Court of Appeal for Saskatchewan **Citation: *R v Chu*, 2016 SKCA 156**

Docket: CACR2618 **Date: 2016-12-02**

Between:

Christopher Pang Chu

Appellant

And

Her Majesty the Queen

Respondent

Before:	Lane, Jackson and Ottenbreit JJ.A.
Disposition:	Appeal allowed
Written reasons by:	The Honourable Madam Justice Jackson
In concurrence:	The Honourable Mr. Justice Lane The Honourable Mr. Justice Ottenbreit
On Appeal From:	2014 SKQB 414, Saskatoon
Appeal Heard:	May 9, 2016
Counsel:	Patrick C. Fagan, Q.C., for the Appellant Wade McBride and Kirsten Janis for the Respondent

Jackson J.A.

I. Introduction

[1] Christopher Pang Chu was found guilty of conspiring with others to traffic in cocaine contrary to s. 465(1) of the *Criminal Code*, RSC 1985, c C-46, and trafficking in cocaine contrary to s. 5(1) of the *Controlled Drugs and Substances Act*, SC 1996, c 19. He was sentenced to a term of 7.5 years in custody and prohibited from applying for parole before the expiry of three years: see *R v Pang Chu*, 2014 SKQB 414 [*Conviction Decision*]. He was granted judicial interim release pending his appeal (see *R v Chu*, 2015 SKCA 60, 460 Sask R 157). He appeals his conviction only.

[2] Mr. Chu's first ground of appeal is based on the learned trial judge's refusal to grant an adjournment of the trial to allow a review of recently disclosed and discovered documents: see *R v Chu*, 2014 SKQB 288, 455 Sask R 168 [*Adjournment Decision*]. In the two days immediately preceding the trial, Crown counsel disclosed the existence of approximately 1,900 documents. Mr. Chu submits that the trial judge should have granted an adjournment to permit a proper assessment of the late-disclosed documents. As part of this argument, Mr. Chu submits that neither Crown counsel nor the trial judge could have accurately assessed the relevance of the documents as the judge was not provided with sufficient information to permit such an assessment.

[3] Mr. Chu submits that to allow the conviction to stand in the face of all relevant circumstances would amount to a miscarriage of justice. He asks that the verdict be set aside and a new trial ordered. I agree with Mr. Chu's submissions. To this day, the documents remain undisclosed. This Court is in the same position as the trial judge, which means that we are not in a position to assess the undisclosed documents to determine whether the undisclosed information could have affected the verdict. A new trial is the only remedy available to the Court.

[4] Mr. Chu has other grounds of appeal. He argues the following: (i) the verdict is unreasonable or unsupported by the evidence; (ii) the trial judge erred by refusing to grant a stay of proceedings when it was discovered that the police had destroyed a number of email messages; and (iii) the trial judge erred by admitting the certificates of an analyst attesting to the

fact that a substance found in the possession of a third party was cocaine and admitting a certificate of conviction with respect to that individual. Mr. Chu submits that these grounds of appeal also merit a new trial.

[5] Since I have concluded that the appropriate remedy to address the late and non-disclosure issue is a new trial, I do not need to address Mr. Chu's other grounds of appeal.

II. Trial Context and the *Conviction Decision*

[6] In light of my decision to order a new trial, I will review the circumstances of the case as briefly as possible.

[7] The Saskatoon Combined Forces Special Enforcement Unit [Special Enforcement Unit] initiated an investigation into cocaine trafficking in Saskatoon in April of 2011. The investigation involved the surveillance of Mr. Chu and a number of his associates, the interception of their private communications, and the execution of search warrants in relation to their homes, vehicles, places of association and financial institutions. The surveillance continued until November 9, 2011, when Mr. Chu was arrested.

[8] The Crown's case against Mr. Chu is based on the activities of his associates, telephone intercepts revealing coded language consistent with drug trafficking and the link between a blue bag that had been seen in Mr. Chu's possession on one occasion, and was later found in the possession of a known associate. The bag at that time was shown to contain cocaine.

[9] As it turns out, when he testified, Mr. Chu's defence was that he was not trafficking in cocaine, but he was trafficking in OxyContin and steroids – and that all of the Crown's surveillance was directed to the wrong drug – in relation to him. He admitted that he had been trafficking in drugs and conspiring to do so, but that the drugs in question were OxyContin and steroids – not cocaine. Indeed, four of the officers testified they believed that Mr. Chu was trafficking in steroids (as well as cocaine).

[10] In the arguments made to the trial judge on his behalf, it was submitted that there was no direct evidence linking Mr. Chu to trafficking in cocaine or conspiring to traffic in cocaine. For

example, the seizure of garbage over an extended period of time and the search of his home and possessions did not reveal any cocaine or cocaine residue. In a search incident to arrest, the police discovered steroid kits and cell phones only.

[11] The trial judge did not believe Mr. Chu that he trafficked in OxyContin and steroids only. On the basis of the circumstantial evidence, the trial judge drew the conclusion that Mr. Chu was guilty of the charges against him.

III. Background to the Adjournment Request and Decision

[12] As I have indicated, the broad issue on this appeal is whether the trial judge's refusal to adjourn the trial, or to take other steps to address Mr. Chu's allegations of a s. 7 breach of the *Charter*, requires a new trial. I will now provide the background to this issue and analyze the trial judge's reasons to explain my conclusion.

A. What transpired over the weekend prior to the trial

[13] The Special Enforcement Unit was not the only group of police officers investigating Mr. Chu and his associates. Another team of officers from the Integrated Proceeds of Crime Unit [Proceeds of Crime Unit] was also conducting an investigation into proceeds or assets that might be derived from Mr. Chu's and his associates' activities. Unfortunately, the Crown counsel responsible for prosecuting the within case were not informed that the Proceeds of Crime Unit was working on the same file or, more importantly, that it had amassed a large quantity of data referring to Mr. Chu.

[14] With the trial fixed for Monday, September 8, 2014, Crown counsel learned about the existence of the work of the Proceeds of Crime Unit, and the existence of a second database, in the afternoon of Friday September 5, 2014, only. This revelation took the two Crown counsel to a document entitled "Global Document Report" [Index], which is 176 pages long and contains approximately 1,900 entries.

[15] The Index is an alphabetically listed document with such headings as “Account Information”, “Affidavits”, “Analysis”, “Application”, “Asset Description”, “Assets”, and continuing through to “Witness Statements”. The first page of the Index indicates its format:

ABM DEPOSITS

EXHIBIT 2011-0032 ITEM 713

Document #: 375		Task 96 - ABM Deposits with backing documents from President’s Choice Financial for Christopher CHU, Account# 48616676

EXHIBIT 2011-00321TEM 715

Document #: 379		Task 96- ABM Deposits with backing documents from President’s Choice Financial for Christopher CHU, Account# 48616700

ACCCOUNT SUMMARY OF HOLDINGS INVESCO

DUONG, MICHELLE

Document #: 1923	2013/03/18	Task 232- Account Summary of Holdings from lnvesco Canada Ltd, account 15442748 for Michelle DUONG, and Affidavit for Solape ILORI.

ACCOUNT & TRANSACTION HISTORY

CHU, CHRISTOPHER PANG

Document #: 1941	2011/09/07	Task 121 - Account activity for 764480054682 from 2011-09-01 to 2011-09-07 for Christopher Pang CHU.
Document #: 1942	2011/09/16	Task 121 - Account activity for 764480054682 from 2011-09-08 to 2011-09-14 for Christopher Pang CHU.
Document #: 1943	2011/09/22	Task 121 - Account activity for 764480054682 from 2011-09-15 to 2011-09-21 for Christopher Pang CHU.
Document #: 1944	2011/10/03	Task 121 - Account activity for 764480054682 from 2011-09-22 to 2011-09-30 for Christopher Pang CHU
Document #: 1945	2011/10/11	Task 121 - Account activity for 764480054682 from 2011-10-01 to 2011-10-05 for Christopher Pang CHU
Document #: 1946	2011/10/17	Task 121 - Account activity for 764480054682 from 2011-10-06 to 2011-10-13 for Christopher Pang CHU
Document #: 1947	2011/10/31	Task 121 - Account activity for 764480054682 from 2011-10-14 to 2011-10-31 for Christopher Pang CHU
Document #: 1955	2011/11/09	Task 187 - Account activity for 764480054682 from 2011-11-01 to 2011-11-09 for Christopher Pang CHU
Document #: 1956	2011/11/29	Task 187 - Account activity for 764480054682 from 2011-11-10 to 2011-11-29 for Christopher Pang CHU

(RF at 43)

[16] It is common ground that an unknown quantity of the documents listed in the Index had not been previously disclosed, including, for example, the information pertaining to Mr. Chu shown above.

[17] Crown counsel discovered the existence of the Proceeds of Crime Unit investigation and the Index when they were preparing Cst. Shurkin (one of their next week's witnesses) to testify. The specific discovery was that Cst. Shurkin had notes in both the Special Enforcement Unit's database and the newly-discovered database. Indeed, Crown counsel's initial discovery revealed 120 pages of evidence relevant to the cross-examination of two upcoming witnesses. Crown counsel immediately provided these 120 pages to defence counsel on Friday afternoon at about 2:00 p.m.

[18] After this initial release, Crown counsel began a review of the Index. Based on that review, at 5:45 p.m. on Saturday, September 6, 2014, Crown counsel released 27 documents (plus the Index) in electronic form but, because the other documents individually listed in the Index had not been vetted, the Crown was not prepared to allow access to the balance of the 1,900 documents. One of the late-disclosed 27 documents was not actually reviewable by defence counsel until Monday morning because it could not be downloaded due to its file size.

B. What transpired in court on Monday morning, the first day of the trial

[19] After preliminary matters were dealt with, defence counsel made these remarks requesting an adjournment:

> [MS. FAGAN] But in any event, I'm in the awkward position, sir, of needing an adjournment this morning, and, frankly -- and I've discussed this with my friend -- it's -- the sheer volume of the disclosure is such that I'm entitled to make the application to adjourn the entire month-long proceedings.
>
> Now, I don't know if I'm going to need to do that yet, but what I am asking this Honourable Court to do is to allow me until Wednesday, possibly Thursday morning -- this Court will have my best efforts to review -- upon receipt of the disclosure from my friend, to review all of it and to -- and to proceed as scheduled at that point.
>
> That being said, sir, I know that my friend has two witnesses here today who have travel plans. One is an RCMP officer, the other is a civilian. Apparently both have flights booked. My friend has represented to me that what has been disclosed should have no impact on their testimony, should have no impact on what I'm doing.

> Now, [this is a] difficult representation for me to accept; however, I have obtained instructions from my client to allow these two witnesses to testify this morning to accommodate their travel schedules, notwithstanding the fact that I'm certainly entitled to ask that they're -- that they be called on a different date after I've had a chance to review full disclosure, but it's a -- they're instructions that I do have, sir, to accommodate in this regard.
>
> (Emphasis added, trial transcript at T6)

[20] Crown counsel then explained to the Court what had transpired over the course of the weekend. He explained why they had provided the Index and the documents in these terms:

> My colleague, Ms. Kirsten and I, upon receipt of that index, then conducted our own review of that index to assess what, if any, further disclosure obligation was triggered as a result of reviewing that index. We determined that there were 27 additional documents not previously disclosed in the combined forces database that would trigger our disclosure obligation.
>
> And, again, without describing each one in particular, for the most part, they -- they're not central to the investigation, but nonetheless, on the question of -- could we say they're clearly not relevant? No, we can't stand up and say that. And so 26 of those documents were disclosed on Saturday.
>
> (Emphasis added, at T8)

[21] When the trial judge questioned Crown counsel further, the following exchange occurred:

> THE COURT: And based upon your review of the index, you've identified some 27 of those documents as potentially relevant.
>
> MR. NEELY [Crown Counsel]: Correct.
>
> THE COURT: Although you don't assess them (INDISCERNIBLE).
>
> MR. NEELY: Correct.
>
> …
>
> So to go -- that's an overview of where we're at, I think, in terms of the disclosure. I was defence counsel one time in my life, and so I understand the importance of looking, not just at what the Crown's putting in, but what the Crown did not put in.
>
> THE COURT: M-hm.
>
> MR. NEELY: And for that reason, my friend's request to be able to review that index, I think, is a submission with some justification. And I haven't told her I'm going to give her 1,900 documents. I have told her that if she wants to come over to our conference room, I'm prepared to link up any document that she wants so that she can then assess whether or not I'm correct in saying it's not relevant.
>
> THE COURT: In other words, follow-up on the hyperlinks.
>
> MR. NEELY: So some measured response to my friend's request, I think, is appropriate. I've indicated to her that I have two witnesses with flight plans; a civilian, Mark

> Florence, who is a resident of Calgary, who has a flight that leaves at the end of the afternoon to go back to Calgary because I told him he would likely be the second witness in this trial and should be free to fly back tonight.
>
> (Emphasis added, at T9–T10)

[22] As to the length of the adjournment, Mr. Neely was prepared to agree to a short period of time only:

> As to whether we come back on Wednesday or Thursday, my preference would be that we come back on Wednesday. That will give my friend two full days to review an index that Ms. Kirsten and I conducted our review on, basically in the course of one afternoon, namely, Friday, so that I would submit practically speaking, that should give her plenty of opportunity to assess that index to assess whether or not she wishes to take issue with our conclusions about what is or isn't disclosable.
>
> (at T11)

[23] The trial judge then granted the adjournment in these terms:

> -- and given Mr. Neely's indication of willingness to accommodate to a certain extent, I am, after we hear the two witnesses, going to adjourn the matter.
>
> The difficulty is knowing precisely where we'll be at Wednesday morning, but having said that, I would like -- and I'm going to say we're just adjourning to 9:45 Wednesday morning.
>
> If something particular arises, of course, Ms. Fagan, I have absolute confidence that you will be raising that with me then. But I'm also alert to the fact that there may still be some time needed, but there's also Friday afternoon coming up, and I'm extremely reluctant, given the time that has been scheduled for this trial – the difficulty of some 54 witnesses and maintaining that schedule, noting as well as your representation as to the situation of your calendar in the future, I'm extremely reluctant to do -- other than to provide only such time as per -- to be necessary to deal with this matter.
>
> (at T12)

[24] The trial continued for several hours so that certain out-of-town witnesses could testify. It was then adjourned to Wednesday, September 10, 2014.

C. What transpired after court recessed on Monday, September 8, 2014, and in court the following day

[25] After court adjourned on Monday, September 8, 2014, Crown counsel invited defence counsel to the Crown offices where she was allowed access to a computer, but she was required to show Crown counsel what she wished to review and they reviewed the document with her to

see if it contained privileged information. After 20 minutes, defence counsel left the Crown's office and immediately sent a note to the trial judge objecting to the surveillance of her work and asking to see him at his earliest convenience.

[26] On Tuesday, September 9, 2014, the Court reconvened at defence counsel's request to make further submissions on the disclosure issue. She advised the court as follows:

> To bring the Court up to speed, you'll recall that yesterday I was invited to attend at my friend's office to review the content of a hyper-linked document. It's a 176-page document. In acceding to that offer, I was under the impression that I would be given privacy in reviewing said materials. When I attended at my friend's office yesterday afternoon to review these materials, it was in the company of both of my learned friends here. They would scroll the documents. I would indicate which ones to stop on, which ones I wanted to look at. And the Crown was essentially privy to every second that I was looking at or otherwise assessing the importance of these documents. I lasted about 20 minutes. Sir, in my respectful submission, with my adversary proverbially and literally looking over my shoulder as I review disclosure, does not, in my respectful submission, permit for a meaningful review within the confines of Section 7 of the *Charter*.
>
> (Emphasis added, at T28)

[27] Notwithstanding Crown counsel's statement on Monday morning that he could not say the documents were "clearly not relevant", Crown counsel filed a brief of law on Tuesday morning asserting the following: (i) a number of the documents in the Index compiled by the Proceeds of Crime Unit overlapped with documents in the Special Enforcement Unit database and had already been disclosed; and (ii) the balance of the Index dealt with "money laundering".

[28] Referring to Crown counsel's submissions, the trial judge called upon defence counsel to provide some basis to say how what appeared to him to be financial records might assist her in her defence of Mr. Chu. Defence counsel's response was that she could not give an answer without seeing the documents. She assured the court that she was not embarking on a "fishing expedition". The bottom line of her argument, however, was that relevance may be inferred by virtue of the fact that the Crown disclosed the existence of the documents – and she would be boxing at shadows to provide any meaningful response.

[29] In open court, the trial judge then conducted a brief review of the documents, identifying a number of them that he believed would have already been disclosed and a number of other documents that were financial documents. He asked defence counsel how financial transactions

of the accused could be relevant to his defence, particularly when the Crown had given its undertaking that it would not be relying upon any of the documents listed in the Index that had not already been disclosed. The trial judge said the following:

> And with respect to the financial documents relating to Mr. Chu, if the Crown's not using them -- and then I say to myself, how could financial transactions of Mr. Chu be relevant? And as the Crown's brief says in paragraph 31: (As read)
>
> > To establish a breach of a disclosure, the applicant must establish a reasonable possibility that the undisclosed information could have been used in leading the Crown advancing a defence or otherwise a decision which could affect the conduct of the defence.
>
> That seems to be the cusp, and I'm -- and I know I've asked you already, <u>but I wanted to come back to it to give you my, shall I say, preliminary sense of this global document, to give you an opportunity to address it at -- focusing on you establishing a reasonable possibility that could assist you because that's what I'm having difficulty with, Ms. Fagan</u>.
>
> (Emphasis added, at T43)

[30] Defence counsel indicated that she was not going to "reveal the direction" in which the defence was headed by speculating on documents that she had not seen, saying she was "between a rock and a hard place". She continued:

> But I would be in dereliction of my duties as defence counsel when a document is disclosed to me -- clearly, my friend's not in the business of disclosing irrelevant documents. When a document is disclosed to me with potentially thousands of pages of information and I don't request it -- and this -- this Honourable Court in *R v. Walker* in 2012 indicated: (As read)
>
> > Merely being insignificant evidence or significant in the Crown's opinion or not destined to be evidence is insufficient for withholding disclosure.
>
> So for me to not bring this application on behalf of my client --
>
> THE COURT: Well, I understand that.
>
> MS. FAGAN: -- highly problematic in my respectful submission, sir. I have nothing to add.

She reminded the Court that at the last pretrial conference on May 7, 2014, the Crown had assured the case management judge that "disclosure was complete". She advised the Court that she had been prepared to run the trial on the basis of that assurance.

[31] The trial judge then indicated that he would adjourn to consider the matter further, strongly indicating that counsel should be prepared to recommence hearing witnesses the following day.

[32] Following the hearing, defence counsel filed a letter of objection, stating that, having not seen the documents, she should not be called upon to establish relevance, and asking that the trial be adjourned outright. That letter was filed on Tuesday, September 9, 2014. Ms. Fagan wrote as follows:

> In accordance with my client's right to make full answer and defence and his right to a fair trial as guaranteed by sections 7 and 11(d) of the *Charter* I would respectfully request that this Honourable Court review the impugned materials and render an informed judicial ruling in this regard.
>
> Further compounding the unfairness occasioned by my client is that of the late disclosure of 27 documents provided by the Crown (26 of which were provided on Saturday, September 6, 2014 at approximately 5:45 pm and the last of which was provided at approximately 10:00 pm on Sunday, September 7, 2014). The length of the adjournment granted by this Honourable Court has been insufficient to allow counsel for the Accused to properly review and synthesize this late disclosure (i.e. hundreds of pages).
>
> As a consequence of the foregoing and for the reasons stated on the record if this matter proceeds to trial tomorrow my client will be unable to make full answer and defence. Further to my application for an adjournment made on September 8, 2014 please take notice that I am seeking an adjournment of these proceedings **in their entirety**.
>
> (Bold emphasis in original)

[33] Later that afternoon, the trial judge released a written decision refusing to adjourn the trial. He said the trial would commence on Wednesday morning, but that he would adjourn at noon on Friday to permit defence counsel to continue to review the documents Friday afternoon and during the weekend. He then offered to hear an application on Monday to seek leave to recall any of the witnesses who had testified if she wished to further cross-examine any of them in light of what she might discover by any continuing review of the documents that she might undertake.

[34] The balance of the *Adjournment Decision* is best reviewed as part of my analysis explaining why I find the trial judge erred and why I find a new trial is warranted.

IV. Whether the Judge Errored by Refusing to Adjourn the Trial

A. Position of the parties

1. Mr. Chu

[35] Before asserting they were not relevant, Mr. Chu argues that the Crown "did not conduct any meaningful review of the 1,900 documents" (AF at para 55) and merely relied on the description of each document contained in the Index. Mr. Chu argues that the trial judge's failure to grant an adjournment denied him a fair trial contrary to s. 7 of the *Charter* and the ability to make full answer and defence contrary to s. 11(d) of the *Charter*. According to Mr. Chu, when the s. 7 concerns were raised about his inability to review the documents privately, the Crown "reversed" its position and filed written materials indicating the documents were not relevant. He asserts that the trial judge erred by not finding a breach of s. 7 of the *Charter* and, as a result, erred by not granting him an appropriate remedy to address the breach.

[36] He also argues, apart from any consideration of s. 7, that the trial judge erred by failing to grant an adjournment in light of the fact that defence counsel was taken completely by surprise. In that regard, Mr. Chu also relies on *Barrette v The Queen*, [1977] 2 SCR 121 [*Barrette*], and *R v Davis* (1998), 159 Nfld & PEIR 273 (NLCA) [*Davis*],[1] for the proposition that even where late disclosure does not result in a *Charter* breach, declaring a mistrial, excluding evidence or granting adjournments may all be appropriate remedies.

2. The Crown

[37] The Crown argues it always maintained that the withheld materials had already been disclosed previously or were irrelevant, noting that *R v Stinchcombe*, [1991] 3 SCR 326 [*Stinchcombe*], imposes an obligation on the Crown to withhold such materials. According to the Crown, Mr. Chu failed to establish that the material was relevant, and – even if it were relevant – Mr. Chu cannot demonstrate that late and non-disclosure affected his right to make full answer and defence.

[1] An appeal to the Supreme Court of Canada was dismissed in [1999] 3 SCR 759, but the Supreme Court did not comment on the disclosure issue or the comments of the Newfoundland Court of Appeal with respect to that issue.

[38] The Crown suggests that Mr. Chu's position is similar to the position taken by trial counsel in *R v Anderson*, 2013 SKCA 92, 300 CCC (3d) 296 [*Anderson*]. In addition, because Mr. Chu did not take up the Crown's offer to continue to review the documents over the course of the week following the *Adjournment Decision*, and make a further application to the judge, he should be taken to have "abandoned" his application to continue to review the documentation, and he should be precluded from raising the issue before this Court.

[39] Finally, the Crown argues, based on *R v Dixon*, [1998] 1 SCR 244 [*Dixon*], and *R v Taillefer*, 2003 SCC 70, [2003] 3 SCR 307 [*Taillefer*], that if this Court finds that the trial judge erred by not granting an adjournment, we can nonetheless consider whether the verdict can be sustained, and, according to the Crown, the proper application of those decisions should preclude intervention by this Court.

B. Analysis

[40] The right to disclosure is an element of the constitutional right to make full answer and defence encompassed within s. 7 of the *Charter*. This right imposes a duty upon the police and the Crown to disclose all relevant material pertaining to the investigation of the accused (see *R v McNeil*, 2009 SCC 3, [2009] 1 SCR 66). Since this right is grounded in the *Charter*, the request to adjourn the proceedings is a request for a remedy under s. 24(1) of the *Charter* for breaching the obligation to disclose. As such, the trial judge's decision to refuse to adjourn the trial or grant any other remedy is an order made under s. 24(1). The standard of review to apply to a decision under s. 24(1) of the *Charter* is a deferential one (see *R v Bellusci*, 2012 SCC 44 at para 17, [2012] 2 SCR 509).

[41] Notwithstanding the deferential standard of review, I find the trial judge misdirected himself in two ways. First, he erred in his statement of the obligation on the Crown when defence counsel asked for a review of the Crown's refusal to disclose known documents. Second, he erred by classifying the Index as a *Laporte* inventory (see *R v Laporte* (1993), 84 CCC (3d) 343 (Sask CA) [*Laporte*]) and relying upon it alone to determine whether the Crown had met the burden on it to show the documents were clearly irrelevant. If the judge had not made these errors, he would have found that the Crown's late disclosure (and non-disclosure) amounted to a breach of s. 7 for which a remedy had to be granted.

1. The Crown's obligation on a review of disclosure

[42] The trial judge provided an overview of the law that he was applying, beginning first with what he believed to be the relevant authorities:

> [14] The law is clear that once the Crown has justified non relevance in the first instance, it then falls to the defence to articulate a basis on why the documents sought should be characterized as relevant and thus subject to disclosure. In *R. v. Chaplin*, [1995] 1 S.C.R. 727, 96 C.C.C. (3d) 225, at paragraph 32, the Supreme Court of Canada said:
>
> > [32] Apart from its practical necessity in advancing the debate to which I refer above, the requirement that the defence provide a basis for its demand for further production serves to preclude speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming disclosure requests. …
>
> [15] While, as defence counsel puts it, the threshold for relevance is low, demonstration of relevance is nonetheless central. In *R. v. Mah*, 2001 ABQB 322, 288 A.R. 249, Sulyma J. said:
>
> > [4] The requirement that the Defence provide a basis for its demand for further production is, from a reading of *R. v. Chaplin* (*supra*) applicable to any request and, by *R. v. Starr* (1998) 123 C.C.C. (3d) 145 (Man. C.A.); [1998] S.C.C.A. No. 141 (S.C.C.) applies where the Crown has declined to produce material on the basis of lack of relevance or privilege. This is not a matter of onus, but rather an overriding principle that the Defence must provide a basis for its demand for further production. As will be seen in a consideration of the specific requests in this case, the Crown only contests that a basis has not been provided in a few of the matters raised.
>
> (Emphasis added, *Adjournment Decision*)

[43] He reviewed *Anderson* and *Laporte*, concluding as follows:

> [23] I am satisfied by my review of the Global Document Report [the Index], which I classify as equivalent to a *Laporte Inventory*, the submissions of Crown counsel with respect to the efforts they have undertaken to disclose the relevant documents therefrom and the failure of defence counsel to demonstrate a reasonable possibility that the undisclosed documents could be used to meet the case for the Crown, advance a defence or otherwise assist in making a decision would affect the conduct of the defence that it is appropriate for me to exercise my discretion and to find that the Crown has met its disclosure obligations. The nature of the undisclosed documents are not, in my opinion, relevant to the issues in this trial.
>
> (Emphasis added)

[44] In my respectful view, the trial judge erred by placing a burden on defence counsel to demonstrate the relevance of existing documents that the Crown refused to disclose. *R v Chaplin*, [1995] 1 SCR 727 at para 32 [*Chaplin*], draws a clear distinction between the "Procedure Where Existence of Information is Established" (paragraphs 25 to 29) and "Procedure Where Existence of Material is Disputed" (paragraphs 30 to 33). The trial judge referred to that part of *Chaplin* that addresses the Crown's obligation when the defence alleges that other documents exist without knowing whether they actually are in existence. If *R v Mah*, 2001 ABQB 322, 288 AR 249, can be taken to speak to the issue of disclosure of existing documents, I would not follow it.

[45] In a series of decisions leading up to *Chaplin*, the Supreme Court of Canada heard appeals intended to address the proper procedure where the existence of a document or information is not in doubt but the Crown resists disclosure: *R v Duarte*, [1990] 1 SCR 30; *Dersch v Canada (Attorney General)*, [1990] 2 SCR 1505; and *R v Durette*, [1994] 1 SCR 469. These are wiretap cases, but in *Chaplin*, Sopinka J. relied upon these decisions to comment upon the "Catch 22" position of the defence when the Crown refuses to disclose information known to exist, but does not provide sufficient information to assess relevance:

> [27] … In *Dersch, supra,* for example, the accuseds had been given notice that the Crown intended to adduce evidence obtained as a result of *Criminal Code* wiretap authorizations made as part of the investigations into the charges being tried. The accuseds applied for an order for access to the contents of the sealed packets containing the affidavits in support of the authorizations, claiming that they were needed for them to make full answer and defence. In restoring the order of the trial judge to grant the application, this Court noted that the accuseds could not gain access to the affidavit unless they could prove the grounds for such access, and could not prove such grounds unless they had access.
>
> (Emphasis added)

[46] In *Chaplin*, this Catch 22 prompted Sopinka J. to write the following:

> [25] In situations in which the existence of certain information has been identified, then the Crown must justify non-disclosure by demonstrating either that the information sought is beyond its control, or that it is clearly irrelevant or privileged. The trial judge must afford the Crown an opportunity to call evidence to justify such allegation of non-disclosure. As noted in *R. v. Stinchcombe*, supra, at p. 341:
>
> > This may require not only submissions but the inspection of statements and other documents and indeed, in some cases, *viva voce* evidence. A *voir dire* will frequently be the appropriate procedure in which to deal with these matters.
>
> (Emphasis added)

[47] Shortly after the Supreme Court of Canada released *Stinchcombe*, and before *Chaplin*, this Court established a procedure to review the Crown's refusal to disclose in *Laporte*. According to *Laporte*, the Crown is required to produce "a written, itemized inventory of the information in its possession, identifying those items which it intends to disclose and those which it does not, and containing, in respect of the latter items, a statement in each case of the basis upon which the Crown proposes to withhold disclosure" (at para 18). The Crown should describe each item "with sufficient detail that counsel will be enabled to make a reasoned decision as to whether to seek disclosure or not".

[48] As Ottenbreit J.A. indicated in *Anderson*, the courts in Saskatchewan have continued to follow the procedure set out in *Laporte*. Although it is not mandatory and it is not inconsistent with *Chaplin*, it is a tool to help determine whether the Crown has met its disclosure obligations (see paragraph 97 of *Anderson*). Ottenbreit J.A. confirmed, however, that the Crown "has to justify non-disclosure" (at para 96) in circumstances where the Crown refuses to disclose documents known to exist.

[49] When the trial judge relied upon the failure of defence counsel to demonstrate a reasonable possibility that the undisclosed documents were relevant, he erred. He was required to call upon the Crown to demonstrate that the documents were clearly irrelevant. The Crown's solution at trial, which was to allow defence counsel to review the documents in their presence during the first weekend of the trial, does not affect this analysis.

2. Misdirection as to the status of the Index

[50] As *Chaplin* holds, where the existence of a document is not in doubt, the burden is on the Crown to bring itself within an exception to its obligation to disclose. In this case, that meant the Crown had to demonstrate that the documents were "clearly irrelevant". There were several ways in which the Crown could have discharged that burden. Given that the Index was discovered two days before trial, Crown counsel chose to meet its obligation by producing the Index on the first day of trial, calling it a *Laporte* inventory and providing little else.

[51] Notwithstanding the Crown's submissions, this is not a case like *Anderson* where the trial judge concluded Crown counsel was "unable to satisfy the defence's demands because [they] were such that they were incapable of being met" (trial transcript at T1006). Nonetheless, the

analysis in *Anderson* is highly relevant to this appeal. Speaking for the Court in *Anderson*, Ottenbreit J.A. demonstrated that when counsel take divergent views of the Crown's obligations it is necessary to return to first principles beginning with *Stinchcombe*.

[52] In *Stinchcombe*, Sopinka J., writing for the Court, wrote at length regarding the Crown's obligation to disclose all information (subject to certain named exceptions). The Crown "must err on the side of inclusion" but "it need not produce what is clearly irrelevant" (at 339). Sopinka J. made it clear that "The initial obligation to separate 'the wheat from the chaff' must therefore rest with Crown counsel".

[53] In *R v Egger*, [1993] 2 SCR 451, Sopinka J. again made it clear that the burden is on the Crown to justify non-disclosure:

> The Crown's disclosure obligation is subject to a discretion, the burden of justifying the exercise of which lies on the Crown, to withhold information which is clearly irrelevant or the non-disclosure of which is required by the rules of privilege, or to delay the disclosure of information out of the necessity to protect witnesses or complete an investigation: *Stinchcombe*, *supra*, at pp. 335–36, 339–40. As was said in *Stinchcombe*, *supra*, at p. 340, "[i]nasmuch as disclosure of all relevant information is the general rule, the Crown must bring itself within an exception to that rule".
>
> (Emphasis added, at 466)

[54] As I have indicated, this Court in *Anderson* held that a *Laporte* inventory is not the only means by which the review process may begin, but in the case at bar, the Crown put forward the Index, asserting that it was a *Laporte* inventory and urged the Court to accept it as such.

[55] In my respectful view, the Index is not a *Laporte* inventory. Quite simply, the Index was prepared for a different purpose. Calling the Index a *Laporte* inventory was a means to try to salvage the trial dates, but the Index does not provide "sufficient detail that counsel will be enabled to make a reasoned decision as to whether to seek disclosure". It does not indicate the basis upon which disclosure is resisted. This is not what the Supreme Court of Canada had in mind when it imposed an obligation on the Crown to disclose all information, excluding that which is "clearly irrelevant".

[56] The trial judge considered the Index in some detail, but in my view, he erred in describing the Index:

> [19] Crown counsel advises and defence counsel does not dispute that many of the approximate 1,900 documents in this database are also found in the CFSEU [Special Enforcement Unit] database and thus are among the documents that have been previously disclosed in these proceedings. Examples of such documents include police investigation and surveillance reports, affidavits and exhibits on various applications for court orders, search warrants, production orders, restraint and management orders, CPIC documents with respect to various individuals and the like.
>
> [20] Defence counsel confirms she does not seek duplicate disclosure. Crown counsel has specifically represented to the Court and to defence counsel that they will not be seeking to use in these proceedings any document listed in the IPOC Global Document Report [the Index] except to the extent that such documents have already been disclosed.
>
> [21] The balance of the IPOC database contains documents that are records of financial transactions, banking transaction, income tax records, information relating to assets owned, acquired or disposed of, tracing of funds and assets, ISC records, SGI customer profiles, corporate registry searches, and correspondence relating to financial matters or investigations involving a significant number of individuals including the accused.
>
> (Emphasis added, *Adjournment Decision*)

[57] While it was common ground that there were documents in common between the two databases, the difficulty was in knowing the numbers and in knowing where the overlap lay. The trial judge made the assumption that all that was left was the financial information. Even assuming for the moment that financial records of known associates in a conspiracy trial are automatically "clearly irrelevant" without examination, the fact is, as Mr. Chu's counsel on appeal demonstrated, there are other documents not disclosed and not common to both investigations, and which were not financial documents.

[58] Comparing the list of documents that Crown counsel disclosed during the weekend prior to the trial with some of the listed items on the Index is one way to illustrate this point. The 27 documents that were released on Saturday, September 6, 2014, are listed in an appendix to the Crown's factum on appeal. That list is as follows (pages 219 to 220):

Description of Late Disclosure Documents

1. **Doc 1810** (6 pgs) – financial analysis of banking records by Cory Oliver.
2. **Doc 1277** (19 pgs) – emails between Cst Hunter and Cpl Black re: getting copies of wallet content of Youlong Thai's wallet seized on Drumheller, AB stop.
3. **Doc 1745** (3 pgs) – email between Cst Hunter to Cst Frisk.
4. **Doc 1746** (2 pgs) – email between Cst Frisk to Cst Hunter
5. **Doc 1811** (2 pgs) – emails between Cst Hunter to Cst Ireland
6. **Doc 1812** (3 pgs) – emails between Cst Hunter to Cst Ireland

7. **Doc 1813** (2 pgs) – emails between Cst Hunter to Cst Ireland
8. **Doc 1814** (3 pgs) – emails between Cst Hunter to Cst Ireland
9. **Doc 1816** (2 pgs) – emails between Cst Hunter to Cst Ireland
10. **Doc 1771** (2 pgs) – email Cpl Kerr to Cst Hunter describing his involvement Oct 4 events
11. **Doc 1731** (2 pgs) – email Cpl Kerr to Cst Hunter giving Bennet Tse's Vancouver address.
12. **Doc 1283** (5 pgs) – Exhibit Ledger for 122 Galbraith Crescent
13. **Doc 1415** (2 pgs) – Exhibit Ledger for 45th Street warehouse.
14. **Doc 1161** (53 pgs) – ITO for 122 Galbraith Crescent
15. **Doc 1167** (53 pgs) – ITO for 45th Street warehouse
16. **Doc 1164** (53 pgs) – ITO for 805 Circle Drive
17. **Doc 1679** (6 pgs) – SIU concluding investigation report as file turned over to CFSEU. Authored by Jan Lucier.
18. **Doc 1671** (10 pgs) – Offline Information Services Corporation (ISC) check
19. **Doc 1587** (510 pgs) – Cst. Amy Hunter's handwritten notes
20. **Doc 673** (2 pgs) – PROS Reports List re: Thai (Drumheller)
21. **Doc 1282** (14 pgs) – Report to a Justice for 122 Galbraith Crescent
22. **Doc 1144** (10 pgs) – Report to a Justice for 122 Galbraith Crescent
23. **Doc 1347** (4 pgs) – Report to a Justice for 45th Street warehouse
24. **Doc 1518** (4 pgs) – Report to a Justice for 805 Circle Drive
25. **Doc 1162** (3 pgs) – Search Warrant for 122 Galbraith Crescent
26. **Doc 1168** (3 pgs) – Search Warrant for 45th Street warehouse
27. **Doc 1165** (3 pgs) – Search Warrant for 805 Circle Drive

(Box emphasis added, compare below)

[59] Each of the documents in the list above can be found as an entry in the Index but, in the Index, the number of pages is not shown. For example, the following appears in the Index under the heading "Member Notes" and can be found on pages 165–166 of the Crown factum:

MEMBER NOTES

HICKS, KYLA CST

Document #: 1826 2011/08/18 Task 5 - Member Notes of Cst Kyla HICKS

HUNTER, AMY CST

Document #: 1587 2011/05/30 Task 171 - Member Notes of Cst Amy HUNTER

Document #: 1755	2011/11/08	Task 211 - Member Notes of Cst Amy HUNTER regarding suspicious banking transaction made by Joanne HO and Blane MCDONALD at the Credit Union in Watrous, SK
KERR, JASON CPL		
Document #: 1754		Task 210 - Member Notes of Cpl Jason KERR regarding inquires made to construction companies involved in work at 1014 Ledingham LN, Saskatoon, SK
Document #: 1346	2012/01/09	Task 171 - Member Notes of Cpl Jason KERR
LERAT, MIKE CPL		
Document #: 1694	2011/08/03	Task 5 - Member Notes of Cpl Mike LERAT
Document #: 1734	2011/08/04	Task 5 - Member Notes of Cpl Mike LERAT
Document #: 1822	2011/08/17	Task 5 - Member Notes of Cpl Mike LERAT
Document #: 1823	2011/10/06	Task 5 - Member Notes of Cpl Mike LERAT
PIPRELL, AARON CST		
Document #: 1827	2011/08/30	Task 5 - Member Notes of Cst Aaron PI PRELL
SHUKIN, DARCY SGT		
Document #: 1318	2011/06/08	Task 171 - Member Notes of Sgt Darcy SHUKIN
TAYLOR, BRENT SGT		
Document #: 1248	2012/01/09	Task 171- Member Notes of Sgt Brent TAYLOR
WINTERMUTE, ROBIN SGT		
Document #: 1825	2011/09/12	Task 5 - Member Notes of Sgt Robin WINTERMUTE

(Box emphasis added, compare above)

[60] Again, with respect to the above, none of the Member Notes, other than those of Cst. Hunter, were disclosed – and it was only after production that defence counsel learned that this document spanned 510 pages (see the boxed entries above).

[61] Another way to illustrate why the Index does not meet the requirements of a *Laporte* inventory is to consider some of the individual items in greater detail – apart from any comparison with the disclosed list. During the hearing of the appeal, Mr. Chu's counsel took us through the Index. He invited us to look at the description of approximately 57 documents. This is a representative sample of those documents (see AF at 98–103):

GENERAL WARRANT AND ASSISTANCE ORDER
RBC 2011-09-08

Document #: 1564 2011/09/08 Task 122 - General Warrant and Assistance Order on the oath of Cst Amy HUNTER regarding the covert entry to examine the contents of the safety deposit box of Youlong THAI located at 154 1st AVE S, Saskatoon, SK (RBC)

…

TORONTO-DOMINION BANK 2011-11-02

Document #: 1056 2011/11/02 Task 167 - General Warrant and Assistance Order on the oath of Cst Amy Hunter regarding the banking/financial institution records and data for Youlong THAI, Christopher Pang CHU, Christopher PANG, and 101146259 Sask Ltd

…

GENERAL WARRANT, ASSISTANCE ORDER & SEALING ORDER …
CIBC 2011-09-01

Document #: 1352 2011/09/01 Tasks 114, 116, 118 and 120 - General Warrant, Assistance Order and Sealing Order, on the oath of Cst Amy HUNTER, signed by Judge Q.D. AGNEW, PCJ regarding banking/financial institution records and data from the Canadian Imperial Bank of Commerce for Christopher pang CHU

…

IDENTIFICATION
CHU, CHRISTOPHER PANG

Document #: 1800 Task 5 - Photocopy of personal identification of Christopher Pang CHU provided by CFSEU to CST Amy HUNTER

…

INFORMATION TO OBTAIN …
RBC, TD, CIBC & SCOTIABANK 2011-09-01
Document #: 1348 2011/09/01 Tasks 114, 116, 118 and 120 - Information to Obtain a General Warrant, Assistance Order and Sealing Order on the oath of Cst Amy HUNTER regarding any banking/financial institution records and data for Youlong THAI and Kari-Lynne KEDDIE, 101185813 Saskatchewan Ltd, Thien NGUYEN, Chris PANG and Christopher Pang CHU.

RBC, TD, CIBC ET AL 2011-11-02
Document #: 1055 2011/11/02 Task 167, 168, 169, 170, 172 and 173 - Information to obtain a General Warrant, Assistance Order and Sealing Order on the oath of Cst Amy HUNTER regarding banking/financial institution records and data for Youlong THAI, Christopher Pang CHU, Christopher PANG, and 101146259 Sask Ltd

…

INTERNET QUERY
BEGINNERS STERIOD [*sic*] USE
Document #: 1769 2011/11/21 Task 157 & 162 - Beginners steroid use Internet Query on website www.muscletalk.co.uk

…

HOW TO TAKE ANABOLIC STEROIDS
Document #: 1770 2011/11/21 Task 157 & 162 - How to take anabolic steroids Internet Query on website www.steriods-pharma.com

[62] These documents may be found in the context of a new trial to be irrelevant, but on their face it is not possible to make such a determination. Mr. Chu was charged with conspiring to traffic in cocaine and possessing cocaine. His defence turned out to be that he was not guilty of either of those crimes but that he was possessing and trafficking OxyContin and steroids. It would seem to me that banking information linking Mr. Chu and his associates could not be classified as "clearly irrelevant" without more. On their face, any of the documents associated with other drugs would also not be clearly irrelevant.

[63] Presenting the Index on the first day of trial, and expecting defence counsel to determine not only what is new but also to determine facial relevance of what remains, without even direct and unsupervised access to the hyperlinked documents, would be an impossible task for defence counsel – and therein lies the real problem. Crown counsel, defence counsel and the Court were

in a dilemma. Given the timing and quantity of the disclosure, everything was telescoped down to a short bridge of time, leaving few options. The trial judge is to be commended for wanting to make sure the trial dates were not lost, but what had transpired meant that an adjournment had to be granted – or other steps had to be taken to attempt to provide a remedy under s. 7. In another case, with more time, Crown counsel might have been able to work with a document like the Index. In *Anderson*, for example, it appears that a document similar to the Index formed the basis for disclosure, but the parties spent upwards of six days in hearings over several months canvassing several disclosure motions and ultimately resulting in additional disclosure being made.

[64] As Ottenbreit J.A. indicated in *Anderson*, the review exercise when the Crown refuses to disclose known documents is a complex one:

> [64] As a practical matter, during a review of the Crown's disclosure obligations prior to trial or during trial, a trial judge must look at a myriad of relevant factors touching on whether the Crown has fulfilled its obligation in good faith and in a timely manner. Without providing an exhaustive list, this could include looking at the essential elements of the offence, the complexity of the investigation, the volume and type of disclosure already provided, what the Crown refuses or is unable to provide, a preliminary assessment of how the further disclosure sought is relevant in the sense of assisting the accused, whether it is part of the case to meet, the interaction between the Crown and defence, the behaviour of the Crown and defence, the timing of disclosure and the nature of the defence requests for disclosure. The interplay of these factors is case specific.

[65] Referring to the non-exhaustive list mentioned by Ottenbreit J.A. in *Anderson*, the investigation in the within case was complex – so much so that Crown counsel was not even aware of the parallel police investigation. The timing of the disclosure could not have been more problematic. It is clear that defence counsel was not being obstreperous. She did not go fishing for additional disclosure. She accepted the Crown's assurance that disclosure had been complete four months earlier and was prepared to proceed to trial on what she had.

[66] Thus, I conclude that the trial judge erred by (i) misapplying the test in *Chaplin*, (ii) imposing a burden on the defence, and (iii) concluding that the Crown had met its disclosure obligations by providing the Index. In light of the Crown's late and non-disclosure, the judge erred by not granting an adequate remedy to address the s. 7 breach.

3. Effect of *Dixon* and *Taillefer*

[67] Notwithstanding any error on the part of the judge to find a s. 7 breach or to grant a remedy in relation to it, the Crown asks this Court to sustain the result on the basis that Mr. Chu was nonetheless able to make full answer and defence – having regard for the principles set down in *Dixon* and *Taillefer*. *R v Illes*, 2008 SCC 57, [2008] SCR 134 [*Illes*], is also relevant. In *Illes*, the accused learned of an additional statement after trial, which became the subject of a fresh evidence application on appeal. LeBel and Fish JJ. for the majority wrote the following:

> [24] With respect to the fresh evidence not available to the defence at trial due to the Crown's failure to disclose, a new trial is the appropriate remedy under s. 24(1) of the *Canadian Charter of Rights and Freedoms* if the accused can show that his right to make full answer and defence was thereby violated. In order to discharge this burden, the accused can show *either* "that there is a *reasonable possibility* that the non-disclosure affected the outcome at trial" *or* that it affected "the overall fairness of the trial process" (*R. v. Dixon*, [1998] 1 S.C.R. 244, at para. 34 (emphasis in original)).

Understandably, given the volume of material, there is no fresh evidence application in this Court, but this fact has consequences for the analysis of the *Dixon–Taillefer* issue.

[68] As the Supreme Court of Canada made clear in *Dixon*, different principles and standards apply in determining whether disclosure should be made before conviction and in determining the effect of a failure to disclose after conviction:

> [31] … For instance, where the undisclosed material is available for review at trial, the presiding judge will evaluate it in relation to the *Stinchcombe* threshold to determine whether the Crown breached its obligation to disclose by withholding the material. If it has, an order for production or perhaps an adjournment will be the appropriate remedy. Obviously, <u>these remedies are no longer available after conviction. At this stage, an appellate court must determine not only whether the undisclosed information meets the *Stinchcombe* threshold, but also whether the Crown's failure to disclose impaired the accused's right to make full answer and defence</u>. Where an appellate court finds that the right to make full answer and defence was breached by the Crown's failure to disclose, the appropriate remedy will depend on the extent to which the right was impaired. <u>Where, as here, the accused was tried before a judge alone, the judge has provided thorough reasons for the decision, and the undisclosed evidenced is available for review, an appellate court is particularly well placed to assess the impact of the failure to disclose on the accused's ability to make full answer and defence at trial</u>.
>
> (Emphasis added)

[69] Based on *Dixon*, where an appellant's ground of appeal is based on a failure to disclose, it is open to an appellate court to decide whether the undisclosed information meets the

Stinchcombe threshold and, further, whether the Crown's failure to disclose impairs the accused's right to make full answer and defence. Both of these questions, however, require the appellate Court to examine and review the undisclosed information to determine the impact it might have had on the decision to convict.

[70] In this case, however, we are in the same position as the trial judge: we are left looking at the Index to determine whether the Crown has met its obligation to disclose all documents, except clearly irrelevant ones. Thus, it is still not possible for the Court to determine which of the documents listed in the Index have already been disclosed and no further description of the documents has been provided. In my view, having regard for the burden on the Crown when it refuses to disclose documents that are known to exist, it is not possible to answer that question, which means there must be a new trial.

[71] In light of the power that *Dixon* and *Taillefer* speak to, it may also have been open to the trial judge to address defence counsel's concerns about the lack of privacy in reviewing the Index and to grant a longer adjournment. It may even have been appropriate for the trial judge to refuse the adjournment and, having regard for the standard of review indicated in *Dixon*, to direct Crown counsel to prepare a more detailed list while the trial continued – and to make further rulings as any subsequently disclosed information might require.

[72] Even in the face of the trial judge's decision refusing an adjournment, and without any further directions from the judge, there may have been other ways for the matter to have been handled. Crown counsel might have continued to review the documents listed in the Index, clearly identifying what had already been disclosed and vetting the balance of the documents, including preparing a summary of them – if it were determined that they did not meet the *Stinchcombe* test. The trial continued over some 18 days intermittently over a one-month period.

[73] These options, however, are not before this Court. After receiving the *Adjournment Decision*, which issued on September 9, 2014, Crown counsel was, of course, entitled to do nothing further, but it does mean that this Court cannot rely on *Dixon* or *Taillefer* to perform the trial judge's function. This Court's remedy for the s. 7 *Charter* breach can only be a new trial.

C. Authority apart from considerations of s. 7 and s. 24(1) of the *Charter* to review the trial judge's decision refusing the adjournment

[74] If the Court were to find that the trial judge did not err by failing to grant an adequate remedy under s. 24(1) for the infringement, Mr. Chu's counsel, on appeal, asked the Court to find that the trial judge erred by not granting an adjournment – apart from any consideration of s. 7 of the *Charter*. In the event that I am in error with respect to my conclusion that the Crown's late and non-disclosure required a more adequate remedy under s. 24(1), I will address this alternate basis for the same result.

[75] As support for his position, Mr. Chu's counsel relies on *Barrette* and *Davis*. The majority in *Barrette* held that a decision on an application for an adjournment is a discretionary decision that may be reviewed on appeal if it is based on reasons that are not well-founded in law. The *Barrette* majority described this right of review as "especially wide when the consequence of the exercise of discretion is that someone is deprived of his rights, whether in criminal or in civil proceedings" (at 125). *Barrette*, of course, is a pre-*Charter* decision.

[76] In *Davis*, the Court of Appeal considered whether the defendant had been entitled to a stay of proceedings "on the basis of inadequate and untimely disclosure by the Crown of an intention to call expert evidence respecting post-traumatic stress syndrome in sexual assault cases and respecting toxicology". The Court recognized, following *Stinchcombe*, "that the obligation to disclose is derived from the rights of an accused to a fair trial and to make full answer and defence which are now constitutionalized by virtue of ss. 7 and 11(d)" (at para 9). The Court of Appeal noted, citing *R v O'Connor*, [1995] 4 SCR 411 [*O'Connor*], that as there is no standalone right to disclosure found in the *Charter*, not every failure to make disclosure will necessarily involve a *Charter* breach or entitle an accused to a s. 24 remedy. According to the Supreme Court, the basic remedy for improper non-disclosure is an order for disclosure (see *O'Connor* at para 11).

[77] The Court of Appeal commented that even where there has been no breach of the *Charter* in respect of disclosure, "the court nevertheless has an obligation to ensure that the accused's right to a fair trial is preserved and in that connection the court must always consider the impact

and the manner and timing that the receipt of Crown evidence might have on the ability of the accused to receive a fair trial" (*Davis* at para 12).

[78] The Court in *Davis* noted that crafting a remedy for a *Charter* breach involves a consideration of what is appropriate and just and that "an adjournment will often be the only remedy necessary to deal with an issue of late disclosure" (at para 22). However, the Court also noted that adjournments are the sort of thing that "even without a *Charter* breach, could be made, in the interests of trial fairness whenever the submission of untimely evidence takes the defence by surprise" (at para 21).

[79] In *O'Connor*, L'Heureux-Dubé J. analyzed the Court of Appeal's conclusion that the jurisprudence "favoured maintaining a distinction between the *Charter* and the common law doctrine of abuse of process". Justice L'Heureux-Dubé found at paragraph 60 that individual rights to trial fairness and the general reputation of the criminal justice system were fundamental concerns that underlie both the common law doctrine of abuse of process and the *Charter*. At paragraph 69, she commented as follows:

> [69] Remedies less drastic than a stay of proceedings are of course available under s. 24(1) in situations where the "clearest of cases" threshold is not met but where it is proved, on a balance of probabilities, that s. 7 has been violated. In this respect the *Charter* regime is more flexible than the common law doctrine of abuse of process. However, this is not a reason to retain a separate common law regime. It is important to recognize that the *Charter* has now put into judges' hands a scalpel instead of an axe -- a tool that may fashion, more carefully than ever, solutions taking into account the sometimes complementary and sometimes opposing concerns of fairness to the individual, societal interests, and the integrity of the judicial system.

[80] Ultimately, L'Heureux-Dubé J. concluded that "the only instances in which there may be a need to maintain any type of distinction between the two regimes will be those instances in which the *Charter*, for some reason, does not apply yet where the circumstances nevertheless point to an abuse of the court's process" (at para 70).

[81] Insofar as this second "abuse of process" path remains open where a breach of s. 7 is not found, it may be another path permitting the review of a discretionary decision – as the Court in *Davis* recognized. I recognize that the articulation of a second path is somewhat circuitous in that the law underlying an adjournment decision and the impact on trial fairness are both captured by the same underlying facts. Nonetheless, I note that this Court continued to acknowledge the

authority of *Barrette* in the post-*Charter* era: *R v Ironchild* (1984), 30 Sask R 269 (CA); and see *R v Rak* (1999), 172 Sask R 301 at para 2 (CA). In *Ironchild*, Tallis J.A. stated that the right of review "must be weighed conscientiously and delicately along with the public interest in the orderly administration of justice" (at para 13).

[82] On this basis, I would be prepared to hold that the trial judge's decision to refuse an adjournment or provide another adequate remedy would, in this case, amount to an abuse of process necessitating a new trial. Having regard for the following – (i) the Crown's assurance that disclosure was complete on May 7, 2014, (ii) the timing and volume of disclosure, (iii) the seriousness of the charges, (vi) the requirements of a proper review procedure, and (v) the co-operative approach of defence counsel – the trial judge erred by not adjourning the trial outright or for a sufficient time for both Crown and defence counsel to devise a procedure to address the revelation as to the existence of the second database.

V. Conclusion

[83] The conviction is set aside and a new trial ordered.

"Jackson J.A."

Jackson J.A.

I concur. "Lane J.A."

Lane J.A.

I concur. "Jackson J.A."

for Ottenbreit J.A.