Court of Queen's Bench of Alberta

Citation: R v Peterson, 2022 ABQB 365

Date: 20220524
Docket: 140406828Q1
Registry: Grande Prairie

Between:

Her Majesty the Queen

Crown

- and -

Richard Russel Peterson

Accused

Restriction on Publication

Identification Ban – See the *Criminal Code*, section 486.4.
By Court Order, information that could identify the Complainant must not be published, broadcast, or transmitted in any way.
NOTE: Identifying information has been removed from this judgment to comply with the ban so that it may be published.

Reasons for Decision
of the
Honourable Mr. Justice W. N. Renke

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[1] Mr. Peterson applied for a stay of proceedings following conviction based on violations of disclosure rights protected under s. 7 of the *Charter*. For the reasons that follow, I find that

Mr. Peterson's s. 7 rights were violated. The appropriate remedy is not a stay but a declaration of a mistrial and a disclosure order.

[2] I will review the background to the application, my jurisdiction to hear the application, the governing principles, and the expert testimony in the application before providing my assessment.

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I. Background

A. The Trial

[3] On June 15, 2021, Mr. Peterson was tried on one count of sexual assault alleged to have occurred on March 29, 2014. On June 16, 2021, I convicted Mr. Peterson. I ordered a pre-sentence report and adjourned to set a date for sentencing.

B. Fresh Disclosure

[4] Mr. Peterson retained new (current) counsel following conviction. Counsel made inquiries with the Crown respecting disclosure and requested "materials related to the sexual assault kit obtained by the RCMP in relation to this investigation." A sexual assault kit had been completed with the Complainant on March 29, 2014 after the alleged offence.

[5] On September 23, 2021, the Crown disclosed an updated General Report from Cst. Milleker (Froese) of the RCMP, the lead investigator. This report contained a previously undisclosed third page, stating the following:

> 2014/05/01
>
> Cst. MILLEKER had previously called the Lab about sending in the sexual assault kit. They said they required Eric JOHNSON's DNA [Mr. Johnson was the Complainant's then-boyfriend] to exempt his DNA from the kit ....
>
> 2014/05/02
>
> 2100 Cst. MILLEKER spoke with [the Complainant] and she does not want to involve JOHNSON's DNA and she understands the kit will not be analyzed without it. She understands the investigation is now complete and attempts to

> locate PETERSON have been unsuccessful. She was notified a warrant is out for the arrest of PETERSON and appreciates all the help with the investigation.
>
> An email was sent to Jim HENDRY [the exhibits custodian] to destroy the kit.

[6] On September 30, 2021, Defence Counsel received additional fresh disclosure, Exhibit Reports respecting physical evidence obtained by the RCMP as well as forms 2, 3, and 4 from the sexual assault kit. Form 1, it appears, contained notes by a physician or nurse. The hospital where the sexual assault kit was completed, it also appears, has or had custody of this document.

[7] A March 31, 2014 Exhibit Report and the form 4 referred to "pink pj pants" seized from the Complainant (PE002). These pants were worn by the Complainant at the time of the material events. This Exhibit Report also referred to the "sex assault kit" (PE001). Another Exhibit Report dated March 31, 2014 referred to a "shirt" (PE003). The previously-disclosed p. 2 of the General Report stated that at 1845 the Complainant "attended detachment and gave Cst. FESCHUK her t-shirt she was wearing at the time of the assault and Cst. MILLEKER took it to the exhibit locker and locked it up after sealing and labelling the paper bag. The shirt, however, was left at the house all day without supervision."

[8] The Exhibit Reports confirmed that PE001, PE002, and PE003 were destroyed on May 12, 2014.

[9] Thus, Defence Counsel's inquiries yielded confirmation of:

- destroyed evidence - the sexual assault kit, the Complainant's pj pants, and the Complainant's shirt, and
- late-disclosed evidence - p. 3 of the General Report, forms 2, 3, and 4, and the Exhibit Reports.

[10] Mr. Peterson applied for a stay of proceedings based on the evidence destruction and the late disclosure.

II. Jurisdiction

[11] The Crown and Defence accepted, and I find that I had jurisdiction to hear this application. While I had convicted Mr. Peterson, I had not yet sentenced him, and I was not "*functus*." See ***R v Geick***, 2022 ABQB 92, Ho J, as she then was, at paras 1, 14; ***R v Sauverwald***, 2019 ABQB 482, Antonio J, as she then was, at para 21, rev'd other grounds 2020 ABCA 388 (see para 113(CA)).

III. Principles

A. Duty to Disclose

[12] Under s. 7 of the *Charter*, "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." An aspect of "fundamental justice" is an accused's right to make full answer and defence. "Full answer and defence encompasses the right to meet the case presented by the prosecution, advance a case for the defence, and make informed decisions on procedural and other matters which affect the conduct of the defence:" ***R v Girimonte***, 1997 CarswellOnt 4855, 121 CCC (3d) 33 (CA), Doherty JA at para 15 (CarswellOnt).

[13] To make full answer and defence, the accused requires disclosure. The Crown is therefore obligated to disclose all relevant information in its possession to the accused and the accused has the right to receive this information. In ***R v Bjelland***, 2009 SCC 38, Justice Rothstein wrote as follows at para 20:

> [20] .... The purpose underlying the Crown's obligation to disclose is explained by Rosenberg J.A. in *R. v. Horan*, 2008 ONCA 589, 237 C.C.C. (3d) 514, at para. 26:
>
> > Put simply, disclosure is a means to an end. Full prosecution disclosure is to ensure that the accused receives a fair trial, that the accused has an adequate opportunity to respond to the prosecution case and that in the result the verdict is a reliable one.

"Information is relevant for the purposes of the Crown's disclosure obligation if there is a reasonable possibility that withholding the information will impair the accused's right to make full answer and defence:" ***Girimonte*** at para 15; ***R v Egger***, [1993] 2 SCR 451, Sopinka J at 467).

[14] A corollary of the Crown's duty to disclose is the duty of the investigating State authority - typically the police - to disclose all material pertaining to its investigation of the accused: ***R v McNeil***, 2009 SCC 3, Charron J at para 14.

[15] A further corollary is the duty of the police and Crown to preserve evidence for disclosure purposes: ***R v FCB***, 2000 NSCA 35, Roscoe JA at para 10; ***R v Bero*** 2000 CanLII 16956, 151 CCC (3d) 545 (ON CA), Doherty JA at para 30 (CanLII); ***R v KDS***, 2021 SKCA 84, Jackson JA at para 84.

[16] In this case, evidence was destroyed before trial and disclosure occurred late.

B. A Unified Approach to Lost Evidence and Delayed Disclosure?

[17] The Crown submitted at para 4 of the Memorandum of the Crown Respondent (MCR) that:

> 4. The existence of late or destroyed evidence, in and of itself, is insufficient to establish a breach of the accused's rights under s. 7. The Applicant must show that such disclosure impacting his ability to make full answer and defence. Alternatively, the Applicant can show that these actions rendered the trial process unfair.

The Crown contended that ***Bjelland*** had unified the destroyed evidence and late-disclosure jurisprudence.

[18] I disagree. I note that this argument was rejected in ***KDS*** at paras 96-100. The Crown's contention is not wholly incorrect but oversimplifies.

[19] In my opinion, the Alberta authorities relied on by the Crown do not support the proposition for which they were advanced. The authorities were, for the most part, late disclosure cases only. ***Bjelland*** itself was a late disclosure case. I accept that the Alberta authorities were correctly decided on their facts: ***R v Mamouni***, 2017 ABCA 347 at para 42 and para 4 ("The appellant secondly submits that, during the trial, there were a number of instances of delay in Crown disclosure....") see also the trial decision, 2015 ABQB 40 at para 259; ***R v Blanchard***,

2017 ABQB 512, Macklin J at paras 13, 23; ***R v Sawchuk***, 2015 ABQB 40, Horner J at paras 259 (not only late disclosure but disclosure lost through non-negligent destruction and third-party lost evidence, e.g., paras 13, 22, 45, 80, 85); ***R v McCoy***, 2016 ABQB 240, Dario J (non-recording, as opposed to lost recording, at paras 72-74); ***R v Souvie***, 2016 ABQB 89, Pentelechuk J, as she then was, at paras 56, 59; ***R v RPS***, 2010 ABQB 418, Thomas J (not only late disclosure but misrepresentations about the state of disclosure, paras 8, 10, 14, 20-21, 26, 28-30, 61).

[20] I agree with Judge Semenuk's observation in ***R v BE***, 2016 ABPC 91 at para 117 that the principles relating to destroyed relevant evidence and late-disclosed relevant evidence are distinct.

[21] Three sets of distinctions must be respected –

- the distinction between a s. 7 violation and the remedy for that violation
- the distinctions between a s. 7 claim based on lost evidence and a claim based on late disclosure
- the distinctions between a s. 7 claim based on evidence lost through unacceptable negligence or abuse of process and a s. 7 claim based on evidence lost but not through unacceptable negligence or abuse of process.

I'll begin with the two types of lost evidence claims.

C. Lost or Destroyed Evidence

1. Abuse of Process and Unacceptable Negligence

[22] A section 7 lost or destroyed evidence claim may be based on the at-fault conduct of the Crown or police. Justice Sopinka's decision in ***R v La***, [1997] 2 SCR 680 at paras 22 and 30 suggests that the s. 7 violation is founded on abuse of process. An abuse of process may result from "unacceptable negligence" or from intentional or other abusive conduct:

> 22 .... An abuse of process, however, is not limited to conduct of officers of the Crown which proceeds from an improper motive .... Accordingly, other serious departures from the Crown's duty to preserve material that is subject to production may also amount to an abuse of process notwithstanding that a deliberate destruction for the purpose of evading disclosure is not established. In some cases an unacceptable degree of negligent conduct may suffice.

[23] A claim for *Charter* relief based on evidence lost or destroyed evidence due to unacceptable negligence or (other) abuse of process has the following elements:

(a) Burden on the Accused

[24] The accused must establish on a balance of probabilities that

(a) the police or Crown were in possession of the evidence,

(b) the evidence was "relevant" in the *Stinchcombe* sense,

(c) the evidence has been lost or destroyed.

(b) Burden on the Crown

[25] The burden then shifts to the Crown to provide a satisfactory explanation for the loss or destruction. "Where a *Charter* applicant has shown that disclosable evidence has been lost, a *Charter* breach contrary to s. 7 will be found unless the Crown has provided a satisfactory explanation for that loss, thereby demonstrating that an abuse of process has not occurred:" ***R v Janeiro***, 2022 ONCA 118, Paciocco JA at para 10.

(i) Unacceptable Negligence

[26] If the evidence supports the loss or destruction of evidence through error, the trial judge must determine whether the Crown has established that the loss or destruction was *not* caused by "unacceptable negligence." "Unacceptable negligence" requires a greater degree of fault than mere or simple negligence or civil negligence: ***R v Adem***, 2017 ABQB 6, Gates J at para 87; ***R v MacNeil***, 2022 ABQB 309, Jerke J at para 26(7); ***R v Dessouza***, 2012 ONSC 465, Ricchetti, J at para 107.

[27] In making the determination,

- the trial judge must have regard to all the circumstances.
- the main consideration is whether the Crown or police took reasonable steps in the circumstances to preserve the evidence for disclosure.
- the degree of care required is proportional to the materiality (significance) and the nature of the evidence.

See ***La*** at paras 20, 21; ***Janeiro*** at para 108; ***R v Hersi***, 2019 ONCA 94, Doherty JA at para 26, app. for ext. of time to file app. for leave to appeal denied (and app. for leave to appeal would have been denied regardless), 2020 CanLII 27697 (SCC); ***R v Abreha***, 2019 ONCA 392 at para 11; ***R v Cloutier***, 2011 ONCA 484 at para 71; ***Bero*** at para 30; ***KDS*** at paras 60, 84-85; ***R v Cathcart***, 2019 SKCA 90, Kalmakoff JA at paras 27 to 29; ***FCB*** at para 10; ***Adem*** at para 85; ***MacNeil*** at para 26(6); ***R v Mathieu***, 2016 ABQB 604, Tilleman J at paras 52-53.

(ii) (Other) Abuse of Process

[28] If the record supports a determination that the evidence was lost or destroyed through conduct other than error or negligence, the Crown bears the burden of establishing that the loss or destruction was not caused by conduct amounting to (another type of) abuse of process: ***Janeiro*** at para 107; ***Mathieu*** at paras 54-55. Justice Sopinka wrote as follows at para 22 of ***La***:

> 22 What is the conduct arising from failure to disclose that will amount to an abuse of process? By definition it must include conduct on the part of governmental authorities that violates those fundamental principles that underlie the community's sense of decency and fair play. The deliberate destruction of material by the police or other officers of the Crown for the purpose of defeating the Crown's obligation to disclose the material will, typically, fall into this category ....

In ***R v Nixon***, 2011 SCC 34 at para 36, identified two categories of abuse of process which would be caught by s. 7 of the *Charter*: (1) prosecutorial conduct affecting the fairness of the trial; and (2) prosecutorial conduct that "contravenes fundamental notions of justice and thus

undermines the integrity of the judicial process." See also ***R v Jennings***, 2018 ABQB 583, Shelley J at paras 36, 38.

2. No Abuse of Process or Unacceptable Negligence

(a) No Finding of Abuse of Process or Unacceptable Negligence

[29] If the Crown's explanation satisfies the trial judge that the loss or destruction of the evidence did not occur through unacceptable negligence or another type of abuse of process, the duty to disclose has not been violated: ***BE*** at para 119.

(b) Actual Prejudice

[30] However, the determination that the duty to disclose has not been violated by unacceptable negligence or abuse of process does not foreclose a further s. 7 claim. Even if the duty to disclose has not been violated, the accused may establish that the loss or destruction of the evidence violates the right to make full answer and defence protected under s. 7 by proving actual prejudice to the ability to make full answer and defence: ***La*** at paras 24-25; ***KDS*** at para 97; ***Adem*** at para 85; ***BE*** at paras 119, 120; ***Cloutier*** at para 71. In ***Janeiro***, Justice Paciocco wrote as follows at para 109:

> [109] Alternatively, a *Charter* applicant will succeed even in the face of a satisfactory explanation for the loss or destruction of evidence if they establish that the lost evidence is so important that its loss undermines the fairness of the trial: ***La***, at para. 24. This is a difficult hurdle. In ***Bero***, at paras. 49, 52, Doherty J.A. made it clear that showing a reasonable possibility that the lost evidence could have assisted the defence is not enough to establish that the right to full answer and defence has been undermined. This is so even though the inability to determine whether the lost evidence was harmful, neutral, or helpful to the defence may arise because of the loss of the evidence by the police. In order to demonstrate irremediable prejudice when seeking a remedy, a *Charter* applicant must establish that the evidence would have played an important role in their defence. I see no reason why the same standard would not apply in determining whether a *Charter* breach occurred on the basis that the loss of evidence undermined the fairness of the trial.

3. Remedy

[31] The determination that s. 7 has been violated by unacceptable negligence or other abuse of process does not, by itself, decide the remedy under s. 24(1): ***KDS*** at para 100; ***Cloutier*** at para 71. Remedies shall be discussed below.

D. Late Disclosure

[32] A claim for *Charter* relief based on late disclosure has the following elements:

1. Burden on the Accused

[33] The accused must establish on the balance of probabilities that

(a) the police or Crown were in possession of the evidence,

(b) the evidence was "relevant" in the *Stinchcombe* sense,

(c) disclosure was "late," and

> (d) the accused suffered "actual prejudice" to the right to make full answer and defence, in the sense of a "reasonable possibility" that the non-disclosure affected the outcome at trial or the overall fairness of the trial process.

Proof of these matters will establish a s. 7 violation. Proof of late disclosure alone will not. In ***R v Dixon***, [1998] 1 SCR 244, Justice Cory wrote at para 24 that "[i]t does not automatically follow that solely because the right to disclosure was violated, the Charter right to make full answer and defence was impaired." Hence the requirement to show actual prejudice: ***R v Barra***, 2021 ONCA 568, at para 138; ***R v Wollach***, 2022 ABCA 95 at para 26-27; ***R v Truong***, 2020 ABQB 716, Devlin J at paras 69-71; ***Sawchuk*** at para 31; ***Adem*** at para 83; ***Cathcart*** at para 27.

[34] In ***Bjelland***, Justice Rothstein wrote at paras 20-21 that:

> [20] Before being entitled to a remedy under s. 24(1), the party seeking such a remedy must establish a breach of his or her *Charter* rights. In a case of late disclosure, the underlying *Charter* infringement will normally be to s. 7 ....
>
> [21] However, the Crown's failure to disclose evidence does not, in and of itself, constitute a violation of s. 7. Rather, an accused must generally show "actual prejudice to [his or her] ability to make full answer and defence" (*R. v. O'Connor*, [1995] 4 S.C.R. 411, at para. 74) in order to be entitled to a remedy under s. 24(1).

In ***Dixon***, Justice Cory wrote at para 22 that:

> [22] ..... where an accused demonstrates a reasonable possibility that the undisclosed information could have been used in meeting the case for the Crown, advancing a defence or otherwise making a decision which could have affected the conduct of the defence, he has also established the impairment of his *Charter* right to disclosure.

At para 34, Justice Cory wrote that:

> [34] .... Imposing a test based on a reasonable possibility strikes a fair balance between an accused's interest in a fair trial and the public's interest in the efficient administration of justice. It recognizes the difficulty of reconstructing accurately the trial process, and avoids the undesirable effect of undermining the Crown's disclosure obligations. This would be the result if the Crown were placed in a better position by withholding rather than disclosing information of relatively low probative value. However, the reasonable possibility to be shown under this test must not be entirely speculative. It must be based on reasonably possible uses of the non-disclosed evidence or reasonably possible avenues of investigation that were closed to the accused as a result of the non-disclosure. If this possibility is shown to exist, then the right to make full answer and defence was impaired.

See also ***Barra*** at para 140; ***Wollach*** at paras 28, 36.

2. Aspects of Actual Prejudice

[35] Actual prejudice must be considered in a two-step analysis. The first step considers the effect of late disclosure on the reliability of the conviction. The second step considers the overall effect of the late disclosure on trial fairness. Justice Cory wrote as follows at para 36 of ***Dixon***:

> 36 Thus, in order to determine whether the right to make full answer and defence was impaired, it is necessary to undertake a two-step analysis based on these considerations. First, in order to assess the reliability of the result, the undisclosed information must be examined to determine the impact it might have had on the decision to convict. Obviously this will be an easier task if the accused was tried before a judge alone, and reasons were given for the conviction. If at the first stage an appellate court is persuaded that there is a reasonable possibility that, on its face, the undisclosed information affects the reliability of the conviction, a new trial should be ordered. Even if the undisclosed information does not itself affect the reliability of the result at trial, the effect of the non-disclosure on the overall fairness of the trial process must be considered at the second stage of analysis. This will be done by assessing, on the basis of a reasonable possibility, the lines of inquiry with witnesses or the opportunities to garner additional evidence that could have been available to the defence if the relevant information had been disclosed. In short, the reasonable possibility that the undisclosed information impaired the right to make full answer and defence relates not only to the content of the information itself, but also to the realistic opportunities to explore possible uses of the undisclosed information for purposes of investigation and gathering evidence.

See also ***Barra*** at paras 139, 143-144, 145; ***Wollach*** at paras 36, 37; ***R v Vallee***, 2022 BCCA 11 at para 72.

[36] At para 37 of ***Dixon***, Justice Cory noted that "[i]n considering the overall fairness of the trial process, defence counsel's diligence in pursuing disclosure from the Crown must be taken into account. A lack of due diligence is a significant factor in determining whether the Crown's non-disclosure affected the fairness of the trial process .... When counsel becomes or ought to become aware, from other relevant material produced by the Crown, of a failure to disclose further material, counsel must not remain passive. Rather, they must diligently pursue disclosure."

3. Remedy

[37] If an accused establishes an impairment of the right to make full answer and defence because of the Crown's late disclosure, the accused is entitled to a remedy under s. 24(1) of the *Charter*. Remedies will be discussed next.

E. Remedies

[38] Section 24(1) of the *Charter* provides that:

> Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Factors bearing on the determination of the "appropriate and just" remedy for lost or destroyed evidence or late disclosure include:

- the nature of the *Charter* violation or the seriousness of the *Charter*-offending conduct
- the degree of impairment or prejudice to the accused's fair trial rights

- the timing of late disclosure or of notice of the lost or destroyed evidence
- the availability of measures that would mitigate or ameliorate the prejudice.

[39] In the present context, the *Charter* remedy is to address an impairment of the right to a fair trial. The Ontario Court of Appeal commented in ***Barra*** at 142 that:

> [142] A fair trial is a trial that appears fair, not only from the perspective of the accused, but also from that of the community. It is not the most advantageous trial possible from the accused's point of view. Nor is it a perfect trial. A fair trial is a trial which satisfies the public interest in getting at the truth, while preserving basic procedural fairness for the persons charged: ***Bjelland***, at para. 22.

[40] Remedies for lost or destroyed evidence may include:

- recalling witnesses for cross-examination
- the exclusion of evidence
- an instruction to the jury or a self-instruction that the missing evidence did not advance the Crown's case or that the absence of evidence may be relevant to whether the Crown has established its case beyond a reasonable doubt
- re-opening proceedings
- declaration of a mistrial
- stay of proceedings
- costs.

[41] Remedies for late disclosure may include:

- a disclosure order
- adjournment (which may be coupled with a disclosure order)
- recalling witnesses for cross-examination
- the exclusion of evidence
- re-opening proceedings
- declaration of a mistrial
- stay of proceedings
- costs.

See ***R v Luo***, 2021 ABQB 188, Gates J at para 24; ***Janeiro*** at para 126.

[42] Mr. Peterson's application was brought post-conviction. The stay, mistrial, and costs remedies are of greatest concern.

1. Stay

[43] The test for a stay is the same whether the *Charter* violation concerned lost or destroyed evidence or late disclosure. In ***R v Babos***, 2014 SCC 16, Justice Moldaver wrote as follows at paras 30-32:

> [30] A stay of proceedings is the most drastic remedy a criminal court can order .... It permanently halts the prosecution of an accused. In doing so, the truth-seeking function of the trial is frustrated and the public is deprived of the opportunity to see justice done on the merits. In many cases, alleged victims of crime are deprived of their day in court.
>
> [31] Nonetheless, this Court has recognized that there are rare occasions —the "clearest of cases" — when a stay of proceedings for an abuse of process will be warranted .... These cases generally fall into two categories: (1) where state conduct compromises the fairness of an accused's trial (the "main" category); and (2) where state conduct creates no threat to trial fairness but risks undermining the integrity of the judicial process (the "residual" category) ....
>
> [32] The test used to determine whether a stay of proceedings is warranted is the same for both categories and consists of three requirements:
>
> > (1) There must be 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" (*Regan*, at para. 54);
> >
> > (2) There must be no alternative remedy capable of redressing the prejudice; and
> >
> > (3) Where there is still uncertainty over whether a stay is warranted after steps (1) and (2), the court is required to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against "the interest that society has in having a final decision on the merits" (*ibid.*, at para. 57).

See ***Dixon*** at para 35; ***Blanchard*** at para 25; ***Cloutier*** at para 71; ***Janeiro*** at para 125; ***R v Garnot***, 2018 BCCA 107 at para 31.

[44] The focus of the first two tests is on the degree of actual prejudice caused and whether that prejudice is irreparable.

[45] Irreparable prejudice is not made out only on the basis that "putting forward the position" of the defence has been made more difficult: ***R v Dymkowski***, 2021 ONSC 8428, Goodman J at para 130.

[46] If evidence has been lost or destroyed, other available evidence may provide equivalent information or inferences or equivalent information could be available through procedures such as cross-examination. The impact of the missing evidence must be assessed in the context of other available evidence: ***Dymkowski*** at paras 130-131; ***R v GC***, 2021 ONSC 828, Roger J at para 60; ***R v Sheng***, 2010 ONCA 296 at paras 46-47.

2. Mistrial

[47] A mistrial may be an appropriate remedy for late disclosure, including late disclosure about evidence that was lost or destroyed.

[48] Late disclosure may impair the right to make full answer and defence. The accused may establish that there is a reasonably possibility that the late disclosure affected the reliability of the

conviction. Alternatively, the accused may establish that there was a reasonable possibility that the late disclosure impaired the overall fairness of the trial, such as "lines of inquiry with witnesses or the opportunities to garner additional evidence that would have been available to the defence if the relevant information had been disclosed:" ***Dixon*** at para 36; see ***R v Robinson***, 2020 ABCA 361 at paras 47, 56; ***Blanchard*** at para 24; ***Vallee*** at paras 54, 59. According to Justice Cory in ***Dixon*** at para 35, "where the remedy sought is a new trial, an accused need only persuade the appellate court of the reasonable possibility that the failure to disclose affected either the outcome at trial or the overall fairness of the trial process, and nothing more."

[49] Like a stay, a declaration of a mistrial is a remedy of "last resort" since it terminates a prosecution without a decision on the merits: ***Barra*** at para 147; ***Vallee*** at para 51. A mistrial should not be granted unless other less extreme measures will not prevent a miscarriage of justice, unless lesser remedies will not adequately preserve the accused's right to a fair trial or will not remedy the prejudice suffered by the accused: ***Vallee*** at paras 44, 45, 49, 57. A mistrial must be necessary to prevent a miscarriage of justice where nothing short of a new trial can repair the late disclosure: ***Vallee*** at para 44. Like a stay, mistrials should only be granted in the "clearest of cases:" ***Vallee*** at paras 45-47; ***Sauverwald*** at para 22(QB). Unlike a stay, though, a mistrial may be followed by a re-trial. A mistrial does not have the same finality as a stay.

[50] Further, in contrast to the conditions requisite for a stay, an accused claiming a mistrial on the basis of late disclosure need not establish actual prejudice but a "real danger" or "reasonable possibility" of prejudice to full answer and defence respecting verdict or process, including decisions that might have been made or steps that might have been taken.

3. Costs

[51] In its recent decision in ***R v Matthews***, 2022 ABCA 115, the Court of Appeal wrote as follows at paras 97-98 respecting costs awards under s. 24(1) of the *Charter*:

> [97] Costs awards against the Crown in criminal proceedings are rarely available. A trial court may … award costs as a remedy under s 24(1) of the *Charter* if the court finds a "marked and unacceptable departure from the reasonable standards expected of the prosecution": *R v 974649 Ontario Inc*, 2001 SCC 81 at para 87; *R v Munkonda*, 2015 ONCA 309 at para 140 ....
>
> [98] Apart from *Charter* breaches, costs may be awarded against the Crown in criminal proceedings (1) where the Crown has engaged in misconduct amounting to bad faith or (2) where, absent bad faith, the circumstances are exceptional: *Mukonda* at para 142; *R v Curragh Inc*, [1997] 1 SCR 537 at 436, 144 DLR (4th) 614 .... The exceptional circumstance category comprises cases where a defendant incurred legal fees for an initial trial that had to be reheard through no fault of his own (such as a reasonable apprehension of bias by the trial judge).

IV. Expert Evidence

[52] Expert evidence was relevant to the degree of prejudice suffered by Mr. Peterson because of the destruction of evidence.

[53] The Defence called Valerie Blackmore as an expert witness. The Crown properly conceded her qualifications. Ms. Blackmore has a very impressive background, having been employed in various capacities in the relevant field, including reporting scientist, at

- Ontario's Centre of Forensic Science, conducting scientific investigations for the OPP, municipal police forces, and other police forces,
- Maxxam Analytics, contracted to the RCMP for casework,
- Wyndham Forensic Group, doing work for municipal and provincial police forces across Canada and outside Canada, including the UN Office on Drugs and Crime.

Ms. Blackmore is certified as a DNA auditor by the FBI. She has testified as an expert some 40 times before the Ontario Superior Court, the Alberta Provincial Court, the Nova Scotia Supreme Court, and the Immigration and Refugee Board of Canada (Immigration Appeal Division).

[54] I found that Ms. Blackmore was qualified as a forensic biologist in the areas of forensic bodily fluid identification, forensic DNA analysis interpretation and statistical analysis, the transfer and persistence of biological evidence, and forensic quality management systems.

[55] Ms. Blackmore described short tandem repeat profiling based on Y chromosomes (male chromosomes). Y-chromosome analysis is particularly appropriate when the issue is the analysis of male DNA but that DNA is found with an abundance of female DNA. Y-chromosome STR profiling is a standard analysis tool in North America and Europe for sexual assault cases. Ms. Blackmore has had experience in Y-chromosome STR analysis since 2001. She stated that the STR profiles can be generated from unseen biological materials, from what's handled or worn or found on the person of a complainant or victim. DNA can be recovered not only from some blood cells, semen, or saliva, but from skin cells.

[56] Ms. Blackmore clarified that Y-chromosome STR profiles are not as individualized as autosomal DNA profiles. For example, all male sons of a father would have the same Y-chromosome STR profile as the father since the father is the donor of the Y chromosome to his sons. The profiles, though, still have significant inclusionary and exclusionary functions.

[57] DNA may be deposited on clothing, not only by the person who wears the clothing but by a person who touches the clothing (or by the clothing otherwise coming in contact with the DNA source).

[58] Ms. Blackmore testified that digital vaginal or anal penetration may deposit DNA. This has been confirmed in laboratory settings.

[59] Whether DNA is deposited and the amount deposited would depend on the duration of the transfer event, the degree of friction, the location of the deposit, and the porosity of the substrate (where the DNA was deposited). Some individuals "shed" more DNA than others. Ms. Blackmore confirmed that it is difficult to predict whether DNA has been deposited. She confirmed that there was not enough experimental data to say whether DNA would be comparatively more or less likely to be found on (e.g.) skin, body cavities, or clothes.

[60] In this case, vaginal and anal swabs had been obtained. If the amount of DNA were sufficient, profile analysis could have proceeded even though the material was collected in 2014. When asked how long DNA lasts, Ms. Blackmore said that it depends on how much was there to begin with. Over time, some is lost. But analysis can be done years and even decades later, as occurs in cold case programs. She has worked on cases with samples over 40 years old. Profiles could be generated.

[61] The manner of storage would also affect the viability of the later analysis of samples. Improper storage could permit bacterial degradation of DNA.

[62] Ms. Blackmore confirmed that deposited DNA would degrade at a higher rate in the vaginal cavity of a living female compared with DNA deposited on clothing. Digital penetration-sourced DNA might last for up to 3 days. Ms. Blackmore's explanation was that the vaginal environment of a living female is "dynamic" not a "clock-stops" environment. DNA deposited on clothing could potentially last for years. She did point out that if clothing were washed after contact, there is a high likelihood that DNA would be eliminated.

[63] When asked where she would begin the investigation respecting clothing like pajama pants or a t-shirt, Ms. Blackmore said that the clothing would be examined and tested for biological staining. Swabs would be taken from inside and the outside the waist band. Assumptions would have to be made about how the clothing was contacted.

[64] Ms. Blackmore testified that DNA profiling can disclose whether DNA found at a location matches the DNA profile of an individual. Profiling cannot determine the activity by which the DNA was transferred to the location (how it was deposited), whether it was deposited directly or indirectly.

[65] Ms. Blackmore testified that if testing were done and no DNA other than female DNA were recovered, that would not necessarily mean that touching by a male did not occur. The testing may not have sampled the right area. While the technology is increasingly sensitive (10 skin cells may be detected and used to produce a profile), the deposit at an area tested may not have been sufficient. Similarly, if testing were done and DNA from a non-accused third party were found, that would not necessarily mean that touching by the accused did not occur. Again, the accused may not have left a deposit (or sufficient deposit) at the area tested.

[66] Ms. Blackmore emphasized that lab personnel do not know the "ground truth."

V. Assessment

A. Destroyed Evidence

1. Unacceptable Negligence

[67] The sexual assault kit and the Complainant's clothes had been clearly in the possession of the RCMP. The evidence was equally clearly destroyed.

[68] The Crown correctly conceded that the destroyed items had been disclosable: MCR at para 20.

[69] The Crown also correctly conceded that the evidence was destroyed due to unacceptable negligence: MCR at paras 3, 21. In my opinion, the kit and clothes were destroyed through unacceptable negligence.

[70] In the circumstances there is no need to belabour the point, but the police conduct fell precisely within the type of conduct criticized by Justice Doherty in ***Bero*** at para 39:

> [39] This is not a situation in which the police considered the potential relevance of the vehicle and made a considered decision that it could not be relevant. Nor is it a case where the destruction was accidental in that it was the product of human error, or some cause beyond the control of the authorities. Nor

> is it a case where the police perceived the potential relevance of the vehicle but failed to take adequate steps to preserve it. Rather, as set out above, the failure to preserve the vehicle was caused by the failure to look beyond the needs of the prosecution to the wider question of the potential relevance of the vehicle to the defence. Had anyone directed their mind to the disclosure obligations set out in *Stinchcombe*, *supra*, I think the vehicle would have been preserved. The failure to preserve the vehicle reveals an ignorance of, or at least an indifference to, the duty on the Crown and the police to preserve the fruits of their investigation. This indifference or ignorance is difficult to comprehend so many years after the pronouncement of the Supreme Court of Canada in *R. v. Stinchcombe*, *supra*, and in my view, is a sufficiently serious departure from the Crown's duty to preserve evidence that it constitutes an abuse of process. [emphasis added]

The evidence was destroyed when Cst. Milleker knew there was a warrant out for Mr. Peterson.

[71] As the Crown noted in submissions, the police were incorrectly of the view that Mr. Johnson's DNA sample was required for the kit to be analyzed and Cst. Milleker wrongly gave the Complainant a veto over further analysis. Cst. Milleker wrongly concluded that the kit could have no further relevance in the proceedings against Mr. Peterson. She failed to look beyond the needs of the prosecution to the wider question of the potential relevance of the analyzed kit.

[72] My finding that the kit and clothes were destroyed through unacceptable negligence means that Mr. Peterson has established that the police conduct violated his s. 7 rights.

2. (Other) Abuse of Process

[73] The Defence also claimed that the absence of explanation for the destruction of the kit and clothes amounted to an abuse of process, without further elaboration. As indicated above, unacceptable negligence is one form of abuse of process. I detected no evidence of any other abuse of process.

3. Remedy - Stay

[74] Does the destruction of the kit and clothes warrant a stay of proceedings against Mr. Peterson, either by itself or in association with the late disclosure?

(a) The Acts of Destruction

[75] I'll begin with the second "residual" category of stay cases. According to Justice Moldaver in ***Babos*** at para 35, the focus of the residual category is on State conduct:

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

At para 36 of ***Babos***, Justice Moldaver quoted ***Canada (Minister of Citizenship and Immigration) v Tobiass***, [1997] 3 SCR 391 at para 91:

> For a stay of proceedings to be appropriate in a case falling into the residual category, it must appear that the state misconduct is likely to continue in the future or that the carrying forward of the prosecution will offend society's sense of justice. Ordinarily, the latter condition will not be met unless the former is as well — society will not take umbrage at the carrying forward of a prosecution unless it is likely that some form of misconduct will continue. There may be exceptional cases in which the past misconduct is so egregious that the mere fact of going forward in the light of it will be offensive. But such cases should be relatively very rare ....

[76] But while State conduct is the focus of the residual category, the ongoing effect of permitting proceedings to continue remains at issue as indicated at para 38 of ***Babos***:

> [38] ... the question to be answered at the first stage of the test is the same: whether proceeding in light of the impugned conduct would do further harm to the integrity of the justice system. While I do not question the distinction between ongoing and past misconduct, it does not completely resolve the question of whether carrying on with a trial occasions further harm to the justice system. The court must still consider whether proceeding would lend judicial condonation to the impugned conduct.

[77] In this case, we are dealing with a form of abuse of process sufficient to violate Mr. Peterson's s. 7 full answer and defence rights.

[78] Further, we are dealing not only with negligent conduct but "unacceptable" negligence.

[79] The violation, though, does not dictate the remedy: ***Bero*** at para 42.

[80] From the perspective of the residual category of cases, aggravating circumstances are absent:

- The destruction was a deliberate act, in that Cst. Milleker sent an e-mail requesting destruction and the evidence custodian intentionally destroyed the evidence. However, while the destruction was intentional, there was no evidence that the destruction was for the purpose of destroying evidence that may have been helpful to the defence. From Cst. Milleker's notes, I infer that she concluded that without Mr. Johnson's DNA profile, the analysis of the kit could not proceed and the kit would cease to have any evidential value. Hence it could be destroyed. Cst. Milleker erred, but by failing to consider the scope of the duty to preserve relevant evidence rather than by destroying evidence she knew was relevant or by reckless (subjective) indifference to the relevance of the evidence.
- Cst. Milleker made notes of what she did, as she would had she not realized that what she had done was wrong. There was no effort to hide what was done. There was late disclosure of p. 3 of her notes and of the Exhibit Reports. I attribute that, as did the Crown, to negligence rather than malevolence.
- There was no evidence of any pattern of evidence destruction by Cst. Milleker or her Detachment.

[81] In my opinion, we are dealing in this case with the all-too-human imperfection that may impair the performance of any duty, as Justice Sopinka reminded us in ***La*** at para 20: "despite the best efforts of the Crown to preserve evidence, owing to the frailties of human nature,

evidence will occasionally be lost." I conclude that continuing proceedings against Mr. Peterson (as described below) would not offend society's sense of justice and would not judicially condone unacceptable negligence in performance of disclosure duties. See also ***Hersi*** at para 38: "there is not a trace of police misconduct aimed at subverting the course of justice or thwarting the prosecution's disclosure obligations."

(b) The Kit and the Clothes – Fair Trial

[82] The first category of stay cases concerns State conduct that compromises trial fairness. According to Justice Moldaver in ***Babos*** at para 34, "the question is whether the accused's right to a fair trial has been prejudiced and whether that prejudice will be carried forward through the conduct of the trial; in other words, the concern is whether there is *ongoing* unfairness to the accused."

[83] What degree of prejudice has Mr. Peterson suffered through the destruction of the kit and the clothes? In my opinion, considering the destruction of the kit and the clothes alone, Mr. Peterson has not established actual prejudice to his fair trial rights or that any potential prejudice cannot be remedied.

(i) The Clothes

[84] The Complainant testified that Mr. Peterson touched her under her pajama pants. A visual inspection of those pants would have been relevant to whether the touching had occurred as described. In ***R v Tremble***, both Justice Fragomenti on appeal and the trial judge, Justice Cooper, considered a complainant's garments worn at the time of the alleged assault to be relevant in a similar case: ***R v Tremble***, 2010 ONSC 2777, Fragomeni J at para 45; 2009 ONCJ 320, Cooper J.

[85] It may well be that the pajama pants would not have been of a design that undermined the Complainant's narrative, but it could not be assumed that the pajama pants would have facilitated touching.

[86] Nothing was made of the Complainant's pajama pants design in the trial. On the evidence and lack of evidence, I do not consider that there was a significant probability that the pajama pants design impeded touch, but I cannot exclude the reasonable possibility – in the absence of the physical evidence – that the nature of the pajama pants would be relevant to the assessment of the Complainant's narrative.

[87] It is possible that if the Complainant's t-shirt were very long (i.e. longer than a typical t-shirt), it might have impeded touching.

[88] I accept that there is a reasonable possibility that Mr. Peterson's fair trial rights have been prejudiced as regards the destroyed kit and clothes. However, I do not find that Mr. Peterson has established that the destruction of the kit and clothes has in fact prejudiced his fair trial rights.

[89] I note that the t-shirt was turned in by the Complainant some time after the kit and pajama pants were seized. There was a loss of continuity of the t-shirt. What was done with the t-shirt in the period after the seizure was unknown. Even if Mr. Peterson's DNA had been found on the t-shirt, the probative value of that discovery would at least be imperilled by the break in continuity, although the continuity gap might possibly have been bridged by testimony.

(ii) No DNA Analysis

[90] The kit and the clothes were not submitted for DNA analysis and cannot be submitted for DNA analysis. This evidence is gone.

[91] We do not know whether or not any of the seized objects would have disclosed the presence of Mr. Peterson's DNA. Analysis may have shown that

- Mr. Peterson's DNA was found on one or more of the seized objects
- Mr. Peterson's DNA was not found on any of the seized objects
- Mr. Johnson's DNA (assuming that his profile could have been identified) was found on one or more of the seized objects, whether with or without the co-presence of Mr. Peterson's DNA
- some third party's DNA was found on one or more of the seized objects, whether with or without the co-presence of Mr. Peterson's DNA or Mr. Johnson's DNA.

(iii) Inferences from Absence and Prejudice to Fair Trial

[92] The Crown correctly pointed to an asymmetry in the inferences available from a positive match to Mr. Peterson's DNA profile and the absence of a match.

[93] If Mr. Peterson's DNA were found on one or more of the seized objects, that would be circumstantial evidence of contact between Mr. Peterson and the Complainant, keeping in mind that a DNA match is proof only of the match and presence of the identified DNA and not proof of how the deposit occurred or when the deposit occurred.

[94] If Mr. Peterson's DNA were not found on one or more of the seized objects, that would not be proof that he did not have contact with the Complainant but only a lack of evidence that he did have contact with the Complainant. It would have been possible for Mr. Peterson to have had contact with the Complainant but for analysis to have failed to identify his DNA on any of the seized objects. See ***R v Lemmon***, 2010 ABCA 193 at para 8 ("Another ground of appeal is that the trial judge failed to properly consider the fact that the appellant's DNA was not found in or on the complainant or her clothing. This argument has a speculative premise, namely that the appellant would have left a sufficient source of DNA, notably seminal fluid, behind").

[95] The expert evidence supported the conclusion that if Mr. Peterson's DNA were located on any seized objects, even small amounts, it could have been located, analyzed, and matched to him. The expert evidence, though, also supported the conclusion that if Mr. Peterson's DNA were located on any seized objects, even in analyzable quantities, it could have escaped detection.

[96] It is true that it was reasonably possible that DNA profiles might have been developed if the kit and the clothes were analyzed. But we do not and cannot know whether this evidence would have helped or hindered the defence. Hence, as regards trial fairness, I do not find, on a balance of probabilities, that the absence of that evidence has prejudiced the Defence by eliminating evidence important to the Defence and I do not find that prejudice arising from the missing evidence "will be carried forward throughout the conduct of the trial," that the missing evidence will generate "*ongoing* unfairness to the accused:" ***Babos*** at para 34.

[97] Justice Doherty's observations in ***Bero*** at para 49 are apt:

> [49] An assessment of prejudice is problematic where, as in this case, the relevant information has been irretrievably lost. No one can say with any certainty whether an examination of the vehicle would have produced information helpful to the appellant in his defence. It may have done so, or it may have yielded information that confirmed the Crown's case, or it may have produced information that supported neither the Crown nor the defence.
>
> [52] I accept that, depending on the results of forensic tests of the interior of the vehicle, they could have assisted the appellant in the ways outlined by counsel. The fact remains, however, that these possible advantages to the defence were no more than realistic possibilities and were no more likely than test results that were adverse to or neutral to the defence position.

[98] I do not consider any other evidence in the trial, besides Mr. Peterson's denials of contact, to have elevated the probability that the kit and the clothes would *not* have disclosed his DNA. That is, other independent evidence did not provide support for the prediction of an analytical result favourable to the Defence. In contrast, see ***R v RGC***, 2012 ABCA 392, a late disclosure case at para 2 ("Samples of DNA were obtained from the scene of the crime. The forensic analysis found a match with two unknown male persons, neither of which was the appellant").

[99] I recognize that the potential results of a DNA analysis would not have been binary – either positive match (proof of transfer) or negative (proof of lack of transfer) as in ***KDS*** (the lost video of the accused would have been highly probative on the issue of the degree of the accused's intoxication and on whether the accused's lost clothing would have been soaked with urine from the crime scene (a baby's crib) or not). As indicated above, the negative finding would not rule out undetected transfer or contact without measurable transfer.

[100] The Crown considered the destroyed evidence to have been "neutral:" I agree that we do not know what the analytical result would have been, but I disagree that this eliminated the probative value of the destroyed evidence (particularly in conjunction with other evidence). There was a reasonable possibility that the DNA analysis would return a negative (no detected transfer) result. I'll return to this point shortly, but the evidential significance of the absence of evidence would be a matter for the trier of fact to assess.

[101] Mr. Peterson was denied access to evidence that had a realistic possibility of assisting his defence, but that also could have destroyed his defence or have been of no assistance to his defence. Mr. Peterson has not established that his right to fair trial has in fact been prejudiced.

[102] I have kept in mind that Mr. Peterson was entitled to a fair trial, not the most advantageous trial possible from his point of view: ***Bjelland*** at para 22.

[103] I have also taken into account the comments of the BC Court of Appeal in ***Garnot*** at para 32:

> [32] .... In other cases where identity was in issue and exhibits were lost before they could be forensically tested, courts have held the speculative or equivocal nature of the lost evidence to be a relevant and appropriate consideration: see *R. v. Knox* (2006), 209 C.C.C. (3d) 76 (Ont. C.A.). The judge's approach was consistent with those cases, as he found:

> [104] … there is a reasonable possibility that the analysis of the contents of the kit, including the panties, would have assisted the defence … However, also as in ***Bero*** and *Nicholas*, it is also possible that analysis of the contents of the kit would only have confirmed the identity of Mr. Garnot, to even a greater degree of certainty than the more remotely circumstantial deposit of semen on an unspecified area of the crotch of Ms. M.'s jeans that is currently the basis of the case against him.
>
> [105] Viewed in that light, the destruction of the kit may have impaired the Crown's case more than Mr. Garnot's defence, and the breach would be, in some respect, self-punishing. Or, as indicated in ***Bero***, there is also the possibility that the results could have been of no assistance to the Crown or the defence.

[104] I considered the result in ***Tremble***. In this sexual assault case, the complainant's clothing worn at the time of the alleged offence was never seized by the police. The complainant offered to provide the clothing to the police. After about six months, the complainant threw the clothing away. As in this case, the opportunity for DNA analysis was lost as was the opportunity for examination of the clothing in connection with the narrative of the complainant and the cross-examination of the complainant. The trial judge stayed proceedings and Justice Fragomeni dismissed the appeal. The trial judge did not appear to consider whether the absence of evidence permitted the finding, on the balance of probabilities, of irreparable prejudice. The decision to impose a stay, in my opinion, cannot be reconciled with ***Bero*** or other governing authorities. I consider ***Tremble*** to be an outlier and not persuasive on the remedy issue.

(c) Alternative Remedies

[105] The reasonable possibility of prejudice to Mr. Peterson's fair trial rights does not support the remedy of a stay.

[106] Further, in my opinion, there are measures that may be taken to alleviate the prejudice arising from the destruction of the kit and the clothes. I conclude that this is not one of those rare cases that requires a stay as the appropriate remedy.

[107] Before turning to those appropriate ameliorative measures, I will put the remedy issue in a more complete context by considering the remedies for the late disclosure.

B. Late Disclosure

[108] The missing p. 3 of Cst. Milleker's report and the Exhibit Reports were disclosed after conviction. Mr. Peterson established that the police or Crown were in possession of the disclosed documents, the evidence was "relevant" in a *Stinchcombe* sense, and the disclosure was late. But did Mr. Peterson suffer "actual prejudice" to his right to make full answer and defence? Was there a reasonable possibility that the late disclosure affected the outcome at trial or the overall fairness of the trial process?

[109] In my opinion, Mr. Peterson established that there was a reasonable possibility that the late disclosure affected the outcome at trial.

[110] The late disclosure established that the kit and the clothes had been destroyed on Cst. Milleker's direction.

[111] The late disclosure indicated that Cst. Milleker had the kit and clothes destroyed because the Complainant did not want the RCMP to gather a blood sample from Mr. Johnson so his DNA could be identified and excluded from consideration in the analysis of the kit and the clothes.

1. Missing Form 1

[112] The late disclosure showed that the form 1 prepared in connection with the completion of the sexual assault kit is or was in the custody of the hospital.

[113] Defence Counsel suggested the prospect of a s. 278.2 application.

[114] I agree with the Crown that on the record there was no foundation for the reasonable possibility of a successful application. At this point, we know that the form did exist. We know nothing of its contents. At this point, the application would not appear to get beyond s. 278.3(4), "insufficient grounds."

[115] The speculative prospect of a s. 278.2 application does not support a reasonable possibility of affecting the outcome of the case.

2. Destruction of Evidence

(a) Spoliation

[116] In ***Sawchuk*** at para 68, Justice Horner referred to "[t]he 'trite' rules of 'spoliation' allow the Court to presume that destroyed evidence would have been unfavourable to the Crown's case: [***St Louis v The Queen***] (1896), 25 SCR 649."

[117] Spoliation is an evidential doctrine typically applied in civil litigation. In ***St. Louis*** at 652-653, Justice Taschereau referred to "the rule *omnia præsumuntur contra spoliatorem*. The destruction of evidence carries a presumption that the evidence destroyed would have been unfavourable to the party who destroyed it." This is a rebuttable presumption. Justice Conrad summarized the Canadian law of spoliation at para 29 of ***McDougall v Black & Decker Canada Inc***, 2008 ABCA 353:

> 1. Spoliation currently refers to the intentional destruction of relevant evidence when litigation is existing or pending.
>
> 2. The principal remedy for spoliation is the imposition of a rebuttable presumption of fact that the lost or destroyed evidence would not assist the spoliator. The presumption can be rebutted by evidence showing the spoliator did not intend, by destroying the evidence, to affect the litigation, or by other evidence to prove or repel the case.
>
> 3. Outside this general framework other remedies may be available – even where evidence has been unintentionally destroyed. Remedial authority for these remedies is found in the court's rules of procedure and its inherent ability to prevent abuse of process, and remedies may include such relief as the exclusion of expert reports and the denial of costs ....
>
> 5. Generally, the issues of whether spoliation has occurred, and what remedy should be given if it has, are matters best left for trial where the trial judge can consider all of the facts and fashion the most appropriate response.

> 6. Pre-trial relief may be available in the exceptional case where a party is particularly disadvantaged by the destruction of evidence. But generally this is accomplished through the applicable rules of court, or the court's general discretion with respect to costs and the control of abuse of process.

[118] A few criminal cases rely on the spoliation doctrine. As regards an accused's conduct, the doctrine may not be necessary as the destruction of evidence might be admissible as after-the-fact conduct supporting the Crown's case, depending on the facts at issue. As regards Crown or police conduct, the intentional destruction of evidence by Crown or the State investigating agency would likely amount to an abuse of process and might support the imposition of a stay. I will assume, though, that the doctrine would apply in criminal cases.

[119] For the doctrine to apply, evidence must be destroyed "intentionally." As indicated above, that would fairly describe Cst. Milleker's directions respecting the evidence. However, as also indicated above, I did not find that Cst. Milleker's destruction of the error was for the purpose of "affecting the litigation." She made a mistake about the potential uses and disclosure of the evidence. That rebuts the presumption.

(b) The Role of Missing Evidence

[120] The facts that the evidence had existed, was destroyed, and could reasonably have supported inferences favourable to Mr. Peterson's case could not be ignored by a trier of fact.

[121] At the very least, the missing evidence could be confirmed as not providing any support to the Crown's case. In ***Hersi***, Justice Doherty referred to the trial judge having given the jury a lost evidence instruction:

> [35] .... In that instruction, she told the jury that if they found the prosecution's explanations for destroying the evidence "inadequate", they could infer that the lost evidence would not have assisted the Crown. That inference could, in turn, impact on whether the Crown had proved its case beyond a reasonable doubt.

See ***Garnot*** at paras 34, 23.

[122] In my view, the use of the missing evidence would go farther than to confirm that it would not assist the Crown. I do not contend that an "adverse inference" should be drawn against the Crown, as if the spoliation doctrine applied without rebuttal. Rather, the trier of fact would be entitled to consider the missing evidence, evidence that should have been before the court, on the issue of whether Mr. Peterson committed the *actus reus* of the offence and on the issue of the Complainant's credibility.

[123] I offer the following observations not to tie the hands of any future trier of fact (and indeed, I could not), but to point to reasonably possible ways that the evidence could have been used in trial.

[124] The Defence could have introduced evidence that the police had failed to preserve the evidence as was their duty, and could have called an expert (Ms. Blackmore or someone with similar credentials) on the issues of how the kit and the clothes may have been tested and what sorts of information could have been derived about the presence of DNA on the seized materials. This evidence would go to whether the Crown had proved its case against Mr. Peterson beyond a reasonable doubt: ***Bero*** at paras 54, 65. At para 58, Justice Doherty wrote that "[t]he defence is

still entitled to demonstrate inadequacies or failures in an investigation and to link those failures to the Crown's obligation to prove its case beyond a reasonable doubt." At para 64, Justice Doherty wrote that:

> [64] .... Cross-examination as to investigative measures that were not taken, the results which may reasonably have been expected from those investigations, and the significance of those results to the issues at trial do not involve the putting of "facts" to witnesses that were not part of the evidence. If a witness testified that had forensic testing been done, it could have revealed that traces of blood and that the location of that blood could have been important in determining the identity of a driver, those are "facts" which are in evidence. Those facts could support a defence submission that in the absence of such evidence the jury should not be satisfied that the Crown had proved the driver's identity beyond a reasonable doubt.

[125] The Defence could have reminded the trier of fact of the missing evidence to "help the [trier of fact] assess the overall reliability of the investigative process which produced the evidence relied on by the Crown, and [to] help the [trier of fact] decide the significance, if any, of the absence of evidence that may have been available had the prosecution preserved all relevant evidence:" ***Bero*** at para 67; see ***R v Michel***, 2007 NWTCA 3, Watson JA at para 14; ***Garnot*** at paras 33, 24 and the trial decision of Schultes J (2011 BCSC 1814) at para 108 and para 109:

> [109] Specifically, I must ask myself whether the absence of what could have been additional confirmatory evidence from the sexual assault kit or the reasonable possibility that the analysis of one of the samples from the kit could have pointed to another person mean that the guilt of Mr. Garnot beyond a reasonable doubt is not the only rational inference to be drawn from the evidence.

And see ***R v RDA***, 2015 SKCA 100, Caldwell JA, leave app refd [2016] SCCA No 73 at para 9 (CA): "While DNA evidence disclosing an absence of Mr. A's DNA is not inconsistent with his version of events, it is not proof of what he said had happened either. It is simply a piece of relevant evidence that is material to the question of Mr. A's credibility, as well as that of the complainant."

[126] Finally, the fact that the evidence was missing and therefore unanalyzed deprived Mr. Peterson of important information at multiple stages in his prosecution. See ***Bero*** at para 33:

> [33] There is no dispute but that forensic tests of the interior of the vehicle could have provided evidence relevant to the identity of the driver. That evidence could have affected the appellant's ability to defend himself. Depending on the results, the tests could have influenced the appellant's plea, the forum in which he chose to be tried, and the nature of the defence. The failure to maintain possession of the vehicle deprived the appellant of information which was relevant in that it could have affected his ability to defend himself ….

See also ***Luo*** at paras 19, 28.

[127] In view of the foregoing, there is a reasonable possibility that disclosure relating to the destroyed kit and clothes would have affected the outcome of the case.

3. The Reasons for the Destruction of the Evidence

[128] The late-disclosed reasons for the destruction of the evidence expose further reasonable possibilities that the outcome of the trial would have differed if the Defence had timely access to this information.

[129] I accept that the late disclosed information is likely relevant to the assessment of the Complainant's credibility.

[130] The Complainant did not want Mr. Johnson's DNA to be considered in connection with the analysis of the kit. The Complainant's position is puzzling. Mr. Johnson was her boyfriend and there would have been nothing remarkable in his DNA having been transferred to her.

[131] The Complainant's position respecting her boyfriend's DNA calls out for an explanation. Questioning might clarify whether the reason she gave was the true reason or the whole reason for not wanting the kit analyzed. There is a reasonable possibility that the Complainant's explanation would have been relevant to whether she had a motive to fabricate her evidence against Mr. Peterson. Evidence of motive to fabricate could undermine the Complainant's credibility.

[132] I acknowledge that this reasonable possibility does not entail that the Complainant would necessarily have disclosed evidence in questioning that would undermine her credibility. It would be possible (e.g.) that she was honouring a request by Mr. Johnson to keep his DNA from any police databank. One possibility does not cancel the other, at this stage of proceedings. But were the Complainant to provide an explanation along these lines, Mr. Johnson's incarceration in May, when the Complainant's opposition to obtaining his profile arose, could become relevant and Mr. Johnson might be required to testify. (I agree with the Crown that otherwise the relevance of Mr. Johnson's post-event incarceration would be hard to discern.)

[133] The Crown argued that any attempt to explore why the Complainant did not want to "involve" Mr. Johnson's DNA "would have unavoidably triggered an application under s. 276:" MCR at para 30. That is likely true, since the presupposition of the questioning would be that the Complainant had prior sexual contact with Mr. Johnson.

[134] The Crown claimed, though, that "a s. 276 application on those grounds would have to fail:" MCR at para 31. I disagree. Again, the decision on a yet-to-be-heard s. 276 application would be made by another judge, but Justice McLachlin precisely countenanced questioning designed or evidence proffered to show motive to fabricate in ***R v Seaboyer***, [1991] 2 SCR 577 at 613-614 ("Another category of evidence eliminated by [then-] s. 276 relates to the right of the defence to attack the credibility of the complainant on the ground that the complainant was biased or had motive to fabricate the evidence").

[135] From the Defence perspective, one might argue that a cross-examination based on the late disclosure would not alleviate prejudice. The critical time to have cross-examined the Complainant would have been in her initial cross-examination. That time has come and gone: see ***Luo*** at para 28. However, none of the late disclosure issues surfaced in the initial cross-examination. Some time will pass before the new trial. A cross-examination on fresh material would not be a form of "do-over" for the Complainant.

[136] Again, in my opinion, there is a reasonable possibility that disclosure relating to the reasons for the destruction of the kit and the clothes would have affected the outcome of the case.

4. Defence Due Diligence

[137] ***Dixon*** confirmed at para 37 that "[a] lack of due diligence is a significant factor in determining whether the Crown's non-disclosure affected the fairness of the trial process." See also para 55 ("... defence counsel is not entitled to assume at any point that all relevant information has been disclosed to the defence. Just as the Crown's disclosure obligations are ongoing, and persist throughout the trial process, so too does defence counsel's obligation to be duly diligent in pursuing disclosure").

[138] The Crown, very fairly, did not raise a lack of due diligence in seeking disclosure by prior (not current) counsel. The larger context for this application included another application by current counsel that have I not addressed in these reasons.

[139] I observe that current counsel, commencing on the day he received disclosure from the Crown, took steps to leading to the prompt discovery that the kit and the clothes had been destroyed and to the additional late disclosure. All the additional information was received within about a month from current counsel's requests for further disclosure. The evidence did not disclose that current counsel was required to take any steps to obtain the further disclosure other than asking for it.

[140] Current counsel was certainly duly diligent. As the parties have refrained from making prior counsel's conduct an issue, I will not embarrass any other proceedings with any unnecessary comments.

5. Conclusion

[141] I find, on a balance of probabilities, that the late disclosure of the destruction of the evidence and reasons for the destruction of the evidence establish reasonable possibilities that the outcome at trial would have been different had the disclosure occurred before Mr. Peterson was convicted.

[142] Mr. Peterson has therefore established, on a balance of probabilities, that his s. 7 rights to full answer and defence were violated by the late disclosure respecting the destruction of the evidence.

C. Remedy

[143] I said that this was not one of those rare cases that requires a stay as the appropriate remedy and that there are measures that may be taken to alleviate the prejudice arising from the destruction of the kit and the clothes – and I can now add the prejudice arising from the late disclosure of the destruction of the kit and clothes and of the reasons for the destruction.

1. Re-Opening

[144] In theory, I might re-open the trial. In practice, that would be inappropriate.

[145] My situation is akin to that described by Justice Trotter, as he then was, in ***R v Drysdale***, 2011 ONSC 5451 at para 27-29:

> [27] .... The problem with continuing the trial was that I had already made a very strong adverse finding of credibility against Mr. Drysdale, one that caused me to reject his evidence as a whole ....

> [28] .... Any attempt to re-build my credibility findings on a different footing would be disingenuous ....
>
> [29] Let me put it another way. If I were to continue the trial and permit further evidence to be called, short of finding Mr. Drysdale not guilty on all counts (a result I am not sure is warranted either), he, along with reasonably informed members of the public, would always wonder whether my "new" conclusions and reasons were infected by my prior adverse finding of credibility. Whatever result I reached would always be open to question ....

[146] Like Justice Trotter in ***Drysdale***, I have made adverse credibility findings against Mr. Peterson. I convicted him. A reasonable person would not likely consider me to be the best judge to re-visit issues of credibility and inferences from missing evidence.

[147] I shall not order that the trial be re-opened before me.

2. Mistrial

[148] The trial is over and cannot be re-opened. By establishing the reasonable possibility that the destruction of the evidence and the late disclosure affected the outcome at trial, Mr. Peterson has demonstrated that he is entitled to a new trial: ***Dixon*** at para 35.

[149] Mr. Peterson's "ability to challenge credibility and reliability related to the Crown witness who was the entire basis of the Crown's case:" ***R v Loo***, 2020 ABQB 573, Ross J at para 22; see ***Barra*** at paras 154-155.

[150] The new trial would not likely be much longer than the original one-day trial. Mr. Peterson's first trial did not involve a substantial expenditure of public resources or have any peculiar expenses or procedural complications associated with it. Neither will another trial. See ***Loo*** at para 22. There may or may not be *Jordan* concerns (***R v Jordan***, 2016 SCC 27; ***R v JF***, 2022 SCC 17), but those are not before me.

[151] In my opinion, as Justice Trotter said in ***Drysdale*** at para 29, "[t]he only way to address this issue in a manner that is fair to both sides is to start all over again."

[152] The only way to start all over again is to declare a mistrial. I am satisfied, on a balance of probabilities, that a mistrial is warranted. The first remedial step, therefore, shall be to declare a mistrial.

[153] I acknowledge that continuing with this prosecution lies fully within the constitutional authority of the Crown: ***Krieger v Law Society of Alberta***, 2002 SCC 65, Iacobucci and Major JJ at para 46.

3. Further Disclosure

[154] The Defence requested further disclosure. That was not opposed by the Crown. I do not consider the Defence request unreasonable or onerous. The specific order is set out below.

4. Costs

[155] The Crown did not engage in any misconduct amounting to bad faith. Neither did the Crown engage in a "marked and unacceptable departure from the reasonable standards expected of the prosecution." The errors were made by the RCMP in 2014 and thereafter when called on to provide disclosure.

[156] In ***Matthews***, the Court of Appeal referred to "exceptional circumstances" that would warrant costs, including "where a defendant incurred legal fees for an initial trial that had to be reheard through no fault of his own (such as a reasonable apprehension of bias by the trial judge):" at para 98.

[157] The remedies I am granting Mr. Peterson rest on police errors. He is not at fault for those errors. Nonetheless, I cannot ignore the evidence. Current counsel was able to expeditiously obtain the information supporting my findings of s. 7 violations and remedies. I cannot find that access to that information would have been denied to prior counsel.

[158] Moreover, item 6 on p. 2 of Exhibit G to Shireen Bangash's second affidavit (Ms. Bangash was *not* prior counsel) suggests that prior counsel intentionally failed to pursue disclosure relating to the sexual assault kit.

[159] While the conduct of prior counsel should not be a bar to vindicating Mr. Peterson's rights to fundamental justice, I cannot find that an earlier lack of pursuit of disclosure justifies a monetary remedy for Mr. Peterson. Mr. Peterson's lawyer was his agent and through his agent, Mr. Peterson absorbed some responsibility for the progress of the trial. Again, from ***Dixon*** at para 37: "When counsel becomes or ought to become aware, from other relevant material produced by the Crown, of a failure to disclose further material, counsel must not remain passive. Rather, they must diligently pursue disclosure." If I were to grant costs, passivity would be its own reward.

[160] In the circumstances, I do not award Mr. Peterson costs for his trial before me. My determination is made solely under s. 24(1) of the *Charter*.

VI. Declaration and Orders

[161] I hereby declare a mistrial.

[162] The parties are directed to appear in Grande Prairie Criminal Appearance Court on June 27, 2022 at 2:00 p.m. to set a new trial date before another Justice of this Court.

[163] I hereby order that the following information be disclosed to the Defence, should it exist:

- the recording of the 911 call made in relation to this matter
- the photographs taken by members of the RCMP relating to this matter
- the criminal records of the Complainant and Eric Johnson
- the contact information for Eric Johnson
- all RCMP reports, notes, and other materials not previously disclosed that relate to the investigation of this matter including the notes of Cst. Milleker (Froese) from May 1 and 2, 2014 and her e-mails to any other parties relating to this matter.

If any of the information, records, or documents were but not longer are in the possession of the Crown or the RCMP, I direct that an explanation be provided for the lack of preservation of the information, records, or documents.

Heard on the 25th day of April, 2022.
Dated at the City of Grande Prairie, Alberta this 24th day of May, 2022.

W. N. Renke
J.C.Q.B.A.

Appearances:

Shannon Davis
Alberta Justice
Crown Prosecutors' Office
for the Crown

Kristofer Advent
Beresh Law
for the Accused