NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Derbyshire*, 2016 NSCA 67

Date: 20160913
Docket: CAC 435848
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

Brittany Leigh Derbyshire

Respondent

Judge: The Honourable Justice Duncan R. Beveridge

Appeal Heard: March 15, 2016, in Halifax, Nova Scotia

Subjects: Abuse of process; publication bans

Summary: Undercover police officers posed as members of an outlaw motorcycle gang. They confronted the respondent in a dimly lit underground garage. They ordered her to get back into her car. They demanded that she tell them details of a homicide and her involvement in helping the suspect to escape. She told them, and then travelled with the officers for the remainder of the day, where more details were obtained. She also pointed out to the officers where certain things were done. The police charged the respondent with being accessory after the fact to murder.
Prior to trial, the respondent brought a motion to stay the proceedings under the *Canadian Charter of Rights and Freedoms* or that the police conduct amounted to an abuse of process. The trial judge found that the respondent had cooperated with the undercover police officers out of fear; in particular that there had been a very strong implied threat of physical harm to her if she did not give the "gangsters" what they were after. The trial judge dismissed the *Charter* motion,

but found there had been an abuse of process. Instead of staying the proceedings, he excluded the evidence. The Crown offered no evidence and the respondent was acquitted.

The Crown asked a justice of the Nova Scotia Supreme Court to order a publication ban on information that could identify the undercover police officers for a period of one year. The ban expired in May 2015. The Crown then applied to the Nova Scotia Court of Appeal for a new order.

Issues: (1) Did the trial judge err in law in finding an abuse of process?

(2) Did the trial judge err in his approach or ultimate conclusion that exclusion of the evidence was an appropriate and just remedy?
(3) Was it appropriate to grant a publication ban?

Result: The trial judge committed no legal error in the test he applied nor in his finding of abuse of process. Further, in light of his factual findings, he did not commit reversible error in his chosen remedy of exclusion of the evidence.
It had not been demonstrated that the requested ban is necessary for the proper administration of justice. The application for the publication ban was denied.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 46 pages.

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Respondent

Judges:	Beveridge, Saunders, Van den Eynden, JJ.A.
Appeal Heard:	March 15, 2016, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Beveridge, J.A.; Saunders and Van den Eynden, JJ.A. concurring
Counsel:	Jennifer MacLellan, Q.C., for the appellant Patrick MacEwen and Jonathan Hughes, for the respondent

Reasons for judgment:

INTRODUCTION

[1] Police investigative techniques have evolved to catch criminals. One Canadian innovation is the "Mr. Big" operation. Police pretend to be criminals. They befriend a suspect. For the suspect to gain membership or advance in the fictional criminal organization, he or she must confess details of a crime to the crime boss, Mr. Big. The confession is then used against the suspect.

[2] The Supreme Court of Canada in *R. v. Hart*, 2014 SCC 52 created a new legal paradigm to address the forensic dangers posed by a "successful" Mr. Big operation.

[3] This appeal is not directly about a Mr. Big operation. Here, undercover police officers pretended to be members of an outlaw motorcycle gang (OMG). Originally, the police planned that when the undercover officers confronted the respondent she would contact the real target, Steven Skinner. Their conversations would be intercepted. Information would be obtained as to Skinner's whereabouts so that he could be arrested.

[4] The original plan never got off the ground. When the two "gang members" confronted the respondent, she felt threatened. She said she was held against her will for a whole day. The officers directed her to tell them, and then demonstrate, what she had done to assist Skinner to get rid of evidence and enable him to escape from the jurisdiction. She complied.

[5] The police operation gained no evidence to assist them in the arrest of Mr. Skinner. Instead, the police charged the respondent with being accessory after the fact to murder. The respondent claimed that the police conduct violated her rights under the *Canadian Charter of Rights and Freedoms*, or amounted to an abuse of process. She asked that the prosecution be stayed or the evidence obtained excluded.

[6] The trial judge was the Honourable Justice Michael J. Wood. He dismissed the *Charter* motion and declined to stay the proceedings. However, relying on the principles in *R. v. Hart*, Justice Wood was satisfied that the conduct of the police amounted to an abuse of process. By way of remedy, he ordered the evidence

obtained by the police excluded. The Crown offered no further evidence, and the respondent was acquitted.

[7] The Crown appeals, claiming that the trial judge erred in law in a number of ways on the road to his finding an abuse of process and by the remedy of evidence exclusion. I agree that the analytical path chosen by the trial judge may be open to debate. However, I am not satisfied that the path makes any difference to the soundness of his ultimate conclusion that courts cannot condone the conduct that he found the police engaged in, nor in the remedy he granted.

[8] The Crown applies for an order banning publication of the names of the undercover officers and any information that could disclose their identity. I will discuss the history and outcome of this application separately.

[9] To understand the Crown's complaints, it is necessary to review the trial proceedings and the sometimes difficult jurisprudential terrain created when courts are called on to determine if police conduct warrants a remedy.

TRIAL PROCEEDINGS

[10] First, some background. Stacey Adams was murdered on April 10, 2011. Jeff Belanger and Crystal Stephens gave statements that implicated Steven Skinner as the principal in that homicide and in two other shootings. Skinner was nowhere to be found. Police believed that he had fled the country with the assistance of one or more persons. The police obtained authorization to intercept communications. The authorization did not yield results.

[11] The lead investigator, D/Cst. Steven Langille, proposed a "minor undercover operation". The purpose was to "strictly stimulate conversation" amongst seven named subjects. Undercover officers would pose as members of an OMG. Phase One would have the officers visiting establishments known to be frequented by the subjects of the operation. In Phase Two, scenarios would be developed for the officers to meet some of the subjects to further elevate stress levels and stimulate conversation.

[12] The operation was approved. But when members of the RCMP arrived in Halifax to carry out the undercover operation, a somewhat different plan was developed. Sgt. Chubbs was the "cover" officer. He was in charge of implementing the undercover operation. He proposed that two undercover officers

carry out a one-time approach of the respondent, Brittany Derbyshire. This would occur in a public place, giving her the opportunity to walk away.

[13] Sgt. Chubbs described what he planned and hoped for:

> Details I provided them [the undercover officers] was a little more than, again, I would normally provide. However, the reason why it was given in more detail, My Lord, is that this was a one-time opportunity to approach Derbyshire. One of two things ... and this is, again, based on my experience. So, based on my experience, one of two things were going to happen. Ms. Derbyshire was going to walk away from us and have no dealings with us when we approached her in a public place and tell us to get lost and leave. That's one thing that happens.
>
> The second thing that'll happen is that she believed the cover story and that she reaches out and makes contact to somebody on that targeted list. And, in particular, we wanted her to call Steve Skinner. So those were kind of the anticipated results. So they had to have all the details of the offence in case ... the other thing would be what I call an "off chance" that Brittany Derbyshire tells us everything.

[14] The two officers that carried out the operation were personally chosen by Sgt. Chubbs. They were French Canadian. They would pose as members of an OMG from Montreal. He had confidence that they could carry off the role as members of an OMG. His faith in the authenticity of their assumed persona was not misplaced. If anything, their performance was too good, and not carried out as envisaged by Sgt. Chubbs.

[15] The two undercover officers did not meet the respondent in a public place. They parked their rented SUV outside of her apartment building. When she drove her car inside, they followed on foot. They demanded she get back into her small car. One sat beside her. The other officer blocked her ability to get out of the car. The evidence from the officers and the respondent differed. I will describe it in more detail later.

[16] For now, it is sufficient to say that the respondent told them that she had helped Skinner dispose of evidence and get to the airport in Moncton, knowing that he had committed murder. A charge followed of being an accessory after the fact to murder (s. 240 of the *Criminal Code*). Almost a year in advance of her scheduled jury trial, the respondent brought a motion requesting a stay of proceedings on the basis that the police conduct violated her right to silence and self-incrimination under s. 7 of the *Canadian Charter of Rights and Freedoms*, or

amounted to an abuse of process. Alternatively, the evidence obtained should be excluded under s. 24(2) of the *Charter*.

[17] Evidence was called at a *voir dire*, June 23-27, 2014. The respondent testified. The Crown called five police officers. Detailed oral submissions were made on July 25 and October 1, 2014. In addition, the parties filed written briefs before and after the evidentiary portion of the *voir dire*. The importance of the submissions will become clear later. First, I will refer to the substance of the evidence, the submissions made, and the trial judge's reasons.

The evidence

[18] In the summer of 2011, the respondent was 23 years old. For six years, she worked in sales and promotion, and more lately as a server. She lived alone in a large apartment building in Lower Sackville, Nova Scotia.

[19] In her teens, the respondent had dated one Ryan Belanger. Ryan's older brother, Jeff, was involved in the drug trade. As she and Ryan got older, they also became involved. The evidence was not precise about hierarchy and roles, but Steven Skinner was also involved with the Belangers in trafficking cocaine. The respondent met Skinner when she was 21 years of age.

[20] In 2011, Ryan Belanger lived in Toronto. The respondent assisted him in his drug trafficking activities by relaying messages to associates. She also collected debts and, at the very least, transported money. She was aware of the use of violence in the drug trafficking business, but had not witnessed any. Both Ryan Belanger and Steven Skinner were big men, who wore high-end designer clothes to emanate tough guy personas.

[21] On July 13, 2011, the respondent had spent the night at a friend's apartment. She returned home on July 14, 2011. She used her passcard to open the underground parking door. Parked outside was a black Suburban with two occupants—the undercover officers.

[22] The lead officer was Cpl. Patrick Isabelle. His partner was a larger man, Sgt. Daniel Perron. Both were dressed as members of an OMG, wearing high-end tough guy clothes and gold jewellery. The evidence of the respondent and the undercover officers differed in some details, and definitely in perspective.

[23] There is some commonality. The officers purposely acted aggressively toward the respondent. They ordered her back into her car. Cpl. Isabelle sat next to her; his partner blocked her exit.

[24] According to the respondent, Cpl. Isabelle grabbed her by the wrist to put her into the car. She said she was petrified. Cpl. Isabelle explained that they were in Halifax to deal with the mess made by Skinner. There was a rat. They were there to get rid of Jeff, make him disappear. She could be an asset for them, but they were scared that she was a rat. She could not get out of the car. She said she felt she had no choice or they would think she was a problem that they would need to get rid of.

[25] The respondent told them that she had driven Skinner to the Moncton airport. They asked if she knew where the gun was. She said she did. Cpl. Isabelle told her she was going to Moncton. The respondent said she had to work. Cpl. Isabelle said work was cancelled, she was going with them. They left the garage. The respondent was escorted to the black SUV with tinted windows. She was placed in the rear with Cpl. Isabelle. Sgt. Perron was the driver.

[26] Cpl. Isabelle instructed her to turn off her phone. She was not permitted to use it. When she needed to send a text to explain her absence from work, they vetted the content first. Cpl. Isabelle spoke English with her and French with Sgt. Perron.

[27] The black SUV stopped in Oxford, Nova Scotia on the way to Moncton. The respondent was never left alone. Once in Moncton, she took them to where she said the gun was disposed of. When they stopped for food, the officers ordered. The respondent did not eat. When she went to the washroom, they took her cell phone from her.

[28] On the way back to Lower Sackville, she took them to a site where she said she had burned the clothes that Skinner had worn. Once back at her apartment building, Cpl. Isabelle demanded that she give them the clothes she had worn the day she had helped Skinner. She said she would go get them and return.

[29] That was not an option. Cpl. Isabelle told her they were coming with her. Once in the apartment, the officers examined and commented on the personal photographs of her family. Once again, she felt frightened and scared for herself and other people.

[30] Inside the apartment, Cpl. Isabelle wrote a number down for her and told her to call at 1:00 p.m. the next day—if she was a minute late, or if she decided to disappear, they told her that money talks and they could pay people to find her.

[31] The respondent called the next day. Cpl. Isabelle was very upset. She was five minutes late. He instructed her to call back at 6:00 p.m. and hung up. The reason for the delay was that he wanted more time to set up a wiretap authorization to capture her comments electronically. She called, but explained that she had to work and was then going to leave Nova Scotia. She did not speak to them again.

[32] Much of what the respondent described was confirmed by the evidence of the undercover officers, but with a different perspective. Cpl. Isabelle emphasized that the main objective of an undercover officer is to obtain admissible evidence for court. Neither he, nor Sgt. Perron, mentioned that the object of this operation was to generate electronic communications which could be intercepted.

[33] Cpl. Isabelle explained that the strategy was to confront the respondent with investigational facts and demand to know what had happened, so they can clean up loose ends or mess from the crime. He intended to meet her, not in a public place, but somewhere he could be alone with her.

[34] Dressed as a member of an OMG, Cpl. Isabelle described his approach and initial interaction with the respondent. He told her that they needed to "fucking talk with her" and ordered her back into her car. He denied touching her, but agreed that he sat uninvited in the passenger seat, while Sgt. Perron stood at the driver's window, blocking her ability to exit. In an aggressive tone, he told her that business had gone to shit since the murder, they knew there was a rat, and they were sent by the higher ups from out West to clean up the mess. While still being aggressive, he demanded that she had better be honest with him, and "no fucking bullshit". He never said what would happen to her if she was not honest with him.

[35] Cpl. Isabelle said he was surprised as the respondent immediately agreed that there was a "rat", business had been bad, and told him what she had done to assist Skinner to escape. She drew crude maps to demonstrate, and when asked by Isabelle to show them, simply agreed to do so.

[36] According to Cpl. Isabelle, once she started talking in the underground garage, he stopped being aggressive and simply elicited information in a normal manner. He ensured she was not afraid. He asked her, at least three times, when in the SUV, whether she was afraid. She said she was not.

[37] Cpl. Isabelle admitted he turned overtly aggressive with the respondent in the SUV as they were returning to her apartment building. This was in relation to his demand that she turn over the clothes she wore, and on the way to the apartment he said, "You better fucking not talk to anybody."

[38] Sgt. Perron's evidence added little to what was already known. He said they were asked to approach the respondent and try to get as much information from her as they could. He played the role of driver or assistant. He really said nothing to the respondent.

[39] Sgt. Perron's evidence was noticeably vague in a number of areas, and wavered between direct and cross-examination. Sgt. Perron conceded that he did not have a strong recollection of the events. He agreed that Cpl. Isabelle, in order to impersonate who he was supposed to be, raised his voice "a bit". He also agreed that, in their role as bad guys, they had moved quickly toward the respondent, Cpl. Isabelle had opened the car door and told her to get back in, and indeed had put his hand on her arm and guided her in the process. She appeared to be frightened at the very beginning.

[40] After ten minutes, he described the respondent as relaxed and normal. She agreed to draw a map and take them to Moncton. He recalled that Cpl. Isabelle had raised his voice on a number of occasions in the SUV—insisting that she not lie to them. And she was not free to use her phone. He and Cpl. Isabelle had spent 7.5 hours playing bikers.

The submissions

[41] The respondent filed a brief on April 11, 2014. She alleged that her s. 7 rights to silence and self-incrimination were infringed, and her rights were also breached by the failure of the police to record the interchange between her and the undercover officers. Further, that the police conduct amounted to an abuse of process. The remedy requested was a stay of proceedings or that the evidence be excluded under s. 24(2) of the *Charter*.

[42] The Crown responded with its brief on May 1, 2014. It contended that the respondent's arguments must fail factually and legally. The respondent was not in police custody; she was not detained; there were no threats of violence; nor was there any pronounced emotional or psychological pressure.

[43] Apart from the majority reasons of the Newfoundland Court of Appeal in *R. v. Hart*, 2012 NLCA 61, the authorities did not extend the right to silence to pre-detention situations. *Hart* had been argued before the Supreme Court and was on reserve. The Crown predicted it would not stand.

[44] On July 25, 2014, oral submissions were made. The respondent argued that she had been detained. She was afraid of being labelled a "rat" by the OMG. It was fear that made her talk to the undercover officers. She was told where to sit and what to do. She had no realistic ability to leave. She was physically and psychologically detained. Both factually and legally, the conduct of the police infringed her rights. The proceedings should be stayed or the evidence excluded.

[45] The Crown conceded that the officers' initial approach to the respondent was forceful. Foul language was used, and the tone of voice used by Cpl. Isabelle was to preserve his credibility for the role he was playing. But after that initial approach, the exchange was very relaxed, with the respondent a willing participant.

[46] The Crown also forcefully attacked the credibility of the respondent's version of the interrogation, including that given the evidence of her involvement in a drug trafficking network, she should not have been surprised or shocked by the officers' demeanour and statements.

[47] Six days after oral submissions, the Supreme Court of Canada released *R. v. Hart*, 2014 SCC 52. The majority established a new two-pronged approach to the admissibility of confessions generated by a Mr. Big operation. The evidence is presumptively inadmissible. The Crown must establish that the probative value outweighs the prejudicial effect of the evidence. But, regardless of the reliability of the confession, if the accused establishes that the police crossed the line from skillful police work to abusive conduct that unfairly coerces a confession, a stay of proceedings or exclusion of evidence could result.

[48] The trial judge invited the parties to make submissions in light of *R. v. Hart*.

[49] The Crown filed written submissions on September 12, 2014. It argued that the new *Hart* considerations did not apply as the undercover operation was not a Mr. Big scenario. The Crown agreed that the law on abuse of process doctrine had not changed. The doctrine was meant to "guard against state conduct that society finds unacceptable, and which threatens the integrity of the justice system". In this case, it argued there were no threats, violence, or inducements. The police did not prey on any vulnerabilities unique to the respondent.

[50] The respondent's brief of September 22, 2014 submitted that although the operation conducted in this case was not a classic Mr. Big operation, it was nonetheless a truncated version of one. Hence, the same principles should apply to place the burden on the Crown to establish admissibility.

[51] In addition, regardless of the reliability of the alleged inculpatory remarks and outcome of a balancing of the probative value against prejudicial effect, the conduct of the police amounted to an abuse of process. The respondent relied on the principles outlined in *Hart* by Justice Moldaver, writing for the majority, where he said:

> [115] It is of course impossible to set out a precise formula for determining when a Mr. Big operation will become abusive. These operations are too varied for a bright-line rule to apply. But there is one guideline that can be suggested. Mr. Big operations are designed to induce confessions. The mere presence of inducements is not problematic (*Oickle*, para. 57). But police conduct, including inducements and threats, becomes problematic in this context when it approximates coercion. In conducting these operations, the police cannot be permitted to overcome the will of the accused and coerce a confession. This would almost certainly amount to an abuse of process.
>
> [116] Physical violence or threats of violence provide examples of coercive police tactics. A confession derived from physical violence or threats of violence against an accused will not be admissible – no matter how reliable – because this, quite simply, is something the community will not tolerate (see, e.g., *R. v. Singh*, 2013 ONCA 750, 118 O.R. (3d) 253).

[52] Both parties expressed a desire to appear in person and make oral submissions. They did so on October 1, 2014. There is no need to recite those submissions.

Trial Judge's Reasons

[53] The trial judge set out the background, the relevant evidence, and the positions of the parties. He then turned to his analysis, which focussed on *R. v. Hart* and *R. v. Mack*, 2014 SCC 58. The trial judge reasoned that the respondent was not subject to a Mr. Big operation. As a result, the new rule of evidence established in *R. v. Hart* placing the onus of admissibility on the Crown did not apply.

[54] On the other hand, there were aspects of the Supreme Court's reasons that informed his analysis. First, (unlike the Newfoundland Court of Appeal, and

Justice Karakatsanis in *Hart*), Justice Moldaver refused to extend the s. 7 right against self-incrimination to undercover police operations. Part of Justice Moldaver's rationale was the availability of the common law doctrine of abuse of process to deal with allegations of police misconduct.

[55] This led the trial judge to conclude the s. 7 right to silence had no application, the respondent's allegations of police misconduct were left to be assessed under the doctrine of abuse of process.

[56] The trial judge also decided that the failure by the police to record their exchange with the respondent did not breach her right to make full answer and defence.

[57] Turning to the doctrine of abuse of process, the trial judge accepted the guidance offered by Justice Moldaver in *R. v. Hart*, where he wrote:

> [86] Second, I would rely on the doctrine of abuse of process to deal with the problem of police misconduct. I recognize that the doctrine has thus far proved less than effective in this context. While the problem is not an easy one, I propose to provide some guidance on how to determine if a Mr. Big operation crosses the line from skillful police work to an abuse of process.

[58] The trial judge quoted a number of other paragraphs from the reasons of Justice Moldaver (these included paras. 115 and 116, see above at ¶ 51). He also recited:

> [117] Violence and threats of violence are two forms of unacceptable coercion. But Mr. Big operations can become coercive in other ways as well. Operations that prey on an accused's vulnerabilities – like mental health problems, substance addictions, or youthfulness – are also highly problematic (see *Mack*, at p. 963). Taking advantage of these vulnerabilities threatens trial fairness and the integrity of the justice system. As this Court has said on many occasions, misconduct that offends the community's sense of fair play and decency will amount to an abuse of process and warrant the exclusion of the statement.
>
> [118] While coercion is an important factor to consider, I do not foreclose the possibility that Mr. Big operations can become abusive in other ways. The factors that I have outlined, while not identical, are similar to those outlined in *Mack*, with which trial judges are well-familiar (p. 966). At the end of the day, there is only so much guidance that can be provided. Our trial judges have long been entrusted with the task of identifying abuses of process and I have no reason to doubt their ability to do the same in this context.

[59] The trial judge observed that confessions unfairly coerced by undercover police officers would likely lead to a finding of abuse of process. He cited violence and threats of violence as obvious examples of unfair coercion. He saw no reason to limit these principles to Mr. Big operations:

> [74] With confessions to undercover police officers the use of techniques which unfairly coerce those admissions will likely lead to a finding of abuse of process. Violence and threats of violence are obvious examples. Unlike the new evidentiary rule, there is no logical reason to limit Justice Moldaver's comments on abuse of process to cases involving "Mr. Big" confessions.

[60] The trial judge then turned to the evidence. He noted there were discrepancies. A number of key findings of fact were made. In essence, the trial judge accepted the evidence of the respondent. He was satisfied that the reason she told them what had happened was the result of fear and intimidation, not as the Crown had argued, because of her desire to help the criminal operators from Montreal.

[61] His key findings are found in the following paragraphs:

> [80] Understandably, Ms. Derbyshire completely believed that the undercover operators were gangsters from Montreal. When they approached her in the underground parking garage the officers were intimidating. They moved aggressively and Corporal I. raised his voice, pointed his finger and ordered Ms. Derbyshire into her car. Ms. Derbyshire did as she was told and found herself confined by Corporal I. in the passenger seat and Sergeant P. outside the driver's door. These were very close quarters and Corporal I. continued to speak to her aggressively, waving his finger and demanding that she tell them about her involvement in the Adams' homicide. She did so immediately and **I am satisfied, based upon her testimony, that it was the result of fear and intimidation and not a willingness to help these "criminals" from Montreal.**
>
> …
>
> [86] The undercover operators intended to create an intimidating and threatening environment for Ms. Derbyshire and they were successful in doing so. **She said she was frightened and I have no doubt that she was. There was a very strong implied threat of physical harm to her if she did not give the "gangsters" what they were after. The fact that she gave incriminating information, implicating both herself and Mr. Skinner, in such a short period of time confirms the nature of the atmosphere which had been created.**
>
> [87] The situation faced by Ms. Derbyshire should be contrasted with those encountered by Messrs. Hart and Mack who were given clear choices about whether to confess. They were not subject to threats, intimidation or coercion.

> [88] Once the confession and other information was given by Ms. Derbyshire and she was told to show the officers the physical evidence, the rest of the day unfolded as one would expect. Corporal I. intended to maintain control of the situation, and over Ms. Derbyshire, and he did so. While the tension may have diminished somewhat, that does not make Ms. Derbyshire's subsequent actions or statements any more voluntary. Once she had disclosed the significant information concerning the Adams' murder confirming it in subsequent discussions, or providing further details is part of one continuous transaction.
>
> [89] **I am satisfied that the actions of Corporal I. and Sergeant P. resulted in the type of unfair coercion described by Justice Moldaver in *Hart*. Ms. Derbyshire's confession and identification of physical evidence was obtained by intimidation and implied threats of harm. She was never given a choice which would have permitted her to walk away without disclosure. This was an abuse of process**.
>
> [Emphasis added]

[62] The trial judge then considered what remedy should follow. He directed himself that a stay of proceedings for an abuse of process should rarely be granted. It required "the clearest of cases". The judge was on firm territory. He cited and relied on the latest recitation of the governing principles set out in *R. v. Babos*, 2014 SCC 16.

[63] The trial judge recognized that there are two categories of abusive state conduct that may warrant a stay: the main category, where the conduct compromises the fairness of an accused's trial; and the residual category, where there has been conduct that risks undermining the integrity of the judicial process.

[64] There was no suggestion that trial fairness had been undermined. His focus was, therefore, on the residual category. For that category, the trial judge relied on the direction from the majority reasons for judgment penned by Moldaver J. in *Babos*, where he explained the three stage test to obtain a stay of proceedings for the residual category.

[65] In relation to the first stage of the test for the residual category, the inquiry is whether permitting a trial would leave the impression that the justice system condones conduct that offends society's sense of fair play and decency and would be harmful to the integrity of the justice system:

> [35] By contrast, when the residual category is invoked, the question is whether the state has engaged in conduct that is offensive to societal notions of fair play and decency and whether proceeding with a trial in the face of that conduct would

> be harmful to the integrity of the justice system. To put it in simpler terms, there are limits on the type of conduct society will tolerate in the prosecution of offences. At times, state conduct will be so troublesome that having a trial – even a fair one – will leave the impression that the justice system condones conduct that offends society's sense of fair play and decency. This harms the integrity of the justice system. In these kinds of cases, the first stage of the test is met.

[66] At the second stage, the question is whether any other remedy short of a stay is capable of redressing the prejudice. If still uncertain if a stay is appropriate, the court turns to the third part of the test, which requires the court to engage in a balancing of interests between denouncing the misconduct and preserving the integrity of the justice system, against society's interest in having a decision on the merits.

[67] The trial judge said he considered all of these factors and was not satisfied that a stay of proceedings was required or appropriate. Instead, he found that the harm could be remedied by excluding the evidence the police obtained. He wrote:

> [93] When I consider all of these factors I am not satisfied that a stay of proceedings is required or appropriate. While the misconduct in this case could be categorized as offensive to notions of fair play and decency, I am satisfied that the harm can be remedied by excluding the evidence which was obtained. This would include the statements made by Ms. Derbyshire to the undercover operators as well as the physical evidence and its locations which she identified. By doing so, the Court distances itself from the impugned conduct and at the same time recognizes the importance of having this serious charge tried on its merits.

[68] With this background, I turn to the appellant's complaints of error.

[69] The Crown asserts that the trial judge erred because he: failed to select and apply the proper test for an abuse of process; erred in law in finding an abuse of process; and excluded evidence as a remedy. The precise words set out in its factum are:

1. The trial judge erred in law by failing to consider the proper test for finding an abuse of process.
2. The trial judge erred in law by failing to properly apply the test for abuse and erred in law by finding an abuse of process.
3. The trial judge erred in law by failing to consider the proper test for exclusion of evidence as a remedy for a s. 24(1) *Charter* breach and erred in law by finding that exclusion of evidence was a just and appropriate remedy.

[70] Given the overlap between the first two grounds, I will restructure them as follows:

1. Did the trial judge fail to identify/apply the correct test for an abuse of process?
2. Did the trial judge err in law in finding an abuse of process?
3. Did the trial judge err in his approach or ultimate conclusion that exclusion of the evidence was an appropriate and just remedy?

[71] Before addressing the complaints of error, it is important to recognize the standard of review that governs this Court's analysis of the putative errors.

[72] Whether a right guaranteed by the *Canadian Charter of Rights and Freedoms* has been infringed, or an abuse of process occurred, is a question of law. A trial judge is required to articulate and apply the correct legal principles. A failure to do so will be reviewed on a standard of correctness.

[73] However, not everything that goes into deciding a question of law attracts such a standard. Trial judges are frequently required to make findings of fact that inform the ultimate legal question to be answered. Such findings of fact, or of mixed law and fact, without an extricable legal component, are subject to deference and cannot be disturbed unless the trial judge made a palpable and overriding error (see *Housen v. Nikolaisen*, 2002 SCC 33, at paras. 25, 26 and 36).

[74] I see no reason why this does not also apply generally to facts found in a dispute over violation of rights (see *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48). This imports an assessment of whether the finding is unreasonable or not supported by the evidence (see *H.L. v. Canada (Attorney General)*, 2005 SCC 25).

[75] Justice Moldaver in *Babos* referred to the level of deference for the remedy selected by a trial judge for an abuse of process (under s. 24(1)) as follows:

> [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; *Tobiass*, at para. 87; *R. v. Bjelland*, 2009 SCC 38, [2009] 2 S.C.R. 651, at paras. 15 and 51).

Did the trial judge fail to identify/apply the correct test for an abuse of process?

[76] The appellant set out the leading authorities on the common law doctrine of abuse of process and its seeming assimilation within the framework of the *Charter*. To what end? The appellant says it delved into the issue because it was not clear whether the trial judge was applying a common law or a *Charter* analysis, which would have had implications for the burden of proof and the availability of various remedies.

[77] In essence, the Crown contends that the common law doctrine of abuse of process is subsumed by the *Charter*. The Crown says that this required the trial judge to undertake a balancing exercise to determine if the state conduct amounted to an abuse of process (in addition to a balancing exercise at the remedy stage). The trial judge did not do so, and hence committed legal error.

[78] Further, the Crown suggests that the trial judge erred by lowering the strict requirement to find an abuse of process when he said that the misconduct in this case "could be categorized as offensive to notions of fair play and decency".

[79] Courts decide what they are asked to decide. In this case, the respondent asked the judge to find that the police conduct amounted to an infringement of her rights in two aspects: her right to remain silent under s. 7 and by the failure of the police to record the communications. The latter claim was rightly summarily rejected. The former was foreclosed by the clear direction from the Supreme Court of Canada in *R. v. Hart* that s. 7 of the *Charter* had no application in determining the admissibility of confessions induced by acts and conduct of undercover police officers.

[80] It is not hard to understand the Crown's position. But, with respect, it stems from a failure to keep separate the traditional remedy for conduct found to be abusive—a stay of proceedings—from the ability of a trial judge to find abuse. It also fails to recognize that the common law doctrine of abuse of process has not been entirely subsumed by the *Canadian Charter of Rights and Freedoms*.

[81] It was not until *R. v. Jewitt*, [1985] 2 S.C.R. 128 that the Supreme Court clearly confirmed that courts could order a stay of criminal proceedings as part of their inherent common law jurisdiction:

> [25] I would adopt the conclusion of the Ontario Court of Appeal in *R. v. Young, supra*, and affirm that "there is a residual discretion in a trial court judge

> to stay proceedings where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings". I would also adopt the caveat added by the Court in *Young* that this is a power which can be exercised only in the "clearest of cases".

[82] Little has changed. But state conduct that violates the fundamental principles of justice is also likely to violate the rights guaranteed by the *Canadian Charter of Rights and Freedoms*. If it does, remedies are available under s. 24.

[83] If evidence has been "obtained in a manner" that infringed or denied one or more *Charter* rights, then the tripartite test set out in *R. v. Grant*, 2009 SCC 32 governs whether the Court must exclude the evidence to protect the administration of justice from disrepute pursuant to s. 24(2).

[84] If the admissibility of evidence is not engaged, but rights have been infringed by state conduct, an accused can seek a remedy that is appropriate and just under s. 24(1). The remedy can vary from the most drastic remedy, a stay of proceedings (limited to "the clearest of cases" (*R. v. Bellusci*, 2012 SCC 44)), to an adjournment of proceedings (with or without an award of costs), an exclusion of evidence and an order for a new trial (*R. v. Xenos* (1991), 70 C.C.C. (3d) 362 (Que. C.A.) – either as a 24(1) remedy or for an abuse of process), or a reduction in sentence should the accused be found guilty (*R. v. Nasogaluak*, 2010 SCC 6).

[85] *R. v. O'Connor*, [1995] 4 S.C.R. 411 was the first Supreme Court of Canada case that sought to clarify the relationship between the common law doctrine of abuse of process and the *Charter*. The majority reasons were written by Justice L'Heureux-Dubé. She identified the parallels between state conduct that infringes rights or amounts to an abuse of the court's process (paras. 60 *et seq.*), which led her to conclude:

> [70] For these reasons, I conclude that the only instances in which there may be a need to maintain any type of distinction between the two regimes will be those instances in which the *Charter*, for some reason, does not apply yet where the circumstances nevertheless point to an abuse of the court's process. Because the question is not before us, however, I leave for another day any discussion of when such situations, if they indeed exist, may arise. As a general rule, however, there is no utility in maintaining two distinct approaches to abusive conduct. The distinction is one that only lawyers could possibly find significant. More importantly, maintaining this somewhat artificial dichotomy may, over time, create considerably more confusion than it resolves.

[86] This conclusion was echoed by Justice Major, in dissent:

> [197] I have read the reasons of Justice L'Heureux-Dubé, and agree that common law abuse of process has been subsumed in the *Canadian Charter of Rights and Freedoms* and should not be considered separately unless circumstances arise to which the *Charter* does not apply, which is not the case in this appeal. The party alleging abuse of process must prove on a balance of probabilities that a violation of the *Charter* has occurred. Upon proving this, a variety of remedies are available under s. 24(1).

[87] Despite the attempt to limit the existence of the common law doctrine to instances where the *Charter* does not apply, the doctrine continued to be turned to, sometimes as an alternative. For example in *United States of America v. Cobb*, 2001 SCC 19, Justice Arbour, writing for the Court, reviewed the case law about abuse of process, the *Charter*, and the availability of both to address abusive state conduct:

> [40] The decision of Hawkins J. granting a stay of proceedings was therefore justified, in my opinion, **either as a remedy based on s. 7 of the *Charter* or on the basis of the court's inherent powers at common law to control its own process and prevent its abuse.** In this case, the abuse of process was directly and inextricably related to the committal hearing.
>
> …
>
> [52] By placing undue pressure on Canadian citizens to forego due legal process in Canada, the foreign State has disentitled itself from pursuing its recourse before the courts and attempting to show why extradition should legally proceed. The intimidation bore directly upon the very proceedings before the extradition judge, thus engaging **the appellants' right to fundamental justice at common law, under the doctrine of abuse of process, and as also reflected in s. 7 of the *Charter***. The extradition judge did not need to await a ministerial decision in the circumstances, as the breach of the principles of fundamental justice was directly and inextricably tied to the committal hearing.
>
> [53] In my view, the extradition judge had the jurisdiction to control the integrity of the proceedings before him, and to grant a remedy, both at common law and under the *Charter*, for abuse of process. …
>
> [Emphasis added]

(See also *United States of America v. Shulman*, 2001 SCC 21)

[88] In *R. v. Regan*, 2002 SCC 12, the Court reiterated that, at least, where the common law doctrine of abuse of process is concerned with protecting society's

interest in a fair process the analysis under the *Charter* and the common law will dovetail (paras. 49-50).

[89] Excessive use of force by police can ground a s. 7 infringement and a stay of proceedings (*R. v. Tran*, 2010 ONCA 471; *R. v. Singh*, 2013 ONCA 750), or a lesser remedy such as a reduction in sentence (*R. v. Nasogaluak*, 2010 SCC 6).

[90] But, there are instances where state conduct does not necessarily engage the *Charter*, but the common law abuse of process doctrine is nonetheless engaged. Fundamentally, these involve police conduct that goes beyond what is acceptable in protecting society from criminal conduct. The jurisprudential wellspring for the "defence of entrapment" is the common law abuse of process doctrine.

[91] An accused who has been found guilty beyond a reasonable doubt is entitled to a stay of proceedings if he establishes on a balance of probabilities that the police have engaged in conduct such that allowing the prosecution or the entry of a conviction would amount to an abuse of the judicial process by the state (see *R. v. Mack*, [1988] 2 S.C.R. 903; *R. v. Campbell*, [1999] 1 S.C.R. 565 at para. 21).

[92] The question is one of mixed law and fact and should be resolved by the trial judge. A stay should be entered only in the "clearest of cases" (*Mack*, para. 149).

[93] A stay of proceedings may also be available where the police engage in unlawful conduct. The effect of police illegality is driven by the facts (see *R. v. Campbell*, *supra.* at para. 24).

[94] State conduct was obviously the focus in *R. v. Hart*. The majority of the Newfoundland Court of Appeal, and Justice Karakatsanis, in the Supreme Court of Canada, identified the *Canadian Charter of Rights* as the appropriate analytical framework to regulate Mr. Big operations, given the state's role in generating the confession. However, the majority instead chose a two-pronged common law approach.

[95] The first prong focuses on the admissibility of the inculpatory evidence generated by the undercover operation. A new common law rule was announced. The inculpatory admissions are presumptively inadmissible. To gain admission, the Crown must establish on a balance of probabilities that the probative value of the admissions outweigh their prejudicial effect.

[96] The second prong focuses on police conduct. Justice Moldaver in *Hart* manifestly chose the common law abuse of process as the foundation to address concerns about unacceptable police conduct:

> [11] Trial judges must also carefully scrutinize the conduct of the police to determine if an abuse of process has occurred. No matter how reliable the confession, the courts cannot condone state conduct – such as physical violence – that coerces the target of a Mr. Big operation into confessing. Where an accused establishes that an abuse of process has occurred, the court can fashion an appropriate remedy, including the exclusion of the confession or a stay of proceedings.

[97] Justice Moldaver was aware that the abuse of process doctrine had not yet found much favour in combating questionable police conduct in Mr. Big operations. He proposed to provide guidance on how to determine if a Mr. Big operation crosses the line from skillful police work to an abuse of process (para. 86).

[98] Even if a reliable confession is obtained, Justice Moldaver stressed that the end is not justified by the means. It was in this regard that the abuse of process doctrine has a role. The following illustrates:

> [112] I should not, however, be taken as suggesting that police misconduct will be forgiven so long as a demonstrably reliable confession is ultimately secured. That state of affairs would be unacceptable, as this Court has long recognized that there are "inherent limits" on the power of the state to "manipulate people and events for the purpose of ... obtaining convictions" (*R. v. Mack*, [1988] 2 S.C.R. 903, at p. 941).
>
> [113] In my view, this is where the doctrine of abuse of process must serve its purpose. After all, the doctrine is intended to guard against state conduct that society finds unacceptable, and which threatens the integrity of the justice system (*R. v. Babos*, 2014 SCC 16, at para. 35). Moreover, the doctrine provides trial judges with a wide discretion to issue a remedy – including the exclusion of evidence or a stay of proceedings – where doing so is necessary to preserve the integrity of the justice system or the fairness of the trial (*ibid.*, at para. 32). The onus lies on the accused to establish that an abuse of process has occurred.

[99] In this case, the police did not engage in a classic Mr. Big operation. At first, the operation was supposed to have members of an OMG stimulating suspects to communicate electronically, which would be captured by the authorized wiretap. Then, the operation morphed into an approach of the respondent in a public area, where she would have the option to walk away.

[100] Instead, the undercover officers confronted the respondent in her dimly lit underground parking lot. They ordered her to get back into her car, and demanded she tell them what had happened. She said she was scared by the implicit threats of violence. The trial judge found that that fear caused her to cooperate.

[101] As to such tactics, Justice Moldaver provided the following guidance:

> [115] It is of course impossible to set out a precise formula for determining when a Mr. Big operation will become abusive. These operations are too varied for a bright-line rule to apply. But there is one guideline that can be suggested. Mr. Big operations are designed to induce confessions. The mere presence of inducements is not problematic (*Oickle*, para. 57). **But police conduct, including inducements and threats, becomes problematic in this context when it approximates coercion. In conducting these operations, the police cannot be permitted to overcome the will of the accused and coerce a confession. This would almost certainly amount to an abuse of process.**
>
> [116] Physical violence or threats of violence provide examples of coercive police tactics. A confession derived from physical violence or threats of violence against an accused will not be admissible – no matter how reliable – because this, quite simply, is something the community will not tolerate (see, e.g., *R. v. Singh*, 2013 ONCA 750, 118 O.R. (3d) 253).
>
> [117] **Violence and threats of violence are two forms of unacceptable coercion.** But Mr. Big operations can become coercive in other ways as well. Operations that prey on an accused's vulnerabilities – like mental health problems, substance addictions, or youthfulness – are also highly problematic (see *Mack*, at p. 963). Taking advantage of these vulnerabilities threatens trial fairness and the integrity of the justice system. **As this Court has said on many occasions, misconduct that offends the community's sense of fair play and decency will amount to an abuse of process and warrant the exclusion of the statement**.
>
> [Emphasis added]

[102] The use of feigned or real violence in Mr. Big operations does not necessarily attract a finding of abuse. For example, in *R. v. Allgood*, 2015 SKCA 88, leave to appeal ref'd, [2015] S.C.C.A. No. 423, the police created scenarios involving acts of violence. Eventually, the appellant confessed to murdering his former female partner and attempted murder of her companion. The use of the violent scenarios was not found to be abusive as they were not done to intimidate Mr. Allgood, but rather to show that the organization approved of violent acts being done to non-members, including women (see also *R. v. Johnston*, 2016 BCCA 3 at para. 51 and *R. v. Randle*, 2016 BCCA 125).

[103] However in *R. v. Laflamme*, 2015 QCCA 1517, (leave to appeal ref'd, [2015] S.C.C.A. No. 479) violent scenarios were used to demonstrate the power and willingness of the "Organization" to use violence against its own members, including the accused and the undercover officer who introduced him into the organization. These indirect or veiled threats amounted to unacceptable coercive tactics (paras. 79-80) and compromised the integrity of the justice system. It constituted an abuse of process. A stay of proceedings was entered.

[104] With all due respect, the common law doctrine of abuse of process is available to assess whether police conduct crossed the line from skillful police work to conduct that, if condoned, would be harmful to the integrity of the justice system. It has never been, nor should it be, limited to police misconduct involved in "Mr. Big" operations. It is the coercive power of the implied or indirect threats of harm to the accused or to others that matters, not whether the police had the time and resources to mount a full-fledged "Mr. Big" operation.

[105] The Crown cites the trial judge's language in para. 93 of his decision as demonstrating legal error: "While the misconduct in this case **could be categorized** as offensive to notions of fair play and decency, I am satisfied that the harm can be remedied by excluding the evidence which was obtained" (my emphasis). It contends that the emphasized words indicate that he lowered the threshold for a finding of abuse of process.

[106] With respect, the Crown takes the trial judge's language at para. 93 out of context. The trial judge had already directed himself that his query had to focus on whether the police behaviour might be considered harmful to the integrity of the justice system (para. 72). For this query, he examined if the conduct of the police unfairly coerced the respondent's admissions. After reviewing the evidence, and the competing inferences that could be drawn, he found:

> [89] I am satisfied that the actions of Corporal I. and Sergeant P. resulted in the type of unfair coercion described by Justice Moldaver in *Hart*. Ms. Derbyshire's confession and identification of physical evidence was obtained by intimidation and implied threats of harm. She was never given a choice which would have permitted her to walk away without disclosure. This was an abuse of process.

[107] It was after this finding that he considered the issue of what remedy should follow. Since the respondent was requesting a stay of proceedings, he turned to the test for a stay set out in *R. v. Babos*, *supra*.

[108] In that case, Justice Moldaver, again writing for the majority, confirmed that the test for a stay of proceedings is the same whether the case falls into the "main" category (conduct that jeopardizes an accused's right to a fair trial) or the "residual category" (conduct that risks undermining the integrity of the judicial process).

[109] The test has three requirements. The first focuses on whether the prejudice to the accused's fair trial right, or the integrity of the justice system, will be manifested, perpetuated, or aggravated by a trial. The second is whether there is an alternative effective remedy. If there is still uncertainty whether a stay is warranted, the court must then balance the interests of granting a stay against society's interest in a final decision on the merits (para. 32).

[110] Where it is the residual category in play, Justice Moldaver elaborated on the first requirement for this category at para. 35. I have quoted this paragraph earlier. For ease of reference, I will repeat it:

> [35] By contrast, when the residual category is invoked, the question is whether the state has engaged in conduct that is **offensive to societal notions of fair play and decency** and whether proceeding with a trial in the face of that conduct would be harmful to the integrity of the justice system. To put it in simpler terms, there are limits on the type of conduct society will tolerate in the prosecution of offences. At times, state conduct will be so troublesome that having a trial – even a fair one – will leave the impression that the justice system condones conduct that offends society's sense of fair play and decency. This harms the integrity of the justice system. In these kinds of cases, the first stage of the test is met.
>
> [Emphasis added]

[111] It is the language that I have bolded that the trial judge paraphrased in para. 93 of his decision. He had already quoted the relevant directions from *Babos*, and said that, after he had considered all of those factors, he was not satisfied that a stay of proceedings was required or appropriate. There would have been no confusion if he had just completed his paraphrase from *Babos* to be: While the misconduct in this case could be categorized as offensive to notions of fair play and decency *and proceeding with a trial in the face of that conduct would be harmful to the integrity of the justice system*, I am satisfied that the harm can be remedied by excluding the evidence which was obtained.

[112] I see no error by the trial judge in his articulation and application of the appropriate legal principles that led him to find that the conduct of the police amounted to an abuse of process.

[113] I can now turn to the contention that, nonetheless, the trial judge erred in law in finding an abuse of process.

Did the trial judge err in law in finding an abuse of process?

[114] The Crown launches an all-out attack on the trial judge's finding of abuse of process. First, by insisting that because Justice Moldaver did not say "implied" when he discussed the issue of threats in para. 115 of *Hart*, the trial judge erred in law by finding abuse by the police use of intimidation and implied threats of harm.

[115] Second, the Crown says the trial judge overstated the evidence, failed to consider relevant evidence, misunderstood key Crown evidence, and that the trial judge's finding amounted to palpable and overriding error.

[116] I have already discussed at length the claim that the trial judge applied the wrong test. The Crown is right to this extent—Justice Moldaver did not use the qualifier "implied" when he wrote in paras. 115 and 116 of unacceptable police conduct. The Crown argues this is telling because in *R. v. Mack*, [1988] 2 S.C.R. 903 the Court wrote at para. 124 that "one indication of impermissible conduct" would be the existence of "threats, implied or express, made to the individual being targeted by inducement techniques".

[117] Furthermore, the Crown says this is significant because Justice Karakatsanis, in her concurring judgment in *R. v. Hart*, specifically mentioned implied threats as being relevant to the degree of coercion (para. 194).

[118] I am unable to agree. What Justice Moldaver makes clear is that it is the function of the doctrine of abuse of process to guard against police conduct that society finds objectionable and which threatens the integrity of the justice system (para. 113).

[119] It is the unacceptable use of police tactics to coerce confessions that is problematic. The use of violence or threats of violence are two prime examples. What possible difference can there be to the integrity of the justice system if a confession is coerced by threats of violence that are conveyed to a suspect by implication rather than expressly?

[120] If Justice Moldaver meant to create a meaningful distinction between the two means of conveying threats, he had every opportunity to do so. In fact, in *Hart*, there were no express threats of violence. As explained by Cromwell J., in

his separate concurring reasons, the claim that there had been intimidation and implied threats had been rejected by the trial judge:

> [157] At trial, Mr. Hart maintained that he was "intimidated, scared and felt trapped in his ability to get out" and that his motive to lie about having murdered his children was "the money, the friendships he created with undercover operators, the lifestyle and the chance to get out of Newfoundland": trial judge's *voir dire* reasons, 2007 NLTD 74, 265 Nfld. & P.E.I.R. 266, at para. 33. **Mr. Hart argued at trial that his statements resulted from implied threats, coercions and psychological coercion**: *ibid*., at para. 42.
>
> [158] **The trial judge, who had the advantage of seeing and hearing the witnesses, including Mr. Hart, flatly rejected these contentions as having no foundation in fact.** The trial judge found as a fact that Mr. Hart was offered the opportunity to stop his involvement at any time: "[h]e had numerous chances to leave the operation, but made no effort to do so": *voir dire* reasons, at para. 61. In fact, Mr. Hart, according to the trial judge, "continued to show his willingness to become more involved and to take greater risks... . Mr. Hart wanted to work and continually pressured [the undercover officers] for more work outside of Newfoundland": *ibid*., at paras. 59 and 61.
>
> [Emphasis added]

[121] Moldaver J. did not resolve whether the police use of intimidation and implied threats amounted to an abuse of process in *Hart*. Rather, he said it was unnecessary to decide the abuse claim because the respondent's confessions were excluded under the new common law test.

[122] However, it is noteworthy that Justice Moldaver did not dismiss the implied threats and police coercion as unworthy or inconsequential to an abuse of process claim. Instead, he found that such conduct might well amount to an abuse of process. He wrote as follows:

> [149] Without question, the police conduct in this case raises significant concerns, and might well amount to an abuse of process. However, this is not how the issue was presented at trial. At trial, the respondent took issue with the threatening and intimidating conduct of the officers, and the trial judge rejected those arguments. Given this, and the fact that there is no need to decide the matter, I do not believe this is an appropriate case to decide whether an abuse of process has been established.

[123] Finally, it is not the aura of violence and intimidation in general that crosses the line. It is when intimidation and threats, express or implied, coerce the accused to provide inculpatory evidence (see above, *R. v. Laflamme*).

[124] The Crown's argument that the trial judge's finding is tainted by errors in how he treated certain evidence, and otherwise committed palpable and overriding error, is little more than an invitation for this Court to retry the case.

[125] The trial judge had the advantage this Court does not. He heard firsthand the evidence given by the undercover officers and the respondent. The same arguments made to this Court were made to the trial judge. These included that Ms. Derbyshire, given her involvement in drug trafficking, should not have been, and was not, intimidated by the undercover officers posing as members of an OMG; she was merely acting in her best interests, which were to clean up the problems created by Skinner's actions to get business back to normal.

[126] The trial judge made very clear, strong findings of fact. He accepted the respondent's evidence that she was petrified by the demeanour and statements of the undercover officers, and that she tried to portray an outward calm to them so as not to cause them to think that she was "a problem" they would feel they needed to get rid of. His key findings are:

> [80] **Understandably, Ms. Derbyshire completely believed that the undercover operators were gangsters from Montreal**. When they approached her in the underground parking garage the officers were intimidating. They moved aggressively and Corporal I. raised his voice, pointed his finger and ordered Ms. Derbyshire into her car. Ms. Derbyshire did as she was told and found herself confined by Corporal I. in the passenger seat and Sergeant P. outside the driver's door. These were very close quarters and Corporal I. continued to speak to her aggressively, waving his finger and demanding that she tell them about her involvement in the Adams' homicide. **She did so immediately and I am satisfied, based upon her testimony, that it was the result of fear and intimidation and not a willingness to help these "criminals" from Montreal**.
>
> …
>
> [82] Ms. Derbyshire said her defence mechanism was to stay calm and not appear to be frightened. **I accept her testimony on that point.** This behaviour could well be misinterpreted by the undercover officers as an indication that she was relaxed and cooperating. Since they had no prior experience with respect to her demeanour their opinions about whether she was frightened or not are of limited value.
>
> …
>
> [86] The undercover operators intended to create an intimidating and threatening environment for Ms. Derbyshire and they were successful in doing so. **She said she was frightened and I have no doubt that she was. There was a very strong implied threat of physical harm to her if she did not give the**

> **"gangsters" what they were after. The fact that she gave incriminating information, implicating both herself and Mr. Skinner, in such a short period of time confirms the nature of the atmosphere which had been created.**
>
> …
>
> [88] Once the confession and other information was given by Ms. Derbyshire and she was told to show the officers the physical evidence, the rest of the day unfolded as one would expect. Corporal I. intended to maintain control of the situation, and over Ms. Derbyshire, and he did so. While the tension may have diminished somewhat, that does not make Ms. Derbyshire's subsequent actions or statements any more voluntary. Once she had disclosed the significant information concerning the Adams' murder confirming it in subsequent discussions, or providing further details is part of one continuous transaction.
>
> [Emphasis added]

[127] These findings are amply supported by the evidence of the respondent. The Crown cannot point to any misapprehension of evidence, or a failure to consider relevant evidence or findings that are unreasonable or contrary to evidence that the trial judge accepted.

[128] The Crown attempts to suggest that the officers wagging their fingers at the respondent and raising their voices cannot justify a finding of abusive conduct. If that is all that happened, I would be tempted to agree. But that is a gross understatement of the circumstances facing the respondent, both by her description and that of the police witnesses.

[129] First of all, the respondent described the approach by Cpl. Isabelle—that they were there from Montreal to clean up the mess and they knew there was a rat. She believed that they were there to get rid of Jeff. Within minutes, she answered his demands because she did not believe she had a choice. She testified, "Because I felt if I did not cooperate with him that I was just going to be another person he was going to deal with." When she did tell him what she knew, he responded that she was going with them to Moncton.

[130] She testified:

> A. I told them that I had to work and that I had prior engagements and he said that they were cancelled and that I wasn't ... that I was going with them and not to work.
>
> Q. Okay. What happens next?

> A. He proceeded to get out of the car, the passenger side, and he had a conversation with the gentleman by my driver door and then the gentleman by the driver door opened my door and asked me to get out and he proceeded to tell me that I was coming with them. So I ... I felt that I had no choice. So they started walking me out just behind me out the ... out the garage door.

[131] Ms. Derbyshire said she thought these were serious "gangsters" that put her back into her car and demanded her cooperation—that is how Sgt. Chubbs, the head of the undercover operation, described their assumed persona.

[132] Cpl. Isabelle was chosen by Sgt. Chubbs due to his ability to effectively play that role. Sgt. Chubbs explained:

> A. The other thing ... good point. Yes. The other thing about the undercover operators ... in particular, one undercover operator that I selected was Cpl. Pat Isabelle. Cpl. Isabelle is an experienced undercover operator whose got a wealth of knowledge in this area. **He understands the importance of just the limited duration time you have with the target and he also understands how to effectively, you know, follow the objectives, get accomplished what we need accomplished.**
>
> Q. In your experience with Cpl. Isabelle over the years, would you describe him as charismatic?
>
> A. Yes. Cpl Isabelle is charismatic. He's a true Quebecois in the sense that he's very passionate, very outspoken, very ... another word would be flamboyant. **He would be like what you would expect if you were to meet a ... I put the word gangster on it, My Lord, in that role. He could play that role very effectively.**
>
> **And that's what we truly wanted to portray, because we knew ... and this is the ... I guess this is the crucial part here is that we are coming in as undercover operators and we are trying to portray ourselves as criminals** in organized crime to people that live that life, who are involved in organized crime and who are true criminals. So we have one chance to do it and do it right. And that's why it's important that you select the right people to do these sort of operations.
>
> [Emphasis added]

[133] Sgt. Chubbs confirmed that the scenario was the higher-ups in Montreal had sent Cpl. Isabelle and Sgt. Perron to Nova Scotia to "protect their interest, meaning if people are talking, who else is talking in this group?" The scenario proposed that the officers ask the respondent if she had been speaking to the police. Sgt. Chubbs readily acknowledged that people who talk to the police are "rats".

Without it being explicitly said, such people are in grave danger of physical violence, even death.

[134] Sgt. Chubbs also acknowledged that undercover officers in these roles are supposed to portray themselves as "righteous" bad guys, prepared to commit acts of violence. Strangely, Sgt. Chubbs expected Cpl. Isabelle and Sgt. Perron to create fear in a known, scary guy, Steven Skinner, but insisted he did not expect the respondent to be afraid of them.

[135] Sgt. Chubbs frankly admitted that he was surprised that within minutes of the officers dealing with the respondent, she had developed such a level of trust with them that she told them all that she knew. I have already set out the trial judge's finding of fact that the respondent cooperated with the undercover officers out of fear and intimidation, not because of a willingness to help the "criminals" from Montreal. In addition, he reasoned:

> [81] There is evidence from multiple sources that Steven Skinner was a violent and intimidating man. Ms. Derbyshire had known him for a number of years and was aware of his involvement in the drug trade. In cross-examination she described him as a high end gangster and an MMA fighter. It is inconceivable to me that Ms. Derbyshire would have provided information about the location of physical evidence that would link Skinner to the Adams' murder within the first couple of minutes of her encounter with I. and P. unless she felt threatened and afraid. The Crown's suggestion that she was being cooperative and helpful in volunteering this information is not consistent with the evidence or, in my view, common sense.

[136] The trial judge was required to make findings of fact based on the evidence he heard, including inferences based on that evidence. He did so. The Crown is not happy that the trial judge rejected its theory that the respondent should not have been, and was not, scared by the undercover officers, but was motivated by a desire to help them "clean up the mess". There is nothing illogical or unreasonable in the trial judge's factual findings. They are fully supported by the evidence.

[137] The Crown says the trial judge made no mention of the evidence that the respondent admitted being a responsible member of the drug trafficking business; this robs his findings of important context, and her ability to complain of intimidation.

[138] I am unable to accept either contention. First, a trial judge is not required to refer to every piece of evidence and argument in the course of giving reasons.

Here, the trial judge was obviously aware of the respondent's role and background, and the competing inferences that may be taken from it. The following exchange illustrates:

> MS. BOUR: …one thing... I think needs to be front and center in Your Lordship's mind when assessing this suggestion that Ms. Derbyshire was extremely fearful, ... she's not ... the thin skulled plaintiff. She's not a delicate wallflower. She is not a person that stepped into this crazy scenario as described as a movie and feels terrified. This is an individual who has dealt with ... she's not just ... she's not a person out on the corner selling a few rocks. She is actually entrenched at the higher levels with ... with heavy duty individuals who are involved in acts of violence. So ...
>
> THE COURT: So ... so doesn't it cut both ways in the ... in the sense that that might cause her to be more afraid of these big bad guys from Montreal because she knows from personal experience what people like that are capable of.
>
> MS. BOUR: The problem is is that these big ... the problem with that view of it is that these big bad guys have presented themselves to her for the purpose of ... of mutual interest. They're there because all of their business has been affected in a negative way from the murder. That was acknowledged by Ms. Derbyshire herself. She said yeah, business has been bad. It's not like they're coming here as adversaries and what's more, they're here to clean up the scene which actually, as a matter of fact, serves her well because ...
>
> THE COURT: You're saying her experience in the drug trade would cause her to be less afraid. My only point is ...
>
> MS. BOUR: If I'm ...
>
> THE COURT: ... isn't it equally probable that it would make her more afraid, if she in fact felt threatened by these people because she would have more knowledge than a person on the street about what's potentially at risk of happening. I just don't see that issue, her experience, playing a lot either way. I think ... I think you can argue it both sides is the way I look at it.
>
> MS. BOUR: Well, to suggest as has been suggested that she is a petite blonde shrinking violet ...
>
> THE COURT: I don't think anyone ever suggested that.
>
> MS. BOUR: Well, I think in so many words it's been suggested, My Lord.
>
> THE COURT: Oh, I think she knows her way around and I'm prepared to conclude she does ...
>
> MS. BOUR: Okay.
>
> THE COURT: ... but what that means ...
>
> MS. BOUR: Okay.

> THE COURT: ... in the scheme of things.
>
> MS. BOUR: Well, I didn't ever, I guess, get that impression in ... it's not been suggested that she is sophisticated and knows her way around the drug trade in any Defence submissions so I wanted to highlight that point because I think it's important partly because that's the footing upon which the whole operation started.

[139] While it may have been better for the trial judge to have referred to some of this evidence in the course of his reasons, I do not see that the omission erodes his analysis and findings.

[140] To the extent that the Crown submits that a suspect who is or was involved in the criminal milieu is robbed of the ability to complain if violence or threats of violence are used to coerce a confession, I disagree.

[141] In support of its submission, the Crown relies on the limits to the common law and statutory defence of duress discussed in *R. v. Ryan*, 2013 SCC 3. The defence of duress may enable an accused to escape conviction on the basis that the crime was committed because of a threat made for the purpose of compelling the accused to commit the offence. The Supreme Court in *Ryan* confirmed that those who seek to rely on the common law defence of duress cannot do so if they knew that their participation in a conspiracy or criminal association came with a risk of coercion and/or threats to compel them to commit an offence (para. 75). The majority reasons, by Justices LeBel and Cromwell explain:

> [77] The Court of Appeal's conclusion stands for the proposition that courts must take into account the accused's voluntary assumption of risk, a natural corollary of the unavailability of the defence of duress to those who wilfully engage in criminal conspiracies or organizations. This is consistent with the principle of moral involuntariness. **An accused that, because of his or her criminal involvement, knew coercion or threats were a possibility cannot claim that there was no safe avenue of escape, nor can he or she truly be found to have committed the resulting offence in a morally involuntary manner.**
>
> [Emphasis added]

[142] The respondent did not commit an offence, and then seek to have her conduct excused because she was threatened. She testified that she made statements to undercover police officers and complied with their demands out of fear. The trial judge found that she made admissions because of fear created by the threatening conduct of *police officers*. Whatever the respondent's prior or current

role in illegal activities, it does not give to the police *carte blanche* to coerce confessions.

[143] I would not give effect to this ground of appeal.

Did the trial judge err in finding that exclusion of the evidence was an appropriate and just remedy?

[144] A trial judge who finds a *Charter* breach or conduct that amounts to an abuse of process is required to determine an appropriate remedy. The search for that remedy engages judicial discretion. Deference is owed to the remedy chosen so long as the judge has not misdirected himself in law, made a reviewable factual error, or granted a remedy that is so clearly wrong as to amount to an injustice (see: *R. v. Babos*, *supra*. at para. 48 and *R. v. Bellusci*, 2012 SCC 44).

[145] The Crown says the trial judge gutted the prosecution's case. It complains that the judge, without any analysis or inquiry, decided since a stay was not appropriate, an exclusion order was. But the exclusion order had the same effect as a stay because without the evidence obtained by the undercover officers, proceeding against the respondent became impossible.

[146] I am not convinced that the trial judge erred in the remedy he granted. I come to this conclusion for a number of reasons.

[147] The Crown faults the trial judge for not conducting some further analysis or inquiry before ordering exclusion of the evidence obtained by the abusive police conduct. But as detailed earlier, the respondent in her oral and written submissions repeatedly identified exclusion of the evidence as the only other remedy that would be appropriate.

[148] The Crown had numerous opportunities to make submissions, orally and in writing. Not once did the Crown suggest some other remedy would be just and appropriate; nor that exclusion of the evidence would prevent the Crown from proceeding with the charge against the respondent.

[149] It was obvious that if the trial judge accepted the respondent's version of events and found abusive police conduct coerced her inculpatory remarks and conduct, the proceedings could be stayed or the evidence excluded. As already identified, the law, as set out by the Supreme Court of Canada in *Hart*, envisages a

stay of proceedings or an exclusion order as being appropriate and just remedies (see *Hart* at paras. 11, 113, 116, 117).

[150] There were extensive submissions about the remedy of a stay or excluding the evidence. Neither the Crown nor the respondent gave any indication that if the judge excluded the evidence, it would, as the Crown now says, be "gutting" the prosecution's case. During oral submissions on July 25, 2014, the following exchange illustrates:

> THE COURT: Why do you say there should be a stay as opposed to an exclusion of evidence?
>
> MR. MACEWEN: This marries in with the loss of evidence is that Ms. Derbyshire will never be able to make full answer and defence with respect to this matter. She can't.
>
> THE COURT: Why?
>
> MR. MACEWEN: The crown jewel in the Crown's case is the confession that she made. Everything ...
>
> THE COURT: So if I exclude the confession, exclude the evidence, why does that not solve the problem?
>
> MR. MACEWEN: If all the evidence and all the confession is excluded it may very well solve the problem.
>
> THE COURT: Well, I'm just wondering why because the test for a stay is that there really is no other alternative and the prime alternative is exclusion of evidence so I'm wondering why you think exclusion of evidence is not ... not the alternative that would, I guess, preclude the granting of a stay.
>
> MR. MACEWEN: I would ... and I'm certainly not suggesting this, you know, choose my words carefully here **but should the trial proceed without Ms. Derbyshire's confession, what we won't know is any other information that was provided either to the police or by the police in relation to this investigation that could be used by Ms. Derbyshire in her defence**.
>
> [Emphasis added]

[151] A short time later there was a further exchange between the trial judge and counsel for the respondent about what may or may not happen if a stay is not entered, including police efforts to uncover further evidence:

> MR. MACEWEN: Well, as it relates to the prosecution against her, what Skinner related to her is a fairly significant piece of information.
>
> THE COURT: Right. And there's only one other place they're going to get that.

> MR. MACEWEN: Maybe. I don't know that and that's the ... and the Court doesn't know that and the police don't know that and the Crown doesn't know that. And that's the problem. And that's why the ... I would suggest the trial fairness issue is a very real issue is that, you know, there ... and without getting into too much detail, you know, there are other individuals who have not chosen to speak with the police and what happens here may change that. It may cause the police to take a different route, I don't know…
>
> …
>
> MR. MACEWEN: I would suggest that the safe route for the Court is to enter a stay of proceedings. We don't know what's going to happen with the investigation. I can't know, I'm not a police officer. Prior to this, I'd never seen an undercover operation of this nature. Don't know what else the police have in their bag of tricks so to speak, I just don't know, and I would suggest that while the Skinner investigation continues and I suspect that it is continuing, that the two are so inter-related that it's hard to separate something that's already known by the police while they continue to investigate other leads, other information. We just can't know.

[152] In the face of these exchanges, the Crown never suggested that excluding the evidence would preclude a trial. It said nothing on July 25—nothing in their subsequent written submissions, nor in their oral arguments on October 1, 2014. Now they say it should have been obvious to the trial judge that an order excluding the evidence would gut their case, or he should have made some further inquiry or analysis.

[153] I agree with the Crown that it is evident that the trial judge was not aware if he excluded the evidence it would end the case against the respondent. His reasoning to exclude the evidence is succinct:

> [93] When I consider all of these factors I am not satisfied that a stay of proceedings is required or appropriate. While the misconduct in this case could be categorized as offensive to notions of fair play and decency, I am satisfied that the harm can be remedied by excluding the evidence which was obtained. This would include the statements made by Ms. Derbyshire to the undercover operators as well as the physical evidence and its locations which she identified. **By doing so, the Court distances itself from the impugned conduct and at the same time recognizes the importance of having this serious charge tried on its merits**.
>
> **Conclusion and Disposition**
>
> [94] Ms. Derbyshire has not established a breach of her rights under s.7 of the *Charter*, however she has satisfied me that the police undercover operation was an abuse of process. As a result I will exclude the evidence obtained from Ms. Derbyshire. This includes her statements to the undercover operators and the

> physical evidence and locations which she identified to them. If there is other evidence which Ms. Derbyshire feels should be excluded as the fruits of the abusive conduct, she is free to make a further application for such relief. **My comments should not be interpreted to mean that there will be an automatic exclusion of evidence which is in any way related to the undercover operation no matter how tenuous that connection. As noted by the Supreme Court in *Babos* the granting of relief for abuse of process is discretionary and will involve the weighing of a number of potentially competing factors.**
>
> [Emphasis added]

[154] In theory, there may well have been a vast array of remedies available. But the only two remedies discussed by the parties at trial were a stay of proceedings or an exclusion of evidence. Quite apart from the theoretical availability of other remedies, I fail to see how any of them would address the harm to the integrity of the justice system if the Crown could still rely on evidence which the trial judge found to have been unfairly coerced by the police.

[155] Nonetheless, the Crown argues that the trial judge erred in law in his approach because he did not consider any lesser remedy. The Crown puts it this way:

> 100. In *R. v. Bjelland*, 2009 SCC 38, Justice Rothstein, for the Majority, discussed the necessary analysis when exclusion of evidence is proposed as a remedy under s.24(1) of the *Charter* to maintain the integrity of the justice system. **If the trial judge does not consider whether there is a lesser remedy than exclusion, it is a reviewable error. In ordering the exclusion of evidence the trial judge misdirected himself and did not impose an appropriate and just remedy**. The case emphasizes the severity of an exclusion of evidence order, something which seems to have eluded the trial judge in *Derbyshire*.
>
> [Emphasis added]

[156] The Crown also suggests that "*Bjelland* held that evidence can only be excluded in "exceptional cases" - where it would render the trial process unfair or where exclusion is necessary to maintain the integrity of the justice system (para. 24)".

[157] *R. v. Bjelland*, 2009 SCC 38, was a case about late disclosure—a breach of the accused's right to make full answer and defence guaranteed by s. 7 of the *Charter*. The trial judge ordered exclusion as an appropriate remedy under s. 24(1). The majority of the Alberta Court of Appeal reversed. Rothstein J., for the majority in the Supreme Court, agreed that the prejudice to the accused's right

to make full answer and defence could be remedied by an adjournment and order for disclosure (para. 3).

[158] Justice Rothstein acknowledged that exclusion of evidence would normally be a remedy under s. 24(2) of the *Charter*. It could not be ruled out as an available remedy under s. 24(1), but only where a less intrusive remedy cannot be fashioned to safeguard the fairness of the trial process or the integrity of the justice system.

[159] The notion that an order excluding such evidence is only available in "exceptional cases" in response to abusive police conduct is not borne out by the authorities. Justice Rothstein, in *Bjelland*, wrote of the exceptional nature of an exclusion order in cases of *late disclosure*—not cases where the police have used threats to coerce inculpatory evidence:

> [24] **Thus, a trial judge should only exclude evidence for late disclosure in exceptional cases: (a) where the late disclosure renders the trial process unfair and this unfairness cannot be remedied through an adjournment and disclosure order or (b) where exclusion is necessary to maintain the integrity of the justice system.** Because the exclusion of evidence impacts on trial fairness from society's perspective insofar as it impairs the truth-seeking function of trials, where a trial judge can fashion an appropriate remedy for late disclosure that does not deny procedural fairness to the accused and where admission of the evidence does not otherwise compromise the integrity of the justice system, it will not be appropriate and just to exclude evidence under s. 24(1).
>
> [Emphasis added]

[160] Even then, Rothstein J. specifically acknowledged situations where a stay of proceedings or an order for exclusion may well be appropriate (paras. 25-27).

[161] Justice Moldaver, for the majority in *Hart*, repeatedly emphasized that if police conduct unfairly coerces a suspect into confessing, the courts cannot condone such conduct. A stay of proceedings or an order excluding the evidence will be the appropriate remedy—no matter how reliable the evidence is—because of the impact on the integrity of the justice system.

[162] I am not satisfied that the trial judge erred in the remedy he ordered. Even knowing, as we do now, that the order precluded the prosecution of serious conduct, I fail to see any other remedy that would protect the integrity of the justice system in light of Justice Wood's factual findings.

[163] I would not give effect to this ground of appeal. As a result, I would dismiss the appeal.

PUBLICATION BAN

[164] The trial judge announced, at the outset of the *voir dire*, a ban on publication of the proceedings until the conclusion of the trial. As well, the judge referred to a ban said to have been ordered by Justice Coady under s. 486.5(1) of the *Criminal Code* on the identification of police witnesses.

[165] There was no order in the appeal book. When this appeal was heard on March 15, 2016, the panel asked the parties about the publication ban. Neither party had a copy. The Crown did make the observation that the trial judge had not used initials in the published decision for Sgt. Chubbs, and asked that if the Court was "contemplating a new ban at this level", his name be initialized as well. The Crown undertook to look into the whereabouts of the order.

[166] On March 17, 2016, the Crown wrote, enclosing a copy of the Nova Scotia Supreme Court order. The relevant portion of the letter is as follows:

> The Panel hearing the Derbyshire matter requested a copy of the Publication Ban on the names of the undercover operators granted by Justice Kevin Coady. I have included it with this letter. I have also included a letter from Crown Counsel Alicia Kennedy which seems to indicate that the Ban was contemplated to cover three undercover officers….I also note the Order states that the Ban was for a duration of one year from May 8, 2014. I could find no further Publication Orders in our file. As such, the Crown reiterates its request that this Honourable Court order a Ban on Publication of the names of Sgt. David Chubbs, Cpl. Patrick Isabelle and Sgt. Daniel Perron. If the Court wishes I can provide a draft Order to that effect.

[167] The Registrar of the Court notified the Crown on March 23, 2016 that there no longer appeared to be a ban on any aspect of the evidence heard by the trial judge. Absent a motion, with notice to the appropriate interests, the Court would not issue an order.

[168] On April 28, 2016, the Crown filed a motion for an order pursuant to s. 486.5 of the *Criminal Code* restricting publication of any information that could identify the undercover and cover officers involved in this case for a period of two years. The motion was supported by the affidavit of Sgt. Rob Jodrey. A draft order requested a ban on the publication of any information that could identify the

undercover and cover police officers P.I., D.P. and D.C. pursuant to s. 486.5 of the *Criminal Code*. It also requested that the order direct: "No publication, transmission or broadcast of any evidence taken in this trial shall be linked or cross-referenced to any previously published document, broadcast or transmission which identified P.I., D.P. and D.C. by name or image."

[169] The motion was to be heard by a justice in chambers on May 5, 2016. The presiding justice referred the motion to this panel. The respondent takes no position on the motion, and no media representatives came forward to voice opposition.

The Principles

[170] There are two potential sources of authority to issue the kind of order the Crown seeks: s. 486.5 of the *Criminal Code*, and this Court's common law jurisdiction according to the process set out in *Nova Scotia Civil Procedure Rule* 90.37(15)[1].

[171] *Rule* 90.37(15) provides:

> 90.37 (15) A judge of the Court of Appeal, on motion, may make an order to do any of the following, until the Court of Appeal provides a further order:
>
> (a) allow the use of pseudonyms in the pleadings;
>
> (b) impose a publication ban;
>
> (c) require a sealing of a court file;
>
> (d) require a hearing to be *in camera*.

[172] Under *Rule* 90.37(12)(d), a chambers judge may refer a motion for a publication ban to a panel of the Court of Appeal.

[173] The Crown cited *Rule* 90.37(15) and s. 486.5 in support of its motion, but stressed s. 486.5 as being paramount.

[174] At common law, a Court must be satisfied that a ban is necessary, and the salutary effects outweigh its deleterious effects. This is usually referred to as the

[1] The Nova Scotia Court of Appeal made *Rule* 91 pursuant to s. 482 of the *Criminal Code*. *Rule* 91.02 makes the *Civil Procedure Rules*, and in particular *Rule* 90 applicable with any necessary modification and when not inconsistent with *Rule* 91.

Dagenais/Mentuck test, so-called after the Supreme Court of Canada decisions in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 and *R. v. Mentuck*, 2001 SCC 76. In *Mentuck*, Justice Iacobucci for the unanimous court defined the proper analytical approach to be (para. 32):

> A publication ban should only be ordered when:
>
> (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

[175] Section 486.5 is found in Part XV "Special Procedure and Powers" of the *Criminal Code*. It was first introduced in 1999 as s. 486(4.1):

> A judge or justice may, in any proceedings against an accused other than in respect of an offence set out in subsection (3), make an order directing that the identity of a victim or a witness, or any information that could disclose their identity, shall not be published in any document or broadcast in any way, if the judge or justice is satisfied that the order is necessary for the proper administration of justice.

[176] Section 486(4.7) of the *Code* identified the factors that a judge or justice must consider when deciding whether to make an order. It provided:

> (4.7) In determining whether to make an order, the judge or justice shall consider
>
> (a) the right to a fair and public hearing;
>
> (b) whether there is a real and substantial risk that the victim, witness or justice system participant would suffer significant harm if their identity were disclosed;
>
> (c) whether the victim, witness or justice system participant needs the order for their security or to protect them from intimidation or retaliation;
>
> (d) society's interest in encouraging the reporting of offences and the participation of victims, witnesses and justice system participants in the criminal justice process;
>
> (e) whether effective alternatives are available to protect the identity of the victim, witness or justice system participant;

> (f) the salutary and deleterious effects of the proposed order;
>
> (g) the impact of the proposed order on the freedom of expression of those affected by it; and
>
> (h) any other factor that the judge or justice considers relevant.

[177] Section 486 was repealed and replaced in 2005 (S.C. 2005, c. 32). A number of changes were made, and the numbering was changed to its present format.

[178] While there are obvious similarities between the underlying policy considerations that animate the common law analysis and the legislation found in s. 486.5 of the *Code*, there is room for divergence. The points of divergence are made more palpable by the 2015 amendments to s. 486.5 (S.C. 2015, c. 13, in force July 22, 2015).

[179] The Crown stresses the changes in s. 486.5(1) and (7)(b) implemented by the 2015 amendments. The changes (with emphasis added) are as follows:

> s. 486.5(1) Unless an order is made under section 486.4, on application of the prosecutor in respect of a victim or a witness, or on application of a victim or a witness, a judge or justice may make an order directing that any information that could identify the victim or witness shall not be published in any document or broadcast or transmitted in any way if **the judge or justice is of the opinion that the order is in the interest of the proper administration of justice**.
>
> s. 486.5 (7) (b) whether there is a real and substantial risk that the victim, witness or justice system participant **would suffer harm** if their identity were disclosed;

[180] I need not delve into the complexity of what implications, if any, flow from the 2015 amendments (see the discussion in *R. v. Nguyen*, 2015 ABQB 676), or the proper interplay between the common law test and the *Code* provisions (see *R. v. Nguyen*, *supra*.; *R. v. Sipes*, 2011 BCSC 1329; *R. v. Haevischer*, 2014 BCSC 2085). I say this because, even if s. 486.5 of the *Code* gives an appellate court the power to make such an order, I am not satisfied that any further order is warranted.

Application of the principles

[181] As noted earlier, s. 486.5 is found in Part XV of the *Criminal Code* "Special Procedure and Powers". Part XV covers a wide range of powers given to justices of the peace, provincial court judges, and judges of superior courts of criminal

jurisdiction. These include search warrants, production orders, DNA warrants, sexual-offender registration, and forfeiture orders, to name a few.

[182] Section 486 deals with the power of a presiding judge or justice with respect to making certain types of orders that could restrict the open court principle in proceedings against an accused. For example, s. 486(1) provides that any proceeding against an accused shall be held in open court, but the presiding judge or justice may order the exclusion of all or any member of the public from the courtroom. The presiding judge or justice is given powers to permit the use of support persons, screens, and to restrict the right to personally cross-examine certain witnesses (ss. 486.1; 486.2; 486.3).

[183] For a host of offences (principally sexual), the presiding judge or justice shall, if the application is made by the complainant, prosecutor, or witness, direct that any information that could identify the witness or complaint not be published or broadcast in any way (s. 486.4).

[184] Section 486.5 is the last of the provisions that empower a presiding judge or justice to direct a ban on publication or broadcast of information that could identify a witness. The Crown brought an application, as contemplated by s.486.5(4), to Justice Coady, who was designated to be the trial judge. In written submissions to Coady J., it sought a time-limited ban of one year.

[185] The Crown did not appear to reference s. 486.5 of the *Code* on its application to Justice Coady. It cited *R. v. O.N.E.*, [2001] 3 S.C.R. 478, the companion case to *Mentuck*. Both of these cases had been heard together. Both challenged bans ordered by trial judges on "Mr. Big" operations and on the identity of the officers involved.

[186] In *O.N.E.*, Iacobucci J. applied the two part test articulated in *Mentuck*: is a publication ban necessary to prevent a serious risk to the proper administration of justice because reasonable alternative measures will not prevent the risk; and do the salutary effects of the ban outweigh the deleterious effects.

[187] As in *Mentuck*, Justice Iacobucci found the publication ban to be overbroad by restricting details about the investigative technique and police tactics, but did uphold a ban for a period of one year on "publication of information tending to identify the particular officers involved in the operation, including their names, likenesses and physical descriptions".

[188] Justice Iacobucci in *R. v. O.N.E.*, as he did in *Mentuck*, explained why the ban should be time restricted:

> [14] …The identity of police officers should not be, as a matter of general practice, shrouded in secrecy forever, absent serious and individualized dangers. A force of anonymous, undercover police is not the sort of institution the courts may legitimately, in effect, create; such would be the appearance of an order restraining publication of their identities in perpetuity.

[189] In this case, the order issued by Justice Coady on May 8, 2014 was as follows:

> Upon application of the prosecutor, this Court orders a ban on and prohibits the publication in print and the broadcasting on television, film, video, radio and the internet of any information tending or serving to publicly identify the undercover officers in the investigation of the accused, but not limited to, any likeness of the officers, the appearance of their attire and their physical descriptions.
>
> The duration of the ban is one year.

[190] The ban expired on May 8, 2015. At the time that this motion was brought, there had been no restriction on publication for almost a year. The information now sought to be banned for a further period of two years has been in the public domain with no identified or suggested real and substantial risk of harm from use of the officers' names. It seems evident that there would have been no further action taken had the panel not inquired about the status of the earlier ban.

[191] There is no definition section for Part XV of the *Code*. "Judge" is not defined in the "Interpretation" section (s. 2). "Justice" is defined as meaning a justice of the peace or a provincial court judge. "[P]rovincial court judge" is also defined. The precise words of s. 2 are as follows:

> "justice" means a justice of the peace or a provincial court judge, and includes two or more justices where two or more justices are, by law, required to act or, by law, act or have jurisdiction;
>
> …
>
> "provincial court judge" means a person appointed or authorized to act by or pursuant to an Act of the legislature of a province, by whatever title that person may be designated, who has the power and authority of two or more justices of the peace and includes the lawful deputy of that person;

[192] There are numerous provisions in Part XV that give powers to a justice, a presiding judge, a judge of a superior court of criminal jurisdiction, or to a court. Some of the orders that may be made can be appealed to the Court of Appeal.

[193] Absent from s. 486.5 is any express indication that an appeal court or a judge thereof has the power to impose a publication ban under that section.

[194] The powers of an appeal court and judges thereof are found in Part XXI of the *Criminal Code*. There are numerous provisions in Part XXI making sections found in other Parts of the *Code* applicable, with the necessary modifications, to proceedings before a judge or the Court of Appeal (see s. 679 and s. 683).

[195] This is perhaps why, in *R. v. Canada (Attorney General)*, 2014 ABCA 330, Justice Berger turned to the common law test when faced with a similar situation of a lapsed s. 486.5 ban and a fresh application for a further ban.

[196] Without elaborating, Berger J.A. referenced s. 486.5, but applied the *Mentuck* common law analysis:

> [2] Section 486.5 of the *Criminal Code* contemplates a publication ban to protect the identity of victims or witnesses. This Court has jurisdiction at common law which extends in appropriate circumstances to impose a publication ban to protect undercover officers whose operational endeavours and/or safety may be engaged. That jurisdiction may be exercised if two requirements are set out:
>
> 1) The Order must be necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
>
> 2) The salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice*: R. v. Mentuck*, 2001 SCC 76, [2006] 3 S.C.R. 442.
>
> [3] In my opinion, the affidavit of Heidi Brynn Van Steelandt, sworn on September 22, 2014, setting out the factual underpinnings in support of the application, satisfies the test in *Mentuck.*

[197] Whatever the legal wellspring of the power to impose a publication ban, it is not a routine matter. The imposition of a ban conflicts with the "open court" principle, along with freedom of the press and expression, all of which are matters of fundamental importance to a democratic society (see: *Attorney General (Nova*

Scotia) v. MacIntyre, [1982] 1 S.C.R. 175; *Edmonton Journal v. Alberta (Attorney General*), [1989] 2 S.C.R. 1326).

[198] As emphasized by Justice Iacobucci in *Mentuck*, these are important principles, regardless whether representatives of the press appear to oppose the requested ban:

> [38] In some cases, however, most notably when there is no party or intervener present to argue the interests of the press and the public to free expression, the trial judge must take account of these interests without the benefit of argument. The consideration of unrepresented interests must not be taken lightly, especially where *Charter*-protected rights such as freedom of expression are at stake. It is just as true in the case of common law as it is of statutory discretion that, as La Forest J. noted, "[t]he burden of displacing the general rule of openness lies on the party making the application": *New Brunswick, supra*, at para. 71; *Dagenais, supra*, at p. 875. Likewise, to again quote La Forest J. (at paras. 72-73):
>
> > There must be a sufficient evidentiary basis from which the trial judge may assess the application and upon which he or she may exercise his or her discretion judicially... .
> >
> > A sufficient evidentiary basis permits a reviewing court to determine whether the evidence is capable of supporting the decision.
>
> In cases where the right of the public to free expression is at stake, however, and no party comes forward to press for that right, the judge must consider not only the evidence before him, but also the demands of that fundamental right. The absence of evidence opposed to the granting of a ban, that is, should not be taken as mitigating the importance of the right to free expression in applying the test.
>
> [39] It is precisely because the presumption that courts should be open and reporting of their proceedings should be uncensored is so strong and so highly valued in our society that the judge must have a convincing evidentiary basis for issuing a ban. Effective investigation and evidence gathering, while important in its own right, should not be regarded as weakening the strong presumptive public interest, which may go unargued by counsel more frequently as the number of applications for publication bans increases, in a transparent court system and in generally unrestricted speech on matters of such public importance as the administration of justice.

[199] I have reviewed carefully Sgt. Jodrey's affidavit filed in support of the requested two-year publication ban. I am not satisfied that the common law test has been met. Further, even if I were of the view that this Court had the jurisdiction to order a ban pursuant to s. 486.5, I am not persuaded that an order is warranted under that section.

[200] The requested order would prohibit the publication of any information that could identify the undercover and cover police officers P.I., D.P. and D.C. The draft order goes on to particularize:

> The names of witnesses P.I., D.P., and D.C. are prohibited from publication, transmission or broadcast and the said witnesses shall only be identified in any publication, transmission or broadcast by the initials P.I, D.P. and D.C.
>
> No publication, transmission or broadcast of any evidence taken in this trial shall be linked or cross-referenced to any previously published document, broadcast or transmission which identified P.I., D.P. and D.C. by name or image.
>
> The image or likenesses of P.I., D.P. and D.C. shall not be published in any document, broadcast or transmission.
>
> The publication ban includes, but is not restricted to, broadcast on radio or television, print publication by electronic means, including email or internet.

[201] Sgt. Jodrey asserts, "If the names and identities of the UC and Cover officers involved were made public, undercover operations and the officer's personal safety would be jeopardized." With respect, this bald assertion is not made out by the details set out in his affidavit.

[202] Sgt. Jodrey explains that the requested initialization of the officers' names is because undercover officers usually use their real first names in their pseudonym, or a nickname. For the reasons given by Sgt. Jodrey, this makes eminent sense.

[203] But in these particular circumstances, the requested ban of "any information" that could tend to identify the officers is unwarranted, as is a mandated use of initials. To do so would tend to keep from public light the identity of the officers who were found by the trial judge to have coerced inculpatory statements and conduct by fear and intimidation.

[204] Undercover officer D.P. is retired. There is no suggestion that he might or would be the target of intimidation or retaliation. The cover officer, D.C., is currently assisting with cover duties in Nova Scotia. As a cover officer, he does not come in contact with suspects, but directs and oversees undercover officers. He may well be a "pool operator", and, as such, available from time to time to take part in undercover operations as needed.

[205] Undercover officer P.I. is described as a full time operator, and regularly works as a "cameo" UC. He is scheduled to start an undercover operation.

[206] Notably, what is missing is any description of the impact on any undercover operation or on the personal safety of the officers from the expiry of the publication ban in May of 2015.

[207] It is not in the interests of the administration of justice to create an anonymous police force. I am not satisfied that the request for a further ban is necessary in order to prevent a serious risk to the proper administration of justice or is in the interest of the proper administration of justice. I would therefore decline to order the requested ban.

Beveridge, J.A.

Concurred in:

Saunders, J.A.

Van den Eynden, J.A.