

CANADA / JUDGMENT

R. v. Vallee

2022 BCCA 11

COURT

British Columbia Court of Appeal

DECIDED

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2022 BCCA 11 R. v. Vallee

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Vallee,

2022 BCCA 11

Date: 20220113

Docket: CA45829

Between:

Regina

Respondent

And

Cory Vallee

Appellant

Restriction on publication: A publication ban has been imposed under s. 486.5 of the Criminal Code restricting the publication, broadcasting or transmission in any way of any information including evidence, submissions, and rulings disclosed during any voir dres or pretrial conferences in these proceedings (R. v. Vallee, BCSC Vancouver No. 25023-81) prior to November 14, 2016, or any information that could identify or reveal the safety and protection measures of undercover police officers and witnesses, including, without limitation, the persons referred to in this

judgment as "Witness A", "Witness B", "Witness C", and "Witness D".

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FILE SEALED IN PART

Before:

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Abrioux

The Honourable Mr. Justice Voith

On appeal from: An order of the Supreme Court of British Columbia, dated
June 1, 2018 (conviction) (R. v. Vallee, 2018 BCSC 892, Vancouver Docket 25023).

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Place and Date of Hearing:

Vancouver, British Columbia

May 11-14, 2021

Place and Date of Judgment:

Vancouver, British Columbia

January 13, 2022

Written Reasons of the Court

Summary:

The appellant was convicted of murder and conspiracy to commit murder after a judge-alone trial. The judge held that the appellant was part of a gang-related conspiracy to commit the murder of several rival gang members, and that the appellant was the shooter of an AR-15 automatic rifle who carried out a murder in a Langley mall parking lot. Midway through trial, the Crown realized that surveillance videos that had been disclosed showed the appellant at a

restaurant with other gang members on the date of the murder, in the general vicinity of the murder. This late-discovered information was treated as fresh disclosure. Defence sought a stay or a mistrial as a result, but the judge rejected this application and instead provided an adjournment and the option to recall certain witnesses. The Crown case rested heavily on the testimony of four disreputable witnesses to which the case *R. v. Vetrovec* applied. They gave evidence of the appellant's involvement in the conspiracy, which required linking the appellant to the nickname "Frankie", and evidence of the appellant's role as the AR-15 shooter. The appellant advanced four grounds of appeal, asserting that the trial judge erred in: (1) declining to grant a mistrial; (2) failing to properly analyze the evidence of the *Vetrovec* witnesses; (3) concluding that the appellant was "Frankie"; and (4) applying uneven scrutiny to evidence supporting the defence theory.

Held: Appeal dismissed. The judge did not make the errors alleged by the appellant on any of the four grounds of appeal. (1) The judge demonstrated no error in law or in principle in declining to grant a mistrial, nor did she misdirect herself or exercise her discretion in a manner resulting in a miscarriage of justice. Mistrials are discretionary remedies of last resort where other remedial options are insufficient to preserve an accused's rights. This court's role where late disclosure occurs mid-trial is assessing whether the judge's exercise of discretion demonstrates reversible error. In this case, it does not. (2) The judge canvassed the histories of the *Vetrovec* witnesses in detail, and specified which portions of their evidence she accepted, which portions she rejected, and her reasoning for doing so, with reference to confirmatory evidence. The judge applied the accepted approach to *Vetrovec* witnesses and did not err in her analysis. The appellant's suggestion that this court should adopt a heightened test for "extreme" *Vetrovec* witnesses is rejected. (3) The judge's analysis of the evidence tying the appellant to the name "Frankie" was comprehensive. She was clear on the inferences she drew and her basis for doing so. The judge did not misapprehend evidence, speculate impermissibly, or reverse the burden of proof. (4) While the judge expressed caution about the evidence of the witness purported to be subject to uneven scrutiny, she had a basis for her assessment of it. Even if uneven scrutiny is a standalone ground of appeal, which is unclear on the jurisprudence, the judge made no such error.

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Reasons for Judgment of the Court:

I. Introduction and Overview

- [1] Cory Vallee appeals from convictions on June 1, 2018, of conspiracy to murder the three Bacon brothers (Jonathan, Jarrod, and James) and their associates between January 1, 2008 and February 8, 2009, and the murder of Kevin Leclair, mid-afternoon on February 6, 2009, in his truck in the parking lot of a shopping mall in Langley, British Columbia.

- [2] That there was such a conspiracy to murder was admitted at trial, as was the fact the murder of Kevin Leclair was in furtherance of the conspiracy. The issue at trial on both counts was identity: was Cory Vallee a member of the conspiracy, and did he commit the murder of Kevin Leclair?
- [3] The reasons for conviction include detailed discussions of meetings, conversations, messages, and movements of a multitude of persons. In these reasons, we have in general kept to condensed versions of the circumstances for the purpose of discussing the relatively discrete issues raised on appeal. Consistent with the reasons for judgment and counsels' predominant style in the appeal, we generally refer to the members of the gangs, the witnesses, and the victim of the murder by their surname, and Cory Vallee by his surname or as the appellant.
- [4] This conspiracy to murder and the shooting of Leclair were part of multi-year violent conduct that included many murders and non-fatal shootings. The conflict concerned turf for the illegal supply of drugs, and was between the United Nations gang, also referred to as the UN gang, on one side and the Bacon Brothers and Red Scorpions gangs on the other. Leclair was a former member of the UN gang who had crossed over to the Bacon Brothers.
- [5] The UN gang was a criminal organization that came to police attention in the 1990's. The judge described the UN gang as running drug lines and supplying drug lines run by independent drug dealers. She described the gang's drug dealing as expanding throughout British Columbia, with connections to Calgary, the United States, and Mexico. The gang also had business in firearms. Most UN gang members had guns. The judge found that a member of the UN gang referred to as Witness D in these proceedings "sold semi-automatic pistols, sub-machine guns, and assault rifles, including the AR-15, within the gang."
- [6] The Bacon Brothers and Red Scorpion gangs were criminal organizations also active in British Columbia during the period of the indictment. They began cooperating together around 2007, and through that cooperation expanded their size and control over illegal drug activity in the Lower Mainland.
- [7] It was not controversial at trial that interference by the Bacon Brothers gang in the UN gang's dial-a-dope operations and supply lines led to bloody and lethal conflict between the adversaries. Included in the years' long violence were two incidents particularly germane to this case: the September 2006 shooting of Jonathan Bacon, and the May 2008 murder of Jonathan Barber. The shooting of Jonathan Bacon gave notice to the Bacon Brothers gang that there "was a hit out on them". The murder of Jonathan Barber was thought by police to be mistaken retaliation by UN gang members for the murder by the Bacon Brothers gang of a close friend of the UN gang's leader.

- [8] The judge accepted that during the relevant period the UN gang had a program of intelligence gathering on the Bacon Brothers/Red Scorpions, that the UN leadership developed a "hit list", and that bounties were attached to various persons in the Bacon Brothers/Red Scorpions, with the largest attaching to the three Bacon brothers, said to have grown from an initial amount of \$100,000 to perhaps as much as \$300,000.
- [9] The killing of Leclair was brazen, occurring in the afternoon in the Langley shopping mall parking lot. When Leclair returned to his truck mid-afternoon February 6, 2009, from a mall restaurant, two gunmen approached. One held a handgun; one held an AR-15 automatic rifle, sometimes described in the proceedings as a machine gun. Leclair attempted to drive away. Both shooters commenced firing. The handgun jammed. At least twenty-two rounds were fired from the AR-15, at least fourteen striking the truck. Leclair was fatally wounded in the head. The essential question on the murder count was whether Vallee was the AR-15 shooter.
- [10] The theory of the Crown was that Vallee was a hired hitman of the UN gang, and was culpable in both the conspiracy to murder and the murder of Leclair. Several eyewitnesses to the murder of Leclair testified, and although they gave general descriptions, none could identify the shooters from a photo line-up.
- [11] The case for the Crown rested largely upon the evidence of four witnesses, all of whom had been highly involved members of the UN gang. They are referred to as Witnesses A, B, C, and D. They were all members of the conspiracy, and all gave evidence implicating Vallee in the conspiracy. Witnesses B and C implicated Vallee in the murder. All four witnesses fit easily into the description of Vetrovec witnesses (*Vetrovec v. The Queen*, [1982] 1 S.C.R. 811) whose evidence is inherently untrustworthy and attracts special scrutiny.
- [12] Witness D was the first of the Vetrovec witnesses to cooperate with the police. He had risen quickly through the ranks of the UN gang, ran the supply to the Abbotsford/Mission drug lines, and acted as a "sort of secretary and assistant in all things". His role in the gang began to diminish in 2008, and he began to cooperate with the police in 2009.
- [13] Witness A was a respected member of the UN gang's "upper echelon" until 2008, when he began to lower his profile with the gang. He was arrested in 2009 and faced a series of charges before cooperating with the police beginning in 2013.
- [14] Witnesses B and C are twin brothers who professed to being "very close", and "above best friends". Witness C described Witness B as the "closest person in my life". Witness B was a respected member of the UN gang but left it around 2011-2012 and, apart from his brother, had no gang ties by the time of his arrest. Witness C was a member of the UN gang from 2000 until his arrest, led the Vancouver group of the gang, and became head of the gang in 2011. Witness B and Witness C began to cooperate with the police when they were arrested in 2016.

- [15] The defence's position was that the evidence of the four Vetrovec witnesses was so flawed, so unreliable, that it must be rejected on both the count of conspiracy to murder and the count of murder. The defence theorized that all four Vetrovec witnesses had concocted a story - from rumours, access to disclosure, and the media - that Vallee was a hired hitman nicknamed "Frankie" or "Panther". The defence further theorized that Witnesses B and C had fabricated the story of Vallee as the shooter of Leclair to protect the real shooter, Witness C, and that Vallee was, at most, a drug dealer for the UN gang.
- [16] Vallee was charged by direct indictment, and tried by judge alone, Madam Justice Dillon. The trial was lengthy, lasting over a year and a half from beginning to delivery of the verdicts. Thirty-six witnesses testified. The four Vetrovec witnesses were in the witness box for approximately 49 days, 21 in cross-examination. Sixty-five exhibits were admitted, some themselves multifid. Those exhibits include: admissions; documents; forensic evidence including ammunition, casings, and firearms; wiretap intercepts; DNA evidence; and video and photographic evidence including three video recordings from the day of the murder that are significant to this appeal. Two of those video recordings were made at a Tim Hortons restaurant near the Langley shopping mall in the hours before the murder, one an interior video showing Vallee and others, and the other an exterior video. The third significant video was made at a Telus store in the mall at the time of the shooting. It shows what are conceded to be the two gunmen running away.
- [17] Because of the admissions, the evidence at trial was focused almost entirely on the issue of the identity of Vallee as a member of the admitted conspiracy and as the shooter of the AR-15.
- [18] In her reasons for judgment, in addition to discussion of the evidence of the murder of Leclair, the judge discussed in some detail evidence of the culture, organization, and practices of the UN gang; documentary and other evidence connecting Vallee to members of the UN gang; the UN gang's practice of referring to persons working for it only by nicknames; surveillance evidence of other incidents associated to the inter-gang conflict and related to the conspiracy; and evidence associating Vallee with participation in the conspiracy. A key issue in Vallee's membership in the conspiracy was whether he was the person referred to by UN gang members as "Frankie" or "Panther".
- [19] The judge discussed the principles applying to Vetrovec witnesses and addressed the evidence of each of the four Vetrovec witnesses in detail. At the end of that analysis, she concluded that "Vallee was an outsider who was brought into the group by [Ian] Kroitoru"; that there was "no evidence that Vallee was involved in drug dealing before [the introduction]"; and that "[f]rom the beginning, he interacted at a high level within the [UN] gang".
- [20] The judge concluded on the count of conspiracy to murder:

- [546] Considering the evidence as a whole, the only logical inference to be drawn from Vallee's participation as described is that he was a member of the conspiracy.
- [547] Vallee was introduced to high level members of the gang by Roueche as "Frankie" and given the role as a hit man in the search to kill members of the Bacon group. Vallee changed his nickname to Panther and participated in the search as described. He received a UN ring for his service.
- [548] There is no reason to doubt that Vallee was a member of the conspiracy. I find Cory Vallee guilty on count 1.
- [21] On the count of murder of Leclair, the judge concluded:
- [691] The decision to kill Leclair was planned and deliberate, with time to assess the situation. Cory Vallee was a member of the conspiracy to kill members of the Bacon group. Leclair was a target with a price on his head. Vallee was at the Thunderbird Centre intending to kill the Leclair target and he achieved that goal.
- [692] The murder of Leclair was a contracted killing. While it was not established that Vallee did receive money for the killing of Leclair, it was intended that he would receive payment from D'Monte as bounty for the murder.
- [693] It is established beyond a reasonable doubt that Cory Vallee is guilty of the first degree murder of Kevin Leclair. Cory Vallee is guilty of first degree murder as set out in count 4 of the indictment.
- [22] In addition to the comprehensive reasons for judgment, the judge issued as "Appendix A" an Executive Summary of the decision. In it, she explained the summary's import:
- [2] The reasons for judgment following the trial of Cory Vallee for conspiracy to murder and first degree murder are lengthy and detailed such that counsel for the Crown and for Mr. Vallee have consented to an executive summary of the findings being presented with the verdict on this day. This summary does not supplement the reasons for judgment and the reasons for judgment prevail if in conflict with anything that is stated here. The substantive reasons for judgment will be released immediately following the verdict and this executive summary will be Appendix A.

II. Grounds of Appeal

- [23] Vallee advances four grounds of appeal. He says the judge erred in law:
1. by failing to grant a mistrial as a result of late disclosure;
 2. by failing to properly analyze the evidence of Vetrovec witnesses;
 3. in concluding that he was the person nicknamed "Frankie" by relying on misapprehensions of the evidence, speculation, and reversing the burden of proof; and

4. by applying different levels of scrutiny to the evidence that supported the defence theory as opposed to that which supported the Crown theory.

[24] We turn now to the grounds of appeal.

III. Discussion

1. The Mistrial Issue

[25] Vallee contends the judge erred in law in failing to declare a mistrial as a remedy for late Crown disclosure.

[26] The late disclosure said by Vallee to require a mistrial was made during the Crown's case. It consisted of several videos, some of which were found to place Vallee and other witnesses at a Tim Hortons restaurant near the scene of the crime three hours before Leclair was murdered. Soon after that disclosure, the Crown advised that it intended to lead evidence from an alibi witness, Peter Redekopp, relating to the defence's alternate suspect theory that Witness C had been the AR-15 shooter. This theory had emerged during the defence's cross-examination of Witness C.

[27] These two events caused the defence to file an application for an order declaring that Vallee's right to make full answer and defence under ss. 7 and 11(d) of the Canadian Charter of Rights and Freedoms had been infringed. Vallee sought a stay of the trial pursuant to s. 24(1) of the Charter or, alternatively, a declaration of mistrial.

[28] The Crown conceded, and the judge agreed, that the Crown's failure to disclose the Tim Hortons videos to the defence in a timely manner constituted a breach of Vallee's s. 7 Charter rights. In her reasons denying a stay and a declaration of mistrial, indexed as 2017 BCSC 1224, the judge determined that the "exceptional remedy of a stay" was not appropriate in the circumstances. She also declined to order a mistrial and considered that Vallee's fair trial rights could be otherwise addressed and protected. Finally, the judge concluded that the Crown's decision to call Redekopp did not give rise to a s. 7 breach. This ground of appeal challenges the ruling denying a declaration of mistrial as a remedy for the late disclosure.

[29] Neither the judge's refusal to grant a stay, nor her conclusions in relation to the Crown's decision to call Redekopp are at issue in this appeal, and we have not addressed these matters further.

a) Background and the Ruling

[30] In her mistrial reasons, the judge reviewed the history of the proceedings leading up to the application. She also reviewed the chronology pertaining to the Tim Hortons videos in detail. A brief summary of the history will suffice here.

- [31] In February 2009, as part of the investigation into the murder of Leclair, the police obtained video surveillance from numerous locations near the scene, including from a Tim Hortons restaurant. The videos from the Tim Hortons came from six interior cameras and one exterior camera, with images taken from 07:00 to 17:00 on the day of the murder. One interior video showing Vallee inside the Tim Hortons and the exterior video are significant to this ground of appeal.
- [32] The existence of the Tim Hortons videos was disclosed in the first disclosure package provided to the defence. However, the videos themselves were not disclosed until partway through the trial, on April 18, 2017, after various eyewitnesses had testified and on the first day of Witness D's evidence. The Crown acknowledged that the videos should have been disclosed after February 2016, when Witnesses B and C provided police statements indicating they had attended the Tim Hortons on the day of the murder with Vallee. The police had erroneously assumed, for various reasons, that the videos had already been disclosed to the Crown, and did not do so until April 4, 2017.
- [33] Based on two separate reviews of the videos undertaken by the police in November and December 2016, the summaries of which were provided to the defence, the Crown advised the defence that the videos contained nothing of significance, except a possible sighting of Witness B at around 15:00. At that time, both the Crown and the defence were content to rely on the police reviews and did not independently review the videos.
- [34] Witnesses D and C finished testifying by May 18, 2017. As Witness B began testifying, the defence sought an admission from the Crown on the limited nature of the evidence in the Tim Hortons videos. Before agreeing to the admission, the Crown decided to review the videos to ensure the police analysis was accurate. On June 1, 2017, the Crown reviewed some of the videos and discovered on one of the interior videos an image of what appeared to be Vallee using the bathroom at the Tim Hortons shortly before 13:00. The Crown advised the defence of their observations the next morning. In further reviews of the videos, the Crown observed in the exterior video a grey Nissan Murano parked nearby. On June 3, Witness B gave a police statement after he had finished his examination in chief. He identified Vallee in the interior Tim Hortons video and said he believed he was the driver in the Murano in the exterior Tim Hortons video.
- [35] The defence was provided with a video recording of that interview of Witness B on June 6. Two days later, the defence notified the Crown that it intended to bring its application for a stay of proceedings or a mistrial. The application was heard over six days commencing on June 26, 2017.

- [36] In the mistrial hearing, the defence contended that the only way to address the prejudice created by the late disclosure of the Tim Hortons videos was to order a stay of proceedings or to declare a mistrial. The defence said that prejudice to Vallee and to the fairness of his trial could not be resolved by adjournments, recalling witnesses, or the exclusion of evidence. The defence indicated, in the further alternative, that if the trial was to proceed and no evidence was excluded, it would require an adjournment of 8-12 weeks.
- [37] In her mistrial reasons issued July 14, 2017, the judge recorded the Crown's concession that there had been a breach of the Crown's duty to disclose and that Vallee had been prejudiced by the late disclosure in his right to make full answer and defence. She observed that the "videos cut both ways in terms of benefit" and that "[t]he videos did not disclose completely new information".
- [38] The judge addressed the legal framework for the application. She determined that the exceptional remedy of a stay was not warranted in the circumstances, the Tim Hortons video evidence should not be excluded, and she would not declare a mistrial because, in her view, the trial could be repaired.
- [39] As a remedy for the late disclosure, the judge ordered the trial be adjourned for a period of time to be determined at a subsequent trial management conference. She further directed that the defence could recall a number of witnesses, including four eyewitnesses, Witness B who had just completed his direct evidence when the trial adjourned, and Witness C.
- b) Standard of Review on the Mistrial Issue
- [40] Whether to declare the remedy of a mistrial as a response to events emerging at trial is a decision engaging the exercise of judicial discretion. In *R. v. Cawthorne*, 2016 SCC 32, Chief Justice McLachlin reaffirmed the discretionary nature of a judge's decision whether to declare a mistrial, referring to *R. v. Khan*, 2001 SCC 86:
- [39] The legal principles on the granting of a mistrial were discussed by LeBel J. in his reasons in *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823. Once an error has occurred at trial, a trial judge may, in deciding whether to grant a mistrial, consider whether the error has been or can be remedied at trial: para. 79. The decision of whether to grant a mistrial "falls within the discretion of the judge, who must assess whether there is a real danger that trial fairness has been compromised": *ibid.* That discretion is not absolute, but "its exercise must not be routinely second-guessed by the court of appeal": *ibid.*
- [41] Mistrials are a species of remedy available under s. 24(1) of the Charter. In *R. v. Babos*, 2014 SCC 16, Justice Moldaver for the majority described the standard of review in respect of s. 24(1) remedies, referring to cases including *R. v. Regan*, 2002 SCC 12, and the late disclosure case *R. v. Bjelland*, 2009 SCC 38, using the classic descriptions applied to the exercise of judicial discretion:

- [48] The standard of review for a remedy ordered under s. 24(1) of the Charter is well established. Appellate intervention is warranted only where a trial judge misdirects him or herself in law, commits a reviewable error of fact, or renders a decision that is "so clearly wrong as to amount to an injustice" (Bellusci, at para. 19; Regan, at para. 117; Tobias, at para. 87; R. v. Bjelland, 2009 SCC 38, [2009] 2 S.C.R. 651, at paras. 15 and 51).
- [42] In other words, on a s. 24(1) remedy case, deference must be accorded the judge in the exercise of her judicial discretion, just as it must in all other cases reviewing a judge's exercise of discretion. The deference recognizes, in particular, that the judge has broad latitude to find the balance between competing interests. We have approached this ground of appeal, and other issues in the appeal challenging the judge's exercise of discretion, from that lens.

c) The Law of Mistrial

- [43] The remedy of a mistrial has its origins in an accused's right to a fair trial. In Bjelland, Justice Rothstein for the majority, considering the appropriate approach to a problem of late disclosure, addressed the meaning of a "fair trial":
- [22] While the accused must receive a fair trial, the trial must be fair from both the perspective of the accused and of society more broadly. In R. v. Harrer, [1995] 3 S.C.R. 562, McLachlin J. (as she then was) provided guidance on what is meant by trial fairness. She stated, at para. 45, that:

At base, a fair trial is a trial that appears fair, both from the perspective of the accused and the perspective of the community. A fair trial must not be confused with the most advantageous trial possible from the accused's point of view: R. v. Lyons, [1987] 2 S.C.R. 309, at p. 362, per La Forest J. Nor must it be conflated with the perfect trial; in the real world, perfection is seldom attained. A fair trial is one which satisfies the public interest in getting at the truth, while preserving basic procedural fairness for the accused. [Emphasis added in Bjelland.]

- [44] In her mistrial reasons, the judge discussed the circumstances in which a mistrial is an appropriate remedy for late disclosure:
- [66] A mistrial must be necessary to prevent a miscarriage of justice where nothing short of a new trial can repair the late disclosure (R. v. Burke, 2002 SCC 55 at paras. 74-75; R. v. Ryan, 2012 NLCA 9 at para. 134; McKinnon at paras. 73-76). A mistrial can only be granted in the "clearest of cases" where there is a "fatal wounding of the trial process" (R. v. Arnold, 2001 BCCA 374 at para. 18; McKinnon at para. 74). It is a remedy of last resort which should not be granted unless other less extreme measures are incapable of preventing a miscarriage of justice (R. v. Muller, 2013 BCCA 528 at para. 66).

- [67] In most cases, the appropriate remedy will be to adjourn the trial to allow defence to prepare for the disclosure. However, this may not be appropriate if the result would be to unreasonably delay the trial of an in-custody accused (Horan at para. 32). In such cases, exclusion of the evidence may be more appropriate.
- [45] There is a bounty of largely consistent cases describing the criteria for a mistrial. These recognize that a mistrial should only be declared where lesser remedies will not adequately preserve the accused's right to a fair trial or will not remedy the prejudice suffered by the accused: The comments of Madam Justice Newbury in *R. v. Pires*, 2004 BCCA 33, aff'd 2005 SCC 66, are apposite:
- [59] It is not necessary for me to decide whether the Court's comments in *Khan* are entirely consistent with the standard referred to in *Lawson* [(1991), 1 B.C.A.C. 204] and *Paterson* [(1998), 122 C.C.C. (3d) 254 (B.C.C.A.)] ... It may be that the requirement for a "fatal wounding of the trial process" in the "clearest of cases" is simply a more colourful expression of the principle enunciated in *Khan* that if it was "likely that the exposure by the jury to the tainted information could have affected the jury to the point that the entire trial was compromised and that no remedy other than a new trial was available", the mistrial must be granted.
- [46] In *R. v. Muller*, 2013 BCCA 528, Madam Justice Stromberg-Stein (in dissent) provided this summary, in a passage adopted in *R. v. Montgomery*, 2016 BCCA 379:
- [66] Having regard to the authorities, I conclude a mistrial is a discretionary remedy of last resort that should not be granted unless other, less extreme, corrective measures are incapable of preventing a miscarriage of justice: *Chiasson* [2009 ONCA 789] at para. 14. A mistrial should only be granted "in the clearest of cases", where there is a "fatal wounding of the trial process". A "fatal wounding of the trial process" is "a wounding to the administration of justice which cannot be cured by remedial measures": *Paterson* at para. 93, citing *Lawson* at 209 (emphasis added).
- [47] Several descriptions of the standard for a mistrial have been employed over the years, including that a mistrial is a "last resort": *Muller*, *Montgomery*, and *R. v. J.H.*, 2020 ONCA 165; a mistrial is reserved for the "clearest of cases" where there has been a "fatal wounding" of the trial that cannot be cured by other remedial measures: *Lawson* at 209; *Paterson*, *Muller*, and *Montgomery*; and a mistrial should be ordered where there is a "real danger" of prejudice to the accused or danger of a miscarriage of justice: *R. v. Burke*, 2002 SCC 55, *Cawthorne*, and *R. v. Ryan*, 2012 NLCA 9.
- [48] A mistrial is certainly an exceptional remedy. In *R. v. O'Connor*, [1995] 4 S.C.R. 411, Justice L'Heureux-Dubé discussed the principles for fashioning a remedy for a breach of an accused's right to disclosure under the Charter, in the context of mid-trial disclosure. She described a mistrial as a remedy that may be appropriate in "extreme circumstances", where measures such as permitting the defence to recall certain witnesses, or adjournments to permit the defence to subpoena additional witnesses would be inadequate.

- [49] In *Burke*, the court gave examples of a variety of situations which may merit a declaration of a mistrial, including late disclosure. In *Bjelland*, Justice Rothstein concluded that failure to disclose evidence, itself, was not sufficient to obtain a mistrial - the accused must show actual prejudice to his s. 7 right to make full answer and defence. If there is such prejudice, the court must consider whether less extreme remedies will adequately preserve the accused's right to basic procedural fairness, balanced with the public's interest in getting at the truth, always recognizing that admission of the late disclosed evidence must not compromise the integrity of the justice system.
- [50] The impact on the accused's ability to make full answer and defence, as well as the remedial options available to the court, will vary depending on the circumstances of the error or defect in proceedings: *R. v. Dixon*, [1998] 1 S.C.R. 244. Where, as in *Bjelland*, the incident and application arise prior to trial, the options available to a judge to remedy any prejudice to the accused's Charter rights may be broad. Where the issue arises at or near the conclusion of the trial, such as in *R. v. Burgar*, 2018 BCCA 291, and *Burke*, the remedial options available to the judge to save the trial may be limited.
- [51] Vallee refers to various authorities, including *Ryan*, *Cawthorne*, *Muller*, *Burke*, and *Khan*, that have applied the "extreme remedy" or "last resort" or "real danger" standards. At the same time, relying on *Ryan*, *R. v. Arnold*, 2001 BCCA 374, and *R. v. Jiang*, 2018 ONCA 1081, he says the judge in this case should have relied on *Dixon* and asked whether there is a "reasonable possibility" that the right to a fair trial was impaired.
- [52] Each of the three cases just mentioned arose from instances of late disclosure but are, in our view, distinguishable from the present case in several ways.
- [53] *Arnold* and *Jiang* rely on *Dixon*. *Dixon* is a case of post-conviction disclosure of various police statements in a case of five accused. The existence of the statements had been disclosed by the Crown prior to trial but, for lack of due diligence on the part of counsel, the statements were not produced to the accused until after trial. The Nova Scotia Court of Appeal and the Supreme Court of Canada dismissed *Dixon*'s appeal. The Supreme Court in the other four cases dismissed two appeals, allowed one appeal in part, and allowed one appeal where the accused's counsel was found to have exercised due diligence: *R. v. McQuaid*, [1998] 1 S.C.R. 285; *R. v. Robart*, [1998] 1 S.C.R. 279; *R. v. Smith*, [1998] 1 S.C.R. 291; *R. v. Skinner*, [1998] 1 S.C.R. 298.
- [54] *Dixon* provides guidance on analyzing and remedying instances of late Crown disclosure, in light of the broad right to disclosure stated in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326. In *Dixon*, the court distinguishes the right to disclosure from the s. 7 Charter right to make full answer and defence - a breach of the former does not mean impairment of the latter. The court explains that impairment of the right to make full answer and defence is established where the accused demonstrates, on a balance of probabilities, a "reasonable possibility the non-disclosure affected the outcome at trial or the overall fairness of the trial process" (emphasis in original), in which case the accused is entitled to a remedy under s.

24(1) of the Charter. The court then notes that "where the remedy sought is a new trial, an accused need only persuade the appellate court of the reasonable possibility that the failure to disclose affected either the outcome at trial or the overall fairness of the trial process, and nothing more".

[55] The court in Dixon never uses the term "mistrial", and the remedy of a mistrial was never available because the late disclosure was post-conviction. Rather, the question was whether, looking back at the trial in light of the post-conviction disclosure, the breach of the accused's right to disclosure amounted to a breach of his s. 7 right to make full answer and defence requiring the remedy of a new trial under s. 24(1) of the Charter.

[56] The court noted the post-conviction timing of the late disclosure:

[31] The right to disclosure is but one component of the right to make full answer and defence. Although the right to disclosure may be violated, the right to make full answer and defence may not be impaired as a result of that violation. Indeed, different principles and standards apply in determining whether disclosure should be made before conviction and in determining the effect of a failure to disclose after conviction. For instance, where the undisclosed material is available for review at trial, the presiding judge will evaluate it in relation to the Stinchcombe threshold to determine whether the Crown breached its obligation to disclose by withholding the material. If it has, an order for production or perhaps an adjournment will be the appropriate remedy. Obviously, these remedies are no longer available after conviction. At this stage, an appellate court must determine not only whether the undisclosed information meets the Stinchcombe threshold, but also whether the Crown's failure to disclose impaired the accused's right to make full answer and defence. Where an appellate court finds that the right to make full answer and defence was breached by the Crown's failure to disclose, the appropriate remedy will depend on the extent to which the right was impaired.

[*Italic emphasis in original; underline emphasis added.*]

[57] A trial judge faced with undisclosed evidence that emerges during the trial is required to take a prospective approach to consider whether there is a real danger that less extreme remedies, such as an adjournment and the recalling of witnesses, will be inadequate to safeguard the accused's right to a fair trial.

[58] Vallee's case, of course, is a case of mid-trial disclosure and so the more speculative question asked in Dixon of the potential impact of the post-conviction disclosure on the trial does not arise for us. Rather, we are asked to review the approach of the trial judge who occupied the best judicial position to assess the impact of the disclosure and the available opportunity to provide a remedy for it.

- [59] Because the late-disclosed evidence in this case was before the judge, our task is to determine whether the judge's exercise of discretion in fashioning an appropriate remedy demonstrates a reversible error. This invites the highly deferential approach described by the majority in Khan:
- [7] In my view, if the [irregularity giving rise to the mistrial application] had not been detected until after the trial, it might have been possible to view this ground of appeal as falling under s. 686(1)(a)(iii) [miscarriage of justice]. However, this matter was raised at trial, and the possibility of a mistrial was considered by the trial judge on two occasions. A proper characterization of the issue before us, in my opinion, is whether or not the trial judge made an error of law in refusing to declare a mistrial
- [60] We turn now to the three cases relied upon by Vallee: Arnold, Ryan and Jiang.
- [61] The circumstances in Ryan are significantly different than those before us. In Ryan, the accused represented himself against a charge of second degree murder. The Crown provided late, mid-trial, disclosure. The judge considered whether a mistrial was warranted but, for several reasons, did not declare one. Some of these reasons included Ryan's opposition to a mistrial and the court's concern of further trial delay.
- [62] Finding that the appellant "was not able to conduct his own defence without the assistance of legal counsel and that the trial judge should have taken steps, on her own motion, even though [the appellant] at the time opposed it, to declare a mistrial", the Court of Appeal allowed the appeal and ordered a new trial, Justice Rowe, dissenting. In particular, the court emphasized that the trial judge had noted Ryan's inability to conduct a proper defence more than 60 times. The majority referred to the "reasonable possibility" standard but also said at para. 134: "[t]he test for determining whether a declaration of a mistrial is indicated is, therefore, whether: (i) there is a real danger of prejudice to the accused; or (ii) it is necessary to prevent a miscarriage of justice".
- [63] Arnold is also a different case than the one before us. Unusually, it concerned a second application for a mistrial to remedy late disclosure. The judge declined to engage an analysis on that application and said that only the Court of Appeal could determine the effect of the disclosure issues on the trial process. The trial proceeded and Arnold was convicted. On appeal, this court set the verdict aside and ordered a new trial, observing that the judge's approach had put this court into the position of determining for the first time the potential effect of the late disclosure. As did Justice Stromberg-Stein in Muller, we consider Arnold is, at its heart, a case of a trial judge misunderstanding his role and failing to perform the analysis required on the issue presented, thereby reducing the deference a mistrial decision would normally attract.
- [64] Finally, it is also our view that Jiang presents materially different circumstances than the case before us. Although it employs the "reasonable possibility" standard to a case of mid-trial disclosure in finding that the trial judge had erred in not declaring a mistrial, it does not provide a guide to the standard the judge in this case should have applied. The late

disclosure in Jiang came partway through the appellant's cross-examination, and it was expected by all involved - the appellant, the Crown, and the judge - that any unfairness from the late disclosure could be neutralized before the jury by an upcoming expert witness who had testified at the hearing of the mistrial application. That expert's evidence, however, was different before the jury than expected, and the expert said it was beyond his competence to express an opinion on the relevant issue. The Court of Appeal concluded those circumstances raised a reasonable possibility that the non-disclosure affected the overall fairness of the trial process. In the present case there is no alteration of the landscape as there was in Jiang - we are not called on to consider different circumstances than were evident to the judge when the ruling was made.

[65] The present case is, then, markedly different from Ryan, Arnold, and Jiang. Vallee's position before us is not based on post-trial disclosure or on events after the mistrial ruling. We would not adopt the arguably lower standard of "reasonable possibility" to the contested mistrial ruling in this appeal.

d) Did the Judge Err?

[66] Whether a mistrial, as opposed to some other remedy, was necessary to avoid a miscarriage of justice engages the pertinent surrounding circumstances. The trial was conducted before a judge without a jury. To some degree this both simplified and broadened the realistic remedial options available to the judge.

[67] The judge had managed the case before trial for some time and so was familiar with the history of the proceedings, the progress and extent of disclosure by the Crown, some of the choices made by counsel before the trial, various applications that had preceded and punctuated the trial, and the evidence that had been led. She knew a great deal about the case.

[68] The police investigation leading to the trial had spanned years. The trial itself was long. We are advised the Crown disclosed the astonishing volume of more than one million documents. The materials on appeal indicate that the Crown and defence exchanged more than 500 letters and had ongoing necessary communications to advance the case to a focused trial. Concerning the great effort made in respect of disclosure, the judge observed:

[62] The disclosure process is, by its nature, prone to human error and vulnerable to attack (Dixon at para. 37). The standard is not one of perfection (O'Connor at para. 194; R. v. Trang, 2001 ABQB 1091, [2001] A.J. No. 1694 at paras. 17-22). As stated in R. v. Cody, 2017 SCC 31 at para. 58, "[m]istakes happen".

[69] In considering potential remedies for the late mid-trial disclosure and the possibility of adjournment, the judge observed that the trial "proceeded much as scheduled, with the exception of witnesses taking longer than expected in testimony, resulting in some rescheduling. This would be the first significant adjournment, if such a remedy [were] granted." She was entitled to consider this feature; the number and nature of adjournments

attributable to the Crown is relevant to determining an appropriate remedy under s. 24(1): O'Connor at paras. 79-81.

- [70] As we have discussed, the timing of the late disclosure is both relevant and important. The disclosure of the Tim Hortons videos here occurred mid-trial, opening the enquiry into the available remedies.
- [71] Vallee accepted that the late disclosure of the Tim Hortons videos was not the product of Crown mala fides. He did say it reflected gross negligence or indifference on the part of the police and he proposed that for the purposes of disclosure, the police and Crown were indivisible. The judge did not accept this submission. While she said that the "large volume of material to review [did] not explain the error in failing to identify Mr. Vallee" made by the police, she was satisfied there was nothing in the behaviour of the police that elevated these mistakes, and she found that the mistakes were attributable to inadvertence and oversight.
- [72] Ultimately, however, the reason for late disclosure by the Crown is of limited, if any, relevance absent behaviour that compromises the integrity of the justice system: *R. v. T. (L.A.)* (1993), 14 O.R. (3d) 378 (C.A.); *Khan. Vallee* does not say that late disclosure of the Tim Hortons videos compromised the integrity of the justice system.
- [73] Vallee raises numerous concerns with the judge's decision not to order a mistrial. Some are couched in terms of misapprehension by the judge of evidence. For example, Vallee points to the judge's finding that the "videos did not disclose completely new information" and says this statement is not accurate because the video was the only real evidence of his physical presence near the location of the murder close to the time of the shooting, and the video presented new objective evidence of what he and Witness B wore that day.
- [74] We do not agree with this characterization of the reasons or the evidence. It seems to us that the judge was correct to observe that the videos did not disclose "completely new information", as demonstrated by two examples. First, the presence of Vallee at the Tim Hortons restaurant and meeting with Witness B in a grey Murano had been disclosed in the statements of Witnesses B and C that were provided to the defence in August 2016. Second, the Crown, in its brief opening statement at the outset of the trial, specifically referred to a meeting with the accused at a "food location" on the day of the murder as part of the anticipated evidence from Witnesses B and C.
- [75] The judge was also correct, on the other hand, in recognizing that the videos had changed the trial landscape in some respects. She expressly recognized that the video evidence is real evidence of the physical presence of Vallee near the location of the Leclair murder some hours before the shooting. She also said, "[w]hile the Crown did not favour recall of eyewitnesses given that their observations were fleeting and scarce, some did provide evidence of clothing worn by the suspects and it cannot be said that cross-examination would have been the same if the clothing worn by Mr. Vallee three hours before the shooting had been known." It was this latter conclusion that caused her to allow four eyewitnesses to be recalled for cross-examination. Having directly addressed the very issues that are now

raised by Vallee, it cannot be said that she misapprehended either the evidence before her or the significance of the Tim Hortons videos.

- [76] Vallee also contends that the judge failed to consider how the video would have altered important defence decisions had it been disclosed before trial, and gives several examples. He says, for example, that he might have elected a different mode of trial.
- [77] Vallee did not seek a new trial by jury in his notice of appeal as permitted under s. 686(5)(a) of the Criminal Code. Nor does he suggest anywhere in his factum that he wishes to be re-tried by a jury in the event this court should order a new trial.
- [78] In any case, the trial judge indirectly addressed this issue. She said, "[i]n all discussions, counsel contemplated breaking the trial into segments that would make a jury trial unworkable. In December 2015, defence requested Crown consent to a judge alone trial and this was confirmed at a pre-trial appearance on December 11, 2015." As of December 2015, the likely start of the trial was nearly a year away and the Crown's disclosure was ongoing.
- [79] A similar proposition was advanced in Bjelland. Bjelland had submitted that his right to a fair trial was prejudiced because he obtained disclosure only after he elected to be tried by judge alone. Justice Rothstein did not accept the complaint and said that the appellant knew that disclosure would be forthcoming before he elected. That is the circumstance here - Vallee knew disclosure was not complete when he elected to be tried by judge alone.
- [80] Vallee also contends that he was prejudiced by various formal admissions he made prior to receiving the Tim Hortons videos. He has not, however, identified any particular admission that subsequently gave rise to difficulty or that he would abandon. Those admissions were made at a time when Vallee was aware of the existence of the videos and the anticipated evidence of Witnesses B and C about a meeting with him at a Tim Hortons on the day of the murder.
- [81] Notably, Vallee never sought to withdraw any of his admissions after the Tim Hortons videos were disclosed. An accused may always apply to withdraw an admission and the court may allow withdrawal of an admission made prior to the late disclosure: C. Hill, D.M. Tanovich & L.P. Strezos, *McWilliams' Canadian Criminal Evidence*, 5th ed (Toronto: Carswell, 2013) at 25:60, cited with approval in *Montgomery* at para. 295.
- [82] Vallee suggests that if the Tim Hortons videos had been disclosed earlier, he might not have brought his successful application to exclude his cell plant statement made when he was arrested in 2014. That application was brought in November and early December 2016, several months before the start of the trial proper: *R. v. Vallee*, 2017 BCSC 268. The cell plant statement included both inculpatory and exculpatory statements. In the mistrial hearing, Vallee submitted to the judge that, in the changed landscape resulting from production of the Tim Hortons videos, certain exculpatory statements within the cell plant evidence would have been important to his defence. Vallee does not say that the judge's mistrial reasons were insufficient on the subject of his cell plant statement, but he does submit that the judge

"erred by failing to consider" or "failed to appreciate" or "failed to grapple with" various issues, including the issue of the cell plant evidence.

- [83] A judge is not required to respond to every submission made by counsel or to verbalize her entire reasoning process, so long as the basis for the conclusion is intelligible and the reasons are capable of meaningful appellate review: *R. v. Dinardo*, 2008 SCC 24 at para. 30; *R. v. J.F.D.*, 2017 BCCA 162 at para. 39. We consider this principle applies to the issue of the cell plant statement.
- [84] We observe that the mistrial application occupied a week. The defence filed a nearly 70-page-long submission in advance of the hearing, and raised numerous issues, some of which have now been abandoned. When the application to exclude the cell plant statement was made, Vallee was aware of the existence of the Tim Hortons videos and the anticipated evidence from Witnesses B and C. He was also aware that the Crown's disclosure was ongoing. Then, when the late disclosure was made, Vallee did not ask the judge to revisit her cell plant ruling. A judge has jurisdiction to revisit a ruling on the admissibility of evidence. Although it would have remained at the discretion of the judge to determine whether the prior ruling should be varied, she could have revisited the ruling any time before the trial ended, subject to rules of fairness.
- [85] The detailed considerations that underlie the strategies and tactical decisions of defence counsel are never known to a trial judge. Nevertheless, it falls to trial judges to ascertain, as best they can and based on their knowledge of the case, the extent to which late disclosure by the Crown may have impacted earlier decisions made by the defence and whether such concerns can be addressed in a way that protects an accused's fair trial rights going forward.
- [86] The judge was familiar with the contents of the cell plant statement and it was she who ruled on its admissibility. At the time of the mistrial application, she had also heard many weeks of evidence, and of course she heard Vallee's submissions on the mistrial. There is no reason to think that she did not appreciate the issues that had been raised.
- [87] Ultimately, although Vallee contends that he might have elected a different mode of trial, or that he might not have made various admissions, or that he might not have applied to exclude the cell plant evidence, or that he would have undertaken the cross-examinations of various witnesses differently, he did not seek to revisit or otherwise address any of these decisions after the late disclosure. Nor have any particular items been identified to us that could amount, in our view, to such a wounding of the trial process that we would interfere with the mistrial ruling or the judge's choice of remedy for it.
- [88] Next, Vallee contends that the judge failed to appreciate the significance of other ongoing issues with the Crown's disclosure by focusing exclusively on the late disclosure of the Tim Hortons videos. In her mistrial ruling, the judge said:

- [86] While the defence asks that this conduct be placed within an overall context of indifference in disclosure generally and had specifically referred to alleged late disclosure regarding DNA evidence, disclosure of the personal circumstances of Witness D, disclosure of the cell plant evidence, disclosure of email server data, and other disclosure issues, this is not the application to decide upon the quantitative or qualitative state of disclosure generally or whether there exist exceptional events that reasonably affected disclosure. This application is essentially about whether Cory Vallee can obtain a fair trial after breach of his s. 7 rights for failure to disclose the Tim Horton's videos in a timely way.
- [89] The judge noted that, at the commencement of the trial proper on February 7, 2017, the Crown had indicated that it was not relying on any new pieces of evidence and that disclosure was "substantially complete". The Crown's obligation to disclose is an ongoing one, and in a highly complex trial some degree of ongoing disclosure is to be expected. In a trial of this length and complexity and with this volume of disclosure, the reality is that disclosure is not likely to be complete before trial.
- [90] Such ongoing disclosure, depending on its degree, engages somewhat different considerations than the disclosure of the Tim Hortons videos. As observed in *Dixon*, not every instance of late disclosure impairs the right to make full answer and defence. Here, the defence did not suggest to the judge that the ongoing disclosure, for example, had impacted Vallee's earlier strategic decisions or his earlier applications. Instead, the defence complained that ongoing disclosure created an additional and significant burden of reviewing the disclosure as the trial was ongoing. That is not a basis, in this case, to interfere with the mistrial ruling.
- [91] Finally, Vallee contends the judge gave excessive weight to concerns that a new trial would perpetuate prejudice to the justice system and the fact that the case was near the borderline for unreasonable delay. He submits, citing *Ryan*, that the judge wrongly prioritized society's interests over his interests and so erred in principle by allowing consideration of the right to be tried within a reasonable time to overcome his right to a fair trial.
- [92] We do not agree. As the court explained in *R. v. Jordan*, 2016 SCC 27, the timeliness of trials is important both to individuals and society as a whole.
- [93] Vallee acknowledges that the question of whether a mistrial is needed to prevent a miscarriage of justice includes a balancing of injustice to the accused with other relevant factors such as the seriousness of the offence, protection of the public and bringing the guilty to justice: *Burke* at para. 75. He acknowledges that the trial judge is in the best position to assess the circumstances of each individual case and select the most appropriate remedy. There is no indication that the judge gave undue weight to public concerns, or that she prioritized society's interests at the expense of Vallee's.

[94] On our review of the record, we are not persuaded that the judge erred in law or principle, or that she misdirected herself, or that her exercise of discretion has resulted in a miscarriage of justice. We do not accede to this ground of appeal.

2. The Vetovec Based Challenges

[95] It is unquestioned that Witnesses A, B, C, and D were Vetovec witnesses. Vallee contends they had so many and such deep unsavoury flaws that they are properly described as "extreme" Vetovec witnesses. He says the judge erred in law in her application of Vetovec to the circumstances of the case, based in part on a misapprehension of the evidence. Centrally, he urges on us a view of Vetovec that would preclude the judge from relying on the evidence of the Vetovec witnesses on the issue of identity, proposing, if necessary, augmentation of the Vetovec approach for such "extreme" witnesses.

[96] The Vetovec submission is directed at all of the Vetovec witnesses' evidence that factored into the convictions, but aims its sharpest point at the murder conviction by honing in on certain aspects relevant to the judge's conclusion that, beyond a reasonable doubt, Vallee was the AR-15 shooter of Leclair.

[97] Before we turn to the law on Vetovec witnesses, it is useful to describe some of that evidence relating to the murder of Leclair, and some of the judge's findings of fact and comments on the evidence.

a) Evidence of the Count of Murder

[98] The issue of identity required the judge to assess, in particular, evidence of Witnesses B and C concerning the events of February 6, 2009, the details of their movements and association to guns used by the assailants, and conversations they said they had participated in with Vallee and others after Leclair's murder, all in the context of the balance of evidence including the video recordings, eyewitness evidence, and forensic evidence.

[99] We start with the evidence of the video recording of the interior of the Tim Hortons restaurant made on February 6, 2009, discussed above on the mistrial ground. This video recording was made around 13:00. It revealed an image of a person who appeared to be Vallee going to the washroom and exiting the restaurant shortly after. He was wearing a black shirt, blue top, white shoes, blue jeans, and glasses. Another video of the exterior of Tim Hortons revealed a vehicle arriving around 13:00 with a driver, identified by Witness B as himself, who exited the vehicle and returned to it at about the time Vallee left the restaurant. The vehicle drove away a few seconds later. The judge concluded that Vallee met with Witness B at Tim Hortons at about 13:00.

- [100] Now to the events surrounding the murder. Leclair exited the Langley shopping mall restaurant mid-afternoon and went to his parked grey Lincoln pickup truck where he was approached by two men. Two eyewitnesses to the shooting, Florentin Pirvu and Scott Gothard, had, in the judge's words, "the longest and best opportunity to view events" and "reasonably good memories" of the events.
- [101] The judge found that Pirvu was parking his vehicle when the shooting started. She described what Pirvu saw and did:
- [572] ... As [Pirvu] passed the truck, he observed a man, agreed to be the handgun man, trying to open the door of a pick-up that was backed into a parking spot and that the driver had just entered. As Pirvu was about to turn into the parking spot next to the truck, another man came in front of his car through parked vehicles to the left with a gym bag, took a machine gun out of the bag, and threw the bag about five meters from Pirvu's car close to the central walkway. Pirvu stopped. The machine gunman touched Pirvu's car as he passed in front towards the right side of the truck. He pointed the gun at the side passenger window of the pick-up and pulled the trigger. It clicked but didn't shoot anything. Pirvu thought that the gunman then armed the gun. ... The driver of the truck then turned on his engine and sped left towards the IGA. The machine gunman started shooting and running towards the rear of the truck. Pirvu ducked down in his car and stayed there for about 20 seconds before the shooting stopped. Pirvu thought that the handgun man also shot at the truck. Pirvu had observed all of this for about five to seven seconds before he ducked down. After the shots, the gunmen ran away on foot. Pirvu saw a small car like a Honda speed away in the direction of the Colossus Theatre. He did not see the shooters get into a car.
- [102] Gothard, too, saw the shooting close up. The judge described what Gothard saw and did:
- [573] Gothard had just returned from the IGA to his red Chevy van that was parked facing south towards the central walkway and immediately opposite the grey Lincoln pick-up. He was seated in the driver's seat facing Leclair's pick-up with an unobstructed view when these events occurred. He noticed two men running towards the pick-up. The one on the left beside Gothard in front of the vehicle beside him held a handgun. He fired at the front driver's side of the pick-up, the first shot coming when the man was on the central walkway. The other man who came from one or two cars over on his passenger side, consistent with where the duffle bag was found, held an automatic weapon. Gothard said that the automatic weapon jammed twice before it started to release bullets. From the one live rifle casing found, it is concluded that the gun probably jammed only once and that the gunman had a second issue with the gun. He saw the gunman at the side door of the pick-up try to fire the machine gun and then the gunman discharged the bullet and cleared the round. The man then fired multiple continuous shots as the pick-up started moving away from the parking spot. Gothard said that both males moved with the truck as it turned towards the IGA but Gothard's focus was on the man with the automatic weapon. They then ran past his vehicle headed towards the Colossus Theatre. The man with the machine gun ran past Gothard's passenger side headed north. The incident had lasted about 20 seconds. Gothard

immediately got out of his van and ran in the same direction as the men. He was about 40-50 meters in behind the machine gunman. He saw the gunman jump into a van that was parked facing north between the Taco del Mar and the Rogers store near the crosswalk. He saw a second man get in ...

- [103] In addition, nine other eyewitnesses from the parking lot testified. None could identify the gunmen, but Pirvu and Gothard provided these descriptions:
- [585] Pirvu described the handgun man that he saw for one or two seconds as a 25 year old Caucasian, 70-75 kilograms in weight, and 175 cm in height. In his statement to police immediately after the event, he said that this shooter was in his 30's. ...
- [586] Gothard could not recall the clothing that the handgun man wore. ...
- [587] Pirvu described the machine gun man whose face he saw for three to four seconds as Caucasian with a strong build, short hair, between 175-180 cm. in height, and about 80 kilograms in weight (although he had said 70 kilograms in a previous statement). Gothard described this man as Caucasian, stocky and well built. Gothard had also told police 13 months after the event that the machine gunman had darker, olive skin. In direct examination, he thought that the man was more than six feet in height but agreed in cross-examination with a police statement that the gunman could have been five foot seven to ten. ...
- [588] Pirvu thought that the machine gun man was probably wearing gym clothing, like gym pants and a long sleeve T-shirt. He said that he wore no gloves, sunglasses, or hat. He could not remember whether he wore a jacket. Gothard could only remember that he wore a black shirt. ...
- [104] Other eyewitnesses gave more vague descriptions that did not feature in the judge's reasoning.
- [105] The handgun was a 9 millimeter semi-automatic. It and a machine gun (the AR-15) were found in the areas described by Pirvu and Gothard, as was a gym bag. The handgun had a live round jammed in it. Bullet casings were also found - twenty-two expended rifle casings, one live rifle casing, two expended 9 millimeter cartridges (for a handgun), and two live 9 millimeter rounds. The handgun was capable of having its barrel removed and replaced with one for different calibre bullets. No fingerprints were found on either gun, their magazines, or the casings.
- [106] Mitochondrial DNA ("mtDNA") samples were obtained from exhibits. In respect of Vallee in particular, he was not excluded as the source of mtDNA in a hair shaft found on or in the duffle bag. He was excluded as the source of three hairs found on or in the duffle bag, and from the mtDNA found on swabs of the live rounds, all spent rifle casings, the handgun, and on the inside pocket of the duffle bag. Results were inconclusive for a mixed mtDNA profile obtained from the rifle stock/shoulder rest/butt. The judge found that the mtDNA of the hair shaft in the duffle bag consistent with Vallee's "has no probative value for the

purpose of identifying him as a shooter". Likewise, a hair on or in the duffle bag had no probative value for the purpose of identifying the shooter.

- [107] We now turn to the movements of certain gang members and guns. The evidence, mainly from Witnesses B and C, was not entirely conforming. In addition to the persons already mentioned, evidence was adduced concerning Jesse Adkins, said by the judge to have been "presumably murdered in Mexico in 2011". Adkins was a mid-level member of the UN gang, under Witness C in hierarchy. Witnesses D and C testified that Adkins had become "Frankie's" driver shortly after a murder of a UN gang member in May 2008.
- [108] Both Witness B and C named Adkins as a person involved in gun storage and in the events of February 6, 2009. Witness C testified that he kept his weapons in a large safe at Adkins' house; Witness B testified he and Witness C kept a number of guns at the Adkins' residence.
- [109] Witness C testified he had arranged to meet Vallee and Adkins on the day of the murder, and had parked his vehicle and entered a van carrying Vallee and Adkins. They received a message to meet Witness B and Ismailaj Kreshnik, which they did at the Tim Hortons. Witness C testified that during the drive to meet Witness B and Kreshnik, Vallee spoke about a gun he had in the vehicle, given to him by Witness D, that had an interchangeable barrel. Witness C said he looked briefly at a handgun in a bag under either the driver's seat or the passenger seat. He said he had not noticed an AR-15, that he saw only the handgun, and that he did not know there was another gun in the vehicle. Witness C testified that he was driven back to his vehicle from the Tim Hortons by Vallee and Adkins, and he then drove to Richmond and met with Redekopp at about 14:00-14:30 for two to three hours.
- [110] Witness B testified. The defence did not contest Witness B's presence at the murder and agreed that his role was as a driver. The defence did, however, contest his identification of Vallee as the AR-15 shooter.
- [111] Unlike Witness C, Witness B did not place Adkins at Tim Hortons. Witness B testified that he and Kreshnik met with Vallee and Witness C at Tim Hortons. Vallee and Witness C were in a van. He said that Vallee showed him an AR-15 in a black gym bag on the rear floor of the van. The gun was similar to one he had seen at Adkins' house some time earlier that he knew belonged to another member of the UN gang, Trung Nguyen, who had said it could be used in the Bacon conflict. The judge accepted that the van referred to here by Witness B was the one used in the Leclair shooting.
- [112] Witness B testified that he and Kreshnik left the Tim Hortons in a Murano and that Vallee and Witness C left in the van. Witness B testified as to details of the gang's vehicle movements. The uncertain and contradictory evidence of the movements of these various persons was described by the judge in her reasons. The judge said in respect to a portion of the defence's theory - that Vallee had left the Tim Hortons in his own black van after meeting the others for a social lunch and that a blue van later present at Tim Hortons, likely driven by Adkins, was the van used in the murder:

- [633] This theory is rejected as implausible, lacking in credibility, and undermined by independent evidence. There is no evidence that Vallee or anyone lunched while at Tim Hortons. It has been accepted that Vallee was in search of the Bacons with Witness C on that day and had shown him Moe Amarhoun's house. Vallee was "Frankie" and "Panther". It is unlikely that Vallee would have left for no apparent reason when others were still engaged in the search on that day. The van used in the Leclair murder was either dark blue or black and, as concluded at paragraph 616, quite probably was Vallee's vehicle. The images taken from the Tim Hortons that the defence asserted supported the theory are so distorted in colour and blurred that little can be taken from them. No witness was asked about a second black or dark blue van. In any event, the fact that there may have been a dark coloured minivan at Tim Hortons doesn't mean that there were two such minivans at 13:00, as defence seeks to conclude. If Vallee did leave as defence theorized, then it is assumed that the inference sought to be drawn is that Witness C, now without a vehicle, stayed and travelled with Witness B and Kreshnik in the Nissan Murano, continuing with their activity. This is speculative and unsupported in the evidence. Witness B was not contradicted in his testimony about meeting with Adkins later and that Adkins was driving a light coloured Cadillac. Witness C was not contradicted that he arrived at Tim Hortons with Vallee in the van, having left his vehicle at a Starbucks.
- [113] Witness B testified that after he and Kreshnik left Tim Hortons in the Murano and Witness C and Vallee left Tim Hortons in the van, the two vehicles drove off in separate directions. He and Kreshnik drove around for a while in the Murano. He testified that he then communicated with Witness C because Witness C "had to go to work" packaging drugs for shipment internationally. He testified further that he then met up with Vallee at a pub. Vallee left his vehicle and entered into the Murano. They continued to search for the Bacon group. Witness B testified that he spotted Leclair in a truck and followed him to the shopping mall where he saw it park facing out. He said he saw Leclair leave the vehicle and enter a mall restaurant. He contacted Connor D'Monte and told him "Traitor" had been spotted. At some time, he learned that Adkins was on his way to meet them. Witness B testified that he, Kreshnik, and Vallee decided to go and get the weapon from Vallee's vehicle. They returned to the pub and there was discussion about the plan. Vallee said he would be the one to do it, Witness B would drive the van, and Kreshnik would drive the Murano as a blocker car. Witness B testified that he and Vallee left in the van, and Kreshnik followed in the Murano. They changed licence plates on the van and proceeded back to the mall with Witness B driving the van and Vallee seated in the back seat. Witness B testified that they met with Adkins near the theatre in the mall. Adkins sat in the passenger seat of the van, and they proceeded to the mall with Kreshnik following. Witness B testified that he had only a vague memory of a handgun held by Adkins on his lap.

- [114] Witness B gave a physical description of Adkins, saying he thought Vallee and Adkins were dressed about the same. He described Adkins as being about the same height as Vallee but slimmer. Witness B described himself as wearing a black hoodie, black pants, a black hat, and white shoes.
- [115] Witness B testified that he, Vallee and Adkins discussed the plan as they waited in the van. Kreshnik was to let them know when Leclair left the restaurant. Witness B was to give Vallee a "Go" and he, Witness B, was to wait close by. When Leclair exited the restaurant, Kreshnik sent the message to Witness B and Witness B told Vallee and Adkins it was time to go. Vallee and Adkins jumped out, Vallee with the AR-15 and Adkins with the handgun. Witness B testified that he then lost sight of Vallee and Adkins as they turned into the parking lot.
- [116] Witness B testified that he heard rapid gunshots. He testified that he pulled the vehicle out and waited. Witness B said Adkins arrived first from the direction of the IGA, and Vallee arrived shortly after, jumping into the rear passenger seat and closing the door, after which he (Witness B) sped off as fast as he could given speed bumps. The judge found:
- [645] Witness B's narrative of events is confirmed in large and significant measure by the video and photo evidence, the exhibits from the scene, and the eyewitness testimony.
- [117] With reference to the Telus video showing the two gunmen running after shots were fired, referred to earlier, Witness B denied the suggestion that he left the van, ran in front of the Telus store, and then fled. The judge found Witness B was not the person on the Telus video running in front of the store. She said:
- [643] ... From the location of the dropped handgun and the accepted testimony that Adkins left the van with the handgun, it most reasonable to conclude that it was Adkins seen running from the murder scene in the Telus video.
- [118] We return to the evidence of Witness C. He testified that he was in Richmond with Redekopp readying drugs for shipment when he received an email from a gang member saying "Traitor got it". He testified he told Redekopp that one of their enemies had just been shot. He testified further that he had some discussion with Redekopp about the possibility of Redekopp acting as a false alibi for Witness B.
- [119] Redekopp testified that he had no recollection of meeting Witness C or of hearing from Witness C that an enemy had been killed. Redekopp denied discussing being an alibi for Witnesses B or C. The judge described Redekopp as a reluctant witness, a "drug dealer's lackey", and rejected Redekopp's testimony on the alibi issue. More is said below about the judge's treatment of Redekopp's evidence in the discussion of the fourth ground of appeal.
- [120] The judge concluded that Witness C had left the others to meet with Redekopp as Witness C testified, and gave reasons for the conclusion.

- [121] Witness B testified that after the murder of Leclair, they all went to Kreshnik's house where they disposed of their clothes and discussed events. He testified that he discussed the shooting with Adkins, Vallee, and Kreshnik immediately after the killing. He testified that he recalled Adkins telling him the handgun had jammed. He also testified that Vallee had described trying to fire at Leclair's vehicle, Leclair putting his hands up, that he clicked the gun over to off of safety and by then Leclair was driving away so he "unloaded the gun through the back window of Leclair's vehicle". The judge concluded on this:
- [671] It is accepted that this conversation with Vallee occurred as stated at Kreshnik's house after the Leclair murder. Witness B gave the same recollection of the substance of the conversation to police and at trial after a long interval of time from the event. The narrative of what Vallee said is in harmony with the general picture of events and was not fabricated as defence suggested. The eyewitness evidence confirmed that the machine gun shooter had a problem with the weapon. Witness B would not have known about such a problem if not told by the shooter. ... It is reasonable and makes sense that these men would have talked about this sensational killing immediately after it happened, especially in the immediate aftermath with adrenalin still high and Witness B not knowing exactly what happened as the driver of the vehicle. ...
- [122] Witness B also testified he spoke later with Witness C about the events.
- [123] Witness C testified that he spoke with Vallee and Adkins about the murder two or three days later and that Vallee had enthused over the AR-15 saying, in particular, "that thing was awesome". Of this evidence, the judge accepted only that Vallee had said to Witness C that the AR-15 was "awesome". She said:
- [268] From all of this, it is concluded that Witness C was truthful about a conversation between Witness C, Vallee and Adkins within a week after the murder of Leclair. Witness C likely conflated what he heard from Witness B and from Vallee and Adkins. He could not distinguish what Vallee told him from what Adkins told him. Without any context, it cannot be found that Vallee adopted any of this admission, except for the sole statement attributed to him. That statement was to the effect that the AR-15 was "awesome".
- ...
- [675] Witness C denied in cross-examination that this conversation never occurred. Although he denied that his recollection of this conversation had been inconsistent, it was indeed found to be so at paragraphs 265-268. There were also reliability concerns about this testimony such that it was accepted only that Witness C had a routine conversation with Vallee and Adkins within a week after the murder of Leclair. In that conversation, Vallee told Witness C that the AR-15 was "awesome".
- [124] The judge addressed inconsistencies in the evidence of Witnesses B and C on the subject of Adkins' participation, resolving it thus:

- [680] It was established that Adkins participated in the Leclair murder as a shooter, particularly as the shooter with the handgun. He was certainly present. The only question is when he arrived on the scene. The defence theorized that Adkins could have arrived at 13:52 at the Tim Hortons in a blue minivan. This theory has been rejected. The evidence of Witness B is the most plausible and reasonable given all of the circumstances. He had particular reason to recollect events of that day and his memory is more precise as to Adkins movements. He assumed that Vallee had contacted Adkins after Vallee, Kreshnik, and Witness B had spotted Leclair near the Gold's Gym. This is reasonable given that Adkins and Vallee were teamed in the search for the Bacons. Aside from recalling Adkins driving the van, Witness C had no specific recollection of anything that Adkins did on that day, in contrast to his recollection of interaction with Vallee. He knew Vallee and Adkins to drive around together most of the time in a van and likely was mistaken on this usual day as to Adkins presence.
- [125] The accounts of Witnesses B and C on the location and timing of post-murder conversations, and content, were not entirely in accord. The judge resolved any inconsistency in favour of Witness B, and accepted the fact of the conversation about the murder (but not its content, which she did not rely upon). She said the fact of the conversation was significant because "it needn't have taken place if Witness C had participated in the shooting of Leclair".
- [126] One of the many factual issues at trial concerned the prospect of payment to Vallee for the murder of Leclair. The judge found it was intended Vallee be paid but there was no evidence he was in fact paid. On this subject, Witness C provided some hearsay evidence to the effect that a payment had been made. The defence suggested Witnesses B and C were inconsistent as to their contribution to a payment, but the judge rejected that submission and found the witnesses were consistent that they did not pay Vallee for the murder.
- [127] In passages discussed below, the judge found Vallee guilty of the murder of Leclair.
- b) The Vetrovec Legal Framework
- [128] Vetrovec addressed the need for special caution in considering the evidence of unsavoury witnesses and established the current practical approach for jury instructions with respect to corroboration of accomplices by abandoning, as unnecessarily complex and formalistic, the requirement of corroboration for the evidence of accomplices. Having abandoned the old rules, it then addressed concerns about the truthfulness of an unsavoury witness - the faith the trier of fact may have in the witness's commitment to the truth of the evidence under consideration. It did this by speaking of the need for special caution in considering the evidence of unsavoury witnesses, establishing a framework in which a "clear and sharp warning" is given to alert the trier of fact of the risks of relying upon a witness of "demonstrated moral lack" and the need for prudent scrutiny of all of the evidence. Vetrovec recognizes that circumstances in which this approach must be applied are myriad and says at 831:

Because of the infinite range of circumstance which will arise in the criminal trial process it is not sensible to attempt to compress into a rule, a formula, or a direction the concept of the need for prudent scrutiny of the testimony of any witness. What may be appropriate, however, in some circumstances, is a clear and sharp warning to attract the attention of the juror to the risks of adopting, without more, the evidence of the witness.

- [129] In *R. v. Khela*, 2009 SCC 4, Justice Fish for the majority described the dual purpose of *Vetrovec* as alerting jurors to the danger of relying on unsupported evidence of unsavoury witnesses and, in appropriate cases, providing them the tools necessary to identify evidence capable of enhancing the trustworthiness of those witnesses: at para. 47. The same careful approach is required of judges sitting alone (*R. v. Kehler*, 2004 SCC 11), although a formal self-instruction in the judge's reasons may not be necessary: *R. v. Snyder*, 2011 ONCA 445 at para. 24.
- [130] Two issues emerge in *Vetrovec*, both of which require the exercise of judicial discretion: when should a *Vetrovec* caution be given, and what should be the content of it? These discretionary issues attract the same standard of review discussed at para. 42 above: has the judge misdirected herself in law, committed a reviewable error of fact, or come to a decision that is so clearly wrong it amounts to an injustice?
- [131] This case concerns the second of the *Vetrovec* issues, and the application of the caution required.
- [132] *Khela* is a leading authority on the content of a *Vetrovec* caution. In it, Justice Fish observed as to our role:
- [13] The crafting of a caution appropriate to the circumstances of the case is best left to the judge who has conducted the trial. No particular set of words is mandatory. In evaluating its adequacy, appellate courts will focus on the content of the instruction and not on its form. Intervention on appeal will not be warranted unless a cautionary instruction should have been given but was not, or the cautionary instruction that was given failed to serve its intended purpose.
- [133] Justice Fish then took guidance from previous cases, in particular *R. v. Brooks*, 2000 SCC 11, and *Kehler*, and described the content of a *Vetrovec* caution this way:
- [37] In *Sauvé* [(2004), 182 C.C.C. (3d) 321 (Ont. C.A.)], at para. 82, the Ontario Court of Appeal set out a principled framework that will assist trial judges in constructing *Vetrovec* warnings appropriate to the circumstances of each case. That proposed framework, which I adopt and amplify here, is composed of four main foundation elements: (1) drawing the attention of the jury to the testimonial evidence requiring special scrutiny; (2) explaining why this evidence is subject to special scrutiny; (3) cautioning the jury that it is dangerous to convict on unconfirmed evidence of this sort, though the jury is entitled to do so if satisfied that the evidence is true; and (4) that the jury, in determining the veracity of the suspect evidence, should look for evidence from another source tending to show that the untrustworthy

witness is telling the truth as to the guilt of the accused (R. v. Kehler, 2004 SCC 11, [2004] 1 S.C.R. 328, at paras. 17-19).

- [38] While this summary should not be applied in a rigid and formulaic fashion, it accurately captures the elements that should guide trial judges in crafting their instructions on potentially untrustworthy witnesses. The fourth component, of particular interest on this appeal, provides guidance on the kind of evidence that is capable of confirming the suspect testimony of an impugned witness.
- [39] Common sense dictates that not all evidence presented at trial is capable of confirming the testimony of an impugned witness. The attribute of independence defines the kind of evidence that can provide comfort to the trier of fact that the witness is telling the truth. Where evidence is "tainted" by connection to the Vetrovec witness it can not serve to confirm his or her testimony (N. Harris, "Vetrovec Cautions and Confirmatory Evidence: A Necessarily Complex Relationship" (2005), 31 C.R. (6th) 216, at p. 225; R. v. Sanderson, 2003 MBCA 109, 180 C.C.C. (3d) 53, at para. 61).
- [40] Materiality is a more difficult concept. In Vetrovec, the Court did away with the requirement that corroborating evidence implicate the accused. As Dickson J. noted, such evidence is not the only type capable of convincing a jury that a witness is telling the truth. In Kehler, the Court confirmed that evidence, to be considered confirmatory, does not have to implicate the accused. We maintain that position here.
- [41] Individual items of confirmatory evidence need not implicate the accused. ...
- [42] However, when looked at in the context of the case as a whole, the items of confirmatory evidence should give comfort to the jury that the witness can be trusted in his or her assertion that the accused is the person who committed the offence. ...
- [43] This passage was cited with approval in this Court's unanimous judgment in Kehler, where the Court concluded that confirmatory evidence must be capable of restoring the trier's faith in relevant aspects of the witness' account (para. 15). As a matter of logic, where the only issue in dispute is whether the accused committed the offence, the trier of fact must be comforted that the impugned witness is telling the truth in that regard before convicting on the strength of that witness's testimony.
- [Emphasis added.]
- [134] It happens in this case that the only evidence on the identity of the accused as perpetrator of the murder is given by a Vetrovec witness. This also was the case in Kehler, a judge alone trial referred to in the passages from Khela, above. In Kehler, Justice Fish for the court wrote:
- [15] The appellant wrongly equates "relevant" with "disputed". Mr. Greenwood's detailed account of the robbery, though undisputed, was no less "relevant" to the offences charged than his implication of the appellant in their commission. And while confirmatory evidence should

be capable of restoring the trier's faith in relevant aspects of the witness's account, it hardly follows that the confirmatory evidence must, as a matter of law, implicate the accused where the only disputed issue at trial is whether the accused was a participant in the crimes alleged.

- [16] As the appellant himself concedes, it is clear from *Vetrovec*, supra, that independent evidence, to be considered confirmatory, does not have to implicate the accused. There is no separate rule in this regard for cases where the only evidence of the accused's participation in the offence is that of a tainted witness.

...

- [20] Where a particular risk attaches to one critical element of the evidence of "an accomplice, or a disreputable witness of demonstrated moral lack" (*Vetrovec*, supra, at p. 832), the trier of fact must be satisfied that the "potentially unreliable" evidence of the witness can be relied upon as truthful in that regard.

- [21] Such a risk may arise, for example, where there is any basis in the record for suggesting that the unsupported evidence of an accomplice, though evidently truthful as to his own participation in the offence charged, is for any reason subject to particular caution as regards his implication of the accused.

- [22] However, even then, having considered the totality of the evidence, the trier of fact is entitled to believe the evidence of the disreputable witness -- even on disputed facts that are not otherwise confirmed -- if the trier is satisfied that the witness, despite his or her frailties or shortcomings, is truthful.

...

- [27] Mr. Greenwood's credibility was a matter for the trial judge alone to determine.

[*Italic emphasis in original; underline emphasis added.*]

c) Discussion of the Content of the Caution in this Case

- [135] The principles expanded on in *Kehler* and *Khela* have been applied repeatedly across Canada in cases too many to name. Vallee would have us say that there is a subset of *Vetrovec* witnesses who have such a host of indicia of unsavoury character that they should be considered irredeemable witnesses whose evidence, in words his counsel used at trial, "cannot be believed absent extremely significant and confirmatory evidence on the material issue". He calls such witnesses "extreme" *Vetrovec* witnesses. At trial, Vallee said it was open to the court to find that use of evidence of the four *Vetrovec* witnesses was not in the public interest. He submitted that where the question is identity of the accused as perpetrator of the crime, the confirmatory evidence must restore confidence that the accused was the perpetrator. Vallee submitted there was no such evidence and urged the judge to reject the evidence of him as the AR-15 shooter, particularly the evidence of Witness B.

- [136] On appeal, Vallee advances the same submission and he also advocates for an augmented approach in which there is a legal requirement of corroborating evidence on the issue of identity - a framework whereby once a Vetrovec witness is identified as extreme, the Crown must establish that there is independent corroborative evidence to confirm material aspects of the Vetrovec witness's testimony. That is, Vallee proposes that the independent evidence must implicate the accused, and absent such evidence, the Vetrovec witness's testimony on the point should be withdrawn from consideration.
- [137] In support of this augmented approach, Vallee refers to a passage in Khela at para. 7 that Vetrovec "was not intended to deprive an accused of the protection that the warning has historically been meant to provide", and the observation at paras. 39-40 that the search for confirmatory evidence engages both independence of the evidence and materiality. He also refers to Khela's description at para. 43 of the materiality of the evidence that may suffice to restore faith in the Vetrovec witness's evidence where the only issue is identity. Here Justice Fish said that "the trier of fact must be comforted that the impugned witness is telling the truth in that regard before convicting on the strength of that witness's testimony." Vallee says that statement leaves open the possibility that corroboration on the issue of identity is required.
- [138] Vallee submits that his approach will address a current significant risk of a miscarriage of justice in a case of contested identity. He relies upon *R. v. Hay*, 2013 SCC 61, *R. v. Hart*, 2014 SCC 52, and *R. v. Bradshaw*, 2017 SCC 35, as examples of circumstances that warranted special rules to protect against wrongful conviction, and for support in principle of his submission that such corroboration is necessary.
- [139] The Crown objects to our hearing this submission. Relying on *R. v. Gill*, 2018 BCCA 144, the Crown says Vallee's submission is made for the first time on appeal, is contrary to his position at trial, and contradicts his reliance at trial on evidence admitted on the premise of the current jurisprudence. The Crown says the judge was within her purview as trier of fact to accept the Vetrovec witnesses' identification of Vallee as the AR-15 shooter.
- [140] In our view, Vallee is entitled to raise with us the correct approach to what he would term extreme Vetrovec witnesses, but we would not give effect to the submission. On our review of the trial record, the general theme of his submissions in this court is not new: at trial, Vallee protested the use of Witness B's evidence to prove he was the shooter on the basis there was not sufficient confirmatory evidence presented by the Crown. His proposal for an augmented approach is an extension of his trial submission, but could reasonably be seen to be caught in his broad submission that the judge lacked a reliable non-Vetrovec basis for finding he was the AR-15 shooter.
- [141] We do not agree, however, with the substance of Vallee's submission that there must be independent evidence that implicates him in the offence before the judge may rely upon the Vetrovec evidence. Such a conclusion usurps the role of the trier of fact.

- [142] The authorities require a judge to instruct a jury to look for independent evidence that will restore faith in the witness's testimony. The importance of such independent evidence increases with the centrality of the disputed issue to the crime alleged and to the degree of disrepute of the witness. However, in respect of a trial by jury, we know of no cases that require more than instructions warning the jury of the danger of convicting on a Vetrovec witness's identification alone, so as to prohibit a conviction.
- [143] Nor do we accept Vallee's submission that the statement in Khela made by Justice Fish "the trier of fact must be comforted that the impugned witness is telling the truth in that regard before convicting on the strength of that witness's testimony" means that corroboration is required on the disputed issue. The phrase "in that regard" comes straight from para. 20 of Kehler, which affirms the ability of the trier of fact to believe the evidence of a disreputable witness, even on disputed facts that are not confirmed if the trier of fact considers the witness is telling the truth. In other words, we read "in that regard" as applying to the contentious evidence - is the trier of fact satisfied that the witness is truthful on that factual issue in contention?
- [144] It happens that serious crimes occur where the only evidence of the commission of the offence comes from a highly disreputable witness, or from a nest of such people. With the aid of an appropriately fashioned Vetrovec caution, such cases are left to a jury tasked with determining whether the facts essential to conviction are established. Credibility assessments belong to the jury. In a judge alone case, credibility assessments belong to the judge as trier of fact. The approach proposed, in our view, is contrary to paras. 15 and 22 of Khela and contrary to the proper role of a trier of fact.
- [145] We decline to adopt the proposition that the judge here was unable to accept the evidence of Witness B for the sole reason of lack of confirmatory evidence (corroboration) on the issue of identity. It follows we do not accept the augmented approach advanced before us.
- [146] Vallee raises Hay, Hart, and Bradshaw as cases in which the Supreme Court of Canada applied a principled, not rule-based, approach and modified the law to reduce the potential for a miscarriage of justice arising from frailties of evidence. Those three cases, however, address zones of evidence in which reliability of evidence is the central issue, respectively: eyewitness identification, confessions obtained during a Mr. Big operation, and hearsay evidence from accomplices who will not testify. In Hart and Bradshaw the evidence was second-hand, without cross-examination to assist the judge in assessing the source's commitment to the truth. In a different way, Hay also did not concern the issue of commitment to telling the truth. Instead, it addressed the inherently suspect nature of eye witness identification. None of these cases, then, address the Vetrovec question, which is the faith a trier of fact may have in the truthfulness of a witness - to put it another way, the faith a trier of fact may have that a witness is not playing false in respect to their evidence. While Vallee says this distinction is a rule-based approach to different types of evidence, we see it as distinguishing between faith in the witness's commitment to the truth and the reliability of evidence tendered, whoever may be the witness.

[147] The new approach advocated by Vallee appears to us to return to some of the formalism regarding corroboration that Vetrovec replaced. We consider the proposal is beyond us; we are bound by Vetrovec and its progeny.

[148] We do not accede to these submissions.

d) Application of the Vetrovec Warning

[149] The issue we have just addressed concerns the approach the jurisprudence requires the judge to take to the Vetrovec evidence. Vallee also raises discrete concerns. He says the judge erred in her application of Vetrovec on certain aspects of the evidence that required corroboration because of the discreditable character of Witnesses B and C. This submission relates in particular to the conviction for the Leclair murder.

[150] At trial, the defence advanced the alternative theory that Witness C was the AR-15 shooter. The evidence of Witnesses B and C, both implicating Vallee, was key to this theory. Vallee says to rely on the evidence of Witnesses B and C implicating him in the Leclair murder, the judge was required to seek out evidence confirming that:

- 1) witness C had an alibi for the time of the murder;
- 2) he, Vallee, was at the scene of the murder;
- 3) it was intended that he, Vallee, be paid for the murder; and
- 4) he, Vallee, described killing Leclair to Witnesses B and C after the murder.

He says there was no confirmatory evidence on any of these matters, and so the judge erred in accepting the accounts of Witnesses B and C of events material to the issue of identity.

[151] Vallee expanded on each of the four points he said were essential to a finding of guilt:

- 1) In respect of ruling out Witness C as the shooter, Vallee says there was no objective evidence confirming Witness C's testimony that he had an alibi. Here he was referring to Witness C's evidence that he was in Richmond with Redekopp when the murder occurred. But, he says, Redekopp was not a witness for purposes of an alibi;
- 2) In respect of Vallee's presence at the scene of the murder, Vallee says the only evidence that he was there was from Witness B, a person admittedly at the scene and who, therefore, would have had knowledge of the scene from his role as an accomplice. Facts that Witness B gathered from his own presence at the scene, in Vallee's submission, cannot make Witness B's testimony that Vallee was the shooter more believable because Witness B would need to have added only Vallee's participation "to an otherwise truthful, and potentially confirmable story" to create a plausible version that Vallee had participated: *R. v. Smith*, 2009 SCC 5 at para. 15;

- 3) On the issue of paying Vallee for the murder, Vallee says there were material inconsistencies in the evidence of Witnesses B and C, and insufficient confirmatory evidence to support the judge's conclusion that it was intended Vallee be paid for the "hit"; and
- 4) In respect to Vallee's statements after the murder, Witnesses B and C testified that Vallee made several admissions, including describing the AR-15 firearm as "awesome". Vallee says the judge erred in accepting that he had made those admissions, absent confirmatory evidence. He refers to the dissenting reasons of Justice Major in *Brooks*, in turn referring to *The Report of the Kaufman Commission on Proceedings Involving Guy Paul Morin*, which identified as a danger that an informer's "claim that the accused said 'I killed A.B.' is easy to make but extremely difficult for any accused to disprove". In relation to Witness C's evidence of Vallee's admissions to him of being at the scene, Vallee contends that the judge erred in referring to consistencies between Witness C's in-court testimony and his previous police statements. In sum, Vallee contends that there was "insufficient confirmatory evidence with respect to whether any such conversation took place and the details of that discussion".
- [152] The Crown takes the position that Vallee's submissions effectively invite this court to re-assess and second guess the judge's conclusions on credibility. The Crown says it was open to the judge to rely on the evidence of the Vetrovec witnesses that she accepted, after her review of the witnesses' disreputable features and careful scrutiny of all the evidence. The Crown says that the judge was meticulous in her sorting of the evidence. It notes she rejected large portions of the evidence helpful to the Crown and then focused properly on the essential questions before her with a keen appreciation of the evidence.
- [153] We start with a review of the judge's approach. She first recognized that each witness was an accomplice to the conspiracy and that Witness B, and arguably Witness C, were accomplices to the Leclair murder. She acknowledged that each was "in a particularly compelling position to provide a story that falsely implicates" the appellant. She then said:
- [160] According to the principled framework established in *R. v. Sauvé*, (2004), 182 C.C.C. (3d) 321 (Ont. C.A.), this evidence, having been identified as requiring special scrutiny, then requires identification of the characteristics of each witness that brings his evidence into serious question and then an appropriate caution to be brought to mind that it is dangerous and unsafe to act upon his unconfirmed evidence (*Sauvé* at para. 82; *Smith* [2007 NSCA 19] at para. 111; *R. v. Khela*, 2009 SCC 4 at para. 37). While it may be dangerous to convict without confirmatory evidence, the trier of fact may still do so if satisfied that the Vetrovec witness is telling the truth.
- [154] In a comprehensive 6-page discussion on the approach to evidence from Vetrovec witnesses (paras. 160-172), the judge identified characteristics that may attract special scrutiny and discussed at length, with detailed reference to binding and persuasive jurisprudence, the nature of independent confirmatory evidence that is capable of "restoring the trier's faith in relevant aspects of the witness's account" (referring to paras. 12 and 15 of *Kehler*). She addressed some of the impediments to the independence of evidence

relied upon "to show that the untrustworthy witness is telling the truth as to the guilt of the accused" (referring to Khela at para. 37, R. v. Hurley, 2010 SCC 18 at para. 19, and R. v. Roks, 2011 ONCA 526 at para. 63). The discussion is complete and compact. She recognized the distinction between credibility and reliability. Included in her self-instruction are these concluding passages:

- [169] Confirmatory evidence need not incriminate an accused in the criminal activity charged to be confirmatory, even when the only evidence of the accused's participation in an offence is that of a tainted witness (Vetrovec at 826; Kehler at paras. 15-16; Khela at para. 40; R. v. Khan, 2011 BCCA 382 at para. 52; Labossiere at para. 44; Illes at para. 37; Magno at para. 115; Kakeeway at para. 6). However, the facts of a case are significant to the common sense approach as stated in Khela at para. 42:
- [42] when looked at in the context of the case as a whole, the items of confirmatory evidence should give comfort to the jury that the witness can be trusted in his or her assertion that the accused is the person who committed the offence. Again in Vetrovec, Dickson J. thus noted, with respect to evidence capable of being confirmatory:

All of this incriminating evidence, when considered together, strongly strengthens the belief that Langvand was telling the truth regarding the participation of Vetrovec and Gaja. It rebuts any suggestion that he is falsely implicating innocent individuals. [Emphasis added [in Khela]; p.833]

- [170] When the only issue is whether the accused committed or participated in the offence, there must be comfort provided that the witness is telling the truth "in that regard" (Khela at para. 43; R. v. Seruhungo, 2015 ABCA 189 at paras. 59-60 per O'Ferrall J.A., dissenting, rev'd 2016 SCC 2 substantially for the reasons of O'Ferrall J.A.). Voith J. put the question this way in Paterson [2017 BCSC 536] at para. 220: "Does this confirmatory evidence 'rebut any suggestion' that [the unsavoury witness] is falsely implicating [the accused]?" To rebut the suggestion, it has been said that the confirmatory evidence need not speak directly to the issue of, for example, whether the accused was the shooter, but should support the evidence of the witness, even if weak (Kehler at para. 15; Labossiere at para. 44; Kakeeway at para. 6). As stated in MacIsaac at para. 44, the confirmatory evidence "need not cut a direct path to guilt: it need only be capable of assuring the trier of fact that it is safe to rely upon the word of a disreputable witness". However, a more cautious approach could be taken where a particular risk attaches to the testimony of an accomplice who, though truthful as to his own participation, is subject to a particular caution as regards his implication of the accused (Kehler at paras. 20-21). In Seruhungo, the trial judge had rejected certain confirmatory evidence as weak and the Vetrovec witness's testimony that was confirmed by what actually happened was either notorious or capable of apprehension (Seruhungo at para. 64).

- [171] A trial judge is required to consider pieces of alleged confirmatory evidence individually to see if it is independent, material and relevant to the portion of testimony alleged (Seruhungo at paras. 63-65). Circumstantial evidence can be confirmatory. However, it is the combined strength of the totality of the confirmatory evidence that matters in the end (Khan at para. 55; Seruhungo at para. 65). As stated in Vetrovec at 828, the question is ultimately not how trust is restored, but whether it is restored at all.
- [172] Of course, as with all witnesses, rejection of some of the evidence of a witness does not necessarily mean that other evidence of that witness need be rejected (R. v. Sanderson, 2003 MBCA 109 at para. 32; Drabinsky at paras. 71 and 136; Najafi-Chaghabouri at para. 28). Assessment of credibility and reliability is not a global exercise but is related to specific events and issues (Drabinsky at para. 38). The distinction between credibility and reliability was aptly described in Paterson at paras. 115-118 and need not be repeated here.
- [155] The judge analyzed each witness, starting with Witness D:
- [182] There are many reasons to be concerned about Witness D's trustworthiness. The Crown said that Witness D's evidence should be approached with "extreme" caution.
- [156] Witness D's evidence included details of the operations of the UN gang, the conspiracy, and his cooperation with police. He testified that Vallee had made a statement, in his presence, which he took to be confirmation of Vallee's participation in the murder. He testified he knew the police were looking for "Frankie" and "Panther", he identified Vallee as "Frankie", and he said Vallee had other nicknames including "Panther". The judge rejected a significant portion of Witness D's evidence due to "lack of confirmation or inconsistency or unlikely timing":
- [199] ... his testimony about a conversation with D'Monte about Adkins acting as a get away driver for Vallee, his description of specific searches for Bacon locations with Vallee, his sighting of Jamie Bacon and Leclair with Vallee, his evidence that D'Monte had asked him for "eyes" in Langley on the day of the Leclair murder, his denial that he had supplied the handgun used in the Leclair murder, and his tale of meeting at his home when Vallee and Adkins showed him an AR-15 assault rifle are rejected.
- [157] The judge, however, did accept the evidence of Witness D as to how he met Vallee and that Vallee was "Frankie":
- [200] Witness D's testimony at trial about how he first met Vallee was substantially consistent throughout except for details that are not memorable and not significant such as whether it was Kroitoru or Witness D that suggested that Witness D meet Vallee at the Lonsdale quay for their second meeting. Vallee was introduced to the gang by Kroitoru. Vallee was introduced to Roueche. Vallee was introduced to Witness D. This must have occurred somehow as it is not denied that Vallee knew Witness D and Witness D was able to set up a meeting with Vallee after he cooperated with police. Witness D consistently described the circumstances in which he met Vallee. This evidence is accepted.

- [201] It is also accepted that Witness D did not cobble together information and make up the story about Vallee being "Frankie", as opposed to choosing someone else within the UN gang. While it is true that Vallee was an outsider whom Witness D thought was "expendable" at the time of the February 25, 2008 police stop, by the time that Witness D cooperated just over a year later, Vallee was entrenched into the gang. Witness D was the first witness to cooperate and had many "poker chips" to play. He had not been involved in the Barber or Leclair murders and his communications were not intercepted.
- [158] The judge applied the same framework for consideration of the evidence of Witness A. She identified Witness A's background with the UN gang and the process by which he became cooperative with police. Here, too, the judge's review of Witness A's credibility was complete and discerning. In respect of Witness A's testimony that Vallee confessed to the Leclair murder, she explained why she rejected it:
- [223] Witness A's testimony about Vallee admitting his involvement in the Leclair murder to him is rejected not only as unreliable as tainted from disclosure and media, but also unreliable as a potent example of bad memory, feigned or not. He could not remember: when the conversation occurred, how the conversation unfolded, who raised the topic, or what exactly was said except that Vallee felt bad about it. In direct examination, he said that Vallee told him that he was with Adkins and that "they shot him". His memory was not refreshed in direct examination by reference to a prior statement.
- [159] The judge, on the other hand, accepted that Witness A knew Vallee and had communications with him through an encrypted Blackberry in which Vallee did not use his own name. She said:
- [231] ... Some of his evidence is accepted, particularly if it is uncontested or otherwise independently confirmed or if it is accepted as reasonable and truthful in all of the circumstances. It is accepted as reasonable and truthful that Witness A did not concoct a story about Vallee's introduction and role within the UN gang.
- [160] The judge then turned to Witness C; twin brother to Witness B. She described his role in the UN gang, his arrest, and his cooperation with police. She found caution was required in respect of his evidence:
- [250] Witness C is an important witness for the Crown because he was with Vallee on the day of the killing of Leclair and testified as to Vallee's movements on that day. He is also important to the defence which asserts that Witness C's alibi evidence that he left the scene on the day of the Leclair murder to do other work is fabricated and that he was a shooter of Leclair and not Vallee. There is also the factor that Witness C is in a particularly compelling position to falsely implicate Vallee because of his close relationship as the twin brother to Witness B, who participated in the murder of Leclair.

[251] There are many factors that give rise to caution before accepting any of the evidence of Witness C. This general caution prevails here as specific aspects of his evidence are discussed.

[161] The judge discussed in detail aspects of Witness C's disreputable conduct and character, identifying particular events or actions that warranted treating his evidence with great skepticism. She ended with a long discussion of the cautionary approach she brought to his evidence (at paras. 250-272), resolving the testimony that she accepted and that which she rejected. In particular, the judge considered the relationship between Witnesses B and C in weighing the evidence of both men. Figuring in her conclusions in relation to Witness C were the confessions of Witnesses B and C to the murder of Jonathan Barber, and their exculpation of Vallee in that crime. The judge's important conclusions include:

[260] After consideration of the evidence of Witness B in the context of whether Witness C and Witness B colluded in their testimony to implicate Vallee, it has been decided that they did not. Witness C appreciated that his deal with police would vanish if he and Witness B contrived their evidence. Although Witness C is cunning and smart, he implicated the one person most important in the world to him in the murder of Leclair, his brother, Witness B. He did so at a time when both he and Witness B thought that the evidence against them was weak. Did he do so at the price of Vallee or to save himself? Probably not, because he was already facing a life sentence for the Barber killing. As well, the testimony established that the brothers talked together to strategize their cooperation and deal, but not directly to falsely implicate Vallee. While it is appreciated that a false implication would be difficult to prove because it is unlikely that anyone would ever admit to it, the testimony of Witness C and especially Witness B fit with the preponderance of probabilities which neither witness could have fully realized.

...

[268] From all of this, it is concluded that Witness C was truthful about a conversation between Witness C, Vallee and Adkins within a week after the murder of Leclair. Witness C likely conflated what he heard from Witness B and from Vallee and Adkins. He could not distinguish what Vallee told him from what Adkins told him. Without any context, it cannot be found that Vallee adopted any of this admission, except for the sole statement attributed to him. That statement was to the effect that the AR-15 was "awesome".

...

[271] After reflection upon Witness C's evidence, it appears that he was inconsistent with prior statements with respect to how he was first introduced to Vallee and with respect to the content of an admission by Vallee regarding the Leclair murder. It is accepted that he did not remember Vallee using "Frankie" at first because this was not how Witness C usually referred to him. But, the general credibility of Witness C's evidence is established primarily through his testimony about his and Witness B's participation in the Barber murder and through his implication of Witness B in the Leclair murder. The testimony about the Barber

murder was remarkably consistent between Witness B and Witness C except for insignificant and unmemorable details given the length of time since the event. Given the close relationship between these two witnesses, it is unlikely that Witness C would have implicated Witness B to police in the Leclair murder at a time when the content of the Tim Hortons video was unknown, if that implication was not true. Given the time that the brothers had to construct their evidence, and given that neither knew about the Tim Hortons video, and given that police did not know the identity of the shooters when they interviewed Witness B and Witness C, they could have identified others as involved in the Leclair shooting and exonerated themselves if they intended to be dishonest about it. The acceptance of honesty about these events is bolstered by the fact that Witness C did not implicate Vallee in the Barber murder even though he knew that police had charged Vallee and had reason to believe that he was there because of the false identifications of Witness D and Witness A.

- [162] In the same fashion, the judge reviewed the characteristics of Witness B, his background with the UN gang, his extensive criminal activities, and his involvement with violence. Her discussion of him and his evidence was comprehensive. She noted his inconsistencies and mistakes on details but, for the extensive reasons provided (at paras. 291-309), she concluded that his evidence on particular aspects was reliable. Here, too, she checked his evidence on the Barber murder (to which he admitted and exonerated Vallee) against objective evidence:
- [305] Witness B was consistent overall at trial in his recollection about events of the Barber murder, despite some minimization. ... Despite these limitations, Witness B's description of events in the Barber murder was consistent and fit with the objective evidence and the evidence of Witness C.
- [163] In reaching her conclusion that much of Witness B's evidence was reliable, she said (in addition to her para. 260 above):
- [307] Witness B's evidence was consistent overall regarding the Leclair murder both internally and externally. He was not substantially challenged in his recollections as to the events themselves but as to details regarding when Adkins arrived on the scene, when the handgun appeared, the colour of Vallee's minivan, and the alibi evidence. The suggestion that he was a shooter was not supported in evidence other than not being excluded as a source of one of the hairs found on or in the duffle bag for which a reasonable explanation was given and not challenged, namely, that he had looked into the duffle bag in the van at the Tim Hortons. His recollection of the AR-15 being in a black bag in the van, of the presence of a handgun, of the sequence of events at the Thunderbird Centre and of the vehicles used is consistent with the eyewitness and objective evidence. There is no doubt that Witness B participated in the murder of Leclair as he described.

- [308] After considering Witness B's evidence as a whole and the preponderance of probabilities arising from objective and other evidence, and particularly after factoring in the benefits that he received from immunity, it is accepted that Witness B strove to tell a true story to this Court. ...
- [309] There was no DNA from Witness B or Witness C found "on the murder weapon". Witness B withstood this significant challenge to his credibility. Even the defence did not seek to reject Witness B's evidence in total.
- [164] It is in the context of the judge's detailed analysis of each of the Vetrovec witnesses and the entire body of evidence that we must consider the four complaints made by Vallee, above at para. 150.
- [165] As we do not agree with the proposition advanced by Vallee that the judge needed confirmatory evidence on specific points of the Vetrovec witnesses' testimony, we do not agree that any of the four particular complaints (of a lack of confirmatory evidence) demonstrate error on the part of the judge. The judge's recognition and discussion of the many indicia of disreputability of each of the Vetrovec witnesses, and rigorous culling of their evidence to that body of evidence she accepted, is the exercise expected of a trier of fact. The reasons show the judge was acutely aware of the risks associated with Vetrovec witnesses generally, and these Vetrovec witnesses in particular, within the framework of the law she was required to apply.
- e) Misapprehension of Evidence Found to be Confirmatory
- [166] Vallee also contends that the judge misapprehended evidence she said confirmed the testimony of the Vetrovec witnesses that he was the AR-15 shooter.
- [167] These challenges are aimed at the summary paragraph of the judge:
- [686] The eyewitness Gothard had the best view of the machine gunman because he didn't duck down for safety as had Pirvu, he had an unobstructed view, and he ran after the gunman. He remembered the machine gunman as stocky and well built and wearing a black shirt. The second person seen running towards the Thunderbird Apartments in the Telus video is wearing dark clothes and white shoes. Vallee was wearing a black shirt and white shoes at Tim Hortons. The description of the machine gunman is consistent with Vallee's appearance on that day. There is no evidence of what Witness C was wearing on that day and the fact that he may have sometimes worn gym pants, consistent with Pirvu's recollection of the machine gunman, does not lead to a reasonable inference that Witness C was the shooter, given the balance of the other evidence about the machine gunman.
- [168] Echoes of that paragraph are found in the Executive Summary, which is to be read bearing in mind the limited import she expected it to have (at para. 22 above):

- [48] It was not contested that Witness B drove the van as he described and then waited as the two gunmen left the vehicle and headed towards Leclair's truck. The description of the machine gunman by the eyewitness who got the best unobstructed view and the pictures from the Telus store of the two gunmen running, when combined with the appearance of Vallee at the Tim Hortons earlier on that day, establish a consistency between the appearance of the machine gunman and Cory Vallee.
- [169] Vallee says the judge demonstrated three misapprehensions of evidence in her para. 686:
- 1) in saying that the description of the gunman was consistent with Vallee's appearance that day;
 - 2) in concluding that Vallee matched the person seen in the Telus video running from the scene, whereas that person was the handgun shooter, found earlier to be Adkins; and
 - 3) in failing to appreciate the inconsistency between Pirvu's description of the clothing of the AR-15 shooter - gym pants - and the clothing worn by Vallee in the Tim Hortons video - blue jeans.
- [170] He says these misapprehensions fatally undermine the judge's conclusion that there was confirmatory evidence that gave credit to the truthfulness of Witness B's account of certain events on critical matters.
- [171] Contrary to Vallee's submissions, we do not consider a misapprehension of evidence is demonstrated.
- [172] The most important of the three points is the second alleged misapprehension - the "white shoes" references.
- [173] Vallee says that the effect of para. 686 is to find that the video corroborated Gothard's description of the machine gunman or otherwise is confused whether Vallee was the man running near the Telus store because he wore white shoes at Tim Hortons and the running man wore white shoes. This demonstrates, Vallee says, a fatal confusion in the evidentiary analysis leading to the conclusion he was the AR-15 shooter.
- [174] Paragraph 686 is one of the several summary paragraphs of the judge's conclusions. It must be read in context:

O. Conclusions

- [684] The crime scene evidence established that there were two shooters and two drive away vehicles involved in the killing of Kevin Leclair. It has not been contested that Kreshnik was the driver of the Silver or grey Nissan Murano that followed the van into and out of the Thunderbird Centre. It has been established that Adkins was present as the handgun shooter at the scene of the murder.

- [685] Cory Vallee had no reason to be anywhere else on that day. He had no legitimate employment for three months. He had been actively engaged in the search for the Bacons with Witness C, Witness B, and Adkins at least since Meyer's death. He was being paid by D'Monte to fully engage in the Bacon conflict. He was so engaged earlier in the day when he went with Adkins and Witness C to evaluate an attack on the house of Moe Amarthoun.
- [686] The eyewitness Gothard had the best view of the machine gunman because he didn't duck down for safety as had Pirvu, he had an unobstructed view, and he ran after the gunman. He remembered the machine gunman as stocky and well built and wearing a black shirt. The second person seen running towards the Thunderbird Apartments in the Telus video is wearing dark clothes and white shoes. Vallee was wearing a black shirt and white shoes at Tim Hortons. The description of the machine gunman is consistent with Vallee's appearance on that day. There is no evidence of what Witness C was wearing on that day and the fact that he may have sometimes worn gym pants, consistent with Pirvu's recollection of the machine gunman, does not lead to a reasonable inference that Witness C was the shooter, given the balance of the other evidence about the machine gunman.
- [687] Disposal of the van by Vallee immediately following the Leclair murder is some evidence of involvement, although minimal given some equivocation as to whether the van used was dark blue or black. It is speculative as to other reasons why Vallee may have disposed of the van after owning it for just over three months. It is considered, however, that the disposal transaction was in Vallee's own name using his own address. This is in contrast to the planned disposal of the Tahoe after the Barber murder.
- [688] The mtDNA evidence is given very limited weight to link Vallee, Witness B and/or Witness C to the duffle bag at some point. However, when combined with Vallee's statement to Witness C that the AR-15 was "awesome", the link between Vallee, the AR-15, and the duffle bag found at the scene gains weight.
- [689] While the assessment of the evidence of Witness B and Witness C has been particularly challenging and subject to special scrutiny because an accomplice can easily falsify his evidence, the final determination about their credibility and reliability rested upon consideration of the preponderance of the evidence as a whole. Contrary to the position of the defence, it has not been accepted that all of the Vetrovec witnesses lied to implicate Vallee. The overwhelming evidence established beyond any reason to doubt that Vallee was "Frankie" and he was "Panther". Vallee was at the Tim Hortons on February 6, 2009, just hours before Leclair was gunned down. The AR-15 was in the van that Vallee was in and he showed it to Witness B. The most likely scenario is that it was Witness C who left the scene as he described: it was not his job to stay.
- [690] Vallee was teamed with Adkins following the Meyer murder and it makes sense that he would have contacted Adkins after Leclair was spotted rather than go it alone. The crime scene and eyewitness evidence supports Witness B's narrative from his own perspective and as told by Vallee afterwards at Kreshnik's house.

[691] The decision to kill Leclair was planned and deliberate, with time to assess the situation. Cory Vallee was a member of the conspiracy to kill members of the Bacon group. Leclair was a target with a price on his head. Vallee was at the Thunderbird Centre intending to kill the Leclair target and he achieved that goal.

[Emphasis added.]

[175] We do not read the reference in para. 686 to white shoes as the judge saying this observation corroborates Gothard's description of the machine gunman. However, it may be that, separated from the entirety of the reasons for judgment and read in isolation, one could interpret the passage as the judge drawing a conclusion that Vallee was the man running closest to the Telus store. Such an interpretation, however, is contrary to the judge's conclusion that the handgun shooter, who she found to be Adkins, was that runner. This possible interpretation, then, would be at odds with the judge's detailed analysis of the evidence and her findings of fact, and is out of step with her conclusions replicated above. It simply would not accord with the balance of her reasons, and there is no indication elsewhere of the judge losing track of her findings of fact.

[176] The Supreme Court of Canada directs us to consider the judge's language not only with care, but also in context: *R. v. Gagnon*, 2006 SCC 17. In *R. v. Stirling*, 2008 SCC 10, Justice Bastarache for the court said:

[4] In my view, this appeal ought to be dismissed. Although the passages above contain some ambiguous comments about the use the trial judge made of the prior consistent statements, these remarks must be read in the context of the reasons as a whole. It is clear from this judgment that the trial judge was very aware of the limited use of the prior consistent statements, and he correctly instructed himself on this point repeatedly.

...

[13] I also do not agree that paras. 59 and 95 of the trial judge's reasons indicate clearly that he used Mr. Harding's prior consistent statements for an inappropriate purpose. The precise meaning of these passages is ambiguous, and that ambiguity must be resolved by looking at the remainder of the judgment. As this Court held in *R. v. Davis*, [1999] 3 S.C.R. 759, at para. 103, it is inappropriate for an appellate court to read a single passage out of context, and the reasons as a whole must be evaluated in order to determine whether an error has occurred: [quote omitted]

[Emphasis added.]

[177] We adopt the same approach. The inference we are asked to draw on para. 686's meaning is not ineluctable. It does not have to be made and should not be made, given the entirety of the reasons, the judge's earlier undisputed conclusion that the runner closest to the Telus store was the handgun shooter, and para. 686's location right below the restatement of her conclusion that Adkins was the handgun shooter.

[178] Vallee also submits that the judge was wrong to say that the eyewitnesses' description of the person with the AR-15 was consistent with Vallee's appearance in the Tim Hortons video, and in failing to give weight to the inconsistency in Pirvu's description of the AR-15 shooter's pants and those Vallee is seen wearing on the Tim Horton's video. In making this submission, Vallee presumes the witness to be given primacy is Pirvu, and that the significant aspect of the description is the clothing. We do not find this error. In para. 686, the judge referred only to Gothard and said that earlier she considered that Gothard's evidence was more reliable than Pirvu's; Pirvu had, understandably, ducked for many critical seconds, raising his head after the shooting stopped. Gothard, on the other hand, watched the events unfold and ran after the AR-15 shooter.

[179] As to the evidence, Pirvu described the AR-15 shooter as Caucasian, having a "strong build", and being about 80 kilograms in weight and 175-180 cm in height. Gothard described him as Caucasian, stocky and well built, and around six feet (direct examination) or possibly around five foot seven to ten (cross-examination). Pirvu did not describe the colour of the AR-15 shooter's clothing, but thought he wore gym pants. Gothard remembered a dark shirt. The judge had the Tim Hortons video of Vallee before her, and Vallee was in the courtroom. It was open for her to conclude that Gothard's physical description was consistent with Vallee's appearance. Likewise, Gothard's sole description of his garments - a dark shirt - was consistent with the Tim Hortons video. It was for the judge as trier of fact to assess these points of evidence, and interference with her assessment of the evidence and conclusions would be impermissible.

[180] In conclusion, we would not give effect to these submissions concerning misapprehension of evidence.

f) Conclusion on Vetrovec

[181] In our view, the judge did not demonstrate error in any fashion in considering the evidence of the Vetrovec witnesses. We do not accede to this ground of appeal.

3. The Identity of Frankie

[182] This issue addressed primarily the charge of conspiracy to murder in which the identity of Vallee as a conspirator was the key issue. It played a less significant role in Vallee's conviction for the murder of Leclair.

[183] At the outset of her reasons, the judge identified a key factual question was whether Vallee was a hitman for the UN gang known as "Frankie" or "Panther". The evidence on this issue relied in part on the evidence of the Vetrovec witnesses.

[184] On appeal, Vallee says that the judge committed various errors in finding that the nickname "Frankie" referred to him, including misapprehending the evidence, speculating impermissibly, and reversing the burden of proof. To put these issues in context, we review first the structure of the judge's reasons and the breadth of the evidence on the issue of Vallee's membership in the conspiracy.

a) Structure of the Judge's Reasons on the Conspiracy Charge

[185] The judge began her analysis with a detailed description of the legal principles and rules of evidence in the law of conspiracy, adopting the three-step analysis applied in *R. v. Tran*, 2014 BCCA 343:

[78] In *Carter*, Mr. Justice McIntyre held that to reach a verdict in a case in which the Crown relies on the co-conspirator exception to the hearsay rule a trier of fact must proceed in three steps. He reiterated those steps in *R. v. Barrow*, [1987] 2 S.C.R. 694 at 740. They are:

- (1) The trier of fact must consider all of the evidence to determine whether the alleged conspiracy has been proven beyond a reasonable doubt.
- (2) If the alleged conspiracy is found to exist, then the trier of fact is to consider the evidence directly admissible against each accused and unindicted conspirators to decide, on a balance of probabilities, whether that person is a member of the conspiracy.
- (3) If the trier of fact is satisfied that an accused is probably a member of the conspiracy, then it must go on to decide whether that accused's membership has been established beyond a reasonable doubt. At this step, the trier of fact must consider all of the evidence, including hearsay acts and declarations made in furtherance of the conspiracy by those who have been found to be probable members of the conspiracy.

See also: *R. v. Wang*, 2013 BCCA 311 at para. 48, 299 C.C.C. (3d) 431, leave to appeal ref'd, [2013] 3 S.C.R. xi.

[186] The judge then discussed the content and requirements of each of the three steps. No issue is taken with any aspect of this analysis.

[187] At the first step, which requires consideration of all the evidence, the judge described the general background, largely uncontroversial, of the conflict between the Bacon Brothers and the UN gang, and she further detailed the underlying evidence pertaining to eight different "key events in the conspiracy".

[188] The judge turned then to step two, engaging the balance of probabilities. Vallee contended that the evidence at trial established only that he was associated with some members or associates of the UN gang, and that the evidence did not establish that he probably was a member of the conspiracy. The judge rejected that submission on the basis of four broad categories of evidence, some subdivided into further categories. No issue is taken on any aspect of the findings she made in this part of her analysis.

- [189] The judge last turned to the third step in the analysis - was Vallee's membership in the admitted conspiracy established beyond a reasonable doubt? Here she considered six further categories of evidence, some of which contained multiple discrete items.
- [190] One of these six categories of evidence is titled "Is Cory Vallee 'Frankie'?" Another is headed "Is Cory Vallee 'Panther'?" Under the "Frankie" heading, the judge addressed more than 20 separate statements or intercepted communications, including from the W Hotel, a hotel in Montreal that members of the UN gang visited in 2008. The judge also addressed evidence of each of the four Vetovec witnesses.
- [191] Under the "Panther" heading, the judge dealt with further intercepted communications and the evidence of the four Vetovec witnesses, and she noted that Vallee had a black tattoo of a panther on his right leg.
- [192] Vallee's concerns and identification of purported errors is limited to the single body of evidence that relates to him as "Frankie", and he seeks to impugn only a relatively modest subset of the judge's conclusions. Vallee takes no issue with her findings that he was likely Panther, apart from the relationship of that nickname with Frankie. Nor does he take issue with any of the other findings made under any other heading or body of evidence relevant to membership in the conspiracy.
- [193] In the Executive Summary, the judge summarized her conclusions:
- [31] The Crown also proved beyond a reasonable doubt that Vallee actually was a member of the conspiracy to murder the Bacon Brothers/RS. This conclusion flowed from detailed analysis of the intercepted communications of Kroitoru and Roueche at the W Hotel in April 2008 and later in May 2008 to determine whether reference to "Frankie" was a reference to Cory Vallee or to someone else, from examination of the evidence as to who was "Panther", from review of the intercepted call from Kroitoru to someone named "Sky" on June 5, 2008, from Vallee's involvement in the search for the Bacons as accepted evidence from the key witnesses, from certain admissions of Vallee, and from circumstances including the sale of vehicles close in time to the Meyer and Leclair murders and receipt of a UN ring.
- b) Witness D's Access to the W Hotel Intercepts
- [194] Much of Vallee's submission on misapprehension of the "Frankie" evidence focuses on the W Hotel intercepted communications and Witness D's evidence concerning them.
- [195] Vallee advanced the theory that Witness D's testimony about Vallee as Frankie was a complete fabrication. Ultimately the judge did not accept Vallee's theory of this fabrication on the part of Witness D.
- [196] Vallee's submission on misapprehension of evidence in respect of the Frankie issue addresses the judge's statement that there was "no evidence that Witness D was aware of the W Hotel intercepts when he first cooperated." On this, Vallee says the judge misapprehended the evidence and shifted the burden of proof onto him, a proposition that

would have seriously undercut Witness D's evidence. Vallee accepts that there was no such direct evidence, but he says that there was a significant body of evidence supporting an inference that Witness D had such access from other gang members. He also says that the judge's finding that there was "no evidence" indicates a failure to understand the significance of the evidence as a whole. Still further, he says that the judge's finding that Witness D knew the police were looking for Frankie and Panther "was based upon gang rumour and not from access to disclosure documents" is unsupported by any evidence.

[197] In our view, Vallee has not established the misapprehensions of evidence asserted.

[198] The judge addressed Witness D's evidence that Vallee was Frankie twice in her reasons, first when she dealt with Witness D as a Vetrovec witness whose evidence required "extreme caution":

[194] Witness D knew, however, before he began to cooperate, that police were looking for "Frankie" and "Panther". This was based upon gang rumour and not from access to disclosure documents. It was not established that Witness D had ever seen the executive summary of the police investigation or that he had access to the W Hotel intercepts before he cooperated with police. While he did access the media reports of the W Hotel intercepts at some point, it was not established when this was or how they influenced Witness D's testimony. After review of all of the evidence on this point, but primarily because he did not have access to disclosure regarding the W Hotel intercepts and did not have context to the McDonald's video stills, it is concluded that revelation of who was "Frankie" was not a card that he otherwise played.

[195] The analysis regarding "Frankie" and "Panther" at paragraphs 496-522, Vallee's introduction to the UN gang at paragraphs 123-150, and whether Vallee was a drug dealer for the UN gang at paragraphs 151-155, leads to the conclusion that Witness D did not fabricate the existence of Vallee as "Frankie" based upon rumour, access to disclosure, and the media. The idea of "Frankie" as rumour only was not suggested to Witness D. Witness D was not shown to have disclosure that resulted in the moulding of his evidence. In particular, it was not established as likely that Witness D had access to the executive summary that gave an overview of the W Hotel intercepts based upon the fact that he had heard about other disclosure and may have known of the name of the police investigation. It was not established when he listened to portions of the W Hotel intercepts online through the media.

[196] There are some reasons why Witness D's evidence has particular credibility, despite the indicia of untrustworthiness. He came to police without any assurances and set up a meeting so that police could identify Vallee whom Witness D had said was "Frankie". He did not have access to and did not review any relevant disclosure before identifying Vallee as "Frankie". Much of his evidence was uncontested or confirmed by other witnesses or independent evidence. Given the level of dishonesty that Witness D exercised over courts in the past and all of the other negative trustworthy factors, his evidence should not be

accepted unless it is uncontested or confirmed by other independent evidence that significantly implicates the accused.

- [199] The judge returned to this issue when she more directly addressed the conspiracy charge and the evidence relating to Frankie. In particular, she discussed Witness D's evidence that Frankie had been introduced to him as having previously worked "back east" for a notorious gangster:
- [511] It is concluded that this background story was constructed by either Kroitoru or Roueche to give instant credibility to Vallee within the gang and to inspire Witness D and others to give Vallee respect. The theory that this was a complete fabrication of Witness D does not stand in face of the W Hotel intercepts. There is no evidence that Witness D was aware of the W Hotel intercepts when he first cooperated. Roueche was pressured at the time as leader of the gang to appear to be doing something about the Bacon problem.
- [200] The judge recognized that the defence considered Witness D an unsavoury witness whose evidence had been tainted by the disclosure he had seen, and accepted that Witness D's evidence required extreme caution. She also acknowledged that there was a general sharing of disclosure and information within the gang, expressly addressing this issue several times. Her reasons also dealt directly with access to disclosure of the other Vetrovec witnesses.
- [201] The judge declined, however, to draw the inference that the defence urged upon her in relation to Witness D's access to the W Hotel intercepts or other disclosure about Frankie or Panther before he spoke to the police. Witness D accepted that gang members would sometimes exchange or provide "paperwork" or disclosure to other gang members. He testified, however, that he had no recollection or knowledge of the gang having seen a police executive summary that provided an overview of the W Hotel intercepts, and said he did not know what the executive summary was. Witness D said that he did not know whether the gang became aware of the W Hotel intercepts from other disclosure, and he had no recollection of having received information from the disclosure of another gang member. He did not know when he became aware of the W Hotel intercepts but accepted that he had listened to them at some point after they were disclosed to the public and made available online. We see no basis to conclude that the judge misapprehended any of this evidence.
- [202] We reach the same conclusion on Vallee's contention that the judge lacked an evidentiary foundation to conclude that Witness D was aware of police interest in Frankie through gang rumour. In cross-examination, Witness D agreed the UN gang had learned about a police investigation into the gang, named Project E-Prada, from D'Monte (nicknamed "Benzo"). Witness D testified:

Q [D]o you recall Benzo learning about the--the project name of the police investigation into the UN Gang?

A I believe you're referring to Project E-Prada?

Q Yes, that's right. Tell me about that.

A I don't recall the particulars, other than there was some word on the street, if you will, of the--a police investigation called E-Prada and it was--it had something to do with our gang.

I don't--I don't really have a ton of information about it. He had--he told--he told me and--and others in the gang, I don't recall exactly who, that he--or I should say he spread it in the gang, that it should be talked about a lot, that we had knowledge of this operation to, I don't know, get the message across to the police that we were--that we were aware of it or something along those lines.

Q Okay. And then at some point the gang learned in particular that the police [were] looking for Frankie and Panther, is that right?

A I believe so, yes.

Q And the gang learned that--through a letter that Benzo obtained from a lawyer, is that correct?

A It may--that may have happened like that. I don't recall exactly.

Q That sounds familiar to you, though?

A I wouldn't say it sounds familiar, but it would make sense.

Q The gang learned that the police believed that Frankie and Panther were separate people, correct?

A Yes, that--that--that I recall, yes.

Q And it was only after you came forward that this police theory changed from Frankie and Panther being the same person, is that right?

A I don't know what exactly the police believed at which time, but I do recall telling them that at some point, I believe, that they were the same person.

[203] The foregoing excerpt is consistent with the judge's conclusions and provided a basis on which to infer Witness D was aware, through gang rumor, of police interest in Frankie. There is no basis to find the misapprehension propounded by Vallee.

i) Reversing the Burden of Proof

[204] Vallee also contends in respect of the W Hotel intercepts that the judge reversed the burden of proof. In making this submission, he relies upon the judge's use of the phrases "it was not established" and "it was not established as likely" (at paras. 194 and 195). Vallee says this demonstrates the judge was looking to the defence to establish as likely that Witness D had access to the W Hotel intercepts before he spoke to police.

- [205] As previously discussed, a judgment must be read as a whole: *R. v. Villaroman*, 2016 SCC 33. The judge's reasons amply demonstrate a correct understanding of the burden of proof at each stage of the conspiracy analysis, and she considered each of these stages in turn. The impugned references in paras. 194 and 195, and her return to the issue of Witness D's access to the W Hotel intercepts at para. 511 (all replicated above) in the context of the reasons as a whole, are part of her proper assessment of and weighing of the entire body of evidence on the issue.
- [206] We do not accede to this submission.
- c) Characteristics of Vallee and Frankie
- [207] These challenges to the reasons address the issue of Vallee's identity as Frankie, apart from issues just discussed concerning the W Hotel intercepts.
- i) Background and Findings
- [208] Vallee contends that the judge speculated and drew impermissible inferences when concluding that he was likely Frankie and that she placed a burden on him to disprove the Vetrovec narrative.
- [209] Vallee has, to some degree, shifted the issues that were before the judge in making this submission, and has not recognized that portions of the judge's reasons were made in response to theories Vallee advanced.
- [210] In the W Hotel intercepts, the police captured a series of conversations between Clayton Roueche and Kroitoru in which they mentioned both Frankie and Panther. The judge found that either Roueche or Kroitoru had constructed the story about Frankie being a hitman who had previously worked "back east" for a notorious gangster.
- [211] This fiction, she found, was developed to provide Vallee with instant credibility within the gang and to inspire others to give him respect. She concluded that both Roueche and Kroitoru were "big talkers, full of bravado and flare". She concluded that "Roueche was known to be boastful, to exaggerate and to 'play things up'." The judge noted that "[i]n the W Hotel intercepts, Kroitoru described himself as having blown Frankie up as 'the best guy to have' and warned Roueche that he made up stories and that Roueche might hear 'weird crazy shit' but to 'just go with it'."
- [212] The Crown contended that Vallee was both Frankie and Panther. Vallee said Frankie and Panther were two different people and it was not established he was Frankie. Vallee suggested that Frankie was likely a drug dealer called Frank Misiti who was arrested after meeting with Kroitoru on June 4, 2008. The defence based this submission, in large measure, on Misiti's name, the fact Misiti was from Ontario, and that Misiti had a girlfriend there.

- [213] Responding to this submission, the judge reviewed more than 20 excerpts from the W Hotel intercepts and considered whether each of the intercepts was consistent with Frankie being Vallee, or Misiti. She found some of the intercepts were equivocal, many were generally consistent with Frankie being Vallee, and a few were more consistent with Frankie being Misiti.
- [214] Ultimately, having reviewed the evidence concerning the identity of Frankie, and recognizing that this was only one part of her "Frankie" analysis, she found it was "improbable that Frank Misiti is the 'Frankie' referred to in these conversations" and rejected the inference that Frankie was Misiti. This was well within her purview as trier of fact.
- [215] The judge then reviewed the Panther evidence and rejected the theory that Panther and Frankie were two separate people. Vallee does not challenge this finding, or the reasons she found that he was probably Panther, although they bolstered the judge's conclusion that he was likely Frankie.
- [216] We see no basis to say the judge drew impermissible inferences in finding Vallee was Frankie.

ii) Speculation

- [217] Vallee contends that the judge engaged in impermissible speculation in finding that certain references to Frankie in the W Hotel intercepts were consistent or inconsistent with a reference to him. An inference of fact is speculative where there are no proven facts from which the inference can reasonably be drawn: *R. v. Clark*, 2015 BCCA 488, aff'd 2017 SCC 3, and such a factual finding is most commonly seen as a palpable and overriding error of fact: *Clark* BCCA at paras. 42-43. To be a reversible error, the speculative inference of fact must be clearly identified and shown to have affected the result: *R. v. Clark*, 2005 SCC 2:

9 Appellate courts may not interfere with the findings of fact made and the factual inferences drawn by the trial judge, unless they are clearly wrong, unsupported by the evidence or otherwise unreasonable. The imputed error must, moreover, be plainly identified. And it must be shown to have affected the result. "Palpable and overriding error" is a resonant and compendious expression of this well-established norm .

- [218] In our view, Vallee has not demonstrated impermissible speculation and his submission obscures the relevant inquiry. The question before the judge was not whether every use of the name Frankie in the W Hotel intercepts was consistent with a reference to Vallee - the question was whether she was convinced beyond a reasonable doubt, based on the whole of the evidence, that Vallee was a member of the conspiracy.
- [219] In any case, the judge's inferential reasoning of which Vallee complains (inferences from the W Hotel intercepts) responded to the defence's submissions that various references to Frankie in the intercepts were inconsistent with a reference to Vallee and were consistent with a reference to Misiti. Vallee said this should raise a reasonable doubt on Vallee's

identity as Frankie and, consequently, his membership in the conspiracy. The judge fully addressed this proposition. She said not every reference to Frankie in the W Hotel intercepts, taken literally, was consistent with Vallee, nor would such a conclusion have been necessary to support a conviction. Indeed, the judge recognized that certain references to Frankie in the intercepts "appear[ed] wrong" or "equivocal in relation to" the known circumstances of Vallee. Ultimately, having addressed the whole of the evidence, she did not have a reasonable doubt that Vallee was a member of the conspiracy.

[220] Vallee refers to several instances where he asserts that the judge's findings arising from her review of the excerpts from the W Hotel intercepts were speculative.

[221] The alleged speculation falls into two broad categories. The first relates to excerpts from the intercepts that discuss, for example, Frankie being "out here now" or how Frankie was supposed to "make his money and go home". They are based on Frankie's apparent lack of connection to Vancouver, although we know Vallee had resided in Vancouver and North Vancouver for some time.

[222] On this, the trial judge said:

· Frankie had been "out here now" for two months by April 19, 2008 - While "out here now" may suggest that Frankie came from somewhere else, it could also refer to the fact that Frankie had been newly involved with the gang for that period of time. Given that it was Kroitoru who said "out here", it may have been a play into Kroitoru's story to Roueche about how he came to bring Frankie into the gang, the details of which are not known except for rumours heard by Witness D and others. Vallee was known to have been involved with Witness A, Witness D, and others by February 28, 2008 when he was stopped by police at 8 Rinks. Misiti appears to have been headed east on Highway 1 when he was stopped by police on June 4, 2008, well after the W Hotel conversations. He had lived in Ontario since 1996 and the June 4, 2008 stop was the only evidence of his being in British Columbia.

· Frankie has a new girlfriend in North Vancouver After Kroitoru was released from arrest on June 5, 2008, he called someone named "Sky" and told him that it was important to contact "Cory" and told Sky that "Cory" had a "new broad". This evidence is a direct link to establish that it is Vallee with the "new broad" who is talked about by Kroitoru at the W Hotel. More will be said about this conversation below. The evidence is that Misiti had a dispute in 2008 in Ontario with a woman who had his child. This was not, therefore, a new relationship.

[223] This analysis generally mirrors the judge's treatment of the intercept excerpts she particularly mentioned, which she addressed in bullet form, following the pattern of focus on the language used, discussion of other pertinent evidence, and consideration of the circumstances of each of Vallee and Misiti in relation to that evidence.

[224] In making this submission, Vallee advocates a different, and more literal, interpretation than the conclusion the judge reached.

[225] In like vein, the judge said:

· Frankie was suppose[d] to "make his money and go home" and "the job was supposed to be done in a week or two" - This could refer to Vallee if he was introduced by Kroitoru for the purpose of being a hit man for the UN. There is no suggestion that this was to be a permanent position within the UN whose business was drug dealing. Misiti was only in Vancouver once according to the evidence and it can be inferred that he was on his way back to Ontario when he was arrested.

[226] Vallee seeks to revisit the submissions made to the judge and to advance a literal, as opposed to more colloquial, interpretation of the phrase "go home". This is in circumstances where, as noted by the judge, the communications between Kroitoru and Roueche are infused with a distinct and highly exaggerated vernacular.

[227] We do not accept these complaints as to the judge's interpretation of the intercepts - it was for the trial judge to determine what was meant by the words spoken, not this court.

[228] The second category of impermissible speculative inferences alleged by Vallee relate to his personal circumstances. Vallee was once married to a woman who resided in Vancouver. He had recently become involved with another who also resided in Vancouver and had one child. Vallee contends that these personal circumstances did not accord entirely with Frankie's circumstances as described in the intercepted communications. The judge addressed a number of these mis-matches as she worked her way through the intercept excerpts, and Vallee raises no concern with respect to several of her conclusions.

[229] Vallee does say, however, that certain conclusions are speculative, for example:

· Frankie expressed to Kroitoru that he loved "our kids" - Vallee does not have any children. However, he had a close relationship with Lockart who had a small child that Vallee was seen with in police surveillance. In relation to Vallee, the use of "our" could be a colloquial use by Kroitoru. Misiti had a child in Ontario. But, there is no evidence that he had a relationship with Kroitoru in April 2008 or at any time when he would have discussed loving his child.

[Emphasis added.]

[230] Vallee says the underlined words are speculation and do not adequately reconcile the intercept with his parental circumstances. We consider that Vallee takes too much from these words on this small point of evidence. The phrase seems to be simply part of the judge's exploration of evidence which was unclear; couched in the indefinite words of "could be", they are not a finding. They are, in any case, of no consequence in the context of the reasons as a whole.

[231] We have reviewed many other examples Vallee relies on to challenge the judge's findings as speculative. We do not consider them to have merit. It is apparent that the judge's consideration of each of the intercept excerpts was, by virtue of their number, necessarily succinct. In our view, the isolated examples identified by Vallee do not undermine her conclusions on the W Hotel intercepts or the "Frankie" issue more generally.

iii) Reversing the Burden of Proof

- [232] Vallee submits that the judge reversed the burden of proof on the issue of his identity as Frankie. He says the judge should have asked whether the evidence about Frankie's circumstances, when compared to the appellant's circumstances, raised a reasonable doubt on the issue, not whether the defence could conclusively disprove that the appellant matched Frankie's circumstances.
- [233] This submission simply misreads the reasons for judgment. The judge did not require the defence to disprove that Vallee matched Frankie's circumstances. Rather, the judge responded to Vallee's theory that Frankie was likely Misiti, and to exculpatory inferences that were urged upon her.
- [234] Exculpatory inferences need not be based on proven facts, but a reasonable doubt cannot be founded on alternative theories that are mere speculation or conjecture. The defence's alternative inferences must be reasonable, not just possible: Villaroman at paras. 37, 42; R. v. Paquette, 2019 BCCA 396 at para. 26; R. v. Duong, 2019 BCCA 299 at para. 84.
- [235] It is the role of the trier of fact to assess whether alternative inferences are reasonable, and it is not open to this court to revive an exculpatory inference that the judge reasonably rejected. Importantly, when reviewing the judge's inferences drawn from circumstantial evidence, the evidence and the judge's reasons must be assessed as a whole and not in a piecemeal fashion: Duong at para. 64.
- [236] Further, it is not a reversal of the burden of proof to reject the defence's alternative theories or inferences because they are speculative or are not reasonable. The standard of reasonable doubt applies to consideration of the evidence as a whole and not to individual pieces of evidence: Villaroman at para. 15; Paquette at para. 35; Duong at para. 65.

d) Conclusion on the Identity of Frankie

- [237] We see no error in the judge's finding that Vallee was Frankie. We do not accede to Vallee's third ground of appeal.

4. The Evidence of Peter Redekopp: Uneven Scrutiny

- [238] In this ground of appeal, Vallee contends that the judge applied different standards of scrutiny to evidence that supported the defence theory than she did to evidence that supported the Crown theory.
- [239] A key factual issue on the Leclair murder was whether Vallee had left the shopping mall area before the murder and Witness C had remained and participated as the AR-15 shooter. This was the main alternate suspect theory.
- [240] Witness C denied participation in the murder of Leclair and advanced Redekopp as his alibi for the time of the murder. Redekopp's evidence about that alibi was inconsistent with the evidence of Witness C. The judge rejected the evidence given by Redekopp.

a) Legal Framework

- [241] Whether "uneven scrutiny" is a standalone ground of appeal is uncertain. In *R. v. G.F.*, 2021 SCC 20, Justice Karakatsanis for the majority expressed "serious reservations" as to whether uneven scrutiny is a helpful analytical tool to demonstrate error in credibility findings. Uneven scrutiny is, however, a doctrine that has been applied or considered by this and other appellate courts: *R. v. Roth*, 2020 BCCA 240; *R. v. Murray*, 2020 BCCA 42; *R. v. Aird*, 2013 ONCA 447; *R. v. Kiss*, 2018 ONCA 184; *R. v. Wanihadie*, 2019 ABCA 402; *R. v. Willis*, 2019 NSCA 64.
- [242] Credibility findings are the purview of trial judges. A submission of uneven scrutiny, if it be a ground of appeal, is notoriously difficult to make out because of that high degree of deference given to credibility determinations. At para. 99, G.F. notes this comment by Justice Doherty in *R. v. Howe* (2005), 192 C.C.C. (3d) 480 (C.A.):
- [59] It is not enough to show that a different trial judge could have reached a different credibility assessment, or that the trial judge failed to say something that he could have said in assessing the respective credibility of the complainant and the accused, or that he failed to expressly set out legal principles relevant to that credibility assessment. To succeed in this kind of argument, the appellant must point to something in the reasons of the trial judge or perhaps elsewhere in the record that make it clear that the trial judge had applied different standards in assessing the evidence of the appellant and the complainant.

b) Discussion

- [243] For convenience, we briefly digest again the "Redekopp" evidence. In this case, Witness C said he was with Redekopp when Leclair was killed. Witness C said he and Redekopp were building furniture they planned to use to hide drugs for shipment to Mexico. Witness C said that when he was with Redekopp, he received a message saying "Traitor got it", he told Redekopp one of their enemies just got shot, and Redekopp replied it was "a good thing you're with me, you have an alibi". Witness C said Redekopp confirmed that he would be willing to act as a false alibi for Witness B. Witness C also testified that he later told Witness B that he could use Redekopp as a false alibi. Witness B, however, gave different evidence and said his brother never spoke to him about Redekopp being a false alibi.
- [244] In his evidence, Redekopp professed a poor memory of events. He did not recall meeting Witness C close to the time of Leclair's murder, or having a conversation with Witness C about "an enemy" being killed, or Witness C speaking to him about Leclair's murder. Redekopp expressly denied ever having discussed being Witness C's alibi or about being Witness B's false alibi. He said he would have remembered either discussion.
- [245] The judge said, assessing Redekopp's evidence:

- [650] Peter Redekopp was a reluctant witness with professed little memory and vagueness and ambiguity on significant matters. He was a big user of crack cocaine in 2007-2008 but was "trying to get away from it". He also had undiagnosed neurological problems. He was a drug dealer's lackey, packaging drugs for shipment and transporting large quantities of illicit drugs throughout the Lower Mainland.
- [655] Redekopp obviously knew a lot more than he was willing to tell. He purposefully did not remember many matters. I reject his testimony that he would have remembered being asked to be a false alibi for Witness B. Redekopp was not about to admit to anything in this regard. Also, his criminal lifestyle at the time and his dependence upon Witness C was such that it is concluded that he would have readily agreed to be a false alibi and such a discussion would not have been at all remarkable.
- [656] After consideration of all of the evidence about alibi, it is concluded that Witness C left the others following the meeting at Tim Hortons to work with Redekopp on packaging drugs for shipment. Witness C was working with Redekopp at this time as described by Redekopp and Witness B.
- [246] Vallee agrees it was open to the judge to reject Redekopp's evidence and accept the evidence of Witnesses B and C. He contends, however, that the judge failed to apply equal scrutiny to the evidence of Redekopp on one hand and Witnesses B and C on the other. The submission is that the judge applied a more forgiving eye to the evidence of the Crown's other witnesses than to the evidence of Redekopp.
- [247] We do not accede to this argument. In his short testimony, Redekopp expressed ignorance or a lack of memory over 60 times. He gave evidence only on a finite issue relevant to an incident with which he was not directly involved. The judge addressed Redekopp's purported lack of memory and found he was not a forthright witness. It was open to her to make such a finding.
- [248] We do not agree, either, that the judge treated other witnesses with a more forgiving eye than Redekopp. It was open to the judge to accept none, some, or all of the evidence she heard from any number or combination of witnesses: *R. v. Najafi-Chaghabouri*, 2014 BCCA 278. The fact that Redekopp and the Vetrovec witnesses were all, to some degree, imperfect witnesses did not require the judge to accept or reject their evidence equally.
- [249] A review of the judge's reasons shows she provided a detailed and separate consideration of each of the witnesses. The judge expressed "caution" or "extreme caution" in approaching the Vetrovec evidence and looked for confirmation. She rejected significant portions of their evidence. She found, for example, that "Witness A often had a poor memory", and that his evidence in respect of several issues was affected by the disclosure that he had seen. She similarly rejected evidence of Witness D. Conversely, she found that "Witness C had a reasonably good memory and was clear when he did not". Even then, she found that "he was mistaken in his recollection of some events" and she addressed those issues. This was discussed above on the second ground of appeal, the Vetrovec issue.

- [250] More generally, Vallee seeks to use uneven scrutiny to revisit the judge's credibility findings. He does this in relation to general topics and in relation to specific and detailed evidence.
- [251] For example, Vallee addresses the "criminal lifestyles" of each of Witnesses B and C. So too did the judge. Vallee comments on the fraternal relationship of Witnesses B and C and their communications with each other prior to testifying at trial. So too did the judge. Vallee identifies inconsistencies in the evidence given by each of Witnesses B and C. So too did the judge. Vallee contends that evidence given by Witness B in his cross-examination about his alibi was inconsistent with his police statements. The judge addressed this issue and referred to the cross-examination.
- [252] The judge made extensive and detailed credibility findings based on the mountain of evidence she heard. We find no error demonstrated on which to interfere with her findings. We do not consider that there is any merit to this ground of appeal.

IV. Conclusion

[253] The appeal is dismissed.

"The Honourable Madam Justice Saunders"

"The Honourable Mr. Justice Abrioux"

"The Honourable Mr. Justice Voith"

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