SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Skinner*, 2019 NSSC 195

Date: 20190624
Docket: CRH 474409
Registry: Halifax

Between:

Her Majesty the Queen

v.

Steven Douglas Skinner

DECISION ON VOIR DIRE 1 AND 2
Post-Offence Conduct

Restriction on Publication: s. 539(1) of the *Criminal Code*

Judge:	The Honourable Justice Jamie Campbell
Heard:	April 29, May 1, June 4, 5, and 17, 2019, in Halifax, Nova Scotia
Written Decision:	June 24, 2019
Counsel:	Eric Taylor, Cheryl Schurman and Robert Kennedy, for the Provincial Crown Patricia MacPhee, for the Federal Crown Stanley MacDonald, for the Defence

By the Court (Orally):

[1] Steven Skinner has been charged with the murder of Stacey Adams. Stacey Adams was killed on April 10, 2011. Steven Skinner was driven from the house in Lake Echo Nova Scotia, where Stacey Adams was killed, to the Moncton airport that same day. He flew to British Columbia and then to Mexico. He did not return until he was questioned by police in Caracas Venezuela. He was extradited to Canada in June 2017. The Crown wants to introduce Mr. Skinner's alleged after-the-fact conduct as part of the evidence from which to infer that he was the person who murdered Stacey Adams.

[2] A voir dire was held to determine whether evidence of Mr. Skinner's conduct after the death of Stacey Adams should be admissible as evidence in the trial. There was an issue about what evidence could be used in the voir dire. The Crown sought to use the evidence of Brittany Derbyshire. Ms. Derbyshire had been charged with being an accessory after-the-fact in the murder of Stacey Adams. She was the subject of a police investigation involving her speaking with undercover police officers on July 14, 2011. They used techniques that were found to have amounted to an abuse of process. After a voir dire held on June 23, 2014, the court ruled that the evidence obtained through that investigation was not admissible against her. That included her statement made to the police and the physical evidence obtained from that statement.

Issues

[3] It was agreed that an abuse of process had taken place in the police investigation that led to charges against Brittany Derbyshire relating to the murder of Stacey Adams. While an accused person cannot rely on the breach of another person's rights under the *Charter*, an abuse of process demands a remedy that preserves the integrity of the justice system by distancing the court from abusive police tactics. The fact that an abuse of process has taken place in the investigation of this crime has to be addressed in the context of these charges. The larger question is what implications those findings have in the trial of Steven Skinner.

[4] The first issue is whether the Crown should be allowed to call Ms. Derbyshire was a witness. The next issue is, if she was called, whether the Crown could show her the transcript of her evidence in the June 23, 2014 voir dire to refresh her memory about the events of April 10, 2011. Then the issue is whether the evidence obtained from her could be admissible as post-offence conduct evidence against Steven Skinner. Finally, if her statements made about the events

of that day were admissible would the physical evidence directly related to those statements also be admissible in the trial proper.

Summary

[5] The abuse of process in the investigation into the death of Stacey Adams has to be considered within its broader context. That finding has already had a meaningful effect in the case against Brittany Derbyshire. In effect, it has resulted in the charge of being an accessory after-the-fact to the murder of Stacey Adams not proceeding. While the investigative techniques did not involve a breach of *Charter* rights, it was Brittany Derbyshire who was most directly affected by the abuse of process. The Crown has paid a price for the impugned police investigation and the court has distanced itself from that behavior. The remedy in the case against Steven Skinner need not be the same.

[6] Stanley MacDonald Q.C. for Mr. Skinner initially objected to Ms. Derbyshire giving evidence. Her evidence was heard provisionally. It was a substantially less fulsome account of the events of April 10, 2011 than the Crown had anticipated based on her comments to the undercover police. The concern about her testifying at all was not advanced in final argument. In any event, Ms. Derbyshire was a compellable witness and could assert no privilege over the subject matter of her testimony. Denying the Crown the opportunity to call her as a witness in this case would not be an appropriate further remedy for the abuse of process.

[7] It was appropriate for the Crown to show Ms. Derbyshire the transcript of her own testimony from the June 23, 2014 voir dire to refresh her memory. She was being asked what she recalled of the events of April 10, 2011. The transcript would either assist her in giving accurate testimony or it would not. To a very significant extent it did not. She did not simply adopt as her evidence what she had told the undercover police. Far from it. It did not amount to using her statements to undercover police officers as evidence. The evidence given by Ms. Derbyshire after refreshing her memory using that transcript should be used. Refusing the Crown the right to offer that transcript to Ms. Derbyshire for the purpose of refreshing her memory would not be an appropriate remedy for the abuse of process in this case.

[8] Mr. MacDonald did not object to the admissibility at trial of some of the evidence put forward by the Crown as post-offence conduct evidence. He noted that the Defence will lead evidence about the flight from Nova Scotia of Jeff

Belanger, a Crown witness whom the Defence argues is the person who killed Stacey Adams. It would not be proper to allow the Defence to lead that evidence and deny the Crown the right to lead the evidence about Mr. Skinner's flight from Nova Scotia. When asked about the concern that the jury may weigh the post-offence conduct of the two people Mr. MacDonald indicated that the issue could be addressed in jury instructions. The court should not interfere with the trial strategy of the Defence by excluding Crown evidence when explicitly urged not to do so.

[9] The remaining issues were the use to be made of Ms. Derbyshire's evidence and whether the physical evidence referenced in this voir dire should be excluded. Ms. Derbyshire's evidence relates to the travel to Moncton by Steven Skinner. If the Defence accepts that the departure from Moncton to British Columbia and Mexico is proper as post-offence conduct evidence, subject to proper jury instructions, Brittany Derbyshire's evidence about how Mr. Skinner got to Moncton is also admissible for that purpose. That is the evidence that she gave during the course of this voir dire.

[10] The Defence objects to some portions of it. She said that she recalled her phone number, that she saw Steven Skinner throw something into the river in Moncton and had seen something being burned by someone on Kings Road in Wellington. That was her current recollection of what happened on April 10, 2011. It is her evidence. If her evidence of post-offence conduct is admissible there must be a justification given for excluding some part of it. The only justification was that it was obtained by having her refresh her memory.

[11] Physical evidence was located during the course of Ms. Derbyshire's interaction with the undercover police. The police found a gun in the river and investigated a burn site in Wellington. Those pieces of evidence are clearly linked to her voir dire testimony about something being thrown and something, specifically evidence, to use her word, being burned. Because she referred to both of those pieces of physical evidence in her testimony they relate directly to that testimony.

[12] Excluding all evidence obtained in the impugned investigation involving Ms. Derbyshire is an appropriate remedy in the case against her. The Crown has paid a significant price for the abuse of process in the case against Ms. Derbyshire. In this case of course, it cannot use words she spoke to the undercover officers as evidence against Steven Skinner. Ms. Derbyshire has not volunteered much of the information that was anticipated based on what she told the undercover police. The

Crown's case is significantly weaker without the use of Ms. Derbyshire's statement to the undercover police, which would not be admissible in any event against Mr. Skinner.

[13] Mr. Skinner and Ms. Derbyshire are in different positions. Excluding physical evidence recovered by the police through the undercover operation but to which she has made reference in her evidence in this voir dire, would impair the truth-seeking function of the trial beyond proportion to what is required to distance the court from the abuse of process in the investigation.

Procedure

[14] The trial is scheduled for September of this year.

[15] There are few days left that will accommodate the schedules of everyone involved to have more dates set for the voir dire. That reality has affected the way the evidence in this voir dire was received. Potentially the matter would require the setting of further dates for hearing evidence.

[16] The only witness was Brittany Derbyshire. Mr. MacDonald objected to her giving evidence at all. That issue had not been the subject of any of the pre-hearing briefs. If she did give evidence, he asserted that she should not have the voir dire transcript presented to her to refresh her memory. That could mean hearing argument about whether she should give evidence and adjourning for decision. If she could give evidence, there would be further argument on whether the transcript could be used. Rather than adjourning and returning, Ms. Derbyshire's evidence was heard. If her evidence were found not to be admissible at all it would eventually be excluded.

[17] Ms. Derbyshire's examination was separated into two parts. In the first part the Crown could ask Ms. Derbyshire what she recalled about the events of April 10, 2011. No reference could be made to the transcript of the voir dire from June 23, 2014 for the purpose of refreshing her memory. Exhibits from that voir dire were designated as VD1. If her evidence was admissible for consideration in the voir dire, the evidence from the process designated as VD1 would be considered.

[18] The second portion in which exhibits were marked as VD2, was noted as being provisional. Evidence would be heard but after argument that evidence may be found to have been inadmissible. VD2 proceeded with the Crown asking Ms. Derbyshire questions using the transcript of the June 23, 2014 voir dire to refresh

her memory. The evidence from VD1 would become part of VD2 to avoid repetition. The refreshing of memory was only with respect to her memory as to what occurred on April 10, 2011. It was not for the purpose of refreshing her memory of what she told the police during the impugned investigation in July 2011. The second voir dire permitted the Crown to probe further, using the transcript as an aid to her memory.

Evidence from VD1

[19] In the first voir dire Ms. Derbyshire said that she knew Steven Skinner and had known him since she was in her early 20's. She is now 31 years old. They had met through her ex-boyfriend Ryan Belanger, Jeff Belanger's brother.

[20] Ms. Derbyshire received a text message from Steven Skinner on April 10, 2011 sometime around 10:00 am or 11:00 am. He needed a drive and was at Jeff Belanger's house in Lake Echo. She had been there a few times before but couldn't recognize the house from a picture. She told Mr. Skinner that she would come to pick him up and take him to meet a buddy. She was supposed to work that day sometime between 3:00 pm and 5:00 pm. She finished getting ready for work and drove to get Mr. Skinner in Lake Echo from her home in Lower Sackville. She was driving her Toyota Yaris.

[21] She knew that Steven Skinner lived in Toronto and was not sure how long he'd been in Nova Scotia. She had had some contact with him a couple of days before but could not remember if someone else was present or where that contact was.

[22] When she got to the home in Lake Echo, she said that she did not go into the house. She parked in the driveway and Steven Skinner came out. She could not recall anything about his manner of dress or his behaviour. She did not see Stacey Adams that day. She had heard of him before but did not even know if Stacey Adams was at the house in Lake Echo when she got there. She said that she never saw Stacey Adams' dead body.

[23] She said that she had never seen a gun other than at a gun range.

[24] She did not see Steven Skinner contact anyone else that day.

[25] She was shown text messages about a person being asked to get gas for making a fire. She could not recall her phone number so that the texts, in this voir dire, could not be associated with her.

[26] She drove Steven Skinner to Moncton, specifically to the Moncton airport. She could not recall anything they spoke about over the course of that drive except for him telling her that he had been drinking the night before with Jeff Belanger. She did not recall making any stops on the way to Moncton.

[27] She dropped him off at the airport. She did not recall Steven Skinner having luggage or anything else in his possession. She could not recall if he had a ticket and had no idea then or now where he was going.

[28] She did not recall ever going to any river near Moncton.

[29] She was aware of King's Road in Wellington Nova Scotia. She grew up there and her grandparents had a cottage there.

Evidence from VD2

[30] In the second voir dire the Crown was permitted to present Ms. Derbyshire with the transcript of the voir dire held on June 23, 2014, in the case against her. For the most part it did not serve to refresh her memory.

[31] The voir dire in June 2014 was about the admissibility of the evidence obtained in the police investigation which led to the charges against Ms. Derbyshire. It was specifically not about what took place on April 10, 2011, but about Ms. Derbyshire's interaction with undercover police officers on July 14, 2011. There is an important distinction to be made between refreshing Ms. Derbyshire's memory of what she said to the police on July 14, 2011 and refreshing her memory of what happened on April 10, 2011. She said that she told the police, whom she believed at the time to have been violent criminals, what she thought they wanted to hear. She specifically confirmed though that what she told the court in the voir dire on June 23, 2014 was true.

[32] In the second voir dire Ms. Derbyshire was shown portions of the transcript of the June 23, 2014 voir dire. That did not assist her in recalling information about when she left her apartment to pick up Steven Skinner, about what she saw when she went to Lake Echo, about seeing Stacey Adams' body, or about what she and Steven Skinner talked about in the car on the way to Moncton.

[33] She was shown pictures of a gun. She said that she had never seen that gun or one like it before.

[34] She confirmed that she had seen Steven Skinner a couple of days before April 10, 2011.

[35] Ms. Derbyshire was asked about showing the officers a "burn site" on King's Road, near where she had gown up. That did refresh her memory. She said that she knew the site was there. She had seen a fire there and something being burned. She did not know what was being burned and she did not bring whatever that was to the burn site. Someone was there with her, but she could not recall who that was. They did not travel together to the burn site. The site was the same site she showed to the undercover officers.

[36] Ms. Derbyshire was asked about her telephone number. She was shown a series of text messages that had been obtained through a production order. It is important to note that the production order was obtained on May 18, 2011, which was before the undercover police officers had any contact with Ms. Derbyshire. There would be no issue about the admissibility of the documents obtained through that production order.

[37] Ms. Derbyshire was able to confirm that texts recorded in that document were from her cell phone, and confirmed the number associate with that device. Texts sent from her cell phone in the afternoon of April 10, 2011 indicate that she asked a third party to get a "gas can with all kinds of gas". In the text she says, "U know how to make a fire? We are going camping wink wink. I'll be home soon."

[38] Ms. Derbyshire confirmed that the texts related to making a fire at the burn site on King's Road. She said that she could not recall why she was asking for a gas can but that someone did bring a can of gas to the site. She could not recall what was being burned.

[39] Ms. Derbyshire was asked about whether she had an encrypted phone, known as a buzz phone or a buzzer. She recalled that she did have such a phone as well as her other non-encrypted phone. She used it to communicate with Steven Skinner.

[40] She was provided with the transcript to refresh her memory about having gone to a river in Moncton. Despite having said earlier that she had never been to any river near Moncton, she could recall that she had been to a river in Moncton

with the undercover police officers. She said that she took them there. She had been there with Steven Skinner and he had thrown something in the river, but she did not know what it was. The undercover police officers had told her that there had been a gun involved. She said that because Steven Skinner had thrown something in the river, she assumed that was what they were looking for. She said that she did not see Steven Skinner throw a gun in the river. She believed that she had told the undercover police officers that he had thrown a gun, but she had not actually seen him do that. Her evidence is that he threw something. She did not know what it was. The place where that something was thrown was the place she identified to the undercover officers.

[41] The Crown requested leave under s. 9(2) of the *Canada Evidence Act* to cross-examine Ms. Derbyshire on inconsistent statements in the voir dire of June 23, 2014 and her testimony in court. In her testimony she said that she had never seen Steven Skinner throw a gun into the river. In the voir dire, she said that she took the police to the place where Steven Skinner had got rid of the gun. The statement in the voir dire has to be considered in the context of the voir dire itself. It was a voir dire about what she said to the police, not about what was alleged to have happen on April 10, 2011. The statement about Steven Skinner getting rid of the gun was part of the narrative that she was providing to the undercover police. In the voir dire it was not a statement about whether Steven Skinner had got rid of a gun but about what she had told them. That is not inconsistent with her in court testimony about not seeing a gun.

Admissibility for Purposes of Determining Post-Offence Conduct

[42] Brittany Derbyshire was a compellable witness. She could not and did not assert privilege of any kind. There was no reason why she should not be required to give evidence. Having a finding made that evidence from a police investigation involving her but directly related to this matter was inadmissible against her because it was obtained by an abuse of process does not grant her immunity from the legal requirement to testify. Her evidence from VD1 would then be used to determine the post-offence conduct that can be considered for admission in the trial proper.

[43] Mr. MacDonald objected to her being examined in a way that would allow her to refresh her memory using the transcript of the voir dire from June 23, 2104, which ultimately resulted in the evidence from the police investigation ruled inadmissible in her trial. Once again, that is why the voir dire was separated into

two voir dires with separate exhibit numbers. Evidence from one voir dire might be used while evidence from the other might not be.

[44] Mr. MacDonald argued on behalf of Mr. Skinner that any information obtained through the police investigation that was found to have been an abuse of process should not be used to assess the admissibility of post-offence conduct. Based on that, the transcript of the voir dire should not be used to allow Ms. Derbyshire to refresh her memory.

[45] That voir dire of June 23, 2014 took place in the context of charges against Ms. Derbyshire that relate very directly to this matter. She was charged with being an accessory after-the-fact to the same murder. She was alleged to have assisted Mr. Skinner, who the Crown, then as now, alleged committed the murder of Stacey Adams. In that voir dire it was argued that the evidence obtained by the police from Brittany Derbyshire involved an abuse of process. That decision was made by then Justice Wood, now Chief Justice of Nova Scotia. Justice Wood concluded, after hearing evidence, that while there had been no breach of Ms. Derbyshire's *Charter* rights, there had been a common law abuse of process. The evidence obtained from the police operation was held to be inadmissible. That included her statements, and the physical evidence and locations that she identified to the police.

> My comments should not be interpreted to mean that there will be automatic exclusion of evidence which is in any way related to the undercover operation no matter how tenuous that connection. As noted by the Supreme Court in *Babos* the granting of relief for abuse of process is discretionary and will involve the weighing of a number of potentially competing factors.
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> I would also note that my decision in this case concerning the exclusion of evidence against Ms. Derbyshire should not be interpreted as a determination of the admissibility of her statements and any resulting physical evidence in proceedings against any other person - the most obvious being Steven Skinner. *R. v. Derbyshire* 2014 NSSC 371, at paras. 94 and 95.

[46] The Crown appealed. That appeal was denied by the Court of Appeal.

[47] The Crown in this case accepted the finding that an abuse process took place in the investigation of this homicide and it did not need to be proved a second time. The police investigation was an abuse of process.

[48] An accused person cannot claim the "benefit" of a breach of a witness' *Charter* rights. Those rights pertain to the individual. The accused cannot claim

that evidence is inadmissible because it was obtained in breach of another person's right to silence for example. An abuse of process is a different matter. An abuse of process is a common law finding that holds not only that a person's rights have been infringed but that the investigating authority has conducted itself in a way that amounts to an abuse of process. That conduct affects the integrity of the justice system. Sometimes the system must distance itself from such behaviour entirely. The court may grant a stay or may refuse to condone the use of evidence derived from the abusive conduct.

[49] In the *Derbyshire* case Justice Wood found that the actions of the police offended the sense of fair play and decency. Justice Wood was satisfied that the remedy of granting a stay was not required. The harm could be remedied by excluding the evidence that was obtained.

[50] The finding of an abuse of process in *Derbyshire* applies to the case against Mr. Skinner. The abuse of process involves the investigation of the homicide with which Mr. Skinner has been charged. It does not follow from that conclusion that the same remedy must be applied to this case. Evidence that appears to have been probative was excluded in the trial of the person who was the direct subject of the impugned police behaviour. The court must consider what that means for this case. How expansive should the remedy be when applied to the case against Mr. Skinner?

[51] Justice Wood referred to *Babos*. That is another way to reference the Supreme Court of Canada case, *R. v. Piccirilli* 2014 SCC 16 which discusses the remedies available for abuse of process. When considering those remedies courts should have regard to the nature and seriousness of the impugned conduct, whether it is isolated or systemic and ongoing, the circumstances of the accused, the charges he or she is facing, and the interests of society in having the charges disposed of on the merits. The test for a stay has been considered to be useful generally in crafting the remedy for an abuse of process.

[52] The circumstances of the abuse of process here are serious. They were not sufficiently serious to justify a stay in Ms. Derbyshire's case though. They involved the investigation of this case but they were not directed against Mr. Skinner. Ms. Derbyshire is the one who was directly and personally involved. The police had no direct contact with Mr. Skinner at all. Mr. Skinner is facing a murder charge. The Crown has already suffered a meaningful consequence for the impugned police investigation in the case against Ms. Derbyshire. Even though the

abuse of process applies more broadly and was not a breach of the personal rights of Ms. Derbyshire, she was a witness in this case. She was an accused person on her own.

[53] There is a fundamental procedural and evidentiary difference between the case against Mr. Skinner and the case against Ms. Derbyshire. In the case against Brittany Derbyshire, unless the evidence from the undercover police operation were excluded, her statements against her own interest made to the undercover police could be entered into evidence. Those statements would be the evidence. The only way the integrity of the justice system could be protected was by specific exclusion. In the case against Steven Skinner, Ms. Derbyshire's statements to the police are not evidence. They were not sought to be used as evidence in the voir dire. The remedy of preventing her from refreshing her memory using a transcript is broader than a remedy of excluding evidence because the transcript is not sought to be entered as evidence.

[54] The voir dire held on June 23, 2014 dealt with what Ms. Derbyshire told the police. The voir dire itself was not an abuse of process. It was part of the court process. There has of course been no suggestion that the voir dire was improper in any way.

[55] The Crown wanted to show her a transcript of what she said at the June 23, 2014 voir dire if her memory failed, as it did, and she required the transcript to refresh her memory, which for the most part it did not. In the part of the process identified as VD2 she was given other materials to refresh her memory. The testimony obtained when she was shown Exhibit VD1-2, obtained through a production order granted before the abuse of process took place, was not related to the abuse of process and should be admitted into evidence. That related to her identification of texts sent on April 10, 2011.

[56] She was directed to an exchange about telling the undercover police officers about going to a place where something had been burned near King's Road in Wellington. She was then able to recall having been there, with some people whom she could not remember, to burn some things, that she could not remember. She said that it related to texts in which she was asking a third party to bring gas to the site.

[57] Ms. Derbyshire was shown her voir dire testimony about comments that she made to the police regarding the disposal of something in the river at Moncton. She

recalled that she had been there with Steven Skinner and that he had thrown something in the river.

[58] Questions put to Ms. Derbyshire during the voir dire are not evidence. The transcript of her voir dire was not evidence. Her discussions with the undercover police officers are not evidence. If they come from the police, they are hearsay and if they come from her, they are potentially prior consistent statements. The Crown has not tried to have the transcript entered into evidence through any other process.

[59] Showing Ms. Derbyshire a transcript of what she said in the course of a voir dire in her own case, does not amount to admitting it as evidence. What she said in this voir dire is evidence. Ms. Derbyshire was quite prepared to identify what she could not remember about April 10, 2011, when provided with the record of what she had said in June 2014. The voir dire transcripts were being provided to her to allow her to review them, not for the purpose of stating what she told the police, but for the sole purpose of seeing if it helped her in recalling what happened on the day that Stacey Adams was killed, April 10, 2011. Her evidence is what she said under oath at this voir dire, assisted or not by the transcript.

[60] Evidence used to refresh a witness' memory need not be admissible and in many cases, it is not admissible. Using that transcript as an aid to refresh Ms. Derbyshire's memory does not offend the values of the justice system. It is not the same as entering her evidence as given to the police in her own trial.

[61] If she was compellable and competent as a witness, and could refresh her memory using the voir dire transcript, her evidence is then what she said. Some parts are no more or less admissible than others.

[62] Her testimony was about what she recalled of the events of April 10, 2011. The accuracy of that recollection is important to the truth-seeking process of the trial. Refusing to allow her to refresh her memory with the transcript of another court appearance would not serve to uphold the integrity of the justice system by distancing the court from impugned police behaviour. Preventing the use of the transcript in that way would not be a remedy that would be an appropriate and reasonably measured response to the police conduct that involved Ms. Derbyshire.

Physical Evidence

[63] The physical evidence sought to be used in the trial includes a .44 calibre handgun recovered from the Petitcodiac River and a burn site in Wellington Nova Scotia.

[64] The Defence argues that they are derived from the investigation that was an abuse of process. Using that evidence would amount to condonation of the police misconduct.

[65] The issue again is the remedy to be applied in this case for that abuse of process. The same reasoning from the test for a stay as a remedy for abuse of process applies.

[66] It would be wrong if the Crown could use the statements made by Ms. Derbyshire to the undercover police as evidence in this case. In her own case they were prevented from doing that. In this case they cannot do it. What she said in her voir dire evidence however was untainted. It was her recollection. In it she made reference to a gun and to a burn site. That evidence was untainted by the abuse of process.

[67] The exclusion of the physical things to which she referred, as a remedy imposed in this case would fail to respect the balance between the preservation of the integrity of the justice system and the truth-seeking function of the trial. The impugned investigation is "used" in the sense that the physical items were preserved through it. The gun was obtained and the burn site was photographed and examined in the course of that investigation. But Ms. Derbyshire in her testimony said that something had been thrown in the river at the location to which she took the undercover officers. She had witnessed something being burned in a location that she showed them. There is nothing objectionable about that evidence. Rejecting the physical items themselves would be a remedy that in the case against Mr. Skinner is not required to preserve the integrity of the system.

Post-Offence Conduct

[68] The Crown has put forward the evidence that is sought to be admitted as post-offence conduct evidence in support of the inference of Mr. Skinner's guilt. The Crown has set out the source of the evidence and the inference sought to be drawn from each piece of it. Some of that evidence is not strictly post-offence conduct evidence and would be admissible in any case as part of the narrative.

More significantly however, Mr. MacDonald, for Mr. Skinner has indicated that the Defence will be arguing that Jeff Belanger killed Stacey Adams and his post-offence conduct is also consistent with his being the perpetrator. If the evidence of Mr. Skinner's leaving the scene and the province is not admitted, it will be difficult to see how the evidence relating to Mr. Belanger would then be admitted.

[69] Even considering Mr. MacDonald's anticipated use of the post-offence conduct of Jeff Belanger and my reluctance to find Crown evidence inadmissible when urged by the Defence not to do that, it is nevertheless important to consider whether admitting that evidence would be inconsistent with the court's gatekeeper function.

[70] The Crown will lead evidence from Jeff Belanger and Crystal Stevens that Steven Skinner shot and killed Stacey Adams with a .44 calibre handgun at Shadewell Lane in Lake Echo on April 10, 2011. After the shooting Steven Skinner made no attempt to assist Stacey Adams. That is after-the-fact conduct and supports the inference that the shooting was with intent to kill.

[71] They will give evidence that Mr. Skinner chased away another person. That supports the inference of his identity as the person who killed Stacey Adams.

[72] The Crown evidence will be that Stacey Adams' body was moved from the dining room area and placed in a car. An attempt was made to clean up the blood. That information will be provided by a blood stain pattern analyst. The same expert will testify that the bloodstain patterns in the residence are consistent with Stacey Adams having received a bloodletting injury and then being moved from the kitchen dining area of the house to the garage while bleeding. That is obviously relevant. It is the kind of evidence that would be provided in almost any homicide trial. The evidence would implicate Mr. Skinner because he was the only person remaining and it can be inferred that he was removing evidence of the crime.

[73] Then the evidence of Brittany Derbyshire picks up the narrative. Her evidence will be that she got a text to pick up Mr. Skinner at the house in Lake Echo where Jeff Belanger and Crystal Stevens were staying. She drove Mr. Skinner to the Moncton airport. She was with him when he threw something into the river in Moncton. A .44 calibre revolver was located there by the police. She exchanged texts that day with someone about bringing gas to start a fire and she was present in Wellington when something was burned. She showed that site to the police.

[74] Steven Skinner left Moncton for British Columbia and then Mexico. He remained away from Canada until he was extradited from Venezuela in 2017.

[75] Mr. MacDonald does not object to the admissibility of the post-offence conduct evidence other than the evidence Brittany Derbyshire. The evidence of Brittany Derbyshire of post-offence conduct is not different in character from the post-offence conduct to which the Defence does not object.

[76] Post-offence conduct evidence is admissible as a form of circumstantial evidence. It must be dealt with very carefully to prevent a jury from improperly reasoning that post-offence conduct is conclusive evidence of guilt. As post-offence conduct evidence the evidence of Brittany Derbyshire is no more problematic than the other post-offence conduct evidence that the Crown seeks to have admitted.

[77] The dissenting judgement of Justice Martin in *R. v. Calnen* 2019 SCC 6 sets out the process to be used.

[78] Evidence of after-the-fact conduct is admissible if it is relevant to a live, material issue in the case, does not offend any exclusionary rules and its probative value is greater than its prejudicial effect. It is not a special category of evidence. It is circumstantial evidence which allows a jury to draw inferences. Doing that requires the use of "logic, common sense and experience". The kinds of inferences that can be drawn will depend on the nature of the conduct, what is sought to be inferred, the parties' positions and the totality of the evidence. Just because there may be a range of inferences that could be drawn does not mean that the evidence of the after-the-fact conduct is of no value. The judge or the jury decide what inferences they will accept and the weight that they will give them.

[79] It is a process that requires conscious attention to the evidence of post-offence conduct so that it is identified as potentially problematic and specific attention paid to the purpose for which it will be put so that it is not allowed to be used for any other purpose.

Equally Compelling Circumstances

[80] When there are competing inferences that arise from the post-offence conduct, and the inferences are equally compelling, making it unreasonable to choose one over the other, the post-offence conduct is not admissible for the purpose of drawing that inference. Post-offence conduct may be consistent with

more than one inference. Just because another explanation is offered for conduct that does not mean that the evidence loses its relevance in permitting the inference of guilt to be made. The overall conduct and circumstances must be such that it is not possible to choose between the inference pointing toward guilt and the inference supporting the absence of guilt.

[81] Nothing about the evidence of Brittany Derbyshire was of a nature that would distinguish it from the other post-offence conduct evidence. The reference to something being thrown in the river and a gun being found later permits an inference to be made. The reference to a burn site similarly permits an inference to be made. That evidence is not more prone to lure a jury into impermissible reasoning about guilt than other post-offence conduct. It is not equally compatible with an inference that does not involve guilt when considered the context of all of the other post-offence conduct evidence. Post-offence conduct must be considered in its context to be properly assessed. Removing Brittany Derbyshire's evidence of post-offence conduct deprives the jury, as the finders of fact, of that important context.

[82] The post-offence conduct as a whole is more compatible with the inference of guilt than with any other inference. The Defence had argued that the post-offence conduct was compatible with Mr. Skinner leaving the province for reasons that do not lead to the inference that he killed Stacey Adams. Mr. Skinner was on a recognizance relating to outstanding charges that prohibited him from being in Nova Scotia. After the death of Stacey Adams Mr. Skinner was in a state of panic and shock. In April 2011 there were people who wanted Steven Skinner dead and had put out a contract hit on him. That hit was outstanding after he left Nova Scotia. The defence says that the inference can be drawn that Mr. Skinner left Nova Scotia for reasons that are not consistent with his having killed Stacey Adams.

[83] The post-offence conduct evidence should be considered as a whole. Each piece of evidence may not permit an inference to be made but in combination it may reasonably permit that inference to be made. Each of the pieces of evidence logically and based on human experience support the inference of guilt. They may permit the inference to be made that Mr. Skinner did not kill Stacey Adams but was simply getting away from Nova Scotia. That is an alternative inference. The presence of an alternative theory or another inference, even a reasonable one, does not prevent post-offence conduct from being put before a jury. The timing of Mr. Skinner's departure immediately after the murder of Stacey Adams is significant,

as is the evidence that he drove to Moncton to fly from there rather than Halifax and the evidence of the disposal of items in that process.

[84] That evidence can also be consistent with his being a person who was involved on a more peripheral level, while others were directly responsible for Stacey Adams' death. It is not inconsistent with the inference that Jeff Belanger killed Stacey Adams. Steven Skinner may have witnessed the murder and felt compelled to flee out of fear for his own safety or for fear of being implicated in the murder. A jury may find that to be an inference that would raise a reasonable doubt as to his guilt. They may not. That will be for the jury to decide. At this stage the issue is whether the evidence should not be allowed to be put before a jury for them to use because its use would lead to improper reasoning.

[85] The inference of guilt from the post-offence conduct is stronger than the alternative. Mr. Skinner was on a recognizance that prohibited him from being in Nova Scotia. Fleeing out of the country is not proportionate to that concern. Mr. Skinner left, from the home where Stacey Adams was killed on the day of the murder. Mr. Skinner's quick departure involved stopping to throw something into the Petitcodiac River. Brittany Derbyshire witnessed something being burned the same day that she took Mr. Skinner to Moncton. It requires some speculation to imagine what one might need to dispose of that was that is consistent with something other than guilt. Maybe the person who committed the murder demanded that he dispose of a weapon. That is possible. It just isn't as reasonable an inference as the inference of guilt.

[86] The after-the-fact conduct evidence is relevant. It is probative with respect to the material issue of identity. It does not require speculative or unreasonable inferences to be drawn to make it relevant. While there are alternative explanations that may be put forward with respect to that behaviour, the evidence is more capable of supporting the inference sought than any alternative inference. What if any inference is accepted and the weight to be given to it, is a matter that should be left to the jury with appropriate instructions. A jury has to be assumed to be able to understand the significance of an instruction that will tell them that they are to determine guilt having regard to all of the evidence and that post-offence conduct evidence should be considered having regard to inferences that are not consistent with guilt. A jury must be assumed to be able to understand an instruction that they are not to weigh the post-offence conduct of the accused and a third-party suspect as a substitute for considering all the evidence.

[87] Keeping that relevant and probative evidence from the jury can and should be done when the risks to a fair trial by the admission of prejudicial evidence outweighs the probative value of the evidence. Here, that post-offence conduct evidence is more probative than prejudicial.

Campbell, J.