NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. Marriott***, 2013 NSCA 12

Date: 20130129
Docket: CAC 352265
Registry: Halifax

Between:

Aaron Gregory Marriott

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	Oland, Fichaud and Farrar, JJ.A
Motion Heard:	December 13, 2012, in Halifax, Nova Scotia
Held:	Declaration of limited waiver of solicitor client privilege, and denial, as premature, of Crown's motion to dismiss grounds of appeal, per reasons for judgment of Fichaud, J.A.; Oland and Farrar, JJ.A. concurring
Counsel:	Elizabeth D. Cooper, for the appellant Mark Scott, for the respondent

Reasons for judgment:

[1] Mr. Marriott fired several close range gunshots at Mr. Jason Hallett. Mr. Hallett survived. Mr. Marriott was charged with various offences, including attempted murder, along with another attempted murder of Mr. Hallett three months earlier. At the start of the trial, the Crown and defence presented the judge with a joint recommendation for a guilty plea to attempted murder, the Crown's withdrawal of the other charges, and sentence. Mr. Marriott, represented by counsel, pleaded guilty to one count of attempted murder. The Crown called no evidence on the other charges, which the court dismissed. The jointly proposed sentence was fifteen years incarceration with no credit for remand against the fifteen years. The Crown recited the facts to the sentencing judge. Mr. Marriott's counsel, in Mr. Marriott's presence, confirmed the essential facts and the points of the joint recommendation. Mr. Marriott then spoke, took full responsibility for his conduct, and made no objection to the recited facts, the sentence or the other points of the joint recommendation. The judge accepted the joint recommendation and sentenced Mr. Marriott to fifteen years.

[2] Mr. Marriott appeals his sentence. He says he was not shown the statement of facts that was put to the sentencing judge, and disputes the accuracy of certain facts in that statement. He submits that the absence of credit for remand time and his segregation while in custody violate his *Charter* rights, and that his sentence was demonstrably unfit. He applies to introduce fresh evidence to support his appeal, and asks that his sentence be reduced to five years.

[3] The Crown moves for rulings that Mr. Marriott's position impliedly waives aspects of his solicitor client privilege with his trial counsel, and that several of Mr. Marriott's grounds should not be entertained. The Court of Appeal heard the Crown's motions separately, without hearing the fresh evidence motion and the appeal proper. These reasons address the Crown's motions.

Background

[4] Mr. Marriott was charged, on a multi-count information, with attempted murder of Jason Hallett. His co-accused were Jeremy LeBlanc, Matthew Murphy and Shaun Smith.

[5] The event occurred on the evening of November 18, 2008 outside the IWK Children's Hospital in Halifax. Later (para 13) I will quote the statement of facts put to the sentencing judge.

[6] Mr. Marriott elected a trial by judge and jury in the Supreme Court of Nova Scotia. He was represented by Mr. Kevin Burke, Q.C., an experienced criminal counsel. According to the comments by counsel to the trial judge, there had been an extensive and lengthy evaluation of evidence and negotiation between the Crown and Mr. Burke. Mr. Burke said he had "extensive discussions with my client, before an agreement was reached here". As a result, on the opening day of trial, April 26, 2011, Mr. Marriott entered a guilty plea to attempted murder under s. 239 of the *Criminal Code*. Justice Kevin Coady of the Supreme Court of Nova Scotia presided. The sentencing was adjourned to May 16, 2011, to enable the Crown and defence to place before the Court the basis for their joint recommendation on sentence. No pre-sentence report was requested.

[7] The guilty plea and joint position incorporated more than one file for which Mr. Marriott was subject to prosecution. The plea and recommendation were premised partly on the Crown's withdrawal of an eleven count indictment alleging, among other things, another attempted murder by Mr. Marriott on the same victim three months before the IWK event.

[8] The sentencing hearing proceeded on May 16, 2011, Justice Coady again presiding.

[9] At the sentencing hearing, the Crown's brief included a statement of facts (below para 13), that both counsel informed the sentencing judge was not in dispute. The Crown and Mr. Marriott's counsel jointly recommended a forward sentence of fifteen years, meaning no reduction for remand custody from the fifteen years. Mr. Marriott's counsel informed the court that Mr. Marriott understood the implications, including segregation, of penitentiary time for his offence. Mr. Marriott attended during the sentencing hearing on May 16, 2011, addressed the Court after hearing the submissions by the Crown and his own counsel, said he took full responsibility, and said "I have to face the consequences and take my punishment".

[10] The following passages appear on the transcript of April 26, 2011, when Mr. Marriott pled guilty.

APRIL 26, 2011

...

THE COURT: Mr. Burke, you're here on behalf of Mr. Marriott?

MR. BURKE: That's right.

...

THE COURT: All right. Mr. Marriott, as you heard me say to Mr. LeBlanc, you, initially, elected to be tried by a judge and jury in this court?

AARON MARRIOTT: Yes.

THE COURT: And your counsel has filed a Notice of Re-Election, and you support that Notice of Re-Election?

AARON MARRIOTT: Yes, Your Honour.

THE COURT: And that re-election is to this court with a judge sitting alone, that being myself?

AARON MARRIOTT: Yes.

THE COURT: And you have made that decision freely and voluntarily with assistance of advice from your counsel?

AARON MARRIOTT: Yes.

THE COURT: All right. Very well, I'm prepared to accept that re-election. You may be seated, sir.

...

THE COURT: Mr. Marriott. Can we arraign Mr. Marriott.

MR. BURKE: Good morning, Your Honour, My Lord. I'd like to simply address the attempted murder charge, which I believe is count 2 of the indictment.

THE COURT: Yes.

MR. BURKE: My client would ask that that charge be read to him and that he will be entering a plea with respect to that charge.

THE COURT: All right. Very well. Faith, would you read Mr. Marriott count number 2.

COURT CLERK:

AARON GREGORY MARRIOTT, you stand charged that on or about the 18th day of November, 2008, at or near Halifax, that you did attempt to murder Jason William Hallett while using a firearm, by discharging a firearm at Jason William Hallett, contrary to Section 239(a) of the **Criminal Code**."

How do you plead?

AARON MARRIOTT: Guilty.

THE COURT: Any comments on the remaining counts?

MS. SMITH: Yes. Again, My Lord, it would be the Crown's intention, if that plea is accepted, to withdraw the remaining counts on the indictment. We have, again, a request for an adjourned sentencing date. The date convenient to Mr. Burke and myself would be May 16th at 9:30 a.m., for two hours. And we will have a joint recommendation to make to the court at that time.

THE COURT: Thank you. All right. Mr. Marriott, you've indicated that ... you have indicated your willingness to plead guilty to count number 2, as I understand it?

AARON MARRIOTT: Yes, Your Honour.

THE COURT: All right. You understand ... And you've received disclosure; you understand what they're alleging you did?

AARON MARRIOTT: Yes.

THE COURT: All right. And can you assure me that no one is bringing any pressure to bear on you to plead this out?

AARON MARRIOTT: No, Your Honour.

THE COURT: And you understand that you are presumed innocent, as you stand here now, until I accept your plea, but you're giving it up and you're going to be guilty?

AARON MARRIOTT: Yes.

THE COURT: You understand that?

AARON MARRIOTT: Yeah.

THE COURT: And you understand that the joint recommendation that may, that your counsel and Ms. Smith have spoken about, that I'm not necessarily bound by that?

AARON MARRIOTT: Yes, I understand.

THE COURT: Okay. I'm prepared to accept his plea. I'll put Mr. Smith's sentencing over til May 18th at 9:30 for half a day and I'll put Mr. Marriott's sentencing over til May 16th at 9:30 a.m. Is that satisfactory?

MR. BURKE: There's one other thing, My Lord.

THE COURT: Yes?

MR. BURKE: The charges that will be withdrawn by the Crown are the charges that are set out, the remaining charges that are set out in the indictment, and there's also two other charges that the Crown has undertaken not to proceed with. I simply want to indicate that...

THE COURT: Unrelated?

MR. BURKE: ... on the record.

MS. SMITH: Yes.

THE COURT: Okay.

MS. SMITH: That's correct.

THE COURT: So will you want to have that back, those matters ...

MS. SMITH: I will, I will arrange to have those indictments brought before the court on the 16th of May.

THE COURT: Very well. Any request for any kind of report, pre-sentence report or anything like that?

MR. BURKE: No, My Lord.

THE COURT: No. Okay. All right. That's fine. I'm fine with that.

[11] The following extracts appear in the transcript of Mr. Marriott's sentencing hearing of May 16, 2011.

MAY 16, 2011

...

THE COURT: I ... Mr. Marriott was before me on April 26th, 2011, and entered a plea of guilty to the attempt murder and I believe

all other counts were either dismissed or were going to be dismissed on today's date. So I gather we're here for sentencing.

MS. SMITH: That's correct.

...

MS. SMITH: And as I had indicated to the Court, and I believe it may have been indicated on the day that Mr. Marriott entered his plea, my friend and I have a joint recommendation before the court today's date.

THE COURT: All right.

...

SUBMISSION ON SENTENCING BY MS. SMITH

MS. SMITH: ...

The facts in relation to this matter are referred to at length in the brief filed by the Crown, and I will touch on them briefly. These matters are not in dispute as between my friend and myself.

The sequence of events that unfolded on November 18th of 2008 unfolded very rapidly, beginning with a call from the girlfriend of Jeremy LeBlanc, an associate of Mr. Marriott's, advising that one Jason Hallett could be located at the IWK Hospital in downtown Halifax.

Within half an hour of that call being received, Mr. Hallett was shot by Mr. Marriott in the front area of the hospital's parking outside of the entrance, these events having unfolded with that call and the result being that Mr. Marriott, along with others, travelled to the hospital via two separate vehicles. Once there, Mr. Hallett was located, quite by chance, as he had come out of the building, from visiting his infant child, to have a smoke and to obtain more cigarettes from a friend.

At the time that Mr. Hallett was shot by Mr. Marriott, Mr. Hallett was shot while seated in the passenger seat in the front of a Jeep Cherokee being operated by the person who had come to provide him with cigarettes. There was another individual who was in the back seat at that

time. This shooting occurred at approximately 6:45 p.m. on a weekday evening. Mr. Hallett was shot at close range with a handgun. He was struck in the wrist, and this was despite the fact that witnesses would say anywhere from three to five shots were fired into the Cherokee. Certainly, on a forensic examination of the vehicle, the vehicle was hit with at least three distinct projectiles. The injury that Mr. Hallett suffered was superficial; it required some treatment by way of stitches at the Emergency, and Mr. Hallett was certainly releasable that day.

The motivation for this crime, as if there could ever be any good one, was simply that Mr. Hallett had switched allegiances from one rival crime group to another.

Mr. Marriott is 20 years of age. He comes before the court with 22 prior convictions, those convictions having been entered between 2004 and 2011. Essentially, the last seven years saw Mr. Marriott amass these 22 prior convictions. In 2004, when his criminal record began, he was a mere 13 years of age. All of his prior convictions, save for one, had been committed while he was a youth. The one that has been committed since he was an adult occurred while he was on remand in relation to this offence and related to ...

THE COURT: Did you say of the 22 prior convictions ...

MS. SMITH: Yes.

THE COURT: How many were as a youth?

MS. SMITH: 21.

THE COURT: 21 as a youth.

MS. SMITH: 21 of those. The one prior or the one conviction that occurred as an adult occurred since Mr. Marriott has been on remand for this offence and relates to a mischief offence that occurred in the correctional facility.

This record of Mr. Marriott's includes crimes of violence, weapons offences and drug trafficking.

We do not have the benefit of a pre-sentence report before the court. My friend and I have discussed this matter, and I'm sure Mr. Burke will have much to say about Mr. Marriott's personal circumstances. I can recall, certainly, from reading past pre-sentence reports in relation to Mr. Marriott, that he was said to come from a law-abiding family, to have had the benefit of a good upbringing, to have had opportunities to have played hockey and engage in sports as a young person. Very clearly, this was a lifestyle that Mr. Marriott chose.

...

The recommendation that my friend and I have reached, on a very considered basis, Your Lordship, is for a sentence of 15 years' imprisonment. That would be on a go-forward basis, with no credit for the remand time that Mr. Marriott has served to date, which has been since his arrest some two and a half years ago, in December of 2008. Effectively, the recommendation that the Crown makes and which my friend has joined in has already taken into account the remand time that Mr. Hallett(sic) [from transcript] has served. This is a primary designated offence and, as such, we're asking that a DNA order be made. I have provided a copy to the clerk for the court. My friend has a copy. As well, there is a mandatory firearms order and, because of the previous order made against Mr. Marriott, that order should be for life.

...

SUBMISSION ON SENTENCING BY MR. BURKE

MR. BURKE: Thank you, Your Honour, My Lord. The facts that the Crown has outlined to the court, for the most part, I don't take issue with. The comments concerning Mr. Hallett, I think, deserves a little more elaboration than maybe what my learned friend has pointed out to the court

Mr. Hallett was carrying a handgun at the time, carrying a handgun inside the Children's Hospital, a loaded handgun. It's very difficult to appreciate the emotional impact that this particular incident had on Mr. Hallett, given the fact that he has quite a history in terms of his participation in one criminal gang versus another, the fact that he was carrying a handgun into a public children's hospital on, I believe it's on the second floor, for no other purpose, I would respectfully suggest, than had he had to use the handgun, that the handgun would have been there for

use. And so I point that out to the court, not in the sense that if any particular person is a victim of violence that, obviously, they're going to suffer some degree of trauma as a result, but given the fact that there are special circumstances as it relates to Jason Hallett that I think need to be taken into consideration, as well.

As my learned friend has pointed out, there have been extensive discussions in respect to this matter. The discussions not only focused on the IWK incident but also has focused on other matters that, as Your Lordship can see, are presently before this court and will be dealt with as part of the whole submission that's being made here this morning. The discussions as it relates to this joint recommendation commenced close to a year ago. They've been ongoing for some considerable period of time. I have had extensive discussions with the Crown, as well, extensive discussions with my client, before an agreement was reached here. A number of factors have been carefully considered and, in particular, the strength of the Crown's case as it related to this particular incident and also as it relates to the other matters that are presently before the court. So the sentence that's being suggested here is not an undue lenient sentence, by any stretch of the imagination. It's a 15 year sentence, commencing today, that also recognizes that Mr. Marriott has been in custody since December of 2008, December 11th, 2008. So he's got 29 months in pre-trial custody. Now, obviously, that has to be reflected, and it is reflected, the fact that he is, essentially, being sentenced without any two-for-one credit being considered at all, that he's looking at 17 years and five months.

...

Now, of course, the difficulty that he's facing is that ... and Mr. Marriott knows that, as well as a lot of us, that he'll be sentenced and he'll be sent to Renous and, because of past associations, he will be dealt with accordingly. In other words, he will be segregated. He will be segregated with his past associates, which creates an almost insurmountable difficulty in trying to extract himself from a never-ending scenario. He will then be in the same situation that he would have been, say, growing up, when he was 13 or 14 or 15, in Spryfield, or the same thing in Burnside. There's no course corrections here. What, in essence, will happen is that there'll be a lot of associates that would be put on the same range as Mr. Marriott, from the officials' point of view, more for control than anything. No attempt at rehabilitation of any meaningful, in any meaningful way. It will be simply a matter of control. And consequently, he has to be looking at a sentence of 15 years that really nothing is changing in his environment. He's in the

same environment that he moved out of in Spryfield into Burnside and on to Renous. The only possibility that he has is to, essentially, apply for a transfer, which everyone else is doing. And that even follows him wherever he goes, whether it's B.C. or Ontario or Alberta, that the association of being involved with a "gang" automatically characterizes him and where he's going to be placed in whatever institution.

So it's a very difficult future that a 20-year-old faces. Even if he has a sincere and honest desire to somehow change his life, if he recognizes that he has a level of intelligence that can allow him to change, he recognizes that the only person that is going to give him any assistance, any assistance whatsoever, is himself. And this is something he's learned in Burnside, that his contacts, his communications with, say, professors at Acadia may open a world to him, but you can see, without much further consideration, that that's a very, very small part of what his life is going to be like when he's sent to Renous.

He recognizes that unless something should come out of these efforts that he's making, in terms of trying to get a university degree, that he's looking at two situations: one, that he'll end up doing two-thirds of his time - he's 20 years old, he's ... he knows that - not one-third of his time, by virtue of his being associated, his being, I guess, pigeon-holed or characterized. So you're looking at 10 years, not five years, in terms of when he actually has a realistic possibility of being released. So he's, essentially, going to be from 20 to 30 years old at the time when he is applying.

...

Mr. Marriott ... What I'm, essentially, relating to the court today, Mr. Marriott has related to me, over a number of discussions that we've had over the past several years. These are views, these are feelings that he has expressed to me, that I'm passing along to the court. And it's a rather tragic situation that we are looking at today.

It is a joint recommendation, and Mr. Marriott is prepared, he understands what 15 years is all about and he's prepared to accept it and to deal with it. And the way he's going to try an (sic) deal with it is the way that I've explained it to the court today.

Those are my comments.

THE COURT: Mr. Marriott, would you like to say anything?

AARON MARRIOTT: Do you think I could have a brief recess first? Is there any way ...

...

THE COURT: Thank you. Please be seated. All right. Mr. Marriott, did you wish to say something, sir?

AARON MARRIOTT: Yes, Your Honour. I've prepared a few things.

THE COURT: Well, you go ahead, sir.

AARON MARRIOTT: First of all, Your Honour, I would like to take this moment to address the court. I would like to apologize for what I did. I am very remorseful, and I definitely regret my actions on that night. I would also like to apologize to the public for what I did. What I did was unacceptable and I have no excuses for what happened, but what did happen should have never taken place in the location that it did, under any circumstances. I am sorry for what I did, but I deeply regret that it happened in such a public place.

I would like to apologize to my family for everything that I've put them through. They also suffered the consequences of my actions. They also feel the punishment. So I am sorry for everything that I put them through. I not only messed up my own life but also theirs.

I would also like to sincerely apologize to two people, in particular, Jeremy LeBlanc and Matthew Murphy, and also their families. I am sorry for dragging them into this mess. What I did was unpredictable and completely out of character for me. Jeremy LeBlanc and Matthew Murphy are completely innocent. They are both standing trial because of my actions and the decisions that I made. There is no way possible that they could have known what I was going to do that night. Unless they had psychic abilities, they didn't know what was about to happen. I didn't even know what I was going to do. I'm not sure exactly when I made the decision, but it was sometime between getting out of my vehicle and

walking toward the victim. It was my fault for having a loaded handgun on me. There was no way that Jeremy or Matthew could have known I was carrying a gun on me. I am using this opportunity to let the courts know that two completely innocent men are facing charges because of my actions. And what I done has affected so many people - my family, them, their families, the victim, his family, all the people that were at the IWK that night when I did what I did. I'm responsible for what happened, and not them.

I can't explain the weight that I have been carrying with me during the last two and a half years that I have been incarcerated, knowing that my actions have affected as many people's lives as they did. I have no excuses for what I did. I definitely regret it. There's no way that I can undo it. And I know that all there is now is I have to face the consequences and take my punishment.

THE COURT: Thank you, Mr. Marriott.

AARON MARRIOTT: Thank you for your time, Your Honour.

...

MS. SMITH: Yes, My Lord, if we could deal with the matter of re-election with respect to that indictment.

...

THE COURT: All right. And Mr. Marriott, is it your intention to now change your election from that of a judge and jury to a judge alone of this court, that being myself?

AARON MARRIOTT: Yes.

THE COURT: All right. And you're making this decision freely and voluntarily?

AARON MARRIOTT: Yes.

THE COURT: All right. All right. I will accept the re-election, orally.

> **MS. SMITH:** And while there is no plea, I am content to deal with whether Your Lordship feels a plea should be taken, but the Crown intends to offer no evidence against Mr. Marriott on this indictment.
>
> **THE COURT:** All right. I don't require anything more than just you telling me that.
>
> **MS. SMITH:** Thank you.
>
> **THE COURT:** All right. Those ... Indictment CR 324027, 11-count indictment, the charges are dismissed.

[12] At the beginning of the Crown's submission on sentencing, quoted above, counsel for the Crown, Ms. Smith, referred to the facts recited in the Crown's brief, which Ms. Smith informed the judge "are not in dispute as between my friend and myself". Later, Mr. Marriott's counsel opened his submission by stating "[t]he facts that the Crown has outlined to the court, for the most part, I don't take issue with", to which Mr. Burke then added a point - that Mr. Hallett had a loaded handgun at the time. Neither the Crown nor the defence offered evidence at the sentencing. As noted at the end of the April 26th hearing, Mr. Marriott's counsel did not request a pre-sentence report, and none was prepared.

[13] The statement of facts in the Crown's sentencing brief said:

> **Part 1 - Facts**
>
> 1. On November 18, 2008, Jeremy Leblanc (hereinafter "LEBLANC") and his associates, including Aaron Marriott (hereinafter "MARRIOTT") made a plan to kill Jason Hallett (hereinafter "HALLETT"). They were unaware that while they made this plan the police were listening.
>
> 2. Operation Intrude was a joint investigation by RCMP and Halifax Regional Police into *Criminal Code* and *C.D.S.A.* offences being committed by a targeted group of individuals who were subject to surveillance of different varieties, including phone intercepts. MARRIOTT, LEBLANC, and Shaun Smith (hereinafter

"SMITH") were known to police to be members of a group working in the illicit drug trade and referring to themselves as the "Spryfield M.O.B."

3. On the date in question, judicial authorization to intercept MARRIOTT, LEBLANC and SMITH's phone calls, and phone calls of other LEBLANC associates, was obtained by police. Consequently, the phone conversations that took place between and among LEBLANC, MARRIOTT, SMITH and Matthew Murphy (hereinafter "MURPHY") as the plan to kill HALLETT developed, were recorded.

4. On November 18, 2008, at approximately 6:09 pm, LEBLANC received a phone call from his then-girlfriend, Jennifer Hachey, who worked at the IWK Children's Hospital in Halifax. Hachey told LEBLANC that HALLETT was at the IWK, hospital. LEBLANC told Hachey, "just do your job, okay?" (see Intercepts, Tab 1).

5. LEBLANC proceeded to communicate by phone with each of SMITH and MARRIOTT, informing them that HALLETT, a member of a rival gang, was at the IWK Hospital. LEBLANC was already proceeding to the IWK hospital in a vehicle with MURPHY. MARRIOTT and SMITH drove together to the IWK hospital in a Chevrolet Blazer that was missing its rear window, and that had clear plastic affixed in the place of the rear window with bright red tape. The Blazer's license plate was ENM 609.

6. MARRIOTT and SMITH stopped to meet with Dawn Anne Bremner at approximately 6:26 pm, before carrying on to the IWK hospital.

7. While proceeding to the IWK hospital, MARRIOTT phoned LEBLANC to clarify where Hachey worked, and LEBLANC confirmed to SMITH and MARRIOTT that HALLETT was located at the IWK hospital: "the same place we were lookin' before" (see Intercepts, Tab 9). During this phone conversation, LEBLANC directed MARRIOTT not to run right in to the hospital in order to carry out their plan, since Hachey was working there, and her employer "might fuck around with her later."

8. HALLETT was at the IWK hospital because his child had been born there a few days earlier, and the child was still admitted to the hospital.

9. LEBLANC and MURPHY arrived first together at the IWK hospital on the evening of November 18, 2008. From within their vehicle, they covertly observed HALLETT outside the hospital, and passed information about HALLETT's location to SMITH by phone. HALLETT had come down from visiting his child inside the hospital in order to smoke a cigarette outside of the hospital, and in order to obtain more cigarettes from a friend. HALLETT had a handgun in his possession at that time.

10. When LEBLANC indicated to SMITH over the phone that HALLETT might be leaving the hospital grounds, SMITH expressed to LEBLANC a desire to block HALLETT from leaving.

11. Subsequently, after it became evident that HALLETT was not leaving the hospital yet, LEBLANC and MURPHY, while on the phone with SMITH, drove beside HALLETT's exact position, and MURPHY told SMITH that HALLETT was "right there on the right." At this point, SMITH is heard saying, "gimme, gimme the gat" (see Intercepts, Tab 11).

12. Shortly afterward, in a subsequent phone call, LEBLANC and MURPHY told SMITH that HALLETT had jumped into a Cherokee (a Jeep sport utility vehicle).

13. In the final phone call before HALLETT was shot, LEBLANC and MURPHY confirmed the location of the Cherokee, "right in front," to SMITH and MARRIOTT (see Intercepts, Tab 13). SMITH then told MARRIOTT, "get out and blaze that Cherokee."

14. At approximately 6:45 pm, MARRIOTT then exited the Blazer, dressed all in white and wearing a hooded sweatshirt with the hood pulled close over his face, and proceeded to walk up to the Cherokee that HALLETT and two other passengers were sitting inside.

15. MARRIOTT fired several shots at close range from a handgun into the Cherokee in an attempt to kill HALLETT. Various

eyewitnesses reported having heard anywhere between three and five shots. Forensic analysis revealed that the Cherokee had sustained damage from at least three different fired projectiles, and that the projectiles were most likely fired from a .375, .38, or 9 millimetre-calibre pistol or revolver.

16. MARRIOTT then turned and ran back to the Blazer. Once he was inside the Blazer, SMITH drove away proceeding Westbound in an Eastbound lane on University Avenue, and then Northbound on Robie Street. An eyewitness who was in a vehicle behind the Blazer on Robie Street called 911 to report the Blazer, as the eyewitness suspected that the driver was intoxicated on the basis of the Blazer's erratic and dangerous driving through traffic.

17. HALLETT was hit only once, in the wrist, by the shots that were fired at him. He received emergency medical treatment at the QEII hospital shortly after the shooting, and was discharged from that hospital the same night.

18. No one else was injured in the shooting, although the shooting caused a substantial disruption to the IWK hospital, which declared a "Code" and a form of lockdown in relation to the shooting, and to the witnesses who were all kept behind for hours and asked to provide statements to police investigators.

19. Multiple eyewitnesses who were present in very close proximity to the Cherokee at the time of the shooting, and the IWK hospital security camera footage, all indicated that an individual who was dressed completely in white walked up to and fired several shots into the Jeep Cherokee. The shooting took place at or around a normal IWK hospital staff shift change, so there was substantial pedestrian and vehicular traffic around the entrance to the hospital at the time of the shooting.

20. HALLETT positively identified the individual who shot him as Aaron MARRIOTT. Although HALLETT was initially reluctant to cooperate with police investigators, he indicated to a police officer who was at the QEII hospital on the night of November 18, 2008, that MARRIOTT was the shooter, and HALLETT has subsequently confirmed this information to the police throughout the investigation into the shooting.

21. MARRIOTT was arrested on December 11, 2008, for shooting HALLETT; the arrest took place after HALLETT had agreed to cooperate with the police investigation.

22. SMITH, LEBLANC, and MURPHY were later arrested for their roles in the shooting, but only after the expiration of the Operation Intrude judicial authorization to intercept communications that yielded the intercepted phone calls relating to the shooting of HALLETT.

23. HALLETT has been placed in witness protection for his safety as a result of his participation in police investigation into the shooting and his testimony at judicial proceedings arising from the shooting.

24. HALLETT has suffered substantial psychological trauma as a result of the shooting. He is unable to maintain the relationships and the lifestyle that he knew prior to the shooting.

[14] The judge accepted the joint recommendation and sentenced Mr. Marriott to fifteen years incarceration. The judge's reasons, delivered orally on May 16, 2011, included:

> I am familiar with the principles and objectives of sentencing as set out in the **Criminal Code**, and I'm not going to repeat them here. And I'm very familiar with the similar cases that have been provided to me by counsel that helped me determine if the joint recommendation is an appropriate recommendation. And I will say, after consideration of those authorities, I have no difficulty accepting the joint recommendation of 15 years. I recognize that the law says I should accept joint recommendations unless I can articulate a good reason not to, and I have no hesitation in saying, in this case, that I have no such reason that I could possibly articulate.
>
> ... Ms. Smith got it right when she described this as a botched first degree murder. ... But when our citizens hear about an attempt to murder someone at 6:45 p.m. at the local maternity and children's hospital, things change considerably. When they hear about someone running up to another person in a vehicle and blasting them three to five times with a high-powered pistol, in the middle of that parking lot, it sends out a message that's new to the general community.

> ... But this type of shooting and the great possibility of what one could callously call collateral damage has done great damage to our community and our citizens and their sense of self, well being.
>
> The other tragedy is that Mr. Marriott stands before this court as a 20 year old person who's been in jail for all of his adult life. ...
>
> These factors tell me it's all about accepting peer pressure and wanting to make his mark in the criminal community, without very much thought about the consequences of what would happen to the person receiving the damage and himself. In a way, as I was sketching out my remarks, I wanted to say to Mr. Marriott just how lucky he is. It's something I want you to think about in the coming years. Mr. Hallett could be dead, and that would be a lost life, and you could be facing a life sentence with no chance of parole for 25 years. ...
>
> But I think it's very clear from the comments of your counsel, and which I know from my own experience, that you must disassociate yourself from your fellow offenders in jail and over the years, if you want to have any chance whatsoever of a better life in your 30s, 40s, and 50s. ...
>
> I am going to sentence you to 15 years in prison for your involvement in this offence.

[15] On June 20, 2011 Mr. Marriott, unrepresented by counsel, filed a notice of appeal against sentence with the Court of Appeal. His grounds of appeal recited that, before the sentencing, he had spent two and one half years in custody, much of it in solitary confinement. He described his penitentiary experience as "mental torture". His notice said that the sentence did not take into account the purposes and principles of sentencing, that he had not received credit for his guilty plea, that his sentence was higher than a sentence issued to his co-accused, and that the sentence did not take account his age and "[m]y lack of a significant criminal record". Finally, his notice appealed "[o]n the basis of incompetent counsel".

[16] On May 24, 2012, Mr. Marriott, represented by his current appeal counsel, filed an amended notice of appeal. The amended notice withdrew the ground alleging incompetent counsel, and added grounds that: (1) the sentence was demonstrably unfit, (2) "the duration and nature of the conditions of his sentence constitute cruel and unusual punishment contrary to s. 12 of the Charter", because the sentence was excessive, did not give him credit for remand time, deprived him

of an opportunity to further his education, involved solitary confinement, and involuntarily transfers to other penitentiaries without access to family visits; and (3) the sentencing judge failed to consider factors such as " the lack of significant, if any, injuries to the victim", that Mr. Marriott "is very remorseful", that "[t]here was no one that was in immediate danger when this particular incident occurred", and "the serious misconduct of the victim".

[17] On July 16, 2012, Mr. Marriott further amended his notice of appeal to add that: (1) his rights under ss. 7 and 9 of the *Charter* were violated by the "arbitrary actions of the prisons, in holding him in solitary segregation for grossly excessive periods of time", constituting an abuse of process, (2) the sentence exceeded that prescribed by s. 239 of the *Criminal Code*, (3) the sentence violated his right to equal protection under s. 15(1) of the *Charter* and (4) he is entitled to a reduction of sentence for the *Charter* breaches under s. 24(1) of the *Charter* and *R. v. Nasogaluak*, [2010] 1 S.C.R. 206.

[18] Mr. Marriott's factum submits that a fit sentence would be ten years, less a five year credit for remand time, leaving five years forward incarceration from his sentencing date of May 16, 2011.

[19] Mr. Marriott moves in this Court to add fresh evidence to support his grounds of appeal. He tenders his affidavits of September 7, 2012 and December 5, 2012. These affidavits recite evidence concerning (1) Mr. Marriott's background, (2) his criminal record that he says "consisted of schoolyard quarrels", (3) the conditions of his pre-trial custody that included lengthy solitary confinement, (4) his successful attempt during pre-trial custody to complete a high school equivalency and acceptance into University, (5) his efforts at rehabilitation and course work during pre-trial custody, (6) his continuing efforts to continue his University education, (7) his experience in the federal penitentiary system after his sentencing, particularly respecting his segregation, and (8) his complaints filed against the Institution at Renous, and the responses he received to those complaints.

[20] On October 3, 2012, at the Crown's initiative, the chambers judge of this Court scheduled December 13, 2012 for the hearing of two issues only:

> (1) Do Mr Marriott's submissions to the Court of Appeal impliedly waive his solicitor client privilege with his former counsel, Mr. Burke?
>
> (2) May Mr. Marriott raise the *Charter* based grounds cited in his amended notice of appeal?

Those two issues were cited for early determination because they affect the scope of fresh evidence that the parties may elicit for this Court at or before the hearing of the appeal proper. Whether solicitor client privilege is waived affects whether evidence from Mr. Burke may be adduced or compelled by the Crown in response to Mr. Marriott's tendered fresh evidence. Whether Mr. Marriott may proceed with his grounds respecting the conditions of his custody affect whether the Crown should offer responding evidence respecting Mr. Marriott's treatment during his incarceration.

[21] Mr. Marriott's Brief for his Fresh Evidence Motion (paras 31 and 47) had referred to the "incorrect assumption" in the facts put to the sentencing judge and to the "mistaken record". Exhibit 8 to Mr. Marriott's tendered Affidavit of September 7, 2012 contains Mr. Marriott's quoted statement that he "only shot him in the wrist and I didn't try to kill him". That item of evidence might be inconsistent with the factual premise of the jointly agreed guilty plea to attempted murder.

[22] At the hearing in this Court on December 13, 2012, Mr. Marriott's counsel was asked to identify the alleged inaccuracies in the record of facts put to the sentencing judge. Mr. Marriott and his counsel both reiterated their allegations that the statement of facts put to the sentencing judge was incorrect. The Court then requested Mr. Marriott's counsel, after consulting her client, to list in writing the particulars of the statement of facts put to the sentencing judge that Mr. Marriott alleges to be inaccurate.

[23] On January 8, 2013, Mr. Marriott's counsel filed a letter that said "The Appellant disagrees with" seven points in the statement of facts that had been put to the sentencing judge. Those points of disagreement are significant, and include the wording in the statement of facts that:

> "Marriott made a plan to kill Jason Hallett." (Statement of Fact # 1)

> "Marriott ... were known to the police to be members of a group working in the illicit drug trade and referring to themselves as the 'Spryfield M.O.B.' " (Statement of Fact # 2)
>
> That the victim, Jason Hallett was "a member of a rival gang". (Statement of Fact # 5)

[24] In her written and oral submissions to the Court of Appeal, Mr. Marriott's counsel also contended that, apart from the inaccuracies, the facts put to the sentencing judge were incomplete, as of the date of the sentencing hearing, in a number of material respects.

[25] As to how these alleged inaccuracies and deficiencies came to be in the position jointly stated to the sentencing judge, we have the following. Mr. Marriott's affidavit of September 7, 2012, says:

> 18. I was never shown the agreed statement of facts that formed part of the Crown's brief.

His factum says:

> 1. ... Because of his guilty plea, the facts in relation to the Appellant were not brought forward.

His Brief for the Fresh Evidence Motion says:

> 22. The Appellant was told, by his counsel, that he would have the weekend to think about the proposed sentence.
>
> 25. The Appellant had no opportunity to see the agreed statement of facts, nor any opportunity to review the contents of the Crown's position contained in the Crown's brief filed at his sentencing, that forms the basis of his sentence.
>
> 71. The way the Appellant was sentenced, he was left in the cold with nothing said about him.

> 93. ... He is simply stating the fact that he did not see the agreed statement of facts, nor the justification for the Crown's sentence, before his sentencing. As well, the sentence that he received, that was agreed upon by the Crown and his attorney, was not communicated to him until the day before he pleaded guilty to the offence, on which the sentence is based.
>
> 109. The nature of the joint recommendation on sentence in the Appellant's case, that excluded any credit whatsoever for the 2.4 years that the Appellant spent in pre-trial custody, silenced [underlining in the Brief] Mr. Burke, Q.C. from having any opportunity to raise a Charter argument on sentencing.
>
> 156. ... very little about his background was brought to the attention of the Court at his sentencing.
>
> 159. While a pre-sentence report would have been of assistance in the Appellant's case, it was not required for a joint recommendation on sentence, and neither the Crown nor the defence at trial requested that one be prepared.

Mr. Marriott also alleges improper Crown disclosure as an explanation for the allegedly deficient facts put to the sentencing judge. The letter of January 7, 2013 from Mr. Marriott's counsel to the Court of Appeal says:

> It is highly relevant that the Crown failed to disclose the facts of the Appellant's participation in the offence, together with the driver of the vehicle in which the Appellant was transported, ...

[26] The Crown disputes that there was insufficient or improper disclosure and disagrees that the statement of facts in the Crown's brief to the sentencing judge was inaccurate.

[27] On December 14, 2012, after the hearing in the Court of Appeal, counsel for the Crown wrote to this Court, copied to Mr. Marriott's counsel, stating that Mr. Marriott's disagreement with facts that were jointly put to the sentencing judge raises further procedural issues. To quote the Crown's letter:

> ... Should the Appellant succeed in convincing the Court that he was unaware of and disagrees with any or all of the facts contained in the Agreed Statement of Facts, we would be in the same position as a contested sentencing hearing. That

> is, following a guilty plea, should the Crown seek to have the Court rely on facts or factors which would be aggravating, it would be required to prove the facts underlying same beyond a reasonable doubt. It would otherwise be improper to simply strike those aspects with which the Appellant disagrees.
>
> The consequence of limiting the matter to an appeal on sentence alone would be significant delay in preparation and presentation of evidence to allow the Crown to seek to prove such facts.
>
> More fundamentally, it appears that the Agreed Statement of Facts is part and parcel of the full package relating to the resolution agreement. ... while the Agreed Statement of Facts clearly affects the sentence ordered, the effect of disagreeing with these facts does not end there. Rather, it fundamentally undermines the basis for the resolution and the *quid pro quo* within same.
>
> ...
>
> ... it is the Crown's position that any disagreement with any of the facts constitutes an argument that the guilty plea was not fully informed. Should the Panel agree, it will have to consider whether the Appellant should be entitled to amend his Notice of Appeal to seek to withdraw his guilty plea on that basis. Then the law with respect to same would be the lens through which the hearing could be held.
>
> Should the Appellant be successful in seeking to withdraw his guilty plea, the resolution agreement would obviously be repudiated. The consequence of this would be that the Crown would reinstitute the Indictment that was discontinued against Mr. Marriott at the sentencing hearing... .

[28] Mr. Marriott's counsel replied and disagreed with the Crown's comments.

Issues

[29] The issues, scheduled by the chambers judge on October 3, 2012, are:

> (1) Does Mr. Marriott's position on the appeal impliedly waive his solicitor client privilege with his former counsel, Mr. Burke?
>
> (2) May Mr. Marriott raise, in the Court of Appeal, the *Charter* grounds stated in his amended notice of appeal?

[30] The effect of Mr. Marriott's attempted repudiation of the joint submission, discussed in the letter from the Crown quoted above, para 27, is not an issue before the Court on this hearing. That matter may play a more prominent role in the hearing of Mr. Marriott's appeal proper.

First Issue -
Waiver of Solicitor Client Privilege

[31] Mr. Marriott denies that he has waived solicitor client privilege. His position is that the Crown is not entitled to speak to Mr. Burke, or have Mr. Burke testify as to any of the events that culminated in the joint submission.

[32] I respectfully disagree. Clearly there is no express waiver of solicitor client privilege. But Mr. Marriott seeks to repudiate a joint submission based on his allegations of what transpired between Mr. Marriott and Mr. Burke. The maintenance of solicitor client privilege would mean that Mr. Marriott's own evidence would monopolize any fact-finding on these allegations. In my view, Mr. Marriott's position on the appeal impliedly waives solicitor client privilege to the limited extent that is necessary to allow the Crown to explore and this Court, if Mr. Burke's evidence is offered, to make reliable findings, respecting those pivotal facts that Mr. Marriott has placed in issue.

[33] In *R. v. Campbell*, [1999] 1 S.C.R. 565 the accused were found guilty of conspiracy to traffic and possess *cannabis resin* contrary to the *Narcotic Control Act*. They sought a stay on the basis that the RCMP's evidence was obtained from what was claimed to be an illegal reverse sting operation, constituting an abuse of process. The RCMP responded that they had acted in good faith on legal advice from the Department of Justice. The question was whether the accused could access that legal advice. The Supreme Court held that the RCMP, or the Crown, had impliedly waived solicitor client privilege. Justice Binnie, for the Court, said:

> 46 ... While not explicitly stated in so many words, the plain implication sought to be conveyed to the appellants and to the courts was that the RCMP accepted the legal advice they were given by the Department of Justice and acted in accordance with it. ...
>
> 48 It appears, therefore, that the only satisfactory way to resolve the issue of good faith is to order disclosure of the content of the relevant advice. This

> should be done (for the reasons to be discussed) on the basis of waiver by the RCMP of the solicitor-client privilege. ...
>
> *Waiver of Solicitor-Client Privilege*
>
> 67 The record is clear that the RCMP put in issue Cpl. Reynolds' good faith belief in the legality of the reverse sting, and asserted its reliance upon his consultations with the Department of Justice to buttress that position. The RCMP factum in the Ontario Court of Appeal has already been quoted in para. 46. In my view, the RCMP waived the right to shelter behind solicitor-client privilege the contents of the advice thus exposed and relied upon.
>
> ...
>
> 70 ... It was sufficient in this case for the RCMP to support its good faith argument by undisclosed advice from legal counsel in circumstances where, as here, the existence or non-existence of the asserted good faith depended on the content of that legal advice. The clear implication sought to be conveyed to the court by the RCMP was that Mr. Leising's advice had assured the RCMP that the proposed reverse sting was legal.
>
> ...
>
> 73 ... Because the RCMP made a live issue of the legal advice it received from the Department of Justice, the appellants were and are entitled to get to the bottom of it.

Justice Binnie (para 74) then noted that the waiver ruling was "not an 'open file' order in respect of the RCMP's solicitor and client communications". He limited the scope of the waiver to communications that specifically addressed the points that the RCMP had placed in issue.

[34] In *R. v. Hobbs*, 2009 NSCA 90 the appellant had been convicted of possession and transportation of the proceeds of the commission of an indictable offence, contrary to ss. 353(10 and 462.31(1)(a)) of the *Criminal Code*. He appealed. He said that he had instructed his trial counsel to make an argument, that had not been made. The Court held that Mr. Hobbs had impliedly waived solicitor client privilege respecting that topic. Justice Saunders said:

> [14] A client who puts in issue the advice received from his or her solicitor risks being found to have waived the privilege with respect to those communications.

Justice Saunders (paras 15-20) followed the decisions of appellate courts in *Harish v. Stamp* (1979), 27 O.R. (2d) 395 (C.A.), paras 6, 21 and 23, *R. v. Read* (1993), 36 B.C.A.C. 64 (C.A.) and *R. v. Li* (1993), 36 B.C.A.C. 181 (C.A.), paras 50-51. In the adopted passages from *Harish*, Justices Lacourciere and Morden said:

> 6. ... The defendant driver gave evidence about his lawyer's failure to discuss the defence or his lack of comprehension of it. In the circumstances of the plea the defendant had, in my view, effectively waived the solicitor-client privilege which could not be relied upon as a ground to object to this testimony. [Lacourciere, J.A.]
>
> 21. In my respectful view, having regard to the evidence which had already been given, the learned trial Judge erred in holding that there has been no waiver of the solicitor-client privilege. Reference may usefully be made to McCormick on Evidence, 2nd ed. (1972), p. 194:
>
> > Waiver includes, as Wigmore points out, not merely words or conduct expressing an intention to relinquish a known right but conduct, such as partial disclosure, which would make it unfair for the client to insist on the privilege thereafter. [Morden, J.A.]

[35] Mr. Marriott has withdrawn his initial ground of appeal that alleged "incompetent counsel". His appeal counsel submitted that, as there is no formal criticism of Mr. Burke, there is no basis for any implied waiver of solicitor client privilege.

[36] In my respectful view, it's not that simple.

[37] Mr. Marriott's appeal turns on his repudiation of the joint submission on sentence. In the material that Mr. Marriott has filed with the Court of Appeal, he justifies that repudiation with allegations that: (1) facts that his counsel told the sentencing judge "I don't take issue with" were inaccurate; (2) "[t]he way the Appellant was sentenced, he was left in the cold with nothing said about him"; (3) the "nature of the joint recommendation ... silenced Mr. Burke"; (4) Mr. Marriott

"was told, by his counsel, that he would have the weekend to think about the proposed sentence"; (5) Mr. Marriott "was never shown the agreed statement of facts that formed part of the Crown's brief" and "had no opportunity to see the agreed statement of facts, nor any opportunity to review the contents of the Crown's position contained in the Crown's brief filed at his sentencing, that forms the basis of his sentence"; (6) "the sentence that he received, that was agreed upon by the Crown and his attorney, was not communicated to him until the day before he pleaded guilty"; (7) the jointly proposed sentence ignored his two and one half years of remand custody, which constituted cruel and unusual punishment contrary to s. 12 of the *Charter*; and (8) the jointly proposed sentence ignored his conditions of custody, particularly segregation, which violated ss. 7, 9 and 12 of the *Charter*. Put simply, (9) Mr. Marriott alleges that, before his sentencing, he had no opportunity to be properly informed or to understand the implications of what became the jointly recommended sentence. (See above, paras 21-25)

[38] The result, according to his submission, was an abuse of process and a demonstrably unfit sentence. Mr. Marriott says that the fifteen year sentence should have been five years.

[39] Many of these assertions differ markedly from the statements made by Mr. Burke, on Mr. Marriott's behalf and in Mr. Marriott's presence, to Justice Coady at the hearings of April 26 and May 16, 2011 (above paras 10-13).

[40] Despite that the amended grounds of appeal do not recite the words "ineffective counsel", Mr. Marriott's submission to this Court of Appeal rests squarely on the assumption that his trial counsel's expression of support for the joint recommendation was not effective representation. It is difficult to conceive how his current allegations, summarized above in para 37, could coexist with effective representation by Mr. Marriott's trial counsel. But we only have Mr. Marriott's version of these points. To "get to the bottom of it", as Justice Binnie said in *Campbell*, Mr. Burke's input also is needed.

[41] Mr. Marriott's position on the appeal enlists facts - *i.e.* the contents, timing and interpretation of communications - between Mr. Marriott and Mr. Burke. He has placed those facts in issue. According to the authorities I have cited earlier, this impliedly waives solicitor client privilege respecting those facts.

[42] I would allow the Crown's motion, and declare that Mr. Marriott has waived his solicitor client privilege with Mr. Burke to the following limited extent. The Crown may explore with Mr. Burke and, if evidence from Mr. Burke is offered, the Court may hear Mr. Burke's evidence as to what transpired between Mr. Marriott and Mr. Burke respecting Mr. Marriott's allegations that are set out in items 1 through 9 in para 37, above. The waiver is limited to those allegations. To be clear, this is not a declaration that Mr. Marriott has waived solicitor client privilege respecting Mr. Burke's advice (1) whether or not Mr. Marriott would have been convicted of any offence, after a trial, or (2) what sentence Mr. Marriott could have expected for any conviction, had there been no joint recommendation.

Second Issue - New Charter Grounds

[43] The Crown asks this court to order that Mr. Marriott's *Charter* grounds of appeal may not proceed. The Crown's factum says:

> 25. The principle of finality generally mandates that new grounds, including *Charter* arguments, should not be raised for the first time on appeal. Generally, the record will be insufficient and there would be no trial Judge's decision to review. [*R. v. Phillips*, 2006 NSCA 135, at paras 30-33]
>
> ...
>
> 43. Simply put, it is not in the interests of justice to entertain the *Charter* Motions, or fresh evidence relating thereto, raised for the first time on appeal.

[44] I respectfully disagree that the Court should issue a pre-emptive ruling that precludes an appellant even from making his motion for fresh evidence.

[45] *R. v. Phillips*, 2006 NSCA 135, cited above by the Crown's factum, discussed when a new *Charter* ground, not raised at the trial, may be advanced on the appeal from a conviction. This Court said:

> [32] In *Nova Scotia (Minister of Health) v. V.S.*, 2006 NSCA 122, this court discussed whether a challenge to the validity of legislation should be considered for the first time in the Court of Appeal. The court stated:
>
> > [28] The Supreme Court of Canada and provincial courts of appeal often have said that a new issue on appeal, including a new constitutional issue,

> (1) should not be considered unless the record contains all the facts material to that issue, and further (2) should not be considered if the opposing party would be prejudiced in a manner not remediable by costs. The opposing party would be irremediably prejudiced if, in the lower court, that party would have adduced additional evidence, not already on the record, that is relevant to the new issue. See: *R. v. Warsing*, [1998] 3 S.C.R. 579, at ¶ 16, L'Heureux-Dubé, J. dissenting on another issue; *R. v. S.(K.)* (2000), 148 C.C.C. (3d) 247 (Ont. C.A.) at ¶ 33; *Perez v. Salvation Army of Canada* (1978), 171 D.L.R. (4th) 520 (Ont. C.A.), at ¶ 12; *R. v. Brown*, [1993] 2 S.C.R. 918, approving the dissenting reasons of Harradence, J.A. in the Alberta Court of Appeal (1992), 73 C.C.C. (3d) 481 (C.A.) at p. 488; *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 at ¶ 48-55; *Canadian Newspapers Co. v. Canada (A.G.)*, [1988] 2 S.C.R. 122 at p. 134; *Vickery v. Nova Scotia Supreme Court (Prothonotary)*, [1991] 1 S.C.R. 671, at p. 679; *Ross v. Ross*, 1999 NSCA 162 at ¶ 34; *S-Marque Inc. v. Homburg Industries Ltd.*, [1999] N.S.J. No. 94, at ¶ 26 - 29, *Jeffrey v. Naugler*, 2006 NSCA 117, at ¶ 13 - 15; *Scott Maritimes Pulp Ltd. v. B.F. Goodrich Canada Ltd.* (1977), 19 N.S.R. (2d) 181 (C.A.) at ¶ 40; Sopinka, *The Conduct of an Appeal* (2nd ed.), 2000, at p. 66.
>
> [33] The conditions for considering a new issue on appeal do not exist here. The record does not contain all the facts material to the constitutional issue. The Crown, or the Attorney General representing the Province, would have adduced evidence with respect to the challenge to s. 38(1) and justification under s. 1 of the *Charter*. Because the matter was not raised at trial, this evidence has not been adduced. To decide the issue would prejudice the Crown or Province. Mr. Phillips' factum discusses the topic in four paragraphs, and at the hearing Mr. Phillips' counsel barely touched the issue. Section 38(1) is a significant power of apprehension, and its equivalent exists in the statutes of most provinces. On this sparse record, this court is in no position to consider the constitutional validity of s. 38(1) as a new issue.

[46] The contents of the record and whether or not the Crown would be irremediably prejudiced by its deficiencies, under the principles in *Phillips*, will depend partially on the outcome of the fresh evidence motion. As discussed, the record for the fresh evidence motion may include evidence of Mr. Burke, that may be elicited by the Crown. The record for the motion also may include evidence that the Crown offers in reply to Mr. Marriott's tendered evidence. After all the fresh evidence is offered, and that motion is argued, the panel of this Court will decide what, if any, fresh evidence may be admitted under the criteria in *Palmer v. The Queen*, [1980] 1 S.C.R. 759, at p. 775.

[47] Only then would the record be fixed, and only then would this Court be in a position to assess the criteria discussed in *Phillips* for the reception of a new *Charter* issue.

[48] The Crown's submission would neuter the fresh evidence motion in the starting gate. An appellant would not be able to advance a new *Charter* argument because there was deficient evidence on the record, under *Phillips*. He could not move to add fresh evidence, to address the deficiency, because his ground of appeal would already be struck before the Court considered his fresh evidence motion. I don't accept this circularity. An appellant should be entitled to have his fresh evidence motion decided according to the *Palmer* criteria. Then any prejudice from deficiencies in the record may be assessed.

[49] As the Crown notes, this means the Crown will have to address whether to martial rebuttal evidence, to guard against the possibility that Mr. Marriott's fresh evidence motion succeeds. But this is the logistical consequence of our appellate process that permits an appellant to have his fresh evidence motion determined by *Palmer*'s criteria.

[50] The Crown's request for ruling that Mr. Marriott's *Charter* grounds be dismissed is premature.

[51] Nothing I have said should be taken as a comment on the merit or lack of merit of either Mr. Marriott's fresh evidence motion or his grounds of appeal, or on whether Mr. Marriott may withdraw from the joint submission, or the effect of a withdrawal. Those are matters for a later hearing.

Conclusion

[52] I would grant the Crown's motion and order that Mr. Marriott has waived his solicitor client privilege with Mr. Burke, to the limited extent stated in paragraph 42, above.

[53] I would dismiss, as premature, the Crown's motion for an order dismissing Mr. Marriott's *Charter* grounds of appeal. Consideration of the merits of Mr. Marriott's grounds of appeal is for the panel of this Court after the hearing of the fresh evidence motion. Under the usual practice of this Court, the panel that hears

the fresh evidence motion usually then hears the merits of the appeal, and issues one decision that determines both the fresh evidence motion and the grounds of appeal. Whether that practice will be followed here is up to the panel that hears the fresh evidence motion and appeal proper.

Fichaud, J.A.

Concurred: Oland, J.A.

Farrar, J.A.