SUPREME COURT OF FLAVELLE

ON APPEAL FROM

THE COURT OF APPEAL FOR FALCONER

BETWEEN:

SCOTT CAMERON

Appellant

– and –

HER MAJESTY, THE QUEEN

Respondent

FACTUM OF THE RESPONDENT

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PART I: OVERVIEW

1. This appeal engages the significant interests that the public has in the effective prosecution of criminal offences and in the resolution of these issues by a fair trial on the merits. Mr. Scott Cameron, (the "Appellant") was convicted of theft for his involvement in a burglary on December 28, 2012 ("the burglary").[1] The reliability of this verdict is not in question, nor does the Appellant deny that he was provided the procedural protections of a fair trial. Nonetheless, the Appellant appeals his conviction, and seeks to avoid his due sentence through collateral attacks on the fairness of his prosecution.

2. The Appellant first asks this court to overturn a conviction because of private counsel's ineffective assistance in plea negotiations, despite that ineffective assistance having no impact on the fairness of his subsequent trial. He argues that he was entitled to a *Rowbotham* order to fund his counsel, despite having the means to pay for counsel. Finally, he alleges that the Crown committed an abuse of process by its strategic decision to advance alternate theories at the trial of his co-accused, only one of which was factually inconsistent with the theory advanced during the Appellant's prosecution.

3. None of these concerns constitutes a violation of the Appellant's *Charter* rights. The right to effective assistance of counsel should not extend carte blanche to plea negotiations. *Rowbotham* orders should remain limited to those who lack the means to employ counsel. The Crown should remain free to advance compelling theories in its prosecutions without undue judicial interference. This appeal should be dismissed, and the Appellant's conviction should be upheld.

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[1] 2016 Grand Moot Problem, at paras 15 and 51 [Problem].

PART II: SUMMARY OF FACTS

The Burglary, and the Appellant's Legal Assistance from CLS

4. The Appellant was arrested along with Mr. Vinnie on suspicion of theft on January 16th, 2012. They were each subsequently charged with theft over $5,000 and breaking and entering contrary to ss. 332 and 348 of the *Criminal Code* respectively.[2]

5. As the Appellant does not meet the requirements for legal aid, he elected to seek the legal assistance of Community Legal Services ("CLS") for his defence. John Doe ("Mr. Doe"), one of the founding lawyers of CLS, was assigned to the Appellant's file.[3]

6. Mr. Doe negotiated a plea offer with the Crown on the Appellant's behalf. The Crown offered to charge the Appellant with theft under $5,000, and to elect summarily on the charge in exchange for a guilty plea. However, Mr. Doe was exceptionally busy at this time, and failed to communicate this plea deal to the Appellant before its expiry. As a result of this error, the Appellant dismissed his counsel, and proceeded with a *Rowbotham* application to seek state funding for new counsel. The Appellant proceeded to plead not guilty at his trial.[4]

The Appellant's Unsuccessful Rowbotham Application

7. The Appellant argued that he lacked the means to fund counsel without government assistance, despite having an annual income of $25,000 and $34,684.82 of equity in his home.[5] While aware of the difficult choices the Appellant would have to

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[2] Problem, at para 9.
[3] Problem, at para 20.
[4] Problem, at para 26-30.
[5] Problem, at para 20 and 43.

make in order to fund counsel, Wynngarden J. was not satisfied that the difficulty of these choices justified a *Rowbotham* order. In his reasons Wynngarden J. reiterated that "Flavellian jurisprudence indicates that *Rowbotham* orders should only be granted where an accused person has exhausted all other possible routes of funding."[6]

8. The Appellant elected to appear *pro se* for his criminal trial.[7]

Mr. Vinnie and the Appellant's Convictions

9. Because Mr. Vinnie elected to proceed to trial by jury and the Appellant by judge, they were tried separately for their involvement in the burglary. In the closing submissions at Mr. Vinnie's trial, the Crown argued that either Mr. Vinnie committed the burglary alone, or that he committed it along with the Appellant. At his trial, the jury found Mr. Vinnie guilty.[8]

10. At the Appellant's subsequent trial, the Crown alleged that he committed the burglary with Mr. Vinnie. The Appellant was convicted of theft over $5,000 and breaking and entering, contrary to ss. 332 and 348 of the *Criminal Code*. He was sentenced to four years in prison. In his decsion, Wynngarden J. noted that he relied on the "credible and reliable" testimony of the Crown witnesses, and stated that he had no hesitation in finding that the Appellant's guilt had been established beyond a reasonable doubt.[9]

The Appellant's Unsuccessful Appeal

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[6] Problem, at paras 43 and 46.
[7] Problem, at para 47.
[8] Problem, at paras 31 and 38-40.
[9] Problem, at paras 47 and 51.

11. After the Appellant's conviction, the law firm of Snap, Crackle and Pop, took on his case pro bono, and argued his appeal before the Falconer Court of Appeal.[10]

12. Three issues were raised by the Appellant on appeal:

(a) Were the Appellant's s. 7 rights infringed by lack of effective assistance of counsel during plea negotiations with the Crown?
(b) Did Wynngarden J. err in rejecting the Appellant's *Rowbotham* application?
(c) Did the Crown's theory of liability in the Appellant's trial amount to an abuse of process given its theory of liability in Mr. Vinnie's trial?[11]

13. The majority of the Court of Appeal upheld the Appellant's conviction. The Majority could not find any reason to doubt the substantive reliability of the trial judge's verdict.[12] In her majority opinion, Lewis J.A. stressed that "a conviction pursuant to a full and fair trial [does not] constitute a "miscarriage of justice" for the purposes of the effective assistance of counsel test."[13] Lewis J.A. expressed substantial agreement with Wynngarden J.'s reasoning, adding that significant deference is owed to trial judges in respect of *Rowbotham* applications. [14]

14. With respect to abuse of process, Lewis J.A. found that because Mr. Vinnie's trial was before a jury and it was unclear which of the alternate arguments advanced at Mr. Vinnie's trial had been accepted by the jury, there was no abuse of process with respect to the Appellant's case. In any event, any inconsistency would not justify displacing

[10] Problem, at para 52.
[11] Problem, at para 53.
[12] Problem, at para 54.
[13] Problem, at para 54.
[14] Problem at para 56.

Wynngarden J.'s clear finding of guilt.[15] Williams J.A. disagreed with the majority on all grounds of appeal.[16]

15. The Appellant appeals his conviction to the Supreme Court of Flavelle.

PART III: ISSUES AND ARGUMENTS

16. The Respondent respectfully submits that:

a. the Appellant's s. 7 rights were not infringed by lack of effective assistance of counsel during the plea negotiations with the Crown;

b. the Appellant's s. 7 rights were not infringed by the rejection of his *Rowbotham* application;

c. the Crown's theory of liability in the Appellant's trial did not amount to an abuse of process given its theory of liability in Mr. Vinnie's trial; and

d. the Appellant is not entitled to a remedy.

[15] Problem, at para 57.
[16] Problem, at para 58.

Issue 1 - The Appellant's Section 7 Rights Were Not Infringed By Ineffective Assistance of Counsel in Plea Negotiations

17. In order to demonstrate a violation of the right to effective assistance of counsel, the Appellant must prove "first, that counsel's acts or omissions constituted incompetence and second, that a miscarriage of justice resulted."[17] The Falconer Court of Appeal correctly concluded that the Appellant is not entitled to a remedy based on ineffective assistance of counsel.[18] The Crown concedes that defence counsel's failure to convey the plea offer constituted incompetence, but submits that defence counsel's incompetence did not result in a miscarriage of justice.

18. The Appellant's conviction does not constitute a miscarriage of justice and should be upheld. The Appellant does not claim that the incompetence of counsel in any way affected the fairness of his trial. Instead, he argues that a miscarriage of justice occurred because his counsel's failure to communicate a plea offer resulted in conviction under a more serious charge at trial. This Court should reject the Appellant's proposed expansion of the right to effective assistance of counsel to plea negotiations. In this case, the Appellant received precisely what the right to effective assistance of counsel is designed to safeguard: the procedural protections of a full and fair trial.

A. There Is No Miscarriage Of Justice

19. The right to effective assistance of counsel exists to ensure a fair trial free from miscarriages of justice.[19] A miscarriage of justice can arise when counsel's

[17] *R v B.(G.D.)*, 2000 SCC 22, at para 26 [*G.D.B.*].
[18] Problem, at para 55.
[19] *G.D.B.*, supra note 17, at para 25.

incompetence affects either the "adjudicative fairness of the process used to arrive at the verdict" or "the reliability of the verdict.[20] Neither of these is in question in this case.

20. Rather then simply protecting the accused's interests, the right to effective assistance of counsel facilitates the necessary workings of the adversarial trial process and its search for the truth. As explained by Doherty J.A. in *Joanisse*:

> The importance of effective assistance of counsel at trial is obvious. We place our trust in the adversarial process to determine the truth of criminal allegations. The adversarial process operates on the premise that the truth of criminal allegations is best determined by "partisan advocacy on both sides of the case."[21]

21. Neither *G.D.B.* nor *Joanisse* – or any other Canadian authority – suggest that the right to effective assistance of counsel extends to advice or omissions in plea negotiations that result in a conviction at a full and fair trial. On the contrary, those cases suggest that a full and fair trial is precisely the right that effective assistance of counsel is meant to preserve.[22]

B. The Right to Effective Assistance of Counsel Should Not Be Extended

22. The principles in *G.D.B.* and *Joanisse* should not be expanded to grant the Appellant a remedy for four reasons:

1) Society's interest in upholding the Appellant's conviction outweighs the Appellant's interest in a lower charge.

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[20] *G.D.B.,* supra note 17, at para 25; quoting *R v. Joanisse*, [1995] O.J. No.2883 (Ont. CA), at para 64. *[Joanisse]* (emphasis added).

[21] *Joanisse, supra* note 20, at para 64.

[22] *Ibid*.

2) The Appellant's proposed approach to effective assistance of counsel will harm the plea negotiation process.

3) The Appellant's approach inappropriately imports American Sixth Amendment principles into Canadian law.

4) The Appellant's proposed remedy inappropriately interferes with prosecutorial discretion.

i. Society's Interest In The Result Of A Fair Trial Outweighs The Appellant's Interest In A Lower Charge

Determining When There Is A Miscarriage of Justice Involves a Balancing Of Interests

23. The principles of fundamental justice are an attempt at "a delicate balancing to achieve a just accommodation between the interests of the individual and those of the state in providing a fair and workable system of justice."[23] McLachlin J., as she then was, warned in *R v. Harrer* that:

> A fair trial must not be confused with the most advantageous trial possible from the accused's point of view. Nor must it be conflated with the perfect trial; in the real world, perfection is seldom attained. A fair trial is one which satisfies the public interest in getting at the truth, while preserving basic procedural fairness to the accused.[24]

24. In plea negotiations, as everywhere else in the criminal justice system, the interests of the accused must be balanced against "the practical limits of the system of

[23] *R v. Harrer*, [1995] 3 SCR 562, at para 14.
[24] *Ibid.*, at para 45.

justice and the lawful interests of others involved in the process."[25] Extending constitutional protection to the accused's interest in the effective assistance of counsel in plea negotiations would cause such serious harm to the societal interest in a fair trial and the workings of the plea negotiation system that it should be refused.

There Is A Strong Public Interest in Upholding the Appellant's Conviction

25. The societal interest in the truth-seeking function of the trial is based on the "collective interest in ensuring that those who transgress the law are brought to trial and dealt with according to the law."[26] This reflects a broad societal interest in ensuring that the truth is discovered and criminal actions are punished.[27]When the courts ignore the truth-seeking function of the justice system and override the result of a fair trial without any basis in a substantive or procedural right, that decision brings the administration of justice into disrepute.[28]

26. Here, the public has a significant interest in the conviction remaining intact. The Appellant's guilt was proven beyond a reasonable doubt, with the procedural and substantive protections of "a full and fair trial."[29] To overturn that now, because of a mistake made by the Appellant's counsel which did not affect the fairness or reliability of the trial, is to disregard the public interest in imposing penalties on those found guilty. Such a decision would bring the administration of justice into disrepute.

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[25] *R v. Find*, 2001 SCC 32, at para 28; quoting *R v. O'Connor*, [1995] 4 SCR 411, McLachlin J., concurring at para 193 [*O'Connor*].
[26] *R v.* Grant, 2009 SCC 32, at para 79 [*Grant*]; quoting *R v Askov*, [1990] 2 SCR 1199 at 1219-1220 [*Askov*].
[27] *Askov*, *supra* note 25, at 1220.
[28] *Grant*, *supra* note 25, at para 81.
[29] Problem, at para 54.

The Accused's Interest in A Lower Sentence Does Not Outweigh Society's Interest in Upholding His Conviction

27. The Appellant's interest in a lower sentence is not sufficient to outweigh society's interest in upholding his conviction. The Appellant has no right to a favourable plea offer from the Crown. The Appellant's interest in procedural fairness in plea negotiations is also adequately protected.

(a) *The Appellant Had No Right to a Favourable Plea Offer From the Crown*

28. The Appellant's allegations of procedural unfairness must be viewed in light of the fact that the Appellant has no right to a plea deal or to plea negotiations. Such negotiations are purely within the discretion of the Crown.[30]

29. No special procedural rights are created when a plea is offered. In *R v. Nixon,* the Supreme Court of Canada emphasized the discretionary nature of a plea bargain and held that the Crown's decision to repudiate a completed plea was *only* reviewable if the Crown conduct constituted an abuse of process.[31]

30. As a result of his counsel's incompetence, the Appellant lost nothing to which he had a right. The Appellant is in the same place he would have been in had Crown chosen not to offer him a plea. His interest in this potential benefit, which was lost to him by the actions of his own private counsel, cannot outweigh the interest of society in the upholding of a guilty verdict.

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[30] *R v. Nixon*, 2011 SCC 34, at para 30 [*Nixon*]; *Krieger v. Law Society (Alberta)*, 2006 SCC 47, at paras 32, 46 [*Krieger*].

[31] *Nixon, supra* note 30, at para. 31.

(b) *The Appellant's Interest in Procedural Fairness in Plea Negotiations Is Adequately Protected*

31. The Appellant cites *Joanisse* for the premise that procedural unfairness can lead to a miscarriage of justice even when there is no impact on the reliability of the result of the trial.[32] That is correct. However, that form of miscarriage of justice exists because "justice must not only be done, but must be manifestly seen to be done".[33] This is not a concern in this case.

32. The full procedural protections of the Appellant's trial ensured that justice was "seen to be done". As submitted above, justice is not simply what is in the best interest of the accused, but is rather a complicated and multifaceted balancing act. Nonetheless, our society has determined that the answer to what is just is simple. What is just is a full and fair trial with full constitutional protections. That is what all procedural fairness is measured against.[34] That is the gold standard of justice and exactly what the Appellant received.

33. If there is a guilty plea, it is protected from unfairness by the judge's responsibility to ensure that the plea is voluntary, informed and unequivocal.[35] This protects against any relevant failings in the effectiveness of counsel where a guilty plea is accepted. This supervision is integral as a guilty plea foregoes the procedural assurances of a full trial.

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[32] Factum of the Appellant, at para 33.
[33] *Joanisse*, *supra* note 20, at para 76.
[34] *Baker v. Canada (Miniter of Immigration)*, [1999] 2 S.C.R. 817 at para 23.
[35] *R v T(R)* (1992), 10 OR (3d) 514 at para 14.

34. Further, courts are empowered to remedy abuse of process on the part of the prosecution.[36] Abuse of process "protect[s] against abusive state conduct"[37] including prosecutorial misconduct.[38] While it is primarily focussed on trial fairness, its residual category is also concerned with ensuring that egregious state conduct in the prosecution of offences is not "harmful to the integrity of the justice system" by "leav[ing] the impression that the justice system condones conduct that offends society's sense of fair play and decency."[39]

35. These protections are sufficient to ensure that any incompetence on the part of counsel during a plea negotiation will not lead to a miscarriage of justice.

ii. The Appellant's Proposed Expansion of the Right to Effective Assistance of Counsel Would Harm The Plea Negotiation Process

36. In his dissent in *Lafler*, Justice Scalia censures the US Supreme Court's pursuit of "perfect justice" through its extension of the right to effective assistance of counsel. [40] He warns that it would irreparably harm the plea negotiation process, making it resemble the rest of the American justice system: "too long, too expensive, and unpredictable."[41] The Supreme Court of Canada has affirmed that these practical concerns are of fundamental importance in determining what constitutes a just legal system. In *R v. O'Connor*,

[36] *Nixon*, *supra* note 30, at para 31.
[37] *R v. Hart*, 2014 SCC 52, at para 79 [*Hart*].
[38] *Nixon*, *supra* note 30, at 31.
[39] *R v. Babos*, 2014 SCC 16 at para 35 [*Babos*].
[40] *Lafler v. Cooper*, 132 S.Ct. 1376 at 1391 (Scalia in dissent) [*Lafler*].
[41] *Ibid*.

MacLachlin J., as she then was, noted that our conception of a fair trial takes into account the "[t]he need for a system of justice which is workable, affordable and expeditious."[42]

37. The extension demanded by the Appellant will significantly decrease the predictability of the plea negotiation process by creating the possibility that a later conviction will be overturned because of ineffective assistance of counsel in plea negotiations. This will in turn harm the "workable, affordable and expeditious" nature of that process by disincentivizing the offering of pleas in two contexts.

38. First, the Crown will be less willing to negotiate or communicate pleas through defence counsel as any interaction with defence counsel will create a chance of a later verdict being overturned. If the Court accepts the Appellant's submission that defence counsel is integral in ensuring the accused's interest in this process, this would seriously harm the effectiveness of plea negotiations.

39. Second, the Crown will be incentivised to offer less generous pleas. Crown calculations of what constitutes an appropriate plea deal will now have to take into account the risk that the plea may be implemented after a conviction.[43] This increases the Crown's interest in offering a heavier sentence during plea negotiations. Both of these incentives will make plea negotiations less common and less beneficial for the accused, ensuring that fewer cases are resolved before trial. This will in turn force more cases into a heavily burdened trial system.

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[42] *O'Connor*, *supra* note 25, at para 194 (emphasis added).

[43] Mike Work, "Creating Constitutional Procedure: *Frye*, *Lafler*, and Plea Bargaining Reform" 104 *J. Crim. L. & Criminology* 457 2014 at 485; and Sean Michael Fitzgerald. "Losing Sight of the Forest for the Tress: The Supreme Corut's Missaplication of Sixth Amendment *Strickland* Analysis in *Missouri v. Frye* and *Lafler v. Cooper*" 21 *Am. U. J. Gender Soc. Pol'y & L.* 681 2012-2013, at 702.

iii. The Appellant's Proposed Approach Inappropriately Imports American Sixth Amendment Principles into Canadian Law

40. That plea negotiations are integral to the criminal justice process is not a basis for extending the right to effective assistance of counsel. The Appellant relies on American Sixth Amendment jurisprudence, particularly the U.S. Supreme Court decisions in *Lafler v. Cooper* and *Missouri v. Frye,* for extending the right to effective assistance of counsel to plea negotiations. Such reliance is inappropriate because of the differing scope of the right to counsel under the American *Bill of Rights* and the Canadian *Charter*. The decisions in *Lafler* and *Frye* rely on the fact that the Sixth Amendment expressly provides the accused with the right to counsel at all stages of a criminal proceeding.[44]

41. As the Supreme Court of Canada recognized in *R v. Sinclair,* "[s]ignificant differences exist between the Canadian and American regimes" with respect to the right to counsel.[45] The *Charter* does not provide a comparable right to counsel at all stages of a criminal procedure[46] and in *R v. Hebert,* the Supreme Court of Canada cautioned against relying on Sixth Amendment jurisprudence for which there is not an analogous right within the Canadian *Charter.*[47]

42. The core difference between the Canadian and the American jurisprudence on the right to counsel can be found in *Lafler*: "The constitutional guarantee applies to pretrial critical stages that are part of the whole course of a criminal proceeding, a proceeding in which defendants cannot be presumed to make critical decisions without counsel's

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[44] *Lafler*, supra note 39, at 1384.
[45] *R v. Sinclair,* 2010 SCC 35, at para 39 [*Sinclair*].
[46] *R v. Rowbotham*, [1988] O.J. No. 271 (Ont. CA), at para 183 [*Rowbotham*].
[47] *R v. Hebert,* [1990] 2 S.C.R. 151 at para 27.

advice."[48] In the American jurisprudence effective assistance of counsel is needed at every step to ensure that the proceedings are fair.

43. The majority of the Supreme Court in *R v. Sinclair*, directly rejected that approach, finding that the s. 10(b) right "to retain and instruct counsel" upon arrest does not create an ongoing right to counsel during the interrogation process.[49] In *Sinclair*, the Appellant argued that the purpose of s.10(b) is to "restore a power balance between the detainee and the police."[50] The majority rejected that interpretation, stating that "[t]his view of s. 10(*b*) goes against 25 years of jurisprudence defining s. 10(*b*) in terms of the right to consult counsel to obtain information and advice immediately upon detention, but not as providing ongoing legal assistance."[51]

44. Just as with s. 10(b), the right to effective assistance of counsel is not meant to balance the power discrepancy between the accused and the state. The right to effective assistance of counsel exists to ensure that any imbalance of power does not weigh upon the scales of justice and lead to an unfair trial or an unjust result.

iv. The Appellant's Proposed Remedy is an Unconstitutional Overreach

45. The difficulties with the Appellant's proposed expansion of the right to effective assistance of counsel are all the more evident in light of the proposed remedy. The Court would be usurping the role of the executive in determining the appropriate charge. The Crown will be forced to reoffer the plea if the remedy is found to be appropriate. This is

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[48] *Lafler*, *supra* note 40, at 1385.
[49] *Sinclair*, supra note 45, at para 31.
[50] *Ibid,* at para 30.
[51] *Ibid,* at para 31.

the kind of unconstitutional overreach into Crown discretion that the Supreme Court warned of in *Krieger*.[52]

46. Our criminal justice system is divided between all three branches of government, with each playing an integral but limited role. As stated in *Doucet-Boudreaux*, "courts must be sensitive to their role as judicial arbiters and not fashion remedies which usurp the role of the other branches of governance by taking on tasks to which other persons or bodies are better suited."[53] Prosecutorial discretion over plea negotiations is such a task and the courts should be extremely hesitant to interfere in its exercise.

Issue 2 – The Appellant is Not Entitled to a *Rowbotham* Order

The Charter does not expressly grant indigent accused persons the right to be provided with counsel.[54] Rather the right to state-funded counsel is derivative of the right to a fair trial, protected by ss. 7 and 11(d) of the *Charter*.[55] *Rowbotham* orders are intended to provide funding for trial counsel only when the accused has no alternative means of accessing counsel.[56] The Appellant's rights were not violated by Wynngarden J.'s rejection of his *Rowbotham* application as the Appellant had alternative means of accessing counsel.[57] The Appellant's assessment that paying for counsel would unduly impact his family's quality of life does not create a constitutional requirement that the government fund his defence.

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[52] *Krieger*, *supra* note 30, at paras 31 and 45.
[53] *Doucet-Boudreaux v. Nova Scotia (Minister of Education)*, 2003 SCC 62 at para 34.
[54] *R v Rowbotham*, *supra* note 46, at para 183; *R v. Imona-Russel*, [2008] O.J. No. 5405 affirm this at para 15.
[55] *Rowbotham*, *supra* note 46, at para 183.
[56] *Ibid.*, at para 197.
[57] Problem, at paras 46 and 56.

A. The Appellant Was Not Entitled to State-Funded Counsel

i. Financial Hardship is Not Protected by Section 7

47. In *Rowbotham*, the Ontario Court of Appeal stressed that it was "common sense" that "a person who has the means to pay the costs of his or her defence but refuses to retain counsel may properly be considered to have chosen to defend himself or herself."[58] The Appellant was denied his *Rowbotham* application precisely because Wynngarden J. found that his income and assets were sufficient to fund counsel.[59] The Appellant does not dispute that he has funds at his disposal. Rather, he submits that he should not be required to use them.

48. As the Appellant is capable of funding his own defense, the interest engaged is not his liberty interest but his interest in the protection of his property or quality of life. The Supreme Court has held that s. 7 does *not* create any constitutional interest in preserving property.[60] It also does not create a government responsibility to maintain the individual's quality of life. As stated by McLachlin C.J.C. in *Gosselin*: "Nothing in the jurisprudence thus far suggests that s. 7 places a positive obligation on the state to ensure that each person enjoys life, liberty or security of the person."[61]

49. The Crown does not dispute that the Appellant was required to make a difficult decision. However, the Appellant's financial priorities do not create a constitutional responsibility on the government to ensure that those priorities will be realized. Even where an individual faces the decision to forego the entirety of their trial rights in

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[58] *Rowbotham*, *supra* note 46, at para 178.
[59] *Ibid*.
[60] *Beals v. Saldanha*, 2003 SCC 72 at para. 78.
[61] *Gosselin v. Quebec*, 2002 SCC 84, at para 81 [*Gosselin*].

difficult circumstances, Courts are hesitant to find that the voluntariness of these decisions are vitiated. In *R v Krzehlik* the Ontario Court of Appeal found a guilty plea to be voluntary and described precisely the type of circumstances faced in the present case:

> While unquestionably difficult, the circumstances in which the appellant found himself were not unique. Individuals must normally decide whether to plead guilty in difficult circumstances. They are under pressure. They are faced with options none of which are favourable. However, as this court has said, without more, circumstances such as these cannot invalidate a guilty plea, on appeal.[62]

50. Our criminal justice system and our society as a whole, function on the premise that "[p]eople are capable of deciding what is in their best interests even when they are under considerable pressure and none of the available options are attractive."[63] The Appellant had a challenging decision, but there was no state pressure on him to decide not to be employ his own counsel, and the decision he made should be upheld as voluntary.

ii. The Correct Test is Whether the Accused is Substantially Incapable of Accessing Counsel

51. The current *Rowbotham* test requires a factual finding that the accused "cannot pay a lawyer"[64] before an application will be granted. This is consistent with *Charter* approaches to this type of claim, which require that the constitutional claimant be "substantially incapable of exercising their right".[65]

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[62] *R v. Krzehlik*, 2015 ONCA 168, at para 35.
[63] *R v. Carty* 2010 ONCA 237, at para 37.
[64] *Rowbotham*, supra note 46 at para 183.
[65] *Gosselin,* supra note 61, at para 221 (Bastarache J. dissenting on another matter); *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94 at para 35.

52. At the heart of this *Rowbotham* appeal is essentially a claim that Flavelle's legal aid program is under inclusive and that this leads to a violation of the Appellant's s.7 rights. However, "[t]hat poverty's plight appeals for relief does not mean the redress is constitutional."[66] In *Gosselin*, Bastarache J. sets out the test for when an under inclusive government action should be found to violate s.7. That test, repeating the framework used in *Dunmore*, is that the claimant must be "substantially incapable of exercising their right to security of the person without government intervention."[67] If an accused has the means to pay for counsel, no matter how challenging it may be to access those means, the accused is not "substantially incapable" of accessing a fair trial.

iii. The Design of Social Programs and Distribution of Resources is Beyond the Competency of the Judiciary

53. The question of whether the state should prevent the Appellant from facing the difficult decision to sell his house to retain counsel is essentially a political question. The test proposed by the Appellant puts in the hands of the courts a decision as to what is an unacceptable level of financial hardship. This is ultimately about the distribution of public resources, a domain in which the Courts have rightly questioned their own competency.[68] The legislature is better suited to make choices based on "policy judgments, competing claims between groups, or evaluation of complex and conflicting social science research."[69] Courts should be cautious not to overstep "the bounds of their

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[66] *Boulter v. Nova Scotia Power Incorporation*, 2009 NSCA 17, at para 43.
[67] *Ibid.*
[68] *Wynberg v Ontario*, 82 O.R. (3d) 561, at para 184 [*Wynberg*]; *Irwin Toy v Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at 990.
[69] *Wynberg*, *supra* note 68, at para 184.

institutional competence."[70] The Court's jurisdiction to order the expenditure of state funds is only justified when that funding is *necessary* to the exercise of a right. Here, the Appellant had the ability to access counsel and determined that he would not choose to have counsel at his trial unless it was funded by the state.

ISSUE 3 – The Crown's Conduct Does Not Amount to an Abuse of Process

54. The Appellant's claim for an abuse of process is anchored in a factual inconsistency between a Crown theory led at the beginning of a separate legal proceeding, against a separate accused, and the theory advanced in the Appellant's trial. The Crown acted well within the proper bound of prosecutorial discretion in leading these theories. The results of these separate and fair proceedings are not irreconcilable and the fairness of the Appellant's trial is not in dispute. Nonetheless, the Appellant asks that his conviction be set aside. This argument is untenable. Both the claim that an abuse of process has occurred and the Appellant's claim for a remedy must fail.

A. There is no Claim for Residual Abuse of Process

55. The Appellant has failed to meet the high threshold necessary to establish an abuse of process. The residual branch of abuse of process refers to "egregious"[71] state conduct that creates no threat to trial fairness but risks undermining the integrity of the judicial process.[72] Courts have repeatedly confirmed that the residual category of abuse of process is a narrow one.[73] The onus is on the accused to demonstrate "conduct on the

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[70] *M v. H*, [1999] 2 S.C.R. 3, at para 79.
[71] *R v Mahalingan*, 2008 SCC, at para 42.
[72] *R v Babos*, *supra* note 39, at para 31.
[73] *Nixon*, *supra* note 30, at paras 34 and 64.

part of the Crown that is so oppressive, vexatious or unfair as to contravene our fundamental notions of justice."[74]

56. Courts are, and should be, particularly reluctant to accept abuse of process claims that interfere with the exercise of prosecutorial discretion. Courts have "repeatedly affirmed that prosecutorial discretion is a necessary part of a properly functioning criminal justice system."[75] In *Henry v British Columbia (Attorney General)*, the Supreme Court of Canada linked the thresholds for malicious prosecution and abuse of process in relation to their purposes: "they are high standards *deliberately designed* to capture only very serious conduct that undermines the integrity of the judicial process."[76] Such a high bar for judicial intervention is necessary to properly protect its exercise.[77] The traditional deference provided to prosecutorial discretion should be kept in mind when evaluating the effect of the Crown's trial strategy on the integrity of the justice system and whether it amounts to an abuse of process.

57. The Appellant does not allege that the Crown acted in bad faith or with an improper motive in either the Appellant or Mr. Vinnie's trial. In essence, the Appellant takes issue with the way that individual prosecutors chose to frame evidence in their respective trials. The unreasonableness of the Appellant's position is highlighted by the fact that the impugned theory was ultimately offered in the alternative.[78] Mr. Vinnie's guilt did not hinge on the Appellant's innocence, nor was it a required finding of fact on either characterization of the evidence.

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[74] *O'Connor*, *supra* note 25, at para 53.
[75] *R v Anderson*, 2014 SCC 41 at para 37.
[76] *Henry v British Columbia (AG)*, 2015 SCC 24, at para 50 (emphasis in original).
[77] *Ibid*.
[78] Problem, at para 38.

58. Preventing prosecutors from pursuing theories of a case grounded in credible evidence is an unjustifiable interference into this important executive function. The expansive conception of abuse of process advanced by the Appellant unduly restricts prosecutorial discretion, and is unacceptable for at least two reasons:

i. It inhibits the ability of the Crown to effectively pursue the prosecution of criminal offences; and

ii. It discourages reasonable disagreement between Crown prosecutors.

i. The Crown has a Responsibility to Effectively Prosecute Criminal Offences

59. Crown prosecutors must be able to advance theories in trial that increase the chances of conviction where there is credible evidence that a particular accused committed a crime. In other words, the Crown must be able to make strategic decisions that increase the chances of achieving *legitimate results*.

60. The Crown has significant responsibilities to the public for the prosecution of offences, and it is required to dutifully fulfil its obligations as an advocate in an adversarial system. In proceeding to trial the Crown is required "to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime."[79] It is integral to the proper functioning of the justice system that in presenting this credible evidence that the Crown act as a strong advocate: "In this regard, it is both permissible

[79] *Boucher v. R*, [1954] S.C.J. No. 54 at para 26.

and desirable that it vigorously pursue a *legitimate result* to the best of its ability. Indeed, this is a critical element of this country's criminal law mechanism." [80]

61. An indispensable aspect of the Crown's duty is the selection and framing of evidence to present in support of an accused's guilt. In *Cook*, the Supreme Court held that regardless of the knowledge potential witnesses may have of the events in question, the Crown was under no obligation to call any particular witness as part of its case in chief.[81] If recognized, such a duty "would have a major impact upon the Crown's ability to conduct its own case."[82]

62. The Appellant asks, in a similarly unacceptable vein, that the Crown be inhibited from *framing* evidence in a way that is inconsistent with the theory advanced in a separate case.[83] However, the Supreme Court has recognized that, on its own, there is nothing problematic about the leading of two factually inconsistent theories.[84] In *R v Thatcher* the Crown advanced alternate theories regarding the charge of homicide. The Crown argued that the accused either committed the murder of his wife personally, or was an accomplice to it. The Court found that the inconsistencies were a matter of "legal indifference". [85] The majority went so far as to applaud their use:

> if an accused is to be acquitted in situations when every juror is convinced that the accused committed a murder in one of two ways, merely because the jury cannot agree on which of the two ways, "it is difficult to imagine a

[80] *R v Cook*, [1997] 1 SCR 1113, at para 21 [*Cook*].
[81] *Ibid*, at para 19.
[82] *Ibid.*
[83] *Appellant's Factum*, at para 65.
[84] *R v Thatcher*, [1987] 1 S.C.R. 652, at 698-699 [*Thatcher*].
[85] *Ibid.*, at 694.

> situation more likely to bring the administration of justice into disrepute—and deservedly so."[86]

63. The alternate theories advanced in Mr. Vinnie and the Appellant's respective trials were legitimate strategic responses to distinct defences, brought by separate defendants, in trials of different formats. In Mr. Vinnie's trial, the Crown prosecutor rightly anticipated that Mr. Vinnie would deny all involvement and point to the Appellant as the sole perpetrator of the burglary.[87] The Crown's choice of emphasis in this case was an attempt to discredit the Appellant's involvement as a means for Mr. Vinnie to escape conviction.[88]

64. The Appellant's trial proceeded after Mr. Vinnie's conviction, and so Mr. Vinnie's involvement was not in issue.[89] The Crown accordingly led evidence, and provided a theory of the case that posited that the Appellant committed the burglary with Mr. Vinnie.[90] A finding that the impugned state conduct is unacceptable would have the consequence of unduly constraining the Crown's ability to effectively present their case and in turn, pursue legitimate results in the public interest.

65. The unreasonableness of the Appellant's submission is further underlined by the fact that the merits of the theories advanced by the Crown must ultimately be tested by a judge or jury. The Crown's decision to proceed with a particular theory of the case is not determinative of the rights of the accused. There must be a trial in which both sides will have the opportunity to present their own evidence. Inhibiting the Crown in its choice of

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[86] *Ibid*., at 699.
[87] Problem, at para 33.
[88] Problem, at para 34.
[89] Problem, at para 31.
[90] Problem, at para 50.

theory at the trial stage before any findings are made is premature, and accordingly unjustifiable.

ii. Crown Prosecutors Must be Empowered to Have Reasonable Disagreement

66. A finding of abuse of process in this case would also undermine prosecutors' abilities to assess and evaluate the evidence before them. Undue interference with the ability of prosecutors to exercise their own judgment substantially undermines the effectiveness of the office. Under the Appellant's approach, the Crown would now be bound by the prior decisions of particular prosecutors in separate trials, even if subsequent prosecutors would have come to a different view of the evidence and its respective strength.

67. In *Nixon*, the Court stressed that "reasonable counsel" will differ on their assessment of the relative strength of the evidence against a particular accused.[91] Reasonable disagreement, they continued, "can hardly be regarded as evidence of misconduct."[92] Ensuring that individual prosecutors have the ability to exercise their judgment in respect of the evidence before them is crucial. In *Miazga v Kvello Estate*, the Supreme Court of Canada emphasized that the public interest is advanced by "enabling prosecutors to make discretionary decisions in fulfilment of their professional obligations without fear of judicial or political interference."[93]

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[91] *Nixon*, *supra* note 30, at para 68.
[92] *Ibid.*
[93] *Miazga v Kvello Estate*, 2009 SCC 51, at para 47.

68. The prosecutions of Mr. Vinnie and the Appellant were pursued by separate prosecutors.[94] It was and should remain open to them to come to different views of the relative merits of the evidence, and the theories put to the triers of fact to frame that evidence. Moreover, the Appellant's prosecution occurred after Mr. Vinnie's trial, during which time it was open to both prosecutors to modify their initial evaluations, either in response to the performance of witnesses during their testimony at the first trial, or upon further reflection on the totality of the case.

69. On the Appellant's view, prosecutors would be bound not only by the theories advanced in other trials, but the theories advanced at the *beginning* of other trials. The responsibilities of the Crown cannot be properly discharged if prosecutors are not empowered to exercise their discretion. No abuse of process should be recognized here.

B. The Appellant Is Not Entitled to the Proposed Remedy

70. Any order proposed to remedy a residual abuse of process must satisfy two requirements:

i. The remedy must respond to the alleged harm to the justice system so as to dissociate it from the impugned state conduct.[95] Where the proposed remedy is a stay of proceedings, it will only be warranted in the "clearest of cases"[96]; and

[94] Problem, at para 57.
[95] *Babos*, *supra* note 39, at para 39.
[96] *Nixon*, *supra* note 30, at para 37; *R v O'Connor*, *supra* note 25, at paras 68, 82; *R v Jewitt*, [1985] 2 S.C.R. 128, at 136-137.

ii. The balance of interests must favour the proposed remedy in light of the other interests at stake.[97]

71. Even if this Court accepts that the conduct of the Crown amounted to an abuse of process, the proposed remedy of vacating the Appellant's conviction cannot be granted.[98] The remedy is not connected to the alleged injustice and cannot pass the "clearest of cases" threshold. It is also not favoured by the balance of interests.

i. The Appellant Should Not Be Permitted to Circumvent the Higher Threshold Required for Obtaining a Stay of Proceedings

72. The Appellant's proposed remedy effectively amounts to a stay of proceedings, the most drastic remedy a court can order.[99] The Appellant's framing of the proposed remedy is a thinly-veiled attempt to circumvent the higher threshold that would otherwise apply to his proposed Court order. Vacating the Appellant's conviction on the condition that the Appellant could be prosecuted on the finding of new evidence effectively prevents his prosecution.

73. Even if the remedy is not effectively equivalent to a stay of proceedings, the "clearest of cases" threshold should nevertheless apply. A stay of proceedings should only be granted in the "clearest of cases" because this drastic remedy undermines a significant public interest in the prosecution of criminal offences. In staying proceedings, "the truth-seeking function of the trial is frustrated and the public is deprived of an opportunity to see justice done on the merits. In many cases, alleged victims of the crime

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[97] *Babos*, *supra* note 39, at paras 40-41.
[98] Factum of the Appellant, at para 74.
[99] *Babos, supra* note 39, at para 30; *R v Regan*, 2002 SCC 12 at para 53.

are deprived of their day in court."[100] This case also engages the public interest in the finality of proceedings as the Appellant has already been convicted in a trial, the fairness of which is not in dispute.

74. It is the *drastic* nature of the remedy that warrants the higher threshold. The Supreme Court indicated in *R v O'Connor* that a lower threshold may be appropriate where a proposed remedy was "less drastic than a stay of proceedings".[101] In the circumstances, the remedy asked for by the Appellant is nothing if not drastic. The Appellant asks this Court to set aside a fairly determined conviction and to effectively immunize him from prosecution. This "drastic" result demands a high threshold. The high threshold must apply.

ii. The Clearest of Cases Threshold Cannot be Met

75. The appellant must show that there is a connection between the proposed remedy, and the alleged harm to the justice system.[102] With respect to the residual category, "the goal is *not* to provide redress to an accused for a wrong that has been done to him or her in the past."[103] A stay of proceedings, or in this case, an effective stay of proceedings, is only justified in cases where it is abundantly clear that a stay is *necessary* to preserve and protect the integrity of the justice system.[104] It is only in rare circumstances that this standard will be met.[105] The Appellant has failed to demonstrate that the proposed

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[100] *Babos*, s*upra* note 39, at para 30.
[101] *O'Connor*, *supra* note 25, at para 69.
[102] *Babos*, *supra* note 39, at para 39.
[103] *Ibid*.
[104] *Ibid,* at para 3; *R v O'Connor*, *supra* note 25, at para 83.
[105] *Babos*, *supra* note 39, at para 31.

remedy will respond to the alleged injustice, and is necessary to sever the association between the justice system and the impugned conduct of the state.

76. State conduct that has warranted a stay of proceedings in the residual category include Mr. Big schemes designed to be "unacceptably coercive" through preying on an accused's vulnerabilities.[106] Conduct that has fallen short include the Crown resiling from a plea agreement,[107] and the Crown threatening a criminal defendant with further charges should he not plead guilty.[108] Viewed through the lens of these cases, the impugned state conduct is not so egregious or unfair that it is *clear* that only a stay of proceedings will protect the integrity of the justice system.

77. Moreover, the evidence discloses a reasonable possibility that both the Appellant and Mr. Vinnie were involved in the burglary. This possibility is further supported by the findings of guilt at their respective trials. Rather than severing a tie to an alleged injustice, the remedy would introduce a new basis to question the integrity of the justice system: the staying of a conviction arising from a fair trial on the basis of a factual inconsistency of "legal indifference". The clearest of cases threshold is not met.

iii. The Balance of Interests Favours Upholding the Appellant's Conviction

78. Even if the alleged abuse of process satisfies the clearest of cases threshold, or some other lower threshold, a balancing of interests is still required for a residual abuse of process.[109] As the residual category of abuse of process is fundamentally about confidence and trust in the justice system, the Court must consider which of two options

[106] *Hart*, *supra* note 37, at para 117.
[107] See *Nixon, supra* note 30.
[108] See *R v Babos*, *supra* note 39.
[109] *R v Zarinchang*, 2010 ONCA 286 at para 61 [*Zarinchang*].

better protects the integrity of the system.[110] In this case that is whether the balance of interests favours an effective staying of the proceedings and granting the Appellant a "windfall" , or upholding the Appellant's conviction, and "having the case decided on the merits."[111]

79. The balance of interests weighs in favour of upholding the Appellant's conviction. A stay of proceedings would effectively immunize the Appellant from being prosecuted for a crime for which he was convicted in a fair proceeding on the merits. This immunity is disproportionate to the innocent differences in approach between two prosecutors that did not impact the fairness of the Appellant's trial.

PART IV – ORDER SOUGHT

81. The Respondent requests that the Supreme Court of Flavelle:

DISMISS the Appellant's constitutional challenges; and

UPHOLD the decision of the Falconer Court of Appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this twelfth day of September, 2015.

Giorgio Traini

Sarah Bittman

[110] *Babos*, *supra* note 39, at para 41.
[111] *Zarinchang*, *supra* note 109, at para 60.

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