SCC File No.: 36448

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

JONATHAN DAVID MEER

APPELLANT

-and-

HER MAJESTY THE QUEEN

RESPONDENT

FACTUM OF THE APPELLANT
(JONATHAN DAVID MEER, APPELLANT)

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The Appellant Jonathan David Meer, together with others in his family, was involved in businesses that were in default of distinct financial obligations owed to Ronald Simpson and to the Royal Bank of Canada. Lawyer James Thorlakson represented Mr. Simpson in a civil action. Stewart Ross was an employee of RBC, and chartered accountant Thomas Klaray was appointed a receiver of one of the Appellant's corporations on application by RBC.[1]

2. The Respondent's allegations concerned a scheme to use unalwful acts to discourage the pursuit and enforcement of the various civil claims. It was argued that the scheme was a conspiracy, that the Appellant had aided and abetted others to carry out arson against Mr. Simpson and Mr. Klaray, that he had extorted Mr. Simpson and RBC and obstructed their legal processes, and that he committed offences in relation to firearms. The Appellant was charged on a 15-count indictment.[2]

3. The Appellant gave evidence and denied being a member of a conspiracy. He was kept in the dark by the persons responsible, chiefly his son and a family friend, who were both motivated against the complainants and who kept the Appellant in the dark about their criminal activities until over a week after they were completed.[3] Most of the counts on the indictment were dismissed, stayed or withdrawn.[4]

4. The Appellant appealed his conviction to the Court of Appeal on the basis that the learned trial judge made wrong decisions on questions of law and that the Appellant's trial counsel was incompetent and ineffective, which occasioned a miscarriage of justice. The majority of the Court of Appeal panel held that the Appellant was precluded from raising the issue because he was attempting to change a tactical decision at trial, the issues were moot, he had not waived solicitor-client privilege, and the record did not prove incompetence.

5. Berger J.A., in dissent, rejected the notion that the Appellant was precluded on any of these grounds. He concluded that the record established that the "trial counsel's conduct of the

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[1] *R. v. Meer*, 2010 ABQB 768 [Appellants Record ("A.R."), Vol. I, Tab 2] paras 7, 8
[2] *Idem*, paras 11-14
[3] *Idem*, para 227
[4] *Idem*, para 434

case was woefully incompetent," and that "there is not a hint of the exercise of reasonable professional judgment or informed tactical decision-making in this case."[5]

6. The Appellant appeals his conviction as of right pursuant to section 691(1)(a) of the *Criminal Code*.

B. The Other Suspects

7. As a member of the Meer family, the Appellant's son Christopher Meer was a substantial beneficiary of an above-average standard of living afforded by the family businesses. He had actively, and sometimes inappropriately, interfered with the ongoing civil proceedings. Personal property enjoyed by Christopher Meer at the Meer family's residence in Edmonton was subjected to civil enforcement seizures. Christopher Meer was charged in connection with these circumstances, but has not been arrested and did not testify at the Appellant's trial.

8. Dustin Pisesky, while training to be a welder and machinist, was a personal friend of many years of Christopher Meer. He became affiliated with the Meer family on a social basis, dining and travelling with them. The learned trial judge found that Pisesky "derived considerable benefit from his association" with the Meers, sharing in their luxurious lifestyle. He was familiar with the legal trouble facing the Meers' businesses.[6]

9. Pisesky had recruited Jesse McKay, his mutual friend with Christopher Meer,[7] and Nicholas Radloff, Pisesky's childhood friend, to assist in the commission of crimes.[8]

10. It is not disputed that Christopher Meer and Dustin Pisesky set upon Mr. Simpson, Mr. Thorlakson, Mr. Klaray and Mr. Ross in a criminal manner. The Appellant does dispute that he planned, directed or approved of the actions undertaken by the pair. He denies having known about their involvement until they were confessed to him on December 29, 2007.[9]

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[5] *R. v. Meer*, 2015 ABCA 141 [A.R., Vol. I, Tab 4] para 153.
[6] *R. v. Meer*, 2010 ABQB 768 [A.R., Vol. I, Tab 2] paras 48-51
[7] *Idem*, para 129
[8] *Idem*, para 150
[9] *Idem*, para 238, 239

C. Matters Under Indictment

11. **Count 1** On March 25, 2007, Pisesky set Mr. Simpson's cabin at Mulhurst Bay, Alberta on fire by igniting kindling and a plastic lawn chair he had positioned near the structure's gas meter. The cabin was destroyed. The Learned Trial Judge found the Appellant to have abetted Pisesky by encouraging him to "scope out" the cabin with Christopher Meer days before the arson. The charge of arson of an occupied property under section 433(a) of the Criminal Code was dismissed—the Learned Trial Judge accepted that Pisesky believed the cabin was unoccupied. After hesitating about whether or not section 433(a) includes arson under section 434, the Appellant was so convicted.[10]

12. **Count 2** During the night of November 2-3, 2007, Pisesky drove Christopher Meer with a paintball gun Pisesky acquired that they filled with marbles to the residences of Mr. Thorlakson, Mr. Klaray and Mr. Ross. Marbles were pelted at the windows of the residences. The garage at Mr. Klaray's property was set on fire. The Appellant was acquitted of the section 433(a) charge, there being no evidence of foreknowledge on his part.[11]

13. **Counts 3, 10, 11** On December 20, 2007, Pisesky recruited his friends, Nicholas Radloff and Jesse McKay, to assist him and Christopher Meer in a plan to lure Mr. Thorlakson and Mr. Simpson out of their homes to assault them. The plan was abandoned. The group then drove to Mr. Simpson's residence, lit it on fire and destroyed it.[12] The Learned Trial Judge found that the Appellant had directed Pisesky to assault Mr. Simpson and convicted him of conspiring to do so in count 10,[13] but did not accept that the Appellant was a member of the conspiracy to assault Mr. Thorlakson and he was acquitted on count 11.[14] The Learned Trial Judge found that the Appellant aided the arson by conspiring to assault Mr. Simpson, and abetted it by giving approval to Christopher Meer, and convicted him of the section 433(a) charge in count 3.[15]

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[10] *R. v. Meer*, 2010 ABQB 768 [A.R., Vol. I, Tab 2] paras 335-345
[11] *Idem*, 346-359
[12] *Idem*, paras 127-190
[13] *Idem*, paras 413-418
[14] *Idem*, paras 419-424
[15] *Idem*, paras 360-369

14. **Count 4** The Learned Trial Judge found that words and gestures used by the Appellant in the course of the litigation with Mr. Simpson, together with the arsons of his property and a phone call to him made by Pisesky which the Learned Trial Judge attributed to the Appellant, and other phone calls, amounted to extortion of Mr. Simpson by the Appellant.[16]

15. **Count 5** The Learned Trial Judge found that pelting the properties of Mr. Klaray and Mr. Ross and the arson of Mr. Klaray's garage amount to extortion of RBC by the Appellant.[17]

16. **Count 6** The Learned Trial Judge found that the cumulative effect of the arsons and extortions was to obstruct justice, namely the judicial proceedings involved in the claims of Mr. Simpson and RBC.[18] The charge was stayed under *Kienapple*.

17. **Counts 7, 8, 9** The Learned Trial Judge found that a conspiracy existed between Pisesky, Christopher Meer, Radloff and McKay to commit arson, extortion and obstruction of justice, and that the Appellant was a member.[19] The latter count was stayed under *Kienapple* and the Appellant was convicted of the other two.

18. **Counts 12, 13, 14 and 15** concerned firearms licence and registration charges that were variously withdrawn or dismissed at trial.[20]

D. The Trial Evidence

19. Pisesky testified that in his initial interviews with police, he falsely denied involvement in the arsons[21]. He then negotiated a plea agreement in which he agreed to testify "truthfully," and received, as the learned trial judge put it, "a very substantial reduction in the sentence he would otherwise have received." The agreement explicitly threatened that the Crown would seek to increase Pisesky's sentence and charge him with serious offences if he was not "truthful" enough to impress the Crown.[22]

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[16] *R. v. Meer*, 2010 ABQB 768 [A.R., Vol. I, Tab 2] paras 370-377
[17] *Idem*, paras 378-383
[18] *Idem*, paras 384-390
[19] *Idem*, paras 391-412
[20] *Idem*, paras 425-434
[21] A.R. Vol II, Tab 7, p. 692
[22] *Idem*, para 307

20. Cross-examined by the Appellant's trial counsel, Pisesky explained:

> Q In your view you saved ten years by implicating Mr. Meer?
> A Yes.
>
> Trial Transcript [A.R., Vol. II, Tab 7] p. 693
>
> …
>
> Q When you provided your statement to the police the version consistent with what you have told us today, you were informed that if you changed your version of events you would be prosecuted, correct?
>
> A Yes.
>
> Trial Transcript [A.R., Vol. II, Tab 7] p. 693
>
> …
>
> Q So even if you wanted to tell the truth now or change your version of events you couldn't.?
>
> A Yes.
>
> Trial Transcript [A.R., Vol. II, Tab 7] p. 693
>
> …
>
> Q It is inherent in your plea agreement that you relay that version of events, correct?
>
> A Correct.
>
> Trial Transcript [A.R., Vol. II, Tab 7] p. 712

21. With the agreement in hand, Pisesky implicated the Appellant. Pisesky gave evidence that the Appellant had prior knowledge of the arsons and attempted assaults and together with Christopher Meer had directed them. He attested to conversations and meetings with the Appellant during which the crimes were planned, as well as conversations and meetings after the crimes which, in his version, were consistent with prior knowledge.

22. The learned trial judge regarded Pisesky's evidence as being "of central importance" to the inculpation of the Appellant. He noted that Pisesky was the only witness who testified to the conversations in which the Appellant would have given the agreement that would give rise to his status as a co-conspirator.[23] To find the Appellant to be criminally involved, the Learned Trial

[23] *R. v. Meer*, 2010 ABQB 768 [A.R., Vol. I, Tab 2] para 303

Judge must have relied on Pisesky's uncorroborated account of what the Appellant had said in Pisesky's presence.

23. The Appellant denied having any foreknowledge of the crimes committed by Christopher Meer and Pisesky and others. They had confessed to what they had done on December 29, 2007, more than a week after the commission of the final round of crimes. He and his wife Loreena Meer had denied the components of the Respondent's theory that were necessary to inculpate the Appellant.

24. The balance of the evidence against the Appellant included a daytimer seized from the Meer residence and intercepted conversations between various parties described in more detail below.

E. Ineffective Assistance of Counsel

25. The Appellant swore an affidavit in support of the fact that the assistance of his trial counsel, Mr. Ajay Juneja, was ineffective. He was not cross-examined on that affidavit. The Respondent obtained an affidavit from Mr. Juneja, who was cross-examined by the Appellant's appellate counsel. This fresh evidence was admitted by the Court of Appeal.[24]

26. The affidavits discuss many aspects of Mr. Juneja's representation of the Appellant, but the only points argued by the Appellant relate to the spousal privilege issue, the daytimer issue, and the conflict of interest issue.

27. The fresh evidence supports the following facts:

a. Mr. Juneja did not object to the admission of telephone conversations between the Appellant (in custody at the Edmonton Remand Centre) and his wife;

b. Mr. Juneja did not object because the spousal privilege issue did not occur to him;[25]

c. The conversations were significant evidence against the Appellant;[26] Transcript p. 26;

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[24] *R. v. Meer,* 2015 ABCA 141 [A.R., Vol. I, Tab 4] paras 14, 15

[25] Affidavit of Ajay Juneja [A.R., Vol. IV, Tab 12] para 22; Transcript [A.R., Vol. IV, Tab 13] p. 26

d. Mr. Juneja thought that the fact that the Appellant's wife was being called as a defence witness meant that she could be questioned by the Respondent about the conversations;

e. Proof of ownership of the daytimer was an important part of the Crown's case against the Appellant;[27]

f. Proof of the handwriting in the daytimer was part of the proof of ownership;[28]

g. Mr. Juneja's theory at trial was that the handwriting was not that of the Appellant;[29]

h. Mr. Juneja did not obtain handwriting comparison samples from anyone to prove or disprove whose handwriting it was: Transcript p. 22; Appellant's Affidavit para. 25;

i. Mr. Juneja did not consult with a handwriting expert at any time: Transcript p. 22;

j. Exhibit 48 was an unrelated police report used by the Respondent as a handwriting comparison during cross-examination of the Appellant;

k. Exhibit 48 was not disclosed to the Appellant or Mr. Juneja prior to its use in cross-examination of the Appellant;[30]

l. Mr. Juneja did not object to Exhibit 48 on the basis of unfair surprise and lack of disclosure, because he did not think of it at the time;[31]

m. Mr. Juneja believed that Exhibit 48 was relevant to the trial;[32]

n. Mr. Juneja did not take steps to investigate Dustin Pisesky beyond reviewing the disclosure and speaking with the Appellant and his family;[33]

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[26] Transcript [A.R., Vol. IV, Tab 13] p. 26
[27] Transcript [A.R., Vol. IV, Tab 13] p. 22
[28] *R. v. Meer*, 2010 ABQB 768 [A.R., Vol. I, Tab 2] para 273
[29] Affidavit of Ajay Juneja [A.R., Vol. IV, Tab 12] para 21; Transcript [A.R., Vol. IV, Tab 13] p. 22
[30] Affidavit of Jonathan David Meer [A.R., Vol. IV, Tab 11] para 25; Transcript [A.R., Vol. IV, Tab 13] pp. 23, 24
[31] Transcript [A.R., Vol. IV, Tab 13] p. 24
[32] *Idem*, p. 25

o. If the Appellant could prove that Dustin Pisesky committed the arson on Patrick Pisesky's property, it would have damaged the Respondent's case;[34]

p. Mr. Juneja did not take steps to verify whether or not Patrick Pisesky was unable to testify in the trial, or apply to the Court for accommodations.[35]

28. The Appellant asserts Mr. Juneja represented two key witnesses in the Appellant's case, Patrick and Dustin Pisesky, in connection with an arson investigation. The Appellant asserts that Mr. Juneja told him this in the course of trial preparation. Mr. Juneja denies the representation.

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[33] *Idem*, pp. 28-30
[34] Transcript [A.R., Vol. IV, Tab 13] p. 28
[35] *Idem*, pp. 31, 32

PART II – QUESTIONS IN ISSUE

29. The Appellant submits the following questions:

(1) Was the Appellant precluded from raising the issue of ineffective assistance of counsel on appeal?

(2) If not, did a miscarriage of justice occur due to ineffective assistance of the Appellant's trial counsel?

PART III – STATEMENT OF ARGUMENT

A. Precedents for Ineffective Assistance of Counsel

30. In *R. v. G.D.B.*,[36] this Honorable Court laid out the general approach to assessing ineffective assistance of counsel:

> 26 …For an appeal to succeed, it must be established, first, that counsel's acts or omissions constituted incompetence and second, that a miscarriage of justice resulted.
>
> 27 Incompetence is determined by a reasonableness standard. The analysis proceeds upon a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. The onus is on the appellant to establish the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The wisdom of hindsight has no place in this assessment.
>
> 28 Miscarriages of justice may take many forms in this context. In some instances, counsel's performance may have resulted in procedural unfairness. In others, the reliability of the trial's result may have been compromised.

31. In that case, the accused's trial counsel had a secret audio recording made by the complainant's mother that was inconsistent with the complainant's trial evidence. Counsel decided not to use the recording to discredit the complainant. The reason was that the complainant's mother was a key witness for the accused and, in the circumstances, the secret recording would also serve to discredit her. Counsel's decision was found not to be incompetence, but rather a tactical choice that could have benefited the accused. Accordingly, the recording was not admitted as fresh evidence on appeal.

32. In *R. v. Carr*,[37] trial counsel formed an opinion, pre-trial, that his client, the accused, was competent and voluntary in making statements to the police following a car accident. During the trial, he argued that the statements were involuntary due to the accused's mental state. Trial counsel relied only on the accused's testimony for this purpose. Counsel did not make inquiries of, or call as a witness, the emergency room physician (Dr. Rawlyk) whose opinion was that the accused was concussed and may have had "difficulty functioning rationally, retaining

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[36] [2000] 1 SCR 520, 2000 SCC 22 [Book of Authorities ("BA") TAB 2]
[37] 2010 ABCA 386 [BA TAB 1] paras 23, 45

information, and making appropriate decisions," which could have raised a reasonable doubt about the voluntariness of the accused's statement. The Court of Appeal held that the "the failure to have adduced the medical evidence available at trial was caused by ineffective legal assistance at trial, rather than an explainable trial tactic."

33. Allegations of ineffective assistance of counsel in various other cases are traced to well-meaning tactical decisions of competent trial counsel which, in hindsight, did not result in acquittal, similar in nature to *G.D.B.*

34. These cases can be differentiated from *Carr*, where there was an incompetent unfamiliarity with the relevant evidence: "there is simply no satisfactory explanation for the decision not to call Dr. Rawlyk's evidence. It is difficult to conceive of any downside to such evidence from the defence standpoint."[38]

B. Key Defence Issues

35. The volume of evidence, complexity of the issues, length of the trial, and appellate role of this Honorable Court preclude the complete appraisal of the Appellant's trial counsel. The Appellant asserts that Mr. Juneja failed to defend him in several critical and essential aspects. This both rendered the trial unfair, a ground of appeal in and of itself, and provides context for how the wrong decisions on questions of law were arrived at, which is relevant to the application of the curative proviso. The key issues are as follows:

a. The failure to object to the admission of intercepted communications between the Appellant and his wife on the ground of spousal privilege;

b. With respect to the daytimer evidence, the failure to consult with a handwriting expert, object to the admissibility of the comparison sample, or object to the non-disclosure of the comparison sample; and

c. Mr. Juneja did not properly investigate this matter and was in a conflict of interest with respect to the Respondent's key witness.

36. At the start of the trial, the Respondent opposed Mr. Juneja's representation of the Appellant and applied to the learned trial judge for Mr. Juneja to be removed from the case. The

[38] *Idem* para 43

Appellant resisted the application because his only alternatives were to (a) represent himself without any time to prepare to do so, having only had limited access to the disclosure in total and no access to the disclosure in the months leading up to the trial, or (b) delay his trial for as long as 2 years (while in pre-trial custody) in order to accommodate replacement counsel. Mr. Juneja's view was that the Appellant would not have bail during any delay.

37. This episode is not, in and of itself, ineffective assistance of counsel *vis a vis* the issues of guilt or innocence at trial, but explains why it would have been unreasonable for the Appellant to discharge Mr. Juneja, and confirms that Mr. Juneja did not have the Respondent's confidence to represent the Appellant.

C. Spousal Privilege

38. A competent counsel exercising professional judgment would have been aware that the admission of the intercepted communications between the Appellant and his wife would violate section 4(3) of the *Canada Evidence Act.*[39] A competent counsel exercising professional judgment would not wrongly believe that the fact that the Appellant's wife would later testify for the Appellant would change the admissibility of the communications. A competent counsel exercising professional judgment would have objected to the admission of the communications.

39. Mr. Juneja did not object to the admission of the communications at any point in the trial. His evidence makes clear that he was unfamiliar with the law on spousal privilege and that he did not even consider it when preparing for or conducting the Appellant's trial. This is completely inconsistent with any notion of a tactical decision to not object.

40. The failure to object resulted in procedural unfairness in the sense that the Appellant was judged on inadmissible evidence.

41. The learned trial judge used the spousal communications to reject the Appellant's evidence that he was not involved in, or aware of, the offences,[40] and to reject his evidence that he was not the owner of the daytimer.[41]

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[39] RSC 1985 c C-5 [BA TAB 3]
[40] *R. v. Meer*, 2010 ABQB 768 [A.R., Vol. I, Tab 2] paras 294-297
[41] *Idem*, para 298

42. The learned trial judge placed considerable importance on the incriminating nature of the communications.[42]

43. The failure to object to the spousal communications was the result of incompetence, and caused procedural unfairness and challenges the reliability of the verdict.

D. Daytimer Evidence

44. The daytimer evidence unfolded in several steps and was erroneous at different steps for different reasons.

45. First, Mr. Juneja correctly predicted that the Respondent would not be calling a handwriting expert, the Respondent did not disclose or give notice of any handwriting comparison samples that would be exhibited as evidence, and that the Respondent's witnesses would not offer opinions that they recognize the Appellant's handwriting in the daytimer. He made a decision to try to prove that the handwriting was not the Appellant's handwriting.

46. In such circumstances, a competent counsel exercising professional judgment would have obtained handwriting comparison samples from the Appellant and anyone who was to be proved on behalf of the Appellant to be the author of the daytimer, and submitted them together with the daytimer to a handwriting expert. These materials and the expert could have corroborated the evidence of the Appellant and his wife that the Appellant did not author the daytimer, or could have raised a reasonable doubt.

47. In preparing for the trial, Mr. Juneja did not do, or even consider doing any of those steps.

48. When the Appellant was under cross-examination, the Respondent produced Exhibit 48. A competent counsel exercising professional judgment would have objected to the admission of Exhibit 48 on the ground of relevance. Exhibit 48 was completely irrelevant to the circumstances set out in the indictment, and should not have been admitted solely for the purpose of handwriting comparison.

49. In cross-examination, Mr. Juneja explains that in his opinion Exhibit 48 was relevant, and that even if the Appellant did not testify, Exhibit 48 could have been admitted "through the

[42] *R. v. Meer*, 2010 ABQB 768 [A.R., Vol. I, Tab 2] para 297

officer who took the statement or some other format." Obviously, this would have been impossible after the Respondent's case had closed.

50. A competent counsel exercising professional judgment would have also objected on the basis of non-disclosure. The Appellant was prevented from incorporating Exhibit 48 into his decision whether or not to testify. Mr. Juneja admitted this error on cross-examination.

51. Once Mr. Juneja abandoned his objection to the admission of Exhibit 48, it became part of the trial evidence. A competent counsel exercising professional judgment would have re-considered obtaining expert advice and/or evidence about the comparison. Mr. Juneja did not do so.

52. Further, a competent counsel exercising professional judgment would have prepared a legal argument (consisting of the authorities set out by the Appellant on appeal) that the learned trial judge should not attempt to analyze the handwriting. Mr. Juneja acknowledged in cross-examination his opinion that the learned trial judge could not do this, but did not argue or provide the authorities.

53. It is respectfully submitted that Mr. Juneja ignored several legal points and seriously misapprehended the law in this area, while exercising poor judgment about what measures would be necessary to disprove, or raise doubt about, the Respondent's theory of the ownership of the daytimer. There was no tactical advantage to these problems, which are entirely attributable to incompetence.

54. In the result, the Respondent's theory relied on the daytimer as being a "hit list" whose owner was strongly motivated against the individuals referred to in it, which included the complainants. The learned trial judge agreed and used the handwriting to prove ownership. The evidence was used by the learned trial judge to reject the Appellant's evidence,[43] to independently confirm the credibility of the alleged accomplices Dustin Pisesky and Nicholas Radloff[44] and incriminate the Appellant.[45]

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[43] *R. v. Meer,* 2010 ABQB 768 [A.R., Vol. I, Tab 2] para 279-280
[44] *Idem*, para 325
[45] *Idem*

55. The Appellant submits that the learned trial judge's handwriting analysis was a wrong decision on a question of law, and if so, Mr. Juneja's incompetence caused procedural unfairness on that point. In any case, conclusions of the learned trial judge with respect to the rejection of the Appellant's evidence and the verdict as a whole is rendered unreliable.

E. Dustin Pisesky and Patrick Pisesky

56. Mr. Juneja had "very strong suspicions" that Dustin Pisesky committed arson on his father Patrick Pisesky's property, which were shared with Jesse McKay's counsel Mr. Tarrabain. Mr. Juneja did not do anything else to investigate his suspicions, such as hiring a private investigator, or interview witnesses such as Dustin Pisesky, Patrick Pisesky, the insurer or the fire investigator.

57. Mr. Juneja correctly formed the opinion that if he were able to prove that Dustin Pisesky committed the arson, it would damage his credibility. It is further submitted that it would have the effect of proving that Dustin Pisesky did not require the Appellant's involvement in committing arsons.

58. It is respectfully submitted that a competent counsel exercising professional judgment would have attempted investigative steps.

59. At trial, Dustin Pisesky denied committing the arson.

60. Patrick Pisesky was to be a witness at trial for the Respondent. The Respondent informed Mr. Juneja that testifying was not possible because Patrick Pisesky had brain cancer. Mr. Juneja wanted Patrick Pisesky to testify, even for the Appellant, because his evidence would be advantageous or neutral, but not dangerous.

61. A competent counsel exercising professional judgment, having formed those opinions about Patrick Pisesky, would have attempted to indepenently assess his ability to testify and apply to the Court for any necessary accommodations. Mr. Juneja did not follow up, and there was no application.

62. The evidence of the Appellant and Mr. Juneja diverge as to the explanation for these omissions. The Appellant states that Mr. Juneja told him that he represented Dustin Pisesky and Patrick Pisesky on that arson case. Mr. Juneja denies doing so, or ever communicating with the

Piseskys apart from the Appellant's trial. There is no evidence that corroborates either witness' story.

63. Had Mr. Juneja acted as a lawyer for the Piseskys in some capacity, it could explain why he had very strong suspicions that Dustin Pisesky committed the arson, despite there apparently being no evidence at hand to support his suspicions other than a directly contradictory fire investigator's report. It would also explain why Mr. Juneja was not motivated to investigate further or take steps to force Patrick Pisesky to testify. Mr. Juneja would have been in a serious conflict of interest that would have deeply prejudiced his ability to represent the Appellant while betraying a loyalty owed to the Piseskys.

64. Whether this Honorable Court finds a conflict of interest or not, Mr. Juneja's failure to take steps to follow up on the Piseskys was incompetence and, based on Mr. Juneja's evidence of his suspicions, challenges the reliability of the verdict.

F. Conclusion on the Merits of Ineffective Assistance of Counsel

65. The facts that underlie Mr. Juneja's incompetence are supported almost entirely by his own evidence and the record of the trial. They related to enough of the critical aspects of the trial that it cannot be safely concluded that the Appellant received a fair trial, or that the verdict would necessarily have been the same with the assistance of competent counsel.

66. Berger J.A., in dissent, summarized the situation as follows:

> [145] It apparent from all of the foregoing that:
>
> - At no time before the trial began or in its presentation of the Crown's case did Crown counsel signal that it was the intention of the Crown to affirmatively demonstrate that the handwriting in the daytimer was that of the appellant.
>
> - AJ was prepared to rely on the testimony of his client and his client's wife that the handwriting was not that of the appellant.
>
> - AJ made no effort to seek the opinion of a handwriting expert.
>
> - Although AJ initially objected to the admissibility of Exhibit 48, he withdrew that objection.

> • AJ appreciated that Exhibit 48 had not been disclosed but failed to object on the basis of "unfair surprise" and non-disclosure.
>
> • AJ sought no adjournment to obtain the opinion of a handwriting expert.
>
> • Had AJ been aware of Exhibit 48, notwithstanding his client's desire to testify, it would have been prudent for AJ to have carefully considered whether it would be appropriate to put the appellant on the stand. Indeed, he acknowledges, "I would have to say that I think that he would still be testifying but I can't say to a certainty. If I had that document, there were other things that could possibly – other questions and other things I would have discussed with him."
>
> …
>
> [149] In the case at bar, it is apparent that the appellant's trial counsel neither anticipated nor understood the significance of the critical evidentiary and procedural issues that would and did emerge at trial. AJ was naively of the view that he need do nothing more than put his client on the stand and assert that the handwriting in the diary was not his. Defence counsel did not think to take it upon himself to compare the handwriting in the diary with a known sample of his client's handwriting. No expert testimony was sought before he put the appellant on the witness stand. Importantly, as the fresh evidence reveals, defence counsel had absolutely no appreciation of the very real prospect that his client might well be confronted in cross-examination with a known handwriting comparison and that the judge would be permitted, without the benefit of expert testimony, to compare the two.
>
> …
>
> [153] In my view, there is not a hint of the exercise of reasonable professional judgment or informed tactical decision-making in this case. With regret, I must characterize trial counsel's conduct of the case as woefully incompetent. Counsel's ineffectiveness pertains to critical aspects of the trial such that it cannot be safely concluded that the appellant received a fair trial.[46]

G. Analysis of the Court of Appeal's Judgment

67. The rationale for the majority of the Court of Appeal to reject the Appellant's argument was given as follows:

> 45 As the previous section of these reasons show, the appellant is precluded from raising the "incompetence of counsel" argument because he is attempting to

[46] *R. v. Meer*, 2015 ABCA 141 [A.R., Vol. I, Tab 4] paras 145, 149, 153

> change a tactical decision he made at trial, he has not waived privilege, some of the issues are moot, and the inadequate record fails to prove incompetence.

68. It is respectfully submitted that the question of what precisely an appellant is required to in order to be entitled to argue on appeal that a miscarriage of justice has occurred is a question of law.

69. The opinion of Berger J.A. in dissent better addresses the issues raised by the Respondent on appeal. He observed the following in response to the tactical decision issue:

> [151] If, as my colleagues contend, tactical choices are here engaged, it seems to me axiomatic that such tactical choices in the course of a trial in which the liberty of one's client is at stake, must be premised upon a clear understanding by defence counsel of the applicable law. To proceed in a knowledge vacuum is a recipe for an unfair trial. By way of example, the appellant's "adamant" desire to testify most surely was driven, at least in part, by his lawyer's inept or non-existent advice.

70. And the following with respect to the waiver of privilege issue:

> [152] I would add only that nothing here turns on the majority's contention that, in some collateral respects, aspects of solicitor-client privilege (for example, with other counsel) was not waived. The testimony of AJ convincibly establishes that his conduct of the trial was not competent and that the appellant was denied effective representation.

71. With respect to the issues concerning the production of Mr. Juneja's file for the Crown and waiver of privilege for the Appellant's lawyers other than the one alleged to be incompetent, the Appellant submits that there is an absence of legal procedures in Alberta that would justify the treatment of this argument by the majority in the Court of Appeal.

72. The Courts of Appeal for Ontario[47] and for British Columbia[48] have detailed procedural protocols for addressing appellate allegations of incompetence in criminal trials. No such rules exist for Alberta. However, it is noteworthy that both the Ontario and British Columbia protocols are materially inconsistent with what the majority in the case at bar held the Appellant should have done.

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[47] Administrative Advisory, Procedural Protocol - Re Allegations of Incompetence of Trial Counsel in Criminal Cases, May 1, 2000 [BA TAB 4]

[48] Practice Directive (Criminal), Ineffective Assistance of Trial Counsel [BA TAB 5]

73. For example, in British Columbia the procedure is for the appellant to provide the trial counsel the affidavit in support of the allegation and a signed waiver of privilege. The waiver is expressly limited "to the extent necessary to allow trial counsel to respond to the allegations against him or her."[49] Trial counsel prepares his or her own affidavit and is directed not to divulge any confidential information except to the extent necessary to respond to the allegation of ineffective assistance, and provides it to the appellant. If the appellant considers the trial counsel's affidavit to have divulged excessive confidential information, the appellant is to redact the excess before sending it to the Crown. The appellant files the redacted and unredacted versions with the Court. The parties appear before a case management judge of the Court who determines procedural matters such as whether or not any redacted confidential information was waived, bearing in mind that the waiver need go no further than to the extent necessary to allow trial counsel to respond to the allegations against him or her. There is no mention in the protocol of production to the Crown of the parts of the trial counsel's file which the trial counsel chose not to exhibit to the response affidavit.

74. In Ontario, the appellant is required to permit the Crown to have access to the trial counsel's file, "except for any materials in the file over which solicitor-client privilege is claimed by the appellant."[50] The onus is on the Crown to apply to an assigned case management judge for directions as to privilege claims.[51] The protocol specifically directs as follows:

> Every effort should be made to resolve all potential privilege issues before trial counsel is examined. If trial counsel objects to answering a question based on a claim of solicitor-client privilege and the parties to the appeal cannot agree on whether counsel is obliged to answer the question, trial counsel will not be required to answer that question until the privilege claim is determined either after consultation with the case management Judge or by order of the Court.[52]

75. The Appellant in the case at bar waived privilege for information that Mr. Juneja was aware of up to the point of the termination of the trial proceedings that appears relevant and

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[49] *Idem*, para 4
[50] Administrative Advisory, *supra*, s. 10
[51] *Idem*
[52] *Idem*, s. 15

material to issues in dispute in his conviction appeal.[53] There was nothing stopping the Crown from making an application to the Court for the production of other things.[54]

76. The Appellant was not legally required to waive privilege in respect of confidential communications he had with lawyers other than the trial counsel, or permit the Crown to conduct an unrestricted open-box examination of the trial counsel's file. Any dissatisfaction by the Crown as to the information it possessed should have been raised with the Court in advance of the appeal hearing. The policy that is advanced by the majority in the case at bar is that an appellant is required to turn over literally everything he or she has, without any judicial supervision of its relevance, out of a fear that it would be used as a reason to dismiss the appeal altogether. It is submitted that the policies on these matters underpinning the written practices in Ontario and British Columbia better address allegations of incompetence on a practical basis, are more in tune with how litigation is conducted in general, and do not punish appellants for maintaining an honest dispute with the Crown as to the Crown's entitlements.

77. Berger J.A.'s dissent on a question of law was that the Appellant was not legally precluded from raising the incompetence issue,[55] and that being the case, he concluded that a new trial was warranted.[56]

PART IV: SUBMISSIONS CONCERNING COSTS

78. No costs are payable on this appeal.

PART V: ORDER SOUGHT

79. The Appellant respectfully requests that this Honorable Court allow the appeal, set aside the convictions, and order a new trial.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 13th DAY OF AUGUST, 2015

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Dale Knisely, Counsel for the Appellant
Jonathan David Meer

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[53] Affidavit of Jonathan David Meer [A.R., Vol. III, Tab 11], Exhibit "A"
[54] *R. v. Meer*, 2015 ABCA 141 [A.R., Vol. I, Tab 4] para 40
[55] *R. v. Meer*, 2015 ABCA 141 [A.R., Vol. I, Tab 4] para 152
[56] *Idem*, paras 153, 154

PART VI – TABLE OF AUTHORITIES

PART VII – STATUTORY PROVISIONS

Canada Evidence Act, RSC 1985 c C-5, s. 4(3) (see Book of Authorities)