SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Leggette,* 2015 NSSC 152

Date: 20150414
Docket: CRH No. 430128
Registry: Halifax

Between:

Her Majesty the Queen

v.

Blake William David Leggette and Victoria Lea Henneberry

DECISION ON SEVERANCE

Judge:	The Honourable Justice Joshua M. Arnold
Heard:	January 19, 20 & 21, February 12 & 25, 2015, in Halifax
Final Written Submissions:	March 31, 2015
Written Decision:	May 21, 2015 *(Oral decision was rendered on April 14, 2015)*
Counsel:	Christine Driscoll and Sean P. McCarroll, for the Crown Terrance Sheppard, for the Defendant, Blake William David Leggette J. Patrick L. Atherton, for the Defendant, Victoria Lea Henneberry

By the Court:

Overview

[1] Loretta Saunders was killed in Halifax on February 13, 2014. In late February, 2014 Blake Leggette ("Leggette") and Victoria Henneberry ("Henneberry") were arrested in Ontario for her murder. They were brought back to Nova Scotia and both Leggette and Henneberry were remanded in custody. Leggette was housed at the Central Nova Scotia Correctional Facility in Burnside, Nova Scotia ("Burnside Jail"). Both Leggette and Henneberry are charged with the first-degree murder of Loretta Saunders. Henneberry is also charged with accessory after the fact. She now applies for severance.

[2] On April 8, 2014, the prison guards at the Burnside Jail were conducting a general search for a broken mop handle which could be converted to a weapon, known in prison terms as a "shank". During the course of their search the guards discovered 35 pages of writings in the cell that housed Leggette and his cellmate, Darcy Kory ("Kory"). These writings include what appears to be a complete confession by Leggette to his own involvement in the murder of Ms. Saunders. Leggette at times describes Henneberry as being a party to the murder. Another aspect of these writings describes a plan by Leggette to blame Henneberry entirely for the murder. Leggette also writes about his feelings for Henneberry, which range from deep love to deep hatred. The writings include allegations that Henneberry has a connection to the Hells Angels motorcycle club and describe her as devious and manipulative.

[3] Leggette applied to have the 35 pages of writings excluded from evidence during a pretrial *voir dire* on the basis of solicitor-client privilege and alleged violations of his rights under the *Canadian Charter of Rights and Freedoms*. These writings were introduced as exhibit VD-1. Further writings attributed to Leggette were introduced through his former cellmate, Kory, and numbered as exhibit VD-5 and exhibit VD-6. Defence counsel took the position that if I ruled VD-1 admissible on the trial proper they would consent to the admission of VD-5 and VD-6. For ease of reference the writings will be referred to the same way in this decision.

[4] A severance application was brought concurrently by Henneberry, claiming that if VD-1 was admitted the contents would be so prejudicial to her that the interests of justice would require her to be tried separately from Leggette. All parties to this severance application agree that the evidence on the admissibility *voir dire* can be relied on during the severance application.

[5] In *R. v. Leggette and Henneberry*, 2015 NSSC 112, I ruled that VD-1 was admissible on the trial proper. Leggette's writings are not admissible against Henneberry. Henneberry argues that nonetheless the evidence is so prejudicial that a limiting instruction to the jury would be insufficient to prevent the jury from convicting her on the basis of Leggette's writings.

The Legislation

[6] Section 591(3) of the *Criminal Code* of states:

> 591 (3) The court may, where it is satisfied that the interests of justice so require, order
>
> > (*a*) that the accused or defendant be tried separately on one or more of the counts; and
> >
> > (*b*) where there is more than one accused or defendant, that one or more of them be tried separately on one or more of the counts.

The Facts

[7] The strength of the case against Henneberry, in comparison with that of Leggette, is one relevant factor in determining whether severance is appropriate. I heard no *viva voce* evidence on this application. I was provided no disclosure by counsel in relation to this application. On this application counsel have provided the following: 35 pages of writings seized from Leggette's cell marked as VD-1; two other sets of Leggette's prison writings that were given to Kory marked as VD-5 and VD-6; Kory's own handwritten notes marked as VD-7; a brief summary of anticipated evidence as included in Defence counsel's brief and reproduced below; and the decision on committal by the Honourable Judge Anne Derrick in relation to the Leggette and Henneberry Preliminary Inquiry (2014 NSPC 117).

[8] The summary of anticipated facts from defence counsel's brief states as follows:

> On February 17, 2014, Miriam Saunders reported that her daughter Loretta Saunders had not been seen since February 13, 2014.
>
> Camera footage showed that shortly before 11 a.m. on February 13, 2014, Loretta Saunders entered an apartment building at 41 Cowie Hill Road, where she had been subletting an apartment to Blake Leggette and Victoria Henneberry. At approximately 2:30 pm later that day, Blake Leggette was seen leaving 41 Cowie Hill Road carrying a large hockey bag.
>
> On February 18, 2014, Leggette and Henneberry were arrested in Harrow, Ontario, while driving a Toyota Celica belonging to Loretta Saunders. Leggette had Loretta Saunders' debit card on his person as well. Leggette and Henneberry were returned to Nova Scotia on February 23, 2014, where they were both charged with first degree murder.
>
> Ms. Henneberry made a statement to Sgt. Anthony McNeil, wherein she stated that Mr. Leggette murdered Loretta Saunders while she cowered in the bathroom.
>
> Between March 1, 2014 and April 6, 2014, Mr. Leggette made 35 pages of notes while in custody at the Central Nova Scotia Correctional Facility. These notes are admissible only against Mr. Leggette, and not against Ms. Henneberry. These notes describe the murder in detail. They state that Mr. Leggette asked Ms. Henneberry to hand him a plastic bag to help suffocate Ms. Saunders. They also describe a plan by Mr. Leggette to "pin" the murder on Ms. Henneberry.

[9] In Judge Derrick's very detailed decision on committal, evidence that was available at the Preliminary Inquiry in relation to Henneberry appears to be much stronger than that alluded to in the defence brief. While Judge Derrick's decision is found in the Appendix, some of the more significant evidence that was considered admissible by Judge Derrick against **both** Leggette and Henneberry includes:

- On February 13, 2014, Loretta Saunders was with her boyfriend, Yalcin Surkultay, until somewhere between 9:00 and 10:00 in the morning. Ms. Saunders left with Mr. Surkultay's only set of keys to go and check on an apartment she was subletting to Leggette and Henneberry on Cowie Hill Road. Mr. Surkultay did not expect Ms. Saunders to be gone long and went back to sleep. He never saw Ms. Saunders alive again. Ms. Saunders drove a blue Toyota Celica car and would have used it to get to Cowie Hill Rd.

- Surveillance video footage depicts Ms. Saunders entering the lobby at the Cowie Hill Road apartment building and getting into an elevator. There is no depiction of Ms. Saunders again on the February 13, 2014 video.

- The same security video footage shows Leggette and Henneberry coming and going from the building through the lobby. At times, Henneberry is seen leaving the building with a computer box. Leggette is seen coming off the elevator with a large black hockey bag that must be carried in both his hands. He has to put it down as soon as he steps off the elevator into the lobby to get a better grip on the bag and then takes it out the front door. The video shows the bag to be heavy and unwieldy. Leggette is later shown carrying a small white bag to the main garbage room. Leggette is later seen carrying luggage off the elevator to the front door comprised of a pink suitcase, a red duffel bag and a darker bag. This luggage resembles the luggage seized by the Ontario Provincial Police when Leggette and Henneberry were arrested. The last security video footage of Leggette and Henneberry shows them leaving together with a number of personal possessions. On each occasion when the video footage shows Leggette and Henneberry leaving the building, they are headed toward the upper parking lot where Ms. Saunders' assigned parking spot was located.

- Leggette and Henneberry are seen on other security video footage in a blue Toyota Celica on February 13, 2014 at a Tim Horton's and a Sobeys on the Bedford Highway. They appear on the security camera of an electronics shop in the Halifax Shopping Center. Leggette appears to be holding the computer box Henneberry carried out of the apartment. A receipt from the store was subsequently seized by the police from Henneberry's possessions, indicating a debit card refund in the amount of $462.40. Judge Derrick inferred that after Leggette and Henneberry left the Cowie Hill Road apartment, they returned a computer.

- On February 18, 2014, the Ontario Provincial Police located Ms. Saunders' car in Harrow, Ontario. Leggette and Henneberry were located at the residence where the car was found and were arrested for possession of stolen property. In addition to the blue Toyota Celica, Ms. Saunders' Scotiabank client card and other pieces of identification belonging to Ms. Saunders were found in their possession.

- Leggette and Henneberry were returned to Nova Scotia for questioning, as Ms. Saunders had been reported missing by her family and Mr. Surkultay.

- Henneberry gave a statement to the police on February 26, 2014. Later that day, with Henneberry's assistance, Ms. Saunders' frozen body was found in a wooded area just off the TransCanada Highway near Salisbury, New Brunswick. The body was located in a large black hockey bag. Once the hockey bag was cleaned of snow, a Greyhound baggage ticket became obvious dated January 16, 2014, with a trip destination of Halifax and the name "Victoria Henneberry".

- Ms. Saunders' head was completely encased in 11 layers of plastic wrap. Leggette's fingerprint was found on the 10th layer of the saran wrap. Additionally, a broken twig was found in Saunders' hair matching exactly a broken twig found in a decorative arrangement located on the floor of the Cowie Hill Road apartment.

- Also located at the Cowie Hill Road apartment was an empty box of *Glad* brand *Saran Wrap* and a torn plastic Sobeys bag.

[10] The evidence Judge Derrick considered admissible **only** against Leggette at the Preliminary Inquiry includes 35 pages of notes seized from Leggette's prison cell, VD-1. In these writings Leggette provides several descriptions of the murder of Loretta Saunders. In VD-1, Leggette first writes:

> February 13/2014 M Day
>
> Loretta Saunders came to the apartment of 41 Cowie Hill Rd, Halifax, N.S. It was between 10:00 am and 11:00 am I believe, asking for the rent money which Victoria Henneberry stated to her we would have days before that in a message.
>
> Loretta Saunders enters the apartment, and claims she is their for the rent, Victoria stated she lost her bank card and I.D. Victoria proceeds to the bedroom to make a phone call to the bank, to see about getting a new card to be able to get the money out of the account. Which is difficult to do, almost impossible without ID. At this point I am talking with Loretta about nothing but chit chat things. Loretta claims that she needs dishs because Yulchin is making a nice dinner, and proceeds to collect dishes. She is getting annoyed claims "is the rent even available" to Victoria, I responded with yes. Loretta sits on the couch messaging on her phone.
>
> I walk into the room to speak with Victoria. I say, "should I do it". Victoria says "you don't have the balls!"
>
> That made me angry, and I said really, ok.

> I walked out to the living room where Loretta was sitting on the couch, came up behind her all in one motion grabbed her by the throat and proceeded to choke her, she kicked off the couch and we ended up in the dining room, while I constantly had her by the throat. For some reason it wasn't working, In my mind once I started I shouldnt stop. I asked Victoria for assistance, first with a plastic bag, Loretta put up a fight and tore 3 different bags I tried to use. Finaly I hit her head twice on the floor to knock her out which worked. I proceeded to wrap her head in plastic wrap to make sure she was actually dead.
>
> After she was officially passed away, I proceeded to place her in the hockey bag, cleaned up her Id gave Victoria her phone. I proceeded to get the car ready, taking the tires out, and placing them in front of the car, and cleaning out garbage. Carried her down the hallway, into the elevator to the main floor. Went outside, placed her on the sidewalk, and proceeded to get the car to bring to the body, (Dead weight is heavey). Parked the car, and proceeded to bring our stuff that Victoria and I packed to the car. Last but not least Victoria and our cat and I got in the car and left.

[11] A version consistent with that written by Leggette in VD-1 is found in VD-5:

> On February 13, 2014, Victoria and I were arguing, because she did not want to be in N.S. anymore (she never seemed to be satisfied). I was just finally sick of moving around so much, and wanted to just make it work. She was so hard to be with, always wanting what she wanted and not what was needed. I was getting sick of it, and my anger. I was trying my whole life previously to keep out of my life, was coming out, and she knew how to push my buttons. She had through out the idea, days before about killing Loretta Saunders! I never thought I would be capable of such an action, never say never!!!
>
> Loretta Saunders walks into the apartment, obviously in our minds, wanting the rent money we owe her and she was entitled to, ($430.^{00}$). Victoria told her that she lost her bank card and I.D., and that that would make it difficult to get out the money. Loretta even offered to drive her to the bank. While Victoria is on the phone in the bedroom, I am pacing around trying to figure in my head, if I really want to do what Victoria wish's I would. Loretta is on the couch texting, and from what I could tell getting frustrated, especially since we portrayed ourselve's to be to be good honest people. Loretta, seeming frustrated remembers that she was meant to get some dishes for a dinner Yulchin was planning on preparing, so she continues to do so. As she does this, I decide to go and see what Victoria is doing, and she is literally on the phone talking to the bank about getting into her account without a bankcard or I.D. as if she is believing her lie. I ask Victoria, "should I do it?" she says "I don't know", and continues on the phone. I pause and think, I don't want to do this, but what do I do. So I . . . decide to go and check to see what Loretta is doing. She is on the couch more frustrated, smoking, and texting.

She exclaims "Do you even have the money or what's the deal?" I said "yes". Which isn't a lie.

Walked back to Victoria who is still in the room, on the phone with the bank, I asked her again, "should I do it!" She say's "You don't have the balls".

That angered me beyond what I had left, after everything we have been through, and like I said she knew how to push my button's. I walked out to where she was sitting on the couch, and all in one motion, I grabbed her by the neck from behind, and started to choke her, she struggled until we were off the couch, kicking over the coffee table, which made a horrible mess, and ended up in the dining room. Where I continued to choke her. In my mind I say, 'you've started, you cannot stop'. For some reason choking alone wasn't working. So I grabbed a bag, and loretta being a fighter, ripped at it, so I grabbed another, again she ripped at it. Suddenly Victoria got the nerve to come out, she's almost smiling. I exclaim 'it isn't working, why isn't it working. The bag isn't working, choking isn't working." Then It occurred to me. I took her head and softly hit her head on the floor twice, and only twice, as if I was feeling bad as I commited the act.

March 4, 2014

How can I feel bad during this act, I was confused. I asked Victoria for help, as if it would help me feel better. I told her to get the plastic wrap. Loretta was already knocked out which made the task of wraping her head in the plastic easy. Satisfied that she would cause no more trouble or fight it any more, I was able to stand and breath, and look and allow to sink in what I did. I remember thinking I must be crazy because I felt relieved, stress free, all my anger from my childhood, and the last 2 years with Victoria all disappeared. I felt happy. Then action needed to take place, first I cleaned up the mess of the kicked over coffee table, luckily I had cigarettes to calm nerves, but believe me all I wanted was a joint, and couldn't wait to get some weed. Then we began packing our cloths, and since we had Victoria's cat, (Ceo) we needed the litter box and food. Last but not leased I packed Loretta into her grey hockey bag, yet she was the first into the car.

At this point I started to get nervous, because there was know way to load the car without beeing seen on camera, but I proceeded anyway. Packing the vehicle was fast, before we left Victoria had a worried look on her face. She said to me "I'm scared of you now, what if you do the same to me?" I responded, "Trust me, I love you, you are the reason I'm doing this, for our future, if I was to do it to you, I would have already." I could tell she was hesitant, but kissed me anyway. Even that kiss, I knew it was the end and of our relationship would never be the same. I felt it.

[12] In VD-6, Leggette writes:

> February 12, 2014
>
> Victoria and I are having trouble making ends meat. Her student loan came in, and per usual, we blew through it in a day. Well most of it. I was having trouble getting work, and all she wanted to do was spend, spend with no thought of paying our bills, didn't even want to get groceries. Only what she wanted. Over the last two years I've came to just give her what she want's to save arguement.
>
> That is when the words "why don't we just kill her and leave". "I don't want to be here anymore it sucks. I don't want to be here".
>
> My nerves were shot, from stress of arguing so much, constantly for the last 2 years, I want and would do anything for her, I would take a bullet for her. Never thought I would kill for her for her own selfish reasons. I constantly believed what she has said for other issues, have pushed my family away, saying they are liers, and trying to stay and stand by her side.
>
> All my life all I've wanted was to have that one love, and I always said I would not give up if I found it, and I thought I truly did. Till this day I do not know why I've been so blinded.

[13] At various points in VD-1 and VD-5 Leggette describes murdering Loretta Saunders by his own hand. He alludes to the fact that Henneberry was a party to the offence. Leggette also writes that he will attempt to blame Henneberry for the murder. In VD-1:

> To: Darcy Kory
>
> From: Blake Leggette
>
> March 9, 2014 Entry 3
>
> …Once again I woke up, forgetting I was in this place, a most horrible feeling. Darcy has lot's of story's of things he has accomplished with the organization, for only being a tattoo artist for them, raises questions in my mind about what else his affiliation may intake. But, still he seems trustworthy enough, and seem's to have my interests, my best interest's in mind, and seems to sincerely want to help. What does he have to gain by helping me? He has stated previously he doesn't want a cent from me, so what is his motive, or is there a bigger picture that I cannot see, why am I being pushed to lie about February 13, (The murder), to ensure my release, and keep Victoria locked up, knowing it's for life. Has her uncle realized she trouble and cannot have the heart to kill her, so this being a way to keep her safe, and a way for her to not cause trouble anymore??? To many questions & not enough answers. Cory (cell 10) finally came through with the joint, he gave for Darcy's bday, but since he doesn't smoke he gave it to me.

March 11, 2014 Entry 4

Today and yesterday were the same, it's been pretty quiet on the 23h lockdown range. Darcy and I are sleeping more, trying to pass by the day a bit faster, he gets up to grab breakfast bag's, then goes back to bed. I think it interesting, the type of friend's I make, and the level of respect given, it's better than dealing with the rest of the animals in this place. I know I would end up becoming one, if I did not have Darcy's influence. I have completed my defense, on the matter at hand. Victoria's true color's are becoming more clearer day by day. She has had this situation planned for quite a while, at least, I mean to get rid of me, letting me where a Nomads Ontario sweater, just to tell me she did it to get me shot, . . . I've been reassured that family or not, the fact that she is talking about things she shouldn't make's her a liability to the organization, and her uncle should be steering clear away from the situation. I just hope nothing change's between her uncle and I, and I can't wait for Darcy to find out if she's been lying about that as well.

March 18, 2014 Entry 8

…Darcy say's this is going to start getting very serious. Lyle has gotten a death threat already to drop the case. But I am focusing on what I want and looking out for myself, since that is what she is doing. I don't care if she isn't the one who actually killed Loretta, it's what I will hopefully make everyone believe. That is how I will make her pay for the last 3 years.

March 22, 2014 Entry 10

…Basically I am growing impatient, I'm angry at myself for Killing Loretta, and the fact I'm going to be blaming Victoria for it, so I don't do life in prison, but as Darcy say's she deserve's it. I'm also fighting with whether I can actually trust Darcy or not, or am I just being played, once again, being lied to again, for someone's self gain. I want to trust him, and for the moment I do trust him,

??????????????????

[14] Leggette also writes in VD-1:

Journal March 7, 2014

Entry 1Blake Leggette

Suprisingly, was called for a lawyer meeting, just to find out it wasn't Lyle Howe. Instead it was Brian F. Bailey, who is an older lawyer, who apparently recieved his certificate 12 year's before I was even born, so he's been around, and must be well respected. I told him how Victoria is the one who commited the murder while I was in the shower, he believes me.

March 13, 2014 Entry 6

Day two in West 7, you can definitely tell who want's to act on there judgement that I'm the murderer, and they are simply holding back, because they are not allowed to do anything. I've been informed of another lie of Victoria's, she told me their was no Hells Angels in Halifax, and Darcy mentioned yesterday, how there are 3 patched members in this jail. Slowly but surely I'm starting to see how much of a liar she actually is, and it makes me wonder, what in the last two year's has she also lied about.

My defense March 11, 2014

Dear Darcy,

I right this to you now, because I feel that people should know the truth about the happenings of February 13, the day Loretta Saunders passed away. It bothers me to recall this day, for this was an innocent woman, with a promising future, and recently had found out she was to have child. It saddens me to know that within minute's, the woman that I have spent two years loving, and caring about, even through all of her controlling way's, and yes it ashame's me as a man to say that I let a woman control my life for 2 years, but that is no one's fault but my own, and to this day, I still am trying to figure out why. She controlled what I ate, how I dressed, who I talked to, pretty much everything, every aspect of my life, right down to days I was allowed to shave. I mean everything. This is the woman who has taken an innocent person's life, and the following, is the truth of what happened that day!

I awoke that day, with the daunting thought, of Victoria's word's she had stated day's before in a drunken, raging fit, one of many that I have endured, although this time I filmed it on my phone (that the investigaters have watched), simply to show her what she acted like in an atempt to steer her from drinking and treating me like a piece of shit, trying to cut herself, screaming bloody murder for no reason, (for I have never laid a hand on her), and punching herself in the stomach, saying "I hope I'm not pregnant, I hope I'm not pregnant", for we were trying, the previous year she had a mis carriage. She was saying everything in her power to hurt me. For some reason she looked at me and stated "you can't even admit you want to kill Loretta". I say to her each time she said this, "what are you talking about". For I truly had no idea what she what talking about, just Vicki talking shit in another drunk fit of hers, I now know that those word's were really thought's she was having, and something she was planning, and knowing I was video taping her, decided to incriminate me to cover her own ass, If only I would have realized this sooner, Loretta Saunders may still be alive.

April 6, 2014 Entry 14

> Well things just keep coming to light more and more concerning Victoria. Jason and dad have both done their research, and certain people within the organization have tried to contact the supposed Uncle, which I had been speaking to, and he will not answer, and if he was who I was told he was, he would have answered. This person had me believing I was partially responsible for three people's death's, that I was respected, and considered family by the organization (81), just to find out it was all a control thing, that Victoria was using. Now I find out that this whole year, she's been twisting things, telling certain people that I'm saying shit that I know I haven't said, and shit I know should not be said. I can't believe she actually had been trying to get me killed, what have I possibly done wrong to deserve that, oh right, nothing, but love her unconditionally, and try to help her, when she didn't need or want it. These three years have been nothing but lies and deciet. I hate her with everything in me, and with all the god's of this earth she will be going away for 25 to Life, no matter what the truth is, …

[15] Henneberry is mentioned frequently in the writings on many more occasions than are referenced in this decision. Not only does Leggette implicate Henneberry in the murder of Ms. Saunders wherein he describes himself as the principal actor, and in other instances details an effort to blame Henneberry completely for the murder of Ms. Saunders, but he makes specific references to the bad character of Henneberry including her alleged ties to the Hells Angels motorcycle club, her ties to an uncle who is allegedly involved in organized crime and Leggette's claim that she is deceitful and manipulative.

[16] In her decision on committal the Honourable Judge Derrick also detailed the evidence called at the Preliminary Inquiry that she determined was admissible **only** against Henneberry:

- In the ten days before Ms. Saunders was murdered Henneberry was having financial problems;
- By February 3, 2014 Henneberry had sold her phone for food and was waiting for her Ontario student loan to arrive;
- Two days later Henneberry emailed a friend and mentioned that she was not likely to pay Ms. Saunders the rent that was owed;
- In this same email Henneberry asked if she and Leggette could stay with this friend to avoid any unnecessary drama;

- In another email to the same friend Henneberry admitted that she had no phone, was broke and did not have money for food;

- In another email Henneberry told her friend that she and Leggette were planning to leave Nova Scotia once her money came in;

- Henneberry again wrote that she would not be paying Ms. Saunders the rent that was owed;

- Within days of that email a cell phone video was made in which Henneberry knew that Leggette was contemplating a plan to kill Ms. Saunders;

- Henneberry appeared to harbour animosity toward Ms. Saunders, referring to Ms. Saunders in various emails as "a bitch", someone who "… isn't who she has claim to be and we aren't impressed with what we found out about her", "a sneaky bitch" and someone with a "bitchy ass attitude";

- After Ms. Saunders was killed in the apartment Henneberry left Nova Scotia with Leggette in Ms. Saunders' car, with her cell phone and her bank card;

- On February 26, 2014 Henneberry was interrogated by police. Her statement is only admissible as evidence against her and is inadmissible in relation to Mr. Leggette;

- In her statement to the police Henneberry says that on February 13, 2014 Ms. Saunders arrived at the apartment. Henneberry was doing the dishes. Ms. Saunders sat on the couch and asked for the rent. Henneberry told her she did not have the rent because she lost her bank card. This, Henneberry said to the police, was a lie to cover up the fact that she did not have the money. Henneberry says that at that time she went into the bedroom to call the bank. Henneberry says Leggette had been pacing and then "took off down the hallway to the living room." She next heard Ms. Saunders say "What the fuck?" and "What are you doing? Stop. Help." Henneberry said she was shaking so she "went to the bathroom" because she thought she was going "to puke and stuff". Henneberry told the police that while Ms. Saunders was being asphyxiated she was in the bedroom "sitting there in shocked disbelief". Henneberry says that "Whenever I went out there I started shaking. I couldn't do anything. I couldn't even stand. I had jello legs."

- Henneberry told the police that Leggette put a Sobeys bag over Ms. Saunders' head and smothered her. She also mentioned the use of "Saran wrap". In her police statement Henneberry appeared to know exactly how the killing occurred.

[17] Judge Derrick determined one inference that could be drawn from these facts was that Henneberry was merely present when Leggette murdered Ms. Saunders. Another competing inference was that Henneberry had knowledge of Leggette's plan to kill Ms. Saunders and when Ms. Saunders came to the apartment Henneberry was an aider and abetter. Henneberry was aware that Ms. Saunders wanted the rent money. The lie about a lost bank card could have been a ruse to stall Ms. Saunders at the apartment so that Leggette could kill her. Henneberry described watching Leggette pacing before he went to the living room where Ms. Saunders was waiting on the couch for the rent money. Henneberry says that she heard Ms. Saunders crying out, yet her narrative does not involve Henneberry calling out to ask what was going on or checking to see what was happening. Instead she told the police she was "shaking" at this point and went in the bathroom because she thought she might throw up. Judge Derrick inferred that Henneberry therefore knew what was happening with Ms. Saunders. It may have made her nauseous but she did not need to investigate. Henneberry knew Leggette had put into motion a plan to kill Ms. Saunders.

[18] Henneberry describes Leggette as stopping Ms. Saunders' breathing by putting a bag over her head while they were on the floor. Judge Derrick found that this description supports an inference that Henneberry watched at least some of what was happening to Ms. Saunders as a party and was not simply told what happened later by Leggette. Judge Derrick inferred that Henneberry may not have merely been a passive, horrified observer, but acted to aid and abet a killing designed to liberate her and Leggette from owing rent to "a bitch", gain access to Ms. Saunders' car and enable them to leave Nova Scotia.

[19] Henneberry told the police during her interview that she wished she could have saved Ms. Saunders and immediately followed that statement with "But I was so angry and I just didn't want to be in Halifax anymore. We came here and there was nothing here anymore… I was just angry in general. I was so angry for coming here… I was angry at Blake for everything." Judge Derrick therefore found an inference that Henneberry's state of mind while Ms. Saunders was being murdered was not one of disbelief as she claimed in her statement. Henneberry did

not tell the police that she wished she could have saved Ms. Saunders but was too frightened or frozen with shock. Instead, Henneberry told the police that she was very angry about being down and out in Halifax.

[20] Judge Derrick inferred that Henneberry's anger contributed to a decision to kill Ms. Saunders and enabled her to participate in it, first by lying to Ms. Saunders about the availability of the rent money to keep her on the couch and then by standing by, at the ready, while the murder was carried out by Leggette. Once that was accomplished Henneberry was an active participant, packing up, taking Ms. Saunders' car, cell phone and bank card, getting money by returning the computer for a refund and then leaving the province. Judge Derrick determined that this evidence, if considered in combination with the rest of the evidence, was capable of supporting the inference that Henneberry was a party to the murder of Ms. Saunders.

[21] There is more after-the-fact conduct that Judge Derrick found to be relevant to the issue of whether Henneberry was a party to the murder. Yalcin Surkultay, Ms. Saunders' boyfriend, had texted Henneberry's phone on February 14, 2014, after Ms. Saunders did not return to his apartment as he expected. He received texts that Judge Derrick inferred were sent by Henneberry from her own cell phone. The texts from Henneberry indicated she had paid Ms. Saunders the rent in cash and that Ms. Saunders had left after taking Henneberry and Leggette grocery shopping. Henneberry's text also included a suggestion that Ms. Saunders may have gone to Newfoundland. Henneberry also texted indicating that she and Leggette had been out looking for work and viewing some apartments. Mr. Surkultay confirmed that he received that last text when he had been trying to reach Leggette and Henneberry on February 14, 2014. Judge Derrick inferred that through the use of these texts, Henneberry wanted Mr. Surkultay to believe she and Leggette were still in Halifax. Henneberry tried to assure Mr. Surkultay that Henneberry would let Ms. Saunders know to bring his keys and get back to him. She further stated she would call Ms. Saunders but "Her phone could be dead though" because she forgotten her charger "at the apartment."

[22] Judge Derrick inferred that the laying of a false trail after Ms. Saunders' death began the day of the murder, February 13, 2014. On that day Mr. Surkultay also exchanged texts with Ms. Saunders' cell phone believing he was having a conversation with Ms. Saunders that continued late into the evening, with Mr. Surkultay becoming increasingly frustrated because Ms. Saunders would not tell

him where she was nor when she was returning. In the early morning hours of February 14, 2014 Mr. Surkultay received a text from Ms. Saunders' cell phone that read in response to his inquiries: "I wanted to see some friends and take my mind off shit".

[23] Judge Derrick found that the whole of the evidence could support an inference that Ms. Saunders' murder was planned and deliberate and that the perpetrators did not want it known that Ms. Saunders had been murdered, not simply taken off capriciously for Newfoundland. The false trail would assist in the getaway. The rest of the plan required the elimination of Ms. Saunders, the elimination of the rent obligation and access to the means to leave Nova Scotia, that being in Ms. Saunders' car.

Severance

[24] According to *R. v. Litchfield*, [1993] 4 S.C.R. 333; (1993), 86 C.C.C. (3d) 97, an application for severance is to be made before the trial judge. The onus is on the applicant to prove, on a balance of probabilities, that the interests of justice require separate trials. The *Criminal Code* does not define the phrase "the interests of justice".

[25] In *R. v. Weir* (1899), 3 C.C.C. 351 (Que. Q.B.) the Quebec Court outlined some of the original grounds that impact on the decision to sever:

> (1.)- That the defendants have antagonistic defences;
>
> (2.)- That important evidence in favor of one of the defendants which would be admissable on a separate trial would not be allowed on a joint trial;
>
> (3.)- That evidence which is incompetent against one defendant, to be introduced against another, and that it would work prejudicially to the former with the jury;
>
> (4.)- That a confession made by one of the defendants, if introduced and proved, would be calculated to prejudice the jury against the other defendants; and
>
> (5.)- That one of the defendants could give evidence for the whole or some of the other defendants and would become a competent and compellable witness on the separate trials of such other defendants;

[26] More recently a line of cases emphasized the principle that persons accused of the joint commission of a crime should be tried together. This rule is, of course, subject to the *Canadian Charter of Rights and Freedoms* and, in particular, the

s.11(d) right of an accused to a fair trial. The presumption favouring joint trials is not absolute and the discretion to order separate trials must be exercised on the basis of competing legal principles including the principle that severance should not be ordered unless it is established that a joint trial will work an injustice to the accused. The mere assertion of what is known as a "cut-throat defence" is not sufficient to warrant separate trials on its face.

[27] In *R. v. Crawford*, [1995] 1 S.C.R. 858, Sopinka J stated, at p. 875, when discussing the authorities that support joint trials:

> A fourth solution would be to sever the trial whenever the conflict occurs, but no one in this appeal advocates such a solution and it would run counter to a uniform stream of authority in this country in favour of joint trials. No application for severance was made at trial and the issue was not raised or commented on in the Court of Appeal.

[28] Sopinka J. went on to comment at pp. 880-881:

> Although the trial judge has a discretion to order separate trials, that discretion must be exercised on the basis of principles of law which include the instruction that severance is not to be ordered unless it is established that a joint trial will work an injustice to the accused. The mere fact that a co-accused is waging a "cut-throat" defence is not in itself sufficient. In Pelletier, supra, a co-accused was permitted to cross-examine another accused on a statement to the police that had not been proved to be voluntary. On appeal of his conviction he contended that if he had been tried separately the cross-examination would not have been permitted. On this basis he claimed that the trials should have been severed. In dismissing this ground, Hinkson J.A., on behalf of the court, stated, at p. 539:
>
> > On this point it is necessary to keep in mind that the trial judge has a discretion as to whether or not he will grant a severance. The general rule of severance is that persons engaged in a common enterprise should be jointly tried unless it can be demonstrated that a joint trial would work an injustice to a particular accused: R. v. Black and six others, [1970] 4 C.C.C. 251 at pp. 267-8, 10 C.R.N.S. 17 at pp. 35-6, 72 W.W.R. 407. In this case, the trial judge was not persuaded that it was appropriate to grant a severance. I do not conclude that he erred in the exercise of his discretion.

[29] Sopinka J. also concluded although limiting instructions to a jury may be complex or may require subtle analysis, nonetheless, such jury instructions have firm roots in the Canadian judicial system. He stated at pp. 883-884:

> The limited use to which the evidence can be put must of course be explained to the jury with some care. The distinction between the use of evidence limited to credibility and evidence that can be used to infer guilt is well understood by lawyers but may not be easily understood by a jury. It has been criticized as being artificial. See R. v. Gilbert (1977), 66 Cr. App. R. 237 (C.A.). While I recognize that the distinction is a subtle one, it is nonetheless a distinction that is firmly rooted in our law and is one that can be adequately explained to a jury. The distinction was recently re-affirmed by this Court in Kuldip, supra. At p. 635, the Chief Justice stated:
>
> > This seems an appropriate time at which to mention that I share Martin J.A.'s concern that it is sometimes difficult to draw a clear line between cross-examination on the accused's prior testimony for the purpose of incriminating him and such cross-examination for the purpose of impeaching his credibility. A trial judge will have to be very clear in his or her instructions to the jury when setting out the uses to which previous testimony can be put and the uses to which such testimony must not be put. While such a distinction may be somewhat troublesome to the jury, it is my view that with the benefit of clear instructions from the trial judge the jury will not be unduly burdened with this distinction. These instructions should, in many ways, be reminiscent of those which are routinely given with respect to the use to which an accused's criminal record may be put. A trial necessarily involves evidentiary questions which are sometimes complex in nature. While simplicity in these manners is generally preferable to complexity, the policy reasons underlying the need for a jury to have before it all the relevant information related to the charge (discussed by this Court in R. v. Corbett, [1988] 1 S.C.R. 670) clearly outweigh the benefits of simplicity in these circumstances.
>
> . . .
>
> A proper balance with respect to the competing rights in issue can be achieved if the trial judge when sitting alone carefully applies the distinction to which I refer above. The evidence of pre-trial silence is not to be used as positive evidence to infer the guilt of the accused either as tending to show consciousness of guilt or otherwise.

> In a trial before a jury the trial judge must explain the respective rights involved, how they are to approach the use of the evidence of silence and its limited purpose.

[30] In *R. v. Suzack*, (2000) 141 C.C.C. (3d) 449; 2000 CanLII 5630 (Ont. C.A.), leave to appeal to S.C.C. refused, 2001, Doherty J.A. was faced with a severance issue and stated for court at paras. 85-89:

> [85] Motions for severance are governed by s. 591(3) of the Criminal Code. That section provides that a judge may direct severance where "the interests of justice so require." Like the change of venue provision, this section vests a broad discretion in the trial judge. That discretion must be exercised bearing in mind the competing interests of the public and the accused. In this case, Trainor J. had to consider the competing interests of Suzack, Pennett and the Crown. Suzack wanted severance, the other two did not.
>
> [86] Appellate review of the exercise of the discretion to grant or refuse severance must afford the same level of deference to the trial judge as that accorded to other discretionary decisions made by the trial judge: see R. v. Litchfield (1993), 86 C.C.C. (3d) 97 at 113-14 (S.C.C.).
>
> [87] In reviewing Trainor J.'s refusal to order severance, I begin with the proposition that persons accused of the joint commission of a crime should be tried together. That presumption applies with particular force where the co-accused are each alleging that the other is the guilty party: R. v. Crawford (1995), 96 C.C.C. (3d) 481 at 497 (S.C.C.)
>
> [88] Separate trials where co-accused are blaming each other for the crime raise not only the danger of inconsistent verdicts, but also a real concern that the truth will not be discovered at either trial. It is axiomatic that the truth of an allegation is best tested through a process which requires the accuser to confront the accused with the allegation and gives the accused a chance to respond to the allegation. If co-accused who are blaming each other for a crime are allowed to do so in separate trials, neither jury will have the benefit of that process. If the accused are tried separately, it is highly unlikely that either jury will hear the complete story. As Professor Elliot said in "Cut Throat Tactics: the freedom of an accused to prejudice a co-accused", [1991] Crim. L.R., 5 at 17:
>
> > ... it is undeniable that the full truth about an incident is much more likely to emerge if every alleged participant gives his account on one occasion. If each alleged participant is tried separately, there are obvious and severe difficulties in arranging for this to happen without granting one of them immunity. In view of this, on all but exceptional cases, joint trial will be resorted to, despite the double bind inevitably involved ...

> [89] In his reasons for refusing severance, delivered after the trial, Trainor J. recognized both the presumption in favour of joint trials in cases of alleged joint participation in crimes and the risk that the truth could be a casualty of any severance order:
>
> > Secondly, this killing appeared to me to be the result of a joint venture, where the two accused, who were long time friends, either acted in concert and assisted one another as principals or one was the shooter (that caused death) and the other aided for the purpose of the killing. There were only three people on the lawn at 1124 Gordon Street that night. They were Constable MacDonald, Clinton Suzack and Peter Pennett. The fact that the shooter (the one that fired the fatal shots) was guilty of first degree murder was not an issue. The defence position was that the shooting was an isolated and totally unexpected act of violence. They told the jury that determination of the shooter was the vital issue to be decided. Each accused said the other was the killer. Counsel for each accused did his best to create a reasonable doubt in the minds of the jury.
> >
> > The jury heard and judged the evidence of each accused. In separate trials the jury will not likely have this important evidence. That alone, in a case involving common participation and aiding, cannot be conducive to a just verdict.

[31] In considering the argument that injustice had resulted to one of the accused (Suzack) because the jury heard evidence of his bad character and propensity for violence as adduced by his co accused (Pennett) Doherty J.A. found at paras. 93-100:

> [93] This submission turns on the contention that no instruction could adequately protect Suzack against misuse of the propensity evidence. The other bases for severance advanced at trial are not put forward as separate grounds for severance on appeal, although counsel does argue that the inflammatory opening and closing by Pennett's lawyer exacerbated the prejudice caused to Suzack by the admission of the propensity evidence.
>
> [94] The jury heard a good deal of evidence which cast Suzack in a bad light. However, much of that evidence would have been properly before the jury had Suzack been tried alone. His very extensive criminal record, his activities as a large-scale drug dealer, his familiarity with and use of weapons, his status as a parole violator, and the outstanding warrant for his arrest were all before the jury by the time Suzack completed his evidence in-chief and before he saw the need to apply for severance. While Mr. Hurd's testimony involving Suzack's threatened conduct towards him about five hours before the murder would not have been before the jury but for Pennett's participation in the trial, I share Suzack's trial counsel's view that that evidence was not particularly significant (see, *supra*,

para. 74). Any significance it had was further diminished by Suzack's admission that he used that very same weapon to do much more than threaten Constable MacDonald immediately prior to his murder. Suzack admitted that he used the weapon in an effort to beat Constable MacDonald into a state of unconsciousness.

[95] The extensive reference to the facts underlying Suzack's numerous convictions would not have been admissible but for Pennett's participation in the trial. In my mind, that is the only significantly prejudicial evidence that was before this jury on the joint trial and would not have been before a jury had Suzack been tried alone. The admission of that evidence alone does not overcome the competing interests which favoured a joint trial.

[96] Suzack's argument does not, however, turn on the mere admissibility of this prejudicial evidence, but rather on the use that the jury were invited to make of that evidence. Had Suzack been tried alone, the Crown could not have suggested to the jury that the evidence demonstrated Suzack's propensity for violence and that propensity could be used in determining his involvement in the murder of Constable MacDonald. Indeed, the trial judge would have had to make it clear to the jury that they could not use the evidence for that purpose. On a joint trial, Pennett could, however, advance the propensity argument. He did so repeatedly and forcefully.

[97] Trainor J. had to decide whether he could reconcile the competing rights of Suzack and Pennett and provide a fair trial for both. His ability to do so turned on whether the jury could be instructed in such a way as to permit the use of the propensity evidence as part of Pennett's defence while at the same time preventing the misuse of the evidence as part of the Crown's case against Suzack. Fashioning the required instruction was not an easy task and properly applying it was even more challenging.

[98] Suzack relied on the judgment of Glithero J. in *R. v. Moscato and Thurston*, [1995] O.J. No. 3712 (QL) (Gen. Div.) [summarized 29 W.C.B. (2d) 174] where, in very similar circumstances, he ordered severance after concluding that the jury could not be instructed on the proposed propensity evidence in a manner which was fair to both accused. I take no issue with the manner in which Glithero J. exercised his discretion in that case. It is not, however, the law that whenever a trial judge is faced with propensity evidence led by one accused against another that he must order severance: *R. v. Kendall and McKay* (1987), 35 C.C.C. (3d) 105 (Ont. C.A.) at 127-28; *R. v. Tom*, [1997] O.J. No. 2807 (QL) (C.A.) [summarized 35 W.C.B. (2d) 247]. Trial judges must make individual evaluations of the efficacy of limiting instructions in the particular circumstances of each case.

[99] In deciding that the difficulties inherent in properly instructing the jury on the use of the evidence of Suzack's propensity for violence did not warrant separate trials, Trainor J. placed reliance on the jury's ability to follow and apply

difficult instructions. In doing so, he echoed the strong words of Chief Justice Dickson in *R. v. Corbett* (1988), 41 C.C.C. (3d) 385 (S.C.C.) at 400-401:

> *In my view, it would be quite wrong to make too much of the risk that the jury might use the evidence for an improper purpose. This line of thinking could seriously undermine the entire jury system*. The very strength of the jury is that the ultimate issue of guilt or innocence is determined by a group of ordinary citizens who are not legal specialists and who bring to the legal process a healthy measure of common sense. *The jury is, of course, bound to follow the law as it is explained by the trial judge. Jury directions are often long and difficult, but the experience of trial judges is that juries do perform their duty according to the law*. …
>
> Juries are capable of egregious mistakes and they may at times seem to be ill-adapted to the exigencies of an increasingly complicated and refined criminal law. But until the paradigm is altered by Parliament, the court should not be heard to call into question the capacity of juries to do the job assigned to them. The ramifications of any such statement could be enormous. Moreover, the fundamental *right* to a jury trial has recently been underscored by s. 11(*f*) of the *Charter*. If that right is so important, it is logically incoherent to hold that juries are incapable of following the explicit instructions of a judge. [Emphasis added by Doherty JA.]

[100] The Chief Justice made these comments in support of his conclusion that the Crown could cross-examine an accused charged with murder on a prior murder conviction because the jury could properly follow a direction that evidence of the prior murder conviction was relevant only to the credibility of the accused.

[32] Doherty J.A. went on, at paras. 127-129, to discuss the crafting of a jury instruction that would be sufficient to properly balance the competing interests:

> [127] In a case like this one where an accused leads evidence of the co-accused's propensity for violence in support of the position that the co-accused committed the crime, a proper balance of the competing interests requires that the jury be told how it can use the evidence in considering the case of the accused and how it cannot use the evidence in considering the case of the co-accused. An example of an appropriate limiting instruction is found in the draft specimen charges developed by the Ontario Specimen Jury Instruction Project under the direction of the Honourable Mr. Justice David Watt. That instruction provides:
>
> > (1) Sometimes a person charged with a crime will say, "it was not me, it was (an) other person charged who did it", and will point to evidence that this other person had an opportunity and a disposition to do it. In this

> case, (NOA1) is saying that (NOA2) committed the crime, and points to evidence (NOA2) is the sort of person who would do such a thing.
>
> (2) It is up to you to determine whether the disposition evidence, alone, or together with other evidence, raises a reasonable doubt that (NOA1) committed the offence charged. However you must not use the disposition evidence in any way when you consider whether Crown counsel has proven the case against (NOA2). No one can be convicted of a crime just for being the sort of person who might have committed it.
>
> (3) In other words, you may consider evidence of (NOA2)'s opportunity and disposition to commit the offence(s) charged in deciding whether you have a reasonable doubt that (NOA1) committed it (them), but you must *not* use evidence of (NOA2)'s disposition to find (NOA2) guilty of it (them).

> [128] Some will say that a jury could not possibly follow the Committee's proposed instruction. I do not pretend that there is no risk that the jury would not follow that instruction. Like any limiting instruction, there is a risk that the jury will not abide by it. As long as we maintain trial by jury, however, courts must proceed on the basis that juries accept and follow the instructions given to them by the trial judge: *R. v. Corbett*, supra, at p. 401; *R. v. Eng* (1999), 138 C.C.C. (3d) 188 (B.C.C.A.) at 201-202. That is not to say that in a specific case a trial judge could not decide that the risk of misuse of propensity evidence offered by one co-accused could not be adequately addressed by a limiting instruction. If a trial judge reaches that conclusion, he or she will have no choice but to order severance. It would, however, be wrong for a trial judge to accept as a general proposition that a jury would not or could not abide by a limiting instruction.
>
> [129] Trainor J. did not have the advantage of the specimen instruction prepared by Justice Watt's Committee and his instruction did not conform with that specimen charge in all respects. The instruction did, however, in my view, adequately protect Suzack's right to a fair trial.

[33] In *R. v. Al-Enzi*, 2014 ONCA 569, Laskin J.A. looked at severance in the context of cut-throat defences and stated at paras. 61-62:

> [61] The legal context for analyzing this main ground of appeal is well established and uncontroversial. Section 591(3) of the *Criminal Code* sets out the test for severance: the court may order that two accused be tried separately "where it is satisfied that the interests of justice so require". This provision confers broad discretion on a trial judge. In exercising that discretion, the trial judge must take account of the interest of each accused and of the public, represented by the Crown: see *R. v. Suzack* (2000), 141 C.C.C. (3d) 449 (Ont. C.A.), at para. 85, leave to appeal to S.C.C. refused, [2000] S.C.C.A. No. 583.

> [62] When, as in this case, two persons are accused of committing a crime in concert, there is a presumption in favour of trying the accused together. That presumption applies with particular force when two accused mount a cut-throat defence and blame each other, as Kayem and Al-Enzi did: see *Suzack*, at paras. 87-89. Thus, in cases in which two accused engage in cut-throat tactics, only exceptionally should they be tried separately.

[34] As noted by Justice Laskin in *Al-Enzi* at para. 73, although the existence of a likely cut-throat defence being mounted by a co-accused creates a strong presumption in favour of joint trials, that of course is not the only consideration.

[35] Unlike the situation in *Al-Enzi*, Henneberry and Leggette's case does not involve complex legal and factual issues such as dozens of wiretaps. Additionally, Mr. Al-Enzi was left to conduct his trial without a lawyer in a complex trial wherein his finger-pointing co-accused and the Crown were both aligned in interest against him and both were represented by experienced counsel. Both Henneberry and Leggette are represented by counsel.

[36] In *R. v. Grewall*, 2000 BCSC 1451, Romilly J. dealt with an application regarding the admissibility of evidence against one co-accused that would be prejudicial to the other co-accused in a murder trial. In reviewing the law relating to severance, Romilly J. stated at paras. 20-26:

> **20** It is in the public interest that those alleged to be jointly involved in criminality be tried together: *R. v. Crawford* (1995), 96 C.C.C. (3d) 481 (S.C.C.); *R. v. Court and Monaghan* (1995), 99 C.C.C. (3d) 237 (Ont. C.A.) at 259; *R. v. Olah and Ruston* (1997),115 C.C.C. (3d) 389 (Ont. C.A.) at 402 per Osborne J.A. (leave to appeal to S.C.C. refused (1998), 12 C.C.C. (3d) vi). In *R. v. Suzack* (2000), 141 C.C.C. 449 (Ont. C.A.), Doherty J.A. recently reiterated at para. 87 that there is a presumption that "persons accused of the joint commission of crime should be tried together."
>
> **21** There are strong policy reasons for accused persons charged with offences arising out of the same events or series of events being jointly tried. The avoidance of inconsistent verdicts and the economies of a singular trial are recognized as legitimate objectives. The policy reasons take on greater significance when each accused blames the other or others. Separate trials under such circumstances create a risk of inconsistent verdicts. In *R. v. Crawford, supra*, Sopinka J. stated at p. 497:
>
> > Although the trial judge has a discretion to order separate trials, that discretion must be exercised on the basis of principles of law which include the instruction that severance is not to be ordered unless it is

> established that the joint trial will work an injustice to the accused. The mere fact that a co-accused is waging a "cut-throat" defence is not in itself sufficient.

At p. 497 Sopinka J. also stated:

> There exist, however, strong policy reasons for accused persons charged with offences arising out of the same event or series of events to be tried jointly.

He goes on to conclude at pp. 497-8:

> The general rule, therefore, is that the respective rights of the co-accused must be resolved on the basis that the trial will be a joint trial. This does not mean, however, that the trial judge has been stripped of his discretion to sever. That discretion remains, and can be exercised if it appears that the attempt to reconcile the respective rights of the co-accused results in an injustice to one of the accused.

22 Notwithstanding the strong policy reasons for joint trials, the courts have recognized that in cases with a co-accused, actions of co-accused may affect one another and there may exist not only evidentiary consequences, including cross-examination on a statement not proven to be voluntary *R. v. Logan et al* (1989), 46 C.C.C. (3d) 354 (Ont. C.A.) at 389-391 (affirmed on other bases at (1990), 58 C.C.C. (3d) 391 (S.C.C.)), attacks on character and credibility (*R. v. Jackson* (1991), 68 C.C.C. (3d) 385 (Ont. C.A.) at 434-6 per Doherty J.A. (affirmed on other grounds (1994), 86 C.C.C. (3d) 385 (S.C.C.)), and use of pre-trial silence (*R. v. Crawford, supra* at 498-500), but also procedural delays arising from lengthy examinations, the accommodation of each counsel's professional schedule, decisions regarding admissions and witnesses to be called.

23 In *R. v. Suzack, supra***,** Doherty J.A. stated at paras. 111-112:

> Where accused are tried jointly, each is entitled to the constitutional protections inherent in the right to a fair trial. Those protections include the right to make full answer and defence and the right to be shielded from evidence which unfairly prejudices an accused. An accused right to a fair trial does not, however, entitle that accused to exactly the same trial when tried jointly as the accused would have had had he been tried alone: *R. v. Crawford, supra*, at p. 497-98; *R. v. Pelletier* (1986), 29 C.C.C. (3d) 5333 (B.C.C.A.). In joint trials, one accused may elicit evidence or make submissions in support of his defence that are prejudicial to the other accused and could not have been elicited or made by the Crown. In those cases, the respective rights of each accused must be balanced by the trial

> judge so as to preserve the overall fairness of the trial. In *Crawford, supra,* Sopinka J., said, at p. 498:
>
> > I have gone to some length to stress that *Charter* rights are not absolute in the sense that they cannot be applied to their full extent regardless of the context. Application of *Charter* values must take into account other interests and, in particular, other *Charter* values which may conflict with their unrestricted and literal enforcement. This approach to *Charter* values is especially apt in this case, in that the conflicting rights are protected under the same section of the *Charter*.
>
> Sopinka J. balanced the competing constitutional interests in *Crawford* by holding that while an accused (unlike the Crown) could lead evidence that the co-accused had failed to give his version of events prior to trial, the co-accused was entitled to a jury instruction that pre-trial silence was relevant only to credibility and was not evidence of the co-accused's guilt. In addition the jury had to be told that pre-trial silence was only one factor to be considered in assessing credibility and that depending on the evidence, the co-accused's pre-trial silence may be explained by factors which do not reflect adversely on the co-accused's credibility: *R. v. Crawford*, supra, at 500. Sopinka J. balanced the competing interests by allowing the co-accused to advance evidence of the co-accused's silence while at the same time placing limits on how the jury could use that evidence.

[37] After citing Doherty J.A.'s comments at para. 88 of *Suzack* (already referred to above), Romilly J. stated in *Grewall*:

> **25** The cases suggest therefore that, even where co-accused wage "cut-throat" defences, there is a presumption that persons accused of the joint commission of crime should be tried together. The courts have, however, placed a heavy onus indeed on the trial judge to ensure that the jury hearing a joint trial are properly instructed in order to protect the conflicting rights of an accused and co-accused.
>
> **26** Before I leave this portion of the judgment, I note parenthetically that there have been some submissions to the effect that this present application would be setting the stage for a severance application by the accused Toor. In anticipation of that application, I would again quote from Doherty J.A. in *R. v. Suzack, supra,* where he stated at para. 105:
>
> > The point in a trial at which a severance application is made is relevant to the determination of the "interests of justice": *R. v. M.(B.)* (1998), 42 O.R. (3d) 1 at 9 (Ont. C.A.); *R. v. C.(D.A.)* (1996), 106 C.C.C. (3d) 28 (B.C.C.A.), aff'd, [1997] 1 S.C.R. 8. As Proulx J.A. said in *R. v.*

> *Cross* (1996), 112 C.C.C. (3d) 410 at 420 (Que. C.A.), leave to appeal to S.C.C. refused, [1997 S.C.C.A. No. 15, (1997), 114 C.C.C. (3d) vi:
>
> > However, the time at which such a motion is brought is likely to have an influence on the judge's decision whether or not to order separate trials. The considerations concerned with the proper administration of justice are more important at this stage. This is all the more true where the trial is a jury trial. ... The trial judge has the duty to take into account the practical consequences which an order for separate trials may have. He must also assess the potential prejudice which the co-accused will suffer should he grant the motion.

[38] Romilly J. found that a proper jury charge would be satisfactory to preserve a fair trial and stated at paras. 44-46 of *Grewall*:

> **44** In *R. v. Suzack, supra,* Doherty J.A. recognized that there is always a concern regarding the ability of the jury to understand complex legal instructions, and even the willingness of the jury to follow instructions. He concluded, however, at para. 128:
>
> > ... I do not pretend that there is no risk that the jury would not follow that instruction. Like any limiting instruction, there is a risk that the jury will not abide by it. As long as we maintain trial by jury, however, courts must proceed on the basis that juries accept and follow the instructions given to them by the trial judge: *R. v. Corbett***,** 41 C.C.C. (3d) 385 at p. 401; *R. v. Eng* (1999),138 C.C.C. (3d) 188 (B.C.C.A.), at 201-202. That is not to say that in a specific case a trial judge could not decide that the risk of misuse of propensity evidence offered by one co-accused could not be adequately addressed by a limiting instruction. If a trial judge reaches that conclusion, he or she will have no choice but to order severance. It would, however, be wrong for a trial judge to accept as a general proposition that a jury would not or could not abide by a limiting instruction.

[39] Similarly, Walters J. noted in *R. v. Qahwash,* 2011 ONSC 4649, at paras. 33-34:

> **33** The use of juries in our criminal justice system is premised on the assumption that jurors are intelligent, ethical and have the ability to follow instructions. This belief has been repeatedly affirmed in the jurisprudence of this country, including that of the Supreme Court of Canada. In *R. v. Corbett*, [1988] 1 S.C.R. No. 670 at paras. 38-39, Chief Justice Dickson noted that despite the length and complexity of many jury instructions, the experience of the system is that jurors perform their duties according to law. He underscored the importance

of maintaining the assumption that juries are fully capable of performing the job assigned to them.

34 Likewise in *R. v. Vermette*, [1988] 1 S.C.R. No. 985 at para. 21, Justice La Forest relied on the court's remarks in *R. v. Corbett, supra*, to the effect that jurors have the ability to disabuse themselves of information they may have heard but have been told they are not to consider. And perhaps most poetically, Justice Addy in *R. v. Lane and Ross*, (1969), 6 C.R.N.S. 273 at 279 (Ont. S.C.):

> I feel that it is quite possible, as has been done in many cases in the past, to explain clearly to the jury, in such a way that they will govern themselves in accordance with the directions of the Judge, that the confession of one accused in a joint trial is not evidence against his co-accused. The danger of a miscarriage of justice clearly exists and must be taken into account but, on the other hand, ***I do not feel that, in deciding a question of this kind, one must proceed on the assumption that jurors are morons, completely devoid of intelligence and totally incapable of understanding a rule of evidence of this type or of acting in accordance with it. If such were the case there would be no justification at all for the existence of juries***... [emphasis added by Walters J.]

[40] Dickson C.J.C. also commented on the ability of juries to follow clear instructions in *R. v. Corbett*, [1988] 1 S.C.R. 670, at p. 692:

> In my view, it would be quite wrong to make too much of the risk that the jury might use the evidence for an improper purpose. This line of thinking could seriously undermine the entire jury system. The very strength of the jury is that the ultimate issue of guilt or innocence is determined by a group of ordinary citizens who are not legal specialists and who bring to the legal process a healthy measure of common sense. The jury is, of course, bound to follow the law as it is explained by the trial judge. Jury directions are often long and difficult, but the experience of trial judges is that juries do perform their duty according to the law. We should regard with grave suspicion arguments which assert that depriving the jury of all relevant information is preferable to giving them everything, with a careful explanation as to any limitations on the use to which they may put that information. So long as the jury is given a clear instruction as to how it may and how it may not use evidence of prior convictions put to an accused on cross-examination, it can be argued that the risk of improper use is outweighed by the much more serious risk of error should the jury be forced to decide the issue in the dark.

[41] Several cases suggest editing the evidence if necessary. In *R. v. Olah*, [1997] O.J. No. 1579 (Ont. C.A.) (leave to appeal to S.C.C. dismissed, [1997] S.C.C.A. No. 549), two accused were charged with murder. Upon arrest, Olah

provided a video statement to police describing in detail the events leading up to the offence and the offence itself. The trial judge described the statements as "…graphic, complete, detailed and convincing…" and "one of the most powerful pieces of evidence I have seen in over 15 years on the bench".

[42] The statements implicated the co-accused, Ruston. Olah's statements were not admissible against Ruston. The trial judge refused Ruston's severance application. The statements included references about Ruston that were not necessary to Olah's narrative of the crime. These references related to Ruston's criminal record, an indication that Ruston wanted to commit murder before he was 18 to take advantage of a reduced penalty and Ruston's alleged comments explaining why he had participated in the killing: "we only did it for a good time". In *Olah*, at paras 40-41, the Ontario Court of Appeal reviewed the trial judge's decision to edit Olah's statement:

> **40** The trial judge was concerned with the number of references to Ruston that Olah made in his statements, and also with the number of damaging references he made about Ruston that were not necessary to Olah's narrative. He cited as examples Olah's comments about Ruston's criminal record; his statement that Ruston wanted to complete the commission of the planned offence before he was 18 because of the significantly reduced penal consequences under the *Young Offenders Act*; and Olah's observation that Ruston said that the reason for the killing was that "we only did it for a good time." The trial judge understandably characterized these comments, which were unnecessary to the narrative Olah was providing, as "highly prejudicial" to Ruston.
>
> **4l** On May 13, 1991, the trial judge concluded that if Olah's statements were to be admitted at trial, "...the risk of prejudice to Ruston is significant and a separate trial should be ordered for him." However, the trial judge went on to hold that Olah's statements should be edited to remove what the trial judge characterized as "gratuitously offensive comments attributed to or related to Ruston." Pending the editing of Olah's statements, the trial judge stated that he would reserve judgment on Ruston's severance application. Although the trial judge referred to reserving judgment on the severance application, it appears to me that he adjourned it so that Olah's statements could be edited.

[43] Once edited, the remainder of the statement still implicated Ruston. The trial judge cured any possible prejudice with proper instructions to the jury on the appropriate use it could be made of the evidence. At para. 47, the Court of Appeal in *Olah*, stated:

> **47** When he dealt specifically with Olahs statements, the trial judge instructed the jury:
>
> > I just want to mention to you, at that time, as I advised when the evidence was introduced, the statement by Olah to the police on his arrest, is not evidence, nor is it capable of being evidence for or against Ruston, except and only to the extent that the statement has been adopted by Ruston himself, or by Ms. Chisamore. So the number of statements by Mr. Olah to the police following the event upon arrest, is evidence only for or against Mr. Olah and cannot be used for or against Mr. Ruston except to the extent that it has been adopted by Mr. Ruston ... [Emphasis added.]

[44] The unanimous decision of the Ontario Court of Appeal in *Olah*, was delivered by Osborne J.A., where he concluded, at paras. 50-52:

> **50** In my opinion, the trial judge carefully considered all of the appropriate factors, including, most importantly, prejudice to Ruston, as a result of Olah's comments about him in his police statements. The trial judge was alert to the potential for a miscarriage of justice in respect of Ruston arising out of Olah's extensive audio-taped and video-taped statements to the police. He exercised a discretion that was open to him when he refused Ruston's application for severance after undertaking extensive editing of the statements. This court should not interfere with the exercise of his discretion unless we are satisfied that he did not exercise his discretion judicially, or that his order refusing the severance application resulted in a miscarriage of justice. See *R. v. Litchfield* (1993), 86 C.C.C. (3d) 97 (S.C.C.) at 113-114 and *R. v. Court* (1995), 99 C.C.C. (3d) 237 (Ont. C.A.), at 259.
>
> **51** I do not think that the trial judge was unmindful of the increased potential for prejudice arising from the jury hearing Olah's audio-taped statement and hearing and seeing him give his video-taped statement. When he commented on the principles applicable to severance applications, he did no more than note that the same principles apply when an application for severance is based on the prejudicial effect to accused caused by the admission into evidence of a statement of a co-accused, in whatever form the statement may be received by the jury. I am satisfied that the trial judge took account of the medium by which the jury would receive Olah's statements.
>
> **52** I would not interfere with the trial judge's ruling on Ruston's severance application.

[45] In *R. v. Hamilton*, 2011 ONCA 399; [2011] O.J. No. 2306 (C.A.), four accused were each charged with attempted murder and two counts of first-degree murder in relation to a shooting in downtown Toronto. The Crown led evidence of

wiretap intercepts of one co-accused (Hamilton) which included remarks about the involvement of another co-accused (Read). The trial judge refused to grant a severance application. The Court found that there was a minimal risk of inconsistent verdicts as there was no indication of a possible cut-throat defence. Even so, the Ontario Court of Appeal determined that policy reasons for joint trials were of sufficient importance to uphold the presumption, confirming at paras. 206-208:

> **206** A trial judge may order severance of the trial of a co-accused only if satisfied that "the interests of justice so require": *Criminal Code*, s. 591(3)(b). The interests of justice encompass those of the accused, the co-accused, and society's interest in seeing that justice is done in a reasonably efficient and cost-effective manner: see *R. v. Last*, [2009] 3 S.C.R. 146 (S.C.C.), at para. 16.
>
> **207** A trial judge will direct severance only if the accused seeking it overcomes the presumption that two co-accused, who are jointly charged and are said to have acted in concert, should be tried together: see *R. v. Savoury* (2005), 200 C.C.C. (3d) 94 (Ont. C.A.), at para. 22. In addition, factors that a court may consider in deciding to refuse severance include the desire to avoid a multiplicity of proceedings and the prospect of two lengthy trials, having regard to the evidence to be called: see *Last*, at para. 18.
>
> **208** A trial judge's decision on severance is an exercise of discretion and is entitled to deference: see *R. v. Litchfield*, [1993] 4 S.C.R. 333 (S.C.C.), at pp. 353-54. This court will interfere where the trial judge fails to consider relevant principles, or has considered irrelevant principles. However, even then, this court will review the exercise of a trial judge's discretion against a reasonableness standard: see *R. v. McKnight* (1999), 44 O.R. (3d) 263 (C.A.), at p. 273.

[46] At para. 210 of *Hamilton*, the unanimous Ontario Court of Appeal stated:

> **210** While Reid is correct that the risk of inconsistent verdicts was minimal, such a risk is merely one of several policy reasons to be considered in ordering separate trials. We are of the view that, although the risk of inconsistent verdicts was slight, any chance of a miscarriage of justice was eliminated by the trial judge's various instructions to the jury on the way they could use the wiretap conspiracy evidence.

[47] In reviewing the trial judge's charge to the jury in *Hamilton*, the Ontario Court of Appeal noted at paras. 211-214:

> **211** The jury was clearly instructed that the intercepts of Reid's co-accused about killing Reid and the inferences that could be taken from those comments

were not admissible against Reid because he was not a party to the discussions to kill himself. In his instruction to the jury on the use they could make of the evidence of the plot to kill Reid, the trial judge said:

> In the end, it would be open to you to infer and find as fact, though you need not do so, that Davis's statement during the intercepts, that Schloss's statements during the intercepts, and that Hamilton's statements during the intercepts constitute an implicit admission that the maker of the particular statement indeed had participated in the murders of Paul Watson and Michael Lewis. However, you may not so infer unless you first find as fact from the context of the intercepts that the fear and panic that the three accused expressed about Reid's conduct was because Michael Reid was, in fact, talking to third parties in jail about his own involvement and the involvement of Hamilton, Schloss and Davis in the murders of Paul Watson and Michael Lewis. That is a precondition. Finally, I repeat that whatever Michael Reid may have said to the third parties in jail is not in any manner admissible for or against him. He was not a party to the wiretap interceptions.

212 This instruction was repeated in varying ways in the charge. It was also repeated in response to a question by the jury:

> The evidence, of course, is not admissible, not admissible against Michael Reid, a non-party to the interceptions, in fact, the proposed target of murder himself. So they are not admissible against Mr. Reid in the least.

213 The jury would have understood these instructions, as well as those given mid-trial, and would have followed them. This is especially true given that the Crown also provided an additional warning to the jury during its closing address about not using the co-accused's intercepts against Reid.

214 It is well established that juries should be assumed to understand and follow such instructions: *R. v. Suzack* (2000), 141 C.C.C. (3d) 449 (Ont. C.A.), at paras. 99-102, (application for leave to appeal dismissed, [2000] S.C.C.A. No. 583), quoting *R. v. Corbett*, [1988] 1 S.C.R. 670, at pp. 692-93. We see no reason to believe that the jury did not understand the trial judge's instructions. On the contrary, we assume that the jury properly considered the plot to kill Reid when weighing the evidence against the co-accused, and then disregarded this same evidence when turning their minds to the guilt of Reid.

[48] In relation to editing the Court said at paras. 216-218:

216 Reid makes one additional argument. He says that severance was also required because he was identified by his nickname "Killer" in the wiretap intercepts. He contends that references to his street name or nickname "Killer" were prejudicial and that the way the trial judge dealt with the editing of the name

from the transcripts and intercepts only compounded the prejudice associated with this nickname.

217 We disagree. At defence counsel's request, Reid's nickname was carefully edited from all transcripts and intercepts and each side ensured that their witnesses did not use it. There was only one occasion when the name "slipped out" and this was found to be the fault of everyone involved. The jury was clearly and unequivocally instructed after the error occurred as follows:

> Members of the jury, last week you heard an intercept in which there was reference to one of the accused Michael Reid's nicknames not being either Dog or Richie. The nickname used was unfair and irrelevant and must, therefore, be completely disregarded. In fairness to Mr. Reid, do not speculate as to what the nickname was. Simply disregard it if, indeed, you recall it.

218 The trial judge was correct to refuse severance and his instructions more than addressed the attendant prejudice that may have resulted. Reid has failed to establish that the trial judge did not act judicially or that the decision to refuse severance worked an injustice to him. This ground of appeal is dismissed.

[49] In concluding that editing and/or carefully worded jury instructions were satisfactory in addressing a request for severance, Ferguson J. stated in *R. v. Jacobson*, [2004] O.J. No. 383 (Ont. Sup. Ct. J.), at para 11:

> **11** Where there will be evidence at trial which would not be admissible if the accused were tried alone, and therefore cannot be used against that accused, the judge must consider how any prejudice can be avoided by taking precautions such as:
>
> (a) Giving timely instructions to the jury. The judge must consider whether it is possible to explain the permissible and impermissible use of the evidence, whether such an instruction would be fair to both accused, and whether the jury will be able to apply the instruction in all the circumstances: *Suzack* at para. 97-98, 117. The courts have recognized the risk that a jury may not follow an instruction not to use the statement of one accused in reaching their verdict against another accused but appear to have decided that we must presume they will follow the instruction if a clear instruction can be fashioned: *R. v. McLeod, Pinnock and Farquarson* at pp. 32-33. A possible modification of this assumption may be that the judge can assess the risk by considering whether the risk of improper use is outweighed by the much more serious risk of error should the jury be forced to decide the issue without the benefit of the statement: *R. v. Olah* at pp. 404-405; *R. v. Suzack* at p. 481.

(b) Editing the statement of one accused to remove content which is not admissible against the other: *R. v. Giesecke* (1993), 82 C.C.C. (3d) 331 (Ont. C.A.) at p. 334. While the judge has the discretion to edit statements and remove totally immaterial but prejudicial portions or "gratuitously offensive comments" consideration has to be given to the dangers of marring the flow of the statement and arousing the suspicion and speculation of the jury: *R. v. McLeod* at p. 34; *R. v. Olah* at p. 402.

(c) Explaining not only the limitations on the use of the evidence but also the rationale behind the rule: *R. c. Noel* (2002), 168 C.C.C. (3d) 193 (S.C.C.) at para. 55.

[50] At this stage I do not believe that the facts of this case are so complicated or the evidence so complex that a properly instructed jury would not be capable of applying the evidence properly. Furthermore, I find that the prejudicial impact of Leggette's writings is tempered by the totality of the evidence that appears likely admissible against both accused. This is not a case where the writings of Leggette are the only evidence linking Leggette and Henneberry to the crime. Aside from the writings, this is not a case where there is significantly more evidence against Leggette than against Henneberry. Leggette did not provide a statement to the police. Henneberry did. Although I am advised by counsel that the statement is mainly exculpatory and places the blame on Leggette, parts of Henneberry's statement will be used by the Crown to suggest Henneberry was a party to the murder. Of course, Henneberry's statement is not admissible against Leggette; just as Leggette's writings are not admissible against Henneberry. As Ferguson J. noted in *Jacobson* at paras. 8-10:

8 The simple fact that the Crown will introduce the statement of one accused and that this statement implicates the applicant accused is not sufficient ground to order separate trials: *R. v. McLeod, Pinnock and Farquarson* (1983), 6 C.C.C. (3d) 29 (Ont. C.A.), at pp. 32-33. In a joint enterprise the statement of one accused would be expected to make reference to the other accused: *Olah* at para. 402. The customary remedy for any potential prejudice is to instruct the jury on its use.

9 Where the video statement of one accused is to be introduced the trial judge should consider the possibility that a video may be more prejudicial than a statement recorded in another way because a video statement could have a greater impact because the jury would be able to see and hear the accused give the statement. However, the fact that the Crown proposes to tender both audio and video statements which are compelling because of their content and the medium

does not mean that a jury instruction will not be adequate. *R. v. Olah* (1997), 115 C.C.C. (3d) 389 (Ont. C.A.) at p. 403.

10 The trial judge should consider what other evidence is admissible against the potentially prejudiced accused on the same issue. If the problematic evidence is the only evidence then this favours a separate trial: *R. v. Proulx* (1995), 101 C.C.C. (3d) 560 (Que. C.A.). If there is other evidence tending to prove the same issue against the accused then this mitigates against a separate trial: *R. v. Suzack* at para. 94. If there is other admissible evidence against the accused on the same issue which is more prejudicial then this mitigates against a separate trial: *Suzack* at para. 101. The consideration of the quantity, nature, and weight of other evidence which is admissible against the accused is relevant in my view because the existence of other evidence lessens the risk that the jury will be influenced by the inadmissible evidence.

[51] Trial fairness must also be considered in assessing whether the interests of justice require severance. As Romilly J. reviewed in *R. v. Thrower*, 2005 BCSC 234, at paras. 46-50:

46 In ***R. v. Lyons*** (1987), 37 C.C.C. (3d) 1 (S.C.C.) at p. 46 the point was made that:

> ...s.7 of the ***Charter*** entitles the [accused] to a fair hearing; it does not entitle him to the most favourable procedures that could possibly be imagined.

See also ***R. v. Beare*** (1988), 45 C.C.C. (3d) 57 (S.C.C.).

(a) What "Fairness" Implies

47 Fairness includes the interest of the state as represented by the public. In ***R. v. Corbett*** (1988), 41 C.C.C. (3d) 385 (S.C.C.), La Forest J. stated, in dissent at p. 439:

> ..."fairness" implies, and in my view demands, consideration also of the interests of the state as representing the public. Likewise the principles of fundamental justice operate to protect the integrity of the system itself, recognizing the legitimate interest not only of the accused but also of the accuser.

48 In ***R. v. Harrer*** (1995), 101 C.C.C. (3d) 193 (S.C.C.), McLachlin J. stated at para. 45 that a fair trial is one that appears fair from the perspective of both the accused and the community. She further stated at para. 45 that "a fair trial is one which satisfies the public interest in getting at the truth, while preserving basic procedural fairness to the accused."

49 In ***R. v. Bradford*** (2001), 151 C.C.C. (3d) 363 (Ont. C.A.) Weiler J.A., for the Court, addressed this issue at paras. 6-9 where she held the following:

> In assessing the prejudice to the accused's right to make full answer and defence as secured by s. 7 of the ***Charter***, it is important to bear in mind that the accused is entitled to a trial that is fundamentally fair and not the fairest of all possible trials. As stated by McLachlin J. in O'Connor, [1995] 4 S.C.R. 411, at pp. 78-79:
>
> > ...the ***Canadian Charter of Rights and Freedoms*** guarantees not the fairest of all possible trials, but rather a trial that is fundamentally fair: ***R. v. Harrer***, [1995] 3 S.C.R. 562, 101 C.C.C. (3d) 193. What constitutes a fair trial takes into account not only the perspective of the accused, but the practical limits of the system of justice and the lawful interests of others involved in the process, like complainants and the agencies which assist them in dealing with the trauma they may have suffered. Perfection in justice is as chimeric as perfection in any other social agency. What the law demands is not perfect justice but fundamentally fair justice.
>
> In a similar vein, Justices McLachlin and Iacobucci commented in ***R. v. Mills***, [1999] 3 S.C.R. 668 at 718, 139 C.C.C. (3d) 321 that fundamental justice embraces more than the rights of the accused and that the assessment concerning a fair trial must not only be made from the point of view of the accused but the community and the complainant.
>
> **50** The issue of fairness was also addressed by the Supreme Court of Canada in ***R. v. Latimer*** (2001), 150 C.C.C. (3d) 129 (S.C.C.) where the court stated at para. 50:
>
> > Nonetheless, while the trial judge's approach was imperfect, the benchmark for measuring trial fairness is not perfection. The critical question is whether the trial judge's approach rendered the appellant's trial unfair. The inquiry is necessarily specific to the facts of the case under consideration; the determination of whether the timing of a particular ruling rendered a trial unfair must be made on a case-by-case basis.

[52] Although the defence have not disclosed their strategy, this trial carries with it the strong possibility of a classic cut-throat situation. Henneberry has given a statement exculpating herself and blaming Leggette. Leggette, in his writings, has described a detailed plan to blame Henneberry. While the likelihood of a cut-throat defence does not carry the day in relation to the issue of severance, it certainly is one significant factor to be considered.

[53] Editing might also be employed in relation to certain portions of the writings to reduce the prejudice to Henneberry, although I am not convinced that editing is

a definite necessity and will hear proposals from counsel in this regard. As Walters J. went on to state at para. 36 of *Qahwash, supra*:

> [36] Furthermore, there are other mechanisms available to the court to further decrease the risk of prejudice to the co-accused if the various statements prove to be admissible. If possible, a ruling on admissibility may require that portions of the recordings be edited or omitted in order to remove reference to the co-accused. This method was used in conjunction with a strong limiting instruction and was upheld by the Court of Appeal in *R. v. Olah and Rushton*, [1997] O.J. No. 1579.

[54] The defence rely on several decisions in support of severance. Most recent is *R. v. Figliola*, 2011 ONCA 457; [2011] O.J. No. 2777 (Ont. C.A.). In that case the judge's timing in relation to a particular ruling impacted significantly on whether severance was appropriate. During pretrial motions the trial judge ruled that a prospective witness's evidence would be edited so as to not include the co-accused's name and identifying features. All parties agreed to this process with the understanding that the co-accused would not suggest that the prejudicial conversation actually took place. There was very little other evidence against the prejudiced co-accused.

[55] The trial proceeded for approximately eight weeks on that basis. However, at a late stage in the trial it became obvious that the co-accused was calling into question the existence of the conversation. At that point, the trial judge reversed the evidentiary finding and "unredacted" the co-accused's name and identifying features. Up until the point of this reversal counsel had refrained from any cross-examination on this evidence.

[56] The Ontario Court of Appeal determined that the limiting instructions provided by the trial judge in *Figliola* offered essentially without explanation or rationale, were inadequate and would have significantly taxed the jury's common sense.

[57] I agree with Walters J. as he distinguished *Figliola* in *Qahwash, supra*, at paras. 37-45:

> **37** In light of the very real and multi-faceted concerns for cost and delay if this matter were to be severed into three separate trials and the ability to correct any prejudicial impact occasioned by the impugned statements with editing and a limiting instruction, I do not find this case to be an exceptional one in which

justice requires severance. Notwithstanding this conclusion, much emphasis was placed by defence counsel on the recent Ontario Court of Appeal decision in *R. v. Figliola*, [2011] O.J. No. 2777, such that I feel it is appropriate to set out why I find that the holding in that decision has no bearing on the disposition of this application.

38 The determination of whether to sever the trial of an accused from that of his co-accused is a highly fact-specific inquiry. While s. 591(3) will govern any such application such that the same test will apply in all cases, what drives this discretionary decision is the individual facts of the particular case at bar. While similar facts should produce similar outcomes, there is little precedential value to a case that does not change the law. In this regard, while there are some factual similarities between the case at bar and *Figliola*, the decision does not change the test or the threshold for granting severance. As such, its value to the court in the present case is limited.

39 Like the case at bar, *Figliola* involved an alleged contract hit. The accused Maria Figliola was alleged to have hired her co-accused, Daniele Di Trapani, to carry out a hit on her husband. The two were jointly tried for first degree murder. Mr. Di Trapani moved at the outset to have his trial severed from Ms. Figliola's on the basis of the evidence to be given by a Mr. Gonsalves to whom Mr. Figliola had told that she had hired someone named Dan (Mr. Di Trapani's first name) to kill her husband. She provided Mr. Gonsalves with a description of how the murder was carried out and what "Dan" looked like. The description of Dan matched that of Mr. Di Trapani and the description of the murder matched the way in which it appeared to have happened.

40 The trial judge denied the application for severance on the basis that Mr. Gonsalves's evidence could be edited to remove the name "Dan" and the offending description. This was agreeable and the trial proceeded. However, when it came time for Mr. Gonsalves to testify things changed. Counsel for Ms. Figliola, in apparent contravention of an earlier agreement with the court, began to cross-examine Mr. Gonsalves laying the foundation that the impugned conversation never took place. In order to prove that it did, Mr. Gonsalves was permitted to testify about the details, i.e. the name and description. This prompted a revival of Mr. Di Trapani's severance application which was subsequently denied. The changed circumstances and the denial of this second application resulted in counsel for Mr. Di Trapani having to completely change his trial strategy more than mid way through the trial.

41 It was this second denial of the severance application that was the basis for the Court's finding that Mr. Di Trapani was denied a fair trial. At paragraph 111, the Court notes the compound nature of the problem:

> When the consequences for Mr. Di Trapani of the order of March 3 denying severance are assessed, we must then consider both the consequences of the ruling itself and the consequences of the

> circumstances in which it was made. Taking these together, we have no hesitation in concluding that, in the circumstances, the ruling resulted in an injustice.

This is a radically different circumstance than the case at bar. Granted, we are not yet at the trial stage, but at this juncture, one cannot foresee a reversal in rulings which would force the defendants to change trial strategy midstream.

42 There are other notable differences. At paragraph 103, the Court notes that the limiting instructions provided to the jury were inadequate:

> At the end of Mr. Gonsalves' evidence-in-chief and re-examination, and again in his charge, the trial judge delivered an instruction to the jury. He simply directed them to abide by the special rule that statements attributed to Ms. Figliola constituted evidence against her but could not be used against Mr. Di Trapani even if they described what Mr. Di Trapani said or did. Offered as they were, essentially without explanation or rationale, these directions would have significantly taxed the jury's common sense.

Granted, this is not an appeal and no instructions have been given at this point, however, there is no reason to doubt that adequate instructions can be crafted for both mid trial and final purposes so as to provide the jury with sufficient information so as not to "tax their common sense."

43 Furthermore, the Court notes at paragraph 99 that aside from the impugned statement, the balance of the evidence against Mr. Di Trapani was circumstantial. There was no physical evidence linking Mr. Di Trapani to the crime and he himself made no incriminating statements. The lack of hard evidence against Mr. Di Trapani presumably raised the prejudicial impact of Mr. Gonsalves's testimony.

44 This is once again different from the case at bar, where there is physical evidence in the form of the gun found at Mr. Qahwash's family residence. Mr. Qahwash's fingerprint was found on the bag containing the extra magazine from the gun and Mr. Zvolensky could not be excluded from the DNA found on the gun's grip. Furthermore, as it relates to Mr. Zvolensky, he himself made statements which could be considered incriminating in nature. While the statements made by Mr. Qahwash are nowhere near as damming as those of his co-accused, they are arguable evidence of his complicity.

45 Unlike here, in *Figliola*, neither accused alleged the other was the guilty party and there was no real risk of inconsistent verdicts from separate trials.

[58] In *Guimond v. The Queen,* [1979] 1 S.C.R. 960 the co-accused were charged with conspiracy and one accused had provided a statement admitting to having entered into a conspiracy with the co-accused. The evidence against the first co-accused was vastly greater than that admissible against the second co-accused.

The Court determined there was an enhanced prejudice in light of the fact that the co-accused were charged with conspiring with each other. It was therefore difficult for the jury to disabuse their minds of the fact that the first co-accused conspired with the second co-accused when the ultimate issue was whether the second co-accused conspired with the first co-accused. At pp. 967-968, Ritchie J. stated, for the majority:

> In charging the jury the trial judge instructed them that Guimond's written statement was not evidence against Muzard, but the Court of Appeal was of the opinion that this direction was not enough under the circumstances and that it would be difficult to imagine a jury of laymen being able to separate the contents of the statement from the effect that its instruction would have had on them when considering Muzard's case as the allegation that Guimond had conspired with Muzard would readily invite the conclusion that Muzard had in fact in turn conspired with him. …

[59] Ritchie J. adopted the reasoning of the Québec Court of Appeal where Belanger J.A. said:

> However, it is difficult to imagine that, in the same trial, the jury could accept as true Guimond's confession that he was guilty of an illegal agreement with Muzard, without coming to the same conclusion towards the latter, or at least without all other evidence presented by the Crown being thereby coloured in the sense of such an illegal agreement, regardless of Guimond's and Muzard's denials. [*Guimond* at 968].

[60] I agree with the Crown in this case that *Guimond, supra*, is distinguishable since it deals specifically with concerns unique to the charge of conspiracy. In *R. v. Melvin* (1994), 129 N.S.R. (2d) 391 (N.S.S.C.), Kelly J. relied on *Guimond, supra*, and stated at para. 5:

> [5] That statement expresses the obvious concern in conspiracy charges that a confession in the form of an admission or a guilty plea on the part of one of the alleged co-conspirators may prejudice the jury that is to continue the trial of the second. …

[61] In *Melvin* the severance application, made by both defence and Crown, came in the middle of a conspiracy trial immediately after two co-accused changed their pleas to guilty. Leggette and Henneberry are not charged with conspiracy. This

[62] distinguishes their circumstances.

Conclusion

[63] The writings were created by Leggette in a jail cell following his arrest on these charges. Henneberry had nothing to do with their creation. The writings would be evidence that could be considered by the jury in relation to determining the guilt or innocence of Leggette. The jury would not be permitted to consider the writings in determining the guilt or innocence of Henneberry. Leggette's writings are a clearly delineated piece of evidence. In my opinion, a jury would be capable of following carefully drafted instructions advising them as to the use to be made of these writings. The charge I will suggest is:

> Crown counsel is going to introduce into evidence a **[document]** that was allegedly written by **[NOA1]**. First, I am going to give you a warning about how you may use this evidence.
>
> This **[document]** is only evidence against the person who wrote it, **[NOA1]**. It is not evidence against **[NOA2]**. The reason for this is straightforward. If **[NOA1]** and **[NOA2]** were being tried separately, you would not hear this evidence at the trial of **[NOA2]**. Therefore, you may only use this document to decide whether **[NOA1]** is guilty or not guilty. You must not use it to decide whether **[NOA2]** is guilty.

[64] The co-accused are likely to each raise a cut-throat defence, one blaming the other. I believe that based on the information provided in this application Henneberry and Leggette can each have a fair trial if tried together. The truth would most likely be revealed if Leggette and Henneberry are tried together. With separate trials the risk of inconsistent verdicts is real. A clear and careful mid-trial instruction and final instruction will be sufficient to preserve procedural fairness. With such a mid-trial and final instruction there will be no risk of a miscarriage of justice if Leggette and Henneberry are tried together. The application for severance is denied.

Arnold, J.