

CANADA / JUDGMENT

R. v. Bouvette

2023 BCCA 152

COURT

British Columbia Court of Appeal

DECIDED

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2023 BCCA 152 R. v. Bouvette

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Bouvette,

2023 BCCA 152

Date: 20230412

Docket: CA47325

Between:

Rex

Respondent

And

Tammy Marion Bouvette

Appellant

FILE SEALED IN PART

Before:

The Honourable Mr. Justice Fitch

The Honourable Mr. Justice Voith

The Honourable Mr. Justice Skolrood

On appeal from: An order of the Provincial Court of British Columbia, dated

May 13, 2013 (conviction) (R. v. Bouvette, Cranbrook Dockets 29382-8-C;

29382-6-A; and 29759-1).

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Place and Date of Hearing:

Vancouver, British Columbia

February 15, 2023

Place and Date of Judgment:

Vancouver, British Columbia

April 12, 2023

Written Reasons of the Court

Summary:

In 2013, the appellant entered a guilty plea to criminal negligence causing the death of a 19-month-old child who had been left in her care. She appeals conviction seeking the admission of fresh evidence to establish material non-disclosure by the Crown and orders allowing the appeal, vacating the guilty plea, setting aside the conviction, and entering an acquittal or, in the alternative, directing a stay of proceedings. The Crown concedes that the fresh evidence should be admitted, the appeal allowed, the conviction set aside, and an acquittal entered or, in the alternative, an order made staying the proceedings. Held: Fresh evidence admitted, appeal allowed, guilty plea vacated, conviction set aside and a stay of proceedings entered. The failure of the Crown and/or police to disclose relevant information violated the appellant's right to make full answer and defence. It renders the appellant's guilty plea invalid as it deprived her of an opportunity to make an informed choice about how to proceed. The conviction must be set aside as the product of a miscarriage of justice, as the evidence and circumstances establish a reasonable possibility that the appellant would not have pleaded guilty to criminal negligence causing death had full disclosure been made. An acquittal is not the appropriate remedy. First, on the evidence available to the Crown, an acquittal would not be the only reasonable verdict on a retrial. Second, application of the exceptional remedial approach set out in *Truscott (Re)*, 2007 ONCA 575 is not justified, since the record before this Court is incomplete and there is a theoretical possibility of a new trial. However, as the appellant has suffered serious prejudice as a

consequence of the disclosure breaches and she has served the entirety of her sentence, ordering a new trial would constitute an abuse of process. The appropriate remedy is a judicial stay of proceedings.

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Reasons for Judgment of the Court:

I. Introduction

- [1] This is an appeal from conviction. It arises in unusual and troubling circumstances.
- [2] On May 13, 2013, the appellant, who was represented by counsel (not counsel on appeal), entered a guilty plea in the Provincial Court of British Columbia to criminal negligence causing the death of Iyanna Teeple ("Iyanna"), a 19-month-old child who had been left in her care. The offence was alleged to have been committed on May 26, 2011, in Cranbrook.
- [3] By this appeal, the appellant seeks orders allowing the appeal, vacating the guilty plea, setting aside the conviction, and entering an acquittal or, in the alternative, a stay of proceedings.
- [4] In support of the relief she seeks, the appellant makes application for the admission of a substantial body of fresh evidence tendered to establish: (1) material non-disclosure by the Crown and police prior to the date upon which the plea was entered; and (2) the existence of a reasonable possibility she would not have pleaded guilty to the offence of criminal negligence causing death had the disclosure breaches not occurred.
- [5] The Crown, represented on appeal by a special prosecutor appointed under the Crown Counsel Act, R.S.B.C. 1996, c. 87, consents to the admission of the fresh evidence and to the orders the appellant seeks. Like the appellant, the Crown submits that if this Court decides not to enter an acquittal, a judicial stay of proceedings should be imposed.
- [6] The focus of the appeal is not so much on whether the appellant has demonstrated an entitlement to a remedy--plainly, she has. The more difficult issue for us to decide is the nature of the remedy that should be granted in this case as a consequence of established disclosure breaches.
- [7] For the reasons that follow, we agree that the fresh evidence tendered by the appellant, including the transcript of the preliminary inquiry, should be admitted on appeal. We also agree that the guilty plea should be set aside and the appeal from conviction allowed. We have not been persuaded that this is an appropriate case in which to enter an acquittal. Instead, we would enter a judicial stay of proceedings. We do so on grounds that a new trial would perpetuate the systemic harm that has already been occasioned by the miscarriage of justice that occurred in this case, and no remedy short of a stay is capable of redressing that

harm.

- [8] At the commencement of the hearing on February 15, 2023, we granted a sealing order on certain materials filed as part of this appeal. The order protects against the public disclosure of sensitive information, including autopsy photos and information engaging third-party confidentiality or privacy interests. Apart from the autopsy photos, the sealing order does not extend to filed materials that are relevant to the determination of this case.

II. Background

- [9] Our task in setting out the complex background of this case has been considerably aided by an Agreed Statement of Facts ("ASF") prepared by counsel and filed for use on the appeal. What follows is a summary of information and events most relevant to the disposition of this appeal. This judgment does not purport to address all of the information put before us by the parties.
- [10] We emphasize at the outset of these reasons that the disposition we are making is attributable to the non-disclosure of information clearly falling within the Crown's duty to disclose set out in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326.
- [11] We have not been asked to make, and do not make, any findings concerning the reliability of the opinions or evidence given by any of the forensic pathologists involved in this case. Put simply, the record before us does not permit the making of such findings and it is unnecessary for us to wade into the controversy this case has generated in the community of forensic pathologists to properly dispose of this appeal. Accordingly, nothing in these reasons should be taken as reflecting negatively on any of the forensic pathologists mentioned herein.

The Circumstances Leading up to Iyanna Teeple's Death

- [12] On the morning of May 26, 2011, Iyanna was dropped off at the appellant's home. The appellant had babysat Iyanna regularly in the past.
- [13] In a statement given to the police, Iyanna's mother described her daughter as being in good health that day. She said there were no recent events that might have resulted in Iyanna being injured before she was dropped off that morning. Iyanna was described as a content child who was just beginning to walk on her own.
- [14] The appellant was almost 28 years of age on the date of the alleged offence. She was raised primarily by her older brother because her father was "a physically abusive alcoholic" who abandoned the family when she was young, and her mother "struggled with mental health and addiction issues". The appellant is the mother of four children, two of whom--one 18 months old and one four years old at the time--were also in the house and under her care the morning of May 26, 2011. The appellant was diagnosed with Borderline Intellectual Functioning and Attention-Deficit/Hyperactivity Disorder. She attended special educational classes while in school.

- [15] At some point in the late morning of May 26, 2011, the appellant left Iyanna unattended in a bathtub for an unknown period of time. The bathtub did not have a slip guard.
- [16] At 11:30 a.m. that day, the appellant phoned 911 seeking emergency medical assistance for the child. When first responders arrived, the appellant was attempting resuscitation, but Iyanna was not breathing and did not have a pulse. Iyanna's heartbeat was restored through aggressive resuscitation efforts made at the scene and at East Kootenay Regional Hospital. She was airlifted to Calgary Children's Hospital but was pronounced brain-dead the next day. Her death occurred on May 28, 2011, following organ donation, a gift to others made possible by the charity and grace of Iyanna's family.
- [17] No forensic evidence of significance, including any evidence of blood, was discovered at the scene. Wet spots were identified on the floor in a couple of areas in the house, including on the carpet in an upstairs bedroom.
- [18] None of the first responders saw or made note of any blood in Iyanna's mouth.

The Appellant's 911 Call and First Two Statements to Police

- [19] The appellant gave somewhat inconsistent accounts of the length of time she left Iyanna unattended in the bathtub, and the circumstances in which that occurred.
- [20] In her 911 call, the appellant said she did not leave the bathroom, but just turned her head and, when she looked back, noticed that Iyanna had swallowed some water. She told one first responder that she had been bathing the child, turned away and, when she looked back, discovered that Iyanna was underwater. She told another first responder that she left Iyanna unattended in the bathtub "only for a minute" to get some shampoo. She told one of the first police officers on the scene that she had been bathing Iyanna in the bathtub, turned away to grab some shampoo, and turned back to discover the child face first in the water.
- [21] The appellant gave four formal statements to the police, the first on the date of the alleged offence and the last on June 14, 2011.
- [22] In her first statement to the police, the appellant said she placed Iyanna in the tub with about four to five inches of water, although she was "not really good about figuring inches out." She said she briefly turned away to get some shampoo and, when she turned back, Iyanna was face down in the water and unconscious. She said she only turned away for a few seconds, "not even a minute". When pressed for clarification, the appellant said, "Sorry, I just, I was trying to figure like, the seconds." Later in the interview, the appellant changed her account and admitted she had left the bathroom to clean up some water that had been spilled by one of the children on the bedroom carpet. She returned to the bathroom to discover Iyanna in distress in the bathtub. The appellant said she was not away from the bathroom for long, and that it was "just for that second", because she cleaned up the water on the bedroom carpet "really quick".

- [23] On June 6, 2011, the appellant gave her second statement to the police. The second statement was largely consistent with the first. The appellant added that one of her children sometimes hit Iyanna with a toy. She saw this occur on the morning of the incident when one of her children hit Iyanna on the arm. She heard noises consistent with a similar incident having occurred again when she was in the kitchen making lunch and the children were out of her sight. Iyanna's mother said in one of her police statements that she had seen the appellant's youngest child strike Iyanna during rough play. She noted that there had "been a few times I've picked [Iyanna] up and she had some bruises on her face, but from toys."
- [24] Iyanna's mother had also observed her climbing and standing up while in the bathtub.
- [25] Dr. Davis, Iyanna's family physician, had seen the child several times since birth for normal issues but said in her statement that she had never noticed any unexplained bruising.

Iyanna's Hospitalization in March 2011 for Post-Viral Cerebritis

- [26] In her May 26, 2011 statement to the police, Iyanna's mother advised that "[a]bout three months ago, [Iyanna] had a viral infection in her cerebellum [but] she recovered quickly cuz it was something where she couldn't even sit up, she couldn't stand".
- [27] The viral infection was also mentioned by Iyanna's grandmother in her May 31, 2011 statement to the police.
- [28] Iyanna's mother also advised the police that the second or third day after treatment, Iyanna was walking around and able to sit up and that everything was fine. Both of these statements were disclosed. Iyanna's mother's statement that Iyanna had been diagnosed with a viral infection in the base of her cerebral cortex which had "been treated [with] no further issues" was also summarized in a portion of the Report to Crown Counsel ("RTCC") that was disclosed to the defence.
- [29] On May 31, 2011, two police officers made notes of a conversation they had with Dr. Davis. The notes include references to Iyanna having been diagnosed with post-viral cerebritis. One officer made notes reflecting that the condition was "completely treated by April 4/11", the infection was "completely healed, and that if something hadn't healed they would have seen signs". The other officer who participated in the same interview made a note that Dr. Davis had seen Iyanna for follow-up on April 4, 2011. The notes this officer made include the following entries: "sudden onset of flopp[i]ness", "viral infection caused inflammation in brain", "April 4, walking, running again", "post-viral cerebritis". These notes were also disclosed to the defence.
- [30] After the second interview, the appellant's brother told investigators that the appellant had been afraid to disclose in her previous statements that, on the day of the incident, Iyanna had fallen from her high chair.

The Appellant's Third and Fourth Statements to the Police

- [31] The appellant was contacted by the police and agreed to provide a third statement on June 8, 2011. In this statement, the appellant described putting Iyanna in a booster seat on a chair in the kitchen. She left the kitchen but then heard a noise. She returned to the kitchen to discover that Iyanna had fallen to the floor with the chair and booster seat on top of her. Other than a red mark on her forehead, she said the child seemed uninjured when she was placed in the bathtub shortly thereafter. The appellant's account of how long she was away from the bathroom was consistent with the version of events she gave in the latter portion of her first statement.
- [32] The appellant's five-hour fourth interview by the police occurred on June 14, 2011. It included the administration of a polygraph test. When asked by police if she understood why she was there, the appellant responded, "not really", apologized, and explained that she had a learning disability. She said she had agreed to take the polygraph test because she was told that, "everything will be over if I take the test". Some hours into the interview, she said she was unaware the polygraph examiner was a police officer. During the interview, the appellant said she was having difficulty breathing and was feeling unwell and claustrophobic. She expressed suicidal ideation. The interviewing officers posed leading questions and repeatedly expressed their belief that the appellant had caused Iyanna's death.
- [33] In her fourth statement, the appellant provided what amounts to the most incriminatory version of events with respect to the frustrations she experienced that day in attempting to care for three young children, Iyanna's condition when she left the bathroom, and the length of time she left Iyanna unattended in the tub, which she said was "maybe like five minutes". We do not propose reviewing the fourth statement in any detail because, even before the appointment of a special prosecutor, Crown counsel had determined that the statement would be found by a court to be involuntary and inadmissible. The special prosecutor also takes the position that the Crown cannot meet its burden to prove the voluntariness of the appellant's fourth statement.

The Autopsy and Opinions of Dr. Matshes

- [34] On May 30, 2011, Dr. Evan Matshes conducted an autopsy on Iyanna's body. At the time, he was an Assistant Chief Medical Examiner in Alberta.
- [35] Dr. Matshes concluded that Iyanna's death was caused by drowning. Dr. Matshes noted multiple bruises on Iyanna's face and scalp, and a recent tear of her maxillary frenum (the tissue on the inner upper lip that attaches to the gumline above the front teeth). In his Certificate of Medical Examiner, Dr. Matshes reported that the manner of death was "undetermined".
- [36] On May 30 and 31, 2011, RCMP investigators spoke with Dr. Matshes. Police created notes, and reports of those conversations, which were disclosed to the defence, reflect that Dr. Matshes provided the following additional information and opinions: the bruising noted on

Iyanna's head was "newish"; that it would be unusual for a fall to result only in head injuries and nowhere else on the body; the injuries "make the whole story of what happened questionable"; it was unlikely that a fall from a high chair could account for some of the bruising to the child's head, one of which was noted to be quite deep; it was unlikely that the trauma to Iyanna's mouth (the frenum laceration) was caused by CPR or intubation; that a laceration of the frenum is typically associated with a "blow" to the face which could have been caused by Iyanna falling against the tub; the bruising to the child's head was not the direct cause of her death, although the bruising was indicative of blows to the head which could have caused her to become unconscious after being placed in the bathtub; and, anything that irritates the brain can cause seizures which could lead to other symptoms contributing to a drowning.

- [37] Police notes reflect that Dr. Matshes stated that were he asked to provide evidence in court, he would say that, "[t]his is a child who has been injured by another person in the last couple of days".

The Murder Charge and Further Opinions of Dr. Matshes

- [38] By information sworn October 24, 2011, the appellant was charged with second degree murder in relation to Iyanna Teeple.
- [39] On March 21, 2012, Deputy Regional Crown Counsel had a further conversation with Dr. Matshes, a record of which was disclosed to defence counsel. With respect to the bruising on Iyanna's head, Dr. Matshes is reported to have said: there is no benign explanation for the injuries, which are typical of those seen in child abuse cases; the force used was not extreme, but considerable; the child could have been rendered unconscious by the blows that caused the bruising; and, the pattern and distribution of the bruising is not consistent with a fall from a high chair. Dr. Matshes is also reported to have opined during this conversation that it takes three to five minutes for a child to die by drowning.

Review Undertaken by Alberta Justice of Dr. Matshes' Work

- [40] In late May, 2012, Cranbrook RCMP was formally advised by its Alberta counterpart that Alberta Justice had commenced a review of cases in which Dr. Matshes had performed autopsies, including Iyanna Teeple's case. Around the same time, a representative of Alberta Justice wrote the Cranbrook RCMP advising that:

The Chief Medical Examiner for Alberta has expressed her concerns about work done by Dr. Matshes in some of his cases. This has, in turn, caused Alberta Crown Prosecutors to take a second look at cases where Dr. Matshes had been involved. We are currently dealing with the 'fallout' arising from Dr. Matshes' questioned reliability as a medical examiner.

I see that Ms. Bouvette may be charged with a form of homicide (manslaughter) and other offences arising from this death and that she has an appearance on June 11, 2012. There has been some suggestion that a guilty plea may be forthcoming.

If you have any concerns about Dr. Matshes' involvement in this matter should the case proceed to trial and/or the potential for a wrongful conviction I would be pleased to speak with you.

[41] Cranbrook RCMP communicated this information to the assigned prosecutor in Cranbrook. Alberta Justice was subsequently advised that it was the intention of Cranbrook Crown counsel to have Dr. Matshes' work reviewed by a British Columbia-based pathologist. There are no documents in the defence, RCMP or Crown files to suggest that disclosure was made to the defence of any of these May 2012 Alberta-based communications.

[42] On August 10, 2012, Dr. Anny Sauvageau, the Chief Medical Examiner of Alberta, completed and sent to Cranbrook Crown counsel an email with an attached Peer Review Form pertaining to the post-mortem examination of Iyanna Teeple performed by Dr. Matshes. In the email, Dr. Sauvageau advised:

I don't agree that there is any ground, on the autopsy findings alone, to support that this is an inflicted trauma. The opinions expressed to [Deputy Regional Crown Counsel] are disturbing and clearly unreasonable.

[43] In the accompanying Peer Review Form, Dr. Sauvageau agreed that the opinions of Dr. Matshes respecting the manner and cause of Iyanna's death are reasonable. She concluded, however, that the verbal opinions attributed to Dr. Matshes by the police and Deputy Regional Crown Counsel are "unreasonable". She reiterated that there is insufficient evidence in the autopsy findings to support a conclusion of "inflicted trauma". Further, she characterized as "unreasonable" the opinions attributed to Dr. Matshes that "there is no benign explanation" for the injuries sustained by Iyanna, and that "the extensive bruising" is "typical of abused children". The Peer Review Form was disclosed to the defence and was stamped as being received on August 17, 2012. The email was not disclosed, but nothing turns on this as all of the information contained in the email was reproduced in the Peer Review Form.

[44] On August 21, 2012, Cranbrook Crown counsel received a letter from Dr. Ross Zumwalt, Chief Medical Investigator, State of New Mexico, and Professor of Pathology at the University of New Mexico School of Medicine. Dr. Zumwalt had reviewed the autopsy report and photographs taken at the time of the autopsy, the information said to have been subsequently communicated by Dr. Matshes to the Crown and police, and Dr. Sauvageau's email. He said that "the opinions of Dr. Matshes as reflected in his interview with [Deputy Regional Crown Counsel] are logical and based on sound medical and forensic pathology principles". Dr. Zumwalt strongly disagreed with the views expressed by Dr. Sauvageau that the opinions reportedly provided by Dr. Matshes to the police and Deputy Regional Crown counsel were "unreasonable", and noted that he was at a loss to understand Dr. Sauvageau's perspective.

[45] On August 24, 2012, and apparently in response to inquiries made by them, Cranbrook RCMP received a letter from Dr. Sam Andrews, Associate Medical Investigator and Assistant Professor of Pathology in the New Mexico Office of the Medical Investigator. Dr. Andrews

was the Deputy Chief Medical Examiner for the Province of Alberta and Dr. Matshes' supervisor when the autopsy on Iyanna Teeple was performed. Dr. Andrews had consulted with Dr. Matshes about the Teeple case when the autopsy was performed. He reviewed the autopsy report and photographs along with the Peer Review Form prepared by Dr. Sauvageau. He agreed with Dr. Matshes that the extent and location of the injuries to Iyanna's head were highly concerning and raised the possibility that they resulted from non-accidental trauma. He also opined that the theoretical scenarios offered for the injuries (presumably, the fall from the booster seat and the possibility that Iyanna may have struck her head while in the bathtub) were not consistent with the injuries Dr. Matshes documented. Dr. Andrews also expressed the view that Dr. Sauvageau was "incorrect" in characterizing as "unreasonable" the opinions Dr. Matshes communicated to the police and Deputy Regional Crown counsel.

- [46] On August 27, 2012, Cranbrook Crown counsel received an opinion from Dr. Stephen Cina, another forensic pathologist based in the United States. Dr. Cina reviewed the autopsy report of Dr. Matshes and the opinions expressed by Dr. Sauvageau and Dr. Zumwalt. He concurred with the opinion of Dr. Zumwalt. He, too, expressed puzzlement with Dr. Sauvageau's position. He opined that the presence of injuries on Iyanna's face, multiple surfaces of her scalp, and maxillary frenulum "cannot be explained by a simple fall, two falls, slipping in the bathtub or CPR-artifact. Rather, they are compatible with [non-fatal] injuries inflicted by another person." Dr. Cina expressed a number of possibilities including that Iyanna had been struck and subsequently drowned in the bathtub.
- [47] The letters sent by Dr. Zumwalt and Dr. Cina were disclosed to the defence; Dr. Andrews' letter was not.

The Preliminary Inquiry

- [48] The preliminary inquiry commenced on August 28, 2012. Dr. Matshes testified for the Crown. He had, by then, left his employment in Alberta and was the Associate Medical Investigator and Director of Pediatric Forensic Pathology at the Office of the Medical Investigator in New Mexico.
- [49] Dr. Matshes acknowledged in his evidence that controversy had arisen in Alberta concerning the reliability of his work. With respect to this case, he testified that the Chief Medical Examiner for Alberta disagreed with his interpretation of Iyanna's head injuries, but agreed with him that Iyanna died by drowning and that the manner of her death was appropriately classified as "undetermined".
- [50] Dr. Matshes described bruising scattered in multiple places over Iyanna's forehead and the top of her head. Two bruises were visible on the surface of Iyanna's face and head. The rest were not externally visible, but were noted during the autopsy.

- [51] Dr. Matshes testified that the injuries could have been sustained from a few hours to a few days before Iyanna's death. He agreed that the injuries may have been caused by an older child striking Iyanna with a toy. He could not say whether the injuries were intentionally inflicted or accidentally sustained.
- [52] Dr. Matshes reiterated his opinion that the torn maxillary frenum was unusual and highly concerning. He testified that a laceration of the inner lining of the mouth would tend to bleed fairly heavily. He also reiterated his opinion that such an injury is not typically caused by resuscitation efforts. Instead, it generally results from blunt force to the face. Dr. Matshes was unable to say whether the bruising or the laceration of the frenum was accidentally or intentionally inflicted. He said it is highly unusual to see a torn frenum in a child, and testified that this type of injury is classically associated with child abuse.
- [53] Dr. Matshes testified that the cluster of injuries to the child's head discovered during the post-mortem examination were highly concerning and "a red flag to a board-certified forensic pathologist".
- [54] He testified it could not definitively be determined how the head injuries would have affected Iyanna. In response to a question posed by Crown counsel that invited him to opine on a range of possibilities, Dr. Matshes said it was unlikely that Iyanna would appear normal in the immediate aftermath of the injuries. He would have expected the injuries to cause Iyanna pain and upset. He testified that the injuries were not the cause of Iyanna's death, but it was possible that the effects of the injuries may have caused her to fall forward into the bath water.
- [55] Dr. Matshes reiterated his view that a fall from the high chair would be unlikely to result only in head injuries.
- [56] Dr. Matshes also testified that irreversible brain injury resulting from oxygen deprivation would occur within three to five minutes. He was not asked how long Iyanna would have been immersed in the bath water before becoming unconscious.
- [57] On August 29, 2012, Cranbrook Crown counsel was again informed by a representative of the Attorney General of Alberta that questions had been raised about "the reasonableness of [Dr. Matshes'] conclusions in many cases, including the Teeple case", and that a review of his work in Alberta was being conducted. As the author of this communication noted, it was being sent to Cranbrook Crown counsel "so that she can properly prosecute her case and make disclosure to the defence". This Alberta-based communication was also not disclosed to the defence.
- [58] On September 21, 2012, the appellant was committed for trial on the charge of second degree murder.

Results of the External Peer Review Undertaken in Alberta are Communicated to Cranbrook Crown Counsel but Not Disclosed

- [59] On December 13, 2012, the Crown's office in Cranbrook received a covering letter dated December 7, 2012, and package of documents (about 140 pages in total) from Alberta Justice. The covering letter, addressed to the Cranbrook Crown counsel assigned responsibility for the appellant's prosecution, refers to "additional disclosure" consisting, among other things, of: (1) the results of an External Peer Review Committee that was established in Alberta to re-examine the findings of Dr. Matshes, including in the case of Iyanna Teeple; and (2) correspondence from Dr. Matshes to the (then) Alberta Minister of Justice.
- [60] In his correspondence to the Minister of Justice, Dr. Matshes advised that he had sought out the opinions provided by Dr. Zumwalt and Dr. Cina. The correspondence also contains Dr. Matshes' speculation that the "vindictive nature" of Dr. Sauvageau's peer review report stemmed from his refusal to support her pursuit of the Chief Medical Examiner position in Alberta because she (allegedly) had not undertaken forensic pathology training in a centre credentialed by a national body, and lacked board certification in forensic pathology.
- [61] The covering letter sent by Alberta Justice, the results of the External Peer Review Committee, and Dr. Matshes' letter to the Minister of Justice were not in defence counsel's file. Further, no documents in the defence or Crown files suggest that any of these materials were disclosed by the Crown to the defence.
- [62] We wish to emphasize that our summary of events and correspondence relevant to the appeal before us is factual. We are not impugning the motives or professionalism of either Dr. Matshes or Dr. Sauvageau. Dr. Matshes did nothing wrong in seeking out opinions that confirmed the reliability of his work and served to protect his professional reputation. Further, we do not suggest that Dr. Sauvageau was motivated by anything other than a good faith understanding of her professional obligations.
- [63] Put simply, the problem in this case does not stem from the conduct of either of these forensic pathologists; rather, it stems from the Crown's failure to disclose this information.
- [64] In its Peer Review Form completed on November 17, 2012, the three-member external review panel, comprised of forensic pathologists other than the Chief Medical Examiner of Alberta, concluded that while the case was a "very difficult" one, the opinions reported to have been expressed by Dr. Matshes to the police and Crown counsel are "not reasonable". The review panel also characterized as unreasonable Dr. Matshes' conclusions with respect to the cause of death (drowning) and the manner of death (undetermined). We were given no explanation for the review panel's apparent rejection of Dr. Matshes' opinions concerning the cause and manner of death.

The Crown's Decision Not to Seek Admission of the Appellant's Fourth Statement to the Police

[65] By early 2013, the Crown had decided not to rely on the appellant's fourth statement for any purpose, concluding it was likely involuntary and, thus, inadmissible. There are no documents confirming that the Crown's position on this issue was communicated to defence counsel before the appellant pleaded guilty to criminal negligence causing death.

The Crown's Decision to Limit its Reliance on Dr. Matshes' Opinions

[66] On or about March 20, 2013, Cranbrook Crown counsel with carriage of this prosecution received information from Alberta Justice that it would not be calling Dr. Matshes as a witness on any of the cases in which he was involved. Instead, all of the work performed by Dr. Matshes would be re-examined by a different pathologist.

[67] Around the same time, a decision was made by the Crown in British Columbia not to rely in the opinions of Dr. Matshes in the case at bar. Subsequently, that decision was revisited and it was decided that, for the purposes of resolution discussions on the basis of a criminal negligence causing death charge, the Crown would only rely on Dr. Matshes' opinions on factual issues relating to the cause of death (drowning) and the time within which irreversible brain injury results from oxygen deprivation--three to five minutes.

The Plea and Sentencing Proceedings

[68] Later in March 2013, a plea agreement was reached. A new charge of criminal negligence causing death would be laid, the appellant would plead guilty to that charge in provincial court, and the murder charge would be stayed.

[69] An information alleging criminal negligence causing death was sworn on May 10, 2013.

[70] As noted earlier, the guilty plea was entered on May 13, 2013. The guilty plea was entered on the appellant's behalf by her counsel. No plea comprehension inquiry was conducted as required by s. 606(1.1) of the Criminal Code, R.S.C. 1985, c. C-46 [Code].

[71] In her sentencing submissions, Crown counsel submitted that the injuries to Iyanna's head, including the bruising and lacerated frenulum could have been caused accidentally or by rough play between the children. She said that the Crown could not prove the appellant caused any of the injuries. She submitted, however, that the mouth injury would have resulted in significant bleeding, pain and disorientation. The Crown submitted that the appellant's failure to protect Iyanna amounted to a wanton and reckless disregard for her life and safety as "there was an obviously injured, bleeding, and distraught child, who was crying and trying to stand in the tub, and she was left alone in that shape for at least three to five minutes".

- [72] As previously noted, there was no blood located in the appellant's home following the incident. Further, the Crown's contention that the appellant left Iyanna alone in the bathroom for three to five minutes must have been based on her fourth statement to the police (determined by the Crown to be involuntary and inadmissible), on Dr. Matshes' evidence at the preliminary inquiry that irreversible brain injury classically occurs in three to five minutes, or on an admission made by the appellant for sentencing purposes.
- [73] There is no evidence before us that the plea proceeded by way of an agreed statement of fact, or that the appellant admitted, for the purposes of sentencing, that she left Iyanna unattended in the bathtub for three to five minutes. In addition, the record is, in our view, insufficiently clear to support a submission that because Iyanna sustained an irreversible brain injury, she must therefore have been left in the bathroom submerged in water for three to five minutes. Iyanna may have been removed from the bathtub by the appellant before that time elapsed but in a state where she continued to be deprived of oxygen.
- [74] The appellant's trial counsel submitted that the evidence Iyanna was bleeding came exclusively from Dr. Matshes. He pointed out that Dr. Matshes' work had been independently reviewed and found to contain unreasonable conclusions, although counsel said he was "not sure if this case was included" in the review.
- [75] Crown counsel interjected to note that the case had been reviewed by "the coroner" and the results of that review were disclosed to the defence. We understand this to be a reference to the peer review undertaken by Dr. Sauvageau, which was disclosed to the defence. The Crown advised that the coroner did not disagree with Dr. Matshes' findings concerning the nature of the injuries, but did disagree with his suggestion to the Crown and police that these injuries had been intentionally inflicted. The exchange between the Crown and the sentencing judge on this issue may have left an impression that the coroner (Dr. Sauvageau) agreed that the child would have been bleeding profusely from the mouth when placed in the tub. While this cannot fairly be read into Dr. Sauvageau's peer review findings, we wish to be clear that we do not attribute to Crown counsel any intention to misrepresent to the sentencing court Dr. Sauvageau's conclusions.
- [76] On May 16, 2013, the appellant was sentenced to 12 months' imprisonment and probation for criminal negligence causing death.
- [77] In her reasons for sentence, the judge made these observations:
- [19] A pathologist conducting the autopsy on Iyanna found evidence of bruising on the top and sides of Iyanna's head and [a] gash inside her mouth that would have led to considerable blood loss, in that pathologist's opinion, and that Iyanna's distress would have been obvious.
- [20] The Crown is adamant that Iyanna would have been visibly distressed, and not the unfussy girl splashing in the tub that Ms. Bouvette made out.

- [21] The findings of the pathologist are contested by Ms. Bouvette, whose counsel says was investigated by the Government of Alberta and found wanting. The Crown replied that an independent investigator in this province agreed that Iyanna had an injury to her mouth that would have caused bleeding and that would have been painful.
- [22] We will never know whether Iyanna was visibly bleeding when she was taken to the bath, but Ms. Bouvette's admission that she was calming Iyanna [after the fall from the high chair] and all of the circumstances indicate that Iyanna would have been very upset . A prudent parent, even suspecting only a small head wound, might have called 9-1-1 or taken Iyanna to the hospital to ensure that she was not injured.
- [23] Sadly, Ms. Bouvette did not seem to have the presence of mind to make that obvious decision, one that might have led to a much different result. Rather, Ms. Bouvette took Iyanna to the bathroom where she placed her in the tub and inexplicably left her there, while she went into her bedroom to get a towel and there commenced, she says, cleaning some water off of the rug.
- [24] When Ms. Bouvette returned to the bathroom about five minutes later, she found Iyanna lying face down in the tub.
- [26] In interviews with police Ms. Bouvette lied about events, before ultimately giving a version of events that corresponded somewhat with the physical evidence. Ultimately, Ms. Bouvette indicated that some of the marks on Iyanna's head could have been caused when her [child] struck Iyanna that day as [they] did several times with [their] toys.
- [27] Crown submitted that the opinion of the pathologist was that Iyanna's marks could be consistent with [blows from toys], as well as from the fall off of the booster seat. In the result, the Crown has proceeded with this charge of criminal negligence causing the death of Iyanna.
- [33] The circumstances of this case, in my view, evidence a marked and substantial departure from the conduct of a reasonably prudent parent. Ms. Bouvette had to have known just how risky it was to leave Iyanna alone in the tub after she had just fallen and injured her head, no matter how slight. To leave her alone, a child under two, in the tub for five minutes under any circumstances falls well below any rational norm.
- [34] In this instance, the Crown submits that Ms. Bouvette showed reckless disregard for the life of Iyanna by leaving her in the bathtub alone for no good reason, knowing that it was dangerous to do so and being careless about the consequences. I agree. The offence has, without question, been made out
- [57] This death was a terrible accident. It was not intentional, but it did come about as [a] function of the criminal negligence of Ms. Bouvette, who was that day in May reckless as to the life and safety of Iyanna.
- [78] Consistent with the plea agreement, the murder charge was stayed.

[79] The appellant has, of course, long since been served the sentence imposed on her for the offence of criminal negligence causing death.

Appointment of the Special Prosecutor

[80] On January 14, 2020, the BC Prosecution Service ("BCPS") announced the appointment of a special prosecutor to conduct an independent review of the case to determine whether a miscarriage of justice may have occurred. Following an exhaustive review of the background circumstances, it was announced on February 25, 2021 that the special prosecutor had made a series of remedial recommendations to the BCPS. Shortly thereafter, the special prosecutor disclosed previously undisclosed information to the appellant's counsel.

The Notice of Appeal and Extension of Time

[81] A notice of appeal was filed in this Court on the appellant's behalf on March 16, 2021. The sole ground of appeal is framed as follows:

That Crown Counsel failed to disclose to the appellant the evidence of three forensic pathologists comprising an expert review panel that reviewed the autopsy report in the case and stated that the conclusions of the medical examiner that there was "no benign" explanation for the injuries of the deceased, that they were "intentional injuries," and that they were "typical of child abuse" were unreasonable. The appellant pleaded guilty based on the autopsy report with only a partial understanding of the case against her and without the ability to make full answer and defence due to the non-disclosure of the expert review panel's evidence. The guilty plea therefore constitutes a miscarriage of justice per s. 686(1)(a)(iii).

[82] On November 23, 2021, and with the consent of the special prosecutor, a judge of this Court granted the appellant's application to extend time to appeal. Reasons for judgment on the extension of time application are indexed as 2022 BCCA 9.

Summary of the Undisclosed Information and Documents

[83] For clarity, we present, in summary form, the most significant documents and information referred to in the ASF that were not disclosed to the defence:

Documents Relating to the Alberta Review of Dr. Matshes' Opinions

- The Alberta-based communications sent to the Cranbrook detachment of the RCMP or the Cranbrook Crown in May 2012 advising that Alberta had commenced a review of cases in which Dr. Matshes had performed the autopsy, including the Teeple case;
- The August 29, 2012, email advising Cranbrook Crown counsel that questions had been raised about the reasonableness of Dr. Matshes' conclusions in many cases, including the Teeple case, and that a review of his work in Alberta was being conducted;

- The December 2012 communication from Alberta Justice that enclosed approximately 140 pages of documents, including: (1) the report of the External Peer Review Committee established in Alberta to re-examine the findings of Dr. Matshes, and its conclusion that the opinions he verbally communicated to the Crown and police in the Teeple case are "unreasonable"; and (2) correspondence from Dr. Matshes to the Alberta Minister of Justice: (a) advising that he had obtained the forensic pathology consultation reports prepared by Dr. Zumwalt and Dr. Cina; (b) characterizing Dr. Sauvageau as "vindictive"; and (c) claiming that Iyanna had sustained "an ultimately lethal injury", and that the appellant confessed to killing the child; and
- Dr. Andrews' opinion that was supportive of Dr. Matshes' report and conclusions.

Documents Relating to Iyanna's Brain Virus

- Clinical records from the East Kootenay Regional Hospital pertaining to Iyanna's hospitalization for three days commencing March 20, 2011, for a suspected viral infection of the brain. The records reflect that Iyanna presented with a sudden onset of loss of balance and hypertonia (abnormally increased muscle tone resulting in rigidity). She was noted to be arching and flopping backwards. She was diagnosed with post-viral cerebritis. When Iyanna was discharged on March 23, 2011, she had improved but still had mild signs of ataxia (lack of muscle co-ordination and control);
- As set out in the ASF, nothing in the Crown, defence, or RCMP files indicates that these clinical records were provided by the RCMP to the Crown or disclosed to the defence;
- Occurrence Report 16 - The first page of the report sets out information apparently provided by Dr. Matshes, which is followed by this entry: "Child does have a recent past medical history of a brain infection with conditions that could contribute to some of the findings." This investigative report was in the RCMP file but was not found in the Crown or defence files. There are no documents confirming that this report was provided to the Crown or disclosed to the defence;
- Occurrence Report 17 - This report records that Dr. Davis was interviewed on May 31, 2011, and advised that Iyanna had been admitted to the hospital for "post-viral cerebritis (a viral infection that moved to the small brain causing hypertonia and ataxia which caused [her] to become limp with a high fever)", but that the condition had completely healed by April 4, 2011. Dr. Davis is also reported to have advised that if Iyanna's brain had still been affected, the symptoms would have been noticeable. She said the condition would not have contributed to Iyanna's death;
- Occurrence Report 43 - This report summarizes again the May 31, 2011 police interview of Dr. Davis. It largely mirrors Occurrence Report 17;
- The RTCC consists of 106 pages. The only pages of the RTCC found in the defence file are pages 4-32 and 91. There is no evidence confirming that pages 50-90 and 92-106 had been disclosed to the defence prior to the appellant entering her guilty plea. However, the parties agree that much of the content of these pages of the RTCC had been disclosed in other forms. For example, where civilian witness statements were summarized in these undisclosed pages of the RTCC, the

statements themselves had been disclosed. Page 59 of the RTCC (not disclosed to the defence) summarizes the police notes made of their May 31, 2011 meeting with Dr. Davis. Consistent with the police notes that were disclosed, this page of the RTCC records that Dr. Davis saw Iyanna on April 4, 2011, and that there were no ongoing symptoms of the infection. Iyanna was noted to be playing, moving and walking normally.

III. Legal Framework and Analysis

Setting Aside Guilty Pleas in Cases of Material Non-Disclosure: General Principles

- [84] An accused who has been convicted following the entry of the guilty plea may appeal the conviction and assert that the plea was not valid and the underlying conviction the product of a miscarriage of justice. Section 686(1)(a)(iii) of the Code authorizes an appellate court to allow a conviction appeal where it is of the opinion that "on any ground there was a miscarriage of justice".
- [85] A guilty plea may be set aside on appeal where there are "valid grounds" to do so: *Adgey v. The Queen*, [1975] 2 S.C.R. 426 at 431. As this Court noted in *R. v. Alec*, 2016 BCCA 282 at para. 76, there is no complete catalogue of the circumstances that may be found to constitute "valid grounds" for setting aside a guilty plea. The inquiry is case specific and must be sufficiently flexible to take account of the almost infinite range of circumstances that might be said to have contributed to a miscarriage of justice.
- [86] Generally speaking, a valid guilty plea is one that is informed, voluntary and unequivocal: *R. v. T. (R.)* (1992), 10 O.R. (3d) 514 at 519, [1992] O.J. No. 1914 (C.A.).
- [87] However, even if the basic requirements for validity are met, a guilty plea may be set aside in the face of material non-disclosure. In this context, the appellant "must demonstrate that there is a reasonable possibility that the fresh evidence [the undisclosed information] would have influenced his or her decision to plead guilty, if it had been available before the guilty plea was entered": *R. v. Taillefer*; *R. v. Duguay*, 2003 SCC 70 at para. 90. If there is a realistic possibility that an accused would have run the risk of a trial had they been in possession of the undisclosed information, leave should be given to withdraw the guilty plea.
- [88] In *R. v. Wong*, 2018 SCC 25, the Court clarified that the framework for striking a guilty plea involves two discrete steps.
- [89] The first step involves whether the accused has been misinformed about sufficiently serious information. Where a plea is sought to be set aside on appeal for non-disclosure, this entails assessing the undisclosed evidence together with all of the evidence known to the accused at the time the plea was entered. The inquiry--to the end of determining whether there has been an infringement of the right to make full answer and defence--involves assessing the volume, weight and relevance of the undisclosed evidence and the new possibilities the opportunity to use that evidence would have offered: *Wong* at paras. 33-34, citing *Taillefer* at paras. 90, 111-112. Whether the information unknown to the accused falls within the scope

of what an accused must know to enter a valid plea is assessed objectively.

- [90] The second step set out in *Wong* requires demonstration that the lack of information resulted in prejudice. This step involves a subjective assessment of whether the accused would have taken a meaningfully different course of action, including running the risk of a trial, had they been in possession of the undisclosed information: *Wong* at para. 35.
- [91] Where, as here, an appellant seeks the admission of new evidence to challenge the validity of the trial process, the strictures of the test set out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759 do not apply. Rather, the principles that apply to the admission of evidence discovered after the Crown's breach of its duty to disclose were set out in *R. v. Dixon*, [1998] 1 S.C.R. 244 at para. 34. Specifically, an accused who alleges material non-disclosure and seeks to have new evidence admitted on appeal must demonstrate a reasonable possibility that the non-disclosure affected the outcome at trial or the overall fairness of the trial process: *Taillefer* at para. 78.

Application of Principles to the Case at Bar

- [92] It is common ground on appeal that a body of relevant information was within the possession of the Crown and/or police and not disclosed to the defence.
- [93] Most significantly, the undisclosed evidence pertained to the reliability of the evidence and opinions of Dr. Matshes. The respondent concedes that this information (along with all of the other undisclosed material summarized herein at para. 83) attracted a disclosure obligation.
- [94] We turn next to consider whether, viewed objectively, the impact of the non-disclosure was sufficiently serious to render the appellant misinformed (to use the language in *Wong*), or whether the non-disclosure resulted in an infringement of the appellant's right to make full answer and defence (to use the *Taillefer* formulation).
- [95] It is common ground on appeal that the opinions of Dr. Matshes formed a crucial component of the Crown's case. The Crown's theory underlying the murder charge must have rested on Dr. Matshes' opinion that the injuries he observed on Iyanna were intentionally inflicted by the appellant. Dr. Matshes' opinions were also critical on issues relating to cause of death and the length of time the appellant must have left Iyanna unattended in the bathtub. That an external peer review panel disagreed with aspects of Dr. Matshes' opinion in several cases, including this case, would be highly useful to the defence in terms of pursuing further investigations, retaining experts with an opposing point of view, and cross-examining Dr. Matshes.
- [96] Similarly, the advice of Alberta Justice that it would not be calling Dr. Matshes in any future case would have been useful information for the defence.

- [97] The letter Dr. Matshes wrote to the Minister of Justice in Alberta before testifying at the preliminary inquiry was also significant. The fact that Dr. Matshes obtained the confirmatory consultation reports from Dr. Zumwalt and Dr. Cina was relevant to the defence, as was the possibility of animus between Dr. Matshes and Dr. Sauvageau. This information might have been used as the foundation for an argument that Dr. Matshes should not be qualified to give expert evidence in this case. It might have been argued that Dr. Matshes' opinions in the case were so enmeshed with his dispute with Dr. Sauvageau and related desire to protect his professional reputation, that he had developed an intensely personal and disqualifying interest in the litigation: *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 at paras. 32, 35-40, 49.
- [98] Failure to disclose hospital records concerning Iyanna's admission and treatment in March 2011 for a brain virus that could result in loss of balance and motor control was also significant. With these records in hand, the defence might have explored with their own expert the physiology of post-viral cerebritis and whether it could have played a continuing role on May 26. In addition, the failure to disclose Occurrence Report 16 was significant insofar as it suggested that the conditions associated with a viral brain infection "could contribute to some of the findings".
- [99] We are satisfied the fresh evidence establishes a failure on the part of the Crown and police to disclose to the appellant information of considerable significance to the defence. The undisclosed evidence had an immediate potential use and could also have been used to pursue avenues of inquiry helpful to the defence. The failure to disclose this information violated the appellant's right to make full answer and defence. It also renders the guilty plea invalid as the appellant was, by virtue of the non-disclosure, deprived of an opportunity to make an informed choice about how to proceed. The first step of the Wong test is met.
- [100] We turn next to the second step in the Wong framework--whether the appellant has established prejudice that is serious enough to constitute a miscarriage of justice, in the sense that the circumstances and new evidence give rise to a reasonable possibility that she would not have entered the guilty plea had full disclosure been made.
- [101] In her fresh evidence affidavit, the appellant deposes she would not have pleaded guilty to the offence of criminal negligence causing death had she been aware of the undisclosed material and its potential impact on the strength of Dr. Matshes' opinion evidence:
17. In March 2013, [defence counsel] told me about a plea offer from Crown, which involved me pleading guilty to criminal negligence causing death and the charge of murder against me being stayed.
18. I did not believe I was responsible for Iyanna's death. However, [defence counsel] told me I should take the plea offer. He said the likely outcome at trial would be a conviction for second degree murder because of Dr. Matshes' expert opinion. I understood Dr. Matshes' would be giving evidence that I had caused Iyanna's death.

19. I felt like I had no choice but to plead guilty. I wanted to get out of jail and I was facing 25 years.
43. If I had been advised of the non-disclosed materials and how they would have negatively impacted on the strength of Dr. Matshes' expert opinion, I would not have accepted the plea bargain.
44. If I had been advised that Dr. Matshes' opinions [were] the subject of considerable expert criticism, including his opinion in Iyanna's case, I would not have accepted the plea bargain.
- [102] The appellant's trial counsel deposes in his fresh evidence affidavit that, "[i]f I had been aware of other file materials, including reports or documents impugning the reliability of the expert opinion [of] Dr. Matshes, it is likely that I would have advised Ms. Bouvette differently".
- [103] The Crown has not sought to challenge the assertions of the appellant or her trial counsel.
- [104] That the appellant's prejudice claim has not been challenged is an important, but non-determinative factor. As emphasized in Wong at para. 26, an accused's claim about what his or her subjective and fully informed choice would have been must be measured against the objective circumstances to test its veracity against the standard of reasonable possibility: see also R. v. Klassen, 2023 BCCA 103 at para. 42.
- [105] Scrutinizing the appellant's claim against the objective circumstances, we see no reason to doubt its veracity. At the time of the guilty plea, the appellant was facing a charge of second degree murder and, upon conviction, an automatic life sentence with a minimum parole ineligibility period of 10 years. She is the mother of four young children. In short, she was facing the loss of her liberty for a substantial period of time, the stigma associated with a murder conviction, and the loss of her relationships with her children.
- [106] The information provided by Dr. Matshes to the police and Deputy Regional Crown Counsel, together with the evidence he gave at the preliminary inquiry, was to the effect that Iyanna's injuries were newish, would have caused her considerable distress if not unconsciousness, and were classically associated with child abuse. The appellant was facing an allegation that she put a child, who had been disabled or rendered unconscious by head injuries she inflicted, into the bath and left her there to drown.
- [107] The appellant was completely reliant on her counsel. She is a marginalized person from a disadvantaged background who operates with borderline intellectual functioning. In her reasons for sentence, the judge took note of the Crown's position that the appellant has "fragilities" and is "poorly equipped, both intellectually and emotionally, to deal with stress".

- [108] The appellant's trial counsel appears to have been aware that Dr. Matshes' work was being questioned and systematically reviewed in Alberta, but neither he nor the appellant was aware that those concerns extended to the autopsy Dr. Matshes conducted on Iyanna Teeple.
- [109] The appellant was also unaware of the results of the external peer review overseen by Alberta Justice, and the possibility that the review could be the source of an alternative opinion refuting the damning one offered by Dr. Matshes, or at least undermining the reliability of the Crown's key witness.
- [110] In the circumstances, the appellant faced a terrible dilemma, similar to the one that faced the appellant in *R. v. Kumar*, 2011 ONCA 120 at para. 34. She could proceed to trial and risk being convicted of second degree murder, or plead guilty to a reduced charge. Against this background, the Crown held out a powerful inducement: a guilty plea to a lesser charge and the certainty of a much-reduced sentence. Indeed, the Crown sought the imposition of a two-year custodial term on the appellant's plea of guilty to criminal negligence causing death. It is not difficult to imagine why, unarmed with critical information that could assist her, this marginalized, overwhelmed and intellectually challenged appellant would enter a guilty plea to a lesser offence.
- [111] In our view, this evidence, assessed against the significance of the undisclosed information, establishes a reasonable possibility that the appellant would not have pleaded guilty to criminal negligence causing death had the Crown and police complied with their disclosure obligations.
- [112] In our view, the conviction entered following the appellant's guilty plea is the product of a miscarriage of justice. It must be set aside.

Remedial Options: General Principles

- [113] Where an appeal from conviction is allowed under s. 686(1)(a) of the Code, s. 686(2) provides that the court shall quash the conviction and (a) direct a judgment or verdict of acquittal to be entered; or (b) order a new trial.
- [114] An acquittal will be entered if the appeal court is satisfied, based on the trial record as augmented by the fresh evidence, that no reasonable jury, properly instructed in the law, could convict: *R. v. Hinse*, [1997] 1 S.C.R. 3 at para. 2. The test is a strict one: *R. v. Dhillon*, 2014 BCCA 480 at para. 50; *Truscott (Re)*, 2007 ONCA 575 at para. 752.
- [115] There is appellate court authority for the proposition that, in exceptional circumstances, an acquittal may be entered even when it cannot be said that an acquittal would be the only reasonable verdict. In *Truscott*, a case in which the validity of a historical conviction was revisited in light of fresh evidence, the Court entered an acquittal despite concluding that a reasonable jury, acting judicially, could convict. The circumstances in *Truscott* were acknowledged by the Court to be "highly unusual" for a number of reasons: at paras. 751,

787.

- [116] First, a new trial was not possible in Truscott. This consideration was found to justify a more vigorous review of the factual record than would have been required if a new trial was possible. Second, the Court was satisfied on the "complete record" before it that there would never be another forum in a better position to assess the appellant's culpability: at para. 260. Against this background, the Court said this:
- [265] This is one of those cases where a new trial could result in an acquittal or a conviction. In most cases, that conclusion would lead to an order for a new trial. However, to order a new trial in these circumstances merely because the remaining evidence clears a relatively low evidentiary threshold, knowing full well that a new trial will never be held, would be unfair to the appellant and does a disservice to the public. Nor would an order for a new trial accompanied by a further order staying the new trial be an adequate remedy. It would remove the stigma of the appellant's conviction, but leave in place the stigma that would accompany being the subject of an unresolved allegation of a crime as serious as this one.
- [266] The appellant, through no fault of his own, will never have the opportunity to stand before a jury of his peers and make full answer and defence to the allegation that he murdered Lynne Harper. He will never have his guilt determined by a jury who knows what this court now knows. Fairness to the appellant dictates that this court should, to the extent that it can within the institutional limits of appellate review, endeavour to bring this matter to a conclusive end.
- [267] The integrity of the criminal justice system would also be served by bringing finality to this long-running case. The public uncertainty as to the validity of the appellant's conviction, reflected in the Minister's decision to order the Reference, deserves, if possible, a more definitive answer than an order for a new trial knowing that a new trial will never be held.
- [268] In the unique circumstances here, we take the following approach in exercising our remedial discretion. While acknowledging the limitations imposed by the appellate forum, the passage of time, and the numerous factual questions that will never be fully answered, we approach the determination of the appropriate remedy by envisioning how a hypothetical new trial of the appellant would proceed in light of the entirety of the information that is now before us. In our view, the appellant should be entitled to an acquittal if we conclude, based on all of the information now available, that it is clearly more probable than not that the appellant would be acquitted at a hypothetical new trial.
- [269] We are satisfied that the appellant has met that standard.
- [117] A new trial will, however, generally be ordered if the appeal court is satisfied that the entirety of the record at the end of the appeal admits of a reasonable possibility of a conviction on a retrial: Truscott at paras. 247-248.

- [118] As an alternative to entering an acquittal or ordering a new trial, an appeal court may stay the proceedings to prevent an abuse of process. As explained in *Dhillon* at paras. 32-35, an appeal court's jurisdiction to order a judicial stay of proceedings may be found in s. 686(8) of the Code and s. 24(1) of the Charter.
- [119] Section 686(8) provides that "where a court of appeal exercises any of the powers conferred by subsection (2), (4), (6) or (7), it may make any order, in addition, that justice requires". In *Dhillon*, this Court held that where an appeal court allows an appeal and quashes a conviction, it is exercising a power conferred on it by s. 686(2). It is, therefore, unnecessary for the court to order a new trial before making an order staying proceedings.
- [120] A stay of proceedings may only be entered to prevent an abuse of process. It is a remedy only to be granted in the clearest of cases. In *R. v. Babos*, 2014 SCC 16 at para. 31, the Court noted that cases in which a stay of proceedings is required will generally fall into two categories: (1) where state conduct compromises the fairness of an accused's trial (the "main" category); and (2) where state conduct creates no threat to trial fairness but risks undermining the integrity of the judicial process (the "residual" category). Whether a stay is sought under the main or residual category, the test is the same: there must be prejudice to the accused's right to a fair trial or the integrity of the justice system that "will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome", and no alternative remedy capable of redressing that prejudice. Where uncertainty arises over whether a stay is warranted, the court must balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against the interests of the community in having a final decision on the merits: *Babos* at para. 32.
- [121] Factors to be considered in determining whether to order a stay of proceedings in a case of this kind include: the seriousness of the disclosure breach; the impact the breach has had on the accused; and, whether the accused has already served the sentence that was imposed following the entry of the plea. As noted in *Taillefer* at paras. 128-129, ordering a new trial when the accused has already served the sentence may be seen as perpetuating an injustice that would tarnish the integrity of the justice system.
- [122] While a stay of proceedings is tantamount to a judgment or verdict of acquittal for the purposes of determining appellate rights under the Code, the two remedies are not otherwise the same and should not be equated. As explained in *R. v. Jewitt*, [1985] 2 S.C.R. 128 at para. 56, a "stay of proceedings for abuse of process is given as a substitute for an acquittal because, while on the merits the accused may not deserve an acquittal, the Crown by its abuse of process is disentitled to a conviction". In addition, we accept that a stay is, from the perspective of the appellant, an inferior remedy. While it would remove the stigma of the conviction, it would leave in place the stigma that accompanies being the subject of an unresolved allegation of criminally negligent conduct that resulted in the death of a child: see *Truscott* at para. 265.

Application to the Case at Bar

a. The Elements of the Offence

[123] To determine whether a reasonable jury could convict the appellant of criminal negligence causing death, it is necessary to understand the essential elements of the offence the Crown would have to prove beyond a reasonable doubt. Section 219(1) of the Code provides that "Every one is criminally negligent who: (a) in doing anything, or (b) in omitting to do anything that it is his duty to do, shows wanton or reckless disregard for the lives or safety of other persons". To obtain a conviction, the Crown would have to prove the appellant undertook an act, or omitted to do anything that it was her legal duty to do, and that the act or omission caused the death of Iyanna Teeple (the actus reus). The Crown would also have to prove that the appellant's act or omission displayed a wanton or reckless disregard for Iyanna's life or safety. Neither "wanton" nor "reckless" is defined in the Code, but in *R. v. J.F.*, 2008 SCC 60 at paras. 7-9, the Court confirmed that the offence of criminal negligence causing death imposes a modified objective standard of fault. As with other negligence-based criminal offences, the fault element of criminal negligence causing death is assessed by measuring the degree to which the accused's conduct departed from that of a reasonable person in the circumstances. But the requisite degree of departure is, in this context, an elevated one. It would require the Crown to prove that the appellant's conduct constituted a marked and substantial departure from the conduct of a reasonable person in her circumstances (the mens rea): *R. v. Javanmardi*, 2019 SCC 54 at paras. 19-23.

b. Positions of the Parties

[124] In her main factum, the appellant sought orders admitting the fresh evidence, allowing the appeal, setting aside the guilty plea and associated conviction, and entering a stay of proceedings.

[125] The appellant's initial position on remedy was formulated before the Crown communicated its position that it could not meet its burden of proving the voluntariness of the appellant's fourth statement to the police. On receiving confirmation of the Crown's position on this issue, the appellant filed a reply factum seeking an acquittal on these two alternative grounds: (1) on the remaining evidence available to the Crown, no reasonable jury could convict; and (2) even if it could be said that a reasonable jury could convict, it is appropriate to apply the more relaxed test set out in *Truscott* and conclude it is more probable than not that a retrial would result in an acquittal. In the further alternative, the appellant maintains her position that, if this Court declines to enter an acquittal, a stay of proceedings should be entered.

[126] For its part, the Crown seeks the entry of an acquittal or, in the alternative, an order judicially staying the proceedings.

[127] We agree with the Crown that key to the determination of whether a reasonable jury could convict the appellant of criminal negligence causing death is an assessment of the evidence available to the Crown on the following issues: (1) Iyanna's condition when she was placed in the bathtub by the appellant; (2) the appellant's awareness of Iyanna's condition at that time; and (3) the length of time Iyanna was left alone in the bath without supervision.

Could a Reasonable Jury Convict?

[128] The Crown has available to it evidence that Iyanna was uninjured when she was dropped off at the appellant's home the morning of May 26, 2011. The Crown also has evidence that Iyanna's post-viral cerebritis had been successfully treated prior to May 26.

[129] The Crown has evidence supporting a reasonable conclusion that Iyanna sustained injuries while in the appellant's care. In addition, the Crown has available to it evidence that injuries of the sort Iyanna sustained were unlikely to have been caused by resuscitation efforts.

[130] Regardless of how Iyanna's injuries were sustained, there is evidence that those injuries were significant enough to have had an observable impact on her. Dr. Matshes testified at the preliminary inquiry that it was unlikely Iyanna would have presented as being "normal" in the immediate aftermath of the injuries he noted during the autopsy. Rather, he would have expected her to be upset and in pain. Alternatively, she may have been injured badly enough to have been rendered "dazed", if not unconscious. Based on this evidence, a reasonable jury could conclude that Iyanna was at least disoriented by her injuries when she was left in the bathtub. A jury could reasonably conclude there is little else to account for the inexplicable drowning of an otherwise healthy 19-month-old child in four to five inches of bath water.

[131] On the same evidence, a reasonable jury could also conclude that the appellant knew Iyanna had been injured before she put her in the bathtub.

[132] We acknowledge that, absent the appellant's fourth statement to the police, the Crown cannot prove exactly how long the appellant left Iyanna in the bathtub unattended. Further, Dr. Matshes did not provide an opinion on how long Iyanna would have been immersed in water before becoming unconscious. We do note, however, that the appellant acknowledged in her statement to one of the first responders that she left Iyanna alone in the tub "only for a minute".

[133] In our view, and accepting for the purposes of this analysis that a jury could not reasonably find any of Iyanna's injuries to have been inflicted by the appellant, we are of the view that a reasonable jury could nonetheless conclude that knowingly leaving an injured 19-month-old child unattended in a bathtub for as long as a minute constitutes a marked and substantial departure from the conduct of a reasonable person in the appellant's circumstances. In these circumstances, it cannot be said that no jury properly instructed in the law could convict the appellant of criminal negligence causing death.

Should an Acquittal be Entered Applying the Framework in Truscott?

- [134] As noted, the appellant argues in the alternative that this Court should apply the analytical approach developed in Truscott, conclude it is more probable than not that the appellant would be acquitted at a new trial, and enter a verdict of acquittal.
- [135] The Crown submits that the circumstances of the case at bar tend to support a finding that this is an exceptional case warranting a Truscott analysis. In support of its position, the Crown relies on the following submissions: the appellant's conviction is the product of a miscarriage of justice; the non-disclosure underlying the failure of justice in this case is "exceedingly serious"; the appellant has served the entirety of her sentence; the consequences of the miscarriage of justice visited upon the appellant have been highly damaging to her and to her family; and, the Crown's case on any retrial ordered by this Court is "weak". Similar factors were considered in Truscott: at para. 260. Applying Truscott, the Crown concedes it is more likely than not that the appellant would be acquitted on a retrial.
- [136] The Crown also made clear in oral argument that, regardless of the remedy granted by this Court, it has no intention of proceeding with a new trial.
- [137] The exceptional remedial approach found to be justified in the "highly unusual" circumstances of Truscott has never been applied by this Court, although we would not preclude its consideration in an exceptional case. We note that the Truscott remedial framework has been followed by other provincial appellate courts: see Ostrowski (Re), 2018 MBCA 125 and R. v. D.R.S., 2013 ABCA 18. We are not, however, satisfied that the circumstances of this case are sufficiently exceptional to justify embarking on a Truscott analysis.
- [138] In Dhillon, as in this case, a retrial could theoretically proceed, even though the Crown would likely enter a stay of proceedings if a new trial was ordered: at para. 49. In declining to apply the framework set out in Truscott, the Court in Dhillon appears to have treated the inability to conduct a retrial in the Truscott case as being the most important factor motivating adoption of an exceptional remedial approach: at para. 50. We agree that the theoretical possibility of a new trial in the case at bar distinguishes this case from Truscott.
- [139] There is a second factor that distinguishes Truscott from the case at bar. In Truscott, the Court was satisfied that it had the benefit of a complete record, and that there would never be another forum in a better position to assess the appellant's culpability: at para. 260. The same cannot be said in the instant case. We are operating on an incomplete record, and in circumstances where counsel acknowledge that we are not in a position to make any findings respecting the disputed forensic pathology evidence. In these circumstances, we are of the view that embarking on a Truscott analysis in this case is not a viable option. At worst, it would involve a judicial prognostication as to the likely outcome of a new trial that this Court is in no position to make. At best, it would involve an intolerable degree of judicial speculation as to the likely outcome of that new trial.

[140] For these reasons, we distinguish Truscott from the case at bar and decline the invitation of counsel to apply the remedial framework set out therein.

Should a Judicial Stay of Proceedings Be Entered?

[141] We do, however, consider this to be a clear case warranting a judicial stay of proceedings. The non-disclosure constituted a serious breach of the appellant's right to make full answer and defence. While there is no direct evidence before us of bad faith on the part of the Crown, a demonstration of prosecutorial bad faith or misconduct is not a condition precedent to the granting of a judicial stay of proceedings: Taillefer at para. 129.

[142] To be clear, we make no finding of bad faith or malice on the part of the Crown. But neither can we ignore that the disclosure breaches were not isolated or confined to information of dubious value to the appellant. As a consequence of material non-disclosure, the appellant was deprived of the opportunity to make an informed decision about how to plead apprised of the strengths and weaknesses of the case against her on fundamental issues.

[143] The prejudice the appellant has suffered as a consequence of the disclosure breaches is set out in her affidavit. After being charged with Iyanna's murder, the appellant relapsed and began misusing substances again. She lost custody of her children. Since being released from custody, she has struggled with addiction issues, homelessness, poverty, social isolation, and physical and mental health challenges. While incarcerated, she was assaulted because she was perceived to be a "baby killer", and moved to segregation for her own protection. She attempted suicide on several occasions. Her children have been harassed and bullied at school because their mother has been found to be criminally responsible for the death of a child.

[144] In addition, the appellant has served the entirety of her sentence. Ordering a new trial in these circumstances would be unjust. She has already been punished for the offence of criminal negligence causing death. It would amount to punishing the appellant again for succeeding in having her guilty plea and conviction quashed: Taillefer at para. 128. It would contribute to the perpetuation of a serious injustice that has been visited upon the appellant. It would also tarnish the integrity of our judicial system. Despite the seriousness of the alleged offence, this is clearly one of those cases where a stay of proceedings is warranted because compelling the appellant to stand trial again would violate those fundamental principles of justice which underlie the community's sense of fair play and decency.

[145] We are satisfied that the systemic prejudice identified herein is irreparable and would be perpetuated if a new trial were ordered.

[146] In all the circumstances, we conclude that a new trial would constitute an abuse of process and that a judicial stay of proceedings is the appropriate remedy. We grant that remedy pursuant to s. 686(8) of the Code.

IV. Disposition

[147] For the foregoing reasons, we admit the fresh evidence, set aside the guilty plea, quash the conviction, and enter a stay of proceedings.

"The Honourable Mr. Justice Fitch"

"The Honourable Mr. Justice Voith"

"The Honourable Mr. Justice Skolrood"

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