CITATION: *R. v. Nygard*, 2025 MBPC 64

THE PROVINCIAL COURT OF MANITOBA

BETWEEN:

His Majesty the King	)	Robbie D. Parker, K.C.
	)	for the Crown
	)	
-and-	)	
	)	
Peter John Nygard	)	
	)	Gerri Wiebe, K.C.
(Accused) Applicant	)	for the (Accused) Applicant
	)	
	)	
	)	
	)	
	)	Reasons for Decision
	)	Delivered: October 8, 2025

Pursuant to s. 486.4(1) of the Criminal Code of Canada, any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way.

HARVIE. P.J.

INTRODUCTION

[1] The accused Peter Nygard ("Nygard") is charged with sexual assault contrary to s. 271 of the *Criminal Code* (the "*Code*") and unlawful confinement contrary to s. 279(2) of the *Code* arising from an alleged incident on November 18, 1993. Counsel for Nygard has brought a "lost evidence" Application and is seeking a declaration that Nygard's right to make full answer and defence pursuant to s. 7 of

the *Charter of Rights and Freedoms* (*"*the *Charter"*) has been violated due to the inability of Crown counsel to disclose certain police reports, notes and a statement of the complainant completed around the time of the incident. Crown counsel concedes that the material in question is relevant and would otherwise be disclosed to defence. However, given the passage of time it has likely been lost or purged from the police data systems. Defence seeks a stay of proceedings pursuant to s. 24(1) of the *Charter*.

[2] A few observations are warranted at the outset. It is with increasing frequency that courts are called upon to hear cases involving "historical" sexual assault allegations. The fact that these allegations are sometimes very dated does not make them any less serious. At times, the opposite is true. It is now recognized that the violent nature of these types of offences can significantly impact a victim's ability to discuss the offending behaviour, and many victims of sexual violence require years to process the trauma before they are able to come forward and disclose the assault to the police and the courts.

[3] The criminal justice system is aware of these challenges and is trying to respond appropriately. Allegations which are historical in nature often present challenges for both the prosecution and the defence. The passage of time can cause memories to fade, witnesses to become unavailable or evidence to go missing. It is critically important that all participants within the criminal justice system make

appropriate adjustments to recognize these challenges, to respond appropriately to victims who are prepared to confront their abuser, while at the same time respecting the constitutional rights of the accused and the need for proof of any allegations beyond a reasonable doubt, thus guarding against wrongful convictions.

[4] Such is the challenge in this case, which involves allegations of a sexual assault that occurred more than 30 years ago. In 1993, Nygard was an internationally recognized fashion mogul, and the complainant was a young woman who was a model and aspiring actress who says she was in Winnipeg at the invitation of Nygard's company to discuss modelling for his signature line of clothing. She alleges that while at his Notre Dame warehouse she was locked in a suite within the warehouse and was repeatedly sexually assaulted. Upon leaving the warehouse, she attended to a friend's apartment, where she briefly spoke to members of the Winnipeg Police Service ("WPS"). Immediately upon her return to Vancouver approximately one week later she spoke to an officer of the North Vancouver Royal Canadian Mounted Police ("RCMP") at her home. Although she says she provided a "statement" she also indicated that she would not "press charges".

[5] Any notes or reports of her 1993 interaction with WPS members are no longer available. The statement and any notes or reports generated as a result of her meeting with the Vancouver RCMP officer are also no longer available. Given the amount

of time that has elapsed and the possible classification of these interactions by the respective police forces, both are presumed to have been purged from their systems.

[6] Almost 27 years later, on June 25, 2020, the complainant provided a recorded video statement to members of the WPS disclosing details of the alleged offences. This statement has been provided to defence counsel and is the only evidence available of the elements of the alleged offences.

[7] Cases involving "lost evidence" are not new and are largely fact based. I note at the outset that there is no suggestion that these documents were intentionally destroyed in order to subvert the prosecution and counsel is not asserting that their destruction amounts to an abuse of process. Evidence was filed as to the efforts made to locate these documents and Crown counsel argues that the document retention polices of the police agencies are the likely reason for their destruction. These proceedings therefore require an analysis of the available evidence respecting the efforts made to locate the documents in question and the document retention policies of the respective police forces in order to determine whether the destruction was as a result of "unacceptable negligence". If so, a finding that a *Charter* s. 7 breach is made out, necessitating a determination of whether, on the totality of the circumstances, this is one of the "clearest of cases" warranting a stay of proceedings pursuant to *Charter* s. 24(1).

THE PROCEEDINGS

Evidentiary Foundation

[8] Unlike many other cases involving a "lost evidence" Application, counsel chose not to call *viva voce* evidence. Instead, both counsel filed affidavits which include as exhibits the transcripts of the WPS interviews conducted in June and August, 2020 of the complainant, her mother, the friend she stayed with in Winnipeg when the 1993 WPS check occurred, as well as an undated statement of the officer.

[9] The materials also include correspondence from the respective police forces referencing the efforts made to locate the documents in question and their document retention policies. Interestingly, while the City of Winnipeg By-Law governing the management of police reports and other related documents was provided, the written policy if there is one, governing the retention and destruction of RCMP documents was not filed. No evidence was called to explain the rationale behind either retention policy or how these policies were applied to reports generated in specific investigations. The nature and sufficiency of the evidence before the Court will be the subject of later discussion.

Notification of the "Unacceptable Negligence" Allegation

[10] As will later be noted, the case law requires the Court to consider whether the evidence was lost or destroyed due to "unacceptable negligence" on the part of the respective police forces. At the suggestion of the Court, Crown counsel formally

notified the RCMP officer of the allegation made by defence counsel that both his and the RCMP's handling of the 1993 investigative reports supports a finding of "unacceptable negligence". Crown counsel confirmed on the record that such notification was provided to the officer. However, despite a request from the Court, Crown counsel did not provide formal notification that a negligence allegation had been made against the RCMP force. Similarly, I have no indication that the WPS was notified of the negligence allegation. While these parties do not have formal standing in these proceedings, it seemed important that they be given every opportunity to provide an explanation to the Court through Crown counsel. I do note that the materials filed contain correspondence from both the RCMP and the WPS indicating that the investigative files were "likely" purged pursuant to their respective document retention policies. Further, given that the RCMP officer was notified, he had opportunity to advise his employer. I am satisfied, therefore, that the respective police agencies had an adequate opportunity to respond through Crown counsel to the issues raised in this Application.

THE ALLEGED SEXUAL ASSAULT AND INITIAL INVESTIGATION

[11] In order to assess the retention or purging of investigative reports by the police, it is necessary to consider their perceived importance at the time they were created. This requires an analysis of the alleged facts, the information available to

police at the time of the 1993 interactions with the complainant, and whether the information available to the respective police forces changed over time.

[12] In a statement provided to the WPS on June 25, 2020, the complainant alleges that she came to Winnipeg on November 18, 1993, to meet with Nygard to discuss modelling for his signature line of clothing. After being picked up at the airport and taken to the Nygard warehouse on Notre Dame, she eventually ended up in a suite within the warehouse where she alleges that she was forcibly confined and repeatedly sexually assaulted by Nygard. Because the door to the suite was locked by a key-only mechanism, she was unable to leave. She initially thought she had been in the apartment for a much longer period of time but later determined that she was able to leave on November 19, 1993. Having located a telephone within the suite, she said she called both her mother and a friend who lived in Winnipeg, "KN", asking him to pick her up. She was able to escape when she discovered that the door had been left unlocked. KN, who is a relative of Nygard's, was friends with the complainant as they were both pursuing a career in acting. He came to the Notre Dame warehouse, after which they went for food and then back to his apartment, where she stayed for approximately one week.

[13] On the day she escaped the warehouse suite, the complainant said that two WPS officers, along with a social worker, attended to KN's apartment. She spoke to them briefly and told them "I am safe, I am fine, I will be fine" after which they

left. In his 2020 statement to WPS members, KN confirmed that he received an unexpected call from the complainant, that he picked her up from the Nygard warehouse and eventually took her to his apartment. He recalled WPS members attending and speaking briefly to the complainant, but he gave the parties privacy and did not overhear what was said. The complainant told him that she was in Winnipeg to discuss a modelling opportunity but was frustrated because Nygard was on the phone and was "ignoring her", causing her to call KN and leave. KN said that he has never had a close relationship with Nygard, and there is no suggestion from the complainant that he was involved in the circumstances leading to the sexual assault.

[14] Immediately upon her return to Vancouver, the RCMP officer came to the complainant's house to take a statement. In his typewritten statement filed in these proceedings, which is undated but appears to have been completed after the complainant's 2020 disclosure to WPS, the officer confirmed that after being contacted by the complainant's parents, he had asked the WPS to check on the wellbeing of the complainant at the Nygard warehouse. According to the RCMP officer's statement, he met with the complainant upon her return to Vancouver and recalls being told by the complainant that she was at a "social gathering" at the Nygard "office/warehouse" when she began to feel unwell. She said she went to the bathroom, where she felt that she was being watched. Believing that she had been

drugged, she called Nygard's relative who "got her out of that situation". It is important to note that in his statement, the officer stated that he suspected at the time that she may have been sexually assaulted but understood why the complainant "did not wish to pursue" the matter. He did, however, advise the complainant that she could talk to him any time if there was more that she wished to tell him.

[15] In her 2020 statement to WPS members, the complainant's recollection of the discussion with the RCMP officer is somewhat different. She candidly admits that she cannot recall everything she told the officer but does indicate that she told him that she "had been held against her will". While she was initially inclined to pursue the matter, she told WPS members that "the long and short of it is that I didn't press charges".

[16] The complainant and the RCMP officer stayed in contact, and she estimates that it was a number of years after the incident that she contacted him to ask him how long DNA would last on clothing, as she had kept the coat she was wearing on the night of the alleged sexual assault. The officer said he told her that he could not give her a solid answer but advised that she keep the item in a paper bag in a cool, dry place. After receiving that call, he stated that he "felt his suspicions were correct" that the complainant had been sexually assaulted. It was the officer who, some years later, contacted the complainant and told her about a class action lawsuit against Nygard that had been commenced in the United States. In his undated statement,

the officer indicates that he tried to find the "police file from 1993" but that the "North Vancouver Detachment does not keep concluded files that long" and further that there is "no electronic record of the file."

[17] The complainant's mother also provided a statement to WPS members in 2020 confirming that she had contacted the police in Vancouver because she hadn't heard from her daughter after she left for Winnipeg. The Vancouver police advised that they would be contacting the WPS. Shortly after, the complainant called her mother and said words to the effect of "I'm getting out of here. Don't worry. I'm okay." She believes the complainant phoned when she got to KN's apartment, confirming that she was with KN and that she was okay. She also confirmed the meeting between the officer and the complainant at their home after her return from Winnipeg.

LOST EVIDENCE - THE LEGAL PRINCIPLES

[18] Both Crown and defence counsel agree on the general legal principles governing an Application of this nature. They also agree that there is a significant degree of overlap between the factors to be considered respecting a *Charter* s. 7 breach and, if necessary, a *Charter* s. 24(1) analysis.

[19] The Supreme Court of Canada's decision in *R. v. La,* [1997] 2 S.C.R 680 is the seminal authority respecting lost or destroyed evidence. Speaking for the majority, Sopinka J. discussed the relationship between the Crown's duty to disclose

evidence and the duty to preserve evidence. When the twin duties of preservation and disclosure are at issue, Crown counsel has a duty to provide an explanation to the Court for the loss or destruction of the evidence based on the following principles (at paras 20-21):

> 20) This obligation to explain arises out of the duty of the Crown and the police to preserve the fruits of the investigation. The right of disclosure would be a hollow one if the Crown were not required to preserve evidence that is known to be relevant. Yet despite the best efforts of the Crown to preserve evidence, owing to the frailties of human nature, evidence will occasionally be lost. The principle in *Stinchcombe (No. 2)*, *supra*, recognizes this unfortunate fact. Where the Crown's explanation satisfies the trial judge that the evidence has not been destroyed or lost owing to unacceptable negligence, the duty to disclose has not been breached. Where the Crown is unable to satisfy the judge in this regard, it has failed to meet its disclosure obligations, and there has accordingly been a breach of s. 7 of the *Charter*. Such a failure may also suggest that an abuse of process has occurred, but that is a separate question. It is not necessary that an accused establish abuse of process for the Crown to have failed to meet its s. 7 obligation to disclose.
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> 21) In order to determine whether the explanation of the Crown is satisfactory, the Court should analyse the circumstances surrounding the loss of the evidence. The main consideration is whether the Crown or the police (as the case may be) took reasonable steps in the circumstances to preserve the evidence for disclosure. One circumstance that must be considered is the relevance that the evidence was perceived to have at the time. The police cannot be expected to preserve everything that comes into their hands on the off-chance that it will be relevant in the future. In addition, even the loss of relevant evidence will not result in a breach of the duty to disclose if the conduct of the police is reasonable. But as the relevance of the evidence increases, so does the degree of care for its preservation that is expected of the police.

[20] After discussing the test for abuse of process (a claim that has not been advanced in this case) the Court noted the test for a stay of proceedings under *Charter* s. 24(1) is as follows:

> 23) In either case, whether the Crown's failure to disclose amounts to an abuse of process or is otherwise a breach of the duty to disclose and therefore

> a breach of s. 7 of the *Charter*, a stay may be the appropriate remedy if it is one of those rarest of cases in which a stay may be imposed, the criteria for which have most recently been outlined in *O'Connor*, *supra*.

[21] The principles to be applied in a lost evidence application were helpfully summarized by the Nova Scotia Court of Appeal in *R. v. B. (F.C.)*, 2000 NSCA 35:

> (1) The Crown has an obligation to disclose all relevant information in its possession.
> (2) The Crown's duty to disclose gives rise to a duty to preserve relevant evidence.
> (3) There is no absolute right to have originals of documents produced. If the Crown no longer has original documents in its possession, it must explain their absence.
> (4) If the explanation establishes that the evidence has not been destroyed or lost owing to unacceptable negligence, the duty to disclose has not been breached.
> (5) In its determination of whether there is a satisfactory explanation by the Crown, the Court should consider the circumstances surrounding its loss, including whether the evidence was perceived to be relevant at the time it was lost and whether the police acted reasonably in attempting to preserve it. The more relevant the evidence, the more care that should be taken to preserve it.
> (6) If the Crown does not establish that the file was not lost through unacceptable negligence, there has been a breach of the accused's s. 7 **Charte**r rights.
> (7) In addition to a breach of s. 7 of the **Charter**, a failure to produce evidence may be found to be an abuse of process, if for example, the conduct leading to the destruction of evidence was deliberately for the purpose of defeating the disclosure obligation.
> (8) In either case, a s. 7 breach because of failure to disclose, or an abuse of process, a stay is the appropriate remedy, only if it is one of those rare cases that meets the criteria set out in **O'Connor**.
> (9) Even if the Crown has shown that there was no unacceptable negligence resulting in the loss of evidence, in some extraordinary case, there may still be a s. 7 breach if the loss can be shown to be so prejudicial to the right to make a full answer and defence that it impairs the right to a fair trial. In this case, a stay may be an appropriate remedy.
> (10) In order to assess the degree of prejudice resulting from the lost evidence, it is usually preferable to rule on the stay application after hearing all of the evidence.

[22] There is no issue with respect to the first three points in the *B. (F.C.)* summary. Crown counsel fairly acknowledges the relevance of the items in question, that there

would be a duty to disclose these investigative documents if they were available, and that there is an onus on the Crown to explain their absence. At issue is whether Crown counsel has adequately explained the efforts to locate the missing documents, and to determine whether the explanation for the missing documents, being an adherence to document management By-Laws or policies of the respective police forces amounts to "unacceptable negligence". Both *La* and *B. (F.C.)* agree that this analysis involves an assessment of the perceived relevance of the documents at the time they were created and an assessment of whether the conduct of the police in attempting to preserve the documents was reasonable.

[23] Defence counsel argues that the evidence falls far short of that being necessary to discharge the Crown's onus, expressing concerns over what ought to have been the perceived relevance of the documents and the lack of evidence supporting the document retention policies relied on by Crown counsel.

What Amounts to "Unacceptable Negligence"? Guidance from the Courts

[24] Courts have had to consider the issue of whether an explanation for missing documents is due to something other than "unacceptable negligence". Each case is highly fact based, and each demonstrates the evolution of the law as it relates to the twin duties of preservation and disclosure of evidence. For example, in *La,* the Court accepted that a missing interview with the complainant, recorded for a child welfare rather than a criminal hearing, was not lost due to "unacceptable negligence" and the

officer had taken reasonable steps to preserve it. Similarly, in *B. (F.C.)* concerns were raised when only a typewritten copy of a 1984 statement made by the complainant, rather than the original, was available, the original having been destroyed due an RCMP document retention policy of five years. The Court was satisfied that there was no "unacceptable negligence", but emphasized that the analysis required consideration of what was reasonable "at the time the file was destroyed," noting that it was not until the 1991 decision in *R. v. Stinchcombe (No.1),* [1991] 3 S.C.R. 326 that the duty of full disclosure was determined to be a constitutional right, and not until the 1993 decision in *R. v. Egger*, [1993] 2 S.C.R. 451 that the duty to disclose included a duty to preserve evidence.

[25] In *R. v. Bradford,* (2001) O.R. (3d) 257 (ONCA) the Court considered the issue of the perceived relevance of a complainant's statement as it related to the duty of the police to preserve evidence. In March 1984, the complainant made statements to the police, both written and recorded, alleging sexual assaults by the accused. Although Crown counsel concluded that no charges would be laid, the accused was advised that the complainant's statement would be retained for use as similar fact evidence. In 1995, following a complaint to the College of Physicians and Surgeons, charges were laid against the accused involving the complainant's 1984 allegations and allegations involving four other complainants. The statement taken in 1984 could not be located, and at trial there was no direct evidence as to what had

happened to it. The Ontario Court of Appeal reviewed a number of cases involving evidence which had been lost or destroyed, concluding that it was open to the trial judge to find unacceptable negligence. As it relates to the issue of the perceived relevance of the statement, the Court noted (at para. 32) "The fact that the police told the accused the statement could be used as similar fact evidence in the future is indicative that the officers realized that the statement might have future potential use. For this reason alone, they should have taken steps to preserve it."

[26] In *R. v. B.E.*, 2016 ABPC, the Court considered the delayed reporting of sexual offending as it relates to the need to preserve evidence. The accused was charged with a historical sexual assault allegedly having occurred between January 1, 1986, and March 1, 1990. A complaint was made to police in 1990, resulting in audio statements being recorded and other notes and reports completed. A decision was made not to lay criminal charges. The complainant made a second complaint in 2013, with charges authorized in March 2015, by which time much of the evidence from the initial investigation had been destroyed. After conducting a thorough review of the authorities to date, the Court commented on the distinction between documents which are lost as opposed to those which are destroyed. In finding that the items had been destroyed due to "unacceptable negligence", the Court commented on the need to preserve evidence gathered during a sexual assault investigation, even where no charges are laid (at para 133):

> Finally, the *viva voce* evidence adduced by the Crown in the *voir dire* to explain how the original file was either lost or destroyed does not satisfy me that there wasn't any duty or responsibility on the CPS at the time, to preserve the file. The absence of a CPS retention policy at the time is not a complete answer for the Crown, particularly in cases involving allegations of serious child sexual abuse. Members of the CPS Child Abuse Unit ought to have known that even when files are concluded without charge, these types of cases have a habit of resurfacing 10, 20 or 30 years or more, down the road. The number of reported cases across Canada dealing with historical sexual assaults is well documented and publicised.
>
> *Emphasis added*

[27] Although the facts involved correspondence lost by the Prosecutions Office rather than the police, the Court in *R. v. V.C.,* 2017 MBQB 94 addressed the importance of retaining key documentation in the face of the sometimes-changeable dynamic involving sexual assault prosecutions. The accused was charged in 1991 with "historical" sexual assault offences. In 1993, the complainant sent a letter to Crown counsel, through her counsel, as a result of which Crown counsel entered a stay of proceedings on all charges. A short time later, the complainant indicated a willingness to proceed with the allegation, however no steps were taken to recommence the prosecution. In December 2014 the accused was arrested for the same charges that had been previously laid. The 1993 letter resulting in the earlier stay of proceedings could not be located. While the Court was satisfied as to the explanation made regarding the efforts to locate the letter, the Court was not satisfied as to the explanation as to why the letter was lost, finding that "the need to retain that document and preserve it was blatantly apparent, particularly when, in 1994, (the complainant) requested that charges be recommenced." (at para 54)

[28] As early as the Supreme Court's decision in *La,* the message from the Courts has been clear - the more relevant the document, the greater the obligation to preserve. And as it relates to sexual assault investigations, police departments must recognize that disclosures may be made incrementally and over time. Document retention policies need to reflect that reality. However, the facts in this case suggest some concerning shortfalls in that regard.

RETENTION POLICIES AND MISSING INVESTIGATIVE FILES

"Circumstances Surrounding the Loss of the Evidence"

The Winnipeg Police Service

[29] In both *R. v. La* and *R. v. B. (F.C.),* the Courts recognized the need to assess the perceived relevance of the documents at the time they were created and to determine whether the police acted reasonably in their efforts to preserve the reports. As the evidence demonstrates, after a request to produce the documents was made in 2025, efforts were made by the WPS to locate the items in question, and those efforts were significantly impacted by the manner in which the documents were presumably classified at the time of their destruction.

[30] In correspondence dated February 12, 2025, the WPS explains both the search efforts made and the policy considerations behind the apparent destruction of the reports created for what is assumed to be a "wellness" or "wellbeing check". As to the first issue, the correspondence states that "the WPS has searched current

electronic record systems and has located no physical records; however, through the course of investigation the above incident has been corroborated." The correspondence goes on to note:

> Electronic systems which were in place in 1993 are no longer accessible. The WPS is unable to conduct a search of officers notebooks. Notebooks are stored by officer badge number. The officer badge number is unknown and a complete and accurate list of WPS officers by rank for the relevant time period cannot be compiled. All notebooks from the relative time period may not have been retained. Furthermore, attending officers may not have made an entry in their notebook or it might not have been identified as such."

As to the length of time documents are retained, the correspondence noted as follows:

> The "record retention period for these types of records has passed (see: City of Winnipeg Records Management By-Law No. 123/2020 Schedule C – Winnipeg Police Service 105(7)/(121.07) and 110(1)/126.01)."

[31] It appears from this correspondence that efforts were made to locate the documents in question, which apparently have long since been purged from the system. What the Court must assess is whether, to use the language of the Court in *La* "the conduct of the police" in purging these documents was reasonable given the perceived relevance at the time they were created. There are significant evidentiary shortfalls which make the assessment of this issue difficult.

[32] First, the correspondence notes that "electronic systems which were in place in 1993 are no longer accessible." This statement is difficult to assess as it is before the Court without any further explanation. Secondly, the correspondence states that either the officers' notebooks cannot be located, as they are stored by badge number

or may not have been retained. Again, there is no information beyond this statement as to why notebooks would not be retained, or who bears that responsibility. The statement that notebooks are stored by badge number suggests that the force has taken on this role, but is of limited assistance given that, for reasons not articulated, "a complete and accurate list of WPS officers by rank for the relevant time period cannot be compiled". This type of evidence falls short of assisting the Court in determining whether the documents are missing due to "unacceptable negligence".

[33] The available evidence suggests that the 1993 interaction between the complainant and WPS members was a brief one. This is significant when assessing the apparent categorization of the interaction which Crown counsel argues was likely classified as a "wellness check". He points to the policy provisions which govern the length of time certain WPS documents are retained. The *City of Winnipeg Records Management By-Law* No.123/2020 Schedule C - Winnipeg Police Service, which was filed, states that "a record of requests to locate persons for compassionate reasons" could be destroyed after one year. He argues that the policy is a reasonable one given the volume of calls the WPS responds to each year. Crown counsel filed statistical reports of the WPS for the years of 1991 through 1995 which contain details as to the number of calls for service. For example, in 1993 (the year of this alleged offence) there were a total of 266,370 calls for service, 75,006 of which involved the reporting of a *Criminal Code* offence.

[34] There are several evidentiary and practical concerns respecting Crown counsel's position. First, it requires the Court to accept that the WPS attendance to speak to the complainant was nothing more than a "wellness" or "wellbeing check". Even though WPS records are retained depending in part on their categorization, the term "wellness check" does not appear to be defined. Crown counsel urges a plain language interpretation of this term. But regardless of how the Court or counsel define the term, there is no evidence as to whether individual officers were trained to properly assess and classify matters, or how police calls were categorized or how notes and reports were logged. What we do know from the evidence is that WPS members responded to a request from the RCMP officer to check on the complainant at the request of the complainant's mother, that they initially thought she was at the Nygard warehouse but subsequently located her at KN's apartment. The evidence is not clear as to whether any further concerns, beyond the "wellbeing" of the complainant, were expressed to WPS officers who attended. Interestingly, the complainant recalls that the WPS officers who attended were accompanied by a "social worker". If her recollection is correct, this suggests that the call went beyond simply a wellbeing check on a young woman who had not called home for a few days. There is no explanation in the evidence as to why a "social worker" would accompany WPS members on a "wellness check", but if that did occur, it does suggest a heightened level of importance to the call.

[35] A further difficulty in assessing the explanation for the apparent destruction of the documents is the fact that while the 2020 *City of Winnipeg Records Management By-Law* is before the Court, there is no evidence as to By-Laws or policies governing records retention in the 1990s, when these documents were presumably destroyed. Nor is there any evidence whatsoever as to the legal or practical rationale underlying the By-Law. I am very troubled by the evidence that suggests that the reports would have been purged from the system, either after one year due it being categorized as a "wellness check" or possibly after 25 years if the report was categorized as "obsolete or superseded". From a practical perspective, this means that even if the police reports or notes were classified as something other than a "wellness check", they may well have been destroyed by the time the complainant came forward with her 2020 disclosure.

[36] No evidence was proffered as to why either time-period was chosen. Some evidence indicating the constraints on computer storage systems, the time related to the scanning of documents or other systems-based difficulties would have allowed the Court to determine whether such a policy is reasonable. Challenges and opportunities related to the electronic storage of documents have changed drastically since the 1993 decision of the Supreme Court's decision in *La*. The absence of evidence on this point is problematic, given the onus on the Crown.

[37] While these concerns could apply to a vast array of investigations, they are particularly problematic given what we know about sexual assault victims and the difficulty with timely reporting. And as defence counsel rightly points out, there are glaring concerns with such policies given that there are no limitation periods in the *Code* barring prosecution. She fairly argues that an accused may be called upon to respond to allegations which are many decades old and be expected to produce evidence supporting a denial of an allegation, but pursuant to this By-Law a police force is not required to maintain notes related to an early investigative interaction with a complainant that may not have resulted in charges being laid.

[38] All of the foregoing supports defence counsel's contention that the onus on the Crown to establish that the documents were not lost or destroyed due to unacceptable negligence has not been met.

The RCMP

[39] Similar evidence was tendered respecting the efforts made by the North Vancouver RCMP and the officer to locate the 1993 investigative reports. Once again, critical to this analysis is the perceived relevance of the documents at the time they were created and therefore whether the conduct of the police in attempting to preserve the documents was reasonable.

[40] In correspondence dated December 12, 2024, the North Vancouver RCMP state that they made "every reasonable effort" to locate the file respecting "the

welfare check" of the complainant in November 1993. Interestingly, the correspondence indicates a file number was likely assigned to the investigation conducted by the officer but that:

> based on Sergeant (W's) description of this investigation, it is reasonable to believe the file was scored as a check the wellbeing investigation, which carried a retention period of 24 months. Therefore, we estimate that this file was purged from our system in November 1995 or some time shortly thereafter.

[41] As with the WPS files, it appears that reasonable efforts were made to locate the items. The central issue is whether the conduct of the police in purging the file at the time was reasonable given the perceived relevance of the information at the time.

[42] Crown counsel relies on the statement that the file was "scored" as a "wellbeing investigation" and further argues that the RCMP officer did not receive anything "in the statement of the complainant to suggest any criminal activity on the part of the Applicant." I cannot accept his assertion on this point. Although their recollections differ on what was disclosed during the interview, the officer recalls being told by the complainant that "she did not feel safe" while at the Nygard warehouse and believed that she had been drugged. There was discussion about whether the complainant had any "recourse" as she was not able to "prove anything". These comments suggest that the complainant told the officer that she was the victim of some type of criminal activity. For her part, the complainant recalls telling the officer that she had been "held against her will" but that she decided not to "press

charges." It bears repeating that one of the charges the Applicant is presently facing is unlawful confinement. Both the comments of the officer and the statement of the complainant run contrary to Crown counsel's assertion that there was nothing in the way of criminal activity that was discussed at that 1993 meeting. Either way, the officer felt that the complainant was not telling him everything and suspected that she had been sexually assaulted. He told the complainant that she could contact him in the future if she wanted to discuss the matter further. This significantly elevates the interaction beyond that of a "wellbeing investigation" and is an important factor to consider when assessing the "perceived" relevance of the resulting police documents at the time they were created.

[43] The officer's actions also suggest a heightened level of concern as to what had occurred while the complainant was in Winnipeg. The evidence suggests that he attended to the complainant's residence the day she returned to Vancouver. This immediate attention would not be necessary if the only concern was the "wellbeing" of a young woman who had not called home.

[44] Given all of this, it is not clear why the December 12, 2024, correspondence from the North Vancouver RCMP concludes that "it is reasonable to believe the file was scored as a "wellbeing investigation". There is no evidence before the Court as to how investigations were "scored", who is responsible for "scoring" or for that matter, how a "wellbeing investigation" was defined. Nor is there any evidence as

to whether individual officers contribute to the process or can override the "scoring". The Court was not provided with any information as to the knowledge, training or role of individual officers as to the categorization of investigative notes and statements, an issue which is obviously important when assessing the RCMP's document retention policies. As with the City of Winnipeg By-Laws, no evidence was called as to the rationale behind the time frames in the polices, including any possible technological challenges underpinning the document retention periods. The officer was not called to explain his role, if any, in the categorization or retention of the notes, reports or statement generated, or whether his suspicions that the complainant had been the victim of an undisclosed sexual assault altered the "scoring" process.

[45] The Court was provided a chart from the North Vancouver RCMP, being the PRIME (Police Records Information Management Environment) file retention table, purportedly adopted by the RCMP "in the early-mid 2000s" and updated in June 2023. No evidence was provided explaining the periods of retention of RCMP files in existence in 1993. Without further explanation, the June 2023 chart details the retention period for a wide range of offences and indicates that a file in respect of a sexual assault or related offence would be retained for a period of 240 months. Crown counsel argues that even if the file generated as a result of the officer's interaction with the complainant was categorized as something other than a

"wellbeing investigation", it would have been destroyed before the complainant made her 2020 disclosure to the WPS.

[46] There are several problems with this argument. First, there is no evidence whatsoever as to how the time periods set out in the chart is applied to actual files. When does the time period start to run? Who is responsible for making that decision? Do the individual officers who create a report have a voice in the categorizing process? Does the time period consider the ongoing nature of some investigations, such as a suspected sexual assault? If the latter is the case, then Crown counsel's argument fails to take into account the inquiry made by the complainant to the RCMP officer regarding DNA and clothing. The officer candidly indicated in his statement that this furthered his suspicion that the complainant had been sexually assaulted. The Court must determine whether the conduct of the police in preserving evidence was reasonable. There is nothing in the evidence to indicate that the officer took steps to further the investigation or to ensure the file from his earlier interaction with the complainant remained intact. This is a very concerning shortfall in the evidence.

[47] Secondly and as indicated earlier with respect to the possible impact of the *City of Winnipeg By-Law*, I am very troubled by these retention periods as they relate to sexual assault offences. Without further compelling evidence, I cannot accept that this approach is appropriate. It bears repeating that sexual assault victims may take

years to come forward to fully disclose their victimization, and disclosures may be made incrementally. Any early interactions with any police agency, even if it does not involve a full disclosure of a sexual assault, should not be purged simply due to the passage of time without first being subject to a proper assessment to determine if the information might be needed at a later time.

Has Crown Counsel Discharged the Onus Confirming No "Unacceptable Negligence"?

[48] The twin duties of preservation and disclosure of evidence have been the subject of judicial comment since 1993. When relevant documentation, which would otherwise be disclosed is missing, the Court must consider whether the conduct of the police (or others within the prosecutorial system) was reasonable given the perceived relevance of the documents at the time. With respect to both the WPS notes or reports of the interaction with the complainant and with respect to the RCMP notes, statements and reports, I find that the evidence fails to explain the rationale behind the destruction of the documents. Therefore, I must conclude that their destruction amounts to unacceptable negligence. Applying the language in *La,* I am mindful that the destruction of these documents was not just "owing to the frailties of human nature" but likely due to the application of policies which contemplate both the retention and the destruction of documents. For Crown counsel to discharge the onus to explain the missing documents, it is not sufficient to simply argue that a By-Law or policy resulted in the purging of police files without

explaining the rationale or legal basis behind that policy. Otherwise, the Court is simply unable to assess whether the policy is a reasonable one and therefore whether the actions of the respective police departments in purging the documents was reasonable.

[49] It would be one thing if the only evidence at issue was the notes from the 1993 WPS interaction with the complainant. Despite the concerns I have about the evidentiary shortfalls in this case, I recognize that the 1993 interaction between the complainant and the WPS was a brief one. The same cannot be said of the interview conducted by the RCMP officer. I am not satisfied from the evidence that his interaction with the complainant was nothing more than a "wellbeing investigation". The limited evidence before the Court is that the officer suspected that the complainant was the victim of a sexual assault. This adds a heightened degree of importance to the report generated. That, coupled with his subsequent interactions with the complainant, do not support a finding that the documents were properly purged after having been "scored" as a "wellbeing investigation". The notes, reports and statements ought to have been preserved. I cannot conclude that the explanation for the purging of those files was reasonable in all the circumstances, given what ought to have been their perceived relevance at the time and afterwards.

[50] Returning to the findings in *La,* "Where the Crown is unable to satisfy the judge in this regard, it has failed to meet its disclosure obligations, and there has

accordingly been a breach of s. 7 of the *Charter*." I am not satisfied on a balance of probabilities that the evidence before the Court discharges the onus on Crown counsel to explain that the documents were not destroyed due to "unacceptable negligence", and therefore I find that the Crown has not met their disclosure obligations. As such, I am satisfied that there has been a breach of the Applicant's rights under *Charter* s. 7.

CHARTER s. 24(1): IS A STAY OF PROCEEDINGS AN APPROPRIATE REMEDY?

The Test for a Stay of Proceedings

[51] As was noted at the outset, a stay of proceedings pursuant to *Charter* s. 24(1) should only be granted in the "clearest of cases". The section itself is broadly worded, is very fact driven and requires a balancing of many interests:

> **24 (1)** Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

[52] The parameters of available remedies under *Charter* s. 24(1) have been discussed in many cases, recognizing that there is a degree of tension between the competing tests. In *R. v. Nixon*, 2011 SCC 34 the Court reiterated the test originally articulated in *R. v. O'Connor,* [1995] 4 SCR 411 which recognized that a *Charter* s. 24(1) analysis calls for a nuanced approach when assessing a *Charter* s.7 breach (in the context of an abuse of process application):

> Remedies less drastic than a stay of proceedings are of course available under s. 24(1) in situations where the "clearest of cases" threshold is not met but where it is proved, on a balance of probabilities, that s. 7 has been violated. In this respect the *Charter* regime is more flexible than the common law doctrine of abuse of process. However, this is not a reason to retain a separate common

> law regime. It is important to recognize that the *Charter* has now put into judges' hands a scalpel instead of an axe -- a tool that may fashion, more carefully than ever, solutions taking into account the sometimes complementary and sometimes opposing concerns of fairness to the individual, societal interests, and the integrity of the judicial system. Even at common law, courts have given consideration to the societal (not to mention individual) interests in obtaining a final adjudication of guilt or innocence in cases involving serious offences.

[53] In discussing the test for granting a stay of proceedings, the Court noted (at para 41):

> The test for granting a stay of proceedings for abuse of process, regardless of whether the abuse causes prejudice to the accused's fair trial interests or to the integrity of the justice system, is that set out in *Canada (Minister of Citizenship and Immigration) v. Tobiass*, 1997 CanLII 322 (SCC), [1997] 3 S.C.R. 391, and *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297. A stay of proceedings will only be appropriate when: "(1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and (2) no other remedy is reasonably capable of removing that prejudice" (*Regan*, at para. 54, citing *O'Connor*, at para. 75).

[54] The test to determine whether a judicial stay of proceedings is an appropriate remedy was further refined by the Supreme Court in *R. v. Babos*, 2014 SCC 16 (at para 32):

> The test used to determine whether a stay of proceedings is warranted is the same for both categories and consists of three requirements:
> (1) There must be prejudice to the accused's right to a fair trial or the integrity of the justice system that "will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome" (*Regan*, at para. 54);
> (2) There must be no alternative remedy capable of redressing the prejudice; and
> (3) Where there is still uncertainty over whether a stay is warranted after steps (1) and (2), the court is required to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against "the interest that society has in having a final decision on the merits" (*ibid.*, at para. 57).

[55] Each of the tests require an assessment of the missing evidence and a determination as to whether its destruction has prejudiced the accused in a

substantial or material way. If the accused can otherwise receive a fair trial, a stay of proceedings will not be granted. The Court must also consider any impact on the integrity of the justice system that would result from a continuation of the trial. The Court must also consider factors that extend beyond the accused, including the complainant and society as a whole in seeing matters adjudicated on their merits. Where the credibility of the complainant is the central issue at trial, the impact of the lost or destroyed evidence must be assessed in light of any agreements or concessions offered by Crown counsel or any other relatively reliable evidence available to the defence in lieu of the missing documents that could be used to challenge the complainant's credibility.

What is the Degree of Prejudice?

[56] An analysis of the first test in *Babos* involves an assessment of potential prejudice to the accused's right to a fair trial. A common thread throughout the authorities in "lost evidence" applications relates to the actual nature of the missing information and the availability of alternative sources of information which could reasonably be used to challenge the credibility of the complainant. For example, in *La,* the impact of the missing initial statement was lessened due to the availability of a further statement taken a short time later, and more importantly due to the concession that the complainant "told a few lies" during the initial interview. This concession meant that there was some foundation to the accused's challenge to the

credibility of the complainant, despite the missing interview. Similarly in *B.(F.C.)* where a finding of unacceptable negligence was not made out, Crown counsel agreed to be bound by the contents of the typewritten copy of the missing written statement of the complainant. As well, there was further evidence from that time frame that defence counsel could rely upon during cross-examination. In the circumstances of those cases, the accused's right to a fair trial was not compromised by the missing evidence, as there were concessions made to protect the integrity of the trial process.

[57] Other cases have considered the importance of the missing items as it relates to the ability of defence to challenge a complainant's credibility. For example, in *R. v. R.C.S., 2004* NSSC 232, a complainant's statement was recorded by investigating officers. However, the equipment was not tested and malfunctioned, making the first 45 minutes of the statement completely unintelligible. There were discrepancies between the available portions of the recorded statement and the notes taken simultaneously by the interviewing officer. Recognizing credibility to be an essential consideration at trial, the Court concluded (at para. 42) that "the ability of R.C.S. to effectively cross-examine the complainant is extremely important in these circumstances. There is no alternative source of information that can make up for the evidence that was lost in enabling him to make full answer and defence." The Court ultimately directed a stay of proceedings.

[58] Crown counsel distinguishes these and other authorities by arguing that the complainant in this case did not provide details of the actual assault, and therefore the statement, even if available, would provide little assistance in impeaching the complainant's credibility. There may be some validity to the argument with respect to the initial exchange between the complainant and the WPS members, which by all accounts it appears to have been a very brief encounter. However, the same cannot be said about the exchange with the RCMP officer, which appears to have been a much more involved discussion. At the very least, the complainant says she disclosed that she was held against her will and the RCMP officer had concerns about a possible sexual assault. The details of the discussion are unknown, and the complainant and the officer differ in their recollection of what was discussed, but both agree that there was discussion about whether the complainant would "press charges", suggesting that criminal activity was part of the conversation. I cannot accept Crown counsel's position in this regard, as it requires the Court to assume that nothing was said to the officer that could be used to impeach the complainant's credibility. And unlike in other cases, there are no contemporaneously created documents that could be used, even by agreement, to assist in detailing the content of the complainant's statement.

[59] The right to test a complainant's credibility through cross-examination is well recognized as "a fundamental tenet of our criminal justice system, particularly as it

relates to prior statements, letters or comments" (see *R. v. C. (V.)*, 2017 MBQB 94 at para. 46). Were it just the notes from the WPS interaction with the complainant, the impact would not be as significant. But the documents, including the statement of the complainant, because of her interaction with the RCMP officer, carry a heightened level of relevance. It is critically important to remember that these are matters that are being addressed in the context of a criminal trial, where the onus rests with the Crown to prove the allegations beyond a reasonable doubt. The credibility of the complainant is a central issue. If the statements made by the complainant were available and contained inconsistencies when compared to her disclosure in 2020 to the WPS, those discrepancies might be explained and understood given what is now known about the sometimes-incremental reporting of sexual assault complaints. But that would be a matter for the trial judge, who may or may not be satisfied with the explanation. By denying the accused the opportunity to challenge the complainant on her initial statement to the RCMP officer due to its unavailability, the accused's ability to make full answer and defence has been compromised.

[60] With respect to the second test in *Babos*, the Court must consider whether an alternative remedy is available. To that end, there are no concessions from Crown counsel respecting the credibility of the complainant, such as those in *La,* where Crown counsel agreed that the complainant had told "a few lies" during the missing

interview. There are no other documents proffered for defence to rely upon for the purpose of cross-examination, as was the concession in *B.(F.C.)*. While the complainant could be confronted about the very general comments referenced in the RCMP officer's undated statement, it is important to remember that these are not verbatim comments. All that is offered is the recollection of the officer, presumably written at least 27 years after the interview, without the aid of his notes or reports. And the references within his statement are not consistent with the recollection of the complainant. For the purposes of cross-examination, the comments are of extremely limited value.

[61] As noted, this is a case that turns on the credibility of the complainant where the Crown bears the onus of proving allegations beyond a reasonable doubt. In this case, I am satisfied that given the lack of any concessions on the part of Crown counsel as to the credibility of the complainant, and the absence of any other contemporaneously created documents which could be used in lieu of the missing documents, the result is that there is significant prejudice to the ability of counsel to make full answer and defence and therefore to the accused's right to a fair trial.

The Timing of the Application - Pre-Trial vs. Post-Trial

[62] In his written brief, Crown counsel referenced the authorities which suggest that it is "usually preferable" for the Court to rule on an Application of this nature after hearing the evidence at trial, as the Court would then be in a better position to

assess the degree of prejudice resulting from the loss of the evidence. In response, Applicant's counsel argues that the evidence before the Court is sufficient to identify the nature of the missing evidence and to assess its impact on the trial process. She argues that her ability to cross-examine the complainant and other witnesses and therefore to make full answer and defence is fundamentally undermined by the absence of these documents.

[63] The determination of a "lost evidence" Application on a pre-trial basis is not without precedent. In *R. v. Girou,* 2016 ABQB 607, the Court considered the loss of an RCMP audio recording of a complainant's statement in a sexual assault investigation. The Court considered a variety of factors, including some agreements between counsel and the evidentiary foundation available to the trial judge. While accepting the direction set out by the Court in *R. v. Bero* 2000 CanLII 16956 (ONCA) that a ruling on a "lost evidence" Application should be reserved until the end of a trial, the Court also recognized that strict adherence to such a rule "would be nothing more than a victory of formality over function." Where a Judge can effectively assess whether actual prejudice arising from the lost evidence, hearing the Application on a pre-trial basis is an "acceptable alternative" to delaying the ruling until after evidence is called. A similar conclusion was reached in *C.(V.).* As was the circumstance in *Girou*, the Court heard a "lost evidence" Application prior to the commencement of a jury trial, a factor which played a role in both decisions.

Recognizing credibility to be a central factor at trial and given the significant passage of time and the fact that there was nothing that "could be utilized in substitution" for the missing evidence, the Court concluded that "in this particular set of circumstances, it is appropriate to decide this section 7 issue in advance of the trial."

[64] There are two reasons why I have concluded that it is appropriate to deal with this matter in advance of trial. First, given that the missing evidence in this case involves an analysis of the impact of By-Laws and policy decisions, I am satisfied that these are most appropriately addressed on a pre-trial basis prior to the complainant having to testify. Secondly, I am mindful of the fact that, like many cases involving allegations of sexual assault, this is a credibility case. As has been noted, unlike other cases where a lost evidence application is brought, there are no contemporaneously completed notes or reports that the Court can reliably consider in lieu of the missing documents and that defence can utilize during cross-examination. Nor are there any concessions forthcoming from Crown counsel as to the impact that these documents could have on the credibility of the complainant. The Court had been provided with significant evidence in the form of the transcribed statements of the witnesses, including one that Crown counsel concedes should be called by the Court. As such, I am in the unique position of being able to assess the role these missing documents and statements could play during the trial proper. Given the foregoing, I am satisfied that the Court can adequately assess at the pre-

trial stage the impact of these missing documents on the ability of defence to make full answer and defence to these charges.

The Impact of Multiple Charter Breaches

[65] In *R. v. O'Connor*, [1995] 4 SCR 411, the Supreme Court of Canada identified two types of cases where a stay of proceedings was considered warranted after a finding of abuse of process: 1) where the state conduct compromised an accused person's right to a fair trial and 2) although there was no risk to trial fairness, the state conduct risked undermining the integrity of the judicial process. The Court in *Babos* adopted those principles, adding consideration as to whether a remedy other than a stay of proceedings was available. As well, the Court added a third test, requiring the Court to balance the misconduct complained of against the need to preserve the integrity of the justice system and the interest of society in having "a final decision on the merits."

[66] The tests in *O'Connor* and *Babos* provide helpful guidance in assessing what is now a second *Charter* s. 7 breach in this prosecution. A finding of abuse of process resulted in a *Charter* s. 7 breach in a previous Application made by Nygard in relation to the actions of the Attorney General in seeking a "second opinion" as to whether charges should be authorized against him after Manitoba Prosecution Services concluded that there was "no reasonable likelihood of conviction": see *R. v Nygard*, 2025 MBPC 43.

[67] Both counsel agree that the Court can consider that there are now two *Charter* breaches when considering whether a stay of proceedings is an appropriate remedy. In that regard, I note that the state conduct which resulted in the previous *Charter* breach was found to have "undermined the integrity of the judicial process." However, the Application for a stay of proceedings was not granted as I was satisfied that the accused still had the evidentiary and procedure protections available as part of the trial process. Now, however, as a result of this *Charter* breach, I am satisfied that "the state conduct compromised an accused person's right to a fair trial". This means that both prongs of the *O'Connor* test have been engaged by the breaches of the accused's *Charter* rights. This multiplier affect which must be considered when determining if a stay of proceedings is warranted.

[68] The third prong of test in *Babos* recognizes the need to strike a balance between denouncing misconduct and preserving the integrity of the justice system against the interest in having a final decision adjudicated on the merits. I include in this latter consideration the interests of the complainant in this matter. To that end, I would note that this complainant's journey through the criminal justice system has not been a smooth one. Since her disclosure to WPS in June 2020, this matter has been the subject of many prosecutorial ups and downs, including much controversy as to whether charges should be laid, motions as to whether this matter should proceed, as well as other evidentiary motions. I am also aware that there has been

considerable public interest in this prosecution. I can only hope that the reasons outlining the decisions in this matter assist in explaining the final conclusion in this matter.

FINAL COMMENTS AND CONCLUSION

[69] And so I shall end where I began by noting that a disclosure from a victim of sexual violence may not be forthcoming immediately after an assault. It is important that all players within the criminal justice system recognize that it may take multiple meetings over months or years for the disclosure process to be completed and for charges to be laid. Recognizing that, it is critically important that police forces take appropriate steps to ensure that communications with victims, even those that may be incomplete, not be purged from a police information storage system without appropriate evaluation. This may mean significant changes are necessary to the categorization and storage of police reports, notebooks and statements. We live in a day and age where the storage of vast quantities of documents has never been easier. For the sake of victims of sexual violence, and to ensure against wrongful convictions, no other alternative is acceptable.

[70] As to the specifics of this case, I am satisfied that the accused's rights under *Charter* s. 7 have been breached. I am taking into account that this is the second such breach. Applying the tests set out in the case law with respect to the application of *Charter* s. 24(1), I am satisfied that the Applicant's right to a fair trial has been

substantially prejudiced and will be further aggravated by allowing the trial to proceed. In balancing the interests of denouncing *Charter* breaches against the interest in having matters decided on the merits, I am satisfied that this is one of the "clearest of cases" warranting a stay of proceedings.

[71] The Application is granted. A stay of proceedings is entered on both counts before the Court.

"Original signed by:"

M.K HARVIE P.J.