SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Greenwood*, 2024 NSSC 90

Date: 20240326
Docket: CRK-352344
Registry: Kentville

Between:

His Majesty the King

v.

Leslie Douglas Greenwood

CHANGE OF VENUE APPLICATION

Judge: The Honourable Justice Joshua Arnold

Heard: February 26, 2024, in Halifax, Nova Scotia

Counsel: Peter Craig, KC, and Shauna MacDonald, KC, for the Crown
Oliver Abergel and Keara Lundrigan, for Mr. Greenwood

Overview

[1] Leslie Douglas Greenwood is charged with two counts of first-degree murder. This will be his third trial in relation to these charges. He applies for a change of venue, to the Halifax Regional Municipality, rather than Kentville, where the previous trials were conducted. Mr. Greenwood argues that extensive pre-trial publicity and the small size of the community will impair his ability to have a fair trial in Kentville. The Crown says any possible prejudice can be cured by way of the normal procedural safeguards, including challenge for cause. For the reasons that follow, Mr. Greenwood's application for change of venue is allowed.

Facts

[2] The defence filed a book of materials comprising media reports relating to the alleged offences. I also have access to the two decisions of the Nova Scotia Court of Appeal ordering retrials for Mr. Greenwood: *R. v. Greenwood*, 2014 NSCA 80 (*Greenwood #1)*, and *R. v. Greenwood*, 2022 NSCA 53, leave to appeal denied, 2023 SCCA No. 366 (*Greenwood* #2).

[3] As counsel for Mr. Greenwood point out, Mr. Greenwood was also found guilty of two counts of murder in Quebec (*R. c. Greenwood*, 2017 QCCS 6279). Those Quebec convictions have been mentioned in news articles.

Previous trials

[4] In *Greenwood #1*, Fichaud J.A. determined that evidence had been erroneously tendered by the Crown, then erroneously admitted by the trial judge, including (1) the affidavit and *viva voce* evidence of Brian Bailey, a lawyer who represented a co-accused, Michael Lawrence, on his change of plea and sentencing; and (2) the video of Mr. Greenwood's interrogation by police, which included playback of statements made by Jeffery Lynds, another man implicated in the murder, who was dead by the time of the first trial.

[5] The affidavit and *viva voce* evidence of Mr. Bailey was described by Fichaud J.A. as coming into evidence based on the following:

> [80] In his direct examination, Lawrence testified that on the day of the Mersereau/Christensen murders, Lawrence had the .32 while Greenwood had the .357 Magnum. On April 27, 2012, during Lawrence's cross-examination, Greenwood's counsel showed Lawrence an Agreed Statement of Facts filed with

the Court for Lawrence's sentencing in January 2012. The Agreed Statement, signed by Lawrence, said:

> The following day while armed with the same handgun he used to kill Mr. Maddison, Mr. Lawrence and an accomplice went to the residence of the two victims, Kirk Mersereau and Nancy Christensen.

Lawrence had used the .357 to shoot Maddison. Greenwood's counsel suggested to Lawrence that, by signing the Agreed Statement, Lawrence acknowledged that "he" - *i.e.* Lawrence - was "armed" with the .357 for the Mersereau/Christensen murders.

[81] The Crown objected to the use of the Agreed Statement. The Chief Justice allowed the cross-examination, but the Agreed Statement itself was not admitted into evidence.

[82] On the cross-examination, Lawrence testified:

> Q. And you saw that and read that before you signed it, correct?
>
> A. Yes, I did.
>
> Q. And you signed that stating that it was the truth?
>
> A. Yes, I did. But I have something to say. I think that I thought that says, "while armed with the same handgun," that meant two of each with a gun. I believe that's what I thought.

[83] Mr. Lawrence's lawyer for his sentencing had been Mr. Brian Bailey.

[84] On May 2, 2012, the Crown submitted an Affidavit of Mr. Bailey and called Mr. Bailey as a witness. Mr. Bailey's Affidavit, sworn April 28, 2012, included:

> …
>
> 4. In preparation for that sentencing, a document entitled "Agreed Statement of Facts" was prepared by Mr. Craig, Crown attorney and sent to me for my concurrence in consultation with my client.
>
> 5. My understanding of the matter was that Mr. Lawrence used a .357 calibre firearm to kill Mr. Charles Maddison on September 8, 2000 which he was given by an accomplice and subsequently returned the firearm to that accomplice.
>
> 6. The following day, acting on direction from that accomplice, Mr. Lawrence and another individual were given the .357 calibre firearm and a .32 calibre firearm and they went to a residence at or near Centre Burlington, Nova Scotia and shot Mr. Mersereau and Ms. Christianson.
>
> 7. In the Agreed Statement of Facts, I never intended or understood the meaning to be that my client:
>
> > a. had the .357 calibre handgun on his person while travelling to the Mersereau - Christianson residence; or

> b. he used the .357 calibre handgun to shoot either Mersereau or Christianson.
>
> 8. I am not aware of any prior statement or testimony from Mr. Lawrence where he ever stated he had the .357 calibre firearm on his person at any material time either travelling to or during the murders of Mr. Mersereau or Ms. Christenson, nor that he used the .357 calibre firearm in those murders.

…

[86] The judge admitted the Affidavit, saying:

> **THE COURT:** All right. I am going to permit the use of the affidavit in evidence. I'm doing that on the basis that counsel, Mr. Brian Bailey, is present before this court and going to be available to respond to statements in the affidavit, his own affidavit, and secondly will be available for purposes of cross-examination.

Mr. Bailey's affidavit was entered as Exhibit 49.

[87] Mr. Bailey then testified. Defence counsel did not object to Mr. Bailey's *viva voce* testimony. His direct examination by the Crown reiterated the points in his Affidavit. He was cross-examined.

[88] At no time did the Chief Justice give a limiting instruction on the jury's permitted use of Mr. Bailey's affidavit or *viva voce* evidence. The judge did not, for instance, tell the jury that Mr. Bailey had no personal knowledge of the events of September 9, 2000, and that his evidence should not be taken as confirmatory of Lawrence's version of the events on that day. The jury was not instructed that Mr. Bailey's evidence of the events of September 9, 2000, was hearsay.

[6] Fichaud J.A. explained the significance of that evidence:

> [94] Mr. Bailey was not at Mersereau's home on September 9, 2000. His understanding of the events of September 9, 2000, is irrelevant hearsay. Nor does he have personal knowledge what was in Lawrence's mind when Lawrence signed the Agreed Statement. The most Mr. Bailey could say was that, during the drafting of the Agreed Statement in January 2012, Lawrence told him what happened on September 9, 2000. If Lawrence told Mr. Bailey that the accomplice (*i.e.* Greenwood) had the .357, used to shoot the victims, that would be consistent with Lawrence's testimony on his direct examination at Greenwood's trial. So, Mr. Bailey's contribution to the Greenwood trial would be to relate Lawrence's prior consistent statement.

[7] In ruling that the admission of this evidence was an error, Fichaud J.A. stated:

> [102] Greenwood does not allege that Lawrence had a particular motive to fabricate. Nobody has identified what *MacWilliams* terms a "discrete factual

> event" or "improper influence" that would generate a motive to fabricate. There is no evidence of such an event or influence after Lawrence's Agreed Statement in January 2012. To the contrary, one can infer that Lawrence's self-interest to shift blame would be greater before his January sentencing hearing than afterward. If this were so, then Lawrence's statements to Mr. Bailey would post-date any motive to fabricate. The lynchpin of the exception is an identified motive to fabricate that developed after the prior statement. That condition is missing in this case.
>
> [103] Mr. Bailey's evidence about what Lawrence told him of the events of September 9, 2000, does not satisfy the requirements of the "recent fabrication" exception, or any other exception. It is inadmissible under the general rule against prior consistent statements.
>
> …
>
> [110] This means that at least the jury should have been cautioned that Mr. Bailey's evidence was not entered for the truth of its contents and could not be taken as confirmatory of Lawrence's version of events on September 9, 2000. The Chief Justice repeatedly gave similar cautions for Jeff Lynds' audio statement, that I will discuss later (paras. 129, 131). But there was no caution for Mr. Bailey's evidence. The jury was left to consider that, as Mr. Bailey's evidence did not generate a caution, apparently it differed from Lynds' statement, and the jury's use of Mr. Bailey's understanding of the facts was unconstrained. This case isn't like *Ward*, *supra*, paras. 46-49, where the trial judge gave clear instructions on the jury's limited use of the statement.

[8] The court took note of the principle that evidence in a criminal trial is normally given *viva voce*, and that the effect of admitting the affidavit as an exhibit was to put before the jury the evidence of a member of the bar that Greenwood and Lawrence "shot Mr. Mersereau and Ms. Christensen" (paras. 111-113). Fichaud J.A. added that the Crown's closing address "didn't help" (para. 114):

> [115] Mr. Craig told the jury: "I was associated with that process", and "if you want to point any fingers, you can point them this way", and "if you want to point some blame, I'm going to have to wear that one". The *sotto voce* message was that Greenwood, not Lawrence, had the .357 on September 9, 2000, and insofar as the wording of Lawrence's Agreed Statement gave a different impression, that discrepancy was caused by Mr. Craig's conduct, and the jury should overlook the discordant wording. The submission would not be problematic if it was based simply on evidence. But counsel for the Crown asked the jury to accept that message from the perspective that he personally had been "associated with that process". Mr. Craig said "I'm not giving you evidence". But essentially that is what he did, without taking the witness stand. Counsel's address to the jury should not rely on counsel's extra-evidential "personal experience or observations": *Pisani v. The Queen*, [1971] S.C.R. 738, at p. 740, per Laskin, J., as he then was, for the Court.

> [116] So the jury had *quasi*-factual assertions from a second lawyer to assist their search for *Vetrovec* confirmation of the events of September 9, 2000.
>
> [117] The Chief Justice's jury charge said nothing about Mr. Craig's comment.

[9] As noted, during the trial, Mr. Greenwood's video statement was played for the jury, and the statement included long soliloquies by the police about inadmissible matters, as well as the audio of an interview that the police did with Jeff Lynds, who was deceased at the time *Greenwood #1* came to trial. Fichaud J.A. described the evidence as follows:

> [121] The interrogation also included an audio tape of an interview with Jeff Lynds, who was dead by the time of Greenwood's trial. Greenwood's jury heard a tape within a tape. Jeff Lynds' audio tape includes Lynds ("JL") saying that Greenwood and Lawrence went to Mersereau's home, then:
>
> FF: What then, what?
>
> JL: Kirk and his wife
>
> FF: His wife Nancy
>
> JL: He, *he only wounded them*, and then Michael, or, the shots go off, he, he
>
> JL: came in the house, on his way in he shot the dog, which was, I believe somewhere around the door
>
> FF: Ok
>
> JL: At the time
>
> FF: Ok
>
> JL: He shot …(End of tape)
>
> [emphasis added]
>
> [122] So the jury heard a taped Jeff Lynds say that "he" - *i.e.* Greenwood - fired the first shots at Kirk and Nancy, and "wounded them", before Michael Lawrence entered the Mersereau house and shot them again.
>
> [123] Jeff Lynds wasn't at Mersereau's home on September 9, 2000. The quoted passage, entered without Lynds' attendance at Greenwood's trial, was exponential hearsay. Even if Lynds had taken the witness stand, he could not have testified to those events. If Greenwood had testified, the Crown could not have put Lynds' inadmissible statement about the occurrences at Mersereau's home, to Greenwood on cross-examination... Even if Lynds' statement had been hypothetically admissible, but merely unproven, Greenwood could not have been cross-examined on it unless the trial judge first balanced probative value and prejudicial effect… Yet Lynds' statement finessed its evidential obstacles to emerge before this jury

> simply because the police embedded it in their interrogation. During its deliberations, the jury had the tape, as am (sic) exhibit, in the jury room with playback equipment.

[10] Fichaud J.A. noted that there was no *voir dire* in respect of the video, including the Lynds audio excerpts, which had no probative value (paras. 126 and 137). He continued:

> [138] Immediately after the end of the tape with the Lynds' excerpt (quoted above, para. 121), and before Greenwood had the opportunity to say anything, the interrogating officer spoke in a monologue, on various topics, for several pages of transcript. Lynds' quoted excerpt was not played to Greenwood for his immediate reaction, or spliced into a chopped dialogue during which the jury had to hear Lynds to understand Greenwood. The Lynds' excerpts do not aid the comprehension of what Greenwood said happened at Mersereau's home (see above, para 37).
>
> [139] Greenwood denied that he shot anybody, or even had a gun. He denied it on a free standing basis, and when he was eventually asked about the Lynds' excerpts. As the Chief Justice's jury charge acknowledged (above, para 131), the Lynds' excerpts have no adopted probative value through Greenwood.
>
> [140] The interrogation occurred in December 2010, over ten years after the murders. Greenwood's reaction to the Lynds' excerpts was not knotted into the criminal event, and doesn't qualify as narrative. This case is unlike *Ward*, *supra*, paras. 46-48.
>
> [141] The potential for prejudice is obvious. The outcome of any balancing exercise, had one been performed after a *voir dire*, would have been that clear prejudice out-weighed minimal probative value.
>
> …
>
> [146] Jeff Lynds said Greenwood shot Mersereau and Christensen. Greenwood said he didn't shoot anyone and didn't have a gun. The jury attributes meaning and value to both statements, positions Lynds' spoken word next to Greenwood's spoken denial, compares and appraises the spectacle. That is the natural way to use Lynds' statement to assess Greenwood's credibility. But attributing value to Lynds' statement is impermissible, and is forbidden by the Chief Justice's other instruction. It isn't apparent how the jury could reconcile the two instructions.
>
> [147] This potential for confusion in the jury room, on a damning item of evidence, stemmed from the threshold ruling that Lynds' excerpts would be played for the jury, without either a *voir dire* to hear the tape or a balance of prejudice against probative value. It was compounded by the attempt to identify for the jury some permissible use for valueless evidence.

[11] In *Greenwood #2*, Jeff Lynds's statement once again found its way before the jury. Farrar J.A. described the issue:

> [91] This issue has two elements. The first involves the admissibility of evidence. When the jury heard Greenwood's arrest statement, they heard the police officer say to Greenwood, "Mike gives you up, then you've got Jeff who's the head of the Organization … both of them saying you had a gun, and you pulled the trigger". [Emphasis added.]
>
> [92] As noted earlier, the Jeff referred to is Jeff Lynds. There is no evidence Jeff Lynds was at the Mersereau residence at the time of the shooting—he could not have seen Greenwood with a gun, nor could he see him pull the trigger. Hearsay from him should not have been admitted. The Crown acknowledges this. The question then becomes whether the judge's instruction to the jury alleviated any prejudice that arose as a result of this evidence having been admitted.
>
> [93] When the audio-tape was played for the jury with Jeff Lynds' hearsay evidence included, there was an immediate discussion between counsel and the court about this evidence being heard by the jury and them receiving a transcript of it.
>
> [94] After this discussion, the offending portion was removed from the transcript the jury received. However, they had already heard the evidence from the audio-tape. The trial judge then said this to the jury:
>
> > […] the printed part's been removed but what you've heard hopefully will just be removed from your memory and you won't be able ... you'll be able to just not consider it at all. I'm also going to say to you that during the course of it, you would have heard the Sergeant speaking, telling Mr. Greenwood what Jeff said. Jeff said this, Jeff said that. What I've told you earlier is what the Sergeant said to Mr. Greenwood isn't evidence. I'm just going to repeat that to you and sort of double up on it or double down on it I guess is the phrase that's used now and say it's when he's talking about what someone else told him, it's not evidence either. So what ... what he says that Jeff said to him isn't evidence because what he says isn't evidence, okay. It's only what Mr. Greenwood says and the only reason you're hearing from anybody else is to give a context to what Mr. Greenwood says. Counsel, is that instruction satisfactory?
> >
> > [Emphasis added.]
>
> [95] Greenwood's counsel agreed the instruction was satisfactory. Unfortunately, it was not.

[12] As noted by Farrar J.A., a related issue regarding Jeff Lynds's statement had arisen in *Greenwood #1*:

> [97] A similar issue arose in the 2014 trial. It also concerned Jeff Lynds' audio-recordings which were embedded in Greenwood's statement. In *Greenwood #1*, Fichaud J.A. set out the Chief Justice's charge to the jury as follows:
>
> > [131] The Chief Justice's jury charge said:
> >
> > If you were [*sic*] use what Jeffrey Lynds says on that tape in relation to the ultimate determination of the guilt or the innocence of Les Greenwood, that would be a bad verdict. It's that simple. You cannot use it for that purpose.
> >
> > Please ... you can use it for context in relation to his ... the statements that ... and the answers that Les Greenwood is giving and the Crown has every right to put that statement before you to allow you to consider the various things that he said, but do not use what was played for his benefit against him in any manner unless, in the one instance, they talk about the fact that he totally adopted something. Do not ... one thing he didn't adopt was what Jeff Lynds ... Lyons ... I have a problem with that surname, obviously ... Jeff Lyons was saying. So please use it in the right context.
> >
> > [132] This passage charged the jury "do not use what was played for his benefit against him in any manner unless, in the one instance, they talk about the fact that he totally adopted something" but "one thing he didn't adopt was what Jeff Lynds ... was saying." The passage acknowledged that what Jeff Lynds said about the murders has no probative value. This may be coupled with the Chief Justice's mid-trial comment to counsel after the tape had been played to the jury (above para 128): "if I had seen it coming up, I might well have considered a probative versus prejudicial aspect to it". It appears that, in retrospect, the Chief Justice wished he had weighed the non-existent probative value against the clear prejudice. [Emphasis added.]
>
> [98] Similarly, the trial judge here instructed the jury that what Jeff Lynds said was to give context to what Greenwood said.

[13] Farrar J.A. went on to refer to Fichaud J.A.'s conclusion in *Greenwood #1* that there was no way for the jury to reconcile the instructions on the use of Lynds's statement in assessing Greenwood's credibility, and reached a similar conclusion:

> [100] The same considerations apply to the second trial. There is nothing to contextualize. The evidence was clearly inadmissible and has no probative value. Its prejudice is obvious. The only issue was Greenwood's credibility in his responses to the police officer on the audio-tape. To tell the jury they could use Jeff Lynds' hearsay evidence to give context to what Greenwood said creates the same issue as the first trial. Attributing any value to what Jeff Lynds said was impermissible.

[14] Farrar J.A. likewise observed that the "issue was exacerbated by the Crown's submissions to the jury" (para. 101), which could have led the jury to understand that Greenwood was "avoidant when confronted with evidence of others placing him at the scene with the gun and pulling the trigger" (para. 104). He concluded:

> [105] In my view, as in *Greenwood #1*, the trial judge's instructions on Jeff Lynds' hearsay evidence were confusing and could have lead the jury to use the evidence in an impermissible way. If the jury considered Greenwood to be evasive in his response when confronted with Jeff Lynds' statement, it could have impacted on Greenwood's credibility and corroborated Lawrence's testimony.
>
> [106] The jury could also have used or relied on the hearsay statement to corroborate Lawrence's testimony. The trial judge had provided the jury with a *Vetrovec* warning in relation to Lawrence's evidence telling the jury it would be dangerous to accept Lawrence's testimony unless someone else confirmed what he said. Jeff Lynds' statement does that—it puts Greenwood at the murder scene, with a gun, and pulling the trigger.

[15] Therefore, evidence was wrongly elicited and admitted in *Greenwood #1* and in *Greenwood #2*. That evidence was highly prejudicial to Mr. Greenwood. Each jury convicted Mr. Greenwood of murder. As a result of the errors in admitting the evidence, at each trial various items of inadmissible evidence were advertently or inadvertently reported by the media, thus receiving publicity.

The Venues

[16] The alleged murders took place in Center Burlington, which is in the Judicial District of West Hants. Mr. Greenwood's two previous trials took place in Kentville, and this trial is scheduled for the same location.

[17] The Judicial District of Kentville encompasses the Municipalities of West Hants and Kings County. The census data for those two counties shows that as of 2021 the population of West Hants was 19,509, and that of Kings county 47,918. The two municipalities also encompass the towns of Kentville, Wolfville, and Berwick. As of 2021, the population of Kentville is 6,630, Wolfville 5,057, and Berwick 2,455. This creates a total jury pool of 81,569 people.

[18] In contrast, a change of venue to Halifax would mean that the jury pool could be drawn from the population of HRM which was 439,819 in 2021.

Evidence on the Application

[19] The only evidence tendered on this application was the affidavit of Anika Wright, which has attached exhibits, including a book excerpt and online news articles from various media organizations. The exhibits contain highly prejudicial information that would be inadmissible at Mr. Greenwood's trial, which I summarize as follows:

> ***Connections to Hells Angels***
>
> The subject matter includes material linking Mr. Lynds, and the Mersereau/Christensen murders allegedly committed on his orders, to the Hells Angels, and accounts of undercover police operations targeting Mr. Greenwood.
>
> ***Mr. Greenwood's convictions for these murders***
>
> Several of the articles deal with Mr. Greenwood's trials and convictions for the Mersereau/Christensen murders, as well as the appeals. There is also reference to Mr. Greenwood's convictions for murder in Quebec.
>
> ***Mr. Greenwood's connections to the co-accused***
>
> The materials also included reporting connecting Mr. Greenwood to Mr. Lynds and Mr. Lawrence, and dealing with their respective guilty pleas and police cooperation, as well as Mr. Lawrence's testimony in Mr. Greenwood's trials.
>
> ***Mr. Greenwood's murder convictions in Quebec***
>
> Several of the articles deal with Mr. Greenwood's trials and convictions for the Mersereau/Christensen murders, as well as the appeals. There is also reference to Mr. Greenwood's convictions for murder in Quebec.
>
> ***Other inadmissible evidence***
>
> The attached materials also include reporting on details the agreed statement of facts and Mr. Greenwood's statement, including what police told him about what Mr. Lynds had allegedly said about his involvement in the murders.

Change of Venue Under s. 599

[20] Section 599(1) of the *Criminal Code* sets out the conditions in which a change of venue may be ordered:

> **Reasons for change of venue**
>
> **599 (1)** A court before which an accused is or may be indicted, at any term or sittings thereof, or a judge who may hold or sit in that court, may at any time before or after an indictment is found, on the application of the prosecutor or the accused,

> order the trial to be held in a territorial division in the same province other than that in which the offence would otherwise be tried if
>
> **(a)** it appears expedient to the ends of justice, including
>
> **(i)** to promote a fair and efficient trial, and
>
> **(ii)** to ensure the safety and security of a victim or witness or to protect their interests and those of society; or
>
> **(b)** a competent authority has directed that a jury is not to be summoned at the time appointed in a territorial division where the trial would otherwise by law be held. [Emphasis added.]

[21] Relevant sections of the *Charter of Rights and Freedoms* related to Mr. Greenwood's right to a fair trial include sections 7 and 11(d):

> **7** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> **...**
>
> **11** Any person charged with an offence has the right
>
> ...
>
> **(d)** to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

Positions of the Parties

[22] Mr. Greenwood says a change of venue is necessary to ensure that he has a fair trial, in accordance with s. 599(1)(a). The parties do not allege any issue related to s. 599(1)(b), requiring a change of venue to "ensure the safety and security of a victim or witness or to protect their interests and those of society". The Crown concedes that there are no Crown witnesses who will be greatly inconvenienced if the venue is changed from Kentville to Halifax. Therefore, Mr. Greenwood's right to a fair trial is the main consideration in this application.

Presumption

[23] It has been routinely noted in cases addressing change of venue applications that the right to a trial in the jurisdiction of the crime is a right held by the accused and the community (*R v MacNeil* (1993), 125 NSR (2d) 346, [1993] NSJ No 406 (SC), at para. 54).

[24] As noted by Kelly J. in *R. v. Muise* (1992), 118 NSR (2d) 363, 1992 CarswellNS 268 (SC), there is a common law presumption that a criminal jury trial will be held in the territorial jurisdiction where the crime is alleged to have occurred. Justice Kelly said:

> 2 The general common law rule relating to jury trials is that they should be held in the area where the crime was committed. This rule finds its roots in the early history of English law where the jury was a source of local facts, even facts related to the charge, and at the same time participated in the verdict on the charge. However, the jury gradually had evolved into the impartial adjudicator of fact in a criminal trial by the time it was received into the colony of Nova Scotia as part of the common law in 1758. Granger, Charron and Chumak, **Canadian Criminal Jury Trials**, (Toronto: Carswell, 1989).
>
> 3 The current reasons for holding a criminal jury trial in the territorial division of the alleged crime relate in part to the obvious convenience and cost factors regarding the presentation of the evidence. In this matter for example, most of the witnesses for the crown and defence likely come from this region. However other, perhaps less obvious but equally important factors are also involved. Principal among these is the importance of demonstrating to the region where the alleged crime occurred that, justice will be fully and fairly administered in theft community. Regardless of whether an accused person is acquitted or found guilty, the community will be aware that the verdict was agreed upon by persons selected from among them, thus enhancing that community's respect for the administration of justice.

[25] Section 599 has been judicially interpreted in a restrictive manner.

Burden of Proof

[26] The parties agree that the burden of proof to displace this presumption is on the applicant, that the onus is measured on a balance of probabilities, and that the burden is "a heavy one". I asked counsel how the burden could both be a "heavy one" and one measured on a balance of probabilities. Neither counsel could offer a clear answer.

[27] The Supreme Court of Canada has repeatedly declared that the burden of proof on an accused raising a *Charter* issue is the balance of probabilities. While this application is not framed as a *Charter* motion, s. 599 of the *Criminal Code* requires the court to consider whether a change in venue will "promote a fair and efficient trial." *Charter* principles must be considered when deciding any criminal issue. Therefore, in keeping with well established *Charter* principles, I do not agree that the burden on Mr. Greenwood is a particularly "heavy one." Instead, as

the applicant, he must prove on a balance of probabilities that the proposed change in venue will "promote a fair and efficient trial."

[28] Considering the significant procedural safeguards in the jury process, including the availability of a challenge for cause in accordance with s. 638(1) of the *Criminal Code,* as well as the availability of mid-trial and final jury instructions, it is fair to say that it will be challenging for an applicant to establish on a balance of probabilities (that is, in simple terms, 51 percent) that a change of venue is required in the overwhelming majority of cases. It will be a rare situation where the fair trial issues will be so significant that the usual procedural safeguards will be insufficient and where s. 599 will allow for displacement of the presumption that a trial be held in the district where the crime is alleged to have occurred.

[29] As noted by Kelly J. in *Muise*, the presumption of a trial being held in the district where the crime is alleged to have occurred can only be displaced if there is a fair and reasonable possibility that the jury will not be impartial, or the trial will not be fair. In describing the burden on the applicant as requiring them to show "a fair and reasonable probability", Kelly J. stated:

> 7 …A court considering an application for a change of venue in a jury trial must thus embark on a consideration of whether the factors submitted by the applicant are likely to so affect the potential jury panel that there is a fair and reasonable probability that a jury selected from the panel will not be impartial, or that the trial will be unfair. The ultimate objective of this inquiry is to ensure a fair trial, one fair to the legitimate interests both of the accused and of the state.

[30] *Muise* involved allegations that multiple accused used guns to commit robbery at a fast-food restaurant in a small community, resulting in multiple employees dead or severely injured. The incident was widely publicized. Kelly J. denied the change of venue application. He concluded that the existing protections for the right to a fair trial, such as the jurors' oath to be impartial and to follow the instructions of the trial judge, were sufficient to ensure a fair trial:

> 34 I acknowledge that there exists some reasonable apprehension of bias in this community regarding the possibility of a fair trial. Nor do I dispute that there is a possibility that the attitude of a considerable number of prospective jurors may be prejudiced to the extent that they perceive the socially correct view in the community as a belief in the guilt of the two accused. Nevertheless, I believe it is appropriate for me to consider whether such views, if they exist, can properly be dealt with by the protections already afforded to the accused's right of a fair trial

by the criminal justice system. Principal among these safeguards is the juror's sworn oath to be impartial, to consider all the evidence presented in the case, and to render a true verdict based only on that evidence and on the law as they are directed by the judge. Jurors are presumed to respect their oaths. They are also solemnly charged by the trial judge to put aside any prejudice and disregard any information that was not received as part of the evidence. The accused will have 20 peremptory challenges to the jury panel, and limitless challenges for cause to eliminate members of the panel tainted by impartiality.

35 As stated by Walker, J. of the Sask. Q.B. in **R. v. Wilson**, [1983] 6 W.W.R. 360 at 370:

> It [The Supreme Court of Canada in *R. v. Hubbert*] points out that the trial judge has a wide discretion in controlling the challenge process, to prevent its abuse, to ensure it is fair to the prospective juror as well as the accused ... Possible grounds for a challenge for cause on the ground that a juror is not 'indifferent between the Queen and the accused' would include prior association with the accused, direct connection with the prosecution and pre-trial publicity surrounding the case. It also points out that, as to the procedure to be followed in empanelling the jury, the trial judge prior to the selection process may properly direct a question to the panel as a whole as to whether any member of the panel has any connection with any of the parties. Following any further inquiries as to such connection that may be appropriate the trial judge may in his discretion, excuse such a person notwithstanding that there is no specific authority for the *Criminal Code*.
>
> With specific reference to the establishment of a defence fund for the accused -the principal basis for the crown's change of venue application in **Wilson** - Walker, J. continued on the same page:
>
> > It seems to me that it will be open to the trial judge, in his sole discretion and if he sees fit, to deal with the problem by way of a question to the jury panel in respect of the fund and, perhaps, excusing certain jurors. If connection of some sort with the defence fund is apparent from the response to the question of the trial judge, and he does not excuse a juror in the circumstances, that Juror may be challenged or asked to stand aside as if he had never been questioned by the trial judge.

36 These techniques are available to defence counsel and to the trial judge in this case. As well, a recommendation can be made to the appropriate authority to significantly increase the number of potential jurors on the panel because of the potential for significant challenges in any case. I would note finally that any verdict must be unanimous, and if a few jurors with a bias become part of the jury and ignore their oath, at least some of the jurors are sure to respect that oath and the directions of the court. Such is the strength of the jury system. As I expressed earlier, I do have a concern that there is some reasonable apprehension regarding the possibility of a fair trial for the accused, but I find that the applicants have not

> satisfied their burden in this regard. I am satisfied that it is probable that the protections of the criminal justice system referred to above will be effective to provide a fair trial for the accused in Cape Breton County.

[31] The burden on an applicant requesting a change of venue was also considered by Mahoney J. in *R. v. Steinke*, 2008 ABQB 201, where a change of venue was granted. At paragraph 8, Justice Mahoney referenced *R. v. Pappas*, 2004 ABQB 668, where Clackson J. summarized the principles that should be considered in an application for a change of venue:

> 1. It is well established that criminal trials should be held in the venue in which the alleged crime took place;
> 2. The onus in such an application is upon the applicant;
> 3. The onus upon the applicant to discharge the presumption of venue is a heavy one;
> 4. The applicant must establish on a balance of probabilities that there is a fair and reasonable likelihood of partiality or prejudice among the prospective jurors in the presumed venue;
> 5. The applicant must also show on a balance of probabilities that partiality or prejudice cannot be overcome by jury screening, peremptory challenges, challenges for cause and the cleansing inherent in the trial process;
> 6. The goal is to ensure that both Crown and the accused have a fair trial with an impartial jury.

[32] I note that the court referred to the onus as a "heavy one", but this is clearly within the context of a balance of probability analysis. The court in *Steinke* also cited *R. v Daunt,* 2005 YKSC 33*,* where Veale J. set out a non-exclusive framework for analysis of a s. 599 application, at paragraph 8 of *Steinke*:

> 1. the size of the community;
> 2. prejudicial pre-trial publicity;
> 3. widespread animosity that people may have towards the accused or the victim;
> 4. widespread sympathy for the accused or the victim;
> 5. fear or revulsion in the community;
> 6. the nature of the crime; and
> 7. the nature of the issues.

[33] Justice Mahoney went on to explain that the court must take a broad approach to the concept of a "fair trial" under s. 599:

> [10] In *R. v. Charest* (1990), 28 Q.A.C. 258, 57 C.C.C. (3d) 312, the Court of Appeal of Quebec held that when deciding whether a change of venue is warranted, courts should not restrict themselves to evaluating the impartiality of potential jurors; rather, courts should take a broader approach, at p. 348 the Court of Appeal said:
>
> > With respect, I prefer the test formulated in *Collins* to the narrower one laid down by Aikins J. in *Beaudry*. It adds to the "impartial jury" standard the additional and broader concept of a *fair trial*. In my view, a fair trial can be conducted only in a reasonably serene environment. Extensive prejudicial publicity shortly before the trial, pronounced hostility toward the accused, widespread sympathy for the victim, and a frightened or enraged community, surely create – especially in a small judicial district – the kind of emotionally charged atmosphere in which the end of justice may be best served by removal of the trial to another venue. [Emphasis in original]

[34] Therefore, while the procedural safeguards within the criminal jury system ensure a fair trial in the overwhelming majority of cases, it is still possible for an applicant to show, on a balance of probabilities, that a change of venue is required to provide a fair trial.

General Considerations

[35] In *MacNeil*, Gruchy J. determined that on a change of venue application the applicant must prove the following:

> 1. there is a reasonable probability of partiality or prejudice in the jurisdiction; and
>
> 2. a full and impartial trial cannot be held in the jurisdiction of the crime (para. 55).

[36] As noted in the defence brief, E.G. Ewaschuk's *Criminal Pleadings & Practice in Canada,* 3d ed, provides, at section 2:15, a non-exclusive list of factors both in favour of granting a change of venue and militating against such a change:

> [6] Factors that may militate in favour of granting a change of venue application include:
>
> a. The extensive adverse publicity;
>
> b. A trust fund set up for victim's family or in victim's memory;
>
> c. The small size of the community;

d. A public opinion poll of the crime;

e. Publicity of the application for change of venue;

f. The dissemination of prejudicial false information by the police;

g. The need to facilitate videoconferencing of a witness.

[7] Factors that may militate against a change of venue include:

a. The instructions of the trial judge to the jurors that the case is to be determined only on the evidence elicited at trial;

b. The oath of the jurors to the above effect;

c. The fact that only admissible evidence is permitted to go before the jurors;

d. The accused's statutory right of challenge for cause and peremptory challenges of potential jurors; and

e. Any screening and questioning of the panel and individual prospective jurors that the trial judge considers necessary.

[37] In *R. v. Fitzgerald* (1981), 61 CCC (2d) 504, [1981] OJ No 823 (ONSC), Craig J. rejected the application for a change of venue and relied on the following mechanisms to ensure the jury trial was fair:

> **29** Lastly I refer to my own unreported decision in Regina v. Ialenti (February 23rd, 1979), where I stated at pp. 5-6:
>
> "... I point out that in the trial process, there are inherent mechanisms necessary to ensure a fair trial for an accused person including:
>
> (a) the instruction of the trial judge in the ordinary course to the jurors that the case is to be determined only on evidence elicited at trial;
>
> (b) the oath of the prospective jurors;
>
> (c) the fact that admissible evidence only is permitted to go before the jury;
>
> (d) the applicant's statutory right of challenge for cause and peremptory challenges in respect of potential jurors pursuant to sections 562 and 567 of the Criminal Code; and
>
> (e) any screening of the panel that the trial judge considers necessary."

Pre-trial Publicity

[38] Mr. Greenwood says that he has established the reasonable probability of partiality among potential jurors due to the extensive publicity of his previous trials, as well as publication about his conviction for two murders in Quebec, and the details from the trials and convictions of his co-accused.

[39] In *Muise,* Kelly J. noted that a change of venue could be allowed where newspaper reports about the accused had included inadmissible evidence or information that would have been noteworthy to the average reader:

> 11…In several of the cases cited to me where a change of venue was allowed, newspaper reports about the accused had included information regarding previous criminal records or other facts that would likely have been inadmissible at trial. Further, it was normally the type of information that would likely have "stuck" in the minds of the average reader.…

[40] However, Justice Kelly also noted that a change of venue had been denied when the applicant was unable to prove that the offending media comments had not been widely publicized in the proposed alternate venue:

> 12 …In **R. v. Vaillancourt** (1973), 1973 CanLII 1476 (ON SC), 14 C.C.C. (2d) 136 (Ont.H.C.J.), a change of venue was also refused when the defence could not establish that the offending newspaper comments had not been widely publicized in the proposed alternate venue. Thompson, J. felt that, given the population of the original venue, York County, it was unlikely that an impartial jury could not be obtained. He also suggested that the nature of the offence (murder of a police officer) was likely to carry the risk of some prejudice wherever the trial was held. Similarly, a change of venue was refused from Barrie to Toronto in **R. v. Fitzgerald and Schoenberger, supra,** where the publicity was, to a great extent, province-wide and it could not be said to be pre-judgmental of the accused's guilt. Interestingly, in that case the judge held that fund-raising activities for the families of the victims (a police officer and a service station attendant) were not prejudicial.

[41] In *R. v. Stewart*, 1997 CarswellOnt 7527, [1997] O.J. No. 633, (Ont. Ct. J.), the court explained how publicity may impact the partiality of a jury in the context of purely print media:

> [7] A corollary of maturity is that ordinary people forget media reports with the passage of time: *Q. v. Suzack and Pennett* (September 12, 1994, Trainor, J.) At least two Ontario judges (Anderson, J. and Southey, J.) have invoked Billy Rose's *nostrum* for a "bad press": Newspapers end up being used to wrap herring. (Frederick and Chater, infra, and Lepage, unreported, May 3, 1985).
>
> [8] The fact that a juror may have read about the case through the media "is by and large unimportant .... In an extreme case...such publicity should lead to

> challenge for cause at trial, but I am far from thinking that it must necessarily be assumed that such publicity must necessarily be biased." (per La Forest, J. in Vermette, *supra*, at p. 530.)
>
> …
>
> [10] Pre-trial publicity alone does not suffice to establish bias. "Good sense and the weight of authority are to the contrary," according to Anderson, J. in *Reg. v. Frederick and Chater* (1978) 41 C.C.C. (2d) 532 at p. 537. As Limerick, J. said in *R. v. Alward* (1976) 32 C.C.C. (2d) 416 at p. 426-7:
>
> > There must be very strong evidence of a general prejudicial attitude in the community as a whole to justify a change of venue.

[42] The court in *Stewart* went on to note that the size of the venue matters. In smaller venues, a larger percentage of the population will have information about the case. In larger ones, the information would likely have been disseminated to a smaller percentage of the jury pool.

[43] *Muise* and *Stewart* were both decided before the internet and social media became principal sources of information. It may seem trite to mention, but news reports, as well as other forms of publicity, such as social media, are now posted online, can be accessed world-wide, and are likely to be available in perpetuity. As such, prejudicial stories have a significantly more lingering impact today than they did when *Muise* and *Stewart* were decided. News articles no longer disappear the next day. It is no longer true to say that yesterday's news is used to "wrap herring."

[44] Justice Mahoney stated in *Steinke* that negative pre-trial publicity, in and of itself, does not necessarily mandate a change of venue, referring to *MacNeil*:

> [14] There is no question that the murders of Debra, Marc and Jacob Richardson attracted a great deal of publicity, as did the trial of Steinke's co-accused. But publicity alone is not reason enough to grant a change of venue. In the case of *R. v. MacNeil (F.D.) (No. 1)* (1993), 125 N.S.R. (2d) 346 (N.S. S.C.), at para. 60, Gruchy J. said the following about publicity:
>
> > I conclude from those cases that in weighing the effect of publicity, it is a matter of degree. It is the norm to expect wide publicity in virtually any murder, and that is especially so in a case of multiple killings. The publicity in and of itself is not a ground for change of venue. It is the degree and the nature of <u>that</u> publicity in <u>that</u> community which must be examined and its effect on the potential jury panel determined. If there is an adverse effect on the accused's right to expect a fair and impartial tribunal, then the jury selection process should be considered as the first line of safety. Only when

> the publicity has extended to jeopardize that process should change of venue be considered. (Underlining in original)
>
> [15] The mere fact of sensationalist publicity does not constitute the determining factor in the decision whether or not to order a change of the location of the trial. Rather, it is a question of deciding whether this publicity is gone beyond the point where it becomes difficult to ensure "a fair trial before an impartial jury": *R. v Proulx* (1992), 1992 CanLII 3362 (QC CA), 76 C.C.C. (3d) 316 (Que. C.A.), p.356.

[45] In *MacNeil* Gruchy J. determined that pre-trial publicity of evidence that is inadmissible at trial is a relevant consideration:

> **73** I am concerned that this caveat has particular relevance here. Most of the information concerning the authors of these events in the restaurant came from the statements of Wood and Muise. That information may not be available to a jury in MacNeil's trial.

[46] In *Fitzgerald*, the court was not satisfied that the pre-trial publicity was confined to the county in which the trial would be held. The evidence established that much of the publicity was broadcast in surrounding communities on local news stations. The court was also satisfied that the population of the county, about 220,000, was large enough to mitigate potential partiality.

[47] Although not in the context of a s. 599 application, consideration of prejudicial publicity in the post-internet era was undertaken by Morrison J. in *R. v. Oland,* 2018 NBQB 253. Prior to a re-trial, the accused applied to change his mode of trial from a judge and jury to judge alone. He argued that due to prejudicial pre-trial publicity, including newspaper articles, a Wikipedia page, an episode of the television show "The Fifth Estate", several books, and social media commentary, his ability to have an impartial jury and a fair trial would be adversely impacted. News articles were exhibited on the application that discussed the alleged crime, including details that would not be admissible evidence at the retrial.

[48] Although Morrison J. found the news stories to be highly prejudicial, he concluded that there were adequate safeguards in the jury selection process to mitigate the prejudicial effect:

> 103 Admittedly, these are examples of information that is in the public domain but will not likely ever be before a jury. While such information is potentially damaging, in my view, details such as those described above are unlikely to remain in the consciousness of most readers. While potentially harmful, in my view they do not pose a serious risk of poisoning the jury pool.

…

117 I have already expressed my concerns over the publication of information that will likely not become evidence in the upcoming trial. Particularly concerning is the second part of Mr. Oland's video statement to police. Publication of such information is an important factor to be considered. However, a similar issue was before the court in *Millard (R v Millard,* 2017 ONSC 6040). After careful analysis of the facts and the law Justice Code dismissed the application. At paragraphs 16 and 17 he concludes:

> 16 Applying the above principles, I dismissed Smich's first Motion at the end of oral argument because the record before me does not rise to the level of the "demanding" and "clearest of cases" standard for *Charter* relief against trial by jury. The difficulty for Smich is that his Motion tries to anticipate or predict what will happen during upcoming jury selection procedures. He asserts that he will not be able to find 12 fair and impartial jurors, no matter how careful and thorough the jury selection process. I concede that the pre-trial publicity in this case has been damaging and that jury selection will be difficult**. I also concede that this is not merely a case of adverse pre-trial publicity relating to the present case but relating to a separate case that resulted in an earlier conviction, that included a striking item of evidence (the use of a large commercial incinerator) that will figure in the present case, and that I have excluded the evidence from the prior trial as similar fact evidence in the present trial. These factors will undoubtedly make jury selection particularly difficult.**
>
> 17 Nevertheless, the court has summonsed two very large panels of prospective jurors (there are about 800 prospective jurors in the two panels and it can be anticipated that between 400 and 600 prospective jurors will appear). In addition, I will allow a careful challenge for cause that should succeed in screening out partial jurors (as discussed below). **There have always been difficult cases in this country, with particularly bad facts and a lot of adverse pre-trial publicity, and yet fair trials with impartial juries have been feasible**. I am unwilling to admit defeat in advance by granting the present Motion, without at first making an effort to select an impartial jury. The Motion can be renewed, at a later stage, if the record presently before me changes... [Emphasis in original]

[49] Justice Morrison in *Oland* relied in part on *Millard*, wherein Code J. determined that it would be preferable to wait until jury selection to determine if re-election was necessary due to the inability to empanel an impartial jury. This is not a practical solution in relation to a change of venue application (as opposed to a re-election application), especially in the post-*Jordan* era.

[50] In *R. v. Yarema*, [1990] OJ No 2785 (SC-HCJ), Watt J. (as he then was), cautioned judges to pay particular attention to pre-trial publicity that discloses prejudicial information that would not otherwise have been known to jurors, in the context of a change of venue application based on prejudicial publicity. In commenting on the nature of the publication being of paramount importance, Justice Watt stated:

> [26] … one must be ever-vigilant to ensure that the prospect of a fair trial is not diminished by advance disclosure of prejudicial information that could not, or is unlikely to become, evidence at trial, whether on account of lack of relevance, contravention of an exclusionary canon of the law of evidence, constitutional precept, or otherwise…

[51] In *R. v. White,* 2018 ONSC 4829, the court considered the threshold for establishing potential for partiality, in the context of change of venue and challenge for cause on the basis of pre-trial publicity. Mew J. stated:

> [33] Where pretrial publicity is relied upon to establish a lack of indifference, the distinction is drawn between, on the one hand, mere publication of the facts, and on the other, misrepresentation of the evidence, wide publicity of previous discreditable conduct by the accused and speculation as to guilt or innocence: *R. v. Sherratt*, [1991] 1 S.C.R. 509, at para. 64, per L'Hereaux-Dubé J., who continues:
>
> > It may well be that the pre-trial publicity or other ground of alleged partiality will, in itself, provide sufficient reasons for a challenge for cause. The threshold question is not whether the ground of alleged partiality will create such partiality in a juror, but rather whether it could create that partiality which would prevent a juror from being indifferent as to the result. In the end, there must exist a realistic potential for the existence of partiality, on a ground sufficiently articulated in the application, before the challenger should be allowed to proceed.
>
> [34] Although the determination of whether pre-trial publicity gives rise to a realistic potential for bias amongst members of the jury pool, despite the safeguards of the trial process, is a matter for judicial discretion, the Supreme Court in *R. v. Find*, [2001] 1 S.C.R. 863, at para. 45, cautions that judicial discretion should not be confused with judicial whim. However, speaking for the Court, McLachlin C.J. continues:
>
> > If in doubt, the judge should err on the side of permitting challenges. Since the right of the accused to a fair trial is at stake, "[i]t is better to risk allowing what are in fact unnecessary challenges, than to risk prohibiting challenges which are necessary": *Williams*, supra, at para. 22.

> [35] In *R. v. Knight*, [2017] O.J. No. 5862, 2017 ONSC 6606, at para 9, the court summarised the factors that a trial judge should consider on an application such as this:
>
> a. The age of the coverage;
>
> b. The extent of the coverage; and
>
> c. The content of the coverage.

[52] In this case, the coverage spans many years, is extensive, and contains prejudicial information specifically about Mr. Greenwood, not merely the alleged crime in general.

Size of Jury Pool

[53] The presumption that the trial will take place in a "reasonably serene environment" is threatened when "the community in question is very small, and jurors may have to face persons directly interested in the outcome after the trial" (*R v Leibel*, 2000 SKQB 594, at para. 17).

[54] Courts across this country have been willing to change the venue of a trial when it is scheduled to be held in a location with an unacceptably small jury pool. For example, in *R v. Bouvier*, 2017 NWTSC 36, the court allowed the Crown's change of venue application due to the small size of the venue, in conjunction with difficulties empaneling a jury in previous trials due to high rates of absenteeism.

[55] However, the circumstances in *Bouvier* were unusual. There was evidence of eight jury trials in the previous five years, only three of which were able to empanel a jury on the first attempt. Compounding the issue of jury absenteeism were concerns about delay and the potential for large numbers of potential jurors to be excused based on familial connections to the accused.

[56] When dealing with a change of venue application, the size of the venue can have a detrimental or ameliorating effect when considering the potential prejudicial effect of factors such as pre-trial publicity. In *R. v. Genereux*, [2001] OTC 475, [2001] OJ No 2391 (Sup Ct J.), Valin J. discussed the interplay between publicity and community size:

> 20 The two most significant factors are the size of the community and the nature, extent and effect of publicity surrounding the case. The case of *R. v. Miller* [1979] O.J. No. 1008 (H.C.J.) is authority for the proposition that the size of the community must always be taken into account. In that case, Steele J. stated in [para

> 6] that the probability of prejudice or partiality in a small community is not necessarily the same as that in a large community. The inference I draw from that comment is that the chance of a change of venue is greater in a smaller community than in a large metropolitan area where there would be a substantial proportion of the jury panel who would not retain the details of newspaper articles concerning the previous trial of the accused.

[57] Kelly J. also considered the impact of community size in *Muise*:

> 15 The size of the community seems to be more of a factor where the community is very small or very large. In the latter case it generally appears that, in the absence of other specific incidents of prejudice, the presence of a large number of persons from whom to choose the jury panel may overcome any general prejudice arising from extensive publicity. On the other hand, in a very small community the opposite is more likely true; extensive publicity coupled with a small potential jury panel increases the possibility of prejudice.

[58] Similarly, in *MacNeil*, Gruchy J. noted that in a small venue there are increased dangers associated with pre-trial publicity:

> **[67]** It appears to be accepted that extensive publicity in a small community has greater impact than in a larger urban centre. (See *R. v. Miller* (1980), 12 C.R. (3d) 126) This factor, again, requires an examination of the publicity itself - its extent, fairness and truthfulness. Cape Breton County has a population of 120,000. It is the second largest county in Nova Scotia. The Crown has argued that that is a sufficient base from which to choose an impartial jury. That, however, must be judged with the impact of the publicity and nature of the community in mind.
>
> **[68]** I have added a further factor - the nature of the community itself. Cape Breton is a closeknit community. Its citizens know and care for one another. I have no legal evidence of this; but is it is a well known fact in Nova Scotia and a point for consideration

[59] Kentville draws on a potential jury pool that, in normal circumstances, is more than adequate to allow for a fair trial. Mere possibility of an unfair trial is not enough. The applicant has to show a fair and reasonable probability that an unfair trial will result if a change of venue is not ordered.

Analysis

[60] This will be a third trial for Mr. Greenwood on these charges. There are numerous widely-published news stories reporting that Mr. Greenwood was found guilty of murdering Kirk Mersereau and Nancy Christensen. These reports also suggest that Mr. Greenwood was connected to the Hells Angels, and disclose

details of inadmissible evidence that contributed to the convictions of May 2012 and February 2018. Various articles also reference the convictions of his co-accused. I am satisfied that the publication of this prejudicial information, combined with the reporting on his related convictions, repeated over the course of many years, is prejudicial to Mr. Greenwood's right to a fair trial.

[61] In *MacNeil*, the court determined that people reading published material about the co-accused's guilty pleas may associate the accused with guilt as well (at para. 18). Justice Gruchy discussed how to analyze pre-trial publicity:

> [60] I conclude from those cases that in weighing the effect of publicity, it is a matter of degree. It is the norm to expect wide publicity in virtually any murder, and that is especially so in a case of multiple killings. The publicity in and of itself is not a ground for change of venue. It is the degree and nature of that publicity in that community which must be examined and its effect on the potential jury panel determined. If there is an adverse effect on the accused's right to expect a fair and impartial tribunal, then the jury selection process should be considered as the first line of safety. Only when the publicity has extended to jeopardize that process should change of venue be considered.
>
> …
>
> [65] Each case must be decided on its own merits, considering: whether the publicity was massive, whether there were peculiar features of the case that would stay in a juror's mind, whether publicity was widespread, whether the publicity was intense and repetitive, etc.

[62] As noted, some of the older cases, such as *Muise, MacNeil, Stewart* and *Fitzgerald* were decided when news reporting was still, by and large, in print in the form of local newspapers, or through local one-time broadcasts. Since then, news reporting and commentary have shifted to online platforms, accessible in perpetuity, rather than hard-copy print versions which would be difficult or impossible to access after their initial appearance. Furthermore, the prejudicial statements in this case, identifying Mr. Greenwood as a convicted murderer, are not confined to a narrow time-frame. Instead, they were published periodically over a period of some ten years. Although there may have been a significant passage of time between the first article and the impending third trial, the continuous publication of stories does not give the passage of time an ameliorative effect. The repeated description of Mr. Greenwood as a convicted murderer over the course of ten years is possibly even more prejudicial because it reinforces Mr. Greenwood's apparent guilt over time. News reports about the co-accused Michael Lawrence and Curtis Lynds discuss their guilty pleas where they allege that there

was a third co-conspirator who carried out the murders. Those articles name Mr. Greenwood in connection with the murders. The prejudicial information that could impact Mr. Greenwood's trial is significant.

[63] One of the safeguards against potential partiality among jurors is the size of the venue. A larger population decreases the possibility of partial jurors. If there are jurors with preconceived notions about the accused's guilt, a larger jury pool allows them to be dismissed without draining the entire jury pool.

[64] As noted in *Oland*, another means of counteracting potential partiality among jury members is to summon a particularly large jury pool and to allow a challenge for cause procedure to ask jurors about their knowledge of the case and their ability to set aside any relevant knowledge.

[65] The statistics noted above demonstrate that the potential jury pool in Kentville is significantly smaller than that in Halifax, given the much smaller population base. As noted, extensive publicity in a small community has a greater impact on the potential for assembling a jury pool than it does in larger urban areas. I accept that the pre-trial publicity related to this case would have more impact in Kings and West Hants Counties because of the rural nature of those communities and the consequent sparser population, in comparison with the HRM, which is more urban and more densely populated. I also accept that the publicity contained several media stories included details that would stick out in potential jurors' minds in more rural communities, such as multiple murders connected to the Hells Angels, the murders having taken place while a baby was in the adjoining room, combined with Mr. Greenwood's reported record for two other murders.

Other Procedural Safeguards

[66] Canadian courts presume that jurors are impartial. Additionally, as noted above, the criminal jury selection process is embedded with safeguards designed to protect against jurors that may have biases that would render a trial unfair. In *R. v. Corbett,* [1988] 1 S.C.R. 670, Dickson C.J.C. confirmed that the courts must presume that jurors will proceed in accordance with their oaths:

> 38. 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.
>
> 39. It is of course, entirely possible to construct an argument disputing the theory of trial by jury. 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. Yet it is just this holding that is urged upon this Court by the appellant, for it is only this holding that can justify the conclusion that when s. 12(1) of the *Canada Evidence Act* is employed against an accused, the section infringes the accused's right to a "fair hearing".
>
> [Emphasis in original.]

[67] In *R. v Spence*, [2005] 3 SCR 458, Binnie J., stated for the court, in the context of the challenge for cause procedure (some citations omitted):

> 21 Our criminal law is premised on the ability of 12 jurors to do their job with "indifference" as between the Crown and the accused. We do not start with the idea that it is up to the potential juror to demonstrate his or her impartiality. Our procedures in this respect differ from the American approach. In this country, people called for jury duty benefit from a presumption that they will do their duty without bias or partiality...
>
> 22 Our collective experience is that when men and women are given a role in determining the outcome of a criminal prosecution, they take the responsibility seriously; they are impressed by the jurors' oath and the solemnity of the proceedings; they feel a responsibility to each other and to the court to do the best job they can; and they listen to the judge's instructions because they want to decide the case properly on the facts and the law. Over the years, people accused of serious crimes have generally chosen trial by jury in the expectation of a fair result. This confidence in the jury system on the part of those with the most at risk speaks to its strength. The confidence is reflected in the *Charter* guarantee of a trial by jury

> for crimes (other than military offences) that carry a penalty of five years or more (s. 11(f)).

[68] Our entire jury system rests on the presumption that jurors are intelligent, responsible and will follow trial judges' instructions. Jury instructions offer one clear method to address the potential for bias or partiality. In *Corbett,* at para 45, Lamer C.J., quoted with approval the following passage from *R. v. Lane and Ross*, [1970] 1 CCC 196, 1969 CarswellOnt 13 (SC):

> 18 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, and what has been regarded for centuries as a bulwark of our democratic system and a guarantee of our basic freedoms under the law would in fact be nothing less than a delusion.

[69] In *R. v. Chouhan*, 2021 SCC 26, Moldaver and Brown JJ. discussed bias and partiality, and, more specifically, the court's ability to address potential jury bias by means of jury instructions:

> [48] Although our jury system depends on the impartiality of each juror, it does not demand that jurors be neutral. This Court explained the distinction between impartiality and neutrality in *R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863, at para. 43:
>
> > Impartiality does not require that the juror's mind be a blank slate. Nor does it require jurors to jettison all opinions, beliefs, knowledge and other accumulations of life experience as they step into the jury box. Jurors are human beings, whose life experiences inform their deliberations.
>
> But the life experiences that jurors may legitimately bring to their deliberations cannot interfere with their responsibility to approach the case with "an open mind, one that is free from bias, prejudice, or sympathy" (*R. v. Barton*, 2019 SCC 33, at para. 195).
>
> [49] In our view, jury instructions have a critical role to play in ensuring that jurors approach their deliberations free from bias. Jury instructions can respond to a significant danger of biased reasoning, which is that many biases are unconscious: individuals often do not recognize they hold a particular bias and would likely, and

> honestly, deny having it if asked… And jurors must be made aware of their own unconscious biases if the influence of biased reasoning is to be eliminated… In appropriate cases, therefore, trial judges should consider providing the jury with instructions that will "expose biases, prejudices, and stereotypes that lurk beneath the surface, thereby allowing all justice system participants to address them head-on — openly, honestly, and without fear" (*Barton*, at para. 197). Such instructions can add a measure of self-consciousness and introspection that fosters objectivity and fairness over the course of the jury's deliberations...
>
> [50] Anti-bias instructions will be appropriate wherever "specific biases, prejudices, and stereotypes . . . may reasonably be expected to arise in the particular case" (*Barton*, at para. 203). This is not because of some freestanding notion or interpretive principle of "substantive equality", as our colleague Martin J. suggests (at para. 110), but because impartiality is inherently attuned to the concept of bias. As our understanding of the nature of bias evolves, so will our understanding of what a trial judge must do to foster impartiality among members of the jury. Informed by recent case law and a modern understanding of impartiality, trial judges may therefore draw on their own professional experiences and good sense in deciding whether anti-bias instructions are required, and the submissions of counsel will be helpful in identifying appropriate cases for such instructions. The reality is that context matters: no trial "take[s] place in a historical, cultural, or social vacuum" (*Barton*, at para. 198). Participants in the justice system must remain vigilant in identifying and addressing the unconscious biases that might taint the integrity of jury deliberations.

[70] In *R. v. Find*, [2001] 1 S.C.R. 863, McLachlin C.J. emphasized the presumption that jurors, like judges, can set aside bias and perform their task impartially:

> 26 The Canadian system of selecting jurors may be contrasted with procedures prevalent in the United States. In both countries the aim is to select a jury that will decide the case impartially. The Canadian system, however, starts from the presumption that jurors are capable of setting aside their views and prejudices and acting impartially between the prosecution and the accused upon proper instruction by the trial judge on their duties. This presumption is displaced only where potential bias is either clear and obvious (addressed by judicial pre-screening), or where the accused or prosecution shows reason to suspect that members of the jury array may possess biases that cannot be set aside (addressed by the challenge for cause process). The American system, by contrast, treats all members of the jury pool as presumptively suspect, and hence includes a preliminary *voir dire* process, whereby prospective jurors are frequently subjected to extensive questioning, often of a highly personal nature, to guide the respective parties in exercising their peremptory challenges and challenges for cause.

[71] In *Corbett* the issue involved limiting the details of an accused's criminal record and providing clear instructions to the jury regarding the limited reliance on the record when arriving at a verdict. This is not the same as the concern that members of the jury pool could be so tainted, having been exposed over many years to reports about Mr. Greenwood's previous findings of guilt, suggesting a propensity for murder, as well as reports that include inadmissible evidence, that the concern about misuse of propensity reasoning cannot be defeated by a jury instruction. In *R. v. Last*, 2009 SCC 45, Deschamps J, for the court, determined that some prejudice created by a failure to sever cannot be cured by a limiting instruction:

> [45] While the Crown argued that it was open to the trial judge to decide that a proper jury instruction can overcome any potential prejudice to Mr. Last, I agree with the dissenting judge below that this should be done only where there are sufficient countervailing factors providing a rationale for a joint trial:
>
> > Here, the countervailing factors in favour of trying these two sets of charges together were negligible and the reasons to sever were compelling. As a result, this was not a case to attempt to address the risk of prejudice by a jury instruction. [para. 155]
>
> [46] Indeed, if a proper jury instruction were all that was needed to deal with potential prejudice to the accused, then prejudice would in a sense cease to be a relevant factor in the analysis. While a limiting instruction can *limit* the risk of inappropriate cross-pollination or propensity reasoning, courts should not resort to a limiting instruction unless there is a valid reason to do so. As with the accused's intention to testify, the limiting instruction is but one factor in the balancing exercise.
>
> [47] As previously stated, all the factors must be considered and weighed cumulatively. Here, most of the factors militated in favour of separate trials. Consequently, the significant risk of prejudice to the accused clearly outweighed any benefits to the administration of justice in trying the counts together. Failing to conduct a proper balancing of the relevant factors, the trial judge made an unreasonable decision. I therefore conclude that the trial judge acted unjudicially and that intervention is warranted.
>
> [Emphasis in original.]

[72] In *R. v. Rarru*, [1996] 2 S.C.R. 165, Sopinka J., for the court, adopted the dissenting decision of Rowles J.A., in the British Columbia Court of Appeal (62 B.C.A.C. 81), respecting whether a limiting jury instruction would be an adequate substitute for severance. Justice Rowles said:

> **139** While the trial judge did instruct the jury that it should treat the counts involving each complainant separately, I question whether it was realistic to assume that the jury, when arriving at a verdict on those counts involving one complainant, could disregard the substantial body of evidence given by the other complainants. The jury had plainly heard the evidence, and because it was evidence of propensity, there was obviously a potential for its misuse.
>
> **140** When the trial judge concluded that the "similar fact" evidence was inadmissible, a severance of counts was no longer an option. Considering the way in which the Crown's case had been presented, and the highly prejudicial nature of the "similar fact" evidence, I am of the view that a mistrial was probably the only safe alternative, because the possibility of a miscarriage of justice could not be excluded, regardless of the instructions which could be given in the trial judge's charge.
>
> **141** Appellant's counsel did not move for a mistrial, however, and the trial judge appears to have assumed that proper instructions would suffice.

[73] Therefore, despite the fact that our jury system is premised on the ability of jurors to follow judicial instructions, there are situations where a limiting jury instruction will not be sufficient to eradicate potential prejudice to the accused.

[74] As noted above, in addition to jury instructions, another safeguard noted in caselaw and by academic authors is the challenge for cause process. Section 638(1) of the *Criminal Code* allows unlimited challenges to jurors based on partiality. In theory this safeguard should eliminate jurors who are biased. In *Find*, the court considered juror partiality in the context of a challenge for cause:

> 32 As a practical matter, establishing a realistic potential for juror partiality generally requires satisfying the court on two matters: (1) that a widespread bias exists in the community; and (2) that some jurors may be incapable of setting aside this bias, despite trial safeguards, to render an impartial decision. These two components of the challenge for cause test reflect, respectively, the attitudinal and behavioural components of partiality…
>
> 33 These two components of the test involve distinct inquiries. The first is concerned with the existence of a material bias, and the second with the potential effect of the bias on the trial process. However, the overarching consideration, in all cases, is whether there exists a realistic potential for partial juror behaviour. The two components of this test serve to ensure that all aspects of the issue are examined. They are not watertight compartments, but rather guidelines for determining whether, on the record before the court, a realistic possibility exists that some jurors may decide the case on the basis of preconceived attitudes or beliefs, rather than the evidence placed before them.
>
> [Emphasis in original.]

[75] In *Chouhan*, Moldaver and Brown JJ., writing for the majority, discussed the modest burden on a party seeking to use a challenge to establish bias:

> [62] While widespread bias cannot be presumed in all cases, the parties do not face an onerous burden for raising a challenge for cause. The accused person or the Crown must merely demonstrate a reasonable possibility that bias or prejudicial attitudes exist in the community, with respect to relevant characteristics of the accused or victim, and could taint the impartiality of the jurors. In most cases, expert evidence will not be necessary: challenges for cause must be available wherever the experience of the trial judge, in consultation with counsel, dictates that, in the case before them, a realistic potential for partiality arises. The trial judge necessarily enjoys significant discretion to determine how and under what circumstances the presumption of impartiality will be displaced, and how far the parties may go in the questions that are asked on a challenge for cause…

[76] The effective use of jury instructions, even for bias as deeply ingrained as prejudice and stereotypes, was discussed in *Chouhan*:

> [49] In our view, jury instructions have a critical role to play in ensuring that jurors approach their deliberations free from bias. Jury instructions can respond to a significant danger of biased reasoning, which is that many biases are unconscious: individuals often do not recognize they hold a particular bias and would likely, and honestly, deny having it if asked … And jurors must be made aware of their own unconscious biases if the influence of biased reasoning is to be eliminated… In appropriate cases, therefore, trial judges should consider providing the jury with instructions that will "expose biases, prejudices, and stereotypes that lurk beneath the surface, thereby allowing all justice system participants to address them head-on -- openly, honestly, and without fear" (*Barton*, at para. 197). Such instructions can add a measure of self-consciousness and introspection that fosters objectivity and fairness over the course of the jury's deliberations (Su, at p. 90).
>
> [50] Anti-bias instructions will be appropriate wherever "specific biases, prejudices, and stereotypes ... may reasonably be expected to arise in the particular case" (*Barton*, at para. 203). This is not because of some freestanding notion or interpretive principle of "substantive equality", as our colleague Martin J. suggests (at para. 110), but because impartiality is inherently attuned to the concept of bias. As our understanding of the nature of bias evolves, so will our understanding of what a trial judge must do to foster impartiality among members of the jury. Informed by recent case law and a modern understanding of impartiality, trial judges may therefore draw on their own professional experiences and good sense in deciding whether anti-bias instructions are required, and the submissions of counsel will be helpful in identifying appropriate cases for such instructions. The reality is that context matters: no trial "take[s] place in a historical, cultural, or social vacuum" (*Barton*, at para. 198). Participants in the justice system must

> remain vigilant in identifying and addressing the unconscious biases that might taint the integrity of jury deliberations.
>
> ...
>
> [54] Trial judges should exhort jurors to approach their weighty task with a heavy dose of self-consciousness and introspection. Jurors must identify and set aside prejudices or stereotypes when considering the evidence of any given witness and when reaching a verdict…

[77] In *R v Munson*, 2003 SKCA 28, [2003] SJ No 161, the court dismissed a change of venue application and held that a challenge for cause was an appropriate procedural safeguard. The court approved the following questions to be asked of potential jurors related to the pre-trial publicity, at para. 23:

> 1. Have you formed any opinion regarding the guilt or innocence of the accused on the basis of the media coverage or any other source of information to date?
>
> 2. Would you be able to disregard your previous knowledge derived from all other sources, and base your decision in this trial solely on the evidence in this case?

[78] In *Munson,* the accused had applied for a change of venue from Saskatoon, with a population of approximately 250,000, to Swift Current or Estevan where the population was only 25,000. The court noted that the pre-trial publicity was province-wide, so a change in venue would not mitigate against potential prejudice.

[79] However, every challenge must be adapted to address the unique circumstances of each case. The practical limitations of a challenge for cause during a re-trial were discussed by Valin J. in *Genereux*:

> [32]…
>
> > (ii) I believe that, on a re-trial of the accused in Timmins, the jury will know that the accused was found guilty of first-degree murder in the first trial.
> >
> > (iii) A newspaper editorial published after the verdict was handed down in the first trial, begins with the words: "Justice has been done." The editorial expresses a very blunt and judgmental opinion in these words: "There have been countless stories in the media the last several years about criminals who have received early parole, only to turn around and pull the trigger on someone ... Canadians have collectively said: Enough is enough, and Joel Genereux, 22, found himself on the receiving end of this outrage Wednesday when a jury of five women and seven men found him guilty of first degree murder in the killing of Melissa Mallet, 8 ... She was not struck down by leukaemia or any number of other childhood maladies. She was

> murdered, stabbed 180 times by a young man who towered over her small frame ... And as a result, the 12 good citizens on the jury clearly felt Genereux's life, as he knew it, should also end. A first-degree murder conviction mandates 25 years in prison with no chance of parole. There is nothing to gloat about here. A little girl is dead, two sets of parents are heartbroken, and a young man's life is effectively over. We can only take solace in the knowledge that justice has been done."
>
> (iv) One of the safeguards listed in *Fitzgerald* and *Schoenberger (supra)* is the accused's constitutional right to an unlimited number of challenges for cause based on partiality. Despite a realistic possibility of partiality on the part of potential jurors, in most cases the granting of challenge for cause to test jurors for partiality may avoid the need to change the venue of the trial. However, I agree with defence counsel that it would be extremely difficult, if not impossible, to develop questions in this case that would not raise in the minds of the jury the previous finding of guilty of first-degree murder or the disclosure of the inadmissible evidence given by Dr. McDonald.
>
> …

[80] Similarly, Mr. Greenwood has already been found guilty of these charges twice by juries in Kentville. There has been extensive coverage of the trials and numerous publications and online sources identifying Mr. Greenwood as one of the murderers. In the previous trials inadmissible evidence was put before the jurors. In order to challenge their partiality and see if their opinions have been tainted by the media coverage and the disclosure of inadmissible evidence, a detailed challenge for cause carries the risk of drawing the jurors' attention to the impugned information. With the trial taking place in Halifax, it is anticipated that if a challenge for cause is undertaken it will be less likely to exhaust the jury pool, in these specific circumstances.

[81] In this case, I do not believe that challenge for cause or jury instructions will provide sufficient procedural safeguards to ensure that Mr. Greenwood has a fair trial, considering the nature and extent of the pre-trial publicity, combined with the smaller jury pool in Kentville, and the fact that this is a third trial. In other words, Mr. Greenwood has shown, on a balance of probabilities, that it is probable, or more likely than not, that he will not have a fair trial if it is held in Kentville for the third time.

Conclusion

[82] A change of venue is a rare event. In *almost* every situation, the built-in safeguards in the criminal justice system, including, but not limited to, challenge

for cause and jury instructions, will be more than adequate to ensure fair trial rights are protected. Nonetheless, there are highly unusual circumstances in which an applicant will be able to show on a balance of probabilities that a s. 599 change of venue is necessary.

[83] Mr. Greenwood is facing retrial #2, which means trial #3, for a notorious double homicide, in which a husband and wife were shot to death in close proximity to their infant child. It is alleged to have been a Hells Angels contract hit. The co-accused had separate trials in which Mr. Greenwood was implicated. Inadmissible details were elicited in evidence, and publicly reported, in Mr. Greenwood's two previous trials. He was convicted both times. Mr. Greenwood was convicted of two murders in Quebec. All of this was widely and repeatedly publicized for over a decade. The first two trials took place in Kentville, a relatively small town and small judicial district, population-wise, providing a much more limited jury pool than Halifax.

[84] As a result, the applicant, Leslie Greenwood, has proven on a balance of probabilities that he cannot have a fair trial in Kentville. Therefore, his application for a change of venue from Kentville to the Halifax Regional Municipality in accordance with s. 599(1)(a) of the *Criminal Code* is granted.

Arnold, J.