

CANADA / JUDGMENT

R. v. James

2021 BCSC 1408

COURT

Supreme Court of British Columbia

DECIDED

19 July 2021

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2021 BCSC 1408 R. v. James

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. James,

2021 BCSC 1408

Date: 20210719

Docket: 181243

Registry: Victoria

Regina

v.

Craig Harley James

Before: The Honourable Associate Chief Justice H. Holmes

Ruling re Defence Application to Quash Count 1

Counsel for the Crown:

B. Martland, QC

D.G. Butcher, QC

Counsel for the Accused:

G. Cameron

K. Westell

Place and Date of Hearing:

Vancouver, B.C.

May 27, 2021

Place and Date of Judgment:

Vancouver, B.C.

July 19, 2021

INTRODUCTION

- [1] Craig James, who is charged in a six-count direct indictment, applies for an order quashing the first of the counts, or alternatively an order requiring the Crown to particularize that count.
- [2] In the notice of application he filed, Mr. James contended that count 1 does not contain sufficient detail to give him reasonable information about the charge, or to identify the transaction to which it relates, and that he is therefore unable to adequately prepare a defence. As I will explain below, this problem was largely addressed by statements Crown counsel made at the hearing of the application, which made clear what count 1 alleges and what it does not.
- [3] However, Mr. James contends that count 1 is nonetheless flawed and, given the Crown's statement about what it alleges, is duplicative, as well as duplicitous, and is prejudicial to his own interests as well as to the conduct of a fair and orderly trial.
- [4] For the reasons set out below, the application to quash count 1 is granted in the unusual circumstances of this case.
- [5] I will begin by describing the charges against Mr. James, before outlining and then discussing the parties' positions about whether count 1 is lawfully framed and, in the context of the other charges, allows for a fair and manageable trial.

BACKGROUND

- [6] The indictment charges Mr. James in connection with his role as Clerk of the House for BC's Legislative Assembly. The four counts that require consideration in this application (counts 1, 2, 3, and 5) all allege that Mr. James committed breach of trust in connection with the duties of his office, contrary to s. 122 of the Criminal Code (breach of trust by a public official).

- [7] Before I describe those four counts in more detail, I will briefly note that no issue is raised in this application about the other two counts on the indictment, counts 4 and 6. Counts 4 and 6 allege fraud contrary to s. 380(1)(a) of the Criminal Code, consisting of the same conduct as is alleged in counts 3 and 5, respectively. There is no suggestion by either party that counts 4 and 6 have any bearing on the issues in this application, and it is therefore unnecessary to consider those counts further in the discussion that follows.
- [8] To explain what is charged in the four counts to be considered in this application, it is easiest to begin with the three that are not directly challenged, namely counts 2, 3, and 5. Each of these counts alleges a distinct type of conduct said to have been committed in breach of the duties of Mr. James's office. Count 2 alleges improperly obtaining and keeping a long service award in the amount of \$257,988.38. Count 3 alleges obtaining benefit from the purchase and use of a trailer and wood splitter paid for with public funds. Count 5 alleges submitting claims and receiving reimbursement for personal (not job-related) travel expenses. Each of these types of conduct is alleged to have taken place during a specified period, the longest of these being the period in count 5, which spans almost five years.
- [9] Count 1, by contrast, makes the general allegation that Mr. James used his position to advance his own personal interests over the public good, and that count does not specify the type of conduct by which he is alleged to have done so:

Craig Harley JAMES, between September 10, 2011, and November 21, 2018, inclusive, at or near the City of Victoria, in the Province of British Columbia, being the Clerk of the House for the Legislative Assembly of British Columbia, did commit breach of trust in connection with the duties of his office by using his position to advance his own personal interests over the public good, contrary to Section 122 of the Criminal Code.

- [10] As I briefly noted earlier, Mr. James first brought this application he contended that count 1 does not allow him to prepare a defence because the allegation may apply to an almost infinite range of acts or omissions over more than seven years, Mr. James's entire career in the position of Clerk.
- [11] Counsel for Mr. James referred to this problem in a case management conference before the application was scheduled, and indicated that an application would likely be necessary. Crown counsel then advised that count 1 should be understood as alleging only the conduct that is also the subject of counts 2, 3, and 5. Crown counsel confirmed again, in a letter dated April 13, 2021, to defence counsel, that "[t]he conduct that constitutes the offence in count 1 is that specified in counts 2-6 and set out in the reports to Crown Counsel".
- [12] The potential scope of count 1 nonetheless remained of understandable concern to Mr. James. This was because Crown counsel appeared (subject to what I will say next) to view count 1 as enlarging the scope of admissible evidence in the trial, even though, by the Crown's assurance, count 1 alleges no conduct that is not also alleged in counts 2, 3, or 5.

- [13] The Crown's position on this point was not entirely clear. In the April 13 letter, Crown counsel did not appear to be of this view, saying instead, "[t]he evidence that the Crown intends to lead on count 1 is the evidence the Crown will lead on counts 2-6". However, in a case management conference on April 26, Crown counsel said that count 1 was necessary to include on the indictment in order to permit the admission of evidence of Mr. James's entire career in the office of Clerk, so that his conduct is considered in its entirety. This approach appeared also in the Crown's written submissions filed in response to the application, in which count 1 is described as permitting "a comprehensive assessment of the accused's conduct over time", and allowing the trier of fact to consider the cumulative effect of individual incidents, in order to determine whether the overall pattern of Mr. James's conduct amounted to a breach of the duties of his office. Crown counsel stated further in those submissions that count 1 "preserves [the Crown's] ability to adduce additional evidence - so long as relevant and admissible - to prove any of the counts", and referred to examples of evidence the Crown might adduce under the auspices of count 1. One of those examples, if proven, could in my assessment itself amount to a breach of trust or an attempt at such. Another example the Crown gave of possible evidence to be adduced under count 1 was of "evidence showing a general pattern of extravagant spending".
- [14] The obvious concern at the time was that the Crown may take the position in the trial that count 1 allows the trier of fact to consider instances of wrongful conduct, additional to those alleged in counts 2-6, without those instances having been specified in count 1 or elsewhere. This would leave Mr. James unable to adequately prepare his defence against any such allegations.
- [15] Before I explain how the concern was resolved, I should note that at no time in the proceedings did Crown or defence counsel or the Court suggest that, without count 1 on the direct indictment, the Crown would not be able to lead evidence to situate the conduct alleged in counts 2-6 in its larger context. This topic was canvassed at some length by the Court and counsel during the hearing of this application. In my view, evidence of that nature would be admissible whether or not count 1 is included on the indictment, subject to the usual evidentiary rules relating to the prejudicial effect of the evidence, which rules apply equally across all counts.
- [16] The concern that the Crown may view count 1 as allowing for the admission of evidence of conduct that is not specified in counts 2-6 or elsewhere was largely put to rest during the submissions of Crown counsel in the hearing of this application when Crown counsel described the Crown's position concerning count 1 as follows:
- the criminal conduct alleged in count 1 consists of the same specific incidents as are alleged in counts 2-6, and no more
 - the Crown does not view count 1 as expanding the scope of evidence admissible in the trial

- the Crown will not seek, and would not be entitled, to rely on any evidence of additional unlawful conduct that may emerge during the trial ("fruit that may fall from the tree", in Crown counsel's words) for proof of the conduct alleged in any of the charges, including count 1, and
- the conduct alleged in counts 2-6 must be proven beyond a reasonable doubt before that conduct can ground a conviction under count 1 (subject to the application of the principle in *R. v. Reyat*, 2012 BCCA 311, which I will discuss later).

[17] The clarifications I have set out above appeared to largely address the concern that count 1 as framed did not put Mr. James on sufficient notice of the allegations against him.

[18] However, Crown counsel also concluded their main submissions by observing that the inclusion of count 1 on the indictment allows for a consideration in the trial of Mr. James's entire course of conduct in the position of Clerk, this potentially clouding the intended effect of the Crown's previous clarifications.

THE PARTIES' POSITIONS

Mr. James's Position

- [19] Mr. James submits that if, as the Crown says, the allegations in count 1, on one hand, merely duplicate those in counts 2-6, on the other, and the body of evidence for each is no different, then count 1 should be quashed because its inclusion on the indictment brings no value to the Crown or the trial process, but carries numerous risks, including of confusing the jury, for the various reasons I will outline later. As a duplicative charge, count 1 will also cause Mr. James prejudice, he submits, by increasing the number of charges he faces for the same offences in respect of the same conduct.
- [20] Next, Mr. James submits that count 1 violates the single transaction rule in s. 581(1) of the Criminal Code. In a different but related submission, relying on *R. v. Sharpe*, 2007 BCCA 191, he submits that count 1 is duplicitous and prejudicial to him because it includes allegations of different types of conduct to which different fundamental elements apply, and therefore allows for a verdict of guilt without jury unanimity.
- [21] Finally, Mr. James submits that if count 1 is valid only with the clarification given by Crown counsel that the conduct it alleges is the same as alleged in counts 2, 3, and 5, then the Deputy Attorney General cannot be said to have given his consent to the charge, as s. 577 of the Criminal Code requires.

The Crown's Position

- [22] In response to Mr. James's application for an order to quash count 1, the Crown notes that, absent allegations of abusive conduct - and no such allegations are made here - Crown charging decisions are generally not subject to challenge: *R. v. Ghavami*, 2010 BCCA 126 at para. 41. And, while the Criminal Code does indicate that the Crown's discretion in the framing of charges is not unlimited, courts considering the adequacy of a charge will avoid a formalistic approach or rigid adherence to technical requirements.
- [23] The Crown submits that ample authority supports the charging of either or both of (a) a "rolled-up" count, charging a course of conduct, and (b) counts that overlap on an indictment, in the sense that they relate to the same alleged conduct. As to the former, the Crown describes count 1 as permitting "a comprehensive assessment of [Mr. James's] conduct over time", and allowing the jury to consider "the cumulative effect of various individual incidents", so as to determine "whether the net effect is that there was . . . a pattern of conduct that amounts to a breach of trust", as I mentioned earlier.
- [24] Finally on this point, the Crown submits that the charges as framed cause Mr. James no real prejudice. The Kienapple principle prevents multiple convictions for the same delict or wrongful act. Further, though count 1 will allow members of the jury to rely on different conduct in reaching a conclusion of guilt - a proposition which Mr. James disputes, as I will discuss below - this will cause Mr. James no prejudice, because he would be in the same situation were count 1 the only count on the indictment.
- [25] The Crown does not object to an order for particulars to formally document the position it says it has made clear in less formal ways, namely that count 1 alleges the same conduct as alleged by counts 2-6, and no more.

THE ISSUES

- [26] The parties' positions in my view give rise to the following issues:
1. whether the "Reyat principle" applies in relation to count 1
 2. whether count 1 is duplicitous and also prejudicial to Mr. James as a result
 3. whether as a duplicative charge count 1 may cause prejudice or affect the fairness of the trial
 4. whether count 1 violates the single transaction rule, and
 5. whether the Deputy Attorney General gave the necessary consent to count 1, as amplified by the clarifying statements of Crown counsel.
- [27] I will address those issues in turn, except for the final one which, given my conclusions on other issues, is unnecessary to address.
1. DOES THE REYAT PRINCIPLE APPLY TO COUNT 1?

- [28] This is not an issue raised by Mr. James, who takes the position that the principle does not apply in respect of count 1. However, I find the issue necessary to address, given its close relationship to the other issues Mr. James's application raises.
- [29] As I will explain shortly, the principle would in some circumstances allow a jury to achieve unanimity in finding Mr. James guilty of the offence in count 1 more easily than the jury could in relation to the offences in counts 2, 3, or 5.
- [30] The principle did not originate with *Reyat*, but that case presented it starkly. Mr. *Reyat* was charged with a single count of perjury, encompassing 19 instances of allegedly false statements. His counsel asked for a ruling that, to convict, the jury must be unanimous as to at least one of the alleged false statements, but Justice McEwan did not agree with that conclusion. In a ruling upheld by the Court of Appeal, he held that the jury must be unanimous that the accused committed perjury with respect to at least one of the alleged statements, but need not be unanimous about which one (or more): see 2010 BCSC 1623. Like Ryan J.A. in *G.L.M.*, McEwan J. concluded that the reasoning in *R. v. Thatcher*, [1987] 1 S.C.R. 652, allowing jurors to reach a unanimous verdict of guilt by each relying on different bases of liability (principal vs. party), applies equally when jurors each base their verdict of guilt on different occurrences or particularized allegations within a multi-occurrence charge.
- [31] In general terms (and subject to the comments I will make later) count 1 is such a charge that similarly permits multiple factual routes to a verdict of guilt, with its allegations of three different types of conduct. If the *Reyat* principle applies, then a jury unable to reach unanimity (or "hung") on counts 2, 3, and 5 could nonetheless reach a unanimous verdict of guilt if each juror were satisfied beyond a reasonable doubt of guilt in respect of one (or more) of the types of alleged conduct, even without jury unanimity as to which type.
- [32] Mr. James submits that the *Reyat* principle cannot apply in relation to count 1 because of the breadth and complexity of the elements or ingredients of the offence (under s. 122) it charges. To explain why I am unable to accept this submission, I will first outline the elements of the s. 122 offence.
- [33] Chief Justice McLachlin, writing for the Court, spelled them out as follows in *R. v. Boulanger*, 2006 SCC 32 at para. 58:
1. the accused was an official
 2. the accused was acting in connection with the duties of his or her office
 3. the accused breached the standard of responsibility and conduct demanded of them by the nature of the office
 4. the conduct of the accused represented a serious and marked departure from the standards expected of an individual in the accused's position of public trust, and

5. the accused acted with the intention to use their public office for a purpose other than the public good, for example, for a dishonest, partial, corrupt, or oppressive purpose.
- [34] Mr. James submits that the s. 122 offence is thus somewhat unique, both in its imprecision and in requiring the jury to consider (through the third and fourth elements) the standard of care that applied to the particular conduct alleged. He submits that since the applicable standard of care will necessarily vary according to the conduct in issue, and all five elements of the offence must coexist in relation to an alleged occurrence, the jury would be faced with an overwhelmingly complex task if instructed according to *Reyat*, with inevitable confusion the result. He submits that the *Reyat* principle cannot have been intended to apply to an offence such as that in s. 122.
- [35] In my view, this submission relates more appropriately to whether count 1 brings unmanageable complexity into the trial, and not to whether the *Reyat* principle applies to count 1 as a matter of law.
- [36] I see no reason to depart from the conclusion in *Reyat*, as well as in many other cases, that, to find guilt, the jury must be unanimous in concluding that all of the elements are proven beyond a reasonable doubt in respect of one or more of the types of conduct alleged in the charge, but need not agree as to which of the types of conduct.
2. IS COUNT 1 DUPLICITOUS AND ALSO PREJUDICIAL TO MR. JAMES AS A RESULT?
- [37] Mr. James submits that count 1 is duplicitous and should be quashed because it puts him at risk of significant prejudice. I will explain the basis for that submission shortly.
- [38] In loose terms, a count is duplicitous if it charges more than one offence. Professor Steve Coughlan explains this in *Criminal Procedure*, 4th ed (Toronto: Irwin Law, 2012) at 503, and also distinguishes duplicity from violations of the "single transaction" rule, which I will discuss later:

A duplicitous count is one that appears to charge the accused with committing two different offences, and it is objectionable because the ambiguity prevents the accused from knowing the case to meet. If any ambiguity does not rise to that level, the charge is not duplicitous. This is a distinct requirement from the "single transaction" rule in section 581(1). That rule limits a count to a single factual situation, while the duplicity rule limits it to a single legal issue.

- [39] A duplicitous count is not necessarily objectionable (s. 590(1), quoted below). Moreover, if a duplicitous count may embarrass the accused person in their defence, they may apply at any stage to amend or divide the count (s. 590(2)). Those provisions read as follows:

590 (1) A count is not objectionable by reason only that

- (a) it charges in the alternative several different matters, acts or omissions that are stated in the alternative in an enactment that describes as an indictable offence the matters, acts or omissions charged in the count; or

- (b) it is double or multifarious.
- (2) An accused may at any stage of his trial apply to the court to amend or to divide a count that
 - (a) charges in the alternative different matters, acts or omissions that are stated in the alternative in the enactment that describes the offence or declares that the matters, acts or omissions charged are an indictable offence, or
 - (b) is double or multifarious,

on the ground that, as framed, it embarrasses him in his defence.

[Emphasis added.]

- [40] Mr. James submits that count 1's allegations of different types of conduct engage different elements of the s. 122 offence in such a way as to allow for a verdict of guilt without juror unanimity. This submission raises a separate question from whether the Reyat principle applies, as discussed above. The Reyat principle allows a jury to properly reach unanimity by different factual routes, while this submission contends that the jury could improperly reach unanimity on count 1 by different legal routes. For this latter submission, Mr. James relies on *R. v. Sharpe*, 2007 BCCA 191.
- [41] In *Sharpe*, Ryan J.A. found a count charging indecent assault over a period of time to be duplicitous because the complainant turned 14 during the period, and, on reaching that age, could lawfully consent to the conduct in question. A lack of consent on the complainant's part was not a necessary ingredient in relation to any pre-birthday conduct, but was a necessary ingredient in relation to conduct at age 14 or more. Although the trial judge explained this to the jury, the problem was that the jury was left with two paths to conviction, and some jurors might have taken one path, and the remaining jurors the other (at para. 22). This was not a breach of the single transaction rule, but was rather a violation of the rule against duplicity, because the count encompassed two different substantive offences (at para. 26).
- [42] Justice Ryan distinguished the situation from that in *Thatcher*, where, as I noted earlier, jurors were held entitled to rely on different modes of participation in an offence in reaching a unanimous verdict of guilt. She noted the agreement in the case authorities that the jury may take different factual routes to a verdict of guilt, so long as all jurors agree that the Crown has made out each of the elements of the offence (at para. 29). However, "[c]oterminous with this conclusion is the principle that there must be a single set of ingredients upon which unanimity can be reached" (emphasis added, at para. 30). The ingredients of the offence in issue in *Sharpe* were different before and after the 14th birthday, and the count therefore duplicitous because it allowed the jury to convict without being unanimous about a single set of ingredients.

[43] Mr. James submits that count 1 is no different. He submits that it similarly invites a jury to "consider two [here three] potentially different sets of circumstances in convicting" (Sharpe at para. 21) because of the different standards that apply to each of the three types of alleged wrongful conduct. The following extract from his supplemental written submissions explains:

That the standards in play are all different, leaving aside the disparate conduct, is illustrated in the excerpts from the Reports to Special Prosecutor ("RTSP") which are in evidence. The first refers to a failure to uphold a "fiduciary duty" in relation to the Long Service Award Payment (Count 2). The next refers to a "viola[tion] [of] BCLA expenditure policy a serious and marked departure from the BCLA standard of sourcing items from local Canadian industry", and a "failure to safeguard public funds as defined in BCLA policies" in relation to Count 5. The last raises an allegation that Mr. James' actions in relation to a wood splitter and trailer are a marked departure from a standard governing the use or retention of government property.

[44] The difficulty with this submission is that it does not distinguish the ingredients or elements that compose an offence (and which the Crown must prove beyond a reasonable doubt) from the facts by which those ingredients or elements may be proven.

[45] It is clear from her reasons as a whole that, in speaking of the risk of a jury considering "two potentially different sets of circumstances", Ryan J.A. was referring to the ingredients or elements of the offence, not the facts said to prove them. Reference to the ingredients or elements of the offence is central to her analysis - indeed, the reasoning rests fundamentally on the fact that the complainant turning 14 meant a change in the essential elements. See also Reyat at paras. 43-44.

[46] As discussed earlier, the elements of the s. 122 offence include conduct representing "a marked departure from the standards expected of an individual in the accused's position of public trust" (Boulanger at para. 58). Because of the breadth and generality of this description, and its potential application to a wide range of conduct, the specific ways in which it may do so will inevitably vary with the type of conduct alleged.

[47] The standard expected of an accused person in relation to a particular type of conduct may be informed by reference to written or other policies or protocols concerning the particular subject matter. But the element of the offence remains the same across all types of conduct, namely a breach of the overall standard, not breaches of the policies and protocols that help inform the standard.

[48] It is of interest in this regard, although I do not ground my conclusions on this, that McLachlin C.J.C. in Boulanger, in discussing this element of the s. 122 offence, referred variously to the "standard" and the "standards" of conduct (see paras. 52-58), using the plural somewhat more often in the English reasons and the singular somewhat more often in the French. If the interchangeable use has any significance, it surely indicates that a public official's conduct may be measurable according to multiple standards, and that the focus of the inquiry is on whether the conduct in issue represents a serious and marked departure

from them.

[49] I am not persuaded that count 1 appears to charge two or more offences with different elements. It is therefore not duplicitous, or objectionable for being so.

3. IS COUNT 1 DUPLICATIVE AND PREJUDICIAL AS A RESULT?

Is Count 1 Truly Duplicative?

[50] As discussed, count 1 essentially replicates, in a rolled-up charge, the charges in counts 2, 3, and 5. Mr. James submits that as, thus, a duplicative count, count 1 adds nothing to the indictment with any value to the Crown or the public, and instead gives rise to prejudice to him and to the trial process in various ways.

[51] The Crown responds that the Criminal Code and the governing case authorities give solid support to counts that allege the same conduct, and that count 1 is no different from those.

[52] First, the Crown notes that s. 590(1) of the Criminal Code expressly authorizes alternative charges:

590 (1) A count is not objectionable by reason only that

- (a) it charges in the alternative several different matters, acts or omissions that are stated in the alternative in an enactment that describes as an indictable offence the matters, acts or omissions charged in the count; or
- (b) it is double or multifarious.

[53] Second, the Crown submits that the governing case authorities recognize that one incident may give rise to a number of counts, even if the counts overlap or duplicate each other. For example, in *Ontario (Ministry of Labour) v. Black & McDonald Ltd.*, 2011 ONCA 440, Justice Laskin made this clear at least twice (at paras. 21 and 27):

[21] Here, each count alleges a single offence. No count offends the single transaction rule. Neither Fuller nor Black & McDonald suggested otherwise. Additionally, a number of counts in an information, each arising out of the same incident and even overlapping or duplicating each other, does not create a duplicitous charge. A single incident may give rise to multiple charges.

[27] I accept that some of these counts overlap with others; however, that does not make any of the counts objectionable. A single incident may give rise to more than one charge. As Cory J.A. said in *[R. v. Milberg (1987), 35 C.C.C. (3d) 45 at 49 (Ont. C.A.)]*, "It is manifest that many offences are capable of being committed in more ways than one under the provisions of the Code."

[54] However, the situation in relation to the charges against Mr. James is different from that in *Black & McDonald* and the other cases on which the Crown relies. In those cases, the charges described as overlapping, duplicating, or alternative all charged different types of

offences. In *Black & McDonald*, for example, the charges (for each accused) all related to the same industrial accident that killed a worker, but they alleged violations of different provisions of Ontario's Occupational Health and Safety Act or the applicable regulation. Here, by contrast, not only does count 1 allege the same unlawful conduct as is alleged in counts 2, 3, and 5; it also charges the same Criminal Code offence (under s. 122) in relation to that conduct. While the charges in *Black & McDonald* overlapped, in charging different offences in respect of generally the same conduct, count 1 does not merely overlap with the other counts on the indictment against Mr. James, it duplicates those charges.

- [55] The Crown relies also on *R. v. Hazlewood* (1994), 42 B.C.A.C. 44 at para. 7, and *R. v. Kenegarajah*, 2018 ONCA 121 at para. 17, for authority to allege "a sequence of criminal acts as separate counts, as one global count, or both" (Crown's supplemental submissions at para. 5). However, the same or a similar distinction applies. The charges in those cases each alleged different conduct, different victims, or different offences (in the sense of offences against different statutory provisions), and for that reason were not duplicative charges. In *Hazlewood*, count 1 alleged income tax evasion over the course of a seven-year period, count 2 alleged the same offence over the course of an earlier five-year period, counts 3 through 255 each alleged making false statements on the tax returns of multiple individuals, each count naming a different individual, and counts 256 through 269 alleged other tax offences committed over different periods of time (see *R. v. Hazlewood* (1992), 16 W.C.B. (2d) 171). In *Kenegarajah*, the 92 charges (which are conveniently described in a chart at para. 17), alleged multiple charges of fraud, in addition to some other offences, but each fraud charge related to a different alleged victim (see also *R. v. Kanagarajah et al*, 2012 ONCJ 636).
- [56] Nor do I view count 1 as charging in the alternative, as contemplated by s. 590(1)(a). Count 1, as clarified by Crown counsel's statements, alleges exactly the same conduct as alleged in counts 2, 3, and 5, as amounting to exactly the same Criminal Code offence, not the same conduct amounting to a different offence.
- [57] Count 1 is thus truly duplicative. It is also unusual in so being. Counsel were unable to provide the Court with any case authority in which similarly duplicative charges were considered. (As I have explained, the cases to which the Crown referred involved charges either relating to different conduct charged as the same offence or to the same conduct charged as different offences.)

Is Count 1 Prejudicial to Mr. James or Trial Fairness?

- [58] But the question nonetheless remains of whether, as a duplicative charge, count 1 brings a risk of prejudice to Mr. James or to the fairness of the trial process.
- [59] Mr. James submits that it does so in several ways.

- [60] He submits that count 1 inherently puts him at risk of facing an increased number of verdicts of guilt for the same conduct characterized as the same offence. He submits that the Kienapple principle does not remove this prejudice because, although it would prevent a conviction in respect of the duplicate charge, the duplicate findings of guilt would remain, increasing the stigma to him, particularly in light of the high profile of this case.
- [61] Mr. James submits also that the jury may be misled into treating count 1 as encompassing a broader range of allegations than the Crown (through the clarifying statements of counsel) says is intended. This risk follows, he submits, from the breadth and non-specificity of the count, and (in duplicating counts 2, 3, and 5) its lack of any other apparent purpose on the indictment.
- [62] In a related submission, Mr. James also warns of the risk that, when considering count 1, the jury will take into account additional evidence of alleged improper conduct. He submits that this risk is amplified by the fact that the investigation began with allegations in the dozens, most of them discredited or not pursued, and he posits that count 1 will provide a route for them to re-emerge in the guise of "pattern of conduct" evidence.
- [63] These are all risks to be taken into account.
- [64] Many of them, particularly those relating to evidence the jury may properly consider in relation to count 1, could likely be addressed by (a) careful attention before and during the trial to the basis on which evidence is adduced, and (b) clear mid-trial and final instructions to the jury on that topic.
- [65] Particular caution would be necessary, in that regard, in the approach to the tendering of "context" evidence. I say this because of: (a) the broad scope of the s. 122 offence; (b) the broad time period covered by the charges, encompassing most or all of Mr. James's career as Clerk; (c) the Crown's reference, mentioned earlier, to count 1 allowing for a consideration of Mr. James's course of conduct in the position of Clerk; and (d) the references the Crown made to some potential evidence, such as of an alleged attempt to gain an additional retirement benefit, and evidence showing "a general pattern of extravagant spending". Again, in saying this I also acknowledge that it is undoubtedly open to the Crown, as well as the defence, to lead evidence to put the alleged conduct into its larger context, so that the jury may determine whether, for example, any seemingly improper conduct resulted from accident or mere oversight, or did not represent a sufficient departure from the applicable standard of conduct to ground the s. 122 offence - such is the case in relation to all of the charges, not only count 1.
- [66] However, the duplicative character of count 1 introduces an additional layer of complexity to the jury's task that in my view puts at risk the fairness and integrity of the trial in the following way.

- [67] The risk begins with the Reyat principle, which, as I explained earlier, applies as a matter of law in respect of the three types of conduct alleged in count 1. Of itself, that would not make the trial unfair. Indeed, the Court of Appeal in Reyat found no unfairness in the application of the principle in that case, noting that a finding of guilt always requires all jurors to agree that each element of the offence has been established beyond a reasonable doubt (paras. 34-45). It should be noted, however, that Mr. Reyat faced only the one rolled-up count on the indictment, whereas Mr. James faces the other, duplicative counts as well.
- [68] In this case, an additional difficulty arises, in my view, from the fact that the Reyat principle applies not only to the three types of conduct alleged in count 1. It applies also, at another level of the necessary analysis, in respect of the allegations within count 5 (which are effectively repeated within count 1) that Mr. James claimed and received reimbursement for a variety of travel and other expenses that were actually personal, not business, expenses.
- [69] In short, it would be necessary to instruct the jury to apply the Reyat principle in relation to the expense allegations in count 5 (and in the corresponding consideration of those allegations in respect of count 1), and then again, separately, in respect of the three types of conduct alleged in count 1. At each of those stages, each juror would need to determine whether they are satisfied beyond a reasonable doubt that one or more of the allegations is proven, those being the multiple expense claims in the jury's consideration of count 5 (and the corresponding aspect of count 1), and the three types of conduct alleged in count 1.
- [70] It may well be possible to devise instructions to sufficiently guide the jury through this layered and rather complex task. Crown counsel suggested, for example, that the jury could readily be instructed on counts 2, 3, and 5, respectively, and then on count 1 in essentially the same terms, and I agree that this would be the only manageable approach. Counsel did not address how those instructions would reflect the Reyat principle in relation to the multiple occurrences alleged in count 5 (and its companion fraud count 6), and also in relation to the three types of conduct alleged in count 1. However, I do not doubt that suitable instructions could be crafted, though they would be somewhat mechanical and repetitive.
- [71] However, the instructions specific to count 1 would also be artificial, in the sense that they would direct the jury to a task it could not validly perform except in extremely limited circumstances. (In saying "validly", I am assuming that the jury would not deliberate in such a way as to produce inconsistent verdicts.)
- [72] There are two significant situations in which the jury would have no real role in relation to count 1.
- [73] The first of these would arise if the jury were to find Mr. James not guilty of each of the offences in counts 2, 3, and 5. In that situation, the only reasonable verdict on count 1 would be an acquittal.

- [74] The second situation would arise if the jury were to find Mr. James guilty on one or more of the offences in counts 2, 3, and 5. In that situation, the only reasonable verdict on count 1 would be a verdict of guilt.
- [75] Indeed, in both of those situations it might well be that the jury should be expressly or tacitly directed to acquit or find guilt, as the case may be, on count 1.
- [76] The only situation in which the jury would have a meaningful task, in considering count 1 (after first considering counts 2, 3, and 5), is a third one, namely if the jury were unable to reach a unanimous verdict (that is, if it were hung) on two or more of counts 2, 3, and 5. (If the jury were hung on only one of those counts, it would necessarily be hung also on count 1.) At that point, the Reyat principle could result in a verdict of guilt on count 1, despite the lack of unanimity on two or more of counts 2, 3, and 5.
- [77] One might debate how likely it is that the third situation would arise (i.e. the jury hung on two or three of counts 2, 3, and 5). If it is unlikely to arise, Mr. James's position gains yet further force, that there is little utility to count 1's inclusion on the indictment. But if the situation is not unlikely to arise, that too raises concern because a jury struggling for unanimity in respect of at least two of the three types of alleged conduct may be inclined to turn directly, and prematurely, to count 1, without first giving the appropriate effort to the other counts.
- [78] Further, what would a verdict of guilt on count 1 indicate in the third situation I have identified? Because of the scope of count 1, and the breadth of its allegations, as well as the effect of the Reyat principle at two stages of the jury's analysis, the verdict could reflect a range of vastly different conclusions about the seriousness of the offence. For example, it could mean that all 12 jurors found very serious breaches of trust, albeit different ones, in relation to large amounts of public funds (as alleged in counts 2 and 3). Or, it could mean that 11 jurors found only a few relatively minor improper expense claims (among the many alleged in count 5), while only one juror found not those but a larger scale breach of trust (as in counts 2 or 3). Judges sentencing an offender after a jury's verdict of guilt are regularly required to make findings of fact, consistent with the jury's verdict. However, in relation to count 1 of this indictment, such a task could be exceptionally challenging if the jury were hung on two or more of counts 2, 3, and, in particular, 5, because the jury's verdict would offer unusually little guidance.
- [79] With these observations in mind about some of the risks and challenges count 1 poses, relative to its benefits to the trial process, I turn to consider how count 1 stands in relation to the single transaction rule.
4. DOES COUNT 1 VIOLATE THE SINGLE TRANSACTION RULE?
- [80] The single transaction rule is found in s. 581(1), which provides that each count in an indictment must in general apply to a single transaction. It reads as follows (with subsections (2) and (3) also quoted for additional context):

581 (1) Each count in an indictment shall in general apply to a single transaction and shall contain in substance a statement that the accused or defendant committed an offence therein specified.

- (2) The statement referred to in subsection (1) may be
 - (a) in popular language without technical averments or allegations of matters that are not essential to be proved;
 - (b) in the words of the enactment that describes the offence or declares the matters charged to be an indictable offence; or
 - (c) in words that are sufficient to give to the accused notice of the offence with which he is charged.
- (3) A count shall contain sufficient detail of the circumstances of the alleged offence to give to the accused reasonable information with respect to the act or omission to be proved against him and to identify the transaction referred to, but otherwise the absence or insufficiency of details does not vitiate the count.

[Emphasis added.]

- [81] Subsection (2) addresses the language to be used in stating the charge, and does not bear on the issues in this application except in that it highlights, in para. (c), the importance of notice to the accused of the offence with which they are charged. Subsection (3) was the basis of Mr. James's application as initially framed, but, now that the Crown has clarified what conduct is alleged in count 1, it is no longer directly in issue.
- [82] The rule is flexibly applied. Case authorities make clear that a single transaction may validly encompass multiple instances or occurrences of similar conduct, each in themselves capable of constituting an offence. Justice Ryan so explained in *R. v. G.L.M.*, 1999 BCCA 467 at para. 11:
 - [11] A "single transaction" may validly encompass a number of occurrences, each in themselves capable of constituting an offence, where the acts relate to a similar activity or involve a similar course of conduct. Thus, an indictment will not necessarily offend the single transaction rule even where it spans a lengthy period of time and involves a number of separate incidents in a variety of locations.
- [83] In *G.L.M.*, the accused's multiple alleged sexual acts against his nephew, a young boy, were appropriately treated as a single transaction in the charge: the acts were successive and cumulative, and indicated a continuing sexual interest in the nephew (at para. 12). Similar applications of the "single transaction rule but multiple occurrences" principle are discussed in *R. v. Rocchetta*, 2016 ONCA 577 at paras. 43-44, and *R. v. Stover*, 2020 BCCA 368 at paras. 18-25.

[84] A count may meet the single transaction requirement but nonetheless be subject to amendment or division into two or more counts where "the ends of justice require it":

590 (2) An accused may at any stage of his trial apply to the court to amend or to divide a count that

(a) charges in the alternative different matters, acts or omissions that are stated in the alternative in the enactment that describes the offence or declares that the matters, acts or omissions charged are an indictable offence, or

(b) is double or multifarious,

on the ground that, as framed, it embarrasses him in his defence.

(3) The court may, where it is satisfied that the ends of justice require it, order that a count be amended or divided into two or more counts, and thereupon a formal commencement may be inserted before each of the counts into which it is divided.

[85] In G.L.M., Ryan J.A. noted that generally the ends of justice will require the amendment or division of a count reflecting multiple alleged occurrences when the count as framed will "embarrass" the accused in their defence. This may be where, for example, the accused has different defences in relation to different alleged occurrences. However, the mere fact that multiple occurrences are alleged in a single count, rather than each in a separate count, does not, without more, embarrass an accused contrary to the ends of justice (see G.L.M. at para. 14).

[86] In this case, count 1 encompasses a wide range of allegations over a long period of time, as I have noted. In addition, the three types of alleged conduct may require consideration according to different policies and protocols, as I have noted (although the overriding alleged breach of the applicable standards, as a legal element of the offence, remains consistent).

[87] These characteristics of count 1 are not necessarily fatal to the count being viewed as relating to a single transaction encompassing multiple occurrences, but they at least push the situation to the outer boundaries of this flexible rule. It is difficult to view the allegations in count 1 as relating to a "similar activity" or involving "a similar course or conduct" (G.L.M. at para. 11) except in the broadest of terms.

[88] Were count 1 standing alone on the indictment, I would likely find it just barely within the broad and flexible parameters of the single transaction rule. However, on the indictment Mr. James faces, count 1 stands alongside other, duplicate counts, and in my view the single transaction rule must be considered in that light.

[89] In counts 2, 3, and 5, the Crown has chosen to treat each of the three types of alleged conduct as a single transaction (with count 5 alleging multiple occurrences of one of those transactions, through improper expense claims, as discussed). As Crown counsel submits, courts will respect the Crown's exercise of discretion in the framing of charges on an

indictment, absent some form of abuse in the process, or prejudice to the accused or the trial process, and no abuse is suggested in this case. However, in my view, with the Crown having chosen to characterize each of the three types of conduct as single transactions in counts 2, 3, and 5, it is problematic for the Crown to also characterize those same types of conduct as instances or occurrences of a more broadly conceived single transaction, for the purposes of count 1.

- [90] Even if both ways of conceiving of the s. 122 offences are justifiable - whether as three types of alleged conduct, each representing a single transaction, or, rather, as one "course of conduct" transaction, encompassing three occurrences or types of conduct. The difficulty is in presenting the jury with both concepts, each charged as a s. 122 offence.

CONCLUSION

- [91] Taking this difficulty into account, along with the forms of potential prejudice to the trial process, discussed earlier, arising from the duplicative nature of count 1, as well as the relatively little significance count 1 could validly have in the trial, I conclude that count 1 should be quashed.
- [92] This conclusion is based in part on an application of the various rules I have discussed, but it is also informed by the responsibility of a trial judge to manage the trial in a way that allows the process to be fair. I am not satisfied that with count 1 on the indictment the trial would proceed as smoothly as it should, or that it would be fair, in the sense of presenting the jury with a clear and manageable task.
- [93] I gave consideration to inviting the Crown to choose whether to proceed on counts 2-6, or, rather, on counts 1, 4, and 6 alone. However, the latter option would not solve all of the potential difficulties with count 1, which extend somewhat beyond its duplication of counts 2, 3, and 5.
- [94] In my view, the appropriate remedy is the primary one Mr. James seeks.

ORDER

- [95] The application is granted.
- [96] Count 1 is quashed.

"The Honourable Associate Chief Justice H. Holmes"

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Prepared on 29 October 2026 · Esheria