

***VETROVEC* WITNESSES: WEAVING  
TOGETHER MEANINGFUL PROTECTION  
AGAINST WRONGFUL CONVICTIONS**

Nikos Harris, Q.C.

Peter A. Allard School of Law

Peck & Company

# Defining the *Vetrovec* / Incentivized Witness

- Severe Credibility and Reliability Issues Prior to Testifying
  - Single overwhelming issue (e.g. perjury conviction, accomplice who received deal, or other significant other state benefits)
  - Combination of significant issues (e.g. substantial criminal record, ongoing criminal activity, and multiple inconsistent statements)

# 4<sup>th</sup> Leading Cause of Wrongful Conviction

- 20% of wrongful convictions involved lying *Vetrovec* witness
  - Morin, Sophonow, Assoun
- “prone to personal advantage of over public duty” (*R. v. Khela*)
- “convincing liars” (*R. v. Khela*)
- massive state benefits
- experts at creating “corroborated accounts”

# Testimony is Presumptively Admissible

- Credibility and Reliability Assessment for Admissibility Are Limited to Presumptively Inadmissible Evidence: Hearsay, Expert Evidence, Similar Fact Evidence: *R. v. Buric*; *R. v. Murrin*
- Should this be revisited due to *R. v. Hay* and *R. v. Hart*?

# *Vetrovec and Khela*: Mandatory Caution

- Separate out *Vetrovec* Witnesses in Jury Instructions
- Review Circumstances Which Caused them to be in *Vetrovec* Category
- Instruct Trier of Fact That They Can Convict on their Testimony Alone But Dangerous To Do So (but see *R. v. Hay*)
- Instruct Trier of Fact to Consider Whether Confirmatory Evidence Restores Faith in *Vetrovec* Witness

# Confirmatory Evidence is the Critical Protection Against Miscarriages of Justice for *Vetrovec* Witnesses

- Must Carefully Define Confirmatory Evidence
- Critical to Understand How Confirmatory Evidence is to be Used by the Trier of Fact in Assessing Whether Identity of Perpetrator Proven Beyond a Reasonable Doubt

# *Vetrovec and Khela*: Scope of Confirmatory Evidence Extremely Broad

- Includes evidence which does not implicate the accused, such as that which only confirms offence committed as described by *Vetrovec* witness
- can be evidence of highly suspect reliability
- can be evidence of highly suspect credibility
- can be second *Vetrovec* witness: *R. v. Illes*; *R. v. Magno*

# *Khela* Adds Two Requirements for Confirmatory Evidence

- Must be **Independent**
  - did *Vetrovec* taint corroborating witness?
  - did *Vetrovec* tailor account through means such as access to disclosure, presence at crime scene, or speaking to others present at crime scene?
- However, determining independence generally left to trier of fact: *R. v. Magno*



# Materiality Requirement

- Confirmatory Evidence must go to an important part of the *Vetrovec* Testimony
- What is Confirmed?
  - *Khela*: [43] This passage was cited with approval in this Court's unanimous judgment in *Kehler*, where the Court concluded that confirmatory evidence must be capable of restoring the trier's faith in relevant aspects of the witness' account (para. 15). As a matter of logic, where the only issue in dispute is whether the accused committed the offence, the trier of fact must be comforted that the impugned witness is telling the truth in that regard before convicting on the strength of that witness's testimony.

# Key: Admissibility of Confirmatory Evidence Does Not Equate With Safe to Convict

- Trier of Fact must assess cogency of confirmatory evidence
- Confirmatory Evidence with substantial flaws and frailties should be given limited weight
- In many cases, particularly with severe *Vetrovec* witness, only highly reliable evidence that directly implicates the accused will be sufficient to meet reasonable doubt standard

# This Qualitative Approach to Confirmatory Evidence Applied In Judge Alone Trials

- *R. v. Kylo, Lubkey and Toupin*, 2003 BCSC 1926
- *R. v. Chenier*, 2008 CanLII 61242 (Ont. S.C.)
- *R. v. Paterson*, 2017 BCSC 53

# Appellate Support for Qualitative Approach?

## Enter *R. v. Seruhungo*

- Severity of *Vetrovec* witness relevant
- Confirmatory Evidence with frailties may be given little or no weight
- Confirmatory Evidence easily accessible from other sources may be given little or no weight
- Some Reliable Evidence which implicates accused may be insufficient to convict on the *Vetrovec* testimony

# Additional Jury Instructions

- Consider the Severity of the *Vetrovec* Witness
- Consider the credibility and reliability of the confirmatory evidence
- The presence of some confirmatory evidence does not mean it is necessarily safe to convict
- If *Vetrovec* witnesses were present at the scene they will be able to accurately describe the offence and substitute the perpetrator
- Ensure that the confirmatory evidence convinces you beyond a reasonable doubt that the accused was the perpetrator and not just that the offence occurred as described by the *Vetrovec* witness

# Case Authorities Cited

- “*R. v. Seruhungo*: The Supreme Court of Canada 'Substantially' Affirms a Powerful Tool to Protect Against Wrongful Convictions Caused by *Vetrovec* Witnesses” (2017) 38 C.R. (7th) 64-72
- “Justice for All: The Implications of *Hart* and *Hay* for *Vetrovec* Witnesses”(2015) 22:1 C.R. (7th) 105-117
- “*Vetrovec* Cautions and Confirmatory Evidence: A Necessarily Complex Relationship” (2005) 31 C.R. (6th) 216-230