Citation: Reference re Ross, 2022 MBCA 101
Date: 20221214
Docket: AR14-30-08179

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Diana M. Cameron
Madam Justice Janice L. leMaistre
Madam Justice Brenda L. Keyser (*ad hoc*)

IN THE MATTER OF section 696.1 of the *Criminal Code*, SC 2002, c 13;

AND IN THE MATTER OF a reference by the Minister of Justice to the Manitoba Court of Appeal upon an application for ministerial review advanced by Deveryn Donald Alexander Ross, convicted at Brandon, Manitoba on May 26, 1995 of two counts of fraud over one thousand dollars;

AND IN THE MATTER OF a request by the Minister of Justice pursuant to section 696.3(2) of the *Criminal Code* for the opinion of the Manitoba Court of Appeal as to the admissibility of certain new information as fresh evidence;

AND IN THE MATTER OF a reference by the Minister of Justice to the Manitoba Court of Appeal pursuant to section 696.3(3)(a)(ii) of the *Criminal Code* that, should the Manitoba Court of Appeal conclude that any of the new information would be admissible as fresh evidence, the Court determine the case as if it were an appeal by Deveryn Donald Alexander Ross based on a consideration of the existing record, the evidence already heard, and such further evidence as the Court in its discretion may receive and consider.

B E T W E E N :

	)	***D. D. A. Ross***
HIS MAJESTY THE KING	)	*on his own behalf*
	)	
Respondent	)	***P. S. Lindsay***
	)	*for the Respondent*
- and -	)	
	)	*Motions heard:*
DEVERYN DONALD ALEXANDER ROSS	)	***June 15, 2022***
	)	
(Accused) Applicant	)	*Decision pronounced:*
	)	***December 14, 2022***

CAMERON JA

Introduction

The Reference

[1] On May 26, 1995, after a trial by a judge in the Court of Queen's Bench, the applicant, Deveryn Ross (Ross), was convicted of two counts of fraud over $1,000, contained in a nine-count indictment. He was acquitted of the remaining seven counts. The convictions have resulted in several legal proceedings culminating in the current reference by the Minister of Justice of Canada (the Minister) to this Court pursuant to Part XXI.1 of the *Criminal Code* (the *Code*)—Applications for Ministerial Review—Miscarriages of Justice (the Reference). A copy of the Reference is reproduced in the appendix attached to these reasons and will be referred to throughout these reasons.

[2] The Reference is a dual reference (see *R v Kelly*, 2001 SCC 25 regarding dual references). The first part is made pursuant to section 696.3(2) of the *Code*. Simply described, it asks this Court to provide its opinion as to whether three listed items of new information would be admissible as fresh evidence on an appeal to this Court (see appendix).

[3] The second part, made pursuant to section 696.3(3)(a)(ii) of the *Code*, states:

> . . .
> If this Honourable Court concludes that any of the information listed in paragraphs 1 through 3, inclusive, would be admissible as fresh evidence, I do hereby respectfully refer to this Honourable Court pursuant to subsection 696.3(3)(a)(ii) of the *Criminal Code*, based on a consideration of the existing record, the evidence

> already heard, and such further evidence as this Honourable Court in its discretion may receive and consider, to determine the case as if it were an appeal by Deveryn Ross.
> . . .

[4] In *R v Ross*, 2017 MBCA 77 (*Ross 2017*), this Court determined the scope of the Reference, finding that, while it has the broad discretion to receive evidence at both stages of the Reference, it "cannot proceed to the appeal stage of the Reference unless [it is] of the opinion that any of the three listed items of [new information] would be admissible as fresh evidence" (at para 44).

Part 1 of the Reference

[5] As earlier stated, the first part of the Reference refers three questions. It states, in part:

> . . .
> Having regard to the existing record and such further material and evidence as this Honourable Court sees fit to receive:
>
> 1) Would the new information concerning the conversations between Mr. Ronald Simpson and Mr. Brian Savage be admissible as fresh evidence on an appeal to this Honourable Court? [Question 1]
>
> 2) Would the new information concerning the non-disclosure of Settlement Agreements executed by William Knight and Sheldon Gray on April 18, 1995, which were presented to the Manitoba Securities Commission on that date, be admissible as fresh evidence on an appeal to this Honourable Court? [Question 2]
>
> 3) Would the new information concerning the non-disclosure of the Assignment Agreement whereby William Knight and Sheldon Gray had assigned their interest in civil actions that they had instituted against

> Deveryn Ross to the investors of Perkins Limited Partnership be admissible as fresh evidence on an appeal to this Honourable Court? . . . [Question 3]

(Collectively, the Reference questions.)

The Motion for Fresh Evidence

[6] Ross argues that the Reference questions do not sufficiently reflect the whole picture relating to what happened prior to and since the time of his convictions. Thus, he has brought a motion for fresh evidence. In support of his motion, he relies on affidavit evidence that provides information of which he became aware after his conviction and that is not referred to in the Reference questions. Much of the information that Ross seeks to have admitted was before the Minister when the Reference was made, but he declined to include it in the Reference.

The Motion to Expunge

[7] In addition, Ross has filed a motion to expunge certain evidence filed by the Crown found in the affidavits of the Crown attorney who prosecuted him, Paul Jensen (Jensen). By agreement of the parties, this motion proceeded in written form only and was not argued at the oral hearing of this matter.

Result

[8] For the following reasons, I would answer the Reference questions in the negative and would not admit the new information on appeal. As a result, this Court is without jurisdiction to consider the second part of the Reference.

[9] I would dismiss Ross's motions for fresh evidence and to expunge significant portions of Jensen's affidavits.

Factual Background of the Fraud Charges

[10] The facts underlying Ross's two fraud convictions are described in previous judgments of this Court and others. The following is a broad summary of the factual background. More detailed information will be provided as I consider the Reference questions.

The Fraud as Against All the Investors (Count 8)

[11] In late 1989 or early 1990, Ross, a practicing lawyer, along with three others, determined that they would purchase a Perkins Family Restaurant franchise (the restaurant) and operate it in Brandon, Manitoba. The plan was for this group to fund an operating company that would own the franchise and operate the restaurant. The operating company would pay rent to investors in a separate limited partnership created to construct and equip the restaurant (the investors). The investors were yet to be recruited.

[12] Ross created three entities in pursuit of the plan. They were:

- 2570701 Manitoba Limited (257)—incorporated on April 2, 1990 of which Ross was the sole director and which later became the general partner in Perkins Limited Partnership (PLP);

- PLP—created on May 20, 1990 to acquire the land required for the restaurant, build and equip it. Initially, PLP consisted of

257 as a general partner with Ross as the initial limited partner. The investors then also became limited partners;

- 2594596 Manitoba Corporation (259)—incorporated on May 29, 1990 to be the operating company that would own the franchise and operate the restaurant and pay rent to the investors in PLP.

[13] Ross engaged Sheldon Gray (Gray) and William Knight (Knight), who were dealers and licensed brokers under *The Securities Act*, CCSM c S50 (the *SA*), to recruit the investors for PLP.

[14] Based on Ross's estimates of the cost to set up the restaurant, the investors were told that their contribution would cover $300,000 to build the restaurant, $400,000 to equip it and $300,000 for unspecified capital expenditures for a total cost of $1,000,000. Forty units at $25,000 per unit were created to reflect the total cost of $1,000,000.

[15] The investors, as unit holders, became limited partners of PLP. The investors were not told that 12 of the 40 units were unfunded (the unfunded units) and had been allocated to Ross, Knight and Gray and/or their nominees or wives.

[16] As was noted by this Court in *R v Ross*, 1996 CarswellMan 14 (CA) (*Ross 1996*) (at para 12):

> What [the investors] were not told was that a substantial part of the capital they invested was to be used to pay out the unfunded unit holders. Moreover, these payments would be made either before firm figures for the cost of constructing and equipping the restaurant were known, or worse, when it had become reasonably

> certain that there would be a shortfall of the cash required to construct and equip the building.

[17] Between May 10 and June 24, 1990, a total of $850,000 had been subscribed by nine separate investors.

[18] In late July 1990, it became obvious that the construction of the restaurant would cost significantly more than had been anticipated and that PLP would not have the resources to construct and equip it. In response, Ross created another limited partnership, 2613981 Manitoba Limited Partnership (261) to borrow funds to complete the restaurant. He made 257 the general partner of 261. To summarize, 257 was now the general partner of both PLP and 261.

[19] On August 20, 1990, Ross executed an agreement between 261, PLP and 257. As 257 was the general partner of PLP, Ross was able to sign on behalf of all the parties without the knowledge of the investors. The agreement acknowledged that PLP was financially unable to construct and equip the restaurant and incapable of meeting its obligations under the lease of the property on which it was to be constructed. As was noted by this Court in *Ross 1996* (at paras 16-17):

> . . . The thrust of the agreement is to assign the lease from PLP to the new entity, 261. The agreement specified that PLP "shall contribute $700,000 towards the cost of constructing and equipping the building." Ross then proceeded to transfer $700,000 from PLP to 261. These arrangements were completely unknown to the unit holders of PLP.
>
> It is a fair inference that the transfer of assets was made to facilitate 261 negotiating the necessary loan to allow the construction and the equipping of the restaurant to be completed

> without the necessity of advising the proposed lenders of the existence of the unit holders in PLP, and without advising those same unit holders that the construction was being financed by a credit grantor, contrary to the original scheme.

[20] The transfer of funds from PLP to 261 is the subject matter of the fraud conviction on count 8 (count 8).

[21] The agreement was for a period of 10 years. It provided that, if the agreement expired or was otherwise terminated, 261 was to return the building and the land that was subject to the lease, as well as all trade fixtures. It also prohibited 261 from granting any security interest in the building without the consent of PLP.

[22] In October 1990, based on a proposal made on behalf of 259, 257 and 261, prepared and submitted by Ross, the Canadian Imperial Bank of Commerce (CIBC) lent $400,000 to 261 (the CIBC loan) to facilitate the completion of the restaurant. The equity of 261, stated to be $700,000, formed part of the security for this loan in accordance with the proposal, which was made without the consent of PLP. The existence of PLP was not mentioned in the proposal.

[23] In late 1991 and early 1992, the restaurant failed and was placed into receivership. It was only at this time that the investors learned of the CIBC loan.

[24] Ross was convicted of count 8. That conviction was upheld in *Ross 1996* and forms part of the Reference.

The Simpson Fraud (Count 7)

[25] One of the original investors of the $850,000 was Ronald Simpson (Simpson). In May 1990, he purchased four units in PLP totalling $100,000. By February 1991, the restaurant was open. Simpson indicated to Ross that he was interested in purchasing one or two more units in PLP. Simpson's evidence at trial was that Ross said that a "lady . . . up north" had some units that she was considering selling in order to pay for repairs to an apartment building that she owned. That is not what in fact happened. At the time, Gray wanted to sell one of his wife's unfunded units for $15,000. Ross purchased it for that amount. He then sold that unit, along with one of his wife's unfunded units (for which he charged $35,000) to Simpson for a total sale of two units for $50,000. He did not disclose to Simpson that he was not purchasing shares from the investor directly, or that he was purchasing one unfunded unit for $15,000 and another unfunded unit from Ross's wife for significantly more than the $25,000 stated cost of the unit.

[26] As well, at the time of the purchase, Ross did not advise Simpson about the agreement between PLP and 261, the cash shortfall to finish constructing and equipping the restaurant or the CIBC loan which was secured against the assets of 261.

[27] The sale of the units to Simpson formed the basis of the second conviction for fraud found at count 7 of the indictment (count 7).

[28] Post conviction, Ross hired Brian Savage (Savage), a private investigator. Savage initiated conversations with Simpson regarding evidence that he had given at Ross's trial concerning the person from whom the units

were initially intended to be purchased. Part of those conversations are the subject of Question 1.

Relevant Legal Proceedings

[29] As I will later explain, part of the Reference relates to the admissibility of evidence that was not disclosed in the criminal proceedings against Ross, but was related to proceedings initiated by the Manitoba Securities Commission (MSC), as well as legal proceedings initiated by the investors.

[30] In early 1992, when the restaurant could no longer meet its financial obligations, CIBC appointed a receiver. The assets of the restaurant were sold and held pending a determination of the priority of claim between the limited partners in PLP (i.e., the investors) and CIBC. According to the trial judge, the sum of the realizable assets remaining was only around $55,000.

[31] In January 1994, the investors filed a lawsuit against Knight, Gray and Ross.

[32] Investigations were initiated by the MSC, the RCMP and the Brandon Police Service.

[33] The MSC investigations resulted in Knight, Gray and Ross being charged pursuant to the *SA*. As well, the MSC initiated disciplinary proceedings against Knight and Gray to determine whether their brokerage licences should be cancelled.

[34] In January 1994, the RCMP investigation resulted in Ross being charged with numerous counts of fraud. In September 1994, after a

preliminary hearing, he was committed to stand trial. His trial commenced in the Court of Queen's Bench in Brandon on April 18, 1995. He was convicted of counts 7 and 8 on May 26, 1995.

[35] Another important event occurred on April 18, 1995. On that date, the MSC disciplinary hearing into the conduct of Knight and Gray was scheduled to begin. However, Gray and Knight had reached individual settlement agreements with the MSC in advance of the hearing, which were filed in the proceedings on that date (the settlement agreements). The settlement agreements were filed at the disciplinary hearing and explained by the respective counsel for the MSC, Gray and Knight.

[36] The settlement agreements included terms of a settlement that the investors had reached with Gray and Knight in their civil suit (the assignment agreement). At the hearing on April 18, 1995, counsel for Gray explained the assignment agreement to the disciplinary panel.

[37] The settlement agreements and the assignment agreement are the subject of Question 2 and Question 3, respectively.

The Governing Principles

The Palmer Test

[38] The admission of fresh evidence by an appellate court is governed by section 683 of the *Code*. In *Palmer v The Queen*, [1980] 1 SCR 759, the Supreme Court of Canada set out the criteria to be met for admission of fresh evidence on a trial appeal pursuant to section 610 of the *Code*, the predecessor to section 683. They are that the evidence: (i) should not generally be

admitted if, by due diligence, it could have been adduced at trial; (ii) must be relevant; (iii) must be credible in the sense that it is reasonably capable of belief; and (iv) if believed, must be such that it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result (see p 775).

[39] In *R v TS*, 2012 ONCA 289, Watt JA, writing for the Court, observed (at para 116):

> Evidence tendered for reception on appeal may impeach the reliability of a verdict reached at trial in different ways. It may cast doubt on a theory of liability advanced by the Crown, impeach the credibility of a crucial Crown witness or the reliability of his or her testimony, or diminish the confirmatory potential of evidence advanced as supportive of the testimony of a *Vetrovec* witness [*Vetrovec v The Queen*, [1982] 1 SCR 811]: *R. v. Hurley*, 2010 SCC 18, [2010] 1 S.C.R. 637, at paras. 17-19.

[40] Recently in *Barendregt v Grebliunas*, 2022 SCC 22, Karakatsanis J, writing for the majority of the Court (not dissented to on this issue), stated (at para 3):

> . . . Appellate courts must apply the *Palmer* criteria to determine whether finality and order in the administration of justice must yield in service of a just outcome. The overarching consideration is the interests of justice, regardless of when the evidence, or fact, came into existence.

[41] However, the *Palmer* test does not "apply to evidence going to the validity of the trial process itself" (*Barendregt* at para 30). In such a case, the test developed and explained by the Supreme Court in the cases of *R v Dixon*, [1998] 1 SCR 244; and *R v Taillefer; R v Duguay*, 2003 SCC 70 (*Taillefer*), applies.

The Dixon-Taillefer Test

[42] In criminal proceedings, fresh evidence is sometimes composed of information that was undisclosed by the Crown at the time of the trial. In such a case, the burden is on the accused to demonstrate that they had a constitutional right to disclosure of the information in order to make full answer and defence in accordance with the standard in *R v Stinchcombe*, [1991] 3 SCR 326. That standard stipulates that the Crown must disclose all relevant, non-privileged material in its possession or control, whether inculpatory or exculpatory (see *R v Gubbins*, 2018 SCC 44 at para 18). Relevant material is that which could reasonably be used by the defence in meeting the case for the Crown, advancing a defence or otherwise making a decision which could have affected the conduct of the defence (see *Dixon* at paras 20, 22). This is referred to as first party disclosure.

[43] Generally, there is no duty on the Crown to disclose information that is not in its possession but, rather, in the possession of third parties, including other Crown entities (see *R v McNeil*, 2009 SCC 3 at paras 13, 22; and *R v Quesnelle*, 2014 SCC 46 at para 11). Disclosure of information in the possession of third parties is referred to as third party disclosure and is subject to a different regime than first party disclosure. The process of obtaining third party disclosure is referred to as the *O'Connor* regime (see *R v O'Connor*, [1995] 4 SCR 411).

[44] While there is generally no duty to disclose third party information, the Crown who is put on notice of the existence of relevant information has an obligation to inquire further and obtain the information if it is reasonably feasible to do so, unless the notice appears unfounded. Consideration of relevant third

party information enables the Crown to fully assess the merits of the case and fulfill its duty as an officer of the court (see *McNeil* at para 49). Where a review of the information demonstrates that it is obviously relevant, that information should form part of the first party disclosure (see *McNeil* at para 59).

[45] Generally, information that is available to the public does not constitute information required to be disclosed pursuant to the *Stinchcombe* standard (see *R v Davey*, 2012 SCC 75 at para 46; and *R v Michelle*, 2015 MBCA 6 at para 12).

[46] If there does exist undisclosed information that satisfies the *Stinchcombe* standard, the accused must establish, on a balance of probabilities, that the failure to disclose the information constituted a violation of their right to make full answer and defence pursuant to section 7 of the *Canadian Charter of Rights and Freedoms* (the *Charter*) (see *Dixon* at para 31). To establish this, the accused must demonstrate that there is a "reasonable possibility the non-disclosure affected the outcome at trial or the overall fairness of the trial process" (*Dixon* at para 34).

[47] In *Taillefer*, LeBel J, writing on behalf of the Court, explained (at para 78):

> . . . [T]he burden on the party seeking to have fresh evidence admitted is more stringent under the *Palmer* test than under the *Dixon* test. In the latter case, this Court held that an accused seeking to have fresh evidence admitted by alleging a breach of his or her right to disclosure must demonstrate that there is a reasonable possibility the non-disclosure affected the outcome at trial or the overall fairness of the trial process (*Dixon*, *supra*, at para. 34). The mere existence of such a possibility constitutes an infringement of the right to make full answer and defence. In *Palmer*, this Court required, instead, that the new evidence "must

> be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result" (*Palmer*, *supra*, p. 775 (emphasis added)). The English version of McIntyre J.'s reasons uses words that denote an even more exacting standard than the French version, which states that the fresh evidence "*doit être telle que si l'on y ajoute foi, on puisse raisonnablement penser qu'avec les autres éléments de preuve produits au procès, elle aurait influé sur le résultat*". That test is more exacting than the mere reasonable possibility test: it assigns the applicant the burden of showing that the failure to disclose probably affected the result of the trial. Having regard to the difficulties involved in reconstituting a trial, this Court did not wish to impose such a high burden on an accused seeking to have fresh evidence admitted, where the accused was deprived of that evidence because of a breach by the Crown of its duty to disclose.
>
> [emphasis in original]

[48] If a breach of section 7 is found, the degree to which an accused's rights were impaired becomes important in the determination of remedy. If the accused seeks a stay of proceedings, they must demonstrate that there was irreparable damage to the right to make full answer and defence. If a new trial is sought, they must show that the failure to disclose affected either the outcome of the trial or the overall fairness of the trial process (see *Dixon* at para 35).

Question 1—"Would the new information concerning the conversations between Mr. Ronald Simpson and Mr. Brian Savage be admissible as fresh evidence on an appeal to this Honourable Court?"

Background

[49] The facts giving rise to this question occurred after Ross had been convicted and his appeal had been dismissed by this Court. They concern

Ross's conviction on count 7 relating to Simpson's purchase of the additional units in PLP worth $50,000 (the additional units).

[50] As earlier indicated, at the trial, Simpson testified that when he had mentioned to Ross that he was interested in purchasing the additional units in February 1991, Ross told him that "a lady up north" wished to sell hers. Jensen argued that Ross lied when he made the above statement to Simpson in order to facilitate the purchase of the unfunded units owned by Gray's wife for $15,000 and the purchase of Ross's wife's unfunded unit for $35,000.

[51] In a detailed memo given to his counsel, Timothy Killeen (Killeen), early in the proceedings (before the preliminary hearing), Ross indicated that he and Simpson had discussed two different women as possible vendors of units: Lena Lumb (Lumb) and Marjorie Ford (Ford). Both were investors, but Lumb was invested in 261, not PLP. In that memo, Ross also stated that Lumb was the "lady up north" and that it was his belief that Ford might have been getting pressure from her family to sell. Finally, he said that when he took Simpson's cheque for $50,000, the intention was for 257 to buy the units from Ford and then have 257 issue new units to Simpson. The deal fell through at the last minute when Ford refused to sell. It is for this reason that he said he sold the unfunded units. Ross agreed that he did not tell Simpson about the change in vendors until the next time that he saw him after the sale. At that time, he said he also told Simpson that he had purchased units from Gray's wife and Ross's wife.

[52] At trial, Killeen elicited the following evidence when cross-examining Simpson regarding the issue:

. . .

Q Do you remember that he told you that he thought that there might be a lady who wanted to sell her units?

A Yes.

Q And is it true, as well, that what he said was that he would have to check, but that he would know within a month or so if she was going to do that?

A Yes, I, I would concede that he had to check to make sure, but there was one lady, he said, had requested to get, if she could get some money out, she needed it for this apartment repairs.

Q Okay. Do you remember him saying something to you about she wanted the money out because of some pressure for -- excuse me, some pressure from some relatives who wanted some money in relation to an apartment up north?

A There was nothing about relatives, that I recall; it was just that she had encountered some unexpected repairs that were necessary to her apartment and didn't have the money to do it with.

. . .

[emphasis added]

[53] In his closing submissions at trial, Killeen argued that Simpson could have been confused when he gave his testimony regarding a "woman up north" and that Simpson's recollection did not constitute proof beyond a reasonable doubt on this point. He argued that an inference could be drawn that Ford owned the units that were being discussed for purchase by Simpson. He also argued that there was no misrepresentation because Simpson got what he had bargained for: two units for $50,000.

[54] The trial judge rejected the above arguments in convicting Ross.

[55] In dismissing Ross's appeal in *Ross 1996*, this Court considered, but rejected, the argument that the conviction on count 7 was wholly based on Ross's failure to disclose to Simpson who he was purchasing the additional units from or that they were unfunded. It held that the conviction was also founded on Ross's non-disclosure to Simpson regarding the agreement between PLP and 261, the shortage of funds to build and equip the restaurant, the CIBC loan and the bank holding security on the assets of 261 (see para 28).

[56] Ross did not seek leave to appeal to the Supreme Court after *Ross 1996*.

The New Information—the Savage Interviews

[57] In 2000, Ross hired Savage, a private investigator, to conduct an investigation into certain aspects of his case. Ross and Savage concocted "scripts" which involved Savage representing himself as an investigator who was giving advice to a friend who might have been conned by Gray and Knight. Savage had two conversations with Simpson. During the second conversation, Savage mentioned that he had seen that Ross had offered to buy Ford's units. Simpson stated that Ross told him that he was selling him Ford's units and that "something had come up with her family" and that "[s]he had to help some of her family out or something like that" (the Savage information).

Ross's Fresh Evidence Motion Relating to Question 1

[58] In addition to arguing for the admission of the Savage information, Ross asks for the admission of three other items consisting of:

- the affidavit of Daniel Lett (Lett) sworn March 16, 2015. In that affidavit, Lett provides transcripts of interviews that he had with Simpson, wherein Simpson stated that Ross told him that the $50,000 purchase of additional units was to be from Ford;

- a copy of the transcript of an examination for discovery of Simpson conducted on February 2, 1995, relating to the investors' civil suit (examination transcript) wherein he agreed that Ross did not convince him to make the $50,000 purchase, contrary to the statement of claim that had been filed which stated that Ross had recommended and encouraged him to do so; and

- a copy of the transcript of a conversation that Simpson had with an MSC investigator, Marc Boily, on February 10, 1995, wherein Simpson claims that Ross altered a letter to the bankruptcy trustee (the Boily interview).

Positions of the Parties

[59] Both parties argued the admissibility of the Savage information based on the *Palmer* criteria.

[60] Ross maintains that the Crown's case regarding the charge involving Simpson "rested solely on the uncorroborated evidence" of Simpson and his story about the "lady up north". He states that the Crown relied on this evidence to argue that he dishonestly concealed the identities of the vendors of the additional units by creating a fictitious person who was willing to sell her units.

[61] Ross states that his position at trial was that Simpson's recollection was a confused combination of what he had heard from Ross about Ford and Lumb and their willingness to sell their units. He reasons that the comments made by Simpson in the second Savage interview would have reinforced that Simpson was confused or untruthful and that Ross did not concoct some "lady up north" story for the purpose of selling Simpson the additional units.

[62] He argues that the statement to Savage is reinforced by Simpson's statements to Lett to the same effect.

[63] Regarding the statements found in the examination for discovery, Ross argues that he could have cross-examined Simpson on the issue and that would have provided evidence regarding Simpson's credibility.

[64] Regarding the fresh evidence concerning the Boily interview, Ross argues that this evidence was subject to the Crown's duty to disclose on the *Stinchcombe* standard, thereby engaging the *Dixon-Taillefer* test.

[65] The Crown argues that the information provided to Savage and Lett do not meet the second, third and fourth criteria in *Palmer*.

[66] The Crown further argues that, being a party to the investors' civil suit, Ross was entitled to obtain the transcript of the examination for discovery, whereas the Crown was not a party and not automatically entitled to the information.

[67] Regarding the Boily interview, the Crown argues that it is outside the scope of this Reference.

[68] The arguments raised by the parties with respect to the Boily interview are similar to those raised in Question 2 and Question 3 in that they are subject to the *Dixon-Taillefer* test and will accordingly be considered in my analysis of those questions.

Discussion

The Savage and Lett Conversations

[69] As earlier indicated, the *Palmer* criteria involve a consideration of due diligence, relevancy, credibility and impact on the result.

[70] The Crown does not argue that the due diligence consideration has not been met, although it observes that Ford's name is not mentioned in the cross-examination of Simpson at the trial.

[71] Regarding relevance of the Savage information and the conversations with Lett, as the Crown points out, the significance of the evidence is not whether Simpson thought that he was purchasing the additional units from Lumb or Ford but, rather, that Ross caused Simpson to believe that he was purchasing units from "someone who had actually invested cash into the project," but sold him the unfunded units that belonged to Gray's wife and Ross's wife. Simpson testified that had he known this fact, he would not have purchased the additional units. In this regard, Ross admitted that he did not tell Simpson whose shares he had purchased until sometime after the transaction was completed.

[72] In addition, I have concerns about the circumstances under which the statements to Savage and Lett were made. The statement to Savage came

about in response to a deception. It was not made until 2001, almost six years after the trial and 10 years after the offence had occurred.

[73] The statements to Lett were made in 2004, nine years after the trial and almost 14 years after the offence had occurred. They were made in response to leading questions. Simpson indicated that he could not remember all of the details surrounding the event and had to rely on notes that his wife had made at the time. These concerns lead me to question the reliability of the statements.

[74] Aside from the above, the most compelling reason not to admit the statements that Simpson made to Savage and Lett is that they would not have affected the result. In *Ross 1996*, this Court explained that the conviction resulting from the sale of the additional units to Simpson was also supported by the evidence that Ross did not disclose (see para 28):

- the agreement between PLP and 261;
- the cash shortfall of PLP to finish constructing and equipping the restaurant;
- the CIBC loan to 261 for $400,000; and
- the bank holding security on the assets of 261.

[75] In the result, I would not admit the statements made to Savage and would therefore answer Question 1 in the negative. In addition, I would not admit the statements made to Lett as requested in the fresh evidence motion.

The Examination for Discovery

[76] In my view, the admissibility of this information can be dealt with summarily. Ross argues that, if he had the examination transcript, he could have cross-examined Simpson on an alleged contradiction that Simpson had made in the statement of claim, which Simpson and the other investors had filed against him.

[77] It is important to note that the statement of claim had been filed as an exhibit at the trial. When testifying at the trial, Simpson agreed that he was the one who initiated the conversation regarding the purchase of the additional units. He was not cross-examined on the alleged contradiction in the statement of claim at that time, presumably as part of Ross's trial tactic not to press the investor witnesses.

[78] In the examination for discovery, Simpson confirmed that he was the one who initiated the conversation regarding the purchase of the additional units. Thus, the request for admission is for the same evidence as was testified to at trial.

[79] The examination for discovery occurred well before the trial. Ross could have easily obtained a transcript of it. Moreover, contrary to his assertion, the examination transcript in the civil suit against him, Knight and Gray, was not information which was disclosable by the Crown; it was not in the possession and control of the Crown.

[80] However, even if Ross had been in possession of the examination transcript, I fail to see the relevance of the alleged contradiction in light of all of the circumstances. Legal counsel, not Simpson, prepared the pleadings and

there is no evidence that Simpson ever stated that he was induced by Ross to enquire about the purchase of the additional units.

[81] In the end, I am of the view that the examination for discovery would not have changed the result of the trial and I would not admit it.

Question 2—"Would the new information concerning the non-disclosure of Settlement Agreements executed by William Knight and Sheldon Gray on April 18, 1995, which were presented to the Manitoba Securities Commission on that date, be admissible as fresh evidence on an appeal to this Honourable Court?"

Question 3—"Would the new information concerning the non-disclosure of the Assignment Agreement whereby William Knight and Sheldon Gray had assigned their interest in civil actions that they had instituted against Deveryn Ross to the investors of Perkins Limited Partnership be admissible as fresh evidence on an appeal to this Honourable Court? The new information in the Assignment Agreement consisted of the following: . . ." (provided later in these reasons)

Factual Background

[82] As earlier stated, the MSC disciplinary hearing into the conduct of Knight and Gray was scheduled for April 18, 1995, the same date as Ross's trial. From the time of Ross's preliminary hearing through to his trial, the disciplinary hearing was widely publicized in the local newspaper. Often the news articles referred to the criminal proceedings against Ross and were printed on the same page as the articles relating to the disciplinary hearing.

[83] The settlement agreements were fully discussed at the disciplinary hearing and the assignment agreement was also explained by counsel to the investors at the hearing.

[84] While the content of some of the settlement agreements was reported in the local newspaper, the actual settlement agreements were not disclosed to Ross until October 25, 1995, after he had been convicted, but before his appeal hearing. They had been provided to Ross by the MSC in response to a request made by him. As well, the contact information for the court reporter was provided to Ross in the event that he wanted to obtain a transcript of the disciplinary hearing.

[85] In their affidavits, Killeen and Ross state that, upon receipt of the settlement agreements, Killeen immediately contacted Jensen to question him about them and that Jensen responded by saying that he had never heard of them. Jensen's affidavit indicates that he does not recall learning about the settlement agreements until November 2002. In any event, I am of the view that there is no serious argument to suggest that Jensen was aware of the content of the settlement agreements at the time of the trial, nor anytime after the trial, until at least when Ross obtained them in October 1995.

[86] In the settlement agreements, Gray and Knight acknowledge that they acted improperly and in contravention of the *SA* in their dealings with the investors. Knight's registration was suspended for three years.

[87] As part of his settlement agreement, Gray's registration was suspended for six months and he agreed to pay the investors $300,000 no later than October 31, 1995, with further payments totalling $200,000 due in June 1999.

[88] While the settlement agreement was for Gray to pay $500,000 to the investors, counsel for Gray explained to the disciplinary panel hearing the matter that Knight was contributing by deferring all of his entitlements to

future income from Gray's company for five years and that Knight's wife had agreed to forgo four years of future payments.

[89] In addition to the settlement agreements, the investors were in the process of negotiating a settlement of the civil suit (the civil settlement) that they had filed against Ross, Knight and Gray. At the MSC disciplinary hearing on April 18, 1995, after the settlement agreements had been reviewed by counsel for the MSC, counsel for Gray, in his submissions, outlined the proposed terms of the civil settlement. The first two terms of the civil settlement included the payment of $500,000, as described above. The third element of the civil settlement was the assignment to the investors by Gray and Knight of their respective rights of action against Ross for providing negligent legal advice. The relevant terms of the assignment agreement, as stated in the Reference, are as follows:

> . . .
> (a) The investors were to receive from Knight and Gray cash payments over time totalling $500,000.00. These cash payments consisted of an initial payment of $300,000.00 with $50,000.00 being paid per year for four years commencing June, 1996.
>
> (b) William Knight, Sheldon Gray and W.G. Knight and Associates Inc. agreed to a consent judgment in favour of the investors in the amount of $1 million. This judgment was intended to ensure Knight's and Gray's continued compliance with the terms of the Assignment Deal.
>
> (c) Sheldon Gray, William Knight and W.G. Knight and Associates agreed to assign to the investors their right of action against Deveryn Ross for negligent legal advice in the lawsuit that they instituted against him to a maximum of $500,000.00.

> (d) The investors undertook not to enforce their $1 million judgment against Knight, Gray and W.G. Knight and Associates Inc. provided the cash payments described above were made and undertook to file a Notice of Satisfaction of this judgment when the assigned civil lawsuit against Deveryn Ross was concluded.
>
> (e) Knight and Gray were to fully cooperate with Douglas Bedford, the investors' counsel, in attempting to obtain recovery against Deveryn Ross through the professional misconduct suits filed against him on behalf of Knight and Gray.
>
> . . .

The Estoppel Argument

[90] As a preliminary matter, Ross argues that this Court is estopped from determining Question 2 and Question 3. While this argument can be summarily dismissed, some explanation of the history of the Reference is required.

[91] Ross filed his application for ministerial review pursuant to section 696.1 of the *Code* on May 26, 2004. In August 2004, the Minister appointed Alexander Pringle (Pringle) to act as his agent to investigate Ross's application.

[92] Between 2004 and 2006, Pringle conducted extensive investigations culminating in his final report that was delivered to the Minister on June 22, 2009 (the Pringle report). On September 29, 2010, the Minister dismissed Ross's application.

[93] Ross commenced an application for judicial review of the Minister's decision in the Federal Court. A redacted version of the Pringle report was

filed as part of the application. The Minister and Ross were the only parties to that proceeding. The Attorney General of Manitoba was not a party to the application.

[94] On April 7, 2014, Mosley J of the Federal Court allowed the application and remitted the matter to the Minister for further reconsideration (see *Ross v Canada (Justice)*, 2014 FC 338) (*Ross 2014*).

[95] In his reasons, Mosley J noted that the Pringle report concluded that the settlement agreements and other alleged non-disclosed evidence were subject to *Stinchcombe* disclosure requirements by the Crown and an application of the *Dixon-Taillefer* test led him to the conclusion that the defence would have been conducted differently. In his consideration of whether the Minister erred in his application of the test for ministerial review, Mosley J stated that, to meet the standard of reasonableness, the Minister was under a heightened duty to explain his reasons for his disagreement with the conclusion in the Pringle report that the defence would have been conducted differently (see para 56). In his view, the Minister failed to do so. He found that the Minister's exercise of discretion did not conform to the principles in *Dixon-Taillefer* in relation to the undisclosed evidence and that he had, therefore, not applied the correct legal test (see para 63). For these reasons, it did not meet the standard of reasonableness (see para 80).

[96] After reconsideration, the Minister referred the questions that are the subject of this Reference to this Court.

[97] The pre-conditions for estoppel require that: (1) the issues be the same as were decided in the previous proceeding, (2) the prior judicial

decision had to have been final, and (3) the parties to both proceedings must be the same (see *R v Mahalingan*, 2008 SCC 63 at paras 52-56).

[98] Regarding the first pre-condition, the issue in this case is the admissibility of the new information contained in Question 2 and Question 3 on an appeal. That issue was not before Mosley J and he did not decide it.

[99] In my view, the above is determinative of the issue. I would, however, also add that Mosley J's decision was not final and there was no mutuality of parties as the Attorney General of Manitoba was not a party to Ross's application in the Federal Court. Therefore, all three pre-conditions are not met.

Positions of the Parties on Question 2 and Question 3

Ross

[100] Ross argues that the new information in Question 2 and Question 3 constitutes undisclosed information that the Crown had an obligation to disclose. Relying on *Gubbins*, he argues that, based on the nature of the relationship between the Crown and the police who investigated the charges and the investigators and staff of the MSC and their concurrent investigations, relevant information obtained by the MSC was subject to the *Stinchcombe* standard of disclosure by the Crown.

[101] He states that, if he had been in possession of the information in the settlement agreements and the assignment agreement, it is reasonably possible that he would have conducted his defence in a different manner by cross-examining the witnesses more forcefully and, likely, testifying.

[102] Both Ross and Killeen swear in their affidavits that the foundation for Ross's defence at trial rested in discrediting the evidence of Gray and Knight. In order to do this, they strategized that it was important to portray each of the investors as reliable witnesses whose evidence could be believed when it was at odds with the testimony of Gray or Knight, despite the fact that Ross disagreed with a significant amount of the evidence given by the investors. He describes this strategy as a "tactical imperative". As a result, he says a "very delicate" approach was taken in the cross-examination of each of the PLP investors.

[103] In addition, Ross states that it is likely that he would have testified at his trial had he known about the undisclosed information. He states that his decision not to testify was based on the concern that his evidence would be contradicted by a number of other Crown witnesses and that he would be disbelieved on the basis that he would be asking the trial judge to conclude that so many witnesses were either mistaken or lying regarding material points of their evidence.

[104] Based on the above, he argues that the standard for admission in accordance with the *Dixon-Taillefer* test has been met regarding the settlement agreements and the assignment agreement.

The Crown

[105] The Crown argues that the settlement agreements and the assignment agreement were not subject to the *Stinchcombe* standard of disclosure. Relying on *Davey*, it argues that each of those agreements constituted public information that was easily obtainable and not subject to Crown disclosure rules. It argues that both Ross and Killeen were aware that

the MSC disciplinary hearings for Gray and Knight were taking place; Killeen admitted in cross-examination that he knew or ought to have known that they were public.

[106] The Crown maintains that the evidentiary predicate of the *Dixon-Taillefer* principle is proof of the Crown's failure to disclose information that it had a duty to disclose. It states that Ross agrees that, if there was no duty to disclose, the *Dixon-Taillefer* line of cases would not apply. The Crown argues that should this Court find that it had no duty to disclose the documents on the basis that they were public documents, that is dispositive of the admissibility of the evidence contained in Question 2 and Question 3.

[107] In any event, the Crown argues that it did make full disclosure of its case, in compliance with the principles in *Stinchcombe*. It argues that it did this by conducting a full preliminary inquiry and by providing full access to the police investigative files, including having the police files brought to the courtroom for the trial in the event that counsel wished to inspect them.

[108] Next, the Crown argues that the information contained in Question 2 and Question 3 were documents in the possession of the MSC and not Manitoba Justice. It disputes that the nature of its relationship with the MSC regarding the investigation of Ross was such that it had a duty to disclose. Regarding the information held by the MSC, it argues that any disclosure obligation to make inquiries of another government agency is predicated on a request or demand from the defence, which did not occur in this case.

[109] Finally, the Crown disputes Ross's assertion that he would have conducted the trial differently if he had the information contained in Question 2 and Question 3. This is because Ross did have the settlement

agreements more than six weeks prior to his appeal and made a tactical decision not to bring a motion for fresh evidence at that hearing.

Were the Settlement Agreements and the Assignment Agreement Information Subject to a Public Hearing and in the Public Domain?

[110] The issue of whether documents that are in the public domain are subject to Crown disclosure is one which has not been the subject of much jurisprudence. The concept was considered in passing in the Supreme Court case of *Davey*. In that case, the Court considered whether there was a duty to disclose the personal opinions of police officers that were sought by the Crown regarding the suitability of prospective jurors. In reaching her conclusion regarding the nature of information that had to be disclosed, Karakatsanis J, writing on behalf of the Court, stated (at para 46):

> It seems to me that general impressions, personal or public knowledge in the community, rumours or hunches, need not be disclosed: see *Yumnu* [*R v Yumnu*, 2012 SCC 73], at para. 64. To the extent that the underlying information is readily ascertainable by members of the community, it is not linked to the prosecution's role as an agent of the state, or to the Crown's disproportionate access to resources, and there is no onus on the Crown to bring forward information that is easily obtainable elsewhere. The same logic applies to information about a prospective juror readily available on the internet. Further, the subjective feelings, hunches, or suspicions of members of the prosecution's team with regard to prospective jurors do not engage "the overriding concern that failure to disclose impedes the ability of the accused to make full answer and defence": *Stinchcombe*, at p. 336. Thus, for instance, the Crown need not disclose observations regarding demeanour in the courtroom, or views based upon general experience and judgment, or upon public information. . . .
>
> [emphasis added]

[111] Despite Ross's assertions to the contrary, all evidence points to the fact that the MSC disciplinary hearing where the settlement agreements and the assignment agreement were discussed was a public hearing. This is supported by section 5(1)(h) of the *SA*, which provides that, save for certain circumstances which did not exist in this case, hearings held by the MSC "shall be open to the public". The actual notice of the hearing itself indicated that it would be a public hearing. The media was advised by the MSC that the hearing was to be a public hearing and was reported as such by the local newspaper on a number of occasions. The transcript of the hearing evidences that the hearing was intended to be public. The results of the hearing were published in the local newspaper.

[112] However, the fact that information is public does not necessarily end the matter. In my view, a contextual analysis is required to determine whether public information is subject to Crown disclosure.

[113] For example, in *Michelle*, this Court held that the Crown did not breach its duty to disclose an inconsistency in the evidence given by the witness in the accused's trial versus the evidence given by that witness in the trial of the co-accused on the basis that the evidence referred to was contained in the written reasons of the trial judge who presided over the co-accused's trial and had been reported in the Canadian Legal Information Institute (online: *CanLII* <www.canlii.org>), a free legal case reporter and research website (see para 12).

[114] However, in *R v Upshaw*, 2006 SKCA 124, the Court held that a transcript of the testimony of a witness in the accused's trial who had earlier testified in a trial for a co-accused was subject to the duty to disclose by the

Crown. While the issue of whether the document was public was not raised, the Court easily dismissed the Crown's argument that counsel for the accused should have had deemed knowledge of the transcript given that counsel for the co-accused belonged to the same law firm as counsel for the accused.

[115] In my view, factors such as the extent that the underlying information is readily ascertainable by members of the community, whether the information is linked to the prosecution's role as an agent of the state or if it is linked to the Crown's disproportionate access to resources, may also be relevant to the determination of whether certain public information is subject to disclosure on the *Stinchcombe* standard.

[116] In this case, Ross argues that the relationship between the MSC and the Crown gave rise to a duty to disclose, or at the least, a duty to inquire. Thus, I next examine the extent to which the settlement agreements and the assignment agreement were linked to the prosecution's role as an agent of the state.

Was the Relationship Between the MSC and the Crown Such that it Gave Rise to a Duty to Disclose?

[117] In *Gubbins*, Rowe J, writing for the majority (not dissented to on this issue) reviewed the law of first party disclosure (*Stinchcombe*), third party disclosure (including police entities) and the Crown's duty to inquire pursuant to *McNeil*, along with the obligation on the police to disclose (see paras 1-21).

[118] Rowe J then explained how the court is to determine which disclosure regime is applicable. The court should consider whether the information sought is in the possession or control of the prosecuting Crown

and whether the nature of the information sought is "such that the police or another Crown entity in possession or control of the information ought to have supplied it to the prosecuting Crown" (at para 33).

[119] Regarding first party disclosure, a review of Jensen's affidavit sworn September 22, 2021, demonstrates that the Crown offered disclosure of the entire police file. The only issue here is disclosure of the settlement agreements and the assignment agreement, documents that were in the possession and control of the MSC.

[120] The information charging Ross with fraud was sworn on January 27, 1994. On that same day, the MSC laid charges against Ross, Knight and Gray under the *SA*.

[121] Prior to and during the time that the criminal charges were proceeding against Ross, the Crown was aware of and relied on some of the documents obtained by the MSC in its investigation. It disclosed those documents to Ross. However, Jensen's 2021 affidavit demonstrates that the Crown was not in possession of all of the documents and statements in the possession of the MSC. It also demonstrates that Killeen was obtaining disclosure from the MSC regarding its investigation and laying of charges under the *SA*, independent of the Crown. For example, in his affidavit, Jensen states that, at the preliminary hearing and at the trial, Killeen used MSC statements that Jensen was not aware of, when cross-examining the Crown's witnesses.

[122] In addition, attached to and reviewed in Jensen's 2021 affidavit is a significant amount of correspondence between Killeen and the MSC regarding disclosure. Jensen was not copied on any of this correspondence.

This correspondence confirms that Killeen was requesting and receiving disclosure from the MSC regarding its investigation into the matter throughout the period of January 27, 1994, when the criminal charges were laid against Ross, until the conclusion of the trial of those charges in May 1995. Letters written during that time also indicate that Killeen advised the MSC that he was reviewing "the particulars with respect to the [*SA*] charges to determine what position" Ross would take.

[123] The preliminary hearing into Ross's criminal charges proceeded between September 12-28, 1994. On September 12, 1994, Gray and Knight pleaded guilty to charges under the *SA*. Killeen was aware of the guilty pleas as he wrote about them in a letter to counsel for the MSC on September 21, 1994. Also on that date, Killeen cross-examined Gray during the preliminary inquiry about his *SA* charges, as well as the upcoming disciplinary hearing.

[124] During the trial on May 3, 1995, Jensen asked Gray in direct examination what had happened at the disciplinary hearing. Gray responded by describing the penalty he had received and the conditions that he had to meet. In cross-examination, Killeen briefly asked Gray about the terms of his and Knight's suspensions, but did not ask any further details.

[125] Jensen asserts that Killeen never asked him for any information or disclosure pertaining to the disciplinary hearings held on April 18, 1995. I would accept this statement given the history of the file, the documents provided and the distinct disclosure that Killeen had from Jensen on the criminal charges and from the MSC regarding the charges under the *SA*.

[126] I accept that the settlement agreements and the assignment agreement were relevant and could have been used by Killeen in cross-

examining the witnesses. However, in these unique circumstances, where (a) Killeen was well-positioned to obtain disclosure from the MSC regarding its disciplinary hearing against Gray and Ross, (b) he was in fact receiving disclosure regarding the *SA* matters from the MSC and communicating directly with them regarding disclosure issues, and (c) the disclosure at issue was the subject of a full, public hearing of which Ross and Killeen were aware, I would not find that a *McNeil* duty to inquire arose independently with respect to the Crown.

[127] In conclusion, the first part of the *Dixon-Taillefer* test has not been met in that the Crown was not obligated to disclose the information (see *Taillefer* at para 78).

[128] In addition, my above observations apply as well to the statement that Simpson made in the Boily interview referred to in Ross's motion for fresh evidence related to Question 1. It was not evidence that was subject to disclosure by the Crown on the *Stinchcombe* standard.

[129] Based on the above, I need not consider whether the failure to disclose the information impacted either the outcome or the overall fairness of the trial. Nonetheless, in the event that I am wrong and the settlement agreements and the assignment agreement were subject to disclosure by the Crown, I next consider whether Ross has demonstrated that his right to make full answer and defence was infringed.

Was Ross's Right to Full Answer and Defence Infringed?

[130] In *Dixon*, the Supreme Court held that not every breach of the duty to disclose will impair the right to make full answer and defence. In order to

demonstrate such a violation, an accused must demonstrate that there was a reasonable possibility that the failure to disclose affected the outcome of the trial or the overall trial fairness (see para 34; and *Taillefer* at paras 71, 78).

[131] The Court described the two-step test for determining whether, on a balance of probabilities, the accused has demonstrated that their right to full answer and defence was impaired as a result of the failure to disclose. First, the court must examine the undisclosed information to determine the "impact it might have had on the decision to convict" (at para 36). If the undisclosed information itself does not affect the reliability of the verdict, the second stage of the test involves examining whether there was a reasonable possibility that the undisclosed information had an effect on the fairness of the trial process. As further explained by the Court (*ibid*):

> . . . 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.

[132] In this case, the first stage of the test is easily discernable from the record. At trial, the core of Ross's argument was that Gray and Knight were incredible witnesses and were responsible for misleading the investors and that it was reasonable to infer that they had also misled Ross. In his reasons convicting Ross, the trial judge referred extensively to the documentary evidence regarding the file. He found that Knight and Gray did not explain the concept of the investment to the investors or that some of their investment

would be used to purchase the unfunded units. He referred to the Crown's argument that Ross had insulated himself from Gray and Knight in order to avoid convictions on the first six fraud charges involving the lack of disclosure of the unfunded units to the investors. He agreed that, on the evidence, Ross was "indeed insulated from the broker[s]."

[133] Later, in an application for mistrial made by Ross, Killeen argued that Ross's right to a fair trial was infringed on the basis that Gray and Knight provided untruthful evidence. In response, the trial judge indicated that he did not rely on the evidence of Gray and Knight in entering the convictions. He noted that he had acquitted Ross on the first six counts as he found that it was Gray and Knight who were directly implicated in those counts. He stated that he relied on the evidence of the investors and the documentary evidence in convicting Ross. Thus, there is no reasonable possibility that the admissions that Gray and Knight made in the settlement agreements or the contents of the assignment agreement would have affected the reliability of the conviction.

[134] Regarding the assignment agreement, cross-examination of the investors in a more probing manner or questioning their motivation to testify based on its contents would not have changed the finding that Ross did not tell the investors about the agreement between PLP, 261 and 257 and that 261 was borrowing money to fund the construction of the restaurant.

[135] Many of the investors testified at the preliminary inquiry prior to the existence of the assignment agreement. Regarding any financial motive resulting from the assignment agreement, the investors had already filed their lawsuit against Ross. Furthermore, Ross himself does not allege that he told any of the investors about the creation of 261, the shortfall of funds to

construct the restaurant or the CIBC loan. Thus, it is not reasonably possible that cross-examination regarding the assignment agreement and the investors' financial motivation in testifying would have reasonably affected the result of the trial.

[136] In summary, the trial judge based the convictions on transactions that Ross caused to happen after the shortfall was known to him. Those transactions were fully supported by the documentary evidence created by Ross and filed at the trial. He found that Ross did not advise the investors of the funding shortfall at the time he made those transactions and that he did not tell Simpson about the shortfall at the time that Simpson made his additional $50,000 purchase.

[137] In my view, Ross has not demonstrated a reasonable possibility that the failure to disclose the settlement agreements and the assignment agreement affected the reliability of the verdicts.

[138] Regarding trial fairness, despite the affidavits of Killeen and Ross indicating that a different approach would have been taken with the investors, including Simpson, I am not convinced that there is a reasonable possibility that Ross's defence would have been conducted differently had he been in possession of the settlement agreements and the assignment agreement. In my view, Ross's argument is unpersuasive for two reasons.

[139] First, Ross received copies of the settlement agreements from counsel for the MSC by way of a letter dated October 25, 1995, which also included the contact information of the court reporter who transcribed the April 18, 1995 MSC disciplinary hearing where the settlement agreements and the assignment agreement were discussed. At no time prior to October

did Ross or Killeen request the settlement agreements despite being aware of them as early as April 19, 1995, nor did they request a transcript of the proceeding which described the assignment agreement in detail.

[140] In addition, counsel for the investors made a submission at Ross's sentencing hearing requesting a compensation order pursuant to what was then section 725 of the *Code*. In that submission, counsel made reference to the civil settlement, noting that it was subject to many conditions, none of which had yet been fulfilled and that the civil settlement could still collapse. The assignment agreement was part of that civil settlement.

[141] The dates scheduled for the hearing of Ross's appeal were December 14 and 15, 1995, meaning that he had disclosure of the settlement agreements a full seven weeks prior to his appeal hearing.

[142] Despite being in possession of the information, a decision was made to not raise the issue at Ross's appeal or make a motion for fresh evidence at that hearing.

[143] In *Dixon*, the Court explained the significance of the responsibility of the defence to exercise due diligence in pursuing disclosure and the consequences of tactical decisions not to pursue it, stating that a lack of due diligence is a significant factor in the determination of whether the non-disclosure affected the trial process. It stated (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. This was aptly stated by the

British Columbia Court of Appeal in *R. v. Bramwell* (1996), 106 C.C.C. (3d) 365 (aff'd [1996] 3 S.C.R. 1126), at p. 374:

> . . . the disclosure process is one which engages both the Crown and the defence. It is not one in which defence counsel has no role to play except as passive receiver of information. The goal of the disclosure process is to ensure that the accused is not denied a fair trial. To that end, Crown counsel must disclose everything in its possession which is not clearly irrelevant to the defence, but the defence must also play its part by diligently pursuing disclosure from Crown counsel in a timely manner. Further, where, as here, defence counsel makes a tactical decision not to pursue disclosure of certain documents, the court will generally be unsympathetic to a plea that full disclosure of those documents was not made.

. . .

[emphasis added]

[144] In his affidavit sworn February 27, 2004, Killeen explained the decision not to argue the lack of disclosure or pursue a fresh evidence motion in the Court of Appeal as follows:

> . . . I regarded a number of the legal grounds of appeal to be advanced on behalf of Mr. Ross as very strong, in relation to the convictions on counts 7 and 8. The convictions had been personally devastating for Mr. Ross, depriving him of his ability to practice law, and they had received wide public and media attention in Brandon. In those circumstances, I thought it best to proceed with the appeal rather than delay it further in order to introduce the Settlement Agreements as fresh evidence. Any attempt to do so might have led to many months of further delay, with the need for cross-examination of Knight and Gray and, perhaps, the need for my own affidavit which would have had the effect of removing me as counsel for Mr. Ross.

[145] The ability of the defence to meet the *Palmer* test for fresh evidence was not referred to in Ross's initial submissions to the Minister nor in the above-mentioned affidavit.

[146] In a later affidavit sworn June 11, 2015, Killeen stated that he did not think that Ross could meet the *Palmer* test for fresh evidence in light of the fact that when he made a motion for a mistrial after Ross had been convicted, the trial judge stated that he did not rely on the evidence of Knight and Gray for the convictions on counts 7 and 8. For this reason, Killeen reasoned that the settlement agreements and the assignment agreement would not have affected the verdict at trial.

[147] In addition, Ross argues that the law changed with *Dixon* in that the issue of trial fairness now becomes engaged where the Crown has failed to disclose relevant information and that trial fairness involves a consideration as to whether he would have conducted his defence differently. He asserts that, at the time of his appeal, the *Palmer* test was the only test applicable to the admission of fresh evidence.

[148] The Crown asserts that the reasons provided for failing to raise the issue at the appeal are inconsistent as between the 2004 and 2015 affidavits provided by Killeen. Nonetheless, it argues that even back in 1995, the *Palmer* test was not the sole basis on which the alleged breach of the Crown's disclosure obligations could predicate a motion for fresh evidence where, even if the fresh evidence might not have affected the verdict at trial, the breach resulted in an unfair trial. I agree.

[149] While *Dixon* had not yet been decided by the Supreme Court at the time, appellate jurisprudence decided prior to Ross's appeal clearly supported

the principle that, where the fresh evidence is related to non-disclosure of relevant information, the *Palmer* test should be modified to include a consideration as to whether the right to a fair trial may have been affected. See *Taillefer* at para 75; *R v Creamer* (1995), 97 CCC (3d) 108 at paras 23, 25 (BC CA); and *R v McKellar*, 1994 CarswellOnt 104 (CA), where the *Palmer* test was not met, but the fresh evidence about incompetence of counsel led to an unfair trial (see para 12).

[150] In my view, the decision not to proceed with a fresh evidence motion was a reasonable tactical decision that was made in light of all of the circumstances known at the time. However, it undermines Ross's argument that, had he been aware of the settlement agreements and the assignment agreement, there is a reasonable possibility that he would have conducted his defence differently.

[151] I also agree with the Crown that disclosure of the settlement agreements and the assignment agreement would not have made any meaningful difference as to how the Crown witnesses would have been cross-examined or whether Ross would have testified.

[152] As earlier indicated, Gray and Knight had nothing to do with the frauds on PLP or Simpson. It was Ross who knew of the shortfall to build and equip the restaurant and he arranged for the CIBC loan without informing the investors. He created 261 expressly for the purpose of obtaining the CIBC loan.

[153] As for Ross's contention that he might have cross-examined the investors more aggressively in order to demonstrate that Gray and Knight told them about the shortfall, the creation of 261 and the CIBC loan, defence had

every opportunity to do so at the trial while maintaining their approach of "going easy" on the investors.

[154] Regarding the assignment agreement and the assertion that the investors could have been cross-examined about their pecuniary interest, that issue could have easily been raised with them despite the lack of the assignment agreement. As earlier stated, the investors had filed a lawsuit against Ross prior to the trial.

[155] As for the Boily interview that is the subject of Question 1, Simpson testified in cross-examination at the trial that he had concerns that the document that he had signed had been altered. That was not new information. Killeen cross-examined Simpson on this point and confirmed Simpson's evidence at the preliminary inquiry that he had signed the letter.

[156] Finally, regarding Ross's allegation that he might have changed his decision not to testify, Ross stated that the decision not to testify was made, in part, because his evidence would be contradicted by a number of witnesses. Further, he said that Killeen told him that "he was concerned the trial judge could disbelieve [his] evidence simply because [he] was asking him to conclude so many witnesses were either mistaken or lying on material points of their evidence." He stated that this is especially true with respect to the evidence provided by Simpson. However, the concern he describes would have been the same regardless of whether he was in possession of the settlement agreements and the assignment agreement. His description of the events would still significantly conflict with Simpson's evidence, as well as that of many of the other witnesses.

[157] In conclusion, it is my view that there is no reasonable possibility that the undisclosed information affected the reliability of the conviction, or the overall fairness of the trial process. Therefore, I would not admit the evidence contained in Question 2 and Question 3 or the Boily interview information referred to in Question 1.

[158] However, in the event that I am wrong and the failure to disclose the information resulted in an unfair trial process, I will next consider whether a remedy should be granted pursuant to section 24(1) of the *Charter*.

Should a Remedy Be Granted Pursuant to Section 24(1) of the Charter?

[159] Ross argues that this Court should vacate the conviction and enter a stay of proceedings as a remedy for the failure to disclose the information that he says resulted in an unfair trial process. He submits that the events that gave rise to the allegations occurred in 1991 (more than 31 years ago) and that many of the witnesses, including Simpson are now deceased. As well, he argues that he has already served his sentence. Alternatively, he asks that a new trial be ordered.

[160] In *Dixon*, the Supreme Court noted that, once an accused establishes an impairment of the right to make full answer and defence, the determination of remedy involves a consideration of the degree of impairment or prejudice (see para 35).

[161] The extraordinary remedy of a stay of proceedings requires that the accused not only establish that the right to make full answer and defence was impaired, but also that there was irreparable prejudice to that right (*ibid*; and *Taillefer* at paras 117-21).

[162] Where a new trial is sought, a weighing and balancing must occur. Furthermore, where the materiality of the undisclosed information is relatively low, a lack of due diligence would be a "very significant factor in deciding whether to order a new trial" (*Dixon* at para 39).

[163] For the reasons that I have already reviewed, the materiality of the settlement agreements and the assignment agreement is low. Balancing that with Ross's knowledge of the agreements and failure to raise them at his appeal, I am not persuaded that either a stay of proceedings or a new trial is an appropriate remedy.

Ross's Motion for Fresh Evidence in Relation to Question 2 and Question 3

[164] Having ruled that the new information contained in the three questions would not be admissible on an appeal, I need not consider Ross's motion for fresh evidence. Nonetheless, I will make a brief comment.

[165] Ross moves to have 72 items admitted, including the information contained in Question 2 and Question 3. Among other things, these items consist of various affidavits, materials found in the MSC file, examinations for discovery of the investors in their civil action against Gray, Knight and Ross, examinations for discovery of two other brokers who worked with Gray and Knight and materials found in the Crown's file.

[166] The main submission of the Crown is that most of the items that Ross asks this Court to admit are beyond the scope of the Reference. In making this argument, the Crown points out that, following the Mosley J decision in *Ross 2014*, the Reference made by the Minister specifically sought this Court's opinion as to whether information contained in Question 1,

Question 2 and Question 3 would be admissible on an appeal. It argues that, at that time, the Minister was fully aware of many of the items that Ross asks be admitted as Ross had earlier asked the Minister to include them in the Reference. The Minister declined the request.

[167] In addition, the Crown argues that there are items of information that were not before the Minister at the time the Reference was made and that those items are beyond the scope of the Reference.

[168] As earlier stated, the Crown brought a motion for directions to this Court regarding the material that Ross had filed for the Reference, claiming that most of the material was outside of the scope of the review. The Court stated that it has the broad discretion to receive evidence, but that the scope of the Reference was limited depending on the admissibility of the information found in the first part of the Reference.

[169] After this Court's decision in *Ross 2017*, Ross applied to the Minister for a "Supplementary Reference" requesting that the Minister refer the items of information not included in the original Reference. He also requested many additional items which he alleged had not been disclosed by the Crown. In a letter dated January 2, 2020, general counsel for the Department of Justice's Criminal Conviction Review Group, writing on behalf of the Minister, declined his request pending the decision of this Reference indicating that, "[i]f necessary, a new application pursuant to [section] 696.1 should be submitted" after the final decision of this Court.

[170] While I have considered many of the items of information that Ross asks to be admitted as fresh evidence, given all of the above, I would dismiss his motion for fresh evidence.

Ross's Motion to Expunge

[171] Prior to this Court hearing the Reference, Ross filed a motion to expunge significant portions of Jensen's 2021 affidavit consisting of 111 paragraphs and 145 exhibits, and 12 paragraphs from his supplementary affidavit also filed in 2021 (collectively, the Jensen affidavits). The parties agreed that the motion could proceed by way of written submissions and that the matter would be dealt with by this Court as part of the Reference.

[172] Ross raises a number of issues in his motion brief regarding the Jensen affidavits. I intend only to briefly deal with some of his more substantive arguments.

[173] First, Ross relies on *Tymkin v Ewatski et al and Gov't of Manitoba*, 2001 MBQB 246, aff'd 2002 MBCA 91, as authority for the assertion that an affidavit cannot contain opinions (unless the deponent is an expert posing an opinion within their area of expertise, conclusions of fact or law, legal argument or irrelevant statements). See also *Manitoba Metis Federation Inc v Brian Pallister et al*, 2019 MBQB 118.

[174] He argues that the Jensen affidavits are replete with inadmissible opinions, legal argument, spin and/or conclusions of fact or law.

[175] The Crown argues that all of the information provided is admissible. It has provided a response to each and every one of the impugned paragraphs and exhibits attached to the Jensen affidavits.

[176] In my view, unlike in cases such as *Tymkin*, a review of each and every impugned piece of disputed material in the Jensen affidavits is not

required in this case. I have reviewed the impugned evidence and to the extent that it may contain some legal opinions, I have not relied on them. The same applies to legal argument, but not to facts that Jensen views differently than Ross.

[177] Next, relying on *Reference re: Gruenke* (1998), 131 CCC (3d) 72 (Man CA), (*sub nom R v Fosty*, 131 ManR (2d) 161), Ross asserts that the redacted version of the Pringle report attached as an exhibit to the Jensen affidavits is inadmissible. I agree that the opinions and conclusions of Pringle as found in his report are not admissible. Despite the Crown's argument that some factual findings found in that report could be considered by this Court, I have chosen not to rely on those findings in reaching my own conclusions. However, to the extent that the Pringle report contains the information that was before the Minister at the time the Reference was made (including affidavits and cross-examinations), I have considered it.

[178] In conclusion, without reviewing each of the numerous assertions made by Ross regarding the Jensen affidavits, I would simply give effect to the legal principles and not consider prohibited information, rather than embarking on a sentence-by-sentence review of the Jensen affidavits and their corresponding exhibits.

Conclusion and Decision

[179] I would dismiss Ross's motion for fresh evidence on all questions.

[180] I would dismiss Ross's motion to expunge with the proviso that I did not consider legal arguments or opinions of Jensen.

[181] I would answer Reference Question 1, Question 2 and Question 3 in the negative and not admit the new information indicated in those questions. Therefore, based on *Ross 2017*, I am precluded from considering the second part of the Reference made pursuant to section 696.3(3)(a)(ii) of the *Code*.

Cameron JA

I agree: leMaistre JA

I agree: Keyser J

Appendix

IN THE MANITOBA COURT OF APPEAL

IN THE MATTER OF SECTION 696.1 OF THE *CRIMINAL CODE*, S.C. 2002, c. 13;

AND IN THE MATTER OF A REFERENCE BY THE MINISTER OF JUSTICE TO THE MANITOBA COURT OF APPEAL UPON AN APPLICATION FOR MINISTERIAL REVIEW ADVANCED BY DEVERYN ROSS, CONVICTED AT BRANDON, MANITOBA ON MAY 26, 1995 OF TWO COUNTS OF FRAUD OVER ONE THOUSAND DOLLARS

REFERENCE

WHEREAS Deveryn Donald Alexander Ross was convicted of two counts of fraud over one thousand dollars by the Honourable Mr. Justice DeGraves sitting without a jury, in the Court of Queen's Bench of the Province of Manitoba at Brandon on May 26, 1995, upon the following counts in an indictment which read:

> 1. THAT he, the said Deveryn Donald Alexander Ross, between the 1st day of January, 1991, and the 1st day of March, 1991, both dates inclusive, at or near the City of Brandon, in the Province of Manitoba, did unlawfully by deceit, falsehood or other fraudulent means, defraud Ronald Simpson of money of a value exceeding One Thousand Dollars.
>
> 2. THAT he, the said Deveryn Donald Alexander Ross, between the 1st day of June, 1990, and the 4th day of January, 1992, both dates inclusive, at or near the City of Brandon, in the Province of Manitoba, did unlawfully by deceit, falsehood or other fraudulent means, defraud Perkins Limited Partnership of money or other valuable security of a value exceeding One Thousand Dollars, by causing the said Perkins Limited Partnership to transfer money in the amount of $700,000.00 from its assets to 2613981 Manitoba Limited Partnership.

AND WHEREAS, Deveryn Donald Alexander Ross was sentenced to eighteen months imprisonment, concurrent, with respect to both of the counts for which he was convicted;

AND WHEREAS, an appeal to the Manitoba Court of Appeal was dismissed on January 9, 1996;

AND WHEREAS, an application pursuant to Section 696.1 of the *Criminal Code* was made to the Minister of Justice by counsel on behalf of Deveryn Donald Alexander Ross;

AND WHEREAS, new information has arisen of which I am satisfied that my intervention is warranted;

I HEREBY REQUEST, that this Honourable Court, pursuant to section 696.3(2) of the *Criminal Code*, provide its opinion on the following questions:

Having regard to the existing record and such further material and evidence as this Honourable Court sees fit to receive:

1) Would the new information concerning the conversations between Mr. Ronald Simpson and Mr. Brian Savage be admissible as fresh evidence on an appeal to this Honourable Court?

2) Would the new information concerning the non-disclosure of Settlement Agreements executed by William Knight and Sheldon Gray on April 18, 1995, which were presented to the Manitoba Securities Commission on that date, be admissible as fresh evidence on an appeal to this Honourable Court?

3) Would the new information concerning the non-disclosure of the Assignment Agreement whereby William Knight and Sheldon Gray had assigned their interest in civil actions that they had instituted against Deveryn Ross to the investors of Perkins Limited Partnership be admissible as fresh evidence on an appeal to this Honourable Court? The new information in the Assignment Agreement consisted of the following:

   (a) The investors were to receive from Knight and Gray cash payments over time totalling $500,000.00. These cash payments consisted of an initial payment of $300,000.00 with $50,000.00 being paid per year for four years commencing June, 1996.

   (b) William Knight, Sheldon Gray and W.G. Knight and Associates Inc. agreed to a consent judgment in favour of the investors in the amount of $1 million. This judgment was

intended to ensure Knight's and Gray's continued compliance with the terms of the Assignment Deal.

(c) Sheldon Gray, William Knight and W.G. Knight and Associates agreed to assign to the investors their right of action against Deveryn Ross for negligent legal advice in the lawsuit that they instituted against him to a maximum of $500,000.00.

(d) The investors undertook not to enforce their $1 million judgment against Knight, Gray and W.G. Knight and Associates Inc. provided the cash payments described above were made and undertook to file a Notice of Satisfaction of this judgment when the assigned civil lawsuit against Deveryn Ross was concluded.

(e) Knight and Gray were to fully cooperate with Douglas Bedford, the investors' counsel, in attempting to obtain recovery against Deveryn Ross through the professional misconduct suits filed against him on behalf of Knight and Gray.

If this Honourable Court concludes that any of the information listed in paragraphs 1 through 3, inclusive, would be admissible as fresh evidence, I do hereby respectfully refer to this Honourable Court pursuant to subsection 696.3(3)(a)(ii) of the *Criminal Code*, based on a consideration of the existing record, the evidence already heard, and such further evidence as this Honourable Court in its discretion may receive and consider, to determine the case as if it were an appeal by Deveryn Ross.

DATED at Ottawa, this 14 day of May, 2014

"Peter MacKay"
The Honourable Peter MacKay
Minister of Justice

To: The Chief Justice of the
Manitoba Court of Appeal