SCC File No. 39635

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

- and -

MATTHEW JAMES JOHNSTON and CODY RAE HAEVISCHER

Respondents

- and -

ANIL KAPOOR and SARAH N. WEINBERGER

Amici Curiae

-and-

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Interveners

FACTUM OF THE INTERVENER INDEPENDENT CRIMINAL DEFENCE ADVOCACY SOCIETY

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PART I – OVERVIEW

1. The intervener Independent Criminal Defence Advocacy Society ("CDAS") has two primary submissions, one practical and one principled.

2. The practical submission stems from the reality of *Vukelich* hearings in British Columbia. This reality is very different from the theory behind *Vukelich*. Hearings designed to save court time are having the opposite effect. They have become lengthy, protracted hearings initiated by the crown as a matter of course, regardless of the strength of the proposed *Charter* claims. Instead of weeding out patently unmeritorious arguments, they are being used to obstruct legitimate issues. In some cases, *Vukelich* hearings take as long or longer than the *voir dire* itself. The *Vukelich* system in British Columbia is broken. Intervention by this court is needed.

3. The principled submission is based on unfairness to accused persons at both the trial and appellate levels. At the trial stage, viable arguments are at risk of being precipitously shut down by an elevated *Vukelich* threshold. At the appellate stage, accused persons who were denied a *voir dire* at trial have to overcome an elevated standard of review, stemming from the characterization of that denial as a discretionary "trial management" decision. The combined effect of these two elevated standards creates a "synergy of prejudice" for accused persons. They are denied the ability to raise potentially decisive arguments at trial, and effectively prevented from challenging that denial on appeal. This has important consequences for their right to make full answer and defence, and for the administration of justice generally.

PART II – STATEMENT OF POSITION

4. A brief summary of CDAS's position is as follows:

   a. *Vukelich* hearings are being used in ways inconsistent with their stated purpose. This practice needs to be corrected.

   b. *Vukelich* hearing should be used with restraint.

c. The standard to be met under *Vukelich* should be a low one.

d. *Vukelich* should be interpreted in a way consistent with *Charter* values such as the right to make full answer and defence and the right to a fair trial.

e. *Vukelich* rulings denying accused persons a *voir dire* should not be insulated from appellate review.

PART III – STATEMENT OF ARGUMENT

A. Practical Submission

5. As an organization representing criminal defence lawyers in British Columbia, CDAS respectfully submits it is well situated to speak to the practical realities of how *Vukelich* has come to work in practice. *Vukelich* was a British Columbia case and *Vukelich* hearings are largely a British Columbia phenomenon.[1]

6. *Vukelich* hearings were designed to save scarce resources in an overburdened justice system. They are not working. The short efficient hearings based on submissions of counsel envisioned by McEachern C.J.B.C. in *Vukelich* are not happening. Instead *Vukelich* hearings have become lengthy and protracted. They often involve filing large amounts of disclosure and many volumes of legal authorities. Argument often takes days to complete. Sometimes weeks. This is a far cry from the simple screening mechanism that *Vukelich* hearings were intended to be.

7. To illustrate this point CDAS relies on two authorities from British Columbia trial courts: *R. v. Tse*[2] and *R. v. Ali-Kashani*[3]. CDAS submits these two cases represent the practice that has emerged in British Columbia.

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[1] *R. v. Vukelich*, (1996), 108 C.C.C. (3d) 193 (B.C.C.A.).
[2] *R. v. Tse*, 2008 BCSC 867.
[3] *R. v. Ali-Kashani*, 2017 BCPC 358.

8. Before discussing these cases, CDAS makes two preliminary points. The first is that these cases come from two different levels of trial court. *Vukelich* problems are not limited to any particular area or level of court. The second is that the chronology of these cases is noteworthy. In *Tse*, a 2008 case, Davies J. emphasized problems with how *Vukelich* hearings were being conducted. Almost ten years later, in 2017, Judge St. Pierre identified similar problems in *Ali-Kashani*. Both of these judges are experienced criminal jurists who have heard many *Vukelich* hearings over the years. The case at bar is five years after *Ali-Kashani*. The *Vukelich* problems identified in these submissions are longstanding and in need of correction.

9. Turning to the cases themselves, in *Tse* Davies J. refers to the "many *Vukelich* hearings I have been required to conduct in this case".[4] He expressed concerns about the misuse of *Vukelich* hearings on previous occasions within that same trial.[5] Apparently those warnings had gone unheeded.

10. Davies J. emphasized that *Vukelich* hearings were designed to prevent undue delay stemming from applications that could be characterized "wasteful exercises".[6] They were not intended to be "a protracted pre-hearing examination of the minutiae of the accused's application".[7] He stated that the latter was exactly what had occurred on multiple occasions in *Tse*.[8] CDAS respectfully submits that, unfortunately, this has become common practice in British Columbia.

11. Davies J. held that protracted *Vukelich* hearings into the evidentiary merits of the applications resulted in far lengthier proceedings, not shorter ones.[9] In other words, *Vukelich* was being used in a way that defeated its stated purpose.

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[4] *Tse* at para. 18.
[5] *Ibid* at para. 18.
[6] *Ibid* at paras. 18-20.
[7] *Ibid* at para. 21.
[8] *Ibid* at para. 21.
[9] *Ibid* at para. 23.

12. 10 years later, Judge St. Pierre expressed similar concerns in *Ali-Kashani*. In that case, the crown took days of court time responding to a defence request for a *voir dire*.[10] St. Pierre J. opined that the *voir dire* might have been completed within the time the crown had taken resisting it.[11]

13. In *Ali-Kashani*, the *Vukelich* hearing occupied three days of court time. Several thousand pages of materials and authorities were placed before the court. A 300-page Information to Obtain a search warrant was examined in detail.[12] Despite the vigor with which the crown resisted a *voir dire*, insisting it had no prospect of success, a *voir dire* was ordered. Several search warrants were upheld; one was set aside.[13]

14. In his ruling directing a stay of proceedings pursuant to section 11(b) of the *Charter*, St. Pierre J. stated:

> There have been hundreds of cases that have considered *Vukelich* since that time [when the judgment was issued in 1996]. The hearings have become longer and more complicated as time passes by. If the Chief Justice were around today to see how his direction has been implemented he would be quite disappointed I would imagine.
>
> It is clear that most of these hearings should be able to be conducted with a simple and short written or oral argument by counsel explaining how the low threshold has been met or not. They should never, in my opinion, become so protracted as to be consuming, unnecessarily, the very scarce resources the hearing itself was designed to avoid wasting. [Emphasis added][14]

15. CDAS respectfully agrees. Unfortunately, the counter-productive practice identified by St. Pierre J. has become the rule more than the exception in British Columbia.

16. *Vukelich* hearings need to be "reined in" to bring them back in line with the expeditious hearings contemplated by McEachern C.J.B.C. in *Vukelich*. This expeditious approach is consistent with this court's recent emphasis on promoting trial efficiency.[15]

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[10] *Ali-Kashani* at para. 48.
[11] *Ibid* at para. 48.
[12] *Ibid* at para. 49.
[13] *Ibid* at para. 55.
[14] *Ibid* at paras. 51-52.
[15] *R v Jordan*, 2016 SCC 27; *R v Cody*, 2017 SCC 31.

17. CDAS submits that practical guidance from this court is needed in two areas.

18. First, CDAS asks this court to emphasize the need for restraint in the use of *Vukelich*. *Vukelich* hearings should not be undertaken as a matter of course. They should be reserved for situations only where there is a credible argument that a proposed *voir dire* is frivolous. In other words, a waste of the court's time. Such restraint is consistent with the purpose of preserving scarce judicial resources, without sacrificing trial fairness on the altar of efficiency.

19. Second, CDAS asks this court to emphasize the need for efficiency within *Vukelich* hearings themselves. The hearings should not consume more time than they save. They should not involve arguing every conceivable point of fact or law the crown could advance at the end of a *voir dire*. They should be a simple, efficient screening mechanism to weed out patently unmeritorious applications. Nothing more.

20. CDAS submits that these practical suggestions dovetail with the standard to be applied under *Vukelich*, which is addressed below.

B. Principled Submission

21. CDAS submits that the *Vukelich* standard should be a low one. CDAS respectfully adopts the position advanced by the respondent Johnston, that the correct threshold is whether the application is "not frivolous".

22. Conscious of its obligation not to repeat the parties' submissions, CDAS will not do so. However, it wishes to add some general comments in support of its position about the need for a low *Vukelich* threshold.

23. The higher the *Vukelich* threshold is set, the more applications for a *voir dire* will be denied. This increases the risk of potentially meritorious applications being summarily dismissed. This has serious implications for accused persons; their right to make full answer and defence; and their right to a fair trail, as protected by sections 7 and 11(d) of the *Charter*.[16]

24. In many possession cases, such as drug cases, a search warrant challenge will be the one and only line of defence. Shutting down that defence before it begins may effectively decide the case. Preventing an accused from advancing a *Charter* claim through a *voir dire* may, in practice, eviscerate the right to make full and defence, with serious penal consequences. In recognition of this reality the courts ought to set the *Vukelich* bar low, so arguments central to the defence, which are not frivolous, are not unfairly weeded out.

25. CDAS submits this "proportionality approach" to the *Vukelich* threshold is consistent with *Charter* values such as the right to make full answer and defence and the right to a fair trial. It is also consistent with the desire to avoid wrongful convictions. Unduly limiting the ability of accused persons to fight against conviction not only affects them personally, it also affects the administration of justice generally. Public confidence in the administration of justice, which is at the core of section 24(2) of the *Charter*, would be shaken by the use of a screening mechanism to unfairly limit challenges to state action.[17] All members of the public, not just accused persons, have an interest in a fair justice system. Risking unfair trials to promote efficiency undermines core constitutional values and public confidence.

26. CDAS respectfully submits that in the *Vukelich* context, courts should err on the side of caution. Only frivolous applications should be dismissed at the outset, after a limited summary process.

27. The submissions above address prejudice at the trial level. CDAS will now address the issue of prejudice at the appellate level.

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[16] *Canadian Charter of Rights and Freedoms,* Part 1 of the Constitution Act 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, ss. 7, 11.
[17] *Charter*, s. 24(2).

28. On appeal, substantive *Charter* rulings are reviewed on a standard of correctness.[18] That means if an accused person is granted a *voir dire*, but is ultimately unsuccessful at its conclusion, they can appeal the denial of their *Charter* claim based on it being "incorrect". However, if an accused person is denied a *voir dire*, that denial may be characterized as a "trial management decision" which is accorded deference on appeal. This substantially reduces their ability to challenge the ruling.

29. There is "double unfairness" to the accused. They are denied the ability to advance a *Charter* claim at trial and that denial is effectively insulated from appellate review. This "synergy of prejudice" is damaging to both the individual accused and the reputation of the justice system generally.

30. This court recently adverted the exact danger that CDAS points to. In *R v Samaniego*[19] Moldaver J., speaking for the majority, stated:

> ... Under their trial management power, trial judges are permitted to control their courtroom and streamline the functioning of the trial. Exercises of trial management will generally not overlap with evidentiary rulings, but sometimes they do. This does not mean that erroneous evidentiary rulings can be justified under the guise of trial management. They cannot.
>
> …
>
> Ensuring efficiency does not mean sacrificing the rules of evidence. Mr. Samaniego submits that trial management decisions and evidentiary rulings must always remain separate to ensure that erroneous evidentiary rulings are not glossed over under the guise of trial management on appellate review. While I disagree that trial management and evidentiary rulings must *always* remain separate, I agree that trial management does not provide a safe haven for erroneous evidentiary rulings.
>
> Trial management decisions and the rules of evidence must generally remain separate issues on appellate review. The standard of review for evidentiary errors is correctness, while deference is owed to trial management decisions. Extricable evidentiary errors are held to a more stringent standard of review than trial

[18] *R. v. Le*, 2019 SCC 34 at para. 23.
[19] *R. v. Samaniego*, 2022 SCC 9.

> management decisions. The trial management power is not a license to exclude otherwise relevant and material evidence in the name of efficiency.
>
> Sometimes trial management decisions will overlap with the rules of evidence. For example, where counsel tries to revive a line of inquiry that the trial judge has previously barred in an evidentiary ruling, the rules of evidence and trial management overlap. Drawing on the previous evidentiary ruling - - that the line of questioning is barred by an evidentiary rule -- the judge exercises their trial management power to curtail irrelevant and repetitive questioning. As this example illustrates, it is important on appellate review that trial management decisions are examined in the context of the trial as a whole, rather than as isolated incidents. Trial management decisions, as the one in this example, engage the judge's discretion. Absent error in principle or unreasonable exercise, these discretionary decisions deserve deference (*R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at para. 44).
> [Emphasis added] [20]

31. The danger is that, through *Vukelich*, *Charter* claims may be shut down at the "front end", after only a summary proceeding. That effectively becomes a substantive *Charter* ruling denying the accused relief. However, that ruling will not be reviewed for correctness, because it is characterized as discretionary. In this way, *Vukelich* rulings are insulated from appellate review. This creates substantial unfairness to the accused by ensuring that his/her *Charter* claims are never decided on their merits, either at trial or on appeal.

32. Ironically, a person denied the ability to advance their arguments at trial is worse off on appeal. The prejudice is simultaneously repeated and magnified at the appellate level. This is the "synergy of prejudice".

33. In light of this court's recent comments about trial efficiency, trial judges may be tempted to apply *Vukelich* more, rather than less aggressively.[21] Appellate courts, even if they wish to intervene, will be constrained by the limited standard of review. Legally incorrect decisions may never be substantively remedied. This is unfair to the accused and detrimental to the integrity of the justice system as a whole.

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[20] *Ibid* at paras. 4, 24-26.
[21] *Cody* at paras. 38, 39.

PART IV – CONCLUSION

34. CDAS respectfully submits that the cure has become worse than the disease. *Vukelich*, which was intended to prevent delay, is causing it. The desire to increase efficiency is not working in practice. *Vukleich* hearings have become a major source of inefficiency and create a serious risk of prejudice to the accused at both the trial and appellate levels. CDAS respectfully submits that intervention is required.

PART V – COSTS SUBMISSION

35. CDAS seeks no costs and respectfully requests that none be awarded against it.

ALL OF WHICH IS RESPECTFULY SUBMITTED, this 24th day of May, 2022

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PARTS VI – TABLE OF AUTHORITIES

Case Law

Authority	**Paras.**
R. v. Ali-Kashani, 2017 BCPC 358	7, 8, 12, 13, 14, 15
R. v Cody, 2017 SCC 31	16, 33
R. v. Jordan, 2016 SCC 27	16
R. v. Le, 2019 SCC 34	28
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Legislation

Authority	**Paras.**
Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, ss. 7, 11, 24(2)	23, 25