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(Winnipeg Centre)  
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## **COURT OF KING'S BENCH OF MANITOBA**

### **B E T W E E N:**

HIS MAJESTY THE KING	)	<u>Charles P.R. Murray</u>
	)	<u>Joel N. Myskiw</u>
- and -	)	for the Crown
	)	
	)	
KEVIN CHARLES QUEAU,	)	<u>Saheel Zaman</u>
	)	<u>Jeremy Kostiuk</u>
	)	for the accused
accused.	)	
	)	
	)	Judgment Delivered:
	)	August 1, 2025

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### **RULING ON DEFENCE APPLICATION FOR DISCLOSURE OF PRIVILEGED DOCUMENTS, REMOVAL OF CROWN COUNSEL AND RECALL OF WITNESSES**

### **BOND J.**

[1] Kevin Queau (the accused) is charged with second degree murder in relation to the death of Crystal Saunders in 2007. Ms. Saunders' body was found in a rural area of Manitoba in 2007, and her death was investigated as a homicide. The accused was

identified as a suspect in 2015. Subsequently, the RCMP undertook an undercover operation (the "operation") that involved undercover police officers posing as members of an organized criminal group (the "undercover operators"). Over a period of months, the undercover operators engaged the accused in social activities and activities held out to be criminal in nature through a series of orchestrated scenarios. These interactions were audio recorded pursuant to judicial authorization. The operation culminated in a conversation between one of the undercover operators and the accused wherein the accused was asked about his involvement in Crystal Saunders' death. (This type of undercover operation is sometimes referred to as a "Mr. Big" operation.)

[2] A *voir dire* to determine the admissibility of the accused's confession, pursuant to **R. v. Hart**, 2014 SCC 52, commenced in April 2025, with the undercover operators giving evidence. This ruling is in relation to issues that arose in the cross-examination of one of the undercover operators during the *voir dire*.

[3] When they testified in the *voir dire*, the undercover operators were identified only by pseudonyms. In cross-examination, UC Jorge was asked about his preparation for testifying. UC Jorge stated that in addition to reviewing his notes, he had reviewed a document that had been prepared by the Crown and provided to him. UC Jorge testified that he no longer had the document.

[4] The defence requested disclosure of the document that had been provided to UC Jorge. Crown counsel declined to provide disclosure, claiming litigation privilege. The defence then brought a disclosure motion. Crown counsel, Michael Desautels ("Mr. Desautels") swore an affidavit dated April 15, 2025 (the "Desautels Affidavit") to be

relied on by the Crown in opposing the disclosure motion. The Desautels Affidavit contained information regarding the document referred to by UC Jorge. It also contained details of steps taken by Mr. Desautels in preparing the undercover operators to testify as witnesses for the *voir dire*, including the use of a PowerPoint presentation.

[5] The defence then filed this application seeking further relief in addition to the disclosure of the document referred to by UC Jorge. The application seeks orders for:

- a) the removal of Mr. Desautels as Crown counsel on this matter;
- b) recall of three of the undercover officers who had already testified on the *voir dire*, UC Simon, UC Mike and UC River; and
- c) disclosure of the PowerPoint.

## **EVIDENCE**

[6] The Desautels Affidavit included the following:

- When preparing the undercover operators to testify, Mr. Desautels had provided UC Jorge with a draft of his direct examination. That draft direct examination contained a condensed version of each scenario that UC Jorge was involved in, with information that Mr. Desautels considered to be important to emphasize ( para. 4);
- Mr. Desautels had met with a number of the undercover operators some months in advance of the start of the *voir dire*. He had conducted a PowerPoint presentation outlining trial scheduling plans, the pre-trial process, the Crown's trial strategy, a review of the law of the admissibility of Mr. Big confessions, and a review of the potential for litigation risk in this particular

case as well as the Crown's perceived strengths of the case and areas of potential cross-examination. Mr. Desautels gave this presentation to groups of undercover operators, and gave it more than once because not all the undercover operators could meet at the same time (paras. 10-11);

- Closer to the start of the *voir dire* hearing, Mr. Desautels met with each of the undercover operators individually to review their anticipated evidence (para. 7);
- UC Jorge had been involved in a large number of the scenarios during the operation, and was relatively inexperienced with testifying. Because of this, Mr. Desautels discussed with him how to prepare and review his notes, how he would ask questions, areas of direct examination, areas of potential cross-examination, as well as trial strategy. Mr. Desautels talked with UC Jorge about the Crown's trial strategy in terms of what they would review, why they would not review other parts of his testimony, as well as what defence would likely ask and why it was relevant (para. 8);
- During his meetings with UC Jorge in March of 2025, Mr. Desautels provided UC Jorge with a draft of his direct examination. This draft included themes that he would ask about, why they mattered to the Crown, what the defence may ask him, why defence may ask him and how to deal with the cross-examination on a Mr. Big case and on these facts in particular. The document was a draft that Mr. Desautels continued to modify as he prepared

for the *voir dire*. He does not have the version of the document that he would have shown to UC Jorge (para. 10);

- There were no occasions where UC Jorge provided information to Mr. Desautels that was inconsistent or different from what had been written in his notes or what was disclosed in the audio recording sessions or transcripts (para. 12);
- Mr. Desautels' preparation with UC Jorge was for the purpose of the witness getting a feel for how he would ask questions and Mr. Desautels getting a feel for how UC Jorge would respond. Mr. Desautels sought to ease some of the nervousness that UC Jorge had about testifying, and to develop a rhythm of questioning with the witness. The preparation was also to get UC Jorge comfortable answering questions as Mr. Desautels posed them, getting him studied on the case, refreshing his memory from his notes and the audio recordings, and preparing him for areas of cross-examination. Mr. Desautels made no notes during these meetings (paras. 12-13); and
- Mr. Desautels considers his approach to preparing a witness to give testimony to be consistent with standard practice, with good advocacy, and consistent with the Law Society of Manitoba's Code of Professional Conduct. [See *Code of Professional Conduct*, The Law Society of Manitoba (2023, Ch. 5, ss. 5.4-2 and 5.4-3.)]; and
- Mr. Desautels understood that had UC Jorge (or any other witness) provided information that was new or contradictory to information that had already

been disclosed to the defence, he would have an obligation to disclose the new or contradictory information, and he would have done so (paras. 15 and 19).

[7] Mr. Desautels was produced for cross-examination at the hearing of the application.

[8] Mr. Desautels testified that he believes he took the draft direct examination document back from UC Jorge when they met and threw it out, although he cannot confirm that for certain. He no longer has the draft direct examination as it was when given to UC Jorge in either electronic or paper form.

[9] Mr. Desautels confirmed that the format of the draft direct examination was a "distillation" of UC Jorge's notes, including portions of the notes added into the document by way of "cut and paste". The draft direct examination included references to dates and locations that Mr. Desautels took from UC Jorge's notes. It also included "rhetorical questions" and things that Mr. Desautels wanted UC Jorge to think about in advance of testifying. The draft direct examination also included references to where in UC Jorge's notes answers to certain direct examination questions might be found.

[10] Mr. Desautels testified that he did not provide a draft direct examination to UC River, he does not recall if he provided one to UC Simon, and he is aware that his co-counsel did provide one to Corporal Scott Robinson, one of the investigators. UC Eric and UC Mike did not receive one. He testified that UC Gio was provided with a draft of the Crown's brief on the *Hart* analysis. It was provided for the purposes of UC Gio providing feedback on any factual errors.

[11] Mr. Desautels confirmed that in some instances he met with undercover operators together for their introductory meetings, but when reviewing their evidence, he met with them separately. There was one exception to this and that was UC Gio who would occasionally be present for another undercover operator's meeting with Mr. Desautels. Because UC Gio had already reviewed all of the undercover operators' notes, as well as the audio recordings, there was no concern that meeting along with the other undercover operators would taint UC Gio's evidence. He was already familiar with their notes and the audio recordings of their interactions with the accused as part of his role in the investigation.

[12] The credibility and reliability of Mr. Desautels' evidence were not challenged and I accept it.

### **ISSUES**

[13] This application raises four issues:

- a) Is the defence entitled to disclosure of the draft direct examination?
- b) Is the accused entitled to disclosure of the PowerPoint presentation?
- c) Should Mr. Desautels be removed as Crown counsel with carriage of this prosecution?
- d) Should the witnesses UC Mike, UC River and UC Simon be recalled on the *voir dire* to be cross-examined further?

[14] For the reasons that follow, I find that the accused is not entitled to the relief sought and the application is dismissed.

**Issue # 1 - Is the Defence entitled to Disclosure of the Draft Direct Examination?**

[15] First, as noted above, the draft direct examination in issue itself no longer exists. In lieu, the defence is seeking a declaration that the accused would be entitled to disclosure of the document if it still existed. The defence argued this is not a meaningless exercise because, should it be determined that the draft direct examination is disclosable, then its destruction or loss could lead to a “lost evidence” motion seeking a remedy pursuant to the *Charter* and *R. v. Carosella*, 1997 CanLII 402 (SCC), [1997] 1 S.C.R. 80. (The defence has filed a separate motion pursuant to *Carosella* in relation to some electronic notes of UC Jorge. That motion will be argued at a future date.)

[16] The Crown asserted litigation privilege over the draft direct examination. It is well established that litigation privilege (also referred to as “work product privilege”) serves to protect a “zone of privacy” for those preparing for and engaged in litigation to conduct their analysis and preparation of the case (*R. v. Basi*, 2008 BCSC 1858, [2008] B.C.J. No. 2725 (QL), at para. 51) (“*Basi 1*”). (See also *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 (CanLII), [2006] 2 S.C.R. 319, at paras. 32 and 34.) The privilege may be waived, either directly or by implication. It may also yield in certain circumstances (*Blank*, at paras. 44-45).

[17] The defence conceded that litigation privilege applies to the draft direct examination but argued that the privilege had been waived by implication. The onus to establish waiver of litigation privilege rests with the party seeking disclosure of the document in issue, in this case the accused (*R. v. Chan*, 2002 ABQB 753, at para. 94). The defence argued that the litigation privilege had been waived because the witness

used the document to refresh his memory before testifying. The defence relied on ***R. v. Fast***, 2009 BCSC 1671, 202 C.R.R. (2d) 356 and ***R. v. Mitchell***, 2018 BCCA 52.

[18] In ***Fast***, the court states the principle as follows:

[46] ... [W]here a witness refreshes, the claim of privilege over the refresh document is deemed waived based on the governing principle of trial fairness. ... [I]t would be unfair to allow witnesses to bolster their credibility with the use of a document, and then protect themselves from cross-examination by claiming privilege over that document ...

[Citations omitted]

[19] In ***Mitchell***, a defence witness testified that he had provided a statement to defence counsel (taken in point-form notes) and that he had reviewed that statement prior to testifying. The Crown sought production of a copy of the statement. The Court held that although litigation privilege would apply to the statement given to defence counsel, litigation privilege was implicitly waived when the witness was called to testify and refreshed his memory from the document. In my view, the principle has limited application.

[20] First, In ***Mitchell***, the Court draws a distinction between a statement of a Crown witness and that of a defence witness:

[51] There is a clear difference between pre-trial disclosure, where the Crown's obligations are markedly different from those of the defence, and production of documents during trial. Although all statements of Crown witnesses must be disclosed to the defence before trial, there is no reciprocal obligation on the defence: *R. v. Stinchcombe*, 1991 CanLII 45 (SCC), [1991] 3 S.C.R. 326. Moreover, there is no traditional litigation privilege over Crown witness statements made during interviews with Crown counsel in preparation for trial. This is because the Crown cannot claim privilege over that which it is obliged to disclose: *R. v. Malik*, 2003 BCSC 1709 at para. 9. There is, however, litigation privilege over defence witness statements made during interviews with defence counsel in the same circumstances.

[21] Litigation privilege does not attach to a Crown witness's statement because the statement is subject to the Crown's disclosure obligations under *R. v. Stinchcombe*, 1991 CanLII 45 (SCC), [1991] 3 S.C.R. 326.

[22] Second, the court in *Mitchell* also clearly states that the implied waiver of litigation privilege does not apply to defence counsel's work product:

[55] I also do not accept the appellant's submission that requiring production of defence counsel notes in these circumstances will interfere with counsel's duty when interviewing witnesses. With the protection of litigation privilege, counsel is free to ask any questions of a potential witness and take whatever notes he or she considers necessary in preparing for trial. Anything that properly constitutes defence counsel's work product will remain subject to litigation privilege even after the witness takes the stand at trial. The issue of waiver of litigation privilege arises here because counsel created a document purporting to reduce the witness' evidence to writing and gave it to the witness, who then refreshed his memory from it prior to testifying.

[23] The principled basis for the implied waiver of litigation privilege in relation to a statement used by a defence witness to refresh his memory is described in *Mitchell*, as follows:

[74] When an accused elects to call a witness in his or her defence, the Crown is entitled to test the reliability of the witness's testimony in cross-examination. Where the witness has refreshed his or her memory in some way from reading a previous statement of his evidence, the Crown is entitled to explore the impact of the statement on the witness' recollection of the events in question. ...

[24] The defence argued that the Crown waived litigation privilege over the draft direct examination by implication because UC Jorge reviewed it in preparation for testifying. The argument does not succeed for the following reasons.

[25] First, it is not clear that UC Jorge did actually use the draft direct examination to refresh his memory. He clearly testified that he had relied on his notes to refresh his

memory. He was asked whether he “looked at any other notes or anybody else’s documents that were created before [he] testified”. He answered, “I reviewed a document prepared by the Crown that had some I guess topics of conversations throughout the scenarios”. He said, “they provided me with, I guess, a compacted version of notes for review”. (Transcript, cross-examination of UC Jorge, at p. 12, l. 31-32; 36-37 and 41.) He did not say that he had used the document to refresh his memory; he was not asked that question.

[26] However, the defence says that the only reasonable inference is that UC Jorge refreshed his memory from the document. Although I agree that is one inference that may be drawn, it is not an inevitable inference. Mr. Desautels described in his testimony providing the document to UC Jorge in advance of their witness meeting, and likely taking it back from him after the meeting. The document was intended to assist UC Jorge in getting comfortable with the questions that would likely be asked, as described by Mr. Desautels. There is no other evidence about when UC Jorge reviewed the document, and he certainly did not have it with him at court when he was asked about it. When invited to ask further questions of UC Jorge about the document, counsel declined.

[27] Second, even if I resolve any doubt about whether the document is a “refresh document” in favour of the accused, I am not persuaded that litigation privilege is waived in the circumstances of this case. The draft direct examination contains portions of UC Jorge’s notes, incorporated by way of “cut and paste.” The accused has already received disclosure of UC Jorge’s notes in Crown disclosure. Other aspects of the draft

direct examination, such as Mr. Desautels' rhetorical questions and possible areas of cross-examination, do not constitute a statement of the witness.

[28] I agree with Crown counsel's argument that the principle articulated in ***Mitchell*** that required disclosure of the defence witness's statement to the Crown on the basis that litigation privilege had been waived simply do not apply to this case. The issue in ***Mitchell*** was whether litigation privilege over a prior statement of a defence witness is waived where the accused elects to call the witness to testify and the witness has reviewed the statement before testifying and refreshed his memory from it (***Mitchell***, at para. 43). Here, the accused is seeking disclosure of Crown counsel's draft direct examination that includes references to notes that related to Crown counsel's questions, things Crown counsel intended to ask about, what and why defence counsel may ask, and how to deal with cross-examination. The document is clearly Crown work product and not a witness statement. The only portion of the document that arguably could be the equivalent to a witness statement would be the portions of UC Jorge's notes that were copied into the draft direct examination by way of cut and paste. Trial fairness does not mandate disclosure of those portions of notes, because defence counsel is already in possession of UC Jorge's notes.

[29] I have concluded that the implied waiver of litigation privilege identified in ***Mitchell*** is not applicable to the draft direct examination. The accused's application for disclosure of the draft direct examination is dismissed.

**ISSUE #2 - Is the Accused entitled to Disclosure of the PowerPoint Presentation?**

[30] The defence sought to establish waiver of litigation privilege over the PowerPoint, by analogy to the *Mitchell* decision. The defence took the position that the PowerPoint had the potential to influence the testimony of the undercover operators and should be disclosed so that it could be used for cross-examination, arguing that this is a matter of trial fairness.

[31] Again, the defence conceded that litigation privilege applies to the PowerPoint, as it does to the oral communications that occurred between Mr. Desautels and the witnesses when he prepared them to testify. Defence counsel argued, however, that waiver of the litigation privilege is implied once the communication is put into writing and presented to the witness. With respect, I find no merit to this argument.

[32] The form of the communication – written or oral – is not relevant to the litigation privilege that attaches. There is no basis to find waiver of litigation privilege in relation to the PowerPoint presentation used by Mr. Desautels to explain the law in relation to the *Hart voir dire* and its application in this case. To accept defence counsel's argument would undermine the principles of litigation privilege, which are well established.

[33] With respect, the defence argument conflates the rationale for implied waiver found in *Mitchell* based on trial fairness and the justification for piercing litigation privilege to protect an accused's right to make full answer defence, as identified and applied in *Basi 1*.

[34] The doctrine that mandates piercing litigation privilege to protect an accused's right to make full answer and defence is articulated in *Basi 1*:

[63] In summary, if the document is made for the dominant purpose of litigation, then the litigation privilege will apply in criminal cases, subject to the right of the accused to argue that production is necessary on the basis of his or her need to make full answer and defence.

(See also *R. v. Basi*, 2009 BCSC 772, 244 C.C.C. (3d) 537) ("*Basi 2*").

[35] One identified example where litigation privilege is pierced or set aside is where there is evidence of prosecutorial misconduct. Litigation privilege does not protect from disclosure evidence of abuse of process or other misconduct. As stated in *Blank*:

45 Even where the materials sought would otherwise be subject to litigation privilege, the party seeking their disclosure may be granted access to them upon a *prima facie* showing of actionable misconduct by the other party in relation to the proceedings with respect to which litigation privilege is claimed. ...

[36] Defence counsel suggested that UC Jorge, and perhaps other undercover operators, may have been influenced by the witness preparation conducted by Mr. Desautels, unintentionally in a manner likened to a gravitational pull. This suggestion is speculation without evidentiary foundation, and is far from an allegation of misconduct. It is not surprising that the defence did not seek to establish that piercing litigation privilege in relation to the PowerPoint was necessary for the accused to make full answer and defence. That threshold cannot be met on the evidence before me.

[37] I have concluded that the implied waiver of litigation privilege identified in *Mitchell* is not applicable to the PowerPoint. The accused's application for disclosure of the document is dismissed.

**ISSUE # 3 - Should Mr. Desautels be removed as Crown Counsel with Carriage of this Prosecution?**

[38] I find no basis to order that Mr. Desautels must be removed as Crown counsel on this case. There is no evidence to support any finding of misconduct on the part of

Mr. Desautels in his preparation of the witnesses in this case. Indeed, the defence did not base its argument to remove Mr. Desautels as Crown counsel on an allegation of misconduct. Rather, the defence argued that Mr. Desautels will be required to give evidence in this matter and so he cannot continue as Crown counsel.

[39] Nevertheless, in both written materials and submissions in court, defence counsel hinted at, and speculated about, Crown misconduct and the tainting of evidence during witness preparation. For example, in written materials defence counsel states:

Finally, it is arguable that Mr. Desautels' conduct and judgment could itself be seen to be problematic, insofar as it has courted the risk of affecting the evidence of at least UC Jorge, and potentially all of the undercover officers who will ultimately testify before the jury. This will place current Crown counsel in the position of having to defend his own conduct on both the *Hart* and *Carosella* applications.

(Defence Argument, Removal of Counsel,  
Recall of Crown Witnesses, and Disclosure  
of Litigation Privilege Material, para. 4)

[40] To obtain an order removing counsel because he may also be a witness in the case, the defence must establish that there is a realistic risk that he will be required to testify. The assessment of whether there is a realistic risk that counsel will become a witness in a case requires some forecasting of how proceedings might unfold. But this is different from speculation; the purported risk must be based on some evidentiary foundation. (See ***R. v. Downey***, 2013 ONSC 138, at paras. 39-52.)

[41] The defence argued vigorously that Mr. Desautels will have to testify not only in the ***Hart*** *voir dire* in this case but at the trial as well, should the confession be ruled admissible. Defence counsel suggested that there may be inconsistency between testimony of the undercover operators regarding their preparation to testify, and

Mr. Desautels' evidence on that issue. They argued that this is an important issue because the reliability and credibility of the testimony of the undercover operators is central to this case. They remind the Court that it must not be presumed that police witnesses are reliable and credible simply because of their professional status. They also point out that the testimony of the undercover operators is central in this case because the admissibility of the confession will be determined on their testimony alone or it will be determined by an assessment of the testimony of the accused and that of the undercover operators, and there may be conflict in the evidence.

[42] Counsel must not be required to testify based on mere speculation. There must be something in the evidence to show that counsel's testimony will be relevant and necessary. The comments of the Ontario Court of Appeal in ***R. v. Elliott***, 2003 CanLII 24447 (ON CA), 114 C.R.R. (2d) 1 (Ont. C.A.), at paras. 114-116 are particularly apt:

*(i) The test for calling counsel as witnesses*

[114] It is only in exceptional circumstances that Crown or defence counsel will be permitted to call opposing counsel as a witness. It is not sufficient that the counsel may have material evidence to give. The party seeking to call opposing counsel must lay an evidentiary foundation for showing that the counsel's evidence is likely to be relevant and necessary. This stringent test applies whether it is defence counsel seeking to call Crown counsel or Crown counsel seeking to call defence counsel. This rule has been laid down in many decisions of the Superior Court. Craig J. expressed the test, in part, as follows in *R. v. Stupp, Winthrope and Manus* (1982), 1982 CanLII 1897 (ON SC), 36 O.R. (2d) 206 at 219 (Ont. H.C.J.):

In my opinion, when a subpoena or the right to call a witness is challenged as here, it is not sufficient for the party proposing to call the witness to merely allege that the witness can give material evidence; but rather the onus is on the accused in this case to establish that it is likely that Brian Johnston can give material evidence. That is particularly applicable where, as here, the accused takes the extraordinary step of seeking to call Crown counsel as a witness. If Brian Johnston is called, he obviously cannot continue as counsel at the preliminary hearing and

other counsel will be required to pick up the pieces of a long and complicated preliminary hearing. It is an interference with the judicial process which can only be contemplated in unusual cases. *In my opinion, an accused person should not be permitted to call Crown counsel to conduct a fishing expedition or to examine in the hope that something might turn up that would assist him on the issue; but rather counsel must satisfy the judge that there is a real basis for believing that it is likely the witness can give material evidence. If it is otherwise, preliminary hearings and trials can be interrupted at random; and the administration of criminal justice could be seriously impaired.* That is particularly so where, as in this case, there are extensive police investigations. If the investigating officers seek legal advice during the course of the investigation, then Crown counsel in all such cases may be put under subpoena in an attempt to establish abuse of process [emphasis added].

[115] In *R. v. Sungalia et al.*, [1992] O.J. No. 3718, Campbell J. held as follows:

Crown counsel and defence counsel are subject to the process of the court. They are not immune from subpoena.

As a practical matter, however, criminal litigation would be impossible if Crown counsel had the unrestricted right to call defence counsel as a witness or if defence counsel had the unrestricted right to call Crown counsel as a witness.

*There is a persuasive burden on the lawyer who seeks to force opposing counsel to go into the witness box and relinquish his role as counsel. The persuasive burden is to show relevance and necessity.*

*As a general rule neither relevance nor necessity is shown simply because opposing counsel, accompanied by an assistant interviews a witness whose statement becomes the subject of cross-examination. If Crown counsel or defence counsel could be routinely called as a witness simply because she had previously interviewed one of her own witnesses then no lawyer, Crown or defence, could ever prepare properly for trial [emphasis added].*

[116] We agree with these statements. In particular, we stress the necessity part of the test. In this case, the trial judge permitted defence counsel to call several of the Crown counsel because they had attended meetings at which many others, including police officers, were present. There was no basis shown that the evidence of the Crown counsel was necessary in such circumstances. There was nothing to show that the police officers who attended the meetings could not adequately convey what occurred. The defence counsel's vague suspicions that Crown counsel might say something different from the police officers was not enough to overcome the threshold for calling counsel as witnesses.

[Emphasis added in the original]

[43] Crown counsel have a duty to prepare witnesses to testify, including police witnesses who are required to testify in a *Charter* application (*R. v. Trought*, 2019 ONSC 1421 at paras. 18-19). This preparation may include alerting a witness to potential areas of cross-examination (*R. v. Mahmood*, 2011 ONCA 693, at paras. 63 and 67). Like any lawyer preparing a witness to testify, Crown counsel must exercise caution to avoid tainting the witness's evidence. Certain practices are to be avoided. For example, counsel should avoid reviewing a witness's evidence in the presence of another witness. If counsel chooses to alert a witness to conflicting evidence, this should be done with caution and steps taken to address the possibility of tainting (*R. v. Spence*, 2011 ONCA 2406, at para. 26).

[44] There is no evidence and nothing on the record of this proceeding to support any assertion that Mr. Desautels has crossed a line between appropriate and inappropriate conduct in the preparation of witnesses.

[45] I find that the accused has not established that there is a realistic risk that Mr. Desautels will be required to testify in this matter. There is no basis to remove Mr. Desautels as Crown counsel with carriage of the prosecution.

**ISSUE # 4 – Should the Witnesses UC Mike, UC River and UC Simon be recalled on the *Voir Dire* to be Cross-Examined Further?**

[46] The defence seeks an order that UC Simon, UC Mike and UC River be recalled for further cross-examination. Defence counsel say they were caught by surprise by the testimony of UC Jorge regarding the draft direct examination document that he had been provided. They wish to ask questions of the other undercover operators who have already testified about whether they were provided with a similar document.

[47] The discretion to order a witness be recalled for further cross-examination must be exercised with caution. As stated in *R. v. Ramos*, 2020 MBCA 111, at para. 138, “The orderly and adversarial nature of the trial should not be unduly interfered with; recalling a witness should only be permitted where it is ‘essential to do justice in the case’ (*R. v. Owens*, 2018 MBCA 94 at para 18)”.

[48] I am not satisfied that I ought to exercise my discretion to have the witnesses recalled. First, the witnesses could have been asked questions about how they prepared themselves to testify when they were on the witness stand. Defence counsel may well have been caught by surprise by UC Jorge’s answer that he had been provided a document by Crown counsel. However, that testimony was elicited by a question that could have been asked of any of the witnesses: Did you look at any other documents in preparation to testify? Whether it was a strategic decision to ask the question only of UC Jorge and not of the other undercover operators, or it was inadvertent, the desire to now ask the other undercover operators is not a reason to recall them.

[49] Even if these witnesses were recalled, permissible questioning would be limited because of the Crown’s assertion of litigation privilege. The waiver argument raised by the defence was specific to the draft direct examination and the PowerPoint. I have rejected the argument and the litigation privilege has been upheld. There has been no further argument made by the defence that the litigation privilege that protects witness preparation has been waived or should be set aside. It is not necessary to recall the witnesses to do justice in this case.

[50] I find no reason to exercise my discretion to have UC Simon, UC Mike, and UC River recalled.

**CONCLUSION**

[51] For the forgoing reasons, I would answer the questions raised in this application as follows:

1. Is the defence entitled to disclosure of the draft direct examination?

Answer: No.

2. Is the accused entitled to disclosure of the PowerPoint presentation?

Answer: No.

3. Should Mr. Desautels be removed as Crown counsel with carriage of this matter?

Answer: No.

4. Should the witnesses UC Mike, UC River and UC Simon be recalled on the *voir dire* to be cross examined further?

Answer: No.

[52] The application is dismissed.

\_\_\_\_\_J.