NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Potter; R. v. Colpitts*, 2020 NSCA 9

Date: 20200205
Docket: CAC 478375 and CAC 478392
Registry: Halifax

Between:

Daniel Frederick Potter
Appellant/Respondent on Cross-Appeal and Sentence Appeal

v.

Her Majesty the Queen
Respondent/Appellant on Cross-Appeal and Sentence Appeal

and

Between:

Robert Blois Colpitts
Appellant/Respondent on Cross-Appeal and Sentence Appeal

v.

Her Majesty the Queen
Respondent/Appellant on Cross-Appeal and Sentence Appeal

Judge: The Court (Bourgeois, Van den Eynden, and Derrick JJ.A.)

Appeal Heard: September 11–13; 16–19, in Halifax, Nova Scotia

Subject: Abuse of process; s. 7 of the *Charter*; pre-charge delay; investigative delay; s. 11(b) of the *Charter*; post-charge delay; "frivolous" defence applications; "illegitimate" defence applications; defence unavailability; delay caused by co-accused; markedly inefficient defence conduct; a judge's case and trial management powers; *Jordan*'s complexity exceptional circumstance; factual investigative witnesses; lay opinion evidence; expert opinion evidence; co-conspirators' exception to the hearsay rule; conspiracy; fraud on the public market; market manipulation; misapprehension of evidence; judicial bias; sentencing range for large-scale, complex fraud;

principle of proportionality; delay as mitigating; lawyer fraud.

Summary:

After Knowledge House Incorporated ("KHI") collapsed in September 2001, regulatory and criminal investigations into the conduct of Daniel Potter, KHI's Chief Executive Officer, and Blois Colpitts, KHI's lawyer and Lead Director, followed. On March 17, 2011, after an eight-year investigation, the Crown charged Mr. Potter and Mr. Colpitts, along with KHI's stockbroker. The Crown alleged that they, along with other KHI principal shareholders who were not charged, had spent over a year and a half engaging in a variety of manipulative techniques to artificially prop up the price of KHI shares. The company's stockbroker pleaded guilty. Mr. Potter and Mr. Colpitts did not deny the activity forming the subject matter of the charge occurred nor what was said in e-mails sent between them and relied on by the trial judge. Instead, they asserted their activities were lawful and the Crown's evidence deficient and unreliable. They also unsuccessfully challenged the admissibility of evidence from an RCMP investigator, evidence from the Crown's market expert, and e-mails written by co-conspirators.

On March 9, 2018, Mr. Potter and Mr. Colpitts were convicted of conspiracy to affect the public market price of KHI shares with intent to defraud (s. 465(1)(c) of the *Criminal Code*) and of affecting the public market price of KHI shares with intent to defraud (s. 380(2) of the *Criminal Code*) during the period of January 2000 to August 2001. Justice Kevin Coady sentenced Mr. Potter and Mr. Colpitts to terms of imprisonment of five and four and a half years, respectively. They appeal against their convictions. The Crown appeals against the sentences and cross-appeals against the convictions stayed under the *Kienapple* principle in the event that the conviction appeals are allowed.

Issues:

(1) Did the trial judge err in failing to find that Mr. Potter's and Mr. Colpitts' rights under s. 7 of the *Charter* were infringed due to an abuse of process stemming from pre-charge delay, and thus erred in failing to enter a stay of

proceedings under s. 24(1)?

(2) Did the trial judge err in dismissing Mr. Potter's and Mr. Colpitts' applications for a stay of proceedings because their rights to be tried within a reasonable time under s. 11(b) of the *Charter* were infringed?

(3) Did the trial judge err in law by admitting the evidence of Ian Black and then by relying on that evidence?

(4) Did the trial judge err in law by qualifying Langley Evans to give expert opinion evidence and then by relying on that evidence?

(5) Did the trial judge err in law by admitting into evidence the out-of-court statements of co-conspirators?

(6) Were the guilty verdicts for conspiracy unreasonable?

(7) Were the guilty verdicts for fraud on the public market unreasonable?

(8) Did the trial judge misapprehend the evidence, and, in particular, did he misapprehend the defences advanced?

(9) Did the trial judge's conduct give rise to a reasonable apprehension of bias, or establish actual bias against Mr. Potter and Mr. Colpitts?

(10) Did the trial judge err in law and in principle in imposing sentences that are demonstrably unfit in all the circumstances?

Result: The conviction appeals are dismissed. Leave to appeal the sentences is granted, but the sentence appeals are dismissed, as are the cross-appeals.

(1) The judge did not err in finding there was no abuse of process and therefore Mr. Potter's and Mr. Colpitts' s. 7 *Charter* rights were not infringed. First, their argument that the pre-charge delay resulted in lost evidence in the form of

faded witness memories is rejected. They fell far short of identifying, as is required, what specific evidence was lost, and they had other feasible options to advance their defences. Second, their argument that the delay caused by the funding dispute between the provincial and federal prosecution services was an abuse of process is rejected. While the investigation was lengthy, it is not the court's role to scrutinize the efficiency of investigations. The judge's conclusion that the investigative delay was "unacceptable" did not equate to finding egregious or oppressive Crown conduct. Absent a *Charter* breach, the judge did not err in refusing to grant a stay under s. 24(1) of the *Charter*.

(2) The trial judge did not err in dismissing Mr. Potter's and Mr. Colpitts' applications under s. 11(b) of the *Charter*. Even if some of their allegations regarding the trial judge's calculation of post-charge delay had some merit, the result would still be far less than the delay they allege. The trial judge did not err in finding they were responsible for the vast majority of the post-charge delay. His finding of 41 months of net delay was supportable on the record. While the net delay was above the 30-month ceiling set out in *Jordan* and was therefore presumptively unreasonable, the Crown had justified the excess delay. The matter was sufficiently complex, and the Crown took reasonable steps to minimize delay. Mr. Potter's and Mr. Colpitts' rights to a trial within a reasonable time were not infringed.

(3) The trial judge did not err with respect to the evidence of Ian Black. The trial judge's mid-trial ruling did not improperly admit Mr. Black's evidence as lay opinion evidence; as he had not yet heard that evidence, he did not make a conclusive determination. Mr. Potter's and Mr. Colpitts' objections to Mr. Black's evidence during the trial were addressed; they have not pointed to any particular objection where their concerns were not resolved. The record also demonstrates Mr. Black's work product (spreadsheets) was admitted into evidence with Mr. Potter's and Mr. Colpitts' tacit consent. Mr. Black did not give lay opinion evidence at trial. His evidence constituted a factual overview

of the investigation. Finally, the trial judge did not err in his use of Mr. Black's evidence. He independently assessed the evidence, including the emails introduced through Mr. Black's testimony, and drew his own inferences and conclusions.

(4) The trial judge did not err with respect to Langley Evans' evidence. He correctly applied the test from *Mohan*/*White Burgess* for qualifying an expert and admitting expert evidence. His determination Mr. Evans was an objective and unbiased witness who conducted an independent, reliable analysis was firmly supported by the record. Mr. Potter and Mr. Colpitts failed to point to any evidence suggesting otherwise. The trial judge also did not err in his use of Mr. Evans' evidence. He was entitled to determine that Mr. Evans' mistakes in his report, including incorrect margin calculations, were insignificant and that, in this case, Mr. Evans did not need to assess order information to provide a reliable opinion on market manipulation. The trial judge also did not surrender his fact-finding role; he considered Mr. Evans' evidence in the context of all the evidence and determined the issues for himself.

(5) The trial judge did not err with respect to the out-of-court statements (the contemporaneous emails) of co-conspirators. Mr. Potter's and Mr. Colpitts' argument that the judge neglected to meaningfully assess the necessity and reliability of the hearsay email communications is rejected. Necessity may be found by focusing on the availability of the testimony. The Crown was not required to call the declarants as witnesses. Like intercepts and other written communications, the emails were inherently reliable. The trial judge's threshold determinations on necessity and reliability are entitled to deference. Mr. Potter's and Mr. Colpitts' attacks on the trial judge's assessment of the ultimate reliability of the emails also do not withstand scrutiny. There was no evidence before the trial judge that the declarants in the email communications may have been untruthful. The emails resonate with candour and spontaneity. They only support one interpretation. The trial judge also properly

applied the three step test from *Carter* to admit the emails under the co-conspirators' exception.

(6) The guilty verdicts for conspiracy were reasonable. The trial judge determined Mr. Potter and Mr. Colpitts were guilty of conspiracy to affect the market price of KHI shares with intent to defraud after an exhaustive review of the leading case authorities, an application of the correct legal principles, and a comprehensive and logical examination of the vast amount of evidence before him. He looked at the emails which disclosed an agreement to unlawfully influence the KHI stock price, the trading activity in KHI shares as disclosed by the Match Trade Report, and the relationship between the emails and the Match Trade Report. He considered the testimony of the Crown's market expert, Langley Evans, explaining how the market operates and the manipulative techniques that can be used to distort it, and the testimony of others. The evidence established beyond a reasonable doubt Mr. Potter, Mr. Colpitts, and their co-conspirators acted in concert to pursue a common objective, affecting the market price of KHI shares through fraudulent means. In the face of the evidence accepted by the trial judge, it is not enough for Mr. Potter and Mr. Colpitts to assert on appeal that their market activities were lawful. There was no credible or reliable evidence before the judge that supported those claims. The trial judge's determination that Mr. Potter and Mr. Colpitts were participants in an agreement to commit an unlawful act was firmly anchored in the law and facts.

(7) The guilty verdicts for fraud on the public market were reasonable. This case turns on the facts the trial judge diligently reviewed. What the trial judge heard from witnesses and saw in the documentary record was evidence of the unlawful nature of Mr. Potter's, Mr. Colpitts', and their co-conspirators' market activities during the indictment period—market domination, sales suppression, high closing, parking stock, use of nominee accounts and incentives, non-disclosure of material information—all in the service of propping up the KHI share price with the intent to defraud. The evidence the trial judge accepted as credible and reliable supported his

conclusion the *actus reus* and *mens rea* for fraud on the market had been proven beyond a reasonable doubt. The email communications taken together with the trading in KHI stock provide incontrovertible proof of the deceitful nature of Mr. Potter's and Mr. Colpitts' conduct, their intention to defraud, and the effect their conduct had on the market price of KHI shares. There was a direct causal relationship between their dishonest acts rigging the market and the risk of financial deprivation to the investing public.

(8) The trial judge did not misapprehend the evidence. The evidence showed normal market forces of supply and demand were displaced by manipulative techniques resulting in the artificial inflation of the KHI share price throughout the indictment period. Mr. Potter and Mr. Colpitts accomplished this by not disclosing material information that would have been important for investors to know (deceit), directly lying to investors (falsehood), and utilizing manipulative strategies in a highly regulated industry (other fraudulent means). Nor did the trial judge misapprehend the defences advanced. It is irrelevant whether Mr. Potter and Mr. Colpitts complied with certain disclosure requirements of the securities industry. KHI stock was purchased by investors who had no idea the share price was being rigged. Financial institutions loaned money on margin against the apparent value of the stock in complete ignorance of the co-conspirators' exhaustive efforts to buoy up the share price. There is no such thing as a "fiduciary duty" defence to fraud. Corporate obligations cannot be used to shield criminality. The criminal law does not recognize a defence of contributory negligence. The facts that National Bank Financial failed to properly supervise their co-accused, Bruce Clarke, KHI's stockbroker, and had egregiously misconducted itself in the civil litigation have no relevance to the criminal prosecution against Mr. Potter and Mr. Colpitts. The trial judge reached the entirely supportable conclusion that the KHI stockbroker was not providing, nor did Mr. Potter and Mr. Colpitts believe he was providing, market making services. The testimony supporting the lawfulness of the trading activity came from defence witnesses the trial judge rejected as lacking credibility. Mr. Colpitts' submission

that the trial judge gave his defence short shrift is equally lacking in merit. The trial judge reacted to the evidence Mr. Colpitts sought to elicit from witnesses by explaining it was not responsive to the charges. The record confirms the trial judge tried hard to focus Mr. Colpitts and assist him in putting forward his defence. The record is replete with examples of the trial judge's patience, fairness, and restraint.

(9) The conduct of the trial judge did not establish bias nor give rise to a reasonable apprehension of bias. The trial judge was correct in the recusal motions that Mr. Potter's and Mr. Colpitts' complaints, when properly put in context, did not give rise to a reasonable apprehension of bias or establish actual bias. Mr. Potter's and Mr. Colpitts' submissions that the stay decisions were a product of bias or pre-determinations of the outcome of trial are also rejected. They were a product of the trial judge attributing delay, as he was required to do. The trial judge's finding they had adopted a strategy of delay was a conclusion well-founded in the record. The assertion the trial judge's trial management rulings demonstrate bias is also unequivocally rejected. The trial judge, in exercising his discretion, applied the appropriate legal principles. Nor was the trial unfair. The record is clear Mr. Colpitts was not restricted in calling evidence. He simply was required to seek leave to call additional witnesses. He never sought leave. Given the difficulties Mr. Colpitts demonstrated in arranging witnesses, the expectations the trial judge placed on him were entirely warranted. Nor did requiring leave to bring a mistrial application give rise to a reasonable apprehension of bias. A reasonably informed observer would be aware of a trial judge's case and trial management powers in light of recent Supreme Court of Canada direction regarding the court's role in preventing delay. The reasonable person could also not conclude that the trial judge had pre-judged Mr. Colpitts' defence and lacked impartiality. The interjections by the trial judge when Mr. Colpitts was presenting his defence demonstrate the care he took to ensure Mr. Colpitts was well equipped to advance a coherent, responsive defence. Further, the record does not support Mr. Potter's allegation that the trial judge's alleged

lack of impartiality impacted his decision not to testify. Finally, these latter bias allegations were never made to the trial judge. The entire record shows a trial judge who diligently applied his best efforts to ensure a very complex prosecution was heard in a manner that respected Mr. Potter's and Mr. Colpitts' *Charter* rights. Their allegations relating to bias are entirely without merit.

(10) Leave to appeal sentences is granted but the appeals are dismissed. While some bases exist for disagreeing with the trial judge in relation to how he dealt with aspects of the issues, intervention to increase the sentences he imposed has not been justified. An appellate court owes significant deference to sentencing judges. While the trial judge erred in equating the specific intent element of s. 380(2) and the s. 380.1(1)(b) aggravating factor, this error is of no consequence. There is agreement with the Crown that the sentencing range the trial judge identified for s. 380(2) offences—three to six years—is too compressed with an upper end that is too low. However, the trial judge's identification of the range does not amount to reversible error. The Crown has failed to show the sentences were unfit. The sentences imposed took proper account of the gravity of the offences committed by Mr. Potter and Mr. Colpitts and the degree of their moral culpability. The trial judge considered all the significant aggravating factors the Crown emphasized. He did not overemphasize the mitigating factor of delay. He did not err in factoring into the sentencing calculus the professional jeopardy faced by Mr. Colpitts as a consequence of his criminal convictions. He did not err in refusing to find that lawyers convicted of large-scale complex frauds should face a higher sentencing range than non-lawyers. The trial judge undertook a careful balancing of all the factors he was required to consider in crafting proportionate sentences for these offenders. His highly discretionary determination deserves deference.

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Judges:	Bourgeois, Van den Eynden, and Derrick JJ.A.
Appeals Heard:	September 11–13; 16–19, 2019, in Halifax, Nova Scotia
Held:	Conviction appeals dismissed; Leave to appeal sentences granted; Cross-appeals and sentence appeals dismissed, per reasons for judgment of the Court
Counsel:	Brian H. Greenspan, Jane O'Neill QC, and Michelle Biddulph, for the appellant Mr. Potter (respondent on cross-appeal and sentence appeal) Robert Blois Colpitts, appellant in person (respondent on cross-appeal and sentence appeal) Mark Covan, James Martin, and Scott Millar, for the respondent (appellant on cross-appeals and sentence appeals)

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By the Court:

Overview

[1] When Knowledge House Incorporated ("KHI"), a small publicly traded e-learning company, collapsed in 2001 few could have predicted the breadth of the consequences to follow. The financial losses that flowed from its demise may have been contemplated, at least in part, but even those intimately involved in the company likely did not anticipate the waves of regulatory, civil, and criminal proceedings that have rolled through the past 19 years.

[2] For Daniel Potter, KHI's Chief Executive Officer, and Blois Colpitts, legal counsel and Lead Director, their actions led to serious criminal consequences. They were convicted of conspiracy to affect the public market price of shares with intent to defraud (s. 465(1)(c) of the *Criminal Code*[1]) and of affecting the public market price of shares with intent to defraud (s. 380(2) of the *Criminal Code*). The trial judge, Justice Kevin Coady, sentenced Mr. Potter and Mr. Colpitts to terms of imprisonment of five and four and a half years respectively. They appeal against their convictions. The Crown appeals the sentences.

[3] The trial was long and demanding. It spanned more than 160 days, spread over two years. The record before the trial judge was massive. Fifty-seven Crown witnesses testified followed by Mr. Colpitts' 17 witnesses and Mr. Colpitts himself. Mr. Potter called no evidence. Tens of thousands of documents were contained in 184 exhibits. Exhibit 1 alone contained 5,672 electronic documents consisting of financial documents, reports, market analysis, and over 800 communications between the parties. As we will outline later, there were numerous pre-trial and mid-trial applications that produced a multitude of decisions on a broad range of issues. The trial judge's reasons giving rise to the convictions are contained in 715 paragraphs.

[4] Mr. Potter and Mr. Colpitts contended their activities were legitimate and consistent with their corporate responsibilities. However, the trial judge did not see it that way. He found the defendants engaged in manipulative strategies to artificially maintain the KHI share price. He was satisfied the conduct purported to be lawful was unlawful and that the Crown had established guilt beyond a reasonable doubt.

[5] On appeal, Mr. Potter and Mr. Colpitts launched a wide sweeping attack. In an appeal hearing lasting seven days, Mr. Potter and Mr. Colpitts advanced a litany of missteps and misdeeds that they say ultimately led to improper convictions. They fault the police for the delay in investigating and laying the charges. They fault the Crown for the delay incurred due to the approach they took to advancing the prosecution. They fault the trial judge for allowing improper evidence to be introduced at trial, and then improperly relying on it. They say the trial judge did not understand the defences they were attempting to put forward, and further fault him for allegedly demonstrating "sustained animosity" and bias towards them. In short, they assert their defences were valid and their trial was unfair.

[6] This is an appeal. Not a retrial. Mr. Potter and Mr. Colpitts must establish the trial judge erred. However, despite stridently proclaiming they were at the mercy of a biased judge and denied a fair trial, Mr. Potter and Mr. Colpitts have not substantiated their claims.

[7] Our review of the record reveals a diligent trial judge focused on ensuring the prosecution was heard in a manner that respected Mr. Potter's and Mr. Colpitts' rights, the rules of evidence, and the applicable substantive law. In the following reasons, we explain why Mr. Potter's and Mr. Colpitts' complaints lack merit, and why their appeals against conviction are dismissed.

[8] As for the sentences imposed, the Crown says they are demonstrably unfit, and the circumstances of the offences warrant longer periods of incarceration. Sentencing is a highly individualized exercise. As an appellate court, we owe deference to the trial judge's weighing of the relevant sentencing factors. We should intervene only if he exercised his discretion unreasonably and are also satisfied the sentences are demonstrably unfit.

[9] We grant leave to appeal but dismiss the sentence appeals. In our reasons, we explain why there is no basis to justify appellate intervention.

The Origins of KHI

[10] KHI was founded in 1984 by Dr. Bernard Schelew for the development of medical education software. Known then as Knowledge House Publishing Limited, in 1988 it obtained a listing on the Montreal Stock Exchange. Mr. Potter was a member of the Board of Directors.

[11] In 1998, Mr. Potter took a controlling interest in KHI and resigned from the Board. Mr. Colpitts, legal counsel to KHI, took Mr. Potter's seat. Mr. Potter had a

transformative vision for KHI. As the trial judge noted, it was to transition the company to "a learning, performance support and information technology company" that would be instrumental in the "complete overhaul of the K-12 and post-secondary education system through the introduction of collaborative, problem-based learning programs".[2]

[12] Although a pure e-learning company was the ultimate objective, the initial business model was as a provider of school technology infrastructure. KHI had an impressive start, acquiring Nova Scotia companies with lucrative government contracts to supply computer hardware, software, warranty support, and installation services to a K-12 public education system. A business incubation centre and a distance learning centre were also absorbed into the KHI fold.

[13] The initial contracts extended to early 2001 and provided KHI with a revenue stream. KHI also raised significant capital in 1998 and 1999 through a limited partnership offering ("KHLP"). Various profitable contracts were signed in late 1999 and early 2000 for partnerships in the private and public sector for technology and services.

A Summary of the Evidence Relied on by the Trial Judge

[14] Despite the legitimate business activity being undertaken by KHI, according to the trial judge, there was rot at its core. He accepted the Crown's allegations that, during the period of January 2000 to August 2001, Mr. Potter, KHI's CEO, and Mr. Colpitts, KHI's lawyer, conspired with Bruce Clarke,[3] the company's stockbroker, and others, including a number of KHI principal shareholders, to fraudulently maintain the share price of KHI stock at artificially high levels. The unindicted conspirators were a group that included Calvin Wadden, Raymond Courtney, Ken MacLeod, Bernard Schelew, Eric Richards, and Stephen Wilsack, amongst others. The Crown's witnesses included Steven Clarke, Bruce Clarke's son, who worked in his father's brokerage business, and Gerard McInnis, KHI's Senior Vice-President Finance and Accounting, who each were found to have played instrumental roles in the conspiracy.

[15] The Crown alleged the conspirators used a variety of manipulative techniques that included: buy-side domination of the market; sales suppression of stock; high closing the stock; the use of incentives to induce the purchase or suppress the sale of stock; parking stock; the use of an account owned by Mr.

Clarke—the 540 account—to buy stock; and the non-disclosure of material information. The trial judge noted the Crown's allegation that the techniques were employed "to maintain access to credit sources, to entice new investments and to protect the defendants' personal net worth".[4]

[16] During the indictment period a core group of conspirators did the heavy lifting, including purchasing significant amounts of KHI stock using various techniques and suspect accounts. According to the trial judge, Mr. Potter, Raymond Courtney, Calvin Wadden, Ken MacLeod, and Bernard Schelew schemed and maneuvered to keep up the appearance of a company performing strongly in the market. (The trial judge's references to "suspect accounts" related to accounts "connected to the alleged conspiracy".[5]) Mr. Colpitts was instrumental in assisting these efforts and Bruce Clarke ensured the conspirators' instructions were carried out.

[17] Mr. Potter and Mr. Colpitts challenged the case against them by asserting their activities had been lawful and the Crown's evidence deficient and unreliable. They argued unsuccessfully against the admissibility of the evidence the trial judge ultimately relied on to convict them – the evidence of an RCMP investigator, Ian Black; the Crown's market expert, Langley Evans; and the contemporaneous communications amongst the conspirators. These emails were admitted into evidence as admissions by Mr. Potter and Mr. Colpitts and otherwise under the co-conspirators' exception to the hearsay rule.

Ian Black

[18] Ian Black was a significant witness for the Crown. The trial judge described his evidence as follows:

> [317] Ian Black is an RCMP investigator who, at the time of the investigation, had 23 years of investigative experience, nine of those exclusively in commercial crime investigations. He was also a licensed investment advisor and worked in the industry for three years. Mr. Black was tasked by the RCMP with preparing a buy and sell analysis for KHI shares for the relevant period. Mr. Black relied on the Match Trade Report, trading information from the TSX, monthly portfolio statements, e-mails from KHI servers, and witness interviews. The end result of his efforts is Exhibit 62 – a binder with 31 tabs containing spreadsheets and charts analyzing the trading in KHI from January 2000 to August 2001.[6]

Langley Evans

[19] Langley Evans was the Crown's market expert. At the time of trial, he was

> … the manager of the Special Investigations Unit at the British Columbia Securities Commission. He is a chartered accountant who has been employed as a regulator in the investment industry since 1984, primarily with the Vancouver Stock Exchange and then with the British Columbia Securities Commission. He has held positions in investigations, enforcement and regulation, both in the field and in management. …[7]

[20] The report prepared by Mr. Evans for trial stated that its purpose was

> … to review the market for the securities of Knowledge House Inc. (KHI) between December 1999 and September 2001 and assess whether or not trading or the other related activity created or resulted in artificial prices for the securities of KHI.

[21] Mr. Evans' report indicates the conclusions he reached. The "Group" he referenced included Mr. Potter and Mr. Colpitts, amongst others:

> In summary, general market trends and disclosed operating results for KHI are not sufficient to explain or support the trading price of KHI during the entire period reviewed.
>
> It is my view that the Group, through their trading and other actions, maintained the trading price KHI securities on the TSE [Toronto Stock Exchange] at artificially high levels for most of the period reviewed.
>
> I believe that the trading patterns and other actions by the Group were too consistent over time to be explained by coincidence, incompetence or bad luck.
>
> The Group's trading and other actions had a cumulative effect on the price of KHI shares over the period, and that effect became material starting in approximately May 2000. From that point forward through to August 16, 2001, the Group's actions had an increasing impact on the trading price of KHI and maintained the price at artificially high levels.
>
> The Group's actions resulted in a misleading appearance of strength of the KHI market from approximately April 2000, and from that point forward, resulted in numerous trades on the TSE at prices that were artificially high by a material amount.

The Match Trade Report

[22] Although Mr. Potter and Mr. Colpitts are not arguing the Match Trade Report was inadmissible, Mr. Potter has tried to diminish its significance by calling it "a limited snapshot of market activity". He says that, "[i]n a case alleging market manipulation and artificial pricing, it is imperative to review all market activity,

not just executed trades". The defence led no evidence at trial to support this assertion.

[23] Mr. Black and Mr. Evans referred in their testimony to the Match Trade Report, which was described by the trial judge:

> [335] A match trade report is a tool used by regulators and criminal investigators to track the trading in a given security over time. The Match Trade Report for the KHI investigation was prepared by Mehran Shahviri, a senior investigator for the Ontario Securities Commission who has worked in the securities field for over 25 years.
>
> [336] Both Mr. Shahviri and Langley Evans testified and were cross-examined on the creation of the report, its uses, its strengths, and its limitations. Mr. Shahviri explained that the MTR is the product of a match trading software program that combined stock exchange data with broker data to generate a historical record of the trading in KHI. Once the software generated its initial report, Mr. Shahviri did an independent analysis of the broker data to verify the results, making amendments where the software failed to make associations that it ought to have made. Several years after completing the report, Mr. Shahviri did a "final check" that involved reviewing the monthly statements of suspect account holders – where available – to confirm the trading volumes reported in the MTR and on the TSX.
>
> [337] The finished product admitted at trial is a 417-page trade-by-trade listing of every transaction of KHI stock that took place on the TSX between December 6, 1999 and August 21, 2001. For each trading day, columns on the left side – the "Buy Side" – identify the brokerage firm, the client who bought the stock and the quantity of the stock. The centre columns identify the total number of shares traded according to the TSX data, the time of the trade and the share price.[8]

The Contemporaneous Communications

[24] Evidence about the activities of the conspirators emerged from the testimony of a handful of witnesses but was primarily presented by the Crown through a considerable volume of contemporaneous communications. As the trial judge said:

> [61] The Crown called evidence from only two of the above conspirators: Steven Clarke and Gerard McInnis. Mr. Colpitts testified on his own behalf and called evidence from Bernard Schelew and Shirley Locke. While the defendants take issue with the Crown not calling additional co-conspirators, the Crown makes no excuses for that decision. The Crown relies on the co-conspirators exception to the hearsay rule to introduce contemporaneously-made correspondence between the alleged co-conspirators in 2000-2001. The Crown views the correspondence as more reliable than what the conspirators might say in

> oral testimony. After all, these exchanges were made over 15 years ago and the human memory may not be able to recover the detail outlined in the correspondence. There is also the danger the conspirators might not be forthright given their status as unindicted co-conspirators. Furthermore, if the defendants felt that any of the individuals who were not called had information friendly to the defence, they had the option of calling those individuals.[9] [Footnote omitted]

[25] Only some of the communications required the application of the co-conspirators' exception to the hearsay rule. The Crown explains in its factum:

> … [T]he words of Mr. Potter and Mr. Colpitts were sufficient to ground a conviction. Their words are clear admissions. There is no need to "interpret" what they said. Their words were contemporaneous and inherently reliable. Reliability was established through a detailed examination of the internal and external consistency of those communications over 21 months; consistency with witness testimony (such as Gerard McInnis); consistency with trading activity reflected in the MTR and their own account statements; and consistency with the body of all the evidence establishing the core theme of controlling the market. It is an evidentiary juggernaut, laid out in detail in Justice Coady's decision. [Footnotes omitted]

In a Nutshell, What the Trial Judge Concluded from the Evidence

[26] The evidence of Mr. Black and Mr. Evans, and their use of the Match Trade Report and the email communications mined by investigators from various sources, including the KHI servers (the Searchlight emails), were the interlocking pieces of the foundation for the trial judge's findings of guilt. Early in his reasons, he laid out the case against Mr. Potter and Mr. Colpitts and their positions in relation to it:

> [62] The Crown's case against the defendants is built on hundreds of communications, a Match Trade Report ("MTR") containing a historical record of every trade of KHI stock on the TSX during the relevant period, charts and summaries prepared by RCMP investigator Ian Black in relation to the trading of KHI, and opinion evidence from its expert, Langley Evans, who was provided with the MTR and materials prepared by Ian Black.
>
> [63] The defendants do not challenge the authenticity of the communications. They do not deny that the transactions described in those documents and confirmed by other evidence did indeed take place. They disagree, however, with the interpretation the Crown has placed on those communications and transactions, and the intent imputed to the defendants pursuant to that interpretation. According to the defendants, everything they did was legal and consistent with standard industry practice for management and insiders of a small-

> cap public company. With respect to allegations of high closing, they say that any illegal activity by Bruce Clarke was done without their knowledge.
>
> [64] The defendants also argue that the MTR – prepared without reference to order tickets or contemporaneous market depth information – does not paint an accurate picture of the market as it appeared to investors at the relevant times. According to the defendants, this deficiency makes the MTR, and the evidence of Mr. Black and Mr. Evans by extension, completely unreliable. In relation to Mr. Evans, they also say that his report was riddled with errors and that his conclusions are based on incomplete information. For this reason, they say his evidence should be rejected in its entirety.[10]

[27] The trial judge rejected Mr. Potter's and Mr. Colpitts' arguments about the reliability of Ian Black, Langley Evans, and the MTR. He did not accept what they said about the emails, and Bruce Clarke as a rogue broker. He found the Crown had established beyond a reasonable doubt Mr. Potter and Mr. Colpitts were involved in a conspiracy to manipulate the market price of KHI shares using a variety of techniques, including market domination,[11] sales suppression,[12] and high closing.[13] He was satisfied they also failed to disclose material information about the true nature of the trading activity. He held:

> [712] All of these activities constitute "fraudulent means" in a regulated securities market like the TSX. I find that each of the defendants knowingly undertook these activities and subjectively appreciated that their conduct could have as a consequence the deprivation of another. Their goal was to artificially maintain the KHI stock price while they secured new investors, who, as a result of the defendants' conduct, would be making investment decisions based on a misleading impression of the level of demand for the stock. In other words, the defendants acted with an intent to defraud.[14]

The Key Participants in the Conspiracy

[28] Certain individuals who were found by the trial judge to have become enmeshed in the conspiracy started their relationship with KHI as a result of business transactions:

- Calvin Wadden and Raymond Courtney sold Micronet to KHI. They each received 1.1 million shares (which came in installments over a period of several years), a KHI executive position, and a seat on the Board of Directors. No cash was paid for the acquisition.[15]
- The evidence indicates Mr. Wadden was aware of what the trial judge found to be the conspiracy and, at various times, fully participated in it.

> There were occasions when Mr. Wadden wanted to sell his KHI shares to fund other projects. This created significant conflict between him and the other co-conspirators.[16]
>
> - Mr. Courtney's "primary role in the conspiracy was to buy [KHI] shares off the market".[17]
>
> - Ken MacLeod sold his share in two companies, Silicon Island Art & Innovation Centre ("Silicon Island") and the Centre for Distance Education ("CD-Ed"), to KHI in exchange for shares, an executive position, and a seat on the Board. The trial judge described the Crown's allegations about Mr. MacLeod as a "core member" of the conspiracy: Mr. Potter, Mr. Colpitts, Mr. Clarke, and Mr. Wadden used him "as a primary source" for alleviating sell-side pressure on KHI stock by using his account, FutureEd.com, for share purchases.[18]
>
> - Stephen Wilsack sold his share in Innovative Solutions to KHI in exchange for shares. At the request of other co-conspirators, he bought KHI shares on the market at escalating prices. He looked for permission before trying to sell any of his KHI shares.[19] (Craig Dunham, a co-owner of Innovative Solutions also sold to KHI but was not part of the conspiracy.)

[29] In time, Dr. Schelew also joined what the trial judge found to be the conspiracy. He held over a million shares when he left KHI. The evidence indicated that when he wanted to start selling his holdings, the conspiracy was revealed to him. This led to him joining forces with the other conspirators to maintain the KHI share price.[20]

[30] In addition to being KHI's broker, Bruce Clarke was also the investment advisor for Mr. Potter, Mr. Colpitts and most of the co-conspirators. In 2000–2001, he worked in the Halifax office of National Bank Financial Limited ("NBFL"). The trial judge described Mr. Clarke's role in the conspiracy as alleged by the Crown:

> [50] The Crown says Bruce Clarke was the broker who implemented the majority of the trading activity in the alleged conspiracy. A broker with access to a public market was an essential piece in the price maintenance scheme. The Crown alleges that he was in the hands of Messrs. Potter and Colpitts and, as such, managed the trading in all NBFL accounts for all of the alleged co-conspirators. It further alleges that his trading in these accounts dominated the buy side of the KHI market, pushing back the sell side which, if left unattended, would have driven down the price of the stock. Much of this buying was conducted through his 540 account.[21]

[31] Mr. Clarke owned a private investment numbered company—2317540 Nova Scotia Limited. It had a margin account at NBFL referred to at trial as "the 540 account". Although historically it had been relatively inactive, the evidence indicated it was infused with cash and securities as part of the conspiracy "to enable it to buy and sell KHI shares".[22] The account, often referred to by the conspirators as "the orderly market account", was used "to manipulate the price of KHI stock on the Toronto Stock Exchange".[23] The trial judge noted the Crown alleged that Mr. Potter controlled the 540 account that was used to purchase KHI shares coming onto the market "while avoiding insider reporting requirements".[24]

[32] The Crown alleged there was another investment advisor involved in the conspiracy. The evidence disclosed that Bank of Montreal Nesbitt Burns' ("BMO NB") Eric Richards was responsible for the investment portfolios of Calvin Wadden, Raymond Courtney, and Steve Tsimiklis, who also had significant KHI investments. Mr. Richards worked with a good friend of Mr. Colpitts, Shirley Locke, who was another investment advisor and branch manager of BMO NB's Halifax office. The trial judge noted the Crown's case included evidence that Mr. Richards "knew there was no market for KHI shares and accepted that any sales must be conducted with the buy side arranged".[25]

[33] The evidence also indicated Shirley Locke "encouraged her clients to buy KHI stock when Mr. Potter and Mr. Colpitts needed someone to 'soak up selling pressure'".[26]

[34] Mr. Colpitts called Dr. Schelew and Shirley Locke as witnesses. They denied being part of a conspiracy to artificially maintain the KHI share price. The trial judge found neither of them to be credible. Their testimony did not square with the evidentiary record, notably the contemporaneous email communications and the trading evidence.

The Email Communications, the Objective Trading Evidence, and the Opinions of Langley Evans

[35] The trial judge's review of the Crown's evidence extends over 200 paragraphs.[27] Our description of the Indictment period relies heavily on the trial judge's narrative, which has not been challenged by Mr. Potter and Mr. Colpitts. They have never denied the trading that occurred or what was said in email communications.

[36] We have not found it necessary in these reasons to review all of the evidence of market manipulation. We describe many, but not all, of the contemporaneous email communications exchanged amongst the conspirators. We have chosen to concentrate on certain emails, the evidence of market trades, and Langley Evans' opinions because this evidence amply proved the charges beyond a reasonable doubt. Additional evidence is mentioned in the discussions of the grounds of appeal.

[37] KHI stock was moved to the TSX on December 6, 1999. On December 1st, Mr. Potter sent an email to Calvin Wadden and Harold ("Hal") Greenwood, then KHI's Director of Finance. Entitled "Share the Future Program", it referred to ensuring that options for employees to buy KHI shares were arranged, as had been promised. Mr. Potter indicated:

> I am initiating a push to create overall increased demand for KHI shares on the market – my personal target is to have an average of 10,000 shares a day trading on the exchange by the end of Jan. 2000.

[38] Shortly afterwards, on the same day, Mr. Potter forwarded the "Share the Future Program" email to Bernard Schelew with the following message:

> From the memo below you'll see that I am working to get the stock to progress to the next level. As part of this process, I will be asking each Director to help facilitate buy-side activity in the stock – it is a good time to do this for our respective friends and network because that stock has consolidated strongly around the $4.00 level and increased activity will tend to bring that up.
>
> In discussing this program with Bruce and David, they advised that Anthony P wanted to sell 200,000 KHI shares – I assume that this may be connected to his investment [*sic*] your new company. I am asking you to help me in our initiative at this time and NOT to put sell-side pressure on the stock at this time. It will fine [*sic*] as we (with your help) find new buyers for the KHI shares, that Tony and anyone else wishing to invest in your company, sell so that they may do so. Right now, however, the emphasis needs to be on the "Goose that lays the Golden Eggs – KHI")!
>
> Please confirm that you can keep Tony's shares from becoming a burden to the efforts I have initiated with David, Bruce and others to have the KHI stakeholders work together and support the company in this initiative.

[39] The "Share the Future Program" email was also forwarded on December 1, 1999 to others including, Bruce Clarke, Ken MacLeod, Blois Colpitts, and again to Calvin Wadden.

[40] The trial judge noted the Crown said this was the start of the conspiracy with these emails showing:

> … Dan Potter's plan to get insiders to purchase stock with the objective of increasing the price. In addition, the e-mail to Dr. Schelew was the first example of Mr. Potter attempting to suppress sales of stock by KHI shareholders.[28]

[41] In an email exchange on December 16th, Mr. Potter and Dr. Schelew spoke about Anthony Phelips' (Tony) 50,000 KHI shares, with Dr. Schelew telling Mr. Potter:

> Nice write-up in Nova Scotia magazine. Lookin' good! I also love the way the stock is moving. What a great thing!
>
> re: Anthony
>
> He has decided to wait until January (for tax reasons) to sell 50,000 shares. Actually, he may not sell KHI at all but may hang in.

[42] Mr. Potter replied:

> Missed you at the KHI party last night – it was great!
>
> I hear you did a fantastic job at Silicon Island last Friday. Thanks a million!
>
> By a copy of this to Bruce Clarke, I'm advising him of Tony's decision. Please ensure that, when his selling intent wells up again, that we have lots of advance notice.

[43] The trial judge indicated the following about the KHI stock in December 1999:

> [70] On December 6, 1999, KHI's first day on the TSX, the stock traded between $4.15 and $4.30. By December 29, the stock reached $6.75 before closing the month at $6.25. For the month of December, 353,752 shares of KHI crossed the Exchange. Suspect accounts purchased 23,300 of those shares.[29] [Footnote omitted]

[44] In January 2000, trades in KHI shares involving KHI insiders and Bruce Clarke led to 10,000 shares trading on 13 of 20 trading days that month. The trial judge noted Mr. Potter's December 1st plan was working.[30]

[45] A February 25, 2000 email from Mr. Potter was an indication of his role in managing how KHI shares hit the market. Gerard McInnis was tasked with advising Stephen Wilsack and Craig Dunham how to arrange paying off their shareholder loans with KHI, loans that had arisen as a result of purchase

adjustments from the acquisition by KHI of their companies. The email Mr. McInnis sent was copied to Mr. Potter and Mr. Wadden and said:

> Spoke with Andrew Burke today and he asked for you each to contact him regarding making arrangements for you to take possession of the shares we released from escrow to allow you to pay off your shareholder loan. (Andrews [*sic*] number is [*]). I had recommended that you deliver the shares to Bruce Clark [*sic*] at National Bank who would hold them in trust, sell them into an orderly market and forward proceeds to us. If you choose to use your own broker we will allow this, however we still request you co-ordinate the sale with Calvin so they can be sold in an orderly manner as to not disrupt our market position.

[46] Mr. Potter reacted strongly to Mr. McInnis' suggestion that Mr. Wilsack and Mr. Dunham could choose to use their own broker to sell the shares:

> Sorry for the back seat driving but we should insist on Bruce doing the selling!

[47] This led to Mr. McInnis hastily amending his instructions:

> I apologize for flip-flop on this one…but upon speaking with Dan again he was more insistent on having you deliver the shares to Bruce Clark [*sic*] and have Bruce manage the selling transactions. I would be pleased if you would honor this request.

[48] The trial judge described how the Crown saw this as fitting into Mr. Potter's hands-on role in the conspiracy:

> [77] The Crown says this was an early example of a pattern throughout the indictment period of Dan Potter convincing or requiring shareholders to place their shares with Bruce Clarke so that the defendants, through Mr. Clarke, could effectively control the trading of KHI stock. In other words, to the greatest extent possible, no one was going to sell KHI shares without the defendants' knowledge and approval.[31]

[49] The trading in KHI shares in February 2000 closed the stock at $6.60. Bruce Clarke's personal expenditures on KHI stock was described by the trial judge as "staggering":

> [84] During February 2000, 348,069 KHI shares crossed the Exchange. Suspect accounts purchased 63,000 shares. From February 2 to February 11, the Clarke joint account and the Bruce E. Clarke account spent a combined $253,475 acquiring KHI shares. Accordingly, for the months of January and February 2000, Bruce Clarke personally spent a staggering $431,755 acquiring KHI shares (without accounting for commissions). In terms of the share price, the stock

> closed on February 1 at $7.25, the highest price it would reach for that month. The price dropped through the month and closed on February 29 at $6.60.[32]

[50] As the trial judge noted, March 2000 was significant for two reasons: the 540 account was loaded with shares (from Calvin Wadden) and cash (from Mr. Potter) so it could start buying shares, and the "tech bubble" burst. The significance of each development was considered by the trial judge.

[51] The "loading" of the 540 account increased its purchasing muscle from just over $13,000 to more than $1.6 million. This equipped the account with robust purchasing power:

> … With KHI's margin requirement of 50%, the 540 account acquired $850,000 in loan-value-based buying power and immediately started buying KHI stock.[33]

[52] It was Langley Evans' opinion that the 540 account was a nominee account[34] utilized for stock manipulation purposes by the group to which Mr. Potter and Mr. Colpitts belonged:

> [87] According to the Crown's expert, Langley Evans, the 540 account was clearly a nominee for the control group. He wrote, at para. 106 of his report:
>
> > Clarke's status as a registered broker, combined with the receipt of assets from KHI insiders and associates coincident with the start of heavy KHI trading activity by the 540 account … lead me to the opinion that the 540 account was a nominee for the Group. The activity in the 540 account in the following months is also consistent with playing a nominee role in the Group's trading. All these factors surrounding the 540 account are indicators consistent with a manipulative agenda. Clarke appears to be a fully knowledgeable and willing participant in the Group's agenda.[35]

[53] The trial judge noted the 540 account was just getting out of the gate when the "exuberant" tech market crashed. Technology stocks suddenly lost their lustre, which threatened to impact the KHI share price. This put "tremendous pressure on KHI insiders to keep the stock price from plummeting like so many others had".[36]

[54] Despite the adverse developments in the tech market, KHI shares did very well in March 2000. At the end of the month the stock closed at $8.40. Suspect accounts (including an account controlled by Mr. Potter, and Bruce Clarke's joint account) spent nearly $740,000 buying KHI shares. $500,000 was spent by the 540 account alone.[37] Langley Evans viewed the March trading by the 540 account as "suspicious":

> The early trading by the 540 account is fortuitous. Between March 3 and March 24, the 540 account accumulates over 30,000 KHI shares at prices between $6.35 and $6.75. KHI released encouraging financial results on March 23. The market responded favourably to these results and price for KHI shares increased significantly. From March 28 to 31, the 540 account is a net seller of several thousand shares at prices ranging from $7.35 to $8.75.
>
> This trading is suspicious. Given that the trading immediately precedes the favourable announcement of company profits combined with Clarke's association with insiders of KHI, the activity raised the prospect of illegal insider trading (i.e. trading with knowledge of undisclosed material information).

[55] Not everyone had a positive impression of KHI's stock. Eric Richards joined BMO NB in April 2000 and wanted to bring with him several heavily margined client accounts (Calvin Wadden, Raymond Courtney, and Steve Tsimiklis) with concentrated holdings in KHI. As a result, Bruno Falvo, a member of BMO NB Risk Management Group, took a look at the company's trading. Mr. Falvo was a Crown witness at trial. He described the KHI stock as very illiquid, trading at only 3,000–10,000 shares per day. (It was Mr. Falvo's evidence that stock would not qualify as liquid unless it was trading at least 100,000 shares per day.)[38]

[56] Mr. Richards' client accounts could not be transferred without review and approval by the Risk Management Committee. Mr. Falvo reported to the Chair of the Committee who indicated to the BMO NB Halifax office that "due to the limited liquidity, BMO NB should contemplate granting no loan value on KHI".[39]

[57] The trial judge described the trading in April 2000:

> [96] The stock opened on April 3, 2000 at $8.55, the high price for the day, and closed at $7.60. For most of the month, it traded between $7 and $8, but by April 25 had dropped back down in the $6.00-$7.00 range. On April 28, with significant buying by the 540 account, the stock closed at $7.20.
>
> [97] By the end of April, the effects of the tech crash were becoming apparent. The number of shares crossing the Exchange was 290,775, a 60% drop from the previous month. The 540 account was a heavy purchaser, spending over $1 million buying KHI shares. The Clarke joint account spent $5,086. Together, these accounts purchased just under half of the KHI shares that crossed the Exchange.[40]

[58] In early May, there were signs of disharmony in the KHI group. Calvin Wadden emailed Dan Potter on May 4th, copying Raymond Courtney and sounding peeved:

> I had an opportunity [*sic*] talk with Ray about our stock and the issue of supporting the market. Ray is not prepared to place more than $100,000 in an account to support KHI until he at least has an opportunity to sell some of his existing stock. I have to agree with his position since we have both used our KHI stock as security to purchase more stock in the market. I am comfortable with the same arrangement if you are in agreement.
>
> In the meantime I would like to make arrangements to free up the 220,000 shares Bruce holds at National Bank. To be honest Dan I wish someone told me before $1.1 million of KHI stock was purchased using this as security. I am quite willing to do my part but I would like to have a [*sic*] been kept in the loop.
>
> As I told you and Ray in April I have committed to my partners to support the company and not place pressure on the market but I fully expect that if opportunities arise to sell stock we are the three people to be offered the sale first. It has been my position for some time that I will need to sell stock by the end of June. I am still working under these timelines.

[59] Mr. Potter responded on May 5th:

> In relation to being "kept in the loop", as far as I'm concerned, you've been able to be just as much in the loop as I have, and, if you are in any way implying that Bruce or I have done something that you do not or did not agree with, I say it comes as a total surprise to me! As far as I know, you talk to Bruce as much as I do, or at least I assumed that you were doing so as part of your investor relations role.
>
> In any event, let's focus, as always, on working together to problem solve, both the freeing up of your 220,000 shares and the sale of some of your shares (how many?) by the end of June! I'll give some thought to some alternatives and get back to you.

[60] As promised in his email, Mr. Potter got back to Mr. Wadden (with a copy to Mr. Courtney) later on May 5th with a proposal to be effected through Bruce Clarke's "orderly market" account, that is, the 540 account. Mr. Potter also laid out an idea that would control the one million shares Mr. Wadden received from the sale of Micronet and eliminate "market pressure over the coming months":

> I greatly appreciate your attitude and desire to keep things smooth as you transition – it's certainly critically important for all KHI shareholders!
>
> My suggestion for you to think about re Bruce's "orderly market" account is that you, Ray and I should each support it equally, with 100,000 KHI shares and no cash. I've spoken to Ray about this and he agrees. Over to you to think about it. I [*sic*] would be good to get it done next week – you could free up 120,000 shares in the process!

> Another thing to think about is the potential for further share sales by you. The "win-win" I'd be looking for here is that you get liquidity while at the same time the shares get put in long term hands so there will be no market pressure over the coming months. In this regard, it would be good if you'd consider giving us the right to try to place, say 1 million plus of your holdings over the next, say, three months. To make this feasible, you'd have to be willing to agree to a sale at current levels (like a three month option concept) to give us the leveage [*sic*] to shop them around without chasing the market fluctuations on news, etc. The understanding here would be that the shares would be attractively enough priced compared to market to get potential buyers (like our German friends who continue to express strong interest) to take a substantial position. Similarly, we'd need price stability in order to effect a secondary offering type of placement of a substantial number of shares through the services of Bay Street investment bankers, such as RBC DS (by the way, Gerard and I have a conference call with RBC tomorrow – they seem very interested still!)

[61] Mr. Wadden accepted the proposal, telling Mr. Potter he was committed to helping "support the stock and continue to promote KHI". As for placing his one million shares "in long term hands so there will be no market pressure over the coming months", Mr. Wadden indicated he wanted "to keep this amount and be considered a strong supporter of KHI going forward".

[62] Mr. Potter was content with the resolution. He expressed hope about new investment—the "German folks"—on the horizon:

> Re your investment intent, I think it's great that you're a believer and that the three of us agree to sell in "lock-step" in the future!
>
> Now, we'll have to turn our attention to the near term sales! I'm hoping the German folks may be part of the answer here. We'll keep our fingers crossed. Also, we'll continue working on the other components as well – the brokers, institutional buyers, Intel Capital, etc.
>
> In relation to the orderly market account, by a copy of this to Ray, I'm asking him to forward a certificate for 100,000 KHI shares to Bruce – I'll do the same. Once they are in place, we'll get Bruce to get 120,000 out to you.
>
> I really like doing business like this – keeping this kind of spirit of co-operation and partnership going will contribute greatly to our mutual success over the years!!

[63] The German investment was materializing by late May. Mr. Potter emailed Gerard McInnis, with a copy to Mr. Colpitts, to say:

> A German investor group led by Mr. Michael (Ben) Barthe is interested in investing a minimum of 500,000 treasury shares of KHI.

> His group is willing to make a long term commitment to hold the stock, but wants a discount of 20% to the current market. …

[64] The trial judge noted the trading volumes for May:

> [102] Trading volumes in May dropped a further 65%, with only 104,805 KHI shares crossing the Exchange. The 540 account was a constant buyer, spending $285,149 to purchase 39.1% of the total shares traded. The share price remained fairly stable with the stock trading between $6.50 and $7.25 before closing the month at $6.90.[41]

[65] The 120,000 shares referred to by Mr. Potter in the May email exchange with Mr. Wadden were forwarded to Mr. Wadden in June from the 540 account. The transaction was orchestrated by Mr. Potter, as described by the trial judge:

> [103] On June 6, 2000, Dan Potter arranged for Calvin Wadden to get his 120,000 shares back from the 540 account. He e-mailed Bruce Clarke authorizing the transfer of 120,000 shares from the account of 3020828 Nova Scotia Limited, an account owned by Mr. Potter. Bruce Clarke followed up with a letter to Calvin Wadden, copied to Dan Potter confirming that 120,000 of the 220,000 shares Mr. Wadden loaned to the 540 account in March were being returned to him, and that 100,000 shares remained in the account.
>
> [104] According to the Crown, the fact that Dan Potter used his own shares to replace the shares that Mr. Wadden had loaned to the 540 account is clear evidence that Mr. Potter controlled the 540 account and was aware of everything it was doing.[42]

[66] In early June, Stephen Wilsack wanted his share certificates that were at the law office where Mr. Colpitts was a partner, Stewart McKelvey. He emailed Gerard McInnis with this request. Mr. McInnis referred to Mr. Wilsack's shareholder loan and endeavoured to dissuade him from selling, saying:

> … You have had sufficient shares released to allow for proceeds to paydown the loans. Dan does not want to see any more pressure on the stock (sell side) if possible until Sept. However, if you need to sell more to raise the needed cash we would ask you co-ordinate with Bruce Clark [*sic*]… .

[67] As the trial judge noted, Mr. Wilsack was "clearly unhappy with this response"[43] and emailed Mr. McInnis on June 8th to say so:

> On a related note, I will co-ordinate with Bruce as much as possible the sale of shares to pay off this debt. As for the release of the rest of the stock, I may have to sell some stock due to my present financial situation and a renovation project I already started. At no time was there a mention of a condition about holding the

> stock until September as part of my settlement. As of yesterday, this was the first mention of this. I will also need funds for a source of income for the short time period.
>
> When I drop of [*sic*] the final amount of $141,475.50, (planning next week). I will pick up the balance of my share certificates.

[68] The matter did not end there. Mr. McInnis emailed Mr. Wilsack on June 14th:

> Can you advise status from your end. I understand Eric has sold your shares into market already so you have raised the cash for repaying the loan. Is the only o/s matter from your end the timing of release of balance of shares from escrow? Is this chicken and egg in your mind or can I still expect payment this week. I know Dan has concerns about the timing of sale of the balance of your shares and he asked to speak to you directly if you have a problem waiting until the fall. …

[69] An email from Mr. Wilsack to Mr. Potter on June 18th indicates Mr. Potter had sorted the problem out:

> Thanks for KHI update today. Your deck is quite relaxing too!! As always I enjoyed our chat . . . . . Further to our conversation regarding my shares, I will set up an account with Bruce this week. I plan to settle my outstanding balance with KHI with a stock exchange. I will work with Bruce with any further liquidation of stock until the end of September. At that time, I have the option of transferring my stock to another broker or continue on with Bruce. …

[70] In an email to Mr. Wilsack later on June 18th, Mr. Potter confirmed their agreement:

> … I'm confirming our agreement that KHI will release your shares from escrow immediately on the understanding that you will put the shares in a new account you will open with Bruce at National Bank Financial and dispose of them only in consultation and agreement with him at least until the end of this Sept. …
>
> We also agreed that the balance of your account with KHI will be paid with the appropriate number of the released escrowed shares at $7.00 per share.
>
> What a great win-win way to work together!

[71] The trial judge described the significance of Mr. Potter's intervention:

> [110] The Match Trade Report shows sales by Steve Wilsack prior to his meeting with Mr. Potter. From the date of the meeting until September, Mr. Wilsack did not sell any more shares, despite his reported high need for cash.

> [111] The Crown submits that the reason Dan Potter did not want anyone selling until September is obvious: he was trying to keep the share price stable in anticipation of the deal with Ben Barthe. To accomplish this, he needed to keep sellers he knew about off the market, while inducing Bruce Clarke and other insiders to buy up as many shares as possible from retail sellers that he could not control.[44]

[72] Other trading maneuvers were undertaken in June. As explained by the trial judge in a section of his reasons entitled "The 540 runs out of buying power":

> [112] During the early days of June, Bruce Clarke, using the 540 account, was a frequent purchaser of shares. But the account only had so much buying power. According to the Crown, when the account was nearing its limit, Mr. Clarke decided to use a client account to buy a substantial number of KHI shares without that client's knowledge and contrary to his instructions.
>
> [113] In 2000, Lowell Weir was the President of Enervision, a public company that had an investment account with Bruce Clarke. Mr. Weir testified that Enervision typically had $600,000 to $700,000 invested in certificates of deposit or GICs. During his direct examination, he explained that Bruce Clarke had encouraged him to invest in public stocks. Mr. Weir agreed, but told Mr. Clarke that he was only interested in liquid, blue chip stocks. The money in the account was the company's working capital and he could not afford any losses. Mr. Weir testified that he was out of town during June, and when he returned, he learned that Mr. Clarke had used the Enervision account to purchase $203,680 worth of KHI shares. He testified that he told Mr. Clarke to stop buying KHI and when he later tried to sell the shares, Mr. Clarke put him off. He did manage to sell some shares in November 2000, when Mr. Clarke used another client account to purchase them. On cross-examination, Mr. Weir clarified that he had understood that some KHI shares would be purchased in June but that it was not going to be all KHI, and not in the numbers purchased.
>
> [114] Mr. Potter's wife's account, the 230 account, was also a heavy purchaser in June 2000. According to the Crown's theory, with the 540 account near its margin limits, the 230 account entered the market and became the primary purchaser for the group. From June 14 to June 29, the 230 account spent $212,355 acquiring shares.[45]

[73] The trial judge summarized the trading in June:

> [115] During the month of June, 157,200 shares crossed the Exchange. Suspect accounts purchased 57.7% of the total shares. Together with the Enervision purchases, the total spent was $611,480. In terms of the share price, the stock closed on June 1 at $6.70. In the weeks that followed, it traded between $6.40 and $7.50, closing at $6.95 on June 30, 2000.[46] [Footnote omitted]

[74] Suspect accounts being referred to above included the 540 account, Mr. Colpitts' account, Bruce Clarke's joint account, and Mr. Potter's wife's account, which he controlled.[47]

[75] By July 2000, Calvin Wadden had decided he wanted to sever his relationship with KHI and sell his shares. He needed Bruce Clarke to return his 100,000 KHI shares but was not getting any traction with him. The trial judge described how Mr. Wadden sought to navigate the impasse:

> [120] In July 2000, the relationship between Calvin Wadden and KHI imploded. Harold Greenwood, a former employee of KHI and a friend of Mr. Wadden, testified that at some point, likely in June 2000, Mr. Wadden told him he wanted to divest his shares and sever his relationship with KHI. Mr. Wadden told him he was becoming frustrated with the direction of the company and with his inability to sell the stock. Mr. Wadden asked Mr. Greenwood to help him, as a friend, to approach Dan Potter about what could be done to sell his shares. When asked whether he told Mr. Wadden to simply go to the market and put in an order to sell, Mr. Greenwood said they discussed it but Mr. Wadden said he was experiencing some difficulty having his orders executed.
>
> [121] Hal Greenwood testified that one of the first things they did was contact Mr. Potter to see if he could help them understand why there was a problem with selling shares. He said there were a number of discussions with Mr. Potter as to what could and could not be done with the shares and that at one point, Mr. Potter told him that all he had to do to stop Calvin Wadden from selling was to make the right phone calls. According to Mr. Greenwood, he and Mr. Wadden eventually decided to hire a lawyer. Dan Potter did not cross-examine Mr. Greenwood on his evidence.
>
> [122] On July 17, Brian MacLellan, a lawyer at Merrick Holm, e-mailed Calvin Wadden confirming his retainer and instructions to enter an agreement to sell Mr. Wadden's KHI shares on the TSX. Mr. MacLellan e-mailed Blois Colpitts the same day and the two lawyers began drafting term sheets for the purchase of Mr. Wadden's shares. As the term sheets evolved, the purchaser was identified as Starr's Point Capital Incorporated, a holding company owned by Dan Potter. The term sheet also contemplated the return to Calvin Wadden of the 100,000 shares he had loaned to Bruce Clarke's 540 account. On July 20, 2000, Mr. MacLellan wrote to Bruce Clarke at NBFL requesting the return of the 100,000 shares. He noted that Calvin Wadden had made similar requests on July 14 and July 17.[48]

[76] While Mr. Wadden's interest in selling his KHI shares was being stymied, Bruce Clarke found a new source of funds for buying stock on the market. As the investment advisor to the "Union account" of Locals 83 and 1392, affiliates of the United Brotherhood of Carpenters and Joiners of America, Mr. Clarke had discretionary control over the account. Contrary to standing instructions based on

investment policies that would have prohibited the purchase of speculative education technology stocks, Mr. Clarke used the account to buy $30,335 worth of KHI stock between July 24th and 26th.[49]

[77] The trial judge noted what Langley Evans said in his report about the Union account trading:

> [125] The Union Local 73 [*sic*] and 1392 Carpenters Welfare Plan had a brokerage account with NBFL (the Union account) for several years. Clarke was the broker for this account and discretionary control over the account. This client appears to have relied entirely on Clarke's advice. This client account fits the profile of an account that could be used to "park" stock.[50]

[78] The trial judge described the trading in KHI shares for July:

> [131] In July 2000, 98,075 KHI shares crossed the Exchange. Suspect accounts were active purchasers, spending over $300,000. From early July until the end of the month, the stock price ranged from $6.30 to $6.90, frequently trading between $6.60 and $6.75. On July 31, the 540 account and the Clarke joint account bought every share on the market and trading closed at $6.70.[51] [Footnote omitted]

[79] Suspect accounts being referred to above included the 540 account, the Union account, Ken MacLeod's FutureEd.com account, Bruce Clarke's joint account, and Mr. Potter's wife's account, which he controlled.[52]

[80] As the trial judge explained, a purchase of $1 million worth of KHI shares by Derek Banks was finessed in early August 2000 with the help of Shirley Locke and Blois Colpitts and the involvement of Mr. Potter. Mr. Banks testified he understood he would be buying the shares from Calvin Wadden and Raymond Courtney in a private sale. On the day of the closing, he learned from Mr. Colpitts that the deal was being done on the TSX through BMO NB with the shares coming from Mr. Potter's pension fund.[53] The 540 account played an active role as well:

> [134] In the days leading up to the Banks transaction, the 540 account was a very active buyer. On July 31, the 540 and the Clarke joint account bought every share that was sold. On August 1, the 540 and the Clarke joint account were the only purchasers, other than the market maker who picked up an odd lot of 105 shares. On August 2, the 540 bought 3,700 out of 5,700 shares. The Crown says this buying activity was intended to keep the price up before the deal closed. The Banks transaction took place on August 3, with Mr. Banks, through his Plastics Maritime account, purchasing 156,250 shares of KHI from Dan Potter's RRSP.[54] [Footnote omitted]

[81] The $1 million from the Banks transaction enabled Mr. Potter to immediately embark on what the trial judge called "a spending spree" purchasing KHI shares, mostly from suspect accounts. 143,800 shares were purchased from August 4th to 18th and almost all the purchases were "at prices higher than the $6.40 paid by Mr. Banks". The highest price paid was $6.75.[55]

[82] Langley Evans commented in his report on Mr. Potter's flurry of purchasing:

> The transactions from August 4 to 18 show a very high level of coordination in trading among the Group accounts. The Potter RSP redistributes the $1 million proceeds received from the Banks transaction by making market purchases of KHI shares from other Group accounts including:
>
> - $300,000 from Courtney
> - $50,000 from Wadden
> - $168,000 from the 540 account
> - $100,000 from Colpitts
>
> The Group accounts eventually benefit from about two-thirds of the proceeds from Banks purchases. The money received by the 540 account and Colpitts accounts is timely because both are at or near their margin limits at the time of these transactions. The rest of proceeds are used by Potter's RSP account to support the KHI market. The transactions among the Group accounts have the appearance of pre-arranged trading, and give a misleading appearance as to the strength of the market during this period.

[83] Meanwhile, Calvin Wadden's problems persisted. He had still not received his 100,000 shares from Bruce Clarke. Blois Colpitts had instructions for how Mr. Clarke was to deal with the issue. On August 4th, in an email to Mr. Clarke and copied to Mr. Potter, Mr. Colpitts drafted the text of a letter to be sent to Mr. Wadden's lawyer.

[84] The trial judge set out the text in his reasons:[56]

> here is the letter to send this morning:
>
> 2317540 Nova Scotia Limited
>
> August 4, 2000
>
> …
>
> Mr. Brian MacLellan, Q.C.

…

Dear Mr. MacLellan,

RE: Calvin Wadden – Knowledge House Inc. – 100,000 Common Share Certificate

Further to your letter of July 20, 2000 to Bruce Clarke and August 3, 2000 to Eric Hicks at National Bank Financial Inc., we are writing by way of response.

We had not responded earlier as 2317540 Nova Scotia Limited had understood that you were in discussions for your client which may have led to substituted security being generated.

As you may be aware the certificate reference in your letter was deposited by your client as security for the margin account of 2317540 Nova Scotia Limited to facilitate market purchasing for the account of 2317540 Nova Scotia Limited.

This certificate is not connected to your clients' margin account at National Bank Financial Inc. and it can only be released when the account can be liquidated or when substitute security is provided.

This was a private transaction between 2317540 Nova Scotia Limited and is not connected to his dealings with National Bank Financial Inc.

Yours truly,

2317450 NOVA SCOTIA LIMITED

BY: Bruce Clarke, President

BC/cc: Eric Hicks, National Bank Financial Inc.

[85] Bruce Clarke sent the letter penned by Mr. Colpitts out under his signature later that same day.

[86] The trial judge described this tactic:

> [585] On August 2, 2000, Brian MacLellan, counsel for Calvin Wadden, sent a letter to Eric Hicks, Mr. Clarke's Branch Manager, demanding the return of the 100,000 shares that Wadden had loaned to the 540 account. Mr. MacLellan wrote to Mr. Hicks only after his first letter to Mr. Clarke had been ignored. On August 4, Mr. Colpitts stepped in, drafting a reply to Mr. MacLellan on behalf of 2317540 NS Ltd. In the letter, Mr. Colpitts wrote that Mr. Wadden had deposited the shares as security for the 540 account "to facilitate market purchasing", that "[t]his certificate is not connected to your clients' margin account at National Bank Financial Inc.", and that:
>
> > This was a private transaction between 2317540 Nova Scotia Limited and is not connected to his dealings with National Bank Financial Inc.

> [586] Mr. Colpitts was not counsel to 2317540 NS Ltd. or Bruce Clarke. During his testimony, he was unable to provide a satisfactory reason for drafting this letter.[57]

[87] Buoying up the KHI stock was being orchestrated like a relay. The trial judge described how Ken MacLeod stepped up in August:

> [139] In August 2000, Ken MacLeod opened a margin account with NBFL called FutureEd.com. On August 17, he e-mailed Bruce Clarke, authorizing him to purchase up to 40,000 shares of KHI "[t]o give you a bit of breathing room on damage control." He e-mailed Clarke again the next day, authorizing another 20,000 to 25,000 shares. From August 17 to August 23, the FutureEd.com account bought 64,000 shares at a cost of $410,710.
>
> [140] The Crown says the timing [*sic*] Mr. MacLeod's buying was deliberate. With the Barthe investment deal soon to close and Dan Potter's $1 million almost exhausted, Mr. MacLeod had to take over buying for the group in order to keep the price up.[58]

[88] Bruce Clarke was relieved to get Mr. MacLeod's order, emailing him on August 17th to say:

> thanks for the order today, we really needed it as we got hit by unknown seller at RBC Securities who sold a total of 45 000 shares very aggressively by hitting any of are [*sic*] bids that we would post.

[89] August 2000 was notable as the start of a pattern of high closing the KHI stock. Purchases made very late in the trading day by Mr. Potter, Mr. MacLeod's FutureEd.com account, and Bruce Clarke closed the stock at prices between $6.40 and $6.50, higher than prices earlier in the same days. The trial judge noted what Langley Evans had to say about this trading:

> [141] … The Crown says these transactions were no coincidence. Langley Evans wrote at paras. 131 and 132 of his report:
>
> > High-closing transactions by Group accounts become a pattern with occurrences on August 18, 21, 22 and 23. These high close transactions occur in four consecutive trading sessions and coincide with final discussions with Barthe on his eventual market purchases. I am of the opinion that these high closes were not a coincidence, and these trades appear to be deliberately setting the stage for the large purchases that follow.
> >
> > In my opinion, the market price of KHI shares would have been significantly lower by August 25, 2000 without the intervention of Group in KHI market during this period. … This activity contributed to an

> artificially high price for KHI and a misleading appearance of the strength of the market for KHI shares. Absent this activity, in my opinion, the KHI trading price would have been significantly lower.[59]

[90] Other trading in August, including the $1.7 million from the German investor, Ben Barthe, who had purchased 250,000 shares earlier in the month, benefitted members of the group who had been propping up the stock. Mr. Barthe's money was used to purchase market not treasury shares even though it was treasury shares he had originally requested. Calvin Wadden got back the remaining 100,000 shares he had loaned the 540 account in March although they actually came to him from Mr. MacLeod's account.[60] The trial judge noted Langley Evans' comments:

> [146] Langley Evans commented on the significance of the change from treasury to market purchases at para. 139 of his report:
>
> > I find it significant that the Potter-led negotiations with Barthe and others directed the purchases to the marketplace where the Group accounts directly benefited from the proceeds. It would have been entirely feasible for these monies to be directed to a private placement of KHI treasury shares, where KHI could have used the funds to run the company. The choice of directing new investment towards market trading and price support instead of financing KHI was later acknowledged by Potter as a mistake in his January 15, 2001 memo to the KHI board.[61]

[91] The trial judge described the trading volumes and share price for August:

> [147] The stock closed on August 1 at $6.60. For the rest of the month, the stock traded in the range of $6.00 to $6.80, closing on August 31 at $6.65. In total, 718,811 shares crossed the Exchange in August. After removing 465,250 shares representing large prearranged transactions rather than true retail trade, the total volume of shares was 253,561. Of that, the suspect accounts purchased 221,500 (87.4%), spending over $1.4 million. Out of 22 trade days, suspect accounts were involved in five alleged high closes.[62]

[92] In September, the 540 account was able to get back in play. This was because it reduced its margin loan[63] significantly with money from a $2 million investment in KHI shares by David Fountain. The trial judge described this landscape:

> [149] During the month of September 2000, 531,516 KHI shares crossed the Exchange. With the 540 account reducing its margin loan by more than $900,000 through the Fountain sale, it re-entered the market as a heavy purchaser, spending

> $462,030. Despite pressure from BMO NB to clear his margin loans, Calvin Wadden bought 10,000 shares at $6.40 per share. The Union account spent $37,866.
>
> [150] Also during September, suspect accounts were involved in alleged high closes on eight out of 20 days (40%). The Crown says these high closes were intended to keep the stock price up while Dan Potter was negotiating a $3.25 million private placement by Ben Barthe and his friend, Dr. Lutz Ristow.[64]

[93] Thomas Purves, David Fountain's broker, testified it was Mr. Fountain's assistant who called with instructions for the share purchase. To Mr. Purves' surprise, Mr. Colpitts was also on the call. He said he had had "no prior experience" with a corporate member of the company whose stock was being traded participating in such a call.

[94] In the fall of 2000, negotiations got underway with German investors, Ben Barthe and Dr. Lutz Ristow, for a private placement investment worth $3.25 million. The trial judge noted Dr. Ristow's testimony about his first meeting with Mr. Potter:

> [152] … [He] wanted them to buy existing shares, but Dr. Ristow refused. He explained that he only invests in treasury shares so that his money goes to the company, rather than into the pockets of existing shareholders.[65]

[95] While negotiations with the German investors were in process, in late October, Dr. Schelew announced his intention to sell 1.3 million KHI shares from November 2000 to March 2001 in allotments of 10,000 shares per week, "so long as it does not put too much downward pressure on the stock".[66] Mr. Potter sent him an email on October 30th, copied to Mr. Colpitts and Mr. Clarke, confirming their conversation that day where they "had agreed that KHI management would take on the job of finding a buyer for Schelew's shares rather than him sending out a letter".[67] As we explain later, addressing Dr. Schelew's plans to divest himself of KHI shares did not unfold as smoothly as Mr. Potter apparently hoped it would.

[96] The trading volumes and KHI share price for October 2000 showed robust activity by the 540 account:

> [155] During October 2000, 147,921 KHI shares crossed the Exchange. The 540 account, the only suspect account buying, was very active, spending $641,447 to purchase 63.4% of the total shares traded. The stock opened on October 2 at $6.70 and closed at $7.00. For the rest of the month, the stock traded between $6.50 (the price offered to the German investors) and $7.10.

> [156] With the Barthe/Ristow deal set to close in November, the high closing pattern increased in October. On 12 out of 21 trading days (57%), suspect accounts were involved in alleged high closes.[68]

[97] In early November, Gerard McInnis emailed Mr. Potter about a variety of finance/investment related issues with the subject line "Wise Counsel required". Mr. McInnis explained concerns about the structure of the deal with the German investors:

> 1. Structure of German deal. Blois has indicated he does not like the terms agreed to with Ben/Lutz and he has suggestions for different structure that would see higher price on shares from treasury and perhaps use of options on individuals shares (Bernie, Calvin, Ray etc at lower prices. Bernie has already offered $6) which could get the Germans to same place with better optics in the public market (ie higher treasury price and no warrants, concern is that need for the warrants indicates current trading price is too high). I tend to agree. By using options from these individuals we are helping to address the overhang problem .. but we are forgoing more cash into treasury (from warrants). Hard to say which is better. No doubt the overhang must be dealt with in order to work in any substantive way to raise market prices so I would tend toward getting these guys out asap. In the interests of time do we want to work on an amended deal with these guys?

[98] In relation to another pending transaction, Mr. McInnis indicated a common understanding about the effect of KHI shares not being kept off the market: "I understand the problem of having KHI shares come to market as we need to eat them".[69]

[99] With the German investment not yet finalized, potential pressure on the stock emerged from Steve Tsimiklis. His interest in liquidity came to Mr. Potter via Calvin Wadden. Mr. Potter responded on November 19th, copying Mr. Colpitts:

> Thanks for the note.
>
> We don't have any liquidity solution for Steve at this moment. However, I'd be pleased to meet with him at, say, 11:00AM tomorrow (Monday) morning at our offices to put a plan together (it would be great and helpful if you could attend as well).
>
> As you know, we are closing on a $3,250,000 treasury issue to our German friends – we are hoping to get this completed (closed) on Mon. or Tues. (Nov. 20 or 21). The price of this issue is $6.50 per share. If the market is driven down in advance of this issue it is quite likely that the investors will not close. This would be most harmful for the company and all of its shareholders, including Steve. Hopefully, he can be convinced to proceed with care, prudence and caution.

[100] An arrangement was reached with Mr. Tsimiklis. It led to the following email exchange between Calvin Wadden and Mr. Potter on November 26th:

> Dan,
>
> I will participate in your plan to provide Steve with the liquidity he requires. I have had quite a few discussions with Steve and I agree that he will sell stock on the market unless he can get the 50,000 shares he requires by Friday.
>
> I am also interested in an agreement between the five of us but I would prefer some form of binding escrow agreement. I would like to see a two year escrow for the stock we were each given for our respective companies and some form of written agreement not to sell more than 5,000 shares per month of any other KHI stock held by the five of us, starting, say April 01, 2001. All sales would be coordinated through Bruce.
>
> The binding agreement would be set up to hold the KHI stock in trust for a term of 24 months expiring January 01, 2003. The more I think about it the more I believe that we should have kept an escrow agreement in place from the very beginning.
>
> I assume from your email that you have committed Bernard some liquidity since you have suggested that he be given the next 100,000 shares after my requirements are met. If that is the case I will agree to your suggestion. I would be looking for a legal agreement that would exclude any other shares being sold outside this exception.
>
> As for the options being written for the sake and placement of 200,000-300,000 shares for Doug Rudolph. As long as the stock being placed is coming from the orderly market account and that the funds will be used to support the retail market, I fully agree.
>
> I also request Dan, that since these terms will be binding for the five of us, that KHI will not provide any further loans or compensation for any of the five people in this arrangement. Compensation for the executive should be based on performance not personal need.
>
> I am sure you understand my request for something binding to ensure we all stand united over the upcoming two years.
>
> I will continue to follow the company and I will be following the trades as they occur. I am interested in working with yourself, Bruce and Blois going forward.
>
> I look forward to hearing from you.
>
> Regards,
>
> Calvin

[101] Mr. Potter was pleased with Mr. Wadden's commitment to their common enterprise:

> Thanks for the thoughtful memo Calvin. This is the kind of thinking and agreement to work together that will bring success.
>
> Regarding the binding agreement suggestions, we probably cannot actually go so far as to arrange to "hold the shares in trust" since most are already either held in margin accounts or RRSPs. That does not mean, however, that we cannot have a binding agreement on how we will deal with our stock. I'm not opposed to a binding document. The key is that we are all committed to a unified course of action.
>
> I encourage the others to respond quickly and affirmatively so we can keep going forward without delay.

[102] Mr. Potter copied his email to Mr. MacLeod, Mr. Courtney, and Dr. Schelew.

[103] November saw Mr. Potter with a major problem on his hands, in the form of Dr. Schelew's intended sale of 10,000 shares a week from November to March. After advising Mr. Potter in late October of his plan and being assured that KHI management would find purchasers, Dr. Schelew lost patience and on November 23rd instructed Bruce Clarke to start selling. Mr. Potter forwarded the email (which Mr. Clarke must have sent him) to Mr. Colpitts the same day, saying: "We need to talk about this! Unbelievable!"[70]

[104] What transpired from this was Mr. Potter revealing to Dr. Schelew the stage-managing behind the scenes at KHI. The trial judge described what this looked like:

> [163] The Crown says that in the e-mails that follow, Dan Potter "pulled back the curtain" on the conspiracy and revealed to Schelew that, contrary to what the trading volumes suggest, there was no retail demand for the stock. The market activity wasn't real; it was a product of the conspirators' efforts. The Crown argues that this Court could find a conspiracy on the basis of these e-mails alone.
>
> [164] The first e-mail was sent by Dan Potter to Dr. Schelew on November 24, 2000, with a copy to David Mack. [David Mack was another broker.] He set out all of the purchases and sales by KHI insiders since January 11, 2000, noting that only Donnie Snow had been a net seller. He then advised Dr. Schelew:
>
> > In my opinion you should either be buying or supporting the buying of shares in the coming week and beyond. If you insist on selling shares (without having the buy-side arranged) as you have previously indicated, then I'd say all of our good work in attracting investors over the last several months may well prove to have been in vain. Now, more than ever, we need to work co-operatively to protect the interests of KHI shareholders, including you and the people you have brought into the

> company over the years. In this regard, I should add that Steve T warned us that he has to sell 50,000 shares by Dec. 1.
>
> I want to also say that I fully appreciate the pressure you are under to support and fund Handsmiths - I sincerely feel your pain in this area.
>
> I hope common sense and enlightened self-interest prevails.

[165] Bernard Schelew responded on the same day, noting that according to Mr. Potter's numbers, the net value of KHI shares bought by insiders or long-term investors was approximately $12 million. He asked, "Is it correct to say that this $12,000,000 was used to support the stock from unknown street sellers?" Before Dan Potter could respond, Dr. Schelew e-mailed him again. He expressed his belief that KHI was "fundamentally strong" and would "prove its business model over the next 12 months." He wrote that "the selling pressure on the stock was temporary" and that Mr. Potter had "done a super job of eliminating this downward pressure." He pointed out that Mr. Potter had been aware of his interest to sell since the summer, but that none of his shares had been sold, with Mr. Potter telling him to take his turn in the queue and that "the squeaky wheel gets the grease" and so on. Dr. Schelew went on to note:

> 4. Although Handsmiths has a much less certain future than Knowledge House, I am prepared to bridge finance the company (to the tune of $2 million) thinking that by the second or third quarter I can bring outside investors in. The cash I need is for survival. I believe in my story enough to back it.
>
> 5. Although Knowledge House has a much more certain future, you have indicated to me that my 10,000 shares/week will be the straw the [*sic*] breaks the camel's back and the stock could fall dramatically. This indicates to me that, although the board and management fully believe that the situation is temporary, further investment in KHI to support the stock (we're not talking survival here) is too risky for them. Fair enough. It is too risky for me! Everyone has their limits.
>
> …
>
> So lets continue with the plan to sell 10,000 shares/week as outlined. I'll continue to work with you to incent the sale of a large block.

[166] Dan Potter responded on November 25, with a copy to David Mack and Bruce Clarke, writing in part:

> Your analysis that leads you to the conclusion that you or any other major, non-retail KHI shareholder can achieve liquidity next week in [*sic*] completely wrong- there is NO WAY that can happen. You have seen the stock trade down to $6.00 in the last several sessions. There is at least 30,000 shares of pressure on the market as of Friday PM, not including Steve T's 50,000 to come next week. You will ABSOLUTELY FOR SURE CRASH THE STOCK IF YOU ACT ON YOUR FLAWED ANALYSIS -ABSOLUTELY FOR SURE! "Management and directors"

> cannot and will not be magically buying. You need to understand and believe this fundamental truth -there currently is no buying power in the KHI network. There can be again, if we are given the chance and support to go out a find more investors - but there is none now!
>
> As I mentioned to you before by telephone, it is most unfortunate that you have seen fit to include Bruce Clarke [*sic*] your communications re liquidity. It only serves to put more pressure of [*sic*] him - a person who has undertaken huge personal risks to invest in the company. It is grossly unfair to him, grossly unfair and I must say it is very upsetting to me to see you continue to include him in this dialogue.
>
> I'm sure that it's somewhat true that "desperate people do desperate things". But I [*sic*] will be a sad irony if, in your desperation, to support Handsmiths, you, in fact, destroy the real source of your own financial well-being- your KHI shares!
>
> I'll continue to do my best to run the company in the interests of all shareholders as long as I have the support of the "founding" shareholders with the biggest stakes, but, if and when that cracks, all bets are off.
>
> I'm going to send an email (by noon tomorrow- Sunday) outlining the situation and my recommended action to each of the major shareholders with "founders shares" -you, Calvin, Ray and Ken with a recommended joint plan for cooperative action to support and protect the KHI stock over the coming weeks while we are bringing in more new investors. I strongly recommend that you keep an open mind to my recommended plan of action.
>
> If the major shareholders who have liquidity needs don't realize that this is not the moment for demanding liquidity, but rather the moment for coming to the aid of the company, then tens of millions of dollars in shareholder value will, I'm sure, be lost, including the value of each of such major shareholders. If cool heads prevail, we'll have future liquidity events for all- if there is no co-operation and concerted supportive action now, there will be no such future events.
>
> All of which is put to you with the utmost respect and in what I sincerely regard to be your own interests.

[167] Blois Colpitts, who had obviously received a copy of the e-mails, was irritated by a comment from Dr. Schelew that Colpitts had netted out $50,000. He wrote to Dan Potter on November 26:

> Can you make sure that Bernie understands that my sales (aside from the $150,000 swap for Solutioninc) was relieving the margin pressure incurred in (i) exercising options to put money into the company- $250,000; and (ii) buying shares on margin to support the market- nearly $800,000 in total.

> He should also understand that some of the trades he totals included moving KHI shares into my wife's RRSP, kid's RESPs and my mother's RRSP to relieve some of the margin pressure. It is still there as you know.
>
> He should also understand that sales made were in conjunction with Barthe, Banks (not Fountain) that I spent the whole summer working on - to the exclusion of any vacation with the kids.
>
> Geesh
>
> He wrote again that day, "I also forgot my $200,000 of LP units – he wouldn't even participate."[71]

[105] On November 26th, Mr. Potter outlined his "Recommended Plan of Joint Action" in an email to Raymond Courtney, Ken MacLeod, Calvin Wadden, Dr. Schelew, and blind-copied to Mr. Colpitts. The agreement it contemplated has been described in the Notices of Appeal as "an agreement to engage in lawful market activities". Mr. Potter and Mr. Colpitts say there was no criminal conspiracy.

[106] The trial judge reproduced the email in its entirety "due to [its] importance … to the Crown's case".[72] We excerpt its principle points:

- Its subject line was "Major Shareholder Co-operation and Help needed to Support KHI".
- It set out a four-part plan to accomplish the support Mr. Potter was seeking.
- Mr. Potter explained in the email that "the current retail market for KHI shares (like most other small caps) is almost non-existent", "our sources of buying are completely exhausted", and "[w]e need some more new investment".
- Mr. Potter explained that "there is significant pressure on the market" with "increase[ed] retail selling over the last couple of weeks". He said: "[t]his is [*sic*] driven the price down and exhausted buying support".
- Mr. Potter described the sell-side pressure on KHI shares and the intention expressed by shareholder Steve Tsimiklis to sell 50,000 shares by December 1st to finance a real estate project. Mr. Potter noted Mr. Tsimiklis had been "good about communicating his situation" but said he had no doubt that these shares would get placed on the market "soon". A recent attempt by Mr. Tsimiklis to sell had been neutralized by Calvin Wadden who

"personally bought 10,000 shares from him and convinced him to stop and work with us".

- Mr. Potter acknowledged that group members were already heavily leveraged as a result of buying KHI shares using margin loans: Ken MacLeod "ha[d] bought over 135,000 [shares] on margin", Mr. Potter had a margin loan of $1.3 million "with virtually no buying room left", Calvin Wadden and Raymond Courtney had high margin loans and needed funds to pay them down.

- Mr. Potter warned that a cooperative effort amongst the major KHI shareholders was needed to support the stock or the market price could tank:

> These are all valid needs for liquidity, but in the current conditions, we really need to be more concerned about protecting the value of our KHI shares -without support from us, it is clear that there will be further price erosion and, in fact, the market could fall significantly and rapidly in the next few days. Unless we all put our liquidity requirements aside for the short term and turn our attention to finding ways of supporting the shares in the market, there will be no liquidity opportunities for any of us worth having.

- Mr. Potter then laid out his four-point "Recommended Plan of Joint Action": (1) the purchase from Mr. Tsimiklis of 50,000 shares (10,000 each) to avoid him putting more downward pressure on the stock; (2) infusing the 540 account with more buying power by loading it with additional shares that could then be margined; (3) the contribution by the group members to an options package that would incentivize a collegial accountant to find purchasers for KHI shares; and (4) an agreement that none of the group would sell without collective consent:

> That we agree on a formula for sharing in liquidity opportunities going forward and each agree not to sell any otherwise than as arranged under this arrangement. In this regard, I committed to Calvin some time ago that he would get the first 200,000 share liquidity arranged by the company above the needs of the retail market. I think we should stick to this and give the next 100,000 to Bernard because of his high need and, thereafter we would each have the right to share equally over the next period of time- say two years. I'm not talking about any formal legal agreements here -just sensible, honorable gentleman's agreement among 5 business people with a huge business interest in common working together in a fair and straightforward way.

- Mr. Potter concluded with an exhortation to the group to prevent, through cooperation, the share price from collapsing:

> Unless we do something in a united way like this, I'm afraid it's going to be a case of: "United we stand, divided we fall!" And, if we fall, we'll all fall with a heavy thud! And so will the other shareholders.
>
> I'd urge each of you to respond positively to this, bearing in mind that the stakes are big and the market will [*sic*] unforgiving if we are unable to act strongly together.

[107] The Crown submitted this email would have been sufficient on its own to prove the conspiracy charge against Mr. Potter and Mr. Colpitts. The trial judge had this to say about it:

> [520] Notwithstanding euphemisms like "supporting the market" and "protecting the value of our KHI shares", the objective of the agreement was both clear and criminal: to artificially maintain the price of KHI shares on the Toronto Stock Exchange while the company sought new investment.[73]

[108] The trial judge heard testimony from Langley Evans about "supporting the market" being a euphemism for illegitimate price support. Mr. Evans testified that in his experience an examination of the trading activity in relation to a company's shares "usually" revealed that "market support" was in fact a strategy to "prevent the price from falling or to push it to a different level, to push it to a higher level". Mr. Evans explained "market support" used to manipulate the share price is quite different from "acceptable stock promotion":

> **[Crown]:** So hypothetically speaking, if an individual's engaged in a program of price support, does that fall within the legitimate aspect of market support?
>
> **[Mr. Evans]:** No. In my view, no. And the prices are supposed to flow as a natural consequence of market activity. And this is – this is the nuance, that if I enter the market as a buyer in an illiquid stock, it may go up as a result of my actions. But if my intent is to buy it at the best price then that's – that's – then that's fine. If I go in with the intent to drive the price up or to push it up, then that's manipulation. So it's contextual and really – it's really comes down to what the intent or the perceived intent from the – the market participant.

[109] The trial judge also heard Gerard McInnis' response to being asked if there was anything about Mr. Potter's "Recommended Plan of Joint Action" email that was inconsistent with his experience at KHI. He said: "[n]o not in any way".

[110] The trial judge noted the evidence showed the group solidarity Mr. Potter had urged:

> [169] Responses from the group were largely positive. Calvin Wadden agreed to buy some of Steve Tsimiklis's shares, noting that he and Mr. Tsimiklis had agreed that "[Tsimiklis] will sell stock on the market unless he can get the 50,000 shares he requires by Friday." Mr. Wadden also recommended an escrow agreement preventing the five major shareholders from selling more than 5,000 shares per month. Ray Courtney responded that he would provide a 100,000 share certificate to Bruce Clarke "to support the market". Ken MacLeod was also on board. Bernard Schelew, on the other hand, was not interested. He explained that both he and his company faced "financial meltdown" unless he took action. He maintained his direction to David Mack to sell 10,000 shares per week, noting that Mack "can sell 2,000/day or whatever. (As you know, KHI trades on average 100,000 shares/week)."[74]

[111] Getting Dr. Schelew to fall into line was going to require more of an effort from Mr. Potter.

[112] KHI shares traded at around the same price throughout November. The trial judge described November trading volumes and the company's share price:

> [170] Trading opened on November 1 at $6.65 and closed at $6.70. Leading up to the German investment on November 23, the stock price stayed relatively stable, trading in the range of $6.30 to $6.70, but always closing at $6.50 or higher. For the rest of the month, the stock dipped slightly, closing several times at $6.40. On November 30, the stock closed at $6.45. The Crown says it was no coincidence that the closing price never dropped below $6.50 (the price to be paid by Ristow and Barthe) until immediately after the deal closed. Out of 20 trading days, suspect accounts were involved in alleged high closes on 13 of them (65%).[75]

[113] The Barthe/Ristow private placement closed on November 23rd at $6.50 a share. The very next day, November 24th, the stock closed at $6.40, lower than at any time during the negotiations with the German investors. As the trial judge wrote: "… other than on one occasion in early December 2000, the stock never again closed at $6.50 or higher".[76]

[114] The evidence indicated trading was tightly managed during November:

> [171] During the month of November, 228,340 shares of KHI crossed the Exchange. Suspect accounts were very active buyers, spending just over $1 million and acquiring 77% of the total shares traded.[77] [Footnote omitted]

[115] Suspect accounts being referred to above included the 540 account, the Union account, Ken MacLeod's FutureEd.com account, Bruce Clarke's joint account, and Calvin Wadden's and Daniel Potter's accounts.[78]

[116] A December 1st email from Dr. Schelew to Mr. Potter made it clear that Dr. Schelew was not dancing to the "United we stand, divided we fall!" tune of Mr. Potter's November 26th "Recommended Plan of Joint Action" email. He wanted KHI to purchase 23,000 shares from him to assist in the financing of his company. He said this would "encourage" him "to sign the gentlemans [*sic*] agreement that we spoke of yesterday". Mr. Potter forwarded the message to Mr. Colpitts, saying, "SHIT!"

[117] On December 3rd, Mr. Potter wrote back to Dr. Schelew:

> We're backsliding here!
>
> When we left our 4 hour meeting the other day, you said you were on-side with the orderly selling agreement and were going away to see if you could contribute 50,000 shares. Your request that we "arrange to take [23,000] shares" comes as a real surprise after all the discussions we had and agreements we reached during our discussion.
>
> On the strength of the agreement among all 5 major shareholders, Calvin and I were able to get Steve Tsmikilis to agree not to sell 50,000 shares in the market, but rather wait and work with us! It was crucial to his decision that the major shareholders have an agreement only to sell according to an agreed plan. If there is in fact no such agreement, he'll bolt for sure!
>
> All the other major shareholders are on-side with the agreement idea. Please do the right thing and work with me on these [*sic*]. I really need to direct my attention to running the company and selling shares to new investors. With your help, this can be a big success. Without your co-operation, it can't work.
>
> By the way, last week I scrounged and (including kids RESPs) and [*sic*] bought 13,000 shares. Ken authorized the purchase of 10,000. These are all to support the retail market.

[118] The trial judge described how the Dr. Schelew wrinkle got ironed out:

> [173] The two men continued back and forth, with Dan Potter forwarding an e-mail to Blois Colpitts and writing, "He just doesn't get it! At least we're talking and we'll get him to the right answer eventually!" But Bernard Schelew persisted, writing Dan Potter a lengthy e-mail outlining his interpretation of their discussions to date, and proposing what he considered to be a plan that would satisfy the needs of both parties. Dan Potter forwarded the e-mail to Blois Colpitts and wrote:

> What a high maintenance fellow he has turned out to be. This is a classic case of someone who "just doesn't get it!"
>
> …
>
> As much as I hate to bother you on this, it seems clear that we need to work on him together. …

[174] On December 13, Dan Potter sent an e-mail to Bernard Schelew confirming that Messrs. Potter, Schelew and Colpitts had met in person and that "all of the major shareholders have now reached a deeper mutual understanding of all the issues and opportunities presented by our big ownership positions in KHI." He went on to note:

> Ray Courtney is providing 100,000 shares for Bruce's investment account. However, there will be some time lag – up to a couple of weeks or so in getting this completed, so it would be most helpful if you could provide 50,000 shares to Bruce at this time. The logistics of this can be worked out between David and Bruce upon your instructions to David. Your prompt attention to this will be greatly appreciated.[79]

[119] At an early stage in the discussions, Mr. Potter reminded Dr. Schelew of how critical it was to sustain the collective effort to prop up KHI's share price:

> I understand your circumstances - but just think what your overall personal financial condition would be if KHI collapsed because one or more of the major shareholders precipitated mass selling pressure! We need to stand united.
>
> In any case, let's keep talking. I'll give you a call.

[120] In December, as the trial judge described in detail, KHI management decided to wind up KHLP. The limited partnership units had been sold to investors, raising $3.45 million for KHI in 1998–1999.[80] Under the subscription agreement for the LP units, KHI had a call option to acquire the units in exchange for KHI shares. The call option did not contain any restrictions on the sale of the shares by the unitholders who "would be free to trade their shares as they wished".[81]

[121] The winding up of the limited partnerships threatened to bring nearly 650,000 KHI shares into the market. Concerns about this, identified by Gerard McInnis, and discussed with Mr. Potter and Mr. Colpitts, led to KHI management deciding "to impose a six-month contractual hold period on the shares",[82] which would allow the shares to be margined but not sold. This would neutralize the potential for the market being flooded with KHI shares acquired by KHLP unitholders.

[122] Gerard McInnis testified the ultimate decision about placing trade restrictions on the shares would have rested with Mr. Potter. He was shown an email dated December 15, 2000 that he had received from Mr. Potter in which Mr. Potter said:

> … sorry for the confusion. Blois and I did talk last night and he convinced me to go with a 6 month hold request (apparently he is concerned about a couple of holders he sold). He assured me the stock could still be margined.

[123] The trial judge referenced Langley Evans' discussion about the "unusual" trade restriction that was "consistent with a manipulative agenda":[83]

> Imposing trading restrictions at the time of the sale of a security is common. Hold periods due to regulatory requirements or as a contractual term of the purchase are typical examples. However, imposing these restrictions after the purchase and just prior to issuing the shares is unusual. There is no record of putting this change to a vote by the unit holders. The exception to allow use of the shares as collateral is also unusual.
>
> These restrictions were consistent with a manipulative agenda in two important ways. They keep the shares from being sold for at least 6 months. At the same time, the shares can be used as collateral in margin accounts. The Group was under financial pressure from extensive margin loans at this time. The depositing of these shares would have provided additional equity to the Group's margin accounts and supplied additional potential buying capacity the Group could use for supporting KHI's price.

[124] Mr. McInnis testified the unrestrained selling of KHI shares by the LP unitholders would have meant "that much more shares I would have had to find buyers for".

[125] Mr. McInnis sought Mr. Potter's direction when another problem arose in December—a treasury direction in relation to CD-Ed share options that, if issued, would release previously purchased share certificates. Those share certificates, once released, could then be sold, putting downward pressure on the KHI share price.

[126] The trial judge set out the email exchange between Mr. McInnis and Mr. Potter:

> [185] On December 17, Gerard McInnis e-mailed Dan Potter in relation to CD-Ed share options:

> We are "sitting on" the Treasury Direction (yet have banked the funds). I am getting calls literally 2 an hour about status. I appreciate there is no market for their shares but they have legal right to the shares as purchased via exercise of their options. Blois has asked that I "lag [*sic*] the puck" which we have been doing but will need to release the direction soon. Any advice

[186] Mr. Potter replied:

> It's a hassle, but the longer you can rag the puck the better. Not a great answer. I'll keep thinking.[84]

[127] Mr. McInnis testified his statement, "I appreciate there is no market for their shares…" was "just the continued issue of trying to balance sellers and buyers".

[128] The trial judge described the trading volume and KHI share price for December:

> [188] Trading opened on December 1 at $6.20 and closed at $6.40. From then until December 29, the stock traded primarily between $6.00 and $6.50, although it did briefly drop down to $5.50 on December 27. During December, 255,502 shares crossed the Exchange. Suspect accounts were heavy buyers, spending a total of $880,286 and acquiring 60% of the total shares traded. In addition, group members were involved in alleged high closes on 14 out of 19 trading days (73.7%).[85] [Footnote omitted]

[129] Suspect accounts being referred to above included the 540 account, the Union account, Ken MacLeod's FutureEd.com account, and accounts of Calvin Wadden, Raymond Courtney, and Mr. Potter.[86]

[130] On January 15, 2001, Mr. Potter sent a lengthy memo to the KHI Board of Directors that focused on raising needed equity through investment by existing shareholders. His report on the company's share price performance reveals how successful the market manipulation machinations had been so far, without actually disclosing the conspiracy:

> … The price of KHI shares declined only $.15 on a year-over-year comparison (Dec. 31 2000 compared to Dec. 1999). This is in an environment where the market value of many comparable companies declined sharply, often by amounts well in excess of 50%.

[131] Mr. Potter also informed the Board that KHI's $3 million operating line of credit at the Royal Bank was reduced in mid-December to the base amount of $500,000. $2.5 million worth of credit had been secured by receivables from major

school projects that were terminating. The trial judge set out Mr. Potter's explanation of what this meant for KHI:[87]

> This significant change in credit availability has created a real cash crunch. Over the last several weeks the company has been put on credit hold by a number of its technology suppliers. This seriously impairs our ability to execute new business and makes working capital extremely tight in relation to meeting other commitments including, payroll, trade payables, etc.

[132] In cross-examination,[88] Langley Evans commented on the January 15, 2001 memo from Mr. Potter to the KHI Board:

> … The January 15th memo, confidential memo to the board is – presents a very clear financial picture of the company. And I did not see – I was struck by the contrast of that disclosure versus what was in the publicly available material.
>
> …
>
> That describes a company in financial distress. It also describes certain market directed activities by insiders. And I didn't see that reflected anywhere in the public record.
>
> …
>
> As an investor or an advisor I think that certainly seemed to be a candid and truer picture of what the status of the company is and the challenges going forward versus what was in the public record at the time.
>
> …
>
> SEDAR[89] is supposed to be a complete record and I was struck by the contrast of the – both the tenor and the substance of the January memo versus what was in the disclosure record at the time.
>
> …
>
> The test I was using if I was an investor I would have liked to have known what was in the memo and would it have affected my investment decisions or – and I would say yeah I would have liked to have seen more what was in that memo than what I saw in the disclosure record –

[133] This was not a good time to have shareholders wanting to sell. The trial judge described how Bruce Clarke did not sell KHI shares in January despite instructions from clients to do so. The Match Trade Report indicates that, when left with no alternative, Mr. Clarke used his own account and Ken MacLeod's FutureEd.com account to buy the shares of a client who insisted on all her KHI shares being sold immediately.[90]

[134] The purchasing of KHI shares by conspirators continued. As an example, Calvin Wadden sent the following email to Mr. Colpitts on the morning of January 4th:

> Please forward my share certificate for the converted LP to Bruce as soon as possible. I will be depositing to my margin account and will be able to help Bruce take 20,000 shares of KHI out of the market if we can do this today.

[135] Mr. Colpitts saw to this immediately, emailing Mr. Wadden before noon the same day to say: "Done – I delivered it myself". (In stark contrast, as discussed further below, some months later in the summer of 2001, owners of share certificates who were not part of the conspiracy were unable to pry their certificates loose from the grasp of Mr. Colpitts and Mr. Potter despite repeated requests and the involvement of legal counsel.)

[136] The trial judge described the trading volumes and KHI share price for January:

> [200] Trading opened on January 1 at $6.00 per share, and closed the day at the same price. In the weeks that followed, the stock traded between $4.50 and $6.25. During the month of January, suspect account purchasing and alleged high closing reached an all-time high. In total, the suspect accounts spent $1,715,849, and purchased 68.6% of the total shares. The alleged high closing purchases also reached an all-time high, with suspect accounts involved alleged high closes on 17 out of 22 trading sessions (77.27%).[91] [Footnote omitted]

[137] Suspect accounts being referred to above included the 540 account, the Union account, and accounts of Mr. Colpitts, Calvin Wadden, Raymond Courtney, Bruce Clarke's joint account, and Mr. Potter's wife's account, which he controlled.[92]

[138] In February 2001, Steve Tsimiklis re-emerged as a problem for the conspirators. He wanted to sell. The trial judge explained what the evidence disclosed about how Mr. Potter and Mr. Colpitts contained the Tsimiklis threat:

> [202] On February 8, Mr. Colpitts e-mailed Mr. Potter an option agreement for Steve Tsimiklis. The agreement contemplated that Mr. Tsimiklis would receive options on 123,870 KHI shares at an exercise price of $0.50 if Mr. Tsimiklis would abstain from trading any of his KHI shares. Since this was a private transaction conducted outside the TSX, the KHI market price would be unaffected and the investing public would be unaware that Mr. Potter was willing to sell his shares for $0.50.[93]

[139] According to the trial judge, the conspiracy machinery was turning over smoothly as February rolled on. The trial judge referred to what can only be regarded as an extremely probative email from Calvin Wadden to Mr. Potter on February 8, 2001:[94]

> I have been speaking with Ray, Blois and Ken throughout the day and they have been in supporting the market. Ray and I would really like to get the stock to $5.45 and try to solicit more support from the group going forward. If we can get to $5.45 - $5.50 I would like to see each of us put 5,000 shares into the support side and try to inch up toward $6.00 to $6.50 until we get some positive news on the street.
>
> If we could come up with a formula to provide support say 5,000 shares each at every $.15-.20 gain forward we could be building some reserve and give each of us some breathing room until we attract substantial buyers. I think this along with the options would be be [*sic*] a strong sign for the major shareholders who are at the sidelines.
>
> Ray and Ken each purchased 4,000 shares today and have agreed to pick up an additional 1,000 shares each by the close. Blois and I bought as well. Aside from all the hard feelings it was good to see the teamwork this afternoon.
>
> I have spoken to Stewart from Assante(FCG) and he has agreed to work with me. I really think he was sincere but someone is still in the market. Can you make time for me to arrange a pep talk for Eric and Stewart some time next week? Ray and I think if we can turn Eric into a supportet [*sic*] we are clear sailing.

[140] Mr. Potter forwarded this email to Mr. Colpitts, "FYI—good to see!" The trial judge saw the correspondence as supporting "only one interpretation":

> [522] …. Contrary to the defendants' submissions, this correspondence begets only one interpretation: a group of individuals is working in concert to intentionally move the KHI stock price higher, giving themselves "some breathing room" until they "get some positive news on the street" and "attract substantial buyers." These individuals were not buying more KHI stock because they wanted it; in fact, most were anxious to sell. Instead, they were buying in order to prop up the share price until the company could entice new investors.[95]

[141] The collective effort to push up the KHI stock price involved coordinated purchasing. Ken MacLeod wrote Bruce Clarke on February 8th:

> Hi Bruce:
>
> I was talking to Calvin Wadden who had been in touch with Blois and Ray. They seem hell bent on taking the stock up to 5.50. To do so, they indicated that they may need an additional 1000 from me. You may have a differing view on where

> to take this, so, although I am authorizing you for an additional 1000, use them at your most able discretion.

[142] Ken MacLeod's earlier email on February 8th to Mr. Colpitts and Mr. Potter also shows the concerted purchasing efforts directed at propping up the KHI share price:

> I just sent an email to Bruce Clark [*sic*] giving him permission to buy 4,000 shares. Ray Courtney is going to see if he can purchase another 4000. Bruce says that should close the day at 5.25 and that perhaps we can move to 5.50 or so tomorrow at which point Calvin says he may be able to get back in.

[143] Mr. MacLeod's email to Raymond Courtney on February 8th indicates supporting the KHI share price was having profound implications:

> I've given some thought to yesterday's meeting – boy, your statement about where you were 18 months ago and where you are now really hit home. The same for me – 18 months ago Donnie and I owned McKenzie and CD-Ed and Silicon Island and didn't owe a cent to anyone, now we (not Donnie) are on the brink of financial ruin. That being said, it seems to me we can sit and cry in our beer or we can mobilize as a group to see if we can pull this out of the hat. We all have history here, and we might have our differences with Dan and how we got where we are, but you have to give it to Dan that he is doing everything in his power to pull us out of this tail spin. I think he is right that he can't get anywhere with controlling the market or getting new investors if we (you, me, Calvin, Dan) don't have it together. I haven't talked to anyone about the end of yesterday's meeting, but if Calvin sticks to his word, and we all give the same commitment re. holding off on selling for now, that will be enough so that Dan at least doesn't have to worry about seeing us popping up in the sell category while he tries to wrestle with the rest. I certainly don't see Calvin as the bad guy here. I think he is saying what we are all thinking, and I don't blame him for being pissed, but I don't think acting as an individual in this case will get us out of this. We all have huge bills to pay, and the only hope we have of paying them is to group together and come up with a plan. If we don't like the present plan, then come up with another. However, selling by any of us is the kiss of death. You might get a few bucks in the beginning, but the whole thing will crash. On the positive side, I see, at least within KHI, that with our backs to the wall, we have become leaner and meaner and much more focused (should have done that at least 6 months ago). So, if we can pull out, I think the company will survive and even prosper. But getting into an argument about how we are going to divide up the spoils, when we might never get to the spoils, doesn't make sense to me.
>
> I'm in a really bad position, because I am not creditor protected at all. IF we go down, I lose my house and everything else, because everything is in both of our names and I would guess it is too late to fix that. It doesn't make for great sleeps!

[144] February trading and the KHI share price was heavily supported by conspirators:

> [208] Trading opened on February 1 at $5.30 and closed at $5.25. Although the stock dipped to $4.70 on February 7, it recovered (with significant suspect account purchasing) to trade between $5.05 and $5.80 before closing the month at $5.60.
>
> [209] In February 2001, 201,360 shares crossed the Exchange, with suspect accounts purchasing over 70% at a total cost of $770,109.20. Out of 19 trading days, suspect accounts were involved in 13 alleged high closes (68%).[96] [Footnote omitted]

[145] Suspect account purchasing in February included Ken MacLeod's FutureEd.com account, Bruce Clarke's joint account, and accounts of Calvin Wadden, Raymond Courtney, Mr. Potter, and Bernard Schelew.[97]

[146] By late February, Dr. Schelew indicated in an email to Calvin Wadden that beyond a commitment to buy some additional KHI shares from his Handsmiths company "in the next two months", he could not "participate in any more rounds of buying … I'm tapped out". He included a reassurance: "I have not sold any shares".

[147] KHI's financial situation in February remained unresolved. The trial judge described how Mr. Potter was responding to it:

> [207] On February 21, Dan Potter circulated a memo in advance of the February 26 KHI Board of Directors meeting. The memo outlined a series of operational steps the company had taken to address the "financial crunch" it had experienced for the previous eight weeks. The memo also set out several steps taken at the shareholder and investor level including reaching a "Managed Selling Agreement" and a "market support arrangement" among the five largest shareholders. The memo further noted that the company had obtained commitments for $1.25 million of the $2 million private placement but that KHI's future was in jeopardy unless it secured the remaining $750,000.[98]

[148] March saw the major actors prepared to incentivize new investment by selling their shares to potential, targeted investors (David Fountain or Charles Keating) for amounts far below their ostensible market price. Ken MacLeod indicated on March 1st he might sell his 800,000 shares for $1.90 a share. Mr. Potter advised that Mr. Wadden had volunteered to sell his 1.4 million shares at $1.83 each to sweeten the pot for a $1 million private placement contribution by either Mr. Fountain or Mr. Keating. While this idea percolated, Mr. Potter made "a

'strong recommendation' that the five major shareholders 'as a team, commit to buy 5,000 more shares while we work all the options'". Ken MacLeod followed this up the following day with instructions to Bruce Clarke to buy up to 5,000 shares.[99]

[149] Mr. Wadden, although still "very much interested in the team approach", emailed Mr. MacLeod, Mr. Courtney, Dr. Schelew, Mr. Potter, and Mr. Colpitts on March 2nd to indicate he was only prepared to sell his shares at a low price to Charles Keating or David Fountain if there was full participation:

> … If everyone does not have the ability or desire to purchase shares again today, I am once again saying that I will not participate without everyone in the group involved. This is a difficult time for everyone but it was evident to me that without market support "the 5 of us" all buying at the same time we were faced with a tough decision. I am still putting my hand up and will be prepared to sell my stock to clear my outstanding margin and leave something at the end. I hope this will be a tool to assist KHI to get through this period. This is simply a business decision and I still fully believe if KHI can get through the next few months that things would improve for all.

[150] As the trial judge noted about the private transaction incentive plan:

> [211] … [T]he KHI market price would be unaffected and the public would not know that major shareholders were willing to let go of their shares for $1.83. …[100]

[151] In March, Mr. Potter also faced the possibility of employee options on KHI shares being exercised. When this was brought to his attention by Gerard McInnis on March 3rd, he responded:

> I think we have now decided to deal with this on a case by case basis until we get a little further along – having said this, we definitely are going to tell anyone who requests/demands to exercise that it's not on for now.
>
> I have no problem dealing with anyone who becomes the least bit demanding.

[152] Although some new investment was attracted in March, the various incentive ideas by Mr. Potter and his confederates fell flat. The trading volumes and share price continued to reflect high closing and market domination by insiders:

> [218] Trading opened on March 1 at $5.45 and closed the day at $5.30. For the rest of the month, the stock price remained quite stable, trading between $5.10 and $5.55. When the stock hit the low of $5.10 on March 16, Bruce Clarke e-

> mailed Dan Potter, writing, "Could you please give me a call. Knowledge House is $5.10 to $5.25." The stock closed on March 30 at $5.40.
>
> [219] In March 2001, 106,830 KHI shares crossed the Exchange. Suspect accounts spent $356,191 and bought 62% of the total shares. Out of 21 trading days, suspect accounts were involved in 10 alleged high closes (47.6%).[101] [Footnote omitted]

[153] The suspect accounts referred to above included Ken MacLeod's FutureEd.com account, Mr. Potter's wife's account, which he controlled, the joint account of Bruce Clarke, and accounts of Mr. Wadden and Mr. Courtney.[102]

[154] In early April a plan for "[m]arket support using [Dr. Schelew's] shares" was concocted by Mr. Potter with Mr. Wadden and Mr. Courtney. In an April 4th email to Mr. MacLeod, Dr. Schelew, Mr. Wadden and Mr. Courtney, and copied to Mr. Colpitts and Bruce Clarke, Mr. Potter set out the proposed loans and purchases, and said: "[t]he job at hand now is to provide ongoing market support".[103] These transactions and variations of the "market support" they sought to accomplish did not materialize.[104]

[155] As the trial judge noted, in early April, Mr. Colpitts used his muscle as KHI's lawyer to sort out Stephen Wilsack whom he suspected might be selling shares on the market:

> [222] At some point in early April 2001, Blois Colpitts became concerned that Steve Wilsack was selling KHI shares on the market. On April 9, he e-mailed Mr. Wilsack as follows:
>
> > We are the solicitors for Knowledge House Inc. Further to your agreement dated December 13, 2000 which released your shares from escrow, among other things, and based on your agreement not to sell shares of Knowledge House Inc. otherwise than through Bruce Clarke, please provide us with evidence that you have complied with the terms of your agreements.
> >
> > I understand you have not contacted Mr. Clarke at all in this regard and therefore would presume you have not sold any shares. Please acknowledge receipt of this email by tomorrow and fax me your statements to prevent any further action.
>
> [223] Mr. Wilsack replied on April 10:
>
> > Thank you for [*sic*] email. For clarification purposes, could you show me in the December 13 agreement where it states that I cannot buy and sell shares of KHI other than through Bruce Clarke and that I have to deal exclusively with National Bank for my personal financial portfolio.

> Also in your email you stated "to prevent any further action." Could you please clarify this statement.
>
> [224] Mr. Colpitts responded the same day, with a copy to Andrew Burke [a Stewart McKelvey associate]:
>
> Thank you for your email today.
>
> Without getting into a legal argument with you, you have a copy of the agreement and can read the last paragraphs.
>
> You also are aware of the terms of the release of your shares from escrow. It is very clear that you have not had any dealings with Bruce Clarke in respect of selling any of your shares and therefore the presumption is that you have not sold any shares or you have breached the agreement and will be held accountable for any resulting damages caused by your breach(s), both in the past and the future.
>
> You have told others you are not selling shares and we are merely verifying your compliance with the agreement on behalf of our client. Please provide me with copies of your statements to avoid any further action on this file.[105]

[156] Mr. Colpitts was effective in neutralizing the Wilsack sell-side threat. The trial judge referred to what the Match Trade Report showed, that between January 2nd and April 10th, Mr. Wilsack had sold 37,400 KHI shares, and from March 30th to April 9th, 5,800 shares. From April 10th, the date of Mr. Colpitts' last email to him, to June 14th, Mr. Wilsack sold only 300 shares.[106]

[157] Suspect accounts kept up the majority of the trading in KHI shares through April 2001:

> [227] Trading opened on April 2 at $5.40, the only trade of the day. For the rest of the month, KHI traded between $5.20 and $5.55, closing the month at $5.35. During April 2001, 59,730 KHI shares crossed the Exchange. The only suspect accounts purchasing were FutureEd.com and the Union account. Together, these accounts spent $300,273, purchasing 71% of the total shares traded. Out of 15 trading days, suspect accounts were involved in eight alleged high closings. (53%).[107] [Footnote omitted]

[158] As the trial judge noted, a similar trading pattern and share price was evident in May 2001:

> [233] On May 1, 2001, trading in KHI shares opened at $5.30 and closed at $5.35. For the rest of the month, the stock traded between $5.25 and $5.80, before closing the month at $5.40. During May 2001, 124,130 KHI shares crossed the Exchange. The suspect accounts spent $386,335 and bought 74.7% of the total

> shares. For the month of May, suspect accounts were involved in alleged high closes on nine out of 21 trading days (42.8%).[108] [Footnote omitted]

[159] Suspect accounts purchasing stock in May included: Ken MacLeod's FutureEd.com account, Calvin Wadden's accounts, Bruce Clarke's joint account, and others.[109]

[160] When June rolled around, Stephen Wilsack reached out to Bruce Clarke via email with a request to sell "a few KHI shares…too many personal bills are mounting…". Mr. Clarke forwarded the request to Mr. Colpitts the same day he received it, June 12th. Mr. Colpitts prepared a draft response, which he emailed to Mr. Potter, Mr. Wadden, and Mr. Clarke. As the trial judge noted, the draft reply said the following:[110]

> Steve:
>
> Thank you for your email.
>
> I had been put on notice by Blois Colpitts as counsel to KHI that you were under an ongoing obligation pursuant to your letter agreement dated December 13, 2000 which released your shares from escrow, among other things, not to sell shares of Knowledge House Inc. otherwise than through me.
>
> Blois Colpitts has subsequently advised that you have an outstanding request to provide him with evidence that you have complied with the terms of your agreements.
>
> As you are aware from your meeting the bids for KHI are currently support bids and if others arise we will proceed with your request within the context of your instructions.
>
> Thank you.
>
> Bruce

[161] Mr. Wilsack hoped Mr. Wadden could help him and, just over a week after his email to Bruce Clarke, sought permission to sell:

> … just checking in to see about selling 2000 shares of KHI.
>
> I am going to put a sell order into Bruce on Thursday. I have been holding off as long as I could…but got too many bills and visa bills mounting…

[162] The trial judge set out Mr. Wadden's response:[111]

> Steve,

> I am working on your request every day but I have had no luck yet. Yesterday there was more selling from BMO and Yorkton and we are out of support. I am asking everyone to buy not to sell this week. I am hoping on Dan's return on the weekend we will have some progress and positive news.
>
> I am going to keep doing what I can until I head for Russia the first week of July (fingers crossed) then I am moving away from KHI and persuing [*sic*] another career to see if I can rebuild. They say it is always easier the second time around. I hope their [*sic*] is some truth to that.
>
> I am asking everyone to send their statements to Dan by Saturday. I will forward mine today to ensure the group I am part of the solution. It will be interesting who will comply!? Blois mentioned he bought KHI (5,000 shares) last week for his mothers RRSP account. Things are really bad when that becomes our last bit of support.
>
> Going to be a rough few days…hope KHI can survive!
>
> Cal

[163] Mr. Wilsack was compliant, saying, I will "hold my breath for another few days to see what the magician pulls out of the hat".

[164] On June 21st, in an email to Mr. Potter, Mr. Wadden resigned from the investor relations role he had held at KHI since February. He expressed his concern about whether there was faithful adherence by all to the agreement not to sell KHI shares:

> Dan,
>
> I am hoping for the best for KHI and I will do my best to support Bruce but I have no buying ability left to draw on. Yesterday there was selling (1500 shares from Yorkton and more from BMO Investorline) .. I am printing of [*sic*] my statements for both accounts for the last few months and will forward to you today to ensure everyone I am not the problem. I am sending everyone a request to forward their statements to you by Saturday so you and Blois can review them on the weekend.
>
> I am not confident that everyone in our group is keeping their end of our non sell agreement so I have decided to move away from the daily market responsibilities. I am apparently no longer effective in that role and I am heading to Russia in a few weeks anyway so I think we should look for a better candidate. The daily debates with our merry band of investors is becoming too much for me to deal with. I have my own financial issues and they never seem to be a topic of conversation when I am dealing with our group.
>
> I commend you and Blois for your perseverance and I will continue to support your efforts. Blois mentioned last night that he had to buy 5,000 shares for his mother account last week for support. I can't believe that our group continues to

> sell and make demands when we are so close to having the stock crack. I can't figure out if it is fear or selfish greed driving these guys!?!
>
> I will do what I can until the end of the month and after that I will provide any statements upon request to ensure the group I am not the problem. …

[165] A late June transaction by Raymond Courtney elicited derision from Mr. Wadden who said in an email to Mr. Wilsack:

> … Bruce Clarke told me the idiot, AKA "Ray" did a 30,000 share cross below market and screwed up the close for the weekend papers. He sure is the anchor on our team of vagabonds. Gotta love the irony of the situation.

[166] As the trial judge explained, Mr. Wadden was referring to this: the Match Trade Report shows that on June 22nd, Mr. Courtney purchased 30,000 KHI shares from his own numbered company at $5.20 per share. The previous trade had been at $5.35. Mr. Courtney's transaction closed the stock that day at $5.20.[112]

[167] The trial judge described the trading volume and share price for June 2001:

> [242] Trading opened on June 1 at $5.25 and closed at $5.40. During the rest of the month, the stock traded between $5 and $5.50, with a brief drop to $4.55 on June 8. The stock closed on June 28 at $5.30. During June 2001, 115,612 KHI shares crossed the Exchange. Suspect accounts spent $102,473 purchasing 34.5% of the total shares. Although the Janine McInnis account purchased $11,820 worth of shares, Gerard McInnis testified that Bruce Clarke made those purchases without his authorization.[113] [Footnote omitted]

[168] The suspect accounts purchasing KHI stock in June included Bruce Clarke's joint account, Mr. Wadden's accounts, the Union account, Mr. Potter's accounts, Mr. Colpitts' joint account, and Mr. Clarke's RSP account.[114]

[169] July 2001 saw the KHI stock price under pressure. This was recognized by Calvin Wadden in an email on July 7th to Mr. Potter:

> … I noticed we are under pressure in the market again. I wonder if Bernard had any more thoughts on lending or selling his stock to use for support. My own financial issues aside I think we all could do a little more on the positive front to change the direction of the pressure.
>
> I think we should have a talk with everyone again. It seems to me that some of the team are running for cover and by doing so putting a negative cloud over our efforts. I understand Ray is continuing to move assets around and is working with his lawyer and Eric on the details. Also I know Blois is frustrated and may sell his stock to just cover his margin (+ $1.80). Blois mentioned that to me one day and I

> am not sure if he was serious or just frustrated as we all are. I will call you from Toronto to let you know when I will be back to the office. Good luck with your continued work. You are making great progress.

[170] On July 11th, Mr. Colpitts reached out to Shirley Locke: "[i]t would be great if we could find some support for khi – talk soon".

[171] And then, on July 12th, Mr. Potter was copied by KHI's Vice President of Finance on an email to Gerard McInnis advising that the hold on the LP shares had expired on June 27th. This meant nearly 650,000 shares could flood the market. Mr. Potter responded:

> We are working to keep this low key- a number of the shares are still being held and will only be released upon request, etc. etc. Please send any inquiries to me.

[172] The trial judge heard that LP unitholders George Unsworth and Kiki Kachafanas were both "anxiously awaiting" the release of their share certificates. They waited in vain. Mr. Unsworth testified how Mr. Colpitts, who had been a good friend, deflected his inquiries. Mr. Unsworth only received his share certificates in 2002. They arrived in a plain envelope in his mailbox, delivered anonymously. By then, they were worthless.[115]

[173] Mr. Unsworth returned to testify approximately three weeks after giving evidence about trying to recover his share certificates. The trial judge explained why he was recalled by the Crown:

> [248] After George Unsworth finished testifying, Blois Colpitts approached him outside the courtroom and made some relevant comments. The Crown learned of the incident and recalled Mr. Unsworth. According to Mr. Unsworth's testimony, Mr. Colpitts had approached him while he waited for Ms. Kachafanas to return from the washroom. He testified that Mr. Colpitts shook his hand, said he was sorry for getting Mr. Unsworth "involved in this again", and that his parting comment was, "Well if I would have sent any of the certificates he would have had me disbarred." Mr. Colpitts then left on the elevator while Mr. Unsworth continued to wait for Ms. Kachafanas. On cross-examination, Mr. Colpitts suggested to Mr. Unsworth that he had actually said that "lawyers have to follow client instructions or face disbarment" or words to that effect. Mr. Unsworth disagreed, maintaining his version of the exchange.[116]

[174] The trial judge found the "obvious inference" was that Mr. Colpitts was referring to Mr. Potter when he said "he" would have had him disbarred if Mr. Colpitts had returned any of the share certificates to their owners.[117]

[175] As the end of July approached, storm clouds were gathering. On July 17th, NBFL cut the loan value on KHI shares to 35 percent. Margin call letters were sent out. Ken MacLeod was told he owed National Bank $280,000. He emailed Mr. Potter and told him: "[e]ven if I can do something about this margin call, one more of these and I'm definitely going to have to start selling KHI shares (no other recourse??)"

[176] Mr. Potter replied:

> I've been discussing the margin change with NBF and warned them not to be too aggressive on timing with enforcing the change. I have received an undertaking from the NBF senior management in Montreal that they will work with us -we have set up a process whereby I have a telephone conference every two weeks with one of their executives to report progress, etc.
>
> You still need to work with Bruce to come up with your plan - but Aug 2 is not a hard deadline for payment - hopefully, we can get some block sales of shares this fall through the work we are doing with Michael Moe's firm (ThinkEquity Partners) - no guarantee but it's part of the plan.
>
> Bruce and Blois are working with me on the NBF file, so I'm copying them on this to keep them in the loop.

[177] Thanking him for the "update", Mr. MacLeod said he would call Mr. Clarke "and work with him on this".

[178] Mr. Potter was still reeling in investors in late July, even as KHI wobbled further on its flimsy axis. Thomas Hickey, whose company, Frontline Safety, had an online training component, told the trial judge Mr. Potter had painted a very positive picture in their discussions. KHI was portrayed as a growing e-learning company with an exciting future. The trial judge described Mr. Hickey's testimony:

> [250] …When Mr. Hickey was asked whether Mr. Potter had any discussions with him about the financial state of the company prior to his investment, Mr. Hickey answered:
>
> > Everything was rosy in all of the discussions. There was no discussion that they were in financial duress.[118]

[179] The trial judge explained what happened to Mr. Hickey's investment:

> [251] On July 30, 2001, Mr. Hickey purchased 10,000 shares at $5.10 per share. Within two to three weeks of his purchase, the share price dropped down to about 30 cents. He estimated his losses at between $40,000 and $50,000.[119]

[180] The coordinated efforts to support the KHI share price continued through July:

> [252] The stock opened on July 3 at $5.15 and closed the day at $5.15. For the rest of the month, the stock price dipped below $5.00, trading down to $4.25, before rebounding and closing the month at $5.34. In July 2001, 88,149 KHI shares crossed the Exchange. Suspect accounts spent $146,432.50 and bought 32% of the shares. Although the Janine McInnis account spent $2,655 buying shares, Gerard McInnis testified that, again, Bruce Clarke made these purchases without his authorization. There were no alleged high closes in July.[120]

[181] August brought no relief. On August 15th, Bruce Clarke reached out to Mr. Colpitts as the KHI share price continued to founder. He was trying to get a high closing purchase:

> KHI - $5.00 to $5.10 last at $5.05 on 1300 shares
>
> Looking for help to close higher. Spoke to Calvin and he can't help.
>
> Please call if you can before quarter to five.

[182] The trial judge described the collapse of the KHI share price in late August 2001:

> [254] … [O]n August 17, KHI announced it had entered an agreement with IBK Capital Corp of Toronto to raise up to $5 million by way of private placement of common shares or other securities. The news was not favourably received, and shareholders began aggressively selling their shares. The result was a collapse from a closing price of $5.10 per share on August 16 to $0.33 per share on August 31.[121]

[183] The anxiety caused by the IBK Capital announcement was reflected in an email on August 20th from Ken MacLeod to Mr. Potter:

> Hi Dan:
>
> I've been getting a flurry of calls and visits from KHI stock holders (particularly from a friend who has 100,000 shares) regarding our present situation. I've been painting the most positive picture I can, but people are getting ansty. [*sic*] It seems that a lot of folks have seen the BKI Capital announcement as a very negative thing. They interpret it as we <u>need</u> $5 million in a hurry, just like ITI needed $10 million and look what happened to them when they didn't get it! Anyway, I'm sure you are hearing much the same. I don't know what the hell we are going to do with the margin calls that would have been precipitated by the drop to $4 on Friday (I'm still struggling with the $300,000 from the last margin call).
>
> Any light on the horizon??

> Ken [Emphasis in original]

[184] With the margin calls and the diminished value of KHI shares, the wheels were coming off. Gerard McInnis spoke candidly to Mr. Potter in an email on August 17th:

> I realize the tremendous pressure you are under personally, and we are collectively under corporately and I apologize in advance for the timing of this message. As you are aware, I too am under personal financial pressure which I intend to action in my own ways.
>
> I have been seriously damaged, personally and professionally, by the downturn of ITI and I cannot let things continue to happen to me. To address my personally [*sic*] financial situation I intend to direct National Bank Financial to sell up to 50,000 KHI shares into the market as they deem necessary to deal with the cash calls being made on my account. I will not direct as to the timing of the sales and will not action any sooner than required, but the fact is the only means to address the cash call is by liquifying portions of my KHI holdings. I realize the impact of any selling pressure has to the whole of the market but I must at some point begin to act in my own best interests and I trust you respect and appreciate that.
>
> In the past two years I have offered considerable sacrifice, again personally, professionally and financially in support of both KHI and ITI. At this point in time I have to conclude that this has not paid off. I realize I do not have the same financial exposures as do you and other shareholders and I am empthetic [*sic*] to their plight. However, what I do have are my talents and work ethic and I must consider where these are now best invested.
>
> I have assumed a worst case scenerio [*sic*] of personal bankruptcy and am at peace with that. I have actioned the sale of my home and am prepared to start over.
>
> I am scheduled for vacation next week and plan to use the time to assess personal affairs. I am questionaing [*sic*] my future with KHI and am leaning toward making a fresh start somewhere new. I am writing now because you need to know that.
>
> I am concerned about maintaining your support and respect and I realize I am risking the loss of both.

[185] With the end of August approaching, the ability of the conspirators to provide buying support for KHI shares had been exhausted. The Match Trade Report shows that on August 21st the closing price of KHI shares was $2.30.

[186] As KHI's situation circled the drain, Leon Trakman, an LP unitholder, was looking for his share certificates. Mr. Trakman and Mr. Potter exchanged emails about KHI's failure to deliver his share certificates in June 2001. Mr. Trakman

wanted compensation. Having told Mr. Trakman in an August 22nd conversation that KHI would make him a substantial offer on a without prejudice basis, Mr. Potter emphasized in an email on August 25th: "[i]n no way did I acknowledge that Knowledge House has any legal responsibility for the fall in the value of your shares since June, 2001". Two days later, he informed Mr. Trakman that the matter was being referred to KHI counsel and that his lawyer would be contacted accordingly.

[187] Mr. Potter told Mr. Trakman in an August 28th email that he had asked Mr. Colpitts "to have the appropriate person" contact his lawyer "as soon as possible". As the trial judge noted, he then emailed a warning to Mr. Colpitts on September 4th:[122]

> We need to be careful about this [*sic*] guys - they could go to the TSE or Securities Commission if we do not give them a lawyer to talk to!! Neither you or I need that!

[188] The fight to keep KHI afloat was lost by September 13, 2001. The company announced it was closing down due to a lack of available financing. The conspiracy had run its course.[123]

[189] The trial judge reviewed Langley Evans' examination of KHI's performance:

> [274] Langley Evans testified that, in preparing his report, he looked at the KHI share price and observed that it seemed to significantly outperform market indices over the period in question. He then reviewed KHI's public disclosures to determine whether the company's operating results could explain the stock's comparatively superior performance. He found no explanation in the disclosure. In his report, Mr. Evans noted that, "KHI's operating results were poor and its financial position deteriorated, especially in the latter half of 2000 and throughout 2001."
>
> [275] Having found nothing helpful in the disclosure, Mr. Evans reviewed the documentary evidence provided by the RCMP and found what he considered to be ample evidence to explain the stock's superior performance. He cited numerous manipulative indicators that he believed were used to affect the price for KHI shares, including high closings, buy-side domination, use of nominees, parking stock, providing undisclosed incentives, suppressing selling activity, and non-disclosure of material changes. He found these indicators in the communications, the trade data, account statements, and witness statements. At paras. 236-239 of his report, Mr. Evans outlined his opinion as to the impact the suspect account group's actions had on the KHI stock price:

> The Group's initial actions in the first few months of the period under review did not have an immediate or dramatic effect on the KHI stock price. At the early stages from December 1999 up [to] the end of March and into early April 2000, the excitement of the new listing on the TSE, combined with the optimistic market environment and the release of encouraging financial results by KHI, is sufficient to provide reasonable explanations for the observed trading price of KHI shares on the TSE.
>
> However, beginning in mid-April 2000 and certainly by May 2000, the Group's actions began to affect the KHI stock price, and from that point forward, had a cumulative and growing impact on the price of KHI shares as traded on the TSE. From May 2000 onwards, there was a diminishing general market interest [in] KHI. From November 2000 onwards, KHI was under increasing internal financial pressure with losses from operations and an inability to raise sufficient capital. The Group was able to stabilize the KHI market price and hold it at artificially high levels while both the general tech market collapsed and KHI's operations also deteriorated. The actions of Group were successful in this regard until the KHI price collapse in mid-August 2001.[124]

Procedural Background

[190] Given the issues raised on appeal, it is necessary to now canvass both the investigative history giving rise to charges being laid against Mr. Potter and Mr. Colpitts and the progress of the prosecution. Although more detail will be provided in the analysis to follow, a brief summary of the procedural history leading to the convictions will be of assistance in placing our decision in context.

The Investigatory Period

[191] The criminal investigation of Mr. Potter and Mr. Colpitts spanned over eight years. It commenced in 2003 and ended with the Crown preferring an indictment against them and co-accused Bruce Clarke in 2011. The nature of the investigation was reviewed in a pre-trial motion for a stay of the criminal charges brought by all three defendants in 2015. In the course of his reasons dismissing the motions,[125] the trial judge set out in detail the history of the investigation. We will set those steps out later but for now offer the following summary:

- In 2003, the RCMP received a written complaint from Scott Peacock of the Nova Scotia Securities Commission and later that year announced it was undertaking a criminal investigation relating to KHI's collapse.

- In 2004, the investigation was marked as "high priority" and a "Quick Start" team from the Integrated Market Enforcement Team ("IMET") of the RCMP was assigned to aid in the investigation. Various interviews were conducted and warrants executed in 2004.

- In December 2004, Ian Black joined the investigation team. His involvement is the subject of a ground of appeal and will be reviewed in detail.

- Document collection, including as a result of judicial authorizations, and witness interviews continued in 2005.

- In 2006, the investigation team gained access to the KHI servers and retrieved more than 145,000 emails.

- Warrants continued to be executed in 2006, 2007, and 2008.

- The prosecution was originally undertaken by the Nova Scotia Public Prosecution Service (in 2005), but was transferred in 2008 to the Public Prosecution Service of Canada.

- On March 17, 2011, charges were laid against Mr. Potter, Mr. Colpitts, and Mr. Clarke by way of a preferred indictment.

The Pre-trial Period

[192] In the fall of 2011, Justice Suzanne Hood was assigned as case management judge. In that capacity, she undertook a number of case management conferences and heard several pre-trial motions. Although not intended as an exhaustive review of issues that were raised and addressed during the period of Justice Hood's management, we note the following:

- In early 2012, the Crown raised a concern relating to Mr. Colpitts' then counsel, Tyler Hodgson of Borden Ladner Gervais. It was asserted Mr. Hodgson might be in a conflict of interest in his representation of Mr. Colpitts, as his father, James Hodgson of Norton Rose Fulbright, was counsel for National Bank Financial Limited, a party adverse in interest to the three defendants.

- The Crown's Notice of Motion seeking to have Mr. Hodgson removed as counsel for Mr. Colpitts was filed in February 2012.

- In response to the Crown's motion, Borden Ladner Gervais and Norton Rose Fulbright filed motions in May 2012 seeking to intervene in the Crown's conflict motion.

- The motions to intervene were heard on June 7, 2012. In her decision rendered on June 28, 2012,[126] Justice Hood allowed Messrs. Hodgson and their respective law firms to intervene in the conflict motion.

- On August 20, 2012, the conflict motion was heard. Justice Hood rendered a decision on November 22, 2012[127] in which she dismissed the motion to have Tyler Hodgson removed as counsel.

- In November 2011, Mr. Clarke made the court aware that his efforts to obtain counsel through Nova Scotia Legal Aid had been unsuccessful. In January 2012, Mark Knox wrote to the court advising he had received instructions from Mr. Clarke to bring a motion for state-funded counsel (a *Rowbotham* application).

- The *Rowbotham* application was filed October 9, 2012 and later amended on October 25, 2012. It was heard on February 19, 2013.

- Mr. Clarke's *Rowbotham* application was successful. By way of letter dated March 7, 2013, Justice Hood advised the parties a conditional stay of the proceedings against all three defendants would be in place until state-funded counsel was appointed for Mr. Clarke. Written reasons on the *Rowbotham* motion, granted earlier in an oral decision, were released on May 24, 2013,[128] and Barry Whynot was retained on June 18, 2013 to represent Mr. Clarke.

- On September 25, 2013, Mr. Colpitts filed a motion relating to materials held by the Nova Scotia Securities Commission. Supported by Mr. Potter and Mr. Clarke, he sought a declaratory order that the Crown breached its duty to make reasonable inquiries concerning materials known to be in the possession of the Securities Commission, and an order requiring the Crown to immediately vet the Securities Commission materials and disclose them to the defendants or, in the alternative, that the defendants be permitted to access the materials. This is referenced in the record and in the arguments on appeal as the *McNeil* application.

- The motion, opposed by the Crown, was heard on October 17, 2013. Justice Hood provided an oral decision on November 15, 2013 and subsequently released a written decision.[129] Justice Hood found the Crown had breached its *McNeil* obligations but that the matter was moot because

Mr. Colpitts already had the materials he sought. She directed any further motions for Securities Commission materials be brought by way of an *O'Connor*[130] application. This decision became the subject of much future discussion between the parties, before the trial judge, and in this Court. It will be discussed later.

- On November 15, 2013, trial dates were confirmed, with the trial to commence on April 2, 2014.

[193] In January 2014, Justice Coady was assigned as trial judge and undertook all further case management. In the same decision referred to above that set out the investigation history, the trial judge set out the court appearances that occurred since he took carriage of the matter:

> [100] ...
>
> - January 27, 2014: Jurisdictional appearance. Trial adjournment discussed and scheduled for February 15, 2014.
>
> - February 15, 2014: Adjournment application heard. Trial re-scheduled for early January, 2015.
>
> - February 28, 2014: Various issues discussed. Delay application scheduled for November 24-December 5, 2014. Other defence motions scheduled for April 28-May 2, 2014. August 11-15, 2014 set aside for contingencies.
>
> - April 28-29, 2014: Hearings held on defence applications (1) Task 335; (2) Drafts of expert's report; and (3) seeking particulars. *O'Connor* application scheduled for July 17-18, 2014.
>
> - July 17, 2014: Discussions related to the NSSC documents and how to proceed. No *O'Connor* applications filed. August 11-15, 2014 retained for defence motions including *O'Connor* applications.
>
> - August 11, 2014: Load file and expert notes applications settled. Hearing held on issue of NSSC communications with the Crown. No *O'Connor* motion filed.
>
> - October 22-24, 2014: Hearing held re: Randy Gass' commitment to provide the Court and defence with NSSC documents. Hearing held for return of NSSC hard drives mistakenly sent to defendants and containing privileged documents.
>
> - December 4, 2014: First recusal motion heard.
>
> - January 5, 2015: Jurisdictional appearance. Filing and hearing dates set for *O'Connor* privilege and likely relevance arguments. Delay applications set for April 14, 2015.

- January 15-16, 2015: *O'Connor* privilege hearing held. Decision reserved.
- February 18-20, 2015: *O'Connor* likely relevance hearing held. Decision reserved.
- March 9, 2015: Delay applications adjourned to April 20, 2015.
- April 14, 2015: Second recusal motion heard.
- April 20 to July 10, 2015: Delay applications heard. Decision reserved.[131]

[194] The trial judge dismissed the applications for a stay based on delay. (This was Stay Decision #1.) The record shows that on September 1, 2015, Mr. Potter and Mr. Colpitts sought to further adjourn the trial, submitting they were not ready to proceed. The request was granted and the trial re-scheduled to start on October 27, 2015 (later adjourned to November 16, 2015 due to Mr. Potter's wife being involved in a motor vehicle accident). The last pre-trial matter was a recusal motion (the third) brought by Mr. Potter and Mr. Colpitts on September 22, 2015. It was dismissed by the trial judge.[132]

The Trial Period

[195] The trial began on November 16, 2015. A number of mid-trial motions were considered by the trial judge. He described them in his second stay decision as follows:

> November 16, 2015 (Day 1) Mr. Potter applied to adjourn the trial to allow an application to force the Crown to take possession of the NSSC documents so they could assess the likelihood of a conviction. Mr. Colpitts supported Mr. Potter while Mr. Clarke did not. Leave was denied.
>
> January 16, 2016 (Day 18) A defence application was made challenging the manner of the redirect of one of the Crown's technical witnesses. The defendants also applied to cease the use of the electronic monitors and revert to paper exhibits. Both motions were dismissed.
>
> February 8-11, 2016 (Day 23) The defendants brought two applications respecting the evidence of Ian Black. The first sought to limit his *viva voce* evidence. The second sought an Order that the co-conspirators exception to the hearsay rule was not available to the Crown. Both applications were dismissed at 2016 NSSC 48.
>
> August 3, 2016 (Day 79) On this date the Crown's expert, Lang Evans, was to commence his testimony. The defendants challenged his qualifications. Mr. Potter's counsel proposed an alternative style hearing which would address qualifications, scope of the expert evidence, and issues of admissibility. This

> motion was dismissed and a conventional *voir dire* was held until August 8. Mr. Evans was qualified as proposed at 2016 NSSC 219.
>
> October 6, 2016 (Day 92) Mr. Potter's counsel applied to allow both defendants to open their case together. This application was dismissed at 2016 NSSC 271.
>
> October 18, 2016 (Day 93) Mr. Colpitts applied to adjourn his case until January, 2017. The Court granted a two-week recess to allow for requested preparation.
>
> October 25, 2016 (Day 94) The defendants objected to the inclusion of certain documents in the document exhibit disk. The objection was dismissed by way of oral decision.
>
> January 9, 2017 (Day 111) Mr. Colpitts applied to have his witness, Rob Peters, qualified as an expert. At the conclusion of the *voir dire* he withdrew his application (when he realized it could not succeed).
>
> February 9, 2017 (Day 129) The defendants brought an application to adjourn the prosecution so they could bring a second delay application [post ***Jordan***]. The Court directed that the defendants' delay applications be heard after the conclusion of evidence: 2017 NSSC 40.
>
> July 18, 2017 (Day 143) The defendants applied for a mistrial. Leave was denied at 2017 NSSC 200. [The mistrial application was brought following the trial judge's three and a half-month unscheduled adjournment, prompted by his health issues. The trial judge had received advice that he required a substantial break to recover.]
>
> August 10, 2017 (Day 154) The Crown and the defendants differed on the order of closing briefs and arguments. The Crown argued that the merits and delay submissions should be heard together. The defendants argued that the delay application should be decided before argument on the merits. The Court decided to hear the delay motion and closing remarks contemporaneously: 2017 NSSC 228.[133]

[196] We will return to several of the above pre-trial and mid-trial rulings later when addressing the grounds of appeal.

Issues

[197] In their respective Notices of Appeal, Mr. Potter and Mr. Colpitts set out almost identical grounds of appeal. The 22 grounds (many broken into sub-grounds), were condensed in their factums. Mr. Potter articulated the grounds as follows:

1. The trial judge erred in failing to enter a stay of proceedings under ss. 7 and 11(b) of the *Charter* both with respect to pre-trial and post-trial delay.

2. The trial judge exhibited bias in his pre-trial rulings and in the manner in which he conducted the trial.

3. The trial judge erred in ruling that the evidence of Ian Black was admissible lay opinion evidence and erred in admitting the evidence of Langley Evans, as expert opinion.

4. The trial judge erred in finding that there was an agreement to commit an unlawful act and alternatively, he erred in ruling that the Crown could rely on the co-conspirators exception to the hearsay rule.

5. The trial judge erred in finding that the *actus reus* and *mens rea* of the offence of fraudulently affecting the public market had been proven.

6. The trial judge erred by misapprehending the evidence by persistently accepting Crown evidence as relevant and the evidence sought to be adduced by the defence as irrelevant.

[198] Mr. Colpitts adopts the above grounds as well as Mr. Potter's written submissions. In his written and oral submissions, Mr. Colpitts expands upon how the trial judge's errors particularly impacted him.

[199] After having considered the written and oral submissions of the parties, the issues to be determined on appeal are best stated as follows:

1. Did the trial judge err in failing to find that Mr. Potter's and Mr. Colpitts' rights under s. 7 of the *Charter* were infringed due to an abuse of process stemming from pre-charge delay, and thus erred in failing to enter a stay of proceedings under s. 24(1)?

2. Did the trial judge err in dismissing Mr. Potter's and Mr. Colpitts' applications for a stay of proceedings because their rights to be tried within a reasonable time under s. 11(b) of the *Charter*, were infringed?

3. Did the trial judge err in law by admitting the evidence of Ian Black and then by relying on that evidence?

4. Did the trial judge err in law by qualifying Langley Evans to give expert opinion evidence and then by relying on that evidence?

5. Did the trial judge err in law by admitting into evidence the out-of-court statements of co-conspirators?

6. Were the guilty verdicts for conspiracy unreasonable?

7. Were the guilty verdicts for fraud on the public market unreasonable?
8. Did the trial judge misapprehend the evidence, and, in particular, did he misapprehend the defences advanced?
9. Did the trial judge's conduct give rise to a reasonable apprehension of bias, or establish actual bias against Mr. Potter and Mr. Colpitts?

[200] The Crown's sentence appeals can be addressed by asking the following:

> Did the trial judge err in law and in principle in imposing sentences that are demonstrably unfit in all the circumstances?

Standard of Review

[201] Given the issues attract differing standards of appellate review, we address the applicable standards in our analysis of each.

Analysis

Issue #1: Did the Trial Judge Err in Failing to Find that Mr. Potter's and Mr. Colpitts' Rights Under s. 7 of the *Charter* were Infringed due to an Abuse of Process Stemming from Pre-charge Delay, and thus Erred in Failing to Enter a Stay of Proceedings Under s. 24(1)?

[202] Mr. Potter and Mr. Colpitts say their s. 7 *Charter* rights to life, liberty and security of the person were infringed due to the accumulated delay from the beginning of the RCMP investigation to the laying of criminal charges. They argue the trial judge erred in law when he concluded otherwise.

[203] We will first address the background leading to the trial judge's impugned decisions, after which the parties' positions on appeal will be reviewed. As part of our analysis, we will set out the appropriate legal principles, including the appropriate standard of review. We will then conclude our analysis by applying those principles to the arguments advanced before us.

Background

[204] This ground of appeal finds its genesis in an interlocutory decision rendered in August 2015. In *R. v. Clarke*[134] ("Stay Decision #1"), the trial judge considered the motions advanced by all three accused to have their criminal charges stayed.

Although that decision addressed allegations of *Charter* breaches arising from both pre- and post-charge delay, we address only the former under this ground. Post-charge delay is addressed in the next issue.

[205] All three defendants filed motions with supporting affidavits and pre-hearing briefs outlining their respective positions in support of a stay. The arguments advanced by all three were closely aligned. The motion hearing ran from April 20, 2015 to July 10, 2015. The trial judge's written decision was released on August 12, 2015.

[206] During the motion hearing, significant evidence was called relating to the pre-indictment period and the work undertaken by the RCMP. The trial judge heard evidence from seven members of the investigation team (called by Mr. Clarke). These witnesses described the contents of a 4,400 page "Task binder", entered as an exhibit, which set out the investigative steps.

[207] In his written decision, the trial judge summarized the course of the investigation:

> [57] The investigative phase extended from February 20, 2003 until March 17, 2011. The following is the timeline of that investigation:
>
> - February 20, 2003: Sgt. Barrett, Commercial Crime Section (CCS), receives a letter from Scott Peacock proposing a criminal investigation.
> - May 16, 2003: Sgt. Barrett emails John Sliter (IMET) to solicit investigative expertise to assist with the criminal investigation into KHI.
> - Summer, 2003: Cst. Robinson transferred to Halifax to join the IMET team. Inspector MacDougall assumes the role of the senior investigator.
> - April 19, 2004: IMET Quick Start team first meet with the CCS and initiate an investigative plan.
> - April 21, 2004: Investigators attended the prothonotary's office and review all KHI civil filings. This process took approximately two months and captured 755 documents.
> - June 14, 2004: Cpl. Murdock assumes the role of file manager and institutes a case management system.
> - June 25, 2004: The law offices of Walker Dunlop are searched by consent and 2576 documents are seized. Interviews are conducted and search warrants executed throughout 2004.

- Fall, 2004: Three search warrants were executed. Three CCS investigators, six IMET members, two transcribers and one information processor were assigned to the case.

- December, 2004: Ian Black joins the team as an investigative assistant. His role was to review and complete a trading analysis of KHI transactions. Several other investigators joined the team.

- During 2005: The team filed and executed 19 judicial authorizations which resulted in the analysis of 4512 documents. Fourteen production orders were executed at financial institutions. Two were executed at Computershare, KHI's transfer agent. One search was conducted (notebook). One general warrant was executed at the law office of Tim Hill where the KHI servers were seized. One Mutual Legal Assistance Treaty was prepared resulting in two investigators travelling to Germany to interview three witnesses in 2006.

- During 2005: The team interviewed 36 witnesses whose names arose as a result of previous investigative steps.

- September, 2005: Lori Shea is recruited to determine the number of shares KHI had issued and outstanding at any given time including the actions of the inside group. Ms. Shea's report was finalized in August, 2008.

- During 2006: The team interviewed 43 witnesses. As well, three production orders were executed at financial institutions. The result was the seizure of 852 documents. One search was executed at the offices of the local carpenters union pension administrator.

- November, 2006: Access to the KHI servers resulted in 145,216 emails coming into the investigation.

- During 2007: Access to the KHI servers continued before the Court. Twenty-four witness interviews were conducted at various places across Canada. Two production orders were executed at financial institutions. Two search warrants were executed at the NSSC[135] and the law offices of Stewart McKelvey Stirling Scales.

- March, 2008: The federal Crown takes over the prosecution from the Public Prosecution Service of Nova Scotia.

- During 2008: The team interviewed seven witnesses by June. In addition one warrant to search was executed at the Toronto Stock Exchange.

- September, 2008: The team completes its disclosure brief and delivers it to the Crown.

- November, 2008: Langley Evans was identified as an individual with the qualifications and experience to be the Crown's expert witness.

> He met with the Crown in January, 2009 and his final report was available in February, 2010.
>
> - July, 2009: Access to the KHI servers was authorized to perform keyword searches (Searchlight 2). One interview was conducted in Montreal (Rousseau).
>
> - October, 2009: A process was established for access to the KHI server for a review of electronic files. The results were received in November, 2010, but nothing of investigative value was found.
>
> - March 17, 2011: The Crown files a direct Indictment.[136]
>
> [Footnote omitted]

[208] The trial judge described the concerns advanced by Mr. Potter, Mr. Colpitts, and Mr. Clarke with respect to the investigation:

> …
>
> - The ineffectiveness of the IMET Quick Start Team's choices when getting the investigation started.
>
> - Issues surrounding the KHI servers and the emails contained therein.
>
> - Failing to proceed with the KHI investigation until the NSSC investigation was ongoing.
>
> - Issues related to the retention of legal counsel and the delay associated with that problem.
>
> - Inordinate delays in obtaining search warrants and production orders.
>
> - Failure to conduct timely interviews.
>
> - Delay in processing raw data and in obtaining an expert witness.
>
> - A general lack of resources on the part of the Commercial Crime Team in Halifax.[137]

[209] Although the trial judge found "the KHI investigation suffered from several deficiencies" leading to "unreasonable" investigative delay (specifically in the period prior to 2008), he ultimately concluded this did not give rise to an abuse of process warranting a stay of proceedings.[138]

[210] The trial judge also rejected the defendants' claims that the pre-charge delay resulted in an inability to make full answer and defence due to faded memories and other lost evidence. Mr. Colpitts in particular pointed to the death of Mr. Keating, a

former KHI director, the loss of Mr. Colpitts' personal notes, and the faded memories of potential witnesses as detrimental to the advancement of his defence. The trial judge concluded there was no "air of reality that the lost evidence would in fact, and in a material way, assist Mr. Colpitts make full answer and defence".[139] The motions were dismissed.

[211] Mr. Potter and Mr. Colpitts again raised the issue of pre-charge delay, along with post-charge delay (discussed later), following the release of the Supreme Court of Canada's decision in *R. v. Jordan*[140] and the Newfoundland and Labrador Court of Appeal's decision in *R. v. Hunt*.[141] The trial judge directed that the motions, made mid-trial in February 2017, be heard at the conclusion of trial.[142] Although the resulting decision (Stay Decision #2[143]) focused primarily on post-charge delay, the trial judge also declined to reconsider his earlier view with respect to pre-charge delay. He noted:

- As in the previous motion, the defendants had not demonstrated, as required, actual prejudice to their fair trial rights.[144]
- The Supreme Court of Canada's recent decision in *R. v. Hunt*[145] stated courts cannot impose judicial limitation periods or exercise judicial supervision over the allocation of police resources. That decision also established generalized prejudice experienced by a defendant due to delay is insufficient to give rise to an abuse of process.[146]

[212] The defendants' requests for a stay were again dismissed.

Position of the Parties on Appeal

[213] Mr. Potter and Mr. Colpitts submit the trial judge erred by failing to find a breach of their s. 7 *Charter* rights due to the lengthy pre-charge delay. Their Notices of Appeal set out identical grounds:

> 1. That the learned trial judge erred in failing to properly consider the application of s. 7 of the *Charter* and its impact upon the fairness of the trial process and on the ability to make full answer and defence.
>
> 2. That both in his initial pre-trial ruling on August 12, 2015, and his subsequent determination post-trial on March 9, 2018, the learned trial judge demonstrated a failure to appreciate the prejudicial and unacceptable impact of the unnecessarily protracted nature of the investigation which had occupied more than eight years.

3. That the learned trial judge failed to properly appreciate in assessing both the inherent and actual prejudice attributable to the mismanagement and inexplicable abuse of both the investigatory and prosecutorial functions and its profound impact upon the ability to make full answer and defence, and in particular:

- That the issue of the collapse of KHI which occurred on September 13, 2001 was first referred to the RCMP by the Nova Scotia Securities Commission (NSSC) on February 20, 2003;
- That is was not until May 4, 2004 that the NSSC directed the RCMP to in fact commence their investigation after having met with the "Quick Start Team" on April 19, 2004;
- That on October 4, 2004 it was recommended that the RCMP assign a prosecutor, retain an expert, and initiate charges within six weeks;
- That in February 2005, the Integrated Market Enforcement Team (IMET) of the RCMP requested a decision to prosecute by the end of March 2005;
- That in April 2005, a prosecutor was retained and IMET was engaged in the preparation of the Crown brief, while in July 2005 a forensic accountant was retained;
- That on March 22, 2006 it was anticipated by the RCMP that charges would be initiated in late 2006; in April 2007, September was set as the target; and in June 2007, November was set as the new target for laying charges;
- That in March 2008, the Provincial Crown quit the file and on March 17, 2008 the PPSC assumed carriage of the prosecution;
- That the complete file was not forwarded to the PPSC by the RCMP until January 4, 2010 and that a direct indictment was finally preferred in March 2011.

[214] In his submissions to this Court, Mr. Potter says the pre-trial delay gave rise to an abuse of process in two ways. He argues the delay "profoundly affected the fairness of the trial" due to the death of important witnesses and the diminished memories of others. This resulted in his inability to present his defences, primarily that Bruce Clarke was providing KHI with a legitimate market making service approved by NBFL; that he relied on NBFL to supervise Mr. Clarke, which it failed to do; and that his own conduct was perfectly acceptable and commonplace for a CEO of a small company during the time in question. Mr. Potter also argues that the pre-charge delay resulted in an abuse of process within the residual category as discussed in *R. v. O'Connor*.[147]

[215] Although the trial judge concluded the pre-charge delay did not affect the fairness of the trial, Mr. Potter submits this conclusion was inextricably linked to his finding that the entirety of the defence evidence was irrelevant, his fundamental lack of understanding of market activity, and bias.

[216] Mr. Colpitts adopts the above and adds that the pre-charge delay created great personal and professional distress for him. The constant looming of potential charges being laid over such an extended time was particularly problematic. He points to his family situation and the challenges of continuing a law practice amidst the ever-present threat of criminal charges.

[217] The Crown submits Mr. Potter and Mr. Colpitts have failed to demonstrate any error on the part of the trial judge and are simply asking this Court to reconsider the arguments advanced before, and rejected by, the trial judge. The Crown says there is no error in principle in the trial judge's reasoning, the factual conclusions he reached were supported by the evidence, and he was correct in concluding Mr. Potter and Mr. Colpitts had failed to establish a breach of their s. 7 *Charter* rights. As such, a stay was not warranted. Further, the Crown submits the trial judge clearly demonstrated a full understanding of market activity and the claims of bias are without merit.

[218] We address Mr. Potter's and Mr. Colpitts' claims relating to the trial judge's misapprehension of their defences and bias later. Now we will consider the trial judge's reasons focusing on the legal principles raised in relation to the pre-charge delay.

Legal Principles

[219] It is well-established that delay during the investigation of an offence may give rise to a *Charter* breach. In *Mills v. The Queen*,[148] Lamer, J. (as he then was) wrote in his dissent (on other grounds) at p. 945:

> Pre-charge delay is relevant under ss. 7 and 11(*d*) because it is not the length of the delay which matters but rather the effect of that delay upon the fairness of the trial. Pre-charge delay is as relevant as any other form of pre-charge or post-charge conduct which has a bearing upon the fairness of the trial. In other words, pre-charge delay is relevant to those interests which are protected by the right to a fair trial whereas it is irrelevant to those which are protected by s. 11(*b*). Similarly, pre-charge delay may be a relevant consideration under the doctrine of abuse of process in the same manner as any other conduct by the police or the Crown which may be held to constitute an abuse of process.

[220] Mr. Potter and Mr. Colpitts anchor their claims of a *Charter* breach in the doctrine of abuse of process, specifically relying on *R. v. O'Connor*.[149] Mr. Potter writes in his factum:

> 31. … As L'Heureux-Dubé J. stated in *R. v. O'Connor*, there are two categories of abuse of process: where conduct on the part of the Crown or authorities infringes the accused's right to a fair trial; and a residual category of conduct that does not affect the fairness of the trial but nevertheless is so egregious as to contravene fundamental notions of justice and undermine the integrity of the judicial process. [Footnote omitted]

[221] The Crown does not take issue with Mr. Potter's and Mr. Colpitts' articulation of the relevant legal principles. Nor do we. Subsequent decisions have provided guidance with respect to the principles engaged in claims of abuse of process advanced under each category.[150]

Infringement of fair trial rights

[222] As they did before the trial judge, Mr. Potter and Mr. Colpitts argue the loss of evidence gave rise to an abuse of process under this category.

[223] Lost evidence challenges typically fall into two broad categories: those involving the loss of potential exhibits, and those involving the loss of testimonial evidence through faded memory or witness unavailability. Although a claim of lost evidence engages a case-specific contextual analysis, a number of broad principles emerge from the authorities. We note:

- A stay is an exceptional remedy granted only in the clearest of cases (this principle applies equally to the second category of abuse of process).[151]
- An accused seeking a stay on the basis of lost evidence must show on a balance of probabilities actual prejudice to their fair trial rights.[152]
- Actual prejudice is demonstrated "when the accused is unable to put forward [their] defence due to the lost evidence and not simply that the loss of the evidence makes putting forward the position more difficult".[153]
- In the context of lost testimonial evidence, an accused seeking a stay must demonstrate the witness would have given specific evidence without which a defence could not be fairly advanced.[154]

- In assessing whether a trial would be unfair, it is important to remember that an "accused is entitled to a trial that is fundamentally fair and not the fairest of all possible trials".[155]

[224] We will return to these principles in our analysis.

Residual category

[225] After the trial judge heard the first stay application, but before the second one was argued, the Supreme Court of Canada released its decision in *R. v. Hunt*.[156] In *Hunt*, the residual category of abuse of process took centre stage. There, the majority of the Newfoundland and Labrador Court of Appeal upheld a stay of proceedings in a complex commercial fraud and conspiracy prosecution.[157] That outcome was primarily grounded in concerns about the integrity of the administration of justice giving rise to a finding of abuse of process.

[226] The Supreme Court of Canada allowed the appeal, set aside the stay of proceedings, and adopted the dissenting judgment of Hoegg J.A.[158] In her reasons, Justice Hoegg undertook a thorough review of the legal authorities and provided valuable guidance for assessing abuse of process claims, particularly where fair trial rights are not engaged. From her reasons we extract the following principles:

- Delay, even lengthy pre-charge delay from the time of the alleged offence to the laying of an indictment, cannot give rise to a stay of proceedings in the absence of Crown conduct affecting trial fairness or tarnishing the integrity of the justice system.[159]
- To meet the test for residual category abuse of process, egregious Crown conduct—which is distinct from, though certainly includes, misconduct—must be demonstrated.[160]
- A finding of an abuse of process cannot be made in a vacuum and must be found in the factual context established by the evidence.[161]
- While some review of investigatory Crown conduct is required for abuse of process allegations, courts ought not to question whether police and prosecutors undertook their tasks in the investigative stage in an efficient manner. It is not the role of a judge to scrutinize for investigative efficiency, as doing so conflates the roles of the executive and the judicial branches of government.[162]

Analysis

Standard of review

[227] We must be mindful of the lens through which we consider allegations of error. A trial judge's determination as to whether a *Charter* right has been infringed is a question of law attracting a standard of correctness. The same applies to a finding of abuse of process. A judge must consider and apply the correct legal principles in making these determinations. However, this Court must defer to a trial judge's factual findings that underlie the ultimate legal question unless an appellant demonstrates a finding is based on a palpable and overriding error or produces an outcome so clearly wrong that it results in an injustice.[163]

Fair trial rights

[228] In their argument before us, Mr. Potter and Mr. Colpitts do not take issue with the relevant law as stated by the trial judge. Instead, they say he wrongly concluded they had not shown an actual impairment to their fair trial rights based on lost evidence.

[229] In our view, the trial judge identified the correct legal principles governing lost evidence claims. Mr. Potter's and Mr. Colpitts' challenges relate to how the trial judge applied those principles to the evidence.

[230] It was necessary for Mr. Potter and Mr. Colpitts to establish on the evidence actual prejudice to their ability to have a fair trial. Having reviewed the record, and considering their submissions on appeal, we see no error in the trial judge's conclusion that they had not met that burden.

[231] Mr. Potter and Mr. Colpitts submit that due to the faded memories of witnesses, they were unable to counter the interpretation of the various Searchlight emails reviewed by Ian Black in his evidence. We reject this proposition. Firstly, and as we will discuss later, Mr. Black did not provide an interpretation of the various emails that were exchanged between and amongst Mr. Potter, Mr. Colpitts, Mr. Clarke, and the other unindicted co-conspirators. Secondly, Mr. Potter and Mr. Colpitts were not prevented from calling evidence regarding the meaning of the various email exchanges. Mr. Colpitts testified and also called two unindicted co-conspirators, Mr. Schelew and Ms. Locke. Further, they had the opportunity to cross-examine Crown witnesses, and could have called others who had been part of the email exchanges to testify to the meaning of the communications.

[232] The appellants fell far short of identifying, as is required, what specific evidence was lost.

[233] It is difficult for Mr. Potter and Mr. Colpitts to put forward a credible lost evidence claim when the record demonstrates the Crown was willing to explore reasonable accommodations to have evidence placed before the court which might otherwise have been "lost". By way of example, on December 15, 2016, the Crown wrote to Mr. Potter and Mr. Colpitts:

> In order to move this trial along, the Crown reiterates that it is prepared to work out an agreed statement of facts, particularly as it relates to the "NBFL evidence". We maintain our position that most, if not all, of the evidence we are hearing from the NBFL witnesses called by Mr. Colpitts is irrelevant to any issue at this trial. At the same time, to date the Court has permitted the defendants to adduce this evidence. An agreement on non-contested facts may also serve to address concerns you may have about the loss of evidence.
>
> Please consider this request and advise. We can meet this week or early next week at your convenience. [Footnote omitted]

Mr. Potter and Mr. Colpitts did not respond to the Crown's offer.

[234] The arguments of Mr. Potter and Mr. Colpitts have failed to persuade us. We are not satisfied that either appellant was precluded from advancing the defences they wished. With respect to the "NBFL" defence in particular, Mr. Colpitts called a number of witnesses who, for the most part, had been located at the head office of NBFL in Montreal at times relevant to the charges. Neither he nor Mr. Potter were prevented from calling other witnesses, such as individuals from the NBFL Halifax office with potential direct knowledge of Bruce Clarke's role at NBFL or the local office's failure to supervise his activities (the Crown was willing to concede this fact). We further note neither Mr. Potter nor Mr. Colpitts chose to cross-examine Crown witness Steven Clarke in relation to their claims that his father had acted as a market maker for KHI.

Residual category

[235] In his submissions to us, Mr. Potter's counsel says egregious delay going to the heart of the administration of justice was caused by the dispute between the two levels of government as to which would carry and fund the prosecution. Mr. Greenspan argues the trial judge was wrong to not find a residual category abuse of process on that basis.

[236] In asking us to reach a different conclusion, Mr. Potter's counsel submits:

- The Supreme Court of Canada's decision in *Hunt* is inapplicable in the present case and should not have governed the trial judge's analysis in Stay Decision #2,[164] nor our review thereof.
- *R. v. Campbell*[165] and *R. c. Presenti*[166] should govern how the pre-charge delay is assessed in the present case.
- The trial judge found the pre-charge delay was "unacceptable" but then inexplicably failed to make the resulting finding of an abuse of process and s. 7 infringement.

[237] We will address each of these submissions in turn. Mr. Potter submits *Hunt* is factually distinguishable, as there, the trial judge did not make a finding that criminal charges ought to have been laid earlier. Here, the trial judge expressly found the charges should have been laid by 2008. Mr. Potter asserts in his factum:

> 50. This alone distinguishes this case from *Hunt*, where there was no evidence of when charges ought to have been laid. However, this case also involved fewer documents, fewer searches, fewer investigator hours, and more certainty about the charges to be laid than *Hunt*. The delay in *Hunt* was justified by the complexity of the investigation. The delay here is not. …

[238] With respect, these factual differences do not restrict the applicability of the principles enunciated in *Hunt*. The degree of complexity involved in lengthy investigations will inevitably vary depending on the nature of the charges, the number of accused and a host of other factors. Nothing in *Hunt* signals that its principles were intended to apply to only those investigations which meet a certain complexity threshold.

[239] Similarly, the trial judge's conclusion here that charges ought to have been laid by 2008 is of no consequence. In fact, it is the type of conclusion that *Hunt* suggests should be avoided.[167] His conclusion does not preclude the application of *Hunt*. We set out the principles arising from Justice Hoegg's judgment earlier and are satisfied Mr. Potter and Mr. Colpitts have failed to establish a residual abuse of process.

[240] We turn to the authorities relied on by Mr. Potter. With respect to *R. v. Campbell*, he writes:

> 45. In *R. v. Campbell*, the Ontario Superior Court of Justice entered a stay of proceedings due to a lengthy pre-charge delay resulting from unnecessarily duplicative regulatory and criminal investigations. In that case, the investigators determined within three days of the incident that they had grounds to lay provincial charges. However, provincial charges were not laid for another 11 months, and a guilty plea to those charges was not entered for a further 11 months. Five months after the accused pleaded guilty to the provincial charges, criminal charges were initiated. The Court found prejudice to the accused based on the "additional turmoil associated with prolonging this matter", as well as "the financial cost of defending two separate charges arising from the same facts." Prejudice was also found based on the impact of the accused's guilty plea in the provincial matter on the criminal charges, as well as the fact that one of the witnesses who had prepared a report on the incident had died prior to trial. [Footnotes removed]

[241] *Campbell* is not of assistance to the appellants. There, a finding of abusive conduct was predicated on neither the police nor the Crown advising the accused that following his admission of guilt to regulatory offences, criminal charges involving the same matter were contemplated. The court found the accused was entitled to more emphatic notice of the possibility of criminal charges being laid, and further, was entitled to a sense of security that by resolving the regulatory charges, finality would follow. It is understandable why on these facts the prosecutorial conduct was found to be objectionable. However, it is not comparable to the circumstances before us.

[242] With respect to *Presenti*, Mr. Potter says:

> 46. In *R. c. Presenti*, the Court of Quebec entered a stay of proceedings following a nine-year investigative delay in a fraud case. The events underpinning the charges in that case occurred between 1997 and 2000. In 2003, the AMF [the Quebec securities regulator] launched an investigation into whether the accused had violated securities law. The police commenced a parallel investigation, which resulted in a report being prepared for the prosecutor in August of 2007. However, the accused was not charged until March of 2016. The Court found that the nine-year delay was caused by the original prosecutor being moved to another division and no other prosecutor assuming the responsibility of reviewing the file to determine whether and when charges ought to be laid. It held that this delay undermined the integrity of the justice system, and that the decision to lay charges after such a lengthy delay could only be described as oppressive. The court entered a stay of proceedings. [Footnote omitted]

[243] We agree with the Crown that *Presenti* is also distinguishable. There, the court had no evidence as to the complexity of the investigation or why the prosecution sat dormant for nine years. The finding of an abuse of process in light

of the paucity of contextual evidence is not surprising. Here, the trial judge heard extensive evidence regarding the progress of the prosecution and the multiple steps taken. Unlike the judge in *Presenti*, he was able to assess the nature of the investigation and had been provided ample evidence to assess Crown conduct.

[244] We turn to the trial judge's finding in Stay Decision #1 that the pre-charge delay was "unacceptable", and the consequences Mr. Potter says should have flowed from it. We start by setting out what the trial judge said:

> [93] I find that charges should have been laid by mid-2008. The issue of permanent legal counsel was resolved by March 20, 2008. Judicial authorizations were completed by May 20, 2008 and interviews by June 6, 2008. The Crown brief was completed by September, 2008. The KHI server/email issue was, for the most part, completed by November 21, 2007. Clearly this investigation took longer than it should. If the above steps were pursued diligently the evidence would have been available much sooner and an indictment would have been possible. **I find that the investigative delay was unreasonable prior to 2008.**

And later:

> [96] The expert report was completed in January, 2010. The additional search of the servers was completed in 2009. NBFL interviews were completed in July, 2009. A more efficient investigation would have produced these tasks prior to the federal Crown taking over the prosecution. **The 8 years required to complete this investigation is unacceptable even in a case of this complexity.**[168] [Emphasis added]

[245] Contrary to Mr. Potter's assertion, we do not accept the trial judge's finding of "unacceptable" delay equates to the type of egregious Crown conduct required to establish an abuse of process. It is important to note the trial judge's use of "unacceptable" was in the context of his opinion that charges should have been laid by mid-2008. As we discussed earlier, this type of conclusion has been discouraged by *Hunt*.

[246] The trial judge's reasons make clear he did not view "unacceptable" delay as rising to the level of the "egregious" conduct required to establish an abuse of process. Notably, he wrote:

> [99] I find that the defendant's [*sic*] circumstances are not caught by the residual category. There is nothing to suggest behaviour that is so unreasonable and unfair that it undermines fundamental notions of justice. I am unable to conclude that the investigation eroded the integrity of the judicial process. It was simply delay caused by bona fide choices in an under-resourced investigation. In

> light of these conclusions, I find that the defendant's [*sic*] section 7 rights were not infringed.[169]

[247] The trial judge's finding that the lengthy pre-charge delay did not give rise to an abuse of process is not inconsistent with his criticism of the time the investigation took. To that end, we note these comments of Justice Hoegg in *Hunt*:

> [96] … As well, I am unable to identify any choices made by the investigators that could be regarded as unjust or unfair or cause injustice or unfairness to the Respondents. The investigation was conducted in a professional manner with appropriate forensic and legal consultation. The length of time it took speaks to its enormity. Accordingly, I do not accept that the Crown oppressed the Respondents by virtue of its lengthy investigation. **I note that even if there were Crown conduct which could be regarded as oppressive, it would have to be of magnitude that would tarnish the integrity of the justice system (*Nixon* [*R. v. Nixon*, 2011 SCC 34], at paragraph 59) or seriously compromise its integrity** (*Anderson* [*R. v. Anderson*, 2014 SCC 41], at paragraph 50). This issue was at play in *R. v. Clarke*, 2015 NSSC 224, 363 N.S.R. (2d) 337, where the court found that the choices made by the investigatory team did not amount to abuse of process in the nine-year investigation of fraud relating to unlawfully affecting the public market price of an incorporated company, despite findings of mistake in the conduct of the investigation and that the investigation was significantly under resourced. The court refused to stay the charges.[170] [Emphasis added]

[248] Here the trial judge did not find that any of the Crown or investigative conduct was oppressive. We are satisfied the trial judge did not err in concluding the "unacceptable" delay in the investigatory period was insufficient to establish the type of egregious Crown conduct required to ground an abuse of process. "Unacceptable" delay in the context of this case and in the manner in which it was used by the trial judge does not equate to unconstitutional delay.

[249] Finally, we are not persuaded that delay occasioned by questions surrounding which prosecution service would have carriage of the file amounted to egregious Crown conduct. We return to Justice Hoegg's reasons:

> [104] The Judge's remarks about when the Crown ought to have laid charges against the Respondents show that he engaged in a review of the efficiency of the Crown's investigation. While some review of Crown conduct in an investigation is required if abuse of process is alleged, judicial scrutinizing of an investigation for efficiency is, in my view, neither required nor appropriate. In my opinion, it is not part of the judicial role, as *Rourke*, *Mills*, *L.(W.K.)* and *Young* make clear. **The reason why it is not the Judge's role to scrutinize an investigation for efficiency is because doing so conflates the roles of the judicial and executive branches of government.**[171] [Emphasis added]

Conclusion

[250] The trial judge concluded pre-charge delay in this matter did not constitute an abuse of process giving rise to a s. 7 *Charter* breach. He was correct in doing so.

[251] We dismiss this ground of appeal.

Issue #2: Did the Trial Judge Err in Dismissing Mr. Potter's and Mr. Colpitts' Applications for a Stay of Proceedings Because their Rights to be Tried Within a Reasonable Time Under s. 11(b) of the *Charter* were Infringed?

[252] Mr. Potter and Mr. Colpitts say their s. 11(b) *Charter* rights to be tried within a reasonable time were infringed due to the excessive time which accrued after the laying of criminal charges. They assert the trial judge's conclusions to the contrary were erroneous and biased. We address the appellants' claims of bias elsewhere in these reasons.

[253] We will first review the trial judge's reasons relating to post-charge delay, and the allegations of error advanced by Mr. Potter and Mr. Colpitts. We will next review the legal principles, including the appropriate standard of review, followed by our analysis.

Background

[254] Mr. Potter's and Mr. Colpitts' concerns about post-charge delay arise from two decisions of the trial judge. We discussed the first, Stay Decision #1,[172] earlier as it related to delay arising in the investigatory stage. We previously referenced the second, Stay Decision #2,[173] for the same reason. We now return to review these decisions in the context of post-charge delay.

Stay Decision #1

[255] This decision arose from a pre-trial motion heard over 34 days (April 20 to July 10, 2015). The trial judge's decision of August 12, 2015 began by canvassing the court appearances which had occurred to that point. He set the period of delay at 59 months from the preferring of the indictment (March 17, 2011) to the anticipated conclusion of trial. The trial was scheduled to start on September 14,

2015, with an anticipated completion date of February 1, 2016. The trial did not proceed as scheduled. Later, we will explain why.

[256] After concluding that 59 months was sufficient to trigger an inquiry into the reasonableness of the delay, the trial judge considered the legal principles from *R. v. Morin*[174] that governed at the time.

[257] After reviewing the "*Morin* framework" in detail,[175] the trial judge reached a number of conclusions regarding the genesis of the delay:

- The defendants unreasonably delayed bringing an *O'Connor* application in relation to materials possessed by the Securities Commission. Twelve months of delay were attributed to them.
- The defendants unreasonably resisted the return to the Securities Commission of a hard drive that all the parties conceded contained privileged information. The Commission had to bring a motion to get the hard drive back. The defendants had two months of delay attributed to them.
- The defendants were found responsible for five months' delay for an adjournment of the trial from April 2, 2014 to September 27, 2014.
- The two failed recusal motions earned the defendants the attribution of three months' delay.
- A further delay of eight months was attributed to the defendants for pushing back the commencement of trial to September 14, 2015.

[258] The trial judge attributed 13 months of delay to the Crown. This was due to the Crown's failed motion to remove Mr. Colpitts' counsel for an alleged conflict of interest and its opposition to Mr. Clarke's *Rowbotham* application.

[259] With respect to the final *Morin* factor, prejudice, the trial judge wrote:

> [168] I accept, without hesitation, that these defendants have suffered terribly as a result of the KHI proceedings. I cannot imagine what it must be like to live in a small community while facing regulatory, civil and criminal proceedings. Nothwithstanding, [*sic*] I find that the defendants suffered much of their prejudice as a result of the drawn out, high profile civil and regulatory proceedings. The additional prejudice suffered after the criminal charges were laid is not measurable. It must be noted that all persons criminally charged suffer prejudice. In this case I am unable to state that the delay in prosecution exacerbated the prejudice reported. It must be remembered that an accused must demonstrate they have suffered prejudice beyond the prejudice ordinarily suffered as a result of

> being charged with a criminal offence. The prejudice at issue in a section 11(b) analysis is prejudice resulting from the delay, as opposed to prejudice resulting from the charge.
>
> [169] I have considered the prejudice evidence advanced by Messrs. Clarke, Potter and Colpitts. I find that the nature and seriousness of their prejudice is not sufficient to tilt the balancing of their interest against the public interest in having the charges heard on the merits.[176]

[260] The trial judge concluded Mr. Potter and Mr. Colpitts (and Mr. Clarke) had not established a breach of their s. 11(b) *Charter* rights and dismissed their motions.

Stay Decision #2

[261] As noted, following the Supreme Court of Canada's release of *Jordan*, Mr. Potter and Mr. Colpitts again brought motions seeking stays on the basis of post-charge delay. The trial judge directed the motions to be argued immediately following the conclusion of the trial evidence.[177]

[262] The motions were dismissed in written reasons released on March 9, 2018.[178] The trial judge's reasons will be addressed in detail later. To summarize, the trial judge determined:

- The earlier stay decision contained mathematical errors and double counting with respect to the calculation of defence delay. He adjusted the amount of delay attributable to the defendants in the period covered by that decision from 30 months to 21 months.
- Other than adjusting the time attributed to them, he did not alter his view that the defendants were responsible for the delays previously laid at their feet.
- The *Jordan* framework governed the new motions, and the total period of delay from indictment to the actual end of trial (November 7, 2017) was 79 months.
- In addition to the 21 months of delay noted above, a number of other instances of defence delay were identified. Deducting all defence delay from the total period left a net delay of 46 months.
- As the net delay was above the presumptive ceiling in *Jordan*, the burden fell to the Crown to justify the excess on the basis of "exceptional

circumstances". Three discrete periods of time under this category were deducted, reducing the net period to 41 months.

- Delay over the *Jordan* ceiling can be justified on the basis of complexity, another category of "exceptional circumstances". This case was particularly complex, and the Crown had developed and attempted to follow a plan to efficiently navigate the prosecution of the charges. The actions of Mr. Potter and Mr. Colpitts throughout the trial undermined those efforts and contributed to the complexity.

- The Crown had met its burden to justify the delay on the basis of complexity, but the delay could also be justified on the basis of the transitional exception established by *Jordan*.

[263] In finding Mr. Potter's and Mr. Colpitts' s. 11(b) rights were not infringed, the trial judge concluded:

> [143] The defendants in this case were not the victims of delay. Indeed, they went to great efforts throughout the entirety of this prosecution to create it. It would be a miscarriage of justice to reward their efforts by staying the charges against them for delay.[179]

Position of the Parties on Appeal

[264] Mr. Potter and Mr. Colpitts challenge both stay decisions, alleging fatal errors in each. Their grounds of appeal are identical. With respect to Stay Decision #1, they allege:

> 4. That the original ruling on the issue of the application of s. 11(b) in accordance with *Morin* principles delivered on August 12, 2015 reflected fundamental errors in relation to the trial judge's misapprehension of evidence, to his miscalculation of periods of delay, and to his fundamentally flawed attribution of the estimated time frame of 59 months from the time the Crown preferred the indictment to the estimated completion of trial.
>
> 5. That the learned trial judge erred in attributing to the defence responsibility for what he termed a "pall of inertia around document production". This conclusion was particularly egregious in light of the fact that virtually all document production applications were ruled in favour of the defence and were subsequently resisted by persistent Crown non-compliance with court orders.

[265] With respect to Stay Decision #2, Mr. Potter and Mr. Colpitts claim:

6. That the learned trial judge erred in his post-trial assessment of s. 11(b) of the *Charter* delivered on March 9, 2018 by failing to properly apply the *Jordan* framework and in repeating the fundamental factual and legal errors which had been evident in his first post-charge delay ruling. In particular:

- The learned trial judge erred in finding that the *Jordan* period is measured between the charge and the end of the trial, not the date of decision. There is no authority for this position, as an accused's right to a trial within a reasonable time includes the right to a judgment within a reasonable time.

- The learned trial judge erred in attributing the full time period from December 15, 2013 to September 14, 2015 to the defence, as he failed to take into account the fact that the trial was adjourned due to the Crown's late disclosure of the Security [*sic*] Commission materials.

- The learned trial judge erred by once again double counting one month of delay against the defence, as he had attributed the time between August 15, 2015 and September 14, 2015 to the defence as part of the pre-trial delay, then attributed that month of delay to the defence again for bringing a recusal motion and adjourning the trial.

- The learned trial judge erred by double counting three weeks of delay as defence delay and exceptional circumstances, being the three weeks of delay caused by the injury to Mr. Potter's wife in October of 2015.

- The learned trial judge erred in finding that the defence attempted to withdraw its consent to an electronic trial in order to cause delay.

- The learned trial judge erred in attributing the entire period of delay resulting from the third party records issue to the defence, despite the fact that he had previously conceded in his first s. 11(b) ruling that the *McNeil/O'Connor* issue was unsettled.

- That the learned trial judge erred in his attribution to the defence of the time spent by Crown witnesses testifying on disputed issues. Defence delay cannot result from the requirement that the Crown be put to the strict proof of its case, including continuity, particularly where the accused are either unrepresented or intermittently unrepresented. This is especially apt in this case where there was legitimate concern as to the integrity of the servers from which the investigators had obtained the hearsay email communications.

- The learned trial judge erred in attributing delay from unsuccessful defence motions to the defence. The challenges to Ian Black's testimony and the co-conspirators' exception to the hearsay rule were legitimate, as was the defence application to combine their cases. Delay resulting from motions brought as a legitimate response to the charge and, in the case of

> the application to combine defence cases, delay resulting from motions aimed at expediting the trial, cannot be characterized as defence delay.
>
> - The learned trial judge erred in attributing the time it took Mr. Colpitts to present his defence as defence delay. An accused's decision to present evidence in his own defence cannot amount to defence delay, as he is otherwise forced to choose between his right to a speedy trial and his right to make full answer and defence.
>
> - The learned trial judge erred in finding that both accused were equally responsible for all defence delay and based this conclusion on the fact that they applied to present a joint defence, while ignoring the fact that he had rejected this application as "frivolous" and without merit because he did not believe that their interests were truly aligned.
>
> - The learned trial judge erred by "deducting" six weeks of agreed-upon delay from the calculation, as the Crown had agreed to that delay and it was not attributable to the defence.
>
> - The learned trial judge provided insufficient reasons with respect to most of his attributions of defence delay during the trial period.
>
> - The learned trial judge erred in finding that complexity justified the inordinate delay in bringing this matter to trial. For example, the trial judge found that the Crown could not have anticipated the nature of the defence evidence at trial despite the fact that the defence evidence was the subject of the *McNeil/O'Connor* dispute.
>
> - That the learned trial judge erred by dismissing the relevance of the entirety of the defence evidence in his complexity analysis. His reasons for doing so conflict with his reasons for judgment as to the merits of the case, and in particular, with respect to the "useful" exercise of reciting the history of KHI.

[266] Mr. Potter and Mr. Colpitts say in Stay Decision #2, the trial judge: continued to make mathematical errors; apportioned delay on a fundamental misunderstanding of *Jordan* principles; failed to appreciate the nature of the constitutional violation arising from the delay; and improperly used the attribution of delay to penalize the defence.

[267] The Crown acknowledges there is a counting error in Stay Decision #1, but says the trial judge identified and applied the correct legal principles in both decisions. He made factual findings well-supported on the record, including concluding the appellants were responsible for the vast majority of delay. The Crown argues the 21 months of delay attributed to Mr. Potter and Mr. Colpitts during the time period covered by Stay Decision #1 (as adjusted in Stay Decision #2) is entirely supportable, if not conservative.

[268] The Crown submits an assessment of the trial judge's numerous findings "requires knowledge of the complete context for those rulings: the [appellants'] resistance to get the application filed or evidence called, resisting the Court's direction, failing to make reasonable agreements, failure to prepare for trial, and making frivolous arguments". The Crown says the trial judge was correct to not reward Mr. Potter and Mr. Colpitts with a stay in light of their marked attempts to prevent the criminal proceedings from ever being heard on the merits.

Legal Principles

[269] The trial judge identified the correct legal principles in both stay decisions. It will be of assistance in addressing the issues raised on appeal to set out the guiding ones.

[270] Section 11(b) of the *Charter* requires an accused to be tried within a reasonable time. In *Jordan*, the Supreme Court of Canada set out a new framework to guide courts in assessing allegations of unconstitutional post-charge delay. Keeping in mind the issues relevant on this appeal, we note:

- The Court established a presumptive ceiling of 30 months for the conclusion of criminal matters tried in superior court. Delay past this ceiling is presumptively unreasonable.[180]
- The Court directed that as a first step, the total period of delay is to be calculated from the date of the charge "to the actual or anticipated end of trial".[181]
- The next step requires a consideration of defence delay, which falls into two categories: delay waived by the defence and delay solely caused by the conduct of the defence. The cumulative amount of defence delay is deducted from the total period of delay.[182]
- How the remaining analysis proceeds is dependent on whether the net delay is above (as it is here) or below the presumptive ceiling.
- If the remaining delay falls above the presumptive ceiling, the Crown must show the presence of exceptional circumstances justifying the delay, failing which a stay is warranted.[183] The Court directed exceptional circumstances must be of such nature that they lie outside the Crown's control due to being reasonably unforeseen or reasonably unavoidable and the Crown cannot reasonably remedy the delays arising therefrom.

Exceptional circumstances include discrete events and the complexity of the case.[184]

- For cases where charges were laid prior to the Court implementing the new framework, the Crown may be able to rely on a "transitional" exception to justify the delay.[185]

[271] If there were any lingering doubt about the need to adhere to the new approach to assessing post-charge delay ushered in by *Jordan*,[186] that was extinguished by the Court's subsequent decision in *R. v. Cody*.[187] In *Cody*, the framework was endorsed and reiterated. In particular, we note the following in relation to the calculation of defence delay:

- A defence waiver can be either explicit or implicit, as long as it is "informed, clear and unequivocal".[188]

- Deducting delay caused by the defence is aimed at preventing an accused from benefitting from their "own delay-causing action or inaction".[189]

- Courts must carefully consider delay caused by the defence. *Jordan* made clear that "defence actions legitimately taken to respond to the charges" are not deductible.[190]

- Deductible defence delay is described in *Cody* as:

> [30] The only deductible defence delay under this component is, therefore, that which: (1) is solely or directly caused by the accused person; and (2) flows from defence action that is illegitimate insomuch as it is not taken to respond to the charges. As we said in *Jordan*, the most straightforward example is "[d]eliberate and calculated defence tactics aimed at causing delay, which include frivolous applications and requests" (*Jordan*, at para. 63). Similarly, where the court and Crown are ready to proceed, but the defence is not, the resulting delay should also be deducted (*Jordan*, at para. 64). These examples were, however, just that — examples. They were not stated in *Jordan*, nor should they be taken now, as exhaustively defining deductible defence delay. Again, as was made clear in *Jordan*, it remains "open to trial judges to find that other defence actions or conduct have caused delay" warranting a deduction (para. 64).
>
> …
>
> [32] Defence conduct encompasses both substance and procedure — the decision to take a step, *as well as the manner in which it is conducted*, may attract scrutiny. To determine whether defence action is legitimately taken to respond to the charges, the circumstances surrounding the action

> or conduct may therefore be considered. The overall number, strength, importance, proximity to the *Jordan* ceilings, compliance with any notice or filing requirements and timeliness of defence applications may be relevant considerations. Irrespective of its merit, a defence action may be deemed not legitimate in the context of a s. 11(*b*) application if it is designed to delay or if it exhibits marked inefficiency or marked indifference toward delay.[191] [Emphasis in original]

- Not only can defence actions justify a deduction, but delay due to inaction can also be attributed to the defence.[192]

- Defence counsel have a responsibility to assist in the preservation of their clients' s. 11(b) rights by actively advancing their right to a trial within a reasonable time, collaborating with the Crown when appropriate, and using court time efficiently.[193]

- The deduction for illegitimate defence conduct does not serve to diminish a defendant's right to make full answer and defence, as the Court in *Cody* explained:

> [34] This understanding of illegitimate defence conduct should not be taken as diminishing an accused person's right to make full answer and defence. Defence counsel may still pursue all available substantive and procedural means to defend their clients. What defence counsel are not permitted to do is to engage in illegitimate conduct and then have it count towards the *Jordan* ceiling. In this regard, while we recognize the potential tension between the right to make full answer and defence and the right to be tried within a reasonable time — and the need to balance both — in our view, neither right is diminished by the deduction of delay caused by illegitimate defence conduct.[194]

[272] The Court in *Cody* also considered the nature of exceptional circumstances that justify a net delay above the presumptive ceiling:

- The Court affirmed *Jordan's* requirement that exceptional circumstances must be beyond the control of the Crown.[195]

- Exceptional circumstances fall into two general categories: discrete events and particularly complex cases. In addition, where the matter was already in the system prior to *Jordan*, the Crown may rely on a third, transitional category.[196]

- Discrete events are considered first. Delay caused by discrete exceptional events or circumstances that are reasonably unforeseeable or

unavoidable is deducted, but only to the extent it could not have been reasonably mitigated by the Crown and the justice system.[197]

- If, after the deduction of discrete events, the net delay remains above the presumptive ceiling, the Crown may attempt to justify the delay based on the complexity of the case. This step does not involve a deduction of a quantifiable amount of time, rather the determination is whether the case as a whole is particularly complex such that the time the case has taken is justified. If it is found not to be complex, the delay is unreasonable.[198]

- A complex case is one that requires an inordinate amount of trial or preparation time because of the nature of the evidence or the nature of the issues, or both.[199]

- If the case as a whole is found to be complex, the Crown may be able to rebut the presumption of unreasonableness, provided it can show there was a firm plan in place to mitigate delay in light of the complexity.[200]

[273] For transitional cases, the Crown has a final opportunity to justify any remaining net delay above the presumptive ceiling. The Court in *Cody* noted:

- This is the final step in the exceptional circumstances analysis and need only be done if the Crown has been unable justify the delay by either of the first two categories.[201]

- The Crown may rely on the transitional exception "if it can show that 'the time the case has taken is justified based on the parties' reasonable reliance on the law as it previously existed'" prior to *Jordan*, specifically how delay would have been assessed under *Morin*.[202]

- The transitional exception, like complexity, is a qualitative, not quantitative, consideration.[203] Under this category of exceptional circumstance, delay is either justified or it is not.

[274] The *Jordan* framework is now well-entrenched, having been recently re-affirmed in *R. v. K.J.M.*[204] The Supreme Court has mandated that all participants in the criminal justice system share responsibility to proactively prevent unreasonable delay. It has emphasized the obligation of trial judges to conduct proceedings in a manner that promotes efficiency and effects change in a system that has historically paid inadequate attention to s. 11(b) imperatives.

Analysis

Standard of review

[275] As stated earlier, a trial judge's conclusion as to whether a *Charter* right has been infringed attracts a standard of correctness, as does whether a particular period of time is properly characterized as Crown or defence delay.[205]

[276] In *Jordan*, the Supreme Court recognized trial judges are "uniquely positioned to gauge the legitimacy of defence actions".[206] Endorsing the above, the Court in *Cody* said:

> [31] The determination of whether defence conduct is legitimate is "by no means an exact science" and is something that "first instance judges are uniquely positioned to gauge" (*Jordan*, at para. 65). It is highly discretionary, and appellate courts must show a correspondingly high level of deference thereto. While trial judges should take care to not second-guess steps taken by defence for the purposes of responding to the charges, they must not be reticent about finding defence action to be illegitimate where it is appropriate to do so.[207]

[277] Finally, a deferential standard is to be applied to a trial judge's conclusion regarding complexity, it being "a determination that falls well within the expertise of a trial judge".[208] We apply the above standards when assessing the trial judge's conclusions.

Overview

[278] Mr. Potter and Mr. Colpitts take no issue with the trial judge's identification of the proper legal principles. There is no dispute that the net delay in this matter was significantly above the 30-month presumptive ceiling.

[279] Mr. Potter and Mr. Colpitts challenge the trial judge's final calculation of the net delay as 41 months. They assert if this Court corrects his errors of attribution and arithmetic, the net delay is 64 months. They attack the trial judge's conclusion that such a significant and presumptively unreasonable delay could be justified on the basis of complexity and the transitional exceptional circumstance.

[280] In addressing Mr. Potter's and Mr. Colpitts' complaints, it is not our intention to examine each and every event which occurred since the preferring of the indictment and attribute delay on a *de novo* basis. Such a process is contrary to the direction in *Jordan* to forego the micro-accounting which complicated *Morin* analyses. We are satisfied the trial judge's ultimate determination of 41 months'

net delay is supportable on the record. We will explain why we reach this conclusion.

[281] We agree with the Crown that even if some of the appellants' calculation concerns were to bear fruit, the end result would still be far less than the 64 months of net delay they advance. The addition of even several months to the trial judge's net delay would not give rise to a s. 11(b) violation. We are satisfied the matter can be disposed of on the basis of complexity. We further agree with the Crown that it is not necessary to engage in a consideration of the transitional exception to justify the delay.

The total delay period

[282] In Stay Decision #2,[209] the trial judge set the total delay at 79 months. He used as his time frame the end of trial, not the date of conviction. In their Notices of Appeal, Mr. Potter and Mr. Colpitts assert there was "no authority" for this and that the proper period ran to the date of conviction.

[283] In argument before us, the appellants concede there is authority for the approach taken by the trial judge, but note that appellate courts across the country have taken differing views on whether the time required in reaching judgment should be counted. Mr. Potter's counsel acknowledged this Court has decided that the time a judge takes to render a decision is not included in the *Jordan* analysis,[210] and, subject to the Supreme Court of Canada determining otherwise, he no longer challenges the trial judge's determination.

[284] We note the Supreme Court has not ruled on the issue of whether the "end of trial" extends only to the completion of the trial or to the date of conviction (or to the date of sentencing), specifically declining to do so recently in *K.J.M.*[211] Consistent with previous authority from this Court, we are of the view the trial judge did not err in excluding the time between end of trial and conviction in his calculation of total delay.

Issues in attributing defence delay

[285] Mr. Potter and Mr. Colpitts challenge the trial judge's attribution of defence delay as well as his calculations of time. They have divided their arguments to reflect the attributions contained in each of the stay decisions. We will mirror our responses accordingly.

[286] As we observed in para. 257, in Stay Decision #1[212] the trial judge found the appellants generated significant delay. In Stay Decision #2, his original determination in Stay Decision #1 of 30 months was reduced due to mathematical errors to 21 months. In challenging the attribution of 21 months, Mr. Potter and Mr. Colpitts focus on the trial judge's assessment of delay for the *McNeil/O'Connor* disclosure standoff. We address their concerns in that regard, and explain why we are of the view the trial judge did not err in his attribution of 21 months in the period covered in Stay Decision #1.

[287] Mr. Potter also challenges the trial judge's attribution of delay in Stay Decision #2, focusing on:

- The trial judge's use of "frivolous" in the context of assessing delay arising from defence motions.
- The trial judge's attribution of delay due to the unavailability of defence counsel.
- The trial judge attributing delay to the appellants for the time when Crown witnesses were testifying.
- The trial judge's attribution of delay for Mr. Colpitts' "mismanagement" of his defence.
- The trial judge's attribution of delay to Mr. Potter for Mr. Colpitts' conduct.

[288] We will consider all of the above and explain why we do not find the trial judge's calculation of defence delay to be in error.

Attribution of 21 months arising from Stay Decision #1

The trial judge's attribution of delay for the "McNeil/O'Connor" disclosure standoff

[289] Mr. Potter and Mr. Colpitts argue the trial judge's attribution of delay to them for the time associated with their attempts to obtain the Securities Commission file materials is wrong in law, based on factual errors, and was a result of bias. They say the trial judge's conclusion they were at fault for the impasse resulted in erroneous attributions of delay for failing to bring a timely *O'Connor* motion and for at least one trial adjournment. In his factum, Mr. Potter describes the attribution as follows:

> 61. Potter groups his submissions on this issue as follows:
>
> 1) First, in attributing delay to the defence, the trial judge did not understand the defence position in the *McNeil* and *O'Connor* dispute, unjustifiably penalizing the defence for taking a position that he viewed as "intransigent" without appreciating that the Crown bore equal responsibility for the disclosure standoff.
>
> 2) Second, the trial judge's attributions of delay following the *McNeil* ruling were both legally and factually erroneous, as they attributed delay to the defence for successful motions; penalized the defence for the adjournment of the trial due to late disclosure; and double and triple-counted months of delay against the defence for no discernible reason.

[290] We will address the substantive aspects of these complaints, leaving the allegation of bias for later.

[291] There is no dispute that significant time and pre-trial effort was expended on the issue of who was responsible for obtaining the Securities Commission files relating to the KHI investigation. The disagreement has always been who, the appellants or the Crown, should be faulted for the significant time that passed in obtaining these materials. In Stay Decision #1, the trial judge attributed delay to Mr. Potter and Mr. Colpitts and found the Crown's approach to obtaining the materials "legally defensible". On appeal, the appellants and the Crown, respectively, expended significant effort in attacking and justifying the trial judge's conclusion.

[292] It would be a substantial and lengthy undertaking to set out all the context and nuances giving rise to the dispute surrounding the Securities Commission materials. For the purposes of providing as concise a narrative as possible, we adopt the background set out by the trial judge in Stay Decision #1:

> **THE PURSUIT OF NSSC DOCUMENTATION:**
>
> [102] No issue has dominated this proceeding more than the defendant's [*sic*] ongoing search for documents created by the NSSC regulatory proceeding. The Crown's disclosure (fruits of the investigation) was provided to the defendants early in the prosecution. The Crown and the defence have never been *ad idem* on the proper route to the NSSC materials. The Crown has maintained the position that the pursued documents were third party records, and as such, it was up to the defendants to apply for the documents through the *O'Connor* process. The defendants took the position that the Crown had the obligation to obtain and vet the documents before releasing them as first party *Stinchcombe* disclosure. These positions have not changed.

> [103] As early as August 19, 2011, this subject arose at the first case management conference (CMC). It was the subject of discussion at many CMCs. On an April 26, 2013 CMC hearing dates were proposed for mid-2013 but not all counsel could accommodate that schedule. On July 8, 2013 Mr. Colpitts issued a subpoena to the NSSC without prejudice to his position that the documents were first party records. On January 14, 2014 Messrs. Potter and Clarke issued subpoenas and received the same package of materials from the NSSC as those provided to Mr. Colpitts. A subpoena is the first step in the *O'Connor* process.
>
> [104] Previously on November 15, 2013 Justice Hood conducted a hearing on whether the NSSC documents were first or third party disclosure. A formal decision concluded that the Crown failed in its duty to inquire of the NSSC but that the issue was moot because Mr. Colpitts already had the materials. She concluded the regulatory files were third party records and that the NSSC had additional records and that the procedure to obtain them is through the *O'Connor* process.
>
> [105] In the months that followed it became apparent that there were NSSC documents not yet released for reasons of relevance and privilege. The NSSC continued to argue that they were third party records and that an *O'Connor* application was the proper route to them. The Crown concurred. The defendants took the position that these records should be handed over to the defendants and the Court as a result of an undertaking given by Randy Gass (Scott Peacock's replacement) when he earlier testified. They complained about his tardiness. They resisted the Crown and the Court's urgings to file an *O'Connor* application. The defendants argued the Crown remained in breach of their *McNeil* obligations.
>
> [106] At a CMC on November 10, 2014, all defendants indicated they would be filing a "default" *O'Connor* application returnable on November 24, 2014. The NSSC noted that this application was late in the game and presented many problems around logistics. Such was the case. On January 15-16, 2015 an O*'Connor* privilege hearing was conducted. On February 18-20, 2015 an *O'Connor* likely relevance hearing was held. The privilege decision was released on January 30, 2015 (2015 NSSC 26) and the likely relevance decision was released on February 27, 2015 (2015 NSSC 59).[213]

[293] Based on our review of the record, we are satisfied the background provided by the trial judge is factually correct.

[294] Mr. Potter and Mr. Colpitts tether much of their argument to the "*McNeil*" decision[214] rendered by Justice Hood. They say their position on the Crown's obligation to obtain, vet, and disclose the Securities Commission materials was accepted by the court. They say it was the Crown who stubbornly refused to acknowledge Justice Hood's conclusion and continued to breach their *McNeil* obligation to obtain the materials. Mr. Potter and Mr. Colpitts submit it was

unreasonable for the trial judge to not only "overrule" Justice Hood's decision, but then proceed to assign the resulting delay to them.

[295] Before considering the trial judge's treatment of the "*McNeil/O'Connor"* standoff, it is helpful to set out Justice Hood's conclusions. In her decision released December 5, 2013, she wrote:

> [72] The Crown knew of the Securities Commission investigation and that the Securities Commission had information. The Crown admits there is relevant information in the Securities Commission's files. Accordingly, the Crown had an obligation to inquire and attempt to obtain that information. I find that it breached that obligation.
>
> [73] It seems clear that had the Crown met its obligation, the forty boxes of material delivered to Blois Colpitts' counsel pursuant to the subpoena would have been delivered to the Crown. The only question is the timing of that delivery had the Crown requested the material at a time before the subpoena was issued.
>
> [74] However, the issue is, in my view, now moot because Blois Colpitts has the Securities Commission material now. Therefore, it is appropriate to grant the alternate remedy sought, which is to grant Blois Colpitts access to the material he now has.
>
> [75] **It appears some information is not included in those files and, if Blois Colpitts seeks that information, an O'Connor application is the option available to him.**[215] [Emphasis added]

[296] We now turn to the trial judge's reasons relating to the cause of delay in the ongoing impasse. The subject was addressed by the trial judge in both of his stay decisions. In Stay Decision #1, after reviewing Justice Hood's *McNeil* decision, the trial judge noted:

> [139] Responsibility to obtain the NSSC regulatory documents has been a major bone of contention between the Crown and the defence. The Crown, and for that matter the Court, have continuously urged the defendants to utilize the *O'Connor* regime. The defendants have resisted arguing that such an approach amounts to a switching of an onus from the Crown to the defendants. They insist *McNeil* represents the proper regime to obtain production of third party records. While other applications were heard in the interim, the parties maintained a Mexican standoff on the *O'Connor/McNeil* issue. It was my observation that the actual production of the NSSC materials got lost in the approach. The defendants relied heavily on Justice Hood's ruling to argue that the "breached obligation" was ongoing.[216]

[297] The trial judge then undertook a review of the relevant case authorities, observing:

> [141] … This language seems to suggest that the search for relevant evidence is a joint responsibility. I see nothing in the *McNeil* decision that alters the *O'Connor* regime. I see nothing in the caselaw to suggest *O'Connor* and *McNeil* cannot peacefully coexist.[217]

[298] The trial judge referenced an article by Professor (now Justice) Paciocco:[218]

> [143] David Paciocco commented as follows at page 3 of this article:
>
> > It can safely be predicted that defence counsel are going to exploit the "duty to inquire and attempt to obtain" as an alternative to bringing *O'Connor* applications when seeking information from Crown agencies and departments. Instead of resorting to distracting, costly and time-consuming third party record proceedings, they will put the prosecuting Crown on notice of potentially relevant information and call on the prosecuting Crown to fulfill its duty by trying to track the information down. While prosecuting Crowns are unlikely to see it this way, there is a laudable efficiency in this. It is far simpler, cheaper, and a more rational use of court time for prosecuting Crowns to use their good offices in an effort to secure relevant Crown information than it is to require court applications to be brought.
> >
> > In spite of this, it is arguable that the *McNeil* Court did not intend this new-found obligation to operate as a surrogate for *O'Connor*. Instead, it may be that the duty to inquire and attempt to obtain was meant to operate as a supplement to *O'Connor*.
>
> It appears as if the following excerpt at page 3 describes the role of the Crown since the decision in *McNeil*.
>
> > In sum, the *Stinchcombe* obligation is now more muscled than it was prior to the *McNeil* decision. The police are to furnish the Crown with more than the investigative file; they are now expected, as a matter of course, to include, in the disclosure package, documents arising out of the incident under investigation, even if prepared for internal police purposes. They are also to include documents relating to serious misconduct by officers performing a material role in the investigation. Crown Attornies [*sic*] are going to have to take steps to train investigating police forces to do this, or risk breaching their *Stinchcombe* obligations. Moreover, when a prosecuting Crown is put on notice — even by the defence — of the reasonable possibility there is relevant information held by other Crown agencies and departments, the prosecuting Crown must inquire and attempt to secure relevant information. If it cannot do so, it must report this to the defence, who can then initiate an *O'Connor* application.
>
> In the case at bar, the Crown refused to pursue the NSSC materials. Late in the prosecution the defence filed *O'Connor* applications.[219]

[299] The trial judge noted the Crown was reluctant to access the regulatory material because information contained in it may not be *Charter* compliant, and that this concern had been made known to the defendants and the court. The trial judge quoted from what Mr. Clarke said in his motion brief to demonstrate the nature of the Crown's dilemma:

> [147] Mr. Clarke's second brief recognizes this dilemma at page 3:
>
> > Mr. Clarke does note that between his submissions and Her Majesty's, an apparent contradiction arises in our law: the Crown has an obligation under *R. v. McNeil* to not only obtain but vet third party materials for disclosure to the defence, but the Crown also has an obligation pursuant [*sic*] *R. v. Jarvis*, [2002] 3 S.C.R. 757 and *R. v. Ling*, [2002] 3 S.C.R. 814, not to view or make use of materials that a third-party state agency has obtained through its compelled investigative powers.[220]

[300] The trial judge concluded:

> [151] Clearly the defendants should be responsible for delay related to not bringing an *O'Connor* application in a timely manner. The difficult question is how much of that delay is the responsibility of the defendants. While this debate goes back to August 19, 2011, I am not satisfied that the defendants should wear this much delay. I am attributing delay to the defendants commencing on December 15, 2013, the date of Justice Hood's decision on *McNeil*. It will end as of January 5, 2015, the date when *O'Connor* applications were set for a hearing. Given all the factors, I attribute 12 months delay to the defendants in relation to the *McNeil*/*O'Connor* issue.[221]

[301] The defendants' failure to bring a timely *O'Connor* application was a factor in the trial judge's attribution of delay to them for the trial being adjourned for five months in 2014. He wrote:

> [153] I am of the view that the defendants must be responsible for the adjournment of the trial from April 2, 2014 until September 27, 2014. This was a defence application opposed by the Crown. On January 27, 2014 a trial adjournment was discussed and scheduled for February 15, 2014. The defendants sought the adjournment on the basis they were not able to fully review the regulatory file, as well as other disclosure, prior to April 2, 2014. Another factor was the late arrival of Mr. Whynot as counsel for Mr. Clarke. I granted the adjournment and stated at paragraphs 61-62:
>
> > [61] An adjournment application is highly discretionary. The *Criminal Code* applies. It is my view that an adjournment is warranted notwithstanding the persuasive argument advance by Mr. Martin. While I may find his comments persuasive, I am influenced more by my obligation

> to ensure Messrs. Clarke, Colpitts and Potter have a fair trial and are given every opportunity to make full answer and defence.
>
> [62] The section 11(b) impact will be for another day.

The adjournment delayed the trial for five months. I attribute that delay to the defendants on the basis they failed to bring a timely *O'Connor* application seeking the NSSC documents.[222]

[302] In concluding, the trial judge remarked:

> [173] I stated earlier that my ruling on the delay caused by the *McNeil*/*O'Connor* debate would figure prominently in these applications. My determination of that issue means the defendants must bear responsibility for delay caused by their position.
>
> [174] The Court and the Crown throughout urged the defendants to utilize the *O'Connor* procedure. The defendants maintained their position that the Crown continued to be in breach of their *McNeil* obligations. This Court went to great lengths to quickly schedule the defendants' applications respecting various aspects of disclosure. Yet many of these applications amounted to unfocused efforts. Others were not perfected. The defendant's [*sic*] strategy was to maintain their position expecting that that [*sic*] the Court would endorse *McNeil* rather than *O'Connor*. They put all their section 11(b) eggs in that basket. This dynamic was always at play. It had a profound effect on the timing of this prosecution.
>
> [175] In conclusion the defendants are responsible for thirty months delay as per the *Morin* factors. Additionally they have created a pall of inertia around document production which has permeated much of the 59 months. Further, the evidence of prejudice was not such that it significantly factored into the *Morin* formula. I am unable to conclude the defendants' section 11(b) rights have been breached by the state. Consequently all three applications are dismissed.[223]

[303] Before considering the allegation of error advanced by Mr. Potter and Mr. Colpitts in relation to the above attributions, it is useful to canvass the trial judge's return to the *McNeil/O'Connor* dispute in Stay Decision #2. At the time he revisited this issue, the trial had concluded. By this time, he had the benefit of not only the pre-trial events as considered in his first decision, but the full context of how matters subsequently unfolded.

[304] Although lengthy, we will set out the trial judge's view of the appellants' pursuit of the Securities Commission materials. This is important not only to address the substantive allegations of error, but the claim the trial judge harboured actual bias against Mr. Potter and Mr. Colpitts (addressed later in paras. 755-764).

[305] The trial judge noted:

[5] The most significant issue during this period was the ongoing dispute over the acquisition of the NSSC regulatory file. The Crown took the position that it was third-party disclosure and, as such, an ***O'Connor*** application was available to the defendants. The defendants took the position that it was first-party disclosure and, as such, a ***McNeil*** application was the proper route to these materials. The defendants maintained the belief that the Crown had an obligation to acquire the file, vet the materials for relevancy and privilege, and then turn the balance over to the defendants. It should be noted that Mr. Potter had already received the regulatory file from the NSSC in mid-2009, while Messrs. Colpitts and Clarke had likewise received the materials in July 2013.

[6] In addition to the regulatory file, the defendants were seeking other NSSC materials. Most of these consisted of correspondence between the NSSC investigator and others associated with the regulatory proceedings. The defendants steadfastly relied on Justice Hood's ***McNeil*** decision (2013 NSSC 386) to maintain their original position that it was the Crown's responsibility to acquire these additional materials.

[7] It became obvious to the Court that the defendants were intransigent in their position. The Court and the Crown continuously urged the defendants to bring an ***O'Connor*** application forthwith, rather than arguing the point. The defendants resisted, citing Justice Hood's decision as authority for their position. It became apparent that the defendants valued the argument above access to the materials they sought. This led to a number of unnecessary discovery-like applications and a great deal of delay. Having achieved nothing by this route, the defendants eventually brought an ***O'Connor*** application on November 24, 2014.

[8] Production of the NSSC documents was a live issue for the defendants since the indictment was preferred. The actual hearing was held in January and February 2015. Although I did not find the materials to be "likely relevant", I released some documentation that did not require an ***O'Connor*** analysis.

[9] The issue of the NSSC materials arose at many of the case management and pre-trial conferences. The following is a brief synopsis of those proceedings:

> April 26, 2013: Mr. Martin proposed May 21 or 22 for an application about third-party records. Mr. Hodgson was unavailable but could be available the week of July 29. Mr. Potter indicated that he might join in the motion. Mr. Hodgson said he would issue a subpoena without prejudice to his argument that these were first-party records.
>
> May 22, 2013: A third-party production application was set for July 2013.
>
> June 19, 2013: Mr. Hodgson, at this case management meeting, said he was "not sure we can do anything with the July dates."
>
> July 23, 2013: Mr. Hodgson wrote the Court indicating that, given the sheer volume of material that would be provided by the NSSC, he did not believe that dates in August or September were realistic.

> July 29, 2013: There were discussions about when the defence would be ready. Mr. Covan said the issue of the Securities Commission's file was raised at the first pre-trial in August, 2011. He stated the Crown had taken the position from the start that this was third-party disclosure and the defence has done nothing until the subpoena was issued in July 2013.
>
> July 21, 2014: The dates of August 11-15, 2014 had been reserved for some time for the purpose of an *O'Connor* application respecting NSSC materials. These dates were not utilized for reasons advanced by the defendants. Tentative new dates of October 20-24, 2014 were reserved for an *O'Connor* application.
>
> September 24, 2014: The defendants complained about the NSSC delay in producing the secondary documents. Both the Crown and the NSSC argued that the defendants should proceed with an *O'Connor* motion. The defendants took the view that it was all about fulfilling an undertaking given to the Court by a NSSC employee (Randy Gass).
>
> September 29, 2014: This case management memo states that the week of October 20-24, 2014, was initially reserved for what the Court understood to be an *O'Connor* application. I advised the defendants that I expected all outstanding applications to be filed for that week. I also advised that not proceeding with a motion that week could very well limit the possibility of a later hearing date.
>
> November 10, 2014: All three defendants advised they would be filing "default" *O'Connor* applications returnable on November 24, 2014. The applications did not proceed on that date and were ultimately bumped to early 2015.

The defendants' search for the NSSC materials, and their reluctance to follow the ***O'Connor*** regime, contributed greatly to delay occasioned between January 27, 2014 and the start of the trial on November 16, 2015. During that period, the Court conducted eight pre-trial conferences and five case management conferences.

[10] Throughout this period the defendants maintained their view that all NSSC materials were first-party documents. They brought forth the following proceedings in relation to the NSSC materials:

> April 28-30, 2014: The defendants brought an application to examine Randy Gass of the NSSC. The Court stated, "Mr. Gass was examined with the consent of all counsel. Essentially this was an exercise in support of a future *O'Connor* application. No further action was taken on that notice": 2014 NSSC 177, para. 48.
>
> August 11, 2014: The defendants applied for disclosure of communications between the Crown and the NSSC. The Court released the sought after correspondence: 2014 NSSC 314.

> September 24, 2014: The defendants applied for an order directing the NSSC to provide a timeline/deadline for production of archived emails. The Court declined this request.
>
> October 22-24, 2014: The defendants applied to enforce an alleged commitment by Randy Gass to disclose NSSC materials. The Court stated, "The first application involves testimony from Mr. Gass on April 30, 2014. Subsequent to Justice Hood's decision, it became apparent that the NSSC intended to withhold documents from the defendants for various privilege reasons. Instead of filing an *O'Connor* application the defendants issued subpoenas to Mr. Gass to produce a broad spectrum of materials": 2014 NSSC 392, at para. 10.

[11] The defendants' intransigence was ill-founded. Justice Hood's decision, upon which they relied so heavily, does not support their position on accessing the NSSC documentation. While I make no comment on the correctness of Justice Hood's ruling that the Crown breached its ***McNeil*** obligation, her subsequent comments permit only one interpretation – the remaining NSSC materials were third-party records and an ***O'Connor*** application was the proper procedure to obtain them:

> 70 The records are third-party records but, when the conditions referred to in *McNeil* are met, the Crown has an obligation to inquire and attempt to obtain them. If it does obtain the records, then they are treated like fruits of the investigation and *Stinchcombe* applies to them.
>
> [Underlining of Hood J.]
>
> 71 *McNeil* provides a streamlined process which, when its conditions are met, bridges the gap between first-party disclosure and third-party production. If neither *Stinchcombe* nor *McNeil* apply, the *O'Connor* regime may be available to the accused.
>
> 73 It seems clear that, had the Crown met its obligation, the 40 boxes of materials delivered to Blois Colpitts' counsel pursuant to the subpoena would have been delivered to the Crown. The only question is the timing of that delivery had the Crown requested the material at a time before the subpoena was issued.
>
> 74 However, the issue is, in my view, now moot because Blois Colpitts has the Securities Commission materials now. Therefore, it is appropriate to grant the alternate remedy sought, which is to grant Blois Colpitts access to the material he now has.
>
> 75 **It appears some information is not included in those files and, if Blois Colpitts seeks that information, an *O'Connor* application is the option available to him.**

[12] As explained in the previous delay decision, I find that the Crown's refusal to acquire the NSSC materials was legally defensible. It was concerned, based on the Supreme Court of Canada's decisions in ***R. v. Jarvis***, 2002 SCC 73,

[2002] 3 S.C.R. 757, and ***R. v. Ling***, 2002 SCC 74, [2002] 3 S.C.R. 814, that the Crown's receipt and review of compelled regulatory evidence raised *Charter* risks to the criminal prosecution. In addition, the Crown was aware that the defendants already had access to the materials as a result of their involvement in the regulatory process.

[13] The Crown's reasonable refusal to obtain documentation did not entitle the defendants to sit on their hands while delay accumulated. There is also an obligation upon defence counsel to pursue disclosure. In ***R. v. Dixon***, [1998] 1 S.C.R. 244, [1998] S.C.J. No. 17, Justice Cory stated, at para. 37:

> 37 In considering the overall fairness of the trial process, defence counsel's diligence in pursuing disclosure from the Crown must be taken into account. A lack of due diligence is a significant factor in determining whether the Crown's non-disclosure affected the fairness of the trial process. In *Stinchcombe, supra*, at p. 341, defence counsel's duty to be duly diligent was described in this way:
>
> > Counsel for the accused must bring to the attention of the trial judge at the earliest opportunity any failure of the Crown to comply with its duty to disclose of which counsel becomes aware. Observance of this rule will enable the trial judge to remedy any prejudice to the accused if possible and thus avoid a new trial. See *Caccamo v. The Queen*, [1976] 1 S.C.R. 786. Failure to do so by counsel for the defence will be an important factor in determining on appeal whether a new trial should be ordered.
>
> The fair and efficient functioning of the criminal justice system requires that defence counsel exercise due diligence in actively seeking and pursuing Crown disclosure. The very nature of the disclosure process makes it prone to human error and vulnerable to attack. As officers of the court, defence counsel have an obligation to pursue disclosure diligently. When counsel becomes or ought to become aware, from other relevant material produced by the Crown, of a failure to disclose further material, counsel must not remain passive. Rather, they must diligently pursue disclosure. This was aptly stated by the British Columbia Court of Appeal in *R. v. Bramwell* (1996), 106 C.C.C. (3d) 365 (aff'd [1996] 3 S.C.R. 1126), at p. 374:
>
> > … the disclosure process is one which engages both the Crown and the defence. It is not one in which defence counsel has no role to play except as passive receiver of information. The goal of the disclosure process is to ensure that the accused is not denied a fair trial. To that end, Crown counsel must disclose everything in its possession which is not clearly irrelevant to the defence, but the defence must also play its part by diligently pursuing disclosure from Crown counsel in a timely manner. Further, where, as here, defence counsel makes a tactical decision not to pursue disclosure

> of certain documents, the court will generally be unsympathetic to a plea that full disclosure of those documents was not made.
>
> [14] The defendants knew early on that the Crown would not pursue the NSSC materials and, as of Justice Hood's decision, they were aware that the Court considered the remaining NSSC materials to be third-party documents, requiring an ***O'Connor*** application. They therefore had an obligation to make an application that had a real chance of addressing their concerns with disclosure and production.
>
> [15] The defendants' conduct demonstrated that they were in no rush to acquire the NSSC documents. Their strategy was clear – ignore Justice Hood's conclusion that the outstanding materials were third-party records, avoid the ***O'Connor*** process at all costs, and run up the s. 11(b) clock. On the Randy Gass issue, the Court stated:
>
> > The Crown has continuously taken the position that an *O'Connor* application is the appropriate vehicle to access third-party records. I agree with that position. **It is my view that the Defendant's [*sic*] approach amounts to an 'end run' around *O'Connor* and is driven by Section 11(b) considerations.**
>
> Had the defendants filed a timely ***O'Connor*** application, none of the above proceedings would have been necessary and much delay (and expense) would have been avoided.[224] [Emphasis of trial judge]

[306] After reviewing the record and considering the submissions of the parties, we would not interfere with the trial judge's attributions of delay relating to the Securities Commission materials and the five-month trial adjournment in 2014.

[307] The trial judge did not fail to understand, as alleged, the defence position in the *McNeil* and *O'Connor* dispute. His thorough reasons, in both stay decisions satisfy us he clearly did.

[308] The trial judge did not attribute the entire time frame consumed by the *McNeil/O'Connor* standoff to the appellants. Despite his view that the majority of the delay was due to the "pall of inertia" on the part of Mr. Potter and Mr. Colpitts, the only attribution, 12 months, was for delay following Justice Hood's decision. In Stay Decision #2, the trial judge described this quantification of time as "conservative". We agree with that observation.

[309] We agree with the trial judge that Justice Hood's conclusion was clear—if Mr. Potter and Mr. Colpitts wanted additional materials from the Securities Commission beyond the extensive documents already in their possession, they were to bring a third party *O'Connor* application, not continue to insist on the

Crown seeking out the materials as a *McNeil* obligation. The trial judge did not, as alleged by Mr. Potter and Mr. Colpitts, overrule Justice Hood's decision.

[310] The record before us irrefutably demonstrates that the Crown and the trial judge repeatedly encouraged Mr. Potter and Mr. Colpitts to bring an *O'Connor* application following Justice Hood's decision. It took them over a year to do so. Instead, they brought motions that did not result in obtaining the materials they said they wanted. These motions included an attempt to rely on what they purported was the court's "inherent jurisdiction" to order production of records in the possession of the Securities Commission.

[311] The trial judge's finding that Mr. Potter and Mr. Colpitts were "intransigent" was available to him. Although we are to defer to such conclusions, on our own review of the record, he was correct in this assessment. He was not "unjustifiably penalizing" the defence. He was attributing delay, in the course of an alleged s.11(b) breach, in accordance with the relevant legal framework. In our view, his attribution was correct.

[312] With respect to the five-month trial adjournment, it is clear that the appellants' approach to obtaining the Securities Commission materials resulted in the parties arguing over the responsibility to provide documents they already had or could easily access. Their approach led to additional materials being provided in bits and pieces. The trial judge's assignment of five months' delay to them because of their asserted need to review the Securities Commission materials before trial is reasonable. We reject the appellants' assertion that this adjournment was necessitated by the Crown failing to meet its disclosure obligations.

Other attributions of delay

[313] In Stay Decision #2, the trial judge explained the balance of the 21 months' defence delay also included, amongst other things, the time incurred in relation to the two recusal motions.[225] In Stay Decision #1, the trial judge had attributed a total of six months' delay for these recusal motions. In both, Mr. Potter and Mr. Colpitts argued the trial judge's conduct demonstrated actual bias. We will discuss the recusal motions in detail later. At this time, it is sufficient to say that having reviewed the record, we are satisfied both motions were without merit. The motions unnecessarily sidelined the progress towards trial. The trial judge's assignment of three months' delay for each of the recusal motions is entirely supportable.

[314] We are further satisfied the record is full of additional events where time was lost due to Mr. Potter and Mr. Colpitts not using times previously scheduled to bring motions, or being unable to advance matters for a variety of reasons. Some of these, if carefully scrutinized would only serve to increase the defence delay for *Jordan* purposes. We have chosen not to undertake that further analysis, but rather, accept the trial judge, having experienced firsthand the unfolding of the lead up to trial, was best placed to assign a delay of 21 months to Mr. Potter and Mr. Colpitts. He recognized this case did not lend itself easily to a precise mathematical calculation of delay. We agree with that observation, and based on the analysis we conducted above, are satisfied that his attribution of 21 months for the period considered in Stay Decision#1 is well-supported.

Attributions in Stay Decision #2

The trial judge's use of "frivolous"

[315] The trial judge attributed delay to Mr. Potter and Mr. Colpitts for a number of unsuccessful defence motions. This included the challenge to the presentation of evidence electronically (one week); the challenge to the admission of the Searchlight emails and Ian Black's evidence (four weeks); the request to combine defences (one week), and the mistrial application (three weeks). Mr. Potter and Mr. Colpitts argue the trial judge erred in doing so, as none of the applications were "frivolous" as contemplated by *Jordan*.

[316] Mr. Potter writes in his factum:

> 85. The trial judge attributed "significant" delay to the defence for bringing motions during the trial. This was an error. It was the product of judicial bias, as set out below, but also the product of legal and factual errors.
>
> 86. As the post-*Jordan* jurisprudence has demonstrated, "frivolous" is a very high bar. A defence motion that is legitimately filed, legitimately argued, and supported by legitimate case law cannot, in Potter's submission, be considered frivolous for the purpose of s.11(b). To do so would pit the constitutional rights of an accused against each other and force an accused to choose between them: he may pursue either his right to make full answer and defence or his right to a trial within a reasonable time. He cannot have both. This, Potter submits, is not constitutionally tolerable nor supported by the Supreme Court's decision in *Jordan*. [Footnote omitted]

[317] In his argument before us, Mr. Potter's counsel submits that a finding of "frivolous" should be rare, and only made in the clearest of cases. He sets the bar

very high for a motion to surpass this threshold. He says none of the defence motions were frivolous.

[318] There are two striking features to Mr. Potter's submissions. He does not challenge the trial judge's articulation of the legal principles, and he does not reference what the Court in *Cody* said regarding defence delay.

[319] We will set out what the trial judge found to be the relevant principles in assessing defence delay, followed by his findings. With respect to the law, the trial judge wrote in Stay Decision #2:

> [66] Defence delay was extensively canvassed in ***Cody***, and the following principles emerged:
>
> - Where the Court and Crown are ready to proceed, but the defence is not, the resulting delay should be deducted.
> - Examples of defence delay in ***Jordan*** are only examples and should not be taken as exhaustively defining deductible defence delay. It remains open to trial judges to find that other defence actions or conduct have caused delay warranting a deduction.
> - The determination of whether defence conduct is legitimate is not an exact science and is something trial judges are uniquely positioned to gauge.
> - Determining defence delay is highly discretionary, and appellate courts must show a correspondingly high level of deference.
> - Defence conduct encompasses both substance and procedure. The decision to take a step, as well as the manner in which it is conducted, may attract scrutiny.
> - Irrespective of its merit, a defence action may not be legitimate if it is designed to delay or if it exhibits marked inefficiency or marked indifference toward delay.
> - Inaction may amount to defence conduct that is not legitimate. Defence counsel are expected to actively advance their client's right to a trial within a reasonable time.
> - Legitimacy takes its meaning from the culture change demanded in ***Jordan***.
>
> It must be acknowledged that the s. 11(b) right is one which can often be transformed from a protective shield to an offensive weapon in the hands of the accused.[226]

[320] We turn to the trial judge's conclusion:

> [91] Significant delay was caused by illegitimate defence motions. None of these applications were intended to move matters forward. They were not advanced in response to the charges or in support of a discernable defence. They had no reasonable prospect of success and their only impact was delay. On January 11, 2016, the defendants brought a motion objecting to the Crown's use of electronic evidence at trial and challenging the manner of redirect of one of the Crown's witnesses. One week was lost. Following that delay, the defendants immediately brought two more mid-trial applications. The first related to the scope of Crown witness Ian Black's proposed testimony and the second was an attempt to stop the Crown from using the co-conspirator's exception to the hearsay rule to exhibit contemporaneous emails. Four weeks were lost. On October 4, 2016, the defendants applied to combine their cases. That delayed the trial for another week. Finally, the defendants made a frivolous motion for a mistrial on July 10, 2017, which resulted in a delay of three weeks. The total defence delay caused by these illegitimate defence motions is nine weeks. Net delay is reduced to 52 months, two weeks.[227]

[321] We agree with Mr. Potter that a "frivolous" motion would be one which is meritless and note that *Jordan* utilized that terminology. However, in discussing deductible defence delay (delay attributable to the defence that reduces presumptively unreasonable delay), *Cody* used the concepts of legitimacy and illegitimacy:

> [31] The determination of whether defence conduct is legitimate is "by no means an exact science" and is something that "first instance judges are uniquely positioned to gauge" (*Jordan*, at para. 65). It is highly discretionary, and appellate courts must show a correspondingly high level of deference thereto. While trial judges should take care to not second-guess steps taken by defence for the purposes of responding to the charges, they must not be reticent about finding defence action to be illegitimate where it is appropriate to do so.
>
> [32] Defence conduct encompasses both substance and procedure — the decision to take a step, *as well as the manner in which it is conducted*, may attract scrutiny. To determine whether defence action is legitimately taken to respond to the charges, the circumstances surrounding the action or conduct may therefore be considered. The overall number, strength, importance, proximity to the *Jordan* ceilings, compliance with any notice or filing requirements and timeliness of defence applications may be relevant considerations. Irrespective of its merit, a defence action may be deemed not legitimate in the context of a s. 11(*b*) application if it is designed to delay or if it exhibits marked inefficiency or marked indifference toward delay.
>
> [33] As well, inaction may amount to defence conduct that is not legitimate (*Jordan*, at paras. 113 and 121). Illegitimacy may extend to omissions as well as acts (see, for example in another context, *R. v. Dixon*, [1998] 1 S.C.R. 244, at para. 37). Accused persons must bear in mind that a corollary of the s. 11(*b*) right

> "to be tried within a reasonable time" is the responsibility to avoid causing unreasonable delay. Defence counsel are therefore expected to "actively advanc[e] their clients' right to a trial within a reasonable time, collaborat[e] with Crown counsel when appropriate and . . . us[e] court time efficiently" (*Jordan*, at para. 138).
>
> [34] This understanding of illegitimate defence conduct should not be taken as diminishing an accused person's right to make full answer and defence. Defence counsel may still pursue all available substantive and procedural means to defend their clients. What defence counsel are not permitted to do is to engage in illegitimate conduct and then have it count towards the *Jordan* ceiling. In this regard, while we recognize the potential tension between the right to make full answer and defence and the right to be tried within a reasonable time — and the need to balance both — in our view, neither right is diminished by the deduction of delay caused by illegitimate defence conduct.[228] [Emphasis in original]

[322] Contrary to Mr. Potter's assertion, it is not only meritless motions that can be deducted as defence delay. Even those with merit can be illegitimate. *Cody* makes this clear, along with emphasizing that trial judges are well-placed to make such a determination.

[323] We see no reason to interfere with the trial judge's attribution of delay in relation to the defence motions (a total of nine weeks as referred to earlier). The conclusions he reached were available to him based on the record and the governing legal principles. We will later address the allegation of bias in relation to his findings.

The unavailability of defence counsel

[324] In Stay Decision #2, the trial judge wrote:

> [96] Defence counsel unavailability was another issue that caused delay. I find that Mr. Greenspan's unavailability for the testimony of Langley Evans, coupled with the unavailability of Mr. Colpitts, created four weeks of delay. …[229]

[325] Mr. Potter does not challenge the trial judge's attribution of delay based on Mr. Colpitts' unavailability. His argument is solely focused on Mr. Greenspan. In argument, counsel directed our attention to an exchange which took place between counsel and the trial judge on May 19, 2016. It related to the scheduling of Mr. Evans' testimony. Counsel submits the record is clear he stated his schedule should not be used as a reason to postpone when the Crown chose to call this expert witness. Counsel says the record unequivocally shows Mr. Evans could have been called, and Mr. Potter would have proceeded on his own. As such, the trial judge

erred in attributing any delay to Mr. Potter and Mr. Colpitts in relation to the timing of Mr. Evans' testimony.

[326] Some context is helpful. Mr. Evans was a very important witness to the prosecution. The Crown had given notice of its intention to call him as an expert and, as required, provided a copy of his report well in advance of trial. Further, the record shows that the Crown had made known that it planned to call Mr. Evans as its last witness.

[327] At trial, Mr. Greenspan and Ms. O'Neill were on a limited retainer. They were present at times, otherwise Mr. Potter represented himself. The Crown was prepared to call Mr. Evans during the week of July 4, 2016. The record shows Mr. Greenspan had earlier advised of his availability during that week.

[328] The record confirms Mr. Greenspan advised his schedule should not determine the scheduling of Mr. Evans' testimony. He said if he was unavailable to attend when the Crown chose to call him, Mr. Potter would represent himself. However, he also indicated Mr. Potter had made clear to him he wanted counsel present for certain witnesses. With respect to scheduling Mr. Evans, Mr. Greenspan acknowledged he had advised the Crown he was available the week of July 4th, but the problem was being adequately prepared to address this particular witness' anticipated evidence. He stated:

> In the same way -- and I'll be very candid about it -- I did say that I personally happened to be available the week of July 4th. I can't prepare for Mr. Evans without the assistance both of Mr. Potter and either Mrs. O'Neil, Mrs. Levine, people who have read the material and can assist in trying direct [*sic*] my attention to aspects of the case. In addition we have a consultant and quite frankly he, I phoned him a couple of times since last week and he's away and hasn't been able to get back to me in terms of his availability particularly to prepare in the week or two before July 4th so I'm at a loss in other words I can't commit to July 4th not because I'm unavailable. I told My Friends I physically can be here but I'm not going to come unless I'm properly prepared for that timeframe.

[329] The Crown re-scheduled Mr. Evans to testify at a time when Mr. Greenspan would be available and suitably prepared for his evidence. Given the importance of the witness and the degree of preparation highly experienced criminal counsel had said was required to prepare, it was appropriate for the Crown not to forge ahead on July 4th, and leave Mr. Potter to manage this critical witness on his own.

[330] The trial judge attributed defence delay due to Mr. Evans (the Crown's last witness) being called a month later than originally scheduled. Based on the

circumstances, we are not satisfied he was in error for doing so. *Jordan* has made clear that defence delay will be incurred when the Court and Crown are ready to proceed but the defence is not.[230] We note from the record that the week of July 4th was not lost, as the Crown called other witnesses during this time. However, we do not view this as prohibiting the trial judge from assigning a period of delay as he did.

[331] In *K.J.M.*,[231] Justice Moldaver identified a period of defence delay that had not been assigned by either the trial judge or on appeal. In that instance, the accused was late appearing for his *voir dire*. Other matters were dealt with until his arrival later in the day. His unavailability, like here, did not result in a period of completely wasted time. Justice Moldaver noted the relatively short delay in the accused's arrival had a ripple-effect on subsequent scheduling:

> [96] Ultimately, it was the appellant's late appearance that created a need to find a date that would accommodate a five-hour, rather than 2 ½-hour, trial. Accordingly, there is good reason to treat at least some of the delay between March 2, 2016 and July 28, 2016 (almost five months) as defence delay, even if a continuation was inevitable. Without assigning blame, just as the delay occasioned by the Crown's change of mind in seeking to introduce the appellant's statement is attributable to the Crown, so too should the delay caused by the appellant's failure to attend court on time be attributable to the defence. It is, of course, difficult to quantify with precision the extent of the delay caused by the defence, and I would not attribute the full five months to it. However, attributing a delay of two to three months to the defence is in my view both fair and reasonable. This results in a net delay of 16 to 17 months.

[332] Justice Moldaver's approach is relevant to the matters before us in two ways. Firstly, it signifies a generalized approach to the assessment of delay, rather than one which micro-accounts with sharp precision. This of course is not new, *Jordan* having directed such an approach, but it serves as a helpful example of the methodology to be employed. Secondly, it illustrates that defence delay is not confined to those periods where the Court is sitting idle. Relatively small timing delays due to defence unavailability that has a cascading effect may give rise to more significant periods being attributed as defence delay.

[333] Mr. Greenspan had advised of his availability for the week of July 4th and the Crown had accordingly planned to call Mr. Evans as their last witness. Mr. Evans' evidence was re-scheduled because, notwithstanding having had his report, Mr. Greenspan required more time to prepare for his testimony. This altered the Crown's scheduling of its witnesses and ultimately delayed the conclusion of the

trial. We see no reason to interfere with the trial judge's attribution of four weeks delay occasioned by the re-scheduling.

The trial judge's attribution of delay to Mr. Potter and Mr. Colpitts for the time Crown witnesses spent testifying

[334] Mr. Potter and Mr. Colpitts say the trial judge was wrong to attribute four weeks of delay to them because of the time Crown witnesses spent testifying, specifically in relation to the continuity of evidence. Mr. Potter argues there were legitimate reasons to question the continuity of the emails retrieved from the KHI servers (the Searchlight emails) and the appellants should not have been penalized for doing so. He writes:

> 92. The legal error is that the time that Crown witnesses spend testifying cannot be attributable to the defence for the purpose of s. 11(b). Such an attribution is both unprecedented and unwarranted in Canadian law, as it is a fundamental right of an accused person to put the Crown to the strict proof of its case. The accused's choice to do so cannot attract a finding of defence delay.

[335] Mr. Potter further submits:

> 94. Finally, it cannot be ignored that both Potter and Colpitts were self-represented when they chose to require the Crown to establish continuity. The Crown had assured Potter and Colpitts of their right to put the Crown to the proof of its case, and advised them they were not being pressured to agree to anything (including continuity). [Footnote omitted]

[336] In addition, it is alleged the assignment of four weeks is factually incorrect, as the continuity witnesses occupied, at most, two and a half weeks of court time.

[337] This is what the trial judge said about the continuity evidence called by the Crown:

> [32] As discussed earlier, the defendants' unwillingness to reach reasonable agreements proposed by the Crown persisted during the trial. While there were many missed opportunities for cooperation, the defendants' position on continuity of documentary exhibits was the most significant. Agreements on continuity are the rule, not the exception. Several weeks of Crown evidence were devoted solely to proving the continuity of exhibits. In addition, the testimony of several Crown witnesses was extended because they were required to review related correspondence.
>
> [33] The defendants were unable to provide the Court with a defensible reason for their position on continuity. The fact that they formally admitted continuity

> ten months after the evidence was led suggests there was never a justification to offer.[232]

[338] We do not agree the trial judge erred in his attribution of four weeks' delay in relation to the Crown's calling of evidence to establish continuity.

[339] There is no blanket prohibition to assigning defence delay for periods when Crown witnesses testify, if the testimony has been necessitated by illegitimate defence action or inaction. In *Jordan*, the majority wrote:

> [137] Real change will require the efforts and coordination of all participants in the criminal justice system.
>
> [138] For Crown counsel, this means making reasonable and responsible decisions regarding who to prosecute and for what, delivering on their disclosure obligations promptly with the cooperation of police, creating plans for complex prosecutions, and using court time efficiently. It may also require enhanced Crown discretion for resolving individual cases. For defence counsel, this means actively advancing their clients' right to a trial within a reasonable time, **collaborating with Crown counsel when appropriate** and, like Crown counsel, using court time efficiently. **Both parties should focus on making reasonable admissions, streamlining the evidence, and anticipating issues that need to be resolved in advance.**[233] [Footnote omitted; Emphasis added]

[340] The trial judge determined the failure to admit continuity of the Searchlight emails was illegitimate. Having been involved in pre-trial case management, and having heard the extensive trial evidence, he was well-positioned to make that determination. We note Mr. Colpitts had acknowledged he ought to have conceded continuity much earlier, but having the evidence called gave him a chance "to get [his] breath". Further, both Mr. Potter and Mr. Colpitts, prior to their concession on continuity, had made extensive use of the emails at trial. This significantly undermines their suggestion they had legitimate concerns regarding the reliability of the communications.

[341] We see nothing in *Jordan* and the jurisprudence that has followed that restricts the deductibility of defence delay to represented accused. In our view, limiting deductible defence delay to those cases where an accused is represented would increase the potential for self-represented defendants to excessively and unreasonably extend proceedings. Such a result would be counter-intuitive to the *Jordan* framework.

[342] The trial judge's assignment of delay in this instance did not serve to impair Mr. Potter's and Mr. Colpitts' rights of full answer and defence. Accused persons

can fully question the case brought against them and advance the arguments they believe respond to the charges. This includes challenges to evidentiary continuity. What must be understood, however, is that should an accused then seek to launch a s. 11(b) application, his or her decisions may be examined for legitimacy. Delay occasioned as a result of litigation choices, if found to be illegitimate, may be deducted. Such a result is compatible with *Jordan'*s expectation that all participants, including defendants, have a responsibility to reduce delay.

[343] We decline to consider whether the four weeks of delay assigned by the trial judge should have been two and a half weeks. As discussed earlier, there is nothing objectionable with the time being assigned in a generalized fashion. In the context of this case, to parse through the record to determine whether the delay calculations were off by a few weeks, would invite the type of micro-accounting now discouraged post-*Jordan*.

The trial judge's attribution for Mr. Colpitts' "mismanagement" of his defence

[344] In his factum, Mr. Potter sets out his challenge to the five weeks of delay attributed to the appellants by the trial judge arising from Mr. Colpitts' management of his defence. He writes:

> 96. There are two main errors in the trial judge's attribution on this point. First, the time that an accused person spends calling evidence in his defence cannot constitute delay attributable to the defence for the purpose of s. 11(b) of the *Charter*, as it would be improper to require an accused person to choose between his right to a trial within a reasonable time and his right to make full answer and defence. The Court in *Jordan* explicitly stated that it is improper to deduct defence preparation time and non-frivolous defence applications and requests from the net delay, as "such a deduction would run contrary to the accused's right to make full answer and defence". Instead, the necessity of defence preparation, the calling of defence evidence, and defence applications is built into the presumptive ceiling. It is worth noting that there does not appear to be a reported decision in Canadian history where the time that defence witnesses spent testifying at trial was attributed to defence delay for the purpose of s. 11(b). To do so would be unconscionable.
>
> 97. Second, it is also trite to observe that delay caused by a co-accused is not attributable to the accused. As the Ontario Court of Appeal held in *R. v. Gopie*, "attributing to an accused the delay caused by the actions or inactions of a co-accused is inconsistent with the approach and language of *Jordan*". Instead, "delays arising in the case of jointly-charged accused can give rise to exceptional circumstances under the *Jordan* framework". This approach to attribution of

> delays caused by the actions of a co-accused has been accepted by appellate courts in Alberta and British Columbia, and trial courts across the country. [Footnotes omitted]

[345] In his submissions, Mr. Colpitts challenges the trial judge's conclusion that his defence was presented in an inefficient manner. He asserts he presented his defence much more efficiently than the Crown had presented the prosecution evidence. He says the attribution is wrong in law and fact, and is a further indication of the trial judge's bias.

[346] We decline to give effect to these complaints of error. There is no prohibition against defence delay being found in how an accused presented his defence if aspects of his conduct were illegitimate. As noted in *Cody*, illegitimate defence conduct includes actions which showed "marked inefficiency or marked indifference toward delay".[234] To say otherwise would permit a defendant to improperly occupy vast amounts of court time, again without consequence. This is the opposite of what the *Jordan/Cody* principles demand.

[347] Further, we have thoroughly reviewed the record, and see no error, palpable or otherwise, in the trial judge's conclusion that Mr. Colpitts mismanaged his defence, resulting in unnecessary delay. The record shows Mr. Colpitts did not make use of the time afforded to him to prepare and did not attend to scheduling witnesses in an efficient manner. Mr. Colpitts' conduct showed marked indifference to the delay in having the trial progress. It is notable that notwithstanding his conclusion the time expended was much greater, the trial judge only assigned five weeks of delay in his *Jordan* analysis:

> [31] The efficiency with which Mr. Colpitts led his case was not the only problem. His choice of witnesses was another. Throughout this prosecution, the theory of the defendants was that National Bank Financial Limited ("NBFL") was somehow responsible for their present predicament. The witnesses called by Mr. Colpitts, and extensively cross-examined by Mr. Potter's counsel, were unable to give evidence that addressed either the elements of the offences charged or any discernable defence. The Court and the Crown often questioned the relevance of this testimony, but that did not deter Mr. Colpitts from pursuing it over 31 days of trial, spread over 3.5 months. It is certainly arguable that this entire period can be classified as defence delay.[235]

Other attributions of delay

[348] In addition to the above attributions, the trial judge assigned delay for a number of other instances. We will review them briefly.

[349] As referenced earlier, the trial had been scheduled to commence in January 2015, but was adjourned to September 2015. Following the release of Stay Decision #1, the trial was further adjourned at the request of Mr. Potter and Mr. Colpitts. Again, some context is helpful. At the conclusion of submissions on the stay motion, Mr. Potter's counsel advised the court that he would be in a position to commence the trial "mid-September". Although dependent on the outcome of the stay motion, the trial commencement date was set for September 14, 2015. The stay decision was released on August 12th, and on September 1, 2015, Mr. Potter and Mr. Colpitts made motions seeking to delay the commencement of trial until January 2016 because they were not ready to proceed.

[350] On September 2, 2015, the trial judge moved the start of the trial to October 27th (the trial did not start until November 16th, due to other exceptional circumstances arising). On September 10, 2015, Mr. Potter and Mr. Colpitts filed motions seeking the trial judge's recusal (Recusal #3). They were heard on September 22nd and dismissed.[236]

[351] The trial judge attributed a period of two months delay for the adjournment and recusal motions. Although a strict calendar reference would create a delay of six weeks from September 14th to October 27th, we are not concerned with the additional two weeks assigned by the trial judge. Filing the recusal motion within the time frame granted to the defendants to prepare for trial prompted the need for the court and the Crown to turn their minds away from trial readiness to address the motion. The trial judge is best placed to quantify the temporal impact of delay-causing defence conduct.

[352] The trial judge attributed to Mr. Potter and Mr. Colpitts a further five weeks for adjournments sought during the trial. He wrote:

> [90] The trial began on November 16, 2015, at 9:30 am. Fifteen minutes later, Mr. Potter asked for another adjournment to give him time to prepare a "fulsome brief" for an application to have the Court direct the Crown to review 85,000 pages of NSSC documents. The Court denied the application, but trial was adjourned for one day. Although that adjournment resulted in the loss of only one day, many more adjournment requests would follow. Requests were made on October 18, 2016 (two weeks of delay), December 14, 2016 (two weeks of delay) and November 21, 2016 (one week of delay). Adjournment requests by the defence during trial amount to five weeks of defence delay. …[237]

[353] Our review of the record satisfies us the trial judge's assignment of delay in relation to mid-trial adjournments was warranted.

[354] The trial judge further attributed a period of two weeks to the defendants in relation to their request to slow the pace of trial. The record shows Mr. Potter and Mr. Colpitts raised concerns regarding the number of Crown witnesses being scheduled to testify each day. They asked the Crown to reduce the daily schedule of witnesses. As a result, the time required for the calling of witnesses spread over a greater number of days. The trial judge's quantification of time is, in our view, conservative.

[355] The trial judge attributed five weeks of delay to the defendants in relation to the scheduling of final submissions at the close of trial. This was linked to the trial judge finding they had not used the hiatus caused by his health break to prepare. He wrote:

> [93] Finally, the defendants failed to make proper use of the three-month break beginning in March 2017. This was time that had been blocked off for trial, so the parties had no other commitments scheduled. At that point, Mr. Colpitts, the trial's final witness, had completed his direct testimony and had been cross-examined by Mr. Potter's counsel. The Crown had completed one day of its cross-examination.
>
> [94] On March 29, 2017, the Crown wrote to the defendants and explained that it would be using the time to prepare written submissions on both the *Charter* issues and the merits of the case. The Crown urged the defendants to do the same. According to Mr. Potter's counsel, they were "troubled" by the suggestion. Three days after the trial resumed, Mr. Potter elected to call no evidence and the trial concluded. The defendants then asked for four months to prepare closing submissions, which would see the parties arguing well into December 2017. Under the Crown's proposal, everything would have been completed by September 29, 2017. In light of the defence's failure to use the three-month break, I found the Crown's proposal too ambitious and scheduled closing arguments to run until November 8, 2017. If the defence had made proper (or indeed any) use of the break, I find that at least five weeks of delay could have been avoided. …[238]

[356] It was not reasonable for Mr. Potter and Mr. Colpitts to claim they were unable to commence preparation of their closing submissions until the trial had concluded. When the trial was adjourned for the trial judge's health break, all but four days of evidence had been heard. They knew from the Crown's pre-trial brief and trial evidence the basis on which convictions were being sought and could have easily started their preparations. The trial judge was correct when he found the delay caused would have been less if the appellants had made use of that time. His attribution of five weeks is, again, conservative.

[357] Finally, the trial judge attributed a further six weeks to Mr. Potter and Mr. Colpitts:

> [95] There were other factors that contributed to delay during the trial proper. The parties agreed not to sit for two weeks in each of March 2016 and March 2017 so that they could spend time with family. There was a week-long break in late April, 2016. Mr. Potter requested a week in July 2016 to attend a wedding. I deduct six weeks for these periods… .[239]

[358] Having reviewed the record, we see no reason to interfere with the trial judge's attributions of delay.

Attribution of delay to Mr. Potter for Mr. Colpitts' conduct

[359] We turn to Mr. Potter's complaint that he should not have been tagged with delay caused by Mr. Colpitts. He says the trial judge "did not explain why this delay was attributable" to him. This assertion is categorically incorrect. The trial judge provided a substantial and well-reasoned explanation:

> **Partners in the creation of delay**
>
> [36] My decision to this point applies equally to Mr. Potter and Mr. Colpitts. While I must assess each defendant's application individually, I conclude that both participated equally in creating the delay that has permeated the entirety of this prosecution. This Court has observed a high level of consultation and cooperation between them and they have not challenged each other. Mr. Potter did not testify, while Mr. Colpitts did. Further, Mr. Potter's counsel did not cross-examine Mr. Colpitts in a way that challenged his testimony. There were no "cut throat" defences advanced by either defendant.
>
> [37] The most significant evidence of a joint trial strategy was the application to combine their defence. I described this proposal at para. 5 of 2016 NSSC 271:
>
> > The proposal before me would see both defendants elect to call evidence at the start of the defence case. They would then collectively design a witness list that includes both defendants' witnesses. Once a witness is called, one of the defendants would declare that witness as their own and would conduct a direct examination. The other Defendant and then the Crown would cross-examine the witness. This would continue until all of the defendants' witnesses are called. Once the witnesses have completed their evidence, the defendants could elect to take the stand. They could testify in an agreed order or, in the absence of an agreement, as per the order on the indictment.
>
> [38] The defendants had no authority for this approach and the Crown was opposed. It argued that if the agreement between the defendants broke down, it

was very likely that Mr. Colpitts' rights would be compromised. The Court responded to the defendants' proposal at para. 18:

> My concern for [the risks inherent in the proposed approach] is enhanced by the fact Mr. Colpitts does not have trial counsel. I have a duty to assist Mr. Colpitts in receiving a fair trial. The need for that assistance was apparent when, during submissions, he indicated a willingness to sign a document waiving the right to make a mistrial motion regardless of the circumstance.

If the Court had countenanced this approach, it would have created a situation where the only remedy would be a mistrial. Such an occurrence could jeopardize the future of this prosecution, at worst. At best, it would contribute to further delay.

[39] The vast majority of interlocutory and mid-trial applications were brought by both defendants. When Mr. Colpitts filed an application or raised an issue, he was supported by Mr. Potter. When Mr. Potter filed an application or raised an issue, he was supported by Mr. Colpitts. I cannot think of a single occasion where the defendants took opposing positions. On many occasions, they asked for a recess to consult with each other and counsel.

[40] Mr. Colpitts did not have his own legal counsel during the trial while, for the most part, Mr. Potter had dedicated trial counsel. It was apparent to the Court that Mr. Colpitts presented as the "point man". He regularly agreed to Mr. Potter's counsel questioning Crown witnesses first, despite his name appearing first on the indictment. While both defendants were invested in the "NBFL defence", Mr. Colpitts called those witnesses, thereby allowing Mr. Potter's counsel extensive cross-examination.

[41] Messrs. Potter and Colpitts submitted pre and post-trial briefs. Upon review, it is quickly apparent that they are aligned in their message and do not challenge one another. In situations where Mr. Potter's counsel filed notices and other documents, Mr. Colpitts' documents mirror those of Mr. Potter. The same is true of their closing written and oral submissions.

[42] The fact that both defendants are advancing this application means they are both complaining about delay. When Mr. Colpitts was calling his case, with all of its interruptions and delays, Mr. Potter did not complain. In fact, his counsel, Ms. O'Neill, said she would "not agree to limitations on Mr. Colpitts' case." The Crown addressed the consequences of this stance at para. 158 of its post-trial brief:

> By remaining silent, or by expressly supporting Mr. Colpitts, Mr. Potter acquiesced to all of the delay occasioned in this period. He is as responsible as Mr. Colpitts. As both *Jordan* and *Cody* state, 'defence counsel are therefore expected to actively advanc[e] their clients' right to a trial within a reasonable time, collaborat[e] with Crown counsel when appropriate and . . . us[e] court time efficiently'. Mr. Potter's counsel did

> nothing of the sort. They sat on their hands and watched the weeks and months accumulate, saying only that the Crown took a long time to present its case, and Mr. Colpitts has a right to full answer and defence.
>
> I agree with this analysis. I find both defendants equally responsible for the delay in this prosecution.[240]

[360] Mr. Potter says courts have determined it would be improper to attribute delay to one co-accused for the actions of another.[241] This is not absolute. In the proper context, courts have done so. In *R. v. Albinowski*,[242] the Ontario Court of Appeal set aside a stay entered by the trial judge on the basis of a s. 11(b) infringement. There, the three accused had been charged with conspiring to smuggle Polish nationals from Canada into the United States. Mr. Albinowski was also charged with possession of the proceeds of crime. What is relevant for our analysis is that the court assigned defence delay to all respondents on the basis of delay arising from the scheduling difficulties of only one of their lawyers. Sharpe J.A. explained coordination amongst the accused is a pivotal consideration:

> [36] How then is delay to be assessed in this joint trial? The trial judge did not have the benefit of this court's decision in *R. v. Gopie*, 2017 ONCA 728, 140 O.R. (3d) 171, which sets out an analytical framework for the assessment of delay in joint trials with multiple accused. *Gopie* instructs that "an individualized approach must be taken to the attribution of defence-caused delay in cases of jointly-charged accused": *Gopie*, at para. 128. This approach avoids "attributing to an accused the delay caused by the actions or inactions of a co-accused [which] is inconsistent with the approach and language of *Jordan*": *Gopie*, at para. 136.
>
> [37] In my view, however, the individualized approach in *Gopie* does not apply in this case because the delay was common to all respondents who proceeded as a collective in this joint trial. Here, the actions or inactions of a co-accused did not cause the delay. Rather, the delay at issue was entirely due to scheduling challenges, which arose directly and inevitably from the respondents' joint situation.
>
> [38] Not only is it common ground that joint proceedings were justified in this case (especially in light of the coordinated nature of the allegations), all parties accepted that severance was never an option. As Mr. Albinowski's counsel submitted before the trial judge on the s. 11(b) application, a severance application would have amounted to the kind of defence conduct decried under the *Jordan* framework. In essence, the defence presented a united front. For example, during the s. 11(b) application, counsel for Mr. Pipien commenced his submissions by stating he was speaking on behalf of the two other defence counsel. Moreover, each defence counsel largely endorsed the others' submissions on the application. Because the defence proceeded through the system as a collective, the delay caused by scheduling challenges must be analyzed in the same manner—that is, communally.

[361] More recently, in *R. v. Brissett*,[243] the delay associated with one co-accused was again attributed to all. There, the trial judge determined a four-month delay occasioned by the unavailability of counsel for one accused was attributable to his two co-accused. On appeal, the court wrote:

> [14] The appellant challenges the four-month defence delay attribution on the basis that this delay was caused by the unavailability of a different co-accused's counsel to start the trial four months before it actually commenced. The appellant says that he should not be penalized, when he was ready, because of a delay caused by a co-accused.
>
> [15] We are not persuaded by this submission. The trial judge's reasoning on this point was:
>
> > The only other period of "defence delay" was the four months in this Court, from September 2016 to January 2017, when Mr. Rusonik was not available for trial. Once again, I did not attribute this period of delay personally to Mr. Rusonik's client Morris. I attributed it to the case as a whole, as "defence delay" under the *Jordan* framework. Mr. Rusonik and his client have acted responsibly throughout, asking to hear from only two witnesses at the preliminary inquiry, making numerous realistic admissions, and consenting to committal in a timely way. They then waited patiently in this Court until the other accused arrived after their somewhat slower committals. Furthermore, Mr. Rusonik was the only counsel who was retained and on the record from the beginning in this Court. When he needed four months of delay in this Court, in order to clear his calendar, the other accused acquiesced in this delay and did not raise s. 11(b) concerns, presumably because they needed the further delay in order to complete their own retainers and prepare for trial. In all these circumstances, it would have been inappropriate to treat this four months of "defence delay" as applying narrowly to the accused Morris, as opposed to the case as a whole.
>
> [16] We agree with this conclusion: see *R. v. Albinowski*, 2018 ONCA 1084, at paras. 37-39.

[362] Although the delay Mr. Potter complains of here did not arise from the unavailability of Mr. Colpitts' counsel, we do not view the distinction as being material. What is significant is whether the defence delay of one co-accused should attach to another—a highly contextual exercise. Whether the defendants presented common defences, and their respective responses to the delay-causing conduct of the other, are relevant considerations.

[363] Here, the trial judge considered the broad context of how Mr. Potter and Mr. Colpitts had advanced their respective defences. His conclusion as set out above is

confirmed by our own review of the record. We are of the view it is not now open to Mr. Potter to complain about sharing in the consequences of Mr. Colpitts' poor management of his defence. The record is replete with his counsel either explicitly supporting Mr. Colpitts' approach or failing to object to the resulting delay.

Exceptional circumstances

[364] After deducting defence delay, the trial judge moved to the next step in the *Jordan* framework. Mr. Potter and Mr. Colpitts did not take issue with the trial judge's identification of three discrete events which should be deducted—Mr. Potter's wife being injured, resulting in a three-week delay; Bruce Clarke's guilty pleas, resulting in a three-week delay; and the trial judge's three and a half-month health break. After deducting these events, the trial judge concluded the net delay was 41 months.

Observations on net delay

[365] In some cases, it will be a straightforward exercise to quantify periods of defence delay. This is especially so where defence conduct triggering a deduction for delay is limited or confined to an identifiable period of time. This is not such a case. Here, given the nature of the proceedings, the number of motions, and the issues constantly arising, it is impossible to parse with precision the delay created by the numerous and often inter-related defence actions and inaction.

[366] Precision is also difficult when various periods of delay are described in different units of time. Some delays are expressed as months, others weeks, a few in days. These need to be factored into a framework which has assigned a ceiling of 30 months. It is easy to see how the addition of varying time frames do not always permit an exacting calculation of net delay.

[367] An exacting review with a calendar-precise accounting of time may very well produce a net delay different than 41 months. Mr. Potter and Mr. Colpitts advocate that type of exercise. We have declined to do it. If such an approach were used, it would be necessary to revisit the delay of 79 months calculated from indictment to the end of trial. The trial judge simply counted calendar months. His calculation did not factor in the trial schedule that had been agreed to by all parties. With a few exceptions, the trial ran on a four week on, one week off schedule, and trial weeks typically did not include Fridays. The trial did not run consistently for 79 calendar months. There were many breaks, agreed to by the parties as part of

the ongoing trial schedule. The agreements would constitute implied defence waiver and would result in an adjustment downwards of at least three months.

[368] We are satisfied the 41 months of net delay identified by the trial judge is supportable on the record before us.

The trial judge's complexity finding

[369] Mr. Potter and Mr. Colpitts challenge the trial judge's complexity finding. In his reasons, the trial judge explained why he found the matter before him to be complex. He wrote:

> [103] The Court must now determine whether the Crown has demonstrated that this is a particularly complex case that required an inordinate amount of trial or preparation time such that the delay is justified.
>
> [104] The defendants argue that the case was not sufficiently complex to justify the delay, and, further, that the Crown failed to have a plan in place to address the complex nature of the case. I disagree. The Court in ***Jordan*** identified several "hallmarks" of particularly complex cases at para. 77:
>
> > … Particularly complex cases are cases that, because of the nature of the evidence or the nature of the issues, require an inordinate amount of trial or preparation time such that the delay is justified. As for the nature of the evidence, hallmarks of particularly complex cases include voluminous disclosure, a large number of witnesses, significant requirements for expert evidence, and charges covering a long period of time. Particularly complex cases arising from the nature of the issues may be characterized by, among other things, a large number of charges and pre-trial applications; novel or complicated legal issues; and a large number of significant issues in dispute. Proceeding jointly against multiple co-accused, so long as it is in the interest of justice to do so, may also impact the complexity of the case.
>
> [105] The present case meets and exceeds these identifiers. …[244]

[370] The trial judge noted Mr. Colpitts and Mr. Potter had, at times, acknowledged the complex nature of the proceedings:

> [107] During his adjournment submissions on September 12 [*sic*], 2015, Mr. Colpitts described some of the complexity of both the evidence and the issues:
>
> > It is easy when you have unlimited resources to say you are ready, frankly. It is not easy when you don't have those resources to say you are ready and it is more than just reading the 85,000 pages of disclosure and I don't even know the exact page count for the Securities Commission… to make

> full answer and defence I have to review it and I not only have to speak to their witnesses but I have to put forward my own witnesses….This process has been a long, torturous process and it has been as you are well aware…it has been application after application after application and dealing with little issues and they are not little but issues…
>
> All you have to do is the math. How many pages can you, Justice Coady, read in the run of a day, assimilate it, organize it, and then put it into some reasonable thought to come forward and cross-examine witnesses, remember it, organize it, tab it, the whole thing. I think when there are hundreds of thousands of pages, all you have to do is count the days.

George MacDonald, for Mr. Potter, agreed that the trial comprised "serious and complex issues".[245]

[371] With respect to the complexity of the evidence, the trial judge observed:

> [118] This prosecution carries every hallmark of evidentiary complexity identified by the majority of the Supreme Court of Canada in ***Jordan***. It had multiple accused involved in a complex and multi-faceted scheme with 11 co-conspirators. Their alleged crimes were carried out over an indictment period of 20 months. They used, at various overlapping times, multiple bank accounts in the names of multiple individuals, conducting varied and multiple manipulative techniques that required extensive expert evidence to explain.
>
> [119] Crown disclosure comprised over 15,500 documents, including hundreds of witness statements, complex financial documents and trade data, and a network of communications resulting from 31 judicial authorizations. This information was culled from over 150,000 e-mails and 700,000 electronic files. The evidence covered almost a two-year period with over 700 communications and thousands of supporting documents. This does not even include the thousands of documents this Court reviewed in the ***O'Connor*** applications for privilege and likely relevance. For Crown witnesses Dr. Lutz Ristow and Barbara Barthe, the Crown required the assistance of the German authorities under the *Mutual Legal Assistance Act*. The Crown called two expert witnesses – Mehran Shahviri and Langley Evans. Mr. Shahviri testified over five days, while Langley Evans was on the stand for 11 days (including the *voir dire* on qualifications). The defendants aggressively challenged their evidence.[246]

[372] The trial judge also concluded the issues involved in the proceedings were complex:

> [122] As noted above, ***Jordan***'s hallmarks of a case that is complex because of the nature of the issues "may be characterized by, among other things, a large number of charges and pre-trial applications; novel or complicated legal issues; and a large number of significant issues in dispute. Proceeding jointly against multiple co-accused, so long as it is in the interest of justice to do so, may also

> impact the complexity of the case": para. 77. Once again, this case is the prototype.
>
> [123] To say that this trial involved a large number of issues in dispute would be a gross understatement. The defendants brought 27 formal applications during the prosecution. As discussed above, many were illegitimate, as defined by the Supreme Court of Canada in ***Jordan*** and ***Cody***. Some, however, were legitimate defence conduct. Examples include Mr. Clarke's *Rowbotham* application and the first delay application. I have reviewed most of the applications earlier in this decision, and need not repeat them here. The number of applications alone does not reflect the lost court dates, the time needed to prepare written briefs, and the delay each application caused in the next step in the process.[247]

[373] The trial judge's determination of complexity is entitled to deference. We agree with the Crown that the trial judge "lived" this prosecution and was best-placed to appreciate the many nuances informing his conclusion. The record amply refutes Mr. Potter's claim that the apparent complexity of this matter was simply "a mirage".

[374] As we said earlier, a finding of complexity is not, on its own, sufficient to justify a presumptively unreasonable delay. The Crown must also establish it developed and followed a concrete plan to minimize the delay.[248] The trial judge did not overlook this requirement.

[375] In the court below, as before us, Mr. Potter and Mr. Colpitts argued the Crown failed to meet its burden to establish they had a plan to advance the prosecution. This proposition was flatly rejected by the trial judge. He gave extensive reasons for doing so. Despite their length, we view it as beneficial to set them out:

> [125] The defendants allege that "at no point did [the Crown] seek to narrow the issues, seek fair and appropriate admissions, or seek to admit evidence on consent". Having been a witness to these proceedings, I reject this assertion in its entirety.
>
> [126] At the initial stages of the debate over access to the NSSC[249] materials, the Crown encouraged the defendants not to spend time in 2013 arguing over who was responsible for accessing these materials. Rather, the Crown's position was the entire application to Justice Hood was moot at the point the Securities Commission was prepared to provide the materials for the mere formality of a subpoena. The effect of that process could then be argued later at the inevitable s. 11(b) motion. The defendants rejected that approach and instead spent almost all of 2013 debating an issue that was ultimately held to be moot. The discussion around these materials began at the earliest days of the process, and the defendants leveraged this issue, to the best of their ability, to create delay. The

Crown provided a reasonable option to make efficient use of court resources and the defendants rejected it.

[127] In [*sic*] January 31, 2014, the Crown provided the defendants with a notice under the *Canada Evidence Act* and recommended to counsel that they review the notice for the purpose of identifying potential agreements on continuity or admissibility. The defendants never responded.

[128] As previously mentioned, on September 29, 2015, two months prior to trial, the Crown approached the defence in writing with a host of suggestions for shortening the trial. The options included:

- An agreed statement of facts, followed by submissions on the legal effects of those facts.
- Defence admission to the Crown's alleged facts, followed by defence evidence and possibly Crown rebuttal evidence.
- Defence admission to *some* of the Crown's facts, followed by evidence of the Crown and the defence. [Emphasis of trial judge]
- Defence admission to some evidentiary issues, followed by evidence of the Crown and defence.

[129] With respect to evidentiary issues, the Crown provided a detailed list of continuity witnesses, and sought agreement on their evidence. In addition, the Crown outlined all of the locations from which trial evidence had been seized, seeking agreements on admissibility. Initial discussions were promising but, in the end, both Mr. Potter and Mr. Colpitts rejected every option, as was their right. Their later change in position and its effect on the prosecution has been discussed elsewhere in this decision.

[130] Those options were all in respect of the Crown's evidence, but the Crown was also open to facilitating defence evidence through agreements, and made that known to the defendants and to the Court. For example, the Crown encouraged the defendants to apply to have (the deceased) Daniel Boucher's statement tendered as evidence, or to prepare an agreed statement of facts for him. They never did.

[131] On several occasions, the Crown offered to work on an agreed statement of facts related to the NBFL witnesses, including an agreement that NBFL did not properly supervise Bruce Clarke. It was not pursued by the defence. The Crown offered to review statements of fact for particular witnesses in order to expedite the NBFL evidence process. That offer was taken up only once by Mr. Colpitts in relation to National Bank Director of Settlement Sector, Cecile Orlup. However, Mr. Colpitts provided a draft agreement less than two hours before Ms. Orlup was scheduled to testify. The Crown would not agree to the proposed facts, given that it would not actually save time and it contained details the Crown was certain that Ms. Orlup could not know (which was later confirmed when she testified). The Crown then told both Mr. Colpitts and Mr. Potter that "we remain open to

working on agreements so long as we are given sufficient notice of the facts you wish to have entered". Neither took the Crown up on its offer, as was their right.

[132] But the Crown's concrete plan to minimize delay was not limited to seeking agreements. The Crown continuously and consistently created and suggested solutions to deal with the exceptional circumstances. Frequently, they were frustrated by the defendants. The examples are varied and numerous:

- Number of co-accused: The Crown made the significant decision of limiting the prosecution to the three essential members of the conspiracy. There were ample grounds to have prosecuted other members of the conspiracy, however the complexity factor had to be considered in determining the scope of the prosecution. As a result, charges were laid against the three individuals without whom the conspiracy could not have succeeded: the broker, the CEO and the lawyer.

- Access to disclosure: The Crown and police traveled to Toronto to provide training on the use of the disclosure hard drive. The Crown had the police rename all 16,000 documents on the hard drive at the request of the defendants because they wanted the search results to look better. The Crown acceded to the defendants' request to provide them with the "load files" used to organize the disclosure hard drive, only to have that result in another application in August 2014. Then after Mr. Hodgson agreed to the terms of access to the load files, he never responded to the Crown's offer to assist in putting the materials together.

- Electronic courtroom: The electronic courtroom was specifically created for this trial due to its nature and complexity. The Crown made efficient use of it, and even operated it for Mr. Colpitts, at his direction, during his evidence. Initially all parties agreed to it, but the defendants tried to revoke their "consent", which would have increased trial time exponentially.

- Constant Crown concern over delay: As noted in the first stay decision, the Crown always had concerns about delay and repeatedly asked the Court to schedule matters promptly, over the objection of the defence.

- Crown agreements to move process along: The Crown strongly encouraged the defendants to access the NSSC materials and to argue the effect of process during the s. 11(b) hearing. The Crown pushed the defence throughout the third party record hunt to bring a proper ***O'Connor*** application, even agreeing in April 2014 to present Randy Gass as a witness in some unidentified hearing hoping that it would move the matter along. It did not. It only made it worse. And it resulted in another application in October 2014 to enforce a supposed Randy Gass undertaking.

> - Abbreviated filing dates: The Crown was always prepared to file its application materials within short timelines. It agreed to receive notices in an informal manner and assisted when possible in accessing witnesses or documents.
>
> - Booking multiple witnesses: The Crown scheduled multiple short and non-controversial witnesses in single days. This was met with an application to slow the trial by calling fewer witnesses each day.
>
> - Continuous re-assessment of its case: After Bruce Clarke pled guilty, the Crown removed several witnesses from its list determined to be non-essential to the case against the remaining defendants. As the trial proceeded, and the strength of the evidence presented was assessed, the Crown repeatedly reduced its witness list and could have done so even further with more reasonable cooperation by the defendants.
>
> - Efficient use of unexpected delay: The Crown used the sudden three-month adjournment near the end of trial to prepare argument, and suggested to the defendants that they do so as well.
>
> [133] ***Jordan*** requires the Crown to demonstrate that it made reasonable efforts to mitigate any delay flowing from the exceptional circumstance. However, the Crown does not have to act against the interests of its case or accept any defence proposal. As the Ontario Court of Appeal recently stated in ***R. v. Saikaley***, 2017 ONCA 374, [2017] O.J. No. 2377, leave to appeal denied, [2017] S.C.C.A. No. 284:
>
> > 47 Again, we do not read *Jordan* as requiring the Crown to take any and all steps proposed by the defence to expedite matters. The Crown's reasonable and principled position on the *Dawson* application provides no basis to conclude the Crown acted arbitrarily or in bad faith in refusing to consent to the cross-examination proposed by the defence. So long as the Crown acts reasonably and consistently with its duties, it would be unconscionable to deny it the benefit of the complex case exception to the 30-month presumptive ceiling.[250]

[376] The determination that the Crown had a prosecution plan to minimize and respond to delay is entitled to deference. We are satisfied the trial judge's conclusion is unequivocally supported by the record. It discloses no palpable and overriding error.

[377] Given our conclusion on complexity, it is not necessary to consider the trial judge's ruling on the transitional exception. The trial judge's ultimate conclusion that Mr. Potter's and Mr. Colpitts' s. 11(b) *Charter* rights had not been infringed was based on his finding that the Crown had justified the delay on the basis of complexity. This conclusion, firmly anchored in the record, is correct.

Conclusion

[378] We dismiss this ground of appeal.

Issue #3: Did the Trial Judge Err in Law by Admitting the Evidence of Ian Black and then by Relying on that Evidence?

[379] The Crown called Ian Black, a former RCMP officer. His testimony spanned over 19 days. Several exhibits were introduced in the course of his testimony. These included spreadsheets he prepared, as well as the numerous emails sent between and amongst Mr. Potter, Mr. Colpitts, Mr. Clarke, and others.

[380] We will first review the background to the introduction of Mr. Black's evidence, including a motion brought by Mr. Potter in advance of his testimony to have it limited in scope. We then discuss the introduction of two specific exhibits that Mr. Potter and Mr. Colpitts assert were erroneously admitted by the trial judge. Finally, we will set out the positions of the parties advanced on appeal before undertaking our analysis of the appellants' allegations of error. Because we are of the view Mr. Potter and Mr. Colpitts have misconstrued the nature of Mr. Black's evidence, it is unnecessary to undertake a standard of review analysis.

Background

[381] The context in which Mr. Black's evidence was considered is important. The appellants' complaints fall into two broad categories: the trial judge's admissibility rulings, in particular his mid-trial ruling that the proposed evidence was permissible lay opinion (*R. v. Colpitts*[251]); and his subsequent use of that evidence.

[382] With respect to the background giving rise to the mid-trial ruling, we note Mr. Potter and Mr. Colpitts each filed Notices of Motion prior to the commencement of Mr. Black's testimony. They sought an order limiting his *viva voce* evidence, asserting it would constitute opinion evidence requiring expertise; the Crown was not seeking to have him qualified as an expert; Mr. Black lacked the necessary expertise to give opinion evidence; and his anticipated evidence was not relevant.

[383] The Crown argued the motion was premature. The trial judge had yet to hear any evidence from Mr. Black; therefore, any type of restriction on his testimony would be improper.

[384] The Crown said it was not seeking to elicit expert opinion from Mr. Black and refuted the suggestion he would be providing lay opinion evidence. His anticipated evidence was described in its motion brief as follows:

> **1. Mr. Black's Proposed Evidence**
>
> 53. Ian Black is an experienced RCMP investigator with (at the time of the investigation) 23 years of investigative experience, 9 of those exclusively in commercial crime investigations. The Crown will call upon Mr. Black to testify to his work as an investigator on the Knowledge House investigation. The Crown anticipates the following evidence with respect to Mr. Black's role:
>
> - He used available data to affirm the accuracy of Mehran Shahviri's Match Trade Report (MTR). The data he used included account statements and Toronto Stock Exchange reports ("Toronto Trading Requests"); and,
>
> - He compared the trading represented on the MTR during the relevant period with contemporaneous email communications authored by the accused, by co-conspirator Bruce Clarke, and by a group of other suspects that crystallized through the course of his investigation. This comparison was further informed by information gleaned from witness interviews conducted over the course of the investigation.
>
> 54. On the strength of this comparison, Mr. Black:
>
> - Established a group of individuals and accounts that he suspected of being involved in the manipulation of KHI stock. This group has at times been referred to as "the connected group" or "the control group";
>
> - Did a comparison of the buy and sell activity of the connected group with the wider buying and selling of the stock;
>
> - Counted the number of late day trades conducted by the connected group, following an established criteria ("The High Close Analysis"); and,
>
> - Created a series of spreadsheets summarizing the above three points.

[385] In his oral submissions, Crown counsel described the nature of Mr. Black's anticipated evidence as:

> … We have a police investigator who considered a body of evidence and correlated that with other pieces of evidence. And that's being presented to the court.
>
> This is not a case where Mr. Black is going to provide the court with ready made inferences or opinions. …

[386] In his mid-trial reasons, the trial judge reviewed the legal authorities submitted by the parties, and their views of Mr. Black's anticipated evidence. He wrote:

> [25] I anticipate Mr. Black's testimony will be as fully described at Paragraph 53 of the Crown's brief (and fully reproduced at Paragraph 5 of this ruling). I anticipate this evidence will be a compendious expression of technical data and, therefore, will be of great assistance to me as trier of fact.
>
> [26] I am not, at this time, placing any limitations on Mr. Black's testimony. Given that this ruling is being made in somewhat of a vacuum, I will hear from the Defence if they feel he is wandering into expert evidence. However, I will be reluctant to limit him in light of the various authorities cited herein. I will only intervene if Mr. Black offers an opinion requiring specialized knowledge. This application is dismissed.[252]

[387] It is helpful to see whether what the Crown indicated would be the nature of Mr. Black's evidence was realized at trial. The trial judge addressed Mr. Black's evidence in the conviction decision. We set out, in its entirety, his review:

> [317] Ian Black is an RCMP investigator who, at the time of the investigation, had 23 years of investigative experience, nine of those exclusively in commercial crime investigations. He was also a licensed investment advisor and worked in the industry for three years. Mr. Black was tasked by the RCMP with preparing a buy and sell analysis for KHI shares for the relevant period. Mr. Black relied on the Match Trade Report, trading information from the TSX, monthly portfolio statements, e-mails from KHI servers, and witness interviews. The end result of his efforts is Exhibit 62 – a binder with 31 tabs containing spreadsheets and charts analyzing the trading in KHI from January 2000 to August 2001.
>
> [318] Daniel Potter challenged the reliability of Mr. Black's evidence at paras. 61-63 of his post-trial brief:
>
> > It is clear that Mr. Black, almost from the moment he was hired on contract in 2004, determined that there was a conspiracy to illegally affect the price of KHI shares by creating an artificial price. He then spent several years attempting to confirm that theory without considering any purpose other than to create an artificial price for the trading in KHI shares. Mr. Black's lack of understanding of and experience in the capital markets was evidence [*sic*] throughout.
> >
> > Even more problematic is the "analysis" conducted by Mr. Black which includes:
> >
> > 1) deciding which accounts to label as "suspect" or "control group" accounts; and

> 2) determining which trades should be considered by the Court to be illegal high closings and therefore evidence of a conspiracy to unlawfully affect the public share price of KHI shares.
>
> The composition of the group of controlled accounts is not a decision that Mr. Black can make. It is only after hearing all of the evidence that the Court must then determine which accounts, if any, to include for the purposes of looking at trading patterns. …

[319] Mr. Potter proceeded to argue at length that it is not even clear from the evidence which accounts have been included in Mr. Black's calculations or why they have been included.

[320] I agree with Mr. Potter that it is for the Court to decide which accounts, if any, to include for the purpose of looking at trading patterns. I further agree that the mere fact that Mr. Black referred to a trade as a "high close" does not, without more, establish that a late-day uptick involving a suspect account amounted to a high close.

[321] I disagree, however, that there is any confusion about which accounts have been included in Mr. Black's calculations or why they have been included. As the Crown explained in its post-trial brief, Mr. Black established a group of individuals that he suspected were involved in the manipulation of KHI stock (the "control group"). Next, he compiled a list of brokerage accounts that were either controlled by these individuals or could be influenced by them. Using that list and the trading data, he established a list of "suspect accounts" that were used to buy KHI shares at various times. Some of these accounts were directly controlled by members of the conspiracy (e.g., Calvin Wadden controlled accounts at NBFL, BMO, TD and Yorkton Securities). Other accounts were used by members of the conspiracy when needed (e.g., Clarke's use of the Union and Enervision accounts). Finally, others were included in the "suspect Account" group because the objective evidence demonstrated that some trading by these accounts was done at the request of, or in conjunction with, a member of the alleged conspiracy (e.g., Meg Research).

[322] Ian Black was a credible witness who gave his evidence in an honest and forthright manner. I find that, on the whole, Mr. Black took a conservative approach to his investigation. When he was in doubt as to whether to include certain trades in his calculations, he erred on the side of the defendants by excluding those trades from his analysis. A decision by this Court to adopt or reject any of his conclusions does not undermine the usefulness of the materials he prepared. Several of his charts and spreadsheets–particularly the colour-coded "MTR Reduced", the "Summary of Daily Trading on the TSX", and "Suspect Account Buying of KHI Shares on the TSX" (Exhibit 66) – were of assistance to the Court in drawing its own inferences from the evidence.[253]

[388] For further background, it is of assistance to describe the two trial exhibits that contained Mr. Black's work product, including spreadsheets. Exhibit 62—

referenced as the "Ian Black Exhibit Binder" at trial, consisted of 31 tabs. The Crown described these materials, accurately in our view, in its post-trial brief:

> 599. Black testified that he prepared Exhibit #62, appropriately called "Ian Black Exhibit Binder." It contains 31 tabs, as follows:
>
> - **Tab #1** — the "MTR reduced is a version of the Match Trade Report for the period of March 3, 2000 to August 17, 2001. The colour coding shows "box buying" (buying by Suspect Accounts), box selling, box on both sides of a trade and excluded trades;
>
> - **Tabs #2-24** — here, Mr. Black summarized the trading in various accounts for each person or company he analyzed. The summaries show buys and sells on a daily basis for the entire period in question, and totals the amount spent (buys) or realized (sells) each day. Contrary to the submissions of the defence, this is not the list of "Suspect Accounts";
>
> - **Tab #25** — this tab aggregates some of the information provided by Tabs #2-24, identifying each account by name and colour. Here, Mr. Black identifies the "Suspect Accounts" consistent with Exhibit #66. One can readily see intensified Suspect Account buying activity in January, 2001, for example, when KHI share volumes crossing the TSX increase dramatically and the conspirators are forced to utilize as many accounts as they can to continue to dominate the buy-side;
>
> - **Tab #26** — this tab provides the same information as Tab #25, but differs in that it does not include selling by Suspect Accounts, share balances and share volumes;
>
> - **Tab # 27** — this tab shows both Suspect Account buying and Suspect Account selling, and also identifies the party on the other side of the trade;
>
> - **Tab #28** — this is the "Late Day Trade Analysis," also known as the High Close Analysis. Mr. Black utilized a conservative formula to identify late day trades: a trade within the last hour of the day; a trade by a Suspect Account or one controlled by Bruce Clarke; the trade must cause an increase in the KHI share price. The analysis was done for each trade day, and the results aggregated at the end of the document on the last page; and
>
> - **Tabs #29-31** — Mr. Black compared the purchasing by the Suspect Accounts to overall market volume for KHI shares on the TSX to determine what percentage of shares these accounts were buying on a daily (Tab #29), monthly (Tab #30) and across the period of March, 2000 to August, 2001 (Tab #31).

[389] The Crown described Exhibit 66 as follows:

> 600. Black also prepared Exhibit #66. This document totals the amount of money spent by each Suspect Account buying KHI shares on a monthly basis for the period of March, 2000 to August, 2001. It also totals the entire amount spent by Suspect Accounts over this same period—over $11.5 million dollars.

Position of the Parties on Appeal

[390] Mr. Potter's and Mr. Colpitts' Notices of Appeal are identical in terms of their complaints of error. They allege the trial judge erred in ruling the evidence of Ian Black was admissible lay opinion evidence because:

- Lay opinion evidence may be admissible only if the opinion amounts to a compendious statement of the facts observed by the witness, and even then, only if those facts involve matters of common experience. They say none of these requirements were met.
- The determination to permit Ian Black to provide lay opinion evidence is inconsistent with the trial judge's subsequent determination to qualify Langley Evans as an expert. They say the subject matter of their evidence, stock market regulation, was the same.

[391] In his submissions before us (adopted by Mr. Colpitts), Mr. Potter expanded upon his complaints, and submits:

- Mr. Black's evidence improperly directed the trial judge what inferences to draw from the evidence, and the trial judge erred in accepting that invitation.
- The trial judge erred in finding Mr. Black's evidence to be permissible lay opinion because his opinion was not founded on personal observations.
- Mr. Black could not be viewed simply as a fact witness because he went well beyond describing investigative steps when he offered his interpretation of the Searchlight emails and drew inferences from them. Further, the nature of his problematic evidence is best demonstrated by the spreadsheets he created (in Exhibits 62 and 66), which were erroneously admitted into evidence by the trial judge.
- Mr. Black strayed into providing expert opinion when he provided definitions of various terms, such as "high closing".

- Allowing the Crown to elicit expert opinion from Mr. Black without undertaking a qualification process prevented the appellants from challenging the foundation of his opinion and his spreadsheet calculations.

[392] As a result of the above errors, Mr. Potter and Mr. Colpitts say Mr. Black's evidence should not have been admitted or relied upon by the trial judge. Mr. Potter argues the trial judge simply accepted the evidence of Mr. Black, including his inadmissible inferences.

[393] The Crown argues the appellants have misconstrued not only the nature of Mr. Black's evidence, but how it was used by the trial judge. The Crown submits that putting the Black evidence in context, both in terms of the trial judge's admissibility ruling, the record and the reference to it in the conviction decision, necessarily leads to a dismissal of this ground of appeal.

Analysis

[394] This ground of appeal is without merit. Mr. Potter and Mr. Colpitts have mischaracterized the trial judge's mid-trial ruling regarding Mr. Black's anticipated evidence, the nature of the evidence he provided at trial, and the trial judge's use of it, and have failed to address their lack of meaningful objection at trial.

Nature of the mid-trial ruling

[395] We reject Mr. Potter's and Mr. Colpitts' assertion that the trial judge, in advance of hearing Mr. Black's evidence, found it to be admissible lay opinion. We agree with the description offered by the Crown in its factum:

> 221. Justice Coady determined that the applications to limit the testimony of Mr. Black were premature as he had not yet testified, he held that his "ruling is being made in somewhat of a vacuum". During oral submissions, he openly questioned how he could craft a decision before the witness had testified, important context was heard and, indeed, before a question was asked. Nevertheless, the Trial Judge set forth the law concerning factual testimony, lay opinion testimony and expert opinion testimony. Based upon the Crown's description of Mr. Black's testimony described in our brief of law, the Trial Judge anticipated that Mr. Black's testimony would be admissible as a "compendious expression of technical data…" He did not rule that all of Mr. Black's testimony would be admissible as lay opinion evidence nor did he limit the defendants' ability to object accordingly. Moreover, the defendants were not limited in their ability to raise an objection should Mr. Black stray into matters requiring

> specialized knowledge, a point acknowledged by Mr. Colpitts on February 25, 2016. [Footnotes omitted; emphasis in original]

[396] The trial judge recognized he was ruling in a vacuum in terms of addressing the mid-trial motion. Not only had he not heard Mr. Black's evidence, he had not seen Exhibits 62 and 66, which were eventually tendered at trial. The trial judge anticipated Mr. Black's evidence would be factual, and might extend into lay opinion. However, he simply did not have the context necessary to make a conclusive determination. Mr. Potter's assertion that the trial judge's mid-trial decision constituted an improper admission of lay opinion evidence is without merit.

Lack of meaningful objection at trial

[397] In the mid-trial decision, the trial judge expressly left open the right of Mr. Potter and Mr. Colpitts to challenge Mr. Black's evidence at trial as being impermissible opinion evidence.[254] This was re-emphasized by the trial judge in the course of Mr. Black's testimony. Specifically, the trial judge directed the witness to not give opinion evidence and encouraged Mr. Potter and Mr. Colpitts to object should they have concern with the evidence as it unfolded.

[398] In his factum, Mr. Potter asserts he "objected strenuously" to the admissibility of Mr. Black's evidence. That is true with respect to the mid-trial motion, but the record does not support this as an accurate description of what took place at trial. To explain, we address both Mr. Black's *viva voce* evidence, and the admission of his work product—the spreadsheets contained in Exhibits 62 and 66.

[399] As the record demonstrates, Mr. Potter and Mr. Colpitts made objections during Mr. Black's trial testimony. In our view, the trial judge was clearly supportive of the appellants' efforts to prevent him from providing impermissible opinion. In the vast majority of instances, the Crown responded to concerns raised by reframing the question posed. Mr. Potter and Mr. Colpitts have not pointed to any particular trial objection where their concerns were not appropriately addressed by the Crown or the trial judge.

[400] Mr. Potter argues the trial judge erred by admitting Exhibits 62 and 66. He says they contain expert opinion and impermissible inferences. At this point, we address the appellants' claim that this material was improperly entered into evidence over their objections. Upon careful review of the record, we are satisfied

both exhibits, including the spreadsheets, were entered with the tacit consent of Mr. Potter and Mr. Colpitts. We will explain.

Exhibit 62

[401] With respect to the admission of Exhibit 62, the record shows that on the first day of Mr. Black's testimony (February 24, 2016), the 31-tabbed binder was tendered by the Crown as a trial exhibit. The trial judge asked for any comment on the Crown's request. Hearing no opposition, the binder was marked as an exhibit. Mr. Black's testimony continued, referencing the contents of the exhibit.

[402] At the outset of the following day, Ms. O'Neill (Mr. Potter's counsel) objected to the entirety of Exhibit 62. She alleged it was improper expert opinion and requested it be excluded from evidence. In response, Mr. Covan for the Crown submitted that more specificity was needed to support the objection. He said:

> If that's what Ms. O'Neill is doing, then I think she has to do more than say, "This whole document is expert evidence." She has to point to specific sections of the document or specific sections of the materials that she says require expert opinion qualifications.
>
> And then I think the Court would have to rule on the specific sections of the document that require -- would have to rule on that objection at that time, looking at the specific provisions.

[403] Mr. Colpitts helpfully offered a solution to what may have otherwise developed into a time-consuming impasse:

> **MR. COLPITTS**: There's a certain part of this binder that I don't object to. But there's a lot of -- and I went back last night and re-read your ruling because I didn't have mine with me yesterday either. And you did leave the door open for specific objections.
>
> …
>
> And I think it would -- it might be -- it might be opportune if we took 15 minutes, met with the Crown and see if there's anything that could be agreed upon, what could stay and what could go in this binder.
>
> …
>
> So there's -- that would be a good exercise so that we're not always fighting and we could at least have a look and see what we object to and what we don't object to, to narrow the field. Because I don't think Your Lordship had this [Exhibit 62] in front of you when you made your ruling.
>
> **THE COURT**: This here?

MR. COLPITTS: Yes.

THE COURT: Well no, I didn't. And I think that's why I left the door open.

MR. COLPITTS: Yeah. I agree with that.

[404] The parties followed Mr. Colpitts' suggestion and broke to discuss possible resolution of Ms. O'Neill's objection. Upon reconvening, the Crown advised an agreement had been reached to replace certain contents of the exhibit that the defendants viewed as objectionable. It was anticipated a new binder would be filed as a replacement exhibit. The Crown further advised that based on the discussions, Mr. Black would avoid the use of certain terminology in his *viva voce* evidence. Neither Mr. Potter nor Mr. Colpitts disputed the Crown's representation that an agreement had been reached.

[405] After a break in his testimony, Mr. Black returned on March 3, 2016, at which time the Crown presented the new version of Exhibit 62. Despite having alleged the original exhibit contained inadmissible materials, Ms. O'Neill now wanted it to remain in evidence, with the replacement version being admitted as a separate exhibit. The Crown opposed this approach, arguing that if the exhibit contained inadmissible material as alleged, then it should not be in evidence. It was either inadmissible, or it was not.

[406] The trial judge directed the original Exhibit 62 be removed from the record. It was replaced with the version containing the agreed changes. In response to Ms. O'Neill's concerns, the trial judge suggested the defendants could use the original in their cross-examinations and enter it as their exhibit should they wish. The record demonstrates that the original exhibit was provided to Ms. O'Neill. It was never tendered as an exhibit. No further objections were raised in the course of the hearing as to the contents of the replacement Exhibit 62.

Exhibit 66

[407] Exhibit 66 was tendered on April 18, 2016 near the end of Mr. Black's direct examination. Neither Mr. Potter (his counsel were present) nor Mr. Colpitts objected to it being entered as a trial exhibit. Mr. Black provided evidence with respect to the spreadsheets it contained without objection.

[408] The record confirms both exhibits were entered in a form satisfactory to all parties. The appellants' assertion the exhibits were improperly admitted by the trial judge cannot be sustained.

[409] As this Court has previously directed, objections to the admissibility of evidence should be timely and clear.[255] If Mr. Potter and Mr. Colpitts were of the view the exhibits contained inadmissible evidence, it was incumbent on them to unequivocally say so and specify the basis of objection. Instead, after a break to discuss modifying Exhibit 62, and it being amended, it was entered without further objection. Later, Exhibit 66 was entered without comment. The trial judge cannot now be faulted for the exhibits being admitted.

The nature of Mr. Black's evidence

[410] We now address a number of concerns raised by Mr. Potter and Mr. Colpitts regarding Mr. Black's testimony. The common foundation of their complaints is that his evidence was impermissible lay opinion. These complaints were framed in their Notices of Appeal:

> **A. Lay Opinion**
>
> 11. That the learned trial judge erred in ruling that the evidence of Ian Black was admissible lay opinion evidence:
>
> - Lay opinion evidence may be admissible only if the opinion amounts to a compendious statement of the facts observed by the witness, and even then, only if those facts involve matters of common experience. None of these requirements were met as to the admissibility of Ian Black's testimony.
>
> - That the determination of the learned trial judge to permit Ian Black to provide lay opinion evidence is inconsistent and contradicts his subsequent determination to qualify Langley Evans as an expert, as the subject matter of their testimony, stock market regulation, was the same.

[411] The Crown says this ground of appeal, and the various iterations of the complaints launched against Mr. Black's evidence, fail because it never elicited opinion, expert or lay, from him. The Crown submits he was called as a fact witness. Any opinion Mr. Black gave was elicited in cross-examination by Mr. Potter and Mr. Colpitts.

[412] The arguments advanced by Mr. Potter and Mr. Colpitts are based on their characterization of Mr. Black's evidence as being lay opinion. They assert it did not meet the admissibility requirements for lay opinion set out by the Supreme Court of Canada in *Graat v. The Queen*.[256] The Crown says Mr. Black was a fact witness and the appellants' complaints therefore have no traction. We agree.

[413] After reviewing the record, we are satisfied the Crown did not elicit opinion evidence from Mr. Black. His evidence, including the spreadsheets he prepared, constituted a factual overview of the investigation. In argument Mr. Potter and Mr. Colpitts cite a number of American authorities for the proposition that courts should reject summary evidence provided by police witnesses. We agree with the Crown that American authorities are of no assistance in the present instance. Canadian courts recognize investigatory witnesses can provide the type of evidence provided here, and view it as factual in nature.

[414] Several decisions considering evidence analogous to that challenged on this appeal are helpful. They warrant a brief review. In *R. v. Hamilton*,[257] the Ontario Court of Appeal heard an appeal arising from the conviction of four appellants for first degree murder and attempted murder. The factual context was a gang retribution shooting. Central to the Crown's case was evidence obtained through cellphone records that were said to demonstrate the appellants were near the scene of the murders, minutes before the shootings. The court described the nature of the evidence as follows:

> [231] At trial, the Crown called three "cell phone witnesses", representatives of the carriers Telus Mobility, Rogers Wireless, and Bell Mobility. These witnesses testified about three matters germane to this appeal: the rules governing the location of a cell phone in relation to a cell phone tower; the times and towers at which the cell phones of each of the appellants registered; and the extent of the synchronization between the times used by the cell phone carriers and the 911 system.
>
> [232] After these three witnesses testified, the Crown called a police witness, who, with the aid of a PowerPoint presentation, collated and summarized the cell phone location evidence for the jury.
>
> [233] This cell phone evidence played a prominent role at the trial, where identity was the central issue. The Crown relied on the cell phone evidence as a compelling piece of circumstantial evidence showing that the appellants were together near the scene of the murders minutes before and minutes after the shootings took place. …[258]

[415] Contrary to the assertion of the appellants in that case, the court found the evidence of the cellphone company employees was factual, not opinion, noting:

- Their testimony about the times each appellants' cellphone registered, the number called, the duration of the call and the location of the towers at which the call registered, were all factual details.[259]

- The employees had the knowledge and experience to provide factual evidence about the general rule of locating a cellphone on the basis of which tower received its signal, and its exceptions.[260]

- None of the three cell phone witnesses was asked to give an opinion about the precise location of an appellant's cellphone when a particular call was made or received. Such an inquiry may have crossed into impermissible opinion evidence.[261]

[416] Particularly salient to the matter at hand, is how the data presented by the cellphone witnesses was presented to the jury. A police witness, an officer involved in the investigation, summarized and compiled the evidence in a PowerPoint presentation, without the need to have him qualified to do so. He was a factual witness, providing a visual depiction of the evidence collected in the course of the investigation. The Crown says this is comparable to what Mr. Black did. We agree.

[417] *R. v. Mahmood*[262] involved charges of tax evasion and a challenge to the admissibility of documents created by the lead investigator. His work was described by the court as follows:

> [3] Mr. Castrucci was the lead investigator with respect to this investigation. He has a Bachelor of Commerce degree specializing in accounting. He has been an investigator with the Canada Revenue Agency ("CRA") for almost 20 years. He was involved with the search of Mr. Mahmood's residence, car, and business. That search did not turn up any books or records for the relevant years but it did produce a large number of documents, both electronic and hardcopy, relating to the business' income and expenses. Mr. Castrucci also obtained and reviewed CRA records, related corporate records and bank records obtained through production orders. He then created annual statements for the business by entering the various documents on either the income or expense side. To do so, he followed the CRA's manual that is available to taxpayers either online or at the CRA's service desk.[263]

[418] In a mid-trial admissibility ruling, the defence argued Mr. Castrucci "must have exercised some professional judgment" in carrying out the preparation of the annual statements. The Crown said he was a fact witness, "simply collating and explaining the documentary evidence" for the jury's benefit. The court found the evidence to be factual. Convictions ensued, which were upheld on appeal.[264]

[419] The nature of Mr. Castrucci's evidence was described by Watt J.A. in a chambers decision, *R. v. Mahmood*.[265] Justice Watt was deciding a motion for

state-funded counsel. In the course of doing so (which included a limited consideration of the proposed merits of the appeal), Justice Watt described the challenged evidence of Mr. Castrucci as "a factual recounting of steps taken during the investigation".[266]

[420] Lastly, we turn to *R. v. Ajise*.[267] Mr. Ajise, a tax return preparer, was convicted by a jury of one count of fraud over $5000 in relation to filing false claims of charitable donations made on behalf of his clients. All of the donations were to the same charity—"Tractors". On appeal, Mr. Ajise argued the trial judge erred by admitting the non-expert opinion evidence of an investigator of the then-called Canada Customs and Revenue Agency. Justice Sharpe described the nature of the impugned evidence as follows:

> [8] The Crown also called Seeta Maraj, a C.C.R.A. investigator. Maraj prepared a number of detailed spread-sheets summarizing information obtained from documents filed with the C.C.R.A., bank documents obtained pursuant to a production order and documents seized pursuant to search warrants executed at the Tractors premises and the residences of the appellant, Eto and Salami. The appellant's clients' tax returns were found on his computer. The charitable receipts issued by Tractors were found on Eto's computer. The appellant made no objection when the spreadsheets and other documents were introduced in evidence.[268]

[421] The challenge to Ms. Maraj's evidence focused on the admission of a spreadsheet entitled "Tax Evaded Calculation" that gave totals for "false donation claims" in returns filed by Mr. Ajise over three taxation years. In considering the appellant's claim this evidence was improper opinion, Sharpe J.A. wrote:

> [22] I am not persuaded that the admission or treatment of Maraj's evidence at trial amounts to a reversible error for the following reasons.
>
> [23] First, Maraj is properly characterized by the Crown as a fact witness, called to explain how she had assembled and summarized a large volume of documentary evidence relating to the income tax returns filed by the appellant. It was only at the end of her evidence in chief, when Exhibit 12 was introduced, that she was asked to explain why she believed all the charitable claims filed by the appellant's clients were false. When asked that question, she simply explained what the records showed. Maraj was doing nothing more than explaining her sources and her methodology in a way that would allow the jury to understand and to assess the numbers on Exhibit 12. … While it might have been preferable had Maraj not been asked to formulate her summary of the evidence she found in terms of her belief, and had the trial judge not referred to her opinion in his instructions, it remains that Maraj's evidence was essentially factual in nature. It was entirely proper for her to explain to the jury the nature of the calculations she

> had made and the source data she used to compile Exhibit 12, which was an admissible demonstrative aid designed to summarize the properly admitted evidence and "to assist the jury in understanding the entire picture presented by voluminous documentary evidence": *R v. Scheel* (1979), 42 C.C.C. (2d) 31, at p. 34 (Ont. C.A.); *Kon Construction Ltd. v. Terranova Developments Ltd.*, 2015 ABCA 249, 20 Alta L.R. (6th) 85, at para. 46. As with the summaries in *Scheel*, the usefulness of Exhibit 12 "depended entirely…upon the acceptance by the jury of the proof of the facts upon which [it was] based": *Scheel*, at p. 34 . The jury was in a position to assess for itself the worth of Maraj's explanation for her calculations as they did not rest on or draw its force from any specialized or technical skill or knowledge.[269] [Citations omitted]

[422] Further, Sharpe J.A. said:

> [28] The third and related reason that leads me to reject this argument is how Maraj's evidence relates to the substance of the defence advanced by the appellant. The appellant did not seriously challenge the contention that his clients had made false charitable donations. His defence was that he believed that the donations were valid and that he had relied on Eto to verify the donations before authorizing charitable receipts. Maraj's evidence went to the *actus reus* of the fraud – whether false claims were made and in what amount. The appellant's defence was that he did not know that the claims were false and that he lacked the *mens rea* to commit fraud.[270]

[423] Mr. Potter attempts to distinguish *Ajise* on the basis that the trial counsel did not object to the admission of the Maraj spreadsheet. As we have already discussed, the appellants' objections to Mr. Black's documentary evidence were resolved by agreement and the evidence admitted. There is no basis to distinguish *Ajise*.

The trial judge's use of Mr. Black's evidence

[424] Mr. Potter and Mr. Colpitts say Mr. Black interpreted the Searchlight emails and drew inferences from them. They argue the trial judge improperly adopted Mr. Black's interpretation and accepted his inferences without undertaking an independent analysis.

[425] We are satisfied Mr. Black did not interpret the emails. There is no validity to the claim the trial judge abdicated to the witness his responsibility to independently review the evidence and draw his own inferences and conclusions.

[426] The contents of a number of the Searchlight emails have been set out earlier. The communications between and amongst Mr. Potter, Mr. Colpitts, Mr. Clarke, and others were critical to the Crown's case against the appellants. The emails were introduced into evidence through Mr. Black. (The appellants' challenge to the admissibility of the emails is addressed in paras. 494-571.) He read numerous communications and was asked by the Crown to make reference to other documents collected in the course of the investigation, and his spreadsheets. As the record demonstrates, this was a tedious and time-consuming process.

[427] Because Mr. Potter and Mr. Colpitts had not yet conceded continuity of the emails, Mr. Black's testimony was used by the Crown to establish their reliability by having him compare the written words of the co-conspirators to the trading activities shown in the documents. He did not interpret the emails. Remember that, on appeal, the appellants do not challenge that they undertook the various trading activities identified by Mr. Black; wrote and received the emails in question; or reached agreements with respect to the trading of KHI shares. Their challenges rest with the required elements of the offences, saying everything they did was lawful. Although Mr. Black's evidence certainly was of assistance to the Crown in establishing who did what, when, and where in terms of the offences charged, he did not offer any insight about whether Mr. Potter and Mr. Colpitts intended to manipulate the market with intent to defraud.

[428] We are satisfied the trial judge was well aware of his obligation to independently review the evidence and draw his own inferences. He acknowledged this in his reasons, and we are satisfied he did so.[271]

Conclusion

[429] We would dismiss this ground of appeal.

Issue #4: Did the Trial Judge Err in Law by Qualifying Langley Evans to give Expert Opinion Evidence and then by Relying on that Evidence?

Background

[430] Langley Evans was the Crown's final witness. Following a contested *voir dire*, the trial judge qualified him to provide opinion evidence:

> … related to the analysis and interpretation of stock market trading practices and techniques utilized to artificially affect and/or maintain the price of publically

> [*sic*]-traded shares and, in particular, has conducted an analysis of the trading practices involving the shares of Knowledge House Incorporated.

[431] Mr. Potter and Mr. Colpitts were opposed to Mr. Evans being qualified. They primarily focused their arguments on the "properly qualified expert" requirement addressed in *R. v. Mohan*,[272] and *White Burgess Langille Inman v. Abbott and Haliburton Co.*[273] They argued Mr. Evans did not have the expertise to fulfill the objectives of his report and did not employ the proper methodology required for an analysis of KHI trading.

[432] We will begin by discussing why Mr. Potter and Mr. Colpitts were opposed to the admission of the expert evidence at trial and how they say the trial judge erred by admitting it. We will then consider the applicable standard of review. We will examine the trial judge's application of the legal principles that govern the admission of expert evidence to determine if he was in error when he admitted the evidence. Finally, we will assess whether the trial judge gave over his role to the expert and allowed him to determine the ultimate issue of guilt.

Position of Appellants

[433] Mr. Potter and Mr. Colpitts complain about the trial judge's decision to admit Langley Evans' evidence and the reliance he placed on it. Their Notices of Appeal identify identical grounds. They say the trial judge erred:

- In qualifying Langley Evans as an expert witness with respect to stock market regulation and market manipulation.
- By ignoring Mr. Evans' failure to utilize "essential analytical tools" in the preparation of his report, "failure to analyze the essential data which was required in order to satisfy professional standards of analysis", and lack of independence and objectivity that is required of expert witnesses.

[434] The appellants' complaints are expanded in their factums where they have reiterated their trial arguments. Their combined, comprehensive criticisms include that Mr. Evans:

- Adopted Mr. Black's analysis of the Crown's theory of the conspiracy, the members of the conspiracy, how the conspiracy was effected, and the evidence on which the Crown relied to prove the conspiracy. Mr. Evans is said to have lacked independence because he "did

not independently consider any evidence that Black did not specifically ask him to review".

- Failed to "employ the accepted methodology for analysing market activity".
- Failed to use any methodology at all.
- Omitted any examination of order information, i.e., the timing, price, and volume of orders entered by the alleged suspect accounts, and the circumstances that existed in the market at the time of the relevant orders and transactions.
- Omitted any examination of the impact that orders had on: published quotations (bid and offering prices) market prices (prices of actual trades), and the holdings of the Group accounts, including the status of any margin loans.
- Failed to examine other non-trading actions of the Group on the market for KHI shares.
- Made a number of errors in his report, including in his descriptions of KHI's financial statements, profits in 1999 and 2000, and the number of high closes.
- Made an error in the margin calculations for certain shareholder accounts. (This was relevant to Langley Evans' opinion that where securities and cash held in a margin account served as collateral for margin loans, avoiding margin calls would be a motive for maintaining an artificially high share price. Higher margins would not be as susceptible to margin calls so, Mr. Potter and Mr. Colpitts argue, the amount of margin calculation was very relevant.)
- Was not independent, impartial or unbiased, and was nothing more than an advocate for the prosecution.
- Exhibited unconscious bias, professional credibility bias, and confirmation bias.
- Usurped the trial judge's role as the trier of fact. Mr. Colpitts says the trial judge's error was "essentially adopting Mr. Evans' conclusions and testimony wholesale in convicting me".

[435] Mr. Potter's arguments, adopted by Mr. Colpitts, can be grouped into three broad complaints. The first objection relates to the evidence of Ian Black. Mr.

Potter says Mr. Black's evidence and trading analysis are the undergirding to Mr. Evans' opinion. He argues any error in the trial judge's admission of Mr. Black's evidence is fatal to Mr. Evans' evidence. Simply put, Mr. Black should not have been allowed to give the evidence he gave and, without his evidence, there is no support for Mr. Evans' opinion.

[436] In the second prong of attack on the admissibility of Mr. Evans' evidence, Mr. Potter and Mr. Colpitts argue the trial judge failed to properly exercise his gatekeeping function at both stages of the required admissibility analysis. Had he done so, they say Mr. Evans' report and his testimony would have been excluded. Mr. Potter and Mr. Colpitts submit the trial judge's errors permitted the receipt of evidence from a witness who was unable to provide reliable evidence, failed to satisfy the requirements to be independent, unbiased and impartial (and therefore properly qualified) and did not offer evidence that was of more benefit than its cost.

[437] Mr. Potter and Mr. Colpitts also argue that, quite apart from the issue of admissibility, the trial judge erred by abdicating his role as the trier of fact and uncritically relying on seriously flawed opinion evidence to convict them.

Standard of Review

[438] Although the "proper articulation and application" of the law relating to the admissibility of expert evidence is reviewable for correctness,[274] it is well-established that appellate courts owe deference to the decisions of trial judges on admitting or rejecting expert evidence.[275] A trial judge's cost/benefit analysis is also entitled to deference[276] as is the judge's determination of the weight to be accorded to the expert evidence.[277]

[439] However, appellate intervention is appropriate where:

> … a finding of admissibility under *Mohan* is clearly unreasonable, contaminated by error in principle or reflective of a material misapprehension of evidence. …[278]

[440] Further, it is a legal error to permit an expert to usurp the role of the trier of fact.[279]

[441] Trial judges are required to engage in a two-step inquiry to determine the admissibility of expert evidence.[280] This must be done in the context of the factual matrix of the case and according to the requirements in *Mohan* and *White Burgess*.

The evidence must clear the threshold requirements for admissibility and, even if it does, the trial judge must then undertake an analysis of whether the benefits of receiving the evidence outweigh any costs.

[442] Did the trial judge undertake the required admissibility inquiry without error? We are satisfied the answer is yes. As we will discuss, we are equally satisfied the trial judge's application of the evidence to the facts of this case and his reliance on it does not warrant appellate intervention.

[443] We can deal summarily with Mr. Potter's and Mr. Colpitts' argument that Evans' evidence must fall with Mr. Black's. As indicated earlier, we find no error in the trial judge's reliance on Ian Black, a witness who provided relevant, factual evidence that was accepted by the trial judge as credible and reliable.

The trial judge's application of the relevant legal principles

[444] The trial judge was required to assess the proposed evidence in accordance with the legal principles developed in *Mohan* and *White Burgess*:

- The evidence had to be logically relevant.
- The evidence had to be necessary to assist him.
- There had to be no other exclusionary rule that would prevent the evidence being admitted.
- Mr. Evans had to be properly qualified, which required him to be willing and able to discharge his duty to the court to provide evidence that was impartial, independent and unbiased.
- In the second step of the admissibility inquiry, the cost/benefit analysis, the trial judge as gatekeeper had to decide whether the benefit of admitting expert evidence that met the preconditions of admissibility outweighed any harm the admission of the evidence could cause the trial process.[281]

[445] The trial judge correctly applied the *Mohan/White Burgess* criteria. He concluded the proposed evidence was logically relevant and found "a clear connection" between it and the allegations against the defendants. The evidence was necessary in his view, as it would be "of significant assistance in [his] comprehension of the technical aspects" of the stock market industry. He also

noted there was no exclusionary rule that would disqualify the evidence from admission.[282]

[446] Mr. Potter and Mr. Colpitts have not seriously challenged these findings. As Mr. Potter says in his factum, "an opinion about market activity is relevant and necessary … and there does not appear to be an exclusionary rule". In his factum, Mr. Colpitts takes the same position: "I do not dispute that evidence on the general operation of markets in Canada or the hallmarks of manipulation was both relevant and necessary in this case".

[447] As we have noted, the appellants' most strenuous objections to Mr. Evans' evidence focused on the requirement for a "properly qualified expert". Their position was summarized by the trial judge in his *voir dire* decision:

> [11] … The Defendants submit Mr. Evans' opinions are not based entirely on his own work. They argue that his methodology is flawed and that he failed to consider materials they view as essential to his opinions. The Defendants argue that he failed to independently investigate and adopted the materials and theories of the RCMP without question. They accuse him of tunnel vision and suggest he has become an advocate for the Crown. They argue his opinions are not reliable and, as such, are of no assistance to the trier of fact.[283]

[448] The trial judge identified the two features of a "properly qualified expert" as established by *White Burgess*: (1) in relation to the matters they are being asked to testify about, the proposed expert witness must have the required special knowledge through study or experience; and (2) they must be able and willing to fulfill their duty to the court to provide fair, objective, and non-partisan assistance.[284]

[449] The trial judge found Mr. Evans satisfied both requirements. He noted Mr. Evans had testified he was impartial, had produced an independent report and analysis, and his opinions were not directed by either the Crown or the RCMP.[285] He rejected the arguments that Mr. Evans was unqualified.

[450] Having satisfied himself there was no basis for excluding Mr. Evans' proposed evidence at the threshold stage, the trial judge undertook the cost-benefit analysis. As a gatekeeper, he had to assess whether the benefits of admitting the evidence outweighed the potential risks.

[451] The considerations that inform the threshold assessment for admissibility must be taken into account again at this next step of the analysis. The trial judge identified reliability as "a major consideration in the cost-benefit analysis

exercise". He found reliability to include "elements of relevance and a properly qualified expert".[286]

[452] Mr. Potter's and Mr. Colpitts' attack on Mr. Evans' evidence sought to establish the trial would be compromised by its admission. Mr. Potter and Mr. Colpitts argued Mr. Evans had produced a flawed and incomplete analysis that would only protract and complicate the case. The trial judge disagreed. He viewed the evidence as reliable "in that it is not encumbered by a faulty methodology and any alleged impartiality [*sic*] has not been established". He found the evidence would not "extend the trial or add confusion to the proceeding". He saw no costs associated with admitting it.[287]

[453] The trial judge was alive to the considerations that inform the cost/benefit analysis. He referred to the passages in *R. v. Abbey* (*Abbey* #1)[288] where Doherty J.A. articulated the following principles that inform the gate-keeping function:

- At the cost/benefit stage of the admissibility inquiry, the trial judge is not deciding whether the evidence should be relied on, but simply whether it should be admitted.[289]
- An assessment of potential probative value requires consideration of the reliability of the evidence.
- Reliability must lie in the subject matter of the evidence and also the methodology used by the expert in developing their opinion, the expert's expertise, and "the extent to which the expert is shown to be impartial and objective".[290]
- The costs assessment requires consideration of the risks inherent in admitting expert opinion evidence—delay, confusion, distraction, uncritical deference to the opinion, danger the opinion will be afforded undue weight, abdication of the trier's fact-finding role, protracting and complicating the proceedings.[291]
- The cost/benefit analysis must be conducted contextually, with regard to the "particular circumstances of the individual case".[292]

[454] Although Mr. Potter and Mr. Colpitts accepted Mr. Evans had "special knowledge" about the operation of the markets, it was his opinions about market manipulation that made him contentious for them. Mr. Greenspan, on Mr. Potter's behalf at the qualifications *voir dire*, acknowledged Mr. Evans' "wide ranging experience in the securities industry" but suggested he had "very limited exposure

to market manipulation". As the trial judge noted in his decision to qualify Mr. Evans, it was the position of Mr. Potter and Mr. Colpitts that Mr. Evans' "impact evidence", that is, his analysis of whether KHI's trading created an artificially inflated stock price, was completely unreliable.[293] The trial judge rejected this criticism.[294]

[455] Mr. Greenspan had argued Mr. Evans' evidence should not be admitted because he acknowledged making errors in the margin calculations for certain of the accounts he examined. In Mr. Greenspan's submission, these errors were fatal to the reliability of Mr. Evans' opinion that the avoidance of margin calls was a motivator for artificially propping up KHI's share price. This, Mr. Greenspan said, left the trial judge with no properly qualified expert who could assist "with the motivation for what occurred here" because the calculations of the "so-called expert" needed to be redone.

[456] Mr. Greenspan's argument did not persuade the trial judge. He said he had "no doubt" the defence would challenge Mr. Evans' margin calculations at trial and found it was an issue that went to weight not admissibility.[295]

[457] The trial judge, applying the principles espoused by Doherty J.A. in *Abbey* #1, determined the proposed evidence was not, as argued by Mr. Potter and Mr. Colpitts, the inadequate and unreliable analysis of an advocate for the Crown. He referred to the Mr. Potter's and Mr. Colpitts' submissions and Mr. Evans' report:

> [23] The Defendants argue that Mr. Evans' report and his proposed testimony are not the product of independent analysis. It is their view that Mr. Evans' report is a compilation of several other opinions. They claim that the report only advances the theories of the investigators. They claim "he just did not do the work and then applied a flawed analysis." It is their view that he provided no analysis on the impact of the alleged manipulations on the price of KHI stock. The Defendants accept that Mr. Evans can give opinion testimony on terminology, the mechanics of the market, and the roles of various players in the industry. However, they argue his impact evidence is completely unreliable. The Defendants see Mr. Evans as nothing more than an advocate.
>
> [24] I do not agree that Mr. Evans' impact evidence is of such questionable quality that I would limit the scope of his evidence. He states at paragraphs 120-122 of his report:
>
> > The Group's overall margin loans increased greatly during this period. By the end of April, Group's margin loans increased to over $4.5 million. By May, the Group's outstanding margin loans rise to close to $7.9 million and then hover around to $8 million until later in June. By July 31, 2000,

> the 540 account and Callbeck/Colpitts account are near or at the allowable limit for margin (50% and 48% respectively).
>
> Indicators of a manipulative agenda by the Group during this time period include:
>
> - the domination of the buy-side of the market by the Group accounts
> - the continued heavy activity of the 540 account as the nominee account
> - parking stock in the Union account
> - orchestrated trading the FutureEd.com, 540 and Callbeck/Colpitts accounts
>
> In my opinion, the price of KHI shares would have experienced a significant decline over this same period except that KHI share price was maintained at an artificially high level by the activity of the Group led by the 540 account trading.

No doubt the Defendants will challenge Mr. Evans' margin account calculations. Nonetheless, he has provided his opinion and did not back away from it during an extensive cross-examination. He advanced the reasons for his impact opinion at paragraph 132 of his report:

> In my opinion, the market price of KHI shares would have been significantly lower by August 25, 2000 without the intervention of Group in KHI market during this period. I base this on the general nature of the Group's trading including:
>
> - the Group's domination of the buy-side during most trading sessions
> - the apparent orchestrated trading among the group and
> - the high closing activity from August 18 through 23.
>
> This activity contributed to an artificially high price for KHI and a misleading appearance of the strength of the market for KHI shares. Absent this activity, in my opinion, the KHI trading price would have been significantly lower.

This is a firm opinion with significant support in the evidence. I do not find his evidence "totally unreliable".[296]

[458] In addition to his references to Mr. Evans' report, the trial judge's determinations were firmly grounded in the evidence from the qualifications *voir dire* where Mr. Evans testified:

- In his assessment of the issue of market manipulation, he was not restricted to the material provided by the RCMP, but considered other publicly available materials.

- He looked at public disclosure made by KHI on SEDAR, the system of electronic data analysis and filings for publicly traded companies in Canada. Mr. Evans wrote in his report:

> 73. KHI was a reporting issuer recognized under the Securities Acts of Ontario, Nova Scotia and elsewhere. As a reporting issuer, KHI had continuous disclosure obligations, which included preparing and distributing financial statements and making timely announcements of any material changes in the KHI's affairs. Canadian reporting issuers must file all materials related to their continuous disclosure obligations on SEDAR. A summary of all KHI's filings on SEDAR is found at Appendix 5.

- He spoke to people involved in industry and regulatory practices, consulted reports from other experts, notably a former colleague, Dean Holley, and adopted their methodology, something he was entitled to do.

- His assessment of the trading and related activity of KHI was conducted independently of the RCMP.

- He reviewed not only those portions of witness statements highlighted by the RCMP, he read the entire statement where he thought a witness was relevant to his analysis.

- There were some errors in his report that indicated he had considered order information when he had not, and he made what he termed embarrassing "clerical" errors.

- He corrected certain errors in his original report by preparing an Addendum.

[459] The trial judge was persuaded the proposed evidence was relevant and would assist him "in navigating through this challenging case".[297] He found the proposed expert evidence was being offered by a witness with the requisite specialized knowledge whose methodology had not been effectively challenged by the Mr. Potter and Mr. Colpitts.

[460] The trial judge noted Mr. Potter and Mr. Colpitts had not called "any evidence which clearly supported their view of the proper methodology".[298] He did not suggest Mr. Potter and Mr. Colpitts had any obligation to call evidence: he was referring to what he had in evidence before him, which was Mr. Evans'

"impressive" experience and studies. He found any error Mr. Evans may have made "in defining his methodology", went to weight.[299]

[461] The trial judge also rejected complaints about Mr. Evans' objectivity and impartiality:

> [33] … [T]he Defendants have failed to establish that Mr. Evans is not a properly qualified expert based on his impartiality. He came to the KHI task with little knowledge of the background. It is the role of all proposed experts to seek instructions from a party to the litigation. These types of contact do not equate to evidence of bias sufficient to finding the opinions inadmissible.
>
> [34] … I see nothing to support the Defendants' view that Mr. Evans exercised tunnel vision or is in the pockets of the RCMP. No doubt there will be challenges to Mr. Evans' impartiality during this trial, but they are not significant enough to displace his assertion that he is an independent expert well aware of his foremost obligation to the Court.[300]

[462] The trial judge's determination Mr. Evans was an objective, independent, and non-partisan witness able to provide reliable evidence was firmly supported by the evidence before him. Mr. Evans testified he did not simply rely on material provided by the police and adopt their theory of the case. In addition to the materials he received from the RCMP, he undertook an independent review of the public record for KHI, an examination of trading in KHI stock compared to general market activities, and went on to identify a range of manipulative techniques that were used to influence the price of KHI shares. This included buy-side domination, sales suppression, high closing, parking stock, use of undisclosed incentives, non-disclosure of material changes, and use of a box account and nominee accounts. In relation to this latter example, Mr. Evans examined whether the 540 account could be described as a market making account as claimed by Mr. Potter and Mr. Colpitts. He testified to understanding his duty to the court to be objective and provide fair, unbiased, impartial, and independent evidence.

[463] *White Burgess* established that the acknowledgement by a proposed witness of their duty to the court shifts the burden on the impartiality aspect of the properly qualified expert issue to the party opposing the admission of the evidence. The opposing party is obliged to show there is "a realistic concern" the expert will be unable or unwilling to comply with their duty to the court. Demonstrating this is fatal to admissibility.[301]

[464] Mr. Colpitts argues Mr. Evans fell into various forms of bias described in a 2009 *Canadian Criminal Law Review* article by then Professor David Paciocco (now of the Ontario Court of Appeal) and referenced in *R. v. France*:[302]

> … Professor Paciocco stresses the importance of the expert maintaining an "open mind to a broad range of possibilities" and notes that bias can often be unconscious. He refers to a number of forms of bias: lack of independence (because of a connection to the party calling the expert); "adversarial" or "selection" bias (where the witness has been selected to fit the needs of the litigant); "association bias" (the natural bias to do something serviceable for those who employ or remunerate you); professional credibility bias (where an expert has a professional interest in maintaining their own credibility after having taken a position); "noble cause distortion" (the belief that a particular outcome is the right one to achieve); and, a related form of bias, "confirmation bias" (the phenomenon that when a person is attracted to a particular outcome, there is a tendency to search for evidence that supports the desired conclusion or to interpret the evidence in a way that supports it).Confirmation bias was a particular problem identified in the Goudge Report as Dr. Smith and other pathologists and coroners at the time approached their investigations with a "think dirty" policy, an approach "inspired by the noble cause of redressing the long history of inaction in protecting abused children," and designed to "help ferret it out and address it." Unfortunately, as commented on by the Goudge Report and by Professor Paciocco, such an approach raises a serious risk of confirmation bias.[303]
> [Footnotes omitted]

[465] Mr. Colpitts submits Mr. Evans' opinion was flawed by "adversarial" or "selection" bias, and claims he was "selected to fit the needs of the RCMP and the Crown" because they were not satisfied with an earlier expert report they had received. He says as a "career regulator" Mr. Evans suffered from "professional credibility bias", the inability to view the trading in KHI shares other than through the lens of a regulator, and, in order to safeguard his professional credibility, was unwilling to shift the position he had taken in his evidence. In Mr. Colpitts' submission, the "overwhelming source of unconscious bias in this case was confirmation bias"—in his view, an inability or a resistance to seeing the evidence in the case as anything other than evidence of market manipulation.

[466] Mr. Colpitts' arguments about bias rest significantly on a theme raised at trial and repeated on appeal. In his factum, Mr. Colpitts accuses Mr. Evans of having, "assessed only limited information that the RCMP identified for him in order to identify the manipulation that the RCMP wanted him to identify".

[467] This purported "unwillingness to look at all the available information" is not borne out by Mr. Evans' evidence about what he considered. And the description

of what the RCMP provided to him can hardly be characterized as limited. As Mr. Evans indicated in his report, it included two binders of emails—the "communications" the trial judge referred to (that we will be discussing further under the conspiracy (Issue #6) and fraud (Issue #7) grounds of appeal), various charts, timelines, account statements, and witness statements.

[468] The trial judge was well aware of how bias can compromise objectivity. He recognized that "selection" of an expert by one party can raise concerns. However, he observed, "[t]hese concerns standing alone are never sufficient to reject the proposed evidence".[304] This is correct. In *White Burgess*, Cromwell J. cited Professor Paciocco from the same article mentioned by Mr. Colpitts: "… expert witnesses have a duty to assist the court that overrides their obligation to the party calling them". It is only if a proposed expert cannot or will not fulfill that duty that their evidence should not be admitted.[305]

[469] As we discussed earlier, the trial judge addressed and dismissed the allegations that Mr. Evans relied exclusively on what the RCMP provided to him, applied a flawed methodology, and was stubbornly clinging to his views to protect his professional credibility. The trial judge, noting Mr. Evans had stood by his opinion there was market manipulation "during an extensive cross-examination", found it to have been "a firm opinion with significant support in the evidence".[306]

[470] This case bears no resemblance to *Alfano v. Piersanti*,[307] an Ontario Court of Appeal decision relied on by Mr. Potter and Mr. Colpitts. There the proposed expert report was "repetitious and argumentative" and "read like the appellant's counsel's written argument". It ventured beyond the scope of the proposed expert's expertise, addressed factual areas that were properly the purview of the judge, and expressed opinions on matters of law. Emails between the proposed expert and Mr. Piersanti were found to reveal "a pattern of [the proposed expert] attempting to craft his report to achieve Mr. Piersanti's objectives in litigation". Mr. Piersanti was sent each draft of the report to read, review, and approve.[308] None of what the Ontario Court of Appeal identified in *Alfano* as inconsistent with the non-partisan role of an expert has been established in relation to Mr. Evans' report or his preparation of it.

[471] Mr. Potter and Mr. Colpitts have not pointed to any evidence consistent with a "realistic concern" about Mr. Evans' ability or willingness to satisfy the requirements of impartiality and objectivity. They produced no such evidence at trial. The record does not support their submission Mr. Evans acted as an advocate for the Crown.

[472] We find the trial judge, on the issue of Mr. Evans' independence and impartiality, committed no error in concluding Mr. Potter and Mr. Colpitts had failed to meet the onus *White Burgess* required them to satisfy.

[473] The trial judge's admissibility inquiry shows he identified and applied the correct legal principles at both the threshold and the cost/benefit stages and made determinations he was entitled to make that are supported by the record. His findings are subject to deference. We find he committed no errors in admitting Mr. Evans' opinion evidence.

[474] Our rejection of the appellants' challenge to the admission of Mr. Evans' opinions does not conclude the expert evidence issue in this appeal. Mr. Potter and Mr. Colpitts have complained about the trial judge's use of the evidence. They say he chose to simply embrace Mr. Evans' flawed opinions, and thereby failed to discharge his role as the trier of fact.

The trial judge's use of the evidence adduced at trial

[475] At trial, Langley Evans provided opinion evidence about the 540 account, the use of the Union account to park stock, coordinated trading amongst suspect accounts, high closing the KHI stock by suspect accounts, the imposition of trade restrictions on limited partnership unitholders, the role of a market maker, private placements, and the overall performance of the KHI share price. He noted the contrast between what was contained in Mr. Potter's January 15, 2001 confidential memorandum to the KHI Board of Directors with the publicly available information about the company. The financial distress that KHI was experiencing and the "market directed activities by insiders" was not reflected in the public record.

[476] The trial judge referred to Mr. Evans' report for its definitions of market domination,[309] sales suppression,[310] high closing stock,[311] use of nominee accounts,[312] parking stock,[313] use of incentives,[314] and non-disclosure of material information.[315] He also referenced Mr. Evans' evidence about the Match Trade Report,[316] the issue of whether, as argued by Mr. Potter and Mr. Colpitts, Bruce Clarke's trading activities indicated he was an informal market maker for KHI,[317] and how, contrary to Mr. Colpitts' testimony, "market support" is inappropriate where it is employed to artificially manage the direction of stock.[318]

[477] The trial judge provided an overview of Mr. Evans' evidence in a section of his trial reasons entitled "Effect of trading by suspect accounts on the KHI stock price during entire period under review":

> [274] Langley Evans testified that, in preparing his report, he looked at the KHI share price and observed that it seemed to significantly outperform market indices over the period in question. He then reviewed KHI's public disclosures to determine whether the company's operating results could explain the stock's comparatively superior performance. He found no explanation in the disclosure. In his report, Mr. Evans noted that, "KHI's operating results were poor and its financial position deteriorated, especially in the latter half of 2000 and throughout 2001."
>
> [275] Having found nothing helpful in the disclosure, Mr. Evans reviewed the documentary evidence provided by the RCMP and found what he considered to be ample evidence to explain the stock's superior performance. He cited numerous manipulative indicators that he believed were used to affect the price for KHI shares, including high closings, buy-side domination, use of nominees, parking stock, providing undisclosed incentives, suppressing selling activity, and non-disclosure of material changes. He found these indicators in the communications, the trade data, account statements, and witness statements. At paras. 236-239 of his report, Mr. Evans outlined his opinion as to the impact the suspect account group's actions had on the KHI stock price:
>
> > The Group's initial actions in the first few months of the period under review did not have an immediate or dramatic effect on the KHI stock price. At the early stages from December 1999 up [to] the end of March and into early April 2000, the excitement of the new listing on the TSE, combined with the optimistic market environment and the release of encouraging financial results by KHI, is sufficient to provide reasonable explanations for the observed trading price of KHI shares on the TSE.
> >
> > However, beginning in mid-April 2000 and certainly by May 2000, the Group's actions began to affect the KHI stock price, and from that point forward, had a cumulative and growing impact on the price of KHI shares as traded on the TSE. From May 2000 onwards, there was a diminishing general market interest [in] KHI. From November 2000 onwards, KHI was under increasing internal financial pressure with losses from operations and an inability to raise sufficient capital. The Group was able to stabilize the KHI market price and hold it at artificially high levels while both the general tech market collapsed and KHI's operations also deteriorated. The actions of Group were successful in this regard until the KHI price collapse in mid-August 2001.[319]

[478] The trial judge found Mr. Evans' evidence to be "very helpful". He cited it when, in addition to addressing the allegations of market manipulation, he was

dealing with the reliability of the Match Trade Report,[320] the issue of whether, as alleged by Mr. Potter and Mr. Colpitts, Bruce Clarke was a market maker for KHI,[321] and the issue of private placements.[322]

[479] Mr. Potter and Mr. Colpitts attacked Mr. Evans' analysis for failing to consider order information—information that would establish the precise time an order was entered into the system, the type of order placed, the volume of shares ordered at any particular time, and whether the order was filled or cancelled—asserting it was essential to prove manipulative intent and relevant to the allegation of market domination.

[480] Mr. Evans testified that, in this case, market domination and the fact there was no market for KHI shares could be identified without order information: information about bids, offers (or asks), and the identity of the active participant in each transaction was unnecessary. Order information was not required where multiple strategies were employed to effect market manipulation, not just high closing, and because the email communications he examined revealed there was no market for KHI shares.

[481] The trial judge accepted this evidence. He found order information was "clearly vital" in a prosecution where the only manipulative technique being alleged was high closing of stock. He was satisfied order information would not be helpful to the broad range of market manipulation techniques—market domination, sales suppression, parking stock, offering incentives, and non-disclosure of material information—of which Mr. Potter and Mr. Colpitts stood accused.[323] He referenced Mr. Evans' testimony that a "very strong pattern" of high closing and "the sheer number" of high closing incidents rendered order information unnecessary to his analysis.[324] In dismissing the argument that order information was required to properly assess the allegation of high closing, the trial judge noted the Crown had relied on the contemporaneous email communications and not exclusively on the evidence of either Mr. Evans or Mr. Black.[325]

[482] The trial judge was also not persuaded by the defence arguments that order information was relevant to the allegation of market domination as it could indicate a large order placed earlier for KHI stock for legitimate investment purposes. In considering these submissions, the trial judge found there was "uncontroverted evidence that KHI was a highly-illiquid stock",[326] and said "there was no retail demand for the stock and … an abundance of shareholders eager to sell their holdings".[327] He saw little value in any evidence about order information:

> [356] Mr. Potter and others sent e-mails complaining about the lack of buyers and the overall lack of liquidity for KHI shares. Mr. Potter and Mr. Clarke pleaded for support bids and commented on the lack of buying power within the group. The only reasonable conclusion is that the TSX system was not stacked with bids waiting to be filled. There were no large orders from suspect group members slowly being filled over weeks and months. In other words, order information is unlikely to have been of much assistance to the defendants.[328]

[483] The trial judge also observed that no order data was put to Mr. Evans:

> [357] Before moving on, it is worth noting that order information, including the complete order information for NBFL, was included in the Crown disclosure. This information was available to the defendants to put to the Crown's expert and Ian Black on cross-examination in an attempt to raise a reasonable doubt. Not a single order ticket was put to these witnesses. Finally, while the defendants are under no obligation to call evidence, it was open to them to retain an expert to review the order information and respond to the Crown's evidence.[329]

[484] The trial judge found there were careless mistakes in Mr. Evans' report. As noted, Mr. Evans had acknowledged these in his testimony. They included his incorrect reference to order information, something he did not analyze or consider, incorrect calculation of margin positions of individual accounts, and typographical and mathematical errors. However, the trial judge was satisfied these errors were inconsequential.[330]

[485] The trial judge was unconcerned about Mr. Evans' incorrect margin calculations. In cross-examination by Mr. Colpitts, Mr. Evans acknowledged his margin calculations of 50 percent for individual accounts were inaccurate because he had failed to consider the different margin rates that applied to different securities held in the accounts. The trial judge found the error to be "insignificant", for reasons that included what was said in the contemporaneous email communications:

> [332] Although the defence made much of this error, I find it insignificant for two reasons. First, Mr. Evans' margin analysis was intended to show that margin availability was one of several motives for maintaining the stock price at an artificially high level. The Court has plenty of other evidence on margin availability, including e-mails where the alleged conspirators are concerned or complain about the lack of available margin, and e-mails from financial institutions and Steven Clarke advising that accounts had fallen under margin. In other words, Mr. Evans' evidence that conspirators were motivated to keep the KHI share price artificially high to avoid margin calls and increase buying power is corroborated by numerous contemporaneous communications.

> [333] Much time was spent at trial on the issue of the 50% vs. 70% loan value. The evidence before the Court is clear – if NBFL increased the loan value to 70% in December 2000, the suspect group was not aware of it. Until June 2001, Steven Clarke regularly prepared portfolio overviews for Dan Potter using a 50% margin rate that he testified came directly from the NBFL computer system. Furthermore, numerous e-mails exchanged by suspect group members reference a 50% margin rate.[331]

[486] Despite his view that Langley Evans was not a "perfect" expert witness, the trial judge expressed satisfaction with his analysis, finding it was "supported by other evidence—including statements by the defendants themselves", and concluded it was safe to rely on his report.[332]

[487] Mr. Potter and Mr. Colpitts argue Mr. Evans overstepped his role and offered conclusory opinions about their motivations, evidence the trial judge should not have allowed. The following points are relevant to this complaint.

[488] Mr. Evans never offered the trial judge a legal opinion on the intent or culpability of Mr. Potter and Mr. Colpitts and did not seek to provide evidence on their state of mind. He testified about both legitimate and manipulative motivations for the techniques he noted in his report, including stock promotion, market domination, use of nominee accounts, grouping of accounts, and use of incentives. The defendants did not object to this evidence.

[489] Mr. Evans' opinion on the issue of motivation was actively sought in cross-examination by Mr. Greenspan. Mr. Evans was asked about possible "economic motivations" of the insiders who had been spending a very significant amount of money to inch the share value up by a minimal amount late in the day. Mr. Evans' response included this statement:

> … What we've gone through is a repeated pattern at the end of the day where they've come in to finish strong and…as a result of that strength they've moved the price, in my view, to artificial levels and at the same time their intent is to dominate the market. And you can see that. They've spent millions of dollars not just at the end of the day but throughout to – they call it either price support or managing flow. What they're doing is fighting a market that looks to be wanting to go down and they're fighting the tide. And so – and they're spending a lot of money doing that. Because as we discussed earlier, they don't have complete control over the float. So, they're putting millions of dollars in the market to hold the price up. And they're doing it at the end of the day.

[490] In his cross-examination, Mr. Greenspan criticized Mr. Evans' review of the Potter/Schelew November 2000 email exchange and his decision to rely on the

content of the emails rather than Dr. Schelew's subsequent explanation to police for what was intended in the exchange. Mr. Evans preferred what Dr. Schelew had said when the emails were written and formed an opinion they indicated a manipulative agenda. He described this opinion in his report:

> … Potter provides a candid evaluation of the underlying lack of market strength for KHI. Further, Potter raises the prospect of a collapse in price as a means to intimidate Schelew and dissuade him from selling shares at this time.

[491] Mr. Evans' opinions about the Group's motivations and what the emails indicated was evidence he was entitled to provide as part of his analysis of the KHI trading activity. His view of the communications and activities of Mr. Potter and "the Group" (of which Mr. Colpitts was a member) was admissible evidence. There is no merit to the arguments by Mr. Potter and Mr. Colpitts that it was not.

[492] There is no basis for the appellants' claim the trial judge blithely adopted Mr. Evans' opinions, surrendering his role as the trier of fact. Contrary to Mr. Potter's submissions on appeal, the trial judge did not simply rely on the conclusions Mr. Evans reached without considering them in the context of the rest of the evidence he had heard. Having qualified Mr. Evans to provide opinion evidence as proposed, the trial judge took it into account with all the evidence before him, assessed the weight to accord it, and determined he could safely rely on it. He was entitled to do so and did not surrender his fact-finding role to the expert. His reliance on Mr. Evans' opinion as a component of determining there was proof of guilt in this case beyond a reasonable doubt must be shown deference. There is no justification for appellate interference.

Conclusion

[493] We find no error in the trial judge's admission of the expert evidence of Langley Evans or the use he made of it. We dismiss this ground of appeal.

Issue #5: Did the Trial Judge Err in Law by Admitting into Evidence the Out-of-Court Statements of Co-conspirators?

Background

[494] The RCMP investigation of Mr. Potter and Mr. Colpitts led to the seizure of "thousands of emails, letters and commercial documentation".[333] In order to have

the out-of-court communications of declarants (other than the accused) not being called to testify admitted for the truth of what they contained, the Crown had to rely on the co-conspirators' exception to the hearsay rule.

[495] The trial judge admitted the communications into evidence and relied on them in convicting Mr. Potter and Mr. Colpitts. They appeal his determination that the communications, which are hearsay, were admissible pursuant to the co-conspirators' exception to the hearsay rule.

[496] Mr. Potter and Mr. Colpitts raise identical concerns about the trial judge's treatment of hearsay communications. They mirror each other's complaints in their Notices of Appeal under the heading "Conspiracy/Co-conspirators' Exception", a reflection of the inextricable connection between the co-conspirators' exception and the conspiracy conviction. This connection is represented in the relevant grounds of appeal, which we reproduce in part:

> 14. The learned trial judge erred in law in finding that there was an agreement to commit an unlawful act. An agreement to engage in lawful market activities, as was established in this case, or the absence of the requisite *mens rea* relating to the object of the conspiracy, cannot establish a criminal conspiracy.
>
> 15. In the alternative, the learned trial judge erred in ruling that the Crown was entitled to rely on the co-conspirators' exception to the hearsay rule for the evidence of unindicted co-conspirators.

[497] The record before us discloses the trial judge dealt with the out-of-court communications in two separate contexts: an application brought by Mr. Potter and Mr. Colpitts in relation to threshold admissibility,[334] and in his ultimate analysis of the evidence advanced by the Crown.[335]

[498] We will discuss both contexts. Addressing the co-conspirators' exception ground of appeal requires us to first examine the trial judge's application ruling and then look at his determination that the communications were ultimately reliable.

Hearsay Evidence and the Co-conspirators' Exception

[499] Hearsay evidence, such as the contemporaneous communications that were in issue before the trial judge, is presumptively inadmissible. Its trustworthiness is difficult to assess. The demeanour of the declarant generally cannot be observed. The declarant is not present in court to be cross-examined. The hearsay statement

may not have been recorded accurately, and "the trier of fact cannot easily investigate the reliability of the declarant's perception, memory, narration, or sincerity".[336]

[500] The co-conspirators' exception to the hearsay rule permits statements made by a person engaged in an unlawful conspiracy to be admitted into evidence against "all those acting in concert if the declarations were made while the conspiracy was ongoing and were made towards the accomplishment of the common object".[337]

[501] The Supreme Court of Canada has said there may be "rare cases" where, even though the hearsay evidence in issue falls under an existing exception (in this case, the co-conspirators' exception), it should be excluded because it lacks the requisite indicia of necessity and reliability.[338]

[502] In *R. v. Mapara*,[339] a majority of the Supreme Court of Canada rejected the submission that all hearsay evidence, even that falling within a traditional exception, such as the co-conspirators' exception, must be assessed for its necessity and reliability. The majority affirmed the co-conspirators' exception as meeting the requirements of the principled approach to the hearsay rule, those requirements being necessity and reliability.[340] The "rare case" exclusion of the co-conspirators' exception due to the circumstances of the particular case was found to still be available.[341]

The Defence Application

[503] A "mid-trial" application relating to the admissibility of the hearsay communications was brought by Mr. Potter and Mr. Colpitts prior to Ian Black's testimony. As it was only day twenty-four of the 160 plus day trial—hardly "mid-trial"—it is perhaps better described by what it concerned: whether this was a "rare case" where the Crown should not be permitted to utilize the co-conspirators' exception.

[504] The "rare case" application was decided on February 16, 2016. Ian Black began his testimony on February 24, 2016. The Crown indicated Mr. Black would be testifying about the KHI investigation. It was anticipated his evidence would include comparing the trading represented on the Match Trade Report during the relevant period with contemporaneous email communications "authored by the

accused, by co-conspirator Bruce Clarke, and by a group of other suspects that crystallized through the course of his investigation".[342]

[505] The record establishes that, in addition to Mr. Potter and Mr. Colpitts, the contemporaneous email communications involved the individuals whom the Crown said constituted "the suspect group". That group included Bruce Clarke, Gerard McInnis, Calvin Wadden, Raymond Courtney, Ken MacLeod, Eric Richards, Stephen Wilsack, Bernard Schelew, Shirley Locke, and Steven Clarke.

[506] At the hearing of the defence application to deal with the admissibility of the communications, the Crown described their significance: the "communications between the defendants, other alleged unindicted co-conspirators and third parties … provide a daily context to the multiple ways in which the defendants fraudulently supported the market price of KHI shares".

Threshold Admissibility and the Defence Burden

[507] The objective of the "rare case" application was to secure a ruling from the trial judge at a threshold admissibility stage and thereby deny the Crown the ability to use the communications at trial to prove the charges. Mr. Potter and Mr. Colpitts argued the declarants were available and compellable and the communications did not meet the necessity and reliability requirements of the principled approach to the admissibility of hearsay evidence.

[508] In oral submissions, the Crown correctly explained the limits of what the trial judge could do at this threshold admissibility stage:

> … You're not determining whether or not what Person A and Person B say should be relied on ultimately and in that context you will see that there is a considerable amount of evidence where the Defendants may argue you should not rely on that statement. That statement is unsupported by other evidence or there is a credibility factor about a particular witness. That's not…what you're being asked to do now and it's not what you can do now.
>
> What you're being asked to do now is determine the threshold issue of whether or not necessity and reliability defeats these particular pieces of communications versus ultimate reliability about what you do with them if anything. …

[509] The trial judge was alive to the context in which he was operating at the time of the application. Very little evidence had been adduced. The main police investigator, Ian Black, had not yet testified about his factual review of the KHI

share trading with reference to the Match Trade Report and the accounts that he viewed as having engaged in suspicious transactions. All the trial judge had to work with were circumstantial indicators of reliability.[343] During submissions by Mr. Potter's lawyer, the trial judge commented on the issue of assessing the reliability of the communications:

> … When is the right time, given that we're in a co-conspirators exception to the hearsay rule situation, for that to be dealt with? Because I'm somewhat of the view that my – from reading the case – is that my role on the front end is severely limited, and that my role – the most significant part of it will be after all the evidence is in, and I will look to see that – whether it's in furtherance of the conspiracy, whether it's within the timeframe of the conspiracy, and all those other considerations that apply. So, I'll leave that with you.

[510] The burden lay on Mr. Potter and Mr. Colpitts to establish the trial judge had before him "one of those rare cases" where communications that came within the co-conspirators' exception failed to satisfy the requirements of necessity and reliability. The Crown emphasized this, telling the trial judge, "…if they haven't shown you enough evidence then you can dismiss it".

[511] The trial judge concluded Mr. Potter and Mr. Colpitts had not displaced their burden and dismissed the application. He was not persuaded he was dealing with a "rare case" and found the communications to be "presumptively admissible" under the co-conspirators' exception.[344] They were subsequently referred to by Ian Black in his testimony. They were taken into account by Langley Evans in formulating his opinion about the existence of market manipulation. They played a meaningful role in the trial judge's ultimate assessment of the Crown's allegations and whether the Crown had established guilt beyond a reasonable doubt.

[512] As we will explain, we do not agree the trial judge neglected to assess the necessity and reliability of the hearsay communications. We find no error in his conclusion this was not a "rare case" where the Crown should have been prevented from utilizing the co-conspirators' exception.

The Position of the Appellants

[513] Mr. Potter's submissions have been adopted by Mr. Colpitts. They argue the communications of unindicted alleged co-conspirators should never have been allowed into evidence at trial where they were relied on to convict them. They say this is a case where, to guard against the inherent dangers of hearsay evidence, the

trial judge should have assessed whether the communications satisfied the requirement of necessity and reliability, and failed to do so.

[514] Mr. Potter's factum says there are two reasons why the out-of-court communications should not have been allowed into evidence:

> 218. Potter submits that this is one of the rare cases where the exceptions to the hearsay rule should yield to the principles of necessity and reliability. This is for two reasons: (1) the availability of the declarants to testify, and to testify truthfully; and (2) the absence of evidence corroborating the truthfulness and reliability of the hearsay communications. The trial judge cited this Court's decision in *R v. Kelsie* to establish the framework for determining whether the exception applied. While the trial judge correctly set out the legal principles, he did not properly apply them. [Footnotes omitted]

[515] Mr. Potter and Mr. Colpitts insist that not obliging the Crown to call the declarants "unduly limited" their right to cross-examine "critical Crown witnesses" and compromised their fair trial rights. They say in their Notices of Appeal the declarants were "precluded … from offering any contextual explanation of their declarations" which resulted in "a skewed and incomplete view of the evidence".

[516] Mr. Potter explains the "skewed and incomplete view of the evidence" point in his factum:

> 207. … [T]he trial judge erred in finding that the Crown was entitled to rely on the co-conspirators' exception to the hearsay rule. This is one of those rare cases where the co-conspirators' exception should have yielded to the principled requirements of reliability and necessity. The parties the trial judge found to have been members of the conspiracy were all engaged in legitimate market activity. It was the purpose of their trading, and not the trading itself that was alleged to convert this otherwise-lawful activity into criminal fraud. It was therefore imperative to hear direct evidence from them about the purpose for which they were participating in the market. [Footnotes omitted]

[517] As the foregoing discloses, the "rare case" argument, which was the focus of the February 2016 application, is repeated on appeal.

Standard of Review

[518] The standard of review is one of deference to the trial judge's determinations on necessity and threshold reliability, if they were informed by correct principles of law. As stated by Saunders J.A. of this Court in *R. v. Cater*:

> [170] During the course of any trial, judges are called upon to decide the admissibility of evidence. Often an objection is made based upon an assertion of hearsay. Trial judges are well placed to assess the extent to which hearsay dangers are of concern in any particular case and whether they can be adequately and fairly managed. Rulings on admissibility are generally entitled to deference provided they are informed by the proper application of correct legal principles. See *R. v. Couture*, 2007 SCC 28; *R. v. Shea*, 2011 NSCA 107, leave to appeal ref'd [2012] S.C.C.A. No. 298.[345]

See also: *R. v. Sheriffe*;[346] *R. v. Youvarajah*;[347] and *R. v. Blackman.*[348]

Analysis

[519] Mr. Potter and Mr. Colpitts have a number of complaints about the trial judge's threshold admissibility ruling. They say:

- As to necessity, the availability of the declarants should have precluded the Crown's reliance on the co-conspirators' exception, citing *R. v. Simpson*[349] and *R. v. Brooks*.[350]
- A combination of three factors is required to displace the necessity requirement: (1) non-compellability of a co-conspirator declarant; (2) the undesirability of trying alleged co-conspirators separately; and (3) the evidentiary quality of contemporaneous declarations made in furtherance of an alleged conspiracy. In support of this statement, Mr. Potter and Mr. Colpitts refer to *Mapara*.[351]
- Email communications lack the inherent reliability that has been found to characterize wiretap communications.

[520] A number of the other arguments made by Mr. Potter in his factum (and adopted by Mr. Colpitts) relate to the ultimate reliability of the hearsay communications. We will address this issue in the context of the trial judge's determination there was proof beyond a reasonable doubt of an unlawful conspiracy.

[521] The "rare case" application obliged the trial judge to use the three-part framework for determining if the co-conspirators' exception should apply. This framework—the *Carter*[352] test—could only be given a limited application at such an early stage of the trial. It required the trial judge to:

1. Be satisfied beyond a reasonable doubt there was a conspiracy.

2. If he found the alleged conspiracy to exist, to then review all the evidence directly admissible against each accused and decide on a balance of probabilities whether they were members of the conspiracy.

3. If he found on a balance of probabilities the accused is a member of the conspiracy, to then move on to decide whether the Crown had proven membership beyond a reasonable doubt. At this step, he would be able to apply, as evidence against the accused on the issue of guilt, the acts and declarations of other co-conspirators done in furtherance of the conspiracy.

[522] As the Crown has noted, there is "no clear statement" in the case law about the timing of the threshold admissibility assessment. This Court in *R. v. Cater* tacitly approved the approach in that case where the necessity/reliability analysis and the application of the co-conspirators' exception were done at the end of the trial once all the evidence was in.[353] This is the typical process. The trial judge recognized there were limitations to what he could address as he had not yet "heard or seen the evidence". The application before the trial judge illustrates the challenges an incomplete evidentiary record may present. Parties should be mindful of this in bringing such applications.

[523] In his assessment of whether Mr. Potter and Mr. Colpitts had established this as "one of those 'rare cases'", the trial judge invoked the *Carter* test, noting in his ruling that it was "not possible to extensively discuss the in furtherance factor" as he had yet to see and hear the evidence.[354] Indeed, he did not have the evidence to complete a thoroughgoing *Carter* analysis at any of the steps.

[524] What the trial judge did do was address the submissions relating to necessity and reliability. We are satisfied he did so without error.

Necessity

R. v. Simpson; *R. v. Brooks*

[525] Mr. Potter and Mr. Colpitts complained strenuously to the trial judge that most of the declarants in the communications were available and compellable. The trial judge noted the Crown's position that "the availability of the declarants to testify in no way limits the application of the co-conspirators' exception".[355]

[526] Mr. Potter and Mr. Colpitts say that had the trial judge followed the Ontario Court of Appeal decisions in *R. v. Simpson*,[356] and *R. v. Brooks*,[357] he would have recognized the availability of the declarants precluded the Crown being able to resort to the co-conspirators' exception. We do not agree. The facts in *Simpson* and *Brooks* significantly distinguish them from this case.

[527] Neither *Simpson* nor *Brooks* concerned contemporaneously recorded communications. In *Brooks*, the hearsay evidence of V.B., a confederate of the accused who was involved in the homicide and under subpoena by the Crown, was the only evidence of planning and deliberation to lead to a first degree murder verdict. The court found there was a live issue regarding necessity, given V.B.'s availability to testify. The Crown conceded they could have called V.B. but preferred not to for tactical reasons. The trial judge had given no reasons to explain why V.B.'s hearsay statements were admitted under the co-conspirators' exception. A new trial was ordered:

> [25] In summary, the decision to instruct the jury on the co-conspirators' exception to the hearsay rule is not supportable on the record nor is the basis for the decision apparent from the circumstances. Given the centrality of the hearsay evidence to the Crown's case and the fact that the trial judge provided no reasons for giving instructions, a new trial must be ordered.[358]

[528] In *Simpson*, the court said that "in some circumstances" the availability of the declarant might disallow the Crown's reliance on the co-conspirators' exception, requiring the evidence to be called through the testimony of the declarant.[359] There were concerns about the reliability of the evidence that included there being one witness—an undercover police officer—to the hearsay utterances and a delay in the officer recording the utterances in her notes. For our purposes, it is noteworthy the court in *Simpson* found the hearsay statements to the undercover officer to be "potentially less reliable than the direct communication between two actual co-conspirators whose conversation was recorded contemporaneously".[360] And the court further said, "[u]nlike in *Mapara*, this is not a case where the out-of-court statements were entirely recorded using a wiretap".[361]

R. v. Chang

[529] In *Mapara*, where the issue was whether the co-conspirators' exception reflected the required indicia of necessity and reliability, the majority of the Supreme Court defined necessity on the basis of the three factors we referred to in para. 519 that were identified in *R. v. Chang*,[362] a decision of the Ontario Court of Appeal.

[530] Mr. Potter and Mr. Colpitts say because the first two *Chang* factors cannot be said to have applied here—the declarants were not non-compellable or unavailable and there was no issue of co-conspirators being tried separately—the trial judge should not have found the necessity criteria was met.

[531] The trial judge disagreed with Mr. Potter and Mr. Colpitts that the Crown was obliged to call the declarants as witnesses. He referred to this Court's decision in *R. v. Cater*[363] and the Crown's discretion to call as witnesses whomever it wishes:

> [43] The Defendants have expended great effort arguing the Crown should be forced to call the co-conspirator declarants as witnesses. It is their position that these individuals are available and, as such, necessity is not met. They have framed this argument in fairness to the Defendants and to the alleged co-conspirators. Justice Saunders addressed this issue in *R. v. Cater*, *supra*, at paragraph 176:
>
> > [176] In argument the appellant's counsel stated explicitly that the Crown was under "a legal obligation" to call witnesses such as Paul Cater, Torina Lewis, and Shawn Shea to "prove" the contents of the intercepts. The Crown is under no such duty. It has the discretion to call whomever it wants to offer testimony as part of the Crown's case. See *R. v. Cook*, [1997] 1 S.C.R. 1113. Nothing prevented the appellant from calling Paul Cater, Torina Lewis, Shawn Shea and other individuals if he felt they had evidence to offer which would prove helpful to his defence. People exposed to the record in this case would not be surprised by his reticence in doing so.
>
> The necessity of calling declarants is inconsistent with the flexible approach taken to the notion of necessity in the jurisprudence since the development of the principled approach. Necessity is broader than the unavailability of the declarant and extends to the nature and quality of the evidence. (*R .v. Y(N)* 2012 ONCA 745)
>
> [44] In terms of reliability, there is little more reliable than contemporaneous exchanges. …[364]

[532] What Saunders J.A. said in *Cater* about contemporaneous hearsay communications and the requirement of necessity can be profitably repeated:

> [174] The necessity to receive this evidence arose because it was the best evidence available. It was better than calling witnesses three years after the events occurred. …[365]

[533] It is therefore well-established that necessity may be determined through a focus on the availability of the testimony, not the availability of the witness. This

focus has been endorsed by this Court in *Cater* and by the Ontario Court of Appeal in *R. v. N.Y.*,[366] also cited by the trial judge. In *N.Y.*, the court held "…it *is the availability of the evidence, not the availability of the witness*, that is of ultimate significance, and that, while co-conspirators may be physically available, their testimony rarely is".[367] [Emphasis in original]

[534] We find necessity must be assessed according to the particular circumstances of the case. We are not satisfied that by referencing *Chang* the majority in *Mapara* was casting the necessity criteria in stone to be inflexibly applied regardless of the circumstances of the case. This would be wholly inconsistent with the flexible approach that is to be taken to the admissibility of hearsay evidence. Where the issue of necessity is raised, the analysis and outcome must reflect the facts and context of the case.

[535] A final point on necessity. Necessity is not to be assessed in isolation from threshold reliability. An inherently reliable declaration may mean the necessity analysis loses much of its significance.[368]

Reliability

[536] The efforts by Mr. Potter and Mr. Colpitts before the trial judge to throw the reliability of the communications into question focused on a miniscule number of emails. The Crown's submissions to the trial judge illustrated this:

> … My Friends [referring to defence counsel] have only presented you I think with thirty-six [communications] that she's talked about today. Now she's not saying I'm not going to argue about others but you're looking at an incredibly large number of communications that not only are relying on the co-conspirators exception but may be admissible based on some other hearsay exception or may be presented through a witness and the difficulty you have at this point of course is because you don't know which witnesses have actually testified that would make it admissible or because they didn't testify would be inadmissible and you don't – do not have a really good contextual idea of how these communications fit into the story to determine whether or not they are truly in furtherance.

[537] The trial judge was not persuaded by the defence submissions. He found: "The alleged deficiencies in the 37 [*sic*] documents are not the stuff that would indicate this is one of those 'rare cases'".[369] We find no error in his reasoning.

[538] Quoting from the Ontario Court of Appeal decision in *R. v. Chang*, the trial judge found that establishing a "rare case" for exclusion of the communications required Mr. Potter and Mr. Colpitts to advance evidence raising:

> [40] … serious and real concerns about reliability emerging from the circumstances in which a declaration was made, which concerns will not be adequately addressed by use of the *Carter* approach. …[370]

[539] The trial judge concluded Mr. Potter and Mr. Colpitts failed to meet the "serious and real concerns" requirement and determined the contemporaneous communications to be admissible.[371]

[540] The trial judge recognized admitting the communications did not preclude him from ultimately determining what weight to accord them once all the evidence was before him. He left the door open to future challenges to the evidence:

> [41] I accept there may be times when the Crown wishes to rely on documents where it may be necessary to revisit necessity and reliability. Objections will not be discouraged. However, the Defendants must recognize that "rare cases" are just that -- rare. Displacing the presumption of admissibility will require much greater evidence than that presented to date.[372]

[541] The issues of necessity and reliability were never raised again by Mr. Potter and Mr. Colpitts at trial.

Inherent Reliability—Email Communications vs. Intercepts

[542] In his analysis of the inherent reliability of the hearsay communications, the trial judge referenced this Court's endorsement in *Cater* and that of the Alberta Court of Appeal in *R. v. Alcantara*[373] of the inherent reliability of contemporaneous intercept communications and the appropriateness of their admission under the co-conspirators' exception.

[543] Mr. Potter and Mr. Colpitts submit this analogy of email communications to wiretap intercepts was fundamentally flawed. Mr. Potter says the following in his factum:

> 228. The trial judge admitted this hearsay evidence based on the Crown's analogy to wiretap evidence. The Crown submitted, and the trial judge agreed, that email communications are reliable like wiretap conversations because the declarants are unaware that they are being recorded and a court can therefore infer that they are speaking truthfully. But this analogy is fundamentally flawed: a speaker in a conversation that is secretly being recorded has no knowledge that he or she is being recorded. This is what makes a wiretap conversation reliable. But a person who is writing an email knows that he or she is "being recorded", as that person is intentionally *creating the record* with his or her words. A person writing

> an email may choose his or her language very carefully, knowing that what he or she writes will be permanently set in writing, and knowing that the recipient can use the communication in any manner that he or she wishes. The author of an email may therefore be untruthful, guarded, coded, or unreliable in his or her communications because the author knows there is no expectation of privacy in the email. [Footnotes omitted; emphasis in original]

[544] There was no evidence before the trial judge that supported the submissions Mr. Potter is making. They amount to nothing more than speculation. The trial judge's view that contemporaneous email communications are akin to contemporaneous intercept communications represents a rational, common-sense appreciation of their comparable features.

[545] In *Cater*, it was the circumstances in which the intercepted communications were obtained that imbued them with inherent reliability. The participants did not know they were being recorded. They had no motive to lie. The statements, made contemporaneously with ongoing events, were spontaneous, accurate, and complete.[374] Wiretap cases often involve conspirators using guarded, coded language intended to frustrate police investigative efforts. This suggests an awareness that the police may gain access to the conversations. There is no evidence of any such concern amongst the conspirators here nor were evasive techniques employed. These conspirators did not anticipate that law enforcement would eventually read their messages. Nothing supports the tailoring suggested by Mr. Potter. The emails have all the features of inherently reliable communications—they were contemporaneous with ongoing events such as trading, spontaneous and complete.

[546] We agree with the trial judge's view that typically there is nothing to distinguish emails from intercepts in an analysis of the applicability of the co-conspirators' exception.[375] Trial courts have consistently applied the co-conspirators' exception to written communications, including text messages, for example, and it only makes sense to do so. (See, for example, *R. v. Parrot*[376] (telexes); *R. v. Harris*;[377] and *R. v. MacKay*[378] (text messages)).

[547] The inherent reliability of written communications is persuasively described by the British Columbia Supreme Court in *R. v. MacKay*, quoting the Ontario Court of Appeal in *R. v. Bridgman*[379] dealing with text messages in the context of drug transactions:

> [54] It is hard to imagine how a cross-examination would probe any serious issues about perception, memory, narration or sincerity in relation to the above statements. They were committed to a permanent electronic record. …
>
> [55] The quantity of the messages, repeating patterns of requests for different types of drugs, only enhances their threshold reliability: *Baldree* [*R. v. Baldree*, 2013 SCC 35], at para. 71. The majority in *Baldree* relied upon a passage taken from I.H. Dennis, *The Law of Evidence*, 4th ed. (London: Thomson Reuters/Sweet & Maxwell, 2010), at p. 708, to make the point that one or two callers might be mistaken, "or might even have conspired to frame the defendant as a dealer, but it defied belief that all the callers had made the same error or were all party to the same conspiracy".
>
> [56] This court has previously accepted that where there are multiple drug calls, threshold reliability may be enhanced: *R. v. Malcolm-Evans*, 2016 ONCA 28, at para. 7; see, also, *R. v. Belyk*, 2014 SKCA 24, 433 Sask. R. 195, at paras. 24-25. The principle is simple. The more people who write to someone about obtaining drugs, the less likely it is that the declarants are all suffering from the same misperception, wrongly remembering something, engaged in unintentionally misleading behaviour or all knowingly making false statements.
>
> [57] Although every hearsay question is informed by its own facts, one statement about obtaining drugs may be explained by some alternative explanation – a wrong number, a wrong impression or a wrong understanding. But multiple statements that have the same theme may render implausible any explanations other than that the originators of the communication are asking for drugs.

[548] We cannot see any basis in principle for distinguishing email communications in a stock market manipulation conspiracy and fraud case from text messages in a drug trafficking case.

[549] We find what little the trial judge could do at such an early stage of the trial, he did without error. Throughout his ruling on the defence application, the trial judge took careful note of the law articulated by the Supreme Court of Canada that applies to the co-conspirators' exception: *R. v. Carter*,[380] *R. v. Starr*,[381] and *R. v. Mapara*.[382]

[550] The trial judge could not conduct a throughgoing *Carter* analysis of the communications without the evidence that was yet to come, evidence he needed for his assessment of whether the Crown had proven beyond a reasonable doubt there was a conspiracy and there was independent evidence against each of the accused establishing they were probable members of the conspiracy.[383] Only then could he decide whether to rely on the hearsay communications offered by the Crown, provided they were shown to be in furtherance of the conspiracy.[384]

[551] We are satisfied the trial judge went about the task of deciding the threshold admissibility of the hearsay communications application without falling into error. He identified the correct law. He applied it correctly. There is no basis for saying the trial judge failed to deal with necessity and reliability. The trial judge's threshold determinations on necessity and reliability are entitled to deference. His finding that this is not "one of those rare cases" is likewise entitled to deference. There is nothing to justify appellate intervention.

The Ultimate Reliability of the Out-of-Court Communications

[552] We now address the trial judge's approach to the ultimate reliability of the out-of-court communications and whether he fell into error in his determination the communications could be relied on for the truth of what they contained. We have more to say about the content of the communications when we later discuss the conspiracy verdict.

[553] In convicting Mr. Potter and Mr. Colpitts, the trial judge relied on the hearsay communications we have been discussing. He found them to be evidence of their involvement in the conspiracy and stock market fraud alleged by the Crown.

[554] As we indicated, Mr. Potter has carried the brief on the co-conspirators' exception to the hearsay rule issue, with Mr. Colpitts adopting his arguments.

The Position of the Appellants on the Ultimate Reliability of the Communications

[555] Mr. Potter advances a number of complaints about the trial judge's acceptance of the hearsay communications as ultimately reliable:

- The trial judge's determination of the ultimate reliability of the communications was derived from Ian Black's interpretations of what the declarants meant.
- The trial judge failed to account for the fact that: "[m]any of the statements … were hypothetical, speculative, contained double hearsay, and boastful untruths", and therefore not reliable.

- Unlike intercepts, emails do not represent a private conversation. Consequently, the author of an email communication may be "untruthful, guarded, coded, or unreliable … because the author knows there is no expectation of privacy in the email".

- As held by the Quebec Court of Appeal in *R. c. Proulx*,[385] the email communications should have been assessed for their ultimate reliability and probative value in light of the evidence as a whole.

- The trial judge had to be satisfied "the only likely explanation for the hearsay statement is the declarant's truthfulness about, or the accuracy of, the material aspects of the statement". The trial judge should have "rule[d] out any plausible alternative explanations on a balance of probabilities". Mr. Potter invoked *R. v. Bradshaw*[386] as authority for these principles.

Analysis of the Ultimate Reliability Issue

[556] The attacks by Mr. Potter and Mr. Colpitts on the trial judge's finding the hearsay communications were ultimately reliable on the question of guilt do not withstand scrutiny. We will take them in order.

[557] As we have already discussed, Ian Black did not interpret the email communications. Nor did he spoon feed the trial judge the inferences to be drawn from them. In his reasons, the trial judge referred to and relied on the actual communications themselves. Nowhere does he find Mr. Black interpreted the emails. The emails spoke for themselves.

[558] Mr. Potter and Mr. Colpitts have characterized the email communications as rife with content that was hypothetical, speculative, and replete with double hearsay and boastful untruths. No witness testified to this effect. There was no evidence before the trial judge to establish what Mr. Potter and Mr. Colpitts now claim. There was testimony from Dr. Bernard Schelew and Shirley Locke about what they claimed to be saying in their email communications. Mr. Colpitts also testified about email communications. The trial judge found all these witnesses to lack credibility. Notably, Mr. Potter and Mr. Colpitts have not directly challenged these credibility findings. Had they done so, those findings would have been upheld on the basis that, absent a clear and material error, a trial judge's credibility determinations are entitled to considerable deference. (*R. v. Skinner*;[387] *R. v. Brooks*;[388] and *R. v. Gagnon*.[389])

[559] There was no evidence before the trial judge the declarants in the email communications may have been "untruthful, guarded, coded, or unreliable" because they had no expectation of privacy in the emails they were sending. Furthermore, there was no evidence to support the claim of "no expectation of privacy". The suggestion this might have been the case is counterintuitive. Electronic conversations, such as those contained in the email communications placed into evidence at this trial, can readily be analogized to texts which, as a majority of the Supreme Court of Canada held in *R. v. Marakah*,[390] are implicitly private:

> [35] Indeed, it is difficult to think of a type of conversation or communication that is capable of promising more privacy than text messaging. There is no more discreet form of correspondence. …

[560] The promise of privacy is just as robust in the case of emails as it is for texts. It only makes sense to say the email communications would have been made in circumstances where the originator expected them not to be intercepted by any person other than the person who was intended to receive them.[391] This would be especially true where the communications being exchanged concerned what the trial judge ultimately found was an unlawful conspiracy.

[561] The basis for suggesting the authors of the email communications were being duplicitous in their messaging is implausible, speculative, not supported by any evidence, and contrary to common sense. The emails resonate with candour and spontaneity.

[562] The *Proulx* decision relied on by Mr. Potter and Mr. Colpitts bears no resemblance to this case. Indeed, what it says a trial judge should do was done here. As the court there said, just because the hearsay communications are admissible "does not mean that the trier of fact is bound to take all that it reveals as proven. …[I]ts ultimate reliability and probative value must be assessed".[392] The trial judge here conducted that assessment.

[563] In submissions on the "rare case" application, the trial judge understood that, as the Crown submitted, "the determination [about ultimate reliability] can really only be done once you understand the context of all of the other communications…". He was well aware he needed to have all the evidence before he could determine ultimate reliability.

[564] In *Proulx*, the trial judge was found to have admitted all the intercepted conversations into evidence without questioning their ultimate reliability and

probative value in light of the evidence as a whole.[393] The evidence as a whole in *Proulx* included the testimony of the accused, Linda Proulx.[394] The court took note of the fact there was no "overwhelming" or "powerful" evidence of Ms. Proulx's "knowledge of the nature of the conspiracy or her intention to follow through with the terms of the agreement".[395]

[565] Here, the evidence as a whole did not include any testimony from Mr. Potter. The testimony provided by Mr. Colpitts was found by the trial judge not to be credible.[396] In his assessment of Mr. Colpitts' credibility, the trial judge carefully considered the contemporaneous written communications "and the only rational inferences that can be drawn from them… ."[397]

[566] Here, the trial judge did not fail to assess the ultimate reliability and probative value of the hearsay communications. The evidence he accepted can only be described as providing overwhelming support for the charges. He conducted a painstaking review of the communications in the context of all the evidence before him. He found there was "an abundance of evidence from the alleged unindicted co-conspirators in the form of contemporaneous e-mails that support only one interpretation".[398] They were fully contextualized by their inter-related content, the Match Trade Report and the performance of KHI's share price.

[567] As to the final point made by Mr. Potter and Mr. Colpitts on the issue of the trial judge's finding of ultimate reliability, the Supreme Court of Canada decision in *R. v. Bradshaw* does not come into play where the issue is the admissibility of hearsay communications under the co-conspirators' exception. *Bradshaw* addressed hearsay dangers in the context of circumstantial evidence. It is not a case about the application of the co-conspirators' exception to hearsay evidence. As we mentioned previously, that analysis is found in the Supreme Court's decisions of *Carter*, *Starr*, and *Mapara*, all of which were referenced and applied by the trial judge.

[568] In assessing the merits of the Crown's case, the trial judge found the communications to be reliable and took them into account in his conspiracy analysis. He noted and agreed with the Crown's position there was "overwhelming" evidence proving the allegations against Mr. Potter and Mr. Colpitts without the need for reliance on the co-conspirators' exception.[399] In an abundance of caution he went on to apply the three-step approach laid out by *Carter*.[400] He ultimately relied on the hearsay communications as evidence of guilt but did not find them to have been essential.[401]

[569] It is worth repeating here what the Crown has said in its factum about what was, in fact, limited use of the co-conspirators' exception:

> 347. Further, the defendants ignore the fact that for the majority of the communications the Crown did not rely on the co-conspirator's exception to the hearsay rule. The Crown tendered some 826 communications which it tracked in a spreadsheet. Of those communications:
>
> 1. A total of 443 communications are admissible as an admission against Mr. Potter because he was speaking or was told something, as an adopted admission, or to prove his state of mind.
>
> 2. Mr. Colpitts testified and verified the communications he authored and received (222), as did co-conspirators Steven Clarke (98), Shirley Locke (63) and Gerard McInnis (153).
>
> 3. Other, non-conspirator witnesses testified and verified their own communications, and the communications they received from the defendants and the co-conspirators. This included Dr. Schelew (76) and the BMO witnesses.
>
> 4. Only a comparatively small number of communications were admitted under the exception – approximately 100. The Crown carefully tracked each communication and prepared a spreadsheet showing the path to admissibility for each one. [Footnotes omitted]

[570] We find nothing to criticize in the trial judge's analysis of the ultimate reliability issue. He considered and applied the correct law. He made findings that are entitled to deference. We find he made no error in admitting the communications of the conspirators pursuant to the co-conspirators' exception to the hearsay rule and then relying on those communications.

Conclusion

[571] We dismiss this ground of appeal.

Issue #6: Were the Guilty Verdicts for Conspiracy Unreasonable?

[572] The submissions by Mr. Potter and Mr. Colpitts challenging their convictions for conspiracy are aligned. They say their activities and the agreements they made to support KHI stock were lawful and in keeping with their obligations as the CEO of KHI (Mr. Potter) and its lawyer (Mr. Colpitts).

[573] In their Notices of Appeal, Mr. Potter and Mr. Colpitts say:

> 14. The learned trial judge erred in law in finding that there was an agreement to commit an unlawful act. An agreement to engage in lawful market activities, as was established in this case, or the absence of the requisite *mens rea* relating to the object of the conspiracy, cannot establish a criminal conspiracy.

[574] We will now set out the legal principles underlying the offence of conspiracy and, applying the appropriate standard of review, examine how the trial judge applied them to the evidence before him.

The Essential Elements of Conspiracy

[575] It is not disputed the trial judge correctly set out the essential elements of the offence of conspiracy: (1) an intention to agree; (2) the completion of an agreement; and (3) a common unlawful design.[402] He identified the "gist of the offence" as "the agreement by two or more persons to perform an illegal act or to achieve a result by illegal means".[403]

[576] Identifying the agreement as a critical feature of the offence of conspiracy, the trial judge quoted from the Supreme Court of Canada's decision in *R. v. J.F.*:[404]

> [44] … [A]greement is a central element to the offence of conspiracy. Conversely, an act done in furtherance of the unlawful object is not an element of the offence of conspiracy. Although such acts can serve as circumstantial evidence to support the existence of a conspiracy, they are not themselves a component of the *actus reus* of conspiracy. Indeed, a conspiracy can be established in the absence of any overt acts done in furtherance of its unlawful object. …

[577] The trial judge correctly identified what the Crown was required to prove beyond a reasonable doubt for Mr. Potter and Mr. Colpitts to be convicted of the conspiracy charges: (1) an agreement amongst two or more persons to fraudulently affect the market price for the shares; and (2) involvement by Mr. Potter and Mr. Colpitts as parties to that agreement.[405]

Standard of Review

[578] Mr. Potter and Mr. Colpitts do not deny the activities that formed the basis for the charges. They say what they did was incorrectly viewed as illegal by the Crown, Mr. Evans, and ultimately the trial judge. The complaint they are making about their convictions for conspiracy is essentially an attack on the reasonableness

of the verdicts. The reasonableness of a verdict, within the meaning of s. 686(1)(a)(i) of the *Criminal Code*, is a question of law.

[579] Determining whether a verdict is reasonable involves asking this question: on the basis of the evidence presented at trial, could a properly instructed jury, acting judicially, have returned it?[406] We must also assess "whether it was based on an inference or finding of fact that, (1) is plainly contradicted by the evidence relied on by the trial judge in support of that inference; or (2) is shown to be incompatible with evidence that has not otherwise been contradicted or rejected by the trial judge".[407]

[580] To satisfy us they should not have been convicted of conspiracy, Mr. Potter and Mr. Colpitts would have to demonstrate the guilty verdicts were not reasonably available to the trial judge on the evidence before him.

[581] As explained by the Supreme Court of Canada in *R. v. Biniaris*,[408] the assessment of unreasonableness on appeal is "somewhat easier" where the verdict was rendered by a judge alone without a jury:

> … at least when reasons for judgment of some substance are provided. In those cases, the reviewing appellate court may be able to identify a flaw in the evaluation of the evidence, or in the analysis, that will serve to explain the unreasonable conclusion reached, and justify the reversal. … [T]he court of appeal often can and should identify the defects in the analysis that led the trier of fact to an unreasonable conclusion. The court of appeal will therefore be justified to intervene and set aside a verdict as unreasonable when the reasons of the trial judge reveal that he or she was not alive to an applicable legal principle, or entered a verdict inconsistent with the factual conclusions reached. These discernable defects are themselves sometimes akin to a separate error of law, and therefore easily sustain the conclusion that the unreasonable verdict which rests upon them also raises a question of law.

[582] In *R. v. R.P.*,[409] the Supreme Court of Canada again discussed the test for deciding whether a verdict is unreasonable and set out the limitations that apply to a review of a trial judge's credibility findings:

> [9] To decide whether a verdict is unreasonable, an appellate court must, as this Court held in *R. v. Yebes*, [1987] 2 S.C.R. 168, and *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, at para. 36, determine whether the verdict is one that a properly instructed jury or a judge could reasonably have rendered. The appellate court may also find a verdict unreasonable if the trial judge has drawn an inference or made a finding of fact essential to the verdict that (1) is plainly contradicted by the evidence relied on by the trial judge in support of that

> inference or finding, or (2) is shown to be incompatible with evidence that has not otherwise been contradicted or rejected by the trial judge (*R. v. Sinclair*, 2011 SCC 40, [2011] 3 S.C.R. 3, at paras. 4, 16 and 19-21; *R. v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190).
>
> [10] Whereas the question whether a verdict is reasonable is one of law, whether a witness is credible is a question of fact. A court of appeal that reviews a trial court's assessments of credibility in order to determine, for example, whether the verdict is reasonable cannot interfere with those assessments unless it is established that they "cannot be supported on any reasonable view of the evidence" (*R. v. Burke*, [1996] 1 S.C.R. 474 (S.C.C.), at para. 7).

[583] Appellate intervention would be necessary if the correct legal principles had not been applied to the facts in arriving at the guilty verdicts. Mr. Potter and Mr. Colpitts have not taken issue with the trial judge's articulation or application of the law relating to conspiracy. Their grounds of appeal also do not directly challenge the trial judge's credibility assessments. They have not identified an error of law or a palpable and overriding error of fact.

An Unlawful Agreement

[584] The trial judge expressly rejected the submissions by Mr. Potter and Mr. Colpitts that their conduct was lawful and not done with criminal intent. Contrary to the statement in the Notices of Appeal mentioned earlier, it was *not* established in this case there was an agreement to engage in lawful market activity.

[585] Mr. Potter and Mr. Colpitts criticize the trial judge for using a "distorted lens" to examine their conduct and failing to understand the agreements they entered into with the individuals described as co-conspirators "were in the normal course of the business and expansion of KHI and were neither fraudulent nor unlawful". They argue the trial judge should not have found anything unlawful in the activities Mr. Potter and other members of the group (that included Mr. Colpitts) were engaged in:

> … finding investors, buying shares, agreeing with insiders not to trade during certain time periods, paying its promoters, swapping warrants that were about to expire, not disclosing the terms of a credit line that had already been approved by the TSE, acting as buyers of last resort, creating liquidity events and attempting to keep the market stable… .

[586] There is a concise response to the "nothing we did was unlawful" submission. The expert evidence led through Langley Evans and appropriately

relied on by the trial judge described the activities of the appellants and others. These various activities were a means for fraudulently manipulating the market price of KHI shares. Mr. Potter and Mr. Colpitts did not show how the verdicts rendered are incompatible with the evidence the trial judge had before him. There was no expert or other credible evidence that supported the claims their activities were lawful.

[587] To be clear on this latter point, Mr. Potter and Mr. Colpitts were entitled to rely fully on the Crown's burden to prove the charges against them beyond a reasonable doubt. While they were under no obligation to call any evidence, it was open to them to do so in support of their defences.

[588] The trial judge found Mr. Potter and Mr. Colpitts and their co-conspirators participated in an illegal scheme that "used a variety of techniques to manipulate the market for KHI shares".[410] He identified the techniques as including:

- Market domination, noting "the amount spent by the suspect accounts purchasing KHI shares on the TSX exceed[ed] $11 million".[411]
- Sales suppression, i.e., preventing numerous individuals, including co-conspirators from selling their KHI shares.[412]
- Regular high closing of KHI stock.[413]
- Failure to disclose material information concerning the "'KHI buying network', KHI's financial situation, and the existence of a managed selling agreement".[414]
- Parking stock.[415]

[589] In arriving at these findings, the trial judge looked at what the evidence showed had been happening during the relevant period.

[590] In determining what evidence he could consider on the conspiracy charges, the trial judge undertook the three-step *Carter* analysis he had discussed in his decision on the "rare case" application.

[591] Applying the *Carter* analysis, the trial judge determined:

1. The Crown had proven beyond a reasonable doubt there was a conspiracy.
2. Mr. Potter and Mr. Colpitts were probable members of the conspiracy, as was Bruce Clarke (the KHI stockbroker) and a number of other

individuals, including Calvin Wadden, Raymond Courtney, Ken MacLeod, Eric Richards, and Stephen Wilsack.

3. All the communications referenced in the decision constituted communications in furtherance of the conspiracy to commit fraud in relation to the KHI market share price on the Toronto Stock Exchange.

[592] The trial judge did not only look at the communications in finding Mr. Potter and Mr. Colpitts were involved in a conspiracy. He took careful note of the trading activity in KHI shares as disclosed by the Match Trade Report. He considered the relationship between what was discussed in email communications and what the Match Trade Report revealed about KHI share trading. He had the testimony of Langley Evans explaining how the market operates and the manipulative techniques that can be used to distort it. He also had the evidence of Gerard McInnis, who was Senior Vice President of Finance and Accounting with KHI from January 2000 until early 2001 when he moved into more of an operations role with the company. In both these roles, Mr. McInnis reported directly to Mr. Potter. The trial judge found Mr. McInnis to be a credible witness. We described some of his evidence earlier in the section of these reasons entitled: "The Email Communications, the Objective Trading Evidence and the Opinions of Langley Evans".

[593] We agree with the comprehensive submissions made by the Crown in its factum. We endorse the following from the Crown's factum as correct in law and fully supported by the record:

> 317. The Trial Judge carefully considered the submission that the defendants' conduct was lawful and that the Court lacked sufficient evidence to prove an unlawful intent. He devoted significant portions of his decision assessing the evidence as a whole and properly rejected any suggestion that the defendants' conduct was lawful and that it was not done with criminal intent. For example, he referenced the evidence proving market domination, sales suppression, high closing, and failure to disclose material information, concluding that:
>
> > All of these activities constitute "fraudulent means" in a regulated securities market like the TSX. I find that each of the defendants knowingly undertook these activities and subjectively appreciated that their conduct could have as a consequence the deprivation of another. Their goal was to artificially maintain the KHI stock price while they secured new investors, who, as a result of the defendants' conduct, would be making investment decisions based on a misleading impression of the

> level of demand for the stock. In other words, the defendants acted with an intent to defraud.
>
> 318. Moreover, there was no credible evidence to support the suggestion that the defendants' conduct was lawful. The only defence witnesses who attempted to support this narrative were Dr. Schelew and Mr. Colpitts himself, both of whom were found to lack credibility.
>
> 319. In [*sic*] is difficult to understand how the defendants can maintain a claim that their complex and consistent pattern of dominating the buy-side of the market, parking stock, suppressing sales by others, lying to potential investors about the health of the company, high closing the stock, hiding share certificates from their lawful owners (so they can't sell), and withholding all of these activities from major investors, while negotiating multi-million dollar contracts with them, was all perfectly lawful activity – without a single credible witness to support their claims. They put some of these suggestions to Mr. Evans and he categorically rejected them. [Footnotes omitted]

[594] In the face of the evidence accepted by the trial judge, it is not enough for Mr. Potter and Mr. Colpitts to simply assert on appeal their market activities were lawful. The evidence the trial judge accepted as credible and reliable clearly indicates this was not the case. There was no evidence that established otherwise or raises a reasonable doubt.

[595] The trial judge assessed the legality of what Mr. Potter and Mr. Colpitts did on the basis of the evidence he had before him. As the Crown has pointed out, the defence informed the trial judge they would be calling a market expert to provide a contrary view to that of Mr. Evans. No such contrary opinion materialized. The trial record establishes three experts were retained—two by Mr. Colpitts and one by Mr. Potter. None of them was produced to give evidence.

Carter Step #1—Proof of a Conspiracy Beyond a Reasonable Doubt

[596] The trial judge noted the existence of a conspiracy is typically inferred from the conduct of the alleged conspirators. He saw from the evidence this case was different and described it as: "… one of the rare cases where proof of the conspiracy exists in writing".[416] The "writing" to which the trial judge was referring was the email communications exchanged amongst the co-conspirators, including Mr. Potter and Mr. Colpitts. It is direct evidence of the agreement to fraudulently affect the KHI share price.

[597] In dealing with the first step in the *Carter* analysis—whether the existence of a conspiracy had been proven beyond a reasonable doubt—the trial judge was entitled to consider the acts and declarations of alleged co-conspirators as circumstantial evidence of the conspiracy.

[598] The trial judge's finding there had been a conspiracy was based on the following evidence:

- Detailed testimony from Mr. Evans discussing how Canada's stock markets are designed and structured to operate and the techniques that can be used, alone or in aggregate, to manipulate the market. This evidence was not seriously challenged on cross-examination.
- The considerable trove of email communications detailing the nature and scope of the conspiracy. We reproduced a number of them earlier. We repeat a sampling of them again here.

[599] The trial judge identified as highly probative an email sent from Mr. Potter on November 26, 2000 to Calvin Wadden, Raymond Courtney, Ken MacLeod, Bernard Schelew, Bruce Clarke, and blind-copied to Mr. Colpitts.[417] At trial, this was referred to as the "Recommended Plan of Joint Action" email.

[600] The trial judge noted the following about this email:

- Its subject line was "Major Shareholder Co-operation and Help needed to Support KHI".
- It set out a four-part plan to accomplish the support Mr. Potter was seeking.
- Mr. Potter explained in the email "the current retail market for KHI shares (like most other small caps) is almost non-existent," "our sources of buying are completely exhausted" and "[w]e need some more new investment".
- Mr. Potter explained "there is significant pressure on the market" with "increase[ed] retail selling over the last couple of weeks". He said: "This is [*sic*] driven the price down and exhausted buying support".
- Mr. Potter described the sell-side pressure on KHI shares and the intention expressed by shareholder Steve Tsimiklis to sell 50,000 shares by December 1st to finance a real estate project. Mr. Potter noted Mr. Tsimiklis had been "good about communicating his situation" but said he had no doubt

these shares would get placed on the market "soon". A recent attempt by Mr. Tsimiklis to sell had been neutralized by Calvin Wadden who "personally bought 10,000 shares from him and convinced him to stop and work with us".

- Mr. Potter acknowledged group members were already heavily leveraged as a result of buying KHI shares using margin loans: Ken MacLeod "has bought over 135,000 [shares] on margin", Mr. Potter had a margin loan of $1.3 million "with virtually no buying room left", Calvin Wadden and Raymond Courtney had high margin loans and needed funds to pay them down.

- Mr. Potter warned a cooperative effort amongst the major KHI shareholders was needed to support the stock or the market price could tank:

> These are all valid needs for liquidity, but in the current conditions, we really need to be more concerned about protecting the value of our KHI shares -without support from us, it is clear that there will be further price erosion and, in fact, the market could fall significantly and rapidly in the next few days. Unless we all put our liquidity requirements aside for the short term and turn our attention to finding ways of supporting the shares in the market, there will be no liquidity opportunities for any of us worth having.

- Mr. Potter then laid out his four-point "Recommended Plan of Joint Action": (1) the purchase from Steve Tsimiklis of 50,000 shares (10,000 each) to avoid him putting more downward pressure on the stock; (2) the addition of more buying power to the 540 account by loading it with additional shares that could then be margined; (3) the contribution by the group members to an options package that would incentivize a collegial accountant to find purchasers for KHI shares; and (4) an agreement that none of the group would sell without collective consent:

> That we agree on a formula for sharing in liquidity opportunities going forward and each agree not to sell any otherwise than as arranged under this arrangement. In this regard, I committed to Calvin some time ago that he would get the first 200,000 share liquidity arranged by the company above the needs of the retail market. I think we should stick to this and give the next 100,000 to Bernard because of his high need and, thereafter we would each have the right to share equally over the next period of time- say two years. I'm not talking about any formal legal agreements here -just sensible, honorable gentleman's agreement among 5 business people with a huge business interest in common working together in a fair and straightforward way.

- Mr. Potter concluded with an exhortation to the group to prevent, through cooperation, the share price from collapsing:

> Unless we do something in a united way like this, I'm afraid it's going to be a case of: "United we stand, divided we fall!" And, if we fall, we'll all fall with a heavy thud! And so will the other shareholders.
>
> I'd urge each of you to respond positively to this, bearing in mind that the stakes are big and the market will [*sic*] unforgiving if we are unable to act strongly together.

[601] The Crown submitted this email would have been sufficient on its own to prove the conspiracy charges against Mr. Potter and Mr. Colpitts. The trial judge had this to say about it:

> [520] Notwithstanding euphemisms like "supporting the market" and "protecting the value of our KHI shares", the objective of the agreement was both clear and criminal: to artificially maintain the price of KHI shares on the Toronto Stock Exchange while the company sought new investment.[418]

[602] The trial judge heard testimony from Langley Evans about "supporting the market" being a euphemism for illegitimate price support. Mr. Evans testified that in his experience an examination of the trading activity in relation to a company's shares "usually" revealed that "market support" was in fact a strategy to "prevent the price from falling or to push it to a different level, to push it to a higher level". Mr. Evans explained "market support" used to manipulate the share price is quite different from "acceptable stock promotion":

> **[Crown]:** So, hypothetically speaking, if an individual's engaged in a program of price support, does that fall within the legitimate aspect of market support?
>
> **[Mr. Evans]:** No. In my view, no. And the prices are supposed to flow as a natural consequence of market activity. And this is – this is the nuance, that if I enter the market as a buyer in an illiquid stock, it may go up as a result of my actions. But if my intent is to buy it at the best price then that's – that's – then that's fine. If I go in with the intent to drive the price up or to push it up, then that's manipulation. So it's contextual and really – it's really comes down to what the intent or the perceived intent from the – the market participant.

[603] The trial judge also heard Gerard McInnis' response to being asked if there was anything about Mr. Potter's "Recommended Plan of Joint Action" email that was inconsistent with his experience at KHI. He said: "[n]o not in any way".

[604] The trial judge described as "equally probative" an email dated February 8, 2001 from Calvin Wadden to Dan Potter:[419]

> Dan,
>
> I have been speaking with Ray, Blois and Ken throughout the day and they have been in supporting the market. Ray and I would really like to get the stock to $5.45 and try to solicit more support from the group going forward. If we can get to $5.45 - $5.50 I would like to see each of us put 5,000 shares into the support side and try to inch up toward $6.00 to $6.50 until we get some positive news on the street.
>
> If we could come up with a formula to provide support say 5,000 shares each at every $.15 - .20 gain forward we could be building some reserve and give each of us some breathing room until we attract substantial buyers. I think this along with the options would be be [*sic*] a strong sign for the major shareholders who are at the sidelines.
>
> Ray and Ken each purchased 4,000 shares today and have agreed to pick up an additional 1,000 shares each by the close. Blois and I bought as well. Aside from all the hard feelings it was good to see the teamwork this afternoon.
>
> I have spoken to Stewart from Assante (FCG) and he has agreed to work with me. I really think he was sincere but someone is still in the market. Can you make time for me to arrange a pep talk for Eric [Richards] and Stewart some time next week? Ray and I think if we can turn Eric into a supportet [*sic*] we are clear sailing.

[605] As the trial judge noted, Mr. Potter forwarded this email to Mr. Colpitts with the message, "FYI – good to see!" The trial judge concluded these emails were clear evidence of a conspiracy to manipulate the KHI share price:

> [522] … Contrary to the defendants' submissions, this correspondence begets only one interpretation: a group of individuals is working in concert to intentionally move the KHI stock price higher, giving themselves "some breathing room" until they "get some positive news on the street" and "attract substantial buyers." These individuals were not buying more KHI stock because they wanted it; in fact, most were anxious to sell. Instead, they were buying in order to prop up the share price until the company could entice new investors.[420]

[606] We agree with the Crown's submission these emails disclose a conspiracy to unlawfully influence the KHI stock price. They show more than two people were acting in concert to execute an illegal plan. That plan was the coordination of KHI share purchases to intentionally push the share price higher, a deliberate interference with the retail market's role in setting the true price.

[607] There was a very telling exchange of emails in November 2000 between Bernard Schelew and Mr. Potter that is further evidence of the unlawful nature of the group's intentions and activities. The exchange led to Mr. Potter pulling back the curtain to reveal to Dr. Schelew what was being orchestrated behind the scenes to boost KHI's share price.

[608] The "reveal" was triggered by Dr. Schelew giving Bruce Clarke firm instructions in a November 23rd email to sell 10,000 KHI shares per week. He needed the money. KHI's share price looked to be doing well.

[609] That same day, Mr. Potter forwarded a copy of the email to Mr. Colpitts, saying: "We need to talk about this! Unbelievable!" On November 24th, Mr. Potter disclosed to Dr. Schelew the identity of the individuals who had been in the market supporting the KHI share price: including Ken MacLeod, Calvin Wadden, Raymond Courtney, Bruce Clarke, and Mr. Potter himself. Mr. Potter concluded his email as follows:

> The period since the crash of dot-coms after March 10 has been one of the most challenging for small cap companies since 1987. We have been working hard to maintain interest in and support for the KHI vision and operation.
>
> Bernard, there is no magic in why the stock has done as well as it has – people who value the company and their investment in it have come to the party! I sincerely recommend that you do too.
>
> I am willing to co-ordinate some positve [*sic*] activities to attract new investors. We can meet to discuss this. I have not, as yet, spoken to other major holders on any specific iniatives [*sic*] but have a call in to Calvin and will talk to Ray on Monday.
>
> In my opinion you should either be buying or supporting the buying of shares in the coming week and beyond. If you insist on selling shares (without having the buy-side arranged) as you have previously indicated, then I'd say all of our good work in attracting investors over the last several months may well prove to have been in vain. Now, more than ever, we need to work co-operatively to protect the interests of KHI shareholders, including you and the people you have brought into the company over the years. In this regard, I should add that Steve T. warned us that he has to sell 50,000 shares by Dec. 1
>
> I want to also say that I fully appreciate the pressure you are under to support and fund Handsmiths - I sincerely feel your pain in this area.
>
> I hope common sense and enlightened self-interest prevails.

[610] The trial judge observed Mr. Colpitts was in this communication loop and concerned that his contribution to the enterprise not be overlooked:

> [524] Fearing his contribution would be left out, Blois Colpitts e-mailed to make sure that Mr. Potter informed Dr. Schelew that he too purchased "shares on margin to support the market – nearly $800,000 in total."[421]

[611] In his review of the evidence, the trial judge noted how Dr. Schelew's correspondence led to Mr. Potter's response in an email dated November 25th, revealing the conspiracy and forecasting the "Recommended Plan of Joint Action" email:[422]

> Your analysis that leads you to the conclusion that you or any other major, non-retail KHI shareholder can achieve liquidity next week in [*sic*] completely wrong-there is NO WAY that can happen. You have seen the stock trade down to $6.00 in the last several sessions. There is at least 30,000 shares of pressure on the market as of Friday PM, not including Steve T's 50,000 to come next week. You will ABSOLUTELY FOR SURE CRASH THE STOCK IF YOU ACT ON YOUR FLAWED ANALYSIS -ABSOLUTELY FOR SURE! "Management and directors" cannot and will not be magically buying. You need to understand and believe this fundamental truth -there currently is no buying power in the KHI network. There can be again, if we are given the chance and support to go out a find more investors - but there is none now!
>
> As I mentioned to you before by telephone, it is most unfortunate that you have seen fit to include Bruce Clarke [*sic*] your communications re liquidity. It only serves to put more pressure of [*sic*] him - a person who has undertaken huge personal risks to invest in the company. It is grossly unfair to him, grossly unfair and I must say it is very upsetting to me to see you continue to include him in this dialogue.
>
> I'm sure that it's somewhat true that "desperate people do desperate things". But I [*sic*] will be a sad irony if, in your desperation, to support Handsmiths, you, in fact, destroy the real source of your own financial well-being - your KHI shares!
>
> I'll continue to do my best to run the company in the interests of all shareholders as long as I have the support of the "founding" shareholders with the biggest stakes, but, if and when that cracks, all bets are off.
>
> I'm going to send an email (by noon tomorrow - Sunday) outlining the situation and my recommended action to each of the major shareholders with "founders shares" - you, Calvin, Ray and Ken with a recommended joint plan for co-operative action to support and protect the KHI stock over the coming weeks while we are bringing in more new investors. I strongly recommend that you keep an open mind to my recommended plan of action.
>
> If the major shareholders who have liquidity needs don't realize that this is not the moment for demanding liquidity, but rather the moment for coming to the aid of the company, then tens of millions of dollars in shareholder value will, I'm sure, be lost, including the value of each of such major shareholders. If cool heads

> prevail, we'll have future liquidity events for all - if there is no co-operation and concerted supportive action now, there will be no such future events.
>
> All of which is put to you with the utmost respect and in what I sincerely regard to be your own interests.

[612] The communications amongst the group members left no doubt in the trial judge's mind a conspiracy existed to manipulate the KHI share price. The following examples support his conclusion.

[613] The joint plan to "prop up the share price" is clear from an email sent by Ken MacLeod to Mr. Potter on January 5, 2001:

> Other than getting him to pay for dinner, I had absolutely no luck with Donnie last night. Apparently Blois had taken a crack at him yesterday as well, so he was prepared for my sales pitch. He doesn't believe in buoying up the stock price by margining, most of his shares are in warrants, yadda yadda. Gave it the old college try and more, but no dice.

[614] In an email exchange on January 25, 2001 about the share price falling below $5.00 Gerard McInnis replied:

> Painfully aware…they are working on a few folks who are supposed to e [*sic*] putting in support bids. It should close at $5 or $5.10

[615] Mr. McInnis testified the main shareholders who, at this time, "had been working in concert to help provide support", included Mr. Potter and Mr. Colpitts.[423] His evidence also indicated that moving the price up to $5 or $5.10 would be achieved by high closing, "[b]y putting in a closing bid. So by … having the purchase at the end of the day or the last purchase of the day".

[616] On January 25, 2001, 19 minutes before the TSX closed, Bruce Clarke used the Union account to purchase 800 shares at $5.00 a share. The Union account bought another 500 shares just 23 seconds before the end of the trading day, which caused the KHI stock to close at $5.10. As the trial judge noted, "exactly as predicted by Mr. McInnis".[424]

[617] In a February 8, 2001 email to Raymond Courtney, Ken MacLeod praised Mr. Potter's efforts to keep the KHI share price propped up:

> … We all have history here, and we might have our differences with Dan and how we got to where we are, but you have to give it to Dan that he is doing everything in his power to pull us out of this tail spin. I think he is right that he can't get

> anywhere with controlling the market or getting new investors if we (you, me Calvin, Dan) don't have it together.

[618] Email communications on February 8, 2001 and on August 15, 2001, including to Mr. Potter and Mr. Colpitts, and the corresponding evidence from the Match Trade Report, indicated steps taken to high close the stock.[425]

[619] The evidence disclosed there was strategic high closing on other dates in August and October and November 2000, notably at times when significant external investors were being courted.[426]

[620] The evidence showed there was a failure to disclose material information about the true state of KHI's financial house. The trial judge described how KHI would have appeared to potential investors in the period of April 2000 to July 2001:

> [556] … Looking at the market, they would see that the stock price appeared largely unaffected by the dot-com crash in March 2000. The price remained relatively steady through 2000 and 2001, usually trading between $5.00 and $6.50. It was outperforming the indices. The trade volume on the TSX was at times low, with occasional increases, not unlike most comparable start-ups. There were months where millions of dollars worth of shares crossed the exchange. A review of KHI's public disclosure would reflect a strong small-cap company with dynamic leadership, encouraging press releases, buzz on the street, and significant local support.
>
> [557] Potential investors reviewing KHI's public disclosure would not know: 1) that over 50% of the share volume on the TSX was generated by a small KHI "buying network"; 2) that the 540 account, funded by company insiders, purchased millions of dollars worth of shares; 3) that KHI had lost a major source of financing; 4) that insiders offered millions of their shares to deep-pocket investors for a fraction of the reported price; 5) that the company struggled to make payroll; or, 6) that the CEO and other major shareholders privately questioned KHI's very survival. To suggest that this information would not have been considered important to a reasonable investor deciding whether to buy or sell KHI shares is, frankly, ridiculous. If reporting issuers were not required to disclose any of this information, public confidence in Canadian capital markets would be non-existent. The markets would cease to function. For these reasons, I am satisfied that material non-disclosure was an element of the conspiracy to commit fraud in relation to the market price for KHI shares.[427]

[621] The trial judge's finding the Crown had proven the existence of a conspiracy beyond a reasonable doubt was solidly anchored in the evidentiary record before him.

Carter Step #2—Probable Membership in the Conspiracy

[622] Having found the Crown had proven the existence of a conspiracy to fraudulently manipulate the KHI share price, the trial judge went on to consider, on the basis of evidence directly admissible against each of Mr. Potter and Mr. Colpitts, whether they were probable members of the conspiracy. He also assessed the probable membership of the unindicted co-conspirators, including Bruce Clarke, Calvin Wadden, Raymond Courtney, Ken MacLeod, Eric Richards, and Stephen Wilsack. Because Gerard McInnis, Steven Clarke, Bernard Schelew, and Shirley Locke all testified, there was no need for the trial judge to undertake a "probable membership" analysis in relation to them.

[623] The trial judge found Gerard McInnis' testimony supplied "[s]ome of the most useful direct evidence to determine probable membership in the conspiracy".[428] Mr. McInnis identified the individuals in the group, including Mr. Potter and Mr. Colpitts, who were actively engaged in propping up the KHI share price. He described the "market support" efforts as "continuous … so that you'd always coordinate buying and selling … for purposes [*sic*] not putting pressure on the stock". He testified Mr. Potter and Mr. Colpitts were at the centre of these efforts with Mr. Wadden, Mr. Courtney, and Mr. Clarke.

[624] Mr. McInnis' evidence was central to the trial judge's findings of Mr. Potter's and Mr. Colpitts' probable membership in the conspiracy:

> [571] Mr. McInnis was a credible witness. His testimony, understood in the context of the rest of the evidence, identifies the main players in the conspiracy. At the centre was Mr. Potter, along with Mr. Colpitts, Mr. Clarke, Mr. Wadden and Mr. Courtney. Mr. McInnis also identified Mr. MacLeod, Jack Sullivan, Dr. Schelew and others whose continuous concern was to ensure that there was no pressure put on the stock and to always coordinate buying and selling of KHI shares. His evidence on this point was not challenged and is consistent with the other evidence available to establish probable membership.[429]

[625] Much of the "other evidence" the trial judge drew upon to find Mr. Potter's probable membership was in the email communications that indicated:

- Mr. Potter was active in minimizing sell-side pressure on the stock.
- Selling of shares was coordinated with Mr. Potter.

- Mr. Potter controlled the 540 account, for example, loading it in March 2000 with $100,000 so it could purchase KHI shares on the market.
- Mr. Potter directed Bruce Clarke's "market support" activities.
- Mr. Potter was "the central performer" in the "maneuvering of stock to perpetrate the charade" and prevent KHI's stock price from falling.[430]

[626] The email communications written by Mr. Potter were admissions against interest and directly admissible against him on this basis. Their admissibility did not rely on the co-conspirators' exception.

[627] As noted, Mr. McInnis identified Mr. Colpitts as a key player in the KHI share price manipulation group. The trial judge referred to Mr. Colpitts' testimony that the major KHI shareholders had engaged in "support buying" that he suggested was legitimate price stabilization. The trial judge rejected this characterization.

[628] In addition to Mr. McInnis' evidence, the trial judge found Mr. Colpitts was a probable member of the conspiracy on the basis of evidence that he:

- Acted to protect the conspiracy. For example, by "threatening to enforce undefined terms" of an agreement against Stephen Wilsack to keep him from selling his KHI shares.[431]
- Demonstrated his knowledge that the "bids on the market for KHI were orchestrated 'support bids' intended to maintain the stock price, not genuine retail bids".[432]
- Intervened as a "fixer" in order "to ensure the objective of the conspiracy continued without disruption".[433]
- Obstructed KHI limited partnership unit holders from accessing their share certificates preventing them from selling their shares. In contrast, Mr. Colpitts promptly ensured fellow conspirators Calvin Wadden and Shirley Locke were able to receive their share certificates when they intended to use them to buy more KHI stock.[434]

[629] As in the case of Mr. Potter, email communications written by Mr. Colpitts were directly admissible against him as admissions against interest.

[630] Mr. Potter and Mr. Colpitts knew what they were doing was wrong. In August 2001, an LP unit holder was trying to secure the return of his share

certificates, necessitating the involvement of his lawyer and communications with Mr. Potter. Mr. Potter deflected them. He forwarded the chain of emails to Mr. Colpitts on September 4th, saying:

> We need to be careful about this [*sic*] guys – they could go to the TSE or Securities Commission if we do not give them a lawyer to talk to!! Neither you or I need that!

[631] Mr. Potter was absolutely right. He and Mr. Colpitts could not afford to have the stock exchange or securities regulator supplied with a reason to start looking into what was going on behind the scenes at KHI. As with other types of criminal conspiracies, Mr. Potter and Mr. Colpitts needed to fly under the radar to avoid the risk of exposure and the inevitable consequences that would follow.

Carter Step #3—Declarations in Furtherance of the Conspiracy

[632] In close to 80 paragraphs, the trial judge went on to consider the evidence directly admissible against the remaining co-conspirators to find they were also probable members of the conspiracy.[435]

[633] The trial judge concluded his analysis by assessing, at the third step of the *Carter* framework, whether on the basis of all the evidence (which included the out-of-court acts and declarations of the other members of the conspiracy made in furtherance of the conspiracy), it had been established beyond a reasonable doubt that Mr. Potter and Mr. Colpitts were members of the conspiracy to fraudulently affect the market price of KHI shares. He was satisfied they were:

> [676] I have considered all of the correspondence referenced in this decision and I find it all to have been in furtherance of the conspiracy to commit fraud in relation to the market price for KHI shares on the Toronto Stock Exchange. Even without admitting these communications for the truth of their contents, I would have been satisfied the Crown has proven that the defendants were members of the conspiracy and are guilty of the conspiracy-related charges against them. Admitting the statements for their truth merely reinforces that finding.[436]

Conclusion

[634] The essential features of a conspiracy were amply made out by the evidence before the trial judge. As described by the Supreme Court of Canada in *R. v. Papalia*; *R. v. Cotroni*:

> … The agreement reached by the co-conspirators may contemplate a number of acts or offences. Any number of people may be privy to it. Additional people may join the ongoing scheme while others may drop out. So long as there is a continuing overall, dominant plan there may be changes in methods of operation, personnel, or victims, without bringing the conspiracy to an end. The important inquiry is not as to the acts done in pursuance of the agreement, but whether there was, in fact, a common agreement to which the acts are referable and to which all of the alleged offenders were privy. …[437]

[635] In a conspiracy, all the participants do not need to communicate directly with each other or even be acquainted. Their roles may "differ widely". They do not all have to "know the details of the common scheme, though each must be aware of the general nature of the common design and be an adherent to it".[438]

[636] These principles were cited by the trial judge.[439] They dispense with an argument made by Mr. Potter and Mr. Colpitts that there is significance in the absence of any evidence they knew about the Union account being utilized by Bruce Clarke to purchase and park KHI stock.

[637] The trial judge arrived at his determination Mr. Potter and Mr. Colpitts were guilty of conspiracy to affect the market price of KHI shares with intent to defraud after an exhaustive review of the leading case authorities, an application of the correct legal principles, and a comprehensive and logical examination of the vast amount of evidence—testimony, documentary evidence, and email communications—that was before him. He undertook a detailed and well-reasoned assessment of the Canadian jurisprudence submitted by Mr. Potter and Mr. Colpitts (such as *R. v. Campbell*,[440] which we discuss later in these reasons) and found none of it was of assistance to them.[441] He committed no errors and his findings of fact are owed deference.

[638] The evidence established beyond a reasonable doubt Mr. Potter and Mr. Colpitts and their co-conspirators acted in concert to pursue a common objective, affecting the market price of KHI shares through fraudulent means. We find the trial judge's determination that Mr. Potter and Mr. Colpitts were participants in an agreement to commit this unlawful act to be firmly anchored in the law and facts. The guilty verdicts for conspiracy were entirely reasonable and supported by the evidence. We dismiss this ground of appeal.

Issue #7: Were the Guilty Verdicts for Fraud on the Public Market Unreasonable?

Issue #8: Did the Trial Judge Misapprehend the Defence Evidence and, in Particular, did he Misapprehend the Defences Advanced?

[639] We will now address two inter-related issues. We will first set out Mr. Potter's and Mr. Colpitts' complaints in relation to each issue as described in their Notices of Appeal and factums. We will then set out the standards of review, and finally, our analysis.

Fraud

[640] Mr. Potter and Mr. Colpitts were found guilty pursuant to section 380(2) of the *Criminal Code* of affecting by deceit, falsehood or other fraudulent means, the public market price of KHI shares, with intent to defraud. They were also found guilty of the offence of fraud *simpliciter* under section 380(1), a conviction the trial judge stayed pursuant to the principles in *R. v. Kienapple*.[442]

[641] The trial judge set out what was then the applicable sections of the *Criminal Code*:[443]

> **Fraud**
>
> 380(1) Everyone who, by deceit, falsehood or other fraudulent means … defrauds the public or any person, whether ascertained or not, of any property, money or valuable security or any service,
>
> (a) is guilty of an indictable offence and liable to a term of imprisonment not exceeding ten years…
>
> **Affecting public market**
>
> 380(2) Every one who, by deceit, falsehood or other fraudulent means … with intent to defraud, affects the public market price of stocks, shares, merchandise or anything that is offered for sale to the public is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

[642] Mr. Potter and Mr. Colpitts do not take issue with the trial judge's articulation of the law as it relates to the offence of fraudulently affecting the market. Indeed, Mr. Potter says in his factum that "the trial judge in this case appears to have properly set out the elements of the offence".

How the Trial Judge Arrived at Guilty Verdicts for Fraud

[643] The trial judge extensively reviewed the relevant case law relating to the offence of fraud *simpliciter*, including the leading cases of *R. v. Olan*,[444] *R. v. Théroux*,[445] and *R. v. Zlatic*.[446] In that context, he discussed *R. v. Riesberry*,[447] a decision of the Supreme Court of Canada that Mr. Potter and Mr. Colpitts submit does not apply. We discuss *Riesberry* later in these reasons.

[644] The trial judge then correctly described what must be proven to secure a conviction for the specific fraud offence of affecting the public market:

> [680] …The *actus reus* requires proof of a dishonest act in the form of an act of deceit, falsehood or other fraudulent means and that the dishonest act affected the public market price of stocks, shares, merchandise or anything that is offered for sale to the public.
>
> [681] The *mens rea* of the offence is established on proof that the accused knowingly undertook the conduct which constituted the dishonest act, that the accused committed the dishonest act with the intent to defraud, and that the accused subjectively appreciated that the public market price would be affected as a consequence of the dishonest act.[448]

[645] The trial judge recognized the *actus reus* for a s. 380(2) offence is similar to that for fraud under s. 380(1) but with a consequence element of affecting the market price of shares:

> [483] The *actus reus* under s. 380(2) is similar to that of fraud *simpliciter* under s. 380(1). Both sections refer to the conduct elements as being "deceit, falsehood or other fraudulent means." Subsection 380(2), however, has a different consequence element -- affecting the market price of stocks, shares, merchandise or anything offered for sale to the public.[449]

[646] The trial judge then extracted from case law and scholarly authority the following principles, none of which Mr. Potter and Mr. Colpitts have disputed:

- The same "fraudulent means" can be used to establish proof of the *actus reus* for offences under both ss. 380(1) and 380(2).[450]
- Section 380(2) is a specific intent offence as the Crown must prove the accused committed the conduct elements of the offence with "an intent to defraud".[451]
- It is not a defence to a s. 380(2) offence that the accused may have believed the manipulated share price reflected the true value of the company. The law criminalizes the use of deceit to affect the market price of shares

and the intention to dishonestly induce investors to purchase the artificially inflated shares.[452]

- The specific intent of "intent to defraud" is determined through the application of a subjective test. It can be established upon proof of: (a) knowledge or recklessness as to the facts which constitute a "deceit", a "falsehood" or "other fraudulent means"; and (b) foresight or recklessness as to the facts which are found in law to constitute "deprivation".[453]

- Section 380(2) of the *Criminal Code* aims to "protect the integrity of Canada's capital markets and prevent fraudulent conduct that 'affects' the public market price".[454]

- The "public market price" of shares "must be the product of the natural and unimpeded forces of supply and demand within that market place". This is "fundamental to the integrity of Canada's capital markets".[455]

- Interference with "the normal forces of supply and demand in the marketplace, or any attempt to create a misleading appearance with respect to the price of a security or its trading volume, is contrary to these fundamental principles and undermines public confidence in the market".[456]

- The regulatory regime governing Canada's capital markets provides context for the interpretation of the phrase in s. 380(2), "affects the public market price". Regulation is through provincial legislation, provincial regulators, self-regulatory organizations, the exchanges themselves and the criminal law.[457]

- "The regulatory framework of Canada's capital markets can also inform the … analysis of 'other fraudulent means' under s. 380".[458]

[647] Following his dissection of these principles, the trial judge summarized the activities of Mr. Potter and Mr. Colpitts and the other conspirators from December 1999 to August 2001, much of which we described earlier in these reasons. (The trial judge's comprehensive review of the Crown and Defence evidence spans 254 paragraphs of his decision.[459])

[648] We repeat here what the trial judge concluded from the evidence:

> [709] As the foregoing demonstrates, the defendants and their fellow conspirators used a variety of techniques to manipulate the market for KHI shares. Starting with market domination, Ian Black identified a list of suspect accounts that purchased shares as part of the conspiracy. While I agree with most of this list, I have not included the purchases by Gerald Doucet or Stevens Construction

in reaching my conclusions. Even without these purchases, the amount spent by the suspect accounts purchasing KHI shares on the TSX exceeds $11 million.

[710] The defendants, together with Bruce Clarke and the other conspirators, suppressed sales by numerous individuals, including Steve Wilsack, Calvin Wadden, Bernard Schelew, Steve Tsimiklis, LP unitholders, Jim Wilson, Michael Mahoney, John Groves, and others.

[711] The defendants, together with their fellow conspirators, regularly high closed the stock. They also failed to disclose material information concerning the "KHI buying network", KHI's financial situation and the existence of a managed selling agreement.

[712] All of these activities constitute "fraudulent means" in a regulated securities market like the TSX. I find that each of the defendants knowingly undertook these activities and subjectively appreciated that their conduct could have as a consequence the deprivation of another. Their goal was to artificially maintain the KHI stock price while they secured new investors, who, as a result of the defendants' conduct, would be making investment decisions based on a misleading impression of the level of demand for the stock. In other words, the defendants acted with an intent to defraud.

[713] The defendants argue that the Crown has failed to prove that their conduct affected the price of KHI stock. I disagree. Where market manipulation is alleged to have occurred in a narrow window of time, or to have involved a small number of purchases, proving that an accused's activities created an artificial price would be quite challenging. In this case, however, the defendants' conduct spanned an 18-month period which, significantly, included the dot-com crash. During this time, the conspirators spent more than $11 million buying over 50% of the KHI shares that crossed the Exchange. Even Mr. Potter's own statements support the conclusion that the defendants succeeded in artificially maintaining the share price. In his January 15, 2001, memo to the KHI Board of Directors, for example, Mr. Potter noted:

> The price of KHI shares declined only $.15 on a year-over-year comparison (Dec. 31 2000 compared to Dec. 1999). This is in an environment where the market value of many comparable companies declined sharply, often by amounts well in excess of 50%.

[714] I find that the defendants' conduct affected the price of KHI shares on the Toronto Stock Exchange. This conduct not only put the economic interests of existing and potential KHI shareholders at risk, but caused significant economic loss to numerous investors, known and unknown, and financial institutions. As a result, I find each defendant guilty of fraud contrary to ss. 380(1)(a) (two counts each) and 380(2) (one count each).[460]

The Errors Alleged by the Appellants (Fraud)

[649] Mr. Potter and Mr. Colpitts say the trial judge erred in reaching his conclusions by:

- Finding "knowing non-compliance with a regulatory scheme was sufficient to amount to fraud".
- Finding non-compliance with the securities regulatory regime amounts to fraud in the absence of making any factual findings to establish non-compliance with the regulatory regime. There was nothing deceitful or dishonest for the CEO and Directors of KHI not to disclose what the trial judge found should have been disclosed.
- Finding "non-disclosure of material information" was a feature of the alleged conspiracy and fraud when insider reports were filed and KHI's continuous disclosure obligations were met.
- Finding the *actus reus* of the offence had been proven notwithstanding the "lawful nature of the trading activities". Mr. Potter says there were "rational and reasonable inferences available" other than guilt that the trial judge failed to consider. The trial judge "misinterpreted legitimate trading and corporate activity, erroneously labelling it deceptive and done with the sole intention of creating an artificial price". Mr. Potter says "all of the trading activity was open, transparent, and legitimate" and that he did "exactly what a CEO of a growing company should do to ensure its success and he did not attempt to hide it". Mr. Colpitts says there was no basis for the trial judge's conclusion of fraudulent market manipulation through buy-side domination as the company insiders satisfied their disclosure obligations and their trading was "plainly disclosed for investors to see".
- Finding, in the absence of evidence of deceit, falsehood, or other fraudulent means, the *mens rea* of the offence had been established beyond a reasonable doubt.
- Failing to consider, in his evaluation of deceit, falsehood, or other fraudulent means, the fiduciary duties owed by the appellants to KHI. Mr. Colpitts says the trial judge "viewed our actions in isolation without adding the context of our legal duties … and he attributed a manipulative intent to us as a result". Mr. Colpitts refers to protecting KHI from Calvin Wadden breaching, through the sale of shares, his fiduciary duty, and "[o]ther alleged suppression actions, such as Steve Wilsack, were related to my obligations as the company's solicitor".

- Failing to accept as analogous the decisions of *Québec (Autorité des marchés financiers) c. Forget*,[461] and *R. v. Campbell*,[462] and instead referring to the Supreme Court of Canada decision in *R. v. Riesberry*.[463] Relying on *Riesberry* was "misplaced, improperly encroaches upon provincial regulatory regimes, and unduly expands the scope of criminal fraud".

- Finding there was sufficient evidence to establish beyond a reasonable doubt they fraudulently affected the public market price of KHI shares.

The Errors Alleged by the Appellants (Misapprehension of Evidence)

[650] In their Notices of Appeal, Mr. Potter and Mr. Colpitts say the trial judge, employing "a fundamentally flawed analysis of the essential elements of the alleged conspiracy and fraudulent conduct", rejected defence evidence as "irrelevant". They say the trial judge's characterization of the NBFL witness evidence called by Mr. Colpitts as irrelevant was a failure to "examine the evidence as a whole". They claim the trial judge misunderstood the purpose of the defence evidence, which was to show the activities of Mr. Potter and Mr. Colpitts during the indictment period were "common and sanctioned practices in the Nova Scotia securities industry in 2000 and 2001". They criticize the trial judge for failing to appreciate the role NBFL played "in the demise of KHI" and NBFL's "efforts to suppress relevant evidence".

[651] Mr. Potter says he "had every reason to believe that none of the trading activity in his accounts was unlawful as NBFL, his adviser had rules, policies and procedures in place to prevent unlawful trading".

[652] Mr. Potter claims Mr. Clarke, acting for NBFL, offered "market-making services" to him, which he accepted. Mr. Potter did not testify but says Mr. Colpitts endeavoured to draw out evidence to support this claim from the NBFL witnesses he called.

[653] Mr. Colpitts says the trial judge failed to analyze any share purchases by Mr. Colpitts or the co-conspirators to determine if they were made "with a legitimate investment objective". He points to his testimony that all of his share purchases were made because he "legitimately believed in the future of KHI" and "that KHI shares were undervalued" and would "rise exponentially as KHI continued to develop and grow". He claims the trial judge misinterpreted the trading activities and found criminality "where none existed".

Standard of Review

Fraud

[654] As with the guilty verdict for conspiracy, the complaint Mr. Potter and Mr. Colpitts make about the guilty verdicts for fraud on the market is essentially an attack on the reasonableness of the verdicts. The reasonableness of a verdict, within the meaning of s. 686(1)(a)(i) of the *Criminal Code*, is a question of law.

[655] Determining whether the guilty verdict for fraud is reasonable involves asking the same question and engaging in the same assessment we noted in para. 579.

Misapprehension of Evidence

[656] This Court recently summarized the standard of review for misapprehension of evidence in *R. v. Dim*:[464]

> [62] A misapprehension of evidence may refer to a mistake as to the substance of evidence, a failure to consider evidence relevant to a material issue or a failure to give proper effect to evidence. A misapprehension of the evidence must have played an essential part in the reasoning process that led to conviction. It cannot be peripheral. Nor can it be confused with a different interpretation of the evidence than that adopted by the trial judge. (See *R. v. Lohrer*, 2004 SCC 80; *R. v. Morrissey* (1995), 80 O.A.C. 161 (Ont. C.A.); and *R. v. J.P.*, 2014 NSCA 29.)

[657] The Supreme Court of Canada has referred to the test as "stringent". The errors "must go to the substance rather than to the detail" and they "must play an essential part not just in the narrative of the judgment but in 'the reasoning process resulting in a conviction'".[465]

Analysis

[658] Boiled down to its essence, Mr. Potter and Mr. Colpitts say the trial judge did not have the evidence to convict them of fraud; misapprehended the evidence he did have; and, due to bias and a failure to understand the industry and customary practices during the relevant time, was unable and unwilling to grasp

their activities were legitimate and consistent with their corporate responsibilities. They assert their defences were valid and their trial was unfair.

The lack of evidence to establish criminality claim

[659] The lack-of-evidence submission was raised at trial. Mr. Potter and Mr. Colpitts argued the Crown had "failed to provide the Court with sufficient evidence to determine whether their actions were criminal".[466]

[660] The trial judge found there was plenty of evidence to prove criminality beyond a reasonable doubt. A review of the evidentiary record places this finding beyond question. For example, on the critical issue of intent, in concluding the Crown had proven the existence of the conspiracy beyond a reasonable doubt, the trial judge discussed what the evidence revealed:

> [560] This leaves only the issue of intent. The defendants submit that the Crown cannot prove conspiracy to commit fraud contrary to ss. 380(1) and 380(2), or the substantive offences, because it has failed to establish an intent to defraud. I disagree. I find that the objective of the agreement, as proven by the communications, was to artificially maintain the KHI share price on the Toronto Stock Exchange – creating a false impression of retail demand for the stock – for the specific purpose of attracting new investors. Said differently, the whole point was to induce outside investors to buy shares, putting their economic interests at risk, in the hope that further investment would pull the company out of its tailspin. For the conspirators, substantial new investment could turn their illusion of an active market for KHI into reality, leaving no one the wiser. In the words of the British Columbia Court of Appeal in *Allman*,[467] the conspirators' intention "was to cause people to part with their money in exchange for shares or not acquire money by disposing of their shares. In short, they were deceiving people into having shares instead of money."
>
> [561] The strongest evidence of intent to defraud relates to the Barthe/Ristow private placement. As early as September 2000, Ben Barthe and his friend Dr. Lutz Ristow were in discussions to make a large purchase of KHI shares. Dr. Ristow testified that Dan Potter initially wanted him to buy shares from existing shareholders, but he refused. He testified that his due diligence included watching and researching the performance of KHI shares on the TSX. He agreed to the price of $6.50 per share, at Mr. Potter's insistence, because that was "the then going market price." During negotiations on the price, Dr. Ristow reviewed the performance of KHI stock on the TSX and found that $6.50 "was repeatedly paid." He further testified that he believed that the price was set by normal supply and demand, and that liquidity was a factor he considered when deciding whether

> to invest. The deal, worth $3.25 million, was to be finalized on November 15, 2000, but in fact did not close until November 23.
>
> [562] Dr. Ristow was unaware that, behind the scenes, the "KHI network" was buying large volumes of KHI shares to keep the price from falling and frequently high closing the stock to maintain the KHI share price at or above $6.50. In September, suspect accounts spent over $500,000 buying 56.3% of the shares; in October, the 540 account spent $641,447 buying 63.4%. By November, suspect account purchases increased to 77.1% of the total KHI shares, at a cost of over $1 million. High closing by the suspect accounts followed the same pattern, increasing from one month to the next. In September, they high-closed the stock eight times; in October, 12 times; and in November, 13 times, or 65% of trading days. None of this coordination was disclosed.
>
> [563] In addition to high closing and market domination, there was significant sales suppression during this period, for the purpose of defrauding the German investors. The intent to defraud Dr. Ristow and Mr. Barthe is made clear in Mr. Potter's November 19, 2000, e-mail to Calvin Wadden in relation to Steve Tsimiklis' intention to sell shares:
>
> > As you know, we are closing on a $3,250,000 treasury issue to our German friends- we are hoping to get this completed (closed) on Mon. or Tues. (Nov. 20 or 21). The price of this issue is $6.50 per share. **If the market is driven down in advance of this issue it is quite likely that the investors will not close. This would be most harmful for the company and all of its shareholders, including Steve. Hopefully, he can be convinced to proceed with care, prudence and caution.**
> >
> > …
> >
> > **I'm copying Blois just to keep him in the loop.** [Emphasis of trial judge]
>
> [564] At the time of Mr. Potter's e-mail, Mr. Colpitts would have been preparing (or overseeing the preparation of) the Barthe/Ristow legal agreement for their treasury share purchase. On November 23, the Germans signed the agreement to purchase at what they believed to be a fair market price: $6.50 per share. On November 24, with the ink still wet, the stock closed below $6.50 for the first time in three months. When the KHI share price plummeted in August 2001, Dr. Ristow and Mr. Barthe lost their entire investments.[468]

[661] Mr. Potter and Mr. Colpitts have not shown what the trial judge found is wrong in either law or fact. We reject the submission they were engaged in lawful trading activities. There was nothing lawful about the manipulative strategies they and their co-conspirators employed to artificially maintain the KHI share price. Mr. Potter and Mr. Colpitts knew this. They were keenly aware what they were doing needed to remain under the radar. As the trial judge noted, an investigation by regulatory authorities would have risked the curtain being pulled back:

> [559] In the highly-regulated setting of the Toronto Stock Exchange, market domination, sell-side suppression, undisclosed incentives, high closing, non-disclosure of material information, and parking stock clearly constitute "other fraudulent means." Indeed, contrary to what they say now, the dishonest nature of their conduct was not lost on the defendants themselves at the time. After the stock price collapsed, Leon Trakman and his lawyer, Bob Barnes, wanted the name of a lawyer for KHI to discuss the financial losses incurred by Mr. Trakman when his LP shares were not delivered to him on time. Leon Trakman's e-mails became threatening, and Mr. Potter forwarded the chain to Mr. Colpitts:
>
> > B,
> >
> > We need to be careful about this [*sic*] guys – they could go to the TSE or Securities Commission if we do not give them a lawyer to talk to!! Neither you or I need that![469]

[662] Mr. Potter and Mr. Colpitts continue to make assertions for which there is no support in the evidence. They say the trading in KHI shares was "open, transparent, and legitimate". As the evidence establishes, it was not. They say the trial judge's misinterpretation of their "legitimate" trading and corporate activities led him to find deceit and the intention to create an artificial price.

[663] What led the trial judge to find deceit and the intention to defraud was the evidence. The deliberately manipulative strategies employed to prop up the KHI share price is glaringly obvious in the email communications the trial judge reviewed. The Crown's expert, Langley Evans, refuted the suggestion the trading activities were legitimate. No evidence was called to contradict that opinion.

[664] The evidence the trial judge accepted as credible and reliable supported his conclusion the *actus reus* and *mens rea* for fraud on the market had been proven beyond a reasonable doubt. What the trial judge heard from witnesses and saw in the documentary record was evidence of the unlawful nature of the conspirators' market activities during the indictment period—market domination, sales suppression, high closing, parking stock, use of nominee accounts and incentives, non-disclosure of material information—all in the service of propping up the KHI share price with the intent to defraud. The email communications taken together with the trading in KHI stock provide incontrovertible proof of the deceitful nature of Mr. Potter's and Mr. Colpitts' conduct, their intention to defraud, and the effect their conduct had on the market price of KHI shares.

The misapprehension of defence evidence claim

[665] Mr. Potter and Mr. Colpitts have utterly failed to show where the trial judge misapprehended any of the evidence. The trial judge considered all the evidence relevant to the substantive issues. The evidence established to his satisfaction Mr. Potter and Mr. Colpitts with their confederates conspired to commit fraud and committed fraud by unlawfully affecting the KHI share price through a variety of techniques. The normal market forces of supply and demand were displaced by these techniques resulting in the artificial inflation of the KHI share price throughout the indictment period. Mr. Potter and Mr. Colpitts accomplished this by not disclosing material information that would have been important for investors to know (deceit), directly lying to investors such as Thomas Hickey, George Unsworth, and Lutz Ristow (falsehood), and utilizing manipulative strategies in a highly regulated industry (other fraudulent means).

[666] Mr. Potter and Mr. Colpitts knew they were withholding material information they were obliged to disclose about a publicly-traded company. In his direct testimony, Mr. Colpitts echoed precisely what Langley Evans had said: material information is any information that could affect an investment decision.

[667] KHI's own "Disclosure, Confidentiality and Insider Trading Policy" established the requirements for disclosure of information "that has a significant affect [*sic*], or would reasonably be expected to have a significant affect [*sic*], on the market price of Knowledge House shares". Significantly, the policy stated information "may also be considered material if it is substantially likely" it "would be considered important to a reasonable investor in making a decision to buy or sell Knowledge House shares". KHI was required by the policy to "disclose material information", which was described as including projections of future earnings or losses and impending liquidity problems to the public immediately "except under limited circumstances". KHI's liquidity problems were not disclosed. Langley Evans' evidence contrasted KHI's public filings with the fact of the company's significant financial distress.

[668] It is completely irrelevant Mr. Potter and Mr. Colpitts complied with certain disclosure requirements of the securities industry such as filing their insider reports. Their stock market manipulations were hidden from view. KHI stock was purchased by investors who had no idea the share price was being rigged. Financial institutions loaned money on margin against the apparent value of the stock in complete ignorance of the conspirators' exhaustive efforts to buoy up the share price.

[669] The trial judge acquired a precise understanding of all this from the evidence. The email communications reveal in starkly unambiguous terms how strenuously Mr. Potter and Mr. Colpitts and their fellow conspirators worked to create a misleading impression of the value of KHI's stock. "Other fraudulent means" as an element of the offence of fraud includes non-disclosure of important facts.[470] The trial judge juxtaposed the public face of KHI—how Mr. Potter and Mr. Colpitts and others orchestrated KHI's appearance to investors—with what the evidence established was the reality in which the company was operating:

> [556] With all of this in mind, consider the perspective of potential investors analyzing KHI from April 2000 to July 2001. Looking at the market, they would see that the stock price appeared largely unaffected by the dot-com crash in March 2000. The price remained relatively steady through 2000 and 2001, usually trading between $5.00 and $6.50. It was outperforming the indices. The trade volume on the TSX was at times low, with occasional increases, not unlike most comparable start-ups. There were months where millions of dollars worth of shares crossed the exchange. A review of KHI's public disclosure would reflect a strong small-cap company with dynamic leadership, encouraging press releases, buzz on the street, and significant local support.
>
> [557] Potential investors reviewing KHI's public disclosure would not know: 1) that over 50% of the share volume on the TSX was generated by a small KHI "buying network"; 2) that the 540 account, funded by company insiders, purchased millions of dollars worth of shares; 3) that KHI had lost a major source of financing; 4) that insiders offered millions of their shares to deep-pocket investors for a fraction of the reported price; 5) that the company struggled to make payroll; or, 6) that the CEO and other major shareholders privately questioned KHI's very survival. To suggest that this information would not have been considered important to a reasonable investor deciding whether to buy or sell KHI shares is, frankly, ridiculous. …[471]

[670] The trial judge found the major KHI shareholders acted in accordance with an unwritten non-sell agreement. Mr. Colpitts, whose denial of such an agreement was rejected by the trial judge, conceded in cross-examination that had a managed selling agreement existed, there would have been an obligation to disclose it.[472]

Cases relied on by the appellants

[671] Mr. Potter and Mr. Colpitts say the trial judge should have understood what they did in a different light, that what they did was lawful. They again rely on *Québec (Autorité des marchés financiers) c. Forget*,[473] (which upheld Mr. Forget's acquittal by the Court of Quebec, an acquittal that was again upheld by the Quebec

Court of Appeal[474]) and *R. v. Campbell*,[475] both of which were discussed and distinguished by the trial judge. We find he was correct to conclude that neither case was of assistance.

Québec (Autorité des marchés financiers) c. Forget

[672] In *Forget* the issue was whether the accused's trading manipulated the value of shares in order to ensure an anticipated private placement closed at an agreed upon amount. Mr. Forget was the largest shareholder of Clemex Technologies Inc., a company traded on the TSX Venture Exchange. The Exchange accepted a proposed private placement at a price of $0.20 a share. A few days before the private placement was to be completed, Mr. Forget had his broker purchase 20,000 Clemex shares using his wife's account, an account over which Mr. Forget did not have trading authority. As a result, Clemex shares increased in value from $0.17 per share to $0.24.

[673] In a decision upheld on appeal in 2018, the Quebec Superior Court upheld Mr. Forget's acquittal:

> [193] Again, although the transaction was made at the end of the day at a rising price and the company's "blackout" policy was violated, the Tribunal is hardly convinced beyond a reasonable doubt that this transaction was not dictated by the game of supply and demand and it was manipulation.[476]

[674] Mr. Colpitts told the trial judge the trading in advance of the Barthe/Ristow private placement in November 2000 was no different than what Mr. Forget had done and been acquitted of. The trial judge reviewed this evidence and disagreed:

> [431] On the issue of the trading leading up to the Barthe/Ristow private placement, Mr. Colpitts testified that "price stabilization" or "price protection" in advance of a public offering, including a private placement, is accepted practice. In other words, according to Mr. Colpitts, there was nothing wrong with the major shareholders buying stock in order to keep the price at $6.50 until the deal closed. Mr. Potter, through counsel, argued that once the TSX agreed to protect the price at $6.50 per share, it no longer mattered what happened in the market. At the same time, he suggested that, as in *Forget*, the Court does not have sufficient evidence to know whether his assertion is correct. I disagree. This Court, unlike the Court in *Forget*, has sufficient evidence to conclude that the trading by the suspect group was not some form of legitimate price stabilization or price protection. This Court also has evidence that the stock price in the days and weeks leading up to the private placement would indeed have influenced whether or not the deal closed.[477]

[675] The trial judge then reviewed the evidence, including Langley Evans' testimony on private placements. Mr. Evans agreed with Mr. Colpitts that price protection from the TSX permits the issuance of shares to the investor at a previously agreed-upon price even if the shares have since increased in value. The trial judge explained how price protection worked for the Barthe/Ristow private placement, and how it was complicated by the fact the purchase was to be made in four equal installments. Contemporaneous email communications disclosed that a strategy of sales suppression was viewed as necessary to ensure the purchase went through:

> [436] The TSX subsequently granted price protection for the private placement at $6.50, subject (as always) to any intervening material change from the time of price protection to the time of issuance of the securities. As a result, if the market price went up after the price protection was in place but before the shares were issued, the German investors would still pay only $6.50 per share. The price they negotiated was protected. But what if the market price went down? Dan Potter answered that question in an e-mail to Calvin Wadden in response to news that Steve Tsimiklis "would like to have some type of proposal for liquidity." On November 19, Mr. Potter wrote to Mr. Wadden:
>
> > As you know, we are closing on a $3,250,000 treasury issue to our German friends- we are hoping to get this completed (closed) on Mon. or Tues. (Nov. 20 or 21). The price of this issue is $6.50 per share. **If the market is driven down in advance of this issue it is quite likely that the investors will not close.** This would be most harmful for the company and all of its shareholders, including Steve. Hopefully, he can be convinced to proceed with care, prudence and caution.
> >
> > …
> >
> > I'm copying Blois just to keep him in the loop.[478] [Emphasis of trial judge]

[676] The trial judge had evidence from Dr. Ristow that he followed the performance of the KHI stock on the TSX. Dr. Ristow saw in daily trading that shares were repeatedly purchased at a price of $6.50 per share. He testified he believed the share price was the result of the normal operation of supply and demand. It was his evidence that had he known about a conspiracy to maintain or manipulate the price of KHI's stock, he would not have invested.

[677] The trial judge had the evidence Dr. Ristow was missing: what was going on behind the scenes. Unlike the court in *Forget*, the trial judge was satisfied he had:

> … the evidence necessary to determine that the suspect purchases leading up to the private placement were not a lawful form of price stabilization and that a

> decline in the market price could result in the German investors pulling out of the deal.[479]

[678] We will make a final comment on the issue of "price stabilization". Mr. Colpitts was asked on cross-examination by the Crown whether he could "point to anything … that says that you can surreptitiously stabilize the price of stock … at any particular point in time without public disclosure?" Mr. Colpitts' response was telling and wrong: "[t]here's nothing that says you can't so it's—at law that's permissive".

[679] As the trial judge noted, Mr. Colpitts admitted there was "market support" being undertaken during the indictment period:

> [370] … Mr. Colpitts testified that there is nothing wrong with supporting or protecting the stock price, particularly in advance of a public offering like a private placement. On cross-examination by the Crown, Mr. Colpitts testified as follows:
>
> > Q. Let me just back up Mr. Colpitts you agree with me that there was a price support effort going on in 2000 and 2001 though. And you knew it at the time?
> >
> > A. There were circumstances in the concept of financing where people provided market support.
> >
> > Q. Well not just ---
> >
> > A. Yes.
> >
> > Q. --- during financing, at all times during 2000 and 2001.
> >
> > A. The company was seeking financing at all times in 2000 and 2001.
> >
> > Q. And sir there was a price support effort underway in 2000 and 2001 correct?
> >
> > A. There were support levels yes.
>
> [371] Mr. Colpitts intimated that these market support efforts were similar to those undertaken in "bought deals", which are an entirely different kind of transaction. Mr. Colpitts' evidence on price support is contradicted by the evidence of the Crown's expert who testified that, regardless of what you call it, it is inappropriate to engage in "market support" in order to prevent a stock from moving in a direction that it is expected to move. Mr. Colpitts never challenged him on this point during cross-examination.[480]

R. v. Campbell

[680] *Campbell* was a penny stock manipulation case. The Crown alleged the accused entered into an agreement, a conspiracy, "to affect, fraudulently and dishonestly, the public market price" of the shares of a junior mining company.[481] The issue at trial was whether their conduct, "fell within the parameters of legitimate 'stock promotion', or whether it exceeded those limits and constituted 'stock manipulation', in the generic sense contrary to the *Criminal Code*".[482]

[681] The accused were acquitted. Their testimony was accepted and raised a reasonable doubt:

> [89] … At the end of the day, however, I do accept the thrust of the accuseds' testimony, namely, that what they were engaged in was an attempt to promote the Penway stock, causing its price to rise in the process, to their own profit and advantage but also to the profit and advantage of those who followed them into the market to buy the stock.[483]

[682] There was also the issue of whether the *Campbell* accused had the means to control the stock. The judge in *Campbell* described this as an important factor:

> [48] … On balance I am not persuaded that the accused had control, either in the normal sense or in the expanded sense of being able to influence the shareholders not to sell which would enable them to carry out the accumulation side of a manipulation strategy. …[484]

[683] Here, the trial judge made no error in distinguishing *Campbell*. He had good grounds for viewing Mr. Potter and Mr. Colpitts as very different from the *Campbell* accused:

> [452] The decision in *Campbell* is distinguishable. As the trial judge said in that case, "the accused are promoters. They are penny stock salesmen. Their stock and trade is hyperbole." At the end, the trial judge found that the evidence had to be assessed in light of the roles of the accused in promoting this speculative penny stock. Nearly all of their conduct could be traced back to their salesmanship. Mr. Potter and Mr. Colpitts were not stock promoters or penny stock salesmen. They were the CEO, Chair of the Board of Directors, Legal Counsel, Lead Director and Chair of the Audit Committee of KHI.[485]

[684] Referencing intercepted communications and the issue of controlling the market, the trial judge found the facts in *Campbell* distinguished it from the case before him:

> [453] The Court in *Campbell* held that the accuseds' conversations … could support the existence of a conspiracy. They were, however, also consistent with

> an innocent explanation… . In this case, on the other hand, there is an abundance of evidence from the alleged unindicted co-conspirators in the form of contemporaneous e-mails that support only one interpretation. Providing the other unindicted co-conspirators with the opportunity to deny the plain meaning of those communications would be as helpful to the defendants (and to the Court) as the evidence of Dr. Schelew and Ms. Locke.
>
> …
>
> [455] Control over buying and selling is critical to an accused's ability to fraudulently affect the public market price. As will become clear later in this decision, I am satisfied that the defendants, unlike the accused in *Campbell*, were remarkably effective at controlling the market for KHI shares. As will also become clear, I find that there is far more evidence in this case to establish fraudulent intent than in *Campbell*.[486]

[685] We find no basis for disagreeing with the trial judge. There was "far more evidence" in this case establishing fraudulent intent, including the contemporaneous email communications. The basis for reasonable doubt, instrumental in producing acquittals in *Campbell*, did not exist here.

[686] Mr. Potter says several other cases are analogous—*R. v. Jay*,[487] *Lampard v. The Queen*,[488] and *R. v. Alston*,[489]—where the accused were acquitted. The issue in each case was proof of fraudulent intent. But the fact the evidence in those cases did not meet the proof beyond a reasonable doubt standard for conviction does not throw the trial judge's findings about Mr. Potter's and Mr. Colpitts' guilt into doubt.

[687] The *Jay*, *Lampard*, and *Alston* cases were all before the trial judge in Mr. Potter's post-trial brief. He did not refer to them in his reasons. We also do not find them useful. We will briefly review their facts.

R. v. Jay

[688] Mr. Jay was convicted at trial of entering purchase orders for a security at substantially the same time as sales orders were entered for him that were close to the same price "with intent to create a false or misleading appearance of acting public trading". The Ontario Court of Appeal overturned the conviction, finding the Crown was required to prove the purchase and sale orders were "entered with intent to create a false or misleading appearance of active public trading".[490] The

court found little correspondence between the purchase and sales orders and no evidence that Mr. Jay intended to create a false appearance of active public trading.

Lampard v. The Queen

[689] Mr. Lampard was charged with "intent to create a false or misleading appearance of active public trading" through transactions in relation to certain securities. His acquittals at trial were overturned on appeal and then restored by the Supreme Court of Canada. While the Supreme Court's focus was on whether an inference is a question of law or fact, the context in which the discussion occurred was the requirement for proof of intent. In reinstating the acquittal, the Court held: "[t]here is dispute as to the vital question of fact whether the appellant did the acts which he is proved to have done with the guilty intention specified in the section".[491]

R. v. Alston

[690] In *Alston*, the accused were prosecuted for fraudulently affecting the share price of a publicly traded company and for conspiring to commit that offence. Both accused testified. They gave evidence about obtaining permission from the Alberta Securities Commission to conduct the trades as they did. They stated there "was no guilty intention on their part to defraud anyone or to deceive and that their purpose was to distribute the shares in as orderly a manner as possible with the least possible fluctuation in the market price". The court found the explanation provided "is one that is capable of belief and accordingly the necessary fraudulent intent had not been proven beyond a reasonable doubt".[492]

[691] The *Jay*, *Lampard*, and *Alston* cases all turned on their particular facts. In these cases, as in *Forget* and *Campbell*, the evidence left the trial judges with a reasonable doubt. Here, the trial judge made no error in finding the evidence in this case did not.

[692] This case turns on facts the trial judge diligently reviewed. He carefully examined the evidence relevant to the issue of Mr. Potter's and Mr. Colpitts' intent. Mr. Potter did not testify. Mr. Colpitts was found by the trial judge not to be credible.

[693] The trial judge did not misapprehend the evidence that led him to conclude there was proof beyond a reasonable doubt of fraudulent intent, and convict accordingly.

The relevance of R. v. Riesberry

[694] A case the trial judge did find to be relevant was *R. v. Riesberry*.[493] Mr. Potter and Mr. Colpitts say he should not have. Mr. Potter says injecting a horse with a performance-enhancing drug cocktail prior to a race—the conduct at issue in *Riesberry*—was "deceitful because it [was] contrary to the regulatory scheme" governing horse-racing. Mr. Potter's argument appears to be that a fraud conviction can only be obtained by proof of the specific regulatory infractions he and Mr. Colpitts committed. He goes on to say not only was no evidence led of the regulatory regime for the securities industry, "in fact, none of [his] actions were contrary to any securities laws or regulations".

[695] Mr. Potter's submissions are entirely without merit. First, they are incorrect. Langley Evans gave evidence about the regulatory regime for the securities industry and Canada's capital markets. Second, they are a variation of the "lawful conduct" arguments we addressed, and dismissed, earlier.

[696] The trial judge discussed *Riesberry* in the course of reviewing the law as it relates to fraud *simpliciter*, a conviction he entered against Mr. Potter and Mr. Colpitts and then stayed. We are satisfied he correctly identified the legal principles in *Riesberry* and correctly applied those principles to the facts. He referenced the case again at the end of his review of the law relating to the section 380(2) offence:

> [505] The regulatory framework of Canada's capital markets can also inform the Court's analysis of "other fraudulent means" under s. 380. As discussed above, the Supreme Court of Canada in *Riesberry* held that the accused's "conduct constituted 'other fraudulent means' because in the highly regulated setting in which he acted, that conduct can 'properly be stigmatized as dishonest'": para. 25.[494]

[697] The accused in *Riesberry* was charged under s. 380(1) with defrauding the betting public after attempting to fix a horse race by injecting his entry with a prohibited drug. He argued he could not be convicted because his actions did not

put the public at risk of deprivation and, in the alternative, the risk of deprivation was too remote.

[698] Mr. Riesberry's acquittal at trial was overturned by the Ontario Court of Appeal. The trial judge recited key paragraphs from the court's reasons:

> [480] …
>
> Concerning the risk of deprivation issue, it was established at trial that horse racing is a highly regulated industry and that the regulatory scheme includes a ban on the presence of the performance-enhancing drugs utilized by the respondent in the body of a horse on race day. **Given this regulatory scheme, bettors were entitled to bet on each race assuming that no horse in the race was affected by such drugs.**
>
> In this regard, we agree with the Crown that the horseracing bettors are in a similar position to the investors in *R. v. Drabinsky*, 2011 ONCA 582. Just as investors were entitled to rely on the accuracy of the financial statements, bettors were entitled to assume compliance with the regulatory scheme. What occurred in this case was not a minor breach or minor non-compliance with the regulatory scheme. Where there is an attempt (successful or not) to affect the outcome of a race through the use of banned performance-enhancing substances, such a significant breach of the regulatory scheme necessarily places bettors at risk of being deprived of their bets. Indeed, as the trial judge found, the very purpose of the injection was to create "an unfair advantage" for the respondent's horse.
> …
>
> Further, as in *Drabinsky*, where there is a failure to disclose material non-compliance with the regulatory scheme, it is no answer to say bettors may have relied on other factors in making their bets. Bettors were entitled to assume compliance with the regulatory scheme when weighing those others [*sic*] factors and coming to a final decision. **Non-compliance with the regulatory scheme in a manner so as to affect the outcome of a race necessarily puts the bettors' economic interests at risk. Bettors were deprived of information about the race that they were entitled to know; they were also deprived of an honest race run in accordance with the rules.** In these circumstances, the trial judge erred in law because he failed to take account of the regulatory scheme in considering the risk of deprivation issue.[495] [Emphasis of trial judge]

[699] As the Supreme Court of Canada said in upholding the reversal of Mr. Riesberry's acquittal on appeal:

> [25] Mr. Riesberry injected and attempted to inject the racehorses with performance enhancing substances. The use of such drugs is prohibited and

> trainers such as Mr. Riesberry are prohibited even from possessing loaded syringes at a racetrack. This conduct constituted "other fraudulent means" because in the highly regulated setting in which he acted, that conduct can "properly be stigmatized as dishonest": *Olan*, at p. 1180. He carried out these dishonest acts for the purpose of affecting the outcome of two horse races on which members of the public placed bets. His dishonest acts, therefore, were intended to and in one case actually did result in the possibility that a horse that might otherwise have won would not. The conduct therefore caused a risk of deprivation to the betting public: it created the risk of betting on a horse that, but for Mr. Riesberry's dishonest acts, might have won and led to a payout to the persons betting on that horse. […] Mr. Riesberry's dishonest conduct created a risk that bettors would be deprived dishonestly of something which, but for the dishonest act, they might have obtained.
>
> [26] **There is a direct causal relationship between Mr. Riesberry's dishonest acts and the risk of financial deprivation to the betting public. Simply put, a rigged race creates a risk of prejudice to the economic interests of bettors. Provided that a causal link exists, the absence of inducement or reliance is irrelevant**. …[496] [Emphasis added]

[700] The same can be said of what Mr. Potter and Mr. Colpitts did: there was a direct causal relationship between their dishonest acts and the risk of financial deprivation to the investing public. Simply put, a rigged market created a risk of prejudice to the economic interests of investors. Indeed, when KHI collapsed, many investors suffered actual, significant losses.

[701] *Riesberry* was plainly relevant to the trial judge's analysis of the section 380(1) charge and consideration of "other fraudulent means". And there is undeniable proof of dishonest deprivation relative to the s. 380(2) charge, which is the subject of this appeal. *Riesberry* is directly on point and does not "unduly expand the scope of criminal fraud" as argued by the appellants.

Rejection of the defences—no error

[702] As we noted, Mr. Potter argues he did "exactly what a CEO of a growing company should do to ensure its success and he did not attempt to hide it". Both he and Mr. Colpitts complain the trial judge should have assessed their actions in the context of their fiduciary obligations to KHI. Had the trial judge not misunderstood the purpose of the defence evidence he would have seen their activities were common and accepted practice in the Nova Scotia securities industry at the time.

They say the trial judge wrongly dismissed what has been referred to as the "NBFL defence".

[703] Mr. Colpitts says the trial judge did not understand his defence and did not afford him adequate time and opportunity to develop it. In his submission, the trial judge:

- Lost patience with his defence.
- Failed to grasp the relevance of his defence, and ignored aspects of the evidence relevant to it, demonstrating he had "a closed mind".
- Precluded Mr. Colpitts from calling relevant evidence.
- Failed to grasp Mr. Colpitts' evidence about the email communications.

[704] Much of what Mr. Potter and Mr. Colpitts assert can be addressed summarily.

[705] There is no such thing as a "fiduciary duty" defence to fraud. Corporate obligations cannot be used as a cloak to shield criminality. "… [D]eliberately practised fraudulent acts which, in the knowledge of the accused, actually put the property of others at risk" is criminal.[497]

[706] The criminal law does not recognize a defence of contributory negligence.[498] That is to say, no defence can be mounted from the various arguments by Mr. Potter and Mr. Colpitts that NBFL was the real culprit. As noted by the Crown in its factum, these arguments included: NBFL's "operational wrongdoing and mismanagement within [their] Halifax branch and Montreal head office" was the reason for any manipulative trading; KHI's collapse was a result of "mismanagement of credit and concentration inside NBFL" and not because the conspirators could no longer prop up the share price; and NBFL's failure to intervene earlier to shut down Bruce Clarke's trading activities.

[707] The "no defence of contributory negligence" deals with the argument by Mr. Potter's lawyer, Mr. Greenspan, before us, that the NBFL/Nova Scotia Securities Commission secret agreement had "profound relevance to the Defence" but was "denigrated" by the trial judge "at every opportunity".

[708] The secret settlement agreement is discussed in a civil appeal decided by this Court, *National Bank Financial Ltd. v. Barthe Estate*.[499] It was executed in June

2005 and included admissions by NBFL that it failed to properly supervise Bruce Clarke and that "Clarke used the 540 Account to facilitate the market support for KHI on behalf of KHI insiders. …"[500] NBFL's admissions were no defence to the charges against Mr. Potter and Mr. Colpitts. Furthermore, the Crown was prepared to admit that NBFL had violated its regulatory obligations and failed to properly supervise Mr. Clarke.[501] The secret settlement agreement was irrelevant because nothing it contained provided Mr. Potter or Mr. Colpitts with any defence to the charges.

[709] *National Bank Financial Ltd. v. Barthe Estate* has been invoked by Mr. Potter and Mr. Colpitts in support of their arguments on appeal that the real culprit throughout was NBFL. It is necessary to emphasize that the condemnation of NBFL for egregiously misconducting itself in the complex civil litigation that followed the collapse of KHI has no relevance to the criminal prosecution against Mr. Potter and Mr. Colpitts.

[710] Trying to save a company from collapse is not a defence to fraud. Mr. Potter and Mr. Colpitts may have believed KHI could turn the corner but that does not absolve them of criminal liability for conspiracy and fraud. This principle is reflected in *R. v. Gaetz*,[502] a decision cited by the trial judge:

> [478] In *R. v. Gaetz*, [1992] N.S.J. No. 444, 1992 CarswellNS 245 (N.S.C.A.) the accused argued on appeal that the trial judge erred in failing to instruct the jury that the accused was acting in the best interests of the company and without personal gain. The trial judge recognized in his charge that the accused was trying to buy more time to meet the company's financial obligations, and that he had been acting diligently in attempting to find other sources of funds. Chipman J.A. rejected this argument, finding that it did not vitiate intent:
>
> > Indirect personal gain or absence of loss to the appellant was clearly at the heart of his efforts to keep [his business] afloat. Other motives, such as the welfare of his employees and perhaps in the long run even that of the bank, undoubtedly played their part, **but these generally good intentions of the appellant are of no help in determining whether he intended in fact to deprive the bank by fraudulent means. It is the deception and deprivation that is the evil aimed at by the legislation, any benefit or lack of it to the accused being of no consequence. It is clear too that fraud is not negated merely because the accused does not intend or desire that actual loss be suffered by the victim.**[503]
> > [Emphasis of trial judge]

[711] As Langley Evans testified, stock promotion—"exactly what a CEO of a growing company should do to ensure its success"—can be legitimate. What was done in this case bore no resemblance to what Mr. Evans said was acceptable:

> I think management is entitled to be optimistic about their company and enthusiastic. Otherwise they should perhaps seek other employment. And talking to the – generally the investment community or key parts of it is expected. It's legitimate. But it's constrained. You aren't there to tell people to buy the stock. That's for their – for those people to decide on their own.
>
> And so you can promote the company but you're supposed to stop short of telling people to buy the stock.

[712] Mr. Potter and Mr. Colpitts did not restrict themselves to encouraging investment. The evidence established they engaged in a tireless campaign of deceit and manipulation to sustain the KHI share price at artificially high levels.

[713] Mr. Potter has asserted inferences he says should have been relevant to the trial judge's fraud analysis. His inferences rely on unsupported factual claims, which are not relevant, and have largely been addressed already. For example:

- Even if he had testified, it was not relevant what Mr. Potter may have thought was the value of KHI or that, in his view, the artificially-maintained share price reflected its value.
- Even if Mr. Potter and Mr. Colpitts could have shown what they did was "accepted industry practice", that would have been irrelevant. By analogy, had all the other horse trainers also been injecting their horses with performance-enhancing drugs, Mr. Riesberry would still have been guilty of fraud.
- Motive is irrelevant to intent as is the belief the conduct is not improper.[504]

[714] The reason why KHI ultimately collapsed in September 2001 was also irrelevant to the charges. Mr. Colpitts attributed the collapse:

> [293] … to an "unforeseen confluence of internal and external factors" including the general market environment where financing dried up, the actions of NBFL, and the actions of insiders who treated their shares in the small-cap company like cash to purchase houses, cars, boats, and so on.[505]

[715] As the email communications we discussed earlier indicate, margin calls put a stranglehold on the conspirators' ability to continue their "market support"

efforts. With aggressive selling by shareholders "the bottom fell out of the KHI market".[506] None of those events had any bearing on what had already occurred—strategies undertaken by Mr. Potter and Mr. Colpitts to fraudulently affect the KHI's market share price.

[716] Mr. Colpitts' submissions the trial judge gave his defence short shrift are equally lacking in merit. The trial judge reacted to the evidence Mr. Colpitts sought to elicit from witnesses by explaining it was not responsive to the charges. The record confirms the trial judge tried hard to focus Mr. Colpitts and assist him in putting forward his defence. There is no basis for saying the trial judge "lost patience". The record is replete with examples of his patience, fairness, and restraint. Mr. Colpitts was treated with respect and courtesy throughout.

[717] The evidence supports the trial judge's assessment of Mr. Colpitts' defence:

> [276] Blois Colpitts called 18 witnesses, including himself. The bulk of these witnesses were individuals who worked at NBFL within the credit and compliance departments, or who were otherwise in a position to oversee the performance of Bruce Clarke. Mr. Colpitts' apparent objective in calling these witnesses was to establish: 1) that NBFL did not properly supervise Bruce Clarke; 2) that the mechanisms in place to identify and address inappropriate or unlawful behaviour were deficient; and 3) that NBFL caused or contributed to the demise of KHI by advancing too much margin, allowing too much concentration, and loaning shares for shorting purposes after cutting the margin rate. During closing submissions, the defendants argued that NBFL came up with the market manipulation allegations, after the stock price crashed, to deflect attention from its own failures.
>
> [277] The position of the Crown, with which I agree, is that the evidence of these witnesses is not responsive to the charges against the defendants. The Crown advised the defendants before Mr. Colpitts opened his case that it was willing to admit NBFL had failed to properly supervise Bruce Clarke. Further, the possibility that NBFL's actions caused or contributed to the demise of KHI is inconsequential. Whether KHI collapsed or prospered is irrelevant to whether the defendants artificially maintained the share price during the indictment period. The defendants' attempt to shift blame onto NBFL is misguided and I see no benefit to reviewing the evidence of these witnesses in any detail.[507]

[718] In his factum, Mr. Colpitts says he relied on NBFL management witnesses to:

> [S]et up my defence that I honestly relied on NBFL to supervise Mr. Clarke, and that any manipulative trading or deceit by Mr. Clarke was done without [his] knowledge or permission. … Neither I nor Mr. Potter were supervising Mr.

> Clarke's activities for legality because, as customers [of NBFL], that was not our job.

[719] The trial judge heard this evidence from Mr. Colpitts. He rejected it. In addition to noting with specific detail where Mr. Colpitts' testimony was inconsistent with other evidence he accepted, the trial judge held:

> [372] On the issue of high closing, Mr. Colpitts testified that he approached Bruce Clarke to ensure that he was following all the rules and was told to mind his own business. According to Mr. Colpitts, that was sufficient to end his inquiry. I do not accept this evidence. The evidence shows that Mr. Clarke regularly sought direction from the defendants and relied on them for advice, even allowing Mr. Colpitts to draft letters for him. I do not accept that Mr. Clarke told Mr. Colpitts, the self-described premier securities lawyer in Atlantic Canada, to stick to lawyering, or that Mr. Colpitts would have accepted such a response from him.[508]

[720] On the basis of the evidence, the trial judge rejected claims by Mr. Potter and Mr. Colpitts that Bruce Clarke was a rogue trader, that they could shelter behind NBFL's responsibility to rein him in, and that Mr. Clarke, representing NBFL offered "market-making services" to Mr. Potter, which he accepted. He was entitled to decide what evidence he accepted and what he could give no credence to.

[721] The trial judge decisively rejected the evidence of Robert Peters, called by Mr. Colpitts to establish that Bruce Clarke was "market-making" in relation to KHI stock under the authorization of NBFL. Mr. Peters' recollections were shown to be inaccurate. Mr. Peters had been an investment advisor and NBFL's branch manager in Halifax from January 1995 to September 1998. He testified that Bruce Clarke had been given permission, orally, by NBFL to act as a market maker for KHI. He said he had regularly monitored the 540 account and Bruce Clarke's use of it for market making. However, as the trial judge noted, portfolio statements for the 540 account, shown to Mr. Peters on cross-examination, proved the account had done no trading in KHI stock during the time he said he was monitoring it. The 540 account only became active after he left his position with NBFL in Halifax.

[722] Mr. Peters' credibility was dealt a fatal blow when it became apparent he was nothing more than an advocate for the defendants. In a letter to the RCMP on the eve of the trial's commencement in November 2015, Mr. Peters described the charges against Mr. Potter and Mr. Colpitts as a "gross miscarriage of justice". As the trial judge observed, he remained resolute in his views:

> [391] … According to Mr. Peters, the only wrongdoer in relation to KHI was NBFL. Mr. Peters maintained this position at trial despite admitting that he never reviewed (or even had access to) any information in relation to Bruce Clarke's accounts or his trading activities after September 1998. Nor did he ever see any internal NBFL documentation relating to KHI, or any of the KHI e-mails or other internal company documents in evidence. When asked whether there was anything he could be shown that would change his mind, Mr. Peters said, "I don't know if it exists." Mr. Peters was not a credible witness, and this Court cannot rely on his evidence.[509]

[723] The trial judge explored the "Bruce Clarke as a market maker" claim in painstaking detail and found it had no merit. He considered it in relation to the evidence from witnesses David Watson, the TSX's Registered Trader for KHI, and Langley Evans, and by reference to the Match Trade Report. Bruce Clarke's activities did not accord with the role of a market maker as described by the trial judge:

> [394] For every stock that trades on the Toronto Stock Exchange, the TSX appoints a designated market-maker firm (e.g., NBFL, BMO NB, etc.) and a Registered Trader (an employee of the designated market-maker firm). The Registered Trader represents the market-maker firm and carries out the market making duties for the stock. The Registered Trader for KHI was David Watson at BMO NB. Mr. Watson was a witness for the Crown.
>
> [395] The Registered Trader is responsible for supporting an orderly market for the stock. He must maintain a continuous two-sided market within the spread goal for the security. This means he must ensure that there is always a bid and an ask available to retail investors. If a shareholder wants to sell, the Registered Trader is there to buy, and *vice versa*. The Registered Trader's job is to enhance market liquidity and depth, and to moderate price volatility.[510] [Footnote omitted]

[724] The trial judge contrasted what Bruce Clarke was doing with how a legitimate market maker operates. A snapshot of this comparison is reflected in these paragraphs from the reasons:

> [414] By intervening to buy when a stock price is dropping, and to sell when it is rising, the market maker follows the market, helping to smooth out the stock without impacting the direction of the price. If market forces cause the stock price to begin to fall, or to rise, the market maker does not prevent that from happening. He simply moderates the speed at which the stock moves, preventing dramatic fluctuations in price. This is what separates the activities of a market maker from those of a market manipulator.
>
> [415] Bruce Clarke, on the other hand, used the 540 account primarily to purchase. Unlike a market maker, he did not buy on downticks and sell on upticks

> to earn a profit. On the few occasions where the 540 account did sell stock, it was done to create additional buying room. Unlike a market maker, Mr. Clarke accumulated a huge position in the stock. For example, the August 2000 portfolio statement for the 540 account shows the account holding 435,970 KHI shares, worth about $2.9 million. Moreover, there are numerous examples of Mr. Clarke leading the market (buying on an uptick, for example). Unlike a market maker, Mr. Clarke received his capital from KHI insiders like Dan Potter and Calvin Wadden, and kept Dan Potter informed on all of the 540 account's activities.[511]

[725] The trial judge reached the entirely supportable conclusions that: there was no evidence Mr. Potter accepted a market making service from NBFL, noting Mr. Potter did not testify; Bruce Clarke's activities could not be classified as market making; and the defendants never believed Mr. Clarke was acting on behalf of NBFL as a market maker for KHI.

[726] The trial judge was on solid ground when he found that Bruce Clarke was in fact a member of the conspiracy to manipulate the market. An email from Mr. Potter to Dr. Schelew on November 25, 2000 spoke of Mr. Clarke as a person "who has undertaken huge personal risks to invest in the company". The trial judge concluded "the only rational inference" was that Bruce Clarke "had undertaken 'huge personal risks' by using his position as an investment advisor to help the defendants control the market for KHI".[512]

[727] Mr. Colpitts was not precluded from calling any witnesses. The trial judge merely reminded him he needed to advance relevant evidence. As Mr. Colpitts' factum reveals, the evidence he claims he did not have time to prepare (and therefore could not call) was not relevant:

> All of this evidence would have provided a very different counter-narrative to the Crown's case against me. What the Crown and, ultimately, the trial judge saw as manipulation was, in fact, very ordinary efforts of the directors of a small-cap company to attract investors; to prevent breaches of fiduciary duties; to disclose everything that was required to be disclosed; to ascertain persons who were shorting the stock and attempt to mitigate the effects of the short-sales; to structure transactions in creative (but legal) ways to maximize benefits for all participants; all the while continuing to develop and market a product with significant future value.

[728] In effect, Mr. Colpitts is saying the trial judge prevented him from presenting evidence that would have shown the activities engaged in by him, Mr. Potter, Mr. Clarke, and all the others were lawful activities and there was no conspiracy to fraudulently affect the KHI share price. This submission has absolutely no merit.

[729] Of the evidence Mr. Colpitts called in his defence, in addition to himself, only Dr. Schelew and Ms. Locke could speak to the trading in KHI shares during the indictment period. The trial judge rejected this evidence as lacking credibility. He had before him ample evidence that contradicted the testimony given by these witnesses.

[730] The trial judge described Bernard Schelew as "evasive and defensive". The evidence he gave that Mr. Potter and Mr. Colpitts did not engage in sales-suppression in relation to his KHI shares was found by the trial judge to be "completely at odds with the contemporaneous e-mails exchanged by the parties".[513] The trial judge described the emails as "far more reliable".[514] He rejected Dr. Schelew's denials about "support buying". He characterized aspects of Dr. Schelew's evidence as "completely unbelievable" and concluded that "completely unbelievable … was a good representation of his testimony in general" and said:

> [382] …. When Dr. Schelew's testimony is considered against the e-mail chains and his objective trading data, the credibility assessment results in only one conclusion: his testimony relating to the actions of the defendants cannot be believed if it is at odds with the objective evidence.[515]

[731] The trial judge viewed Shirley Locke as "similarly unimpressive". He provided detailed examples of where her testimony was wholly inconsistent with the documentary evidence. She was unable to explain actions she took that assisted the conspiracy and, as the trial judge noted, others started to notice:

> [388] Ms. Locke's behaviour in relation to KHI even managed to attract the attention of the BMO NB compliance department during the fall of 2000. By March 2001, Tammy Carpenter, a compliance officer, concluded that the Halifax branch was "supporting/creating the market on this stock to avoid the deterioration of the price."[516]

[732] The trial judge concluded Ms. Locke was not credible, rejecting her evidence where it conflicted "with the evidence of the investor witnesses, and common sense…".[517]

[733] The trial judge viewed Mr. Colpitts in the same light, saying he did not accept his evidence where it "diverged from the contemporaneous written communications – and the only rational inferences that can be drawn from them".[518] Mr. Colpitts' explanations about the email communications were found to lack credibility. The trial judge identified Mr. Colpitts as one of the core

members of the conspiracy. He rejected Mr. Colpitts' characterization of admitted "support buying" as legitimate price stabilization.[519] This dispenses with Mr. Colpitts' complaint the trial judge "misinterpreted the trading activities" and found criminality "where none existed". The trial judge found criminality because that is where the evidence led him.

Conclusion

[734] The grounds of appeal attacking the reasonableness of the s. 380(2) verdicts and alleging a misapprehension of defence evidence are dismissed.

Issue #9: Did the Trial Judge's Conduct Give Rise to a Reasonable Apprehension of Bias, or Establish Actual Bias Against Mr. Potter and Mr. Colpitts?

[735] Mr. Potter and Mr. Colpitts say they were the victims of a biased trial judge. In his written submissions, Mr. Potter summarizes his position:

> 144. It is respectfully submitted that the trial judge's actions, viewed cumulatively, created an unmistakeable apprehension of bias. It was not only reasonable; it was actual. The trial judge's animosity toward Potter in his pre-trial rulings and in his s. 11(b) rulings is clear. His inability or refusal to understand the relevance of the defence evidence was indicative of a closed mind. His position merely echoed the position of the Crown that the entire defence was irrelevant and demonstrated his predisposition to decide in favour of the Crown. Potter did not receive a fair trial.

[736] Mr. Colpitts agrees with the above and adds further criticism. He says the trial judge purposely prevented him from presenting his defence evidence—a clear indicator of actual bias. The Crown says a review of the trial judge's case management, pre-trial decisions, trial management, and decisions absolutely refutes the appellants' allegations of bias. As we will explain, we agree with the Crown.

Background/Position of the Parties

[737] Mr. Potter's and Mr. Colpitts' allegation of bias cannot be narrowed to a single comment, action, or decision of the trial judge. Rather, their assertion of actual judicial bias has insinuated itself into the very fabric of the proceedings. It is

used to challenge virtually all the trial judge's conclusions. This includes the trial judge's findings we addressed earlier and upheld on the substantive merits.

[738] In their arguments before us, Mr. Potter and Mr. Colpitts expand upon the grounds set out in their virtually identical Notices of Appeal. They assert:

> 8. That the allegations of bias and the applications for pre-trial recusal dismissed by the learned trial judge were demonstrably justifiable and were ultimately manifested by a lack of balance and fairness to the accused during the course of the trial and in the manner in which the trial judge discharged his trial management function.
>
> 9. That in addition to the extreme and prejudicial comments made by the trial judge which precipitated the first recusal application which was dismissed on December 10, 2014, the trial judge persisted both substantively and procedurally in demonstrating a lack of objectivity and adversely pre-judged the conduct of the case for the defence. This bias was reflected in numerous rulings and comments throughout the trial. For example:
>
> - Unjustifiably concluding that this was a case where, after more than sixteen years of public humiliation, the accused did not want to bring themselves to trial. This finding was based on a flawed and inaccurate analysis of the historical record and which was, in fact, merely a "bald assertion".
>
> - Permitting the Crown unlimited time and opportunity to introduce both documentary and testamentary evidence at its leisure and sole discretion, while precipitously imposing a protocol for the assessment of relevance and trial efficiency in relation to the evidence of an unrepresented accused.
>
> - Despite the offer, freely and voluntarily made by both accused, to present an efficient and organized defence by not compartmentalizing the defences of each accused, the proposal was summarily dismissed on the basis of Crown speculation that the interests of the accused might not ultimately align.
>
> - Precluding the opportunity to bring a *Jordan* application prior to the conclusion of the trial which demonstrated an implicit prejudgment of the outcome of the application.
>
> - Imposing an extraordinary protocol for an application for a mistrial by creating a precondition that the trial judge first determine whether there was sufficient merit to the application to justify the court time which would be required to hear the application.
>
> - Refusing to permit any meaningful discussion of the effect and impact of his extraordinary and unilateral decision in March 2017 to adjourn the trial for a period of four [*sic*] months.

> 10. That the cumulative effect of the systemic bias demonstrated by the learned trial judge significantly affected and impaired the Appellant's perception of the fairness of the trial process and his ability to present his case. This lack of impartiality not only impaired the right to make full answer and defence but, in fact, impacted upon the determination not to call a defence.[520]

[739] In their oral submissions, Mr. Potter's and Mr. Colpitts' arguments fell into four broad categories of complaint about the trial judge:

- His objectionable pre-trial comments and stay decisions demonstrated his actual bias against them and a closed mind to their defence.
- His trial management rulings.
- His treatment of the mistrial application.
- His treatment of the defence evidence and his refusal or inability to recognize the validity of the defences they were attempting to put forward in response to the criminal charges.

[740] We address these submissions in the analysis to follow. Prior to doing so, it will be of assistance to set out the guiding principles.

Legal Principles

Bias

[741] This Court canvassed the principles governing a claim of judicial bias, or reasonable apprehension thereof in *Nova Scotia (Attorney General) v. MacLean*.[521] There, Saunders J.A. wrote:

> [39] First, as a matter of law, there is a strong presumption of judicial impartiality, which is not easily displaced. Second, there is a heavy burden of proof upon the person making the allegation to present cogent evidence establishing "serious grounds" sufficient to justify a finding that the decision-maker should be disqualified on account of bias. Third, whether a reasonable apprehension of bias exists is "highly fact-specific". Such an inquiry is one where the context, and the particular circumstances, are of supreme importance. The allegation can only be addressed carefully in light of the entire context. There are no shortcuts. See Wewaykum Indian Band v. Canada, 2003 SCC 45.
>
> [40] The "test" regarding what constitutes a reasonable apprehension of bias appears in the oft-quoted dissenting judgment of de Grandpré, J. in Committee for Justice and Liberty v. National Energy Board, [1978] 1 S.C.R. 369 at ¶40:

> ... the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information, that test is "what would an informed person, viewing the matter realistically and practically -- ...conclude? Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly.

[41] In relation to what constitutes the "reasonable person", the qualifications are not limited to just being "reasonable". The law requires a fully *informed* "reasonable person". That is:

> ...a person who approaches the question of whether there exists a reasonable apprehension of bias with a complex and contextualized understanding of the issues in the case. The reasonable person understands the impossibility of judicial neutrality, but demands judicial impartiality.
>
> [*R. v. S.(R.D.)(R.D.S.)*, [1997] 3 S.C.R. 484]

[42] In that case, the Supreme Court of Canada explained in detail the requirement for neutrality in decision-making, and how the duty to be impartial did not oblige judges to have no sympathies or opinions at all, but rather to ensure that they were receptive to other points of view. In his reasons, Justice Cory (joined by Justice Iacobucci, said at ¶119:

> 119 The requirement for neutrality does not require judges to discount the very life experiences that may so well qualify them to preside over disputes. It has been observed that the duty to be impartial
>
> > does not mean that a judge does not, or cannot bring to the bench many existing sympathies, antipathies or attitudes. There is no human being who is not the product of every social experience, every process of education, and every human contact with those with whom we share the planet. Indeed, even if it were possible, a judge free of this heritage of past experience would probably lack the very qualities of humanity required of a judge. Rather, the wisdom required of a judge is to recognize, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies that fellow citizens are free to carry, untested, to the grave.
> >
> > True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind.
>
> (Canadian Judicial Council, *Commentaries on Judicial Conduct* (1991), at p. 12.)

[43] In that case the issue was whether the trial judge's remarks concerning credibility when acquitting the accused in a criminal case had given rise to a

> reasonable apprehension of bias. In finding that the Crown had failed to prove bias or a reasonable apprehension of bias, Justices L'Heureux-Dubé and McLachlin, as part of the majority, concluded at ¶35:
>
> > True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind.
>
> [44] Having an opinion will not disqualify a decision-maker from fairly adjudicating a matter; it is the ability to approach one's consideration of the issues in dispute with an "open mind" that is required. See as well *Arsenault-Cameron v. Prince Edward Island*, [1999] 3 S.C.R. 851 at ¶3.

[742] Assessments of judicial bias are highly fact specific. In *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*,[522] Abella J. wrote:

> [26] The inquiry into whether a decision-maker's conduct creates a reasonable apprehension of bias, as a result, is inherently contextual and fact-specific, and there is a correspondingly high burden of proving the claim on the party alleging bias: see *Wewaykum*, at para. 77; *S. (R.D.)*, at para. 114, per Cory J. As Cory J. observed in *S. (R.D.)*:
>
> > … allegations of perceived judicial bias will generally not succeed unless the impugned conduct, taken in context, truly demonstrates a sound basis for perceiving that a particular determination has been made on the basis of prejudice or generalizations. One overriding principle that arises from these cases is that the impugned comments or other conduct must not be looked at in isolation. Rather it must be considered in the context of the circumstances, and in light of the whole proceeding.
> > [Emphasis in original]

[743] The conduct of trial judges is often the subject of scrutiny, including for comments made in the course of trial. However, judges are not expected to be silent observers in the process. In *R. v. Baccari*,[523] the Alberta Court of Appeal declined to find the trial judge's interjections and challenges to counsel indicative of bias. We reference:

> [24] During argument, trial judges are not precluded from commenting on evidence or attempting to focus the argument on issues of particular concern to the trial judge. Give and take between a trial judge and counsel may be robust but observations made by a trial judge during argument are not pronouncements: *R. v. Hodson*, 2001 ABCA 111, 281 A.R. 76 at paras. 33 and 35. A trial judge is not precluded from voicing concerns about the evidence. Nor is a trial judge precluded from directing counsel's attention to the real issues in the case. Trial

> judges are not expected to be mute manikins: *R. v. W.F. M.* (1995), 169 A.R. 222 (C.A.) at para. 10.

[744] As will be discussed later, Mr. Potter and Mr. Colpitts say the outcomes of pre-trial motions demonstrate the trial judge's pre-determination of critical issues, including credibility. Again, this calls for a contextual examination of the trial judge's conclusions. We note the comments of the Saskatchewan Court of Appeal in *R. v. E.E.D.*,[524] where the trial judge's comments regarding a child witness' credibility during a qualification motion was alleged to be an indicator of bias. The court wrote:

> [13] In his ruling on this matter, the trial judge said the following:
>
> > Now, I find that [S.] has been very forthright, first of all. I find that she does not understand the nature of an oath or solemn affirmation and, of course, at her young age I understand that because those are big words and a lot of older people don't understand what they mean. However, I find that she is clearly able to communicate the evidence and that she understands the necessity of telling the truth. And she has promised to tell the truth. I'm satisfied that she knows the difference between truth and falsehood. I find also that she's committed to telling the truth. She clearly, in my opinion, is able to communicate the evidence, in fact, I must say I'm very impressed with her as a young girl. She's very forthright and there's no doubt in my mind that she is able to communicate the evidence and that she knows it's important to tell the truth and I'm satisfied that she will tell the truth. Accordingly, I find that [S.] is in summary able to communicate the evidence and she may testify on promising to tell the truth as she has done. She has promised to tell the truth. (Trial transcript, p. 60, lines 2-23)
>
> …
>
> [15] It is my respectful view that these words would not give rise to a reasonable apprehension of bias. The findings of the trial judge largely reflect the test he was obliged to apply in order to permit such a young witness to testify: that she understood and *appreciated* the obligation to tell the truth—that she was committed to telling the truth. This was the test to be applied, and the trial judge cannot be faulted for applying it. The words, "I'm satisfied that she will tell the truth," while, if interpreted literally, could constitute a prejudgment of the witness's testimony, in the context imply nothing more than that the trial judge was satisfied that S.B. was committed to telling the truth. [Emphasis in original]

[745] The above authorities highlight the importance of applying a contextualized approach to considering allegations of judicial bias.

Case and trial management

[746] Many of Mr. Potter's and Mr. Colpitts' allegations of bias arise in the context of the trial judge exercising case or trial management functions. We turn to the scope of those functions and the relevant principles.

[747] It is widely recognized trial judges have a discretion to manage proceedings before the court. This is not a new development. Twenty-five years ago, the Alberta Court of Appeal observed in *R. v. Steel*:[525]

> [26] It was said by one counsel during argument that there was a "strong tail wind pushing this trial along." This curious comment seemed to imply a criticism of the trial judges, or judges generally, for giving effect to a determination that a proceeding not unnecessarily bog down. In our view, it is the unpleasant duty of the courts to see to it that justice is not unduly delayed. Even when every party to a proceeding seems to be content to see litigation drag on, it is in the public interest to prevent that unhappy result. **The modern concept of case management requires a judge not merely to see to it that every party has a fair hearing, but also to see to it that the parties do not abuse that right**. For example, parties - and their counsel - should prepare for a step in a proceeding when preparation is required in order to move the proceedings along, and not just when it suits their calendars or their other interests. **Courts today must decide, and give directions on, matters that unreasonably delay proceedings**. Unreasonable delay can come from prolixity, but also hairsplitting and other techniques. Increasingly judges in the future will be required to ration time and effort for motions and objections in terms of the quality of the application. One example comes from this case. One accused sought a judicial stay of this serious charge simply because an accomplice told the jury that he had pleaded guilty for his part in the affair. This, in our view, exemplifies the hopeless applications that frequently are brought and which must be sternly regulated by the trial judge. [Emphasis added]

[748] In recent years the management of proceedings, particularly in the criminal realm, has been framed in more obligatory language. In his 2012 paper, "The Duty to Manage a Criminal Trial", Justice Casey Hill wrote:

> [1] Originally cast in terms of inherent authority to control the processes of the court and prevention of abuse of the process, it is today recognized that a trial judge has a duty to *manage* the trial process balancing fairness to the parties as well as efficient and orderly discharge of court process. Judicial management of litigation recognizes that "there is more at stake than just the interests of the accused". Management involves control, direction and administration in the conduct of the trial. This power, settled within a broad discretion, relates to the entirety of the trial proceeding extending beyond the scope of pre-trial case management rules designed for "effective and efficient case management". [Footnotes omitted; emphasis in original]

[749] One of the most referenced statements of the scope of a trial judge's management function is that of Rosenberg J.A. in *R. v. Felderhof*.[526] There, in the context of a complex securities prosecution in relation to Bre-X Minerals Ltd., the trial judge provided direction to the Crown as to the order of witnesses. On appeal, the Crown argued the trial judge's conduct was inappropriate and interfered with its right to a fair trial. In dismissing that ground, Justice Rosenberg noted:

> [38] Admittedly, this trial management power must be exercised with care. The decision of this court in *Sorger v. Bank of Nova Scotia* (1998), 39 O.R. (3d) 1, demonstrates the dangers of an overly interventionist approach. At the beginning of the trial in the *Sorger* case, the trial judge told plaintiff's counsel to call certain evidence first. When both counsel expressed reservations about proceeding in that manner the trial judge said, "With great respect, the two of you may be *ad idem* on this, but I'm running this trial. Normally I go along with what counsel agree on, but this may be just a waste of time." This court held, at p. 5 that it "was inappropriate to require the plaintiffs to begin in this way" and this was one of a number of incidents during the trial that led this court to find, at pp. 8-9 that "the cumulative effect is, in our view, unfortunately clear. A reasonable and informed observer would have a reasonable apprehension that the mind of the trial judge was closed to a fair and impartial consideration of the appellants' case. There is a reasonable apprehension of bias." However, I do not read the holdings in *Sorger* as being inconsistent with the court's trial management power, including a power, when appropriate to direct the order in which certain evidence should be called. The direction by the trial judge in that case at the opening of the trial was inappropriate. It was part of a pattern of conduct demonstrating impatience with the plaintiffs and a concern that counsel was wasting time to the point where there was a reasonable apprehension of bias.
>
> [39] The context of this case is far different. The trial judge had spent 67 days of trial with the case. **He was intimately familiar with the issues and the potential pitfalls of proceeding in the way suggested by the prosecution. Far from showing impatience or partiality to one side or the other this trial judge had shown considerable patience and restraint. But, he was of the view that something had to be done to bring the case back under control. This was not a demonstration of partiality but an exercise of a trial management power.**
>
> [40] **Whatever may have been the case in the past, it is no longer possible to view the trial judge as little more than a referee who must sit passively while counsel call the case in any fashion they please.** Until relatively recently a long trial lasted for one week, possibly two. Now, it is not unusual for trials to last for many months, if not years. Early in the trial or in the course of a trial, counsel may make decisions that unduly lengthen the trial or lead to a proceeding that is almost unmanageable. **It would undermine the administration of justice if a trial judge had no power to intervene at an appropriate time and, like this trial judge, after hearing submissions, make directions necessary to ensure that the trial proceeds in an orderly manner.** I do not see this power as a

> limited one resting solely on the court's power to intervene to prevent an abuse of its process. Rather, the power is founded on the court's inherent jurisdiction to control its own process. [Emphasis added]

And later:

> [57] **I think something should be said about the trial management power. It is neither necessary nor possible to exhaustively define its content or its limits.** But it at least includes the power to place reasonable limits on oral submissions, to direct that submissions be made in writing, to require an offer of proof before embarking on a lengthy *voir dire*, to defer rulings, to direct the manner in which a *voir dire* is conducted, especially whether to do so on the basis of testimony or in some other form, and exceptionally to direct the order in which evidence is called. The latter power is one that must be exercised sparingly because the trial judge does not know counsel's brief. However, a judge would not commit jurisdictional error in exercising that power unless the effect of the ruling was to unfairly or irreparably damage the prosecution. That did not occur here. While some other judge might not have made the order that the trial judge did in this case and might very well have seen the merit of immediately proceeding with the omnibus document motion, I am not convinced that the trial judge's decision to do otherwise was a jurisdictional error. On my reading of the record, the ruling did not prevent the prosecutor from calling his case. I agree with the application judge's view (at para. 227) that deferring the documents motion did not "unfairly or irreparably" damage the position of the prosecution. [Emphasis added]

[750] This Court has recognized a trial judge's use of time limits in relation to a self-represented accused's cross-examination of witnesses in a disclosure application as an appropriate exercise of their inherent power to manage the proceedings. This Court in *R. v. West*[527] considered the following parameters set by the trial judge:

> [219] … The trial judge clearly articulated the limits, and the reasons they were needed, as follows:
>
> > … With each witness, I will give Mr. West 15 minutes to examine the witness. If anything probative emerges in that 15 minutes, I will not intervene. If nothing emerges as probative value to the application, at 15 minutes I will notify Mr. West that we are at that point in time. After another 15 minutes, if nothing comes out, I will terminate the examination. If good evidence comes out, I will allow Mr. West to continue until he exhausts that line of relevant examination. In other words, I will only end the examination if I conclude that nothing has been produced and the examination does not change focus in any material way.

[751] In upholding the trial judge, the Court wrote:

> [220] It is well recognized that a trial judge has the inherent power to manage the trial being conducted before him or her, and to promote the efficient use of court time. (See **R. v. Morley** (1988), 87 Cr. App. R. 218 (C.A.); **R. v. Fabrikant** (1995), 97 C.C.C. (3d) 544 (Que. C.A.); **R. v. Felderhof** (2003), 180 C.C.C. (3d) 498 (Ont. C.A.); **R. v. Schneider**, 2004 NSCA 99, [2004] N.S.J. No. 314.)
>
> [221] We do not see any error in the steps taken by the trial judge to ensure the trial was conducted in a fair and orderly manner. As observed by this Court in **Schneider, supra**:
>
> > [58] The rights afforded accused persons cannot be permitted to undermine the object for which they are given - the holding of a fair trial according to law. As Chipman, J.A. said on behalf of the Court in **R. v. Howell** (1995), 146 N.S.R. (2d) 1; [1995] N.S.J. No. 483 (Q.L.) (C.A.), aff'd [1996] 3 S.C.R. 604 "... the many safeguards built into the criminal justice system for an accused, particularly an unrepresented one, cannot be allowed to give rise to a right in an accused person to disrupt the orderly process of a trial." (para. 55)

[752] All of the above pre-dates *Jordan*. Earlier we set out the Supreme Court's expectation that all participants in the justice system must contribute to reducing delay. This includes trial judges. The scope of a trial judge's case management functions must also be viewed in light of *Jordan*'s direction that the culture of complacency in criminal proceedings is not to be tolerated.

Analysis

Standard of review

[753] If a reasonable apprehension of bias arises from, or an actual bias is found in, a judge's words or conduct, then the judge has exceeded his or her jurisdiction and erred in law.[528]

The trial judge's comments, pre-trial and stay decisions that allegedly demonstrated his actual bias

[754] Many of the alleged indicators of bias raised by Mr. Potter and Mr. Colpitts on appeal were made known to the trial judge. Three pre-trial recusal motions were advanced on the basis of the same comments and decisions they now ask us to find as conclusive of the trial judge's bias. They have not directly appealed the trial

judge's dismissal of the recusal motions, nor suggest he applied wrong principles of law. Their arguments are, however, a challenge to the trial judge's failure to recuse himself in response to the motions. We address in turn, the trial judge's reasons and, finally, our assessment of the appellants' arguments.

Recusal #1

[755] The first recusal motion was advanced by all three defendants. In his Notice of Application filed November 20, 2014, Mr. Colpitts sought the trial judge's recusal on the following basis:

> 2. That on February 28, 2014, a pre-trial application pursuant to s. 11(b) of the *Charter of Rights and Freedoms* (the "*Charter*"), was scheduled for November 24, 2014;
>
> 3. That at a case management conference held on June 26, 2014, the trial judge stated that the trial dates set for January, 2015, would not move "come hell or high water" and that the trial dates were "not going anywhere";
>
> 4. That counsel for the Colpitts was sufficiently concerned by the nature of His Lordship's remarks to inquire whether the [*sic*] His Lordship intended to convey that he had pre-judged the previously scheduled s. 11(b) application;
>
> 5. That on October 14, 2014, the defendants brought applications seeking relief with respect to documents and records relating to the investigation of the same conduct that is the subject of the current criminal proceedings by another government agency, the Nova Scotia Securities Commission ("NSSC");
>
> 6. That on October 31, 2014, in providing his written reasons for disposing of the application, the trial judge made unnecessary and conclusory findings that would cause a reasonable person with knowledge of all the relevant circumstances to conclude that the trial judge has an appearance of bias in that the trial judge has made up his mind on a serious issue that will affect or be prejudicial to the outcome of any applications that will be brought by the defendants, including any pre-trial applications pursuant to s. 11(b) or otherwise of the *Charter*, and to the outcome of the trial;
>
> 7. That in particular, in his decision of October 31, 2014, the trial judge found that:
>
> > (a) There was "absolutely no good reason for the defendants to be allowed to circumvent *O'Connor*" (paragraph 15);
> >
> > (b) "that the defendants have an alternative purpose in proceeding as they have" (paragraph 14);
> >
> > (c) "that the defendants' approach amounts to an 'end run' around *O'Connor* and is driven by section 11(b) considerations" (paragraph 12); and

> (d) that "the defendants' refusal to return the hard drive is another attempt at the 'end run' around *O'Connor*" (paragraph 35);
>
> 8. That at a case management conference held on November 10, 2014, the trial judge stated that the October 31, 2014 decision "had a message in it", and later referred to the above findings and stated, "Those were strong words, those words are not going to change, and they are words that will come into play" in relation to a future application brought by the defendants;
>
> 9. That the trial judge has exhibited actual bias and, at the very least, a fully informed, reasonable person would perceive that the trial judge could not impartially adjudicate an issue that he has already decided and subsequently indicated would not change;
>
> 10. That in particular the trial judge has made a finding, in advance of any applications that may be brought by the defendants pursuant to the *Charter*, that the defendants, as opposed to the Crown or the Court, have been the cause of delay associated with the defendants' efforts to obtain production of the NSSC materials;
>
> 11. That the trial judge has made adverse findings with respect to the credibility of the defendants in advance of any testimony that the defendants might provide, either in support of any applications or otherwise in the course of the trial in these proceedings;

[756] Mr. Potter's and Mr. Clarke's requests for recusal were based on the same grounds as above. The appellants have advanced substantially the same allegations in this Court.

[757] The Crown opposed the recusal motions. It argued the trial judge's impugned conduct did not give rise to grounds for a recusal. The Crown's response to the allegations is summarized in the opening paragraphs of its motion brief:

> 1. By the very nature of their judicial obligations, judges must make adverse findings, determine credibility, focus the issues, debate the law and control the process. That is a judge's job. This recusal motion is based solely on the proper exercise of this Court's judicial function. Nothing more. It therefore is without foundation.
>
> 2. The evidentiary and persuasive burden is on the defendants to displace the presumption of judicial impartiality and integrity with cogent evidence of actual bias or a reasonable apprehension of bias. The burden is "substantial", and cannot be the result of simple adverse findings or excessive sensitivity to this Court's attempt to control the proceedings. Disqualification can only be met where a reasonable person, fully informed of the circumstances would conclude that the judicial officer could not act fairly.

> 3. This application falls well short of that threshold. It rests upon a decontextualized interpretation of judicial rulings and comments during case management conferences; it ignores or minimizes the contentious issues properly before the Court, as well as the history of the proceedings. Viewed in its entirety, the record reveals that the defendants' complaints are without foundation.
>
> 4. In seeking disclosure of the non-privileged NSSC materials, the defendants asked this Court to reach into a residual authority. In determining the matter, this Court had to assess whether and why it should depart from the *O'Connor* process in favour of the ill-defined "inherent jurisdiction" approach. The finding that the defendants' conduct was driven by s.11(b) considerations was a relevant and material consideration in rejecting the inherent jurisdiction argument; it was one of the reasons why this Court refused the request to reach into residual authority and was an entirely appropriate factual determination.
>
> 5. Furthermore, this Court has continuously provided the defendants with opportunities to litigate issues they state are fundamental to their rights to full answer and defence. Instead, the defendants have squandered weeks of judicial resources. They have no basis to complain that this Court wants to ensure that the lengthy period of time assigned for this trial is utilized in a manner that is in the public interest.

[758] The Crown's response to the allegations of bias have remained consistent throughout the trial and on appeal.

[759] The recusal motion was heard on December 4, 2014. Oral reasons dismissing the motion were given on December 8th, with written reasons following on December 10th [529]. After reviewing the legal principles relating to judicial impartiality and the heavy burden borne by the defendants to establish a reasonable apprehension of bias, the trial judge declined to recuse himself. With respect to the defendants' allegation he had pre-judged the s. 11(b) *Charter* application because of his finding they had purposefully delayed the proceedings, the trial judge said:

> [39] I will address the section 11(b) issue first. There is no section 11(b) application before this Court at this time and the trial proper starts in one month. It has been just short of four years since the indictment was preferred. The delay to date is significant and this Court recognizes the time requirements of such an application. Additionally the defendants advised the Court that their delay application will include pre-charge delay and that will increase the time and resources required to resolve the issue. Also obvious to the Court was the need to resolve this issue before the trial as the remedy for unconstitutional delay is a staying of the charges.
>
> …
>
> [41] I find that the "reasonable" person, fully informed would not conclude that I have pre-judged any future application. The reasonable person, with a full

> history of this file, would conclude the cited language was an effort to motivate the defence to bring their applications in advance of the January 12, 2015 trial date. After all this trial was already once adjourned. I believe I have a duty to protect the accused persons' cases from entering the realm of unconstitutional delay.
>
> [42] The defendants argue that I am attributing delay to them and that such suggests pre-judging the issue. There have been no Crown applications in 2014. The Court has continuously offered extra weeks and resources if that would move things along. There is no cogent evidence that would displace the presumption of impartiality in respect to any section 11(b) application the defendants may choose to make.[530]

[760] Regarding Mr. Potter's and Mr. Colpitts' assertion that several of the trial judge's comments were indicative of actual bias, he said:

> [43] The second assault on my language relates to my October 31, 2014 ruling (2014 NSSC 392) and in particular the following passages:
>
> - There was absolutely no good reason for the defendants to be allowed to circumvent *O'Connor*";
> - "the defendants have an alternate purpose in proceeding as they have";
> - "the defendants' approach amounts to an 'end run' around *O'Connor* and is driven by section 11(b) considerations"; and
> - "the defendants' refusal to return the hard drive is another attempt at the 'end run' around *O'Connor*".
>
> Also challenged are my words spoken at a case management conference held on November 10, 2014:
>
> > I've certainly been speaking to you people on a regular basis about the scheduling of these applications and I think my decision of the 31st had a message in it and that is that we are proceeding as scheduled. And if you bring an 11(b) application, we'll be doing it at that time.
> >
> > If there are other applications, I'm not sure we're going to be able to accommodate you without encroaching on the trial dates. That's a little more palatable, given that we are without a jury. But nobody should make any assumptions that I'm not going to be sitting here on the 24th of November and I'm going to be sitting here on the 12th [of January], ready to go and that's the way it's going to be. And if you want to make applications to adjourn anything, I suspect that you better make them pretty soon so that I can deal with them promptly.
>
> The defendants have not made an application to further adjourn this trial.

> [44] I find that the "reasonable" person, fully informed would not conclude that the above phrases amount to bias or an apprehension of bias. The reasonable person would have to be aware of the events of the past several years. They would also have to be aware that matters must make it to trial "within a reasonable time" as per section 11(b) of the *Charter*. They would also have to be familiar with the options available to counsel to cause production of third party records. I conclude the "reasonable" person would see the cited phrases as the Court's efforts to motivate the defendants to bring their applications against the NSSC at times that did not threaten these very late trial dates.
>
> …
>
> [47] Additionally, the Court expressed concern about the time it would take to complete the *O'Connor* application. The amount of documentation measured in the thousands of pages. Notices would have to be given to many individuals and organizations. Issues of privilege would have to be vetted. The language cited would be viewed by the reasonable person as an effort by the Court to move matters along. After all it has been almost four years since the indictment was preferred. Once again I find there is no cogent evidence that would displace the presumption of impartiality in respect to any *O'Connor* application. These words represent the Court's direction that "we can't afford to waste time."[531]

[761] Finally, the trial judge rejected the complaint he had impugned the defendants' credibility:

> [48] The defendants argue that my conduct/language impugned their credibility, and as such, I should recuse myself. Specifically Mr. Garson stated at page 30 of his motion brief:
>
> > On the section 11(b) application, the defendants will be required to produce evidence as to the actual prejudice the pre-charge delay has caused them. Your finding that the defendants have been driven by 11(b) considerations is a finding of fact that the defendants have been purposefully dragging out the proceedings which undermines any claim to privilege they may advance before even beginning to produce this evidence. Accordingly, to succeed the defendants must start by attempting to persuade you of their credibility.
>
> With respect I do not accept this submission. The defendant's [*sic*] credibility is not in issue now and has never been the subject of comment by this Court. All phrases cited by the applicants are in response to their litigation strategy which had the potential to sidetrack the trial. At no time has this Court considered the credibility of Messrs. Clarke, Colpitts and Potter. I find that the reasonable person would not conclude that any of my words impugned the defendant's [*sic*] credibility.[532]

Recusal #2

[762] When the first recusal motion was brought, the *O'Connor* application had not yet been heard. The trial judge's *O'Connor* decisions triggered a second recusal motion by Mr. Colpitts. The "Notice of Renewed Application for Recusal" was filed April 7, 2015 and repeated nearly all the grounds in the first motion. It added further allegations of bias arising from the first recusal decision and the *O'Connor* rulings. Specifically, Mr. Colpitts pointed to the trial judge's decision to release investigators' notes after finding they were not relevant. He asserted this was indicative of bias.

[763] The motion was heard on April 14, 2015. In his written reasons,[533] the trial judge considered the new claims of bias, and revisited the previous ones. The trial judge set out the background of his release of the investigative notes:

> **THE INVESTIGATIVE NOTES:**
>
> [3] In the final *O'Connor* ruling I ordered the release of the investigative notes of the two principle Securities Commission investigators. In the privilege ruling I commented as follows at paragraphs 46 and 47:
>
> > [46] Mr. Connell-Tombs was an investigator in the enforcement department of the Investment Dealers Association of Canada throughout the NSSC investigation. He is named in the amended section 27 order dated April 23, 2003. I have been provided with a binder that contains 959 pages of handwritten notes. They span the period from August 28, 2002 until September 30, 2004. Much of these notes are illegible.
> >
> > [47] The notes do not carry any privilege designation. They are clearly the same as police officer's notes in a *Criminal Code* investigation. A police officer's notes are routinely disclosed to defendants. Given that the NSSC cooperated with the RCMP, I see no reason why these notes attract any kind of privilege. Scott Peacock's notes are no different than a police officer's notes.
>
> I released these notes as I felt they should not have been the subject of the *O'Connor* regime. The Securities Commission have, from time to time, released documents to the defendants by consent. I would have expected these notes would be similarly released. Given that the RCMP cooperated with the Securities Commission, I question why they were not subject to first party *Stinchcombe* disclosure.
>
> [4] I am also of the view that the Scott Peacock notes attract the same analysis. They should not have been subject to the likely relevance analysis for production. The disclosure of the investigators' notes are routinely disclosed to defendants. I ordered the release of these investigative notes without resort to a likely relevance analysis. Clearly I misspoke at paragraph 52 of my February 27,

> 2015 decision when I stated "I have concluded the defendants have not established they are likely relevant to an issue in this trial." However, I made it very clear in the next sentence that "I am prepared to release Scott Peacock's notes as investigator's notes."
>
> [5] Mr. Colpitts submitted as follows at paragraph 13 of his April 7, 2015 brief:
>
> > 13. At paragraph 52 of your decision, Your Lordship explicitly found that the notes of Scott Peacock (and Brian Connell-Tombs) were not likely relevant but nonetheless ordered them disclosed. If Your Lordship had truly been of the opinion that these notes did not meet the likely relevant standard, such an order for disclosure would have been illegal and in violation of the rights of affected third parties. Your Lordship has previously found that the court does not enjoy any inherent jurisdiction to make such an order, especially once an *O'Connor* application has been filed, and (as reviewed above) your Lordship recognized that if documents are found not to be likely relevant *O'Connor* does not provide any authority to order the documents produced. Accordingly, it was not open to the court to reach this conclusion and make the production order that it did. The order is illegal on its face.
>
> I want to make it crystal clear that these investigative notes were produced to assist the defendants and without resort to the *O'Connor* analysis. I reject the suggestion that releasing these notes amounts to evidence of judicial partiality.[534] [Emphasis in original]

[764] The trial judge again declined to recuse himself.

Recusal #3

[765] We earlier addressed Mr. Potter's and Mr. Colpitts' substantive challenges to the trial judge's decision in Stay Decision #1,[535] released on August 12, 2015. Mr. Potter and Mr. Colpitts were, and still are, of the view that the conclusions reached by the trial judge were strong indicators of bias. On September 10 and 15, 2015, they filed more motions seeking his recusal. The motions were heard on September 22, 2015. The trial judge dismissed the motions on September 24th, with written reasons following on September 29, 2015.[536] In his reasons, the trial judge set out the allegations of bias. They are the same as those now advanced in this Court. The trial judge noted:

> [7] On September 10, 2015 Mr. Potter filed a third recusal motion. This motion came in the wake of my ruling on delay and abuse of process. Essentially Mr. Potter argues that his "concerns in recusal #1 appear to have been realized in the section 11(b) decision rendered on August 12, 2015 [stay decision]." He

further argues I have "made findings about Mr. Potter's credibility and motives" and "made findings that Mr. Potter's main defence is not relevant to the charges against him."

[8] Mr. Potter filed an affidavit in support of his motion. The following conclusions appear in that document:

> 1. That in my February 27, 2015 ruling I failed to get the facts right.
>
> 2. That in my "stay" decision I overruled Justice Hood's *McNeil* ruling and that amounts to an impermissible appeal.
>
> 3. That I failed to see the significance of Mr. Rousseau's evidence in which he acknowledged he was "duped" by his NBFL superiors into giving the police false information.
>
> 4. That I erred in commenting on the "joint investigation" issue.
>
> 5. That I contracted the "virus of tunnel vision," and, as such, I am shielding NBFL from investigation.

It is clear from Mr. Potter's affidavit that he does not feel my prior rulings are correct. He goes so far as to describe my February 27, 2015 decision a "disaster." He asserts that I have acquired a negative view of his credibility and, as such, he "no longer feel [*sic*] secure about testifying on my own behalf at the trial" and he "cannot have a fair trial if he remains as the trial judge." Essentially he argues that my prior rulings are the product of actual bias rather than legal analysis.

[9] On September 16, 2015 Mr. Colpitts filed a similar motion. He advanced the following grounds:

> 1. That I erred in the "likely relevance" decision by not finding "a single document met the likely relevance threshold."
>
> 2. That he objected to my release of the running notes of Mr. Peacock and Mr. Tombs without labelling them likely relevant.
>
> 3. That I had prejudged the delay/ abuse of process application by comments about a "joint investigation."
>
> 4. That I erred when I found the defendants were the cause of delay related to the production of third party records.

Mr. Colpitts also advances "the self-fulfilling prophecy" argument. In essence he said I "prejudged the stay application and your ruling confirms my suspicions."

[10] Mr. Colpitts filed an affidavit in support of his recusal motion. The focus of that affidavit is Scott Peacock. There is no evidence in that affidavit that supports a recusal motion.

[11] Mr. Colpitts also filed a brief in support of his recusal motion. He asserts that if I remain on the case he will be denied a fair trial. In essence he is saying that I am determined to convict him regardless of the evidence. Like Mr. Potter, he submits that my stay decision has deprived him of his main defence. Also like

Mr. Potter, he argues that I overruled Justice Hood's *McNeil* decision and ignored the evidence of Mr. Rousseau.[537]

[766] With respect to Mr. Colpitts' concerns, the trial judge wrote:

> [13] I find Mr. Colpitts stated grounds more akin to appeal grounds than recusal grounds. The suggestion that when finding the defendants responsible for much of the post-charge delay, I was exhibiting bias is not legally defensible. The *Morin* analysis requires me to attribute delay to the party causing the delay. If I got it wrong a successful appeal is the appropriate relief. Getting it wrong is never evidence of any kind of bias.
>
> [14] I respectfully reject Mr. Colpitts' submissions as [*sic*] appear at paragraph 63 of his motion brief. He offered no evidence, cogent or otherwise, to support the following assertions:
>
> - That I have taken guidance and instruction from the Crown more often than the defence.
> - That my rulings to date reflected only the Crown's position and instructions.
> - That I was more collegiate [*sic*] with the Crown.
> - That I am not capable of overseeing this case.
> - That I have made inappropriate comments that suggest I do not appreciate the gravity of the situation.
> - That I was conspiring with Mr. Martin to find a strategy to restrict further motions by the defence.
>
> I may not be as "technically savvy" as all of the players in this trial. I fail however to see how this reality supports recusal. Further, I make no apology for the use of humour to relieve the tension that has permeated this prosecution. Once again I fail to see how that supports recusal.[538]

[767] The trial judge said the following with respect to Mr. Potter's allegations of bias:

> [15] Mr. Potter alleges I have made negative findings as to his credibility in the stay decision. Once again I was required to apply *Morin* and that meant apportioning responsibility for delay. He further alleges that my stay decision robs him of his main defence and was the product of my bias in favour of the Crown. I reject this proposition as it ignores paragraph 41 of the decision, which I will repeat here:
>
> > Should the defendants wish to pursue the avenues of investigation, that is their prerogative. It is open to them to call whatever evidence they find in response to the Crown's case. I conclude the RCMP and the Crown have

> complied with their constitutional and investigative obligations *vis-à-vis* NBFL and the NSSC.
>
> I want to stress that my remarks were about investigative obligations and were not a prejudgment of any defence to be advanced by these defendants.
>
> [16] On Mr. Potter's suggestion that I overruled Justice Hood's *McNeil* decision, I disagree, with respect. My stay decision assessed reasons for delay and not responsibility for disclosure. The findings were supported by evidence. If Mr. Potter feels I got it wrong, his remedy will lie in an appeal. In relation to the Rousseau issue, I did not find his evidence to be particularly relevant to the delay/ abuse of process application. The tunnel vision allegation amounts to nothing more than an allegation.[539]

[768] Finally, the trial judge set out the following reasons for dismissing the recusal motions:

> [18] I am dismissing these applications for the following legal reasons:
>
> - The burden of the applicants is an onerous one and must not appeal to the most sensitive or scrupulous conscience – to use the language in *Committee for Justice and Liberty.*
> - The applicants have not produced the kind of cogent evidence required to displace the presumption of judicial impartiality.
> - That in managing the trial process I am entitled to participate in legal debate, state preliminary views and to challenge counsel's positions on trial issues – to use the language of *Baccari*.
> - The applicants failed to consider the remarks attributed to me in the context in which they were spoken, or within the larger context of the entire trial – to use the language of *Bulua.*
>
> The allegations of real or actual bias have not been supported by the evidence. The principle of judicial impartiality is a cornerstone of our trial system. It has been included as a *Charter* principle. I have not found any evidence (cogent or otherwise) that could displace that principle of judicial impartiality. The alleged incidents of real bias amount to nothing more than speculation and unsupported inference.[540]

[769] On appeal, Mr. Potter and Mr. Colpitts add to their allegations of bias. They raise new concerns with the trial judge's Stay Decision #2.[541] They are similar to the complaints about the trial judge's earlier comments and decisions. The appellants also raise bias concerns about the trial management rulings that were not addressed with the trial judge.

[770] We have had the benefit of reviewing the record in its entirety, including notably, how matters proceeded following the recusal decisions. Although we have set out the trial judge's conclusions in relation to the three motions, we have looked well beyond them.

[771] The trial judge's correct identification of the applicable legal principles would not save his rulings if we were satisfied, based on our own review, the record established on a cumulative basis he was biased or there was a reasonable apprehension of bias. The record establishes no such thing. We have concluded the allegations made by Mr. Potter and Mr. Colpitts in the recusal motions, and in relation to the stay decisions, do not support a finding of reasonable apprehension of bias. Further, the allegations of actual bias are without merit.

[772] As explained earlier, we found no substantive errors in the trial judge's attribution and calculation of delay in the stay decisions and are satisfied the outcomes are supportable on the record. We reject Mr. Potter's and Mr. Colpitts' submissions these decisions were based on factual errors, a misunderstanding of the positions advanced, or pre-determinations of the outcome of trial. They were not a function of bias nor did they create a reasonable apprehension of bias. They were a product of the trial judge attributing delay, as he was required to do in accordance with the legal frameworks that governed the s. 11(b) motions.

[773] In the context of the two stay decisions, the trial judge's finding the appellants had adopted a strategy of delay was not indicative of bias, but rather a conclusion well-founded in the record. His determination that this was a strategy put in play from the outset of the prosecution was supported by the appellants' lawyers' early acknowledgments that s. 11(b) considerations were in play. The trial judge's conclusion was reinforced by the many steps taken by Mr. Potter and Mr. Colpitts that slowed the process. His inference that at least some of these steps were intended for no purpose other than to delay was one readily available to him. A trial judge reaching such a conclusion on the record here is not biased, he is astute.

[774] The many concerns raised by Mr. Potter and Mr. Colpitts as the basis for their three recusal motions were, in our view, addressed correctly by the trial judge in his resulting decisions. Based on our own review, we are fully satisfied the trial judge was correct in concluding the complaints, when properly put in context, did not give rise to a reasonable apprehension of bias or establish actual bias.

The trial judge's trial management rulings

[775] Mr. Colpitts says the trial judge made trial management rulings that prevented him from advancing his defence. He says this not only establishes judicial bias, but he argues it resulted in an unfair trial. Mr. Potter challenges the trial judge's decision to have the second stay motion heard at the end of trial, arguing that ruling is indicative of bias and a pre-determination of the merits of the motion. The Crown says the trial judge was simply exercising his trial management function, which cannot give rise to a claim of bias. Further, the trial judge's directions did not impair Mr. Potter's and Mr. Colpitts' right to a fair trial.

[776] We will briefly review the decisions Mr. Potter and Mr. Colpitts assert establish actual bias on the trial judge's part. We will then consider their assertions of bias in light of the case and trial management powers of trial judges.

Mid-trial ruling—trial management

[777] Eleven weeks after the Crown closed its case, the trial judge invited submissions from the parties because it had "become apparent [Mr. Colpitts] is unable to garner his witnesses such that all scheduled trial dates are utilized".[542] In the resulting decision on January 18, 2017 (written reasons released January 24, 2017[543]) the trial judge outlined expectations for the calling of Mr. Colpitts' evidence. He wrote:

> [26] I am not going to put time limits on Mr. Colpitts' individual witnesses, as he may consider some witnesses more important than others. Instead I am directing that Mr. Colpitts complete his witnesses' evidence by the end of the day on February 2, 2017. Adding Friday, January 20th and Friday, January 27th provides him with 12 days. This time allocation does not include Mr. Colpitts' testimony should he elect to testify.
>
> [27] In the event Mr. Colpitts fails to complete his witnesses by February 2nd and wishes to call others, he will have to apply to the Court for permission to do so. I, at that time, will determine what rules will apply to any such application for leave. I expect I would allow Mr. Colpitts two hours of direct to satisfy the Court they have something to add to existing testimony. If the witness has nothing to add the examination will be over without further examinations.
>
> [28] If the witness has something to add I will permit full examination. I reserve the right to place time limits on direct and cross-examinations in such cases. Time limits will be firm but subject to variance should the circumstances so dictate. In the event Mr. Colpitts seeks leave to call more witnesses, those applications will be heard the week of February 6th to 10th, 2017.
>
> [29] I place no time restrictions on any aspect of Mr. Colpitts' personal evidence should he elect to testify. If the February 6th to 10th dates are not utilized

> as above, then Mr. Colpitts will testify in that time slot, or on whatever day the leave witnesses complete their applications or testimony. Should Mr. Colpitts not finish testifying on Friday, February 10th, he will resume his testimony on the week of February 13th.
>
> [30] This ruling affects only Mr. Colpitts. However, I will expect Mr. Potter to elect and call evidence immediately after Mr. Colpitts' closing. Should there be a compelling reason that a short break is necessary between Mr. Colpitts' closing and Mr. Potter's opening, I will hear submissions from Ms. O'Neill. Any recess will be brief.[544]

Mid-trial ruling #2

[778] On January 25, 2017, in response to the trial management ruling issued the previous day (oral reasons had been rendered on January 18th), Mr. Colpitts filed a "Notice of Application for Timing of Calling of Defence on Behalf of R. Blois Colpitts". The motion was heard and reasons released on January 26th [545] in which the trial judge noted concerns with the efficient use of court time:

> [2] The principal concern in my previous ruling was Mr. Colpitts' inability to call witnesses on days scheduled for trial. The fact of the previous ruling did not result in utilization of subsequent trial days. The following represents sitting times between January 18th and February 2, 2017:
>
> - January 18: Ms. Gueto testified from 2 p.m. until 3:12 p.m.
> - January 19: Mr. Lecat testified from 9:30 a.m. until 12 noon.
> - January 20: Ms. Loridon testified from 9:30 a.m. until 11 a.m.
> - January 23: Mr. Robillard testified from 10:30 a.m. until 1 p.m.
> - January 24: Mr. Saintonge testified from 10:30 a.m. until 12 noon.
> - January 25: Ms. Beaulieu testified from 10:30 a.m. until 12 noon.
> - January 26: Mr. Colpitts did not have a witness scheduled.
> - January 27: Mr. Colpitts does not have a witness scheduled.
> - January 30: Mr. Colpitts does not have a witness scheduled.
> - January 31 – February 1: Mr. Colpitts proposes calling Mr. Mack.
> - February 2 – Mr. Colpitts proposes calling Ms. Menard.[546]

[779] And further:

> [4] This Application proceeded by way of submissions. Mr. Colpitts' submissions amount to a plea to give him as much preparation time as he feels is necessary to make full answer and defence. Mr. Colpitts' submissions ignore all

> the time lost since this trial commenced on November 1, 2016 [*sic*]. This trial has been shut down more than it has been sitting. These times provided Mr. Colpitts with significant preparation time. Obviously, he did not utilize the Court's imposed down times. I reject the suggestion that the time constraints set forth in my January 18th ruling threaten Mr. Colpitts' full answer and defence rights.[547]

[780] The trial judge concluded:

> [6] Notwithstanding the above I am prepared to order that Mr. Colpitts complete his case on the following schedule:
>
> - Tuesday, January 31 – Mr. Mack
> - Wednesday, February 1 – Mr. Mack
> - Thursday, February 2 – Ms. Menard
> - Friday, February 3 – Ms. Menard (9:30 to 10:30 a.m. and 1:30 to 4:30 p.m.)
> - Monday, February 6 – Applications for Leave
> - Tuesday, February 7 – Applications for Leave
> - Wednesday, February 8 – Applications for Leave
>
> Should a proposed witness be granted leave for a full examination, such testimony will follow the granting of leave. Should leave not be granted to a proposed witness, the directions set forth in my July [*sic*] 18th decision will apply. Once these Applications are decided, and any associated evidence called, Mr. Colpitts will have three calendar days to prepare for his own testimony.
>
> [7] There will be rules associated with this schedule. I will not accept the kind of down time experienced during Mr. Colpitts' case. If, for example, Mr. Mack finishes on a scheduled day prior to the end of the day, I would expect Ms. Menard to be available to complete the day. If, for example, Ms. Menard finishes her testimony early, I expect Mr. Colpitts to immediately commence any Leave Applications he may wish to advance. Mr. Colpitts should always have available sufficient leave applicants so as to avoid losing Court time if leave is not granted.[548]

Scheduling the second stay decision

[781] In February 2017, Mr. Potter and Mr. Colpitts advised the trial judge they each intended to bring second stay applications seeking dismissal of the criminal charges on the basis of delay. On February 9, 2017, the trial judge heard submissions from the parties on the timing of the applications. Mr. Potter and Mr. Colpitts submitted the applications needed to be heard immediately. The Crown argued the applications should be heard at the end of trial.

[782] In his written reasons, the trial judge explained why the motion would be heard at the end of the trial:

> [8] I am directing that the Defendants' delay Applications be heard after the trial evidence is complete. I offer the following reasons for this decision:
>
> - The trial started on November 16, 2015, approximately 16 months ago. Past evidence is voluminous and complex and it is difficult to recall it all in its proper context. Another trial interruption will exacerbate that reality.
>
> - There is no indication how much Court time these Applications will require. The 2015 Application was scheduled for one week but was heard over ten weeks. A similar delay could mean not getting back to the trial for months should these Applications fail.
>
> - It would make little sense to hear these Applications mid-trial and not give a decision mid-trial. It took a month to write a 104-page decision on the 2015 Application. Writing the decision after briefs would further delay a return to the trial proper.
>
> - I find it unlikely that these Applications are ready to be heard. The Defendants' Application will, in part, be based on failed memory. They will be required to prepare transcripts and to parse all affected testimony for material memory loss. This will be time consuming and could delay hearing these Applications for weeks if not months. In the meantime, this Court would not be able to sit.
>
> - It is conceivable that if these Applications were successful and then overturned on appeal, the reviewing Court would be left with no indication of what the outcome of the trials on the merits would have been and this could result in a complete re-trial. Given the time requirements and complexity of this prosecution, such would be a very troublesome scenario.
>
> - This Court will be in a better position to decide these Applications when the underlying factual record is as complete as possible.
>
> - I accept that Messrs. Colpitts and Potter have been living under this prosecution for a long time. It has, no doubt, impacted the life of themselves and their families. In the event these Applications fail, those impacts will be extended. The outcome of these Applications is uncertain. Hearing these Applications at the end of the trial could result in less time under the spotlight.
>
> There is no doubt in my mind that the best way forward is to continue with the trial and to deal with these Applications at the end of this trial. In time, I will have discussions with counsel and Mr. Colpitts as to the logistics of proceeding in this fashion.[549]

[783] We unequivocally reject Mr. Potter's and Mr. Colpitts' assertions the above decisions demonstrate judicial bias.

[784] None of Mr. Potter's and Mr. Colpitts' concerns about bias with respect to these rulings was brought to the attention of the trial judge. The failure to do so has deprived us of a full record on which to evaluate their complaints. In *Palkowski v. Invancic*,[550] the majority said:

> [73] An allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice. Judges start with a presumption of impartiality. Where the ground is raised for the first time on appeal in circumstances where there is no record below, this court must exercise great caution: see, e.g., *R. v. Fell*, 2009 ONCA 551 at para. 9.
>
> [74] Where counsel in the court below is of the view that the trial judge, or in this case, the motion judge, is exhibiting bias, they have the obligation to raise it with the judge below at the time. At that point, a record will become available and the judge will make a ruling – both of which will then be available for this court to review. That was not done here and the motion judge was not alerted to this issue, now raised for the first time on appeal.

[785] On the record we do have, we are satisfied all three trial management decisions were entirely acceptable manifestations of the trial judge's discretion to control the proceedings before him. Absent an error in principle or trial unfairness, this Court should not intervene.[551]

[786] Mr. Potter and Mr. Colpitts have raised no error in principle in relation to the mid-trial decisions. We are satisfied the trial judge, in exercising his discretion, applied the appropriate legal principles.

[787] As just noted, application of correct legal principles would not save a trial judge from appellate scrutiny when exercising legitimate case management powers if the results led to an unfair trial. Mr. Colpitts submits the restrictions the trial judge placed on his ability to call evidence did just that. We flatly reject this submission.

[788] From the trial judge's trial management decisions and our review of the record, it is clear Mr. Colpitts was not restricted in calling evidence. He simply was required to seek leave to call additional witnesses. Dates were reserved for that purpose. Mr. Colpitts never sought leave to call the evidence of the numerous witnesses he now tells this Court would have been valuable to his defence. Given the difficulties Mr. Colpitts demonstrated in calling evidence and arranging for the

attendance of his witnesses, the expectations the trial judge placed on him were entirely warranted.

[789] Mr. Potter says the trial judge's decision to hear the second stay application after the conclusion of trial demonstrates he had pre-judged its outcome. This falls far short of the requirement to adduce cogent evidence to overcome the presumption of judicial impartiality. We are satisfied the trial judge gave supportable reasons for scheduling the application when he did.

The trial judge's treatment of the mistrial motion

[790] On March 28, 2017, when the trial had been underway for over 140 days, the trial judge adjourned it on his own motion for three months. In doing so, he stated the demands of trial were having a significant effect on his personal health and well-being. He had been advised he needed a substantial break to recover. The trial was to recommence on July 10, 2017.

[791] On July 4, 2017, Mr. Potter's counsel wrote to the trial judge to advise a motion for mistrial and stay of proceedings would be forthcoming. In response, the trial judge directed a leave application would be required before hearing a full motion. He wrote to the parties on July 5, 2017:

> … [N]ext week I will be prepared to discuss whether I am going to hear your mistrial application. I will hear short, oral submissions as soon as Mr. Colpitts' evidence is completed. At that time, I will expect you and Mr. Greenspan to articulate why you feel that "Mr. Potter's ability and right to make full answer and defence has been prejudiced and that fairness and the appearance of fairness have been irretrievably compromised during the course of this trial."

[792] After hearing from the parties (Mr. Colpitts had joined in the request for a mistrial), the trial judge denied leave. His written reasons were released on July 26, 2017.[552] Mr. Potter and Mr. Colpitts argue the trial judge's requirement they seek leave to bring a mistrial application is indicative of bias. In his factum, Mr. Potter asserts:

> 139. The very fact that the trial judge required Potter to obtain "leave" to apply for a mistrial also created a reasonable apprehension of bias. After Potter had advised the trial judge of his intention to apply for a mistrial due to the events of March 28, 2017 which resulted in a three month hiatus, the trial judge responded by letter advising that he would "hear short, oral submissions" as soon as Colpitts' evidence was completed. He then stated that "once those submission are made, I will release a ruling as to whether I will permit your proposed motion to proceed".

> Consistent with this direction, Potter prepared no written materials other than a succinct notice of application. Following brief oral submissions during which counsel invited the Court to retire to chambers in order to listen to the audio tape of the proceedings on March 28, 2017, the trial judge summarily dismissed the application for "leave" on the ground that the motion had "absolutely no chance of success". [Footnotes omitted]

[793] We have reviewed Mr. Potter's and Mr. Colpitts' Notices of Appeal. They do not contain any allegation the trial judge's leave decision was wrong in law or fact. The only pleading which references the mistrial application is that alleging bias, specifically Ground 9 which reads in part:

> … This bias was reflected in numerous rulings and comments throughout the trial. For example:
>
> …
>
> - Imposing an extraordinary protocol for an application for a mistrial by creating a precondition that the trial judge first determine whether there was sufficient merit to the application to justify the court time which would be required to hear the application.

[794] Mr. Potter argues the trial judge, in requiring leave to bring the mistrial motion, injected an extraordinary and previously unknown requirement into the process. He says a reasonably informed observer would find this gives rise to a reasonable apprehension of bias.

[795] We reject that submission. A reasonably informed observer would be knowledgeable of the proceedings, and a trial judge's role in preventing delay. They would also be aware of the case management powers of trial judges and the recent direction of the Supreme Court of Canada from *Cody*:

> [38] In addition, trial judges should use their case management powers to minimize delay. For example, before permitting an application to proceed, a trial judge should consider whether it has a reasonable prospect of success. This may entail asking defence counsel to summarize the evidence it anticipates eliciting in the *voir dire* and, where that summary reveals no basis upon which the application could succeed, dismissing the application summarily (*R. v. Kutynec* (1992), 7 O.R. (3d) 277 (C.A.), at pp. 287-89; *R. v. Vukelich* (1996), 108 C.C.C. (3d) 193 (B.C.C.A.)). And, even where an application is permitted to proceed, a trial judge's screening function subsists: trial judges should not hesitate to summarily dismiss "applications and requests the moment it becomes apparent they are frivolous" (*Jordan*, at para. 63). This screening function applies equally to Crown applications and requests. As a best practice, all counsel — Crown and defence —

> should take appropriate opportunities to ask trial judges to exercise such discretion.[553]

[796] Here, the trial judge was acting within his discretion to manage the proceedings before him. Deference is afforded to such decisions in the absence of an error in principle or an unjust result. Mr. Potter and Mr. Colpitts have not pleaded an error in principle, nor have we identified one. Nor did any injustice arise. We are satisfied the trial judge's approach to the mistrial application does not give rise to a reasonable apprehension of bias.

The trial judge's treatment of the defences

[797] Both Mr. Potter and Mr. Colpitts claim the trial judge was dismissive toward the defence evidence, predisposed to accepting the Crown's theory of the case, and had a closed mind to everything the defence put forward to counter it.

[798] These claims, although not specifically articulated in the Notices of Appeal, are made in Mr. Potter's and Mr. Colpitts' factums. There is no support for them in the record. As we have discussed, the trial judge's conclusions were firmly anchored in a rock-solid foundation of evidence against Mr. Potter and Mr. Colpitts. They painted themselves into a corner of guilt with their own words. Their defences were either unresponsive to the charges, unknown to law, unsupported by any evidence, or offered through evidence the trial judge found lacked credibility. Beyond proclaiming they were at the mercy of a biased judge and denied a fair trial, Mr. Potter and Mr. Colpitts have produced nothing to substantiate their allegations.

[799] In submissions before us, Mr. Potter argues he had been relying on Mr. Colpitts' defence, and any undermining of it had implications for his right to a fair trial. In other words, both appellants had an interest in how the trial judge dealt with Mr. Colpitts.

[800] Mr. Potter asserted in his factum the trial record is "replete" with comments by the trial judge indicating "pre-judgment of the relevance of defence evidence and a failure to appreciate the position of the defence". His complaints about the trial judge's reaction to evidence Mr. Colpitts was seeking to adduce include the trial judge: querying the theory of the defence, encouraging Mr. Colpitts to better focus evidence from Shirley Locke, seeking some guidance as to the relevance of testimony being given, and trying to better grasp the thread of a disjointed narrative.

[801] There is simply no merit in the accusation that what the trial judge was doing indicated bias. In every instance the trial judge patiently sought clarification. It was in Mr. Colpitts' interests that the trial judge expressed concern about experiencing difficulty grasping the theory of his defence:

> … [I]f there's one thing I tell students is you've got to start with a theory of the case. If you've got a defence, you've got to have a theory. The Crown has to have a theory.
>
> And I'm having a great deal of difficulty understanding what your theory is. And without that understanding of the theory, it's very difficult to put these bits and pieces [of evidence] together.

[802] On a subsequent occasion, the trial judge explained to Mr. Colpitts what a defence is intended to achieve. He said:

> It seems to me that you're re-ploughing the same ground that has been ploughed several times before with witnesses. And ground that is somewhat remote from what this trial is all about. The Defence evidence usually has one of two objectives. One is to challenge … charges that you face to show that the Crown's theory is defective or not supportive of a conviction and that allows you to be able to create reasonable doubt.
>
> Two, to establish a Defence to the allegations advanced by the Crown, also for the purpose of creating reasonable doubt. …

[803] The trial judge went on to say that notwithstanding relevance "being strained" he had decided "early on in this trial" he would:

> … allow you and Mr. Potter to explore the Defences that you envisage. And didn't want to do anything that would deprive you of that purpose.
>
> I'm not sure you're achieving that objective. But that is still my goal. But you must bring your witnesses to their point. If things go your way you will then be in a position to define your theory in calling this witness.

[804] Every one of these interjections by the trial judge demonstrate the care he took to ensure Mr. Colpitts was well equipped to advance his defence in a coherent fashion that was responsive to the charges. He brought to bear his considerable experience as a trial judge in a genuine effort to assist Mr. Colpitts. Those efforts were commendable.

[805] Mr. Potter relies on *R. v. Parker*[554] from the Ontario Court of Appeal in support of his allegation the trial judge was biased toward the defences being

advanced. The facts in *Parker* bear no resemblance to how the trial judge treated Mr. Colpitts.

[806] The Court of Appeal in *Parker* found the trial judge's conduct raised a reasonable apprehension of bias. The conduct that drew the court's criticism began at the conclusion of the Crown's case when the trial judge engaged in a "lengthy dialogue with defence counsel, in which he became argumentative at times", making clear "he saw no merit in the proposed defence". The Court of Appeal found further evidence of the trial judge's adverse pre-judging of the merits of the defence in the cross-examination he conducted of the accused and a defence witness. The court ordered a new trial, satisfied the reasonable hypothetical person:

> [7] … listening to the dialogue between the trial judge and defence counsel concerning the proposed defence, would conclude that the trial judge had pre-judged the defence and lacked impartiality and that the appellant had not obtained a fair trial. Any reasonable person present in the courtroom would probably have believed that the conduct of the trial was unfair.[555]

[807] Having studied the record here, we are satisfied the reasonable person could not conclude the trial judge had pre-judged Mr. Colpitts' defence and lacked impartiality. Indeed, the Court in *Parker* held it is not inappropriate for a trial judge at the end of the Crown's case:

> [2] … to canvas [*sic*] with defence counsel the defence which the accused intends to present and to express his, or her, tentative views concerning the viability of the defence… .[556]

[808] The record shows the trial judge actively sought to assist Mr. Colpitts in focusing his efforts on responding to the charges. The following comments, which he made when Mr. Colpitts was testifying, are a good example of this, and are representative in tone and content of many other interventions during Mr. Colpitts' defence:

> … I've been following along through your evidence all through Friday afternoon especially because we're into this area and through today and since we've come back this afternoon I'm having a lot of difficulty understanding what it's got to do with anything we've talked about over the last couple of days.
>
> I mean isn't your job up here an attempt to explain why you are not responsible – that it's wrong that you are charged with these criminal offences? In other words establishing that there was no offence or advancing a particular defence.
>
> And I've been listening hard for the last two or three hours and I've not been able to make those connections. And when you wandered into the Jack Sullivan thing

> I'm thinking now what's this got to do with anything that I've listened to over the last two to three days.
>
> What has this got to do with the charges that are before the Court. What does this got to do with a proactive Defence because if it's not going to one of those two places it's very hard to get at a place.
>
> Now I don't know if that makes any sense to you or not and you know you're certainly a very capable gentleman to understand what we're all talking – you have a very good understanding of the process and you've got an extremely good understanding of the case that's against you but I think where you're falling down with the greatest respect Mr. Colpitts is you're not giving us your story.

[809] We make two final comments about the bias allegations as they relate to Mr. Potter's and Mr. Colpitts' defence to the charges.

[810] As the Crown highlights and as we noted above, these bias allegations were never made to the trial judge. Allegations of bias are to be brought "as soon as it is reasonably possible to do so".[557] Therefore no record exists of how the trial judge would have responded to this attack on his integrity and its implications for the administration of justice.

[811] Mr. Potter has made a post-trial allegation of bias in his Notice of Appeal that is completely at odds with what was said to the trial judge. Mr. Potter claims the trial judge's "lack of impartiality not only impaired the right to make full answer and defence but, in fact, impacted upon the determination not to call a defence". He repeated this in his factum.

[812] The record does not support what Mr. Potter is saying now. When called upon, at the close of Mr. Colpitts' defence, to elect whether to call evidence, Mr. Potter's lawyer, Ms. O'Neill, said the following:

> My Lord this is Day 152 of this trial…And in all of the circumstances that brought us here today it's not in anyone's interest to spend one more day hearing evidence. With the number of witnesses that could be called we could easily be here another 60/70 days.
>
> Well over 200 days, two calendar years. Simply not a realistic use of anyone's time or resources. What we need here now is perspective on the evidence that's been called, not more evidence. So Mr. Potter elects not to call evidence as in reviewing the evidence that was called by the Crown it's our position that it simply is not proved that Mr. Potter committed any offence in law.

[813] At trial, Mr. Potter never alleged judicial bias as a reason he chose not to call defence evidence. Saying now, as he does in his factum, "[w]hat was the point in

calling defence evidence if the trial judge had already misinterpreted everything that had been done to advance his defence …?" is an exercise in inventing an argument for the benefit of his appeal in the face of a trial record that directly contradicts his claim.

Conclusion

[814] Whether one looks at the instances of judicial conduct Mr. Potter and Mr. Colpitts allege constitute bias, or take a more cumulative view of the record, the result is the same. Mr. Potter and Mr. Colpitts have not met the very high burden to displace the presumption of judicial impartiality. They have not even come close. There is absolutely no merit to their complaints.

[815] Our review of the entire record shows a trial judge who diligently applied his best efforts to ensure a very complex prosecution was heard in a manner that respected Mr. Potter's and Mr. Colpitts' *Charter* rights. Balancing their rights to a trial within a reasonable time and their right to full answer and defence had the trial judge constantly walking a tightrope. When he tried to move matters along, Mr. Potter and Mr. Colpitts found reasons to assert their rights to full answer and defence. They also asserted unreasonable delay and brought two motions on that basis. When the trial judge responded to those motions following the required adjudicative framework, his decisions prompted claims of bias.

[816] There are numerous instances in the record where the trial judge ruled against the Crown. Mr. Potter and Mr. Colpitts have not mentioned those. They do not fit with the narrative of a trial judge who was out to get them.

[817] For the reasons outlined above, we dismiss this ground of appeal.

The Sentence Appeals

Introduction

[818] The trial judge sentenced Mr. Potter and Mr. Colpitts on July 25, 2018. As reported in *R. v. Colpitts*,[558] they received prison terms—five years for Mr. Potter and four and a half for Mr. Colpitts.

[819] The Crown has expressed considerable concern over the three to six-year sentencing range accepted by the trial judge. And, notwithstanding the issue of the

appropriate range, the Crown says the sentences are manifestly unfit and do not reflect the gravity of the offences and the degree of each offender's responsibility.

[820] There is no question the offences for which Mr. Potter and Mr. Colpitts were convicted are very serious offences. At the time the offences were committed, they carried a maximum sentence of ten years' imprisonment. (In 2004, the maximum penalty for a fraud conviction was increased to 14 years. In 2011, Parliament established a mandatory minimum sentence for frauds over one million dollars. These legislative amendments do not apply to these crimes committed in 2000 and 2001.)

[821] The Crown has made a forceful case in support of its position. While we find some bases for disagreeing with the trial judge in relation to how he dealt with aspects of the issues before him, we are not persuaded we should intervene and increase the sentences he imposed. We grant leave to appeal sentences but dismiss the appeals.

Overview of the Parties' Positions on Appeal

[822] The Crown identifies the issue as: whether the trial judge erred in law and in principle in imposing sentences that were demonstrably unfit in all of the circumstances.

[823] The Crown says the following are the errors committed by the trial judge:

- Establishing the sentencing range for offences under s. 380(2) of the *Criminal Code* as comparable to the sentencing range for s. 380(1) offences, which the trial judge found to be three to six years.
- Irrespective of range, imposing demonstrably unfit sentences.
- In the case of Mr. Colpitts, overemphasizing the potential collateral consequences of his convictions and underemphasizing the fact he used his position as a lawyer to effect and perpetrate the fraud.
- In the case of both Mr. Potter and Mr. Colpitts, overemphasizing the mitigating factor of delay.

[824] Mr. Potter and Mr. Colpitts say the trial judge identified the appropriate range and imposed fit sentences. Their position is summed up in the closing paragraph to Mr. Potter's factum:

> 67. At its heart, the sentence appeal asks this Court to consider all of the same factors that were considered by the sentencing judge and to re-weigh them in order to reach the Crown's desired result. This is not an appropriate approach to appellate review. The sentencing judge appropriately identified the range of sentence and found that this offence fell within the high end of the range. This decision accounted for all aggravating and mitigating factors. The sentencing judge did not overemphasize or ignore any aggravating or mitigating factors. There is no basis upon which this Court should interfere with the sentence imposed.

Standard of Review

[825] As Saunders J.A. of this Court explained in *R. v. Skinner*,[559] standard of review is the lens through which we examine the error the sentencing judge is said to have made in order to determine if appellate intervention is warranted.

[826] It is firmly established that the role of an appellate court in a sentencing appeal is "narrowly defined".[560] It is not our role to determine how many years in prison we would have imposed had Mr. Potter and Mr. Colpitts appeared before us to be sentenced.[561]

[827] An appellate court is not to take "an interventionist approach" to a sentencing appeal:

> … An appellate court should not be given free rein to modify a sentencing order simply because it feels that a different order ought to have been made. The formulation of a sentencing order is a profoundly subjective process; the trial judge has the advantage of having seen and heard all of the witnesses whereas the appellate court can only base itself upon a written record. A variation in the sentence should only be made if the court of appeal is convinced it is not fit. That is to say, that it has found the sentence to be clearly unreasonable.[562]

[828] This Court recently explained in *R. v. Espinosa Ribadeneira*:[563]

> [34] Sentencing involves the exercise of discretion by the sentencing judge. An appellate court should only interfere if the sentence was demonstrably unfit or if it reflected an error in principle, the failure to consider a relevant factor, or the over-emphasis of the appropriate factors. An error of law or an error in principle will only justify appellate intervention if the error had an impact on the sentence. An appellate court is not to interfere with a sentence simply because it would have weighed the relevant factors differently. See *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500

> at ¶90; *R. v. Nasogaluak*, 2010 SCC 6 at ¶46; *R. v. Lacasse*, 2015 SCC 64 at ¶43-44 and ¶49.

[829] Even if the sentencing range for offences committed under s. 380(2) is or should be higher than the range the trial judge accepted, it does not follow that these sentencing appeals should succeed. The choice of sentencing range "cannot in itself constitute a reviewable error".[564] We must still be satisfied the sentences imposed are demonstrably unfit.[565]

[830] As stated by the Supreme Court of Canada in *R. v. Lacasse*:[566]

> [52] It is possible for a sentence to be demonstrably unfit even if the judge has made no error in imposing it. As Laskin J.A. mentioned, writing for the Ontario Court of Appeal, the courts have used a variety of expressions to describe a sentence that is "demonstrably unfit": "clearly unreasonable", "clearly or manifestly excessive", "clearly excessive or inadequate", or representing a "substantial and marked departure" (*R. v. Rezaie* (1996), 31 O.R. (3d) 713 (C.A.), at p. 720). All these expressions reflect the very high threshold that applies to appellate courts when determining whether they should intervene after reviewing the fitness of a sentence.

The Parties' Positions at Sentencing

[831] There was a wide divergence in the parties' positions at sentencing. The sentences imposed were longer than Mr. Potter and Mr. Colpitts had hoped for but significantly less than sought by the Crown.

[832] On the basis of its submission the applicable range was seven to nine years for each offence, to be served consecutively, the Crown had sought 10 to 12 years for each of Mr. Potter and Mr. Colpitts after the application of the totality principle. Mr. Potter and Mr. Colpitts described the Crown's position as "draconian" and "cruel" and "unwarranted both in law and fact".[567] They pegged the sentencing range for "large scale frauds in Nova Scotia" at three to six years. Mr. Potter said he should receive a three-year sentence for each offence. Mr. Colpitts said one and a half to two and a half years was appropriate for him. They sought concurrent sentences.

[833] The trial judge found the applicable sentencing range was three to six years, imposed concurrent sentences, and declined to make a restitution order sought by the Crown in favour of 13 individual investors and three financial institutions. The Crown abandoned its appeal of the concurrent sentences and restitution issues.

Background Facts

[834] We extensively reviewed the evidence relied on by the trial judge to convict Mr. Potter and Mr. Colpitts. In his sentencing decision, the trial judge encapsulated the context for the sentencing:

> [1] On December 6, 1999, Knowledge House Incorporated ("KHI") began trading on the Toronto Stock Exchange ("TSX"). Dan Potter, KHI's CEO, and Blois Colpitts, its Lead Director and legal counsel, were confident that the company's collaborative, problem-based learning programs would revolutionize the K-12 and post-secondary education system. So confident were they in the inevitability of KHI's success that they decided to artificially maintain the share price until the company could secure the capital it needed to get its software into schools across the country and beyond. The ends, they believed, would surely justify the means. The students would be equipped to succeed in the "knowledge economy", and the shareholders – including Mr. Potter and Mr. Colpitts – would get rich in the process. Unfortunately for the defendants, the financing never materialized and, after propping up the share price for 18 months, they could only watch as the house of cards they had built collapsed in August 2001, the stock plummeting from $5.10 a share to 33 cents. KHI closed its doors a few weeks later.[568]

[835] The trial judge described the "variety of manipulative techniques" employed to maintain the KHI share price. Mr. Potter and Mr. Colpitts played critical roles in the market manipulation conspiracy. They were ideally situated to do so. The trial judge explained their mastery of the plan, and Bruce Clarke's function in effecting the required trades:

> [7] The key participants in the conspiracy and fraud were Dan Potter, the CEO; Blois Colpitts, the lawyer; and Bruce Clarke, the broker. Each of them was critical to the market manipulation scheme. Mr. Potter was the silver-tongued mastermind, the architect of the conspiracy, who exerted his influence to manipulate and control other shareholders. He dictated who could sell shares, when they could sell, and how much they could sell. Mr. Colpitts was the enforcer, using his position as counsel to threaten legal action against anyone who might derail the conspirators' efforts, as well as preparing legal documents and providing legal advice in support of the conspiracy. At other times, he negotiated investment deals and prepared legal documentation knowing that the market price for KHI was being manipulated. Mr. Clarke was the engineer, moving the levers as directed by the defendants to manage the trading in all of the conspirators' margin accounts. When Dan Potter wanted to reward certain shareholders for their loyalty, Mr. Clarke ensured that those individuals received liquidity.[569]

[836] Bruce Clarke was sentenced in the Nova Scotia Supreme Court on April 15, 2016 by Justice Jamie Campbell on the basis of a joint recommendation he serve three years in prison. He was 71 years old. He pleaded guilty in late 2015 to the conspiracy charges of which Mr. Potter and Mr. Colpitts were convicted (conspiracy to manipulate the KHI share price), and a separate count under s. 380(1)(a) of fraud—approximately $900,000—relating to the Union account.[570] The s. 380(2) stock market fraud charge was dropped.

The Trial Judge's Reasons for Sentence

[837] The trial judge understood denunciation and general deterrence are the most important sentencing objectives in cases of large-scale, premeditated fraud. He cited the emphasis by the Ontario Court of Appeal in *R. v. Drabinsky*[571], a case we will say more about later, that in large commercial frauds, the dominant principles of denunciation and deterrence "most often find expression in the length of the jail term imposed".[572]

[838] Specific deterrence was not an issue: the trial judge found there was "virtually no risk" either Mr. Potter or Mr. Colpitts would re-offend.[573]

[839] The trial judge recited the purpose and principles of sentencing laid out in ss. 718 to 718.2 of the *Criminal Code* and noted the fundamental principle of proportionality enshrined in s. 718.1, requiring sentences be "proportionate to the gravity of the offence and the degree of responsibility of the offender".[574] He recognized "sentencing is a highly individualized and fact-specific exercise".[575] Undoubtedly with Bruce Clarke's three-year sentence in mind, he observed the principle of parity—similar sentences for similar offenders who have committed similar offences in similar circumstances—may have less application where the circumstances warrant because of the principle of proportionality.[576]

[840] Parity played no obvious role in the sentencings of Mr. Potter and Mr. Colpitts. The trial judge identified "some very important reasons" why Mr. Clarke deserved a lower prison term than Mr. Potter and Mr. Colpitts. He noted his guilty pleas, his very reduced financial circumstances as a result of losing his job with NBFL and his securities license, and the fine imposed on him by the Nova Scotia Securities Commission of $150,000.[577]

[841] The parties put a number of cases before the trial judge in support of their positions on the range of sentence. The Crown relied most heavily on *R. v. Cameron*,[578] *R. v. Drabinsky*,[579] and *R. v. Fast*,[580] all s. 380(1) frauds, with the caveat that the crimes committed by Mr. Potter and Mr. Colpitts were more serious.

[842] *Cameron* is described in the brief filed by the Crown with the trial judge:

> 109. Although lacking the magnitude, complexity, and the degree of planning required to commit the KHI fraud, and also lacking an impact on the public markets, *R. v. Cameron*, is a close analogue in the jurisprudence to this prosecution. Over the course of 5 years, Mr. Cameron ran a scheme selling shares of a private company, Venture Trading Inc. (VTI), of which he was the President and majority shareholder. The defendant made false statements about VTI's investments and profitability to entice investment, and diverted investor funds for his personal use. Investors were defrauded of over $8 million dollars.
>
> 110. The case shares many of the fraudulent techniques seen in the case at bar – Mr. Cameron kept secret the true financial position of VTI, he continually required new investment to fund his operation because VTI was not profitable, and when investors pressed for return of their investment, he resisted, relying on new investors to repay existing investors because the VTI was essentially bankrupt – a type of Ponzi scheme. … [Footnote omitted]

[843] Mr. Cameron, in poor health (he had recurring lymphoma) and aged 66, received a sentence of 11 years after adjusting for totality once the judge found that the fraud convictions warranted 10 years and the tax evasion conviction warranted four. (He was also ordered to pay restitution and fined under the *Income Tax Act*.)[581]

[844] The trial judge did not rely on *Cameron* in identifying the sentence range or fixing the specific sentences for Mr. Potter and Mr. Colpitts. He distinguished it, noting Mr. Cameron's offences were committed over a five-year period, in the course of which Parliament increased the statutory maximum sentence for fraud from 10 to 14 years.[582] He appreciated the 14-year maximum did not apply to Mr. Potter and Mr. Colpitts.[583]

[845] The trial judge also discussed *R. v. Fast*,[584] a decision of the Saskatchewan Court of Appeal. Mr. Fast defrauded 250 primarily elderly people in his community of $16.7 million through a Ponzi scheme that went on for many years.[585] Mr. Fast's very serious health problems had worsened by the time of his appeal. Notwithstanding, his seven-year prison sentence was upheld.[586]

[846] *Drabinsky* had the most resonance for the trial judge. He viewed it as "the closest analogue" to this case and noted the Crown had relied "heavily" on it.[587]

[847] A thumbnail sketch of the *Drabinsky* facts are found in the Crown's sentencing brief:

> 112. *R. v. Drabinsky* is recognized as one of the leading authorities for fraud sentencings. Garth Drabinsky and Myron Gottlieb were convicted of two counts of fraud and one count of forgery, in relation to their running of two companies. They misrepresented the value of one company's assets in its financial statements, resulting in a fraud against the investors in an IPO. In their second company (Livent), they used a variety of accounting techniques to fraudulently reduce expenses, thus increasing net income and causing the company to appear more favourable to potential investors and lenders. This was classified as a large scale fraud, although the precise amount was never calculated, nor was the loss to investors. [Footnote omitted]

[848] The trial judge did not regard *Drabinsky* as supporting the sentencing range advocated by the Crown. He said:

> [110] … The Court of Appeal in *Drabinsky* held that the trial judge was correct in holding that large-scale commercial frauds normally attract significant penitentiary terms. But it stopped short of adopting [the sentencing judge's] conclusion that the applicable range for these offences is five to eight years. Indeed, despite the many aggravating factors, the Court of Appeal reduced the defendants' sentences to five and four years' imprisonment, respectively.[588]

[849] We discuss *Drabinsky* in more detail later but now make this clarification: the sentences of Mr. Drabinsky and Mr. Gottlieb were reduced because there was no proof of actual financial loss,[589] a consideration that did not apply in this case where there is proof of actual financial loss just not a judicial determination of a precise amount.

[850] The trial judge noted the basis for the Crown distinguishing the section 380(1) cases the Crown referred to:

> [59] According to the Crown, the crimes of Mr. Potter and Mr. Colpitts are more complex and more serious than those committed in any of the cases it provided to the Court. The Crown emphasizes that unlike the defendants in the other cases, Mr. Potter and Mr. Colpitts are not being sentenced for fraud *simpliciter* under s. 380(1). Instead, they are being sentenced for conspiracy and for the offence of affecting the public market price of KHI shares with an intent to defraud, contrary to s. 380(2). The Crown submits that the additional element required for a conviction under s. 380(2) significantly enhances the defendants'

> moral blameworthiness and justifies the Crown's recommended sentence of seven to nine years' imprisonment on each count.[590]

[851] The Crown did not dispute defence submissions that offenders convicted in Nova Scotia of large-scale s. 380(1) frauds have typically received sentences between three to six years. The Crown's position was that Mr. Potter and Mr. Colpitts had not been convicted of a s. 380(1) offence, fraud *simpliciter*. Their fraud, perpetrated through the manipulation of KHI's share price on the public market, merited consideration in the context of a higher range.

[852] In the Crown's submission, the range of sentence should be higher in Mr. Colpitts' case because he leveraged his position as a lawyer to support the conspiracy. The trial judge noted this, treating it as an aggravating factor although he rejected the proposition it warranted an increased range.[591]

[853] The trial judge identified a host of aggravating factors, including: the central roles Mr. Potter and Mr. Colpitts played in the conspiracy; abuse of trust in relation to KHI's shareholders and the public; the significant impact on the victims; the large number of victims; the magnitude, complexity, duration, and the degree of planning of the fraud; the advantage taken by Mr. Potter and Mr. Colpitts of their good reputations in Halifax's business and legal communities; their knowledge they were violating securities laws and regulations; the recruitment of third parties into the fraud; the value of the fraud being in excess of one million dollars; and the adverse effect on investor confidence in the capital market.[592]

[854] The trial judge saw little to distinguish the roles Mr. Potter and Mr. Colpitts played in the conspiracy:

> Dan Potter's role in the offences
>
> [114] At trial I found that Dan Potter, as President and CEO of KHI, was the primary figure in the conspiracy. He was the architect of the "recommended plan of joint action" and oversaw every aspect of its execution. His long-term involvement with public companies, combined with his legal education and his personal wealth, gave him the knowledge, experience, and financial means required to orchestrate and implement the conspiracy. Without Mr. Potter, there could be no conspiracy. Bruce Clarke and the other co-conspirators regularly reported to him and took his instructions. Nothing was done without his knowledge and approval, and he ensured that his fellow conspirators adhered to his code of conduct. Mr. Potter's central role in the conspiracy is an aggravating factor.
>
> Blois Colpitts' role in the offences

> [115] Blois Colpitts was Lead Director of the KHI Board, as well as Chair of the Audit Committee and legal counsel to the company. Although he was not the mastermind behind these offences, Mr. Colpitts used his legal expertise and his reputation as the pre-eminent securities lawyer in Atlantic Canada to advance the conspirators' aims. He was in regular communication with Mr. Potter about all aspects of the conspiracy. When called upon, he provided necessary legal assistance. He drafted legal documents and negotiated investment deals knowing that the KHI share price was artificial. He threatened legal action to suppress potential sellers. So enmeshed was he in the conspiracy that, on one occasion when Bruce Clarke was looking for help to high close the stock, he e-mailed Mr. Colpitts. Although Mr. Colpitts' role in these offences was not as substantial as that of Mr. Potter, his use of his legal skills and reputation to assist the conspiracy is an aggravating factor that makes him as blameworthy as Mr. Potter for the offences.[593]

[855] The trial judge ultimately made a modest differentiation between Mr. Colpitts and Mr. Potter based on additional mitigating factors in favour of Mr. Colpitts and the collateral consequence of the probable loss of his ability to practice law.[594]

[856] As to the magnitude of the fraud, the trial judge noted there was "insufficient evidence before the Court to calculate the actual loss to any particular investor", something the Crown acknowledged in its post-trial brief. While not prepared to assign "an exact dollar value to the fraud", he was, however, satisfied it was "a large-scale, multi-million dollar fraud that resulted in significant economic harm to investors and financial institutions".[595] Mr. Potter and Mr. Colpitts do not challenge this characterization. They say the trial judge made no error in principle in including the magnitude of the fraud as one of the aggravating factors.[596]

[857] The trial judge took into account the following mitigating factors: delay; publicity and stigma; age—Mr. Potter was 66 at sentencing, Mr. Colpitts was 55; and, to a lesser extent, lack of criminal record and prior good character.[597] (Mr. Potter had no criminal record. By the time of sentencing, Mr. Colpitts was not a first-time offender but the Crown told the trial judge his unrelated record was "of little significance" to this matter. The trial judge treated Mr. Colpitts accordingly.[598])

[858] The trial judge viewed the mitigating effect of previous good character, positive letters of reference, and the lack of a criminal record as having diminished significance due to the role Mr. Potter's and Mr. Colpitts' excellent reputations had in assisting them perpetrate the offences.[599]

[859] Delay was regarded by the trial judge as the most significant mitigating factor. He noted the RCMP investigation into KHI's demise was announced in February 2003. A direct indictment was preferred against Mr. Potter and Mr. Colpitts in March 2011. They were not convicted until March 9, 2018. While the trial judge reiterated the finding he made in Stay Decision #2 that Mr. Potter and Mr. Colpitts "were not the victims of delay … they went to great efforts throughout the entirety of this prosecution to create it",[600] he found mitigation in the following facts:

- The KHI investigations "suffered from several deficiencies and faltered on many fronts".
- Mr. Potter and Mr. Colpitts were not responsible for the eight-year investigation, had no control over how the investigation was resourced, and no ability to expedite it.
- They "were forced to endure considerable uncertainty, public stigma, and prejudice while awaiting conclusion of the investigation".
- They "lived the last 15 years with the very real possibility of imprisonment looming over them".[601]

[860] Although, as we indicated earlier, the trial was correct in his conclusion that the investigative delay did not give rise to a s. 7 breach, it was a legitimate factor to be taken into account at sentencing.

[861] The trial judge cited Bruce Clarke's sentencing decision[602] and *R. v. Bosley*[603] from the Ontario Court of Appeal in support of his determination that delay, which has caused prolonged uncertainty for an accused, but does not qualify as a section 11(b) violation, can mitigate sentence.

[862] The Crown acknowledged delay had some relevance as a mitigating factor but mounted two arguments against it having much impact: (1) in Stay Decisions #1 and #2, the trial judge had found Mr. Potter and Mr. Colpitts were responsible for much of the post-charge delay; and (2) any mitigation should be off-set by the significant aggravating circumstances. The trial judge identified three mitigating factors unique to Mr. Colpitts: the discipline proceedings and sanctions he faced before the Nova Scotia Securities Commission and the Nova Scotia Barristers' Society; the likelihood of his disbarment; and the fact he was the sole member of the conspiracy to pay off his margin debt to NBFL after KHI's stock price collapsed.[604]

[863] The trial judge described what transpired from the Nova Scotia Securities Commission and Nova Scotia Barristers' Society disciplinary processes:

> [147] … Before the Securities Commission, the allegation was that, in his role as Lead Director and Chair of the Audit Committee, Mr. Colpitts failed to "uncover conduct" by an insider group that was engaged in market transactions that were contrary to the public interest. He paid fines and costs totalling $50,000 and was prohibited from being an Officer or Director or a reporting issuer for a period of two years. Before the NSBS, the complaint concerned the failure to identify conflicts of interest in relation to his representation of KHI. He paid penalties and costs totally [*sic*] $12,000 and received a reprimand.[605]

[864] The trial judge also considered two further issues in relation to both Mr. Potter and Mr. Colpitts: whether they were driven to commit their offences purely by greed, and lack of remorse.

[865] As urged by Mr. Potter and Mr. Colpitts, the trial judge accepted they had not been driven by pure greed. While not diminishing the financial self-interest that fueled the crimes, he took note of the context:

> [134] … With respect, the conclusion that financial self-interest played a significant role in these offences is inescapable. The defendants directly benefitted from the fraud because of their financial, personal, and professional interest in KHI. The success of the company was their success. That said, KHI was not a scam company created for the purpose of committing the offences. The defendants were operating a legitimate business when they committed these offences. They were not driven by pure greed. In *Drabinsky*, the Court of Appeal accepted that the defendants had been running a legitimate enterprise, and distinguished this context from scams, which "will normally call for significantly longer sentences than frauds committed in the course of the operation of a legitimate business. Whether the absence of 'pure greed' is viewed as a mitigating factor or simply as the absence of an aggravating factor would seem to make little difference in the ultimate calculation": para. 173.[606]

[866] The trial judge found that notwithstanding "overwhelming evidence against them", Mr. Potter and Mr. Colpitts maintained they had done nothing wrong. He treated this as a neutral factor in sentencing. They simply did not get the benefit accorded to offenders who acknowledge responsibility and express remorse for the harm caused.

Analysis

[867] We next drill down into the Crown's criticism of the sentences imposed: the sentencing range used and, irrespective of the sentencing range, the inadequacy of the sentences. Consideration of this latter issue requires us to examine whether the collateral consequences of conviction for Mr. Colpitts and delay were overemphasized by the trial judge, and whether Mr. Colpitts' use of his position as a lawyer in committing the offences was underemphasized in his sentence.

The Sentencing Range for s. 380(2) Offences

[868] The Crown takes issue with the basis used by the trial judge to inform the sentences he crafted. This is explained in the Crown factum:

> 5. The Trial Judge erred in law when he found that the range of appropriate sentences for fraud *simpliciter* under s. 380(1) is the same as that for market fraud under s. 380(2). It is an error because the specific harm of breaching public trust in public markets places the s. 380(2) offence in a higher category of criminality and more blameworthiness. Sentence ranges should reflect that. … The sentences are insufficient to meet the goals of sentencing in such cases – deterrence and denunciation.

[869] The issue is of particular significance to the Crown because it says no sentencing range has been established for s. 380(2) offences, at least not until the trial judge accepted the submission by Mr. Potter and Mr. Colpitts it should not be higher than the sentencing range for s. 380(1) offences.

[870] The trial judge tackled the sentencing range issue immediately upon commencing his analysis:

> [110] The Court's first task is to decide on the range of sentence for a fraud of the nature committed here. In recommending a range of seven to nine years for each offence, the Crown relies heavily on the *Cameron* and *Drabinsky* decisions. In my view, neither of these decisions supports the Crown's position. The offences in *Cameron* took place over a period of five years, during which Parliament increased the statutory maximum sentence to 14 years. It is clear from the decision that the sentencing judge increased the applicable sentencing range to accord with Parliament's change. As I stated earlier, these amendments to the statutory maximum sentence do not apply to the defendants. As for *Drabinsky*, that decision is, in my view, the closest analogue to this case. I am not satisfied that it supports the Crown's range, either. The Court of Appeal in *Drabinsky* held

> that the trial judge was correct in holding that large-scale commercial frauds normally attract significant penitentiary terms. But it stopped short of adopting her conclusion that the applicable range for these offences is five to eight years. Indeed, despite the many aggravating factors, the Court of Appeal reduced the defendants' sentences to five and four years' imprisonment, respectively.[607]

[871] The trial judge identified what he found to be the range for "large-scale, complex frauds of the nature committed here" and rejected the Crown's argument for a higher range for lawyers involved in such frauds:

> [111] I agree with the defendants that for large-scale, complex frauds of the nature committed here, Nova Scotia case law supports a range of three to six years' imprisonment. While I am mindful that Dan Potter and Blois Colpitts were convicted of an offence under s. 380(2), not s. 380(1), the Crown has not persuaded me that this necessarily justifies a higher sentencing range. In sentencing for fraud, it is an aggravating factor [under s. 380.1(1)(b)] if the offence adversely affected, or had the potential to adversely affect, the stability of the Canadian financial markets or investor confidence in those markets. In my view, where the Crown has proved the additional element required for a conviction under s. 380(2) – that the public market price of a stock has been affected by the fraudulent conduct – this aggravating circumstance has been made out, and will support a sentence at the higher end of the existing sentencing range.
>
> [112] I also reject the Crown's submission that there is necessarily a higher range for large-scale, complex frauds involving lawyers. The Crown based this assertion on *Davis*, where the Alberta Court of Appeal identified three categories of fraud cases relied on by the Crown: non-lawyer trust thefts, lawyer trust thefts, and frauds exceeding $1 million. The sentences imposed in two cases of lawyer fraud involving over a million dollars were seven and eight years. I agree with Mr. Colpitts that the Court was merely categorizing the cases provided by the Crown, not endorsing a separate sentencing range for lawyers involved in multimillion dollar fraud cases. Indeed, the Court in *Davis* sentenced a lawyer who defrauded and stole almost $3 million to only four years' imprisonment. While Mr. Colpitts' position as a lawyer is certainly an aggravating factor, I do not find that it automatically results in a higher sentencing range.[608]

[872] In the Crown's submission, the trial judge made a reversible error in para. 111 by finding an element of the offence of s. 380(2) and the section 380.1(1)(b) aggravating factor to be the same. The Crown argues the additional element in s. 380(2) of a specific intent to affect the public market price of shares with intent to defraud, an element that does not have to be proven in a s. 380(1) prosecution, justifies a higher sentencing range for s. 380(2) convictions.

[873] Before proceeding further, there are several principles to be kept in mind about the role of sentencing ranges in the determination of what constitutes a fit

sentence. While sentencing ranges are important, "they are guidelines rather than hard and fast rules".[609] Sentencing ranges are "only one tool among others"[610] for determining what is an appropriate sentence in a particular case.[611] A sentence that falls "outside the regular range of appropriate sentences is not necessarily unfit".[612] A sentence is to be crafted from "all the circumstances of the offence and the offender" and must take into account "the needs of the community in which the offence occurred".[613]

[874] Determining a fit sentence is a far more complex exercise than simply identifying what may be an appropriate range. A sentence must ultimately represent the application of sentencing principles to the individualized circumstances of the offence and the offender. This is reflected in the observations of Justice Wagner (as he then was) in *Lacasse*:[614]

> [57] … Where sentencing ranges are concerned, although they are used mainly to ensure the parity of sentences, they reflect all the principles and objectives of sentencing. Sentencing ranges are nothing more than summaries of the minimum and maximum sentences imposed in the past, which serve in any given case as guides for the application of all the relevant principles and objectives. However, they should not be considered "averages", let alone straitjackets, but should instead be seen as historical portraits for the use of sentencing judges, who must still exercise their discretion in each case:
>
> …
>
> [58] There will always be situations that call for a sentence outside a particular range: although ensuring parity in sentencing is in itself a desirable objective, the fact that each crime is committed in unique circumstances by an offender with a unique profile cannot be disregarded. The determination of a just and appropriate sentence is a highly individualized exercise that goes beyond a purely mathematical calculation. It involves a variety of factors that are difficult to define with precision. This is why it may happen that a sentence that, on its face, falls outside a particular range, and that may never have been imposed in the past for a similar crime, is not demonstrably unfit. Once again, everything depends on the gravity of the offence, the offender's degree of responsibility and the specific circumstances of each case. …

[875] As *Lacasse* explains, the appellate inquiry into whether a sentence is "demonstrably unfit", in other words, "clearly excessive or inadequate" must focus, not on range, but on the principles and objectives of sentencing:

> [53] This inquiry must be focused on the fundamental principle of proportionality stated in s. 718.1 of the *Criminal Code*, which provides that a sentence must be "proportionate to the gravity of the offence and the degree of

> responsibility of the offender". A sentence will therefore be demonstrably unfit if it constitutes an unreasonable departure from this principle. Proportionality is determined both on an individual basis, that is, in relation to the accused him or herself and to the offence committed by the accused, and by comparison with sentences imposed for similar offences committed in similar circumstances. Individualization and parity of sentences must be reconciled for a sentence to be proportionate: s. 718.2(a) and (b) of the *Criminal Code*.
>
> [54] The determination of whether a sentence is fit also requires that the sentencing objectives set out in s. 718 of the *Criminal Code* and the other sentencing principles set out in s. 718.2 be taken into account. Once again, however, it is up to the trial judge to properly weigh these various principles and objectives, whose relative importance will necessarily vary with the nature of the crime and the circumstances in which it was committed. …[615]

[876] The Crown makes two principal arguments in support of its position the sentencing range for s. 380(2) offences is higher than the range for large-scale s. 380(1) offences: (1) an offence under s. 380(2) is, "generally, a more serious offence, with more serious consequences …"; and (2) Parliament made the decision to create the offence of market fraud, which, in addition to having all the elements of s. 380(1), includes "the additional specific intent of affecting the public market price for shares". The Crown says the reason for this separate offence is:

> 60. … [B]ecause frauds that affect public markets are generally more complex and broader in scope with the potential to defraud a large group of market participants the result of which can be to undermine the legitimacy of national stock exchanges, decrease confidence in public markets, and directly impact the Canadian economy".

[877] The trial judge was not persuaded the existence of the separate offence of s. 380(2) fraud supported a requirement for a higher sentencing range. He found an equivalency in the moral blameworthiness targeted by ss. 380(2) and 380(1). He reasoned in part that the specific intent element of s. 380(2) and the aggravating factor under s. 380.1(1)(b) of adversely affecting or potentially adversely affecting the stability of the Canadian financial markets or investor confidence in those markets were effectively targeting the same type of harm. This contributed to him concluding a conviction for a s. 380(2) fraud did not deserve a higher sentence than a conviction under s. 380(1) where the s. 380.1(1)(b) aggravating factor applies.

[878] The specific intent element of s. 380(2) and the s. 380.1(1)(b) aggravating factor are not the same. It was an error for the trial judge to equate them. We find

this error to be of no consequence. It was not his sole basis for concluding the sentencing range for a s. 380(2) offence should be no higher than the sentencing range for s. 380(1) offences. He observed the *Criminal Code* has fixed the same maximum penalty for both sections, a maximum of ten years' imprisonment,[616] and relied on cases such as *Drabinsky* to find the offences were similar enough to warrant the same sentencing range.

[879] The Crown's position that s. 380(2) offences are subject to a higher range than large-scale s. 380(1) offences does not rest on any explicit authority. In the absence of binding authority establishing otherwise, the trial judge was entitled to view the range for a s. 380(2) offence as comparable to the range for a s. 380(1) offence where the aggravating factor of adversely affecting investor confidence in the market was applicable.

[880] We do not accept Parliament has created the explicit distinction advanced in the Crown's submissions. The wording of the specific intent element in s. 380(2) is different from the wording in s. 380.1(1)(b), the aggravating factor the trial judge referred to, but that does not establish Parliament's intention to create a higher sentencing range. The most obvious indicator of such an intention would be a higher maximum penalty. Yet when Parliament increased the maximum penalty for fraud from ten years' imprisonment to fourteen years, it did not differentiate between s. 380(1) and s. 380(2).

[881] The trial judge's sentencing range analysis must be placed in perspective: (1) there are very few s. 380(2) cases, which makes identifying a sentencing range quite challenging; and (2) there was very little to assist him in determining a sentencing range in this case. The only s. 380(2) decision that was discussed in the context of sentencing, and in no great detail, was *R. v. Carter*.[617]

A Sentencing Range that is Too Compressed but No Reversible Error

[882] We do not agree the trial judge committed reversible error in his determination of the sentencing range for the offences committed by Mr. Potter and Mr. Colpitts. However, we share the Crown's concern the range he identified for s. 380(2) offences is too compressed with an upper end that is too low. Based on our examination of the most comparable sentencing cases, including *Carter*, we find significant, complicated, and sophisticated fraud convictions under s. 380(2)

can attract sentences in a higher range than the three to six years the trial judge settled on.

[883] We begin with *Carter*.[618] The Crown cited *Carter* in its sentencing submissions to support its position there is a distinction between a simple fraud prosecution and a prosecution for market fraud meriting an "exemplary" sentence for a s. 380(2) offence. The Crown noted what Borins J., the sentencing judge, had said:

> 26. … A public stock exchange such as the Vancouver Stock Exchange operates on the principle that every member of the public must be able to invest, free in the knowledge that only legitimate and honest factors affect the value of the securities listed for trading on the stock exchange. … It is my opinion that an exemplary sentence is required not only because of the magnitude of the offence but as an example to those who might be inclined fraudulently to affect the activities of the stock market, be it the Vancouver Stock Exchange, the Toronto Stock Exchange, or any other stock exchange. This is the type of case where the public quite properly looks to the court to express its feelings of condemnation and disapproval by the imposition of an exemplary sentence.[619]

[884] We note the "exemplary" sentence imposed on Mr. Carter, and upheld on appeal, was a five and a half-year prison sentence for the s. 380(2) offence. *Carter* was not argued by the Crown as a precedent for sentencing Mr. Potter and Mr. Colpitts. The decision deserves closer attention.

[885] Mr. Carter, a stock promoter, was convicted under s. 380(2) of fraudulently affecting the public market price of the shares of a company (Tye Explorations Inc.) over a period in excess of 12 months. He did this, with a partner, Mr. Ward, through a variety of manipulative techniques that included dominating the market, parking stock, trading near the end of the trading day, and numerous matched and "wash" trades. The manipulation of the Tye Explorations stock created "a false or misleading appearance of active public trading" through the Vancouver Stock Exchange.[620] The purpose was to increase Tye Explorations' share price in order to profit from a U.S. mutual fund purchasing all of the company's shares. Due to the fraudulent manipulation of the stock market, these shares were virtually worthless shortly after their acquisition.[621]

[886] The use of corrupt payments to persuade the portfolio manager of the mutual fund to purchase $26 million worth of shares in Carter/Ward companies netted Mr. Carter a conviction on a second count in the Indictment. This conviction for paying "secret commissions" is not relevant here.

[887] We excerpt from Justice Borins' lengthy decision on conviction a taste of the complex Carter/Ward market fraud:

> 53 Much of the stock trading in Tye carried out by Carter, Sr., and Ward occurred in Toronto. They used several brokerage accounts located with brokerage firms in Toronto for this purpose, as well as brokerage accounts with firms located in Vancouver. People employed by Carter, Sr., in his Toronto office kept daily records of all trading activities in Tye conducted through brokerage accounts owned or controlled by Carter, Sr., and/or Ward or through brokerage accounts of corporations which they owned or controlled. These people also kept up-to-date records respecting banking and financial transactions in connection with Tye and other Carter/Ward stocks in which Carter, Sr., had an interest so that he would know each day what stock in what quantity he had in each account. All of this was necessary to enable Carter, Sr., to carry out the ongoing manipulation of the stock market in regard to Tye.
>
> 54 When Carter, Sr., was in Toronto he was in frequent telephone communication with Ward for the purpose of developing their daily trading strategy in connection with Tye, such as which brokerage accounts to use, the price they were hoping to achieve and specific manipulative trading practices to be employed. When he was in Toronto, Carter, Sr., or his staff, instructed various brokers in Toronto and Vancouver to trade in Tye pursuant to the trading strategy which he and Ward had developed.[622]

[888] Mr. Carter was found to have made illegal profits of between six and nine and a half million dollars from his fraudulent activities. He moved significant sums offshore with the intention of rendering himself judgment-proof.[623] Justice Borins agreed with Crown counsel's description that Mr. Carter and Mr. Ward were, during the relevant time, "in the exclusive business of commercial crime in British Columbia and Ontario".[624] He viewed their crimes as very grave:

> 21 I consider first the size and magnitude and duration of the offences. As much has already been said about these factors, I intend only to emphasize certain points. The size and magnitude of the offences were large, involving the loss to the Fund of $26,000,000 (Cdn.), including its acquisition of the Tye shares. The loss was the result of a continuous, deliberate, planned and carefully structured criminal enterprise, created and carried out by Messrs Carter and Ward for over a year. This involved the investment of other people's money, as the Fund was a mutual fund and itself had many thousands of shareholders. In that regard, it is necessary to take into consideration the fact the individual shareholders in the Fund sustained losses as did those members of the public apart from shareholders in the Fund who invested in the shares of Tye at fraudulently inflated prices caused by the rigging of the public market by Messrs Carter and Ward. It is probably impossible to calculate the losses of such persons. In addition to practising fraud upon the public and the Fund, Messrs Carter and Ward practised

> fraud on the appropriate regulatory authorities in Canada and the U.S. The size, magnitude and duration of the fraud alleged in count one is, in my opinion, one of the worst examples of such a crime and demands severe punishment on that ground alone. The same can be said in respect to count two, in which Messrs Carter and Ward provided Mr. Lazzell with a secret commission of about $1,400,000.[625]

[889] The impact on public confidence (the most significant aggravating factor in Justice Borins' view) and specific deterrence required "a substantial sentence".[626] Justice Borins agreed with the Crown the proper range was "between eight and nine years".[627] Once mitigating factors were applied, Mr. Carter was sentenced to seven years in prison. His sentence for the s. 380(2) offence was five and a half years.[628]

[890] Mr. Carter's business partner and criminal accomplice, Mr. Ward, was sentenced by a different judge to three years' incarceration. Justice Borins dismissed an argument from Mr. Carter that his sentence should be comparable. Amongst the mitigating factors considered in Mr. Ward's case was the fact that, unlike Mr. Carter, he had admitted responsibility by pleading guilty.[629]

[891] The Ontario Court of Appeal reduced Mr. Carter's total sentence of seven years to five and a half by making his sentence for the "secret commissions" offence concurrent to his five and a half sentence for the s. 380(2) offence. The court did not comment on Justice Borins' view of the sentencing range for the offences Mr. Carter and Mr. Ward had committed.

[892] We note Mr. Ward, like Bruce Clarke, received a three-year prison sentence following a guilty plea. These are two examples of significant criminal misconduct involving public market shares that earned prison sentences at the lower end of the range used by the trial judge.

[893] In setting the sentencing range in *Carter* to between eight and nine years, Justice Borins did not draw on any case authorities. It represented the high-water mark for the "exclusive business of commercial crime" in which he found Mr. Carter to be engaged.

[894] Mr. Potter and Mr. Colpitts were not found to be in the "exclusive business of commercial crime". Their crimes were nevertheless viewed by the trial judge as very serious. The trial judge applied the s. 380.1(1)(b) aggravating factor of "adversely affecting investor confidence" to them[630] as urged by the Crown. (This aggravating factor was also applied in *Carter*.) Having referred in the conviction

decision to the importance of public confidence in the integrity of Canada's capital markets, the trial judge was keenly aware of the significance of this aspect of their offences.[631]

[895] We mentioned earlier the Crown offered *Drabinsky* as a "close analogue" and a leading authority for fraud sentencings involving public companies while noting its view that the crimes of Mr. Potter and Mr. Colpitts were "more complex and more serious". The trial judge found *Drabinsky* to be of assistance.

[896] Mr. Drabinsky and his co-accused Mr. Gottlieb were convicted of s. 380(1) fraud. The sentencing judge, Benotto J., found the appropriate range of sentence was five to eight years, which she described as "a conservative range in light of the large amounts of money, breach of trust and threat to the public confidence in the stock market".[632]

[897] The Ontario Court of Appeal in *Drabinsky* approved of substantial prison terms for "large scale, premeditated frauds involving public companies", but explicitly avoided fixing the parameters of the sentencing range:

> 164 After reviewing several authorities, the trial judge fixed the appropriate range of sentence for large scale, premeditated frauds involving public companies at between five and eight years (para. 35). While one might quibble about both ends of that spectrum, the trial judge was correct in determining that crimes like those committed by the appellants must normally attract significant penitentiary terms well beyond the two-year limit applicable to conditional sentences.[633]

[898] The Drabinsky/Gottlieb fraud shared many similarities with the Potter/Colpitts fraud, despite the different fraud sections that were prosecuted. Like the Potter/Colpitts fraud, the Drabinsky/Gottlieb fraud used a variety of deceitful techniques to misrepresent the value of a public company for the purpose of inducing investment through the purchase of shares. The offenders in both cases made these misrepresentations to the public at large, either through public disclosure of fraudulent financial statements (Drabinsky/Gottlieb), or through the creation and maintenance of an artificial share price on the public market (Potter/Colpitts).

[899] The Crown argues the distinctions between the two frauds undercut any comparability: the Potter/Colpitts fraud was a fraud in relation to the market utilizing a public company, whereas the Drabinsky/Gottlieb fraud was a fraud in relation to a public company and nothing more. The Crown differentiates the Drabinsky/Gottlieb fraud from the Potter/Colpitts fraud on the basis that in

Drabinsky, the intention was to "cook" the books and not necessarily to affect the public market share price.

[900] The Crown also says the Drabinsky/Gottlieb fraud, unlike the Potter/Colpitts fraud, did not target any known investor. (The Crown notes the Potter/Colpitts conspiracy targeted David Fountain, Derek Banks, Mr. Barthe and Dr. Ristow, amongst others.) However, the distinction between the cases is not as pronounced as suggested. It appears Mr. Drabinsky and Mr. Gottlieb knew the manipulated financial statements would be examined in a due diligence review by the accounting firm, KPMG and, by extension, would be relied on by Mr. Ovitz, a potential investor, who had retained KPMG to conduct the review.

[901] The *Drabinsky* trial judge found Mr. Drabinsky knew in March 1998 the Ovitz investment was pending and while "Mr. Drabinsky may not have known of every detail in the accounting department [h]e knew that the system of manipulations was taking place. He had long ago pushed the first domino".[634] (The Ovitz investment closed in June 1998 and two months later the Drabinsky/Gottlieb fraud collapsed in on itself.)

[902] We find it difficult to see a real distinction between the Drabinsky/Gottlieb and Potter/Colpitts frauds where in both cases the harm caused was to investor confidence in the capital markets. We note what the Ontario Court of Appeal said in the *Drabinsky* sentencing appeal:

> [157] … [T]he trial judge, after referring to a long line of authority from this court, held that general deterrence and denunciation were of primary importance when sentencing persons who as officers and directors of public companies use their positions to engage in large scale frauds that compromise the integrity of the public market place.[635]

[903] As in the case of Mr. Potter and Mr. Colpitts, the deleterious effect on market confidence, although not an element of the charges against Mr. Drabinsky and Mr. Gottlieb, was a factor in their sentencing. The Ontario Court of Appeal remarked on it:

> [186] In describing the loss as we have, we do not mean to suggest that this was not a large scale and significant fraud. It clearly was. Nor do we take away from the non-economic harm caused by this kind of fraud. When prominent business leaders who are directors and officers of public companies engage in fraudulent activity, the public faith in, and the integrity of, the public marketplace no doubt suffers regardless of the actual financial loss suffered.[636]

[904] The fraud in *Drabinsky* was complex and involved very substantial amounts of money. Accounting records were fraudulently manipulated to disguise the true financial state of the company. The *Drabinsky* sentencing judge's comments indicate this was not merely a large, commercial fraud:

> [24] The offence was fraud with respect to a high profile public corporation. The financial records of the corporation were systematically altered to mislead auditors, the Board of Directors, investors and the public. **There was a direct link between the financial manipulations and the share value**. …[637] [Emphasis added]

[905] What was said about the Drabinsky/Gottlieb fraud could readily be said about the Potter/Colpitts fraud:

> [53] Corporate fraud such as this results in tangible losses to employees, creditors and investors. It also results in less tangible, but equally significant loss to society. It fosters cynicism. **It erodes public confidence in the financial markets.**[638] [Emphasis added]

[906] The statement by Borins, J. in *Carter* also had resonance in the Drabinsky/Gottlieb sentencing. We are setting it out more expansively below:

> [26] … A public stock exchange such as the Vancouver Stock Exchange operates on the principle that every member of the public must be able to invest, free in the knowledge that only legitimate and honest factors affect the value of the securities listed for trading on the stock exchange. Any stock exchange is intended to function on the basis of complete and honest disclosure to the public and to regulatory authorities. Nobody can be allowed to profit and cause loss to the investing public as a result of the dishonest rigging of the market. The clear inference to be drawn from the evidence in this trial is that the dishonesty of Messrs Carter and Ward caused a serious public crisis in the integrity of the Vancouver Stock Exchange. … It is my opinion that an exemplary sentence is required not only because of the magnitude of the offence but as an example to those who might be inclined fraudulently to affect the activities of the stock market, be it the Vancouver Stock Exchange, the Toronto Stock Exchange, or any other stock exchange. This is the type of case where the public quite properly looks to the court to express its feelings of condemnation and disapproval by the imposition of an exemplary sentence.[639]

[907] The principles articulated by the courts in *Carter* and *Drabinsky* guide us to a different view than the trial judge's on the issue of the range of sentence for s. 380(2) cases. The ranges chosen by the *Carter* sentencing judge (eight to nine years) and the *Drabinsky* sentencing judge (five to eight years) suggest the upper

end of the range for significant frauds affecting the public market share price of a company should be higher than six years.

[908] However, we do not think this justifies appellate intervention. Sentencing ranges are guidelines, not imperatives. Furthermore, there is no clear consensus on what the upper range should be for such offences. It is not necessary for us to make a firm pronouncement. Our task is to ultimately determine whether the trial judge imposed fit sentences, not whether he identified the sentencing range correctly.

[909] Sentences for convictions under s. 380(2) must be responsive to the circumstances of the offence and the offender. The cases we have discussed illustrate this. In addition, there are other cases involving market manipulation that garnered sentences falling below the range used by the trial judge. We note two.

[910] In *R. v. Wenger*,[640] a sentence of two years' imprisonment was imposed for conspiracy to artificially increase the shares of a Canadian Venture Stock Exchange (now, TSX Venture Exchange) listed company controlled by Mr. Wenger and a co-conspirator. To do so, they staged a flare, using commercial propane to suggest the company's assets included a well with sufficient pressure to produce gas. The company raised capital by selling shares on the Exchange. Investors, attracted by the fraudulently inflated share price, spent over $1 million for shares whose value collapsed precipitously. All the investors lost money.

[911] The Crown in *Wenger* characterized the offence as a "major fraud" and sought a sentence in the range of three to five years. The sentencing judge accepted the diminution of public confidence in the stock market as an aggravating factor and cited the comments of Justice Borins' in *Carter* referenced earlier. The two-year sentence reflected the sentencing judge's assessment of a crime neither as sophisticated nor protracted as those in the cases cited by the Crown, such as *Drabinsky*.

[912] In *R. v. Allman*,[641] another case of conspiracy to defraud the public by affecting the market price of shares of a company, the sentence imposed was 15 months' incarceration. The offenders were found to have affected the market price of shares by deceit over a period of three months. The court emphasized general deterrence. Delay between the laying of the charges and the commencement of the trial was treated as mitigating.

[913] We are satisfied the sentences of large-scale fraudsters prosecuted under s. 380(1) can assist in the sentencing of s. 380(2) offenders. We already discussed

Drabinsky as an example. *R. v. Pavao*,[642] a case from the Ontario Superior Court of Justice decided a month after the trial judge sentenced Mr. Potter and Mr. Colpitts, is also instructive.

[914] Mr. Pavao was convicted of ten counts of fraud against named individuals and one count of defrauding the public. Molloy J. described the relevant facts:

> [2] The frauds involved the sale of shares in gold mining companies. The gold mining companies actually existed, but Mr. Pavao never had access to the shares he purported to sell. Ten unsophisticated investors, many of them pensioners or people about to retire, paid hundreds of thousands of dollars to Mr. Pavao's numbered company for these fictitious shares. Their cheques were deposited into the numbered company's bank account, exclusively controlled by Mr. Pavao. The innocent investors received precisely nothing for the money they paid. The total amount of the fraud with respect to these ten victims was over $1.1 million.
>
> [3] In addition, Mr. Pavao encouraged individuals who invested in these shares to bring in their friends and relatives, which many of them did. That is the subject matter of the conviction for defrauding the public.[643]

[915] The investors duped by Mr. Pavao had been told they were investing in a private placement "at a very advantageous price they could not obtain on the stock market".[644] Mr. Pavao took their money and gambled with it, investing in high risk stocks in margin trading accounts. He lost all the money.[645]

[916] In *Pavao,* the sentencing range was in issue. As the sentencing judge explained:

> 86 Both counsel agree that the bottom end of the range for a crime of this nature is three years. They differ as to the top of the range: Ms. Hassan, for the defence, submits that the upper limit is five years, whereas Ms. McCallum, for the Crown, submits that the top of the range has moved in recent jurisprudence to eight years. In my view, the Crown is correct that the range has moved up somewhat in recent years, but it is difficult to define where that upper limit now rests.[646]

[917] Mr. Pavao received a sentence of five years. The sentencing judge noted 14 years is now the maximum penalty and found that the absence of a criminal record and general prior good character were the only mitigating factors.

[918] *Pavao* recognized the steady drum beat in all these large-scale fraud sentencings, those before and after the increase by Parliament of the maximum penalty: crimes involving significant fraud will attract substantial penitentiary

terms. And generally they should. We endorse the views of the sentencing judge in *Pavao*:

> 23 The *Criminal Code* requires that the principles of denunciation, deterrence and rehabilitation be considered in sentencing. There is considerable legitimate debate as to whether significant sentences imposed on offenders truly have a deterrent effect, either for the individual offender or for others who might be tempted to commit similar crimes. However, it is well recognized that if deterrence is relevant at all, it is particularly so for crimes of this nature, involving individuals who are intelligent and who deliberately set out to plan and execute sophisticated frauds. It is important that such individuals be aware that the significant risk of a long jail term outweighs any benefit or financial reward they may obtain from the fraud. This is relevant to the individual offender, and also to others in the community who are tempted towards such crimes.[647]

[919] This view is also reflected in *Drabinsky*.[648]

[920] We add this: we are not persuaded s. 380(2) offences should, because of the specific element of affecting the public market price for shares, necessarily attract sentences in a higher range than s. 380(1) frauds that inflict devastating consequences on employers, organizations, or vulnerable investors. Some examples are: *R. v. Dunkers*,[649] fraud by a bookkeeper which led to a non-profit ceasing operations—five years in prison; *R. v. Davatgar-Jafarpour*,[650] a $2 million to $2.5 million fraud by the executive director of a non-profit resulting in all 150 employees losing their jobs and the organization going bankrupt—sentence increased on appeal from two years to four; and *Pavao*—a five-year sentence for defrauding "ordinary, middle-class people" who had accumulated some savings for retirement or to send their children to university, were unsophisticated and relied entirely on the perpetrators who swindled them. These victims were variously unable to retire as planned, had to acquire unplanned debt, suffered strains to their marriages and family relationships, and could not pay for expenses associated with their children, such as sports activities and university.[651]

[921] In conclusion on the sentencing range issue, we find there is a strong case to be made that the upper end of the sophisticated fraud sentencing range is higher than six years. The ranges chosen by the sentencing judges in *Carter*, *Drabinsky*, and *Pavao* support this view. That said, we have concluded the sentencing range used by the trial judge of three to six years in this case does not constitute reversible error. This appeal does not turn on whether the trial judge should have determined a sentencing range with a higher upper end. Our focus has to be on whether, notwithstanding the range he identified, we are satisfied the sentences

imposed took proper account of the gravity of the offences committed by Mr. Potter and Mr. Colpitts and the degree of their moral culpability. We are satisfied they did.

The Sentences are not Demonstrably Unfit

[922] The trial judge was required to impose sentences on Mr. Potter and Mr. Colpitts that were proportionate to the gravity of their offences and their high degree of responsibility. Proportionality is "the cardinal principle that must guide appellate courts in considering the fitness of a sentence…".[652] A proportionate sentence is one that holds an offender accountable for what they have done and condemns their role and the harm they have caused but does not exceed what is just and appropriate.[653] These principles that inform proportionality require:

> [42] … [T]he degree of censure required to express society's condemnation of the offence is always limited by the principle that an offender's sentence must be equivalent to his or her moral culpability, and not greater than it. The two perspectives on proportionality thus converge in a sentence that both speaks out against the offence and punishes the offender no more than is necessary.[654]

[923] Sentencing is a highly individualized exercise. As an appellate court, we owe significant deference to the trial judge's weighing of the relevant factors "in the delicate balancing process that sentencing requires".[655] We are not to recalibrate how he weighed the factors he took into account. We should intervene only if he exercised his discretion unreasonably.[656]

[924] There was nothing unreasonable in how the trial judge assessed all the factors relevant to determining a fit sentence. He was uniquely positioned to make that determination.

[925] The sentencing of Mr. Potter and Mr. Colpitts must be situated in the context of the trial judge's unique familiarity with the case. To quote from the Crown's factum on the appeal against conviction:

> 61. From the date of his assignment to this trial (Dec. 5, 2013) until he imposed sentence, Justice Coady lived this file. For lengthy periods of time, it consumed 100% of his time and he sat on no other matters. He attended every court appearance and heard every motion. That experience was hard-earned and, given the size of this record and length of proceedings, is unique. A trial judge in

> these circumstances knows the file in the way that a captain knows their ship. It is an intimate experience that cannot be re-created. …

[926] The Crown reiterated on appeal the significant aggravating factors it emphasized at sentencing. The trial judge took them all into account. He referred to the obligation Mr. Potter and Mr. Colpitts had to KHI shareholders who "were entitled to expect [they] would act in the company's best interests and observe the applicable laws".[657] He considered their motivations and concluded that, while "financial self-interest played a significant role" in the offences, Mr. Potter and Mr. Colpitts were not simply running a scam:

> [135] The defendants did not set out to cheat KHI investors while lining their own pockets. There was no version of the defendants' plan where they got rich at the expense of innocent investors. It is obvious that Mr. Potter and Mr. Colpitts firmly believed that KHI would be a huge success, revolutionizing education in North America and beyond, and that investors, including themselves, would reap the rewards of their belief in the company's potential. Contrary to the Crown's submissions, this fact distinguishes this case from fraud cases like *Cameron*, *Fast*, and *Kazman* [*R. v. Kazman*, 2018 ONSC 2332].[658]

[927] As for mitigating factors, the trial judge decided delay had the greatest significance. Deference is owed to this assessment. We do not accept the Crown's submission that any mitigating effect obtained from delay should be nullified by "the significant aggravating factors" in this case. Such an offset would be the equivalent of us recalibrating the balancing done by the trial judge. Doing so would fail to respect the principle of deference.

[928] We do not agree the trial judge overemphasized delay. Although the fifteen years of living with "the very real possibility of imprisonment looming over them" included the trial proceedings protracted by Mr. Potter and Mr. Colpitts, the trial judge very reasonably found, "[b]oth defendants were forced to endure considerable uncertainty, public stigma, and prejudice" while they awaited the conclusion of the police investigation that took eight years.[659] We find no fault in his conclusion delay should mitigate the length of the prison sentences he imposed.

[929] We turn to the Crown's criticisms of the trial judge's treatment of Mr. Colpitts' status as a lawyer, namely, that he placed too much emphasis on the likelihood of his disbarment and too little emphasis on the use he made of his position as a lawyer to perpetrate the conspiracy.

[930] The Crown says the trial judge, having found that Mr. Colpitts' use of his position as a lawyer to further the conspiracy was an aggravating factor, then

"essentially negated the impact of that factor by then providing credit to Mr. Colpitts due to his potential disbarment".

[931] It was appropriate for the trial judge to treat Mr. Colpitts' position as a lawyer as an aggravating factor. He recognized the significance of Mr. Colpitts using his knowledge and status as a lawyer to lubricate the wheels of the conspiracy and did not underemphasize what this meant to his determination of an appropriate sentence. He was specific about why this qualified as aggravating: "Mr. Colpitts used his legal expertise and his reputation as the pre-eminent securities lawyer in Atlantic Canada to advance the conspirators' aims".[660] Indeed, the trial judge found the use Mr. Colpitts made of "his legal skills and reputation to assist the conspiracy" brought him to a level of blameworthiness equal to Mr. Potter even though his actual role in the offence was not as substantial.[661]

[932] Having arrived at this conclusion, the trial judge was not prohibited from also factoring in what Mr. Colpitts stood to lose as a result of his convictions. A proportionate sentence takes into account "*all* the relevant circumstances related to the offence and the offender".[662] [Emphasis in original]

[933] If Mr. Colpitts were disbarred, this would constitute a collateral consequence flowing from his convictions. As Moldaver J. explained in *R. v. Suter*:[663]

> [48] … The relevance of collateral consequences stems, in part, from the application of the sentencing principles of individualization and parity: *ibid*.; s. 718.2(b) of the *Criminal Code*. The question is not whether collateral consequences diminish the offender's moral blameworthiness or render the offence itself less serious, but whether the effect of those consequences means that a particular sentence would have a more significant impact on the offender because of his or her circumstances. Like offenders should be treated alike, and collateral consequences may mean that an offender is no longer "like" the others, rendering a given sentence unfit. [Footnotes omitted]

[934] Although *Suter* characterizes collateral consequences as "not necessarily aggravating or mitigating factors" under s. 718.2(a) of the *Criminal Code* because "they do not relate to the gravity of the offence or the level of responsibility of the offender",[664] there is, in their application, little distinction between what are often treated as mitigating factors and what constitutes a collateral consequence. How certain factors are utilized in the sentencing analysis is a component of the tailoring of the sentence to the circumstances of the offence and the offender. Accordingly, we find the trial judge did not fall into error by taking into account the professional

jeopardy faced by Mr. Colpitts as a mitigating factor even though, more precisely, it represents a collateral consequence of his conspiracy and fraud convictions.

[935] What the trial judge did with the professional jeopardy faced by Mr. Colpitts was what was required of him. He factored it into the sentencing calculus that must consider the circumstances of the offender. Balancing aggravating and mitigating factors and determining what weight to assign them and any applicable collateral consequences is central to a sentencing judge's task. In sentencing Mr. Colpitts, the trial judge did just that.

[936] This Court has not found fault with such balancing where being a lawyer raises both aggravating and mitigating considerations. This can be seen in *R. v. Calder*.[665] Ms. Calder was convicted for trafficking a narcotic into a correctional institution. The use she made of her position of trust as a practicing lawyer to smuggle the drug into the jail was found to be a significant aggravating factor. The sentencing judge referred to how this "cast a large dark cloud over all the mitigating factors", of which there were a number.[666] Those mitigating factors included "the cost of these offences and the convictions on her future", that cost being the loss of Ms. Calder's legal career.[667]

[937] When she was sentenced in June 2011, Ms. Calder was still a member of the Nova Scotia Barristers' Society, although voluntarily suspended. After her appeal was dismissed, professional discipline proceedings were started against her and on June 6, 2012, having admitted to, and been found guilty of, professional misconduct and conduct unbecoming a barrister, she was permitted to resign.[668]

[938] In dismissing Ms. Calder's appeal against conviction and sentence in January 2012, this Court noted with approval the sentencing judge's emphasis on the aggravating factor of Ms. Calder taking advantage of her "privileged position as a lawyer" to perpetrate her crime.[669] There was no criticism leveled at his treatment of the loss of Ms. Calder's career as mitigating. This Court held: "[t]he judge did not make an error in principle, fail to consider a relevant factor or overemphasize the appropriate factors".[670]

[939] And further to the question of whether the trial judge overemphasized Mr. Colpitts' potential career loss as a mitigating factor, we assess his expectation that Mr. Colpitts will presumably be disbarred as a result of his convictions for its reasonableness, not from any other perspective. What actually happens to Mr. Colpitts' professional status, if anything, will be determined by the Nova Scotia Barristers' Society.

[940] We find it was reasonable for the trial judge to anticipate Mr. Colpitts is likely to lose "his entitlement to practice law".[671] In cases of significant acts of fraud and dishonesty, the Barristers' Society has sought disbarment. Some examples are: *Nova Scotia Barristers' Society v. Calder*;[672] *Nova Scotia Barristers' Society v. Pillay*;[673] and *Nova Scotia Barristers' Society v. Peter van Feggelen*.[674]

[941] Finally, we have considered Justice Moldaver's agreement in *Suter* with academic commentary that the mitigatory effect of a collateral consequence is "greatly diminished" where it "so directly linked to the nature of an offence as to be almost inevitable".[675] We have this to say: if the trial judge's statement that Mr. Colpitts will "presumably be disbarred" is the equivalent of a finding his disbarment is "almost inevitable", Mr. Colpitts' sentence shows the mitigation accorded to him for this anticipated consequence was minimal. All the mitigating factors the trial judge took into account for Mr. Colpitts only reduced his sentence to six months below Mr. Potter's.

[942] The trial judge rejected the Crown's submission that lawyers convicted of large-scale complex frauds should face a higher sentencing range than non-lawyers. We are not persuaded he was wrong to have done so in this case. We say this for several reasons. We do not find it would have been appropriate to place Mr. Colpitts in a higher sentencing range than Mr. Potter. We also recognize, as did the trial judge, that sentencing must be individualized. The remarks of Doherty J.A. in *R. v. Rosenfeld*[676] are apposite on this point. *Rosenfeld* involved a sophisticated, large-scale money laundering by a lawyer. Justice Doherty declined to adopt the Crown's "sweeping condemnation of sentences imposed on lawyers for this kind of offence":

> [33] Mr. Wakely, for the Crown, in very able submissions, frankly acknowledged that the three-year sentence imposed by the trial judge was not inconsistent with sentences imposed on lawyers for similar offences. Nor did Mr. Wakely suggest that the trial judge committed any error in principle. He argued, however, that the relatively few sentences imposed on lawyers who were involved in sophisticated, large-scale money laundering operations were far too low to adequately reflect the seriousness of the offence and adequately express society's denunciation of the conduct of lawyers whose actions aided and abetted large-scale, organized international crime. Mr. Wakely submitted that a three-year sentence is demonstrably unfit and, therefore, properly the subject of appellate variation: see R. v. M. (C.A.), [1996] 1 S.C.R. 500, [1996] S.C.J. No. 28.
>
> [34] There is a danger in generalizing when describing the imposition of an appropriate sentence. Canadian sentencing philosophy has avoided the concept of tariff sentencing for certain kinds of offences and favoured an approach that

> recognizes the uniqueness of each sentencing problem. Sentencing judges in Canada must tailor the sentence to the specifics of the offence and the specifics of the offender: see *Criminal Code*, s. 718.1.[677]

[943] Justice Doherty increased Mr. Rosenfeld's sentence to five years' imprisonment from three on the basis that a "significantly longer jail term" was required given the seriousness of the offence and Mr. Rosenfeld's level of culpability.

[944] The trial judge sentenced Mr. Colpitts on the basis of his circumstances and the circumstances of the offence, treated his status as a lawyer as an aggravating factor, and imposed a significant term of imprisonment. We find no error in his approach.

[945] The use of professional status or position to further criminal activity is not limited to corrupt lawyers. Nor is it only corrupt lawyers who occupy a position of trust that they abuse to perpetuate an offence. Physicians, teachers, and psychologists who sexually abuse their patients, students, and clients are guilty of using their professional status as a means to commit their crimes. The required denunciation and deterrence will be reflected in the treatment of these breaches of trust as an aggravating factor. In all such cases, sentencing must be individualized as it was here by the trial judge. He was best placed to balance all the relevant factors in determining a proportionate sentence for Mr. Colpitts.

[946] The trial judge's treatment of both the use Mr. Colpitts made of his position as a lawyer, and the further consequences he likely faces, is entitled to deference and does not amount to an error in principle.

Conclusion

[947] By its own admission at the sentencing hearing, the Crown sought "harsh" sentences for Mr. Potter and Mr. Colpitts. The trial judge was entitled to find less punitive sentences could faithfully serve the primary objectives of denunciation and deterrence in this case. It is also not to be forgotten that restraint is a fundamental sentencing principle. Sentences in the five-year range for serious fraud were found to be appropriate in *Carter*, *Drabinsky*, and *Pavao*.

[948] The trial judge undertook a careful balancing of all the factors he was required to consider in crafting proportionate sentences for these offenders. His determination deserves deference.

[949] We find no basis in law or principle to justify appellate interference in the sentences imposed. We grant leave to appeal sentence but dismiss the appeals.

Disposition

[950] The conviction appeals brought by Mr. Potter and Mr. Colpitts are dismissed. We grant the Crown leave to appeal the sentences but dismiss the appeals. As we have not disturbed the convictions, there is no need to deal with the Crown's cross-appeals and they are dismissed.

Bourgeois J.A.

Van den Eynden J.A.

Derrick J.A.

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[1] *Criminal Code*, R.S.C. 1985, c. C-46.
[2] *R. v. Colpitts*, 2018 NSSC 40, para. 7.
[3] All references in these reasons to "Mr. Clarke" are to Bruce Clarke.
[4] *R. v. Colpitts*, 2018 NSSC 40, para. 22.
[5] *Ibid*., para. 70, footnote 4.
[6] *Ibid*.
[7] *R. v. Colpitts*, 2018 NSSC 40, para. 323.
[8] *Ibid.*
[9] *Ibid*.
[10] *Ibid*.
[11] Market domination was described by the trial judge as involving "the intentional maintenance of the stock price by purchasing a high percentage of shares offered for sale by retail shareholders". (*Ibid*., para. 23)
[12] Sales suppression was described by the trial judge as "taking steps to ensure that as little stock is sold as possible". (*Ibid*., para. 25)
[13] High closing was described by the trial judge as "the practice of entering the market, usually late in the day, and purchasing (or offering to purchase) stocks at increasing prices to give a false impression of favorable performance". (*Ibid*., para. 26)
[14] *R. v. Colpitts*, 2018 NSSC 40.

[15] *Ibid*., paras. 52–53, 295–296.
[16] *Ibid*., para. 52.
[17] *Ibid*., para. 53.
[18] *Ibid*., para. 54.
[19] *Ibid*., para. 56.
[20] *Ibid*., para. 60.
[21] *Ibid.*
[22] *Ibid*., para. 40.
[23] *Ibid*.
[24] *Ibid*., para. 41.
[25] *Ibid*., para. 55.
[26] *Ibid*., para. 59.
[27] *Ibid*., paras. 67–275.
[28] *Ibid*., para. 67.
[29] *Ibid.*
[30] *Ibid*., para. 74.
[31] *Ibid*., para. 77.
[32] *Ibid.*
[33] *Ibid*., para. 86.
[34] The trial judge noted that Langley Evans' described nominee accounts as mechanisms for disguising the true nature of manipulative trading. (*Ibid*., para. 33)
[35] *R. v. Colpitts*, 2018 NSSC 40.
[36] *Ibid*., para. 90.
[37] *Ibid*., para. 92.
[38] *Ibid*., para. 94.
[39] *Ibid*.
[40] *Ibid.*
[41] *Ibid*.
[42] *Ibid*.
[43] *Ibid*.
[44] *Ibid*.
[45] *Ibid.*
[46] *Ibid.*
[47] *Ibid*., para. 115, footnote 7.
[48] *Ibid*.
[49] *Ibid*., paras. 124–126.
[50] *Ibid*.
[51] *Ibid*.
[52] *Ibid*., para. 131, footnote 9.
[53] *Ibid*., paras. 127–130; 132–134.
[54] *Ibid*.
[55] *Ibid*., para. 135.
[56] *Ibid*., para. 137.
[57] *Ibid.*
[58] *Ibid.*
[59] *Ibid.*
[60] *Ibid*., para. 145.
[61] *Ibid*.
[62] *Ibid.*
[63] Margin trading allows clients to buy securities with borrowed money – margin loans. The collateral for the margin loan is the securities in the investor's account. (*Ibid*., para. 28)
[64] *R. v. Colpitts*, 2018 NSSC 40.

[65] *Ibid.*
[66] *Ibid*., para. 153.
[67] *Ibid*., para. 154.
[68] *Ibid*.
[69] *Ibid*., para. 158.
[70] *Ibid*., para. 161.
[71] *Ibid*.
[72] *Ibid*., para. 168.
[73] *Ibid*.
[74] *Ibid*.
[75] *Ibid.*
[76] *Ibid*., para. 539.
[77] *Ibid*.
[78] *Ibid*., para. 171, footnote 11.
[79] *Ibid*.
[80] *Ibid*., para. 10.
[81] *Ibid*., para. 175.
[82] *Ibid*., para. 178.
[83] *Ibid*., para. 179.
[84] *Ibid*.
[85] *Ibid.*
[86] *Ibid*., para. 188, footnote 12.
[87] *Ibid*., para. 191.
[88] This cross-examination was at the qualifications *voir dire*. The parties agreed the evidence at the *voir dire* would be admitted as evidence at the trial proper.
[89] SEDAR: System of Electronic Data Analysis and Retrieval. (A repository of publicly available information for publicly traded companies in Canada.)
[90] *R. v. Colpitts*, 2018 NSSC 40, paras. 193–198.
[91] *R. v. Colpitts*, 2018 NSSC 40.
[92] *Ibid*., para. 200, footnote 14.
[93] *Ibid*.
[94] *Ibid*., paras. 203, 521.
[95] *Ibid*.
[96] *Ibid*.
[97] *Ibid*., para. 209, footnote 16.
[98] *Ibid*.
[99] *Ibid*., paras. 210–211.
[100] *Ibid*.
[101] *Ibid*.
[102] *Ibid*., para. 219, footnote 17.
[103] *Ibid*., para. 220.
[104] *Ibid*., para. 221.
[105] *Ibid*.
[106] *Ibid*., para. 225.
[107] *Ibid*.
[108] *Ibid.*
[109] *Ibid*., para. 233, footnote 23.
[110] *Ibid*., para. 235.
[111] *Ibid*., para. 237.
[112] *Ibid*., para. 240.
[113] *Ibid*.
[114] *Ibid*., para. 242, footnote 24.

[115] *Ibid*., paras. 244–247.
[116] *Ibid*.
[117] *Ibid*., para. 590.
[118] *Ibid*.
[119] *Ibid*.
[120] *Ibid*.
[121] *Ibid*.
[122] *Ibid*., para. 257.
[123] *Ibid*., para. 258.
[124] *Ibid*.
[125] *R. v. Clarke*, 2015 NSSC 224.
[126] *Ibid*.
[127] *R. v. Clarke*, 2012 NSSC 406.
[128] *R. v. Clarke*, 2013 NSSC 177.
[129] *R. v. Clarke*, 2013 NSSC 386.
[130] An *O'Connor* application is an application for production of records in the possession of a third-party.
[131] *R. v. Clarke*, 2015 NSSC 224.
[132] *R. v. Colpitts*, 2015 NSSC 272.
[133] *R. v. Colpitts*, 2018 NSSC 41, para. 28.
[134] *R. v. Clarke*, 2015 NSSC 224.
[135] Nova Scotia Securities Commission.
[136] *R. v. Clarke*, 2015 NSSC 224.
[137] *Ibid.*, para. 47.
[138] *Ibid*., paras. 88, 93, 99.
[139] *Ibid.*, para. 97.
[140] *R. v. Jordan*, 2016 SCC 27.
[141] *R. v. Hunt*, 2016 NLCA 61, rev'd 2017 SCC 25.
[142] *R. v. Colpitts*, 2017 NSSC 40.
[143] *R. v. Colpitts*, 2018 NSSC 41.
[144] *Ibid*., para. 58.
[145] *R. v. Hunt*, 2017 SCC 25.
[146] *R. v. Colpitts*, 2018 NSSC 41, para. 59.
[147] *R. v. O'Connor*, [1995] 4 S.C.R. 411.
[148] *Mills v. The Queen*, [1986] 1 S.C.R. 863.
[149] *R. v. O'Connor*, [1995] 4 S.C.R. 411.
[150] *R. v. Babos*, 2014 SCC 16; *R. v. Nixon*, 2011 SCC 34.
[151] *R. v. O'Connor*, [1995] 4 S.C.R. 411, para. 68; *Babos*, *ibid*., para. 31.
[152] *R. v. Grimes*, 1998 ABCA 9; *R. v. La*, [1997] 2 S.C.R. 680; *R. v. Bradford*, [2001] O.J. No. 107 (C.A.).
[153] *Bradford*, *ibid*., para. 8; *Ontario (Ministry of Labour) v. Lee Valley Tools Ltd.*, 2009 ONCA 397, para. 25.
[154] *Lee Valley Tools Ltd.*, *ibid*., para. 27.
[155] *R. v. Bradford*, [2001] O.J. No. 107 (C.A.), para. 6; *R. v. Harrer*, [1995] 3 S.C.R. 562, para. 14.
[156] *R. v. Hunt*, 2017 SCC 25.
[157] *R. v. Hunt*, 2016 NLCA 61.
[158] *Ibid*.
[159] *Ibid.*, paras. 65, 67.
[160] *Ibid.*, para. 80.
[161] *Ibid.*, para. 85.
[162] *Ibid.*, para. 104.
[163] *R. v. Derbyshire*, 2016 NSCA 67, paras. 72–74; *R. v. Babos*, 2014 SCC 16, para. 48.
[164] *R. v. Colpitts*, 2018 NSSC 41.
[165] *R. v. Campbell*, 2017 ONSC 3442.
[166] *R. c. Presenti*, 2017 QCCQ 15289 (unofficial English translation).

[167] *R. v. Hunt*, 2016 NLCA 61, para. 104.
[168] *R. v. Clarke*, 2015 NSSC 224.
[169] *Ibid*.
[170] *R. v. Hunt*, 2016 NLCA 61.
[171] *Ibid*.
[172] *R. v. Clarke*, 2015 NSSC 224.
[173] *R. v. Colpitts*, 2018 NSCC 41.
[174] *R. v. Morin*, [1992] 1 S.C.R. 771.
[175] *R. v. Clarke*, 2015 NSSC 224, paras. 115–128.
[176] *R. v. Clarke*, 2015 NSSC 224.
[177] *R. v. Colpitts*, 2017 NSSC 40.
[178] *R. v. Colpitts*, 2018 NSSC 41.
[179] *Ibid*.
[180] *R. v. Jordan*, 2016 SCC 27, para. 46.
[181] *Ibid*., para. 60.
[182] *Ibid*., paras. 60, 61, 63.
[183] *Ibid*., para. 47.
[184] *Ibid*., paras. 69, 71.
[185] *Ibid*., para. 96.
[186] The *Jordan* court was divided over the introduction of a new s. 11(b) framework. However, the *Cody* court was unanimous in its endorsement of the new framework.
[187] *R. v. Cody*, 2017 SCC 31.
[188] *Ibid*., para. 27; *R. v. Jordan*, 2016 SCC 27, para. 61.
[189] *R. v. Cody*, 2017 SCC 31, para. 28, citing *Jordan*, *ibid*., para. 113.
[190] *Cody*, *ibid*., para. 29, citing *Jordan*, *ibid*., para. 65.
[191] *Ibid.*
[192] *Cody*, *ibid*., para. 33; *Jordan*, *ibid*., paras. 113, 121.
[193] *Cody*, *ibid*., para. 33; *Jordan*, *ibid*., para. 138.
[194] *Cody*, *ibid.*
[195] *Ibid*., para. 45, citing *R. v. Jordan*, 2016 SCC 27, para. 69.
[196] *Cody*, *ibid.*,, para. 46.
[197] *Ibid*., para. 48.
[198] *Ibid*., paras. 63–64.
[199] *Ibid*., para. 64.
[200] *Ibid*.; see also *R. v. Jordan*, 2016 SCC 27, para. 79.
[201] *Cody*, *ibid.*,, para. 67.
[202] *Ibid*., para. 68, citing *R. v. Jordan*, 2016 SCC 27, para. 96.
[203] *Cody*, *ibid.*, para. 69.
[204] *R. v. K.J.M*., 2019 SCC 55.
[205] *R. v. R.E.W*., 2011 NSCA 18 at paras. 30, 34–35; *R. v. K.G.K.*, 2019 MBCA 9, para. 53; *R. v. Jurkus*, 2018 ONCA 489, para. 25.
[206] *R. v. Jordan*, 2016 SCC 27 para. 65.
[207] *R. v. Cody*, 2017 SCC 31.
[208] *Ibid*., para. 64; *R. v. Jordan*, 2016 SCC 27, para. 79.
[209] *R. v. Colpitts*, 2018 NSSC 41.
[210] *R. v. Brown*, 2018 NSCA 62, paras. 73–75.
[211] *R. v. K.J.M.*, 2019 SCC 55.
[212] *R. v. Clarke*, 2015 NSSC 224.
[213] *Ibid.*
[214] *R. v. Clarke*, 2013 NSSC 386.
[215] *Ibid.*
[216] *R. v. Clarke*, 2015 NSSC 224.

[217] *Ibid.*
[218] David M. Paciocco, "Stinchcombe on Steroids: The Surprising Legacy of McNeil" (2009) 62 C.R. (6th) 26.
[219] *R. v. Clarke*, 2015 NSSC 224.
[220] *Ibid.*
[221] *Ibid.*
[222] *Ibid.*
[223] *Ibid.*
[224] *R. v. Colpitts*, 2018 NSSC 41.
[225] *Ibid.*, para. 47.
[226] *Ibid.*
[227] *Ibid.*
[228] *R. v. Cody*, 2017 SCC 31.
[229] *R. v. Colpitts*, 2018 NSSC 41.
[230] *R. v. Jordan*, 2016 SCC 27, para. 64.
[231] *R. v. K.J.M.*, 2019 SCC 55.
[232] *R. v. Colpitts*, 2018 NSSC 41.
[233] *R. v. Jordan*, 2016 SCC 27.
[234] *R. v. Cody*, 2017 SCC 31, para. 32.
[235] *R. v. Colpitts*, 2018 NSSC 41.
[236] *R v. Colpitts*, 2015 NSSC 272.
[237] *R. v. Colpitts*, 2018 NSSC 41.
[238] *Ibid.*
[239] *Ibid.*
[240] *Ibid.*
[241] *R. v. Gopie*, 2017 ONCA 728; *R. v. Klassen*, 2018 ABCA 258.
[242] *R. v. Albinowski*, 2018 ONCA 1084.
[243] *R. v. Brissett*, 2019 ONCA 11.
[244] *R. v. Colpitts*, 2018 NSSC 41.
[245] *Ibid.*
[246] *Ibid.*
[247] *Ibid.*
[248] *R. v. Jordan*, 2016 SCC 27, para. 79.
[249] Nova Scotia Securities Commission.
[250] *R. v. Colpitts*, 2018 NSSC 41.
[251] *R. v. Colpitts*, 2016 NSSC 48.
[252] *Ibid.*
[253] *R. v. Colpitts*, 2018 NSSC 40.
[254] *R. v. Colpitts*, 2016 NSSC 48, para. 26.
[255] *R. v. Keats*, 2016 NSCA 94, para. 105.
[256] *Graat v. The Queen*, [1982] 2 S.C.R. 819.
[257] *R. v. Hamilton*, 2011 ONCA 399.
[258] *Ibid.*
[259] *Ibid.*, para. 277.
[260] *Ibid.*
[261] *Ibid.*, para. 280.
[262] *R. v. Mahmood*, 2012 ONSC 6487
[263] *Ibid.*
[264] *R. v. Mahmood*, 2016 ONCA 75.
[265] *R. v. Mahmood*, 2015 ONCA 442.
[266] *Ibid.*, para. 41.
[267] *R. v. Ajise*, 2018 ONCA 494, aff'd 2018 SCC 51.
[268] *Ibid.*

[269] *Ibid*.
[270] *Ibid*.
[271] *R. v. Colpitts*, 2018 NSSC 40, paras. 320, 322.
[272] *R. v. Mohan*, [1994] 2 S.C.R. 9.
[273] *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23.
[274] *R. v. Dim*, 2017 NSCA 80, para. 85, citing *R. v. Dominic*, 2016 ABCA 114, para. 17.
[275] *R. v. D.D.*, 2000 SCC 43, para. 13 (McLachlin C.J. in dissent).
[276] *R. v. Abbey*, 2009 ONCA 624, para. 97.
[277] *R. v. S.A.B.*, 2003 SCC 60, para. 63; *R. v. Clark*, 2016 ABCA 72, para. 61.
[278] *R. v. Shafia*, 2016 ONCA 812, para. 230, referring to *R. v. Mohan*, [1994] 2 S.C.R. 9.
[279] *Mohan, ibid*., para. 24.
[280] *R. v. Abbey*, 2009 ONCA 624, para. 76.
[281] *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, paras. 19, 23–24, 52–53.
[282] *R. v. Colpitts*, 2016 NSSC 219, paras. 7–9.
[283] *Ibid*.
[284] *Ibid*., paras. 10, 12.
[285] *Ibid*., para. 12.
[286] *Ibid*., para. 21
[287] *Ibid*., paras. 35, 37
[288] *R. v. Abbey*, 2009 ONCA 624.
[289] *Ibid*., para. 89.
[290] *Ibid*., para. 87.
[291] *Ibid*., paras. 90–91.
[292] *Ibid*., para. 92.
[293] *R. v. Colpitts*, 2016 NSSC 219, para. 23.
[294] *Ibid*., para. 24.
[295] *Ibid*., paras. 24, 27.
[296] *Ibid*.
[297] *Ibid*., paras. 26, 27.
[298] *Ibid*., para. 31.
[299] *Ibid*.
[300] *Ibid*.
[301] *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, para. 48.
[302] *R. v. France*, 2017 ONSC 2040.
[303] *Ibid*., para. 17 citing David Paciocco, "Taking a 'Goudge' out of Bluster and Blarney: an 'Evidence-Based Approach' to Expert Testimony" (2009) 13 Can. Crim. L.R. 135.
[304] *R. v. Colpitts*, 2016 NSSC 219, para. 19.
[305] *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, para. 46.
[306] *R. v. Colpitts*, 2016 NSSC 219, para. 24.
[307] *Alfano v. Piersanti*, 2012 ONCA 297.
[308] *Ibid*., paras. 115–11, 118.
[309] *R. v. Colpitts*, 2018 NSSC 40, paras. 23–24.
[310] *Ibid*., para. 25.
[311] *Ibid*., paras. 26–27.
[312] *Ibid*., para. 33.
[313] *Ibid*., para. 35.
[314] *Ibid*., paras. 37–38.
[315] *Ibid*., para. 42.
[316] *Ibid*., paras. 336, 349, 351, 355.
[317] *Ibid*., paras. 400–402, 404.
[318] *Ibid*., para. 371.
[319] *R. v. Colpitts*, 2018 NSSC 40.

[320] *Ibid*., paras. 336, 349, 351, 355.
[321] *Ibid*., paras. 400–402, 404, 413.
[322] *Ibid*., para. 432.
[323] *Ibid*., para. 327.
[324] *Ibid*., para. 328.
[325] *Ibid*., para. 329.
[326] *Ibid*., para. 330.
[327] *Ibid*., para. 352.
[328] *R. v. Colpitts*, 2018 NSSC 40.
[329] *Ibid*.
[330] *Ibid*., para. 334.
[331] *Ibid*.
[332] *Ibid*., para. 334.
[333] *R. v. Colpitts*, 2016 NSSC 48, para. 27.
[334] *Ibid*.
[335] *R. v. Colpitts*, 2018 NSSC 40.
[336] *R. v. Bradshaw*, 2017 SCC 35, para. 20.
[337] *R. v. Mapara*, 2005 SCC 23, para. 8 citing with approval John Sopinka, Sidney N. Lederman & Alan W. Bryant, *The Law of Evidence in Canada*, 2nd ed. (Markham: Butterworths Canada Ltd., 1999), at p. 303.
[338] *R. v. Starr*, 2000 SCC 40, para. 214.
[339] *R. v. Mapara*, 2005 SCC 23.
[340] *Ibid*., para. 31.
[341] *Ibid*., para. 34.
[342] *R. v. Colpitts*, 2016 NSSC 48, para. 5.
[343] *R. v. Mapara*, 2005 SCC 23, para. 16.
[344] *R. v. Colpitts*, 2016 NSSC 48, para. 48.
[345] *R. v. Cater*, 2014 NSCA 74.
[346] *R. v. Sheriffe*, 2015 ONCA 880, para. 120.
[347] *R. v. Youvarajah*, 2013 SCC 41, para. 31.
[348] *R. v. Blackman*, 2008 SCC 37, para. 52.
[349] *R. v. Simpson*, 2007 ONCA 793.
[350] *R. v. Brooks*, 2018 ONCA 587.
[351] *R. v. Mapara*, 2005 SCC 23, para. 18.
[352] *R. v. Carter*, [1982] 1 S.C.R. 938.
[353] *R. v. Cater*, 2014 NSCA 74, aff'g 2012 NSPC 15.
[354] *R. v. Colpitts*, 2016 NSSC 48, paras. 39, 46.
[355] *Ibid*., para. 28.
[356] *R. v. Simpson*, 2007 ONCA 793.
[357] *R. v. Brooks*, 2018 ONCA 587.
[358] *Ibid.*
[359] *R. v. Simpson*, 2007 ONCA 793, para. 36.
[360] *Ibid*., para. 32.
[361] *Ibid*., para. 49.
[362] *R. v. Mapara*, 2005 SCC 23, para. 18, citing *R. v. Chang*, [2003] O.J. No. 1076 (C.A.), para. 105.
[363] *R. v. Cater*, 2014 NSCA 74.
[364] *R. v. Colpitts*, 2016 NSSC 48.
[365] *R. v. Cater*, 2014 NSCA 74.
[366] *R. v. N.Y.*, 2012 ONCA 745.
[367] *Ibid*., para. 78.
[368] *R. v. Bridgman*, 2017 ONCA 940, para. 63.
[369] *R. v. Colpitts*, 2016 NSSC 48, para. 39.
[370] *Ibid*., citing *R. v. Chang*, [2003] O.J. No. 1076 (C.A.), para. 132.

[371] *R. v. Colpitts*, 2016 NSSC 48, para. 40.
[372] *Ibid*.
[373] *R. v. Alcantara*, 2015 ABCA 259.
[374] *R. v. Cater*, 2014 NSCA 74, paras. 173–174.
[375] *R. v. Colpitts*, 2016 NSSC 48, para. 37.
[376] *R. v. Parrot* (1979), 106 D.L.R. (3d) 296 (Ont. C.A.).
[377] *R. v. Harris*, [1989] O.J. No. 2635 (Dist. Ct.), aff'd [1992] O.J. No. 142 (C.A.).
[378] *R. v. MacKay*, 2018 BCSC 1820.
[379] *R. v. Bridgman*, 2017 ONCA 940.
[380] *R. v. Carter*, [1982] 1 S.C.R. 938.
[381] *R. v. Colpitts*, 2016 NSSC 48, paras. 33–34, citing *R. v. Starr*, 2000 SCC 40.
[382] *Colpitts*, *ibid.*, paras. 31, 34–35, citing *R. v. Mapara*, 2005 SCC 23.
[383] *Mapara*, *ibid*., para. 8.
[384] *Ibid*., para 22.
[385] *R. c. Proulx*, 2016 QCCA 1425 (unofficial English translation).
[386] *R. v. Bradshaw*, 2017 SCC 35, paras. 44, 49.
[387] *R. v. Skinner*, 2016 NSCA 54, para. 21.
[388] *R. v. Brooks*, 2000 SCC 11, para. 6.
[389] *R. v. Gagnon*, 2006 SCC 17, para. 10.
[390] *R. v. Marakah*, 2017 SCC 59.
[391] *R. v. Telus Communications Co.*, 2013 SCC 16, paras. 12, 57, 135.
[392] *R. c. Proulx*, 2016 QCCA 1425, para. 65 (unofficial English translation).
[393] *Ibid*., para. 66.
[394] *Ibid*., para. 67.
[395] *Ibid*., para. 82.
[396] *R. v. Colpitts*, 2018 NSSC 40, para. 379.
[397] *Ibid*., para. 379.
[398] *Ibid*., para. 453.
[399] *Ibid*., para. 464, 507.
[400] *Ibid*., para. 507.
[401] *Ibid*., para. 676.
[402] *Ibid*., para. 459, citing *United States v. Dynar*, [1997] 2 S.C.R. 462, para. 86.
[403] *Ibid.*, para. 458, citing *R. v. O'Brien*, [1954] S.C.R. 666, at pp. 668–669.
[404] *R. v. J.F.*, 2013 SCC 12.
[405] *R. v. Colpitts*, 2018 NSSC 40, para. 463.
[406] *R. v. Biniaris*, 2000 SCC 15, para. 36.
[407] *R. v. Patterson*, 2018 NSCA 73, para. 28; *R. v. Thompson*, 2015 NSCA 51, para. 60.
[408] *R. v. Biniaris*, 2000 SCC 15, para. 37.
[409] *R. v. R.P.*, 2012 SCC 22.
[410] *R. v. Colpitts*, 2018 NSSC 40, para. 709.
[411] *Ibid*.
[412] *Ibid*., para. 710.
[413] *Ibid*., para. 711.
[414] *Ibid*.
[415] *Ibid*., para. 558.
[416] *Ibid*., para. 509.
[417] *Ibid.*, para. 520.
[418] *Ibid*.
[419] *Ibid.*, para. 521.
[420] *Ibid*.
[421] *Ibid*.
[422] *Ibid*., para. 166.

[423] *Ibid*., para. 530.
[424] *Ibid*., para. 532.
[425] *Ibid*., paras. 533–537.
[426] *Ibid*., paras. 538–540.
[427] *Ibid*.
[428] *Ibid*., para. 570.
[429] *Ibid.*
[430] *Ibid*., paras. 572–583.
[431] *Ibid*., para. 587.
[432] *Ibid*., para. 588.
[433] *Ibid*., para. 589.
[434] *Ibid*., paras. 590–593.
[435] *Ibid*., paras. 596–673.
[436] *Ibid*.
[437] *Papalia v. The Queen*; *R. v. Cotroni*, [1979] 2 S.C.R. 256, at pp. 276–277.
[438] *R. v. Root*, 2008 ONCA 869, para. 68.
[439] *R. v. Colpitts*, 2018 NSSC 40, para. 462.
[440] *R. v. Campbell*, [1993] O.J. No. 3844 (Ct. J. (Gen. Div.)).
[441] *R. v. Colpitts*, 2018 NSSC 40, paras. 448–455, distinguishing *Campbell*, *ibid*.
[442] *R. v. Kienapple*, [1975] 1 S.C.R. 729.
[443] *R. v. Colpitts*, 2018 NSSC 40, para. 467.
[444] *R. v. Olan*, [1978] 2 S.C.R. 1175.
[445] *R. v. Théroux*, [1993] 2 S.C.R. 5.
[446] *R. v. Zlatic*, [1993] 2 S.C.R. 29.
[447] *R. v. Riesberry*, 2015 SCC 65, aff'g 2014 ONCA 744.
[448] *R. v. Colpitts*, 2018 NSSC 40.
[449] *Ibid*.
[450] *Ibid*., para. 484.
[451] *Ibid*., para. 488.
[452] *Ibid*., para. 490.
[453] *Ibid*., para. 495, citing *R. v. Bird*, 2013 SKQB 343, para. 82.
[454] *Ibid*., para. 496.
[455] *Ibid*., para. 497.
[456] *Ibid*., para. 498.
[457] *Ibid*., para. 500.
[458] *Ibid*., para. 505.
[459] *Ibid*., paras. 62–275, 276–315.
[460] *Ibid*.
[461] *Québec (Autorité des marchés financiers) c. Forget*, 2018 QCCA 1419 (unofficial English translation).
[462] *R. v. Campbell*, [1993] O.J. No. 3094 (Ct. J. (Gen. Div.)).
[463] *R. v. Riesberry*, 2015 SCC 65.
[464] *R. v. Dim*, 2017 NSCA 80.
[465] *R. v. Lohrer*, 2004 SCC 80, para. 2.
[466] *R. v. Colpitts*, 2018 NSSC 40, para. 426.
[467] *R. v. Allman*, [1984] B.C.J. No. 1406 (C.A.).
[468] *R. v. Colpitts*, 2018 NSSC 40.
[469] *Ibid.*
[470] *R. v. Théroux*, [1993] 2 S.C.R. 5, p. 16; *R. v. Zlatic*, [1993] 2 S.C.R. 29, p. 44.
[471] *R. v. Colpitts*, 2018 NSSC 40.
[472] *Ibid*., para. 373.
[473] *Québec (Autorité des marchés financiers) c. Forget*, 2016 QCCS 6522 (CanLII) (unofficial English translation).
[474] *Québec (Autorité des marchés financiers) c. Forget*, 2018 QCCA 1419 (unofficial English translation).

[475] *R. v. Campbell*, [1993] O.J. No. 3094 (Ct. J. (Gen. Div.)).
[476] *Autorité des marchés financiers c. Forget*, 2016 QCCS 6522 (CanLII) (unofficial English translation).
[477] R. v. Colpitts, 2018 NSSC 40
[478] *Ibid.*
[479] *Ibid.*, para. 440.
[480] *Ibid.*
[481] *R. v. Campbell*, [1993] O.J. No. 3094 (Ct. J. (Gen. Div.)), paras. 5, 8.
[482] *Ibid.*, para. 2.
[483] *Ibid.*
[484] *Ibid.*
[485] *R. v. Colpitts*, 2018NSSC 40.
[486] *Ibid.*
[487] *R. v. Jay* (1965), [1966] 1 C.C.C. 70, (Ont. C.A.).
[488] *Lampard v. The Queen*, [1969] S.C.R. 373.
[489] *R. v. Alston*, 1980 CanLII 1147 (Alta. Q.B.).
[490] *R. v. Jay* (1965), [1966] 1 C.C.C. 70, p. 71.
[491] *Lampard v. The Queen*, [1969] S.C.R. 373, p. 379.
[492] *R. v. Alston*, 1980 CanLII 1147 (Alta. Q.B.), paras. 13, 34.
[493] *R. v. Riesberry*, 2015 SCC 65, aff'g 2014 ONCA 744.
[494] *R. v. Colpitts*, 2018 NSSC 40.
[495] *Ibid.*, para. 480, citing *R. v. Riesberry*, 2014 ONCA 744
[496] *R. v. Riesberry*, 2015 SCC 65
[497] *R. v. Théroux*, [1993] 2 S.C.R. 5, p. 26.
[498] *R. v. Nette*, 2001 SCC 78, para. 49.
[499] *National Bank Financial Ltd. v. Barthe Estate*, 2015 NSCA 47.
[500] *Ibid.*, para. 243.
[501] *R. v. Colpitts*, 2018 NSSC 40, para. 277.
[502] *R. v. Gaetz* (1992), 117 N.S.R. (2d) 22 (C.A.).
[503] *R. v. Colpitts*, 2018 NSSC 40.
[504] *R. v. Théroux*, [1993] 2 S.C.R. 5, pp. 23–24; *R. v. Olan*, [1978] 2 S.C.R. 1175, p. 1194.
[505] *R. v. Colpitts*, 2018 NSSC 40.
[506] *Ibid.*, para. 707.
[507] *Ibid.*
[508] *Ibid.*
[509] *Ibid.*
[510] *Ibid.*
[511] *Ibid.*
[512] *Ibid.*, para. 419.
[513] *Ibid.*, para. 381.
[514] *Ibid.*
[515] *Ibid.*
[516] *R. v. Colpitts*, 2018 NSSC 40.
[517] *Ibid.*, para. 389.
[518] *Ibid.*, para. 379.
[519] *Ibid.*, para. 584.
[520] The above is reproduced from Mr. Potter's Notice of Appeal. Mr. Colpitts' Notice is identical with the exception of the second bullet point in ground 9, which reads "… in relation to the evidence of myself as an unrepresented accused struggling to be in court and prepare witnesses" and the last sentence in ground 10 which reads: "[t]his lack of impartiality impaired my ability and right to make full answer and defence and in fact, impacted upon the determination of my co-accused not to call a defence".
[521] *Nova Scotia (Attorney General) v. MacLean*, 2017 NSCA 24.
[522] *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25.

[523] *R. v. Baccari*, 2011 ABCA 205.
[524] *R. v. E.E.D.*, 2007 SKCA 99.
[525] *R. v. Steel*, [1995] A.J. No. 992 (C.A.).
[526] *R. v. Felderhof* (2003), 180 C.C.C. (3d) 498 (Ont. C.A.).
[527] *R. v. West*, 2010 NSCA 16.
[528] *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, para. 99; *C.B. v. T.M.*, 2013 NSCA 53, para. 31.
[529] *R. v. Clarke*, 2014 NSSC 431.
[530] *Ibid.*
[531] *Ibid.*
[532] *Ibid.*
[533] *R. v. Colpitts*, 2015 NSSC 117.
[534] *Ibid.*
[535] *R. v. Clarke*, 2015 NSSC 224.
[536] *R. v. Colpitts*, 2015 NSSC 272.
[537] *Ibid.*
[538] *Ibid.*
[539] *Ibid.*
[540] *Ibid.*
[541] *R. v. Colpitts*, 2018 NSSC 41.
[542] *R. v. Colpitts*, 2017 NSSC 22, para. 2.
[543] *Ibid.*
[544] *Ibid.*
[545] *R. v. Colpitts*, 2017 NSSC 24.
[546] *Ibid.*
[547] *Ibid.*
[548] *Ibid.*
[549] *R. v. Colpitts*, 2017 NSSC 40.
[550] *Palkowski v. Invancic*, 2009 ONCA 705.
[551] *R. v. Schneider*, 2004 NSCA 99, para. 56.
[552] *R. v. Colpitts*, 2017 NSSC 200.
[553] *R. v. Cody*, 2017 SCC 31.
[554] *R. v. Parker*, [1998] O.J. No. 469 (C.A.).
[555] *Ibid*.
[556] *Ibid*.
[557] *R. v. Curragh Inc.*, [1997] 1 S.C.R. 537, para. 11.
[558] *R. v. Colpitts*, 2018 NSSC 180.
[559] *R. v. Skinner*, 2016 NSCA 54, para. 17.
[560] *Ibid*., para. 28.
[561] *Ibid*.
[562] *R. v. Shropshire*, [1995] 4 S.C.R. 227, para. 46.
[563] *R. v. Espinosa Ribadeneira*, 2019 NSCA 7.
[564] *R. v. Lacasse*, 2015 SCC 64, para. 51.
[565] *Ibid*., para. 67.
[566] *Ibid.*
[567] *R. v. Colpitts*, 2018 NSSC 180, para. 4.
[568] *Ibid*.
[569] *Ibid*.
[570] *R. v. Clarke*, 2016 NSSC 101, paras. 13, 56, 79–80.
[571] *R. v. Drabinsky*, 2011 ONCA 582.
[572] *R. v. Colpitts*, 2018 NSSC 180, para. 30, citing *R. v. Drabinsky*, *ibid.*, para. 160.
[573] *Colpitts*, *ibid.*, para. 173.
[574] *Ibid*., para. 26.

[575] *Ibid*., para. 29.
[576] *Ibid*., para. 31.
[577] *Ibid*., para. 151.
[578] *R. v. Cameron*, 2017 ABQB 554.
[579] *R. v. Drabinsky*, 2011 ONCA 582.
[580] *R. v. Fast*, 2015 SKCA 56.
[581] *R. v. Cameron*, 2017 ABQB 554.
[582] *R. v. Colpitts*, 2018 NSSC 180, para. 110, see also para. 135.
[583] *Ibid*., para. 28.
[584] *Ibid*., para. 52.
[585] *R. v. Fast*, 2014 SKQB 161, para. 40.
[586] *R. v. Fast*, 2015 SKCA 56.
[587] *R. v. Colpitts*, 2018 NSSC 180, para. 110.
[588] *Ibid.*
[589] *R. v. Drabinsky*, 2011 ONCA 582, para. 5.
[590] R. v. Colpitts, 2018 NSSC 180.
[591] *Ibid.*, paras. 112, 115.
[592] *Ibid*., paras. 114–132.
[593] *Ibid.*
[594] *Ibid*., paras. 147–150.
[595] *Ibid*., para. 132.
[596] Mr. Colpitts adopted portions of Mr. Potter's factum including this point.
[597] *R. v. Colpitts*, 2018 NSSC 180, paras. 138–146.
[598] *Ibid*., para. 144.
[599] *Ibid*., para. 146.
[600] *Ibid*., para. 140, citing *R. v. Colpitts*, 2018 NSSC 41, para. 143.
[601] *R. v. Colpitts*, 2018 NSSC 40, paras. 138–141.
[602] *R. v. Colpitts*, 2018 NSSC 180, para. 139, citing *R. v. Clarke*, 2016 NSSC 101, para. 76.
[603] *R. v. Bosley*, 1992 CarswellOnt 125 (C.A.), para. 44.
[604] *R. v. Colpitts*, 2018 NSSC 180, paras. 147–149.
[605] *R. v. Colpitts*, 2018 NSSC 180.
[606] *R. v. Colpitts*, 2018 NSSC 40.
[607] R. v. Colpitts, 2018 NSSC 180.
[608] *Ibid.*
[609] *R. v. Nasogaluak*, 2010 SCC 6, para. 44.
[610] *R. v. Lacasse*, 2015 SCC 64, para. 69.
[611] *R. v. Suter*, 2018 SCC 34, para. 25; *ibid*., para. 69
[612] *R. v. Lacasse*, 2015 SCC 64, para. 58; *R. v. Nasogaluak*, 2010 SCC 6, para. 44; *Suter*, *ibid*., para. 25.
[613] *Nasogaluak*, *ibid*., para. 44.
[614] *R. v. Lacasse*, 2015 SCC 64.
[615] *Ibid.*
[616] *R. v. Colpitts*, 2018 NSSC 180, para. 2.
[617] *R. v. Carter*, [1990] O.J. No. 3140 (Ct. J. (Gen. Div.)).
[618] *Ibid*.
[619] *Ibid*.
[620] *R. v. Carter*, [1990] O.J. No. 3089 (Ct. J. (Gen. Div.)), paras. 2, 45–50.
[621] *R. v. Carter*, [1990] O.J. No. 3140 (Ct. J. (Gen. Div.)), para. 2.
[622] *R. v. Carter*, [1990] O.J. No. 3089 (Ct. J. (Gen. Div.)).
[623] *R. v. Carter*, [1990] O.J. No. 3140 (Ct. J. (Gen. Div.)), paras. 2, 11.
[624] *Ibid*., para. 22.
[625] *R. v. Carter*, [1990] O.J. 3140 (Ct. J. (Gen. Div.)).
[626] *Ibid*., paras. 25, 27.

[627] *Ibid*., para. 28.
[628] *Ibid*., para. 37.
[629] *Ibid*. paras. 31–32.
[630] *R. v. Colpitts*, 2018 NSSC 180, para. 124.
[631] *R. v. Colpitts*, 2018 NSSC 40, paras. 497–498.
[632] *R. v. Drabinsky*, [2009] O.J. No. 3282 (Sup. Ct. J.), para. 35.
[633] *R. v. Drabinsky*, 2011 ONCA 582.
[634] *R. v. Drabinsky*, [2009] O.J. No. 1227 (Sup. Ct. J.), paras. 455, 500.
[635] *R. v. Drabinsky*, 2011 ONCA 582.
[636] *Ibid*.
[637] *R. v. Drabinsky*, [2009] O.J. No. 3282 (Ont. Sup. Ct. J.).
[638] *Ibid*.
[639] *R. v. Carter*, [1990] O.J. No. 3140 (Ct. J. (Gen. Div.)).
[640] *R. v. Wenger*, 2011 PESC 10.
[641] *R. v. Allman*, [1983] B.C.J. No. 1149 (Co. Ct.).
[642] *R. v. Pavao*, 2018 ONSC 4889.
[643] *Ibid*.
[644] *Ibid*., para. 16.
[645] *Ibid*.
[646] *R. v. Pavao*, 2018 ONSC 4889.
[647] *Ibid*.
[648] *R. v. Drabinsky*, 2011 ONCA 582, para. 159.
[649] *R. v. Dunkers*, 2018 BCCA 363.
[650] *R. v. Davatgar-Jafarpour*, 2019 ONCA 353.
[651] *R. v. Pavao*, 2018 ONSC 4889, paras. 48–56.
[652] *R. v. Lacasse*, 2015 SCC 64, para. 12.
[653] *R. v. Nasogaluak*, 2010 SCC 6, para. 42.
[654] *R. v. Nasogaluak*, 2010 SCC 6.
[655] *R. v. Chase*, 2019 NSCA 36, para. 57.
[656] *R. v. Nasogaluak*, 2010 SCC 6, para. 46, citing *R. v. McKnight*, [1999] O.J. No. 1321 (C.A.), para. 35.
[657] *R. v. Colpitts*, 2018 NSSC 180, para. 120.
[658] *Ibid*.
[659] *Ibid*., paras. 138–141.
[660] *Ibid*., para. 115.
[661] *Ibid*.
[662] *R. v. Suter*, 2018 SCC 34, para. 46.
[663] *Ibid.*
[664] *Ibid*., para. 48.
[665] *R. v. Calder*, 2012 NSCA 3.
[666] *R. v. Calder*, 2011 NSSC 312, para. 48.
[667] *Ibid*., para. 46.
[668] *Nova Scotia Barristers' Society v. Calder*, 2012 NSBS 2 (CanLII).
[669] *R. v. Calder*, 2012 NSCA 3, para. 38.
[670] *Ibid*., para. 40.
[671] *R. v. Colpitts*, 2018 NSSC 180, para. 148.
[672] *Nova Scotia Barristers' Society v. Calder*, 1996 NSBS 2 (CanLII).
[673] *Nova Scotia Barristers' Society v. Pillay*, 2005 NSBS 2 (CanLII).
[674] *Nova Scotia Barristers' Society v. Peter van Feggelen*, 2013 NSBS 1 (CanLII).
[675] *R. v. Suter*, 2018 SCC 34, para. 49, citing Allan Manson, *The Law of Sentencing*, (Toronto: Irwin Law, 2001), p. 137.
[676] *R. v. Rosenfeld*, 2009 ONCA 307.
[677] *Ibid*.