SUPREME COURT OF CANADA

CITATION: R. *v.* Haevischer, 2023 SCC 11

APPEAL HEARD: October 4, 2022
JUDGMENT RENDERED: April 28, 2023
DOCKET: 39635

BETWEEN:

His Majesty The King
Appellant

and

Cody Rae Haevischer and Matthew James Johnston
Respondents

- and -

Director of Public Prosecutions, Attorney General of Ontario, Criminal Lawyers' Association of Ontario, Independent Criminal Defence Advocacy Society, Criminal Trial Lawyers' Association, Trial Lawyers Association of British Columbia and Canadian Civil Liberties Association
Interveners

CORAM: Wagner C.J. and Karakatsanis, Côté, Brown,* Rowe, Martin, Kasirer, Jamal and O'Bonsawin JJ.

REASONS FOR JUDGMENT: (paras. 1 to 123)
Martin J. (Wagner C.J. and Karakatsanis, Côté, Rowe, Kasirer, Jamal and O'Bonsawin JJ. concurring)

[*] Brown J. did not participate in the final disposition of the judgment.

His Majesty The King *Appellant*

v.

Cody Rae Haevischer and
Matthew James Johnston *Respondents*

and

Director of Public Prosecutions,
Attorney General of Ontario,
Criminal Lawyers' Association of Ontario,
Independent Criminal Defence Advocacy Society,
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ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law — Procedure — Summary dismissal of application — Crown moving for summary dismissal of applications brought by accused for stays of proceedings for abuse of process — Trial judge allowing Crown's motion and summarily dismissing stay applications — Whether trial judge erred in allowing motion — Threshold applicable to summary dismissal of application in criminal law context.

H and J were tried and found guilty of six counts of first degree murder and one count of conspiracy to commit murder. Before convictions were entered, H and J applied for stays of proceedings for abuse of process. They claimed that systemic police misconduct and the inhumane conditions of confinement they experienced while on remand caused prejudice to their rights to a fair trial and undermined the integrity of the justice system. *Amici curiae*, who were appointed to represent the interests of the accused and to provide an adversarial context for the court, also put forward an additional ground of police misconduct based on confidential information.

Before the stay applications brought by H and J proceeded to a *voir dire*, the Crown brought a motion for summary dismissal of the applications on the basis that neither application disclosed a sufficient foundation to establish that a *voir dire* was necessary or would assist the court in determining the merits of the applications. Although the written record on the summary dismissal motion was extensive, there was

no opportunity to adduce *viva voce* evidence or to cross-examine key witnesses in either the open or the *in camera* portion of the hearing.

The trial judge concluded that, even if the applications were taken at their highest, the grounds advanced could not support a stay of proceedings, and, as such, an evidentiary hearing (i.e., a *voir dire*) on the merits would not assist the court. She summarily dismissed the applications and ordered the convictions entered. On appeal by H and J, the Court of Appeal quashed the convictions and remitted the stay applications to the trial court for a *voir dire*. It held that the trial judge imposed too high a standard to permit the applications to proceed to an evidentiary hearing and that the applications should have been fully addressed and decided at a *voir dire* on their merits.

Held: The appeal should be dismissed.

An application in a criminal proceeding, including for a stay of proceedings for abuse of process, should only be summarily dismissed if the application is manifestly frivolous. This threshold best preserves fair trials, protects the accused's right to full answer and defence, and ensures efficient court proceedings. It is a rigorous standard that allows trial judges to weed out the sort of applications that the summary dismissal power is designed to exclude, but permits most applications to be decided on their merits in proportionate proceedings. In the instant case, the stay applications were not manifestly frivolous and should not have been summarily dismissed.

Trial judges have the power to summarily dismiss applications made in the criminal law context in certain circumstances. The standard selected for summary dismissal must be based on the two sets of underlying values at play in such proceedings: trial efficiency and trial fairness. These values coexist and both must be pursued in order for each to be realised. In the criminal context, the need for efficient trials to reduce undue delay is manifest. Dismissing unmeritorious applications helps ensure that trials occur within a reasonable time, which is an essential part of the criminal justice system's commitment to treating presumptively innocent accused persons in a manner that protects their interests in liberty, security of the person, and a fair trial. As for trial fairness, it is more than a policy goal: it is a constitutional imperative. A criminal trial involves allegations made by the state against an accused whose liberty is often at stake. The summary dismissal of criminal applications can curtail the accused's right to full answer and defence and the right to a fair trial protected by ss. 7 and 11(d) of the *Charter* by stopping the accused from fully making arguments and eliciting evidence on their application.

The underlying values of trial fairness and trial efficiency mandate the conclusion that a rigorous threshold should be applied to summary dismissal motions in criminal trials. A summary procedure is, as its name suggests, intended to be summary: preliminary, brief, and more in the nature of an overview than a deep dive. Summary dismissal is built upon allegations and supported by the artifice of assuming that the facts asserted are true. By contrast, a hearing on the merits involves a final determination of the facts, and of whether, after a full review, the proven facts support

the allegations and ground the requested remedy. A rigorous threshold is also supported by the particular characteristics of criminal trials, including how the trial judge's broad case management powers can help ensure the efficient, effective and proportionate use of court resources as well as the accused's fair trial rights. Judges perform a gatekeeping function, and the goal is that only those applications that should be caught by the summary dismissal power are in fact summarily dismissed. Trial judges should err on the side of caution when asked to summarily dismiss an application.

The correct threshold for the summary dismissal of applications made in the criminal law context is whether the underlying application is manifestly frivolous. This threshold promotes both trial efficiency and trial fairness. The "frivolous" part of the standard weeds out those applications that will necessarily fail, and "manifestly" captures the idea that the frivolous nature of the application should be obvious. If the frivolous nature of the application is not manifest or obvious on the face of the record, then the application should not be summarily dismissed and should instead be addressed on its merits. This rigorous standard will allow judges to weed out those applications that would never succeed and which would, by definition, waste court time. It also protects fair trial rights by ensuring that those applications which might succeed, including novel claims, are decided on their merits. This standard does not apply to summary dismissal motions that are otherwise subject to a legislated or judicial threshold.

The moving party, on a motion for summary dismissal, bears the burden of convincing the judge that the underlying application is manifestly frivolous. When applying the "manifestly frivolous" standard, the judge should not engage in even a limited weighing of the evidence to ascertain if it is reasonably capable of supporting an inference, nor should the judge decide which among competing inferences they prefer. Any such weighing should be left to the *voir dire*. The judge must assume the facts alleged by the applicant to be true and must take the applicant's arguments at their highest. The applicant's underlying application should explain its factual foundation and point towards anticipated evidence that could establish their alleged facts. Where the applicant cannot point towards any anticipated evidence that could establish a necessary fact, the judge can reject the factual allegation as manifestly frivolous. The judge ought to generally assume the inferences suggested by the applicant are true, even if competing inferences are proffered. The judge should only reject an inference if it is manifestly frivolous, meaning that there is no reasoning path to the proposed inference. A similar approach is taken to the overall application. Because the truth of the facts alleged is assumed, an application will only be manifestly frivolous where fundamental flaws are apparent on the face of the record. Finally, the trial judge's power to summarily dismiss an application is ongoing. Even if the judge permits the application to proceed to a *voir dire*, the judge retains the ability to summarily dismiss the application during the *voir dire* if and when it becomes apparent that the application is manifestly frivolous.

The record on a summary dismissal motion should normally be minimal and of a summary nature because extensive evidence often demands the type of time, effort and delay which works to defeat the very purpose of the motion. While both parties are expected to put their best foot forward, there is no need to set firm rules about what type of record ought to be filed. The party who has brought the underlying application bears the minimal burden of providing the judge with the following specifics, through oral or written submissions: (1) what legal principles, *Charter* provisions, or statutory provisions are being relied on and how those principles or provisions have been infringed; (2) the anticipated evidence to be relied on and how it may be adduced; (3) the proposed argument; and (4) the remedy requested. Deciding whether something more is required and how the summary dismissal motion is to proceed is then within the judge's case management powers.

In the case at bar, the judge erred by failing to take the alleged facts and inferences as true, applying a more merits-based threshold for summary dismissal which was not sufficiently rigorous, and by focussing on the merits and on the ultimate outcome rather than on whether the applications were manifestly frivolous.

Cases Cited

Distinguished: *R. v. Cody*, 2017 SCC 31, [2017] 1 S.C.R. 659; *R. v. Pires*, 2005 SCC 66, [2005] 3 S.C.R. 343; **considered:** *R. v. Vukelich* (1996), 78 B.C.A.C. 113; **referred to:** *R. v. Bacon*, 2020 BCCA 140, 386 C.C.C. (3d) 256; *R. v. Babos*, 2014 SCC 16, [2014] 1 S.C.R. 309; *Bacon v. Surrey Pretrial Services Centre*, 2010

BCSC 805, 11 Admin. L.R. (5th) 1; *R. v. Sadikov*, 2014 ONCA 72, 305 C.C.C. (3d) 421; *Erven v. The Queen*, [1979] 1 S.C.R. 926; *R. v. Kematch*, 2010 MBCA 18, 251 Man. R. (2d) 191; *R. v. Garnier*, 2017 NSSC 239; *R. v. Wilder*, 2004 BCSC 304; *R. v. Hamill* (1984), 14 C.C.C. (3d) 338; *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297; *R. v. Kutynec* (1992), 70 C.C.C. (3d) 289; *R. v. Garofoli*, [1990] 2 S.C.R. 1421; *R. v. Biring*, 2021 BCSC 2678; *R. v. Kuntz-Angel*, 2020 BCSC 1777; *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631; *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45; *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87; *R. v. Glegg*, 2021 ONCA 100, 400 C.C.C. (3d) 276; *R. v. Samaniego*, 2022 SCC 9; *R. v. Edwardsen*, 2019 BCCA 259; *R. v. Orr*, 2021 BCCA 42, 399 C.C.C. (3d) 441; *R. v. Tse*, 2008 BCSC 867; *R. v. Ali-Kashani*, 2017 BCPC 358; *Dersch v. Canada (Attorney General)*, [1990] 2 S.C.R. 1505; *R. v. Rose*, [1998] 3 S.C.R. 262; *R. v. McDonald*, 2013 BCSC 314; *Teal Cedar Products Ltd. v. Rainforest Flying Squad*, 2022 BCSC 429; *R. v. Frederickson*, 2018 BCCA 2; *R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863; *Accurso v. R.*, 2022 QCCA 752; *Brûlé v. R.*, 2021 QCCA 1334; *R. v. Armstrong*, 2012 BCCA 242, 350 D.L.R. (4th) 457; *R. v. Omar*, 2007 ONCA 117, 84 O.R. (3d) 493; *R. v. Cobb*, 2021 QCCQ 546; *R. v. Gill*, 2018 BCSC 661; *R. v. Sandhu*, 2021 MBQB 22; *Valcourt v. R.*, 2019 QCCA 903; *R. v. RV*, 2022 ABCA 218; *R. v. Wesaquate*, 2022 SKCA 101, 418 C.C.C. (3d) 225; *R. v. Giesbrecht*, 2019 MBCA 35, [2019] 7 W.W.R. 280; *R. v. Greer*, 2020 ONCA 795, 397 C.C.C. (3d) 40; *R. v. Emery Martin*, 2021 NBQB 67; *Carver v. R.*, 2021 PESC 40; *R. v. Greenwood*, 2022 NSCA 53, 415 C.C.C. (3d) 89; *R. v. Lehr*, 2018 NLSC 249, 426 C.R.R. (2d) 1; *R. v. Smith*, 2021 YKTC 60; *R. v. Denechezhe*, 2021 YKTC 18; *R. v. Oland*, 2017 SCC 17, [2017] 1 S.C.R. 250; *R. v.*

Passey (1997), 56 Alta. L.R. (3d) 317; *R. v. Effert*, 2006 ABCA 352; *R. v. Greer*, 2021 BCCA 148; *R. v. Mian* (1996), 148 N.S.R. (2d) 155; *R. v. Manasseri*, 2013 ONCA 647, 312 C.C.C. (3d) 132; *R. v. Gill*, 2016 BCCA 355, 1 M.V.R. (7th) 245; *R. v. Hanna* (1991), 3 B.C.A.C. 57; *R. v. Drouin*, 1994 CanLII 4621; *R. v. Perrier*, 2009 NLCA 61, 293 Nfld. & P.E.I.R. 92; *R. v. Beseiso*, 2020 ONCA 686; *R. v. Mehedi*, 2019 ONCA 387; *R. v. McPherson*, 1999 BCCA 638, 140 C.C.C. (3d) 316; *Ouellet v. R.*, 2021 QCCA 386, 70 C.R. (7th) 279; *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391; *Hu v. R.*, 2022 QCCS 2871; *R. v. Morin*, 2022 SKCA 46, [2022] 7 W.W.R. 443; *R. v. Walton*, 2019 ONSC 928; *R. v. Dwernychuk* (1992), 135 A.R. 31; *R. v. Baker*, 2004 ABPC 218, 47 Alta. L.R. (4th) 152; *R. v. Felderhof* (2003), 68 O.R. (3d) 481; *R. v. J.J.*, 2022 SCC 28; *R. v. Rice*, 2018 QCCA 198; *R. v. Lyttle*, 2004 SCC 5, [2004] 1 S.C.R. 193; *R. v. Osolin*, [1993] 4 S.C.R. 595; *R. v. Shearing*, 2002 SCC 58, [2002] 3 S.C.R. 33; *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 7, 11(d), 12.

Court of King's Bench of Alberta Criminal Procedure Rules, SI/2017-76, r. 14.

Criminal Code, R.S.C. 1985, c. C-46, ss. 320.25, 679, 685(1).

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Oxford English Dictionary (online: https://www.oed.com/), “manifest”, “manifestly”.

APPEAL from a judgment of the British Columbia Court of Appeal (Tysoe, MacKenzie and Willcock JJ.A.), 2021 BCCA 34, 487 C.R.R. (2d) 48, [2021] B.C.J. No. 331 (QL), 2021 CarswellBC 491 (WL), quashing the convictions entered by Wedge J., 2014 BCSC 2172, 15 C.R. (7th) 84, 321 C.R.R. (2d) 192, [2014] B.C.J. No. 2821 (QL), 2014 CarswellBC 3427 (WL) (open reasons); 2014 BCSC 2194 (sealed reasons), affirming the verdicts of guilt entered by Wedge J., 2014 BCSC 1863, [2014] B.C.J. No. 2451 (QL), 2014 CarswellBC 2909 (WL), and remitting the applications for a stay of proceedings to the trial court. Appeal dismissed.

Mark K. Levitz, K.C., *Geoff Baragar, K.C.*, and *Mark Wolf*, for the appellant.

Dagmar Dlab, *Simon R. A. Buck* and *Roger P. Thirkell*, for the respondent Cody Rae Haevischer.

Brock Martland, K.C., *Daniel J. Song, K.C.*, *Jonathan Desbarats* and *Elliot Holzman*, for the respondent Matthew James Johnston.

Anil K. Kapoor and *Dana C. Achtemichuk*, as *amici curiae*.

Elaine Reid and *David Schermbrucker*, for the intervener the Director of Public Prosecutions.

Katie Doherty, for the intervener the Attorney General of Ontario.

Scott C. Hutchison and *Sarah Strban*, for the intervener the Criminal Lawyers' Association of Ontario.

Matthew A. Nathanson and *Mika Chow*, for the intervener the Independent Criminal Defence Advocacy Society.

Graham Johnson and *Stacey M. Purser*, for the intervener the Criminal Trial Lawyers' Association.

Tony C. Paisana and *Mark Iyengar*, for the intervener the Trial Lawyers Association of British Columbia.

Andrew Matheson and *Natalie V. Kolos*, for the intervener the Canadian Civil Liberties Association.

The judgment of the Court was delivered by

MARTIN J. —

I. Overview

[1] In this appeal the Court addresses the standard to be applied in criminal cases when judges are asked to summarily dismiss an application without hearing it on

its merits. Specifically, when is it appropriate to summarily dismiss an application for a stay of proceedings for abuse of process?

[2] There is a clear consensus in courts across Canada that trial judges have the power to summarily dismiss applications made in the criminal law context in certain circumstances. However, the national case law is divided about the proper threshold to be applied. It is time for this Court to provide guidance on this important issue, which is linked to concepts as fundamental to our criminal justice system as trial fairness and trial efficiency. The chosen standard must protect the accused's constitutional rights to a fair trial and full answer and defence while avoiding undue delay and the disproportionate or wasteful use of court resources. It should also discourage decision makers from determining the merits of the underlying application without all the evidence, as this risks unfairness for an efficiency which may be more apparent than real.

[3] As a result, an application in a criminal proceeding, including for a stay of proceedings for abuse of process, should only be summarily dismissed if the application is "manifestly frivolous". This threshold best preserves fair trials, protects the accused's right to full answer and defence, and ensures efficient court proceedings. It is a rigorous standard that allows trial judges to weed out the sort of applications that the summary dismissal power is designed to exclude, but permits most applications to be decided on their merits in proportionate proceedings.

[4] In the case at bar, Mr. Johnston and Mr. Haevischer applied for stays of proceedings based on abuse of process; the Crown, in turn, asked for and was granted summary dismissal of the stay applications. Based on the trial judge's own findings, Mr. Johnston's and Mr. Haevischer's applications for a stay of proceedings were not manifestly frivolous. I agree with the Court of Appeal for British Columbia that it was an error to summarily dismiss them. Accordingly, I dismiss the appeal. Mr. Haevischer's stay application will be remitted to the trial court for a *voir dire*. As requested by Mr. Johnston's counsel, I make no order in relation to Mr. Johnston, who passed away in prison after this appeal was argued before this Court.

II. Background

A. *The Surrey Six Murders*

[5] Mr. Johnston and Mr. Haevischer were tried and found guilty of six counts of first degree murder and one count of conspiracy to commit murder. Committed on October 19, 2007, what became known as the "Surrey Six murders" were precipitated by a dispute over the drug trade in Surrey, British Columbia, between Corey Lal, the intended victim, and James (Jamie) Bacon, one of the leaders of a criminal organization called the "Red Scorpions". Pursuant to a conspiracy to kill Mr. Lal, three members of the Red Scorpions — Mr. Johnston, Mr. Haevischer and "Person X" — went to Mr. Lal's drug "stash house", a suite in a residential apartment building in Surrey, to murder him.

[6] When Mr. Johnston, Mr. Haevischer and Person X arrived at the apartment, they came into contact with Mr. Lal, three of his associates, a gas fitter who was servicing fireplaces in the complex, and a young man who lived across the hall. The latter two victims had no connection to Mr. Lal. Though Mr. Lal was the intended target, the five other victims were also killed to avoid detection. The murders were committed execution-style. The forensic evidence discloses that all six men were shot multiple times at close range while lying on the floor of the apartment and that two different guns were used to kill them.

B. *The E-Peseta Investigation and the Charges*

[7] These horrific high-profile murders led to a multi-year, large-scale Royal Canadian Mounted Police ("RCMP") investigation, known as "Project E-Peseta", which eventually resulted in multiple charges against numerous individuals.

[8] Some five years later, Mr. Johnston and Mr. Haevischer were each charged with six counts of first degree murder and one count of conspiracy to murder Mr. Lal. They were ultimately tried together.

[9] Person X, the third participant in the murders, was unindicted, but pleaded guilty to second degree murder of three of the victims and conspiracy to murder Mr. Lal. The Crown had intended to call Person X as a witness at Mr. Johnston and Mr. Haevischer's trial, but Person X was ultimately precluded from testifying after an *in camera* proceeding conducted in the absence of Mr. Johnston and Mr. Haevischer.

[10] Quang Vinh Thang (Michael) Le and Mr. Bacon, leaders of the Red Scorpions, were charged with the murder of Mr. Lal and with conspiracy to murder Mr. Lal. Mr. Le pleaded guilty to the conspiracy charge in December 2013 and testified in the trial against Mr. Johnston and Mr. Haevischer. Mr. Bacon pleaded guilty to the conspiracy charge after the Court of Appeal overturned a stay of proceedings that had been entered in his case (*R. v. Bacon*, 2020 BCCA 140, 386 C.C.C. (3d) 256).

[11] Person Y, a Red Scorpions member, was another co-conspirator. He acted as a police agent during the investigation in exchange for immunity from prosecution for the Surrey Six murders. However, he subsequently pleaded guilty to two unrelated first degree murders.

[12] The E-Peseta investigation was complex and plagued by difficulties. While the RCMP believed that the Red Scorpions were responsible for the Surrey Six murders, they were of the view that the only persons who could provide reliable evidence about what happened would be the participants themselves or their close associates, all of whom were "hostile" to police. The investigators decided that they needed to cultivate informers who would be willing to testify against those who committed this crime.

[13] According to the material filed in the record, the investigators developed the "moving witnesses" strategy to "move criminals and their associates from loyalty to their group to loyalty to the RCMP" (A.R., vol. XIV, at p. 36). Focusing on vulnerable members of the Red Scorpions and girlfriends of Red Scorpions members,

the RCMP attempted to "dismantle the inner relationships within the Red Scorpions" and "replace those relationships by building ties between the potential witnesses and themselves" (p. 37). The strategy called for "maximizing" or "creating" events in the targeted individual's world, "[w]ith the goal of putting them in a position where they need to or want to turn to the 'decent cop' for help" (p. 32). By gaining witnesses' loyalty, the RCMP hoped to obtain their cooperation to solve the murders.

C. *The Trial*

[14] Mr. Johnston and Mr. Haevischer's trial, held before Wedge J., was complex and lengthy, due in part to dozens of pre-trial and mid-trial applications and the high number of witnesses. Both were found guilty of all counts.

[15] One pre-trial application — Application No. 65 (2013 BCSC 1526) — bears specific mention. Application No. 65 challenged the Crown's assertion of informer privilege over certain information. To respect the sensitive nature of informer privilege issues, the hearing in Application No. 65 was held in the absence of both the accused and the public, and *amici curiae* were appointed to represent the interests of the accused and to provide an adversarial context for the court. The same *amici* were also appointed for the stay of proceedings applications. The information disclosed to them on Application No. 65 formed the basis of the *amici*'s sealed submissions on the stay applications.

D. *Applications for a Stay of Proceedings for Abuse of Process*

[16] Before convictions were entered, both defence counsel applied for a stay of proceedings for abuse of process based on the test set out by this Court in *R. v. Babos*, 2014 SCC 16, [2014] 1 S.C.R. 309, at para. 32.

[17] A stay is an extraordinary remedy reserved for the "clearest of cases" (*Babos*, at para. 31). The defence claimed that egregious police conduct caused prejudice to Mr. Johnston's and Mr. Haevischer's rights to a fair trial and undermined the integrity of the justice system. The allegations fall into three basic categories. The first two, which were raised by defence counsel, are (1) systemic police misconduct; and (2) the inhumane conditions of confinement Mr. Johnston and Mr. Haevischer experienced while on remand. The third category contains the sealed arguments made by the *amici*.

[18] The first category contained multifaceted allegations of police misconduct. Mr. Johnston and Mr. Haevischer challenged the investigation's use of the "moving witnesses" strategy, characterizing it as "extremely aggressive" (2014 BCSC 2172, 321 C.R.R. (2d) 192, at para. 29). Additionally, they alleged criminal and other misconduct by officers involved in the E-Peseta investigation. In particular, Sgt. Brassington, S/Sgt. Attew, and two other officers engaged in exploitative sexual relationships with two female protected witnesses. Notably, Sgt. Brassington and S/Sgt. Attew were lead E-Peseta investigators who were "lynchpins" in the efforts to develop and handle witnesses as part of the "moving witnesses" strategy. Finally, they alleged that the

police mishandled funds, evidence, witnesses, agents and informants. Among the most egregious allegations were that the four officers who committed misconduct lost evidence and that S/Sgt. Attew and Sgt. Brassington endangered the safety of two female witnesses by improperly revealing their whereabouts.

[19] The second category of allegations related to Mr. Johnston's and Mr. Haevischer's post-arrest conditions of confinement. Defence counsel submitted that Mr. Johnston and Mr. Haevischer were deliberately and punitively kept in solitary confinement for 14 months, in harsh and inhumane conditions, contrary to ss. 7 and 12 of the *Canadian Charter of Rights and Freedoms* and to international human rights obligations. Mr. Haevischer's cell was cold and filthy, smeared with mucus, feces and blood. Mr. Johnston's cell, for months, had no natural light. Both were confined to their cells, alone, for 22 or 23 hours per day, with extremely limited opportunities for visits or contact. In effect, they were cut off from all contact. These conditions caused physical deterioration and significant adverse mental health effects — both feared for their sanity. Defence counsel alleged this illegal treatment was part of the "moving witnesses" strategy and was designed to create the need for the inmates to seek out police help to change their desperate circumstances.

[20] Mr. Johnston and Mr. Haevischer were only released from solitary confinement after Mr. Bacon, who was kept in similarly horrendous conditions pending trial for the Surrey Six murders, successfully brought an application for *habeas corpus* seeking release into the general prison population (see *Bacon v. Surrey Pretrial*

Services Centre, 2010 BCSC 805, 11 Admin. L.R. (5th) 1, at para. 292). McEwan J., who granted Mr. Bacon's application, strongly condemned these conditions and found the treatment of Mr. Bacon contrary to both ss. 7 and 12 of the *Charter*.

[21] The third category of allegations was put forward by the *amici*, who argued an additional ground of police misconduct based on confidential information disclosed during Application No. 65. Their submissions were made *in camera* and *ex parte*.

E. *The Crown's Request for a Vukelich Hearing*

[22] In the normal course, these stay applications would be heard in a separate hearing within the trial called a "*voir dire*" (*R. v. Sadikov*, 2014 ONCA 72, 305 C.C.C. (3d) 421, at paras. 30-31; *Erven v. The Queen*, [1979] 1 S.C.R. 926, at pp. 931-32).[1] At the end of the *voir dire*, the judge would decide whether the applications succeed or fail on their merits, answering the ultimate question, which is "have the applicants met the applicable burden of proof by establishing facts that fulfill each of the legal requirements of the requested remedy?" In the case at bar, the judge would need to

[1] To avoid confusion in these reasons I refer to an underlying application as an "application" or as an "underlying application" and to a request for summary dismissal as a "motion". As well, while the terms "*voir dire*" and "evidentiary hearing" are often used interchangeably in the jurisprudence, here I use "*voir dire*" to refer to a separate hearing that occurs within a trial to decide a particular application. I use "evidentiary hearing" to refer to the calling of *viva voce* evidence during a *voir dire*. A *voir dire* may include an evidentiary hearing, but may also proceed only on a written record, or only on counsel's submissions (*R. v. Kematch*, 2010 MBCA 18, 251 Man. R. (2d) 191, at para. 43; see also *R. v. Garnier*, 2017 NSSC 239, at para. 13 (CanLII)). How the *voir dire* proceeds is a matter within the trial judge's discretion.

decide whether the applicants have met all three parts of the *Babos* test such that stays of proceedings are warranted in the circumstances.

[23] This ultimate question was never answered because the Crown requested that the judge instead first hold the type of hearing described in the British Columbia jurisprudence in *R. v. Vukelich* (1996), 78 B.C.A.C. 113. Other provinces have similar procedures under different names. A *Vukelich* hearing occurs before the court hears the merits of the underlying application and is directed to a very different question: Should the underlying application be summarily dismissed or should it be allowed to proceed to a *voir dire*? The appropriate standard to be applied for this preliminary question about summary dismissal lies at the heart of this appeal.

[24] In this case, the Crown's basis for requesting summary dismissal at a *Vukelich* hearing was that neither defence application disclosed "a sufficient foundation to establish that an evidentiary hearing is necessary or will assist the Court in determining the merits of the application" (A.R., vol. XIV, at p. 22). Even if the allegations were true, the Crown contended that either they would not meet the standard for an abuse of process or they would not amount to the clearest of cases justifying the imposition of a stay.

F. *The Vukelich Hearing Procedure*

[25] Wedge J. agreed to conduct the *Vukelich* hearing requested by the Crown. The summary dismissal motion was heard over six days and was divided into an open

portion and an *in camera* portion. Defence counsel made submissions and tendered exhibits for the open portion. Only the *amici* made sealed submissions and filed sealed exhibits during the *in camera* portion. (Mr. Johnston, Mr. Haevischer and defence counsel did not, and still do not, have access to the sealed material.) In neither the open nor the *in camera* portion of the hearing was there the opportunity to adduce *viva voce* evidence or to cross-examine key witnesses.

[26] The written record on the summary dismissal motion was extensive. Multiple exhibits were filed for the open portion of the hearing, including various police documents outlining the RCMP investigative strategy for the E-Peseta investigation and numerous documents regarding Mr. Johnston's and Mr. Haevischer's confinement. The sealed exhibits filed for the *in camera* portion of the hearing were significant and augmented the overall record.

[27] While the open record was large, it did not represent the full range of evidence the defence wanted to place before Wedge J. Defence counsel indicated they wished to elicit additional evidence, should the judge decide to hold a *voir dire*. They intended to call certain RCMP officers for cross-examination, including those involved in the police misconduct, those who had helped develop the "moving witnesses" strategy, and those involved in decisions to place Mr. Johnston and Mr. Haevischer in solitary confinement. They also intended to call correctional officers for cross-examination regarding the use of solitary confinement and experts to testify as to the impact of solitary confinement on Mr. Johnston's and Mr. Haevischer's mental health

and physical well-being. Finally, they intended to tender other documents that they thought would materialize once they received full disclosure.

G. *The Vukelich Hearing Decision: British Columbia Supreme Court, 2014 BCSC 2172, 321 C.R.R. (2d) 192 (Open Reasons); 2014 BCSC 2194 (Sealed Reasons)*

[28] Based on this lengthy yet limited written record, Wedge J. summarily dismissed the underlying stay applications.

[29] Wedge J. stated the test for summary dismissal was whether an evidentiary hearing (i.e., a *voir dire*) would assist in deciding if the alleged abuses could entitle Mr. Johnston and Mr. Haevischer to a stay. She referred to *R. v. Wilder*, 2004 BCSC 304, and *R. v. Hamill* (1984), 14 C.C.C. (3d) 338 (B.C.C.A.), and concluded that the applications could be summarily dismissed "if . . . the grounds advanced by the applicants could not support a stay of proceedings" (para. 9).

[30] Wedge J. considered whether the defence could satisfy the *Babos* test for a stay of proceedings based on an abuse of process. This test requires an applicant to demonstrate (1) that there is "prejudice to the accused's right to a fair trial or the integrity of the justice system that 'will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome'"; (2) that there is "no alternative remedy capable of redressing the prejudice"; and (3) that, "[w]here there is still uncertainty over whether a stay is warranted after [stages] (1) and (2) . . . the interests in favour of granting a stay [outweigh] 'the interest that society has in having a final

decision on the merits'" (*Babos*, at para. 32, quoting *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, at paras. 54 and 57).

[31] At stage one of the *Babos* analysis, Wedge J. accepted, for the purposes of the *Vukelich* hearing, that certain conduct could amount to an abuse of process and that entering convictions in light of that conduct would be harmful to the integrity of the justice system. Certain misconduct of the four officers — engaging in exploitative sexual relationships, endangering the safety of protected witnesses, lying to superiors, and manipulating overtime and expense claims — could constitute an abuse of process. However, she rejected the allegation that the "moving witnesses" strategy and the other impugned investigative practices amounted to an abuse of process. Wedge J. also accepted that Mr. Johnston's and Mr. Haevischer's conditions of confinement violated their ss. 7 and 12 *Charter* rights and could amount to an abuse of process. Finally, Wedge J. accepted certain allegations of abuse raised by the *amici*, but rejected certain inferences they put forward that were favourable to Mr. Johnston and Mr. Haevischer. Instead, she preferred inferences favourable to the Crown's position. She determined that the materials available on the *Vukelich* hearing did not support the *amici*'s theory.

[32] At stage two of the *Babos* analysis, Wedge J. accepted, for the purposes of the *Vukelich* hearing, that there were no alternate remedies for the breaches she identified.

[33] At stage three of the *Babos* analysis, Wedge J. determined that this was not one of the "clearest of cases" where a stay was warranted (para. 153). On one side of

the scale, the misconduct by the four officers was extremely serious. However, the misconduct was not ongoing: the officers were suspended and removed from the investigation. Further, the affected female witnesses were not called at trial, tempering the seriousness of the misconduct. Though the conditions of confinement amounted to serious, prolonged and systemic misconduct that had an immediate and significant impact on Mr. Johnston's and Mr. Haevischer's mental and physical health, Wedge J. noted that the conditions were not ongoing, and the state conduct had been judicially criticized by McEwan J. She also accorded weight to the misconduct alleged by the *amici* (though not the inferences that she had rejected). On the other side of the scale, the crimes were incredibly serious: the circumstances of the offences were shocking, there were six victims, and the motivation behind the murders was a desire to demonstrate the Red Scorpions' strength, instill fear in rival gangs, and expand the Red Scorpions' drug business. Both society and the family members of the deceased had an interest in seeing convictions entered. For Wedge J., these considerations weighed more heavily in the balance.

[34] Wedge J. concluded that, even if the applications were taken at their highest, the grounds advanced could not support a stay of proceedings. As such, an evidentiary hearing (i.e., a *voir dire*) on the merits would not assist the court. For these reasons, she summarily dismissed the applications and ordered the convictions entered.

H. *Appeal of the Vukelich Ruling: British Columbia Court of Appeal, 2021 BCCA 34, 487 C.R.R. (2d) 48 (Tysoe, MacKenzie and Willcock JJ.A.)*

[35] The Court of Appeal for British Columbia concluded that Wedge J. should not have summarily dismissed the stay applications at the *Vukelich* hearing. They ought to have been fully addressed and decided at a *voir dire* on their merits. The court allowed the appeals, quashed the convictions, affirmed the verdicts of guilt, and remitted the stay applications to the trial court for a *voir dire*.

[36] The court acknowledged that a judge's decision on whether to hold a *voir dire* or evidentiary hearing is discretionary and owed deference. Nevertheless, Wedge J. had erred respecting the *amici*'s sealed submissions by weighing the evidence, drawing inferences and finding facts on an incomplete record. She failed to take the *amici*'s submissions at their highest and did not assume the truth of the facts alleged. The *amici* had identified sufficiently reasonable interpretations and plausible inferences such that a full evidentiary hearing was warranted.

[37] In addition, Wedge J. imposed too high a standard to permit an evidentiary hearing. The threshold is meant to be low, and it was met in this case. When the judge found that stages one and two of *Babos* were satisfied, it was clear that the applications were not frivolous. However, the judge's balancing at stage three purported to determine the ultimate issue without all the evidence.

[38] In addition, the court admitted some of the fresh evidence that the *amici* tendered. The court determined that it showed there was conflicting evidence on the facts relevant to the *amici*'s argument and that it could be open to a judge to make different findings about the extent of the misconduct.

[39] As well, the court remarked that, as a matter of law, no category of offence — no matter how serious — can be beyond the ambit of the abuse of process doctrine. The court always retains the ability to dissociate itself from misconduct through a stay.

III. Analysis

[40] The key question on appeal is whether the trial judge erred in summarily dismissing the stay applications for abuse of process. Answering this question requires this Court to determine the appropriate threshold for the summary dismissal of an application in the criminal law context.

[41] I begin with a review of the genesis of the *Vukelich* hearing and the values of trial efficiency and trial fairness. I then identify and explain the proper threshold: an application can only be summarily dismissed without a hearing where the application is manifestly frivolous. I also remark on the framework for summary dismissal motions, including who bears the burden of proof and what should be included in the record.

[42] In the final section, I apply the "manifestly frivolous" standard to the case at bar. Like the Court of Appeal, I find that the applications were not manifestly frivolous and should have been heard and decided on their merits.

A. *Summary Dismissal in the Criminal Law Context*

(1) The Genesis of the *Vukelich* Hearing

[43] The *Vukelich* hearing has its genesis in a 1996 decision which upheld the trial judge's refusal to hold a *voir dire* on the constitutionality of a search warrant (*Vukelich*, at para. 8). McEachern C.J., writing for the Court of Appeal for British Columbia, relied heavily on the earlier Ontario case of *R. v. Kutynec* (1992), 70 C.C.C. (3d) 289 (C.A.), which acknowledged that a "trial judge can weed out the applications which have no basis in fact or law, and can decide how and when those with potential merit should be resolved" (p. 302). McEachern C.J. also noted that trial judges must "control the course of the proceedings" (para. 26). Procedurally, he endorsed a "flexible approach . . . rather than [a] formal procedure" to determine whether or not to embark on a *voir dire* and how a *voir dire* should be conducted (para. 23). The same approach had been taken in *Kutynec*. McEachern C.J. felt that both questions could be answered based on the statements of counsel, possibly supported by an affidavit.

[44] Because of the nature of the underlying application, McEachern C.J. did not need to articulate a general standard for when an application in a criminal trial should be summarily dismissed. The defence application advanced in *Vukelich* challenged a search warrant and relied upon *R. v. Garofoli*, [1990] 2 S.C.R. 1421. In *Garofoli*, the Court held that successfully challenged portions of an information to obtain ("ITO") are to be excised, after which the trial judge must determine if the remainder of the ITO supports the issuance of the warrant. In *Vukelich*, the trial judge applied the *Garofoli* framework to conclude on the face of the record, accepting all of

the defence's allegations as true and excising the impugned information, that there was still sufficient information to issue the warrant. Given the nature of the defence application and the principles from *Garofoli*, McEachern C.J. found that holding a *voir dire* would "not assist the proper trial of the real issues" (para. 26).

[45] Since 1996, *Vukelich* hearings have been extended well beyond search warrant cases and are frequently used in criminal trials in British Columbia. While it is more common for the Crown to request a *Vukelich* hearing to summarily dismiss a defence application, the trial judge's screening function applies equally to Crown applications, and defence counsel do sometimes request *Vukelich* hearings (see *R. v. Cody*, 2017 SCC 31, [2017] 1 S.C.R. 659, at para. 38; *R. v. Biring*, 2021 BCSC 2678, at para. 5 (CanLII); *R. v. Kuntz-Angel*, 2020 BCSC 1777, at para. 71 (CanLII)).

(2) Underlying Values: Trial Efficiency and Trial Fairness

[46] The standard selected for summary dismissal on a *Vukelich*-type hearing will be based on the two sets of underlying values at play in such proceedings: trial efficiency and trial fairness. These values coexist and "both must be pursued in order for each to be realised: they are, in practice, interdependent" (*R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631, at para. 27, quoting B.C. Justice Reform Initiative, *A Criminal Justice System for the 21st Century* (2012), at p. 75).

(a) *Trial Efficiency*

[47] In both the civil and criminal contexts, trial judges play a gatekeeping role and can summarily dismiss certain applications without a hearing on the merits.

[48] A civil claim will be struck "if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action" or, alternatively phrased, if the claim has no reasonable prospect of success (*R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 17). Striking such claims "unclutters the proceedings", "promotes litigation efficiency, reducing time and cost", and allows litigants to focus on serious claims (paras. 19-20). Relatedly, the civil rules for summary judgment, which is generally available when there is no genuine issue for trial, are "interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims" (*Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 5; see also para. 34).

[49] The same purposes are important in the criminal context, where the need for efficient trials to reduce undue delay is manifest (see *R. v. Glegg*, 2021 ONCA 100, 400 C.C.C. (3d) 276, at para. 36; *Jordan*, at paras. 114 and 139; *Cody*, at paras. 36-39). Dismissing unmeritorious applications made in the criminal law context helps ensure that trials occur within a reasonable time, which is an "essential part of our criminal justice system's commitment to treating presumptively innocent accused persons in a manner that protects their interests in liberty, security of the person, and a fair trial" (*Jordan*, at para. 20). "Timely trials impact other people who play a role in and are

affected by criminal trials, as well as the public's confidence in the administration of justice" (para. 22).

[50] Indeed, the time limits set in *Jordan* for the completion of most criminal trials should encourage those bringing underlying applications or seeking their summary dismissal to carefully consider whether such steps are necessary and to assess their impact on the trial timelines. *All* participants in the criminal justice system share a responsibility to take a "proactive approach . . . that prevents unnecessary delay by targeting its root causes" (*Cody*, at para. 36, citing *Jordan*, at para. 137). According a high degree of deference to summary dismissal decisions encourages trial judges to take on that responsibility and to exercise this discretionary power where appropriate (see *R. v. Samaniego*, 2022 SCC 9, at para. 25; *R. v. Edwardsen*, 2019 BCCA 259, at para. 75 (CanLII); *R. v. Orr*, 2021 BCCA 42, 399 C.C.C. (3d) 441, at paras. 53-54).

[51] The allure of efficiency is not, however, to advance simplicity or speed as ends in themselves. Complexity in criminal trials is sometimes unavoidable, and the goal is to avoid disproportionate or undue delay, which impairs the interests of justice (see *Jordan*, at para. 43). Trials, and the applications taken in respect of them, should take a *proportionate* amount of time. What is required to fairly and justly address any particular application will depend on the nature of the application and the context of the broader trial. Trial judges should guard against any "procedural step or motion that is improperly taken, or takes longer than it should" as they would "depriv[e] other worthy litigants of timely access to the courts" (para. 43). Those steps do not increase

the quality of justice in that particular trial. Similarly, trial judges should scrutinize decisions taken in the name of efficiency to ensure they actually save court time and judicial resources. Anticipated savings should be both real and required. This is an important factor when considering protracted and merits-oriented summary dismissal motions, which often create other forms of costs and delays (in the civil context, see *Hryniak*, at para. 6).

[52] Unfortunately, a review of the jurisprudence reveals that, as *Vukelich* hearings proliferated, becoming almost routine, their animating goal of increasing trial efficiency has not been realized in practice. In many cases, they are unnecessarily lengthy and veer towards the merits of the underlying application. A *Vukelich* hearing "insisted upon by the Crown" may devolve into a "protracted pre-hearing examination of the minutiae of the accused's application" and result in the repetition of arguments on the ultimate *voir dire* (*R. v. Tse*, 2008 BCSC 867, at para. 21 (CanLII); see also para. 23). In the result, the hearing "consumes, unnecessarily, the very scarce resources that the hearing itself was designed to avoid wasting" (*R. v. Ali-Kashani*, 2017 BCPC 358, at para. 52 (CanLII)).

[53] That *Vukelich*'s initial goal has not always materialized is exemplified by the case at bar. Here, the six-day *Vukelich* hearing involved extensive submissions by counsel, substantial evidence, and a deep dive into the merits of the stay applications. It led to a lengthy appeal which will result in repetition of the very same arguments when the applications are ultimately heard on their merits.

[54] Clearly, it cannot simply be assumed that summary dismissal is a surefire way to increase efficiency. To be practical and take proportionality into account, judges should identify and weigh the full impact of the various procedural options. The resources that may be notionally saved by not hearing the main underlying application are simply a part of the picture. Judges must also factor in their extensive case management powers, which allow them to control the trial and the process and procedure of the underlying application. These powers go a long way towards tempering legitimate concerns over prolix trials, fishing expeditions, disproportionate processes and undue delay. They are not a full answer, but they play an important role because they encourage the tailoring of proportionate proceedings.

(b) *Trial Fairness*

[55] However pressing the goal of trial efficiency, summary dismissal also raises concerns about fairness because it runs counter to the notion that parties should have the opportunity to present their cases and to have their evidence, claims and allegations adjudicated on their merits. In civil cases, there is a reluctance to drive the plaintiff from the judgment seat at an early stage of the proceedings because of the potential prejudice which may result from the premature dismissal of the claim — especially when the claim is novel or close to the line.

[56] In criminal cases, trial fairness is more than a policy goal: it is a constitutional imperative. A criminal trial involves allegations made by the state against an accused whose liberty is often at stake. The summary dismissal of criminal

applications can curtail the accused's right to full answer and defence and the right to a fair trial protected by ss. 7 and 11(d) of the *Charter* by stopping the accused from fully making arguments and eliciting evidence on their application (see *Dersch v. Canada (Attorney General)*, [1990] 2 S.C.R. 1505; *R. v. Rose*, [1998] 3 S.C.R. 262). There are, of course, limits to these rights. For example, accused persons are not entitled to a *voir dire* and, if a *voir dire* is granted, are not entitled to whatever style of *voir dire* they would prefer (*Vukelich*, at para. 26). The trial judge decides if and how the *voir dire* proceeds and whether it should include an evidentiary hearing. Nevertheless, summary dismissal of applications made in the criminal law context implicates and, in certain circumstances, can curtail the accused's rights.

[57] Due to this constitutional dimension, the civil rules and thresholds may provide limited guidance, but they cannot simply be adopted or transposed into the criminal domain. In this area of public law, the accused's *Charter* rights must be accounted for, particularly when the underlying application is brought by the defence in pursuit of fair trial rights. Additionally, the discrete realities of criminal trials must be respected. This includes an appreciation of the vast nature, breadth, scope and variety of possible applications made in the criminal law context — issues which go well beyond those raised by civil statements of claim. In the criminal context, certain applications are governed by a separate body of criminal procedure, legislated processes and statutory standards, and others are governed by long-standing case law. The distinctive features of the criminal context bear both upon the appropriate standard for summary dismissal and how it ought to be applied in individual cases.

[58] Concerns about trial fairness can arise in numerous ways. Setting too lax a standard for summary dismissal risks the dismissal, based on a limited or incomplete record, of applications that might have proved successful after a full hearing on the merits. This risk becomes particularly salient where a party puts forward novel arguments which may carry significant precedential value and allow the law to develop. As recognized in the civil context, "[t]he approach must be generous and err on the side of permitting a novel but arguable claim to proceed" (*Imperial Tobacco*, at para. 21). This concern applies with equal force in criminal cases: courts have acknowledged the risk of stifling novel claims, given that "the contours of constitutional rights are settled through the litigation of emerging, unresolved and contentious issues" (*R. v. McDonald*, 2013 BCSC 314, at para. 44 (CanLII); *Teal Cedar Products Ltd. v. Rainforest Flying Squad*, 2022 BCSC 429, at paras. 14-15 (CanLII)). Certain interveners pointed out that a novel application might require full evidentiary exploration for the issues to properly emerge. I agree.

[59] These concerns inform and align with existing jurisprudence, which recognizes that trial fairness requires a low threshold for holding a *voir dire*, such that most applications are heard on their merits (see *R. v. Frederickson*, 2018 BCCA 2, at para. 33 (CanLII)). Indeed, the parties before this Court generally all agree that it should not be difficult for an accused's application to proceed to a *voir dire*, though they disagree on the exact standard to be applied.

(c) *The Values of Trial Efficiency and Trial Fairness Support a Rigorous Threshold for Summary Dismissal in the Criminal Context*

[60] The underlying values of trial fairness and trial efficiency mandate the conclusion that a rigorous threshold should be applied to summary dismissal motions in criminal trials. A summary procedure is, as its name suggests, intended to be summary: preliminary, brief, and more in the nature of an overview than a deep dive. Summary dismissal is built upon allegations and supported by the artifice of assuming that the facts asserted are true. By contrast, a hearing on the merits involves a final determination of the facts, and of whether, after a full review, the proven facts support the allegations and ground the requested remedy.

[61] A rigorous threshold is also supported by the particular characteristics of criminal trials, including how the trial judge's broad case management powers can help ensure the efficient, effective and proportionate use of court resources as well as the accused's fair trial rights. Judges perform a gatekeeping function, and the goal is that only those applications that should be caught by the summary dismissal power are in fact summarily dismissed. Trial judges should therefore err on the side of caution when asked to summarily dismiss an application made in the criminal law context. This is especially so in light of the deferential standard of review applied on appeal to a judge's case management decisions (*Samaniego*, at para. 25; *Edwardsen*, at para. 75). The threshold and standard selected for summary dismissal must respect this Court's observation (in the context of jury selection) that "occasional injustice cannot be accepted as the price of efficiency" (*R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863, at para. 28).

B. *The "Manifestly Frivolous" Threshold for Summary Dismissal*

[62] I turn now to the question at the heart of this appeal: What is the threshold for the summary dismissal of applications made in the criminal law context? I briefly review the uncertainty in the existing jurisprudence. I then identify the correct threshold, which is whether the underlying application is manifestly frivolous, and explain why this threshold promotes both trial efficiency and trial fairness. I also outline why other proposed thresholds are less suited to summary dismissal motions and provide some guidance about how the "manifestly frivolous" standard is to be applied, who bears the burden on the summary dismissal motion, and what type of record should be filed. I conclude with a summary of the applicable framework for summary dismissal motions.

(1) Review of the Jurisprudence

[63] The threshold test "has been expressed in different ways at different times" (*McDonald*, at para. 18). It has been variably described as having no reasonable prospect of success (*Cody*, at para. 38); being frivolous or manifestly frivolous (*Jordan*, at para. 63; *Cody*, at para. 38; *Accurso v. R.*, 2022 QCCA 752, at paras. 323 and 329 (CanLII); *Brûlé v. R.*, 2021 QCCA 1334, at para. 31 (CanLII)); having no basis upon which it could succeed (*Cody*, at para. 38); having no reasonable likelihood that the *voir dire* will assist (*R. v. Pires*, 2005 SCC 66, [2005] 3 S.C.R. 343, at para. 35); being doomed to failure (*R. v. Armstrong*, 2012 BCCA 242, 350 D.L.R. (4th) 457, at para. 38; *R. v. Omar*, 2007 ONCA 117, 84 O.R. (3d) 493, at para. 31; *R. v. Cobb*, 2021 QCCQ

546, at paras. 7 and 157 (CanLII); *R. v. Gill*, 2018 BCSC 661 ("*Gill* (BCSC)"), at para. 36 (CanLII)); being unmeritorious on its face (*Cobb*, at para. 7); not being grounded in any facts that have a reasonable likelihood of ultimately supporting a remedy (*Gill* (BCSC), at para. 36); having no basis in fact or law (*Kutynec*, at p. 302); having no foundation in the evidence (*Omar*, at para. 31); being completely devoid of merit (*R. v. Sandhu*, 2021 MBQB 22, at para. 23 (CanLII)); or being [TRANSLATION] "manifestly unfounded and frivolous" (*Valcourt v. R.*, 2019 QCCA 903, at para. 6 (CanLII)). Indeed, some cases refer to multiple combinations of these words or phrases (see, e.g., *Cobb*, at para. 7; *Gill* (BCSC), at para. 36; *Omar*, at para. 31).

[64] As is apparent from the citations above, this uncertainty is not limited to British Columbia. Provinces and territories across the country have relied on a combination of cases, including *Vukelich*, *Kutynec* and *Cody*, as authority for the trial judge's power to summarily dismiss applications (see, e.g., *R. v. RV*, 2022 ABCA 218, at paras. 63-64 (CanLII); *R. v. Wesaquate*, 2022 SKCA 101, 418 C.C.C. (3d) 225, at para. 93; *R. v. Giesbrecht*, 2019 MBCA 35, [2019] 7 W.W.R. 280, at paras. 134-36; *R. v. Greer*, 2020 ONCA 795, 397 C.C.C. (3d) 40 ("*Greer* (ONCA)"), at paras. 108, 111 and 113; *Accurso*, at paras. 311-12; *R. v. Emery Martin*, 2021 NBQB 67, at para. 14 (CanLII); *Carver v. R.*, 2021 PESC 40, at para. 16 (CanLII); *R. v. Greenwood*, 2022 NSCA 53, 415 C.C.C. (3d) 89, at paras. 147-48; *R. v. Lehr*, 2018 NLSC 249, 426 C.R.R. (2d) 1, at paras. 14-18; *R. v. Smith*, 2021 YKTC 60, at paras. 5 and 13 (CanLII); *R. v. Denechezhe*, 2021 YKTC 18, at para. 82 (CanLII)).

[65] While the various formulations all seek to avoid unnecessary and wasteful *voir dires*, Mr. Johnston was correct when he argued that rearticulating a standard using different words and phrases creates confusion and generates uncertainty. The existing jurisprudence is thus unsettled and demonstrates that this Court needs to provide clarity on the proper threshold to be applied to the summary dismissal of applications made in the criminal law context. This is a question of first instance, and the Court is now called upon to establish the correct threshold based on first principles.

(2) The "Manifestly Frivolous" Threshold

[66] I conclude that the appropriate standard for summary dismissal is whether the underlying application is manifestly frivolous. This standard draws on the case law concerning frivolous applications, as advanced by some parties and interveners, including Mr. Johnston, Mr. Haevischer, the Independent Criminal Defence Advocacy Society, the Canadian Civil Liberties Association, and the Trial Lawyers Association of British Columbia. However, it also requires that the flaws in the application are manifestly apparent.

[67] The "frivolous" part of the standard weeds out those applications that will necessarily fail. This Court has previously stated that the "'not frivolous' test is widely recognized as being a very low bar" (*R. v. Oland*, 2017 SCC 17, [2017] 1 S.C.R. 250, at para. 20). Having reviewed the case law on the "not frivolous" threshold, inevitability or necessity of failure is the key characteristic of a "frivolous" application. In relation to the case law on applications for bail pending appeal of a conviction under

s. 679(3) of the *Criminal Code*, R.S.C. 1985, c. C-46, see *R. v. Passey* (1997), 56 Alta. L.R. (3d) 317 (C.A.), at paras. 6-8; *R. v. Effert*, 2006 ABCA 352, at paras. 5-6 (CanLII); *R. v. Greer*, 2021 BCCA 148, at para. 36 (CanLII); *R. v. Mian* (1996), 148 N.S.R. (2d) 155 (C.A.), at para. 9; *R. v. Manasseri*, 2013 ONCA 647, 312 C.C.C. (3d) 132, at para. 38; *R. v. Gill*, 2016 BCCA 355, 1 M.V.R. (7th) 245, at para. 17; *R. v. Hanna* (1991), 3 B.C.A.C. 57, at para. 6; *R. v. Drouin*, 1994 CanLII 4621 (Sask. C.A.), at p. 2; cf. *R. v. Perrier*, 2009 NLCA 61, 293 Nfld. & P.E.I.R. 92, at para. 24. In relation to s. 685(1) applications for summary dismissal of appeals where the court of appeal determines that the legal grounds for the appeal are frivolous or vexatious, see *R. v. Beseiso*, 2020 ONCA 686, at para. 7 (CanLII); *R. v. Mehedi*, 2019 ONCA 387, at para. 6 (CanLII). Finally, in relation to s. 320.25 applications for a stay of a driving prohibition pending appeal, see *R. v. McPherson*, 1999 BCCA 638, 140 C.C.C. (3d) 316, at para. 5.

[68] Aside from the inevitability or necessity of failure, the "frivolous" standard has captured a compendium of other phrases. It is because it will necessarily fail that a frivolous application has also been described as "not arguable" and as "having no basis upon which it could succeed". Similarly, saying an application is "doomed to failure" connotes inevitability and is just another way of saying an application is "frivolous" (see, e.g., *Armstrong*, at para. 38; *Omar*, at para. 31; *Cobb*, at para. 7).

[69] However, I add the word "manifestly" to capture the idea that the frivolous nature of the application should be obvious. "Manifestly" is defined as "as is manifest;

evidently, unmistakably, openly", and "manifest" is defined as "[c]learly revealed to the eye, mind, or judgement; open to view or comprehension; obvious" (*Oxford English Dictionary* (online)). Just like the civil standard for striking a claim requires that it be "plain and obvious" that the claim discloses no reasonable cause of action (or, in French, "*évident et manifeste*"), the addition of the word "manifestly" adds another layer to the "frivolous" standard and helpfully indicates that a summary dismissal motion should be based on that which is clearly revealed.

[70] The "manifestly frivolous" standard has been used recently by the Quebec Court of Appeal, including in the context of the proposed summary dismissal of a stay application (*Accurso*, at paras. 323 and 329; *Brûlé*, at para. 31; see also *Ouellet v. R.*, 2021 QCCA 386, 70 C.R. (7th) 279, at para. 12, fn. 3, referring to an application being [TRANSLATION] "frivolous on its face"). In applying this standard, the Court of Appeal has called for judges to exercise caution before summarily dismissing an application because such dismissal deprives the applicant (often the accused) of a hearing on the merits (*Accurso*, at paras. 314-15, citing *Brûlé*, at para. 31). In summary dismissal motions, rather than requiring that the accused prove the existence of the *Charter* violation on an underlying *Charter* application, the Court of Appeal has required only that the accused demonstrate that it is conceivable that the claim could be allowed (*Accurso*, at para. 323).

[71] Thus, the "manifestly frivolous" standard, which connotes the obvious necessity of failure, is the appropriate threshold for the summary dismissal of

applications made in the criminal law context. If the frivolous nature of the application is not manifest or obvious on the face of the record, then the application should not be summarily dismissed and should instead be addressed on its merits.

[72] This standard best serves both the values of trial efficiency and trial fairness. It is a rigorous standard that will allow judges to weed out those applications that would never succeed and which would, by definition, waste court time. The blunt tool of summary dismissal, which precludes the applicant from proceeding, is not the only way judges can protect efficiency. The judge's panoply of case management powers allows for tailored proceedings and mitigates concerns that "fishing expeditions" may derail a trial's progress, generate undue delay, or result in the disproportionate use of court time.

[73] The "manifestly frivolous" threshold also protects fair trial rights by ensuring that those applications which *might* succeed, including novel claims, are decided on their merits. Protecting fair trial rights is always important, but takes on added significance when the application in question carries great consequences. Generally speaking, the greater the consequences associated with a given application, the greater the possible impact on an accused's rights if the application is summarily dismissed. Certain applications carry more significant consequences simply because of their nature and the issues they raise. For example, applications for a stay of proceedings based on abuse of process are of enormous import for an accused and the public. They often involve serious allegations of egregious state misconduct and always

call for serious consequences, namely, a permanent halting of the prosecution (*Babos*, at paras. 30, 35 and 37; *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391, at para. 91). Similarly, an underlying application might allege breaches of an accused's *Charter* rights, such that its summary dismissal prevents the accused from litigating those rights in the course of trial.

(3) Other Standards Proposed by the Parties

[74] The alternative standards proposed by some of the parties and interveners are not as well suited to the task as the "manifestly frivolous" threshold.

[75] The Crown and others proposed the "no reasonable prospect of success" threshold based on their reading of *Cody*. In *Cody*, this Court used the phrases "reasonable prospect of success", "no basis upon which the application could succeed", and "frivolous" in connection with summary dismissal motions (para. 38). In this case, the Court of Appeal for British Columbia stated that this Court "has articulated this standard as requiring an application to have a 'reasonable prospect' of success or of assisting in determining the issues before the court" (para. 373). Other courts have also relied on *Cody* as authority for the threshold for summary dismissal, citing to one or more of the three phrases used (see, e.g., *Lehr*, at para. 17; *Hu v. R.*, 2022 QCCS 2871, at para. 13 (CanLII); *Greer* (ONCA), at para. 108; *R. v. Morin*, 2022 SKCA 46, [2022] 7 W.W.R. 443, at para. 23; *R. v. Walton*, 2019 ONSC 928, at para. 47 (CanLII)).

[76] However, *Cody* did not decide the threshold to be applied generally to the summary dismissal of applications made in the criminal law context. *Cody* was not a case on summary dismissal, but rather a case on unreasonable delay violating s. 11(b) of the *Charter*. *Cody* affirmed the framework set out in *Jordan* and echoed *Jordan*'s call for trial judges to use their case management powers to minimize delay. In this latter respect, *Cody* remarked, as an example, that trial judges should exercise these powers to summarily dismiss applications. *Cody* did not closely examine and establish the proper standard under which that power should be exercised and should not be read to establish any authoritative statements in this regard.

[77] Further, the "no reasonable prospect of success" standard is ill suited to summary dismissal in the criminal context as it may invite an assessment of the merits of the underlying application. A detailed assessment goes beyond the scope of a summary dismissal motion and invites the sort of protracted proceedings that currently plague *Vukelich* hearings. It risks drawing the summary dismissal judge in too deeply on a limited record. While it is a useful standard in other areas of law, it tends to work against efficiency when used for summary dismissal in the criminal context. The assessment of the merits of the underlying application ought to be reserved for the final part of the decision-making process: that is, when answering the ultimate question on the *voir dire* itself.

[78] Alternatively, others before this Court invoked *Pires* to argue that trial judges should decline to embark on an evidentiary hearing if the petitioning party "is

unable to show a reasonable likelihood that the hearing can assist in determining the issues before the court" (para. 35); this is sometimes referred to as the "no reasonable likelihood of assistance" standard. However, by commenting on the need for trial judges to control prolix proceedings, the Court in that case also did not purport to decide the threshold for summary dismissal motions. Rather, *Pires* dealt with a challenge to a search warrant and affirmed the requirement from *Garofoli* that the defence must show a reasonable likelihood that cross-examination of the affiant will assist in determining the relevant issues (paras. 3 and 40).

[79] The "no reasonable likelihood of assistance" standard suffers from the same flaw of being merits-based. In addition, its focus is on procedure (*how* to decide the underlying application) rather than substance (namely, whether the application is somehow flawed and ought to be summarily dismissed). Thus, while this may be a helpful consideration when deciding how a *voir dire* should be conducted, it should not be used in summary dismissal motions to determine whether an underlying application should proceed to a *voir dire*.

[80] The "manifestly frivolous" standard is intended to be a clear standard to be applied to summary dismissal motions brought in the criminal law context that are not otherwise subject to a legislated or judicial threshold. It does not, for example, have an impact on applications brought under *Criminal Code* provisions such as s. 685(1) applications concerning frivolous appeals or s. 679 applications for bail pending an appeal (including *Oland*). Nor does this standard eclipse the bodies of law that have

developed around particular types of applications, such as *Garofoli* and *Pires* applications to challenge the lawfulness of a search warrant.

(4) Applying the "Manifestly Frivolous" Standard

[81] Having established what the threshold should be, I now provide guidance on how the "manifestly frivolous" threshold should be applied. I explain how judges should treat the facts and inferences alleged in the underlying application and how to identify when the application is manifestly frivolous.

[82] The Crown argued that trial judges should be allowed to engage in a limited assessment or weighing of the proposed evidence and should be permitted to reject facts or inferences for which there is no reasonable basis in the facts alleged by the applicant. The Crown's approach invites an assessment of the merits and is thus out of step with the "manifestly frivolous" threshold. It runs contrary to the established proposition that the facts must generally be *assumed* true, not accepted as true after a limited weighing. The judge should not engage in a limited weighing of the evidence to ascertain if it is reasonably capable of supporting an inference, nor should the judge decide which among competing inferences they prefer. Any such weighing should be left to the *voir dire* proper.

[83] On the summary dismissal motion, the judge must assume the facts alleged by the applicant to be true and must take the applicant's arguments at their highest (*Vukelich*, at para. 26; *Armstrong*, at para. 8; *Gill* (BCSC), at para. 24). While there is

no need to weigh the evidence or decide any facts on the summary dismissal motion, the applicant's underlying application should explain its factual foundation and point towards anticipated evidence that could establish their alleged facts. Where the applicant cannot point towards any anticipated evidence that could establish a necessary fact, the judge can reject the factual allegation as manifestly frivolous.

[84] Likewise, the judge ought to generally assume the inferences suggested by the applicant are true, even if competing inferences are proffered. The judge should only reject an inference if it is manifestly frivolous, meaning that there is no reasoning path to the proposed inference. This might be the case where a necessary fact underpinning the inference is not alleged or if the inference cannot be drawn as a matter of law (e.g., if the proposed inference is based on impermissible reasoning).

[85] A similar approach is taken to the overall application. Because the truth of the facts alleged is assumed, an application will only be manifestly frivolous where there is a fundamental flaw in the application's legal pathway: the remedy cannot be reached. For example, an application may be manifestly frivolous because the judge has no jurisdiction to grant the requested remedy (see, e.g., *Lehr*, at paras. 27-32). Alternatively, the application could put forward a legal argument that has already been rejected: applications that depend on legal propositions that are clearly at odds with settled and unchallenged law are manifestly frivolous (see, e.g., *Lehr*, at paras. 22-23).

[86] An application may also be manifestly frivolous where the remedy sought could never issue on the facts of the particular application. The nature of the application

will be relevant to this analysis. On certain applications, the trial judge may be able to assume the facts put forward by the applicant and, assuming those facts, determine whether the remedy sought could issue. *Garofoli* applications, where trial judges ask if the ITO could still support the issuance of the search warrant even if the challenged portions of the ITO are excised, make the point. Where the ITO still supports the issuance of the warrant, then the application can be summarily dismissed because, even if the defence could prove that the impugned portions of the ITO ought to be struck, the sought-after remedy (the exclusion of evidence obtained under the warrant) would not follow.

[87] Alternatively, key portions of the application could be missing. For example, the application may fail to set out a conclusion that is necessary to satisfy the relevant legal test. Specifically, an application for a stay for abuse of process must fail if the applicant accepts that an alternative remedy is capable of redressing the prejudice. Key factual allegations might also be missing. For instance, an application for a stay for abuse of process must fail if the applicant has not alleged any abusive conduct.

[88] These fundamental flaws ought to be manifest. If the error is not apparent on the face of the record, the application should proceed.

[89] Finally, the trial judge's power to summarily dismiss an application is ongoing. Even if the judge permits the application to proceed to a *voir dire*, the judge retains the ability to summarily dismiss the application during the *voir dire* if and when it becomes apparent that the application is manifestly frivolous (*Cody*, at para. 38,

citing *Jordan*, at para. 63). This may occur if the applicant is unable to elicit *any* evidence, contested or otherwise, to prove a necessary fact.

(5) The Burden Rests on the Party Seeking Summary Dismissal

[90] On a motion for summary dismissal, the party moving for summary dismissal bears the burden of convincing the judge that the underlying application is manifestly frivolous.

[91] Some argued that the burden should be placed on the party bringing the underlying application because there is no automatic entitlement to a *voir dire* (*Vukelich*, at para. 26). However, placing the onus on the party who moves for summary dismissal is logical, practical and preferable. Logically, the party who seeks summary dismissal should bear the onus of demonstrating that this remedy ought to be granted. Practically, the burden may discourage the moving party from applying to summarily dismiss every single application brought in a case, whether manifestly frivolous or not. Such tactical behaviour is highly inefficient and wastes court time.

[92] If, without a motion from a party, a trial judge exercises the case management power to hold a summary dismissal hearing, the burden still rests on the party opposing the underlying application (i.e., the party who would benefit from the application's summary dismissal). If the party demonstrates that the application is manifestly frivolous, the judge can summarily dismiss the application.

(6) Minimal Record on Summary Dismissal Motions

[93] The record on a summary dismissal motion should normally be minimal and of a summary nature because extensive evidence often demands the type of time, effort and delay which works to defeat the very purpose of the motion. While both parties are expected to put their best foot forward, there is no need to set firm rules about what type of record ought to be filed (see *Glegg*, at para. 37; *Giesbrecht*, at para. 158). Given the different rules of procedure that apply across the provinces and territories, and given that a trial judge has discretion to determine how an application should unfold, the approach to a summary dismissal hearing should involve "a flexible rather than a fixed process" (*Vukelich*, at para. 19; see also *Kutynec*, at pp. 293-94 and 299).

[94] As a preliminary matter, the party filing the underlying application must ensure that their application complies with the local court rules and the applicable practices, directives and procedures. Some jurisdictions have developed particular rules and approaches to control which applications should be heard in a *voir dire*. Ontario incorporated the power to summarily dismiss an application into its rules of criminal procedure (see *Glegg*, at para. 34; *Criminal Proceedings Rules for the Superior Court of Justice (Ontario)*, SI/2012-7, r. 34.02). Alberta requires all *Charter* applications to be accompanied by sufficient particulars (see *R. v. Dwernychuk* (1992), 135 A.R. 31 (C.A.), at paras. 12 and 21; *R. v. Baker*, 2004 ABPC 218, 47 Alta. L.R. (4th) 152, at para. 11; *Court of King's Bench of Alberta Criminal Procedure Rules*, SI/2017-76,

r. 14). The Crown in Alberta would often seek further particulars to better understand the defence's application before motioning for its summary dismissal.

[95] Material filed on the underlying application, as well as the motion for summary dismissal, will of course form part of the record. The moving party should clearly explain *how* the underlying application is manifestly frivolous. It is not sufficient to simply advance conclusory statements that the underlying application will not, on the ultimate analysis, result in the remedy — that line of argument inappropriately focuses on the final merits of the underlying application and not on whether it is manifestly frivolous.

[96] In accordance with the principle that an application should only be dismissed if it is *manifestly* frivolous, any additional material that is filed as part of the record on a summary dismissal motion should be minimal and necessary. This will help avoid the issue of delay and inefficiency that has, to date, plagued *Vukelich* hearings. It should not take extensive and detailed contested evidence to ascertain whether the application will necessarily fail. Counsel should, at minimum, offer particulars as to (1) what legal principles, *Charter* provisions, or statutory provisions are being relied on and how those principles or provisions have been infringed; (2) the (anticipated) evidence to be relied on and how it may be adduced; (3) the proposed argument; and (4) the remedy requested (*Baker*, at para. 11; *Dwernychuk*, at paras. 21-22).

[97] On a summary dismissal motion, the party who has brought the underlying application bears the minimal burden of providing the judge with the specifics outlined

above through oral or written submissions. While the overall burden rests on the party seeking summary dismissal, the applicant is the one with knowledge of what remedy they seek, so they should set out, with sufficient detail, what they hope to prove on the application in order to obtain that remedy. Depending on local filing requirements, much of this information may already be set out in a notice of application and supporting materials. Counsel's submissions will be a "useful first step" to supplement that information (*Vukelich*, at para. 23). Additionally, it is worth recalling that it is within the trial judge's case management powers to make inquiries of the applicant to draw out these particulars before proceeding to a *voir dire* (*R. v. Felderhof* (2003), 68 O.R. (3d) 481 (C.A.), at para. 57).

[98] While counsel's statements will often be sufficient, sometimes more might be required. I leave it to the discretion of the judge deciding the summary dismissal motion to determine whether something more is required and, if so, what that something more should be. Deciding how the summary dismissal motion proceeds is within the judge's case management powers. However, the judge should bear in mind that the more material filed, the greater the risk of delay, the greater the risk that the summary dismissal hearing devolves into a scrum over the merits of the underlying application and the greater the risk that the judge inadvertently decides the merits of the application itself (*Gill* (BCSC), at para. 24).

C. *Summary and Framework for Summary Dismissal*

[99] While the “manifestly frivolous” standard sits at the core, the overall framework for summary dismissal requires a flexible approach to permit jurisdictional variance around the rules of criminal procedure and to foster a principled and practical approach.

[100] In the normal course of a criminal trial one party files an underlying application — which can take many forms and cover myriad topics — and the party opposite may counter with a motion to dismiss that underlying application. This creates a two-part framework under which judges are asked to (1) address the summary dismissal motion; and, if refused, (2) decide the underlying application on its merits.

[101] The two parts involve different questions, with distinct considerations and their own legal standards. During the first part, when deciding the summary dismissal motion, the question is whether, taking the facts and inferences alleged to be true, the party seeking summary dismissal has demonstrated that the underlying application is manifestly frivolous. If the matter proceeds to a *voir dire*, then, during the second part, at the conclusion of the *voir dire*, judges must decide the ultimate question of whether the underlying application succeeds or fails on its merits: Has the applicant met the applicable burden of proof and established the facts necessary to fulfill the legal requirements underlying the requested remedy for the particular application at issue?

[102] These parts are, however, related by more than sequence because, throughout, judges will need to consider how to exercise their discretion and case management powers to ensure justice is done in the circumstances. Judges control their

courtrooms and are not required to hear all motions or hold particular types of hearings. Judges may, for example, direct how motions or the *voir dire* will be heard, especially whether to do so on the basis of testimony or some other form; direct the order in which evidence is called; restrict cross-examination that is unduly repetitive, rambling, argumentative, misleading or irrelevant; place reasonable limits on oral submissions; direct written submissions; and defer rulings (*Samaniego*, at para. 22; *Felderhof*, at para. 57). Case management powers also include the ability to revisit prior evidentiary determinations or to allow new applications mid-trial if doing so would be in the interests of justice (*R. v. J.J.*, 2022 SCC 28, at para. 86). A motion by counsel for directions also calls for an exercise of case management powers (*J.J.*, at paras. 103-5).

[103] Quite apart from the separate legal standards applied at the two parts of this process, judges will need to turn their minds to whether they will entertain a summary dismissal motion at all; how that summary dismissal motion should be heard; and how any eventual *voir dire* will be conducted. These are discretionary decisions taken under judges' case management powers.

[104] In exercising their discretion concerning whether to hear the summary dismissal motion, judges must consider the context and consequences associated with the underlying application, including whether it is amenable to summary disposition and how the applicant's fair trial rights will be affected by a summary dismissal hearing. Additionally, judges must consider whether holding a summary dismissal hearing will be an effective use of court time or if it will actually create delay. Where,

for example, the summary hearing would take almost as long as a *voir dire* on the underlying application, consideration needs to be given to whether fairness, efficiency and respect for the administration of justice more strongly support using the time to deal with the merits of the underlying application rather than devoting resources to matters preliminary to it. In terms of pure efficiency, judges could not be faulted for proceeding directly to a *voir dire* when it would take the same time to hear the application on its merits as to conduct a summary dismissal hearing. Judges should only conduct a *Vukelich*-type hearing where doing so best ensures a proportionate process: one which respects the applicant's right to be heard, serves the goal of trial fairness, actually saves resources, and avoids undue delay.

[105] If judges decide to hear the summary dismissal motion, they must also decide *how* to hear it. Judges must ensure the summary dismissal motion proceeds in a fair and proportionate manner.

[106] If summary dismissal is refused, judges will also be called upon to determine *how* the *voir dire* on the underlying application should be conducted, including whether there should be an evidentiary hearing or whether the matter can proceed solely on the basis of argument, an agreed statement of facts or some combination of methods. Allowing an application to proceed to a *voir dire* is not a free licence to counsel to argue an application however they choose. The time and leeway given to counsel to present and argue the application should be proportionate: just

enough to ensure that the application is fairly treated. Beyond that point, additional time and leeway can cause undue delay.

[107] Exercising these case management powers not only calls for proportionate proceedings which balance trial efficiency and trial fairness, but may require a comparative assessment of what approach best meets the exigencies and equities of a particular case. Judges should bear in mind that the summary dismissal power is not their only tool to manage the underlying application and consider whether their other case management powers are better suited to managing the underlying application (*Samaniego*; *Cody*, at para. 38). The values of trial efficiency and trial fairness may be better served by holding a *voir dire* on the underlying application that is tailored through the use of judicial discretion to only what is necessary for a fair consideration of the substance of the allegations. When judges exercise their case management powers in this way, they fulfill the underlying purposes of case management powers: ensuring that trials proceed in a fair, effective and *efficient* manner (*Samaniego*, at para. 21).

IV. Application to This Case

[108] Bearing this framework in mind, the judge erred in summarily dismissing Mr. Johnston's and Mr. Haevischer's applications for a stay based on abuse of process. First, the judge failed to assume the truth of the facts and inferences alleged by defence counsel and the *amici*. Second, the judge applied an insufficiently rigorous threshold for summary dismissal, which led her to engage in the balancing stage of *Babos* without

the benefit of all the evidence on the scope of the state misconduct and to decide the merits of the stay applications on a partial record.

A. *Failure to Assume the Truth of the Alleged Facts*

[109] The judge correctly identified that she had to accept the facts alleged by the applicants as true. However, in practice, she failed to assume the truth of the alleged facts and inferences, and in doing so, failed to take the allegations at their highest.

[110] Most notably, and as found by the Court of Appeal, the judge erred in her sealed reasons by weighing the evidence, drawing inferences and finding facts. The judge erred by accepting the Crown's argument that the filed materials did not support the *amici*'s theory and, thus, she failed to take the *amici*'s argument at its highest. The judge should have assumed that the facts alleged by the *amici* were true and should not have rejected the *amici*'s inferences at this stage, given that the inferences were not manifestly frivolous.

[111] I also find that the judge erred in the open ruling by failing to take the alleged facts and inferences as true in three instances.

[112] First, the judge failed to accept the allegation that the "moving witnesses" strategy encompassed the abusive conditions of confinement. She acknowledged the defence allegation that the "moving witnesses" strategy "included isolating the accused by directing their conditions of confinement so as to make them particularly

vulnerable" (trial judgment, at para. 35; see also paras. 58 and 113). While the judge accepted the factual allegations respecting the custodial conditions and the allegation that the conditions were directed by the RCMP, it does not appear that she accepted the connection alleged between the "moving witnesses" strategy and the conditions of confinement. This is evident insofar as the judge rejected the allegation that the "moving witnesses" strategy was itself abusive. If the judge had accepted the alleged connection between the abusive conditions of confinement and the "moving witnesses" strategy, then she would have accepted the inference that the "moving witnesses" strategy was itself abusive. On the face of the record, this inference was not manifestly frivolous. The judge erred by not accepting these allegations and inferences and failed to take Mr. Johnston's and Mr. Haevischer's cases at their highest.

[113] Second, the judge did not accept the allegation that there was an intentional connection between the "moving witnesses" strategy and the misconduct of the four officers. She accepted that the effect of the strategy "was to encourage an 'anything goes' attitude on [the four officers'] part" (para. 124). Defence counsel's arguments went beyond that. During submissions, Mr. Johnston's counsel clarified that they wished to cross-examine S/Sgt. Attew and the supervising superintendent to help the court understand "how that strategy came to be, how it was formulated, and by whom, and to what degree it influenced the conduct of these officers" (A.R., vol. XV, at p. 263). The allegation was that the strategy explicitly or implicitly permitted the misconduct; the corresponding inference is that the strategy was itself abusive. For example, the applications raised the possibility that the strategy was created with the

intention that the officers move loyalties by engaging in sexual conduct with protected witnesses. As pointed out by Mr. Johnston's counsel in his notice of application, a document summarizing the strategy makes note of the fact that "girlfriends" might be vulnerable and discusses "creating events" in the targeted witnesses' worlds, including "infidelity" (A.R., vol. XIV, at pp. 14 and 31-32). The judge failed to take the applications at their highest by finding that the "moving witnesses" strategy merely encouraged the officer misconduct.

[114] Third, and finally, the judge found that other instances of police misconduct alleged by Mr. Johnston and Mr. Haevischer did not amount to an abuse of process under stage one of the *Babos* test. While the judge may have assumed as a fact that these investigative practices occurred, she went on to make a finding that police handling of certain funds, witnesses, agents, informers and evidence could not amount to an abuse of process at stage one of *Babos*. Taking the arguments at their highest, I conclude that the allegation that these practices amounted to an abuse of process was not manifestly frivolous: there was no fundamental flaw in the allegation.

B. *Application of an Insufficiently Rigorous Threshold*

[115] The judge erred in law by applying an incorrect threshold for summary dismissal. Though the judge did not have the benefit of these reasons setting out the "manifestly frivolous" threshold, she correctly noted that the overarching question was whether the stay applications should proceed to a hearing on their merits. However, in

her analysis, she applied a more merits-based threshold for summary dismissal which was not sufficiently rigorous.

[116] An application might be manifestly frivolous at stage one or stage two of *Babos*. However, that was not the case here in light of the strong allegations of abuse put forward by the applicants. Accordingly, once the judge found (1) that the applications put forward allegations of police misconduct that would shock the community's conscience and/or were offensive to societal notions of fair play and decency; (2) that the integrity of the justice system would be prejudiced by continuing the proceedings; and (3) that no remedy short of a stay was capable of redressing the prejudice, it should have been clear that the applications were not frivolous, let alone manifestly frivolous. The findings that there were serious abuses at issue in this case and that a stay was the only possible remedy were enough to establish that the applications were not manifestly frivolous.

[117] Accordingly, in this case, there was no need for the judge to engage in the balancing exercise at stage three of *Babos*. By engaging in that balancing exercise, the judge committed a further error as she purported to decide the ultimate issue on an incomplete record. She conducted the balancing exercise after inappropriately rejecting that certain of the allegations amounted to an abuse of process at stage one of *Babos,* thus skewing the balancing process. Additionally, I would note that, at the balancing stage, caution must be taken when considering the extent to which a judicial rebuke made in someone else's case (here, in Mr. Bacon's *habeas corpus* application before

McEwan J.) can help redress the personal abuses alleged by others before a different court.

[118] Moreover, the judge conducted the balancing exercise when she could not be sure that she had access to all the necessary evidence. In cases like this, which involve state misconduct, there is a distinct possibility that the extent of the misconduct will be unknown at the summary dismissal stage, and it may well be more serious than alleged. Where the trial disclosure is not relevant to the issues on an application, separate disclosure will likely be necessary to ensure that all material relevant to the application is produced. In addition, the misconduct may only come to light through cross-examination. As acknowledged by the Court of Appeal, certain defence allegations — such as the ones made here — "are such that they can likely only be established through cross-examination" (para. 404; see also *R. v. Rice*, 2018 QCCA 198, at para. 64 (CanLII)). This Court has further recognized that cross-examination is a critically important tool and an essential component of the accused's right to full answer and defence (see, e.g., *R. v. Lyttle*, 2004 SCC 5, [2004] 1 S.C.R. 193, at para. 41; *R. v. Osolin*, [1993] 4 S.C.R. 595, at p. 663; *R. v. Shearing*, 2002 SCC 58, [2002] 3 S.C.R. 33, at para. 76; *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, at para. 64).

[119] The Crown describes this outcome as troubling and submits that requiring a *voir dire* once the first two stages of *Babos* show that the application is not manifestly frivolous unduly curtails a judge's discretion to summarily dismiss an application, such that judicial resources will be wasted. The concern about wasting judicial resources is

misplaced, in light of the possible consequences. Summarily dismissing a stay application without all the evidence impairs the accused's right to a fair trial and may undermine public confidence in the administration of justice. Stay applications may allege abuse of the highest order: summarily dismissing them without any opportunity for the applicant to further elicit evidence to substantiate their claims risks compounding any wrongs done by the state to the applicant. Additionally, this result does not unduly curtail a judge's discretion in the rare case in which balancing at stage three of *Babos* might be appropriate on the summary dismissal motion; it merely recognizes that, in this case, the application was not shown to be manifestly frivolous at stages one and two of *Babos* and, in the circumstances, should not have been summarily dismissed.

[120] Finally, I agree with the Court of Appeal that the judge slid towards deciding the ultimate merits of the applications. In finding that she would not grant a stay, the judge focused on the merits and on the ultimate outcome rather than on whether the applications were manifestly frivolous. In doing so, she applied too lax a threshold for summary dismissal and conflated the analysis required for the summary dismissal hearing with the analysis she was required to undertake on the *voir dire* itself.

[121] As a final matter, the Crown stresses that its submission is not that a stay could never issue for such serious offences, but rather that, in these particular circumstances, on balance, a stay should not issue. While it remains to be determined whether a stay of proceedings should or should not issue in this particular case, in light

of both the seriousness of the offences *and* the seriousness of the abuse, I agree with the general proposition set out by the Court of Appeal that no category of offence is beyond the ambit of the abuse of process doctrine.

V. Conclusion

[122] When the above framework is applied, it is apparent that the stay applications were not manifestly frivolous and should not have been summarily dismissed. Accordingly, I dismiss the appeal. In light of Mr. Johnston's passing, only Mr. Haevischer's stay application will be remitted to the Supreme Court of British Columbia for hearing at a *voir dire*. Mr. Haevischer will have the opportunity to argue all the allegations. That Mr. Haevischer should have "a full chance to re-litigate all the issues" if the matter was remitted was agreed to by the Crown in submissions (transcript, at p. 20). That said, I leave how the *voir dire* ought to be conducted to the hearing judge's discretion.

[123] In the course of my reasons, I have not relied on the fresh evidence admitted by the Court of Appeal and, as such, do not decide whether the Court of Appeal erred in admitting that evidence. The admissibility of the fresh evidence and, if admitted, what weight to give it will be considered and dealt with by the judge hearing Mr. Haevischer's stay application.

Appeal dismissed.

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