an abuse (AF, 86), and the impact of the conditions of confinement upon them (AF, 94), to mention but a few.

66. The "high point" of this expansive interpretation of *Pires* is found at AF, 123: "[s]tated in the language used … in *Pires*, the question for the court in a *Vukelich* hearing in an abuse of process case is whether there is a 'reasonable likelihood that [an evidentiary] hearing [would] assist [the court] in determining' whether the factual

[6] "The concern over the constructive use of judicial resources is as equally, if not more, applicable today as it was 15 years ago when *Garofoli* was decided. For our justice system to operate, trial judges must have some ability to control the course of proceedings before them. One such mechanism is the power to decline to embark upon an evidentiary hearing at the request of one of the parties when that party is unable to show a reasonable likelihood that the hearing can assist in determining the issues before the court." (*Pires*, para.35)

underpinnings of the application make the case 'the clearest of cases'." Like the "issues" in the preceding paragraph, this is simply incorrect.

67. At AF, 102, the appellants abandon all pretense of serious consideration of what is required to trigger an evidentiary hearing, instead offering this thematically consistent "simple point": "the very nature of the complaint – police misconduct – called out for an evidentiary hearing to ensure the court actually knew the full extent of the conduct". Such a contention subverts the entire screening function which animates the *Vukelich* hearing. Notably, this was not the position of defence counsel in the trial court. To accede to the appellants' contention would mean that an application grounded in abuse of process arising from allegations of police misconduct could never be summarily dismissed. There is no basis in law for such a proposition.

68. For the purposes of the screening function fulfilled by the *Vukelich* process, there was only one issue before the judge – was there a reasonable possibility of a stay being granted if an evidentiary hearing was held? As the appellants themselves put "the fundamental question" at AF, 41, "would an evidentiary hearing 'assist in determining' whether there has been an abuse of process warranting a stay?" This is the very question the judge answered: "this is not one of the 'clearest of cases' where the exceptional remedy of a stay of proceedings would be warranted" (*Vukelich* Ruling, at para. 153).

69. At AF, 31, the appellants condition success in meeting the high threshold required to overcome the deferential standard of review applicable in this appeal on their demonstration that the judge misdirected herself on the threshold test to apply.

70. As the judge directed herself in accordance with the appellants' correct formulation of the "fundamental question", by their own admission, success on this ground of appeal necessarily eludes them.

(b) By conducting a three stage *Babos* analysis (Essential Point #2)

71. As previously noted, at various points in their factum, the appellants submit that that the judge erred by not recognizing that something less than a full consideration of the

Babos analytical framework ought to have sufficed to trigger the need for an evidentiary hearing. There is a significant problem with this position.

72. At those points where the appellants would "draw the line", i.e., say the threshold had been crossed, the required analysis was not yet completed. The *Babos* framework consists of three stages, not one. The third stage, the balancing stage, "must always be considered" in residual category cases, per Moldaver J. at para. 41. The judge would have erred had she not completed her task by considering the balancing stage. Without having done so, she would not have been able to rule on whether the appellants had demonstrated a reasonable prospect of success on their applications.

Conclusion

73. The appellants have failed to meet the "high threshold" necessary to overcome the deferential standard of review this Court must bring to this appeal. On the face of the *Vukelich* Ruling itself, it is abundantly clear that the judge instructed herself to take the respective defence cases outlined on the *Vukelich* hearing at their highest. There is no reason to believe that she did not do so. She appreciated the "full picture" put before her. Defence counsel provided her with sufficient substance to enable her to properly exercise her discretion. What they sought to adduce on an evidentiary hearing simply reinforced the case already presented. It would not have been of further assistance.

74. Given the context of the abuse applications seeking stays, the judge applied the correct legal framework in its entirety. She weighed the various factors to be balanced as she saw fit. This was her task and she carried it out in accordance with the authorities. She asked herself the correct threshold question at the point in the analysis it needed asking.

75. The appellants have failed to demonstrate any basis upon which this Court may interfere with the judge's exercise of discretion. No useful purpose would be served by an evidentiary hearing in the trial court. Such a hearing will never alter the underlying facts. The appellants were found guilty of horrific crimes. Intending to kill one drug rival to make an example of him and to advance their drug trafficking gang's turf, they murdered six men, two of whom were unconnected with the drug trade, execution-style as those men

lay defenceless on the floor. The appellants and their Red Scorpion ("RS") gang associate chose this wanton and pitiless violence over the option of simply abandoning their callous, dangerous and risky plan. The resulting carnage was unspeakable. A stay of proceedings will always be a disproportionate response. This ground of appeal ought to be dismissed.

PART IV – NATURE OF ORDER SOUGHT

76. The respondent submits that this Court ought to dismiss ground 3 of Johnston's amended notice of appeal and ground 18 of Haevischer's amended notice of appeal. In the alternative, should this Court only accede to this joint ground of appeal, an order for a new trial is not required. Instead, the matter should be remitted to the trial court for a full evidentiary hearing of the appellants' respective applications for a stay of proceeding for abuse of process.

B. DISCLOSURE ISSUES

PART I – OVERVIEW AND STATEMENT OF FACTS

<u>Overview</u>

77. This part of the factum responds to the disclosure issues raised by the appellants with respect to post-trial disclosure of: (i) a 2019 statement given by former police officer Derek Brassington (the "Brassington Statement") and (ii) Person Y's entry into the federal Witness Protection Program ("WPP") while serving a custodial sentence.

78. The appellants apply to adduce the Brassington Statement into fresh evidence on appeal. The statement was made over four years after the conclusion of the trial. The appellants rely on a portion of the statement in which Brassington alleges that Cpl. Paul Dadwal, another Surrey Six investigator, told him "shady stuff" happened between Dadwal and Crown witness K.M. He provides no elaboration or details about what the "shady stuff" entailed. He also states his belief that the police played a game of "truth or dare" with K.M., but is not sure how he knows this information.

79. The appellants assert because the Crown failed to disclose this statement before the trial, the *Dixon* framework (*R. v. Dixon*, [1998] 1 S.C.R. 244) ("*Dixon*") governs the admissibility of the statement in this appeal. However the *Dixon* framework, premised on the Crown's failure to disclose relevant information at trial, is not applicable here because the appellants have not established, nor attempted to establish, that the Crown violated the appellants' section 7 *Charter* right to disclosure by failing to disclose the Brassington Statement. Fundamentally, the Brassington Statement did not exist and was not in the Crown's possession at the time of trial.

80. As the *Dixon* framework does not apply, the appellants instead must satisfy the more onerous *R. v. Palmer,* [1980] 1 SCR 759 ("*Palmer*") criteria, which govern the admissibility of evidence on appeal which was discovered post-trial. Because of the appellants' erroneous reliance on the *Dixon* framework, they have not addressed the *Palmer* criteria.

81. When the *Palmer* criteria, or even for that matter the *Dixon* criteria, are applied in the context of the entire case, the Brassington Statement should not be admitted as fresh evidence. The Brassington Statement cannot "reasonably be expected to have affected the result" of the appellants' trial (*Palmer*); nor was there a "reasonable possibility that the failure to disclose affected the outcome at trial or the overall fairness of the trial process"

(*Dixon*). That is because (i) the Brassington Statement is inadmissible in both form and substance; (ii) the allegations relied on by the appellants are unreliable and vague; (iii) the appellants had disclosure at trial showing K.M. repeatedly denied witnessing inappropriate police conduct; (iv) the appellants cross-examined K.M. about late night phone calls with Dadwal, drinking and dancing with police, and sexual text and phone messages between K.M. and police; and (v) the judge accepted the evidence of K.M. for many reasons, including that she was corroborated by independent evidence, rejected the defence argument that K.M. was too close to the police, and ultimately convicted the appellants on the basis of a broad spectrum of circumstantial evidence of which K.M.'s testimony formed a part.

82. The second disclosure issue pertains to Person Y. He became a police agent on the Surrey Six investigation, subsequently pleaded guilty to two counts of first degree murder unrelated to the Surrey Six, and testified against the appellants at their trial. As a justice system cooperator, especially one who testified against members of the notorious Red Scorpions gang, he faced heightened security threats in jail. He was enrolled in the WPP after he testified solely as a means of trying to keep him safe in prison. The appellants apply to adduce this information through a fresh evidence application. They argue, relying on the *Dixon* framework, that the WPP information, disclosed to them after the trial, calls into question Person Y's credibility which they say could have affected the outcome of the trial and the overall fairness of the trial process.

83. More specifically they say this information shows that Person Y misled the court during his cross-examination about his future in the correctional system. They also say that entry into WPP was a benefit, so Person Y had every motive to lie about the Surrey Six in order to be kept safe in prison and treated like the average inmate. They say nondisclosure of this information could have affected the outcome of the trial even though they knew through disclosure before Person Y testified that the RCMP promised to work with the prison authorities to keep him safe and that his cooperation hinged on being placed in a facility that did not require him to be in worse conditions than the average inmate.

84. The appellants made these same arguments before this Court on a disclosure application for Person Y's WPP records. In dismissing the application, the Court (*per* Griffin J.A.) concluded that the WPP evidence was not a key piece of evidence relating to Person Y's credibility, but was at best minor and tangential: *R. v. Johnston*, 2019 BCCA 107 ("*Johnston*") at para. 123. Nothing that Person Y said during his testimony is at odds with his WPP status or could be interpreted as misleading (*Johnston* at para. 115). And enrollment in WPP would not have provided Person Y with an expectation that he would be better off than the average inmate (*Johnston* at para. 117).

85. The *Johnston* decision is determinative in rejecting the appellants' arguments. This Court concluded that there was no reasonable possibility that the records will assist the appellants in a fresh evidence application; and that there is no reasonable possibility that the WPP records will give rise to a viable argument that the information could have affected the outcome of the trial or fairness of the trial (*Johnston* at paras. 123-125). The appellants have not advanced any new arguments which ought to cause this Court to come to a different conclusion.

86. For all these reasons, this Court ought to dismiss Johnston's amended notice of appeal ground # 5, and the fresh evidence application, in which they seek to adduce evidence of the Brassington Statement and the WPP information.

87. The relevant facts will be set out under Part III argument.

PART II – RESPONDENT'S POSITION ON ISSUE ON APPEAL

88. The Brassington Statement cannot reasonably be expected to have affected the result of the appellants' trial (*Palmer*) nor was there a reasonable possibility that the failure to disclose affected the outcome at trial or the overall fairness of the trial process (*Dixon*).

89. There is no reasonable possibility that the WPP records could have affected the outcome of the trial or the overall fairness of the trial process (*Dixon*).

PART III – ARGUMENT

Applicable legal principles – nondisclosure of information of marginal value ought not to result in a new trial

90. The appellants argue that the evidence they propose for admission on their appeals has to do with information that was not disclosed prior to trial and accordingly they are seeking a new trial. To get a new trial, they need to establish two requirements on the balance of probabilities. First, they need to establish that the Crown failed to disclose relevant information at trial further to its *Stinchcombe* duty to disclose: *Dixon*, at para. 31.

91. The *Stinchcombe* duty requires the Crown to disclose "all relevant, non-privileged information in its possession or control, whether inculpatory or exculpatory": *R. v. Gubbins*, 2018 SCC 44, at para. 18 (emphasis added). In explaining that this standard only applies to the prosecuting Crown and not all Crown entities (such as the police generally), the Court in *Gubbins* observed that "the law cannot impose an obligation on the Crown to disclose material that it does not have or cannot obtain": at para. 20, citing *R. v. McNeil*, 2009 SCC 3 at para. 22; *R. v. Atzenberger*, 2018 BCCA 296, at para. 103.

92. Second, there may be instances, like the post-trial disclosure at issue on this appeal, where non-disclosed material meets the *Stinchcombe* standard, but only has a marginal value to the issues at trial. For this reason, the appellants also must establish on a balance of probabilities that the right to make full answer and defence was impaired as a result of the failure to disclose. To meet this burden the appellants must establish either that there is a reasonable possibility the non-disclosure affected the trial result or that it affected the overall fairness of the trial process: *Dixon* at paras. 33-34; *R. v. Illes*, 2008 SCC 57 at para. 24; *R. v. Lee*, 2012 BCCA 284 at para. 19; *R. v. Cathcart*, 2019 SKCA 90 at para. 37.

93. To assess whether there is a reasonable possibility the non-disclosure affected the trial result, an appellate court must decide whether there is a reasonable possibility that the undisclosed evidence could have created a reasonable doubt in the mind of the trier of fact: *Illes*, at para. 25; *R. v. Taillefer*, 2003 SCC 70, at para. 82; *R. v. T.S.*, 2012 ONCA 289 at para. 126.

94. The diligence – or lack of diligence – on the part of the defence in pursuing disclosure is an important consideration in assessing the impact of the undisclosed evidence on the overall trial fairness. So, too, is whether there are realistic opportunities to use the undisclosed information for purposes of investigation or gathering other evidence: *Dixon*, at paras. 36 to 38; *T.S.* at para. 127; *Cathcart* at para. 39.

95. Rather than examining the undisclosed information, item by item, to assess its probative value, an appellate court ought to reconstruct the overall evidentiary tableau that would have been presented to the trier of fact had it not been for the trial Crown's failure to disclose the relevant evidence: *Taillefer*, at para. 82; *Illes*, at para. 26; *T.S.* at para.128.

Issue #1 – The Brassington Statement cannot reasonably be expected to have affected the result of the trial

Factual background – Brassington Statement

96. On December 6, 2009, Supt. John Robin, the head of the investigation into this matter, received information alleging Sgt. Derek Brassington, an investigator, was in a sexual relationship with a potential Crown witness. On February 18, 2010, the Ontario Provincial Police (OPP) were retained to investigate these allegations. Brassington was arrested and charged on June 22, 2011. On November 22, 2011, the Crown asked Brassington to provide information about his dealings with the potential Crown witness. He declined through his lawyer.[7]

97. In the end, four officers were charged with criminal offences resulting from the OPP investigation: Brassington, David Attew, Paul Johnston, and Danny Michaud. Brassington pled guilty to breach of trust and obstruction of justice on January 18, 2019. He provided the Brassington Statement on January 15, 2019 as part of his plea agreement with the Crown. This was the first time Brassington provided a statement to the OPP about the charges against him.

[7] Affidavit of Laura Munday, filed August 6, 2020 (“Munday Affidavit #1”) – Exhibits I and J

Argument

There was no failure to disclose: *Dixon* step one

98. The appellants provide no submission on the first step of the *Dixon* analysis other than erroneously asserting they "anticipate that the Crown will acknowledge that all of the evidence at issue… ought to have been disclosed" (AF, 132) and that "(a)ll of the information included in the proposed fresh evidence pre-existed the completion of the trial proper" (*Fresh Evidence Memorandum*, para. 7).

99. The respondent does not acknowledge that the appellants have satisfied the first step of the *Dixon* analysis. Fundamentally, the appellants have failed to adduce any admissible evidence to satisfy their burden of proof on a balance of probabilities.

100. Fresh evidence admitted by a Court of Appeal must satisfy the ordinary requirements for admissibility: *R. v. O'Brien*, [1978] 1 S.C.R. 591, at pp. 216-217; *R. v. Teneycke*, [1996] B.C.J. No. 1326, at para. 18; *R. v. Alec*, 2016 BCCA 282, at para. 82. These requirements include the rules against the admission of hearsay evidence unless necessity and reliability, or a traditional hearsay exception, can be established: *R. v. Mapara*, 2005 SCC 23, para. 15.

101. In *R. v. Dell*, [2005] O.J. No. 863 (Ont. C.A.), the contents of a sworn, warned statement attached to the affidavit of a legal assistant were found to be inadmissible hearsay: paras. 77, 85. This material is of the same quality as the Affidavit of Karen Ma attaching the sworn Brassington Statement. The appellants have not filed an affidavit from Brassington, Dadwal, or K.M. providing direct evidence about these allegations. Providing evidence in an admissible form is "not a mere formality". It is crucial that the witness' mind be directed to the purpose for which their allegations are being used, and so that they can provide a full, detailed account of the allegations: *Dell*, at para. 86.

102. In *R. v. Assoun*, 2006 NSCA 47, the Court rejected affidavits on a fresh evidence application because the deponents did not have personal knowledge of the third-party suspects referred to therein, stating at para. 307:

> This is an application to adduce evidence. It is not just a preview of topics which would be canvassed, through witnesses other than these deponents, if a new trial occurred. If the tendered evidence would be inadmissible at trial, it is inadmissible in the Court of Appeal. (emphasis added).

103. Karen Ma, the deponent in this Court, does not have any personal knowledge of the facts alleged in the Brassington Statement. Ms. Ma would not be permitted to testify at trial about the contents of the Brassington Statement in order to establish their truth. To the extent the appellants rely on an exception to the rule against hearsay, they have provided no evidence of their attempts to obtain this evidence directly from Brassington in order to establish *necessity*, nor have they provided any evidence, aside from the fact that the statement was given under oath, to establish the *reliability* of the Brassington Statement.

104. As the appellants have failed to present any admissible evidence, their application in relation to the Brassington Statement should be dismissed. Alternatively, even if the Brassington Statement can be considered for its truth, the appellants have not established the Crown breached its *Stinchcombe* obligations.

105. The appellants do not articulate how the Crown breached its *Stinchcombe* disclosure obligations. The appellants have not established that the Brassington Statement, created on January 15, 2019, was in the Crown's possession at the time of trial, which concluded on October 2, 2014. The Crown had no means to compel Brassington to provide information related to his criminal charges prior to trial, given his right to silence in relation to those charges. As noted above at para. **96**, Brassington refused to provide the Crown with any information about his dealings with the potential Crown witness.

106. It appears the appellants rest their assertion of a disclosure breach on the failure by Dadwal to disclose to the Crown that "shady stuff" and a game of "truth or dare" occurred with K.M. The respondent recognizes the *Stinchcombe* duty can be breached when the police fail to provide relevant information (the existence of a personal relationship with a witness) to the Crown: *R. v. Biddle*, 2018 ONCA 520, at paras. 72, 73. However, the appellants have failed to prove this allegation on a balance of probabilities.

107. First, leaving aside the formal admissibility issues addressed above, the allegations themselves are hearsay. Brassington has never met K.M.[8], and he provides no direct evidence of conduct which required *Stinchcombe* disclosure. The only direct evidence Brassington provides is of Dadwal's statements to him that "shady stuff" occurred.

108. With respect to the allegation of "truth or dare", Brassington attributes the allegation to two other individuals (Paul Johnston and the potential Crown witness) before saying he "believes" it was told to him by Dadwal. He provides no direct evidence about a "truth or dare" game.[9]

109. Second, there is a complete lack of detail or elaboration about what "shady stuff" or "truth or dare" mean. These are vague allegations, based on Brassington's own speculation, open to multiple interpretations. From these allegations, the appellants ask this Court to infer that misconduct occurred which required *Stinchcombe* disclosure.

110. However, it is unreasonable to presume that these allegations involve anything that wasn't already disclosed to the appellants at trial (set out below at paras. **124-127**) or would affect K.M.'s credibility and reliability such that they required disclosure.

111. Without direct evidence supporting Brassington's speculative allegations, or further detail about Dadwal's alleged admissions, the appellants have not proved on a balance of probabilities that the Crown (or police) were in possession of information which was not clearly irrelevant and failed to disclose it. This is therefore not a case of Crown non-disclosure; the *Dixon* framework does not apply. The appellants must satisfy the *Palmer* criteria for admission of the Brassington Statement on appeal. Alternatively, the respondent addresses the second step of *Dixon* at paras. **140-150** below.

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[8] Affidavit of Karen Ma, filed March 16, 2020 ("Ma Affidavit"), p.197(15-16) (Exhibit B, p.186)
[9] *Ibid.*, p.197(5-14)

Palmer test applies

112. The Ontario Court of Appeal in *T.S.*, at para. 115, re-stated the *Palmer* criteria, citing *Snyder* and *Truscott*, as follows:

1. The admissibility requirement: is the proffered evidence admissible under the rules of evidence applicable to criminal trials?

2. The cogency requirement: is the evidence sufficiently cogent that it could reasonably be expected to have affected the verdict?

3. The due diligence inquiry: what is the explanation offered for the failure to produce the evidence at trial and how should that explanation affect its admissibility on appeal?

113. The cogency requirement comprises three questions:

i. Is the evidence relevant in that it bears upon a decisive or potentially decisive issue at trial?

ii. Is the evidence credible in that it is reasonably capable of belief?

iii. Is the evidence sufficiently probative that, when taken with the other evidence adduced at trial, it could reasonably be expected to have affected the result? (*T.S.*, at para. 118)

114. This Court recently stated the cogency requirement requires "a qualitative assessment of the evidence proffered, measuring its probative potential in the context of the entirety of the evidence heard at trial" (emphasis added): *R. v. Nyoni*, 2017 BCCA 106, at para. 8, citing *Re Truscott*, 2007 ONCA 575, at para. 100.

115. The respondent concedes the due diligence inquiry does not pose a bar to the reception of the Brassington Statement on appeal. However, the appellants have failed to satisfy the admissibility and cogency requirements of *Palmer*.

Admissibility criterion

116. The appellant addresses the formal admissibility of the Brassington Statement at paras. **100-104** above. Further, as outlined above at paras. **107-108**, the allegations made by Brassington are themselves hearsay. They are also only relevant to a collateral issue – whether Dadwal and K.M. played "truth or dare" or engaged in "shady stuff" – and are irrelevant to any factual issue at trial.

117. Evidence about collateral issues is only admissible in a criminal trial for the limited purpose of testing a witness' credibility and reliability. Counsel can do no more with collateral facts than suggest their import to a witness. If denied, the defence are bound by the denial and cannot call evidence on the collateral issue to contradict the witness: *R. v. Gassyt*, [1998] O.J. No. 3232 (Ont. C.A.), at para. 39.

118. Should a new trial be ordered here, these allegations can only be used in the cross-examination of K.M., where it can be suggested that "shady stuff" and a game of "truth or dare" occurred. However, as outlined below, K.M. has already been cross-examined about inappropriate conduct between her and her police handlers.

119. The appellants have not satisfied the admissibility criterion. The Brassington Statement as attached to the Affidavit of Karen Ma is inadmissible hearsay. Further, the allegations themselves are inadmissible hearsay about collateral facts which have very limited use in the cross-examination of K.M.

The cogency requirement is not met

(i) The evidence bears on a decisive issue at trial

120. The respondent acknowledges that, without considering the credibility and reliability of the allegations therein, the Brassington Statement is relevant to K.M.'s credibility generally, which bore on a potentially decisive issue at trial. The judge convicted the appellants because the circumstantial evidence, of which K.M.'s evidence formed only a part, allowed for no reasonable conclusion other than the guilt of the appellants.

121. The appellants also allege the fresh evidence is relevant to their application for a

stay of proceedings. However, as outlined at para. **109** above, these vague allegations would not make any difference to the trial judge's conclusion that the appellants would be unable to obtain the remedy of a stay of proceedings in this case. They do not bear on a decisive issue on the stay of proceedings application.

(ii) The evidence is not reasonably capable of belief

122. The appellants rely on the fact that the Brassington Statement was given under oath as establishing that it is reasonably capable of belief: *Fresh Evidence Memorandum*, para. 17. The respondent disagrees. Brassington's allegations are vague, not supported by the disclosure, and unreliable.

123. As argued above at para. **109**, the allegations made by Brassington are vague. The appellants do not refer to any material, other than the Brassington Statement, to support the notion of an improper relationship between Dadwal and K.M.

124. The disclosure does not support critical aspects of Brassington's allegations. While transcripts of late-night phone calls and text were disclosed before trial (Brassington asserts Dadwal told him K.M. called him at "all hours of the night"[10]), there is no support for the notion that Dadwal confessed to Supt. Robin that he had misconducted himself or otherwise engaged in "shady stuff" which was not disclosed to Crown. Supt. Robin recorded information about admissions of misconduct in his regular notebook[11]. His notes contain no details of a meeting with Dadwal in which Dadwal admitted to having improper relations with K.M. The notion that Supt. Robin would receive an admission of misconduct by Dadwal and do nothing, but only months later subject Brassington and others to an OPP investigation into allegations of misconduct, does not accord with common sense.

125. The disclosure also shows that Dadwal visited K.M. on February 6-8, 2010[12], after Dadwal completed his principal dealings with K.M. in April, 2009[13]. The fact that Dadwal

[10] Ma Affidavit, p.436(11-13) (Exhibit B, p.425)
[11] Munday Affidavit #1– Exhibits M-P
[12] Munday Affidavit #1– Exhibit S
[13] T. Dec. 12, 2013, p.2663(33-42); Munday Affidavit #1– Exhibit K, p.5(86-95)

visited K.M. in February 2010 is inconsistent with the allegation he demanded to have no further dealings with her.

126. The appellants do not refer to K.M.'s statement to the OPP on April 26, 2010, in the course of its investigation of Brassington. This statement was disclosed to the appellants on December 28, 2011. K.M. denied witnessing inappropriate sexual behaviour from the police, and specifically from Dadwal[14]. K.M. is asked about "some information on a blog that had indicated at one point that … there may have been something that occurred"[15] between K.M. and Dadwal. K.M. denies anything occurred, and says she was upset about the online rumours[16]. K.M. states:

> Well the only guys that I've dealt with are like Ross[17], PJ[18], um [redacted][19] and I talked to Paul [Dadwal] but like there's never any, been anything weird or fucked up so they just knew that I was going to be pissed off that people thought that I was the one that was doing that.[20]

127. K.M. provided another statement to the OPP on June 13, 2011, disclosed to the appellants on April 8, 2013, related primarily to her interactions with Paul Johnston and Danny Michaud. K.M. again denied any inappropriate sexual behaviour by the police officers she dealt with[21].

128. Counsel for Johnston referred to K.M.'s April 26, 2010 statement to the OPP during her cross-examination. He put to her that "a good deal of your interaction with many, if not most of the other officers in this case was anything but professional"[22]. No further use was made of the statement at trial.

129. Finally, the context in which the Brassington Statement is provided is significant.

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[14] Munday Affidavit #1, Exhibit L, pp.2(34-36); 4(113-119); 8(224)-9(233)
[15] *Ibid.*, p.5(120-122)
[16] *Ibid.*, pp.5(140)-7(185)
[17] Insp. Ross Joaquin
[18] Cpl. Paul Johnston
[19] A witness protection officer
[20] Munday Affidavit #1– Exhibit L, p.7(186-190)
[21] Munday Affidavit #1– Exhibit K, pp.20(508)-21(521)
[22] T. Dec. 12,2013, p.2646(20)-2647(28)

When asked to speak about the Surrey Six investigation, Brassington says:

> Appreciate this is 10 years after the fact or 12 years now after the fact. And it is – all of this is -- are things that I have taken extraordinary steps to put out of my mind just to live day-to-day because it would consume me otherwise. And so whether it's mindfulness/meditation, cognitive -- it's called cognitive behavioural therapy but it's mental health stuff, I've gone out of my way to put it out of my mind.[23]

130. When all of the circumstances are considered, the allegations in the Brassington Statement do not satisfy the test of being "reasonably capable of belief". Rather, they are vague and speculative allegations which find no independent support.

(iii) The Brassington Statement cannot be expected to have affected the result

131. The appellants have failed to show that the admission of the Brassington Statement would have made any difference to the judge's assessment of K.M.'s evidence such that it could reasonably be expected to have affected the result. This is because the judge had before her evidence of "shady stuff" occurring between K.M. and the police, and accepted her evidence nonetheless.

132. Counsel for Johnston presented K.M. with a 15 tabbed volume of transcripts of phone calls between her and her police handlers, including Dadwal.[24] When referring to a transcript of a late-night communication with Dadwal on April 13, 2009, counsel suggested K.M. had a "telepathic relationship"[25] with him.[26]

133. K.M. agreed that she attended a celebration involving "a good deal of alcohol being consumed by [K.M.] and various of these police officers and dancing and merriment". She specifically noted that Dadwal was "at the drinking thing".[27] Counsel also referred to phone and text conversations on April 16, 2009 between K.M. and Dadwal, including a text referring to going dancing the night before.[28] This portion of the cross-examination

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[23] Ma Affidavit, p.62(11-20) (Exhibit B, p.51)
[24] T. Dec. 12, 2013, p.2649(13-21)
[25] T. Dec. 12, 2013, p.2652(39-40)
[26] T. Dec. 12, 2013, p.2651(20)-2656(9)
[27] T. Dec. 12, 2013, p.2663(10-32)
[28] T. Dec. 12, 2013, p.2665(26)-2666(20)

concluded with K.M. acknowledging one occasion where she got drunk with police and danced on a table with two police officers [not Dadwal], however she denied[29] that any further partying with police occurred.[30]

134. Counsel also asked K.M. about nicknames some officers had for her, like "Spunkface" and "K-Dawg".[31] Counsel for both Johnston and Haevischer pointed out the sexual banter K.M. had with police.[32] Counsel referred to three pages of text messages containing "extremely sexual jokes between you and it looks like Officer Banghu".[33]

135. K.M.'s cross-examination also touched on the allegations against Brassington, Attew, Michaud, and Paul Johnston. Counsel for the appellant Johnston pointed out K.M.'s text message exchange with Michaud, after the misconduct allegations surfaced, in which she worried that the conduct of Paul Johnston would "fuck the case up".[34] Counsel also asked K.M. about an evening in Toronto when she, Paul Johnston, and Danny Michaud attended a hockey game together. After leaving her police handlers, she became extremely intoxicated, later making multiple phone calls to Paul Johnston, Ross Joaquin, and Dadwal.[35]

136. Based on this cross-examination, the appellants argued at trial that K.M.'s evidence should be viewed with "extreme skepticism as she stands firmly in the corner of the prosecution": *R. v. Haevischer, 2014 BCSC 1863* ("RJ") RJ, 498.[36] The judge disagreed:

> That was not my perception of K.M. I do not disagree that K.M. became reliant on her police handlers following her decision to cooperate and before she was relocated. She suddenly found herself alienated from her former family and friends; the police were her only means of support. However, I disagree that K.M. appeared to favour the Crown's case: RJ, 499.

[29] T. Dec. 12, 2013, p.2667(20)-2668(1)
[30] T. Dec. 12, 2013, p.2666(21)-2669(31)
[31] T. Dec. 12, 2013, p.2644(20)-2645(8); T. Dec. 13, 2013, p.2689(30-43)
[32] T. Dec. 12, 2013, p.2659(10)-2661(18); T. Dec. 13, 2013, p.2690(24-43)
[33] T. Dec. 13, 2013, p.2691(13-36)
[34] T. Dec. 13, 2013, p.2691(37)-2692(25)
[35] T. Dec. 13, 2013, p.2695(4)-2696(5)
[36] Munday Affidavit #1– Exhibit Q

137. K.M.'s relationship with the police was only one aspect of her overall testimony. Critically, as outlined at paras. 152-153 of the respondent's factum #1, the material aspects of K.M.'s evidence were corroborated by independent sources. The judge found the main reason K.M. decided to cooperate was because of pressure put on her by "Jen, someone K.M. described as her surrogate mother and a loved and highly respected person in her life" (RJ, 484) and to avoid going to jail (RJ, 485). The judge found it was apparent that "K.M.'s loyalties remain divided" (RJ, 489) and she "was a reluctant Crown witness who continued to have emotional ties to Mr. Haevischer. She did not appear to favour the Crown's case or display animosity toward the accused" (RJ, 504).

138. When all of the context is considered, the Brassington Statement cannot reasonably be expected to have affected the result in this case. The disclosure provided to the appellants gave them far more information about K.M.'s relationship with the police than what is found in the Brassington Statement. The appellants used that disclosure to bring to light K.M.'s close relationship with the police at trial. The judge was aware of the relationship between K.M. and the police, and accepted her testimony.

139. The Brassington Statement would also make no difference to the outcome of the appellants' application for a stay of proceedings. As addressed above on the abuse of process issue, given what was before the judge on that application, the vague allegations found in the Brassington Statement cannot reasonably be expected to have affected her decision to grant the Crown's *Vukelich* application.

No violation of right to make full answer and defence: *Dixon* step two

140. Should this Court disagree that the *Palmer* test applies to the admission of the Brassington Statement on appeal, the respondent provides the following submission on step two of *Dixon*.

141. The appellants have not established that their right to make full answer and defence was violated. They argue that "anything that remotely touched on the credibility or reliability of [K.M.] could have affected the outcome of the trial": AFJ#2, para. 153. The respondent disagrees – K.M.'s evidence was only one piece of a larger circumstantial case (see paras. 44-54, 96-106 of respondent's factum #3). Even if a piece of information

can be said to be relevant to K.M.'s general credibility, this Court must ultimately determine whether the verdict could be affected by the Brassington Statement. Even when undisclosed evidence is relevant to a witness' credibility, the non-disclosure will not always violate the accused's right to make full answer and defence: *R. v. Kehoe*, [1993] B.C.J. No. 600, at paras. 77-79; *R. v. Smith*, [1998] B.C.J. No. 2616, at para. 3-4.

142. Here, the appellants have failed to show that the Brassington Statement could have affected the verdict. As stated at paras. **107-108, 116-117** above, the Brassington Statement is hearsay relevant only to a collateral issue. Aside from its many reliability issues, the most it can be used for at trial is for counsel to put the vague allegation of "shady stuff" and a "truth or dare" game to K.M. in cross-examination. As described above, the appellants already canvassed many of the non-investigatory interactions between K.M. and police at trial.

143. It is helpful to compare this case to *Biddle*. In *Biddle*, the Ontario Court of Appeal ordered a new trial because the reliability of the verdict was undermined by the existence of a personal relationship between the complainant and a police officer at the time of trial. Unlike the present case, in *Biddle* the relationship was a proven fact, and the complainant's eye-witness identification of the accused was the central feature of the Crown's "extraordinarily weak" case: at paras. 23, 30. The impugned police officer was directly involved in the complainant's flawed in-court identification of the accused, which was relied on by the Crown to secure the conviction: at para. 83.

144. Here, K.M.'s credibility and reliability, while important to the Crown case, was not the basis for convicting the appellants. She did not provide the type of unreliable eye-witness identification evidence at issue in *Biddle*. Rather, K.M. was an accomplice, assisting the appellants before and after the murders, whose testimony was corroborated by independent evidence.

145. Perhaps most importantly, in this case there is simply no proof of anything: the allegations amount to nothing more than unreliable hearsay. When taken in context with the evidence at trial and the judge's reasons for conviction, it cannot be said that these vague, unsupported, and speculative allegations could have affected the verdict.

Defence ability to pursue line of investigation was not affected

146. The second consideration for this court under *Dixon* is whether the failure to disclose the Brassington Statement prevented the appellants from pursuing a reasonably possible avenue of investigation that was closed as a result of the Crown's non-disclosure: *Taillefer* at para. 84.

147. As outlined above, the appellants were provided with ample disclosure with which to investigate any possible relationship between K.M. and Dadwal. The appellants argue that, had they been provided the Brassington Statement prior to trial, the defence "would have, for example, ensured that they had received sufficient information to identify all of the occasions on which K.M. and Dadwal had any sort of interaction" (AF, 159). However, it appears that counsel at trial pursued that line of inquiry.

148. On December 13, 2013, the final day of K.M.'s cross-examination, counsel for Johnston advised the Court that they pursued disclosure of all phone contacts between K.M. and the police[37], and put a letter before K.M. outlining those contacts, which included her communications with Dadwal[38].

149. Counsel's statements show the appellants had identified K.M.'s interactions with police as an issue relevant to her cross-examination and sought "anything that [they] can get" related to that issue. Further, K.M.'s cross-examination shows that the defence were aware that K.M. had a close relationship with police and Dadwal in particular, and cross-examined her using a volume of transcripts of text and phone calls with police. That K.M. was too close to the police was advanced by Johnston as a reason to disbelieve her.[39]

150. The appellants' contention on appeal that they were deprived of the opportunity to pursue this line of inquiry because they were not provided with the Brassington Statement cannot be maintained when the entire record is considered. The unsupported allegation that Dadwal played "truth or dare" with K.M. and that undefined "shady stuff" occurred,

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[37] T. Dec. 13, 2013, p.2683(36-43); p.2684(5-9)
[38] Munday Affidavit #1– Exhibit R
[39] Munday Affidavit #1– Exhibit Q; RJ, 498

does not materially change the information the defence had at trial allowing them to investigate K.M.'s relationship with the police.

Issue #2 – There is no reasonable possibility that the WPP records could have affected the outcome or the overall fairness of the trial

Background - the appellants knew through disclosure that keeping Person Y safe and protected within CSC was a major concern to Person Y and the police

151. In *Johnston*, this Court dismissed a disclosure application made by Johnston and supported by Haevischer for Person Y's WPP records (at para. 125). In doing so, the Court rejected the appellants' argument that Person Y – someone who had experienced periods of abysmal conditions in custody including segregation – misled the court when he described his future in custody as "super-duper protective custody" and "sit[ting] in a hole" (at paras. 106, 115). Seemingly disregarding this Court's decision in *Johnston* – ignoring the decision but for one reference in their factum – the appellants once again make this argument on their appeals. They assert that Person Y misled the court because he would have known, but they did not, that he would be given WPP status after he completed his testimony for the sole purpose of trying to keep him safe in prison.

152. As will be explained, the Court, in rejecting this argument, considered information about Person Y's custodial situation which had been disclosed to the appellants before Person Y testified. This disclosure gives important context to refute the appellants' assertion that their right to make full answer and defence was impaired as a result of the failure to disclose the WPP information until after the trial concluded.

153. By way of background and as detailed in the respondent's factum #1 at para. 89, Person Y entered guilty pleas on April 13, 2010 to two counts of first degree murder unrelated to the Surrey Six murders. He was sentenced to mandatory life imprisonment with no parole eligibility for 25 years. The appellants assert that Person Y would have known that he would be in violation of the so-called "convict code" when he cooperated. In fact, he was a free man when he approached the police and offered to cooperate in the Surrey Six investigation. His guilty pleas were entered two years later. As noted in *Johnston* at para. 111, Person Y's conduct in coming forward to assist the police in 2008

pre-dated his pleading guilty to the murder charges and was prior to any protection or custodial issues.

154. The Court in *Johnston* acknowledged the heightened security concerns for justice system cooperators serving custodial sentences. Protective measures are required to keep the cooperating gangster safe especially for those like Person Y who testify against the interests of gang members. (para. 114)

155. The Court concluded that WPP evidence was at best marginal and tangential to Person Y's credibility in the context of the disclosure the appellants received prior to Person Y's testimony (*Johnston* at para. 123). The contextual pre-trial disclosure was summarized in *Johnston* as follows:

> [96] Throughout the pre-trial disclosure, the Crown submits it disclosed all monetary and non-monetary benefits received by Person Y. These included not only substantial sums paid to Person Y, but also written promises to him by the RCMP to work with the CSC to ensure that he was transferred to a CSC facility capable of providing a safe and secure environment where he would be afforded a similar level of treatment and privileges provided to other inmates. The disclosure also included Person Y's position that his cooperation hinged on placement within the CSC that did not require him to be in worse conditions than the average inmate due to his cooperation.[40] (underlining added)
>
> …
>
> [101] Also part of the context is that the Crown disclosed to the defence before trial that Person Y had been moved around within the CSC from time to time. The Crown also disclosed that Person Y had been moved from the custody of the CSC to RCMP custody at times in advance of trial, during trial preparation and during the trial itself. It could not have been unexpected by the defence that there would be some changes in Person Y's custodial arrangements after testifying, because he would no longer be involved in trial preparation.
>
> [102] Further, the Crown disclosed that Person Y met with witness protection officers, and that some parts of the records regarding witness protection were redacted based on assertions of privilege. The asserted privilege was coded to indicate that the redactions were of information that could not be disclosed

[40] The defence had received disclosure, before Person Y testified, that on October 10, 2013 Person Y was committed to trial preparation and the review process with Crown counsel, but remained adamant that his cooperation hinged on having placement in CSC that did not require him to be in worse conditions than the average inmate due to his cooperation. See Munday Affidavit #1, Exhibit A.

under the *WPP Act*, or because disclosure would create a risk to the safety of a protected Crown witness or protected individual.

156. The Crown also disclosed that very soon after he was transferred to a Correctional Service of Canada ("CSC") institution, Person Y was recognized by other inmates and threatened. Consequently, he entered segregation. Person Y was moved to RCMP custody due to his deteriorating psychological condition while in segregation. Person Y's lawyer advised E-Peseta investigators that Person Y could not be placed in administrative segregation again, and his safety could not be compromised again. Supt Robin, responded by reiterating that the RCMP would assist in finding an institution for Person Y in which he could be treated similarly to other inmates. Person Y's lawyer responded that neither CSC or the RCMP could assure Person Y that there was a place to house him within the correctional system where he would not be at severe risk of injury or death, absent administrative segregation.[41]

157. Through post-trial disclosure, the appellants learned that after he concluded his testimony Person Y obtained WPP status for his safety and protection: *Johnston* at paras. 5, 94. There is additional information that the appellants do not know that is set out in the sealed response to the *amici's* factum at paras. 190-193. This information was not disclosed because it was the Crown's position that the information is not only irrelevant but is protected by the safety of individuals subset of public interest privilege, and disclosure is prohibited pursuant to the *Witness Protection Program Act*, S.C. 1996, c. 15 ["*WPPA"*]. The appellants have now received all the information in the Crown's possession relating to Person Y seeking and being afforded entry into the WPP, redacted for privilege (*Johnston,* at para. 31).

158. In support of their argument, the appellants refer to four other post-trial disclosure documents which they seek to adduce through a fresh evidence application. None of this information in the documents was new. The information was provided to the appellants before Person Y testified.

[41] Munday Affidavit #1, Exhibits B-F

(i) In 2010, four years before he testified, Person Y told correctional officials if he was forcibly transferred to another institution, he would become an uncooperative witness.[42]

159. This comment was made in context of Person Y's then abysmal custodial conditions and deteriorating psychological condition in 2010, all which was disclosed as outlined in para.**156** above. Also disclosed, as stated above, was that as of October 2013, about five months before he testified, he remained adamant that his cooperation hinged on having placement in CSC that did not require him to be in worse conditions than the average inmate due to his cooperation.

(ii) In 2010 Crown counsel Melissa Gillespie believed that if Person Y was placed in segregation it would result in further deterioration of his mental state and ultimately his ability to testify.[43]

160. As already stated, the appellants knew, through pre-trial disclosure, of Person Y's mental state during this period of time. While Ms. Gillespie's opinion was not disclosed, that was not a relevant piece of information.

(iii) A series of emails of Supt. John Robin beginning May 22, 2013 to April 2, 2014 dealt with witness protection issues for Person Y referencing in part discussions with unnamed WPP officers.[44]

161. As already stated, the Crown disclosed prior to the commencement of his testimony that Person Y met with witness protection officers. The significance to these appeals of the post-trial WPP and witness protection disclosure information is discussed below in the argument.

(iv) In correspondence dated September 26, 2013, Supt. Robin noted that Person Y and his counsel indicated that Person Y's cooperation was unlikely to continue if segregation was a protective option.[45]

162. As already stated, the appellants knew prior to Person Y commencing his testimony that his cooperation hinged on having placement in CSC that did not require him to be in worse conditions than other inmates.

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[42] Ma Affidavit, p. 569 - Exhibit D at pg. 68 of 91
[43] Ma Affidavit, p. 503 - Exhibit D at pg. 2 of 91
[44] Ma Affidavit, p. 458 - Exhibit C
[45] Ma Affidavit, p. 474 - Exhibit C at pg.17 of 44

163. The appellants refer to an affidavit of Cpl. Boucher filed in support of a spring order allowing Person Y to be held in the custody of the RCMP until he concluded testifying at the appellants' trial. The appellants received a redacted copy of the affidavit post-trial. The appellants suggest that non-disclosure of the affidavit limited the ability of the appellants to apply to unredact information which might pertain to Person Y's entry into the WPP. This issue is addressed in paras.**183-185** below and in the sealed response to the *amici's* factum at paras. 220-223.

Argument: the WPP evidence is at best of marginal value to Person Y's credibility – the *Johnston* decision is determinative

Person Y did not mislead the court

164. The appellants, relying on the *Dixon* framework, are seeking a new trial based on the Crown's failure to disclose the WPP information prior to Person Y's testimony. The crux of the appellants' argument is that Person Y seemingly misled the court during cross-examination about his future in the correctional system, calling into question his credibility. As already stated, this same argument was made by the appellants in the WPP disclosure application but was rejected: *Johnston* at paras. 106, 115. This Court rejected this argument in the context of finding that there was not a reasonable possibility, as *per Dixon*, that that the WPP information could have affected the outcome or fairness of the trial. (para. 125) The *Johnston* decision ought to be determinative in rejecting the appellants' argument.

165. The *Johnston* decision is determinative even though *Johnston* only dealt with an application for disclosure of those parts of the WPP materials never disclosed because of privilege. The appellants' complaint on this appeal is wider. The complaint is about a failure to disclose the WPP information at trial. Whether disclosed or not, the WPP information, as this Court concluded at para. 123, was at best minor and tangential. The appellants have not put forward anything new which undermines this decision.

166. As will be explained, the defence had plenty of disclosure at their disposal if they cared to challenge Person Y on his assertions about his conditions of confinement even though there is nothing in Person Y's testimony that is at odds with his WPP status or that

could be interpreted as misleading. The appellants rely on the following parts of his testimony:

- In response to a question that his cooperation was motivated in part by profit, Person Y compared his situation as a police agent to other gangsters like the appellants serving time in prison as “apples and oranges” referring to having to live at the very end alone in segregation because he was less than a child molester. (RJ, 477; *Johnston* at para. 26)
- In response to a question that his cooperation was driven by his hatred of Jamie Bacon, Person Y answered “what would revenge mean for me, man? I’m in prison. I’m never leaving solitary confinement or protective – super-duper protective custody”. Later in his testimony he said “I will sit in a hole for the rest of my life”. He said he will be “in ultra-high protection because I’m one of the biggest rats, or agents” and that “I look forward to the rest of my life…in some type of solitary confinement”. (RJ, 479; *Johnston* at para. 27)

167. Person Y’s answers have to be put in context with how he presented himself in court. As the trial judge pointed out, Person Y presented at times as impulsive, hot-tempered and emotional, and his evidence was occasionally disorganized and rambling. (RJ, 478) He used colourful language (*Johnston,* at para. 112).

168. As noted in *Johnston* at para. 113, the thrust of Person Y’s evidence was not a bare assertion that he was going to be in solitary confinement for the rest of his life as a result of cooperating with police. Rather, Person Y’s responses are examples of his colourful language, and the emotional responses referred to by the trial judge. Person Y was trying to make the point that as a justice system cooperator (“one of the biggest rats”) serving a life sentence: his safety would always be at risk; special measures such as segregation or “super-duper protective custody” were required to keep him safe in prison because of his status; and consequently his custodial conditions were harsher than for other gangsters serving time in prison. (RJ, 473; *Johnston* at para. 113)

169. Indeed, the facts establish that Person Y had spent part of his time while in custody in the worst possible conditions. He had been placed in segregation. He isolated himself

from other inmates and lived in virtual segregation while he was serving his sentence in general population. His safety was at risk as a justice system cooperator.[46]

170. Person Y's answers also must be put in context of what the appellants knew through Crown disclosure when Person Y gave this testimony (see paras. **155-156** above). This is information they could have used to challenge Person Y's credibility about his future custodial conditions if they really thought that Person Y misled the court about the conditions of his incarceration, but they chose not to do so. The Court in *Johnston* made this point at para. 118:

> If the defence wished to challenge Person Y's testimony about his fears regarding his future custodial conditions, they had evidence of the following facts about Person Y's safety: he had in fact been kept safe until then; he insisted on and was given assurances that he would be kept safe; and he insisted on not being in worse conditions than other inmates as a condition of testifying and the RCMP promised to work with him to achieve this. The defence had the opportunity to put to Person Y that his fears and expectations were unfounded and that he was not truly concerned about his future conditions of custody.

171. In rejecting the appellants' argument that Person Y misled the court, the Court in *Johnston* considered the broader context, as opposed to parsing some of Person Y's words in his testimony. (para.108) In considering the broader context, the Court pointed to the information about Person Y's custodial situation as set out in the pre-trial disclosure referred in para. **156** above (para. 116), as well as the following factors:

- "The future conditions Person Y faced in custody did not directly relate to the investigation or evidence against the appellants", but only to his credibility. (para. 109)
- "[T]he appellants knew of a number of benefits that Person Y received as a result of cooperating with the police", and that "the RCMP promised to work with the CSC to provide Person Y with the conditions of custody he demanded: to be kept safe and be afforded similar treatment and privileges as other inmates." (para. 110)
- "Person Y's conduct in coming forward to assist the police pre-dated his pleading guilty to other charges and was prior to any protection or custodial issues." (para. 111)

[46] Munday Affidavit #1, Exhibit G

- As to Person Y referring to sitting "in a hole for the rest of my life", Person Y was just using colourful language, and thus the Court rejected the argument that he had committed perjury or attempted to mislead the court. (para. 112)

- "The thrust of Person Y's evidence…was not a bare assertion that he was going to be in solitary confinement for the rest of his life as a result of cooperating with police. Rather, read as a whole, his evidence was that he faced a threat as a prisoner because of the fact that he was cooperating with police and would be labelled a "rat" by other inmates. His evidence suggested he felt it was against his interests to cooperate with police, as this meant he would suffer disadvantage due to his need for protection in custody, especially compared with other gangsters in prison who would be welcomed with "open arms"." (para.113)

- [I]nmates who cooperate as witnesses for the Crown, especially as against the interests of gang members, face heightened security threats while in jail. While measures may be taken to protect the identity and security of such inmates…these measures are not iron-clad and there is no guarantee that another inmate will not recognize a protected inmate or that disclosure of the true identity or location of a cooperating witness will not leak out, or that segregation will not be necessary or become necessary to protect a cooperating inmate. Further, it is clear that protective measures will need to involve keeping the cooperating gangster safe and apart from other members of the same gang." (para. 114)

172. After considering this context, this Court indicated why it would be difficult to impeach Person Y's testimony on how he saw his future in custody ("super-duper protective custody", "sit in a hole") stating at para. 115:

> … Person Y was reflecting only a belief or expectation about his future prison conditions. It would be very hard to impeach such an expectation, especially where, as here, it had to be in part based on his actual experience as to what his life as a prisoner had turned out to be like as a result of cooperating with the police, despite the assurances he had received. By the time he testified, he had experienced four years of custody.

173. The Court concluded at para. 123 that the WPP information was not a key piece of evidence relating to Person Y's credibility, and was at best minor and tangential in the context of what was disclosed. Therefore, there was not a reasonable possibility, as *per*

Dixon, that that the WPP information could have affected the outcome or fairness of the trial. (*Johnston,* at para. 125)

Enrollment in the WPP as a motive could not possibly have affected Person Y's credibility

174. The appellants also argue that entry into the WPP represented a clear benefit to Person Y. So they assert that Person Y had every motive – presumably to lie about what he knew of the Surrey Six murders, which included implicating himself and Johnston in the conspiracy but not Haevischer – in order to ensure he would be kept safe in prison and treated like the average inmate.

175. This alleged motive is premised on the promises made to keep Person Y safe and be treated like the average inmate. But the appellants knew before Person Y testified that the authorities promised that Person Y would be placed in a facility where he would be kept safe and that Person Y's cooperation hinged on having placement in CSC that did not require him to be in worse conditions than other inmates. Enrollment in WPP was the outcome of these promises. The information added little value to what the appellants already had to impeach Person Y's credibility on motive if they had chosen to go that route.

176. As stated, the Court in *Johnston* (at para. 118) pointed out that the defence had information which they could have used to impeach Person Y on the issue of his future custodial conditions. But the defence must have made a tactical decision not to pursue this as a theory for motive. The defence made this decision likely because they did not want to detract from their strongly-argued theory that Person Y was motivated by revenge against Jamie Bacon as well as by the monetary benefits he received. (RJ, 466, 479)

177. They also may have realized the futility of advancing such a theory. After all, and unlike the alleged revenge and monetary motives, if true, Person Y's concerns in 2013/2014 about being kept safe in prison and treated like the average inmate were not on his radar in 2008 when he approached the police, became a cooperator and police agent, and related what he knew about the Surrey Six murders. This point was acknowledged in *Johnston,* at para. 111. See above at para. **171**.

178. In sum, this information was at best minor and tangential to Johnston for impeaching Person Y's credibility, and even less so for Haevischer. Haevischer's 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)

179. Furthermore, enrollment in WPP would not have been much of a motivating factor, at least not one that could have affected the outcome of the trial, as it did not provide Person Y with an expectation that he would be better off than the average inmate or even be treated equivalent to the average inmate. In *Johnston*, this Court considered it possible that Person Y viewed enrollment in the WPP as a benefit. The Court said that there is at least a reasonable possibility that disclosure of these records will assist the appellants in an argument on appeal that the earlier failure to disclose this information was in breach of the Crown duty to disclose all benefits and inducements offered to Person Y (at para. 104).[47]

180. However, the issue that determines this appeal is whether non-disclosure merits a new trial under the *Dixon* analysis. Significant to this issue is this Court's conclusion at para. 125 that there is "no reasonable possibility that the [WPP] records will give rise to a viable argument that the information could have affected the outcome of the trial or fairness of the trial."

181. In so finding, this Court rejected the appellants' arguments summarized in *Johnston*, at para. 106 about how the enrollment in the WPP as a benefit could possibly have had affected Person Y's credibility about his motives for testifying. Person Y possibly viewed enrollment in the WPP as a benefit. But enrollment would not have provided him with an expectation that he would be better off than the average inmate or even be treated as equivalent to the average inmate:

> I do not see any reasonable basis to suggest that a promise that Person Y would be enrolled in the WPP**, as a means of trying to keep him safe in prison,**

[47] Based on this decision, the respondent is not taking issue with the appellants' position, as *per* the first step of the *Dixon* inquiry, that the Crown breached its disclosure obligation, subject to the privilege claims, by failing to disclose the steps taken and decisions made in respect of Person Y's future custodial arrangements.

> would have provided him with an expectation that he would be better off in custody than he would have been if he had not been a cooperating witness, or even that his experience in custody would be equivalent to other non-cooperating gangsters. He had not yet experienced whether being enrolled in the WPP while in custody within the CSC would in fact work to keep him safe. This protective measure was something other inmates who were not police cooperators did not need. (*Johnston,* at para. 117) (emphasis added)

<u>The appellants have not established a reasonable possibility that the non-disclosure could have affected the overall fairness of the trial</u>

182. Nor have the appellants met their burden under the *Dixon* framework that there is a reasonable possibility that this marginal evidence could have affected the overall fairness of the trial process. First, in the context of impeaching Person Y's credibility, the substantial pre-trial disclosure the appellants received on Person Y's conditions of incarceration and the promises made and the measures taken to keep him safe are significant factors militating against ordering a new trial for trial fairness.

183. Second, the appellants suggest that non-disclosure of the WPP information limited their ability to apply to unredact information which might pertain to Person Y's entry into the WPP. But they could have sought further disclosure of Person Y's conditions of confinement if they thought such information was potentially relevant to them. They knew about the promises made by the police to keep Person Y safe and his refusal to cooperate if his demands about his custodial conditions were not met. As pointed out in *Johnston,* at para. 101, the appellants could have expected that there would be some changes in Person Y's custodial arrangements after testifying.

184. Similarly, the appellants argue the Crown's failure to disclose the Boucher Affidavit <u>prevented</u> them from seeking any disclosure about the conditions in which Person Y was held in RCMP custody leading up to and during his testimony at trial. However, the Boucher Affidavit was not the means by which they learned Person Y was in RCMP custody during the trial. Rather, at trial the appellants and their counsel knew that Person Y was in RCMP custody, knew that he was removed from CSC custody further to "spring"

orders in order to prepare for trial[48] and knew the Crown viewed these movements of Person Y as both irrelevant and privileged.[49]

185. If the appellants believed that Person Y's conditions of confinement in RCMP custody or his post testimony conditions of confinement were relevant, they could have sought this disclosure or asked Person Y about those conditions on the stand. They did neither.

186. Third, an important consideration in the *Dixon* inquiry for assessing the impact of the undisclosed evidence on the overall fairness of the trial is whether there are realistic opportunities to use this undisclosed information for purposes of investigation or gathering other evidence (see para. **94** above). But even if the appellants successfully challenged the claims of privilege and the redactions were removed, it would not reveal information that could be used for purposes of investigation or gathering other evidence. See the sealed response to *amici's* factum at para. 224.

187. Fourth, the appellants were not diligent in pursuing the WPP disclosure before Person Y testified, another important consideration in assessing the impact on the overall fairness of the trial. Given what the appellants knew, they could have expected that the police did not abandon their agreement to assist in keeping Person Y safe. They knew that: Person Y had met with witness protection officers before he testified; he remained adamant that his cooperation hinged on having placement in CSC that did not require him to be in worse conditions than the average inmate due to his cooperation; he was given assurances that he would be kept safe; and the RCMP promised to work with him to achieve this. And, as stated, the appellants could have expected that there would be some changes in Person Y's custodial arrangements after testifying (*Johnston* at para. 101). They also knew of the Crown's position that information relating to witness safety and incarceration details, including strategies employed by the police to protect witnesses and the movement of incarcerated witnesses, were viewed as irrelevant and privileged (*Johnston,* at paras. 98-99).

[48] T. March 25, 2014, p. 3776(31)-3777(21)
[49] Munday Affidavit #1, Exhibit H

188. Based on the Crown's position and the information they had, the appellants could have pursued finding out more information – and could have made a disclosure application if the Crown refused to disclose the information – if they thought that Person Y's concern about his future custodial conditions had more than just a minor and tangential value to them for impeaching him on his motive for testifying. For example, they could have asked whether the police and CSC acted upon Person Y's ultimatum linking his cooperation to a suitable placement in CSC.

189. As stated, the defence must have made a tactical decision not to pursue Person Y's concern about his future custodial conditions as a theory for motive. They likewise must have made a tactical decision not to seek further disclosure about this information. This information was just of minor and tangential relevance to the defence in contrast to their strongly-argued theory that Person Y was motivated by revenge and money. The minor and tangential value of this evidence to Haevischer is underscored by his position at trial that Person Y's shortcomings related more to his reliability than credibility and that the judge ought not to reject his evidence in total. See para. **178** above.

190. As defence counsel knew or ought to have known of a disclosure failure or deficiency on the basis of other disclosures, yet remained passive as a result of a tactical decision or lack of due diligence, this Court ought not to accede to their submission that late disclosure of the WPP information affected the overall fairness of the trial in the sense of preventing them from challenging Person Y's credibility on his custodial conditions: *Dixon*, at para. 38; *R. v. M.G.T.*, 2017 ONCA 736 at para. 125; *R. v. Young*, 2007 ONCA 714 at paras. 15-18.

Conclusion

191. The appellants seek a new trial relying on the *Dixon* framework. But, as pointed out in *Johnston* at para. 119, the WPP information at issue here "is less significant and even more peripheral than the evidence considered insignificant on appeal in *Dixon*…" and at para. 123 is at "best minor and tangential" in the context of what was disclosed.

192. The marginal value of this evidence has to be put in context of the judge's detailed analysis of Person Y's credibility and reliability, including her application of the *Vetrovec*

framework, as set out in the respondent's factum # 1 at paras. 82-90; and the evidence and many factors she considered including that his evidence was corroborated in many respects by independent evidence.

193. In that context and upon considering the judge's reasons as a whole, the appellants have not met their *Dixon* burden by establishing that their right to make full answer and defence was impaired as a result of the failure to disclose. More specifically, they have not established there is a reasonable possibility this marginal information could have affected the judge's acceptance of Person Y's evidence on many of its essential points (RJ, 481).

PART IV – NATURE OF ORDER SOUGHT

194. The respondent submits that this Court ought to dismiss ground 5 of Johnston's amended notice of appeal and the fresh evidence application, in which the appellants seek to adduce evidence of the Brassington Statement and the WPP information.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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

July 31, 2020
Vancouver, B.C

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