

CANADA / JUDGMENT

R. v. Downey, Guray, & Gall

2020 BCSC 1794

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1794 R. v. Downey, Guray, & Gall

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Downey, Guray, & Gall,

2020 BCSC 1794

Date: 20201008

Docket: 41813-2

Registry: Duncan

Between:

Regina

v.

James Otis Downey, Manjit Singh Guray, and

Curtis Cleveland Gall

Before: The Honourable Mr Justice Crerar

Oral Reasons: Removal of Counsel

Counsel for Crown:

Meneka Giri

Counsel for Curtis Cleveland Gall:

Counsel for James Otis Downey:

Scott W. Sheets

Jeremy W.D. Mills

Counsel for Manjit Singh Guray:

Donald J. McKay

Place and Date of Trial:

Duncan, B.C.

October 6 - 8, 2020

Place and Date of Judgment:

Duncan, B.C.

October 8, 2020

I. introduction

- [1] The Crown brings a pre-trial application to declare that Mr McKay, counsel for the co-accused Mr Guray, is in a conflict of interest due to his ongoing representation of the co-accused Mr Downey in a separate criminal matter prosecuted by the federal Crown.
- [2] Mr Downey is represented in the present criminal proceeding by Mr Mills. To compound the situation, Mr Mills has recently started practising with Mr McKay in the same law firm, becoming to some extent Mr McKay's law partner.
- [3] The Crown proposes an adjournment of the trial, which was scheduled for three weeks, beginning on Monday, October 5, 2020.
- [4] The three accused have not yet been arraigned, and the trial has not yet started. Monday, October 5th and Tuesday, October 6th have been partly occupied by pre-trial matters, including the raising of the present issue on Tuesday. Both Mr Guray and Mr Downey have been present in Court for this application, and both are present here for these reasons.
- [5] Initially, the Crown also took the position and sought a ruling that Mr Mills could no longer represent Mr Downey in this proceeding, and should be disqualified as well. The Court observed that if it agreed with the Crown's position that Mr McKay be removed, an adjournment of the trial would be certain. Mr Mills and his client Mr Downey could then assess their position in light of these reasons. This would include assessing whether Mr Mills could continue to represent Mr Downey and whether protections could be put in place that would reassure the Court and the public that a fair trial could occur, and be seen to occur, without actual or perceived compromise of the duties of confidentiality and undivided loyalty that are the professional and ethical hallmarks of the legal profession. The Crown accordingly does not seek a ruling today with respect to Mr Mills's representation of Mr Downey, and this Court will leave that matter to a future court if necessary.

II. facts

A. This proceeding: R. v. Downey, Guray & Gall

- [6] The three co-accused are charged with aggravated assault.
- [7] The assault is alleged to have occurred on February 15, 2019, at the Duncan Motel. The complainant, Mr Rideout, allegedly told police that he had been kicked, punched, and hit with a baseball bat by various individuals. Witnesses at the scene allegedly identified the three accused. All three accused were arrested that day.
- [8] The Crown proposes calling some 24 witnesses. These include some eight civilian witnesses, and a DNA expert witness.
- [9] The complainant is scheduled for the last day of the Crown's case. There are indications that Mr Rideout is a reluctant witness, and that he may not attend. Mr Mills referred to Mr Rideout as a "very reluctant" witness, and noted that Mr Rideout was a Vetovec[1] witness with a considerable criminal record. Defence counsel expressed concern that Mr Rideout's evidence, as unpredictable as it will be, will not be known until the end of the Crown's case.
- [10] Mr McKay was retained by Mr Guray around the time of his arrest on February 15, 2019, and has represented him since that time.
- [11] As a yet further complication, Mr McKay also briefly spoke with Mr Downey about this matter around the time of Mr Downey's own February 15, 2019 arrest. There is no sworn evidence before the Court with respect to the communications between Mr McKay and Mr Downey. Mr McKay advises the Court that his advice to Mr Downey was limited to the standard advice given on arrest: assert his Charter right to remain silent. Mr McKay also told Mr Downey that he would not be able to represent both him and Mr Guray in this matter. He referred Mr Downey to Mr Mills for representation. He advises the Court that he received no confidential information from Mr Downey. For the purposes of this application, I am content to rely upon Mr McKay's unsworn statements to the Court on to the minimal advice and communications with Mr Downey with respect to the circumstances leading to this prosecution.

B. The federal prosecution: R. v. Downey

- [12] Mr McKay was retained to represent Mr Downey in this federal prosecution around the same time as Mr Downey was arrested with respect to this present prosecution: around February 15, 2019. Mr McKay has represented Mr Downey ever since with respect to the federal prosecution.
- [13] The federal prosecution is unrelated to this present proceeding. In the federal prosecution, Mr Downey is charged with two counts of possession for the purpose of trafficking. The alleged offences, in March and June 2018, predate those in the present case.
- [14] Neither Mr Guray nor Mr Gall have any apparent connection to the federal prosecution. They are not co-accused in the federal proceeding, nor are they anticipated to be witnesses.

- [15] The trial in the federal prosecution is scheduled to start on October 26, 2020. Like the present case, it is a Duncan file, alleging criminal activity in the Cowichan Valley.
- [16] Again, I have no sworn evidence as to communications between Mr McKay and Mr Downey in the federal matter. As those communications would be privileged, it is likely neither possible nor desirable for either Mr McKay or Mr Downey to provide such evidence to the Court. The Court is thus unable to assess the risk and extent to which Mr McKay may possess confidential information pertaining to Mr Downey or whether the information would or could, consciously or unconsciously, affect the defence of Mr Guray in this case.

C. Mr McKay's law firm

- [17] Mr McKay practices under the name of Donald J. McKay Law Corporation, and has done so for many years.
- [18] Around June 2020, he entered into a form of partnership with Mr Mills. As at present, the name of the law firm has stayed the same. Mr Mills and Mr McKay have not entered into a formal partnership agreement. Nor have they made significant decisions as to their professional relationship beyond those set out below.
- [19] The Law Society of British Columbia has instructed Messrs Mills and McKay to refer to their practice arrangement as a law partnership. That said, in many facets it does not resemble a typical law partnership.
- [20] For one, they maintain separate physical offices. Mr McKay practises in Saanich and Mr Mills practises in Oak Bay. Their billings and revenues are entirely separate. Whereas the default in a typical national or small partnership is the transparent sharing of information about files and full access to computer and paper documents, the default in the McKay-Mills partnership is that all files are to be kept separate. While they share a document management computer system, each must specifically grant access to the other on any given file.
- [21] In his practice, Mr McKay retains an articled student, now an associate. From time to time, she would appear on Mr Mills's behalf for court appearances and provide him with legal opinions and research. I understand that there has been no communication via the articled student-associate with respect to this specific matter.
- [22] Messrs Mills and McKay share a legal assistant and also share a mailing address. Apparently these aspects of their law practice would convey to the public that they are acting in partnership, and are the basis for the Law Society requiring Messrs Mills and McKay to refer to themselves as a law partnership.

III. position of the parties

- [23] The Crown argues that Mr McKay's ongoing representation of Mr Downey in the federal matter puts him in an irremediable conflict of interest. The dynamic nature of a criminal trial makes it impossible for Mr Downey to make an informed waiver in advance that he will not, based on the unfolding evidence, ever advance evidence or argument adverse to the interests of Mr Guray, nor testify on his own behalf, and thus subject himself to cross-examination by Mr McKay. The Crown argues that the risk of mistrial is great and that the consequences of a mistrial are significant.
- [24] Mr Mills and Mr McKay argue forcefully that while there could be a hypothetical conflict, and that nothing can ever be ruled out with 100 percent certainty, it is almost impossible for a real conflict to arise on the specific facts of the present case. They argue that a properly-informed member of the public would not lose confidence in the administration of justice, and in particular, in the efficacy of the fiduciary solicitor-client relationship in these circumstances.
- [25] They also point to specific safeguards that have been put in place. Their counsel advised the Court that neither Mr Guray nor Mr Downey will advance a "cutthroat" defence adversarial to the other, or advance or seek to solicit evidence that would harm the other. Defence counsel take the position that the Crown's case, based largely on the testimony of Mr Rideout, is particularly weak, and that there is no way that either would advise or call either of their respective clients to testify on their own behalf. Accordingly, it is highly unlikely that Mr McKay would be in the position of cross-examining Mr Downey, his client, in the federal matter.
- [26] Further, both Mr Guray and Mr Downey have signed waivers confirming that they are content to have Mr McKay act for Mr Guray in this matter and for Mr Downey in the federal matter. They also confirm their understanding of the risks of proceeding in this manner. Both Mr Guray and Mr Downey have apparently received the benefit of independent legal advice before signing the waivers.
- [27] In addition, Mr Downey (but not Mr Guray) has agreed to waive solicitor-client privilege with respect to this matter vis à vis communications with Mr McKay.
- [28] Those waivers speak in broad terms of a consent for Mr McKay to act for Mr Guray notwithstanding his concurrent representation of Mr Downey. They do not specifically waive a right to advance or seek to solicit evidence adverse to the co-accused. Nor do they specifically waive their ability to take the stand and thus expose themselves to cross-examination by Messrs Mills and McKay. They do not specifically waive a right to seek a mistrial based on the potential conflict, or to respond to adverse evidence that might arise and that might prompt them to seek to resile from their present position. They do not waive a right to allege ineffective representation, or a misunderstanding of those waivers, as the grounds for a later appeal if they are convicted. That said, counsel have indicated that the co-accused would be willing to provide such written reassurances.

- [29] With respect to the position of the parties, that leaves the third co-accused, Mr Gall, who is represented by Mr Sheets. As is of course his right, Mr Gall has not foreclosed the possibility of pointing a finger at either of Mr Downey or Mr Guray, or to fully cross-examining either of those co-accused if either takes the stand.
- [30] Mr Gall takes no position on this conflict application. He does echo the positions of Messrs Downey and Guray that any delay in the trial and resolution of this matter will cause ongoing stress and prejudice to himself and the other co-accused.

IV. LAW

- [31] In the leading case of *R. v. Neil*, 2002 SCC 70, the Supreme Court of Canada emphasises that the lawyer's duty of loyalty to their client is integral not only to the solicitor-client relationship, but also to reassure the public of the proper administration of justice and the fair trial of an accused:

A. The Lawyer's Duty of Loyalty

- [12] Appellant's counsel reminds us of the declaration of an advocate's duty of loyalty made by Henry Brougham, later Lord Chancellor, in his defence of Queen Caroline against the charge of adultery brought against her by her husband, King George IV. He thus addressed the House of Lords:

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.

(Trial of Queen Caroline (1821), by J. Nightingale, vol. II, The Defence, Part 1, at p. 8)

These words are far removed in time and place from the legal world in which the Venkatraman law firm carried on its practice, but the defining principle -- the duty of loyalty -- is with us still. It endures because it is essential to the integrity of the administration of justice and it is of high public importance that public confidence in that integrity be maintained: *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235, at pp. 1243 and 1265, and *Tanny v. Gurman*, [1994] R.D.J. 10 (Que. C.A.). Unless a litigant is assured of the undivided loyalty of the lawyer, neither the public nor the litigant will have confidence that the legal system, which may appear to them to be a hostile and hideously complicated environment, is a reliable and trustworthy means of resolving their disputes and controversies: *R. v. McClure*, [2001] 1 S.C.R. 445, 2001 SCC 14, at para. 2; *Smith v. Jones*, 1999 674 (SCC), [1999] 1 S.C.R. 455. As O'Connor J.A. (now A.C.J.O.) observed in *R. v. McCallen* (1999), 43 O.R. (3d) 56 (C.A.), at p. 67:

... the relationship of counsel and client requires clients, typically untrained in the law and lacking the skills of advocates, to entrust the management and conduct of their cases to the counsel who act on their behalf. There should be no room for doubt about counsel's loyalty and dedication to the client's case.

[131] The value of an independent bar is diminished unless the lawyer is free from conflicting interests. Loyalty, in that sense, promotes effective representation, on which the problem-solving capability of an adversarial system rests. Other objectives, I think, can be related to the first. For example, in *MacDonald Estate*, supra, Sopinka J. speaks of the "countervailing value that a litigant should not be deprived of his or her choice of counsel without good cause" (p. 1243). Dubin J.A. remarked in *Re Regina and Speid* (1983), 8 C.C.C. (3d) 18 (Ont. C.A.), at p. 21:

We would have thought it axiomatic that no client has a right to retain counsel if that counsel, by accepting the brief, puts himself in a position of having a conflict of interest between his new client and a former one.

[32] Representation of multiple clients raises the spectre that confidential information obtained from one client may be used, consciously or unconsciously, in a manner unfavourable to another client: incompatible with the counsel's duty of undivided loyalty. But the avoidance of conflicts of interest is based upon broader principles than the maintenance of confidentiality in the solicitor-client relationship. As stated in Neil:

[19] The aspects of the duty of loyalty relevant to this appeal do include issues of confidentiality in the Canada Trust matters, but engage more particularly three other dimensions:

(i) the duty to avoid conflicting interests: *Davey v. Woolley, Hames, Dale & Dingwall* (1982), 35 O.R. (2d) 599 (C.A.), and *Services environnementaux Laidlaw (Mercier) Ltée v. Québec (Procureur général)*, [1995] R.J.Q. 2393 (C.A.), including the lawyer's personal interest: *Szarfer v. Chodos* (1986), 54 O.R. (2d) 663 (H.C.), aff'd (1988), 66 O.R. (2d) 350 (C.A.); *Moffat v. Wetstein* (1996), 29 O.R. (3d) 371 (Gen. Div.); *Stewart v. Canadian Broadcasting Corp.*, supra.

(ii) a duty of commitment to the client's cause (sometimes referred to as "zealous representation") from the time counsel is retained, not just at trial, i.e. ensuring that a divided loyalty does not cause the lawyer to "soft peddle" his or her defence of a client out of concern for another client, as in *R. v. Silvini* (1991), 5 O.R. (3d) 545 (C.A.); *R. v. Widdifield* (1995), 25 O.R. (3d) 161 (C.A.); *R. v. Graham*, [1994] O.J. No. 145 (QL) (Prov. Div.); and,

(iii) a duty of candour with the client on matters relevant to the retainer: *R. v. Henry* (1990), 61 C.C.C. (3d) 455, [1990] R.J.Q. 2455 (C.A.), at p. 465 C.C.C., per Gendreau J.A.; *Spector v. Ageda*, [1971] 3 All E.R. 417 (Ch. D.), at p. 430; the Canadian Bar Association, *Code of Professional Conduct* (1988), c. 5, Commentary 4-6. If a conflict emerges, the client should be among the first to hear about it.

- [33] The Supreme Court of Canada emphasized that the principles governing a lawyer acting in conflict against a current client are stricter and more comprehensive than those that apply when acting against a former client. The duty owed by a solicitor to a current client may place the solicitor in an inescapable position of divided loyalty, notwithstanding any consent provided by the client. As stated by the Court:
- [27] More recently in England, in a case dealing with the duties of accountants, the House of Lords observed that "[t]he duties of an accountant cannot be greater than those of a solicitor, and may be less" (p. 234) and went on to compare the duty owed by accountants to former clients (where the concern is largely with confidential information) and the duty owed to current clients (where the duty of loyalty prevails irrespective of whether or not there is a risk of disclosure of confidential information). Lord Millett stated, at pp. 234-35:

My Lords, I would affirm [possession of confidential information] as the basis of the court's jurisdiction to intervene on behalf of a former client. It is otherwise where the court's intervention is sought by an existing client, for a fiduciary cannot act at the same time both for and against the same client, and his firm is in no better position. A man cannot without the consent of both clients act for one client while his partner is acting for another in the opposite interest. His disqualification has nothing to do with the confidentiality of client information. It is based on the inescapable conflict of interest which is inherent in the situation. [Emphasis added.]

(Bolkiah v. KPMG, [1999] 2 A.C. 222 (H.L.))

- [29] The general prohibition is undoubtedly a major inconvenience to large law partnerships and especially to national firms with their proliferating offices in major centres across Canada. Conflict searches in the firm's records may belatedly turn up files in another office a lawyer may not have been aware of. Indeed, he or she may not even be acquainted with the partner on the other side of the country who is in charge of the file. Conflict search procedures are often inefficient. Nevertheless it is the firm not just the individual lawyer, that owes a fiduciary duty to its clients, and a bright line is required. The bright line is provided by the general rule that a lawyer may not represent one client whose interests are directly adverse to the immediate interests of another current client -- even if the two mandates are unrelated -- unless both clients consent after receiving full disclosure (and preferably independent legal advice), and the lawyer reasonably believes that he or she is able to represent each client without adversely affecting the other.

[emphasis added]

- [34] Moving from the general to the specific, the parties all cited the useful distillation of the principles governing an application to remove counsel set out by the learned criminal law jurist Silverman J in *R. v. Cocks*, 2012 BCSC 1336 at para. 10:

1. The right to counsel of choice is vital and important, but it is not an absolute right and is subject to reasonable limitations: *R v. Speid* (1983), 3 D.L.R. (4th) 246 (Ont. C.A.) and *R v. Robillard* (1986), 28 C.C.C. (3d) 22 (Ont. C.A.).

2. There is no absolute bar to joint representation of co-accused by one or more lawyers of the same firm.
3. The over-arching principle of public confidence in the administration of justice requires that a lawyer who represents a client be free from any conflict of interest: *Robillard, Speid*.
4. There is a heavy onus on the defence to ensure that there is no conflict arising from the joint representation of co-accused: *R. v. W.W.* (1995), 100 C.C.C. (3d) 225 (Ont. C.A.)
5. There is an obligation on the Crown to raise a disqualification issue at the earliest possible stage.
6. The issues of timing do not detract from the importance of deciding the conflict on its merits once presented. It is the fundamental fairness of the criminal trial which is the paramount concern.
7. The court has an inherent and supervisory jurisdiction to ensure that legal proceedings are fair and conducted in a manner that appears fair to the public. As an exercise of supervisory jurisdiction, a court is always required to consider the public interest and the need for public confidence in the administration of criminal justice.
8. The constitutional right to counsel includes the right to effective counsel: *W.W.* In particular, public confidence in the administration of justice requires that a lawyer who represents a client be free from any conflict of interest. The mere appearance of a conflict may undermine public confidence in the administration of justice: *R. v. Neil*, 2002 SCC 70, *Speid*.
9. The court will also take steps to support public confidence in the administration of justice by avoiding later conflicts that might emerge and thereby result in a mistrial.
10. Once there has been a relationship of concern established between the retainers in which a lawyer is involved, there is a rebuttable presumption that relevant confidential information was in fact received by counsel. In that circumstance, the court should infer that confidential information was imparted unless the solicitor satisfies the court that no information was imparted which could be relevant.
11. The court's degree of satisfaction must be such that it would withstand the scrutiny of the reasonably informed member of the public that no such information is passed. The burden must be discharged without revealing the specifics of the privileged information. The door should not be shut completely on a solicitor who wishes to discharge this heavy burden. That wording, partly paraphrased, comes from the case of *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235.
12. The foundation of the lawyer-client relationship rests on the duty of loyalty which includes the duty not to divulge confidential information. The duty of loyalty may operate to disqualify counsel from accepting another retainer where the interests of two clients are materially adverse.

13. The threshold for removing counsel for reasons of conflict of interest is a high one. A litigant cannot be deprived of his choice of counsel without good cause, compelling reasons or in exceptional circumstances: *MacDonald Estate*.
 14. The standard to be met is "the possibility of real mischief", that is from *MacDonald Estate*, sometimes referred to as "the substantial risk test", from *R. v. Neil*. A realistic risk of a conflict of interest requires that the evidence be more than theoretical or strictly speculative.
 15. The question of whether a conflict exists, which will be of concern for the court, depends on the facts in each case: *R. v. Brown*, 1998 CarswellOnt 5908 (Ct. J. (Gen. Div.)).
 16. A waiver which may be signed by the clients in such cases must be considered as a factor in terms of whether or not there is some unfairness which may operate with respect to the clients, and in terms of the context of the greater issue of public confidence: *R. v. Con-Drain Co. (1983) Ltd.*, 2008 ONCJ 114.
 17. Even with a waiver, there may sometimes be untenable conflicts which could materialize. Even the word irrevocable may not necessarily result in an ultimate finding of irrevocability.
- [35] In *R. v. Widdifield* (1995) 25 OR (3d) 161 (CA) [sub nom. *R. v. WW*] at p. 175, Doherty JA sets out the perilous position of a trial judge faced with a potential conflict on the cusp of trial:

It is important to distinguish between the respective functions of a trial judge and an appellate court when faced with a conflict of interests claim. Where the issue is raised at trial, the court must be concerned with actual conflicts of interests and potential conflicts that may develop as the trial unfolds. In deciding whether counsel should be permitted to act for co-accused, trial judges must, to some degree, speculate as to the issues which may arise and the course the trial will take. The trial judges' task is particularly difficult since they cannot be privy to the confidential discussions which may have passed between the clients and counsel and which may reveal the source of potential conflicts. Given those circumstances, trial judges must proceed with caution and when there is any realistic risk of a conflict of interests they must direct that counsel not act for one or perhaps either accused.

[emphasis added]

- [36] At pp. 175-76, *Widdifield* also set out that while the trial court must concern itself with potential conflict, there is a different test on appeal:

Where the allegation of a conflict of interests is raised for the first time on appeal, the perspective is very different. The appellate court looks backward at the completed trial. The court has the full trial record and may have further material detailing the circumstances surrounding the joint representation and the effects of that representation on counsel's ability to defend the appellant. Unlike the trial court, the appellate court is not concerned with prophylactic measures intended to avoid the potential injustice which may flow from compromised representation. Instead, the appellate court must determine whether counsel's representation was in fact compromised in

such a way as to result in a miscarriage of justice. The concern on appeal must be with what happened and not with what might have happened. It makes no more sense to find ineffective representation based on the possibility of a conflict of interest, than it does to find ineffective representation based on the mere possibility of incompetent representation.

[emphasis added]

V. DISCUSSION AND decision

[37] The general principles above, applied to specific fact scenarios of alleged conflict in the jurisprudence, guide this Court in its present decision.

[38] Defence counsel emphasize the following general principles set out in Cocks:

2. There is no absolute bar to joint representation of co-accused by one or more lawyers of the same firm.
11. The court's degree of satisfaction must be such that it would withstand the scrutiny of the reasonably informed member of the public that no such information is passed. The burden must be discharged without revealing the specifics of the privileged information. The door should not be shut completely on a solicitor who wishes to discharge this heavy burden
13. The threshold for removing counsel for reasons of conflict of interest is a high one. A litigant cannot be deprived of his choice of counsel without good cause, compelling reasons or in exceptional circumstances .
14. The standard to be met is "the possibility of real mischief" sometimes referred to as "the substantial risk test".... A realistic risk of a conflict of interest requires that the evidence be more than theoretical or strictly speculative.
16. A waiver which may be signed by the clients in such cases must be considered as a factor in terms of whether or not there is some unfairness which may operate with respect to the clients, and in terms of the context of the greater issue of public confidence . [authorities omitted]

[39] Defence counsel also rely significantly on R. v. Lamar, 2016 BCSC 335, where the Court dismissed the Crown's application to have counsel removed. There, counsel had appeared on behalf of both co-accused at the preliminary inquiry. It was always the intention of the co-accused to retain separate counsel, and they consented to the impugned counsel appearing for both of them on the limited mandate of the preliminary inquiry, as other counsel was unavailable. Defence counsel in the present case emphasize the penultimate paragraph of the Lamar Court:

[27] In other words, I do not find that Mr. Campbell's presence creates an appearance of conflict sufficient to shake a fully informed, knowledgeable and reasonable member of the public's confidence in the integrity, fairness, or reliability of the justice system.

- [40] Defence counsel argue that the properly-informed reasonable member of the public would not lose confidence in the integrity, fairness, or reliability of the justice system in the present case. Their unified defence, their waivers, and the expected evidence make it extremely unlikely that the interests of Messrs Guray and Downey would ever conflict at trial, in turn, putting Mr McKay in irremediable conflict.
- [41] I will start with Cocks, endorsed by both sides as the leading British Columbia case.
- [42] In Cocks, the accused were father and son. They were charged with one count of second degree murder, along with five other co-accused. It was alleged that each of the co-accused played a role in beating the victim to death.
- [43] Cocks Senior and Junior were represented by separate lawyers, who were partners in the same law firm. As such, the lawyers were presumed to share information: a rebuttable presumption. The Cockses confirmed that they were content with their representation and waived any conflict. The Crown argued that notwithstanding these reassurances, a hypothetical conflict could become a real conflict, necessitating the adjournment of a trial or a mistrial, and in turn eroding the public's perception of trial fairness and its overall confidence in the administration of justice.
- [44] The Crown in Cocks brought the application at an early stage. No trial date had been set, and it would not likely occur until some two years later.
- [45] Silverman J ordered that both Cocks counsel be removed:
- [45] I note as well the suggestion that the two accused could still go out and provide the precise same waiver providing the same authority to two independent counsel and that the court would not be able to interfere with that decision. I agree with that comment entirely. However, it fails to recognize the difference between the two types of relationships; that of, on the one hand, the relationship of independent lawyers with their individual clients, and on the other hand the relationship of two lawyer partners to clients of their firm.
- [46] In the former, although the independent lawyers may have the same broad instructions to share with another lawyer and client, at the end of the day each of those lawyers has only one client, and only one client to whom he owes his allegiance and duty as a lawyer. In the latter, the two partners each have two clients, because they are clients of the firm, and they owe their duties to both - duties which may become irreconcilable for the reasons I have already noted.
- [47] In *Davey v. Wooley, Hames, Dale & Dingwall* (1982), 133 D.L.R. (3d) 647 (Ont. C.A.) the court says this at p. 650:

The underlying premise . . . is that, human nature being what it is, the solicitor cannot give his exclusive, undivided attention to the interests of his client if he is torn between his client's interests and his own or his client's interests and those of another client to whom he owes the self-same duty of loyalty, dedication and good faith.

[48] In *R. v. Chen* (2002), 53 O.R. (3d) 264 (S.C.J.), the outcome and reasoning of Davey is approved and the court says the following at para. 39:

In Davey, therefore, for purposes of determining and assessing professional duties and loyalties in relation to conflict of interest, the Ontario Court of Appeal was prepared to treat a law firm as a unitary whole, in which the duties and loyalties of one lawyer extended across the firm.

[49] I have considered the question of whether or not one of these two lawyers might be permitted to stay on and whether or not it would be acceptable to simply disqualify one of them, but I have come to the conclusion that that cannot happen, because of what has already occurred. Confidences have already been shared, creating the potential for mischief resulting in the future.

[46] Cocks has several similarities to the present case. As I will discuss in a moment, each of the Cocks accused provided a waiver reassuring the Court that they would never engage in a defence strategy that would cast blame on the father or son, respectively. Further, in both Cocks and in the present case, multiple accused were accused of jointly participating in the physical assault on the victim.

[47] At the same time, there were greater reassurances of predictability in Cocks. As father and son, one can presume less likelihood that one would seek to inculcate the other. The Cocks co-accused provided particularized and expansive waivers and consents. Both Cockses waived solicitor-client confidence vis à vis each other, and expressed a desire to share information and strategy. No one lawyer represented both co-accused.

[48] At paras. 35 and 36, Silverman J discussed how the Cockses' waivers and reassurances could evaporate, based upon changes in evidence and consequent trial strategy:

[35] The Crown has referred to a number of aspects of the anticipated evidence in some detail to suggest the reasonable possibility that these accused may realistically change their minds about wanting to cooperate with each other. The Crown points, among other things, to the anticipated evidence relating to an incident before the alleged beating, the circumstances of the beating itself, evidence of motive, evidence of a hammer with DNA of the victim on it found in a location accessible to both of these accused, as well as to a third accused, and the prospect of one or both of these accused testifying. It takes little imagination to realize that one of the strategies that may be available to one or both of these accused will be to minimize his own involvement. Often that strategy requires an attempt or results in an attempt to shift some or all blame to other accused persons. That strategy may manifest itself in cross-examination of a witness, in cross-examination of each other, should either of these persons choose to testify, or even in the giving of evidence, should either of them choose to testify. There are certainly other ways in which it may manifest itself.

[36] If a lawyer (or two lawyers who have shared all information) is acting for two accused, how does he fulfil his duty to both accused in that situation? Does he ask the questions that helps one but may hurt the other? Does he deliberately not ask the questions that hurt one but

may help the other? In either case, the interests of one might have to be sacrificed for the interests of the other, even if it is only on a question-by-question basis and/or it may appear to one of the accused that this is what has happened, and/or it may appear to the public that this is what has happened.

[Emphasis added]

- [49] The Crown cites several cases for general propositions of the importance of counsel avoiding perceptions of conflict of interest, and thereby eroding public confidence in the administration of justice, particularly in the realm of criminal prosecutions.
- [50] The Crown particularly relies upon a decision of the Ontario Court of Justice: *R. v. Barrett*, 2017 ONCJ 835, which she argues is almost precisely on point with the present case. There, the two female co-accused were charged with assault in an altercation inside a bar; the alleged weapon was a wedge shoe. Just before the start of the trial, the Crown discovered that counsel for one co-accused was also currently representing the other co-accused in another criminal proceeding unrelated to the present charges: see para. 13.
- [51] The Court ruled that counsel be disqualified from representing his client at the trial:
- [34] In this case, the court must consider in the context of the potential conflict of interest, whether there is a substantial risk that Mr. Lam's representation of Ms. Barrett in this trial would be materially and adversely affected by his duties to his other client Ms. Harris. In conducting a defence for Ms. Barrett in this trial, those issues could include whether he might restrict or circumscribe the nature of any defence for Ms. Barrett, the raising of reasonable doubt, or the application of the law regarding parties, that might in her defence potentially deflect blame to Ms. Harris. There may well be, as often is the case in cases of this nature, issues of identification as to who did what to whom. Civilian witnesses may point the finger for identification by way of describing an assaulter in a vague way. Would that witness be cross-examined by Mr. Lam to show that potentially it was Ms. Harris who did a portion of the assault? If so, this would divide his loyalty between two existing clients. Also, if Ms. Harris testifies, Mr. Lam as counsel for Ms. Barrett has the opportunity to cross-examine his client Ms. Harris. This begs the question, how would he conduct that cross-examination? Would it reflect his divided loyalty to both clients? Would he "soft pedal" that cross-examination? How would Ms. Harris feel about being cross-examined by Mr. Lam, her counsel in another criminal case whom she has had the fiduciary relationship and expectation of full and undivided loyalty? How could she feel, or how could anyone walking into the court, perceive the administration of justice in that context when a client was being cross-examined, potentially aggressively by their own lawyer? Clearly that would not be a positive scenario, either as viewed by Ms. Harris after the fact, or a member of the public walking in and seeing that scenario and considering the expected role of lawyers in our criminal justice system, which requires the confidence of the public in the integrity of the system.

- [35] Secondly, in terms of his duty to Ms. Barrett, might she feel that Mr. Lam was avoiding shedding the blame or culpability in this case to her co-accused, simply because she is another of his clients? Again, rhetorically, how could Ms. Barrett feel that Mr. Lam is giving her undivided loyalty?
- [36] The problem, this court would find, is that there would be divided loyalty between two current clients. Independent legal advice cannot cure or remedy this type of problem, where the trial court cannot predict, nor can counsel, the twists and turns that may play out in a criminal trial of the nature set out above. There are many witnesses, both civilian and police. Criminal trials are fluid. Evidence is not always as counsel expect.
- [37] This court finds that if the court were to permit Mr. Lam to represent Ms. Barrett, while he remains counsel for Ms. Harris in another criminal law proceeding, that he would be putting himself in a position of divided loyalties. Given the nature of this fiduciary relationship, the court finds that the independent legal advice provided to Ms. Barrett, relied upon by Mr. Lam, does not negate this concern. Nor does the representation of counsel for Ms. Harris in this trial that she is agreeable to this representation negate this concern. This is a clear case, where both defendants in this case are charged arising from the same incident, where parties' provisions may be considered, where issues related to which of the two might be culpable, or to what extent, where each may testify and give evidence which might be the subject of cross-examination. The Court of Appeal for Ontario in Baharloo, supra, at para. 50, in reviewing what it found to have been an actual conflict of interest in the trial stated that the:

"concurrent retainers created a substantial risk that Munn's representation of the appellant would be materially and adversely affected. They created conflicting pressures on Munn's judgment because of the divided loyalties created by her concurrent retainers. To use the vernacular: for Munn to investigate and advance a third party suspect defence on behalf of the appellant, she would have to throw another client, Banda, "under the bus". Those circumstances created a real risk that Munn would "soft peddle" her representation of the appellant to avoid prejudicing the interests of Banda - a continuing, repeat client.

- [38] Similarly, this court has the same concern. The court finds that there is a substantial risk that the dual retainers and divided loyalty of Mr. Lam to both his clients, Ms. Barrett and Ms. Harris, could cause Mr. Lam's representation of his client to be materially and adversely affected. If in defending Ms. Barrett Mr. Lam proceeded to advance a theory that Ms. Harris was the party who caused bodily harm, and/or used a weapon, he would be "throwing under the bus" his current ongoing client Ms. Harris. At the same time, there would be a substantial risk that in being concerned for Ms. Harris and the risk of her liability in this trial, he would engage a defence for Ms. Barrett which would "soft peddle" her representation hoping for the best outcome, with a constrained defence that did not implicate Ms. Harris in what was an altercation where the allegation is that both participated in an altercation with the complainant, to varying degrees.

[emphasis added]

- [52] The evidence in Barrett was more predictable and less likely to require either co-accused to present evidence unfavourable to the other, or require cross-examination by counsel of his former client. The co-accused were good friends and more likely to retain a common defence: indeed, the allegation was that one co-accused came to the aid of her friend in self-defence: Barrett at para.19. Further, the assault was captured on video. Finally, there were only seven to nine witnesses, in contrast to the present case 24 or so witnesses. Counsel were still disqualified.
- [53] The Crown cited the very recent unreported decision of the British Columbia Provincial Court in *R. v. Chester and Paul* (14 August 2020, Port Hardy). That case not only has factual similarities to the present, but indeed also involved an alleged conflict on the part of Mr McKay. The two accused faced charges of possession for the purpose of trafficking, as well as a weapons charge. The two accused were in a relationship. The female accused had no criminal record, while the male accused had a lengthy one. Mr McKay represented the female accused, but had earlier represented the male accused in another proceeding. He no longer represents that co-accused. Both accused advised the Court that they consented to Mr McKay's representation, notwithstanding the hypothetical prospect of Mr McKay having to cross-examine his former client, with the potential benefit of his knowledge of his former client's criminal record and other facts flowing from that past representation. To assuage this fear, the two accused reassured the Court that they would likely present a unified defence and not point the finger at the other.
- [54] Whonnock PCJ reluctantly ordered that Mr McKay be removed as counsel. The administration of justice required not only that no actual conflict exist, but that no appearance of conflict exist, citing the words of Cory J in *MacDonald Estate v. Martin*, [1990] 3 SCR 1235 at para. 56.
- [55] Chester in turn relied significantly on *R. v. Cote and Buhrig*, 2011 BCPC 501, where the trial counsel for Mr Cote had, until just before trial, served as counsel for the co-accused Ms Buhrig. Wood PCJ, formerly of the British Columbia Court of Appeal, and then later sitting as a Provincial Court Judge in Duncan, ruled that counsel could not continue to act. In reaching that conclusion, that eminent jurist made the following observations on the dynamic and unpredictable nature of a criminal trial:
- [25] In doing so, at that point in time, evidence that at this point in time seems inconsequential, statements made by her to counsel that at this point seem inconsequential and of little moment, may suddenly become important to either a cross-examination of Ms. Buhrig or indeed a decision which might be taken at that point to have Mr. Cote give evidence that would in some respect be adverse in interest to Ms. Buhrig.

- [26] The fact that counsel cannot at this point in time point to any evidence or information that may be considered confidential in their view that might be in Mr. Tousaw's possession as a result of his long retainer by Ms. Buhrig, does not end the issue that I must review in considering the whole question of potential conflict.
- [27] In the decision of the Supreme Court of Canada in the *Macdonald Estate v. Martin*, which is found reported in [1990] 3 S.C.R. 1235, at page 1260 and 1261, Mr. Justice Sopinka pointed out the following:

In my opinion, once it is shown by the client that there existed a previous relationship which is sufficiently related to the retainer from which it is sought to remove the solicitor, the court should infer that confidential information was imparted unless the solicitor satisfies the court that no information was imparted which could be relevant. This will be a difficult burden to discharge. Not only must the court's degree of satisfaction be such that it would withstand the scrutiny of the reasonably informed member of the public that no such information passed, but the burden must be discharged without revealing the specifics of the privileged communication. Nonetheless, I am of the opinion that the door should not be shut completely on a solicitor who wishes to discharge this heavy burden.

- [28] Now, what must be kept in mind is all of that was said in the context of a civil case, a civil case in which the rules of disclosure had made all parties aware of what was, at the point in time when the issue arose, relevant information that would be bearing in on the substance of the issues that separated the parties.
- [29] That is not in any way consistent with an ongoing criminal trial. As I have already indicated, criminal trials have a tendency to change direction from the time of the opening statements of counsel to the time of final verdict. That is all the more so when there are multiple accused, as there is in this case, and where there is the potential for conflicting defenses.
- [30] In my opinion, at this point in time, and notwithstanding the statements of counsel which I accept as being a true reflection of what they honestly believe at this point in time, and as I have said, without any reflection whatsoever on their integrity, it is my view that they cannot apprehend, any more than I can or Mr. Morgan can, what direction this trial may take when the time comes for the Crown to lead its evidence.
- [31] So, in all of the circumstances, I cannot be satisfied that, because of the longstanding retainer of Mr. Tousaw by Ms. Buhrig, that there does not exist a realistic possibility that at some point in this trial a circumstance will arise where indeed Ms. Buhrig will, by virtue of something she says in evidence -- and her decision will only be taken at the close of the Crown's case when all of the Charter decisions have been decided against the accused and all of the Crown's evidence is in, if the case indeed gets that far, and it may not, but what I am dealing with here are possibilities and not certainties -- I cannot be satisfied that it will not then befall to Mr. Tousaw a very obvious duty to cross-examine Ms. Buhrig. If that happens, there is the potential, as I say, the real risk that what at this point in time seems insignificant and inconsequential in terms of any communication which Ms. Buhrig may

have made to Mr. Tousaw, will then become important and will put Mr. Tousaw in the unhappy position of in fact acting against his former client, as that phrase is used in the law.

[Emphasis added]

- [56] Defence counsel sought to distinguish these cases from the present. They argue that it is so highly unlikely that a conflict would emerge on the present facts, while conceding that it is impossible to rule out any eventuality. Again, both counsel have advised their clients not to take the stand, and those clients have agreed not to advance or solicit evidence that might harm the defence of the other.
- [57] Defence counsel also emphasize that the assault is alleged to have taken place in a finite space, with a finite number of participants: the three co-accused and the victim alone in a motel room. No one else was in the room where it happened. But even within this limited universe, evidence may emerge such that it would be desirable, as a matter of strategy or near-necessity, for either or both of Messrs Guray or Downey to take the stand or to put forward argument or evidence unfavourable to the other. They say that they presently have an agreement not to mount a cut-throat defence, but that only accounts for half of the persons alleged to be in the motel room at the time of the assault. Either of Messrs Rideout or Gall could indicate that one of those two accused was absent from the room, or participated more violently than the other, or did not participate at all, or tried to restrain the other from violence. Any of the remaining 23 or so witnesses could also advance evidence that might potentially inculcate one co-accused at the expense of the other, or prompt one or both of Messrs Guray or Downey to reconsider their position. This might not only be a matter of tactics. The conflict, and their adherence to their waiver of that conflict, might impact their ability to mount a full defence in the context of a dynamic criminal trial where the evidence of multiple witnesses can never be fully known in advance.
- [58] Defence counsel note that Cote, Chester, and Barrett are all Provincial Court cases, and thus not binding on this Court, Barrett even less so as it comes from another province. That is true, but I find the analysis to be persuasive in each of these cases. They are founded upon universal bedrock principles of conflicts of interest that transcend jurisdictional boundaries. I agree with their commonsensical analysis of the dynamics of criminal trials, and the limited ability of a waiver or stated defence strategy to reassure in advance that a conflict will not arise in the midst of the trial.
- [59] I return to defence counsel's main case of Lamar. As set out above, whether a conflict is irredeemable is a fact-specific inquiry. In Lamar, two facts stand out in strong contradistinction to the present case. First, the alleged assault was recorded on a dashboard video: see para. 14. The facts of the assault would likely be relatively uncontroversial, and the defence's evidence and that of the co-accused accordingly constrained and predictable. The timing of the joint representation in Lamar was also important. The Lamar application did not come on the eve of trial, as here, but over a year before the likely trial date; in fact, no trial date had yet been set. That said, even at that very early stage, counsel had already

recognized the potential conflict problem, and separate counsel had been retained. By the time of the eventual trial, this potentially curative safeguard would have been in place for over a year. Notwithstanding this, the Court did not rule out the possibility that this safeguard would be insufficient to satisfy the public and the Court that the accused would be afforded a fair defence, with preservation of confidential information and undivided loyalty. Meiklem J expressly left the issue of the sufficiency of these preventative steps to the trial judge: see para. 25. At the end of the day, in Lamar, there might have still existed an irremediable conflict requiring removal of counsel.

- [60] I turn to defence counsel's argument that Messrs Guray and Downey have provided waivers, based on independent legal advice, confirming that they are content to have Mr McKay act on behalf on Mr Guray.
- [61] Counsel for the accused point to appellate courts' confirmation of the efficacy of the consents provided by the accused appellants in *R. v. Yellowhead*, 2015 BCCA 389 at para. 17 and *R. v. Barbeau*, [1996] RJQ 1127 (CA) at 9.
- [62] The underlying facts and the procedural scenario in *Barbeau* and *Yellowhead* differ considerably from those of the present case. In both cases, the appellant co-accused had assured the trial courts that they consented to the joint representation. The accused were convicted in both trials. The accused claimed on appeal that they did not appreciate the effect of the waivers and consents, and that their counsel conducted their defences in a position of divided loyalty. They cited these alleged impairments as evidence of ineffective representation, and as specific grounds for appealing their convictions.
- [63] In *Barbeau*, the conflict was known in advance. Two of the five co-accused, husband and wife, provided their consent after receiving a detailed legal opinion of the risks posed by the joint representation.
- [64] In *Yellowhead*, in contrast, the conflict was discovered mid-trial. The accused was charged with the sexual assault of ZS, a minor. MS was the mother of ZS, and in the house the night of the alleged assault. The allegation of conflict was not made before or at the start of the trial, but several days into the trial, during the cross-examination of ZS. The problem was two-pronged. First, the Crown had made late discovery and disclosure of Facebook messages between the accused and ZS that provided evidence supporting of the alleged assault. Second, defence counsel mid-confirmed that he had acted for the mother MS in an unrelated family law matter seven years earlier; that matter did not involve ZS.
- [65] Thus, mid-trial, counsel and the Court looked to ways the conflict could be addressed and the trial preserved. Defence counsel agreed not to cross-examine the mother, and to have a different lawyer cross-examine ZS. The accused also waived the right to seek a mistrial. As a quid pro quo, the Crown agreed not to adduce the new unfavourable Facebook evidence. The accused signed a lengthy and particularized waiver that set out his strategic reasons for continuing with the trial, rather than risking a new trial that would include the adverse Facebook evidence: see para. 17. In open court, on the record, the judge asked and

confirmed that the accused understood the consequences of his election. As described by the Court of Appeal:

- [43] In my view, the record establishes that the appellant validly waived his right to apply for a mistrial. He certainly had knowledge of his options, which were to continue with the trial or to accept a mistrial, and it is not suggested to us that, broadly speaking, there were other alternatives. These two alternatives were discussed by defence counsel and the appellant on Friday evening after the conflict of interest problem was identified, again on Sunday night, and yet again on Monday morning before court. The record establishes that the instruction to defence counsel and the agreement in open court to the judge's plainly posed question, were given by the appellant knowing and believing that saving the trial gave him the best opportunity for an acquittal. The alternative of obtaining a mistrial and facing the late Facebook evidence at a new trial was a dismal prospect. No one has said otherwise.
- [66] Thus in *Yellowhead*, as in *Barbeau*, the appellants citing the waivers as grounds of appeal were the very persons who signed those waivers in order to obtain a clear tactical advantage at the trial below. That tactic having failed, they employed the new tactic of seeking to resile from those waivers on appeal. Sanctioning the appellants' strategy would in effect hand a free ground of appeal to any accused providing a consent for joint representation at trial: a result starkly undermining of the public perception of the justice system.
- [67] One must also appreciate the context in which the *Barbeau* and *Yellowhead* Courts gave effect to those waivers and consents. In both cases, the appellate courts were not in the shoes of a trial judge, on the verge of trial, contemplating whether the dynamics of the trial and the potential evidence might, in future, create a conflict resulting in a mistrial, adjournment, or appeal. The *Barbeau* and *Yellowhead* appellate courts, of course, had the advantage of hindsight in assessing whether or not the accused had suffered actual prejudice arising from the conflict. Accordingly, the Courts asked themselves not whether the perception of conflict might arise, but whether actual conflict had occurred. The observation of Doherty JA in *Widdifield*, above, and the appellate focus on actual conflict, as opposed the trial court focus on potential conflict, governed: see also Barrett at para. 20 and Neil at paras. 38-39. In this, I agree with the Cocks analysis and its distinguishing of *Barbeau* at para. 44.
- [68] Returning to *Cocks*, the two co-accused in question had also signed waivers. Silverman J found these to be insufficient to reassure the Court and the public that the ostensible conflict and the risk of a mistrial would not undermine the actual or perceived administration of justice:
- [39] It is true that both of these men have signed a document saying that their minds will never change, and they say it is irrevocable and certain portions of it, for example, say this:

These conflicts will not arise because I will never launch or participate in any defence strategy that would compromise my father's interest as an accused in this matter;

And:

That if a conflict arises between my father and I that is not resolved, I understand that the court could order that both Mr. Watt and Mr. McCullough must be disqualified. I understand this could result in a delay of my trial while I retain new counsel;

And:

I hereby ... waive unequivocally and irrevocably my entitlement to counsel's undivided loyalty to me;

And:

I hereby ... consent to Mr. McCullough cross-examining me at trial should I testify...

With the appropriate changes to the name of the lawyer, and to whether it is a father or son, both accused make the same statements in their signed documents.

[40] All of that is well and good, but what is a court to do in mid-trial if one of these men stands up and says, "I know I signed it. I meant it when I signed it. I didn't really understand what might happen. I have changed my mind. This isn't fair. I want a new lawyer and a new trial." In my view, that is a realistic possibility, given the kind of case that this is.

[41] Would the self-described irrevocability be upheld? Perhaps, but it is not clear to me that it would necessarily be upheld.

[42] In Con-Drain the court said this at para. 66:

It is settled law that courts must consider the public interest and the need for public confidence in the administration of criminal justice, even where there is a valid waiver or consent. A valid, fully-informed waiver may be overridden by the public interest in protecting the integrity and fairness of the criminal justice system, particularly the reliability of verdicts.

[43] The irrevocability is simply not something which is carved in stone. What is clear is this: That if such a development occurred, it would have the potential to derail the trial of this matter with a mistrial, with great prejudice to the other of these two, to the other five co-accused, to the public, and to the public's confidence and faith in the administration of justice. Even the waivers themselves acknowledge the possibility of such a development:

That if a conflict arises between my father and I that is not resolved, I understand that the court could order that both Mr. Watt and Mr. McCullough must be disqualified. I understand this could result in a delay of my trial while I retain new counsel.

That delay, if the trial had already started, would likely be a mis-trial, followed by a long delay.

[emphasis added]

- [69] These concerns apply equally to the present case. What will happen if the evidence evolves such that it would be in the best interests of either Mr Downey or Mr Guray to point the finger at the other, or for Mr Downey take the stand and expose himself to cross-examination by Mr McKay, or otherwise seek to withdraw from the waiver and consent? Mr McKay would then be in the impossible position of having to provide Mr Guray advice not only with respect to the merits of the present case, but also with respect to whether the waiver should be revoked. He may also be in the further impossible position of advising his client whether he may have recourse against his present solicitor, Mr McKay, for his earlier advice on whether to enter into the waiver in the first place.
- [70] In this, both Yellowhead and Barbeau provide precedents for accused who regret and seek to resile from their waivers. The fact that the waivers themselves are cited as a ground of appeal further indicates that the Court and the public can only rely so far on waivers as a reassurance for the protection of the integrity of the administration of justice and the avoidance of a mistrial on appeal. The fact of the waiver may itself result in further delay in resolution of a given prosecution, in providing a ground of appeal and an argument of ineffective representation.
- [71] Defence counsel argued that removal of counsel will result in an adjournment, and thus further delay. This is certainly a concern with respect to the public perception of the administration of justice especially in post-Jordan[2] age. This valid concern, however, also indicates that the Court should follow the caution mandated in Widdifield, and not start at trial with such obvious pitfalls ahead. As an essential practical question: would it be wise to embark on this perilous journey now if it can be avoided, albeit with some delay? Even with a slight risk of a conflict arising, do we risk a mid-trial adjournment, or a mistrial, or an appeal based upon ineffective representation, due to a claimed misunderstood waiver of Charter rights to make a full answer and defence and testify on their own behalf?
- [72] Where the conflict arises mid-trial, as in Yellowhead, the court and the parties must do the best they can do to salvage the trial if possible. But here, as in Barrett, Cote, Chester, and Cocks, it is better to recognize the significant potential consequences of a conflict arising mid-trial, or being asserted on appeal after trial, and avoid it altogether. While the Court is sure that Mr McKay possesses commendable advocacy skills, he is not the only experienced criminal defence counsel on Vancouver Island. Mr Guray can be readily represented by a new counsel, who can be briefed with reasonable efficiency, such that this trial may proceed with minimal delay, without the cloud of conflict arising mid-trial, or the perception of compromised representation. Mr Guray ought to have been represented by different counsel from the start. In order to foster their reputation, and the reputation of the criminal justice system in general, all counsel should avoid these situations entirely.

- [73] This is not to say that waivers and consents will never mollify concerns of conflicts in a criminal trial. Again, it is a fact-specific inquiry. The nature of the charges, the number and nature of the witnesses, and the strength and reliability of the evidence may be such that there is little or no risk that a conflict will arise, or that the conflict will be compounded by the tactical need for counsel to advise on whether the consent be abandoned.

VI. conclusion

- [74] For the reasons above, the Court orders that Mr McKay be removed as counsel for Mr Guray on this matter. A reasonably well-informed member of the public would question the ability of a counsel to provide undivided loyalty to two current clients who are both co-accused in this matter. While seemingly remote, the prospect of Mr McKay having to cross-examine one client, Mr Downey, on behalf of his other current client, Mr Guray, in the context of a criminal trial with significant penal consequences, would be inherently unsettling to a reasonably well-informed member of the public, and inherently corrosive to public perceptions of a fair trial. The inherently dynamic nature of a criminal trial, coupled with the large number of witnesses and the uncertainty about the main witness, emphasise that the evidence is far from predictable. This unpredictability places counsel in a further potential conflict of interest: whether Mr McKay could give unblemished advice as to whether Mr Guray should seek to resile from his agreement not to advance a cutthroat defence, take the stand, or to consent to Mr McKay's joint representation of Mr Downey.
- [75] Again, this analysis does not rest on Mr McKay's reassurances, to which I afford the highest respect. The Court must look to reasonable public perception of the potential undermining of a fair trial. The fact that Mr McKay is now practising in partnership with Mr Mills provides a further potential conflict, further corrosive to public confidence in this trial as well as in the administration of justice.
- [76] It flows from this result that the trial is adjourned.
- [77] Insofar as it is possible, I direct the parties and request the Registry to take all reasonable steps to reschedule the trial of this matter at the earliest reasonable date.
- [78] An application such as the present is a sensitive one. I wish to emphasize that in reaching this difficult conclusion, I am in no way casting aspersions on the ethics or professionalism of either Mr McKay or Mr Mills. Mr McKay appears to have operated under the good faith belief that the waiver would be sufficient to address the potential conflict. That said, the stark facts of this case, coupled with the authorities presented, compels this result.
- [79] As stated above, the Court directs that Mr Mills and Ms Giri move at all reasonable haste to first determine the nature of Mr Mills's retainer and law firm, as well as that of all proposed safeguards. These could be based on statements of Mr Mills or, potentially if necessary, on affidavit evidence. The Crown should then advise as swiftly as reasonably possible, if necessary, its position on whether Mr Mills may appropriately continue to represent Mr Downey. If the Crown persists in its position that Mr Mills must be removed from the file,

and Mr Mills and Mr Downey disagree, the parties should, again, as soon as possible, appear before a judge of this Court for determination of this issue.

[80] I similarly direct Mr Guray to secure new counsel, as soon as reasonably possible. While I will not bind the hands of a future court, if and when a Jordan application is made with respect to this matter, I would observe that the delay occasioned by this adjournment lies the feet of Mr Guray and his present counsel, rather than those of the Crown.

"Crerar J"

[1] *Vetrovec v. The Queen*, [1982] 1 SCR 811.

[2] *R. v. Jordan*, 2016 SCC 27.

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