

CANADA / JUDGMENT

R. v. Gagne

2024 BCSC 2183

COURT

Supreme Court of British Columbia

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2024 BCSC 2183 R. v. Gagne

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Gagne,

2024 BCSC 2183

Date: 20241126

Docket: 43022-2

Registry: Courtenay

Rex

v.

Cameron Don Mathew Gagne

Before: The Honourable Madam Justice V. Jackson

Oral Reasons for Judgment re Mistrial and

Application for Summary Dismissal

Counsel for the Crown

(Appearing by Video):

M. Shah

M. Richards

Counsel for the Defendant

(Appearing by Video):

T. Spettigue, Agent for

B. Movassaghi

Place and Date of Hearing:

Courtenay, B.C.

November 8, 2024

Place and Date of Judgment:

Courtenay, B.C.

November 26, 2024

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INTRODUCTION

[1] These oral reasons were delivered in court. They have since been edited for publication.

[2] In August of 2021 the defendant was charged with having committed a sexual assault on June 28, 2021. He elected to be tried by a judge sitting with a jury. Crown counsel Nicholas Grabe had conduct of the pre-trial matters as well as the jury trial. The defendant's defence counsel was Eric Chesterley.

- [3] The trial was initially scheduled to commence January 10, 2023, but defence counsel advised that the defendant had been involuntarily committed to a psychiatric facility. A week before the start of trial, Mr. Chesterley applied involuntarily for the trial to be adjourned. Crown counsel did not oppose. The trial was adjourned.
- [4] The trial was rescheduled and began on October 23, 2023. Mr. Chesterley was assisted by Mary-Anna Eddy, who worked at his law firm and Mr. Chesterley described as a paralegal. Mr. Chesterley sought leave to have Ms. Eddy sit beside him at the counsel table, which I granted. Ms. Eddy was seated beside Mr. Chesterley throughout the majority of the trial.
- [5] Following the close of the Crown's case, the defendant elected not to call evidence.
- [6] On November 1, 2023, the jury returned a verdict of guilty of sexual assault. The verdict was recorded.
- [7] Several applications were filed by Mr. Chesterley post verdict (since abandoned).
- [8] A PSR and psych report were ordered and arrived on January 22, 2024.
- [9] A hearing to determine the facts essential to the jury's verdict (sometimes referred to as a Gardiner or Ferguson hearing because of the governing leading cases) was scheduled for March 26, 2024, and the sentencing hearing was scheduled for May 31, 2024.
- [10] On March 26, 2024, the date that had been set for the Gardiner hearing, Mr. Chesterley and Crown counsel John Boccabella, not Mr. Grabe, appeared before me. Mr. Chesterley advised the Court as follows:

An issue has come up, Justice, and I think I am placed in the position on behalf of Mr. Gagne to seek to adjourn this. And I won't go into too much detail, but the court will recall that during the course of this trial my paralegal, Ms. Eddy had been accompanying me and taking notes and so forth.

It turns out - and it wasn't entirely unknown to me, but she was also dating the prosecutor at the time and this has led to a confidence issue from the standpoint of Mr. Gagne, perhaps understandably. I don't think she did anything inappropriate, but nonetheless certainly that raises an issue and he wants to seek independent legal advice about that.

- [11] I wish to note that the words "and it wasn't entirely unknown to me" were spoken by Mr. Chesterley sotto voce.
- [12] Mr. Boccabella did not oppose the adjournment request, which I granted.
- [13] The defendant's matter was adjourned to the April 15, 2024 criminal chambers list. From there the matter was adjourned again, this time to the April 29, 2024 criminal chambers list. On that date, Bobby Movassaghi appeared on behalf of the defendant as counsel.
- [14] By May 14, 2024, no application seeking any relief had been filed on behalf of the defendant.

- [15] Several post-conviction judicial management conferences (JMC) followed.
- [16] At the May 14, 2024 JMC, there was some suggestion by Mr. Movassaghi that the defendant might seek relief arising out of the situation related to the relationship between Mr. Grabe and Ms. Eddy. I ordered a further JMC be held on June 5, 2024, any application seeking relief was to be filed and served by the defendant before June 5, 2024. Mr. Movassaghi was to advise, also before June 5, 2024, whether there were any facts in the victim impact statement to which the defendant objected being taken into account in the sentencing, and the parties were to select a new sentencing date, which was to be confirmed at the June 5, 2024 JMC.
- [17] As at the June 5, 2024, JMC, no application related to the situation involving the relationship between Mr. Grabe and Ms. Eddy had been filed on behalf of the defendant. At that JMC, I ordered:

By 4:30 pm, June 6, 2024, defense to advise whether there are any facts in the victim impact statement the accused says cannot be taken into account by the Court in sentencing.

By 4:30 pm, June 6, 2024, defense to advise whether the NOAs presented by previous counsel (the "Previous Applications") are being pursued (I am not sure whether the Previous Applications were "filed" or "served").

By 4:30 pm, June 6, 2024, defense is to file and serve its mistrial application.

Before June 10, 2024, the parties are to select a date for the mistrial application and any other of the Previous Applications defence advises Crown by June 6 it is pursuing. Please set a full day. I want to avoid any risk that the application(s) will not conclude on the date scheduled.

By end of business June 14, 2024, defence is to file and serve any evidence upon which Mr. Gagne intends to rely in the mistrial application.

[18] On June 6, 2024, the defendant filed a notice of application seeking a mistrial (the "Mistrial Application").

[19] On June 14, 2024, the defendant swore and filed an affidavit in support of his Mistrial Application, which includes the following:

4. In March 2024, Mr. Chesterley advised me that Mr. Grabe was no longer prosecuting the file. He was unaware as to the reason but advised me that he would find out and let me know.
5. The day after the above noted conversation, I again spoke with Mr. Chesterley at which time he advised me that his paralegal and Mr. Grabe were in a romantic relationship and that the relationship was ongoing during my trial.
6. I was in a state of shock and disbelief upon learning of this relationship.

7. Mr. Chesterley's paralegal was assisting him both before and throughout the trial. She was sitting next to him at counsel's table and was taking and passing him notes. She was also present during our meetings to discuss trial strategy. As far as I was aware, she was part of my legal representation.
8. After the complainant testified in my trial, I relied on their collective advice in reaching my decision to not testify in my own defence.
9. Had I known in advance that my lawyer's paralegal was involved in a romantic relationship with the Crown counsel who was prosecuting my case, I would have immediately asked for a new lawyer.

[20] A further JCM was held on July 17, 2024, at which I ordered:

By July 22, 2024, crown counsel was to file any evidence on which it intended to rely in responding to the Mistrial Application;

By August 8, 2024, defence counsel was to advise crown counsel whether they wish to cross examine crown's affiant(s);

By August 30, 2024, defence counsel was to file and serve either an amended notice of application, or a written submission, clearly setting out the legal bases upon which it is relying in seeking relief in the Mistrial Application, including any cases which would be relied on, including pinpoint paragraph references, including any constitutional bases, and if the latter, to serve the Attorney General of BC in accordance with the Notice of Constitutional Questions Act by that date; and

[21] On July 22, 2024, Crown counsel filed the affidavit of Nicolas Grabe, which includes the following:

4. In approximately August 2022 I began dating a woman named Mary-Anna Eddy. We are still together today. We maintain separate residences and have never lived together.
5. Eric Chesterley was retained to represent Mr. Gagne in his defence of file # 43022. He represented Mr. Gagne throughout the trial and during the pre-trial matters. Ms. Eddy is employed at Eric Chesterley's law office as a legal assistant. She does not have any legal training, but I understand Mr. Chesterley has made her a designated paralegal. I do not know the extent of her role as a designated paralegal, but understand she has from time to time attended court with Mr. Chesterley to assist with note-taking. I do not know exactly when she started working for Mr. Chesterley, but believe she was so employed throughout the relevant time of the Gagne prosecution.

7. As a government employee, I am aware of my duty to keep information received in the course of my employment strictly confidential. I am also aware of my confidentiality obligations as a lawyer pursuant to the Code of Professional Conduct. At no time during my relationship with Ms. Eddy have I disclosed to or discussed with Ms. Eddy any information about the Gagne prosecution or any other prosecution file.
 8. As a general rule I do not work from home and do not bring file materials to my residence. I am confident that Ms. Eddy would not have had access to any confidential information while in my residence.
 9. Ms. Eddy has never discussed with me any confidential information about Mr. Gagne, his defence, or matters involving the prosecution. I have never seen, been provided, or reviewed any information relating to Mr. Gagne's matter while at Ms. Eddy's residence or in her presence.
 10. I understand, based on my discussions with Ms. Eddy, that Mr. Chesterley was aware of my relationship with Ms. Eddy prior to the Gagne prosecution.
- [22] This last point aligns with comments made by Mr. Chesterley on March 26, 2024, that the dating relationship between Mr. Grabe and Ms. Eddy "wasn't entirely unknown to" him. I make this point because para. 5 of the defendant's Mistrial Application (later para. 9 of the defendant's amended notice of application) states: "Present Counsel [Mr. Movassaghi] was advised that Mr. Chesterley was unaware of the relationship and upon becoming aware of it, was either removed, or applied to be removed, as counsel of record." There is no evidence supporting the truth of that statement.
- [23] On August 12, 2024, it was agreed that the Mistrial Application would be heard on November 8, 2024.
- [24] On August 27, 2024, Crown filed a notice of application seeking a summary dismissal of the Mistrial Application (the "Summary Dismissal Application"), based on the position that the Court lacks jurisdiction to make an order granting a mistrial following the recording of a jury's verdict.
- [25] Also on August 27, 2024, the defendant filed an amended notice of application (also the Mistrial Application).
- [26] On August 28, 2024, via a Request to Appear Before a Particular Judge (RTA), Crown advised it wished to have the Summary Dismissal Application heard in writing so as to preserve the November 8 date and use it for Mr. Gagne's sentencing. The Crown sought direction about how to proceed.
- [27] A JCM was arranged for October 2, 2024. At the JCM, defence counsel advised they wished to cross-examine Mr. Grabe. The parties were not in a position to confirm whether they were in agreement as to whether cross-examination was as of right or whether leave was required. After hearing submissions from the parties, I denied Crown's request to determine

its Summary Dismissal Application solely in writing. As a result of the parties' and the Court's schedule, the first available date for the Court to address the Crown's Summary Dismissal Application was the same day that had been scheduled for the Mistrial Application itself, November 8, 2024. I ordered that the November 8 date be used for all matters related to the Mistrial Application and the Summary Dismissal Application.

- [28] At the November 8 date, Crown sought to have its Summary Dismissal Application heard first. I rejected that request on the basis that I did not view that approach as efficient, given the fact that all matters had been scheduled for the same day and the fact that the Crown's Summary Dismissal Application would require consideration of the basis of the Mistrial Application. I directed that defence counsel's application to cross-examine Mr. Grabe (which was not reduced to writing) proceed first, followed by the Mistrial Application and that Crown counsel's submission with respect to a lack of jurisdiction be made in response to the Mistrial Application.
- [29] The parties agreed the governing jurisprudence provides that cross-examination is not as of right in a criminal application of this nature. After hearing submissions on whether to grant leave to cross-examine, I delivered oral reasons for judgment dismissing the application. The Mistrial Application proceeded. These are my reasons for judgment on the Mistrial Application.

THE MISTRIAL APPLICATION

- [30] The defendant seeks a mistrial on the basis that his trial was unfair because the failure of Mr. Chesterley and Mr. Grabe to ensure he was aware of the relationship between Mr. Grabe and Ms. Eddy constituted a miscarriage of justice.
- [31] No constitutional provision is pled in the Mistrial Application. I proceed on the basis that the defendant is referring to his common law right to a fair trial, as now constitutionally protected by sections 7 and 11(b) of the Charter. Crown did not argue the mistrial remedy sought by the defendant could not be granted as a common law remedy, take issue with the defendant's failure to plead the Charter, nor submit the defendant failed to provide any notice required by law.
- [32] Crown's primary argument is that this Court has no jurisdiction to order a mistrial in this case. In the alternative, Crown argues the defendant has not satisfied the applicable test for a mistrial.
- [33] As this Court's jurisdiction to order a mistrial in the circumstances of this case is a threshold issue, I will address it first.

JURISDICTION

The parties' positions

- [34] Relying on *R. v. Burke*, 2002 SCC 55 and *R. v. Henderson*, 2004 CanLII 33343, 189 C.C.C. (3d) 447 (O.N.C.A.), the Crown argues there are only "two narrow exceptions to the general rule that a trial judge is functus following a jury's verdict: 1) where the jury does not render the verdict it intended; and 2) where the accused raises the defence of entrapment". The Crown points out that *Henderson* has been followed by this Court in *R. v. Maligaspe*, 2023 BCSC 126 and *R. v. Hawco*, 2024 BCSC 857 and argues that the principles of judicial comity and horizontal stare decisis require me to follow *Maligaspe* and *Hawco*.
- [35] The defendant argues *Oberreiter v. Akmal*, 2009 BCCA 557 supports a broader interpretation of *Burke*.

Analysis and conclusion

- [36] The defendant was tried by a jury. The jury returned a verdict of guilty.
- [37] There is no suggestion the jury did not render the verdict it intended. Entrapment is not an issue. The jurisdiction issue turns on whether, as the Crown argues, those two situations are the only exceptions to the general rule that a trial judge is functus following a jury's verdict.
- [38] The relevant jurisprudence urged on me by the parties begins with the Supreme Court of Canada's decision in *R. v. Head*, [1986] 2 S.C.R. 684, 1986 CanLII 8. In *Head*, the issue was whether a jury could be reconvened after being discharged, either to reconsider its verdict or to complete or correct the transmission and recording of a verdict it had arrived at prior to being discharged. In that case, the jury returned a verdict of not guilty on the charge of attempted murder. The judge dismissed them and discharged the accused. The foreman of the jury then indicated to the judge that the jury may have found the accused guilty of a lesser included offence. The judge had the jury reassemble in the body of the courtroom, heard submissions, and then found that he was functus.
- [39] In *Head*, the Court articulated the common law rule that following the return of the jury, if a clear and unambiguous verdict is given, it is the judge's duty to accept the verdict and cause it to become a part of the record of the court, but that where there is ambiguity in the verdict, the trial judge should inquire into the matter to ascertain the true position. The Court in *Head* held that in these latter circumstances, the trial judge has the discretion to accept a substituted or second verdict for the first one returned but that this discretion is one which must be exercised prior to the discharge of the jury: at pp. 688-90.
- [40] In *R. v. Mack* [1988] 2 S.C.R. 903, 1988 CanLII 24, the Court addressed the manner in which a claim of entrapment should be dealt with by the courts. In considering the question, the Court held in the entrapment context, "the court's sense of justice is offended by the spectacle of an accused's being convicted of an offence which is the work of the state" and "is, in effect, saying it cannot condone or be seen to lend a stamp of approval to behaviour which transcends what our society perceives to be acceptable on the part of the state": at 942. As the Court observed, "[t]he stay of the prosecution of the accused is the manifestation

of the court's disapproval of the state's conduct" and that while the remedy of a stay benefits the accused "the Court is primarily concerned with a larger issue: the maintenance of public confidence in the legal and judicial process" and that "the basis upon which entrapment is recognized lies in the need to preserve the purity of administration of justice": at 942. If a jury decides the accused has committed all of the elements of the crime, it is then open to the judge to stay the proceedings because of entrapment by refusing to register a conviction.

- [41] In *Burke*, the Court was again faced with an issue linked to the jury's verdict. After the accused's trial for attempted murder, the jury foreman announced the verdict. The entire court party heard "not guilty as charged". A "not guilty" verdict was recorded and the jury was discharged. However, while escorting the jurors out of the courtroom, a court officer asked the foreman what the jury's verdict had been, and he replied, "You're kidding, guilty". The issue before the Court was "whether a trial judge has jurisdiction in a criminal trial to inquire into and possibly correct an error in the verdict after the discharge of the jury, and if so, the extent to which such jurisdiction exists": at para. 22. In *Burke*, based on "evolving jurisprudence and policy concerns", the Court articulated a further exception to the general rule enunciated in *Head* that a trial judge is *functus officio* and lacks jurisdiction to reconvene the jury to inquire into an alleged error in the verdict once the jury in a criminal trial has been discharged, namely when a jury does not deliver the verdict it intended.
- [42] In the course of its reasons in *Burke*, the Court held a reformulation to the common law rule in *Head* was needed because "otherwise, apparent absurdities might result" and that "the administration of justice would be brought into disrepute by barring the court from correcting a recorded verdict where there is no perceptible injustice to the accused and no reasonable apprehension of bias": at paras. 46, 48. The Court also observed that *Head*'s "blanket approach" failed to respond to the nuances of specific contexts and that it appeared "obvious that an absolute rule with no exceptions is not attuned to modern, lengthy and expensive jury trials" and that a "more refined and flexible analysis of this sort of problem, similar to the contextual approach suggested by Justice Lamer [in *Head*] should be adopted: at paras. 50, 51.
- [43] The focus of the Court's analysis in both *Head* and *Burke* was the need to protect the policy concerns animating the bright-line rule articulated in *Head*, namely precluding the jury from changing its mind after it has delivered its verdict.
- [44] The Crown places significant reliance on *Henderson*, which considered both *Head* and *Burke*. As both parties acknowledge, *Henderson* is not a binding authority on this Court.
- [45] In *Henderson*, on the date set for sentencing following the respondent's conviction by a jury on 249 counts of fraudulently obtaining and attempting to obtain GST refunds, the jury's verdicts having been recorded, the trial judge declared a mistrial on the basis that the Crown's failure to preserve certain documents amounted to an abuse of process and a breach of the defendant's s. 7 Charter rights. The trial judge concluded that he had jurisdiction to consider a stay or mistrial after the jury had provided their verdict. The oft

quoted passage in Henderson is at para. 29:

- [29] A trial judge's jurisdiction to alter a jury's verdict, order a stay or declare a mistrial after a jury verdict is extremely limited. The normal rule is that following the delivery and recording of a verdict by the jury, the trial judge is functus in respect of that verdict, which cannot be altered, except on appeal. The rule is somewhat different in a judge-alone trial. In that case, where the trial judge has entered a verdict of acquittal, the verdict is final and cannot be subsequently altered by the trial judge. However, where a trial judge convicts an accused but has not yet sentenced him or her, the trial judge is not functus in respect of that charge, and can, in exceptional circumstances, vacate the adjudication of guilt before sentencing: *R. v. Lessard* (1976), 1976 CanLII 1417 (ON CA), 30 C.C.C. (2d) 70 at 73-75. (Ont. C.A.); *R. v. Bennis*, [2004] O.J. No. 182 (C.A.).

[Emphasis added.]

- [46] In Henderson, the Court referred to its earlier decision in *R. v. Gostick* (1991), 62 C.C.C. (3d) 276) 1991 CanLII 11749 (O.N.C.A.), where the Court had rejected an argument the trial judge retained jurisdiction post-verdict to order a mistrial. However, again, the underlying facts on which the mistrial had been advanced (deplorable conditions of the jury room) were known before the jury rendered its verdict: excerpt set out at para. 33 of Henderson. In Gostick, the Court had endorsed the view that where circumstances that would constitute a denial of a fair trial are known during the trial, "the matter should be raised and dealt with by the judge during the course of the trial" but that if "...the case goes to the jury and the allegation is not made until after the verdict has been recorded and the jury discharged, the matter then becomes one to be dealt with by way of appeal and not by the trial judge": at 284.
- [47] The Court in Henderson held a trial judge does have a narrow jurisdiction to order a mistrial after a jury verdict, and observed this could occur (1) where the jury has rendered or communicated an unintended verdict and the trial judge is not able to correct the verdict because the jury has dispersed, causing a reasonable apprehension of bias in that jury; and (2) where the accused wants to raise the defence of entrapment. The Court commented, at para. 27, that "[i]n those narrow circumstances, the trial judge has the authority to order a mistrial in order to avoid a miscarriage of justice" [emphasis added]. I interpret that passage as recognizing that a trial judge sitting with a jury has the jurisdiction, post jury verdict, to order a mistrial in order to avoid a miscarriage of justice, and that the two circumstances identified (correcting an unintended jury verdict and entrapment) are examples of such avoidance.
- [48] My interpretation is supported by Justice Feldman's observation at para. 36 of Henderson.

In Burke, the court acknowledged at para. 74 that there are broad common law powers to declare a mistrial, the test being "whether there is a 'real danger' of prejudice to the accused or danger of a miscarriage of justice" but that "in canvassing the circumstances when a mistrial is the appropriate remedy, all of the examples cited by the court were cases where the mistrial motion was brought either during the trial, during jury deliberations, or in one case, after the jury had

found the accused guilty but was deadlocked on the issue of mental disorder, and where the guilty verdict had not yet been recorded.

[49] As a corollary, I observe that in all of those cases, the facts upon which the mistrial applications were based, were known during the trials and before the juries rendered their verdicts. The significance of this fact is evident from the judgment itself at paras. 9, 10, which includes the following:

Importantly, the defence made no motion for a remedy for the Crown's failure to provide disclosure of the employment records either before the trial or at any time before the verdict was given by the jury and jury members were discharged.

[50] It is evident from the Court's reasons in Henderson that the Court was concerned about the potential for mischief where information was known during the trial, but not acted on. As Feldman J.A. observed at para. 46: "Counsel cannot save such motions to be brought only if the accused is convicted. Once the jury has delivered its verdict, matters that involve the conduct of the trial and that could have affected the jury's verdict can only be raised on appeal."

[51] Again, I do not interpret that passage as precluding a trial judge ordering a mistrial based on facts that support the conclusion that "there is a 'real danger' of prejudice to the accused or danger of a miscarriage of justice", and were unknown or unknowable during the trial and before the verdict was entered. I would add that I do not see the rationale for, or how the interests of justice would be served by, an interpretation of that passage that precludes the trial judge from remedying that 'real danger' of prejudice to the accused or danger of a miscarriage of justice. Surely it cannot be the case that the trial judge is simply required to hold their nose and proceed to sentencing in the hope that the miscarriage of justice would be cured on appeal, if such a course of action is something the defendant has the means to pursue.

[52] In Oberreiter, the British Columbia Court of Appeal had occasion to consider the issue of a trial judge's jurisdiction to order a mistrial post jury verdict. In Oberreiter a division of the Court considered an application to vary the order of a chambers judge of that Court, who had denied the appellants (the defendants at the trial) leave to appeal the mistrial order made by the trial judge after the jury in a personal injury case had rendered its verdict, but before the verdict had been entered. The mistrial order had been made after plaintiffs' counsel had discovered that a DVD that had been entered as an exhibit, and gone with the jury into the jury room, contained ten minutes of surveillance that had not been shown to the jury at trial. The plaintiffs applied for a mistrial "pursuant to the inherent jurisdiction of the court to address an irregularity that went to the issue of trial fairness": at para. 5.

[53] Oberreiter is binding on this Court. Crown counsel argues Oberreiter is distinguishable because it was a civil case and the civil jury's verdict had not been entered. However, in the course of its reasons dismissing the variation application, at para. 24, the Court commented on the scope of a trial judge's jurisdiction post jury verdict:

It is settled law that until a judgment or order has been entered, a trial judge continues to be seized of the matter before him or her. In *Clayton v. British American Securities*, 1934 CanLII 229 (BC CA), [1935] 1 D.L.R. 432 at para. 83, [1934] 3 W.W.R. 257 (B.C.C.A.), the court noted that this was recognized as an "unquestioned practice" and "one of very long standing". Similarly in *Burke*, the court concluded that, as a principle of law, a trial judge retains the remedial jurisdiction to declare a mistrial on an issue that goes to trial fairness (in that case it was whether there existed a reasonable apprehension of bias) after a jury verdict has been rendered and the jury discharged.

[Emphasis added.]

[54] The Court's analysis in *Oberreiter* was considered in the criminal context in *R. v. Stankovic*, 2015 ONSC 5437. *Stankovic* involved an application for a mistrial following the return and recording of the jury's verdict of guilty as charged in a sexual assault, after the complainant allegedly provided different information regarding the sexual assault in her victim impact statement. *Stankovic* argued that the different information supported his defence that he had an honest mistaken belief that the complainant consented. The Court determined Henderson was determinative of the jurisdiction question and that the circumstances underpinning the mistrial application before the Court did not fall into either of the only two exceptions to the "normal rule" that the trial judge is functus in respect of the verdict after the verdict is delivered, being (1) where the jury does not render the verdict it intended; and (2) where the accused wants to raise the defence of entrapment: at paras. 6, 7. Although the trial judge determined that given their conclusion on jurisdiction it was not necessary to decide whether the complainant's victim impact statement was inconsistent with her evidence at trial, they nonetheless held they "would find that it is not": at para. 9. Thus, in *Stankovic* the Court concluded the factual matrix did not raise trial fairness concerns.

[55] In *R. v. Azzi*, 2020 ONSC 848, the defendant was tried by judge and jury. His trial began on December 9, 2019. The jury selection proceeded by way of the (then) new procedures which came into force on September 19, 2019, which abolished peremptory challenges, without objection by Mr. Azzi. Mr. Azzi was found guilty by the jury on December 19, 2019. The facts are similar in *R. v. Aristor*, 2020 ONSC 2658 appeal to the ONCA on other grounds dismissed, 2022 ONCA 719; leave to appeal to the SCC ref'd, 40628 (8 June 2023). In both cases, post conviction, following the Ontario Court of Appeal's decision on January 23, 2020, in *R. v. Chouhan*, 2020 ONCA 40 [Chouhan ONCA], the defendants applied for a mistrial on the basis that Chouhan held peremptory challenges had been available for certain trials based on the prospective application of the Criminal Code, R.S.C. 1985, c. C-46 changes.

[56] In *Aristor*, the Ontario Superior Court of Justice referred to five similar post-Chouhan ONCA applications in which the courts had found they had no jurisdiction post jury verdict and denied mistrials on the basis that they were functus. The Court also referred to *Azzi* where the Court held at para. 9 it had jurisdiction:

In my view, the Supreme Court of Canada decision in *R. v. Burke* 2002 SCC 55 (CanLII), [2002] S.C.J. No.56 applies. That case makes clear at paras. 74-75 that "There are broad common law powers to declare a mistrial. Mistrials have been ordered or considered as a potential solution in a range of situations." Those situations include numerous circumstances occurring after juries have been discharged. Factors to be considered in determining whether a mistrial is needed to prevent a miscarriage of justice include the rights of the accused, the public interest and the effect of a mistrial on the public's confidence in the administration of justice.

[57] Nonetheless, although determining it had the jurisdiction to grant a mistrial, the Court in *Azzi* declined to grant a mistrial based on the facts of that case, which included that the Crown was consenting to bail, and the appeal was being fast tracked.

[58] The Court in *Aristor* dismissed the mistrial application on the basis that they were "not persuaded" they should follow "the obiter in *Azzi*". The Court concluded at para. 18:

... this case does not fit into the recognized exceptions, as clarified in *Henderson*. The verdict registered was final and recorded many months prior to this application. That aspect of the case was as final as if the applicant had been acquitted by the jury. As was stated by Boucher J. in *R. v. Turner* (unreported decision, Ont. S.C., court file no. CR-19-50000623-0000) "At this stage, the only jurisdiction the trial judge has is to sentence the accused under section 720. Remedies for errors or jurisdiction must at this stage be sought by way of appeal. Even if the verdict in this matter is avoidable by the trial judge, the decision to grant a mistrial is discretionary. I would, nonetheless, decline to grant a mistrial in these circumstances.

[59] *Henderson* has twice been considered by this Court - in *Maligaspe* and *Hawco*.

[60] In *Maligaspe*, the defendant was convicted of two counts of sexual assault by a jury. After the verdict was rendered, he made a mistrial application on the basis that the trial judge's former law firm had been retained by one of the sexual assault complainants, after the jury had rendered its verdict. The trial judge recused themselves and Associate Chief Justice Holmes appointed Justice Gropper to preside over the sentencing proceedings under s. 669.2 of the Criminal Code and directed that the sentencing hearing be heard before her.

[61] In *Maligaspe* the parties disagreed on whether Gropper J. was functus officio and therefore precluded from granting a mistrial. The Crown relied on *Henderson*. The defendant argued *Henderson* took too narrow an approach to the issue of functus, or was wrong.

- [62] Justice Gropper dismissed the mistrial application. Referring to para. 29 of Henderson, and the two exceptions to a trial judge being functus officio following the return of a jury verdict referred to therein, she observed that the jury had returned the verdict that was intended, that the verdict was clear and unambiguous, and that the verdict was properly recorded. She held that in those circumstances the Court was functus officio and could not declare a mistrial.
- [63] Justice Gropper went on to consider the merits of the mistrial application, in the event she was wrong in her conclusion that she was functus. She held there was no reasonable apprehension of bias during the jury trial, and up to and including the verdict, since the complainant had no contact with the law firm until after the jury returned its verdict, and a reasonable person aware of the circumstances, would be satisfied that any previous apprehension of bias, potential of prejudice to the accused, or unfairness in this matter had been removed by the appointment of a new judge. Thus, there was no circumstances giving rise to concerns about trial unfairness in that case.
- [64] In Hawco, the other decision of this Court to consider Henderson, the defendant had been convicted of sexual-assault by a jury. After the verdict he applied for a mistrial on the basis that he was unable to make full answer and defence, and his rights to a fair trial violated, due to the non-disclosure of the redacted portions of the complainant's statement. The defendant argued the Court retained jurisdiction to order a mistrial where an accused's Charter right to a fair trial was compromised, and the failure to order a mistrial would result in a miscarriage of justice: at para. 35. The Court's judgment makes clear the fact that the statement had been redacted was known to the defence during trial: at para. 15.
- [65] In describing the applicant's arguments Justice G. P. Weatherill wrote:
- [36] I consider these submissions weighty and persuasive. The court has a duty to be vigilant to ensure an accused has had a fair trial and that his or her Charter rights are not violated, and the court should act to reverse any unfairness and to prevent a miscarriage of justice: R. v. Taillefer; R. v. Duguay, 2003 SCC 70 at paragraph 65 [Taillefer; Duguay]; R. v. Cowan, 2022 ONCA 432.
- [37] However, while a trial judge must always be vigilant to ensure trial fairness and the preservation of an accused's Charter rights, a trial judge's power to declare a mistrial after the recording of a jury's guilty verdict is still very limited and will only occur in exceptional cases and where exceptional circumstances exist. Factors to consider include the rights of the accused, the public interest, and the effect of a mistrial on the public's confidence in the administration of justice: R. v. Azzi, 2020 ONSC 848 at paragraph 9.

- [38] Having seen the trial through to the discharge of the jury, it is obvious that the trial judge is in the best position to determine and assess the damage that may have been caused, if any, when an accused's Charter rights have been violated, to determine the appropriate remedy, and to declare a mistrial if warranted. The core consideration is, on an examination of the surrounding circumstances and on balance, whether there is a real danger of a miscarriage of justice: *Burke* at paragraphs 24, 72, and 74 to 75, and *R. v. Nasogaluak*, 2010 SCC 6.
- [39] Mr. Hawco argues that the court's findings in *Head*, *Burke*, and *Henderson* should be read narrowly, such that the Court is functus in relation to the jury verdict itself. That is, they should be interpreted to mean that the Court has no power to set aside the jury's verdict itself. He says that he is not suggesting that a jury's guilty verdict should be set aside, but rather a mistrial should be ordered. He contends that the Court must be able to consider issues related to abuse of process or Charter violations, right up to and including the end of sentencing. As he puts it, there is no "Charter-free zone" that exists between a jury's guilty verdict and the conclusion of sentencing.
- [40] Mr. Hawco places heavy reliance on *Lalich*, where Leggett J. had occasion to consider the Supreme Court of Canada's decision in *Head*. Mr. Lalich had been convicted by a jury and, prior to his sentencing, applied for a mistrial on the basis of third-party interference with a jury member. The issue of whether the Court was functus officio was considered. Leggett J. distinguished *Head* on the basis that *Head* was a case focused on the true intention of the jurors and the jury process itself. The issue in *Lalich*, however, dealt with the proper administration of justice which the Court concluded was a task entrusted to the judge. The Court referred to *R. v. Mack*, [1988] 2 S.C.R. 903, 1988 CanLII 224, and concluded that it was not functus officio because it is the guardian of due process, that a trial judge is charged with ensuring proper conduct of that process, and that a judge's jurisdiction to ensure proper conduct is not extinguished by a jury's finding of guilt.
- [41] Mr. Hawco urges me to adopt these findings. He submits that the courts in *Head*, *Henderson*, and others did not intend to limit a trial judge's jurisdiction in cases where there have been allegations of obstruction of justice (as was the case in *Lalich*), or in this case allegations of breaches of Charter rights that may have affected an accused's right to a fair trial. To hold otherwise, he asserts, would be contrary to the Court's duty to ensure the proper administration of justice.
- [42] Interestingly, *Lalich* was considered by the Nova Scotia Supreme Court in *R. v. Hobbs*, 2009 NSSC 257, in relation to a defence mistrial application after the discharge of a jury. Like the Application here, it was based on non-disclosure by the Crown. The Court adopted the findings of the Nova Scotia Court of Appeal in *R. v. Gumbly*, 1996 NSCA 213, *R. v. Lawrence*, 2001 NSCA 44, and two decisions from the Alberta Court of Appeal in *R. v. Halcrow*, 2008 ABCA 319, and *R. v. Ferguson*, 2006 ABCA 36, all of which held that the trial court was functus officio. The Court in *Hobbs* respectively declined to follow *Lalich*.

- [43] Turning to the Application, I accept that the integrity of the judicial system must be maintained, and such integrity includes respecting the individual Charter rights of an accused to a fair trial. However, the weight of appellate authority is that a trial judge generally has no jurisdiction to hear a motion for a mistrial once the jury has been discharged.
- [44] While I appreciate that Mr. Hawco does not seek to have a reconsideration of the jury's verdict but rather a Charter remedy for what he says was a breach of his right to a fair trial, I am bound to conclude that I am functus officio and unable to consider the Application.
- [Emphasis added.]
- [66] Justice G.P. Weatherill went on to consider, in the alternative, the merits of the mistrial application and wrote that in any event, he was not persuaded a mistrial should be ordered.
- [67] The Crown argues I too am bound to follow the previous judgments of this Court on this issue - Maligaspe and Hawco - based on the principle of judicial comity, sometimes referred to as horizontal stare decisis.
- [68] Judicial comity is an important principle intended to bring certainty to the law. In British Columbia, there is a long-standing "rule of practice" for judges exercising judicial discretion when determining whether to go against the judgment of another judge of the Court, described in the frequently cited case of *Re Hansard Spruce Mills Ltd.*, [1954] 4 D.L.R. 590 at 592, 1954 CanLII 253 (B.C.S.C.). The *Re Hansard Spruce Mills* approach provides that a judge should not go against the judgment of another judge of this Court unless (1) subsequent decisions have affected the validity of the impugned judgment; (2) it is demonstrated that some binding authority or relevant statute was not considered in the impugned judgment; or (3) the impugned judgment was 'unconsidered', in the sense of being an immediate decision given without opportunity to fully consult authority: at 592.
- [69] At all times the approach to judicial comity should advance the interests of justice, which will almost always involve following a decision of another judge of the same court, but is not limited to a "rote" application of the *Re Hansard Spruce Mills* approach.
- [70] As I have already noted, *Oberreiter* is a binding authority on this Court. However, it appears to me the Court's judgment in that case was not presented to either Gropper J. or G.P. Weatherill J. It is not referred to in either *Maligaspe* or *Hawco*. That binding authority was therefore not considered by either Gropper or G.P. Weatherill JJ.
- [71] As our Court of Appeal held in *Oberreiter*, "... as a principle of law, a trial judge retains the remedial jurisdiction to declare a mistrial on an issue that goes to trial fairness ...after a jury verdict has been rendered and the jury discharged" (at para. 24).
- [72] I will add that I do not see any conflict between our Court of Appeal's decision in *Oberreiter* and the Ontario Court of Appeal's decision in *Henderson*. In *Henderson*, at para. 34 the Court referred to cases cited by the defendant as support for the principle that the categories

of cases where an abuse of process argument can be raised on a stay application following a jury verdict of guilt are not limited to entrapment, and that the procedure in Mack can apply more broadly, namely: R. v. Lalach, [1989] B.C.J. No. 2386, 1989 CarswellBC 1510 (Co. Ct.); R. v. Robinson, 1999 ABCA 367; R. v. Rogers, [1995] O.J. No. 3114, 1995 CarswellOnt 3717 (Gen. Div.); R. v. White, [1997] A.J. No. 255, (Q.B.); R. v. G.G.M., 2003 NSSC 258. However, writing for the division, at para. 35 Feldman J. determined the Court did "not need to decide, in that case, whether there are any circumstances when the stay procedure in Mack might be extended, because the issue before the Court in Henderson was whether, as a remedy for a Charter breach or for an abuse of process, the trial judge had jurisdiction to declare a mistrial following the recording of a jury's verdict of guilt for pre-trial non-disclosure by the Crown which was known to the defence" (emphasis added). The Court in Henderson concluded the trial judge did not have such jurisdiction, relying on Burke and the Ontario Court of Appeal's decision in Gostick, both of which involved post-verdict mistrial applications based on facts known to the accused during the trial.

- [73] With the exception of Maligaspe, all of the cases referred to where trial unfairness was alleged as a basis for the mistrial, the facts upon which the mistrial application was based were known during the trial. No trial unfairness was found to exist. In Maligaspe, the facts underpinning the mistrial application arose after the jury verdict had been rendered and recorded. Again, Gropper J. found there had been no actual or apparent unfairness in those circumstances.
- [74] I was referred to no authorities in which the trial judge was satisfied the trial had been unfair, or where the alleged unfairness was based on facts unknown by the accused during trial, and yet concluded they had no jurisdiction to declare a mistrial in the circumstances. For the reasons I have outlined I would find such a situation to be perverse and contrary to the interests of justice.
- [75] For all of these reasons, I have concluded that a trial judge retains the remedial jurisdiction to declare a mistrial on an issue that goes to trial fairness after a jury verdict has been rendered and the jury discharged.
- [76] I turn now to the issue of whether the defendant has satisfied his burden to establish a basis for a mistrial in this case.

MERITS OF THE MISTRIAL APPLICATION

[77] The facts include the following:

- 1) Mr. Grabe was the Crown counsel with conduct of the prosecution against the defendant;
- 2) Ms. Eddy was a staff member at the firm of defence counsel, Eric Chesterley;
- 3) Ms. Eddy assisted Mr. Chesterley in the course of his representation of the defendant, including by taking notes for Mr. Chesterley during the trial and attending meetings where trial strategy was discussed;

- 4) Mr. Grabe was in a dating relationship with Ms. Eddy in the lead up to and during the defendant's trial;
- 5) The Crown knew about the relationship;
- 6) The Crown did not disclose the relationship to defence counsel, but "[understood] based on [his] discussions with Ms. Eddy that Mr. Chesterley was aware of [his] relationship with Ms. Eddy prior to the Gagne prosecution";
- 7) Mr. Chesterley knew about the relationship;
- 8) Mr. Chesterley did not disclose the relationship to the defendant until almost five months after the jury returned its verdict;
- 9) The defendant did not know about the relationship until Mr. Chesterley disclosed it to him;
- 10) Neither Mr. Grabe nor Mr. Chesterley advised the Court of the relationship before the jury had rendered its verdict; and
- 11) Had the defendant known in advance that Mr. Chesterley's paralegal was involved in a romantic relationship with the Crown counsel who was prosecuting his case, he would have immediately asked for a new lawyer.

The parties' positions

- [78] The defendant argues the failure of Mr. Chesterley to disclose to him, and the Crown's failure to raise with the Court, before or during the trial, the fact that Crown counsel was dating Mr. Chesterley's paralegal in the lead up to and during his trial for sexual assault, undermines the public's confidence in the administration of justice. He argues his trial both appeared to be, and was, unfair. The defendant argues Mr. Chesterley had a duty to disclose that information to him, and that Crown counsel had a duty to disclose that information to the Court, at the earliest possible stage, so that the continued representation of the defendant by Mr. Chesterley, and the ongoing involvement of Mr. Grabe in the prosecution, could have been addressed and his right to a fair trial preserved.
- [79] The defendant also argues the relationship between Mr. Grabe and Mr. Chesterley's paralegal constituted an actual or apparent conflict of interest that rendered his trial unfair, in appearance and in substance.
- [80] The Crown argues the defendant has failed to establish a basis for a mistrial. Crown argues that post-conviction, a defendant seeking a mistrial must establish an actual conflict of interest, and not just an appearance of one, and that the facts in this case do not give rise to an actual conflict of interest. The Crown argues that even if an actual conflict of interest existed, the defendant has not established an adverse effect on Mr. Chesterley's representation at trial, which it argues is required where conflict of interest is raised after the trial.

Analysis

The solicitor client relationship and the duty of loyalty

- [81] Lawyers are officers of the court whose conduct in legal proceedings may affect the administration of justice: *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235 at 1245, 1990 CanLII 32. The courts have inherent supervisory jurisdiction over both proceedings and lawyers.
- [82] Provincial legislatures have conferred on law societies the power to establish regulations for their member lawyers, who have throughout much of Canada's history been a self-governing profession: *MacDonald Estate* at 1244. Law societies are responsible for the good governance of the legal profession and, in pursuit of that goal, establish general rules applicable to all members of the profession to (i) ensure ethical conduct, (ii) protect the public, and (iii) provide for the discipline of lawyers who breach the standards of conduct a law society has adopted: *Canadian Pacific Railway v. McKercher LLP*, 2013 SCC 39 at para. 15. These rules express the collective views of the profession as to the appropriate standards to which the profession should adhere: *MacDonald Estate* at 1244.
- [83] In their respective roles, law societies and the courts "may properly have regard for the other's views", but courts are not "bound by the letter of law society rules": *McKercher* at para. 16. Nonetheless, an expression of a professional standard in a code of ethics should be considered an important statement of public policy: *MacDonald Estate* at 1246.
- [84] Lawyers, and the firm with which they are associated, owe a duty of undivided loyalty to their clients during the course of the retainer: *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, at para. 135. This duty of loyalty is essential to the integrity of the administration of justice. Public confidence in the integrity of the administration of justice is of critical public importance: *R v. Neil*, 2002 SCC 70 at para. 12. Where the duty of loyalty is betrayed, public confidence suffers.
- [85] The duty of loyalty has three salient dimensions: (i) a duty to avoid conflicting interests; (ii) a duty of commitment to the client's cause; and (iii) a duty of candour: *McKercher* at para. 19; *Neil* at para. 19.

Conflicts of interests

- [86] The avoidance of conflicts of interest is one element of a lawyer's duty of loyalty. Lawyers must avoid situations where they have, or may develop, a conflict of interests. Two primary types of prejudice can arise from a lawyer's conflict of interests: prejudice arising from the lawyer's misuse of confidential information obtained from a client; and prejudice arising where the lawyer's representation of their client is made subordinate to the lawyer's own interests, or those of another client or third person: *McKercher* at para. 23. The latter raises concerns that the lawyer will "soft pedal" their representation of a client in order to serve their own interests, or those of another.

- [87] A lawyer must be able to provide their client with complete and undivided loyalty, dedication, full disclosure, and good faith, and their ability to do so may be jeopardized if their judgment or actions either are, or appear to be, at risk of being clouded, where their client's interests are not the only interest they are considering.
- [88] A conflict of interest exists where there is a "substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or third person": Neil at para. 31; *R. v. Louie*, 2015 BCCA 23 at para. 16; Law Society of British Columbia's Code of Professional Conduct of British Columbia Chapter 3, R. 3.4-26.1 ("Code of Conduct").

Was there a conflict of interests?

- [89] The position of Crown counsel is that the relationship between prosecuting counsel Mr. Grabe and Ms. Eddy, did not create a conflict of interests for Mr. Chesterley. Crown argues the Code of Conduct does not prohibit a lawyer from acting where the lawyer has a personal relationship with opposing counsel. Crown counsel submits that "the notion that a lawyer's representation of a client would be materially and adversely affected simply because the lawyer has a personal relationship with opposing counsel has been rejected in the case law".
- [90] With respect, the cases relied on by the Crown are not analogous to the facts before me. In *Grabber and Janes v. Stewart*, 2000 BCCA 206, the Court upheld the dismissal of the defendant's application to disqualify the plaintiffs' firm. The application had been premised on an alleged conflict of interest arising from the fact that the senior partner of the plaintiffs' law firm was married to the defendant's corporate solicitor. *Grabber and Janes* involved a marriage relationship between two lawyers. At para. 26, the Court held "[w]here there is a clear rule against disclosure, and where the lawyer [I would add, each of the two lawyers] would run the risk of professional discipline for breach of confidentiality, I do not think any inference or presumption that a lawyer will share professional confidences with his or her spouse should arise".
- [91] However, the case before me does not involve a relationship between two lawyers. It involves a relationship between one lawyer and a person who Mr. Grabe acknowledges "does not have any legal training". There is no evidence before me that "paralegals" (however that may be defined) are a profession regulated in the public interest, guided by a code of ethics by which the conduct of members is gauged.
- [92] I make the same comments in respect of *Down (Re)*, 71 BCLR (3d) 175, 1999 CanLII 5781 (S.C.) and *R. v. Clarke*, 2012 NSSC 406 - on which the Crown also relied. *Re Down* involved a marriage of two lawyers. *Clarke* involved two lawyers, who were father and son. The presumption that a lawyer would fulfil their professional duties simply does not apply to Ms. Eddy.

- [93] In my view, the dating relationship between prosecuting Crown counsel and a member of defence counsel's firm, who was part of the defence team, constituted a conflict of interests for Mr. Chesterley. Ms. Eddy, and by extension Mr. Chesterley and his firm, were personally aligned with the prosecutor. There was a substantial risk both that Mr. Chesterley's representation of the defendant would be materially and adversely affected by that relationship. There was a risk that Ms. Eddy, a key member of the defence team, would favour Crown counsel because of that relationship. In addition, there was a substantial risk that confidential information to which Ms. Eddy was privy would be disclosed to Crown in the course of that personal relationship. The risk that such confidential information could have been disclosed to Crown by Ms. Eddy is implicitly acknowledged by the fact that Crown counsel prepared an affidavit in which he deposed that no such evidence was received by him. If there was no risk of disclosure, such an affidavit would have been unnecessary.
- [94] The relationship between Mr. Grabe and Ms. Eddy created a significant risk of both types of prejudice that the rule precluding conflicts of interest is designed to prevent.

Conflicts of interest: the trial test v. the appellate test

- [95] Crown counsel argues that even if the relationship between Mr. Grabe and Ms. Eddy constituted a conflict of interests for Mr. Chesterley, the defendant has not established that the conflict resulted in any adverse effect on his representation at trial.
- [96] Crown submits that when a conflict of interest allegation is made before or during a trial in the criminal law context, the party raising the complaint need only establish that there is "a realistic possibility that an apparent or actual conflict of interest may impact the integrity and fairness of the proceeding, and cause a miscarriage of justice": Louie, at para. 18. However, the Crown argues the situation before me calls for the application of a different test because the conflict of interest is being raised after conviction. Crown argues the "appellate test", which is "more onerous", must be applied where a conflict of interest is raised after conviction but before sentencing, and that under the appellate test, "the focus shifts from the avoidance of harm to a retrospective assessment of whether the conflict caused sufficient harm to the offender to constitute a miscarriage of justice": Louie at para. 19. The Crown submits that "while the offender need not establish actual prejudice, he or she must demonstrate that counsel was in an actual conflict of interest, and that this conflict adversely affected the lawyer's ability to effectively represent the offender's interests": Louie at para. 19.
- [97] In Louie, as in the other cases to which Justice Neilsen referred in which the 'appellate test' was applied (R. v. Robillard (1986), 28 C.C.C. (3d) 22, 1986 CanLII 4687 (O.N.C.A.); R. v. W. W., 100 C.C.C. (3d) 225 1995 CanLII 3505 (O.N.C.A.); R. v. M.Q., 2012 ONCA 224), the facts giving rise to the conflict of interest were known to the defendants either before (W.W.) or during (Robillard and M.Q.) the trial and no objection was taken. I note that is not the situation in the case before me. The defendant was not aware of the relationship at trial. Crown does not argue, reasonably in my view, that Mr. Chesterley's knowledge of the relationship is to be

imputed to the defendant.

- [98] In any event, I have concluded that I need not determine whether the trial test or the appellate test applies in the circumstances of this case. In my view, this application falls to be determined based on the defendant's argument with respect to the concealment of the relationship, from him and from the Court, by both defence counsel and the Crown.

Duty of candour

- [99] A fundamental duty of a lawyer is to act in the best interest of their client to the exclusion of all other adverse interests, except those duly disclosed by the lawyer and willingly accepted by the client: Strother at para. 1.
- [100] In a lawyer-client relationship, the client is reposing confidence in the solicitor and the solicitor is obliged to make full disclosure to the client to enable them to make proper decisions in respect of the matter for which they have been retained.
- [101] As part of the duty of loyalty, a lawyer owes a duty of candour to the client which requires them to disclose any factors relevant to the lawyer's ability to provide effective representation: McKercher at para. 45. This includes conflicts of interest. The lawyer must not keep the client in the dark about matters they know to be relevant to the retainer: Strother at para. 55; McKercher at para. 45. When advising a client, the lawyer must be honest and candid and must inform the client of all information known to the lawyer that may affect the interests of the client in the matter: Code of Conduct, Chapter 3, R. 3.2-2.
- [102] Courts have traditionally imposed a high duty of disclosure on solicitors who have placed themselves in a position of conflict.
- [103] Even if the relationship between Mr. Grabe and Ms. Eddy did not constitute a conflict of interest, the relationship was a material fact that ought to have been disclosed to the defendant by Mr. Chesterley.
- [104] The question of whether a fact is material is to be viewed objectively. Therefore, the fact that Mr. Chesterley acknowledged before me on March 26, 2024, that the defendants "confidence issue" was "reasonable", and the defendants affidavit evidence that had he "known in advance that [his] lawyer's paralegal was involved in a romantic relationship with the Crown Counsel who was prosecuting [his] case, [he] would have immediately asked for a new lawyer" is not the focus. The issue is whether a reasonable solicitor would consider the information material to their client's decision, here, to retain or continue to be represented by Mr. Chesterley.

- [105] Would a reasonable lawyer consider the fact that the prosecuting Crown counsel was dating their paralegal, on whom they were relying in their representation of an accused at trial, a paralegal they were including in solicitor / client communications involving trial strategy, to be material to their client's decision to retain them or continue to be represented by them? I would answer that question with a resounding yes.
- [106] Crown points out that the defendant has not advanced a claim of ineffective assistance of counsel, and argues an appearance of unfairness or an apparent conflict of interest without any prejudice would not undermine the integrity of the justice system and constitute an abuse of process: *R. v. Babos*, 2014 SCC 16, at paras. 31-38. However, *Babos* involved allegations of abuse of process and an application for a judicial stay of proceedings, and its analysis focused on those issues. The application before me is for a mistrial, to cure the trial unfairness caused by the failure for this relationship to be disclosed to the defendant before the trial.
- [107] Second, and more importantly, even if the defendant's concerns with respect to Mr. Chesterley's failure to disclose the relationship to him could only be considered under the rubric of ineffective assistance of counsel, and I did not consider his failure to disclose the relationship to the defendant, that does not end the matter.

Crown's failure to raise the relationship between Mr. Grabe and Ms. Eddy with the Court

- [108] The defendant has argued that when Mr. Grabe assumed conduct of the prosecution, "he was obligated to raise the issue of the relationship, and his failure to do so directly undermined the [defendant's] right to a fair trial". The defendant argues that Mr. Grabe's failure to raise their relationship with the Court prevented the court from exercising its "supervisory jurisdiction to ensure that legal proceedings are fair and conducted in a matter that appears fair to the public": *R. v. Cocks*, 2012 BCSC 1336 at para. 10. He argues that 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.
- [109] In *Cocks*, the Crown applied to disqualify the lawyers representing two of the seven co-accused and who worked at the same firm. Both accused had signed "irrevocable waiver" documents and argued that there is no risk of any conflict of interests as between the lawyers because they wanted "a sharing of all information, including otherwise confidential and privileged information, as they pursue a joint defence strategy": at para. 9. Despite the position advanced by the two accused in response to Crown's application, Justice Silverman was "satisfied that there is a substantial risk of a conflict of interest", since there was a risk the two accused might change their mind in the future, which could impact not only their trial fairness but also that of the other five co-accused if an adjournment mid-trial became necessary, and that "to continue as counsel would result in the possibility of real mischief bearing on the fundamental fairness of the trial and the public's perception of the fairness of the trial": paras. 6, 30.

[110] In *Cocks*, the Crown was aware of information, a conflict of interests, that had the potential to result in an unfair trial. Even though the two defence counsel in that case were aware of the facts said to give rise to the conflict, Crown counsel nonetheless raised the issue with the Court, which permitted the Court to superintend over the legal proceeding and take steps to preserve trial fairness for all of the accused. In my view, it was incumbent on Mr. Grabe, or more appropriately in my view another Crown counsel, to do likewise. Had the Crown done so, the relationship would have been disclosed and the defendant, and the Court, could have addressed the issue in a way that preserved the accused's right to a fair trial.

[111] In *R. v. Davey*, 2012 SCC 75 at para 51, cited in *R. v. Ball*, 2019 BCCA 32, at para. 119, Justice Karakatsanis cited the following passage from Justice Cromwell's judgment in *R. v. Wolkins*, 2005 NSCA 2, at para. 89 with approval:

the courts have generally grouped miscarriages of justice under two headings. The first is concerned with whether the trial was fair in fact. A conviction entered after an unfair trial is in general a miscarriage of justice. The second is concerned with the integrity of the administration of justice. A miscarriage of justice may be found where anything happens in the course of a trial, including the appearance of unfairness, which is so serious that it shakes public confidence in the administration of justice. [Citations omitted.]

[112] Therefore, even absent what I consider to be an egregious breach of Mr. Chesterley's duty of candour owed to the defendant, even if I were not to rely on that breach of duty, the failure of Crown to bring the relationship between Ms. Eddy and Mr. Grabe to the attention of the Court was conduct that was so serious as to constitute a miscarriage of justice. The relationship was concealed from the defendant. For counsel, for both sides, to have failed to disclose that information to the Court, is conduct so egregious that it creates an appearance of unfairness to such a degree that it would taint the administration of justice in the eyes of a reasonable and objective observer: *Ball* at paras. 119, 120. A reasonable and objective observer would consider it a betrayal and a fundamental breach of trial fairness for an accused to learn only after he has been convicted at trial that a member of his defence team had been, at least metaphorically, sleeping with the enemy, by being involved in a personal relationship with the Crown, a relationship known to both counsel, but concealed from him.

[113] The defendant's application is granted. I order a mistrial.

[114] The matter will be adjourned to a fixed date list to set a new trial date.

"V. Jackson J."

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