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2006 CarswellOnt 4463, 40 C.R. (6th) 290, 143 C.R.R. (2d) 1

R. v. Ghany

Her Majesty the Queen (Respondent) and Ahmad Mustafa Ghany, Zacharia Amara, Asad Ansari and Qayyum Abdul Jamal (Applicants)

Ontario Superior Court of Justice

Durno J.

Heard: July 10, 11, 2006
Judgment: July 20, 2006
Docket: 1035/06

Counsel: James W. Leising, Geoffrey Roy for Respondent / Crown

Rocco Galati for Applicant, Ahmad Mustafa Ghany

David Kolinsky for Applicant, Zacharia Amara

Anser Farooq for Applicants, Asad Ansari, Qayyum Abdul Jamal

Subject: Criminal; Constitutional

Criminal law --- Pre-trial procedure — Release by judge of superior court — General

Accused and others were arrested and charged with terrorism offences contrary to s. 83.18(1) of Criminal Code — Accused applied for orders that their bail hearings be held before judge of Superior Court of Justice, pursuant to ss. 522 or 515 of Criminal Code, on basis that offences with which they were charged were, or were akin to, s. 469 offences — Applications dismissed — Section 469 provides that every court of criminal jurisdiction has jurisdiction to try indictable offence, except for certain enumerated offences — Persons charged with "s. 469" offences must have their bail hearings and trial before judges of superior court of criminal jurisdiction — There was no basis upon which it could be concluded that offences in s. 83.01 were or should be treated as s. 469 offences — Section 83.01 offences were not within "core jurisdiction" of superior court at time of confederation — Parliament's decision to place s. 83.01 offences outside of s. 469 was intra vires s. 96 of Constitution Act, 1867 — Non-inclusion did not deprive accused of their Charter rights at bail stage by depriving them of ability to obtain declaratory relief, remedial relief under s. 24(1) of Charter and 52 of Constitution Act, 1982, or any other Charter relief — Parliament considered issue of bail for s. 83.01 offences by making them "reverse onus"

offences — Parliament chose to place these offences with vast majority of criminal cases with bail hearings conducted in provincial court, with reviews without leave to superior court.

Criminal law --- General principles — Jurisdiction — Jurisdiction of court — Generally — Superior court

Accused and others were arrested and charged with terrorism offences contrary to s. 83.18(1) of Criminal Code — Accused applied for orders that their bail hearings be held before judge of Superior Court of Justice, pursuant to ss. 522 or 515 of Criminal Code, on basis that offences with which they were charged were, or were akin to, s. 469 offences — Applications dismissed — Section 469 provides that every court of criminal jurisdiction has jurisdiction to try indictable offence, except for certain enumerated offences — Persons charged with "s. 469" offences must have their bail hearings and trial before judges of superior court of criminal jurisdiction — There was no basis upon which it could be concluded that offences in s. 83.01 were or should be treated as s. 469 offences — Section 83.01 offences were not within "core jurisdiction" of superior court at time of confederation — Parliament's decision to place s. 83.01 offences outside of s. 469 was intra vires s. 96 of Constitution Act, 1867 — Non-inclusion did not deprive accused of their Charter rights at bail stage by depriving them of ability to obtain declaratory relief, remedial relief under s. 24(1) of Charter and 52 of Constitution Act, 1982, or any other Charter relief — Parliament considered issue of bail for s. 83.01 offences by making them "reverse onus" offences — Parliament chose to place these offences with vast majority of criminal cases with bail hearings conducted in provincial court, with reviews without leave to superior court.

Criminal law --- Offences — Terrorism — General

Accused and others were arrested and charged with terrorism offences contrary to s. 83.18(1) of Criminal Code — Accused applied for orders that their bail hearings be held before judge of Superior Court of Justice, pursuant to ss. 522 or 515 of Criminal Code, on basis that offences with which they were charged were, or were akin to, s. 469 offences — Applications dismissed — Persons charged with s. 469 offences must have their bail hearings and trial before judges of superior court of criminal jurisdiction, judges appointed by federal government pursuant to s. 96 of Constitution Act, 1867 — As none of offences with which accused were charged existed in 1867, it was difficult to see that they were within "core jurisdiction" of superior court at time of confederation — Terrorism offences are not same as or akin to s. 469 offences — There is no apparent unifying theme to s. 469 offences — Not all offences in Pt. II of Code are in s. 469, and some offences in s. 469 are not included in Pt. II — Fact that offence, when committed under certain circumstances, becomes another criminal offence does not equate with s. 469 offence — There was no basis upon which it could be concluded that offences in s. 83.01 were or should be treated as s. 469 offences — Section 83.01 offences were not within "core jurisdiction" of superior court at time of confederation — Parliament's decision to place s. 83.01 offences outside of s. 469 was intra vires s. 96 of Constitution Act, 1867.

Criminal law --- Constitutional authority — Federal criminal law powers — Criminal power

Accused and others were arrested and charged with terrorism offences contrary to s. 83.18(1) of Criminal Code — Accused applied for orders that their bail hearings be held before judge of Superior Court of Justice, pursuant to ss. 522 or 515 of Criminal Code, on basis that offences with which they were charged were, or were akin to, s. 469 offences — Applications dismissed — Persons charged with s. 469 offences must have their bail hearings and trial before judges of superior court of criminal jurisdiction, judges appointed by federal government pursuant to s. 96 of Constitution Act, 1867 — As none of offences with which accused were charged existed in 1867, it was difficult to see that they were within "core jurisdiction" of superior court at time of confederation — Ter-

rorism offences are not same as or akin to s. 469 offences — There is no apparent unifying theme to s. 469 offences — Not all offences in Pt. II of Code are in s. 469, and some offences in s. 469 are not included in Pt. II — Fact that offence, when committed under certain circumstances, becomes another criminal offence does not equate with s. 469 offence — There was no basis upon which it could be concluded that offences in s. 83.01 were or should be treated as s. 469 offences — Section 83.01 offences were not within "core jurisdiction" of superior court at time of confederation — Parliament's decision to place s. 83.01 offences outside of s. 469 was intra vires s. 96 of Constitution Act, 1867.

Criminal law --- Charter of Rights and Freedoms — Presumption of innocence — General

Accused and others were arrested and charged with terrorism offences contrary to s. 83.18(1) of Criminal Code — Accused applied for orders that their bail hearings be held before judge of Superior Court of Justice on basis that non-inclusion of s. 83.01 offences in s. 469 deprived them of their s. 7 rights to presumption of innocence at bail stage by depriving them of ability to obtain declaratory or remedial relief under s. 24(1) of Charter and 52 of Constitution Act, 1982, as well as other Charter relief — Applications dismissed — Non-inclusion of s. 83.01 offences in s. 469 of Code did not constitute constitutional breach by way of legislative omission — Parliament considered issue of bail in regard to s. 83.01 offences by making them "reverse onus" offences — Charter relief cannot be granted at bail hearing in absence of separate Charter application — Accused had statutory procedure available under s. 515 of Code to determine their pre-trial status — In determining whether there should be release order, judge or justice is not precluded from considering Charter implications as they relate to grounds for detention — Superior court judge should generally decline jurisdiction to hear Charter applications before trial in favour of trial judge, who will have full evidentiary record — Bail hearing is meant to be expeditious summary proceeding, and is not location for full Charter application seeking relief under s. 24(1) — There was nothing to indicate that accuseds' Charter rights were breached or jeopardized as result of prosecution and police "manufacturing" tertiary grounds for detention and leaks to media — Argument in support of declaration estopping Crown and police from making public statements was inconsistent with law applicable at bail hearings — Application for habeas corpus could only be heard by superior court judge, and it could not be said that accused were unlawfully detained — Grounds did not support exercise of any discretion to order hearing before superior court judge.

Criminal law --- Charter of Rights and Freedoms — Unreasonable denial of bail

Accused and others were arrested and charged with terrorism offences contrary to s. 83.18(1) of Criminal Code — Accused applied for orders that their bail hearings be held before judge of Superior Court of Justice on basis that non-inclusion of s. 83.01 offences in s. 469 deprived them of their s. 7 rights to presumption of innocence at bail stage by depriving them of ability to obtain declaratory or remedial relief under s. 24(1) of Charter and 52 of Constitution Act, 1982, as well as other Charter relief — Applications dismissed — Non-inclusion of s. 83.01 offences in s. 469 of Code did not constitute constitutional breach by way of legislative omission — Parliament considered issue of bail in regard to s. 83.01 offences by making them "reverse onus" offences — Charter relief cannot be granted at bail hearing in absence of separate Charter application — Accused had statutory procedure available under s. 515 of Code to determine their pre-trial status — In determining whether there should be release order, judge or justice is not precluded from considering Charter implications as they relate to grounds for detention — Superior court judge should generally decline jurisdiction to hear Charter applications before trial in favour of trial judge, who will have full evidentiary record — Bail hearing is meant to be expeditious summary proceeding, and is not location for full Charter application seeking relief under s. 24(1) — There was nothing to indicate that accuseds' Charter rights were breached or jeopardized as result of prosecution and police

"manufacturing" tertiary grounds for detention and leaks to media — Argument in support of declaration estopping Crown and police from making public statements was inconsistent with law applicable at bail hearings — Application for habeas corpus could only be heard by superior court judge, and it could not be said that accused were unlawfully detained — Grounds did not support exercise of any discretion to order hearing before superior court judge.

Cases considered by *Durno J.*:

Ardoch Algonquin First Nation & Allies v. Ontario (2000), 2000 SCC 37, 2000 CarswellOnt 2460, 2000 CarswellOnt 2461, *(*sub nom. *Lovelace v. Ontario)* 48 O.R. (3d) 735 (headnote only), *(*sub nom. *Lovelace v. Ontario)* 188 D.L.R. (4th) 193, 255 N.R. 1, *(*sub nom. *Lovelace v. Ontario)* 75 C.R.R. (2d) 189, *(*sub nom. *Lovelace v. Ontario)* [2000] 1 S.C.R. 950, 134 O.A.C. 201, *(*sub nom. *Lovelace v. Ontario)* [2000] 4 C.N.L.R. 145 (S.C.C.) — considered

Canada (Minister of Indian Affairs & Northern Development) v. Ranville (1982), [1982] 2 S.C.R. 518, 139 D.L.R. (3d) 1, 44 N.R. 616, [1983] 1 C.N.L.R. 12, [1983] R.D.J. 16, 1982 CarswellNat 486, 1982 CarswellNat 486F (S.C.C.) — considered

France v. Ouzchar (November 30, 2001), Nordheimer J. (Ont. S.C.J.) — considered

MacMillan Bloedel Ltd. v. Simpson (1995), [1995] 4 S.C.R. 725, [1996] 2 W.W.R. 1, 14 B.C.L.R. (3d) 122, 44 C.R. (4th) 277, 130 D.L.R. (4th) 385, 103 C.C.C. (3d) 225, 191 N.R. 260, 33 C.R.R. (2d) 123, 68 B.C.A.C. 161, 112 W.A.C. 161, 1995 CarswellBC 974, 1995 CarswellBC 1153 (S.C.C.) — considered

R. v. Chase (1987), 59 C.R. (3d) 193, [1987] 2 S.C.R. 293, 45 D.L.R. (4th) 98, 80 N.R. 247, 82 N.B.R. (2d) 229, 37 C.C.C. (3d) 97, 208 A.P.R. 229, 1987 CarswellNB 25, 1987 CarswellNB 315 (S.C.C.) — considered

R. v. Girimonte (1997), 1997 CarswellOnt 4855, 121 C.C.C. (3d) 33, 12 C.R. (5th) 332, 48 C.R.R. (2d) 235, 105 O.A.C. 337, 37 O.R. (3d) 617 (Ont. C.A.) — referred to

R. v. Hall (2002), [2002] 3 S.C.R. 309, 2002 SCC 64, 2002 CarswellOnt 3259, 2002 CarswellOnt 3260, 4 C.R. (6th) 197, 217 D.L.R. (4th) 536, 167 C.C.C. (3d) 449, 293 N.R. 239, 165 O.A.C. 319, 97 C.R.R. (2d) 189 (S.C.C.) — considered

R. v. John (2001), 2001 CarswellOnt 2948 (Ont. S.C.J.) — considered

R. v. LaFramboise (2005), 203 C.C.C. (3d) 492, 2005 CarswellOnt 8335 (Ont. C.A. [In Chambers]) — referred to

R. v. Mills (1986), *(*sub nom. *Mills v. R.)* 29 D.L.R. (4th) 161, *(*sub nom. *Mills v. R.)* 67 N.R. 241, 16 O.A.C. 81, 52 C.R. (3d) 1, *(*sub nom. *Mills v. R.)* 21 C.R.R. 76, *(*sub nom. *Mills v. R.)* 58 O.R. (2d) 544 (note), *(*sub nom. *Mills v. R.)* [1986] 1 S.C.R. 863, *(*sub nom. *Mills v. R.)* 26 C.C.C. (3d) 481, 1986 CarswellOnt 1716, 1986 CarswellOnt 116 (S.C.C.) — considered

R. c. Pearson (1992), 17 C.R. (4th) 1, [1992] 3 S.C.R. 665, 77 C.C.C. (3d) 124, 12 C.R.R. (2d) 1, 52 Q.A.C. 1, 144 N.R. 243, 1992 CarswellQue 17, 1992 CarswellQue 120 (S.C.C.) — considered

R. v. Phillion (July 21, 2003), Watt J. (Ont. S.C.J.) — considered

R. v. Trimarchi (1987), 49 D.L.R. (4th) 382, 24 O.A.C. 379, 40 C.C.C. (3d) 433, 62 C.R. (3d) 204, 63 O.R. (2d) 515, 1987 CarswellOnt 126 (Ont. C.A.) — considered

Reference re Residential Tenancies Act (Ontario) (1981), 123 D.L.R. (3d) 554, 37 N.R. 158, [1981] 1 S.C.R. 714, 1981 CarswellOnt 623, 1981 CarswellOnt 623F (S.C.C.) — followed

Reference re Young Offenders Act (Canada) (1991), *(*sub nom. *Reference Re Young Offenders Act & Youth Court Judges)* 121 N.R. 81, *(*sub nom. *Reference re Young Offenders Act, s. 2 (P.E.I.))* 77 D.L.R. (4th) 492, 89 Nfld. & P.E.I.R. 91, 278 A.P.R. 91, *(*sub nom. *Reference re Young Offenders Act, s. 2 (P.E.I.))* 62 C.C.C. (3d) 385, *(*sub nom. *Reference re Young Offenders Act (P.E.I.))* [1991] 1 S.C.R. 252, 1990 CarswellPEI 88, 1990 CarswellPEI 88F (S.C.C.) — considered

Vriend v. Alberta (1998), 1998 CarswellAlta 210, 1998 CarswellAlta 211, 156 D.L.R. (4th) 385, 50 C.R.R. (2d) 1, 224 N.R. 1, 212 A.R. 237, 168 W.A.C. 237, 31 C.H.R.R. D/1, [1998] 1 S.C.R. 493, 98 C.L.L.C. 230-021, 67 Alta. L.R. (3d) 1, [1999] 5 W.W.R. 451, 4 B.H.R.C. 140 (S.C.C.) — followed

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 1 — referred to

s. 7 — considered

s. 11(e) — considered

s. 15 — considered

s. 15(1) — referred to

s. 24(1) — considered

s. 24(2) — referred to

Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5

s. 96 — considered

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, reprinted R.S.C. 1985, App. II, No. 44

Preamble — referred to

s. 52 — considered

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 36 — considered

Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24

Generally — referred to

ss. 4-7 — referred to

Criminal Code, 1892, S.C. 1892, c. 29

Generally — referred to

Criminal Code, R.S.C. 1985, c. C-46

Generally — referred to

Pt. II — referred to

Pt. II.1 [en. 2001, c. 41, s. 4] — referred to

Pt. XXI.1 [en. 2002, c. 13, s. 71] — referred to

s. 47 — referred to

s. 49 — referred to

s. 51 — referred to

s. 52 — referred to

s. 53 — referred to

s. 57 — referred to

s. 61 — referred to

ss. 63-66 — referred to

ss. 72-73 — referred to

s. 74 — referred to

s. 75 — referred to

s. 76 — referred to

s. 77 — referred to

s. 78 — referred to

s. 79 — referred to

s. 80 — referred to

s. 81 — referred to

s. 82 — referred to

s. 83.01 [en. 2001, c. 41, s. 4] — considered

s. 83.01 [en. 2001, c. 41, s. 4] "entity" — considered

s. 83.01 [en. 2001, c. 41, s. 4] "terrorist activity" — considered

s. 83.01 [en. 2001, c. 41, s. 4] "terrorist group" — considered

s. 83.05(1) [en. 2001, c. 41, s. 4] — considered

s. 83.18(1) [en. 2001, c. 41, s. 4] — considered

s. 83.2 [en. 2001, c. 41, s. 4] — referred to

s. 103 — considered

s. 235 — referred to

s. 240 — referred to

s. 460 — referred to

s. 463 — referred to

s. 463(a) — referred to

s. 463(b) — referred to

s. 465 — referred to

s. 467.12 [en. 2001, c. 32, s. 27] — referred to

s. 469 — considered

s. 515 — considered

s. 515(6)(a)(iii) — referred to

s. 515(10) — referred to

s. 515(11) — referred to

s. 517 — referred to

s. 518 — referred to

s. 518(1) — considered

s. 518(1)(d) — referred to

s. 519 — referred to

s. 520 — referred to

s. 520(1) — referred to

s. 520(2) — referred to

s. 520(8) — referred to

s. 522 — referred to

s. 522(2) — referred to

s. 680 — referred to

s. 680(2) — referred to

s. 696.2(3) [en. 2002, c. 13, s. 71] — referred to

Individual's Rights Protection Act, R.S.A. 1980, c. I-2

Generally — referred to

Offences against the Person, Act respecting, S.C. 1869, c. 20

Generally — referred to

Young Offenders Act, R.S.C. 1985, c. Y-1

Generally — referred to

Youth Criminal Justice Act, S.C. 2002, c. 1

Generally — referred to

Rules considered:

Ontario Court of Justice Criminal Proceedings Rules, SI/92-99

R. 20.04 — referred to

R. 20.05 — referred to

APPLICATIONS by accused charged with terrorism offences for orders that their bail hearings be held before

judge of Superior Court of Justice.

***Durno J.*:**

1 The applicants and nine other men were arrested and charged with offences under Part II.1 of the *Criminal Code*, Terrorism, on June 2 and 3, 2006.[FN1] This is the second prosecution under the legislation, which has been in force since January 17, 2002. Five "young persons" arrested as a result of the same police investigation are charged separately under the *Youth Criminal Justice Act*. The bail hearings for the applicants are yet to be held in the Ontario Court of Justice.[FN2]

2 They apply for orders that their bail hearings be held before a judge of the Superior Court of Justice, pursuant to s. 522 or 515 of the *Criminal Code*, contending that the offences with which they are charged are s. 469 offences, or akin to s. 469 offences, which are within the exclusive jurisdiction of the Superior Court of Justice. In the alternative, they submit that the bail hearing in any event ought to be heard in the Superior Court, because at their bail hearings they seek relief by way of *habeas corpus*, declaratory relief based on breaches of ss. 7, 11(e) and 15 of the *Charter*, and relief pursuant to s. 24(1) of the *Charter* and s. 52 of the *Constitution Act*.

3 The applicants Zacharia, Ansari and Amara submit in the further alternative, that there should be an order that a judge of the Superior Court of Justice preside at the bail hearing as an *ex offico* justice of the peace.

4 For the following reasons the applications are dismissed.

Are s. 83.01 offences, s. 469 offences?

5 The applicants submit that s. 83.01 offences are akin, of the same class and indistinguishable from offences included in s. 469 of the *Criminal Code*, and therefore within the exclusive jurisdiction of the Superior Court of Justice. They argue that on the allegations as disclosed to date, "some of the allegations cited constitute, or may constitute, treason and/or intimidating Parliament or attempts thereunder". Further, the applicants submit the nature and content of terrorism charges are "either subsets or specific instances of s. 469 offences or indistinguishably akin to them".

Section 469 offences

6 Section 469 of the *Criminal Code* provides that every court of criminal jurisdiction has jurisdiction to try an indictable offence, except for the following offences with the maximum sentence and *Criminal Code* sections bracketed: treason (s. 47, life imprisonment as a minimum sentence for high treason, and 14 years or life as maximum sentences for treason), acts intended to alarm Her Majesty or break public peace (s. 49, 14 years), intimidating Parliament or a legislature (s. 51, 14 years), inciting mutiny (s. 53, 14 years), seditious offences (s. 61, 14 years), piracy (s. 74, life imprisonment), piratical acts (s. 75, 14 years) or attempting to commit any of the foregoing offences (s. 463, 14 years for life offences, and one half the sentence for the full offence in other cases); murder (s. 235, life imprisonment as a mandatory minimum sentence), conspiracy to commit any of the foregoing offences (s. 465, 5 or 10 years), being an accessory after the fact to high treason (s. 463(a), 14 years), treason (s. 463(b) life or 14 years) or murder (s. 240, life imprisonment as a mandatory minimum sentence), and offences under sections 4-7 of the *Crimes Against Humanity and War Crimes Act* (genocide, crimes against humanity and war crimes, punishable by life imprisonment, although when the act which forms the basis of the crimes involves the intentional killing of a person or persons, the mandatory sentence is life imprisonment).

7 Persons charged with "s. 469" offences must have their bail hearings and trial before judges of the superior court of criminal jurisdiction, judges appointed by the federal government pursuant to s. 96 of the *Constitution Act, 1867*. Their preliminary inquiries are held before provincial court judges.

8 Regarding bail, anyone charged with a s. 469 offence, must be detained in custody and committed to jail pursuant to s. 515(11) of the *Criminal Code* at their first court appearance. Whether they should be released from custody is only determined upon an application by the accused to a judge of a superior court pursuant to s. 522 of the *Criminal Code*. At that hearing, the judge is required to detain the accused in custody, unless the accused shows cause why he or she should be released: s. 522 (2). There is no provision to review an order made under s. 522 except by the Court of Appeal, with leave from the Chief Justice or Acting Chief Justice: s. 680. If the parties consent, a judge of the Court of Appeal may conduct the review instead of three judges: s. 680(2)

The Charges against the Applicants

9 All of the applicants are charged with nine others with "knowingly participating in or contributing to, directly or indirectly, activity of a terrorist group, for the purpose of enhancing the ability of a terrorist group to facilitate or carry out a terrorist activity", contrary to s. 83.18(1) of the *Criminal Code*, an offence punishable by 10 years imprisonment;

10 Amara, Jamal and Ghany are charged with seven others with receiving training, knowingly participating in or contributing to, directly or indirectly, activity of a terrorist group, for the purpose of enhancing the ability of a terrorist group to facilitate or carry out a terrorist activity, contrary to s. 83.18(1) of the *Criminal Code*, an offence punishable by ten years imprisonment;

11 Amara is charged with four others with, by providing training or recruiting persons to receive training, knowingly participating in or contributing to, directly or indirectly, activity of a terrorist group, for the purpose of enhancing the ability of a terrorist group to facilitate or carry out a terrorist activity, contrary to s. 83.18(1) of the *Criminal Code*, an offence punishable by 10 years imprisonment,

12 Amara, Ansari and Jamal are charged with four others with doing anything with intent to cause an explosive substance that is likely to cause serious bodily harm or death to persons, or is likely to cause serious damage to property, contrary to s. 81 of the *Criminal Code* for the benefit of, at the direction of, or in association with a terrorist group, contrary to s. 83.2 of the *Criminal Code*, an offence punishable by life imprisonment.

13 Other adults are charged in the same information with offences carrying maximum sentences of life and ten years imprisonment.

14 The relevant portions Part II.I of the *Criminal Code* regarding terrorism offences are as follows;

> "entity" means a person, group, trust, partnership or fund or an unincorporated association or organization.
>
> "terrorist activity" means
>
> > (a) an act or omission that is committed in or outside Canada and that, if committed in Canada, is one of the following offences:
> >
> > > (i) the offences referred to in subsection 7(2) that implement the Convention for the Suppression of

Unlawful Seizure of Aircraft, signed at The Hague on December 16, 1970,

(ii) the offences referred to in subsection 7(2) that implement the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on September 23, 1971,

(iii) the offences referred to in subsection 7(3) that implement the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on December 14, 1973,

(iv) the offences referred to in subsection 7(3.1) that implement the International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on December 17, 1979,

(v) the offences referred to in subsection 7(3.4) or (3.6) that implement the Convention on the Physical Protection of Nuclear Material, done at Vienna and New York on March 3, 1980,

(vi) the offences referred to in subsection 7(2) that implement the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on February 24, 1988,

(vii) the offences referred to in subsection 7(2.1) that implement the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on March 10, 1988,

(viii) the offences referred to in subsection 7(2.1) or (2.2) that implement the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on March 10, 1988,

(ix) the offences referred to in subsection 7(3.72) that implement the International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on December 15, 1997, and

(x) the offences referred to in subsection 7(3.73) that implement the International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations on December 9, 1999, or

(b) an act or omission, in or outside Canada,

(i) that is committed

(A) in whole or in part for a political, religious or ideological purpose, objective or cause, and

(B) in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act, whether the public or the person, government or organization is inside or outside Canada, and

(ii) that intentionally

(A) causes death or serious bodily harm to a person by the use of violence,

(B) endangers a person's life,

(C) causes a serious risk to the health or safety of the public or any segment of the public,

(D) causes substantial property damage, whether to public or private property, if causing such damage is likely to result in the conduct or harm referred to in any of clauses (A) to (C), or

(E) causes serious interference with or serious disruption of an essential service, facility or system, whether public or private, other than as a result of advocacy, protest, dissent or stoppage of work that is not intended to result in the conduct or harm referred to in any of clauses (A) to (C),

and includes a conspiracy, attempt or threat to commit any such act or omission, or being an accessory after the fact or counselling in relation to any such act or omission, but, for greater certainty, does not include an act or omission that is committed during an armed conflict and that, at the time and in the place of its commission, is in accordance with customary international law or conventional international law applicable to the conflict, or the activities undertaken by military forces of a state in the exercise of their official duties, to the extent that those activities are governed by other rules of international law.

"terrorist group" means

(a) an entity that has as one of its purposes or activities facilitating or carrying out any terrorist activity, or

(b) a listed entity,

and includes an association of such entities.

83.05 (1) The Governor in Council may, by regulation, establish a list on which the Governor in Council may place any entity if, on the recommendation of the Minister of Public Safety and Emergency Preparedness, the Governor in Council is satisfied that there are reasonable grounds to believe that

(a) the entity has knowingly carried out, attempted to carry out, participated in or facilitated a terrorist activity; or

(b) the entity is knowingly acting on behalf of, at the direction of or in association with an entity referred to in paragraph (a).

15 Charged with offences not included in s. 469, the accused will have their bail hearing in the Ontario Court of Justice, presumably before a justice of the peace. At that hearing, pursuant to s. 515(6)(a)(iii), the justice of the peace shall order their detention, unless they show cause why they should not be detained. If an accused is detained at that hearing, he can apply to the Superior Court of Justice for a review of that decision on at least two clear days' notice to the prosecutor: s. 520(1)(2). Where a review has been held under s. 520, a further

review cannot be brought for thirty days from the date of the last review without leave of a judge of the Superior Court: s. 520(8). There is no statutory limit on the number of reviews that can be brought.

Analysis

16 The applicants first submit that offences under s. 83.01 are required to be treated as s. 469 offences. As s. 469 offences, neither justices of the peace nor provincial court judges would have jurisdiction to conduct bail hearings for those charged under s. 83.01. They submit that Parliament could not remove jurisdiction reserved for the superior court without infringing s. 96 of the *Constitution Act, 1867*. Mr. Galati contends that Parliament's haste in drafting the legislation in the wake of the events of September 11, 2001, accounts for the omission to place s. 83.01 offences in s. 469.

17 While the applicants concede the offences they face were not offences in 1867, they submit that "some of the allegations cited constitute, or may constitute, treason, and/or intimidating Parliament or attempts thereunder" and that the "nature and content of terrorism charges under s. 83.01 are either a subset or specific instances of s. 460 offences, or indistinguishably akin to them".

18 Parliament's power over criminal law and procedure enables it not only to create substantive law relating to crimes, but also to grant jurisdiction over the offences to specific courts. Parliament can attribute criminal jurisdiction to provincially constituted courts: *Reference re Young Offenders Act (Canada)*, [1991] 1 S.C.R. 252 (S.C.C.) at par 11. In *R. v. Trimarchi* (1987), 63 O.R. (2d) 515 (Ont. C.A.) the Court of Appeal for Ontario held that s. 96 did not prevent Parliament from altering criminal jurisdiction, so long as it stopped short of destroying the criminal jurisdiction of the superior court. The applicants contend *Trimarchi* does not determine the issue they raise because the Court did not deal with s. 469 offences. They submit that Parliament cannot attribute s. 469 offences to the provincial courts.

19 The starting point for the analysis is *Reference re Residential Tenancies Act (Ontario)*, [1981] 1 S.C.R. 714 (S.C.C.), where the Supreme Court established a three-step analysis to determine whether the matter in question was within the exclusive jurisdiction exercised by s. 96 courts at the time of Confederation. The first step, the historical inquiry, involves a consideration of whether, in light of the historical conditions existing in 1867, the particular power or jurisdiction was exercised by "s. 96 judges" at the time of Confederation. Only if the power was identical or analogous to a power exercised by a s. 96 court at Confederation did it become necessary to proceed to the second step. The question is whether the power or jurisdiction conforms to the power or jurisdiction exercised by superior, district or county courts at the time of Confederation — were these offences within the "core jurisdiction" of the superior court at that time?

20 The second step involves a consideration of the function within its institutional setting, to determine whether the function was still "judicial", with the subject matter rather than the apparatus of adjudication determinative. Only if the power could be described as judicial was it necessary to proceed to the third step. The final step involves a review of the tribunal's function as a whole, in order to appraise the impugned function in its entire institutional context. A provincial scheme remained valid so long as the adjudicative function was not the sole or central function of the tribunal, so that it could be said to be operating like a s. 96 court.

21 Addressing the first question, the "core jurisdiction" of the superior court comprises those powers which are essential to the administration of justice and the maintenance of the rule of law: *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725 (S.C.C.) at par 26.

22 The applicants have provided no information regarding the "historical conditions existing in 1867". Mr. Galati submitted that all of the s. 469 offences were formerly punishable by death. When capital punishment was abolished in Canada, there were 17 offences in s. 469, only 3 were punishable by death. When questioned on his comments regarding capital punishment, he said it would have referred to the time of Confederation, but provided no authority for his position.

23 The 1859 *Offences Against the Person Act*, provided that the penalty for being an accessory after the fact to murder or attempted murder was life, but that it was not a minimum sentence. In the 1892 *Criminal Code* 26 offences were listed in the predecessor of s. 469; 2 offences were subject to the death penalty, murder and rape.

24 The short answer to the applicants' submission is to focus on whether the s. 83.01 *offences* and not *conduct* were within the "core jurisdiction" of the superior court at the time of confederation. None of the offences with which they are charged existed in 1867, so that it is difficult to see that they were within the "core jurisdiction" of the superior court at the time of Confederation. The conventions listed in 83.01 did not exist in 1867. As was the case with the *Young Offenders Act*, the jurisdiction over young persons charged with criminal offences was not significantly exercised by any judicial body at Confederation. Since the juvenile delinquent legislation was the consequence of a concern that appeared in the legal world after 1867, and led to the creation of a new scheme and new powers, they could constitutionally be entrusted to an inferior court: *Reference re Young Offenders Act (Canada)* (S.C.C.) at para 25. Here, while no doubt acts which could be regarded as "terrorist activity" as defined above existed at the time of Confederation, there were no specific terrorism offences as defined above.

25 If that conclusion does not resolve the issue against the applicant, I will consider their contention that terrorism offences are "in fact, and/or ought to be treated as s. 469 offences", that the allegations are the same as or akin to s. 469 offences, an analysis based on the *conduct* and not the offence. To assess this submission, requires an examination of the s. 469 offences, s. 83.01 offences, the allegations and other offences not included in the s. 469.

26 Dealing first with the s. 469 offences, there can be no dispute that those offences are not "fixed in stone" at any given date, as reflected in the analysis above. Parliament can attribute criminal jurisdiction to provincially constituted courts. Section 469 has changed since Confederation, with some offences being removed, such as manslaughter, and others, such as the *Crimes against Humanity and War Crimes* offences, being added. I am unable to find any authority to support that these changes are unconstitutional.

27 As currently structured, it is difficult to see that there is any unifying theme to the s. 469 offences. While 7 of the offences are found in Part II of the *Criminal Code*, Offences Against Public Order, not all offences in Part II are in s. 469. For example, sabotage (s. 52, 10 years), inciting mutiny (s. 53, 14 years), passport offences (s. 57, summary conviction to 14 years), unlawful assembly or riots (s. 63-66, summary conviction to 2 years), forcible entry and detainer (s. 72-73, summary conviction to 2 years), hijacking (s. 76, life), endangering the safety of aircrafts or airports (s. 77, life), taking an offensive weapon or explosives substance on any civil aircraft (s. 78, 14 years), possession or control of dangerous substances (s. 79 and 80 14 years to life), using explosives (s. 81, 14 years to life) and possessing any explosive substance (s. 82, 5 or 14 years), are not included in s. 469. Some of the offences could be included in terrorist activity. Using this approach, some of the allegations in this case would be akin to those excluded from s. 469, particularly in regard to explosives, aircrafts, firearms and ammunition.

28 There are also offences in s. 469 which are not included in Part II: murder, bribery by the holder of a judicial offence, attempted murder, conspiracy to commit murder, and the *Crimes Against Humanity and War Crimes* offences.

29 The fact that some of the offences under s. 83.01 involve elements of other offences does not assist the applicants. For example, another count of the information charges two accused with importing a firearm and prohibited ammunition contrary to s. 103 of the *Criminal Code* for the benefit of, at the direction of, or in association with a terrorist group, thereby committing an offence contrary to s. 83.2 of the *Criminal Code*. Doing so does not turn those offences into s. 469 offences. Section 103 is not covered by s. 469.

30 The fact that an offence when committed under certain circumstances becomes another criminal offence, does not equate with a s. 469 offence. For example, certain offences when committed for the benefit of, at the direction of, or in association with a criminal organization, become a further offence pursuant to s. 467.12. The criminal organization offences are not included in s. 469.

31 The intended target of terrorist activities in s. 83.01 does not in itself, or in conjunction with other factors, support the applicants' position. Terrorist activity is either offences contrary to one of the enumerated conventions, or acts or omissions described earlier in s. 83.01. While some of those could be described as against the sovereign, most are not, unless one views all criminal offences as against the sovereign.

32 Finally, the maximum penalties for the offences do not assist the applicants. The s. 83.01 offences range from 14 years to life imprisonment as maximum sentences. There are no minimums, as occur for murder which is under s. 469. Indeed, the initial applicant, Ghany, faces two counts with 10 year maximum sentences. The *Criminal Code* provides penalties of two, five, seven, ten, fourteen years, and life imprisonment as a mandatory sentence.

33 There is no basis upon which it could be concluded that the offences in s. 83.01 are "in fact, and/or ought to be treated as" s. 469 offences. An examination of those offences, the allegations and s. 469, does not support their position. Section 83.01 offences were not within the "core jurisdiction" of the superior court at the time of confederation. Parliament's decision to place s. 83.01 offences outside of s. 469 was *intra vires* s. 96 of the *Constitution Act, 1867*.

Is the non-inclusion of s. 83.01 offences in s. 469 a further breach of ss. 7, 11(e) and 15 of the Charter?

34 The applicants submit that even if not *ultra vires* s. 96 of the *Constitution Act, 1867*, the non-inclusion of s. 83.01 offences in s. 469 constitutes a constitutional breach by way of legislative omission, as set out by the Supreme Court of Canada in *Vriend v. Alberta*, [1998] 1 S.C.R. 493 (S.C.C.).

35 Further, they submit that the non-inclusion under s. 469 deprives the applicants of their s. 7 rights to the presumption of innocence at the bail stage, by depriving them of the ability to obtain declaratory relief, remedial relief under s. 24(1) of the *Charter* and 52 of the *Constitution Act, 1982*, as well as any other *Charter* relief sought relying on ss. 7 and 11(e) of the *Charter*.

36 The applicants further submit that their s. 15 *Charter* rights are impacted by this constitutional omission. Mr. Galati argues that having these offences against the Canadian state tried by provincially appointed "lower magistrates" infringes sections 7 and 15 of the *Charter*, as well as infringing the pre-amble to the *Constitution Act, 1982* in placing offences against the Canadian state before provincially appointed "lower magistrates and

justices". Finally, they submit that s. 469 "offers certain procedural and judicial benefits and protections for the accused" which mitigates in favour of having "the highest judicial scrutiny, and review by exclusive jurisdiction at first instance". In regard to the contention that the cases are being "tried" in the Ontario Court of Justice, the issue on this application is the forum of the bail hearings.

37 In *Vriend*, the Supreme Court of Canada examined the Alberta *Individual Human Rights Protection Act* that did not include sexual orientation as a protected ground of discrimination. The applicants had to establish that there was an omission and that the omission violated the *Charter*. The Supreme Court held there was an omission, that it violated s. 15 of the *Charter*, and that the infringement could not be justified under s. 1.

38 The issue on this application is the forum of the applicants' bail hearings. I am not persuaded by Mr. Galati that Parliament's haste in drafting and passing this legislation accounts for an "omission" regarding bail. Parliament did consider the issue of bail in regard to s. 83.01 offences by making them "reverse onus" offences. A decision was made to place the offences within the limited number of offences where the onus is on the accused to show cause why they should be released. In these circumstances, to assume Parliament did not address the issue of the forum of bail is inappropriate.

39 Here, there is no omission. Parliament has not omitted the forum or procedure to be applied at the bail hearings. Rather, Parliament has chosen to place these offences with the vast majority of criminal cases with bail hearings conducted in the provincial court, with reviews without leave to the superior court.

40 The provisions of ss. 515, 517 and 519 apply to hearings under s. 515 and those under s. 522. The same three grounds must be examined to determine, in accordance with the applicable onus, whether detention is necessary. I am unable to find that there has been an omission as described in *Vriend*.

41 The applicants' next submissions, regarding their s. 7, 11(e) and 15 *Charter* rights, as well as the contention that the bail "ought to be heard in the Superior Court", can be conveniently dealt with together at the outset, because of the reliance on the judgments in *France v. Ouzchar*, [2001] O.J. No. 5713 (Ont. S.C.J.) and *R. v. Phillion*, [2003] O.J. No. 3422 (Ont. S.C.J.), and a consideration of the nature of bail hearings. It is the applicants' position that by having their bail hearings before a justice of the peace or provincial court judge they are deprived of their ability to obtain declaratory relief or remedial relief under s. 24(1) of the *Charter* and s. 52 of the *Constitution Act, 1982*, as well as other remedial relief under s. 7 and s. 11(e) of the *Charter*.

42 What the applicants anticipated is not a bail hearing to determine whether the applicants should be released from custody. What the applicants seek is an omnibus hearing to determine the constitutional validity of all or portions of s. 83.01, to argue that in some circumstances, the tertiary ground should not be relied upon, or that there should be special evidentiary rules relating to bail hearing where the tertiary ground is relied upon, that there should be a prohibition on police disseminating information at the time of arrests or thereafter, and to argue that there is a right to disclosure before a bail hearing. To paraphrase Mr. Galati's position, it should not depend on which wicket he attends, all of his *Charter* and other remedies must be available at the bail hearing. That can only occur if his client is not deprived of "judicial access" in the appropriate forum to obtain the relief he seeks.

43 Before addressing the substantive submissions, as a preliminary matter, I asked counsel whether I had jurisdiction to order that a bail hearing on charges in an information currently before the Ontario Court of Justice, and not s. 469 offences, should be held before a judge of the Superior Court. Mr. Galati submitted I had the inherent jurisdiction to do so in the capacity of a superior court supervising inferior courts, notwithstanding

s. 36 of the *Courts of Justice Act* provides the Chief Justice of the Ontario Court of Justice shall direct and supervise the sittings and assignments of that court. I have serious reservations that I have such authority, either as a judge of the Superior Court or as the Regional Senior Judge of the Superior Court in Central West region. However, given my determination of the other issues raised by the applicants, it is not necessary to determine this issue. Suffice it to say, that assuming there was inherent jurisdiction to do so, it would be a most extraordinary case where such a decision would be considered.

44 A fundamental premise of the applicants' position is that *Charter* relief can be granted at a bail hearing in the absence of a separate discreet *Charter* application. They contend that *France v. Ouzchar* and *Phillion* support their position. I disagree.

45 In *Phillion*, the applicant had been convicted of murder. The Minister of Justice ordered a review of his conviction, having concluded there was a reasonable basis to conclude that a miscarriage of justice had occurred when Phillion was convicted. The Minister delegated the investigation to a member of the bar, as permitted under s. 696.2(3) of the *Criminal Code*. Phillion applied for bail pending that review.

46 As Watt J. noted at the outset, the application was novel. There was no express authority in the new Part XXI.I of the *Criminal Code* for such an application, which was based on constitutional and common law grounds. One of the bases for the application was that he was entitled to release pursuant to s. 24(1) of the *Charter*, through the vehicle of *habeas corpus* or directly. A second basis was that by analogy to extradition and court martial cases, a superior court had inherent jurisdiction to grant release.

47 None of that rationale applies here. There is a statutory route for the bail hearing pursuant to s. 515. Watt J. was dealing with an application that had not been dealt with before. Bail hearings pursuant to s. 515 are held countless times daily in Canada. The applicants have a statutory procedure available to determine their pre-trial status.

48 In *France v. Ouzchar*, France sought the extradition of a Canadian citizen, after his conviction *in absentia* in France for preparing a terrorist act and acting as an accessory in the falsification of an administrative document. After he was sentenced to 5 years in jail, France sought his extradition. He applied for bail before Nordheimer J. In the course of the judgment, His Honour addressed the primary ground, and found there was no evidence he was a flight risk. His Honour then examined the secondary ground, and concluded there was no evidence at all to suggest the defendant was a risk to the public.

49 Finally, His Honour examined the tertiary grounds, and found the manner in which the charges proceeded was "highly disturbing". The investigation started in France in 1999. In 1999, at the request of the French Government, a search warrant was obtained and executed at Ouzchar's home in Canada. He was ordered to, and did attend an examination at RCMP offices in Ontario. Without any notice to him, he was tried and convicted in France. There was no pre-trial application for extradition. His Honour found the allegations were only as disclosed in the judgment, which was "long on generalities and short on specifics as to exactly what the events and activities of this defendant in respect of offences with which he was charged".

50 Nordheimer J., in considering the tertiary grounds approached "the matter from the point of view of a reasonably informed, right thinking member of the community, cognizant of the presumption of innocence and the notion that an accused should not be deprived of liberty without a sufficient legal basis." His Honour acknowledged "recent world events" in the November, 2001 judgment, and continued that he would hope the vast majority of reasonably informed, right thinking members of our community would agree that, notwithstanding

those events, every citizen of this country is still entitled to their basic constitutional rights and freedoms, including the right to be informed without unreasonable delay of the offence alleged, and the right not to be denied bail without just cause.

51 His Honour found there was some evidence Ouzchar had been denied the former right, and he did not intend that he should be denied bail. He concluded this section of the reasons:

> I conclude, therefore, that the defendant's detention is not justified on the tertiary ground. I therefore grant judicial interim release ....

52 Nordheimer J. did not grant a *Charter* remedy at the bail hearing. He considered the three grounds upon which detention could be justified in the context of the *Charter* and the rights thereunder. He does not mention s. 24(1) or s. 24(2), nor does he mention *Charter* relief. What His Honour did was examine the grounds of bail as justices of the peace and judges do on a daily basis.

53 In *R. v. John*, [2001] O.J. No. 3396 (Ont. S.C.J.) Hill J. dealt with the procedure followed in most bail hearings in Ontario, with the Crown reading in a synopsis of the allegations with the consent of the accused. In dealing with the content of the synopsis, His Honour noted:

> ... Not unreasonably, it is anticipated that this preliminary documentation will be fair and balanced, without vagueness or unstated or unsupported conclusions, and inclusive of factors capable of detracting from the reliability of the accumulated evidence, for example, known bias or interest of principal witnesses, the circumstantial limits of investigative facts in possession crimes, identification evidence frailties, *and without concealment of acts suggesting constitutionally questionable evidence-gathering techniques*. The circumstances of the alleged offence(s) impacting on the probability of conviction of the accused are particularly relevant to the secondary and tertiary grounds for detention. (emphasis added)

54 Whether there are reasonable grounds to believe that the admissibility of the Crown's evidence is in question is always a relevant consideration on the basis identified by Hill J. It does not take a *Charter* application to consider that issue on a bail hearing. It can be considered by a judge or justice of the peace presiding in the Ontario Court of Justice. In determining if there should be a release order under s. 515(10), a judge or justice of the peace is not precluded from considering *Charter* implications as they relate to the grounds for detention.

55 Section 11(e) of the *Charter*, the right "not to be denied reasonable bail without just cause", informs the determinations to be made at any bail hearing under s. 515 or s. 522. To suggest there has to be a *Charter* remedy at a bail hearing, or that the bail hearing must be conducted by a judge of a superior court for there to be any consideration of *Charter* implications as they relate to the grounds for release, is inconsistent with the law and criminal procedure in Ontario.

56 Here, the applicant, Ghany, at least seeks to challenge the constitution validity of s. 83.01 at the bail hearing. If successful, and the legislation were found to violate s. 15 of the *Charter*, that would be the end of the matter. In the previous paragraph I am not suggesting that under the guise of examining the strength of the Crown's case, the applicant, with the onus on the bail hearing, would be entitled to a full hearing to determine or consider whether s. 83.01 survives *Charter* scrutiny as though it were a *Charter* application relying on s. 24(1). I say this for the following reasons.

57 First, even if the applicant brought a separate challenge to the legislation and sought it to be heard at the

time of the bail hearing, while it would be for the presiding judge to determine, I doubt any judge would embark on that hearing in the course of the bail hearing. If such an application were brought it would have to be brought before a judge of the superior court, since neither a judge nor a justice of the peace of the Ontario Court of Justice would have jurisdiction to consider the issue at a bail hearing. If brought in the Superior Court, there would still have to be a separate application for *Charter* relief, and it would be for the presiding judge to determine if it should proceed at the same time.

58 Second, the Supreme Court of Canada has held that judges of the Superior Court should generally decline jurisdiction to hear *Charter* applications before the trial, as is contemplated here, in favour of the trial judge who will have the full evidentiary record available: *R. v. Mills*, [1986] 1 S.C.R. 863 (S.C.C.). *Mills* dealt with a s. 24(1) application to stay proceedings for trial delay. A similar position has been taken by our Court of Appeal regarding the exclusion of evidence: *R. v. Chase* (1987), 37 C.C.C. (3d) 97 (S.C.C.).

59 Third, bail hearings are not meant to be trials, nor should this "summary proceeding assume the complexities of trials". The show cause hearing is meant to be expeditious, with a degree of flexibility and procedural informality sufficient to protect the liberty interests and security of the public: *R. v. John*, [2001] O.J. No. 3396 (S.C.J.)

60 The procedural "informality" is supported by s. 518(1), which provides the justice may make "such inquiries, on oath or otherwise, of and concerning the accused as he considers desirable", except the accused cannot be questioned about the offence except by his or her own counsel, unless they were questioned about the offence in their examination in chief. The judge or justice of the peace can consider "any other relevant evidence" led by the prosecution regarding the accused person's criminal record, outstanding charges, previous failures to attend court and the circumstances of the offence, particularly as they relate to the probability of a conviction: s. 518. Evidence obtained from intercepted communications can be led without compliance with the notice provisions: s. 518(1)(d). The judge or justice of the peace can base his or her decision on "credible and trustworthy" evidence.

61 Where oral evidence is presented, as will occur here, Hill J. found that the Court is tasked with control of its own process, prohibiting the abuse of a meandering discovery, while maintaining focus on the s. 515 test.

62 Fourth, a feature of bail hearings which supports the position that a bail hearing is not the location, regardless of the forum, for a full *Charter* application seeking relief under s. 24(1), is that Parliament has established procedures to have bail hearings heard in a timely manner. In his text, *The Law of Bail in Canada*, Carswell Thomson Profession Publishing, Toronto, 1999, Trotter J., notes that time is a monumental concern when it comes to bail, as it is essential that the hearing be conducted as soon as possible. The need for "swift justice" requires a "certain level of informality", which translates into the relaxation of certain rules of evidence at bail hearings and an expansive approach to relevance, (at pages 221 and 223).

63 Finally, the provision that the presiding justice *may* adourn the proceedings and remand the accused in custody for not more than three clear days without the consent of the accused, supports the premise that Parliament intended bail issues be dealt with expeditiously. To embark on a full hearing to determine the constitutional validity of s. 83.01 or a portion of it at a bail hearing is inconsistent with the intent of the bail sections.

64 Returning to the specific issues raised by the applicants, the applicants seek *Charter* relief based upon the nature of the allegations, as well as prosecution, police and media conduct at the time of the arrests and thereafter. I am not persuaded that any of the grounds suggested support the exercise of any discretion I might

have to order the hearing before a judge of the Superior Court of Justice. They contend that they are deprived of their s. 7 right to the presumption of innocence at the bail hearing, by being deprived of their ability to obtain declaratory relief and remedies under s. 24(1) of the *Charter* and s. 52 of the *Constitution Act, 1987*, and that their rights under s. 7 and 11 (e) of the *Charter* are violated by s. 83.01 offences not being in s. 469. As noted earlier, the applicants are subject to the same law as those charged with s. 469 offences. The Supreme Court of Canada has made it clear that the presumption of innocence is "an animating principle throughout the criminal justice process": *R. c. Pearson* (1992), 77 C.C.C. (3d) 124 (S.C.C.). There is no need to have a separate s. 24(1) application for a judge to consider those issues in examining at least the secondary and tertiary grounds.

65 To the extent that the applicants seek relief under s. 7, that there has been an abuse of process as a result of the prosecution and police "manufacturing" the tertiery grounds for detention, with police leaks and unnamed source reports in the media, the application ignores the test to be applied under that ground by the Supreme Court of Canada. The reasonable person making the assessment in the tertiary ground is "one properly informed about the philosophy of the legislature provisions, *Charter* values, and the actual circumstances of the case": *R. v. Hall*, [2002] 3 S.C.R. 309 (S.C.C.) par 41. The consideration of the tertiary ground or any other ground is informed by the circumstances of the case as presented in court, not through leaks to the media. There is nothing in the material before me to indicate the applicants' *Charter* rights have been breached or placed in jeopardy by leaks to the media, when the grounds for detention are examined in light of *Hall* and subsequent decisions, such as *R. v. LaFramboise* (2005), 203 C.C.C. (3d) 492 (Ont. C.A. [In Chambers]).

66 The applicants also seek a declaration that the Crown and police are estopped from making public statements and/or representations, or from "engineering any 'confidential source' leaks to the media" or from parading any alleged evidence at press conferences with respect to the accused upon issuance of a warrant in the first instance, and that the engineering of any media event prior to, at, or after the arrest is a breach of the accused's constitutional rights. Where the Crown has "manufactured" the tertiary ground, they should be estopped from relying on the tertiary ground. As noted above, this argument is inconsistent with the law applicable at bail hearings.

67 The applicants would also seek a declaration that they be provided with disclosure of the information the Crown seeks to lead at the bail hearings. To date, they have received an 8 page synopsis, common to all of the adults and youths charged. Each accused also received a separate page outlining specific allegations against them. As I understand the applicants' position, it is not that they would seek full disclosure before their bail hearing. If that were their submission, it would be answered in the negative by *R. v. Girimonte* (1997), 121 C.C.C. (3d) 33 (Ont. C.A.) at 42. They submit that they should have disclosure of the evidence the Crown will lead at the hearing. Here, the Crown has indicated they will lead evidence of the synopsis, and call an officer to give further details. That evidence will basically be the same for all accused. Since some adults have already had their bail hearings, the transcripts of that evidence are obtainable. If an accused is taken by surprise by evidence at a bail hearing or believes that contrary evidence is available, they have the right to seek an adjournment of the hearing to obtain that evidence.

68 The applicants also seek to argue *habeas corpus* at the bail hearing. That application could only be heard by a judge of the superior court. While *R. c. Pearson* (1992), 77 C.C.C. (3d) 124 (S.C.C.) held that *habeas corpus* was available "in the narrow circumstances of this case," I am not persuaded there is a basis upon which this application can fit within the *Pearson* criteria.

69 In *Pearson*, there was a special type of constitutional claim, with two remedies sought. First, he sought a

declaration a bail section of the *Criminal Code* was of no force and effect under s. 52 of the *Constitution Act*, and a remedy under s. 24(1), namely, a new bail hearing in accordance with constitutionally valid grounds. Given the judgment in *Hall*, there is no application to find the tertiary ground of no force and effect. In addition, as Hill J. noted in *John*, since none of the applicants have had their bail hearing yet, the application for *habeas corpus* is premature. What would be ordered is the bail hearing. Pearson had had his bail hearing *before* invoking *habeas corpus.* I am unable to see any basis upon which it could be argued the applicants are unlawfully detained now.

70 The applicants' reliance on a s. 15 violation is based on the constitutional validity which I found was most unlikely to be litigated at a bail hearing in the superior court. That hearing would be lengthy and deal with complex issues. That the legislation will be challenged, and the bases upon which the challenge will be brought in summary form will help to inform the analysis of the secondary and tertiary grounds at the bail hearing. In the alternative, if the s. 15 claim is based on the exclusion of s. 83.01 offences from s. 469, the applicants would have to establish they were subject to i) differential treatment, which is established, ii) that the basis of the differentiation was the enumerated or analogous grounds, and, iii) which conflict with the purpose of s. 15(1) and amount to substantive discrimination: *Ardoch Algonquin First Nation & Allies v. Ontario*, [2000] 1 S.C.R. 950 (S.C.C.). Here, there is no evidence the discrimination in regard to the forum of the bail hearing was on enumerated or analogous grounds.

71 The final issues in the *Charter* aspects of the application are set out in paragraph 11 of the factum filed on behalf of Ghany. The applicants state:

> It is clear that s. 469 offers certain procedural and judicial benefits and protections for the accused, and that historically, and by 1867, constitutionally, these most serious of offences and charges were, and continue to be, the exclusive jurisdiction of the Superior Court owing to:
>
> a) the seriousness of the offences alleged;
>
> b) the clear nature of the offences as against the Crown and its sovereignty;
>
> c) the penal consequences to the accused which carried the death penalty, and since its abolition, 14 years to life;
>
> d) the benefit that the Superior Court have plenary jurisdiction, even at the bail hearing, to deal with any and all statutory and/or constitutional issues preliminary, ancillary to, or remedial, going to the crux of the bail application, which inferior courts do not possess,
>
> which mitigates in favour of having the highest judicial scrutiny, and review by exclusive jurisdiction at first instance, failing which the s. 7 and 11(e) *Charter* remedies sought by the applicant would be deprived, and further aggravated by the breach of s. 15 of the *Charter*.

72 It is difficult to see the "procedural benefits" accruing to those charged with s. 469 offences, as opposed to those charged with other offences. At this time, the applicants were not subject to an automatic detention order on their first appearance, as those charged with s. 469 offences are. They can have their bail hearing without serving notice of the application at least two clear days before the hearing (Rule 20.04 of the *Superior Court of Justice Criminal Proceeding Rules*), or filing affidavits from the accused, employers, and sureties, (Rule 20.05). If detained in custody or released on terms, they can review the detention order or release in the Superior Court

of Justice, and if unsuccessful or there is a change in circumstances, have a statutory right to apply again after 30 days. Those charged with s. 469 offences have no such right of review and must apply for leave to do so in the Court of Appeal, as noted earlier, with no statutory right to bring successive reviews.

73 As noted earlier, not only have the applicants filed no evidence to support their position regarding bail in 1867, their submission is factually wrong. While the most serious offence in the *Criminal Code*, murder, is included in s. 469, many other serious offences are not. Neither the clear nature of the charges nor the penal consequences supports the applicants' position. The submission that "the penal consequences ... which carried the death penalty, and since abolition, 14 years", is incorrect. I have already dealt with the contention that judges of a superior court have the *Charter* jurisdiction contended at a bail hearing, and whether it is appropriate to deal with those issues at a bail hearing.

74 The final issue raised in argument by counsel on behalf of Ansari, Amara and Jamal, was that if the other arguments failed, I should direct that a judge of the Superior Court hear the application in any event, because a judge of the Superior Court would bring an added "experiential factor" to the bail hearing. No evidence was filed on this issue, and no further submissions made. However, it is clear that the vast majority of bail hearings are held in the Ontario Court of Justice, with the reviews heard in the Superior Court.

75 I agree with Mr. Galati's submission that based on *Canada (Minister of Indian Affairs & Northern Development) v. Ranville*, [1982] 2 S.C.R. 518 (S.C.C.), were a judge of the Superior Court to preside at the bail hearings, he or she would be acting as a judge of the Superior Court and not as a justice of the peace. In these circumstances and for the reasons indicated earlier, I decline to make the order.

Conclusion

76 The applications are dismissed.

Applications dismissed.

FN1 This application was initiated by counsel on behalf of Ahmad Mustafa Ghany. On the date submissions started, the three other named applicants were granted leave to join the application. The written and oral submissions of the three applicants mirrored those made on behalf of Ghany, except where noted. Counsel on behalf of Shareef Abdelhaleen supported the position of the applicants, and made submissions in furtherance of their position without filing a Notice of Application.

FN2 The applicant, Amara, started his bail hearing prior to the release of these reasons, but after counsel had been advised that the application would be dismissed.

END OF DOCUMENT

Case Name:

R. v. O'Neil

Between
Her Majesty the Queen, and
Andrew O'Neil

[2007] O.J. No. 3790

161 C.R.R. (2d) 271

253 C.C.C. (3d) 120

Court File No. BL557/07

Ontario Superior Court of Justice

M.R. Dambrot J.

Heard: September 10 and 14, 2007.
Judgment: October 3, 2007.

(23 paras.)

Criminal law -- Compelling appearance, detention and release -- Judicial interim release or bail -- Review of -- Crown not required to disclose all evidence to accused prior to bail hearing -- Crown entitled to cross-examine defence witness on summaries of intercepted telephone conversations -- Evidence filed in support of review by accused referred to same summaries -- Objection to further cross-examination of same witness on same summaries at detention review hearing overruled -- Criminal Code, s. 518.

Criminal law -- Procedure -- Crown's duties -- Disclosure -- Crown not required to disclose all evidence to accused prior to bail hearing -- Crown entitled to cross-examine defence witness on summaries of intercepted telephone conversations -- Evidence filed in support of review by accused referred to same summaries -- Objection to further cross-examination of same witness on same summaries at detention review hearing overruled.

Ruling on objection to line of cross-examination of defence witness, during application by O'Neil

for review of detention order -- O'Neil charged with participating in activities of criminal organization to enhance its ability to traffic in cocaine, participating in activities of criminal organization to enhance its ability to traffic or possess firearms, and nineteen other drug and firearm offences -- Evidence against O'Neil included intercepted private communications -- O'Neil's detention ordered following hearing -- O'Neil's witness, Notice, testified at hearing regarding his willingness to act as surety for O'Neil -- Crown then asked Notice about telephone calls he had participated in, bearing on his suitability as witness -- Crown referred to summaries of telephone calls provided by police -- Crown also called police officer in reply, who used same summaries to outline and interpret telephone calls to contradict evidence from Notice -- O'Neil objected to cross-examination of Notice and to police officer testifying -- In affidavit in support of O'Neil's review application, Notice clarified some evidence he gave in response to Crown's questions about telephone calls at original hearing -- Notice also testified at bail review application, and Crown asked him if he recalled questions about telephone calls from first hearing -- O'Neil again objected to questioning of Notice on telephone calls -- O'Neil conceded Crown did not have obligation to make pre-trial disclosure of all evidence prior to bail hearing, but took position principles of natural justice and procedural fairness required Crown to provide O'Neil with summaries of telephone calls before cross-examining Notice about them or leading outline of their content through police officer -- HELD: Objection overruled -- Disclosure of telephone call summaries not prerequisite to their admissibility at bail hearing -- To impose obligation on Crown to provide disclosure prior to bail hearing would undermine goal of expedition for bail hearings -- Judge at bail hearing had discretion to receive and based decision on any evidence considered credible or trustworthy, including hearsay -- Where Crown entitled to cross-examine Notice on telephone calls at original bail hearing, Crown also entitled to do same at review hearing -- O'Neil could not place Notice's additional evidence about telephone calls before court in affidavit, then complain about references to telephone calls by Crown.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, s. 7

Criminal Code, s. 515, s. 518(1)(d.1), s. 518(1)(e)

Counsel:

E. Nadeau, for the Crown.

Daniel A. Stein, for the Accused.

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1 M.R. DAMBROT J.:-- Is the Crown obliged to make disclosure of intercepted private

communications prior to making use of them at a judicial interim release hearing or review? That question arises in this application for a review of a detention order.

BACKGROUND

2 Andrew O'Neil is charged with participating in the activities of a criminal organization to enhance its ability to traffic in cocaine, participating in the activities of a criminal organization to enhance its ability to traffic or possess firearms and nineteen other drug and firearm offences. The evidence against the accused includes intercepted private communications.

3 Mr. O'Neil was ordered detained by Justice of the Peace De Morais on July 11, 2007. I am hearing an application for a review of that order.

4 At the original hearing, the accused called Paul Notice as a witness. Mr. Notice was, and at the outset of this bail review remained a proposed surety for the accused. In the course of cross-examining Mr. Notice at the original hearing, over the objection of counsel for Mr. O'Neil, Crown counsel asked him about certain telephone calls he had participated in, which bore on the question of his suitability as a witness.[1] She did so by reference to summaries of these telephone calls provided to her by the police. She subsequently called a police officer in reply, again over the objection of counsel for the accused, who, making use of the same summaries, outlined and interpreted some of these telephone calls in order to contradict the evidence of Mr. Notice.

5 When Mr. Notice testified as a witness before me, Crown counsel asked him if he recalled her asking him about telephone calls at the original bail hearing. Counsel for the accused again objected to cross-examination about these calls. I am called upon to determine the propriety of Crown counsel's proposed cross-examination. I cannot do so without considering the propriety of the cross-examination on these telephone calls at the original bail hearing.

THE ISSUE

6 Counsel for the accused acknowledges that the obligation on the Crown to make pre-trial disclosure to the accused of all information in the possession of the Crown relevant to the alleged offence mandated by s. 7 of the *Charter* does not apply to a bail hearing. Counsel argues, however, that the principles of natural justice and procedural fairness require the Crown to provide to the accused a summary of intercepted private communications in the possession of Crown counsel before Crown counsel either cross-examines a defence witness about them, or leads an outline of their content in evidence at a bail hearing through a police officer. This is said to be necessary so that counsel for the accused can prepare the witness for the cross-examination, or prepare himself or herself to cross-examine the police officer.

ANALYSIS

7 Counsel for Mr. O'Neil was correct to acknowledge that the Crown has no constitutional

obligation to make full disclosure prior to a bail hearing. The Supreme Court concluded in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, that the obligation to disclose is triggered by a request, and should occur before the accused is called upon to elect the mode of trial or to plead. Ordinarily, an accused is not called on to elect the mode of trial, or plead, until long after the judicial interim release hearing, which is usually conducted shortly after the arrest of an accused. What is more, a justice conducting a preliminary hearing, and so, *a fortiori*, a justice conducting a bail hearing, has no inherent jurisdiction to order disclosure, no jurisdiction to order disclosure as a *Charter* remedy and no jurisdiction to order disclosure flowing by necessary implication from the provisions of the *Criminal Code*. (See *R. v. Girimonte* (1997), 121 C.C.C. (3d) 33 at paras. 21 to 39.) Accordingly, the justice conducting Mr. O'Neil's preliminary inquiry had no jurisdiction to order disclosure.

8 Counsel for the accused argues, however, that he is entitled to a more limited form of disclosure. He says that he is entitled to disclosure of evidence to be led by the Crown, or to be used by the Crown in cross-examination, as a principle of natural justice, or as a matter of procedural fairness. In this regard he relies on the ruling of Dawson J. in *R. v. Willis*, [2004] O.J. No. 4593. In that case, counsel for the accused argued that while there may not be a constitutional right to disclosure before a bail hearing, in the circumstances there the failure to provide disclosure amounted to a breach of the rules of natural justice. Dawson J. was not satisfied that there was a breach of the rules of natural justice in that case. He noted that the rules of natural justice vary with the nature of the proceeding, and that a bail hearing is a proceeding that, for the benefit of the accused, must normally be held on an expeditious basis, with the rules of evidence relaxed. In the end, Dawson J. was not satisfied that there was such a lack of information in the possession of the applicant in that case that, having regard to the nature of a bail hearing, there was unfairness that amounted to a breach of the rules of natural justice.

9 Finally, in *obiter*, Dawson J. stated that general considerations of fairness apply to a bail hearing and that a failure or refusal by the Crown to provide information which, on the facts of a given case results in an unfair hearing, will open up the bail hearing to review under s. 520 of the Criminal Code.

10 Of course I agree with Dawson J. that a bail hearing must be fair, and that an unfair bail hearing is subject to review. I also agree with him that the rules of natural justice vary with the nature of the proceeding. What is fair at a bail hearing is not identical to what is fair at a trial. I part company with him, respectfully, when he says in *obiter* that a failure by the Crown to disclose in advance the information in its possession that will be adduced in evidence at a bail hearing could result in an unfair hearing. I find it to be an odd notion that while the right to fundamental fairness protected by s. 7 of the *Charter* does not compel disclosure of the evidence to be lead by the Crown at a bail hearing, the common law right to procedural fairness does.

11 I prefer the judgment of Durno J. in *R. v. Ghany*, [2006] O.J. No. 2972 on this point. He stated, at para. 67:

> The applicants would also seek a declaration that they be provided with disclosure of the information the Crown seeks to lead at the bail hearings. To date, they have received an 8 page synopsis, common to all of the adults and youths charged. Each accused also received a separate page outlining specific allegations against them. As I understand the applicants' position, it is not that they would seek full disclosure before their bail hearing. If that were their submission, it would be answered in the negative by *R. v. Girimonte* (1997), 121 C.C.C. (3d) 33 at 42. (Ont. C.A.) They submit that they should have disclosure of the evidence the Crown will lead at the hearing. Here, the Crown has indicated they will lead evidence of the synopsis, and call an officer to give further details. That evidence will basically be the same for all accused. Since some adults have already had their bail hearings, the transcripts of that evidence are obtainable. If an accused is taken by surprise by evidence at a bail hearing or believes that contrary evidence is available, they have the right to seek an adjournment of the hearing to obtain that evidence.

12 It appears from paras. 41 and 42 of the judgment in *Ghany* that the applicants argued for a right to disclosure based on sections 7, 11(e) and 15 of the *Charter*. As can be seen, Durno J. recognized no right of disclosure even of the evidence that the Crown intends to call at a preliminary inquiry. The only right contemplated by Durno J. when an accused is taken by surprise by evidence lead by the Crown is the right to an adjournment. This makes perfect sense to me. It is consistent with the expectation in the *Criminal Code* that a bail hearing be heard expeditiously, and in a relatively informal manner.

13 The reason that a bail hearing is to be held expeditiously, quite obviously, is because an accused should not be detained without a bail hearing longer than is necessary. The provisions of the *Criminal Code* reflect this policy, and reinforce it. A peace officer who arrests a person without warrant is required by s. 503 of the *Criminal Code* to bring that person before a justice *without unreasonable delay* unless the officer or an officer in charge releases the person under arrest. A person arrested with a warrant is required by s. 511(1) of the *Criminal Code* to be brought before a justice *forthwith*. In either case, when an accused charged with an offence is brought before a justice, s. 515 provides that the accused must be released on an undertaking unless the prosecutor shows cause why some other order should be made.[2] The prosecutor is entitled only to *a reasonable opportunity* to do so. To impose an obligation on the prosecutor to make disclosure even of the evidence that will be called at the bail hearing would necessarily extend the reasonable opportunity given to the prosecutor to show cause and undermine the goal of expedition.

14 A bail hearing is to be conducted in a relatively informal manner for the same reasons. It is not intended that a bail hearing should take on the formal trappings of a trial, which would, inevitably, result in releasable accused persons being detained longer than is necessary. Once again, the provisions of the *Criminal Code* reflect this policy, and reinforce it. For example, s. 518(1)(e) provides that a justice conducting a judicial interim release hearing "may receive and base his

decision on evidence considered credible or trustworthy by him in the circumstances of each case". This provision has been interpreted to allow the admission into evidence of hearsay. (See *R. v. Hajdu* (1994), 14 C.C.C. (3d) 563 (Ont. H.C.J.))

15 Durno J. had this to say about the need for expedition and informality at a bail hearing at paras. 59-62 in *Ghany*:

> para. 59 Third, bail hearings are not meant to be trials, nor should this "summary proceeding assume the complexities of trials". The show cause hearing is meant to be expeditious, with a degree of flexibility and procedural informality sufficient to protect the liberty interests and security of the public: *R. v. John* [2001] O.J. No. 3396 (S.C.J.)
>
> para. 60 The procedural "informality" is supported by s. 518(1), which provides the justice may make "such inquiries, on oath or otherwise, of and concerning the accused as he considers desirable", except the accused cannot be questioned about the offence except by his or her own counsel, unless they were questioned about the offence in their examination in chief. The judge or justice of the peace can consider "any other relevant evidence" led by the prosecution regarding the accused person's criminal record, outstanding charges, previous failures to attend court and the circumstances of the offence, particularly as they relate to the probability of a conviction: s. 518. Evidence obtained from intercepted communications can be led without compliance with the notice provisions: s. 518(1)(d). The judge or justice of the peace can base his or her decision on "credible and trustworthy" evidence.
>
> para. 61 Where oral evidence is presented, as will occur here, Hill J. found that the Court is "tasked with control of its own process, prohibiting the abuse of a meandering discovery, while maintaining focus on the s. 515 test.
>
> para. 62 Fourth, a feature of bail hearings which supports the position that a bail hearing is not the location, regardless of the forum, for a full *Charter* application seeking relief under s. 24(1), is that Parliament has established procedures to have bail hearings heard in a timely manner. In his text, *The Law of Bail in Canada*, Carswell Thomson Profession Publishing, Toronto, 1999, Trotter J., notes that time is a monumental concern when it comes to bail, as it is essential that the hearing be conducted as soon as possible. The need for "swift justice" requires a "certain level of informality", which translates into the relaxation of certain rules of evidence at bail hearings and an expansive approach to relevance,

(at pages 221 and 223).

16 In particular, and perhaps a complete answer to the argument of the accused in and of itself, is s. 518(1)(d.1), which provides that:

> the justice may receive evidence obtained as a result of an interception of a private communication under and within the meaning of Part VI, in writing, orally or in the form of a recording and, for the purposes of this section, subsection 189(5) does not apply to that evidence.

17 Ordinarily, s. 189(5) serves as both a notice provision and a statutory disclosure provision in relation to intercepted private communications. It provides that the content of an intercepted private communication shall not be received in evidence unless the party intending to adduce it has given reasonable notice to the accused of the intention to do so, together with a transcript of the private communication where it will be introduced in the form of a recording, or a statement setting out full particulars of the private communication where evidence of it will be given *viva voce*, together with a statement of the time, place and date of the communication and the parties to it.

18 It is plain that Parliament has suspended the statutory disclosure prerequisite to the admissibility of private communications at bail hearings. In the absence of a constitutional challenge to this provision, and here there is none, it must prevail. Disclosure is not a prerequisite to the admissibility of the private communications of a witness at a bail hearing.

19 I note as well that even if the *obiter* in the judgment Dawson J. in *Willis* is correct, it provides little comfort to the accused in this case. It is clear that Dawson J. viewed only a virtually complete absence of disclosure of information about the case against an accused as a breach of the principles of natural justice.

20 In addition, I note that once Crown counsel had cross-examined Mr. Notice on summaries of his telephone calls, counsel for the accused was entitled to ask for production of the summaries for the purpose of re-examination. Similarly, once Crown counsel had examined the officer that she called in reply about the telephone calls, counsel for the accused was entitled to ask for production of the summaries for the purpose of cross-examination since the witness had refreshed her memory with the summaries. Counsel for the accused chose to exercise neither of these rights.

21 If I am correct that Crown counsel was entitled to cross-examine Mr. Notice on the interceptions at the original bail hearing, then it follows that there is no impediment to her doing so again on this review. In any event, however, regardless of the propriety of the Crown's cross-examination of Mr. Notice on his intercepted private communications without prior disclosure at the original bail hearing, the accused faces two insurmountable obstacles when objecting to a similar cross-examination of Mr. Notice on this review. First, the accused received significant disclosure of the contents of Mr. Notice's telephone calls when synopses of them were adduced in evidence in reply at the original bail hearing. And second, in the affidavit of Mr. Notice filed by the

accused on this review, he clarified some of the answers he gave at the original bail hearing when cross-examined on his intercepted private communications. The accused cannot have it both ways. He cannot place before me Mr. Notice's additional affidavit evidence about his telephone calls on the one hand, and resist cross-examination on those calls on the other.

22 Finally, a word of caution. I should not be taken as suggesting by these reasons that Crown counsel is entitled to hide evidence in the possession of the Crown at a bail hearing that is exculpatory, or that otherwise bears significantly in favour of the release of the accused. That would not violate the general duty on the Crown to make disclosure of relevant evidence before trial. Rather, it would violate the well-known duty on the Crown to be a Minister of Justice, and to act scrupulously fairly towards the accused, and could give rise to a violation of s. 7 of the *Charter*.

23 The objection by the accused to cross-examination by the Crown of Mr. Notice on his intercepted private communications is overruled.

M.R. DAMBROT J.

cp/e/qlbxr/qllkb/qlbrl/qlhcs

1 In view of the fact that this is an ongoing criminal proceeding, I will refrain from referring to any of the allegations made against the applicant or the specifics of the evidence lead at the judicial interim release hearing in making this ruling.

2 Except in the case of the offences listed in s. 515(6), where the onus is placed on the accused to show cause why detention is not justified.

Indexed as:

R. v. Girimonte

Between
Her Majesty the Queen, respondent, and
Franco Girimonte, applicant/appellant

[**1997] O.J. No. 4961**

37 O.R. (3d) 617

105 O.A.C. 337

121 C.C.C. (3d) 33

12 C.R. (5th) 332

48 C.R.R. (2d) 235

1997 CanLII 1866

37 W.C.B. (2d) 10

Docket No. C25173

Ontario Court of Appeal
Toronto, Ontario

Doherty, Weiler and Moldaver JJ.A.

Heard: May 28, 1997.
Judgment: December 9, 1997.

(25 pp.)

Criminal law -- Rights of accused -- Right to discovery or production.

This was an appeal by the accused from the dismissal of an application for an order of mandamus. The accused was charged with several offences related to the possession and sale of firearms. The

charges resulted from an investigation conducted by Canadian and American authorities. The accused claimed that the Crown did not make full disclosure. He requested the disciplinary records of police officers involved in the investigation. He also request audio-tapes of police telephone calls and information regarding all illicit firearms dealings in a certain location. He asked for correspondence between American customs officers and law enforcement officials. The preliminary inquiry judge found that he did not have jurisdiction to order further disclosure. The accused's application for an order of mandamus compelling the judge to order further disclosure was dismissed. The Superior Court judge hearing the application ordered further limited disclosure under his discretion. The accused appealed the decision dismissing his application.

HELD: The appeal was dismissed. The limited disclosure order made by the Superior Court judge settled the Crown's disclosure obligation at the preliminary inquiry. The preliminary inquiry judge did not err in finding that he did not have jurisdiction to order further disclosure. He was not expressly granted this power by Parliament. The power did not flow by necessary implication from his express powers.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, ss. 7, 24(1).
Criminal Code, ss. 535, 537(1)(I), 548(1).
Rules of the Ontario Court of Justice in Criminal Proceedings, SI/97-133, Rule 27.03(2).

Counsel:

Allan Young and Ricardo Federico, for the applicant/appellant.
Susan Ficek and Shawn Porter, for the respondent.

The judgment of the Court was delivered by

1 DOHERTY J.A.:-- On May 28, 1997, the court dismissed this appeal and remitted the matter to the Ontario Court (Prov. Div.) for the expeditious completion of the preliminary inquiry. That inquiry had commenced in November 1995, but had been interrupted by the interlocutory proceedings which culminated in the appeal to this court. In dismissing the appeal, the court indicated that reasons would follow. These are those reasons.

I. Procedural History

2 In January 1995, the appellant was charged with numerous offences involving the alleged possession and sale of prohibited and restricted firearms. The charges were laid after an investigation involving Canadian and American law enforcement agencies, and arose out of events

said to have occurred between November 1994 and January 1995.

3 In August 1995, counsel for the appellant wrote to the Crown acknowledging receipt of some disclosure and taking the position that full disclosure had not been made in several specified areas. Defence counsel reiterated his position and made additional written disclosure demands later in August and again in November 1995. "Pre-trials" were held in the Ontario Court (Prov. Div.) in August and October 1995 at which disclosure issues were canvassed but not fully resolved. Crown counsel continued to make disclosure up to November 1995, however, counsel for the appellant maintained that full disclosure had not been made as of November 20, 1995.

4 On November 20, 1995, the appellant was arraigned before Judge Lindsay of the Ontario Court (Prov. Div.) sitting as a justice under Part XVIII of the Criminal Code. He refused to elect his mode of trial, claiming that he could not make an informed election until he had received full disclosure. Having refused to elect, the appellant was deemed to have elected trial by judge and jury, and Judge Lindsay's jurisdiction was limited to the conducting of a preliminary inquiry under Part XVIII of the Criminal Code. The appellant then brought an application before Judge Lindsay styled as a demand for "disclosure and production of records." He sought an order directing disclosure of material which he contended the Crown was obligated to disclose to him under the criteria established in R. v. Stinchcombe (1991), 68 C.C.C. (3d) 1 (S.C.C.). After hearing extensive argument, Judge Lindsay held that he had no jurisdiction to make the order when sitting as a justice conducting a preliminary inquiry. He said:

> I have no jurisdiction to make an order ...
>
> If, during the preliminary inquiry, matters arise on which I determine that there is some relevancy, I can rule on that. If matters arise during the preliminary that deals with the issue of privilege, I can rule on it, but failing that, I have no jurisdiction to dictate to the Crown how the Crown should conduct its case. That is it.

5 The preliminary inquiry did not proceed. Instead, counsel for the appellant brought an application in the Ontario Court (Gen. Div.) for an order in the nature of mandamus to compel Judge Lindsay to order the Crown to make the disclosure demanded by the appellant. At the same time, the appellant brought a motion under s. 24(1) of the Charter seeking an order from a superior court judge compelling the Crown to provide the disclosure sought by the appellant.[1]

6 On June 25, 1996, Ewaschuk J. dismissed the application for mandamus, holding that Judge Lindsay had correctly determined that he had no jurisdiction to make the order requested. Ewaschuk J. did, however, exercise his original jurisdiction under s. 24(1) of the Charter and ordered that the Crown provide some of the information referred to in the disclosure demand.[2]

7 By notice of appeal dated July 15, 1996, the appellant launched this appeal. In the notice of

appeal the appellant claimed that Ewaschuk J. erred in refusing to issue mandamus and erred in making only a limited disclosure order under s. 24(1) of the Charter. The appellant also asked this court to exercise original jurisdiction under s. 24(1) of the Charter and to order the Crown to make the disclosure requested. In oral argument, counsel pursued only the mandamus claim and formally abandoned the request that this court exercise any original jurisdiction it might have under s. 24(1) of the Charter.

II. The nature of the disclosure sought by the appellant.

8 In his application for a disclosure order brought before Judge Lindsay, the appellant sought disclosure in relation to some 35 itemized matters. Some of the demands referred to specific material or information (e.g. the identity of a person described as M.P.). Many of the demands were, however, general and far-ranging. For example, the defence demanded disclosure in the following terms:

> all disciplinary records, internal discipline records, documentation from personnel files, including all information pertaining to misconduct activities, of each police officer and government agent including all U.S. A.T.F. police;
>
> ...
>
> all audio-taped conversations and, if in existence, transcripts of same, and all records of long-distance telephone calls made by the police.
>
> ...
>
> all information in possession of the Canadian police and/or Crown attorney re: the credibility of any proposed Crown witnesses, inconsistent statements, subsequent recantation, any promise of immunity, any mental disorder or substance abuse problem that the witness may suffer;
>
> ...
>
> all information regarding "Project Gunrunner";
>
> ...
>
> all information involving illicit firearms dealings in the Toronto area;
>
> ...
>
> all police information regarding the newly formed S.I.S. - Firearms Unit;
>
> ...

9 The appellant also demanded disclosure of notes and materials in the possession of American officials and law enforcement agencies. His demands included:

> all correspondence made to U.S. Customs regarding this investigation and notes of all U.S. Customs Personnel involved in this case;
>
> ...
>
> regarding Dick Mairgret: all notes made and all correspondence to the District Attorney and any other District Attorney involved in this matter;
>
> ...

10 Before Judge Lindsay, Crown counsel took the position that a justice conducting a preliminary inquiry had no jurisdiction to make the order requested. He also contended that the Crown had complied with its disclosure obligations. Counsel argued that the material demanded by the appellant in the notice was irrelevant, or did not exist, or was protected by a public interest or police informant privilege. He further maintained that some of the demands were so vague that he could not respond to them in a meaningful way and that others demanded the production of material that was not in the possession of or under the control of the prosecution.

11 I need not make an item-by-item analysis of the appellant's demand for disclosure. Full disclosure is fundamental to the right to make full answer and defence. The Crown has both a legal and ethical obligation to make that disclosure. While the Crown's obligation to make full disclosure is quite properly stressed, defence counsel also has an obligation to act "responsibly" in the course of the disclosure process: R. v. Stinchcombe, supra, at p. 12. Some of the items which the appellant sought produced are clearly beyond the pale of any reasonable disclosure demand.

12 Disclosure demands which are no more than "fishing expeditions", seeking everything short of the proverbial kitchen sink undermine the good faith and candour which should govern the conduct of counsel. For example, counsel's demand for "documentation from personnel files" of all Canadian and American police officers involved in the investigation can only be described as frivolous and abusive. No reasonable person would suggest that personnel records of all police officers involved in a criminal investigation must be turned over to the defence at the outset of a prosecution. It would be obvious to anyone that the prosecution would resist compliance with such a far-fetched demand. Disclosure demands like some of those made in this case seem calculated to create needless controversy and waste valuable resources rather than to assist the accused in making full answer and defence.

III. The disclosure order made by Ewaschuk J.

13 This appeal could have been dismissed on a narrow ground. The appellant chose to invoke the Charter jurisdiction of the superior court by way of an application under s. 24(1). Ewaschuk J.

regarded this as one of those unusual cases in which he should exercise that jurisdiction and he made a disclosure order under s. 24(1). Although that order was initially challenged in the appellant's notice of appeal, that ground was not pursued in argument.[3] The order made by Ewaschuk J. settles the Crown's disclosure obligation at this stage of these proceedings. Even if Judge Lindsay had jurisdiction to make a disclosure order, he could not exercise that jurisdiction in the face of an order of a superior court judge made in response to an identical application for disclosure. On that basis alone, the appeal from the refusal of the mandamus order must be dismissed.

IV. Judge Lindsay's jurisdiction to make the order requested.

14 Although the order of Ewaschuk J. made under s. 24(1) of the Charter necessitates the dismissal of the appeal from the refusal of the mandamus order, I will address the merits of the appellant's submission that Judge Lindsay had jurisdiction to make the order requested. That issue was fully argued and involves a matter of general importance to the profession.

15 The Crown's disclosure obligation is firmly established. The Crown must disclose to the defence all information whether inculpatory or exculpatory under its control, unless the information is clearly irrelevant or subject to some privilege which justifies the refusal to provide that information to the defence. Information is relevant for the purposes of the Crown's disclosure obligation if there is a reasonable possibility that withholding the information will impair the accused's right to make full answer and defence. Full answer and defence encompasses the right to meet the case presented by the prosecution, advance a case for the defence, and make informed decisions on procedural and other matters which affect the conduct of the defence: R. v. Stinchcombe, supra, at pp. 10-14; R. v. Egger (1993), 82 C.C.C. (3d) 193 at 203-4 (S.C.C.); R. v. Chaplin (1995), 96 C.C.C. (3d) 225 at 233-234 (S.C.C.).

16 The accused's right to disclosure is a principle of fundamental justice and a component of the constitutional right to make full answer and defence. Full and timely disclosure by the Crown enhances both the fairness and the reliability of the trial process. The Crown's failure to meet its disclosure obligations results in a breach of an accused's rights under s. 7 of the Charter and entitles the accused to an "appropriate and just" remedy under s. 24(1) of the Charter: R. v. Carosella (1997), 112 C.C.C. (3d) 289 at 301-306 (S.C.C.).

17 The Crown's obligation to disclose is triggered by a request for disclosure from counsel for an accused. Initial disclosure must occur sufficiently before the accused is called upon to elect or plead so as to permit the accused to make an informed decision as to the mode of trial and the appropriate plea. In a perfect world, initial disclosure would also be complete disclosure. However, as is recognized in Stinchcombe, supra, at p. 14, the Crown will often be unable to make complete disclosure at the initial stage of the disclosure process. There will also be rare cases in which the Crown can properly delay disclosure until an investigation is completed. If full disclosure cannot be made when initial disclosure is provided, the Crown's obligation to disclose is an ongoing one and

requires that disclosure be made as it becomes available and be completed as soon as is reasonably possible. In any event, an accused will not be compelled to elect or plead if the accused has not received sufficient disclosure to allow the accused to make an informed decision.

18 The disclosure process requires that the Crown make the initial determination of what material is properly subject to disclosure to the defence. In making that determination, the Crown must exercise the utmost good faith and be guided by the spirit and the letter of Stinchcombe. The Crown's determination is subject to judicial review. The trial judge may exercise that reviewing authority and, in exceptional cases where the circumstances require, a judge of the superior court, may under the authority of s. 24(1) of the Charter, review the adequacy of the disclosure provided by the Crown: R. v. Stinchcombe, supra, at pp. 11-12; R. v. Laporte (1993), 84 C.C.C. (3d) 343 (Sask. C.A.); R. v. Connell, [1996] O.J. No. 4530, (Ont. Ct. (Gen. Div.)). If the disclosure made by the Crown does not meet Stinchcombe standards, the court can require the Crown to make the appropriate disclosure.

19 Counsel for the appellant acknowledges that judicial review of the Crown's disclosure decisions is available before the trial judge or by way of an application to the superior court under s. 24(1) of the Charter. He submits that both remedies can cause significant delays and that review by the trial judge may come too late to protect an accused's right to make full answer and defence. Counsel submits that a justice presiding over a preliminary inquiry is in the best position to exercise that reviewing power in a timely and efficient way.

20 Counsel recognizes that he cannot succeed by showing only that the criminal justice system would be better served if a justice conducting a preliminary inquiry could review the Crown's disclosure decisions. This court cannot determine what powers a justice should have when conducting a preliminary inquiry, but must decide what powers Parliament has conferred on a justice performing that function.

21 A justice conducting a preliminary inquiry has no inherent power and is not a court of competent jurisdiction for the purposes of s. 24 of the Charter: R. v. Doyle, [1977] 1 S.C.R. 597 at 602; R. v. Dubois (1986), 25 C.C.C. (3d) 221 at 227 (S.C.C.); R. v. Mills, supra, per McIntyre J. at pp. 492-93, per La Forest J. at p. 565, per Lamer J. at p. 515; R. v. Seaboyer (1991), 66 C.C.C. (3d) 321 at 411-413 (S.C.C.). The justice's powers are limited to the powers expressly granted by the provisions of Part XVIII of the Criminal Code, and any additional powers which flow by necessary implication from those express powers: R. v. Doyle, supra. Nothing in Part XVIII of the Criminal Code expressly gives a justice conducting a preliminary inquiry the power to review the Crown's disclosure decisions. The appellant's position, therefore, depends on whether that power flows by necessary implication from a statutory power expressly granted to a justice conducting a preliminary inquiry.

22 Before turning to the statutory provision of Part XVIII relied on by the appellant, I would make this observation. Applications challenging the Crown's disclosure decisions are largely, but

not exclusively, Charter based. Any statutory or common law power a court has to make a disclosure order is all but subsumed in the broad remedial powers of s. 24(1) of the Charter. The resolution of disclosure disputes in the trial court is consistent with the primary role assigned to the trial court in the determination of constitutional issues which arise in the course of criminal proceedings: R. v. Seaboyer, supra, at pp. 412-413. If those applications can be brought in the course of the preliminary inquiry, the risk of prolonged and fragmented preliminary proceedings is increased: see R. v. Mills, supra, R. v. Seaboyer, supra. Those concerns speak in favour of a cautious approach to any claim based on the assertion that additional powers are necessarily incidental to those expressly granted to a justice in Part XVIII.

23 The appellant submits that the justice's power to review Crown disclosure is necessarily implied from the terms of s. 537(1)(i):

> 537. (1) A justice acting under this Part may
>
> (i) regulate the course of the inquiry in any way that appears to him to be desirable and that is not inconsistent with this Act. [Emphasis added.]

24 This section is clearly procedural. It does not define the scope or nature of the Part XVIII inquiry, but permits a justice to "regulate the course of the inquiry." It is one of many procedural provisions found in Part XVIII, which together make up the "careful and detailed procedural directions" referred to in R. v. Doyle, supra, at p. 602. Section 537(1)(i) may be invoked to fill procedural gaps which arise in the course of an inquiry. The section allows a justice to implement procedures which are not inconsistent with the Act and will allow the justice to effectively carry out his or her mandate; R. v. Swystun (1990), 84 Sask. R. 238 at 239 (C.A.). Any particular order sought under s. 537(1)(i) must be measured against this test.

25 I do not think that the kind of disclosure order sought by the appellant had anything to do with regulating the course of the preliminary inquiry. Counsel was not asking Judge Lindsay to compel a witness to testify, to answer questions, or to produce documents for the purpose of cross-examination of that witness. Counsel had no idea whether any of the material he asked Judge Lindsay to order produced would ever surface at the preliminary inquiry or have any connection to any testimony given at the preliminary inquiry. An order compelling the Crown to disclose material cannot be equated with a ruling as to the admissibility of evidence, the production of documents, or the compellability of a witness. Those rulings occur in the course of the inquiry and require an assessment by the justice grounded in the applicable rules of evidence and the specifics of each situation. Clearly, those rulings regulate the course of the inquiry: R. v. R.(L.) (1995), 100 C.C.C. (3d) 329 at 336 (Ont. C.A.); R. v. Richards (1997), 115 C.C.C. (3d) 377 at 379-380 (Ont. C.A.).

26 An accused's right to disclosure and the proper limits, if any, imposed on that disclosure are in no way dependent upon anything which occurs in the course of the preliminary inquiry. The Crown's disclosure obligations and the court's power to ensure that those obligations are met, exist

apart from, and are not affected by, the preliminary inquiry process: Re R. and Arviv (1985), 19 C.C.C. (3d) 395 (Ont. C.A.), leave to appeal to S.C.C. refused (1985), 19 C.C.C. (3d) 395. Quite simply, the preliminary inquiry has nothing to do with a Crown's obligation to make full disclosure to the defence. Consequently, judicial review of Crown disclosure cannot be seen as a manifestation of the justice's power to regulate the course of the inquiry.

27 I also cannot regard review of Crown disclosure decisions as providing any assistance to a justice in the carrying out of his or her mandate under Part XVIII of the Criminal Code. The mandate is set out in s. 535:

> 535. Where an accused who is charged with an indictable offence is before a justice, the justice shall, in accordance with this Part, inquire into that charge and any other indictable offence, in respect of the same transaction, founded on the facts that are disclosed by the evidence taken in accordance with this Part. [Emphasis added.]

28 Section 535 contemplates an inquiry into a charge based on evidence led before the justice. That inquiry is directed to the judicial determination required by s. 548:

> 548. (1) When all the evidence has been taken by the justice, he shall
> (a) if in his opinion there is sufficient evidence to put the accused on trial for the offence charged or any other indictable offence in respect of the same transaction, order the accused to stand trial; or
> (b) discharge the accused, if in his opinion on the whole of the evidence no sufficient case is made out to put the accused on trial for the offence charged or any other indictable offence in respect of the same transaction.

29 The inquiry established by Part XVIII is a charge screening device: R. v. Tapaquon, [1993] 4 S.C.R. 535 at 545-547. It protects an accused from trial where the Crown is unable to produce sufficient evidence to warrant the accused's committal for trial. The Supreme Court of Canada has repeatedly recognized the charge screening function as the purpose underlying the preliminary inquiry. I will refer to three of those decisions. In R. v. Patterson (1970), 2 C.C.C. (2d) 227 at 230, Judson J., for the majority, observed:

> ... The purpose of a preliminary inquiry is clearly defined by the Criminal Code -- to determine whether there is sufficient evidence to put the accused on trial. It is not a trial and should not be allowed to become a trial. ...

30 Similarly, in R. v. Caccamo (1975), 21 C.C.C. (2d) 257 at 275, de Grandpre J., for the majority, said:

> It is, of course, now settled law that the sole purpose of the preliminary inquiry is to satisfy the Magistrate that there is sufficient evidence to put the accused on

> trial and that, therefore, the Crown has the discretion to present only that evidence which makes out a prima facie case. ...

31 Finally, in R. v. Dubois, supra, at 227, Estey J., for the majority, observed:

> ... It has been said numerous times that the objective of holding a preliminary inquiry is merely to determine whether there is enough evidence against the accused to justify ordering him to stand trial. It is not intended to determine, finally or otherwise, the accused's guilt or innocence. ...

32 These authorities indicate that the justice's mandate is only to inquire into the charge for the purpose of making the determination referred to in s. 548. Certainly, none of these cases suggest that a justice has any supervisory authority over the Crown's overall conduct of the prosecution or any responsibility to safeguard the accused's right to make full answer and defence at trial.

33 It is argued, however, that in R. v. Skogman (1984), 13 C.C.C. (3d) 161 at 171-72, the Supreme Court of Canada recognized that in addition to a charge screening function, the preliminary inquiry also serves as a means whereby the defence may obtain disclosure of the Crown's case. This disclosure function was said to be secondary or ancillary to the primary charge screening function of the preliminary inquiry. Based on Skogman, it is argued that since disclosure is a purpose underlying the preliminary inquiry, a justice must, in the course of regulating the inquiry, have the power to make orders directing that the Crown provide further and better disclosure.

34 The passage relied on in Skogman is found at pp. 171-72:

> ... The purpose of a preliminary hearing is to protect the accused from a needless, and indeed, improper, exposure to public trial where the enforcement agency is not in possession of evidence to warrant the continuation of the process. In addition, in the course of its development in this country, the preliminary hearing has become a forum where the accused is afforded an opportunity to discover and to appreciate the case to be made against him at trial where the requisite evidence is found to be present. ...
>
> ... The purpose of adducing evidence is to enable the judge to exercise his jurisdiction by making determinations of fact, applying the law to those facts, and finally, to exercise his discretion to commit or discharge the accused. ...

35 It is noteworthy that the quoted passage from Skogman begins and ends with a reference to "the purpose" of the preliminary inquiry. That purpose is described in terms which are entirely consistent with Patterson, Caccamo and Dubois. Between those two references to the purpose of a preliminary inquiry, Estey J. observes that the nature of the inquiry gives the defence the chance to

"discover and appreciate" the Crown's case. He refers to the article of G. Arthur Martin (later Mr. Justice Martin of this court) where he said:

> From the point of view of defence counsel the preliminary hearing has another aspect. It affords counsel an opportunity of ascertaining the nature and the strength of the case against his client and it may be likened in that respect to an Examination for Discovery.[4]

36 In the article, Mr. Justice Martin describes, at some length, how defence counsel may best use the opportunity afforded by the preliminary inquiry to cross-examine witnesses and to call witnesses to gain an appreciation of the strengths and weaknesses of the Crown's case. Mr. Justice Martin made the same point in a subsequent article:

> ... I do wish to emphasize, however, that the preliminary hearing gives defence counsel an opportunity to test the strengths and weaknesses of the Crown's case; to form a judgment as to the mental make-up or personality of the witnesses; to discover those parts of the case that are vulnerable to attack at the trial, and also those areas where he must tread warily.[5]

37 In both articles Mr. Justice Martin is speaking to the techniques available to counsel to assist in the effective defence of a client. The process described in both articles and alluded to by Estey J. in Skogman has nothing to do with a Crown's obligation to make disclosure to the defence. Disclosure refers to the Crown's constitutional obligation, subject to limited exceptions, to make full and timely disclosure to the defence of all relevant information in its possession or under its control. Mr. Justice Martin is referring to the process by which the defence may discover the case for the Crown at the preliminary inquiry. Discovery involves a testing by the defence of the strengths and weaknesses of the Crown's case through the questioning of witnesses. Discovery is a forensic tactic and a means whereby counsel prepares for trial. Unlike disclosure, discovery is not a constitutionally protected right. The Crown has no obligation to afford the defence an opportunity to discover the Crown's case.

38 In my view, Mr. Justice Martin is simply making the point that proper preparation for trial may require that defence counsel take advantage of their statutory right to cross-examine and call witnesses at the preliminary inquiry so as to gain discovery of the Crown's case. The fact that the preliminary inquiry may serve the discovery interests of the defence does not alter the purpose of the preliminary inquiry or the singular nature of the justice's function at a preliminary inquiry. Estey J. does not describe discovery of the Crown's case as a purpose of the preliminary inquiry, but rather acknowledges that defence may use it to that end. In my view, discovery is an incidental benefit to the defence flowing from a process which requires the Crown to establish a case for committal for trial by means of viva voce evidence at a proceeding in which the defence is given the statutory right to cross-examine witnesses called by the Crown and to call its own witnesses.

39 No doubt, there is a strong tension between the limited judicial purpose of the preliminary

inquiry and defence efforts to maximize its value as a discovery vehicle. R. v. O'Connor (1995), 44 C.R. (4th) 1, per L'Heureux-Dubé J., speaking for four members of the majority, at 72-73 (S.C.C.). It may be that these competing ends cannot be properly served in the same proceeding. Be that as it may, I can find no connection between the defence entitlement to exercise its power to cross-examine witnesses and call witnesses to further discovery interests and the claim that a justice has the power to review Crown disclosure decisions. Review of Crown disclosure decisions is not incidental to a justice's power to regulate the course of the preliminary inquiry.

40 In holding that Part XVIII does not give a justice the power to review Crown disclosure decisions, I should not be taken as diminishing in any way either the Crown's obligation to provide timely disclosure or the valuable role that a justice may play in resolving disclosure disputes at an early point in the proceedings. The Crown must make full disclosure as soon as is reasonably possible. An accused's decision to have a preliminary inquiry is no excuse for either delaying or curtailing disclosure: Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions, G.A. Martin, Chairman (1993), at pp. 171-173.

41 In Stinchcombe, supra, at p. 12, Sopinka J. observed that most disclosure problems could be resolved by reasonable discussions between counsel conducted in good faith. I share that view. I would add that in complex cases, like this one, where judicial "pre-trials" are available in the Provincial Division those "pre-trials" afford an excellent opportunity for counsel to solicit the assistance of a judge in resolving contentious disclosure issues.[6] We are fortunate in Ontario to have a highly qualified and respected criminal bench in the Provincial Division. The experience and expertise of those judges can prove invaluable in resolving disclosure disputes in a manner which ensures compliance with Stinchcombe and avoids unnecessary delay and protracted preliminary inquiries. Even though judges of the Provincial Division cannot review Crown disclosure decisions (except where the trial is in the Provincial Division), their views as to what material should be disclosed should, and no doubt, will carry great weight with Crown counsel.

42 In rare cases, the Crown will not have provided sufficient disclosure to allow the accused to make a reasonably informed election. If the Crown takes the position that the requested disclosure will be made, but requests further time to make that disclosure, a justice should adjourn the taking of the election and allow the Crown a reasonable time to fulfil its disclosure obligations. If the time needed to make proper disclosure is inordinate, any delay in the proceedings will count against the Crown. If there is a true disclosure dispute, that is the Crown refuses to produce material which the defence claims should be produced and is essential to the making of an informed election, a justice may adjourn the taking of the election to allow the accused to seek the appropriate remedy in the superior court. If it turns out that the Crown has improperly withheld disclosure, any delay caused by the bringing of that application in the superior court will count against the Crown.

43 As indicated in the endorsement of May 28, 1997, the appeal is dismissed.

DOHERTY J.A.

WEILER J.A. -- I agree.
MOLDAVER J.A. -- I agree.

cp/d/alp/DRS/DRS/qlhjk

1 Ewaschuk J. also heard a cross motion brought by the Crown and quashed certain subpoenas issued at the request of the appellant. That motion is not relevant on this appeal.

2 Justice Ewaschuk ordered the Crown to disclose certain telephone records and certain CPIC information.

3 The jurisdiction of this court to entertain an appeal from the s. 24(1) order made by Ewaschuk J. prior to the implementation of the trial is doubtful to say the least: R. v. Mills (1986), 26 C.C.C. (3d) 481 per McIntyre J. at pp. 496-97, per La Forest J. at p. 570 (S.C.C.); Dagenais v. C.B.C. (1994), 94 C.C.C. (3d) 289 at 302-303 (S.C.C.).

4 G.A. Martin, "Preliminary Hearings", 1955 Special Lectures of the Law Society of Upper Canada at p. 1. Many of Justice Martin's valuable contributions to the criminal law literature have been collected in G. Arthur Martin: Essays on Aspects of Criminal Practice, J.W. Irving ed. (1997).

5 G.A. Martin "Preparation for Trial" 1969 Special Lecture Series of the Law Society of Upper Canada, 221 at 234-35.

6 Pre-trials in the Provincial Division are now the subject of court rules: Ontario Rules of the Ontario Court of Justice in Criminal Proceedings, SI/97-133 Ontario Gazette, Part II, November 26, 1997. Rule 27.03(2) provides that a pre-trial judge may inquire into the extent of disclosure made and any further requests for disclosure.

Case Name:

R. v. Spackman

Between
Her Majesty the Queen, Appellant, and
Kelly Spackman, Respondent

[2012] O.J. No. 6127

2012 ONCA 905

274 C.R.R. (2d) 196

300 O.A.C. 14

Docket: C50464

Ontario Court of Appeal
Toronto, Ontario

J.I. Laskin, K.N. Feldman and D. Watt JJ.A.

Heard: April 25, 2012.
Judgment: December 24, 2012.

(264 paras.)

Criminal law -- Criminal Code offences -- Offences against person and reputation -- Homicide -- Second degree murder -- Appeal by Crown from acquittal allowed -- Accused, who was charged with murdering dealer he supplied drugs to, alleged another dealer committed murder -- Exclusion of testimony of alternate suspect and evidence derived from it not required as remedy for late disclosure and judge erred in evaluation of probative and prejudicial effect of evidence -- Judge failed to instruct on joint participation basis on which accused's liability could be determined and improperly referred to wrongful convictions and miscarriages of justice -- Wiretap evidence improperly excluded -- As errors related to central issue of identity, errors had bearing on verdict.

Criminal law -- Procedure -- Trial judge's duties -- Charge or directions -- Appeal by Crown from acquittal allowed -- Accused, who was charged with murdering dealer he supplied drugs to, alleged another dealer committed murder -- Exclusion of testimony of alternate suspect and evidence

derived from it not required as remedy for late disclosure and judge erred in evaluation of probative and prejudicial effect of evidence -- Judge failed to instruct on joint participation basis on which accused's liability could be determined and improperly referred to wrongful convictions and miscarriages of justice -- Wiretap evidence improperly excluded -- As errors related to central issue of identity, errors had bearing on verdict.

Criminal Law -- Evidence -- Admissibility -- Prejudicial evidence -- Probative value -- Private communications -- Witnesses -- Appeal by Crown from acquittal allowed -- Accused, who was charged with murdering dealer he supplied drugs to, alleged another dealer committed murder -- Exclusion of testimony of alternate suspect and evidence derived from it not required as remedy for late disclosure and judge erred in evaluation of probative and prejudicial effect of evidence -- Judge failed to instruct on joint participation basis on which accused's liability could be determined and improperly referred to wrongful convictions and miscarriages of justice -- Wiretap evidence improperly excluded -- As errors related to central issue of identity, errors had bearing on verdict.

Appeal by the Crown from the acquittal of the accused on a charge of second degree murder. The accused was charged with second degree murder in the stabbing death of Christoff. The victim was a drug dealer who sold cocaine he purchased from the accused. Prior to his death, the victim gave money to the accused for cocaine, but did not receive the cocaine. After attempts to obtain the cocaine or his money failed, the victim threatened the accused. Up until the time of the victim's death, there were frequent cell phone calls between the accused, the victim and Chung, another drug dealer who supplied the accused. The victim's body was found near Chung's residence. When the accused was interviewed by police he indicated he was home at all times material to the murder. However, the accused's cell phone records contradicted his account of his whereabouts. Chung denied knowing the victim. Intercepted communications and surveillance of the accused and Chung showed they had several conversations and met several times after the murder, but revealed no information identifying the perpetrator of the murder. Police believed Chung was involved in the murder and obtained a search warrant for his home. During the search, a marijuana grow operation was found, but nothing was found linking Chung to the murder. The accused wished to advanced Chung as an alternate suspect and raise the defence of inadequate investigation. On the accused's pre-trial motion on those issues, Chung initially denied involvement in the killing or knowledge of the person responsible, but later testified the accused confessed to him. The accused was permitted to advance Chung as an alternate suspect, raise the defence of inadequate investigation and adduce evidence supporting his assertions. The Crown was not permitted to call Chung as a witness at trial or introduce any evidence derived from Chung's disclaimer of responsibility. In addition, the intercepted private communications were also excluded from evidence. The jury found the accused not guilty. The Crown sought to appeal the acquittal primarily on the basis the judge erred in excluding Chung's evidence and other evidence derived from his testimony. In addition, the Crown alleged the trial judge made errors in the charge to the jury and in the exclusion of evidence of intercepted private communications.

HELD: Appeal allowed. The trial judge erred in excluding Chung's testimony and evidence derived from it. Late disclosure, without more, did not violate an accused's right to a fair trial and exclusion of evidence for late disclosure was an extraordinary remedy reserved for cases where an adjournment was insufficient. Furthermore, the judge erred in his evaluation of the probative value and prejudicial effect of Chung's evidence. In his assessment of probative value, the trial judge focused almost exclusively on a portion of Chung's evidence, ignoring other portions which were relevant and had probative value. In his determination of prejudicial effect, the judge wrongly concluded the evidence would generate moral and reasoning prejudice and inappropriately considered the adequacy of the investigation and the unfair surprise from the Crown's failure to call Chung at the preliminary inquiry and of the police to conduct a timely investigation. In addition, the judge erred in his instructions to the jury. As the inference the accused and Chung jointly participated in the killing was available on the evidence, the jury should have been told that, if they were satisfied that both participated in the killing, they could have convicted the accused without having to decide Chung's precise role. The trial judge erred in repeating references to wrongful convictions and miscarriages of justice. On the application to exclude the intercepted communications, the reviewing judge erred in concluding there was no reliable evidence on which the wiretap authorization could have been granted. The reviewing judge applied the wrong standard of review, his piecemeal approach to reviewing the material was inappropriate and he failed to articulate the basis upon which he rested his conclusions. Except for the exclusion of the wiretap evidence, the errors related to the central issue of the killer's identity and had a bearing on the verdict. A new trial was required.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 7, s. 8, s. 11(d), s. 24(1), s. 24(2)

Criminal Code, R.S.C. 1985, c. C-46, s. 21, s. 21(1)(a), s. 21(1)(b), s. 21(1)(c), s. 21(2), s. 186(1), s. 186(1)(b), s. 676(1)(a)

Appeal From:

On appeal from the acquittal entered by Justice W. Brian Trafford of the Superior Court of Justice, sitting with a jury, on April 16, 2009.

Counsel:

Alexander Alvaro, for the appellant.

Joseph Wilkinson and Anida Chiodo, for the respondent.

The judgment of the Court was delivered by

1 **D. WATT J.A.**:-- Sometimes, a person accused of a crime will point to someone else as the person who committed it.

2 And sometimes, a person accused of a crime will claim that the police investigation of the offence that resulted in the charge was seriously flawed.

3 Both happened here.

4 Kelly Spackman was charged with second degree murder. The Crown alleged that he killed Alexander Christoff. Spackman contended that another person, Steve Chung, was the killer and that the police investigation of Chung's involvement was inadequate; the product of "tunnel vision" that focussed exclusively on Spackman (the respondent).

5 Crown counsel at trial wanted to call Chung as a witness to give the lie to the respondent's claim that Chung was the killer. The trial judge, who had already decided that alternate suspect and inadequate investigation issues could be advanced before the jury, ruled that the Crown could not call Chung as a witness or introduce any evidence derived from Chung's disclaimer of responsibility.

6 The jury found the respondent not guilty.

7 The Crown appeals the respondent's acquittal. The principal ground of appeal concerns the exclusion of Chung's evidence and other evidence derived from his testimony. Other grounds assert errors in the charge to the jury and in the exclusion of evidence of intercepted private communications.

8 These reasons explain why I have concluded that a combination of errors in the conduct of these proceedings requires a new trial.

THE BACKGROUND FACTS

9 It is helpful to begin with a brief overview of the case as it was presented to the jury at trial leaving detailed elaboration where necessary to the individual grounds of appeal.

The Principals

10 The deceased was a drug dealer who lived in an apartment over a convenience store not far from the intersection of Yonge Street and Lawrence Avenue in Toronto. His currency was marijuana although he had expanded into cocaine trafficking in the year before he died. He was "cautious" in his illicit dealings, careful in his choice of customers, and in the manner in which he conducted his business.

11 In the three or four months prior to his death, the respondent became the deceased's supplier of cocaine.

12 The respondent was also a drug dealer. He lived in an apartment at 110 Erskine Avenue with his girlfriend, Tijana Petrovic.

13 Steve Chung, another drug dealer, lived at 326 Dalesford Road, a very short distance from where the frozen body of the deceased was found by a passerby on March 11, 2005. Chung supplied cocaine to the respondent in kilogram level quantities.

14 The respondent and Chung were associates in the cocaine trade. Each had a prior conviction for large scale distribution of drugs. Chung and the deceased did not deal directly with one another although they may have met briefly one evening at the Film Lounge, a local nightclub.

Drug Dealings Between the Respondent and Deceased

15 The evidence adduced at trial revealed two drug transactions between the respondent as seller and the deceased as purchaser.

16 The first transaction began at the respondent's apartment. He asked for, and the deceased provided, $30,000 in cash for a kilogram of cocaine. The respondent took the money, left the apartment, and returned a few minutes later with a kilogram of cocaine. The deceased took the drugs and left the apartment.

17 The deceased agreed to buy another kilogram of cocaine from the respondent. The price was about the same as the first deal. The deceased turned over the money to the respondent in the same apartment. The respondent left with the money to get the drugs. A few minutes later, the respondent returned to the apartment without the drugs or the money the deceased had given him.

18 The deceased expressed concern that he had been "ripped off". The respondent offered to help the deceased recover the drugs or money.

The Recovery Efforts

19 The deceased and respondent made several "attempts" to recover the drugs or money. The deceased told a friend that a "Woodbridge guy" had been involved in the drug deal.

20 On February 23, 2005, the deceased and respondent made several telephone calls in connection with the failed drug transaction. They left together from the respondent's apartment and travelled to Woodbridge, all to no avail. They returned to the respondent's apartment.

The Threat

21 Frustrated by the respondent's failure to refund his money or supply the drugs, the deceased

told the respondent that unless the cash were returned or the drugs supplied, he (the deceased) would send some Asian gang members after both the respondent and his girlfriend, or his girlfriend would be kidnapped.

The Cell Phone Traffic

22 Between February 24 and March 8, 2005, 63 calls were made between cell phones owned by the deceased and the respondent. At least one call took place every day. No money or drugs changed hands.

The Events of March 9, 2005

23 The deceased and respondent exchanged a further 7 cell phone calls on March 9, 2005.

24 The deceased's parents invited him for supper at their home on the evening of March 9, 2005. As they waited for dinner, the deceased answered several calls on his cell phone. Around 7:00 p.m., he left his parents' home. He said he would be back for supper in 10 minutes. He never returned.

25 The deceased called a friend and asked him to provide backup for a meeting he (the deceased) was to have with the respondent. The friend declined.

26 The last telephone call between the deceased's and respondent's cell phones took place at 7:29 p.m. on March 9, 2005 and lasted seven seconds. The same cell tower handled both phones indicating that the respondent and deceased were not far apart.

27 At about 7:30 p.m. on March 9, 2005, the deceased entered the convenience store located on the ground floor of the building where he lived. He was in the store only briefly before he left.

Evening Travels

28 Calls were made from or received by the deceased's cell phone between 7:30 and 7:55 p.m. on March 9, 2005. According to the cell towers routing the calls, the trier of fact could conclude that the deceased and the respondent travelled south from the area of the deceased's apartment to the Gardiner Expressway and west on the Expressway. The deceased spoke to a friend at 7:34 p.m. and again at 7:55 p.m. He said that he was on his way to meet the "Woodbridge guy" to collect his money. At 7:55 p.m. the deceased was less than three kilometres from the place where his body was found two days later.

29 From 8:20 p.m. on March 9, 2005 and thereafter, all incoming calls to the deceased's cell phone went directly to voicemail and were routed through one or both towers with coverage in the area where his body was found.

30 No calls were made from or received by the respondent's cell phone from 7:29 p.m. until 8:08 p.m. on March 9, 2005, when the tower routing information placed him in an area about 1 kilometre

east of where the deceased's body was found. Similar information placed him near his home at around 8:37 p.m. on March 9, 2005.

31 A police officer travelled the distance between the location of the deceased's body and the respondent's residence on Erskine Avenue in 24 minutes between 8:07 and 8:31 p.m. one evening.

32 An expert in cellular telephone technology explained that two cell towers provided overlapping coverage in the area in which the deceased's body was found. Overlapping coverage was not unusual. It was the witness' opinion that the deceased's handset was likely stationary from 8:20 p.m. on March 9, 2005. The changes between the overlapping towers revealed by the incoming calls that went directly to voicemail were likely due to instantaneous environmental factors, such as the volume of cellular telephone traffic, or an environmental change such as the movement of a large vehicle through the area.

33 It was the expert's opinion that although the deceased's cell phone could have received text messages between 8:20 p.m. on March 9, 2005, and when his body was found two days later, no text messages were sent from the deceased's cell phone during that same time.

The Time and Cause of Death

34 A passerby walking along a pathway discovered the deceased's body early in the afternoon of March 11, 2005. The body was fully clothed, resting against a chain-link fence near a walkway about 60 or 70 paces away from 326 Dalesford Road where Chung lived. The deceased's cell phone and a pager were in his pocket.

35 No blood trail was visible in the area around the body. Investigators found some blood along the back wall of the building, north of the body, as well as on the deceased's clothing and under his body. They found a toque and pager clip north of the deceased's body.

36 The deceased died of blood loss caused by 12 sharp force injuries only one of which was superficial. Two of the wounds were associated with fractures of adjacent ribs indicative of the application of significant force. Dr. David Chiasson, the forensic pathologist who conducted the post-mortem examination of the deceased, said that the wounds had been caused by a single knife or knife-like object with a blade 2.5 centimetres wide and 10 to 15 centimetres long, or by more than one cutting instrument of a similar nature. Dr. Chiasson could not say how many people were involved in the stabbing.

37 Dr. Chiasson could offer no firm conclusion about the time of the deceased's death. The body was frozen, a process that takes at least 24 hours, and had rested on its back for an extended time as was apparent from the post-mortem lividity the doctor saw on the posterior surface of the deceased's body.

38 No evidence was adduced at trial about where the deceased was killed.

The Respondent's Version

39 The respondent did not testify at trial. As part of its case, the Crown introduced two videotaped interviews of the respondent conducted by investigating officers. The accounts provided in each were relatively consistent, the one with the other, but some of the respondent's answers were demonstrably false in light of other evidence admitted at trial, including telephone records.

40 The respondent acknowledged that he had known the deceased for about three months through his girlfriend and had seen him socially during that time. The respondent knew that the deceased sold "weed" and "stuff like that", as well as cocaine. The respondent had bought "weed" from the deceased, but was not involved with him in any illegal activities.

41 The respondent told investigators that he had last seen the deceased on March 8, 2005, but had spoken to him by telephone while he was at his mother's Mississauga home at around 6:00 or 7:00 p.m. the following day. The respondent was suffering from the flu on March 9, 2005, and went home around 7:30 p.m. from his mother's place. He stayed at home with his girlfriend the rest of that night.

42 The respondent denied any other contact with the deceased. He told investigators that he did not kill the deceased and had no idea who might have done so.

43 Cellular telephone records admitted at trial contradict the respondent's account of his whereabouts on March 9, 2005, as well as the nature and frequency of his contact with the deceased.

The Chung Factor

44 At trial, the respondent advanced Chung as an alternate suspect, a fellow drug trafficker with an equivalent motive and commensurate opportunity to kill the deceased whose body was found about 60 or 70 paces away from where Chung lived. A second feature of the "Chung as killer" theme pressed by counsel at trial was an attack on the adequacy of the police investigation that focussed early on the respondent and, blinded by tunnel vision, never adequately examined the much more likely killer, Chung.

45 Chung called the respondent twice on March 9, 2005, the last time at 1:50 p.m. Chung's cell phone was in the vicinity of his home from 3:07 to 8:34 p.m. on March 9, 2005, and later that evening, at 10:46 and 11:12 p.m. was located in the Woodbridge area north of Toronto.

46 Police canvassed the neighbourhood in which the deceased's body was found over several days following its discovery. Chung was interviewed by police and shown a photo of the deceased whom Chung said he did not recognize.

47 Shortly after the first neighbourhood canvass, on March 17, 2005, the respondent and Chung

were in contact with each other. That day, surveillance officers saw the respondent remove a package from the trunk of his car and give it to Chung. For his part, Chung returned a dark brown square pouch to the respondent. The pair met on several other dates including immediately after police re-canvassed Chung on May 18, 2005.

48 On June 13, 2005, police searched Chung's home under a warrant issued on the basis of an information sworn by the lead investigator asserting a belief that Chung may have been "directly or indirectly involved" in the murder of the deceased. The investigator's sworn belief was grounded on the close proximity of Chung's residence to the location where the deceased's body was found and cell phone records that put Chung in the area during the time the police considered the deceased was killed.

49 During the search of Chung's residence, about three months after the deceased had been killed, investigators found nothing to link Chung to the killing. They found no traces of blood on the floor and didn't test any knives for the presence of blood because they didn't expect to find any traces of blood on them.

50 What investigators did find at Chung's home was a marijuana grow operation, along with some cocaine and several pills. Chung was charged with production of marijuana as a result of the discovery. Five months later, in November 2005, the federal Crown withdrew the charges against Chung.

51 Police did not obtain a warrant to search and did not search Chung's vehicle.

THE GROUNDS OF APPEAL

52 Crown counsel raises four grounds of appeal. One relates to the exclusion of evidence, two to the judge's charge to the jury, and the fourth to a pre-trial ruling made by another judge setting aside an authorization to intercept private communications and declaring inadmissible several intercepted private communications proposed for admission by the Crown.

53 At the risk of inaccurate paraphrase, I would characterize the grounds of appeal in this way:

i. that the trial judge erred in law in excluding the testimony of Chung and any evidence derived from that testimony proposed by Crown counsel to rebut the "alternate suspect" defence and claim of inadequate investigation;
ii. that the trial judge erred in law in instructing the jury that if they could not decide whether the respondent or Chung killed the deceased, they must find the respondent not guilty;
iii. that the motion judge erred in law in "setting aside" an authorization to intercept private communications granted under Part VI of the *Criminal Code*, and in excluding several intercepted private communications tendered for admission by the Crown as evidence; and

iv. that the trial judge erred in law in making repeated references to wrongful convictions and miscarriages of justice in his final instructions to the jury.

Ground #1: The Exclusion of Chung's Evidence

54 The first and principal ground of appeal relates to a ruling made by the trial judge at the conclusion of a pre-trial motion brought by trial counsel for the respondent (not Mr. Wilkinson). In his ruling, the trial judge:

i. permitted counsel for the respondent to raise the "defence" of inadequate investigation of the alternate suspect Chung;
ii. permitted counsel for the respondent to adduce evidence supportive of the assertion that Chung killed the deceased and that the investigation of Chung's potential involvement was inadequate; and
iii. excluded the testimony of Chung and any evidence derived therefrom that the Crown proposed to elicit to rebut the "defences" of alternate suspect and inadequate investigation.

55 The appellant does *not* quarrel with the trial judge's decision that permitted counsel for the respondent to adduce evidence in support of the "defences" of alternate suspect and inadequate police investigation. The appellant says that the error lies in the trial judge's refusal to permit the Crown to respond to the issues admittedly in play at trial with contrary evidence from Chung and others that would have left the jurors with a more balanced picture to evaluate the legitimacy of the respondent's claim.

56 To appreciate more fully this ground of appeal, it is necessary to sketch in some further detail about Chung and the investigation that followed the discovery of the body of the deceased.

The Additional Background

The Early Investigative Steps

57 Chung was first approached by the police within days of the finding of the body of the deceased. He told them that he had been at a nightclub on the night of March 9, 2005 and had not returned until 3:00 a.m. on March 10, 2005. Immediately after he had spoken to police, Chung called the respondent twice. Chung also contacted the respondent's brother. The respondent called Chung.

58 On April 27, 2005, a judge of the Superior Court of Justice granted an authorization to intercept the private communications of several named persons including both the respondent and Chung. The supportive affidavit alleged that Chung was directly involved in the killing of the deceased.

59 Police spoke to Chung again on May 18, 2005 and showed him a photograph of the deceased. Chung said he didn't know the person in the photograph. After this canvass, Chung called the respondent several times and went to his apartment. He also counselled another witness not to speak to the police about the investigation.

The Search of Chung's Home

60 Detective Sgt. Saunders swore an information to obtain a warrant to search Chung's residence on June 13, 2005 (the ITO). The lead investigator alleged that Chung was involved in the killing of the deceased and that the killing took place at 326 Dalesford where Chung lived.

61 After Chung's arrest on drug charges that arose as a result of the search of his home on June 13, 2005, Det. Sgt. Saunders approached Chung to ask him some questions about the killing of the deceased. Chung was not under arrest for the murder, nor considered a suspect. Chung declined the police request to speak to them about the homicide investigation.

62 The authorization to intercept private communications granted on April 27, 2005, expired on June 27, 2005. The intercepted calls revealed nothing conclusive about Chung's involvement in the killing, but nothing said eliminated the possibility that Chung had been directly involved.

63 The respondent was arrested for the murder of the deceased on July 14, 2005. Det. Sgt. Saunders considered that the investigation of Chung was sufficiently complete that police could concentrate on the case against the respondent. No further investigation was undertaken in connection with Chung.

64 Chung left the jurisdiction in late 2005 after the federal Crown had withdrawn the charges laid in connection with the grow operation found during the search on June 13, 2005.

The Preliminary Inquiry

65 At the respondent's preliminary inquiry in June, 2006, Chung did not testify. He was not subpoenaed as a witness. The police had made no effort to locate him. Trial counsel for the respondent did not discuss Chung's attendance with Crown counsel, nor ask that Chung be made available to give evidence at the inquiry.

66 During his cross-examination of Det. Sgt. Saunders, trial counsel for the respondent elicited evidence on two issues that he would later raise at trial:

i. Chung as an alternate suspect; and
ii. the adequacy of the police investigation in connection with Chung.

It is a reasonable inference that, by the end of the preliminary inquiry, both the lead investigator, Det. Sgt. Saunders, and Crown counsel knew that, at trial, counsel for the respondent would raise the adequacy of the police investigation and the involvement of Chung as an alternate suspect as a

basis upon which the trier of fact would be invited to have a reasonable doubt about the respondent's guilt.

The First Trial Date

67 In June 2007, a judge set January 14, 2008, as the date for the respondent's trial. The case was not reached on this date.

68 At the end of January, 2008, Crown counsel asked Saunders about Chung's status and whereabouts. Saunders told the Crown, and the Crown advised the respondent's trial counsel, that the police did not know Chung's location and hadn't looked for him.

69 In October or November, 2008, the respondent's trial counsel asked the Crown again about Chung whom he wanted to call as a witness (under subpoena) to establish that, within months of the killing, Chung had fled the jurisdiction. At the time of the request, the police had done nothing to locate Chung.

The Second Trial Date

70 The respondent's trial was rescheduled to begin in early February, 2009. During a pre-hearing conference conducted the week before the trial was scheduled to begin, the trial judge emphasized the need to find Chung and bring him to court for the purpose of the respondent's motion to permit advancement of the alternate suspect and inadequate investigation issues before the jury. Crown counsel acknowledged that the respondent was entitled to raise the alternate suspect issue, but opposed the respondent's motion as it related to an inadequate investigation.

71 Chung was found in another province the day following a police inquiry of a source suggested by trial counsel for the respondent.

Chung's Refusal to Cooperate

72 Counsel for the Crown at trial proposed that a statement be taken from Chung by investigators, and turned over to defence counsel for cross-examination on the respondent's motion to raise the inadequate investigation issue. Chung consulted with his own counsel, then made it clear that he would not provide a statement to police about his activities or connection with the death of the deceased.

73 The respondent sought and the trial judge ordered the Crown to disclose what efforts had been made to find Chung during the course of the investigation since evidence of these efforts was relevant to the adequacy of the investigation of the alternate suspect.

74 On February 12, 2009, Chung appeared as a witness on the respondent's motion. Trial counsel for the respondent cross-examined Chung for four days on the motion.

Chung's Evidence on the Motion

75 Chung testified on the respondent's motion. He denied any involvement in the killing of the deceased and initially declined any knowledge of the persons responsible.

76 Chung admitted that he had supplied cocaine to the respondent in amounts of between one-half and one kilogram. He described two specific transactions. He acknowledged that he had met a man named "Alex" (the first name of the deceased) once at the Film Lounge, a local nightclub.

77 At the conclusion of his examination-in-chief by Crown counsel on the motion, Chung responded to an open-ended question by saying that the respondent had admitted to him (Chung) that he (the respondent) had stabbed the deceased to death and got rid of the knife at "Lakeshore Harbourfront". Chung provided no further details about the time, place, or circumstances of the stabbing.

78 Chung explained that the respondent confessed to the killing to provide a form of security for Chung for a drug deal in which they had been involved that did not turn out as planned. The deal involved the supply of cocaine to a United States purchaser and payments in cash and pills, but the debt remained unsatisfied. Chung thought he had been set up to take the fall for the killing of the deceased, since it took place so close to Chung's home, but he continued to keep in contact with the respondent.

The Ruling of the Trial Judge

79 The trial judge decided that the respondent was entitled to raise the issue of inadequate police investigation and to introduce some investigative hearsay evidence in support of that claim. The judge permitted Crown counsel to introduce relevant investigative hearsay to rebut the respondent's claim, but rejected the Crown's request to be permitted to call Chung as a witness and to introduce other evidence in rebuttal derived from Chung's disclosures.

80 The trial judge considered three discrete, yet related rules of admissibility in determining whether to admit or exclude the testimony of Chung as well as its derivatives. He considered exclusion under:

i. the common law, and later constitutionalized rule that authorizes the exclusion of evidence, the admission of which would render trial proceedings unfair;
ii. the remedial authority of s. 24(1) of the *Charter* that permits exclusion of evidence as a just and appropriate remedy where introduction of the evidence would render the trial unfair, and thus offend ss. 7 and 11(d) of the *Charter*; and
iii. the common law discretion to exclude evidence the prejudicial effect of

which exceeds its probative value.

81 In his lengthy reasons for judgment, the trial judge emphasized that the duties on the police to investigate, and on the Crown to prosecute, must be carried out objectively and reflect the exercise of due diligence to avoid tunnel vision that created the palpable risk of wrongful conviction. The trial judge found that the police had not exercised due diligence in the investigation of Chung as an alternate suspect. The investigation of the case was incomplete, the prospect of its timely completion unknown, and the prejudice to the defence obvious from the lack of opportunity to consider and investigate recently disclosed information.

82 The trial judge considered the probative value of Chung's evidence. Among the factors he listed in his assessment were these:

i. that Chung admitted lying under oath on the motion;
ii. that Chung attempted to interfere with the investigation by counselling others to mislead the police and by destroying his email messages;
iii. that Chung was linked to the murder by motive, opportunity, and other suspicious circumstances;
iv. that Chung's testimony contained several important inconsistencies;
v. that Chung's testimony was contradicted by other reliable evidence;
vi. that the manner in which investigators handled Chung after he had been located sparked concerns about a motive on Chung's part to fabricate allegations;
vii. that parts of Chung's testimony, such as the alleged

confession by the respondent, were inherently unlikely; and

viii. that Chung was a witness of unsavoury character.

83 The trial judge expressed his conclusion about the probative value of Chung's evidence in this way:

> For these reasons, I am satisfied that Mr. Chung's evidence is of slight probative value, looking at the anticipated evidence as a whole. It is fragile evidence that is not confirmed by independent evidence. The reasonable inferences to be drawn from it are many and varied, some of which are incriminating and some of which are exculpatory. This testimony raises the spectre of a miscarriage of justice, looking at the anticipated evidence as a whole.

84 On the issue of prejudicial effect, the trial judge considered that Chung's evidence raised the prospect of moral and reasoning prejudice and would increase the complexity of the trial through the proliferation of innumerable factual and legal issues. Court time would be wasted. There was a

danger of unfair surprise to the defence. And the likelihood of an adjournment to permit the respondent to investigate and contemplate the effect of the new material would render the prosecution vulnerable under s. 11(b) of the *Charter*.

85 The trial judge concluded his reasons for exclusion in these terms:

> For these reasons, I am satisfied that the just and appropriate remedy is to exclude the testimony, of Mr. Chung, and all of its derivative evidence, to ensure the fairness of the defendant's trial and to maintain the integrity of the administration of justice and the public confidence in it. The tunnel vision of Inspector Saunders, and others acting under his direction, in this case is evident and palpable. To some extent the original Crown Attorneys are implicated in the tunnel vision and otherwise failed to diligently fulfill their own duties to the administration of justice. See *R. v. McNeil*, *supra*. The testimony of Mr. Chung, only available at this late stage through the efforts of the Court and the Crown Attorneys on the record at trial, would, if admitted into evidence, create a risk of a miscarriage of justice. Its probative value is slight and its prejudicial effect is significant. The ongoing investigation of collateral sources of information important to an impartial determination of Mr. Chung's credibility compromises the ability of the defendant to make full answer and defence. The defence is left in a position where the evidentiary landscape at trial is shifting, without a reasonable opportunity to anticipate the dynamics of the trial and develop a coherent and effective response to it, if one is available. Further late disclosure may lead to a mistrial, and a waste of judicial resources. Any such mistrial may lead to a stay of proceedings under s. 11(b) of the *Charter*, in a case of murder that should be tried on its merits. In the circumstances of this case, the just and appropriate remedy is to exclude the testimony of Mr. Chung and the evidence derived from it.

The Arguments on Appeal

86 For the appellant, Mr. Alvaro takes no issue with the trial judge's determination that the alternate suspect and inadequate investigation issues were properly in play before the jury. He acknowledges that appellate courts are bound to accord substantial deference to decisions of trial judges that involve the exercise of discretion, such as the discretion to exclude relevant, material, and otherwise admissible evidence. He submits, however, that where, as here, the discretion is exercised by taking into account factors or principles that are irrelevant, by failing to consider factors or principles that are relevant, and by failing to give consideration to a remedy short of complete exclusion, the decision of the trial judge is not entitled to deference and warrants appellate intervention.

87 Mr. Alvaro says that exclusion of evidence is an exceptional remedy when a trial judge

exercises trial management authority or grants a remedy for failed or late disclosure. Nothing in this case warranted exclusion on either of these grounds. In a similar way, outright exclusion cannot be justified on the basis that receiving the evidence would compromise trial fairness to such an extent that it would infringe ss. 7 and 11(d) of the *Charter*. Remedies for *Charter* infringement under s. 24(1) of the *Charter* must be just and appropriate in the circumstances of the case and this is neither.

88 Mr. Alvaro contends that the trial judge erred in law in his:

i. assessment of the probative value of Chung's evidence;
ii. assessment of the prejudicial effect of Chung's evidence; and
iii. evaluation of where the balance settled between probative value and prejudicial effect.

89 In determining the probative value of Chung's evidence, Mr. Alvaro argues, the trial judge erred by failing to take into account that the evidence:

i. included a "confession" to murder that described the means by which the deceased was killed;
ii. rebutted the position advanced by the respondent that Chung killed the deceased;
iii. confirmed other evidence about the lack of prior contact between Chung and the deceased; and
iv. showed the nature of the relationship between Chung and the respondent and thus, to some extent at least, a common motive to kill the deceased.

90 Mr. Alvaro says further that the trial judge erred in his assessment of the prejudicial effect of Chung's evidence. Contrary to what the trial judge concluded, Chung's evidence did not engender either reasoning or moral prejudice. The trial judge's conclusion that investigators, to some extent the prosecutors, displayed tunnel vision in failing to fully plumb the involvement of Chung was likewise not a factor to be taken into account in assessing the prejudicial effect of admitting Chung's evidence.

91 In addition, Mr. Alvaro argues, the trial judge failed to consider any remedy short of exclusion of the sum of Chung's testimony and evidence derived from it. To the extent each source of potential exclusion is discretionary, partial exclusion was a viable alternative to which the trial judge paid no heed. He could have excluded the alleged confession or evidence of some post-offence conduct, but permitted Chung to provide details of his whereabouts at the material time and his denial of involvement in the killing. The failure to consider some less sweeping exclusion left the jury with an entirely distorted picture on the alternate suspect issue.

92 For the respondent, Mr. Wilkinson acknowledges that the trial judge made errors in his probative value/prejudicial effect analysis. The proposed evidence did not engender either moral or

reasoning prejudice. But in the end, these erroneous considerations had no impact on the result. Exclusion of Chung's testimony and its derivatives was a just and appropriate remedy for an inadequate investigation and late disclosure that breached the respondent's right to make full answer and defence to the charge. No remedy short of complete exclusion could vindicate this constitutional infringement.

93 Mr. Wilkinson says, further, that the appellant should be estopped from raising this ground of appeal, at all events from obtaining a new trial on this basis, because Crown counsel at trial declined the trial judge's offer of a mistrial that would have permitted the prosecution to reload and recommence proceedings subject to successful opposition to a motion under s. 11(b) of the *Charter*. Crown counsel's decision to decline the offer, a strategic, tactical decision according to Mr. Wilkinson, forecloses the remedy of a new trial sought here.

94 In the end, Mr. Wilkinson submits, even if the trial judge wrongly excluded the evidence and the Crown is not estopped from seeking a new trial because Crown counsel at trial declined the offer of a mistrial, the verdict would necessarily have been the same. Chung was an unreliable witness whose tale of a barren, unsolicited confession and the circumstances in which it was made was incredible. Admitting the evidence would have produced a different script, but the same ending.

The Governing Principles

95 Several principles inform the decision in connection with this ground of appeal including but not only the scope of the basis upon which a trial judge may exclude relevant, material, and otherwise admissible evidence on grounds of unfairness, late disclosure, or in accordance with the cost-benefit analysis described in *R. v. Mohan*, [1994] 2 S.C.R. 9. There is also the question of whether what is involved here is a question of law alone, cognizable on an appeal by the Crown under s. 676(1)(a) of the *Criminal Code*, R.S.C. 1985, c. C-46, and the standard and scope of appellate review of a trial judge's exercise of the exclusionary discretion.

96 The trial judge's decision to permit counsel for the respondent at trial to raise the alternate suspect and inadequate investigation issues is not challenged here. That said, some discussion of the principles at work in such cases is of importance in determining whether the ruling on admissibility reflects error.

The Right of Appeal: A Question of Law Alone

97 In proceedings by indictment, the Crown's right of appeal from an acquittal entered after trial is limited by the provisions of s. 676(1)(a) of the *Criminal Code*, to grounds of appeal that involve questions of law alone.

98 The rules of admissibility, which comprise the chief work of the law of evidence, are rules of law and, by nature, primarily exclusionary. Evidence that is relevant and material, but falls foul of an admissibility rule, is excluded unless it can gain entry by an exception to the exclusionary rule.

Decisions on admissibility usually involve questions of law alone, at the very least where the allegation is that the admissibility decision was based on wrong legal principles: *R. v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R. 197, at para. 29.

Exclusion of Evidence to Ensure Trial Fairness: The Common Law Rule

99 A trial judge has a common law authority to exclude relevant and material evidence on the ground that its admission would render trial proceedings unfair: *R. v. Harrer*, [1995] 3 S.C.R. 562, at paras. 21, 23, 41, and 42; *R. v. White*, [1999] 2 S.C.R. 417, at para. 86. This common law admissibility rule has achieved constitutional status because of the s. 11(d) *Charter* guarantee of a fair hearing: *Harrer*, at paras. 23-24.

Exclusion of Evidence to Ensure Trial Fairness: s. 24(1) of the Charter

100 Where evidence proposed for admission at trial has been obtained in a manner that infringed or denied an accused's constitutional rights or freedoms, the appropriate exclusionary mechanism is s. 24(2) of the *Charter*. To invoke s. 24(2) an accused must establish the three requirements of the subsection which can be briefly described as:

* infringement;
* nexus; and
* effects.

The requirements are cumulative. The standard of proof required is proof on a balance of probabilities: *R. v. Collins*, [1987] 1 S.C.R. 265, at pp. 276-277; see also *R. v. Therens*, [1985] 1 S.C.R. 613; and *R. v. Strachan*, [1988] 2 S.C.R. 980.

101 Where evidence has not been *obtained* by constitutional infringement, however, s. 24(2) of the *Charter* is unavailable as an exclusionary mechanism. Constitutionally obtained evidence may nonetheless be excluded under the *Charter* if the introduction of that evidence would render the trial unfair, and thus infringe the fair trial rights of an accused guaranteed by ss. 7 and 11(d) of the *Charter*. The exclusionary mechanism in such cases is s. 24(1) of the *Charter*, not s. 24(2): *Harrer*, at para. 42; *White*, at para. 89.

102 Trial fairness is not the exclusive preserve of those charged with crime. A fair trial is a trial that appears fair, not only from the perspective of the accused, the person on trial, but also from the perspective of the community: *Harrer*, at para. 45; *R. v. Bjelland*, 2009 SCC 38, [2009] 2 S.C.R. 651, at para. 22. A fair trial is a trial that satisfies the public interest at getting at the truth, but at the same time preserves basic procedural fairness for the accused: *Harrer*, at para. 45.; *Bjelland*, at para. 22.

103 The remedy of evidentiary exclusion under s. 24(1) is not for the asking. An accused who seeks this remedy must establish a breach of his or her *Charter* rights: the right to a fair trial in

accordance with ss. 7 and 11(d) of the *Charter*. The remedy of evidentiary exclusion under s. 24(1), like any of the panoply of remedies available under the subsection, is subject to the controlling language of the provision: evidentiary exclusion must be "appropriate and just in the circumstances". Evidentiary exclusion is only available as a remedy under s. 24(1) in those cases where a less intrusive remedy cannot be fashioned to safeguard the fairness of the trial process and the integrity of the justice system: *Bjelland*, at para. 19.

Exclusion of Evidence under the Trial Management Power

104 Trial judges have an expansive, but not unbounded authority to manage the conduct of criminal trial proceedings to promote the efficient use of court time and to ensure fair treatment of all parties involved in the proceedings: *R. v. Felderhof* (2003), 180 C.C.C. (3d) 498 (Ont. C.A.), at paras. 37 and 57. However, excluding relevant, material, and otherwise admissible evidence under the trial management power is an unusual exercise of that power. Evidentiary exclusion should be reserved for cases in which it is plain and obvious that the circumstances require evidentiary exclusion and that the usual remedies, like a brief adjournment, will not be adequate: *R. v. Horan*, 2008 ONCA 589, 237 C.C.C. (3d) 514, at para. 33.

Evidentiary Exclusion as a Remedy for Late Disclosure

105 The Crown's obligation to make timely disclosure to an accused of all relevant information in its possession is well established at common law and now constitutionally entrenched in the right to make full answer and defence under the *Charter*: *R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66, at para. 14. As a necessary corollary to the Crown's disclosure duty under *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, the police (or other investigating state authority) have an obligation to disclose to the Crown all material pertaining to its investigation of the accused: *McNeil*, at para. 15.

106 Under our system of law enforcement, the general duty to investigate allegations of criminal conduct falls upon the police. The fruits of a criminal investigation, it follows, are gathered by the police who also determine, often with the benefit of legal advice from the Crown, whether criminal charges will be laid. The Crown obtains the fruits of the investigation because of the corollary duty of police investigators to disclose to the Crown all relevant material in their possession: *McNeil*, at para. 23.

107 It does not follow from the disclosure obligations imposed upon the Crown, or the correlative duty imposed upon the police to turn over their fruits of the investigation to the Crown, however, that an accused is entitled to a particular kind of disclosure or assured of a specific form of investigation.

108 The disclosure obligations of the Crown do *not* require the production of witnesses for discovery, for example by calling them as witnesses at a preliminary inquiry: *R. v. S.J.L.*, 2009 SCC 14, [2009] 1 S.C.R. 426, at para. 23; *R. v. Khela*, [1995] 4 S.C.R. 201, at para. 18. Nor does an accused have a constitutional right, as an incident of the right to make full answer and defence or

otherwise, to an adequate police investigation of the crime with which she or he is charged: *R. v. Darwish*, 2010 ONCA 124, (2010), 103 O.R. (3d) 561, at para. 29; *R. v. Barnes*, 2009 ONCA 432, at para. 1. Further, an accused has no constitutional right to direct the conduct of a police investigation of which she or he is the target or, through a disguised disclosure demand, conscript the police to undertake investigatory work for him or her: *Darwish*, at para. 30; *R. v. Schmidt*, 2001 BCCA 3, 151 C.C.C. (3d) 74 (B.C.C.A.), at para. 19. On the other hand, the police and Crown should give serious consideration to investigative requests made on behalf of an accused: *Darwish*, at para. 30. That said, it is the prosecutorial authorities, not the defence, that bear the ultimate responsibility for determining the course of the investigation: *Darwish*, at para. 30.

109 The disclosure right of an accused does *not* extend so far as to require the police to investigate potential defences: *Darwish*, at para. 31. Where, however, material and meritorious allegations of state misconduct are advanced as a basis for *Charter* relief in an ongoing criminal prosecution, a duty to investigate may be imposed: *Darwish*, at para. 38; see also *R. v. Ahluwalia* (2000), 149 C.C.C. (3d) 193 (C.A.), at paras. 70-72.

110 Setting to one side any constitutional impairments that may follow from a failure to investigate various issues raised by an accused, a concurrent prosecutorial failure to adduce evidence to rebut a defence otherwise in play at trial, may result in a reasonable doubt about an accused's guilt.

111 A breach of the Crown's disclosure obligations, without more, does not constitute a breach of s. 7 of the *Charter*. To demonstrate constitutional infringement, and thus entitlement to a just and appropriate remedy, an accused must show actual prejudice to his or her right to make full answer and defence resulted from the infringement: *R. v. O'Connor*, [1995] 4 S.C.R. 411, at para. 74; *Bjelland*, at para. 21.

112 Breaches of the Crown's disclosure obligations that amount to a constitutional infringement do not involve *obtaining* evidence in an unconstitutional way. As a result, remedies for these infringements fall within the compass of s. 24(1) of the *Charter*, not s. 24(2): *Harrer*, at paras. 42-43. Remedies under s. 24(1) are flexible and contextual: *Bjelland*, at para. 18.

113 Exclusion of evidence may be available as a remedy for constitutional infringement under s. 24(1), provided exclusion is "appropriate and just in the circumstances". *Bjelland*, at para. 19. As explained in *Bjelland*, at para. 24, exclusion of evidence is an exceptional remedy for late disclosure, confined to cases in which:

i. the late disclosure renders the trial process unfair and the unfairness cannot be remedied through an adjournment and disclosure order; or
ii. exclusion is necessary to maintain the integrity of the justice system.

Where a trial judge can fashion an appropriate remedy for late disclosure that does not deny an accused procedural fairness and where admission of the evidence does *not* otherwise compromise

the integrity of the criminal justice system, exclusion of evidence will not be an appropriate and just remedy under s. 24(1): *Bjelland*, at para. 24.

114 In most cases of late or inadequate disclosure, the focus of the search for an appropriate and just remedy under s. 24(1) is the remediation of any prejudice suffered by an accused. Safeguarding the integrity of the criminal justice system is also relevant: *Bjelland*, at para. 26. Admission of evidence despite late disclosure may compromise the integrity of the criminal justice system where an accused is in custody and an adjournment may unduly prolong the proceedings, or where the late disclosure is the product of deliberate Crown misconduct: *Bjelland*, at para. 27. On the other hand, society's interest in a fair trial that reaches a reliable determination of guilt or innocence based on all the evidence, especially in cases involving serious crimes cannot be ignored: *Bjelland*, at para. 27.

Exclusion of Evidence under the General Exclusionary Discretion

115 A judge presiding in a criminal trial has a well-established discretion to exclude evidence that is relevant, material, and otherwise compliant with the rules of admissibility. This discretion, rather its exercise, involves a cost-benefit analysis, an inquiry into whether the value of the proposed evidence to the correct disposal of the litigation is worth its cost to the litigation process: *Mohan*, at pp. 20-21. As held in *Mohan*, at pp. 20-21, a trial judge may exclude evidence in the exercise of this discretion where:

i. the probative value of the evidence is overborne by its prejudicial effect;
ii. the introduction of the evidence would involve an inordinate amount of time not commensurate with its value to the determination of the dispute; or
iii. the evidence is misleading because its effect on the trier of fact, especially a jury, is disproportionate to its reliability as proof.

116 The application of this general exclusionary discretion in any case in which it is invoked requires a case-specific factual inquiry. Where the balance being assessed involves probative value and prejudicial effect, relevant factors in the assessment of probative value could include the strength of the evidence, the extent to which the facts the evidence tends to establish are at issue in the proceedings, and the extent to which the evidence supports the inferences advanced. An assessment of prejudicial effect may involve considerations like whether the evidence reveals discreditable conduct not charged in the indictment, confusion of issues, the ability of the accused to respond to the evidence, whether the evidence is apt to give rise to an inference of guilt through propensity reasoning, and the efficacy of limiting instructions.

117 In some cases, for example those that involve evidence of extrinsic misconduct, what is proposed for admission might engender moral prejudice or reasoning prejudice. Moral prejudice is the danger of bad personhood: the risk that an accused will be convicted because of the kind of person the evidence reveals him or her to be, rather than because of what the evidence establishes that she or he did: *R. v. Handy*, 2002 SCC 56, [2002] 2 S.C.R. 908, at paras. 31, 100, and 139-142.

Reasoning prejudice is the danger that a jury might be confused by the multiplicity of incidents revealed by the evidence and distracted from the core issues in the case: *Handy*, at paras. 31, 100, and 144-146.

118 Where the basis on which the exclusionary discretion is invoked is a claim that the prejudicial effect of the evidence exceeds its probative value, the balancing exercise brushes up uncomfortably close to the jury's function of weighing the evidence. A trial judge, invited to exercise his or her exclusionary discretion on this basis, must be careful not to invade the jury's territory. In a similar way, in assessing the potential prejudicial effect of evidence, a trial judge must take into account and not underestimate the jury's ability to understand and follow limiting instructions *R. v. Corbett*, [1988] 1 S.C.R. 670, at pp. 692-693.

Alternate Suspects and Inadequate Investigation

119 Although the appellant takes no issue with the trial judge's ruling that permitted the respondent to advance Chung as an alternate suspect and to challenge the adequacy of the police investigation, principally, but not exclusively, as it related to Chung's potential involvement in the offence, some features of each "defence" warrant brief discussion.

120 It is fundamental that if A is charged with the murder of X, then A is entitled, by way of defence, to adduce evidence to prove that B, not A, murdered X: *R. v. McMillan* (1975), 7 O.R. (2d) 750 (C.A.), at p. 757, affirmed, [1977] 2 S.C.R. 824; *R. v. Grandinetti*, 2005 SCC 5, [2005] 1 S.C.R. 27, at para. 46. The evidence on which an accused relies to demonstrate the involvement of a third party in the commission of the office with which the accused is charged must be relevant to and admissible on the material issue of identity: *McMillan*, at p. 757; *Grandinetti*, at para. 46.

121 It is essential that there be a sufficient connection between the third party and the crime, otherwise any evidence about the third party would be immaterial. An accused must show that there is some basis upon which a reasonable jury, properly instructed, could acquit based on the claim of third party authorship: *Grandinetti*, at paras. 47-48; *R. v. Fontaine*, 2004 SCC 27, [2004] 1 S.C.R. 702, at para. 70. Absent a sufficient connection, the "defence" of third party authorship lacks an air of reality and cannot be considered by the trier of fact: *Grandinetti*, at para. 48.

122 Where the "defence" of third party authorship is in play at trial, it is open to the Crown, as with other defences advanced on an accused's behalf, to introduce evidence that rebuts the claim that a third party committed the offence. The evidence may take various forms and originate in different sources. The Crown's rebuttal must be relevant to and admissible on this material issue: see e.g. *R. v. Mullins-Johnson* (1996), 112 C.C.C. (3d) 117 (Ont. C.A.), at pp. 123-124, affirmed, [1998] 1 S.C.R. 977; *R. v. Parsons* (1993), 84 C.C.C. (3d) 226 (Ont. C.A.), at p. 238; and *McMillan*, at pp. 767-768.

123 The "defence" of inadequate investigation may be related to but can be discrete from a claim of third party authorship. The decision by an accused to attack the integrity of the police

investigation of the offence charged is a permitted, but risky strategy. The risk involved is that, by invoking the strategy, the accused will make relevant, material, and admissible, evidence that would never have seen the light of day if tendered by the Crown as part of its case in-chief: *R. v. Dhillon* (2002), 166 C.C.C. (3d) 262 (Ont. C.A.), at para. 51; and *R. v. Mallory*, 2007 ONCA 46, (2007), 217 C.C.C. (3d) 266, at para. 87. Included among the evidence that may be made admissible is investigative hearsay, albeit subject to instructions about its limited use: *Dhillon*, at para. 51; *Mallory*, at para. 92; *R. v. Starr*, 2000 SCC 40, [2000] 2 S.C.R. 144, at para. 184; and *R. v. Van*, 2009 SCC 22, [2009] 1 S.C.R. 716, at para. 33. To deny the Crown the right to adduce evidence to rebut a claim of inadequate investigation, as with the "defence" of third party authorship, would be to leave an entirely distorted and incomplete picture with the jury.

The Scope of Appellate Review

124 To the extent that a ground of appeal has to do with a determination that involves the exercise of judicial discretion, appellate courts are to accord a significant degree of deference to the decision made at first instance. For example, a high degree of deference is accorded the decision of a trial judge that balances the probative value of evidence against its prejudicial effect: *R. v. B. (C.R.)*, [1990] 1 S.C.R. 717, at pp. 733-734; *Handy*, at para. 153; and *R. v. Arp*, [1998] 3 S.C.R. 339, at para. 42. It is of no moment to the scope of appellate review whether this balancing of probative value and prejudicial effect takes place in the context of evidence of extrinsic misconduct tendered as part of the Crown's case in-chief, or, as here, in response to a claim of inadequate investigation.

125 Similar deference is accorded decisions of trial judges about the choice of remedy that is "appropriate and just" under s. 24(1) of the *Charter*. As with any discretion, the discretion conferred by that subsection must be exercised judicially. Appellate courts are entitled to intervene where the trial judge has misdirected him or herself, or where the trial judge's decision is so clearly wrong that it amounts to an injustice: *Bjelland*, at para. 15; *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, at paras. 117-118.

The Principles Applied

126 Before examining the merits of this, the principal ground of appeal, it is helpful to clear away two related decisions made by the trial judge that are not in issue here.

127 First, the appellant acknowledges, as did counsel for the Crown at trial, that an alternate suspect issue was in play in this case. Accordingly, the respondent was entitled to adduce relevant and admissible evidence that tended to show that Chung killed the deceased.

128 Second, the appellant accepts that the trial judge rightly concluded that an inadequate investigation issue was also in play here in connection with the investigation of Chung as an alternate suspect, if not the actual killer. Thus, it was open to the respondent to adduce relevant and admissible evidence before the jury that tended to show the inadequacy of the police investigation

of Chung's potential involvement in the killing of the deceased.

129 What the appellant contests is the correctness of the trial judge's ruling that prohibited the Crown at trial from calling Chung as a witness and adducing evidence derived from Chung's testimony to rebut evidence adduced by the respondent that tended to show Chung killed the deceased.

130 For reasons that I will develop, I agree with the appellant that the trial judge's ruling reflects error on this issue.

131 In his lengthy pre-trial ruling, the trial judge referred to three rules of admissibility each of which involves the exercise of judicial discretion:

i. exclusion to ensure trial fairness;
ii. exclusion as a remedy for late disclosure; and
iii. exclusion of evidence on the basis that its prejudicial effect exceeded its probative value.

The reasons do not refer, at least in terms, to the authority to exclude evidence under the trial management power. That authority, and those listed as items "i" and "ii" above, share common features, thus it is unnecessary to canvass the availability of the trial management power as an exclusionary mechanism in this case.

Exclusion to Ensure Trial Fairness

132 The first basis upon which the trial judge grounded his exclusion of the evidence is expressed in these terms:

> In my view, it is just and appropriate to exclude the testimony of Mr. Chung, and any evidence derived from it, to ensure the fairness of the defendant's trial.

133 The trial judge described several factors that underpinned his conclusion:

i. the lack of a diligent and timely investigation of Chung as an alternate suspect;
ii. the ongoing investigation of the respondent and his contacts with Chung through the use of "electronic modalities" and the uncertainty of when the investigation would be completed;
iii. the lack of opportunity for the respondent's counsel at trial to consider recent Crown disclosure; and
iv. the lack of objectivity and unjustifiable disparity in the investigative and prosecutorial treatment of the respondent and Chung.

134 The language used and the factors considered by the trial judge in excluding the testimony of

Chung and its derivatives appear to be an amalgam of two exclusionary rules:

* exclusion to ensure trial fairness, a common law rule now constitutionalized under ss. 7 and 11(d) in the *Charter*; and
* exclusion as a remedy for failed or late disclosure of information relating to the investigation of Chung.

Each rule involves the exercise of judicial discretion.

135 I acknowledge at the outset that the scope of appellate review of the exercise of judicial discretion is narrowly and rightly confined, all the more so when the right of appeal invoked is limited to a question of law alone: *R. v. B.(L.)* (1997), 35 O.R. (3d) 35 (C.A.), at p. 59. That said, I am satisfied that the trial judge erred in law in excluding Chung's testimony and evidence derived from it on this basis. Read as a whole, the reasons on this issue reflect self-misdirection on the governing legal principles.

136 The trial judge did not have the benefit of the guidance provided by the Supreme Court of Canada in *Bjelland* when he made his ruling on March 2, 2009. Several principles emerge from *Bjelland* that are critical to an assessment of the correctness of the trial judge's ruling.

137 First, a failure to disclose, as well delayed or late disclosure, without more, does not violate the right of an accused to a fair trial. As a general rule, an accused must go further to show actual prejudice to his or her right to make full answer and defence: *Bjelland*, at para. 21; *O'Connor*, at para. 74. Absent an infringement of the right to make full answer and defence, no infringement of either s. 7 or s. 11(d) of the *Charter* has occurred, thus the critical condition precedent to the operation of s. 24(1) as an exclusionary mechanism remains unsatisfied and access to the remedy s. 24(1) provides is unavailable.

138 Second, evidentiary exclusion is an exceptional remedy for failed or late disclosure, available only where the late disclosure renders the trial unfair and cannot be remedied by an adjournment and disclosure order, or where exclusion is necessary to preserve the integrity of the justice system: *Bjelland*, at para. 24.

139 Third, the appropriate focus in most cases of failed or late disclosure is remediation of any prejudice caused to the accused, as well as safeguarding the integrity of the justice system: *Bjelland*, at para. 26. Neither is necessarily secured by evidentiary exclusion.

140 Fourth, in some cases, an adjournment and disclosure order may not be appropriate because the admission of evidence compromises the integrity of the justice system. Evidentiary exclusion may be appropriate where the Crown has withheld evidence by deliberate misconduct amounting to an abuse of process. On the other hand, even in such cases, society's interest in a fair trial that reaches a reliable determination of an accused's innocence or guilt on all the available evidence cannot be ignored, especially where the crime charged is serious: *Bjelland*, at para. 27.

141 Finally, the fair trial interest is not the exclusive preserve of the accused. A trial must be fair, not only from the perspective of the accused, but equally from the perspective of society generally: *Bjelland*, at para. 22. A fair trial is a trial that satisfies the public interest at getting at the truth, at the same time preserving basic procedural fairness for the accused: *Harrer*, at para. 45.

Exclusion as a Remedy for Late Disclosure

142 The trial judge appears to have concluded that late disclosure, on its own, violated the respondent's right to a fair trial and warranted exclusion of Chung's testimony and any evidence derived from it. However, following *Bjelland* and *O'Connor*, the respondent was also required to show late disclosure caused actual prejudice to his ability to make full answer and defence: *Bjelland*, at para. 21; *O'Connor*, at para. 74.

143 The trial judge does not appear to have considered the exceptional nature of evidentiary exclusion as a remedy for late disclosure. As *Bjelland* makes clear, evidentiary exclusion is reserved for those cases in which the usual remedy (an adjournment and disclosure order) would not be adequate or where exclusion was necessary to maintain the integrity of the justice system. Neither applied here.

144 Further, the trial judge does not appear to have considered the bilateral nature of the fair trial interest in concluding that the exclusion of the entirety of Chung's evidence and its derivatives was just and appropriate in the circumstances. An accused does not have the exclusive right to a fair trial.

145 The trial judge does not appear to have considered any evidentiary exclusion short of an absolute bar of all the evidence from Chung and all the evidence derived from Chung's testimony. The effect of this ruling was to permit the respondent to raise an alternate suspect defence ("Chung did it") and adduce evidence about the inadequacies of the police investigation, yet deny the Crown the opportunity to adduce the evidence of the alternate suspect to rebut the claim he killed the deceased. Chung's evidence could have been restricted, for example, by excluding evidence of the respondent's "confession" with the result that the jury would be better positioned to decide whether Chung's alleged participation, or the inadequacy of the police investigation, raised a reasonable doubt about the respondent's guilt. Permitting Chung to give evidence would not have deprived the respondent of his right to advance the alternate suspect and inadequate investigation issues before the jury and to adduce evidence in support of each. Excluding Chung's evidence forced the jury to make that decision on a distorted and incomplete evidentiary foundation.

146 The trial judge appears to have implicitly held that the respondent had a constitutional right to an adequate investigation of the case against him, including an investigation to determine whether the offence was committed by Chung.

147 The trial judge did not have the benefit of the reasons of this court in *Darwish* according to which an accused has no free-standing constitutional right to an adequate investigation of the case

against him. Inadequacies in an investigation may lead to the ultimate failure of the prosecution, to the specific breach of a *Charter* right, or to a civil remedy, but, on their own, do not constitute a denial of the right to make full answer and defence: *Darwish*, at para. 29.

148 Any error in excluding the evidence of Chung and its derivatives on the ground of trial fairness, or as a remedy for late disclosure, is beside the point if the trial judge was correct in excluding the evidence on the ground that its prejudicial effect exceeded its probative value. It is to that basis of exclusion that I turn next.

Exclusion under General Exclusionary Discretion

149 The trial judge considered the Chung evidence, as a whole, to be of slight probative value. He described it as "fragile" evidence, not confirmed by any independent evidence, which spawned "many contradictory inferences" and raised "the spectre of the miscarriage of justice".

150 In his analysis of the prejudicial effect of the Chung evidence, the trial judge referred to:

i. the possibility of reasoning and moral prejudice against the respondent;
ii. the increased complexity of the trial;
iii. the danger of unfair surprise because the Crown failed to call the evidence at the preliminary inquiry and the police failed to conduct a timely collateral investigation; and
iv. the likelihood of an adjournment of trial proceedings and a further delay of one year before the trial could begin again with a serious risk that proceedings would be stayed under s. 11(b) of the *Charter*.

151 In my respectful view, the trial judge's evaluation of the probative value and prejudicial effect of the Chung evidence as a whole, and his determination that the preponderance of prejudicial effect over probative value warranted exclusion of the evidence as a whole, constituted legal error.

152 First, in his assessment of the probative value, the trial judge focussed almost exclusively on that portion of Chung's testimony in which Chung recounted the purported "confession" of the respondent to the killing of the deceased. But there was more to Chung's testimony than the elicitation of the respondent's alleged "confession". Chung's denial of responsibility and his explanation of his activities at the relevant time had probative value in rebuttal of the respondent's claim that Chung was the killer, even if the "confession" part of his evidence were excluded. Put differently, Chung's testimony and the derivative evidence was relevant and had probative value in relation to the alternate suspect defence advanced by the respondent.

153 Second, in his determination of the prejudicial effect of this evidence, the trial judge considered that the evidence generated moral and reasoning prejudice. Moral prejudice refers to the stigma of bad personhood. Reasoning prejudice relates to the prospect that the introduction of evidence will confuse the trier of fact and distract it from an informed consideration of the issues

raised at trial.

154 The introduction of the Chung evidence would neither have created nor enhanced moral or reasoning prejudice. A substantial body of evidence had already been admitted about the respondent's activities in the illicit drug trade and his association with Chung and the deceased. It was the respondent who introduced the alternate suspect issue and challenged the adequacy of the police investigation, especially as it related to Chung. The responsive evidence from Chung would not have involved anything new or different from what had already been introduced without objection.

155 Third, whether the police investigation of Chung was inadequate and whether the investigation of the appellant was a product of "tunnel vision" were not relevant factors in the cost benefit analysis required in connection with the probative value and prejudicial effect of the Chung evidence.

156 Fourth, the "unfair surprise" factor that the trial judge considered in his cost benefit analysis appears grounded, at least in part, on an adverse inference the trial judge drew from the failure of the Crown to call Chung at the preliminary inquiry and of the police to conduct a timely collateral investigation.

157 The Crown was under no obligation to call Chung at the preliminary. The failure to do so can sponsor no adverse inference, much less be a factor to consider in assessing the probative value or prejudicial effect of the Chung evidence. The inadequacy of the police investigation was advanced as a basis upon which the jury may have a reasonable doubt about the adequacy of the Crown's proof of the respondent's guilt. The admissibility issue that required a decision related to the probative value/prejudicial effect balance of evidence responsive to the related claims that Chung was the killer and the police investigation was inadequate. To assign these factors a place of influence is to confuse a rule of admissibility with a substantive "defence".

158 The trial judge erred in excluding the Chung evidence in its entirety.

Ground #2: The *SchellandPaquette* Error

159 This ground of appeal requires consideration of the correctness of a jury instruction about the basis upon which the respondent's liability was to be determined. The instruction, repeated several times, attracted objection from both counsel at trial, but no further elucidation by the trial judge.

160 Some reference to the evidence adduced at trial and the positions advanced by the parties there is necessary to situate this claim of error in its proper place.

The Evidence at Trial

161 It was common ground at trial that each of the respondent and Chung had an equivalent

motive and opportunity to kill the deceased. The parties were also of one mind that each engaged in conduct after the deceased was killed that could be used as circumstantial evidence of their involvement in it. In the circumstances, the jury could also infer that, rather than single authorship, the respondent and Chung together killed the deceased.

162 The forensic pathologist who conducted the post-mortem examination testified that the deceased had been stabbed 12 times with at least one sharp object of a particular dimension. The doctor could not exclude the involvement of more than one knife with similar dimensions, thus could not confirm the number of stabbers or deny that more than one person could have been involved in the killing.

163 Evidence admitted at trial could support a finding that Chung and the respondent were involved in the drug business and frequently communicated with one another. Although the deceased may have met Chung briefly, there was no evidence of any dealings of substance between them.

The Positions of the Parties at Trial

164 At the pre-charge conference, counsel and the trial judge discussed the basis of liability, more accurately, the modes of participation to be left for the jury's consideration.

165 Trial counsel for the respondent contended that there was no air of reality to support an instruction on co-principals. The evidence adduced at trial was entirely circumstantial. Each of the respondent and Chung had motive and opportunity and said and did things afterwards that could support an inference that one or the other killed the deceased. But the evidence was incapable of supporting an inference of joint participation.

166 The respondent's counsel at trial agreed that the jury did not need to decide the extent of Chung's involvement, but rather needed to be satisfied beyond a reasonable doubt only that the respondent was a principal in the killing. There was no evidence upon which the jury could conclude that the respondent was an aider or an abettor of Chung, nor was there any evidence that more than one weapon was involved. Counsel sought an instruction that if the jurors were unable to decide whether the respondent or Chung killed the deceased, the respondent was entitled to an acquittal.

167 The trial Crown sought an instruction that left the respondent's liability to the jury on the basis that he was a co-principal with Chung in the killing of the deceased. She also sought an instruction that permitted the jurors to find the respondent guilty as a principal with Chung as his helper.

168 The trial Crown noted that the pathologist could not exclude the involvement of more than one person in the stabbing of the deceased. The Crown contended that there was evidence of pre-concert, since both Chung and the respondent were involved in cocaine transactions. Each had

an equivalent opportunity and motive to kill the deceased and said and did things afterwards that confirmed their participation in the killing.

169 The trial Crown expressly disavowed reliance on s. 21(2) of the *Criminal Code* as a basis of liability and conceded that there was no air of reality to a submission that the respondent participated as an aider or abettor.

The Ruling of the Trial Judge

170 The trial judge refused to instruct the jury that the respondent could be found guilty as a co-principal. He concluded:

> In my view, looking at the evidence as a whole, there is no evidence that the 12 stab wounds were inflicted by more than one person. Therefore, there will be a charge like *Schell* and *Paquette*, and the submissions of counsel will have to be cast accordingly.

171 The trial judge directed the trial Crown that, in her closing address, she was to take the position that only one person stabbed the deceased to death and that person was the respondent.

The Charge to the Jury

172 In his final instructions to the jury, the trial judge canvassed the the positions of the parties and reviewed the evidence on which each relied to support their position. In accordance with his earlier ruling and direction to the trial Crown, the trial judge told the jury that the Crown's position was that the respondent killed the deceased.

173 On at least four separate occasions during his lengthy charge, the trial judge instructed the jury in these or similar terms:

> The identity of Kelly Spackman as the person who killed Alexander Christoff must be proven beyond a reasonable doubt before a verdict of guilty is proper as a matter of law against him. In this case, members of the jury, there is no evidence that more than one person stabbed Alexander Christoff twelve times. Thus, you will deliberate on the issue of whether or not the Crown has proven beyond a reasonable doubt that Kelly Spackman was the person who stabbed Alexander Christoff twelve times. The mere presence of a person, such as Kelly Spackman or Mr. Chung, at the scene of a crime does not make a person guilty of the crime. If, after reasonable and thorough deliberations, you are unable to determine whether Kelly Spackman or Mr. Chung stabbed Alexander Christoff twelve times, you must return a verdict of 'Not Guilty'. The Crown must prove, beyond a reasonable doubt that Mr. Chung was not the person who stabbed Alexander Christoff twelve times.

The Argument on Appeal

174 For the appellant, Mr. Alvaro says that the excerpted instruction, based on *R. v. Schell and Paquette* (1977), 33 C.C.C. (2d) 422 (Ont. C.A.), should not have been given. The instruction should only be given in cases in which there is no evidence of a joint venture and the evidence indicates that one of two persons committed the offence. In those circumstances, and only in those circumstances, is it correct to instruct the jury that if they cannot determine which of the two persons committed the offence, they are to find both (or the one on trial) not guilty.

175 Mr. Alvaro submits that the *Schell and Paquette* instruction is not required, or correct in all cases in which two persons are said to be the killer. In this case, the Crown's position was that the respondent killed the deceased. The Crown never suggested that the respondent did so without any help, only that the respondent was guilty as a principal irrespective of the involvement of Chung.

176 Mr. Alvaro contends that the trial judge's direction to the Crown and the final instructions forced a reconfiguration of the Crown's position and had the effect of telling the jury to find the respondent not guilty if they had a reasonable doubt about Chung's involvement in the killing.

177 For the respondent, Mr. Wilkinson acknowledges that, by withdrawing a co-principal basis of liability from the jury, the trial judge erred. The trial judge was wrong when he decided that a jury finding that the respondent and Chung were co-principals in the stabbing would be speculative, incapable of support by reasonable inferences drawn from the evidence adduced at trial. The trial judge appears to have imposed limits on inference-drawing that were inapplicable and appropriate only to curtail the scope of expert opinion evidence. There was an air of reality to the co-principal's basis of liability and it should have been left to the jury.

178 Mr. Wilkinson says that the effect of the jury charge on this issue was that if the jury had any doubt about Chung's participation, they were required to find the respondent not guilty unless they concluded that Chung was simply a witness or assisted the respondent after the killing had occurred. According to Mr. Wilkinson, the jury should have been told that if they accepted the evidence implicating both the respondent and Chung, they could convict the respondent without having to decide Chung's precise conduct.

179 Mr. Wilkinson submits, however, that despite the error in the instruction on the liability of co-principals, this ground of appeal should fail. The trial judge offered the trial Crown the option of a mistrial at the conclusion of his jury instructions. The Crown declined to accept the trial judge's offer and should be estopped from the remedy of a new trial to advance a new or alternative theory of liability. In any event, the evidentiary foundation for co-principals' liability barely met the air of reality test and does not satisfy the standard required for an appeal from an acquittal to succeed.

The Governing Principles

180 A person can become a party to an offence in different ways. He or she may be a principal,

aid or abet someone else to commit the offence, or join and pursue a common unlawful purpose with another or others who commit the offence. A person may be a principal alone or along with another or other persons.

181 Section 21(1)(a) of the *Criminal Code* governs the liability of principals. The provision applies where two or more people "actually commit" an offence and makes both persons individually liable for that crime. The provision also applies where two or more persons together form an intention to commit an offence, are present at its commission, and contribute to it, although each does not personally commit all the essential elements of the offence. Provided the trier of fact is satisfied beyond a reasonable doubt that an accused committed all elements of a crime, it is of no moment whether another person may also have committed it: *R. v. Pickton*, 2010 SCC 32, [2010] 2 S.C.R. 198, at para. 63.

182 Sometimes, the involvement of a person or persons other than the accused in the circumstances of the offence may be clear, but the extent of their involvement may be uncertain. In other cases, uncertainty about the involvement of another may not matter to the liability of the accused whom the trier of fact is satisfied committed all the elements of the crime: *Pickton,* at paras. 62-63.

183 Co-principal liability for concurrent acts of two or more persons often arises in prosecutions for murder or manslaughter. Two or more people each individually beat or stab the victim. The victim dies. It may be unclear which attack caused the victim's death as opposed to other injuries. Legal principle does not require the trier of fact to determine who struck the "fatal blow" for co-principal liability to attach to each participant. Whether this wound or that, or some combination of the two, caused the victim to die is of no concern for co-principal liability, provided both assaults are found to be a "significant contributing cause" of death: *Pickton,* para. 66; *R. v. Ball*, 2011 BCCA 11, (2011), 267 C.C.C. (3d) 532, at para. 28.

184 Where evidence admitted at trial properly supports an alternate mode of participation under s. 21 of the *Criminal Code*, an instruction on that provision should be left to the jury, even though the identity of the other participant or participants is unknown, and even though the precise part played by each may be uncertain: *Pickton*, at para. 58. In these cases, the jury need not be unanimous on the nature of an accused's participation in an offence, provided all are satisfied that the accused committed the offence in one way or another: *Pickton*, at para. 58; *R. v. Thatcher*, [1987] 1 S.C.R. 652, page 694.

185 In prosecutions of a single accused in which the evidence provides an air of reality for a submission that more than one person was involved, a trial judge may instruct the jury about modes of participation other than sole principal even though the identity of the other participants may be unknown and the precise part played by each maybe uncertain: *R. v. Sparrow* (1979), 51 C.C.C. (2d) 443 (Ont. C.A.), at pp. 457-458; *R. v. Isaac*, [1984] 1 S.C.R. 74, at p. 81. On the other hand, where the evidence fails to provide an air of reality to the claim of another's involvement, an

alternative mode of participation should not be left for the jury's consideration: *Sparrow* at p. 458.

186 In *Schell and Paquette*, the deceased, a child of three, died as a result of a subdural haematoma that destroyed the vital centres of her brain. The usual causes of the kind of injury suffered by the deceased were one or more blows to the head involving the application of considerable force, or a violent shaking of the head. There was no direct evidence about how the fatal injury had been inflicted. The deceased had also suffered a number of other injuries over an extended period of time but none contributed to her death. Schell and Paquette were the only persons who had custody and control over the deceased at the material time. Each had mistreated the deceased on earlier occasions. Schell denied killing the deceased. Paquette did not testify.

187 The trial judge did not instruct the jury on s. 21(2) of the *Criminal Code* and mentioned ss. 21(1)(b) and (c), but pointed out that there was no evidence of aiding or of abetting. It was in those circumstances that Zuber J.A., on behalf of the court, concluded that the jury should have been instructed that they should convict one or the other and, if they could not decide which, should acquit both: *Schell and Paquette*, at p. 428.

The Principles Applied

188 The parties agree that the trial judge erred in including in his charge the instruction that forms the subject matter of this ground of appeal, but they differ about the impact of the error on the jury's verdict of acquittal. I will explain why I agree with the parties that the impugned instruction should not have been included in the jury charge in the circumstances of this case.

189 In this case, the respondent and Chung were involved together in the supply of controlled substances. The deceased was a purchaser, who was out about $30,000 that he paid the respondent in advance for drugs that the respondent failed to deliver. The deceased had made some threats to the respondent about what might happen if either the drugs or a refund of the purchase price was not forthcoming.

190 Chung and the respondent were both in the immediate vicinity of where the deceased's body was found at about the time the deceased was killed. Their subsequent conduct and repeated contact confirmed the closeness of their relationship. Evidence of their common motive, equivalent opportunity, and subsequent association left open an inference of a common venture.

191 The trial judge's conclusion that the cumulative effect of the evidence could not sustain an inference that the respondent and Chung were co-principals in the killing rests, in part at least, on his determination that the opinion evidence of the forensic pathologist excluded participation by more than one person in the killing. This determination, in turn, originates in either a misapprehension of the evidence of the pathologist, or a misapplication of the principles governing the admissibility of expert opinion evidence to the determination of whether the evidence, as a whole, could support an inference that more than one principal was involved in the killing.

192 The forensic pathologist could not exclude the involvement of two knives or other cutting instruments of similar dimensions. The wound dimensions could not be definitive on the issue. Nor could the pathologist say how many persons were involved in the stabbing. Speculation is no more the province of an expert than it is of any other witness.

193 On the other hand, whether there is an air of reality to submit a mode of participation to the jury for their consideration is a function of the cumulative effect of the evidence and the availability of the essential inference as one of the field of inferences available on the evidence as a whole.

194 The availability of an inference of joint participation distinguishes this case from *Schell and Paquette* and, as the parties agree, renders the instruction required there inappropriate here. The jury should have been told that if they were satisfied that both participated in the killing of the deceased, they could convict the respondent, without having to decide Chung's precise role, as long as they were satisfied that the respondent's participation satisfied the essential elements of the offence charged: *Pickton*, at para. 63.

195 In the result, the misdirection left the respondent's liability to be determined on a basis that excluded a mode of participation available on the evidence. I will examine the impact of this misdirection after my discussion of the remaining grounds of appeal.

Ground #3: Exclusion of Intercepted Private Communication as Evidence

196 This ground of appeal challenges a ruling made by another judge ("the reviewing judge") who heard and decided an application that invoked the decision in *R. v. Garofoli*, [1990] 2 S.C.R. 1421 in connection with an authorization to intercept private communications. As a result of the motion judge's decision, several intercepted private communications that the Crown proposed to introduce at trial were ruled inadmissible because of a violation of s. 8 of the *Charter*.

197 Some additional background is necessary to permit an adequate examination of this ground of appeal.

The Background

198 At trial, the Crown proposed to adduce evidence of 16 intercepted private communications. Nine calls were offered to demonstrate the relationship between the respondent and Chung, an association that involved the supply of drugs to others. Seven calls were tendered to establish things done and said by the respondent after the killing of the deceased.

199 Counsel for the respondent at trial contended that the supportive affidavit of Det. Sgt. Saunders failed to satisfy the investigative necessity requirement in s. 186(1)(b) of the *Criminal Code* and was deliberately misleading in its claim that potential witnesses would not co-operate in providing information to investigators for fear of reprisal. Trial counsel also argued that the authorizing judge erred in relying on unsworn answers provided by the affiant during the *ex parte*

application in satisfaction of the statutory conditions precedent to be met before authorization may be given.

The Supportive Affidavit

200 The affidavit filed in support of the application for the authorization identified both the respondent and Chung, among others, as "Primary Persons of Interest" and sought authority to intercept their private communications, along with those of other known and unknown persons, in respect of the offence of first degree murder and related preliminary and consequential offences.

201 The affidavit recites the various orders requested, provides an overview of the investigation, then continues with a detailed, 160-page *History and Chronology of the Investigation* that describes what investigators had done and found out during the six-week period after the deceased's body was found.

202 In the final 30 pages of the affidavit, Det. Sgt. Saunders summarized the grounds for his belief that interception of the private communications of the named objects, including the respondent and Chung, would assist in the investigation by providing evidence of the listed offences. The officer then described the other investigative techniques that had been tried and failed or were unlikely to succeed. Among the other investigative techniques described are these:

i. informants/Crime Stoppers tips;
ii. undercover officers;
iii. search warrants/production orders;
iv. dialled number recorders;
v. surveillance;
vi. canvass and search of crime scene;
vii. tracking warrant;
viii. interviews;
ix. forensics;
x. photographic line ups; and
xi. public appeal.

For each technique, the affiant explained briefly why it had not been tried or, if tried, why it had failed to provide evidence that tended to show where the deceased was killed and who killed him.

The Endorsement of the Authorizing Judge

203 The authorizing judge, who was neither the reviewing judge nor the trial judge, released an endorsement in which he recorded his findings under s. 186(1) of the *Criminal Code*. In connection with the investigative necessity requirement, the authorizing judge concluded:

> [3] I am also satisfied that the second ground of investigative necessity set out in

> section 186 exists in this case. Specifically, I am satisfied that other investigative procedures have been tried and have failed to garner the evidence necessary for a successful prosecution and, as well, that those other investigative procedures are unlikely to succeed in producing such evidence. As I have already mentioned, other investigative procedures have been employed in this case and have yielded some results. Indeed, they may still produce further results. However, the evidence filed makes it clear that those investigative procedures by themselves will not succeed in obtaining the required evidence to pursue charges with any reasonable chance of success. Part of this reality arises from the apparent reluctance of individuals with knowledge to come forward with information given their concern as to possible retaliation against any witnesses. Some of these individuals may also be reluctant to come forward given they themselves may have been involved in criminal activity, namely, the sale and or use of illegal drugs. The investigation is further complicated by the lack of certainty regarding the actual scene of the crime, which is believed to be different from the scene where the body of Mr. Christoff was found, the [consequent] lack of direct forensic evidence and the lack of any known eyewitnesses to the actual event.
>
> [4] The offence which is being investigated is the most serious of offences. The problems facing the investigation, taken with the affidavit material detailing the results of the investigation to date, establishes to my satisfaction the requirement of investigative necessity and also establishes that there is no other reasonable alternative method of successfully investigating these particular crimes - see *R. v. Araujo*, [2000] 2 S.C.R. 992.

The Reasons of the Reviewing Judge

204 The reviewing judge set aside the authorization on the basis that the supportive affidavit failed to establish the investigative necessity requirement in s. 186(1)(b). He also excluded the intercepted private communications that Crown counsel proposed to adduce in evidence. This exclusion was based on s. 24(2) of the *Charter* because the interception process had offended s. 8.

205 The reviewing judge identified several deficiencies in the police investigation and in the affiant's explanation for the failure of other investigative procedures to yield evidence about who killed the deceased. The deficiencies included:

> i. the failure of police to search the respondent's vehicle on March 15, 2005, within a week of discovery of the deceased's body, despite the respondent's consent to the search;
> ii. the unexplained failure of police to investigate several witnesses with material information to provide;

iii. the affiant's conclusory assertions, unsupported by any specific allegations, that fears of reprisal on the part of some members of the drug culture rendered their accounts incomplete and unhelpful;
iv. the affiant's conclusory assertions that persons with knowledge of material circumstances declined to provide that information because of their affections for some of the principals; and
v. the affiant's unsupported and conclusory statements about the reluctance of those with criminal antecedents to co-operate with investigators.

206 In the end, the reviewing judge concluded that the affidavit had failed to satisfy the investigative necessity requirement for two reasons:

> [85] For the foregoing reasons, I find that the requirement of investigative necessity was not made out due to the failure of the police to interview, at the very least, Messrs. Pistore, Chu, Powell and Seraphim. Additionally, I am troubled by the failure of the police to accept Mr. Spackman's offer to search his car. But I reject the other arguments advanced by Mr. Lacy as reasons to find that the requirement of investigative necessity was not satisfied.

207 The reviewing judge added some comments about the affiant's motivation:

> [86] The gravity of the failure to interview is exacerbated by the fact that D. Sgt. Saunders made assertions that were unsupportable on the evidence. At best, he was reckless with the truth; at worst, he made these comments in order to mislead the authorizing Justice.
>
> [87] In short, I accept Mr. Lacy's submission that, in seeking the Part VI authorization, D. Sgt. Saunders was motivated not by investigative necessity but rather by investigative efficacy. In cross-examination at the preliminary inquiry on October 3, 2006, D. Sgt. Saunders indicated a marked preference for wiretaps over interviews:
>
> Well, throughout the past history and in other cases where I have dealt with circumstances along those lines *I find that whenever people are talking over the telephone to one another versus interviews that they provide the police before to be more truthful* and in fact that is exactly what did come to surface as a result of that particular interpretations [*sic*]. [Emphasis added.]
>
> While not entirely clear, it appears that the reference to "circumstances along those lines" refers to situations where D. Sgt. Saunders thought that witnesses

were being less than truthful with the police.

208 The reviewing judge rejected the submission advanced by the respondent's counsel at trial that the authorization was also vitiated because the authorizing judge had relied upon unsworn answers provided by the affiant when he appeared before the authorizing judge. The reviewing judge was satisfied that the unsworn answers provided by the affiant repeated information contained in the affidavit itself.

209 The reviewing judge expressed his conclusions for setting aside the authorization in these terms:

> [96] D. Sgt. Saunder's opinion that the requirement of investigative necessity under s. 186 of the *Code* was met in the circumstances of the case lacked an adequate factual basis. Indeed, for the reasons outlined above, his unsubstantiated, misleading claims about potential witnesses' fear of reprisal constituted, at best, a reckless disregard for the truth, if not an outright fraud. Moreover, there can be no question that these claims influenced the authorizing Justice's determination that the condition precedent of investigative necessity had been satisfied. Indeed, paragraph 3 of his endorsement makes it clear that this was the principal reason he concluded that further interviews would not obtain "the required evidence to pursue charges with any reasonable chance of success."
>
> [97] Given the nature of these misrepresentations and the role they played in the authorizing Justice's decision, it cannot be said that, in their absence, the authorization would nonetheless have been given. Consequently, the authorization of April 27, 2005 is set aside.

The Arguments on Appeal

210 For the appellant, Mr. Alvaro acknowledges that, as he began his reasons, the reviewing judge correctly stated the test to be applied. But in the end, Mr. Alvaro says, the reviewing judge erred in the application of the test.

211 Mr. Alvaro submits that the critical component here was the requirement of investigative necessity. The issue for the reviewing judge to decide was whether, on the record before the authorizing judge, as amplified on the review, there was reliable information on the basis of which the authorizing judge *could* conclude that there were no other reasonable investigative alternatives to authorize interceptions in the circumstances of the criminal inquiry. Investigators were not required to exhaust every other potential form of investigation. What happened here is that the reviewing judge engaged in a microscopic dissection of the investigation, an exercise that he was not entitled to pursue.

212 Mr. Alvaro says that the reviewing judge exceeded his authority by weighing and reconsidering *de novo* the evidence before the authorizing judge as amplified on the review. The reviewing judge discounted the fears of reprisal expressed by some on police interview, despite evidence to the contrary, as well the unwillingness of those involved in criminal conduct to co-operate with investigators. The reviewing judge failed to consider the contents of the affidavit as a whole and drew unsubstantiated inferences about the affiant's state of mind.

213 For the respondent, Mr. Wilkinson submits that the reviewing judge did not err in his application of the test on review, but, even if he did make a mistake, it all comes to naught in the circumstances of this case.

214 Mr. Wilkinson reminds us that we are to accord deference to the decision of the reviewing judge, just as he was to accord deference to the conclusions of the authorizing judge. The reviewing judge was well within his authority to find, and did find on the evidence before him, that there was no evidence on the basis of which the authorizing judge could have found that the test of investigative necessity had been met. Investigative expediency is not investigative necessity. The flaws identified by the reviewing judge were fatal to a display of investigative necessity. The conclusory statements of the affiant about the efficacy of other investigative procedures were at once inadequate and misleading.

215 Mr. Wilkinson says that this is a case of no harm, no foul, even if the reviewing judge was wrong. The substance of much of what the intercepted private communications were offered to prove was contained in an *Agreed Statement of Facts* filed at trial and what remained could have been established by calling as witnesses at trial (if available) those whose calls were intercepted to give *viva voce* evidence of what was said. The Crown failed to do so and sought to re-open its case too late in the proceedings to warrant reception of the evidence.

The Governing Principles

216 The principles that govern our determination of this ground of appeal are not in controversy.

217 The investigative necessity requirement enacted by s. 186(1)(b) of the *Criminal Code* is established if the supportive affidavit demonstrates that, practically speaking, no other reasonable alternative method of investigation is available, in the circumstances of the particular criminal inquiry: *R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. No. 992, at para. 29. The requirement must be interpreted in a practical common sense fashion. Judges may issue authorizations under s. 186(1) of the *Criminal Code* even when police have not pursued all other investigative techniques: *Araujo*, at para. 33.

218 A variety of grounds may afford an authorizing judge a basis to conclude that normal investigative techniques are unlikely to succeed, among them, a demonstration that the techniques would not reveal key information or are ineffective against the group under investigation: *Araujo*, at para. 33.

219 The reviewing judge does not substitute his or her view for that of the authorizing judge. The review is not a hearing *de novo* of the application for authorization. If, based on the record before the authorizing judge, as amplified on the review, the reviewing judge concludes that the authorizing judge *could* have granted the authorization, then the reviewing judge is not entitled to interfere: *Garofoli*, at p. 1452. On the review, the existence of fraud, non-disclosure, misleading evidence, and new evidence are relevant, but only to determine whether there remains any reliable evidence that might reasonably be believed on the basis of which the authorizing judge *could* have granted the order: *Garofoli*, at p. 1452; *Araujo*, at para. 54; *R. v. Pires*; *R. v. Lising*, 2005 SCC 66, [2005] 3 S.C.R. 343, at para. 30.

220 Appellate review of decisions of reviewing judges also involves deference to the findings of fact of the reviewing judge in his or her assessment of the original record as amplified on review: *R. v. Grant* (1998), 132 C.C.C. (3d) 531, at p. 540; and *R. v. Agensys International Inc*. (2004), 71 O.R. (3d) 515 (C.A.), at para. 30. An appellate court ought not to interfere with the findings of the reviewing judge absent an error of law, a misapprehension of the evidence, or a failure to consider relevant evidence: *Grant*, at p. 540; *Agensys International Inc*., at para. 30.

The Principles Applied

221 As I will explain, I would give effect to this ground of appeal. The reviewing judge erred in concluding that, on the record before the authorizing judge, as amplified on review, there was no reliable evidence that might reasonably be believed on the basis of which the authorizing judge *could* have granted the authorization.

222 First, despite his statement of the proper standard of review at the outset of his reasons, the balance of the reviewing judge's reasons, read as a whole, betrays the proper application of this standard. What appears, rather, is a *de novo* review, on an item-by-item basis, of each investigative procedure undertaken and a critique of the investigating officer's conclusions about its efficacy. It is not the role of the reviewing judge to micromanage homicide investigations.

223 Second, the piecemeal approach followed by the reviewing judge is incompatible with his obligation to review the affidavit material as a whole, and to acknowledge the authority of the authorizing judge to draw reasonable inferences from the contents of the supportive affidavit.

224 Third, the reviewing judge failed to articulate the basis upon which he rested his conclusions about the state of mind, purposefulness, and lack of understanding of the authorization process demonstrated by the affiant: *R. v. Ebanks*, 2009 ONCA 851, 97 O.R. (3d) 721, at paras. 37 and 42.

225 Fourth, the reviewing judge seems to have lost sight of the common sense reality of the specific criminal inquiry in which investigators were engaged. A drug dealer, pressing others for a return of funds advanced or delivery of drugs purchased, was stabbed to death, his body dumped in the snow. No murder scene. No eyewitnesses. No weapon. A group of buyers, sellers and others disinclined to offer assistance.

226 Finally, in stating his conclusion on the validity of the authorization, the trial judge misstated the standard of review:

> [97] Given the nature of these misrepresentations and the role they played in the authorizing Justice's decision, it cannot be said that, in their absence, the authorization *would* nonetheless have been given. Consequently, the authorization of April 27, 2005 is set aside. [Emphasis added.]

The relevant standard is whether, based on the record before the authorizing judge, as amplified on the review, the authorization *could* have been granted, not whether it would have been granted: *Garofoli*, at p. 1452.

Ground #4: The References to Wrongful Convictions and Miscarriages of Justice

227 The final ground of appeal relates to several references in the charge to the jury to wrongful convictions and the potential for miscarriages of justice. A brief reference to the closing address of trial counsel for the respondent and the charge to the jury will set this claim of error in its appropriate context.

The Address of Defence Counsel

228 Trial counsel for the respondent referred to the dangers of wrongful convictions and the history of miscarriages of justice in Canada. These references were linked to submissions about the inadequacies of the police investigation of those responsible for the killing of the deceased and the "tunnel vision" of the investigators.

229 In his closing address, trial counsel for the respondent did not mention the names of any persons wrongly convicted or the victims of miscarriages of justice.

The Trial Judge's Charge

230 The final instructions of the trial judge contain repeated references to wrongful convictions and miscarriages of justice. The first reference appears in an early portion of the instructions explaining the meaning to be assigned to the standard of proof:

> Lastly, let me comment on the miscarriages of justice that have recently occurred in Canada during the prosecutions of Guy Paul Morin, Donald Marshall, David Milgaard and others. You are required by your oath of office to consider the evidence in this case, the submissions of counsel and my instructions to you. If, after diligently doing so, you are satisfied beyond a reasonable doubt of the guilt of the defendant you must return a verdict of guilty against him. To decline to return a verdict of guilty if you are satisfied beyond a reasonable doubt of the guilt of the defendant because of the miscarriages of justice in other cases would

> be an improper step on your part. However, errors can be made in the administration of criminal justice that lead to the conviction of innocent persons. Our recent history includes a number of such errors. There can be no greater human tragedy than the conviction of the innocent. Do not let these other cases affect your interpretation of the principles of reasonable doubt but be cautious, very cautious, in your application of them to this case.

The jury was provided with a written copy of the entire charge for their use during deliberations.

231 The trial judge repeated these references to wrongful convictions and miscarriages of justice in his discussion of the position of the defence, which included about 40 pages reviewing "the defence" of inadequate investigation. A later portion of his instructions is entitled *The History of Miscarriages of Justice*.

232 Counsel for the Crown at trial did not object to the charge to the jury on this ground.

The Arguments on Appeal

233 For the appellant, Mr. Alvaro says that the repeated references in the final instructions to wrongful convictions and miscarriages of justice reflects error in much the same way that similar references in the closing addresses of defence counsel have attracted appellate disapproval. In jury instructions, these references reflect error in much the same way that instructions about the "timid juror" introduce inappropriate considerations into the deliberation process.

234 For the respondent, Mr. Wilkinson prefers to characterize the instructions as nothing beyond fair comment about a very weak prosecution case. What was said properly focussed on the inadequacies of the investigation and the acknowledged dangers associated with tunnel vision. What was said amounted to little more than an instruction that jurors were to approach the evidence with caution.

The Governing Principles

235 No parade of precedent need be marshalled to support the authority of a trial judge to comment in final jury instructions about the weight to be assigned to various items of evidence and even factual conclusions. The standard to be applied where factual comments are challenged on appeal as beyond what is permitted is somewhat elusive: *R. v. Ruddick* (1980), 57 C.C.C. (2d) 421 (Ont. C.A.), at pp. 435-436; and *R. v. Yanover* (1985), 20 C.C.C. (3d) 300 (Ont. C.A.), at p. 319.

236 The undoubted authority of a trial judge to express his or her views on factual issues, including but not only the credibility of witnesses, is not unconfined. The language used must not leave the jury to think that they must find the facts in synch with the manner indicated by the judge: *Ruddick*, at p. 435; *Yanover*, at p. 319. Further, the charge, read as a whole, must not deprive an accused of the fair presentation of his or her case to the jury: *Ruddick*, at p. 435; *Yanover*, at p. 319.

237 An appellate court may intervene where the opinion expressed by the trial judge is far stronger than the circumstances warrant, or where the judge has expressed his or her opinion so strongly that there is a likelihood of the jury being overawed by the opinion, despite instructions that jurors are not bound by the judge's opinions: *Yanover*, at p. 320.

238 When reference is made to wrongful convictions and miscarriages of justice in the closing addresses of defence counsel, the decision in *R. v. Horan*, 2008 ONCA 589, 237 C.C.C. (3d) 514 offers valuable assistance about the boundary between the permissible and the forbidden. Reference to a "parade of wrongful convictions" risks inviting jurors not to convict, despite the absence of a reasonable doubt, because of a possibility, not based on the evidence or lack of evidence, that the accused might later be found to have been innocent: *Horan*, at para. 67. This possibility seems enhanced when the author of the reference is the trial judge and the reference appears in his or her final instructions to the jury.

239 Further, *Horan* teaches that final addresses should not refer to specific cases by name or attempt to draw parallels between those cases and the case being tried: *Horan*, at para. 69.

The Principles Applied

240 I would give effect to this ground of appeal. The repeated references in the charge to the jury to wrongful convictions and miscarriages of justice reflect error.

241 The case for the Crown consisted entirely of circumstantial evidence, relying on evidence of opportunity, motive, and things said and done after the killing to prove that the respondent killed the deceased. No eyewitness testified. No jailhouse informant gave evidence. It was not an overwhelming case, but it was one that was ideally suited for a jury to decide.

242 The case for the respondent pointed to another person as the killer. Chung had motive, opportunity, and said and did things after the killing that pointed to him as the killer. The investigation was inadequate, the product of tunnel vision, failing to thoroughly investigate Chung and focusing exclusively on the respondent. The likelihood of Chung's involvement and the investigative inadequacies, coupled with the respondent's denial during police interviews admitted as part of the Crown's case, raised a reasonable doubt about the respondent's guilt. The respondent did not testify.

243 As a general rule, as is the case with the closing address of defence counsel, a reference in the charge to the jury to the "history" in Canada of demonstrated wrongful convictions will not help jurors in their task: *Horan*, at para. 69. Contemporary Canadian jurors well understand the nature of their task and the importance of making an informed and correct decision after a thorough consideration of the whole of the evidence and in accordance with the governing legal principles as explained by the trial judge. They need not be bludgeoned by a barrage of reminders that, sometimes, mistakes are made.

244 Second, nothing should be said by a trial judge, whether explicitly or by necessary implication from the repetition of references to the subject, to overstate the extent of the problem of wrongful convictions: *Horan*, at para. 69. Although a single wrongful conviction is one too many, there is, as yet, no "parade" or "history", as the heading in the written charge announced in bold type, of wrongful convictions in Canada.

245 Third, the trial judge should not have made reference to specific cases of documented wrongful convictions or have tried to draw parallels with them. As other authorities like *Horan* have pointed out, the circumstances of the cases of established wrongful convictions are multi-faceted and complex, much different than those at work in the case at hand.

246 Fourth, instructions like those under review here, risk inviting jurors to take into account irrelevant considerations and imaginary dangers, rather than focusing on their task of assessing the evidence in accordance with the governing legal principles in the case that is theirs to decide: *Horan*, at para. 67.

247 Finally, like the "timid juror" instruction that implies that any juror who does not convict is timid and imagines doubts where none exist to avoid making a decision, repeated references to miscarriages of justice and wrongful convictions is a form of intimidation that invites acquittal, not because of an absence of sufficient proof of guilt, but because a verdict of guilt might be proven wrong in the fullness of time: *Horan*, at paras. 67-68.

The Effect of the Errors on the Jury Verdict

248 What remains for decision is whether the errors identified above, considered as a whole, had any effect or exerted any influence on the jury's verdict. The respondent does not suggest that the identified errors do not raise questions of law alone, but does say that, because of the inherent weaknesses in the Crown's case at trial, and the failure to take up the trial judge's offer of a mistrial, the errors had no material bearing on the result.

249 In my view, for the reasons that follow, the combined effect of the trial judge's errors in failing to admit the testimony of Chung and the derivative evidence and in the instruction based on *Schell and Paquette* require a new trial. I would not order a new trial only on the basis of the trial judge's references to miscarriages of justice in the charge to the jury, or the order of the reviewing judge setting aside the authorization to intercept private communications, whether those errors are considered individually or in combination.

250 On an appeal from acquittal in proceedings by indictment, the Crown must establish that legal errors made by the trial judge, considered cumulatively, might reasonably be thought, in the concrete reality of the case, to have a material bearing on the verdict of acquittal: *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609, at para. 14.

251 Crown counsel does not have to persuade an appellate court that the verdict would

necessarily have been different, but must satisfy the court that the verdict would not necessarily have been the same had the errors not been made: *Graveline*, at paras. 14 and 16.

252 In this case, the jury had to decide whether the Crown had proven beyond a reasonable doubt that the respondent unlawfully killed the deceased in circumstances that amounted to second degree murder. The core issue at trial was the identity of the deceased's killer. The Crown said it was the respondent and that Chung's participation didn't matter. The defence said it was Chung, or at least there was a reasonable doubt that it was the respondent. The evidence was entirely circumstantial.

253 The legal errors in this case, except that of the reviewing judge in setting aside the authorization, all related to the central issue of the identity of the deceased's killer.

254 First, the ruling that excluded Chung's testimony and any evidence derived from it left jurors with an incomplete and distorted picture about Chung's alleged participation in the killing.

255 The respondent was permitted to adduce evidence about Chung's opportunity and motive to kill the deceased and of what he did and said after the killing that tended to link him to it. The ruling precluded the Crown from adducing evidence that tended to rebut the respondent's assertion that Chung participated in the killing of the deceased or was the killer. The excluded evidence included the testimony of the very person whom the respondent alleged was the killer: Chung. Even if Chung were not permitted to testify about the respondent's "confession", evidence rebutting Chung's participation was critical to a proper evaluation of the legitimacy of the alternate suspect claim.

256 The effect of the ruling here is similar to the effect of the decision by the trial judge in the foundational case of *R. v. McMillan*. There the trial judge permitted the defence to adduce expert opinion evidence of the alternate suspect's disposition as circumstantial evidence of conduct, but denied the Crown the right to adduce evidence that tended to show the accused had a similar, if not equivalent disposition. The effect of the ruling was to leave the trier of fact with an incomplete or distorted picture on the central issue of the identity of the deceased's killer. McMillan's acquittal was set aside and a new trial ordered on the basis that evidence of McMillan's disposition had been wrongly excluded. It will be for the judge presiding at the new trial to rule on the admissibility of Chung's evidence.

257 The trial judge concluded that, if he admitted the evidence of Chung and its derivatives, an adjournment would be necessary to permit the completion of the ongoing investigation, disclosure, and the need for the defence to consider the effect, if any, of the new information on the conduct of the defence. According to the trial judge, proceedings could not be rescheduled for about one year.

258 Chung testified on the *voir dire* to determine the admissibility of his evidence. With the then available and recently provided disclosure, he was cross-examined for four days. His evidence was not complex. He denied involvement in the killing of the deceased and recounted a barebones confession of the respondent. I am at a loss to understand why it would take months to complete any further investigation, provide disclosure, and assess the impact of this evidence on the defence. I am

equally at a loss to understand why proceedings could not be recommenced in the largest jurisdiction in this province for a year. All that was required was a brief adjournment, of weeks, not months or a year, a disclosure order, and a resumption of proceedings within weeks consistent with the Crown's obligation to ensure that the respondent was tried within a reasonable time.

259 Nor am I persuaded that Chung's evidence was so unreliable that its reception would have made no difference to the jury's verdict at trial. Properly instructed juries in criminal cases are well-equipped to assess the credibility of witnesses like Chung and to determine the reliability of their evidence. What a jury would make of Chung's evidence, along with the rest of the evidence, is for a jury to say. This jury never had that opportunity to consider whether they would believe some, none, or all of Chung's testimony and the related evidence. It simply cannot be said, as the respondent suggests, that, had that evidence been given, along with the rest of the evidence, that the jury's verdict would necessarily have been the same.

260 Second, the instruction based on *Schell and Paquette* confined the jury's consideration of the respondent's liability for the killing too narrowly. The effect of the instruction was that, if the jury had a reasonable doubt about Chung's participation, the respondent was to be acquitted. A proper instruction on co-principals would have focussed on the respondent's participation and required a finding of guilt upon adequate proof of it irrespective of Chung's involvement.

261 In the circumstances of this case, the trial judge's "offer" of a mistrial, when Crown counsel objected at the end of his charge to his reconfiguration of the Crown's position and to his instruction based on *Schell and Paquette*, does not estop or otherwise bar the Crown from seeking and obtaining a new trial. The Crown was entitled to have its case presented to the jury in a legally correct way in accordance with the evidence adduced at trial. The trial judge's ruling prevented any such adjudication. The mistrial "offer" was no solution when it was accompanied by a judicial warning that a stay of proceedings would likely be granted because a rescheduled trial could not be put in place for another year.

262 Third, the inappropriate and repeated references to the prospect of wrongful conviction and a miscarriage of justice resulted in an instruction that invited jurors to take into account irrelevant considerations and imaginary dangers in reaching their decision, rather than a reasoned assessment of the evidence as a whole in accordance with the governing legal principles. These instructions, repeated on eight separate occasions, amounted to a form of jury intimidation inviting acquittal, not because of inadequacies in the proof of guilt, but because, sometime later, a conviction *might* be determined to have been a miscarriage of justice.

263 The ruling on the *Garofoli* application, which resulted in exclusion of several intercepted private communications from the Crown's case, adds little to the Crown's case for a new trial. The bulk of the content of the excluded interceptions made its way into evidence through formal admissions under the *Criminal Code*. That said, I am unable to agree with the trial judge's decision to admit one of the interceptions at the insistence of the respondent. The reviewing judge found that

the interceptions were the product of constitutional infringement. Nothing more should have been heard of them.

CONCLUSION

264 As a result of the cumulative effect of what I consider to be legal errors in the exclusion of Chung's evidence and in the charge to the jury, I would allow the appeal, set aside the respondent's acquittal, and order a new trial on the indictment.

D. WATT J.A.
J.I. LASKIN J.A.:-- I agree.
K.N. FELDMAN J.A.:-- I agree.

cp/e/qljel/qlpmg/qlhcs/qlced

** Preliminary Version **

Case Name:

R. v. Bjelland

Between:
Jason Chester Bjelland, Appellant;
v.
Her Majesty The Queen, Respondent.

[2009] S.C.J. No. 38

[2009] A.C.S. no 38

2009 SCC 38

[2009] 2 S.C.R. 651

[2009] 2 R.C.S. 651

[2009] 10 W.W.R. 387

67 C.R. (6th) 201

309 D.L.R. (4th) 257

246 C.C.C. (3d) 129

J.E. 2009-1416

EYB 2009-162073

391 N.R. 202

10 Alta. L.R. (5th) 1

460 A.R. 230

2009 CarswellAlta 1110

File No.: 32446.

Supreme Court of Canada

Heard: November 20, 2008;
Judgment: July 30, 2009.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella and Rothstein JJ.

(70 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA

Criminal law -- Constitutional issues -- Canadian Charter of Rights and Freedoms -- Legal rights -- Procedural rights -- To make full answer and defence -- Remedies for denial of rights -- Specific remedies -- Exclusion of evidence -- Appeal by accused from Court of Appeal's decision to set aside his acquittal and order a new trial dismissed -- Appellant was acquitted after trial judge excluded evidence of witnesses due to late disclosure -- Under s. 24(1), where evidence was obtained in conformity with Charter, its exclusion was only available as a remedy where its admission would result in an unfair trial or would otherwise undermine the integrity of the justice system -- In this case, prejudice to appellant's right to make full answer and defence could be remedied through an adjournment and disclosure order.

Appeal by the accused from the Court of Appeal's decision to set aside his acquittal and order a new trial on charges of importing cocaine and possession of cocaine for the purpose of trafficking. After the pre-preliminary hearing conferences, the Crown indicated that disclosure was substantially complete. However, the Crown subsequently disclosed a transcript of an accomplice on March 16, 2006, and a statement of facts from another accomplice on April 19, 2006. The trial date was May 1, 2006. The appellant sought a stay of proceedings on the grounds that his right to make full answer and defence had been prejudiced by the late disclosure of the evidence. In the alternative, he asked that the evidence be excluded from the trial. The trial judge ordered the exclusion of the evidence and the appellant was acquitted. The Court of Appeal found that the trial judge committed a reviewable error by failing to consider whether a less severe remedy than exclusion of evidence could cure the prejudice to the appellant by the late disclosure while still preserving the integrity of the justice system.

HELD: Appeal dismissed. The trial judge committed a reviewable error by failing to consider whether the prejudice to the appellant could be remedied without excluding the evidence and the

resulting distortion of the truth-seeking function of the criminal trial process. Since there was no suggestion that the police obtained the impugned evidence in breach of the Charter, section 24(1), and not s. 24(2), was therefore the appropriate remedial provision through which to remedy the prejudice to the appellant. Under s. 24(1) of the Charter of Rights and Freedoms, where the evidence was obtained in conformity with the Charter, its exclusion was only available as a remedy where its admission would result in an unfair trial or would otherwise undermine the integrity of the justice system. In this case, the prejudice to the appellant's right to make full answer and defence could be remedied through an adjournment and disclosure order and there was nothing that otherwise compromised the fairness of the trial process or the integrity of the justice system. By ordering exclusion of evidence, the trial judge misdirected himself and did not impose an appropriate and just remedy. Furthermore, the appellant's right to a fair trial was not prejudiced on the basis that he was denied the right to cross-examine the witnesses at a preliminary hearing. Cross-examining a witness at a preliminary hearing was not a component of the right to make full answer and defence. What was protected under s. 7 was the right to make full answer and defence at trial, not the right to cross-examine a witness at a preliminary hearing.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms 1982, s. 7, s. 24(1), s. 24(2) <LEGISLATION>
Controlled Drugs and Substances Act, S.C. 1996, c. 19. <TREATMENT> R

Subsequent History:

NOTE: This document is subject to editorial revision before its reproduction in final form in the Canada Supreme Court Reports.

Court Catchwords:

Constitutional law -- Charter of Rights -- Remedy -- Crown disclosing relevant information to accused a few weeks prior to trial -- Late disclosure prejudicial to accused's right to make full answer and defence -- Whether trial judge erred in excluding late disclosed evidence under s. 24(1) of Canadian Charter of Rights and Freedoms -- Whether prejudice to accused could have been cured by adjournment and disclosure order.

Constitutional law -- Charter of Rights -- Fundamental justice -- Right to make full answer and defence -- Crown disclosing relevant information to accused a few weeks prior to trial -- Whether accused's rights to fair trial and to make full answer and defence prejudiced by denial of opportunity to cross-examine witnesses at preliminary hearing -- Canadian Charter of Rights and Freedoms, s. 7.

Court Summary:

The accused was charged with importing cocaine and possession of cocaine for the purpose of

trafficking. After pre-preliminary hearing conferences, the Crown indicated that disclosure was substantially complete. A preliminary hearing was subsequently held and a trial date set for May 1, 2006. In March and April 2006, the Crown provided the accused with evidence from two alleged accomplices, both of whom were to be called at trial. The accused moved for a stay of proceedings or, alternately, for the exclusion of the evidence on the grounds that his right to make full answer and defence had been prejudiced by the late disclosure. The trial judge ordered the exclusion of the late disclosed evidence under s. 24(1) of the *Canadian Charter of Rights and Freedoms*. At trial, the accused was acquitted. The Court of Appeal, in a majority decision, set aside the acquittal and ordered a new trial, finding that the trial judge committed a reviewable error by failing to consider whether a less severe remedy than exclusion of evidence could have cured the prejudice to the accused.

Held (Binnie, Fish and Abella JJ. dissenting): The appeal should be dismissed.

Per McLachlin C.J. and LeBel, Deschamps and **Rothstein** JJ.: Exclusion of evidence obtained in conformity with the *Charter* is only available as a remedy under s. 24(1) of the *Charter* where (a) late disclosure renders the trial process unfair and this unfairness cannot be remedied through an adjournment and disclosure order or (b) exclusion is necessary to maintain the integrity of the justice system. The integrity of the justice system requires that the accused receive a trial that is fair in that it satisfies the public interest in getting at the truth, while preserving basic procedural fairness for the accused. Because the exclusion of evidence impacts on trial fairness from society's perspective, insofar as it impairs the truth-seeking function of trials, it will not be appropriate and just to exclude evidence under s. 24(1) where a trial judge can fashion an appropriate remedy for late disclosure that does not deny procedural fairness to the accused and where admission of the evidence does not otherwise compromise the integrity of the justice system. [para. 3] [para. 22] [para. 24]

The trial judge committed a reviewable error by failing to consider whether the prejudice to the accused's right to a fair trial could be remedied without excluding the evidence. The Crown provided the accused with disclosure, albeit late, and there is no suggestion that the Crown had engaged in deliberate misconduct. In the circumstances of this case, an adjournment and a disclosure order would have sufficiently addressed the prejudice to the accused while preserving society's interest in a fair trial. By ordering the exclusion of the evidence, the trial judge misdirected himself and did not impose an appropriate and just remedy. [para. 3] [para. 29] [para. 37] [para. 39]

The accused's s. 7 *Charter* right to make full answer and defence was not infringed by his inability to cross-examine the potential Crown witnesses at a preliminary hearing. The material provided to the accused was sufficient disclosure of the Crown's case against him, and cross-examining a witness at a preliminary hearing is not a component of the s. 7 right to make full answer and defence. [para. 32] [para. 37]

Per Binnie, **Fish** and Abella JJ. (dissenting): The trial judge's order excluding evidence is subject to

appellate interference only if the Court abandons the governing principles it adopted nearly a quarter-century ago and, since then, has repeatedly and consistently applied. Under s. 24(1), the *Charter* entitles anyone whose rights or freedoms have been infringed "to obtain such remedy as the court considers appropriate and just in the circumstances". This "widest possible discretion", as the Court has framed it, is subject to appellate interference only if the trial judge misdirects himself or if his decision is so clearly wrong as to amount to an injustice. Here, the Court of Appeal should not have interfered with the trial judge's exercise of discretion. He reviewed the evidence carefully and accurately, considered and rejected alternative remedies, including a stay of proceedings and an adjournment. He found that exclusion of the tardily disclosed evidence was not a particularly drastic remedy in this case and, balancing the accused's rights and society's interests, concluded that to place both the accused and the Crown in the position they occupied before the Crown attempted to introduce this new evidence was the proper remedy in the circumstances. The trial judge committed no reviewable error. He exercised his discretion reasonably and well within the broad limits fixed by the *Charter* and the governing principles. [para. 42] [para. 48] [para. 56] [paras. 66-68]

Confining the trial judge's broad and unfettered discretion to exclude evidence under s. 24(1) to two narrow circumstances is a change in the law that is unwarranted, inconsistent with prior decisions of the Court and incompatible with the plain language and evident purpose of s. 24(1). Furthermore, the new proposed limitation introduces the same exacting standard for exclusion of evidence as a remedy under s. 24(1) as, until now, has been uniquely reserved for a stay of proceedings. The remedy of exclusion granted by the trial judge was not equivalent to a stay of proceedings and should not be made subject to the same constraints. To restrict exclusion as a remedy under s. 24(1) to those limited circumstances in which a stay would be warranted exaggerates the severity of exclusion as a remedy and minimizes the importance attached by our system of justice to objectives other than truth-finding. The new standard also fails to take account of the nature of the constitutional violation or infringement. Finally, it regulates the exclusion under s. 24(1) more closely, and more intrusively, than the same remedy under s. 24(2) even though the plain language of these provisions grants the trial judge a broader discretion under s. 24(1). The new standard, as well, would preclude trial courts from granting exclusion as a remedy under s. 24(1), but, in analogous circumstances, require exclusion under s. 24(2). [paras. 43-47] [paras. 64-65]

Cases Cited

By Rothstein J.

Referred to: *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3; *R. v. Stinchcombe*, [1991] 3 S.C.R. 326; *R. v. Horan*, 2008 ONCA 589, 237 C.C.C. (3d) 514; *R. v. O'Connor*, [1995] 4 S.C.R. 411; *R. v. Harrer*, [1995] 3 S.C.R. 562; *Re Regina and Arviv* (1985), 51 O.R. (2d) 551; *R. v. Sterling* (1993), 113 Sask. R. 81.

By Fish J. (dissenting)

R. v. Grant, 2009 SCC 32; *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297; *Mills v. The Queen*, [1986] 1 S.C.R. 863; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3; *R. v. Rahey*, [1987] 1 S.C.R. 588; *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575; *Friends of the Oldman River Society v. Canada (Ministry of Transport)*, [1992] 1 S.C.R. 3; *Charles Osenton and Co. v. Johnston*, [1942] A.C. 130; *R. v. O'Connor*, [1995] 4 S.C.R. 411; *R. v. Harrer*, [1995] 3 S.C.R. 562; *R. v. Genest*, [1989] 1 S.C.R. 59; *R. v. Collins*, [1987] 1 S.C.R. 265; *Pearse v. Pearse* (1846), 1 De G. & Sm. 11, 63 E.R. 950.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 7, 24(1), (2).

Controlled Drugs and Substances Act, S.C. 1996, c. 19.

Authors Cited

Freedman, Sidney. "Admissions and Confessions", in Roger E. Salhany and Robert J. Carter, eds., *Studies in Canadian Criminal Evidence*. Toronto: Butterworths, 1972, 95.

History and Disposition:

APPEAL from a judgment of the Alberta Court of Appeal (Hunt and Martin JJ.A. and Brooker J. (*ad hoc*)), 2007 ABCA 425, 83 Alta. L.R. (4th) 4, 53 C.R. (6th) 241, 425 A.R. 293, 165 C.R.R. (2d) 92, [2008] 4 W.W.R. 208, 2007 CarswellAlta 1754, [2007] A.J. No. 1445 (QL), setting aside the accused's acquittal and ordering a new trial. Appeal dismissed, Binnie, Fish and Abella JJ. dissenting.

Counsel:

C. John Hooker, for the appellant.

Croft Michaelson and *Robert A. Sigurdson*, for the respondent.

[Editor's note: A corrigendum was published by the Court August 4, 2009. The corrections have been incorporated in this document and the text of the corrigendum is appended to the end of the judgment.]

The judgment of McLachlin C.J. and LeBel, Deschamps and Rothstein JJ. was delivered by

ROTHSTEIN J.:--

1. Introduction

1 By reason of the Crown's failure to disclose information in a timely way, the Crown breached the appellant's right to make full answer and defence guaranteed by s. 7 of the *Canadian Charter of Rights and Freedoms*. The issue in this appeal as of right is whether the trial judge misdirected himself by ordering the exclusion of the late disclosed evidence as a remedy under s. 24(1) of the *Charter*.

2 The majority in the Court of Appeal found that the trial judge committed a reviewable error by failing to consider whether a less severe remedy than exclusion of evidence could cure the prejudice to the appellant by the late disclosure while still preserving the integrity of the justice system (2007 ABCA 425, 83 Alta. L.R. (4th) 4, at para. 30).

3 I agree with the result of the majority in the Court of Appeal. In my view, the trial judge committed a reviewable error by failing to consider whether the prejudice to the appellant could be remedied without excluding the evidence and the resulting distortion of the truth-seeking function of the criminal trial process. Under s. 24(1), where the evidence was obtained in conformity with the *Charter*, its exclusion is only available as a remedy where its admission would result in an unfair trial or would otherwise undermine the integrity of the justice system. In this case, the prejudice to the appellant's right to make full answer and defence could be remedied through an adjournment and disclosure order and there was nothing that otherwise compromised the fairness of the trial process or the integrity of the justice system.

4 I would therefore dismiss the appeal.

2. Facts

5 On December 23, 2003, the appellant was driving a motor vehicle which entered Canada from the United States at the border crossing at Del Bonita, Alberta. Upon a search of the vehicle and the utility trailer that it was towing, customs officials discovered approximately 22 kilograms of cocaine hidden in two metal drawers concealed behind the trailer's bumper. The appellant and his passenger were charged with importing cocaine and possession of cocaine for the purpose of trafficking, contrary to the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19.

6 After pre-preliminary hearing conferences, the Crown indicated that disclosure was substantially complete. Following the preliminary hearing, the appellant pleaded not guilty and elected trial by judge and jury on February 28, 2005. A trial date was originally set for November 14, 2005, but the trial was adjourned at the request of the appellant because he had changed counsel. On February 14, 2006, a trial date of March 20, 2006, was also adjourned as neither counsel was ready to proceed. A new trial date of May 1, 2006, was set.

7 On March 21, 2006, the Crown advised the appellant's counsel that disclosure of evidence concerning an accomplice was to be forthcoming. On March 24, 2006, the appellant re-elected for trial by judge alone. On March 29, 2006, the Crown disclosed a transcript of a videotaped KGB statement, taken on December 16, 2004, from one Robert Friedman, and indicated that Friedman

would be called as a witness. On April 6, 2006, counsel for the appellant requested additional information pertaining to Friedman and the notes of the officers who dealt with Friedman, including the notes of Constable Simon and Constable Gillespie. On April 19, 2006, the Crown advised that it was aware of information concerning Constable Gillespie that was potentially relevant to the officer's credibility, character and ability to perform his duties during his involvement in the investigation of this matter and invited the appellant to bring an *O'Connor* application for access to this information.

8 Also on April 19, 2006, the Crown provided the appellant with a five-page agreed statement of facts from another proceeding signed by another alleged accomplice, one Todd Holland, that was to be used in Holland's guilty plea and sentencing hearing. The Crown advised that it intended to call Holland as a witness at trial. Some further information was disclosed on April 22, 2006.

9 By notice of motion before the trial judge, the appellant sought an order for a stay of proceedings on the grounds that his right to make full answer and defence had been prejudiced by the late disclosure of the evidence relating to Friedman and Holland. The appellant asked, in the alternative, that the evidence of Friedman and Holland be excluded from the trial.

3. Decision of The Trial Judge

10 On April 25, 2006, the trial judge ordered the exclusion of the evidence of Friedman and Holland. He held that the prejudice to the appellant resulted from the fact that:

> ... on the eve of trial, counsel for the accused is left to speculate on what will be provided to him by way of final disclosure and how to mount a defence against an ever moving prosecution.
>
> ...
>
> ... The simple fact is, that on the eve of trial the applicant has been confronted with partial disclosure in relation to two potentially damaging witnesses. ... A preliminary hearing has been held, the accused has been committed to stand trial, and elections and reelections have been made. ...
>
> ...
>
> ... The use of this evidence [of Friedman and Holland] at trial is unfair and prejudicial to the accused. It renders the process unfair.

11 The trial judge found that the late disclosure of evidence did not result from misconduct by the Crown.

12 On the issue of the appropriate remedy, the trial judge stated that:

> An adjournment of the matter is nothing more than a reward for the Crown's tardiness.
>
> ...
>
> ... The proper remedy which address [*sic*] the accused's rights and balances those rights with the interest of society, is to place both the accused and the Crown in the position they occupied before the Crown attempted to introduce this new evidence.

The trial proceeded and the appellant was acquitted.

4. Decision of The Court of Appeal, 2007 ABCA 425, 83 Alta. L.R. (4th) 4

13 The majority of the Court of Appeal held that the trial judge "committed a reviewable error ... by failing to consider whether a less severe remedy than the exclusion of significant evidence could cure the harm done to the respondent by the late disclosure, while still preserving the integrity of the justice system" (para. 30). In this case, exclusion was not required to cure the harm to the appellant. It set aside the acquittal and ordered a new trial.

14 Brooker J. (*ad hoc*), in dissent, held that the choice of the appropriate remedy under s. 24(1) of the *Charter* falls within the wide discretion of the trial judge. Absent the trial judge misdirecting himself or being so clearly wrong in his decision that it amounts to an injustice, there was no basis for appellate intervention in this case. He found that the trial judge considered the evidence and granted a remedy that balanced the rights of the appellant with the interests of society. He would have dismissed the appeal.

5. Standard of Review

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

6. Determining an Appropriate Remedy Under Section 24(1)

16 This appeal raises the issue of when the exclusion of evidence will be an appropriate remedy under s. 24(1) of the *Charter* for late disclosure by the Crown.

17 The remedy of exclusion of evidence will normally arise under s. 24(2) of the *Charter*. Section 24(2) applies to evidence obtained in a manner that infringes or denies a person the rights or freedoms granted by the *Charter*. But such evidence will only be excluded if its admission would bring the administration of justice into disrepute. Section 24(2) provides:

> Where, in proceedings under subsection 1, a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

18 Remedies under s. 24(1) of the *Charter* are flexible and contextual: *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at paras. 41, 52 and 54-56. They address the most varied situations. Different considerations may come into play in the search for a proper balance between competing interests. Section 24(1) provides:

> Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

19 Here, we are concerned with aspects of the conduct of a criminal trial and of the operation of the justice system, where the courts have to pass upon the guilt or innocence of an accused. While the exclusion of evidence will normally be a remedy under s. 24(2), it cannot be ruled out as a remedy under s. 24(1). However, such a remedy will only be available in those cases where a less intrusive remedy cannot be fashioned to safeguard the fairness of the trial process and the integrity of the justice system.

20 Before being entitled to a remedy under s. 24(1), the party seeking such a remedy must establish a breach of his or her *Charter* rights. In a case of late disclosure, the underlying *Charter* infringement will normally be to s. 7. Section 7 of the *Charter* protects the right of the accused to make full answer and defence. In order to make full answer and defence, the Crown must provide the accused with complete and timely disclosure: see *R. v. Stinchcombe*, [1991] 3 S.C.R. 326. The purpose underlying the Crown's obligation to disclose is explained by Rosenberg J.A. in *R. v. Horan*, 2008 ONCA 589, 237 C.C.C. (3d) 514, at para. 26:

> Put simply, disclosure is a means to an end. Full prosecution disclosure is to ensure that the accused receives a fair trial, that the accused has an adequate opportunity to respond to the prosecution case and that in the result the verdict is a reliable one.

21 However, the Crown's failure to disclose evidence does not, in and of itself, constitute a violation of s. 7. Rather, an accused must generally show "actual prejudice to [his or her] ability to make full answer and defence" (*R. v. O'Connor*, [1995] 4 S.C.R. 411, at para. 74) in order to be entitled to a remedy under s. 24(1).

22 While the accused must receive a fair trial, the trial must be fair from both the perspective of the accused and of society more broadly. In *R. v. Harrer*, [1995] 3 S.C.R. 562, McLachlin J. (as she then was) provided guidance on what is meant by trial fairness. She stated, at para. 45, that:

> At base, a fair trial is a trial that appears fair, both from the perspective of the accused and the perspective of the community. A fair trial must not be confused with the most advantageous trial possible from the accused's point of view: *R. v. Lyons*, [1987] 2 S.C.R. 309, at p. 362, *per* La Forest J. Nor must it be conflated with the perfect trial; in the real world, perfection is seldom attained. A fair trial is one which satisfies the public interest in getting at the truth, while preserving basic procedural fairness for the accused. [Emphasis added.]

23 Apart from ensuring trial fairness, there is one other circumstances in which late disclosed evidence might be excluded. That is where to admit the evidence would compromise the integrity of the justice system.

24 Thus, a trial judge should only exclude evidence for late disclosure in exceptional cases: (a) where the late disclosure renders the trial process unfair and this unfairness cannot be remedied through an adjournment and disclosure order or (b) where exclusion is necessary to maintain the integrity of the justice system. Because the exclusion of evidence impacts on trial fairness from society's perspective insofar as it impairs the truth-seeking function of trials, where a trial judge can fashion an appropriate remedy for late disclosure that does not deny procedural fairness to the accused and where admission of the evidence does not otherwise compromise the integrity of the justice system, it will not be appropriate and just to exclude evidence under s. 24(1).

25 This view is reflected in cases such as *O'Connor* that have considered whether a stay is the appropriate remedy for late or insufficient disclosure under s. 24(1). As L'Heureux-Dubé J., for the majority, stated in *O'Connor*, at para. 83:

> In such circumstances [of late or insufficient Crown disclosure and a consequent s. 7 breach], the court must fashion a just and appropriate remedy, pursuant to s. 24(1). Although the remedy for such a violation will typically be a disclosure order and adjournment, there may be some extreme cases where the prejudice to the accused's ability to make full answer and defence or to the integrity of the justice system is irremediable. In those "clearest of cases", a stay of proceedings will be appropriate.

26 This statement recognized that the appropriate focus in most cases of late or insufficient disclosure under s. 24(1) is the remediation of prejudice to the accused, but that safeguarding of the integrity of the justice system will also be a relevant concern. Of course the prejudice complained of must be material and not trivial. For example, the exclusion of evidence may be warranted where the evidence is produced mid-trial after important and irrevocable decisions about the defence have been made by the accused. Even then, it is for the accused to demonstrate how the late disclosed evidence would have affected the decisions that were made. For purposes of trial fairness, only where prejudice cannot be remedied by an adjournment and disclosure order will exclusion of evidence be an appropriate and just remedy.

27 There may also be instances where an adjournment and disclosure order may not be appropriate because admission of evidence compromises the integrity of the justice system. For example, as Rosenberg J.A. stated in *Horan*, at para. 31:

> In some cases, an adjournment may not be an appropriate or just remedy if the result would be to unreasonably delay the trial of an in-custody accused. In such a case, an appropriate remedy could be exclusion of the undisclosed evidence. However, the burden is on the accused to demonstrate that exclusion of the evidence was appropriate.

In other words, where an accused is in pre-trial custody, an adjournment that significantly prolongs the custody before trial may be seen as compromising the integrity of the justice system. The exclusion of evidence may also be an appropriate and just remedy where the Crown has withheld evidence through deliberate misconduct amounting to an abuse of process. Yet even in such circumstances, society's interest in a fair trial that reaches a reliable determination of the accused's guilt or innocence based on all of the available evidence cannot be ignored. This will especially be true where the underlying offense is a serious one: see *O'Connor*, at para. 78. In clear cases, however, the exclusion of evidence may be an appropriate and just remedy under s. 24(1) in order to preserve the integrity of the justice system.

7. Application to The Facts

28 There is no doubt that the late disclosure to the appellant in this case was prejudicial to his right to make full answer and defence. However, there is no suggestion that the police in this case obtained the impugned evidence in breach of the *Charter*. Section 24(1), and not s. 24(2), was therefore the appropriate remedial provision through which to remedy the prejudice to the appellant.

29 There was also no finding of deliberate Crown misconduct or any other reason to believe that the integrity of the justice system was compromised. In this case, on the motion before the trial judge, the Crown submitted that the impugned evidence was not disclosed to the appellant earlier because of concerns that to do so would imperil a witness and compromise an ongoing investigation. While the trial judge did not accept that the Crown's concerns were well-founded in this case, he did not find that the Crown had engaged in deliberate misconduct. Rather, he stated clearly, "I do not suggest the Crown has been unethical or malicious". There is no suggestion that the appellant was held in pre-trial custody.

30 The question is, having regard to the interest of society in a fair trial, whether the prejudice to the appellant could have been cured by an adjournment and disclosure order. The trial judge's concern was that an adjournment would simply be a reward to the Crown for its late disclosure. However, the integrity of the justice system was not at issue. Therefore, the trial judge had only to consider whether an adjournment and disclosure order was an appropriate remedy to cure the actual prejudice to the appellant's right to a fair trial. This the trial judge did not do.

31 The appellant argued that his right to a fair trial was prejudiced because he obtained disclosure only after he elected trial by judge alone. As pointed out by the majority in the Court of Appeal however, he knew that disclosure would be forthcoming before he elected and, in any event, the opportunity to re-elect could have formed part of the s. 24(1) remedial order.

32 The appellant also says that his right to a fair trial was prejudiced because he was denied the right to cross-examine Friedman and Holland at a preliminary hearing. Cross-examining a witness at a preliminary hearing, however, is not a component of the right to make full answer and defence. What is protected under s. 7 is the right to make full answer and defence at trial, not the right to cross-examine a witness at a preliminary hearing.

33 In *Re Regina and Arviv* (1985), 51 O.R. (2d) 551 (C.A.), Martin J.A. considered whether the *Charter* afforded the accused a right to question a witness at a preliminary inquiry. The case against the accused was proceeding by direct indictment. As a result, no preliminary inquiry was held and the accused had no opportunity to cross-examine a "key witness" (p. 562). The Crown had provided the accused with the testimony of this witness at the preliminary inquiry of an accomplice of the accused as well as that same witness's testimony from the accomplices' trial. The Crown had further provided the accused with other statements that had been made by the witness, including a videotaped statement that the witness had made to the police (pp. 561-62).

34 Martin J.A. stated, at pp. 560 and 562, that:

> The constitutional standard which a criminal trial must satisfy under s. 7 of the Charter is the standard encompassed by the concept "the principles of fundamental justice". The so-called "right" to a preliminary hearing is not elevated to a constitutional right under the Charter.
>
> ...
>
> ... We are not prepared to hold and, in our view, are not entitled to hold, that the failure to provide the opportunity to cross-examine, even a key witness, prior to the giving of evidence by that witness at the trial, *per se*, contravenes the Charter, where full disclosure of the Crown's case and of the witness's evidence has been made.

I agree with the principle expressed by Martin J.A. There is no independent *Charter* right to cross-examine a witness at a preliminary inquiry. As stated above, s. 7 of the *Charter* protects the right of the accused to make full answer and defence. As indicated, in order to make full answer and defence, the Crown must provide the accused with disclosure (see *Stinchcombe*). However, this does not mean that the accused has a *Charter* right to a particular method of disclosure.

35 In *R v. Sterling* (1993), 113 Sask. R. 81, the Saskatchewan Court of Appeal considered whether, in light of this Court's decision in *Stinchcombe*, the accused had a *Charter* right to

cross-examine a witness at a preliminary inquiry. After endorsing the judgment of Martin J.A. in *Arviv*, Wakeling J.A., concurring, said, at para. 77, that:

> The principle appears to have been established that production of witnesses, which is what a preliminary hearing produces, is not an essential component of fundamental justice so long as full disclosure is otherwise given by the Crown.

36 Although the primary purpose of the preliminary inquiry is to enable a provincial court judge to determine whether an accused should be committed for trial, as noted by Martin J.A. in *Arviv*, at p. 560, "the preliminary hearing does serve the ancillary purpose of providing a discovery of the Crown's case". However, if Crown disclosures are otherwise complete, then the accused's s. 7 right has not been infringed by his not being able to cross-examine a witness at a preliminary hearing. The discovery purpose of the preliminary inquiry has been met through other means, such as providing the accused with witness statements.

37 In the present case, the Crown provided the appellant with disclosure, albeit late. In light of the fact that disclosure was ultimately provided to the appellant, the appellant's s. 7 right to make full answer and defence was not infringed by his inability to cross-examine the potential Crown witnesses at a preliminary hearing. The appellant was provided with a transcript of a videotaped KGB statement of one accomplice, as well as an agreed statement of facts that formed the basis for a guilty plea and sentencing of the other accomplice. This material provided the appellant with sufficient disclosure of the Crown's case against him. The appellant could make full answer and defence as guaranteed by s. 7 of the *Charter* without the need to cross-examine these witnesses at a preliminary inquiry. The prejudice resulting to the appellant from this late Crown disclosure would therefore have been cured by an adjournment to provide the appellant with an opportunity to consider this new evidence against him.

38 Unlike the exclusion of the impugned evidence ordered by the trial judge, an adjournment would have preserved society's interest in a fair trial while still curing the prejudice to the accused. Had he properly directed himself, this should have been the remedy ordered.

8. Conclusion

39 By ordering exclusion of evidence, the trial judge did not impose an appropriate and just remedy when an adjournment and disclosure order would have sufficiently addressed the prejudice to the appellant while preserving society's interest in a fair trial. I am of the respectful opinion that, in doing so, the trial judge misdirected himself.

40 I would dismiss the appeal and confirm the order of the Court of Appeal for a new trial.

The reasons of Binnie, Fish and Abella JJ. were delivered by

FISH J. (dissenting):--

I

41 The order of the trial judge that concerns us here is subject to appellate interference only if the Court abandons the governing principles adopted by the Court itself nearly a quarter-century ago - and has since then repeatedly and consistently applied. I would decline to do so.

42 Briefly stated, these are the governing principles. On an application under s. 24(1) of the *Canadian Charter of Rights and Freedoms*, once an infringement has been established, the trial judge must grant "such remedy as [is] appropriate and just in the circumstances". The remedy granted must vindicate the rights of the claimant, be fair to the party against whom it is ordered, and consider all other relevant circumstances. Appellate courts may interfere with a trial judge's exercise of discretion only if the trial judge has erred in law or rendered an unjust decision. This is particularly true of remedies granted by trial judges under s. 24(1) of the *Charter*, which by its very terms confers on trial judges the *widest possible discretion*. Finally, appellate courts must take particular care not to substitute their own exercise of discretion for that of the trial judge merely because they would have granted a more generous or more limited remedy.

43 Justice Rothstein would confine the broad and unfettered discretion of trial judges under s. 24(1) of the *Charter* to two narrow circumstances. In my respectful view, this proposed change in the law is unwarranted, inconsistent with prior decisions of the Court and incompatible with the plain language and evident purpose of s. 24(1) of the *Charter*.

44 With respect, moreover, the new standard proposed by my colleague is inappropriate for other reasons as well.

45 First, it introduces for exclusion of evidence as a remedy under s. 24(1) of the *Charter* the same exacting standard that until now has been uniquely reserved for a far more drastic remedy - a stay of proceedings. At best, this fusion of the formerly distinct tests invites confusion regarding their application to the two distinct remedies. At worst, the fused test eliminates exclusion of evidence as a live option under s. 24(1).

46 Second, the test for exclusion proposed by my colleague takes no account of the *nature* of the constitutional violation or infringement, limiting the remedy of exclusion without regard to which *Charter* right or freedom has been abridged.

47 Third, the proposed test regulates the discretionary remedy of exclusion under s. 24(1) of the *Charter* more closely, and more intrusively, than an order of exclusion under s. 24(2). This strikes me as particularly incongruous: The plain language of both provisions makes it perfectly clear that a trial judge's discretion under s. 24(1) is *broader*, not *narrower*, than under s. 24(2). Moreover, under the narrow test proposed by my colleague, trial courts would be *precluded* from granting exclusion as a remedy under s. 24(1), yet *required* by the panoply of factors just recently set out in *Grant* to

order exclusion under s. 24(2) in analogous circumstances. See *R. v. Grant*, 2009 SCC 32, particularly at para. 71.

48 For these reasons and for the reasons that follow, I agree with Brooker J.A., dissenting in the Court of Appeal (2007 ABCA 425, 83 Alta L.R. (4th) 4), that the trial judge committed no reviewable error in exercising his discretion as he did.

49 With respect for those who are of a different view, I would therefore allow the appeal, set aside the order for a new trial, and restore the verdict at trial.

II

50 It is undisputed that the appellant's constitutional right to timely disclosure, guaranteed by s. 7 of the Charter, was infringed by the Crown in this case. And it is undisputed as well that the appellant was therefore entitled to a remedy under s. 24(1) of the Charter.

51 The Court has made it clear, time and time again, that orders under s. 24(1) should be disturbed on appeal "only if the trial judge misdirects himself or if his decision is so clearly wrong as to amount to an injustice": *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, at para. 117. Justice Rothstein, at para. 15, reaffirms this standard of review.

52 There is no suggestion in Justice Rothstein's reasons that the trial judge in this case exercised his discretion unreasonably or in a manner that amounted to an injustice. Rather, my colleague finds that the trial judge, in excluding the previously undisclosed evidence, erred in law. As I stated at the outset, the trial judge's exercise of discretion in this regard can properly be characterized as an error of law *only if we change the law*. And with the greatest of respect, as likewise stated at the outset, I believe the change in the law proposed by Justice Rothstein is unwarranted, inconsistent with prior decisions of the Court and incompatible with the plain language and evident purpose of s. 24(1) of the *Charter*.

53 The full extent of a trial judge's discretion in crafting a remedy under s. 24(1) was recognized by the Court in the earliest days of the *Charter*, and has since then been reaffirmed in the clearest of terms:

> It is difficult to imagine language which could give the court a wider and less fettered discretion [than that of s. 24(1)]. It is impossible to reduce this wide discretion to some sort of binding formula for general application in all cases, and it is not for appellate courts to pre-empt or cut down this wide discretion.

(*Mills v. The Queen*, [1986] 1 S.C.R. 863, at p. 965. Cited with approval in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at paras. 24, 50 and 52; in *R. v. Rahey*, [1987] 1 S.C.R. 588, *per* La

> Forest J., at p. 639; and again in *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575.)

54 As if for added emphasis, McLachlin C.J., speaking for the Court in *974649 Ontario*, at para. 18, described s. 24(1) as "confer[ring] the widest possible discretion on a court to craft remedies for violations of *Charter* rights."

55 Justice Rothstein proposes that this broad and unfettered discretion be henceforth narrowly constrained. Under my colleague's novel approach - I say "novel" because it is entirely unsupported by precedent - evidence may be excluded as a remedy under s. 24(1) of the *Charter in two circumstances only*: (1) where its admission would result in an unfair trial and the unfairness cannot be remedied by any lesser remedy; or (2) where exclusion of the evidence is necessary to preserve the integrity of the justice system (paras. 23, 24 and 27). And this second exceptional circumstance is itself limited to "clear cases" where countervailing interests - such as society's interest in having all available evidence presented at trial - are outweighed (para. 27).

56 In short, the *Charter* entitles anyone whose rights or freedoms have been infringed "to obtain such remedy as the court considers appropriate and just in the circumstances". This "widest possible discretion" is subject to appellate interference, as we have seen, "only if the trial judge misdirects himself or if his decision is so clearly wrong as to amount to an injustice" (*Regan*, at para. 117). There is no suggestion, I repeat, that the trial judge's decision in this case amounted to an injustice. On the contrary, the trial judge exercised his discretion reasonably, and well within the broad limits fixed by the *Charter* and the governing principles set out in *Mills* and its progeny.

57 Accordingly my purpose here is not to defend the trial judge's choice of remedy. It requires no further defence. My purpose, rather, is to uphold the trial judge's constitutional authority, under s. 24(1) of the *Charter, to make that choice*. If the discretion were theirs to exercise, some judges might well have chosen instead to order disclosure and adjourn the proceedings. But we are not entitled to intervene for that reason:

> The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way.
>
> (*Friends of the Oldman River Society v. Canada (Ministry of Transport)*, [1992] 1 S.C.R. 3, at p. 76), quoting *Charles Osenton and Company v. Johnston*, [1942] A.C. 130 (H.L.), at p. 138.)

58 An appellate court that would have exercised original discretion as the trial judge did will rarely be tempted to tamper with the law as it stands. The temptation, I fear, is far greater, where the

appellate court might have been inclined to exercise its discretion differently. Disagreement, particularly strong disagreement, invites caution: A reviewing court must not, on account of its disagreement alone, place trial judges offside by redrawing the established boundaries of their discretion.

59 I think it better by far for an appellate court to affirm a discretionary decision with which it disagrees than to reverse it impermissibly by adopting, *ex post facto*, a more regimented framework that might have resulted in what it regards as a preferable result at trial. In the context that concerns us here, the law as it stands does not authorize us to intervene in the impugned decision of the trial judge. And the proposed change in the law, while it would prevent trial judges in future cases from exercising their discretion as the trial judge did here, would at the same time hypothecate their constitutional duty, under s. 24(1) of the *Charter*, to fashion appropriate and just remedies in circumstances we cannot anticipate.

III

60 It is true that in *R. v. O'Connor*, [1995] 4 S.C.R. 411, the Court limited access to a particular remedy under s. 24(1) by imposing essentially the same stringent test that Justice Rothstein would adopt here. But that case dealt with a stay of proceedings and has no application here.

61 The stringent limits placed on the issuance of stays are a function of the severity and finality of that remedy. Unlike a stay of proceedings, the exclusion of impugned evidence rarely terminates the proceedings - and, more rarely still, terminates the proceedings *definitively*. On the contrary, probative evidence is often excluded under the common law of evidence or under s. 24(2) of the *Charter* in trials that nonetheless proceed and routinely result in convictions.

62 At the very least, the exclusion of evidence as a s. 24(1) remedy should not be subject to the same demanding criteria as a stay of proceedings unless exclusion will preclude a trial, which is not our case. Here, Mr. Bjelland was committed to trial at the conclusion of a preliminary inquiry that proceeded without the tardily disclosed evidence. Moreover, after that evidence was excluded by the trial judge, the Crown was evidently satisfied that the remaining evidence was capable of supporting a conviction. In the absence of a reasonable prospect of conviction, Crown counsel could not reasonably have proceeded with the trial.

63 The Crown did have an option. Instead of proceeding on the strength of the remaining evidence in its possession, the Crown, if it considered the excluded evidence of central importance to its case, could have declared its proof closed and appealed the inevitable acquittal on the very ground that it now invokes. On the other hand, if the Crown did not attach great importance to the evidence then, it can hardly ask us to do so now. And yet, having opted to place Mr. Bjelland in jeopardy of conviction at one trial on evidence it considered sufficient, the Crown now seeks a "second kick at the can".

64 On any view of the matter, the remedy of exclusion granted by the trial judge was hardly

equivalent to a stay of proceedings and should not be made subject to the same constraints.

65 Finally, we have long accepted that an acquittal that results from the exclusion of evidence is warranted by overriding considerations of justice. See *R. v. Harrer*, [1995] 3 S.C.R. 562, at para. 42 (*per* McLachlin J., as she then was, concurring); *R. v. Genest*, [1989] 1 S.C.R. 59, at pp. 82, 91 and 92 (*per* Dickson C.J., for the unanimous Court); *R. v. Collins*, [1987] 1 S.C.R. 265, at pp. 282-86. The policy of the law in this regard was well put by Samuel Freedman, then Chief Justice of Manitoba, in this well-known passage:

> The objective of a criminal trial is justice. Is the quest of justice synonymous with the search for truth? In most cases, yes. Truth and justice will emerge in a happy coincidence. But not always. Nor should it be thought that the judicial process has necessarily failed if justice and truth do not end up in perfect harmony... . [T]he law makes its choice between competing values and declares it is better to close the case without all the available evidence being put on the record. We place a ceiling price on truth. It is glorious to possess, but not at unlimited cost. "Truth, like all other good things, may be loved unwisely - may be pursued too keenly - may cost too much."
>
> (S. Freedman, "Admissions and Confessions", in R. E. Salhany and R. J. Carter, eds., *Studies in Canadian Criminal Evidence* (1972), 95, at p. 99, quoting *Pearse v. Pearse* (1846), 1 De G. & Sm. 11, 63 E.R. 950, at p. 957.)

Restricting exclusion as a remedy under s. 24(1) of the *Charter* to those limited circumstances in which a stay would be warranted at once exaggerates the severity of exclusion as a remedy and minimizes the importance attached by our system of justice to objectives other than truth-finding.

IV

66 The trial judge reviewed the evidence carefully and accurately. He considered and rejected alternative remedies, including a stay of proceedings and an adjournment.

67 Understandably, the trial judge considered as well that exclusion of the tardily disclosed evidence was not a particularly drastic remedy in this case. He noted that the remaining evidence had been found sufficient by a Provincial Court Judge at the conclusion of a preliminary inquiry, to permit a reasonable jury, properly instructed, to find the appellant guilty as charged.

68 Ultimately, the trial judge concluded that "[t]he proper remedy which address[es] the accused's rights and balances those rights with the interest[s] of society, is to place both the accused and the Crown in the position they occupied before the Crown attempted to introduce this new evidence." Manifestly, the trial judge was guided in his exercise of discretion by the established principles governing applications for a remedy under s. 24(1) of the *Charter*.

69 On the whole of the record, I am thus satisfied that the trial judge's decision under this standard was neither erroneous in law nor so clearly wrong as to amount to an injustice.

V

70 For all of these reasons, as mentioned at the outset, I would allow the appeal, set aside the order for a new trial, and restore the verdict at trial.

Solicitors:

Solicitors for the appellant: Lord, Russell, Tyndale, Hoare, Calgary.

Solicitor for the respondent: Public Prosecution Service of Canada, Calgary.

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Corrigendum, released August 4, 2009

Please note the following change in the English version of the case *R. v. Bjelland*, 2009 SCC 38, released on July 30, 2009:

> In para. 57, the first sentence which reads "Accordingly my purpose here is not to defend the trial judge's choice of remedy, it requires no further defence." should be replaced by "Accordingly my purpose here is not to defend the trial judge's choice of remedy. It requires no further defence."

cp/e/qlecl/qlaxw/qlcal/qlhcs/qlaxr/qlced/qlcas/qlced/qlcas/qlhcs/qlsxr