IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *R. v. Banks Island Gold Inc.*,
2020 BCSC 167

Date: 20200211
Docket: 29244-C4
Registry: Prince Rupert

Between:

Regina

Appellant/Respondent

And:

Banks Island Gold Inc.,
Benjamin Mossman and Dirk Meckert

Defendants/Appellants

Before: The Honourable Mr. Justice Punnett

On Appeal from Orders of the Provincial Court of British Columbia,
dated May 17, 2018 and December 7, 2018

Reasons for Judgment

Counsel for the Crown:	G.G.R. McDonald
Counsel for the Defendants:	C.C. Cheng and G.A. Hooper
Place and Date of Hearing:	Prince Rupert, B.C. May 6-9, 2019
Place and Date of Judgment:	Prince Rupert, B.C. February 11, 2020

Introduction

[1] These appeals arise from offences alleged to have occurred at a gold mining site operated by Banks Island Gold Ltd. (“BIG”) on Banks Island,

approximately 120 km south of Prince Rupert, B.C.

[2] The defendant/appellant Benjamin Mossman was the President, CEO and a director of BIG. He was also the designated "mine manager" for the mine site. He appeals his conviction of Count 1 for failing to report a spill under s. 79(5) of the *Environmental Management Act,* S.B.C. 2003, c. 53, and for Count 22 for failing to report the deposit of a deleterious substance out of the normal course of events contrary to s. 38(5) of the *Fisheries Act,* R.S.C. 1985, c. F-14. He also appeals the dismissal of his application for a stay of proceedings pursuant to *R. v. Jordan,* 2016 SCC 27 (the "*Jordan* Application").

[3] The Crown appeals the acquittal of Mr. Mossman on 11 counts and the acquittal of Dirk Meckert, the Assistant Manager and Chief Geologist and Alternate Mine Manager for BIG, on 14 counts under the *Environmental Management Act*, the *Fisheries Act*, and the *Water Act*, R.S.B.C. 1996, c. 483.

[4] Not all grounds of appeal were addressed as counsel agreed to adjourn several pending this appeal. This appeal then is limited to the appeal by Mr. Mossman and Mr. Meckert of a *voir dire* ruling regarding admission into evidence of portions of their joint July 9, 2015 statement, observational evidence at the mine site, and a subsequent Spill Report, and the Crown appeal of the ruling excluding a portion of the July 9 statement and both of the defendants' July 15, 2015 statements.

[5] I will refer to Mr. Mossman and Mr. Meckert collectively as the defendants in these reasons.

Background

[6] Much of the background is summarized in the Agreed Facts on Appeal:

> General Facts:
>
> 1. This trial dealt with a number of offences alleged to have occurred at the Banks Island Gold mining site, also known as the Yellow Giant mine, between August 2014 and July 2015. The mine site was located on Crown land, but Banks Island Gold Ltd. had mineral tenure for the location.
> 2. At all material times, Benjamin Mossman was the President, CEO and a director of Banks Island Gold Ltd. Benjamin Mossman was also the designated "mine manager" for the mine site pursuant to section 21 of the *Mines Act*.

3. At all material times, Dirk Meckert was employed as the Assistant Manager and Chief Geologist by Banks Island Gold Ltd. Dirk Meckert was designated as an alternate mine manager pursuant to the *Mines Act*. Dirk Meckert was not an officer or director of Banks Island Gold Ltd.

4. The Banks Island Gold mine site was located on Banks Island, approximately 120 km south of Prince Rupert, British Columbia.

5. The Banks Island Gold mine site operated under a number of different permits. The learned trial judge described the permitting in his Reasons for Judgement.

6. At all material times, the Banks Island Gold mine site comprised of three distinct sites - Tel, Bob and Discovery. Tel was a formal mine site pursuant to *Mines Act* permit M-241. *Environmental Management Act* Permit 106576 related to the Tel mine site. Banks Island Gold Ltd. had a mineral lease for the Tel site. Bob and Discovery were advanced exploration sites pursuant to a *Mines Act* exploration permit MX-1-862.

7. The *Environmental Management Act* Permit 106576, applications and associated documents were Exhibit 1 on the trial.

8. The *Mines Act* Permit M-241, *Mines Act* Exploration Permit MX-1-862, the mineral lease, applications and associated documents were Exhibit 2 on the trial.

9. An agreed statement of facts was tendered at the start of the trial and was Exhibit 3.

10. Allegra Cairns ("Cairns"), the former Environmental Manager, and Brent Edmunds ("Edmunds"), the former Safety Manager, testified in the trial before the *voir dire.*

[7] The reasons for judgment relevant to the defence and Crown appeals are the *voir dire* decision pronounced on March 14, 2018 with reasons issued on December 7, 2018 (the *"Voir Dire* Reasons") and the *Jordan* Application reasons dated May 17, 2018 (the *"Jordan* Reasons").

Defence *Voir Dire* Appeals

[8] The defence appeals the admission of portions of Mr. Mossman's statement of July 9, 2015 on the grounds the trial judge erred:

(1) In admitting certain evidence contrary to sections 7 and 10 of the *Canadian Charter of Rights and Freedoms* including:

(a) Portions of a statement given by Mossman to state agents on 9 July 2015;

(b) A written report containing self-incriminatory statements authored and submitted under the direction of Mossman dated 22 July 2015, which report state agents compelled Mossman to produce (the "Spill Report"); and

(c) Observational evidence obtained on July 9, 2015.

in particular such evidence was gathered:

(a) contrary to Mossman's rights against self-incrimination under section 7 of *the Canadian Charter of Rights and Freedoms*; and,

(b) while Mossman was under regulatory detention triggering his right under section 10 of the *Canadian Charter of Rights and Freedoms.*

(2) In convicting Mossman for failing to report. In particular:

(a) Count 1: if the Spill Report is held to have been improperly admitted, then the trial judge erred by relying on the Spill Report in convicting Mossman of Count 1 as the Spill Report contains the only evidence led at trial capable of forming a conviction of Count 1;

…

[9] The portions of the Agreed Facts on Appeal relevant to the *voir dire* issues are:

(1) In the trial below, Mossman and Meckert brought an application to exclude evidence on the basis of breaches of section 7, 8, and 10 of the *Charter of Rights and Freedoms*.

(2) The evidence at issue in the *voir dire* was physical and observational evidence, and statements of Mossman and Meckert, obtained by various officers or inspectors from the British Columbia Ministry of Energy and Mines, the British Columbia Ministry of Environment, and Environment Canada. Persons from those agencies attended the Banks Island Gold site on July 9, 2015 and after.

(3) The following witnesses were called in the *voir dire*, each of whom attended the Banks Island Gold site visit on July 9, 2015:

a. Ministry of Environment Conservation Officer Gareth Scrivner;

b. Ministry of Environment Environmental Protection Officer Neil Bailey;

c. Ministry of Energy and Mines Inspector James Robinson;

d. Environment Canada Officer Normand Legare.

(4) Crown and Defence agreed that testimony of the persons listed … would be incorporated into the trial record, if ruled admissible.

(5) Mossman and Meckert did not testify in the *voir dire.*

(6) In addition, the Defendants and Crown entered an agreed statement of fact on the *voir dire,* as contained in Appendix B to this Agreed Facts on Appeal.

(7) On 14 March 2018, the trial judge ruled without reasons that:

a. The observations by the government officers and inspectors of the mine sites were admissible.

b. Part of a recorded statement taken on July 9, 2015 with both Mossman and Meckert was inadmissible, while the other part was admissible;

c. The statements of Mossman and Meckert on July 15, 2015 were inadmissible; and,

d. That various references to dates of discharges, contained in other documents, obtained from the inadmissible statements would also be inadmissible.

(8) On December 7th, 2018 the trial judge released reasons for judgment on the *voir dire* (the *"Voir Dire* Reasons").

(9) In the *Voir Dire* Reasons, the trial judge made the following findings with respect to the July 9, 2015, visit by officers and inspectors to the Banks Island Gold mine site:

a. The Court adopted the Defendants' chronology of actions … by officers and inspectors leading up to and during the July 9, 2015, visit to the Banks Island Gold mine site; and,

b. The trial judge made a legal finding that Mossman and Meckert "… did not have any expectation of privacy in the circumstances of the officers and inspectors' attendance, inspection, observation and sample collection of the Banks Island Gold mine sites".

c. The Court made a legal finding that the predominant purpose of the officers and inspectors was the "… continued regulation and continued operation of a multi-site mine, and the return to compliance of those areas that were identified to be in contravention of the Permits".

d. The trial judge made a legal finding, or a finding of mixed law and fact, that Mossman and Meckert were not detained when they drove the investigators to the mine sites and it was not apparent whether they were subjectively compelled at the time.

(10) With respect to the statements by Mossman and Meckert on July 9, 2015, and July 15, 2015, the trial judge made the following findings:

a. The Crown's facts were adopted concerning the content of the warning by officers and inspectors to Mossman and Meckert on July 9, 2015;

b. The Crown's facts were adopted concerning the content of the warning to Mossman by officers on July 15, 2015; and,

c. The Crown's facts were adopted concerning the content of the warning by officers to Meckert on July 15, 2015;

d. The trial judge found that the investigators had sufficiently described the types of offences they were investigating;

e. The warnings used by investigators were deemed appropriate for *Criminal Code* offences, but insufficient for

the regulatory offences before the Court.

(11) With respect to the statements by Mossman and Meckert on July 15, 2015, the trial judge ruled that these statements were "…in a certain respect, a continuation of the [July 9]" [statement].

[10] Because the Crown submits the defendants are asking the Court to "arbitrarily replace the trial judge's findings with the Defence's preferred theories," I will first address the role of an appeal court.

Role of Appeal Court

[11] An appellate court cannot interfere with the factual findings of a trial judge unless there is palpable and overriding error. An appellate judge is prohibited from reviewing a trial judge's decision if there was some evidence upon which he or she could have relied to reach that conclusion: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 1.

[12] An appellate court is not to make its own findings of fact. As Romilly J. said in *R. v. Gaudaur*, 2008 BCSC 981:

> [28] In *Fletcher v. Manitoba Public Insurance Co*., [1990] 3 S.C.R. 191 at 204, 74 (4th) 636, Wilson J. stated:
>
> > [A]ppellate courts should only interfere where the trial judge has made a "palpable and overriding error which affected his assessment of the facts". The very structure of our judicial system requires this deference to the trier of fact. Substantial resources are allocated to the process of adducing evidence at first instance and we entrust the crucial task of sorting through and weighing that evidence to the person best placed to accomplish it. As this Court and the House of Lords have repeatedly emphasized, it is the trial judge who is in the best position to assess the credibility of testimony. An appellate court should not depart from the trial judges conclusions concerning the evidence "merely on the result of their own comparisons and criticisms of the witnesses".
>
> [29] In *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, Iacobucci and Major JJ., established that the standard of review for a trial judge's findings of fact is palpable and overriding error. At paras. 23-24 they commented on the deference which should be given to the trial judge's findings of fact, and in particular her assessment of the credibility of the witnesses:
>
> > We reiterate that it is not the role of appellate courts to second-guess the weight to be assigned to the various items of evidence. If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the *inference-drawing process itself* is palpably in error that an appellate court can interfere with the factual

> conclusion. The appellate court is not free to interfere with a factual conclusion that it disagrees with where such disagreement stems from a difference of opinion over the weight to be assigned to the underlying facts. ...
>
> [A]lthough the same high standard of deference applies to the entire range of factual determinations made by the trial judge, where a factual finding is grounded in an assessment of credibility of a witness, the overwhelming advantage of the trial judge in this area must be acknowledged.

[30] In *R. v. Gagnon*, 2006 SCC 17, [2006] 1 SCR 621, Bastarache and Abella JJ., for the majority, further emphasized the deference owed to trial judges' assessments of credibility at para. 20:

> Assessing credibility is not a science. It is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events. That is why this Court decided, most recently in *H.L.*, that in the absence of a palpable and overriding error by the trial judge, his or her perceptions should be respected.

[31] It is not the role of appellate courts to "impermissibly recast the issues by substituting its own findings of fact for those of the trial judge" or second-guess the weight to be assigned to evidence: *R. v. Chaisson*, 2006 SCC 11 at para. 7, [2006] 1 S.C.R. 415. It is not enough that there is a difference of opinion with the trial judge: *Gagnon* at para. 10.

[32] The *Housen* rule does not preclude an appellate court from identifying errors that have a sufficiently decisive effect that they would justify intervention and review on appeal: *Prud'homme v. Prud'homme*, 2002 SCC 85 at para. 65, [2002] 4 S.C.R. 663. In *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401, Fish J. explained, at para. 56, that on this standard of review, "appellate intervention will only be warranted where the court can explain <u>why</u> or <u>in what respect</u> the impugned finding is unreasonable or unsupported by the evidence."

[Emphasis in original.]

[13] With these principles in mind, I will first address the defence and Crown appeals relating to the *Charter voir dire* before turning to the defence appeal of the *Jordan* Application dismissal.

<u>Alleged *Charter* Breaches</u>

[14] At trial the Crown sought to rely on the officers' observational and physical evidence obtained on July 9, 2015, the July 9 and July 15, 2015 statements of Mr. Mossman and Mr. Meckert, and the Spill Report. The trial judge conducted a *voir dire* on the defence application to exclude this evidence based on breaches of ss. 7, 8, and 10 of the *Charter*.

[15] The defence *Charter* application asserted that the state abused the compliance officers' regulatory powers to inspect by doing so to gather evidence to be used against a regulated person in a criminal proceeding. They argue evidence was obtained after it was known or ought to have been known that the relationship between the state and the defendants had turned adversarial and as a result all such evidence should be excluded.

[16] The defendants submit the trial judge misunderstood the applicable legal principles and their submissions by holding it was the nature of the evidence, not when it was compelled that determined admissibility. They also submit the trial judge incorrectly held the defendants did not contest the admissibility of certain evidence under ss. 7 and 10 of the *Charter*.

[17] As is apparent from the background above, four regulatory officers attended at the BIG mining site on Banks Island on July 9, 2015. At issue is the admissibility of what they saw and the statements they obtained.

[18] The trial judge found:

> [5] The accused, Mossman and Meckert brought a Charter Application dated October 12, 2017, seeking the exclusion of the following evidence;
>
> a. All observations, photographs or other evidence collected by inspectors on July 9, 2015 and on all subsequent inspections of the Banks Island mine sites (the "July 9, 2015 Observations"),
>
> b. Warned statements given by Mossman and Meckert on July 9, 2015;
>
> c. Warned statements given by Mossman and Meckert on July 15, 2015; and
>
> d. Statutorily compelled reports, including the July 22, 2015 Spill Report.
>
> [6] The analysis was simplified by certain admissions and positions from counsel. Crown only sought the admission of the July 9, 2015 Observations, and none of the statements made by Mossman and Meckert during the site inspection other than the warned statement.
>
> [7] Counsel for Mossman and Meckert were fair to concede that, even when the dominant purpose of an investigation shifts to gathering evidence of a regulatory offence, if there is no expectation of privacy, there is no breach of the section 8 right and the "observational" evidence is admissible.
>
> NO EXPECTATION OF PRIVACY

[8] I find that Mr. Mossman and Mr. Meckert did not have any expectation of privacy in the circumstances of the various officers' attendance, inspections, observations, and sample collection at the mining sites on Banks Island Gold.

…

[12] While I have found that there was no expectation of privacy, and thereby, the Observations are admissible, the chronology of the inspection at Banks Island remains relevant to the consideration of the statements made by Mossman and Meckert, as well as the July 22, 2015 Spill Report.

[19] The trial judge adopted portions of the chronology provided by the defendants:

Planned Regulatory inspection

1. Prior to the events of July 6th, 2015 planning was underway for either a site inspection by the Ministry of Environment on July 2oth, 2015 or a joint inspection by MOE and Mines, on July 13th, 2015, (the "Planned Inspection").

Whistle Blower

2. Mr. Edmunds, a mine safety officer took photos of events at Bob and Discovery. Mr. Edmunds compiled the photos into two documents for the purpose of making a report to the Ministry of Energy and Mines. Those documents are Exhibit 5 (concerning Discovery; the "Discovery Photos") and Exhibit 6 (concerning Bob, the "Bob Photos"). Mr. Edmunds used a former BIG employee to make an anonymous complaint to government.

The anonymous phone complaint

3. On July 2, 2015, 9:57 a.m., a caller, who wished to remain anonymous, contacted Emergency Management British Columbia. A Dangerous Goods Incident Report was prepared, and recorded that mines belonging to Banks Island Gold (Bob Mine Site) and (Discovery Mine Site) are letting mine tailings into the water systems on the island which are fish habitats.

4. Ministry of Environment, the Ministry of Energy and Mines, and Environment Canada were all notified of the Dangerous Goods Incident Report, all on July 2, 2015. Various emails were sent on July 2 within the Ministries of Environment and Energy and Mines; however, none of the emails indicate a plan to move up the Planned Inspection.

The complaint from the Opposition Critic

5. On Monday July 6, 2015, Opposition Critic Norm Macdonald emailed Minister of Environment Mary Polak and Minister Energy and Mines Bill Bennett, and copied Chief Mines Inspector Al Hoffman. The subject line of the email was "Environmental and safety concerns at Banks Island Gold Mine". Mr. Macdonald referred to an incident at Banks Island that he had been made aware of, and attached the Discovery Photos and Bob Photos.

6. Officer Bailey received the Discovery Photos and the Bob Photos along with the email on July 6, 2015. Officer Bailey admitted that the email raised a very serious concern and increased the urgency of going to BIG. In fact, Officer Bailey's supervisor, Compliance Section Head Jason Bourgeois, referred to this email as creating "a bit of hysteria".

7. After receiving the Discovery Photos and the Bob Photos, individuals within the Ministries of Environment and Energy and Mines moved the Planned Inspection to July 9, 2015.

Bailey's file review

8. On July 6, Officer Bailey performed a "file review" of BIG. Bailey described this file review as a paper inspection, and included looking at BIG's permits, including the EMA permit, and reviewing their annual report and associated appendices. On July 7, 2015, Officer Bailey completed his file review and communicated his results to his superiors. Officer Bailey concluded that:

    a. BIG had exceeded permit discharge levels on various occasions (offences under section 120(7) of the *Environmental Management Act*); and

    b. BIG was engaged in unauthorized discharges (an offence under section 6(2) of the *Environmental Management Act*), stating "I believe the discharges in the photos to be unauthorized discharges."

9. Regarding the first category, Officer Bailey admitted that he did not require any further evidence to confirm those offences. This category would be copied into his subsequent inspection report, and then into the report to crown counsel, and form the basis for Counts: 2-10 in this trial. Crown adduced no more documentary evidence than was in the hands of Officer Bailey at the time of his file review to support these offences.

…

10. Officer Bailey met with his supervisor, Jason Bourgeois, a lawyer, before going to [the] site, and the two discussed "crossing the Rubicon". Officer Bailey explained that he understood that crossing the Rubicon occurred when an inspector obtains evidence of "an obvious violation" or "large issues". Officer Bailey further admitted that observing a "discharge of tailings into the environment; into a creek would definitely cross the Rubicon". Officer Bailey explained that at that point, the inspection would transition to an investigation, and *Charter* rights would need to be read.

…

11. Others within the Ministry of Environment, including those more senior to Officer Bailey, reached the same conclusion - that the Discovery Photos and Bob Photos showed offences, and that a Conservation Officer should be onsite. Specifically, on July 7, 2015 at 11:40 am, Ministry of Environment Regional Director Douglas Hill emailed Head of Compliance Jason Bourgeois (Officer Bailey's direct supervisor), regarding the planned site visit. Hill

recommending that the Conservation Officer Service ("COS") also attend, stating:

> Based on the photos submitted to us it appears that there may be some unauthorised discharges. If you haven't already done so it may be necessary to get COS involved and possibly participate in the trip to the mine (it is fly in only).

12. Officer Bailey ultimately arranged to have Conservation Officer Gareth Scrivner attend ("Officer Scrivner") on July 9th, 2015.

The helicopter fly-over

13, During the fly-over, the Officers took photos of alleged discharges at Discovery and Bob. Inspector Robinson was utilizing a software program on his tablet that enabled him to take photos and record contemporaneous notes about each photo. These notes and photos, along with other notes, formed his inspection record. Inspector Robinson opened a new inspection report at 9:42 am, and began taking photos. He took a photo of a "green plume" in a lake near the Discovery site ("Englishman Slough") and noted, while still in the helicopter "Discovery - see green discharge" and "Sump and unauthorized Discharge."

14. Officer Legare agreed that when he saw the green plume at Discovery he had reasonable grounds to believe that a violation of the *Fisheries Act* had occurred.

...

Discovery site visit

1. When the Officers arrived at Discovery, Officer Legare began gathering legal samples of the discharge into Englishman Slough within 5 minutes of exiting the vehicle.

2. The Officers collected additional physical and observational evidence of the discharge into Englishman Slough, previously seen from the helicopter.

3. Officer Bailey testified that the observations on the ground confirmed the violation observed from the helicopter, being an offence under section 6(2) of the *Environmental Management Act*.

4. On viewing the Discovery site, Officer Scrivner was also satisfied that an offence had been observed under section 6(2) of the *Environmental Management Act*, and that some enforcement action could be taken at that point.

5. Officer Bailey advised Scrivner that he wanted to see the site where the Discovery Photos were taken before an investigation was started.

6. Inspector Robinson also wanted to see the location where the Discovery Photos were taken. After completing the discussion with Legare, Bailey, and Scrivner regarding the violations already observed, Inspector Robinson directed Mr. Mossman three times to show the Officers the site from the Discovery Photos. Each time, Inspector Robinson was more forceful, before finally getting

compliance. During his evidence in Chief, Inspector Robinson described the demands as follows:

> A. ... I questioned him and said, "Ben, please show me" or, "Mr. Mossman, please show me where I can find where the pipe was tied to the tree from the document from" - actually, I didn't say from any document. I just said, "Where the pipe is tied to the tree. Please show me where you discharge where pipe is tied to the tree." And he just blank stared at me. I asked him again –
>
> Q. What do you mean he blank stared at you?
>
> A. He just didn't answer the question and just stared right at me. And so I asked again a little more firm and he didn't say anything again, so I said, "Ben, show me where the bloody" - you know, "Show me where the pipe is tied to the tree. I know you know where it is." So he just said, "Okay, follow me,"

…

7. Inspector Robinson testified that if Mr. Mossman had not shown him the site of the discharge, “there’s a good chance I could have walked all around there and not found it”.

Caution at Heplar Lake

8. Mr. Mossman showed Officer Bailey, Inspector Robinson, and Officer Scrivner the location from the Discovery Photos. Officer Scrivner then proceeded to follow what appeared to be discharge into the forest down the hill and towards Heplar Lake. Inspector Robinson and Mr. Mossman also proceeded down to Heplar Lake. Officer Bailey did not proceed to Heplar Lake, and instead returned to get Officer Legare to collect legal sampling of what had been seen in the forest.

9. Officer Scrivner testified that at 12:35 pm, at Heplar Lake, he advised Mr. Mossman that he was now under investigation. Inspector Robinson witnessed Officer Scrivner read Mr. Mossman his rights. Mr. Meckert was not present.

10. No recording was made of the content of Mr. Mossman’s rights being read to him. Moreover, Officer Scrivner and Inspector Robinson gave different accounts of which statutes Mr. Mossman was being investigated under.

11. Officer Bailey testified that he believed that Officer Scrivner had warned both Mr. Mossman and Mr. Meckert. In fact, Mr. Meckert had not been warned.

…

Search at Bob

12. The Officers conducted a search at Bob, and gathered additional evidence.

Tel Joint Statements

13. The Officers then returned with the Defendants to Tel to take a recorded statement. Officer Scrivner asked Officer Legare if he wanted the official caution to include the *Fisheries Act*, which would be normally investigated by Environment Canada. Officer Legare confirmed that the caution should include the *Fisheries Act*.

[20] After a review of the law (*R. v. Fitzpatrick,* [1995] 4 S.C.R. 154; *R. v. Jarvis,* 2002 SCC 73; *R. v. Rice*, 2009 BCCA 569; *R. v. Nolet*, 2010 SCC 24; and *R. v. Mission Western Developments Ltd.*, 2012 BCCA 167), the judge summarized the principles he was to apply:

> [53] In the consideration of any charter right we must begin on "the ground" with a concrete and contextual analysis of the circumstances raised. The contextual analysis of a challenged regulatory procedure must include both the societal interest and the individual regulatory participant's interest.
>
> [54] Specific to the right against self-incrimination - this is not absolute. Insofar as one is compelled to provide information in a regulated activity, two related contextual considerations must be made.
>
> 1. Is this coerced, or is it voluntary?
>
> Specifically, is the individual's voluntary participation in the regulated industry an informed choice to submit to a duty to report or respond.
>
> 2. Is this adversarial or inquisitorial?
>
> In answering this, it is not a characterization of a point in time in a relationship so much as the nature of the information sought. Is the nature of the compelled information consistent with the shared societal and individual interest in the regulated activity, (non-adversarial): or is the information sought consistent with an inquisitorial or adversarial relationship?
>
> [55] Further, in considering the limits of what information may be compelled, care should be taken to guard against two risks:
>
> 1. unreliable reporting, and
>
> 2. the abuse of power by the state
>
> [56] Again, it is the nature of the demand, rather than a point in time that should define the concept of abuse. If what is sought is informational - which in a regulatory context will often be the factual nature of the non-compliance forming the *actus reus* of the offence - this increases the reliability of the reporting and reduces any risk of abuse.
>
> [57] It is once the questioning becomes inquisitorial - and in the context of a strict liability offence - seeking admissions of specific individual knowledge, admissions of fault, failures of due diligence, that concerns of abuse may arise.
>
> [58] That this is the point of focus is supported by Justice LaForest in *Fitzpatrick* when he states at para 51 that "*The information divulges*

nothing of the state of mind, thoughts or opinions of the individual who has submitted the records." Citing his own decision from *Thomson Newspapers*, at pp. 517-18, "*they do not, in short, deal with those aspects of individual identity which the right of privacy is intended to protect from the overbearing influence of the state.*"

[59] Concluding at paragraph 52, LaForest J. states:

> Moreover, the requirement to keep records under the *Fisheries Act* does not impose any psychological or emotional pressures on the individual, and in this way the state intrusion at issue here contrasts sharply with inquisitorial and police interrogatories and testimonial compulsion. These latter do not arise in the ordinary course of business, usually occur after deliberations of wrongdoing are complete, and place the individual in a heightened state of anxiety since the inquisitorial or investigatory procedures of the state are put into operation.

[60] LaForest J. looks by comparison to the consideration of business records in the regulatory context under s. 8 of the *Charter,* and the relative absence of any individually intrusive information.

[61] The concept of a *mens rea* distinction, to a degree, engages concepts developed in the caselaw of detention. Recall *R v. Moran* (1987), 1987 CanLII 124 (ON CA) and the consideration of factors there including;

> 4. the stage of the investigation ... whether the questioning was conducted for the purpose of obtaining incriminating statements...; and
>
> …
>
> 6. the nature of the questions: whether they were questions of a general nature designed to obtain information or whether the accused was confronted with evidence pointing to his or her guilt.

[62] The related analysis of detention, supports a focus not on point in time, but the nature of the information sought. If the nature of the compelled information is necessary to the common societal and individual interest in the regulation of the resource, (non-adversarial): or is the information sought consistent with an inquisitorial or adversarial relationship?

[21] The trial judge noted that the defence focused on the existence of reasonable and probable grounds to believe offences had occurred before the officers attended the mine site as determinative of the evidence being compelled contrary to the *Charter.* He found that such belief, while relevant, was not determinative, finding that in a strict liability regulatory offence, "reasonable grounds are focused on the *actus reus* of an offence." Referring to the example from *Fitzpatrick* of fishers who are expected to accurately record catch data, including exceedances of quota or retention of prohibited incidental by-catch, he

stated that “compelled information, is not merely reasonable grounds of an offence, it is the central evidence of the offence. In that context, it is admissible ... However, viewed in the lens of its regulatory purpose, while incriminating, such information, while compelled, is not either coercive or adversarial."

[22] Part of the defendants’ submission on the inadmissibility of the statements and the Spill Report was the assertion the inspectors attended on July 9, 2015 under the ruse of conducting a regulatory inspection to avoid meeting the legal requirements of a warrant, and then compelled the defendants to provide evidence of an offence. The trial judge found this argument ignored the mandated broader context of the current and continuing regulation of a multi-site mine.

[23] The trial judge also found that any investigation of offences was, and remained subordinate to, the continued regulation and operation of the mine site and the return to compliance of those areas found to contravene the Permits.

Defendants’ Position

[24] The defendants argue the observational evidence, July 9 and July 15 statements, and Spill Report were inadmissible as they were obtained in breach of ss. 7, 8 and 10 of the *Charter*. They submit the state used regulatory powers to obtain evidence when it was known, or it should have been known, that the relationship between the state and the defendants had become adversarial.

[25] They submit the trial judge erred by:

a) concluding that the moment at which the relationship between the Officers and the Appellants became adversarial did not trigger the Appellants’ rights to be protected from self-incrimination and to exercise their rights to counsel;

b) failing to exclude all observational evidence obtained after the start of the adversarial relationship;

c) failing to hold that the July 9 and 15 statements were inadmissible through taint (though correctly holding they were otherwise inadmissible);

d) admitting the Spill Report, despite being compelled by an order after an investigation had started;

e) concluding that the Officers’ use of regulatory powers to compel the Appellants to conscript evidence against themselves did not constitute a psychological detention that triggered the Appellants’ section 10 rights under the *Charter*.

[26] As noted earlier, they also submit the trial judge erred in holding it was the nature of the information, not when it was compelled, that determines admissibility, and further, that the trial judge incorrectly held the appellants did not contest the admissibility of certain evidence under ss. 7 and 10 of the *Charter* when they did.

[27] They characterize the trial judge's conclusions as follows:

> a) under section 8: the Appellants had no reasonable expectation of privacy. The trial judge erroneously held that the Appellants had only sought to exclude the observational evidence under section 8, not sections 7 and 10, so did not consider the Appellants submissions under those sections.
>
> b) under section 7: the statements were obtained in breach of section 7, but only excluded part of the July 9 statement while excluding the entirety of the July 15 statements.
>
> c) under section 10: the Appellants were legally required to assist the Officers and provide information to them, but did not address the Appellants' submissions that such compulsion constitutes "psychological detention" under *R. v. Grant.* The trial judge held there was no detention and no section 10 rights.

[28] On the *voir dire*, and on appeal, the defendants submitted that before attending the site on July 9, 2015, the officers believed offences had been committed and that they would be gathering evidence to be used in a prosecution. They submit the *Charter* applied, and the defendants had a right to be free from self-incrimination and to be advised of their right to counsel. They submit those rights were beached.

[29] The defendants further note that, from a regulatory perspective, there was a duty to speak that runs contrary to the right to remain silent, hence there was an additional duty to either confine the regulatory answers to the regulatory proceeding or advise the accused that despite their regulatory duties and their obligation to speak, if such evidence was to be used for criminal proceedings, they could remain silent insofar as the use related to criminal proceedings.

[30] The defendants also submit that after a whistle blower notified an opposition MLA and photos were provided to the Ministries of Energy and Mines and Environment, including the Chief Inspector of Mines, and while the site visits were being organized, individuals in the Ministries involved had formed the belief that the photos showed offences had occurred. They argue that as a result, rather than a compliance inspection being organized, a site visit to support a criminal

investigation was instituted. They further submit that the helicopter fly-over confirmed the offences, yet upon landing and attending the mining site, the officers informed the defendants they were conducting an inspection rather than an investigation.

Crown's Position

[31] The Crown rejects this characterization of events and motivations. They submit the defendants' allegations that inspectors had concluded that offences had occurred, were attending for an investigation, and were directing the defendants to assist them with access to particular locations expressly to compel the defendants to incriminate themselves does not match the evidence nor does it match the trial judge's finding that the predominant purpose of the inspection was regulatory.

Discussion of *Charter Voir Dire*

[32] Mining is a highly regulated activity. A mine operator must comply with numerous Acts including the *Environmental Management Act,* the *Fisheries Act*, the *Water Act*, and the *Mines Act*, R.S.B.C. 1996, c. 293, and must obtain multiple permits. The legislation protects the environment and seeks to ensure compliance. The statutes and the permits issued under them also place obligations on mines and mine management to permit inspections and ensure compliance with the legislation. In operating the mine sites under the statutes and under the permits, the mine management has agreed to being subject to compliance procedures.

[33] Under the *Mines Act*, mine managers and their designates must supervise the mine site(s) constantly to ensure they operate in full compliance with statutory obligations. That is part of the basis under which they are entitled to operate and benefit commercially.

[34] The mines in issue are on Crown Land. The Crown sought to tender the evidence of inspectors who attended those mine sites on July 9, 2015. The Crown did not tender into evidence any comments of the defendants during the regulatory inspection. The trial judge noted the *Charter* had to be applied in the context of a multi-site mine with ongoing regulatory issues. The mines were still operating when the inspections were arranged and carried out.

[35] The Crown admitted that at 12:35 p.m. on July 9, 2015, the inspectors began an investigation into the mine discharge they were observing at Heplar Lake. Mr. Mossman was the only defendant present. Officer Scrivner warned Mr. Mossman they were investigating the discharge. The inspectors and Mr. Mossman left Heplar Lake and returned to their vehicles. They then continued to, and inspected, the remaining site – called "Bob". No information was sought from either defendant until after the inspection was concluded. After that, the July 9 statement was obtained jointly from both defendants.

Inspection Versus Investigation

[36] The main point of the defendants' argument is that the state's ability to adduce in a criminal prosecution evidence that has been conscripted from the defendants depends not on the nature of the evidence but on the moment when the relationship between the state agents and the defendants became adversarial. That is, once the officers moved from a regulatory inspection to a criminal investigation, at that point the defendants had a right to be free from self-incrimination and had the right to counsel.

[37] The Crown notes the trial judge held that the predominant purpose of the July 9 inspection was regulatory compliance and remediation of the mine. They submit the defendants seek to have this court substitute their own theory that the inspectors were conducting a criminal investigation throughout. The Crown says there was ample evidence from which the trial judge could, and did, find that the predominant purpose of the inspectors was regulatory. They submit no palpable and overriding error permitting appellate intervention has been shown.

[38] The defendants argue the trial judge approached his analysis with a flawed premise leading to legal errors. They submit he did so by holding it was the nature of the evidence sought to be adduced that governed whether the evidence would violate the principle against self-incrimination, not the nature of the relationship between the state and the accused when the evidence was created. They refer to the section of his judgment referred to earlier which I repeat here for convenience:

> [54] 2. Is this adversarial or inquisitorial?
>
> In answering this, it is not a characterization of a point in time in a relationship so much as the nature of the information sought. Is the nature of the compelled information consistent with the shared societal and individual interest in the regulated activity,

> (non-adversarial): or is the information sought consistent with an inquisitorial or adversarial relationship? [Emphasis added by counsel.]

[39] They suggest this alleged error laid the foundation for all substantive errors alleged in the appeal of the *voir dire* finding. They refer to several authorities.

[40] In *Fitzpatrick* the Court considered whether "statutorily required fishing logs and hail reports … may be used as evidence in the regulatory prosecution of fishers for overfishing … More specifically, does the use of these statutorily compelled documents at trial violate ss. 7, 11(c) and 11(d) of the *Canadian Charter of Rights and Freedoms* as being inconsistent with the principle against self-incrimination?" (at para. 1). The Court held that "the general principle against self-incrimination, as applied in the regulatory context of the present case, does *not* require the appellant to be granted immunity against the use by the Crown of his statutorily-compelled hail report and fishing lots. His rights under s. 7 of the *Charter* simply do not extend that far" (at para. 32).

[41] In support of their submission that a specific time applies as to when a relationship becomes adversarial, the defendants refer to *R. v. White*, [1999] 2 S.C.R. 417:

> [56] A key factor in the Court's reasoning in *Fitzpatrick* was that the accused and the state were not in an adversarial relationship at the specific time that the self-incriminatory statements were made. The hail reports and fishing logs were made in a context that was entirely free of psychological or emotional pressure for the accused, at a time when the accused was not under investigation by fishing authorities. Moreover, the hail reports and fishing logs were required by the state for the useful purpose of calculating fish stocks in order to determine appropriate fishing quotas. As noted by La Forest J., the accused and the fishing authorities could properly be seen, in exchanging information about the quantity of harvest in this way, as partners in the greater collective endeavour of conserving fish stocks and correspondingly conserving the commercial fishery. La Forest J. emphasized that the hail reports and fishing logs were an essential component of this conservation scheme.

[42] In *Jarvis* the court addressed the issue of when a relationship becomes adversarial:

> [88] In our view, where the predominant purpose of a particular inquiry is the determination of penal liability, CCRA officials must relinquish the authority to use the inspection and requirement powers under ss. 231.1(1) and 231.2(1). In essence, officials "cross the Rubicon" when the inquiry in

question engages the adversarial relationship between the taxpayer and the state. There is no clear formula that can answer whether or not this is the case. Rather, to determine whether the predominant purpose of the inquiry in question is the determination of penal liability, one must look to all factors that bear upon the nature of that inquiry.

[89] To begin with, the mere existence of reasonable grounds that an offence may have occurred is by itself insufficient to support the conclusion that the predominant purpose of an inquiry is the determination of penal liability. Even where reasonable grounds to suspect an offence exist, it will not always be true that the predominant purpose of an inquiry is the determination of penal liability. In this regard, courts must guard against creating procedural shackles on regulatory officials; it would be undesirable to "force the regulatory hand" by removing the possibility of seeking the lesser administrative penalties on every occasion in which reasonable grounds existed of more culpable conduct. This point was clearly stated in *McKinlay Transport*, *supra*, at p. 648, where Wilson J. wrote: "The Minister must be capable of exercising these [broad supervisory] powers whether or not he has reasonable grounds for believing that a particular taxpayer has breached the Act." While reasonable grounds indeed constitute a necessary condition for the issuance of a search warrant to further a criminal investigation (s. 231.3 of the ITA; *Criminal Code*, s. 487), and might in certain cases serve to indicate that the audit powers were misused, their existence is not a sufficient indicator that the CCRA is conducting a *de facto* investigation. In most cases, if all ingredients of an offence are reasonably thought to have occurred, it is likely that the investigation function is triggered.

[90] All the more, the test cannot be set at the level of mere suspicion that an offence has occurred. Auditors may, during the course of their inspections, suspect all manner of taxpayer wrongdoing, but it certainly cannot be the case that, from the moment such suspicion is formed, an investigation has begun. On what evidence could investigators ever obtain a search warrant if the whiff of suspicion were enough to freeze auditorial fact-finding? The state interest in prosecuting those who wilfully evade their taxes is of great importance, and we should be careful to avoid rendering nugatory the state's ability to investigate and obtain evidence of these offences.

[91] The other pole of the continuum is no more attractive. It would be a fiction to say that the adversarial relationship only comes into being when charges are laid. Logically, this will only happen once the investigators believe that they have obtained evidence that indicates wrongdoing. Because the s. 239 offences contain an element of mental culpability, the state will, one must presume, usually have some evidence that the accused satisfied the *mens rea* requirements before laying an information or preferring an indictment. The active collection of such evidence indicates that the adversarial relationship has been engaged, since it is irrelevant to the determination of tax liability. Moreover, although there are judicial controls on the unauthorized exercise of power (*Roncarelli v. Duplessis*, [1959] S.C.R. 121 (S.C.C.); *Babcock v. Canada (Attorney General)*, 2002 SCC 57 (S.C.C.), at para. 25), we believe that allowing CCRA officials to employ ss. 231.1(1) and 231.2(1) until the point where charges are laid, might promote bad faith on the part of the prosecutors. Quite conceivably, situations may arise in which charges are delayed in order to compel the

taxpayer to provide evidence against himself or herself for the purposes of a s. 239 prosecution. Although the respondent argued that such situations could be remedied by the courts, we view it as preferable that such situations be avoided rather than remedied. It is for this reason that the test is as set out above.

[92] Whether a matter has been sent to the investigations section is another factor in determining whether the adversarial relationship exists. Again, though, this, by itself, is not determinative. An auditor's recommendation that investigators look at a file might result in nothing in the way of a criminal investigation since there is always the possibility that the file will be sent back. Still, if, in an auditor's judgment, a matter should be sent to the investigators, a court must examine the following behaviour very closely. If the file is sent back, does it appear that the investigators have actually declined to take up the case and have returned the matter so that the audit can be completed? Or, does it appear, rather, that they have sent the file back as a matter of expediency, so that the auditor may use ss. 231.1(1) and 231.2(1) to obtain evidence for a prosecution (as was found to be the case in *Norway Insulation*, *supra*).

[93] To reiterate, the determination of when the relationship between the state and the individual has reached the point where it is effectively adversarial is a contextual one, which takes account of all relevant factors. In our opinion, the following list of factors will assist in ascertaining whether the predominant purpose of an inquiry is the determination of penal liability. Apart from a clear decision to pursue a criminal investigation, no one factor is necessarily determinative in and of itself, but courts must assess the totality of the circumstances, and make a determination as to whether the inquiry or question in issue engages the adversarial relationship between the state and the individual.

[94] In this connection, the trial judge will look at all factors, including but not limited to such questions as:

(a) Did the authorities have reasonable grounds to lay charges? Does it appear from the record that a decision to proceed with a criminal investigation could have been made?

(b) Was the general conduct of the authorities such that it was consistent with the pursuit of a criminal investigation?

(c) Had the auditor transferred his or her files and materials to the investigators?

(d) Was the conduct of the auditor such that he or she was effectively acting as an agent for the investigators?

(e) Does it appear that the investigators intended to use the auditor as their agent in the collection of evidence?

(f) Is the evidence sought relevant to taxpayer liability generally? Or, as is the case with evidence as to the taxpayer's *mens rea*, is the evidence relevant only to the taxpayer's penal liability?

(g) Are there any other circumstances or factors that can lead the trial judge to the conclusion that the compliance audit

had in reality become a criminal investigation?

> It should also be noted that in this case we are dealing with the CCRA. However, there may well be other provincial or federal governmental departments or agencies that have different organizational settings which in turn may mean that the above factors, as well as others, will have to be applied in those particular contexts.

[43] The defendants also rely on *Rice*:

> [74] No doubt there would be a line, in some investigations under the *Wildlife Act*, where a conservation officer's s. 95 inspection function moves into a criminal investigation function, as was the case in *White*, but that line was not crossed here. Even though the conservation officer had reasonable and probable grounds to believe an offence had occurred, he did not cross the line into a criminal or penal investigation because the information he sought was statutorily compellable. The purpose of s. 95 and all the questions asked by the officer was to obtain truthful information about compliance with the *Act.* [Emphasis added.]

[44] The Crown argues the defendants' seeking a specific time upon which to claim immunity from regulatory inspection is in error.

[45] In *Nolet* the accused were subject to a random traffic stop of the tractor-trailer they were operating. The police officer conducted a search of the truck cab as a part of a regulatory compliance inspection. He located a duffel bag containing a large amount of cash typical of drug transactions. A more thorough search of the truck was conducted which led to the discovery of almost 400 pounds of packaged marijuana. Justice Binnie differentiated the context of that case from *Jarvis* and concluded:

> [39] Police power, whether conferred by statute or at common law, is abused when it is exercised in a manner that violates the *Charter* rights of an accused. This is a better framework of analysis, in my opinion, than the "predominant purpose" test applied here by the trial judge. If the *Charter* is violated, it makes little difference, I think, that the police had in mind multiple purposes. A valid regulatory purpose, whether predominant or not, would not sanitize or excuse a *Charter* violation.
>
> …
>
> [41] I agree with Wilkinson J.A. that the question is not "determining which purpose is predominate or subordinate" (para. 85). As long as there is a continuing regulatory purpose on which to ground the exercise of the regulatory power, the issue is whether the officer's search of the duffle bag infringed the reasonable expectations of privacy of the appellants. I do not think that it did, having regard to the totality of the circumstances as they had progressed to the time of that search.
>
> ...

> [45] ...The present case is wholly different. We are not "crossing the Rubicon" from a civil dispute into penal remedies. Here the context was always penal. The *Charter* applies to provincial offences as well as to criminal offences. The shifting focus argument was appropriate in *Jarvis*, but I do not think it helps in the solution of this appeal. The issue here is whether the police search of the duffle bag did "in the totality of the circumstances" invade the reasonable privacy interest of the appellants. I would hold that it did not.

[46] The Crown relies on *Mission Western* where Bennett J.A. in Chambers applied *Nolet* and addressed the applicability of the "shifting focus" analysis set out in *Jarvis*:

> [40] The applicants argue further that the appeal judge "incorrectly concluded that the decision of the Supreme Court of Canada in [*Nolet*] ... had jettisoned the predominate purpose distinction between regulatory and penal inspections set out by the Supreme Court of Canada in [*Jarvis*]". In fact, the appeal judge nowhere refers to *Jarvis*. More importantly, as the applicants elsewhere observe, the Supreme Court in *Nolet* specifically held that it was not overturning *Jarvis* and that the context was clearly distinguishable. *Jarvis* involved a civil tax audit, in which the taxpayer was obliged to disclose financial information; the audit evolved into a criminal investigation for tax evasion. Viewed from the subject's perspective, the nature of his liability altered from that of a taxpayer, whose relationship with the state is in the nature of a civil dispute, to that of a potential accused, whose relationship with the state is adversarial. In such circumstances, as Binnie J. affirmed in *Nolet*, it is appropriate to apply a "shifting focus" inquiry to determine at what point the relationship between state and individual becomes adversarial. Both *Nolet* and the present case take place in a wholly different context. Like the inspection in *Nolet*, the DFO employees' actions always took place, broadly speaking, in a "penal" or "adversarial" context, in the sense that s. 49(1) of the *Fisheries Act* grants powers of entrance and inspection "for the purpose of ensuring compliance with this Act and the regulations". Ultimately, the proper question for consideration, as Binnie J. held in *Nolet*, is whether the officers' regulatory inspection powers were exercised reasonably in the totality of the circumstances. [Emphasis added.]

[47] I note that Bennett J.A.'s comments in *Mission Western,* an application for leave to appeal, are not binding on this court: *Sattva Capital Corp. v. Creston Moly Corp.,* 2014 SCC 53 at para. 122. However, the Supreme Court of Canada's decision in *Nolet* is binding and *Mission Western* provides an accurate and helpful summary of the law as set out in *Nolet.*

[48] In this case, from its outset, the defendants were subject to inspection within a regulatory context which always bore the spectre of penal liability. The officers were entitled to attend the mining site, perform their regulatory inspection

duties, and, if necessary, conduct an investigation. Attempting to identify a “point in time” at which the inquiry became adversarial is not appropriate in this context. Instead, the proper contextual analysis asks “whether the officers’ regulatory inspection powers were exercised reasonably in the totality of the circumstances.”

[49] The defendants’ position on this issue is not supported by the evidence nor the trial judge’s reasons. The characterizations and motivations described by the defendants are inaccurate and do not match the trial judge’s findings. Their assertion that the inspectors had concluded early on that offences had occurred and that they then attended for the express purpose of an investigation and that they were directing the defendants to assist in accessing particular locations in order to incriminate themselves is not the evidence. In addition, it is inconsistent with the trial judge’s findings that the predominant purpose of the inspection was regulatory. The defendants seek to have this court reassess the facts and to reach conclusions contrary to those of the trial judge where no palpable and overriding error has been shown. For example:

a) When mines Inspector James Robinson first saw the photographs on July 7, 2015, he was told by his superior to have an open mind and not assume any offences had occurred.

b) Environmental Officer Bailey described his state of mind during the inspection: “I recall my mind was racing. I recall trying to wrap my mind around what I was seeing and trying to understand what we’d seen and what we’d observed. It was shocking.” He was not thinking about an investigation but rather the regulatory breaches he was seeing.

c) The trial judge accepted Environment Canada Officer Normand Legare attended so he could teach Officer Bailey how to take samples, not as an investigator.

d) Conservation Officer Scrivner had been advised by his superiors he should expect a “boring day.” As a consequence, Conservation Officer Scrivner brought no sampling or investigative equipment to the site.

e) When inspectors first arrived at the Discovery site and observed an unauthorized settling pond and sump pump discharging into a slough, they decided at that time they would deal with that administratively, declining to even issue a violation ticket noting it was likely at “the warning level.”

f) After inspecting all of the mine sites, the inspectors discussed amongst themselves what orders they would issue and other regulatory steps they would take to attempt to stop more mine discharges into the environment and remediate the discharges that they had already observed.

[50] Also, the trial judge noted that the *Charter* had to be applied in the context of a multi-site mine with ongoing regulatory issues:

> [76] Even if the site had been shut down, any conclusion that a criminal investigation was necessarily the dominant or remaining purpose, ignores the realities of this mining operation. The regulated endeavour here continued. The physical conditions at the multi-site mine were themselves evidence of certain events, but more importantly, Bob continued to leak, the necessary piping to divert the water at Discovery back to Tel, was yet to be installed, and plans remained to move on to discovery at Kim.
>
> [77] Even if all of the optimism that this might all still be achieved by both the inspectors and the operators was completely unrealistic, and the failure of the continued operations was already inevitable, there remained a site requiring reclamation, remediation, and closure.
>
> [78] Unlike *Nolet,* this mine was not a truck seized and secured until its evidential value could be recorded. Unlike *Jarvis,* the facts concerning this mine did not crystalize at the end of the relevant taxation period. Here, any investigation of offences, remained subordinate to the continuing, evolving, complexity of this multi-site mining operation.
>
> …
>
> [81] I find that these investigative steps were for the dominant purpose of the continued regulation and continued operation of a multi-site mine, and the return to compliance of those areas that were identified to be in contravention of the Permits.
>
> [82] The fact of an existing investigation to gather evidence of those offences remained ancillary to the dominant purpose of regulating the continued operation of the mine.

[51] The defendants’ characterization of the inspections fails to take into account the nature of regulatory processes. As noted in *Fitzpatrick* at para. 35, albeit in the fishing industry, the participants and the state are not adversaries. They participate

in a regulated scheme as a matter of mutual benefit, something done with clear, free and informed consent. Included in the activity is inspection and compliance.

[52] Unlike the circumstances of *Jarvis*, *Nolet*, *Rice*, or *Mission Western*, where the offences had occurred and concluded, the mine sites here were still operating with ongoing compliance and remediation issues.

[53] The trial judge had the benefit of hearing the witnesses and their explanations and it is not for this court to re-assess them and come to a different view of their evidence where no palpable and overriding errors have been shown.

[54] The officers attended the mine site to conduct an inspection. While they had received photos and related information before attending that might lead to an investigation, that was not their purpose in attending. The trial judge's findings that the purpose was to conduct inspections is consistent with the evidence. His conclusions on this point have not been shown to be in error.

[55] As a result, I reject the defendants' submission that the investigation commenced on the arrival of the inspection team. Further, I reject the defendants' submission that the point in time at which the relationship became adversarial is determinative of the applicability of the *Charter*. The case law makes clear that a contextual analysis taking into account the totality of the circumstances is required. The trial judge properly considered the regulatory context and the circumstances. No error in the trial judge's conclusion has been shown.

Compulsion to Participate in Investigation

[56] The trial judge found the defendants were not compelled to participate personally in the inspection nor were they required to drive the inspectors to the mine sites. Under s. 15(2) of the *Mines Act,* an inspector has the authority to request a representative accompany them during an inspection. Section 15(7) of the *Mines Act* provides, "The owner, agent, manager, permittee, and all persons in, on or about a mine must provide an inspector with all assistance necessary for the completion of an inspection or investigation." Further, s. 1 of the *Mines Regulation*, B.C. Reg. 126/94, states that "... management must provide the inspector with access to all of the mine, including the underground and surface portions, and all mine records." These provisions do not compel personal attendance by management on the inspection. Any employee could have been

directed by the defendants to provide access to the inspectors and accompany them if requested. The trial judge also noted that it was "not apparent that [the Defendants driving the inspectors] was subjectively based on any legal compulsion although it is admitted by Crown that such a compulsion exists." Further, there was insufficient evidence of whether either defendant thought themselves to be subjectively compelled to assist the inspectors in accessing the mine sites.

[57] The trial judge found that the defendants were not compelled to assist in the investigation. No palpable and overriding error has been shown in this conclusion.

Observational Evidence

[58] The defendants refer to the trial judge's *voir dire* reasons where he stated:

> [7] Counsel for Mossman and Meckert were fair to concede that, even when the dominant purpose of an investigation shifts to gathering evidence of a regulatory offence, if there is no expectation of privacy, there is no breach of the section 8 right and the "observational" evidence is admissible.

[59] In doing so, they state he erred, submitting they never conceded that point and instead argued the observational evidence was inadmissible because all such evidence was gathered contrary to their ss. 7 and 10 *Charter* rights. They further submit the trial judge failed to address that submission and erred in holding that they sought to exclude the observational evidence under s. 8 only.

[60] Turning first to the s. 8 issue, the trial judge discussed the nature and scope of the search of the mining site and concluded the defendants "did not have any expectation of privacy in the circumstances of the various officers' attendance, inspections, observations, and sample collection at the mining sites" (*Voir Dire* Reasons at para. 8). No error has been shown in this conclusion.

[61] The defendants submit that since the investigation started when the officers arrived at Banks Island, the defendants were compelled to assist the officers, and the officers could not have made the observations they did at the Discovery and Bob sites without the defendants' cooperation, all of the observational evidence adduced at trial was gathered in violation of the defendants' rights under s. 7.

[62] This submission is premised on the assertion that the defendants were compelled to assist the officers in violation of their s. 7 rights. That assertion has been rejected on this appeal.

[63] The trial judge concluded the defendants were not detained, thus their s. 10 *Charter* rights were not engaged. Again, no error has been shown in this conclusion.

[64] As a result, the observational evidence was properly before the court.

The Statements

[65] The trial judge excluded a portion of the July 9 joint statement of Mr. Mossman and Mr. Meckert and both July 15 statements of the individual defendants:

> [135] I find as follows with respect to the excluded portion of the July 9, 2015 statement and both of the July 15, 2015 statements:
>
> 1. They are inquisitorial and adversarial. They are not focused on the continued compliance, or return to compliance of the remaining operations of the mine at Discovery, Tel, and Bob.
> 2. Because Mr. Mossman and Mr. Meckert remained legally compelled to disclose information in the regulation of the continued operations of the mine, it must be made clear that those obligations are suspended before they are asked to participate in a separate inquisitorial process.
> 3. The warnings given here did not achieve this.

[66] Regarding the July 9, 2015 statement, the trial judge stated:

> [91] However, I find that the demand to *"show me the bloody rope,"* is not discernibly different from "who shot the moose," which is referred to in *R. v. Rice.* There are photographs from June 25th, 2015 of an obvious, observable discharge in Heplar Lake, and this may be clear evidence of a prohibited act, but in a regulatory setting, and for a regulatory purpose (such as the conservation and fair allocation of a resource) certain information may be compelled.
>
> [92] However, the pipe, and the active discharge of mine water clearly visible in the June 25th, 2015 photos is no longer present. On July 9th, 2015, the pipe has been removed, and while there is dried sediment on the vegetation near the former placement of the pipe, there is no longer any active discharge.
>
> [93] The only remaining compliance consideration specific to Heplar Lake is remediation. With respect to the discharge into Heplar Lake, any compliance consideration concerning remediation was now subordinate to

the now dominant investigation of the offence relating to the discharge at Heplar Lake …

[94] I acknowledge that what had occurred at Heplar Lake may have remained relevant to a determination whether to permit B.I.G. to continue with its remaining operations. But this does not appear on the facts. B.I.G. was permitted on July 9, 2015 to continue with its operations in spite of what occurred at Heplar Lake. Indeed, once that decision had been made (to permit continued operations), the only reason to ask about Heplar was offence dominant.

[95] However, for the remaining operations at Tel, Bob and Discovery (specific to the problems at Englishman slough, and the plan to pipe water back to Tel), the dominant-purpose remained the compliance-focused decision about whether and how the mining operations would continue.

[96] This difference in purpose - in a general way - delineates the excluded portions from the recorded statements of Mr. Meckert and Mr. Mossman on July 9th, 2015. Where the focus was on the continuing regulatory compliance of the remaining mining and exploration operations at Banks Island Gold there is no resulting concern. While certain admissions may have been made by Mr. Meckert, this was in the context of a discussion about the necessary remedial steps related to the identified non-compliance and then the continued, compliant operation of the various mining activities.

[97] I am concerned with the apparent failure to identify that the purpose of questions concerning the Heplar Lake discharge, was no longer relevant to continue compliance. As indicated above, there may have been an ancillary purpose to discussing Heplar Lake, insofar as past non-compliance and/or a prompt and reasonable response may be relevant to a continued consideration of compliance, but blending the two purposes is fraught with risk.

[98] In the determination of whether, in relation to Heplar, the relationship had turned adversarial, or inquisitorial, the information sought was no longer immediately relevant to the common interest in the regulated activity. The information sought was now inquisitorial.

[99] At page 6 line 259 of the July 9th, 2015 statement, the focus does change to Bob, but a general discussion about the discharge at Bob, is blended with some discussions about the failure to report. I recognize that discussion concerning non-reporting is initiated by Mr. Mossman at line 307, page 7 as follows;

> And as far as reporting like we didn't get reported but you know we had everything in place, like Allegra .... was the .... she took a bunch of pictures, and said, I was off site, she told me what was happening, I told them to take a bunch of pictures before and after and then, and then send the report to me and I would send it in. But she ended up going on this hiking trip and uh I never actually got submitted, I probably should've just sent it without any of the information but uh but then all along too ...

[100] My impression is that these obviously defensive utterances are illustrative of the type of psychological or emotional pressures on an individual and heightened state of anxiety referenced by Justice LaForest

at para. 52 in *Fitzpatrick* referenced above. In this regard, I note that earlier in the discussion on Heplar, Officer Scrivner has asked (page 5, line 204); *"'it's just kind of concerning that it was going for that length of time without any kind of monitoring, or ... do you have a system in place."*

[101] Then, in a relatively stark contrast in purpose, at page 9, line 407 there is a shift in focus to a return to compliance, which remains to conclusion.

[67] And, with respect to the July 15, 2015 statements:

[102] The July 15th, 2015 statements of Mr. Meckert and Mr. Mossman are clearly inquisitorial.

[103] If we look at the July 15th, 2015 Statements -- in particular that of Mr. Mossman -- there are certain areas canvassed that are predominantly an investigation of these past events and apparently for the purpose of assessing individual liability.

[104] At page 6 line 22, Officer Gow asks; ''I know you're aware now of your obligations to report to various ministries when there is a discharge of the normal course of events. *What was your knowledge of that at the time?"*

[105] At line 33, "But once you realised it went to the creek, you know, it wasn't reported at that time." When Mossman says that "he'd never gone down there," he is challenged; "But you were made aware at that time that it had discharged into the creek, correct?" Then, having obtained an admission of knowledge, Officer Gow persists, at p. 7, asking "And I'm wondering why it wasn't reported at that time."

[106] It is inescapable that certain of the questions are pre-dominantly relevant to the consideration of the exercise of due diligence to prevent the commission of an offence; or any reasonable and honestly held belief that would render the person's conduct innocent. I'm not suggesting that F.O. Gow necessarily had the wording of s. 78.6 of the *Fisheries Act* in mind when conducting the interview. Instead, the relevance of the questions asked, and answers given, to the consideration of due diligence in the context of a regulatory offence reveals his training and his purpose.

[107] The focus is not the continued compliance of the operation of the mine. The focus is an assessment of individual responsibility for, and the reasonableness of that individual's response to the prior non-compliance. This interview was now adversarial, and was now central to an assessment of liability for offences and exposure to penal consequences.

[108] Just as clear, is that both Mr. Mossman and Mr. Meckert were cautioned by Fisheries Officer Doug Gow. I repeat certain of the Crown summary of facts on this set out earlier in these reasons.

(1) The officers were investigating offences under *the Fisheries Act* and the *Mine Metal Effluent Regulations*.

(2) They were not under arrest or detention and were free to go at any time.

(3) They did not have to speak to the officers, but that if he did speak, anything said could be used in evidence.

(4) A “secondary warning” was given with respect to contact with other officers and emphasized that they were not compelled to speak, but that anything said could be used in evidence.

[109] I have no concerns with respect to the adequacy of the description of the nature of the offences. Whether every relevant legislative enactment engaged is listed is not critical. It is clear that it was well understood by these individuals that the observable circumstances at Tel, Discovery and Bob were under investigation.

[110] The failure in these warnings was that they failed to address the context, and the shifting context of this regulatory setting.

[111] In particular, the standard caution, *“you are not obligated to say anything”* - which is the scripted language taken from a traditional criminal context - is not adequate in this regulatory context.

[112] In this regulatory setting, these individuals have earlier consented to submit to a duty to report certain information that may be self-incriminating. It is the shift from that non-coercive obligation - to an adversarial, non-compellable inquisition that must be made clear. That is the context in which the s. 7 rights are determined. It is in that context that the sufficiency of the caution, and whether it effected a clear suspension of individual compellability must be viewed.

[113] This is particularly so in the context of a continuing regulatory purpose. The individuals here remain engaged in the very operation under investigation. Day by day, they remain compelled to provide information, including incriminating information, concerning the continued operation of Tel, Discovery and Bob.

[114] On July 9th, 2015 Messrs. Mossman and Meckert and B.I.G. seek the continued operation of the mine. Ultimately the shut-down order is somewhat limited. There remains a way forward if they are able to stop the discharge. In fact, both the provincial and federal regulators, also have the common interest in a return to compliance, and the successful remediation and ultimate closure of the mine. Both on July 9th and July 15th, 2015, the "partnership” of a common interest, referenced by LaForest in *Fitzgerald* continues. As a result, that non-adversarial, submission to be compelled to disclose incriminating information remains.

[115] The delineation between these two individuals continued compellability in the regulatory context, and their non-compellability in this adversarial inquiry must be made clear.

[116] In this case, on July 15th, 2015, rather than the standard language regarding obligation, the following should have been made clear;

1 Pursuant to various regulatory legislation, and pursuant to their employment, they were (and remained) obliged to disclose certain information.

2. This is a separate investigation into whether an offence has occurred.

3. For the purposes of this statement, and for the duration of any such statement, they were relieved of any such regulatory obligations to disclose and/or provide information.

> [117] I am not suggesting that a regulatory investigator use any prescribed language. In this context it could have been made clear that the discussion was not about the continued operation or remediation of the mine. To acknowledge that in the operation of the mine one is, and may continue to be compelled to answer questions and provide information to determine compliance, or remediation of past non-compliance. Finally, to confirm that for the purposes of the interview, those regulatory obligations, are of no effect.
>
> [118] Further, the standard secondary caution regarding prior dealings with state actors, and any hope of advantage or fear of prejudice, is inadequate in this continuing regulatory context. I note the words of CO Scrivener at page 8 line 349 to 373 that "we need to be in the loop on any problems," and " You know if looks, it looks a lot better on your guys when you're volunteering information and being open and transparent about some of the problems that you are having" and "I think it's in your own interest."
>
> [119] Similarly, I return to portions of Inspector Robinson's comments on July 9, 2015 at page 13, line 610;
>
> > This is kind of the way it works, right, so you know obviously there's no way I want to put you out of business and that's not why I want to be here and that's not why I came, um, but we need some assurance that things are going to be done in a way that is not going to be a big surprise when we come to site ...
>
> [120] In effect, within this continuing regulatory context, these individuals are obligated to make disclosure, and in that context, beyond legal obligation, there is an advantage to such disclosure insofar as it is a necessary condition to the continued operation of the mine.
>
> [121] I do take into account the separation in time and context between the July 9th statement and the July 15th statement. One concern with the July 9th statement is the presence of various inspectors and investigators as well as both Mr. Mossman and Mr. Meckert at the same time. Certainly, the July 15th statement does not include the blended purposes addressed above with respect to July 9th. But there is a certain blurring between the two. In particular, one of the Fisheries Officers is involved in both the July 9th and July 15th statements. One interview is then, in a certain respect, a continuation of the other.
>
> [Emphasis added.]

[68] The trial judge found that Mr. Mossman and Mr. Meckert were not detained, hence their s. 10 rights were not triggered. He found the focus to be on whether the statements were compelled and, if so, whether their admission into evidence would be contrary to s. 7 of the *Charter.*

[69] As noted earlier, the statements are the subject of cross-appeals.

Crown's Position on the Statements

[70] The Crown's grounds for appeal are:

a) The learned trial judge erred in law by excluding the warned, out of custody, voluntary statement given by the Respondents on July 9, 2015, by;

i. Finding that the statement was compelled contrary to section 7 of the *Charter* when there was no evidence of compulsion;

ii. Finding that the statement was compelled contrary to section 7 of the *Charter* when there was no evidence that either of the Respondents subjectively believed themselves to be compelled to speak to investigators; and,

iii. Finding that the warnings given by investigators to the Respondents advising them they did not have to give a statement, though sufficient for *Criminal Code* charges, were insufficient for regulatory, strict-liability offences.

b) The learned trial judge erred in law by excluding the warned, out of custody, voluntary statement given by the Respondent, Benjamin Mossman, on July 15, 2015, by:

i. Finding that the statement was compelled contrary to section 7 of the *Charter* when there was no evidence of compulsion;

ii. Finding that the statement was compelled contrary to section 7 of the *Charter* when there was no evidence that the Respondent subjectively believed himself to be compelled to speak to investigators;

iii. Finding that the warnings given by investigators to the Respondent advising them they were being investigated for offences and did not have to give a statement, though sufficient for *Criminal Code* charges, were insufficient for regulatory, strict-liability offences; and

i.v Finding that the statement taken on July 15, 2015 had been tainted by the warned, out of custody, voluntary statement given by the Respondent six days prior and/or providing insufficient reasons as to how the statement was tainted.

c). The learned trial judge erred in law by excluding the warned, out of custody, voluntary statement given by the Respondent, Dirk Meckert, on July 15, 2015, by:

i. Finding that the statement was compelled contrary to section 7 of the *Charter* when there was no evidence of compulsion;

ii. Finding that the statement was compelled contrary to section 7 of the *Charter* when there was no evidence that the Respondent subjectively believed himself to be compelled to speak to investigators;

iii. Finding that the warnings given by investigators to the Respondent advising them they were being investigated for

offences and did not have to give a statement, though sufficient for *Criminal Code* charges, were insufficient for regulatory, strict-liability offences: and,

i.v Finding that the statement taken on July 15, 2015 had been tainted by the warned, out of custody, voluntary statement given by the Respondent six days prior and/or providing insufficient reasons as to how the statement was tainted.

[71] The Crown submits the defendants on July 9 provided an admissible, warned, out-of-custody statement and that the defendants knew they did not have to speak. They submit the warnings given were comprehensive and included the right to silence and that they were free to leave and that both men admitted they understood the warnings and wished to speak to the investigators in any event.

[72] They also note the statement was admitted to be voluntary in the *Voir Dire* Agreed Facts exhibited to the Agreed Statement of Facts on the *Charter* Application before the trial judge:

> 3. Mossman and Meckert voluntarily gave statements to officers in the offices of Banks Island Gold, at the Tel Site, on Banks Island on 9 July 2015 and 15 July 2015. Mossman and Meckert admit the accuracy of the transcripts of the statements they gave to officers and others on 15 July 2015.

[73] The Crown submits voluntariness is determinative of s. 7 of the *Charter*, relying on *R. v. Singh* 2007 SCC 48 at para. 37:

> [37] … if the Crown proves voluntariness beyond a reasonable doubt, there can be no finding of a *Charter* violation of the right to silence in respect of the same statement. The converse holds true as well. If the circumstances are such that an accused is able to show on a balance of probabilities a breach of his or her right to silence, the Crown will not be in a position to meet the voluntariness test …

[74] The Crown submits the trial judge's finding that the statements were compelled despite the admission of voluntariness is an error of law. They also submit that the finding is contrary to *White* alleging no evidence was before the court that the statements had been statutorily compelled.

[75] Specifically, they submit there was no evidence of compulsion, the statements were admitted to be voluntary and there is no evidence of their alleged subjective belief that they were required to speak.

Defendants' Position on the Statements

[76] The defendants submit that the July 9 and 15 statements were obtained contrary to their ss. 7 and 10 *Charter* rights and that the trial judge erred by admitting a portion of the July 9 statement. They submit the Crown appeal should be dismissed.

[77] The defendants also argue it was wrong for the officers to take the defendants' statements jointly in the July 9 interview. They further submit that the officers referred to an offence that the defendants had failed to provide information to regulators and then confused the defendants as to their right to remain silent by reminding them of their obligations to provide information, in effect blending the investigatory and regulatory purpose of the statement taken. They submit that more than a standard police caution was required given this context. They also say there was evidence of compulsion present to support the trial judge's finding that the defendants' subjective belief of compulsion can be inferred. Finally, they argue that the July 9 statement tainted the July 15 statements such that the July 15 statements were properly excluded.

[78] The defendants also submit the July 9 statement was tainted by the observational evidence which they argue should have been excluded. Having already concluded the observational evidence was properly admitted, I need not address this argument further.

[79] The defendants submit that their admission of voluntariness at the *voir dire* is distinct from the issue of compulsion and self-incrimination. In their *voir dire* submissions, the defendants argued their admission on voluntariness only related to the recorded statements, not the broader issue of compulsion and self-incrimination in relation to the officers' conduct on July 9.

[80] Based on the *Voir Dire* Reasons, it appears the trial judge agreed with the defendants' position on this issue:

> [127] Crown submits that because there is no detention, the sufficiency of the warning is a voluntariness issue under the *Oickle* analysis, and insofar as voluntariness was admitted in this voir dire, the Court need not consider it.
>
> [128] I am however considering voluntariness, not in the context of *Ibrahim and the Queen*, or *Oickle*. I am considering it in the way it is raised in the context of an informed consent to participate, voluntarily in the regulated industry that includes an obligation to provide incriminating information.

[81] I agree with this interpretation. The statements were voluntary insofar as they were not obtained contrary to the principles in *R. v. Oickle,* 2000 SCC 38, relating to threats or promises, oppression, operating mind, and police trickery. The admission of voluntariness is separate and distinct from the issue of self-incrimination and compulsion under s. 7 of the *Charter.*

Applicable Law

[82] The Crown relies on *R. v. Singh*, 2007 SCC 48, where a statement was taken from an individual who was in custody and detained. The Supreme Court of Canada held the confessions rule subsumed the rule against self-incrimination under s. 7 of the *Charter*. There was no competing duty to speak for the purposes of regulatory compliance in *Singh*. He had an absolute right of silence. The Court noted that is not always the case:

> [39] Further elaboration is required here on the warning that it would be "a mistake to assume one subsumes the other entirely". For the reasons I have already expressed, the confessions rule effectively subsumes the constitutional right to silence in circumstances where an obvious person in authority is interrogating a person who is in detention because, in such circumstances the two tests are functionally equivalent. However, this does not mean that the residual protection afforded to the right to silence under s. 7 of the *Charter* cannot supplement the common law. Professors Paciocco and Stuesser explain this interrelationship between the common law rule and s. 7 succinctly as follows:
>
> > Section 7 of the *Charter* can supplement the common law. It has been recognized, for example, that the voluntariness rule has acquired constitutional status as a principle of fundamental justice. This particular development has little practical significance, however. With respect to statements themselves, accused persons will be better off relying on the common law rule where the Crown bears the onus of establishing voluntariness, and where exclusion of the statement is automatic. If the *Charter* principle is relied upon, the accused bears the burden of establishing a violation on the balance of probabilities, and if the Crown can demonstrate that the accused would have spoken without the breach, the statement made might still be admissible.
> >
> > Although in most cases the common law will therefore provide greater protection, there will be cases where section 7 gives added value to the accused. As has already been seen, section 7 is violated if the accused is cross-examined about why he did not give a statement to the police. Moreover, as described below, section 7 protects the right to silence, and although it is contentious, [note that it is this area of contention that is resolved in this appeal] it may be that a breach of that constitutional right can result in the exclusion of otherwise admissible statements; without question, section 7 goes beyond the voluntariness rule in cases of "detained

> statements," excluding many that would otherwise meet the voluntariness rule. Similarly, in cases of "statutory compulsion" statements made in compliance with statutory obligations to speak may be excluded, even though they would have been admissible at common law. Section 7 also supports the exclusion of derivative evidence that the common law would have received. As Justice Iacobucci warned in *R. v. Oickle* with respect to the common law and *Charter* regimes, "[i]t would be a mistake to assume that one subsumes the other entirely." [Footnotes omitted.]
>
> (*The Law of Evidence* (4th ed. 2005), at pp. 304-5.)
>
> [Emphasis added.]

[83] Statutory compulsion as a s. 7 *Charter* issue is therefore not equivalent to common law voluntariness. As noted, the trial judge found the statements were compelled contrary to s. 7.

[84] The Crown also argues the trial judge's finding was contrary to *White* submitting there was no evidence before the court that the statements had been statutorily compelled.

[85] The July 9 statement commenced as an investigative interview, not regulatory. However, after it was underway the interview shifted to regulatory matters without the defendants being advised the investigatory questions were concluded and that the purpose now was to shift to regulatory matters focusing on continued compliance and operation of the mine site.

[86] While parallel regulatory and criminal inquiries may co-exist, once the inquiry involves the investigation of penal liability, the process for evidence gathering must be *Charter* compliant. In *R. v. Mercer,* 2005 NLCA 10, the Newfoundland and Labrador Court of Appeal held:

> [39] It was underscored in *Jarvis*, and reiterated in *Ling*, that an audit and an investigation are not mutually exclusive. There is nothing intrinsically wrong with both proceeding simultaneously and nor is there a requirement that there be a fire wall between the two. What is not countenanced is the making use of the audit process, either directly or surreptitiously, to obtain information to support a criminal investigation. Contact between the persons involved in the separate processes is not proscribed and use of the information gathered by way of an audit can be used in the criminal investigation as long as it has not been tainted.

[87] The B.C. Court of Appeal discussed this issue in *United States v. Wilson,* 2010 BCCA 85:

> [56] … A civil and criminal investigation may coexist in regard to the same set of circumstances. It is the "predominant purpose" or focus of the investigation that determines the rights that must be protected and the process to be followed in the gathering of evidence. Information that is obtained in the civil context is not subject to the same expectations of privacy as that obtained in a criminal proceeding. It is only when the focus of the investigation involves or evolves to a determination of penal liability that the state [is] required to ensure that the process for the gathering of evidence is *Charter* compliant: *R. v. Jarvis*, 2002 SCC 73, [2002] 3 S.C.R. 757 (S.C.C.) at para. 98. [Emphasis added].

[88] I turn first to the sufficiency of the warnings given to the defendants in the July 9 and July 15 interviews in this regulatory context.

Sufficiency of Warnings

[89] The trial judge referred to the Crown's written submissions summarizing the facts relevant to the July 9 and July 15, 2015 statements:

> [16] Similar to the approach taken above with aspects of the facts summarized by counsel for Mossman and Meckert, I also include the following summary of the facts relevant to the July 9, 2015 statements from the written submissions of the Crown … At that time the accused Mossman and Meckert are advised of the following.
>
> a. They are not under arrest and are not detained.
>
> b. They are free to leave at any time.
>
> c. The inspectors are investigating the accused for a number of offences under the *EMA, Fisheries Act, Mine Metal Effluent Regulations* and *Forest and Range Practices Act*.
>
> d. The Applicants are not obliged to say anything but that anything said could be used as evidence.
>
> e, Benjamin Mossman indicates that he understands as does Mr. Meckert.
>
> f. The accused are then given a "secondary warning" regarding contact with officers and emphasizing that the Applicants "must not feel compelled to say anything to the inspectors for any reason, but anything you do say may be used in evidence."
>
> g. Both Mr. Mossman and Mr. Meckert indicate they understand the warning.
>
> [17] I include the Crown summary of facts relevant to the July 15, 2015 statement of Benjamin Mossman who was advised of the following by Fisheries Officer Doug Gow:
>
> 1. The officers were investigating offences under the *Fisheries Act* and the *Mine Metal Effluent Regulations* … Benjamin Mossman indicated he understood this warning…

2. Benjamin Mossman was not under arrest or detention and was "… free to go at any time" … Benjamin Mossman indicated that he understood this warning …

3. Benjamin Mossman did not have to speak to the officers, but that if he did speak, anything said could be used in evidence … Benjamin Mossman indicated that he understood this warning …

4. A "secondary warning" was given with respect to contact with other officers and emphasized that Benjamin Mossman was not compelled to speak, but that anything said could be used in evidence ... Benjamin Mossman indicated that he understood this warning …

5. After receiving all of the above warnings and indicating that he understood them, Benjamin Mossman was asked if he wished to give a statement ... Benjamin Mossman indicated that he wanted to give a statement ... and then proceeded to do so.

[18] I further include the Crown summary of facts relevant to the July 15, 2015, statement of Dirk Meckert who was advised of the following by Fisheries Officer Doug Gow:

1. The officers were investigating offences under the *Fisheries Act* and the *Mine Metal Effluent Regulations* … Dirk Meckert indicated he understood this warning …

2. Dirk Meckert was not under arrest or detention and was … "free to go at any time"… Dirk Meckert indicated that he understood this warning …

3, Dirk Meckert did not have to speak to the officers, but that if he did speak, anything said could be used in evidence … Dirk Meckert indicated that he understood this warning …

4. A "secondary warning" was given with respect to contact with other officers and emphasized that Dirk Meckert was not compelled to speak, but that anything said could be used in … Dirk Meckert indicated that he understood this warning …

5. After receiving all of the above warnings and indicating that he understood them, Dirk Meckert was asked if he wished to give a statement … Dirk Meckert indicated that he wanted to give a statement … and then proceeded to do so.

[90] The trial judge discussed the warnings and the regulatory context as follows:

> [126] Just as it is necessary for the court to consider the limits of the regulatory purpose requiring compelled statements, it is critical that the court consider the limits of that voluntary consent to be compelled.
>
> [127] Crown submits that because there is no detention, the sufficiency of the warning is a voluntariness issue under the *Oickle* analysis, and insofar

as voluntariness was admitted in this *voir dire* the Court need not consider it.

[128] I am however considering voluntariness, not in the context of *Ibrahim and the Queen*, or *Oickle*. I am considering it in the way it is raised in the context of an informed consent to participate, voluntarily in the regulated industry that includes an obligation to provide incriminating information.

[129] This focus must remain is found in Justice LaForest's consideration of the fundamental purposes behind the principle against self-incrimination; specifically, the protection against unreliable confessions, and the abuse of power by the state.

[130] I find that the failure to make clear that the regulatory reporting obligation was suspended, does create a risk of unreliable reporting. For both individuals they are at the apex of overlapping reporting obligations. Certain of those obligations are specific to the corporate accused, B.I.G. and not under an individual licensing scheme, such as a fisherman. This engages a consideration of employment obligations, directions or duties. At least for Mr. Mossman, he is also separately regulated as [a] Professional Engineer, and an officer and director of a public company.

[131] If in that regulatory context, when the nature of information requested shifts to the type that engages "psychological or emotional pressures on the individual," and resulting "anxiety" described by LaForest in *Fitzpatrick,* it should be made clear to the individual they [are] not compelled by the obligations they otherwise consent to.

[132] Concerning the risk of abuse, Justice LaForest commented on the comparable impacts should certain individuals not be conscripted by the state to promote a self-defeating purpose. Recall the reference to the alternative of a small armada of vessels to maintain surveillance over the fishery.

[133] This is not a concern here. There is no urgency. There is no suggestion of any risk of dissipation of evidence. The remoteness of Banks Island relates to a physical inspection. It is of almost no relevance to taking a statement which can occur in setting mutual convenience.

[134] Ultimately, ensuring clarity on the suspension of a regulatory obligation to report, is critical to the very purpose for which the duty was imposed. In the appropriate regulatory context, there is a shared non-adversarial interest in the conscription of that individual to promote a potentially self-defeating purpose. When that interest is no longer engaged, that must be made clear.

CONCLUSION ON SECTION 7

[135] I find as follows with respect to the excluded portion of the July 9, 2015 statement and both of the July 15, 2015 statements;

1. They are inquisitorial and adversarial. They are not focused on the continued compliance, or return to compliance of the remaining operations of the mine at Discovery, Tel, and Bob.
2. Because Mr. Mossman and Mr. Meckert remained legally compelled to disclose information in the regulation of the continued operations of the mine, it must be made clear that

those obligations are suspended before they are asked to participate in a separate inquisitorial process.

3. The warnings given here did not achieve this.

[91] The Crown submits the standard police cautions used by the officers were sufficient because the criminal standard is more onerous than strict liability regulatory offences which they submit receive a lower standard of *Charter* scrutiny as they are for the public good and generally an accused has chosen to participate in the regulatory regime for their own benefit.

[92] The defendants say a standard police caution is not good enough when it is given in a regulatory setting where the accused under investigation has a right to remain silent that is at odds with his duty to speak to regulators. They submit that *White* requires that a regulatory officer make it clear that the individual's duty to speak is being terminated if the officer wishes to rely on any statements made by an accused in an investigation.

July 9, 2015 Interview

[93] The trial judge said this about the July 9 interview:

> [96] This difference in purpose – in a general way – delineates the excluded portions from the recorded statements of Mr. Meckert and Mr. Mossman on July 9th, 2015. Where the focus was on the continuing regulatory compliance of the remaining mining and exploration operations at Banks Island Gold there is no resulting concern. While certain admissions may have been made by Mr. Meckert, this was in the context of a discussion about the necessary remedial steps related to the identified non-compliance and then the continued, compliant operation of the various mining activities.
>
> [97] I am concerned with the apparent failure to identify that the purpose of questions concerning the Heplar Lake discharge, was no longer relevant to continue compliance. As indicated above, there may have been an ancillary purpose to discussing Heplar Lake, insofar as past non-compliance and/or a prompt and reasonable response may be relevant to a continued consideration of compliance, <u>but blending the two purposes is fraught with risk.</u>
>
> [98] In the determination of whether, in relation to Heplar, the relationship had turned adversarial, or inquisitorial, the information sought was no longer immediately relevant to the common interest in the regulated activity. The information sought was now inquisitorial.
>
> [Emphasis added.]

[94] The portion of the July 9 statement excluded by the trial judge addresses non-regulatory concerns. It appears the trial judge took the approach of breaking down the interview into discrete lines of questioning, delineating those he deemed "adversarial or inquisitorial" from those relating to regulatory compliance. He considered the "purpose" of specific questions, apparently applying the "nature of the demand" test he summarized earlier in his reasons, to determine admissibility of various portions of the interview. In my view, this focus on purpose or nature of the questions was too narrow. The trial judge instead ought to have performed a "concrete and contextual analysis" of the totality of the circumstances of the interview, which includes but is not limited to the nature or purpose of the questions.

[95] The Crown notes the investigators cautioned the defendants at the beginning of the interview that they were being investigated for environmental offences, that they were free to leave, and that they did not have to speak, but if they did so what they said could be used in evidence. The defendants both acknowledged they understood the warnings including the right to silence and state they wished to give the statements anyways. However, the officers also reminded Mr. Mossman and Mr. Meckert of their regulatory reporting obligations during the interview.

[96] In addition, the Crown conceded on the *voir dire* the defendants were required by regulation and statute to provide mine access to the inspectors and the trial judge made a finding of fact to that effect. They submit the start of an investigation does not change that obligation as both the *Mines Act* and the *Mines Regulation* continue to compel participation in the regulatory process even after the start of an investigation. On July 9, 2015 the joint statement was taken in the presence of Inspector Robinson, an inspector under those enactments, and as a result, the defendants were obligated to speak.

[97] The defendants further submit the situation was more complex than portrayed by the Crown. They argue the interviews were confusing and combined investigatory and regulatory matters. They submit with respect to the July 9 statement:

> 5. Officer Scrivner undermined the integrity of the statement. Officer Scrivner admitted he had no training in taking statements to be used in a prosecution. Consistent with that lack of training, Officer Scrivner decided

to take the statements of both Mossman and Meckert concurrently. Officer Scrivner warned Mossman and Meckert that they were both giving statements in an investigation. He then told Mossman and Meckert that they were free to leave the interview and did not have to provide statements - but then told them that the investigation included an offence that Mossman and Meckert had failed to provide information to regulators. Exacerbating the confusion caused by the defective warning, Officer Scrivner concluded his "warnings" with "that's kind of the legal stuff out of the way, I mean I think we just want to have a conversation [emphasis added]" (page 2, lines 105 -106).

6. The Officers then added to the confusion regarding Mossman and Meckert's right to remain silent by reminding Mossman and Meckert of their obligations to provide information to the state. For example, Officer Bailey stressed the legal obligations to provide information to the Ministry of Environment, referring to that obligation as "the big one" in terms of his concerns:

> ... I don't want to sit here and go through the little reporting non-compliances and things like that, I want to address the big stuff first of course. ... the big one is that is moving forward uh under your permit any process modifications you have to notify the director so before you implement those changes ... you have to notify director, and it doesn't matter uh if the permitted levels are wrong you still have to notify so you can't pump directly from the Tel and bypass the sediment control pond, you have notify. When [you're] discharging from Discovery and you're not pumping it down here, that's a modification, because it's a modification, they should've been notified so the same goes for upgrading the works, we ask for that notification... (pages 9-10, lines 418-429)
>
> ... if there's any non-compliances, you've got to notify ... (page 10, lines 457 - 459).
>
> ...
>
> we need to be kept in the loop on that communication and so a lot of this can be avoided a lot of things you need to forward the information so we can help you, it can slow things down I know, but at the end of the day we you take action without notification you put yourself at risk uh, and so there is some non-compliance notification and non-compliance reporting that needs to be happening and it's in your permit ... (page 10, lines 463-471).

7. Inspector Robinson added "the big take away from all of this and I hope what we, we all gain is that communication is key right, I mean we need to know when things are operationally changing on the mine site because at the end of the day like these permits are legal documents right..." (p. 12, lines 557 -560). Inspector Robinson also stated "there's no way I want to put you out of business ... but we need some assurance that things are going to be done in a way that is not going to be a big surprise when we come to site ..." (p. 14, lines 622 -625).

8. Officer Scrivner added (at page 8, lines 357-369):

> "You know it looks, it looks a lot better on your guys when you're volunteering information and being open and transparent about

> some of the problems that you are having than you know us hearing through other means and having to come and then seeing oh yeah ..."
>
> ...
>
> you know, you're operating technically kind of without a permit right because it's not what you've applied to do so it's just good to keep these guys in the loop and, and get that stuff documented and then, then you're good, right, you're covered then for that kind of stuff so.
>
> 9. The Officers made no efforts to reconcile Mossman and Meckert's right to remain silent with their competing duty to provide information or participate with regulatory matters. Officer Scrivner acknowledged the blended investigative and regulatory purpose of the statement at the outset, noting:
>
> > ... you can go through each of those individually but take your time and you know, we'll sit here as long as we need to and after we'll, I'm sure we'll have some questions and <u>we can get to what's gonna happen going [forwards] after right at the end, we can go kind of go through that kind of stuff</u> (page 3, lines 113 - 117).
>
> 10. The "kind of stuff' that had to be dealt with included an administrative order that Inspector Robinson had prepared under section 10 of the *Mines Act*. That order shut down parts of the mine site. Inspector Robinson dealt with that order during the statement, as opposed to separately. Mossman, as mine manager, was obligated to receive that order and to implement it. He was not free to go.
>
> [Emphasis added.]

[98] Mr. Mossman and Mr. Meckert were interviewed in the presence of four investigating officers. They could not, in my view, be reasonably expected to make an assessment of the difference in purpose of regulatory compliance versus adversarial investigation. They knew they were obligated to provide certain information under the regulatory framework and were reminded as such by the officers, but also knew they were being investigated for potential offences as was explained to them at the start of the interview. There was no clear delineation of their regulatory obligations by the officers as suggested in *White.*

[99] The trial judge discussed these issues when assessing the adequacy of the cautions given by the officers:

> [110] The failure in these warnings was that they failed to address the context, and the shifting context of this regulatory setting.
>
> …
>
> [112] In this regulatory setting, these individuals have earlier consented to submit to a duty to report certain information that may be self-incriminating. It is the shift from that non-coercive obligation – to an adversarial, non-compellable inquisition that must be made clear. That is the context in

> which the s. 7 rights are determined. It is in that context that the sufficiency of the caution, and whether it effected a clear suspension of individual compellability must be viewed.
>
> [113] This is particularly so in the context of a continuing regulatory purpose. The individuals here remained engaged in the very operation under investigation. Day by day, they remained compelled to provide information, including incriminating information, concerning the continued operation of Tel, Discovery, and Bob.
>
> …
>
> [115] The delineation between these two individuals continued compellability in the regulatory context, and their non-compellability in this adversarial inquiry must be made clear.
>
> …
>
> [130] I find that the failure to make clear that the regulatory reporting obligation was suspended, does create a risk of unreliable reporting. For both individuals they are at the apex of overlapping reporting obligations…
>
> [131] If in that regulatory context, when the nature of information requested shifts to the type that engages "psychological or emotional pressures on the individual," and resulting "anxiety" described by LaForest in *Fitzpatrick*, it should be made clear to the individual that they [are] not compelled by the obligations they otherwise consent to.

[100] While the trial judge correctly identified that the blending of the regulatory and investigatory purposes of the Heplar Lake discharge questions was "fraught with risk," and he rightly excluded that portion of the interview, in my view the entire interview was "fraught with risk" because of the way regulatory and investigative purposes were seemingly blended by the interviewing officers without delineation for the accused.

[101] The lack of clarity respecting what was occurring is made clear by the trial judge. He concluded the officers did not act in bad faith and found that the July 9 statement was "unnecessarily rushed, and regrettably mixed in with the only pressing and immediate concern which was stopping the discharge at Bob and Discovery and returning the operations to compliance." He noted the apparent concern around expedience, efficiency, and the costs associated with the inspection/investigation. He also noted that some of the officers lacked experience or were not prepared to conduct an investigation.

[102] The evidence did not suggest that the officers intended to abuse their regulatory powers and violate the defendants' *Charter* rights by way of the

interview. However, while these factors may *explain* some of the issues with the interview, it does not *excuse* them.

[103] I am not satisfied the officers exercised their regulatory powers reasonably in conducting the interview. There were clear problems with the interview which could not be mitigated by the warning alone in these circumstances. It would be problematic to ignore an improperly conducted interview, one "fraught with risk" and in which the accused's *Charter* rights were violated, based on an after-the-fact analysis which happens to be able to delineate some admissible portions from some inadmissible portions. Instead, the courts ought to demand proper investigative practices which give full effect to accused persons' *Charter* rights throughout.

July 15, 2015 Interviews

[104] The trial judge excluded the July 15 statements in their entirety finding they were a continuation of the July 9 interview. He concluded that the defendants remained legally compelled to disclose information respecting the regulation and continued operation of the mine and it was not made clear to them that those obligations were suspended before they were asked to participate in a separate inquisitorial process, that is, the warnings were not sufficient.

[105] The July 15 interviews were different from the July 9 interviews. They were focused on the lack of compliance and the alleged events relevant to proof of the offences, not regulatory concerns. The interviews were more structured and straightforward compared to the July 9 interview. Before starting the July 15 interviews, the officers clearly advised the defendants that:

a) Mr. Gow and Mr. Legare were federal fisheries officers interviewing the defendants for the purpose of investigating potential violations of the *Fisheries Act* and *Metal Mining Effluent Regulations,* specifically the release of deleterious substances.

b) They were not under arrest or detention and were free to go at any time.

c) They were not obligated to say anything, but anything they said may be given in evidence.

d) If any officer had offered them any hope or advantage or suggested fear of prejudice should they speak or not speak to the officers, that no such offer or suggestion can be of any effect and must not influence them or make them feel compelled to say anything for any reason.

[106] Both Mr. Mossman and Mr. Meckert, after receiving these warnings, confirmed they were still willing to provide statements and they proceeded with their interviews.

[107] The July 15 interviews were conducted by two fisheries officers, rather than the mix of officers from different agencies present on July 9. Unlike the July 9 interview, there was no overlap of regulatory inquiry with offence investigation. The interviews were clearly investigatory. The officers kept the interviews focused on the topic of the discharge investigation. Also, unlike the July 9 interview, there had been no preceding search of the mining site or discussion with the officers earlier in the day. Coupled with the clear warnings given at the outset, it is unlikely that the defendants would have been confused about their right to silence or misled as to their regulatory obligations during the course of the interview, in contrast to the July 9 interview.

[108] The warnings and the content of the July 15 statements address the alleged statutory compulsion. They made it clear the investigators were investigating environmental offences and not regulatory inquiries. Nor is there any evidence the defendants subjectively believed they were compelled to speak. In addition, as discussed above, they admitted in the *voir dire* that the statements were voluntary.

Evidence of Subjective Belief of Compulsion to Speak

[109] The Crown submits there was no evidence the defendants believed themselves to be compelled to speak given they did not testify.

[110] The defendants submit this is a new argument on appeal. They further submit there was evidence of compulsion present to support the trial judge's finding and that an admission of voluntariness does not preclude the distinct concept of self-incrimination through statutory compulsion.

[111] I agree this is a new issue raised by the Crown on appeal. This raises the preliminary issue of whether I should hear a new issue on appeal.

[112] In *R. v. Gill*, 2018 BCCA 144, the Court set out the test for determining whether a new issue ought to be heard on appeal:

> [10] While the general rule admits of exceptions, it has been said that new issues raised on appeal "ought to be most jealously scrutinized": *S.S. "Tordenskjold" v. S.S. "Euphemia*" (1908), 41 S.C.R. 154 at 164, per Duff J. citing The "*Tasmania*", 15 App. Cas. 223. Whether to hear a new issue on appeal engages the exercise of discretion. This Court has said that the discretion to hear new issues on appeal will be exercised "rarely" or "sparingly and only where the interests of justice require it": *Zeligs* at para. 66; *R. v. Trieu*, 2010 BCCA 540 at para. 55. As this Court said in *Gorenshtein* at para. 46, "the restrained approach to entertaining new issues engaging the evidentiary record also applies to legal questions that have not been the subject of a reasoned decision."
>
> [11] Leave is required for a new issue to be raised on appeal and the onus rests with the party seeking leave to demonstrate that the record in the court below is as complete as it would have been had the issue been raised in a timely way: *Zeligs* at para. 66. As Justice Duff put it in *Lamb v. Kincaid* (1907), 38 S.C.R. 516:
>
> > A court of appeal, I think, should not give effect to such a point taken for the first time in appeal, unless it be clear that, had the question been raised at the proper time, no further light could have been thrown upon it.
>
> [12] In *Quan v. Cusson*, 2009 SCC 62 at paras. 36–38, the majority of the Court laid out a framework for determining whether to permit a party to raise a new issue on appeal. The first question is whether the issue is new. If so, the second question is whether the evidentiary record and the interests of justice support granting an exception to the general rule against raising new issues on appeal. In determining whether the interests of justice warrant an exception to the general rule, it is appropriate to consider whether entertaining the issue for the first time on appeal might lead to a different ultimate outcome for the parties: *L.S. v. G.S.* at para. 112. As Binnie J. said in *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19 at para. 33, a court may hear a new issue on appeal if refusing leave would risk an injustice.

[113] In *Bartch v. Bartch,* 2018 BCCA 271, the Court with reference to *Gill* noted "the guiding consideration is the interests of justice as they affect all parties" (at para. 31).

[114] The Crown argues the defendants did not tender evidence of their subjective beliefs regarding whether or not they believed they were compelled to speak. They rely on *White* at para. 75 as supporting their position there must be

evidence that a person speaks or reports "… on the basis of an honest and reasonably held belief that he or she was required by law to report" and that the onus is on the appellants. They also cite *White* at para. 81:

> [81] Does the Crown bear the onus of establishing that an accident report was *not* made pursuant to the statutory duty created by s. 61 of the *Motor Vehicle Act*? The answer to this question must be no. The accused who raises a *Charter* challenge to the admissibility of evidence bears the onus of establishing an infringement of his or her *Charter* rights. Thus, where an accused seeks to argue that the admission of a statement into evidence will violate the principle against self-incrimination under s. 7 because he or she was compelled to make the statement by the terms of a provincial statute, it is the accused who must establish on the balance of probabilities that the statement was compelled. There cannot be any controversy about this point. The real question is whether the trial judge erred by placing an onus on the Crown to disprove compulsion.

[115] The defendants submit Mr. Mossman and Mr. Meckert were not required to testify in the *voir dire* as their subjective belief could be inferred.

[116] In *White,* the majority addressed subjective belief as part of the test for compulsion, but did not impose a requirement that the accused testify to establish such belief. In *Nolet,* the Court in determining the existence of a reasonable expectation of privacy held, "[w]hile the appellants did not testify about their subjective belief, the court may presume that individuals would expect a measure of privacy in what, for a long-distance trucker, suffices as a temporary mobile home" (at para. 31). In *R. v. De Zen et al*, 2010 ONCJ 437 at paras. 20-24, citing *R. v. Laidley*, [2001] O.J. No. 6281 (Ont. S.C.J.), the Court concluded subjective belief could be assessed without testimony in the context of determining whether forensic accountants who interviewed the accused were persons in authority.

[117] Based on this legal framework, the defendants were not required to testify to establish their subjective belief of compulsion. There was ample evidence at trial of the actions of the officers and the conduct of the inspection and interviews to allow the trial judge to consider the issue of compulsion.

[118] I am satisfied that the outcome for the parties would have been no different had this issue been considered at trial. The interests of justice do not require this issue to be heard on appeal and I decline to do so.

Tainting of July 15 Statements by July 9 Statement

[119] The Crown submits that the trial judge erred by concluding the July 15 statements were tainted by the July 9 statement. They submit that the trial judge failed to explain or provide sufficient reasons as to why or how the July 15 statements were tainted beyond noting that one officer present on July 9 was also present on July 15.

[120] The defendants submit the trial judge heard all of the evidence of the officers and found as a finding of fact that the July 15 statements were a continuation of the July 9 interview. The defendants submit the Crown cannot appeal a finding of fact as s. 676(1)(a) of the *Criminal Code* permits the Crown to appeal on grounds that "involve[s] a question of law alone" relying on *R. v. J.M.H.*, 2011 SCC 45. They submit the trial judge correctly took a "purposive and generous approach" and determined the statements were part of the "same transaction or course of conduct."

[121] The defendants also submit the reasons were sufficient as the Crown relies on a single paragraph of the trial judge's reasons and does not put the paragraph in context. In addition, they submit the Crown is demanding more of reasons than is required.

[122] The trial judge's discussion of the tainting issue is limited:

> [121] I do take into account the separation in time and context between the July 9th statement and the July 15th statement. One concern with the July 9th statement is the presence of various inspectors and investigators as well as both Mr. Mossman and Mr. Meckert at the same time. Certainly the July 15th statement does not include the blended purposes addressed above with respect to July 9th. But there is a certain blurring between the two. In particular, one of the Fisheries Officers is involved in both the July 9th and July 15th statements. One interview is then, in a certain respect, a continuation of the other.

[123] I turn first to the issue of tainting before addressing the sufficiency of the trial judge's reasons.

Tainting

[124] The Supreme Court of Canada in *R. v. Wittwer,* 2008 SCC 33, sets out the test for determining whether a statement is tainted by an earlier *Charter* breach:

> [21] In considering whether a statement is tainted by an earlier Charter breach, the courts have adopted a purposive and generous approach. It is

> unnecessary to establish a strict causal relationship between the breach and the subsequent statement. The statement will be tainted if the breach and the impugned statement can be said to be part of the same transaction or course of conduct: *Strachan,* at p. 1005. The required connection between the breach and the subsequent statement may be "temporal, contextual, causal or a combination of the three": *R. v. Plaha* (2004), 189 O.A.C. 376 (Ont. C.A.), at para. 45. A connection that is merely "remote" or "tenuous" will not suffice: *R. v. Goldhart*, [1996] 2 S.C.R. 463 (S.C.C.), at para. 40; *Plaha*, at para. 45.

[125] Justice Barrow in *R. v. Kipling,* 2010 BCSC 1298, also provides some helpful considerations for the tainting analysis:

> [25] Thus, there are two issues. The first is whether there is a continuation of the disqualifying features relating to the first statement at the time the second statement is given and, even if there is not, the second issue is whether the fact that the first statement was given was a substantial contributing factor to the making of the second statement. The latter issue arises usually, but not exclusively, when the first statement is inculpatory. An example of that is *R. v. Kiloh*, 2003 BCSC 209 (B.C.S.C.). There, the accused gave several statements. The first statement was inculpatory. At paragraph 138, MacKenzie J. (as she then was) addressed tainting and, in particular, the role of the first statement in relation to the second. There, the accused had argued that he had "already spilled the beans" and that played a role in his decision to speak when interviewed subsequently by the police. That is commonly the situation when dealing with the role of the first statement in the decision to make a second. It is not always the case and it is not the case in the circumstances at hand.
>
> [26] The features to be looked at in resolving the issues raised by the notion of tainting include:
>
> 1. the passage of time between the two statements; the longer the gap between the two statements, generally, the less likely there will be a strong connection;
> 2. the external circumstances, the place and the personnel involved in the giving of the second statement; the greater the correspondence between the two, the greater is the possibility of a continuing influence of the disqualifying features;
> 3. the intervening events which may mitigate or eliminate the disqualifying features; generally those involve things like the giving of the police caution, the providing of a secondary warning, and access to counsel.
> 4. whether during the second statement the police adverted to the fact of the first statement. Again, as noted, this is a greater concern when the first statement is inculpatory. *Wittwer* is another example of that phenomenon.
>
> [27] Viewed from a different perspective, Fish J. in *Wittwer* identified three aspects to the analysis: temporal, causal, and contextual. Again, it is not a matter of addressing each of these aspects in isolation, but rather

> whether all give rise to a concern either on the first or second aspect of the tainting analysis. In many cases, one aspect will affect or influence the degree of importance of the other aspects.

[126] In *Wittwer,* the accused participated in two interviews with police, one in July 2003 and another in October 2003, and gave statements which were later found to be inadmissible. In January 2004, he was interviewed again by another police officer. After struggling for five hours to make progress in the interview, the officer referenced the accused's inadmissible statements in the prior interviews in order to get him to talk:

> [14] Sergeant Skrine testified that he and the appellant remained "at loggerheads". He felt that the only way to get the appellant to incriminate himself was to acknowledge that he knew about the sexual encounter described by the appellant in the first two interviews. Sergeant Skrine concluded that there was only one way he could get the appellant "to talk". In the officer's words:
>
> > ... I felt that if he were going to make admissions with regard to those assaults, that he would only do it if he knew that I knew about his conversation with Constable Ghadban [who had taken the appellant's first statement]. [A.R., at p. 157].
>
> [15] Sergeant Skrine's conclusion proved correct. On his return to the interview room after leaving briefly to consult with Constable Ghadban, Sergeant Skrine informed the appellant that he now knew what the appellant had told Constable Ghadban. Only then did the "gates ope[n]": The appellant proceeded immediately to give the statement that he had until then resolutely refused to provide (judgment on the *voir dire*, at para. 27).

[127] In concluding the third interview was tainted, the Court found:

> [22] In this case, I am satisfied that the connection is *temporal*, in the sense that mention of the first inadmissible statement (the "Ghadban statement") was followed *immediately* by the appellant's statement to Sergeant Skrine. The connection is *causal* as well, in the sense that the impugned statement was elicited after more than four hours of resistance by the appellant and — as the interrogator expected — as a result of the interrogator's reference to the Ghadban statement. In this regard, I again reproduce Sergeant Skrine's prescient observation: "I felt", he testified, "that if he were going to make admissions with regard to those assaults, that he would only do it if he knew that I knew about his conversation with Constable Ghadban". Finally, I am satisfied that the connection between the impugned statement and its inadmissible predecessors is to some extent *contextual*, in that any prior gap between the two was intentionally and explicitly bridged by Sergeant Skrine's association of one with the other in the course of his interrogation of the appellant with Constable Ghadban's watchful assistance. On any view of the matter, the connection required under *Goldhart* and *Plaha* has plainly been established.

> [23] In this regard, I consider particularly apt the observations of Sopinka J., speaking for a unanimous Court in *R. v. I. (L.R.)*, [1993] 4 S.C.R. 504 (S.C.C.), at pp. 526-27:
>
> > Under the rules relating to confessions at common law, the admissibility of a confession which had been preceded by an involuntary confession involved a factual determination based on factors designed to ascertain the degree of connection between the two statements. These included the time span between the statements, advertence to the previous statement during questioning, the discovery of additional incriminating evidence subsequent to the first statement, the presence of the same police officers at both interrogations and other similarities between the two circumstances ...
> >
> > In applying these factors, a subsequent confession would be involuntary if either the tainting features which disqualified the first confession continued to be present or if the fact that the first statement was made was a substantial factor contributing to the making of the second statement …
> >
> > In these cases the fact that a caution or warning had been given or that the advice of counsel had been obtained between the two statements was a factor to be considered but it was by no means determinative. While such an occurrence went a long way to dissipate elements of compulsion or inducement resulting from the conduct of the interrogators, it might have little or no effect in circumstances in which the second statement is induced by the fact of the first.
> >
> > [Emphasis added.]

[128] In *Kipling*, two interviews of the accused were held only 13 hours apart by the same police officer in the same room while the accused was in custody. The accused was a young, vulnerable, unsophisticated woman. The interviewing officer advised the accused that the police believed she had lied in her first statement in an obvious attempt to persuade the accused to give a statement. The Court concluded:

> [42] The broad issue is whether the Crown has proven that the first statement was not a substantial contributing factor in the making of the second statement. I am not satisfied that has been proven to the necessary degree. There are three factors that I consider important. The first is in relation to the intervening warnings and events that might otherwise reduce or mitigate the effect of the earlier statement. Here, the warnings were either incomplete or inaccurate and given at a time when Ms. Kipling was especially vulnerable and I say "especially" in the context that she is vulnerable on many days and was particularly so at the conclusion of this first statement and still vulnerable, if not as vulnerable, at the beginning of the second statement. Second, the temporal and situational connection between the two statements is in this case rather strong. Finally, there is overt reference to the first statement and the fact that the police believe

> she lied in that statement and it is that reference which appears to give rise to her decision to provide the account that she provided.

[129] Turning to the July 9 and July 15 interviews, the temporal connection is weak. The July 15 interviews were conducted six days after the July 9 interview, not mere hours like in *Kipling.* The trial judge himself noted the “separation” in time. However, as seen in *Wittwer,* even a five-month separation may not bar a temporal connection. While the officers on July 15 made some reference to the July 9 interview, they did not attempt to use the July 9 interview or the statements the accused made in an effort to extract further statements. This can be contrasted with *Wittwer* where the Court concluded:

> [25] ... In my view, the required connection between the first statement and the third statement is direct and obvious. If Sergeant Skrine had not acknowledged that he was already aware of what the appellant had told Constable Ghadban, the appellant would not have reiterated the same incriminating admissions. What we have here, then, is not a suspect's change of heart but an interrogator's fatal change in strategy.

[130] While we do not have the benefit of testimony from the defendants to explain their motivations, the circumstances do not suggest they gave the statements on July 15 because of the statements they gave on July 9, that is, it does not appear that “the fact that the first statement was made was a substantial factor contributing to the making of the second statement.” The causal connection is also weak.

[131] There is some contextual connection between the two interviews in that the officers conducting the July 15 interviews made some reference to the July 9 interview and, as the trial judge noted, the same fisheries officer, Mr. Legare, participated in both interviews. As submitted by the defendants, the presence of an officer at both interrogations is a factor to consider according to *R. v. I. (L.R.) and T. (E.),* [1993] 4 S.C.R. 504.

[132] However, there were also contextual differences between the two interviews. On July 15 the defendants were interviewed separately by two federal fisheries officers instead of together with the four different officers present on July 9. In the interviews, the fisheries officers were specifically focused on the investigation of the discharge. These interviews were not, on the evidence, intended as a continuation of the July 9 interview. This is distinguishable from

Wittwer where the purpose of the third interview was to obtain a new statement after the police learned the first two would be inadmissible. As the trial judge noted in his *voir dire* reasons, “Certainly the July 15th statement does not include the blended purposes addressed above with respect to July 9th.” He noted the “separation” in context between the interviews.

[133] As I discussed above, the July 15 interviews were conducted in a clear and focused manner without the “disqualifying features” of the July 9 interview. The defendants were given clear warnings as to the nature of the investigation and their right to silence and were advised they were free to leave at the outset, but they participated in the interviews regardless. As suggested in *Kipling,* the proper police warnings given on July 15 also mitigate the impact of the disqualifying features from the July 9 interview.

[134] Also as noted in *Kipling* at para. 27, “it is not a matter of addressing each of these aspects in isolation, but rather whether all give rise to a concern either on the first or second aspect of the tainting analysis. In many cases, one aspect will affect or influence the degree of importance of the other aspects.” Overall, in my view, while the July 15 interview was clearly part of the same investigation as the July 9 interview, it was not “part of the same transaction or course of conduct” as contemplated by *Wittwer*.

[135] While there is some loose temporal and contextual connection, such connection is remote and tenuous and the July 15 statements should not have been excluded on the basis of tainting.

Sufficiency of Reasons

[136] In *R. v. Vuradin,* 2013 SCC 38, the Supreme Court of Canada summarized the approach appellate courts should take in determining whether reasons are sufficient:

> [10] An appellate court tasked with determining whether a trial judge gave sufficient reasons must follow a functional approach: *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, at para. 55. An appeal based on insufficient reasons “will only be allowed where the trial judge’s reasons are so deficient that they foreclose meaningful appellate review”: *R. v. Dinardo*, 2008 SCC 24, [2008] 1 S.C.R. 788, at para. 25.
>
> ...

> [12] Ultimately, appellate courts considering the sufficiency of reasons "should read them as a whole, in the context of the evidence, the arguments and the trial, with an appreciation of the purposes or functions for which they are delivered": *R.E.M.*, at para. 16. These purposes "are fulfilled if the reasons, read in context, show why the judge decided as he or she did" (para. 17).

[137] In *R. v. R.E.M.,* 2008 SCC 51, the Court noted:

> [52] In *Sheppard*, the Court, *per* Binnie J. enunciated this "simple underlying rule": "[I]f, in the opinion of the appeal court, the deficiencies in the reasons prevent meaningful appellate review of the correctness of the decision, then an error of law [under s. 686 of the *Criminal Code*] has been committed" (para. 28).
>
> [53] However, the Court in *Sheppard* also stated: "The appellate court is not given the power to intervene simply because it thinks the trial court did a poor job of expressing itself" (para. 26). To justify appellate intervention, the Court makes clear, there must be a functional failing in the reasons. More precisely, the reasons, read in the context of the evidentiary record and the live issues on which the trial focussed, must fail to disclose an intelligible basis for the verdict, capable of permitting meaningful appellate review.

[138] The trial judge's reasons for excluding the July 15 statements are insufficient to ascertain why the statements were excluded. It may be the tainting issue, the sufficiency of the warnings, or some combination thereof. As a result, I conclude the reasons on this issue are insufficient. They do not permit meaningful appellate review.

Conclusion Respecting Statements

[139] With respect to the July 9, 2015 statement, I conclude the trial judge erred in only excluding a portion of the statement. The July 9 statement should be excluded in its entirety.

[140] The July 15, 2015 statements were admissible and the trial judge erred in their exclusion.

Spill Report

[141] As set out in the Agreed Statement of Facts for the *voir dire:*

> 8. The Spill Report (Exhibit B in the *voir dire*) was made following an order contained in the July 9, 2015, Inspection Record of Environmental Protection Officer Neil Bailey (Exhibit J, Tab 1 in the *voir dire*) in which Banks Island Gold Ltd. was directed to submit "…a written report to the Director within 30 days of receiving this report …" (page 4).

[142] In the *Voir Dire* Reasons, the trial judge held:

> [153] Exhibit "B" on *Voir Dire* was the "Report for the June 24th to 25th 2015 Spill" - was dated July 22nd, 2015 and related to the discharge at Bob ("the Spill Report").
>
> [154] I find that the Spill Report is the exact nature of permissibly compellable information discussed by LaForest J. in *Fitzpatrick*, and the related decisions discussed above.
>
> [155] It contains nothing but the physical circumstances of the Bob site.
>
> [156] I can see no meaningful difference between this information, and the type of information reported in hail reports and fishing logs discussed in *Fitzpatrick*.
>
> [157] In the same way that hailing reports and fishing logs may include self- incriminating information, where there is an exceedance of quota the same information is reportable whether compliant or non compliant. It is necessary to the continued regulation and management of the resource. Even where it may be incriminating - and constitutes evidence of an offence - the obligation to report it, is undertaken voluntarily upon deciding to operate in the regulated industry.
>
> [159] The information in the Spill Report remained properly compellable without reference to time. As referenced above, Mr. Mossman in the July 9th statement indicated his earlier intention, but admitted delay, to report the same or similar information. The fact that a demand was then made on July 9th, 2015 to produce the same information that was always properly compellable raises no *Charter* concerns. Indeed it remained relevant and necessary to the continued compliant operation of the Bob Site.

[143] The defendants submit Mr. Mossman did not have to create and deliver the Spill Report independently of Officer Bailey's July 9, 2015 order. They submit the report would not have existed but for Officer Bailey's order. They acknowledge the officer had the power to compel the production of the report for compliance purposes but that it was not admissible for prosecution purposes.

[144] The Crown submits the defendants were required to submit the Spill Report information earlier under the Mines Permit M-241, section D(2)(c), and the Environmental Permit 106576, sections 2.1, 5.3 and 6.1. As a result, they submit its production was not conscripted contrary to s. 7 of the *Charter* as it is not coercive to require a person to provide information as part of a regulatory scheme. In essence, they had agreed in advance to provide the Spill Report as required by participating in the regulated activity of mining.

[145] The permits required reporting at the time of the spill, hence the obligation to submit the necessary reports existed before the investigation occurred and

independent of Officer Bailey's direction. I see no error in the trial judge's reasoning and his conclusion the Spill Report was admissible.

[146] I turn next to the defendants' appeal of the trial judge's *Jordan* Application ruling.

The *Jordan* Application

[147] The defence appeals the dismissal of Mr. Mossman's *Jordan* application on the grounds that the trial judge erred:

> (1) … in dismissing an application to stay the counts pursuant to *R. v. Jordan*. In particular, the trial judge failed to distinguish between a prosecution's inherent complexity, which could justify a trial length beyond constitutional presumed limits, and unnecessary complexity caused by the Crown which should not.

[148] The Crown conceded there was no defence delay until commencement of oral submissions on February 26, 2018 on the *Charter* application to exclude evidence. Despite the time period in issue, the Court acknowledged that "[t]he conduct of this trial has been a model of efficient, careful, thoroughly prepared, and thoughtfully considered advocacy."

[149] The trial judge, in his *Jordan* Application reasons issued May 17, 2018, stated:

> [57] Here the analysis goes solely in the context of complexity. I find that this case is complex. I find that a 24-month ceiling for a matter of this complexity is not an inordinate amount of time needed. I further find that there was a concrete plan in place by Crown counsel, and I deny the stay.

[150] The defendants however submit the 18-month ceiling was exceeded "solely because of the court's scheduling practice." The defendants assert the court failed to schedule requested dates for trial despite the request of both defence and the Crown for eight weeks of trial time. The approach taken to scheduling is said to have "ensured the ceiling was passed." All other factors, such as the complexity of the trial relied on by the Crown, are described by the defence as a red herring. The defence submits the trial was not "particularly complex" as that term is defined.

[151] The Crown submits the defendants seek to replace the trial judge's finding that the complexity of the matter required a threshold of 24 months with their

preferred theory that trial scheduling caused all the delay and that the trial was simple. The Crown notes that no palpable and overriding error on this issue has been shown. They further submit the trial was highly complex and that it is not simply a matter of counting court days and the time between appearances.

[152] The portions of the Agreed Facts on Appeal relevant to the *Jordan* issue are:

> *Jordan* Application
>
> 20 Mossman and Meckert brought an application to stay the trial, pursuant to *R. v. Jordan* (the "*Jordan* Application").
>
> 21. The Crown made admissions on the Jordan application to facilitate the hearing of the application. …
>
> 22. The Court declined the application for a stay on the basis that the complexity of the case justified a timeline of 24 months for the hearing of the trial.
>
> 23. The Crown and Defence agree to the following chronology:
>
> a) The original Information was sworn on 13 July 2016;
>
> b) The trial was scheduled for 8 weeks;
>
> c) The first pretrial conference was held on 1 March 2018. At that pre-trial conference, Crown and Defence asked for 8 weeks of trial to be scheduled. The trial judge ordered those weeks to be scheduled.
>
> d) Following the pretrial conference, the judicial case manager scheduled eight days of trial - September 18 - 21, and October 10 - 13.
>
> e) Further pre-trial conferences were held on May 1, 2017 and July 7, 2017.
>
> f) On August 7, 2017, Crown requested that the judicial case manager set additional dates.
>
> g) On August 14, 2017, the judicial case manager set three additional weeks, being February 26-March 2, March 13-16, and March 24-28.
>
> h) On September 18, 2017, on the first day of trial, the counsel advised the Court that the trial was scheduled to exceed the presumptive 18-month ceiling set by *R.* v. *Jordan.*
>
> i) The Crown called evidence in the trial on September 18 and 19. On September 20, the Court convened a *voir dire,* to consider evidence subject to the notice of application to exclude evidence under the *Charter.*
>
> j) Evidence in the *voir dire* concluded on October 13, 2017.
>
> k) Submissions in the *voir dire* occurred the week of February 26, 2018. The trial judge reserved on the *voir dire.*

l) The Court adjourned March 13, 2018 to provide additional time to deliberate.

m) On March 14, 2018 the trial judge delivered his ruling, without reasons, on the *voir dire.*

n) Crown called evidence on the morning of March 14 and closed its case. Defence counsel obtained a half day adjournment.

o) On March 15, 2018, Mossman and Meckert applied for a directed verdict. Their submissions on the directed verdict completed on Friday, March 16, 2018.

p) The Crown response to the directed verdict application occurred on the morning of March 26, 2018.

q) The Defence conducted their reply on March 26 and March 27. The Court reserved and two days were adjourned.

r) On April 13, 2018, the Court gave its ruling without reasons on the directed verdict application. The Court then invited submissions on the lawful uses of the Spill Report…

s) On April 20, 2018, Crown and Defence made submissions regarding the Spill Report. The Court admitted the report.

t) The *Jordan* Application was argued April 25 to 26, 2018.

u) On May 17, 2018, the Court gave written reasons denying the *Jordan* Application.

v) Mossman and Meckert elected to call no evidence. Closing submissions were made June 4, 5 and 6, 2018.

w) On July 13, 2018, the Court gave the first reasons for judgment acquitting Meckert of all charges and convicting Mossman of two charges.

x) On August 30, 2018, the trial judge released further written reasons for judgment regarding the July 13, 2018, decision.

y) On December 7, 2018, the Court gave written reasons for its March 14, 2018, *voir dire* decision.

z) On December 10, 2018, the Court gave written reasons for the April 13, 2018, directed verdict decision.

Law on Delay

[153] In the Provincial Court, the presumptive ceiling beyond which delay is unreasonable is 18 months (*Jordan* at para. 46). If the presumptive ceiling is exceeded, the burden shifts to the Crown to rebut the presumption of unreasonableness on the basis of exceptional circumstances (*Jordan* at para. 105). This is the only basis upon which the Crown can discharge its burden to justify a delay that exceeds the ceiling (*Jordan* at para. 81).

[154] The ceiling in this case was January 13, 2018. The information was sworn on July 13, 2016, the trial commenced on September 18, 2017 and proceeded as outlined in the above chronology. The decision acquitting Mr. Meckert of all charges and convicting Mr. Mossman of two charges was delivered July 13, 2018. There was therefore a delay of 24 months from the charges being laid to the end of trial.

[155] Since the presumptive ceiling was exceeded, the burden shifted to the Crown to rebut the presumption of unreasonableness, in this case on the basis of exceptional circumstances due to particular complexity. The defence however blames institutional delay, not complexity.

[156] In *Jordan* the Court addressed institutional delay:

> [166] Institutional delay is the period of time that results from the inadequacy of institutional resources. The period of institutional delay "starts to run when the parties are ready for trial but the system cannot accommodate them": *Morin*, at pp. 794-95. At this stage of the objective analysis, the court will determine an acceptable period of time for the court to be available to hear the case once the parties are ready to proceed.
>
> …
>
> [184] To sum up, in assessing a claim under s. 11(*b*), the courts must first determine the reasonable time requirements, objectively viewed, for the type of case before them. Simply put, the courts must determine how long the case should reasonably take (or have taken). This consists, first, of the length of time required for that type of case to be prepared, heard, and decided (i.e. the case's inherent time requirements). The second element is the additional time required for the court to be available to hear the parties beyond the point at which they should be prepared to proceed (i.e. the period of institutional delay). This period of institutional delay is assessed by applying the administrative guidelines developed in *Askov* and *Morin*: eight to ten months in provincial court and six to eight months in superior court. These guidelines set some rough limits on the point at which inadequacy of state resources will be accepted as an excuse for excessive delay.
>
> …
>
> [185] Having addressed the objective elements of the analysis — the reasonable institutional delay and the reasonable inherent time requirements of the case — the judge moves on to compare those objectively reasonable time periods against the time actually taken in the case before the court, to determine whether the overall delay is reasonable. Delay in excess of the objectively required time may be reasonable if it is not attributable to the state. As mentioned at the outset, s. 11(b) protects only against unreasonable delay attributable to the state. The period fairly attributable to the state excludes any time period fairly attributable to the accused — including "waiver" — and any extraordinary

> and unavoidable delays that should not be counted against the state. The main task at this step of the analysis is to identify any portion of the actual elapsed time that should not count against the state.

[157] Exceptional circumstances have been defined as those that lie outside the Crown's control in that: (1) they are reasonably unforeseen or reasonably unavoidable; and (2) the Crown could not reasonably remedy the delays emanating from those circumstances once they arose. In general, exceptional circumstances fall under two categories: discrete events and particularly complex cases (*Jordan* at paras. 69-71).

[158] If the exceptional circumstance relates to a discrete event, the delay attributable to that discrete event is subtracted from the total period of delay to determine if the ceiling has been exceeded (*Jordan* at paras. 72-76).

[159] Particularly complex cases are cases that, because of the nature of the evidence or the nature of the issues, require an inordinate amount of trial or preparation time such that the delay is justified:

> [77] As indicated, exceptional circumstances also cover a second category, namely, cases that are particularly complex. This too requires elaboration. Particularly complex cases are cases that, because of the nature of the *evidence* or the nature of the *issues*, require an inordinate amount of trial or preparation time such that the delay is justified. As for the nature of the evidence, hallmarks of particularly complex cases include voluminous disclosure, a large number of witnesses, significant requirements for expert evidence, and charges covering a long period of time. Particularly complex cases arising from the nature of the issues may be characterized by, among other things, a large number of charges and pre-trial applications; novel or complicated legal issues; and a large number of significant issues in dispute. Proceeding jointly against multiple co-accused, so long as it is in the interest of justice to do so, may also impact the complexity of the case.
>
> [78] A typical murder trial will not usually be sufficiently complex to comprise an exceptional circumstance. However, if an inordinate amount of trial or preparation time is needed as a result of the nature of the evidence or the issues such that the time the case has taken is justified, the complexity of the case will qualify as presenting an exceptional circumstance.
>
> [79] It bears reiterating that such determinations fall well within the trial judge’s expertise. And, of course, the trial judge will also want to consider whether the Crown, having initiated what could reasonably be expected to be a complex prosecution, developed and followed a concrete plan to minimize the delay occasioned by such complexity (*R. c. Auclair*, 2014 SCC 6, [2014] 1 S.C.R. 83 (S.C.C.) , at para. 2). Where it has failed to do so, the Crown will not be able to show exceptional circumstances, because

it will not be able to show that the circumstances were outside its control. In a similar vein, and for the same reason, the Crown may wish to consider whether multiple charges for the same conduct, or trying multiple co-accused together, will unduly complicate a proceeding. While the court plays no supervisory role for such decisions, Crown counsel must be alive to the fact that any delay resulting from their prosecutorial discretion must conform to the accused's s. 11(*b*) right (see, e.g., *Vassell*). As this Court said in *R. v. Rodgerson*, 2015 SCC 38, [2015] 2 S.C.R. 760 (S.C.C.):

> Certainly, it is within the Crown's discretion to prosecute charges where the evidence would permit a reasonable jury to convict. However, some semblance of a cost-benefit analysis would serve the justice system well. Where the additional or heightened charges are marginal, and pursuing them would necessitate a substantially more complex trial process and jury charge, the Crown should carefully consider whether the public interest would be better served by either declining to prosecute the marginal charges from the outset or deciding not to pursue them once the evidence at trial is complete. [para. 45].

[80] Where the trial judge finds that the case was particularly complex such that the time the case has taken is justified, the delay is reasonable and no stay will issue. No further analysis is required.

Discussion of *Jordan* Application

[160] The trial chronology from the start date in 2017 to the decision in 2018 is informative:

- September 18 to 21 - four days of evidence.
- October 10 to 13 - four days of evidence.
- Crown and Defence agree to a schedule for filing written submissions on the *voir dire.*
- December 15 - Defence files a 132-page, 480 paragraph written argument on the *voir dire*.
- January 15 - Crown files a 28 page, single spaced reply.
- February 13 - Defence files an 8 page reply.
- February 26 to 28 - Despite the extensive written materials, counsel argue multiple complex issues on the *voir dire* for three full days. The Court reserves its decision.

- March 13 - the trial was to resume, but the Court was not yet ready to give its decision. Trial cannot proceed further without a decision. The trial is adjourned one day to March 14.

- March 14 to 16 - the Court gives its decision on the *voir dire*. The Crown calls some further evidence and closes its case. The defence obtains a half day adjournment to seek instructions on whether it will call a case. On March 15 the Defence begins two days of argument on a no evidence motion. The Defence presentation fills both days and includes written submissions, a power point presentation and a nine-page chart.

- March 26 to 27 - the Crown replies to the Defence no evidence motion. There is a further sur-reply by the Defence. Scheduled trial dates March 28 and 29 are adjourned to permit time for the Court to give a decision.

- April 13 - the Court gives a decision on the no evidence motion, allowing it in part. The Court renders a separate decision regarding the Annual Report. The Court requests further submissions on the allowable uses of the Spill Report.

- April 20 - Crown and Defence provide written submissions in advance and oral arguments are made that morning. The Court gives an oral decision admitting the Spill Report in the trial … Defence advises the Court it intends to bring a *Jordan* application before deciding whether to call a case or not. Counsel agree that two days should be sufficient. April 23 and 27 are cancelled.

- April 25 to 26 - Crown and Defence argue the *Jordan* application with written submissions and two days of oral argument. The Court reserves its decision.

- May 13 - The Court gives a decision denying the *Jordan* application.

- June 4 to 6 - The Defence declines to call evidence. Crown and Defence give closing submissions for three days.

- July 13 - The Court gives its decision convicting Mossman of two counts and acquitting Meckert on all counts.

[161] The defendants submit the Court's approach to scheduling was the reason the 18-month ceiling was exceeded, not complexity, and in any event the trial was not complex. They submit there were two errors of law made by the trial judge:

a) Failing to address how, because of the Court's internal scheduling policy, the scheduling of 20 days of trial over nine months was not the real issue; and

b) Conflating complexity *simpliciter* with "particularly complex," failing to address whether an inordinate amount of time was required.

[162] The defence submits the trial was not "particularly complex." They argue the trial judge acknowledged the scheduling issue but erred in failing to decide its role in exceeding the ceiling. They submit the scheduling issues were the reason the ceiling was exceeded. They note the trial, in terms of days required, was completed within the time originally estimated by the Crown and defence.

[163] In *R. v. Han,* 2016 ONCJ 648, the accused's 1.5 day trial commenced on April 18, 2016, but was unable to be completed on the second day due to an overbooked court docket. On the accused's *Jordan* application, the Court noted it was "obvious that the adjournment of the case was not caused by the defence – it was caused by the state, due to an overbooked courtroom" (at para. 42). The Court found that court time was available between April 18, 2016 and October 3, 2016; however, mutual unavailability of counsel meant the continuation could not be scheduled until November 3, 2016. In the result, the Court apportioned one month of delay to defence, reflecting defence counsel's unavailability through October 2016.

[164] The defence submits only "particularly complex" cases are exceptional. To be such the case must necessitate an "inordinate amount of trial or preparation time." They note as well the trial judge only found it was "complex," not "particularly complex" as required by *Jordan*. Authorities addressing "particularly complex" cases are of assistance.

[165] In *Halton Region Conservation Authority v. Ahmad*, 2017 ONCJ 858, there were 812 counts involving 39 defendants. The charges related to harm done to a wetland under five different regulations. The trial judge found there was no evidence the alleged complexity required an inordinate amount of time:

> [81] There is no question that these proceedings involve 39 separate defendants and an enormous number of charges. However, the evidence relative to the *actus reus* of the subject offences and the nature of the issues relative to those offences appears to be the same for all of the defendants, thereby alleviating the obvious concern that the prosecution would "require an inordinate amount of trial or preparation time" (*Jordan*, at para. 77).

[166] See also *Mississauga (City) v. Uber Canada Inc.*, 2016 ONCJ 461, which involved 30 charges against Uber Canada and 75 charges against 52 individual Uber drivers:

> [15] First, do these matters involve such complex legal arguments that they should be heard by a Judge? As indicated by Regional Senior Justice Fuerth, *Charter* applications are frequently heard by justices of the peace in Provincial Offences Court. Although the challenge to the by-law may not be an everyday occurrence in those courts, it is also within the ordinary realm of decisions made by justices of the peace. Their education and training now is such that it cannot be stated that the issues presented here are too complex and should be handed over to a Judge. With regard to factual complexity, just because there are a considerable number of counts, it does not make these cases factually complex.

[167] In *Desmarais c. Autorité des marchés financiers*, 2017 QCCS 3561:

> [33] By its appeal, the AMF asks the Tribunal to substitute its opinion for that expressed by the trial judge. However, she was better placed than anyone to appreciate the complexities of the case. In the absence of a demonstration of a palpable and decisive error in the judge's conclusions, it is not for the appellate court to describe as "particularly complex" a case that the management judge did not deem appropriate to so define.

[168] The authorities relied on by the defence refer to the number of counts and witnesses. The level of complexity in those cases was not due to complex legal issues. Each case is unique. The complexity can arise from a myriad of sources.

[169] In this instance the complexity arose not from the number of witnesses or the number of counts but from the legal issues raised by the defence and the fact that rulings were required before matters could proceed.

[170] A review of the record reveals the trial was anything but “simple”. It was in fact highly complex with counsel engaging in multiple arguments, most with written (often lengthy) submissions provided in advance. Despite that level of preparation, there were nine days of trial and the arguments required over 12 court days. The complexity of the arguments on each issue required the Court to reserve four times. A decision was required each time before the next stage of the trial could proceed.

[171] The trial judge commented and counsel agreed that gaps were needed in the trial so the court could render decisions. In each instance, the trial could not proceed further until the previous decision had been given. The Crown’s case could not close until after the *voir dire* decision. The defence could not decide whether to call a case until the no evidence motion and the uses of the Annual Report and Spill Report had been decided. The defence did not wish to consider whether they would call a case until the *Jordan* decision had been given. Each of these applications were conducted with extensive written submissions and lengthy arguments.

[172] The fact the trial judge did not use the term “particularly complex” is not determinative. In my view, “particularly complex” is simply the term used by the Court in *Jordan* to describe complexity, constituting an exceptional circumstance such to justify delay in excess of the presumptive ceiling. The complexity of this case is self-evident both from the history and the issues raised and the findings of the trial judge. It is also self-evident that it was “*particularly* complex” and the trial judge concluded that in his ruling.

[173] The sheer volume of submissions both written and oral and the supporting authorities clearly required time for the court to distill and consider such.

[174] Justice Maisonville in *R. v. McConnell,* 2018 BCSC 2258, discussed the issue of whether time to decide a decision by the court is a discrete event that should be counted toward the presumptive ceiling:

> [158] In the decision of *R. v. Lai*, 2018 BCSC 867, Justice Schultes of this Court stated at para. 65 as follows:
>
> > [65] Judicial delay was not justified under the Morin framework. In particular, the well-known decision of *R. v. Rahey*, [1987] 1 S.C.R. 588 at p. 591, points out that extending the judge the courtesy of adjournments to complete their delayed reasons does

> not amount to waiver by the accused of significant periods of delay – 11 months in that case. It is also clear, the defence submits, that in the *Jordan* context a judicial delay in rendering rulings is a type of institutional delay and counts towards the 30−month ceiling …

See also Justice Schultes comments about the decision of *R. v. Mamouni*, 2017 ABCA 347 at para. 135 of *Lai*:

> [135] In *R. v. Mamouni*, 2017 ABCA 347, the Court held that in some cases, such as where the evidence and submissions were complex or multiple rulings were required, judicial time to render decisions could be treated as an exceptional circumstance. (The defence pointed out, however, that the holding of the majority in that decision was that in most cases judicial time requirements will count against the ceiling.)

[159] Ultimately, in *Lai*, Justice Schultes did not exempt the time to render reasons from consideration in providing reasons.

…

[162] It is argued that this period of time, and any periods of time to render reasons, given this was a straightforward case, should be included in the total time: *Mamouni* and *R. v. Gatt*, 2017 ONSC 3563.

...

[164] However, providing reasons in the usual and ordinary course is part of the time to complete a trial. I agree with Schultes J.'s reasoning in *Lai*.

[165] I agree that providing reasons does not constitute exceptional circumstances. The period from November 17, 2014 to the ruling in February 12, 2015 is included in the total period of delay.

[175] Thus, the periods of time taken by the trial judge to render his decisions during the course of the trial do not constitute exceptional circumstances *per se* and will not be deducted from the total period of delay. However, the number of decisions the trial judge had to render and the time it took for him to do so still speaks to the overall complexity of the trial and is a factor to consider in deciding whether the delay has been justified.

[176] The defendants have failed to show a palpable and overriding error that would permit this court to interfere with the trial judge's finding that the complexity required a 24-month threshold. The argument that the trial should have been set for a fixed period of consecutive days is untenable given the complexity. Even had such days been set, the trial could not have been concluded over consecutive days as numerous adjournments would have been required to enable counsel and the court to address the various issues raised.

[177] The defence appeal of the trial judge's *Jordan* ruling is dismissed.

Summary

[178] No errors have been shown in the trial judge's admission of the observational evidence or the Spill Report. The defence appeals on these issues are dismissed.

[179] The trial judge erred in excluding only a portion of the July 9, 2015 statement. The July 9 statement should have been excluded in its entirety.

[180] The July 15, 2015 statements were admissible and the trial judge erred in their exclusion.

[181] No error has been shown in the trial judge's decision on the *Jordan* application. This ground of appeal is dismissed.

[182] For the reasons I have outlined, I order a new trial.

"The Honourable Mr. Justice Punnett"