NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. West*, 2012 NSCA 112

Date: 20121108
Docket: CAC 264962
Registry: Halifax

Between:

William Fenwick West

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	MacDonald, C.J.N.S.; Farrar and Bryson, JJ.A.
Appeal Heard:	June 11, 2012, in Halifax, Nova Scotia
Held:	Motion for disclosure/third party records dismissed; motion to adduce fresh evidence dismissed; and appeal from conviction dismissed per reasons for judgment of Farrar, J.A. MacDonald, C.J.N.S. and Bryson, J.A. concurring.
Counsel:	James White, for the appellant Mark Scott, for the respondent

Reasons for Judgment:

Background

[1] The appellant appeals from his conviction for the robbery of the Mahone Bay Bank of Montreal on December 18, 1998.

[2] On a preliminary motion, Mr. West sought disclosure/production of third party records and numerous items listed in an Affidavit sworn November 8, 2010, a Brief filed March 18, 2011, and a Supplemental Affidavit sworn February 18, 2011.

[3] The motion for production was heard on April 11, 2012. After hearing from counsel we dismissed the appellant's motion with reasons to be included with the reasons on the conviction appeal.

[4] The appellant's appeal from conviction was heard on June 11th, 2012. The appellant also sought to introduce fresh evidence on the appeal. For the reasons that follow I would dismiss the motion to introduce fresh evidence, I would also dismiss the appeal from conviction.

[5] I will address the disclosure motion first; the fresh evidence motion second; and finally, the appeal from conviction.

Disclosure Motion

[6] The information for which the appellant seeks disclosure can be grouped into five broad categories and I would slot the information into the categories as follows:

1. **Documents over which we have no jurisdiction:**

    (a) the redacted disclosure package from the office of the Information Commissioner;

2. **Documents which the appellant assumes are in existence but there is no proof of their existence:**

    (a) Sergeant Oldford's disciplinary record;
    (b) Chief Brent Crowhurst's notes pertaining to the road block that occurred on Highway 103 on November 18, 1998;
    (c) Sergeant Rob Douthwright's notes concerning the road block at Exit 11;

3. **Documents that have been disclosed:**

    (a) Sergeant Brian Oldford's complete Mahone Bay file;
    (b) SUS-12 VHS tape;
    (c) New Minas RCMP Ident files;

4. **Documents that are not relevant:**

    (a) Sergeant Brian Oldford's service record;
    (b) Sergeant Larry Kavanagh's December 8, 2003 exhibit list;
    (c) Pamela Mood's invoices and purchase orders;

5. **Documents to which the disclosure was addressed by Coughlan, J. at trial:**

    (a) Sergeant Oldford's complete file;
    (b) Chief Brent Crowhurst's notes;
    (c) New Minas Ident files;
    (d) the missing Radio transmission tapes;
    (e) Constable Barry Ettinger's notes.

[7] Our reasons for dismissing the disclosure motion may be self-evident by my categorization of the information sought. However, I will explain further.

[8] The parties agree the Crown has an ongoing duty to disclose "the fruits of the investigation" relating to the matter being prosecuted. The information is to be disclosed whether the Crown plans to introduce it into evidence or not and whether it is inculpatory or exculpatory: **R. v. Stinchcombe**, [1991] 3 S.C.R. 326.

[9] However, that does not allow the appellant, on a motion such as this, to embark on a fishing expedition. A Crown's obligation to disclose arises where the items sought are in existence, relevant, within the control of the Crown and not protected by privilege or delayed disclosure considerations. Where the existence of such items is disputed, i.e., the Crown is unaware of or denies their existence, the burden is on the applicant to establish the existence of potentially relevant material. The test is not intended to be onerous. However, it is not intended to include speculative and/or fanciful requests: **R. v. Chaplin**, [1995] 1 S.C.R. 727, ¶25, ¶30-32.

[10] A party to an appeal, like Mr. West, may obtain production of third party records pursuant to this Court's ancillary powers under s. 683 of the **Criminal Code**. Third party production is, in essence, an extension to common law access governed by the principles of pre-trial access to records set out by the Supreme Court of Canada in **R. v. O'Connor**, [1995] 4 S.C.R. 411.

[11] In **R. v. Trotta**, [2004] O.J. No. 2439 (Q.L.) (C.A.), the Ontario Court of Appeal held that third party production orders at the appellate level are governed by the same policies and evidentiary burdens that govern in an ***O'Connor*** application at the trial level with the appropriate modifications for the appeal context. This reconciliation of the test leads to a two-part question before documents in the presence of third parties are ordered produced. The applicant must show:

1. There is a connection between the request for production and the fresh evidence he proposes to adduce in that there is a reasonable possibility that the material sought could assist on the motion to adduce fresh evidence; and

2. There is a reasonable possibility that the evidence to which the production request is linked may be received as fresh evidence on appeal.

[12] With these principles in mind I will now turn to the specific documentary request made by Mr. West.

Issue #1 - Can this Court Order the Redacted Disclosure Package from the Office of the Information Commissioner, File # A-2008-23, Disclosed?

[13] On January 3rd, 2002, Mr. West sent a request to the Royal Canadian Mounted Police under the **Access to Information Act**, R.S.C. 1985, c. A-1 (**ATIA)** seeking access to the RCMP's Police Radio Transmission Tapes.

[14] On January 9, 2002, the RCMP responded stating that they were "unable to locate any information" relating to the transmission tapes.

[15] Upon being refused access, Mr. West complained to the Information Commissioner on January 31st, 2002. During the course of the investigation of the complaint two records were identified by an investigator that referred to the relevant transmission tapes. These records were disclosed to Mr. West.

[16] Mr. West subsequently requested further information relating to the radio transmission tapes. However, again the tapes could not be located and were not provided. Mr. West then made a second complaint to the Information Commissioner.

[17] The Commissioner investigated the appellant's two complaints and reported the results of these investigations to Mr. West.

[18] In 2007 Mr. West made an access to information request to the office of the Information Commissioner seeking disclosure of the Commissioner's investigative files in relation to the two complaints he made against the RCMP.

[19] The office of the Information Commissioner gave Mr. West access to the investigative files with information redacted. Mr. West, asks us, on this motion to order production of the radio transmission tapes and the redacted portions of the Information Commissioner's file.

[20] I will address the issue of the radio transmission tapes first. This was fully litigated before Coughlan, J. After hearing a significant amount of evidence with respect to the radio transmission tapes, he concluded that the tapes were missing

and that there was no explanation for what happened to these tapes. Coughlan, J. found that there was a breach of the Crown's duty to disclose. However, there was no evidence that the absence of the radio transmission tapes impaired or prejudiced Mr. West's ability to make full answer and defence (**R. v. West**, 2006 NSSC 40 ¶10).

[21] There is nothing new in the information provided by Mr. West or the submissions made in support of his motion for production of these tapes. They are no longer in existence. They cannot be disclosed.

[22] More importantly, this request, along with the other disclosure requests which were addressed by Coughlan, J. in the numerous motions made by Mr. West in this proceeding , represent a collateral attack on the trial judge's decision. Where the issues have been decided by the trial judge, Mr. West's remedy is to appeal that decision and not to attempt to attack it collaterally by making a motion to this Court for disclosure of the same information. In **Wilson v. The Queen**, [1983] 2 S.C.R. 594, the Supreme Court of Canada reviewed the law with respect to collateral attacks on a decision and concluded at p. 604:

> The cases cited above and the authorities referred to therein confirm the well-established and fundamentally important rule, relied on in the case at bar in the Manitoba Court of Appeal, that an order of a court which has not been set aside or varied on appeal may not be collaterally attacked and must receive full effect according to its terms.

(See also **R. v. Sarson**, [1996] 2 S.C.R. 223 at ¶33-35).

[23] The appellant is asking us to address the same motion he made below and which was already decided by the trial judge. This aspect of the motion is an impermissible collateral attack on the trial judge's decision.

[24] Turning now to the redacted portions of the information in the Commissioner's file, Mr. West did not seek judicial review of the Commissioner's decision to withhold that information. Section 41 of the **ATIA** provides:

> 41. Any person who has been refused access to a record requested under this Act or a part thereof may, if a complaint has been made to the Information

> Commissioner in respect of the refusal, apply to the Court for a review of the matter within forty-five days after the time the results of an investigation of the complaint by the Information Commissioner are reported to the complainant under subsection 37(2) or within such further time as the Court may, either before or after the expiration of those forty-five days, fix or allow.

[25] The Nova Scotia Supreme Court concluded in **Canadian Broadcasting Corporation v. Canada (Attorney General)**, 2009 NSSC 400 (affirmed 2010 NSCA 99) that it was not within the jurisdiction of this Court to order disclosure of materials which were in the possession of the RCMP after the investigation had been completed. At ¶52 this Court held:

> 52 I am further satisfied that the CBC was obliged to proceed against the RCMP in the Federal Court. I am satisfied that the investigation had concluded, and the RCMP was acting as a federal statute-governed agency in dealing with the request to release the materials, although the materials had their origin in the criminal investigation. As such, I am satisfied that this court does not have jurisdiction to deal with the matter in question. The application is allowed.

[26] In this case, Mr. West sought access to information from the Information Commissioner in relation to the two complaints he made against the RCMP with respect to the disclosure of the radio transmission tapes. Like **Canadian Broadcasting Corporation, supra**, the requested disclosure of the radio transmission tapes had their origin in the criminal investigation. However, the investigation files he is seeking come from the Information Commissioner's investigation into Mr. West's complaints relating to the radio transmission tapes. Mr. West's remedy was to seek judicial review of the Commissioner's decision to withhold that information pursuant to s. 41 of the **ATIA**. He chose not to do so. There is no jurisdiction in this Court to order access to that information.

[27] Further, there was no connection shown between the request for production and the fresh evidence that Mr. West proposed to introduce nor was there any reasonable possibility that the evidence to which the production request was linked may be received as fresh evidence on this appeal (**R. v Trotta**, **supra**).

Issue #2 - Has Sergeant Brian Oldford's Complete Mahone Bay File Been Disclosed and, If Not, Should it? (This is also referred to as the Yarmouth file)

[28] I am satisfied that Sergeant Oldford's complete Yarmouth file was disclosed to Mr. West on three occasions.

[29] The issue of Sergeant Oldford's complete Yarmouth file was fully canvassed between Sergeant Kavanagh, Mr. West, the Crown and the Court at trial. Mr. West suspects that he does not have the complete file because he says that Sergeant Kavanagh (who was responsible for disclosing the file) informed him at a meeting on March 30, 2005, that the Yarmouth file had been "3" to 4" thick". What was disclosed to Mr. West was not "3" to 4" inches thick". Therefore, says Mr. West, there are documents missing.

[30] Sergeant Kavanagh gave testimony on May 19, 2005, at Mr. West's disclosure motion before Coughlan, J. If Sergeant Kavanagh had told Mr. West the file was "3" to 4" thick" one would think Mr. West would put that statement to him when questioning him on the disclosure motion. He did not. Sergeant Kavanagh never stated in his testimony that the Yarmouth file was approximately three to four inches thick, and the question was never put to him by Mr. West.

[31] It is also clear from a review of the transcript that Sergeant Kavanagh was satisfied that he had received and disclosed to Mr. West the full Yarmouth file relating to the Mahone Bay investigation. He testified as follows:

> **A.** Okay. This box ... okay, the labeling on the first banker box it says "File 1998-42030." It's labeled "Fen William West, armed robbery, Bank of Montreal, Mahone Bay, Nova Scotia. December 18th, 1998." This is ... we refer to this as box number 2. This box, myself and Mr. West, April the 8th, 2005, we sat down at our office in Chester and reviewed this file.
>
> Box number one, again, the same file number, the same caption, I was helping Mr. West review this file and this box contains five binders. There were white binders and two black binders. We reviewed this, as well, at the Chester office on the 8th of April, 2005.
>
> ...

> **A.** Yes, there is an express post that just came back from our lab in Halifax.
>
> ...
>
> **Q.** And that's all?
>
> **A.** ... [Y]es. ...
>
> ...
>
> **Mr. West:** And this was disclosed to me from Yarmouth?
>
> **A.** No. ... yes, ... I think maybe the first day you were here in the courtroom.

[32] On that same date, the Crown said that they had disclosed another copy of the Yarmouth file to the applicant on May 2nd, 2005.

[33] When Mr. West disputed that he had been provided with the file on May 2nd, 2005, yet another copy was made and provided to him the following day (May 20th). The next morning Mr. West confirmed that he had an opportunity to review the documents.

[34] The evidence establishes that the file, in its entirety, has been disclosed. There is nothing in the information filed in support of his motion or in the submissions made by counsel that Mr. West has not received the complete file of Sergeant Oldford.

[35] This issue was also addressed by Coughlan, J. and represents another impermissible collateral attack on his decision (see 2005 NSSC 329, ¶19).

Issue #3 - Should Sergeant Oldford's Complete Service and Disciplinary Record Be Disclosed to the Applicant?

[36] Mr. West uses the terms "service record" and "disciplinary record" interchangeably. There is an obvious distinction between a disciplinary record and

a service record. A disciplinary record would include all materials relating to any internal disciplinary investigations for which the RCMP member has been subject. A service record is the RCMP record of a member as an employee and it contains the usual information relating to employment.

[37] In response to Mr. West's motion the Attorney General of Canada filed the affidavit of Sergeant Thomas Sheldon Woodfine. Sergeant Woodfine testified in his affidavit that there are no disciplinary records in existence for Sergeant Oldford. Mr. West has produced no evidence which suggests that any such record exists.

[38] I am satisfied that a disciplinary record does not exist for Sergeant Oldford and, therefore, it cannot be disclosed.

[39] With respect to Sergeant Oldford's service record, there has been no basis put forward to establish how any document contained in his service record could be relevant or assist in the fresh evidence motion. It is nothing more than a fishing expedition by Mr. West. I would not order production of Sergeant Oldford's service record.

Issue #4 – Should Sergeant Rob Douthright's notes concerning the road block at Exit 11 Be Disclosed to the Applicant?

[40] Sergeant Rob Douthright filed an affidavit in response to Mr. West's motion. In ¶7 he states:

> I made no notes with respect to my involvement at any road block.

[41] Sergeant Douthright's other notes have been disclosed. What Mr. West seeks simply does not exist.

Issue #5 – Should Chief Brent Crowhurst's Notes Pertaining To the Road Block That Occurred On Highway 103 On December 18, 1998 Be Disclosed?

[42] Like Sergeant Douthright, Chief Crowhurst's other notes were disclosed. Mr. West is not satisfied they constituted all of his notes. The Affidavit of Chief Crowhurst filed in response to Mr. West's motion before us clearly indicates that he made no other notes.

[43] There is no evidence to substantiate the existence of any further notes. Again, if they do not exist they cannot be disclosed.

Issue #6 – Have All the New Minas RCMP Ident Files That Deal With The Mahone Bay Robbery Been Disclosed And, If Not, Should They Be Disclosed?

[44] Sergeant Kavanagh's testimony confirms that all New Minas RCMP ident files were disclosed. In giving his testimony on May 19, 2005, in response to questions by Mr. West, Sergeant Kavanagh said the following:

> **A.** ... [Y]ou requested that I go and have the Identification Section in New Minas provide me with all the copies they have. And so, therefore, I did that and I disclosed that to Mr. Tancock at some time for our purposes.
>
> **Q.** And what did they provide?
>
> **A.** Again, they provided, to my understanding, all of the ident reports that were on the New Minas Identification Section file in New Minas were provided to me. And, in turn, I gave it to Mr. Tancock.

[45] Coughlan, J. also addressed this issue and concluded:

> The evidence is Mr. West received copies of any New Minas Identification Reports.
>
> (**R.** v. West, 2006 NSSC 40, ¶19)

[46] Sergeant Kavanagh also filed an affidavit in response to Mr. West's request before this Court, again, confirming that the complete file had been disclosed.

[47] The complete file had been disclosed. There is nothing left to be disclosed.

[48] Again, this is another example of Mr. West seeking to collaterally attack the decision of the trial judge below.

Issue #7 – Should SUS-12 VHS Tape Seen on April 4, 2005 Be Disclosed To The Applicant?

[49] It is clear, from a review of the evidence, a copy of this tape was provided to Mr. West. A transcript of the tape was also provided to Mr. West. At trial the original of the tape was played in a *voir dire* on September 14, 2005. A comparison of the transcript provided to Mr. West, and a review of the record when the video was played on the *voir dire* reveals they are one and the same. Mr. West's assertion that there is a tape which has not been disclosed is without merit. (I am aware that a VHS tape of Mr. West's interview on December 22, 1998, went missing. The trial judge addressed this in his decision at 2006 NSSC 40, ¶11-12).

Issue #8 – Should Sergeant Larry Kavanagh's December 8, 2003 Inventory List of Exhibits Held at the Chester RCMP Detachment Be Disclosed to the Applicant?

[50] In Sergeant Kavanagh's Affidavit filed on this motion, he says that when he received the file he believes that he filled out a one or two page list of what the file contained. However, he does not know where that list is at the present time.

[51] The issue with respect to Sergeant Kavanagh's exhibit list first arose on May 18, 2005 at Mr. West's disclosure application referred to previously. Sergeant Kavanagh testified that when he took custody of the exhibits he made a list of the contents of the boxes. It is worthwhile to repeat here the exchange that took place between Sergeant Kavanagh and the appellant at that hearing. The questions are being posed by Mr. West, the responses are Sergeant Kavanagh's:

MR. WEST: Were you present back on March 30th of 2005 at the Chester RCMP Detachment?

A. Yes, I was. At that date Mr. West, yourself, you attended at the Chester RCMP office in Chester at approximately 9 a.m. in the morning. At that time we had an opportunity to view all the exhibits that I presently have in my custody at the exhibit locker in Chester dealing with the armed robbery that took place at the Bank of Montreal in Mahone Bay on the 18th day of December, 1998.

Q. Our review of the two boxes that were ... two boxes, what did they contain?

A. The two boxes that I have in my possession contain a number of various exhibits running from ... anywhere from a photo line-up, some paper documents to various VHS video tapes, different swabs, some various exhibits that were taken by the Idents, or I'm assuming were taken by the Identification Section. A number of exhibits are there in that box.

Q. Basically exhibits that were hand ... (were?) entered at Court or trial (excuse me?)

A. I'm assuming that. Again, I have no bearing on the investigation. I only became part of this file as a result of a transfer from the Yukon Territory back in June of 2003. So as a part of my duties as taking on a new command I will ensure that all the exhibits are accounted for in the exhibit locker. So what I had done, I believe it was on the 8th day of December, 2003, I noted that there were two boxes of exhibits pertaining to this particular matter. I, again, inventoried those boxes and so I can only speak of the continuity of these two boxes as of that time. As to where these exhibits actually came from, I have no knowledge. So I don't know whether these exhibits were entered in Court at one point or not entered in Court at a point.

Q. During the review of the two boxes, were any items identified as not being present?

A. Again, that's a difficult question. I mean I can only base it on the inventory that I completed on December 8, 2003, are the exhibits that I had and made available to you. Now I understand that you feel that there may be some exhibits that I'm not privy to may not be there.

> **Q.** And let me put it this way, did we review those two boxes with an exhibit list?
>
> **A.** That's correct.
>
> (My emphasis)

[52] This excerpt from the hearing reveals:

1. The exhibit list was disclosed to Mr. West on March 30, 2005;

2. Sergeant Kavanagh and Mr. West had the exhibit list when they reviewed the file on March 30, 2005. They reviewed the two boxes of exhibits with the list. There is no suggestion either at the hearing on May 18, 2005 nor on this motion that there are items that were listed on the exhibit list which were not disclosed to Mr. West; and

3. Mr. West did not have a concern about the production of the exhibit list at that time. His concern was there may be other items that were not shown to him and which were not on the list or in the boxes shown to him.

[53] In his factum filed in support of this motion, Mr. West does not say what relevance that exhibit list could have in these proceedings. He simply says:

> ...the failure to disclose an exhibit inventory list would have the reasonable possibility of affecting the overall outcome of the trial and/or the overall trial fairness.

However, Mr. West has not said how that could be the case in these circumstances. He and Sergeant Kavanagh reviewed the disclosure with the exhibit list in March of 2005. There was no suggestion that anything that was on the exhibit list has not been disclosed.

[54] Mr. West has not established how the list is relevant or what use he wishes to make of it. Even if it could be shown the list was still in existence I would decline to order its production at this stage of the proceeding.

Issue #9 – Have Constable Ettinger's Notes Been Disclosed To The Applicant and If Not Should They Be Disclosed?

[55] The record reveals that Mr. West received four pages of Constable Ettinger's notes. Again, this issue was litigated before Coughlan, J. and he concluded:

> There is no evidence Constable Barry Ettinger of the Yarmouth RCMP made any notes that have not been disclosed to Mr. West.
>
> (**R. v. West,** 2006 NSSC 40, ¶43)

[56] It appears Mr. West just refuses to accept that this is the extent of Constable Ettinger's notes. Again, what Mr. West seeks does not exist. It cannot be produced. It is yet another collateral attack on Coughlan, J.'s decision.

Issue #10 – Should Pamela Mood's Invoices And Purchase Orders Be Disclosed To The Applicant?

[57] Pamela Mood was the person who transcribed Mr. West's videotape interviews.

[58] The affidavits filed on behalf of the respondent on this motion show that if there were any invoices from Ms. Mood in existence they no longer exist. Mr. West suggests that the invoices would be relevant to address the various issues with the videotape interviews as well as their transcription. This is entirely speculative. I am not satisfied they have any relevance to the matters in issue on this appeal or Mr. West's fresh evidence motion.

Other Documents Referred to in Mr. West's Affidavit

[59] Mr. West refers to other documents in his Affidavit and Supplemental Affidvait. However, they are not addressed in either his factum filed in support of the motion or oral argument. For good reason − there is no merit to the request for disclosure of these documents. I will not say anything further with respect to them.

Conclusion

[60] For all these reasons, the motion for production is dismissed.

Fresh Evidence

[61] This Court in **R. v. West**, 2010 NSCA 16 set out the criteria for admission of fresh evidence under s. 683(1) of the **Criminal Code** as follows:

> (i) fresh evidence is received where it is in the interests of justice;
>
> (ii) the Court of Appeal enjoys wide discretion in this regard;
>
> (iii) the evidence can be directed at the result or the process;
>
> (iv) identifying that to which the evidence is directed in (iii) will determine the rules to apply;
>
> (v) evidence directed at the verdict will be subject to the "Palmer" criteria, with diligence slightly relaxed;
>
> (vi) evidence directed at the process will rely much less on diligence;
>
> (vii) all evidence must be reasonably capable of belief and capable of affecting the outcome/establishing a miscarriage of justice.

[62] The **Palmer** criteria referred to in **R. v. West**, 2010 NSCA 16 are well-known − the "interests of justice" in s. 683(1)(d) are governed by four factors:

> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases. ...
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
>
> (3) The evidence must be credible in the sense that it is reasonably capable of belief, and,

> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result. (**R. v. Palmer**, [1980] 1 S.C.R. 759 at p. 775)

[63] The fresh evidence can only affect the result, under Palmer's fourth factor, if it is otherwise admissible under the usual rules of evidence. Again, returning to **R. v. West**, 2010 NSCA 16 at ¶34 where this Court held:

> 34 The fresh evidence could only affect the result, under Palmer's fourth factor, if it is admissible under the usual rules of evidence that govern criminal proceedings. Section 683(1) does not dispense with the law of evidence. In **R. v. O'Brien**, [1978] 1 S.C.R. 591, Justice Dickson said at p. 602:
>
> > Section 610 of the *Criminal Code* lends no assistance to respondent's case. It is a prerequisite that any evidence sought to be adduced under the discretion granted by that section be admissible evidence. The section manifestly does not authorize a Court of Appeal to dispense with the law of hearsay evidence. If that were so we would have the anomalous situation in which counsel could seek to adduce on appeal that which the common law prohibits at trial. The section is not operative until the threshold for admissibility as defined by common law and statute is crossed. That threshold has not been crossed in the instant case.
>
> Similarly, in **R. v. Dell**, [2005] O.J. No. 863 (O.C.A.), at para. 85, Justice Sharpe said:
>
> > 85 Most of the material in the Crown brief relied upon by the appellant is unsworn, inadmissible hearsay. The appellant submits that Keyes' sworn videotaped statement is not hearsay. I disagree. That statement was given at another time for another purpose; indeed, it was given when Keyes was the subject of an investigation for conspiracy to murder Kim Knott. It is not evidence sworn for the purpose of this appeal. Requiring an affidavit sworn in the particular proceeding offering first hand evidence is not a mere formality. It appropriately directs the mind of the witness to the precise reason for which the evidence is offered and provides a means whereby the responding party can test the evidence by way of cross-examination. A statement given under oath at another time and for another reason does not satisfy these important safeguards.
> > (My emphasis)

[64] Mr. West filed eight volumes of documents on the fresh evidence motion

[65] The information sought to be introduced by Mr. West is not otherwise admissible under the usual rules of evidence that govern criminal proceedings. The "Notice of Fresh Evidence Application" filed by the appellant states as follows:

> **AND FURTHER TAKE NOTICE** that support of the application attached is the supporting affidavit of the Appellant which will be referred to upon the hearing with any additional evidence, material and witnesses as the Appellant may suggest and This Honourable Court may permit.

The information is not in the form of an affidavit and on the basis alone is inadmissible but its admissibility also fails for other reasons. The eight volumes of documents (and this is not an exhaustive list) consists of:

1. Correspondence which he authored to a number of parties, including his request for information under the **ATIA**;

2. Portions of transcripts of these proceedings with his notations on them;

3. Correspondence to him from various parties, again with Mr. West's notations on the correspondence including highlighting and underlining which, to anyone but Mr. West, would have no significance;

4. Mr. West's submissions on why there has been non-disclosure, late disclosure or investigations which were not undertaken.

5. Copy of his police interview, again with notations, underlining and highlighting again, the significance of which is only known to Mr. West;

6. Correspondence, photographs, notes made by Mr. West all of which is not evidence but rather submissions on issues that have either been dealt with on this appeal or at the trial below or on the various applications which have been made by Mr. West throughout these proceedings; and

7. Some of the information relates to the Bass River robbery for which Mr. West was convicted and has nothing to do with the Mahone Bay robbery (**R. v. West**, 2010 NSSC 16).

[66] Turning to the **Palmer** criteria, Mr. West does not identify which evidence is "new". Much of the information sought to be introduced on this motion is information which had been disclosed to Mr. West or comes about as a result of the trial proceedings themselves. Mr. West does not say what it is in the material that could not have been adduced at trial even if he had been acting duly diligent (**Palmer**, first criteria).

[67] There is also no way to know, from a review of the material, what Mr. West intends to prove by its admission, there is no way of knowing how it bears on a decision or potentially decisive issue in the trial (**Palmer**, second criteria).

[68] The evidence is not credible, in fact much of it is not even evidence but rather Mr. West's submissions, positions or interpretation on what someone may have said or written (**Palmer**, third criteria).

[69] Finally, even if one could identify evidence that fulfilled the first three criteria in **Palmer, supra** (and I have been unable to do so), it is difficult to identify (and Mr. West has not done so) what evidence could be introduced that would be expected to affect the result at trial (**Palmer**, fourth criteria).

[70] In conclusion, on this issue the "evidence" sought to be admitted is not in form and substance that would allow it to be tendered at any stage of the proceeding. Its admissibility also fails on the **Palmer** criteria.

[71] I would dismiss the appellant's motion to adduce fresh evidence.

Conviction Appeal

[72] Mr. West listed 18 grounds of appeal in his prisoner appeal. Counsel, in their facta, have reduced the issues to five. The Crown has conveniently summarized those issues. I adopt the Crown's summary of the issues and will address them in the following order:

(a) Did the trial judge err in law when he admitted the confession of Mr. West provided in the early morning of December 19, 1998 based on the following: Was Mr. West detained arbitrarily?

(b) Did the RCMP provide Mr. West with the opportunity to consult legal counsel prior to interrogation?

(c) Did the events of December 18th, 1998 and December 19th, 1998 amount to oppression to the extent the statement should be excluded as being involuntary?

(d) Did the trial judge err in not ordering a mistrial or a stay of proceedings on the basis of the multiple violations of the Charter of Rights and Freedoms with regard to the loss of critical evidence, the late or non-existent disclosure?

(e) Did the trial judge err in law by a failure to provide sufficiency of reasons for his decisions with respect to admissibility of evidence, lack of disclosure or on the issue of identity?

[73] I will outline the standard of review applicable to each issue when I address it.

Issue #1 Did the trial judge err in law when he admitted the confession of Mr. West provided in the early morning of December 19, 1998 based on the following: Was Mr. West detained arbitrarily?

Standard of Review

[74] The standard of review for a **Charter** breach was set out in **R. v. B.(T.W.)**, 2012 MBCA 7, at ¶24:

> 24 In *R. v. Farrah (D.)*, 2011 MBCA 49, 268 Man.R. (2d) 112, Chartier J.A. wrote (at para. 7):
>
> By which standard is this court to review the issue of whether there is a *Charter* breach? There are several components to this question. They are as follows:

a) When examining a judge's decision on whether a *Charter* breach occurred, the appellate court will review the decision to ensure that the correct legal principles were stated and that there was no misdirection in their application. This raises questions of law and the standard of review is correctness.

b) The appellate court will then review the evidentiary foundation which forms the basis for the judge's decision to see whether there was an error. On this part of the review, the judge's decision is entitled to more deference and, absent palpable and overriding error, the facts as found by the judge should not be disturbed (see *Grant*, at para. 129).

c) The appellate court will also examine the application of the legal principles to the facts of the case to see if the facts, as found by the judge, satisfy the correct legal test. In the criminal law context, this is a question of law and the standard of review is correctness (see *R. v. Shepherd (C.)*, [2009] 2 S.C.R. 527, 391 N.R. 132, 331 Sask.R. 306, 460 W.A.C. 306; 2009 SCC 35, at para. 20).

d) The decision on whether to exclude under s. 24(2) of the *Charter* is an admissibility of evidence issue which is a question of law. However, because this determination requires the judge to exercise some discretion, "considerable deference" is owed to the judge's s. 24(2) assessment when the appropriate factors have been considered (see *Grant*, at para. 86, and *R. v. Beaulieu (G.)*, [2010] 1 S.C.R. 248, 398 N.R. 345; 2010 SCC 7, at para. 5).

[at ¶24; see also **R. v. V.(S.E.)**, 2009 ABCA 108, at ¶3-5]

The issue is whether there were reasonable and probable grounds to detain/arrest Mr. West. Reasonable and probable grounds are grounded in factual findings to which deference is afforded. Whether they amount to reasonable grounds, objectively, however, is a question of law (**R. v. Shepherd**, 2009 SCC 35, at ¶18, ¶20).

Facts

[75] Mr. West's application to determine whether detention and arrest breached s. 9 of the **Canadian Charter of Rights and Freedoms**, Part I of the *Constitution*

Act, 1982, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11 was heard on September 6, 7 and 12, 2005. Coughlan, J. rendered his decision on October 3, 2005. I will summarize the testimony relied on by the trial judge in his decision on this issue.

[76] On December 18, 1998, the Bank of Montreal in Mahone Bay, Nova Scotia was robbed. The Lunenburg-Mahone Bay Police Department was notified by 911 at approximately 9:21 a.m. of the robbery. The description provided to the police was that of a six foot tall, slender male. He had left the bank in a red Topaz which belonged to one of the employees.

[77] Constable Edwin Mugford of the New Minas RCMP Detachment heard an RCMP communication about the robbery and went on patrol in the Aylesford Road area. While he was on the Aylesford Road a white Intrepid automobile went by him at a high rate of speed.

[78] Constable Mugford continued his patrol and later learned a white Intrepid automobile may have been involved in the robbery.

[79] Constable Brian Stones was also in the Aylesford Road-Lake Paul area that morning looking for a lost hunter. He was also advised that a white Intrepid may have been involved in the robbery.

[80] A tow truck company owner had alerted the police that a white Intrepid had left the Aylesford Road and was being towed from the ditch. He told the RCMP that he thought the car may have been involved in a robbery and that his wife had received two calls from the owner of the car 15-20 minutes apart.

[81] Constable Stones came upon the tow truck with the white Intrepid being towed. He saw Mr. West who he described as approximately six feet tall and approximately 160 pounds. Constable Stones took no action at that time other than to advise Mr. West and the tow truck driver that he would follow them with his emergency lights flashing. Constable Stones called for assistance and Corporal Charles Blakeney, a member of the RCMP stationed in Kingston, Nova Scotia, responded. At approximately 11:55 a.m. Corporal Blakeney pulled over the tow truck towing the Intrepid.

[82] Corporal Blakeney decided to arrest the appellant as a result of discussions between himself, Corporal Vernon Fraser and Chief Brent Crowhurst of the Mahone Bay-Lunenburg Police Department. His reasons were: the appellant's size, the area he was in, the weather conditions, the fact that he could have robbed the bank within the time period and respective locations, the fact that he was a known bank robber, and the description of the car being driven.

[83] Mr. West was asked if the vehicle could be searched and he agreed. A search of the vehicle revealed nothing connected to the robbery.

[84] Chief Crowhurst said he had been advised that a white Intrepid was parked near the red Topaz involved in the robbery. Discussions with Sergeant Brian Oldford of the RCMP indicated that, based on his knowledge of Mr. West, he may be the robber. Chief Crowhurst testified he also made the decision to arrest Mr. West based on the following: the tow truck operator's suspicions regarding the white Intrepid; he was a lone male who generally fit the description; his name came up as a possible suspect; the location and timing of the car off the road; and Constable Mugford's observations.

[85] Sergeant Brian Oldford testified that he conversed with Chief Crowhurst regarding the robbery. He had been travelling west on highway 103 when he received a pager call and returned with a call to Chief Crowhurst who described the circumstances surrounding the robbery. Sergeant Oldford testified he advised Chief Crowhurst that Fen West would be a suspect and ordered Mr. West detained.

[86] After reviewing the testimony of the witnesses the trial judge then turned his attention to the law and said:

> The basis for arrest is found in s.495(1)(a) of the *Criminal Code*, which provides:
>
> Arrest without warrant by peace officer - A peace officer may arrest without warrant: (a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence.

S.495 makes it clear the police were required to have reasonable and probable grounds before they could arrest Mr. West. As Cory, J. stated in giving the decision in **R. v. Storrey**, [1990] 1 S.C.R. 241 at paragraphs 14, 15 and 16:

> Section 450(1) makes it clear that the police were required to have reasonable and probable grounds that the appellant had committed the offence of aggravated assault before they could arrest him. Without such an important protection, even the most democratic society could all too easily fall prey to the abuses and excesses of a police state. In order to safeguard the liberty of citizens, the Criminal Code requires the police, when attempting to obtain a warrant for an arrest, to demonstrate to a judicial officer that they have reasonable and probable grounds to believe that the person to be arrested has committed the offence. In the case of an arrest made without a warrant, it is even more important for the police to demonstrate that they have those same reasonable and probable grounds upon which they base the arrest.

The importance of this requirement to citizens of a democracy is self-evident. Yet society also needs protection from crime. This need requires that there be a reasonable balance achieved between the individual's right to liberty and the need for society to be protected from crime. Thus the police need not establish more than reasonable and probable grounds for an arrest. The vital importance of the requirement that the police have reasonable and probable grounds for making an arrest and the need to limit its scope was well expressed in **Dumbell v. Roberts**, [1944] 1 All E.R. 326 (C.A.), wherein Scott L.J. stated at p. 329:

> The power possessed by constables to arrest without warrant, whether at common law for suspicion of felony, or under statutes for suspicion of various misdemeanors, provided always they have reasonable grounds for their suspicion, is a valuable protection to the community; but the power may easily be abused and become a danger to the community instead of a protection. The protection of the public is safeguarded by the requirement, alike of the common law and, so far as I know, of all statutes, that the constable shall before arresting satisfy himself that there do in fact exist reasonable grounds for suspicion of guilt. That requirement is very limited. The police are not called on before acting to have anything like a prima facie case for conviction; but the duty of making such inquiry as the circumstances of the case ought to indicate to a sensible man is, without difficulty, presently practicable, does rest on them; for to shut your eyes to the obvious is not to act reasonably.

> There is an additional safeguard against arbitrary arrest. It is not sufficient for the police officer to personally believe that he or she has reasonable and probable grounds to make an arrest. Rather, it must be objectively established that those reasonable and probable grounds did in fact exist. That is to say a reasonable person, standing in the shoes of the police officer, would have believed that reasonable and probable grounds existed to make the arrest.
>
> (*Voir Dire* decision, October 3, 2005)

[87] This is a correct statement of the applicable law. Coughlan, J. then applied the law to the facts and concluded:

> There were certain facts known to the police when Mr. West was arrested:
>
> (1) The Bank of Montreal was robbed on the morning of December 18, 1998, prior to 9:21 a.m.
>
> (2) The robber was a lone male, approximately six feet tall and weighing approximately 160 pounds.
>
> (3) Mr. West generally fit the description of the robber as to height and weight.
>
> (4) Mr. West's name came up as a possible suspect.
>
> (5) A white Intrepid might possibly be involved in the robbery. Mr. West was driving a white Intrepid.
>
> (6) Mr. West was stopped at a place and at a time which would have made it possible for him to commit the robbery.
>
> (7) Cst. Mugford has observed a speeding white car driving much faster than the road conditions warranted in the Aylesford Road area.
>
> (8) Mr. West's presence in the Lake Paul-Lake George area.
>
> (9) The weather conditions then existing.

> (10) The police need to show reasonable and probable grounds for the arrest. They are not required to establish a prima facie case for a conviction for making the arrest.
>
> I find the cumulative effect of the various factors, including Mr. West generally matched the description of the robber, Mr. West was driving a white Intrepid, a vehicle thought to be involved in the robbery, the police knowledge of Mr. West, gave the police reasonable and probable grounds to arrest Mr. West.

[88] The appellant's argument on this issue is that the trial judge erred in finding that there were reasonable and probable grounds to detain and arrest Mr. West. He says the only reasonable conclusion to come to after a review of the evidence is that "Mr. West was detained and then arrested because he was Fen West". With respect, the appellant ignores the rest of the evidence, which I have set out in detail above, which supports the trial judge's finding.

[89] I am satisfied that the trial judge illustrated reasons which are all supported by the record and objectively substantiate reasonable grounds to detain and arrest.

[90] Mr. West has failed to demonstrate an error in the legal principles involved or a palpable and overriding error regarding the factual conclusions of the trial judge.

[91] I would dismiss this ground of appeal.

Issue #2 - Did the RCMP provide Mr. West with the opportunity to consult legal counsel prior to interrogation?

Standard of Review

[92] The standard of review with respect to this issue is the same as set out above under the arbitrary detention ground of appeal with one additional factor. That is, whether a person has been diligent in exercising their right to counsel is reviewable on a standard of reasonableness. **R. v. Maloney** (1995), 147 N.S.R. (2d) 139, ¶26-27.

Facts

[93] Arguments on Mr. West's s. 10 **Charter** motion was heard on September 13-16, 19-23, 29-30 and October 3rd, 2005 with the trial judge rendering his decision on December 1st, 2005 (**R. v. West**, 2005 NSSC 329).

[94] Section 10(b) of the **Charter** provides:

> Everyone has the right on arrest or detention
>
> ...
>
> (b) to retain and instruct counsel without delay and to be informed of that right;

[95] Again, I will summarize the factual background as found by the trial judge as it relates to this issue. There will be some repetition of the facts relating to the first issue.

[96] On the morning of December 18th, 1998, Constable Brian Stones, an RCMP member stationed in New Minas, Nova Scotia, was advised by Constable Edwin Mugford of the New Minas RCMP Detachment to keep a look out for a white Intrepid automobile.

[97] At approximately 11:30 a.m. Constable Stones was advised of a white car being towed.

[98] Constable Stones located the tow truck which was towing a white Intrepid. Constable Stones called for assistance and Corporal Charles Blakeney, a member of the RCMP stationed in Kingston, Nova Scotia, responded and at approximately 11:55 a.m. Corporal Blakeney pulled over the tow truck which was towing the Intrepid.

[99] Corporal Blakeney approached the tow truck and asked who the driver of the Intrepid was. Mr. West, who was in the passenger seat of the tow truck, said he was. Corporal Blakeney asked Mr. West to come to his vehicle, which Mr. West did. Corporal Blakeney did not tell Mr. West why he was stopped.

[100] Corporal Blakeney asked Mr. West if the police could search the trunk of the Intrepid to which Mr. West agreed. The trunk was searched and nothing relating to the robbery was found.

[101] Discussions between Corporal Blakeney and other police officers took place and Corporal Blakeney arrested Mr. West at approximately 12:30 p.m. on December 18th, 1998, informing him he was arrested for suspicion of robbery.

[102] The trial judge found that Mr. West was detained when the tow truck in which he was a passenger was stopped at approximately 11:55 a.m. on December 18th, 1998. Mr. West was not informed of the reason for his detention at that time and as a result there was a breach of his rights under s. 10(a) of the **Charter** (the right to be informed promptly of the reasons for detention). However, since no evidence was obtained during the time Mr. West was detained, there was no evidence to be excluded under s. 24(2) of the **Charter**.

[103] The trial judge went on to find that when Mr. West was arrested at approximately 12:30 p.m. he was advised of his reason for arrest and his right to counsel as follows:

> [14] At the time of arrest, Mr. West was given information concerning the right to counsel in the following words:
>
> > I am arresting you for suspicion of bank robbery in Mahone Bay and that you have the right to retain and instruct legal counsel without delay. You may call any lawyer you wish and it is also my duty to inform you that there is duty counsel available through the legal office that can be contacted to provide preliminary legal advice without charge, provide specific information on how the detainees can contact the legal office and including phone number.
>
> **R. v. West**, 2005 NSSC 329

[104] Mr. West acknowledged that he understood the police caution. Corporal Blakeney and Mr. West then left the arrest scene en route to the New Minas RCMP Detachment in the police vehicle. (*Ibid* at ¶15,16)

[105] At approximately 1:00 p.m., while en route to the New Minas Detachment, Corporal Blakeney's cell phone was used to contact Richard Vaughn, a solicitor for the Kentville office of Nova Scotia Legal Aid. Mr. West spoke to Mr. Vaughn, a Legal Aid lawyer. He advised Mr. West not to say anything to the police until he had spoken to another lawyer with the Kentville office of Nova Scotia Legal Aid. (*Ibid*. ¶20)

[106] After the telephone call, Corporal Blakeney attempted to take a statement from Mr. West. He went through a Statement Form with Mr. West which included the following:

> CHARTER CAUTION (✓)
>
> YOU HAVE THE RIGHT TO RETAIN AND INSTRUCT COUNSEL (A LAWYER) WITHOUT DELAY. YOU MAY CALL ANY LAWYER YOU WISH. YOU HAVE THE RIGHT TO APPLY FOR LEGAL ASSISTANCE WITHOUT CHARGE THROUGH THE PROVINCIAL LEGAL AID PROGRAM.
>
> **WHEN DUTY COUNSEL AVAILABLE READ: DUTY COUNSEL (A LAWYER) CAN BE CONTACTED ON YOUR BEHALF TO PROVIDE LEGAL ADVICE TO YOU IMMEDIATELY AND WITHOUT CHARGE. [Duty counsel available 24 hours weekends, holidays, 4:30 p.m.-8:30 a.m. Monday to Friday. 1-800-300-7772]**
>
> WE WILL PROVIDE YOU WITH THE PHONE BOOK AND (1) THE PHONE NUMBER FOR LEGAL AID OR (WHEN DUTY COUNSEL AVAILABLE) (2) CONTACT DUTY COUNSEL ON YOUR BEHALF, IF YOU WISH.
>
> DO YOU UNDERSTAND? ANSWER Yes
>
> DO YOU WISH TO CONSULT WITH COUNSEL (A LAWYER) NOW? ANSWER Yes
>
> PERSON CONSULTED: Rick Vaughn
>
> TIME CONSULTED: 1313 Hours
>
> POLICE CAUTION (✓)

> YOU NEED NOT SAY ANYTHING. YOU HAVE NOTHING TO HOPE FROM ANY PROMISE OR FAVOR AND NOTHING TO FEAR FROM ANY THREAT WHETHER OR NOT YOU SAY ANYTHING. ANYTHING YOU DO SAY MAY BE USED AS EVIDENCE.
>
> DO YOU UNDERSTAND? ANSWER Yes
>
> SECONDARY CAUTION (✓)
>
> YOU MUST CLEARLY UNDERSTAND THAT ANYTHING SAID TO YOU PREVIOUSLY SHOULD NOT INFLUENCE YOU, NOR MAKE YOU FEEL COMPELLED TO SAY ANYTHING AT THIS TIME. WHATEVER YOU FELT INFLUENCED OR COMPELLED TO SAY EARLIER YOU ARE NOW NOT OBLIGED TO REPEAT NOR ARE YOU OBLIGED TO SAY ANYTHING FURTHER. WHATEVER YOU DO SAY MAY BE GIVEN IN EVIDENCE.
>
> DO YOU UNDERSTAND? ANSWER Yes

[107] The trial judge found as a fact that Corporal Blakeney read the Statement Form to Mr. West and that the RCMP had fulfilled the informational component of its s. 10(b) duty. (*Ibid* ¶22)

[108] I pause here to mention that there was an apparent discrepancy between the testimony of Corporal Blakeney and Constable Stones regarding Corporal Blakeney's presence in the police cruiser while the appellant spoke with duty counsel. The trial judge accepted the evidence of Corporal Blakeney that he was not in the police cruiser when Mr. West spoke to Mr. Vaughn. (*Ibid* ¶26)

[109] After speaking with Mr. Vaughn, Mr. West declined to give a statement to the RCMP and they proceeded to the New Minas RCMP Detachment where Mr. West was given unrestricted access to a telephone and a telephone book and told to make all the calls he wanted. At that time, Mr. West did not try to make a telephone call to any lawyer. He called his wife at work (but she had left). He also called his mother and told her what had happened. He testified that his mother told him she was going to call a lawyer, Harry How, and have Mr. How contact Mr. West. (*Ibid* ¶29)

[110] After making the calls Mr. West was taken into the Detachment's interview room. This was approximately 3:40 p.m. on December 18th, 1998. At approximately 4:16 p.m. Mr. West left the interview room to call a lawyer. Mr. West said that he left a message with a female employee at Legal Aid to have a lawyer call him. The call to Legal Aid at 4:16 p.m. was the last time Mr. West asked to call a lawyer (*Ibid* ¶30).

[111] Mr. West told Constable Stones of his call to Nova Scotia Legal Aid. Constable Stones asked Mr. West if he wanted to call private counsel, duty counsel or any other lawyer. Mr. West responded "No. It's okay". At 4:35 p.m. on December 18th Mr. Harry How called the New Minas Detachment on behalf of Mr. West's mother. Corporal Blakeney did not ask Mr. How if he wanted to speak to Mr. West nor did Mr. How ask to speak to him (*Ibid* ¶33 & ¶34).

[112] At 11:00 p.m. on December 18th, 1998, Mr. How again called the Detachment and Corporal Craig Gibson of the RCMP spoke to Mr. How. Mr. How asked if there were any developments that the RCMP call Mrs. West and gave the RCMP Mrs. West's telephone number (*Ibid* ¶35).

[113] Police questioning of the appellant began at approximately 9:17 p.m. and concluded in the early morning hours of 19 December, 1998 (*Ibid* ¶39).

[114] After setting out the facts, the trial judge instructed himself on the applicable law on s. 10(b) of the **Charter** as follows:

> [10] The duties imposed on police were set out by Lamer, C.J.C. in *R. v. Bartle*, [1994] 3 S.C.R. 173 at p. 191:
>
> > This Court has said on numerous previous occasions that s. 10(b) of the Charter imposes the following duties on state authorities who arrest or detain a person:
> >
> > (1) to inform the detainee of his or her right to retain and instruct counsel without delay and of the existence and availability of legal aid and duty counsel;

> (2) if a detainee has indicated a desire to exercise this right, to provide the detainee with a reasonable opportunity to exercise the right (except in urgent and dangerous circumstances); and
>
> (3) to refrain from eliciting evidence from the detainee until he or she has had that reasonable opportunity (again, except in cases of urgency or danger).

(See, for example, *Manninen*, at pp. 1241-42, R. v. Evans, [1991] 1 S.C.R. 869, at p. 890, and *Brydges*, [1990] 1 S.C.R. 190 at pp. 203-4.) The first duty is an informational one which is directly in issue here. The second and third duties are more in the nature of implementation duties and are not triggered unless and until a detainee indicates a desire to exercise his or her right to counsel.

[11] And at p. 195:

> Accordingly, *Brydges* had the effect of adding two new elements to the information component of s. 10(b):
>
> (1) information about access to counsel free of charge where an accused meets prescribed financial criteria set by provincial Legal Aid plans ("Legal Aid"); and
>
> (2) information about access to immediate, although temporary legal advice irrespective of financial status ("duty counsel").

At the same time, *Brydges* made it clear that the specific nature of the information provided to detainees would necessarily be contingent on the existence and availability of Legal Aid and duty counsel in the jurisdiction: *Prosper*.

[12] The duty upon police was described by Cromwell, J.A., in giving the Court's judgment, in *R. v. Grouse (D.D.)* (2004), 226 N.S.R. (2d) 321 (C.A.) at p. 324 as follows:

> This section imposes two types of duties on the police. The first, which flows from its opening words, is to afford detained persons the right to retain and instruct counsel. This has been referred to as the facilitation or implementation aspect of s. 10(b). It requires the police to provide a detainee who has indicated a desire to exercise the right to counsel with a reasonable opportunity to do so and to refrain from eliciting evidence from

> the detainee until he or she has had that reasonable opportunity: *R. v. Bartle* (K.), [1994] 3 S.C.R. 173; 172 N.R. 1; 74 O.A.C. 161, at 191-192 [S.C.R.]. The second type of duty, which flows from the concluding words of the section, has been referred to as the informational component. It requires the police to inform the detainee of his or her right to retain and instruct counsel without delay and of the existence and availability of legal aid and duty counsel.
>
> (**R. v. West**, 2005 NSSC 329)

[115] He then went on to conclude:

> [39] Mr. West was questioned by Sgt. Robert Brian Oldford, then of the R.C.M.P. Major Crime office at Yarmouth, Nova Scotia. Sgt. Oldford started questioning Mr. West at 9:17 p.m. Between 4:25 p.m. and 9:17 p.m. Mr. West sat in the interview room, read a newspaper and worked on a crossword puzzle. He did not make any further attempts to contact a lawyer. Mr. West did not ask Cst. Stones or anyone if Mr. How or Mr. Mattson had called.
>
> [40] I find, Mr. West was afforded a reasonable opportunity to retain and instruct counsel, but Mr. West was not reasonably diligent in his attempt to instruct and retain counsel, and therefore the police could continue their investigation.
>
> [41] I find the R.C.M.P. complied with the implementation component of s. 10(b) of the *Charter*. Mr. West's s. 10(b) rights were not violated, the application is dismissed.
>
> [42] Mr. West has failed to show a breach of his rights pursuant to s. 10(a) and s. 10(b) of the *Charter*.
>
> (**R. v. West**, 2005 NSSC 329)

[116] Mr. West takes no issue with the trial judge's statement of the law or his application of the law to the facts. His issue is the trial judge's factual findings. The appellant's argument on this point is very brief. Mr. West argues that he was diligent in seeking legal advice and that he was not allowed to consult Mr. How during his two calls to the Detachment. The evidence clearly establishes otherwise.

[117] The trial judge found that Mr. West was not diligent in instructing legal counsel and further, there is nothing in the evidence that suggests Mr. How at any time requested to speak to Mr. West.

[118] Once again, I am satisfied that the trial judge correctly applied the law to the facts as he found them. His conclusions are abundantly supported by the record. He set out, in detail, his findings of fact and his reasons for finding the police had fulfilled both the informational and implementation components of s. 10(b) of the **Charter**. I would dismiss this ground of appeal.

Issue #3 - Did the events of December 18th, 1998 and December 19th, 1998 amount to oppression to the extent the statement should be excluded as being involuntary?

[119] The voluntariness issue was litigated at the same time with the same evidence as the s.10(a) and 10(b) motions. The standard of review for voluntariness of a statement was set out by this Court in **R. v. Grouse**, 2004 NSCA 108 as follows:

> [44] In summary, I would state the applicable principles of the standard of appellate review of a finding of voluntariness in a conviction appeal as follows:
>
> 1. The judge's findings of fact, including the weight to be assigned to the evidence and the inferences drawn from the facts, are to be reviewed on the standard of palpable and overriding error: **Buhay** at para. 45.
>
> 2. The judge's statements of legal principle are to be reviewed on the standard of correctness: **Oickle** at para. 22.
>
> 3. The judge's application of the principles to the facts is to be reviewed on the standard of palpable and overriding error unless the decision can be traced to a wrong principle of law, in which case the correctness standard should be applied: **Buhay** at para. 45; **Housen** at para. 37.

[120] Mr. West does not allege an error in law by Coughlan, J. on the legal principles he applied when considering voluntariness. He alleges the trial judge "erred in fact" which is subject to review on a palpable and overriding error standard.

[121] At the outset, the trial judge instructed himself of the burden on the Crown to prove beyond a reasonable doubt that the statements were voluntary. He also reminded himself that trial judges must be alert to the entire circumstances surrounding a confession when making a decision as to whether there is reasonable doubt as to the statement's voluntariness. He cites **R. v. Oickle**, [2000] 2 S.C.R. 3 as follows:

> [46] In *R. v. Oickle, supra*, the Court is clear trial judges must be alert to the entire circumstances surrounding a confession, making the decision as to whether there is a reasonable doubt as to the statement's voluntariness. In its analysis, the Court raised certain relevant factors to be considered, but did not limit the inquiry by the trial judge to any particular list of factors. The factors set out in *R. v. Oickle, supra*, to be considered by the trial judge included: were threats or promises made, was a *quid pro quo* offered for the confession, whether oppressive conditions were present, including depriving the person of food, clothing, water, sleep, medical attention or access to counsel, was the person subjected to excessively aggressive, intimidating questioning for prolonged periods of time, the use of fabricated evidence, whether the accused had an operating mind and the use of police trickery which would "shock the community".
>
> (**R. v. West**, 2005 NSSC 329)

[122] He then reviewed the evidence to determine whether the circumstances surrounding the confession gave rise to a reasonable doubt as to its voluntariness. He found:

1. Although Mr. West said that he was in a disassociated state of mind at the time the interview took place, after a review of the videotape and observing Mr. West's answers to questions the trial judge found that he had an operating mind. His responses to questions were appropriate, at one point he did the crossword and read a newspaper, and he was engaging with Sergeant Oldford during the interrogation. (**R. v. West**, 2005 NSSC 329, ¶49)

2. During the interrogation Sergeant Oldford told Mr. West that he (Mr. West) knew the right thing to do and that he was going to jail for a long time. He said giving the money back could go in Mr. West's favour. The trial judge found that these statements by Sergeant Oldford did not call into

question the voluntariness of the statement. Sergeant Oldford clearly stated he was not making any kind of deal and it was clear from the videotape that Mr. West was not affected by these statements. (*Ibid* ¶50)

3. Sergeant Oldford also made statements with respect to Mr. West's family members' involvement in the incident including the fact that his mother's car was involved and that Mr. West could be placed at his brother's cottage that day. However, Sergeant Oldford also stated that he did not think Mr. West's mother gave him permission to use the car in the offence nor is there any indication that they thought other members of his family were involved in the incident. The trial judge found the mention of Mr. West's family did not affect the voluntariness of the statement. (*Ibid* ¶51)

4. During the course of questioning Mr. West was given false information as follows:

   (i) the license plate number of the white Intrepid he was driving was seen in Mahone Bay on the morning of the robbery;

   (ii) Mr. West was caught on a video camera at the Pharmasave Pharmacy in Mahone Bay on the morning of the robbery; and

   (iii) Sergeant Oldford had spent hours reviewing wiretaps of Mr. West.

   Again, after reviewing Mr. West's interaction with the police with respect to this information the trial judge concluded that the false information did not induce Mr. West to make the statements to the police. (*Ibid* ¶52)

5. The trial judge also looked at whether there were any oppressive conditions present at the time the statement was taken. It was common ground that the interview room was cold. Mr. West was placed in the interview room at 3:41 p.m. on December 18, 1998. At 4:00 p.m. his clothes were taken and he was given a white tyvex suit. Mr. West complained about the cold and requested and received a blanket. At 8:31 p.m. a heater was placed in the room. Mr. West thanked the police for bringing in the heater. The questioning started at 9:17 p.m. and the trial judge concluded that while

> Mr. West was clearly cold before the heater was brought in the room, conditions improved prior to his being questioned. He also concluded Mr. West was not deprived of food or water. (*Ibid* ¶52, 53)

[123] In addition to these specific references, the trial judge also made other observations about Mr. West's demeanor during the interrogation process – he looked relaxed and, at times, even bored. Mr. West joked with the police officer and made appropriate responses. He even disputed issues with the interrogator suggesting that the police may be exaggerating the evidence which they had. (*Ibid* ¶55)

[124] The trial judge went on to conclude that having regard to all of the evidence the Crown had established beyond a reasonable doubt the statement given by Mr. West in the early morning of December 19, 1998 was voluntary and should be admitted into evidence (2005 NSSC 329, ¶61).

[125] Mr. West's submissions on this ground of appeal are simply the trial judge was wrong to conclude the statement was voluntary. He makes the same arguments on this appeal that were made at trial. He asks us to overturn the trial judge without identifying an error of law or a palpable and overriding error of fact. It is asking us to reach a different conclusion. That is not our role. The trial judge's conclusion that the statement was voluntary is amply supported by the record.

[126] I would dismiss this ground of appeal.

Issue #4 - Did the trial judge err in not ordering a mistrial or a stay of proceedings on the basis of the multiple violations of the Charter of Rights and Freedoms with regard to the loss of critical evidence, the late or non-existent disclosure?

Standard of Review

[127] The standard of review on a trial judge's decision on a stay of proceedings as a result of non-disclosure or loss of evidence was recently articulated in **R. v. Watt**, 2008 NSCA 25:

11 In **R. v. Hiscock**, [1999] N.S.J. No. 363 (C.A.), this court stated:

> 42 The standard of appellate review from the decision of a trial judge granting a stay of proceedings was considered by the Supreme Court in **Canada (Minister of Citizenship and Immigration) v. Tobiass** (1997), 118 C.C.C. (3d) 443. The judgment was delivered by a unanimous Court.
>
> 43 At page 470, the Court said:
>
> A stay of proceedings is a discretionary remedy. Accordingly, an appellate court may not lightly interfere with a trial judge's decision to grant or not to grant a stay. The situation here is just as our colleague Gonthier J. described it in **Elsom v. Elsom**, [1989] 1 S.C.R. 1367 at p. 1375, 59 D.L.R. (4th) 591:
>
> > [An] appellate court will be justified in intervening in a trial judge's exercise of his discretion only if the trial judge misdirects himself or if his decision is so clearly wrong as to amount to an injustice.

12 While the discretionary granting of a stay will not lightly be interfered with, the Supreme Court of Canada stated in **R. v. Regan**, [2002] 1 S.C.R. 297 ("*Regan* (SCC)"):

> [118] This does not mean, however, that the trial judge is completely insulated from review. It is settled law that where the "trial judge made some palpable and overriding error which affected his assessment of the facts", the decision based on these facts may be reversed ("*Kathy K*", [1976] 2 S.C.R. 802 at p. 808). In the present case, I find that the trial judge made palpable and overriding factual errors which set his assessment of the facts askew. I also find that he misdirected himself regarding the law for granting a stay by overlooking key elements of the analysis, thereby committing an error which was properly reversed by the Court of Appeal.

[128] The trial judge properly instructed himself with respect to the jurisprudence:

> [2] The duty is upon the Crown to disclose all relevant information in its possession, whether inculpatory or exculpatory, whether the Crown intends to rely upon it or not. *R. v. Stinchcombe*, [1991] 3 S.C.R. 326.

> [3] The Crown also has a duty to preserve relevant evidence. The duty on the Crown if evidence is lost was set out by Sopinka, J. in giving the majority judgment in *R. v. La*, [1997] 2 S.C.R. 680 at p. 684:
>
> > ... I find that when the prosecution has lost evidence that should have been disclosed, the Crown has a duty to explain what happened to it. So long as the explanation is satisfactory, it discharges the Crown's constitutional obligation to disclose. There will, however, be a breach of the *Canadian Charter of Rights and Freedoms* if the explanation does not satisfy the trial judge. Moreover, I would not rule out a remedy in the extraordinary case in which a satisfactory explanation is given for the loss of evidence and no abuse of process is found, but the evidence is so important that its loss renders a fair trial problematic.
>
> (**R. v. West**, 2006 NSSC 40)

[129] The trial judge then went on to determine that there were some problems with disclosure and after reviewing each item in detail concluded:

> … I find the non-disclosure to Mr. West does not prejudice or impair his ability to make full answer and defence, and this is not an appropriate case for a stay of proceedings. *Ibid* (¶44)

[130] Mr. West does not identify an error in law but rather, again, seeks to re-argue and re-litigate the issues which were before Coughlan, J. Coughlan, J. in a well-reasoned, thoughtful judgment considered all of the issues surrounding the disclosure and determined that they did not prejudice or impair Mr. West's ability to make full answer and defence. In reaching his conclusion, the trial judge did not make a palpable and overriding error which affected his assessment of the facts nor did he misdirect himself regarding the law regarding a stay by overlooking key elements of the analysis (**R. v. Regan**, **supra**, ¶118).

[131] I would dismiss this ground of appeal.

Issue 5 - Did the trial judge err in law by a failure to provide sufficiency of reasons for his decisions with respect to admissibility of evidence, lack of disclosure or on the issue of identity?

Standard of Review

[132] The standard of review with respect to whether proper reasons have been given begins with a deferential approach to the trier's perception of facts. It is not enough to intervene if the trial judge did a poor job of expressing him/herself. One must ask whether there is an intelligible basis for the decision. This incorporates a functional test in light of the full record of evidence and submissions on the live issues. Therefore, one does not ask how the trier of fact came to his or her conclusion. Rather, one must ask whether the reasons reflect why the trial judge concluded as he or she did. (**R. v. R.E.M.**, 2008 SCC 51, at ¶15-17, ¶34, ¶ 37, ¶41, ¶45, ¶53-54)

[133] This ground of appeal is entirely without merit. Here, the trial judge clearly grasped the numerous issues. The *voir dires* and submissions were lengthy and detailed. Mr. West's complaints were many and repeated often. Put quite simply, there was no merit and little or no evidentiary basis on which Mr. West could succeed on any of his various motions. The record reveals that the trial judge on every ruling thoroughly reviewed the evidence, resolved conflicts in the evidence, properly instructed himself on the law and then reached his conclusion. When there were issues of credibility he clearly resolved those issues.

[134] The appellant, in his factum, does not outline areas in which he considers the trial judge's decision to be deficient, but rather, takes issue with the trial judge's rulings. The appellant may disagree with the conclusions reached by the trial judge, however, that does not make his reasoning deficient.

[135] I have no difficulty in saying that there is an intelligible basis for every decision which was made by the trial judge during the course of this lengthy trial.

[136] I would dismiss this ground of appeal.

Conclusion

[137] The appellant's motion for disclosure/third party records is dismissed. The appellant's motion to admit fresh evidence is dismissed. The appeal from conviction is dismissed.

Farrar, J.A.

Concurred in:

MacDonald, C.J.N.S.

Bryson, J.A.