

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Red Branch Investments Limited v. Long*,
2026 BCCA 376

Date: 20260916
Docket: CA50166

Between:

Red Branch Investments Limited and Gerald Wright

Appellants/
Respondents on Cross Appeal
(Plaintiffs)

And

David P. Long

Respondent/
Appellant on Cross Appeal
(Defendant)

Before: The Honourable Mr. Justice Butler
The Honourable Justice MacNaughton
The Honourable Justice Brundrett

On appeal from: Orders of the Supreme Court of British Columbia, dated
August 28, 2024 and March 18, 2025 (*Red Branch Investments Limited v. Long*,
2024 BCSC 1588 and 2025 BCSC 468, Vancouver Docket S187807).

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Cross Appeal:

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Cross Appeal:

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Place and Date of Hearing:

Vancouver, British Columbia
March 2, 2026

Place and Date of Judgment:

Vancouver, British Columbia
September 16, 2026

Written Reasons by:

The Honourable Mr. Justice Butler

Concurred in by:

The Honourable Justice MacNaughton

The Honourable Justice Brundrett

Summary:

The parties have been involved in protracted litigation concerning the ownership of a mining royalty interest. The respondent succeeded in his claim for a half interest in the royalty at a trial in the Supreme Court of British Columbia in 2015. The decision was upheld on appeal. The appellants appeal the dismissal of their action to set aside the 2015 judgment on the basis that the respondent had effected a fraud on the court at the earlier trial. While the trial judge agreed that the respondent had perjured himself about the neutrality of a key witness with the intent to mislead the court at the first trial, he concluded that the fraud was not sufficiently material to set aside the earlier judgment. The appellants contend that the judge applied the wrong test for materiality having found that the respondent committed a fraud on the court. The respondent cross appeals the costs decision which set aside the special costs order made at the first trial.

Held: Appeal allowed. The judge committed errors in principle in determining whether the fraud on the court was sufficiently material to require a new trial. He applied the wrong threshold for materiality. When a party commits perjury with the intent to mislead a court, the test for the effect of the fraud on the result should not be placed too high. It is sufficient if it might have misled the court. Here, the fraud went to a matter of central importance, the credibility of the parties. A new trial is required to preserve the integrity of the trial process. The judge erred in principle by attempting to resolve materiality by reweighing the evidence from the first trial to determine whether the first trial judge would have arrived at a different decision had he known of the fraud. That is not the proper inquiry. That task should have been left to a new trial where a judge can consider all the evidence touching on the parties' agreement concerning the royalty interest without any concern for the effect of perjury on the first trial decision. In these circumstances, the fact that other independent evidence supported the result at the first trial carries little weight because the role of such evidence is diminished where false evidence has been tendered to mislead the court.

The royalty action is remitted to the trial court for a new trial. There is no need to consider the cross appeal. The costs decision is set aside, and costs for the first trial and appeal will be considered at the new trial.

Reasons for Judgment of the Honourable Mr. Justice Butler:

[1] Red Branch Investments Limited ("Red Branch") and Gerald Wright (together, the "appellants") appeal the dismissal of their action against David Long, in which they sought to set aside a previous judgment of the Supreme Court of British Columbia on the basis that Mr. Long had effected a fraud on the court in the earlier trial, referred to by the parties as the "Royalty Action".

[2] The judge below found that Mr. Long had perjured himself in the Royalty Action to mislead the court about the neutrality of a key witness. Contrary to Mr. Long's sworn assertion at that trial, he found the witness, John Darch, was in fact aligned with Mr. Long and had assisted him with trial strategy and preparation. Despite this finding, the judge concluded that the fraud alleged "was not material to the outcome" of the trial "when considered in combination with the rest of the evidence" and dismissed the claim: 2024 BCSC 1588 at para. 89. As Mr. Long perjured himself at the first trial, the judge set aside the trial order for special costs against the appellants and awarded Mr. Long costs of both trials at Scale B.

[3] The sole issue on appeal is whether the judge erred in his approach to the materiality analysis required when considering whether a decision should be set aside because of fraud on the court. The appellants submit that the judge applied the wrong test for materiality. Mr. Long argues the judge correctly concluded that his perjury was not material to the outcome and urges this Court to uphold the trial decision.

[4] Mr. Long cross appeals from the order setting aside his entitlement to special costs at trial.

[5] For the reasons that follow, I would allow the appeal and remit the Royalty Action for a new trial. Having arrived at that conclusion, I need not consider the cross appeal as the costs order from the first trial is set aside. Costs will be determined by the court rehearing the Royalty Action.

Background

[6] The parties have been engaged in litigation over the ownership of a royalty interest in a mine in Thailand for more than 15 years (the "Royalty Interest"). The Royalty Interest was given to Mr. Long in 1999 and was transferred to Red Branch in 2010. The issue in dispute was whether the parties had agreed that Mr. Long was beneficially entitled to 50% of the royalty paid pursuant to the Royalty Interest, as Mr. Long contended, or whether the appellants were entitled to the entire royalty, as Mr. Wright contended. The dispute has given rise to four previous decisions of the

trial court, two of which were on costs, and two decisions of this Court. The lengthy history of the dispute and the discovery of Mr. Long's fraud is set out in the reasons for judgment in those cases. I refer extensively to those prior reasons to set out the background and highlight the important findings relevant to the question of materiality.

[7] For ease of reference, the following is a chronology of the relevant decisions:

- November 27, 2015—following a three-week trial, Justice Wong released reasons for judgment: 2015 BCSC 2192 (the “First Trial Decision”)
- February 9, 2016—Justice Wong’s costs ruling: 2016 BCSC 274 (the “Costs Decision”)
- July 12, 2017—this Court issued reasons dismissing the appellants’ appeal: 2017 BCCA 256 (the “Appeal Decision”)
- March 28, 2018—this Court dismissed the appellants’ application to admit fresh evidence regarding Mr. Long’s fraud and to reopen the appeal, but stated that the dismissal was not an impediment to a future action in the trial court: 2018 BCCA 115 (the “Supplemental Appeal Decision”)
- April 24, 2024—oral ruling of the trial judge at the start of the second trial: 2024 BCSC 2165 (the “Evidentiary Application”)
- August 28, 2024—the decision under appeal was issued following a 12-day trial: 2024 BCSC 1588 (the “Second Trial Decision”)
- March 18, 2025—the costs decision which is the subject of the cross appeal: 2025 BCSC 468 (the “Second Costs Decision”)

[8] This Court summarized the background to the parties’ dealings about the royalty in the Appeal Decision:

[1] This is an appeal from a judgment in a dispute over a royalty interest in Asia Pacific Resources Ltd.’s undeveloped potash mine at Udon Thani in

Thailand. The trial judge ... held the personal appellant, Gerald Wright, gave 50% of his interest in the royalty to the respondent, David Long, in 1999. The judge found the royalty was transferred to Long pursuant to a verbal agreement that it would be held in trust for the parties, as equal beneficial owners, until it could be transferred to an offshore corporation. In 2010, pursuant to that agreement and at Wright's request, Long transferred the royalty interest to a Hong Kong company, Red Branch Investments Limited, to hold in trust for both parties as equal beneficial owners.

[2] The judge rejected Wright's evidence that Long had no beneficial interest in the royalty and that it had been transferred to Long solely as Wright's nominee in 1999 and returned unconditionally to Wright's company in 2010.

[9] The Royalty Interest had been acquired by Mr. Wright in the 1990s when it had only speculative value. The mine is not yet operating, but the royalty appears to have significant value. Mr. Wright acquired the royalty, and in 1999, agreed to transfer his interest in the royalty to Mr. Long, a lifelong friend, by way of a backdated agreement. Around the same time, Mr. Long signed an undated agreement to transfer the royalty to an unnamed purchaser (the "Blank Agreement"): Appeal Decision at paras. 4–6.

[10] When it appeared the Royalty Interest had some value, Mr. Wright sought tax advice and retained Vancouver lawyers, nominally acting as the agent for Mr. Long. In June 2010, Mr. Wright asked Mr. Long to transfer the royalty to Red Branch. He did so for the nominal sum of \$1 and signed an agreement described as the "2010 Agreement". Neither agreement specified the interest, if any, held by Mr. Long. In 2011, the parties had a falling out and Red Branch refused to confirm that it held half the royalty in trust for Mr. Long, who commenced the Royalty Action: Appeal Decision at paras. 7–9.

[11] At the First Trial, the court had to choose between two starkly different versions of the dealings between the parties concerning ownership of the royalty. Justice Wong noted:

[5] At issue is conflicting credibility between the parties as to their agreed arrangement.

[Emphasis added.]

[12] The dispute was a credibility contest: either Red Branch held the royalty in trust equally for Mr. Long and Mr. Wright, or 100% of the royalty was beneficially held by Red Branch, Mr. Wright's off-shore company set up to hold that interest. It was, to borrow a phrase from a different context, a "he said-he said" case.

[13] Justice Wong found in Mr. Long's favour. His findings are summarized in the Appeal Decision:

[10] The trial judge accepted Long's evidence that when Wright's share in the royalty was transferred to Long in 1999, Wright told Long they would each have a 50% beneficial interest in it. He accepted Long's evidence that Wright made the following representations to Long when the 2010 Agreement was signed:

- a) Wright was the beneficial owner of Red Branch and he controlled the company;
- b) Wright wanted to transfer the royalty to Red Branch because there were tax advantages of having the royalty held by a Hong Kong company; and
- c) Red Branch would continue to hold the royalty in trust for both Long and Wright as before, with each of them receiving an equal beneficial interest and, to that end, Wright would make Long a 50% shareholder and director of Red Branch.

[11] While the 2010 Agreement made no reference to the fact that Red Branch held the royalty in trust for Long and Wright, the trial judge accepted that Long relied upon these representations and assurances when he signed the agreement.

[14] After setting out the background and the positions of the parties, Justice Wong's analysis was brief. He stated:

[54] In short, the plaintiff said that 50% of Mr. Wright's share in the royalty was, in fact, given to him in consideration for holding the royalty which was, at all times, intended to be shared between himself and Mr. Wright.

[55] The plaintiff submitted that Mr. Wright either breached his representations that Mr. Long relied upon in transferring the royalty to Red Branch or, in the alternative, that he deliberately lied to Mr. Long in order to induce him to transfer legal ownership. In any event, the representations were clearly made and relied upon by the plaintiff to his detriment.

...

[57] On the evidence, I think Mr. Long's version of events is more probable.

1) The representation of a beneficial 50:50 share of the royalty is consistent with the past friendship and financial business relationship of the parties.

2) Despite being warned by Mr. Darch about “properly papering”, the true nature of a shared 50:50 interest arrangement in the royalty transfer to Mr. Long, Mr. Wright chose not to leave a paper trail, ostensibly for personal domestic and taxation reasons. Mr. Darch in effect corroborated Mr. Long’s assertion that Mr. Wright initially preferred a “better a half than ultimately a quarter” interest in the royalty.

3) Although Mr. Wright is a sophisticated and experienced businessman, he chose not to leave a traceable paper trail about the true nature of the transfer. He was concerned about potential taxation consequences if the true nature of the transfer was papered. However, he could also have effected a private declaration of trust document between himself and Mr. Long, known only between themselves.

[15] The corroborative evidence of Mr. Darch clearly featured in Justice Wong’s decision. He stated:

[47] Mr. John Darch, who was a long-time business associate of Mr. Wright and a fellow Royalty holder testified that he knew that Mr. Wright was appointing Mr. Long as his nominee for the royalty and that he clearly told Mr. Darch that he was sharing this royalty with Mr. Long. Mr. Darch also said that Mr. Wright told him that he would rather receive half of the royalty than one quarter, the reason being that he would lose half to Canada Revenue Agency and he would have to share the other half with his wife Gail whom he was planning to leave for his Thai mistress. Mr. Darch said that Mr. Wright told him this on more than one occasion.

...

[50] Mr. Darch is a neutral witness, having no bias in favour of either of the parties. He has no financial interest in the outcome of this litigation.

[Emphasis added.]

[16] While he referred to the evidence of Mr. Darch, Justice Wong did not address the evidence of Paul Royce, Mr. Wright’s accountant, or that of his wife, Gail Wright. Both gave evidence that provided support for Mr. Wright’s position. The appellants raised the judge’s failure to consider their evidence as grounds for the first appeal. In the Appeal Decision, this Court expressed some concern about the failure of the judge to consider their evidence:

[43] In my view, while it would have been preferable to address Mr. Royce's evidence, that evidence was not so inconsistent with the version of events accepted by the trial judge that it constituted an error of law to fail to deal with it explicitly.

...

[48] Again, it would have been preferable for the trial judge to have addressed [Ms. Wright's] evidence but, given that it may be reconciled with the findings of fact, the failure to do so, in itself, does not confer entitlement to appellate intervention.

[17] The Court also commented on the judge's failure to consider the effect and evidentiary value of the Blank Agreement. While the Court found that the judge "might have avoided dissatisfaction with the adequacy of the reasons by" doing so, the failure to do so did not amount to an error in law: Appeal Decision at para. 51.

[18] After the Appeal Decision, and during proceedings to resolve the special costs awarded at the First Trial, the appellants received information from Mr. Long's solicitor file about Mr. Darch's involvement with Mr. Long and his counsel leading up to the First Trial. Relying on that information, the appellants applied to this Court to admit fresh evidence and reopen the appeal. In the Supplemental Appeal Decision, this Court dismissed the application to adduce the fresh evidence, stating:

[58] ... While this Court has jurisdiction to re-open an appeal, hear fresh evidence in support of an allegation that a judgment was improperly obtained, and set aside a judgment on those grounds, we would be loath to do so in a case where the falsity of the impugned evidence is in issue. We say that because there is no doubt that the trial court retains jurisdiction to hear and determine a challenge to an entered judgment founded upon an allegation of fraud or perjury, and because courts of first instance are in a privileged position with respect to the determination of such factual disputes.

[19] In the Supplemental Appeal Decision, the Court noted that on the Appeal Decision, the appellants argued the judge had committed a palpable and overriding error by ignoring, forgetting, or misconceiving relevant evidence. However, the Court reiterated that they had dismissed that appeal on the basis that although the reasons were "less than ideal in their consideration of the conflicts in the evidence" they were "reasonably intelligible to the parties" and allowed for meaningful appellant review: Supplemental Appeal Decision at para. 12.

[20] In the Supplemental Appeal Decision, at paras. 13–18, the Court set out in some detail the fresh evidence that the appellants sought to admit, as well as some of the trial testimony that the evidence was said to contradict.

[21] In summary, the fresh evidence includes correspondence in 2012 between Mr. Long and his counsel as well as with Mr. Darch, in which Mr. Darch is described by Mr. Long as a “trusted friend and colleague” and as “[m]y business partner, friend and confidant” who “volunteered to act as a witness (against Mr. Wright) in the action and assist in any way he can”. Mr. Darch offered advice on the conduct of the litigation, including stating:

The goal is to prove GW is a liar, discredit him, expose his scheme to evade tax, and in 1998 to leave Gail.

...

I have to be the last witness and one who ties a bow on the case.

[22] The significant testimony from the trial emphasized by the Court in the Supplemental Appeal Decision included Mr. Darch’s testimony that he attended trial because of a subpoena and that he had: “no friendship interest, I have no financial interest, I have no business interest in either of the parties”. So really to me it makes no difference who wins or who loses”: at para. 14, emphasis in original. Mr. Darch also expressly stated that although he had provided some information to Mr. Long, he had not assisted in the litigation: at para. 16. The testimony of Mr. Long referenced by the Court included portions of his cross examination in which he denied ever discussing the case with Mr. Darch (at para. 18):

Q: Have you ever met with him to discuss the issues in – that relate to this litigation?

A: We’ve not discussed the litigation, My Lord.

Q: Sir, I suggest to you that that is, in fact, not true, that you have spoken to Mr. Darch about, in particular, this litigation.

A: My Lord, my recollection is that there has been no discussion of the litigation.

Q: That, in fact, sir, you had a discussion with Mr. Darch shortly before these proceedings were initiated, and he told you that if what you were saying was true, that you should start proceedings because you might have a claim?

A: No, My Lord, that was not his advice.

Q: So just so that I'm perfectly clear, you've never had a discussion with Mr. Darch about this proceeding?

A: No, My Lord.

[Emphasis in original.]

[23] The Court indicated that its decision dismissing the application to reopen the appeal was not an impediment to a future action in the trial court.

[24] The appellants issued a notice of civil claim commencing this action on July 13, 2018.

Trial Reasons

[25] The appellants' notice of civil claim sought to set aside Justice Wong's orders for judgment and for special costs. They also sought damages and costs. The Second Trial was heard over 12 days. The only witnesses to give evidence were Messrs. Wright, Long and Darch.

[26] In the Evidentiary Application at the start of the Second Trial, Mr. Long sought to limit the evidence to be adduced to that of fraud, perjury, or collusion not discovered until after the First Trial. The appellants opposed the suggested restriction on the evidence. While he dismissed Mr. Long's application, the judge stated:

[16] I agree with Mr. Long that the evidence in this matter should not relitigate and otherwise repeat all of the background and details of the events that lead [sic] to the dispute between the parties over the ownership of the royalty interest. The purpose of this trial is to determine if Wong J.'s decision ought to be set aside, not to first determine this issue and then relitigate the underlying issue regarding the ownership of the 50% royalty interest. This latter issue will be determined in a subsequent trial if I conclude that Wong J.'s decision ought to be set aside.

[Emphasis added.]

[27] Citing *D.K. Investments Ltd. v. S.W.S. Investments Ltd.* (1990), 44 B.C.L.R. (2d) 1, 1990 CanLII 586 (C.A.), the judge ordered:

[21] ... The parties may adduce evidence that is relevant to the issue of whether Wong J.'s decision should be set aside because it was obtained through fraud, perjury, and/or collusion. Specifically, evidence is admissible if it is relevant to the following issues regarding the First Action:

- a) was there fraud, perjury, or collusion?
- b) if so, should it have been recognized and raised at that trial? and
- c) was it material to Wong J.'s decision?

[28] The judge set out Justice Wong's findings in detail and summarized the Costs Decision, the Appeal Decision and the Supplemental Appeal Decision.

[29] The judge also set out the legal test for proving fraud on the court sufficient to set aside a judgment. He relied extensively on the decision of Justice Lederer in *Canada v. Granitile Inc.* (2008), 302 D.L.R. (4th) 40, 2008 CanLII 63568 (O.N.S.C.). While the parties now differ on whether the judge accurately described the test, they generally agree that where fraud is alleged, the four-part test set out in that case should be applied to determine whether a prior judgment should be set aside.

[30] To set aside a prior judgment on the basis it was obtained by a fraud on the court, the *Granitile* test requires that an applicant establish: (1) proof of the fraud on a balance of probabilities with clear and cogent evidence; (2) lack of knowledge of the fraud and of the evidence to prove it at the time of the initial trial; (3) the fraud was material to the result, although it need not show that it was a determining factor; and (4) that it acted without undue delay: Second Trial Decision at paras. 31–41, citing *Granitile* at paras. 25, 282.

[31] The judge set out his findings for the first three parts of the test. He did not need to consider the fourth element due to his findings on the second prong of the test and the fact that the appellants began the second action soon after the Supplemental Appeal Decision was issued.

Proof of the fraud

[32] After describing the evidence and the parties' positions, the judge was not convinced that Mr. Darch had any personal animus towards Mr. Wright. He found it more likely that Mr. Darch believed in the validity of Mr. Long's claim. Although Mr. Darch directed funds to Mr. Long's lawyers' firm that were used to fund the

litigation, he found that those funds had been earned by Mr. Long. Nevertheless, the judge concluded that Mr. Long deliberately misled the court at the First Trial:

[66] That said, reviewing pleadings and a draft affidavit, along with providing strategic and tactical litigation advice, goes beyond the role of a purportedly neutral witness. “Nailing Wright” and “putting his head in a noose” suggests that Mr. Darch was strongly in favour of Mr. Long succeeding in his litigation against Mr. Wright.

[67] There is clear and cogent evidence, in the form of several email communications between Mr. Darch, Mr. Long, and Mr. Long’s counsel, that Mr. Darch provided Mr. Long with strategic and tactical litigation advice in the years prior to the First Trial. At the First Trial, however, Mr. Long and Mr. Darch did not disclose the extent to which they had worked together in preparation for the lawsuit and the history of their personal and professional dealings from 2011 to 2014.

[68] I do not accept Mr. Long’s evidence that he simply forgot about Mr. Darch’s involvement in the litigation when asked at the First Trial. He was asked several questions relating to whether or not Mr. Darch and him had discussed this litigation, which he denied. I find that this was a clear attempt to mislead the court....

[69] On the whole, I am satisfied that there is clear evidence that Mr. Long deliberately mislead [sic] the court in his evidence and perjured himself regarding Mr. Darch’s involvement with the trial file. As discussed in my findings below, however, that was not material to the outcome of the trial.

[Emphasis added.]

Due diligence—lack of knowledge of the fraud and of the evidence in support

[33] The judge found that Mr. Wright did not have knowledge of the fraud on the court and was unaware that Mr. Darch had assisted Mr. Long with the litigation. Further, he concluded that Mr. Wright did not possess the evidence required to prove the fraud and that the full extent of Mr. Darch’s involvement only became clear once the appellants had direct access to Mr. Long’s solicitor’s file: Second Trial Decision at paras. 76–78.

Materiality

[34] The judge briefly described some of the evidence and summarized the parties’ positions on materiality. He stated:

[88] The authorities establish that materiality refers to the central issue in the case that goes to the foundation of the decision. The central issue in this case was the credibility of the parties.

[89] I have found that there was a fraud perpetrated by Mr. Long. Nevertheless, I find that a fraud regarding Mr. Darch's neutrality was not material to the outcome of the First Trial when considered in combination with the rest of the evidence.

[Emphasis added.]

[35] The judge was satisfied that "the neutrality of Mr. Darch was not a material factor in Justice Wong's finding that Mr. Wright gifted Mr. Long the Royalty": Second Trial Decision at para. 90. He found there was ample evidence, in addition to Mr. Darch's, to support the finding that Mr. Long held a one-half beneficial interest. That included Mr. Long's evidence that Mr. Wright gave him the interest so he did not need to split it with his wife and pay taxes in Canada, leaving him with just a one-quarter interest. Further, as Justice Wong found, the gift was consistent with the parties' previous friendship and business ventures: at para. 91. The judge also found it significant that Justice Wong disbelieved Mr. Wright, finding in favour of Mr. Long "on the totality of the evidence": at para. 92.

[36] Further, the judge stated that even if Mr. Darch was not neutral, the evidence that Mr. Wright told Mr. Darch that he gave a one-half interest in the Royalty to Mr. Long "rings true"; it was consistent with Mr. Long's evidence and with the evidence of the lawyers at the First Trial Decision: at para. 94.

[37] The judge concluded:

[95] I accept that Mr. Wright did, in fact, tell Mr. Darch that he preferred Mr. Long have a one-half interest in the Royalty and that he would retain the other half as opposed to splitting the Royalty with his wife and paying tax on his share. I further accept that Mr. Darch preferred that Mr. Long succeed in this litigation because he believed that Mr. Long was entitled to a 50% interest in the Royalty, and not because of any personal animus towards Mr. Wright or collusion with Mr. Long. In fact, the evidence demonstrates that at the time of the First Trial, Mr. Darch was no longer friends with Mr. Long.

[96] Finally, Wong J. relied on the fact that Mr. Wright deliberately chose not to leave a paper trail of the transaction between himself and Mr. Long as he was concerned about possible tax consequences of the transfer: First Trial Decision at para. 57.

[97] In my view, evidence of the advice and guidance provided by Mr. Darch to Mr. Long would not have materially affected the finding made by Wong J. regarding the credibility of the parties or affected the outcome of the case.

[38] The judge also considered the appellants' claims that Messrs. Long and Darch committed perjury and that they colluded. He first found that Mr. Darch's lack of disclosure on his involvement in the litigation did not rise to perjury. On Mr. Long's perjury, he concluded:

[104] In any event, while the finding with respect to Mr. Long's perjured evidence would likely have an affect on his credibility assessment, I find, for the reasons already discussed above, that there was sufficient other evidence grounding Wong J.'s decision about the Royalty arrangement. I do not consider the perjured evidence to be material to Wong J.'s decision.

[39] The judge also rejected the claim that Messrs. Long and Darch had colluded to conceal evidence. While Mr. Long had been untruthful at the First Trial, Mr. Darch admitted to providing documents and information that might assist Mr. Long. The judge reasoned that Mr. Darch would not have testified to doing that if they had colluded. The judge further found that Mr. Darch did not attempt to engineer a particular result.

[40] In the Second Trial Decision, the judge dismissed the appellants' applications to set aside both the First Trial Decision and the Costs Decision. However, he overlooked the request that had been made by the appellants to make submissions on costs if a new trial was not ordered. The judge accordingly sought submissions on costs. The appellants asked the judge to set aside the special costs order from the First Trial and to order that each party bear their own costs for both trials. Mr. Long agreed that the judge had jurisdiction to consider the costs issues as the order had not been entered but argued costs issues were better left to the current appeal already underway. Alternatively, Mr. Long argued the special costs order for the First Trial should be upheld and that he should receive special costs for the Second Trial as the perjury was found immaterial to the decision.

[41] In the Second Costs Decision, the judge set aside the order for special costs from the First Trial. He found it unlikely that Justice Wong would have awarded special costs had he known of Mr. Long's perjury. He concluded that while Mr. Long's perjury disentitled him to special costs, as the successful party at both trials, he was entitled to costs at Scale B for both.

The Appeal

The appellants' position

[42] The appellants raise two issues on appeal. Both issues are based on their allegation that the judge erred in his analysis of materiality:

- a) Did the judge err by reweighing evidence considered in the First Trial Decision instead of considering the nature of Mr. Long's fraud?
- b) If the judge was permitted to reweigh evidence, did he err in his approach to materiality by:
 - i. failing to consider how knowledge of the fraudulent conduct and perjury would have impacted the First Trial Decision; and
 - ii. by attempting to penetrate the mind of the trial judge and determine what he would have done without the perjury, rather than considering the totality of the evidence?

[43] The appellants argue that the standard of review for both errors is correctness as they both raise questions of law or misapplication of principle. Alternatively, they submit that if the second error is found to raise a question of mixed fact and law, it raises an extricable question of law reviewable on a standard of correctness.

[44] The judge was first tasked with determining whether a fraud had been perpetrated on the court. Having found fraud on the court, the appellants submit the judge had a gate-keeping role: to strike a balance between finality and the integrity of the judicial process by determining whether the nature of the fraud meant that the underlying judgment should be set aside. By trying to penetrate the mind of

Justice Wong to establish whether the fraud would have materially impacted his decision, the judge improperly stepped outside of his role as gatekeeper and failed to consider the fraud's effect on the integrity of the judicial system.

[45] The appellants submit that the judge erred in the materiality assessment by failing to consider the nature of the fraudulent evidence. In this case, it was relevant that the fraud was: committed by a party; designed to mislead the court; and related to a central issue—Mr. Darch's neutrality—that was relevant to credibility.

Furthermore, Justice Wong had determined that credibility was the central issue between the parties. As a result, the appropriate question was whether Mr. Long's fraud on the court *might* have altered the result. Given the nature and extent of the fraud found by the judge, he should have concluded that it might have impacted the result of the First Trial.

[46] The appellants argue that the judge erred by instead asking what the First Trial judge might have done if he had known of the perjury. This framing led him to attempt to untangle and reweigh the evidence from the First Trial based on his assessment of factors that the trial judge had identified. Such a task should have been left to a future court, particularly as credibility and reliability were intertwined and only one version of the parties' agreement could be correct. They say that Mr. Long's attempt to deliberately deceive the court about Mr. Darch's involvement in the case would necessarily have impacted Justice Wong's assessment of the credibility and reliability of both parties. Accordingly, the judge erred in relying on the fact that the trial judge had disbelieved Mr. Wright on the totality of the evidence at the First Trial.

[47] The appellants criticize the judge for concluding that Mr. Darch's neutrality was not a material factor in Justice Wong's decision when this Court came to the opposite conclusion in the Supplemental Appeal Decision. This Court found that the judge's finding at para. 47 of the First Trial Decision was "critical to the outcome" and that the judge effectively preferred the evidence of Mr. Darch over that of Mr. Royce because he was impartial: Supplemental Appeal Decision at paras. 9–11.

[48] The appellants also submit the judge's approach failed to consider what impact the perjury might have had on the choice between the "independent" evidence of Mr. Darch and Mr. Royce. This Court was critical of Justice Wong's failure to consider Mr. Royce's evidence. The judge did not hear Mr. Royce's evidence, and so could not properly weigh the totality of the evidence. The appellants submit that the judge's approach effectively repeated Justice Wong's error by only looking at the factors he identified to arrive at his decision, instead of ensuring the totality of the evidence is examined at a retrial of the Royalty Action.

[49] In short, the appellants submit the judge erred in considering the materiality threshold by attempting to interpret and analyze the reasoning of the trial judge, rather than examining the nature of the fraud. They say the judge erred in attempting to penetrate the trial judge's mind to estimate the extent to which the fraudulent evidence influenced the outcome. The appellants assert they did not attempt to reargue the evidence from the First Trial, as they understood that the totality of evidence should be reconsidered at a retrial of the Royalty Action. They say the judge's approach contradicts his concession that the purpose of the Second Trial was not to relitigate the underlying case, but simply to "determine if Wong J.'s decision ought to be set aside": Evidentiary Application at para. 16.

The respondent's position

[50] The respondent submits that the judge's decision was an exercise of equitable jurisdiction, involving the application of a legal standard to findings of fact. The challenge on appeal is to a question of mixed fact and law, and the standard of review is palpable and overriding error unless the judge erred in principle.

[51] The respondent argues the judge correctly stated and applied the test for ordering a new trial based on fraud. He stresses that the judge's task in the Second Trial was to prevent relitigation of a matter that had already been determined unless it was found that Mr. Long's perjury was material to the result in the First Trial. He argues that the principles of materiality and due diligence when applied together work to ensure both finality and a just result. The judge's approach

to materiality accorded with the authorities and to the extent that his decision relied on findings of fact, the appellants have not identified an error, let alone a palpable and overriding error.

[52] The respondent submits the judge accurately set out the varying descriptions of the test for materiality—that the evidence would probably have changed the result—and notes that the authorities do not ask the judge to focus on the “nature of the fraud”, as suggested by the appellants. Relying on *Meek v. Fleming*, [1961] 2 Q.B. 366, 3 All E.R. 148 (C.A.), the respondent says that the “onus” on a challenge to a prior decision is “even higher if the fresh evidence goes to credibility”.

[53] The respondent says that the question is not whether Mr. Darch was a neutral witness, but whether the result would have been different had Justice Wong known of the emails and discussions he had with Mr. Long and Mr. Long’s counsel in 2012 and 2013. Mr. Long says that the judge’s consideration of Mr. Darch’s position was nuanced. The judge accepted that Mr. Darch wanted Mr. Long to succeed but also found that Mr. Darch truly believed in the validity of Mr. Long’s claim against Mr. Wright. Accordingly, he correctly concluded that the result would not have been different had the judge known of the perjury.

[54] In response to the suggestion that the judge improperly attempted to “penetrate the mind” of Justice Wong, Mr. Long submits the judge appropriately confined his role: he examined the evidence at the Second Trial and considered Justice Wong’s findings to assess the materiality of the perjured evidence. The judge found that Mr. Darch’s evidence confirmed Mr. Long’s evidence about the terms of the agreement reached with Mr. Wright. Further, that agreement was consistent with the parties’ lifelong friendship and Mr. Wright’s failure to document his version of the agreement.

[55] Additionally, Mr. Long relied on *Bains v. Bhandar*, 2000 BCCA 466, and *Barendregt v. Grebliunas*, 2022 SCC 22, to argue that the exercise of due diligence is an essential element of the test the appellants needed to meet to set aside the decision. The requirement for due diligence works to balance the interests of finality

and achieving a just result. He argues that the examination of due diligence requires a focus on the conduct of the party attempting to introduce new evidence. The court must examine what they knew and what they ought to have known and whether they acted in a way that, with due diligence, would have made the evidence available at trial.

[56] Mr. Long argues that the judge failed to examine the due diligence element of the test. Had the judge considered due diligence, he would have found that the appellants failed to take any steps to ascertain whether Mr. Darch was assisting Mr. Long. The appellants failed to take advantage of pre-trial procedures to obtain evidence about Mr. Darch's involvement with Mr. Long and his lawyers. He further argues that the cross examination of Mr. Darch at the First Trial was brief and ineffective when it could have been used to expose the assistance and cooperation provided by Mr. Darch. Even if this Court is of the view that Mr. Long's perjury may have been material, Mr. Long submits it is open to this Court to uphold the decision because of the appellants' failure to exercise due diligence.

Analysis

The issue on appeal

[57] I have set out the arguments in some detail to explain the parties' different approaches to the alleged errors. To reiterate, the appellants argue the judge erred in assessing materiality after finding that Mr. Long committed perjury and effected a fraud on the court in two ways: first, he applied the wrong threshold for materiality; and second, he attempted to reweigh evidence from the First Trial to ask what Justice Wong would have done had he been aware of the fraud. In my view, these alleged errors are interrelated and best assessed together.

[58] I would restate the error as follows: did the judge err in his assessment of the materiality of the fraud to the trial judge's decision by reweighing the evidence to see if he would have arrived at a different conclusion?

[59] As I noted above, they disagree about the applicable standard of review. I accept the respondent's contention—the errors alleged by the appellants concern the application of a legal standard to a set of facts and circumstances. While the findings with respect to other parts of the four-part test are findings of fact, the materiality prong raises questions of mixed fact and law to which deference is generally owed on appeal.

[60] However, matters of mixed fact and law lie along a spectrum on which errors of law or principle may be extricable. The Court in *Housen v. Nikolaisen*, 2002 SCC 33 described the nature of the spectrum in relation to claims in negligence. If an error with respect to a finding of negligence is attributed to the application of an incorrect standard, failure to consider a required element of a legal test, or similar error in principle, it can be characterized as an error of law: at para. 36. Even so, appellate courts should be cautious in identifying errors of law. This general caution is especially germane where the question or issue on appeal involves a judge's interpretation of "the evidence as a whole": *Housen* at para. 36.

[61] In my view, the trial judge's task here—whether the finding of fraud was sufficiently material to set aside the trial judgment—is somewhat analogous to the task of a court to determine if a party's acts or omissions amount to negligence. The concept of "materiality" in deciding whether to set aside a judgment because of fraud plays a similar role to that of "standard of care" in the consideration of claims in negligence. It certainly involves the application of a legal standard to facts and circumstances.

[62] Despite these similarities, the analysis for these respective tasks can be distinguished in part because they vary in the scope of evidence used to resolve them. In a trial of first instance to determine negligence, a judge hears all the relevant evidence touching on the question of negligence to determine whether the defendant is liable for breaching the standard of care. In the present case, the judge had two determinations to make: (1) whether the court was misled about Mr. Darch's supposed neutrality and if so whether it was intentional, such that a fraud had been

perpetrated on the court; and (2) whether the fraud was sufficiently material to require a new trial at which the court would hear all the evidence anew. Unlike at a trial considering a claim in negligence, the judge did not hear “the evidence as a whole” regarding the substance of the parties’ dispute about the Royalty Interest. Rather, he heard a portion of the evidence to determine the initial question about the existence of fraud and then to subsequently assess whether the fraud might have altered the result.

[63] In addition to being determined on limited evidence, the materiality analysis’ assessment of fraud engages additional interests which call for heightened appellate review. At this second stage of the analysis, as the appellants argue, the judge was performing a gate-keeping role. He was not hearing evidence to decide the dispute about the terms of the Royalty Agreement. The goals at that stage include not only the proper adjudication of the questions posed, but also attempting to ensure that the decision upholds the integrity of the trial process. Where a fraud has been perpetrated on the court, the broader interests of justice, including the integrity of the trial process, take on added import.

[64] This Court expressed the importance of these interests in *J.P. v. British Columbia (Children and Family Development)*, 2017 BCCA 308, when considering an application to admit fresh evidence on appeal. It found that an important expert witness had knowingly misrepresented her qualifications to the court, was untruthful about her expertise and offered an opinion based on discredited science. The Court admitted the fresh evidence and, in doing so, emphasized the attention that should be paid to the broader interests of justice on appellate review in such circumstances:

[195] Where, as here, the fresh evidence establishes that a fraud was perpetrated on the court in relation to a material issue at trial, close attention must be paid on appellate review to the broader interests of justice, including not only preserving the fairness of the trial, in substance and appearance, but also maintaining the integrity of the proceedings and public confidence in the administration of justice: *R. v. Davey*, 2012 SCC 75 at paras. 50–51. Fraud is an act that is capable of vitiating the most solemn proceedings of our courts of justice: *R. v. Stoltz*, [1993] B.C.J. No. 891 at para. 26 (C.A.). In my view, the admission of Ms. Reeves’ evidence compromised the integrity of the proceedings below and has been shown to have occasioned a miscarriage of justice.

[65] In my view, the appellants have identified extricable errors in principle in the judge's approach to the second determination he needed to make. I reach this conclusion because the judge applied the legal test to the facts in this case in a distinct way. Once he found that Mr. Long committed perjury in an attempt to mislead the court, the judge erred by applying the wrong threshold for materiality. He did this by asking the wrong question. Instead of asking whether the fraud might have altered or impacted the result, he asked whether the judge would have arrived at a different decision had he known of the fraud. He then attempted to reweigh the evidence to determine its materiality to the judge's finding. The judge's approach is not in accord with the authorities and amounts to an error in principle.

Did the judge err in his assessment of materiality by reweighing the evidence to determine what the judge would have done had he been aware of the fraud?

The approach to materiality in the event of fraud

[66] It has long been recognized that a trial judgment can be set aside where fraud on the court is established. In the Supplemental Appeal Decision, the Court noted that while fraud can vitiate a judgment, it must be distinctly pleaded and proved. It referred to the oft-cited statement of Justice Beetz, citing *Landreville v. Town of Boucherville*, [1978] 2 S.C.R. 801 at 814, 1978 CanLII 202:

Fraud, dishonesty, bad faith, extortion and bribery form a special category of causes of nullity, which transcends all others.

Fraud unravels everything. The Court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved, it vitiates judgments, contracts and all transactions whatsoever...

Lord Denning in *Lazarus Estates Ltd. v. Beasley*, at p. 712.

[Emphasis added.]

[67] It is also well-accepted that before a judgment should be set aside because of fraud on the court, it must be established that the fraud was material in the sense that the decision in the trial court may not have been the same without the fraud. The articulation of the test for materiality in the authorities has varied for practical reasons. First, the factual situations in which fraud on a court may arise can differ

greatly. Second, the procedural avenue chosen to set aside a trial judgment—whether an application to reopen at trial, an application to adduce fresh evidence on appeal, or the presentation of evidence at a trial to establish fraud—necessarily influences the approach taken by a court. It follows that the proper approach to materiality is partially contextual. As I will explain, despite these slight variations in the test’s articulation to accommodate different contexts, a review of the authorities makes clear there is a common lower threshold for materiality where fraud on the court is established.

[68] The trial judge started off by accurately setting out the four-part *Granitile* test. I agree with the parties that the four-part *Granitile* test is a useful framework to apply when considering an allegation that a fraud was perpetrated on the court in a prior proceeding, and was appropriate to the circumstances. In describing that framework in *Granitile*, Justice Lederer conducted a review of the authorities which I return to below when I consider the test for materiality. At the outset, the judge presented a succinct statement describing the threshold for materiality:

[34] The evidence of fraud must go to the foundation of the decision or be material to the claim, but it need not be determinative of the decision under attack. It is sufficient that it might mislead the court...

[69] While not incorrect, the judge’s statement is incomplete. He failed to acknowledge the lower threshold for materiality that applies when fraud on the court has been established. In the Supplemental Appeal Decision, this Court emphasized this point when it approved of the description of that threshold articulated by Justice Holland in *100 Main Street East Ltd. v. Sakas* (1974), 3 O.R. (2d) 361 at 368, 1974 CanLII 637 (O.N. H.C.J.):

I think it comes down to this: that fraud has been clearly established on the part of the defendant which, if known to the trial Judge, may reasonably have affected the result. I cannot say that of necessity it would have affected the result. I am of the view, however, that where fraud has been clearly established the test of the effect of the fraud on the result should not be placed too high. ...

[Emphasis added.]

[70] In *Granitile*, Justice Lederer described the threshold for materiality in some detail with reference to *100 Main Street*. His remarks stress two points relevant to the issues on appeal. First, his description emphasizes the lowered bar for materiality once fraud has been established. Second, he notes that consequences from discovery of new evidence generally are not the same as those from discovery of new evidence or circumstances revealing fraud:

[313] For a judgment to be set aside as a result of the presence of fraud, the fraud must be material to the decision being attacked. This is discussed in *100 Main Street East Ltd. v. Saka*, *supra*:

The present Chief Justice of Ontario sitting as a trial Judge in *Re: Cook and Morley and Foster*, [1950] O.W.N. 739, adopted and applied to the foregoing principle adding that: '... before a judgment will be set aside [the perjured evidence] must have been material to the Court's decision)' (p. 741).

(*100 Main Street East Ltd. v. Saka*, *supra*, at para. 14)

...

[315] The case, and those to which it makes reference, are clear. Where there is evidence of fraud, it is not necessary for the fraud to be determinative of the decision being examined for it to be material and provide the foundation for the decision to be set aside.

The important distinction between the consequences in law of the discovery of new evidence generally, and new evidence or circumstances revealing fraud, is the subject of an observation by Lord Buckmaster in *Hip Foong Hong v. H. Neotia & Co.*, [1918] A.C. 888 at p. 894:

... the applicant must go further and show that the [new] evidence was of such a character that it would, so far as can be foreseen, have formed a determining factor in the result. Such considerations do not apply to questions of surprise, and still less to questions of fraud. A judgment that is tainted and affected by fraudulent conduct is tainted throughout, and the whole must fail;

(*100 Main Street East Ltd. v. Saka*, *supra*, at para. 15)

[316] In the succeeding paragraph, the case continues:

These authorities make it clear that the new evidence of fraud must relate to the 'foundation' of the decision or be 'material' to the claim or defence, but need not necessarily amount to a 'determining factor in the results.'...

(*100 Main Street East Ltd. v. Saka*, *supra*, at para. 16)

...

[318] The same point was made, albeit somewhat differently, in *Vagi v. Peters*, *supra*:

This court has consistently indicated its concerns for the maintenance of respect for the administration of justice. To that end, I do not consider it appropriate to permit a judgment which is to at least some degree based upon evidence which is untruthful or conceals relevant information to be upheld. This is so even though every aspect of that evidence cannot be said to clearly bear on the judgment rendered. It is enough if the evidence is of some consequence and therefore might have some bearing upon the result of the trial: see: *Meek v. Fleming*, [1961] 2 Q.B. 366, [1961] 3 W.L.R. 532, [1961] 3 All E.R. 148 (C.A.).

(*Vagi v. Peters*, supra, at para. 7)

[319] The fraud need not be the determining factor. It is sufficient that it might mislead the Court. The measure of what is material is set against the basic value that those who deceive others should not be permitted, by the Court, to profit from the deception.

[Emphasis added.]

[71] This expression of the approach to materiality and its lower threshold once fraud has been established is equally present in the seminal decision in this area of *Meek*, also referred to in *Vagi v. Peters*, [1990] 2 W.W.R. 170, 1989 CanLII 5121 (Sask. C.A.). *Meek* was relied on by this Court in *Fullerton v. Matsqui (District)* (1991), 62 B.C.L.R. (2d) 273, 1991 CanLII 5740 (C.A.). The circumstances of fraud considered in *Meek* and *Fullerton* are similar. In both cases, the courts allowed the admission of fresh evidence on appeals from trials where a party had intentionally misrepresented or failed to disclose relevant information to the court touching on the credibility of a party or key witness.

[72] In my view, the approach to materiality in the circumstances of this appeal should be guided by these decisions.

[73] In *Meek*, the appellant press photographer sought to introduce fresh evidence on appeal to set aside a trial judgment dismissing his action against a police officer seeking damages for assault and wrongful imprisonment. The case was heard by a jury that had to decide between the evidence of the two parties that described very different versions of an alleged assault. Although there was no independent evidence about the assault, the defendant officer's account of the events that occurred before and after the assault was supported by evidence from other police

officers. Unbeknownst to the plaintiff, between the time of the assault and the first trial, the defendant officer had been demoted in rank by a disciplinary board for being party to an arrangement to practise deception on a court in an unrelated arrest. Counsel for the defendant was aware of this matter but did not disclose it at the first trial, and the defence took steps to conceal his reduced rank. He was attired as a civilian and referred to by his counsel as “Mr. Fleming”. In cross examination, he agreed that he was a chief inspector although at the time he was not.

[74] On appeal, the respondent argued that because the concealed evidence related only to credibility, albeit of an important witness, the court should decline to admit it as fresh evidence. The respondent referred to the stricter application of the test for admission of fresh evidence where the fresh evidence does not relate directly to an issue on appeal. In such circumstances, the test is that the fresh evidence should not be admitted unless the “the evidence is of such a nature, and the circumstances of the case are such, that no reasonable jury could be expected to act upon the evidence of the witness whose character had been called in question”: at 153. Holroyd Pearce L.J. rejected that test as the court had been deliberately misled. He described the threshold for materiality in such circumstances (at 154):

Where a party deliberately misleads the court in a material matter, and that deception has probably tipped the scale in his favour (or even, as I think, where it may reasonably have done so), it would be wrong to allow him to retain the judgment thus unfairly procured. *Finis Litim* is a desirable object, but it must not be sought by so great a sacrifice of justice which is and must remain the supreme object. Moreover, to allow the victor to keep spoils so unworthily obtained would be an encouragement to such behaviour, and do even greater harm than the multiplication of trials.

It was argued that there were several other police witnesses against the plaintiff’s story; that although part of the issue depended on the evidence of the parties alone, the greater part of the defence depended on other witnesses than the defendant, and that, therefore, the concealment did not have any substantial result. Since the defendant and his advisers thought fit to take so serious a step they must, in the light of their own intimate knowledge of their case, have regarded the concealment as being of overwhelming importance to their success. Therefore, I am not prepared to countenance their present argument that it may have made no difference to the result.

[Emphasis added.]

[75] The Court admitted the fresh evidence and ordered a new trial.

[76] In *Fullerton*, the appellants sought to admit fresh evidence on an appeal from the dismissal by a jury of claims in assault and battery against the defendant municipality's police officers, arising from interactions during their arrests. The appellants and the police officers gave dramatically different versions of the events. The defendants also introduced evidence of the officer charged with investigating the appellants' allegations of assault, Corporal Gustafson. The appellants' theory at trial was that the police officers conspired to conceal the fact of the assault. Corporal Gustafson testified that he had not attempted to cover anything up and had simply conducted a criminal investigation into the allegations. The appellants had also filed a complaint under the *Police Act*, S.B.C. 1988, c. 53, and an internal investigation was carried out by the Ombudsman. At the hearing in the internal investigation, it was revealed that the Deputy Police Chief had improperly terminated Corporal Gustafson's criminal investigation into the appellants' complaints. However, as the investigation had not concluded by the date of the civil trial, the appellants were unaware of the termination of the investigation, and no evidence was led about it at trial.

[77] The issue before this Court was whether evidence about the termination of the investigation should be admitted on appeal. The respondents argued that the fact the investigation had been improperly halted was not material to any issue before the court. In any event, the result would have been the same because all the evidence from individuals present when the alleged assaults occurred was heard at trial. They also argued that the appellants could have found out about the termination of the investigation, had they exercised due diligence. The appellants maintained that the evidence was material as it demonstrated a deliberate intention on the part of the police to suppress evidence and was relevant to the central issue before the jury: whether the assault occurred or whether there was a conspiracy to cover it up. There was no suggestion trial counsel for the defendant had intended or taken steps to mislead the court.

[78] The Court concluded the fresh evidence was material and admissible on appeal. The appeal did not proceed as the respondent consented to an order for a new trial. In admitting the evidence, Justice Cumming, writing for the majority, referred extensively to *Meek*. In addition to the passages from the judgment of Holroyd Pearce L.J. noted above, he quoted with approval from the judgment of Justice Pearson in the same case at 157 (*Fullerton* at para. 29):

There was in the result at the trial of this action a deception of the court, and the defendant in cross-examination was giving uncandid (and at one point false) evidence in order to preserve the concealment of the truth. The fresh evidence has materiality. The main issue at the trial was whether the evidence of the plaintiff or the evidence of the defendant should be believed as to what happened in the passage at the police station.

[Emphasis added.]

[79] In deciding to admit the fresh evidence, Justice Cumming stated:

[37] The essential question to be determined here is whether the evidence of Constable Gustafson led at the trial was calculated to mislead the trial judge and the jury so as to lead to a miscarriage of justice and to bring the administration of justice into disrepute if the jury verdict be permitted to stand. If it was it follows, from the authorities to which I have referred, that no question of due diligence on the part of the appellants or their advisers can arise. Likewise, on the basis of those authorities, and particularly what was said by Lord Justice Holroyd Pearce in *Meek* at p. 154 (*supra*), it is of no significance that the case for the respondents was supported by the evidence of other and even independent witnesses. The weight to be given to the totality of the evidence, in the light of the evidence sought to be adduced, and the inferences to be drawn there from are, of course, for the jury.

[Emphasis added.]

[80] Justice Cumming also rejected the respondents' argument that the termination of the investigation was not material to any issue that had to be determined at trial. He reasoned:

[40] ... [I]t could reasonably be argued that if there were a cover-up, it is a fair inference to draw that there was, in fact, something to be covered up. While the drawing of such an inference...is a matter for the jury, they were entitled to have before them all the relevant evidence from which to do so or to decline to do so. That bears not only on the credibility of the defence, but directly on the central issue as to whether the alleged assault did occur.

[Emphasis added.]

[81] An important principle emerges from these decisions: where a party presents false or incomplete evidence at trial about a matter of central importance, including credibility of the parties, and which is designed to mislead the trier of fact, a new trial is required in the interests of justice to preserve the integrity of the trial process. That is the case whether counsel at the first trial was complicit in putting forward the misleading evidence (*Meek*), or not (*Fullerton*). The principle is applied where the misleading evidence does not directly concern the central findings of fact that had to be made by the triers of fact. In *Meek* and *Fullerton*, the central issue for the triers of fact was whether the defendant(s) assaulted the plaintiff(s). The concealed evidence was material in both cases because it would have provided support for the inference that the plaintiff in each case asked to be drawn—that key witnesses were not telling the truth.

[82] Another proposition that follows from these decisions is that where a party puts forward false evidence, designed to mislead the trier of fact, the existence of other independent evidence is less significant to the decision to order a new trial. That is because such evidence should be considered at the new trial where the trier of fact can hear all the relevant evidence without having to consider the effect of perjured evidence.

Application of materiality to the circumstances in this case

[83] In my view, the circumstances of the present case are analogous to those in *Meek* and *Fullerton*. Accordingly, the same threshold for materiality should have been applied.

[84] The important context includes:

- Mr. Long intentionally lied to the court about Mr. Darch's neutrality and the assistance he provided to Mr. Long;
- He did so intending to mislead the court about those matters to bolster his own credibility and diminish Mr. Wright's credibility;

- The important findings of fact to be made at trial depended largely on the judge's assessment of the parties' credibility; and
- Mr. Darch's neutrality was a material factor in the judge's credibility decision in the First Trial.

[85] The judge erred by ignoring this threshold and applying a different approach to materiality. He failed to conclude that the fraud perpetrated on the court by Mr. Long was sufficiently material to order a new trial despite having found that: 1) Mr. Long had committed perjury; 2) for the purpose of misleading the First Trial judge; and 3) about a matter that was of central importance to the determination of credibility. These findings should have been sufficient to conclude the false evidence met the threshold for materiality because it "might have misled the court" or "may reasonably have" tipped the scales in favour of Mr. Long's version of events: *Granitile* at para. 319; *Meek* at 154. It must be remembered that, at its heart, this case was a credibility contest between the two parties. To the extent that the judge was influenced by Mr. Darch's supposed impartiality, it would have been significant to his assessment of *both* parties' credibility.

[86] Mr. Long concedes that the decision at the First Trial turned on credibility. However, he argues that the present case is distinguishable from *Fullerton* and *Meek* as the judge found as a fact that Mr. Darch's neutrality "was not material to the outcome of the First Trial". The judge arrived at that conclusion because "there was ample other evidence to support Wong J.'s finding that Mr. Long held a 50% beneficial ownership interest in the Royalty": Second Trial Decision at paras. 89–90.

[87] I do not accept this argument. The judge's finding that Mr. Darch's neutrality was not material to credibility reflects the key misstep in the approach he took to the assessment of materiality. As I will explain, the judge attempted to reassess how important Mr. Darch's evidence was to the outcome by reweighing the evidence Justice Wong heard at the First Trial. In undertaking this approach, he failed to: (1) give effect to the First Trial judge's assessment of the importance of Mr. Darch's

neutrality as found by this Court in the Supplemental Appeal Decision; and (2) follow the approach described in the Evidentiary Application.

The judge's approach to materiality

Reweighing the trial evidence

[88] The appellants argue the judge attempted to determine materiality either by reweighing the trial evidence or attempting to look into the mind of the trial judge. I agree. It is clear from paras. 91–96 cited above, that the judge attempted to justify Justice Wong's credibility finding by listing the evidence that Justice Wong relied on to arrive at that finding. In effect, the judge was saying that Justice Wong correctly weighed the evidence.

[89] That is not the correct approach. It is impossible to know the extent to which the perjured evidence influenced the first judge's decision on credibility. I agree with Justice Cullity's observation in *Vale v. Sun Life Assurance Co. of Canada* (1998), 39 O.R. (3d) 444, 1998 CanLII 14823 (O.N. C.T.G.D.), that it was not the judge's role to attempt to penetrate the trial judge's mind. Justice Cullity set out principles, with which I agree, consistent with prior decisions on the requirement of materiality. He cautioned against estimating the extent to which the fraudulent evidence influenced the findings of fact (at 19):

(2) It is not the role of the court hearing the motion to interpret and analyze the reasoning of the trial judge in order to penetrate his mind and determine whether he would have regarded the fraud as related to a material issue. That is not to say that no weight at all should be given to the trial judge's identification of material issues as long as it is kept firmly in mind that this, like the rest of the reasons for decision, may have been affected by the fraud. The court hearing the motion should similarly be wary of attempting to estimate precisely the extent the fraudulent evidence influenced the findings of fact made at the trial. This would often be a dangerous, and in some cases a hopeless, exercise.

[Emphasis added.]

The importance of Mr. Darch's neutrality to the decision of Justice Wong

[90] Nevertheless, the judge went on to assess materiality by examining whether Justice Wong would have arrived at the same result had he known of the deception.

In doing so, he ignored the importance of Mr. Darch's neutrality to the First Trial judge's decision. It is evident from the First Trial Decision that the credibility contest was resolved in large part by the judge preferring the evidence of the "impartial witness". This Court reached the same conclusion in the Supplemental Appeal Decision. It observed that the judge's acceptance of Mr. Darch's evidence (as summarized at para. 47 of the First Trial Decision) was "critical to the outcome": at paras. 9–11. The Court also noted its concern from the Appeal Decision that Justice Wong had not addressed the evidence of Mr. Royce and that he "had effectively done so by preferring the evidence of Mr. Darch, who he considered to be more impartial": at para. 11.

The approach described in the Evidentiary Application

[91] As I set out earlier, in the Evidentiary Application, the judge accurately described the approach required to resolve the issues that had been remitted to the trial court. His first task was to determine whether at the First Trial Mr. Long had intentionally deceived the court about his relationship with Mr. Darch, and the latter's efforts to assist him. The judge correctly stated that the purpose of the trial was to determine if Justice Wong's decision should be set aside, "not to first determine this issue and then relitigate the underlying issue regarding the ownership of the 50% royalty interest": at para. 16. He noted that such an inquiry should be left to a subsequent trial, if the decision ought to be set aside.

[92] However, in order to determine whether the perjury was material, the judge did exactly what he said he should not do; he examined and weighed the evidence concerning the underlying issue of ownership of the Royalty Interest. The judge attempted to resolve materiality by considering whether Justice Wong had arrived at the correct decision on credibility and ownership of the Royalty Interest. Again, this is evident at paras. 91–96, where the judge found that Justice Wong assessed the parties' credibility on the "totality of the evidence" and set out portions of that evidence, finding that some of it "rings true".

[93] The problem with the judge's assessment of the evidence is that he did not hear all of the relevant evidence. He did not hear the evidence that was not considered by Justice Wong even though this Court had observed in the Appeal Decision that it would have been preferable for the First Trial judge to have engaged with that evidence. In essence, the judge reweighed *some* of the evidence and accepted Justice Wong's reasoning.

[94] The judge's approach failed to adhere to the principle arising from *Fullerton and Meek* that the role of independent evidence is diminished in a decision to order a new trial when false evidence is put forward to mislead the trier of fact. He ignored Justice Cumming's caution in *Fullerton* that "the totality of the evidence" be examined anew, irrespective of whether other evidence supports the decision made: at para. 37.

[95] Holroyd Pearce L.J. in *Meek* rejected a similar argument; that the fraud was not material because the trial judge heard evidence of several other police witnesses that was supportive of the defendant's position. It was enough for the judge that the party took such a "serious" step to conceal information, for him to find he could not confirm "it may have made no difference to the result": *Meek* at 154.

[96] Applied here, I conclude that Mr. Long decided to lie about his relationship with Mr. Darch, and the support he gave him at the First Trial, as he thought that by concealing the truth he had a much better chance of succeeding with his claim. This should have led to a new inquiry at a subsequent trial.

Due diligence in the context of fraud

[97] Before concluding, I address one additional argument. Mr. Long submitted that this Court should examine due diligence afresh. He argued that the judge failed to consider whether Mr. Wright could have found out using pre-trial procedures about Mr. Darch's cooperation and the assistance that he provided to Mr. Long prior to the First Trial.

[98] In my view there is no merit to this argument. The judge recognized that one of the issues he had to determine was whether Mr. Wright had knowledge of the fraud or of the evidence necessary to prove it at the First Trial. The judge concluded that he did not. That information only came to Mr. Wright when he had direct access to Mr. Long's solicitor's file: at paras. 76–78. The judge's findings are findings of fact and Mr. Long is unable to direct us to any error, let alone one that is palpable and overriding. This is a complete answer to this argument.

[99] I would also note that the nature of the inquiry into due diligence in this case is somewhat different from that undertaken on a fresh evidence application. First, the result of the Supplemental Appeal Decision which permitted Mr. Wright to commence a new action alleging fraud meant the issue of due diligence became subsumed in the investigation into whether Mr. Long had committed a fraud on the court. The judge could not have arrived at the conclusion he did without considering whether Mr. Wright knew or ought to have known about the deception.

[100] Second, the approach to due diligence changes when the false evidence demonstrates that the opposing party intentionally misled the court in the earlier trial. As noted in *Vagi*, where a party intentionally deceives a court, it is difficult for that party to “protect” a judgment based on false evidence by alleging a failure of due diligence:

[6] The respondent contends that the appellant has not met the conditions set forth in *Palmer and Palmer v. The Queen* (1979), 1979 CanLII 8 (SCC), 30 N.R. 181; 106 D.L.R. (3d) 212 for the admission of this new evidence. I am not prepared to accept that contention, primarily because it does not rest well with the respondent to seek to protect his untruths on the basis that a less trusting or alert appellant could have discovered the untruths at an earlier date. ...

[101] Mr. Long also relies on statements of Justice Southin in *D.K. Investments Ltd.* to emphasize the requirement for due diligence and materiality to be met in cases involving fresh evidence. However, the circumstances in *D.K. Investments Ltd.* have little in common with this appeal. After a first unsuccessful appeal in an action for specific performance involving the sale of land, the losing party brought an action to set aside the first trial decision based on “scientific” fresh evidence. The evidence

showed that a letter the judge had believed was backdated, likely bore the correct date and was contemporaneous with other correspondence. It did not involve a party tendering perjured evidence. The Court stated, “[i]t is essential to remember, in this case, that no allegation is made here against the defendant of fraud by it in procuring the judgment...”: at 9.

[102] In summary, I conclude that the judge applied the wrong test for materiality. He failed to set the threshold of materiality at the required level for cases of intentional fraud on the court and ask: was the fraud sufficiently material that it might have misled the Court, bearing in mind the “basic value that those who deceive others should not be permitted by the Court to profit from the deception”: *Granitile* at para. 319. Instead, the judge erred by attempting to resolve materiality by reweighing the evidence from the First Trial to determine whether the judge would have arrived at a different decision had he known of the fraud. That should have been left to a new trial where a judge can consider all the evidence touching on the Royalty Action, without any concern for the effect of the perjury on the First Trial judge.

[103] I would allow the appeal, set aside the trial order and remit the matter to trial on the Royalty Action.

Cross Appeal

[104] The result of my decision on appeal is that the Royalty Action is remitted to the trial court for a new trial. As a result, the orders made in the Costs Decision and the Second Costs decision are also set aside. Accordingly, I need not consider the arguments of the parties on the cross appeal.

[105] The issues of costs for the First Trial Decision, the Appeal Decision and the Supplemental Appeal Decision will be determined by the court at the new trial. The appellants are entitled to the costs of the Second Trial Decision and of this appeal.

Disposition

[106] The appeal is allowed. The order from the Second Trial Decision is set aside and the Royalty Action claim is remitted to the trial court for a new trial. The Second Costs Decision is set aside and costs will be considered afresh at the new trial of the Royalty Action.

“The Honourable Mr. Justice Butler”

I AGREE:

“The Honourable Justice MacNaughton”

I AGREE:

“The Honourable Justice Brundrett”