IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. MacLellan, 2012 NSPC 46

Date: 05082012
Docket: 2273715
Registry: Sydney

Between:

Her Majesty the Queen

Plaintiff

-and-

Bernard Alexander MacLellan

Defendant

DECISION
On Application for Stay of Proceedings

Judge: The Honourable A. Peter Ross, J.P.C.

Heard: February 7, 9, 10, 14 and March 27, 2012

Decision: May 8, 2012

Charge: s.434 of the *Criminal Code*

Counsel: Christa MacKinnon, for the Crown
Ann Marie MacInnes, for the Defence

[1.] The accused, Bernard MacLellan, makes application for a stay of proceedings. The application is brought at the close of the Crown's case. He contends there has been a breach of his s.7 Charter right, specifically his right to make full answer and defence. This is predicated on failure of the Crown to make full and timely disclosure of certain material in the possession of investigators.

Introduction

[2.] Bernard MacLellan is accused of arson. Just after 7:00 a.m. on January 18th, 2011 a blaze erupted on the front verandah of a recently-vacated dwelling on Glenwood St., Sydney. Mr. MacLellan was arrested for public intoxication at 8:40 p.m. that same day. A short time later he was charged. He consented to remand until March 2nd. He elected trial in provincial court on March 30, 2011. His trial was scheduled for and began on February 7th, 2012.

[3.] A pre-trial was scheduled in July of 2011 and various status dates were assigned, all for the purpose of advancing timely disclosure to the defence of whatever evidence the Crown or police may have in their possession.

[4.] A single-page report of the Deputy Fire Marshall was disclosed in July of 2011. Defence was not certain this was his final report, to be relied upon at trial, until January 20th, 2012 when Crown gave notice of its intent to call the expert

witness and forwarded his *curriculum vitae*. He was described as "an expert in the investigation of fires, the behavior of fire, the determination of a fire's origin, cause and circumstances of its occurrence." The trial commenced with an abridgment of the s.657.3(3) notice period for expert evidence. Defence did not want to delay the proceedings further.

[5.] Prior to trial, and again at its outset on February 7th, Defence raised the possibility of applying for Charter relief for apparent violations of the accused's s.7 right. The court canvassed the possibility of an adjournment. Defence reluctantly agreed to proceed to trial on the scheduled date despite the late notice, and despite the fact that photographs of the scene had been disclosed to the defence only on February 2nd.

[6.] As the trial unfolded certain handwritten notes came to light. Fortuitously February 9th and 10th were available for trial continuation. Court adjourned at 4:00 p.m. on the 7th. Defence counsel had other cases to attend to on the 8th. At 11:00 a.m. on the 9th defence acknowledged receipt of four sets of notes as follows: one set after court on the 7th, two sets on the 8th, and one set that morning. The trial continued at 1:00 p.m. Defence counsel persevered in the face of these obstacles because of the prejudice to the accused in delaying trial beyond those dates. Recognizing that a stay application was still at play, the court gave leeway to both

counsel to question the various witnesses on the disclosure aspects, as well as on the evidence in chief on the trial proper.

[7.] Crown closed its case on February 10th. By that time defence considered that Mr. MacLellan's right to make full answer and defence had been seriously and permanently compromised and brought forward this application for a stay of proceedings. I made room for defence argument on February 14th, for Crown argument on March 27th, and set April 13th as a date for a ruling and for possible resumption of the trial. At this point Crown had closed its case. The trial remains in abeyance for possible defence evidence, depending, of course, on the outcome of this application.

[8.] A ruling was issued on April 12, 2012, The case has now been adjourned to May 17, 2011. These are the reasons for that ruling, which denied the application for a stay.

Facts

[9.] A decision such as this is not taken in a vacuum; it occurs in the context of the charge, the evidence and the proceedings. For this reason I will present a snapshot of the Crown's evidence, mindful that I am not making findings of fact *per se*, and will not until the trial is over. I will then continue to outline the

circumstances concerning Crown disclosure (or lack thereof) which began with the Introduction.

(a) The case for the Crown

[10.] Early in 2011 a tenant died in one of the rental units at 15 Glenwood St. Police were called. The death was not suspicious in nature, but the condition of the premises caused police to call in the building inspector. On January 14th, 2011 the Fire Safety Act was invoked to order tenants out of all five units. The landlord cleaned some things out of the deceased tenant's apartment, the other tenants vacated the premises, and by the morning of January 18th the house was boarded up. The landlord knew that it would cost him roughly $55,000 to bring the building up to Code.

[11.] In the early morning light of January 18th, 2011 a security video camera at a Needs Convenience Store captured the movements of a person on the veranda of 15 Glenwood Street. The individual crossed the street to the parking lot of the store and then proceeded to the entrance where he was picked up by another camera inside. This person was known to store personnel as "Big Al". He has subsequently been identified by witnesses as the accused, Bernard MacLellan. Mr. MacLellan is described by his counsel as a homeless alcoholic.

[12.] The camera recorded the accused at the store entrance at 7:18 a.m. At 7:19:35 flames can be seen on the veranda of the house. Nobody else is seen on the veranda during the material time. Mr. MacLellan spoke with a customer at the store entrance and left the premises after being shooed away by the clerk.

[13.] A man helping his children deliver newspapers saw the fire erupt. He called 911 and checked the house for occupants, finding none. Fire personnel and police responded to the blaze. The fire was extinguished with considerable damage to the front of the house. Police spoke to people in the general area. Store personnel advised police of the security video.

[14.] At noon that day the Deputy Fire Marshall Paul MacCormick and Constable Taylor attended the scene. They took notes. Taylor took photographs.

[15.] That evening police were called to a Tim Hortons outlet on a complaint of an intoxicated person. It was Mr. MacLellan. He was arrested for public intoxication and while in custody at the police station rearrested for arson. He was charged and taken to court on January 19th. He was subsequently released on an Undertaking which included conditions restricting the consumption of alcohol.

[16.] At trial the landlord, Harry Morrison, said that he and another person had cleaned out the deceased tenant's apartment the day before the fire. He claimed to

have left no material or refuse on the veranda afterwards; however, fire and police officials noticed remnants of clothing, a burned mattress, cardboard and paper ash in the fire debris on the veranda. The premises were insured. The landlord must have come under suspicion because he testified that he submitted to two polygraphs. Nobody else has been charged. The house has since been demolished.

[17.] The Crown called the Deputy Fire Marshall to speak to his report. Questions in direct and cross extended the scope of his evidence well beyond it.

[18.] Constable Taylor identified the photographs and described what he saw at the scene. He referred to the materials on the veranda as “common combustibles.” He had been to the premises when the tenant died there a few days before. He said “the place was deplorable”. It was he who had called in the building inspector.

[19.] Other witnesses were Ray MacMillan - the dad who noticed the flames, Cst. Paul Kelly – the officer in charge of the file, Cst. Darren MacDonald – an identification witness, Lynn Finlayson – the Needs store employee the morning of the fire, and Nadine Jackson – manager of the Needs franchise who authenticated the video and also gave some identification evidence.

(b) Disclosure

[20.] Some of the investigative steps have been noted above. Other steps relevant to the disclosure/stay of proceedings issue are briefly set out here.

[21.] The Deputy Fire Marshall (DFM) attended the location at noon that same day. He and Constable Taylor of the forensic identification unit of the Cape Breton Regional Police examined the debris, burn patterns, etc. both inside and outside the dwelling. Taylor took photographs. Both made handwritten notes either at the time or shortly afterwards.

[22.] Constable Kelly, with the arson section of CBRPS, attended the scene at 9:22. He says Taylor was present then. Taylor says he only came on scene at noon, as noted above. Kelly ultimately took charge of the investigation and maintained the police file. He became the liasson with Crown on disclosure.

[23.] Constable Pearcey was not called to testify but apparently was the first police officer on scene. The notes appear to contain the names and addresses and/or phone numbers of people he spoke to shortly after 7:30 that morning. There is mention of a complaint of a male pounding on a door and threatening to burn the house down. This notation is preceded by a name and address at 21 Glenwood St. which is in turn preceded by the notation “15 Glenwood St.” His notes place Taylor and the municipal inspector (Rick Wadden) at the scene at 9:00.

[24.] Constable Ewen MacIsaac did not testify but it appears he arrested the accused. His notebook shows the time as 08:45. The name taken down is Bernard A MacLellan d.o.b. June 19th,1948 , NFA. I take the latter to mean "no fixed address." Other evidence suggested the time of arrest was actually after 8 p.m. Nothing in these notes relates to the fire or the prosecution of the offence before the court.

[25.] The one-page report of the Deputy Fire Marshall says that the only exterior fire damage was "at the front of the building on the right side of a covered veranda." He says he arrived "at 12:10 hours accompanied by Cst. Taylor." The examination revealed that "the fire originated in some combustible material that had been stored or placed on the veranda." It puts the point of origin at floor level of the veranda and describes a path which the fire took up into the roof assembly. It describes some interior damage caused after the fire breached a front window. The DFM says "my inspection did not reveal any accidental source of ignition at the point of origin of the fire. Therefore I am of the opinion that this fire is of an incendiary nature that warrants further investigation by the police." The report also states "Cst. Taylor took a number of photographs of the fire scene before I conducted a more detailed examination of the evidence."

[26.] Defence counsel made its requests for disclosure of the evidence at the very outset of the proceedings. It made the requests publically, in court, and privately, by written correspondence.

[27.] The accused consented to remand between January 19th and March 2nd on which date he was released on an Undertaking which included a condition not to be found intoxicated in a public place. On March 30, 2011 he was given the trial date of February 7th, 2012. A pre-trial was set for July 19th, 2011 lest there be any unresolved disclosure issues. On three subsequent dates, In September, October and November the matter was docketed so as to monitor disclosure. Crown continued to advise that some additional disclosure was to be forthcoming, but - as noted above - some of this came virtually on the eve of trial and some during it.

[28.] A great deal of material *was* given to defence in timely fashion. This is set out in an affidavit filed by the Crown as exhibit #VD-1. I also have before me as exhibit #VD-2 various items of correspondence from defence counsel to the Crown office either acknowledging receipt of some disclosure, or asking when "full disclosure" or "further disclosure" or "new disclosure" might be received. There was apparently reason to believe that some material had not been provided to the Crown, a belief borne out by subsequent events.

[29.] Defence argues that this accused cannot receive a fair trial because of the Crown's failure to comply with the dictates of R. v. Stinchcombe. Defence has also urged the court to view the conduct of police and Crown in its entirety, from the inception of the proceedings to this juncture of the trial, and to consider whether laziness, poor practice, incompetence, disregard, and lack of transparency are such that a stay of proceedings is necessary to uphold the integrity of the judicial process.

[30.] I will not refer to every single item which was, either in timely fashion or tardily, delivered to the defence. Not unexpectedly, some of these did not materialize as evidence at trial. Some of these may have been reviewed and deemed insignificant. Some things may have been of assistance to the defence in ways which I do not yet realize, as I have not yet heard the defence case. It is those parts of the disclosure which were late *and* which appear, at this stage, to be of some importance to the fairness of the trial which warrant the closest attention. After discussing the aspects bearing most directly on trial fairness I will speak to the broader concerns. Before doing so, however, I will deal briefly with two sets of notes which were subject of argument but which I consider to be relatively insignificant.

Constables MacIsaac and Pearcey

[31.] Notes of Constable MacIsaac (who arrested the accused for intoxication) were obtained by defence on February 8th; those of Constable Pearcey (who arrived on scene at 7:30) were received the morning scheduled for resumption of trial, February 9th. However Crown provided a "general occurrence report" from each as part of a package of disclosure in July of 2011. From what I can see these reports contain everything which is in the notes and more. It would have been comforting to Defence to have had these notes earlier than in mid-trial, but the information which they contained had already been conveyed. Persons canvassed at the scene were identified in Pearcey's report. Had defence wished to contact them and take statements, or request through the Crown that the police do so, it had this opportunity as of July 2011.

The Deputy Fire Marshall

[32.] As a preliminary comment I agree with the defence position that this investigator must be viewed in the same way as a police officer when considering the obligation to disclose information. The forensic unit of the local police force requests the services of this office and the two agencies often inspect a suspicious fire scene together. In R. v. MacNeil [2009] 1 S.C.R. 66 the Supreme Court stated at para 23 and 24:

> It is well settled and accepted by all, including the police, that the police, although operating independently of Crown counsel, have a duty to disclose to Crown counsel all relevant information uncovered during the investigation of a crime, including information which assists the accused. ... As one commentator has observed, "the duty of the police to disclose relevant information about a case, to the Crown, is a duty that existed before [Stinchcombe, supra]".
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> . . . It is also widely acknowledged that the Crown cannot explain a failure to disclose relevant material on the basis that the investigating police force failed to disclose it to the Crown….

[33.] Handwritten notes of DFM Paul MacCormick were provided to defence after court on February 7th. His report was disclosed in timely fashion, in July of 2011, (although formal notice of Crown's intent to call such expert evidence at trial was late in coming). He was qualified at trial to give expert opinion about the "behavior and origin of fires, causes and circumstances of its occurrence."

[34.] The potential importance of the notes derives from a central issue of the trial: what caused the fire to break out on the veranda? Besides the Crown's theory that the accused deliberately set it, other possibilities which may eventually be argued include accidental origin, or that combustion began earlier but the fire smoldered for some period before breaking out in flames. This is not intended to limit the possibilities but only as context with which to examine the materiality of any non-disclosed information.

[35.] Having compared the notes to the report, the following pieces of information are found in the notes but not in the report.

- There is mention of a “wooden guard” similar to a picket fence around the veranda and that only its inside surface was burned.
- The veranda is said to have a concrete platform.
- There is mention of aluminum siding below a window being melted and heavy charring around the sash and sill.
- The notes say “checked fire debris – remnants of burned paper – cardboard box in corner, cardboard ash, some remnants of cloth/clothes at floor level – some bedding?.”
- The notes say there is “no extreme deep burning, no sign of smoldering, a surface burn for a short period of time.”

[36.] The report describes burn patterns in some detail and states that the fire began in combustible material on the floor of the veranda. The conclusion was that “(having) examined the fire debris and burn patterns my inspection did not reveal any accidental source of ignition . . . I am of the opinion that this fire is of an incendiary nature and warrants further investigation by police.” There is reference to “a number of photographs of the fire scene” taken by Cst. Taylor. The report does not contain the description of the “fire debris” found in the notes; the report does not contain quite as full a description of the burn patterns.

[37.] In his testimony the DFM described how a typical fire scene investigation proceeds. He went over everything contained in the notes and report. He went through the photographs taken by Taylor and related his observations about debris and burn patterns to them. He spoke about cigarettes as a cause of fire. He saw no evidence of a cigarette butt or filter in the debris. He noted that liquid accelerants sometimes used to set fires normally give off black smoke. He watched the store video and said no such smoke was visible. He said absence of smoke also supported the theory that the fire was fast-burning once started. He said he formed the opinion that the fire was an arson only from an examination of the scene, before viewing the store video, and not as a result of watching it. He was cross-examined about the burning characteristics of cigarettes. He acknowledged that his report did not state that the fire was "fast-burning". Neither, however, do his notes employ this term.

The Photographs of Constable Turner

[38.] Taylor's handwritten notes were not delivered until February 8th. However Taylor prepared a "supplementary occurrence report" which was also disclosed in July of 2011. The report and notes are not identical but they contain essentially the same information. The report states that "the fire originated on the right hand side of the front veranda where mattresses and personal belongings had been stored..."

I take the phrase “set using common combustibles” in the report to have the same significance as “no accelerants” in the notes.

[39.] The photographs of the scene taken by Constable Taylor and introduced at trial (36 in all) were available to defence on February 1st from the Crown office and picked up on February 2nd – five days before trial. However, as noted above the existence of the photos was revealed in the report of the Deputy Fire Marshall which was disclosed in July of 2011.

[40.] Constable Taylor was questioned extensively about the evidence-handling practices within the identification section, about how requests for photos are received and treated, about decisions to print them are taken, etc. I am puzzled, to say the least, how these photographs could remain exclusively in this officer’s control for over a year, given the obvious importance of this material and the numerous requests for disclosure. Constable Kelly, the investigating officer, testified that after a meeting with Crown in July 2011 he knew it wanted the photos, that prior to Christmas that year he spoke to Taylor, and that he finally received them in late January of 2012. Even in the days of the darkroom, but particularly in an electronic age, where photographs are capable of transmission by email, or copying to a disc or portable drive, there is no acceptable excuse for this

failure to get photographs of a crime scene in an arson case to Crown and defence in timely fashion.

The governing legal principles

[41.] I will set out the applicable law simply by referencing case authority and other decisions. At this juncture of the present proceeding, so far as is known, all relevant disclosure has been made. Whether characterized as late-disclosure or non-disclosure the principles are the same. Some of the cases deal with lost evidence, which is not amenable to the same range of remedies as a case of late disclosure. I must bear in mind the obvious difference between a case where trial has concluded and a situation, like this, where the trial is in progress. At the same time, there are cases where the s.7 breach is so egregious that the remedy of a stay has been ordered even before a trial has begun. These extracts are compiled in Appendix "A" attached.

Comparison to Facts in Other Cases

[42.] It has been said that a decision whether to enter a stay of proceedings is very fact specific (see, for instance, R. v. J.G.B. (2001) 151 C.C.C. (3d) 363 (Ont. C.A.) at para 9). While I have not canvassed a great number of cases, the following give some basis for comparison. Where a case was one of lost evidence

it may nevertheless be pertinent to the degree of prejudice which gives rise to a stay of proceedings.

[43.] In R. v. Hill [2002] N.S.J. No.379, 43 minutes of a 92 minute audio statement of the complainant was unaccounted for. The major issue at trial was credibility. There was no corroborative or independent evidence. There was no explanation for the failure to keep a full record of the interview. Given the "extreme importance" of the statement as it related to the ability to cross-examine, the trial judge awarded the accused a stay of proceedings.

[44.] In R. v. J.E.L. [2004] N.S.J. No. 202 Burrill J. ruled against a stay where recording devices had broken down during a complainant interview. A social worker had kept careful notes which were summarized in a Crown sheet. The complainant was re-interviewed 4 days later, and these statements were disclosed. Although there was a finding of loss of evidence the judge found no negligence and pointed out that "*information* concerning the statement has not been lost" (emphasis added).

[45.] In R. v. R.C.S. [2004] N.S.J. No.445 there was a failure to record a statement of a young complainant in a sexual assault case in circumstances which amounted to "unacceptable negligence." The court criticized the failure to take quick corrective action, for instance by re-interviewing the complainant. Noting

that there must be actual prejudice, not merely a theoretical possibility of such, the court, equating the situation to Hill, supra, considered it one of the "rarest of cases" where a stay was necessary.

[46.] In Illes, *(see Appendix "A")*, the accused became aware, only after trial, that a person had seen a human head in a bucket at a certain location, which information was not provided by police to Crown until after the trial. The court concluded that this piece of evidence, if known prior to trial, might have had an impact on the jury's assessment of credibility of certain witnesses, and also may have affected defence's strategic decisions at trial such as the decision not to call any evidence.

[47.] Andrews, *(see Appendix "A")*, is yet another case of a missing video statement and resultant non-disclosure. Notes were made during or shortly after the interview by a police officer and social worker. A second statement was obtained from the complainant about two years later. While acknowledging that the video statement would be much more complete and give a wider opportunity for cross-examination, the court mentions that the note-takers were none the less available. The application was described as being premature. The court declined to grant a stay.

[48.] In Watt, *(see Appendix "A")*, officer's notes were destroyed in a basement flood and the file destroyed after five years in accordance with RCMP policy. The court notes that the application was brought pre-trial. At para 36 it states that "the respondent may at the trial, after the evidence has been presented, be able to point to some particular prejudice suffered as a result of the lost file" but that a stay was not justified at that early stage.

[49.] In Greganti, *(see Appendix "A")* the stay was predicated upon findings of "unexplained and obstructionist conduct" of the police. There had been editing of will-says of police officers and improper vetting of disclosure. Massive amounts of material had to be reviewed and incorporated into trial preparation, virtually at the eve of trial. The court concluded that the police did not wish defence to be aware of vital information. Given the "shocking and deliberate" conduct of police, "society could be properly serve by no remedy other than a stay."

[50.] In R. v. Desmond [1988] N.S.J. No. 447 the principal evidence against the accused was the expert evidence of an insurance investigator. He had examined a fire-damaged car and concluded that it originated in the front seat from some external source. The accused asked to have the vehicle examined by an expert of his choice after committal for trial, but learned that it had been disposed of shortly after examination by the Crown's expert. Noting that "experts often disagree with

one another" and that a "safeguard is an informed cross-examination" the court concluded that the accused, having been deprived of the physical evidence, had lost the opportunity for a fair trial. A stay of proceedings was granted.

Discussion

[51.] The Deputy Fire Marshall (DFM) report does not say, as his notes do, that there was no deep burning and no sign of smoldering. Without the additional benefit of this notes, this is a serious omission from the report. In his direct examination he said that examining the depth of burning was a standard step in a fire investigation as this may give a clue to how long the fire was burning. He was also asked whether the fire may have been started by a cigarette butt, unextinguished. This is not addressed in the report either. He discounted this possibility almost entirely.

[52.] In cross-examination defence questioned the DFM about his knowledge of a statement in a Health Canada website to the effect that cigarettes are a primary cause of house fires. The DFM expressed surprise at this, saying that "we don't recognize them as being an authority." This is not a case where nondisclosed evidence gives support to this competing theory, nor one where the nondisclosed material hides a potential line of inquiry from the defence.

[53.] It appears from the cross-examination of the DFM that defence had considered the possibility that the fire may have originated with a cigarette. The report mentions “combustible material stored or placed on the veranda” at the point of origin. Taylors’s report disclosed in July 2011 says the fire originated “where mattresses and personal belongings had been stored.” The DFM’s report mentions simply “fire debris” at the point of origin. His notes are more specific, describing remnants of paper, cardboard, cloth and possibly bedding. However, there were strong suggestions from other reports that it might consist of such things as cloth (“personal belongings”, “mattresses”) or cardboard (“stored”). Given what was disclosed, defence had sufficient information to develop alternate hypotheses for the cause of the fire (accidental, set much earlier, etc.)

[54.] Defence was not precluded from contacting the DFM to ascertain what the debris consisted of, or to discuss other possible causes. If it turns out that an expert has considered but rejected an alternate hypothesis, it is not especially prejudicial to an accused that this is foretold in nondisclosed notes.

[55.] Should an accused wish to advance an alternate hypothesis through its own expert it must give a copy of its expert’s report to the Crown in advance of trial. Here this would have alerted the DFM to the other line of thinking. This is the very purpose of the notice requirements in s.653.3.

[56.] Defence expressed concern that the DFM's testimony went well beyond the content of the report. Crown and defence did indeed explore alternate theories of causation with this witness. However it is not a rule of evidence or procedure that an expert is confined to the four corners of a report. Sometimes an expert must modify an opinion to explain facts which are only established at the time of trial. On the specific aspects of "no deep burning" / "no smoldering" (which amount to the same thing) and the hypothesis that it may have begun with an unextinguished cigarette the defence did not learn or glean anything from the DFM's testimony, nor from his notes, which would support an alternate theory. Defence was not deprived of any facts or observations which would provide a factual substrate for a competing view. This is not to say that another expert would come to the same conclusions on the same facts. While ideally there would be two experts inspecting the very scene – one for Crown and one for defence – it is unrealistic in the extreme to expect that such would occur. In Desmond *supra* a car was impounded but disposed of before a defence expert could have a look at it first-hand. This led to a stay of proceedings. 31 Glenwood St. could not be preserved as evidence in the investigation.

[57.] In testimony the Deputy Fire Marshall said he did not see a cigarette butt in the debris. Given his general duties and his express purpose in examining the

scene, the fact that his report does not address the possibility of the fire being caused by a cigarette would lead one to suspect that no such item had been seen.

[58.] Here, as with other aspects of the argument, the court must be mindful of what disclosure defence *did* have. This includes the video (with a running clock) of the fire, the blaze developing rather quickly, no obvious smoke beforehand.

[59.] The failure to disclose the still photographs until just a few days before trial is another serious omission. The difficulty was compounded by the inability of defence counsel to locate her client and review them with him. However, defence was aware of the existence of the photos as of July of 2011, for they are mentioned in the DFM's report. It was possible from that point on for Defence to make application for a specific disclosure order for this material (as was done in R. v. Cater [2011 N.S.J. No.624 for example.) And while there are valid reasons why defence counsel would not want to ask for an adjournment of this accused's trial on February 7th, that step was nevertheless available.

[60.] Defence counsel's task in deciding on trial strategy, and in taking instructions on whether to request adjournments in the face of late and non-disclosure, was undoubtedly made more difficult by the fact that the accused has no fixed address and is, it seems, a chronic alcoholic. A client such as this poses

huge challenges to a conscientious and diligent counsel. Mr. MacLellan was on a condition restricting his use of alcohol, and delay carried with it the likelihood that he might be arrested and charged with further breaches. Defence might have made application to have this restriction relaxed or lifted, but there is no guarantee the Crown would consent or that such would be granted by a court. At the same time Mr. MacLellan's propensity to drink and his wayward lifestyle are no fault of the Crown.

[61.] Police acknowledged not viewing anything before 7:00 a.m. on the store video. They were thus unaware of what else (if anything) might have occurred in the vicinity of the fire before that time. While the video prior to 7:00 is now gone defence has not framed its argument around this "lost evidence" and I cannot assume that it has any significance to the fairness of the trial.

[62.] In the present case, at the first day of trial, an adjournment was offered but declined. As difficult as this choice must have been, the waiver of an opportunity to adjourn is, in part, a concession that the late disclosure of the material *as of that point* would not result in an unfair trial. Now, at the close of the Crown's case, some further deficiencies in disclosure have emerged but an adjournment, and permission to re-call witnesses, are still available steps.

[63.] The testimony from the police witnesses about the practices of the identification section in releasing photographs was confusing, to say the least. No clear or consistent understanding seemed to exist about who would instigate such a request, who would authorize release, etc. The suggestion that copies of digital photographs would not be provided until the section was certain that the trial was proceeding simply does not accord with the law on disclosure, and on the face of it does not seem to be an insurmountable technical task.

[64.] I have some sympathy for the burdens placed on police and Crown by the requirement of timely disclosure. Courts need to be mindful of practical difficulties. Sometimes there are reams of documents, complex analyses, ongoing investigation, etc. This is not one of those cases.

[65.] If this application called upon me to assign a mark to the Crown/police on how well it complied with disclosure requirements, it would be a failing grade. But I am required to consider the materiality of the evidence and whether, given how the evidence has unfolded thus far, non-disclosure has affected trial fairness to such a degree that a stay of proceedings is the only appropriate remedy.

[66.] In R. v. J.G.B. (2001) 151 C.C.C. (3d) 363 (Ont. C.A.) the complainant's first statement was lost, but subsequent statements were obtained. The court said at para 8 and 9:

> The fact that a piece of evidence is missing that might or might not affect the defence will not be sufficient to establish that irreparable harm has occurred.... Actual prejudice occurs when the accused is unable to put forward his or her defence... and not simply that the loss of the evidence makes putting forward the position more difficult.... Consideration of the other evidence that does exist and whether that evidence contains essentially the same information as the lost evidence is an essential consideration.

[67.] After stating that the lost evidence must not be considered in a vacuum Weiler J.A. says at para. 46:

> While the task of the defence was made more difficult because of the missing signed statement, the respondent's trial was not fundamentally unfair. . . The present facts do not warrant the issuance of an order overriding the manifest interest in the effective prosecution of criminal charges. Simply, this is not one of those "clearest of cases" in which a stay of proceedings is necessary for the interests of justice.

[68.] As the case extracts above show, the right to disclosure is an aspect of the right to make full answer and defence which is contained implicitly in s.7 of the Charter. "It does not automatically follow that solely because the right to disclosure was violated, the Charter right to make full answer and defence was impaired" – see Dixon at para. 24. In R. v.Bjelland [2009] S.C.J. No. 38 at para.

21 the court states “The Crown’s failure to disclose evidence does not, in and of itself, constitute a violation of s.7. Rather, an accused must generally show actual prejudice to his or her ability to make full answer and defence”. Where a breach is shown, remedies short of a stay must first be employed. If such remedies are possible, or, as here, have been waived by the defence, then a stay is simply not an appropriate step to take, despite any failure to disclose, even despite an impairment of the right to make full answer and defence.

[69.] I have considered what *was* disclosed in terms of *information*, what concessions were made at the outset of the trial, and what remedial measures are, in a procedural sense, still available at this juncture of the trial. There clearly was a failure of the Crown’s obligation to fully disclose in timely fashion. There was some impairment of the accused’s right to make full answer and defence. But there is insufficient prejudice to warrant a stay of proceedings and thus the application is denied. I am prepared to grant the accused an adjournment to consult with an expert or to call more evidence. I am prepared to recall witnesses for additional examination. It is conceivable that the motion for a stay could be renewed later in the proceedings if additional prejudice emerges (per R. v. La, *supra*).

[70.] A process could conceivably become so broken that it would be impossible to patch it back together. Witnesses might be hopelessly out of sequence, adjournments might impact on the quality or availability of evidence, unreasonable delay may be raising its head, and so forth. As well, a process could be so tainted that the stain of misconduct can never be rinsed away. O'Connor speaks of a "residual category of conduct caught by s.7" which relates not to the fairness of the trial but to the manner in which a prosecution is conducted. I wish to point out that I do *not* consider the "concessions" of defence counsel, described above, to be relevant to this particular aspect of the decision to deny a stay. However, the circumstances are not so egregious that a stay of proceedings, effectively equivalent to an acquittal, should be entered on this basis. The end product will not be a model trial, but it should still be possible, at the end of the day, to have a trial on the merits without bringing lasting disrepute to the administration of justice.

Dated at Sydney, Nova Scotia, this 8th day of May, 2012

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A. Peter Ross, P.C.J.

APPENDIX “A”

[71.] In R. v. Greganti [2000] O.J. No. 34 in the Ontario Supreme Court, per Stayshyn J.:

> 147 In R. v. O'Connor, the Supreme Court of Canada held that the common law doctrine of abuse of process has been subsumed under section 7 of the Charter. L'Heureux-Dubé J. recognized that while traditionally the common law doctrine of abuse of process focussed on the protection of the integrity of the court process, and the Charter focussed more on the protection of individual rights, the two have merged. Furthermore, L'Heureux-Dubé J. emphasized that the protection of individual rights and the preservation of the reputation of the administration of justice should not necessarily be viewed as distinct purposes:
>
> > ... Unfair trials will, almost inevitably cause the administration of justice to fall into disrepute. What is significant for our purposes, however, is the fact that one often cannot separate the public interests in the integrity of the system from the private interests of the individual accused.
> >
> > [63] In fact, it may be wholly unrealistic to treat the latter as wholly distinct from the former. This court has repeatedly recognized that human dignity is at the heart of the Charter. While respect for human dignity and autonomy may not necessarily, itself, be a principle of fundamental justice. It seems to me that conducting a prosecution in a manner that contravenes the community's basic sense of decency and fair play and thereby calls into question the integrity of the system is also an affront of constitutional magnitude to the rights of the individual accused. It would violate the principles of

> fundamental justice to be deprived of one's liberty under circumstances which amount to an abuse of process and, in view, the individual who is the subject of such treatment is entitled to present arguments under the Charter and to request a just and appropriate remedy from a court of competent jurisdiction.
> **R. v. O'Connor** (1995), 103 C.C.C. (3d) 1 (S.C.C.) at 35

148 L'Heureux-Dubé J. held, in R. v. O'Connor that, although the doctrine of abuse of process is subsumed under section 7 of the Charter, there is no one particular "right against abuse of process". Different Charter guarantees will be engaged in different circumstances. For example, pre-trial delay may be best addressed by reference to section 11(b) of the Charter. Alternatively, the circumstances may indicate an infringement of accused's right to a fair trial embodied in sections 7 and 11(d) of the Charter. L'Heureux-Dubé J. noted that in both of these instances, concern for individual rights of the accused may be accompanied by concerns about the integrity of the judicial system. In addition to those circumstances where trial fairness or particular enumerated Charter rights are engaged, there is a "residual category" under section 7 of the Charter:

> In addition, there is a residual category of conduct caught by section 7 of the Charter. This residual category does not relate to conduct affecting the fairness of the trial or impairing other procedural rights enumerated in the Charter, but instead addresses the panoply of diverse and sometimes unforeseeable circumstances in which a prosecution is conducted in such a manner as to connote unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process.
> **R. v. O'Connor**, *supra* at 39-40

149 It would appear therefore that the doctrine of abuse of process is available to address virtually every kind of situation within the criminal justice system where:

(i) The fairness of an accused's trial is affected or other procedural rights enumerated in the Charter are impaired, or;

(ii) The administration of justice is brought into disrepute.

153 It is also clear that *mala fides* by the police or the Crown is not a necessary pre-condition for a stay of proceedings on the grounds of abuse of process. Even where a state acted in good faith, the state' agent's conduct may lead to a stay of proceeding on the grounds of abuse of process. However, a finding of *mala fides* on the part of the Crown or police makes it significantly more likely that a stay of proceedings will be warranted - **R. v. O'Connor**, *supra* at 42.

173 One of the most important factors in deciding whether to grant a stay of proceedings, according to L'Heureux-Dubé J., is the conduct and intention of the Crown. At page 42 of her judgment, she continues:

> Among the most relevant considerations are the conduct and intention of the Crown. For instance, non-disclosure due to a refusal to comply with a court order will be regarded more seriously than non-disclosure attributable to inefficiency or oversight. It must be noted, however that while a finding of flagrant and intentional Crown misconduct may make it significantly more likely that a stay of proceedings will be warranted, it does not follow that a demonstration of mala fides on the part of the Crown is a necessary precondition to such a finding. As Wilson J. observed for the court in Keyowski, supra, at p. 4820-483:
>
> To define "oppressive" as requiring misconduct or an improper motive would, in my view, unduly restrict the

> operation of the doctrine... Prosecutorial misconduct and improper motivation are but two of many factors to be taken into account when a court is called upon to consider whether or not n a particular case the Crown's [Conduct] amounts to an abuse of process.

174 There are, as well, other considerations with respect to whether the conduct amounts to an abuse of process. These may include: the prejudice that may result from the inability to actually use the materials in cross-examination, or to use them as the foundation for cross-examination, to point to other opportunities to garner evidence, or to benefit the defence in making appropriate decisions relevant to the conduct of its case. The non-disclosure of the material will be aggravated where the non-disclosure was deliberate and involved active editing.

178 In **O'Connor** (supra) at p. 42 L'Heureux-Dubé J. goes on to cite other factors such, as the number and nature of adjournments attributable to the Crown's conduct:

> Every adjournment and/or additional hearing caused by the Crown's breach of its obligation to disclose may have physical, psychological and economic consequences upon the accused.

179 Here it is clear that if there is a breach, and in my view there clearly was a serious breach of the rights of the accused, the remedies available would include stay, adjournment for further preparation or reversion to either Preliminary Inquiry or the right to cross-examination of witnesses with benefit of the now revealed disclosure.

[72.] Also from Greganti the following comment, equally relevant to the accused before me:

180 Although this is not an unreasonable delay proceeding it must be of interest to consider the totality of the proceeding and its impact upon the accused.

[73.] In R. v. Illes [2008] 3 S.C.R. 134 the Supreme Court says at para 24 et seq:

With respect to the fresh evidence not available to the defence at trial due to the Crown's failure to disclose, a new trial is the appropriate remedy under s. 24(1) of the Canadian Charter of Rights and Freedoms if the accused can show that his right to make full answer and defence was thereby violated. In order to discharge this burden, the accused can show either "that there is a reasonable possibility that the non-disclosure affected the outcome at trial" or that it affected "the overall fairness of the trial process" (R. v. Dixon, [1998] 1 S.C.R. 244, at para. 34 (emphasis in original)).

With respect to the first prong of the Dixon test, it is important to note that the issue here is not whether the undisclosed evidence would have made a difference to the trial outcome, but rather whether it could have made a difference. More precisely, the issue the appellate court must determine is whether there is a reasonable possibility that the additional evidence could have created a reasonable doubt in the jury's mind. See R. v. Taillefer, [2003] 3 S.C.R. 307, 2003 SCC 70, at para. 82.

Our unanimous decision in Taillefer directs the court "not to examine the undisclosed evidence, item by item, to assess its probative value", but rather "to reconstruct the overall picture of the evidence that would have been presented to the jury had it not been for the Crown's failure to disclose the relevant evidence. Whether there is a reasonable possibility that the verdict might have been different must be determined having regard to the evidence in its entirety" (para. 82).

With respect to the second prong of the Dixon test, an appellant need only establish a reasonable possibility that the overall fairness of the

> trial process was impaired. This burden can be discharged by showing, for example, that the undisclosed evidence could have been used to impeach the credibility of a prosecution witness (see Taillefer, at para. 84), or could have assisted the defence in its pre-trial investigations and preparations, or in its tactical decisions at trial.

[74.] In R. v. Watt [2008 N.S.J. 108 at para 23 the Nova Scotia Court of Appeal noted:

> In R. v. Dixon, [1998] 1 S.C.R. 244, the Supreme Court of Canada considered the Crown's duty to disclose and stated:
>
> > In R. v. Stinchcombe, [1991] 3 S.C.R. 326, it was held that the Crown has an obligation to disclose all relevant material in its possession, so long as the material is not privileged. Material is relevant if it could reasonably be used by the defence in meeting the case for the Crown. ...
> >
> > The obligation resting upon the Crown to disclose material gives rise to a corresponding constitutional right of the accused to the disclosure of all material which meets the Stinchcombe threshold. As Sopinka J. recently wrote for the majority of this Court in R. v. Carosella, [1997] 1 S.C.R. 80, at p. 106:
> >
> > > The right to disclosure of material which meets the Stinchcombe threshold is one of the components of the right to make full answer and defence which in turn is a principle of fundamental justice embraced by s. 7 of the Charter. Breach of that obligation is a breach of the accused's constitutional rights without the requirement of an additional showing of prejudice.
>
> Thus, where an accused demonstrates a reasonable possibility that the undisclosed information could have been used in meeting the case for the Crown, advancing a defence or otherwise making a decision

which could have affected the conduct of the defence, he has also established the impairment of his Charter right to disclosure.

[75.] In Watt the following appears at para 13 and 14:

> In R. v. Regan (1999), 179 N.S.R. (2d) 45 at para. 100, Cromwell, J.A. for the majority described a stay as "a drastic remedy because its effect is that the state is permanently prevented from prosecuting the alleged criminal act." The Supreme Court of Canada affirmed this characterization in Regan (S.C.C.) at para. 2.
>
> That a stay of proceedings is an exceptional remedy reserved for exceptional circumstances is clear from R. v. Taillefer, [2003] 3 S.C.R. 307 where the Supreme Court of Canada stated:
>
> > 117 This Court has frequently underlined the draconian nature of a stay of proceedings, which should be ordered only in exceptional circumstances. A stay of proceedings is appropriate only "in the clearest of cases", that is, "where the prejudice to the accused's right to make full answer and defence cannot be remedied or where irreparable prejudice would be caused to the integrity of the judicial system if the prosecution were continued" (O'Connor, supra, at para. 82). It is a "last resort" remedy, "to be taken when all other acceptable avenues of protecting the accused's right to full answer and defence are exhausted"

[76.] In Watt our Court of Appeal, overturning a stay of proceedings entered by the trial judge, stated at para 19 *et seq* :

> I turn then to my analysis of the decision granting a stay of proceedings. The judge held that the respondent's s. 7 Charter rights not to be deprived of life, liberty and security of the person, except in accordance with the principles of fundamental justice, had been infringed. Moreover, the conduct of the Crown had damaged the integrity of the judicial system. In para. 68 of his decision, he quoted the criteria that must be satisfied before a stay of proceedings will be

granted, as set out in Canada (Minister of Citizenship and Immigration) v. Tobiass, [1997] 3 S.C.R. 391. With respect, he misdirected himself by failing to consider all aspects of the analysis essential in determining whether a stay should be granted. Had he done so, it would have been apparent that this was not the sort of case which called for the drastic remedy of a stay of proceedings.

For convenience, I repeat the test set out in para. 90 of Tobiass, supra:

> If it appears that the state has conducted a prosecution in a way that renders the proceedings unfair or is otherwise damaging to the integrity of the judicial system, two criteria must be satisfied before a stay will be appropriate. They are that:
>
> (1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and
>
> (2) no other remedy is reasonably capable of removing that prejudice.

[47] Watt continues at para 31 *et seq* :

Furthermore, the prejudice described by the judge which persuaded him to issue a stay does not impair the respondent's ability to make full answer and defence to the extent required for a stay. His decision referred to several types of prejudice:

(a) The extra preparation and related expense preparing for two trials;

(b) The respondent continuing to be under release conditions;

(c) The effect of the passage of time on the memory of witnesses and the locations of potential witnesses;

(d) The stress of awaiting trial; and

> (e) The adjournment of two trials and the delay before the hearing of a third.
>
> However, showing some prejudice is not enough to support a determination that s. 7 of the Charter has been breached. . .

[77.] R. v. Andrews [2009] N.S.J. No.654 is a case of lost evidence. The decision thus references R. v. La [1997] 2 S.C.R. 451 and R. v. F.C.B. (2000) 182 N.S.R. (2d) 215 (NSCA). There are nevertheless passages which are instructive here. At para 18 the following passage of Sopinka, J. in R. v. Stinchcombe (No.2) [1995] 1 S.C.R. 754 is cited with approval:

> What is the conduct arising from failure to disclose that will amount to an abuse of process? By definition it must include conduct on the part of governmental authorities that violates those fundamental principles that underlie the community's sense of decency and fair play. The deliberate destruction of material by the police or other officers of the Crown for the purpose of defeating the Crown's obligation to disclose the material will, typically, fall into this category. An abuse of process, however, is not limited to conduct of officers of the Crown which proceeds from an improper motive. See R. v. O'Connor, [1995] 4 S.C.R. 411 (S.C.C.), at paras. 78-81, per Justice L'Heureux-Dubé for the majority on this point. Accordingly, other serious departures from the Crown's duty to preserve material that is subject to production may also amount to an abuse of process notwithstanding that a deliberate destruction for the purpose of evading disclosure is not established. In some cases an unacceptable degree of negligent conduct may suffice.
>
> In either case, whether the Crown's failure to disclose amounts to an abuse of process or is otherwise a breach of the duty to disclose and therefore a breach of s. 7 of the Charter, a stay may be the appropriate

remedy if it is one of those rarest of cases in which a stay may be imposed, the criteria for which have most recently been outlined in O'Connor, supra. With all due respect to the opinion expressed by my colleague Justice L'Heureux-Dubé to the effect that the right to disclosure is not a principle of fundamental justice encompassed in s. 7, this matter was settled in Stinchcombe, supra, and confirmed by the decision of this Court in R. v. Carosella, [1997] 1 S.C.R. 80 (S.C.C.). In Stinchcombe the right to make full answer and defence of which the right to disclosure forms an integral part was specifically recognized as a principle of fundamental justice included in s. 7 of the Charter. This was reaffirmed in Carosella. In para. 37, I stated on behalf of the majority:

> The right to disclosure of material which meets the Stinchcombe threshold is one of the components of the right to make full answer and defence which in turn is a principle of fundamental justice embraced by s. 7 of the Charter. Breach of that obligation is a breach of the accused's constitutional rights without the requirement of an additional showing of prejudice. To paraphrase Lamer, C.J. in Tran [1994] 2 S.C.R. 951], the breach of this principle of fundamental justice is in itself prejudicial. The requirement to show additional prejudice or actual prejudice relates to the remedy to be fashioned pursuant to s. 24(1) of the Charter.

[78.] With respect to the timing of a stay application Sopinka, J. is quoted at para 19 of Andrews as follows:

> The appropriateness of a stay of proceedings depends upon the effect of the conduct amounting to an abuse of process or other prejudice on the fairness of the trial. This is often best assessed in the context of the trial as it unfolds. Accordingly, the trial judge has a discretion as to whether to rule on the application for a stay immediately or after hearing some or all of the evidence. Unless it is clear that no other course of action will cure the prejudice that is occasioned by the

> conduct giving rise to the abuse, it will usually be preferable to reserve on the application. This will enable the judge to assess the degree of prejudice and as well to determine whether measures to minimize the prejudice have borne fruit. This is the procedure adopted by the Ontario Court of Appeal in the context of lost evidence cases. In R. v. B.(D.J.) (1993), 16 C.R.R. (2d) 381 (Ont. C.A.), the court said at p. 382:
>
> > The measurement of the extent of the prejudice in the circumstances of this case could not be done without hearing all the relevant evidence, the nature of which would make it clear whether the prejudice was real or minimal.
> >
> > Similarly, in R. v. Andrew (1992), 60 O.A.C. 324 (Ont. C.A.), the court found at p. 325 that unless the Charter violation "is patent and clear, the preferable course for the court is to proceed with the trial and then assess the issue of the violation in the context of the evidence as it unfolded at trial". See also: R. v. François (1993), 65 O.A.C. 306 (Ont. C.A.); R. v. Kenny (1991), 92 Nfld. & P.E.I.R. 318 (Nfld. T.D.).
> >
> > I would add that even if the trial judge rules on the motion at an early stage of the trial and the motion is unsuccessful at that stage, it may be renewed if there is a material change of circumstances. See R. v. Adams, [1995] 4 S.C.R. 707 (S.C.C.), and R. v. Calder, [1996] 1 S.C.R. 660 (S.C.C.). This would be the case if, subsequent to the unsuccessful application, the accused is able to show a material change in the level of prejudice.

[79.] As noted, F.C.B. , *supra*, was a lost evidence case. Nevertheless, if certain parallels may be drawn between a duty to preserve evidence and a duty to disclose it, between lost evidence and non-disclosed (or late-disclosed) evidence, the following extract from our Court of Appeal at para 10 *et seq* may be instructive :

The basic principles applicable to the analysis of all three grounds of appeal raised in this case were summarized by Sopinka, J. in R. v. La, supra, commencing at para. 16.

> (1) The Crown has an obligation to disclose all relevant information in its possession.
>
> (2) The Crown's duty to disclose gives rise to a duty to preserve relevant evidence.
>
> (3) There is no absolute right to have originals of documents produced. If the Crown no longer has original documents in its possession, it must explain their absence.
>
> (4) If the explanation establishes that the evidence has not been destroyed or lost owing to unacceptable negligence, the duty to disclose has not been breached.
>
> (5) In its determination of whether there is a satisfactory explanation by the Crown, the Court should consider the circumstances surrounding its loss, including whether the evidence was perceived to be relevant at the time it was lost and whether the police acted reasonably in attempting to preserve it. The more relevant the evidence, the more care that should be taken to preserve it.
>
> (6) If the Crown does not establish that the file was not lost through unacceptable negligence, there has been a breach of the accused's s. 7 Charter rights.
>
> (7) In addition to a breach of s. 7 of the Charter, a failure to produce evidence may be found to be an abuse of process, if for example, the conduct leading to the destruction of evidence was deliberately for the purpose of defeating the disclosure obligation.

> (8) In either case, a s. 7 breach because of failure to disclose, or an abuse of process, a stay is the appropriate remedy, only if it is one of those rare cases that meets the criteria set out in O'Connor.
>
> (9) Even if the Crown has shown that there was no unacceptable negligence resulting in the loss of evidence, in some extraordinary case, there may still be a s. 7 breach if the loss can be shown to be so prejudicial to the right to make a full answer and defence that it impairs the right to a fair trial. In this case, a stay may be an appropriate remedy.
>
> (10) In order to assess the degree of prejudice resulting from the lost evidence, it is usually preferable to rule on the stay application after hearing all of the evidence.

[80.] The O'Connor criteria referred to in the eighth point are as stated by Justice L'Heureux-Dubé at para. 82 of O'Connor:

> It must always be remembered that a stay of proceedings is only appropriate "in the clearest of cases", where the prejudice to the accused's right to make full answer and defence cannot be remedied or where irreparable prejudice would be caused to the integrity of the judicial system if the prosecution were continued.