NOVA SCOTIA COURT OF APPEAL
Citation: R. v. Hobbs, 2010 NSCA 62

Date: 20100715
Docket: CAC 316120
Registry: Halifax

Between:

Kevin Patrick Hobbs

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	Bateman, Oland and Beveridge, JJ.A.
Appeal Heard:	June 3, 2010, in Halifax, Nova Scotia
Held:	Appeal allowed and new trial ordered, per reasons for judgment of Beveridge, J.A., Bateman and Oland, JJ.A. concurring.
Counsel:	Luke A. Craggs, for the appellant Ann Marie Simmons, for the respondent

Reasons for judgment:

INTRODUCTION

[1] The appellant complains that the jury selection process was flawed, and requests that a judicial stay of proceedings be entered, or at least a new trial ordered. The Crown concedes that the appeal should be allowed but suggests a new trial is the only suitable remedy. For the reasons that follow, I would agree a new trial should be ordered. Since there must be a new trial, only those facts relevant to the disposition of the appeal will be mentioned.

BACKGROUND

[2] The appellant elected trial by judge and jury on charges of production and possession of marijuana for the purposes of trafficking. Trial counsel for the Crown was James Whiting of the Public Prosecution Service of Canada. Mr. Whiting sent a copy of the list of potential jurors to the lead investigator, requesting that the police check the names on the list on the standard databases accessible by the police for criminal records.

[3] The police complied with this request. More details will be set out later on the information provided to the Crown. The defence was unaware of the Crown request and knew nothing of the information provided by the police to Mr. Whiting.

[4] The appellant's trial commenced with jury selection on May 25, 2009. At the close of the Crown's case, the defence called evidence. On June 1, 2009 the jury returned verdicts of guilty on both counts. Sentencing was adjourned to July 20, 2009.

[5] Mr. Whiting became aware that the practice of doing criminal record checks on prospective jurors was the subject of some controversy. He consulted with one of his supervisors. Efforts were commenced to gather documentation regarding the checks done by the RCMP. Defence counsel was advised orally as to what had happened, and that further details would be provided.

[6] Sentencing was adjourned to August 11, 2009. Written confirmation was provided to the defence detailing the requests that had been made of the police, the type of information gathered and that the Crown relied, at least in part, on the information in the exercise of its peremptory challenges during jury selection.

[7] The Crown disclosure prompted an application by the appellant to the trial judge for an order for a mistrial or a judicial stay of proceedings. The trial judge, Coughlan J., ruled he did not have jurisdiction to consider the merits of the application and hence dismissed it. His reasons are reported as *R. v. Hobbs*, 2009 NSSC 257. The appellant was subsequently sentenced.

[8] The appellant appealed from both conviction and sentence. On the conviction appeal, he contends the trial judge erred in law in ruling he lacked jurisdiction to consider his application for a mistrial or a stay, and there has been a miscarriage of justice caused by the Crown using police resources to obtain information about members of the jury pool, using it during jury selection and failing to disclose it to the defence. By way of remedy the appellant asks this Court to enter a judicial stay of proceedings or at least order a new trial.

[9] During the pendency of the appeal hearing, the Crown pursued a full investigation, gathering documents that informed who made the requests, why they were made, who carried out the tasks involved in the requests, what information was produced and how it was used. The investigative effort by the Crown was compiled into a volume of materials. This volume was, of course, disclosed to the appellant. Included in the volume was a detailed narrative from Mr. Whiting. The Crown brought a motion under s. 683(1) of the *Criminal Code* to admit the volume of materials as 'fresh evidence'. The appellant consented that the volume should be admitted, but sought an order from the Court to compel an examination of Mr. Whiting pursuant to s. 683(1)(b) of the *Code*. The application by the appellant was dismissed in reasons now reported (*R. v. Hobbs*, 2010 NSCA 32).

ISSUES

[10] The appellant requests this Court to consider:

> 1. Did the trial judge err in law in concluding he lacked jurisdiction to consider the application for a mistrial or a judicial stay of proceedings ?

2. What is the appropriate remedy for the conduct of the Crown ?

Jurisdiction of the trial judge

[11] In my opinion, the law is clear. In jury trials, once the jury verdict has been recorded and the jury discharged, there is a very narrow jurisdiction for a trial judge to do anything but sentence the offender. The jurisdiction is limited to dealing with an issue of receiving and recording the jury's true verdict (see *R. v. Head*, [1986] 2 S.C.R. 684; *R. v. Burke*, [2002] S.C.J. No. 56). This has been applied consistently by this Court (*R. v. Gumbly* (1997), 155 N.S.R. (2d) 117 (C.A.); *R. v. Lawrence*, 2001 NSCA 44) and elsewhere (*R. v. Halcrow*, 2008 ABCA). The trial judge was eminently correct in his analysis and conclusion that he lacked jurisdiction to deal with the appellant's application. Accordingly, this ground of appeal fails.

Remedy for the Conduct of the Crown

[12] Before addressing the legal principles relevant to the issue of remedy, it is useful to set out in more detail the uncontested primary facts as revealed by the Volume of Materials, the Appeal Book, and An Agreed Statement of Facts.

[13] Mr. Whiting had carriage of the prosecution of the charges against Mr. Hobbs. His trial was originally scheduled to commence on September 10, 2008. This was to be Mr. Whiting's first jury trial. From discussions with senior counsel within his section, he was aware of the practice for counsel to provide a list of the jury panel to the police for the purpose of conducting criminal record checks. It was also his understanding that the results of these checks were not disclosed to the defence.

[14] It was Mr. Whiting's understanding, and this is not contested, that Court staff who prepared the jury panel do not make any attempt to check that the potential jurors listed on it are disqualified from serving as jurors pursuant to the strictures of the *Criminal Code*, or the *Juries Act*, S.N.S 1998, c. 16.

[15] Section 638 of the *Criminal Code* sets out a number of bases to challenge a prospective juror for cause. One of these is that the juror has been convicted of an

offence for which he was sentenced to death or to a term of imprisonment exceeding twelve months. The *Juries Act* directs that, subject to s. 4, every Canadian citizen residing in Nova Scotia who is eighteen years of age is qualified to serve as a juror. Section 4 prescribes that certain individuals are disqualified from serving as a juror. Here the relevant restriction is found in s. 4(e) which mandates that a person who has been convicted of a criminal offence for which he or she has been sentenced to a term of imprisonment of two years or more is not eligible. At least for a criminal jury trial, the disqualification from serving due to a criminal conviction set out in the *Juries Act* seems redundant in light of the *Criminal Code* provision.

[16] Mr. Whiting sent his request to the lead investigator, Cpl. Karine Bernier by facsimile transmission. The transmission enclosed the jury panel list and referenced his request for "criminal record checks". Whiting believes he verbally requested Cpl. Bernier to check both the CPIC (Canadian Police Information Centre) and JEIN (Justice Enterprise Information Network). No materials were provided to the Court about the different type of information, if any, that might be generated by consulting these two separate databases.

[17] Additional police resources were approved to get the request completed in time for the scheduled trial date. The results were provided to Mr. Whiting but not disclosed to Mr. Hobbs, who was unrepresented at the time. Not much of the information gathered by the police has been produced on the appeal. Mr. Whiting says there were two individuals who had significant *Criminal Code* records, sufficient to disqualify them from serving as jurors.

[18] The jury trial was adjourned at Mr. Hobbs' request to January 26, and then to May 25, 2009. Mr. Whiting wrote to Cst. Darren Slaunwhite, the new lead investigator, requesting the names on the jury panel list be checked on CPIC and JEIN. Whiting followed up with Cst. Slaunwhite by phone, explaining he wanted to categorize the names on the jury panel list as follows: those with criminal records, and whether the records involved serious offences; those without criminal records; and those whose names may be associated with a criminal record, but whose identification to those records was uncertain. Additional police resources were again required to get the checks done in time.

[19] Cst. Slaunwhite returned the jury panel list with handwritten notations, and twenty CPIC printouts. There were 323 names on the jury panel list. The police provided no information on 223 names. For some of the balance of one hundred names, there was incomplete information to provide any assurance that the information actually related to the named prospective juror. Cst. Slaunwhite also provided information verbally with respect to 17 names, which Mr. Whiting noted on his copy of the list. The verbal information ranged from "drugs pending" to "38 SOTS [summary offence tickets]".

[20] During the jury selection process, a total of thirty individuals were selected randomly for possible service on the jury. None were challenged for cause. The defence and the Crown were each entitled by law to twelve peremptory challenges (s. 634(2) of the *Code*). Before the jury process was complete, the defence had used all of its peremptory challenges. Mr. Whiting, for the Crown, exercised its right to peremptorily challenge a prospective juror five times. As already noted earlier, the information the police provided to Mr. Whiting was a factor in the Crown's decision to challenge each of these prospective jurors.

[21] In Mr. Whiting's narrative, he set out his belief that the practice of the police doing criminal record checks was reasonable, and was pursued with the goal of discovering information that may disclose significant concerns about prospective juror's impartiality, honesty and/or integrity. He said there was no issue of seeking a strategic advantage, but was simply a means of trying to ensure an impartial jury, and not one favourable to the Crown.

[22] With respect to why the information gleaned from the police was not disclosed, Mr. Whiting said he had several rationales. In summary form, they were: the practice of the Public Prosecution Service, at least in Atlantic Canada, was not to disclose the information; the information did not relate to any aspect of the Crown's case or any potential defence; the information gathered related to third parties who had an expectation of privacy; the information fell within the confines of trial preparation material and hence not disclosable; and lastly, he did not believe the information resulted in a strategic advantage for the Crown.

[23] The appellant's ground of appeal alleges:

> There was a miscarriage of justice arising as a result of the lead investigator and the Crown Prosecutor mis-using police resources to obtain information about members of the jury pool, using this information during jury selection, and failing to disclose it to the Defense.

[24] Although originally framed as a complaint of non-disclosure, the argument eventually presented on appeal was that the conduct of the Crown was geared toward gaining a strategic advantage over the defence, by mining non-public databases to weed out any persons who had had contact or suspected run-ins with the criminal justice system. The appellant says this conduct was an effort designed to maximize the chances of conviction rather than ensuring a fair trial. As such, it amounts to an abuse of process, permanently taints the prosecution of the appellant, and warrants a judicial stay of proceedings. The appellant also submits that the actions of the authorities not only tainted the fairness of his trial, but also the ability of the appellant to be assured of a fair re-trial.

[25] In support of his position, the appellant relies on *R. v. Latimer*, [1997] 1 S.C.R. 217. There are some superficial parallels between that case and what happened here, but that is all. *Latimer* was a highly charged case about euthanasia. Before his first trial, trial counsel for the Crown and an RCMP officer, prepared a questionnaire asking prospective jurors their views on a number of issues, including religion, abortion and euthanasia. The questionnaire was administered to 30 of the 198 prospective jurors, either on the phone or at various RCMP detachments. There were also unrecorded discussions with prospective jurors beyond the exact questions posed by the questionnaire. These activities were never reported to the defence nor the trial judge. Of the 30 prospective jurors contacted, five served on the jury that convicted Mr. Latimer. After the appellant's initial appeal to the Saskatchewan Court of Appeal, the conduct of the Crown and police was disclosed. Fresh evidence was admitted by consent before the Supreme Court detailing the conduct of the trial Crown and police. The Crown conceded there should be a new trial. Lamer C.J. gave the unanimous reasons for judgment. He wrote:

> 43 I need only address this issue very briefly. The actions of Crown counsel at trial, which were fully acknowledged by Crown counsel on appeal, were nothing short of a flagrant abuse of process and interference with the administration of justice. The question of whether the interference actually influenced the deliberations of the jury is quite beside the point. The interference

> contravened a fundamental tenet of the criminal justice system, which Lord Hewart C.J. put felicitously as "justice should not only be done, but should manifestly and undoubtedly be seen to be done": *R. v. Sussex Justices*, [1924] 1 K.B. 256, at p. 259; also see *R. v. Caldough* (1961), 36 C.R. 248 (B.C.S.C.).

[26] The conduct by the authorities in *Latimer*, labelled by Lamer C.J. as a flagrant abuse of process and interference with the administration of justice, is a far cry from the request made by the Crown here for criminal record checks of prospective jurors. Nonetheless, the Crown conceded at the hearing of this appeal that it is appropriate for Mr. Hobbs to get a new trial.

[27] The reasons for the Crown's concession are as follows. Of the actual 30 prospective jurors randomly selected to become jurors, 29 had been checked on CPIC and JEIN. Of these 29 individuals, the Crown had in its possession information on seven – five by way of notations on the list and two CPIC printouts.

[28] The defence challenged twelve prospective jurors. With respect to nine of those individuals, the Crown had no information. For one, there was a notation "JEIN-MVA charges". For the remaining two individuals, the police had noted "Unable to determine – possible" and referenced attached CPIC printouts.

[29] The Crown acknowledges that it should have disclosed the information gathered by the police on the prospective jurors prior to the jury selection process on the basis that it may have had relevance to defence counsel's exercise of his peremptory challenges.

[30] The Crown refers to the decision of the Supreme Court of Canada in *R. v. Dixon*, [1998] 1 S.C.R. 244. This was a case about information that the Crown should have disclosed at trial, but did not. The fact of the non-disclosure was discovered after conviction. The appeal from conviction was dismissed by this Court (see: 156 N.S.R. (2d) 81). On further appeal to the Supreme Court, the appeal was dismissed. The case authoritatively establishes that in order to obtain a remedy on appeal for a failure to disclose, the appellant must demonstrate, on a balance of probabilities, not just the failure to disclose, but that the appellant's right to make full answer and defence was impaired as a result of the failure. Cory J., for the unanimous Court, wrote that: "This burden is discharged where an accused demonstrates that there is a <u>reasonable possibility</u> the non-disclosure affected the outcome at trial or the overall fairness of the trial process."

[31] The failure to disclose in this appeal has nothing to do with full answer and defence. It does raise the issue of the fairness, or at least the appearance of the fairness, of the trial process. If the information had been disclosed at the time of the trial, either jury selection could have occurred with both sides in possession of the relevant information, or a new jury panel drawn up.

[32] The Crown fairly acknowledges that in two instances during the jury selection process the defence exercised its peremptory challenges in circumstances where, if it had the undisclosed information, there is a reasonable possibility it would have done so differently. Specifically, if the defence had the information about the two prospective jurors, it probably would have concluded the Crown would have challenged them peremptorily, and thereby preserved two defence challenges. In this case, the defence used all of their peremptory challenges. In other words, the jury that had the difficult task of weighing the evidence of the Crown and defence, and deciding the guilt or innocence of the appellant, would have been differently constituted.

[33] Jury selection is obviously an integral part of the trial process. In *R. v. Barrow*, [1987] 2 S.C.R. 694, Dickson C.J., in the context of the right of an accused to be present during all parts of his jury trial, commented :

> 25 The selection of an impartial jury is crucial to a fair trial. The *Criminal Code* recognizes the importance of the selection process and sets out a detailed procedure to be followed (ss. 554-573). Both the Crown and the accused participate in the process, with the right to challenge for cause or peremptorily and, in the case of the Crown, to stand aside potential jurors (ss. 562-568). The challenge for cause involves trial of the impartiality of potential jurors, with examination by either side. The accused, the Crown, and the public at large all have the right to be sure that the jury is impartial and the trial fair; on this depends public confidence in the administration of justice.

[34] Furthermore, Dickson C.J. recognized that the appearance of unfairness is important to the maintaining public confidence in the administration of justice. He wrote:

> 33 The argument of the Crown in this appeal does not address what may be the most important aspect of the case, namely, the appearance of justice. Even if the two-stage analysis of the empanelling process is a legally accurate description

> of the interplay of the *Criminal Code* and the Nova Scotia *Juries Act*, it leaves out of account the effect of the proceedings in this case as they would appear to the average citizen...

[35] The history and importance of trial by jury is set out in *R. v. Sherratt*, [1991] 1 S.C.R. 509. L'Heureux-Dubé J., wrote eloquently of the importance of the jury:

> 30 Importantly, the development of the institution known as the jury and the process through which it came to be selected was neither fortuitous nor arbitrary but proceeded upon the strength of a certain vision of the role that that body should play. Most of the early rationales for the use of the jury are as compelling today as they were centuries ago while other, more modern, rationales have developed. The Law Reform Commission of Canada in its 1980 Working Paper, *The Jury in Criminal Trials*, sets out numerous rationales for the past and continued existence of the jury. The jury, through its collective decision making, is an excellent fact finder; due to its representative character, it acts as the conscience of the community; the jury can act as the final bulwark against oppressive laws or their enforcement; it provides a means whereby the public increases its knowledge of the criminal justice system and it increases, through the involvement of the public, societal trust in the system as a whole.

And later:

> 35 The perceived importance of the jury and the *Charter* right to jury trial is meaningless without some guarantee that it will perform its duties impartially and represent, as far as is possible and appropriate in the circumstances, the larger community. Indeed, without the two characteristics of impartiality and representativeness, a jury would be unable to perform properly many of the functions that make its existence desirable in the first place. Provincial legislation guarantees representativeness, at least in the initial array. The random selection process, coupled with the sources from which this selection is made, ensures the representativeness of Canadian criminal juries.

[36] The long standing right of the Crown to exercise 'stand-asides' during the jury selection process was found to be unconstitutional in *R. v. Bain*, [1992] 1 S.C.R. 91. The judgment of Lamer C.J., La Forest J. and Cory J. was delivered by Cory J., who emphasized the importance of appearance of fairness:

> 7 It may well be correct that it would be impossible to prove that a jury selected after the Crown had exercised all its stand bys and peremptory challenges was in fact biased. Nonetheless the overwhelming numerical superiority of choice granted to the Crown creates a pervasive air of unfairness in the jury selection

> procedure. The jury is the ultimate decision maker. The fate of the accused is in its hands. The jury should not as a result of the manner of its selection appear to favour the Crown over the accused. Fairness should be the guiding principle of justice and the hallmark of criminal trials. Yet so long as the impugned provision of the *Code* remains, providing the Crown with the ability to select a jury that appears to be favourable to it, the whole trial process will be tainted with the appearance of obvious and overwhelming unfairness. Members of the community will be left in doubt as to the merits of a process which permits the Crown to have more than four times as many choices as the accused in the selection of the jury.

[37] Stevenson J. wrote the other majority judgment. He arrived at the same result, but for different reasons. Nonetheless he expressed the same concern over the appearance of fairness. He stated:

> 112 In my view, the disparity between the accused's and the Crown's right to challenge jurors cannot meet the test from *Valente*. Briefly the stand by cannot be upheld because the Crown is allowed to have a greater role in fashioning the jury. It may take partisan interests into consideration in carrying out that role. The accused's role in selecting his or her jury of peers is thereby significantly diminished, impairing the appearance that the jury is indifferent as between the Crown and the accused. This offends the *Charter* because the appearance of impartiality is an essential element of the right guaranteed by s. 11(*d*) of the *Charter*.

[38] As Stevenson J. later stressed, the jury should be seen as impartial, representative and competent. No one can doubt that the Crown, as well as the accused, has a legitimate interest in ensuring the jury is impartial, representative and competent. But given the Crown resources and potential access to much more information about prospective jurors, care should be taken that even the risk of an appearance of unfairness is avoided.

[39] The jury selection process must be fair, and in order to maintain respect for the administration of justice, must appear to be fair. If nothing else, the failure to disclose the information, in the circumstances of this trial, gave the Crown an unfair advantage that actually impacted on the selection of the jury. In light of the applicable principles outlined above, the concession by the Crown is appropriate, and I would order a new trial.

[40] The appellant argues the conduct of the Crown amounted to an abuse of process and a stay should be entered. His argument is framed as follows:

> [59] The Appellant submits that there is little doubt that the Crown's conduct during jury selection calls into question the validity of the jury's verdict. At best, the Crown made an honest mistake and was privy to information which was not provided to the defense. At worst, the Crown acted in a manner abusive that was underhanded and has had the effect of permanently tainting this prosecution.
>
> [60] The Appellant's position is that Crown's conducted [sic] amounted to abuse of process and that this court should take the extraordinary step of allowing this appeal and staying the charges.

[41] With respect, the actions of the Crown appear to be nothing more than a well intentioned desire to see that the jury ultimately selected to try the allegations against the appellant was impartial. There is no suggestion that the actual jury was anything but impartial. At worst, the actions of the Crown created the appearance of unfairness by acquiring information from sources unavailable to the appellant, and not disclosing it. In the circumstances of this trial, the non-disclosure likely impacted on how peremptory challenges were exercised by the appellant, to his detriment. In my opinion, the Crown conduct does not rise to the level of constituting an abuse of process. Even if it did, a stay of proceedings is clearly not appropriate.

[42] The principles that govern the power of a court to stay proceedings as a remedy for Crown misconduct amounting to an abuse of process are well known. In *R. v. O'Connor*, [1995] 4 S.C.R. 411, the Court recognized that a prosecution conducted in a manner contravening the community's sense of decency and fair play is also an affront to the constitutional rights of an individual accused and entitles an accused subject to such treatment to request a just and appropriate remedy from a court of competent jurisdiction. L'Heureux-Dubé J., writing for the majority, stated that a stay of proceedings is an exceptional remedy to be employed as a last resort, only after canvassing other available remedies. L'Heureux-Dubé J. also recognized a residual category of conduct that could justify the granting of a stay. She said of this (para. 73):

> ...In addition, there is a residual category of conduct caught by s. 7 of the Charter. This residual category does not relate to conduct affecting the fairness of the trial or impairing other procedural rights enumerated in the Charter, but instead addresses the panoply of diverse and sometimes unforeseeable circumstances in

> which a prosecution is conducted in such a manner as to connote unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process.

[43] Circumstances where a stay may be justified were clarified in *R. v. Tobias*, [1997] 3 S.C.R. 391 and in *R. v. Regan*, [2002] 1 S.C.R. 297. LeBel J., for the majority in *Regan*, reinforced the principle that a stay of proceedings is not to remedy past wrongs, but to prevent the perpetuation of a wrong. There is still a residual category where it is uncertain whether the abuse is sufficient to warrant the drastic remedy of a stay. He wrote:

> 54 Regardless of whether the abuse causes prejudice to the accused, because of an unfair trial, or to the integrity of the justice system, a stay of proceedings will only be appropriate when two criteria are met:
>
> (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. [*O'Connor*, at para. 75]
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> The Court's judgment in *Tobiass*, at para. 91, emphasized that the first criterion is critically important. It reflects the fact that a stay of proceedings is a prospective rather than a retroactive remedy. A stay of proceedings does not merely redress a past wrong. It aims to prevent the perpetuation of a wrong that, if left alone, will continue to trouble the parties and the community as a whole, in the future.
>
> 55 As discussed above, most cases of abuse of process will cause prejudice by rendering the trial unfair. Under s. 7 of the Charter, however, a small residual category of abusive action exists which does not affect trial fairness, but still undermines the fundamental justice of the system (*O'Connor*, at para. 73). Yet even in these cases, the important prospective nature of the stay as a remedy must still be satisfied: "[t]he mere fact that the state has treated an individual shabbily in the past is not enough to warrant a stay of proceedings" (*Tobiass*, at para. 91). When dealing with an abuse which falls into the residual category, generally speaking, a stay of proceedings is only appropriate when the abuse is likely to continue or be carried forward. Only in "exceptional", "relatively very rare" cases will the past misconduct be "so egregious that the mere fact of going forward in the light of it will be offensive" (*Tobiass*, at para. 91).

[44] Even had the conduct of the Crown amounted to an abuse of process, entitling the appellant to a remedy, the obvious remedy is a new trial. The appellant was unable to identify in any way how any prejudice he may have suffered by the Crown's conduct during the jury selection process would in any way be manifested or perpetuated through a new trial. The only suggestion made by the appellant was that potential jurors may be put off wanting to attend for jury duty if they knew the Crown was at liberty to have the police make inquiries into their lives, perhaps infringing on their privacy.

[45] This suggestion is entirely speculative. Even if it had substance, the prejudice would be the same for all persons facing an upcoming jury trial. Furthermore, it ignores the fact that shortly after the outcome of the present trial the Public Prosecution Service of Canada adopted a policy as of June 11, 2009 that provided, amongst other things:

> Counsel may request that the police conduct CPIC checks ONLY for the purpose of confirming whether or not the juror has a conviction for which he/she was sentenced for 12 months or more for which a pardon has not been received, as referred to in section 638(1) (c) of the Code. The request should be made to the RCMP in writing and should be specific
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> ...
>
> Counsel will not seek out any additional information about the jurors.
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> ...
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> All information obtained will be disclosed to defence.

[46] This policy has since been formalized in a more comprehensive Practice Directive from the Director of the Public Prosecution Service of Canada. I note that a similar directive from the DPP, Nova Scotia Public Prosecution Service, has also been issued.

[47] For all of these reasons, I would admit the proffered fresh evidence, quash the convictions and order a new trial.

Beveridge, J.A.

Concurred in:

Bateman, J.A.

Oland, J.A.