SUPREME COURT OF NOVA SCOTIA
Citation: R v. Spinney, 2009 NSSC 127

Date: 20090417
Docket: Yar. No. 292741
Registry: Yarmouth

Between:

Her Majesty The Queen

Appellant

v.

Cecil Lorne Spinney

Respondent

Judge:	The Honourable Justice Arthur J. LeBlanc.
Heard:	November 6, 2008, in Halifax, Nova Scotia
Counsel:	Pierre L. Muise, Esq. for the Appellant Philip J. Star, Q.C. for the Respondent

By the Court:

[1] The Crown appeals the decision of Prince J.P.C. to acquit Cecil Lorne Spinney on a charge that he had care or control of a motor vehicle while his ability to operate a motor vehicle was impaired by alcohol, contrary to s. 253(a) of the *Criminal Code*.

BACKGROUND

[2] On May 13, 2006, Mr. Spinney was drinking with friends at a tavern. He asked a friend, Michael Charles Maillet, to drive them home in his (Mr. Spinney's) vehicle. Mr. Maillet testified that something went wrong with the car's steering, causing him to drive into the ditch. Since the accused was not in a state to travel on foot, Mr. Maillet left the scene of the accident to find assistance. When he returned, the entire area had been cleared. The RCMP had found Mr. Spinney seated in the driver's seat with the engine running.

[3] Mr. Maillet testified that Mr. Spinney was grabbing at him and grabbing at the wheel. He said Mr. Spinney was flailing his arms and was mumbling when he

talked, which Mr. Maillet considered conduct of a person who was drunk. Mr. Maillet stated that he had to shove Mr. Spinney away.

[4] Upon the conclusion of the evidence, closing arguments were made by counsel for Mr. Spinney and Crown. Judge Prince adjourned the trial to allow Mr. Spinney to make further submissions on a point raised in closing argument. During the adjournment period, the defence informed the court and the Crown that he wished to call further evidence. The Crown opposed re-opening the trial for further evidence. Defence counsel advised that he had obtained information from Mr. Spinney and, based on that information, proposed to reopen the defence so that Mr. Spinney could provide evidence with respect to the circumstances under which he occupied the driver's seat.

[5] The Court granted the application to call additional evidence and refused to permit the Crown to question Mr. Spinney relating to information that he had provided to counsel. Judge Prince held that there had been no waiver of solicitor-client privilege, and that there was no basis to permit cross-examination of the defendant in relation to material to which privilege might be applicable. The trial judge ultimately found Mr. Spinney not guilty of the charge.

ISSUES

[6] The parties set out the following issues:

> 1. Did the trial judge err in allowing the application to reopen the case?
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> 2. Did the trial judge err in holding that the respondent had not waived solicitor-client privilege by relying upon the late disclosure of information by the respondent to his counsel as a basis for his application to reopen the trial for further evidence?
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> 3. Did the trial judge err in refusing to allow the appellant to cross-examine the respondent in relation to the timing of the disclosure of the information in question to his counsel?
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> 4. Did the trial judge misapprehend the evidence of Mr. Maillet relating to the respondent grabbing the steering wheel and, as a result, render an unreasonable verdict?

SUMMARY CONVICTION APPEALS

[7] The scope of review of a summary conviction appeal court judge was set out in *R.* v. *Nickerson* (1999), 178 N.S.R. (2d) 189 (C.A.), at para. 6:

> The scope of review of the trial court's findings of fact by the Summary Conviction Appeal Court is the same as on appeal against conviction to the Court of Appeal in indictable offences.... Absent an error of law or a miscarriage of justice, the test to be applied by the Summary Conviction Appeal Court is whether the findings of the trial judge are unreasonable or cannot be supported by the evidence. As stated by the Supreme Court of Canada in *R. v. Burns (R.H.)*, [1994] 1 S.C.R. 656 ... at p. 657 [S.C.R.], the appeal court is entitled to review the evidence at trial, re-examine and reweigh it, but only for the purpose of determining whether it is reasonably capable of supporting the trial judge's conclusions. If it is, the Summary Conviction Appeal Court is not entitled to substitute its view of the evidence for that of the trial judge. In short, a summary conviction appeal on the record is an appeal; it is neither a simple review to determine whether there was <u>some</u> evidence to support the trial judge's conclusions nor a new trial on the transcript. [Emphasis in original.]

[8] The parties agree that if I conclude that the trial judge erred in allowing the accused to reopen the case or in refusing the Crown the opportunity to cross-examine Mr. Spinney on his communication with counsel, the appropriate remedy is a new trial. If, however, I find that the trial judge did not commit reversible error on either of these two points, I will consider the remaining grounds of appeal in order to determine whether he erred in allowing the defendant’s application to reopen the case.

REOPENING THE CASE

[9] A trial judge’s decision on a question of law is reviewed on the standard of correctness. A question involving the application of a correctly-stated legal test is a

question of mixed law and fact, with the degree of deference. A failure by the trial judge to properly consider an aspect of a particular test amounts to an error of law. The majority of the Supreme Court of Canada stated, in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33, at para 27:

> ...In [*Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748] at para. 39, this Court illustrated how an error on a question of mixed fact and law can amount to a pure error of law subject to the correctness standard:
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> > ... if a decision-maker says that the correct test requires him or her to consider A, B, C, and D, but in fact the decision-maker considers only A, B, and C, then the outcome is as if he or she had applied a law that required consideration of only A, B, and C. If the correct test requires him or her to consider D as well, then the decision-maker has in effect applied the wrong law, and so has made an error of law.

[10] Although the trial judge is required to consider all of the elements of the legal test, this does not mean that he or she is required to explicitly address every factor, so long as it is apparent that the correct principles were applied. In *R. v. Lake*, 2005 NSCA 162, [2005] N.S.J. No. 506, the Nova Scotia Court of Appeal discussed the application of *R. v. W.(D.)*, [1991] 1 S.C.R. 742, which sets out the manner in which a jury should be instructed in a situation where the accused has given evidence. In *Lake*, Fichaud J.A., for the court, stated, at para. 15:

> *W.(D.)* dealt with a jury charge. A judge alone is presumed to know the basic principles of law governing reasonable doubt which need not be recited mechanically in every decision. Her decision may operate within a flexible ambit. She need not quote phraseology from *W.(D.)*, follow the *W.(D.)* chronology or even cite *W.(D.)*. The question for the appeal court is whether, at the end of the day and upon consideration of the whole of the trial judge's decision, it is apparent that she did not apply the essential principles underlying the *W.(D.)* instruction....

[11] The Supreme Court of Canada has held that allowing a witness to testify after the parties have made their summations, but before the verdict is rendered, is a matter of discretion: *R. v. Scott*, [1990] 3 S.C.R. 979, [1990] S.C.J. No. 132, at para 60. The trial judge's exercise of discretion must not be interfered with unless it was not done judicially: see *R v. Hayward* (1993), 67 O.A.C. 379, [1993] O.J. No. 2939 (Ont. C.A.), at para. 15.

[12] In *Hayward*, *supra*, the appellant had been convicted of six offences of a sexual nature. After closing argument from the defence, and during the course of the Crown's argument, a witness who had been scheduled to testify but did not appear at trial appeared in the courtroom. Defence counsel applied to reopen the case on the basis that the witness was indispensable, but did not indicate the nature of the evidence the witness would give. The trial judge refused to reopen the trial.

This decision was set aside on appeal. Doherty, J.A., for the court, stated, at paras. 17-19:

> *When faced with an application to reopen the evidence, the trial judge should first be satisfied that the proposed evidence is relevant to a material issue in the case*. That determination can usually be made on the basis of counsel's summary of the anticipated evidence. The trial judge made no inquiry as to the relevance of Fisher's evidence, and counsel provided no indication as to the anticipated content of that evidence. There does not appear, however, to have been any issue as to the relevance of Mr. Fisher's proposed evidence. Crown counsel, who was fully aware of the content of Fisher's "will say", did not suggest that Fisher could not offer any relevant evidence. The events of October 19th as described by both A.S. and the appellant also suggest that Fisher could have given relevant evidence concerning some of the events of that evening. For example, Fisher could have given evidence concerning any sexual activity between himself and A.S. on that evening. Since the Crown relied on the forensic evidence establishing sexual intercourse within a forty-eight hour period to support the contention that the appellant had sexually assaulted A.S., evidence by Fisher of sexual intercourse with A.S. during that period would have been relevant and admissible.
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> *Once it is determined that the proposed witness has relevant evidence to give, the trial judge must consider the potential prejudice to the other party should he or she permit the reopening of the evidence*. There was no suggestion at trial or before this Court that the Crown would have been prejudiced in any way by allowing the defence to reopen its case and call Mr. Fisher.
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> *The trial judge must also consider the effect of permitting a reopening of the evidence on the orderly and expeditious conduct of the trial*. It does not appear from this record that permitting Mr. Fisher to testify would have had any significant negative impact on the progress of the trial. The trial judge did not advert to any such negative consequences in his refusal of the application. The evidence had finished only an hour earlier, and it seems likely that Mr. Fisher's evidence would have been relatively brief. Also, while some additional argument may have been necessary following Fisher's evidence, there would have been no need to repeat arguments already made. I see no reason why the trial would not have been completed within the same day. [Emphasis added.]

[13] The appellant Crown argues that the trial judge failed to consider the second branch of the third step, that is, the orderly conduct of the trial. The appellant

maintains that the application to reopen was a tactical manoeuver, contrary to the orderly conduct of the trial. Although the trial judge did not specifically reject the argument that it was a tactical manouevre, or discuss the orderly conduct of the trial, in his oral decision, he did take the essential principles into account. The circumstances surrounding the application to reopen the trial were straightforward. It is clear that the trial judge did not feel that the tactical argument merited a lengthy discussion before proceeding to the examination of the witness. Having reviewed and considered the analysis described in *Hayward*, and upon considering the trial judge's comments, I am satisfied that the correct legal test was applied.

[14] Having concluded that the trial judge considered the three-part test, I must consider the application of the law to the facts as the trial judge found them. As I stated earlier, the decision of the trial judge is a discretionary one which can only be set aside if the discretion was not exercised judicially.

[15] It was necessary for the trial judge to consider three factors: the relevance of the proposed evidence, the potential prejudice to the other side, and the effect on the orderly and expeditious conduct of the trial. The third step involved a consideration of the prolonging of the trial that may result from allowing re-

opening, and whether permitting the evidence would disrupt the orderliness of the trial. The latter factor includes whether the decision is based solely on an earlier tactical decision.

[16] There is no disagreement that the evidence sought to be introduced was both material and relevant. The evidence of Mr. Spinney was clearly relevant to the proceedings. The reason for Mr. Spinney moving into the driver's seat would tend to prove or disprove facts in support of a rebuttal of the presumption created by s. 258(1)(a) of the *Criminal Code*. This direct evidence was of great importance to Mr. Spinney's case. The Crown submits that the request to have the respondent testify was a reversal of an earlier tactical decision that he would not testify, arising from the Crown's statement that there was no evidence that he had moved to the driver's seat for any reason other than to put the vehicle in motion. To permit the additional evidence in these circumstances, the Crown submits, was detrimental to the orderly conduct of the trial.

[17] The trial judge accepted that there might be some prejudice based on the fact that Mr. Spinney, and his counsel, would have the advantage of hearing the Crown's theory of the case before putting Mr. Spinney on the witness stand. This

could, in certain situations, allow for the tailoring of testimony to rebut the presumption or to raise a reasonable doubt. However, the trial judge took the view that any such risk could be largely mitigated by cross-examination of Mr. Spinney, and by assessing his credibility. In addition, the Crown was given the opportunity to present rebuttal evidence in response to the additional evidence offered by the accused.

[18] There was a basis upon which the trial judge could conclude as he did that the second prong of the *Hayward* test was met. Evidence is typically considered prejudicial and excluded where cross-examination cannot be conducted and credibility cannot be determined. The trial judge clearly pointed out that cross-examination could be used to test potential "tailored" evidence.

[19] Whether or not the effect the additional evidence would impact on the orderly and expeditious conduct of the trial, the trial judge determined that Mr. Spinney's evidence would not cause inordinate delay. Upon review of the trial record, it is evident that allowing the application had little effect on the expeditious conduct of the trial. Once the trial judge allowed the application, the defendant

was called as a witness. There was a *voir dire* on the admissibility of certain evidence surrounding the application, which resulted in a delay of the trial.

[20] The Crown's principal argument relates to the orderly conduct of the trial. There is some confusion as to when Mr. Spinney disclosed to his counsel his reasons for moving from the passenger seat into the driver's seat, where the police found him. This is either due to a mis-characterization by the respondent's counsel, or a misapprehension on the part of the Crown counsel and the trial judge. From the trial record it appears that defence counsel only learned of the reason for Mr. Spinney's change of seats after closing arguments on June 26, 2007. In a letter dated October 11, 2007, counsel clarified the content of Mr. Spinney's impending testimony as follows:

> Although my original letter indicated that the accused wish to provide further evidence with respect to the accident, I can be more specific by indicating that he wishes to testify as to the circumstances surrounding him occupying the drivers seat after the time of the accident. This would obviously very much be more germane and focus on one of the points in issue before this Honourable Court.

[21] This letter does not explicitly specify the timing of the disclosure. Based on the appellant's argument and the trial transcript, it appears that the evidence which Mr. Spinney proposed to offer at trial was freshly disclosed to his counsel after, not

before, closing arguments. According to the appellant, the respondent made a tactical decision not to disclose his motivation for changing seats to his counsel. The appellant postulates that the respondent's counsel made a tactical decision not to have Mr. Spinney testify because of the alleged grabbing of the steering wheel, and to rely solely on the evidence of Mr. Maillet to rebut the presumption of care and control.

[22] The appellant maintains that it was this new evidence that came to defence counsel's attention after closing arguments that prompted counsel to seek to call evidence and explain why the accused switched seats. From the transcript, it appears that the trial judge also made this assumption. At p. 118, he stated:

> [A]t a point in time after the defence had closed their case and after argument the defence counsel involved had obtained information from the defendant and based on that information had sought to re-open the defence's case, specifically, as summarized in one of the submissions of the defendant to provide evidence to the court with respect to the circumstances under which the defendant occupied the motor vehicle in question and the locations of the vehicle.

[23] At p. 132, the trial judge noted his understanding that "the information was obtained as set out in the letters to the court and to yourself that that information

hadn't been obtained prior to the time that it was determined or prior to the time that the case was closed and argument was made."

[24] I conclude that the trial judge inferred that the information received was the same information to which the defendant would testify. No oral arguments were made in this, or any, regards on the *voir dire*, and the defendant was not examined or cross-examined as to whether this was new evidence. It appears to me that the inference that Crown counsel and the trial judge made was reasonable. In the context of an application to reopen the case, it appears that this was new evidence to the respondent's counsel. I do not agree with the Crown's suggestion that respondent's counsel must have been willfully blind, for tactical reasons, to the reason the respondent changed seats. There is nothing in the trial transcript that suggests that failing to discuss the matter with Mr. Spinney was deliberate. It is my view that the trial judge acted judicially in rejecting such an argument.

[25] At the appeal hearing, Mr. Spinney's counsel stated that the inference that he was prompted to reopen the case because his client only recently informed him of his reason for changing seats was incorrect. He added that he had known why Mr. Spinney switched seats for some time, but that it was more general information that

prompted him to seek to reopen the case and call Mr. Spinney to testify. Admittedly, not having this general information before the court may create difficulties. It is unclear how any general information would prompt counsel to change his mind about having Mr. Spinney testify to evidence that was already within counsel's knowledge. The fact that a change in a tactical decision is the primary trigger for an application to reopen the case does not lead to an automatic denial of the application, but remains within the discretion of the trial judge. The court in *Hayward*, *supra*, stated, at para. 20, that "an application to reopen the evidence based on nothing more than a desire to reverse an earlier tactical decision, perhaps because of some comment made during argument, could properly be refused as being detrimental to the orderly conduct of the trial proceedings." Even if it is not determinative, however, it remains a factor to be considered.

[26] In the conclusion of his decision, the trial judge balanced the interests at play:

> It's also clear, in my view and as a factor that the court has to have as much evidence as possible to decide these cases and it's always important that all relevant material evidence be heard, if it's at all possible so that the case can be judged on it's merits as it should be. As a result of those considerations I am of the view that the case can be re-opened and that the proposed evidence can be called.

[27] On this point, I agree with the trial judge's conclusion that the high probative value of the evidence and the availability of cross-examination, rebuttal evidence, and assessments of credibility outweigh the potential prejudicial effects of tailored evidence, and the fact that this application may have been based on the reversal of a tactical decision. As such, I am satisfied that the trial judge not err on the first issue. He exercised his discretion judicially.

SOLICITOR-CLIENT PRIVILEGE

[28] The second issue is whether solicitor-client privilege has been waived. The Crown attempted to question Mr. Spinney regarding the timing of his disclosure of the information provided to his counsel that formed the basis for the application to re-open. The defence objected on the basis of solicitor-client privilege. Crown counsel believed and understood that one of the results of reopening the case would be that there would be an opportunity to cross-examine Mr. Spinney on these details. However, the trial judge held that there had been no explicit or implied waiver of solicitor-client privilege by Mr. Spinney. In ruling against the Crown's request to cross-examine Mr. Spinney, the trial judge stated, at p.145 of

the trial transcript, that there was nothing to prove that the defendant understood the concept of privilege or waiver.

[29] The Defendant does not necessarily need to understand the intricacies of privilege in order for waiver to occur. A lawyer has authority to waive the privilege on behalf of the client, even in the context of criminal law. In *R. v. S.(D.)*, 2000 CarswellOnt 3935 (Ont. S.C.J.), the court said, at para. 46, that "the ostensible authority of the solicitor to bind the client in respect of any matter which arises in or is incidental to the defence of the client on criminal charges before the court, encompasses the authority to waive the client's privilege."

[30] A review of the transcript indicates that there was no suggestion that Mr. Spinney did not intend to grant his counsel authority to bind him in this, or in any aspect of the case. Consequently, it appears to me that nothing prevented his counsel from waiving Mr. Spinney's solicitor-client privilege.

[31] The Crown submits that the accused cannot make use of privileged discussions for one purpose and then rely on the privilege to protect the remaining

details of his discussions with counsel. This appears to be supported by the authors of *The Law of Evidence in Canada* (2d. Edn.), at para. 14.97:

> An obvious scenario of waiver is if the holder of the privilege makes a voluntary disclosure or consents to disclosure of any material part of a communication. Thus, the Court in *Frind v. Sheppard* [[1940] O.W.N. 135 (Master)] held that a client had waived the privilege which attached to letters passing between himself and his solicitor because they had been read into the record in a previous proceeding. In other cases, waiver was said to have taken place when documents over which privilege was claimed had been disclosed in proceedings in another jurisdiction or were referred to in an Affidavit of Documents and had been inspected. Similarly, if a client testifies on his or her own behalf and gives evidence of a professional, confidential communication, she or she will have waived the privilege shielding all of the communications relating to the particular subject matter. Moreover, if the privilege is waived, then production of all documents relating to the acts contained in the communication will be ordered.

[32] Waiver of privilege can occur expressly or by implication. At para. 14.101, the authors quote Wigmore (8 Wigmore (McNaughton rev., 1961) on what constitutes waiver by implication:

> Judicial decision gives no clear answer to this question. In deciding it, regard must be had to the double elements that are predicated in every waiver, i.e., not only the element of implied intention, but also the element of fairness and consistency. A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He may elect to withhold or to disclose, but after a certain point his election must remain final.

[33] The authors continue, at para. 14.02:

> Whether intended or not, waiver may occur when fairness requires it, for example, if a party has taken positions which would make it inconsistent to maintain the privilege. In *Land v. Kaufman*, [(1991), 2 W.D.C.P. (2d) 259 (Ont. Gen. Div.)] solicitor-client privilege was held to have been waived by a solicitor, who filed an affidavit in support of the plaintiff's motion to withdraw admissions made in the statement of claim where the affidavit referred to the very instructions which the plaintiff now sought to protect from disclosure. The defendants contended that the admissions had been crucial to their defence and they could not explore whether the admissions were inadvertent or resulted from wrong instructions without knowing the content of the instructions. The Court concluded that fairness demanded that the defendants be entitled to that disclosure, especially where discoveries had already been completed and the position of the parties had been revealed by their pleadings and their evidence on discovery.

[34] In this case, as in *Land*, it would be unfair to allow Mr. Spinney's counsel to state that he received new information prompting an application to reopen the trial, whatever that information might be, and then invoke privilege to immunize the circumstances from scrutiny. In *Land*, certain questions relating to communications in the preparation of a solicitor's affidavit to amend the statement of claim were held to be irrelevant, and not ordered to be answered. In that case, there were two distinguishable sets of communications: those pertaining to the initial communication, and the later communications relating to the application to amend the statement of claim. The communication between Mr. Spinney and his counsel is directly linked with the mechanics of the application, and consequently in my opinion, is relevant to the merits of that application, and of the case.

[35] Counsel for Mr. Spinney argues that this case is not a criminal communication of the kind discussed in *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44. In that case, the Supreme Court of Canada said, at paras. 9-11:

> Solicitor-client privilege is fundamental to the proper functioning of our legal system. The complex of rules and procedures is such that, realistically speaking, it cannot be navigated without a lawyer's expert advice. It is said that anyone who represents himself or herself has a fool for a client, yet a lawyer's advice is only as good as the factual information the client provides. Experience shows that people who have a legal problem will often not make a clean breast of the facts to a lawyer without an assurance of confidentiality "as close to absolute as possible":
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> > [S]olicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis.
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> > (*R. v. McClure*, [2001] 1 S.C.R. 445, 2001 SCC 14, at para. 35, quoted with approval in *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209, 2002 SCC 61, at para. 36.)
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> It is in the public interest that this free flow of legal advice be encouraged. Without it, access to justice and the quality of justice in this country would be severely compromised. The privilege belongs to the client not the lawyer. In *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 188, McIntyre J. affirmed yet again that the Court will not permit a solicitor to disclose a client's confidence.
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> At the time the employer in this case consulted its lawyer, litigation may or may not have been in contemplation. It does not matter. While the solicitor-client

> privilege may have started life as a rule of evidence, it is now unquestionably a rule of substance applicable to all interactions between a client and his or her lawyer when the lawyer is engaged in providing legal advice or otherwise acting as a lawyer rather than as a business counsellor or in some other non-legal capacity.... A rare exception, which has no application here, is that no privilege attaches to communications criminal in themselves or intended to further criminal purposes.... The extremely limited nature of the exception emphasizes, rather than dilutes, the paramountcy of the general rule whereby solicitor-client privilege is created and maintained "as close to absolute as possible to ensure public confidence and retain relevance" (*McClure*, at para. 35).
>
> To give effect to this fundamental policy of the law, our Court has held that legislative language that may (if broadly construed) allow incursions on solicitor-client privilege must be interpreted restrictively. The privilege cannot be abrogated by inference. Open-textured language governing production of documents will be read not to include solicitor-client documents...

[36] The communication involved in this matter does not amount to a “rare” criminal communication. That exception, it should be noted, applies to situations where privilege has not been waived, and a solicitor-client communication will be examined notwithstanding the right to privilege. In *Blood Tribe* the court did not address the case of waiver, and the case did not change the law in this area with an absolute prohibition of waiver.

[37] I believe counsel waived Mr. Spinney’s solicitor-client privilege for the purpose of reopening the trial. Mr. Spinney was not examined or cross-examined on the relevant discussion. The Crown intended to cross-examine Mr. Spinney on the circumstances surrounding the late emergence of this evidence, so that it could

be considered when assessing Mr. Spinney's credibility and guilt. During the *voir dire*, the Crown attempted to elicit information respecting the discussions Mr. Spinney had with his counsel surrounding the evidence of his move from one seat to the other.

[38] Depending on the information that would have emerged from such questioning, it would have been open to the Crown to put these answers to Mr. Spinney in the trial proper. In *R. v. Darrach*, 2000 SCC 46, the Supreme Court of Canada held that *voir dire* and the trial are separate proceedings for the purposes of analysis of s. 5 of the *Canada Evidence Act* and s. 13 of the *Charter*. Further, depending on the results of the cross-examination of Mr. Spinney, the trial judge could consider this evidence in determining credibility and guilt. This is an approach which would have the effect of balancing any tactical advantage that Mr. Spinney may have been by hearing the summation of the other side before leading additional evidence.

CONCLUSION

[39] It is my view that Crown counsel ought to have been permitted to cross-examine Mr. Spinney on the question of the discussions with his counsel surrounding his move from the passenger seat to the driver's seat. I therefore order a new trial pursuant to s. 686(4)(b)(i) of the *Criminal Code*.

[40] Accordingly, there will be no need to consider the other grounds of appeal.

J.