

CANADA / JUDGMENT

R. v. Baranec

2020 BCCA 156

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 156 R. v. Baranec

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Baranec,

2020 BCCA 156

Date: 20200604

Dockets: CA44035; CA44038

Docket: CA44035

Between:

Regina

Respondent

And

Eduard Viktorovitch Baranec

Appellant

- and -

Docket: CA44038

Between:

Regina

Respondent

And

Baljinder Singh Bahia

Appellant

Before:

The Honourable Madam Justice D. Smith

The Honourable Mr. Justice Fitch

The Honourable Madam Justice Griffin

On appeal from: Orders of the Supreme Court of British Columbia, dated
October 8, 2016 (conviction) (R. v. Baranec; R. v. Bahia,
New Westminster Docket X075945).

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Vancouver, British Columbia

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Vancouver, British Columbia

June 4, 2020

Written Reasons by:

The Honourable Mr. Justice Fitch

Concurred in by:

The Honourable Madam Justice D. Smith

The Honourable Madam Justice Griffin

Summary:

The appellants challenge their convictions for first degree murder. The victim was Bahia's wife. Baranec was alleged to be the killer. The killing was said to have been arranged by Bahia and Athwal, a third accused who was tried and convicted of first degree murder following a separate trial.

Baranec was the target of a Mr. Big operation that eventually ensnared Bahia and Athwal. The case against Baranec consisted of admissions he made to an undercover officer that he did the killing. The case against Bahia consisted of admissions he made to the same undercover officer and a confession he gave following his arrest that he was involved in arranging his wife's murder.

Baranec challenges the decision of the trial judge to admit the evidence gathered during the Mr. Big operation on the grounds that: (1) the judge erred in finding that the probative value of the evidence outweighed its prejudicial effect; and (2) the judge erred in not excluding the evidence on the basis of police conduct said to amount to an abuse of process. Bahia challenges: (1) the dismissal of his severance application; (2) the judge's failure to edit prejudicial evidence that was inadmissible against him before it was presented to the jury; (3) aspects of the judge's instructions to the jury which he says were misleading; and (4) the failure of the judge to give a "Hodgson instruction" (R. v. Hodgson, [1998] 2 S.C.R. 449) that the reliability of his admissions to the undercover officer needed to be assessed in the context in which they were made.

Held: Appeals dismissed. With respect to Baranec's grounds of appeal: (1) Bradshaw (R. v. Bradshaw, 2017 SCC 35) does not, as Baranec suggests, modify the Hart framework (R. v. Hart, 2014 SCC 52). Even if it did, the way the judge approached the admissibility of this evidence is consistent with what Bradshaw requires; (2) the judge's approach to the first prong of the Hart inquiry reflects no reversible error in principle. It was open to the judge to conclude that the probative value of Baranec's confession outweighed its prejudicial effect; (3) the judge was not required to embark on three parallel lines of inquiry as Baranec suggests to determine whether the police conduct amounted to an abuse of process. The judge's conclusion that the conduct of the police did not amount to an abuse of process was based on factual findings that are entitled to deference on appeal. No error was made by the judge in articulating the applicable test or in his

treatment of the evidence.

With respect to Bahia's grounds of appeal: (1) the dismissal of the severance application was not unjudicial nor did it result in an injustice; (2) the judge was not required to edit the evidence as Bahia suggests for the first time on appeal. The instructions guarded sufficiently against the risk that the jury would use evidence inadmissible against Bahia for an impermissible purpose; (3) the charge did not mislead the jury on the limited use they could make of Athwal's statements; and (4) the judge was not required in this case to provide a modified "Hodgson instruction" to the jury.

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Reasons for Judgment of the Honourable Mr. Justice Fitch:

I. Introduction and Overview

- [1] The appellants, Eduard Viktorovitch Baranec ("Baranec") and Baljinder Singh Bahia ("Bahia"), were tried jointly and convicted by a jury of the first degree murder of Amanpreet Bahia ("Amanpreet"). A third person, Tanpreet Athwal ("Athwal"), was tried separately following a severance order and was also convicted of the first degree murder of Amanpreet. Her appeal from conviction is pending in this Court.
- [2] Amanpreet was married to Bahia. On the morning of February 7, 2007, she was brutally murdered in her home in Surrey, British Columbia. The cause of death was multiple stab wounds to the front of her neck and to her back.

- [3] Bahia's parents, who were living with their son and Amanpreet at the time, had left the house that morning to attend a medical appointment. The killing was committed when Amanpreet was alone in the residence with her two youngest children, aged one and three.
- [4] Bahia was a "person of interest" from the outset. Athwal was in India when the murder was committed. While the police suspected Bahia may have been having an extra-marital affair with Athwal at the time of the murder, Athwal was not initially regarded as a "person of interest".
- [5] The investigation foundered for lack of evidence until December 5, 2010, when Baranec, who had been targeted with a Mr. Big operation arising out of the unrelated disappearance and presumed murder of 15-year-old Katelyn Noble in Saskatchewan (the "Noble investigation"), told Constable B, the primary undercover officer, that in addition to killing Ms. Noble he had committed three other murders. This statement was made in Saskatchewan after Baranec was persuaded to accompany undercover officers to that province to re-enact the killing of Ms. Noble and lead them to her burial site.
- [6] Baranec claimed that one of three other murders he committed occurred in 2008. He said he stabbed an East Indian woman to death in her home in Surrey. He said it was arranged by Athwal who paid him \$15,000. Baranec said he never met Bahia but, based on what Athwal told him, Baranec understood that Bahia planned the killing, knew when it would take place, and that it was arranged because Athwal and Bahia wanted to get married. He supplied Cst. B with numerous details respecting the murder, including information about the layout of the Bahia residence, how he committed the murder and what the deceased was wearing at the time. Baranec said that even though he committed the murder himself, he told Athwal he retained an unidentified third party from Toronto to do the killing. Baranec also told Cst. B that he read about the murder in the newspapers.
- [7] Following Baranec's December 5, 2010 statement, the Mr. Big operation continued but shifted focus away from the Noble investigation toward a renewed investigation of the murder of Amanpreet.
- [8] Cst. B convinced Baranec that he needed to speak with Athwal and Bahia to confirm that neither of them had said anything about Amanpreet's murder to anyone else, and that there were no "loose ends" that could bring unwanted attention to Baranec and, through him, to the activities of Mr. Big's criminal organization.
- [9] On January 10, 2011, at the direction of Cst. B, Baranec met with Athwal. Cst. B joined the conversation, assuming the role of the hitman from Toronto Baranec had told Athwal he hired to do the killing. The communications were intercepted. Athwal assured Baranec and Cst. B that only the three of them and Bahia knew what had happened. Cst. B insisted Athwal call Bahia to arrange for a further meeting between the four of them so Cst. B could satisfy himself that Bahia had not said anything to anyone else about the murder. In that meeting, which was also intercepted, Bahia was asked by Cst. B if he had said anything to anyone about his wife getting "whacked". Bahia said he had not.

- [10] On January 14, 2011, Cst. B met with Bahia again, this time alone. This conversation was also intercepted. Bahia told him that the killing was Athwal's idea, but that both of them were involved and that they had no other solution. Bahia assured Cst. B he had not said anything to anyone about the murder, noting that he had as much to lose as Cst. B. In parting, Bahia told Cst. B that his "lips are sealed."
- [11] On January 22, 2011, Bahia made a post-arrest inculpatory statement to the police. He said the murder happened because his wife was going to leave him and he "couldn't handle that." He said he went to Athwal for help and that she pushed him into it. He said he did not pay anything for the murder and that Athwal came up with the money. He knew his parents would be out of the house attending a doctor's appointment the morning the murder was committed. He said he called his wife and told her a repairman was coming to the house and that she should show him the stove. At the end of the interview, Bahia recorded a message to his family saying that he was sorry for what had happened. He confirmed that his wife was going to divorce him and said, "I couldn't handle losing her."
- [12] The case against Baranec consisted of inculpatory admissions made by him to Cst. B during the Mr. Big operation that were audio and videotaped. The case against Bahia consisted of the two statements he made to Cst. B on January 10 and 14, 2011, and the confession he made following his arrest. Neither of the appellants testified at trial. Athwal was not called as a witness.
- [13] Baranec argues on appeal that the trial judge erred in admitting, pursuant to the framework developed in *R. v. Hart*, 2014 SCC 52, the inculpatory admissions he made during the Mr. Big operation. There are two prongs to Baranec's argument.
- [14] First, Baranec submits that the judge erred by ruling the Crown had established on a balance of probabilities that the probative value of his admissions to Cst. B outweighed their prejudicial effect. Among other things, he argues that the Hart admissibility framework upon which the judge's ruling rests has since been overtaken by *R. v. Bradshaw*, 2017 SCC 35. He argues that Bradshaw, a case dealing with the admissibility of hearsay statements made by a non-accused declarant, fundamentally changes the law. In assessing the threshold reliability of a hearsay statement for admissibility purposes, Bradshaw adopted a more stringent standard respecting the use of confirmatory evidence.
- [15] Baranec argues that, post-Bradshaw, confirmatory evidence is only of assistance in considering the admissibility of an out-of-court hearsay statement (including a confession made by an accused in the context of a Mr. Big operation) if it serves to rule out alternative, even speculative, explanations for the statement such that the only remaining likely explanation for the statement is that the declarant spoke truthfully. Baranec submits that the admissibility analysis set out in Bradshaw ousts the admissibility framework developed in Hart just three years earlier. From this premise, Baranec argues that the judge erred in law by declining to engage in speculation and by relying on confirmatory evidence that could not, as a matter of law, serve to enhance the reliability of his confession. Quite apart from

the application of Bradshaw to this case, Baranec argues that the judge relied on confirmatory evidence that could not logically serve to enhance the reliability of his confession.

- [16] Second, Baranec submits that the judge erred by failing to conclude that the manner in which the Mr. Big operation was conducted gave rise to an abuse of process requiring the exclusion of all of his inculpatory statements. Although the abuse of process argument has several components, central to this ground of appeal is Baranec's contention that the police put themselves above the law and committed unauthorized illegal acts by orchestrating his travel to Saskatchewan knowing that by doing so he would be violating the terms of his conditional sentence order ("CSO"). Baranec seeks an order allowing the appeal, setting aside the conviction and directing a new trial.
- [17] Bahia challenges the judge's dismissal of his application for severance. He submits that the dismissal of his severance application constituted an unjudicial exercise of discretion and led to a miscarriage of justice. Central to Bahia's argument is that the prejudicial effect of statements made by Baranec and Athwal to Cst. B that implicated him in the offence--statements that were not admissible against him--were so prejudicial that the jury could not reasonably be expected to follow the limiting instructions they were given. In addition, Bahia submits that, having dismissed his severance application, the judge erred in law by failing to edit certain out-of-court statements made by Baranec and Athwal to Cst. B that implicated him in the murder--including statements that lacked probative value but were highly prejudicial to him. Third, Bahia submits that the judge erred in law in a mid-trial instruction he gave to the jury concerning the limited use they could make of Athwal's out-of-court statements. He submits that the mid-trial instruction failed to make it clear to the jury that any statement made by Athwal in Bahia's absence could not be used to inform their understanding of what Bahia said during the Mr. Big operation. Finally, Bahia argues that, given the threatening context in which he made his statements to Cst. B on January 10 and 14, 2011, the judge failed to give the jury a "Hodgson instruction" (R. v. Hodgson, [1998] 2 S.C.R. 449) cautioning them that statements made as a result of threats of violence may be unreliable or untrue. Bahia also seeks an order allowing the appeal, setting aside the conviction and directing a new trial.
- [18] For the reasons that follow, I would dismiss the appeals from conviction of both Baranec and Bahia.

II. Background

1. Amanpreet's Murder and the Initial Investigation

- [19] The home in which the murder was committed was located on a street four or five houses north of Highway 10 near the intersection of Highway 10 and Scott Road. Amanpreet's body was discovered by Bahia's parents in a ground floor kitchen across the hall from the main foyer and front entranceway. She was wearing a long, green, brown and blue patterned shirt with tan coloured trousers--an outfit Bahia's father described as a traditional Punjabi suit

called a salwar kameez. No blood was discovered in the main foyer or in the hall between the main foyer and ground floor kitchen. There was no evidence that efforts had been made to clean up blood from these areas. In addition, there were no signs of a forced entry. The front door, which could be locked from the interior by pushing and turning the door handle, was locked when Bahia's parents returned to the residence that morning. A staircase leading from the ground floor to the second storey of the house was located to the right of the main entranceway. The stairs turn 90 degrees to the left. There is a decorative railing on the left side of the stairs.

- [20] Amanpreet suffered over 30 sharp-force wounds to her neck, back and left arm, as well as defensive wounds to her hands. The forensic pathologist who testified on the Hart admissibility voir dire noted 15-20 overlapping wounds to the front of Amanpreet's neck. There was a large gaping wound in the front of the neck, 19 cm in length that penetrated to the bone of the spinal column. Amanpreet's jugular vein and carotid arteries had been completely severed. There were additional cuts lower down on her neck. There was a large, gaping and deeply penetrating wound on Amanpreet's left upper arm.
- [21] There were two deeply penetrating wounds to Amanpreet's back. Both punctured the heart. One of the wounds penetrated to a depth of 17 cm and terminated only because the instrument used to cause the injuries came into contact with the back of Amanpreet's sternum. The wounds were most likely caused by a sharp-edged instrument such as a knife. Although the pathologist could not express a definitive opinion on this point, one of the wounds appeared to have been caused by a single-edged knife blade. The other back wound appeared different but the pathologist was unable to say whether this reflected the use of a double-edged blade or simply the way in which the blade was inserted. The cause of death was multiple stab and incised wounds to Amanpreet's neck and back.
- [22] The holdback evidence in this case--evidence known by the investigative team but not otherwise disclosed to other members of the public--was that Amanpreet had been stabbed twice in the back.
- [23] Corporal Paul Wellington, who was involved in the investigation from the outset and became the lead investigator in March 2007, testified that the police did not disclose to the Bahia family, or to the public, information relating to the nature of the weapon that was used in the attack, or the number or location of the stab wounds inflicted by the perpetrator. In addition, the police did not disclose to the public the clothing Amanpreet was wearing at the time of her death, or that the front door of the residence could be locked by someone leaving the home simply by engaging the locking mechanism of the inside door handle.

- [24] Amanpreet's murder attracted a good deal of media attention. Cpl. Wellington testified on the Hart voir dire that no mention was made, in any print media reports he reviewed, of: the layout of the interior of the Bahia residence; the existence of the left-turning angled staircase to the right of the front door; or the existence of an exterior door in the ground floor kitchen area where Amanpreet's body was found. In cross-examination, he conceded it was difficult for the police in a case of this kind to control the flow of information.
- [25] Evidence was led on the Hart voir dire that the following details about the murder were disclosed in print media reports: the victim was a 33-year-old Indo-Canadian female named Amanpreet Bahia; the location of the residence in which the murder was committed; the victim's in-laws left the house at 8:15 a.m.; the victim's body, which was fully clothed and lying in a pool of blood, was discovered between 11:15 a.m. and 11:30 a.m.; two young children were in the home when the murder was committed; the victim's body was variously said to have been discovered in the basement, on the ground floor, and on the kitchen floor; the victim had been stabbed to death more than once; the weapon was variously described as a knife, machete and a sharp object; there were no signs of forced entry and the house was locked when the victim's in-laws returned to the residence; nothing was missing from the house; and the victim's family owned a blueberry farm. The print media also published photographs of the exterior of the Bahia residence that depicted the circular driveway, carport and front door, and a photograph of Amanpreet wearing traditional East Indian clothing at a family gathering. That some information about the murder was in the public domain became an important component of the threshold reliability assessment of Baranec's statements on the Hart voir dire.
- [26] Baranec seeks to adduce as fresh evidence on appeal television news footage relating to Amanpreet's murder that was aired on February 7 and 8, 2007. The news clips include footage that depicts the front of the Bahia residence and a brief close-up view of the open front door that depicts the interior staircase in the main foyer to the right of the door. This evidence was led at trial but not on the Hart voir dire as counsel did not learn of the existence of this footage until after the admissibility ruling had been made. The Crown opposes admission of the evidence arguing that the fourth criteria set out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759, has not been met--namely, that the evidence, if believed, could not, when taken with the other evidence adduced on the Hart voir dire, reasonably be expected to have affected the admissibility ruling.
- [27] Various techniques employed in the investigation of Amanpreet's murder failed to produce evidence. The file was transferred to the Unsolved Homicide Unit in the summer of 2008. The investigation was inactive until the end of 2010.
2. The Saskatchewan Investigation

- [28] Unbeknownst to the RCMP in British Columbia investigating the murder of Amanpreet, the RCMP in Saskatchewan targeted Baranec in the fall of 2010 with a Mr. Big operation in furtherance of an investigation into the disappearance of Ms. Noble. It was during the course of this investigation that Baranec made statements implicating himself, Bahia and Athwal in the murder of Amanpreet.
- [29] Some additional background respecting the Noble investigation in Saskatchewan is necessary to put in context the Mr. Big operation that continued into the murder of Amanpreet, and Baranec's assertion that the conduct of the police in the Noble investigation--conduct which Baranec says is temporally, contextually, and causally connected to his first clear admission of responsibility for Amanpreet's murder--constitutes an abuse of process.
- [30] Central to Baranec's abuse of process argument is the fact that, when he was taken to Saskatchewan during the Noble investigation, he was under a CSO for a previous offence. By the terms of that order, he was required to: remain in British Columbia unless prior written permission to leave the jurisdiction was obtained from his CSO supervisor or the court; observe a curfew from 9:00 p.m. to 7:00 a.m. daily (later varied after a breach to start at 7:00 p.m.); not enter any licensed premises; and abstain from the consumption of alcohol.
- [31] Surreptitious lifestyle surveillance was conducted of Baranec before the Noble investigation began. He was living in Burnaby, British Columbia, with his wife and children. He was working long hours as a welder. He was neither socially isolated nor financially destitute. He was, however, observed to routinely violate the curfew condition of his CSO.
- [32] Approval was obtained to mount a homicide undercover operation targeting Baranec in the Noble investigation on January 30, 2009. An operational plan was approved on July 20, 2010. The approving officers confirmed that the assigned investigators and cover person(s) were aware of the requirements of s. 25.1(8) of the Criminal Code, R.S.C. 1985, c. C-46 [Code], and that should the investigation require the commission of an act that would otherwise constitute an offence, a supplementary operational plan would be submitted prior to the commission of that act.
- [33] In brief, s. 25.1 of the Code authorizes and justifies, within statutorily defined limits, the commission of an act by a designated peace officer that would otherwise constitute an offence. The peace officer so designated must believe "on reasonable grounds that the commission of the act as compared to the nature of the offence or criminal activity being investigated, is reasonable and proportional in the circumstances, having regard to such matters as the nature of the act the nature of the investigation and the reasonable availability of other means for carrying out the officer's law enforcement duties." By virtue of s. 25.1(11), the offence of attempting to obstruct justice cannot be justified under this section.

- [34] The "bump"--the first meeting between the target of the investigation and an undercover police officer--occurred after Baranec was arrested and taken into custody on July 23, 2010, for breaching the terms of his CSO. An undercover officer, posing as a cellmate, introduced Baranec to the work of Mr. Big's fictitious criminal organization and sowed the seeds for involving him in the organization after his release.
- [35] Contact was made with Baranec after his release and he participated in simulated criminal activity with several undercover officers posing as members of the criminal organization. Among the activities to which Baranec was made privy were loan-sharking and dealing in various contraband goods, including counterfeit credit cards, firearms and explosives. He was exposed to, and counted, fairly large sums of money as part of his duties for the organization. Baranec arranged through one of the undercover officers a \$5,000 interest-free loan for himself that he quickly repaid. The undercover officer made clear to Baranec that he was not a customer and that the loan amounted to a friendly favour. Baranec's responsibilities with the organization grew over time and he was tasked with travelling to the interior of the province on a number of occasions.
- [36] As noted above, Cst. B was the primary undercover officer. As the judge noted, Cst. B's presentation was coarse, profane and flavoured with contempt for women. As the police hoped, Baranec came to see Cst. B as a close friend and confidante.
- [37] Baranec was led to believe that the members of the organization were well compensated and prepared to resort to violence if necessary, including in relation to women.
- [38] Baranec was paid by the organization for his work a total of \$13,900. This amount included sums paid to Baranec over 49 police-orchestrated scenarios encompassing both the Noble investigation (38 scenarios) and the investigation into Amanpreet's murder (11 scenarios).
- [39] Baranec was told that the organization relied on information supplied by a number of corrupt officials, including a member of the RCMP. On one occasion when Baranec was present, an encounter was staged between Cst. B and this purportedly corrupt officer in which Cst. B ridiculed and committed a minor assault on the officer.
- [40] Baranec demonstrated throughout the operation that he approved of the organization's criminal activities and that he enjoyed being involved. He said during one scenario that "this is what I wanna do" and "I love doing this shit". Baranec also expressed his approval of the organization's willingness to resort to violence, including violence against women. In one staged encounter, Baranec was present while an undercover officer assaulted and demeaned a female undercover officer who was posing as a sex-trade worker. Afterwards, Baranec expressed his approval of what had occurred.
- [41] No violence was used or threatened against Baranec in the course of the operation, and he was never given the opportunity to act violently towards anyone else.

- [42] It was emphasized to Baranec throughout the operation that, should he wish, he was free to leave the organization and that there would be no adverse consequences for doing so. Baranec was made aware that another employee, who was said to have been unreliable and to have acted against the interests of the organization, was able to leave freely without penalty or consequence.
- [43] On November 3, 2010, Baranec told one of the undercover officers he had "four bodies on him". On November 15, 2010, he assured Cst. B that he had "no heat" on him for killings he had done in the past.
- [44] On November 29, 2010, while travelling with an undercover officer on Highway 10 about four blocks away from the Bahia residence, Baranec said that he would never forget this area because "[i]t brings [back] all my fucking memories, you know?" He said he had killed a man who owed him money three years ago. He said the killing occurred in a house. He said he "[w]ent three streets down" and referred to the "third house". He said when he went into the house and committed the murder he saw "kids, three, four-year-old kids. Watching me, I'm like fuck." He yelled at them to go upstairs. He said he committed the murder with a knife. He also said the murder was front page news. He said the media reported the perpetrator must have had the keys for the house. He said the victim was white but that he was married to an East Indian woman. In this context, Baranec also made a reference to blueberry farms.
- [45] As Baranec's involvement with the criminal organization progressed, the crime boss expressed a desire to interview him. Baranec was told he was being considered for a position as a full-fledged member of the organization and for participation in an upcoming job (the "big score") from which he stood to earn \$20,000. He was told that the organization needed to know if any "loose ends" were left after the killing of Ms. Noble that might attract unwanted police attention.
- [46] In the event Baranec confessed to the murder of Ms. Noble during the interview with Mr. Big, arrangements had been put in place by the RCMP to immediately fly him from British Columbia to Saskatchewan so he could show the undercover officers where he buried Ms. Noble's body.
- [47] The officer who was responsible for conducting the undercover portion of the Noble investigation and designing the scenarios to be used in the operation (the "cover man") testified on the Hart voir dire that authorization was required if it was contemplated that one of the investigators would commit a criminal offence. He was aware that Baranec was subject to a CSO that had a curfew condition, a term prohibiting him from leaving British Columbia without the prior written permission of his CSO supervisor or the court, and a condition requiring him to abstain from consuming alcohol. He was also aware that by taking Baranec to Saskatchewan, Baranec would be breaching his CSO. With this in mind, he sought legal advice from a Department of Justice lawyer before proceeding. The judge ordered that the advice be disclosed during the Hart voir dire.

[48] The written exchange that occurred between the cover man and the Department of Justice lawyer is reproduced, in material part, below:

November 19, 2010 Email to the RCMP Legal Advisory Section of the Department of Justice

I am currently acting as the designated cover person on a long-term Undercover Operation utilizing the Major Crime Technique. The Target of the UCO is believed to have involvement/knowledge in the disappearance of a 15 year old girl, last seen in Saskatchewan a few years ago. Our Target resided in Saskatchewan at the time, with the victim and another male. The day following the young girl's disappearance, our Target hired two males to kill his roommate. They were unsuccessful and our Target was convicted of Aggravated Assault. He has since been released from custody on a CSO with several conditions, including a curfew and being confined to his residence unless granted prior written approval.

We have been able to conduct the entire UCO while respecting all of the Target's conditions. Having said that, the covert interview is scheduled for December 3rd and if we are successful in obtaining incriminating statements, we will need to travel to Saskatchewan in order to retrieve the body.

I anticipate the Target being reluctant to leave British Columbia, but I believe that he will accompany us if we explain to him that he will be going to jail if we don't take care of his problem. Having said that, we would have to pressure him to leave, therefore pressuring him to breach. The only objective of course would be to determine the victim's whereabouts, and therefore [bring] the investigation to an end.

Do you see any legal issues pertaining to a Breach of CSO under those circumstances?

November 22, 2010 Email from the Department of Justice

[T]he good news is that the team would not be aiding and abetting an offence as there is no offence for a breach of a CSO.

Indeed, on that basis a good deal if not all of the [s. 25.1] issue is taken off the table with respect to the CSO.

While we may have facilitated a technical breach of the CSO I am far from certain that our Ops Plan if carried out as per [what] you have stated would be characterized as anything that would "obstruct, pervert, or defeat the course of justice". Indeed, the Ops Plan would do the very converse in promoting the course of justice by obtaining evidence that would hold the target responsible for a heinous homicide.

While, from my perspective as counsel to the RCMP, [I] believe that the public interest proportionality test would more than be satisfied as the target would be in our constructive custody for the duration of the investigation that would culminate in his arrest, others may take a more technical view of our playing perhaps fast and loose with a CSO.

Hence there is some risk involved but given the up-side, the potential to recover a body (and provide closure to the survivors of the victim) which would attach the target to the body and the offence, the risk is at very worst "reasonable". Further, there is no other conventional or alternative investigative avenue at this time to advance the investigation to the point where the Crown's case would be so compelling as to extinguish even an ember of reasonable doubt.

At the end of the day, I rhetorically ask you to consider the alternative; if the alternative (not acting on the admissions) defeat[s] the public interest, then I would suggest that should provide you with your answer.

[49] The cover man was asked on the Hart voir dire to identify the considerations he took into account in deciding whether to take Baranec to Saskatchewan in violation of his CSO if he confessed to the murder of Ms. Noble. He said this:

A Yes, I did take the breach of the conditional sentence order in consideration. I also took into consideration the fact that there's a very likelihood to further the investigation of a missing person, and I was aware that the [Saskatchewan RCMP] investigators had exhausted almost every investigative avenues in the Ms. Noble disappearance, and I sought legal advice, and based on the combination of those factors, I made the decision to, under strict guidance and control by the three operators that travelled with Mr. Baranec, that I made the decision to facilitate the breach of his conditional sentence order in order to advance the murder investigation.

Q Now did you turn your mind to -- you had testified earlier in your evidence that, if the police wished to commit a criminal offence in the course of a scenario, that they need some authorization? Do you remember testifying to that?

A Yes, that's correct.

Q And did you turn your mind to obtaining that authorization with respect to this conditional sentence breach?

A No. I received approval from my supervisors, but as far as the -- the Bill C24 requirements or the -- what we call the law enforcement justification [a reference to s. 25.1 of the Code], my understanding was that the police was not facilitating the commission of a criminal offence.

[50] In cross-examination, the cover man testified that the undercover officers were frequently reminded of Baranec's curfew and abstinence conditions. They knew not to order alcohol for Baranec when dining out, but were told not to say anything if Baranec ordered a drink for himself. The cover man testified that he never considered going before a judge or the CSO supervisor to ask "for an exemption" from the term of the order requiring him to stay in British Columbia. He testified that attempting to have Baranec's CSO amended in this way would risk compromising the entire undercover operation.

[51] Staff Sergeant Maureen Wilkie was the lead investigator in the Noble investigation. She was aware that if Baranec implicated himself in the killing, arrangements would be made to bring him to Saskatchewan in an effort to gather confirmatory evidence and locate Ms.

Noble's body. She was also aware that if Baranec came to Saskatchewan he would be in breach of his CSO. After discussing the matter with the cover man, she made arrangements to temporarily remove Baranec's CSO from the Canadian Police Information Centre ("CPIC"), a national database of police records. Doing so would prevent any officer who was not part of the investigative team from discovering that Baranec was in breach of his CSO and intervening in a way that could imperil the undercover operation.

[52] Staff Sgt. Wilkie was asked to address the considerations she took into account in making this decision:

Q Okay. And what consideration, if any, did you give to that?

A I -- I considered it. There was a bigger investigation going on, with the homicide of a child. Mr. Baranec would be with other police officers and put into a hotel area where he really didn't know anybody. So I looked at the public safety side, but I also looked at that we needed to find Katelyn and bring Katelyn home, and find out what happened to her.

Q So when you say that -- you mean bring Katelyn home, you're saying we needed to find Katelyn Noble's body, is that what you're saying?

A That's correct, yeah.

[53] Staff Sgt. Wilkie testified in cross-examination that she had never done anything like this before and could not point to her lawful authority for doing so. She agreed that her actions were designed to facilitate the undetected breach by Baranec of his CSO.

[54] On December 3, 2010, Baranec met with Mr. Big in Vancouver. During the course of this interview, Baranec was led to believe that the organization had obtained information from a corrupt police source that he was a prime suspect in the murder of Ms. Noble and that his arrest was imminent. He was led to believe that the organization could "fix" the problem thereby permitting Baranec to become a full-fledged member of the organization if he disclosed his involvement in Ms. Noble's disappearance. Baranec confessed to Mr. Big that he had killed Ms. Noble and disposed of her remains.

[55] Mr. Big advised Baranec that it was imperative that they act quickly to deal with the problems this investigation posed. It was determined that Baranec, Cst. B and one other undercover officer would travel to Saskatchewan. Mr. Big told Baranec that his corrupt police source would remove any record of him being bound by a CSO so the police would not be alerted to the breach.

[56] Prior to departing for Saskatchewan, Baranec expressed his gratitude for everything that was being done for him. He told Cst. B that he was "good for four", which the officer interpreted to be a claim by Baranec that he had committed a total of four murders.

[57] While in Saskatchewan, Baranec brought Cst. B and another undercover officer to a rural area he said was connected to Ms. Noble's murder. He provided a re-enactment of what he said had occurred. Ms. Noble's body was not recovered.

[58] On December 5, 2010, while still in Saskatchewan, Cst. B asked Baranec about the other three murders he claimed to have committed. Baranec said he murdered a man in the context of a drug deal in Hamilton, Ontario, in 1997, and committed a similar killing about a year later in Toronto. He provided detailed accounts of both of these killings. Baranec said the third killing had been that of Ms. Noble, and that the fourth was an East Indian woman in Surrey.

[59] With respect to the killing he committed in Surrey, Baranec supplied Cst. B with the following information:

- the killing occurred about two years ago;
- he was paid \$15,000 by "Tempreet" [Athwal] to kill the victim;
- Athwal was a real estate agent who had assisted him in purchasing properties to use as marihuana grow operations. (Evidence was led on the Hart voir dire confirming that Athwal acted as Baranec's real estate agent in at least one transaction);
- Athwal told him she was in a relationship with the victim's husband, and that the victim was to be killed so they could get married. She also told him that the victim's husband had a role in planning the murder and knew when it would take place;
- he had refused to meet the victim's husband even when the victim's husband requested a face-to-face meeting;
- he told Athwal he would arrange for someone from Toronto to commit the murder so Athwal would not know that he carried out the killing himself;
- Athwal drove him by the house in which the victim lived;
- the house was a big, run-down two-storey residence with a circular driveway. It was located just off Highway 10, two blocks from Scott Road;
- it was the second or third house off Highway 10;
- Athwal gave him a photograph of the victim;
- Athwal called him from India the day the murder was committed to tell him that the victim's husband's parents had left the house and that he was "good to go";
- he understood from Athwal that the victim's husband would be in the temple that morning with a friend who would be his alibi witness, and that the victim would be alone in the residence between 9:00 a.m. and 11:00 a.m.;

- he went to work the morning of the killing to establish an alibi for himself. He left work around 10:00 a.m. and drove to the victim's residence;
- he knocked on the front door of the house pretending to be a delivery man and the victim let him in;
- there were stairs going up to the second storey of the residence on the right-hand side of the front door. There was a step up and then a turn in the stairs before they went up again;
- the victim was wearing East Indian clothing like "pyjamas". When asked what colour the victim's outfit was, Baranec said he did not know but thought it was different colours like blue-green polka dots;
- he was wearing a balaclava;
- the victim did not have a chance to say anything;
- he stabbed the victim a couple of times in the chest with a knife. He drew a picture of the knife at Cst. B's request. He described and depicted it as being more like a small spear with four edges;
- he turned the knife in the victim's body as she was going down;
- he remembered the victim's hands and her reaction;
- by the time the victim fell down, she was almost in a laundry room by the front door;
- there was an external back door in the laundry room;
- he remembered reading a newspaper report that the killer must have come in through the back door because the front door was locked;
- when the victim was down he slashed her throat in one action;
- he heard footsteps and was surprised to see two small children on the stairs. He described one as a baby and the other as being three years old. One of the children was coming down the stairs around a railing;
- he scared the children to make them run back upstairs;
- as part of the deal with Athwal, he was supposed to steal the contents of an upstairs safe but did not go upstairs because he saw the children and felt he needed to get out of there;
- he exited the house by the front door. The door locked automatically when he pulled it shut;
- he returned to his worksite by noon or 12:15 p.m.;
- he threw the knife in the Fraser River after committing the murder (no knife was found); and

· the media covered the murder and he saw a short little newspaper article about it but said, "I don't recall what it fucking actually says". He said that the "fucking paper doesn't tell you all the little things". He also said he thought he saw something in the newspaper to the effect that either the victim's family or her husband's family had a blueberry farm.

3. The Undercover Operation Shifts Focus

[60] Armed with this further information, the police made inquiries into the homicides Baranec described. As for the Surrey claim, the police believed that the information provided by Baranec closely matched the known circumstances of the dormant investigation into the murder of Amanpreet. A decision was made to reorient the undercover operation to gather further evidence about Amanpreet's killing. For a short period of time, the investigation went into a holding pattern as the police obtained necessary authorizations to intercept the conversations of the known targets.

[61] On January 10, 2011, Baranec confirmed in a conversation with Cst. B that there was no hitman from Toronto and that he did "the whole job" himself. He said the only people who knew what happened were Athwal and, "obviously", the victim's husband. He said Athwal called him the morning of the murder and said "it's all good to go". He said he "guess[ed]" that the victim's husband phoned Athwal who phoned him. Athwal told him the victim's husband was in the temple when he received the "good to go" call.

[62] Baranec said that when the victim opened the front door he "did this thing quick." He added that after the killing he called Athwal in India to tell her that the job was done. He placed the call from a disposable phone Athwal had purchased for him at 7-11. He then smashed the phone.

[63] Cst. B urged Baranec to set up a meeting with Athwal so they could ensure there were no loose ends arising out of Amanpreet's murder. Cst. B posed as the killer, a deception made possible by the fact that Baranec told Athwal that he had hired someone else to kill Amanpreet. During this scenario, Athwal said that Bahia was the only other person with knowledge of the murder.

[64] Cst. B pressed Athwal to immediately contact Bahia to arrange a meeting. Cst. B, Baranec and Athwal drove to Bahia's worksite. In the presence of Baranec and Athwal, Cst. B demanded to know whether Bahia had told anyone about the killing. Bahia assured Cst. B that he had not said anything to anyone about his wife "getting whacked". Bahia thanked Cst. B and hugged him before departing.

[65] After Cst. B left with Athwal and Baranec, Athwal told Cst. B that Amanpreet was killed because Bahia was her "friend forever" and they were going to get married.

[66] Athwal and Bahia were observed meeting on January 10, 2011, after the end of this scenario.

- [67] The police conducted investigations into Baranec's statements that he had also committed murders in Hamilton and Toronto. They were unable to connect these statements to any unsolved homicide in either city. In his admissibility ruling on the Hart voir dire, the trial judge characterized Baranec's confessions to these two murders as "indisputably false".
- [68] On January 14, 2011, Cst. B reminded Baranec that he should never take credit "for shit you never did". He told Baranec that the crime boss had done some checks and that nothing matched up with Baranec's claim that he committed homicides in Hamilton and Toronto. Baranec admitted that he had lied about his involvement in these two homicides, but continued to assert that someone else did the killings while he was present at the scene for backup. He maintained, however, that he was responsible for the killings of Ms. Noble and Amanpreet.
- [69] On the same day, Cst. B met with Bahia alone. Cst. B asked Bahia to explain the motive behind the killing. Bahia responded that it was a "family thing" involving his wife and Athwal. Bahia told Cst. B the murder was Athwal's idea, but that it was "between both of us" and that "we had no other solution". Bahia also said he called the perpetrator to tell him that the "coast was clear" the morning of the killing once his parents had left the house. It will be recalled that Baranec said he received this call from Athwal. Bahia told Cst. B not to worry about it and that his "lips are sealed."
- [70] Baranec, Bahia and Athwal were arrested on January 21, 2011.
4. Bahia's Post-Arrest Statement to the Police
- [71] On January 22, 2011, Bahia was interviewed by Staff Sergeant Baltej Dhillon. Bahia initially denied any involvement in the murder of his wife. Staff Sgt. Dhillon played recordings of Bahia's conversations with Cst. B on January 10 and 14, 2011. Bahia then confessed that he was involved in the killing of his wife.
- [72] When asked if he was sorry for what he did, Bahia nodded affirmatively. When asked who had the money to pay the killer, Bahia said that "[Athwal] got it from somewhere" and that he "didn't pay a cent."

[73] When asked why the murder was committed, the following exchanges occurred:

Sgt. DHILLON: Your children were playing in their mother's blood. Do they remember that? This is over Baljinder [Bahia]. What was so bad about Amanpreet?

BAHIA: I don't know what was wrong with me.

BAHIA: I don't know. I don't know, why did I do this? I don't know.

Sgt. DHILLON: Why did this happen?

BAHIA: She was gonna leave me.

Sgt. DHILLON: Who was?

BAHIA: Amanpreet.

Sgt. DHILLON: Amanpreet was gonna leave you? How do you know that?

BAHIA: She was talking to some lawyer for a divorce.

Sgt. DHILLON: Now how did this all come about then?

BAHIA: I couldn't handle [her] leaving me.

[74] Bahia indicated that when he learned that his wife was considering a divorce, he asked Athwal for help. He then said Athwal "pushed [him] into doing this."

[75] Bahia told Staff Sgt. Dhillon he knew that his parents would be out of the house on the morning of the killing attending a doctor's appointment. He said he called his wife and told her, "There's a repair man coming, just show him the stove or something." As an aside, I note that a formal admission was made at trial that between January 1, 2007, and February 5, 2007, a cell phone associated with the Bahia family was in contact with a cell phone registered to Athwal on 93 occasions. At 8:59 a.m. on February 7, 2007, a short call was placed from a cell phone associated with the Bahia family to another cell phone associated with the Bahia family. It was the position of the Crown that this was the call Bahia made to Amanpreet the morning of the murder telling her that a repairman was coming to the house and to let him in when he arrived.

[76] Bahia recorded this message to his family near the end of the interview:

I am really, really sorry for what happened. I was too afraid to lose her ok, the way, she was, you know divorce me, I knew that. But I was too afraid to lose her. I tried, and tried but I was gonna lose her I know that. I couldn't handle losing her. I'm really, really sorry, what happened.

[77] Bahia's post-arrest statement to the police was found to be voluntary and was admitted at trial. Bahia does not challenge this ruling on appeal.

III. Proceedings in the Trial Court

1. Overview

[78] Athwal was granted severance on July 10, 2013. Reasons for judgment are indexed as 2013 BCSC 1219. The Crown proceeded against Bahia and Baranec jointly.

[79] Pursuant to the admissibility framework developed in Hart, Baranec applied for exclusion of all of the statements made by him during the Mr. Big operation in Saskatchewan and British Columbia on two grounds. First, he argued that the Crown failed to establish that the probative value of his statements to undercover officers confessing his responsibility for the murder of Amanpreet outweighed their prejudicial effect. Second, he argued that the manner in which the Mr. Big operation was conducted constituted an abuse of process. The trial judge rejected both arguments and admitted Baranec's statements to the undercover officers, subject to editing to minimize the prejudicial effect of the statements. The judge

noted that the Crown did not seek to adduce before the jury all of Baranec's statements to undercover officers. In particular, the judge was aware the Crown would not seek to have Baranec's confession to the murder of Ms. Noble heard by the jury. The ruling on the Hart voir dire is indexed as 2016 BCSC 60.

[80] I should emphasize that the Hart voir dire only dealt with statements made by Baranec--the target of the Mr. Big operation. Bahia did not claim an independent right to a voir dire to determine the admissibility of his statements to Cst. B.

[81] Baranec did not testify on the Hart voir dire.

[82] After Baranec's statements to the undercover officers were ruled admissible, Bahia applied for severance. The application was dismissed. The ruling dismissing Bahia's severance application is indexed as 2016 BCSC 1231.

[83] The jury began hearing evidence on September 13, 2016. On October 8, 2016, Baranec and Bahia were found guilty of first degree murder.

2. The Hart Admissibility Ruling in Relation to Baranec

[84] Confessions made by an accused during a Mr. Big operation are presumptively inadmissible unless the Crown can establish that the probative value of the confessions outweighs their prejudicial effect. Even if the Crown satisfies this onus, the framework set out in Hart also requires consideration of whether the police conduct amounted to an abuse of process.

[85] In considering the probative value of the evidence, Hart requires consideration of the reliability of the confessions. This involves examining both the circumstances in which the confessions were made and the presence or absence of any confirmatory evidence or "markers of reliability".

(a) Probative Value and Prejudicial Effect

[86] The judge noted that the Crown's case against Baranec turned entirely on the admissibility of his statements. Accordingly, the judge treated the application for the remedy of exclusion as being tantamount to an application for a stay of proceedings. Baranec does not challenge this aspect of the judge's ruling.

[87] The judge began his admissibility ruling by observing that virtually all of the undercover scenarios were audio-recorded and that some were video-recorded. He said that he listened to and watched many hours of these recordings--most of which did not go before the jury--and had a "full and well-informed sense of the dynamics of the relationships that developed between Mr. Baranec and the police officers involved."

[88] The judge took account of Baranec's false confessions to the two Ontario murders and proceeded on a further premise most favourable to Baranec--that his confession to the murder of Ms. Noble (although never retracted) was also false because the information he provided about the offence was never corroborated. He concluded that the false confessions

were "important" to the admissibility analysis and that "extreme care and vigilance" had to be exercised in determining the threshold reliability of Baranec's confession to the murder of Amanpreet. He addressed this concern at length in his analysis:

- [115] The fact that Mr. Baranec could say he had committed those offences when it is apparent that he did not (at least as he described them) must give rise to a real concern that the dynamics of the relationship were such that he was prepared to admit to crimes for which he was not actually responsible. This necessarily casts a shadow of doubt over the notion that his confession to the Bahia murder was true.
- [122] To my mind, it is clear that Mr. Baranec held Cst. B in high esteem. Frankly, he thought the world of him. I can find no reason to conclude that Mr. Baranec was afraid or intimidated in that relationship, nor does it seem to make sense that he would lie to him.
- [123] But he did. It is clear he was untruthful when he said he had murdered two men in Ontario many years ago.
- [124] At the time of Mr. Baranec's first confession to Cst. B respecting the Bahia matter and the Ontario murders, it is apparent that Mr. Baranec saw himself as on the verge of acceptance into the organization. I conclude that the logical and most likely explanation for the admissions that he made at the airport was that Mr. Baranec was anxious to burnish his credibility. In fact, he later said as much.
- [125] In my view, it is telling that when Mr. Baranec was subsequently confronted by Cst. B, challenging his claim to having committed the two murders in Ontario, on the basis that the organization had gone to its powerful sources and the claims did not check out, Mr. Baranec quite readily retreated from his claims. He did not maintain his story, but rather admitted that he had made up the events although he left himself some measure of face-saving - to the effect that he had arranged for the killings but doubted that they had occurred. However, the fact is, he had been caught out and it was clear to the others, certainly to Cst. B, that Mr. Baranec had not been truthful.
- [126] What is significant and relevant at that point is that although Mr. Baranec had been exposed as having been untruthful in his claims, no adverse consequences befell him. He was not immediately sent on his way nor was he told that he would no longer be considered for membership in the organization. The significance I take from that, given his relationship with Cst. B, and that he was now very aware that the organization would apply its resources to critically examine his claims, is that he still wanted very much to gain admittance to the organization, one that he saw as aligned with his own values, one that was professional and powerful, and one that he envisioned being part of for the long term.

- [127] It is clear he understood that his chances of being admitted to membership hinged upon his problems from prior criminal conduct being manageable. He knew that the problems attached to him from the Noble situation were seen as a liability, a matter of concern for the organization, but that they could probably be "cleaned up". At that point in time, the organization had not indicated any suspicion that his Noble confession was anything other than true.
- [128] However, it is also striking that it was contrary to Mr. Baranec's self-interest for the organization to believe that he had another "body on him" because that constituted a liability. From Mr. Baranec's perspective, there was a reasonable likelihood that having the Bahia murder "on his account" would be a deal breaker: that it would be a further complication that would cause the crime boss to decide that Mr. Baranec was simply too much of a risk and to decide to cut him loose. In fact, Mr. Baranec said to Cst. B that if the organization decided to reject him, he would accept that and move on.
- [129] There is also the fact that Mr. Baranec, in his discussions with Cst. B, following the original disclosure of the Bahia matter, remained absolutely steadfast with respect to that offence and his liability for it. He never wavered in that, even though he must have understood (based on the organization's reaction when the Ontario claims were debunked) that, if he had admitted that he did not commit the Bahia murder, his prospects for membership were not necessarily finished. Instead, he was fully forthcoming with an array of detail that was striking and comprehensive.
- [130] It can thus be seen that the circumstances surrounding the making of Mr. Baranec's confession to Cst. B that he killed Ms. Bahia are not straightforward. What suggests that they might be untrue is that he made confessions to the crime boss which the subsequent investigation did not show to be true and he made two false claims for murders many years past which, when confronted, he conceded were untrue. That necessarily requires that the Court examine all of the circumstances with great care and caution.
- [131] However, when I take into account the totality of the circumstances and examine them as I have, it is my view that when Mr. Baranec persisted in his claim that he was responsible for the murder of Ms. Bahia, it is most likely he was speaking truthfully.
- [Emphasis added.]
- [89] The judge characterized the Mr. Big operation in this case as "moderate," both in terms of its length and intensity. He noted that Baranec was not "intensively immersed" in the activities of the fictitious criminal organization and, given his curfew, was often done with his work commitments to the organization before 9:00 p.m.

- [90] Given the sense of kinship Baranec obviously derived from his affiliation with the organization, the judge concluded that he had to be "wary of the possibility that the dynamics of Mr. Baranec's relationship with the undercover officers and his desire to be accepted by the organization may have led him to falsely claim that he had done certain things or committed certain offences."
- [91] While the inducements offered to Baranec were found to be "not insignificant," the judge concluded that there was "no basis" in the evidence to find that the inducements undermined his will or volition.
- [92] The judge noted that Baranec was never threatened and was repeatedly told he could leave the organization without consequence.
- [93] The judge also concluded there was no interrogation in this case because the confession was not made to the crime boss (as is usually the case) but in the more natural course of a conversation between Cst. B and Baranec.
- [94] Finally, the judge found that Baranec was not particularly vulnerable. He had a remunerative trade, and a normal family and social life. He was a mature, competent and seemingly intelligent person possessed of "street savvy".
- [95] The judge examined the confession for markers of reliability. The Crown argued in the court below (and on appeal) that Baranec's act of taking Cst. B to Athwal (who in turn took them to Bahia), when coupled with Baranec's admissions in Athwal's presence, was powerful circumstantial evidence of the truthfulness of his confession. The trial judge held that this evidence, and the line of reasoning flowing from it, could not be considered on the Hart voir dire because doing so would violate the rule against hearsay. In my respectful view, the judge erred in coming to this conclusion. I will return to this point later in these reasons.
- [96] The judge noted that Baranec gave a detailed account of the circumstances surrounding Amanpreet's killing, but also provided comprehensive, and false, accounts of his involvement in the two Ontario murders and the murder of Ms. Noble. The judge also noted that Baranec's admissions did not lead to the discovery of any additional or new evidence.
- [97] He found, however, that Baranec's detailed description of the murder was "strikingly similar" to the known circumstances of the offence. He determined that this provided a substantial measure of support for the proposition that Baranec had spoken truthfully when he described to Cst. B his responsibility for the murder of Amanpreet.
- [98] In addition, the judge concluded that some of the details provided by Baranec about Amanpreet's killing were important because they were not "readily available" and likely could only have been known by someone actually involved in the offence. He highlighted, in this regard: Baranec's statements about what Amanpreet was wearing at the time of the murder; the locking mechanism on the front door; the layout of the interior of the house, including the location and turn in the direction of the staircase next to the main foyer; and the presence of an external door located in the ground floor kitchen where Amanpreet's

body was found.

- [99] The judge rejected Baranec's argument that he could have gleaned virtually all of the information he supplied to the undercover officers about the murder from the public record. On this point, the trial judge said this:
- [138] In my respectful view, that is not a persuasive proposition. To accept that as an alternate explanation for Mr. Baranec having the detailed information contained within his confession would require me to engage in a very substantial level of speculation. Given the many disparate sources to which his argument refers, I would have to find that Mr. Baranec scoured, with enormous care and attention to detail, and resourcefully compiled all of those bits and snippets of information into a narrative of compelling similarity to the actual events. At its very highest and best, that may be possible in the sense that it is not completely impossible. However, to accept it as an explanation of even modest viability would necessitate a very substantial act of speculation on the Court's part.
- [100] The judge recognized there were a number of discrepancies between the account given by Baranec and the known circumstances of the offence. Most notably, Baranec claimed to have stabbed Amanpreet in the chest. In fact, Amanpreet was stabbed multiple times, including twice in the back. In short, the judge appreciated that Baranec gave an account inconsistent with the holdback evidence. (I pause here to note that the judge misstated the evidence on this point. The ruling erroneously indicates that Baranec claimed to have stabbed Amanpreet twice in the upper back, while the forensic evidence was that the fatal wounds were inflicted to the front upper chest area. The parties agree that the judge simply misspoke on this factual issue by reversing Baranec's claim with the forensic evidence. In particular, Baranec does not suggest that the judge misapprehended the evidence on this point, or that he failed to appreciate the discrepancy between what Baranec said about the stabbing and the pathology findings.)
- [101] The judge was also alive to the fact that Baranec described attacking Amanpreet at the front door (where no blood was found), and that her body came to rest in a laundry room (not a kitchen). In addition, he noted that Baranec claimed to have used a knife-like instrument with more than one edge, whereas the pathologist testified that (at least one of) the back wounds appeared to have been inflicted by a single-edged knife. The judge said the discrepancies (not all of which were canvassed in the ruling) were carefully set out in the submissions of counsel on the Hart voir dire and that he had considered all of them. Among the discrepancies relied on by Baranec, but not specifically referenced by the judge in the ruling, were that Amanpreet's neck had been repeatedly cut (not just once as Baranec said) and that there was no forensic evidence the weapon used in the killing was turned in Amanpreet's body as Baranec had claimed.

- [102] The judge concluded that the discrepancies did not give rise to a realistic concern that Baranec was fabricating his involvement in the offence. In this regard, the judge relied on *R. v. Johnston*, 2016 BCCA 3 at para. 68, for the proposition that, "[a] finding of threshold reliability is not precluded merely because there are some inaccuracies in an accused's description of the actual facts".
- [103] In summarizing his conclusion respecting the probative value of Baranec's inculpatory statements to the undercover officers, the judge said this:
- [147] In the result, with respect to the issue of probative value, I conclude that the general circumstances surrounding Mr. Baranec's relationship with the undercover operators and particularly the circumstances surrounding the making of the confession which he provided to Cst. B are substantially indicative of the confession being truthful. As for the second aspect of the probative value analysis, that is, an examination of the confession for markers of reliability, I find that his confession was replete with details, the vast majority of which conformed with investigative findings. I take that view, even recognizing that there were some discrepancies, which I would characterize as, in the larger picture, relatively minor. Furthermore, I conclude it to be highly unlikely that he knew all of those details other than by reason of having been involved in the offence.
- [148] I find the probative value of the statement to be well made out.
- [Emphasis added.]
- [104] The judge then considered the prejudicial effect of the evidence. Baranec argued that the risk of prejudice was high because in the course of the operation he: confessed to three other killings; showed himself to be approving of and willing to join in a number of criminal enterprises, including homicide; and spoke in a profane, racist, sexist and homophobic manner. The trial judge noted that there was a genuine risk that the evidence, if fully disclosed to the jury, would likely create insurmountable prejudice.
- [105] The judge noted, in this regard, that evidence regarding the Mr. Big operation was fully presented on the Hart voir dire because it was necessary for the court to have a comprehensive understanding of the investigation to rule on the admissibility of Baranec's confessions. He noted that the jury would not hear the same body of evidence. The Crown had advised the judge that it would adduce only select portions of the intercepted communications at trial, including some earlier "bonding scenarios" to provide necessary background and the scenarios in which Baranec made inculpatory admissions about his role in Amanpreet's murder. The Crown undertook to edit portions of the intercepted communications the jury would hear to remove prejudicial remarks made by Baranec that were unnecessary to the development of the narrative, including remarks suggesting that he generally endorsed violence and held offensive social views. In addition, the judge noted that the Crown had made clear it would not put before the jury Baranec's claim that he committed the murder of Ms. Noble.

- [106] The judge concluded that while some prejudicial evidence would inevitably go before the jury, its negative effects could be minimized by judicially supervised editing of the intercepts to be adduced at trial, and timely instructions to the jury about the limited use that could be made of bad character evidence.
- [107] In addressing the other homicides Baranec claimed to have committed, the judge said this:
- [162] I accept that Mr. Baranec may find it necessary to make reference to the other confessions that he made in order to advance the proposition that he is someone who has made false confessions so that he could join the criminal organization, and thus support a defence that his confession with respect to the Bahia murder was also false. I would think that situation can be fairly and sensibly managed by way of edits or an agreed statement of facts, so that the defence may be put before the jury without unacceptable harm being caused.
- [108] The judge concluded that the Crown had established, on a balance of probabilities, "that the probative value of the evidence substantially exceeds its prejudicial effect" (emphasis added). The test the judge employed was favourable to Baranec as it posited a more stringent admissibility threshold than Hart requires. It may, in fact, reflect the "extreme care and vigilance" the judge considered to be appropriate in conducting the probative value analysis in this case.
- (b) Abuse of Process
- [109] The judge recognized that Hart required him to carefully scrutinize the conduct of the police by applying the traditional abuse of process analysis, but in a more robust form.
- [110] Among other things, Baranec argued that the police acted illegally by taking him to Saskatchewan, by permitting him to consume alcohol, and by conducting scenarios that occasionally required him to be in violation of his curfew--all in violation of the terms of his CSO. Baranec also relied on the actions of Staff Sgt. Wilkie in removing his CSO from CPIC. He placed considerable reliance on *R. v. Campbell*, [1999] 1 S.C.R. 565 (sub nom. *R. v. Shirose*) [Campbell SCC], in advancing the abuse of process claim. He argued that the actions of the police would shock the community and were analogous to what occurred in *Laflamme c. R.*, 2015 QCCA 1517, leave to appeal ref'd [2015] S.C.C.A. No. 479, where an abuse of process was found.
- [111] The judge distinguished *Laflamme* on grounds that the violence in that case rose to another level, and also featured implied threats toward the accused. In the case at bar, Baranec was not subject to any threats of violence. There were no signs he was intimidated or frightened by the actions of the undercover officers, and the operation did not exploit any personal weakness or vulnerability. The judge concluded that there was nothing coercive about the Mr. Big investigative technique as it was applied in this case.
- [112] The judge found that Baranec failed to establish that the conduct of the police in this case amounted to an abuse of process. He reasoned as follows:

- [184] The matter of the police encouraging or promoting Mr. Baranec to violate his CSO is serious and will not be simply disregarded by the Court. That said, it seems to me that the conduct has to be considered in the context of the case.
- [185] Dealing first with the issue of Mr. Baranec consuming alcohol, it is relevant in my view that, generally speaking, the officers did not encourage him to order alcoholic beverages nor did the officers actually make the order; nevertheless, there were times that he did so of his own volition. That is not surprising in that these were social situations where these essentially rough and tumble criminal types were carrying on in the way one might expect. For the members of the organization to have been seen to have insisted on compliance with the terms of the CSO, to, in effect, carry on in a manner consistent with a Boy Scout code of conduct, would seem somewhat unrealistic. As a result, there was some drinking. From the perspective of ensuring that court orders are fully honored, the situation was wrong. However, making some allowance for the practical reality of the matter, I would not characterize this as an abuse of process. It is to be observed that the consumption of alcoholic beverage never appears to have gone beyond a minimal level - there was no drunkenness of which I am aware, and there is no suggestion that the use of intoxicants was instrumental in causing Mr. Baranec to say or do anything that was incriminatory in nature.
- [186] The trip from BC to Saskatchewan is another matter. It was a considered and deliberate action taken by the police in furtherance of the investigation and it was clearly recognized by them as being contrary to the terms of the CSO. The officers testified, and I accept, that they believed that, if and when Mr. Baranec confessed to the Noble murder, as he did in the crime boss interview, investigative necessity dictated that they should take him to the crime scene forthwith in order to secure all available physical evidence.
- [Emphasis added.]
- [113] The judge noted that in Campbell SCC the Court held that police illegality, while an important factor, does not of itself amount to an abuse of process. He also noted that whether the police sought advice on the legality of a proposed investigative measure, and acted in accordance with that advice, was a significant factor. On this issue the judge said this:
- [189] Earlier in the operation at bar, before taking Mr. Baranec to Saskatchewan, the police consulted counsel at the Department of Justice and obtained legal advice. The advice acknowledged the issue with breaching the CSO but advised that they should nevertheless proceed with the operation. While there is certainly room to be critical of the correctness of that advice and the analysis that informed it, I am satisfied the police showed good faith by seeking it out and following it. They weighed the competing interests and chose to follow the advice of counsel. That is an important factor according to the Court in Campbell.

- [190] In *Hart*, while Moldaver J. did not make a finding on the abuse of process issue, he noted that the police permitted the accused to drive despite the fact that he had recently had a seizure, potentially endangering the public. That could be analogized to Mr. Baranec. As pointed out, Mr. Baranec was alone at certain times during the Saskatchewan trip, free from police supervision. That said, Mr. Baranec received at least the amount of supervision on the impugned trip that he would have in BC under the CSO - likely more, given that he was serving his sentence in the community, living at home, and not under any constant supervision. I do not believe the public was endangered by the action of the police during this phase of the operation.
- [192] Considering all of the above, I find that the police conduct in the Mr. Big operation does not amount to an abuse of process. The Supreme Court of Canada in *Hart* made it clear that, while the evidence that these types of investigations expose and the manner in which they are conducted must be treated with great caution, Mr. Big operations are accepted as an effective and useful investigative technique in Canada. Undoubtedly, these operations will sometimes necessarily involve conduct that would, in other circumstances, seem outrageous. Within that context, and considering the brutal nature of the offence that was being investigated, I do not believe that a "reasonable well-informed member of the community" would be shocked by the police flying Mr. Baranec to Saskatchewan as they did or, on occasion, buying alcohol for him, nor would such offend the community's sense of justice and decency.
- [193] In so concluding, I wish to make clear that this Court is not simply taking the view that the end will always justify the means - turning a blind eye and giving the police a free pass on whatever they might do, however outrageous or unlawful. That is not so and the clear thrust of the decision in *Hart* makes that point emphatically. At the same time, balances must be struck. In a matter such as the case at bar, there must be recognition that operations of this type will generally entail dealing with serious criminal conduct, involving violent and unsavoury individuals who have little time or regard for many normative values. To be effective, police strategies will necessarily require taking on the guise of the criminal underworld. It is for the courts to oversee these situations with vigilance, to ensure that fairness is maintained and to see that police conduct does not become abusive or unacceptable.

[Emphasis added.]

3. Bahia's Severance Application

- [114] After the statements made by Baranec during the Mr. Big operation were ruled admissible, Bahia applied for severance.
- [115] As noted earlier, the judge had previously granted Athwal's severance application. He found that the interests of justice required that Athwal be tried separately from Baranec and Bahia because: (1) the out-of-court statements of Baranec and Bahia--which were inadmissible against Athwal--substantially inculpated her in Amanpreet's murder; (2) the case against

Athwal was not as strong as the cases against Baranec and Bahia and there was a real risk that the jury would use inadmissible evidence from the mouths of Baranec and Bahia to convict her; and (3) the judge did not have "an honest sense of confidence that an improper and impermissible effect could be prevented by judicial direction, no matter how frequent or how clearly articulated." As a result, the judge held that it was unlikely Athwal would receive a fair trial if tried jointly with Baranec and Bahia.

- [116] In dismissing Bahia's severance application, the judge began by noting there was no basis to believe that "cut-throat" defences would be advanced or that one accused would seek to call his co-accused as part of the defence. The issue, he noted, was whether trial fairness required the making of a severance order. He observed that Baranec's statements tending to inculcate Bahia--but inadmissible against Bahia--were "much more limited" than Baranec's statements tending to inculcate Athwal. The judge also noted that the case against Bahia was, given his post-arrest confession, "much stronger" than the case against Athwal and there was less of a risk that Bahia would be "swept along to a conviction" based on statements made by Baranec that were inadmissible against him.
- [117] The judge also emphasized the strong policy reasons for trying accused persons jointly when charged with offences arising out of the same event: *R. v. Crawford*, [1995] 1 S.C.R. 858 at para. 30. He noted the well-established proposition that "separate trials for alleged co-conspirators are the exception, not the rule": *R. v. Chow*, 2005 SCC 24 at para. 47. Citing *R. v. Forknall*, 2003 BCCA 43 at para. 44, the judge noted the general rule that severance will not be granted solely on the basis that evidence to be led against one accused is inadmissible against another. He also noted the robust presumption that juries understand and will obey instructions given to them by the trial judge. Unlike the case for severance advanced by Athwal, he had "an honest sense of confidence that any improper and impermissible effect can be prevented" by emphatic jury instructions.
- [118] The judge also noted the substantial overlap in the evidence that would be called against Baranec and Bahia if severance was granted. He noted that many of the witnesses who had already testified on voir dres would be required to testify again at a separate trial. A joint trial would therefore serve the ends of judicial economy.
- [119] I will set out the relevant limiting instructions that were given to the jury in addressing Bahia's grounds of appeal.

IV. Grounds of Appeal

- [120] Baranec challenges the admission of inculpatory statements he made during the Mr. Big operation. With respect to the first prong of the Hart analysis (whether the probative value of the evidence outweighs its prejudicial effect), Baranec argues the trial judge erred in law by:

1. Basing his reliability analysis on corroborating evidence he was not permitted to consider under Bradshaw. As noted earlier, he argues that Bradshaw, which restricted the use of corroborative evidence in assessing threshold reliability under the principled exception to the hearsay rule, modifies the Hart framework for assessing the threshold reliability of evidence gathered during a Mr. Big operation;
2. Relying on facts which, as a matter of logic, were incapable of supporting a finding that his statements had been shown to meet the threshold reliability test for admission. Among other things, he argues: (i) that the level of detail provided in connection with Amanpreet's murder could not bolster the reliability of his confession given that he had also provided detailed, and false, claims of responsibility for at least two other killings; and (ii) the relationship of confidence that developed between him and Cst. B could not enhance the trustworthiness of his statements regarding Amanpreet's murder given that the false confessions were also made to Cst. B; and
3. Finding that the prejudicial effect of evidence gathered during the Mr. Big operation could be substantially minimized by editing his statements.

[121] With respect to the second prong of the Hart analysis (whether the police conduct amounted to an abuse of process), Baranec argues the trial judge erred in law by:

4. Failing to find that the police engaged in illegal acts in the course of the Mr. Big operation and failing to consider that conduct in assessing the abuse of process claim; and
5. Failing to consider factors relevant to the abuse of process claim, including the involvement of the Crown in the misconduct alleged and the removal of his CSO from CPIC. Baranec submits that the failure to consider these factors led to a skewed, incomplete and erroneous analysis of the abuse of process claim.

[122] Bahia argues that the trial judge erred in law by:

1. Dismissing his severance application. Bahia claims that the failure to grant severance also resulted in a miscarriage of justice;
2. Failing to properly edit out-of-court statements made by Athwal and Baranec that had no probative value but were extremely prejudicial to him;
3. Failing to properly instruct the jury in a mid-trial instruction as to the permissible use of Athwal's out-of-court statements; and
4. Failing to provide a "Hodgson instruction" about the reliability of Bahia's statements to Cst. B.

V. Baranec's Grounds of Appeal

1. The First Prong of the Hart Admissibility Framework

- [123] Baranec's first three grounds of appeal challenge the judge's approach to the first prong of the Hart admissibility inquiry.
- [124] In *Hart*, the Supreme Court of Canada recognized that Mr. Big operations inevitably involve powerful inducements and raise the risk that unreliable confessions will be elicited. In addition, the Court recognized that admission of a Mr. Big confession will invariably entail the admission of prejudicial bad character evidence, and that the investigative technique is susceptible to abuse when the police resort to unacceptable tactics in pursuit of a confession.
- [125] To respond to these concerns, the Court set out in *Hart* a two-pronged approach for determining whether evidence gathered during a Mr. Big operation should be admitted. The first prong of *Hart* recognizes a new common law rule of evidence when the Crown seeks to adduce a confession made by the target of the Mr. Big operation. The evidence is presumptively inadmissible. This presumption of inadmissibility will be overcome if the Crown can establish, on a balance of probabilities, that the probative value of the confession outweighs its prejudicial effect. The second prong involves a more robust conceptualization of the doctrine of abuse of process to deal with the potential problem of police misconduct. I will deal with the second prong of the Hart admissibility inquiry in addressing Baranec's fourth and fifth grounds of appeal.
- [126] In assessing the probative value of the evidence, judges exercise an evidentiary gatekeeping function. The first prong of the inquiry is not directed to the ultimate question of whether the evidence should be accepted by the jury. Rather, in determining the admissibility of the evidence, judges decide the threshold question of whether the evidence is worthy of being heard by the jury.
- [127] Mr. Big confessions derive their probative value from their reliability. In assessing the threshold reliability of a Mr. Big confession, the first step is to consider the circumstances in which the confession was made and assess the extent to which those circumstances call into question the reliability of the confession. In *Hart*, the Court enumerated (at para. 102) a non-exhaustive list of factors to be considered. Next, the admissibility inquiry directs trial judges to look to the confession itself for "markers of reliability", including whether the confession identifies any elements of the crime that were not in the public domain, and whether it accurately describes mundane details of the crime the accused is unlikely to have known unless he or she committed it. The Court was clear in *Hart* (at para. 105) that while confirmatory evidence is not a hard and fast requirement, where it does exist, it can provide powerful evidence of the trustworthiness of the confession. The two inquiries work in tandem--the greater the concerns raised by the circumstances in which the confession was made, the more important it will be to identify markers of reliability in the confession itself.

[128] The prejudicial effect of the confession must then be assessed. This requires an assessment of both moral and reasoning prejudice. There is a risk of moral prejudice because Mr. Big operations inevitably highlight the target's bad character--he or she will be shown to have willingly participated in the activities of a criminal organization. Bad character evidence is presumptively inadmissible but routinely admitted in cases of this kind because it provides relevant context for assessing the trustworthiness of the target's confession. This evidence also raises the risk of reasoning prejudice by distracting the jury's focus away from the offence charged, toward the accused's extraneous acts of misconduct.

[129] In the end, trial judges must weigh the probative value and the prejudicial effect of the confession and decide whether the Crown has met its burden.

(a) Standard of Review

[130] The standard of review to be applied on an appeal from a trial judge's decision to admit a Mr. Big confession on grounds that the probative value of the confession exceeds its prejudicial effect was recently addressed by this Court in *R. v. Moir*, 2020 BCCA 116 at paras. 80-82. The admissibility of a Mr. Big confession raises a question of law. But weighing the probative value of a confession given in this context against its prejudicial effect will inevitably be a fact-laden exercise. The advantages trial judges have in making determinations of this kind are well recognized in the jurisprudence and should be respected through the application of a deferential standard of review: Hart at para. 110; see also *R. v. Araya*, 2015 SCC 11 at para. 31; *R. v. Shearing*, 2002 SCC 58 at para. 73; *R. v. Stewart*, 2018 BCCA 76 at para. 14, leave to appeal ref'd [2018] S.C.C.A. No. 185; *R. v. Skeete*, 2017 ONCA 926 at para. 88, leave to appeal ref'd (2019), [2018] S.C.C.A. No. 508; *R. v. Shafia*, 2016 ONCA 812 at para. 255, leave to appeal ref'd [2017] S.C.C.A. No. 17. Absent an error in principle in the articulation of the test, a material misapprehension of the evidence, a palpable and overriding error of fact, or a decision that is clearly unreasonable, an appellate court should not interfere with a trial judge's assessment as to where the balance between probative value and prejudicial effect falls.

(b) Alleged Error in Principle: Failing to Follow Bradshaw

[131] Baranec relies on Bradshaw for the proposition that corroborative evidence that is equally consistent with the truthfulness of the confession as it is with an alternative explanation is of no assistance in the assessment of threshold reliability. Central to Baranec's position is that the availability of "almost all" of the information he supplied to Cst. B about the details of the murder could have been learned by him through media sources. As Baranec did not testify on the Hart voir dire, considering the alternative explanation--that the details of his confession were sourced from publicly available information--would necessarily require a degree of speculation. In accordance with Bradshaw, Baranec submits the judge was, in fact, required to engage in this speculative inquiry, something he says the judge declined to do. He argues that the analytical approach of the judge, although correct at the time, reflects error in principle post-Bradshaw. From here, he submits that the factual findings of

the judge are tainted by error in principle and not entitled to appellate deference.

- [132] Baranec faces several insurmountable challenges in advancing this argument. First, the argument that Bradshaw significantly modifies the admissibility inquiry set out in Hart has been rejected by this Court in Moir. Writing for the Court in Moir, Justice Newbury came to this conclusion:
- [101] I end this too-long discussion by concluding that the Court in Bradshaw did not intend to change or supersede the "approach" established by the majority in Hart for the assessment of confessions made to a Mr. Big. It follows that the trial judge did not apply the "wrong test" in assessing probative value versus prejudicial effect in accordance with Hart. Contrary to what Mr. Moir asserts at para. 71 of his factum, the reliability assessment of a Mr. Big confession under the Hart framework is not "the same as" the assessment of the threshold reliability -- procedural or substantive -- of a hearsay statement under the principled exception. Many of the factors used to demonstrate the trustworthiness of a hearsay statement are "apposite", but the particular dangers sought to be guarded against, the right of the accused in Mr. Big cases to remain silent, the legal terminology used in assessing reliability, and the structure of the prescribed analyses make the two approaches, in my respectful view, clearly different.
- [133] Second, the media reports, taken collectively and at their highest, are incapable of accounting for some of the details Baranec supplied to Cst. B that are consistent with the known circumstances of the offence--circumstances likely to have been known only by the perpetrator. For example, there was no public disclosure in print media reports about: what Amanpreet was wearing at the time of the killing; the nature of the locking mechanism on the front door; the presence of an interior staircase immediately to the right of the front door with a 90-degree left turn leading to the second storey of the residence; that there was a railing attached to those stairs; that there was an external door in the ground floor kitchen where Amanpreet's body was found; that her throat had been cut; or that she suffered defensive hand wounds (in his December 5, 2010 confession Baranec said, "I just remember her hands, her reaction").
- [134] To plausibly account for his knowledge of one of the details not disclosed in the print media--the stairway to the right of the front door--Baranec seeks to adduce fresh evidence on appeal. The fresh evidence consists of television news coverage aired February 7 and 8, 2007, depicting the Bahia residence with an open front door. The interior staircase and railing are briefly but clearly depicted in the February 7, 2007 news clip. This evidence was led before the jury, but was unavailable at the time of the Hart voir dire. With respect to the Palmer test governing the admissibility of fresh evidence, the Crown does not suggest that the evidence could have been secured at the time of the voir dire through the exercise of due diligence. Rather, the Crown submits that the proposed fresh evidence could not reasonably, when taken with the other evidence adduced on the Hart voir dire, be expected to have affected the result. I agree with the position of the Crown.

- [135] Baranec submits that a plausible alternative explanation for his knowledge of the staircase (and railing) is that he saw this particular news clip on February 7, 2007, and committed to memory a mundane detail about the interior of the house in which a murder was committed--a murder he had nothing to do with. Having done so, he then supplied this detail almost four years later to Cst. B in relating an invented story about his involvement in the murder when an opportunity unexpectedly came along to impress upon members of a criminal organization that he, too, was a violent person worthy of full-fledged membership. The suggestion is not only implausible, it borders on the preposterous. Further, it accounts for Baranec's knowledge of only one detail. It leaves unaddressed how Baranec could possibly have known of additional details, not publicly disclosed, that are consistent with the known circumstances of the offence and that could likely only have been known by the perpetrator.
- [136] Finally, even if this Court were to accede to Baranec's argument that Bradshaw modifies Hart in the manner suggested, it would not, in my view, call into doubt the admissibility ruling.
- [137] In the very different context of Bradshaw, the Court confirmed that, in assessing the trustworthiness of the statement, corroborative evidence must be considered in its totality to the end of determining whether it rules out any plausible alternative explanation, including those grounded in speculation (at para. 49). Applying the Bradshaw framework, Baranec says the admissibility ruling is fatally flawed because the judge declined to consider his speculative assertion that he may have learned details of the murder from media reports. I do not agree.
- [138] The principal focus of the threshold reliability inquiry on the Hart voir dire was on the question of whether Baranec could have acquired knowledge of the details of the murder from media reports. As Baranec did not testify on the voir dire, the inquiry was, of necessity, speculative in nature. Having engaged in that speculative exercise, the judge concluded that the alternative explanation for Baranec's knowledge of the details of the murder lacked "even modest viability". He found it to be, "highly unlikely that [Baranec] knew all of those details other than by reason of having been involved in the offence."
- [139] The judge's findings on this issue amount, in my view, to a conclusion that the alternative explanation Baranec relied on for the source of his knowledge was implausible. While the judge said that "to accept it as an explanation of even modest viability would necessitate a very substantial act of speculation on the Court's part", I do not understand the judge to be saying in this passage that alternative explanations could not be rooted in speculation. As I have pointed out, he was engaged in an inherently speculative exercise. In my view, the judge's remarks, when read in context, can only be understood as reflecting a factual finding that, on the whole of the evidence led on the Hart voir dire, Baranec could not plausibly have gleaned his detailed knowledge of the circumstances of the murder from media reports. Accordingly, even if Bradshaw does supplant the admissibility framework developed in Hart--a proposition not open to the appellant in this Court--I see no material

error in principle in the way the judge approached the admissibility of this evidence. It is, in fact, consistent with what Bradshaw requires.

(c) Relying on Facts Incapable of Establishing Threshold Reliability and Minimizing Facts Demonstrating Unreliability

- [140] Having failed to demonstrate error in principle, Baranec must surmount the deferential standard of review mandated by Hart. To do so, he challenges fact-based conclusions made by the judge. He says, in essence, that the judge ignored relevant evidence, misunderstood the import of some of the evidence, or drew erroneous conclusions from it. Baranec asserts that the judge: (1) relied on facts logically incapable of establishing the threshold reliability of his confession; and (2) minimized objective facts demonstrating its unreliability. I would not give effect to this ground of appeal.
- [141] On the first point, Baranec submits it was illogical for the judge to rely on the level of detail in his confession or the closeness of his relationship with Cst. B as factors supporting the reliability of his confession. Baranec reminds us that he supplied Cst. B with detailed accounts of murders he did not commit.
- [142] I think it is clear from the judge's ruling as a whole that he did not rest his threshold reliability conclusion on the detailed nature of Baranec's confession or on the fact that Baranec's account of the murder was "strikingly similar" to the known circumstances of the offence. Rather, he considered that Baranec's comprehensive account was important because it was likely that some of the details he provided could only have been known by the perpetrator. There is nothing illogical about the judge's approach to this issue.
- [143] Further, I do not understand the judge's admissibility ruling to rest on the closeness of Baranec's relationship with Cst. B. Obviously, the judge was alive to the detailed, but false, confessions Baranec made to Cst. B. He recognized that the circumstances in which Baranec confessed to the murder of Amanpreet were "not straightforward" and gave rise to the risk that he similarly fabricated his involvement in her killing. He approached his task on the footing that Baranec's false confessions were an "important" part of the admissibility analysis. He noted that while the closeness of the relationship between Baranec and Cst. B was such that it did not seem to make sense that Baranec would lie to Cst. B about his involvement in previous acts of violence, that is precisely what Baranec did. In the result, the judge cautioned himself that "great care and caution" was required in drawing inferences from the circumstances in which the confession was made, including the relationship of confidence that existed between Baranec and Cst. B.
- [144] Having approached the issue this way, he nonetheless found that the totality of the circumstances surrounding the making of the statement were such that Baranec was likely speaking truthfully when he confessed to Cst. B. On this point, the judge found it particularly significant that even though Baranec resiled from his claim of responsibility for the two Ontario murders when confronted by Cst. B, he remained steadfast in claiming responsibility for Amanpreet's murder. He did so knowing that the lies he told about the

two Ontario murders did not necessarily disqualify him from membership in the criminal organization. Baranec also knew that his admission of responsibility for Amanpreet's murder would be regarded as a liability to the organization--a fact making it more likely that the crime boss would "cut him loose." In short, the judge concluded that it was not in Baranec's self-interest to continue to admit responsibility for Amanpreet's murder.

- [145] In my view, it was open to the judge to come to the conclusion he did. He was not required to resolve the application in Baranec's favour because Baranec lied about his involvement in other homicides. It is not an unusual feature of Mr. Big operations that targets lie about past misdeeds, including murder: see *R. v. West*, 2015 BCCA 379 at para. 35. Indeed, that is why the rule in *Hart* was fashioned. But the judge was required to approach the issue with caution, including by considering the inferences that could properly be drawn from the confirmatory evidence. That is what he did. I see no basis upon which this Court could properly intervene with the admissibility ruling on grounds that the judge's reasoning process was illogical.
- [146] On the second point, Baranec takes no issue with the proposition that a finding of threshold reliability is not precluded because there are discrepancies between the Mr. Big confession and known facts, or inaccuracies in an accused's description of holdback evidence. This proposition is well established in the jurisprudence of this Court: see *West* at para. 87; *Johnston* at para. 68. Nor does Baranec suggest that the judge failed to appreciate the discrepancies upon which he placed reliance. The judge was clearly aware of those discrepancies. Baranec's complaint centres on his suggestion that the judge improperly characterized these discrepancies as "minor".
- [147] Reasons must be read as a whole. In my view, Baranec's complaint invites critical examination of a word used by the judge in his ruling divorced from the broader context in which it appears. Reading the impugned passage (reproduced herein at paragraph 103) in context, it is apparent the judge concluded that the circumstances in which the statement was made, its detail and consistency with the known facts, and the disclosure by Baranec of details that would likely only be known by the perpetrator, established the threshold reliability of his confession. It was in this context that the judge said, "I take that view, even recognizing that there were some discrepancies, which I would characterize as, in the larger picture, relatively minor" (at para. 147).
- [148] The judge did not, as Baranec suggests, characterize the discrepancies as "minor" in isolation. Rather, he characterized them as "relatively minor" in the context of "the larger picture". I take from this that the judge was simply saying he was not prepared to ascribe major significance to the discrepancies in a case where the target of the investigation provided details consistent with the known facts, and in circumstances where it was highly unlikely that knowledge of those facts could have been possessed by someone other than the perpetrator. When the ruling is read in context, I see no cause for complaint, and no basis upon which this Court could properly intervene.

(d) The Probative Value of Baranec's Act of Taking Cst. B to Meet Athwal and Implicating Both of Them in the Murder

- [149] I return now to the judge's conclusion that the rule against hearsay prevented him from relying on Baranec's post-confession act of taking Cst. B to Athwal (who in turn took them to Bahia) and from admissions Baranec made in Athwal's presence. While it is unnecessary to address the point to dispose of this ground of appeal, it is my view that the judge erred in his analysis of this issue. The error did not prejudice Baranec; indeed, it was entirely in his favour. Had the probative value of this evidence been taken into account, it could only have bolstered the judge's conclusion that the reliability of Baranec's Mr. Big confession had been established.
- [150] To put the issue in context, Baranec told Cst. B he was paid by Athwal to commit the murder. Evidence was adduced on the Hart voir dire that Athwal had acted as Baranec's real estate agent. She was a real person with business connections to Baranec. She was also known to have a relationship with Bahia. When Cst. B expressed concerns about "loose ends" in relation to the murder--including whether Athwal or Bahia had said anything to anyone else--Baranec took Cst. B directly to Athwal and, in Athwal's presence, implicated both of them in the killing. Athwal, in turn, took Baranec and Cst. B to Bahia.
- [151] The probative value of Baranec's conduct--and the relationship that conduct revealed, particularly between Baranec and Athwal--did not depend on the truth of anything Athwal (or Bahia) said during these meetings. The probative value of the evidence rested on its capacity to refute Baranec's claim that his confession was an elaborate fabrication designed to impress Mr. Big and his underlings.
- [152] To accept Baranec's alternative and innocent explanation as being even remotely possible would require the following chain of reasoning: Baranec spun a yarn about his responsibility for Amanpreet's murder based on his recollection of media reports aired almost four years earlier--reports he told Cst. B he did not remember much about; in doing so, he implicated his former real estate agent, Athwal, in the killing; then, and in furtherance of the yarn, he introduced Cst. B to Athwal and made statements in her presence that implicated both of them in the killing; he did so with no warning to Athwal about the fiction he was spinning and no apparent concern that Athwal might balk at the false suggestion she was involved in Amanpreet's murder, thereby exposing the yarn as a fabrication in front of Cst. B.
- [153] The notion that Baranec would make up an elaborate but concocted tale of his involvement in the murder, falsely implicate another person, draw that person into the fiction without any warning, and then make false statements implicating them both in the murder is absurd. In fairness, the judge was, in my view, given inadequate assistance in coming to terms with the admissibility or probative value of this evidence. Had he appreciated that its probative value did not rest on anything Athwal or Bahia said or implied (let alone the truth of their statements) it could only have reinforced his conclusion that Baranec's confession

met the test for threshold reliability and was worthy of being heard by the jury. Indeed, I do not see how he could reasonably have come to any other conclusion.

(e) The Alleged Error in the Assessment of Prejudice

[154] Baranec submits that the judge erred by finding that the bad character evidence bound up with his confession and the prejudice flowing therefrom could be "overcome" by judicial editing and an instruction cautioning the jury against its impermissible use. He submits that the evidence would necessarily portray him as someone who held and expressed socially obnoxious views and was comfortable with criminal activities, including violence. Most significantly, Baranec submits that to defend the case he would be required to emphasize evidence gravely prejudicial to him, including that he boasted about killing, or arranging for the killing of, two men in Ontario.

[155] I observe at the outset that the judge did not say prejudice could be overcome by judicial editing and limiting instructions. Rather, he concluded that prejudice flowing from the admission of evidence gathered in the Mr. Big operation could be minimized by a substantial editing agenda and timely jury instructions. In coming to this conclusion, he noted that the evidence called on the Hart voir dire would not be the same evidence presented to the jury. He accepted that admission of the evidence would inevitably give rise to prejudice but concluded that it could be minimized so as not to overwhelm Baranec's right to a fair trial.

[156] In fact, the jury heard no evidence of the confession Baranec made during the Noble investigation. The jury heard that Baranec went with Cst. B and another undercover officer to Saskatchewan to complete "a job" for the organization. Neither the purpose of the trip nor the nature of the job in Saskatchewan was explained to the jury. The jury heard only that Baranec's December 5, 2010 claim that he had committed the murder of a woman in Surrey arose out of an "unrelated investigation". I note that Bahia unexpectedly announced during the course of the trial his intention to elicit extensive bad character evidence in relation to Baranec, including his confession to the murder of Ms. Noble. The application was opposed by Baranec whose counsel noted that "there is a whole host of other bad character evidence that has already been carefully edited out by the Crown and myself in consultation". In a ruling indexed as 2016 BCSC 2674, the judge prevented Bahia from eliciting this bad character evidence in relation to Baranec. Bahia takes no issue with that ruling on appeal.

[157] The jury did hear evidence respecting Baranec's claim that he committed two murders in Ontario. Cpl. Wellington testified at trial that police investigation confirmed "those murders did not occur". This evidence was of central importance to Baranec's defence that his confession to the murder of Amanpreet was a similar fabrication designed to ingratiate him to the criminal organization in which he sought belonging and membership. The jury was, of course, instructed to take into account Baranec's false claim that he committed two murders in Ontario in assessing the reliability of his claim that he murdered Amanpreet.

- [158] In addition, the Crown did not lead evidence before the jury of a number of Mr. Big scenarios in which Baranec was exposed to the use of simulated violence by other undercover officers, including the staged "assaults" of the supposed corrupt officer and sex-trade worker.
- [159] Baranec takes no issue with the instruction the jury was given on the impermissible uses of bad character evidence.
- [160] To return to the issue on appeal, I see no error in the judge's assessment of the prejudicial effect of admitting Baranec's confession to Amanpreet's murder. The judge was alive to the dangers inherent in evidence of this kind and considered that those dangers could be minimized by substantial editing and appropriate limiting instructions. He was not wrong in principle to approach the issue in this way. Under the heading, "How Is Prejudicial Effect Measured?", Justice Moldaver made these comments in Hart:
- [106] Weighing the prejudicial effect of a Mr. Big confession is a more straightforward and familiar exercise. Trial judges must be aware of the dangers presented by these confessions. Admitting these confessions raises the spectre of moral and reasoning prejudice. Commencing with moral prejudice, the jury learns that the accused wanted to join a criminal organization and committed a host of "simulated crimes" that he believed were real. In the end, the accused is forced to argue to the jury that he lied to Mr. Big when he boasted about committing a very serious crime because his desire to join the gang was so strong. Moral prejudice may increase with operations that involve the accused in simulated crimes of violence, or that demonstrate the accused has a past history of violence.
- [107] On the other hand, the risk of prejudice can be mitigated by excluding certain pieces of particularly prejudicial evidence that are unessential to the narrative. Moreover, trial judges must bear in mind that limiting instructions to the jury may be capable of attenuating the prejudicial effect of this evidence.

[Emphasis added.]

- [161] The judge's approach was faithful to the framework developed in Hart for weighing the prejudicial effect of a Mr. Big confession. I see no basis upon which this Court could properly intervene with the judge's assessment of the prejudicial effect of this evidence or of the extent to which that prejudice could be mitigated at trial.
- [162] In the result, the judge's approach to the first prong of the Hart admissibility inquiry reflects no reversible error in principle. The admissibility ruling is well founded in the evidence and entitled to deference on appellate review. I see no basis upon which this Court could properly intervene with the manner in which the judge weighed the probative value of the evidence against its prejudicial effect.

2. The Second Prong of the Hart Admissibility Framework

- [163] Baranec's fourth and fifth grounds of appeal challenge the judge's conclusion that the conduct of the police during the Noble investigation did not give rise to an abuse of process.
- [164] As noted earlier, the second prong of the Hart admissibility inquiry engages the doctrine of abuse of process to deal with the potential problem of police misconduct in Mr. Big operations. The doctrine of abuse of process is intended to guard against state conduct that society finds unacceptable, and which threatens the integrity of the justice system. Hart expressly contemplates a more robust conceptualization of the doctrine that requires trial judges to carefully scrutinize the conduct of the police in Mr. Big operations to determine if an abuse of process has occurred. No matter how reliable the confession, Hart makes clear that courts cannot condone state conduct--such as physical violence--that coerces the target of the Mr. Big operation into confessing.
- [165] The onus lies on the accused to establish that an abuse of process has occurred. Where the onus is discharged, trial judges have a wide discretion to grant remedies, including exclusion of the evidence or a stay of proceedings. While Hart focused on police tactics that coerce a confession, the Court was clear that it was not foreclosing the possibility that Mr. Big operations could become abusive in other ways.

(a) Overview of Baranec's Argument

- [166] Baranec argues that the judge erred by: (1) failing to find that the police engaged in illegal acts in conjunction with the Saskatchewan trip; (2) failing to factor into the illegality/abuse of process analysis (a) the decision of Staff Sgt. Wilkie to remove his CSO from CPIC and (b) the significance of the fact that "the Crown advocated and supported the illegality" and was therefore "complicit in" illegal actions engaged in by the police that undermined the rule of law; and (3) failing to make a finding about whether the legal advice provided to the cover man by the RCMP's Department of Justice counsel was correct. In short, Baranec submits that the judge erred in law by failing to address the whole of the evidence relevant to the illegality/abuse of process claim. He submits that the conduct, taken as a whole, is capable of demonstrating a flagrant disregard for the rule of law. He submits that a new trial is required so these unresolved issues can be addressed.
- [167] In conjunction with this submission, Baranec asserts that there are three independent bases upon which his confession could be excluded: (1) upon demonstration of police illegality which he says amounts, on its own, to a breach of s. 7 of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, for which a remedy is available under s. 24(1) without resort to the doctrine of abuse of process; (2) the doctrine of abuse of process; and (3) the second prong of the Hart admissibility framework which calls for a more robust application of the abuse of process doctrine. As I understand Baranec's submission, he claims that these three analytical models run in parallel and that the judge was obliged to give separate consideration to each of them. The Crown did not address the point in its factum. In oral argument, the Crown submitted that illegal conduct on the part of the state is simply one of

the ways in which an abuse of process may be established. The Crown submits that the single test the judge was obliged to apply is the well-established abuse of process test referred to in Hart. For reasons I will develop, I agree with the position of the Crown.

(b) Standard of Review

[168] The parties made no submissions on the standard of review that applies to the question of whether an abuse of process has occurred.

[169] In Hart at para. 110, Moldaver J. touched on the standard of review applicable to a finding that the probative value of a Mr. Big confession exceeds its prejudicial effect. He did not have occasion in that case to address the standard of review applicable to an abuse of process claim. Even so, I find his remarks instructive in this context.

[170] My own survey of the jurisprudence suggests that the issue has not been uniformly addressed in the past. In some cases, the standard of review applicable to an abuse of process claim has been characterized as a question of mixed fact and law: *R. v. Nixon*, 2009 ABCA 269 at para. 13, *aff'd* 2011 SCC 34 (but without reference to this point); *R. v. Thomson et al.*, 2006 BCCA 392 at para. 38. Other cases have concluded that the issue raises a question of law: *R. v. Derbyshire*, 2016 NSCA 67 at para. 72, *leave to appeal ref'd* (2017), [2016] S.C.C.A. No. 529; *R. v. Potter*; *R. v. Colpitts*, 2020 NSCA 9 at para. 227.

[171] In the absence of submissions, I do not propose attempting to reconcile these authorities in this case. I am content to proceed on a footing I consider to be most favourable to Baranec-- that the articulation of the legal framework governing an abuse of process claim and the ultimate resolution of that claim involve questions of law.

[172] At the same time, it must be recognized that resolution of an abuse of process claim will almost inevitably be a case-specific and fact-intensive exercise. Appellate courts must defer to the factual findings of the judge that underlie resolution of the claim unless an appellant demonstrates that those findings are the result of palpable and overriding error or a material misapprehension of the evidence.

[173] Further, resolution of an abuse of process claim will typically involve the weighing and balancing of competing interests. As Justice Charron observed in *R. v. Nixon*, 2011 SCC 34 at para. 38, "[a]chieving the appropriate balance between societal and individual concerns defines the essential character of abuse of process." Trial judges are best positioned to engage in this fact-driven exercise and a reviewing court should not lightly interfere with the way in which the judge has balanced the competing interests that are engaged by an abuse of process claim.

(c) Parallel Routes to Exclusion?

- [174] I do not accept Baranec's unsupported submission that the judge was obliged to engage in three parallel inquiries to determine whether the conduct of the police required exclusion of the Mr. Big confession. Baranec points to no authority supporting his position. He says the issue is one of first impression.
- [175] For reasons I will explain, I am not persuaded that adoption of three parallel lines of inquiry is either necessary or desirable. Doing so would only risk smothering something relatively simple and well settled in the law with needless layers of complexity.
- [176] The only cases referred to by Baranec in support of his position on this point are Hart and Campbell.
- [177] In Hart, the Court adopted the now-familiar framework for analyzing abuse of process claims. That framework was reiterated in *R. v. Babos*, 2014 SCC 16 at paras. 30-45. Hart did not propose a new analytical model for addressing abuse of process claims in Mr. Big cases. In my view, this is clear from the language used in Hart. After referring to Babos and so-called residual category cases, of which this is one, Moldaver J. said this:
- [114] I acknowledge that, thus far, the doctrine has provided little protection in the context of Mr. Big operations. This may be due in part to this Court's decision in *R. v. Fliss*, 2002 SCC 16, [2002] 1 S.C.R. 535, where Binnie J., writing for the majority, described the Mr. Big technique as "skillful police work" (para. 21). But the solution, in my view, is to reinvigorate the doctrine in this context, not to search for an alternative framework to guard against the very same problem. The first step toward restoring the doctrine as an effective guard against police misconduct in this context is to remind trial judges that these operations can become abusive, and that they must carefully scrutinize how the police conduct them.
- [Emphasis added.]
- [178] These remarks go against Baranec's contention that there is a difference between the traditional abuse of process doctrine and the analysis Hart contemplates on the second prong of the admissibility inquiry. In my view, they are one and the same. Indeed, Hart (at para. 86) expressly "[relies] on the doctrine of abuse of process to deal with the problem of police misconduct." Hart does, however, alert trial judges to the need to pay close attention to whether a particular manifestation of a Mr. Big operation has been shown to give rise to an abuse of process.
- [179] In Campbell, the other case Baranec relies on, police illegality was analyzed under the traditional abuse of process framework. In my view, Campbell does not support the notion that an abuse of process claim based on police misconduct attracts a different analytical framework. Police misconduct is simply one of the ways in which the integrity of the justice system may be undermined. As was said in Babos:

- [135] [T]here 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.
- [180] Further, Baranec's multi-layered approach is contrary to the strong trend in the jurisprudence towards convergence between the Charter and the traditional abuse of process doctrine: *R. v. O'Connor*, [1995] 4 S.C.R. 411 (per L'Heureux-Dubé J. at paras. 66, 71-72; per Major J., dissenting at para. 197); *Nixon* SCC at paras. 36-38; and *India v. Badesha*, 2018 BCCA 470 at para. 56, where it was noted that "[t]he analytic regime is the same regardless of whether the application relies on the common law or s. 7". While I accept for present purposes that the Charter has not extinguished the common law abuse of process doctrine (see *R. v. Neil*, 2002 SCC 70 at para. 43), I see no reason to endorse the parallel and overlapping analyses Baranec urges upon us.
- [181] To obtain relief the judge viewed as being tantamount to a stay of proceedings, Baranec was obliged to demonstrate that the police had engaged in conduct so offensive to societal notions of fair play and decency that admitting his confession to murder would, in the eyes of a reasonable and well-informed member of the community, harm the integrity of the justice system. In all the circumstances of this case, the judge concluded that Baranec had failed to meet his onus on this issue. I see no error in principle in the way the judge analyzed Baranec's abuse of process claim.
- (d) Failure to Find that the Police Committed Illegal Acts
- [182] Baranec submits that the conduct of the police in taking him out of British Columbia in contravention of at least one of the conditions of his CSO constituted a criminal offence. He says the police counselled, or aided and abetted, the commission of an offence by him under s. 127 of the Code (disobeying a court order). Baranec further submits that the conduct of Staff Sgt. Wilkie in temporarily removing his CSO from CPIC constituted an offence under s. 139(1) of the Code (wilfully attempting to obstruct justice). He submits that by doing what they did, the police, or individual officers, may have committed other criminal offences including conspiracy and breach of public trust. In addition, he submits that the unauthorized conduct of the police at issue in this case amounts to a violation of their duties and responsibilities under ss. 18 and 37(b)-(c) of the Royal Canadian Mounted Police Act, R.S.C. 1985, c. R-10, to maintain the integrity of the law and perform their duties in accordance with the law. Baranec reminds us of the constitutional principle that everyone from the highest officers of the state to the constable on the beat is subject to the ordinary law of the land: *Campbell* SCC at para. 1; *Hitzig v. Canada* (2003), 177 C.C.C. (3d) 449 at paras. 112-115 (Ont. C.A.), leave to appeal ref'd [2004] S.C.C.A. No. 5. He reminds us that the obligation of the state to obey the law is fundamental to our system of justice and vital to the very existence of the rule of law. Central to Baranec's argument on this issue is that the judge failed to determine whether the police acted illegally by arranging for his travel to Saskatchewan and by removing his CSO from CPIC.

- [183] I do not consider that the judge was required in this case to make definitive findings about whether the police, or individual officers employed by the RCMP, committed a criminal offence by taking the steps they did in pursuit of the Noble investigation. I say this for two reasons.
- [184] First, the Crown conceded in argument of the abuse of process claim at trial (as it does on appeal) that the conduct of the police was "wrong" and amounted to "misconduct". The factual premise upon which the abuse of process claim was argued was not in dispute. It was acknowledged that the conduct of the police facilitated breach of a court order by Baranec. That this implicated the rule of law was also not in question. The judge recognized that the act of "encouraging or promoting Mr. Baranec to violate his CSO is serious and will not be simply disregarded by the Court." He held that "[t]he trip from BC to Saskatchewan was a considered and deliberate action taken by the police and it was clearly recognized by them as being contrary to the terms of the CSO." He was at pains to make clear that the ends will not invariably justify the means. Given the accepted foundation upon which the abuse of process claim proceeded--that the police misconducted themselves--I see no reason why the judge was obliged to go further and make findings about whether some or all of the impugned conduct constituted a criminal offence.
- [185] I can, however, think of many reasons why a judge would be wary in these circumstances about engaging in the inquiries Baranec submits was necessary. Doing so would entail numerous complex analyses about whether the elements of a particular offence were made out. These inquiries would necessarily take place on the basis of an incomplete record. They would occur without notice to the officers whose conduct was impugned that findings of criminal conduct might be made. Those officers would have no participatory rights on the *Hart voir dire*. The inquiries would add substantially to the length and complexity of the proceeding. Indeed, it would risk taking the admissibility inquiry down the proverbial rabbit hole.
- [186] Second, a finding of illegality would not be dispositive of the abuse of process claim. While relevant, a finding that the police have committed an illegal act in the course of an investigation does not of itself amount to an abuse of process: *Campbell* SCC at paras. 24, 42 and 76. There is good reason for this. Given the terms of the CSO, the police would equally be open to an allegation that they acted illegally and in such a way as to amount to an abuse of process if they ordered one beer for Baranec over dinner, as doing so could also be viewed as aiding or abetting the breach of a court order. In either case, once a finding of illegality was made, the judge would still be bound to determine whether the test for abuse of process was met.
- [187] I recognize that the Ontario Court of Appeal held in *R. v. Campbell* (1997), 115 C.C.C. (3d) 310 at paras. 7-8 (Ont. C.A.) (sub nom. *R. v. Shirose*), that it was necessary to determine whether the conduct of the police (a reverse sting involving sale by the police of hashish to a drug trafficking organization) was illegal. But *Campbell* is distinguishable on its facts from the case at bar. In that case, the Crown sought to argue that the police had not engaged in

wrongful behaviour. Resolution of this disputed fact was an important (but not determinative) step towards resolution of the abuse of process claim. By contrast, the Crown in this case conceded that the act of facilitating a breach of Baranec's CSO was wrong and involved misconduct on the part of the police.

[188] In summary, requiring the judge to make the definitive determinations Baranec says were required would raise serious concerns relating to procedural fairness and the due administration of justice. In a case where misconduct on the part of the police was conceded--misconduct engaging respect for the rule of law--I see no reason why the judge was required to go further and determine whether a particular criminal offence had been committed by the police or one of its members.

(e) Failure to Consider Removal of Baranec's CSO from CPIC

[189] Baranec submits that the judge's failure to make express reference to the decision of Staff Sgt. Wilkie to temporarily remove his CSO from CPIC fatally undermines his analysis of the abuse of process claim. I do not agree. The actions of Staff Sgt. Wilkie were part and parcel of the police misconduct in taking Baranec to Saskatchewan in violation of his CSO. I do not think the judge was required to make express reference to this evidence in his ruling. Moreover, having regard to the judge's reasons as a whole, doing so could not possibly have changed the result.

(f) Failure to Consider the Correctness of the Legal Advice

[190] The judge said "there is certainly room to be critical of the correctness of [the legal] advice and the analysis that informed it". In my view, he was not required to definitively determine whether the legal advice given was correct, and I do not accept Baranec's contention that the judge's failure to do so constitutes error in law.

[191] While I agree with the judge that the legal advice was, at best, incomplete, the focus of his analysis properly remained on whether what the police did amounted to an abuse of process. That issue was informed by whether the police obtained and followed legal advice before they acted in an objectionable way. As Justice Binnie put it in Campbell SCC at para. 47, "[a] police force that chooses to operate outside the law [without obtaining legal advice] is not the same thing as a police force that made an honest mistake on the basis of erroneous advice." There is nothing in Campbell to suggest that a judge in these circumstances is required to opine on the correctness of the advice the police followed. Doing so in this case would not meaningfully inform the abuse of process claim.

(g) Failure to Consider the Conduct of the Crown

[192] Baranec submits that the seriousness of the police misconduct was exacerbated because it was endorsed by the Crown and that the judge erred in law by failing to take this into account. Again, I do not agree. Baranec's submission on this point emphasizes the status of Crown counsel as quasi-ministers of justice and places reliance on Boucher v. The Queen, [1955] S.C.R. 16. His submission fails to recognize the distinction between Crown counsel

who are part of the prosecutorial apparatus, and lawyers employed by the Department of Justice who provide advice to the RCMP but have no prosecutorial responsibility. In this case, there is no evidence that Crown counsel assigned to the prosecution of this case were consulted about the investigative decision to take Baranec to Saskatchewan or that they were aware that the police had sought advice about whether taking Baranec in contravention of his CSO would amount to a criminal offence. I do not see how the fact that the legal advice was given by a Department of Justice lawyer in this case--even if it was wrong--changes the character of the police conduct in ways material to the resolution of the abuse of process claim. The important point to be taken from the judge's ruling is that he was satisfied the police showed good faith by obtaining and following legal advice.

(h) Conclusion on Abuse of Process Ground of Appeal

[193] The judge considered the nature of the offence under investigation when the police misconduct occurred--the brutal murder of a 15-year-old. He was satisfied that the police demonstrated good faith by obtaining and following legal advice before taking Baranec to Saskatchewan. He concluded that while in Saskatchewan Baranec was, for the most part, under the supervision of the police. He concluded that the public was not endangered by this investigative step. He recognized that a finding of illegality on the part of the police does not, of itself, amount to an abuse of process. He accepted, however, that misconduct on the part of the police may be an important factor in determining whether an abuse of process has occurred and that a "free pass" will not be given to the police on the basis that the ends will always justify the means. Balancing what the police did in this case with the nature of the investigation they were pursuing and their understanding, based on legal advice, that the act of taking Baranec to Saskatchewan in violation of his CSO would not involve the commission of a criminal offence, the judge concluded that Baranec had not made out his abuse of process claim.

[194] I see no error in law in the judge's articulation of the test for abuse of process. Indeed, Baranec does not suggest that the judge misstated the test. I would not interfere with the factual findings that underlie this ruling. Those factual findings were supported by the evidence and untainted by material misapprehension of the evidence or palpable and overriding error. Further, I see no basis upon which this Court could properly interfere with the judge's conclusion that, in all the circumstances, a reasonable well-informed member of the community would not be so shocked or offended by the conduct of the police in this case as to require granting of the remedy sought. On the facts found by the judge, that determination was not only reasonable, it was, in my respectful view, correct.

3. Conclusion

[195] I would dismiss Baranec's application for leave to adduce fresh evidence and his appeal from conviction.

VI. Bahia's Grounds of Appeal

1. Overview of Bahia's Arguments on Appeal

- [196] Bahia argues that the judge erred in law by dismissing his severance application. He submits that the judge's decision not to grant severance was both unjudicial and resulted in an injustice. In these circumstances, he says the ruling is not entitled to appellate deference: *R. v. Litchfield*, [1993] 4 S.C.R. 333 at 354, and *R. v. Last*, 2009 SCC 45 at paras. 14-15. He seeks the intervention of this Court pursuant to ss. 686(1)(a)(ii) and/or 686(1)(a)(iii) of the Code.
- [197] Bahia submits that the decision not to sever was unjudicial because the same concerns that led to Athwal being granted severance were present in his case; namely, that the jury would hear a substantial volume of incriminatory evidence from the mouths of Baranec and Athwal that was inadmissible against him. In addition, there was a risk the jury would improperly use statements made by Baranec and Athwal as a potential source of confirmation for the reliability of Bahia's own statements, including his confession to the police.
- [198] With one exception relating to a mid-trial instruction concerning the limited use the jury could make of the out-of-court statements of Athwal, Bahia does not challenge the correctness of the limiting instructions given.
- [199] At the heart of Bahia's argument is the contention that no jury instruction could undo the prejudice caused by the jury hearing Baranec and Athwal's statements regarding his complicity in the murder.
- [200] Bahia submits that the prejudice flowing from dismissal of the severance application must be understood in the context of what he characterizes as the "limited and contradictory" admissions he made on January 10 and 14, 2011, to Cst. B, and the post-arrest confession he made to Staff Sgt. Dhillon "under pressure", neither of which he says provided "a clear path to conviction."
- [201] Bahia submits that the prejudicial effect of the admission of Baranec and Athwal's statements was exacerbated by the judge's failure to edit particularly prejudicial aspects of the statements that had no probative value before they were put before the jury.
- [202] With respect to the mid-trial instruction, Bahia submits that the jury might have concluded that it was permissible to use Athwal's out-of-court statements to inform what he said, including on occasions when he was not present.
- [203] Finally, Bahia submits that the judge erred by failing to give a "Hodgson instruction", to bring home to the jury the context in which his inculpatory statements to Cst. B were made and the need to consider whether those statements were obtained in fear of oppressive treatment such as to call into question their reliability. Bahia submits on appeal that it was critically important that the jury receive such an instruction in this case.

[204] Before addressing the principles of law governing Bahia's grounds of appeal, I would note that: (1) Bahia's trial counsel (not counsel on appeal) did not ask that any portion of the statements of Baranec and Athwal be edited prior to being put before the jury despite his obvious awareness of the availability of this remedy, and further, ineffective assistance of counsel is not raised as a ground of appeal; (2) no objection was taken by Bahia's trial counsel to the clear and repeated instructions given by the judge that no use could be made of the out-of-court statements of Baranec and Athwal in considering the case against Bahia; and (3) the "Hodgson instruction", now said to be critical to Bahia's defence, was not sought at trial.

2. The Failure to Grant Severance

(a) General Principles

[205] The fundamental evidentiary rule that underlies this ground of appeal is that on a joint trial, a statement made by one accused, not in furtherance of a common design and not adopted by another accused, is evidence only against its maker, even if it refers to something said or done by another accused: *R. v. Suzack* (2000), 141 C.C.C. (3d) 449 at para. 117 (Ont. C.A.), leave to appeal ref'd (2001), [2000] S.C.C.A. No. 583. In the case at bar, the statements of Baranec and Athwal, including references made by them to the involvement of Bahia in the killing, were inadmissible against Bahia.

[206] The jurisdiction to grant severance is found in s. 591(3) of the Code, which provides:

591

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

[207] On an application for severance, the judge must determine whether severance is required in the interests of justice. The interests of justice encompass both the accused's right to be tried on admissible evidence, as well as society's interest in seeing that justice is done in a reasonably efficient and cost-effective manner: Last at para. 16.

[208] The decision to grant or deny severance involves an exercise of discretion and attracts a deferential standard of review: *Litchfield* at 354. An appellate court should not interfere with this exercise of discretion unless it can be shown that the judge acted unjudicially, or that the ruling resulted in an injustice.

[209] The determination of whether a judge acted unjudicially requires an inquiry into the prevailing circumstances at the time the decision was made: Last at para. 15. Determining whether the ruling resulted in an injustice, on the other hand, requires a review of how the trial unfolded and the resulting verdicts.

- [210] There is a strong presumption that co-accused alleged to have been involved in a common criminal enterprise should be tried together: *R. v. Forknall*, 2003 BCCA 43 at para. 44, leave to appeal ref'd (2004), [2003] S.C.C.A. No. 466; *Suzack* at paras. 87-88. There are strong policy reasons favouring joint trials of accused persons who are charged with offences arising out of the same event: *R. v. Crawford*, [1995] 1 S.C.R. 858 at para. 30. These policy reasons include the risk of inconsistent verdicts, the cost of multiple trials to both the participants and the criminal justice system, and impairment of the truth-seeking function of the trial.
- [211] Generally speaking, the fact that evidence led against one accused on a joint trial is inadmissible against another accused is not, on its own, sufficient to warrant the making of a severance order: *Forknall* at para. 44.
- [212] While an accused on a joint trial is entitled to the constitutional protections inherent in the right to a fair trial, including the right to be shielded from evidence that unfairly prejudices that accused, joint trials are different than trials involving a single accused. As noted in *Suzack* at para. 111, the right to a fair trial does not mean that those tried jointly are entitled to the very same trial they would receive if they were tried alone.
- [213] In denying severance, a trial judge may consider that potential prejudice arising out of a joint trial can be minimized by clear and emphatic limiting instructions: *R. v. Boima*, 2018 BCCA 297 at para. 41, leave to appeal ref'd (2019), [2018] S.C.C.A. No. 406; *R. v. Zvolensky*, 2017 ONCA 273, leave to appeal ref'd (2018), [2017] S.C.C.A. No. 403; *R. v. Hamilton*, 2011 ONCA 399, leave to appeal ref'd (2012), [2011] S.C.C.A. No. 547; *R. v. Welsh*, 2013 ONCA 190, leave to appeal ref'd [2013] S.C.C.A. No. 383; *R. v. Gayle*, 2013 ONSC 5283, aff'd 2017 ONCA 297, leave to appeal ref'd [2017] S.C.C.A. No. 257.
- [214] There is also a strong presumption that jurors are capable of understanding and following instructions as to the use they can and cannot make of the evidence, even where those instructions are complex: *R. v. Corbett*, [1988] 1 S.C.R. 670 at 692, 695-96; *Suzack* at paras. 99-102.
- [215] There may, however, be circumstances in which a limiting instruction is inadequate to contain the potential for prejudice arising out of a joint trial: *Last* at para. 46. *Bahia* says his case is an illustration of this principle.
- (b) Did Dismissal of the Severance Application Amount to an Unjudicial Exercise of Discretion?
- [216] The trial judge correctly set out the principles that govern applications for severance. *Bahia* does not suggest otherwise.
- [217] The judge correctly apprehended the prejudice that could potentially flow from a joint trial--that incriminating evidence, inadmissible as against *Bahia*, would be heard by the jury.
- [218] Although not a separate ground of appeal, *Bahia* complains that the judge improperly focused on the prejudicial impact of the admission of *Baranec's* statements implicating him in the murder without specifically noting the prejudicial impact of statements made by

Athwal to the same effect. While it is true that the judge focused on the prejudicial impact of the jury hearing Baranec's statements implicating Bahia in the murder, the judge's approach was faithful to the manner in which the application was argued by Bahia's trial counsel. In any event, it is unreasonable to suppose that the potential prejudice flowing from Athwal's statements implicating Bahia in the killing was lost on the judge when he ruled on the severance application.

[219] The judge distinguished Bahia's claim for severance from Athwal's primarily on two grounds. First, he concluded that Baranec's statements did not implicate Bahia to the extent that they implicated Athwal, the person with whom Baranec met and planned the killing. Indeed, Baranec never met with Bahia before the killing occurred. Second, given his post-arrest confession, the judge reasoned that the case against Bahia was much stronger than the case against Athwal. Accordingly, the risk that Bahia would be "swept along" to a conviction in a joint trial on the basis of evidence inadmissible against him was not as great as it was in the case of Athwal.

[220] These were appropriate considerations for the judge to take into account and it was open to him to come to the conclusions he did. The relative strength of the case against jointly charged accused is an important consideration on a severance application. As noted in Welsh at para. 182:

The reason for that is apparent. Where the case against the accused seeking severance is weak and the case against the other accused substantially stronger, there is a greater risk that the jury will resort to the impermissible reasoning of guilt by association to shore up the case against the former.

[221] In contrast to Athwal, it was open to the judge to consider that there was no significant imbalance in the strength of the evidence as between Baranec and Bahia. In this context, it was open to the judge to conclude that the risk of impermissible reasoning was lower in Bahia's case and to regard that risk as being more amenable to limiting instructions. Relatedly, I am also unable to accept Bahia's characterization of his own admissions as "limited" or "contradictory" and unclear. Viewed in context, Bahia's statements amounted to a compelling and clear admission of responsibility for planning the murder of his wife.

[222] The judge concluded that prejudice to Bahia could be contained within tolerable limits by an emphatic instruction that the jury could not use Baranec's (or Athwal's) statements to Cst. B as evidence against Bahia, or vice versa.

[223] It was open to the judge to come to this conclusion on the governing authorities and I see no basis upon which this Court could conclude that dismissal of Bahia's severance application reflected an unjudicial exercise of discretion.

(c) Did Dismissal of the Severance Application Result in an Injustice?

[224] Consideration of whether the dismissal of Bahia's severance application resulted in an injustice requires close attention to the instructions the jury actually received.

[225] In his opening instructions to the jury, in his mid-trial instructions, and at several points in his final instructions to the jury, the judge provided clear directions that the jury could not use statements made by Baranec or Athwal as evidence against Bahia.

[226] In his opening instructions, the judge said this:

There's another important matter of evidence that I wish to raise with you at this time. In this case there are two individual persons being tried in the same trial, Mr. Baranec and Mr. Bahia. At the end of the trial, it will be for you to decide whether the Crown has proven its case against each of these men. You will make that determination about each of them individually. You will decide whether the evidence satisfies you beyond a reasonable doubt that Mr. Baranec is guilty of murdering Ms. Bahia, and you will also decide whether the evidence satisfies you beyond a reasonable doubt that Mr. Bahia is guilty of the murder.

The point I wish to alert you to at this time is a very important one. It is this. In the body of evidence that the Crown will be placing before you will be statements made by each of these men. From Mr. Baranec, it will be alleged that he made statements to undercover officers. The Crown will, I expect, invite you to find that the statements he made were a confession to having killed Ms. Bahia. The Crown will also, I anticipate, lead evidence that Mr. Bahia made statements to police officers in an interview also admitting complicity in the murder of his wife, Ms. Bahia. It will be for you to decide what significance you will give to those statements. However, it is vitally important that you understand that any statement made by an accused person, such as one of these men, is only to be considered as evidence against the speaker, not the other accused. It cannot be used to prove the guilt of any other accused.

Let me offer an example. Two men are charged with robbing a bank. They are being tried together at the same trial, similar to the two defendants in this case. The Crown leads evidence that one of the two, Mr. A, made a statement wherein he told the police that he and the other accused, Mr. B, planned and carried out the robbery. In that case, Mr. A's statement would be evidence against him, but not against Mr. B. It would have no evidentiary effect in the case against Mr. B and the trier of fact, that is the judge or the jury deciding the case, would have to be very careful not to consider it or give it any effect in deciding if the case against Mr. B was proven. That might seem somewhat counterintuitive to you, different than how you make decisions in your ordinary life. However, it is important that you clearly understand that direction and that you comply with it. It is critical that you do so in order that this trial is properly and fairly conducted.

[Emphasis added.]

[227] A mid-trial instruction was given before the jury heard evidence regarding the events of January 10, 2011, involving Cst. B, Baranec, Athwal and Bahia. It served as a reminder to the jury that the out-of-court statements of an accused were only to be considered as evidence against the speaker:

I would like to take a moment and remind you of something I mentioned in my opening remarks at the outset of the trial and to provide a little further direction. In the course of the evidence of the undercover operation, you have heard and you will hear that each of the accused, Mr. Baranec and Mr. Bahia, said things. The things they said are out of court statements. They were not made in this courtroom in the course of the trial.

You will recall my direction to you at the outset, that any out of court statement made by an accused person such as one of these men, is only to be considered as evidence against the speaker, not the other accused. It cannot be used to prove the guilt of the other accused.

To be specific, in this case where Mr. Baranec has made statements, you are entitled to consider those as evidence in the case against him. However, if he says anything about Mr. Bahia, that is not evidence you can consider in deciding whether the case against Mr. Bahia has been proven.

[Emphasis added.]

[228] The mid-trial instruction also directed the jury on the very limited use they could make of Athwal's hearsay statements:

There is another aspect I want to mention as well. In the course of the conversations and interactions involving Mr. Baranec and Mr. Bahia, there was also some interaction with a third party, Ms. Athwal. My instruction to you is this. What Ms. Athwal says is hearsay evidence. It is the out-of-court statement of a person who is not an accused in this trial. Accordingly, you cannot consider what she said as proof of the truth of the contents of the words she spoke. If, for example, she said words that would suggest the guilt of either Mr. Baranec or Mr. Bahia, you are not to use what she said for the purpose of proving the case against either or both of those men. Rather, you may use her words and statement only to inform your understanding of what the accused persons said in the interaction.

I realize that may be somewhat convoluted, however, it's important that you understand it. In my directions to you at the conclusion of the trial, I will provide you with further explanation.

[Emphasis added.]

[229] The limited use that could be made of what Athwal said during an intercepted communication--to put in context and understand what an accused's words mean--was reiterated by the judge on two occasions in his final instructions:

In listening to the recordings, be careful to distinguish between what the accused says and what someone else on the recording is saying. What another person says may help you figure out what the accused speaker says and what his words mean, but the accused can be held responsible only for what he actually says, not for what anyone else says. What another person says may provide a context for understanding what the accused says, but only the accused's words as understood in this context are evidence of what the accused has done or intended to do.

To be clear, only an accused person's words, as understood in context, can be used as evidence of what an accused person has done or intended to do.

[T]here is a very limited and specific purpose to which you can put what Ms. Athwal said. As I will explain, that purpose is to provide context for understanding what an accused has said. Things said by Mr. Baranec were usually in the context of conversations with other persons. For example, much of the evidence before you of things said by Mr. Baranec arises in the context of his dealings with [the undercover officers].

It is in this limited way that you may consider the evidence of what Ms. Athwal said. For example, when Ms. Athwal is engaged in discussion with Mr. Baranec, you are entitled to take into account the things she said, only to the extent that they inform the words spoken by Mr. Baranec. You must not attribute any truth value to what she said.

[Emphasis added.]

[230] In his final instructions, the judge reminded the jury of the "important rule" that out-of-court statements made by an accused were admissible as evidence only against the speaker:

Anything you find that one accused person said outside the courtroom, even if it describes what the other accused person said or did, is only evidence with respect to the person who said it. You must not consider the evidence in deciding the case against the other accused or of anyone other than the person who said it. For example, where you find that Mr. Baranec said things in his dealings with the undercover officer, that evidence can only be used to prove the Crown's case against Mr. Baranec. Even if Mr. Baranec describes something that Mr. Bahia said or did or otherwise seemed to implicate Mr. Bahia, you must only consider what Mr. Baranec said as evidence with respect to him. You must not consider what Mr. Baranec said as evidence in relation to Mr. Bahia, including in your assessment of the reliability of what Mr. Bahia may have said. And to be clear, the same direction applies to any statements by Mr. Bahia in relation to Mr. Baranec.

[Emphasis added.]

[231] The judge instructed the jury again that nothing said by Athwal could be used by them in considering the case against Bahia:

You also have evidence before you of things that were said by Tanpreet Athwal. She has not been called as a witness in this trial. The things that she said were out of court -- were said out of court. Nothing that Ms. Athwal said should be considered by you as proof of the truth of the words she spoke. For example, if she said, "I own a red car", that would not be any basis upon which you would be entitled to find that she owned a red car. For important reasons in our law of evidence, you are not to consider anything she said as proof of the truth of what she said.

In this case, you are aware that Ms. Athwal has said things relating to dealings she had with Mr. Baranec and with Mr. Bahia, things that would seem to implicate each of them in the murder of Ms. Bahia. Please understand my instruction clearly. You are to give no consideration or to -- or attach any significance whatsoever to what Ms. Athwal said in terms of proving the case against either Mr. Baranec or Mr. Bahia. I repeat, nothing she said can be used to prove the case against either of the defendants.

[Emphasis added.]

[232] Significantly, the jury was then instructed to disregard evidence of what Baranec said he had been told by Athwal, including comments he attributed to her that implicated Bahia in the murder:

That direction [not to use anything said by Athwal as evidence against Baranec or Bahia] applies to things that the intercepted communications show her saying. It also applies to evidence of others reporting things she said. Specifically, where either Mr. Baranec or Mr. Bahia speak of having been told anything by Ms. Athwal, you are to disregard that entirely and it will form no part of your deliberation.

For example, if my memory is correct, Mr. Baranec in his discussions with the undercover officer said something like, "[Ms. Athwal] told me that she and Mr. Bahia wanted to arrange the murder of Ms. Bahia." In that circumstance, you would disregard entirely what Ms. Athwal is reported to have said. It would not be any evidence to enable you to find that Mr. Bahia was involved in the offence.

[Emphasis added.]

[233] The judge emphasized that the jury was to decide the case of each accused separately on the basis of the evidence admissible against them:

There is a final point I wish to make with you, one that is tied to the instructions I have provided about the importance of only using the statements made by each defendant to prove the case against him, not the other accused.

The point I wish to make now is this: When you turn to decide whether the Crown has proven its case against each defendant, you are not to take into account whether you are satisfied that the Crown has proven its case against the other defendant.

For example, when you are deciding the case against Mr. -- whether the case against Mr. Baranec has been proven, in addition to my direction that you not take into account the statements of Mr. Bahia or Ms. Athwal, do not allow your decision to be influenced in any way by whether you believe the Crown has proven its case against Mr. Bahia. The case against Mr. Baranec must be decided on the basis of the evidence that is properly admissible against him and nothing else.

The same direction applies with respect to your determination as to whether the case against Mr. Bahia has been proven. Do not take into account statements of Mr. Baranec or Ms. Athwal and do not allow your decision to be influenced in any way by whether you believe the Crown has proven its case against Mr. Baranec.

[Emphasis added.]

[234] Also in his final instructions, the judge emphasized that in considering the case against each accused, proof of the elements of the offence of first degree murder could only come from statements made by them:

First, did Mr. Bahia know that an individual intended to kill Ms. Bahia? This question is relatively straightforward. Whether you find it to be proven beyond a reasonable doubt that Mr. Bahia knew that someone was going to kill his wife must be derived from the statements made by Mr. Bahia, as there is no other evidence regarding this element. Specifically, to remind you again, anything said by Mr. Baranec and anything said by Ms. Athwal is not evidence you can consider in answering this question.

You should examine Mr. Bahia's statement to the police, [Cst. B] and Inspector Dhillon. From that statement, in fact it is statements, plural -- from those statements you should determine whether you are satisfied that Mr. Bahia has admitted that he knew that an individual intended to murder Ms. Bahia.

Second, did Mr. Bahia intend to and did he actually aid the killer? Again, proof of this element must be found in the statement of Mr. Bahia. You must be satisfied beyond a reasonable doubt that he took steps to aid the killer, being both aware that the killer was going to murder Ms. Bahia and with the intention of lending aid to the killer in that task. Specifically, in his statement to the police, Mr. Bahia appears to state that he was aware of the plan and that on the morning of the killing he made telephone contact with the killer to advise him that the scene was set, that the coast was clear.

As well, in [his] statement to the police, Mr. Bahia appears to have stated that he had a conversation with his wife that morning to advise her that a repairman would be attending at the home to repair the stove, with the implication being that she should permit that person to enter the home.

It is for you to examine the statements made by Mr. Bahia and determine whether or not you are satisfied beyond a reasonable doubt that he has admitted to rendering aid to the killer in that fashion with the intention of enabling the murder to proceed. In that regard, you may find the evidence of telephone calls which is contained in the admissions which are Exhibit 47 to be relevant to your consideration of this issue.

Third, did Mr. Bahia know the murder was planned and deliberate[?] To prove this element, it will be necessary for you to be satisfied that Mr. Bahia was aware that a plan had been arranged which would entail an individual murdering Ms. Bahia. Again, your determination of the answer to this question will be found in the conclusions you reach with respect to the statements made by Mr. Bahia during the police interview.

[Emphasis added.]

[235] In my view, these instructions were comprehensive, clear and emphatic. The jury was directed not to use the statements of Baranec and Athwal as evidence against Bahia. Further, the jury would have understood from the instructions given that they were prohibited from using anything said by Baranec or Athwal to assist in assessing the reliability of Bahia's admissions. No objection was taken to these instructions at trial. Save for one aspect of the mid-trial instruction I address below, Bahia does not suggest on appeal that these instructions, standing alone, were deficient in any way.

[236] The administration of criminal justice proceeds on the presumption that juries will understand and give effect to judicial directions as to the use they can and cannot make of evidence: *R. v. Olah* (1997), 115 C.C.C. (3d) 389 at para. 48 (Ont. C.A.), leave to appeal ref'd (1998), [1997] S.C.C.A. No. 549; Corbett at 692, 695-96. Assuming, as we must, that the jury gave effect to the instructions they were given, Bahia could not possibly have been convicted on evidence inadmissible against him.

[237] I will address one additional argument advanced by Bahia in support of this ground of appeal. He cites *R. v. Figliola*, 2011 ONCA 457, as an example of a case in which severance was required in the interests of justice and seeks to draw a parallel between that case and the one at bar.

[238] I do not think that the result in *Figliola* provides much assistance to Bahia. First, inquiries of this kind are inevitably case-specific and fact-laden. For this reason, it will rarely be helpful to point to other cases for guidance, except in the identification of governing principles. Further, the result in *Figliola* that severance ought to have been granted turned on the unusual facts of that case. As this Court noted in *Boima* at para. 43, the conclusion in *Figliola* "turned on a concatenation of particular circumstances which arose during the course of the trial, fundamentally altering the basis on which the case was proceeding".

[239] Briefly, an application for severance made at the outset of the trial was denied in *Figliola* due, in part, to an agreement counsel reached not to elicit evidence from a witness named Gonsalves that would identify one of the co-accused, Di Trapani. This agreement unraveled

after eight weeks of trial through no fault of counsel for Di Trapani. Following another application, the trial judge again refused to sever the trial. The Ontario Court of Appeal noted that the force of the prejudicial evidence, which identified Di Trapani by first name, stature and nationality--yet was inadmissible against him--was enhanced by the fact that it was given by Gonsalves twice, once in chief and once in reply. The other admissible evidence against Di Trapani was entirely circumstantial. Counsel for Di Trapani was faced with the prospect of having to recall witnesses from the previous eight weeks of trial in an attempt to undermine Gonsalves' credibility, and having to do so in circumstances that would necessarily call attention to the prejudicial evidence. The Ontario Court of Appeal ruled that the denial of severance in this unique context resulted in an injustice and allowed the appeal. I see few parallels between Figliola and this case.

[240] As I am of the view that Bahia has not demonstrated that dismissal of his severance application resulted in an injustice, I would not accede to this ground of appeal.

3. The Failure to Edit Baranec and Athwal's Statements

(a) Bahia's Position

[241] Bahia submits that having dismissed the severance application, the judge took on the heavy responsibility of ensuring that the trial was fair, including by editing out what amounts to speculative statements made by Baranec and direct claims made by Athwal that he was involved in the plan to murder Amanpreet. He emphasizes, once again, that none of this evidence was admissible against him. He submits that it was highly prejudicial and that it possessed little or no probative value.

[242] For example, Bahia submits that the judge should have edited or excluded: (1) Baranec's statement that Athwal told him Bahia was involved in planning the murder, and Baranec's further speculative assertion that Bahia gave Athwal the "coast is clear" message the morning the murder was committed; and (2) statements made by Athwal that she arranged the murder with Bahia. Bahia says that Athwal's statements were particularly problematic because they corroborated his own "limited incriminating statements".

[243] Bahia acknowledges that his trial counsel did not ask for any of these statements to be edited by the judge before being presented to the jury, even when the judge and counsel were engaged in aggressively editing Baranec's statements to reduce the amount of bad character evidence the jury would hear. He submits that the failure to do so is not fatal to this ground of appeal as the judge is the ultimate gatekeeper of the evidence the jury hears: *R. v. Borden*, 2017 NSCA 45 at para. 111. He argues that the judge had an independent obligation to raise the issue with counsel and determine whether portions of the statements of Baranec and Athwal could be edited to reduce the potential for prejudice to Bahia. In support of his position, Bahia relies on *R. v. Bonisteel*, 2008 BCCA 344 at para. 45, and *R. v. Oseguera*, 2014 BCCA 352 at paras. 62-64, cases addressing the obligation of judges to edit statements made by an accused that reflect discreditable conduct where the probative value of the evidence is outweighed by its prejudicial effect.

[244] Bahia also notes judicial recognition of the proposition that, in addition to emphatic jury instructions, editing a co-accused's statement may assist in reducing the risk of prejudice flowing from a joint trial in cases of this kind: Welsh at paras. 160-61, 171-74, 178; R. v. Tymchyshyn (C) et al., 2016 MBCA 73 at paras. 53-63.

(b) Analysis

[245] Although framed by Bahia as a separate ground of appeal, failure to edit portions of the statements made by Baranec and Athwal that implicated him in the murder is part and parcel of the second prong of the first ground of appeal--that dismissal of the severance application led to a miscarriage of justice. Put differently, Bahia could not fail on the first ground of appeal, but succeed on this ground.

[246] For reasons already expressed, I am of the view that the instructions provided by the judge guarded sufficiently against the risk that the jury would use evidence inadmissible against Bahia to convict him of the offence charged.

[247] While it may have been possible for the judge to have engaged in some editing of Athwal's statements, and additional editing of Baranec's statements, this would not have been an easy task. As Justice Watt noted in R. v. Largie, 2010 ONCA 548 at para. 87, leave to appeal ref'd (2011), [2010] S.C.C.A. No. 460:

The discretion to exclude relevant, material and otherwise admissible evidence may take on a somewhat different dimension in a joint trial. Evidence received as an admission by one accused, and admissible in relation to him or her, may contain prejudicial information about another accused in connection with whom the evidence is inadmissible. The probative value of the evidence relates to the party making the admission. But the prejudicial effect of the evidence has to do with an accused against whom the evidence is not admissible.

[248] Statements made by Baranec, including those implicating Bahia, formed an important part of the narrative explaining why, when and how he carried out the undetected killing of Amanpreet. It would be challenging to edit Baranec's statements--as Bahia now suggests should have been done--without obscuring the context in which the killing was said to have occurred and impairing the force of the Crown's case against Baranec. Further, I question the utility of attempting to edit statements made by Athwal when Bahia was not present that were not probative of Baranec's involvement but implicated Bahia in the murder. The majority of these statements were made just before Athwal took Cst. B and Baranec to speak with Bahia at which time Bahia confirmed his involvement in the offence. The point is this: even if Athwal's statements to Baranec and Cst. B on January 10, 2011, were edited to delete any reference to Bahia, the inescapable conclusion is that the jury would know Athwal had implicated Bahia in the killing by virtue of her conduct in taking Baranec and Cst. B to meet with him.

[249] As I have noted, trial counsel for Bahia did not ask the judge to edit the statements of Baranec and Athwal implicating him in the murder. Counsel for Bahia on appeal does not suggest how Baranec's statements could fairly be edited or explain how failing to edit Athwal's statements caused the trial to be unfair. The limiting instructions the jury received were, as I have noted, correct and comprehensive.

[250] For these reasons, I would not give effect to this ground of appeal.

4. The Mid-Trial Instruction

[251] Bahia challenges the mid-trial instruction given to assist the jury in understanding the very limited use they could make of Athwal's hearsay statements. For ease of reference, I reproduce it here with the impugned passage emphasized:

What Ms. Athwal says is hearsay evidence. It is the out-of-court statement of a person who is not an accused in this trial. Accordingly, you cannot consider what she said as proof of the truth of the contents of the words she spoke. If, for example, she said words that would suggest the guilt of either Mr. Baranec or Mr. Bahia, you are not to use what she said for the purpose of proving the case against either or both of those men. Rather, you may use her words and statement only to inform your understanding of what the accused persons said in the interaction.

[Emphasis added.]

(a) Bahia's Position

[252] Bahia submits that the mid-trial instruction erroneously left the jury with the impression that statements made by Athwal in Bahia's absence (that he was involved in the murder, that she loved him, and that they were going to get married) could be used to inform the meaning of things said by Bahia, including when he met with Athwal, Baranec and Cst. B on January 10, 2011. The essence of Bahia's complaint is the judge failed to explain that Athwal's statements could only inform the jury's understanding of his statements if Athwal's statements were made in his presence. He further submits that the trial judge did not remedy this error in his final instructions.

(b) Analysis

[253] I see no merit in this ground of appeal.

[254] First, I am confident the jury would have understood this instruction to mean that they could consider Athwal's words to inform what Bahia meant in the context of an "interaction" in which both of them were present.

[255] Second, Bahia's contention that the mid-trial instruction misled the jury on this issue must be assessed with a view to the charge as a whole: *R. v. Jaw*, 2009 SCC 42 at para. 32. Even if the mid-trial instruction had the capacity to mislead—a proposition I do not accept—it would have been cured by the final instructions the jury were given, reproduced herein at paragraph 230. Those instructions could only have been understood by the jury as

restricting the use of statements made by Athwal to providing context for understanding what Baranec (and Bahia) said during a conversation they had with her.

[256] Third, I agree with the Crown that the only way Athwal's statements to Cst. B before they met with Bahia (that he was involved in the murder, that she loved him, and that they were going to get married) could have any logical bearing on the meaning of Bahia's statements would be if the jury were to use Athwal's statements for its truth--something they were clearly told they could not do.

[257] Finally, although the judge was not wrong to give this mid-trial instruction, I do not see that it was required. The statements of Bahia, and the fact that he gave Cst. B--who he thought was his wife's killer--a hug in thanks, stand on their own.

[258] The absence of any objection to the mid-trial instruction (or to the adequacy of the final instructions on the same point) simply fortifies my conclusion that the jury would not have been misled into believing they could consider any statement made by Athwal to inform the meaning of something said by Bahia, including on an occasion when Athwal spoke in Bahia's absence: *R. v. Jacquard*, [1997] 1 S.C.R. 314 at para. 38.

5. The Failure to Provide a Hodgson Instruction

[259] Two days before the date fixed for the hearing of his appeal, counsel for Bahia submitted an aide memoire to the Court seeking leave to raise this ground as an additional ground of appeal. Leave was granted. The Crown was permitted to file a supplemental submission addressing this point. Bahia was given leave to file a reply.

(a) Bahia's Position

[260] Bahia submits that the judge erred in not giving a Hodgson instruction to the jury about how to assess the reliability of admissions he made to Cst. B during the Mr. Big operation. Bahia submits, for the first time on appeal, that he was no less entitled to a Hodgson instruction than Baranec. The jury was instructed that in evaluating the reliability of the admissions made by Baranec to Cst. B, it was important for them to take into account the context in which those admissions were made:

Our law requires that statements of this nature be treated with considerable caution and care. We take that view because there are a number of unusual considerations present. For example, as you know, Mr. Baranec made these statements at a time when he was significantly involved with what he believed to be a serious criminal organization. It is clear that he wanted to become a member of the organization and to be able to take part in what he considered to be its lucrative operations.

In the course of his involvement with the organization, he received money and, as well, was led to believe that if he was permitted to join in the upcoming big score, there would be a substantial monetary benefit for him. As you know, the organization held it out -- held itself out to be powerful and well connected. In the course of his involvement with the organization, Mr.

Baranec saw and had his hands on substantial sums of money. He also understood that the organization was capable of and approving of serious violence and was quite prepared to engage in such conduct.

Additionally, you know that Mr. Baranec had formed a very strong bond of affection for the others in the group, particularly [Cst. B]. In assessing the truthfulness of the statements that Mr. Baranec made confessing to the murder of Ms. Bahia, you must take all of that into account and recognize that when he made that -- when he made the statement, he very much wanted to establish his bona fides and become a member of the group.

Those are all reasons that underpin the importance we place upon being very cautious in assessing the reliability of the statement made by an individual in those circumstances.

In a related vein, experience has caused us to realize that there is a danger that where an individual such as Mr. Baranec is wanting to secure his acceptance by a group of this nature, it may be in his interest to claim to have done the types of things of which the organization would approve. Accordingly, there is a real concern that a person in such a position might falsely claim the credit for offences committed, with a view to making himself seem more worthy of membership in the group.

In this case, as you know, Mr. Baranec initially told [Cst. B] that he had committed three murders, two of them in Ontario many years earlier and the murder of a woman in Surrey. As you also know, when the organization expressed doubt and suggested that the Ontario murders had not taken place as Mr. Baranec described, he admitted that he had falsely claimed to have killed these two men, apparently as a way of making himself seem more worthy of membership. When confronted, he admitted that these claims were not true.

In the result, I emphasize to you the importance of understanding that statements of this type must be examined carefully and critically and with considerable skepticism. You must ensure that you take into account those factors which could cause someone like Mr. Baranec to falsely confess to having committed the murder of Ms. Bahia.

[261] Bahia argues on appeal, as he did before the jury, that Cst. B acted like he was "dangerous" and "bullied" him before he made his admissions on January 10 and 14, 2011. He says the conduct of Cst. B required that a Hodgson instruction be given to assist the jury in assessing the reliability of those admissions in their proper context.

[262] Bahia further argues that Crown counsel at trial requested that a Hodgson instruction be given with respect to Bahia's admissions to Cst. B. He says that the judge's failure to incorporate the Crown's request into the charge constitutes reversible error in law.

(b) General Principles

[263] In Hodgson, the accused confessed to sexual assault in the face of physical threats made by the complainant's family. The case turned on the application of the common law confessions rule, which was held not to apply as the family members were not persons in

authority. Writing for the majority, Justice Cory nevertheless concluded that in certain circumstances the jury should be warned to be cautious in their assessment of the reliability of admissions. The so-called Hodgson instruction reflects the recognition that unfairness or unreliability might result where an accused gives a confession under pressure from degrading treatment, violence, the threat of violence or like behaviour. In this context, Cory J. suggested at para. 30 that a warning along these lines be given to the jury:

A statement obtained as a result of inhuman or degrading treatment or the use of violence or threats of violence may not be the manifestation of the exercise of a free will to confess. Rather, it may result solely from the oppressive treatment or fear of such treatment. If it does, the statement may very well be either unreliable or untrue. Therefore, if you conclude that the statement was obtained by such oppression very little if any weight should be attached to it.

- [264] Hodgson instructions of the kind contemplated by Cory J. are, as a general rule, necessary only in a case where there is evidence that the statement was made as a result of degrading treatment, such as violence or threats of violence, from a person who is not a person in authority: David Watt, *Watt's Manual of Criminal Jury Instructions*, 2d ed. (Toronto: Carswell, 2015) at 314-15.
- [265] A Hodgson instruction--or its functional equivalent--may, however, be advisable (or even required) where admissions are made in the context of a Mr. Big operation that involves degrading treatment and simulated violence, or the threat of violence, or conduct which induces the target of the investigation to mirror through his or her words and conduct the violent past and predisposition being modelled by the primary undercover officer: *Forknall* at para. 39; *R. v. Terrico*, 2005 BCCA 361 at paras. 29-42, leave to appeal ref'd (2006), [2005] S.C.C.A. No. 413. Indeed, a modified Hodgson instruction, adapted to take account of the features unique to Mr. Big operations, has become commonplace in cases of this kind.
- [266] In determining whether a modified Hodgson instruction should be given in a case of this kind, much will depend on the particular manifestation of the Mr. Big investigative technique used in the case and whether it has been used to target the person who made the confession. Where such an instruction is given, the jury should be alerted to the existence of contextual circumstances capable of informing their assessment of the reliability of the confession. As pointed out in *R. v. Mack*, 2014 SCC 58 at paras. 51-54, the circumstances that inform the assessment of ultimate reliability will inevitably overlap with the circumstances that inform the assessment of threshold reliability and will include: the nature and extent of the inducements offered during the investigation; the exposure of the target of the investigation to violence or threats of violence; the nature of the interrogation or conversation that led to the confession; the particular vulnerabilities of the confessor; and whether the confession itself contains markers of reliability (see also Hart at para. 102). In other manifestations of the Mr. Big investigative technique, there may be no evidence of oppressive circumstances leading to the confession. In such a case, giving a Hodgson-type of instruction would be inappropriate as it would only serve to confuse the

jury: R. v. Fry, 2011 BCCA 381 at paras. 82-83, 87.

[267] There is, however, no "magical incantation" that must be included in every jury charge involving a confession to an undercover officer made in the context of a Mr. Big operation: Mack at paras. 49-50. Where an instruction of this kind is given, it should alert the jury to why care needs to be taken in assessing the reliability of the confession, and call their attention to the circumstances that inform that assessment. Trial judges must be given considerable latitude in tailoring the warning to fit the case.

[268] Failure on the part of the judge to give the type of warning contemplated by Mack in a case of this kind will not necessarily result in a finding of reversible error. The adequacy of the charge as a whole will be assessed having regard to the conduct of the trial and the submissions of counsel: R. v. Carter, 2001 BCCA 407 at paras. 54-60; R. v. Skiffington, 2004 BCCA 291 at paras. 40-42, leave to appeal ref'd [2013] S.C.C.A. No. 291; Forknall at para. 39.

(c) Analysis

[269] In my view, the judge was not required to give a modified Hodgson instruction with respect to Bahia. Bahia was not the target of the Mr. Big operation. Unlike Baranec, he was not exposed to any inducements or pressure to speak untruthfully to gain acceptance into the fictitious criminal organization. Unlike Baranec, he had not been exposed to the machinations of a criminal organization that endorsed the use of violence. He met with Cst. B on only two occasions: January 10 and 14, 2011.

[270] I accept that Cst. B was confrontational and aggressive with Bahia, particularly in the first meeting, demanding that Bahia confirm with him that he had not said anything to anyone else about the murder. I think it is fair to say that the first meeting with Bahia was timed and scripted by the police to be filled with tension.

[271] In cross-examination on the trial proper, Cst. B agreed that he spoke to Bahia like he was a "tough guy" and "gangster". He denied, however, bullying Bahia in either meeting. No violence or overt threat of violence was directed at Bahia in either meeting. As Bahia did not testify, there was no evidence that he felt threatened. Further, it is difficult to read into either scenario an air of reality to the proposition that Bahia might have falsely confessed to his involvement in the planning of the murder of his wife because he felt intimidated, threatened or bullied to do so. In fact, Bahia confirmed that he had not said anything to anyone about what happened to his wife within seconds of meeting with Cst. B on January 10, 2011. It is also noteworthy that at the end of their first meeting, Bahia thanked Cst. B for killing his wife and gave him a hug. The second meeting was less confrontational and tension-filled. Bahia again confirmed his complicity in the murder. None of this is consistent with the notion that threats or inducements might have played a role in the elicitation of a false confession.

[272] In his closing address to the jury, Bahia's trial counsel suggested that Bahia was bullied into telling Cst. B what he wanted to hear--that he had said nothing about the murder that might put Cst. B, as the perpetrator, in jeopardy:

You will no doubt have observed that [Cst. B] displayed himself as a killer, at least to Bahia, and he's displayed himself as a killer to Tanpreet Athwal, and he terrorized Tanpreet Athwal. He terrorized her into dragging Bahia off a jobsite, and mandating that she should convince Bahia to tell him, in the presence of Baranec, that he wasn't talking. And it is quite obvious that -- that Ms. Athwal was terrified of him. I mean, when he said jump, she jumped. You know, he -- he bullied her into dragging Bahia off a jobsite.

[T]he most that is said by Mr. Bahia [on January 10, 2011] is that he, in fact, wasn't talking about his wife's murder. Nothing more can be taken from that innocent man, and that was bullied out of him through [Cst. B] and through -- through Tanpreet Athwal.

Now, when you're considering what happened on the 10th of January, remember that [Cst. B] acted like he was dangerous. [H]e portrayed himself as the killer.

Remember that on the 10th of January 2011, Bahia and Tanpreet Athwal met at the Safeway. This is after Athwal had been terrorized by [Cst. B]. This is after Bahia had been bullied.

And then on the 14th of January, [Cst. B] shows up [again at] a jobsite of Mr. Bahia, and he again was acting in a bullying manner, and it was he that was bullying Mr. Bahia again. And Bahia was being mandated, requested, directed, to advise [Cst. B], the killer, that he was not talking.

[273] The judge instructed the jury that they had to decide whether Bahia's statements confessing to his involvement in the planning of the murder of his wife were reliable and true. As the case against both accused rested on their statements, the judge instructed the jury that they had to be satisfied beyond a reasonable doubt that Bahia's confession was true.

[274] The judge reminded the jury of Bahia's position that the reliability of his statements on January 10 and 14, 2011, was undermined by the context in which those statements were made:

Counsel for Mr. Bahia says that [Cst. B] posed as the murderer of Amanpreet Bahia, a fact that Ms. Athwal was led to believe to be true by [Cst. B], who in turn led Mr. Bahia, the accused, to believe that he was the murderer, that he, that is [Cst. B], bullied Tanpreet Athwal into intimidating Bahia to say that he had not talked to anyone about the murder of his wife Amanpreet.

Counsel says that on January 10, 2011, after the meeting among [Cst. B], Baranec, Bahia, and Athwal in White Rock, Mr. Bahia and Ms. Athwal got together at a Safeway store in Surrey. Counsel says that on January 14, [Cst. B] attended to the workplace of Mr. Bahia and intimidated and bullied him into saying that he was not talking to anybody about how Amanpreet Bahia came to her death, and enticed him, that is Mr. Bahia, to tell [Cst. B] that he participated in the murder of Amanpreet so that the killer, [Cst. B], would believe that he was not talking to anyone about

that because to do so would put Bahia at risk, just as it would put the killer [Cst. B] at risk of prosecution.

In the context of this case, I am of the view that no further warning was required in relation to Bahia.

[275] In coming to this conclusion, I have taken note of the fact that Bahia's trial counsel was provided with a written draft of the judge's charge in advance of it being delivered to the jury. Trial counsel is expected to "assist the trial judge and identify what in their opinion is problematic with the judge's instructions to the jury": *R. v. Daley*, 2007 SCC 53 at para. 58 (per Bastarache J. for the majority). When, as here, no objection is taken to the proposed charge, an appellate court may consider the failure to object as a factor reflecting the seriousness of the problem. Here, although not determinative, the failure of trial counsel to object supports my conclusion that the instructions given to the jury were sufficient to equip them with the information they needed to assess the reliability of Bahia's statements. Had the instruction Bahia now seeks been given at trial, the jury would necessarily have been told to assess the reliability of his statements to Cst. B with reference to the surrounding circumstances and to the "markers of reliability", including his post-arrest confession to planning the murder of his wife. It would certainly not have inured to Bahia's benefit to have the confirmatory value of his post-arrest confession highlighted again in this context.

[276] Given the substantial evidence available to the jury supporting the reliability of Bahia's statements to Cst. B, and the paucity of evidence that the statements were made in circumstances that could have produced a false confession to murder, it is reasonable to suppose that Bahia's trial counsel concluded that a warning of the type sought on appeal could only have prejudiced his client's interests.

[277] Finally, Bahia argues that Crown counsel asked that a Hodgson instruction be given with respect to his statements to Cst. B, and that this request was ignored. An examination of the record reveals this not to be the case. In the draft charge, the judge proposed instructing the jury on the issue of whether Bahia knew that someone intended to kill his wife in these terms:

First - did Mr. Bahia know that an individual intended to kill Ms. Bahia?

[218] This question is relatively straightforward. Whether you find it to be proven beyond a reasonable doubt that Mr. Bahia knew that someone was going to kill his wife must be derived from the statements made by Mr. Bahia as there is no other evidence regarding this element. Specifically, to remind you again, anything said by Mr. Baranec and anything said by Ms. Athwal is not evidence you can consider in answering this question.

[219] You should examine Mr. Bahia's statement to the police. From that statement, you should determine whether you are satisfied that Mr. Bahia has admitted that he knew that an individual intended to murder Ms. Bahia.

[Emphasis added.]

[278] When asked for submissions on the draft charge, Crown counsel directed the trial judge to para. 219 and asked him to consider this question in light of all of the statements made by Bahia, including those made to Cst. B:

I've read through and I'm wondering if Your Lordship would consider adding a reference to Mr. Bahia making statements to [Cst. B]. There doesn't seem to be any reference to that. Your Lordship has made a reference to the statement to Inspector Dhillon. I'm wondering if Your Lordship would simply add a phrase there to indicate that the statements include statements made to Dhillon and to [Cst. B].

[279] The trial judge accepted this proposal. The final charge to the jury read:

First, did Mr. Bahia know that an individual intended to kill Ms. Bahia? This question is relatively straightforward. Whether you find it to be proven beyond a reasonable doubt that Mr. Bahia knew that someone was going to kill his wife must be derived from the statements made by Mr. Bahia, as there is no other evidence regarding this element. Specifically, to remind you again, anything said by Mr. Baranec and anything said by Ms. Athwal is not evidence you can consider in answering this question.

You should examine Mr. Bahia's statement to the police, [Cst. B] and Inspector Dhillon. From that statement, in fact it is statements, plural -- from those statements you should determine whether you are satisfied that Mr. Bahia has admitted that he knew that an individual intended to murder Ms. Bahia.

[Emphasis added.]

[280] It is clear from the foregoing that Crown counsel at trial was only concerned with the jury being directed to consider both Bahia's statements to Cst. B and his statement to Staff Sgt. Dhillon following his arrest in determining his guilt. Crown counsel was not, as Bahia now suggests, requesting that a Hodgson instruction be given with respect to his statements to Cst. B.

[281] I would not give effect to Bahia's submission that the judge was required to provide the jury with a Hodgson instruction to assist them in the evaluation of the reliability of Bahia's statements to Cst. B.

[282] In the result, I would dismiss Bahia's appeal from conviction.

VII. Conclusion

[283] For the foregoing reasons, I would dismiss the appeals from conviction of both Baranec and Bahia.

"The Honourable Mr. Justice Fitch"

I AGREE:

"The Honourable Madam Justice D. Smith"

I AGREE:

"The Honourable Madam Justice Griffin"

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