NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Sandeson*, 2020 NSCA 47

Date: 20200617
Docket: CAC 464867
Registry: Halifax

Between:

William Michael Sandeson

Appellant

v.

Her Majesty the Queen

Respondent

Judge:	The Honourable Justice David P.S. Farrar
Appeal Heard:	January 20-21, 2020, in Halifax, Nova Scotia
Subject:	**Criminal Law. Right to Make Full Answer and Defence. Breach of Duty of Disclosure. Appropriateness of a Mistrial as a Remedy for the breach of the duty of disclosure.**
Summary:	William Michael Sandeson was convicted of first-degree murder in the death of Taylor Samson. During the trial it became known that a private investigator working with Mr. Sandeson's defence team had assisted the police by locating and putting them into contact with two witnesses. The witnesses had previously provided statements to the police denying having any significant information relating to Mr. Samson's death. However, after being interviewed by the private investigator it became apparent they had material information relating to the investigation. The private investigator encouraged the police to re-interview the two witnesses and took steps to assist them in locating and gaining the confidence of the witnesses. The involvement of the private investigator with the police

was not disclosed to the defence. In fact, the police took steps to keep the private investigator's name confidential.

When the Crown revealed to defence counsel at trial that the private investigator had assisted the police, the defence immediately moved for a mistrial. The trial judge found that there had been a breach of the duty to disclose but denied the mistrial finding that a short adjournment and further cross-examination of witnesses would remedy the breach.

Sandeson appealed alleging the trial judge erred in failing to declare a mistrial as well as other grounds of appeal.

Issues: The only issue that was necessary to dispose of the appeal was whether the trial judge erred in failing to declare a mistrial.

Result: Appeal allowed; new trial ordered. The trial judge erred in failing to consider whether the undisclosed evidence impacted the ability of the defence to bring process-oriented responses such as *Charter* challenges. The trial judge restricted his analysis to considering whether the undisclosed evidence impacted the ability of Mr. Sandeson to respond to the merits of the Crown's case.

The right to make full answer and defence not only includes challenging the Crown's case on the merits but also the ability to advance reasonable *Charter* and other process-oriented responses to the charges.

The trial judge also erred in finding that the police were merely passive recipients of the information from the private investigator. The trial judge's own findings of fact do not support his conclusion. The facts accepted by the trial judge, and supported by the record, reveal that the police were active participants in a common venture with the private investigator to obtain these statements.

In the circumstances, the failure to disclose precluded Mr. Sandeson from making full answer and defence to the charges against him. The only reasonable and fair remedy for the

breach was a mistrial.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 35 pages.

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Judges:	Farrar, Saunders and Scanlan, JJ.A.
Appeal Heard:	January 20-21, 2020, in Halifax, Nova Scotia
Held:	Appeal allowed, conviction set aside and a new trial ordered per reasons for judgment of Farrar, J.A.; Saunders and Scanlan, JJ.A. concurring.
Counsel:	Ian R. Smith and James A. Bray, for the appellant Jennifer A. MacLellan, Q.C., for the respondent

Reasons for judgment:

Overview

[1] The appellant, William Michael Sandeson, and the deceased, Taylor Samson, were both involved in the drug trade. On August 15, 2015, they agreed to meet at Mr. Sandeson's apartment to complete a drug deal. A surveillance video showed Mr. Samson going into the apartment but not coming out.

[2] After a trial before Nova Scotia Supreme Court Justice Joshua Arnold, sitting with a jury, Mr. Sandeson was convicted of first degree murder in the death of Mr. Samson.

[3] Mr. Sandeson appeals advancing four grounds of appeal. For the reasons that follow, I would allow the appeal, set aside the conviction and order a new trial.

Background

[4] In August of 2015, Sandeson was living in Halifax and was about to start his first year of medical school at Dalhousie University. Mr. Samson was also living in Halifax. He was a physics student at Dalhousie and lived close to the appellant. The August 15 meeting was arranged so that Mr. Samson could sell to Sandeson a large quantity of marijuana for which he was to pay $40,000. Mr. Samson left his apartment and told his girlfriend he would be back soon. He left his wallet, keys and prescribed medication behind. Security video recordings showed Mr. Samson arriving with the appellant at the appellant's apartment at 1210 Henry Street at about 10:30 p.m. on August 15. He was carrying a large black duffel bag. That was the last time Mr. Samson was seen and he has not been heard from since. His body has not been found.

[5] Pookiel McCabe had an apartment across the hall from Sandeson's apartment. He and a friend, Justin Blades, and Sandeson were in McCabe's apartment on the evening of August 15 but Sandeson returned to his own apartment shortly after Blades arrived. Eventually, Blades and McCabe heard a single gunshot. Sandeson can be seen on the security video going to McCabe's door very shortly thereafter and Blades and McCabe testified that the appellant seemed in a state of shock or panic.

[6] At trial Blades and McCabe testified they walked across the hall with Sandeson and looked in his apartment, where they saw a man slumped over in a chair as well as blood, cash and drugs. Blades and McCabe went back to McCabe's apartment but then returned to Sandeson's apartment a short time later. Blades testified that he saw streaks of blood leading from the chair where the man had been sitting, to the bathroom. Sandeson said he had to clean up and asked Blades for the use of his car but Blades refused. As I will discuss in greater detail later, when McCabe and Blades were originally interviewed by the police both denied having any significant information relating to the investigation.

[7] The security video, which recorded to a DVR in Sandeson's apartment, showed Blades and McCabe returning to McCabe's apartment and then leaving the building altogether. The DVR did not record between approximately 11:30 p.m. on August 15 to approximately 1:00 a.m. on August 16.

[8] Sonja Gashus, Sandeson's girlfriend, arrived at the apartment at about 12:30 a.m. on August 16. She noticed the apartment smelled of bleach. Blades made that same observation later that morning.

[9] Sandeson's roommate, Dylan Zinck, testified that Sandeson asked him not to be at their apartment after 8 p.m. on August 15. Similarly, Ms. Gashus testified he told her not to be at his apartment that evening.

[10] At 2:52 a.m. Sandeson texted Jordan McEwan, who was also involved in the drug trade, and told him that Mr. Samson had taken his money without delivering the marijuana. Sandeson sent texts to Mr. Samson's phone complaining that Mr. Samson had not come back with "that stuff" and that he did not know what Mr. Samson was planning to do.

[11] Surveillance video showed Sandeson cleaning out the trunk of his car later on the morning of Sunday, August 16. Mr. Samson's DNA was found in that trunk.

[12] That same day, Mr. Samson was reported missing. The case was not assigned to the Halifax Regional Police Major Crimes Unit until late on Monday, August 17. The police learned that the last call to Mr. Samson's phone came from an IP address located at a group home for persons with disabilities in Lower Sackville. The police attended at the group home to find out who had been communicating with Mr. Samson. Sandeson worked at the group home but was not present when the police attended. A co-worker contacted him on Tuesday,

August 18, and said that the police were looking for someone who had been communicating with Mr. Samson from the home. Sandeson contacted the police and met with them that afternoon.

[13] On the morning of Monday, August 17, the video surveillance recordings showed Sandeson removing garbage bags and other items from his apartment while wearing gloves. Cell tower records indicated that on Tuesday, August 18, Sandeson's phone was in Truro, where his family has a farm. Later, investigators found items at the farm consistent with those Sandeson removed from his apartment. Mr. Samson's DNA was found on some of those items, including a shower curtain and a large duffel bag.

[14] Sandeson met with the police on the afternoon of August 18 and gave the first of three statements. He said, while at work on Sunday, August 16, he learned that Mr. Samson was missing. The last time he had seen Mr. Samson was on Thursday, August 13. That night he sampled some marijuana Mr. Samson was selling, but thought it was of poor quality and did not take any. According to Sandeson they arranged by text to meet again on August 15 so that he could sample some other marijuana that Mr. Samson had in a large quantity.

[15] Sandeson also told the police he waited for Mr. Samson on the evening of August 15, but he did not arrive. Eventually Mr. Samson texted that he was outside. Sandeson said he went outside but did not find Mr. Samson. They spoke briefly on the phone but did not meet. Sandeson said he texted Mr. Samson after Ms. Gashus returned to the apartment and told him not to come and suggested they get together the next day. Sandeson said he received no response to that text.

[16] At the end of the interview, Sandeson let the police look at his phone and take photographs of his text messages with Mr. Samson. After Sandeson left the station, the police reviewed the text messages and became concerned about inconsistencies between the text messages and the information Sandeson had provided. In particular, the messages revealed the planned drug deal was a large transaction. They also seemed to suggest Mr. Samson had not failed to show up as planned, contrary to Sandeson's statement.

[17] The investigation into the disappearance of Mr. Samson was led by a "triangle" of police officers: Sgt. Kim Robinson, Sgt. Derek Boyd and D/Cst. Roger Sayer from the Major Crime Unit. Mr. Samson was reported missing on the morning of August 16. The case was transferred to the Major Crime Unit on August 17, once it was understood that Mr. Samson had a significant medical

problem (a condition related to his liver); had left his apartment without his medication; and, had been arranging to meet someone to complete a drug transaction.

[18] As a result of the inconsistencies in the information provided by Sandeson and out of concern for Mr. Samson's health, at approximately 6:30 p.m. on August 18 the triangle decided they had sufficient grounds for a warrantless (exigent) search of Sandeson's apartment. The search was conducted shortly after 6:30 p.m. on August 18. The police did not find Mr. Samson in the apartment. They did not find any signs of foul play but did see a surveillance system connected to a DVR, a quantity of magic mushrooms, and an empty box for a handgun (but not the gun itself). After leaving the apartment, the searchers later returned and disconnected the DVR to prevent its contents from potentially being erased remotely. Officers on the scene were instructed to secure the apartment while a warrant was obtained. The officers decided to wait in the apartment in order to secure it.

[19] After the exigent search, the triangle determined Sandeson should be arrested for misleading the police, kidnapping and trafficking. He was arrested between 8:00 and 8:30 p.m. on August 18.

[20] A search warrant for Sandeson's apartment was ultimately granted at approximately 4 a.m. on August 19. The search commenced at about 5:30 a.m. that same day.

[21] The search and examination of Sandeson's apartment indicated an attempt had been made to clean the apartment. Despite the cleaning efforts, blood was found that contained Mr. Samson's DNA. Cash was seized and a 9mm gun loaded with one bullet was found in a locked gun case. The blood splatter on the gun was consistent with a person being shot at a distance of two to four feet away. It, too, contained Mr. Samson's DNA. The gun also had the DNA of Sandeson and another unidentified person on it.

[22] A bullet lodged in a window casing in the apartment was also found to have Mr. Samson's blood on it. Expert evidence indicated that the bullet could have been fired by any of a 9 mm, or .38 or .357 caliber firearm. The police noted there was no shower curtain in the apartment's bathroom.

[23] After his arrest on August 18, Sandeson was interviewed a second time. He denied any knowledge of what had happened to Mr. Samson.

[24] A third interview took place on August 19. It began at about 9:50 a.m. and ended at about 6:40 p.m. Sandeson maintained he did not know where Mr. Samson was, what had happened to him, or whether he was alive.

[25] During that interview, Sandeson said three men had entered his apartment dressed in black and wearing masks. They attacked Mr. Samson and Sandeson. One of the masked men had a gun. Sandeson was struck on the head and fell to the floor. He did not see what happened to Mr. Samson, but there was a lot of blood. The intruders took the large duffel bag and any of the money which had not become bloody and exited through the front door with Mr. Samson. Sandeson said he was scared and panicked and cleaned up as much of the blood as he could. He threw out his shower curtain because it had blood on it.

[26] After he was shown some of the video from his security cameras, Sandeson said that two men had been hiding in his roommate's bedroom when he and Mr. Samson were in the kitchen. They had come in through the window which opens on to a rooftop where there is a barbecue. They were wearing black "morphsuits" that covered their faces. The men were there to scare Mr. Samson in part because Mr. Samson owed money. When they came into the kitchen, Sandeson retreated to his room. They pointed a gun at Mr. Samson and told Sandeson to turn off his security video recorder, which he did. The men told Mr. Samson that "he was done." There was a single gunshot and a lot of blood. The two men put Mr. Samson in the duffel bag with the marijuana and most of the cash and carried it out the front door. Sandeson said that he then cleaned up the apartment as well as he could and took the garbage out – mostly paper towels – in the morning.

[27] Although Sandeson initially said that he had not seen Mr. Samson get shot, he eventually said Mr. Samson was shot in the back of the head. At this point, he was arrested for murder.

The mistrial application – the *voir dire* evidence

[28] As noted above, Blades and McCabe, who were across the hall from Sandeson's apartment when they heard a gunshot, were called by the Crown to give evidence at trial. McCabe testified first on May 8, 2017. Counsel for Sandeson began his cross-examination of McCabe that same day but had not finished by the end of the day. After court, Crown counsel advised the defence that a private investigator, Bruce Webb, who had been working with the defence

team, and who had been instructed to interview Blades and McCabe for the benefit of Sandeson, had provided information to the police.

[29] The defence made application for a mistrial and the Court embarked on a *voir dire* to consider it. This was *Voir Dire* 7. It also required the determination of whether Webb had confidential informant status which became *Voir Dire* 7B.

[30] Webb's involvement in Sandeson's defence began in the fall of 2015 when his counsel hired Martin and Associates Investigations Inc., a firm of private investigators, to assist them in preparing for trial. Webb, a retired RCMP officer and an employee of Martin and Associates, was assigned to the file. Webb attended meetings with Sandeson's counsel and was "an active participant in development of defence strategy." Webb became concerned Sandeson was guilty of murder and hoped that he would be convicted. Webb was worried the police were not doing enough to investigate the case.

[31] In the summer of 2016, Webb went to visit a neighbour of his, S/Sgt. Richard Lane, at S/Sgt. Lane's home. Webb told S/Sgt. Lane he was working as a private investigator and assisting Sandeson in the preparation of his defence. He told S/Sgt. Lane he thought the police were not doing a good enough job on the investigation and asked whether they were "doing everything they could" to investigate and prosecute the case against Sandeson. S/Sgt. Lane told no-one of his interaction with Webb. Webb continued to work with the defence.

[32] Blades and McCabe were first interviewed by the police in August of 2015. Both men denied having significant information to provide to investigators about Mr. Samson or his whereabouts. Sandeson's counsel saw the names of Blades and McCabe on the Crown's witness list and wondered if they had more to say than was reflected in their statements. Counsel, wanting to know what they would say under pressure, asked Webb to find and interview Blades and McCabe.

[33] With the assistance of Sandeson's brother, Webb first tracked down Blades. He had left Halifax and moved to Ontario. He was trying to live his life in a way that minimized the possibility he would be drawn into the case. Blades was fearful and hesitant to speak. Webb met with and interviewed Blades on October 18, 2016, and had to work to build a relationship of trust with him. Eventually, Webb was able to convince Blades that it was safe to speak. Blades disclosed to Webb a story consistent with the evidence he gave at trial and inconsistent with his previous police statement. Webb told Blades he would help him give a statement

to the police. Blades told Webb that without Webb's help, he would not meet with the police.

[34] Webb reacted emotionally to Blades' statement. On his way home, he saw S/Sgt. Lane out walking his dog and stopped to speak with him. He told him about Blade's statement. Webb said he did not want anyone to know he had assisted the police. S/Sgt. Lane said he would do what he could in that regard. He said he would have a detective contact Webb.

[35] The following day, S/Sgt. Lane told Sgt. Boyd and Sgt. Jody Allison of Webb's information and instructed them to keep Webb's role confidential. Following his direction, Sgt. Allison followed up with Webb, who again requested confidentiality, but agreed to help the police by meeting with them at Blades' home. In particular, Webb agreed to help the police by convincing Blades to make a statement. The police were aware that Webb worked for Sandeson.

[36] At the *Voir Dire*, Webb described the motivation for his request for confidentiality this way: "My concern was I was working through Mr. Tan [Sandeson's trial counsel] and I didn't want word getting back to him about this." Sgt. Allison testified that he believed Webb had confidential informant status.

[37] In his evidence, Sgt. Allison testified Webb said he would help get Blades to the station for a statement and that Webb was encouraging Blades to speak to the police. Sgt. Allison agreed that without Webb's help the investigators would not have Blades' contact information. Until Webb contacted the police, no-one had been assigned to find and re-interview Blades or McCabe.

[38] Sgt. Allison said he was not concerned the police were receiving information from someone retained by the defence. S/Sgt. Lane was similarly unconcerned. He testified as follows:

> Q. Okay, Now in terms of your own thought or considerations about it, the fact that this information came about as a result of his retainer by the accused, did that weigh on your mind at all?
>
> A. I'm, I'm more of a as long as the truth gets out kind of guy, so that's, basically, why I said I'll get somebody to, to get in touch with you. He, he believed he was telling me factual information and it was part of this case and it was the truth and it needed to get out in court, so that's why I set him up with the investigators

[39] For his part, Webb agreed that by assisting the police he was doing something wrong.

[40] On October 20, 2016, Webb met with Blades and the investigators, Sgts. Boyd and Allison, at Blades' residence. He assured Blades the police were trustworthy and encouraged him to make a statement. Blades agreed. Sgts. Boyd and Allison took Blades to the station where he gave a full KGB statement which mirrored his evidence at trial. Responding to questions from Sgt. Allison, Blades said he was providing a statement because he had a change of heart and was "tired of being scared." He denied that anyone had counselled him on what to say to the police.

[41] Webb did not disclose his involvement with the police to Sandeson or his counsel, nor to his employer, Martin and Associates. Instead, he set about finding and interviewing McCabe who had moved to Ontario in the summer of 2016. McCabe was also nervous about speaking to Webb, whom he thought was working for the Crown. As he had with Blades, Webb built a rapport of trust with McCabe.

[42] Eventually, on October 20, 2016, McCabe made a statement to Webb that was consistent with Blades' statement. Webb encouraged McCabe to speak with the police. Without telling McCabe he was going to do so, Webb then contacted the police and provided McCabe's contact information, advising that he should be re-interviewed. A few days later, the investigators did interview McCabe in Toronto, and he too provided a full KGB statement. McCabe testified that he assumed Webb had given the police his contact information and had advised them of the content of the statement he gave to Webb.

[43] On November 8, 2016, Webb met with the defence team to report on his interviews of McCabe and Blades. He did not report on his contacts with the police.

[44] The Crown disclosed the KGB statements to the defence promptly but did not disclose Webb's role in the creation of those statements until May 8, 2017, as described above. Crown counsel acknowledged in her submissions before the trial judge that the Crown knew of Webb's role shortly after the KGB statements were taken but did not disclose information respecting that role because they felt the defence already knew of it. This is somewhat inconsistent with Crown counsel's acknowledgement the Crown was aware that Webb hoped his role could be "kept quiet."

[45] The KGB statement made by Blades included several references to someone named "Bruce" but without any last name. Counsel for Sandeson, Eugene Tan, said after he reviewed the statement he was suspicious that "Bruce" might be Webb given the statement had been made so soon after Webb met with Blades at Mr. Tan's direction. Counsel confronted Webb who denied he had anything to do with Blades' KGB statement.

[46] Thomas Martin, a retired homicide detective, and the principal of Martin and Associates, also confronted Webb who replied "Absolutely not" when asked if he had played a role in the new statements. At trial, Webb claimed to have no memory of these discussions with Tan and Martin.

[47] Believing Webb, counsel for Sandeson asked for disclosure of police notes surrounding the new KGB statements. Those notes were delivered in April, 2017, and made no mention of any informant or of Webb's role in the statements.

[48] On May 8, 2017, the Crown told the Court and Sandeson's counsel that Webb had waived his claim to informer privilege. However, the *voir dire* on the mistrial application was complicated by the fact that, when Webb appeared to testify, he told the Court he had not waived his privilege. This required the Court to hold an *in camera voir dire* within the *voir dire* to consider whether, in fact, Webb was an informant entitled to claim the privilege (*Voir Dire* 7B). Both Sandeson and the Crown opposed Webb's claim. They both argued that Webb had done more than provide information, he had actively assisted the police in their inquiries respecting McCabe and Blades, he was not an informant but a state agent. The trial judge agreed. He concluded that Webb "became an active participant in the criminal investigation" (*R. v. Sandeson*, 2017 NSSC 146, ¶54).

[49] The trial judge found the Crown had breached its duty of disclosure but concluded an adjournment and further cross-examination was the proper remedy. He dismissed the application for a mistrial.

[50] As noted earlier, the jury found Sandeson guilty of first degree murder in the death of Mr. Samson. I will have more to say about the trial judge's reasons for dismissing the mistrial later in this decision.

Issues

[51] The appellant raises the following issues on appeal:

- Did the trial judge err by failing to declare a mistrial?
- Did the trial judge err by finding that the warrantless search of the appellant's apartment did not violate s. 8 of the *Charter*?
- Did the trial judge err by finding that the appellant's rights under ss. 10(a) and (b) of the *Charter* were not violated during his second and third police interviews?
- Is the conviction for first-degree murder unreasonable?

[52] I am satisfied the trial judge erred in failing to declare a mistrial. In my view, it is not necessary to decide the other three issues identified by the appellant, and further, it would be unwise to do so. The issues arising under these three grounds of appeal will likely be the subject of evidence and argument at the second trial. If I were to say anything with respect to them, it would inevitably compromise the ability of Crown counsel, defence counsel, and the next trial judge to consider those important issues afresh.

Issue #1 Did the trial judge err by failing to declare a mistrial?

[53] Before addressing the standard of review, I will review the trial judge's decision on this issue to provide context (reported 2017 NSSC 196). I will sometimes refer to his reasons as the VD7 decision.

[54] The trial judge found "[t]here was a reasonable possibility that knowledge of Webb's assistance to the police in obtaining statements from Blades and McCabe could have assisted Sandeson in the exercise of his right to make full answer and defence" (¶56). The Crown, therefore, should have disclosed the details of the involvement with Webb as soon as they became aware of it (¶58).

[55] Before turning to the appropriate remedy, the judge commented on the diligence of defence counsel. He found that although the defence did not have knowledge of Webb's involvement until mid-trial, defence counsel should have made inquiries of the Crown due to the temporal proximity between Webb's interviews and the police interviews and because Blades' KGB statement suggested Blades thought Webb was associated with the police (¶60).

[56] The judge determined an adjournment with the ability to recall any witness necessary for further cross-examination would suffice to address the prejudice

caused by the late disclosure and that a mistrial was not warranted (¶86,¶136, ¶142). Distilled to their core, his reasons were fourfold.

[57] First, the trial judge said the significance of Webb's involvement with the police in obtaining the statements was "relatively low" as it was not material evidence against Sandeson (¶68; see also ¶72, ¶85, ¶136). The infringement of his right to a fair trial due to the late disclosure was therefore "at the lower end of the scale" (¶142).

[58] Second, the defence had a chance to cross-examine all witnesses related to the late disclosure during *Voir Dire* 7 (¶81, ¶85, ¶136) and "there is no indication that the effectiveness of cross [of McCabe] was reduced or altered by defence counsel not having the information about Webb's involvement at the outset (¶81).

[59] Third, litigation privilege was not breached and, if it were, the state did not play a role in it and all the information would have been discovered by the police regardless (¶117-119, ¶142).

[60] Finally, he found that any abuse of process argument which might be advanced at a new trial would not succeed. There was "no state conduct in this case that society would find unacceptable or that threatens the integrity of the justice system" (¶125). The police were "essentially passive recipients" (¶132; see also ¶118, ¶133). Webb contacted the police and they had a duty to investigate (¶138). The defence would not receive a stay nor would evidence be excluded because those remedies would shock the community (¶140).

[61] I have summarized the trial judge's decision to isolate the issue we are considering in order to identify the appropriate standard of review. We are not determining whether there was a *Charter* breach – the trial judge found there was. The issue is whether the trial judge erred in his choice of remedy under s. 24(1) of the *Charter.*

[62] A judge's choice of remedy under s. 24(1) of the *Charter*, including whether to grant or refuse a mistrial, is discretionary *(R. v. Bjelland*, 2009 SCC 38, ¶15). Justice Moldaver set out the applicable standard of review in *R. v. Babos*, 2014 SCC 16:

> 48 The standard of review for a remedy ordered under s. 24(1) of the *Charter* is well established. Appellate intervention is warranted only where a trial judge misdirects him or herself in law, commits a reviewable error of fact, or renders a decision that is "so clearly wrong as to amount to an injustice"

> *(Bellusci,* at para. 19; *Regan*, at para. 117; *Tobiass, at para. 87*; *R. v. Bjelland,* 2009 SCC 38, [2009] 2 S.C.R. 651, at paras. 15 and 51).

Analysis

[63] In *R. v. Dixon*, [1998] 1 S.C.R. 244, Cory J. explained that the question of whether late disclosure impaired the accused's right to make full answer and defence as guaranteed by s. 7 engages a two-step inquiry. At the first stage of the inquiry, the undisclosed information must be examined to determine what impact it may have had on the decision to convict.

[64] At the second stage of the analysis, even if the undisclosed information does not itself affect the reliability of the conviction, the effect of the non-disclosure on overall trial fairness must be considered:

> [34] … there is a reasonable possibility the non-disclosure affected the outcome at trial or the overall fairness of the trial process. … It must be based on reasonably possible uses of the non-disclosed evidence or reasonably possible avenues of investigation that were closed to the accused as a result of the non-disclosure. If this possibility is shown to exist, then the right to make full answer and defence was impaired.
>
> …
>
> [36] Thus, in order to determine whether the right to make full answer and defence was impaired, it is necessary to undertake a two‑step analysis based on these considerations. First, in order to assess the reliability of the result, the undisclosed information must be examined to determine the impact it might have had on the decision to convict. Obviously this will be an easier task if the accused was tried before a judge alone, and reasons were given for the conviction. If at the first stage an appellate court is persuaded that there is a reasonable possibility that, on its face, the undisclosed information affects the reliability of the conviction, a new trial should be ordered. Even if the undisclosed information does not itself affect the reliability of the result at trial, the effect of the non‑disclosure on the overall fairness of the trial process must be considered at the second stage of analysis. This will be done by assessing, on the basis of a reasonable possibility, the lines of inquiry with witnesses or the opportunities to garner additional evidence that could have been available to the defence if the relevant information had been disclosed. In short, the reasonable possibility that the undisclosed information impaired the right to make full answer and defence relates not only to the content of the information itself, but also to the realistic opportunities to explore possible uses of the undisclosed information for purposes of investigation and gathering evidence.

[Emphasis in original]

See also *R. v. Aldhelm-White*, 2008 NSCA 86, ¶14; *R. v. Alcantara*, 2013 ABCA 163, ¶27; *R. v. Jiang*, 2018 ONCA 1081, ¶4.

[65] In *R. v. T.S.*, 2012 ONCA 289, Watt J.A. provided a helpful statement on how to assess the impact of the late disclosure on trial fairness:

> [127] To assess the impact of the undisclosed evidence on the overall fairness of the trial, we must assess whether the appellant has shown a reasonable possibility that the overall fairness of the trial was impaired by the failure to disclose. This inquiry examines not only the content of the undisclosed information, but also the *realistic* opportunities to use the undisclosed information for purposes of investigation or gathering other evidence: *Dixon*, at para. 36. A relevant consideration is the diligence of trial counsel's pursuit: *Dixon*, at paras. 37 and 38; and *R. v. McAnespie*, [1993] 4 S.C.R. 501, at pp. 502-503.
>
> …
>
> [129] An appellant can discharge the burden of establishing a reasonable possibility that a failure to disclose impaired the overall fairness of the trial process by showing that the undisclosed evidence could have been used to impeach the credibility of a witness for the Crown, or could have helped the defence in its pre-trial investigations and preparations, or in its tactical decisions made at trial: *Taillefer*, at para. 84.; *Illes*, at para. 27; and *R. v. Skinner*, [1998] 1 S.C.R. 298, at para. 12.
>
> [Emphasis in original]

[66] Trial fairness includes concerns about the integrity of the justice system. In *R. v. Rajalingam*, [2003] O.J. No. 530 (Ont. Sup. Ct. J.), aff'd [2004] O.J. No. 3920 (Ont. C.A.) the court held "[a] breach of section 7 of the *Charter* occurs if the late disclosure either impairs the ability of the accused to make full answer and defence or where the integrity of the administration of justice is threatened by an unfair trial" (¶22). A corollary to this is that examining the impact of the late disclosure also includes considering the appearance of fairness (*Bjelland*, ¶22 citing *R. v. Harrer*, [1995] 3 S.C.R. 562, ¶45).

[67] Once an infringement of the right to make full answer and defence is shown, the accused is entitled to a remedy under s. 24(1) of the *Charter*. At this stage, the degree of prejudice to the accused's rights must be considered (*Dixon*, ¶35). When the late disclosure occurs at the trial level, an adjournment and disclosure order will usually suffice (*Dixon*, ¶33) unless the accused shows another remedy is necessary to cure trial unfairness or maintain the integrity of the justice system

(*Bjelland*, ¶23-27). Ultimately, as Steel J.A. explained in *R. v. Korski*, 2009 MBCA 37, ¶93:

> … remedies for late or non-disclosure … must be responsive to the circumstances of the breach of the accused's disclosure rights. The analysis is context-dependent. Remedies for late or non-disclosure may range from an adjournment to a stay of proceedings. In deciding which remedy is appropriate, a court may take into account a variety of factors, including the stage of proceedings and the impact of the evidence on the proceedings. …

[68] In *R. v. T. (L.A.)*, 1993 CarswellOnt 1497, 84 C.C.C. (3d) 90 (Ont. C.A.), the Court of Appeal found that where the late disclosure of a witness statement "considerably, and arguably, irredeemably reduced" defence counsel's ability to attack the credibility of the complainant and could have affected the appellant's election as to mode of trial, further cross-examination was inadequate to address the prejudice. A new trial was warranted (¶12-16).

[69] Finally, defence counsel's diligence in pursuing disclosure is relevant to assessing trial fairness and factors into the determinations of whether there was a breach and, if so, the appropriate remedy. Part of the rationale is to catch non-disclosures as early as possible, with the hope of curing any resulting prejudice without need for a new trial, and to discourage tactical decisions not to pursue disclosure (*Dixon*, ¶37-38).

[70] Due diligence or lack thereof is not conclusive and, as Cory J. explained in *Dixon*, its significance is negatively correlated with the materiality of the undisclosed evidence:

> 39 … where the materiality of the undisclosed evidence is, on its face, very high, a new trial should be ordered on this basis alone. In these circumstances, it will not be necessary to consider the impact of lost opportunities to garner additional evidence flowing from the failure to disclose. However, where the materiality of the undisclosed information is relatively low, an appellate court will have to determine whether any realistic opportunities were lost to the defence. To that end, the due diligence or lack of due diligence of defence counsel in pursuing disclosure will be a very significant factor in deciding whether to order a new trial. …

[71] Keeping these principles in mind, I now turn to their application in the present case.

[72] I will first discuss what I consider to be the trial judge's two errors which caused him to misstate the nature, and understate the severity of the impairment of Sandeson's right to make full answer and defence generated by the late disclosure of Webb's involvement. I will then explain why, in my view, an adjournment and further cross-examination was insufficient to address the real trial unfairness and ensure maintenance of the integrity of the justice system.

> The impact of the late disclosure on Sandeson's right to make full answer and defence

[73] First, the trial judge erred in law by gauging the impact of the undisclosed evidence on Sandeson's ability to respond to the merits of the Crown's case alone, rather than on the ability to bring a process-oriented response as well.

[74] Despite noting that knowledge of Webb assisting the police in obtaining statements from Blades and McCabe could have assisted the defence (VD7 Decision, ¶55-58, ¶68), the judge's assessment of the materiality of that evidence focused on Sandeson's guilt or innocence. Since "Webb was not a material witness to the events of August 15, 2015" (¶72) and because his involvement with the police was "not material evidence against Sandeson" (¶68), he found "the involvement of Webb … does not, in and of itself, have any impact on a material issue at trial" (¶85), the materiality of Webb's involvement was "relatively low" and, thus, that "although there may have been a violation of *Stinchcombe* principles, the infringement of Sandeson's right to a fair trial was insignificant" (¶68; see also ¶136).

[75] By determining the materiality of the undisclosed information using the yardstick of whether that evidence related to the case against the appellant, the judge restricted the meaning of "full answer and defence" to the ability of an accused to respond to the merits of the Crown's case.

[76] In my view, such limiting is a legal error. The right to make full answer and defence includes not only the ability to challenge the Crown's case on the merits but also the ability to advance reasonable *Charter* and/or other process-oriented responses to the charges.

[77] In *R. v. Aldhelm-White*, it was revealed post-conviction that the officer who had sworn informations on which search warrants were issued was a secret drug dealer who fabricated the underlying information (¶2-4). Because the appellants had pleaded guilty, the non-disclosure engaged the overall fairness of the trial

prong of the *Dixon* analysis (*Aldhelm-White*, ¶15). Further, the undisclosed information about the officer's misconduct did not relate to the merits of the case and whether the appellants were factually guilty. This Court, nevertheless, agreed with the Crown's concessions that the undisclosed evidence impacted the right to full answer and defence because it closed avenues of investigation relating to the legality of the searches and the credibility of the investigations (¶17-18). See also *R. v. McKay*, 2016 BCCA 391, ¶143.

[78] In *R. v. Alcantara*, the undisclosed information revealed several of the intercepted communications tendered at trial were obtained via a technique that the wiretap authorizations perhaps did not permit (¶4-8). In applying the two-part *Dixon* test, the Alberta Court of Appeal found:

> **41 If the Crown had properly disclosed the use of the "put away" feature, it is possible, even likely, that Alcantara's counsel would have applied to stay the prosecution as a result of this *Charter* breach**. This likelihood is evidenced by his having launched a similar application, with some success, in his companion trial. **We therefore cannot conclude that the *Charter* breach did not impact trial fairness**. …
>
> [Emphasis added]

[79] With respect to Alcantara's co-accused, the Court remarked that "[w]hen a failure to disclose deprives an accused of the opportunity to seek the exclusion of evidence, the right to make full answer and defence may be affected notwithstanding that the failure may not have a more direct effect on the issue of 'guilt or innocence'" (¶29).

[80] I pause to note that I recognize the trial judge did go on to consider whether the state conduct in this case amounted to an abuse of process, albeit after he concluded the *R. v. Dixon* analysis. This poses the question of whether it could be inferred from his reasons that he considered the impact of the late disclosure on Sandeson's ability to advance a process-oriented response to his charges.

[81] In my view, such an inference cannot be made. When the judge was considering abuse of process, he asked whether the appellant would ever be successful in an abuse of process claim (VD7 Decision, ¶124). With respect, this is not the correct question. The question should have been whether the defence lost a realistic opportunity to investigate and advance a process-oriented response – a response directed at trial fairness and abuse of process considerations.

[82] In failing to ask the latter question, he imposed on Sandeson a higher threshold than was required by law, similar to what the Supreme Court of Canada found the Court of Appeal of Quebec did in *R. v. Taillefer*, 2003 SCC 70. LeBel J. reviewed the Quebec Court of Appeal's decision in detail and concluded that their focus on whether the disclosure of a piece of evidence would have changed the jury's decision on whether the accused's statement was free and voluntary was too narrow. The appeal court should have also considered whether there was a reasonable possibility the failure impaired the overall fairness of the trial:

> [103] These passages demonstrate that Beauregard J.A. did not properly apply the test of the reasonable possibility of an impairment of the overall fairness of the trial. He asked only whether the jury would have believed the appellant's version in the event that the notes taken by the coordinators Cossette and Pelletier had been disclosed to him. He therefore relied on his own opinion as to the plausibility of the appellant's account (paras. 20-21). Rather than examining the possible uses of the undisclosed notes, Beauregard J.A. sought only to determine whether the disclosure of that piece of evidence would have changed the jury's decision as to whether the accused's statement was free and voluntary. That is not the applicable test. The mere reasonable possibility that the discrepancies between the notes of the coordinators Cossette and Pelletier and the testimony of the officers Charette and Leduc could be used to impeach the officers' credibility, or to raise a doubt as to whether the accused's statement was voluntary, is all that is needed for it to be possible to hold that there was a reasonable possibility that the failure to disclose impaired the overall fairness of the trial.
>
> [Emphasis added]

[83] LeBel, J. went on to conclude that the Court of Appeal made similar errors with respect to a number of other pieces of evidence (¶104-105).

[84] I do not want to appear overly critical of the trial judge. The startling revelation of Webb's relationship with the police, and how to deal with it in the middle of a murder trial before a jury, caught everyone by surprise. There were no precedents for guidance. Trial counsel presented his argument for a mistrial in three parts that blurred and overlapped which may have resulted in confusion. In advancing his argument, trial counsel said:

> **MR. SARSON:** Okay, all right. So generally, My Lord, there are three grounds upon which this application is based. The first is late disclosure by the Crown. The second is an alleged breach of solicitor-client privilege by Mr. Webb. And the third is Mr. Sandeson's right to a fair trial. There is certainly

> some overlap with respect to those three arguments but they are, I would suggest, separate and distinct arguments.

[85] The substance of trial counsel's submissions under the fair trial ground reveal, and I think properly so, that the principal issue was how the late disclosure of this information had caused unfairness.

[86] The trial judge was never asked to find a residual category of abuse of process; rather he was asked to find that the late disclosure impacted trial fairness in a manner that prejudiced defence counsel's ability to investigate it and decide how to deal with it.

[87] In my view, the trial judge should not have gone as far as he did in assessing whether there was an abuse of process on these facts. Not only did he do so without the benefit of submissions on how the abuse of process doctrine applied to this case but, as noted, it led him astray from the relevant legal question.

[88] The trial judge's assessment of the materiality of the undisclosed information, the consequent impact of its late disclosure, and the possible abuse of process concerns should have focused on Sandeson's reasonable opportunities to investigate and advance a *Charter* or other process-oriented response.

[89] I turn now to consider whether, and to what extent, such an impact was made out. This brings me to the other error made by the trial judge.

[90] In my respectful view, the trial judge's finding that the undisclosed information revealed the police were mere passive recipients of information (¶132-133) is not supported on the record. The police did not passively receive information: they successfully encouraged Webb to help them in their investigations and ensured their collaboration remained secret.

[91] The trial judge's own findings of fact do not support his conclusion. He accepted that, prior to approaching S/Sgt. Lane about his interview with Blades, Webb told him "he was working for Martin & Associates, that Martin & Associates was assisting Sandeson in his defence, that he was convinced of Sandeson's guilt, and he was concerned that the police were not doing a good job" (VD7 Decision, ¶14). The judge also accepted the facts of the additional encounters between Webb and the police, which included:

- S/Sgt. Lane offering to connect Webb with the investigators (¶16);

- S/Sgt. Lane telling Sgts. Boyd and Allison "that Webb's involvement was to remain confidential" (¶17);
- S/Sgt. Lane taking such steps while knowing Webb was working for the defence (¶14);
- Sgt. Allison speaking to Webb and asking him to meet the police at Blades' home (¶18); and
- Sgts. Boyd and Allison accepting Webb's assistance to facilitate interviews of Blades by meeting Blades with Webb for the purpose of "help[ing] Blades feel comfortable in speaking with the police" and "assur[ing] Blades that he was doing the right thing and that Sgts. Boyd and Allison were trustworthy" (¶18-19, ¶99, ¶119).

[92] While the police took fewer steps with respect to McCabe's statement, the trial judge accepted that Webb provided the police with McCabe's contact information and advised them to re-interview him as well (¶23).

[93] The Crown does not dispute any of the above findings on appeal. I also note the following testimony on the *Voir Dire*.

[94] While some details of their testimony differed, S/Sgt. Lane, Sgt. Boyd, and Sgt. Allison all testified that S/Sgt. Lane asked one of them, or both, to contact Webb.

[95] Sgts. Boyd and Allison also knew Webb was working for Sandeson. S/Sgt. Lane testified he was "sure" he told Sgts. Boyd and Allison that the defence had retained Webb.

[96] Sgt. Allison testified Webb told him that Webb's client was the defence for the Samson homicide. Sgt. Boyd testified he knew Webb was a private investigator working for Tom Martin and, in late October 2016, knew Webb was retained by Sandeson.

[97] Sgt. Allison testified he called Webb and, at the time, believed Webb had informer status. He told Webb his name would be kept out of any police reports and notes. Both Sgt. Boyd and S/Sgt. Lane testified they did not make any notes mentioning Webb or what Webb said.

[98] Sgt. Boyd further testified that in late October 2016, "[t]here was no intention" to re-interview Blades and McCabe, that no tasks to re-interview them

had been generated, and that the two interviews came about largely because of Webb's intervention. D/Cst. Sayer confirmed the same thing. Sgt. Allison did as well, agreeing there was no intention to speak to Blades again after his original statement.

[99] As Sandeson's counsel argued on appeal, "this catalogue of conduct does not amount to passive listening" (Appellant's Factum, ¶59). Despite the fact the police did not initiate the first contact with Webb (VD7 Decision, ¶138), the facts accepted by the trial judge and supported by the record reveal police officers were active participants in a common venture with Webb to obtain Blades' statement. The police:

- knew that Webb worked for the Defence when they received his information;
- knew that Webb was doing something wrong and that he was violating his duties to the appellant;
- were completely unconcerned Webb was doing something wrong or that they might come into possession of privileged information;
- did not seek legal advice on the point notwithstanding the novelty of the situation;
- told officers to call Webb;
- actually called Webb;
- assured Webb his name would be kept out of police records;
- told officers to keep his identity confidential;
- asked Webb to meet them at Blades' home;
- met Webb at Blades' home; and
- delivered on their assurances to keep his name out of police records.

[100] All of which allowed the police to take advantage of Webb's assistance in obtaining Blades' statement and to benefit from the rapport Webb had built up with Blades. This was nothing less than a collaborative effort between the police and Webb.

[101] I will comment on two other issues argued by the appellant:

- whether the police knowingly encouraged Webb to breach his duty of confidentiality to Sandeson under the *Private Investigators and Private Guards Act*, R.S.N.S. 1989, c. 356; and
- whether Webb disclosed information to the police which was subject to litigation privilege.

[102] Section 22 of the *Private Investigators and Private Guards Act* provides:

> **Protection of information acquired by investigator**
>
> 22 No person shall divulge to anyone, except as is legally authorized or required, any information acquired by him as a private investigator.

[103] It has not been suggested nor argued by the Crown that Webb had a duty to disclose to police the information he had obtained during the course of his investigation. Again, it is not necessary nor desirable to determine whether the police were complicit in Webb breaching any duty he had under the statute. It is not material to this appeal and it may be an issue that arises at a new trial.

[104] Similarly, a finding of whether any of the information disclosed to the police is subject to litigation privilege is not necessary to dispose of this appeal. I need not address it further.

[105] Returning to the police conduct in this matter – does it amount to an abuse of process? At this point it is important to recall that a finding of an abuse of process by the trial judge was neither requested nor necessary. Sandeson only had to show there was a reasonable possibility the late disclosure of the evidence foreclosed realistic opportunities to investigate this issue and advance an abuse of process claim at a new trial.

[106] In my view, Sandeson had crossed that threshold and a mistrial should have been ordered. It would be entirely possible for a judge to find the police conduct revealed by the undisclosed information could amount to an abuse of process. I will explain why. However, the determination of whether it amounts to an abuse of process is for the judge hearing the new trial. My comments here are only to illustrate a viable argument can be made. Whether it will be successful is not for me to decide.

Abuse of Process

[107] In *R. v. O'Connor*, [1995] 4 S.C.R. 411, L'Heureux-Dubé J. explained there are two types of abuse of process: the "main" category where state conduct prejudices the accused's fair trial rights and the residual category where prejudice from the oppressive state conduct takes the form of "unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process" (¶73; see also *R. v. Regan*, 2002 SCC 12, ¶49-51, 55; *R. v. Babos*, 2014 SCC 16, ¶31).

[108] In *R. v. Babos*, Moldaver J., for the majority, elaborated on what type of conduct is caught by the residual category:

> 35 **By contrast, when the residual category is invoked, the question is whether the state has engaged in conduct that is offensive to societal notions of fair play and decency and whether proceeding with a trial in the face of that conduct would be harmful to the integrity of the justice system. To put it in simpler terms, there are limits on the type of conduct society will tolerate in the prosecution of offences**. At times, state conduct will be so troublesome that having a trial — even a fair one — will leave the impression that the justice system condones conduct that offends society's sense of fair play and decency. This harms the integrity of the justice system. In these kinds of cases, the first stage of the test is met.
>
> [Emphasis added]

See also *R. v. Anderson*, 2014 SCC 41, ¶49-50; *R. v. Hunt*, 2016 NLCA 61, ¶78-80 (*per* Hoegg J.A.), rev'd 2017 SCC 25 for the reasons of Hoegg J.A.; *R. v. Derbyshire*, 2016 NSCA 67, ¶105-111.

[109] This statement has its origins in cases decided under common law abuse of process, such as *R. v. Jewitt*, [1985] 2 S.C.R. 128 where Dickson C.J.C. stated that a judge has "discretion … to stay proceedings where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings" (pp. 136-137 citing *R. v. Young*, [1984] O.J. No. 3229 (C.A.), ¶88; see also *R. v. Keyowski*, [1988] 1 S.C.R. 657, pp. 658-59).

[110] What occurred here is unique. The parties and this Court were unable to find any cases where a situation like this has occurred before.

[111] Appellate counsel provided this Court with the Australian case of *A.B. v. C.D.*; *E.F. v. C.D.*, [2017] VSCA 338 (Supreme Court of Victoria – Court of Appeal) aff'd [2018] HCA 58 (High Court of Australia). That case largely dealt with whether public interest immunity should bar disclosure of the identity of a defence lawyer who became a police informer and informed on her now-convicted clients. Before balancing the public interest in disclosure and in preventing harm to the lawyer and her children should her identity be disclosed, the Court had to determine whether the convicted individuals would be able to use the information about the lawyer's duplicitous role to challenge their convictions.

[112] The applications judge found that the convicted persons could do so by arguing that:

> **[T]hey did not receive a trial as required by the criminal justice system and that the trials involved an abuse of process, because … their legal counsel did not provide independent advice**. The requirements of a fair trial include that counsel will provide independent advice to a client and will not have separate obligations to the police who have brought the prosecution.
>
> …
>
> The dual role EF played might assist Peters in having his convictions set aside, despite his plea of guilty. He was not given independent advice and EF was obliged to inform him of anything that might assist him. **The Director's disclosures may therefore provide him with substantial assistance in establishing that the proceedings against him involved an abuse of process because of the invasion of his right to have his legal representative act solely in his best interests and not assist the prosecution.** Those arguments might assist him establish that a miscarriage of justice had occurred.
>
> [Emphasis added]

(*A.B. v. C.D.*; *E.F. v. C.D.* VSCA, ¶111, ¶114 citing the application judge's decision).

[113] The Court of Appeal agreed, finding that the convicted individuals could challenge their convictions by arguing: (1) that they did not receive "independent advice and representation as required by law"; and (2) that "the prosecution was unfairly advantaged and/or had access to evidence and information which was improperly obtained in ways which gave rise to a miscarriage of justice" (*A.B. v. C.D.*; *E.F. v. C.D.* VSCA, ¶112). Although constituting "different conceptual bases" for challenging the convictions (*A.B. v. C.D.*; *E.F. v. C.D.* VSCA, ¶113), both arguments were articulated as being grounded in the fact that the lawyer had

breached legal professional privilege and her other professional duties (of loyalty, of confidentiality, and to avoid conflicts of interest). One ground focused on the accused's fair trial rights and right to independent legal advice; the other, on the state conduct of obtaining information subject to legal professional privilege (*A.B. v. C.D.*; *E.F. v. C.D.* VSCA, ¶105-115).

[114] That it was the lawyer's breach of her duties and the breach of privilege that grounded both bases for challenging the conviction was also affirmed by the High Court of Australia where it stated at ¶10:

> [10] Here the situation is very different, if not unique, and it is greatly to be hoped that it will never be repeated. **EF's actions in purporting to act as counsel for the Convicted Persons while covertly informing against them were fundamental and appalling breaches of EF's obligations as counsel to her clients and of EF's duties to the court. Likewise, Victoria Police were guilty of reprehensible conduct in knowingly encouraging EF to do as she did and were involved in sanctioning atrocious breaches of the sworn duty of every police officer to discharge all duties imposed on them faithfully and according to law without favour or affection, malice or ill-will**. As a result, the prosecution of each Convicted Person was corrupted in a manner which debased fundamental premises of the criminal justice system. It follows, as Ginnane J and the Court of Appeal held, that the public interest favouring disclosure is compelling: the maintenance of the integrity of the criminal justice system demands that the information be disclosed and that the propriety of each Convicted Person's conviction be re-examined in light of the information. The public interest in preserving EF's anonymity must be subordinated to the integrity of the criminal justice system.
>
> [Emphasis added]

[115] Put otherwise, the abuse of process stemmed from police abuse of the "agency of police informer" (*A.B. v. C.D.*; *E.F. v. C.D.* HCA, ¶12) by allowing someone with various obligations to the accused persons as her clients to become an informer in the first place.

[116] Legal professional privilege or solicitor-client privilege is not applicable to this case given that the key player here is the accused's private investigator, not his defence lawyer.

[117] However, it is possible a court may find, even without resort to litigation privilege or confidentiality considerations, it offends society's sense of fair play and fundamental notions of justice for the state to accept assistance of a

professional in the investigation and prosecution of an accused when that professional is currently retained by that accused *for the purpose of helping him defend himself against the state*. Once again I wish to make clear I am not deciding the issue but only illustrating such an argument is neither fanciful nor doomed to fail.

[118] The state conduct in the present case (detailed in ¶91-100 above) could, arguably, be found to affront society's sense of fair play and undermine the integrity of the justice system.

[119] To begin, by accepting and using Webb's information that Webb only possessed because he was asked by defence to interview Blades and McCabe, aspects of defence trial preparations were disclosed to the police, and then used to the state's advantage without the knowledge of the person affected: the accused.

[120] Here, the relationship the police exploited between Sandeson and Webb was not only one of trust, but one formally established for the purpose of assisting him in defending himself against the state. Further, Webb was privy to at least some discussions about defence strategy and details of the accused's side of the story, thus making Sandeson vulnerable to Webb.

[121] Before concluding on this point, I would like to address the trial judge's question to himself about "What should the police have done in these circumstances? (VD7 Decision, ¶138).

[122] There are any number of things the police could and should have done differently in these circumstances. There is no reason why the police should not have told Webb he could not disclose aspects of defence trial preparations. The police should have immediately notified the Crown of Webb's actions so that the Crown could then alert the defence to what Webb had done. Instead, Sandeson's lawyers were left completely in the dark, oblivious to the fact the private investigator they had hired, and with whom they had shared defence strategies, was covertly informing the police, in a relationship the police kept secret.

[123] There are other situations wherein the police must stay away from evidence, such as statutorily compelled evidence obtained after the commencement of a penal investigation (see e.g. *R. v. Jarvis*, 2002 SCC 73 and *R. v. Ling*, 2002 SCC 74). They also cannot accept assistance from professionals such as auditors exercising statutory powers to gather evidence (see e.g. *R. v. Williams* (1994), 130 N.S.R. (2d) 8 (N.S.S.C.) and *R. v. Mercer*, 2005 NLCA 10 (albeit in *obiter*)).

[124] Considering all the above, there is the potential that a court may find the undisclosed information constituted a residual category abuse of process.

Summary

[125] The trial judge erred in focusing on the materiality of the undisclosed information and the extent to which it related to the merits of what did or did not happen on August 15, 2015. He should have asked himself whether the late disclosure of this information foreclosed realistic opportunities to investigate and advance a process-oriented defence. The trial judge also erroneously asked whether the appellant would be successful in an abuse of process claim when that was not an issue before him.

[126] In my view, the undisclosed information revealed the state knowingly encouraged and then accepted the assistance of a professional in the investigation and prosecution of an accused when that professional was, at the time, retained by that accused *for the purpose of assisting him in defending himself against the state*. This conduct could be said to have undermined the essence of procedural protections given to the accused The significance of Webb's involvement with the police was not "relatively low" contrary to the trial judge's finding (VD7 Decision, ¶68).

[127] The late disclosure of the collaboration between Webb and the police precluded the "realistic opportunit[y] to explore possible uses of the undisclosed information [namely, as it related to the state conduct] for purposes of investigation and gathering evidence" (*R. v. Dixon*, ¶36) related to an abuse of process claim. Contrary to the judge's finding (VD7 Decision, (¶68) that the infringement of Sandeson's right to a fair trial was insignificant, the late disclosure of this information significantly infringed Sandeson's right to make full answer and defence and to a fair trial.

[128] Before discussing the remedy, I will briefly mention defence diligence. I agree that defence counsel should have asked the Crown who Blades was referring to when he mentioned "Bruce" in his KGB statement. However, because the materiality of the undisclosed information concerning Webb's secret relationship with the police only revealed itself to a select few in 2016, the impact of defence counsel's failure to press the point by further questioning a year later, is negligible (*Dixon*, ¶39).

Remedy

[129] The trial judge thought an adjournment and additional cross-examination would be an adequate remedy. As the analysis above demonstrates, this remedy was based on a mischaracterization of the police conduct and the nature of the infringement, and a consequent understatement of the gravity of such infringement. Because of these errors, the trial judge's choice of remedy deserves no deference.

[130] While I recognize an adjournment is generally an adequate remedy (*R. v. Dixon*, ¶31, ¶33; *R. v. O'Connor*, ¶76), late disclosure at trial may warrant a mistrial or some other remedy where the accused shows an adjournment will not suffice to address the impairment to his or her right to make full answer and defence (*R. v. O'Connor*, ¶77, ¶83) or where failing to grant a specific remedy will compromise the integrity of the justice system (*R. v. Bjelland*, ¶26-27). As Rothstein J. explained in *R. v. Bjelland*:

> [24] … a trial judge should only exclude evidence for late disclosure in exceptional cases: (a) where the late disclosure renders the trial process unfair and this unfairness cannot be remedied through an adjournment and disclosure order or (b) where exclusion is necessary to maintain the integrity of the justice system. …

[131] The degree and nature of the prejudice suffered by the accused from the late disclosure becomes very relevant at the remedy stage (*Dixon*, ¶35).

[132] In this case, applying the required "context-dependent" analysis (*R. v. Korski*, ¶93), I am of the view that an adjournment and further cross-examination was inadequate for four reasons.

[133] First, the reasons above make clear the undisclosed information did not relate to an existing issue at trial but rather to a new issue—not only in the proceedings against the accused, but also in Canadian law. The trial judge himself described the situation as "so peculiar", "unique", and "very unusual" (VD7 Decision, ¶58, ¶85, ¶136, ¶142).

[134] The cases relied on by the trial judge as examples of where an adjournment and further cross-examination sufficed are distinguishable from the present case. In *R. v. Bjelland* (see VD7 Decision, ¶84), the late disclosure was of evidence relating to the merits of the case: a KGB statement of one accomplice and an agreed statement of facts by another that had been recently produced. Moreover, both were disclosed pre-trial: about a month and 10 days, respectively (*R. v. Bjelland*,

¶7-8). See also *R. v. Selvanayagampillai*, 2010 ONCJ 278 (see VD7 Decision, ¶77, ¶80-82), where the late disclosure related to the already-in-issue question of whether there was alcohol in the Gatorade bottle found in the vehicle (*R. v. Selvanayagampillai*, ¶3-4, ¶12).

[135] Second, the defence did not have time during the trial to properly investigate this issue and decide how to deal with it. As for the novelty of the situation and how difficult it was for the parties to even conduct enough research and investigation to support the mistrial request, the record speaks for itself.

[136] Webb's involvement was disclosed to the defence on May 8, 2017, during McCabe's testimony in the trial proper. *Voir Dire* 7 started the next day – May 9, 2017. The record shows the parties juggling between the trial proper and *Voir Dire* 7 and 7B for 13 sitting days between May 9, 2017 and May 31, 2017:

- May 9, 2017: McCabe testified in both *Voir Dire* 7 and the trial proper in the morning. Three witnesses testified in the trial proper in the afternoon, followed by another two witnesses in *Voir Dire* 7.
- May 10, 2017: Webb began his testimony in *Voir Dire* 7. However, the informer privilege issue arose, causing Webb to step down to obtain legal advice. Three more witnesses testified in *Voir Dire* 7 in the morning, one more in the afternoon. Issues arose regarding Blades' trial testimony with respect to which defence counsel were given the rest of the afternoon to form a position.
- May 11, 2017: court began by dealing with the issue regarding Blades' trial testimony that arose the day prior. Three witnesses testified in the trial proper.
- May 15, 2017: three witnesses testified in the trial proper in the morning, the final one of which continued into the afternoon. Two more witnesses testified during the trial proper in the afternoon, one of which, Don Calpito, a senior security investigator with Telus Communications, was the creator of the maps that were just disclosed to the defence that morning.
- May 16, 2017: the morning consisted of Webb's testimony in the *in-camera* hearing, i.e., *Voir Dire* 7B. In the afternoon, two witnesses testified in the trial proper.

- May 17, 2017: the day started with the second day of *Voir Dire* 7B, wherein the defence called two witnesses and the Crown called one. Submissions on *Voir Dire* 7B followed. Two witnesses testified in the trial proper in the afternoon.
- May 18, 2017: the trial continued by finishing testimony from the last witness the previous day. Three more witnesses testified before lunch. David Webber, a forensic laboratory technician, was also examined in chief before the defence took the lunch break to look over Webber's notes that were just disclosed that day. The cross-examination of Webber along with the testimony of one more witness occurred in the afternoon.
- May 23, 2017: one witness testified in the trial proper the entire morning. The defence and the Crown entered into an agreed statement of facts with respect to one witness over lunch, resulting in an early finish to the day.
- May 24, 2017: one witness testified in the trial proper in the morning. After lunch, the defence raised an issue with material on the backs of paper copies of text exchanges the Crown wanted to introduce. Four more witnesses, including one expert, testified in the trial proper.
- May 25, 2017: two witnesses testified in the trial proper in the morning. *Voir Dire* 7B resumed in the afternoon for the sole purpose of the trial judge delivering his decision. The trial proper then resumed for one witness's testimony.
- May 29, 2017: after discussing various housekeeping issues, an expert witness started to testify in a qualification hearing for the trial proper only to have technological issues. Another witness then testified in *Voir Dire* 7 before lunch. In the afternoon, the expert witness from the morning returned and testified. *Voir Dire* 7 resumed with Webb's testimony, followed by defence counsel's testimony.
- May 30, 2017: the defence informed the court that they would not be pursuing a *Scopelliti* application. Defence submissions on *Voir Dire* 7 then occurred. After the lunch break, *Voir Dire* 10 (relating to the inadequate police investigation) commenced, with one witness testifying for the defence.

- May 31, 2017: *Voir Dire* 10 continued, with one more defence witness and one called by the Crown. Once *Voir Dire* 10 ended, the defence returned to their submissions on follow up points for *Voir Dire* 7. After the Crown had the lunch break to consider new case law provided to it that day, the Crown began its submissions on *Voir Dire* 7, followed by a defence reply and defence submissions on *Voir Dire* 10.

[137] On every single sitting day but two (May 10 and May 30), the defence had to deal with multiple Crown witnesses called in the trial proper. On almost half of the sitting days (May 9, 10, 17, 29, 30, 31), the defence also called its own witnesses, whether in relation to *Voir Dire* 7, 7B or 10. Portions of *Voir Dire* 7 and 7B occurred on the same day as resumptions of trial or *Voir Dire* 10 on 8 of the 13 days (May 9, 10, 16, 17, 25, 29, 30, 31).

[138] During this period, the parties were also trying to determine when *voir dires* for a *Scopelliti* application and an inadequate police investigation allegation would occur and whether there was overlap in the evidence such that they could be partially blended.

[139] Going between the trial proper and the *voir dire* was understandable in order to accommodate witness and counsel availability. For example, McCabe had been flown to Halifax to testify and was scheduled to fly out on the evening of May 9, thus requiring his testimony in both *Voir Dire* 7 and the trial proper on the same day despite the fact the Webb issue had only been disclosed the day prior – May 8, 2017. There was also a desire for witnesses to continue to testify in the trial proper so as to make the most efficient use of time while the jury was available and waiting for the *Voir Dire* issues to be resolved.

[140] Efficiency is always a goal in a criminal trial. But it was in tension with providing defence counsel adequate time to address the issues raised by the undisclosed evidence.

[141] The record is replete with examples of how the legal issues raised by the undisclosed evidence were evolving and how the parties' positions were unknown and were evolving out on a day-to-day basis.

[142] On May 9, 2017—the first day of the mistrial application—defence counsel noted they were "trying to get a sense of exactly what it is that we do wish to accomplish" and that "in light of the information we've just received", they were

only “just coming up with submissions” on whether they wanted the jury to hear any of McCabe’s *Voir Dire* 7 testimony.

[143] On the second day of *Voir Dire* 7 (May 10), the defence was unable to say whether any other witnesses were going to be called as it “depend[ed] a little bit on what Mr. Webb ha[d] to say”. Even the judge noted counsel were “scrambling around preparing for trial, preparing for new legal arguments, organising [their] witnesses”.

[144] By the end of the day on Thursday, May 11, no one yet knew whether Webb was still claiming informer privilege. At the same time, the parties were trying to determine how to address potential prior inconsistent statements of Blades in mid-trial and final jury instructions. On the following Tuesday, the judge tellingly asked the defence, “[h]ave you had a chance to look at that issue yet or were you too tied up with the other stuff?” (May 15, 2017).

[145] On May 15, a week after the first day of *Voir Dire* 7, whether Webb was going to assert privilege was still unknown and the record is clear there was confusion over the nature of the issues to be discussed in *Voir Dire* 7 and what would become *Voir Dire* 7B.

[146] The May 16, 2017 transcript makes clear that the Webb informer privilege issue was still being dealt with on a day-to-day basis as it unfolded. No one knew what Webb was going to say. And it was only after his evidence that the Crown could decide whether to call evidence and the defence could determine whether they had additional questions for S/Sgt. Lane, Sgts. Allison and Boyd.

[147] On May 23, 2017, 10 days after *Voir Dire* 7 began, it was still not clear whether further evidence would be called for *Voir Dire* 7 or 7B.

[148] On May 25, it remained unclear who would be recalled the following week to wrap up *Voir Dire* 7. Everyone was, understandably, still figuring it out as they went, especially given the mistrial application occurred unexpectedly in the middle of the Crown’s case and the defence were also trying to determine how to incorporate a *Scopelliti* application.

[149] On top of the surprise surrounding the revelation of a possible claim of informer privilege, the defence also had to respond to two new late disclosures. On May 15, defence counsel were given an hour to review the accuracy of maps disclosed that morning. On May 18, defence counsel were given the lunch break to

review the forensic lab technician's (David Webber) handwritten notes which were recently discovered and disclosed that day. Defence counsel were also required to do last minute research and come up with a position on issues regarding Blades' trial testimony.

[150] Between having to deal with all these issues, including a *voir dire* on the inadequate police investigation claim, to say nothing of defending the actual prosecution, the pace was hectic. As the trial judge asked on May 29, when summing up the parties' proposed schedule for that very week, "[s]o by noontime on Thursday, depending on a myriad of other things that could occur, all of the arguments and evidence will be in on these *Voir Dires*?".

[151] The numerous issues and manner of proceedings left little time for counsel to investigate and research the issues raised by the undisclosed evidence. The detrimental effect of trying to deal with all of these demands at once was summarized by defence counsel in the *Voir Dire* 7 closing submissions. In response to a question asked by the judge, defence counsel submitted that "part of the problem" with respect to why they have not been able to find relevant cases was that "[b]ecause of the way disclosure has unfolded, Defence mid-trial is scrambling to address a number of issues. The entire order of the trial has been thrown out-of-whack". Defence counsel tried to do some research over lunch in response to the judge's question but needed more time. Even on the final day of submissions in *Voir Dire* 7 on May 31, the defence was still unsure as to what remedy they would seek in a *Charter* application at a new trial.

[152] None of this is to criticize defence counsel. They appeared to be doing the best they could given the circumstances. And not only did the trial judge agree the trial had unfolded in a way that was "anything but smooth", the Crown conceded this struggle as well. At the end of the day on May 30, the day before the Crown submissions on *Voir Dire* 7, the Crown said it would have to do more research that evening "since obviously it's never been optimal to have to argue any of these things in the middle of the trial, and we've been very busy as Your Lordship can appreciate in dealing with witnesses".

[153] While an accused is not entitled to the most optimal procedure or a perfect trial, he is entitled to a fair one and, in this case, a fair trial needed time. Time to meaningfully investigate the Webb issue; time to research; and time to prepare.

[154] In this respect, *R. v. Antinello*, 1995 ABCA 117, is quite similar. In *R. v. Antinello*, the defence needed to investigate an unsavoury witness who was not

disclosed to the defence until three days after the trial began (¶4). Defence counsel requested a mistrial or an exclusion of the witness's evidence. The judge refused to grant either, but found that something was needed to give the defence a chance to prepare for the witness (¶5). Because it was a jury trial, a long adjournment was not feasible (¶13). Instead, the judge ordered the Crown to pay the costs of an investigator and gave defence counsel nine days, during which he had to be in court to deal with other Crown witnesses, to prepare for the unsavoury witness (¶5-7). The Court of Appeal found:

> [14] [o]ne cannot possibly say, in these circumstances, that merely to have the Crown pay for an investigation is an appropriate remedy. … The key was time, not money. I cannot possibly agree that nine days was, in the circumstances, enough time for an adequate inquiry.

[155] Likewise, in the present case, albeit with respect to an issue entirely different from that in *R. v. Antinello*, the defence needed time to determine how to proceed in the face of such unprecedented circumstances. This they did not have while juggling the trial proper with *Voir Dire* 7 and 7B and dealing with new issues arising in both.

[156] Third, the length of the adjournment needed in this case to permit meaningful investigation and, therefore, to preserve the accused's right to a fair trial and to make full answer and defence would have been substantial. Long adjournments are not feasible mid-jury trial (see e.g. *R. v. Antinello* where the Court of Appeal agreed with the trial judge that "[a] long adjournment was not practical because the case had already been placed in the charge of the jury" (¶13); see also *R. v. Gakmakge*, 2015 QCCA 314, ¶40).

[157] Fourth, on the facts of this case, failing to give the defence an opportunity (that is, failing to grant a mistrial) to investigate and research circumstances that may amount to an abuse of process itself compromised the integrity of the justice system and perpetuated an unfair trial process. It also created the appearance of unfairness.

Summary

[158] The late disclosure precluded the defence from being able to fully explore and investigate this unprecedented situation and decide, prior to trial, whether to bring an abuse of process application. While the judge and the Crown suggest the

defence could have made an abuse of process argument mid-trial, the record shows that forcing them to do so would have been unreasonable and unfair.

[159] The defence was simply not able to investigate this novel issue mid-trial. They were juggling the trial proper and multiple *voir dires.* They were coming up with submissions on the fly. They were reading cases over the lunch break. They needed time; time that was unavailable in the middle of a jury trial where lengthy adjournments are not appropriate. The novelty and complexity of the situation which amounted to a potential abuse of process arising as it did in the middle of a jury trial, is exactly the type of an "extreme" situation contemplated by Supreme Court of Canada jurisprudence such as *R. v. O'Connor,* ¶77 and *R. v. Bjelland,* ¶23-27 which demands a remedy more drastic than an adjournment. Put otherwise, to be "responsive to the circumstances of the breach of the accused's disclosure rights" (*R. v. Korski,* ¶93), a mistrial was required.

Conclusion

[160] For the reasons above, I would allow this ground of appeal, quash the conviction, and order a new trial.

Farrar, J.A.

Concurred in:

Saunders, J.A.

Scanlan, J.A.