BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

IN THE MATTER OF MPL BRITISH COLUMBIA DISTRIBUTORS INC. (MPL BC) AGENCY PRIOR APPROVAL PROCESS

SUPPLEMENTARY CLOSING SUBMISSIONS OF MPL BRITISH COLUMBIA DISTRIBUTORS INC.

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1. These submissions are supplemental to MPL BC's submissions made May 26, 2023. MPL BC adopts by reference the defined terms set out in its May 26, 2023 written submissions.

2. On May 26, 2023, after all full participants had provided their evidence, Michael Minerva, a representative of Village Farms, provided submissions via oral testimony to this Panel regarding his views on MPL BC's Agency Application. It was clear from Mr. Minerva's testimony that his main purpose in attending the supervisory review hearing was not to provide admissible concrete evidence, but rather simply to provide submissions on why Village Farms was opposed to MPL BC being granted an agency licence. Mr. Minerva himself summarized Village Farms' three main points as: 1) an opinion that BC producers already have ample choices; 2) a view that MPL is not the type of company that will work within the Commission's guidelines; and 3) a view that MPL BC's inclusion as an agency will result in turmoil between agencies and growers.[1] However, Mr. Minerva had scant admissible evidence to support Village Farms' submissions. The fact that Mr. Minerva was under oath while providing his submissions does not make those submissions evidence.

3. The majority of Mr. Minerva's testimony was opinion and argument – not evidence. While at times Mr. Minerva referred to his opinions being based on his experiences, he did not provide admissible evidence or in some cases even a description of his experiences in a manner that would allow this Panel or the

[1] Draft transcript of Chief of M. Minerva, dated May 26, 2023, at p. 9, lines 1-14.

participants to test or verify the basis for Mr. Minerva's opinions. Mr. Minerva's testimony often referred to unattributable hearsay or double hearsay – neither of which are admissible evidence and were properly objected to by MPL BC's counsel. Village Farms chose not to be a full participant in these proceedings and to put their bald assertions to Mr. Mastronardi in cross examination. Accordingly, it is MPL BC's submission that Mr. Minerva's evidence should be given little to no weight by this Panel.

1. Village Farms has been Significantly Reducing its Vegetable Production in BC and Moving to Cannabis

4. One of Village Farms' primary submissions to this Panel was that there is no need for a new agency in BC[2] and that BC growers already have ample choices with the current agencies.[3] However, the underlying theme of Village Farms' submissions is that they simply do not want another agency to compete with – particularly not MPL BC. It is not surprising that Village Farms does not want another strong agency in BC when Village Farms' produce division is struggling and it has been moving its business more into cannabis.

5. First, it is worth noting that Village Farms, which received its agency licence in 2006, was one of the last, if not the last, companies to receive an agency licence in BC and it is now arguing against an additional agency licence being granted. In Mr. Minerva's evidence, he agreed that "it's definitely important for producers that they have a choice" in agency, but further stated that now there are eight agencies (with Village Farms being one of the last) and producers have enough choices.[4] Essentially, now that Village Farms has an agency licence it wants to maintain the current status quo – something which the Commission found was not "itself a valid objective".[5]

[2] Draft Transcript of Chief of M. Minerva, dated May 26, 2023, at p. 4, lines 27-33.
[3] Draft Transcript of Chief of M. Minerva, dated May 26, 2023, at p. 9, lines 1-5.
[4] Draft Transcript of Cross of M. Minerva, dated May 26, 2023, at p. 26, lines 8-21.
[5] Commission Decision at para. 29.

6. Mr. Minerva started his submissions by emphasising that he thought it was important to mention that Village Farms "are producers first"[6] (it should be remembered that MPL is also a producer with vegetable farming roots dating back over 70 years[7]), but it was disclosed in cross examination that over the last ten years Village Farms has (i) converted approximately 45% of its BC greenhouse acres into cannabis and (ii) decreased its BC agency producer representation to only two outside producers. Specifically, Mr. Minerva testified that:

   a. Village Farms has both a vegetable division and a cannabis division;[8]

   b. one of the ways Village Farms has expanded into cannabis is by converting greenhouse facilities into cannabis.[9] In particular, Village Farms has converted two of its BC produce facilities into cannabis growing facilities;[10]

   c. since 2010, Village Farms has decreased its vegetable acres and increased its cannabis acres. Specifically, in 2010, Village Farms owed and operated approximately 110 vegetable acres in BC, but now only owns and operates approximately 60 acres. In that same time period, Village Farms has gone from having no cannabis acres in BC to "somewhere between 25 and 37" acres;[11] and

   d. as an agency in BC, Village Farms now has two outside producers, while in 2010 it had "definitely two, maybe as high as four or five".[12]

7. Mr. Minerva also acknowledged under cross examination that the audited financials for Village Farms International Inc., the Village Farms' parent company,

[6] Draft Transcript of Chief of M. Minerva, dated May 26, 2023, at p. 3, lines 32-33.

[7] MPL BC's Agency Application, section 2.1 at p. 9; and Draft Transcript of Chief of P. Mastronardi, dated May 23, 2023, at p. 68, lines 7-8 and p. 76, lines 40-46.

[8] Draft Transcript of Cross of M. Minerva, dated May 26, 2023, at p. 13, lines 2-29.

[9] Draft Transcript of Cross of M. Minerva, dated May 26, 2023, at p. 22, lines 13-37.

[10] Draft Transcript of Cross of M. Minerva, dated May 26, 2023, at p. 21, line 33 to p. 22, line 4.

[11] Draft Transcript of Cross of M. Minerva, dated May 26, 2023, at p. 24, line 36 to p. 25, line 17.

[12] Draft Transcript of Cross of M. Minerva, dated May 26, 2023, at p. 36, lines 8-21.

show that its fresh produce division has experienced significant losses over the last three years – including a over $40 million loss in 2022.[13]

8. While Village Farms may prefer for there not to be another agency in BC, that does not detract from the clear benefits that MPL BC can provide to producers in BC – particularly when Village Farms itself is decreasing its involvement in the greenhouse industry in BC in favour of cannabis production.

2. Village Farm's comments about growers are unattributable hearsay

9. In support of Mr. Minerva's submission that in his opinion MPL BC being granted an agency licence would lead to turmoil in the industry, he indicated that in the past growers had left Village Farms for MPL and the returned to Village Farms making statements to the effect that their arrangement with MPL was not "what it was trumped up to be".[14] Mr. Minerva even went as far as to accuse MPL of trying to entice growers with "false promises".[15] However, Mr. Minerva's evidence in this respect is nothing more than unattributable hearsay. Mr. Minerva did not even name the alleged growers in question – nor did he provide any specifics regarding the arrangements between these growers and either MPL or Village Farms. Further, to the extent that Mr. Minerva was purporting to provide evidence of MPL's discussions with these unnamed growers, Mr. Minerva's evidence is double hearsay.

10. Hearsay evidence is inherently unreliable[16] and unattributed hearsay has been described by the courts in BC as "worthless". Even in contexts, such as certain procedural applications, where the BC courts are willing to accept some hearsay evidence, they still reject unattributed hearsay as inadmissible. In this respect, the BC Court of Appeal noted, in *Albert v. Politano*:

[13] Draft Transcript of Cross of M. Minerva, dated May 26, 2023, at p. 22, line 38 to p. 23, line 47.
[14] Draft Transcript of Chief of M. Minerva, dated May 26, 2023, at p. 6, lines 21-25.
[15] Draft Transcript of Chief of M. Minerva, dated May 26, 2023, at p. 6, lines 6-10.
[16] *U. (L.M.) v. U. (R.L.),* 2004 BCSC 95 at para. 22 – Tab 1.

> 20 In *Scarr v. Gower* (1956), 18 W.W.R. 184 (B.C.C.A.) Mr. Justice O'Halloran stated at 188:
>
> > ... failure to state the source of information and belief in an affidavit usable on motions of this kind is not a mere technicality. If the source of the information is not disclosed in other material on the motion the offending paragraphs are worthless and not to be looked at by the court.
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> 21 In *Meier v. C.B.C.* (1981), 28 B.C.L.R. 136 at 137-8 Mr. Justice McKenzie observed that "the word 'source' is equivalent to 'an identified person'". To the same effect is *Trus Joist (Western) Ltd. v. United Brotherhood of Carpenters and Joiners of America, Local 1598,* [1982] 6 W.W.R. 744, wherein Madam Justice McLachlin (now Chief Justice of Canada) said at 747: "The rule permits hearsay evidence, provided the source is given".
>
> 22 The affidavit of the legal assistant does not meet Rule 22-2(13) because it does not identify the source of the information and does not attest to her belief in it. This is more than a mere technical deficiency; by failing to reveal the source, the reliability of the information is put beyond the reach of the respondent. Any cross-examination on the affidavit, by definition, will not be of the foundational source of the information. This affidavit, in this paragraph critical to the application, fails to satisfy Rule 22-2(13), is inadmissible, and fails to meet the third Palmer criteria.[17] [emphasis added]

11. Double hearsay is also inadmissible as evidence.[18]

12. Mr. Minerva's testimony that unnamed growers made comments to him regarding their experiences working with MPL are unattributable hearsay, inadmissible and should be given no weight by this Panel. Without knowing who Mr. Minerva was referring to in his testimony, MPL BC has no way of responding to or defending against Mr. Minerva's comments. In addition, to the extent Mr. Minerva's comments are suggestive of statements allegedly made by MPL to those unnamed growers, Mr. Minerva's evidence is also inadmissible double hearsay.

13. Moreover, it should be remembered that Village Farms initially chose not to participate in this supervisory review other than to send a letter in support of Windset's and GGFI's submissions. Had Village Farms fully participated in these proceedings it could have put questions to Mr. Mastronardi that would have allowed him an opportunity to respond to Village Farm's allegations. Further, upon

[17] *Albert v. Politano,* 2013 BCCA 194 at paras. 20-22 – Tab 2.

[18] *British Columbia (Director of Civil Forfeiture) v. Angel Acres Recreation and Festival Property Ltd.,* 2010 BCCA 539 at para. 44 – Tab 3.

Village Farms being granted an opportunity to provide both written and oral submissions, Village Farms declined to provide advance written submissions and instead only provided oral submissions. Accordingly, MPL BC did not even have advance notice of the general nature of Mr. Minerva's submissions.

14. The importance of confronting a party with allegations that go to their credibility (which Village Farms' allegations that MPL made false promises to growers do) was explained by the BC Court of Appeal, in *R. v. Podolski*, as follows:

> [174] In our view, the appellants' submission that further cross-examination would have been pointless fails to recognize that the object of the rule goes beyond fairness to the witness and includes fairness to the parties and to the trier of fact. In *McWilliams' Canadian Criminal Evidence* at para. 21:30.60.10, the authors describe the justifications for the confrontation principle this way:
>
> > It is often said that the confrontation principle is justified out of fairness to the witness: if a witness is to be presented as unreliable, and in particular as a liar, it is only fair that he or she have a chance to respond in cross-examination, otherwise a baseless allegation may cause serious damage to his or her reputation. In other words, the witness should not be "ambushed" by a challenge made only after he or she has left the stand. This justification is central to the Law Lords' judgments in *Browne v. Dunn*, and has been echoed in many Canadian cases. Yet other justifications for the confrontation principle deserve equal if not greater weight. Of particular importance, a failure to provide the witness with an opportunity to respond leaves the fact finder without information that may show the credibility attack to be unfounded, and thus risk undermining the truth-finding function of the justice system. Breach of the principle can also be seen as unfair to the party calling the witness, who is denied the opportunity to marshal a response and whose case may suffer unwarranted harm as a result. Finally, not providing the witness with a chance to respond during cross-examination may interfere with the orderly presentation of evidence, for instance where the witness has to be recalled, thus wasting time and complicating issues.[19] [emphasis added]

[19] *R v Podolski,* 2018 BCCA 96 at para. 174 – Tab 4.

15. Village Farms chose to only partially participate and minimally appear in these proceedings and as a result they have been able to put their submissions and opinions before this Panel without MPL BC having a meaningful ability to respond to Village Farms' assertions. It would be highly prejudicial to MPL BC if this Panel were to put any weight on Village Farms' unattributable hearsay particularly in circumstances where Village Farms chose not to put those assertions to MPL BC and give them an opportunity to respond.

16. It should be noted that despite MPL BC having no advance notice of Mr. Minerva's allegations, Mr. Minerva's testimony is still in contrast to Mr. Mastronardi's evidence that MPL has low grower turnover. In particular, Mr. Mastronardi stated that MPL has a "very low" grower turnover estimating it to be "less than 10 percent" over the last 30 years.[20] If MPL BC had been given notice of and a fair opportunity to respond to Village Farm's assertions, it can reasonably be inferred that MPL BC would have had further evidence to give on this issue.

17. In the circumstances, Mr. Minerva's testimony regarding what unnamed growers may have said to him at unknown times should be given no weight by this Panel.

3. Village Farms agreed that Large Corporations are involved in Litigation

18. Village Farms has also submitted that MPL BC would not be a good industry participant in BC because, in Mr. Minerva's opinion, MPL is "litigious in nature". However, Mr. Minerva's opinion in this respect is based on little more than speculation and his belief that MPL's "first choice" is litigation rather than trying to resolve issues with other parties.[21] Mr. Minerva's belief in this respect is unsupported by any evidence and, again, this allegation was never fairly put to Mr. Mastronardi to provide him with an opportunity to respond.

[20] Draft Transcript of Chief of P. Mastronardi, dated May 23, 2023, at p. 53, lines 17-22.

[21] Draft Transcript of Chief of M. Minerva, dated May 26, 2023, at p. 5, lines 32-39.

19. Village Farms and, as previously noted, Windset have both provided evidence that large companies (like MPL) are involved in litigation from time to time. In this respect, Mr. Minerva provided the following testimony:

> Q Thank you. So you'll agree with me that from time to time, a large company like yours finds itself in litigation; right?
>
> A We try to avoid it at all cost, but, again, it's part of business, yes.
>
> Q Okay.
>
> A It certainly does happen.
>
> Q And in your experience as a large company in litigation, sometimes you're a plaintiff, sometimes you're a defendant, sometimes you're around intervener depending on the matter; correct?
>
> A In -- in general terms, yeah.
>
> Q Okay.
>
> A I'm sure that's true for anybody involved in litigation.[22]

20. Mr. Minerva later went on to state that "[s]ometimes you need the assistance of courts to settle disputes … That's why they're courts, right, and laws and that sort of thing."[23]

21. Mr. Minerva attempted in his evidence to paint Village Farms as a reluctant litigant while at the same time suggesting that MPL was litigious and, as a result, would be disruptive to the industry. However, Mr. Minerva provided no actual evidence to indicate that MPL's level of involvement in litigation was in general any different than other large companies. It should also be remembered that outside of one or two specific pieces of litigation, Mr. Minerva had little knowledge of the litigation in which Village Farms has been involved and admitted to knowing nothing about the

[22] Draft Transcript of Cross of M. Minerva, dated May 26, 2023, at p. 14, lines 27-42.

[23] Draft Transcript of Cross of M. Minerva, dated May 26, 2023, at p. 21, lines 11-15.

majority of the thirteen litigation cases put to him – including a case from British Columbia, which he acknowledged first seeing on the day of the hearing.[24]

22. It is clear that Mr. Minerva's submissions on this issue were coloured by his opinion of MPL rather than being grounded in facts or evidence. In this respect, it is noteworthy that when asked about Village Farms suing a producer, Mr. Minerva stated that it was Village Farms' "only choice"[25] – but at the same time he is critical of MPL's involvement in litigation. Overall, Mr. Minerva's submissions regarding MPL's general involvement in litigation are not factual evidence. They are nothing more than his opinion and should be given no weight in this proceeding.

4. Randhawa Farms Litigation

23. In Mr. Minerva's testimony, he attempted to make much of Village Farm's litigation with one of its growers, Randhawa Farms, suggesting that MPL had bought product from Randhawa Farms in breach of the Commission's General Order knowing Randahawa Farms had an agency agreement with Village Farms. The implication Mr. Minerva appears to have been trying to make was that MPL was not the type of company that follows the rules, in particular the General Order. MPL was never a party to this litigation nor was any claim whatsoever made by Village Farms against MPL with respect to its dispute with Randhawa.

24. While Randhawa Farms may or may not have been in breach of its production agreement with Village Farms, Mr. Minerva has provided no admissible evidence (other than his own inadmissible opinion) that MPL did anything wrong or that it was actually found to have done anything wrong. Mr. Minerva made some vague statements regarding what Village Farms came "to find out" from its investigation and the litigation discovery process,[26] without providing any proof (including documents) or MPL's actual participation in those proceedings.

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[24] Draft Transcript of Cross of M. Minerva, dated May 26, 2023, at p. 19, line 10 to p. 20, line 44 and p. 31, line 38 to p. 32, line 5.

[25] Draft Transcript of Cross of M. Minerva, dated May 26, 2023, at p. 31, lines 17-21.

[26] Draft Transcript of Cross of M. Minerva, dated May 26, 2023, at p. 31, line 11.

25. Mr. Minerva was never asked by Windset and GGFI's counsel to provide the basis for his opinions – nor did he voluntarily offer any concrete basis for them. While MPL BC did ask Mr. Minerva about the Randhawa Farms lawsuit, it was only in the context of confirming that Village Farms has also sued a producer in the past when Village Farms deemed it necessary to do so. As a result of the order of questioners, MPL BC did not have the ability to subsequently test Mr. Minerva's allegations regarding MPL's involvement with Randhawa Farms.

26. Findings should not be based on speculation and conjecture. As the Court stated in *Allan v. Froese*: the case must be founded on evidence, not speculation.[27] Mr. Minerva's opinions (unsupported by any real evidence) regarding MPL's conduct and knowledge are not proven facts and should not be treated as such.

27. In any event, it should be noted that Village Farms only sued Randhawa Farms in its lawsuit. Had Village Farms any actual evidence that MPL intentionally interfered with Village Farms' contractual relations with Randhawa Farms, Village Farms would have presumably sued or added MPL to the litigation. Further, in response to the Commission's request for industry feedback on MPL BC's Agency Application, Village Farms provided a 19 page letter, signed by Mr. Minerva, opposing MPL BC's Agency Application.[28] No where in the letter does Village Farms raise its current allegations with respect to MPL and Randhawa Farms.

28. In addition, as discussed above, Village Farms chose to only partially participate in these proceedings. As a result, MPL BC did not have notice of Village Farms' submissions such that it could have addressed this issue in its own evidence nor did Village Farms put its allegations to Mr. Mastronardi to provide him with an opportunity to respond to them.

[27] *Allen v. Froese*, 2021 BCSC 28 at para. 64 – Tab 5.

[28] Lt from Village Farms to Commission, dated November 3, 2021, BCVMC-311 to BCVMC-329.

29. Mr. Minerva's statements regarding MPL's involvement with Randhawa Farms are nothing more than speculation and conjecture (or at most his personal opinion) and, as a result, should be give no weight by this Panel.

B. Conclusion

30. As set out in MPL BC's May 26, 2023 submissions, in coming to its decision to recommend that MPL BC be granted an agency licence, the Commission carefully considered MPL BC's Agency Application and conducted a thorough SAFETI-based analysis. It is evident from MPL BC's Agency Application and Mr. Mastronardi's evidence that MPL BC offers strategic benefits to the BC greenhouse industry and that the Agency Application meets all the criteria set out in section 2(6) of Part XIV of the General Order. It is clear that granting MPL BC an agency licence is consistent with sound marketing policy and is in the public's interest. Nothing in Mr. Minerva's testimony or submissions changes that.

31. Accordingly, MPL BC respectfully submits that this panel should approve the decision of the Commission and grant MPL BC's application for Class 1 Agency Status in BC.

All of which is respectfully submitted this 1st day of June, 2023.

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Morgan Camley

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Emma Irving

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Mélanie Power

Counsel for MPL British Columbia Distributors Inc.

2004 BCSC 95
British Columbia Supreme Court

U. (L.M.) v. U. (R.L.)

2004 CarswellBC 307, 2004 BCSC 95, [2004] B.C.W.L.D. 504, [2004] B.C.W.L.D. 626, [2004] W.D.F.L. 258, [2004] W.D.F.L. 313, [2004] B.C.J. No. 286, 129 A.C.W.S. (3d) 294, 25 B.C.L.R. (4th) 171, 45 C.P.C. (5th) 360

L.M.U. (Plaintiff) and R.L.U. (Defendant)

Bouck J.

Heard: December 17, 2003
Judgment: January 23, 2004
Docket: Victoria 02-1737

Counsel: Dalmar F. Tracy for Plaintiff
Robert C. Doell for Defendant

Headnote

Family law --- Domestic contracts and settlements — Validity — Essential validity and capacity — Practice and procedure

Parties were involved in dispute relating to matrimonial property — Parties made many offers and counter-offers to settle — Wife made offer of payment by husband of $350,000 in satisfaction of all outstanding claims regarding matrimonial property, deliverable on November 19, 2003 — Husband agreed, and wife agreed to extension of time — On November 17, 2003, wife withdrew offer — Husband brought application for stay of proceedings — Application granted — Parties agreed to settlement — Fact that counter-offer regarding date of delivery of funds was not in proper form as per R. 37 of Rules of Court, 1990 was irrelevant — Withdrawal of offer was ineffective — Husband entitled to specific performance of settlement agreement — Facts were not seriously contested and application using affidavit evidence was acceptable procedure for settling dispute.

***Bouck J.*:**

INTRODUCTION

1 This is a matrimonial dispute. The defendant alleges the parties settled their differences on 14 November 2003. He seeks an order staying these proceedings relying on sections 8 and 10 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253. He also asks that an order be made "in the terms of the settlement agreement reached between the parties on 14 November 2003." He abandoned his claim for relief under Rule 18A. The plaintiff says she never agreed to any settlement.

FACTS

2 Ms. U. commenced these proceedings on 10 April 2002. The trial is set to take place on 12 January 2004. During the course of the litigation the parties exchanged many Offers and Withdrawals of Offers to Settle under Rule 37 of the Supreme Court Rules. According to plaintiff counsel's Outline there were a total of 13 such Offers and Withdrawals of Offers.

3 On 7 November 2003, counsel for the plaintiff forwarded to counsel for the defendant a Rule 37 Offer titled "Plaintiff's Offer to Settle No.4." One of the terms of the offer was for the defendant to pay the plaintiff $350,000.00 at 4:00 p.m. on 19 November 2003. It read in part:

> 4. . . . the defendant will cause to be paid to the Plaintiff's solicitor in trust, on or before 4:00 p.m. on November 19, 2003, $350,000.00 in cash, in full satisfaction of all the plaintiff's claims for an interest in and reapportionment of all family assets or other property not already divided between the parties.

4 In a letter dated 14 November 2003, counsel for the defendant replied to that offer requesting an extension of time for payment of the $350,000.00 until 28 November 2003. It read in part:

> . . . our client advises that he wishes to accept your client's Offer to Settle No.4 on the condition that payment of the $350,000.00 is made on or before November 28, 2003. Dr. U. advises that the bank requires ten working days in which to process the necessary documentation and provide him with the funds. Kindly advise if we have reached a settlement at your very earliest convenience so that we may advise the Trial Coordinator's office and prepare necessary documentation.

5 By way of a reply letter dated 14 November 2003, counsel for the plaintiff agreed to the extension of time until 28 November 2003. It read in part:

> Further to your letter to me of today's date, Ms. U. will extend the deadline for payment of $350,000.00 to on or before 4:00 p.m. on 28 November 2003 on the condition that we will not speak to an Order finalizing this matter until the settlement funds are in your trust account and you have irrevocable instructions to deliver them to me forthwith, once the order is spoken to, and that no steps are taken to adjourn the trial until the Order is spoken to.

6 On 17 November 2003, counsel for the plaintiff served on counsel for the defendant a Rule 37 Notice of Withdrawal of the Offer dated 7 November 2003.

ISSUES

7

1. Is the defendant entitled to an order staying the proceedings?

2. Did the parties reach a settlement agreement by the exchange of the above documents between 7 November 2003 and 14 November 2003?

ANALYSIS

1. The Order Staying Proceedings

8 Section 8(2) of the *Law and Equity Act* reads:

> 8. (2) Nothing in this Act disables the court from directing a stay of proceedings in a cause or matter pending before it, if it thinks fit.

9 The section allows a court to stay a proceeding either temporarily or permanently. Temporary stays often are granted by way of an adjournment order. In those instances courts usually adjourn a proceeding to a fixed date. Alternatively, they may adjourn it *sine die* which means to a date suitable to one or both counsel. There does not appear to be any case law where a court permanently stayed a proceeding.

10 In a memorandum to counsel dated 7 January 2004, I temporarily stayed the trial proceedings until delivery of these reasons.

11 Counsel for the defendant wants a temporary stay order pending determination of whether the parties settled their differences by the exchange of documents. Therefore, this part of the motion must be treated as an interlocutory application rather than an application for a final order.

12 On these applications and others of a similar nature, the parties seem to have considerable difficulty presenting affidavit evidence that complies with the Supreme Court Rules (the "Rules"). Counsel seldom raise these issues on any application. This judgment presents an opportunity to offer the parties and their counsel some guidance on procedural and evidentiary problems

and suggest better alternatives. Case law dealing with procedure and evidence are notorious for the many distinctions they raise with respect to general principles. Therefore, I do not pretend that the following comments include all the case law concerning these matters.

a. Oral Hearsay Evidence

13 At a trial, where a final order will dispose of the issues between the parties, a witness may give admissible evidence only. Subject to certain exceptions, hearsay evidence is not admissible. Few, if any, cases try to define the exact nature of hearsay because it may take many forms: *R. v. Hawkins* (1996), 111 C.C.C. (3d) 129 (S.C.C.) at 153. Sopinka, Lederman and Bryant, Second Edition, *The Law of Evidence in Canada*, at 173 helpfully offer this definition:

> Written or oral statements, or communicative conduct made by persons otherwise than in testimony at the proceedings in which it is offered, are inadmissible if such statements are tendered either as proof of the truth or as proof of assertions implicit therein.

14 There are three main reasons for excluding hearsay evidence. First, because the speaker was not under oath at the time he or she made the out-of-court statement. Second, because the party opposite in interest to the speaker was not present at the time to cross-examine the speaker. Third, because the trier of fact was not present to observe the demeanour of the speaker when the words were uttered: *R. v. Hawkins* (1996), 111 C.C.C. (3d) 129 (S.C.C.) at 153; *R. v. Abbey* (1982), 138 D.L.R. (3d) 202 (S.C.C.) at 216.

15 On the other hand, a witness at trial may repeat an out-of-court statement for a relevant purpose other than for proof of the truth of the contents: Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*, Second Edition, page 177, paragraph 6.16. There are other exceptions to the admissibility of out-of-court statements at trial when the speaker does not testify. These include admissions by a party, dying declarations, declarations against interest and spontaneous declarations: Sopinka, *supra* at 189, paragraph 6.51. Exceptions also exist with respect to the admissibility of children's evidence in criminal sexual cases: *R. v. Khan* (1990), 59 C.C.C. (3d) 92 (S.C.C.).

16 At a trial, witnesses testify under oath or affirmation. The trial judge rules on admissibility issues before the jury can hear any questioned evidence.

17 The Rules govern interlocutory applications, including rules for presenting evidence and its admissibility. Rule 52(3) states that an "application" includes all proceedings that may be heard in chambers. Rule 44(3) requires a party to bring an interlocutory application by way of a motion. Rule 52(1) says that all interlocutory applications shall be heard and disposed of in chambers. The Rules do not define the word "chambers." Generally, it means a hearing without witnesses conducted in an open courtroom where counsel and the judge do not gown.

18 Subject to certain exceptions, evidence on an interlocutory application must be given by way of affidavit: Rule 52(8):

> 52 (8) On an application, evidence shall be given by affidavit, but the court may . . .
>
> (e) permit other forms of evidence to be adduced.

19 Rule 51(10) describes the nature of the affidavit evidence a deponent may repeat on an application. It reads:

> 51 (10) An affidavit may state only what a deponent would be permitted to state in evidence at trial, except that, if the source of the information is given, an affidavit may contain statements as to the deponent's information and belief, if it is made
>
> (a) in respect of an application for an interlocutory order, or
>
> (b) by leave of the court under Rule 40(52)(a) or 52(8)(e).

20 Rule 40(52)(a) gives a judge the right to allow a party to prove a fact or document at a trial by a statement on oath of information and belief.

21 Rule 52(8)(e) apparently means that on an application a court may admit different forms of evidence, apart from affidavit evidence. What other forms that evidence might take is not clear.

22 Thus, Rule 51(10) allows a deponent to repeat any evidence the deponent would be permitted to give at a trial, if the deponent were called as a witness. A deponent would not be permitted to give hearsay evidence at trial because of its inherent unreliability. The Rules create an exception. They allow a deponent to swear or affirm in an affidavit the contents of an out-of-court statement made by a speaker to the deponent (the information) provided the deponent gives the speaker's name (the source). Failure of a deponent to name the source of the out-of-court statement may make the affidavit "worthless": *Young v. Young Manufacturing Co.*, [1900] 2 Ch. 753 (Eng. C.A.) at 754-755; *Scarr v. Gower* (1956), 18 W.W.R. 184 (B.C. C.A.) at 188. When the purpose of introducing the statement is for the proof of its truth, deponents must swear or affirm that they believe the facts contained in the statement are true (the belief).

23 From this analysis, it seems that any affidavit supporting an interlocutory application should be framed along the following lines where the purpose of the affidavit is to prove the truth of the facts contained in an out-of-court statement made by another person to the deponent:

> On or about the __ day of _____ 20__ at _____, B.C., Mr./Ms. _____ [e.g., source of out-of court statement] stated to me that: _____ [repeat contents of statement made by other person to deponent] and I believe the facts contained in the statement are true.

24 Out-of court oral statements can be admitted where they are tendered for a relevant purpose other than the proof of the truth of the facts contained in the statement: Sopinka, at page 177, paragraph 6.16. For example, where the relevant purpose of introducing into evidence the out-of-court oral statement is only to prove the statement was made, the affidavit should be framed in these words:

> On or about the day __ of ____ 20 __ at _____, B.C., Mr./Ms. _____ [e.g., source of out-of court statement] stated to me that: _____ [recite contents of statement] and this statement is offered into evidence for the relevant purpose of _____ [e.g., explaining the subsequent conduct of the deponent, etc.].

b. Written Hearsay Evidence

25 Rule 51(10) applies to both oral out-of-court statements and written out-of-court documents. Therefore, it is necessary to investigate the admissibility of written documents at a trial and their admissibility on an application. Where the Rules mention the word "document", it is defined under Rule 1(8).

26 Written documents presented by a party at a trial do not become evidence unless the party offering them first proves them through a live person. That is because the document may be a forgery, or it may be incomplete, or it may not be an exact replica of the original document if it is a photocopy of the original, etc. Only a witness personally familiar with the document can testify to its authenticity. Therefore, the law does not allow a judge to order that documents be marked as exhibits at trial just because a party produces them for marking. Typically, a court will require evidence that the document was duly executed. This is proved by calling the person who prepared or authored the instrument. Proof of execution generally is required before proof of contents is allowed: Sopinka, *supra* at page 1023, paragraph 18.43.

27 Some documents must be proved by showing that they were signed or written by the person who purports to have signed or written them. Other documents must be proved by tendering a correct copy of the original. Finally, there are documents that must be proved if they are tendered to establish the truth of the matters contained therein: Sopinka, *supra*, at page 1004, paragraph 18.3.

28 After proof of authorship or execution, the extent to which the document is admissible to prove the truth of the facts stated therein depends on the nature of the statements contained in the document. Some statements may be admissible for this purpose and others may not: Sopinka, *supra*, at page 1026, paragraph 1851.

29 There are exceptions to these rules under the *Evidence Act*, R.S.B.C. 1996, c. 124, where documents may be admitted without calling a person to prove them. They include such things as "state documents," s. 25, "business records" if the proper foundation is laid: s. 42, etc.

30 These are just a few of the requirements that parties must consider when presenting a document for admission at a trial. Of course, opposing parties may formally or informally admit the documents dispensing with their proof: Sopinka, *supra*, at page 1051, paragraphs 19.1 to 19.6.

31 On interlocutory applications, deponents often swear or affirm to the authenticity of documents using these words:

> Attached hereto and marked Exhibit __ ["A", "B", "C", etc.] to this my affidavit is _____ [e.g. a copy of a document dated __ day of __ 200_]."

32 Just because documents are marked as exhibits to an affidavit does not convert them into admissible evidence, particularly where they are tendered for proof of their truth: *Koscot Interplanetary (U.K.) Ltd., Re* (1972), [1972] 3 All E.R. 829 (Eng. Ch. Div.) at 835, d to g Megarry J.

> For the purpose of inspection and copying, I readily accept that there is no distinction between including a statement in the affidavit and exhibiting to the affidavit a document containing the statement; but I greatly doubt whether there is any deemed inclusion of the exhibit in the affidavit for all purposes. . . .
>
> It may also be that the documents might be admissible for some purpose other than establishing the truth of the statements contained in them. But for the purposes for which they were tendered, namely of establishing such truth, I hold them inadmissible.

33 Nor will a statement in an affidavit deposing that the affiant has personal knowledge of written hearsay contained in the document have any weight, if on reading the material it seems improbable that the affiant had such first-hand information: *Koscot Interplanetary (U.K.) Ltd., Re*, *supra*, at 833-834.

34 Rule 51(10) does not restrict itself to oral hearsay evidence. It deals with all types of evidence that a "deponent would be permitted to state at trial," if the deponent were a witness. From this discussion, it seems to follow that written documents introduced by way of affidavit on an application are subject to rules similar to those that apply to oral out-of-court statements. Deponents may be able to swear or affirm to their belief of the truth of some statements in one part of a written document but not with respect to statements in another part.

35 A deponent who is the author or signatory of a document or who has personal knowledge of its contents can depose to its authenticity. But a deponent who lacks this position or knowledge of an out-of-court document must necessarily depose to it on information and belief. On interlocutory applications, when these latter deponents mention a written document as an exhibit to their affidavits for the purpose of proving the truth of the words contained therein, they must assert that allegation. The preamble probably should contain words framed along the following lines:

> On the __ day of _____ 20 __ at _____, B.C., Mr./Ms. _____ [source] informed me that he/she is _____ [e.g., the author; signatory, etc.] of Exhibit ____ (e.g., "A", "B", etc.) and I believe the facts contained in the document are true.

36 This suggested preamble tries to follow the intention of Rule 51(10) that restricts the admissibility of evidence in an affidavit unless the "deponent would be permitted to state that evidence at trial". For the reasons set out above documents

generally cannot become evidence at trial unless a witness with personal knowledge of the document is called to prove it. Without the above preamble, a Chambers judge may find the document "worthless": *Young*, *supra*; *Scarr v. Gower*, *supra*.

37 Like an out-of-court oral statement an out-of-court written statement may be included in a deponent's affidavit if it has some other relevant purpose than the proof of the truth of its contents. In those circumstances, the preamble probably should contain words framed along the following lines:

> On the __ day of _____ 20__ at _____, B.C., Mr./Ms. _____ [source] informed me that he/she is [e.g., the author; signatory; etc.] of Exhibit ___ (e.g., "A", "B", etc.) and I offer the document into evidence for the relevant purpose of proving _____ [e.g., the subsequent conduct of _____,etc.].

c. The Omnibus Preamble

38 Frequently, deponents swear or affirm to the admissibility of hearsay evidence using these words:

> I have personal knowledge of the facts and matters hereinafter deposed to, save where stated to be on information and belief, in which case I verily believe the same to be true.

39 This type of preamble does not make out-of-court oral or written statements admissible on an interlocutory application for proving the truth of the facts contained in the statements because it is inadequate for that purpose. Nor does it make out-of-court statements admissible for proving such things as the fact that the statement was made since it does not mention another relevant purpose for admitting the statement.

d. Personal Opinions and Scandalous Remarks

40 Despite judicial warnings about these matters, deponents often include inadmissible personal opinions and scandalous comments about the character or actions of another person and derogatory statements about their behaviour. Sopinka, *supra*, pages 604-616, paragraphs 12.1 to 12.24 set out the limits the law places on the admissibility of opinion evidence coming from lay persons. In *Creber v. Franklin* (August 26, 1993), Vancouver Registry DO83222 at pp. 8-9 (1993), [1993] B.C.D. Civ. 1549-03 (B.C. S.C.), Spencer J. commented that affidavit deponents should state facts only. They should not add their descriptive opinions of the facts. Affidavits should not be "larded with adjectives" expressing opinions about the conduct of others. "Self-serving protestations of surprise, shock, disgust or other emotions claimed" by deponents are not helpful, even if they rarely might be admissible.

41 These kinds of inadmissible gratuitous comments affect the weight given to the rest of the admissible affidavit material. They may also result in a cost penalty order to the offending party.

e. Affidavit Wars

42 Experience and legal principle confirms that the best way to produce a just result on contested issues at trial is to follow a three-stage process. Stage one is the presentation of the plaintiff's evidence in chief and the cross-examination by the defendant. Stage two is the presentation of the defendant's evidence in chief and the cross-examination by the plaintiff. Stage three is the plaintiff's reply or rebuttal evidence and the cross-examination by the defendant. However, there are limits on the plaintiff's right to call reply evidence. Generally, "matters which might properly be considered to form part of the plaintiff's case in chief are to be excluded"; Sopinka, *supra*, at 958, paragraph 16.154. In other words plaintiffs cannot hold back or "split their case" by leading evidence at trial that they should have anticipated would be necessary to counter any defence. If new evidence is allowed in reply the defendant cannot usually counter it except by leave of the court to offer what is called surrebuttal evidence.

43 When presenting affidavit evidence on interlocutory applications, parties should follow this three-stage procedure because Rule 51(10) confines the admissibility of evidence to evidence that "a deponent would be permitted to state in evidence at trial." A deponent would not be permitted to testify a number of different times during the course of a trial.

44 Unlike a trial, the application process does not give a Chambers judge the ability to regulate what affidavits are admissible as evidence in chief and what affidavits are admissible as evidence in reply. That may be one reason why parties often file a number of affidavits in no particular order. It may also occur because parties do not have the opportunity to cross-examine deponents as they could if the deponents gave evidence at a trial. Without that chance, the system more or less compels the parties to try to "even out the playing field" by filing counter-affidavit after counter-affidavit.

45 On many interlocutory applications, the applicant and the respondent keep presenting affidavit evidence right up to the date of the hearing. Instead of the logical three-stage trial process, the application system becomes a confusing multi-stage process with both sides trying to get in the last word. When that happens, the Chambers judge or master may dismiss the application or order a trial of the issue because there is insufficient time for the judge to sort out the competing facts and reach a just conclusion. Or, they may order a trial of an issue under Rule 52(11)(d). It reads:

> 52 (11) On an application the court may . . .
>
> > (d) order a trial of the proceeding, either generally or on an issue, and order pleadings to be filed, and may give directions for the conduct of the trial and of pre-trial proceedings, and for the disposition of the application.

46 Alternatively, the court may refer the matter to the master, registrar or a special referee requesting that one of them conduct an oral hearing under Rule 32(1) and report back to the court with a report and recommendation: Rule 32(3).

47 If a trial of an issue takes place before a judge under Rule 52(11), he or she can confine the oral evidence to the logical three-stage process. Hearsay would not be admissible. If the hearing occurs before a master, registrar or special referee it seems that they too can control the nature of the process in a similar manner: Rule 32.

f. Cross-Examination on Affidavits

48 Under Rule 52(8)(a) a court may order a deponent to attend for cross-examination before a judge or another person. Rarely does the examination take place before a judge. If it happens at all, it may occur before a court reporter who produces a transcript. For the cross-examination to have any useful meaning, it should be done before the Chambers judge who hears the application. However, there is no administrative machinery in place to ensure this will happen.

49 If an out-of-court cross-examination is held before a court reporter, a party may present the transcript of the examination to the Chambers judge at the application's hearing. In most instances, it will have little persuasive value. This is because the Chambers judge was not present to observe the deponent's demeanour when the cross-examination took place. A Chambers judge can seldom assess a deponent's credibility just by reading an affidavit or a copy of the cross-examination transcript.

50 For these reasons few litigants request an order under Rule 52(8)(a).

g. Written Briefs

51 Our Rules require an applicant and the respondent to file an "outline" following form 125: Rule 51A(12)(a). A copy of each outline must be included in the "chambers record": Rule 51A(12)(c)(iii)(iv). That record is presented to the judge at the start of the hearing. Frequently, the outlines are around two pages in length. They tend to confine themselves to sketching in the nature of the applicant's allegations and the respondent's answer.

52 Rule 51A(d)(ii) gives applicants a discretion as to whether they will include in the chambers record a "written argument". The Rules do not require either party to include written argument in the chambers record or produce it at the hearing. Nor do they suggest a format such an argument might follow.

53 One way that parties might avoid the cost and expense of a trial of an issue under Rule 52(11) or a hearing under Rule 32, would be for their counsel to present written argument in a form that summarizes the essence of the dispute into a brief. It should

include the facts arising from the evidence, the issues, an analysis of the law and the applicable remedies. For a suggested form, see: *British Columbia Annual Practice 2004, SC-667-668*.

h. Conclusion

54 The Lieutenant Governor in Council has the authority to enact and amend the Rules, not the judges: *Court Rules Act*, R.S.B.C. 1996, c. 30, s. 1(1). That includes the power to legislate on the "means by which particular facts may be proved and the mode by which evidence may be given": s. 1(2)(b). Our Rules are based in large part on the English rules of 1883. Many parties and their counsel seem to have considerable difficulty complying with our evidentiary and procedural rules on interlocutory applications. When a system creates problems for the many, the fault usually lies with the system and not with the individuals who try to make it work.

55 After more than 140 years, perhaps now may be the time for the Lieutenant Governor in Council to consider enacting modern rules of procedure that other progressive jurisdictions use in deciding interlocutory issues.

56 On this interlocutory application, neither party complained about the admissibility of the oral or written attachments mentioned in the various affidavits of the other party. Counsel for the defendant agreed with the truth of the facts contained in the affidavit material that I relied upon. Those facts are the ones set out in the first part of this judgment. They are sufficient to grant interlocutory relief in the form of a temporary stay of the action pending completion of the settlement agreement.

2. The Alleged Settlement Agreement

57 The defendant submits that the 7 November 2003 Offer to Settle and the two letters of 14 November 2003 constitute a binding settlement of the dispute between the parties.

58 As I understand him, counsel for the plaintiff contends that because the Offer to Settle of 7 November 2003 was put forward under Rule 37, all acceptances should have been made in compliance with that Rule. Hence, they have no legal effect. He argues that since the defendant did not pay the $350,000.00 on or before 17 November 2003, when the Notice of Withdrawal was delivered, the 7 November 2003 Offer to Settle lapsed.

59 Alternatively, counsel for the plaintiff alleges that defence counsel's letter of 14 November 2003 is not a contractual offer to accept because it only expresses the defendant's "wish" to settle. Plaintiff's counsel also submits that his letter of 14 November 2003 was not an acceptance of the offer because it did not expressly agree to the precise terms of defence counsel's letter of the same date and was only a "refinement" of the original Offer to Settle of 7 November 2003.

60 The defendant asks that I find in his favour on three issues. First, that the parties entered into a binding settlement agreement on 14 November 2003. Second, that the plaintiff breached the agreement by failing to complete it according to its terms. Third, as a result of that breach he is entitled to an order compelling the plaintiff to specifically perform the agreement according to its terms. If I make those findings and grant the order, it will amount to a final order because it will dispose of all the issues in the action. In these circumstances, the law normally requires me to ignore any hearsay evidence and act only on evidence that would be admissible at a trial of this dispute.

61 *McKenzie v. McKenzie* (1974), [1975] 4 W.W.R. 354 (B.C. S.C.) (Macfarlane J.); appeal dismissed; [1976] 5 W.W.R. 214 (B.C. C.A.) is authority for the proposition that where there is a dispute between the parties as to the settlement of an action, a party to the action may bring proceedings in the action by way of a motion and supporting affidavit material for the purpose of enforcing the settlement agreement. In other words, the party alleging the settlement agreement does not necessarily have to commence a separate action in order to enforce the agreement. Macfarlane J. relied upon the case law interpreting the *Laws Declaratory Act*, 1948 R.S.B.C., c. 179, s. 2(7), now s. 10 of the *Law and Equity Act*.

62 Section 10 of the *Law and Equity Act* gives a court the power to grant all reasonable remedies to which any of the parties may be entitled provided the order is within the court's jurisdiction. It reads:

> 10. *In the exercise of its jurisdiction* in a cause or matter before it, *the court must grant*, either absolutely or on reasonable conditions that to it seem just, all *remedies* that any of the parties may appear to be entitled to *in respect of any legal or equitable claim properly brought forward by them* in the cause or matter so that, as far as possible, all matters in controversy between the parties may be completely and finally determined and all multiplicity of legal proceedings concerning any of those matters may be avoided.
>
> (italics mine)

63 Like England, the British Columbia Legislature enacted s. 10 of the *Law and Equity Act* for the purposes of clarifying the law concerning "matters formerly within the Court of Chancery and its effect in relation to common law actions": *McKenzie v. McKenzie*, *supra*, at 359. In the courts of equity a party could bring a summons to enforce a compromise of the original action, "provided no substantial question was raised as to the terms, validity or enforcement of the settlement agreement": *McKenzie v. McKenzie* at 359.

64 It seems to follow that a British Columbia court can enforce the alleged settlement agreement in these proceedings provided there are no substantial differences between the parties on the facts arising from the affidavits as to the terms, validity or enforcement of the agreement. Put another way, there must be no seriously contested issues of fact. Where there is that dispute then, the party who wishes to enforce the agreement should first seek a stay of the original action under s. 8(2). The stay order may be conditional on the applicant taking appropriate steps to enforce the agreement in a timely way.

65 Upon receiving such a stay, the party attempting to uphold the agreement may either commence a separate action to enforce the agreement or bring a motion in the original action as was done here. Either way, it seems that a party must still get an order staying the original action.

66 Where a party seeks to enforce the agreement by bringing an application in the original action, the party may rely on affidavit evidence: Rule 52(8). If it turns out there are seriously contested issues of fact contained in the affidavits, either party may then apply to the court for a trial of the issue as to the agreement's enforceability: Rule 52(11)(d). It reads:

> 52 (11) On an application the court may . . .
>
> > (d) order a trial of the proceeding, either generally or on an issue, and order pleadings to be filed, and may give directions for the conduct of the trial and of pre-trial proceedings, and for the disposition of the application.

67 For the purpose of a trial under Rule 52(11)(d) it may be necessary to amend the original pleadings in order to raise the issue of the settlement agreement. Discovery can then take place on that issue prior to the trial. This might help narrow the scope of the dispute.

68 In *McKenzie v. McKenzie*, *supra*, at page 360, "*there (was)* no question to be determined . . . concerning the terms of settlement or regarding the validity or enforceability of the agreement." Thus, Macfarlane J. did not have to stay the original action, or order the trial of the issue regarding settlement, or compel the aggrieved party to commence an entirely new action.

69 *McKenzie v. McKenzie*, *supra*, cites *Eden v. Naish* (1878), 7 Ch. D. 781 (Eng. Ch. Div.) in support of the proposition that courts of equity could enforce a settlement by way of a summons in the action without compelling the parties to commence a separate action. In *Eden v. Naish*, *supra*, the parties had conducted cross-examination on the affidavits. At page 786, the court said:

> If the Plaintiff had wished for a trial with a jury, I think that he should at an earlier stage have taken steps to obtain it if he could; but I say further that in this particular case had an application for a trial by jury been made even in an action brought for the purpose of enforcing the agreement, I should not have granted it. I think it is a case in which I should have refused it, considering the language of Order XXXVI, Rule 26.

70 English rule Order XXXVI, Rule 26, gave a judge the right to deprive a party of a jury trial if it appeared "desirable." The court never mentioned whether it would have refused to hear the case if tried without a jury. It then went on to say that based on reading the affidavits and the cross-examination transcripts it preferred the evidence of the defendant over that of the plaintiff. However, suppose the affidavit and the cross-examination transcript are not that clear. Given those circumstances a court might now decline to make a finding and compel the dissatisfied party to commence an entirely new action. In that event, all the time and expense spent pursuing a remedy by way of an application would be wasted.

71 The great era of legal reform in England occurred between 1833 and 1875: Holdsworth, *A History of English Law*, Vol. XV. By the *Judicature Act* 1873 (in force in 1875), Parliament gave equity courts and common law courts the right to grant either equitable or common law relief. British Columbia did the same thing in its *Laws Declaratory Act, supra*, now the *Law and Equity Act*, s. 10. More importantly, the rules of the equity courts and those of the common law courts were merged into a single code of civil procedure: Holdsworth, *supra*, Vol. XV pages 128-134. British Columbia adopted the 1875 English Rules as modified in 1883: Darrell W. Roberts; *The British Columbia Annual Practice* 1988, History of the Rules of Court, p. x.

72 Arguably, the Rules only allow a court to make a final order where there are no seriously contested issues of fact. Two rules give a court jurisdiction to make a final order on affidavit evidence alone. They are: Rule 10 - Originating Applications and Rule 18A - Summary Trials. On a Rule 10 application, where there are seriously contested issues of fact, a court may order the petitioner to serve a statement of claim on the respondent and thereafter the dispute would proceed as an action: Rule 52(11)(d); *Nordstrom v. Baumann* (1961), [1962] S.C.R. 147 (S.C.C.) at 156. On a Rule 18A application where there are also seriously contested issues of fact, a court may find the application unsuitable and order the matter proceed to trial in the ordinary way: *Cannaday v. McPherson* (1998), 44 B.C.L.R. (3d) 195 (B.C. C.A.), paragraph [53].

73 In other words, an application seeking a final order is self-contradictory because an application is designed to provide relief by way of an interim order, not a final order. As mentioned above, hearsay evidence is admissible by way of affidavit on an application but is not admissible at a hearing where a party seeks a final order. For these reasons, the defendant's motion for a final order may be outside the court's "jurisdiction" and "not properly brought" as required by s. 10 of the *Law and Equity Act, supra*.

74 Counsel did not argue these points. Additionally, higher authority allows a litigant to pursue a final order based on an alleged settlement by way of an application. Therefore, I do not intend to pursue the matter further.

75 During the course of the hearing, I asked plaintiff's counsel to let me know what exhibits in the defendant's affidavit material he could not admit to as being true. He mentioned several documents and I removed them from my record. Therefore, I assume the remaining material contains the truth. On this material, I found the facts set out above.

76 A dispute remains between the parties as to whether there was an agreement and what its terms were. But the disagreement does not depend upon the credibility of witnesses. It just depends upon a reading of the Offer to Settle dated 7 November, the two letters dated 14 November 2003 and the application of those documents to the law.

77 Courts try to uphold bargains wherever possible. After examining the evidence and the law, I am satisfied the parties agreed to settle their differences through exchanging the Offer to Settle and the two subsequent letters. Just because the plaintiff used a Rule 37 Offer to Settle in the first instance, does not mean the parties had to comply with Rule 37 before they could finally resolve the dispute. Besides, the acceptance of an offer under Rule 37 must be unconditional: Rule 37(15).

78 The defendant accepted the Rule 37 offer conditionally in his counter-offer by requesting a new closing date of 28 November 2003. The plaintiff agreed to that request without insisting that the defendant use the Rule 37 process. In accepting the defendant's counter-offer, the plaintiff waived her right to complain that her letter of 14 November 2003 was not binding on her because it was not presented in the form required under Rule 37.

79 Parties can arrive at a contract of settlement by using Rule 37 alone, by reaching an agreement outside the provisions of Rule 37 or, by a combination of the two processes: *MacKenzie v. Brooks*, 1999 BCCA 623, [1999] B.C.J. No. 2411 (B.C. C.A.):

[24] . . . Rule 37 can operate in tandem, or on a parallel track, with the usual informal procedures by which counsel daily seek to settle their cases . . . the informal process operates on a "without prejudice" basis. . . .

[27] If both formal and informal offers are outstanding at any one time, it is open to the opposing party to accept either of them. Acceptance of either brings the action to an end.

80 Plaintiff's counsel did not treat defence counsel's letter of 14 November 2003 as some sort of exploratory inquiry by the defendant as to the terms of the offer. In plaintiff's counsel reply to that letter, he agreed to "extend the deadline for payment of $350,000.00 to . . . 28 November 2003." Plaintiff's counsel then suggested a way of tidying up the details of the transaction by means of a final court order.

81 Getting a court order was not a necessary ingredient that had to be met in order to make the contract effective. That order would necessarily follow as a matter of course. The plaintiff could not escape from the contract by filing the Notice of Withdrawal of the 7 November 2003 offer on 17 November 2003 because on 14 November 2003 she agreed to complete the settlement on 28 November 2003.

82 For these reasons, I find the parties reached a contract of settlement on 14 November 2003. The plaintiff breached the terms of that contract when she failed to complete on the closing date of 28 November 2003. By way of a remedy, the defendant is entitled to an order for specific performance of the contract.

SUMMARY

83

1. Affidavits filed in support of an interlocutory application may contain oral and written hearsay evidence.

2. An affidavit sworn on information and belief for the purpose of proving the truth of the facts mentioned in an out-of-court oral statement must reveal the source of the information and the deponent's belief that the facts contained in the statement are true.

3. An affidavit sworn on information and belief only for the purpose of proving an oral out-of-court statement was made must reveal the source of the facts contained in the statement, and the relevant purpose for admitting the statement.

4. An affidavit sworn on information and belief for the purpose of proving the truth of the facts contained in a written document authored by a person other than the deponent must reveal the source of the document and the deponent's belief that the facts contained in the document are true.

5. An affidavit sworn on information and belief for the purpose of proving the contents of all or part of a written document authored by a person other than the deponent must reveal the source of the document and the relevant purpose for admitting the document.

6. A document is not admissible on an application unless a deponent proves it in one of the two ways just mentioned.

7. If there are seriously contested issues of fact between the parties about the terms of a settlement agreement that depend upon credibility issues, it appears that the party alleging the agreement should bring an application in the action and then apply for a trial of the issues, or commence a new action.

8. If the facts as to the terms of a settlement agreement are not in serious dispute and the only issue is the agreement's legal validity, a court apparently has the authority to decide the issue by way of a motion in the action based upon affidavit evidence.

9. On this application there were no contested issues of fact concerning the terms of the settlement agreement and its alleged breach.

10. The parties arrived at a settlement agreement and the plaintiff broke the agreement by refusing to complete according to its terms.

11. The defendant is entitled to a decree that the plaintiff specifically perform the settlement agreement.

JUDGMENT

84

1. There will be an order staying the action pending completion of the contract reached between the parties.

2. There will be a decree for specific performance of the settlement contract.

3. There will be liberty to apply.

4. Costs of this application to the defendant.

Application granted.

2013 BCCA 194
British Columbia Court of Appeal

Albert v. Politano

2013 CarswellBC 1383, 2013 BCCA 194, [2013] B.C.J. No. 1032, 228 A.C.W.S. (3d) 612, 338 B.C.A.C. 24, 577 W.A.C. 24

Jegbefumere Bone Albert, Respondent (Plaintiff) and Joseph Anthony Politano, Canadian Road Holdings Company, Irabor Norense, and 0565204 BC Limited, Appellants (Defendants)

Saunders J.A., Chiasson J.A., Frankel J.A.

Heard: April 11, 2013
Judgment: April 19, 2013
Docket: Vancouver CA040131

Counsel: A.M. Gunn, Q.C., S.F. Hoyer, for Appellant
G. Hilliker, Q.C., J.M. Cameron, for Respondents

Headnote

Remedies --- Damages — Damages in tort — Personal injury — Prospective pecuniary loss — Loss of opportunity — To continue chosen profession

Plaintiff was world-class boxer who had achieved significant level of success before turning professional in 2006 — In 2008, plaintiff was rear seat passenger in vehicle that was sideswiped by another vehicle, causing plaintiff's vehicle to strike utility pole — Plaintiff's primary injury was damage to his right hand, which brought end to his boxing career — Plaintiff had also suffered neck pain, back pain, and headaches that had resolved over time — Plaintiff brought action for damages for personal injury against drivers and owners of both vehicles, who admitted liability — At time of trial, he was awaiting criminal trial on charges of conspiracy to commit fraud, deceptive telemarketing, and money laundering — Jury awarded plaintiff $125,000 for non-pecuniary loss, $60,000 for past loss of income, and $838,000 for loss of future earning capacity — Defendants appealed — Appeal dismissed — Defendants failed to establish any reviewable errors — Trial judge instructed jury to take into account negative contingencies when assessing plaintiff's loss of earning capacity, including "other events causing absence from boxing" — Trial judge was not asked to refer specifically to risk of incarceration as negative contingency to apply to claim for loss of future income; there was no evidence upon which jury could assess value of such contingency; and it would not have been appropriate for jury to reduce future damage award for negative contingency of possible future jail sentence — Trial judge should have given instruction about present value of future pecuniary losses, to conform to legislation, but defendants' trial counsel did not object to lack of such instruction — Results of trial should not be undone by ordering new trial — There was no basis upon which principled adjustment could be made to damages awarded — Amounts awarded were supported by evidence.

Remedies --- Damages — Valuation of damages — Deductions — Contingencies — Miscellaneous

Plaintiff was world-class boxer who had achieved significant level of success before turning professional in 2006 — In 2008, plaintiff was rear seat passenger in vehicle that was sideswiped by another vehicle, causing plaintiff's vehicle to strike utility pole — Plaintiff's primary injury was damage to his right hand, which brought end to his boxing career — Plaintiff had also suffered neck pain, back pain, and headaches that had resolved over time — Plaintiff brought action for damages for personal injury against drivers and owners of both vehicles, who admitted liability — At time of trial, he was awaiting criminal trial on charges of conspiracy to commit fraud, deceptive telemarketing, and money laundering — Jury awarded plaintiff $125,000 for non-pecuniary loss, $60,000 for past loss of income, and $838,000 for loss of future earning capacity — Defendants appealed — Appeal dismissed — Defendants failed to establish any reviewable errors — Trial judge instructed jury to take into account negative contingencies when assessing plaintiff's loss of earning capacity, including "other events causing absence from boxing" — Trial judge was not asked to refer specifically to risk of incarceration as negative contingency to apply to claim for loss of future income; there was no evidence upon which jury could assess value of such contingency; and it would not have been appropriate for jury to reduce future damage award for negative contingency of possible future jail sentence — Trial judge

should have given instruction about present value of future pecuniary losses, to conform to legislation, but defendants' trial counsel did not object to lack of such instruction — Results of trial should not be undone by ordering new trial — There was no basis upon which principled adjustment could be made to damages awarded — Amounts awarded were supported by evidence.
Civil practice and procedure --- Practice on appeal — Powers and duties of appellate court — Evidence on appeal — New evidence
Plaintiff, world-class boxer who had achieved significant level of success before turning professional, was passenger in vehicle that was sideswiped by another vehicle, causing plaintiff's vehicle to strike utility pole — Plaintiff's injury to his right hand brought end to his boxing career — Plaintiff brought action for damages for personal injury against drivers and owners of both vehicles, who admitted liability — At time of trial, he was awaiting criminal trial on charges of conspiracy to commit fraud, deceptive telemarketing, and money laundering — Jury awarded plaintiff total of $1,023,000 — Defendants appealed and applied for leave to adduce fresh evidence on appeal — Application dismissed — Evidence at trial indicated plaintiff would have had difficulty competing as professional boxer if he did not travel outside British Columbia — Proposed fresh evidence was affidavit from prosecutor indicating that terms of plaintiff's recognizance required him to remain in British Columbia and surrender his passport; and affidavit from legal assistant deposing that defendants were not aware of bail conditions requiring plaintiff to remain in province — Essential facts of charges against plaintiff were known to defendants, and it was apparent from his presence at trial that he was on judicial interim release — Question by defendants' trial counsel about passport demonstrated that she had some knowledge of terms of bail — Fresh evidence, if admitted, would not establish procedural unfairness amounting to abuse of process such that new trial should be ordered or damages reduced — Documents relating to recognizance should have been disclosed, but defendants had sufficient knowledge at trial to explore relevant issues — Affidavit of legal assistant did not meet R. 22-2(13) of Supreme Court Civil Rules because it did not identify source of information and did not attest to her belief in it — That was more than mere technical deficiency — Legal assistant had no first-hand knowledge of what was known by defendants, and her affidavit amounted to hearsay upon hearsay — It was not in interests of justice to admit evidence.
Remedies --- Damages — Damages in tort — Personal injury — Principles relating to non-pecuniary loss — Miscellaneous
Award for non-pecuniary damages not so high as to be wholly erroneous.
Remedies --- Damages — Damages in tort — Personal injury — Special damages (pre-trial pecuniary loss) — Past loss of income — Plaintiff unable to resume former employment
Award for past income loss not unsupported by evidence, disproportionate, or wholly erroneous.

***Saunders J.A.*:**

1 On July 12, 2012 a jury awarded Mr. Albert $1,023,000 in damages for injury arising from a motor vehicle accident on September 2, 2008. The award was broken into three components:

Non-pecuniary loss	$125,000
Past loss of income	$60,000
Loss of future earning capacity	$838,000
Total	$1,023,000

2 Mr. Albert was a passenger in a vehicle driven by the appellant Mr. Norense and owned by the appellant numbered company, when it was sideswiped by another vehicle driven by the appellant Mr. Politano and owned by the appellant Canadian Road Holdings Company, causing the vehicle carrying Mr. Albert to strike a utility pole. Mr. Albert commenced his action alleging, as his primary injury, damage to his right hand. He also alleged upper body injuries that caused headaches, neck pain and back pain that resolved over time.

3 Liability was admitted but the extent of damages to which Mr. Albert is entitled was vigorously contested. Mr. Albert was a boxer at the time of the accident. The defendants, now appellants, challenged the extent of Mr. Albert's injury, and sought to raise a pre-existing condition as the reason he could no longer box competitively. They challenged Mr. Albert's credibility and the extent of his loss of earnings. They said that he had not mitigated his losses and they were critical of his decision to cease boxing

when he did. The appellants say the damages award, particularly the pecuniary damages for lost earnings as a boxer, cannot be sustained. They ask us to set aside the order and to order a new trial, or alternatively, to reduce damages they are required to pay.

4 An issue before, and at, trial concerned criminal charges outstanding against Mr. Albert. In October 2009, Mr. Albert and seven others were charged on a 29-count indictment issued in Alberta, alleging criminal conspiracy to commit fraud, deceptive telemarketing and money laundering. At his examination for discovery, the defendants questioned Mr. Albert about the charges but Mr. Albert's trial counsel instructed him not to answer the questions. On June 7, 2012 the appellants filed an application seeking, *inter alia*, an order to compel Mr. Albert to answer the questions at a continued examination for discovery. The Master who heard the application dismissed this element of the defendants' application. The defendants raised the issue in a *voir dire* addressing the degree of permitted questioning, if any, that would be allowed them on the matter of the outstanding criminal charges. By then counsel acting for Mr. Albert at the trial understood from counsel acting in respect to the criminal charges, that Mr. Albert's involvement in events leading to the indictment differed from the involvement of his co-accused, and that only one charge, conspiracy, was outstanding against Mr. Albert, and he so advised the judge. On the *voir dire*, counsel for Mr. Albert opposed questioning in respect to the outstanding criminal matter. The defendants said there were four charges outstanding. They submitted that the criminal proceedings were relevant to Mr. Albert's credibility and to the willingness of managers and coaches to associate with him, and they said that the prospect of conviction and consequent incarceration was a negative contingency that should be considered by the jury.

5 Before I turn to the grounds of appeal, there is the matter of a fresh evidence application made by the appellants. As is our practice, we reserved our decision on the fresh evidence application until the end of the appeal.

6 The appellants seek to adduce as fresh evidence, two affidavits. One is from a Crown Prosecutor in Alberta that includes, appended, Mr. Albert's recognizance, the terms of which require him to remain in British Columbia, and to surrender his passport. The Crown Prosecutor deposes that it is unlikely the prosecution service would have consented to modification of the terms to permit Mr. Albert to travel outside Canada. The other is an affidavit of a legal assistant to appellate counsel, who was not counsel at trial. In her affidavit the assistant deposes that she has been told by appellate counsel "that the Appellants (Defendants) did not become aware until the week of March 25, 2013 that [Mr. Albert] has been subject since 2009 to bail conditions that restrict him from travel outside of British Columbia".

7 As is well known, the governing principle on the admission of fresh evidence is the interests of justice. The framework for consideration of the application is provided by *R. v. Palmer* (1979), [1980] 1 S.C.R. 759 (S.C.C.). The *Palmer* test, derived from application of the *Criminal Code*, is applied as well in civil cases, see, for example, *Golder Associates Ltd./Golder Associes Ltee v. North Coast Wind Energy Corp.*, 2010 BCCA 263 (B.C. C.A.). In *Palmer*, the Supreme Court of Canada directed appellate courts, in determining the admissibility of fresh evidence in a conviction appeal, to consider whether: 1) with due diligence, the evidence could have been adduced at trial; 2) the evidence is relevant in the sense it bears upon a decisive or potentially decisive issue in the trial; 3) the evidence shown is credible in the sense it is reasonably capable of belief; and, 4) if believed, the evidence could reasonably, with other evidence, be expected to have affected the result.

8 We are urged by the appellants to admit the fresh evidence. They say it is relevant because it fatally undermines the foundation of the damages award in respect to lost earnings. It establishes, they say, that boxing matches for significant sums were beyond Mr. Albert's geographical reach in that Mr. Albert would not have been able to travel outside Canada, or even British Columbia, to boxing matches and thus not able to earn the income awarded by the jury. The appellants refer to evidence at trial that Mr. Albert would have difficulty competing as a professional boxer if he did not travel outside British Columbia.

9 In general terms, the appellants also say the fresh evidence is relevant to the appeal on an allegation of abuse of process. They say the affidavit of the legal assistant establishes that the appellants did not know about the term of Mr. Albert's recognizance restricting him to British Columbia. They say the Crown Prosecutor's affidavit shows that documents in Mr. Albert's control or possession not produced by him, being the recognizance, would have made a difference to the award of damages and establishes that an answer provided by Mr. Albert in cross-examination by their trial counsel was a deceit on the court.

10 Mr. Albert opposes the application to adduce fresh evidence, saying it fails to meet the *Palmer* test.

11 I will deal first with the application as it relates to the submission the evidence establishes an abuse of process, starting with the affidavit of the Crown Prosecutor. The appellants contend that the indictment, initial recognizance order and successor instruments were required to be listed pursuant to Rule 7-1(1) of the Supreme Court Civil Rules. They say that Mr. Albert's counsel should not have opposed questioning in respect to the criminal matter, and the judge ought not to have restricted questioning by reference to the collateral evidence rule. They also point to testimony of Mr. Albert in which he was asked whether he could travel outside of Canada because he had given up his passport after being charged with the criminal offences. Mr. Albert agreed that he did not have his passport and went on to make an explanation, which, on the appellants' interpretation, was untruthful. On the appellants' interpretation of the answer, Mr. Albert lied to the court by saying that he had been to other places and could travel if he provided his flight itinerary. They interpret the answer as Mr. Albert saying that he had worked outside the country since he had surrendered his passport, and they say the affidavit of the Crown Prosecutor demonstrates both that this is not true, and that Mr. Albert would be unlikely to be allowed to travel outside the country in the future to box in prize matches. All of this they say, amounts to procedural unfairness and an abuse of process that can only be remedied by admission of the fresh evidence.

12 Mr. Albert says no substantial procedural unfairness is established by the fresh evidence. He notes the sequence of events prior to trial, and observes that counsel for the defendants at trial raised the matter with the judge. Over his (Mr. Albert's) objection, the trial judge ruled that evidence concerning the criminal charges was admissible at trial, and counsel for the appellants cross-examined him as to the fact of the criminal proceedings and in some respects, about the proceedings themselves, the identity of the other accused and the potential jeopardy he faced.

13 On the issue of deceit, Mr. Albert disputes the appellants' interpretation of his answer to the passport question, points out that he is a new Canadian with some limited communication skills, and observes that he correctly said he did not have his passport. He urges on us an interpretation of the balance of his statement that stops short of a conclusion that he lied to the court. He says the question itself about the passport demonstrates that counsel for the defendants had some knowledge of the terms of the recognizance and knew that the passport had been surrendered. He observes that the appellants could have pursued this line of questioning further and in doing so would have obtained some clarity as to his understanding of his situation, but elected instead to move back from the passport question to their theory that he would not be an attractive athlete to manage or coach because of the fact of the charges. Mr. Albert says the restriction of living in British Columbia could have been the subject of an application to amend the terms of his recognizance to permit him to travel within Canada to earn income had he some boxing matches to travel to, and in practical terms was not as absolute as the appellants contend.

14 Counsel for Mr. Albert observes that the points relied upon, non-disclosure of documents relating to the criminal charges, and the position taken by counsel at the examination for discovery, reflected his counsel's view, as to which there is no basis to doubt its sincerity, and show that the fact of the charges was well known to the appellants. Counsel for Mr. Albert says it was up to them, knowing his position on the issue, to use the available tools, including Rule 7-1 of the Supreme Court Civil Rules, to access the publicly available documents concerning the criminal charges, and to pursue the lines of enquiry they considered appropriate.

15 I cannot agree with the appellants that the fresh evidence should be admitted because it demonstrates an abuse of process. It is clear that the essential facts of Mr. Albert's charges were known to the appellants, and it was apparent to all attending the trial, from Mr. Albert's very presence, that he was on judicial interim release and not in a jail. Further, counsel for the defendants told the judge she had spoken to Crown counsel in Alberta the day before the cross-examination of Mr. Albert. Her question concerning the passport demonstrates she had some knowledge of the terms of bail, and she referred to her conversation with Crown counsel in Alberta, when discussing the number of outstanding charges. On the matter of his answer to the question concerning his passport, I would be loathe to conclude that he had lied, or in the appellants language, committed a deceit on the court, given that he acknowledged that he did not have a passport, and that counsel did not explore the details of Mr. Albert's rather confused answer, further.

16 Nor do I accept the appellants' contention that, by itself, the term of recognizance requiring Mr. Albert to remain in British Columbia would justify admission of the fresh evidence on the basis of abuse of process because they did not know about the

term. Apart from the possibility that the term he remain in British Columbia would be relaxed on an application to travel to earn income in Canada, I consider the significance of this term must be weighed in light of the minimal use made by the defendants at trial of the surrender of Mr. Albert's passport. With respect, it is making too much of the term requiring Mr. Albert to remain in British Columbia, to say it is so significant as to justify reopening the case

17 In my view, the fresh evidence, if admitted, would not establish procedural unfairness amounting to abuse of process such that a new trial should be ordered or the damages reduced. On that conclusion, I consider it fails to meet the fourth criteria for its admission in respect to an abuse of process submission.

18 While I agree that the documents relating to Mr. Albert's judicial interim release should have been disclosed because they bear upon Mr. Albert's ability to travel, in my view, sufficient information came to the knowledge of the defendants during the trial to alert them to the issues they now seek to explore. On the other hand, in these circumstances, in my view, admission of the fresh evidence would raise the spectre of procedural unfairness the other way, by allowing the appellants to re-work their theory of the case to meet an unfavourable result after a hard-contested trial.

19 Further, I must comment on the affidavit of the legal assistant that is sought to be adduced. In the critical paragraph, she deposes that appellants' counsel has told her that the appellants were not aware of the term requiring Mr. Albert to remain in British Columbia. This is hearsay upon hearsay: obviously the legal assistant has no firsthand knowledge of what was known by the appellants, and appellate counsel to whom she refers, also has no firsthand knowledge. The information is said to come from the appellants, but the person who gave the information is not identified. By s. 30 of the *Court of Appeal Act*, R.S.B.C. 1996, c. 77, and there being no Court of Appeal Rule dealing with the content of affidavits, Rule 22-2(13) of the *Supreme Court Civil Rules* applies. Itis the modern version of the long standing rule laying out the parameters of permitted affidavit evidence:

> (13) An affidavit may contain statements as to the information and belief of the person swearing or affirming the affidavit, if
>
> (a) the source of the information and belief is given, and
>
> (b) the affidavit is made
>
> (i) in respect of an application that does not seek a final order, or...
>
> [Emphasis added.]

20 In *Scarr v. Gower* (1956), 18 W.W.R. 184 (B.C. C.A.) Mr. Justice O'Halloran stated at 188:

> ... failure to state the source of information and belief in an affidavit usable on motions of this kind is not a mere technicality. If the source of the information is not disclosed in other material on the motion the offending paragraphs are worthless and not to be looked at by the court.

21 In *Meier v. Canadian Broadcasting Corp.* (1981), 28 B.C.L.R. 136 (B.C. S.C.), at 137 -8 Mr. Justice McKenzie observed that "the word 'source' is equivalent to 'an identified person'". To the same effect is *Trus Joist (Western) Ltd. v. C.J.A., Local 1598*, [1982] 6 W.W.R. 744 (B.C. S.C.), wherein Madam Justice McLachlin(now Chief Justice of Canada) said at 747: "The rule permits hearsay evidence, provided the source is given".

22 The affidavit of the legal assistant does not meet Rule 22-2(13) because it does not identify the source of the information and does not attest to her belief in it. This is more than a mere technical deficiency; by failing to reveal the source, the reliability of the information is put beyond the reach of the respondent. Any cross-examination on the affidavit, by definition, will not be of the foundational source of the information. This affidavit, in this paragraph critical to the application, fails to satisfy Rule 22-2(13), is inadmissible, and fails to meet the third *Palmer* criteria.

23 Significantly, perhaps not unrelated to the observation just made, we have not been provided with an affidavit from trial counsel as to what she knew. There was, thus, no opportunity for the respondent to cross-examine her as to the extent of

communications between her or the appellants, and Crown counsel in Alberta, or the extent of her knowledge of the criminal processes.

24 In my view, it would be unsafe to upset the jury verdict for non-disclosure, absent direct evidence from trial counsel as to what she knew, and without providing the respondent a chance to cross-examine.

25 In making these comments I do not suggest that counsel before us has not been forthright. It is simply that where a final order is sought to be upset, the best evidence is the standard that must be met. We have not been provided with that best evidence.

26 As a second engine to their application, the appellants urge us to admit the evidence on the basis it is highly probative of the issue of past and future earnings. It is said that the compelling portions of the *Palmer* test are those relating to relevance and the degree to which the evidence could bear upon the order appealed. They say that the issue of due diligence is not absolute, but rather a criteria that bears on the interests of justice. The appellants say that it is an injustice to enforce an award against them when certain information that could bear upon the damages was not known to them, or the jury, and where it is established the respondent lied to the jury as to his ability to travel.

27 I have largely addressed this submission in commenting on the abuse of process issue. This is a case, in my view, in which it is not in the interests of justice that the evidence be admitted at this late date. As I said earlier, I am not satisfied that Mr. Albert is demonstrated to have lied, as contended. And while it might have been open to the appellants to challenge Mr. Albert's ability to travel to boxing matches at trial in a more comprehensive fashion than they did in the single question posed in relation to the passport surrender, they chose instead to deny that the injury to Mr. Albert's right hand in the accident caused him to give up professional boxing, to challenge his contention that a viable professional boxing career was open to him, and to challenge his credibility. It seems to me that this was very much a strategic choice, not wanting to give credibility to Mr. Albert's contention that but for the accident he could have won boxing matches that would have generated significant purses. Now, when the jury has decided against them, they seek a new trial. I consider that this is this sort of situation to which the due diligence criteria is meant to apply. In my view, the admission of the fresh evidence is not in the interests of justice.

28 I turn to the appeal. The appellants agree that to the extent necessary, an appeal is taken on the view evidentiary conflicts are resolved in the respondent's favour: *Moskaleva v. Laurie*, 2009 BCCA 260, 94 B.C.L.R. (4th) 58 (B.C. C.A.).

29 On that basis, it may be said that when the vehicles collided, Mr. Albert, riding in the back seat, raised his hands which then were struck by a television mounted on the headrest on the seat in front of him. Mr. Albert's head struck the roof of the vehicle and he was rendered unconscious for a brief time. The vehicle that Mr. Albert was in sustained damages that exceeded $30,000.

30 Mr. Albert was a boxer who, by the time of the accident, had achieved a significant level of success. He was born in Nigeria, competed on behalf of Nigeria for some years, and was the Nigerian men's champion. He testified that for becoming the national champion, he received $50,000. Mr. Albert represented Nigeria in the All-Africa Games in 1999 and won a silver medal. In 2000, Mr. Albert represented Nigeria at the Olympic Games in Sydney, Australia and had success against a Canadian boxer. He rejected an offer to "go pro" in order to pursue an Olympic gold medal. Following the 2000 Olympics Mr. Albert moved to Edmonton and began boxing throughout Western Canada. He won the British Columbia Provincial Championship in 2001, 2002 and 2003. In 2002 Mr. Albert represented Nigeria at the Commonwealth Games, winning a gold medal. He testified that on that occasion the Nigerian government rewarded him by giving him a house and $100,000 US.

31 In 2004 Mr. Albert won the Canadian Senior Men's title. He did not obtain Canadian Citizenship in time to represent Canada in the 2004 Olympics and did not seek to represent Nigeria in those games.

32 Mr. Albert testified that he turned professional in 2006. Mr. Albert is described as having had extremely fast reflexes and a hard hit. One Olympic teammate became Heavy Weight Champion of the World and fought for purses of $5 million to $10 million. Evidence was adduced that Mr. Albert's record was superior to that teammate's at the time they were both boxing. Another teammate became the Number One World Boxing Commission contender in his weight class. Evidence was given by Mr. O'Shea, a former president of Boxing B.C. and Boxing Canada, an international referee, coach of the Canadian National Team, Canada's boxing representative for the Commonwealth Games and a member of the Canadian Olympic Committee. Mr.

O'Shea testified that Mr. Albert was definitely world class and had the ability to win a world title. He predicted that Mr. Albert would become a world champion.

33 Mr. Albert testified that as a result of the injury to his right hand in the right medial dorsal area, he was unable to sustain his boxing career. He claimed that his injury worsened over time and was the primary reason that he decided to end his career as a professional boxer. He testified that the injury to his hand took away his dream, that his dream of staying in the professional boxing arena was realistic and that the dream offered him opportunity to earn significant income, an opportunity that is now lost.

34 The appellants contended at trial that Mr. Albert had a pre-existing injury. They said a doctor cleared Mr. Albert to fight nine months after the accident, and from that argued the end of Mr. Albert's boxing career was for reasons other than the injuries sustained in the accident. They said, variously:

> 1) Mr. Albert had a pre-existing injury;
>
> 2) he did not do all he should have done to heal his injury;
>
> 3) he was not disabled from boxing because of his injury; and
>
> 4) his earnings were not negatively impacted by the injury or, if they were, the impact was minimal.

35 Re-organizing the grounds of appeal somewhat, the appellants:

> 1) contend the judge, Mr. Justice Greyall, erred in not directing the jury on negative contingencies that should be applied to account for his risk of imprisonment on the criminal charges,
>
> 2) contend the learned judge erred by failing to direct the jury as to the need for present valuation of the jury's assessment of damages for future pecuniary loss;
>
> 3) the jury's assessments for past and future loss of income earning capacity are without evidentiary foundation or wholly out of proportion with the evidence in the case; and
>
> 4) the jury's award for non-pecuniary loss was inordinately high as to be wholly out of proportion to the loss suffered in the case.

36 Before dealing with each of these grounds it is useful to first address our role in reviewing a jury award. The respectful view towards a jury award is discussed today in a decision released today by the Supreme Court of Canada in *R. v. H. (W.)*, 2013 SCC 22 (S.C.C.), albeit in a criminal law context, Justice Cromwell wrote:

> [2] ... the reviewing court must treat the verdict with great deference. The court must ask itself whether the jury's verdict is supportable on *any* reasonable view of the evidence and whether proper judicial fact-finding applied to the evidence *precludes* the conclusion reached by the jury.

37 Our role has been summarized in *Moskaleva v. Laurie*, to which I have referred earlier. It contains a succinct summary of our role in reviewing a jury award of damages:

> [125] An appellate court cannot alter a damage award made at trial merely because on its view of the evidence it would have come to a different conclusion. Whether made by a judge sitting alone or by a jury, damage assessments are questions of fact or mixed fact and law and therefore awards of damages may only be set aside for palpable and overriding error (*K.L.B.*at para. 62; *M.B.* at para. 54; *Young* at para. 64; *Dilello*at para. 39).
>
> [126] It is a long-held principle that a jury's findings of fact are entitled to greater deference on review than findings of fact by a judge alone and, accordingly, "the disparity between the figure at which [the jury] have arrived and any figure at which they could properly have arrived must, to justify correction by a court of appeal, be even wider than when the figure has been assessed by a judge sitting alone" (*Young* at para 64 and *Dilello* at para. 39, both citing *Nance* at 614).

[127] While palpable and overriding error may be found in respect of a judge alone award if the "amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage" (*Nance* at 613), in the case of a jury award, appellate interference is not justified merely because the award is inordinately high or inordinately low, but only in that "rare case" where "it is 'wholly out of all proportion'" (*Foreman* at para. 32 citing *Nance* at 614, and referred to with approval in *Boyd* at paras. 13-14, *White v. Gait* at paras. 10-11, and *Courdin* at para. 22; *Wade* at 1077-1078, Laskin C.J.C. dissenting, also citing *Nance* at 614) or, in other words, when it is "wholly disproportionate or shockingly unreasonable" (*Young*at para. 64).

[128] Support for the view that in order to determine whether a jury award is "wholly out of all proportion" or "wholly disproportionate or shockingly unreasonable", it is appropriate to compare the award under appeal with awards made by trial judges sitting alone in "the same class of case" may be found in *Cory*, but that approach may not be in accord with *Lindal*. Criticism of that approach is found in Gibbs J.A.'s dissent in *Cory* at paras. 49-52; *Ferguson v. Lush*, 2003 BCCA 579, 20 B.C.L.R. (4th) 228 at paras.33-43; and Finch C.J.B.C.'s dissent in *Stapley* at paras. 116-124.

[129] The increased deference accorded to jury awards must be considered when a determination is made about whether an award of non-pecuniary damages must be altered. The award is not wrong simply because it does not conform with damage awards made by judges: *Cody* at para. 25; *Boyd* at para. 42; *Dilello* at para. 49.

38 This general approach must be applied with particular sensitivity to the nature of the issues raised. For example, questions of credibility are particularly within a jury's purview and, absent demonstrated error of principle, are not matters with which this court may interfere.

39 I turn then to the first ground of appeal raised by the appellants, the judge's treatment of the risk of incarceration.

40 The appellants say that the risk of incarceration is a negative contingency that must be applied to Mr. Albert's claim for loss of future income, else he may be remunerated for a period of incarceration for conduct that the criminal law determines is worthy of punishment. They say this would bring the integrity of our justice system into question. The appellants say the judge erred in failing to ensure a negative contingency was applied by telling the jury it must assign a specific contingency to the risk of incarceration and then reflect that contingency in its award.

41 In his instructions to the jury, the judge told the jury it must take into account negative contingencies when assessing the respondent's loss of earning capacity, including "other events causing absence from boxing". Later in his instructions, at the request of the appellants, the judge directed the jury to consider the negative contingencies and added a further negative contingency instruction, namely "the loss of a promoter or manager and other reasons which may have affected the plaintiff's prospects even had there been no accident".

42 I do not agree the judge erred as alleged. I reach this conclusion for three reasons. First, the judge was not asked to give the instruction now advocated, notwithstanding the opportunity given to counsel to comment on the proposed instructions. Second, there was no evidence upon which a jury could assess the value of such a contingency. Third, and most important, I do not consider it would have been appropriate for the jury to reduce the future damage award for the negative contingency of a possible future jail sentence, in the circumstances before the Court. Mr. Albert stood in the courts, and in the community, as innocent until proven guilty. Even if proven guilty, there was no certainty that he would receive a jail sentence. In my view, it would have been entirely speculative for the jury to reduce the damage award to reflect the chance that he might be convicted on the outstanding charges. This is unlike the case relied upon by the appellants, *British Columbia v. Zastowny*, [2008] 1 S.C.R. 27, 2008 SCC 4 (S.C.C.), wherein the Supreme Court of Canada, on appeal from this court, affirmed the appropriateness of a deduction in damages to take account of a period of incarceration that was established as a fact at the trial.

43 In my view it cannot be said, in the circumstances, that the judge erred in the manner contended.

44 Second, the appellants contend the judge erred in failing to instruct the jury that they should discount the award to reflect the present value of future pecuniary losses as is required by s. 56 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253.

45 This issue requires review of the events at trial. The judge discussed the contents of his instructions to the jury with counsel, initially including in his list of proposed instructions a direction concerning present value from paragraph 12.9 of the CIVJI Instructions. Counsel for the appellants stated that the paragraph was "not applicable", referring to the claim for future pecuniary losses as being "a capacity claim". Counsel for Mr. Albert asked for time to think it over and the next morning counsel for the appellants presented the judge with a written list of proposed instructions from CIVJI. These did not include paragraph 12.9 or another paragraph dealing with present value, paragraph 12.11.3A.

46 On the fifth day of trial counsel for Mr. Albert asked the judge about the present value instruction and was told it would not be included in the charge. Counsel for the appellants made no comment.

47 I agree that a present value type of instruction should have been given, to conform to the legislation. However, that this did not happen is the result of the position of the appellants at trial. In that circumstance, in my view, the results of the trial should not be undone by ordering a new trial. In *Kennedy v. Mandarin Enterprises Ltd.* (1993), 20 C.P.C. (3d) 241 (B.C. C.A.) Mr. Justice Taylor, for this court, described a similar issue:

> [13] Mr. Harvey, who appeared before us for the appellant but had not previously been involved in the case, says that even though the objection raised on appeal was not taken at trial, and although the submissions were not made to the trial judge in this connection which, in his view, ought to have been made, the appeal should be allowed and a new trial ordered so as to correct what would otherwise be a miscarriage of justice. He says the manner in which the case went to the jury was such that Ms. Kennedy was effectively deprived of her right to have the central factual issue decided. He urges us not to concern ourselves with assigning responsibility for what happened at the trial.

48 He then said:

> [16] I agree with Mr. Harvey that this case may not have gone to the jury as it would have done had questions been settled after proper submissions of counsel, and had counsel sought more appropriate instructions concerning the law. But does this mean that the plaintiff is entitled to a new trial?
>
> [17] In the Ontario case of *Kralj v. Murray*, [1954] O.W.N. 58 (C.A.), Hope, J.A., said (at p. 60):
>
> > I am of the opinion that while in certain circumstances a new trial should be ordered, nevertheless the principles set out on behalf of this Court by Meredith J.A. in *Caswell v. Toronto R.W. Co. (1911)*, 24 O.L.R. 339 at 350-1, are here applicable, namely:
> >
> > > A new trial is a hardship under any circumstances; and when granted upon insufficient grounds is a very grave injustice; to take away from any one that which has been fairly won, and to subject him to the delay and cost, and the mental and physical strain, of another trial, as well as to the uncertainty of its outcome, is something which fairly may be thought intolerable. New trials are, of course, occasionally necessary in order that justice may be done between the parties, but they are contrary to the public interests and may fairly be described as necessary evils, when necessary.
> >
> > > . . .
> >
> > > A strong case must, therefore, be presented before a new trial can properly be directed; so strong that even in some cases, where an injustice has been done to one of the parties at the trial a new trial is not granted unless the error was pointedly objected to at the time; and, all through the practice upon applications for new trials, the like reluctance in granting new trials is everywhere evident.
> >
> > > It is, however, sometimes the right of a party to have a new trial; and sometimes the Court, exercising a discretion of its own, grants a new trial, but seldom, and only when the interests of justice plainly require it.

> In the present case, no objection was taken at the trial to the learned trial judge's charge on the grounds now advanced by counsel for the appellant and I do not consider that any injustice has been wrought in the light, as I previously stated, of the answers of the jury to the questions submitted.
>
> I would, therefore, on all grounds, dismiss the appeal with costs, if demanded.

This passage was adopted with approval by Esson, J.A., (as he then was) in the majority judgment of this Court in *Rendall v. Ewert* (1989), 38 B.C.L.R. (2d) 1 (at p. 10).

> [18] ... The civil jury system requires citizens to give their time, often at significant personal cost, to resolve the problems of others, and litigants who wish to avail themselves of this process must, of course, make every reasonable effort to ensure that the problem they wish resolved is put to the jury in a way in which the jury can properly deal with it. When eight jurors have given five working days to the resolution of a business dispute such as the present an appeal court should, in my view, be most reluctant to grant a second trial on grounds which counsel did not raise at the first trial.

49 Those comments are apt to the complaint now levelled at the judge's instruction. I would not grant a new trial on this basis. Should we then, make our own adjustment? Neither counsel called evidence on the issue, and one cannot discern from the evidence a relationship between time and the amount awarded by the jury. That is, one cannot determine how the jury viewed the number and timing of the boxing matches that must found the damages award. More so than most cases, this case required crystal ball gazing. In this circumstance, I see no basis upon which we could make a principled adjustment to the damages awarded. Accordingly I would not interfere with the award on this basis.

50 This brings us to the assessment of damages itself. The appellants say that each of the heads of damages assessed is wholly out of proportion to the evidence before the Court.

51 Damages are a question of fact and we may interfere with the quantum, absent an error of law or principle, only if there is a palpable and overriding error.

52 I deal with the loss of earning capacity first. I conclude, from the fact the jury awarded a significant sum, that the jury rejected the appellants' submission that Mr. Albert would have withdrawn from a boxing career, soon after the accident, in any event. Clearly Mr. Albert had boxing ability. The jury must have considered that his boxing ability was diminished as the result of the injuries from the accident. It is true that Mr. Albert did not earn very much money from boxing prior to the accident. It is also true that there was not a great deal of evidence about the size of the purses available in professional boxing. Nonetheless there was some evidence. Witnesses from the world of boxing did testify to some extent as to the purses won in certain matches, particularly in Canada. There was evidence, therefore, before the jury from which they could conclude that Mr. Albert had the skills to fight for, and win, purses in the time between the accident and the trial, amounting to $60,000. The period of past loss is close to four years. The sum awarded is well within the range of the purses that were discussed in the evidence as available, in Canada, over that period of time. Given the positive evidence as to Mr. Albert's abilities, one cannot say the award of $60,000 for past income loss is unsupported by the evidence, disproportionate, or wholly erroneous.

53 I have come to the same conclusion in respect to the award for future loss. That sum may be a small portion of what Mr. Albert otherwise would have earned, or it may be more than he would have earned. We do not know. There was, however, evidence of his considerable abilities and evidence of the purses available in the boxing world, even in Canada, that would support an award of $838,000. I would not interfere with the award for future loss of earnings.

54 This brings me to the last head of damages, non-pecuniary damages, awarded in the amount of $125,000. That is a significant award. Nonetheless, although higher than similar awards in cases of loss of fine athletic capacity, can it be said to be so high as to be wholly erroneous? It was, after all, the jury that saw and listened to Mr. Albert and the other witnesses, and bringing their worldly knowledge which is the hallmark of juries, could assess the pain, suffering and loss of enjoyment of life caused by the injury sustained in the accident, and its effect upon his distinguishing characteristic as a high level boxer.

I cannot say, in these circumstances, that the award of non-pecuniary damages meets the level that would permit this court to interfere. I would not accede to this ground of appeal.

55 I would dismiss the appeal.

***Chiasson J.A.*:**

56 I agree.

***Frankel J.A.*:**

57 I agree.

***Saunders J.A.*:**

58 The application to adduce fresh evidence is dismissed. The appeal is dismissed.

Appeal and application dismissed.

2010 BCCA 539
British Columbia Court of Appeal

British Columbia (Director of Civil Forfeiture) v. Angel Acres Recreation & Festival Property Ltd.

2010 CarswellBC 3222, 2010 BCCA 539, [2010] B.C.J. No. 2347, [2011] B.C.W.L.D. 759, [2011] B.C.W.L.D. 928, [2011] B.C.W.L.D. 929, [2011] B.C.W.L.D. 930, 12 B.C.L.R. (5th) 72, 195 A.C.W.S. (3d) 1023, 296 B.C.A.C. 230, 503 W.A.C. 230

Director of Civil Forfeiture (Respondent / Plaintiff) and Angel Acres Recreation and Festival Property Ltd., Richard Phillips, Lloyd Stennes, Robert Widdifield, Raymond Bradley Cunningham, Lawrence Dean Bergstrom and Gordon Keith Jones (Appellants / Defendants)

Donald, Low, Neilson JJ.A.

Heard: September 22-23, 2010
Judgment: November 30, 2010
Docket: Victoria CA037017

Proceedings: affirming *British Columbia (Director of Civil Forfeiture) v. Angel Acres Recreation & Festival Property Ltd.* (2009), 2009 CarswellBC 601, 2009 BCSC 322 (B.C. S.C.)

Counsel: P.C.M. Freeman, Q.C., J. Adams, J.A. Dutton for Appellants
R.G. Payne, P.D. Ameerali for Respondent

Headnote

Civil practice and procedure --- Pre-trial procedures — Interim preservation of property

Director of Civil Procedure brought action against defendants for forfeiture order under Civil Forfeiture Act, alleging criminal activity carried out by defendants' motorcycle club through clubhouse — Director obtained ex parte interim preservation order (IPO), lasting 30 days, seizing clubhouse — Defendants' application to set aside order was dismissed and Director's application for enduring IPO, of effect until trial of forfeiture action, was granted — Defendants appealed — Appeal dismissed — Applications judge did not weaken disclosure test for ex parte IPO, and did not err in putting honest and fair dealing in context of Act — IPOs were mandated by Act, as opposed to Mareva injunctions calling on court's discretionary equitable jurisdiction in private disputes — Application judge did not err in finding that Director made full and frank disclosure of material facts — Defendants did not establish that Director's amended statement of claim failed to raise valid cause of action — Application judge properly found that expert opinion evidence was admissible, and that police experts' opinions on criminal activity and nature of club did not purport to decide on ultimate issue of issuing order — Application judge did not err in disregarding evidence that was lay witnesses' expressions of belief or was double hearsay — Consideration of subjective element in granting initial IPO did not invalidate order, as objective element was met — Application judge did not make any reviewable error in assessing proportionality of granting order — Director raised serious question to be tried about high-level unlawful activity emanating from clubhouse, and evidence of illegality supported seizure order.

Remedies --- Injunctions — Form and operation of order — Miscellaneous

Director of Civil Procedure brought action against defendants for forfeiture order under Civil Forfeiture Act, alleging criminal activity carried out by defendants' motorcycle club through clubhouse — Director obtained ex parte interim preservation order (IPO), lasting 30 days, seizing clubhouse — Defendants' application to set aside order was dismissed and Director's application for enduring IPO, of effect until trial of forfeiture action, was granted — Defendants appealed — Appeal dismissed — Applications judge did not weaken disclosure test for ex parte IPO, and did not err in putting honest and fair dealing in context of Act — IPOs were mandated by Act, as opposed to Mareva injunctions calling on court's discretionary equitable jurisdiction in private disputes — Application judge did not err in finding that Director made full and frank disclosure of material facts — Defendants did not establish that Director's amended statement of claim failed to raise valid cause of action — Application

judge properly found that expert opinion evidence was admissible, and that police experts' opinions on criminal activity and nature of club did not purport to decide on ultimate issue of issuing order — Application judge did not err in disregarding evidence that was lay witnesses' expressions of belief or was double hearsay — Consideration of subjective element in granting initial IPO did not invalidate order, as objective element was met — Application judge did not make any reviewable error in assessing proportionality of granting order — Director raised serious question to be tried about high-level unlawful activity emanating from clubhouse, and evidence of illegality supported seizure order.

Remedies --- Injunctions — Procedure on application — Evidence — Miscellaneous

Director of Civil Procedure brought action against defendants for forfeiture order under Civil Forfeiture Act, alleging criminal activity carried out by defendants' motorcycle club through clubhouse — Director obtained ex parte interim preservation order (IPO), lasting 30 days, seizing clubhouse — Defendants' application to set aside order was dismissed and Director's application for enduring IPO, of effect until trial of forfeiture action, was granted — Defendants appealed — Appeal dismissed — Application judge properly found that expert opinion evidence was admissible, and that police experts' opinions on criminal activity and nature of club did not purport to decide on ultimate issue of issuing order — Application judge did not err in disregarding evidence that was lay witnesses' expressions of belief or was double hearsay — Consideration of subjective element in granting initial IPO did not invalidate order, as objective element was met — Application judge did not make any reviewable error in assessing proportionality of granting order — Director raised serious question to be tried about high-level unlawful activity emanating from clubhouse, and evidence of illegality supported seizure order.

Remedies --- Injunctions — Form and operation of order — Continuance of interim or interlocutory injunctions — Miscellaneous

Director of Civil Procedure brought action against defendants for forfeiture order under Civil Forfeiture Act, alleging criminal activity carried out by defendants' motorcycle club through clubhouse — Director obtained ex parte interim preservation order (IPO), lasting 30 days, seizing clubhouse — Defendants' application to set aside order was dismissed and Director's application for enduring IPO, of effect until trial of forfeiture action, was granted — Defendants appealed — Appeal dismissed — Applications judge did not weaken disclosure test for ex parte IPO, and did not err in putting honest and fair dealing in context of Act — IPOs were mandated by Act, as opposed to Mareva injunctions calling on court's discretionary equitable jurisdiction in private disputes — Application judge did not err in finding that Director made full and frank disclosure of material facts — Defendants did not establish that Director's amended statement of claim failed to raise valid cause of action — Application judge properly found that expert opinion evidence was admissible, and that police experts' opinions on criminal activity and nature of club did not purport to decide on ultimate issue of issuing order — Application judge did not err in disregarding evidence that was lay witnesses' expressions of belief or was double hearsay — Consideration of subjective element in granting initial IPO did not invalidate order, as objective element was met — Application judge did not make any reviewable error in assessing proportionality of granting order — Director raised serious question to be tried about high-level unlawful activity emanating from clubhouse, and evidence of illegality supported seizure order.

***Donald J.A.*:**

1 The respondent, Director of Civil Forfeiture, obtained two interlocutory orders seizing the Nanaimo Hells Angels Motorcycle Club's clubhouse and Lots 7 and 8 on which the clubhouse sits. They are called interim preservation orders ("IPOs") in the *Civil Forfeiture Act*, S.B.C. 2005, c. 29.

2 The original IPO was made without notice after an *in camera* hearing before Madam Justice D. Smith, then in the Supreme Court.

3 The appellants applied to set aside the original IPO and the respondent applied, with notice, for an enduring IPO having effect until the trial of the forfeiture action.

4 The purpose in attacking the original IPO, even though it was due to expire 30 days after issuance (in fact, extensions were agreed upon), was to demonstrate that the respondent procured the order on material non-disclosure and because of that misconduct cannot seek a further order.

5 Both applications went before Mr. Justice Davies, Madam Justice Smith having been translated to this Court. He decided there was no material non-disclosure in obtaining the original IPO. He also decided that the respondent satisfied the requirements for an enduring IPO and granted the order.

6 The appellants allege he erred in both decisions and the enduring IPO should be quashed. In the alternative, they submit that seizure was a disproportionate response to the circumstances and the order should be varied to allow the appellants to use the property on terms which preserve the respondent's interest pending trial.

7 For the reasons that follow, I do not find any reversible error in the judge's disposition of the issues or in the scope of the order and I would dismiss the appeal.

Background Facts

8 The original IPO was granted on 8 November 2007 on affidavits from a number of police officers familiar with the Hells Angels Motorcycle Club, either as a national organization or as a local entity in Nanaimo. As mentioned, the hearing was in private and without notice.

9 Some of the evidence dealt with an investigation in 2003 called "Project Halo". In that investigation, police intercepted communications and conducted a search of the Nanaimo clubhouse under a warrant. The search turned up unregistered firearms and ammunition, and clear evidence that the clubhouse was being used as a "booze can" where liquor is sold without a licence. Other evidence dealt with the serious beating of a former member in the clubhouse in 2002.

10 The building was described as heavily fortified and protected by surveillance cameras. One of the affiants likened the clubhouse to those of Hells Angels chapters in other parts of Canada. Several offered the opinion that the clubhouse provides a secure place for the planning of violent criminal activity.

11 The original IPO permitted entry as part of the seizure. A description of the clubhouse as it then appeared went before Davies J. in the application for an enduring IPO. It was much the same as in the Project Halo report: a heavily fortified and secure building used as a booze can.

12 A number of items of personal property were seized: three motorcycles, some clothing and badges, and office-type equipment. They have been returned by agreement of the parties. All that remained in issue for the enduring IPO hearing were the clubhouse and the real property immediately surrounding it.

13 Mr. Justice Davies approached the matter by dealing first with the allegation that the original IPO should be set aside by reason of material non-disclosure. Having found no such misconduct, he went on to examine the case *de novo* and considered the many points of objection taken by the appellants. Those objections were common to both stages of the matter. In the end, Davies J. was satisfied that an enduring IPO should be granted and he found that a full seizure of the property, rather than a preservation order that allowed the appellants to regain use and occupancy of the property, was a proportionate interim remedy.

Issues

14 The appellants put forward the following grounds of appeal:

> 8. The Appellants submit that Davies J., with respect, erred in his dismissal of their application to set aside the Original IPO and in granting the Director's application for the Enduring IPO, in questions of law, fact and mixed fact and law.
>
> 9. With respect to the Appellants' application to set aside the Original IPO, Davies J. erred in:
>
> > (A) Failing to require the Director to meet the disclosure obligations required of an *ex parte* applicant for a *Mareva* injunction, which in turn led Davies J. to err in determining that the Director had met the required disclosure standard;

(B) Determining that counsel for the Director had properly disclosed to Smith J. the correct threshold test for obtaining an interim preservation order under the *CFA* (as that test existed at the time) and the relevant caselaw with respect to the definition of a "criminal organization" (as that term is defined in the *Criminal Code of Canada*, R.S.C. 1985, c. C-46 [the "*Code*"]);

(C) Deciding not to address the Appellants' submissions that the Director's pleadings had failed to raise a valid cause of action with respect to many of the claims made therein;

(D) Failing to consider that the Director had alleged that the Clubhouse had been used to facilitate unspecified activities concerning controlled substances under the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, without any evidence whatsoever supporting this allegation;

(E) Failing to decide whether the Director's introduction of evidence obtained from intercepted communications had breached Section 193 of the *Code*, and alternatively deciding in any event that such evidence had been in the public domain before its introduction;

(F) Failing to find that the hearsay and supposed expert evidence submitted by the Director had not been properly admissible before Smith J. due to the Original IPO having amounted to a pre-judgment execution order, the expert evidence having been submitted without a proper foundation in the pleadings and other factors; and,

(G) Determining that certain aspects of the Appellants' application to set aside the Original IPO should have been raised on appeal rather than in an application to set aside the Original IPO.

10. With respect to the Director's applications for the Enduring IPO, Davies J. erred in:

(H) Making findings similar to those in (C) to (F), albeit with respect to the adequacy of the Director's pleadings and the admissibility of the evidence submitted by the Director on the Director's application for the Enduring IPO);

(I) Admitting evidence obtained pursuant to the Original IPO, as a result of his error in not setting aside the Original IPO;

(J) Granting the Enduring IPO on terms that did not provide the corporate Appellant with the use and possession of the Clubhouse pending trial;

(K) Basing his order on the inadmissible supposed expert and lay hearsay evidence that the Clubhouse would "likely" be used to facilitate unspecified future alleged unlawful activities; and

(L) Finding that the Director on his application for the Enduring IPO had met the test of demonstrating that a "serious question to be tried" existed that would justify the issuance of the Enduring IPO.

15 I will not deal with the grounds *seriatim* but will proceed under the following headings:

1. Material Non-disclosure

2. The Pleadings

3. The Evidence

4. Proportionality

Discussion

1. Material Non-disclosure

16 The only practical purpose in pursuing an application to set aside an *ex parte* order about to expire on its own terms would be to prevent the applicant from seeking a replacement order. Otherwise, the order is moot.

17 Sections 9(1) and (2) of the *Civil Forfeiture Act* read:

> 9 (1) Subject to subsection (2), a court may make an interim preservation order under section 8 without notice to any person.
>
> (2) An order made without notice under subsection (1) may not be made for a period greater than 30 days.

18 Applicants for *ex parte* orders have long been required to make full and frank disclosure of material facts. The appellants argue that an order permitting seizure of private property without notice calls for a stringent disclosure test no less than that required for *Mareva* injunctions. It follows, they say, that a failure to meet that high standard should be sanctioned by a refusal to entertain further applications by the defaulting party.

19 The appellants rely on an articulation of the disclosure test for *Mareva* injunctions given by Mr. Justice Groberman, then in the Supreme Court, in *Green v. Jernigan*, 2003 BCSC 1097, 18 B.C.L.R. (4th) 366 (B.C. S.C.):

> [24] I do agree with the defendants that, having proceeded *ex parte*, it was incumbent on the plaintiffs to be fastidious in disclosing to the court all important aspects of the evidence, and in pointing out what defences might be available to the defendants. Above all else, the plaintiffs must not, in such a situation, exaggerate or misrepresent the strength of their case.
>
> [25] It is trite law that a litigant's duties when it comes to court on an *ex parte* basis are onerous, and this is doubly true when the order that is sought is a draconian one, such as *Mareva* or *Anton Piller* relief.

20 Mr. Justice Davies reviewed trial level decisions which discussed the test for *ex parte* applications generally: *Evans v. Silicon Valley IPO Network*, 2003 BCSC 954 (B.C. S.C.) at para. 34, Hood J.; *Lalji v. Sunderji*, [1997] B.C.J. No. 239 (B.C. S.C. [In Chambers]), Levine J., as she then was; and referred to the formulation by Huddart J., as she then was, in *Mooney v. Orr* (1994), [1995] 3 W.W.R. 116, 100 B.C.L.R. (2d) 335 (B.C. S.C.), where she contextualized the test in broad language at para. 20:

> ... An ex parte chambers application is not a trial and should not be turned into one by demands for an unrealistic standard of disclosure. Disclosure must be full in the sense that it must be adequate to the demands of the particular application and always fair to the absent defendant. *Re Philip's Manufacturing Ltd.* (1991), 60 B.C.L.R. (2d) 311 [[1992] 1 W.W.R. 651] (S.C.).

21 Mr. Justice Davies appears to have followed the line of thinking in *Mooney v. Orr* in noting the differences between *Mareva* injunctions, which arise in private disputes and call upon the court's discretionary equitable jurisdiction, and IPOs under the *Civil Forfeiture Act* where the evidentiary threshold requirements are lower and the order is mandated "unless it is not in the interests of justice": s. 8(5).

22 When D. Smith J. made the original IPO, s. 8(5) read:

> (5) Unless it is not in the interests of justice, the court must make an interim preservation order applied for under this section if the court is satisfied that there are reasonable grounds to believe that
>
> (a) the whole or the portion of the interest in property that is the basis of the application under subsection (1) is proceeds of unlawful activity, or
>
> (b) the property that is the basis of the application under subsection (2) is an instrument of unlawful activity.

[Emphasis added.]

23 Section 8(5) was amended by the time the matter went to Davies J. to read:

> (5) Unless it is not in the interests of justice, the court must make an interim preservation order applied for under this section if the court is satisfied that one or both of the following constitute a serious question to be tried:
>
> > (a) whether the whole or the portion of the interest in property that is the basis of the application under subsection (1) is proceeds of unlawful activity;
> >
> > (b) whether the property that is the basis of the application under subsection (2) is an instrument of unlawful activity.
>
> [Emphasis added.]

24 Nevertheless, Davies J. decided to review the allegation of material non-disclosure according to a test framed in conventional terms:

> [50] After considering the submissions of the parties, I have determined that the disclosure obligations upon the Director in the making of without notice applications are, as with any without notice application, very high. However, I also find that those obligations must be assessed against both the statutory property preservation regime established by the *Act* and the relatively low threshold evidentiary requirements that the Director must meet to obtain such orders.
>
> [51] I am satisfied that given the very interim nature and short duration of without notice orders that have been statutorily authorized for public interest purposes (which I will later address at some length) it would be wrong to hold the Director to the fastidious disclosure standards that govern the actions of a plaintiff seeking to invoke the Court's equitable jurisdiction to obtain relief that may often amount to pre-judgment execution.
>
> [52] I have accordingly concluded that when making without notice applications for interim preservation orders under ss. 8 and 9 of the *Act*, the Director must, in good faith, make full and fair disclosure of material facts, including those facts that would tend to diminish the Director's right to the relief sought. The Director must also not misstate or exaggerate the strength of the Director's case or the evidence adduced to obtain the relief sought.

25 On appeal, the appellants argue that the statutory context ought not to have had any influence on the rigour of the test; the *Civil Forfeiture Act* is silent on disclosure, the common law governs, and there is no meaningful difference between *Mareva* seizures and IPOs as far as the deprivation of private property is concerned.

26 I do not see that Davies J. weakened the disclosure test for *ex parte* IPOs to the detriment of the appellants, nor was he wrong in principle in putting timehonoured requirements of honest and fair dealing in the context of the *Civil Forfeiture Act*. In my opinion, he reviewed the Director's conduct in the *ex parte* hearing on an appropriate basis.

27 Next, the appellants argue that regardless of the test, the Director failed to make full and frank disclosure of material facts, and Davies J. erred in not so finding. They enumerate seven particulars where the Director failed (i) to cite relevant authority; (ii) to raise a possible issue of inadmissibility of wiretap evidence in violation of s. 193 of the *Code*; (iii) to raise a possible issue of *Privacy Act* violations; (iv) to discuss weaknesses in the Director's case, including the pleadings; (v) to maintain a balanced presentation of the evidence, rather than exaggerating public safety concerns; (vi) to assist the judge in understanding the applicable standard of proof; and (vii) to seek an order that was not overly broad and intrusive having due regard for the evidence.

28 Mr. Justice Davies dealt with each of these points with care. Virtually all of them relate to the merits of the Director's case for an IPO, although they are dressed up as failures of disclosure.

29 Mr. Justice Davies did not find that they manifest any fault on the part of the Director:

> [106] I have concluded that the defendants have not established any misconduct by the Director in obtaining the Original Interim Order and have also failed to establish that the Director failed to meet his without notice obligations under the *Act*.

30 This finding is entitled to deference, and accordingly I would not interfere with it. The arguments canvassed above overlap with those on the appeal from Davies J.'s enduring IPO and their merits will be discussed next.

2. The Pleadings

31 The appellants allege that the Director's statement of claim did not raise a valid cause of action and the Director was bound to bring deficiencies to the attention of Smith J., and it was an error for Davies J. to make a further order on a defective amended statement of claim. The primary defect is said to lie in the failure to set out specific criminal transactions underlying allegations that the property is used for illegal activity and the Nanaimo Hells Angels Motorcycle Club is a criminal organization.

32 Mr. Justice Davies did not entertain the argument. After Smith J. came to this Court, he was designated the case management judge. He was therefore aware that particulars had been demanded and supplied, and that there was outstanding an application to strike the action under Rule 19(24) (filed 24 April 2008), on the ground that the pleadings disclosed no valid claim. He deferred to the process invoked by the appellants:

> [110] The pleading concerns raised by the defendants may eventually be brought on a formal basis in this proceeding. If so, they, as well as other substantive pleadings applications, including applications to amend or applications for particulars, will have to be resolved by the Court. That will be the time and place for the adjudication of the merits of such substantive issues.

33 We are told that the appellants have not set down the motion to strike for hearing.

34 If it was wrong for Davies J. not to grapple with the pleadings issue, and I do not say it was, then I would dispose of this ground of appeal by saying that on the rather limited argument before us, I am not persuaded that the amended statement of claim suffers from a radical defect. The cause of action is the claim for an order of forfeiture under the *Civil Forfeiture Act*. That is plainly set out in the amended statement of claim. The alleged illegality appears to be sufficiently pleaded, and the criminal organization allegation tracks the elements in the relevant section of the *Criminal Code*: s. 467.1.

3. The Evidence

35 The appellants argue that the two IPOs are based on inadmissible evidence. They say that when the Director's affidavits are stripped of objectionable hearsay and opinion, either they do not support an IPO or they do not justify an enduring IPO amounting to a complete seizure of the clubhouse. They also say that the question whether any of the evidence was derived from information gathered by wiretaps, and therefore protected by s. 193 of the *Criminal Code*, ought to have been determined by Davies J.

36 I will deal with the s. 193 issue first. Officer Douglas Johnson of the Central Saanich Police Service swore an affidavit in support of the IPO in which he said he used, as a primary source of information, the investigation file on Project Halo which involved surveillance, interception of telecommunications under a warrant and a search of the clubhouse, also under a warrant, in 2003.

37 Section 193 provides in relevant part:

> 193.(1) Where a private communication has been intercepted by means of an electro-magnetic, acoustic, mechanical or other device without the consent, express or implied, of the originator thereof or of the person intended by the

originator thereof to receive it, every one who, without the express consent of the originator thereof or of the person intended by the originator thereof to receive it, wilfully

(a) uses or discloses the private communication or any part thereof or the substance, meaning or purport thereof or of any part thereof, or

(b) discloses the existence thereof,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

(2) Subsection (1) does not apply to a person who discloses a private communication or any part thereof or the substance, meaning or purport thereof or of any part thereof or who discloses the existence of a private communication

(a) in the course of or for the purpose of giving evidence in any civil or criminal proceedings or in any other proceedings in which the person may be required to give evidence on oath;

(b) in the course of or for the purpose of any criminal investigation if the private communication was lawfully intercepted;

. . . . .

(3) Subsection (1) does not apply to a person who discloses a private communication or any part thereof or the substance, meaning or purport thereof or of any part thereof or who discloses the existence of a private communication where that which is disclosed by him was, prior to the disclosure, lawfully disclosed in the course of or for the purpose of giving evidence in proceedings referred to in paragraph (2)(a).

38 The appellants sought exclusion of Officer Johnson's affidavit in whole or in large part on the argument that one cannot unpack the wiretap evidence protected by s. 193(1) from that which is not so protected. Mr. Justice Davies noted in his reasons that while the Director relied on the exceptions in s. 193(2)(a) and (b), the appellants cited some authority which may limit those provisions to testimony under compulsion and Officer Johnson was not in that position. The judge found it unnecessary to deal with that exception because he decided the impugned evidence fell under the exception in s. 193(3):

> [77] Further, the defendants' submissions concerning the Director's alleged breach of s. 193(1) of the *Code* must fail because the information that was disclosed by the affiants was within the public domain when adduced by the Director. See: *R. v. Angel Acres Recreation and Festival Property*, 2004 BCPC 224 and *R. v. Angel Acres Recreation and Festival Property*, 2004 BCSC 925.

39 In the reasons cited as 2004 BCSC 925 (B.C. S.C.) above, Mr. Justice Macaulay upheld the order of Quantz P.C.J. allowing publication of the information to obtain the warrant to search the clubhouse sworn in 2003. This was the substance of the Project Halo file on which Officer Johnson relied in his affidavit in the present matter. In my respectful opinion, Davies J. was not wrong in applying s. 193(3) to intercepted communications that have already been put into the public domain.

40 There remain the arguments about opinion evidence and hearsay. Mr. Justice Davies listed the following issues:

> [115] The four specific evidentiary issues are:
>
> (a) Can expert opinion evidence be admitted on an application for an interim preservation order under the *Act*?
>
> (b) Does the expert opinion evidence adduced by the Director offend the "ultimate issue" rule?
>
> (c) Can opinion evidence from a witness who is not qualified as an expert be adduced or relied upon to obtain an interim preservation order under the *Act*?
>
> (d) Can "double hearsay" or "bare allegations" be adduced or relied upon to obtain an interim preservation order under the *Act*?

He found that opinion evidence was admissible on an IPO application. The appellants say that such evidence on an *ex parte* application is unfair because it cannot be tested and ought not to have been admitted by D. Smith J. for that reason. They further submit that the *Rules of Court* do not authorize such evidence on interlocutory applications.

41 Mr. Justice Davies rejected those arguments on the basis that Smith J. accepted qualifications of the experts in the course of the hearing, and that determination was not challenged; and, further, the *Rules* do not prohibit expert opinion - indeed, such evidence is often received. He said in his reasons:

> [122] While it is true that the provisions of Rule 40A of the *Rules of Court* apply specifically to the admissibility of expert evidence at trial, it does not follow that expert evidence is not also admissible on interlocutory applications.
>
> [123] Examples of circumstances where expert opinion evidence is received other than at trial are numerous. They include: evidence concerning the law of a foreign country in *forum conveniens* applications; opinions of value in foreclosure and other insolvency proceedings; and evidence of parenting capabilities in interlocutory family proceedings.
>
> [124] While I recognize that the receipt of expert opinion evidence on interlocutory matters is less common than at trial, and also that on without notice applications there is no opportunity to cross-examine a proposed expert on his or her qualifications, that does not itself render an expert report or the opinions expressed inadmissible.

With respect, I agree with Davies J.

42 On the "ultimate issue" point, he ruled that the police witnesses did not purport to decide whether there should be an IPO, which he considered to be the ultimate issue. While they gave opinions on the Hells Angels Motorcycle Club and the Nanaimo Hells Angels Motorcycle Club as criminal organizations and on the illegal nature of activities in the clubhouse, they did not take over the judge's role in deciding the case. Again, I agree with Davies J.

43 On the lay opinion point, Davies J. agreed that some of the witnesses' evidence was inadmissible as expressions of "belief" without their being qualified, and he expressly disregarded that evidence. I am not persuaded that he missed anything important in that exercise.

44 Mr. Justice Davies acceded to the argument that some of Officer Johnson's affidavit consisted of double hearsay and was therefore inadmissible. As with the lay opinion evidence, he expressly disregarded double hearsay. He appears to have included everything of significance falling under this category.

45 Having put aside this objectionable evidence, Davies J. was nevertheless satisfied that the original IPO was adequately supported by the evidence and that an enduring IPO should issue:

> [232] The Director has raised very serious issues to be tried about alleged continuing high-level unlawful activity emanating from or otherwise involving the use of the Clubhouse by the HAMC [Hells Angels Motorcycle Club] and the NHAMC [Nanaimo Hells Angels Motorcycle Club].

46 One remaining evidentiary issue must be discussed. The appellants submit that the evidence from the search of the clubhouse after the original IPO should not have been considered in the application for an enduring IPO, for amongst the other problems with the order, the IPO was invalid having been made on an incorrect interpretation of the phrase "reasonable grounds to believe" in s. 8(5) of the *Civil Forfeiture Act* as it read when Smith J. considered it. The error is said to be the addition of a subjective element, namely, the belief of the Director that the property is an instrument of unlawful activity, in addition to the objective requirement.

47 This alleged error formed part of the appellants' submission, discussed earlier in these reasons, that the Director's failure to explain the statutory test for an IPO in the *ex parte* hearing and his failure to clear up any confusion in the mind of the

judge amounted to material non-disclosure. Mr. Justice Davies found no fault with the Director on this point and, again, I agree with him.

48 I do not accept that the addition of a subjective element invalidates the order or puts in question the results of a search conducted under the auspices of the order. That is because Smith J. found the objective requirement had been met. She said in her reasons (2007 BCSC 1648 (B.C. S.C.)):

> [45] I am satisfied the evidence filed in support of the order is more than sufficient to establish reasonable grounds to believe that the property is being used as an instrument of unlawful activity. That unlawful activity includes the planning of criminal activities, the assault of victims in secrecy, and the storage of illegal weapons and controlled substances.
>
> [46] The evidence establishes the Director subjectively believes the property is being used as an instrument for unlawful activity. The evidence of Detective Constable Loader, Inspector Turnball, and Officers Johnson and Richards provides the objectively justifiable grounds to support that subjective belief.

49 The reference to the Director's belief is surplus to her reasoning and takes nothing away from the central finding of "objectively justifiable grounds".

4. Proportionality

50 As I understand the appellants' alternate argument on proportionality, there are two main strands. First, the evidence of criminal organization and public safety is weak if it exists at all, and, second, the only use of the clubhouse at the time of the original IPO which on the evidence can be said to be illegal, is selling liquor without a licence. On those grounds, the seizure order is disproportionate. The clubhouse should be restored to the appellants awaiting trial on such terms that would prevent the operation of a "booze can".

51 The scope of the order is a matter of discretion to be exercised on right principles. I am unable to say that Davies J. ignored any relevant factor, considered an irrelevant factor, or proceeded on a wrong principle. He acknowledged that if this forfeiture claim were only about a booze can, a seizure order would go too far. But he ruled that the Director raised "a serious question to be tried" (s. 8(5)) regarding much more serious criminality:

> [229] I accordingly conclude that the Court's consideration of the interests of justice in s. 8(5) should include an assessment of the type and scope of preservation order that is appropriate under s. 8(3), having regard to the relief that may ultimately be available to the Director.
>
> [230] If, for example, the only issue that remained for consideration in this case was whether the Clubhouse was being used to operate an illegal "booze can," I am satisfied that a preservation order denying any use of the Clubhouse by the defendants whatsoever pending trial would be excessive and thus not in the interests of justice. An order restraining the defendants from selling liquor without a license, coupled with an order restraining the disposition of Lots 7 and 8 and requiring the defendants to keep the Clubhouse insured for its full value pending trial, would be sufficient in those circumstances to protect the Director's legitimate interests.
>
> [231] An alleged illegal bar operation is not, however, the only matter that must eventually be addressed at the trial of this proceeding.
>
> [232] The Director has raised very serious issues to be tried about alleged continuing high-level unlawful activity emanating from or otherwise involving the use of the Clubhouse by the HAMC and the NHAMC.

52 The appellants would have us focus solely on the last search of the clubhouse. That ignores the expert evidence, accepted by the two judges below, about who the Hells Angel Motorcycle Club and the Nanaimo Hells Angel Motorcycle Club are and what police investigations into their activities have uncovered. Madam Justice Smith provided the following summary in her reasons:

[32] The Director asserts that the property is an instrument of unlawful activity as it is used to engage in unlawful activity. In his opinion, the NHAMC clubhouse is used to promote and facilitate both social and criminal activities for the benefit of its members, prospects, hang-arounds and associates.

[33] His opinion is derived from the affidavit evidence of:

(a) Detective Constable Mark Loader of the Ontario Provincial Police ("OPP") assigned to the Organized Crime Section, Biker Enforcement Unit ("BEU") of the OPP, who has participated in the execution of search warrants at five HAMC clubhouses in Ontario, and who was qualified to give expert opinion evidence on the historical overview of the HAMC, the international and domestic face of the HAMC, the characteristics defining an Outlaw Motorcycle Gang ("OMG") and the HAMC, the HAMC clubhouses, the HAMC reputation for violence, the NHAMC and the expert evidence led in *R. v. Lindsay*, [2005] O.J. No. 2870 in which Fuerst J. made a finding that the HAMC was a criminal organization within the meaning of s. 467.12(1) of the *Criminal Code*;

(b) RCMP Inspector Robert Turnball who was a supervisor and investigator in the Organized Crime Agency of British Columbia (the "OCA-BC") and is now a seconded member to the Combined Forces Special Enforcement Unit of British Columbia ("CFSEU-BC") and who was qualified to provide expert opinion evidence on OMG's, the HAMC in B.C., and the NHAMC;

(c) police officer Gregory Johnson of the Central Saanich Police Service and seconded member to CFSEU-BC since April 2007, who provided an overview of the NHAMC, its members and associates, its property, its unlawful activities as recounted by reliable informants, and its interaction with other HAMCs and members; and,

(d) police officer Andrew Richards who was also seconded to CFSEU-BC since April 2004, was personally involved in the execution of four search warrants on three separate HAMC clubhouses in B.C., and who was qualified to provide expert opinion evidence on the history and structure of the HAMC in B.C.

[34] CFSEU-BC is an integrated policing agency comprised of members from municipal police agencies, the precursor investigative agency OCA-BC and the RCMP. The purpose of CFSEU-BC is to investigate, disrupt and suppress organized crime groups.

[35] The above-noted individuals provided the following evidence:

(a) The NHAMC is the Nanaimo chapter of the HAMC which was held to be a criminal organization within the meaning of s. 467.12(1) of the *Criminal Code* (see *Lindsay*). The NHAMC functions similarly to other chapters of the HAMC which are found throughout Canada and the world;

(b) The HAMC is involved in a wide variety of criminal activities, the most lucrative of which is drug trafficking. Many members and/or associates have been convicted for the offences of illicit drug importation, exportation, distribution and manufacturing, and trafficking. Additional convictions of murder, theft, possession of stolen merchandise, extortion, firearms possession and money laundering have been registered against HAMC-associated persons;

(c) The HAMC cultivates a reputation for violence in order to facilitate its criminal activities and protect its turf or franchise from encroachment by other individuals involved in criminal activities;

(d) The NHAMC clubhouse displays identifying features of the HAMC that include: being painted in the customary "Red and White" colours that are common to other HAMC clubhouses, displaying a sign on the outside of the clubhouse that includes the words "Hells Angels" and a logo of a "flying death head" that is associated with and trademarked by the HAMC, displaying a large "flying death's head" logo onto the garage door of the clubhouse with the words "Hells Angels Nanaimo" painted around it, posting a sign near a parking

area with a parking symbol on it that states "Hells Angels Only", and engraving the knocker on the front door of the clubhouse with the words "Hells Angels Nanaimo";

(e) The NHAMC clubhouse has hosted parties that have been attended by individuals from a number of HAMC chapters, which assists the NHAMC to facilitate the commission of criminal activities by allowing members to create criminal networks; and

(f) The NHAMC was searched, videotaped and photographed during the execution of a search warrant on December 12, 2003 (Project Halo), during which it was observed:

(i) there were no windows on the ground floor level outside of the fenced compound and therefore no view into the clubhouse proper from the outside;

(ii) the front door was heavily constructed and had a dead bolt, a numeric key pad and a door bell;

(iii) the clubhouse was equipped with a video-monitored security system that included at least eight video cameras mounted outside the clubhouse;

(iv) the mounted cameras appeared to feed numerous video security monitors located throughout the inside of the clubhouse;

(v) displayed on the inside of the main front entrance and exit door was a sign that read "What you do here, what you see here, what you hear here, let it stay here" and "Hells Angels Nanaimo";

(vi) both the front and rear entrance doors were heavily constructed and there was wire mesh fencing around the south side and rear of the building;

(vii) the central common area of the main floor included a bar, with signage pertaining to the HAMC throughout the room. An electronic audio listening device detector was located in the bar area. The bar had many features of a licensed establishment set up for the sale and consumption of alcohol even though NHAMC is not licensed under the *Liquor Control and Licensing Act*, R.S.B.C. 1996, c. 267 or any other act or regulation governing the sale of liquor;

(viii) the kitchen area included storage shelves and a liquor cabinet that contained a large amount of liquor;

(ix) a boardroom on the second floor, with apparent access limited to members only, contained two video monitors, numerous examples of Hells Angels regalia, a computer, a file cabinet and a shredder;

(x) during Project Halo, a number of unregistered shotguns were seized from an unlocked gun case in the boardroom closet and a .25 calibre restricted handgun was located in an insecure main floor locker with two boxes of ammunition. Documentation in the locker was in the name of a then member of the NHAMC; and

(xi) two bedrooms and a storage closet were located on the third floor. The bedrooms appeared unoccupied and the storage closet contained "Red and White" Hells Angels support clothing.

53 No criminal charges emanated from Project Halo, but these are civil proceedings. The Crown approval standard in British Columbia is a substantial likelihood of conviction. The criminal standard of proof is beyond a reasonable doubt. The evidence gathered in Project Halo is viable evidence and remains to be tested at the trial of the action on the balance of probabilities. It follows that I reject the proposition that the evidence of illegality falls short of supporting a seizure order.

Disposition

54 I would dismiss the appeal.

***Low J.A.*:**

I agree.

***Neilson J.A.*:**

I agree.

Appeal dismissed.

2018 BCCA 96
British Columbia Court of Appeal

R. v. Podolski

2018 CarswellBC 1125, 2018 BCCA 96, [2018] B.C.J. No. 847, 147 W.C.B. (2d) 260, 360 C.C.C. (3d) 1

Regina (Respondent) And Leslie Podolski (Appellant)

Regina (Respondent) And Sheldon Richard O'Donnell (Appellant)

Regina (Respondent) And Peter Manolakos (Appellant)

Saunders, D. Smith, Fenlon JJ.A.

Heard: June 12-16, 19-20, 2017
Judgment: March 14, 2018
Docket: CA40515, CA40551, CA40652

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Headnote

Criminal law --- Jury — Charging jury — Direction on corroboration — Accomplices and witnesses of disreputable character [Vetrovec]

Accused were three of five men convicted by jury on various counts of murder and manslaughter in deaths of deceased DM, B, and T — Accused were members of criminal organization known as Greeks and accused M was leader of Greeks — At trial, Crown called 106 witnesses, including members of Greeks and witnesses who entered into plea and immunity agreements — Ten witnesses were omitted from judge's Vetrovec warning, including witnesses W and JM — Accused M was convicted of manslaughter, accused P was convicted of first degree murder, and accused O was convicted of second degree murder — Accused appealed convictions on basis that judge failed to give Vetrovec warning regarding evidence of omitted witnesses and wrongly omitted caution about contaminating or tainting effect police interview process may have had on witness testimony — Appeals dismissed — Judge did not err in declining to give Vetrovec warning for witnesses W and JM or in his restriction of list of Vetrovec witnesses to six — W and JM were not witnesses for whom Vetrovec warning was mandatory — Judge properly, fully, and fairly addressed credibility and reliability issues inherent in evidence of W and JM — Purpose of Vetrovec warning was adequately met by judge's instructions and judge was not required to say more about tainting effect of police interview process.

Evidence --- Examination of witnesses — Cross-examination — Effect of failure to cross-examine

Accused were three of five men convicted by jury on various counts of murder and manslaughter in deaths of deceased DM, B, and T — Accused were members of criminal organization known as Greeks and accused M was leader of Greeks — Before preparing charge to jury, judge asked counsel to identify evidence that might require Browne v. Dunn instruction — At trial, defence counsel thoroughly cross-examined Crown witnesses on issues going to general credibility and reliability, but did not cross-examine some witness evidence on significant points — Judge concluded that confrontation rule in Browne v. Dunn was engaged in relation to five significant point of evidence and issued focused instruction — Accused M was convicted of manslaughter, accused P was convicted of first degree murder, and accused O was convicted of second degree murder — Accused appealed convictions on basis that judge erred in including Browne v. Dunn instructions in charge to jury — Appeals dismissed — Trial judge did not err in finding that confrontation rule had been engaged by counsels' decision not to cross-examine on some significant points of evidence — Rule could be engaged when challenge to witness' evidence arose in closing

argument — There was no basis to interfere with judge's exercise of discretion to remedy breach of rule — It was not judge's role to prohibit jury from considering other pieces of evidence that they might view as important in reaching verdict.

Criminal law --- General principles — Criminal responsibility of parties — Aiders and abettors

Accused were three of five men convicted by jury on various counts of murder and manslaughter in deaths of deceased DM, B, and T — Accused were members of criminal organization known as Greeks and accused M was leader of Greeks — At trial, Crown called 106 witnesses, including members of Greeks and witnesses who entered into plea and immunity agreements — Judge instructed jury that P and O could be convicted of first degree murder as aiders or abettors or murder and that it could rely on doctrine of wilful blindness as alternative to actual knowledge — Accused M was convicted of manslaughter, accused P was convicted of first degree murder, and accused O was convicted of second degree murder — Accused appealed convictions on basis that judge failed to properly instruct jury on proper application of principles of partial liability — Appeals dismissed — Instructions on aiding and abetting and on wilful blindness were properly before jury — Accused S was convicted of first degree murder but did not appeal — There was air of reality to jury finding that S knowingly inflicted harm likely to cause death, that P and O knew or were deliberately ignorant about S's intentions, and that after knowing S's intentions, P and O intentionally assisted or encouraged S — There was evidentiary foundation for judge's charge on wilful blindness and reasonable inferences to be drawn from that evidence on issue of accused's knowledge.

Criminal law --- Offences against the person and reputation — Murder — Second degree murder

Accused were three of five men convicted by jury on various counts of murder and manslaughter in deaths of deceased DM, B, and T — Accused were members of criminal organization known as Greeks and accused M was leader of Greeks — At trial, Crown called 106 witnesses, including members of Greeks and witnesses who entered into plea and immunity agreements — Accused M was convicted of manslaughter, accused P was convicted of first degree murder, and accused O was convicted of second degree murder — Accused O appealed convictions on basis that judge failed to adequately instruct jurors on mens rea requirement for second degree murder — Appeal dismissed — Trial judge's instructions on mens rea were clear and jury was told of necessity of finding that O had requisite murderous intend in order to convict.

Criminal law --- General principles — Actus reus

Accused were three of five men convicted by jury on various counts of murder and manslaughter in deaths of deceased DM, B, and T — Accused were members of criminal organization known as Greeks and accused M was leader of Greeks — DM's death followed prolonged, continuous, and brutal assault where he was transported and delivered to office, duct-taped to chair, and tortured to death — At trial, Crown called 106 witnesses, including members of Greeks and witnesses who entered into plea and immunity agreements — Accused M was convicted of manslaughter, accused P was convicted of first degree murder, and accused O was convicted of second degree murder — Accused P appealed convictions on basis that judge's instructions on causation failed to adequately convey elements of substantial cause — Appeal dismissed — There was no possibility that jury would have considered that transportation of deceased DM to office would have met test for active participation in series of events that let to DM's death — Judge repeatedly conveyed to jury that accused had to have actively participated in continuous series of events and that minor role was not enough to meet element of offence.

Criminal law --- Offences against the person and reputation — Murder — Attempted murder

Accused were three of five men convicted by jury on various counts of murder and manslaughter in deaths of deceased DM, B, and T — Accused were members of criminal organization known as Greeks and accused M was leader of Greeks — At trial, Crown called 106 witnesses, including members of Greeks and witnesses who entered into plea and immunity agreements — Accused M was convicted of manslaughter, accused P was convicted of first degree murder, and accused O was convicted of second degree murder — Accused appealed convictions on basis that judge failed to instruct jury on included offence of attempted murder — Appeals dismissed — There was no air of reality to charge on attempted murder — Mens rea for attempted murder was nothing less than specific intent to kill — Evidence did not support and there was no allegation that P or O intended to kill deceased DM.

Evidence --- Hearsay — Exceptions — Where declarant available — Past recollection recorded

Accused were three of five men convicted by jury on various counts of murder and manslaughter in deaths of deceased DM, B, and T — Accused were members of criminal organization known as Greeks and accused M was leader of Greeks — At trial, Crown called 106 witnesses, including members of Greeks and witnesses who entered into plea and immunity agreements — Judge admitted hearsay evidence from witness C in form of diagram of vehicles she drew during police interview — Accused M was convicted of manslaughter, accused P was convicted of first degree murder, and accused O was convicted of second

degree murder — Accused O appealed convictions on basis that judge erred in admitting out-of-court statement of witness C for truth of contents — Appeals dismissed — Diagram could be admitted as past recollection recorded because C could no longer recall if she saw vehicles arrive or leave — Refusal to allow O opportunity to cross-examine C on voir dire was procedurally fair and there was no prejudice that could have resulted in miscarriage of justice.

Evidence --- Examination of witnesses — Refreshing memory — Miscellaneous

Accused were three of five men convicted by jury on various counts of murder and manslaughter in deaths of deceased DM, B, and T — Accused were members of criminal organization known as Greeks and accused M was leader of Greeks — At trial, Crown called 106 witnesses, including members of Greeks and witnesses who entered into plea and immunity agreements — At trial, witness X reviewed summary of one of her prior statements and was permitted to give evidence — Accused M was convicted of manslaughter, accused P was convicted of first degree murder, and accused O was convicted of second degree murder — Accused O appealed convictions on basis that judge erred in admitting out-of-court statement of witness X for truth of contents — Appeals dismissed — X was entitled to refresh her memory — Jury's task was determining if X did in fact have present memory as her admissions raised issues about her liability — Judge reviewed substance of defence counsel's attack on X's reliability and outcome was properly left to jury.

Criminal law --- Appeals — Appeal from conviction or acquittal — Grounds — Conduct of judge or counsel

Accused were three of five men convicted by jury on various counts of murder and manslaughter in deaths of deceased DM, B, and T — Accused were members of criminal organization known as Greeks and accused M was leader of Greeks — At trial, Crown called 106 witnesses, including members of Greeks and witnesses who entered into plea and immunity agreements — At trial, judge had interrupted cross-examination for various reasons, including to require counsel to read relevant portion of statement to witness, asking counsel to remove himself from hypothetical, and to interject comments — Accused M was convicted of manslaughter, accused P was convicted of first degree murder, and accused O was convicted of second degree murder — Accused appealed convictions on basis that judge improperly interrupted and fettered cross-examination of key Crown witnesses, rendering it less effective — Appeals dismissed — Interruptions and restrictions on cross-examination did not amount to significant and unwarranted constraint on rights of accused to make full answer and defence — Trial judge did not err in exercising discretion to require counsel to read relevant portions of statements to witnesses before cross-examining on inconsistencies — Trial judge's interjection was unfortunate but did not result in material prejudice to accused — Trial judge's admonition to counsel to remove himself from hypothetical was reasonable and in interest of maintaining trial decorum — Decision to limit further cross-examination was matter of trial management and was entitled to deference.

Criminal law --- Trial — Conduct of trial — Defence — Closing address

Accused were three of five men convicted by jury on various counts of murder and manslaughter in deaths of deceased DM, B, and T — Accused were members of criminal organization known as Greeks and accused M was leader of Greeks — At trial, Crown called 106 witnesses, including members of Greeks and witnesses who entered into plea and immunity agreements — During closing argument, M's defence counsel began to make submission related to witness U's murder of deceased A — Trial judge interrupted counsel, excused jury, and prohibited counsel from using deceased A's murder as example as there was no additional evidence about M's role in A's killing — Accused M was convicted of manslaughter, accused P was convicted of first degree murder, and accused O was convicted of second degree murder — Accused appealed convictions on basis that judge erred in restricting portion of M's closing argument before jury — Appeals dismissed — It was improper for defence to take advantage of incomplete record to potentially mislead jury — Accused's argument was based on impoverished conception of trial fairness.

Evidence --- Character — Character of accused — Miscellaneous

Accused were three of five men convicted by jury on various counts of murder and manslaughter in deaths of deceased DM, B, and T — Accused were members of criminal organization known as Greeks and accused M was leader of Greeks — At trial, Crown called 106 witnesses, including members of Greeks and witnesses who entered into plea and immunity agreements — Judge admitted evidence of intercepted phone calls that showed M threatening or berating Crown witnesses and transcript of statement witness T made to police that suggested M was connected to Hells Angels — Accused M was convicted of manslaughter, accused P was convicted of first degree murder, and accused O was convicted of second degree murder — Accused M appealed convictions on basis that judge erred in admitting evidence related to his propensity for violence — Appeals dismissed — Trial judge did not err in admitting intercepted phone calls or police statement transcript — Jury was

thoroughly instructed on dangers of engaging in propensity reasoning and moral prejudice — Prejudicial effect was weighed against probative value and conclusion was that evidence should be admitted with limiting instructions.

Evidence --- Character — Character of accused — Putting character in issue

Accused were three of five men convicted by jury on various counts of murder and manslaughter in deaths of deceased DM, B, and T — Accused were members of criminal organization known as Greeks and accused M was leader of Greeks — At trial, Crown called 106 witnesses, including members of Greeks and witnesses who entered into plea and immunity agreements — Crown was permitted to lead evidence that P and O were enforcers for Greeks with limiting instruction to reduce risk of prejudice to accused — Accused M was convicted of manslaughter, accused P was convicted of first degree murder, and accused O was convicted of second degree murder — Accused appealed convictions on basis that judge failed to instruct jury on certain propensity-based inferences that jury was invited to accept in closing submissions — Appeals dismissed — Judge's instructions clearly and comprehensively cautioned jury against prohibited propensity reading — Judge restricted enforcer description to approximate times of murders with which each accused was charged and gave two limiting instructions with specific cautions — Judge explained proper use jury could make of evidence and specifically warned against drawing inference that M directed or authorized killing based only on finding that he was leader of Greeks.

Criminal law --- Jury — Charging jury — Miscellaneous

Accused were three of five men convicted by jury on various counts of murder and manslaughter in deaths of deceased DM, B, and T — Accused were members of criminal organization known as Greeks and accused M was leader of Greeks — At trial, Crown called 106 witnesses, including members of Greeks and witnesses who entered into plea and immunity agreements — Witness evidence of group's shocked reactions after DM's death was admitted — Accused M was convicted of manslaughter, accused P was convicted of first degree murder, and accused O was convicted of second degree murder — Accused appealed convictions on basis that judge erred to properly instruct jury on evidence of group's reaction upon learning of DM's death — Appeals dismissed — Jury was not improperly prevented from considering post-offence conduct evidence — Judge appropriately cautioned jury against using evidence of groups' reaction as direct proof of accused's state of mind and whether accused had requisite intent for murder.

Criminal law --- Defences — Miscellaneous

Accused were three of five men convicted by jury on various counts of murder and manslaughter in deaths of deceased DM, B, and T — Accused were members of criminal organization known as Greeks and accused M was leader of Greeks — At trial, Crown called 106 witnesses, including members of Greeks and witnesses who entered into plea and immunity agreements — During closing submissions, O suggested that there was evidence connecting DS, who was another Greeks member, to T's murder, including that DS regularly drove vehicle used in homicide — Judge instructed jury to disregard submission as it had no air of reality — Accused M was convicted of manslaughter, accused P was convicted of first degree murder, and accused O was convicted of second degree murder — Accused O appealed convictions on basis that judge erred by instructing jury to disregard defence theory that DS drove vehicle used in T's murder — Appeals dismissed — It was appropriate for judge to consider whether there was air of reality before leaving defence with jury — Trial judge correctly concluded that evidence relied on did not connect DS to scene of T's death and there was no air of reality to third-party defence.

Criminal law --- Charter of Rights and Freedoms — Life, liberty and security of person [s. 7] — Principles of fundamental justice — Procedural fairness

Accused were three of five men convicted by jury on various counts of murder and manslaughter in deaths of deceased DM, B, and T — Accused were members of criminal organization known as Greeks and accused M was leader of Greeks — At trial, Crown called 106 witnesses, including members of Greeks and witnesses who entered into plea and immunity agreements — Accused M was convicted of manslaughter, accused P was convicted of first degree murder, and accused O was convicted of second degree murder — Accused appealed convictions on basis that judge failed to satisfy requirement to deliver fair and balanced charge — Appeals dismissed — Jury instructions were not fatally deficient, unfair, or imbalanced — None of accused's evidence demonstrated imbalance or unfairness in jury instruction — Accused had elevated evidence beyond reasonable importance in case — Judge adequately pointed jury to evidence and left jury to draw conclusions.

Criminal law --- Appeals — Appeal from conviction or acquittal — Procedure — Transcript or record of proceedings

Accused were three of five men convicted by jury on various counts of murder and manslaughter in deaths of deceased DM, B, and T — Accused were members of criminal organization known as Greeks and accused M was leader of Greeks — At trial, Crown called 106 witnesses, including members of Greeks and witnesses who entered into plea and immunity agreements —

During jury instructions, P's counsel filed unsuccessful application to have jury provided with transcripts of closing submissions of all counsel in order to address imbalanced jury instructions — Accused M was convicted of manslaughter, accused P was convicted of first degree murder, and accused O was convicted of second degree murder — Accused appealed convictions on basis that judge erred in refusing to provide jury transcripts of defence counsel's closing submissions — Appeals dismissed — There was no prejudice to cure that would require jury to be provided with transcripts — Ground of appeal relied on proposition that jury instructions were fatally imbalanced — There was no authority for proposition that transcripts of counsels' closing submissions be left with jury.

***Per curiam*:**

I. INTRODUCTION

1 The appellants, Leslie Podolski, Sheldon Richard O'Donnell, and Peter Manolakos, are three of five men convicted by a jury on various counts of murder and manslaughter in the violent deaths of David Barry Marnuik, Thomas Edward Bryce, and Ronald James Thom. The deaths occurred between July 2004 and May 31, 2005, in or near Vernon, British Columbia. The guilty verdicts against all five accused were registered on November 25, 2012, on the jury's 12th day of deliberations.

2 The trial was distinguished for its length, the complexity of the evidence adduced, and the number of paths to conviction open to the jury. It posed unique challenges to the Crown and each of the five accused to present and advance their theories. It also posed unique challenges to the trial judge, Mr. Justice Smart, to ensure fairness of trial process, clarity for the jury, and balance, all within the obligation to provide *each* of the five men a fair trial.

3 These challenges weave themselves through, and provide a complex foundation for, the conviction appeals before us. Sixteen grounds of appeal are advanced, each supported by all three appellants, although the importance of the grounds of appeal differs between appellants. We note the appellants earlier advanced other challenges related to the trial judge's rulings on certain off-the-record proceedings and sought the appointment of an *amicus curiae*, which this Court addressed in reasons respectively indexed as *R. v. Podolski*, 2015 BCCA 513 (B.C. C.A.), and *R. v. Podolski*, 2017 BCCA 169 (B.C. C.A.).

4 The hearing of these appeals was assisted greatly by the pre-hearing work of counsel and Mr. Justice Frankel as appeal management justice. Counsel provided an Agreed Statement of Facts from which much of this Introduction has been drawn.

5 We elaborate on the scale of the trial below. Consistent with counsels' predominant style in the appeal, we generally refer to the appellants, other accused, witnesses, and victims by their surnames.

6 The trial concerned four counts charged, which were related to the three homicides. The theory of the Crown is that the three homicides were directly related to the operations in Vernon of a criminal organization known as "the Greeks", which had as its reason for being the sale and delivery of drugs (mainly heroin and cocaine). Manolakos is conceded to have been the leader of the Greeks. O'Donnell and Podolski, along with Dale Gordon Sipes who was tried with the appellants, were members of the Greeks. The fifth man tried with the appellants, Douglas Corey Brownell, was not a member of the Greeks but is alleged to have had a working drug-trafficking relationship with them.

7 The first in time homicide addressed in the trial was of Marnuik. His body was never found. It is estimated Marnuik died on July 28, 2004, from a prolonged beating. The Crown alleged his death resulted from a beating administered as discipline for stealing from the Greeks, and to extract repayment. Podolski and O'Donnell were charged with the first degree murder of Marnuik (Count 1). Manolakos was charged with the manslaughter of Marnuik (Count 2). Podolski was convicted of first degree murder; O'Donnell was convicted of second degree murder; and Manolakos was convicted of manslaughter. Sipes, who has abandoned his appeal, was charged with and convicted of the first degree murder of Marnuik.

8 The second in time homicide addressed in the trial was of Bryce on November 26, 2004. Bryce died from injuries sustained in a beating administered on November 9, 2004. The Crown alleged Bryce was a drug dealer with a rival gang who sought to preclude a member of the Greeks from selling drugs at a park in Vernon. O'Donnell was charged with and convicted of the

second degree murder of Bryce (Count 4). Brownell, not before us on this appeal, was charged with and convicted of second degree murder of Bryce.

9 The third in time homicide addressed in the trial was of Thom on or about May 31, 2005. Thom died from bullet wounds from two guns. The Crown alleged that Manolakos, having reviewed an Information to Obtain a Search Warrant wrongly obtained from a local criminal law lawyer, William Mastop, incorrectly believed Thom to be a police informant concerning the Greeks and had him killed for that reason. O'Donnell and Manolakos were charged with and convicted of the first degree murder of Thom (Count 3). Sipes and Brownell were also charged with and convicted of the first degree murder of Thom.

10 [Four-line paragraph redacted.]

1. The Trial Proceedings

11 The charges proceeded by direct indictment. While proceedings before jury selection began in 2006, the main pre-trial proceedings occurred between the late spring of 2008 and the beginning of the trial before the jury on May 30, 2011.

12 Most of the multitudinous pre-trial applications and rulings do not bear on this appeal. What is clear is that by the time the first witness was called, the judge, by reason of those many applications and rulings, had extensive exposure to the character of the case and the organizational background to the homicides. In particular, the judge dealt with extensive wiretap challenges and permitted the Crown to introduce only 37 wiretap calls, suitably redacted, of the 82 presented to him, along with a small number of supplemental calls that he subsequently admitted: see *R. v. Sipes*, 2011 BCSC 640 (B.C. S.C.).

13 The trial before the jury commenced on May 30, 2011. The Crown and each of the five accused made brief opening statements. The Crown's last witness testified over a year later, on June 27, 2012. We are told the evidence was adduced over 273 days of trial. The Crown called 106 witnesses, including members of the Greeks and witnesses who had entered into plea and immunity agreements in connection with their crimes. The Crown tendered 288 exhibits, many with sub-exhibits attached. The accused did not testify and did not present evidence. During the trial, the judge addressed many points of contention. Most of the rulings are not at issue in these appeals. Where they are, they are described below.

14 The Crown's address to the jury commenced on August 20, 2012, and concluded on August 28, 2012. The defence addresses to the jury commenced on August 30, 2012, and concluded on September 28, 2012. In all, the addresses took 24 days — six days for the Crown and 18 days for all five accused.

15 After counsels' submissions to the jury concluded, the judge retired to complete his jury instructions. He provided counsel with a draft of the first half (approximately) on October 19, 2012. Counsel then made written submissions on that portion. The judge provided counsel with the second portion of his draft instructions on October 31, 2012. The judge next heard two days of submissions on the entire instructions, after which he finalized his charge.

16 The judge instructed the jury over five days from November 7, 2012, to November 14, 2012. In addition, the judge provided a written copy of his instructions to the jury for it to follow along. The written instructions with numbered paragraphs are 486 pages long. As part of the instructions, the judge attached a table of contents and appendices, including a document setting out the 30 possible verdicts and a document listing all witnesses with a description of the nature of their evidence and the dates on which they testified.

17 Recognizing that the formal record of the instructions is the transcript of the judge's words, for convenience we replicate portions of the jury instructions using the judge's written paragraph numbering. We see no material difference between those written instructions and the transcript of the instructions.

18 The jury began deliberations in the afternoon of November 14, 2012. During its deliberations the jury asked only one question: whether it could see or hear cross-examination by counsel for O'Donnell of Witness U, a witness at the heart of a polygraph issue that is the subject of one of the grounds of appeal. After reminding the jury of his instructions on permissible uses of prior consistent and inconsistent statements, the judge played back the relevant portion of Witness U's cross-examination.

19 On November 25, 2012, the jury rendered verdicts on all counts in respect of each of the five accused. All five were convicted of the offences charged, with the exception of O'Donnell, who was charged with first degree murder of Marnuik but was convicted of second degree murder.

20 With that outline of the trial, we elaborate on the Crown theory, and discuss in a summary way the evidence called and the key witnesses with respect to each of the three homicides before the court, before turning to the substance of the appeals. We address the evidence in more detail in our considerations of the individual grounds of appeal.

2. The Crown Theory

21 The Crown's theory of the case is that each of the homicides was the product of discipline or enforcement action taken by the accused on behalf of the Greeks. The Crown contends the Greeks was organized in a business structure kind of way, with certain members filling certain assigned job functions. The Crown contends the Greeks had "perhaps" 50 members and associates. It says certain members were "runners" and "drivers", whose job was to sell drugs to customers on the street or to deliver drugs to customers who had placed their order by telephone (the dial-a-dope business). The Crown contends that at the beginning of a shift a runner was provided a cell phone, a quantity of drugs, and a vehicle, although some runners used their own vehicles.

22 The Crown contends a second group of members, referred to as "bankers", supplied drugs to the runners and received cash in return from the runners after the drug sales.

23 A third group of members, says the Crown, were "enforcers" — people who, while perhaps taking part in drug trafficking, were specifically responsible for enforcing the rules of the gang and dealing with discipline. It says it was not uncommon for members to perform more than one job function at the relevant time.

24 The Crown contends that O'Donnell and Podolski, as well as Sipes and the three Crown witnesses, acted as enforcers for the Greeks at various times. [Three-line sentence redacted.]

25 Brownell is alleged to have had a working drug-trafficking relationship with the Greeks but was not a member.

26 The Crown alleges that Manolakos, as the leader of the Greeks, kept a close eye on the business with the help of senior members of the gang. Those members were bestowed a gold ring and leather vest piped in red to signify their elevated status. All of the accused at trial except Brownell had such a ring and vest. [Two-line sentence redacted.]

27 The Crown alleges that the Greeks' main headquarters was a two-storey warehouse-style building with a boardroom and attached small apartment-style rooms, nicknamed "the Office". Manolakos lived in the basement of his parents' house. It was known as "the Castle". Manolakos also ran a pizzeria where members of the Greeks congregated.

2.1 The Marnuik Homicide

28 Marnuik was a drug runner for the Greeks who sold drugs to customers in Vernon at the street level. He was also a drug user with a history of using drugs he was supposed to be selling.

29 The Crown contends the events causing Marnuik's death started with his disappearance while working a shift near the end of July 2004. Marnuik disappeared with a drug cell phone and a modest amount of cash and drugs. The Crown alleges that at the time Marnuik disappeared, Witness U and Manolakos were in Calgary, and Podolski had temporary responsibility for the Greeks' dial-a-dope phone lines. The Crown contends that when Podolski learned of Marnuik's disappearance, he contacted Witness U in Calgary, who in turn consulted Manolakos. The Crown alleges Manolakos told Witness U to tell Podolski to find their money and give Marnuik a beating. Marnuik was found with the help of Norman McDonnell and transported to the Office.

30 The Crown contends that once at the Office, Marnuik was duct-taped to a chair, and then beaten repeatedly over a prolonged period with fists, a hammer, a PVC pipe, and a fish bat, and burned with a blow torch to his hands, legs, and forehead.

31 Marnuik died of his injuries and then, says the Crown, his body was removed from the Office and taken to a remote bush location about 50 kilometres from Vernon. There it was cremated. The Crown says further that the remains were dismembered by removal of Marnuik's feet, arms, and head; rocks were then used to break them into smaller pieces. No remains of Marnuik's body were ever found.

32 The Crown contends O'Donnell, Sparks, and Witness V (also a member of the Greeks) attempted to dispose of the chair to which Marnuik had been taped by dousing it with gasoline at a remote location and setting it afire. In October 2004, the police recovered pieces of the chair.

33 The Crown alleges that Sipes, Podolski, O'Donnell, [and several others including] Sparks, and Steve Glass were present at the beating of Marnuik, which was conducted on the instruction of Manolakos. Of those [present], Podolski, O'Donnell, and Sipes were convicted of the murder of Marnuik [and others entered into plea or immunity agreements with respect to this and other homicides]. Sparks and Glass were not charged in connection with Marnuik's death.

34 Manolakos was convicted of the manslaughter of Marnuik.

35 While many witnesses gave evidence that bore on the Marnuik homicide, the key witnesses at trial in respect of it were Witness U, Witness T, McDonnell, Sparks, and Witness W:

- In respect of the charge against Manolakos, Witness U testified that while he was in Calgary he received instructions from Manolakos that Marnuik was to be given a beating, and that he relayed Manolakos' instructions to Podolski. He testified Manolakos gave similar instructions again on their return to Vernon.

- In respect of the charge against Sipes, Podolski, and O'Donnell, Witness U testified that he participated in the prolonged beating of Marnuik at the Office, along with Podolski, O'Donnell, Sipes, Sparks, and Witness T. He testified Marnuik died and he then participated in disposing of Marnuik's body. He described the wrapping of Marnuik's body, its transportation, its cremation, and its further destruction. Witness U directed the police to a site where he said Marnuik's body had been cremated and broken.

- [One of those present] testified that he participated in the beating of Marnuik, along with Podolski, O'Donnell, Sipes, Glass, Sparks, and Witness U. Witness T testified Marnuik died, and he then assisted in disposing of Marnuik's body. He described the wrapping of Marnuik's body somewhat differently than did Witness U. He described the transportation of Marnuik's body and its cremation. [Both witnesses] directed police to the same location [redacted], identifying it as the location Marnuik's body had been cremated.

- McDonnell, a driver for the Greeks, testified he located Marnuik after Marnuik had disappeared with the phone, drugs and money, and notified the Greeks he had done so. He testified that "Big Al" (whom he identified as Podolski) told him Marnuik was being beaten. He further testified that at one stage he went to the Castle and suggested to Manolakos that the beating of Marnuik was "overkill", to which Manolakos responded with words to the effect of "the guys know what they are doing".

- Sparks testified he participated in beating Marnuik, along with Podolski, O'Donnell, Sipes, and Witness T. On cross-examination, Sparks said that Witness U was at the Office "at some point" on that day. Sparks testified he participated in the cremation of Marnuik's body, and further destroying it by smashing the remains with rocks. He directed police to the same site as did [two other witnesses], saying it was the location Marnuik's body had been burned and further destroyed.

- Witness W, an acquaintance of Podolski, testified he heard moaning when he was called to the Office by Podolski (which the Crown postulated was during Marnuik's beating). He testified the sound so scared him that he went outside, followed by Podolski who told him "[t]hey were giving a guy a beating over a thousand dollar debt".

2.2 The Bryce Homicide

36 The Crown contends that Bryce was a rival Vernon drug dealer who occasionally purchased drugs from Brownell, who in turn occasionally purchased drugs from the Greeks for resale. The Crown says that Bryce had a territorial dispute with Witness V, and that Bryce made threats to Witness V to the effect that the Greeks' days were numbered and they were all going to die. It is the Crown's theory that on November 9, 2004, Witness T, having learned of Witness V's dispute with Bryce, told Brownell that he (Witness T) wanted to "have a chat" with Bryce, that Brownell told Witness T that coincidentally he (Brownell) would be meeting soon with Bryce, and that O'Donnell and Sparks accompanied Witness T to the Brownell-Bryce meeting location, to jointly participate in giving Bryce a beating for speaking badly about the gang.

37 The Crown's theory is that when Bryce arrived to meet Brownell, several members of the Greeks were waiting for him. The Crown alleges O'Donnell approached Bryce from behind and struck him over the head with a baseball bat. Bryce fell to the ground after which, says the Crown, O'Donnell hit Bryce again. Others joined in, and Bryce was repeatedly struck in the head and the chest area with the baseball bat, and stomped on the chest and abdomen area. The Crown contends the beating of Bryce was soon over and when those present departed from the location, a car or cars ran over Bryce. Bryce was found by a member of the public. He was taken unconscious to the hospital in Vernon. There he died after 17 days, never having regained consciousness.

38 The principal cause of Bryce's death was blunt force injury to his head, with skull fractures and brain injury caused by one or more blows. Bryce also had numerous abrasions, bruises, and several fractures, including a compound fracture to the left leg that was consistent with being run over by a car.

39 The Crown says O'Donnell, Witness T, Brownell, Sparks, Witness V, Witness X, and another were present at the beating of Bryce, and that a civilian witnessed it from a distance. Important witnesses in the Bryce homicide charges were Witness T, Sparks, Witness V, Witness X, and the civilian:

- [A witness who was present] testified that only he and O'Donnell assaulted Bryce; that O'Donnell wielded the bat, repeatedly striking Bryce in the head and torso; and that he [redacted] stomped on Bryce's chest and abdomen with his boots. Witness T also testified that Brownell drove over part of Bryce's body, going back and forth over it a few times as if the vehicle were stuck.

- Sparks testified that O'Donnell struck Bryce on the head and drove the bat into Bryce's mid-section, and that Witness T kicked Bryce in the head. Sparks testified that as O'Donnell was leaving, O'Donnell said words to the effect, "Did you see him go down? I hit him really hard. Did you hear him moaning?"

- Witness V testified to seeing O'Donnell hitting Bryce in the head with a baseball bat; to Bryce falling to the ground; to, along with Witness T and O'Donnell, kicking and punching Bryce; and to Brownell hitting Bryce in the head with the bat and running over him with the car a couple of times in a back and forth motion.

- Witness X testified she saw Witness T, Brownell, and three others strike Bryce.

- The civilian witness testified he saw a group of individuals using an object similar to a pipe, a bat, or a stick, swinging and kicking a person before they departed, and thought the tallest of the group did most of the hitting. He testified that after they left, he approached the victim, saw that the victim's head and face were injured, and called 911.

2.3 The Thom Homicide

40 Thom was shot to death on May 31, 2005. The Crown contends that Thom, a Vernon resident and drug user who occasionally worked as a runner for the Greeks in their dial-a-dope operations, came (wrongly) under suspicion for informing to police. The Crown alleges that Manolakos ordered the planned and deliberate murder of Thom, which was carried out by his enforcers O'Donnell, Sipes, and Witness T, acting with the assistance of Brownell, who conveyed Thom to the location where he was shot. The Crown contends that Thom had also attracted disapproval for making disparaging comments about Manolakos.

41 Mistaken suspicion of being an informant had fallen on Thom after a police raid on the residence of two men, Jon Thom (the brother of the victim Thom) and Devan Shaw, who were both runners of the Greeks. Manolakos obtained a copy of the Information to Obtain that supported the police action from the lawyer Mastop. After reading of the existence of a confidential informant, Manolakos wrongly concluded the informant was Thom. The Crown alleges that Manolakos then met with his enforcers and, through a hand gesture simulating the use of a gun, directed Thom be shot. The Crown contends that Witness T, Witness U, Sipes, and O'Donnell were given the task of killing Thom, but Witness U had been beaten the previous evening and was unable to participate on the night of Thom's death.

42 In late May 2005, Thom, Belinda Scott (Thom's girlfriend), and drug user Ian Oakes, were staying in a campsite on the shore of Okanagan Lake. The Crown alleges Witness T, in the company of Sipes and O'Donnell, enlisted Brownell to lure Thom from the campground. The Crown alleged that at about 3:00 to 3:30 a.m. on May 31, 2005, Brownell persuaded Thom to leave the campground with him. Thom was not seen alive again by Scott or Oakes.

43 The Crown alleges Brownell drove Thom to a remote roadside location about five kilometres outside Vernon. There the Crown says Thom was fatally shot by Sipes and O'Donnell as soon as he alit from Brownell's vehicle, O'Donnell using a .22 calibre revolver and Sipes using a .380 automatic handgun.

44 The Crown contends that after the shooting, Brownell returned to the tent at the campsite, told Scott "I'm sorry, things got so fucked up", gave her a hug, and said he had to leave Thom behind.

45 The Crown contends that after Thom was shot, O'Donnell, Sipes and Witness T drove in [an SUV] to the residence of Williams, where they changed clothes and left behind a bag containing the firearms used in shooting Thom.

46 The RCMP found Thom dead at the scene at about 4:13 a.m. on May 31, 2005. There were empty shell casings on the ground near his head. Dr. Stephen, the forensic pathologist who performed the autopsy of Thom, observed eight bullet entry wounds to Thom's face and torso.

47 In respect of the charge against Manolakos, several witnesses recounted the gestures described above and statements they said Manolakos made, including Witness U, Witness T, Coutts, Shaw, Williams, Witness W, and Rob Pharoah. In respect of the charge against O'Donnell, Sipes, and Brownell of killing Thom, the main witnesses — Scott herself having been subsequently murdered — were Witness U, Witness T, Oakes, Coutts, Williams, Maria Dyck, and Melissa Clayton:

- Witness U testified he participated in planning to kill Thom, but he did not attend the night Thom was shot because he had been beaten the night before.

- Witness T testified he participated in killing Thom by arranging for Brownell to bring Thom to the place of his eventual death, and was present when O'Donnell and Sipes fatally shot Thom. He testified also of events at Williams' residence after Thom was shot.

- Oakes identified Brownell as the person who attended the tent at the campsite on the shore of Okanagan Lake in the early morning of May 31, and said Brownell later departed with Thom.

- Coutts, a part-time enforcer for the Greeks, testified he attended a pre-shooting meeting attended by Manolakos, O'Donnell, Sipes, Witness T, and Witness U.

- Williams, Dyck, and Clayton all testified about events at Williams' residence, including that O'Donnell, Sipes, and Witness T arrived at the residence in the early hours of May 31, 2005.

II. GROUNDS OF APPEAL

48 With that cursory overview of the offences, the Crown theory, and the role of certain key witnesses, it is useful to list now comprehensively the grounds of appeal advanced by the appellants as they were addressed at the hearing of the appeals.

The grounds of appeal address issues of trial fairness, admissibility of evidence, and correctness and adequacy of the jury instructions. Re-ordering them to accord with the order of our reasons, the appellants say the judge erred:

1. by failing to provide a *Vetrovec* warning or any lesser warning regarding the impact of witness character on the credibility of certain Crown witnesses, particularly Williams and Martin;

2. in the content of the *Vetrovec* warning, by failing to properly instruct the jury on evidence that is sufficiently independent for use confirming the evidence of *Vetrovec* witnesses;

3. by providing a *Browne v. Dunn* instruction that was both unnecessary and inconsistent with the principles laid down in that case;

4. by failing to properly instruct the jury on application of the principles of party liability in s. 21(1) of the *Criminal Code*, R.S.C. 1985, c. C-46;

5. by failing to provide an adequate instruction on the application of s. 231(5) of the *Criminal Code* and the elements of first degree murder committed during a forcible confinement (the *Harbottle* instruction);

6. by failing to instruct the jury on the availability of attempted murder as a lesser included offence on Count 1;

7. by wrongly admitting evidence said to be hearsay;

8. by interfering with the cross-examination of defence counsel, including by failing to permit certain cross-examination of Witness U with respect to a polygraph test and [of a witness] with respect to late disclosed cellular telephone records;

9. by interrupting counsel for Manolakos during closing submissions and prohibiting him from arguing that certain evidence of Witness U demonstrated a Greeks gang member could commit murder without Manolakos' approval;

10. by wrongly admitting certain evidence prejudicial to Manolakos, being interceptions of phone communications of Manolakos threatening or berating witnesses, and evidence that Manolakos had an association with the Kelowna Hells Angels;

11. by failing to correct the Crown's improper and propensity-based use of evidence that Podolski and O'Donnell were Greeks "enforcers";

12. by failing to correct the Crown's improper and propensity-based use of evidence that Manolakos, as leader of the Greeks, exercised tight control over significant gang activities;

13. by expressly directing the jury to disregard "exculpatory post-offence conduct" evidence;

14. by removing from the jury the defence theory of O'Donnell in respect of the Thom murder that another person participated in the offence;

15. by failing to present fair and balanced instructions to the jury; and

16. by failing to provide the jury copies of counsels' submissions and by suggesting that the jurors could resolve their concerns about re-hearing Witness U's cross-examination by reviewing the judge's evidentiary summary.

III. POWERS OF THE COURT

49 Section 686 of the *Criminal Code* defines our powers on a conviction appeal:

686 (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal

(a) may allow the appeal where it is of the opinion that

(i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,

(ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or

(iii) on any ground there was a miscarriage of justice;

(b) may dismiss the appeal where

. . .

(iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (a)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred ...

50 There being a body of evidence adduced that could support conviction, s. 686(1)(a)(i) is not engaged. In other words, the questions for us are whether the appellants have established an error of law (s. 686(1)(a)(ii)), and, if so, whether a substantial wrong or miscarriage of justice has occurred (s. 686(1)(b)(iii)), or in the alternative, whether the appellants have established a miscarriage of justice within the meaning of s. 686(1)(a)(iii).

51 The grounds of appeal discussed below are approached with these questions in mind.

IV. ANALYSIS

1. The Vetrovec Issues (Grounds 1 & 2)

52 In *R. v. Vetrovec*, [1982] 1 S.C.R. 811 (S.C.C.), Justice Dickson (later C.J.C.) established the current practical approach for jury instructions with respect to the corroboration of accomplices. He eschewed the unnecessary complexity and formalism of the rule requiring corroboration for witnesses who fell into that category. Instead, he recognized that certain witnesses — be they accomplices or any other person of sufficiently disreputable character — may need confirmatory evidence before their testimony can be relied upon. Here we set out in full the powerful conclusions Justice Dickson reached, explaining both the rationale for this approach and the expectation of a "clear and sharp" warning, which begin at 831:

> I would only like to add one or two observations concerning the proper practice to be followed in the trial court where as a matter of common sense something in the nature of confirmatory evidence should be found before the finder of fact relies upon the evidence of a witness whose testimony occupies a central position in the purported demonstration of guilt and yet may be suspect by reason of the witness being an accomplice or complainant or of disreputable character. There are great advantages to be gained by simplifying the instruction to juries on the question as to when a prudent juror will seek some confirmation of the story of such a witness, before concluding that the story is true and adopting it in the process of finding guilt in the accused as charged. It does not, however, always follow that the presiding justice may always simply turn the jury loose upon the evidence without any assisting analysis as to whether or not a prudent finder of fact can find confirmation somewhere in the mass of evidence of the evidence of a witness. Because of the infinite range of circumstance which will arise in the criminal trial process it is not sensible to attempt to compress into a rule, a formula, or a direction the concept of the need for prudent scrutiny of the testimony of any witness. What may be appropriate, however, in some circumstances, is a clear and sharp warning to attract the attention of the juror to the risks of adopting, without more, the evidence of the witness. There is no magic in the word corroboration, or indeed in any other comparable expression such as confirmation and support. The idea implied in those words may, however, in an appropriate case, be effectively and efficiently transmitted to the mind of the trier of fact. This may entail some illustration from the evidence of the particular case of the type of evidence, documentary or testimonial, which might be drawn upon by the juror in confirmation of the witness' testimony or some important part thereof. I do not wish to be taken as saying that such illustration must be carried to exhaustion. However, there is, in some circumstances, particularly in lengthy trials, the need for helpful direction on

> the question of sifting the evidence where guilt or innocence might, and probably will turn on the acceptance or rejection, belief or disbelief, of the evidence of one or more witnesses. All of this applies equally in the case of an accomplice, or a disreputable witness of demonstrated moral lack, as for example a witness with a record of perjury. All this takes one back to the beginning and that is the search for the impossible: a rule which embodies and codifies common sense in the realm of the process of determining guilt or innocence of an accused on the basis of a record which includes evidence from potentially unreliable sources such as an accomplice.
>
> [Emphasis added.]

53 All three appellants challenge the judge's treatment of the *Vetrovec* issues raised by the Crown witnesses. At trial, the Crown's case relied heavily on the evidence of members of the Greeks and their associates. Many, if not most, of these witnesses had tarnished character, and their testimony was properly assailed on this basis. The defence theory was their evidence was so unreliable that it could not be said the Crown had proved its case beyond a reasonable doubt. In general terms, the defence asked the judge to provide the jury a list of 16 witnesses whose evidence was fatally flawed as freestanding evidence; they asked the judge to give a warning or caution consistent with *Vetrovec* in respect of those witnesses. We say in general terms because counsel for Sipes supported the position but would have opposed it if Sipes were tried alone. The judge recorded Sipes' position:

> [4] ... (i) it [was] extremely difficult for the court to provide examples of corroborative evidence in a way that [was] succinct, fair, and balanced because of the internal inconsistencies in such evidence; and (ii) much of the risks and frailties associated with these witnesses and their evidence [had] already been exposed to the jury through the extensive cross-examinations in a year-long trial.

54 The judge provided a *Vetrovec* warning in his charge to the jury concerning the evidence of six witnesses: Witness U, Witness T, Coutts, Witness Y, Sparks, and Witness V. He did not provide such a warning with respect to the evidence of the other ten witnesses on the appellants' list: Williams, Pharoah, Shaw, Dyck, Clayton, Witness W, McDonnell, Jesse Martin, Witness X, and another.

55 The appellants raise two grounds of appeal that relate to this warning. First, the appellants contend the judge erred in failing to give a *Vetrovec* warning regarding the evidence of the ten witnesses omitted from the warning, or in the alternative, in failing to provide a diluted warning concerning their evidence. They approach this issue from the sensible viewpoint that if they do not succeed in persuading us a *Vetrovec* warning was required for the testimony of Williams and Martin, where the case for such a warning was the highest among the witnesses listed, then it follows the same was not required for the other eight, whose involvement in events was not as deep or whose character was not as tarnished. They recognize also that as between Williams and Martin, the case for a *Vetrovec* warning was highest for Williams. Accordingly, our analysis of this ground focuses more on the trial judge's treatment of Williams' evidence.

56 Second, the appellants challenge the content of the *Vetrovec* warning, saying the judge wrongly omitted a caution as to the contaminating or tainting effect the extensive police interview processes may have had on the independence of a witness' testimony and the consequent capacity of that testimony to corroborate evidence of a *Vetrovec* witness. In saying many witnesses were tainted by the police, the appellants point to: evidence of the extensive interviews conducted by the police, during which the police revealed evidence that had been gathered; evidence of opportunity for collusion between witnesses as to the events under investigation; and evidence that many witnesses changed their accounts as the investigation evolved and as police described accounts given by other witnesses and the prevailing police theory.

57 In a complex and lengthy investigation into serious crimes such as these, the prod of revelations is not uncommon, nor is the experience of a witness changing his or her account as the revealed knowledge of the police becomes deeper. The question on the second *Vetrovec* ground of appeal is the effect of these considerations on the contents of the jury instructions concerning credibility and the jury's treatment of evidence of these unsavoury witnesses. The answer, the appellants say, is the jury instructions should have fully explained the impact of this police "tainting" on the "independence" necessary to corroborate the testimony of *Vetrovec* witnesses. In their factum on the *Vetrovec* issues, they put it this way:

> 83. ...Where instead there is a live issue before the court that the potential corroborative evidence may have been the product of collusion or tainting, the issue of collusion or tainting should be left for the jury to decide, along with an instruction that if the jury concludes the evidence is tainted then that evidence cannot be used to confirm the veracity of the *Vetrovec* witness.

In the appellants' submission, the omission of this refinement left it open to the jury to give credit to evidence of key Crown witnesses because their evidence accorded in some fashion with non-*Vetrovec* witnesses whose independence was a live issue.

58 While not an independent ground of appeal, the appellants press the point that these two grounds of appeal are mutually reinforcing. In so doing, they use Williams as an example. They say Williams' character was so unsavoury that his evidence required independent corroboration, but he was omitted from the *Vetrovec* warning. This allowed his evidence to be used without looking for independent evidence giving it credit. They say further that he was the subject of police tainting, and the jury should have been particularly alerted to this possibility, but no such instruction was given. The appellants say that the judge's failure on both issues has had the effect of allowing the unchecked evidence of an individual who was impugned on all fronts to corroborate the evidence of the *Vetrovec* witnesses — the most unreliable ones of all.

59 In the main, the appellants say the result of these deficiencies was an instruction that fatally short-changed the jury of the instruction it should have received in order to avoid the dangers that *Vetrovec* (and subsequent cases) sought to address.

60 While the appellants advance two *Vetrovec* grounds of appeal, the first really discloses two questions. Accordingly, we address these grounds in three parts by considering:

> 1. whether the judge erred in giving a *Vetrovec* warning in respect of six witnesses only;
>
> 2. if not, whether he erred by failing to say more in the nature of a diluted warning concerning the list of ten; and
>
> 3. whether the judge erred in the content of the *Vetrovec* instruction in his treatment of independent evidence that may restore faith in the evidence of the *Vetrovec* witnesses.

1.1 The Scope of the Warning

(a) Background

(i) Ruling on the Vetrovec warning at trial

61 In his ruling indexed as *R. v. Sipes*, 2012 BCSC 1148 (B.C. S.C.), the judge limited the *Vetrovec* warning to six witnesses who had admitted their involvement in the homicides and other criminal behavior: Witness U, Witness T, Coutts, Witness Y, Sparks, and Witness V. Therein he set out the factors usually considered in determining whether to give a *Vetrovec* warning and the requisite approach:

> [2] Ms. Johnstone, on behalf of the Crown, provides a thorough summary of the applicable legal principles. The accused take no issue with her summary of the law or the 10 factors identified as relevant to whether to provide a *Vetrovec* warning. The factors are:
>
> • the witness is an accomplice;
>
> • the witness has opportunity to lie for personal benefit, including full or limited immunity from prosecution, or some other benefit;
>
> • the witness has a record of perjury;
>
> • the witness has a lengthy criminal record, including lengthy criminal record of dishonesty;
>
> • the witness has a history of substance abuse;

• the witness is involved in other criminal activities;

• the witness has a motive to lie by reason of connection to the crime or to the authorities;

• there is unexplained delay in the witness coming forward with the story;

• the witness has provided different accounts on other occasions, including lying to the police;

• the witness has lied under oath; and

• the witness may be deflecting blame on another, or protecting another.

. . .

[5] In *Vetrovec v. The Queen*, [1982] 1 S.C.R. 811, the Supreme Court of Canada did away with the mandatory requirement of corroboration for accomplices. The Court left it to the trial judge in the circumstances of the particular case to determine whether to warn the jury of the danger of relying on evidence of an accomplice in the absence of confirmatory evidence. The Court also said that such a warning was not restricted to accomplices and may be appropriate for any untrustworthy witness.

. . .

[7] The two primary considerations for determining whether a *Vetrovec* caution must be given are: (i) the extent to which the witness's credibility is suspect; and (ii) the importance of the witness's testimony to the Crown's case: *R. v. Brooks*, 2000 SCC 11at para. 80; *R. v. Wood*, 2007 BCCA 563at para. 27.

[8] While giving a *Vetrovec* caution is usually discretionary, sometimes it is mandatory: *R. v. Bevan*, [1993] 2 S.C.R. 599.

[9] Whether to give a *Vetrovec* warning is informed by the purpose to be served by doing so. The purpose was explained in *R. v. Khela*, 2009 SCC 4at paras. 2 and 3:

> .... [W]here the guilt of the accused is made to rest exclusively or substantially on the testimony of a single witness of doubtful credit or veracity, the danger of a wrongful conviction is particularly acute.
>
> It is therefore of the utmost importance, in a trial by judge and jury, for the jury to understand *when* and *why* it is unsafe to find an accused guilty on the unsupported evidence of witnesses who are "unsavoury", "untrustworthy", "unreliable", or "tainted". For present purposes, I use these terms interchangeably. And I mean to include all witnesses who, because of their amoral character, criminal lifestyle, past dishonesty or interest in the outcome of the trial, cannot be trusted to tell the truth — even when they have expressly undertaken by oath or affirmation to do so. [Emphasis in original.]

See also *R. v. Luciano*, 2011 ONCA 89 (Ont. C.A.)at para. 133.

62 We do not understand the appellants to say the judge erred in these paragraphs; instead, they say he erred in their application. They say he erred in law because the ten witnesses not included in the warning were the sort for whom a warning was required. These witnesses were not directly involved in the subject homicides, but they did give evidence of peripheral events. At times, their accounts were consistent with the *Vetrovec* witnesses', at times they were not, and at times they were admittedly altered following extensive interviewing by police.

63 The judge explained his reasons for declining to provide a caution in respect of the additional ten witnesses proposed by the accused:

[12] I am not satisfied that a *Vetrovec* warning is necessary for any of the 10 witnesses. It is unnecessary that any of them be "singled out" and "separated from the pack" by way of a special caution: *Brooks*, at para. 132.

[13] In my view, none of the 10 witnesses fall into the category of a key witness. None of them were directly involved in the assault of Mr. Bryce or Mr. Marnuik, or the shooting of Mr. Thom; nor have they entered into agreements with the Crown to cooperate in return for some benefit. In addition, while all witnesses present some of the identified factors, none of the witnesses demonstrate the degree of untrustworthiness usually present for a *Vetrovec* witness, such as with most of the six Crown witnesses.

[14] In addition, there is some prejudice to providing *Vetrovec* warnings unless they are necessary. The prejudice includes adding to an already very long and complicated charge, as well as the risk of diluting the importance of the warning for the critical witnesses.

[15] I agree with the Crown that the concerns that do attach to the evidence given by the 10 witnesses - for example, some have admitted to initially lying to the police or that their recollection of events has been affected by drug use - can be adequately dealt with by instructions concerning credibility.

[16] The only witness proposed by the defence that may appear to warrant a *Vetrovec* warning is Mr. Williams. He was [a] senior member of the Greeks who likely knew on the morning on May 31, 2005 that he was assisting to cover up some crime; he lied to the police on many occasions; and he had led a life of crime until recently. However, on closer scrutiny, I am satisfied that a *Vetrovec* warning is not necessary for him.

[17] Mr. Williams was not involved in the actual commission or planning of the Thom murder. He has no motive to shift responsibility to someone else and no self-interest in blaming someone for something they did not do. Indeed, much of the cross-examination of Mr. Williams was directed at the reliability of his memory rather than his honesty as a witness or any motive to fabricate.

[18] In conclusion, I am not satisfied that the 10 additional witnesses proposed by the defence require *Vetrovec* warnings and the application to do so is denied.

[19] Of the six witnesses proposed by the Crown, I have some hesitation with respect to Mr. Coutts. While he has a very lengthy criminal record and may be motivated out of self-interest and/or anger to embellish or fabricate evidence in order to cause harm to one of more of the accused, I am not certain he should be singled out and given a special warning. However, the Crown's application concerning Mr. Coutts is supported by a number of the accused and opposed by none. It is a close call but I will exercise my discretion to provide a *Vetrovec* warning with respect to him.

[Emphasis added.]

64 The appellants' submissions address the substance of the evidence of Williams and Martin. For this reason, it is useful here to summarize their evidence before turning to the proposition that the judge's *Vetrovec* warning should have included them.

(ii) Williams' testimony

65 Williams' evidence minimally concerned the Marnuik homicide, and centrally, the Thom murder. He gave evidence of a general nature about the roles played by the various accused in the Greeks organization.

66 As to the Marnuik homicide, Williams testified that Marnuik was a runner whom he had initially hired. He agreed he never saw photographs of Marnuik being "disciplined".

67 As to the Thom murder, Williams testified that Thom was his friend and that Thom's death made him angry. He testified that two cars of people went out to find the police informant "discovered" by Manolakos' review of the Information to Obtain wrongly provided by Mastop. Williams testified that the night before Thom's death, he was at a campsite with Thom, Coutts,

Kirby Burden, Benny Burden, Dyck, and Scott (the woman subsequently found murdered, evidence as to which was excluded as being too prejudicial). He testified that Manolakos was angry with Thom in the days before Thom's death because Thom had called Manolakos "a rat".

68 Most important in Williams' testimony was his evidence of the accuseds' post-offence conduct after the Thom homicide. He testified O'Donnell, Sipes, and Witness T arrived at his home in [an SUV] around 5:00 a.m. on May 31, 2005. Williams held to this evidence under rigorous cross-examination when confronted with Coutts' evidence that Williams earlier stated the persons who arrived at his door were Witness T, Sipes and, "Doug the Slug" (Doug Sweitzer), the latter the driver of the [SUV]. Williams testified he provided Witness T with clean clothing, and said the men left a blue gym bag with him that Sipes said contained a gun. Williams testified that the three men also left [the SUV] in his driveway and a briefcase outside his door. He testified Coutts later came to his house, informed him Thom was dead, and made a phone call, after which Witness T arrived at his house and removed the items that had been left by the three men. Williams further testified to overhearing heated discussions between Sipes, Manolakos, and O'Donnell after Thom's homicide, in which Manolakos was loudly decrying how sloppy they had been. He testified about a private moment with Manolakos in which Manolakos made a "gun" hand gesture and said "this fuck got this". Williams took this to imply that Thom had been shot.

69 Williams' evidence was highly material to the Crown's case against O'Donnell. The judge described the identity of O'Donnell as a participant in the Thom homicide as the "critical issue" for the jury on the count against O'Donnell. Williams' testimony helped address that issue by identifying O'Donnell as a visitor to his home on the night of Thom's death in the company of Sipes and Witness T, and by linking O'Donnell to Sipes and the blue gym bag with the gun. This evidence was particularly significant when placed alongside Witness T's testimony that he witnessed Sipes and O'Donnell shoot Thom.

70 Williams' evidence also bore on the case against Manolakos. If accepted, his testimony about Manolakos' hand gesture and participation in the heated discussion with Sipes and O'Donnell reinforced other evidence connecting Manolakos to the Thom homicide.

71 Williams' evidence provided much room for challenge. His version of events evolved over 13 statements given to the police between 2005 and 2012. For example, in cross-examination Williams equivocated as to the timing of the hand gesture — was it before or after Thom's death? He was likewise unclear as to whether Manolakos said "got" or "getting" when the gesture was made. However, when pressed, Williams did not resile from his evidence that Manolakos had made the hand gesture he described.

72 Apart from examination on the varying accounts he gave in his statements, Williams was also examined by both the Crown and defence counsel on his history of drug use and his drug use on the night of the Thom homicide. The jury was apprised of his criminal record, which included offences of dishonesty and violence. Williams agreed he was a man with significant memory issues. He also agreed he had held a senior position in the Greeks, had lied to the police many times, and had changed his statements to the police on occasion when told by the police of information they had or what had been said to them by others. Williams agreed with the suggestion that most of his evidence was based on conjecture and inference from hearsay he had heard.

73 As to a possible motive to implicate the accused or as to any benefit Williams may have received, there was less compelling evidence than in relation to the six witnesses who were named in the *Vetrovec* warning. There was evidence that in September 2005 police offered to pay money to Williams, said he would go to jail if he did not cooperate, and discussed relocating Williams, his wife, children, and others. There was evidence a police officer asked Williams to work as an agent for the police but Williams refused and said, "I'll give you Pete", an apparent reference to Manolakos. Williams testified he had the impression he had to give the police more information or he might end up being charged with murder himself. Indeed, he was arrested in 2006 for the murder of Thom, but was released 13 hours later and the charge was dropped. There was no evidence of the circumstances leading the police to drop the charge. The appellants note that Williams, in keeping the bag after having been told guns were in it, was vulnerable to a charge of being an accessory or an accessory after the fact to manslaughter. They argue he was pressed by this possibility to give false evidence. However, this theory was neither developed in the evidence nor indeed before us, and it appears to lack any foundation.

74 In the end, there was no evidence Williams agreed to work for the police, spoke to the police to avoid prosecution, or had an immunity agreement, in contrast to the evidence of the immunity agreements referred to above for Witness U, Witness T, Witness V, and Witness Y.

(iii) Martin's testimony

75 Martin's evidence related to the Marnuik homicide. Martin gave four recorded statements to the police between 2004 and 2009. Martin testified that before Marnuik's death, O'Donnell told him that Marnuik had gone missing and asked him to start looking for Marnuik, and that Manolakos, too, told him to look for Marnuik. Martin testified he saw photographs of the Marnuik beating on two occasions. He said that, on the first occasion, he was passing through the Office when he saw Witness U and Podolski standing together with O'Donnell, who was holding three or four Polaroid photographs. Martin testified he could make out very little of the photographs, but thought he could see "a bit of blood and stuff like that". He testified that a day or a day and a half later he was called to the Office, where O'Donnell, Podolski, Sipes, and Witness U threatened him with the photographs. However, Witness U gave no evidence of this encounter. Martin testified that the photographs showed Marnuik in a "very, very badly beaten" state, looking as though he was dead. Martin testified that at that time O'Donnell told him, "This is what happens when you fuck around with us. Stop fucking falling asleep," and that Sipes threatened him with a bat studded with nails or screws.

76 Martin also testified about the roles played by the accused in the organization, explained in detail the rules governing the organization's businesses, and stated that the main rule in operating the telephone lines for the Greeks was not to let the line go down. Martin recounted a threat he once received when he fell asleep on shift, and described the physical harm he experienced when he fell asleep a second time. Martin's evidence confirmed portions of the evidence of Witness U, Witness T, and Sparks, some of the main witnesses on the Marnuik homicide and all *Vetrovec* witnesses, and thus was important in light of the objectives of a *Vetrovec* warning.

77 Martin's evidence, too, provided much room for challenge. He had an extensive history of drug use that was the subject of close examination; for example, he confirmed he used drugs on the first occasion he viewed the photographs. Martin was examined on his criminal record, which included crimes of dishonesty, and he was cross-examined on a false statutory declaration he swore when he worked for a rival gang. When questioned about his statements to the police, Martin admitted to lying about his familiarity with Marnuik in his initial interviews. Martin also admitted to making false statements to the police on other occasions when he was in the throes of addiction, and to doing so again in June 2011 when he was not using drugs. Martin agreed that in an early statement, the police had made suggestions to him about the Marnuik homicide and he simply adopted the suggestions as his own knowledge, including as to the existence of the photographs and the first time he saw them. Martin agreed he did not disclose the second occasion on which he saw the photographs until his 2009 statement. In conclusion, however, Martin denied in his testimony that he had constructed his trial evidence by remembering details told to him by the police.

78 In cross-examination, defence counsel did not press the possibility that Martin had a motive to fabricate evidence. Martin denied that he expected one of the investigating officers to assist him in a sentencing hearing in return for the assistance he gave in the homicide investigation, and denied using his involvement in this case to attract a more lenient sentence. There was no evidence to the contrary.

(b) Discussion

79 The first question for us, in considering whether the judge erred in law in declining to include Williams and Martin in the *Vetrovec* instruction, is whether the case for their inclusion was so clear that it was mandatory. If not, then his decision was a discretionary one, and we must ask the classic questions set out, for example, in *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 (S.C.C.) at 76-77 (did the judge err in the exercise of discretion in that no weight or insufficient weight was given to relevant considerations?) and *R. v. Regan*, 2002 SCC 12 (S.C.C.) at para. 117 (did the court misdirect itself or come to a decision that is so clearly wrong it amounts to an injustice?).

(i) Was a Vetrovec warning mandatory for Williams and Martin?

80 The appellants strongly urge us to find that, at least as to Williams, a *Vetrovec* warning was mandatory. They say his evidence was so important to the case and his credit so low that the dangers intended to be avoided by providing the warning were clearly present. On the case against Manolakos, counsel says Williams' evidence that Manolakos made a hand gesture indicating a gun, referred to by the judge in his instructions to the jury as evidence it could use to confirm Manolakos ordered the killing of Thom, was core to the Crown's case. On the case against O'Donnell on the Thom homicide, they say Williams' evidence of post-offence conduct was central circumstantial evidence. With respect to Martin, the appellants say he gave important corroborative evidence on the Marnuik homicide, and say his evidence was troubling considering the manner in which his statement evolved through the police interviews.

81 The Crown argues Williams and Martin did not occupy a central position in its case. Neither of them gave eyewitness evidence of the Marnuik or Thom homicides — evidence that was provided by those witnesses who attracted the *Vetrovec* caution. As examples, the Crown observes that [some *Vetrovec* witnesses] testified Manolakos gave instructions to kill Thom, and [one] identified O'Donnell as a participant in Thom's death and, with respect to the Marnuik homicide, it observes [some witnesses] gave evidence of Podolski and O'Donnell's direct participation, and [one] testified that Manolakos gave the instruction to find and discipline Marnuik. To put it another way, in the Crown's submission, Williams and Martin were clearly outside the circle that planned and participated in the homicides of Marnuik and Thom, as to which a significant body of other evidence central to the case was adduced.

82 It is clear, as recognized by the judge, that there will be cases in which a warning about the testimony of an unsavoury witness is mandatory: *R. v. Bevan*, [1993] 2 S.C.R. 599 (S.C.C.) at 614; *R. v. Brooks*, 2000 SCC 11 (S.C.C.) at para. 11; and *R. v. Khela*, 2009 SCC 4 (S.C.C.) at para. 5. In *Khela*, at paras. 35-36, Justice Fish incorporated the commentary of Marc Rosenberg (later Justice Rosenberg) on the circumstances that attract a mandatory warning, cited in *Brooks*:

> [35] Speaking for himself and Justices Iacobucci and Arbour, Major J. also cited with approval (at para. 79) this passage from a commentary by Marc Rosenberg (now Rosenberg J.A.) on *Vetrovec* and its progeny:
>
> > The judge should first in an objective way determine whether there is a reason to suspect the credibility of the witness according to the traditional means by which such determinations are made. This would include a review of the evidence to determine whether there are factors which have properly led the courts to be wary of accepting a witness's evidence. Factors might include involvement in criminal activities, a motive to lie by reason of connection to the crime or to the authorities, unexplained delay in coming forward with the story, providing different accounts on other occasions, lies told under oath, and similar considerations. It is not then whether the trial judge personally finds the witness trustworthy but whether there are factors which experience teaches that the witness's story be approached with caution. Second, the trial judge must assess the importance of the witness to the Crown's case. If the witness plays a relatively minor role in the proof of guilt it is probably unnecessary to burden the jury with a special caution and then review the confirmatory evidence. However, the more important the witness the greater the duty on the judge to give the caution. At some point, as where the witness plays a central role in the proof of guilt, the warning is mandatory. This, in my view, flows from the duty imposed on the trial judge in criminal cases to review the evidence and relate the evidence to the issues.
> >
> > ("Developments in the Law of Evidence: The 1992- 93 Term — Applying the Rules" (1994), 5 S.C.L.R. (2d) 421, at p. 463)
>
> [36] Though he arrived at a different result, Binnie J. agreed in *Brooks* (at para. 130) that what matters, in determining the need for a clear and sharp warning, is not the judge's personal opinion as to the trustworthiness of the witness, but whether there are factors which experience shows us as requiring "that the witness's story be approached with caution".

83 Accepting that the jurisprudence of the Supreme Court of Canada confirms a warning will be mandatory in some cases, recent jurisprudence most often concerns cases in which provision of a warning is a matter of discretion. Cases such as *R. v.*

Fatunmbi, 2014 MBCA 53 (Man. C.A.), leave to appeal ref'd [2014] S.C.C.A. No. 366 (S.C.C.); *R. v. Rafferty*, 2016 ONCA 816 (Ont. C.A.) at para. 30; and *R. v. Carroll*, 2014 ONCA 2 (Ont. C.A.) at para. 69, leave to appeal ref'd [2014] S.C.C.A. No. 193 (S.C.C.), speak in terms of the warning as a matter of the trial judge's discretion, and it may fairly be said that the trend of cases appears to favour reviewing the issue as an exercise of discretion. In *R v. Rajbhandari*, 2017 ABCA 251 (Alta. C.A.), the Alberta Court of Appeal usefully compiled leading cases on this issue, concluding that the need for a *Vetrovec* warning in that case should be determined consistent with the trend to see the issue as one attracting considerable deference. Notwithstanding this trend, which may be no more than a reflection of the nature of cases presented to appellate courts (judges rarely declining to give such cautions for unsavoury witnesses on whose evidence the trial hangs), *Khela* still speaks of cases in which a warning is mandatory. See also *Carroll* at para. 70, observing that some cases require a *Vetrovec* caution.

84 We too approach this issue recognizing that in some cases the need for a warning is so clear that the judge's decision is owed no deference. Although it preceded *Khela* and *Brooks*, *Bevan* set the mark for the combination of factors discussed above that demands a warning at 614:

> But in my respectful view a *Vetrovec* caution was clearly required in this case with respect to the testimony of both Dietrich and Belmont.
>
> Both of them had lengthy criminal records, had strong motivations to lie, and approached the police only when each perceived that some benefit — such as release from prison, a discontinuation of charges against them, or cash payments — could be obtained in exchange for their testimony. Both of them explicitly told the police at the time they came forward that they were seeking a "deal" in exchange for their evidence against the appellants. Moreover, the evidence of Belmont and Dietrich was incriminating to the appellants, and crucial to the Crown's case.

85 As the trial judge found, Williams and Martin miss this mark. The case for their inclusion in the *Vetrovec* warning did not disclose the kind of clarity *Bevan* and later cases require. With respect to their credibility, we have already noted that both Williams' and Martin's evidence provided much room for challenge. However, the focus of that challenge was their reliability, not their honesty. While counsel raised the spectre of Williams' motive to fabricate, it fell short of being supported by any articulable reason for, or benefit that would result from, Williams falsifying his testimony. This stood in contrast to the immunity agreements or other dealings that the central six witnesses had with the police. With respect to the importance of Williams' and Martin's evidence, the judge, familiar with the substantial body of evidence, from many witnesses, against Manolakos and O'Donnell, found that they did not "fall into the category of a key witness". He observed that, unlike some of the six central witnesses, Williams and Martin were not part of the beating of Bryce or Marnuik or the shooting of Thom. Supported by those conclusions, with which we may not interfere, we consider Williams and Martin were not witnesses for whom a *Vetrovec* warning was mandatory.

(ii) Did the judge err in declining to give a Vetrovec warning for Williams and Martin?

86 The question then is whether the judge erred in the exercise of his discretion. In our view, the answer is no.

87 Since Justice Dickson's judgment in *Vetrovec*, courts have repeatedly confirmed that there is no formulaic list of factors a judge must consider in exercising judicial discretion. The task of the judge is to make a qualitative and objective assessment with a careful eye to the purpose of the warning, which is to tell the jury when and why it is unsafe to find an accused guilty on the unsupported evidence of witnesses of unsavoury character: see *Khela* at para. 47.

88 In *Brooks*, Justice Major summarized the discretionary approach that the trial judge should bring to the issue:

> 80 In summary, two main factors are relevant when deciding whether a *Vetrovec* warning is necessary: the witness's credibility, and the importance of the witness's testimony to the Crown's case. No specific threshold need be met on either factor before a warning becomes necessary. Instead, where the witness is absolutely essential to the Crown's case, more moderate credibility problems will warrant a warning. Where the witness has overwhelming credibility problems, a warning may be necessary even if the Crown's case is a strong one without the witness's evidence. In short, the factors should not be looked to independently of one another but in combination.

89 On appeal, courts should not interfere, "provided there is a foundation for the trial judge's exercise of discretion": *Brooks* at para. 4.

90 In his ruling on the *Vetrovec* warning, the judge acknowledged Williams' position in the Greeks, his life of crime, his many lies to the police, and his likely knowledge that on May 31, 2005, he was helping to cover up a crime. The judge then observed Williams was not involved in the commission or planning of the Thom murder, and had no motive to shift responsibility to someone else and no self-interest in doing so. As we discussed earlier, the judge observed that much of the cross-examination of Williams was directed at the reliability of his memory rather than his honesty or motive to fabricate. While the appellants challenge some of these characterizations, they reflect the judge's comprehensive understanding of the case. They are not matters open to us to re-characterize.

91 Significantly, the judge, in his para. 14 repeated for convenience here, expressed concern that unnecessary warnings may cause prejudice and dilute the warnings provided in respect of the six *Vetrovec* witnesses:

> [14] In addition, there is some prejudice to providing *Vetrovec* warnings unless they are necessary. The prejudice includes adding to an already very long and complicated charge, as well as the risk of diluting the importance of the warning for the critical witnesses.

92 This concern is reminiscent of those expressed by Justice Moldaver in *R. v. Vanezis* (2006), 83 O.R. (3d) 241 (Ont. C.A.), and Justice Strathy (now C.J. Ont.) in *R. v. Araya*, 2013 ONCA 734 (Ont. C.A.), dissenting, rev'd 2015 SCC 11 (S.C.C.). It reflects the danger inherent in expanding the list of *Vetrovec* witnesses, that the more *Vetrovec* witnesses there are, the more examples of non-*Vetrovec* witnesses will need to be mentioned as giving potentially confirmatory evidence, where such evidence itself has been challenged by at least some of the accused. In other words, expansion of the list of *Vetrovec* witnesses may have the effect of reinforcing evidence inculpatory of the appellants: see, for example, *Brooks* at para. 16.

93 Further, it is to be remembered that, in the judge's words describing the position of counsel for Mr. Sipes, "the risks and frailties associated with these witnesses and their evidence has already been exposed to the jury through the extensive cross-examinations in a year-long trial".

94 The challenge for the judge to provide jury instructions with all the necessary components, in a fashion that was understandable and within the jury's limits of absorption, and that fairly addressed not only the Crown's case but all five accuseds', who on some points held competing positions, was considerable. These features of the case require this Court to fully recognize our limited and deferential role in decisions engaging the judge's discretion.

95 We cannot say the judge erred in the approach he took to restricting his list of *Vetrovec* witnesses to the six listed above. We would not interfere, nor may we interfere, with the judge's exercise of discretion in keeping his list of *Vetrovec* witnesses to six.

1.2 A Lesser Warning

96 In the alternative, the appellants contend that should we find no error in the judge's refusal to provide a *Vetrovec* caution for Williams, Martin, or any of the additional eight, in the least the judge was required to give a lesser warning to alert the jury to the danger of accepting their evidence. They contend the instruction on the credibility of Williams and Martin was simply insufficient to alert the jury to the frailties in their evidence, which were raised in the defences' challenges to credibility resulting from the manner and number of police interviews. Concerning Williams, they say the judge failed to bring the issues of Williams' criminality, his motive to implicate Manolakos, and his history of lying fully to the jury's attention. Concerning Martin, they say the judge was required to provide a detailed, careful analysis of his character and evidence of the police interview techniques they say irremediably tainted his evidence.

97 In making this submission, the appellants refer to this passage of Justice Beard in *Fatunmbi*:

> [41] ... trial judges have considerable discretion as to the actual form and wording of the warning. In *McWilliams' Canadian Criminal Evidence*, the authors state (at para. 34:60.10):

> Within a principled exercise of discretion to assist the triers of fact in evaluating the reliability of evidence, a trial judge may, depending on the circumstances of a specific case, (1) provide no opinion or caution to jurors about a witness's testimony, (2) give a full *Vetrovec* warning, a clear and sharp caution against acting on the suspect witness's evidence without more, (3) give an "equivalent warning" to that required by *Vetrovec*, or (4) issue a "lesser instruction" alerting jurors to features of the witness's evidence or background to take into account in assessing the worth of the witness's evidence.
>
> In many cases, without a strict *Vetrovec* warning, a jury charge which highlights for the triers a witness's motivation to lie or other apparent flaw in the prosecution witness's credibility will sufficiently apprise jurors of the care with which they should assess the witness's credibility.

98 *Fatunmbi* does indeed describe the scope of a trial judge's discretion. The extent of cautionary language provided to the jury, absent a need for a *Vetrovec* caution, is a matter within the domain of the trial judge: see *R. v. Van Dyke*, 2014 BCCA 3 (B.C. C.A.) at para. 53, applying *Khela* at para. 13. Our task is to determine whether the judge erred in the exercise of that discretion.

99 On our review of the relevant portions of the instructions to the jury, we see no basis to find the judge gave inadequate instructions with respect to the credibility issues of Williams or Martin — and less so the other eight — as the appellants contend. We consider the jury was appropriately and extensively instructed on the acknowledged frailties of the evidence of Williams and Martin. The jury was fully apprised of the zones of weakness in their evidence — indeed, little that they said would not have been captured by one of the warnings given by the judge. In particular, the complaint that the jury was not adequately instructed on the potential effect of the police providing information cannot be sustained. While the judge does not use the moniker adopted by the appellants of "police taint", the undermining effect of police providing information to a witness, was the subject of specific instruction in passages replicated below at para. 107. In our view it could not have escaped the attention of the jury that what the defence terms "police taint" required the jury's consideration, given the extensive cross-examinations of witnesses by the defence on this issue and the defence's extensive submissions to the jury, followed by the instructions we review below.

100 The submission that a lesser warning was required calls for an examination of the judge's treatment of the evidence of Williams and Martin and the instructions provided on credibility.

101 In his instructions, the judge addressed the significance of the evidence of Williams and Martin to the case respecting all five accused. Without being exhaustive in our description of the instructions on Williams' evidence, the judge:

- noted it related to the post-offence conduct of O'Donnell, Sipes, and Witness T and to the role of Manolakos in the Thom homicide;

- described Williams' evidence that he overheard Manolakos yelling at Sipes and O'Donnell about the sloppy way in which they killed Thom and telling them to "clean up their mess" as potentially confirming the evidence of Witness T on the Thom homicide;

- described his evidence of post-offence conduct of O'Donnell and Sipes following the shooting of Thom as potentially confirming the evidence of Witness T that those two participated in the Thom killing;

- noted that Williams' evidence that Manolakos made a "gun" hand gesture potentially confirmed evidence of Witness U who testified Manolakos made a gun gesture when referring to Thom; and

- described Williams' evidence as potentially confirming Coutts' evidence that Sipes and Witness T went to his campsite the morning after Thom was killed and said, "He's gone," which Coutts took to mean that Thom was dead.

102 While the evidence of hand gestures was key to the case against Manolakos for the first degree murder of Thom, it is important to recall that Williams' testimony stood apart from that of others who also testified about the gestures. Williams testified only to a single private moment at a bar with Manolakos. However, because the jury had to be satisfied beyond a reasonable doubt that Manolakos did or said something to encourage Witness T and/or others to commit the planned and

deliberate murder of Thom, Williams' evidence was less significant than [that of other witnesses who attracted the *Vetrovec* warning], which connected the gesture to the other forms of instruction and encouragement they were personally given.

103 Dealing with Martin's testimony, the judge:

- referred to Martin's evidence that he received a call from O'Donnell instructing him to look for Marnuik;
- referred to Martin's evidence that on one occasion he caught a glimpse of Polaroid pictures of Marnuik;
- referred to Martin's evidence that on another occasion he was threatened with the photographs at the Office;
- described the evidence about the photographs as potentially relevant post-offence conduct by O'Donnell;
- referred to Martin's evidence as potentially confirming Witness T's evidence describing O'Donnell participating in the beating of Marnuik;
- tied Martin's evidence of O'Donnell and Manolakos telling him to look for Marnuik as potentially confirming Witness Y's evidence that Witness Y spoke to Podolski about Marnuik's disappearance and made some efforts to find Marnuik;
- referred to Martin's evidence that he was threatened at the Office as potentially confirming evidence of other witnesses, including Witness T, Witness U and Witness W, who testified about the Polaroids;
- referred to witnesses' (of which Martin was one) evidence as potentially confirming Witness T's evidence that Sipes and O'Donnell were enforcers for the Greeks who may have worked together at times; and
- referred to Martin's evidence as circumstantial evidence from which a juror might infer O'Donnell participated in the assault of Marnuik.

104 With that summary of the judge's treatment of Williams' and Martin's testimony, we turn to the judge's general instructions on credibility and his instructions specific to the *Vetrovec* witnesses and Williams and Martin.

105 The judge's general instructions were greatly expanded from pattern jury charges, and we attach them as Appendix A. They included a version of the classic instructions on credibility, including this instruction on a lie under oath:

> [81] On the other hand, it is entirely different when a witness deliberately lies under oath. You have heard defence counsel suggest to you that certain witnesses lied under oath. It is for you to decide whether the witness was telling a lie, telling the truth, or simply mistaken. A deliberate lie under oath is always serious, and may taint the entire testimony of a witness.

106 The judge also gave correct instructions on the impact of a previous criminal record.

107 In addition to the standard instructions, the judge provided an extensive list of questions he suggested jurors ask themselves in considering the evidence of any given witness. Many of the questions were directly relevant to Williams and Martin. Beginning at para. 83, the judge's questions refer to, for example: apparent honesty; any reason not to tell the truth; any interest in the outcome of the case or reason to prefer one side to the other; the ability of the witness to make accurate and complete observations and the circumstances of the observations; whether there were distractions when the observations were made; the condition of the witness and any impairment of the witness by drugs or alcohol; any impairment of the witness by prolonged substance abuse; the occurrence or not of specific events or circumstances that might fasten the memory; the apparent reliability of the witness' memory; the witness' consistency; the fit of the testimony with the balance of the evidence; the internal consistency of the witness' evidence and its consistency with prior statements; any explanation provided for inconsistencies; and the witness' manner. Significantly, the judge asked:

> [87] Did the witness seem to have a good memory? Is it an independent and accurate memory of the event? Or has that memory been reconstructed over time and its integrity or accuracy influenced by prior statements, dreams or flashbacks?

Does the witness have any reason to remember the things about which he or she testified? Did any inability or difficulty that the witness had in remembering events seem genuine, or did it seem made up as an excuse to avoid answering questions?

[88] Did the witness seem to be reporting to you what he or she saw or heard, or was the witness simply putting together an account based on information obtained from other sources, rather than personal observation? Is there a risk that the memory of a particular witness in relation to an event has been distorted by what others have told him or her about that event?

[89] Did the witness's testimony seem reasonable and consistent as he or she gave it? How does it fit with the rest of the evidence? Is it similar to or different from what other witnesses said about the same events? As important as it is for you to examine the evidence in detail, do not lose sight of the "big picture".

. . .

[93] Is there evidence that witnesses shared their accounts with each other before testifying? Evidence that witnesses shared their accounts before testifying may impact on the reliability of their evidence and the weight you are prepared to give it. Whether intentionally or not, a witness's evidence may be altered or distorted when that witness learns of the evidence another witness is likely to give.

[94] Was a witness, inadvertently or otherwise, provided by the police with information uncovered in the course of the investigation that might permit that witness, consciously or unconsciously, to tailor his or her evidence? More specifically, did the police share with the witness information others supplied about the same events? Did the witness's account change after that information was supplied? If so, how significant was the change? Does it, in the context of the evidence as a whole, undermine your faith in some or all of the witness's testimony? Are you satisfied from the details supplied by that witness in his or her testimony that, despite the information that was or may have been supplied to him or her by others about an event, the witness has independent knowledge of and an accurate memory about that event?

[Emphasis added.]

108 It can be seen that many of the questions the judge suggested the jury consider were relevant to Williams and Martin, in light of their issues of drug consumption, memory frailty, and previous inconsistent statements and untruths. Most importantly, the judge directed the jury to police interviewing techniques and any changes to a witness' account after police supplied information.

109 After these general instructions, the judge provided his *Vetrovec* warning to the jury. The warning itself is reviewed in more detail at paras. 126 and 127.

110 Before he referred to the specific evidence capable of confirming the *Vetrovec* witnesses' testimony, the judge noted the witnesses who gave this evidence themselves had their credibility "vigorously challenged by the defence". He told the jury to scrutinize that evidence carefully before deciding whether it confirmed the evidence from the *Vetrovec* witnesses. He also told the jury to consider whether the witness was supplied confirmatory evidence by police, and reminded the jury to consider the inconsistencies pointed out by defence counsel:

[356] ...One of the factors you should take into account is whether the witness who provided potentially confirmatory evidence was supplied information by the police. This may affect the weight you are prepared to give it.

[357] Do not lose sight of the fact that these witnesses provided inconsistent versions of events to the police, and versions in their testimony before you that are, in some important respects, inconsistent with one another. Counsel reviewed many of these inconsistencies with you in detail in their closing submissions. You should keep those firmly in mind...

[Emphasis added.]

111 In relation to Witness T's evidence, the judge reminded the jurors to be mindful of the frailties of the potentially confirmatory evidence when determining for themselves whether it was safe to rely upon it. He repeated that they should do the same with all of the potentially confirmatory evidence that related to the other *Vetrovec* witnesses' testimony.

112 The judge also gave this cautionary instruction to assist jurors:

> [410] ... You are entitled, indeed obliged, as part of your fact-finding responsibility, to assess the credibility and reliability of Crown witnesses in light of their criminal histories, affiliations and disreputable past conduct. You may also use this evidence to assess the propensity of a Crown witness or witnesses to commit acts of violence in deciding whether the guilt of an accused has been proven beyond a reasonable doubt. I will tell you more about this later in my charge.

113 Later, in his opening remarks relating the evidence to the elements of the offences, the judge referred to all 16 witnesses for whom the defence had sought a *Vetrovec* caution, and again referred to the factors of inconsistent statements, criminal records, history of dishonest conduct, drug abuse, and motive to give false evidence. He said:

> [605] When assessing the testimony of a witness, even one who has given previous inconsistent statements, you may find it helpful to see whether the witness's evidence fits with and is supported by the totality of the evidence. Consider whether the witness has a motive to give false evidence against a particular accused but, even if he or she does, consider whether his or her evidence is supported or contradicted by the evidence of other witnesses. Consider for some witnesses who provided inconsistent statements whether cooperating with the police and providing information about others involved in crime was contrary to the culture in which they lived and worked, particularly given the potential consequences of being labelled a "rat". Consider whether inconsistencies in the evidence of witnesses about events that happened seven or eight years ago are the product of dishonesty or the fragility of memory.
>
> [606] Mostly importantly:
>
> • Use your collective common sense and life experience.
>
> • Consider the totality of the evidence.
>
> • Do not lose sight of the forest for the trees.

114 The judge gave specific instructions concerning Martin, including referring to the defence suggestion Martin had concocted his story of the Polaroids and referring to Martin's inconsistent police statements on the Polaroids. He also noted Martin's evidence of the Polaroids was inconsistent with Witness U's evidence of the same.

115 In his specific instructions concerning Williams, the judge addressed Williams' evidence linking Sipes and O'Donnell to the Thom homicide, and set out for the jury reasons it should question material parts of that evidence. In doing so the judge discussed the content of Williams' evidence, reminded the jury of Williams' drug use on the night of Thom's death, referred to the inconsistencies in Williams' accounts as to who was at the door with Witness T and Sipes, referred to inconsistencies in Williams' in-court testimony, and referred to Williams' significant memory problems.

116 The judge approached Williams' evidence on Manolakos' participation in the Thom homicide the same way. He described Williams' evidence as at times inconsistent, and described frailties of his evidence concerning a hand gesture made by Manolakos. He then gave a *Vetrovec*-like caution specific to the evidence of a hand gesture:

> [1400] [Witness T], [Witness U], Pharoah, Shaw and Williams all gave evidence about a hand gesture they observed Manolakos make before or after the murder of Ron Thom.
>
> [1401] In determining whether Manolakos made such a hand gesture, you may find support for the evidence of any single witness on this point from evidence given by any or all of the four other witnesses who testified he made this gesture, if you find their evidence to be independent and reliable. You may also find that the credibility of any of these witnesses is

undermined by contradictory evidence given by other witnesses on the same point on matters going, for example, to when and in what context the hand gesture was made.

[Emphasis added.]

117 In our view, the judge properly, fully, and fairly addressed the credibility and reliability issues inherent in the evidence of Williams and Martin. The judge, recognizing the many frailties of so many of the Crown's witnesses, elected to give highly detailed instructions on credibility, and returned repeatedly to that central theme as the instructions progressed. We cannot say more was required in respect of the evidence of Williams, Martin, or the additional eight witnesses.

118 In conclusion, we do not accede to the first ground of appeal related to the *Vetrovec* warning.

1.3 The Content of the Warning

119 The appellants contend the judge erred in failing to explain adequately the type of evidence that could restore the jury's faith in the evidence of the *Vetrovec* witnesses, complaining particularly that the judge did not instruct the jury fully on the meaning of "independent" as the qualifier for evidence that could be used to rehabilitate a *Vetrovec* witness. They say that the judge was required to explain that police tainting can transform a witness' professed recollection into evidence that is not independent because it derives, at least in part, from police information and prompting, that is, it is not the witness' independent truthful memory. Here they point to evidence wherein a witness either changed his or her account, or did not give that account until after being provided details of police theories that themselves in part were based on statements provided by *Vetrovec* witnesses.

120 The appellants acknowledge that the *Vetrovec* instruction given by the judge did refer to "independent" evidence, but say that usage of the word in the instruction could have left the jury with the impression "independent" meant "from another set of lips", whereas they say it means from a witness with independent memory unaffected by police suggestions or accounts of other persons.

121 The appellants also contend that the judge erred in his instructions in the use of the examples he gave of potentially independent confirmatory evidence because the independence of those examples was a live issue. They say some of that evidence developed after the witnesses heard recordings of the very *Vetrovec* witness the judge said their evidence may confirm, or after the police provided them with a theory of the case consistent with information gained from a *Vetrovec* witness or witnesses.

122 The appellants wrapped into these submissions concerns of potential collaboration between certain witnesses, but they did not press this suggestion at the hearing of the appeals. They concede that collusion and collaboration were not significant areas of concern at trial and that the focus of the defence theory was the possibility of police tainting. On a review of the record it appears that evidence of opportunity for collusion was established but one cannot say, on a fair reading of those portions of the evidence, that there was evidence of actual collusion. Accordingly, we say no more about it.

(a) Background

123 Early in his instructions, the judge flagged his intention to give a special warning about the evidence of Witness U, Witness T, Coutts, Sparks, Witness Y, and Witness V, and noted the danger of relying upon their unconfirmed evidence:

[78] I want you to bear in mind that these general instructions are subject to the special instructions I will give you later about the need to review the evidence of [Witness U], [Witness T], Coutts, Sparks, [Witness Y] and [Witness V] with great care and caution. As I will explain, it would be dangerous for you to rely upon the testimony of these six witnesses in the absence of independent evidence confirming their accounts.

[Emphasis added.]

124 Even before providing that warning, he continued to advert to this danger:

[99] Your assessment of the evidence of a witness does not occur in isolation. In determining the credibility of a witness or the reliability of that witness's evidence, you should have regard to the whole of the evidence and the extent to which the evidence of the witness fits with, is supported by, or is at odds with, other independent evidence.

. . .

[178] First, as I have mentioned, I will give you an additional special instruction later with respect to some of the Crown witnesses who have criminal records, because they are persons of unsavoury character and it would be dangerous for you to rely upon the unconfirmed evidence of these witnesses. I ask that you pay particular attention to this instruction.

[Emphasis added.]

125 The judge introduced the warning by noting its special character:

[344] I will now give you a *special instruction* about the evidence of [Witness U], [Witness T], Sparks, [Witness V], [Witness Y] and Coutts.

[345] It is an instruction that you must keep foremost in your mind when you are considering how much or how little you will believe of or rely upon the evidence of each of them in making your decisions in this case. What I said earlier to you about the credibility of witnesses applies equally to your assessment of these six witnesses. What I am saying now is an additional instruction that applies to these six.

[Emphasis in original.]

126 The judge's *Vetrovec* instruction followed fairly standard language on the nature of independent evidence required to rehabilitate the *Vetrovec* witnesses, including:

[348] Accordingly, with each of these six witnesses you should look for some *confirmation* of the witness's evidence from somebody or something other than that witness before you rely upon their evidence in deciding whether the Crown has proven the case against each of the accused beyond a reasonable doubt.

. . .

[350] You should look for evidence that is *independent* of that witness's evidence, that is, evidence that is not tainted by connection to that witness. You should also look for evidence that is *material* in confirming or supporting the witness's evidence. By material, I do not mean the evidence must directly implicate the accused in the offence. Items of *confirmatory* evidence do, however, have to provide you comfort that the witness can be trusted in his or her assertions about the accused that implicate them in the offence(s).

. . .

[352] The fact I am giving you a special caution for these six witnesses does not mean that the evidence of one or more of these six witnesses cannot provide confirmation for the evidence of any of the others. It *can*. For example, you may find that the evidence of [Witness T] provides confirmation for the evidence of [Witness U], or the evidence of [Witness U] provides confirmation for the evidence of Sparks. The question is whether the evidence of each supporting witness is independent and reliable such as to provide you with the confirmation you seek before relying on the inculpatory evidence of any of these six witnesses.

. . .

[355] I am now going to give you some examples of evidence you *may* find to be independent and capable of supporting or confirming the evidence of these six witnesses. These are only examples. You may find that the evidence I am about

to mention is *not* helpful in confirming or supporting the evidence of these witnesses, or you may find confirmation or support in other independent evidence. It is for you to say.

[356] I emphasize that much of the evidence I am going to refer to as potentially confirmatory comes from these six witnesses, as well as other witnesses whose credibility has been vigorously challenged by the defence. You must therefore scrutinize this potentially confirmatory evidence carefully before deciding whether it does, in fact, provide the support or confirmation you should seek. You must assess both the honesty of these witnesses and the reliability of their evidence in determining whether you are prepared to rely upon it as providing support for the testimony of these six witnesses. One of the factors you should take into account is whether the witness who provided potentially confirmatory evidence was supplied information by the police. This may affect the weight you are prepared to give it.

[Underline emphasis added.]

127 After giving examples of evidence he said the jury may find to be independent and capable of supporting or confirming the evidence of the six witnesses, the judge concluded:

[396] These are just some examples for you to consider in assessing the reliability of the evidence of the six witnesses I have identified as requiring special caution. You may find the evidence I have referred to unhelpful in confirming or supporting the evidence of one of these six witnesses. Alternatively, you may find the evidence I have referred to helpful in providing confirmation or support for the evidence of these witnesses. Or, you may find confirmation and support in other independent evidence that I have not referred to. Remember that the evidence you rely upon as confirming the testimony of one of these witnesses must have an independent quality to it. Further, you must critically assess the frailties associated with the evidence said to confirm one of these six witnesses before relying on it as confirmatory.

[397] Ask yourself whether the independent confirmatory evidence you accept has convinced you that the testimony of one of the six witnesses I have identified which implicates the accused in the commission of an offence is true, and that it is safe for you to rely upon it. As I explained to you at the outset of this instruction, you are not legally required to find confirmation or support before you can rely upon the testimony of one of the six witnesses I have identified if you are satisfied that their evidence is true. It would, however, be dangerous for you to accept their testimony unless you find independent support for it in the evidence you accept.

[Emphasis added.]

(b) Discussion

128 The issue for us is whether we should interfere with the judge's exercise of his discretion in crafting the *Vetrovec* warning. Here we turn to the jurisprudence.

129 There is no pre-ordained instruction; each *Vetrovec* warning must be tailored to the circumstances presented at trial, all within the foundational principles that inform the judge's exercise of discretion in crafting it: *Khela* at para. 30. Justice Dickson first discussed this functional approach in *Vetrovec*, wherein he held that what is required is the effective and efficient explanation of the risks of the trier of fact adopting, without more, the evidence of certain witness. He explained in simple terms the rationale for requiring support or confirmation at 826:

... The reason for requiring corroboration is that we believe the witness has good reason to lie. We therefore want some other piece of evidence which tends to convince us that he is telling the truth.

130 In *Khela*, Justice Fish held that appellate courts should preserve the functional approach espoused in *Vetrovec*. He added:

[47] ... A truly functional approach must take into account the dual purpose of the *Vetrovec* warning: first, to alert the jury to the danger of relying on the unsupported evidence of unsavoury witnesses and to explain the reasons for special scrutiny of their testimony; and second, in appropriate cases, to give the jury the tools necessary to identify evidence capable of enhancing the trustworthiness of those witnesses.

Justice Fish also explained that not all evidence is capable of confirming the evidence of an impugned witness. Some "independence" is required:

> [39] ...The attribute of independence defines the kind of evidence that can provide comfort to the trier of fact that the witness is telling the truth. Where evidence is "tainted" by connection to the *Vetrovec* witness it can not serve to confirm his or her testimony (N. Harris, "*Vetrovec* Cautions and Confirmatory Evidence: A Necessarily Complex Relationship" (2005), 31 C.R. (6th) 216, at p. 225; *R. v. Sanderson*, 2003 MBCA 109, 180 C.C.C. (3d) 53, at para. 61).
>
> [Emphasis added.]

131 Justice Fish's insights have been applied repeatedly across Canada: see *R. v. Khan*, 2011 BCCA 382 (B.C. C.A.); *R. v. Yumnu*, 2010 ONCA 637 (Ont. C.A.); *R. v. Roks*, 2011 ONCA 526 (Ont. C.A.). In *Yumnu*, Justice Watt usefully explained:

> [163] To be confirmatory of the testimony of a witness whose evidence is subject to a *Vetrovec* caution, the evidence must be independent of the *Vetrovec* witness. Said in another way, confirmatory evidence must come from some source other than the tainted witness. To be confirmatory, this independent evidence need not implicate the accused. But the independent evidence must be capable of restoring the faith of the trier of fact in relevant aspects of the tainted witness' account: *Khela* at paras. 12 and 16; *Kehler* at para. 41. Where the only issue is whether the accused committed the offence, confirmatory evidence should provide comfort for the trier of fact that the tainted witness is telling the truth *in that regard*: *Khela* at para. 43.
>
> [Emphasis in original.]

132 To similar effect in *R. v. Korski*, 2009 MBCA 37 (Man. C.A.), Justice Steel said:

> [145] To be considered confirmatory, evidence does not have to implicate the accused. However, it is not sufficient to simply tell the jury to look for whatever it feels confirms the truth of a witness's testimony. (See *Khela*, at para. 46.) The instruction to the jury must make clear, in the context of the case as a whole, the type of evidence capable of offering support that the witness can be trusted in the assertion that the accused committed the offence.
>
> [146] Evidence that is tainted by connection to the *Vetrovec* witness may not be independent and cannot serve to confirm the testimony. In *Khela*, the defence alleged that the unsavoury witnesses colluded with their female associates and therefore their evidence could not be considered independent. The accused in that case submitted that the trial judge erred in his caution when he did not tell the jury that in order to be confirmatory of the testimony of the unsavoury witnesses, the evidence had to be independent and material. The Supreme Court held that the trial judge should have better explained the need for confirmatory evidence to be independent in his warning. Nonetheless, the warning was held to be adequate because, looking at the caution as a whole, the trial judge repeatedly alerted the jury to the possibility of the Crown witnesses lying or colluding with one another.

133 In his instructions, the judge repeatedly alerted the jury to the dangers of relying upon the evidence of the six *Vetrovec* witnesses, absent confirmation. In particular, it can be seen that the judge's instruction in para. 350 described evidence that can confirm or restore faith in the same terms as suggested in *Khela*, *Khan*, *Korski*, and *Roks*: "evidence that is not tainted by connection to that witness", with the words "that witness" referring to the witness attracting the *Vetrovec* caution, saying such evidence is not independent. At para. 356, the judge raised the substance of the appellants' concern by noting that the weight accorded to a witness' account may be affected if that witness was supplied information by the police.

134 Still, the appellants say the judge was required to go further. They say in their factum that the above concerns necessitated the following specific instruction:

> 83. ...Where instead there is a live issue before the court that the potential corroborative evidence may have been the product of collusion or tainting, the issue of collusion or tainting should be left for the jury to decide, along with an instruction that if the jury concludes the evidence is tainted then that evidence cannot be used to confirm the veracity of the *Vetrovec* witness.

135 In support of this submission the appellants refer to *R. v. Kehler*, 2004 SCC 11 (S.C.C.), aff'g 2003 ABCA 104 (Alta. C.A.); *R. v. Magno*, 2015 ONCA 111 (Ont. C.A.); and *R. v. Labossière*, 2014 MBCA 89 (Man. C.A.). They say these cases are authority demanding a more explanatory instruction on the content of the word "independent".

136 We do not accept that those cases require the instruction advanced by the appellants. Read carefully, they do not demand the instruction proposed.

137 *Kehler*, in both the Alberta Court of Appeal and Supreme Court of Canada, refers to the judge's conclusion that evidence given by a witness was potentially evidence given to conform to information received by the police. The judge had found the evidence was contaminated such that his faith in that witness could not be restored. His reasoning was noted on appeal, but was not the subject of analysis. The judge's conclusion was not controversial: the trier of fact may always find that evidence propounded as confirmatory fails to fulfil that function due to lack of independence. Indeed, as the judge in this case stated, in seeking confirmation the jury should look for evidence "that is *independent* of that [*Vetrovec*] witness's evidence, that is, evidence that is not tainted by connection to that witness". *Kehler* also does not advance the appellants' submission about the requisite contents of the jury instruction, as it was heard by the judge sitting alone.

138 The instruction in *Magno* required jurors to determine whether a *Vetrovec* witness' evidence was sufficiently independent such that it could be relied upon as corroboration for another such witness. There is no functional difference between that instruction and the one at issue here. The jury instructions before us, too, by instructing on the issue of "taint", left it for the jury to determine whether evidence was tainted as contended by the defence and therefore not capable of confirming the *Vetrovec* witnesses' testimony. While the judge described certain evidence as "potentially confirmatory", he scrupulously left open the question of independence. As he stated at para. 352, the question "is whether the evidence of each supporting witness is independent and reliable such as to provide [jurors] with the confirmation [they] seek".

139 In *Labossière* the Manitoba Court of Appeal addressed the function of a trial judge in cases of possible collusion between a witness and a *Vetrovec* witness. The court confirmed in those circumstances the jury must be apprised of the reason evidence may be tainted by connection to the *Vetrovec* witness, and then left it to the jury to decide if the evidence was sufficiently independent to rely on it. This is, more or less, a restatement of *Khela*. However, the appellants argue that the following statement from *Labossière* demonstrates that a court must instruct on a two-stage inquiry:

> [60] ...it is for the jury to decide, as a question of fact, whether the evidence is independent and, if so, whether it assists them in deciding whether it is safe to rely on the testimony of the *Vetrovec* witnesses.

While that statement may provide a useful guide, it does not displace the functional approach *Khela* demands. The question is always whether the dual purpose of the *Vetrovec* warning has been met.

140 The question before us is not whether the judge *could* have said more to the jury to explain that jurors may find a witness obtaining information indirectly from a *Vetrovec* witness through the intermediary of the police may be found not to be independent because, in the words of *Khela*, the evidence is "tainted" by connection to the *Vetrovec* witness, but whether the judge was *required* to make such a statement.

141 We conclude the judge was not required to say more, and that reading the jury instructions as a whole, including not only the instructions on unsavoury witnesses but also the extensive instructions on assessment of evidence (credibility) and the other portions referred to above, reveals that the judge adequately drew the jury's attention to the very real questions arising on the reliability of many witnesses' evidence. We have earlier reviewed those instructions, to which the jury was referred at the start of the *Vetrovec* warning. It is in the context of the general instruction to consider each witness' source of recollection that the instruction at issue here was given. The jury was fully apprised of the need to identify the evidence as being a witness' own memory rather than the product of police interviews that may have had an implanting effect. We consider that while more may have been said, the phrase used by the judge in his para. 350 reference to the subject evidence "tainted by connection to [the *Vetrovec*] witness" poses the essential question — whose memory is the source of the evidence? In the instruction, evidence tainted by connection to the (*Vetrovec*) witness is not independent of that witness' evidence.

142 Moreover, this is a case in which, well known to everyone in attendance, the defence urged the jury over days of submissions, to reject evidence as being irremediably tainted by the police interviewing processes, and reminded the jury repeatedly of the many inconsistencies and features of their evidence that made so many of the witnesses potentially unreliable.

143 We conclude that the purpose of a *Vetrovec* warning was adequately met by the instructions delivered by the judge. How much to say in jury instructions is most often a question best left to the discretion of the judge who is armed with the understanding that comes from presiding throughout the trial. Here the words of Justice Dickson in *Vetrovec* at 831, replicated above at para. 52, resonate:

> ... Because of the infinite range of circumstance which will arise in the criminal trial process it is not sensible to attempt to compress into a rule, a formula, or a direction the concept of the need for prudent scrutiny of the testimony of any witness. What may be appropriate, however, in some circumstances, is a clear and sharp warning to attract the attention of the juror to the risks of adopting, without more, the evidence of the witness. There is no magic in the word corroboration, or indeed in any other comparable expression such as confirmation and support.

144 In our view, the instructions on unsavoury witnesses do not demonstrate error; we do not accede to either *Vetrovec* ground of appeal.

2. The* Browne v. Dunn *Instruction (Ground 3)

145 The rule in *Browne v. Dunn* (1893), 6 R. 67 (U.K. H.L.), requires a party who intends to impeach a witness to provide the witness with an opportunity to explain or address the point on which their evidence is to be challenged later in the trial. The rule is referred to more generally as "the confrontation principle". It is rooted in fairness. Its object is to prevent the "ambush" of a witness on an essential matter. The rule does not "require counsel to ask contradicting questions about straightforward matters of fact on which the witness has already given evidence that he or she is very unlikely to change": *R. v. Khuc*, 2000 BCCA 20 (B.C. C.A.) at para. 44. Nor does it compel counsel to cross-examine on insignificant details: *R. v. Verney* (1993), 87 C.C.C. (3d) 363 (Ont. C.A.) at 376.

146 When the rule is breached, the judge may remedy the deficiency by permitting the unchallenged witness to be recalled, or by instructing the jury as to the manner in which it should approach the evidence in issue: *R. v. Werkman*, 2007 ABCA 130 (Alta. C.A.) at paras. 9- 11; *R. v. Paris* (2000), 150 C.C.C. (3d) 162 (Ont. C.A.) at para. 22.

147 In the present case, the appellants contend the judge erred when he included a *Browne v. Dunn* instruction in his charge to the jury. First, they say the rule in *Browne v. Dunn* was not engaged in this case. Second, if it was engaged, they say the judge erred in the content of the instruction he gave.

148 The two errors alleged attract different standards of review. The preliminary question of whether the rule should have been applied at all attracts a standard of correctness. The second question of whether the instruction was appropriate is a question of the propriety of the judge's exercise of his discretion. In short, the judge must be correct in determining whether the rule is engaged, but once it is, the judge's exercise of discretion as to how to remedy its breach is afforded deference: *R. v. Drydgen*, 2013 BCCA 253 (B.C. C.A.) at para. 22.

2.1 The Browne v. Dunn *Issue*

149 Before preparing his charge to the jury, and about two and a half months before the Crown closed its case, the judge sought input from all counsel on specific instructions that should be included in the final jury charge. He also asked counsel to identify evidence that might require a *Browne v. Dunn* instruction because that evidence had not been put to a witness.

150 In response to this request, the Crown in written argument identified 24 examples of significant matters on which defence counsel had not cross-examined and suggested the following instruction:

When you are assessing the weight to be given the uncontradicted testimony of the witnesses who gave this evidence, you may properly take into account the fact that the witnesses were not questioned regarding these matters in cross-examination.

151 Defence counsel opposed giving the jury a *Browne v. Dunn* instruction. First, they pointed to the extensive cross-examination of each of the witnesses, which reflected the defence's trial strategy to "vehemently" attack "every aspect" of their credibility to show that their evidence simply should not be believed. As a result, defence counsel argued, the witnesses could not have been ambushed by the attack on their credibility during closing submissions to the jury and the rule was not engaged. Second, defence counsel argued that, in any event, the rule in *Browne v. Dunn* was not engaged when a witness' evidence was challenged in closing argument, rather than through evidence called by the opposing party. Since the defence called no evidence, the rule could not apply.

152 Ultimately, the judge concluded the rule in *Browne v. Dunn* had been engaged at least in relation to five "significant points" of evidence. He decided to remedy the breach of the rule by giving what he described as a "focused" *Browne v. Dunn* instruction. The judge provided a memorandum to counsel (not reduced to a ruling, but entered as a jury exhibit) explaining his reasoning:

I was clear throughout the trial that the failure to confront witnesses on material points going directly to proof of the essential elements of the offence could result in such an instruction being given. Whether and how the rule should be applied is very much a case-specific decision. Here, the general credibility of key witnesses was thoroughly challenged. Despite this, some counsel did not challenge witnesses on evidence they gave going directly to a particular accused's alleged participation in an offence. The failure to do so could not have been oversight. Failing to confront a key witness in any meaningful way deprives the jury of an opportunity to assess the witness's response to the challenge on that significant point. The importance of the issue is underscored by the strong language for breach of the rule recommended in CRIMJI (4.99). My instruction on this issue strives to achieve a balance between the instruction the Crown was requesting and the position of the defence that no instruction was warranted.

[Emphasis added.]

153 The judge gave his instruction in two parts. First, in the section of the charge dealing generally with how the jury was to assess the credibility or truthfulness of witnesses, the judge said:

[92] Was the witness challenged on the particular point in issue? I wish to emphasize that there is no obligation on an accused to challenge each and every point of evidence individually. However, if the witness was not challenged on an important point, you may be more inclined to accept the testimony of the witness on that point. As I have said, it is for you to decide how much or little you will believe and rely upon the testimony of any witness. This is just one factor among many that you will consider. I will provide you with further instructions on this issue later.

[Emphasis added.]

154 Second, in the part of the charge headed "The Absence of Cross-Examination on Significant Evidence", the judge gave the jury the following instruction:

[398] Defence counsel thoroughly cross-examined key Crown witnesses on issues going to their general credibility and reliability. I expect it was clear to you during those cross-examinations that defence counsel were suggesting to the witnesses that their evidence should not be believed or accepted.

[399] However, in some instances, a witness's evidence on a significant point, including evidence going directly to a particular accused's participation in a charged offence, was not challenged in cross-examination.

[400] The absence of cross-examination on a significant point *may* be an important factor for you to consider in determining whether you accept that witness's evidence on that point.

[401] To assist you in your deliberations, I will remind you of some areas where this occurred:

> • Sparks' evidence that as they were leaving [the beach], O'Donnell said words to the effect of, "Did you see him go down? I hit him really hard. Did you hear him moaning?" was not challenged in cross-examination.
>
> • [Witness T's] evidence that Sipes was present with him at [the motel] and that Sipes was present with him at the Thom shooting was not challenged in cross-examination.
>
> • The evidence of [Witness T], Williams, Dyck and Clayton that Sipes was present with [Witness T] at the Williams' residence after the shooting was not challenged in cross-examination.
>
> • Counsel for O'Donnell suggested to [Witness T] that [Witness U], not O'Donnell, was present with him at the Thom shooting, but did not suggest to Williams, Dyck, or Clayton that [Witness U] was present with [Witness T] at the Williams' residence after the shooting.
>
> • Counsel for Brownell suggested in his closing submissions that during the Bryce assault at [the beach], Brownell may have been seated in the back seat of his vehicle wearing a wig, but did not suggest that to [other witnesses].

[402] It will be for you to decide how much significance you will attach, if any, to the absence of cross-examination on a significant point. This is only one factor you may consider when deciding whether you accept the evidence of that witness on that point.

[Underline emphasis added.]

2.2 Discussion

155 On appeal, the appellants challenge these instructions as unnecessary and prejudicial. It is apparent from a review of the five examples of "significant points of evidence" identified by the judge that they relate to O'Donnell, Sipes, and Brownell. Of the three, only O'Donnell is an appellant, and his counsel could not identify any *direct* prejudice to him arising from the instruction to the jury on how to treat the unchallenged evidence. The appellants argue, however, that they are all *indirectly* prejudiced. They submit the instruction could have caused the jury to accept the uncontradicted evidence in the examples given by the judge and beyond, which the jury could then have used to corroborate and strengthen the evidence of the *Vetrovec* witnesses — evidence that did go directly to the culpability of Manolakos, Podolski, and O'Donnell. We accept that could have been so.

156 We turn then to the appellants' first alleged error.

(a) Was the rule in *Browne v. Dunn* engaged?

157 The appellants maintain their position at trial and submit that the judge erred in finding the rule in *Browne v. Dunn* was engaged in the present case. First, they say the rule only applies when the defence calls contradictory *evidence* that was not put to a Crown witness, and because none of the accused in the present case led evidence, the rule cannot be engaged. Second, the appellants argue in any event there was no "ambush" — no realistic possibility in this case that any of the Crown witnesses were caught by surprise by closing submissions challenging their evidence. We will address each point in turn.

(i) Does the rule apply when the challenge arises during argument?

158 In their written argument, the appellants rely on the editors' annotation to Gerry Ferguson, Michael Dambrot & Elizabeth Bennett, eds., *Canadian Criminal Jury Instructions*, 4th ed., looseleaf (Vancouver: The Continuing Legal Education Society of British Columbia, 2017 update) ("*CRIMJI*") at para. 4.99B which states:

> Canadian courts adopted [the rule in *Browne v. Dunn*] as part of our criminal law. Rather than confining the rule to circumstances in which defence counsel fails to cross-examine a Crown witness on a particular issue that the witness testified to in chief, and then argues before the jury that the Crown witness "was not speaking the truth", Canadian case

law takes a different approach. It seems to confine the issue of subsequently impeaching the Crown witness's examination in chief by calling defence evidence rather than by argument.

[Emphasis added.]

Based on this interpretation of the law, the appellants argue that since they called no evidence, the rule was not engaged.

159 The appellants did not press this argument at the hearing before us, and in our view it cannot succeed. With respect, the annotation in *CRIMJI* does not reflect the current state of the law in Canada. A number of cases are to the contrary.

160 In *Drydgen* at para. 13, this Court referred with approval to a passage from Sopinka, Lederman, and Bryant's *The Law of Evidence in Canada*, 3d ed. (Markham: LexisNexis, 2009) s. 16.180 (now s. 16.199), which states "[t]he rule applies not only to contradictory evidence, *but to closing argument as well*" (emphasis added). Similarly in S. Casey Hill, David M. Tanovich & Louis P. Strezos, eds., *McWilliams' Canadian Criminal Evidence*, 5th ed., looseleaf (Toronto: Canada Law Book, 2017 release no. 5) vol. 2 at para. 21:30.60.10, the authors describe the confrontation principle this way:

A party who intends to challenge the credibility of a witness, whether by calling contradictory evidence or simply as part of closing submissions to the fact finder, should generally provide the witness with an opportunity to address or explain the point upon which credibility is attacked. Simply put, the witness should be confronted in cross-examination with any material point on which his or her credibility is to be challenged. A failure to do so *may* detract from the strength of the party's case or entitle the party who called the witness to a remedy. This, in a nutshell, encapsulates the nature and impact of the so-called rule in *Browne v. Dunn* as it operates today.

[Underline emphasis added.]

161 Two other examples suffice. In *R. v. McCarroll*, 2008 ONCA 715 (Ont. C.A.), the Crown called no evidence to contradict a defence witness, and did not challenge that witness in cross-examination, but in closing argument suggested the jury should not believe the witness. The Ontario Court of Appeal held the rule in *Browne v. Dunn* applied. In *R. v. Quansah*, 2015 ONCA 237 (Ont. C.A.), leave to appeal ref'd [2016] S.C.C.A. No. 203 (S.C.C.), Justice Watt speaking for the Court stated:

[79] Failure to cross-examine a witness at all or on a specific issue tends to support an inference that the opposing party accepts the witness's evidence in its entirety or at least on the specific point. Such implied acceptance disentitles the opposing party to challenge it later or, in a closing speech, to invite the jury to disbelieve it: *R. v. Hart* (1932), 23 Cr. App. R. 202 (Ct. Crim. App.), at pp. 206-207; *R. v. Fenlon* (1980), 71 Cr. App. R. 307 (C.A.), at pp. 313-314.

[Emphasis added.]

162 In summary on this point, the rule in *Browne v. Dunn* can be engaged when a challenge to a witness' evidence arises in argument.

163 We turn now to the second and primary question: did the appellants fail to confront witnesses so as to engage the rule?

(ii) Did the appellants fail to confront witnesses?

164 The appellants say that all of the closing submissions flowed naturally from the direction taken in cross-examination, such that no witness could have been caught by surprise by the defences' theories of the case advanced in closing submissions to the jury. The appellants submit that both their opening submissions to the jury and the cross-examinations they conducted clearly and plainly put the witnesses on notice that their versions of events were being challenged and their credibility impeached.

165 By way of example, the opening submissions on behalf of Podolski included these comments:

Many of these witnesses that you will hear from have significant credibility and reliability problems. ... The real issue is whether the witness was motivated to shift the blame to others and downplay their own roles in these offences.

> Other Crown witnesses — other witnesses the Crown is calling may be inherently unreliable. Reliability problems may emerge when, for example, witnesses are talking about events that occurred when they were living a drug-addicted lifestyle. Their ability to perceive events and reliably convey those events or people who were present during those events may be compromised because of that. ...

166 With respect to cross-examination, the appellants emphasize that each of the key Crown witnesses was in the witness box for many days and were subjected to extremely thorough cross-examination. For example, Witness U was in the witness box for 17 days and under cross-examination for 12 days; Witness T was in the witness box for 23 days and under cross-examination for 16 days. The appellants point to the trial judge's final instructions to the jury which acknowledged the clarity and success of the defences' cross-examinations. Indeed, the judge introduced the impugned instructions with the following remarks:

> [398] Defence counsel thoroughly cross-examined key Crown witnesses on issues going to their general credibility and reliability. I expect it was clear to you during those cross-examinations that defence counsel were suggesting to the witnesses that their evidence should not be believed or accepted.
>
> [Emphasis added.]

167 There is no doubt the nature of cross-examination put the witnesses on notice that defence counsel would argue they were not worthy of credit and their testimony generally should not be believed. The appellants submit that given the general thrust and tenor of the cross-examination, the failure to cross-examine on specific points in a witness' testimony was insignificant and did not trigger the application of the rule in *Browne v. Dunn*.

168 The appellants submit this case is akin to *Drydgen*, in which the court found the rule was not engaged by defence counsel's failure to confront the complainant with the defence theory that there was no silver gun. Mr. Justice Donald for the Court said:

> [20] In this case it was clear from the cross-examination of the victim that the entire focus of the defence theory was that there was no silver gun. Counsel for the respondent submitted that had defence counsel asked the witness whether he could be mistaken about seeing the gun, he might have had an answer that he was deprived from giving by reserving the matter for argument. However, the victim was cross-examined at length on all of the vulnerable areas of his testimony in reference to seeing the silver gun. It was obvious that the focus on the defence questioning was that in the circumstances of being awakened and assaulted in poor lighting, with only a brief opportunity to make observations, the reliability of the victim's observations was in dispute.
>
> [21] What the judge found deficient in the defence was a pointless exercise.
>
> [Emphasis added.]

169 The appellants submit that in the present case, as in *Drydgen*, it would have been a pointless exercise to slog through every point of a witness' evidence when the entire focus of defence questioning was an attack on the general reliability and credibility of each witness. They argue the judge's determination that the rule was engaged in this case, if upheld, would require counsel to engage in protracted and useless cross-examination and would result in longer trials. The appellants contend in any event that having made their point that each witness was lying or otherwise unreliable, further cross-examination was unnecessary and would have amounted to "gilding the lily".

170 For the reasons below, we do not agree. As we have earlier noted, the rule in *Browne v. Dunn* does not require counsel to engage in useless cross-examination. Indeed, in many cases generally challenging a witness' credibility and reliability will suffice. But it will not always be so. The rule in *Browne v. Dunn* is rooted in fairness and is not fixed — whether it is engaged will depend on the circumstances of the particular case: *R. v. Lyttle*, 2004 SCC 5 (S.C.C.) at para. 65.

171 The trial in this case was long and complex. The theories of the five accused did not coincide as to how the offences occurred or who was responsible. The breadth and detail of the cross-examinations conducted by defence counsel was

extraordinary. In contrast, *Drydgen* involved a single event. Most of the cross-examination was focused on the ability of the victim to observe whether one of the accused had a gun.

172 Although it was clear in the present case that the appellants intended to impeach the witnesses' credibility and reliability, the question for the trial judge was whether the rule was engaged nonetheless when a witness was not confronted on a *particular aspect* of their evidence, such as the identity of participants in the murders.

173 The judge restricted the *Browne v. Dunn* instruction to significant pieces of evidence, giving examples of evidence going to an essential element of the offences charged: the identity of the perpetrators and participants in the killings. These are not minor or tangential pieces of evidence, but matters of substance. The judge's focus on significant matters is in keeping with the absence of any obligation on counsel to slog through unimportant details in cross-examination. We note that in general, issue was not taken with the judge's description of the five examples of uncontradicted evidence as "significant points".

174 In our view, the appellants' submission that further cross-examination would have been pointless fails to recognize that the object of the rule goes beyond fairness to the witness and includes fairness to the parties *and to the trier of fact*. In *McWilliams' Canadian Criminal Evidence* at para. 21:30.60.10, the authors describe the justifications for the confrontation principle this way:

> It is often said that the confrontation principle is justified out of fairness to the witness: if a witness is to be presented as unreliable, and in particular as a liar, it is only fair that he or she have a chance to respond in cross-examination, otherwise a baseless allegation may cause serious damage to his or her reputation. In other words, the witness should not be "ambushed" by a challenge made only after he or she has left the stand. This justification is central to the Law Lords' judgments in *Browne v. Dunn*, and has been echoed in many Canadian cases. Yet other justifications for the confrontation principle deserve equal if not greater weight. Of particular importance, a failure to provide the witness with an opportunity to respond leaves the fact finder without information that may show the credibility attack to be unfounded, and thus risk undermining the truth-finding function of the justice system. Breach of the principle can also be seen as unfair to the party calling the witness, who is denied the opportunity to marshal a response and whose case may suffer unwarranted harm as a result. Finally, not providing the witness with a chance to respond during cross-examination may interfere with the orderly presentation of evidence, for instance where the witness has to be recalled, thus wasting time and complicating issues.
>
> [Emphasis added.]

See also *Quansah* at para. 77.

175 In the present case, it would have been clear to the witnesses as they were being cross-examined that both their truthfulness and their reliability were being called into question and their stories challenged generally. However, the trier of fact, here the jury, was also entitled to the benefit of the witnesses' responses to the contradictory defence theory. As Lord Chief Justice Lane put it in *R. v. Fenlon* (1980), 71 Cr. App. R. 307 (Eng. C.A.) at 313:

> It is the duty of counsel who intends to suggest that a witness is not telling the truth to make it clear to the witness in cross-examination that he challenges his veracity and to give the witness an opportunity of replying. It need not be done in minute detail, but it is the duty of counsel to make it plain to the witness, albeit he may be a co-defendant, that his evidence is not accepted and in what respects it is not accepted.
>
> [Emphasis added.]

176 It is helpful to consider one example of uncontradicted evidence identified by the trial judge as engaging the rule in *Browne v. Dunn*. In closing submissions to the jury, counsel for Brownell suggested that during the Bryce assault at the beach, Brownell may have been seated in the back seat of his vehicle wearing a wig — a challenge to the evidence of Witness T and others who testified that Brownell had been involved in the assault on Bryce. There was evidence that Brownell occasionally wore a wig to avoid being identified. Counsel's suggestion that Brownell was seated in the back seat of his car wearing a wig, and was actually one of the three "girls" described by one of the witnesses as sitting in the vehicle during the assault, was not put to the witnesses who described the events at the beach that night. Defence counsel thoroughly attacked the credibility and

reliability of those witnesses, but did not put this theory to them. As a result, none had an opportunity to respond and to assist the jury in evaluating the strength of the defence argument that Brownell was inside one of the vehicles wearing a wig when the assault on Bryce took place.

177 We repeat that whether the rule in *Browne v. Dunn* is engaged will depend on the circumstances of the particular case. Here, there was a complex, lengthy, and multifaceted trial in which counsel chose to cross-examine extensively but also chose to leave some significant points unchallenged. On the record before us, we conclude the trial judge did not err in finding the rule had been engaged by counsels' strategic decision not to cross-examine on some significant points of evidence.

(b) Was the instruction given appropriate?

178 We turn now to the second error the appellants raise on this ground of appeal. The appellants argue that even if the rule in *Browne v. Dunn* were properly engaged in this case, the judge erred in the instructions he provided. In their submission, his instructions to the jury were improper, novel, and dangerous. They say the judge invited the jury to engage in the following impermissible reasoning: if there was no cross-examination on a piece of evidence, that evidence should be given more weight. The appellants say with some vigour that the absence of cross-examination cannot augment a witness' believability and act as a "make weight".

179 They further argue that the judge's instruction flies in the face of defence counsels' right to control cross-examination so as to make full answer and defence. They say this instruction requires counsel to cross-examine on areas they would rather avoid. Moreover, if upheld, it would create a mandatory rule of practice to the effect that counsel must engage in potentially damaging cross-examination on all "important" or "significant" points — regardless of whether they feel it is in their client's best interest to do so. They submit this obligation would be inconsistent with the broadly construed right of an accused to make full answer and defence, which includes controlling cross-examination.

180 Finally, the appellants say that at a minimum the instruction was flawed because the judge gave five examples of significant evidence that had not been challenged, but left it open to the jury to decide whether there were other examples.

181 We begin by reiterating that deference is owed to a trial judge's exercise of discretion in deciding how to remedy a breach of the rule in *Browne v. Dunn*: *Drydgen* at para. 22. There is no prescribed approach or formulaic jury instruction to address a breach of the rule. This is not surprising given that the seriousness of particular breaches and the context in which they occur will vary widely from trial to trial.

182 With respect, we do not find the appellants' submissions persuasive. The rule in *Browne v. Dunn* is a well-established principle of fairness that does exactly what the appellants complain of — it interferes with counsel's control over cross-examination to the extent that it requires counsel to cross-examine on significant evidence they intend to challenge, failing which they may face a remedial instruction. Put another way, defence counsel cannot be compelled to cross-examine on a particular area and may choose not to do so for good reason; that is counsel's prerogative. However, as Chief Justice McEachern observed in *Khuc* at para. 44, counsel who do not cross-examine take the chance that the witness' evidence will be accepted.

183 In our view, the approach taken by the judge in the present case discloses no reviewable error. It was not novel, nor did it invite the jury to engage in impermissible reasoning. We make the following observations.

184 First, the judge did not instruct the jury to give the uncontradicted evidence more weight. His language was permissive. He did not tell the jury to disregard defence counsels' arguments and theories. Rather, at para. 92, he told the jurors the lack of cross-examination on an important point of evidence was "one factor among many" they could consider — a factor which could incline them "to accept the testimony of the witness on that point". At para. 400, the trial judge also told them that "[t]he absence of cross-examination on a significant point *may* be an important factor for [them] to consider in determining whether [they] accept that witness's evidence on that point". He concluded his instruction at para. 402 by stressing that "[i]t will be for [the jury] to decide how much significance [it] will attach, *if any* to the absence of cross-examination on a significant point" (emphasis added).

185 We note the judge's instruction stands in stark contrast to the one found in *CRIMJI* at para. 4.99B.3, which the trial judge referred to in his memorandum to counsel quoted above at para. 152. *CRIMJI* contains a strongly worded instruction directing the jury to disregard entirely a defence argument that was not put to a witness during cross-examination. Filling in the blanks, the instruction reads as follows:

> Because defence counsel did not cross-examine the Crown witness about [the subject] it was improper for the defence to argue that the Crown witness's evidence was not worthy of belief. You see, if defence counsel had questioned the Crown witness on these matters, it is possible that the witness could have explained any contradictions alleged by defence counsel. Therefore you should pay no attention to his attack on the Crown witness's credibility.
>
> [Emphasis added.]

186 It is clear that the instruction given by the trial judge in the present case was much "softer". He did not take the approach suggested in *CRIMJI*, but instead tailored his charge to fit the circumstances of the case.

187 Second, in assessing evidence when making findings of fact, trial judges routinely refer to and rely on the evidence of a witness that has not been challenged on a particular point. Implicit in this practice is the assumption that unchallenged evidence may be more reliable and may carry more weight. In our view, once the rule in *Browne v. Dunn* is engaged, it is permissible for the trier of fact to take the absence of cross-examination into account in assessing the weight to be given to that evidence.

188 Third, *Browne v. Dunn* instructions in other cases have not been limited to what might be thought of as the "classic" *Browne v. Dunn* instruction to give less weight to a contradictory argument, theory, or piece of evidence that was advanced without being put to a witness. The editors' annotation in *CRIMJI* acknowledges that the failure of defence counsel to cross-examine a Crown witness can affect both the weight to be given to the contradictory defence evidence *and* the weight to be given to the Crown witness' unchallenged evidence. In *R. v. McNeill* (2000), 144 C.C.C. (3d) 551 (Ont. C.A.), Justice Moldaver suggested the following language:

> ... If [an instruction] is warranted, the jury should be told that in assessing the weight to be given to the uncontradicted evidence, they may properly take into account the fact that the opposing witness was not questioned about it. The jury should also be told that they may take this into account in assessing the credibility of the opposing witness.
>
> [Emphasis added.]

189 A similar approach was adopted in *Paris*. That case concerned the effect of a breach of the rule on the credibility of an accused who testified on a matter not put to a Crown witness in cross-examination. Justice Doherty for the Court said:

> [22] Where a witness is not cross-examined on matters which are of significance to the facts in issue, and the opposing party then leads evidence which contradicts that witness on those issues, the trier of fact may take the failure to cross-examine into consideration in assessing the credibility of that witness *and* the contradictory evidence offered by the opposing party. The effect of the failure to challenge a witness's version of events on significant matters that are later contradicted in evidence offered by the opposing party is not controlled by a hard and fast legal rule, but depends on the circumstances of each case: *R. v. Palmer* (1979), 50 C.C.C. (2d) 193 at 209- 210 (S.C.C.); *R. v. H.(L.M.)* (1994), 39 B.C.A.C. 241 at 255 (C.A.); *R. v. Verney* (1993), 87 C.C.C. (3d) 363 at 375-76 (Ont. C.A.); *R. v. K.(O.G.)* (1994), 28 C.R. (4th) 129 at 131 (B.C.C.A.); *R. v. Letourneau and Tremblay* (1994), 87 C.C.C. (3d) 481 at 522-23 (B.C.C.A.); *R. v. McNeill*, supra, at 565; A. Mewett, Witnesses, 2d ed., looseleaf (Toronto: Carswell, 1999) at 2-32 to 2-34.
>
> [Underline emphasis added.]

190 To similar effect, Justice Watt in *Quansah*, after commenting on the flexibility of the instructions to be used to remedy a breach of the rule, said:

[121] A trial judge who decides to give a specific instruction to the jury about the failure to comply with the rule in *Browne v. Dunn* as a factor to consider in the jury's credibility assessment need not pronounce a specific word formula to achieve that purpose. The instructions should not be characterized as a "special instruction", but should make it clear that the failure has relevance for the credibility of the witness who was not confronted with the contradictory evidence, as well as the credibility of the witness who gave the contradictory evidence. The instruction need not elaborate on the obligations of counsel: *Paris*, at paras. 27-29; *Dexter*, at para. 43.

[Emphasis added.]

191 The language used by the judge in para. 92 of the charge suggested the absence of cross-examination on a particular point might cause them to be "more inclined to accept the testimony of the witness on that point". When read in the context of the charge as a whole, and in particular paras. 398-402 (above at para. 154), we find no basis for interfering with the judge's exercise of his discretion to remedy the breach of the rule as he did. While other cases have used different language, there is nothing inherently wrong with the words used by the judge in this case. The thrust of the instructions reflects the well-settled view that the absence of cross-examination on a significant point may result in more weight being given to that evidence by the trier of fact — i.e., it may cause the trier of fact to be more likely to accept it even when the credibility and reliability of the witness has been challenged in a general way.

192 We turn finally to the appellants' submission that the judge erred in leaving it open to the jury to decide whether there were examples of unchallenged and significant evidence other than the five identified by the judge. Ultimately, it is the jurors who must decide what evidence they consider to be important in coming to their verdict. As Justice Doherty noted in *Paris* at para. 29, instructing on the rule in *Browne v. Dunn* is part of the judge's obligation to assist the jury in deciding how to *assess* evidence. It was not the judge's role to prohibit the jury from considering other pieces of uncontradicted evidence which they might view as important in coming to their verdict.

193 We do not accede to this ground of appeal.

3. Party Liability (Ground 4)

194 The pathways for party liability are set out in s. 21(1) of the *Criminal Code*. They include: liability as a principal or co-principal pursuant to s. 21(1)(a); liability as an aider pursuant to s. 21(1)(b); and liability as an abettor pursuant to s. 21(1)(c). While the *actus reus* and *mens rea* for aiding and abetting differ from those of the principal offence, the law does not distinguish between parties' criminal liability: *R. v. Briscoe*, 2010 SCC 13 (S.C.C.) at para. 13.

195 To aid murder, an individual must assist the principal offender, and intend to do so with the knowledge that the principal has the specific intent to kill the victim or to inflict bodily harm that he or she knows is likely to cause death. To abet murder, an individual must encourage the principal offender, and intend to do so with the knowledge that the principal has the specific intent to kill the victim or to inflict bodily harm that he or she knows is likely to cause death. The requisite *mens rea* may be established by either actual knowledge or wilful blindness: *Briscoe* at para. 24.

196 The appellants contend the judge failed to properly instruct the jury on the proper application of these principles. They raise three particular errors.

197 First, they submit the judge erred in failing to ensure the jury understood that in order to secure a conviction on the Crown's theory that the accused were "acting in concert", the Crown was required to prove that each had the subjective foresight that his conduct would cause the victim to die or cause the victim bodily harm that he knew would likely result in death and was reckless whether death ensued. This alleged error, they say, relates to the liability of Podolski and O'Donnell as parties to Marnuik's forcible confinement and murder (Count 1), and to O'Donnell's liability as a party to the Bryce homicide (Count 4).

198 Second, the appellants submit the judge erred in instructing the jury that Podolski and O'Donnell could be convicted of first degree murder as aiders or abettors of the murder by operation of ss. 21(1)(b) or (c) in relation to the Marnuik homicide. O'Donnell contends the same error was made with respect to his involvement in Thom's death (Count 3).

199 Third, the appellants submit the judge erred in instructing the jury that it could rely on the doctrine of wilful blindness as an alternative to finding actual knowledge of an aider or abettor of the principal or co-principal's murderous intent in order to convict Podolski and O'Donnell of the offence of first degree murder in relation to the death of Marnuik. This complaint also relates to O'Donnell's liability for the Thom homicide.

200 We will address these alleged errors as they relate to the Marnuik, Bryce, and Thom homicides, respectively.

201 We also note the appellants' submission that the latter two errors rest largely on the proposition that the evidence did not give rise to an air of reality that could support the impugned instructions. For this reason, on each count it is useful to review some of the evidentiary background and the testimony of key witnesses before turning to the judge's instruction itself.

3.1 The Marnuik Homicide

(a) Background

202 In the Introduction at paras. 28- 33, we provided an overview of the Crown's theory of the murder of Marnuik. For convenience, we repeat some of that here.

203 The Crown alleges that David Marnuik was a street-level drug runner for the Greeks, who in the summer of 2004 let the dial-a-dope line for which he was responsible go down. He disappeared, along with the drugs and money in his possession. The Crown alleges that Manolakos ordered that Marnuik be located and beaten, and that after Marnuik was picked up, he was taken to the Office, where he was duct-taped to a chair and brutally attacked by multiple individuals using fists, motorcycle gloves, a PVC pipe, a fish bat, and a hammer. The Crown further alleges that Marnuik was tortured by the application of a lighted propane blowtorch to his legs, forehead, and left hand, which was charred to the point that the skin began to peel. It contends Marnuik was still duct-taped to the chair when he died.

204 Podolski, O'Donnell, and Sipes were charged with first degree murder pursuant to s. 231(5)(e) of the *Code*, which provides that murder is first degree murder when death is caused while committing or attempting to commit the underlying offence of kidnapping and/or forcible confinement. Manolakos was charged with the manslaughter of Marnuik.

205 The theory of the Crown is that the appellants, O'Donnell and Podolski, along with Sipes and three others, acted in concert as co-principals in the offence.

206 Three *Vetrovec* witnesses [including Sparks] provided evidence key to the Crown's case on those counts. Each gave differing accounts of how the assault unfolded: who was present, when they were present, and what they did during the assault. A summary of their evidence follows.

(i) Sparks' testimony

207 Sparks was an "inactive member" of the Greeks who lived in one of the apartments at the Office. He testified that he, O'Donnell, and Witness T were present when Marnuik was brought to the Office and taken to a room upstairs, where O'Donnell duct-taped Marnuik to a chair. Sparks testified Witness T and O'Donnell told Marnuik he was going to take "a royal beating" and asked Marnuik if he thought he was "going to get away with this".

208 Sparks testified that all three started beating Marnuik, with O'Donnell hitting Marnuik very hard in the legs, arms, and head several times with the PVC pipe that was approximately four feet long and 1.5 inches in diameter. He testified that Witness T also used the pipe to beat Marnuik very hard in the forearms and body area while he (Sparks) hit Marnuik in the face with his fists twice, but "not very hard".

209 Sparks testified that, after about 15 minutes, he, Witness T, and O'Donnell left and went to Sparks' apartment across the hall, and that when Podolski and Sipes arrived at the Office, he accompanied them to the room where Marnuik was confined. He testified that Podolski sat down in a chair facing Marnuik, holding a two-foot long wooden bat that was about three inches in diameter at one end and tapered at the other end. Sparks testified that Podolski asked Marnuik questions like "[d]id you think you were going to get away with this" and "[y]ou think you can smoke all my dope and turn off the phone", but that Marnuik could not answer because he was in a lot of pain. Sparks testified Podolski then began to beat Marnuik on his bare feet with the bat. He testified that Sipes left to go into the boardroom and returned with a propane torch, which Sipes then lit.

210 Sparks testified that at that point he left the room to return to his apartment, saying "I think he's had enough", to which Sipes told him to shut up or "you'll be sitting in the chair". Sparks testified that when he left only Sipes and Podolski remained in the room. He testified that Marnuik looked "very distressed"; he appeared to be in a lot of pain, with welts on his forearms, legs, and face, and blood spattered on his face.

211 Sparks testified that sometime later Podolski came into Sparks' apartment and said that Marnuik was dead. Sparks testified he expressed surprise and said something to the effect of "What? You're fucking kidding me", in response to which Podolski shrugged and got himself a drink. He said that upon returning to the room where Marnuik was confined, he confirmed the report. He testified to seeing Sipes holding the blowtorch and "kind of giggling", to Marnuik's hand being severely burned, and to there being blood splatter on the ceiling and the wall behind Marnuik.

(ii) Witness T's testimony

212 Witness T testified he was with O'Donnell and Podolski when they picked up Marnuik and drove him to the Office, where Sparks and Glass were also present. He testified that someone duct-taped Marnuik to a chair, and shortly thereafter Witness U arrived and suggested they play a game of "who could hit the hardest".

213 Witness T testified that Witness U made the first strike by hitting Marnuik in the jaw; Witness T then hit Marnuik once or twice with his fists, and six or seven times with the PVC pipe on his legs, arms, and the back of his neck, "fairly hard". He testified he acted "the same as everybody else". He testified that Podolski, O'Donnell, Sparks, and Steve also participated in the beating; that O'Donnell hit Marnuik in the arms and legs with the PVC pipe and in the head with his fists; and that Podolski and Sparks also struck Marnuik in the head with their fists.

214 Witness T testified that either Witness U or Podolski left, and whichever one left then returned with Sipes. He testified that, before any of them returned, Marnuik was released and then re-taped to the chair. He testified that Sipes entered the room carrying a tool box, and that Podolski used a hammer from the tool box on Marnuik's feet saying "see what happens when you run from us, you won't run again". Witness T testified that all the while Marnuik was screaming loudly in pain. He testified that Sipes then lit the blowtorch and proceeded to burn Marnuik's left hand, while Podolski struck Marnuik several times in the mouth and the head with a fish bat; Marnuik was in shock and no longer screaming, and Sipes, he said, continued to strike Marnuik in the mouth.

215 Witness T's evidence was that all who were present then left, including himself, Witness U, Podolski, O'Donnell, Sipes, Sparks, and Glass. Witness T testified that sometime after Sparks went back to check on Marnuik, and that when Sparks returned to the group he told them Marnuik was dead. Witness T testified that people were shocked because "there was no intention on anybody's part to kill him".

216 Witness T testified the assault took part in two stages: the first stage was the beating in which everyone in the room participated in striking Marnuik; the second stage was after Marnuik was released and permitted to wash up and have a cigarette before being re-taped to the chair.

217 Witness T also testified that while the assault was ongoing, Witness W arrived with a Polaroid camera and that someone took photographs of Marnuik near the end of the beating and torture. He said that when Witness W saw Marnuik in the chair,

he (Witness W) took off. Witness T testified he took one of the photographs which showed Podolski's arm holding a fish bat with a bloodied and battered Marnuik in the background, with him to Calgary as "insurance".

(iii) Witness U's testimony

218 Witness U testified that he and Sipes drove to the Office after speaking with Manolakos, and that when they arrived Podolski, O'Donnell, Sparks, Witness T, and Glass were present.

219 Witness U saw Marnuik duct-taped to a chair, covered in blood, with a cut to his head, several other small cuts, swollen and bruised eyes and face, blood all over his clothes and legs, and wet from having water poured over him to keep him conscious. He testified Podolski showed him three or four Polaroid photographs "they" had taken, which showed Marnuik at different stages of the beating while duct-taped to the chair. Witness U testified Podolski appeared intoxicated, but he said he did not remember what Podolski did during the assault.

220 Witness U testified he asked Marnuik why he had stolen the money; Marnuik replied that he was sorry and asked to phone someone who could get the money back. Witness U testified the group left the room to discuss this proposal but rejected it.

221 Witness U testified that when they returned to the room: he struck Marnuik in the face several times with his fist; Witness T struck Marnuik hard with his hand more than once; O'Donnell put on his motorcycle gloves and struck Marnuik in the face several times, causing Marnuik's head to snap back; and Sipes struck Marnuik on his legs, hands, and fingers with the hammer, "hard enough to break bones".

222 Witness U also testified that Sipes struck Marnuik's toes one at a time while Marnuik was screaming in pain, then applied the lighted blowtorch to Marnuik's hands, holding it on one spot for several seconds. Witness U testified Marnuik was "screaming in pain and agony" and trying to get away by bouncing the chair. He testified he and Witness T held Marnuik down while Sipes applied the blow torch to Marnuik's hands and down his legs, telling him to "shut up", and at some point during Sipes' assault O'Donnell said, "Hey, he's had enough." Witness U said Sipes applied the blowtorch across Marnuik's forehead and then struck Marnuik very hard in the mouth a couple of times with the fish bat, causing a few of Marnuik's teeth to fall out. The group then left the room.

223 Witness U testified that Sparks went back to mop up, and discovered that Marnuik was dead. He testified that when Sparks returned and told the group, "the reaction in the room was disbelief", and that the group then went back to the room where Marnuik remained tied up in the chair. Witness U testified that Sipes shook Marnuik saying, "Wakey wakey, sunshine," and that when Marnuik did not respond, Sipes said, "Oops, I guess I hit him too hard."

(iv) Application for directed verdict

224 Following the close of the Crown's case, Sipes, Podolski, and O'Donnell each applied for a directed verdict of not guilty on the charge of first degree murder of Marnuik (Count 1). Brownell also applied for a directed verdict of not guilty on the charge of first degree murder and the included offences of second degree murder and manslaughter of Ron Thom (Count 3).

225 In support of their application on Count 1, the appellants said there was an absence of evidence of any stated intention to cause Marnuik's death and the absence of any medical evidence as to the cause of death. The judge dismissed the application in reasons indexed as *R. v. Sipes*, 2012 BCSC 1115, stating:

> [14] I am satisfied there is some evidence from which the jury could reasonably find that: the applicants knowingly participated in the unlawful confinement and beating of Mr. Marnuik as co-perpetrators, aiders and/or abettors; they did so with the required subjective intent for murder; and, each of them was an essential, substantial and integral part in the cause of his death. The statements of [Witness T] and [Witness U] concerning intent may or may not be accepted by the jury and, in any event, are not direct evidence of the intention of the applicants. The absence of medical evidence does not foreclose the jury from reasonably concluding that Mr. Marnuik died from the cumulative effect of being repeatedly assaulted by fists and weapons, including a fish bat, hammer and blow torch, while confined and taped to a chair.

[15] It is for the jury to decide whether the conduct of the applicants constitutes first-degree murder. My jurisdiction to direct a verdict is limited to circumstances where there is no evidence upon which a reasonable jury, properly instructed could return a verdict. I am satisfied there is some evidence from which the jury could find each of the applicants committed the first degree murder of David Marnuik.

226 The ruling reflected the judge's view that there was an evidentiary pathway for a finding of liability against each of the appellants, as a co-principal, aider, or abetter, in the murder of Marnuik. The ruling is not appealed.

(v) Jury instructions on party liability for count 1

227 In his instructions, the judge reviewed the different ways that an accused might participate in an alleged offence. He explained that an accused could be found guilty of an offence by actually committing the offence as a principal or co-principal pursuant to s. 21(1)(a); by assisting the principal to commit the offence as an aider pursuant to s. 21(1)(b); and, by encouraging the principal to commit the offence as an abettor pursuant to s. 21(1)(c).

228 The judge identified the elements of the offence the Crown had to prove beyond a reasonable doubt in order for the jury to find that each of Sipes, Podolski, and O'Donnell committed the first degree murder of Marnuik, at para. 616:

> i. The particular accused, alone or along with others, actually committed an unlawful act, or aided or abetted the commission of an unlawful act by another. [The "unlawful act requirement".]
>
> ii. The unlawful act that the particular accused committed, aided or abetted, caused the death of David Marnuik. [The "causation requirement".]
>
> iii. The particular accused had the state of mind required for murder as a principal, aider or abettor. [The "state of mind requirement".]
>
> iv. The particular accused, alone or along with others, actually committed, aided or abetted the commission of the offence of forcible confinement. [The "forcible confinement requirement".]
>
> v. The forcible confinement and murder of David Marnuik were part of the same series of events. [The "same series of events requirement".]
>
> vi. The particular accused actively participated in the murder as principal, aider or abettor, such that the role he played was a substantial and integral cause of death. [The "active participation requirement".]

229 In his instructions, the judge expressed his expectation that the jury would have little difficulty in concluding affirmatively on some of the above requirements. With respect to the unlawful act requirement, he expected they would have no difficulty finding that the assault of Marnuik was an objectively dangerous unlawful act. He also advised the jury that he expected they were unlikely to have difficulty finding that the accused committed, aided, or abetted in, the forcible confinement of Marnuik by duct-taping him to a chair in the Office because the offence of forcible confinement as a matter of law is an ongoing offence, and those who participated in the assault upon Marnuik while he was duct-taped to the chair must "have knowingly and intentionally assisted and/or encouraged the continuing forcible confinement".

230 Regarding the same series of events requirement, the judge explained that in order to elevate the offence to first degree murder, the forcible confinement and killing of Marnuik did not have to occur at the same time, but only had to be closely connected with one another in the sense that the two events must have been part of the same series of events or same transaction. He advised the jurors, at para. 667, that as "[t]here was no challenge to the evidence that Marnuik was brought to the Office, duct-taped to a chair, assaulted by numerous individuals and eventually died while still duct-taped to the chair", he expected that they would have "little difficulty concluding that his death and forcible confinement were part of the same series of events".

231 Three more contentious issues remained, those being: (i) whether each accused participated in the assault of Marnuik or, alternatively, acted as an aider or abettor to the principal(s) who committed the assault; (ii) whether each accused had the intent to commit murder or had knowledge of the principal offender(s)' intent to commit the murder if they were found to be assisting or encouraging the principal offender; and (iii) if one or more of the accused did commit the murder, whether he or they actively participated in the murder, which would raise the offence to first degree murder.

232 We address the judge's instructions as to the last issue — the active participation requirement — in detail in our discussion of the next ground of appeal. It does not bear on the appellants' submissions on party liability.

233 On the first issue (the causation requirement), the judge related the different levels of participation required of a principal, aider, and abettor. Earlier in the charge, he had explained that an accused's participation in the assault need not have been the sole or primary cause of the victim's death but only a significant contributing cause, stating:

> [543] Where two or more persons acting together commit an offence, the Crown does not have to prove the precise role each person played in the offence, as long as the Crown proves beyond a reasonable doubt that each person participated in the offence as a principal, aider or abettor, and did so with the required knowledge and intent.

234 The judge reiterated these instructions when explaining the Crown's "acting in concert" theory of liability:

> [633] A particular accused would have caused death as a co-principal if, acting in concert with others, he personally participated in the assault, whether the force he used was the actual cause of death or not. When two or more people, acting in concert, commit an unlawful act that causes death, it matters not who actually struck the fatal blow because the act of one is the act of them all.
>
> [634] Alternatively, a particular accused would have caused death as an aider if he intended to do and did something that actually assisted, in some way and to some extent, the principal(s) to commit the unlawful act that caused death.
>
> [635] Alternatively, a particular accused would have caused death as an abettor if he intended to do something that actually encouraged, in some way and to some extent, the principal(s) to commit the unlawful act that caused death.

235 On the second issue (the state of mind requirement), the judge explained that in order to find an accused committed murder as a principal, the Crown must prove beyond a reasonable doubt that the accused either meant to kill the victim, or meant to cause the victim bodily harm that he knew was likely to cause death and was reckless as to whether death ensued or not. The judge informed the jurors he expected their deliberations would focus on the latter.

236 With respect to the *mens rea* for an aider or abettor, the judge advised the jury that an aider or abettor must have intended to assist or to encourage the perpetrator to commit murder while knowing that the perpetrator had the intent to kill, or had the intent to cause bodily harm that he knew was likely to cause death and was reckless as to whether death ensued or not. He added that proof of an aider or abettor's actual knowledge of the perpetrator's murderous intent could alternatively be established by the doctrine of wilful blindness, which he explained as follows:

> [536] Wilful blindness is just another way of establishing knowledge on the part of the accused that the principal intended to commit the offence. Wilful blindness exists where an accused, in all the circumstances, strongly suspects that the principal intends to commit the specific offence, but deliberately chooses not to inquire into whether the principal offender does intend to commit that offence because the accused does not want to know. A person who is wilfully blind knows there is a need for inquiry but does not want to know the truth and pursues, instead, a course of *deliberate ignorance*.
>
> [Emphasis in original.]

237 At para. 540, the judge added that the jurors could rely on the common sense inference — "that a sane and sober person intends the natural and probable consequences of his voluntary actions" — to find that "the conduct of an accused would naturally have the effect of aiding and abetting the principal offender", and therefore "that the accused knew and intended that

his conduct would aid or abet the principal offender." However, at para. 541 he also advised the jurors that they were not required to rely upon the common sense inference.

238 Specifically, he instructed the jury on the intent for liability as a principal, aider, or abettor as follows:

> [644] In this case, you must decide whether the Crown has proved beyond a reasonable doubt that:
>
> (i) the particular accused meant to kill Marnuik, or meant to cause him bodily harm of such a dangerous and serious nature that he knew it was likely to kill Marnuik and proceeded despite his knowledge of that risk; or
>
> (ii) the particular accused knew the principal(s) intended to murder Marnuik and did something with the intention of assisting the principal(s) to do so; or
>
> (iii) the particular accused knew the principal(s) intended to murder Marnuik and did something with the intention of encouraging the principal(s) to do so.

239 He reviewed some of the relevant evidence on this issue, stating:

> [645] ...To determine a particular accused's state of mind (his knowledge and intent), you must consider all the evidence leading up to the death of Mr. Marnuik.
>
> [646] In deciding whether an accused who committed, aided or abetted the beating did so with the required intent for murder, you may find the following considerations of some assistance:
>
> • The nature and extent of the harm inflicted by a particular accused on Marnuik, or inflicted by others with his encouragement or assistance.
>
> • The nature of the tools and implements that were used as weapons in the course of the assault, how they were used, and the areas of Mr. Marnuik's body that were targeted when they were used.
>
> • The extent to which those who participated in the assault targeted Mr. Marnuik's head in inflicting injury, and the force they used in doing so.
>
> • The duration and intensity of the beating.
>
> • That Marnuik was restrained throughout the beating and unable to defend himself.
>
> • Whether a particular accused continued in the assault knowing that Mr. Marnuik was seriously injured. For example, consider [Witness T's] evidence that towards the end of the assault, Marnuik had become very quiet and seemed to have gone into shock.
>
> • Whether a particular accused was present for most or all of the assault, and whether he knew the extent of the beating.
>
> • What an accused said before, during and immediately after the assault.
>
> • With respect to O'Donnell, recall [Witness U's] evidence that at one point O'Donnell said, "Hey, he's had enough." Recall as well Spark's evidence that he [Sparks] said that he thought Dave had had enough.
>
> • The evidence of Sparks, [Witness T] and [Witness U] that they did not expect Mr. Marnuik to die from the beating he was subjected to. I remind you of my previous instruction concerning the use you may make of this evidence. [The judge previously instructed the jury that evidence about a witness' own intention may be one factor to rely on when assessing the accused's state of mind, but they cannot rely on a witness' testimony about anyone else's intention as the witness cannot know what was in the mind of the accused or anyone else.]

• With respect to Podolski, recall [Witness U's] testimony that Podolski was drinking and appeared to be intoxicated during the assault.

[647] The brutality of the assault is one factor relevant to your assessment of a particular accused's state of mind. But guard against letting it overwhelm your analysis of whether the Crown has proven beyond a reasonable doubt the intent required for murder.

240 Thereafter, in the following 75 pages of his charge, the judge reviewed the evidence that he considered the jury might find relevant with respect to each of the elements of the offence. This included in some depth the evidence, both in examination in chief and in cross-examination, of the three Crown witnesses discussed above. At the end of his review, the judge highlighted some of the admissible evidence for and against each of the accused. At paras. 840-841, he noted that these highlights did not include some of the evidence, including that which related to the credibility of the witnesses or the reliability of their evidence, and reiterated that the jury was required to consider all of the admissible evidence against each accused.

241 The judge concluded this part of his charge by identifying "The Critical Questions" as follows:

[870] With Sipes, Podolski and O'Donnell you must be satisfied beyond a reasonable doubt that all the elements of first degree murder have been established.

[871] It is for you to decide, but I suggest the critical questions for each of Sipes, Podolski and O'Donnell are:

• Did he actually participate in the assault, or encourage or assist the others in committing the assault? If not, he is not guilty of any offence. If so, go on to the next question.

• Did he have the state of mind required for murder as a principal, aider or abettor? If not, he is not guilty of first degree murder but guilty of manslaughter. If so, go on to the next question.

• If he committed murder, did he do so while committing the offence of forcible confinement? If not, he is not guilty of first degree murder but guilty of second degree murder. If so, go on to the next question.

• Did he actively participate in the killing of Marnuik? If not, he is not guilty of first degree murder but guilty of second degree murder. If so, he is guilty of first degree murder.

242 The jury convicted Podolski and Sipes of first degree murder, O'Donnell of second degree murder, and Manolakos of manslaughter in relation to the Marnuik killing.

(b) Discussion

243 On appeal, the appellants concede the evidence supported a finding that each of them assaulted Marnuik and therefore committed an unlawful act. They also acknowledge that the content of the judge's instructions with respect to the legal principles on party liability set out above were correct.

244 We turn now to the three errors the appellants raise with respect to the judge's instructions on party liability.

(i) Did the judge err in his instructions on the intent for co-principals acting in concert?

245 The appellants submit the judge erred in failing to instruct the jury that, if it accepted the Crown's theory that Podolski and O'Donnell, along with Sipes, were acting in concert as co-principals in the killing of Marnuik pursuant to s. 21(1)(a), they had to be satisfied beyond a reasonable doubt that each accused had the requisite murderous intent before they could convict that accused. The appellants say the judge erred by failing to link his general instructions on the intent for murder to the Crown's "acting in concert" theory by clearly referring to the required *mens rea* of each of the appellants, as required by *R. v. Suzack* (2000), 128 O.A.C. 140 (Ont. C.A.) at para. 152, leave to appeal ref'd (2001), [2000] S.C.C.A. No. 583 (S.C.C.); *R. v. Pickton*, 2010 SCC 32 (S.C.C.) at para. 32; and *R. v. Elder*, 2015 ABCA 126 (Alta. C.A.) at para. 17.

246 The Crown submits that, based on its closing submissions and the judge's instructions, the jury could not have been left in any doubt as to the *mens rea* required to convict each of the appellants of murder, whether as a principal, co-principal, aider, or abettor. The Crown's theory was that the accused acted in concert as co-principals. In closing submissions, the Crown told the jury that the actions of Podolski, O'Donnell, and Sipes were part of a joint enterprise, that "their actions were cumulative and complemented each other", that "the blows of one were the blows of the other", and that the participation of each accused was an essential, substantial, and integral part of Marnuik's death. The Crown also underscored that before the jury could convict a particular accused, the jury had to be satisfied that the particular accused had the requisite intent for murder.

247 We agree with the appellants that, based on the "acting in concert" theory, the Crown had to establish beyond a reasonable doubt that *each* principal or co-principal accused had the subjective foresight that his participation in the beating would cause Marnuik bodily harm that he knew was likely to cause death and was reckless as to whether death ensued or not: see *R. v. Martineau*, [1990] 2 S.C.R. 633 (S.C.C.).

248 In our view, the instructions clearly meet that requirement; the passages of the jury instructions replicated above demonstrate repeated uses of the phrases "the particular accused" and "a particular accused", consistent with the judge's later instruction in para. 678 that each accused was "entitled to separate consideration based on the evidence admissible for and against him". We see no merit in the submission that the judge failed to relate, in a sufficient fashion, that in the event the jury accepted the "acting in concert" theory of causation, it still must be satisfied beyond a reasonable doubt that each accused had the required subjective intent for murder before he could be convicted of murder.

249 Ultimately, the intent of each accused was a question of fact for the jury to decide.

(ii) Did the judge err by including an instruction on aiding and abetting?

250 The appellants submit the judge erred in instructing the jury on aiding and abetting in the absence of an air of reality on the evidence to support that instruction. They say the only possible theory of either Podolski or O'Donnell's liability as an aider or abettor was too speculative, as it required the jury to find that at some point after the beating of Marnuik began: (i) at least one of the assailants formed the specific intent to kill or knowingly inflicted harm that he knew was likely to cause death and was reckless whether death ensued or not; (ii) one or both of Podolski and O'Donnell developed knowledge of that assailant's murderous intent; and (iii) thereafter one or both of the appellants did something for the purpose of aiding or abetting the assailant to kill Marnuik.

251 This submission, in our opinion, requires an overly surgical view of how the circumstances of this offence unfolded.

252 A jury instruction on aiding or abetting is properly given where two or more persons have a common purpose to commit an unlawful act, and there is some ambiguity as to the role each participant has played in the commission of the unlawful act. Liability as an aider or abettor does not require a separate evidentiary basis distinct from that required to find liability as a principal or co-principal offender: see *R. v. H. (L.I.)*, 2003 MBCA 97 (Man. C.A.) at para. 59, cited in *R. v. Rojas*, 2006 BCCA 193 (B.C. C.A.), aff'd on other grounds 2008 SCC 56 (S.C.C.).

253 *Rojas* involved a joint trial, before a judge and jury, of two accused charged with second degree murder. The Crown's case was largely circumstantial; the evidence was ambiguous as to who did what to the victim that resulted in his death. The trial judge charged the jury on aiding and abetting. On appeal, the appellants submitted he erred in doing so, saying there was no evidence to support those routes to liability, and that on the Crown's case the appellants could only be found to be principals or co-principals. Madam Justice Ryan, for the Court, rejected that position, stating:

> [39] Where a trial judge with a jury is dealing with an offence alleged to have been committed by more than one person, the question of what to tell the jury is formidable. To do justice between the Crown and defence the trial judge must instruct the jury as to all routes to conviction and to acquittal that may be properly founded on the evidence. Balanced against this duty is the requirement that the trial judge should not over-burden the jury with too many instructions which may only serve to confuse it. It is not an easy task.

. . .

[50] It is important to note here that what is being discussed is ambiguity relating to the role each accused has played in the crime, not whether the accused participated at all. ...

[51] Finally, it must also be said that, *conceptually* at least, where two or more persons physically attack a victim, their liability may be grounded on any or all of s. 21(1)(a) and s. 21()(b) or (c). Where two or more persons participate in an attack that results in the death of another it is not wrong to say that the two through their blows not only caused the death of the victim, but, through their blows assisted each other in doing so. ...

. . .

[65] I am of the view that it was open to the trial judge, on the evidence before him, to conclude that it was important that the jury be instructed that no matter what view it took of the roles played by the appellants in the murder, as long as those roles fit within the parameters of s. 21(1) that the appellants could be convicted of murder.

[Underline emphasis added.]

254 In our opinion, as we elaborate below, there was an evidentiary pathway for the judge's instruction on aiding, and abetting.

255 In particular, Sparks testified that Podolski arrived with Sipes and had a homemade bat with him, which he used to strike Marnuik's feet when Marnuik was "very distressed" and could not answer the questions asked of him because he was in so much pain. Sparks testified that Sipes retrieved a blowtorch; Sparks then left and went to his apartment, while Podolski remained with Sipes. Sparks said that sometime later Podolski came to his (Sparks') apartment and said that Marnuik was dead.

256 Witness T testified that Podolski and O'Donnell arrived with him, and that both participated in beating Marnuik. He said O'Donnell used the PVC pipe to hit Marnuik's arms and legs, and struck Marnuik in the head with his fists. Witness T said that after Marnuik was re-taped to the chair, Podolski used a hammer from the tool box on Marnuik's feet. He testified further that Podolski further hit Marnuik with the fish bat, even though Marnuik was not making any noise and appeared to be in shock. Witness T testified that Sipes was angry because Marnuik was not screaming. He testified that both Sipes and Podolski then hit Marnuik in the mouth, after which all of them left.

257 Witness U testified that Sipes used the hammer to hit Marnuik's toes one at a time, as well as his hands and fingers, before using the blowtorch to burn Marnuik's legs, hands, and forehead, and hitting him in the face with the bat hard enough to cause Marnuik's teeth to fall out. He said that Podolski showed him three or four Polaroid photographs that depicted Marnuik's bloodied and swollen eyes and face after Marnuik was doused with water in an attempt to keep him conscious. Witness U said that Podolski and O'Donnell were present while Sipes ran the torch across Marnuik's forehead, and then struck Marnuik in the mouth with the fish bat causing Marnuik's teeth to fall out. Witness U testified that at some point during Sipes' assault upon Marnuik, O'Donnell said, "He's had enough," and left the room.

258 If the jurors accepted some or all of this evidence, it would have been open to them to find the requisite murderous intent was proved. In this regard, we note that direct evidence is not required to establish intent; indeed, it is rarely available. As a result, the "common sense inference" is a standard jury instruction on the element of intent in most jury charges. Absent evidence to the contrary, intent may be inferred from an accused's conduct by an application of the common sense inference: *R. v. Oluwa* (1996), 107 C.C.C. (3d) 236 (B.C. C.A.) at paras. 87- 88.

259 On the evidence reviewed above, we are satisfied there was an air of reality to the jury finding, at the very least, that: (i) Sipes knowingly inflicted harm likely to cause death; (ii) both Podolski and O'Donnell knew, or were deliberately ignorant, about Sipes' intention to inflict harm likely to cause death; and (iii) after knowing of Sipes' intention to inflict harm likely to cause death, each intentionally did something to assist or encourage Sipes in his torture by continuing to assault Marnuik, who by then was in a "very distressed" state of shock and no longer responding to his pain.

260 While we acknowledge Witness U's evidence that at some point near the end of Marnuik's prolonged beating O'Donnell said, "He's had enough," we do not accept that this bare statement, if accepted by the jury, necessarily dispelled the air of reality to the theory O'Donnell had the intent to aid or abet in Marnuik's murder. It was open to the jury to conclude that by then the violence and torture had progressed to such a point that O'Donnell's statement was neither sufficient in substance nor sufficiently timely to obviate the inference that he intended to assist or encourage the common crime: see *R. v. Whitehouse* (1940), 55 B.C.R. 420 (B.C. C.A.).

261 The evidentiary foundation for the judge's instructions on party liability was not unlike that in *R. v. Biniaris*, 2000 SCC 15 (S.C.C.), where the accused and another participated in a senseless and violent beating that left a man dead. Biniaris was charged with second degree murder. The Crown's evidence was largely circumstantial. Its theory of liability was that Biniaris was the principal offender; however, during the trial the Crown's expert changed her opinion and came to share the view of the defence expert that the other participant inflicted the fatal injuries. In its closing submissions, the Crown maintained its theory of principal liability but also suggested that the jury could find Biniaris guilty as a co-principal or an accomplice (i.e., an aider). The trial judge charged the jury on all three routes to liability under s. 21(1). The critical issue for the jury was whether the Crown had established the requisite *mens rea* for murder.

262 On appeal, a majority in this Court dismissed the appeal but substituted a verdict of manslaughter, finding the conviction for second degree murder to be unreasonable because of the change in the Crown's original theory of liability as a result of the expert's reversal of her opinion at trial on causation.

263 In dissent, Justice Ryan reviewed the jurisprudence on the inferences that could be drawn with respect to intent where there are multiple parties participating in an unlawful act, citing an excerpt from *R. v. Macklin* (1838), 2 Lewin 225, 168 E.R. 1136 (Eng. C.C.R.), quoted in Granville Williams in *Criminal Law: The General Part*, 2d ed. (1961) at 349. In *Macklin*, the judge directed the jury that "[i]f several persons act together in pursuance of a common intent, every act done in furtherance of such intent by each of them, is in law done by all". Similarly, Justice Ryan noted as apposite the comments of Chief Justice Lamer in *R. v. McMaster*, [1996] 1 S.C.R. 740 (S.C.C.) at 753, where he repeated the well-established principle that "where a trier of fact is satisfied that multiple accused acted in concert, there is no requirement that the trier of fact decide which accused actually struck the fatal blow". In the result, the issue of intent being a question of fact, Justice Ryan concluded at para. 40 that "[a]ll of these facts were for the jury to assess".

264 On further appeal to the Supreme Court of Canada, the issue was whether the verdict was unreasonable. The Court endorsed the trial judge's instructions on party liability and Justice Ryan's conclusion at para. 40. Writing for the Court, Justice Arbour stated:

> [49] I agree with Ryan J.A.'s conclusion that "[a]ll of these facts were for the jury to assess" (p. 77). There is nothing in the compendium of accumulated judicial experience that should cause concern that the jury went astray in its review and assessment of the evidence. ...
>
> . . .
>
> [51] The determination of the intent or foresight of a person at the time of his participation in a homicide is often a difficult question of fact. It certainly was so in this case ... In my view, the verdict was one that this properly instructed jury, acting judicially, could reasonably have rendered, and it should be restored.

265 In our view, the judge's instructions on aiding and abetting in the instant case were properly before the jury in light of the inconsistencies in the evidence of Sparks, Witness T, and Witness U as to the timing, nature, and extent of each appellant's participation in the assault. There was a substantial body of evidence that, if accepted by the jury, provided the evidentiary foundation for all three routes to party liability pursuant to ss. 21(1)(a), (b), or (c). As Justice Ryan succinctly stated, "[a]ll of these facts were for the jury to assess" in determining the knowledge and intent of each accused participant in the beating.

(iii) Did the judge err in instructing on wilful blindness?

266 The appellants submit that for there to have been the air of reality necessary for instruction on wilful blindness, there must have been identifiable evidence that each of the appellants: (i) actually suspected that one of the assailants had a murderous intent; (ii) actually saw the need for further inquiries; and (iii) deliberately chose not to make inquiries. They contend that the Crown's case did not allege anything more than a beating was planned or contemplated by anyone before Marnuik was duct-taped to the chair. They say, even then, the Crown did not suggest that anyone actually expressed a murderous intent after the beating began.

267 The Crown submits that the instruction on wilful blindness must be considered in the context of the testimony from each of its key witnesses. In particular, it points to the undisputed evidence that the killing took place against the backdrop of extreme gang violence administered by enforcers in retaliation for perceived misdeeds, and evidence that Podolski and O'Donnell were senior members of the gang and enforcers who had a motive to punish Marnuik for letting a drug phone line go down. Given the prolonged nature of the assault, the Crown submits it was open to the jury to find that at some point Podolski and O'Donnell would have known that at least one of the assailants intended to cause serious bodily harm likely to cause death.

268 With respect, we agree. In our opinion, there was an evidentiary foundation for the judge's charge on wilful blindness and reasonable inferences to be drawn from that evidence on the issue of the appellants' knowledge.

269 Wilful blindness arises where a properly instructed jury, on the whole of the evidence, could find that the accused knew there was a need to inquire and deliberately chose not to make the necessary inquiries in order to avoid being fixed with the knowledge that the offence was being or would be committed: see *R. v. Sansregret*, [1985] 1 S.C.R. 570 (S.C.C.).

270 The doctrine of wilful blindness has been described as "deliberate ignorance" connoting "an actual process of suppressing a suspicion": *Briscoe* at para. 24. It imputes knowledge from known facts in circumstances where an accused chooses not to make the necessary inquires once real suspicions arise: *Oluwa* at para. 87; *R. v. Duong* (1998), 39 O.R. (3d) 161 (Ont. C.A.) at para. 24. It meets the constitutional requirement of subjective intent for murder by asking whether the accused was in fact suspicious, not whether he ought to have been suspicious: see *R. v. Malfara* (2006), 211 O.A.C. 200 (Ont. C.A.).

271 The doctrine of wilful blindness can be relied upon to impute to an aider or abettor the knowledge that the principal offender intended to commit the offence of murder. In *Briscoe* at para. 21, the Court described the doctrine as follows:

> [21] Wilful blindness does not define the *mens rea* required for particular offences. Rather, it can substitute for actual knowledge whenever knowledge is a component of the *mens rea*. The doctrine of wilful blindness imputes knowledge to an accused whose suspicion is aroused to the point where he or she sees the need for further inquiries, but *deliberately chooses* not to make those inquiries. See *Sansregret v. The Queen*, [1985] 1 S.C.R. 570, and *R. v. Jorgensen*, [1995] 4 S.C.R. 55. As Sopinka J. succinctly put it in *Jorgensen* (at para. 103), "[a] finding of wilful blindness involves an affirmative answer to the question: Did the accused shut his eyes because he knew or strongly suspected that looking would fix him with knowledge?"
>
> [Emphasis in original.]

272 Further, as the Court observed in *Oluwa* at para. 94, "[t]he concept of wilful blindness cannot be considered in a factual vacuum, in isolation from the reasonable inferences to be drawn from known facts".

273 On our review of the record, we are satisfied the evidence provided the necessary foundation for consideration of wilful blindness in the event the jury concluded Sipes, and not Podolski or O'Donnell, was the principal offender.

274 There was a substantial body of evidence addressing the severe nature of the harm inflicted by Sipes, which could reasonably have supported the inference he knew his actions would likely cause death. There was evidence that Podolski and O'Donnell were present while Sipes was torturing Marnuik, and that Podolski continued to inflict bodily harm on Marnuik during this time. There was also evidence that Podolski and O'Donnell had actively participated in the prolonged and brutal beating of Marnuik, which included dousing Marnuik with water to keep him conscious in order to inflict further pain.

275 The totality of this evidence could have supported the jury finding that Podolski and O'Donnell were present as Sipes tortured Marnuik, knowing — or, at the very least, being wilfully blind to — Sipes' murderous intent.

276 Apart from the substantive submission that the case did not support an instruction on wilful blindness, which we do not accept for the reasons just given, the appellants further take issue with the fact that the Crown only raised the possibility of wilful blindness in relation to one of the appellants' co-accused, Brownell, and only raised it for the first time during an application for a directed verdict.

277 We do not consider either of these features reflects error on the part of the judge. Regardless of when, or even if, a route to liability is raised by the parties, it is open to the judge to instruct the jury on any route to liability that is available on the evidence, absent any prejudice to the parties: *R. v. MacKenzie*, 2017 ONCA 638 (Ont. C.A.) at para. 43. In our view, the appellants were not prejudiced by the instruction on wilful blindness. The issue arose before closing submissions to the jury, and as a result counsel had the opportunity to tailor their speeches as they saw best. Further, counsel had the opportunity to make submissions on the judge's instructions to the jury. In any event, we are satisfied there was an evidentiary basis for the instruction.

3.2 The Bryce Homicide

278 With respect to the Bryce homicide, the appellant O'Donnell submits the judge failed to adequately instruct the jurors that in order to secure a conviction on the Crown's theory that the accused acted "in concert", the Crown still had to prove that O'Donnell had the requisite *mens rea* for second degree murder.

(a) Background

279 As with the previous count, we provided an overview of the Crown's theory of the murder of Bryce in the Introduction at paras. 36- 38. We summarize that again for convenience.

280 Thomas Bryce was a rival drug dealer to the Greeks who purchased drugs from Brownell. In November 2004, he found himself in a territorial dispute with Witness V. The Crown alleges that to resolve that dispute, several members of the Greeks, including Witness T, Sparks, and O'Donnell, met Bryce and Brownell at a beach. There Bryce was beaten repeatedly with a bat and stomped upon while he lay on the ground. He was left on the ground, and was then run over by a vehicle. An independent civilian witness called 911 and Bryce was taken to the hospital, where he died 17 days later. A forensic examination found the principal cause of death to be traumatic brain injury resulting from blunt force injury to his head.

281 O'Donnell and Brownell were each charged with second degree murder. The Crown's theory is that O'Donnell was a principal or co-principal in the assault of Bryce and was acting in concert with [others who were present] and Brownell.

282 The five most important witnesses in the Crown's case were: Witness T, Sparks, Witness V, Witness X, and the civilian witness. Witness T, Sparks, and Witness V all placed O'Donnell at the scene as a participant in Bryce's murder and the wielder of the bat. Sparks recalled that as O'Donnell was leaving he said words to the effect, "Did you see him go down? I hit him really hard. Did you hear him moaning?" Witness X initially testified she thought Witness T was using the bat, but later confirmed that she believed it was O'Donnell.

283 The judge instructed the jury that O'Donnell could be found guilty as a principal, aider, or abetter in the murder of Bryce. He gave similar instructions on party liability to those in the Marnuik homicide, reviewed above at paras. 227, 233- 237. He instructed the jury on both the primary and secondary intents for murder, and the *mens rea* for murder as an aider or abettor.

284 With respect to the intent for murder, the judge reviewed Sparks' evidence of O'Donnell's actions and words, instructing the jurors that they should consider that evidence for the purpose of determining O'Donnell's state of mind. He added that, alternatively, if they found Witness T and not O'Donnell was wielding the baseball bat, they should consider how that might impact their consideration of the element of intent. He concluded by saying the jurors could find O'Donnell guilty of second degree murder, not guilty of second degree murder but guilty of the included offence of manslaughter, or not guilty.

285 O'Donnell was convicted as charged, and Brownell was convicted of manslaughter.

(b) Discussion

286 O'Donnell submits that the judge erred in his instructions on intent by failing to adequately instruct the jurors that, notwithstanding the Crown's acting in concert theory, they still had to be satisfied beyond a reasonable doubt that O'Donnell had the requisite *mens rea* in order to convict him of second degree murder. He says the Crown's closing submissions regarding their "in concert" theory of liability would have left the jury with the belief that simply finding that he participated in the beating as a co-principal would be sufficient for a conviction.

287 With respect, we find no merit to this submission. The judge emphasized that O'Donnell was to be given "separate consideration":

> [943] Although O'Donnell and Brownell have been charged and are being tried together on this count, each is a separate individual who cannot be found guilty of any offence unless the evidence relating to him proves his guilt beyond a reasonable doubt. Each is entitled to separate consideration. Each is entitled to have his case decided on the basis of his own conduct and state of mind, and from the evidence and law that applies to him.
>
> [Emphasis added.]

288 In his instructions relating to the intent element of the offence, the judge instructed the jury that, in order to find O'Donnell had the required intent for murder as a principal, the jury must be satisfied that the Crown had proved beyond a reasonable doubt one of the two intents set out in s. 229(a). He concluded his instructions on intent at paras. 977 and 978, by advising the jury that if it was not satisfied that O'Donnell "participated in the killing of Bryce as a co-principal, aider or abettor, *with the state of mind required for murder*", then it must find him not guilty of murder but guilty of the included offence of manslaughter. The judge's instructions on this element were clear, and, in our view, there can be no doubt that the jury was told of the necessity of finding that O'Donnell had the requisite murderous intent in order to convict him.

3.3 The Thom Homicide

289 Finally, with respect to the Thom homicide, O'Donnell submits that there was no evidentiary foundation for an instruction on aiding or abetting, or on wilful blindness.

(a) Background

290 As with the previous two counts, we provided an overview of the Crown's theory of the murder of Thom in the Introduction at paras. 40- 45. We repeat some of that here for convenience.

291 Ron Thom worked occasionally as a drug runner for the Greeks. He was also a drug user. The Crown's theory is that Thom had (mistakenly) fallen under suspicion for being a police informer. It says that as a result Manolakos ordered his enforcers, Sipes, O'Donnell, and Witness T, to kill Thom. The Crown contends that Witness T approached Brownell and asked for his help in bringing Thom to the appointed location, to which Brownell responded by making sure it was "just to talk". It says that with the help of Brownell, Thom was persuaded to meet Witness T and the others, where he was shot eight times.

292 Sipes, O'Donnell, Witness T, and Brownell were charged with first degree murder pursuant to s. 231(2) of the *Criminal Code*, which provides that "[m]urder is first degree murder when it is planned and deliberate". [One-line sentence redacted.]

293 The critical issue on this count was the identity of Thom's shooter. Witness T testified that he, Sipes, and O'Donnell were present and shot Thom. O'Donnell's position was that Witness U was there and he was not. However, both Witness T and Witness U denied this. We turn to their testimony now.

(i) Witness T's testimony

294 Witness T testified that Manolakos ordered him to kill Thom by making a gesture with his hand in the shape of a gun saying "he's gotta go", and that Manolakos subsequently pressured him several times by saying "when's it gonna get taken care of, when are you doing it, when's it going to get done?" Witness T said that the day before the murder, he met with Manolakos, who told him to take Sipes and O'Donnell with him to "take care of this", adding "you are going to leave the body where it lies" and that will send a message.

295 Witness T testified that O'Donnell, using a .22 caliber revolver, and Sipes, using his .380 handgun, opened fire on Thom when he arrived at their meeting spot. Witness T said that he too tried to shoot Thom but that his gun jammed and would not fire. He admitted to taking Sipes' gun from him and firing a round "towards Thom's face", following which he walked over to Brownell, said "now it is over", and then left with Sipes and O'Donnell.

(ii) Witness U's testimony

296 Witness U testified that the night before Thom's murder, Sipes, O'Donnell, Witness T, Witness U, and several others met with Manolakos at a restaurant. Witness U said that Manolakos reprimanded him for coming up short on a recent drug transaction and then had a conversation with Sipes. Witness U said Manolakos ordered him to go to the Office to remove some drugs. Witness U testified to being held down at the Office by O'Donnell and repeatedly punched in the face by Sipes as punishment for the above transaction. Witness U said that as a result of the beating, he did not meet up with Sipes and O'Donnell to plan or participate in the killing of Thom, but remained home to recover from his injuries [content redacted]. [The Crown provided evidence corroborating this.]

(iii) Jury instruction on party liability for count 3

297 We have reviewed the judge's general instructions on party liability and wilful blindness, which he provided before discussing the specific elements of and evidence relevant to each count, above at paras. 227, 233- 237. Those instructions are also relevant to this ground of appeal.

298 Further, the only occasion on which the judge referred to the doctrine of wilful blindness in relation to a specific accused was in his instructions relating to the intent element for Brownell on Count 3. Although the general instructions the judge provided regarding the availability of wilful blindness for aiders and abettors meant that it would have been open to the jury to rely on wilful blindness wherever they were instructed that an accused could be liable as an aider or abettor, wilful blindness was not emphasized by the judge except in that one instance.

299 The judge instructed the jury that there were only two verdicts open to it on this count: guilty of first degree murder or not guilty of any offence. He stated:

> [1162] I expect that after considering the evidence, the positions of counsel, and my instructions, you will conclude that the critical issue you must decide with respect to Sipes and O'Donnell is *identity* - did Sipes and/or O'Donnell participate with [Witness T] on [the road] in the killing of Ron Thom.
>
> . . .
>
> [1166] If the identity of O'Donnell as a co-principal, aider or abettor is proven beyond a reasonable doubt, I expect you will have little difficult finding that the other elements of first degree murder have also been proven beyond a reasonable doubt. In that event, you will find him guilty of first degree murder.
>
> [Emphasis in original.]

300 The jury convicted Sipes and O'Donnell of first degree murder and Brownell of manslaughter. Only O'Donnell appeals his conviction.

(b) Discussion

301 On appeal, O'Donnell agrees that there was an evidentiary basis for the judge's instructions on aiding and abetting and wilful blindness with respect to Brownell, as the extent of Brownell's role in and his knowledge of the planning and deliberation for the killing of Thom was unclear.

302 However, O'Donnell contends the same did not pertain to his alleged involvement, where the central issue was whether he was in fact the individual who shot Thom with the .22 caliber revolver. He submits there was no evidentiary foundation for an instruction on aiding or abetting, or on wilful blindness, with respect to his involvement with the Thom killing. He says this is the case because: (i) the issue of aiding or abetting only arose with respect to the evidence relating to Brownell; (ii) the doctrine of wilful blindness only arose in the Crown's closing submissions in relation to Brownell and in Brownell's closing submissions; and (iii) alternatively, if there was an evidentiary foundation for these instructions, the judge erred by failing to instruct the jury on the evidence relevant to O'Donnell's alleged wilful blindness.

303 The Crown submits that while the judge's instructions on aiding, abetting, and wilful blindness largely related to Brownell's involvement, they were also appropriate for O'Donnell (and Sipes) as the precise role each accused played in the murder had still to be determined by the jury.

304 We agree with O'Donnell's submission that the evidence of his alleged participation in the killing of Thom did not seem to require a charge on aiding, abetting, or wilful blindness with respect to his alleged involvement. The central issue was identity, not the nature or extent of the principal offenders' participation. The Crown's position was that, based on Witness T's evidence, O'Donnell was a principal offender. O'Donnell's position was that Witness U was the one who shot Thom. The difficulty with O'Donnell's position was that there was no evidence to support his theory. In the result, if the jury accepted Witness T's evidence, then O'Donnell was guilty of first degree murder. If they had a reasonable doubt that it was O'Donnell who used the .22 caliber revolver, then O'Donnell was not guilty of the offence.

305 The judge appears to have included charges on aiding, abetting, and wilful blindness on this count for all of the parties out of an abundance of caution. However, those instructions created no prejudice to O'Donnell's defence and could not have had any impact on the verdict, as the singular issue was his identity as the individual who shot Thom with the .22 caliber revolver when Thom exited the vehicle. Any error, therefore, was harmless and the curative provision would apply: see *R. v. Van*, 2009 SCC 22 (S.C.C.).

306 In conclusion, having considered all three submissions made by the appellants, we do not accede to this ground of appeal.

4. The "Substantial Cause" (Harbottle) Instruction (Ground 5)

307 Podolski submits the judge erred in wording his instruction to the jury on the "substantial cause" portion of the test for constructive first degree murder under s. 231(5), summarized in *R. v. Harbottle*, [1993] 3 S.C.R. 306 (S.C.C.). That test requires that "the accused participate in the murder in such a manner that he was a substantial cause of the death of the victim": *Harbottle* at 325. The Supreme Court later clarified that s. 231(5) requires the Crown to prove that "the killing occurred as part of a continuing series of events constituting a single transaction that establishes not only the killing but also the distinct offence of unlawful confinement", and that the forcible confinement and the killing of the victim are causally and temporally linked: *R. v. Pritchard*, 2008 SCC 59 (S.C.C.) at paras. 3, 35.

308 This submission is advanced in respect of Count 1, the Marnuik homicide.

309 We have already reviewed the factual background and much of the jury instructions related to this count. Accordingly, we turn directly to the judge's instructions on substantial cause, which he described generally as the "active participation requirement":

> [670] A high degree of blameworthiness, beyond that required for second degree murder, must be established in order to convict a person of first degree murder under s. 231(5). A particular accused may only be convicted of first degree

murder under this subsection if the Crown proves beyond a reasonable doubt that the particular accused's participation in the murder was a substantial and integral cause of Mr. Marnuik's death.

[671] To prove this essential element, the Crown must prove that a particular accused played an active role in the events that brought about Marnuik's death. It is not enough that a particular accused was present, or that he played some minor role in the events.

[672] In determining whether a particular accused played an active role in the events that brought about Marnuik's death, you must consider all of the evidence that informs the nature and extent of that accused's participation in the events that brought about the death.

[673] A particular accused is not guilty of first degree murder under s. 231 (5) if you have a reasonable doubt that the intervening acts of another in the death of Mr. Marnuik result in that accused's conduct no longer being substantially connected to the death. You have evidence before you from which you could conclude that Marnuik's death was caused in the course of a group beating involving various individuals and acts. Whatever factual findings you make, you cannot convict an accused of first degree murder under s. 231 (5) unless you are satisfied beyond a reasonable doubt that the accused participated in the murder in such a manner that he was a substantial and integral cause of Mr. Marnuik's death. Please consider the evidence I will review with you next in deciding whether the Crown has proven this essential element.

[Emphasis added.]

310 Podolski submits the judge's instructions on causation failed to adequately capture or convey the elements of "substantial cause" under *Harbottle*, which required the jury to focus on the question of whether Podolski played a very active role in the killing. He submits that at para. 672, replicated above, the judge improperly expanded the requirement that the accused must have played an active role in the killing of the victim to include that the accused must have played an active role "in the events that brought about [the victim's] death". This instruction, he says, could have been misconstrued by the jury to include Podolski's actions during the period in which Marnuik was picked up, transported, and delivered to the Office because of the judge's instruction that "[i]t is open to you to conclude that picking up Marnuik and transporting him to the Office was an act of assistance", which was given earlier at para. 626. These instructions, Podolski contends, failed to temporally connect the degree of his participation in the assault upon Marnuik with the unlawful confinement of Marnuik by the taping of him to the chair.

311 In short, Podolski contends "the killing" and "the events that brought about" the death of Marnuik identify two different time periods. Although the judge's instructions alerted the jury to the legal principle at issue, he says the jury was not properly instructed on its application.

312 The Crown submits that considering the circumstances of this case, the extensive closing submissions by each side, and the judge's instructions, there was no possibility that the jury could have misconstrued the substantial cause or active participation element of the *Harbottle* test. It says that Podolski's submission is merely an attempt to split hairs between two synonymous phrases. Counsel notes that the judge correctly followed the instruction from *Harbottle*, including the over-arching instruction that the jury could only convict the appellants if it were satisfied beyond a reasonable doubt that each of their actions, *after the confinement of Marnuik*, constituted an active role in his killing. As Marnuik's death followed a prolonged, continuous, and brutal assault, the Crown submits that it was open to the jury to find each of the accused had the subjective foresight or knowledge that the bodily harm they inflicted on Marnuik was likely to cause his death and was reckless as to whether death ensued or not. In these circumstances, the Crown says the judge's reference to "the events that brought about Marnuik's death" was wholly appropriate and could only have been understood by the jury to refer to the series of events during the continuous transaction that involved the beating and torture of Marnuik while he was duct-taped in the chair.

313 With respect, we agree. In our opinion, there was no possibility that the jury would have considered that the transportation of Marnuik to the Office could have met the test for active participation in the series of events within a single and continuous transaction that led to Marnuik's death.

314 We note at the outset that the use of the term "active participation" itself cannot contribute to the alleged error; "active participation" is an accepted substitute for "substantial cause": see *R. v. Ferrari*, 2012 ONCA 399 (Ont. C.A.). Indeed, in *Harbottle* at 324, the Court held the accused must have played "a very *active role* — usually a physical role — in the killing" and his actions must have formed "an essential, substantial and integral part of the killing of the victim" (emphasis added).

315 More importantly, the judge repeatedly conveyed to the jury that the accused must have actively participated in a continuous series of events during the period that followed the forcible confinement of Marnuik until his death. He reiterated that a minor role in the events was not enough to meet this element of the offence. Given the structure of the judge's instructions on the legal principles to be applied, the questions he posed for the jury, and the evidence he directed the jury to consider, there could have been no doubt that the focus of the jury's deliberations had to be on the conduct of each accused during the period between the forcible confinement and the death of Marnuik, and whether the Crown had established that each accused's conduct met the level of active participation in the series of events that led to the death of Marnuik as required for first degree murder under s. 231(5)(e).

316 Finally, the judge's instruction that "[i]t is open to you to conclude that picking up Marnuik and transporting him to the Office was an act of assistance" was given to the jury under the "unlawful act" element of the offence and therefore in the context of his instructions on whether the accused was a party to the unlawful assault upon Marnuik. It was provided only as an example of how an accused could be found to have aided a principal in an unlawful act without directly participating in the unlawful act itself. The example was not relevant to, nor was it given under, the "active participation" element of the charge. Notably, none of the accused took issue with the fact that they each had participated in some manner in the assault upon Marnuik. Even if the jurors concluded that one or both of the appellants assisted the principal offender by transporting Marnuik to the Office for a beating, in his instruction on active participation the judge expressly directed the jury's attention to whether the accused played an active role and to whether the accused was a substantial and integral cause of Marnuik's death; the judge also expressly stated "it is not enough...that [the accused] played some minor role in the events".

317 We do not accede to this ground of appeal.

5. The Lack of Instruction on Attempted Murder (Ground 6)

318 The appellants submit the judge's failure to instruct the jury on the included offence of attempted murder of Marnuik was a reversible error of law. They assert there was a body of evidence upon which the jury could potentially have found one or both of them liable as a principal or co-principal by having acted with the intent to murder Marnuik, while also finding that their respective participation in the beating of Marnuik did not significantly contribute to or was not a substantial cause of Marnuik's killing.

319 In particular, they say that Witness T's evidence that the beating and torture of Marnuik occurred in two discrete stages gave an air of reality to this instruction. They say that the evidence of their participation in the first stage was capable of establishing the requisite murderous intent, while at the same time showing that Marnuik was alive and functioning when he was released from the chair and permitted to wash up. They submit that if the jurors accepted the evidence that the appellants did not participate in the second stage, which began after Marnuik was re-taped to the chair, there would have been a break in the chain of causation. This break, they say, would have left it open to the jurors to find the appellants guilty of attempted murder, or alternatively that Podolski was only guilty of second degree murder as his actions in these circumstances would not have been a substantial cause of Marnuik's death. In support of this submission the appellants rely on *R. v. Sarrazin*, 2011 SCC 54 (S.C.C.); *R. v. Ancio*, [1984] 1 S.C.R. 225 (S.C.C.); *R. v. Nette*, 2001 SCC 78 (S.C.C.); and *R. c. Gauthier*, 2013 SCC 32 (S.C.C.) at para. 23.

320 The Crown submits that an instruction on attempted murder did not arise on the evidence or the Crown's theory of liability, namely that the accused acted in concert with *the intent to cause bodily harm* that carried a known likelihood of death, and were reckless as to whether death ensued. The Crown did not allege that the accused acted *with the specific intent to murder*, as required by *Ancio* to convict for attempted murder.

321 In our opinion, there was no air of reality to a charge on attempted murder. Significantly, this submission is advanced for the first time on appeal and is inconsistent with the positions taken by the appellants before the jury, namely that their only intent was to inflict a beating on Marnuik to teach him a lesson and that all were surprised when their actions resulted in his death. Before the jury and in a directed verdict motion before the judge, the appellants forcefully argued that what happened was simply an unintended consequence, and that there was no evidence they had any murderous intent. Indeed, the Crown never alleged the appellants meant to kill Marnuik. Even in his charge, the judge opined that the evidence suggested only the secondary rather than the primary intent provisions were engaged.

322 Moreover, as a matter of law, *Ancio* definitively states that the *mens rea* requirement for attempted murder is nothing less than the specific intent to kill. In this case, the evidence did not support, nor was there any allegation, that Podolski or O'Donnell intended to kill Marnuik.

323 We find no merit to this ground of appeal.

6. Admission of Certain "Hearsay" Evidence for the Truth of its Contents (Ground 7)

324 O'Donnell submits the judge erred in admitting the out-of-court statements of Clayton and Witness X for the truth of their contents. In the absence of a contemporaneous opportunity to cross-examine their declarant(s), out-of-court statements admitted for this purpose are hearsay: *R. v. Khelawon*, 2006 SCC 57 (S.C.C.) at para. 35. The Supreme Court has long established that "[h]earsay is presumptively inadmissible unless it falls under an exception to the hearsay rule": *Khelawon* at para. 42; *R. v. Mapara*, 2005 SCC 23 (S.C.C.) at para. 15.

325 O'Donnell challenges the judge's admission of Clayton's hearsay evidence — that being a diagram she drew during a police interview — as "past recollection recorded": *R. v. Fliss*, 2002 SCC 16 (S.C.C.). He says that Clayton's evidence should have been excluded because she was incapable of validly asserting that the evidence represented her truthful knowledge at the time it was recorded.

326 His submission with respect to Witness X is different. His concern with Witness X's evidence stems from the fact that, during a break in her testimony at trial, she reviewed a summary of one of her prior statements. The judge permitted her to give evidence and left it to the jury to determine whether she was testifying to her present memory revived or simply parroting her reviewed statement in-dock. O'Donnell contends that Witness X had no present recollection of the events to which she was testifying, that her statements were hearsay for that reason, and that no exception to the hearsay rule permitted their admission.

327 We address each submission in turn.

6.1 Past Recollection Recorded

328 Clayton was a witness for the Crown. She was a drug user and resided at Williams' house at the material time. She testified that she knew [Witness T since at least May 2005] and that she also knew Sipes and O'Donnell. She gave a detailed description of O'Donnell, whom she called "Rico".

329 Clayton, along with Dyck and Williams, testified to having observed Sipes, Witness T, and O'Donnell arrive at Williams' house around 5:00 a.m. on the day that Thom was murdered. She testified that the three men asked for and were given a change of clothes and then left. She said their vehicle was at the house when they were there and remained there after they left. In closing submissions, O'Donnell disputed his presence at Williams' house that day.

330 During a police interview nine days after those events, Clayton drew a diagram in an officer's notebook of the location and make of the two vehicles parked outside Williams' house in the early morning hours of May 31, 2005. The diagram included two boxes, one with the words "[SUV] came in" and the other with "Youkon left in". The box depicting the "[SUV] came in" seemed to be the vehicle in which Witness T said the three of them arrived. The import of this evidence was that it could be used to corroborate the evidence of Witness T, a *Vetrovec* witness, that he, Sipes, and O'Donnell drove to the house in [an SUV] shortly after the Thom murder.

331 In a pre-trial interview, Clayton advised Crown counsel she had no recollection of drawing the diagram and was unsuccessful in refreshing her memory by reviewing her statement.

332 The Crown sought to admit the diagram as past recollection recorded. It submitted the police officer who interviewed Clayton on June 9, 2005, would testify Clayton drew the diagram in her notebook, and Clayton would likely say that while she did not recall drawing the diagram she would identify the words "[SUV] came in" and "Youkon left in" in the diagram as being her handwriting, and would confirm that when she gave the information to the police she was being accurate and truthful.

333 On his own motion, the judge entered into a *voir dire* to clarify Clayton's likely evidence. In the *voir dire*, Clayton confirmed she tried to be truthful and accurate in what she told the police, she recalled being asked to draw a diagram, and she recalled actually drawing the diagram including the comments "[SUV] came in" and "Youkon left in". During the *voir dire*, counsel for Sipes sought to cross-examine Clayton but was refused on the basis that the *voir dire* had been called on the judge's own motion. The judge found that the criteria for admitting the diagram as past recollection recorded, as set out in *Fliss* at para. 63, had been met: see *R. v. Sipes*, 2012 BCSC 834 (B.C. S.C.). However, he marked the diagram only as an exhibit for identification to provide the defence the opportunity to cross-examine Clayton in respect of it in the trial proper.

334 Clayton's evidence in the trial proper was similar to that in the *voir dire*. On cross-examination, she testified she had a "vague recollection" of making the diagram. She also admitted to lying to Crown counsel when she told them in the pre-trial interview that she could not remember drawing the diagram.

335 O'Donnell submitted to the jury that Clayton's evidence was unreliable as she was high on drugs at the time. In addition, Clayton testified that when the men arrived at the door of Williams' residence, she and the couple who lived there were "banking", a term the Greeks used to refer to the process of splitting up larger quantities of drugs into smaller packages for sale. O'Donnell contended that Clayton would not have had a good look at who was there as she would have been trying to hide from the men at the door so they would not see that she was high while banking.

336 The judge instructed the jury on Clayton's evidence as follows:

> [189] At the time of her testimony, Clayton had no recollection of the descriptions and locations of vehicles she observed at the Dyck/Williams residence. She testified that she recalled drawing the diagram during an interview with the police, and that she had tried to be accurate and truthful when she did so.
>
> [190] The diagram has been admitted for the truth of its contents. It depicts Clayton's past recollection of the locations and descriptions of the vehicles she observed at the Dyck/Williams residence ("[SUV] came in, Youkon left in"). As with any evidence, it is up to you to decide how much or how little you will believe of and rely upon the diagram. You will recall Clayton's evidence that she was addicted to drugs and was using drugs at the time she observed the events depicted in the diagram.

337 On appeal, O'Donnell repeats his submission with respect to the admissibility of the diagram for the truth of its contents. He contends the judge erred in admitting the diagram as past recollection recorded and in denying him an opportunity to cross-examine Clayton in the *voir dire*.

338 In *Fliss* at para. 63, the majority of the Supreme Court relied on the summary of the doctrine of past recollection recorded recounted by Justice Kerans in *R. v. Meddoui* (1990), 61 C.C.C. (3d) 345 (Alta. C.A.) at 352:

> The basic rule in *Wigmore on Evidence* (Chadbourn rev. 1970), vol. 3, c. 28, s. 744 *et seq.* provided:
>
> i. The past recollection, must have been recorded in some reliable way.
>
> ii. At the time, it must have been sufficiently fresh and vivid to be probably accurate.

iii. The witness must be able now to assert that the record accurately represented his knowledge and recollection at the time. The usual phrase requires the witness to affirm that he "knew it to be true at the time".

iv. The original record itself must be used, if it is procurable.

339 O'Donnell contends the Crown failed to establish the third pre-condition for the admissibility of past recollection recorded, namely a present voucher that Clayton knew the knowledge represented by the diagram to be true at the time it was recorded. He submits that because Clayton did not testify to seeing the men arrive at or leave the Williams residence, the "[SUV] came in" and "Youkon left in" comments on the diagram could only have been based on speculation, hearsay, or an inference that was unexplained in the evidence. He suggests that Clayton may have come to believe that information because it was something Williams had told her, or that she drew an inference based on the absence of the [SUV] in the hours before the men arrived at Williams' house and its presence the following morning. Due to the lack of any explanation about the source of Clayton's belief about the vehicles, O'Donnell says that she cannot be said to have ever "known" that information to be true.

340 With respect, we cannot agree. In both the *voir dire* and the trial proper, Clayton confirmed that she was being truthful when she spoke to police, that she was trying to be as accurate as possible, including when she drew the diagram, and she believed that what she told the police was true to the best of her knowledge at the time. When asked in examination in chief whether she recalled seeing the men arrive at or leave the Williams' residence, Clayton replied, "I don't remember." Although Clayton could recall drawing the diagram and attempting to do so accurately, she no longer recalled the details that diagram portrayed, including the makes and models of the vehicles outside the Williams' residence, and whether she actually saw the three men arrive or leave in those vehicles.

341 Evidence can only be admitted as past recollection recorded if the witness can no longer recall the details provided in the record: see *C. (J.) v. College of Physicians & Surgeons (British Columbia)* (1990), 42 B.C.L.R. (2d) 257 (B.C. C.A.). Indeed, parts of Clayton's diagram, which labelled some of the rooms in the Williams' residence, were properly redacted before the diagram was marked as an exhibit because there was evidence that Clayton had some recollection about those details: see *R. v. Sipes*, 2012 BCSC 834 (B.C. S.C.). The fact that there was no evidence explaining how Clayton knew the details about the vehicles at the time she made the diagram because she could no longer recall if she saw those vehicles arrive or leave *is the very reason* that the diagram could be admitted as past recollection recorded. It did not detract from the clear present voucher for accuracy that she provided.

342 Finally, we need not decide whether the judge's refusal to allow O'Donnell an opportunity to cross-examine Clayton in the *voir dire* was procedurally fair, as there was no prejudice to him that could have resulted in a miscarriage of justice. This is the case for three reasons: (i) O'Donnell had the opportunity to cross-examine Clayton in the trial proper before the diagram was marked as an exhibit; (ii) in cross-examination, counsel for Sipes obtained an admission from Clayton that she in fact had a memory of drawing the diagram before the *voir dire* but had lied to Crown counsel in the pre-trial interview in saying that she had no recollection; and (iii) in any event, the diagram played no part in corroborating Witness T's evidence that O'Donnell was with him when he drove to Williams' house immediately after the Thom murder. It was Clayton's identification evidence of O'Donnell being at the door with Sipes and Witness T that, if accepted by the jury, provided independent corroboration of Witness T's evidence. The diagram merely corroborated Witness T's evidence that he drove there in [an SUV].

6.2 Present Memory Revived

343 Witness X was also a witness for the Crown. She was a drug user and testified she was present when Bryce was murdered. She initially testified in direct examination that Witness T had wielded the bat that was used on Bryce. During a break that followed her giving this evidence, she met with Crown counsel to review a "statement summary". The statement summary was a document the Crown had prepared summarizing what she had said during an interview in 2009, which she had adopted with some revisions in 2010. When they returned from the break, the Crown asked her whether she had had an opportunity to meet with the Crown and the police in order to review the statement summary, and whether she wished to change any aspect of the evidence as a result. She responded that she did want to correct her evidence. O'Donnell objected and requested a *voir dire*

as to what occurred during the break. Ultimately Witness X resumed her testimony, confirmed that reviewing the statement summary over the break had refreshed her memory, and corrected her earlier evidence by stating it was O'Donnell who had struck Bryce on the head with the bat.

344 O'Donnell's position at trial was that Witness X's evidence after the break was inadmissible hearsay. He contended it was not admissible as past recollection recorded, and it could not be admitted as her present memory revived because it was simply a recitation of what she had read in the statement. He submitted that Witness X's answers in cross-examination established she had no present memory of O'Donnell wielding the bat, even after reviewing the statement summary.

345 The Crown contended that what occurred did not raise an admissibility issue as it simply engaged the permissible procedure of having Witness X refresh her present memory by reviewing the statement summary in order to clarify in her own mind who was wielding the bat.

346 In its closing address to the jury, the Crown relied on Witness X's revived memory evidence to support its case that O'Donnell was the individual who assaulted Bryce with the bat. O'Donnell asked the judge to provide the jury with a corrective instruction to the effect that it should disregard Witness X's evidence after the break as being inadmissible hearsay that could not be used for the truth of its contents.

347 In his instructions, the judge reviewed Witness X's evidence in direct and cross-examination. He also instructed the jury as follows:

> [1058] Although [Witness X] initially testified she saw [Witness T] using the baseball bat, following a court break, she said she wished to correct her evidence on that point. She said she had reviewed a statement summary, and that had refreshed her memory concerning the person with the bat.
>
> [1059] [Witness X] said the person with the bat was O'Donnell, and that [Witness T] never used the bat. She said, "I was mixed up with the summary of the statement that I was trying to remember." [Witness X] testified she saw O'Donnell hit Bryce in the head with the bat a couple of times. She said she heard a "ting" sound a couple of times. She did not see anyone else use the bat.
>
> [1060] In cross-examination, the following exchange then occurred:
>
> > Q. All right. This afternoon when the Crown takes you back to that and have — having had you read a — a written — a statement summary or whatever, witness summary, whatever has been prepared by the Crown, ask you why you said [Witness T's nickname] the day before and you said, "I was mixed up in my witness statement yesterday."
> >
> > A. Yes.
> >
> > Q. Do you remember telling us that?
> >
> > A. Yes I do.
> >
> > Q. Okay. So do I understand from that that today what you are telling us is — is not anything about what you remember, but just what you — somebody has written in a witness statement for you, is that what you are doing here?
> >
> > A. Sorry, can you say that again?
> >
> > Q. Okay. What you did this afternoon, having read some — a piece of paper, is you're basically telling us what's in the piece of paper —
> >
> > A. Yes.

Q. — not what you remembered at all, you'd agree with me on that?

A. Yes.

[1061] There are at least two interpretations you might bring to this evidence. The first is that she had no independent recollection of who had the bat on [the beach] and was merely parroting back the content of the statement summary she was shown by the Crown during the break. The second is that [Witness X] was simply acknowledging that her evidence — that O'Donnell had the bat — was not what she remembered before being given the opportunity to refresh her memory by reference to the statement summary. While you may wish that her evidence on this point was clearer, you will have to make your findings of fact and credibility on the state of the evidence before you.

[1062] If you conclude that [Witness X] had no independent recollection of who wielded the bat on [the beach] when she testified before you, you will *not* take her evidence that O'Donnell had the bat into account in your deliberations.

[1063] If you conclude that [Witness X's] memory was refreshed by the statement summary and that, when she testified before you, she had an independent recollection that O'Donnell had the bat, you *will* take her evidence into account, along with the rest of the evidence, in determining whether the Crown has proven beyond a reasonable doubt O'Donnell's guilt in relation to Count 4.

[Emphasis in original.]

348 The judge also highlighted Witness X's admissions in cross-examination that: she had smoked crack cocaine before going to the beach where Bryce was murdered; her memory was "shaky at best" while under the influence of drugs and was also unreliable with respect to this event; she had lied to the police; and that, other than her memory of going to the beach "to re-load" Bryce, she did not have a clear recollection of what happened. The judge cautioned the jury to scrutinize her evidence with particular care.

349 On appeal, O'Donnell repeats his submission that this evidence was inadmissible hearsay that was based not on Witness X's present revived memory but on her review of the inadmissible statement summary. O'Donnell submits that Witness X's evidence on cross-examination established she had no recollection of the event. In particular, he points to Witness X's answer to the last question quoted above, " — not what you remembered at all, you'd agree with me on that?" O'Donnell also says that, had he been permitted to extract that evidence in a *voir dire*, the judge would have found Witness X's evidence about O'Donnell wielding the bat to have been inadmissible because her only evidence came from the statement summary rather than her own memory stimulated by the statement summary.

350 We are not persuaded that the impugned evidence was inadmissible hearsay. Witnesses are entitled to refresh their memory. In *Fliss*, the Supreme Court discussed why a witness who testifies after refreshing his or her memory does not necessarily introduce inadmissible hearsay. At para. 8, Justice Binnie, writing for the majority, held that "[a] witness may refresh his or her memory prior to testifying, as long as he or she testifies from present memory revived by the instrument that refreshed it, whatever that instrument may be". He further explained:

[45] There is also no doubt that the officer was entitled to refresh his memory by any means that would rekindle his recollection, whether or not the stimulus itself constituted admissible evidence. This is because it is his recollection, not the stimulus, that becomes evidence. The stimulus may be hearsay, it may itself be largely inaccurate, it may be nothing more than the sight of someone who had been present or hearing some music that had played in the background. If the recollection here had been stimulated by hearing a tape of his conversation with the accused, even if the tape was made without valid authorization, the officer's recollection — not the tape — would be admissible.

. . .

[60] The prosecution obviously wanted more than "the gist of what transpired" on January 29th or "the general situation". The officer was quite entitled to attempt to "refresh" his memory by an out-of-court review of the corrected transcript, but in the witness box his testimony had to be sourced in his "refreshed" memory, not the excluded transcript.

351 The procedure for refreshing a witness' memory is considerably less stringent than that for admitting evidence of past recollection recorded, which does result in the record of the witness' past recollection being entered into evidence for the truth of its contents.

352 With respect to the determination of whether a witness' memory has truly been refreshed, *Wigmore on Evidence* (1970), Chadbourn Rev., vol. 3, s. 785 quoted the following passage from Sir G.A. Lewin's note to *Lawes v. Reed* (1835), 2 Lewin 152 (Eng. C.C.R.), 153: "Whether in any particular case the witness' memory has been refreshed by the document referred to, or he speaks from what the document tells him, is *a question of fact* open to observation, more or less according to the circumstances" (emphasis added). The question of whether a witness is relying on his or her present memory when giving evidence after having refreshed it, must be a question for the jury: *R. v. Bengert* (1978), [1979] 1 W.W.R. 472 (B.C. S.C.), aff'd (1980), 53 C.C.C. (2d) 481 (B.C. C.A.).

353 The jury's task was to determine whether Witness X did in fact have a present memory of who struck Bryce with the bat. We agree with the judge that Witness X's answers on cross-examination were subject to more than one interpretation. The admissions she made, described above, raised issues about her reliability. O'Donnell rightly points out that Witness X expressed some confusion about the questions and then acknowledged that her testimony after the break was consistent with the statement summary. These were the fodder of an attack by the defence on the reliability of her evidence and the truth of her present memory. The judge reviewed the substance of that attack in his instructions, and its outcome was properly left to the jury.

354 In conclusion, we do not accede to this ground of appeal.

7. Interference with Cross-Examination (Ground 8)

355 The appellants contend the trial judge improperly interrupted and fettered the cross-examination of key Crown witnesses, rendering it less effective. Given that their defences focused on raising a reasonable doubt by attacking the witnesses' credibility and reliability, the appellants submit the cumulative effect of the interruptions and restrictions on cross-examination has been to render the trial unfair.

356 The appellants raise five specific issues. They say the judge erred in:

1. requiring counsel when cross-examining on a prior inconsistent statement to read the relevant portion of the statement to the witness;

2. interrupting cross-examination to make an inappropriate comment;

3. asking counsel to remove himself from a hypothetical;

4. precluding cross-examination of Witness U about a polygraph test he took concerning Victim A's death; and

5. precluding counsel from recalling [a witness] to cross-examine him on phone records disclosed after [that witness] testified.

357 We address each alleged error in turn.

7.1 Requiring Counsel to Read Portions of Statements when Cross-examining on a Prior Inconsistency

358 At trial, defence counsel cross-examined on inconsistencies between witnesses' testimony and their earlier statements to police. Early in the trial, counsel asked witnesses to read a portion of their statements to themselves, and then asked them to agree

with counsel's interpretation of the statement. The jury and judge did not have copies of the statements. The judge interrupted a number of times to ask counsel to read the relevant portions of the statements to the witnesses before summarizing them. Subsequently, the judge ruled on his own motion that defence counsel were not to ask a witness to agree with an interpretation without first reading the portion of the statement in full to the witness. After this procedure was put in place, Crown counsel and the judge intervened from time to time to point out unread but relevant portions of the transcript.

359 Counsel objected to this procedure as an improper constraint on cross-examination. The appellants maintain that objection on appeal. They submit the right of an accused person to cross-examine Crown witnesses is fundamental to the right of an accused under the *Charter* to make full answer and defence — a right that should not be interfered with lightly. The appellants rely on *Lyttle*:

> 1 Cross-examination may often be futile and sometimes prove fatal, but it remains nonetheless a faithful friend in the pursuit of justice and an indispensable ally in the search for truth. At times, there will be no other way to expose falsehood, to rectify error, to correct distortion or to elicit vital information that would otherwise remain forever concealed.
>
> 2 That is why the right of an accused to cross-examine witnesses for the prosecution — without significant and unwarranted constraint — is an essential component of the right to make full answer and defence.
>
> [Emphasis in original.]

360 The appellants submit the trial judge's ruling restricting their use of prior statements is a novel one unsupported by law. They contend that requiring counsel to read a statement verbatim is not necessary when the witness has the statement in front of him or her and has been able to review it prior to being challenged. The appellants point to a number of reasons why defence counsel may prefer to summarize what a witness is attempting to convey in a prior recorded statement: it avoids placing prior consistent statements before the jury; it assists in the management and flow of cross-examination; and a witness may agree with counsel's suggestion about what he or she was trying to convey although the words in the statement themselves contain some ambiguity.

361 The appellants further submit the judge's concern that the jury needed the precise words used by the witness in order to adequately assess the significance of the prior statement was misplaced. They argue that might be a reason to permit re-examination, but is not a reason to interrupt the flow of cross-examination and hinder counsel from eliciting favourable responses about what a witness was trying to communicate to police.

362 Finally, the appellants say the judge's direction led both the judge and Crown counsel to object repeatedly on the basis that defence counsel had not read the entire context of a statement, leaving the jury with the impression that defence counsel had presented a misleading picture and generally done something untoward. The appellants submit the distrust that would predictably arise from such objections was particularly problematic because it eroded the judge's charge to the jurors "not to forget defence counsel's evidentiary summaries" when they retired to consider their verdicts.

363 In the face of similar objections at trial, the judge provided written reasons for his ruling: *R. v. Sipes*, 2012 BCSC 765 (B.C. S.C.). He began by instructing himself on the law:

> [11] There can be no dispute concerning the importance of an accused person's right to make full answer and defence. This includes the ability to cross-examine Crown witnesses without unwarranted interventions by the court. Cross-examination is fundamental to an accused person's right to a fair trial. However, a fair trial extends beyond the accused. A fair trial is one which appears fair from both the perspective of the accused and of society: *R. v. Harrer*, [1995] 3 S.C.R. 562; *R. v. Khelawon*, 2006 SCC 57; *R. v. Grant*, 2009 SCC 32; *R. v. Bjelland*, 2009 SCC 38. A fair trial is also one that satisfies the truth-seeking function of a trial.
>
> [12] Given the submission that it is problematic for a trial judge to interject, it is useful to consider when judicial interventions may be necessary. In *Watson*, the court said, at para. 10:

> ... Trial judges are not mere passive observers at a trial. They are entitled and, in some circumstances, obliged to clear up ambiguities in the evidence, to pursue matters which witnesses' testimony has left vague and to put questions which should have been posed to clarify relevant matters. They also enjoy trial management powers that are designed to permit the effective control of a trial, *to ensure fairness to witnesses and to foster clarity in the evidence*
>
> [citations omitted, emphasis added].

364 The judge then noted the particular challenges raised by the complex nature of the trial before him:

> [16] This is an extraordinary trial in many respects. A number of Crown witnesses are former members or associates of a gang involved in drug trafficking of which four of the accused were members. These witnesses have been interviewed by the police numerous times over many years about the events concerning which they are testifying. [Witness U] and [Witness T], in particular, have provided over 30 and over 80 statements, respectively, totaling thousands of pages. Most of these witnesses are unsophisticated individuals with little or no experience testifying in a courtroom. They are testifying in a large courtroom, before a jury, five accused, and usually in the presence of 15 to 20 lawyers. They are often cross-examined by four or five lawyers for the accused. Some of the cross-examinations have lasted for many days and have focused primarily on the witnesses' previous statements. At times, counsel have cross-examined witnesses on documents the witnesses did not author.

365 The judge emphasized the jurors' task in assessing the significance of the contradictions pressed in cross-examination and their inability to perform that task without proper context:

> [20] Most important, the members of the jury do not have copies of the witnesses' statements and cannot independently assess whether counsels' summaries or interpretations are accurate and complete. After all, and above all, it is for the jury, as the trier of fact, to decide whether what was said by the witnesses is consistent with counsels' interpretations or whether the passages are inconsistent with the witnesses' evidence and, if so, to determine the significance of that inconsistency.

366 The judge provided for exceptions to the procedure he had fashioned where necessary to avoid disclosing inadmissible evidence, or when counsel were merely summarizing evidence to orient or "pinpoint" the witness to a particular topic or passage. He concluded:

> [23] I see no prejudice to the accused in proceeding this way. These statements are hearsay and inadmissible for their truth unless adopted by the witnesses. Counsel can still suggest their interpretations of what the witnesses said and the witnesses can agree or disagree, and the jury will be in a position to assess for itself whether counsels' summaries or interpretations are accurate and complete.

367 Although the procedure imposed slowed the pace of cross-examination and made it more cumbersome at times, it did not prevent counsel from either pursuing substantial areas of cross-examination or putting to the witness counsel's interpretation of the prior statement. We are not persuaded the judge erred in his related direction that counsel should recite enough of the statement to put their questions in context when challenging a witness, rather than leaving it to Crown counsel to re-examine on the statements where it appeared context had been overlooked. The trial judge determined the delay in returning to the point (due to the length of cross-examination and the number of defence counsel cross-examining), would make it difficult for the jury to appreciate the import of the re-examination and would add considerably to the already lengthy trial.

368 As for the appellants' view that objections about sufficient context put defence counsel in a bad light with the jury, we note the manner in which the judge intervened did not suggest that counsel were intentionally leaving matters out, but rather that they had inadvertently done so. In our view, the appellants' concern about the impact of these interjections is overstated.

369 The right of cross-examination in order to make full answer and defence is protected by ss. 7 and 11(*d*) of the *Charter*. Cross-examination is an effective tool, and sometimes, as in this case, the only means available to the accused to raise a reasonable doubt. However, the right is not unfettered. The trial judge is entitled to intervene to ensure fairness to the witness,

to clarify evidence, and to ensure the trier of fact is not being misled, among other things: *R. v. Watson* (2004), 191 C.C.C. (3d) 144 (Ont. C.A.) at para. 10. Absent the kind of unwarranted interference in cross-examination that denies an accused the right to make full answer and defence, this is a matter of trial management with which an appellate court should not lightly interfere.

370 In the circumstances of this case, we are not persuaded the judge erred in exercising his discretion to require counsel to read the relevant portions of statements to witnesses before cross-examining on inconsistencies.

7.2 Interrupting Cross-examination to Make an Inappropriate Comment

371 O'Donnell submits the judge improperly interrupted Witness U's cross-examination. It was O'Donnell's theory that Witness U, and not O'Donnell, was one of the two shooters in the Thom homicide. Counsel put to Witness U that O'Donnell was not present when Thom was killed. Any clear answer Witness U gave about who was or was not present at Thom's shooting would have implied that he was present at that time. This would have been inconsistent with Witness U's earlier testimony that he was not there and would have further diminished his credibility. The judge interrupted the questioning to point out to defence counsel that the witness could not answer that question because it was not consistent with his evidence. The judge immediately recognized his error and permitted the question to be put to the witness. The witness then answered, "I wasn't there; I can't say."

372 In our view, little need be said on this ground of appeal. Witness U was cross-examined for 12 days and had been repeatedly exposed as an untruthful witness. Both in chief and earlier in cross-examination by O'Donnell's counsel, he had denied being present at the Thom killing. Although the judge's interjection was unfortunate (as the judge himself quickly recognized), it did not result in material prejudice to the accused. An accused person is entitled to a fair trial, not a perfect one.

7.3 Asking Counsel to Remove Himself from a Hypothetical

373 During Witness T's cross-examination, counsel attempted to address Witness T's suggestion that he was now a "changed man". The defence theory was that Witness T had not changed since the homicides and continued to be an ultraviolent, unpredictable, and untrustworthy person whose evidence at trial should not be accepted by the jury. Counsel put to Witness T a prior statement in which he said he was generally very passive but could go from "0 to 60" on the violence scale very quickly. Witness T answered by giving an example which made defence counsel the subject of a hypothetical:

> A: Maybe I can explain it to you a little bit better as if I were to see let's say a — yourself on the street, I would not start a problem with you, I would not be confrontational with you, I'd go about my business as a passive person. However, if you were to initiate a — initiate a altercation, then my passivity, it's not there any more.
>
> Q: And then you'd go from zero to 60, right?
>
> A: That's correct, yes.
>
> Q: And 60 being as violent as it gets, right?
>
> A: Yes.

The trial judge did not step in until defence counsel continued to involve himself in the hypothetical:

> Q: And actually, sir, let's just continue on for a minute with your analogy of you bumping into me on the street and something happens where your passivity goes out the window and you become violent.
>
> A: Yes?
>
> Q: In that scenario —
>
> THE COURT: Mr. Nathanson, let's just use a fictitious example.
>
> MR. NATHANSON: Oh, that's fine with me, My Lord. I'm just responding to what the witness said.

THE COURT: I understand, but just use — I don't think it's appropriate [Witness T] use you as an example and so —

MR. NATHANSON: That's fine.

374 The appellants agree that using defence counsel in the hypothetical was inappropriate. However, they submit defence counsel should have been permitted to explore what Witness T meant by his example since it could have been a thinly veiled threat of violence, effectively illustrating for the jury that Witness T remained an ultraviolent and untrustworthy person.

375 In our view, it is a stretch to read Witness T's hypothetical as a threat of violence against counsel. In any event, the trial judge's admonition to counsel to remove himself from the hypothetical was a reasonable one in the interest of maintaining trial decorum.

7.4 Precluding Cross-examination of Witness U in Relation to a Polygraph Test

376 The appellants submit the trial judge should not have prohibited cross-examination of Witness U on a polygraph test taken at a time when Witness U was maintaining he did not kill Victim A.

377 While investigating the murder of Victim A, police tested Witness U with a polygraph to verify his denial of any involvement. At first, the police scored the test manually and concluded Witness U had passed and was being truthful about his role in Victim A's murder. Witness U maintained that Person B killed Victim A, and gave the police a detailed description of Person B's role in Victim A's death.

378 Subsequently, Witness T told police it was in fact Witness U and not Person B who had murdered Victim A. The police then rescored the polygraph test with a computer and determined Witness U had failed. When confronted with this test result, Witness T's statement, and a warning from police that if he did not tell the truth he would lose an opportunity to make a deal, Witness U admitted he had shot and killed Victim A. This led to Witness U entering into an immunity agreement and pleading guilty to the second-degree murder of Victim A.

379 At trial, defence counsel wanted to cross-examine Witness U about the polygraph to show he was an accomplished and savvy liar who, in preparation for lying during the test, had done research on how polygraph machines work and how he might be able to control his physical responses so as to fool the machine. Defence counsel also wanted to explore what they said was Witness U's premeditated lie that he had a heart condition so as to provide an excuse if he failed the test.

380 After hearing submissions, the trial judge dismissed the defence's application to cross-examine Witness U about the polygraph test: *R. v. Sipes*, 2011 BCSC 1764.

381 On appeal, the appellants argue the judge erred by focusing on the admissibility of the polygraph test results. They say to the contrary they were not seeking to admit the actual evidence of the results. Rather, they wanted to cross-examine Witness U on the lies he told while taking the test, his response to being told he passed the test, and his response to being told that the test was rescored and he failed.

382 In our view, the judge did not misconstrue the purpose of the proposed cross-examination. After noting that the opinion of a polygraph examiner as to whether someone passed or failed a polygraph test is inadmissible at trial if led for the truth of the opinion, he observed this was not the purpose of the cross-examination sought by the defence:

> [15] Here, the accuracy of the operator's opinion is not the purpose for which cross-examination is sought. Rather, the purpose is to demonstrate that [Witness U] took the test knowing he was lying when he answered many of the questions. The accused argue that this conduct, as well as the other proposed areas of cross-examination, is relevant to [Witness U's] credibility, a central issue in this trial.
>
> [Emphasis added.]

383 The judge weighed the probative value of the proposed cross-examination and determined that it added little to the defences' challenges to Witness U's credibility:

> [18] In my view, the fact [Witness U] actually took the polygraph test adds almost nothing to the defence challenge to his credibility. First, he had little choice other than to take the test having offered to do so and having no reasonable explanation for refusing. Second, he had to continue to cooperate with the RCMP and maintain the position he was not responsible for the [Victim A] murder to avoid charges altogether. Third, he knew that the results were inadmissible in court.
>
> [19] In addition, evidence that [Witness U] took the polygraph test is merely a further example of his brazen conduct and his many lies concerning the [Victim A] murder. There is evidence before the jury that: [Witness U] spoke to [Person B] wearing a "wire" for the purpose of getting [Person B] to confess to the murder; [Witness U] participated in a videotaped re-enactment of the murder during which [Witness U] attributed his actions to [Person B]; and if [Person B] had been charged with the murder, [Witness U] was prepared to lie at the trial and testify that [Person B] shot [Victim A]. In my view, given what is already before the jury, evidence that [Witness U] took the test adds very little.

384 The judge then considered the cost or prejudice that would likely result from the proposed cross-examination. He accepted that if this area were to be explored on cross-examination, the Crown would need to play the entire polygraph examination and would have to explain to some extent how the test worked and how it was scored. The judge also noted at para. 25 that allowing cross-examination in this area "would take time and resources, and would distract the jury from the real issues in this already lengthy and complex trial".

385 The appellants contend that Witness U's lies, and evidence of his confidence in his ability to lie, were potentially fruitful areas of cross-examination. They say that any extra time taken by the additional questions could not constitute a "prejudicial effect" within the meaning of that term. They submit that this area of cross-examination would have demonstrated the depth of Witness U's dishonesty and argue it is not possible to know if one more lie might have made a difference to the jury's assessment of credibility.

386 In our view, the judge did not err in exercising his discretion to limit the cross-examination of Witness U on the polygraph test. It is within the purview of the trial judge to control the length of cross-examination. It is a power to be used with caution and with due regard for the right of the accused to make full answer and defence, but the judge is not merely a passive observer. In addition to ensuring trial fairness to the accused, the witnesses, and to the triers of fact, the judge has an obligation to the accused to ensure that a trial concludes within a reasonable length of time. That obligation is underscored in *R. v. Jordan*, 2016 SCC 27 (S.C.C.). There the majority observed:

> [139] For the courts, this means implementing more efficient procedures, including scheduling practices. Trial courts may wish to review their case management regimes to ensure that they provide the tools for parties to collaborate and conduct cases efficiently. Trial judges should make reasonable efforts to control and manage the conduct of trials. Appellate courts must support these efforts by affording deference to case management choices made by courts below. All courts, including this Court, must be mindful of the impact of their decisions on the conduct of trials.
>
> [Emphasis added.]

387 In *R. v. Mohan*, [1994] 2 S.C.R. 9 (S.C.C.) at 21, Justice Sopinka observed that a trial judge may exclude otherwise admissible evidence:

> ... if its probative value is overborne by its prejudicial effect, if it involves an inordinate amount of time which is not commensurate with its value or if it is misleading in the sense that its effect on the trier of fact, particularly a jury, is out of proportion to its reliability.
>
> [Emphasis added.]

388 To similar effect, in *R. v. Candir*, 2009 ONCA 915 (Ont. C.A.) at para. 61, the Court recognized the exclusionary discretion of a trial judge "to prohibit or reduce the needless presentation of cumulative evidence" by conducting "the cost benefit analysis of *Mohan* that balances time expended (the cost) against value received (the benefit)".

389 In our view, a trial judge is uniquely positioned to assess whether further cross-examination amounts to nothing more than gilding the lily and adds unnecessarily to the length of the trial.

7.5 Prohibiting Cross-examination on Cell Phone Records

390 The appellants' final point on this ground of appeal stems from the judge's refusal to permit Manolakos' counsel to cross-examine [a witness] on phone records for May 30-31, 2005, dates around the time of the Thom homicide.

391 The records in question related to a cell phone registered to [the witness'] father, which [the witness] had been using at the time of the Thom murder. When [the witness initially testified], neither the Crown nor defence was aware [the witness] had used this number. [The witness] was not questioned about what calls he made the night of the Thom murder or about the phone he was using at that time. It was not until [the witness'] father testified, after [the witness'] testimony had concluded, that it became apparent [the witness] was using a cell phone registered to his father. The records were then produced and tendered by the defence as an exhibit.

392 The trial judge ruled on this issue as part of a general decision on whether [the witness] should be recalled as a witness and whether counsel should be permitted to cross-examine him on three areas. Ultimately, the judge granted the defence's application to recall [the witness], but only in relation to one of the three areas: the July 2004 phone records relating to the Marnuik murder. He dismissed the application to recall [the witness] for cross-examination on the May 2005 records and another statement: *R. v. Sipes*, 2012 BCSC 348.

393 The judge considered it significant that counsel for Manolakos had not asked [the witness] any questions about the phone number or numbers he was using or any phone calls he made in May 2005. The judge noted that if Manolakos had directed his mind to obtaining and using [the witness'] cell phone records during [the witness'] evidence he would likely have been able to do so. The judge concluded that the cross-examination was unlikely to be important:

> [51] It appears to me that Manolakos' application to cross-examine [the witness] on [his father's cell phone] records is an afterthought. This is not to be critical of counsel. There are often many potential areas of cross-examination that could be pursued and counsel may overlook an area which, in hindsight, they wish they had asked questions. In my view, this is the basis for this application. The proposed cross-examination is more in the nature of a discovery. Manolakos is hopeful something of importance will emerge but can point to nothing specific. For these reasons, I am not satisfied of the importance of cross-examination on [the witness' father's cell phone] records.
>
> [Emphasis added.]

394 On the other hand, the judge concluded that permitting the cross-examination would result in significant prejudice:

> [52] On the other hand, I find that there would be significant prejudice if cross-examination is allowed. Given Manolakos' submission that the phone records provide a certain time frame for the occurrence of all of the events leading up to the Thom homicide, the cross-examination would likely involve rehashing the majority of [the witness'] evidence in this area. In particular, I anticipate the questioning would attempt to relate the record of the approximately 250 calls on May 30-31 to the events (and the participants) related to [the witness'] testimony. This would undoubtedly require revisiting days of evidence the jury heard [earlier]. Thus, unlike the July 2004 records, the scope of cross-examination on these records could not be easily confined and would likely result in a relatively lengthy and detailed cross-examination by Manolakos, and perhaps Sipes and O'Donnell, as well as further re-examination by the Crown.

395 The judge also had concerns about harm to [the witness]. Notwithstanding [the witness] would ultimately be recalled to deal with the July 2004 records, the judge generally agreed with the Crown that increasing the number of removals and length

of time [the witness] was away from the institution in which he was then incarcerated would increase the risk other inmates would discover his role as a cooperating witness. The judge observed at para. 16 that if [the witness'] status as a cooperating Crown witness became known within the correctional institution where he was housed, he faced the risk of serious physical harm, even death: see also *R. v. Sipes*, 2011 BCSC 1329 (B.C. S.C.) at para. 150.

396 Finally, at para. 18 the judge considered the length of the trial and the need to move it to a conclusion with the jurors engaged and focused on the evidence.

397 As we have noted in the preceding section, the judge's decision to limit further cross-examination of [the witness] was a matter of trial management which is entitled to deference.

398 In conclusion, we are of the view that the interruptions and restrictions on cross-examination complained of, even when considered cumulatively, do not amount to a significant and unwarranted constraint on the right of the appellants to cross-examine in order to make full answer and defence.

399 We do not accede to this ground of appeal.

8. Interruption of Manolakos' Closing Argument (Ground 9)

400 The appellants contend the judge erred in restricting a portion of Manolakos' closing argument before the jury.

401 At trial, Manolakos' defence was that he did not direct the Marnuik and Thom murders and that gang members regularly acted on their own initiative. In closing argument Manolakos' counsel wanted to suggest that a good example of a Greeks gang member committing a murder without Manolakos' approval could be found in Witness U's murder of Victim A. Manolakos' counsel began to make that submission to the jury:

> And I'd ask you as well to remember the case of [Victim A] and the events at the [nightclub]. [Witness U's] evidence, reluctantly exposed although it is, reveals that he was at the [nightclub] when he saw an opportunity to deal with the problem of [Victim A] threatening his family. [Witness U's] evidence is that he took the opportunity. He chose the —

402 At that point the judge interrupted counsel and excused the jury. After hearing submissions the judge prohibited counsel from using the Victim A murder as an example of a murder committed by the Greeks without the involvement of Manolakos.

403 The appellants contend that the judge's interruption and restriction on closing argument was improper. They say it prevented Manolakos from making an argument based on the evidentiary record before the jury — Witness U's testimony that he had a personal reason to kill Victim A because Victim A had threatened his family.

404 However, there was no additional evidence about Manolakos' role in the Victim A killing only because Manolakos had succeeded in having it excluded. After Witness U testified, the Crown sought to lead evidence from three witnesses to the effect that Manolakos approved of or encouraged Victim A's murder. Manolakos objected to that evidence in part because it would result in the jury hearing highly prejudicial evidence about him — that he counselled a murder not before the jury and directed the body of the deceased be left in the open. The trial judge, in reasons indexed as *R. v. Sipes*, 2012 BCSC 323, concluded the evidence was relevant and otherwise admissible but acceded to Manolakos' argument that it was too prejudicial to admit.

405 Confronted with Manolakos' attempt in closing submissions to rely on the limited record about his involvement in the Victim A killing, the trial judge held as follows, in reasons indexed as *R. v. Sipes*, 2012 BCSC 2165:

> [10] Counsel for Mr. Manolakos now seeks, based on [Witness U's] evidence, to invite the jury to conclude that [Witness U] committed the [Victim A] murder without Mr. Manolakos' approval, or encouragement and further, to invite the jury to use that evidence to support Mr. Manolakos' position that he did not abet the Thom murder.
>
> [11] If the jury had heard evidence the Crown sought to lead, it might come to a different conclusion concerning Mr. Manolakos' role in the [Victim A] murder, a conclusion that could materially affect its consideration of Mr. Manolakos' role

in the Thom murder. If the jury accepted evidence that [Witness U] was present for a conversation about the fact [Victim A] was going to be dealt with, and Mr. Manolakos allegedly said, "[Victim A's nickname]," that's [Victim A], "gotta go," and or "take care of it," it could conclude that whatever his personal reason for wanting to kill [Victim A], [Witness U] was doing so with Mr. Manolakos' approval and encouragement, whether he recalled that when he testified.

[12] A fair trial includes society's interest in getting at the truth while providing procedural fairness to the accused. Counsel for Mr. Manolakos objected to the evidence of statements allegedly made by Mr. Manolakos on the basis that if accepted, they would disclose he counselled and abetted the [Victim A] murder. Having been successful on that application, they now wish to rely on [Witness U's] evidence in isolation, to have the jury conclude the opposite and to use that evidence to support his position he also did not abet the Thom murder.

[Emphasis added.]

406 The judge concluded that to allow Manolakos' submission to be put to the jury would undermine the fairness of the trial. In his view, Manolakos could not take advantage of the limited evidentiary record in this way, as its limited nature was the result of Manolakos' earlier objection. He noted that reopening the Crown's case at that late juncture, after most of the closing submissions had been made, would be highly prejudicial not only to the Crown but also to the other accused and the jury.

407 On appeal, the appellants say Manolakos was entitled to ask the jury to draw inferences from the evidentiary record before it — here Witness U's uncontradicted evidence that he had killed Victim A for personal reasons — without regard to "a body of untested witness statements" not in evidence. They say the Crown can point to no legal authority supporting the proposition that a party is prohibited from making an argument on the basis of an accurate summary of the evidence heard by the jury. They submit the trial judge's reference to trial fairness was "wholly misplaced" given that a jury only hears the evidence presented to it and must make determinations of guilt based on that evidence alone. They say accused persons are entitled to and frequently do make arguments supporting reasonable doubt based on the lack of evidence caused by favourable admissibility rulings.

408 In our view, the appellants' argument is based on an impoverished conception of trial fairness. Having succeeded in excluding evidence probative of the Crown's case on the basis that it would be prejudicial to the accused, it was improper for the defence to take advantage of the incomplete record on the point to potentially mislead the jury.

409 We do not accede to this ground of appeal.

9. Admission of Propensity Evidence Respecting Manolakos (Ground 10)

410 Manolakos contends the judge erred in admitting two types of prejudicial evidence relating to his propensity for violence: (i) intercepted phone calls between Manolakos and other Greeks members showing Manolakos threatening or berating Crown witnesses; and (ii) the transcript of a statement Witness T made to police suggesting Manolakos had connections to the Hells Angels.

411 Manolakos submits the combination of the intercepted calls and the statement resulted in an unfairly prejudicial picture of him as an angry and well-connected gang leader who routinely ordered his enforcers to violently harm others. He submits no corrective instruction could cure this impression. He says that as a result he did not receive a fair trial.

9.1 The Intercepted Calls

412 At trial, Manolakos defended the charges against him on the basis that, although he was in a position to give orders to members, the jury could not be satisfied beyond a reasonable doubt that he did so in relation to the killings of Marnuik and Thom. He submitted the wiretap evidence should be excluded because it was not directly relevant to those charges as the intercepted calls were not contemporaneous with the homicides and did not contain admissions. Accordingly, he argued this evidence was not probative and should not have been admitted. The judge excluded 45 of the 82 intercepted calls because their prejudicial effect outweighed their probative value: *R. v. Sipes*, 2011 BCSC 640 (B.C. S.C.) at paras. 96-266.

413 On appeal, Manolakos says the judge erred in admitting any of the calls. He submits Crown counsel's use of the intercepted phone calls invited the jury to engage in the following impermissible reasoning: Manolakos was violent and maintained tight control over gang members, and therefore no members of the Greeks would have killed Marnuik or Thom without Manolakos' approval.

414 In our view, the judge did not err in admitting this evidence, or in permitting the Crown to rely on it to establish Manolakos' degree of control over the Greeks at the time of the Marnuik and Thom homicides. The judge thoroughly instructed the jury on the dangers of engaging in propensity reasoning, and specifically warned the jury not to conclude that Manolakos had directed violent enforcement actions against either Marnuik or Thom simply because he was the leader:

> [433] I wish to be clear that you are prohibited from inferring from the evidence that Manolakos may have authorized or directed enforcement-related activities, including beatings, on other occasions unrelated to the allegations set out against him on the indictment, that he is a violent person or a person of bad character and, therefore, more likely to have committed the offences with which he is charged. You *cannot* engage in that sort of general propensity reasoning. If, however, you are satisfied that Manolakos had a motive to commit one or both of the offences charged, you are entitled to use the evidence of motive in determining whether you are satisfied beyond a reasonable doubt that he, in fact, committed one or both of them. In doing so, you are not considering whether an inference should be drawn that he committed either offence because he is a person who may have directed the use of violence on other occasions. Rather, you are considering whether an inference should be drawn that he did so because he had a specific motive to commit one or both of the offences.
>
> [434] If you find that Manolakos was the leader of the Greeks, you should not jump to the conclusion that he authorized or directed that violent enforcement-related action be taken in relation to either Mr. Marnuik or Mr. Thom. The use of violence was not an invariable feature of enforcement-related activity by the Greeks. Further, you may conclude from the evidence that, at least on some occasions, enforcers employed by the Greeks acted on their own accord, without Manolakos' authorization or direction.

415 Further, the judge pointed to evidence of members of the Greeks occasionally acting on their own without Manolakos' direction and he warned the jury against moral prejudice.

9.2 A Statement Referring to Manolakos' Connection to the Hells Angels

416 In order to assess Manolakos' contention that the judge erred in admitting an excerpt from one of Witness T's police statements, it is necessary to review the circumstances in which the issue arose.

417 Witness T was repeatedly interviewed by police. He said nothing in his initial police statements about Brownell driving his vehicle over Bryce on the beach. Witness T did not disclose this information until [later, after] he had already given six statements. In cross-examining Witness T, Brownell's counsel sought to establish that Witness T did not mention the vehicle in his initial statements because he, not Brownell, actually drove over Bryce. Confronted with his delay in identifying Brownell as the driver, Witness T gave the excuse that initially he had been afraid to name Brownell because of Brownell's family connections to the Hells Angels.

418 Counsel for Brownell then sought to discredit Witness T's excuse by putting to him [a prior statement] — the statement from which the extract at issue was taken. That statement was given at a time when Witness T maintained that he had no knowledge about *anyone* driving over Bryce. Brownell's counsel took Witness T to the part of his statement in which he discussed in detail drug dealings with [two members of the Hells Angels]. The implication was clear: Witness T's excuse that he was afraid to give evidence against Brownell because Brownell had Hells Angels connections did not ring true given that Witness T quite willingly gave evidence against [the two Hells Angels members].

419 The Crown sought to re-examine Witness T on this evidence for two reasons. First, the cross-examination left the erroneous impression that Witness T was the sole Greeks member who had dealt with the Kelowna Hells Angels, when in reality he was describing dealings authorized by Manolakos himself. Second, the Crown wanted to have Witness T explain why he

was prepared to talk to the police about the criminal conduct of two [Hells Angels members], but was not prepared initially to incriminate Brownell. Crown counsel wanted Witness T to be able to explain to the jury the difference between implicating the two Kelowna Hells Angels in past drug offences and implicating Brownell in Bryce's murder. The Crown submitted the only way for the jurors to properly assess Witness T's explanation was for them to review what Witness T had actually said to the police about [the two Hells Angels members].

420 At this juncture, the trial judge was faced with a situation typical in joint trials, where evidence favourable to one accused may be prejudicial to another. Cross-examination of Witness T on his statement, and in particular on the Greeks' link to the Hells Angels, was important to Brownell's defence because it tended to suggest Witness T's evidence about Brownell running over Bryce was a lie. On the other hand, Manolakos did not want the jury to see those portions of the statement because in his view they suggested he was connected to a notoriously violent criminal organization. He submitted those references were highly prejudicial and could not be corrected by instructing the jury not to use the references for their truth.

421 The judge ultimately allowed re-examination of Witness T on his statement and ruled the six-page extract could be entered as an exhibit: *R. v. Sipes*, 2012 BCSC 2161at paras. 92- 110. He said in part:

> [107] In my view, the jury would not be in a position to assess [Witness T's] explanation for not disclosing Brownell's alleged involvement on [the date a statement was given] unless it knows what was said about [the two Hells Angels members] on [the date a later statement as given].
>
> [108] Without knowing what [Witness T] told the police about these individuals, the jury will be unable to determine whether what he disclosed is inconsistent with his explanation for what he did not say on [the date the first statement as given].
>
> [109] In my view, [Brownell's counsel's] cross-examination has made highly relevant exactly what [Witness T] said about these individuals [on the date the statement was given]. The evidence is prejudicial, but I am satisfied the probative value of the evidence outweighs any prejudice.
>
> [110] The Crown may re-examine as proposed, and the passage at pages 91 to 97 may be marked as an exhibit. I will hear further submissions concerning what instructions should be given to the jury concerning the use of this passage.

422 After the judge ruled the excerpt was admissible, counsel made submissions on whether it should be redacted. Brownell opposed two of the four redactions sought by Manolakos. Brownell argued that Witness T's awareness of a link between Manolakos and the two Hells Angels made his explanation about fearing Brownell's family even less believable. Brownell's counsel argued that context was important; in particular, he said:

> ... if we start playing with ... those five pages too much, we're at a real risk from Mr. Brownell's point of view ... of not giving the jury a full picture ... against which they could assess [Witness T's] answer.

423 The Crown also opposed some of the proposed redactions because they removed the context of Witness T's statement and exactly what he disclosed about [the two Hells Angels members].

424 Ultimately the trial judge ruled the entire document should go before the jury:

> I'm satisfied that this is ... an important issue, a key issue to Mr. Brownell's defence. It's important to the Crown's case against Mr. Brownell. It's important to [Witness T's] credibility and in my view the jury needs to have all of these pages in order to properly asses whether his explanation for not naming Mr. Brownell [initially] whether they accept that or not. So ... in my view, all of these pages without any redactions should be provided to the jury.

425 He was satisfied that a mid-trial and final limiting instruction would focus the jury on using the statement as evidence of Witness T's belief and state of mind, and not as proof of the truth of the statement (i.e., that Manolakos in fact had connections to the Hells Angels). He maintained that view in a subsequent ruling, not appealed, dismissing Manolakos' application for severance: *R. v. Sipes*, 2012 BCSC 850 (B.C. S.C.) at paras. 20- 26.

426 On appeal, Manolakos renews his objection. He maintains that the transcript was too prejudicial to him, and that it should have been edited. He says further that no corrective instruction could have remedied the unfairly prejudicial picture this evidence painted in combination with the wiretap evidence.

427 With respect, we cannot agree. In our view, the judge's reasons for admitting the wiretap evidence and Witness T's unredacted statement do not disclose any legal error. He carefully weighed the prejudicial effect of the two areas of evidence against their probative value and concluded the evidence should be admitted with limiting instructions. Those decisions are entitled to considerable deference.

428 We do not accede to this ground of appeal.

10. Instruction on Propensity-Based Reasoning (Grounds 11 & 12)

429 The following two grounds of appeal take issue with what the appellants say was the judge's failure to instruct on certain propensity-based inferences the Crown invited the jury to accept in closing submissions. While these grounds, like the preceding ground of appeal, advert to the risks of propensity-based reasoning, the appellants take issue here with the sufficiency of the judge's charge, not the admissibility of the evidence itself.

430 Podolski and O'Donnell contend the Crown's submission that they were "enforcers" — and for that reason they were more likely to have participated in the offences charged — required a corrective instruction.

431 Manolakos submits the judge erred in failing to instruct the jury that, contrary to the Crown's closing submissions, it could not conclude that due to the fact and style of Manolakos' leadership of the Greeks he must have directed or authorized any murder committed by them — including the beating of Marnuik and the shooting of Thom.

432 We deal with each ground of appeal in turn.

10.1 Evidence that Podolski and O'Donnell Were "Enforcers"

433 In a pre-trial application, the Crown sought permission to lead evidence that Podolski and O'Donnell (as well as Sipes) were "enforcers" for the Greeks. A number of witnesses for the Crown, including Sparks, Witness T, and Witness U, had acted as enforcers for the Greeks at various times. The Crown anticipated that they would testify as to their roles as enforcers and to the fact that Podolski and O'Donnell had also engaged in "enforcement work", which was an integral part of running drug lines. The Crown submitted this evidence was relevant to the issue of motive — those who broke the rules had to be disciplined — and was logically probative of the issue of their participation in the offences charged.

434 In response, Podolski and O'Donnell submitted that they did not describe their role in the organization this way. They contend this label was highly prejudicial because it amounted to a job description that involved violence on a regular basis, and effectively invited the jury to engage in impermissible propensity reasoning.

435 In his ruling, the judge applied the overarching principle with respect to the admissibility of evidence, namely that "...all evidence that is logically probative of a material issue is admissible unless excluded by a clear rule of law or policy": *R. v. Sipes*, 2011 BCSC 640 (B.C. S.C.) at para. 37, quoting *R. v. Morris*, [1983] 2 S.C.R. 190 (S.C.C.). He concluded that the Crown's case could not be "sanitized", but also recognized that a strong limiting instruction would be required in order to reduce the risk of prejudice to the accused.

436 On appeal, Podolski and O'Donnell contend that a corrective instruction was required because of the manner in which the Crown used that evidence in their closing submissions, which was to identify the small number of individuals who likely would have actively participated in the offences charged because they were "enforcers" within the organization. In other words, they argue that the judge's instructions permitted the jury to conclude that if the accused was an enforcer then he participated in the offence charged.

437 We are not persuaded by this submission. The judge restricted the "enforcer" description to approximate times of the murders with which each accused was charged, and gave two limiting instructions, one mid-trial and a second more extensive one in his final instructions. The latter contained specific cautions and a reminder that this was just one piece of circumstantial evidence to consider along with all of the rest of the evidence, including:

> [425] If you find that an accused was acting as an enforcer for the Greeks at the relevant time, you should not jump to the conclusion that that accused was, therefore, present at the scene of an offence and participating in its commission. It is just one piece of circumstantial evidence that you are entitled to consider with the rest of the evidence. I remind you that the use of violence was not an invariable feature of enforcement-related activity by the Greeks. Even when it was, the evidence is that in many cases, organizational problems were dealt with by means of threats or assaults — in other words, by disciplinary conduct failing well short of the commission of a homicide. Finally, the evidence is that not all enforcers participated in all of the enforcement-related activities of the group.
>
> . . .
>
> [427] Even if you are satisfied that an accused was an enforcer when an offence with which he is charged was committed, and that he had a motive to commit the offence rooted in the responsibilities that attached to his job as an enforcer, you should give the evidence of motive the weight you think it deserves. Please keep in mind that the evidence of motive alone is insufficient to prove guilt beyond a reasonable doubt. Motive or lack thereof is only a factor that may persuade you one way or another whether an accused is guilty or not guilty.
>
> [428] You must not use this evidence for the *prohibited purposes* identified. To be clear, you must *not* use this evidence to conclude that because an accused is a bad person, he is more likely to have committed the offence charged. You *may*, however, use this evidence to conclude that because he had a specific motive or reason to commit the offence it is more likely that he did so.
>
> [Emphasis in original.]

438 In our view, the judge's instructions clearly and comprehensively cautioned the jury against the prohibited propensity reasoning.

10.2 Evidence of Manolakos' Authority over the Greeks

439 Throughout the trial, there was never any real dispute that Manolakos was the leader of the Greeks. However, the extent of Manolakos' control over the Greeks was a live issue and was key to how members of the organization carried out his instructions, the nature of the relationships within the group, and how discipline was imposed and by whom.

440 In closing, the Crown made a number of statements about the nature and scope of Manolakos' authority. Of particular significance for this issue is the following statement:

> Now, [Witness U] may have achieved a degree of seniority over Mr. Podolski and Mr. Sipes and Mr. O'Donnell at the time of Dave Marnuik's death. However, I would suggest there is no evidence that [Witness U] alone would have had the power within the Greeks to authorize what happened to Dave Marnuik.

441 On appeal, Manolakos contends the instruction given cautioning the jury against propensity-based reasoning, reproduced above at para. 414, was inadequate to protect him from the effect of the Crown's closing submissions to the jury. He says the Crown's submissions invited the jurors to conclude that because of Manolakos' leadership and oppressive style they could infer that any murder committed by the Greeks was directed or authorized by him, including the beating of Marnuik and the shooting of Thom.

442 We do not agree. When instructing the jury on how to use the wiretap evidence, the judge reminded the jury of other evidence from which they might conclude that, at least on some occasions, members of the Greeks had committed violent

acts without direction from Manolakos. The judge explained the proper use the jury could make of this evidence. He said it was relevant to Manolakos' motive and authority to direct or encourage other members of the Greeks to ensure the rules were enforced and the business protected. He said this was one piece of evidence to be considered in determining whether Manolakos was guilty of one or both of the offences with which he was charged.

443 Most significantly, in his para. 434, the judge specifically warned the jury against drawing the inference that Manolakos directed or authorized the killing of Marnuik and/or Thom based only on a finding that Manolakos was the leader of the Greeks. We again reproduce that paragraph in part:

> [434] ... If you find that Manolakos was the leader of the Greeks, you should not jump to the conclusion that he authorized or directed that violent enforcement-related action be taken in relation to either Mr. Marnuik or Mr. Thom.

444 In our view, the judge's instructions sufficiently cautioned the jury against Manolakos' concerns about propensity reasoning arising out of the Crown's closing submissions.

445 In conclusion, we do not accede to these grounds of appeal.

11. Post-Offence Conduct Instruction (Ground 13)

446 Podolski and O'Donnell submit the judge erred in failing to properly instruct the jury on evidence of the group's reaction upon learning of Marnuik's death.

447 At trial, the judge gave a "no probative value" instruction to the jury with respect to opinion evidence of another's intention:

> [144] Occasionally during this trial, a witness expressed his or her opinion about the state of mind of someone else, including one of the accused. You must not rely upon such opinions for the truth or validity of the opinion. <u>One person cannot give opinion evidence as to another person's state of mind</u>.
>
> [145] For example, [Witness T] testified that "there was no intention on anybody's part to kill Dave," and [Witness U] testified that "I didn't expect him to die". You must not consider [Witness T's] or [Witness U's] opinion on this point when you are assessing whether Sipes, O'Donnell or Podolski had the intent required for murder. Intention is a state of mind and we cannot physically see into each other's minds to decide whether they intend to do something.
>
> [Emphasis added.]

448 However, the judge was clear that evidence of the group's reaction was not irrelevant. Indeed, the evidence was admitted, and he instructed on it as follows:

> [146] However, if you find that a particular accused was a joint participant in the assault of Marnuik, <u>you may consider, as a piece of circumstantial evidence, the fact that a joint participant in an event did not expect something to happen. That evidence, if accepted by you and considered in the context of all of the evidence, may be one factor you rely on when assessing that accused's state of mind</u>.
>
> [Emphasis added.]

449 The judge also provided an instruction on the use the jury could make of post-offence conduct evidence, though his instructions on this point focused on the cleanup of the Office after Marnuik's death and other subsequent acts, and did not expressly refer to the evidence of the shocked or surprised reactions. He instructed the jury at para. 274 that, subject to his instructions on how to approach the evidence, they could use post-offence conduct evidence "like any other piece of circumstantial evidence to be considered along with all the other evidence in determining whether the Crown has proven beyond a reasonable doubt that the accused committed an offence".

450 The judge expressly included the witnesses' evidence of the group's shocked or surprised reactions in his summary of the evidence he thought relevant to the case for and against each of the appellants, and invited the jury to determine the weight of that evidence as it bore on the case against the appellants.

451 On appeal, the appellants characterize the evidence of the group's reaction as exculpatory post-offence conduct evidence, and submit that the jury was improperly prohibited from relying on this evidence. In particular, they say the following testimony was admissible demeanor evidence from which the jury could draw an inference that no one intended to kill Marnuik: Witness T's evidence that all who were present were "shocked" and "surprised"; Sparks' evidence that he was surprised; and Witness U's evidence that the reaction in the room was "disbelief". While the appellants acknowledge that a third party cannot give opinion evidence about the state of mind of an accused, they submit that evidence of the group's surprised and shocked response upon learning that Marnuik had died was probative as observation or demeanor evidence that went to the issue of their intent to murder. They also say that, in light of the Crown's theory that all involved in the beating were "acting in concert", if one or both of them were found to be putative members of that group then the group's surprised and shocked reaction to hearing of Marnuik's death would have been probative of their state of mind.

452 The Crown submits the witnesses' testimony could not support an inference about the individual intent of Podolski or O'Donnell as it failed to link evidence of the group's general reaction on the news of Marnuik's death to the individual response of either Podolski or O'Donnell. Even if the witnesses' evidence as to the group's reaction could be characterized as demeanor evidence, the Crown contends it would have little if any probative value in the circumstances of this case, which involved a prolonged and brutal beating by multiple individuals, resulting in Marnuik's death.

453 All parties rely on *R. v. White*, 2011 SCC 13 (S.C.C.), wherein Justice Rothstein, for the majority, stated:

> [42] Thus, *Arcangioli* and *White (1998)* should be understood as a restatement, tailored to specific circumstances, of the established rule that circumstantial evidence must be relevant to the fact in issue. In any given case, that determination remains a fact-driven exercise. Whether or not a given instance of post-offence conduct has probative value with respect to the accused's level of culpability depends entirely on the specific nature of the conduct, its relationship to the record as a whole, and the issues raised at trial. There will undoubtedly be cases where, as a matter of logic and human experience, certain aspects of the accused's post-offence conduct support an inference regarding his level of culpability.
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> . . .
>
> [78] Indeed, I agree with Charron J. [in her concurring reasons] that Crown counsel's comment was certainly not "an invitation to infer a murderous intent from the way Mr. White 'looked' just before he fled" (para.122). As her discussion of the record shows, "while every witness to the event testified that the shooter immediately fled, *no witness* was asked by the Crown how the shooter 'looked' at the time he fled" (para. 122 (emphasis in original). Rather, if any examples of "demeanor evidence" were at issue in this case, it was counsel for the defence who attempted to introduce them. I further agree that, had defence counsel successfully shown that there was evidence that Mr. White did look surprised or shocked after the shooting, the jury would have been entitled to the benefit of this evidence (Charron J's reasons, at para. 126).
>
> [Emphasis added.]

454 In our view, it cannot be said that the jury was improperly prevented from considering this evidence. Evidence about the group's reaction to Marnuik's death had both permissible uses (as circumstantial evidence described in *White*) and impermissible uses (as opinion evidence of intent). Accordingly, the success of the appellants' submission turns largely on the particular use(s) against which the judge's instruction cautioned.

455 We find the judge appropriately cautioned the jury specifically against using the evidence of the groups' reaction as *direct* proof of the accused's state of mind, and in particular whether an accused had the requisite intent for murder in paras. 144 and 145, replicated above. A non-expert witness cannot give his or her opinion on such a conclusion: *R. v. Graat*, [1982] 2 S.C.R. 819 (S.C.C.).

456 In contrast, on our review of the charge, the judge did not prohibit or prevent use of this evidence as *circumstantial* evidence. We agree that Justice Rothstein's comments in *White* are apposite — the reactions described by Witness T, Sparks, and Witness U were circumstantial evidence relevant to the fact in issue (intent), the probative value of which turned on the specific nature of the conduct, its relationship to the record as a whole, and the issues raised at trial. Indeed, the judge instructed the jurors that they were entitled to consider whether an accused had not expected something to occur as circumstantial evidence of intent at para. 146 of the charge, replicated above. It was open to the jurors to consider a surprised reaction in their assessment of that expectation. Moreover, the judge explicitly related specific pieces of "reaction evidence" to the elements of the offence. Finally, the judge's general instruction on post-offence conduct also supports this conclusion, as a surprised reaction could fall into that category.

457 Beyond these instructions, we agree with the Crown that there was little if any probative value to the evidence of the general reaction of the group in the absence of any specific evidence of Podolski's or O'Donnell's reaction to Marnuik's death. Aside from the general reaction, there was some limited evidence from Sparks that Podolski simply shrugged and went to get himself a drink after learning the news of Marnuik's death; while this evidence was arguably specific enough to have some probative value, it was not probative of the inference that Podolski lacked the requisite intent. It could be seen as equivocal, as it could have supported the opposite conclusion.

458 We find no merit in this ground of appeal.

12. Instruction to Disregard O'Donnell's Third Party Defence Theory (Ground 14)

459 O'Donnell contends the judge erred by instructing the jury to disregard the defence theory that a third party — and not O'Donnell — drove the vehicle used in the Thom murder.

460 In closing submissions, O'Donnell suggested the jury might have a reasonable doubt about his culpability for the Thom murder because there was evidence connecting another Greeks member, Sweitzer, to the offence. That evidence was entered as part of the Crown's case and can be summarized as follows: Sweitzer owned and regularly drove the [SUV] used in the Thom homicide; he owned a cell phone used in arranging the homicide; and he was employed as a driver for the Greeks at the time of the homicide. Defence counsel also suggested Coutts provided further evidence that Sweitzer may have been involved. Coutts said Williams told him that Sweitzer was one of the three people who came to Williams' house early in the morning after the Thom killing.

461 The trial judge instructed the jury to disregard O'Donnell's submission:

> [501] Finally, I instruct you to disregard the suggestion made by counsel for O'Donnell that you might entertain a reasonable doubt about O'Donnell's guilt in relation to Count 3 as a consequence of evidence connecting Doug (the Slug) Sweitzer to the commission of Thom's murder. I have determined that the evidence in this case falls short of that which is required to permit you to draw a non-speculative inference that Sweitzer may have participated with [Witness T] in the killing.
>
> [502] This instruction should in no way distract you from giving your full consideration to the rest of the closing submissions made on behalf of O'Donnell, and to the question of whether the Crown has, on all the evidence, established O'Donnell's guilt beyond a reasonable doubt.

462 On appeal, O'Donnell contends the judge erred in giving this instruction. He submits the judge erred by treating the submission about Sweitzer's possible involvement in the Thom murder as an alternative third party suspect defence, requiring defence counsel to establish an air of reality before it could be put to the jury. O'Donnell submits he was not raising a third party defence but was simply relying on the evidence linking Sweitzer to the [SUV] and the Greeks, along with all the other evidence, to raise a reasonable doubt.

463 We are not persuaded by the appellant's submission. It was O'Donnell's theory that only shooters and a third party were involved in the Thom killing, those being Witness T, Sipes, and either Witness U or Sweitzer. The theory that Sweitzer was the third person present at the killing, rather than O'Donnell, amounted to a third party suspect defence.

464 In *R. c. Cinous*, 2002 SCC 29 (S.C.C.), the Supreme Court of Canada confirmed there is a long-recognized common law principle that a defence should only be put to a jury if it has an evidential foundation, or air of reality. This rule reflects the practical concern that allowing a defence to go to the jury in the absence of an evidential foundation would invite verdicts unsupported by the evidence, would confuse the jury, and would get in the way of a fair trial and true verdict. The Court said:

> 53 In applying the air of reality test, a trial judge considers the totality of the evidence, and assumes the evidence relied upon by the accused to be true. See *Osolin*, *supra*; *Park*, *supra*. The evidential foundation can be indicated by evidence emanating from the examination in chief or cross-examination of the accused, of defence witnesses, or of Crown witnesses. It can also rest upon the factual circumstances of the case or from any other evidential source on the record. There is no requirement that the evidence be adduced by the accused. See *Osolin*, *supra*; *Park*, *supra*; *Davis*, *supra*.
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> 54 The threshold determination by the trial judge is not aimed at deciding the substantive merits of the defence. That question is reserved for the jury. See *Finta*, *supra*; *R. v. Ewanchuk*, [1999] 1 S.C.R. 330. The trial judge does not make determinations about the credibility of witnesses, weigh the evidence, make findings of fact, or draw determinate factual inferences. See *R. v. Bulmer*, [1987] 1 S.C.R. 782; *Park*, *supra*. Nor is the air of reality test intended to assess whether the defence is likely, unlikely, somewhat likely, or very likely to succeed at the end of the day. The question for the trial judge is whether the evidence discloses a real issue to be decided by the jury, and not how the jury should ultimately decide the issue.

465 On the authority of *Cinous*, it was therefore appropriate for the judge to consider whether there was an air of reality to that defence before leaving it with the jury. Whether there is an air of reality to a defence is a question of law, and subject to appellate review: *Cinous* at para. 55.

466 It is useful to review some of the evidence before determining whether the judge was correct in concluding that there was no air of reality to this defence.

467 At trial, Witness T was the only person who testified to being present at the Thom killing. He gave evidence that he enlisted Brownell to drive Thom out to an isolated location, and then drove there himself in [an SUV] with Sipes and O'Donnell. Witness T drove the same [SUV] to the beach the night Bryce was beaten in November 2004. Witness T said that when Thom exited Brownell's vehicle he was immediately shot numerous times by Sipes and O'Donnell. Witness T gave evidence that he had also intended to shoot Thom but his gun jammed. He said he then took Sipes' gun, walked over to where Thom was lying on the ground and shot him in the face.

468 In cross-examination, counsel suggested to Witness T that O'Donnell was not present at the killing, and that the other person involved was either Witness U or Sweitzer. At no point did defence counsel suggest to Witness T that Sweitzer or someone other than Witness T was driving the [SUV].

469 We turn next to Coutts' hearsay evidence as to Williams' mention of Sweitzer. Under cross-examination, Williams did not agree he told Coutts that Sweitzer came to Williams' residence after Thom's murder to drop off the [SUV]. When asked if it was possible he said that, Williams replied, "It's possible I could have told him anything if I don't have a memory of it." This falls short of adoption of the hearsay statement, and so is not probative of its contents. Accordingly, the jury was correctly instructed they could not use Coutts' evidence for the truth of its contents, and that it was only relevant in assessing Williams' credibility.

470 As the Court stated in *Cinous*, it is an error of law to put to the jury a defence lacking an air of reality, just as it is an error of law to keep from the jury a defence that has an air of reality. In our view, the judge correctly concluded the evidence relied on did not connect Sweitzer to the scene of Thom's death, and accordingly there was no air of reality to the submission that Sweitzer, and not O'Donnell, was involved in Thom's murder.

471 We do not accede to this ground of appeal.

13. Fair and Balanced Charge (Ground 15)

472 Earlier in these reasons for judgment we have addressed complaints of the appellants concerning the content of specific portions of the jury instructions. On this ground of appeal we address the appellants' comprehensive complaint that the judge failed to satisfy the requirement to deliver a fair and balanced charge. The appellants' submissions address propositions to the benefit of all appellants and propositions to the benefit of one or more of the appellants specifically.

473 Before we address the details of the appellants' submissions, it is perhaps useful to first acknowledge the principles that bear on our review of the judge's performance of his task of instructing the jury. Those principles are not controversial in this appeal, and accordingly it is sufficient to refer to only a few of the many cases cited by counsel.

474 The primary obligation of the trial judge was described years ago in *Azoulay v. R.*, [1952] 2 S.C.R. 495 (S.C.C.) by Justice Taschereau at 497:

> ... The rule which has been laid down, and consistently followed is that in a jury trial the presiding judge must, except in rare cases where it would be needless to do so, review the substantial parts of the evidence, and give the jury the theory of the defence, so that they may appreciate the value and effect of that evidence, and how the law is to be applied to the facts as they find them. (*Spencer v. Alaska Parkers* [(1905) 35 Can. S.C.R. 362.]). As Kellock J.A. (as he then was) said in *Rex v. Stephen et al*. [[1944] O.R. 339 at 352.]: "It is not sufficient that the whole evidence be left to the jury in bulk for valuation." The pivotal questions upon which the defence stands must be clearly presented to the jury's mind. ...

475 In *R. v. Jacquard*, [1997] 1 S.C.R. 314 (S.C.C.), Chief Justice Lamer explained the standard to which an appeal court should hold judges in charging juries:

> 1 ... It is undoubtedly important that jurors try the right facts according to the appropriate legal principles in each case. However, we must ensure that the yardstick by which we measure the fitness of a trial judge's directions to the jury does not become overly onerous. We must strive to avoid the proliferation of very lengthy charges in which judges often quote large extracts from appellate decisions simply to safeguard verdicts from appeal. Neither the Crown nor the accused benefits from a confused jury. Indeed justice suffers.
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> 2 These comments are not meant to suggest that we sanction misdirected verdicts. This Court has stated on repeated occasions that accused individuals are entitled to properly instructed juries. ...
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> . . .
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> 62 As I discussed at the outset of my reasons, appellate courts must adopt a functional approach to reviewing jury charges. The purpose of such review is to ensure that juries are properly — not perfectly — instructed.

476 More recently, Justice Moldaver, in *R. v. Rodgerson*, 2015 SCC 38 (S.C.C.), addressed both the task of a trial judge addressing a jury and our task in reviewing the judge's performance of that task, with particular reference to *R. v. Daley*, 2007 SCC 53 (S.C.C.):

> [30] In crafting the jury charge, a trial judge has a general duty to inform the jury of the relevant evidence, and to assist the jury in linking that evidence to the issues that it must consider in reaching a verdict. The level of detail that is required varies depending on the context. As the majority of this Court stated in *R. v. Daley*, ... *per* Bastarache J.:
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> > The extent to which the evidence must be reviewed "will depend on each particular case. The test is one of fairness. The accused is entitled to a fair trial and to make full answer and defence. So long as the evidence is put to the jury in a manner that will allow it to fully appreciate the issues and the defence presented, the charge will be adequate" .... [para. 57]

(Quoting C. Granger, *The Criminal Jury Trial in Canada* (2nd ed. 1996), at p. 249.)

. . .

[50] While the Crown and defence counsel both have roles to play, the role of the trial judge is the most vital, and the most difficult, in formulating jury instructions. A trial judge must strike a crucial balance by crafting a jury charge that is both comprehensive and comprehensible. Recognizing the difficulty inherent in this task, this Court has "repeatedly endorsed" the functional approach to reviewing jury charges (*R. v. Mack*, 2014 SCC 58, [2014] 3 S.C.R. 3, at para. 49). This functional approach is designed to "ensure that the yardstick by which we measure the fitness of a [jury charge] does not become overly onerous", in order to reduce "the proliferation of very lengthy charges in which judges often quote large extracts from appellate decisions simply to safeguard verdicts from appeal" (*Jacquard*, at para. 1). Under the functional approach, the trial judge's duty is to "decant and simplify" (*ibid.*, at para. 13). Over-charging is just as incompatible with this duty as is under-charging.

. . .

[54] ... Mr. Rodgerson would benefit from a jury keenly focused on the evidence and arguments forming the basis of his defence, and not distracted by hours of confusing and repetitive generic instruction. The Crown would also benefit from a simplified charge, with fewer unnecessary contours in which grounds for an appeal of conviction may lay hidden. I do not wish to appear naïve, and I recognize that such an everybody-wins approach is easier said than done. Nevertheless, I remain firmly of the view that "common sense and the law need not be strangers", and that the fundamental purpose of the jury charge must be "to educate, not complicate" (*R. v. Zebedee* (2006), 81 O.R. (3d) 583 (C.A.), at para. 82).

[Emphasis added.]

477 The task for the trial judge always is to provide instruction that meets the function of the jury charge, tailored to the facts of the specific case: *R. v. McNeil* (2006), 84 O.R. (3d) 125 (Ont. C.A.); *Rodgerson* at para. 52.

478 Justice Watt, in *R. v. B. (P.J.)*, 2012 ONCA 730 (Ont. C.A.), provided a helpful explanation of the extent to which the evidence must be reviewed and the degree to which the judge must connect the evidence to the live issues at trial, from which these propositions may be distilled:

- the judge is not required to review *all* the evidence adduced at trial (at para. 45);

- the judge has considerable latitude in the volume of evidence reviewed and related to issues (at para. 46);

- substantial deference is owed to the judge regarding the amount of evidence he or she chose to review, and the failure to mention individual items of evidence will not be fatal unless those items constitute the sole evidentiary foundation of a defence (at para. 46);

- the closing addresses do not relieve the judge of the obligation to ensure the jury understands the significance of the evidence to the issues, although the judge may consider the closing addresses of counsel in deciding how to discharge the obligation (at para. 47); and

- our review of jury instructions requires a functional approach, and takes place in the context of the trial as a whole. Considerations include the complexity and volume of evidence at trial, the extent of the review by counsel in their jury submissions, the length of the trial, the issues the jury must resolve, the effect a more complete and balanced review would have had, and any objection made by counsel (at para. 49).

479 The ultimate question is one of trial fairness: *Daley* at para. 57. As Justice Bastarache explained in the passage from *Daley* referred to by Justice Moldaver in *Rodgerson*, "So long as the evidence is put to the jury in a manner that will allow it to fully appreciate the issues and the defence presented, the charge will be adequate". Assessment of this question most often reduces

to the sufficiency of the judge's review of the evidence and the tension between comprehensiveness and comprehensibleness. That is the case here.

480 The appellants contend the jury instructions were fatally deficient in that they did not present a fair and balanced review of the evidence. They complain that the judge, in relating evidence to the elements of the offence, "provided a detailed summary of evidence supporting conviction, denuded from the substantial concerns that generally arose with witness credibility and reliability". They say the judge was required to do more, and "to balance that review with analysis of the key concerns that arose within that evidence". While acknowledging that the judge periodically reminded the jury to consider defence counsel submissions and not to lose sight of concerns with that evidence, they contend he was required to explore for the jury the major deficiencies in the evidence of important witnesses, and was required to explain how those deficient portions of evidence could raise a reasonable doubt on elements of the offences charged.

481 The appellants complain further that the judge wove the evidence into a chronological narrative as if it presented a complete picture. While they acknowledge the judge spoke to the jury of the risk that he may be leaving them with the impression the evidence formed a seamless narrative when it did not, they say the instructions still wrongly suggested the evidence fit together in one picture. In the result, the appellants say, the instructions neither brought to the attention of the jury substantial weaknesses in the evidence of Crown witnesses, nor related to the theories of their defences several areas of evidence that were helpful.

482 The appellants' submissions pose seven key failures of the judge that they say demonstrate a fatal imbalance:

- failure to alert the jury to areas where they were required to decide whether a witness had deliberately lied under oath;
- failure to explain areas where there was a real concern that police tainting had affected the reliability of the summarized evidence;
- failure to note or relate to the jury certain issues arising in the identification evidence of several witnesses in respect of the charges against O'Donnell;
- failure to relate to Manolakos' defence a body of circumstantial evidence that suggested Witness U was in Vernon at times relevant to the Marnuik homicide;
- failure to relate the evidence of Sparks as to the role of O'Donnell in the Marnuik homicide and of O'Donnell's absence from the ongoing assault, to O'Donnell's defence on the Marnuik homicide that he was guilty at most of manslaughter;
- failure to relate to Manolakos' defence theory the competing accounts of witnesses regarding the gun gestures of Manolakos; and
- failure to relate the ballistics evidence at the Thom homicide scene to Witness T's evidence his gun misfired at the site of the Thom homicide.

483 We first review the development and content of the jury charge, before addressing these specific complaints.

13.1 The Jury Instructions

484 In the Introduction we described the extended trial processes including, after the lengthy evidentiary phase of the trial, the elapse of about one month before counsels' addresses to the jury. That hiatus allowed for some discussion between the judge and counsel, gave counsel ample time to prepare, and — to the extent appropriate — allowed defence counsel to coordinate their closing submissions.

(a) Pre-charge Communications

485 Between the end of the evidentiary phase and commencement of counsels' addresses to the jury, on August 8, 2012, the judge issued a memorandum to counsel indicating that his review of the evidence would not be exhaustive, and advising them to structure their closing addresses with this in mind:

> In advance of the pre-charge conference scheduled for August 10, 2012, I write to alert counsel to: some issues that may shape the way you craft your closing submissions...
>
> > 1. I advise counsel that it is my intention to conduct an evidentiary review for the assistance of the jury as well as to relate what I consider to be some of the most important of that evidence to the essential elements of the offences charged. Having said that, it is the duty of the trial judge to decant and simplify. I intend to do so. It is neither possible nor desirable for me to embark on an exhaustive review of every potential piece of evidence, inconsistency in the evidence or factor which may affect the credibility or reliability of a witness called in this case. I advise you of this so you may prepare and structure your closing submissions to the jury in a fashion inclusive of the evidentiary features of this case that you think the jury should have in mind in reaching its verdicts.

486 Two paragraphs later, the judge noted his effort to reduce "the length and complexity of the charge". The judge's need to grapple with the sheer volume of the case was a recurring theme of his communications to counsel, which began in April 2012, when he first solicited written submissions regarding specific instructions to be included in the final charge.

487 In that same memorandum, the judge referred to concerns expressed to him by counsel that certain evidence (adverse to a particular accused) should not be highlighted in the final instruction. He observed that certain instructions may serve to highlight evidence adverse to one or more accused, demonstrating his awareness of the delicate balancing required to provide instructions fair to all five accused and to the Crown, while still meeting his obligation to properly instruct the jury.

488 Counsels' closing submissions were delivered over 24 days — six for the Crown and 18 for all five accused.

489 Defence counsel made careful and lengthy submissions to the jury. It is fair to describe them as focusing largely on the multitudinous challenges to the truthfulness and reliability of the key Crown witnesses. Their submissions travelled through the evidence tendered by Crown (no evidence having been called by the defence) from the vantage point of each of the five accused, contending that the critical evidence of a particular accused's participation was so lacking in credibility that the jury should not be satisfied beyond a reasonable doubt of the guilt of that accused. Those submissions included PowerPoint presentations by some counsel and detailed reviews of evidence, aided at times by use of some portions of the transcripts from which the jurors could follow along and make notes (the transcripts provided did not accompany the jurors into their deliberations).

490 After hearing the closing submissions, the judge decided against providing a general review of the evidence. He explained this altered intention on October 19, 2012, at a pre-charge hearing:

> THE COURT: Thank you. Let me make some comments to counsel with respect to my final instructions. First of all, I want to deal with the question of a general evidence review. In an earlier memorandum to counsel, I indicated that I would provide the jury with a general evidence review. Since then, counsel have made closing submissions to the jury that lasted 24 days and contained an extensive review of evidence that each team of lawyers considered important to their respective cases. The evidence reviewed by counsel was done with the benefit of PowerPoint and visual displays of transcript excerpts from the evidence, as well as documentary exhibits. It was clear to me, and I expect it was clear to you, that the jury paid close attention to those submissions.
>
> My final instructions are lengthy and complex and will take a number of days to complete. I will, in the course of those instructions, be relating the essential evidence to the elements. To also undertake a fair and balanced general evidence review with the jury will take many additional days. I have concluded doing so is neither necessary nor helpful to the jury. They have had the benefit of counsel's thorough submissions.

For me to repeat what counsel have already reviewed beyond that necessary to relate the evidence to the elements of the offences and my special instructions will likely double or would likely double the length of my final instructions. In my view, it would not serve any useful purpose and may detract from the overall clarity of my charge.

For these reasons, I am exercising my discretion not to provide the jury with a general evidence review.

[Emphasis added.]

491 The judge then observed he would provide some curative instructions, commenting on certain factual errors made by counsel in their submissions, and said:

THE COURT: ... I have concluded that some of those concerns are best dealt with during my review of evidence in the second part of my final instructions. In some cases, I have simply ensured the evidence is correctly stated. In others where I consider the issue to be more significant, I have specifically noted the error. In other instances, I have concluded that to highlight the evidence would be potentially prejudicial, with little benefit to any of the parties or the jury.

[Emphasis added.]

492 The instructions contemplated at that time (and eventually delivered) included an evidentiary review in relation to the elements of the offences charged. Defence counsel expressed concerns that the review did not include enough detail of their challenges to the credibility of Crown witnesses, and counsel for Sipes asked the judge not to leave a written copy of that portion of the instructions with the jury. Counsel for Podolski took the same position the following day. The judge decided to retain that evidentiary review in the written charge. He explained:

I also want to provide counsel at this time with a brief explanation for my decision with respect to the submission that I should delete my review of evidence from the written instructions.

In my view, inclusion of my evidentiary review is necessary given the length and complexity of this trial and the unavoidable delay between the close of evidence and the delivery of my instructions.

The jury has the challenging task of sifting through a year's worth of complicated and detailed evidence in order to decide the 30 available verdicts. The accused are not all charged with the same homicides and their alleged participation in the homicides with which they are charged varies. For example, on the Thom count, Sipes and O'Donnell are alleged to have shot Thom, Brownell to have assisted them, and Manolakos to have encouraged them. The evidence concerning the alleged participation of the accused in the Marnuik and Bryce homicides is detailed and intricate, and the issues the jury must resolve are complicated.

Including the evidence in my written instructions may reduce the need to have evidence played back for the jury, a process which will most certainly be time consuming given that many of the key witnesses testified for many days and were cross-examined by numerous counsel.

I have tried to decant and simplify the evidence by focusing on that which is directly relevant to the elements of the offence with respect to each accused on each count. I have included inconsistencies in the evidence that relate to proof of the elements of the offence, and have continually reminded the jury to consider the closing submissions of defence counsel and the evidence relevant to the credibility of the witnesses generally and the reliability of their testimony. In addition, I have continually reminded the jury to consider all of the evidence, not just that which I have reviewed.

I refer counsel to the decision of Watt J.A. in *R. v. Yumnu*, 2010 ONCA 637. I have carefully considered that decision and have noted that many of the factors present in *Yumnu* are also present here. As in *Yumnu*, I have included the positions of counsel in my written charge.

In short, I am satisfied I should exercise my discretion to provide the jury with my entire instructions in writing, and that doing so will assist the jury in its deliberations to arrive at just and fair verdicts.

[Emphasis added.]

493 In the middle of his instructions to the jury, the judge advanced further explanation for his treatment of evidentiary matters. By memorandum of November 9, 2012, he explained why some of counsels' suggestions had not been incorporated into his instructions. The following is of particular relevance to the appellants' current complaints:

Second, on some occasions, counsel sought the inclusion in my charge of a reference to evidence resulting from cross-examination on a prior statement. In some instances, I am not satisfied that the jury could find the contents of the statement to have been adopted by that witness as their evidence: *R. v. Kelly*, 2011 ONCA 549.

Third, inclusion in the charge of some evidence would require me to emphasize or include other evidence which would be unhelpful to the accused.

Fourth, some of your requests for the inclusion of additional evidence were in relation to matters going to general credibility assessment. While I made exceptions from time to time, I have the responsibility to decant and simplify, and not overload the jury with a repetition of all of the evidence highlighted for them in the comprehensive and carefully prepared closing addresses of counsel. I have repeatedly reminded the jury of the importance of considering all of the evidence, including that which goes to the general credibility of the witnesses and the reliability of their evidence, and to do so whether I make express reference to that evidence not.

Fifth, and to address a concern raised by counsel in their written and oral submissions, I prepared evidence summaries relating to particular accused on some of the counts, not to repeat evidence, but to ensure the jury understands the need to compartmentalize the evidence admissible for and against each individual accused on each count.

[Emphasis added.]

494 As to explaining the theory of the defence of each of the five accused, he said:

Finally, I have attempted to capture the essence of the theories of each party at the end of each count. As you are aware, the written statements of the positions, or theories, of counsel submitted for my review have not been reproduced *verbatim* in my charge. Some were substantially longer than others. Some referred to inadmissible hearsay. Some posited theories for which there is no evidentiary foundation. Some were not count specific. They have been redrafted to some extent (based on the written theories supplied by counsel as supplemented by submissions made to the jury in closing addresses) and in such a way to maintain an overall balance - all of them are approximately the same length. As you are aware, requested changes have, for the most part, been made to ensure that the theories are forcefully expressed, and in a way faithful to the essence of counsels' written submissions.

[Emphasis added.]

(b) The Charge to the Jury

495 The written instructions provided to the jury (and marked as an exhibit) were divided into five parts, and were delivered orally this way to the jury. The written instructions had a detailed index, suitably describing the various topics covered to allow for easy reference. A copy is attached as Appendix B.

496 Part 1 of the charge was entitled "Introduction and General Principles". It contained general instructions, including on the presumption of innocence, burden of proof, and reasonable doubt. In this Part the judge also instructed the jury in considerable detail on the assessment of evidence. That instruction is discussed above at paras. 105- 108.

497 Early in the charge, the judge described to the jury the import of his review of the evidence in these classic terms:

> [43] It is my duty to review what I consider to be the important parts of the evidence, and to relate it to the issues that are yours to decide. In doing that, I may overlook evidence you think important, or mention evidence you think is insignificant. I may make a mistake about what a witness said while testifying.
>
> [44] My references to the evidence are only to help you remember it, and to show you how it relates to the issues in this case. If my memory of the evidence is different from yours, it is *yours* that counts. You have also heard the thorough and very able submissions of counsel. Each of them highlighted for you the evidence they consider to be important to their respective cases. You should take into account in your deliberations the evidence reviewed by counsel in their closing submissions, and by me in the instructions I am about to give you, if it accords with your own recollection of the evidence in the case. You must always keep in mind, however, that to decide this case, you rely upon what *you* remember the evidence was, *not* what counsel or I say it was.

498 Part 2 of the charge was entitled "Specific Rules of Law Applicable to This Case", and included the instructions on evidence of witnesses of unsavoury character (the *Vetrovec* instructions discussed above) and the absence of cross-examination on significant evidence (the *Browne v. Dunn* instruction discussed above).

499 Part 3 of the charge was entitled "Manslaughter, Murder, and Parties to an Offence", and is also discussed above.

500 Part 4, by far the longest portion of the charge, was entitled "Relating the Evidence to The Essential Elements of Each Count". This portion ran from para. 593 through para. 1546 — 304 pages — of the written instructions. We note its length not because it forecloses the appellants' complaint that the jury instruction was insufficient in its recitation of the evidence and the defence theories, but to illustrate the significant task of the judge, given the scale of the case, to craft the instructions in a fashion the jurors could reasonably be expected to absorb. The scale of the case, including the volume of evidence, the detail of the cross-examinations of key witnesses, the length of submissions, and the complexity of the jury charge, given five accused, four counts, three related homicides, and the multiplicity of both routes to conviction and possible verdicts (30), is the context for the judge's exercise of discretion in determining what to include and what not to include. This is the "context" referred to by Justice Moldaver in para. 30 of *Rodgerson*.

501 Part 5 was brief, entitled "Concluding Instructions".

502 Part 4 is central to this ground of appeal.

503 The judge began Part 4 by advising the jurors he intended to remind them of some of the evidence they may find relevant, referring to the instruction given earlier (in Part 1):

> [594] The focus of my review will be on what I consider to be important evidence that relates to proof of the essential elements of the offences. My purpose is to remind you of some of the evidence that you may find relevant when considering whether the essential elements of the offences have been proven. I will not review all of the evidence that you may determine to be relevant, and I may review some evidence that you do not find to be relevant. As I instructed you earlier, you are the judges of the facts. Deciding what evidence is important and whether, on the whole of the evidence, the essential elements of an offence have been proven beyond a reasonable doubt is your job.
>
> [595] I repeat:
>
> - It is for you to decide what evidence you believe is important.
> - It is for you to decide whether you accept some, all or none of the evidence I will review with you.
> - It is your recollection of the evidence that matters, not my recollection or counsels' recollection.

[596] I will not focus on evidence that is relevant to the general credibility of the witnesses or the reliability of their evidence. However, it is critical that you consider that evidence, along with the evidence I will review.

[597] During closing submissions, counsel spent many days thoroughly reviewing evidence that is relevant to the credibility of important witnesses, such as ...

[598] Defence counsel reviewed evidence that disclosed inconsistencies between what some key witnesses told the police and what they told you, as well as inconsistencies in the evidence between witnesses. They highlighted that many of the Crown's key witnesses are persons with lengthy criminal records whose histories disclose a pattern of dishonest conduct, as well as drug abuse. They referenced the immunity agreements and suggested that the terms of those agreements required witnesses to say in court what they told the police.

[Emphasis added.]

504 The judge next briefly referred to defence counsels' submissions concerning the credibility of Witness U, Witness T, and Sparks. We will give as an example only one paragraph concerning Witness U, although the judge provided equally forceful summaries of counsels' submissions in respect of Witness T and Sparks:

[599] Defence counsel highlighted evidence they submit demonstrates [Witness U] is an amoral person who lied over and over to the police even when they urged him to tell the truth. They pointed to the [Victim A] murder and his efforts to blame [Person B], and his lies to the police to accomplish that goal. They reviewed how he added false details to his police statements and wove fact and fiction together to make what he said to them sound more believable. They highlighted evidence they submit shows [Witness U] lied to you when he testified he was in Calgary when Marnuik went missing.

505 The judge reminded the jury that defence counsel also had made similar submissions concerning other witnesses, and he urged the jury to consider defence counsels' submissions and the evidence they reviewed. The judge then returned to assessment of credibility, giving a précis of his earlier instruction, saying:

[605] When assessing the testimony of a witness, even one who has given previous inconsistent statements, you may find it helpful to see whether the witness's evidence fits with and is supported by the totality of the evidence. Consider whether the witness has a motive to give false evidence against a particular accused but, even if he or she does, consider whether his or her evidence is supported or contradicted by the evidence of other witnesses. Consider for some witnesses who provided inconsistent statements whether cooperating with the police and providing information about others involved in crime was contrary to the culture in which they lived and worked, particularly given the potential consequences of being labelled a "rat". Consider whether inconsistencies in the evidence of witnesses about events that happened seven or eight years ago are the product of dishonesty or the fragility of memory.

[606] Mostly importantly:

- Use your collective common sense and life experience.
- Consider the totality of the evidence.
- Do not lose sight of the forest for the trees.

506 The judge next told the jury he would review the evidence in chronological order as a narrative of events and said:

[607] ... I have done so to make the sometimes conflicting and divergent body of evidence understandable. The risk in presenting the evidence this way is to inadvertently suggest or leave with you the impression that the evidence emerged as a seamless narrative. Clearly, that is not the case and I do not intend, by my organization of the evidence, to suggest otherwise. It is your responsibility to recall the evidence and the contradictions in and between the evidence of some of

the central witnesses, including what a particular witness said occurred and when they said it occurred. I will remind you of some of these inconsistencies as I proceed through this part of my instruction.

[Emphasis added.]

507 Following these general instructions on the approach he was taking, the judge turned to the task of relating the evidence to the essential elements of each count. The judge addressed each count in a manner consistent with the general instructions on the approach he was taking, broadly adopting the same structure for all four counts. Below we discuss this structure in more detail, and use as examples the instructions relating the evidence to the elements of Counts 1 and 2, those being the charges against Sipes, Podolski, and O'Donnell (Count 1) and Manolakos (Count 2) in respect of the Marnuik homicide. We note some of these instructions have been canvassed earlier in our discussions of the instructions on party liability.

508 The judge began by discussing the routes to conviction in respect of each accused and the possible verdicts open to the jury, giving a brief description of the position of the Crown and the accused on each homicide. He explained that the jury must consider each person on each count, saying for example on Count 1 at para. 614 that "[e]ach accused is entitled to have his case decided on the basis of his own conduct and state of mind, and from the evidence that may apply to him".

509 The judge moved to the elements of the count being discussed, explaining the threshold that had to be met to establish each essential element of the count. In doing so, he highlighted particular considerations relevant to each. For example, on Count 1 the judge discussed the significance of evidence that Podolski was intoxicated at the time of the Marnuik assault to the jury's assessment of Podolski's state of mind.

510 On each count the judge then discussed the evidence as it related to the elements. In the course of doing so, the judge generally reviewed issues he expected would not be difficult to decide, and identified the particular issues on which he expected the jurors to focus.

511 Again, using Count 1 for example, the judge stated he considered it would not be hard to conclude that Marnuik was duct-taped to a chair, beaten, and died while still duct-taped to the chair. As to issues he expected the jurors would focus upon, he listed:

[680] . . .

• Whether Podolski: (i) was present when Marnuik was picked up in the white Intrepid and returned to the Office; (ii) was present when the assault occurred; (iii) participated in the assault as a co-principal, aider or abettor; and (iv) participated in cremating Marnuik's body at the burn site.

• Whether Sipes and/or O'Donnell participated in the assault as co-principals, aiders or abettors.

• If Sipes, Podolski, and/or O'Donnell did participate in the assault, whether they had the state of mind required to commit murder.

• If they did commit murder, whether they actively participated in the murder.

512 In discussing Count 1, the judge broke his discussion of the evidence as it related to the elements into particular stages of the homicide, shown by the headings in the written charge, which list "Learning that David Marnuik had Taken Off", "Summary of Documentary and Police Evidence", "The Pickup of David Marnuik", "At the Office", "The Clean-up", "Trips to the Burn Site", "Disposal of the Chair", and "Trips to the Chair Disposal Site". Under each heading, the judge pointed the jury to each key witness' evidence and generally described the content of that evidence on that topic.

513 Throughout the discussion on the various counts, the judge culled the evidence to give greatest mention to the testimony of key witnesses, referring to both the witnesses' examinations in chief and their cross-examinations.

514 Returning to Count 1 for illustration, there had been extensive testimony, much of it conflicting, as to the events of the beating of Marnuik. In addition to referring to the inculpatory evidence relied on by the Crown, the judge referred to prior inconsistent statements of a witness, evidence of witnesses that did not accord with evidence of other witnesses, admissions of untruthfulness, and evidence that to varying degrees supported the position advanced by the defence.

515 On each count the judge also provided a more general summary of the evidence. Concerning each of the three accused on Count 1, he said:

> [839] I will highlight some of the evidence that is relevant to the case for and against each of Sipes, Podolski and O'Donnell. I do so only for the purpose of separating out or compartmentalizing evidence that is admissible for and against a particular accused on this count.

516 The judge ended the discussion of each count (or in the case of the Marnuik homicide, counts), with a more complete summary of the position of the parties. He set out the general approach he would take to summarizing the positions of the Crown and of each accused in respect of the various counts:

> [900] For each of the counts, I will provide you with my assessment of the positions of Crown and defence counsel. You have heard their very comprehensive and well-presented addresses. I cannot, and will not, make reference to all of the submissions and evidence counsel relied upon in their closing submissions. What I will do is review the substance of the positions, as I understand them. It is not my function to persuade you of the merits of any position. My task is simply to recall their essential features for you.
>
> [901] For each count, I will review the position of the Crown first, followed by the position of each accused. You should attach no significance to the order in which I describe the positions of the parties, or the comparative length of my references to them.
>
> [902] In deciding whether a particular accused is guilty or not guilty, you must not weigh the position of the Crown against the position of a particular accused and choose between them. It is always the duty of the Crown to prove the guilt of an accused beyond a reasonable doubt.
>
> [903] You are not bound by the position of the Crown when you consider the evidence and the law. The Crown is not bound to prove the exact theory it advances. It must, however, prove the essential elements of the offence(s) beyond a reasonable doubt. Similarly, you are not bound by the position advanced on behalf of any accused. If, based on all of the evidence or the lack of evidence, you are *not* sure that a particular accused committed the crime charged or an included offence, you should find him not guilty of it. You must, however, decide this case on the evidence before you. You must not speculate about what evidence there might have been, or make up and act on some alternative theory which is not supported by the evidence.
>
> [Emphasis in original.]

517 To illustrate, on Counts 1 and 2 (the Marnuik homicide), the judge gave a ten-paragraph summary of the Crown's position as it related to each accused. He then gave summaries of the positions of each accused, proceeding in the order they were named in the two counts: Sipes, Podolski, O'Donnell, and Manolakos. The judge stated, for example, the position (theory) of Podolski, beginning and ending this way:

> [921] Counsel for Podolski submits that the truth has been lost in a "cascade of lies". He highlights that the key Crown witnesses against Podolski — [Witness T], [Witness U] and Sparks — are all members of the unsavoury witness club and have demonstrated time and again that they will lie about anything when it is perceived to be in their selfish best interest to do so.
>
> . . .

[929] He submits that the fundamental problem with what he characterizes as all of this untruthful, unreliable and contradictory evidence, is separating the wheat from the chaff. He says you cannot find in this testimony the facts necessary to displace the presumption of innocence and, as such, the Crown has not met its burden and Podolski should be found not guilty of any offence on Count 1.

518 In the intermediate paragraphs, the judge referred to some of the significant areas addressed by counsel for Podolski in his closing submissions to the jury.

519 The judge followed the same pattern for O'Donnell and Manolakos (and Sipes) on the Marnuik homicide, starting respectively:

[930] Counsel for O'Donnell agrees with and adopts the submissions of counsel for Sipes and Podolski that the evidence of the key Crown witnesses cannot be relied upon and says the case against O'Donnell depends on Sparks, [Witness T] and [Witness U].

[931] He submits that [Witness T] and [Witness U] have tailored their evidence to ensure favourable deals for themselves. He says that [Witness T] and [Witness U] actively sought to escape liability or minimize responsibility for their own actions, and continued to do so during their evidence at trial. He submits that even though Sparks had no written deal he received the benefit of not being charged with any offence. He says these written and unwritten deals serve only to reinforce the lies and deceptions of these three key witnesses.

. . .

And:

[934] Counsel for Manolakos submits that there is no credible or reliable evidence to prove Manolakos encouraged a beating of David Marnuik. He says merely because Manolakos was the leader of a group does not make him responsible for the actions of all of its members. He says there must be clear evidence that Manolakos actually encouraged or directed Marnuik's beating.

[935] Counsel submits that it is only [Witness U] who gives evidence that Manolakos directed a beating of Marnuik. He reminds you that [Witness U] testified he received calls from Podolski while he was in Calgary with Manolakos. He submits that this evidence from [Witness U] is neither credible nor reliable and is a false story that [Witness U] created after being given advice during his [earlier] statement about how someone like Manolakos could be convicted — namely, if Manolakos ordered that a crime be committed.

. . .

520 Part 4 continued in this fashion through Counts 2, 4 (the Bryce homicide), and Count 3 (the Thom homicide), ending with the position of Manolakos on Count 3 (the Thom homicide).

13.2 Discussion of the Particular Criticisms

521 On appeal, the appellants submit the trial judge failed to provide a fair and balanced charge in that his instructions contained inadequate reference to evidence important to their defences, and failed to relate evidence to the issues the appellants raised at trial. They advance the seven "key areas of dispute", listed in para. 482, that they say were not adequately addressed.

(a) Witnesses Deliberately Lying Under Oath

522 The appellants contend the instructions failed to alert the jury to important testimony of key witnesses who they say admitted to lying under oath, or at least whose testimony supported a "strong inference" they lied under oath. They say that while the judge told the jury the defence had suggested a particular witness may be lying, he often followed this with the observation

the witness disagreed with the suggestion. They complain the judge "routinely failed to provide any analysis of the need for the jury to consider the cross-examination, the concerns raised by that cross-examination and the impact of that cross-examination on the credibility and reliability of that witness". They say there were substantial issues with the believability of the evidence, including that it was often inconsistent and shifting, and refer to detailed examples of testimony they say the judge should have addressed. The appellants acknowledge the judge gave the standard instruction on a witness lying under oath, but say that it was insufficient and should have addressed the inconsistencies to which they refer, particularly those inconsistencies found in the testimony of Sparks, Witness T, and Shaw.

523 With respect to the evidence of Sparks, the appellants refer to his testimony on the disposal of Marnuik's remains in particular. They refer to inconsistencies in Sparks' statements to the police, saying the judge "did not highlight the real issue that was raised by the cross-examination", that being whether Sparks was lying to the jury when he denied lying to the police in his initial statements to the police. They refer to details of the cross-examinations of Sparks they say supported an inference he was deliberately lying under oath, a conclusion that would have been germane to his credibility.

524 With respect to the evidence of Witness T, the appellants complain of the judge's treatment of evidence that [an SUV], which they said Witness T drove, had run over Bryce. They refer to the testimony of the civilian witness who said the [SUV], driven by the biggest man on the beach, ran over a man. Witness T's initial statements denied Bryce was run over by a vehicle. In his later statement, Witness T said Bryce was run over and Brownell was the driver. Witness T explained the change in his statement on the basis that he feared Brownell's connection to the Hells Angels. The appellants contend the judge should have connected this cross-examination on Witness T's inconsistent police statements with the defence theory that he lied under oath to avoid admitting he was the driver who ran over Bryce. They say that if the jury accepted the evidence of the civilian, Witness T was the primary aggressor and the driver of the [SUV]. This, they say, potentially could have affected the jury's view of the whole of Witness T's evidence.

525 The third example proffered by the appellants is the evidence of Shaw admitting to lying to the jury about his involvement in drug-trafficking.

526 The Crown addresses each of these three examples. In respect of all these complaints, the Crown refers to passages replicated above where the judge said, comprehensively:

> [597] During closing submissions, counsel spent many days thoroughly reviewing evidence that is relevant to the credibility of important witnesses, such as ...
>
> [598] Defence counsel reviewed evidence that disclosed inconsistencies between what some key witnesses told the police and what they told you, as well as inconsistencies in the evidence between witnesses. They highlighted that many of the Crown's key witnesses are persons with lengthy criminal records whose histories disclose a pattern of dishonest conduct, as well as drug abuse. They referenced the immunity agreements and suggested that the terms of those agreements required witnesses to say in court what they told the police.

527 In respect of Sparks, the Crown observes that the judge made explicit reference to defence counsels' submissions on Sparks, including to those on his testimony of his role in disposing of Marnuik's remains:

> [925] Counsel argues that Sparks did not need an immunity agreement because his solution was to lie his way out of ever needing one. He says Sparks' lies to police were numerous and he continued lying when he testified; in particular, when he claimed not to have remembered his role in the burying of remains at the burn site, or the removal and disposal of the chair.

528 In respect of the appellants' complaint about the judge's treatment of Witness T's evidence, the Crown says the judge adequately pointed the jury to this evidence and the evidence of the civilian witness. It says more was not required in the context of the instructions as a whole. The Crown observes that this issue was taken up at trial by Brownell, who is not an appellant, and that O'Donnell did not address it in either his closing submissions or in his written summary of his position. In any event, the Crown says, the judge adequately summarized this cross-examination by Brownell's counsel, including the Hells Angels reference which was the subject of the cross-examination issue discussed above at paras. 417- 418.

529 In respect of Shaw, the Crown disputes the appellants' submission that the judge omitted an adequate reference to Shaw's admission of lying to the jury.

530 In our view, none of these three examples demonstrates an imbalance or unfairness in the instruction. Considering the breadth of evidence adduced and the thoroughness of the cross-examinations of the witnesses, the possibilities for the same type of instruction the appellants say was required on these pinpoint aspects are so numerous as to demonstrate the reason we have a deferential role in assessing the judge's exercise of discretion in determining the detail of instruction suitable in a given case.

531 In particular, as to the appellants' submission concerning the judge's treatment of Sparks' evidence, we consider the judge adequately pointed the jury to the evidence and left it to the jury to draw its conclusions. What the jury made of the evidence was for it to determine, using the tools described to them so thoroughly by the judge in his discussion of assessing the evidence.

532 The appellants' submission on Witness T's evidence addresses his differing accounts, the cross-examination discussed above under Ground of Appeal No. 10 (Manolakos' connection to the Hells Angels), and the evidence of the civilian. Again, in our view, whether to give an expanded instruction in the nature of the one advocated falls within the proper scope of the judge's discretion. Given his reference to the evidence engaged in this submission and his comprehensive instructions on assessing evidence, we cannot find the judge was required to make the pinpoint instruction advocated.

533 Nor, in our view, is there a fatal flaw in the judge's treatment of Shaw's evidence. While the judge did not comment on Shaw's agreement that he had lied under oath on the collateral issue of his mother's knowledge of drug dealing, he did highlight many of the frailties of Shaw's testimony elicited in cross-examination. Of particular relevance here, the judge noted Shaw had reported to the police a conversation with Manolakos that did not happen and that Shaw agreed he must have been making that conversation up. In our view, having correctly instructed the jury on witnesses lying under oath, the judge's reference to Shaw's agreement he had "made up" certain evidence was an effective alert to the jury concerning Shaw's truthfulness.

534 Further, the appellants elevate these pieces of evidence far beyond their reasonable importance in the case; they were not the sole evidentiary foundation for a conviction, nor were they the major focal point of attack on the credibility or reliability of the witness named.

535 We agree with the judge's observation that it was not possible, let alone desirable, given the magnitude of the proceedings and smorgasbord of avenues for attacks on the credibility and reliability of many of the witnesses, to note every inconsistency or prevarication. Indeed, to embark on such an exercise would be to invite its own set of problems in a case as unwieldy as this one. In these circumstances, we cannot say the absence of a pinpoint reference to the evidence counsel now point to is of such magnitude as to create a fatal unfairness or imbalance to the jury charge.

536 We find no error in the judge's treatment of the evidence encompassed by this complaint.

(b) Police Tainting and Credibility

537 The appellants' second focus of complaint is the judge's treatment of evidence they say establishes police tainting of witnesses in the course of repeated interviews. They contend that the judge's instructions failed to refer to a number of important examples of police interviewing that created artificial consistencies between witness statements. Apart from the effect they say the police investigation methods should have had on the *Vetrovec* warning discussed above, they say the judge's treatment of the issue has led to an imbalance in the jury charge, a matter to be considered in assessing the fairness of the charge as a whole.

538 We have addressed this issue in the context of the *Vetrovec* issue above. Apart from the instructions concerning credibility and unsavoury witnesses earlier noted, the judge referred to the issue as follows:

> [94] Was a witness, inadvertently or otherwise, provided by the police with information uncovered in the course of the investigation that might permit that witness, consciously or unconsciously, to tailor his or her evidence? More specifically, did the police share with the witness information others supplied about the same events? Did the witness's account change after that information was supplied? If so, how significant was the change? Does it, in the context of the evidence as a

whole, undermine your faith in some or all of the witness's testimony? Are you satisfied from the details supplied by that witness in his or her testimony that, despite the information that was or may have been supplied to him or her by others about an event, the witness has independent knowledge of and an accurate memory about that event?

[Emphasis added.]

539 In addition to the instruction above, the addresses of defence counsel leaned heavily on the proposition that much of the evidence of witnesses came not from their own memory but rather from what the police had said to them. In our view, there is no air of reality to the submission the jury was not adequately alerted to the possibility the police interviews had influenced the memories or the testimony of witnesses; we consider the judge provided a thorough explanation of the jurors' duty to assess the evidence of the interviews.

(c) Eyewitness Identification

540 The appellants' third contention is that the charge failed to instruct the jurors on the frailties of two areas of identification evidence. They raise these areas primarily for O'Donnell's benefit.

541 First, they say that Witness X's evidence relating to O'Donnell's use of a bat to beat Bryce was misstated in the following way. They complain the judge made no mention of the issues with Witness X's identification of O'Donnell as the person who had a bat, being that she identified "Rico" as the bat-wielder but failed to identify O'Donnell as "Rico". Accordingly, they say, the judge misstated the evidence by telling the jury Witness X said "O'Donnell had the bat". The appellants say this created a substantial imbalance in favour of the Crown in the instruction, strengthening the Crown's case against O'Donnell and failing to fairly present a key issue in his defence.

542 The appellants further add that the judge erred in leaving it to the jury to determine whether Witness X's evidence was a refreshed memory or inadmissible past recollection, that is, whether it was admissible. That issue is addressed above starting at para. 343 under Ground of Appeal No. 7.

543 Second, the appellants complain of the judge's treatment of Clayton and Dyck's testimony as to who attended the residence on the night Thom was shot. In particular, O'Donnell contends, as he did vigorously before the jury, that the Crown's evidence identifying him as one of the three men who attended Williams' house in the early morning of the Thom shooting was unreliable and could not support the conclusion his identity as a shooter was proved beyond a reasonable doubt.

544 We are not persuaded by the appellants' submission regarding Witness X's evidence. As we understand the trial proceedings on the Bryce homicide, it was not in dispute that O'Donnell was present at the Bryce beating, or that others in attendance were Witness T, Witness V, and Sparks. Witnesses testified that Witness T was sometimes referred to as [Witness T's nickname], and that O'Donnell was sometimes referred to as Rico. Before the jury, O'Donnell's focus was on whether Witness X's evidence was that [Witness T's nickname] wielded the bat, as she originally stated, or Rico did, as she testified after refreshing her memory by reading a statement; it was not on whether O'Donnell was in fact Rico. The apparent acceptance of O'Donnell as Rico by all at the trial is confirmed by the absence of any request to the judge to modify the instruction O'Donnell now complains of, from one saying Witness X said the person with the bat was O'Donnell, to saying she said the person with the bat was Rico. The absence of an objection, of course, is not determinative, but it supports the view this instruction was not of great moment: *R. v. Mack*, 2014 SCC 58 (S.C.C.). While one may say the judge condensed this witness' evidence by combining her statement that Rico wielded the bat with the apparently uncontroversial identification of Rico as O'Donnell, the matter was not confusing in the context of the case before the jury.

545 In our view, the second complaint, about the treatment of Clayton and Dyck's evidence as to who attended at Williams' house on May 31, 2005, is also without substance. The judge reviewed the evidence of these witnesses several times during the course of the instructions, and specifically instructed the jury to consider frailties of their evidence. He reminded the jury of this when assessing their identification evidence:

[1280] When you are assessing the evidence of [Witness T], Williams, Dyck and Clayton, consider the cross-examinations of each of them and the inconsistencies between what each told the police and what they told you in evidence. Also consider the inconsistencies and differences in the evidence of each of them concerning many of the details of what occurred that morning; for example, whether [Witness T], Sipes and O'Donnell went inside the house or stayed outside. You should also consider the inconsistencies and differences in the evidence of Williams, Dyck and Clayton; for example, whether Clayton helped with the clothes and where the duffel bag was put. Defence counsel has reviewed these in detail with you. You must consider these inconsistencies when assessing both the credibility of these witnesses and the reliability of their evidence.

546 Further, in summarizing O'Donnell's position concerning the evidence of Dyck and Clayton, the judge said:

[1526] Counsel for O'Donnell submits that the evidence of Clayton and Dyck is unreliable for similar reasons; specifically, their drug use at the time, the inconsistencies between their evidence and previous statements, and the inconsistencies between the evidence Williams, Clayton and Dyck gave about the events that morning. As one example, Dyck denied discussing the morning visit with Williams after it occurred despite the fact that Williams testified that some discussion of the incident did occur.

[1527] Counsel for O'Donnell reminds you of the frailties associated with identification evidence.

[1528] He also submits that the inherent unreliability of the evidence as a whole is such that you should be left with a reasonable doubt about whether O'Donnell took any part in the planned and deliberate murder of Ron Thom.

547 We find no error in the judge's instruction on the identification evidence of these three witnesses, and as with other challenges on this ground of appeal, this submission invites us to interfere in an impermissible way with the judge's determination of the degree of detail he should provide in the circumstances of the case.

(d) Evidence of Witness U's Location When Marnuik Went Missing

548 The fourth area of focus is of particular relevance to Manolakos. It concerns the judge's treatment of evidence of Witness U's whereabouts when he claimed to be in Calgary with Manolakos at the time Manolakos received the phone call informing him Marnuik was missing. Witness U's testimony was to the effect that Manolakos gave instructions to find and discipline (beat) Marnuik. In the appellants' view, the evidence suggested that Witness U had been in Vernon at the time of the phone call and thus was lying when he testified he was with Manolakos and heard Manolakos give instructions for the Marnuik beating. Apart from bearing on the case against Manolakos, this evidence was important to the Podolski defence as it suggested Witness U had attributed to Podolski things that he (Witness U) did and said, and it was important to the view the jury took of Witness U's evidence on the other counts.

549 On appeal, the appellants acknowledge that the evidence of cell phone records was "somewhat technical and complicated". They also acknowledge that the judge summarized the cell phone evidence, which they say did not support Witness U's testimony he had gone to Calgary with Manolakos.

550 However, they say the judge erred in comparing it to a similar lack of evidence concerning an earlier trip to Calgary, Witness U's participation in which was not in dispute. They say that in so doing the judge suggested that the cell phone evidence was of limited value in establishing Witness U had not gone to Calgary, as the records did not capture the earlier trip. They say this "argument" was not made by the Crown and, because it arose for the first time in the judge's instructions, they had no chance to address the jury on it.

551 Further, in their written submissions, they relate in detail evidence of various phones used in July 2004, arrangements for call forwarding, evidence that the phones were call forwarded to a phone that remained in Vernon for this time, and evidence that Witness U was assaulted with a [weapon] in Vernon [at the material time]. They say the weight of the evidence suggested that the only trip where a number of Greeks members travelled to Calgary that could fit with the timeline of Marnuik's disappearance was between July 26 and 28, 2004, and that the evidence suggested that Witness U could not have been on that trip. They say

the import of laying this circumstantial evidence before the jury could not be overstated; if the jury accepted that Witness U was not in Calgary at the relevant time, then he was lying about meeting with Manolakos when Manolakos ordered the beating of Marnuik.

552 The Crown disputes the characterization of the reference as an "argument", and the suggestion the defence was caught by surprise.

553 In our view, the deficiency in instruction advanced on this issue, including on the body of circumstantial evidence and the defence position that the evidence established Witness U was in Vernon at the relevant time, contrary to his testimony, is not established. Nor do we consider the judge's summary of this evidence denigrated or undermined the defence position as alleged. On our review of the instructions, the judge provided a detailed digest of the cell phone evidence and observed at para. 703, consistent with the appellants' view of the appropriate instruction, that there were "no cell phone records that supported Witness U's evidence he was in Calgary when Marnuik went missing, a trip that is in dispute". The judge then returned to the issue in summarizing the defence positions. Referring to counsel for Podolski, the judge said:

> [923] Counsel submits that a cornerstone of [Witness U's] evidence on the Marnuik homicide is his assertion that he was in Calgary and received phone calls from Podolski advising him that Marnuik was missing. He says the phone records together with the timing of the [weapon] assault have established beyond any doubt that [Witness U] lied to the police and you when he said he was in Calgary. He suggests from this evidence you should find [Witness U] was in Vernon and was in charge from the beginning to the end of what happened to Marnuik.

And, referring to counsel for Manolakos, he said:

> [935] Counsel submits that it is only [Witness U] who gives evidence that Manolakos directed a beating of Marnuik. He reminds you that [Witness U] testified he received calls from Podolski while he was in Calgary with Manolakos. He submits that this evidence from [Witness U] is neither credible nor reliable and is a false story that [Witness U] created after being given advice during his [earlier] statement about how someone like Manolakos could be convicted — namely, if Manolakos ordered that a crime be committed.

554 From these passages, it can be seen that the appellants' complaint that the judge did not lay this evidence before the jury is simply inconsistent with the record.

555 Likewise, we would not give effect to the appellants' complaint that they did not expect the judge to refer to the earlier trip as also not being captured by phone records, and we do not accept their characterization of the judge's reference as an argument. The judge's description of the evidence on the earlier trip was accurate and the evidence was available to the jury in determining the import of the technical cell phone evidence. In our view, it does not create imbalance fatal to the instructions.

(e) Certain Testimony of O'Donnell's Role in the Marnuik Homicide

556 The fifth area of focus concerns the judge's treatment of Sparks' evidence regarding the role of O'Donnell in the beating of Marnuik. This evidence was discussed earlier in Ground of Appeal No. 6. Sparks' evidence was that the first part of the beating of Marnuik, in which O'Donnell is said to have actively participated, was consistent with a mutual understanding of all participants that a beating would occur as punishment or discipline, with no objective expectation Marnuik would die. Sparks testified that after about 15 minutes of beating Marnuik, he, along with Witness T, and O'Donnell, left the room. Sparks' evidence was that he later returned to the room with Podolski and Sipes, at which time the violence escalated. O'Donnell contended at trial, and contends before us, that on this evidence he had no role in Marnuik's circumstances from the time he left with Sparks and Witness T until after they were told Marnuik had died.

557 On appeal, O'Donnell contends that the judge did not directly instruct the jury on his defence that he did not have the specific intent required for murder, and was guilty at most of manslaughter. The premise of this submission is that the judge did not sufficiently address the evidence of Sparks just reviewed, to note that on Sparks' evidence O'Donnell was not present at the beating of Marnuik after Podolski and Sipes arrived. There is no complaint regarding either the instruction on the intent

required for murder, or on the lesser intent for manslaughter; rather, this complaint focuses on the judge's description of the evidence in relation to the alternative verdicts. He says that "[t]he evidence of Sparks, if believed, established that O'Donnell was guilty of manslaughter and not murder". He also says that because his primary position at trial was that the evidence was so unreliable he should be acquitted entirely with respect to the Marnuik homicide, the judge's failure to alert the jury to this alternative defence was particularly significant.

558 The Crown disputes the legal significance of any break in the beating but says the jury, in any case, was adequately reminded of the evidence at issue in this submission.

559 For the purposes of this discussion, we approach this issue from the perspective there may be legal significance to any break in the beating, and accept the possibility the jury could have found there was such a break. The question then is whether the judge adequately instructed the jury in respect of Sparks' evidence just reviewed, which on one view could support a conclusion O'Donnell was not present during the most violent portion of the Marnuik beating.

560 In our view, the judge did adequately instruct the jury on this matter.

561 Relating the evidence to the elements of the offences, the judge referred to the evidence of Sparks that he recalled only Sipes and Podolski being in the room with Marnuik when he left the location and returned to his apartment. Later, in summarizing evidence relating to O'Donnell on Count 1, he said:

> [866] Evidence that you may consider relevant in deciding the case against O'Donnell includes:
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> . . .
>
> • ... I remind you of Sparks' evidence that when Sipes was trying to light the torch he only recalled Sipes and Podolski being in the room.

562 He again noted this evidence in summarizing O'Donnell's position on Count 1:

> [932] Counsel submits that the inherent unreliability of the evidence and the conflicts in the evidence are such that you should be left with a reasonable doubt as to what, if anything, O'Donnell did during the assault. He submits that Sparks' evidence establishes that O'Donnell was in the living room in the apartment next door during the later stages of the beating. ...
>
> [Emphasis added.]

563 These references, combined with the judge's instruction on the intent required for murder and his statement that the jury should consider "whether a particular accused was present for most or all of the assault, and whether he knew the extent of the beating", presented the jury with the evidence supporting the proposition O'Donnell was not present for part of the beating, and directed the jury to the effect that may have on the jury's consideration of O'Donnell's intent.

564 Further, having presented Sparks' evidence, the extent of the judge's reference to it was a matter of his discretion. The judge considered the prejudice that emphasis on this alternative submission would have created for O'Donnell's main theory that — contrary to Sparks' evidence — he did not participate in the Marnuik homicide at all, and tailored his charge accordingly, as he was entitled to do. Here, too, we refer to the proposition that the fact no objection was made may be a consideration in determining its significance in the context of the live issues before the jury: *Mack*. Counsel for O'Donnell did not seek a more expanded instruction linking Sparks' evidence to the theory of manslaughter. This is some indication that, in the context of the issues developed at the trial and in the presence of correct instructions on the law of culpable homicides, the judge's instructions adequately related the evidence to the issue of intent.

565 We are not persuaded by this submission.

(f) The Gun Gestures

566 The sixth area of focus on this ground of appeal concerns the judge's instructions on the evidence that Manolakos made hand gestures imitating a gun. Evidence of gun gestures was critical evidence tying Manolakos to the Thom homicide. At trial, the defence made two submissions, one that the evidence was unreliable or fabricated, and the other that the witnesses spoke of different but similar events.

567 On appeal, the appellants say the judge framed the gun gesture evidence in a manner more favourable to the Crown than to the defence. They say that the judge "did not focus the jury on the proper use of the various hand gestures and simply instructed the jury that they could find support in one gesture from the evidence of the other gestures". They say this ignores the evidence of witnesses describing a different time and place of a gun gesture and distracted the jury from the issue requiring consideration: whether the Crown had proved beyond a reasonable doubt that Manolakos ordered Witness T to kill Thom. They complain that the judge did not explain "that the evidence of Witness U and Witness T on how Manolakos ordered Thom's death was potentially two conflicting stories", thereby failing to fairly present an issue the jury was required to consider in determining whether Manolakos' guilt respecting the Thom homicide was proved beyond a reasonable doubt.

568 Inherent in this submission is the proposition that, in order for evidence to confirm the evidence of Witness U or Witness T that Manolakos made the hand gesture, it must be evidence of another witness describing a similar hand gesture at the *same* time and place. We do not agree. In our view, the judge aptly and succinctly explained the potential use of the hand gesture evidence.

569 As to the complaint that the judge suggested the witnesses were describing the same event of a hand gesture, we do not read the instruction in that fashion. The judge described the evidence of various witnesses in some detail, referring to both their examinations in chief and cross-examinations, and drew out the differences in the accounts of when and where a gesture or gestures were made. For example, the judge specifically noted that Williams testified that no one else was present when Manolakos made the hand gesture (meaning he could not possibly have been testifying about the same event as another witness). After describing these accounts, the judge reminded the jury that "[w]hether Manolakos made a distinctive hand *gesture or gestures*...will be an important aspect of your deliberations on these essential elements" (emphasis added).

570 The judge also commented fairly on the frailties of the evidence. He related inconsistencies between the statements of those witnesses and their testimony in court, and referred to counsel for Manolakos' submission regarding the "various versions" of a gun gesture. In the portion of his instruction relating the evidence to the elements of charge against Manolakos in the Thom homicide, under a sub-title "Evidence of Hand Gestures", he said:

> [1402] Counsel for Manolakos highlighted the inconsistencies between what these witnesses told the police and what they told you in evidence. Most significantly, he pointed to the fact that none of these witnesses told the police about the hand gesture in their initial statements, and some mentioned it for the first time only recently. He emphasizes that:
>
> . . .
>
> • It was never suggested to [Witness U], Pharaoh or Williams that the police provided them any information or suggestions concerning the specific hand gesture they testified about.

571 Reading the jury instructions as a whole, we consider the factual issue of the hand gestures as it related to the Thom homicide was fairly described, the jury was pointed to the evidence developed from each witness of such a gesture, and the jury was properly directed to the role of this evidence in determining whether the Crown had proved Manolakos' guilt beyond a reasonable doubt.

(g) The Ballistics Evidence in the Thom Homicide

572 Finally, the appellants say the judge failed to relate the ballistic evidence from the Thom homicide scene to Witness T's evidence that his gun misfired. This submission is advanced, in the main, for the benefit of O'Donnell. They say the ballistics evidence was circumstantial evidence supporting the proposition that Witness T lied under oath about the events at the scene of Thom's homicide. They have engaged in a detailed analysis of that evidence, and say the judge provided a summary of the

evidence, but that he failed to relate it to Witness T's evidence and did not provide any instruction regarding inconsistencies between the two. They say the judge did not provide any guidance on whether certain other ballistic evidence (for example, of two unexpended rounds of ammunition with aluminium shell casings found 60 feet north of Thom's body) supported or detracted from Witness T's testimony.

573 The judge reviewed this evidence, relating it to the elements of first degree murder in the context of Sipes and O'Donnell, including:

> [1244] You will recall the cross-examination of [Witness T] on his evidence of what happened, what he told the police, and the challenge to his credibility generally. In particular, his evidence concerning: the multiple misfires of the .25 calibre handgun; his delay in disclosing to the police the calibre of the .380 firearm; picking up .25 calibre shells at the scene that would have been ejected and not remembering what he did with them; and not remembering what he did with the .25 calibre firearm following the shooting. He was also cross-examined extensively on his evidence about not knowing whether the gun went off. [Witness T] agreed that in his first statement to the police he lied to the police when he claimed it was empty when he fired it. He also agreed that in subsequent statements he said the .380 misfired, later said he did not know if it fired, and finally said it must have given his comment to Brownell. It was also suggested to [Witness T] that he "invented" the .25 calibre handgun so he would have nothing to do with the Thom shooting. [Witness T] denied this suggestion and said he has taken responsibility for his involvement.
>
> [1245] Much of this has been reviewed by defence counsel during their closing submissions. I would ask you to recall and reflect on those submissions, as I remind you of this and other points emphasized by defence counsel in support of their contention that [Witness T's] evidence cannot be trusted.
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> . . .
>
> [1248] I remind you of Earl Hall's evidence that he tested the .25 calibre handgun and noted it was in good working condition. He said he could not comment on whether it was prone to jamming or had jammed on a previous occasion, but said it did not jam when he tested it with three different kinds of ammunition.

574 The short response to the appellants' submission is that this review of the evidence was consistent with the position of O'Donnell (and Sipes) in written submissions at trial.

575 In any case, the judge related O'Donnell's position to the jury:

> [1519] It is the position of O'Donnell that there were two guns and two shooters on [the road]. One of them was [Witness T]. Counsel for O'Donnell suggests to you that there was never any .25 calibre weapon on [the road] and that [Witness T's] testimony that his .25 calibre weapon misfired or jammed on him when he tried to discharge it is a fabrication. He notes that no live .25 calibre shells were recovered from the scene that might support [Witness T's] evidence on this point.

576 We conclude that the error advanced is not borne out on examination of the instructions and, to the contrary, in his discussion of the Thom homicide, the judge drew the jury's attention to the evidence on the disputed facts of Witness T's actions. This included details that were unfavourable to Witness T's credibility (and accordingly favourable to O'Donnell) that were not mentioned in defence summaries provided to the judge in preparation of the jury instructions. The judge then left it to the jurors, as triers of fact, to come to their conclusions.

(h) Jurisprudence Advanced by the Appellants

577 Having addressed the appellants' seven key areas of dispute, we turn to their overarching complaint that the instructions as a whole were imbalanced. In particular, they say first that the judge's decision not to provide "an independent general review of the evidence" led to his presenting the evidence supporting conviction in substantial detail. Second, they take issue with the judge's decision to present the evidence in what they call a "seamless chronology", which they say had the effect of presenting an overly compelling story while minimizing their challenges to the witnesses' believability.

578 While the appellants acknowledge that the judge periodically provided instructions cautioning the jury on both points, they submit those instructions functioned as bare reminders, and failed to cure the imbalance alleged.

579 In our view, the absence of a comprehensive recap of the evidence is not fatal to the charge. The question in each case is whether the judge fulfilled the requirement set out in *Rodgerson* at para. 30 "to inform the jury of the relevant evidence, and to assist the jury in linking that evidence to the issues it must consider in reaching a verdict". In this case we find the judge fulfilled that functional requirement by discussing key evidence on the elements of the offences charged, in the fashion outlined above. Moreover, none of the cases to which we are referred require the survey of evidence advocated.

580 Likewise, in our view, there is no merit to the complaint that the judge presented the evidence as a "seamless chronology" that minimized the defence challenges to the witnesses' believability. The judge both expressly told the jury, in instructions it must be taken to have followed, that the evidence was *not* a seamless narrative (replicated in para. 506 above), and repeatedly referred to the credibility issues arising in the evidence of the many key witnesses.

581 In support of their contention these jury instructions were fatally imbalanced or deficient, the appellants refer to several cases they say are analogous to the one before us: *R. v. Turningrobe*, 2007 ABCA 236 (Alta. C.A.), rev'd 2008 SCC 17 (S.C.C.); *R. v. Prince*, 2007 MBCA 15 (Man. C.A.); *R. v. Li* (2004), 183 C.C.C. (3d) 48 (Ont. C.A.); *R. v. Evoy* (1992), 7 B.C.A.C. 252 (B.C. C.A.); *R. v. Janvier*, 2008 ABCA 223 (Alta. C.A.); *R. v. Brown*, 2007 ONCA 71 (Ont. C.A.); *R. v. Ilina*, 2000 MBCA 3 (Man. C.A.); *R. v. Minor*, 2013 ONCA 557 (Ont. C.A.).

582 Each of these cases discusses circumstances in which a jury instruction may be found to be deficient. In none of them, however, were the instructions as complete as the ones we are being asked to review. Nor in those cases did the charge follow such extensive submissions to the jury as were presented here. Nor, too, was the evidence so ripe for a challenge to credibility as here, where it was repeatedly acknowledged to the jury that nearly every piece of evidence important to proof of the contested elements came from witnesses against whom strong attacks on credibility and reliability had been mounted.

583 *Turningrobe* described the judge's duty consistent with the principles set out in the cases referred to in paras. 474-478. Nonetheless, the Supreme Court of Canada found the actual instructions were fatally flawed because, on the subject of planning and deliberation, they included "repeated references to capacity, [which] may have confused the jury about the role of the accused's intoxication in assessing the intent, planning and deliberation required for first degree murder": *R. v. Turningrobe*, 2008 SCC 17 (S.C.C.) at para. 1. We see no analogous error here.

584 *Prince* addressed a jury instruction in which the judge did not relate the evidence to the issue of intent for purposes of manslaughter. There is no dispute in the case before us that the difference between murder and manslaughter was properly charged, as we explained above. Unlike in *Prince*, the judge here related the evidence to the issue of intent. We do not consider *Prince* analogous to the case before us.

585 *Li* addressed a case in which the accused testified and called an expert witness. The judge reviewed the Crown's evidence in detail but did not review either the testimony of the accused or that of the defence expert, an obvious fatal deficiency that is not present here.

586 *Evoy*, a decision of this Court, concerned the adequacy of instructions on disputed evidence of the colour of the eyes of the accused. This Court found that nowhere in the charge had the judge dealt expressly and specifically with the theory of the defence. These circumstances are not analogous to the ones before us.

587 *Janvier* concerned evidence that, on the main issue of intent, was confused, inconsistent, and perhaps influenced by other persons. The judge failed to draw these circumstances to the jury's attention, and the jury instruction was found to be fatally deficient. Again, that is not the case before us. The instructions on credibility and reliability in the case before us were detailed, see paras. 105- 107 above, and so do not contain the fault found in *Janvier*. They were further bolstered by the many references by the judge to inconsistencies in the evidence and the judge's repeated reference to the defences' position that the Crown's witnesses were not to be believed.

588 *Browne* also concerned eyewitness identification. Apart from the general instruction on the frailties of eyewitness identification, the judge did not link the frailties of the evidence adduced (e.g., discrepancies in witness descriptions, defects in the photo line-up, and limitations on the ability to make observations) to the eyewitness evidence caution. Again, this deficiency is not present here. The jury here was repeatedly reminded of the primary reasons the defence said certain evidence and witnesses were not reliable.

589 *Ilina*, also, is not at all like this case. In *Ilina*, the judge failed to put to the jury the defence theory that an outside killer had committed the homicide, saying only that the defence theory was that the Crown had not proven its case beyond a reasonable doubt. That was an obvious fatal deficiency in the instructions. No similar omission arises in this case. Apart from the third party defence theory addressed in Ground of Appeal No. 14 above, which was not open to the accused, the judge summarized the defence theory on every count for each accused, using counsels' submissions as the basis for the summaries.

590 *Minor* is a case in which there was no meaningful review of the evidence. For example, there was no review at all of the evidence of ten expert witnesses; the judge simply listed their names and their areas of expertise. This is not the case here. While the judge said he was not going to embark on a review of the evidence, an examination of the jury instructions demonstrates that the judge did review the critical evidence on each element of each count for each accused. This is not a case in which, as in *Minor*, a significant body of evidence was omitted from meaningful discussion.

13.3 Conclusion on Fair and Balanced Charge

591 The appellants have made detailed submissions contending the jury instructions are fatally deficient, unfair, and imbalanced. We find the particular criticisms levelled at the instructions are not borne out on a review of the entire instructions and certain exhibits. We have also had in mind the question of whether, standing back, one could say the jury instructions as a whole impermissibly lean to the Crown, short-change the appellants, or otherwise could lead the jury to omit from their consideration matters significant to the defence. We conclude the answer is no, and our power to interfere with the verdict on this basis under s. 686(1)(a) is not engaged.

592 As we noted at the beginning of these reasons for judgment, this case posed unique challenges to all involved. In particular, the judge was faced with the challenging task of fully instructing the jury while avoiding unfairness as between the accused, whose interests were not always the same. He was also required to perform this function in a way that was manageable from the perspective of the listeners — the jurors serving on this lengthy trial. In our view, there is no basis upon which to say he failed to discharge his obligation to do so. We conclude the judge discharged his onerous task fully.

14. Refusal to Provide the Jury the Transcript of Counsels' Submissions (Ground 16)

593 The appellants contend the trial judge erred in refusing to provide the jury transcripts of their counsels' closing submissions.

594 On the fourth day of jury instructions, counsel for Podolski filed a written application to have the jury provided with transcripts of the closing submissions of all counsel. His proposition was that the jury instructions, which the jury had in written form, did not relate the defence theories and did not discuss the evidence in an adequate fashion, leaving an imbalanced document in the jury room. He contended providing transcripts would redress this imbalance, at least in part.

595 In his decision indexed as *R. v. Sipes*, 2012 BCSC 2186 (B.C. S.C.), the judge dismissed the application:

> [1] THE COURT: Mr. Podolski applies to have the court provide the jury, at the close of my final instructions, with transcripts of counsels' closing submissions. The application is brought without prior notice on day 4 of my final instructions, a day before I anticipate completing my final instructions and the jury will commence its deliberations.
>
> [2] I dismissed the application and said I would provide reasons for my decision later. These are my reasons. I will be brief.

[3] In my view, the reasons for not providing the jury with transcripts of closing submissions are largely self-evident. The submissions took 24 days to complete. The transcripts total almost 1,500 pages, not including additional material which was displayed to the jury visually.

[4] The transcripts are not indexed. Counsel's closing submissions also contain a number of errors which were the subject of submissions that took weeks to complete. I have attempted to correct some of the more significant errors in my charge without identifying who made the error. In many instances, I have chosen not to highlight what was mistakenly said about the law or the evidence. If the jury was to be given the transcripts, I would have to identify and correct those errors.

[5] In order to assist the jury, I have decided to exercise my discretion and provide the jury, in my written charge, with summaries of the positions of counsel with respect to each count. The positions of counsel total approximately 35 pages of my 500-page written charge. The jury will have the summaries with them in the jury room.

[6] In my view, providing the jury with voluminous transcripts of the closing submissions will not assist the jury in its deliberations and will not enhance a fair trial. The application is dismissed.

596 On appeal, the appellants contend the judge erred in declining to leave their closing submissions in writing with the jury. They say that while this would have been an imperfect solution to an imbalanced jury instruction, it "would have attenuated some of the unfairness of the Trial Judge's unbalanced charge being in the jury room".

597 Further, they say this error was particularly concerning in light of the trial judge's response to the jury's request to play back a portion of Witness U's evidence. In their view, that request could only have arisen from disagreement amongst the jurors regarding the evidence they had heard. The appellants take issue with the trial judge's suggestion, made after playing back the requested evidence, that the jury "may find it of assistance to refer back to the summary [of evidence in the jury charge]". The appellants say this response implied that disagreements could be resolved by the judge's summary, and raised the danger that that summary would have undue influence over the jury.

598 We are not persuaded by this submission. The appellants cite no authority for the proposition that transcripts of counsels' closing submissions should be left with the jury at counsels' request. Jurors, as the triers of fact, must be equipped with the relevant information and educated with the appropriate instruction in order to discharge their duties. Where they deem more to be necessary and pose a question to that effect, the judge has an obligation to ensure their question is fully and properly answered: *R. v. S. (W.D.)*, [1994] 3 S.C.R. 521 (S.C.C.). However, as Justice Laskin held in *R. v. Ferguson* (2000), 142 C.C.C. (3d) 353 (Ont. C.A.) at para. 95, dissenting (reasons substantially adopted in 2001 SCC 6 (S.C.C.)), "insisting that the jury be given a copy of the defence's closing address when they did not ask for it, is ... an affront to their common sense". Indeed, "our jury system is predicated on the conviction that jurors are intelligent and reasonable fact-finders": *White* at para. 56.

599 This ground of appeal relies upon the proposition that the jury instructions were fatally unbalanced, which we discussed above under Ground of Appeal No. 15. We have already explained that we do not accept that proposition, and that the judge properly exercised his discretion in determining the extent of his review of counsels' submissions and the evidence. In our view, there was no prejudice to cure. Had we found the jury instructions were fatally imbalanced, we do not consider that providing the jury with a written copy of defence submissions would have cured the deficiency because, regardless, the judge's obligation was to leave adequate instructions with the jury. This alone is sufficient reason to reject this ground of appeal.

600 Wrapped into the appellants' more central proposition about balance is also the contention that the evidentiary summary given to the jury was insufficient. In our view, the jurors were always apprised that it was their recollection of the evidence that mattered, and that the summary provided was simply a guide to help them through the evidentiary body of the case. This instruction was not diluted by the jury question or the judge's handling of it. Moreover, contrary to the appellants' submission, the judge did not suggest that his summary could resolve matters of disagreement. In particular, before the playback, and after discussion with counsel as to the instructions that should accompany it, the judge told the jury:

The evidence you have asked to hear again concerns the cross-examination of [Witness U] by Mr. Orris on a prior statement by [Witness U], or a prior statement [Witness U] gave to the police on [a certain date]. Cross-examination on this portion of the statement pertains to Mr. O'Donnell's participation in the Marnuik assault. Before you listen to the evidence again, I want to remind you of my instructions on prior inconsistent statements and prior consistent statements and the use you may make of each.

601 The judge then played back the examination of Witness U requested by the jury, and concluded by saying:

I remind you, members of the jury, that in considering the evidence that's been played back to you, you must also consider all of [Witness U's] testimony and the entirety of the evidence in reaching your verdicts.

You may find of it assistance to refer back to the summary of [Witness U's] evidence concerning what happened to Mr. Marnuik in the room and to the summary of evidence as it pertains to Mr. O'Donnell on this count. You'll find those summaries at pages 222 to 227 and 264 to 268 in Part 4 of my final instructions.

Now, if the playback of this evidence has not fully responded to your concerns, please advise me of this by providing the sheriffs with another written question or request. You are entitled to hear a playback of additional portions of [Witness U's] testimony or the testimony of any other witness if you think it would assist you in your deliberations.

[Emphasis added.]

602 If more needs to be said, we observe that this extraordinary proposition raises a number of other considerations. First, counsel has speculated on the implications of the jury request for a playback of evidence. Speculation is always unhelpful in a criminal trial. Second, the judge was concerned that counsels' submissions inaccurately summarized some of the evidence. Correction by the court of significant misstatements must be made on occasion, but the potential prejudicial effect of labeling defence counsel as being mistaken in their speech to the jury is always present in such cases, and makes fastidious correction itself a potential source of unfairness. For this reason, relatively minor errors in defence counsels' speeches to the jury are often simply dealt with by reminding the jurors that it is their recollection that matters. This forgiving approach could not be sustained were the jury to receive the written version of the submissions, for it would be wrong to leave with the jury material known to include error. Third, here there were multiple accused. No doubt the corrections would be more damaging to some accused than others, whose interests were not identical in the trial on evidentiary issues.

603 Last, the proposal was highly impractical. The submissions were delivered over 24 days. The transcripts before us reveal that the request would have required the judge to present 1,381 pages of argument, excluding counsels' PowerPoint presentations. As Mr. Justice Hall observed in *R. v. Henry*, 2003 BCCA 476 (B.C. C.A.), there can be dangers to overwhelming a jury with written material. The proposition inherent in this ground of appeal, in our view, is an affront to the common sense of the jury.

604 In conclusion, we see no merit to this ground of appeal and consider the innovative proposition advanced susceptible to serious mischief.

V. CONCLUSION

605 The appellants advance many grounds of appeal addressing the admissibility of evidence, the conduct of the trial, and the contents of the instructions to the jury. For the reasons compendiously set out above, we do not consider the grounds of appeal provide a basis for us to interfere with the verdicts delivered by the jury. We conclude that the judge discharged his responsibilities fully in sorting through the issues we have had drawn to our attention in these appeals.

606 Of the issues raised before us, only the judge's instruction on Count 3 on aiding and abetting and wilful blindness, which appears to have encompassed O'Donnell where the concepts may have had no application to him, could be faulted, but if there were error in that instruction, it would be an error to which the curative provision of s. 686(1)(b)(iii) would apply.

607 Counsel for the appellants have said all that properly may be said on these appeals. Notwithstanding their vigorous and thorough submissions, we conclude that no error is demonstrated on these appeals by which we may interfere with the verdicts under s. 686 of the *Criminal Code*.

608 The appeals are dismissed.

Appeal dismissed.

AppendixA

Q. ASSESSMENT OF EVIDENCE

[77] I am now going to speak to you, in general terms, about how you might go about assessing the credibility or truthfulness of the witnesses in this trial.

[78] I want you to bear in mind that these general instructions are subject to the special instructions I will give you later about the need to review the evidence of [the *Vetrovec* witnesses] with great care and caution. As I will explain, it would be dangerous for you to rely upon the testimony of these six witnesses in the absence of independent evidence confirming their accounts.

[79] As I told you when I spoke to you about the functions of a judge and jury, you must decide the facts of the case. You must decide how much weight or importance you will give to the testimony of each witness. My remarks are intended to help you in these tasks. In assessing the credibility of a witness or the reliability of their evidence, you should consider carefully, and with an open mind, all the evidence presented during the trial. Use your collective common sense. It will be up to you to decide how much or how little you believe and rely upon the testimony of *any* witness. You may believe some, none, or all of it.

[80] As you know, people hear and see things differently. This means you should not be surprised to find innocent discrepancies in the testimony of a witness. Such discrepancies do not mean you must reject the testimony of a witness. Discrepancies in minor matters are often unimportant.

[81] On the other hand, it is entirely different when a witness deliberately lies under oath. You have heard defence counsel suggest to you that certain witnesses lied under oath. It is for you to decide whether the witness was telling a lie, telling the truth, or simply mistaken. A deliberate lie under oath is always serious, and may taint the entire testimony of a witness.

[82] There is no magic formula for deciding how much or how little to believe of a witness's testimony, or how much of it to rely upon in deciding this case. Here are a few questions you might keep in mind during your discussions.

[83] Did the witness seem honest? Is there any reason why the witness would not be telling the truth?

[84] Did the witness have an interest in the outcome of the case, or any reason to give evidence more favourable to one side than to the other?

[85] Did the witness seem able to make accurate and complete observations about the event? Did the witness have a good opportunity to do so? How long was the witness watching or listening? What were the circumstances in which the observation was made? Was there anything else happening at the same time that might have distracted the witness? What was the condition of the witness? Was the ability of the witness to make observations impaired by the consumption of drugs or alcohol? Is the reliability or credibility of the witness affected by prolonged drug or alcohol use?

[86] Was there something specific that helped the witness remember the details of the event he or she described? In other words, was there something unusual or memorable about the event so that you would expect the witness to remember the details? Or was the event relatively unimportant at the time, so the witness might not recall the event or might easily be mistaken about some of the details?

[87] Did the witness seem to have a good memory? Is it an independent and accurate memory of the event? Or has that memory been reconstructed over time and its integrity or accuracy influenced by prior statements, dreams or flashbacks? Does the witness have any reason to remember the things about which he or she testified? Did any inability or difficulty that the witness had in remembering events seem genuine, or did it seem made up as an excuse to avoid answering questions?

[88] Did the witness seem to be reporting to you what he or she saw or heard, or was the witness simply putting together an account based on information obtained from other sources, rather than personal observation? Is there a risk that the memory of a particular witness in relation to an event has been distorted by what others have told him or her about that event?

[89] Did the witness's testimony seem reasonable and consistent as he or she gave it? How does it fit with the rest of the evidence? Is it similar to or different from what other witnesses said about the same events? As important as it is for you to examine the evidence in detail, do not lose sight of the "big picture".

[90] The fact that two witnesses have provided different versions of the same event does not necessarily mean that one, or both, of them is lying. You may come to that conclusion. Or you may decide that one or the other is simply mistaken about that point.

[91] Did the witness say something different on an earlier occasion? Do the number or nature of the inconsistencies in the testimony of a witness suggest that he or she is less reliable or worthy of belief? Is the inconsistency about something important, or a minor detail? Does it seem like an honest mistake? Is it a deliberate lie? Is the inconsistency because the witness said something different, or because he or she failed to mention something? Is there any explanation for it? Does the explanation make sense? If the witness has been deceptive in the past, was he or she being honest in the evidence he or she gave during this trial? Again, you will assess the evidence and make credibility determinations based on the factors I have set out, and any others you consider appropriate.

[92] Was the witness challenged on the particular point in issue? I wish to emphasize that there is no obligation on an accused to challenge each and every point of evidence individually. However, if the witness was not challenged on an important point, you may be more inclined to accept the testimony of the witness on that point. As I have said, it is for you to decide how much or little you will believe and rely upon the testimony of any witness. This is just one factor among many that you will consider. I will provide you with further instructions on this issue later.

[93] Is there evidence that witnesses shared their accounts with each other before testifying? Evidence that witnesses shared their accounts before testifying may impact on the reliability of their evidence and the weight you are prepared to give it. Whether intentionally or not, a witness's evidence may be altered or distorted when that witness learns of the evidence another witness is likely to give.

[94] Was a witness, inadvertently or otherwise, provided by the police with information uncovered in the course of the investigation that might permit that witness, consciously or unconsciously, to tailor his or her evidence? More specifically, did the police share with the witness information others supplied about the same events? Did the witness's account change after that information was supplied? If so, how significant was the change? Does it, in the context of the evidence as a whole, undermine your faith in some or all of the witness's testimony? Are you satisfied from the details supplied by that witness in his or her testimony that, despite the information that was or may have been supplied to him or her by others about an event, the witness has independent knowledge of and an accurate memory about that event?

[95] What was the witness's manner when he or she testified? How did he or she appear to you? Do not jump to conclusions based entirely upon how a witness appeared when he or she testified. Looks can be deceiving. Giving evidence in a trial is *not* a common experience for many witnesses. People react and appear differently. Witnesses come from different backgrounds. They have different abilities, values and life experiences. There are simply too many variables to make the manner in which a witness testifies the only or most important factor in your decision.

[96] Was the witness forthright and responsive to questions? Or was he or she evasive, hesitant or argumentative with counsel?

[97] These are only some of the factors you should keep in mind when you go to your jury room to make your decisions. These factors might help you decide how much or little you will believe of and rely upon a witness's evidence. You may consider other factors as well.

[98] Some witnesses gave evidence respecting more than one count. Your verdict on each count in the indictment must be based only on the evidence concerning that count. But in assessing the credibility of a witness, you should consider the totality of the evidence given by that witness.

[99] Your assessment of the evidence of a witness does not occur in isolation. In determining the credibility of a witness or the reliability of that witness's evidence, you should have regard to the whole of the evidence and the extent to which the evidence of the witness fits with, is supported by, or is at odds with, other independent evidence.

[100] In making your decision, do *not* consider only the testimony of the witnesses. Take into account, as well, any exhibits that have been filed. Decide how much or little you will rely upon the exhibits, as well as the testimony and any agreed facts, to help you decide this case.

AppendixB

AppendixC

STATEMENT CONCERNING THESE APPEALS AS READ BY A SINGLE JUDGE PRONOUNCING JUDGMENT PURSUANT TO S 21(3) OF THE COURT OF APPEAL ACT

This is a statement that will be posted on the Court's website concerning these appeals until it is replaced with redacted reasons for judgment, as now explained.

Leslie Podolski, Sheldon Richard O'Donnell, and Peter Manolakos are three of five men convicted by a jury of various counts in the homicides of three men in or around Vernon, British Columbia between July 2004 and May 31, 2005. The appellants advance 16 grounds of appeal. All grounds are addressed in the reasons for judgment.

The appeals are dismissed.

The reasons for judgment are of the court, and are signed. However, there is a publication ban in place issued by the trial judge, Mr. Justice Smart, in respect of information identifying certain witnesses. That ban was issued under s. 486.5 of the *Criminal Code*. The publication ban means that the full reasons for judgment must be sealed and only a redacted version complying with the ban may be released to the public.

Today, March 14, 2018, Crown counsel and counsel for each of the appellants will receive a copy of the unredacted reasons for judgment, having provided a comprehensive undertaking. In general terms, counsel have undertaken to the Court not to: copy those reasons in any fashion; provide the reasons for judgment to any other person; allow those reasons to be viewed by any other person with narrow exception and then only in counsel's presence; or transmit those reasons to any other person.

There shall be a brief administrative hearing with counsel and a judge of the division to canvass the redactions required to allow for public release of reasons for judgment that comply with the terms of the publication ban.

The reasons for judgment then will be redacted and draft redacted reasons will be provided to counsel on the same undertaking for comment at a further administrative hearing, if required. Counsel will return the original reasons for judgment and the draft redacted version to the Court. The final redacted version of the reasons for judgment will then be released in chambers and made available to the public as is our custom.

The Court acknowledges the cooperation of all counsel in handling the mechanics of the delivery of judgment in this manner.

2021 BCSC 28
British Columbia Supreme Court

Allan v. Froese

2021 CarswellBC 38, 2021 BCSC 28, 12 M.P.L.R. (6th) 92, 330 A.C.W.S. (3d) 195

John Allan, Penny Lynne Allan, Janice Lorraine Braddell, John Fullerton, Julie Fullerton, Grit High, Alexander Grant Schierman, Nora Elizabeth Schierman, Gary David Sawatsky and Linda Elizabeth Temple (Petitioners) and Stanley Jack Froese, Blair Garnet Whitmarsh, Robert Long and Angela Dawn Quaale (Respondents)

Walker J.

Heard: November 30, December 1-4, 2020
Judgment: January 8, 2021
Docket: Vancouver S1914167

Counsel: M. Underhill, D. Wu, for Petitioners
J. Locke, A. Buckley, for Respondents
J. Goulden, Q.C., S. McCalla, for Corporation of the Township of Langley

Headnote

Municipal law --- Council members — Conflict of interest — Disqualification
Petitioners were electors of township — Petitioners sought to have mayor and two current members of township's council removed from office on basis that they failed to disclose pecuniary interests in matters before council and proceeded, despite alleged conflicts of interest, to participate in council meetings and vote on questions in respect of that matters — Respondents currently serving as elected township officials were mayor, two councillors, and former councillor against whom declaratory relief was sought — Allegations were made in connection with contributions made to respondents' election campaigns by individuals connected to development companies while those companies' projects were before council for consideration and approval — Respondents complied with disclosure requirements and contribution limits — Petition dismissed — Petitioners failed to show that respondents had direct or pecuniary interest in impugned matters before them as members of township's council — On first stage of relevant test, petitioners failed to prove that elected officials had direct or indirect pecuniary interest in matter under consideration — There was no evidence that any of respondents had any direct or indirect pecuniary interest in developers' projects put in issue by petitioners and none had been established — There was no evidence of any agreement or quid pro quo between developers and respondents to vote on their projects and no evidence to show that respondents' votes on impugned matters before them were influenced by campaign contributions from any source — Respondents did not conceal campaign contributions they received — Petitioners' claim was not based on evidence but was based on speculation and suspicion founded solely on imprecise assertions of temporal proximity insufficient to establish pecuniary interest and insufficient to challenge respondents' evidence.

***Walker J.*:**

Introduction

1 The petitioners are electors of the Township of Langley ("Township"). They seek to have the mayor and two current members of the Township's council ("Council") removed from office on the basis that they failed to disclose their pecuniary interests in matters before Council and proceeded, despite their conflicts of interest, to participate in Council meetings and vote on questions in respect of those matters. The petitioners also seek declaratory relief against a former councillor on the same basis.

2 The respondents currently serving as elected officials of the Township are the mayor, Stanley Jack Froese (mayor since 2011), and two councillors, Robert Long and Garnet Whitmarsh (on Council since 1999 and 2014, respectively). The fourth respondent is former councillor Angela Dawn Quaale (who served on Council from 2014 to 2018).

3 The petitioners' application is founded on s. 111 of the *Community Charter*, S.B.C. 2003, c. 26 [*Community Charter*]. That section permits ten or more electors of a municipality to apply to the Court by petition for a declaration that a council member is disqualified from holding office due to a conflict of interest. Until the application is determined, the elected official who considers that he or she is qualified to hold office, as the first three respondents do in this case, may, per s. 112, continue to hold office.

4 The petitioners claim that the respondents breached ss. 100 and 101 of the *Community Charter* because they actively participated in matters before Council in which they had a pecuniary interest. Specifically, the petitioners point to campaign contributions made to the respondents' 2018 local election campaigns by individuals connected to development companies while those companies' various projects were before Council for consideration and approval. Even though the respondents complied with disclosure requirements and contribution limits in the *Local Elections Campaign Financing Act*, S.B.C. 2014, c. 18 [*LECFA*], the petitioners assert that the temporal proximity of the campaign contributions and the respondents' participation in Council meetings and their votes on the developers' projects created a conflict of interest.

Position of the Petitioners

5 The petitioners do not argue that mere receipt of a campaign contribution constitutes a direct or indirect pecuniary interest. They agree that to offend s. 101 of the *Community Charter*, there "must be something more". The petitioners acknowledge that the law is clear from the case authorities (e.g., *King v. Nanaimo (City)*, 2001 BCCA 610 (B.C. C.A.) at para. 12) that campaign contributions do not, of themselves, constitute a pecuniary interest.

6 The petitioners also do not allege that the respondents engaged in reprehensible conduct. The petitioners argue they are not required to prove the developers' campaign contributions in fact influenced the respondents' votes or were given to secure an agreement for favourable votes. They say such a high threshold, as suggested by the respondents, would be virtually impossible to meet. Instead, they say the applicable test requires them to show that a reasonably well-informed person would conclude that the respondents, as a result of the contributions, had a pecuniary interest in the developers' applications before Council which might, or was likely to, have influenced the exercise of their official duties.

7 Without suggesting any specific temporal boundaries for receipt of campaign contributions which would avoid offending the *Community Charter*, the petitioners argue that the temporal aspects of the campaign contributions on the facts of this case are sufficient to satisfy the test they must meet to demonstrate a pecuniary interest which engages the conflict of interest provisions. The petitioners allege the pecuniary interest is the respondents' receipt of campaign funds in the midst of various developers' requests for the Township to approve their projects.

8 A useful summary of the petitioners' arguments is contained in the introduction/overview section of their written submissions:

> 2. This case is based on unprecedented (and largely undisputed) facts. In the lead-up to the 2018 municipal election, the respondents received numerous campaign contributions from multiple property developers while those same developers had applications before Council. In some cases, these contributions were received within days of the application coming before Council. Despite having received a legal opinion from the Township's solicitor that a conflict of interest could exist if contributions were accepted while developments were "in-stream", or if the contributions were made shortly after a development application was made, none of the respondents disclosed the contributions and sought legal advice, let alone made a declaration that they were in a conflict of interest. The respondents went on to vote in favour of each of the development applications.

3. To the petitioners' knowledge, this pattern of campaign contributions, with such a close temporal proximity between the contributions and votes on applications, has never come before the courts. It in turn raises an important legal issue with widespread implications for the integrity of, and public confidence in, municipal governance in this province. To date, the jurisprudence on conflicts of interest arising out of campaign contributions has held that a contribution, and a later vote in favour of an application, does not constitute a conflict of interest without "something more". The petitioners say that, in this case, the "something more" is the pattern and temporal proximity of the contributions and voting behaviour, which would lead a reasonably informed person to conclude that the contributions might have influenced the exercise of the respondents' duty as Council members.

4. For their part, the respondents say that there is a much higher legal threshold, and that there must be explicit evidence that the respondents agreed to "deliver a vote" or a *quid pro quo* before a conflict of interest can be made out. The petitioners say that such a high threshold would be virtually impossible to meet from an evidentiary perspective, and is in any event entirely inconsistent with the broad and liberal interpretation to be applied to the conflict of interest provisions in the *Community Charter*. The purpose of the provisions — to maintain public confidence that elected officials do not have divided loyalties — must inform the legal threshold that is to be applied by this Court. Public confidence can be undermined in circumstances short of an explicit "agreement to vote" or *quid pro quo*. It is also not restored by virtue of the fact that disclosure of the contributions is later required under the *Local Elections Campaign Financing Act*, S.B.C. 2014, c. 18. It is the lack of disclosure, and the failure to seek legal advice, at the time of the votes that undermines public confidence.

5. In this case, the circumstances — the timing of the contributions relative to votes, the sheer number of contributions, the repeated pattern of behaviour, the ignoring of legal advice, and the perceived circumvention of legislative restrictions on campaign contributions — are sufficient to give rise to a conflict of interest. If the respondents are correct, and there is no conflict of interest in this case, the democratic principle of transparency will be substantially undermined given that the voting public would have no opportunity to even know about the contributions, and the possibility of divided loyalties, at the time of the votes.

[Emphasis in original]

Position of the Respondents

9 The respondents vigorously defend against the petitioners' allegations. They contend that they acted in accordance with the law throughout, did not have a pecuniary interest in the developers' projects that were before the Township and Council for approval, did not act in conflict, disclosed all campaign contributions in accordance with the *LECFA*, and acted throughout, as they have always done, honestly and in good faith in the best interests of the Township.

10 The respondents submit that the petitioners have misapprehended the test to determine whether a conflict of interest exists to offend the *Community Charter*. According to the respondents, the petitioners must first demonstrate an actual direct or indirect pecuniary interest in the matter before Council before proceeding to a reasonable person analysis and other potential steps in the enquiry.

11 Moreover, the respondents characterize the petitioners' claims as rising to the level of a scandalous accusation that they accepted contributions as a *quid pro quo* to vote in favour of the developers, or, in other words, they say, they "accepted bribes" based purely on speculation without evidence. This excerpt from the respondents' written submissions captures that sentiment:

6. The Respondents deny the allegations of conflicts of interest. Although the Petitioners avoid an express pleading of "bribery", the implication of their pleading is that the current mayor of the Township, two sitting council members, and one former council member all voted in favour of various development-related approvals as a *quid pro quo* for financial contributions made by various individuals to their respective re-election campaigns.

7. To put the breadth of the Petitioners' allegations into context, they allege:

a. that 39 "bribes" were received by the Respondents;

b. from 19 electors; and

c. relating to 16 development-related matters before council,

without evidence that any of the Respondents agreed, even implicitly, to vote in a certain way in exchange for a campaign contribution or otherwise had any sort of interest in the developments.

8. The Petitioners appear to ask that the Court abandon the civil standard of proof and take the unprecedented step of inferring culpability on the part of elected officials on the basis that they "might" have been influenced by campaign contributions, or "might" have accepted money in return for votes.

. . .

10. The Petitioners' implication of "bribery" is based on unsupported speculation whereas the evidence before the Court supports the conclusion that the Respondents each had a history of supporting appropriate development in the Township, each campaigned on re-election platforms supportive of sustainable development, and each followed the written recommendations of the Township's professional planning staff in voting to approve the subject development-related applications within the Impugned Matters. In the absence of sufficient evidence supporting alleged conflicts of interest, the Petition should be dismissed.

12 Although not a named respondent, the petitioners served the Township as required under s. 111(5)(b) of the *Community Charter*. The Township filed a response pleading in support of the respondents and participated in the hearing of the petition.

13 Before turning to the evidence and my analysis of the petitioners' claim, I will begin with a discussion of the provisions of the *Community Charter* and the appropriate test to be applied to determine whether an official elected to local government is in conflict under s. 101.

Community Charter

14 The *Community Charter* restricts elected government officials, such as the respondents, from attending a council meeting where they have a direct or indirect pecuniary interest *in a matter* before council.

15 The prohibition is set out in ss. 101(1) and (2):

Restrictions on participation if in conflict

101(1) This section applies if a council member has a direct or indirect pecuniary interest in a matter, whether or not the member has made a declaration under section 100.

(2) The council member must not

(a) remain or attend at any part of a meeting referred to in section 100 (1) during which the matter is under consideration,

(b) participate in any discussion of the matter at such a meeting,

(c) vote on a question in respect of the matter at such a meeting, or

(d) attempt in any way, whether before, during or after such a meeting, to influence the voting on any question in respect of the matter.

. . .

[Emphasis added]

16 The declaration referred to in s. 101(1) is where, under s. 100(2)(a), the elected official declares that in their view, they have a direct or indirect pecuniary interest in the matter:

Disclosure of conflict

100(1) This section applies to council members in relation to

(a) council meetings,

(b) council committee meetings, and

(c) meetings of any other body referred to in section 93 *[application of open meeting rules to other bodies]*.

(2) If a council member attending a meeting considers that he or she is not entitled to participate in the discussion of a matter, or to vote on a question in respect of a matter, because the member has

(a) a direct or indirect pecuniary interest in the matter, or

(b) another interest in the matter that constitutes a conflict of interest,

the member must declare this and state in general terms the reason why the member considers this to be the case.

(3) After making a declaration under subsection (2), the council member must not do anything referred to in section 101 (2) *[restrictions on participation]*.

. . .

17 An elected official is relieved from recusal, but not necessarily from being found in conflict, if after receiving legal advice on the issue, they determine that they were wrong about their entitlement to participate:

100(4) As an exception to subsection (3), if a council member has made a declaration under subsection (2) and, after receiving legal advice on the issue, determines that he or she was wrong respecting his or her entitlement to participate in respect of the matter, the member may

(a) return to the meeting or attend another meeting of the same body,

(b) withdraw the declaration by stating in general terms the basis on which the member has determined that he or she is entitled to participate, and

(c) after this, participate and vote in relation to the matter.

100(5) For certainty, a council member who makes a statement under subsection (4) remains subject to section 101 [*restrictions on participation if in conflict*].

18 Exceptions to the application of the conflict provisions in ss. 100 — 101 are contained in s. 104 of the *Community Charter*. In the case at bar, the relevant possible exception raised by the parties is found in s. 104(d). The parties have also raised the provision found in s. 101(3) relieving an elected official from the imposition of the penalty for a breach of s. 101.

19 The exception in s. 104(d) applies where the pecuniary interest is so remote or insignificant that it cannot reasonably be regarded as likely to influence the council member in respect of the matter before council:

Exceptions from conflict restrictions

104(1) Sections 100 to 103 do not apply if one or more of the following circumstances applies:

(a) the pecuniary interest of the council member is a pecuniary interest in common with electors of the municipality generally;

(b) in the case of a matter that relates to a local service, the pecuniary interest of the council member is in common with other persons who are or would be liable for the local service tax;

(c) the matter relates to remuneration, expenses or benefits payable to one or more council members in relation to their duties as council members;

(d) the pecuniary interest is so remote or insignificant that it cannot reasonably be regarded as likely to influence the member in relation to the matter;

(e) the pecuniary interest is of a nature prescribed by regulation.

[Emphasis added]

20 The singular penalty for breaching s. 101 is severe: the elected official is disqualified from holding office until the next election. However, under the relieving provision in s. 101(3), an elected official who has breached s. 101 may be relieved from disqualification if the contravention was inadvertent or due to an error in judgment made in good faith:

Restrictions on participation if in conflict

. . .

101(3) A person who contravenes this section is disqualified from holding office as described in section 108.1 *[disqualification for contravening conflict rules]* unless the contravention was done inadvertently or because of an error in judgment made in good faith.

. . .

Disqualification from office for contravening conflict rules

108.1 A person disqualified from holding office under this Division is disqualified from holding office

(a) on a local government,

(b) on the council of the City of Vancouver or on the Park Board established under section 485 of the *Vancouver Charter*, or

(c) as a trustee under the *Islands Trust Act*

until the next general local election.

[Emphasis added]

21 In *Schlenker v. Torgrimson*, 2013 BCCA 9 (B.C. C.A.), the Court of Appeal discussed the rationale underlying the conflict of interest provisions in the *Community Charter*:

[34] The object of the legislation is to prevent elected officials from having divided loyalties in deciding how to spend the public's money. One's own financial advantage can be a powerful motive for putting the public interest second but the same could also be said for the advancement of the cause of the non-profit entity, especially by committed believers in the cause, like the respondents, who as directors were under a legal obligation to put the entity first.

. . .

[38] The purpose of such legislation was eloquently described by Robins J. (later J.A.) speaking for the Ontario Divisional Court in *Re Moll and Fisher* (1979), 96 D.L.R. (3d) 506 at 509:

> This enactment, like all conflict-of-interest rules, is based on the moral principle, long embodied in our jurisprudence, that no man can serve two masters. It recognizes the fact that the judgment of even the most well-meaning men and women may be impaired when their personal financial interests are affected. Public office is a trust conferred by public authority for public purpose. And the Act, by its broad proscription, enjoins holders of public offices within its ambit from any participation in matters in which their economic self-interest may be in conflict with their public duty. The public's confidence in its elected representatives demands no less.
>
> Legislation of this nature must, it is clear, be construed broadly and in a manner consistent with its purpose.
>
> [Emphasis added in *Schlenker*.]

22 The *Community Charter* is a complete code for determination of issues and disputes concerning pecuniary conflicts of interest as set out in ss. 101, 104, and 108.1: *Fairbrass v. Hansma*, 2009 BCSC 878 (B.C. S.C.) at para. 16 [*Fairbrass* SC], aff'd 2010 BCCA 319 (B.C. C.A.) [*Fairbrass* CA]; *Colbert v. Bond*, 2016 BCSC 1703 (B.C. S.C.) at paras. 9 — 10; *Grand Forks (City) v. Butler*, 2016 BCSC 349 (B.C. S.C.) at paras. 3 — 4.

23 In *Fairbrass* CA, the Court of Appeal said it is the existence of a pecuniary interest in a matter before Council that must ground the remedy of disqualification:

> [20] The conflict of interest provisions of the *Community Charter* in issue concern the personal status of the impugned party to continue to hold office. The provisions are intended to enhance and protect the integrity of local government, with the myriad benefits that flow from achieving that objective shared by the community broadly. However, at the same time, addressed as those provisions are to the capacity of the decision makers to fulfill the term of their elected office and thereby to respect the election process, the criteria for disqualification are determinate. Unlike the rather more amorphous terms that may be recited in proceedings challenging a discrete action of a council, the ground for disqualification is restricted to a person holding a pecuniary interest in the outcome of the matter under consideration, whether direct or indirect. Further sections elaborate on this theme, for example s. 105 relating to gifts and s. 108 relating to use of insider information, but the common thread of the disqualification provisions is the requirement of pecuniary interest or gain.
>
> [Emphasis added]

24 With the legislative framework in mind, I will now discuss the test the petitioners must meet to obtain the relief sought in their petition.

The Test

25 The number of steps involved in the test to determine whether the relief sought in the petition should be granted has been variously described in the case authorities. Regardless of the nomenclature used, the case authorities are clear that a multi-staged enquiry is required.

26 In every instance, the first stage of the enquiry is to determine whether, on a balance of probabilities, the elected official has a direct or indirect pecuniary interest in the matter under consideration. The onus is on the petitioners to prove the pecuniary interest. If none is established - and, I find, none has been in this case - there is no need to engage in any further enquiry and the petition must be dismissed.

27 The next stage of the enquiry is engaged only if the petitioners establish a pecuniary interest. If a pecuniary interest is established for any or all of the respondents, then the enquiry moves to consider whether any of the exceptions from the

conflict restrictions found in s. 104(1) of the *Community Charter* are present. If any of the exceptions are engaged, then the petition must be dismissed.

28 The onus is on the petitioners to prove the exceptions in s. 104(1) do not apply: *Fairbrass* SC at para. 20; *Fairbrass* CA at paras. 22, 24; *Calkin v. Dauphinee*, 2014 NSSC 452 (N.S. S.C.) at para. 97; *Helten v. Robertson*, 2015 BCSC 599 (B.C. S.C.) at para. 34.

29 The case authorities (discussed below) consider the potential exception raised by the parties in this case — i.e., s. 104(d) — through an objective test involving a reasonably well-informed person analysis.

30 The petitioners acknowledge that the case authorities variously use the words "might", "would", and "likely" when engaging in the analysis. The petitioners did not take issue with the respondents' submission that the proper view of the test for the *Community Charter* is to analyze it with the word "likely" (the word is codified in the language of s. 104(1)(d)).

31 I agree with the respondents that the words of the statute govern the analysis. Thus, this stage of the enquiry must determine, through the lens of the reasonably well-informed person, whether "the pecuniary interest is so remote or insignificant that it cannot reasonably be regarded as likely to influence the member in relation to the matter."

32 If none of the exceptions in s. 104(1) apply, then the enquiry moves to consider the relieving provision in s. 101(3). The onus shifts to the respondents to demonstrate that they should not be disqualified because their contravention of the *Community Charter* was inadvertent or due to an error in judgment made in good faith:*Fairbrass* SC at para. 19.

33 From their submissions, I took the petitioners' articulation of a singular test to determine a conflict offending the *Community Charter* (involving a reasonably well-informed person analysis) that they must satisfy before turning to consider inadvertence or good faith to be grounded in the main on the Supreme Court of Canada's discussion of the common law test in *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170, 75 D.L.R. (4th) 385 (S.C.C.) [cited to S.C.R.], and also in part on their reading of the reasons in *Schlenker* and *Godfrey v. Bird*, 2005 BCSC 626 (B.C. S.C. [In Chambers]).

34 However, it is clear from the reasons in *Old St. Boniface* (at 1196, excerpted below), which dealt with the common law test, that Mr. Justice Sopinka did not describe the test as the petitioners have done. He said the enquiry concerning a reasonably informed person *follows* a finding of a pecuniary interest:

> ...It is not part of the job description that municipal councillors be personally interested in matters that come before them beyond the interest that they have in common with the other citizens in the municipality. Where such an interest is found, both at common law and by statute, a member of council is disqualified if the interest is so related to the exercise of public duty that a reasonably well-informed person would conclude that the interest might influence the exercise of that duty. This is commonly referred to as a conflict of interest ... [citations omitted].
>
> [Emphasis added]

35 Sopinka J. also said (at 1196) that statutory provisions in provincial municipal statutes "tend to parallel the common law but typically provide a definition of the kind of interest which will give rise to a conflict of interest."

36 In support of their submission that *Old St. Boniface* does not support the petitioners' description of the test, the respondents brought to my attention the reasons in *Calkin*, a recent case from Nova Scotia. In his reasons, Mr. Justice Warner said *Old St. Boniface* has been judicially cited for a three-part test, which first considers whether a pecuniary interest has been established. A reasonably well-informed person analysis is *not* engaged to determine whether a pecuniary interest exists. Warner J. described the test in this way:

> 45 *Old St. Boniface* has been judicially cited as setting out a three-part test for analyzing a conflict of interest: (1) there must be a pecuniary interest held by the councillor in the matter before council, (2) the pecuniary interest must be beyond what the councillor holds in common with the other citizens in the municipality, and (3) a reasonably well-informed person would conclude that the pecuniary interest might influence the exercise of that duty.

37 That said, Warner J. pointed out at para. 46 that while the analysis from *Old St. Boniface* is helpful, the starting point is the statute itself. I agree with that statement. In this province, the *Community Charter* (which the case authorities confirm is a *complete code*) spells out that ss. 101 and 104 are only engaged where a direct or indirect pecuniary interest is established.

38 In *Schlenker*, Mr. Justice Donald first considered whether a pecuniary interest existed before turning to the second stage of the test. He did so at the outset of his reasons at paras. 1 — 3 and then at paras. 32 — 34, where he found an indirect pecuniary interest in the absence of direct financial gain as a result of the elected officials' position as directors of a non-profit society who had an interest in the outcome of the vote:

> **Construction of the Phrase "a direct or indirect pecuniary interest in the matter"**
>
> [1] Elected officials must avoid conflicts of interest. The question on appeal is whether the respondents were in a conflict when they voted to award two service contracts to societies of which they were directors. In the words of s. 101(1) of the *Community Charter*, S.B.C. 2003, c. 26, did they have "a direct or indirect pecuniary interest in the matter[s]"?
>
> [2] The chambers judge found they did not have such an interest because they derived no personal financial benefit from the contracts.
>
> [3] With respect, I disagree with the judge's opinion. His view of the matter comes from too narrow a construction of the enactment. In my judgment, the pecuniary interest of the respondents lies in the fulfillment of their fiduciary obligation to their societies. When they voted for the expenditure of public money on the two contracts, which master were they serving, the public or the societies? In these circumstances, a reasonable, fair-minded member of the public might well wonder who got the better bargain.
>
> . . .
>
> [32] As mentioned, my principal difference of opinion with the judge is in what I consider to be his too narrow construction of the phrase "a direct or indirect pecuniary interest".
>
> [33] By limiting the interest to personal financial gain, the chambers judge's interpretation missed an indirect interest, pecuniary in nature, in the fulfillment of the respondents' fiduciary duty as directors. The result of applying that narrow interpretation to the facts was to defeat the purpose and object of the conflict of interest legislation.
>
> [34] The object of the legislation is to prevent elected officials from having divided loyalties in deciding how to spend the public's money. One's own financial advantage can be a powerful motive for putting the public interest second but the same could also be said for the advancement of the cause of the non-profit entity, especially by committed believers in the cause, like the respondents, who as directors were under a legal obligation to put the entity first.
>
> [Emphasis added]

39 After determining a pecuniary interest was established, Donald J.A. turned to the reasonably well-informed person analysis:

> [41] I think a reasonably well-informed elector on Salt Spring Island would conclude that the respondents' interest as directors would influence their decision to authorize and pay for contracts with their Societies. The respondents themselves initiated the resolutions that directly benefitted their Societies, and then voted in favour of those resolutions, without disclosing that they were directors of the very Societies that were obtaining the benefit.

40 In *Godfrey*, Mr. Justice Burnyeat did not articulate a singular test. He considered the facts concerning the ongoing business relationship between the elected official and individual whose matter was before council as part of his analysis of whether an indirect pecuniary interest existed. The petitioners point to his analysis at para. 124 in support of their characterization of the test, but as I read the reasons, the discussion in that paragraph contains a summary of the judge's conclusion. There is no question

that a pecuniary interest must be established before proceeding to the reasonable person enquiry, and this point is made clear from the analysis in*Fairbrass* SC (at paras. 17 — 21), which was decided after *Godfrey* and sustained by the Court of Appeal.

41 I will now turn to my determination of the petition.

Pecuniary Interest

42 Have the petitioners established the first stage of the enquiry, i.e., that the respondents each had a direct or indirect pecuniary interest in the matters before them?

Legal Principles

43 Generally speaking, the phrase "direct or indirect pecuniary interest in the matter" has no technical significance. In *Godfrey*, Burnyeat J. said "[T]he common usage of [the phrase] is to be given effect" and "interpreted in light of its purpose to prevent conflict between interest and duty": at para. 99.

44 As the petitioners acknowledge, a campaign contribution does not of itself constitute a pecuniary interest.

45 In *King*, Mr. Justice Esson rejected the test applied by the chambers judge that campaign contributions give rise to an indirect pecuniary interest in the outcome of the vote; something more is required to establish a link between the contribution and the matter to be voted upon:

> [12] That conclusion, in my respectful view, is wrong in law. What was prohibited by s. 201(5) is participation in the discussion or vote on a question in respect of "... a matter in which the member has a direct or indirect pecuniary interest." The "matter" (or matters) in respect of which questions arose before Council were, in this case, the various applications by Northridge Village and its associates. Nothing in the facts established in this proceeding could justify the conclusion that Mr. King had a pecuniary interest, direct or indirect, in any of those matters. The mere fact that Northridge made campaign contributions could not, in and of itself, establish any such interest. There could, of course, be circumstances in which the contribution and the "matter" could be so linked as to justify a conclusion that the contribution created a pecuniary interest in the matter. Indeed, the learned chambers judge took note of an example of such a situation when he said in his reasons:
>
> > There is no evidence of a direct pecuniary interest in the sense that he agreed to vote for these projects in return for their campaign contribution of $1,000.00.
>
> [13] It would not be useful to speculate as to what circumstances could create an indirect pecuniary interest. It is enough to say that the mere fact of the applicant having made a campaign contribution is not enough. In the absence of any factual basis for finding that Mr. King had a pecuniary interest in the matter, the finding based on s. 201(5) is wrong in law and must be set aside.
>
> [Emphasis added]

46 The Court of Appeal reiterated this point in *Schlenker*, characterizing a campaign contribution as "a remote and tenuous connection": at para. 55.

47 The question of whether campaign contributions constitute a pecuniary interest was also explored in *Fearnley v. Sharp* (1999), 72 B.C.L.R. (3d) 121, [2000] B.C.W.L.D. 100 (B.C. S.C.).

48 In *Fearnley*, Chief Justice Williams observed that people make campaign contributions to candidates they think support their ideas and policies:

> 35 The questions surrounding conflict of interest, in the municipal arena are by no means simple ones. When one adds to that the position in which a councillor is placed in reference to campaign contributions it becomes even more complex. This is so because of the competing societal values involved. No one would dispute the fact that a councillor having taken the

oath of office is obligated to respect the *Municipal Act* and perform their duties honestly. They must make their decisions upon what they believe is in the best interests of the municipality and its electors. On the other hand, it is clear that every elector should be eligible to run for office in the municipality regardless of their status, their wealth, or occupation of their spouse. Elections cost money and they are most frequently funded by contributions from friends, family and political or other supporters of the candidate. It is a fact in the real world that contributions are made by those who frequently hope that the candidate, if elected, will think as they do and support those ideals, policies and projects which they support. This is so whether the contributors be trade unions, corporations, institutions or wealthy individuals.

36 It is a traditional part of our democratic system to permit (with certain limitations) those wishing to run for office to accept campaign donations. There is nothing in the legislation to prohibit it, though the *Municipal Act* does require full disclosure of donations beyond a minimal amount.

[Emphasis added]

49 The same view was expressed by Mr. Justice Myers in *Helten*:

[36] As the petitioners' counsel acknowledged during argument, and the cases establish, there is nothing wrong with a politician stating his policy in the hopes of obtaining votes or campaign contributions. There is also nothing untoward with contributions being made by supporters of that position. There can also not be anything wrong with a politician carrying out a campaign promise if elected. The petitioners have not demonstrated anything beyond this.

[Emphasis added]

50 On the question of campaign contributions as a pecuniary interest, see also *Guimond v. Vancouver (City)* (1999), [2000] B.C.W.L.D. 42, 7 M.P.L.R. (3d) 44 (B.C. S.C.) at paras. 106 — 110 (which must be read in light of the Court of Appeal's subsequent decision in *King*). The petitioners did not direct me to any cases dealing with campaign contributions where a pecuniary interest was found.

51 A similar approach was taken towards Ontario's conflict of interest legislation, the *Municipal Conflict of Interest Act*, R.S.O. 1990, c. M.50, whose definition of a pecuniary interest is more expansive than the *Community Charter* because it includes the pecuniary interest of the elected official's spouse, parent, or child. The Ontario Court of Appeal said in *Ferri v. Ontario (Ministry of Attorney General)*, 2015 ONCA 683 (Ont. C.A.) at paras. 9 — 10 that "pecuniary interest" must not be defined so broadly to "capture almost any financial or economic interest such that it risks needlessly disqualifying municipal councillors ... from participating in local matters of importance to their constituents."

52 Each case must be decided on its own facts, bearing in mind and giving effect to the objects of the *Community Charter*. In *Fairbrass* SC, Mr. Justice Rogers said at para. 42: "I agree that conflict of interest legislation needs to be interpreted in a way that will give effect to its purpose and intent. That purpose and intent is to preserve the integrity of the political system in this Province, and to ensure that elected officials operate in the public's interest rather than in their own."

53 As noted at the outset, the petitioners submit that evidence of the pecuniary interest is drawn from the temporal connection between the campaign contributions and the various projects before Council for approval. They acknowledge that they have no evidence to prove that the contributions, which they assert are sizeable for municipal elections, in fact influenced the votes cast by each respondent. Instead, the petitioners ask me to find that a reasonably well-informed person would likely conclude an offending pecuniary interest existed for each respondent based solely on a historical and comparative temporal analysis of the votes they cast, the dates each contribution was made and by which individual working for an impugned developer, and the minutes of Council meetings indicating which project was up for consideration and approval. The petitioners acknowledge that there is no bad faith on the part of the respondents. They submit a search for bad faith is not required. Instead, they argue that it is the receipt of campaign contributions while the developers' projects were before Township staff for review, or proceeding to Council for a vote, or shortly before or after a project was voted on, that creates the offending conflict sufficient to breach the *Community Charter*.

54 In advancing their case, the petitioners place great emphasis on the remarks of Burnyeat J. in *Godfrey* at para. 103 regarding the trend towards a broader interpretation of pecuniary interest.

55 In my opinion, the petitioners' reliance on those remarks to prove a pecuniary interest on the facts of the case at bar is misplaced. The trend of the authorities is not to find a pecuniary interest based on speculation. The petitioners overlook the following *dicta* of Rogers J. in *Fairbrass* SC, which immediately follows his reference to para. 103 of the reasons in *Godfrey*:

> [43] That said, I do not understand that anything said in *Godfrey* operates to vitiate the necessity for evidence in these kinds of cases. More generally, I do not understand any of the cases upon which the petitioners rely to say that a direct or indirect pecuniary interest may be inferred out of thin air and in the absence of any evidence showing a link between the pecuniary interests of the official and the matter under discussion by his council. And there lies the flaw in the petitioners' case: they say the court should infer that the mayor has a pecuniary interest in his sons' development of their land, and that the inference may be based upon the familial relationship *simpliciter*. In essence, the petitioners argue that the court must assume that because he is their father, this mayor must be taken to desire financial advancement for his sons, and further that because of that father and son relationship, improvement of the sons' affairs will necessarily equate to an improvement of the mayor's estate.
>
> [44] In my view, the law has not yet come so far as to permit such inferences to be drawn, at least not without there being some evidence to support them. None of the authorities upon which the petitioners rely go that far — they all contain at least some evidence showing a link between the pecuniary interests of the official and the pecuniary interests of the party whose affairs were affected by the matter under discussion. So in *Moll*, for example, the councillor actually deposited the police's rent cheques to his own account; his interest in the lease was clear. So, too, in *Wynja* the Board members' own remuneration scheme was tightly linked to the contract on which they voted: they were essentially negotiating their salaries with themselves. But in the present case there is absolutely no evidence at all to link the mayor's sons' pecuniary interests to his own.
>
> [Emphasis added]

56 In *Fairbrass* CA, the Court of Appeal agreed with Rogers J.'s finding that the councillor did not have a pecuniary interest in the matter, even though the councillor's sons had a direct pecuniary interest in the outcome of the matter before council. The case against the councillor himself, Madam Justice Saunders said, was based on speculation:

> [21] I see no error in the approach of the judge to the petition before him. In the circumstances disclosed to him in the evidence, the case fell to be resolved by considering whether there could be enhancement of the respondent's financial position directly, or through the fact his sons owned adjacent property. The judge recognized the sons had a direct pecuniary interest because the proposal would make it easier for them to sub-divide their property. There were, then, only two questions: did the respondent have a direct interest, and did the sons' direct interest create such potential for enhancement of the respondent's financial circumstances as to be a pecuniary interest that was indirect.
>
> [22] The proposition that the person asserting a fact has the burden of proving it, is fundamental. Here the petitioners alleged a pecuniary interest, either direct or indirect. Yet they adduced no evidence to the effect that the bylaw, were it to pass, would make the respondent's four acre but still un-subdividable property more valuable. Whether the change in set-back requirements would have this effect is speculation. So too, as the judge said, is the possibility of the respondent acquiring land, thereby to sub-divide the property. Even more speculative is the possibility of accretion making the four acre parcel more valuable now.
>
> [23] Likewise, the suggestion that a future bylaw may be proposed that permits lots smaller than 2.5 acres is too speculative to found a conclusion the respondent had a forbidden interest in the bylaw. I do not consider that any legislative proposal could be found to provide a direct or indirect pecuniary interest only on the basis the council may pass, in the future, further bylaws replacing the one in issue.

[24] The reasons for judgment of the judge properly reflect the burden on the petitioners. The judge reached a sound conclusion on the critical question of the existence of a pecuniary interest on the part of the mayor, both direct and indirect. In these circumstances and on this evidence, there was no basis at all to remove him from his elected office, as the judge concluded.

[Emphasis added]

57 In *Highlands Preservation Society v. Highlands (District)*, 2005 BCSC 1743 (B.C. S.C.), Mr. Justice Macaulay said that an applicant must adduce evidence of an agreement to vote for the project(s) in exchange for the contributions. He warned against drawing an inference based on the size of the contribution:

Campaign Contributions

[54] The essence of the claims, in the case at bar, are that the four councillors voted in favour of the bylaws as a quid pro quo for financial campaign contributions. The other authorities referred to in argument do not, on balance, support the proposition that the receipt of campaign contributions, without more, disqualifies a councillor from voting.

[55] Counsel for the society placed significant emphasis on the fact that the total campaign contributions from the corporation amounted to more than 25 percent of the total contributions received by the four councillors. In my view, the emphasis on a percentage absent something more is misguided. The question is not whether there is a magical number which campaign contributions cannot exceed, but whether there is any evidence of contributions coupled with a promise, implicit or otherwise, to deliver a vote. If the evidence revealed that a councillor agreed to sell her vote for a campaign contribution of five dollars, the size of the bribe, or the percentage of overall contributions, would be superfluous. In such a case, it is the link to dishonest conduct that is reprehensible.

[56] Similarly, if a councillor happens to receive only one campaign contribution from a single person, it does not automatically follow that the councillor must have agreed to sell his vote in exchange. Absent such an arrangement, the contributor is simply exercising the democratic right to make a campaign contribution to a candidate that she or he chooses to support. There is nothing reprehensible in that so long as the councillor did not agree, implicitly or otherwise, to vote a certain way.

[57] There should be a further link beyond a campaign contribution to establish an indirect pecuniary interest. I would not infer any appearance of impropriety from the campaign contributions here.

[58] In *King v. Nanaimo*, [2001] B.C.J. No. 2107 (C.A.), Esson J.A., for the court, rejected the conclusion that accepting a campaign contribution from a particular company meant that an alderman had a direct or indirect pecuniary interest that disentitled him from voting on various applications by the contributor. He expressly found that "the mere fact of the applicant having made a campaign contribution is not enough" (para. 13) to create an indirect pecuniary interest. There was no evidence in that case of any agreement to vote for the projects in exchange for the contributions.

[59] Further, Esson J.A. did not comment, as had the chambers judge, on the size of the contribution relative to the overall amount received. In *Guimond v. Vancouver (City)*, [1999] B.C.J. No. 2529 (S.C.), heard before the Court of Appeal decision in *King*, the judge distinguished the chambers judgment in *King*, in part on the basis that the campaign contribution in that case was substantially greater. Any attempt to draw an inference based on the size, relative or otherwise, of the campaign contributions in the case at bar would be dangerous.

[60] I am not persuaded that there is any evidence respecting the purpose of the campaign contributions capable of supporting the contention that the councillors had an indirect pecuniary interest. The contributions were never hidden from public view. I repeat that there is no evidence that they were anything but legitimate.

[Emphasis added]

58 The petitioners submit that the decision of Macaulay J. is overly narrow and against the tide of the case authorities if it requires proof of an actual agreement or *quid pro quo* to vote in a certain manner as the only basis to establish a pecuniary interest.

59 Yet, in *Helten*, Myers J. cited *Highlands* and made the same point as Macaulay J. — there must be evidence of an agreement to vote a certain way:

> [29] Although the petitioners did not argue the point they did leave it hanging and I will, for the sake of completeness say this: there is no evidence before me indicating that Local 1004's contribution was anything other than a lawful political contribution. There is no evidence of an agreement between the respondents and Local 1004 to the effect that *if* a contribution was made, the respondents would take a particular position or that *if* a contribution was not made they would not take that position. Rather, the respondents' long-standing view, one made public well before the current election, was against contracting out of union positions. Moreover, as Mr. Baynham pointed out, the words of the Local 1004 member at the meeting indicate the opposite of an agreement having been made:
>
> > So, yes, we haven't asked those questions yet, obviously, because it's still early in the campaign, but we certainly will have to nail them in terms of protecting our jobs and trying to have as little contracting, try not to have any contracting out, happening in our campaign.
>
> [30] The petitioners argue that Ms. Epstein's reference "to carry favour with Vision" (probably mis-transcribed from "curry favour") "ties the campaign contribution directly to the promise of jobs for CUPE Local 1004 made by Mr. Meggs". That phrase was Ms. Epstein's; not the respondents'. There is nothing to show that the petitioners were aware of her statement or what underlies it.
>
> [31] The petitioners argued that I should infer an agreement between Local 1004 and the respondents because the respondents did not deny the existence of an agreement until Mr. Meggs filed his affidavit, and Mr. Robertson did not file an affidavit. The petitioners argued that Mr. Meggs should have made public statements denying the accusation and not wait until the "eleventh hour when faced with the barrel of a looming petition to disqualify him from his elected office." This argument was a general one, in the sense that it was not directed to specific sections of the *Vancouver Charter*. I will deal with it here, because, in view of my conclusions, it was not relevant to the other sections dealt with.
>
> [32] There are at least three problems with this submission...
>
> . . .
>
> [34] Third, the submission is contrary to cases where the courts have made clear that the onus of proving a financial interest or conflict always rests with the petitioners: *Fairbrass v. Hansma*, 2010 BCCA 319at para. 22 and *Highlands Preservation Society v. Corp. of the District of Highlands*, 2005 BCSC 1743, in which Macaulay J. stated:
>
> > [17] The final allegation said to give rise to reasonable apprehension of bias had to do with the alleged improper contact between the councillors and representatives of the corporation after the public hearing. Counsel for the society conceded that there is a partial conflict in the evidence but suggested that I resolve the conflict by drawing an adverse inference against the respondents. He contends that I should do so because they did not submit affidavits from all the persons who are in a position to give material evidence.
> >
> > [18] I disagree. To the extent there is a conflict in the evidence, it arises from the limited and speculative nature of the evidence that the society relies on and not from an absence of direct evidence for the respondents. The society bears the onus of proof on this issue and has failed to meet it. I set out the evidence below to illustrate.
>
> and:

> [30] There is no requirement that the respondents must place evidence from all potential witnesses before the court to avoid an adverse inference being drawn. Given the absence of reliable evidence from the petitioner, imposing such a requirement would inappropriately shift the burden of proof to the respondent and raise an artificial bar.
>
> These comments are applicable here.
>
> [35] While a court may draw inferences from facts in evidence, I cannot draw an inference of the agreement alleged by the petitioners.
>
> [Emphasis added]

60 The petitioners point to other cases where it was not necessary for the applicants to prove an agreement or other form of *quid pro quo*. I provide some examples below of cases where a pecuniary interest was found. In each case, however, the pecuniary interest arose from the elected members' connections with other organizations that went beyond receipt of a campaign contribution:

- *Schlenker* — Elected trustees for the Salt Spring Island Trust Area were responsible for land use planning and regulation for Salt Spring Island. They were passionate about environmental issues and incorporated and held positions as directors with the Salt Spring Island Water Council Water Society and the Salt Spring Island Climate Action Council Society. Donald J.A. did not restrict pecuniary interest to instances of personal financial gain as it would otherwise "defeat the purpose and object of conflict of interest legislation": para. 33. He found the trustees' positions as directors of the societies were sufficient to ground a pecuniary interest in the matters.

- *Moll v. Fisher* (1979), 96 D.L.R. (3d) 506, 23 O.R. (2d) 609 (Ont. Div. Ct.) — The defendants were members of the Toronto Board of Education. Both were married to elementary school teachers who were employed by the School Board. The defendants were found in conflict when they participated in School Board meetings where pay for high school teachers was on the agenda (there was a clear relationship between contracts negotiated for high school teachers and contracts negotiated for elementary school teachers). The ambit of pecuniary interest in the Ontario legislation included interests of family members of the official.

- *Wynja v. Halsey-Brandt* (1991), 62 B.C.L.R. (2d) 22, [1991] B.C.W.L.D. 2444 (B.C. S.C.), aff'd, (1993), 78 B.C.L.R. (2d) 72, [1993] B.C.W.L.D. 1302 (B.C. C.A.) — The defendants were members of the Richmond School Board and employed as teachers by the Vancouver School Board. They participated in Richmond School Board meetings where remuneration for school teachers in that jurisdiction was up for consideration and a vote. A pecuniary interest was established from the defendants' membership in a teachers' association and the Federation of Teachers; teachers' salaries are a concern for the Federation as a whole and its members. No local chapter of the Federation is permitted to take any action that would affect other chapters. The defendants were characterized as negotiating salaries with themselves.

- *Guimond v. Sornberger* (1980), 115 D.L.R. (3d) 321, 25 A.R. 18 (Alta. C.A.) — The impugned councillors were also employees of a company whose interests were affected by the matter under discussion by the municipality. The commercial viability of the employer was found to be in the pecuniary interest of those who depend on the employer for their incomes. An indirect pecuniary relationship was established.

- *Godfrey* — Councillor Bird had a long, remunerative relationship as a real estate agent with an individual whose business interests were before council. Their relationship was more than casual or temporary. Councillor Bird earned thousands of dollars in commissions from that relationship. They were also business partners. An indirect pecuniary relationship was found from their close commercial relationship. Burnyeat J. found on a balance of probabilities that Mr. Bird was likely to be influenced or biased when he cast his votes.

61 In *Fairbrass* SC, Rogers J. said that the case authorities do not establish that the pecuniary interest "may be inferred out of thin air and in the absence of any evidence showing a link between the pecuniary interests of the official and the matter

under discussion by his council." A suspicion, even a reasonable one, he said, is insufficient to support a finding of a pecuniary interest: para. 43.

62 In *Lee v. Jacobson* (1994), 99 B.C.L.R. (2d) 144 (B.C. C.A.) at 159, (1994), 120 D.L.R. (4th) 155 (B.C. C.A.), the Court of Appeal highlighted the distinction between inference based on speculation and objective facts:

> The leading case distinguishing between conjecture on the part of the finder of fact and the drawing of an inference is *Caswell v. Powell Duffryn Associated Collieries Ltd.*, [1940] A.C. 152 (H.L.). In that case the plaintiff was the mother of a mine worker killed while at work in the respondent's colliery. The precise manner in which the accident occurred could not be determined. At issue was whether the negligence of the employer was the substantial cause of the accident. Lord Wright discussed the role of the trier of fact in drawing inferences from the known facts at pp. 169-70:
>
> > My Lords, the precise manner in which the accident occurred cannot be ascertained as the unfortunate young man was alone when he was killed. The Court therefore is left to inference or circumstantial evidence. Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.
> >
> > [Emphasis added]

See also: *Chernen v. Robertson*, 2014 BCSC 1358 (B.C. S.C.) at paras. 30 — 32.

63 In *Highlands*, Macaulay J. spoke of the need for the applicants to prove a pecuniary interest based on reliable evidence:

> [30] There is no requirement that the respondents must place evidence from all potential witnesses before the court to avoid an adverse inference being drawn. Given the absence of reliable evidence from the petitioner, imposing such a requirement would inappropriately shift the burden of proof to the respondent and raise an artificial bar. I accept the evidence of the respondents that there was no discussion of the rezoning or the development with representatives of the corporation in the restaurant following the public hearing.
>
> [Emphasis added]

Have the Petitioners Proven a Pecuniary Interest?

64 Ultimately, the case must be founded on evidence, not speculation. The statute requires the applicant to prove the elected official *has* a pecuniary interest, not might or could have one.

65 Turning to my findings of fact in the case at bar, unlike the cases cited above, there is no evidence that any of the respondents had any direct or indirect pecuniary interest in the developers' projects put in issue by the petitioners, and I specifically find that none has been established.

66 There is no evidence of any agreement or *quid pro quo* between the developers and the respondents to vote on their projects. There is no evidence from which any such inference can be drawn.

67 There is no evidence to suggest that the respondents' votes on the impugned matters before them were influenced by campaign contributions from any source. The respondents' pro-community development positions and platforms were well-publicized throughout their campaigns.

68 Nor is there any evidence to show that the respondents offered or even suggested they would vote for developers' specific projects before the Township in exchange for campaign contributions. There is also no evidence to establish the petitioners'

unpleaded assertion (made in reply submissions) that the respondents were "incentivized to get more contributions in light of the matters before them."

69 The respondents did not conceal the campaign contributions they received. They disclosed the particulars of all contributions in the timeframe they were required to do by the *LECFA*. The petitioners' complaint that the respondents did not disclose their contributions until after the votes were cast is not evidence of a pecuniary interest. It does not establish a conflict. There is no provision in the *Community Charter* or the *LECFA* requiring the respondents to disclose contributions received while matters were before Council. Further, there is no evidence that the respondents delayed disclosure of their campaign contributions until after they voted, let alone that they delayed disclosure in order to conceal developers' contributions while they voted.

70 The petitioners point out that one of the respondents acted as his own financial agent under the *LECFA* and kept track of the campaign contributions and that another respondent's spouse acted in that role. The other respondents had financial agents; there is no evidence to establish that they were aware of them when they cast their votes. However, mere knowledge of campaign contributions does not establish a pecuniary interest.

71 As was the case in *Highlands*, the respondents have each tendered affidavit evidence. They deny: (a) they were in conflict; (b) any agreement or *quid pro quo* to vote in a certain manner; (c) that their votes were influenced by campaign contributions; and (d) that they acted other than in good faith in the best interests of the Township throughout. The petitioners did not cross-examine the respondents on their affidavits.

72 The petitioners have not established that the respondents attended meetings, including Council meetings, participated in discussions, voted, or attempted to influence voting in respect of any developers' projects in which they had a pecuniary interest.

73 The petitioners' claim is not based on evidence, but on speculation and suspicion founded solely on imprecise assertions of temporal proximity, which is insufficient to establish a pecuniary interest and insufficient to challenge the respondents' evidence. There is no evidentiary basis to support a submission that the respondents had a direct or pecuniary interest in the *matters* — i.e., the developers' various projects — before Council for consideration and vote. The petitioners' case does not rise to the point where I am even required to assess the reliability of their evidence as described by Macaulay J. in *Highlands*.

74 As a consequence, I do not need to consider the respondents' submission, which was contested by the petitioners, that the nature of the proof required for the petitioners to meet their onus impacts the balance of probabilities standard. The respondents cited several case authorities for their submission that the proof must be commensurate with the allegations of wrongdoing against public officials and that courts must be slow to impute bad faith against public officials unless there is no other rational conclusion: *First National Properties Ltd. v. Highlands (District)*, 2001 BCCA 305 (B.C. C.A.) at paras. 31, 38, leave to appeal ref'd [2001] S.C.C.A. No. 365 (S.C.C.); *Rain Coast Water Corp. v. British Columbia*, 2019 BCCA 201 (B.C. C.A.) at para. 108, leave to appeal ref'd (2020), [2019] S.C.C.A. No. 321 (S.C.C.); *MacMillan Bloedel Ltd. v. Galiano Island Trust Committee* (1995), 10 B.C.L.R. (3d) 121, 126 D.L.R. (4th) 449 (B.C. C.A.), leave to appeal ref'd (1996), [1995] S.C.C.A. No. 439 (S.C.C.); *Babiuk v. Chrapko* (1993), 9 Alta. L.R. (3d) 17, [1993] A.W.L.D. 334 (Alta. Q.B.); *Gullion v. Gottfried*, 2018 ABQB 531 (Alta. Q.B.) at para. 26.

75 The potential intersection between those cases and the more recent decisions from the Court of Appeal (e.g., *Nagy v. BCAA Insurance Corporation*, 2020 BCCA 270 (B.C. C.A.) at paras. 39 — 42; *Pavlovich v. Danilovic*, 2020 BCCA 239 (B.C. C.A.) at paras. 26 — 27, both citing *C. (R.) v. McDougall*, 2008 SCC 53 (S.C.C.)) rejecting the notion that there are different levels comprised within the balance of probabilities standard is unnecessary to consider in light of the speculative nature of the petitioners' case.

76 Accordingly, the petition must be dismissed on the basis that the petitioners have failed to meet their onus to demonstrate the requisite pecuniary interest on the part of the respondents.

Additional Findings

77 Even if the petitioners had demonstrated a pecuniary interest for any of the respondents, I would dismiss the petition because I am satisfied that the petitioners have not proven the next stage of the enquiry. They have not established that the exception in s. 104(1)(d) is not engaged. Nor have they established the more general assertion that a reasonably well-informed person would conclude that any such pecuniary interest would likely influence the respondents in the exercise of their public duties.

78 In considering whether the petitioners have established this stage of the enquiry, I am able to and have considered all of the circumstances: see, e.g., *Ferri* at paras. 17 — 18; *Schlenker* at para. 41; *Guimond v. Vancouver (City)* at paras. 108 — 110; *Godfrey* at paras. 122 — 124.

79 The matters impugned by the petitioners concern different types of land use development-related applications (including official community plan amendments, rezoning and development permits, heritage alteration amendments, and development works agreement applications) requiring approval by Council. Some had been in front of Township staff for consideration for years. I have referred to them in these reasons collectively as the developers' projects.

80 During the course of the parties' submissions, I was taken through considerable detail for each impugned project that was before Council and voted on by the respondents and other Council members.

81 The nature of the matters in issue is usefully summarized by the Township in its written submissions as follows:

> 54. In summary, as more particularly set out above, the Council decisions with respect to which the Petitioners allege conflicts of interest are with respect to votes on:
>
> (i) two amendments proposed during the adoption of a portion of the Township's OCP [official community plan], which amendments were consistent with the multi-year and multi-stage OCP drafting and approval process, as well as the staff report before Council;
>
> (ii) nine applications for amendments to the Township's Zoning Bylaw and OCP, which applications were just a few of the many similar applications considered and passed by Council, and which were each the subject of a staff report confirming consistency with the overall objectives of the applicable community or neighbourhood plan;
>
> (iii) twelve applications for DPs [development permits], which applications Council was required to approve if they were consistent with the applicable guidelines and which were each the subject of staff reports confirming that consistency;
>
> (iv) one application for a HAP [heritage alteration permit], which application was the subject of a detailed staff report confirming consistency with applicable guidelines; and
>
> (v) the approval of two development works related agreements, which development agreements were the subject of staff reports recommending them as a cost recovery mechanism for a developer that was required to provide works for the benefit of multiple other properties.

82 Before a proposed amendment or application for any of the matters discussed below is put before Council for a vote, municipal staff prepare a report to the mayor and Council containing staff's recommendation(s). Staff reports to municipal council generally summarize material facts and factors for consideration by council, including recommendations: *Community Assn. of New Yaletown v. Brenhill Developments Ltd.*, 2015 BCCA 227 (B.C. C.A.) at paras. 110 — 114, leave to appeal ref'd [2015] S.C.C.A. No. 244 (S.C.C.); *Hubbard v. West Vancouver (District)*, 2005 BCCA 633 (B.C. C.A.) at paras. 22 — 23. In some instances, the *Local Government Act*, R.S.B.C. 2015, c. 1 [*LGA*] requires the matter to be considered at a public meeting.

83 Official community plans ("OCPs") set out a local government's objectives and policies concerning planning and land use management. They are forward looking documents setting out local government's long-term vision, objectives, and policies

to provide guidance to council: *LGA*, s. 471; *Residents & Ratepayers of Central Saanich Society v. Central Saanich (District)*, 2011 BCCA 484 (B.C. C.A.) at paras. 40, 56.

84 Zoning bylaws divide a municipality into zones in order to regulate use and development of land, buildings, and other structures within a particular zone. Zoning bylaws may prohibit certain uses and development of land consistent with the OCP. Where an owner's plan to develop their property is inconsistent with the zoning bylaws, it may apply to Council to amend the bylaw(s) and/or the OCP. A public hearing is generally required before any amendment to the OCP or bylaw is adopted: *LGA*, ss. 464, 478 — 479.

85 Where development permits are in issue, Council is required to consider the application and vote in accordance with applicable guidelines specified under the official community plan or zoning bylaw. The power to deny an application is limited: *LGA*, ss. 488 — 489, 490(2); *0742848 B.C. Ltd. v. Squamish (District)*, 2011 BCSC 747 (B.C. S.C.) at para. 94.

86 When an owner seeks to develop property inconsistent with a heritage conservation area designation made by local government (e.g., through subdivision), it must apply for a heritage alteration permit. Council is restricted to issuing a heritage alteration permit in accordance with the guidelines established for the conservation area: *LGA*, ss. 614 — 615, 617 — 618.

87 A local government may enter into development works agreements ("DWA") with developers to provide for works (and costs of it) by the developer. Typically, a developer agrees to provide significant off-site infrastructure or services, at its cost, and the local government, through bylaws enacted per the *LGA*, agrees to collect a portion of the costs from owners in the broader benefiting area, and then forward those funds to the developer. DWAs are adopted by bylaw and must be supported by 50% of the owners of parcels that have at least 50% of the assessed value of the lands in the affected benefitting area: *LGA*, s. 570.

88 There is no evidence that any of the requirements of the *LGA* were departed from in relation to any of the impugned developers' projects that were before Council.

89 For each of them, Council had before it a staff report with recommendations. Citing *48 Fraser Hwy Land Ltd. v. Langley (Township)* (1999), 4 M.P.L.R. (3d) 53, [1999] B.C.J. No. 1861 (B.C. S.C.) at para. 34, the Township correctly points out that when Council accepts planning staff's recommendations, the court can infer that Council considered the Township's guidelines in accordance with the project up for a vote. It is only where Council departs from planning staff's recommendations that Council is obliged to provide reasons for its decision.

90 The Township and respondents have established that each of the impugned developers' projects fell within the bounds of the Township's legislative authority, had been considered by Township staff (which in some instances began well before the 2018 election), and were recommended to Council by Township staff charged with the responsibility to vet each project. In each instance, the respondents' votes were consistent with staff recommendations as well as the respondents' own well-known pro-development campaign platforms (e.g., to build smart, properly planned, and sustainable development, including additional housing, in the Township).

91 In view of the requirements and limitations concerning the various developers' projects put in issue by the petitioners and the evidence provided by the respondents and the Township I have reviewed, I find that even if the respondents had a pecuniary interest by virtue of the campaign contributions, the petitioners have not established that the exception in s. 104(1)(d) is not engaged nor have they established the broader assertion that a reasonably well-informed person would conclude that any such pecuniary interest would likely influence the respondents in the exercise of their public duties.

92 Although it is not necessary to consider the good faith defence found in s. 101(3), I wish to set out my finding that I accept what I am satisfied is the respondents' unchallenged evidence that they acted in good faith and in the best interests of the Township throughout. The respondents also fully complied with their disclosure obligations under the *LECFA*.

93 There is one other matter that I wish to comment on in light of the importance the petitioners placed on a legal opinion signed by Don Lidstone, Q.C. in June 2016 to support their interpretation of the *Community Charter*. Mr. Lidstone's opinion was addressed to the Township's Chief Administrative Officer regarding another unrelated project ("Lidstone Opinion").

94 The Lidstone Opinion does not assist the petitioners. I say that for the following reasons.

95 To start with, there is no evidence that the Lidstone Opinion was brought to the attention of the respondents before or during the 2018 campaign.

96 Even assuming it was, the Lidstone Opinion is clear when it states that there must be something more than a campaign contribution to create a conflict: it must be linked to the members' participation in Council's deliberation:

> ... In other words, the campaign contribution by itself does not create a conflict of interest, even if that developer later applies for a rezoning. ...
>
> . . .
>
> In the leading case [*King v. Nanaimo*], the City of Nanaimo removed Mr. King from office due to his failure to file a disclosure statement revealing his campaign contributions from a construction company and where Mr. King later voted in favour of matters benefitting the company. The Court of Appeal decided that the campaign contribution did not establish that Mr. King had a financial interest in the matters on which he voted. In order to find a conflict, there has to be a factual basis, for example, linking the money to the member's participation in a Council deliberation (such as where the member agrees to vote in return for the donation). The Court decision was unanimous. The Court said:
>
> > Nothing in the facts established in this proceeding could justify the conclusion that Mr. King had a pecuniary interest, direct or indirect, in any of those matters. The mere fact that Northridge made campaign contributions could not, in and of itself, establish any such interest...It is enough to say that the mere fact of the applicant [the developer] having made a campaign contribution is not enough.
> >
> > [Emphasis added]

97 The petitioners point to other parts of the opinion where Mr. Lidstone suggests that a conflict arises where a developer makes a campaign contribution when the rezoning application is in mid-stream or comes before Council for a vote. As I read the whole of the Lidstone Opinion, that comment is speculative and raised in the context of the reasonably well-informed person analysis:

> Also, the *Community Charter* lists several exceptions to conflict of interest, in particular if the conflict is so remote that it cannot reasonably be regarded as likely to influence the member in relation to the matter.
>
> There could be a conflict if the Council member was personally or privately connected to the developer, if development was in-stream at the time of the election, or if the developer made a donation after the rezoning application was made. However, we understand that none of these apply in relation to the [redacted] rezoning application.
>
> [Emphasis added]

98 If the Lidstone Opinion purports to suggest, as the petitioners submit it does, that a pecuniary interest exists *solely* on the basis that the campaign contribution was made when the developer's application is mid-stream or in and around the time it is before Council for a vote, then that interpretation is inconsistent with the holdings in the case authorities reviewed in these reasons.

99 I agree with the respondents and the Township that the petitioners' complaint is, in essence, that elected municipal officials must not vote on any developer's matter before council if they received a campaign contribution from individuals connected with the developer at some (undefined) point in time before the vote was taken or while the vote was underway or thereafter. It is not supported by the case authorities and is a matter that is not addressed by the *Community Charter* or the *LECFA*. If the petitioners are intent on redress, their concerns should, as the Township submitted is the appropriate course of action, be taken to the legislature.

Conclusion

100 The petitioners have failed to establish that any of the respondents had a direct or indirect pecuniary interest in the impugned matters before them as members of the Township's Council. On this basis, the petition must be dismissed.

101 If a pecuniary interest had been established, I would have nonetheless dismissed the petition because the petitioners failed to establish that the exceptions in s. 104 are not engaged. In particular, they have not established that a reasonably well-informed person would conclude that any such pecuniary interest would likely influence the respondents in the existence of their public duties. I also accept the respondents' unchallenged evidence that they acted in good faith and in the best interests of the Township throughout.

102 I agree with the respondents' submission that elected officials are expected to have opinions about civic priorities and policies and to campaign on those positions. A candidate who receives campaign contributions from supporters of their positions and then carries out their promises when elected does not, without more, breach the conflict of interest provisions of the *Community Charter*. As the case authorities establish, electors have a democratic right to make campaign contributions to a candidate they believe will support policies or platforms they wish to see enacted or undertaken.

103 The petition is dismissed.

Petition dismissed.