SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Paul's Diving Services Inc.*, 2019 NSSC 359

Date: 20191206
Docket: Hfx No. 481987
Registry: Halifax

Between:

Paul's Diving Services Inc.

Applicant

v.

Her Majesty the Queen in right of the Province of Nova Scotia

Respondent

Decision

Judge:	The Honourable Justice John P. Bodurtha
Heard:	April 2, 2019, in Halifax, Nova Scotia
Written Release:	December 6, 2019
Counsel:	Blair Mitchell, for the Applicant Alex Keaveny, for the Respondent

By the Court:

Overview

[1] This is a motion for leave to extend the time for filing a Notice of Summary Conviction Appeal and to admit fresh evidence on the hearing of an appeal. After having reviewed the Crown disclosure and having obtained legal advice in May 2017, the Applicant entered guilty pleas on September 14, 2017, to the following two offences under section 74(1) of the *Occupational Health and Safety Act*,1996, c. 7, s. 1. The offences were:

> (a) … fail to ensure a written dive plan in place that met the requirements of s. 20(4) of the *Occupational Diving Regulations*, contrary to s. 20(4) of the Regulations thereby committing an offence contrary to s. 74(1)(a) of the *Occupational Health and Safety Act*; and
>
> (b) … fail to ensure a dive was not conducted in hazardous water flow conditions, contrary to s. 70 of the *Occupational Diving Regulations* being an offence contrary to subsection 74(1)(a) of the *Occupational Health and Safety Act*.

[2] The Crown withdrew the remaining two counts.

[3] An *Agreed Statement of Facts* was signed by Greg Paul, President of the Applicant and Alex Keaveny, Senior Crown Attorney. On October 26, 2017, the *Agreed Statement of Facts* was filed with the Court at the sentencing hearing before Judge Digby.

[4] It was not until March 2018 that the Applicant considered an appeal of its October 26, 2017 guilty pleas and sentence. The Applicant seeks to appeal on the basis that the Crown's expert, David Geddes, was not impartial, independent or unbiased and therefore, his report was not admissible. The Applicant submits that this resulted in a miscarriage of justice and, as a result, it seeks to withdraw its guilty pleas.

[5] The Applicant has brought a motion to extend the time to file an appeal and for leave to admit fresh evidence on the hearing of the appeal. The Crown opposes the motion.

Facts

[6] The Applicant received the Crown's disclosure in May 2017.

[7] Mr. Geddes's report, CV, and other documents regarding his role and opinion were provided to the Applicant in the Crown disclosure.

[8] Mr. Geddes's role and identity were discussed in the Crown's brief. The brief states that he was hired to review the incident and prepare a report. It includes a summary of his findings, as well as his identification of the publication *Guidelines for Diving Operations at dams and other work sites where Delta-P Hazards May exist* as the industry standard.

[9] On May 17, 2017, the Applicant obtained legal advice from Brian Casey, Q.C., who had reviewed the Crown disclosure regarding the charges.

[10] On September 6, 2017, the Crown emailed a resolution proposal to the Applicant.

[11] On September 14, 2017, the Applicant plead guilty before Judge Digby to two *Occupational Health and Safety Act* offences. The guilty pleas were entered by Greg Paul, President of the Applicant. The Applicant confirmed on the record that it:

- Understood it was giving up its right to a trial and relieving the Crown of its obligation to prove the charges;
- Had been given sufficient time to get legal advice;
- Understood the charges; and
- Had been advised of the sentence the Crown would likely seek.

[12] The Applicant entered guilty pleas to counts 3 and 4.

[13] The facts supporting the guilty pleas were read into the record and admitted by Greg Paul. The Court was advised that a formal *Agreed Statement of Facts* would be agreed upon by the parties and filed.

[14] On October 24, 2017, the Crown emailed a draft *Agreed Statement of Facts* to the Applicant.

[15] A sentencing hearing took place on October 26, 2017 before Judge Digby.

[16] As discussed on the record on September 14, 2017, the *Agreed Statement of Facts* was filed with the Court on October 26, 2017.

[17] The *Agreed Statement of Facts* was read into the record and the facts were again confirmed by Mr. Paul.

[18] The resolution proposal that had been provided previously to the Applicant was presented to the Court as a joint resolution and accepted by Judge Digby.

[19] At the conclusion of the sentencing, two counts were withdrawn, and a status date was set for October 1, 2018.

[20] The Applicant never applied to withdraw its guilty pleas before Judge Digby and did not appeal its conviction or sentence.

[21] The Applicant did not take any actions regarding the October 26, 2017, convictions and sentence until sometime after a March 21, 2018, meeting with Steven Donovan, a dive safety expert. Steven Donovan was retained by Angela Seabrook to investigate her son, Luke Seabrook's, death.

[22] The Applicant states that after meeting with Mr. Donovan it made attempts to seek advice from legal counsel, "in connection with the matter of Mr. Geddes report and its (sic) ability to be impartial and objective." The Applicant did not obtain any further legal advice until retaining current counsel in late October 2018.

[23] The Applicant states that the process of finding a lawyer took months and that the delay was the result of the law firms being unable to act in the matter due to conflicts. No specific facts are provided regarding the Applicant's efforts except to list six law firms it contacted. The list did not include Brian Casey, Q.C.

[24] On October 1, 2018, the Crown appeared for the scheduled status date. No one appeared for the Applicant. The Court ordered that someone appear for the company for a further status date on October 9, 2018.

[25] Following the October 1, 2018, appearance, the Crown wrote to Mr. Paul informing him that the Court wanted someone to appear on behalf of the Applicant. Mr. Paul responded, "Yes just looking for lawyers".

[26] On October 9, 2018, Mr. Paul appeared for the Applicant and requested a further adjournment as he wanted to retain counsel. The matter was adjourned to October 24, 2018, when Blair Mitchell, present counsel, appeared with Mr. Paul and advised they intended to bring this motion to extend the time to file a summary conviction appeal, and, if granted, to appeal the guilty plea.

Issues

[27] Whether the Court should extend the time for the Applicant to file its application for leave to appeal; and,

[28] If granted, should fresh evidence be admitted on the appeal.

Legislation

[29] *Civil Procedure Rule* 63.05 governs an application to extend time for filing a summary conviction appeal. It states, in part:

> 63.05 (1) A person may start an appeal of a decision in a summary conviction proceeding by filing a notice of appeal within one of the following periods:
>
> > (a) not more than twenty-five days after the day on which the appellant is sentenced, if the appeal is from a conviction, finding of guilt, sentence, or both a conviction or finding of guilt and a sentence;
> >
> > (b) not more than twenty-five days after the day on which the decision is made, if the appeal is from a decision that is not a conviction, finding of guilt, or sentence.
>
> (2) Subsection 815(2) of the *Criminal Code* provides for extension of the period within which notice of an appeal is given.
>
> (3) The notice of appeal must be filed at the office of the prothonotary responsible for scheduling sittings of the Supreme Court of Nova Scotia in the municipality where the proceeding under appeal was heard, unless the prothonotary or a judge permits otherwise. …

[30] Section 815 of the *Criminal Code* reads:

> Notice of appeal
>
> 815(1) An appellant who proposes to appeal to the appeal court shall give notice of appeal in such manner and within such period as may be directed by rules of court.
>
> Extension of time
>
> 815(2) The appeal court or a judge thereof may extend the time within which notice of appeal may be given.
>
> *Criminal Code*, R.S.C. 1985, c. C-46, s. 815

[31] It is not in dispute that the Applicant is out of time to file an appeal pursuant to CPR 63.05(1) and that it requires an extension to withdraw its guilty plea pursuant to Rule 63.05(2) and s. 815(2) of the *Criminal Code*.

Law

[32] In *R. v. M.* (R.E.), 2011 NSCA 8 (N.S. C.A. [In Chambers]), Beveridge, J.A., conducted a detailed review of the law regarding motions to extend the time to file appeal documents. He said:

> 39 Both in Nova Scotia, and elsewhere, the criteria to be considered in the exercise of this discretion has been generally the same. The Court should consider such issues as whether the applicant has demonstrated he had a *bona fide* intention to appeal within the appeal period, a reasonable excuse for the delay, prejudice arising from the delay, and the merits of the proposed appeal. Ultimately, the discretion must be exercised according to what the interests of justice require. (See *R. v. Paramasivan* (1996), 155 N.S.R. (2d) 373; *R. v. Pettigrew* (1996), 149 N.S.R. (2d) 303; *R. v. Butler*, 2002 NSCA 55; *R. v. Roberge*, 2005 SCC 48.)
>
> . . .
>
> 44 Ordinarily, where an offender demonstrates that he had a *bona fide* intention to appeal within the applicable time period and has a reasonable excuse for his delay, the Crown consents to the extension. Does the satisfaction of the first two criteria eliminate or reduce the need for the Court to consider whether the applicant can demonstrate an arguable ground of appeal? In my opinion, it does not.
>
> 45 As stressed earlier, the ultimate question is whether or not the interests of justice require the extension of time to be granted. It cannot be in the interests of justice to extend time in order for a prospective appellant to pursue an appeal that has no merit. To do so wastes prosecutorial and judicial resources and reflects negatively on the administration of justice.

[33] Justice Beveridge concluded that even if the applicant had a *bona fide* intention to appeal within the time period, and had a reasonable excuse for not doing so, the applicant must be able to identify and set out an arguable ground of appeal:

> 70 Ordinarily the interest of justice would militate in favor of granting an extension, even from a SCAC, if the applicant had a *bona fide* intention to appeal within the time period, and has a reasonable excuse for not having done so. To do otherwise would be to deprive the applicant of his or her opportunity to have a panel of this Court determine if leave should be granted, and if so, address the substance of the appeal.
>
> 71 An examination of the merits of a proposed appeal should be a limited one due to the frequent lack of a complete record and detailed submissions. It is decidedly not the role of the Chambers judge to engage in measuring the chances of success, allowing the extension if convinced the applicant has a reasonable or

> strong or some other adjective to measure the merits, but dismiss the application if not so satisfied.
>
> 72 However, the applicant must be able to identify and set out a ground that is at least arguable. I had the advantage of having the whole of the trial record, written and oral argument before the SCAC and the decision of the SCAC judge. Mr. M. has had every opportunity to file evidence and submissions and make oral argument to address the requirement that his proposed appeal have at least one arguable issue. I would not hesitate to grant an extension of time for Mr. M. if he articulated, or I could discern, any arguable issue upon which leave to appeal might be granted by this Court. I could find none, and accordingly his Motion to extend time to file an Application for Leave to Appeal and Notice of Appeal is dismissed.

[34] Bryson, J.A., also discussed the test in *Brooks v. Soto*, 2013 NSCA 7, and stated:

> 4 In *Bellefontaine v. Schneiderman*, 2006 NSCA 96 (N.S. C.A. [In Chambers]), Bateman J.A. described how the discretion is usually exercised:
>
> > [3] A three-part test is generally applied by this Court on an application to extend the time for filing a notice of appeal, requiring that the applicant demonstrate (*Jollymore Estate Re* (2001), 196 N.S.R. (2d) 177 (C.A. in Chambers) at para. 22):
> >
> > > (1) the applicant had a *bona fide* intention to appeal when the right to appeal existed;
> > >
> > > (2) the applicant had a reasonable excuse for the delay in not having launched the appeal within the prescribed time; and
> > >
> > > (3) there are compelling or exceptional circumstances present which would warrant an extension of time, not the least of which being that there is a strong case for error at trial and real grounds justifying appellate interference.
> >
> > [4] Where justice requires that the application be granted, the judge may allow an extension even if the three part test is not strictly met (*Tibbetts v. Tibbetts* (1992), 112 N.S.R. (2d) 173 (C.A. in Chambers)).
>
> 5 Although courts most commonly allude to the three-part test in *Jollymore Estate v. Jollymore* [2001 CarswellNS 264 (N.S. C.A. [In Chambers])], supra, the ultimate question is whether justice requires that an extension be granted: *Farrell v. Casavant*, 2010 NSCA 71 (N.S. C.A. [In Chambers]), at para. 17 and *Cummings v. Nova Scotia (Minister of Community Services)*, 2011 NSCA 2 (N.S. C.A. [In Chambers]), at para. 19. Accordingly, the three-part Jollymore test is an appropriate guide for the exercise of the court's discretion but it is not an exhaustive description of that discretion.

Analysis

Bona fide intention to appeal within the appeal period

[35] It was not until after Greg Paul had a meeting with Steven Donovan on March 21, 2018 that the Applicant began to consider a potential appeal of its guilty plea entered on September 14, 2017. Mr. Donovan questioned Mr. Geddes's impartiality because Mr. Geddes was required to comment on the competency of individuals whom he had trained.

[36] After speaking with Mr. Donovan about Mr. Geddes's report, Mr. Paul began to seek legal counsel to advise him in connection with Mr. Geddes's ability to be impartial and objective.

[37] The evidence clearly demonstrates that the Applicant did not have a *bona fide* intention to appeal during the appeal period.

Reasonable excuse for the delay

[38] On October 26, 2018, one year after the Applicant was sentenced, it filed its Notice of Summary Conviction Appeal and this motion. I find there is no reasonable excuse to explain the 5-month delay from October 2017 to March 2018. This was the period from sentencing up to the meeting with Steven Donovan.

[39] If the Court were to accept that the Applicant formed an intention to appeal after the meeting with Steven Donovan, what is the reasonable excuse for the delay from late March 2018 to the filing of the motion to extend time to appeal in October 2018, a period of 7 months? The Applicant says that Greg Paul began an effort to locate and retain counsel after the meeting with Mr. Donovan. However, it took months to obtain counsel because counsel frequently had conflicts.

[40] The evidence provided by the Applicant regarding conflicts is limited. Mr. Paul advises that he and his partner attempted to contact as least six law firms and he lists the firms. There was no evidence before the Court as to the dates when the Applicant contacted any firm nor when it received a response that any firm contacted was in conflict. There is no explanation as to why the Applicant did not contact Mr. Casey given his familiarity with the file and given that he did not have a conflict.

[41] I am not satisfied that there was a reasonable excuse for the delay in filing the notice of appeal.

Merits of the appeal

[42] The appeal is from guilty pleas and, in essence, is an application to withdraw guilty pleas. In *R. v. Henneberry*, 2017 NSCA 71, Justice Beveridge sets out the applicable legal principles regarding an appeal for a withdrawal of guilty pleas. He describes the types of situations where a guilty plea withdrawal may be permitted as follows:

> 15 An appellate court also has the power to permit an appellant to withdraw a guilty plea provided there are "valid grounds". There is no closed list of what might qualify, but it includes situations where the appellant did not fully appreciate the nature of the charge or the effect of the plea or never intended to admit facts essential to guilt, or on the accepted facts, a conviction is not legally available (see *Adgey v. R.* (1973), [1975] 2 S.C.R. 426 (S.C.C.); *Brosseau v. R.* (1968), [1969] S.C.R. 181 (S.C.C.); *R. v. Bamsey*, [1960] S.C.R. 294 (S.C.C.).)
>
> 16 A frequently quoted description of this power is that of Dickson J., as he then was, in *Adgey v. R.*, supra where he wrote (p. 431):
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> > This Court in *R. v. Bamsey*, at p. 298, held that an accused may change his plea if he can satisfy the Appeal Court "that there are valid grounds for his being permitted to do so." It would be unwise to attempt to define all that which might be embraced within the phrase "valid grounds". I have indicated above some of the circumstances which might justify the Court in permitting a change of plea. The examples given are not intended to be exhaustive.
>
> 17 History has borne out the wisdom of this broad approach. Relief has been granted because of: inappropriate inducements or threats (*R. v. Hirtle* (1991), 104 N.S.R. (2d) 56 (N.S.C.A.); improper pressure by counsel (*R. v. Lamoureux* (1984), 13 C.C.C. (3d) 101 (C.A. Que.); *R. c. Laperrière*, [1996] 2 S.C.R. 284 (S.C.C.)); police threats, (*R. v. Nevin*, 2006 NSCA 72 (N.S. C.A.)); violation of the accused's right to full disclosure (*R. c. Taillefer*, 2003 SCC 70 (S.C.C.)); a powerful inducement by the Crown with reliance on flawed or tainted opinion evidence which, when discredited, undercuts the existence of an informed plea (*R. v. Kumar*, 2011 ONCA 120 (Ont. C.A.); *R. v. Shepherd*, 2016 ONCA 188 (Ont. C.A.)).
>
> 18 Despite its breadth, the power is not unlimited. Absent a legal error in a withdrawal application before a trial judge, the power of an appeal court to permit withdrawal on appeal is tied to a prevention of a miscarriage of justice (s. 686(1)(a)(iii) of the Criminal Code).

[43] The onus is on the Applicant to demonstrate on a balance of probabilities that the plea was invalid. Justice Beveridge continues at paras. 19 and 20:

> 19 The onus is on an appellant to demonstrate on a balance of probabilities that his or her plea was invalid. What factors inform the validity of a guilty plea? *R. v. T.* (R.) (1992), 10 O.R. (3d) 514, [1992] O.J. No. 1914 (Ont. C.A.) is one of the leading cases that discuss this issue. To be valid, a plea must be voluntary, informed, and unequivocal. Justice Doherty, for the Court wrote of these requirements:
>
> > [14] To constitute a valid guilty plea, the plea must be voluntary and unequivocal. The plea must also be informed, that is the accused must be aware of the nature of the allegations made against him, the effect of his plea, and the consequence of his plea: *R. v. Lyons*, [1987] 2 S.C.R. 309 at p. 371, 37 C.C.C. (3d) 1 at p. 52; Law Reform Commission of Canada Working Paper No. 63, "Double Jeopardy Pleas and Verdicts" (1991) at p. 30.
> >
> > . . .
> >
> > [16] I will first address the voluntariness of the appellant's guilty pleas. A voluntary plea refers to the conscious volitional decision of the accused to plead guilty for reasons which he or she regards as appropriate: *R. v. Rosen*, [1980] 1 S.C.R. 961 at p. 974, 51 C.C.C. (2d) 65 at p. 75. A guilty plea entered in open court will be presumed to be voluntary unless the contrary is shown: Fitzgerald, The Guilty Plea and Summary Justice, supra, at p. 71.
> >
> > [17] Several factors may affect the voluntariness of a guilty plea. None are present in this case. The appellant was not pressured in any way to enter guilty pleas. Quite the contrary, he was urged by duty counsel not to plead but to accept an adjournment. No person in authority coerced or oppressed the appellant. He was not offered a "plea bargain" or any other inducement. He was not under the effect of any drug. There is no evidence of any mental disorder which could have impaired his decision-making processes. He is not a person of limited intelligence.
> >
> > [18] In his affidavit the appellant asserts that he was anxious and felt himself under pressure when he entered his pleas. No doubt most accused faced with serious charges and the prospect of a substantial jail term have those same feelings. Absent credible and competent testimony that those emotions reached a level where they impaired the appellant's ability to make a conscious volitional choice, the mere presence of these emotions does not render the pleas involuntary.
>
> 20 To this we would add, voluntary means the accused has not been coerced into pleading guilty. It is the free choice of an accused, untainted by improper threats, bullying or any improper inducement to plead guilty.

[44] The Applicant argues that its pleas were uninformed. The test for an informed plea was outlined by the Nova Scotia Court of Appeal in *R. v. Symonds*, 2018 NSCA 34 at paras 61-66:

> Was the plea informed?
>
> 61 The appellant says his plea was not informed for a number of reasons, including he did not know or agree to the facts upon which the plea was based, he had not received Crown disclosure, in particular the videotaped statement given by the complainant, and he was not aware of the mandatory SOIRA order. He lays these alleged failings at the feet of Mr. Bailey.
>
> 62 It is important to note that this is not an instance where the Crown has failed to provide required disclosure. The appellant makes no such allegation. He says his counsel never provided him with disclosure, nor discussed with him the contents thereof. Mr. Bailey asserts otherwise. He says he discussed the contents of the Crown's disclosure with the appellant, and gave him the opportunity to review it, including a transcript of B.S.'s statement to police. Mr. Bailey acknowledges that the appellant repeatedly asserted B.S. was lying, but conversely repeatedly acknowledged his involvement in the charged offences. Mr. Bailey does acknowledge the appellant did not view the videotape of B.S.'s statement.
>
> 63 In my view, the appellant's evidence in support of his claims is lacking. At best, they are bald assertions with no evidentiary foundation. Nowhere in his evidence does the appellant assert that he was unaware of the nature of the charges laid against him. Nor does he assert that had he known the facts to be read into the record at sentencing, he would not have plead guilty. Similarly, he does not assert that had he known of the mandatory SOIRA order, he would have instructed his counsel differently.
>
> 64 The appellant's evidence is silent as to what difference, if any, reviewing the videotape of B.S.'s statement would have made to his decision to plead guilty. Although he still asserts B.S. was lying, he does not elaborate about what, or how, that would have impacted on his decision.
>
> 65 In *R. v. Riley*, 2011 NSCA 52 (N.S.C.A.), this Court was asked to set aside an appellant's guilty plea to a charge of producing marijuana on the basis that his trial counsel had failed to advise him of a mandatory firearms prohibition. In dismissing the appeal, the Court considered the direction of the Supreme Court in *R. c. Taillefer*, 2003 SCC 70 (S.C.C.), an instance of Crown non-disclosure. Beveridge, J.A. wrote:
>
> > [34] ... A voluntary and apparently informed plea was also struck in *R. v. Taillefer; R. v. Duguay*, 2003 SCC 70 where the Crown failed to fulfill its disclosure obligation. Taillefer and Duguay were jointly charged and convicted of first-degree murder. The Quebec Court of Appeal upheld the conviction of Taillefer but ordered a new trial for Duguay on a charge of second- degree murder. Prior to the retrial, Duguay negotiated a plea to

the lesser and included offence of manslaughter and was sentenced to 12 years imprisonment. Some years later an investigation into the activities of the Sûréte du Québec revealed that the Crown had failed to disclose a considerable amount of relevant and material evidence to the defence.

[35] Both Taillefer and Duguay appealed. Duguay sought leave to withdraw his guilty plea on the basis that he would never have pled guilty had he been aware of the undisclosed evidence. He filed his own affidavit to that effect and deposed that he had not participated in any way in the acts that caused the death of the victim. This sworn evidence was supported by the affidavits of his trial counsel and his counsel on his first appeal, affirming Duguay's claim of innocence and explaining that the reason he had pled guilty to manslaughter was Duguay's inability to go through a second trial and the risk of a murder conviction — not because he admitted involvement in the death of the victim. The Quebec Court of Appeal did not believe Duguay or his lawyers — instead concluding Duguay had pled guilty because he was guilty and simply afraid of being convicted of murder.

[36] LeBel J. wrote the unanimous reasons for judgment of the Supreme Court. He reasoned that the Court of Appeal had incorrectly applied a subjective test in determining what the appellant would have done. Relying on the approach articulated in *R. v. Dixon*, about how to assess the potential impact of a failure to disclose evidence discovered post conviction, LeBel J. wrote:

> 90 In my opinion, those decisions adopt an accurate statement of the Dixon test, adapted to the context of the impact of the breach of the duty to disclose on the validity of a guilty plea. In the context of a guilty plea, the two separate steps in the analysis required by Dixon must be merged, however. In that situation, it is impossible to separate them, because the entire analysis of the breach must bear on the accused's decision to enter the guilty plea that he or she now wishes to be allowed to withdraw. The accused must demonstrate that there is a reasonable possibility that the fresh evidence would have influenced his or her decision to plead guilty, if it had been available before the guilty plea was entered. However, the test is still objective in nature. The question is not whether the accused would actually have declined to plead guilty, but rather whether a reasonable and properly informed person, put in the same situation, would have run the risk of standing trial if he or she had had timely knowledge of the undisclosed evidence, when it is assessed together with all of the evidence already known. Thus the impact of the unknown evidence on the accused's decision to admit guilt must be assessed. If that analysis can lead to the conclusion that there was a realistic possibility that the accused would have run the risk of a trial, if he or she had

> been in possession of that information or those new avenues of investigation, leave must be given to withdraw the plea.

[37] In applying this test to the facts before the Court, he found the test had been met:

> 111 ... In the circumstances of this case, having regard to the volume, weight and relevance of the undisclosed evidence and the new possibilities that the opportunity to use that evidence would have offered, it is not unreasonable to think that an accused, armed with a more solid defence than at his first trial, at which the jury deliberations had lasted fourteen days, would have hesitated to admit his guilt or would have had more confidence about standing trial a second time.
>
> 112 Without reiterating all of the facts previously analyzed in the Taillefer case, I would just reiterate that the fresh evidence would have enabled the appellant Duguay to impeach the credibility of a number of witnesses, and undermine the plausibility of the prosecution theory. In addition, it would have opened new avenues for investigation, which could have led to the discovery of new witnesses. In this context, the Crown's breach of its duty to disclose all of the relevant evidence led to a serious infringement of the appellant's right to make full answer and defence. That breach cast doubt on the validity of the appellant's admission of guilt and the waiver of the presumption of innocence that pleading guilty involved.

[38] In the case at bar, the appellant does not frame his prayer for relief as a breach of his rights, but instead argues that he should now be permitted to withdraw his guilty plea because he was not fully informed in terms of what the sentencing court was required by law to do. In my opinion, a purely subjective test does not seem appropriate. Nonetheless, there should be at least some evidence from an appellant that had he been fully informed, he would not have pled guilty. A bald assertion by an appellant is not likely to be sufficient. There must be some objective basis to convince the Court there is a reasonable possibility that a reasonable person in those circumstances would have made a different decision.

[39] Here there is absolutely no evidence that had the appellant known of the mandatory firearms prohibition order, he would not have pled guilty. He filed two affidavits with this Court. His affidavits are silent on this point. Nor is there any evidence to suggest any reasonable possibility that a reasonable person in the circumstances of the appellant would have decided differently. There is no suggestion in the affidavits, nor was there in argument, of even a glimmer of a potential Charter motion, an affirmative defence, or any prospect of being able to raise a reasonable doubt on the charge of production of marijuana.

(Emphasis added)

…

> 66 In the present case, there is nothing to suggest on either an objective or subjective basis that the information the appellant says was unknown to him, would have made a difference in his decision to plead guilty. He has failed to show his plea was uninformed.

[45] The Applicant's pleas were informed as demonstrated on the record at the sentencing hearing before Judge Digby:

THE COURT:	President?
PAUL:	Yeah, president.
THE COURT:	Okay. Thank you. As agent for the company you understand that if you plead guilty you give up your right to a trial?
MR. PAUL:	Yeah
THE COURT:	As agent, you understand that when you give up your right to a trial you relieve the Crown of their obligation to prove their case at trial beyond a reasonable doubt?
MR. PAUL:	Yes.
THE COURT:	Has the company had sufficient time to get legal advice?
MR. PAUL:	Yes.
THE COURT:	Are you satisfied that as agent of the company you understand the charges against
MR. PAUL:	Yes.
THE COURT:	Have you been advised what sentence the Crown would be likely to seek and answer "yes' or "no
MR. PAUL:	Yes.
THE COURT:	Okay.

[46] The burden is on the Applicant to prove its guilty pleas were invalid or to prove a miscarriage of justice may have occurred. There must be some objective basis to convince the Court there is a reasonable possibility that a reasonable person in those circumstances would have made a different decision. As discussed below, the Applicant has failed to meet this burden.

[47] The Crown disclosure was provided to the Applicant in May 2017. Five months after receiving the disclosure, the Applicant entered guilty pleas. The disclosure included, *inter alia*:

1. A "Synopsis" of the case in the Investigation Report/Instructions to the Crown;
2. Mr. Geddes's report, CV, and contract documents;
3. The documents relied upon as evidence of contact between Mr. Geddes and Mr. Andrews, including the 2003 Seneca College certificate signed by Mr. Geddes;
4. The CADC guidelines—including the listing of contributors that included Mr. Geddes; and
5. The Hatch Engineering report.

[48] Based on the disclosure setting out Mr. Geddes's role and qualifications, the Court finds that the Applicant knew or ought to have known that Mr. Geddes was an expert being put forward by the Crown and that his opinion was central to the charges.

[49] Mr. Paul provided Mr. Casey with the box of Crown disclosure before they met on May 17, 2017 for legal advice in respect of the charges. Mr. Casey states that his consultation did not involve a detailed review of potential legal issues in the matter. He also says that he did not have opportunity to raise detailed issues surrounding the content of the expert's report supporting the consultation. It is interesting to note that Mr. Casey qualifies his consultations with the word "detailed" -- the Court takes from this that these matters were discussed, just not in detail.

[50] There is nothing in the evidence of Mr. Casey or Greg Paul to indicate that they did not discuss the Geddes report or industry dive standards. In fact, Mr. Casey states, "My principal concern in the meeting was passing on to Mr. Paul the fact that the regulatory nature of the charges involving complicated questions of standards, issues of due diligence in defence…" The consultation between Mr. Casey and Greg Paul may not have been detailed but I find that there was a review of potential legal issues in the matter and the Crown disclosure.

[51] The Applicant plead guilty after the consultation with Mr. Casey, Q.C.

[52] The Applicant is not raising any claims of ineffective counsel or negligence in relation to the withdrawal of the guilty pleas.

[53] To summarise:

(c) there is no evidence to suggest the guilty pleas were involuntary or equivocal;

(d) there is no evidence to suggest there were any issues with the manner in which the guilty pleas were entered;

(e) there is no evidence to suggest there were any issues of non-disclosure or any breach of the Applicant's right to disclosure affecting the validity of the guilty pleas;

(f) there is no evidence to suggest the legal advice it received from Mr. Casey was ineffective or negligent; and

(g) there is no evidence to suggest the Applicant's guilty pleas were uninformed as a result of Mr. Casey's legal advice.

In considering all the evidence, including the Crown's disclosure, *Agreed Statement of Facts* and the transcript before Judge Digby, I find that the Applicant's guilty pleas were informed.

Bias

[54] The Applicant argues that the guilty pleas amount to a miscarriage of justice because they were based on an inadmissible expert report and expert evidence intended to be led at trial. It claims the inadmissible evidence would not have founded a conviction on the counts to which the Applicant pleaded guilty.

[55] The Applicant claims that Mr. Geddes's report (a) did not demonstrate an awareness of the role and obligation of an expert witness; and (b) was inadmissible.

a) Awareness of the role of an expert

[56] The Applicant states that there is no evidence of a qualification process through which Mr. Geddes was qualified to give expert evidence in reported case authorities.

[57] This argument has no merit. Mr. Geddes previously testified as an expert on the issues of current industry practices and the training and competency of a dive crew (see *Canada (Parks)(Re)*, 2012 LNOHSTC 9). In this decision, the tribunal does not state how Mr. Geddes was qualified but the decision clearly states Mr. Geddes testified as an expert and his report was accepted into evidence (see paras. 27, 53, 54 and 60).

b) Admissibility of the report

[58] The Applicant argues that it did not appreciate that the prosecution depended on the expert opinion of Mr. Geddes and that it did not know the legal requirement of admissibility of expert opinion. Mr. Paul says these issues were not raised in his discussion with Brian Casey.

[59] The Court does not accept that the Applicant was not aware that its conviction would depend upon the expert evidence of Mr. Geddes. It is clear from the Crown disclosure and the *Agreed Statement of Facts* that the Applicant was aware that the Crown would be relying on expert evidence to prove the offence.

[60] The Applicant states that Mr. Geddes would have been disqualified as an expert witness because he was required to comment on the competency and training of individuals whom he had trained or who had participated in training he provided. Those individuals were Steve Andrews and Greg Paul. Secondly, Mr. Geddes was one of the persons who contributed to the writing of the CADC guidelines. His involvement in writing the CADC guidelines illustrates he was not impartial.

[61] The admissibility of expert evidence was recently discussed by the Ontario Court of Appeal in *R. v. Natsis*, 2018 ONCA 425. In *Natsis*, the trial judge qualified the witness to provide expert evidence, in spite of the fact that there were aspects of the witnesses' conduct that were alleged to show bias. The Court of Appeal dismissed the accused's appeal and said at para. 11:

> 11 I extract the following principles concerning the admissibility of expert evidence from *White Burgess*, at paras. 46-54:
>
> > (a) Expert witnesses have a duty to assist the court that overrides their obligation to the party calling them. If the witness is unable or unwilling to fulfill that duty, their evidence should be excluded.
> >
> > (b) An expert's attestation or testimony recognizing and accepting their duty to the court will generally suffice to meet the threshold for admissibility as it relates to bias.
> >
> > (c) The burden rests on the party opposing the admission of the evidence to show that there is a realistic concern that the expert's evidence should not be received because the expert is unable or unwilling to comply with their duty to the court.
> >
> > (d) If the opposing party establishes that there is a realistic concern, then the party proposing to call the evidence must establish that the expert is able and willing to comply with their duty to the court on a balance of

> probabilities. If this is not done the evidence, or those parts of it that are tainted by a lack of independence or impartiality should be excluded.
>
> (e) Even if the evidence satisfies the threshold admissibility inquiry, any concern about the expert's impartiality and independence is still a relevant factor in weighing the *R. v. Mohan*, [1994] 2 S.C.R. 9 factors for admissibility — such as relevance, necessity, reliability, and absence of bias. Bias remains a factor to be considered in determining whether the potential helpfulness of the evidence is outweighed by the risk of the dangers associated with that expert evidence.
>
> (f) Expert evidence will rarely be excluded for bias; anything less than clear unwillingness or inability to provide the court with fair, objective, and non-partisan evidence should not result in exclusion. Rather, bias must be taken into account in the overall weighing of the costs and benefits of receiving the evidence. Context is important. Both the extent of the expert's alleged bias and the nature of the proposed evidence are relevant.

[62] In *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, referred to in *R. v. Natsis, supra*, Justice Cromwell described the test regarding an expert's relationship with a party as follows at para. 50:

> As discussed in the English case law, the decision as to whether an expert should be permitted to give evidence despite having an interest or connection with the litigation is a matter of fact and degree. The concept of apparent bias is not relevant to the question of whether or not an expert witness will be unable or unwilling to fulfill its primary duty to the court. When looking at an expert's interest or relationship with a party, the question is not whether a reasonable observer would think that the expert is not independent. The question is whether the relationship or interest results in the expert being unable or unwilling to carry out his or her primary duty to the court to provide fair, non-partisan and objective assistance.

[63] There is no evidence before the Court that Mr. Geddes was unable or unwilling to discharge his overriding duty to the Court to provide fair-minded, unbiased and objective evidence. Actual bias must be proven to exclude an expert's testimony.

[64] The Court disagrees that Mr. Geddes had a disqualifying bias based on his previous contact, or possible contact with two employees of the Applicant: Steve Andrews and Greg Paul. Mr. Geddes may have provided some form of instruction to Steve Andrews 12 and/or 20 years before the incident. The evidence of alleged disqualifying bias regarding Mr. Andrews is as follows:

- Mr. Andrews was the Applicant's dive supervisor for the July 15, 2015, dive;
- The Applicant does not know "the details" of any training Mr. Geddes may have provided to Mr. Andrews;
- Mr. Paul's affidavit reveals that, *if* Mr. Geddes actually provided instruction to Mr. Andrews it happened sometime before 1995 and/or 2003;
- Any contact between Mr. Andrews and Mr. Geddes occurred long before Mr. Andrews worked for the Applicant.

[65] The Court finds no merit in the Applicant's position that Mr. Geddes has a disqualifying bias based on training with Steve Andrews that occurred in 1995 and/or 2003, 12 years before the incident. The Applicant must prove *actual* bias as outlined in *White Burgess* and *Natsis*.

[66] The evidence of contact between Mr. Geddes and Greg Paul allegedly resulting in a disqualifying bias is even less persuasive. The evidence is as follows:

- Greg Paul is the Applicant's president;
- Mr. Paul was not in the province on July 15, 2015, and not involved in the dive that resulted in Luke Seabrook's death;
- While Mr. Paul created the form used in the dive, he was not involved in its use in relation to the July 15, 2015, dive;
- Mr. Geddes's only contact with Mr. Paul is that he taught him a 3-day course in 2008, 7 years prior to the incident;
- Mr. Paul attended the 3-day course when he was an employee of a different dive company;
- Mr. Paul only kept 8 pages of a 10-page document called "Basics of Commercial Diving" from the course (pages 5 and 7 are missing). There is no evidence as to what use, if any, was ever made of this incomplete document;
- Mr. Paul did not tell Brian Casey that he had attended the 3-day course, or that Mr. Geddes may have trained Mr. Andrews;
- Mr. Paul does not explain when he first realized he had attended the 3-day course, or that Mr. Geddes may have trained Mr. Andrews;
- Mr. Paul does not explain what impact, if any, Mr. Geddes's role in training Mr. Paul, and possibly training Mr. Andrews, had on the Applicant decision to plead guilty.

[67] The Applicant suggests the evidence regarding Greg Paul and the 3-day course disqualifies Mr. Geddes as an expert witness. The Court finds no merit in the argument that Mr. Geddes has a disqualifying bias based on a 3-day course taught to Mr. Paul seven years prior to the incident.

CADC Guidelines

[68] The final disqualifying bias raised by the Applicant is that Mr. Geddes's use of the CADC guidelines would have disqualified him as an expert witness because he contributed to their creation. This evidence does not support such a conclusion.

[69] The Court finds no merit in the suggestion that Mr. Geddes's use of the CADC guidelines somehow disqualified him as an expert witness or rendered his opinion inadmissible.

[70] The evidence before the Court demonstrates that the Applicant was informed regarding the CADC guidelines, including their use as industry standards in the investigation and their use as part of the Crown's disclosure on which the guilty pleas were based.

Rule in Browne v. Dunn

[71] The Rule is based on trial fairness. The Applicant argued that the affidavit of Greg Paul should be accepted in its entirety because of the failure of the Crown to cross-examine on the affidavit. A witness should be confronted on matters of substance upon which a party seeks to impeach his or her credibility. It is not necessary to address every detail upon which a witness's testimony differs (see *R. v. Giroux*, (2006), 207 C.C.C. 3d 512 (ONCA)).

[72] I agree with Crown counsel that it was not incumbent upon the Crown to cross-examine Mr. Paul on his affidavit because there are many parts of the affidavit which support the Crown's position that the guilty pleas were informed. Even if I were to find that a breach of the rule had occurred, there is sufficient evidence within Mr. Paul's affidavit and the other affidavits before me to demonstrate that guilty pleas were informed. For instance, Mr. Paul does not deny providing the Crown disclosure to legal counsel nor meeting to discuss the case with counsel. Mr. Paul does not deny reviewing the disclosure prior to entering his guilty pleas nor does he refute that he signed the *Agreed Statement of Facts*.

There is also the transcript before Judge Digby which demonstrates that the guilty pleas were informed.

Conclusion

[73] I am not satisfied that the Applicant has a reasonable excuse for the delay in pursuing an appeal. The Applicant has not shown that "exceptional circumstances" or the interests of justice warrant an extension of time to appeal.

[74] The Applicant’s motion to extend the time to file a notice of appeal is dismissed. As a result of this finding, there is no need to address the Applicant’s motion to admit fresh evidence on the appeal.

Bodurtha, J.