

CANADA / JUDGMENT

R. v. Ali

2023 BCSC 2438**COURT**

Supreme Court of British Columbia

DECIDED

7 March 2023

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2023 BCSC 2438 R. v. Ali

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Ali,

2023 BCSC 2438

Date: 20230307

Docket: 29405

Registry: Vancouver

Rex

v.

Ibrahim Ali

Restriction on Publication: Pursuant to s. 486.4(2.2) of the Criminal Code of Canada, any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

Restriction on Publication: Pursuant to s. 486.5(9) of the Criminal Code of Canada, no person shall publish in any document or broadcast or transmit in any way, the contents of the application made pursuant to s. 486.5(1); any evidence taken, information given or submissions made at a hearing under subsection 486.5(6); or any other information that could identify the person to whom the application relates as a victim, witness, or justice system participant in the proceedings.

Before: The Honourable Mr. Justice Bernard

Oral Ruling re Abuse of Process

Counsel for the Crown:

D.J. Porte

I. Keeley

Counsel for the Accused:

K. McCullough

B. Lynskey

Place and Date of Hearing:

Vancouver, B.C.

November 3-4, 14-18, 21-25, 28-30, December 1, 5-6, 12, 2022

Place and Date of Judgment:

Vancouver, B.C.

March 7-8, 2023

A. Introduction

- [1] The accused, Ibrahim Ali, is on trial for the first-degree murder of 13-year-old MS. The charge arises from the discovery by police of MS's lifeless body in a wooded area of Central Park in Burnaby, B.C., at 12:45 a.m. on July 19, 2017, within hours of when she was last seen alive and well. From the evidence at the scene and from the autopsy, the police theory was that MS had been attacked while on a trail and then dragged into the woods where she was raped and killed.
- [2] The post-mortem examination revealed, inter alia, the presence of semen in MS's vagina and anus. DNA from the semen (the "Male 1" sample) was the only evidence of the identity of MS's assailant, and this remained so for the next 13 months of an intensive police investigation focused in finding the match to the Male 1 sample. The investigation included gathering consent and cast-off DNA samples, with a focus on the local Kurdish community. This focus came from a DNA "Snapshot" ancestry report regarding Male 1, conducted by an American DNA laboratory ("Parabon"), showing that Male 1's DNA most closely matched people in its DNA databank who were of Kurdish heritage.
- [3] In August 2018, the police identified Ibrahim Ali as a suspect. This arose from a forensic scientific DNA comparison, performed by Parabon, between a cast-off DNA sample obtained in a police undercover operation at a Kurdish New Year's celebration, and Male 1's DNA. Parabon reported a strong likelihood that the cast-off sample came from a full brother of

Male 1. The cast-off sample was from a man named Chamdin Ali, and the investigators were quickly able to determine that he had a brother, Ibrahim Ali, living in Burnaby. They placed Ibrahim Ali under covert surveillance and obtained a cast-off sample of his DNA from a cigarette butt he discarded. This sample was analyzed as virtually an exact match to Male 1, and on September 7, 2018, Mr. Ali was arrested and charged with MS's murder.

- [4] In the instant pre-trial application, Mr. Ali seeks a judicial stay of proceedings based on an alleged abuse of process in relation to the collection and analysis of DNA during the investigation. He submits that, "[g]iven how intertwined the abuse is with the evidence in this case, there is no remedy other than a stay that would be appropriate." He advances his abuse of process claim under s. 7 of the Charter and relies upon the residual category of abuse of process: i.e., state conduct that creates no threat to trial fairness, but risks undermining the integrity of the judicial process. Mr. Ali particularizes his abuse of process claim as follows.

The investigative step at issue on the abuse of process application is the use of Parabon's Snapshot technology by the police to focus the investigation on the Kurdish community. The applicant alleges that the use of this technology and the consequent police investigation that ensued and necessarily ensues from the use of this manner of technology undermines the confidence in and integrity of the justice system. There are several aspects to this argument:

- (a) First, the applicant will argue that the DNA techniques purported to be used in this case, "genetic genealogy" and "genomic ancestry," are tools that, without limits and proper regulation, obliterate the concept of privacy. The applicant will argue that reasonable limits must be placed on the use of these technologies as, unchecked, the implications for privacy, particularly the privacy and surveillance of minority groups, are Orwellian.
 - (b) Second, the applicant will argue that the use of Parabon in this specific case represents the application of a flawed science. The applicant will argue that the use of unsupportable science to justify any investigation would shock the conscience of the community.
 - (c) Third, the applicant will argue that the practical realities of the police using Parabon in this case meant that they were losing stewardship of the DNA of the persons they collected it from. Specifically, they sent the DNA of persons of Kurdish background to the United States where their privacy and protections are lost.
 - (d) Finally, the applicant will argue that he does, in fact, have standing in respect of his familial DNA that was collected in the course of this investigation on the basis of informational privacy and that his rights were breached by the foregoing.
- [5] The Crown opposes Mr. Ali's application. Its ultimate position is, essentially, that Mr. Ali has failed to meet the onus he bears to establish any measure of abuse of process, let alone such that it would meet the onerous test for a judicial stay of proceedings.

- [6] For the reasons that follow, I am not persuaded that Mr. Ali has met the burden he bears. Accordingly, this application for a stay of proceedings based on abuse of process is dismissed.

B. Background/Evidentiary Synopsis

- [7] Within the Crown's written submission is a fair and helpful synopsis of the background, investigative chronology, voir dire evidence, and admitted facts, germane to the instant application. I adopt this synopsis here for the purposes of this ruling:

Facts

10. Shortly after 12:45 am on July 19, 2017, the police located the deceased body of [MS] ("the victim") in a heavily forested area of Burnaby Central Park. The factual circumstances surrounding her death are set out in detail in the Agreed Statement of Facts which was filed as Exhibit 11 on this Application. The police believed, based on the scene and the surrounding circumstances, that the victim had been killed in the course of a sexual assault and that the same person who sexually assaulted her had also killed her. The circumstances included the location and positioning of her body, the location of her wallet, cell phone and headphones in relation to her body, the arrangement of her clothing (partially exposing a breast as well as her pubic area), the injuries observed to her body, vagina and anal passage and the fact that semen was identified in her vagina and anus.
11. The RCMP National Forensic Laboratory Services ("NFLS") analyzed swabs from the victim's vagina and anus and determined that they originated from two individuals, [MS] and an unknown male designated as "Male 1". The Male 1 profile did not match any profiles in the National DNA Databank.
12. The murder was investigated by the RCMP Integrated Homicide Investigation Team ("IHIT"). The initial investigation included: an extensive crime scene examination and collection of exhibits; interviews of hundreds of people who were in and around the park on July 18, including film crew members; canvassing neighbourhood residents; collecting hundreds of DNA samples by consent or through cast-off; retrieving hundreds of hours of CCTV video from neighbouring residences and businesses as well as transit buses; and setting up a tip line (also see Agreed Statement of Facts). In the ensuing weeks and months, the Male 1 profile was sent to various countries including the USA through Interpol, for comparison within their national DNA databases, but no matches were identified.
13. The Male 1 sample became the key piece of evidence in the investigation. The command triangle believed that if they could determine the physical characteristics of the perpetrator, that would allow them to narrow the suspect pool by being able to include or exclude possible suspects. At the outset, every male within reasonable proximity to the Lower Mainland, whose DNA profile was not in the convicted offender index of the National DNA Databank, was a potential suspect. Accordingly, within days of receiving NFLS Report #1, the

police contacted Hiron Poon, technical operations and team leader in the DNA unit of the local RCMP NFLS lab. They asked Mr. Poon whether there was further forensic testing that could be done in order to ascertain the possible biogeographical ancestry of the Male 1 sample. Mr. Poon advised the police that phenotype testing could be conducted to determine biogeographical ancestry as well as physical traits. Since the local NFLS lab did not have the ability to conduct phenotype testing, he suggested that the police consider using Parabon NanoLabs ("Parabon"), as he was aware that the Vancouver Police Department ("VPD") had recently utilized Parabon's phenotype testing on a file. He had also attended a Parabon presentation on their "SNP" (single nucleotide polymorphism) technology some years prior. Mr. Poon testified that some of the phenotype procedures which Parabon uses had been published and peer reviewed and were accepted in the scientific community. He accepted the validity of the technology involved and the principles behind the science. However, he did not fully understand Parabon's procedures nor was he technically trained in SNP technology.

14. Insp. (then Sgt.) Matthew Turner then spoke with the VPD detective who had dealt with Parabon and who provided a positive reference. Insp. Turner and other command triangle members also searched and reviewed Parabon's website and conducted their own research, in an attempt to determine the validity of the science of genotyping and phenotyping. They were impressed with Parabon's success with helping to solve cold cases and other challenging police investigations in the USA. Based on the information they had, the police believed that phenotyping, to determine physical traits, and biogeographical (genomic) ancestry, were peer reviewed areas, sound in science, and reliable. Insp. Turner testified that it was "the single best tool that we had, the absolute best option at that point in time". Accordingly, they arranged for a portion of the Male 1 sample to be sent to Parabon, located in Virginia, USA, for phenotyping and biogeographic ancestry analysis.
15. Mr. Poon, Christine Crossman and a number of police witnesses testified that there was nothing unusual in their experience in sending biological samples to either private labs in Canada or in the USA or elsewhere for testing, where the technology/capacity was not available locally. Ms. Crossman explained that the RCMP NFLS lab only offers the most common type of testing for the most common types of cases. Mr. Poon specifically referenced the testing of mitochondrial DNA, which could not be done at the NFLS lab and thus biological samples would be sent elsewhere for testing, including to the USA. Insp. (then Staff-Sgt.) Adam Gander cited an example of a firearm being sent to Chicago, USA, as part of a police investigation for purposes of extracting DNA from the firearm. Mr. Poon and Ms. Crossman both testified that they understood it was not contrary to the provisions of the DNA Identification Act, which governs only the National DNA Databank, to do so.
16. Christine Crossman testified that she is the local CODIS Administrator, responsible for uploading data to the relevant indices of the local DNA Databank as well as the National DNA Databank. The latter has stricter criteria for the uploading of DNA profiles. As the local CODIS Administrator, Ms. Crossman is required to be very familiar with the DNA

Identification Act. The DNA Identification Act governs the National DNA Databank and sets out what samples can be collected and what they can be used for. There are privacy protections in the Act pertaining to the convicted offender index. Familial/kinship searching within that index is not permitted. The Act applies specifically to the National DNA Databank and not to forensic biology in general. In other words, it does not apply to or regulate DNA profiles which are not submitted to that databank.

17. Parabon analyzed the Male 1 crime scene sample using SNP technology. SNP stands for single nucleotide polymorphism. SNP technology is a form of DNA analysis which compares variations in a locus of a genome. Ms. Crossman testified that predicting phenotype traits such as hair, eye, skin colour and freckling, as well as predicting biogeographical ancestry through SNP testing is a peer reviewed area and is sound in science. Phenotyping cannot be determined through STR testing, which uses non-coding DNA. The loci selected for STR testing are not associated to specific traits. Ms. Crossman explained that the local RCMP lab only uses STR/Y-STR markers and sex for DNA analysis. The NFLS only began using Y-STR markers for testing in recent years. Ms. Crossman explained that the reason for NFLS using STR markers is simply "historical", as those are the markers which the lab has used for the past 20 years. They are "reliable and robust" for the purposes for which they are required. However, she also testified that the RCMP biology program in Ottawa has since validated a SNP kit for use in phenotype testing, to predict certain physical characteristics such as hair colour, eye colour and "broad scope" biogeographical ancestry. SNP technology is also utilized for DNA testing by other labs in Canada and elsewhere.
18. On August 16, 2017, Parabon issued the "Parabon Snapshot Phenotype Report" ("the Report") which has been marked as Exhibit 1 in these proceedings. The phenotype predictions for skin, eye, hair colour and freckling are set out in detail in the Report and can be summarized as follows:
 - Skin colour: The subject likely has light brown or fair skin with 77.4% confidence and does not have either dark brown skin colour with 99.99% confidence, or brown skin colour with 96.3% confidence;
 - Eye colour: The subject has brown or hazel eye colour with 97.5% confidence and does not have green eye colour with 97.5% confidence or blue eye colour with 99.6% confidence or black eye colour with 99.99% confidence;
 - Hair colour: The subject has black hair darkness with 99.8% confidence and does not have brown hair darkness with 99.8% confidence or blond hair darkness with 99.99% confidence;
 - Freckles: The subject has zero freckles with 92.5% confidence and does not have few freckles with 92.5% confidence, or some or many freckles with 99.99% confidence.

19. The Report also provided a Genomic Ancestry Prediction Result for the subject, concluding that the genome for this subject best matches North Middle Eastern ancestry. Further, in the Snapshot database of subjects with verified ancestry, the subject "closely matches" 151 subjects of which 146 were North Middle Eastern subjects. Among those, 9 were "extremely close matches" representing 8 Kurdish subjects and 1 Kurd Jewish subject.
20. The Report also provided a "Facial Morphology" prediction, essentially a predicted face composite generated using sex, ancestry and thousands of SNP genotypes. The composite used an estimated age of 25 and a "normal" body mass index of 22. Page 9 of the Report, in the section entitled "Limitations and Intended Use", states the following:

Snapshot Materials are intended to help investigators operate more efficiently, for example, by narrowing a suspect list through phenotype exclusion or generating leads by jogging witness' memories. Snapshot composites are provided as approximations of appearance that summarize predicted ancestry and phenotypes. Because many environmental influences can affect an individual's appearance that are not contained within DNA (and thus cannot be predicted through DNA phenotyping), Snapshot composites cannot be expected to represent a subject's exact appearance. Such environmental influences on an individual's appearance include, but are not limited to age, weight, scars, exposure to smoking, exposure to sun, tattoos, hairstyles and presence of facial hair.

21. Based on their review of the Report and taking into account all of the information they had learned, members of the command triangle believed that it provided accurate and reliable predictions for phenotyping, namely hair, eye and skin colour, as well as biogeographical ancestry. They were concerned that the composite profile picture was not sufficiently reliable to be of investigative value and accordingly chose not to rely on it.
22. Insp. Gander subsequently sought and received confirmation via an email from a McMaster University genetics professor, Dr. Guillaume Pare, that biogeographical ancestry and sex can be determined through genetic phenotyping with a very high level of accuracy; and that hair, eye and skin colour can be reasonably determined. Dr. Pare suggested that predicted facial appearance (i.e., facial morphology) be approached with caution. Insp. Gander testified that he felt more confident regarding predictions of physical traits and ancestry after receiving the email from Dr. Pare; and that the email also confirmed the command triangle's reservations about the reliability of facial morphology.
23. Dr. Benedikt Hallgrimsson agreed in his testimony that the science surrounding phenotyping predictions of skin pigmentation, eye colour and hair colour from DNA is scientifically sound and well validated. He testified that he would have liked to see an error rate in the Report, but agreed that without the underlying data, he was not able to comment on the accuracy of the predictions within the Report. He testified that on the available information in the Report, the predictions supported that the subject would likely not have blue, green or black eyes, red or blonde hair, freckling, or very dark skin. He agreed that it was likely that the subject would have "very dark" hair and brown/brown-hazel eyes. Dr.

Hallgrimsson also agreed that Parabon's SNP analysis using 850,000 markers was fairly comprehensive and sufficient for the phenotyping for physical traits reported on in this case.

24. The only portion of the Report that was not scientifically validated, according to Dr. Hallgrimsson, was the facial morphology. He testified that, through genomic testing, a prediction of an average facial shape could be generated but that it is difficult to be specific; it is an approximation that may be right or wrong and environmental factors such as health, nutrition and smoking may play a role. The command triangle was alive to these limitations and did not rely on the facial composite picture.
25. With respect to Parabon's biogeographical ancestry predictions, Dr. Hallgrimsson testified that he agreed that the sample size detailed on p. 6 of the Report was in fact larger than it appeared to be at first glance and that the database included 30 Kurdish subjects and 10 Jewish Kurd subjects (as opposed to 8 and 1). He maintained his concern about a sample size of 30 because he said it would not capture the rare allele frequencies, which in his view would impact on the accuracy of the result. However, he agreed that he was reasonably confident that the North Middle East was the correct biogeographical ancestral area for the subject. He also agreed that the 146 people of North Middle Eastern ancestry are the closest ancestral matches to the donor sample. He clarified that in a 15-dimensional plot (which is the way he believes this should be plotted), the Kurdish people would be the closest or among the closest individuals to the donor sample.
26. Dr. Hallgrimsson testified that Parabon had not submitted their method of analysis for peer review. However, he agreed that private companies often do not do so and that factor alone does not mean that their methodology is not valid.
27. Various command triangle members testified that any phenotyping or biogeographical ancestry predictions would have been helpful, regardless of what those results showed. For example, if the phenotype prediction was European, blond-haired and blue eyed, that would also have assisted the investigation by narrowing the suspect pool. Sgt. (then Cpl.) Robert Kee testified that if the predicted population group was small, that gave the investigation team a better chance of success; but said that even it was a larger population group, that would also have assisted the investigation, although it would have changed the approach. Insp. Turner explained that any known physical characteristics such as hair or eye colour are important, as they allow investigators to give more priority to people who have those characteristics and lower priority to those that do not. Insp. Turner described the predicted physical characteristics as being a "massive advantage" as a tool in the investigation.
28. From the outset of the investigation, the police had been compiling a Person of Interest (POI) list which contained the names of men, any one of whom the police believed could be responsible for the victim's murder. While not strictly "suspects", the investigative team was operating on the belief that anyone on the POI list could potentially be the person who killed [MS]. Investigative team members were tasked with combing through Prime Reports,

interviews, tip-line information and open-source materials and adding selected names to the POI list. Team investigators were tasked with interviewing the many hundreds of individuals on the POI list. In consultation with the Behavioural Sciences Unit, the command triangle also introduced the POIPAT (Person of Interest Priority Assessment Tool) to the POI list. POIPAT contained scoring criteria customized to the investigation. The scoring included various factors such as proximity of residence to Burnaby Central Park/ resident in the Lower Mainland, frequency of visits to the park, age, criminal history, post-offence behaviour, use of public transit. Each name on the POI list was run through the POIPAT and a score assigned. Individuals with high POIPAT scores were prioritized for interviews, DNA collection, and DNA testing. As Sgt. Turner explained, POIPAT was the "engine which drove the investigation", as it determined the prioritization to be given to each individual and investigative step. POIPAT was introduced to bring order and methodology to the POI list, and it allowed for an objective, consistent and transparent approach. By the conclusion of the investigation, there were approximately 2,041 names on the POI list.

29. The command triangle members initially understood from the Report that the donor of the Male 1 sample was of North Middle Eastern ancestry. Their investigative efforts had been focused broadly, but not exclusively, on males who they believed matched the ancestry and the phenotype traits predicted in the Report. During a telephone conversation with Parabon head scientist Dr. Ellen Greytak and Kaitlin Echols (Snapshot Case manager), on Sep 18, 2017, the police learned that the Report in fact identified that the closest ancestry match to the Male 1 sample was Kurdish. The police also learned that the database was made up of 10,000 individuals, with verified ancestry, from around the world. Based on the information learned from Parabon, members of the command triangle believed that the suspect was likely of Kurdish ancestry.
30. Accordingly, the police decided to focus more of their resources on investigating individuals who either identified as Kurdish or were believed to be of Kurdish ancestry. However, they were mindful that "Kurdish" is an ancestral group as opposed to a country. Kurdish people may come from countries including Iraq, Iran, Syria or Turkey. Some individuals may, for a variety of reasons, not self-identify or be identified as Kurdish. Some individuals may not even know that they are of Kurdish ancestry. Sgt. Kee also explained that it is not possible to visually differentiate between an ethnically Kurdish person, or an ethnically Turkish person, when you are walking down the street. The command triangle was also mindful that there may be a margin of error in the Parabon results. They testified that they were therefore careful to maintain a broader focus on Middle Eastern ancestry. The POIPAT scoring was adjusted to include a supplemental score for people known to be, or believed to be of Kurdish ancestry, in addition to scores for North Middle Eastern ancestry and the phenotype traits predicted in the Report. However, as Sgt. Kee pointed out, if a Kurdish person from Chilliwack had no criminal history, he would expect the POIPAT score to be low and they would not "jump ahead" of someone with other scoring characteristics who was not Kurdish. Likewise, a person who did not have black hair would likely be prioritized quite low, as would someone with two phenotype features which did not match the Report's predictions,

given the statistical improbability of that person being the donor of the Male 1 sample. As he explained, the science played a very significant role in the investigation. The police followed the science, but they also considered other factors.

[Insp. Turner; Sgt. Kee)

31. Sgt. Kee testified that the command triangle considered going public with the Snapshot Report phenotype and biogeographical ancestry predictions at an earlier point in the investigation, but they believed that would have negatively impacted or affected the Kurdish population in the Lower Mainland, which they were trying to avoid. As Sgt. Kee explained, the command triangle did not want everyone to know that they were investigating people of Kurdish ancestry, because this could potentially result in reluctance to provide consent DNA; but it was also an informed choice to limit negative publicity for Kurdish groups.
32. Insp. Turner testified that approximately 600 individuals, including POI's, were interviewed during the course of the investigation and more than 1,300 Burnaby Central Park neighbourhood residents were canvassed. One of the goals of the interviews was to collect as many DNA samples by consent as possible. The command triangle was mindful that interviewers were interacting with an ethnic minority group(s) and took a number of steps to ensure that the investigative team as a whole was being culturally sensitive and respectful, which included the following:
 - They arranged for a cultural awareness presentation to be given to the investigative team, covering topics such as background history and customs;
 - They attempted to ensure that interview teams were "mixed", i.e., comprised of both a female and male interviewer;
 - They stressed to interviewing members the importance of ensuring that POI's were fully aware of their rights in Canada and that that they understood that police in Canada were not necessarily like police in the countries they may have emigrated from;
 - They also stressed to interviewing members that any DNA sample obtained by consent needed to be truly voluntarily given; they also wanted to ensure that individuals understood that what they provided was a voluntary sample;
 - The command triangle arranged for real-time translation services to be available during interviews to ensure that there was no confusion;
 - Interviewers received training to ensure that they followed proper protocols for the interviews. POI interviews were to be audio-recorded. Interviews of potential witnesses and POIs were to be conducted with the assistance of a questionnaire, which interviewers were required to follow, in order to ensure consistency; there was detailed note taking of interviews and a separate task number was created for each person listed on the POI.

[Insp. Turner; Sgt. Kee; Cpl. Lim]

33. The interview questionnaire(s) included a DNA section, which explained the reason for the police requesting a consent DNA sample. The versions were very similar. As an example, the POI questionnaire attached at Tab 3 of the Agreed Statement of Facts stated as follows;

As part of our investigation, we are asking all individuals, including yourself, who have been identified as persons of interest to provide a consent sample of their DNA.

This sample will only be used for this investigation, for comparison with any potential suspect DNA obtained by the police. If no match occurs, the sample will be destroyed as it will no longer be needed for the investigation. If the sample matches the suspect's DNA, the evidence may be used against you in court.

I have a DNA Form which explains the use of such samples and requests your consent prior to the taking of the sample.

[Provide the Consent DNA Form and read it VERBATIM].

Obtain DNA sample as per instructions on the Consent DNA Form.

34. A "standard" Consent DNA Form (checklist) was used in conjunction with the questionnaire. The form, used in prior investigations by IHIT, was included with the DNA kit. The blood and buccal sample versions of the form were identical except for the words "blood"/ "buccal". The blood sample version included the following wording:

It is my duty to inform you that you are not required to provide this sample but any sample you so provide will be analysed for forensic DNA comparison with bodily substances that were collected by the police. If you wish, you may contact a lawyer to assist you prior to giving your consent to provide a blood sample. The blood sample that you will provide will be analysed in association with the following offence:

[See Exhibit # 4(a) and (b)]

35. Interviewees were not told that their DNA sample might be tested outside of Canada or specifically that it might be tested for familial relatedness. Insp. Turner testified that the consent forms did not include the testing location because they were intended to be general, as opposed to committing to a specific step and process (which may not unfold). Both Insp. Turner and Sgt-Major Lew testified that they were satisfied that the existing wording in the forms properly covered the scope of the testing.
36. Insp. Turner testified that if an individual was not willing to provide a consent DNA sample, they were not required or obliged to do so. He testified that they in fact had a higher-than-average consent rate and that most people were cooperative and willing to provide a DNA sample. Some people declined. Cpl. Mike Lim testified that over 500 DNA samples, a significant number of which were consent samples, were sent to the local RCMP NFLS for testing over the course of the investigation. There were additional consent DNA samples that were not sent to the lab for a number of reasons. Insp. Turner testified that in the event of an after-the-fact complaint from an individual about their DNA having been collected, or if

there were questions about the DNA collection, the issue/complaint would be appropriately addressed. If an individual withdrew their consent after the fact, and if the sample had not yet been submitted to the lab, it would be destroyed, and confirmation of destruction provided to the donor. To his knowledge, two formal complaints were made to and dealt with by the Complaints Commissioner. Insp. Turner believed those related to people who complained about the police knocking on their doors, as opposed to a specific form of conduct. One complaint was from a person whose door was knocked on, but who was not even interviewed or spoken to by the police. Insp. Turner does not know if the two people who made public complaints were Kurdish or not.

37. Insp. Turner also testified that in the event that a POI declined to provide a DNA sample, their respective POIPAT score would determine whether they would be surveilled for the purposes of collecting a cast-off DNA sample. It was stressed to surveillance team members that only items abandoned or discarded by the subject of the surveillance should be collected as cast-off. This included items like plastic drinking bottles, disposable coffee cups, straws and cigarettes. Cpl. Mike Lim testified that 63 cast-off DNA samples were collected (excluding the cast-off samples collected during the Newroz undercover operation).
38. Over the course of the investigation, many hundreds of DNA samples were sent to the RCMP NFLS lab for one-to-one STR comparison with the Male 1 profile. Consent samples were anonymized by initials with no other identifying biographical information; cast-off samples were generally described by name, also with no accompanying identifying biographical information. As Ms. Crossman explained, cast-off samples typically remain named because there is no privacy interest in a cast-off, and also because it cannot be confirmed as an official "known" sample.
39. Both Ms. Crossman and Cpl. (then Cst.) Mike Lim described the strict protocols which the IHIT and RCMP NFLS have in place with respect to the handling and management of biological samples. This includes careful tagging and numbering of exhibits, safe and secure storage, careful maintenance and updating of exhibit lists and tracking of continuity. Cpl. Lim also explained that none of the consent or cast-off DNA samples could be used in any investigation outside of the this [sic] investigation and that as the exhibits officer, he was the only person authorized to access any of the exhibits.
40. As the investigation progressed in late 2017, the police were exploring various kinship testing options as a possible avenue to advance the investigation. Kinship testing is also referred to as relationship or familial testing. Various witnesses testified that kinship testing by way of either STR, Y-STR or SNP technology is an area which has been peer reviewed and is sound in science. The police learned, through further discussion with Parabon, that Parabon could conduct kinship testing utilizing SNP technology. Parabon would be able to test the Male 1 profile against reference samples and predict kinship to the 6th degree of relatedness. Although the local RCMP NFLS lab was able to conduct STR (and later Y-STR) kinship testing, that testing could only predict kinship to one degree of relatedness. A Canadian lab, "Wyndham" (Wyndham Forensic Group), was able to do SNP-based kinship

testing, but was unable to test beyond 3 degrees of relatedness. Wyndham also required an actual biological sample from Male 1. Additionally, Wyndham advised that phenotyping testing would need to be conducted on each reference sample. However, the police did not need or want phenotype testing for the reference samples. The only purpose of kinship testing was to determine if the reference samples matched the Male 1 profile to a degree of relatedness.

41. Insp. Turner testified that the command triangle had extensive consultations internally and with others with respect to kinship testing. After receiving the necessary RCMP approvals, on March 15, 2018, the RCMP entered into a contract with Parabon to conduct kinship analysis. Key terms included the following:

1.0 SECURITY REQUIREMENT

There is no security requirement applicable to this Contract.

The Contractor must keep all information confidential and all information conceived, developed or produced by the Contractor must be solely for the purpose of the Contract and will remain the property of IHIT.

ANNEX "A" - STATEMENT OF WORK

1.0 TITLE / DESCRIPTION

Forensic Kinship DNA Analysis Services

2.0 BACKGROUND

RCMP requires the services of a Contractor who specializes in the field of analyzing and forensic processing DNA to determine familial relationships between two or more DNA samples with the greatest number of degrees of relatedness. RCMP is seeking the greatest degree of relatedness which can be accurately identified using DNA kinship analysis and should be up to 6 (six) degrees of relatedness.

3.0 REQUIRED RESOURCES

3.2. Contractors in this field must have the training, knowledge, equipment and expertise to provide accurate analysis of DNA samples submitted for processing.

4.0 TASKS, ACTIVITIES, DELIVERABLES AND MILESTONES

4.2 RCMP will ship the DNA extracts to Contractor's genotyping laboratory service provider of choice. The Contractor will ensure genotyping laboratory service provider will consume all DNA extracts and will discard all vials/storage containers upon completion of the analysis in accordance with the United States biohazard waste disposal regulations.

6.0 SPECIFICATIONS AND STANDARDS

6.1 The work completed by the Contractor will be reflected in reports which are delivered / made available to IHIT in secure, electronic format suitable for use by the investigative team.

9.0 OTHER TERMS AND CONDITIONS

9.2 The Contractor must provide an expert(s) as necessary to testify in support of any legal / criminal proceedings which may arise from their involvement in processing evidence as part of this investigation.

10.0 LOCATION OF WORK, WORK SITE, AND DELIVERY POINT

All work will be conducted at the Contractor's office or Contractor's sub-contractor's genotyping laboratory.

[Exhibit # 2]

42. The RCMP arranged to send DNA samples to Parabon in tranches of 48, (see Annex "B" to the Contract). The first batch of 48 samples was sent to Parabon on March 21, 2018. Two subsequent batches of 48 each were also sent. Privacy concerns were addressed by using anonymized labels with identifying alphanumeric descriptors only. See Exhibit # 5 (a), (b) and (c), respectively. No other identifying biographical information accompanied the samples.
43. The samples sent to Parabon were sent solely for the purpose of kinship testing against the Male 1 sample. The testing related only to kinship. The police requested no information about medical or other characteristics of the donors or whether any of the donors were related to each other. The police did not request phenotype predictions for the donors, as they had for the Male 1 sample. The Contract was specifically for kinship analysis and there is no evidence that Parabon ever tested for anything other than kinship.
44. All 144 of the reference samples sent to Parabon were tested for kinship against the Male 1 sample and the police received written reports from Parabon which advised that there was no kinship up to 6 degrees of relationship between the Male 1 sample and the reference samples. No additional information was provided to police about the reference samples. See Exhibits 6(a), (b) and (c), respectively.
45. As to information that can be gleaned from SNP testing, Dr. Hallgrimsson agreed that you will only get the information that you test for. Although a vial of blood contains the full genomic information, the test kits are specific to what is being tested for. If you are not testing for hair colour, the algorithms will not tell you hair colour. If you are not testing for medical conditions, the algorithms will not give you medical information. Furthermore, you cannot learn the identity, age, stature, or body weight of a person through phenotype testing or produce a picture of them (other than a generic composite). Ms. Crossman confirmed that the potential exists to obtain more information through SNP testing than STR testing, but only if you look for or specifically test for the additional information. When you extract DNA for testing, all of the DNA is in the sample, but what you will get will depend on what you are

looking for and what kit is used.

46. Insp. Turner testified that in early 2018, the police had been planning an undercover operation ("UCO") in order to accelerate the collection of DNA from individuals believed to be of Kurdish/North Middle Eastern ancestry. Those samples would then potentially be added to the POI list for possible STR testing against the Male 1 sample and potentially also kinship testing. Insp. Turner explained the rationale for the UCO decision:
- the homicide involved the seemingly random murder of a young girl in a park and the perpetrator, who was believed to be a sexual predator, was believed to be at large and at risk of reoffending; public safety was therefore a major priority;
 - he described the murder as "striking fear into the heart of the community"; there was fear and panic in the community;
 - [MS] was of Asian descent and there was particular concern and interest from the Asian community in knowing the progress of the investigation;
 - the police also believed that the perpetrator likely had a preferred victim type and there was a probability that the victim may have been targeted because of her appearance or race;
 - Resourcing was an ongoing "massive challenge" throughout the investigation due to the sheer number of resources which it consumed; this was one of the largest active investigations that IHIT had undertaken; an entire investigative team had been taken out of rotation in order to focus solely on this investigation; this was putting pressure on other IHIT teams; the command triangle was mindful that they would not be able to maintain an enhanced, expanded investigative team indefinitely;
 - The pace at which the investigation was progressing was a significant concern given the pressing public safety concerns. The police wanted to ensure that they advanced the investigation as efficiently as possible.

The command triangle gave careful consideration, in consultation with senior IHIT members and partners, to determine whether they could and should pursue this investigative strategy in the circumstances of the murder of a young girl. After careful consideration, the command triangle determined that the investigative strategy was discrete, appropriate and proportionate in all the circumstances. All who had been consulted supported the planned undercover operation.

47. Insp. Turner testified that the police decided to conduct an undercover operation ("UCO") at a Kurdish New Year event, "Newroz", to be held in March 2018. There were a number of Newroz events scheduled in the Lower Mainland around the same timeframe. The police selected a Newroz event being held at Barnet Marine Park on March 25, 2018. This was a free, daytime event, held in a public location. It was open to anyone who wished to attend. It was a festival, a celebration of the New Year, to be attended by hundreds of festival goers. There was to be music, food and dancing, with participants mingling and socializing. The police wanted to be very clear about the nature of the event and whether the event had a

religious component to it. Extensive consideration was given to the nature of the event, and inquiries made in advance to determine that. The police believed, based on what they told, that there was not a religious component to the event. This accorded with their observations and understanding on the day of the event. The police also enquired as to whether "Sensitive Sector" approval was required and were advised that it was not. In the weeks or months prior to the Newroz UCO, Mustafa Ahmad provided some information and materials to Sgt-Major (then Cpl.) Lew, which may have related to an explanation of the spring equinox component of the event. At the time, information about Newroz and potential events in the Lower Mainland was also being obtained from other sources, including the internet and interviews. Mustafa Ahmad had no role in the planning of the UCO, nor was he told why he was being asked questions about Newroz.

48. The plan for DNA collection during the undercover operation was to retrieve cast-off, disposable paper cups which had been thrown away as garbage by Newroz festival goers during a tea tasting for "market research" purposes. Insp. Turner testified that care was taken to ensure that the UCO would be conducted in a respectful manner and would not negatively impact festivalgoers. Undercover officers posing as market researchers for a fictitious company were to mingle freely on foot through the crowds of festivalgoers and offer anyone who was interested the opportunity to sample tea. They were to be equipped with portable tea dispensers, disposable cups which had been numbered in advance, survey forms (with numbers which corresponded with the cups), garbage bins and plastic gloves. Participants who chose to sample the tea would receive a Tim Horton's gift card (Insp. Turner believed it may have been for \$5). The participant would be asked if they wished to complete a survey relating to the products sampled. The survey form contained a logo of the fictitious company. A member carrying a garbage bag would ask participants if they wished to discard their empty cups into the garbage container. Sgt. Kee testified that undercover team members were instructed to ask participants "Can I take your garbage?" as opposed to directing them to throw away their cup. Insp. Turner explained that if the participant handed their cup to the operator holding the garbage bin, for disposal, the operator was to wrap the cup in a glove before placing it into the garbage bin, to prevent contamination. From there, the paper cups were to be taken to Cpl. (then Cst.) Lim, who was in charge of collecting and assigning exhibit numbers to the cast-off cups.
49. Insp. Turner testified that it was stressed to the undercover team that every aspect of the tea tasting was to be completely voluntary. If a participant wished to sample tea, they were to be given a cup of tea to taste. This included women, in part to protect the viability of the undercover operation. If a participant did not want to taste tea, they were to be allowed to continue on their way. Participants could elect to complete a survey, including their contact information, which entered them into a contest or sweepstakes. If participants did not wish to complete the survey, they were not obliged to do so. Some participants chose not to complete the survey but still received tea. If they wished to complete the survey without providing their contact information, they could do so. A number of completed forms did not include addresses. If participants did not wish to hand their garbage to the operator, there

was no obligation on them to do so. Some participants walked away with their cups.

50. Insp. Turner testified that the day of the UCO went smoothly. The members of the command triangle, who were located nearby in a command post, were not made aware of any complaints or issues. Hundreds of festivalgoers attended the event. There was no obvious police presence in the park during the celebration. The undercover officers sought no information about immigration status from any of the attendees. Cpl. Lim testified that 150 cups were collected during the UCO; however, 3 were determined to be duplicates. Of the 147 cups remaining, 91 were from males and 56 from females. Of the cups obtained from males, approximately 22 were from males who were already listed on the POI list. DNA samples had already been obtained from some of those males either by consent or through cast-off.
51. A number of DNA samples from the undercover operation were subsequently sent to the local NFLS for STR testing against the Male 1 sample. All of those samples were from males who were on the POI list and whose DNA had been prioritized for testing. None of those samples matched the Male 1 sample. None of the undercover operation DNA samples from females were sent for testing to the local NFLS lab.
52. All of the samples sent to Parabon for kinship testing were from male POIs whose DNA had already been tested at the local NFLS lab. Of the 144 samples sent to Parabon, only one was from the UCO. None of the undercover operation samples from females were sent to Parabon for testing, although the potential to do so existed.
53. In accordance with the terms of the Contract, Parabon provided the RCMP with written confirmation from their genotyping service lab, AKESOgen, that all 144 biological samples which were analyzed had been used up ("consumed") during testing. See Exhibit # 7 (a), (b), and (c), respectively.
54. Insp. Turner testified that he was aware that Parabon would need to retain some form of record/electronic record of the DNA testing results in their system. He also agreed that it would have surprised him if Parabon had deleted all of the files which they produced in their database, when considering the wording of the Contract (which contemplated Parabon providing an expert if necessary to testify in any legal/criminal proceedings) and the potential for lawsuits related to any potential breach of contract.
55. There is no evidence that any of the genetic information from the 144 reference samples was added to the Parabon database(s) or the database(s) of their genotyping service lab, AKESOgen. No biogeographical information, which would have been required for database ancestry verification, was ever sent to Parabon. Insp. Turner also testified that he would have regarded it as a breach of contract if Parabon had converted the information obtained from genetic analysis to its own use by adding the genetic information of the 144 reference samples to its verified database, given the terms of the Contract.

56. On August 3, 2018, NFLS scientist Christine Crossman advised the RCMP that NFLS testing showed that one of the DNA samples received during the Newroz UCO shared many genetic characteristics with the Male 1 profile. This was the sample received from the applicant's brother, Chamdin Ali (the "Chamdin Ali Sample"). Chamdin Ali's name was listed on the POI list.
57. On August 13, 2018, a portion of the Chamdin Ali Sample was sent to Parabon for kinship analysis. The vial containing the DNA was identified by an alphanumeric descriptor. On August 17, 2018, a Parabon representative advised the police via telephone that the Male 1 sample very likely belonged to a sibling of the donor of the Chamdin Ali Sample. The police received a report confirming that, with a confidence percentage of 99.32 (See Exhibit # 8). The police later determined through Prime queries and in-person meetings subsequent to the applicant's arrest that Chamdin Ali was in fact the applicant's brother.
58. On August 24, 2018, the RCMP obtained a cast-off sample of the applicant's DNA from a discarded cigarette butt. That DNA sample was forwarded to the RCMP NFLS lab. On August 31, 2018, the RCMP NFLS confirmed that the cast-off sample from the applicant was a match to the Male 1 profile. The police arrested the applicant on September 7, 2018, at approximately 11:25 am. A DNA warrant was executed on September 9, 2018. The DNA warrant sample obtained from the applicant was analyzed by the RCMP NFLS lab and determined to be a match to the Male 1 profile.
59. Ms. Crossman testified that the Male 1 profile was added to the local and National DNA databank crime scene indices. She further testified that although initial cast-off sample profiles from the investigation were added to the local databank, they were thereafter removed, and no further cast-off sample profiles were added. She further confirmed that the only DNA profile from the investigation which remains in a databank is the Male 1 crime scene sample. The profiles generated from DNA testing are required to be retained for a certain amount of time in the related RCMP NFLS lab files, in part in the event that they are required for any litigation. All biological samples and extracts were returned to the investigator or the RCMP exhibits facility.
60. The command triangle planned for the destruction of all of the biological DNA samples once they were no longer required for purposes of the investigation. Cpl. Lim testified to his understanding that approximately 600 DNA samples have been destroyed to date. Additionally, Insp. Turner and Sgt-Major Lew testified that the plan was to notify individuals, who had provided consent DNA samples, via letters or phone calls, that their DNA had been destroyed. Sgt-Major Lew testified that some individuals had been notified prior to her departure from IHIT but she could not speak to whether every person had been notified. DNA samples which were never tested have been retained pending conclusion of criminal proceedings. As testified to by Cpl. Lim, all exhibits have been carefully documented in a 569-page exhibit list and are being kept securely and confidentially, with no unauthorized access permitted. The DNA samples are solely for purposes of this investigation and not available to investigators on other files.

C. Legal Framework

- [8] It is well-settled law that there are rare occasions described as "the clearest of cases" when a stay of proceedings will be warranted to address an abuse of process. Generally, these cases will fall into one of two categories: (a) where state conduct has prejudiced the accused's right to a fair trial (the main category); or (b) where state conduct does not threaten trial fairness, but risks undermining the integrity of the judicial process (the residual category): *R. v. Babos*, 2014 SCC 16, [Babos], para. 31. If the impugned conduct amounts to an abuse of process, the three-part test for determining whether a stay of proceedings is warranted is the same for both categories: *Babos*, para. 32:
- (1) there must be prejudice to the accused's right to a fair trial or the integrity of the justice system that "will be manifested, perpetuated, or aggravated through the conduct of the trial or by its outcome," see *Regan* at paragraph 54;
 - (2) there must be no alternative remedy capable of redressing the prejudice; and
 - (3) where there is still uncertainty over whether a stay is warranted after Steps 1 and 2, the court is required to balance the interests in favour of granting a stay such as denouncing misconduct and preserving the integrity of the justice system against "the interests that society has in having a final decision on the merits," *ibid.*, at paragraph 57.
- [9] In the residual category, the balancing step takes on added significance because the more egregious the state conduct, the greater the need for the court to disassociate itself from it. Society's interest in a trial on the merits may not prevail if the impugned conduct shocks the conscience of the community or offends its sense of fair play and decency: *Babos*, para. 40. Under the residual category in particular, the accused bears an onerous burden to satisfy the "clearest of cases" standard for a judicial stay which will be granted very rarely and exceptionally: *Babos*, para. 44.
- [10] In *Babos*, the appeal before the Court raised the question of whether the trial judge's stay of proceedings to protect the integrity of the justice system, met the "clearest of cases" standard. The Court found it did not. Justice Moldaver, speaking for the Court, began his judgment by noting that the appeal presented the Court with the opportunity to revisit and clarify the residual category, and he did so at paras. 30- 47:

A. Abuse of Process and Stays of Proceedings

- [30] A stay of proceedings is the most drastic remedy a criminal court can order (*R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, at para. 53). It permanently halts the prosecution of an accused. In doing so, the truth-seeking function of the trial is frustrated and the public is deprived of the opportunity to see justice done on the merits. In many cases, alleged victims of crime are deprived of their day in court.

- [31] Nonetheless, this Court has recognized that there are rare occasions --the "clearest of cases" -- when a stay of proceedings for an abuse of process will be warranted (R. v. O'Connor, 1995 CanLII 51 (SCC), [1995] 4 S.C.R. 411, at para. 68). These cases generally fall into two categories: (1) where state conduct compromises the fairness of an accused's trial (the "main" category); and (2) where state conduct creates no threat to trial fairness but risks undermining the integrity of the judicial process (the "residual" category) (O'Connor, at para. 73). The impugned conduct in this case does not implicate the main category. Rather, it falls squarely within the latter category.
- [32] The test used to determine whether a stay of proceedings is warranted is the same for both categories and consists of three requirements:
- (1) There must be prejudice to the accused's right to a fair trial or the integrity of the justice system that "will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome" (Regan, at para. 54);
 - (2) There must be no alternative remedy capable of redressing the prejudice; and
 - (3) Where there is still uncertainty over whether a stay is warranted after steps (1) and (2), the court is required to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against "the interest that society has in having a final decision on the merits" (ibid., at para. 57).
- [33] The test is the same for both categories because concerns regarding trial fairness and the integrity of the justice system are often linked and regularly arise in the same case. Having one test for both categories creates a coherent framework that avoids "schizophrenia" in the law (O'Connor, at para. 71). But while the framework is the same for both categories, the test may -- and often will -- play out differently depending on whether the "main" or "residual" category is invoked.
- [34] Commencing with the first stage of the test, when the main category is invoked, the question is whether the accused's right to a fair trial has been prejudiced and whether that prejudice will be carried forward through the conduct of the trial; in other words, the concern is whether there is ongoing unfairness to the accused.
- [35] By contrast, when the residual category is invoked, the question is whether the state has engaged in conduct that is offensive to societal notions of fair play and decency and whether proceeding with a trial in the face of that conduct would be harmful to the integrity of the justice system. To put it in simpler terms, there are limits on the type of conduct society will tolerate in the prosecution of offences. At times, state conduct will be so troublesome that having a trial -- even a fair one -- will leave the impression that the justice system condones conduct that offends society's sense of fair play and decency. This harms the integrity of the justice system. In these kinds of cases, the first stage of the test is met.

- [36] In *Canada (Minister of Citizenship and Immigration) v. Tobias*, 1997 CanLII 322 (SCC), [1997] 3 S.C.R. 391, this Court described the residual category in the following way:

For a stay of proceedings to be appropriate in a case falling into the residual category, it must appear that the state misconduct is likely to continue in the future or that the carrying forward of the prosecution will offend society's sense of justice. Ordinarily, the latter condition will not be met unless the former is as well -- society will not take umbrage at the carrying forward of a prosecution unless it is likely that some form of misconduct will continue. There may be exceptional cases in which the past misconduct is so egregious that the mere fact of going forward in the light of it will be offensive. But such cases should be relatively very rare. [para. 91]

- [37] Two points of interest arise from this description. First, while it is generally true that the residual category will be invoked as a result of state misconduct, this will not always be so. Circumstances may arise where the integrity of the justice system is implicated in the absence of misconduct. Repeatedly prosecuting an accused for the same offence after successive juries have been unable to reach a verdict stands as an example (see, e.g., *R. v. Keyowski*, 1988 CanLII 74 (SCC), [1988] 1 S.C.R. 657), as does using the criminal courts to collect a civil debt (see, e.g., *R. v. Waugh* (1985), 1985 CanLII 3557 (NS CA), 68 N.S.R. (2d) 247 (S.C., App. Div.)).

- [38] Second, in a residual category case, regardless of the type of conduct complained of, the question to be answered at the first stage of the test is the same: whether proceeding in light of the impugned conduct would do further harm to the integrity of the justice system. While I do not question the distinction between ongoing and past misconduct, it does not completely resolve the question of whether carrying on with a trial occasions further harm to the justice system. The court must still consider whether proceeding would lend judicial condonation to the impugned conduct.

- [39] At the second stage of the test, the question is whether any other remedy short of a stay is capable of redressing the prejudice. Different remedies may apply depending on whether the prejudice relates to the accused's right to a fair trial (the main category) or whether it relates to the integrity of the justice system (the residual category). Where the concern is trial fairness, the focus is on restoring an accused's right to a fair trial. Here, procedural remedies, such as ordering a new trial, are more likely to address the prejudice of ongoing unfairness. Where the residual category is invoked, however, and the prejudice complained of is prejudice to the integrity of the justice system, remedies must be directed towards that harm. It must be remembered that for those cases which fall solely within the residual category, the goal is not to provide redress to an accused for a wrong that has been done to him or her in the past. Instead, the focus is on whether an alternate remedy short of a stay of proceedings will adequately dissociate the justice system from the impugned state conduct going forward.

- [40] Finally, the balancing of interests that occurs at the third stage of the test takes on added significance when the residual category is invoked. This Court has stated that the balancing need only be undertaken where there is still uncertainty as to whether a stay is appropriate after the first two parts of the test have been completed (Tobiass, at para. 92). When the main category is invoked, it will often be clear by the time the balancing stage has been reached that trial fairness has not been prejudiced or, if it has, that another remedy short of a stay is available to address the concern. In those cases, no balancing is required. In rare cases, it will be evident that state conduct has permanently prevented a fair trial from taking place. In these "clearest of cases", the third and final balancing step will often add little to the inquiry, as society has no interest in unfair trials.
- [41] However, when the residual category is invoked, the balancing stage takes on added importance. Where prejudice to the integrity of the justice system is alleged, the court is asked to decide which of two options better protects the integrity of the system: staying the proceedings, or having a trial despite the impugned conduct. This inquiry necessarily demands balancing. The court must consider such things as the nature and seriousness of the impugned conduct, whether the conduct is isolated or reflects a systemic and ongoing problem, the circumstances of the accused, the charges he or she faces, and the interests of society in having the charges disposed of on the merits.[5] Clearly, the more egregious the state conduct, the greater the need for the court to dissociate itself from it. When the conduct in question shocks the community's conscience and/or offends its sense of fair play and decency, it becomes less likely that society's interest in a full trial on the merits will prevail in the balancing process. But in residual category cases, balance must always be considered.
- [42] This Court's recent decision in *R. v. Bellusci*, 2012 SCC 44, [2012] 2 S.C.R. 509, attests to the need for balancing when the conduct in question falls solely within the residual category. In *Bellusci*, the accused was assaulted in the back of a van by a prison guard while he was shackled and handcuffed. The accused was charged with assaulting the guard and intimidating a justice system participant. Fish J., writing for a unanimous Court, upheld the trial judge's decision to issue a stay of proceedings for state misconduct falling in the residual category. In doing so, he noted that the trial judge had appreciated the need to balance the competing interests at play in contemplating a stay of proceedings. He expressly took into account the difficult position of prison guards, the importance to the justice system of ensuring their protection, the seriousness of the charges against the accused, the integrity of the justice system, and the nature and gravity of the violation of Mr. Bellusci's rights. Only then did he conclude that a stay was warranted. [Emphasis added; para. 29.]
- [43] The Ontario Court of Appeal has also recently emphasized the importance of the balancing stage when the residual category is in issue:

In some sense, an accused who is granted a stay under the residual category realizes a windfall. Thus, it is important to consider if the price of the stay of a charge against a particular accused is worth the gain. Does the advantage of staying the charges against this accused outweigh the interest in having the case decided on the merits? In answering that question, a court will almost inevitably have to engage in the type of balancing exercise that is referred to in the third criterion. [Emphasis added.]

(R. v. Zarinchang, 2010 ONCA 286, 99 O.R. (3d) 721, at para. 60)

- [44] Undoubtedly, the balancing of societal interests that must take place and the "clearest of cases" threshold presents an accused who seeks a stay under the residual category with an onerous burden. Indeed, in the residual category, cases warranting a stay of proceedings will be "exceptional" and "very rare" (Tobiass, at para. 91). But this is as it should be. It is only where the "affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases" that a stay of proceedings will be warranted (R. v. Conway, 1989 CanLII 66 (SCC), [1989] 1 S.C.R. 1659, at p. 1667).
- [45] To recapitulate, while the framework is the same for both categories, the test may -- and often will -- play out differently depending on whether the "main" or "residual" category is invoked.
- [46] The following hypothetical may serve as a useful illustration. Take a case where it is discovered, after trial, that the police have tampered with the jury in order to secure the conviction of an accused. Manifestly, the police conduct would impinge on the accused's right to a fair trial -- but it would also impinge on the integrity of the justice system.
- [47] Ordering a new trial would probably redress the unfairness of the original trial. But the inquiry would not end there. The court would also have to decide whether ordering a new trial, or some other remedy, would suffice to dissociate it from the prejudice occasioned to the integrity of the justice system by the police misconduct. If no remedy would suffice, the court would have to engage in the balancing process and determine whether the integrity of the justice system would be better served by a stay of proceedings or a full trial on the merits. Given the seriousness of the misconduct -- jury tampering strikes at the very heart of the criminal justice system -- the residual category might well necessitate a stay of proceedings to redress the threat to the integrity of the justice system, even though the unfairness that marred the first trial could be cured by a second trial.

D. Discussion

- [11] As noted above, the impugned conduct of the police in the instant case is the investigator's use of Parabon's Snapshot technology to focus the investigation on the Kurdish community. Mr. Ali identifies four aspects to his argument, and these will be addressed below (albeit not in the order listed by him).

I) The science used by Parabon was flawed and unsupportable and therefore the police decision to avail themselves of it as an investigative tool was conduct that would shock the conscience of the community

- [12] The alleged flawed and unsupportable science is that which resulted in the Parabon Snapshot Phenotype Report ("Snapshot Report") for Male 1. This report predicted, inter alia, that Male 1's ancestry was Northern Middle Eastern, and noted "an extremely close match" to the Kurds in Parabon's databank. Given the relatively small local Kurdish population where the crime occurred, and the absence of any other evidence of the identity of Male 1, the police made an investigative decision to focus its efforts on the Kurdish community. This focus resulted in the police obtaining cast-off DNA from Chamdin Ali: a brother of the accused and a Kurd from the Northern Middle East, and this ultimately led to a DNA match between a cast-off DNA sample from the accused, and Male 1.
- [13] Despite the evident accuracy of Parabon's ancestry prediction for Male 1, Mr. Ali submits that the science Parabon used is "inherently flawed." In support of this position, he relies on the testimony of Benedikt Hallgrimsson, an expert in biological anthropology; however, Professor Hallgrimsson's concerns were not with the science, per se. Indeed, Mr. Ali acknowledges that Dr. Hallgrimsson said the science was peer-reviewed and theoretically sound. The concerns the professor expressed in his testimony related to matters such as the size of the reference sample in Parabon's databank, the absence of certain information such as the error rate, and the lack of peer review in relation to Parabon's methods.
- [14] In cross-examination, Dr. Hallgrimsson agreed that without access to the underlying data on which the Snapshot Report was based, he simply could not comment on the accuracy of Parabon's predictions. Nonetheless, he agreed: (a) that Parabon's use of 850,000 markers was sufficient for phenotyping of the physical traits identified in the report; (b) that in relation to Parabon's ancestry prediction, he was reasonably confident "Northern Middle East" was correct; and (c) that the absence of peer review of a private company's methodology does not mean it is unsound. Notably, Professor Hallgrimsson testified that the science of facial morphology was not yet validated; however, in the case at bar, the MS homicide investigators were well aware of the frailties of this science and, therefore, chose not to use it to further their investigation.
- [15] Given the foregoing, I am not persuaded that Mr. Ali has established that the police relied upon a flawed and unsupportable science in their investigation, let alone that reliance upon it as an investigative tool would shock the conscience of the community. Parabon's services were recommended to the investigators by Mr. Poon of the RCMP National Forensic Laboratory Services (NFLS) when he learned that DNA from the semen found inside MS was the only evidence of identity of her assailant and no match to it was found within the National DNA Databank. Moreover, the investigators did their own research and satisfied themselves that the science was sound and, in the words of Inspector Turner, that it was "the single best tool that they had; the absolute best option at that point in time." At that point in time in the investigation, and throughout the balance of it, the DNA of Male 1 was the only

identification evidence of MS's suspected assailant; thus, the overarching investigative objective was to identify Male 1 and this was achieved to the investigators' satisfaction through the DNA analyses performed by Parabon.

(II) The loss of stewardship over the DNA samples collected in Canada, in particular, from the local Kurdish community, and the consequent loss of privacy and protections resulting from the investigators' decision to send these samples to an American laboratory where they would be subject to American law

[16] In the spring and summer of 2018, the investigators sent 145 DNA samples to Parabon for kinship analysis. Parabon had the ability to test for kinship to six degrees of relatedness, and this was a service not yet available in Canada. The 145 samples were a subset of consent and cast-off samples investigators had collected from various persons of interest, including those believed to be members of the local Kurdish community. The kinship analysis was performed pursuant to a written contract between Parabon and the RCMP: see Voir Dire Exhibit #2. This contract for Parabon's Snapshot kinship service included, inter alia, the following terms: (a) that Parabon must keep all information confidential; that all information conceived, developed, or produced by Parabon must be solely for the purpose of the contract and they remain the property of the RCMP; (b) that the contract is to be interpreted and governed by the laws in force in the Province of British Columbia; (c) that the RCMP will ship the DNA extracts to the contractor's genotyping laboratory service provider of choice; (d) that the contractor will ensure the genotyping laboratory service provider will consume all DNA extracts and will discard all vials/storage containers upon completion of the analysis in accordance with the United States Biohazard Waste Disposal Regulations; (e) that the deliverable under the contract will be the analysis and completion of a report detailing the analysis of DNA samples submitted by the contractor by the RCMP's IHIT investigative team; and (f) that the contractor will provide experts, as necessary, to testify in support of any legal/criminal proceedings which may arise from their involvement in the processing of the evidence.

[17] All samples sent to Parabon for kinship analysis were anonymized: i.e.; they were identified to Parabon by alpha-numeric descriptor only. In the analysis of the first 144 samples sent to Parabon, kinship with Male 1 was not found and the samples were entirely consumed in the testing process. The 145th sample was the cast-off DNA sample from Chamdin Ali, gathered at a local March 2018 Kurdish New Year's celebration. This sample was sent to Parabon after NFLS scientist, Christine Crossman, noticed that it shared many genetic characteristics with Male 1's DNA profile. Parabon's kinship analysis predicted that Male 1 was a full brother of the anonymized sample from Chamdin Ali.

[18] As has already been observed herein, there is no evidence that these anonymized DNA samples which were provided without any biogeographical or other identifying information, either could be, or were, used for any purpose other than comparison to Male 1's DNA for kinship. Similarly, there is no evidence that Parabon did not adhere to the contractual terms, including the confidentiality requirement. Nevertheless, Mr. Ali submits that the measures

that the police took, including anonymization, were insufficient to protect the DNA samples from misuse by Parabon or others in the United States. He argues that the persons to whom the DNA belonged were "still inherently identifiable as that was the purpose of the analysis" and explains this assertion as follows:

Each sample had to be identifiable, otherwise any familial match would have been irrelevant. In furtherance of this each sample was identified by alphanumeric designation so that if a match was located, it could be traced back to its source by police investigators.

- [19] While it is accurate to say the DNA samples were identifiable, this was so only to the MS homicide investigators, in Canada, for the purpose of cross-referencing the alpha-numeric designation with a name if Parabon found kinship with Male 1. I am unable to see how Mr. Ali's argument supports his position that anonymization was insufficient to protect the identities of the "donors" of the samples from being known to Parabon.
- [20] Mr. Ali speculates that SNP data from the DNA samples the RCMP sent to Parabon, was stored by Parabon. This leads him to further speculate that the DNA "could be subjected to further tests and for further purposes either by the police, by Parabon itself, or by Parabon's subcontractors, the United States Government, or some further third party." These assertions are made without any evidence to support them from, for example, Parabon, and an expert in U.S. law and the powers of the U.S. Government over anonymous DNA samples held by a private American DNA laboratory.
- [21] In this regard, Mr. Ali argues that the Crown bears the evidentiary onus of showing that the DNA in question "is safe, destroyed, or has not been misused given the huge invasion of privacy." In support of this position, Mr. Ali relies on *R. v. Nixon*, 2011 SCC 34, [Nixon]. In *Nixon*, the Court imposed an evidentiary burden on the Crown in the context of an abuse of process claim relating to the exercise of prosecutorial discretion. Mr. Ali cites paras. 62- 63 of *Nixon*:
- [62] Quite apart from any such pragmatic considerations, there is good reason to impose a threshold burden on the applicant who alleges that an act of prosecutorial discretion constitutes an abuse of process. Given that such decisions are generally beyond the reach of the court, it is not sufficient to launch an inquiry for an applicant to make a bare allegation of abuse of process. For example, it would not suffice for an applicant to allege abuse of process based on the fact that the Crown decided to pursue the charges against him but withdrew similar charges against a co-accused. Without more, there would be no basis for the court to look behind the exercise of prosecutorial discretion.
- [63] However, the repudiation of a plea agreement is not just a bare allegation. It is evidence that the Crown has gone back on its word. As everyone agrees, it is of crucial importance to the proper and fair administration of criminal justice that plea agreements be honoured. The repudiation of a plea agreement is a rare and exceptional event. In my view, evidence that a plea agreement was entered into with the Crown, and subsequently reneged by the Crown, provides the requisite evidentiary threshold to embark on a review of the decision for abuse

of process. Further, to the extent that the Crown is the only party who is privy to the information, the evidentiary burden shifts to the Crown to enlighten the court on the circumstances and reasons behind its decision to resile from the agreement. That is, the Crown must explain why and how it made the decision not to honour the plea agreement. The ultimate burden of proving abuse of process remains on the applicant and, as discussed earlier, the test is a stringent one. However, if the Crown provides little or no explanation to the court, this factor should weigh heavily in favour of the applicant in successfully making out an abuse of process claim.

- [22] In *Nixon*, the Court recognized that imposing an evidentiary burden on the Crown was appropriate because the Crown was the only party privy to the information regarding an exercise of prosecutorial discretion and, thus, in a unique position to "enlighten the court on the circumstances and reasons behind its decision to resile from the [plea] agreement." It is clear that *Nixon* is materially distinguishable from the case at bar. The Crown is not the only party privy to the information about which Mr. Ali speculates. It was open to Mr. Ali to tender evidence from Parabon and from an expert in American law in support of his position, but he did not do so in circumstances where both the evidentiary and persuasive burdens were squarely upon him. Notably, in *Nixon*, the Court confirmed that the burden of proving the alleged abuse of process remains on the applicant.
- [23] Mr. Ali also argues that the ability of Parabon to create a facial image of the donor, using facial morphology technology, nullifies any concept of anonymization "if borne out." In this regard, I am satisfied Mr. Ali's argument rests, again, on speculation rather than evidence. There is no evidence that a person can be identified reliably, based on facial morphology alone. Notably, Mr. Ali's own expert, Dr. Hallgrimsson, expressed significant scepticism as to the validity of facial morphology, stating that many non-genetic factors play a role in one's facial appearance, including age, weight, health, and smoking. Moreover, he said one cannot learn the identity, age, stature, or body weight of a person through DNA phenotyping, or produce a facial image that is anything more than a generic composite.
- [24] Mr. Ali submits that the DNA collected from the Kurdish community falls within the definition of persons under the Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c. 165 (FOIPPA). In particular, he relies, inter alia, on Schedule 1, and ss. 30 and 33.1 of the Act. Schedule 1 of FOIPPA defines "personal information" as, "recorded information about an identifiable individual other than contact information," and ss. 30 and 33.1 provide as follows:

Protection of personal information

30 A public body must protect personal information in its custody or under its control by making reasonable security arrangements against such risks as unauthorized collection, use, disclosure or disposal.

Disclosure outside of Canada

33.1 A public body may disclose personal information outside of Canada only if the disclosure is in accordance with the regulations, if any, made by the minister responsible for this Act.

[25] As noted by the Crown, FOIPPA only applies to all records in the custody or under the control of a "public body" as defined in Schedule 1 or added by regulation to Schedule 2. These schedules do not include the RCMP, thus, FOIPPA does not apply to records in the custody or control of the RCMP. In further support of this position, the Crown cites *Toro v. Canada (Attorney General)*, 2020 BCSC 1513. In *Toro*, the court considered the scope of FOIPPA vis-à-vis the RCMP at para. 30:

[30] Upon review of Schedule 2, there is no reference to the RCMP. Instead, as the Attorney General for Canada has pointed out, the RCMP are covered by the federal ATIA and the mechanism available under that Act. Thus, upon review of the FOIPPA and the Police Act together, there is no legal basis for my intervention found in the Police Act.

I am satisfied the foregoing is dispositive against Mr. Ali in relation to this aspect of his argument.

[26] In sum, I am not persuaded that Mr. Ali has established that the investigative decision to send the DNA samples in question to an American laboratory for a kinship analysis was police misconduct, particularly when viewed in the context of the investigative circumstances, the contractual protections in place, the anonymization of all the samples, and the absence of a like service in Canada. Even if I am wrong in this assessment, I am not persuaded that it was conduct that would shock the conscience of the community or risk undermining the integrity of the justice system, given the investigative circumstances, the seriousness of the crime, and the compelling public interest in its timely resolution.

(III) Mr. Ali has standing to claim a breach of s. 8 of the Charter arising from the search and seizure of his brother Chamdin's DNA

[27] This aspect of Mr. Ali's argument relates to Chamdin Ali's DNA sample gathered by the police and sent to Parabon, for analysis. Mr. Ali says it is clear the police "harvested and furnished" to Parabon, genetic markers that went far beyond identification and could reveal genetic information about medical, physical, and mental characteristics, in addition to family ties and structures. Mr. Ali argues that this sort of information accessible from Chamdin Ali's DNA sample is private and engages his own privacy interests because of his kinship with Chamdin Ali. He says his shared genetic ancestry with his brother "provides him with an informational privacy interest in the familial DNA that was collected abusively and sent to Parabon in the United States."

[28] Mr. Ali cites no authority directly supporting his position that he has a reasonable expectation of privacy in the DNA of his brother, nor has he made a persuasive argument for the existence of such based upon the significant body of jurisprudence on reasonable expectations of privacy arising from state searches and seizures.

- [29] Mr. Ali also argues: (a) that "the use of familial DNA analysis is something that the court ought to regulate"; (b) that the familial analysis is "a new technique that is not permitted under the Canadian legislative framework"; and (c) that "the implications for the technology are such that if not subjected to any limitations effectively render control over one's own DNA meaningless." He says that if a familial DNA analysis is to become a commonplace tool of the police, "it would stand to effectively render (control and anonymity conceptions) of privacy null." He adds that "the scope of DNA detection effectively means that as DNA technology evolves, people will have no control over the analysis of their DNA for identification purposes."
- [30] Mr. Ali made no specific proposals or suggestions as to the regulation he seeks, nor did he address how any such regulation imposed now, would assist him in the instant application.
- [31] The Crown's position is that Mr. Ali's assertion of a reasonable expectation of privacy in his brother's DNA is completely unsustainable. It says that Mr. Ali cannot have a reasonable expectation of privacy in another person's body or their DNA and the information within it, whether that person is related to him or not. The Crown argues that if such a reasonable expectation were to exist it would have a severe impact on individual autonomy to determine what can be done with one's own DNA, whether that be, for example, providing it to the police by consent, sending it to popular DNA-based services such as Ancestry.com for analysis, or submitting it for analysis for a health-related purpose. The Crown notes that if everyone had a reasonable expectation of privacy in the DNA of all their genetic relatives, it would be virtually impossible for the police to identify who had a reasonable expectation of privacy in DNA gathered for investigative purposes.
- [32] In the absence of case-law stating otherwise, I accept the Crown's argument as dispositive of Mr. Ali's claim to a reasonable expectation of privacy in the DNA of Chamdin Ali. Mr. Ali has acknowledged that to establish standing he must show that he has a reasonable expectation of privacy in the DNA of his brother and I find that he has failed to do so.
- [33] As for Mr. Ali's urging that the court impose rules and restrictions on the use of familial DNA, given the absence of legislation, I decline to do so for reasons expressed under heading IV below.
- (IV) The court must place reasonable limits on the DNA techniques employed by the police given the absence of governing legislation and the "Orwellian" privacy implications, particularly for minority groups
- [34] Mr. Ali's overarching premise to this aspect of his alleged abuse of process is that genetic phenotyping and familial DNA technologies have the potential to "obliterate the concept of privacy and to disproportionately affect minority groups" if judicial or legislative limits are not imposed on their use by the police as investigative tools. Mr. Ali says two practical realities arise in the instant case:
- (a) the effect of these DNA technologies on racial/ethnic minorities; and

(b) the exposure of "a huge amount of information from the persons sampled."

[35] In relation to (a), Mr. Ali argues that racial and ethnic minorities will be disproportionately targeted by the police because collecting DNA samples is only a practical investigative option when a DNA analysis of a suspect's sample narrows the investigative focus to a small or "minority" group within the greater population where the crime under investigation was committed. Mr. Ali suggests that this is a form of racial profiling and, in support, he cites *R. v. Dudhi*, 2019 ONCA 665 [Dudhi], paras. 54-62:

(1) The Meaning of "Racial Profiling"

[54] Racial profiling has two components: (1) an attitudinal component; and (2) a causation component. As Brown and Martin JJ. explained in *R. v. Le*, 2019 SCC 34, at para. 76, for the majority of the Court:

[T]he concept of racial profiling is primarily concerned with the motivation of the police. It occurs when race or racial stereotypes about offending or dangerousness are used, consciously or unconsciously, to any degree in suspect selection or subject treatment. [Citations omitted.]

[55] The attitudinal component is the acceptance by a person in authority, such as a police officer, that race or racial stereotypes are relevant in identifying the propensity to offend or to be dangerous: *Peart v. Peel Regional Police Services Board* (2006), 2006 CanLII 37566 (ONCA), 43 C.R. (6th) 175 (Ont. C.A.), at para. 90, leave to appeal dismissed, [2007] S.C.C.A. No. 10. The causation component requires that this race-based thinking must consciously or unconsciously play a causal role. Meaning, race or the racial stereotype must motivate or influence, to any degree, decisions by persons in authority regarding suspect selection or subject treatment.

[56] There are passages in the case law that can be taken to suggest that racial profiling does not occur unless there is no reasoned foundation for the suspect selection or subject treatment other than race or racial stereotyping. In other words, if there is other information that would meet the required legal standard - whether that required legal standard is "reasonable suspicion" [also known as "articulable cause"] or "reasonable grounds" - racial profiling does not exist even if race or racial stereotypes contribute to suspect selection or subject treatment.

[57] A passage from *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39, [2015] 2 S.C.R. 789, at para. 33, quoted by Brown and Martin JJ. in *Le*, at para. 77, can be strained to read this way:

Racial profiling is any action taken by one or more people in authority with respect to a person or group of persons, for reasons of safety, security or public order, that is based on actual or presumed membership in a group defined by race, colour, ethnic or national origin or religion, without factual grounds or reasonable suspicion, that results in the person or group being exposed to differential treatment or scrutiny. [Emphasis added.]

[58] There is a similar passage in *R. v. Brown* (2003), 2003 CanLII 52142 (ON CA), 64 O.R. (3d) 161 (C.A.), at para. 11, that the Crown relies upon before us to argue that "[t]o succeed on an application alleging a s. 9 breach on the basis of racial profiling, an applicant must show that it was more probable than not that there was no articulable cause for the stop, specifically that the stop was based on the person's colour."

[59] This is not the law. As *Brown and Martin JJ.* said in *Le*, at para. 76, racial profiling occurs where race or racial stereotypes are used "to any degree in suspect selection or subject treatment" (emphasis added). Similarly, in *Peart*, at para. 91, *Doherty J.A.* explained:

[Racial profiling] is wrong regardless of whether the police conduct that racial profiling precipitates could be justified apart from resort to negative stereotyping based on race. For example, a police officer who sees a vehicle speeding and decides to pull the vehicle over in part because of the driver's colour is engaged in racial profiling even though the speed of the vehicle could have justified the officer's action: *Brown v. Durham Regional Police Force* (1998), 1998 CanLII 7198 (ON CA), 131 C.C.C. (3d) 1 (Ont. C.A.). [Emphasis added.]

[60] The case law that relates racial profiling to the absence of reasonable suspicion or reasonable grounds must be understood in the context of the principle that policing decisions based on race or racial stereotypes are not, by definition, objectively reasonable decisions. For example, in *R. v. Brown*, at para. 10, *Morden J.A.* cited *Brown v. Durham Regional Police Force* in explaining that "[i]f a police officer stops a person based on his or her colour (or on any other discriminatory ground) the purpose is improper and clearly would not be an articulable cause" (citations omitted).

[61] Similarly, I read para. 33 of *Bombardier* as consistent with the proposition that a decision made in reliance on race or racial stereotypes cannot provide the reasonable basis for that decision. In *Le*, *Brown and Martin JJ.* made this same point after quoting para. 33 of *Bombardier*, when they said that "a detention based on racial profiling is one that is, by definition, not based on reasonable suspicion": at para. 78.

[62] In my view, it is self-evident that a decision need not be motivated solely or even mainly on race or racial stereotypes to nevertheless be "based on" race or racial stereotypes. If illegitimate thinking about race or racial stereotypes factors into suspect selection or subject treatment, any pretence that the decision was reasonable is defeated. The decision will be contaminated by improper thinking and cannot satisfy the legal standards in place for suspect selection or subject treatment.

[36] I am not persuaded that Dudhi assists Mr. Ali in his racial profiling argument. The court in Dudhi cites *R. v. Le*, 2019 SCC 34, in which Justices Brown and Martin for the majority, stated that racial profiling occurs:

when race or racial stereotypes about offending or dangerousness are used, consciously or unconsciously, to any degree in suspect selection or subject treatment.

[37] DNA technology applied to the DNA of a suspect about whom nothing is known, including race and ethnicity - as is the case here - simply does not allow for racial stereotyping, conscious or otherwise. Similarly, an investigative decision to focus on an ethnic/racial group which is based upon objectively reliable information that the perpetrator is a member of that group cannot reasonably be construed as racial profiling. It is of no moment whether that information came from a DNA analysis or an eyewitness to the crime, so long as it is relevant and not tainted by racial/ethnic stereotyping.

[38] In the case at bar, the police knew nothing about Male 1, including his race and/or ethnicity, when they sent his DNA sample for phenotyping and ancestry prediction. It was only upon receipt of the results of the analysis that they learned that he was likely of Kurdish ancestry. Moreover, it was only the very small size of the local Kurdish community where the offence occurred, that made such information of some use because it allowed them to use it as an investigative focus in circumstances where they had no other leads on the identity of Male 1.

[39] I am not persuaded it can reasonably be maintained that either the DNA analysis of Male 1's DNA sample or the subsequent investigative focus on the Kurdish community was an exercise in racial profiling.

[40] The Crown draws an apt analogy between the sort of DNA evidence in question here, and the evidence of a theoretical eyewitness who reports that they saw a man, near to the time and place of the crime, whom they recognized as someone they had seen entering a Kurdish cultural centre many times. The Crown asks, rhetorically, whether the police would be prohibited from acting on such eyewitness evidence as an investigative lead because it indicates that the man is likely Kurdish and, as such, a member of an ethnic/racial minority within the local community.

[41] I turn next to (b): Mr. Ali's assertion that the exposure of a "huge" amount of private information about members of the Kurdish community is at risk as a result of the collection and analysis of DNA samples from them. The essence of Mr. Ali's argument is that a DNA sample holds a wealth of private information about the sample donor. He says, "[t]esting available stands to reveal characteristics about physical features, familial relations, membership to an ethnic group, and medical information." He does not suggest that any of the DNA samples in the case at bar were actually subjected to any testing that would have revealed information other than the existence of kinship to Male 1; indeed, the evidence establishes that Parabon tested all samples, save for that of Male 1, for kinship only. These test results were as reported by Parabon in Voir Dire Exhibits #7 and #8, and reveal nothing about the DNA samples submitted or the persons to whom they are linked, other than the

absence of kinship for 144 anonymized samples, and the presence of full-sibling kinship for one anonymized sample.

- [42] Mr. Ali's argument rests principally on what could have occurred with the DNA samples gathered by the MS homicide investigators, in the absence of legislation or caselaw that would prevent alleged abuses of "Orwellian" proportions. Mr. Ali's position is that this court must take the opportunity presented by his abuse of process application, to fill a legislative lacuna with court-imposed limits on police investigative techniques in relation to DNA.
- [43] I am not persuaded that it would be appropriate to consider imposing investigative limits based on the evidence and arguments in the instant application. Such an exercise would raise manifold considerations and interests not represented here, and would not change the result in the instant application.

E. Conclusion

- [44] Mr. Ali has failed to meet the onus he bears to prove the abuse of process he has alleged. I am not persuaded that Mr. Ali has shown, to any degree, that the state engaged in conduct that is offensive to societal notions of fair play and decency, thereby prejudicing the integrity of the justice system in a manner that would be manifested, perpetuated, or aggravated by a trial or its outcome, let alone that the conduct was so offensive that nothing short of a stay of proceedings would adequately disassociate the justice system from the impugned conduct.
- [45] For all these reasons, the application is dismissed.

"Bernard J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/23/24/2023BCSC2438.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-ali-2023-bcsc-2438>

Prepared on 27 October 2026 · Esheria