NOVA SCOTIA COURT OF APPEAL

Citation: ***R. v. West***, 2010 NSCA 16

Date: 20100225
Docket: CAC 280638
Registry: Halifax

Between:

William Fenwick West
Appellant

v.

Her Majesty the Queen
Respondent

- and -

Malcolm Jeffcock, Q.C.
Intervenor

Judge: The Court

Appeal Heard: November 17, 18 and 19, 2009

Subject: **Bank Robbery. DNA. Fresh Evidence. Alleged Errors in Pre-Trial and Trial Rulings. Ineffective Counsel. Unreasonable Verdict.**

Summary: The self-represented appellant appealed his conviction by judge and jury on various charges stemming from an armed robbery in May 1998. He also sought leave to introduce fresh evidence. The many grounds and ancillary complaints listed by the appellant are particularized in the Index.

Held: But for the limited exception of certain materials, the appellant's application to admit fresh evidence is dismissed. The appeal is dismissed.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 106 pages.

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Intervenor

Judges:	Saunders, Fichaud and Beveridge, JJ.A.
Appeal Heard:	November 17, 18 and 19, 2009, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of the Court.
Counsel:	Appellant in person Mark Scott, for the respondent Michael J. Wood, Q.C. and David Curry, Articled Clerk for the Intervenor

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Decision:

I. Overview

[1] William Fenwick West is serving time in a Federal penitentiary following his conviction for two armed bank robberies resulting in consecutive sentences totalling 18 years imprisonment.

[2] This appeal concerns the robbery of the Bass River Credit Union on May 26, 1998. While Mr. West represented himself at trial and on appeal, he sought and obtained legal advice from several lawyers during the course of these proceedings. In fact, one of his grounds of appeal alleges ineffective counsel by a lawyer who once represented Mr. West but who severed that relationship 15 months prior to trial.

[3] Although unrepresented, Mr. West is hardly a naïf as far as legal proceedings are concerned. The number of applications taken by the appellant prior to trial, during trial, and leading up to this appeal make it clear that the appellant is conversant with procedure and neither slowed nor intimidated by legal process.

[4] The quantity of paper produced by the appellant (which fills several transit boxes), together with the myriad grounds of appeal necessitated case management of the appeal, several telephone and in-person conferences preceding the appeal, and an almost unprecedented three day appeal hearing. The first day of the hearing was taken up with cross-examination of several affiants whose affidavits were filed in relation to Mr. West's fresh evidence application. We heard evidence from the appellant himself, two lawyers who once acted for him, and the RCMP officer who led the investigation into the appellant's claim of alibi with respect to the Bass River robbery.

[5] The materials and submissions put forward by the appellant disclose two principal objectives: first, to persuade this Court to take a "fresh" look at the case from every conceivable angle; and second, to cast blame on other individuals who bear any connection, however slight, to the case.

[6] In our opinion the appeal should be dismissed. The materials relied upon by the appellant are largely irrelevant or otherwise inadmissible. We are satisfied that there is no basis for us to disturb the jury's verdict.

II. Introduction

[7] The appellant, who represented his own interests both at trial and on appeal, has appealed to this Court following his conviction by judge and jury on various charges stemming from the armed robbery of the Bass River Credit Union on May 26th, 1998.

[8] Incidental to the appeal on the merits, Mr. West also launched an application for leave to adduce fresh evidence. Given the host of issues and complaints raised by the appellant, four days were set aside for the entire hearing, including a day to hear *viva voce* testimony from several witnesses who were questioned on the contents of affidavits they had filed related to these proceedings, as directed by the Court. The panel also conducted a hearing on September 15, 2009 to consider the submissions of the appellant, the Crown, and the Intervenor on the question of whether Mr. West had waived solicitor-client privilege. Our decision that he had is reported at 2009 NSCA 94.

[9] In light of the unusual nature of these proceedings and the variety of issues which have been placed before the Court for determination, an index is included with these reasons, for ease of reference.

[10] The analysis will track this Court's distillation of the issues, as restated and reorganized by topic.

[11] For the reasons that follow and as explained in [58] *infra.*, we would provisionally admit certain evidence as fresh evidence but only to the extent described, and we would dismiss the appeal.

[12] Before addressing the issues raised by the appellant in this appeal we will offer a brief review of the circumstances surrounding this robbery, and the proceedings which ensued as a result. Further detail will be provided, as required, when the various topics are addressed in the Analysis segment of this decision.

III. Background

[13] On May 26, 1998, the Bass River Credit Union in Bass River, Nova Scotia, was robbed. Mr. Billy McKinnon, the employee responsible for opening the bank that day was greeted by a man wearing a disguise and armed with a handgun. The robber had entered through a hole cut out of the rear of the Credit Union building. The hole allowed entry into a bank office which was not hooked up to the alarm system. MacKinnon was directed to turn off the alarm system. A second bank employee, Ms. Theresa Francis arrived a short time later. The two employees were forced to open the vault. They were then tied up with duct tape. The robber escaped through the hole with more than $26,000.

[14] The appellant was originally charged for this crime and related offences, on September 29, 1999. However, the charges were withdrawn by the Crown during the scheduled preliminary inquiry on October 4, 2000. Following further investigation, Mr. West was re-charged on December 2, 2002, for this, the "Bass River robbery". Mr. West was committed to stand trial following a preliminary inquiry in December, 2003. After a number of adjournments requested by the appellant, his trial was heard at Truro in January-February, 2007. A variety of pre-trial motions were first considered, and the trial proper before a jury began on February 6, 2007. On February 20, 2007, the jury began its deliberations shortly before noon. Following one question from the jury with respect to reasonable doubt, the jury returned late that afternoon and convicted Mr. West on all counts.

[15] On April 25, 2007, the trial judge, Mr. Justice Kevin Coady of the Nova Scotia Supreme Court sentenced Mr. West to a term of imprisonment of eight years.

[16] The evidence at trial established that following the robbery, police investigation revealed numerous sightings of a suspicious blue (or lavender or purple) coloured Dodge Neon car in the area, both on the day of the robbery and in the time period surrounding the incident. In fact, the appellant and his son Jonathan Gee, were detained in a similar car at approximately 4:00 p.m. on May 26, 1998 in Amherst, Nova Scotia. The car appeared clean, and no evidence linking Mr. West to the robbery was obtained as a result of that stop by the police.

[17] The Crown's theory was that Mr. West, with or without the assistance of someone else, managed to cut a hole in the back wall of the bank, leaving enough

room to crawl in without setting off the alarm, and wait there until the bank employees arrived to open the vault, thereby enabling him to make off with the stolen cash.

[18] The best circumstantial evidence, and the primary focus of the Crown's case, consisted of two blood smears left on the bottom of a filing cabinet beside the hole in the wall where the perpetrator entered and exited the bank. Swabs of the blood smears were eventually matched to the DNA of the appellant after his conviction for another bank robbery, known as the "Mahone Bay robbery". That conviction led to a court order that he provide bodily substances for the purpose of development of a DNA profile for deposit in the national DNA data bank. It was this sample that provided a match to the DNA profile from the Bass River robbery blood sample. This in turn led to a DNA warrant to obtain a sample of the appellant's blood. The warrant was duly executed on June 5, 2002, and the DNA from this sample was found to match the DNA found inside the Credit Union.

[19] This evidence established the necessary connection linking Mr. West to the Bass River robbery, and led to his arrest and conviction on the charges which concern the present appeal.

[20] More than 4½ years <u>after</u> the Bass River robbery, Malcolm Jeffcock, Q.C. of Nova Scotia Legal Aid agreed to act as the appellant's defence counsel. Mr. Jeffcock was not the first lawyer engaged by Mr. West to defend him against these charges.

[21] For reasons which will be described in more detail later in this decision, Mr. Jeffcock resigned as Mr. West's trial lawyer some 15 months <u>before</u> his trial commenced in early 2007.

[22] The appellant's Notice of Appeal sets out fourteen grounds of appeal. Thirteen are substantive in nature, the last a reference to any other grounds that he may glean from the trial transcript. In his 203 page factum, Mr. West lists eleven separate matters that he describes as being raised in the appeal pursuant to the "Amended Notice of Appeal", and his factum addresses each in turn. The respondent did likewise. There is no record of the appellant ever having filed an amended notice of appeal. In any event, there is considerable overlap between the matters identified in the Notice of Appeal and those addressed in his factum. The

usual rule is that an appellant is limited to those issues raised in the Notice of Appeal. In the circumstances of this case (including the fact that it is a criminal appeal, a self-represented litigant, there is substantial overlap, the Crown has responded to each of the grounds, and the grounds relate to issues of law) we consider it appropriate to address the grounds not raised in the Notice of Appeal. Accordingly, each of the matters the appellant has addressed in his factum will be considered. In addition, Mr. West seeks our leave to introduce fresh evidence. This aspect of the appeal will be considered as a separate topic in the Analysis section of this decision. Finally, it should be noted that none of the pre-trial or trial rulings by Justice Coady or Justice J.E. (Ted) Scanlan, which are challenged on appeal, has been reported.

IV. Issues

[23] We will now address the issues in the manner and sequence described in the Index we have prepared.

[24] As several of these issues invoke a different standard of review analysis, where necessary, the appropriate standard will be identified and discussed under each discrete subject.

V. Analysis

Fresh Evidence Application

[25] Mr. West applies to add fresh evidence in the Court of Appeal. His submitted fresh evidence includes the following:

> (a) many statements, authored by himself, of his version of the events. These are in the form of his letters to the Crown, to police officers, to his counsel, and unaddressed written statements or commentary on other evidence. Effectively this is the direct evidence that Mr. West would have given at trial had he testified.
>
> (b) copies of notes from police files of the police investigation, notes of interviews, transcripts of statements to police, correspondence to or from the Crown and police, and transcripts of earlier proceedings in this prosecution.

These often accompany Mr. West's notes alleging inadequate police investigation or a failure to disclose.

(c) photos of "Neon" Dodge vehicles and descriptive material about Neon cars.

(d) material in support of his ground of appeal that his lawyer was incompetent.

[26] Furthermore he says that certain witnesses should have been called to testify at the trial. With one possible exception, to be discussed later, he has not submitted a statement from any of these witnesses.

[27] In the Court of Appeal, during the fresh evidence application, Mr. West was cross examined and his two former counsel, Messrs. Manning and Jeffcock, testified. Messrs. Manning and Jeffcock submitted affidavits . Mr. West filed affidavits responding to those of Messrs. Manning and Jeffcock. The Crown submitted affidavits of Cst. Gordon Hynes, Cpl. Derek Smith and Crown Attorney Diane McGrath respecting aspects of Mr. West's tendered fresh evidence.

[28] Section 683(1) of the **Criminal Code** permits the Court of Appeal, "where it considers it in the interests of justice", to allow the introduction of fresh evidence. In **R. v. Wolkins**, 2005 NSCA 2, Cromwell J.A. (as he then was) reviewed the applicable principles:

> [57] Both the SCAC and this Court have a wide discretion to admit new evidence on appeal where it is in the interests of justice: **Criminal Code**, s. 683(1). Case law has structured the exercise of this discretion in the various contexts in which new evidence may be advanced.
>
> [58] Fresh evidence tends to be of two main types: first, evidence directed to an issue decided at trial; and second, evidence directed to other matters that go to the regularity of the process or to a request for an original remedy in the appellate court. The legal rules differ somewhat according to the type of fresh evidence to be adduced. Mr. Wolkins advances evidence of both types.

[59] Fresh evidence on appeal which is directed to issues decided at trial generally must meet the so-called **Palmer** test. A key component of that test requires that the proposed fresh evidence could not have been available with due diligence at trial: **R. v. Palmer**, [1980] 1 S.C.R. 759 at 775. This rule makes it clear that the place for the parties to present their evidence is the trial. If evidence that with due diligence could have been called at trial were admitted routinely on appeal, finality would be lost and there would be less incentive on the parties to put forward their best case at trial. The rule requiring due diligence at trial is therefore important because it helps to ensure finality and order, two features which are essential to the integrity of the criminal process: **R. v. G.D.B.**, [2000] 1 S.C.R. 520 at para. 19. In that paragraph of **G.D.B.**, the Supreme Court adopted these words of Doherty, J.A. in **R. v. M.(P.S.)** (1992), 77 C.C.C. (3d) 402 at 411:

> While the failure to exercise due diligence is not determinative, it cannot be ignored in deciding whether to admit "fresh" evidence. The interests of justice referred to in s. 683 of the *Criminal Code* encompass not only an accused's interest in having his or her guilt determined upon all of the available evidence, but also the integrity of the criminal process. Finality and order are essential to that integrity. The criminal justice system is arranged so that the trial will provide the opportunity to the parties to present their respective cases and the appeal will provide the opportunity to challenge the correctness of what happened at the trial. Section 683(1)(*d*) of the *Code* recognizes that the appellate function can be expanded in exceptional cases, but it cannot be that the appellate process should be used routinely to augment the trial record. Were it otherwise, the finality of the trial process would be lost and cases would be retried on appeal whenever more evidence was secured by a party prior to the hearing of the appeal. For this reason, the exceptional nature of the admission of "fresh" evidence on appeal has been stressed: *McMartin v. The Queen*, *supra*, at p. 148.
>
> The due diligence criterion is designed to preserve the integrity of the process and it must be accorded due weight in assessing the admissibility of "fresh" evidence on appeal.
>
> In my view, these considerations are equally relevant in the context of an appeal from sentence. Accordingly, due diligence in producing fresh evidence is a factor that must be taken into account in an appeal from sentence, on the same basis as the other three criteria set out in *Palmer*.

> [60] But finality and order, important as they are, must give way in the interests of justice. Accordingly, the due diligence criteria is not applied inflexibly and yields where its application might lead to a miscarriage of justice: **R. v. G.D.B., supra** at paras. 17 - 21; **R. v. Lévesque**, **supra** at para. 15. The due diligence requirement is one factor to be considered in the "totality of circumstances": **G.D.B.** at para. 19. In considering whether the due diligence requirement has been met, the appellate court should determine the reason why the evidence was not available or was not used: **G.D.B.** at para. 20. The absence of an explanation or the fact that the failure to call the evidence was a deliberate tactical choice will weigh against its admission: **R. v. Warsing**, [1998] 3 S.C.R. 579 at para. 51.
>
> [61] The other category of fresh evidence concerns evidence directed to the validity of the trial process itself or to obtaining an original remedy in the appellate court. In these sorts of cases, the **Palmer** test cannot be applied and the admissibility of the evidence depends on the nature of the issue raised. For example, where it is alleged on appeal that there has been a failure of disclosure by the Crown, the focus is on whether the new evidence shows that the failure may have compromised trial fairness: see **R. v. Taillefer; R. v. Duguay**, [2003] 3 S.C.R. 307 at paras. 73 - 77. Where the appellant seeks an original remedy on appeal, such as a stay based on abuse of process, the evidence must be credible and sufficient, if uncontradicted, to justify the appellate court making the order sought: see e.g. **United States of America v. Shulman**, [2001] 1 S.C.R. 616 at paras. 43 - 46. Where the appellant alleges that his trial counsel was incompetent, the fresh evidence will be received where it shows that counsel's conduct fell below the standard of reasonable professional judgment and a miscarriage of justice resulted: see **R. v. G.D.B., supra**.

To the same effect: **R. v. Assoun**, 2006 NSCA 47 at ¶ 297, leave to appeal ref'd [2006] S.C.C.A. No. 233; **R. v. Jones**, 2006 NSCA 136, at ¶ 14.

[29] As noted in **Wolkins**, ¶ 58, fresh evidence may be directed either to an issue decided at trial or to the regularity of the trial process. Mr. West's application invokes both aspects of **Wolkins**' principles. He tenders fresh evidence to challenge both (a) the jury's guilty verdict and the trial judge's findings on interlocutory rulings and (b) the fairness of his trial. We will discuss the two aspects in turn.

(a) Challenge to Jury's Verdict and Trial Judge's Findings

[30] In **R. v. Palmer**, [1980] 1 S.C.R. 759, at p. 775, the Supreme Court said that the "interests of justice" in s. 683(1)(d) are governed by four factors:

(1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases. ...

(2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.

(3) The evidence must be credible in the sense that it is reasonably capable of belief, and,

(4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[31] In **R. v. Angelillo**, [2006] 2 S.C.R. 728 Justice Charron for the plurality discussed **Palmer**'s principles:

> 3 As was the case in the Court of Appeal, the main issue in this appeal relates to the admissibility of the fresh evidence. The rules governing admissibility are the same in this Court, and they are well known. The Court of Appeal had to determine pursuant to s. 687(1) of the *Criminal Code*, R.S.C. 1985, c. C-46 (*"Cr. C.*"), whether it was appropriate to require or receive additional evidence. According to the rules laid down in *Palmer v. The Queen*, [1980] 1 S.C.R. 759, and applied in *R. v. Lévesque*, [2000] 2 S.C.R. 487, 2000 SCC 47, an appellate court should not generally admit evidence if, by due diligence, it could have been adduced at trial – although this general principle is not to be applied as strictly in a criminal case as in civil cases – and should only admit evidence that is relevant and credible and that could reasonably be expected to have affected the result had it been adduced at trial together with the other evidence.

. . .

> 13 In *Lévesque*, at para. 35, this Court adapted to an appeal against sentence the four criteria set out in Palmer for determining whether it is in the interests of justice to admit fresh evidence on an appeal from a verdict:
>
> > (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases.
> >
> > (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue relating to the sentence.
> >
> > (3) The evidence must be credible in the sense that it is reasonably capable of belief.
> >
> > (4) The evidence must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.
>
> . . .
>
> 15 In accordance with the last three of the *Palmer* criteria, an appellate court can therefore admit evidence only if it is relevant and credible and if it could reasonably be expected to have affected the result had it been adduced at trial together with the other evidence. With respect to the first criterion, this Court has stated a number of times that failure to meet the due diligence criterion should not be used to refuse to admit fresh evidence on appeal if the evidence is compelling and if it is in the interests of justice to admit it (*Lévesque*, at para. 15; *R. v. Warsing*, [1998] 3 S.C.R. 579, at para. 51). The fact remains that this criterion is an important one whose specific purpose is to protect the interests and the administration of justice and to preserve the role of the appellate court (*Lévesque,* at para. 30, citing *R. v. M. (P.S.)* (1992), 77 C.C.C. (3d) 402 (Ont. C.A.), at p. 410).

[32] As noted in **Angelillo**, **Palmer**'s first factor, due diligence, may be relaxed "if the evidence is compelling and if it is in the interests of justice to admit it". Whether there should be relaxation involves a context sensitive analysis of cogency,

as exemplified by Justice Doherty's analysis in **R. v. Maciel**, 2007 ONCA 196, at ¶ 36-55, leave to appeal denied [2007] SCCA No. 258. See also **Jones**, ¶ 20-23.

[33] **Palmer**'s second, third and fourth factors are a continuum that governs the cogency analysis. The court asks whether the fresh evidence (i) bears on a potentially decisive issue, (ii) is reasonably capable of belief, and (iii) is sufficiently probative that, with the other evidence adduced at trial, it could reasonably be expected to have affected the result. **R. v. Smith; R. v. James**, 2007 NSCA 19, at ¶ 73-83, affirmed [2009] 1 S.C.R. 146; **R. v. Fitzpatrick**, 2006 NSCA 65, at ¶ 11; **Truscott (Re)**, 2007 ONCA 575, at ¶ 98-100; **Maciel**, ¶ 44-55; **R. v. Chalmers**, 2009 ONCA 268, at ¶ 93-105; **R. v. Phillion**, 2009 ONCA 202, at ¶ 164-199, 239, 246; **R. v. Ross**, 2009 ONCA 149, at ¶ 18-19; **R. v. Johnson**, 2009 ONCA 668, at ¶ 28-30.

[34] The fresh evidence could only affect the result, under **Palmer**'s fourth factor, if it is admissible under the usual rules of evidence that govern criminal proceedings. Section 683(1) does not dispense with the law of evidence. In **R. v. O'Brien**, [1978] 1 S.C.R. 591, Justice Dickson said at p. 602:

> Section 610 of the *Criminal Code* lends no assistance to respondent's case. It is a prerequisite that any evidence sought to be adduced under the discretion granted by that section be admissible evidence. The section manifestly does not authorize a Court of Appeal to dispense with the law of hearsay evidence. If that were so we would have the anomalous situation in which counsel could seek to adduce on appeal that which the common law prohibits at trial. The section is not operative until the threshold for admissibility as defined by common law and statute is crossed. That threshold has not been crossed in the instant case.

Similarly, in **R. v. Dell**, [2005] O.J. No. 863 (OCA), at ¶ 85, Justice Sharpe said:

> 85 Most of the material in the Crown brief relied upon by the appellant is unsworn, inadmissible hearsay. The appellant submits that Keyes' sworn videotaped statement is not hearsay. I disagree. That statement was given at another time for another purpose; indeed, it was given when Keyes was the subject of an investigation for conspiracy to murder Kim Knott. It is not evidence sworn for the purpose of this appeal. Requiring an affidavit sworn in the particular proceeding offering first hand evidence is not a mere formality. It appropriately directs the mind of the witness to the precise reason for which the evidence is

> offered and provides a means whereby the responding party can test the evidence by way of cross-examination. A statement given under oath at another time and for another reason does not satisfy these important safeguards.

To similar effect: **Assoun**, ¶ 301; **R. v. Laffin**, 2009 NSCA 19, ¶ 29-33; **R. v. Kelly**, [1999] N.B.J. No. 98 (C.A.), at ¶ 71; **Chalmers**, at ¶ 69, 77-78, 86; **Truscott**, at ¶ 92-93, 95, 98; **Phillion**, at ¶ 162.

[35] We will apply these principles to Mr. West's application.

[36] We note initially that several categories of Mr. West's fresh evidence application collaterally attack rulings of the trial judge. These include some of Mr. West's requests respecting photographs of Neon vehicles, police officers' notes and e-mail, and suggestions of third party suspects. Some of these items were the subject of evidential motions before or at the trial where the trial judge found that Mr. West's requests had no merit. An appellate challenge to such adverse determinations should be framed as a ground of appeal from the trial judge's evidential rulings, not as a resubmission of the same evidence to the Court of Appeal under s. 683(1). Mr. West's grounds of appeal respecting the trial judge's rulings are considered later in these reasons. As will be discussed, but for an occasional harmless mistake, Mr. West has failed to show any serious error in the trial judge's rulings. The "fresh evidence" issue in the Court of Appeal is whether there is new evidence that satisfies **Palmer**'s criteria. Section 683(1) does not contemplate a mere replay of an evidential motion that was made unsuccessfully to the trial judge.

[37] The evidence that Mr. West offers under s. 683(1) was available at the trial. His commentary embodied in his numerous letters and memoranda, offered as fresh evidence, could have been the subject of his direct testimony. After obtaining legal advice, he chose not to testify. As discussed later, we dismiss Mr. West's ground of appeal that the trial judge improperly induced him not to testify. The tendered material from police files was either (1) available to him at or before trial, or (2) excluded by the trial judge's rulings that are not overturned on appeal, or (3) irrelevant. Mr. West could have subpoenaed available proposed witnesses who might have given relevant and admissible evidence. This is not a case where, after the trial, potentially decisive new evidence has surfaced.

[38] The decisive evidence in Mr. West's trial was two blood smears found on a filing cabinet next to the wall opening where the perpetrator had entered the Credit Union building. The DNA from the blood was matched to Mr. West's DNA. This DNA evidence was the focus of the Crown's case. Without it, there was little to connect Mr. West to the crime. With it, the jury convicted. The outcome turned on the DNA evidence.

[39] Under the cogency analysis from **Palmer**'s second, third and fourth factors, this Court should ask whether there is fresh evidence that is reasonably capable of belief and is sufficiently probative, with the other evidence adduced at trial, that could reasonably be expected to have affected the result. In the circumstances here, this means evidence related to Mr. West's DNA on the filing cabinet. With one possible exception, that we will discuss next, nothing in Mr. West's proposed fresh evidence bears on how his DNA arrived at the crime scene on May 26, 1998.

[40] Mr. West submits, as fresh evidence, an unsworn handwritten statement, bearing the supposed signature "Chris Comeau December 6, 1998". The statement, addressed to "Bill", says that, on May 23, 1998, three days before the robbery, "Chris Comeau" was driving with Mr. West in the Bass River area, and:

> "We stopped at one place that was by a big building but it wasn't open either. You drove around the back and went into the woods for a dump. You went over to some little shed like thing behind the big building. I can't remember why you said you did that. I was at the truck and had a smoke. You don't let people smoke in your truck so you told me. I heard you cursing and you come back with toilet paper hanging out your nose. You said you fell over something and hit your nose on something . You thought you broke it."

Mr. West says that Chris Comeau's evidence, accompanied by Mr. West's own testimony, would show that, three days before the robbery, Mr. West bled in the vicinity of the Bass River Credit Union, and the perpetrator must have tracked Mr. West's blood into the Credit Union, and smeared it onto the filing cabinet, during the robbery three days later on May 26.

[41] The Crown submits that this proposed evidence is not reasonably capable of belief under **Palmer**'s third factor.

[42] Some context is useful here.

[43] On August 16, 2006, Mr. West prepared a written Alibi Statement and sent it to the Crown Attorney at the Public Prosecution Centre. His statement said that, on May 23, 1998, he spent the day with "a friend of mine, Chris Harvie, of Randell Road in Kentville". Mr. West's statement said:

> 63...That we both had to use the washroom for which there was none at hand
>
> 64...That I pulled up by a dumpster at the end of the side driveway that connected onto a dirt road behind the restaurant and Chris had a pee by the truck
>
> 65...That I went across the road into the woods to have a "dump" and I had tissue in my rear pocket, as I usually do when I know I am going on a trip
>
> 66...**THAT UPON EXITING** the wooded area, I noted a "small lean-to-type shed at the rear corner of the long building on my left.
>
> 67...**THAT I BELIEVED THIS BUILDING COULD BE A PUMP HOUSE**
>
> 68...That I told Chris that I would be back in a minute and proceeded to go over and have a look at the shed
>
> 69...That the shed had a door with a metal handle and it was not locked
>
> 70...That I opened the door and went inside and the room was bare but I noticed a wooden door type entry on the left wall with a handle
>
> 71...That I opened the door and knelt down and peered into the darkened recess and that I could not make out anything

NOTE: [see attached diagram "**A**"]

72...That I got back up, closed the inside floor door and exited and closed the outer door

73...**THAT AS I TURNED TO LEAVE I TRIPPED OVER SOME OBSTRUCTION ON THE GROUND IN THE AREA OF THE SHED DOOR**

74...That this occurred because of my coming out of a darkened area back into daylight and my eyes had not as yet finished adjusting

75...**THAT I HIT MY NOSE** on a piece of the debrie [*sic*] on the ground [I cannot say what it was]

76...**THAT THE BANG CAUSED MY NOSE TO BLEED**

77... That I stood by the left rear side of the shed and leaned forward allowing my nose to bleed as I tried to get the remaining tissue out of my left rear pocket

78...That upon obtaining the tissue I made a couple rolled pieces and stuck one in each nostril, and used part to wipe any blood off of my hands

79...That when I returned to the truck Chris made fun of me and asked what had happened as I looked like a baby walrus

80...That I leaned back in my truck seat for a spell, then removed the tissue and all was well

81...That I looked in my mirror and wiped my face and then put the tissue into the dumpster

> 82...**<u>THAT THE REASON WHY I WENT OVER TO THE SHED WAS</u>** because when I worked on the farm in my younger years, the farm had pump houses in the orchards from which I drew water to fill the sprayer tanks
> (Emphasis in original)

Mr. West made no mention of Chris Comeau in his Alibi Statement, or to authorities, or in proceedings before or at his trial.

[44] Police Cst. Hynes interviewed Mr. Chris Harvey (the surname's proper spelling) of Randell Road, Kentville, and took an audio taped statement from Mr. Harvey on January 30, 2007. Mr. Harvey's transcript says:

> HYNES: Chris, I'm here to see you about, ah, William Fenwick West regarding a trip you and he supposedly took down to Bass River, Advocate area. Can you tell me about that?
>
> HARVEY: Yea. In September, Mr. West came to my house with an article about some driftwood and it was in the Advocate Shore area. I don't know exactly what it was called or where it was but it was up in that area somewhere and he said that he wanted, asked if I would like to go up. He wanted to get some information and maybe some evidence on an upcoming case and I wanted to go up and check out this place about the driftwood. My wife makes things out of driftwood. Well, we left here, I guess it was around eight o'clock, ten to eight or something like that on a Saturday morning. It was September of 2001. We got in my, he came here and we went to my parents house and borrowed their truck. He left his truck here. I took my van to their house. We left there and headed down the 101 and went through the Rawdon Hills and up through to Parrsboro. Our first stop, I believe, was at Diligent River, I think, it's a place where my grandmother used to have her cottage. There's an old wharf there and you can look right straight across and see Cape Split. We then left and went farther down shore towards Spencers Island and, finally, down as far as Advocate and checked out the Lighthouse. On the way back, there was a little strip mall and we stopped in there but everything was closed and that was where the

Bank was that Bill thought they might be giving him charges on. He said he wanted to take some pictures. He got out and walked around and took some pictures and I stayed by the truck and had a piss and a smoke. I was not allowed to smoke in my father's truck so I sat out by the front of the hood of it, by a dumpster, sat there and had my cigarette and Bill wandered around taking pictures and we both used the bathroom. Left there and headed back to Truro and got something to eat and then basically came home. We stayed here and chatted for about probably fifteen or twenty minutes. Bill got in his truck and went home. I never thought no more about it until a few years later. He came to me and asked me if I would recall a trip and I said I did recall the trip and he said it was in '98 and he wrote me up a statement that he wanted me to sign and basically fill out, saying that it was in '98 but the trip was in 2001 and my parents have it written down in a diary and, basically, that's about all I got to say.

HYNES: OK, ah, how can you be sure it was in 2001?

HARVEY: Well, my wife sat here for the day when I was gone with people that lived downstairs and, at the time, it was in 2001. In '98 there was no apartment downstairs so there wouldn't have been nobody to hang out with. I borrowed my mother and father's truck which they remember when it was and my mother wrote it down in her personal diary when we took and when we returned home, which was around twelve o'clock that evening. She, my father went to sleep, my mother stayed up waiting for us to get home.

HYNES: OK, ah, and is that the only time you were up there with him?

HARVEY: Yes. I've been to that area twice in the last twenty years. Once was in the, it would have been in the late '80's and once in 2001.

HYNES: Now do you know if he's ever been up there before?

HARVEY: No I don't know that.

HYNES: So he didn't say that he was or not?

HARVEY: No. He said he, yes he did. He said he hadn't been up there in a long, long time.

HYNES: OK. Anything else you can tell me, Chris?

HARVEY: Not really. I don't know. Like I said, that was in 2001 and it was no way it was in '98.

HYNES: Ah, did he ask you to do anything else for him?

HARVEY: No. Just write out that, that, ah statement saying that we were there and took the trip and that we took it in '98 and I told him there was no way I could lie, that my mother had, that my mother and friends all knew what day we went and it would be too easy for me to get caught with perjury charges.

HYNES: And, ah, ah, can you tell me about the story he wanted you to write out?

HARVEY: Basically, it was exact same, almost exact same thing we did that day, just a different year.

HYNES: But now, did he tell you what to recall or?

HARVEY: He wrote down some things on a paper saying what we did that and it was pretty close but it was just three years difference. Me and my wife both told him that we would not do this and I was not gonna

> lie for him, I couldn’t lie. I basically told him I did not want to get involved.

On January 31, 2007, Cst. Hynes disclosed this transcript to Mr. West.

[45] Mr. Harvey’s transcript says that the only trip to Bass River was in September 2001 and, a few years after that, Mr. West gave Mr. Harvey a statement for Mr. Harvey to adopt. Mr. Harvey gave Cst. Hynes the written statement that Mr. West had provided to Mr. Harvey. The written statement recites basically the same version of events for May 23, 1998, as appears in the "Chris Comeau" statement quoted above (¶ 40). The only significant difference is that Mr. West's supposed companion was “Chris Harvie”, instead of Mr. Comeau. At the bottom is the supposed signature "Christopher Harvie September 20, 1998".

[46] At the hearing in the Court of Appeal, Mr. West acknowledged that he had written the "Chris Harvie" statement and had also handwritten the supposed signature "Chris Harvie September 20, 1998" at the bottom. Mr. West had misspelled "Harvey" as "Harvie".

[47] At the hearing in the Court of Appeal, Mr. West admitted Mr. Harvey did not accompany Mr. West to Bass River in September 1998. In short, Mr. West prepared a statement for Mr. Harvey, with a forged signature, saying that, on May 23, 1998, Mr. Harvey had accompanied Mr. West and Mr. West had bled outside the Bass River Credit Union building.

[48] Mr. Harvey did not testify at the trial. At no time before or during the trial did Mr. West mention "Chris Comeau" to anyone.

[49] After his conviction, Mr. West for the first time produced the document quoted above (¶ 40), ostensibly signed by "Chris Comeau" on "December 6, 1998". It is unsworn. Nobody, neither the police nor Mr. West, has been able to locate a "Chris Comeau". There is no evidence that "Chris Comeau" ever existed, that he was with Mr. West on May 23, 1998, or that the handwriting and signature are his.

[50] On the fresh evidence application in the Court of Appeal, Mr. West said that he has possessed the "Chris Comeau" statement continuously since "Chris Comeau" signed it on December 6, 1998. So he would have had it when he asked Mr. Harvey to sign a false statement that Mr. Harvey had been with Mr. West on May 23, 1998;

when he gave the Crown the Alibi Statement that he was with Mr. Harvey on May 23; and when he attended throughout his trial. Yet he did not mention "Chris Comeau" until after his conviction.

[51] In the circumstances, we are satisfied that the “Chris Comeau” statement is not reasonably capable of belief. Further, the proposed evidence is unsworn by “Chris Comeau” and inadmissible. For either reason, we reject the “Chris Comeau” statement as fresh evidence.

[52] We dismiss Mr. West's application to adduce fresh evidence that relates to the jury's verdict or to the trial judge's rulings.

(b) Trial Fairness and Miscarriage of Justice

[53] As noted in **Wolkins**, (¶ 61, above ¶ 28), in an appellate challenge to trial fairness, as opposed to an attack on the correctness of the verdict or of a trial judge's finding, the appellant seeks an original remedy in the appeal court. The ground of appeal is miscarriage of justice. So **Palmer**'s factors are relaxed and admission of the fresh evidence depends on the nature of the issue raised. See also: **Assoun**, ¶ 297; **Smith**, at ¶ 85-91; **Jones**, at ¶ 14; **Fitzpatrick**, at ¶ 12; **R. v. MacInnis**, 2006 NSCA 92, at ¶ 28; **R. v. Nevin**, 2006 NSCA 72, at ¶4; **R. v. Karas**, 2007 ABCA 362, at ¶ 46, leave to appeal denied [2008] S.C.C.A. No. 22; **R. v. Harris**, 2009 SKCA 96, at ¶ 18. In **R. v. Phillips**, 2003 ABCA 4, affirmed [2003] 2 S.C.R. 623, Fruman, J.A. for the majority said:

> 27 The record may, by itself, demonstrate that the accused's ability to defend his case was compromised by the action or inaction of the trial judge. But it may not. Although the concept of trial fairness is flexible, there must be some air of reality to a potential defence. Therefore, an appellant may also apply to adduce additional evidence at the appeal stage to substantiate a claim that the trial was unfair. For example, an appellant might provide evidence to show that he would have done things differently, had he received particular advice: *Criminal Code* s. 683(1); *Hardy (C.A.)*, *supra* at 363. Because such evidence is not directed at a finding made at trial, but challenges the validity of the trial process, admission of the evidence is not dependent on meeting the fresh evidence requirements set out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759: *R. v. W. (W.)* (1995), 100 C.C.C. (3d) 225 at 232 (Ont. C.A.). See also *United States of America v. Shulman*, [2001] 1 S.C.R. 616 at 636.

Similarly, in **Truscott**, the Ontario Court of Appeal said:

> 85 The second category of fresh evidence that may be tendered on appeal is not directed at re-litigating factual findings made at trial, but instead is directed at the fairness of the process that produced those findings. Where an appellant proffers this kind of evidence on appeal, he or she attempts to demonstrate that something happened in the trial process that materially interfered with his or her ability to make full answer and defence. An appellant claims that the verdict is rendered unreliable because the unfairness of the process denied the appellant the opportunity to fully and effectively present a defence and to challenge the Crown's case. When this kind of fresh evidence is received and acted on in the court of appeal, the conviction is quashed as a miscarriage of justice. The miscarriage of justice lies in the unreliability of a verdict produced by a fatally flawed process.

[54] In **United States of America v. Shulman**, [2001] 1 S.C.R. 616, at ¶ 45, Justice Arbour for the Court discussed the required evidential standard in a trial fairness challenge:

> [T]he evidence must be relevant to the remedy sought before the Court of Appeal. It must be credible and sufficient, if uncontradicted, to justify the appellate court making the order.

See also **Wolkins**,¶ 61 and **Assoun**, ¶ 297. In **R. v. Taillefer**, 2003 SCC 70, [2003] 3 S.C.R. 307, at ¶ 77-78, Justice LeBel for the Court stated that **Palmer**'s fourth criterion is relaxed in an appellate challenge to trial fairness:

> 77 In my opinion, those decisions correctly state the law in this area. The principles that apply to the admission of fresh evidence discovered after the Crown's breach of its duty to disclose were clearly established by this Court in *Dixon*. Those criteria are substantially different from those defined in *Palmer* and are not interchangeable. First, the fourth component of the *Palmer* test relates only to the impact of the fresh evidence on the result of the trial. The *Dixon* test is much more flexible, and requires not only that the impact of the fresh evidence on the result of the trial be assessed, but also that the impact of the failure to disclose on the overall fairness of the trial be assessed.

> 78 In addition, the burden on the party seeking to have fresh evidence admitted is more stringent under the *Palmer* test than under the *Dixon* test. In the latter case, this Court held that an accused seeking to have fresh evidence admitted by alleging a breach of his or her right to disclosure must demonstrate that there is a reasonable possibility the non-disclosure affected the outcome at trial or the overall fairness of the trial process (*Dixon*, *supra*, at para. 34). The mere existence of such a possibility constitutes an infringement of the right to make full answer and defence. In *Palmer*, this Court required, instead, that the new evidence "must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result" (*Palmer*, *supra*, p. 775 (emphasis added)). The English version of McIntyre J.'s reasons uses words that denote an even more exacting standard than the French version, which states that the fresh evidence "*doit être telle que si l'on y ajoute foi, on puisse raisonnablement penser qu'avec les autres éléments de preuve produits au procès, elle aurait influé sur le résultat*". That test is more exacting than the mere reasonable possibility test: it assigns the applicant the burden of showing that the failure to disclose probably affected the result of the trial. Having regard to the difficulties involved in reconstituting a trial, this Court did not wish to impose such a high burden on an accused seeking to have fresh evidence admitted, where the accused was deprived of that evidence because of a breach by the Crown of its duty to disclose. [Justice LeBel's underlining]

See also **R. v. Dixon**, [1998] 1 S.C.R. 244 at ¶ 33-39 and **MacInnis**, at ¶ 28.

[55] Mr. West submits that the Crown and police failed to disclose pertinent material, which affected the fairness of his trial. A breach of the Crown's duty to disclose relevant evidence to the defence at trial is a basis for admitting fresh evidence on appeal. This is clear from the Supreme Court's rulings in **Dixon** and **Taillefer**. See also **Phillion**, at ¶ 148.

[56] Later (¶ 197) we discuss Mr. West's grounds of appeal alleging inadequate disclosure. Mr. West's submissions repeat those made to, and rejected by, the trial judge. There is no fresh evidence on the matter that qualifies for admission under s. 683(1). As we discuss later, neither was there a breach of his right to disclosure.

[57] Mr. West says that his lawyer, Malcolm Jeffcock, was incompetent, and this affected the fairness of his trial. Later we will discuss the merits of Mr. West's submission of counsel's incompetence. Here we address the admissibility of the fresh evidence tendered by Mr. West in support of this ground of appeal.

[58] In some cases the trial record may suffice as an evidential basis for a submission of counsel's incompetence. But, in others, the allegations of incompetence may pertain to matters that occurred between client and counsel off the record. In these latter cases, fresh evidence on appeal may be necessary to enable the parties and appeal court to grapple with the issue. **R. v. G.D.B.**, 2000 SCC 22, [2000] 1 S.C.R. 520; **Wolkins**, ¶ 61; **Phillips** (Alta.C.A.), ¶ 27; **R. v. M.P.**, 2006 BCCA 236, at ¶ 9; **R. v. Smith**, 2007 SKCA 71, at ¶ 30-31.

[59] Accordingly, we will provisionally admit as fresh evidence under s. 683(1) the following material:

(i) Mr. West's 18 page "Cover Letter" from his volume entitled "Fresh Evidence Application - Appeal Ground # 11 - Lawyer Incompetency" which outlines his position on the issue;

(ii) The affidavit of Malcolm Jeffcock sworn September 23, 2009, which attaches as exhibits Mr. Jeffcock's file material exchanged with Mr. West;

(iii) The affidavit of Christopher Manning sworn September 21, 2009;

(iv) Mr. West's affidavits sworn on October 6, 2009 which respond to the affidavits of Messrs. Jeffcock and Manning;

(v) The testimony of Messrs. West, Jeffcock and Manning, in the Court of Appeal on November 17, 2009.

[60] The provisional admission of this evidence is only to enable this Court to consider Mr. West's ground of appeal alleging counsel's incompetence. Later we will discuss the merits of that allegation.

[61] With the exception of the materials mentioned in ¶ 59, Mr. West's application under s. 683(1) is dismissed. Mr. West's other tendered material does not, even ostensibly, support an argument that there was an impairment of Mr. West's ability to make a full answer and defence, or that there was trial unfairness or a miscarriage of justice.

Merits of Appeal

#1 Error by trial judge in "preventing" the appellant from testifying

[62] In his factum the appellant describes the issue this way:

> (a) It is submitted the trial justice erred in law by recommending and suggesting the Appellant not take the stand and testify during the trial proper which prevented very important and relevant facts from being presented to the jury and further prevented the application of the test in **R. v. W.(D.), [1991] 1 S.C.R. 742, 63 C.C.C. (3d) 397 (S.C.C.)** and how it applies to proof beyond a reasonable doubt which also applies to the issues of credibility. (p. 29 AF)

[63] In his written and oral submissions Mr. West says he made it known throughout the trial that he intended to take the stand and testify, and that the trial judge assured him he would be given that opportunity. The appellant claims, in effect, that he was talked out of testifying by the trial judge and that as a result he was "deprived of the opportunity to present to the jury as an alternate theory to the Crown case of how the transferred blood stains ... could have been ... deposited on to the filing cabinet. ..." He elaborates in his factum:

> The same theory, and only theory for which the Appellant truly believes did happen ... The Appellant has never denied that he left some blood on the ground by a little pump house, without knowing where the building was located during "a non-criminal occurrence" on Saturday, May 23, 1998.

[64] This was not the only theory put forward by the appellant during the course of these proceedings. He had many theories, as was made clear in the evidence given at the appeal hearing by Mr. Jeffcock. The variety of explanations offered by Mr. West during the course of these proceedings included: denying that he was ever at the location of the robbery; suggesting that he was the victim of a conspiracy and that the police had planted his DNA at the scene, or that they had switched his blood at the lab; and admitting that he had been in the vicinity days earlier but that the blood he had left there after a nose bleed had somehow been transferred to the inside of the bank by the actual robber.

[65] In substance, the appellant argues that having told the judge not just once, but on two separate occasions, that he intended to testify, the trial judge should not have "interfered" in his attempt to take the stand in his own defence.

[66] The appellant's complaints are serious and deserve careful consideration. Taken out of context, the trial judge's remarks are worrisome. However, when properly assessed in the circumstances of this case and this offender, we are not persuaded that the trial judge's exchanges with the appellant constitute an error in law, nor lead to an unfair trial or a miscarriage of justice.

[67] This aspect of Mr. West's appeal invokes our powers under s. 686(1)(a) which enables us to allow the appeal where we are of the opinion that:

> (i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,
>
> (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or
>
> (iii) on any ground there was a miscarriage of justice.;

This particular ground of appeal does not challenge the reasonableness of the verdict, or allege that the judge made a wrong decision on a question of law. Rather, the appellant's complaint focuses on whether there was a miscarriage of justice, specifically, that his right to a fair trial was prejudiced by the trial judge's actions. In assessing the merits of that allegation we will apply a standard of correctness.

[68] The appellant's complaint requires us to consider the responsibility of a trial judge to assist a self-represented accused. This, in turn, raises an ancillary and somewhat unique question which is the extent to which a trial judge can encourage or discourage an accused from testifying.

[69] Among the leading cases in Canada concerning a judge's duty to assist self-represented accused are the decision of the Alberta Court of Appeal in **Phillips**,

supra; and the decision of this Court in **Assoun**, **supra**. From these and other decisions to which we will refer, we have extracted the following principles which are relevant to our assessment in this case.

[70] Accused persons who choose to represent their own interests do not have any special status before the Court. While the judge is bound to provide appropriate assistance, the scope of that assistance is limited to what is reasonable and does not extend to the kind of advice counsel would be expected to provide.

[71] The assistance provided by the judge cannot go so far as to make the judge an advocate for the accused, thereby abandoning the judge's role as an independent and impartial arbiter.

[72] The failure of a trial judge to appropriately assist a self-represented accused is not a free-standing ground of appeal. The question is whether the failure to assist rendered the trial of the accused unfair pursuant to s. 686(1)(a)(iii) of the **Criminal Code**. A judge who prevents an accused from fully presenting his or her defence, or who makes tactical decisions for the accused, will fall into error, but in every case, it must be asked whether the error rendered the trial of the accused unfair. **Assoun** at ¶ 264 *ff*.

[73] We are not aware of any case which specifically addresses the extent to which a judge may encourage or discourage an accused from testifying. Accordingly, we will look to the leading jurisprudence on the duty of a trial judge to assist a self-represented accused, generally, for guidance.

[74] From cases such as **Phillips**, and **Assoun**, we see that the lengths to which a judge may go in assisting a self-represented litigant is a matter of discretion. The type of assistance will vary from case to case and will depend on the circumstances. The extent of the guidance required is essentially fact driven and must be assessed in each case. In our consideration of whether the assistance was adequate we must ask whether the accused was provided with sufficient guidance to present his defence with full force and effect. As this Court observed in **Assoun**, at ¶ 263-66, a review of whether the assistance provided by the trial judge was satisfactory will depend on the circumstances of the case, and while the trial judge has a discretion, the consequences are gauged by an objective standard — that is the right to a fair

trial. Our Court's reasons in **Assoun** and in **Wolkins** describe the interplay of a judge's discretion and the objective standard of trial fairness.

[75] Other appellate decisions since **Assoun** offer similar guidance. See for example, **Ridout v. Ridout**, 2006 MBCA 59; **Harris**, **supra** and **R. v. Moghaddam**, 2006 BCCA 136. Having considered these and other decisions it is our view that no case can be decided by applying a fixed grid or formula to our assessment of the manner in which a trial judge provides assistance to a self-represented accused. Much will depend on such factors as: the nature of the charges; the complexity of the issues; the circumstances of the particular accused including his or her intelligence, and sophistication with legal proceedings; and the overall dynamics of the trial in question. Each of these factors, and others, in isolation and combination, will impact upon the manner, and extent to which, a trial judge is obliged to provide assistance.

[76] We think it also bears repeating that this is not a case where the judge is accused of not doing enough to assist the self-represented accused. Rather, this is a case where the appellant says the judge went too far and said too much, effectively "preventing" the accused from testifying in his own defence.

[77] The record here shows that the trial judge did not err in the way in which he offered guidance to Mr. West on matters of law, evidence and criminal procedure.

[78] Neither does it reflect error in the manner in which the judge exercised his discretion when deciding the extent to which any guidance was required.

[79] The narrow issue here is whether the judge's vigorous warnings to the appellant about the risk that advancing his "theory" as to how his DNA came to be found at the location of the robbery, would likely lead to his being convicted, effectively "prevented" the appellant from testifying and rendered his trial unfair.

[80] The trial transcript reveals a prudent and patient management of a difficult case by a judge who bent over backwards to accommodate and be fair to the appellant. For reasons we will now develop we are satisfied that while the trial judge's comments in this case came close to the line, he did not, ultimately, intervene to the extent that the appellant's right to a fair trial was violated.

[81] We agree with the Crown's submission that the various exchanges between the trial judge and the appellant ought to be reviewed as a whole and evaluated in the circumstances of this most unusual case. To isolate any particular remark or comment does not provide a true appreciation of its meaning or consequence.

[82] We will turn now to an extensive review of the judge's interaction with the appellant. Of necessity this will require us to refer to the record in considerable detail. We will begin at the close of the Crown's case. The following two extracts will serve to illustrate the appellant's criticism of the judge's interventions. While they are not the only strongly worded remarks from the judge, they do reflect the tone and evident concern he felt about the jeopardy in which Mr. West had put himself.

[83] In the absence of the jury as Justice Coady was reviewing with the appellant how matters would proceed if Mr. West chose to testify, the judge heard for the first time Mr. West's "admission" that he had left blood at the scene of the robbery, days before. Justice Coady remarked:

> **THE COURT:** Listen to me. If you tell them that you were at Bass River two days before this robbery, poking around this location, you might as well just hang up your skates, buddy. You might as well just hang up your skates, because you'll have just cut your throat.

[84] Later, in the same exchange, the judge reminded Mr. West that he could only assist him so much, but that if Mr. West had had a lawyer, he was certain the lawyer "would be screaming at Mr. West not to testify". The same point was made later when the judge told the appellant that if he (the judge) "were at the Casino, he would put every buck he had on the bet that if the jury heard Mr. West had been in Bass River, he was dead."

[85] As we have already observed, the judge's remarks can only be fairly understood if placed in their proper context and evaluated in all of the circumstances of this most peculiar case. We will now conduct a detailed contextual analysis to explain the reasons for the trial judge's interventions. When that examination is complete we will at ¶ [112], *infra* return to our assessment as to whether or not the judge's actions prejudiced Mr. West's right to a fair trial.

[86] After the Crown closed its case and the jury was excused, Justice Coady informed the appellant that he would soon have to make two decisions. First, he would have to advise whether he intended to call evidence, but without specifically identifying any intended witnesses. Second, he would have to decide whether he intended to testify on his own behalf. The trial judge assured the appellant that he would not require him to state his intention until later.

[87] The trial judge then made arrangements for the appellant – in the company of Sheriff's officers – to privately interview his witnesses before calling them to the stand.

[88] After completing his interviews the appellant then opened his case and called three witnesses, Mr. Mario Turcott, Ms. Rubia Ann MacKinnon, and Mr. Henry Shay.

[89] Mr. Turcott was employed by Honeywell, an alarm company. He had made a service call to the bank about a week before the robbery. The appellant questioned him about the location of certain motion detectors and whether a sensor might be triggered by certain movement. There was no cross-examination by the Crown. The transcript records this as being one of several occasions where the judge attempted to instruct the appellant on how to conduct an effective examination. It also shows that the appellant was fully capable of framing proper questions. Once reined in by the judge Mr. West managed to focus on more salient points.

[90] The appellant's second witness was Ms. MacKinnon who had been part of a flagging crew at a work site about four kilometres from the Credit Union on the day of the robbery. Her job was to let vehicles pass through, at intervals, when the way ahead became clear. With this witness it would appear that the appellant's objective was to show that the pinkish-purple Neon she described as passing her checkpoint three times on the morning of the robbery, did not have any other identifying features on the front of it. If the appellant's intention was to raise a contradiction between her evidence and that given by the Crown witness, Mr. Jason Murphy, then he was, arguably, successful. It is to be recalled that in his evidence Mr. Murphy said that on the night before the robbery he and friends were driving around the area around 10:00 or 11:00 p.m. and on a dirt road very close to the Credit Union he observed a "blue, purplish-blue Neon" parked with the windows fogged up. He said the car had "white decals up the side of it".

[91] One must also recall, however, that other Crown witnesses gave varying descriptions of the Neon vehicle they had observed. Whatever variations in descriptions had been given by the witnesses, and whether those variations were significant, was argued by both the Crown and Mr. West in their summations to the jury and were thoroughly canvassed by the trial judge in his charge to the jury. On that issue it would not be lost on the jury that Mr. Myles Ferguson whose vehicle window was broken by a rock thrown up by a Neon car which passed him at high speed on the morning of the robbery had testified in part:

> I know my cars rather well. I know it's a Neon.. it's not a normal purple color ... they're very rare ...

When asked to describe the vehicle in question he said: (AB 7, 2536, ln 8 *ff*)

> It was a Neon, four door. It was purple, mauve or lavender. It's a weird color. ... And going quite fast. The gentleman driving was noticeable but only for a second.
>
> Q. When you say gentleman, are you certain it was a male?
>
> A. Yes, sir, I am.
>
> Q. Okay. Any distinguishing features about the male other than being certain it was a male?
>
> A. He was a rather, looked to me like a larger guy, larger person, thinning, very thinning hair and was a white Caucasian and that's about it in that short a time.
>
> Q. Anything about what the individual was wearing, did you notice?

> A. It looked like a button up, just a shirt, maybe a plaid. No, I can't be positive on that. (AB 7, pp. 2536-37)

[92] Further, when shown Exhibit No. 1 and, in particular, photos 36 to 38, Mr. Ferguson said the car depicted in the pictures looked like the car he had encountered that day, and that the front license plate holder shown in Photo 36 could very well have been what he noticed on the car that morning.

[93] The jury would also have heard the evidence given by Amherst Police Cst. White who testified that the vehicle in which he found the appellant and his son on a street in Amherst that afternoon looked much brighter and more purple in the natural light than it appeared in the photographs.

[94] As his third witness Mr. West called Mr. Shay who was the manager of a motel in Bedford at the time of the robbery. The appellant's questioning appears to have been designed to illicit general information concerning the motel's practices and procedures related to record-keeping for such things as arrival, departure, ensuring the room was vacant for house cleaning purposes, telephone service charges, and the like. No evidence was given with respect to how long such records might be retained or available for inspection. One might surmise that the appellant's objective in questioning Mr. Shay was to lend some credence to any later assertion by the appellant — were he to testify and offer such a story — that he and his son had been in Bedford on the morning of the robbery and had driven directly to Amherst without ever going near Bass River. Mr. Shay's evidence was so general as to be virtually useless in providing any link between the appellant and Bedford on the day of the robbery.

[95] After the last of these three witnesses testified there then ensued detailed inquiries made by the trial judge of the appellant, appropriately trying to zero in on the remaining persons subpoenaed by the appellant so as to ascertain the likely relevance of their evidence.

[96] During these discussions, we see many salutary efforts by the judge to focus the appellant's attention on the circumstantial nature of the Crown's case and find out whether the appellant's intended witnesses would be responsive and relevant. Again, the judge gave ample opportunity to Mr. West to confer with his witnesses ahead of time and to carefully reflect on whether they would be helpful to his defence.

[97] Eventually the appellant advised the judge that he would dispense with calling certain witnesses regarding the appearance and composition of the building where the robbery took place since he (West) was "an expert" in building construction. Again the judge reminded the appellant that whatever he said, should he decide to testify, would have to be relevant and meet the requirements of evidence and procedure.

[98] Before the jury was excused for the night the balance of the afternoon was spent in a *voir dire* so that the trial judge could explain to the appellant the nature of a *Corbett* application and the attendant risks associated with his case.

[99] Mr. West confirmed that he had reviewed the materials the trial judge had given him the day before and having done so he wished to bring a *Corbett* application. Upon hearing that on the record, the Crown attorney advised the court that they would not be opposing a *Corbett* application "with one *proviso*". The Crown stipulated that they would forego any questioning of the appellant on his prior criminal record were he to testify, provided he not put his good character in issue before the jury. The Crown warned that if the appellant were to: (p. 3607)

> ... embark upon an avenue of putting his good character before the jury in some substantive way, then that would change the circumstances

and the Crown would then seek to cross-examine the appellant on his criminal record so that the jury would have the opportunity to consider his trustworthiness and credibility. Any reference to Mr. West's criminal record would of course have revealed to the jury his previous conviction and sentencing for armed robbery of the Mahone Bay Credit Union.

[100] The trial judge went to great lengths to explain to the appellant what would happen if he intentionally or unwittingly put his character in issue. He urged the appellant to make proper preparations that evening to organize his testimony and make notes to "tighten it up, get it nice and concise" so that he would not be sitting on the witness stand for hours and hours rambling on. He urged the appellant to focus and reminded him that he had a habit of "having a very long, circuitous way of telling people what happened."

[101] He repeatedly urged the appellant to concentrate on relevant evidence and not bore, annoy or distract the jury with references to insignificant assertions such as the measurement between studs on the back wall of the bank.

[102] Before concluding the *voir dire* and adjourning court over night, it would appear from the record that Justice Coady was shocked by the Crown's revelation that Mr. West had provided a letter "to the Crown, to Ms. McGrath in particular, outlining his alibi" and that if the appellant were to take the stand in his own defence the Crown certainly intended to cross-examine him on its content.

[103] The trial judge explained to the appellant that when they returned to court the next morning, he would give his evidence (p. 3627):

> So we are adjourned until tomorrow morning at 9:30. You'll be here ready to go, all right. And the way it'll go is you'll get up and you'll ... no one will question you. You'll just speak, and then you'll finish speaking. And then the Crown will get up and they will cross-examine you if they so desire. And they've put you on notice that they may be using that letter to impeach you.

[104] Court resumed at 9:30 a.m. the next day, February 16, 2007. Before the jury was brought in the appellant made it known that he wished to discuss certain matters with Justice Coady. The initial exchanges between the appellant and the trial judge show, once again, the considerable efforts made by the trial judge in explaining to the appellant the kinds of things he might properly say during his direct testimony as to how he and his son Jonathan rented the particular Neon in which they were seen in Amherst on the day of the robbery, and in that way explain to the jury that "alibi" <u>at least to the extent the trial judge was aware of it</u>.

[105] The judge reminded Mr. West of his vulnerability in being cross-examined on the written statement he had provided to the Crown. If what Mr. West said on the witness stand was consistent with its content, the document would "probably never see the light of day; the jury will never know it exists." If, however, his testimony strayed from the written "alibi" in material respects then the judge told the appellant he could surely be expected to be confronted with those contradictions.

[106] In pressing the appellant to focus, and to confine himself to evidence which was relevant, we see, for the first time, the appellant's disclosure of his having been present at the scene, and how he came to deposit his blood there. These sudden revelations are made by Mr. West despite the trial judge's repeated attempts to admonish him to keep silent. Justice Coady's incredulity over these developments is apparent from the transcript of the proceedings. It was at this point that we see the exchanges referenced earlier in this decision at ¶ [83], **supra** where the judge voiced his astonishment at the appellant's disclosure of this "theory" and how he might jeopardize his defence if he were to speak about it while testifying. We see this exchange:

> **THE COURT:** Oh, Mr. West, where ... this pump house is so irrelevant to this trial.
>
> ...
>
> **THE COURT:** No, but the evidence ... they have to make the decision on the evidence. What in the name of goodness does this pump house got to do with you being a farmer, or coming from a farm?
>
> ,,,
>
> **MR. WEST:** ... I was in Bass River on May 23rd, 1998. I went over by that building believing it was a pump house.
>
> **THE COURT:** Mr. West, Mr. West, be very careful what you're saying. Mr. West, you be very ... I mean, that's ... I wish you hadn't said that.
>
> ...

THE COURT: Mr. West, you seem to be bent on getting yourself convicted of this offence. And listen, I'm not just blowing wind up here.

...

THE COURT: Mr. West, you are going to sink yourself. If you go there and start all that stuff, you're ...

THE COURT: But it's irrelevant. It's irrelevant. It's irrelevant to the case that's called against you. The pump house. It's a pump house. There's no evidence of it being anything other than a pump house.

MR. WEST: But why was I at the pump house?

...

THE COURT: Do you want to put these people to sleep?

MR. WEST: No.

THE COURT: You're going to if you go there. They're going to say, "Pump house?" You know, you're going to get the same reaction you're getting from me. What in goodness is this pump house stuff all about?

...

THE COURT: Mr. West, you have never broached in this trial the subject of that blood getting there by you at another time.

MR. WEST: Because I never ...

THE COURT: You have never broached that in any of your representations or in your questioning of witnesses. And so you better not go there on your direct.

...

THE COURT: Listen to me. If you tell them that you were at Bass River two days before this robbery, poking around this location, you might as well just hang up your skates, buddy. You might as well just hang up your skates, because you'll have just cut your throat.

...

THE COURT: ... I can only help you so much. If you are determined that you are going to call evidence on your be ... you know, if you had a lawyer sitting there beside you, you'd be out in that room out there and they'd be screaming at you not to testify.

...

THE COURT: Okay. Mr. West, why are you so determined to call evidence that's going to hurt you so bad? Why . . .

...

> **THE COURT:** But I'm just telling you one last thing. When I said yesterday that the worst thing that could happen to you was them to know about your criminal record, I had never dreamed in my furthest reaches of my mind that there could be another piece of evidence that could be more damning than that. And you just told me about it this morning.
> (Underlining ours)
>
> ...

[107] At the conclusion of this very lengthy exchange Justice Coady reminded the appellant that it was his choice, and his choice alone, whether he wished to testify. The trial judge said this:

> **THE COURT:** One thing I want to make clear. I don't want you to interpret any of my comments as trying to discourage you from testifying. That has to be your decision. And I will never do anything to interfere. But this is big. And I think I'd be failing in my responsibility to you as an unrepresented litigant if I didn't say the things that I've been saying and read you what I'm going to read. Okay, we're adjourned for ten.

[108] The trial judge retired to his Chambers to retrieve a textbook to assist the appellant, and then returned to Court to give another detailed instruction to the appellant on the nature and meaning of the burden and standard of proof in a criminal case. He took a further recess to permit Mr. West to think about what he had been told and the significance of what the Crown had in their possession. Justice Coady then read out loud the portion of the charge he intended to give on the DNA evidence led by the Crown so that the appellant would be aware that the jury would be instructed they should not be overwhelmed by any aura of scientific infallibility associated with the DNA evidence, and that they were to treat it as just another piece of circumstantial evidence introduced by the Crown as part of its case. It would not, in and of itself, prove the appellant's guilt. Rather, its significance would depend upon the other evidence introduced at trial and the weight attached to it by the jury.

[109] Then, having done all of that, Justice Coady took a further recess and made arrangements for the appellant to communicate privately with duty counsel in order to obtain independent legal advice on the question of whether he wished to testify in his own defence.

[110] That opportunity was afforded Mr. West, following which he returned to Court to confirm on the record that he had obtained independent legal advice from duty counsel, Mr. Allan Nicholson. After doing so Mr. West advised Justice Coady that he had decided not to take the stand.

[111] Our reference to lengthy portions of the transcript reveals four things of significance. The first, of course, is that Justice Coady urged Mr. West to consider very carefully whether he wished to testify and was explicit about the jeopardy in which Mr. West might find himself if he did choose to take the stand. Specifically mentioned were the possibilities that Mr. West would put his character in issue, that his criminal record would come out in the evidence, and that the jury would hear that Mr. West had been in Bass River around the time of the robbery. Second, the complete transcript also demonstrates that after he had been given such blunt advice, Mr. West still declared his intention to testify. Third, Justice Coady made it absolutely clear that the decision as to whether he wished to testify was entirely up to Mr. West. Finally, the judge made arrangements for Mr. West to speak with a lawyer before deciding what he wanted to do. It was only after a further break and taking the opportunity to consult privately with duty counsel, that Mr. West chose not to take the stand.

[112] Several important features in this case lead us to the conclusion that the trial judge's interventions did not prejudice Mr. West's right to a fair trial. While not intending this to be an exhaustive list, we would highlight the following factors. The appellant presents himself as an intelligent and wily individual who is not intimidated by legal proceedings. He is used to acting for himself in defending criminal charges and shows a heightened level of sophistication in matters of evidence and criminal procedure. His evident stubbornness and persistence moved the judge to use strong language, often repeatedly, to get points across. Mr. West defended himself against similar charges in a trial before a judge alone concerned with the Mahone Bay robbery. He was convicted and sentenced to 10 years on the various charges related to that robbery. That trial took place 12 months before the Bass River trial which is the subject of this appeal.

[113] The judge was understandably shocked to learn details of the appellant's "theory" and that he had previously disclosed such information in an "alibi" to the Crown attorney. The trial judge thoroughly explained the legal and evidentiary issues surrounding any decision on the part of the appellant to testify. The appellant is a strong-willed individual who does not "listen" easily (borne out in his attendance before this Court at the appeal hearing) which necessitated blunt and repeated interventions by the Court. The appellant had consulted with several lawyers about his defence on these charges. He was obviously adept in conducting his own investigations and research and in bringing numerous applications, despite the restrictions imposed in a prison facility. The trial judge concluded his remarks to the appellant with a clearly worded reminder that he was not attempting to discourage Mr. West from testifying, and that it was his fundamental right to decide whether he wished to give evidence. Finally, Mr. West consulted privately with duty counsel and obtained independent legal advice before deciding, himself, not to take the stand.

[114] Quite apart from the judge's strong, cautionary advice, we are not persuaded that the appellant was prejudiced in putting his defence forward. From the exchanges that appear in the trial transcript, and based on his arguments on appeal, it would appear that Mr. West intended to testify that he had been in Bass River three days before the robbery and that when on site and while he was "exploring" a pump house, he tripped, hit his nose and had a nose bleed. The fact that his blood was found inside the bank could only be explained (he would say) by it having been transferred there by the actual perpetrator. It is to be remembered that Justice Coady reminded Mr. West he would face obstacles in making reference to the pump house incident on direct examination, since he had not presented an alternative theory as to how the blood came to be inside the bank. We see further reminders in the transcript where the judge cautions the appellant that he had failed to provide a foundation for his testimony by neglecting to lay the necessary ground work during his cross-examination of certain Crown witnesses. To illustrate, during the cross-examination of Cpl. Gillis (the identification officer), Mr. West asked if Cpl. Gillis had examined the pump house. Cpl. Gillis testified he had and said nothing had attracted his interest. Mr. West went on to ask specifically if the door knob of the pump house had been checked for fingerprints. He did not ask Cpl. Gillis if he had observed any blood in the area. Quite apart from these difficulties, it is now undeniable that had Mr. West testified and offered his "theory" for leaving his

blood at the scene of the crime, his explanation and credibility would have been left in tatters through the inevitable revelation of the fictions surrounding the appellant's "alibi" linked to "Chris Harvie". See for example our detailed analysis in the fresh evidence section of these reasons commencing at ¶ [42] *ff.*, **supra**.

[115] Ultimately, in his address to the jury, the appellant chose to declare his innocence, state that he had nothing to do with the robbery, and focus on the weaknesses and contradictions in the Crown's entirely circumstantial case. We do not see Mr. West's conviction as being attributable to any mistake on the part of the trial judge.

[116] In warning Mr. West of the dangers of explaining his "theory", Justice Coady was obviously motivated by a desire to prevent Mr. West from doing such harm to his defence that a conviction would be assured. The circumstances of this unique case do, however, serve as a reminder as to how a trial judge's attempts to accommodate and be fair to a self-represented accused may, quite unintentionally, backfire and risk leading to the opposite result.

[117] After thoroughly canvassing the matter, we are not persuaded that the comments made by the trial judge rendered Mr. West's trial unfair. None of the judge's remarks were made in the presence of the jury. Mr. West was given considerable latitude in the presentation of his defence. He accepted the trial judge's invitation to confer with duty counsel and after obtaining private, independent advice Mr. West decided of his own volition, not to testify.

[118] In the unique circumstances of this case it seems to us that had the trial judge not advised Mr. West in strong terms about the jeopardy he faced in taking the stand, he might then have equally been subject to an allegation that he had failed to provide appropriate assistance to the self-represented accused.

[119] In summary, on this issue, we are satisfied that Mr. West was fully apprised of his right to testify and knew that it was his to exercise. He understood and had time to reflect on the inherent risks of choosing to take the stand. The trial judge arranged for the appellant to obtain independent legal advice on the matter. Mr. West availed himself of that opportunity. After suitable reflection, without constraint or coercion, the appellant freely and voluntarily exercised his right to remain silent and not testify on his own behalf. When the judge's lengthy

discussions with the appellant are reviewed in their entirety, and seen in proper sequence and context, we cannot say that a miscarriage of justice occurred.

[120] After a thorough review of the entire record, and having examined the complaint objectively through the eyes of a reasonably informed observer, we find that the trial judge's actions did not compromise the appellant's right to a fair trial. Accordingly this ground of appeal is dismissed.

#2 Error by trial judge in not compelling the Crown to call a witness

[121] The appellant sets out in his Notice of Appeal his complaint as follows:

> (b) It is submitted the trial justice erred in law during the voir dire regarding the continuity of the robbery scene sample; VD-3; by not compelling the crown to call the initial person who was alleged to have secured the exhibits at the RCMP Halifax Lab from Cst. Gord Hynes.

[122] In his factum, the appellant sets out in more detail the basis of his complaint, mixing argument with information not in evidence. Even taking into account all of the appellant's submissions and information, we find no merit in his complaint of error.

[123] The essence of his complaint is that the RCMP employee at the forensic laboratory who received the envelope containing the blood sample taken from the Credit Union was not called as a witness during a *voir dire*. The *voir dire* was held to determine the admissibility of the evidence the Crown sought to call regarding the match of the DNA from the blood sample to the DNA from a sample of blood seized from the appellant pursuant to a warrant. Mr. West is correct that the Crown had suggested to the trial judge that they intended to call all of the witnesses in the chain of continuity in the *voir dire*.

[124] The appellant took the position before the trial judge that he was concerned about continuity of the blood sample from the crime scene from June 11, 1998 to June 19, 1998. Cst. Hynes testified he turned the sample over to Margaret McLaughlin at the forensic laboratory on June 11. Nicole McCullough testified she started the forensic examination of the blood sample on June 19, 1998.

[125] The appellant also complains that Nicole McCullough referred to notes when she testified – which he now says he did not have. He says Ms. McCullough should not have been allowed to testify that she was familiar with the initials of Margaret McLaughlin and recognized them on Ex. VD # 3, the envelope containing the blood sample. This he contends was hearsay and hence, impermissible. There is no merit to these complaints.

[126] Ms. McCullough testified on January 23, 2007. She requested permission from the trial judge to refer to her notes with respect to details as to what she did and when she did it in her handling of exhibits from June 1998. The trial judge gave her leave to do so. The appellant made no complaint that he did not have a copy of her notes. The trial record is replete with instances of the appellant's complaints of late or non-disclosure. Here he made none. Ms. McCullough testified that her complete file had been disclosed. Indeed a review of the transcript shows that the appellant had her notes, but complained about the quality of the photocopying of one page. The following exchange illustrates:

> **Q.** Now unfortunately, I don't ... I have three of your pages but I've never been able to get a clear copy of this third page. Do you have ... is that your complete notes there that you have for your involvement?
>
> **A.** Uh-huh.
>
> **Q.** May I have the privilege of looking at them?
>
> **A.** I'm not sure which ...
>
> **THE COURT:** It should only be the ones that would relate to this case.
>
> **A.** Yeah. I'm not quite sure which page he had trouble photocopying. Was it that one?
>
> **MR. WEST:** I don't know. See, it's got to be the third page. No matter how I get it, it's got to be this page.
>
> ...
>
> **MR. WEST:** May I ... actually, I don't know ...can I ask the Court for a photocopy of this that I can read?

THE COURT: I will ... that you can read. Can't you read that?

MR. WEST: Yeah, but just like you can't read these.

THE COURT: No, no. But I mean you can read hers, the yellow page.

MR. WEST: Right, I can read hers.

THE COURT: All right.

MR. WEST: But I can't read this.

THE COURT: All right. Well, do you want to hold onto the yellow page for further questioning of her and then we'll talk about ...

MR. WEST: Yeah, okay. Can I see her complete ... can I see her complete notes for this case?

THE COURT: I thought you already had the other ones.

MR. WEST: Well, yeah, I know. But I mean but her complete sheet ... do you have a complete file?

A. I have a complete file in front of me. However, it's been disclosed ...

THE COURT: Yeah.

A. ... and you should have everything that's before me as well.

THE COURT: A person ... a person wouldn't know what's in the file unless he looked at it, would he?

A. The only thing that I may have additional would be any correspondence that's happened as of late between the Crown and myself for attending this matter.

THE COURT: For travel purposes and the like. Yes.

MR. WEST: Well, I'm not interested in that. ....

[127] The appellant did not object when Ms. McCullough identified Margaret McLaughlin's initials on the exhibit. In any event, the evidence by Ms. McCullough as to what she saw and recognized was not hearsay. There is no merit in this suggestion.

[128] With respect to the appellant's assertion that the trial judge erred in law by not compelling the Crown to call Margaret McLaughlin, the appellant did not request that she be called by the Crown, or by the court. Despite numerous discussions about subpoenaing witnesses for his various applications, and on the trial proper, the appellant never sought to subpoena Ms. McLaughlin. During the hearing of his many applications, the appellant subpoenaed many witnesses. He called them and was given free rein to cross-examine them.

[129] The law is clear that the Crown has a broad discretion with respect to what witnesses it calls, and absent an abuse of process, sometimes described as an oblique motive, it is rare that a judge could interfere with that discretion. (See **R. v. Cook**, [1997] 1 S.C.R. 1113.) Here, not only did the appellant not complain to the trial judge about the Crown not calling Ms. McLaughlin, the appellant does not suggest any oblique motive by the Crown.

[130] Generally, the continuity of an exhibit goes to weight, not to admissibility. There was, therefore, no legal requirement for the Crown to call Ms. McLaughlin, and the trial judge cannot be said to have erred in law in failing to compel the Crown to call a witness when the defence never requested that it should do so.

#3 Error by trial judge in prohibiting the appellant from entering exhibits

[131] The appellant identifies seven things he says the trial judge refused to permit him to adduce into evidence. The complete list identified by the appellant is:

> 1. VHS tapes containing a statement given by the appellant to the police on September 29, 1999;
>
> 2. A twenty-three page document authored by Cst. Hynes date stamped as disclosed on November 30, 1999;
>
> 3. Correspondence between the appellant and the Minister of Justice;

4. A piece of wall panelling seized by the police from the crime scene;

5. Pieces of vinyl siding;

6. Wood fibres;

7. A handwritten sign.

(a) Appellant's Video Taped Statement

[132] It appears from a complete examination of all of the applications that the appellant claims he was questioned by the police on at least three occasions where videotaping occurred. In chronological order they were December 22, 1998, September 29, 1999 and September 30,1999. The December 22, 1998 interview was conducted by Sgt. Brian Oldford. He was the lead investigator into the robbery of the Bank of Montreal in Mahone Bay. The tapes from this interview became lost. It was acknowledged by Sgt. Oldford that during this interview, some mention was made about the Bass River robbery. The Crown did not suggest that the appellant said anything incriminating at that time. There was no attempt by the Crown to lead any evidence about the December 22, 1998 interview.

[133] Sgt. Oldford arrested the appellant on September 29, 1999 for the Bass River robbery. He then questioned the appellant for some hours at the New Minas Detachment of the RCMP. This interrogation was taped. The appellant professed his innocence and made no incriminating statements. The Crown did not intend to try to introduce the statement, nor was there any suggestion they wished to use it in cross-examination if the appellant chose to testify.

[134] The appellant also claims Sgt. Oldford again questioned him at the Bible Hill Detachment on September 30,1999, and that this interview was also videotaped. All officers who dealt with the appellant denied any recording was done. Again, there was no suggestion that the appellant had at any time said anything incriminating.

[135] There were two instances when the appellant sought to have marked and entered the tapes of September 29, 1999: once during his application to have the

charges stayed on the basis of an abuse of process; the other was during his application for a stay of proceedings as a remedy for the Crown's failure to fulfill its disclosure obligations.

[136] In order to put his statement into perspective, some reference to the purpose and scope of the applications is required.

[137] It is difficult to grasp the factual or legal foundation to the application alleging an abuse of process. Nevertheless, the trial judge gave the appellant every opportunity to lead evidence as to what he contended was conduct by the police or Crown that amounted to abuse. The appellant testified on the application. He was permitted to call and cross-examine six Crown witnesses. After hearing submissions on January 30, 2007, the trial judge reserved his decision. He gave an oral decision on February 5, 2007.

[138] In his decision, the trial judge reviewed the contentions advanced by the appellant. The appellant's particulars of the alleged abuse ranged from: the withdrawal of the robbery charges on October 4, 2000 and the subsequent re-laying of the charges on December 2, 2002; the police were said to have committed perjury during his trial for the Mahone Bay robbery (apparently in order to secure his conviction and hence obtain a DNA sample); the failure of the police to follow up with the appellant on his repeated offers to voluntarily provide a DNA sample, be interviewed and take a polygraph; the failure of the police to follow up properly on an alibi witness in time to secure that evidence; and the failure by the RCMP lab in Halifax to have proper security.

[139] There is no doubt that the trial judge stopped the appellant from entering the tapes during the abuse of process application. The appellant makes the bald assertion that the trial judge's refusal to allow him to enter the tapes as an exhibit infringed his right to make full answer and defence. He fails to explain how the refusal to enter the tapes prevented him from making full answer and defence.

[140] The tapes of the September 29, 1999 interview arose when the appellant was examining Sgt. Oldford. He suggested to Sgt. Oldford that on December 22, 1998, Oldford had told the appellant that Oldford "knew" the blood at the scene of the Bass River robbery was the appellant's. Sgt. Oldford said he could not recall the

details of the interview. The appellant asserted that there was some reference on the September 29, 1999 tape to this conversation.

[141] The trial judge failed to see how the alleged comment by Sgt. Oldford of December 22, 1998 had any relevance to the abuse of process application. We also fail to see any relevance or error by the trial judge. The right to make full answer and defence does not include the right to adduce irrelevant evidence.

[142] The appellant also sought to tender the tapes during the disclosure application. The application was a wide-ranging affair. His application materials consisted of a formal notice dated January 15, 2007, a four hundred and forty-two paragraph affidavit sworn by the appellant and a nine page brief. The appellant testified on the application and was permitted to examine fifteen witnesses. More will be said about the application later in these reasons, as the appellant raises as a distinct ground of appeal the fairness of the hearing of the application and the conclusion by the trial judge about disclosure.

[143] For now, it is sufficient to say that one of the appellant's complaints was that during the September 29,1999 interview, he borrowed a pen from Sgt. Oldford and made notes about his activities on the day of the robbery. Because he was arrested he claimed the notes were seized and never returned to him. He also complained that the tape of the interview were not complete. It is unclear what remedy he was seeking if there was in fact a failure to record all of the interview.

[144] The issue of the appellant wanting to enter the tapes as evidence during the disclosure application arose three times. The first was when Sgt. Oldford testified, the second was when Sgt. Barry Ettinger was examined, and the last was when the appellant testified. The trial judge stopped the examination of Sgt. Oldford when the appellant simply asserted that part of the interview had not been recorded, and the tape would show him writing on a paper or papers. Sgt. Oldford at no time acknowledged that he had seized any papers from the appellant.

[145] Sgt. Ettinger did not recall seeing the appellant write on anything. The trial judge refused to permit the appellant to enter the tapes, as he could see no relevance to them on an application for disclosure. The appellant had the tapes. When pressed for why he wanted them entered, the appellant said he had two purposes, to

show the tapes he had did not record all of the interview, and they would show him making notes.

[146] The same exchange occurred when the appellant testified and sought to introduce the tapes. The trial judge remarked that if he were prepared to accept that there was a gap in the recording and that the appellant had indeed made notes during the interview of September 29, 1999, this begged the question: how was this in any way relevant? The appellant seemed to accept that the alleged missing portions on the tape were not relevant:

> **THE COURT:** But isn't it only relevant if they plan on introducing that tape to use against you?
>
> **MR. WEST:** Right. But all ... that's right, I agree with that.
>
> **THE COURT:** They're probably not going to.
>
> **MR. WEST:** There's nothing ... no, that's right. There's nothing on the tape that would support the (Crown?).
>
> **THE COURT:** That's right.
>
> **A.** You're right.
>
> **THE COURT:** Exactly.
>
> **A.** But at the same time I don't believe the police had the right to start and stop a tape and give the Defence only the portions that they want. And that's what would take the issue to in the photos when Mr. Jeffcock knows about the photos. These photos ... only one for the Crown and holding the ones for the Defence? Remember, we don't get all these 50 photos until three years later.
>
> But anyway, my point is ... is that the police simply don't have the power to decide which part of the tapes that they want to disclose. I don't think that's under any law.

[147] With respect to the missing notes, the appellant was seeking to establish that the police took possession of notes detailing his exculpatory explanation for his activities the day of May 26, 1998. The police testified they did not have the notes. But even if they did, the appellant was merely seeking to have produced

information that he had in his own possession. He never claimed that he needed those notes in order to refresh his memory about any aspect of his activities that day, or any other day. His notes may well have had relevance if he planned to testify, since they might be used in cross-examination by the Crown if he was to testify in some way inconsistent with what he had written in the notes. The Crown always maintained they had no such notes.

[148] We see no error by the trial judge in his refusal to permit the appellant to enter the tapes as exhibits during the abuse of process or disclosure applications. The appellant did not in fact seek to enter the tapes of September 29, 1999 on the trial proper, nor do we see any basis for their admission if he had sought to do so, since as a general rule, such statements by an accused are admissible only at the instance of the Crown. (See **R. v. Simpson**, [1988] 1 S.C.R. 3.)

(b) **November 30, 1999 documents and correspondence with the Minister**

[149] It is convenient to deal with these items together. The appellant sought to introduce both of these items during his abuse of process application. The package of documents was marked “Disclosed November 30,1999”. The appellant said he had them in his possession since December 1999. He said he had been guarding them with his life. He said he got the package from Harry How, Q.C. The trial judge was unable to see its relevance and deferred any ruling on its admission.

[150] When Cst. Hynes testified on the abuse application, he was questioned about the initial reliance by the police on the match between the crime scene DNA profile and the DNA profile obtained from a sample seized pursuant to a warrant for the Mahone Bay robbery. Cst. Hynes was the author of the cover letter for the November 30, 1999 package of documents, and apparently authored the contents of the package. The appellant wanted to challenge the legality of the authorities using the sample seized for the Mahone Bay robbery. He took the position that since that sample did not result in any match to the Mahone Bay robbery, the provisions of the **Criminal Code** required the authorities to forthwith destroy the sample.

[151] The trial judge failed to see the relevance of the questions being posed to Cst. Hynes since the authorities did not in fact rely on the Mahone Bay warrant sample in the charges before the court. As detailed earlier, Mr. West was convicted of the Mahone Bay robbery and his DNA seized pursuant to a lawful order of the court. It was that DNA sample that produced a hit to the DNA profile from the Bass River robbery. A new warrant was then obtained by Cst. Hynes that led to a seizure of a further sample from Mr. West on June 5, 2002, which Mr. Modler (the Crown's DNA expert) opined was a match to the Bass River robbery sample.

[152] The trial judge also ruled that the November 30, 1999 documents formed part of the consultation process between the Crown's office and the police and hence were "protected". If the documents were initially prepared for the purpose of seeking legal advice, solicitor-client privilege may well have at one time attached to them. Here, the evidence clearly established that the documents were voluntarily disclosed by the Crown to the appellant. Any privilege they may have had was waived. Although we do not agree with this aspect of the trial judge's ruling, we ultimately agree that the documents lacked any discernible relevance to a claim of abuse of process.

[153] The correspondence the appellant wanted to refer to was a letter from the Minister of Justice of Canada, the Honourable Anne McLellan, that the appellant said described what was supposed to happen to a DNA sample that does not match the crime scene. The trial judge ruled it was inadmissible as being hearsay. We do not see any error in how the trial judge dealt with this issue.

(c) Wood Panelling, Styrofoam, Vinyl Siding, Wood Chips and Handwritten Sign

[154] These items can be conveniently addressed together. To put the complaint into context, the appellant, during his pre-trial applications, repeatedly offered criticism of the manner that the police carried out their investigative duties. The critique ranged from the decision by the identification officer, Cpl. Gillis, to collect the blood from the filing cabinet in one swab (as opposed to treating them as two samples), to a failure to take more and better photographs, to conduct forensic comparisons, and to have better documentation about the handling of physical exhibits seized from the Credit Union and elsewhere. Inherent in his complaint is the notion that there was some forensic value to the physical items seized.

[155] A trial judge must be correct in his or her identification and application of the rules on the admissibility of evidence (see **R. v. Underwood**, 2002 ABCA 310 at ¶ 61; **Smith**; **James**, **supra**, aff'd 2009 SCC 5). Deference is afforded to trial judges with respect to issues such as determination of probative versus prejudicial effect (**R. v. Pasqualino**, 2008 ONCA 554; **R. v. Poulette**, 2008 NSCA 95).

[156] The appellant argues in his factum that the vinyl siding was the police exhibit he wanted to have entered "the most". The existence of the vinyl siding was raised during the *voir dire* to determine the admissibility of the DNA evidence. The trial judge ruled it was immaterial to the issue to be decided on the *voir dire*. The trial judge was correct in his ruling.

[157] During the trial, Cpl. Gillis testified about his examination of the scene. He took pictures and measurements. He gathered up some debris from outside the Credit Union where the hole had been made by the robber to enter the building. He went through the debris once back at his office and found nothing of evidential value.

[158] Included in the debris were pieces of vinyl siding, wood chips and fibres. The pieces of vinyl siding were depicted in some of the photographs, as were pieces of Styrofoam. The appellant suggested to Cpl. Gillis that the amount of siding shown was not sufficient to cover the hole in the wall. Cpl. Gillis had no idea if that was correct. He believed he had checked the siding at the scene for prints. The issue was not explored further by the appellant with Cpl. Gillis. In fact, the appellant never sought to have the siding entered as an exhibit. The trial judge can hardly be accused of error for "failing" to consider something he was never asked to address.

[159] In any event, as emphasized by Gonthier J. in **R. v. Darrach**, 2000 SCC 46, [2000] 2 S.C.R. 443 at ¶ 37: "An accused has never had a right to adduce irrelevant evidence. Nor does he have the right to adduce misleading evidence to support illegitimate inferences: "the accused is not permitted to distort the truth-seeking function of the trial process (**Mills, supra**, at ¶ 74)."

[160] What is relevant in any given case is determined by a wide variety of factors, principally by the facts in issue. The facts in issue are set by the charges before the

court and the defences being raised by the accused (see **R. v. Arp**, [1998] 3 S.C.R. 339, [1998] S.C.J. No. 82 at ¶ 38). In **R. v. Watson**, [1996] O.J. No. 2695 (Ont. C.A.) ¶ 30-35, Doherty J.A. wrote of the requisite approach to assessing relevance as follows:

> 30 ... Relevance must be assessed in the context of the entire case and the respective positions taken by the Crown and the defence: *R. v. Sims* (1994), 87 C.C.C. (3d) 402 (B.C.C.A.) at pp. 420-427, 28 C.R. (4th) 231 (B.C.C.A.). There is no rule limiting prior misconduct by the deceased to cases in which self-defence is raised.
>
> 31 In *R. v. Corbett*, [1988] 1 S.C.R. 670 at p. 714, 41 C.C.C. (3d) 385 at p. 416, La Forest J. (in dissent) described the significance of relevance to our law of evidence:
>
> > All relevant evidence is admissible, subject to a discretion to exclude matters that may unduly prejudice, mislead or confuse the trier of fact, take up too much time, or that should otherwise be excluded on clear grounds of law or policy.
>
> 32 In explaining what he meant by relevance, La Forest J. referred to *Morris v. R.*, [1983] 2 S.C.R. 190, 7 C.C.C. (3d) 97, and then said at p. 715 S.C.R., pp. 417-418 C.C.C.:
>
> > It should be noted that this passage [from *R. v. Morris*] followed a general discussion of the concept of relevance in which the court affirmed that no minimum probative value is required for evidence to be deemed relevant. The court made it clear that relevance does not involve considerations of sufficiency of probative value. ... A cardinal principle of our law of evidence, then, is that any matter that has any tendency, as a matter of logic and human experience, to prove a fact in issue, is admissible in evidence, subject, of course, to the overriding judicial discretion to exclude such matter for the practical and policy reasons already identified. [Emphasis added.]

> 33 While La Forest J. dissented in the result in *Corbett*, his discussion of the significance and meaning of relevance is consistent with previous and subsequent majority decisions of the Supreme Court of Canada: *Morris v. R., supra, per* McIntyre J., at pp. 191-92 S.C.R., pp. 98-99 C.C.C., *per* Lamer J. (dissenting in the result) at pp. 200-01 S.C.R., pp. 105-06 C.C.C.; *R. v. Seaboyer*, [1991] 2 S.C.R. 577 at pp. 609-12, 66 C.C.C. (3d) 321 at pp. 389-92. Relevance as explained in these authorities requires a determination of whether as a matter of human experience and logic the existence of "Fact A" makes the existence or non-existence of "Fact B" more probable than it would be without the existence of "Fact A". If it does then "Fact A" is relevant to "Fact B". As long as "Fact B" is itself a material fact in issue or is relevant to a material fact in issue in the litigation then "Fact A" is relevant and *prima facie* admissible.

[161] In this case, there was no issue that the Credit Union was robbed on May 26, 1998 and the employees forcibly confined. The only issue for the jury to decide was whether the Crown could prove, beyond a reasonable doubt, the identity of the accused as being the person who had committed the offences. We fail to see any relevance to the vinyl siding. For example, there was no evidence that it was unique in some way. Pieces of the siding had not been located elsewhere. There was no forensic value to this debris.

[162] A similar analysis applies to the suggestion that the trial judge erred in preventing the appellant from entering pieces of Styrofoam and the handwritten sign. During the trial proper, the appellant tried to suggest to Cpl. Gillis that the stains on Styrofoam depicted in the photographs were blood. Cpl. Gillis testified it was not blood, but believed it to be transfers of mud or dirt. The appellant asked Cpl. Gillis if he still had the Styrofoam in his possession. He did not. The items he seized had been turned over to Cst. Hynes. When Cst. Hynes testified, the appellant made no mention of the Styrofoam.

[163] Mr. Billy MacKinnon was the Credit Union employee who, on opening the office, was greeted by a man wearing a fake beard and wielding a handgun. The robber asked Mr. MacKinnon to shut the alarm off. The vault could not be opened until a second employee, Ms. Francis arrived. In the meantime, the robber permitted Mr. MacKinnon to answer the phone but "not to try anything funny". He directed MacKinnon to make a sign "Closed until 10:30". The sign was then posted after Ms. Francis arrived.

[164] This handwritten sign was seized by Cpl. Gillis but not entered as an exhibit by the Crown. It was depicted in one of the photographs. The only mention of the sign by the appellant was in cross-examination of Mr. MacKinnon. The following is the complete exchange:

> **MR. WEST:** Well, okay. Now let's go, I want to get to this sign. Do we actually have that sign here?
>
> **THE COURT:** What sign are you referring to?
>
> **MR. WEST:** That sign was put on the door.
>
> **THE COURT:** Well, I don't know, Mr. West. I think if you want to you can see there's a picture that's quite discernable in the photographs, one of these photographs. You may want to use that as a tool to ...
>
> **MR. WEST:** It's in photo 33. You really can't see. It would have been nice if they had a photo from the outside.
>
> **THE COURT:** Well, I have no difficulty in reading it and I suggest the jury can probably see it. Looks to me like "Closed until 10:30." Witness, is that what you see?
>
> **A.** What picture was that?
>
> **THE COURT:** Picture 33.
>
> **A.** Yes.
>
> **MR. WEST:** So that's the sign you wrote?
>
> **A.** Yes.
>
> **Q.** So where did you get the paper from?
>
> **A.** Out of the printer.

[165] Although the appellant expressed a wish to have the sign, he did not make any application to have it produced. He expressed no dissatisfaction with simply

using the photographs. The appellant questioned Cst. Hynes as to whether he had the sign. He testified he believed it have been in the bag of exhibits he had received from Cpl. Gillis. No further mention was made of the sign. We see no relevance to the handwritten sign to any matter that bore on the central issue of the identity of the person or persons who committed the robbery.

[166] Wood debris was seized by Cpl. Gillis from the crime scene. Wood chips and fibres were also seized by the police on May 26,1998 following the arrest and search of a vehicle occupied by two suspects, Martin Meltzer and John Cannell. During the course of the appellant's disclosure application trial management issues were discussed. The Crown advised the appellant that it did not intend to re-call certain witnesses for the trial. The whereabouts of a witness the appellant wanted subpoenaed was discussed.

[167] The appellant then questioned whether all of the exhibits would be available for use by the defence. When asked if he had anything particular in mind, the appellant said he wanted to see the vinyl siding, and certainly wanted to look at Metzler's socks, the wood chips, and fibres that were used for comparison purposes.

[168] From our review of the trial record, the appellant never raised the importance of wood fibres or chips seized by the police. He did not seek to have any of this type of material entered as an exhibit. The only time wood fibres were raised was during what is commonly called the "McMillan *voir dire*", a hearing to determine if the defence can lead evidence suggesting that a third party was the person who actually committed the offence. It gets its name from the leading case of **R. v. McMillan** (1975), 23 C.C.C. (2d) 160 (Ont. C.A.), aff'd [1977] 2 S.C.R. 824. The principles were more recently reviewed in **R. v. Grandinetti**, [2005] 1 S.C.R. 27. In **Grandinetti**, Justice Abella wrote:

> 46 Evidence of the potential involvement of a third party in the commission of an offence is admissible. In *R. v. McMillan* (1975), 7 O.R. (2d) 750 (C.A.), aff'd [1977] 2 S.C.R. 824, Martin J.A. stated the simple underlying premise to be:

> [I]t [is] self-evident that if A is charged with the murder of X, then A is entitled, by way of defence, to adduce evidence to prove that B, not A, murdered X. [p.757]

However, as he explained, the evidence must be relevant and probative:

> Evidence directed to prove that the crime was committed by a third person, rather than the accused, must, of course, meet the test of relevancy and must have sufficient probative value to justify its reception. Consequently, the Courts have shown a disinclination to admit such evidence unless the third person is sufficiently connected by other circumstances with the crime charged to give the proffered evidence some probative value. [p. 757]

47 The requirement that there be a sufficient connection between the third party and the crime is essential. Without this link, the third party evidence is neither relevant nor probative. The evidence may be inferential, but the inferences must be reasonable, based on the evidence, and not amount to speculation.

48 The defence must show that there is some basis upon which a reasonable, properly instructed jury could acquit based on the defence: *R. v. Fontaine*, [page 43] [2004] 1 S.C.R. 702, 2004 SCC 27, at para. 70. If there is an insufficient connection, the defence of third party involvement will lack the requisite air of reality: *R. v. Cinous*, [2002] 2 S.C.R. 3, 2002 SCC 29.

[169] A "McMillan *voir dire*" was held. The appellant identified Messrs. Meltzer and Cannell as the two persons whom he wanted to establish had a sufficient connection to the crime in order to be permitted to lead evidence to that effect. The appellant called three witnesses, Cst. Hynes, Cst. Chlow, and himself. During the testimony of Cst. Hynes, he was directed to the issue of wood fibres or chips being seized from Mr. Cannell's car. Cst. Hynes testified he still had the materials that had been seized but that no comparison had been done to any material from the scene of the robbery. The appellant suggested to the trial judge that he had seen the wood panel on Friday and some of the wood fibres were, in his opinion, very similar.

[170] The police investigators became convinced during the course of their investigation that Messrs. Meltzer and Cannell were not involved in the robbery. There is no need to detail the evidence they relied upon for their conclusion. This was reviewed in some detail by the trial judge in his ruling on the *voir dire*. He found that no substantial connection had been established. The police had eliminated them as suspects once their story had been checked out, and their physical descriptions precluded them as suspects. The appellant does not allege that the trial judge made any error in his ruling.

[171] During the trial proper, the existence of the wood debris from the crime scene was mentioned but at no point did the appellant seek to have them entered as exhibits. We fail to see any relevance if the appellant had wanted to enter them. The trial judge committed no error.

[172] The piece of wood panelling is the last physical item for which the appellant argues the trial judge erred in law in precluding him from adducing, and which resulted in prejudice and his right to a fair trial. As noted earlier, the case at trial was all about identity. The Crown relied entirely on a body of circumstantial evidence to establish that the appellant committed the robbery. Its chief plank was the opinion evidence of Jeff Modler that the DNA of the appellant matched the DNA from the blood found inside the Credit Union. The evidence was that the blood was not there before the morning of the robbery. It was found smeared on a filing cabinet next to the hole cut into the exterior wall of the credit union.

[173] The appellant sought to create a reasonable doubt about identity by suggesting:

- he did not match the physical description of the robber;

- there was no evidence he had any knowledge about the layout of the Credit Union and its alarm system, and the perpetrator had to have such knowledge;

- he was of such a size that it would make it difficult to fit through what he contended was a very small hole in the exterior wall;

- whoever went in and out that hole would have scrapes or marks on their body, and he was "virtually strip searched" a few scant hours after the robbery and no marks were found;

- although witnesses described seeing a purple Neon speeding away from Bass River and he was found in a Neon in Amherst, a search of him and the car turned up no money, tools, or anything to link him to the robbery;

- the Neon he was in with his son did not match the colour nor some of the distinguishing features described by some witnesses;

- when stopped in Amherst, he had cooperated with the police;

- he had explained to the police his whereabouts that day, calls were made and the police then permitted him to be on his way;

- that the police had damaged the integrity of the DNA match by how they took and handled the blood sample from the scene and, in any event, the forensic work to establish the match could be the result of error.

[174] As mentioned earlier, Cpl. Gillis took a number of pictures. Naturally they showed the hole in the exterior wall from both outside and inside the Credit Union. During the *voir dire* to determine the admissibility of the DNA evidence, Cpl. Gillis said the hole was twenty-one by fourteen inches, and the piece of panel board (police Exhibit 4) that had been cut out, had the same dimensions.

[175] In front of the jury, in direct examination, Cpl. Gillis did not testify to any measurements of the hole or of the piece of panel board. He was simply asked what, if anything, he had done with the panel board. His evidence was that he had carried out a fingerprint examination of it that did not turn up anything of value. In cross-examination, Cpl. Gillis said "I believe that piece of panelling is 14 inches by 21 inches". The appellant then sought to have the actual exhibit produced. The Crown did not object to its production. The trial judge did. The following is the relevant exchange:

> **MR. WEST:** Oh, I'm not ... no, I was asking ... I was actually asking the Crown and Mr. Gillis do we have that panel ...

THE COURT: Well, the witness is here to be questioned. Go ahead and ask him if you wish.

MR. WEST: Is that piece of panelling present?

A. No. I turned that panel over to Cst. Hynes on the 29th of May, 1998, and I haven't seen it since.

Q. Does the Crown have the panelling present?

THE COURT: Okay, now just continue with this witness.

MR. WEST: Oh, sorry. Well, I would like ...

THE COURT: You can't be questioning the other lawyers during the proceedings.

MR. WEST: Well, I would like to see the piece of panelling.

THE COURT: Well, I don't think we have it here. Is that your evidence? You do not have it?

A. That is correct, My Lord.

THE COURT: All right.

MR. WEST: But I presume that all exhibits are in the building?

THE COURT: Mr. West, this witness has told you that ... he identified the panel. He's indicated that he doesn't have the panel, that he turned it over to someone else. And that's his evidence.

MR. WEST: What if I want to make ... question him ... I want to question him ... want to ask him some questions on the panelling? We must have the panelling here in the building. That's why I want the panelling, to put in as exhibit. He's the one that seized it.

THE COURT: I've indicated he's answered your question. He doesn't have it.

MR. WEST: My question is: Can we obtain it?

> **THE COURT:** Well, he doesn't have it so I suspect the answer that he might give you is that he can't obtain it for you if he hasn't got it. Just focus on this, Mr. West. The witness right now is Cpl. Gillis.
>
> **MR. WEST:** Well, with the piece of panelling, we could get kind of (the guess?) the size of the hole, and then we could look at the panelling, and there's some questions that I wanted to ask him about the panelling.
>
> **THE COURT:** But Mr. West, I've indicated he doesn't have the panelling.
>
> **MR. WEST:** Can the Court ask the Crown if the panelling is present in the building?
>
> **THE COURT:** I think we should take a break. Sorry, ladies and gentlemen, we're going to have to take another break here. We won't be long.

[176] The trial judge then called on the appellant to make submissions. He argued that the panel itself would demonstrate the actual opening the suspect would have to pass through. The Crown responded that entering the piece of panel board would be entering an exhibit for the sake of entering an exhibit. She assured the trial judge that the piece of panel was in the possession of the police, if Mr. West was insistent on acquiring it, but that it would have to be properly put into evidence.

[177] The trial judge was unconvinced. He reminded the appellant that the piece of panel board did not produce any evidence against him, so why did he want it? The appellant explained that most people would not appreciate the real meaning of just saying what the dimensions were, there would be a real visual effect to the jury seeing the actual piece and the drill marks that were present on it. It would give a better perception of the size of the hole.

[178] The trial judge was still not convinced. He refused its production. On appeal, the Crown argues that admissibility is determined by relevance, materiality and whether the probative value of proffered evidence exceeds any prejudicial effect. In addition, it says a trial judge has an overriding discretion to exclude otherwise relevant evidence, and that the judge was merely exercising his discretion.

[179] It is well recognized that a trial judge has a discretion to exclude evidence that is relevant but not precluded by a specific exclusionary rule. However, there is a distinction on the appropriate approach and scope of that discretion if the evidence is being offered against an accused or by an accused. (See generally Sopinka, Lederman & Bryant: *The Law of Evidence in Canada*, 3rd ed., (LexisNexis Canada Inc., 2009) pp. 60-63.) A full discussion of the difference is unnecessary to the determination of this appeal.

[180] At one point it was thought that a trial judge enjoyed no discretion to exclude evidence tendered by the defence on the basis that its reception would operate unfairly to the Crown (see **R. v. Valley** (1986), 26 C.C.C. (3d) 207 (Ont. C.A.); **R. v. Hawke** (1975), 22 C.C.C. (2d) 19 (Ont. C.A.), [1975] O.J. No. 2200, ¶ 114-15). It must now be taken that the discretion does exist, but is to be exercised for relevant and reliable evidence only where the probative value is substantially outweighed by its prejudicial effect. McLachlin J., as she then was, reached this conclusion in **R. v. Seaboyer**, [1991] 2 S.C.R. 577:

> 43 The Canadian cases cited above all pertain to evidence tendered by the Crown against the accused. The question arises whether the same power to exclude exists with respect to defence evidence. Canadian courts, like courts in most common law jurisdictions, have been extremely cautious in restricting the power of the accused to call evidence in his or her defence, a reluctance founded in the fundamental tenet of our judicial system that an innocent person must not be convicted. It follows from this that the prejudice must substantially outweigh the value of the evidence before a judge can exclude evidence relevant to a defence allowed by law.

See also **R. v. Clarke** (1998), 129 C.C.C. (3d) 1, [1998] O.J. No. 3521, ¶ 33-4.

[181] At trial, the Crown did not suggest that there was anything prejudicial, unreliable, or misleading about the exhibit the appellant wanted to enter into evidence. Nor did they argue it was irrelevant. It was the trial judge that intervened and expressed concern about relevance. The following exchange is illustrative of what led to the ruling not to permit the evidence to be introduced:

> **THE COURT:** ... However, I have a supervisory role to make sure that the evidence is relevant, and that the jury is not being dragged through a bunch of stuff that's got no relevance whatsoever just because you want to do it.

> **MR. WEST:** Well, the entry point has got to be relevant. That's ... the entry point has got to be relevant. That's the whole thing.
>
> **THE COURT:** We've got lots of photos of it. Well, okay, Mr. West, if you can tell me what you expect this to give you at the end, spit it out. Tell me what it is this evidence is going to give to your case.
>
> **MR. WEST:** It gives a very clear, very visual example of what the hole was.
>
> **THE COURT:** And what ... okay, continue. That's not going to trip the wire.
>
> **MR. WEST:** Well then, that way there ...
>
> ...
>
> **MR. WEST:** No, I wanted them to get the full perspective of just what that hole is.
>
> **THE COURT:** You haven't persuaded me.
>
> **MR. WEST:** The height of the hole.
>
> **THE COURT:** You haven't persuaded me. I'm not going to order production of this at this time. We have lots of photographs. **I haven't been given a compellingly good reason why I should**.
> (Our emphasis)

[182] With respect, we are of the view the trial judge erred in not permitting the appellant to introduce the piece of panel board. There was nothing unreliable or misleading about the proposed exhibit. The appellant believed it would give a better perspective to the jury about the true size of the hole than the photographs. It was therefore relevant and *prima facie* admissible.

[183] The trial judge appeared to weigh the value of the proposed exhibit against what was depicted in the photographs. There may well have been little additional probative value to the proposed exhibit, but we can see no prejudicial effect to the proffered evidence. Instead of engaging in a balancing of any prejudicial effect to

its probative value, the trial judge ruled it inadmissible because he had not been given a compellingly good reason why he should. This is not the correct test and he consequently erred in law in refusing to permit the appellant to introduce the exhibit. If, as the Crown now suggests, the trial judge feared the exhibit could be used to somehow mislead the jury, a suitable limiting instruction was available to the trial judge.

[184] However, not every error of law puts in jeopardy a conviction. The **Criminal Code** sets out the powers of an appellate court in hearing an appeal from conviction. Section 686(1) provides:

> 686. (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal
>
> (a) may allow the appeal where it is of the opinion that
>
> (i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,
>
> (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or
>
> (iii) on any ground there was a miscarriage of justice;
>
> (b) may dismiss the appeal where
>
> (i) the court is of the opinion that the appellant, although he was not properly convicted on a count or part of the indictment, was properly convicted on another count or part of the indictment,

> (ii) the appeal is not decided in favour of the appellant on any ground mentioned in paragraph (a),
>
> (iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (a)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred, or
>
> (iv) notwithstanding any procedural irregularity at trial, the trial court had jurisdiction over the class of offence of which the appellant was convicted and the court of appeal is of the opinion that the appellant suffered no prejudice thereby;

[185] Where an appellant establishes that there has been an error in law, the court may nonetheless dismiss the appeal and uphold the conviction if it is satisfied that no substantial wrong or miscarriage of justice occurred. This is frequently referred to as the curative proviso. To invoke the proviso and uphold a conviction, the court must be satisfied there is no reasonable possibility that the verdict would have been different without the error (**R. v. Bevan**, [1993] 2 S.C.R. 599; **R. v. John**, [1985] 2 S.C.R. 476; **R. v. Wildman**, [1984] 2 S.C.R. 311). This result can be arrived at if either the court is satisfied that the error was one that had no impact on the verdict – a true harmless error, or where there are one or more serious errors, but the evidence is so overwhelming that a conviction would be the inevitable result.

[186] We are satisfied that the error in law was a harmless one. There is no reasonable possibility that the verdict would have been different had the trial judge permitted the appellant to introduce the piece of panel board. The proposed exhibit had no bearing on the key evidence – the DNA match of the blood found at the scene to that of the appellant.

[187] Accordingly, this ground of appeal is dismissed.

#4 Error by trial judge in preventing the appellant from inspecting exhibits

[188] The appellant first expressed a desire to see the exhibits in the possession of the police on January 30, 2007. This was the second day of the appellant's application to establish that he had been denied disclosure. The appellant explained

to the trial judge that he wanted the exhibits present so he could go over them with Cpl. Gillis. This seemed to be outside the scope of a *voir dire* to ensure that the Crown had disclosed all information that could possibly be relevant. The Crown did not view the request as a disclosure issue, but if the appellant wished to see the exhibits, the request would not be denied. The trial judge declined to make any order arising out of the appellant's request, and encouraged the appellant to take the matter up with the Crown in light of its position that it would comply with any reasonable request.

[189] February 2, 2007 was a Friday. Submissions had just concluded on the disclosure application. Decision on the application was reserved until Monday, February 5. The Crown proposed to use Friday afternoon to provide the opportunity for the appellant to view the exhibits seized by the police. The relevant discussion was:

> **THE COURT:** So Mr. West will view the exhibits this afternoon.
>
> **MR. TANCOCK:** And unless Your Lordship directs otherwise, I'd advise Cst. Hynes that things that are secured in bags and what not, if they're see-view bags that Mr. West is not to open and handle things directly but can certainly look at them.
>
> **THE COURT:** No, that's right.
>
> **MR. WEST:** Oh no.
>
> **THE COURT:** If we're going to do that, do it in here. Okay, but basically...
>
> **MR. WEST:** I just want to see what they have.
>
> **THE COURT:** All right. That's great. Okay. That's one issue.

> **MR. WEST:** I may make a couple of measurements.

[190] The appellant now complains in his factum that he was denied a true opportunity to view the police exhibits, and this constituted a serious violation of his right to make full answer and defence. He says the denial was caused by the investigating officer, Cst. Hynes, not having all of the exhibits in the box presented to him, being unresponsive to reasonable queries about the exhibits, and not permitting access to the exhibits outside of their restrictive packaging. Almost all of the factual allegations detailed in the appellant's factum are not found in the transcript of the trial proceedings.

[191] When court proceedings resumed on Monday February 5, 2007, the appellant raised no complaint with the trial judge about the process or means of viewing the police exhibits. The first time it was raised was on February 8, 2007 during the cross-examination of Cpl. Gillis before the jury. The issue arose in relation to the piece of panel board. As set out above, the appellant wanted the piece produced and entered as an exhibit. During the course of submissions on this issue, the appellant made the comment: "...the defendant himself has never had a chance to examine or see the exhibit out of the package".

[192] The only other complaint about access to police exhibits was during the "McMillan" *voir dire*. Cst. Hynes had testified that no forensic comparisons had been done between any of the materials seized from the other suspects and the exhibits taken from the crime scene. In the discussion with the trial judge about the probative value of his line of questioning, the appellant said:

> **MR. WEST:** Oh, no. But when I looked ... but I would have had a comparison done because when I looked at that wood panel on Friday ... that's why I wanted to see the wood panel again.
>
> When I seen the wood panel and I seen some of the fibers that were moved from those ... I'm telling you, in my opinion they're very similar.

[193] This appears to be an express acknowledgment that he had an adequate opportunity to view the piece of wood panelling and the fibres connected to the third party suspects. The Crown objected to the opinion being offered by the

appellant. Nonetheless, the appellant then made a request to "On my own I would ask the Court that I be allowed to see the wood panelling separate and the fibers that they seized." When the trial judge doubted that the appellant had any training to be able to carry out such a comparison, the appellant suggested if his examination led him to a belief they matched, he would ask the court to order a comparison. The trial judge commented that halfway through the trial, this was not going to happen.

[194] We accept that access to physical exhibits can reasonably be viewed as part of the Crown's disclosure obligation. Here the transcript demonstrates the appellant had all of the relevant information in the possession of the Crown. The only request ever advanced on behalf of the appellant to view the physical exhibits was in the middle of the trial. He was given access. We see absolutely no error in how the trial judge handled the issue of the appellant's access to the police exhibits.

[195] Some of the complaints articulated by the appellant are, with respect, difficult to follow. One of the complaints particularized in the appellant's reformulated ground of appeal is that he did not have access to the original VHS tape. Presumably this refers to the videotaped interview of September 29, 1999. He says the box shown to him by Cst. Hynes did not contain any VHS tapes. For reasons already set out above, the interview of September 29, 1999 was not relevant. It was certainly not part of the physical exhibits seized by Cpl. Gillis or others, and kept in the custody of the investigating officer, Cst. Hynes. Furthermore, the appellant at no time requested from the trial judge an order requiring the production of the original tapes.

[196] For all of these reasons, this ground of appeal is dismissed.

#5 Error by trial judge regarding disclosure

[197] The appellant expressed his original complaints to this Court about disclosure in his 5th and 11th grounds of appeal as follows:

> 5....It is submitted the learned trial judge erred in law in respect to the Stinchcombe Application and that disclosure is an ongoing process which occurs over years and upon numerous requests , and by restricting the unrepresented accused to a time limit for the questioning of witnesses , as well as restricting the accused from entering documentation in support of the non-disclosed items known

> by the accused to have existed , as well as altered items , missing items and so on , which resulted in prejudice to the accused and the right to a fair hearing.
>
> 11....It is submitted the learned trial judge erred by not providing the unrepresented accused time to view or fully review the late disclosure packages that were continuously being provided by the crown at court which affected the right to a fair hearing.

The expression of the issue in the appellant's factum is much more concise:

> (e) It is submitted the trial judge erred in law in the application of the test in R. v Stinchcombe [1991] 3 S.C.R. 326, 68 C.C.C. (3d) 1 (S.C.C.) and the Attorney General's Directives for Nova Scotia as they applied to the timing of disclosure, non-disclosure and other disclosure matters.

[198] The appellant's factum sets out in considerable detail his complaints about lack of disclosure and how the trial judge conducted the application brought by the appellant alleging non-disclosure. By way of overview, he outlines numerous examples of what he says amounted to late disclosure encountered from 1999 forward. He complains that he did not have adequate time to question the witnesses concerning non-disclosure and was unfairly limited in doing so. He also takes exception to the comments by the trial judge that his application seemed to be nothing more than a fishing trip. Lastly, the appellant sets out some twenty-three instances of what he alleges constituted violation of his right to disclosure. The appellant also sought to tender "fresh evidence" in the form of his affidavit seeking to demonstrate failures by the Crown to disclose. For the reasons that follow, we conclude that none of the matters raised by the appellant have any merit.

[199] With all due respect to the appellant, his complaints about disclosure to the trial judge, and in this Court, appear to stem from a misunderstanding about what is meant by the obligation on the Crown to disclose, and the difference between late and non-disclosure. The right to disclosure exists to ensure an accused's right to make full answer and defence is not violated. To avoid violation, the Crown must disclose all information that could possibly be relevant. The general principles are set out by LeBel J., speaking for the full court, in **Taillefer, supra**, as follows:

> [59] After a period during which the rules governing the Crown's duty to disclose evidence were gradually developed by the provincial appeal courts in recent decades, those rules were clarified and consolidated by this Court in *Stinchcombe*. The rules may be summarized in a few statements. The Crown must disclose all relevant information to the accused, whether inculpatory or exculpatory, subject to the exercise of the Crown's discretion to refuse to disclose information that is privileged or plainly irrelevant. Relevance must be assessed in relation both to the charge itself and to the reasonably possible defences. The relevant information must be disclosed whether or not the Crown intends to introduce it in evidence, before election or plea (p. 343). Moreover, all statements obtained from persons who have provided relevant information to the authorities should be produced notwithstanding that they are not proposed as Crown witnesses (p. 345). This Court has also defined the concept of "relevance" broadly, in *R. v. Egger*, [1993] 2 S.C.R. 451, at p. 467:
>
>> One measure of the relevance of information in the Crown's hands is its usefulness to the defence: if it is of some use, it is relevant and should be disclosed – *Stinchcombe, supra*, at p. 345. This requires a determination by the reviewing judge that production of the information can reasonably be used by the accused either in meeting the case for the Crown, advancing a defence or otherwise in making a decision which may affect the conduct of the defence such as, for example, whether to call evidence.
>
> [60] As the courts have defined it, the concept of relevance favours the disclosure of evidence. Little information will be exempt from the duty that is imposed on the prosecution to disclose evidence. As this Court said in *Dixon, supra*, "the threshold requirement for disclosure is set quite low. . . . The Crown's duty to disclose is therefore triggered whenever there is a reasonable possibility of the information being useful to the accused in making full answer and defence" (para. 21; see also *R. v. Chaplin*, [1995] 1 S.C.R. 727, at paras. 26-27). "While the Crown must err on the side of inclusion, it need not produce what is clearly irrelevant" (*Stinchcombe, supra*, at p. 339).

[200] It must also be emphasized that there is a different test to be applied on appeal as opposed to trial. At trial, a court must intervene when it is established on a balance of probabilities that an accused's right to disclosure has been violated. A number of remedies can be resorted to by the trial court to address a violation. What is appropriate depends on a variety of factors which need not be discussed here. On appeal, in order to obtain a remedy an accused must not only establish that his or her right to disclosure was violated, but that any such failure impacted on his

or her right to a fair trial. The distinction was explained by Cory J. in **Dixon**, **supra**:

> [22] 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 <u>reasonable possibility</u> 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.
>
> [23] However, a finding that an accused's right to disclosure has been violated does not end the analysis. As Sopinka J. wisely observed in *Carosella, supra*, at p. 100, an appellate court must be careful not to "confus[e] the obligation to establish a breach of the right [to full answer and defence] with the burden resting on the appellant in seeking a stay". Similarly, the initial test which must be met in order to establish a breach of the right to disclosure is analytically distinct from the burden to be discharged to merit the remedy of a new trial. The right to disclosure of all relevant material has a broad scope and includes material which may have only marginal value to the ultimate issues at trial. It follows that the Crown may fail to disclose information which meets the *Stinchcombe* threshold, but which could not possibly affect the reliability of the result reached or the overall fairness of the trial process. In those circumstances there would be no basis for granting the remedy of a new trial under s. 24(1) of the *Charter*, since no harm has been suffered by the accused.

> [24] It will be necessary later to explore in greater depth the nature of the burden to be discharged to merit a new trial. Now it will suffice to observe that for the purposes of this first stage of the analysis, an appellate court may well find that an accused's *Charter* right to disclosure has been breached, and yet deny the remedy of a new trial if it is found that the trial process was fundamentally fair and that there was no reasonable possibility the result at trial might have been different had the undisclosed material been produced.

[201] In this case, the appellant brought a formal application to establish on a balance of probabilities that his right to disclosure was violated. As noted earlier the appellant filed an affidavit in support of the application that was over four hundred paragraphs. In addition, he called fifteen witnesses and provided his own testimony. The trial judge found no substantive violation of his right to disclosure, let alone any violation of his right to make full answer and defence.

[202] At the conclusion of the *voir dire*, the trial judge reserved his decision. He delivered his ruling on the application on February 5, 2007. He referred to the leading authorities on disclosure and the appropriate analytical approach where an accused alleges the Crown wilfully or otherwise failed to disclose. The trial judge made several key findings of fact. Chief among them are found in these paragraphs:

> What did emerge was that Mr. West is very familiar with all of the paper he has received through disclosure over the past several years. I am very much of the view that Mr. West has invested heavily in this disclosure issue, and I am of the opinion that this tact has been driven by the knowledge that in many serious cases the battle is fought on the disclosure front.

> Sometimes big disclosure cases are substantively sound, but often it is a way to avoid meeting the Crown's case on its merits. I am also aware that in the two trials of the Mahone Bay robbery, especially in the second, disclosure was litigated for a lengthy period of time. So I understand completely where Mr. West's motivation comes from in relation to this application.

> I am satisfied and I so find as a fact that Mr. West brings a conspiracy approach to this application. He really believes that the police, especially Sgt. Oldford, are pulling strings to get him convicted. He really believes that the DNA

> evidence has been doctored and he really believes that important evidence is being buried so as to deprive him of the ability to defend himself. He is firmly of the view that police officers routinely perjure themselves when giving evidence. Mr. West makes an effort to camouflage his conspiracy arguments under the guise of sloppy police work but there is no doubt in my mind that when you strip it down, Mr. West feels that an active and ongoing conspiracy exists. Let me say that I have found absolutely no evidence to support such a theory.

[203] Despite the appellant's suggestions, the trial judge also found no evidence that the police or any Crown attorney wilfully failed to meet their obligation to disclose and that the appellant had failed to prove the existence or relevance of any materials he claimed should have been produced. The trial judge found:

> Before I go there, I want to make it clear that there is no evidence whatsoever, let alone suspicion, that any police officer or Crown employee willfully failed to meet the **Stinchcombe** obligation. In fact, I find as a fact that the police and the Crown were exceptionally attentive to the issue of disclosure and they had disclosure on their plates at all times as a result of Mr. West's insistence that they were hiding materials from him or his counsel. I also find as a fact that Mr. West has received disclosure many times and that there has been much overlap between the packages he has received. In fact, I will go so far as to state that Mr. West made disclosure the cornerstone of his defence and continually fed that principle by alleging non-disclosure.
>
> I have also concluded that much of what Mr. West has periodically requested, he already had, buried in the immense piles of paper he has accumulated through disclosure over the years. I also find as a fact that most of what Mr. West requested were nothing more than materials he felt existed and I've spoken about that earlier. He has not been able to produce evidence of their existence in many cases.

[204] The trial judge set out a list of items the appellant had identified through his evidence and submissions as being in issue. The trial judge found most were merely speculation by the appellant and their existence was not supported by the evidence.

[205] The trial judge did conclude that there was a witness statement in existence that had not been disclosed, but that the appellant had not established that the information in that statement was relevant, let alone that it had impacted on his

ability to make full answer and defence. The trial judge also noted that handwritten notes by some police officers were only disclosed when they came to court. In all of these instances the Crown led evidence, which was not rebutted by the appellant, that all of the information contained in the handwritten notes was found in their typewritten reports, which had been disclosed.

[206] This led the trial judge to conclude:

> These notes should have been disclosed earlier. There's no question about that. I find it a fact that their disclosure was inadvertent and not intentional and I find that given the officers' very limited involvement, the delay has, in no way, limited or affected Mr. West's ability to make full answer and defence. The information developed by these officers in those late notes did not address the critical issue in this trial and much of that information has been released to Mr. West through other vehicles.
>
> In fact, I find that Mr. West has not suffered any prejudice by the late disclosure of these limited few notes and that Mr. West is not entitled to any relief arising therefrom.
>
> I will dismiss that application.

[207] The appellant fails to identify any error in the trial judge's identification and application of the appropriate legal principles or any palpable and overriding error in his findings of fact. In the absence of such error, we are not at liberty to intervene and substitute our view of the facts for that of the trial judge.

[208] Nonetheless, we have carefully reviewed the twenty-three items of alleged non-disclosure raised in the appellant's factum. Some were not even referred to in his application at trial, such as his request for his "booking photographs". Others were such items as correspondence he insists he sent to Cst. Hynes, but for which copies were not to be found in the police files. In a similar vein, he says that telephone message slips documenting his attempts to have Cst. Hynes call him should be in the police file but are not. The same for facsimile transmissions.

[209] With respect, the appellant confuses disclosure of documentation with disclosure of information. The obligation to disclose applies to information in the possession of the Crown, (which for disclosure purposes includes the police), that could possibly be relevant to the ability of the accused to make full answer and defence. Granted, information is frequently contained in documentation. But there is no information recorded on the correspondence sent by the appellant to the police that was not already in his hands. There may be instances where receipt of such correspondence may be relevant, but here we see none. We fail to see any possible relevance to his ability to make full answer and defence to any of his complaints, let alone the more stringent test on appeal of a reasonable possibility that the result of the trial would have been different if the alleged items had been produced.

[210] We have also carefully reviewed the volumes of material produced by the appellant by way of his application to adduce fresh evidence as it pertains to his complaint of non-disclosure. This material simply demonstrates many of the same or similar complaints that the appellant made to the trial judge. In our view, for the most part, the material is simply an attempt to re-argue the disclosure application. There is nothing produced in the materials that was not before the trial judge, except perhaps an expanded list of non-disclosure allegations. The appellant does not allege that the additional particulars of non-disclosure were somehow unknown to him at trial.

[211] The appellant's complaint about the conduct of the hearing of the disclosure application centers on two issues. The first is that he was forced to proceed without adequate time to prepare. The second is that the trial judge unfairly, and to his prejudice, put limits on his examination of witnesses. We find no merit in these complaints.

[212] The disclosure application brought by the appellant in January 2007 was not a rushed affair. Some context is relevant. The record demonstrates that the appellant was acutely aware of the obligation on the authorities to disclose. The appellant had been representing himself since September 30, 2005. Despite having a duplicate of the Crown's file delivered to him in April 2006, he asked for a complete copy of the "police file". When this was delivered to him in July 2006, he refused to accept it.

[213] The appellant's trial was adjourned from April 10, 2006 to the September 2006 term. On August 9, 2006 the appellant filed an application for a further adjournment and affidavit in support. In his affidavit he deposed that he needed more time to prepare for the upcoming hearings and trial. One of the chief complaints set out in his affidavit was non-disclosure.

[214] The adjournment application was heard by the then trial judge, Scanlan J., on September 5, 2006. The application was granted. The appellant was asked if an adjournment to January 2, 2007 was acceptable. The appellant said it was but was still seeking other information from the Federal Justice department. Other applications were filed by the appellant. A number were dealt with on September 18, 2006 before Scanlan J. One was a disclosure application dated August 29, 2006, along with a forty-two paragraph affidavit of the appellant citing non-disclosure by the authorities and seeking a court order for an itemized list of materials in their possession. Scanlan J. ruled that he was satisfied there was no itemized list available, and would not order one to be made. He encouraged the appellant to accept the copy of the police file which was still available. Scanlan J. found that no breach of the **Stinchcombe** requirements had been established.

[215] The appellant evinced an intention to bring a further application alleging non-disclosure. He was warned by the trial judge not to wait to bring his application or suffer the consequences. The trial was, at that time, set for January 2, 2007 to February 2, 2007. For reasons not disclosed on the record before us, the trial date was pushed back a few weeks, and Justice Coady became the trial judge.

[216] On January 4, 2007 the parties appeared before Coady J. to discuss a variety of issues. Chief among them was the orderly scheduling of the pre-trial applications. The trial was scheduled to commence with applications on January 22, 2007. The first application to be heard was a *voir dire* to determine the admissibility of the expected Crown evidence with respect to DNA. If the evidence was ruled not to be admissible, it was anticipated the Crown would not be able to proceed with the trial, making moot the pending applications by the appellant. The DNA *voir dire* was held January 22 to January 25, 2007.

[217] The appellant was then permitted to bring his application alleging an abuse of process. Evidence was called by the appellant in this hearing January 25-29, 2007. The hearing of the appellant's application alleging non-disclosure was heard

January 30-31 and February 1-2, 2007. In the meantime, the appellant had, on January 16 filed with the court his formal application, his four hundred and forty-four paragraph affidavit and nine page brief. There had also been an *in camera* hearing before the trial judge on January 4, 2007, where the appellant had the opportunity to speak as to why subpoenas should be issued to compel the attendance of some thirty-four individuals he had identified as having relevant evidence to give on his disclosure application. On going through the list, the appellant agreed that a number of the witnesses he had requested to be subpoenaed were not in fact relevant.

[218] At the outset of the disclosure application the only reference to the appellant not having adequate time to prepare was his assertion that there had been a "lock-down" the previous night in the penitentiary, and so he was not "fully prepared". He was on the Inmate Committee and people were "coming at me". He was consequently tired and went to bed. The trial judge then commented on what had gone on in the previous *voir dires*, and the material relied upon by the appellant in support of his disclosure application. This led him to a ruling to put limits on questioning of witnesses by the appellant. He found:

> I cannot find anything in that affidavit or these supporting legal submissions that identify what Mr. West is seeking by way of a disclosure order. There is no meat in that affidavit. It is rambling and confusing. There is nothing in that affidavit to change my view that this application is nothing more than a fishing expedition.
>
> Throughout the previous two applications, Mr. West has advocated that this is all a set up by the police and Crown and the authorities, that it is a conspiracy by police and the Crown to get him convicted on falsehoods and inappropriate State conduct. Mr. West's affidavit does nothing more than advance these theories.

[219] He also concluded that the appellant had a firm grip on the evidence and issues, but that the appellant was attempting to derail the trial by his conduct so far, and avoid a trial on the merits. Nonetheless, the trial judge permitted the disclosure application to proceed, but it was not to be without reasonable limits. The trial judge clearly articulated the limits, and the reasons they were needed, as follows:

> Mr. West will certainly be given the opportunity to build upon what he has stated in the documentation. There is no question about that. However, I will not permit him free reign in doing that. Mr. West has indicated that he wishes to call 20-plus witnesses in this application. If the past few days is any indication, this application would last a month. A jury has been selected and is awaiting the trial. Clearly, if Mr. West puts some meat on the table, the Court will push back the attendance of the jury for trial for as long as is required. However, the Court will not permit unlimited, unfocused, irrelevant examinations of witnesses who have very little evidence to give on the application before the Court. Mr. West has shown that approach over the past week or so.
>
> ...
>
> I am compelled to intervene in my role as a trial manager. With each witness, I will give Mr. West 15 minutes to examine the witness. If anything probative emerges in that 15 minutes, I will not intervene. If nothing emerges as probative value to the application, at 15 minutes I will notify Mr. West that we are at that point in time. After another 15 minutes, if nothing comes out, I will terminate the examination. If good evidence comes out, I will allow Mr. West to continue until he exhausts that line of relevant examination. In other words, I will only end the examination if I conclude that nothing has been produced and the examination does not change focus in any material way.
>
> If there is evidence that impacts on the application, I will give Mr. West the time and the opportunity ... as much time and opportunity as he needs to fully explore the witness in that area.

[220] It is well recognized that a trial judge has the inherent power to manage the trial being conducted before him or her, and to promote the efficient use of court time. (See **R. v. Morley** (1988), 87 Cr. App. R. 218 (C.A.); **R. v. Fabrikant** (1995), 97 C.C.C. (3d) 544 (Que. C.A.); **R. v. Felderhof** (2003), 180 C.C.C. (3d) 498 (Ont. C.A.); **R. v. Schneider**, 2004 NSCA 99, [2004] N.S.J. No. 314.)

[221] We do not see any error in the steps taken by the trial judge to ensure the trial was conducted in a fair and orderly manner. As observed by this Court in **Schneider, supra**:

> [58] The rights afforded accused persons cannot be permitted to undermine the object for which they are given - the holding of a fair trial according to law. As Chipman, J.A. said on behalf of the Court in **R. v. Howell** (1995), 146 N.S.R. (2d) 1; [1995] N.S.J. No. 483 (Q.L.) (C.A.), aff'd [1996] 3 S.C.R. 604 "... the many safeguards built into the criminal justice system for an accused, particularly an unrepresented one, cannot be allowed to give rise to a right in an accused person to disrupt the orderly process of a trial." (para. 55)

[222] The record belies any suggestion by the appellant that he was not prepared to conduct the disclosure application. He had planned for months to bring the application, he put forward his intended witnesses on January 4, 2007 and filed his extensive affidavit and brief on January 16, 2007. With respect to limiting his examination of witnesses, a careful review of the transcript shows that the trial judge often reminded the appellant to pursue only matters that were relevant to his allegation of non-disclosure. Otherwise, the trial judge only limited the appellant's examination of one witness, Sgt. Oldford. The examination the appellant wished to continue pursuing with Oldford concerned the issues of the taped interview of September 29, 1999 and the appellant's own notes he claimed he made and which were then seized by Sgt. Oldford. For the reasons already set out earlier, these matters were, in the circumstances of this trial, irrelevant. There was therefore no improper or unfair limit imposed on the appellant in his examination of witnesses.

[223] The appellant did not advance any argument on his ground of appeal that he had insufficient time to fully review the late disclosure packages provided to him in court. As already noted, there were instances where police officers' handwritten notes were produced at trial. In each case, the Crown led evidence that the information contained in the notes had already been disclosed. This evidence was unchallenged.

[224] We dismiss this ground of appeal.

#6 Error by trial judge regarding the abuse of process application

[225] The appellant expresses his complaint about the abuse of process application somewhat differently as between his Notice of Appeal and his factum, but the gist is the same: the trial judge erred in law in denying the appellant adequate preparation time, and in failing to appreciate the gravity of the prejudice suffered by the appellant by the withdrawal of the original charges on October 4, 2000.

[226] The issue of lack of adequate time to prepare can be dealt with summarily. The appellant said nothing in his factum nor in oral argument about this issue. The record demonstrates that the appellant has long complained about the ability of the Crown to withdraw the original charges on October 4, 2000. On January 4, 2007 he identified the basis of his intended application and the witnesses he wanted to call. At the commencement of the *voir dire*, the appellant gave the particulars of the abuse alleged. Evidence was called and submissions made by the appellant. The trial judge reserved decision. On February 5, 2007 he gave his ruling. In the course of doing so he commented:

> I have been very impressed by the obvious amount of preparation that he has put into this case and, in particular, these applications. I have made every effort to identify his "abuse areas" and I feel confident that I understand his submissions in relation to those items.

[227] There is no merit in any complaint that the appellant did not have adequate time to prepare.

[228] The appellant says the withdrawal of the original charges in October 2000 infringed his **Charter** rights, but he does not specify which ones. We see no merit to his complaints. He says the withdrawal was abusive in that the police had acted unlawfully in using the blood sample obtained from him to do a DNA comparison to the blood found inside the Bass River Credit Union, as the sample could only be used to do a comparison to materials linked to the Mahone Bay robbery. By withdrawing the charges he argues he suffered two types of prejudice. The first is that if the charges had not been withdrawn his lawyer at the time would have been able to exclude the DNA comparison and the case would have been over. The second is that the withdrawal and subsequent re-laying of the charges in 2002 caused witness memories to fade or be lost.

[229] The trial judge did not necessarily accept the contention of the appellant that the police had exceeded their lawful powers in using the Mahone Bay warrant sample to compare it to the Bass River robbery sample. He concluded that the evidence about this had no connection to an abuse of process application in relation to a prosecution based on a facially valid warrant to obtain blood samples from the appellant following his conviction for the Mahone Bay robbery. There was, as he

found, "nothing in this process that warrants any kind of intervention by the Court." We agree.

[230] It is well recognized that discretion is an essential feature of the criminal justice system (see **R. v. Beare**, [1988] 2 S.C.R. 387). Both the police and the Crown must make decisions. Discretionary decisions may be reviewed by the courts, but the test for a court to intervene is a strict one. In **R. v. Power**, [1994] 1 S.C.R. 601, L'Heureux- Dubé J., for the majority, wrote (pp. 614-616):

> In *R. v. Keyowski*, [1988] 1 S.C.R. 657, the Court unanimously reaffirmed the principle enunciated in *R. v. Jewitt, supra*. While she held that a stay of proceedings for abuse of process was not limited to cases where there is evidence of prosecutorial misconduct, Wilson J. for the Court, at p. 659, was careful to point out that the remedy will only be granted in the "clearest of cases". In *R. v. Mack*, [1988] 2 S.C.R. 903, a stay of proceedings was entered on the basis that (*per* Lamer J., at p. 939) "in criminal law the doctrine of abuse of process draws on the notion that the state is limited in the way it may deal with its citizens". In *R. v. Conway*, [1989] 1 S.C.R. 1659, writing for the majority, I expressed the following view, at p. 1667:
>
>> Under the doctrine of abuse of process, the unfair or oppressive treatment of an appellant disentitles the Crown to carry on with the prosecution of the charge. The prosecution is set aside, not on the merits (see *Jewitt, supra*, at p. 148), but because it is tainted to such a degree that to allow it to proceed would tarnish the integrity of the court. The doctrine is one of the safeguards designed to ensure "that the repression of crime through the conviction of the guilty is done in a way which reflects our fundamental values as a society" (*Rothman v. The Queen*, [1981] 1 S.C.R. 640, at p. 689, per Lamer J.) It acknowledges that courts must have the respect and support of the community in order that the administration of criminal justice may properly fulfil its function. Consequently, where the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases, then the administration of justice is best served by staying the proceedings. [Emphasis added.]
>
> I added, however, on the same page, that a stay of proceedings for abuse of process will only be granted in the "clearest of cases". This was reiterated in *R. v. Scott*, [1990] 3 S.C.R. 979, *per* Cory J. See also *R. v. Potvin*, [1993] 2 S.C.R. 880.

> I, therefore, conclude that, in criminal cases, courts have a residual discretion to remedy an abuse of the court's process but only in the "clearest of cases", which, in my view, amounts to conduct which shocks the conscience of the community and is so detrimental to the proper administration of justice that it warrants judicial intervention.
>
> To conclude that the situation "is tainted to such a degree" and that it amounts to one of the "clearest of cases", as the abuse of process has been characterized by the jurisprudence, requires overwhelming evidence that the proceedings under scrutiny are unfair to the point that they are contrary to the interest of justice. As will be developed in more detail further in these reasons, the Attorney General is a member of the executive and as such reflects, through his or her prosecutorial function, the interest of the community to see that justice is properly done. The Attorney General's role in this regard is not only to protect the public, but also to honour and express the community's sense of justice. **Accordingly, courts should be careful before they attempt to "second-guess" the prosecutor's motives when he or she makes a decision. Where there is conspicuous evidence of improper motives or of bad faith or of an act so wrong that it violates the conscience of the community, such that it would genuinely be unfair and indecent to proceed, then, and only then, should courts intervene to prevent an abuse of process which could bring the administration of justice into disrepute. Cases of this nature will be extremely rare.**
>
> (Our emphasis)

[231] The appellant has not pointed to any evidence of improper motive or bad faith involved in the Crown's decision to withdraw the charges on October 4, 2000. When the issue of the withdrawal of the charges was being discussed with the trial judge on January 4, 2007, the Crown volunteered to explain why the charges were withdrawn. The trial judge encouraged her to do so. The explanation was straightforward. It was felt it was inappropriate to use the warrant sample and so the charges were withdrawn on the basis that perhaps down the road there would be a proper opportunity to obtain another sample. The Crown thereafter never sought to rely on the Mahone Bay warrant sample.

[232] Following the appellant's conviction for that earlier robbery, he was ordered to provide a sample to be submitted to the DNA data bank. As we have explained,

it was this sample that provided a match to the Bass River robbery blood sample. This in turn led to a DNA warrant to obtain a sample of the appellant's blood. The warrant was duly executed, and the sample obtained did, in the opinion of Jeff Modler, match the DNA found inside the Credit Union. The trial judge ruled as follows:

> While Mr. West sees a problem with this, I certainly do not. I see it as patient police work. It was a legal way to circumvent the legal issues between the Mahone Bay warrant sample and the Bass River crime scene sample. The first proceeding had not progressed to a point of final adjudication so this tact was open to the Crown.
>
> I reviewed the case of **R. v. Scott (1990)**, 61 C.C.C. (3d) 300 S.C.C. Now while that related to a prosecutorial stay pursuant to s.579 of the **Criminal Code**, the principles I would conclude, apply to this case. Cory J. submitted that the stay of proceedings and subsequent recommencement of the proceedings as authorized by s.579 of the **Code** did not constitute an abuse of process.
>
> None of the areas raised by Mr. West come close to an abuse as defined in law. There is nothing that can possibly impact on the trial fairness and consequently, the application is dismissed.

[233] We agree with the analysis and conclusion by the trial judge. It is somewhat ironic that the appellant led evidence in the pre-trial applications about his persistent offers to the police to voluntarily provide a blood sample for DNA testing. Yet the bulwark of his defence, had the original charges proceeded as planned, was that the police could not use the blood sample he had been compelled to give pursuant to a warrant. In fact, the refusal by the police to take him up on his offers to provide such a sample, take a videotaped statement and a polygraph, was claimed by the appellant to be abusive conduct by the police.

[234] On the issue of prejudice, the appellant asserts that he suffered the greatest adversity by the loss of memories of witnesses who mattered the most, Henry Shay and Judy Rogers. Mr. Shay and Ms. Rogers were employees of the Traveller's Motel on May 25, 1998. As we pointed out earlier, this motel is located in Bedford. As part the appellant's intended alibi he proposed to rely on, he says he stayed there

with his son the night of May 25 and did not leave Bedford until 9:00 a.m. on May 26. If true, it would make it impossible to drive to Bass River in time to have any involvement in the robbery.

[235] The difficulty with his claim of prejudice is that Cst. Hynes spoke with these individuals on June 11, 1998. No statements were taken. In his view, they could neither confirm nor deny the alibi details. It is entirely speculative to argue that the recollection of these individuals was lost due to the withdrawal of the charges at the preliminary inquiry stage in October 2000. It presupposes that they had, at that time, any memory of the events to lose. The complaint of the appellant is really nothing more than an allegation that the police should have seen these, and other potential witnesses sooner in time to May 26, 1998 and taken statements or made better notes. As did the trial judge, we find no merit in his complaint.

[236] We dismiss this ground of appeal.

#7 Error by trial judge in not permitting the appellant to call certain witnesses

[237] The Notice of Appeal expresses his allegation of error as follows:

> 7....It is submitted the learned trial judge erred in law by not allowing certain witnesses to be subpoenaed and called during the application hearings and the trial which prevented relevant information from being entered and known which resulted in prejudice to the accused and the right to a fair hearing and contributed to a miscarriage of justice.

[238] The appellant's factum identifies fourteen witnesses that he says should have been permitted to testify during his pre-trial applications or at trial. The issue of assisting the appellant in subpoenaing witnesses arose in pre-trial proceedings before both Scanlan J. and Coady J. The Crown offered to try to locate and serve witnesses for the appellant. They did so. In addition, the record demonstrates that the trial judge was more than generous in the test he applied in authorizing the issuance of subpoenas.

[239] Of the fourteen witnesses the appellant now claims he was prevented from presenting as witnesses, four were never mentioned by the appellant at trial at all. One prospective witness was an anonymous caller to the police. Two witnesses

could not be located by the authorities, Annette Gould and Jonothan Gee. The appellant wanted Ms. Gould for the disclosure application. She was a former employee of MT&T. The trial judge found she could add little to the application. Mr. Gee was the appellant's son, who could, if the appellant's assertions were true, provide a complete alibi for the appellant. The evidence before the trial judge was that the authorities had tried diligently to locate Mr. Gee, but could not.

[240] A review of the record demonstrates the complaint by the appellant to be entirely without merit. A few examples suffice. He says Cst. Leppan should have been allowed to testify during the disclosure hearing and at trial. Cst. Leppan's notes were already in the appellant's possession. It is patent he had nothing relevant to say at a hearing alleging the authorities failed to disclose. Cst. Leppan was subpoenaed to be a witness during the trial proper. He was scheduled to travel from Ottawa to appear. On February 9, 2007 the appellant realized Cst. Leppan had no relevant evidence to give at the trial proper, and released him from his subpoena.

[241] The appellant, likewise, released Ernie Cameron, after talking to him and realizing he had nothing of any relevance to say. A subpoena had been issued for Daniel MacMillan. The trial judge offered to hold a short *voir dire* to ensure the evidence the appellant hoped to elicit from Mr. MacMillan about the colour of Neons was in fact admissible, and would advance his defence. The appellant declined and did not seek to call him.

[242] We have carefully reviewed the record and see no error in how the trial judge afforded the appellant the opportunity to subpoena, have discussions with, or call witnesses.

[243] We dismiss this ground of appeal.

#8 Error by trial judge in prohibiting the appellant from reading a prepared closing statement

[244] The appellant's Notice of Appeal expresses his complaint as follows:

> It is submitted the trial judge erred in law by not permitting the unrepresented accused to read the written closing summation and argument prepared over the

> course of the proceeding [sic] weekend and by instructing the accused not to mention certain facts to the jury, while the crown was permitted to read their written prepared closing to the jury, which resulted in prejudice to the accused and the right to a fair hearing.

[245] To put this issue into context, it is apparent (as noted earlier) that the appellant initially intended to testify in his own defence. Details of his expected evidence were disclosed to the trial judge in the absence of the jury. Those details, and the Crown's anticipated ability to cross-examine the appellant on them, as revealed in his alibi notice, led the trial judge to caution him strongly about the wisdom of testifying. Ultimately, the appellant decided not to testify. These discussions were held on Friday, February 16, 2007. Court was adjourned until Monday, February 19, 2007so that the parties might then offer their final summations to the jury.

[246] When court convened on February 19 the trial judge instructed the appellant, in the absence of the jury, on the parameters of a proper closing address. The trial judge urged the appellant to focus on his closing as being his opportunity to "pull it together for the jury". He assured the appellant he could refer to the exhibits but cautioned the appellant that he could only refer to the evidence that was before the jury. To illustrate:

> **THE COURT:** . . . Now the other thing that I wanted to say, Mr. West, is this. The closing to the jury is not an opportunity to ... I mean, all ... the only thing that counsel for the Crown and you can talk about is the evidence that's before the jury.
>
> So for example, you can't get into anything that existed and was ... you have to argue on what is before them. Now remember, Mr. West, that they weren't here for a lot of what we did.
>
> **MR. WEST:** No, that's what I'm saying. That's the ...
>
> **THE COURT:** So you've got to keep that out of it. So just don't go there. But the thing is, like, I know that when you were talking to me and to the Court in

the past, you drop a lot of information that really ... you know, things about yourself.

...

THE COURT: You know, I didn't recall that there was that ... let's say, for example, that it wasn't in evidence that you live in the Annapolis Valley, you couldn't say to them that you live in the Annapolis Valley. If it's not in evidence that ... for example, the whole story that you told us in one of the applications about what you and your son were planning on doing that day, that's not in evidence so you can't go there.

MR. WEST: Well, no. Well, no, but we were ...

THE COURT: You can’t for example, talk about the ...

[247] The trial judge explained to the appellant that the purpose of his explanation about the kinds of things he could and could not say to the jury was to ensure that the appellant had a full and uninterrupted opportunity to address the jury. This direction had to be repeated to the appellant:

THE COURT: No, Mr. West, this is why we're having this conversation.

MR. WEST: Okay, but it's in the police notes. I mean, so you're ...

THE COURT: No, no, Mr. West, please. Let's focus here now. What you have to do is you have to decide in your own mind what evidence is there against you and where is evidence lacking. For example, you have to focus on the case, the evidence that's before you. And for the most part, other than a few small witnesses ... and the only one that had anything really significant ... in any way substantive to say was Ms. MacKinnon, Rubia MacKinnon I think was her name.

...

THE COURT: You're focusing ... listen, you're going back to focusing inwardly on the things you have been invested in saying and supporting for a long time. You have to now switch tracks and talk about the evidence and only the evidence.

And I don't want to be in a situation where I have to interrupt, because I think it's very important that you be given an opportunity to speak to this jury freely. But you have to be within the Rules of Evidence. And you can't get in through submissions - what you're doing now ...

MR. WEST: I'm not ...

THE COURT: ... what you might have said if you had taken the stand.

[248] The appellant persisted in his view that he wanted to be able to say to the jury that he was in Bedford at 9:00 a.m. on the morning of May 26, 1998. The trial judge again explained:

MR. WEST: It is in evidence by two officers.

MS. MCGRATH: My Lord, it's the Crown's position again that that is not in evidence. There's nobody who took the stand and said, yes, we saw him in Bedford at 9 a.m. Mr. West has suggested to people, well, didn't I tell you ...

THE COURT: That's right.

MS. MCGRATH: ... and they've said, yeah, maybe you did. But that's not ...

THE COURT: No, it's not really in evidence, Mr. West.

MR. WEST: Oh, no.

MS. MCGRATH: ... in evidence.

MR. WEST: Oh, no. Well, Constable ...

THE COURT: Listen, Mr. West, see, not only is it not in evidence ...

MR. WEST: ... Cpl. Dyke ...

THE COURT: ... but what troubles me is that it means ...

MR. WEST: Cpl. Dyke because the evidence ... (inaudible) made the phone call.

THE COURT: But, see, Mr. West, the significance of this conversation to me is that you see that as important.

MR. WEST: Well, you can't be in two places at once.

THE COURT: Mr. West, you're really ... I'm telling you, I want this to go smoothly so that you're going to have a proper and a significant submission to this jury. You can't go ... or if you have me sending them out of the room every ten minutes because you're into something that you're not allowed to be into, that's not going to be good for you.

[249] The proper limits to a jury address are well known. Neither the Crown nor an accused can introduce new evidence in their summation, nor misstate the evidence before the court. Richards J.A., in **R.v. Sangster**, 2009 SKCA 99, in addressing an

allegation that the Crown had introduced new evidence or misstated evidence, wrote:

> [36] In order to deal with these arguments, it is necessary to begin by confirming the relevant principles governing jury addresses. They are well settled. First, such evidence as is referred to by counsel must be accurately stated. Second, counsel must not give evidence or refer to evidence not before the court. See: Geoffrey Adair, *On Trial-Advocacy Skills Law and Practice*, 2nd ed, (Markham, Ont.: LexisNexis Canada Inc., 2004) at 446, 470.

[250] In **R.v. Neverson**, [1991] Q.J. No. 1428; 42 Q.A.C. 16; 69 C.C.C. (3d) 80; affirmed, [1992] 1 S.C.R. 1014, defence counsel referred to matters that were not in evidence. The accused was acquitted. The Crown appealed and a new trial was ordered. McCarthy J.A., writing for the majority, described the appropriate principles as follows (pp. 83-4 C.C.C.):

> These remarks deal with what is obviously an important aspect of Neverson's defence. They are apparently not supported by the evidence but the judge did not point that out. Crown counsel subsequently told the jurors that “there's nothing in evidence that may make you conclude that someone else took the car, or someone else planted the gun there, to frame him, or whatever.” However, notwithstanding Crown counsel's apparent satisfaction at the time with the judge's instructions, I believe that so serious a misrepresentation of the evidence as that here in question required an explicit correction by the judge. I would apply, *mutatis mutandis*, the statements made respecting the Crown by the Supreme Court of Canada in ordering a new trial in *R. v. Pisani*, (1970), 1 C.C.C. (2d) 477, at page 478, 15 D.L.R. (3d) 1, [1971] 3 S.C.R. 738:
>
> > Over-enthusiasm for the strength of the case for the prosecution, manifested in addressing the jury, may be forgivable, especially when tempered by a proper caution by the trial Judge in his charge, where it is in relation to matters properly adduced in evidence. A different situation exists where that enthusiasm is coupled with or consists of putting before the jury, as facts to be considered for conviction, matters of which there is no evidence and which come from Crown counsel's personal experience or observation. That is the present case.

> At the conclusion of Crown counsel's address in this case, counsel for the accused moved for a declaration of a mistrial. The trial Judge did not act on the motion but proceeded to charge the jury. There was nothing in his charge that can be regarded as directed to the serious breaches of duty exhibited by Crown counsel. The charge was in the general pattern that is followed when there is no untoward situation that demands particular consideration and instruction to the jury. I do not consider that the familiar observation or reminder to the jury that they alone are judges of the facts and that they may disregard any comments, whether of the trial Judge or of counsel, on the facts in evidence, can meet a situation where Crown counsel, who addresses the jury last, puts extraneous prejudicial matters to the jury as if such matters were part of the record of evidence.

> The "serious breach of duty" in the present case, by defence counsel, is not counteracted, in my view, by the subsequent statement of Crown counsel to the jurors. The judge should have pointed out the misrepresentation but he failed to do so.

[251] There can be little doubt that the same principles apply to an address by a self represented accused. A self represented accused, who has not testified, is not entitled by way of summation to make a statement of what he or she says happened. An attempt to give such back-door evidence would be unacceptable. In **R. v. Jones** (1958), 41 M.P.R. 111 (N.B.S.C.A.D.), Bridges J.A., after referring to the history of the ability of an accused to make an unsworn statement, wrote (pp. 115-6):

> The statement of the learned trial judge to the jury that the accused had given evidence was, of course, entirely erroneous. At the present time under our law, if an accused does not choose to testify, he has no right to make a statement but can only address the jury and when so doing should confine himself to the evidence which has been given in the case. I fully realize this presents difficulties for the Court but in the present case the learned trial judge, with all deference, went entirely too far when he told the accused that he could say anything he desired concerning the case.

> As the accused was, in his statement to the jury, restricted to the evidence in the case, the same as counsel representing him would have been, it would not have been proper for him to have informed the jury that he had not been at the Black house during the evening of the commission of the crime.

[252] Despite the trial judge's best efforts to ensure that the appellant did not refer to matters not in evidence, the appellant did just that in his very opening to the jury. He said:

> **MR. WEST:** Good morning, ladies and gentlemen of the jury. First of all, I want to explain that I may not have got out some of the information I wanted from the thing because I'm not learned, and I may have bored you somewhat trying to draw out certain points. But I hope to as we go along show you some of the points that I wanted to bring out.
>
> **The first thing I want to say is that I did not commit this robbery. I did not have any plan in this robbery. I know nothing about the robbery, no more than maybe what you people did, what you read in the paper, or what I learned from the police.**
>
> The first thing I wanted to discuss with you is that ...
>
> **THE COURT:** And Mr. West, I'm just going to say, that is ... you don't have to say any more about that. When you came before this jury and stood here and said "Not guilty," that was incumbent in what you say. So I don't think we should continue on that any more.
>
> **MR. WEST:** Oh, no, I was going to the ...
>
> **THE COURT:** All right.
>
> **MR. WEST:** No, that was just ...
>
> **THE COURT:** All right, so go ahead, Mr. West.
>
> (Our emphasis)

[253] During the remainder of the appellant's summation, the trial judge only intervened when the appellant started to give or misstate the evidence. The interventions were gentle admonitions that the appellant easily understood and complied with. At no time did the trial judge prevent the appellant from reading his prepared closing summation. The appellant was certainly instructed not to mention certain "facts" to the jury, as there was no evidence adduced to support such references.

[254] We see no error in the instructions given to the appellant and certainly none that could be said to have prejudiced the appellant's right to a fair trial. This ground of appeal is dismissed.

#9 Error by trial judge with respect to hearsay evidence

#10 Error by trial judge in denying the appellant the assistance of an expert witness

[255] These last two grounds of appeal do not appear in the appellant's Notice of Appeal. They are identified as the ninth and tenth grounds in the appellant's factum as follows:

> (i) It is submitted the trial justice erred in law regarding the application of the hearsay and how it applies to those thought who are now deceased.
>
> (j) It is submitted the trial justice erred in law or fact in deny the Application for the assistance of an expert witness.

[256] Neither complaint has any merit. The only time the appellant sought to introduce out-of-court statements made by someone deceased, not made under oath, to prove the truth of their contents, was in relation to his former counsel, Harry How, Q.C. Mr. How had represented the appellant for some months in 1999 and early 2000. The appellant testified on his application for a stay based on allegations of abuse of process. During his evidence, he tried to introduce the content of Mr. How's handwritten notes, letters, and the substance of their discussions. The

appellant asserted at trial that these were admissible because Mr. How was deceased.

[257] The appellant argues before us that the trial judge told him that out-of-court statements made by a deceased can be admitted if you go through a certain process, and the trial judge failed to advise him of that process. There is a much more fundamental problem. At trial, the appellant failed to identify any relevance to the content of Mr. How's notes, letters and discussions. There is none.

[258] As a consequence, the trial judge did not err in "failing" to provide guidance to the appellant about the process required to attempt to admit Mr. How's utterances. Accordingly, this "ground of appeal" is dismissed.

[259] The application for the assistance of an expert witness was brought by the appellant to the trial judge on January 31, 2007. This was not his only application for relief filed on or around that date. The appellant also filed: an application for legal assistance, dated January 29, 2007; an application for an adjournment of the trial, dated January 31, 2007; an application for independent testing of the DNA samples, dated February 2, 2007.

[260] Leaving aside the difficult issue concerning the jurisdiction of a trial judge to grant the relief requested in the application for the assistance of an expert witness, the trial judge found as a fact that the application was a ploy by the appellant to stop or delay the trial. The appellant points to no error in law, or that the conclusion was unsupported or unreasonable. In our view, the opposite is the case. It was amply supported by the record before the trial judge. We find no error in his dismissal of the application.

[261] We dismiss this "ground of appeal".

#11 Ineffective Assistance of Counsel

[262] In the appellant's Notice of Appeal this complaint is identified as Ground #13 and is described:

> 13. ... It is submitted that the incompetency of the prior Legal Aid defence counsel; Malcolm Jeffcock; to arrange proper and adequate office meetings,

> pursue disclosure matters, discuss the case in an appropriate and timely manner and the failure to investigate known facts and so on, resulted in prejudice to the accused, the right to a fair hearing and contributed to the miscarriage of justice.

[263] In his factum, Mr. West acknowledges that Mr. Malcolm Jeffcock was not his lawyer at trial but says his own legal research will "reflect on the issue".

[264] He goes on to provide names and details of lawyers he hired to defend him on these charges including: the late Harry How, Q.C., Mr. Christopher Manning, and Mr. Malcolm Jeffcock. Mr. West also told the judges involved with these proceedings that he had consulted with Edward Greenspan, Q.C. And as we have seen, Mr. West obtained legal advice during the course of the trial from Mr. Allan Nicholson, after accepting the judge's invitation to consult privately with duty counsel.

[265] Based on the materials and representations relied upon by the appellant at the hearing before us in September where he conceded (and we found) that he had waived privilege, the submissions in his factum, the materials included in his application for leave to adduce fresh evidence, and the arguments Mr. West made at the appeal hearing, it would seem the appellant's criticisms of Mr. Jeffcock's legal representation may be distilled as a failure to arrange to meet with the appellant or keep notes of their discussions; neglecting to investigate facts which may have assisted with the appellant's defence; and an unwillingness to pursue "alternate theories" on Mr. West's behalf with the result that important information "was lost" and cannot now be presented.

[266] We unhesitatingly reject the appellant's complaints. This ground of appeal has no merit whatsoever. We say that for three principal reasons. First, we are not aware of any case which suggests that the conduct of counsel who was not trial counsel, can support a claim of ineffective assistance. Second, quite apart from novelty or lack of precedent, there is absolutely no evidence of negligence on Mr. Jeffcock's part. Third, even if we were to assume that Mr. West's claim was tenable and we were to apply recognized legal principles to a scrutiny of Mr. Jeffcock's representation, the appellant has completely failed to demonstrate any prejudice, let alone a miscarriage of justice which could possibly be attributed to the actions or inactions of Mr. Jeffcock.

[267] We begin with a brief restatement of the chronology relevant to this ground of appeal. This robbery took place on May 26, 1998. Almost five years later the appellant retained Mr. Jeffcock to represent him. Prior to Mr. Jeffcock's engagement, the appellant had been represented by two lawyers, Mr. Harry How and Mr. Christopher Manning. Mr. Jeffcock withdrew from the case on September 30, 2005. That was 15 months prior to the start of the appellant's trial which began in the winter of 2007.

[268] The principles to be applied when considering a complaint of ineffective assistance of counsel, are well known. Absent a miscarriage of justice, the question of counsel's competence is a matter of professional ethics and is not normally something to be considered by the courts. Incompetence is measured by applying a reasonableness standard. There is a strong presumption that counsel's conduct falls within a wide range of reasonable, professional assistance. There is a heavy burden upon the appellant to show that counsel's acts or omissions did not meet a standard of reasonable, professional judgment. Claims of ineffective representation are approached with caution by appellate courts. Appeals are not intended to serve as a kind of forensic autopsy of defence counsel's performance at trial. See for example, **B.(G.D.)**, **supra**; **R. v. Joanisse** (1995), 102 C.C.C. (3d) 35 (Ont. C.A.), leave to appeal ref'd [1996] S.C.C.A. No. 347; and **R. v. M.B.**, 2009 ONCA 524.

[269] One takes a two-step approach when assessing trial counsel's competence: first, the appellant must demonstrate that the conduct or omissions amount to incompetence, and second, that the incompetence resulted in a miscarriage of justice. As Major J., observed in **B.(G.D.), supra**, at ¶ 26-29, in most cases it is best to begin with an inquiry into the prejudice component. If the appellant cannot demonstrate prejudice resulting from the alleged ineffective assistance of counsel, it will be unnecessary to address the issue of the competence.

[270] The real question under this ground of appeal is whether the performance of counsel who did not act for Mr. West at trial can form the basis of a claim of ineffective assistance. The case most on point (although it does not deal with former counsel) is **R. v. Gordon**, [2003] O.J. No. 2145 (C.A.). In that case the Ontario Court of Appeal expressly refused to accept that an accused who represented himself at trial could advance a claim of ineffective assistance. The Court stated:

> 1 Since the appellant chose to represent himself at trial, there is no merit to the argument that he was deprived of the effective assistance of counsel. Nor, in our view, is an accused who chooses to represent himself expected to perform at the level of competent counsel. The ineffective assistance cases have no application to a situation where an accused chooses to represent himself.
> (Underlining ours)

[271] Even if one were to assume that Mr. West could seriously challenge his conviction based on the conduct of a lawyer who had withdrawn from representing him 15 months earlier, his complaint fails absolutely. On any measure we reject Mr. West's submissions. He has not shown any prejudice occasioned by Mr. Jeffcock's professional services. Were it necessary for us to consider Mr. Jeffcock's work we would say that at all times his representation of the appellant was commendable and totally professional.

[272] The appellant seems to be under the misapprehension that Mr. Jeffcock was nothing more than his mouthpiece, there to do his bidding. We wish to disabuse him of such thinking. Mr. Jeffcock properly understood that his legal and ethical responsibilities as counsel not only required him to offer capable representation but also obliged him to fulfill his duties as an officer of the Court and to exercise careful, independent judgment.

[273] The record demonstrates that Mr. Jeffcock was diligent in his attempts to meet with and obtain proper instructions from the appellant. It was Mr. West who failed to keep appointments or respond to Mr. Jeffcock's wise, timely and repeated inquiries.

[274] Mr. Jeffcock was vigorous in his demands for full disclosure and in tracking down information which might be relevant and assist in mounting an effective defence to the charges.

[275] One of the appellant's principal complaints is that Mr. Jeffcock did not accede to his theory of the case. At issue was the DNA identification obtained from a blood sample left on the filing cabinet in the Credit Union. Mr. West's theory (from an assortment of theories) was that his blood had somehow been "transferred" to inside the bank from the spot where it had been innocently left on the ground, either by the actual perpetrator or by a police officer who had conspired against him

and arranged for the blood samples to be swapped at the Halifax testing lab. Mr. West complains that Mr. Jeffcock neither conducted any investigation into these two lines of inquiry, nor interviewed any potential witnesses. Interestingly, Mr. West reveals in his factum that his two previous lawyers did not agree with his theory of the case. He says that they too failed to carry out adequate investigations and interviews.

[276] Mr. Jeffcock's advice to the appellant concerning the viability of his assorted "theories" was prudent, and necessarily blunt. To ensure that Mr. West was capable of grasping his legal advice, and appreciating the risks inherent in much of his own advocacy, Mr. Jeffcock referred his client to Dr. Theriault, a psychiatrist, to obtain his professional opinion concerning not only Mr. West's fitness to stand trial, but his ability to understand the legal strategy his counsel was proposing, and provide advice as to whether their differences had become irreconcilable. Throughout his diligent representation of the appellant, Mr. Jeffcock went to great lengths to explain, in plain language, the grave prejudice that Mr. West's own theories and obsessions with irrelevant matters had provoked. Ultimately, as reflected in Mr. Jeffcock's meticulous correspondence with the appellant - he recognized his ethical responsibilities and saw that he had no other alternative but to withdraw from the case.

[277] As Mr. Jeffcock's affidavit makes clear, the first version of events disclosed by the appellant was that he had never been anywhere near the Bass River Credit Union and that the only explanation for his blood being found there was that an RCMP officer, Sgt. Oldford (whom West obviously regarded as his nemesis) had conspired and planted his blood at the scene. One can appreciate Mr. Jeffcock's consternation when the appellant gave him an entirely different version or "theory" at their first face to face meeting in April 2003. Mr. Jeffcock elaborates in his affidavit sworn for this appeal, September 23, 2009:

> 28. That Mr .West and I met on a face to face basis for the first time on April 9, 2003, and we spent an extensive period of time together.
>
> 29. My notes of that meeting confirm that Mr. West once again indicated that for a long period of time he had believed that Sergeant Oldford had planted his blood at the scene of the crime, however, he advised me that he had in

fact been at the area of the Bass River Credit Union on Saturday, May 23rd between the hours of 5:00 and 6:00 p.m.

..

34. That hearing his new explanation from Mr. West on April 9th which was inconsistent with his previous repeated claims that he had never been to Bass River and also being inconsistent with his claims that he had been searched from head to toe during a strip-search conducted by the Amherst Police and that no injuries or wounds were located on his body caused me concern. It appeared to me that Mr. West was coming up with a new explanation that was inconsistent with his previous advice that he had never been to the scene of the crime and that when he was searched on the day of the robbery he had absolutely no injuries to his person.

35. Mr. West explained to me on April 9th that he no longer felt Sergeant Oldford put the blood at the scene but rather "some other cop found the blood off the ground and wiped it onto the cabinet". Mr. West explained that he believed the "hole in his hand healed quicker than the blood dried" so that is why no marks were present on his hand when he was examined in Amherst. He expressed that "either a cop did it or a robber got his blood off the ground".

...

41. That from my perspective, given the fact that Mr. West was a match to the unknown sample of DNA, the issue to be addressed was the validity of the science giving rise to the conclusion.

42. My conclusion was that the only defence that would be viable was to challenge the process involved prior to the unknown sample arriving at the laboratory; could the sample be questioned?

43. That in reviewing the materials it was apparent that the officer who took the swab at the scene of the crime and thereby collected the unknown "sample" of blood used a single swab to collect material from two separate, albeit closely located, blood smears.

44. It appeared to me as a defence lawyer that this would be the best opportunity to question the validity of the conclusions, *i.e.*, by questioning the collection methodology and the sample itself, not the result of the work done by scientists in the controlled environment of a laboratory.

...

50. The purpose of sending my letter of March 31, 2005, was to remind Mr. West of my concerns with respect to the strength of the Crown's DNA evidence and to request his instructions in writing.

...

53. In the spring of 2005, there continued to be difficulties in the solicitor-client relationship with Mr. West due to his fixation with conspiracy theories and other issues which I did not consider to be significant to his defence.

54. During this time, I was having difficulty determining what Mr. West's instructions were with respect to dealing with the Crown's DNA evidence. He had offered a variety of explanations as to why his blood was found at the scene including being planted by Sergeant Oldford or others, accidental or deliberate placement by someone who encountered it in the pump house where it had been deposited by either first by a significant cut on his hand; or subsequently followed by an explanation of a "bleeding nose" as the source of the blood.

...

> 57. As a result of my inability to get instructions from Mr. West and my concerns in relation to his conduct I forwarded to Mr. West correspondence on September 28, 2005, attached hereto as **Exhibit 18**. Therein I set forth the reasons for my withdrawing as Mr. West's counsel.
>
> 58. On September 30, 2005, I wrote to the Supreme Court advising that I would be withdrawing as solicitor for Mr. West. A copy of that letter is attached as **Exhibit 19** to this my affidavit.
>
> ...

[278] The other criticisms levelled by the appellant under this ground of appeal may be dealt with summarily. For example, he spends considerable time complaining about belated disclosure or disbursement costs yet fails to explain how any of that influenced the jury's verdict. He complains that Mr. Jeffcock failed to arrange for a provincial bailiff to attend the Credit Union and measure the filing cabinets so as to demonstrate the precise location and size of the blood smears. Yet the appellant never explains why he did not arrange to have those same measurements taken during the 15 months after Mr. Jeffcock's withdrawal. Nor does he explain why those and similar inquiries could possibly have made a difference in the outcome of his trial. Even if such steps were important, Mr. West had ample time to have made such arrangements.

[279] The appellant's complaint that being charged disbursements by Mr. Jeffcock's office for photocopying documentation in some way suggests he was given ineffective counsel, is patently absurd.

[280] Before leaving this subject we wish to note that at the appeal hearing in response to questions from the Bench, the appellant told us he neither wanted nor needed a lawyer at his trial, but that he could have used an assistant to take notes and keep track of things.

[281] In conclusion, it hardly lies in the mouth of the appellant to seek to overturn his conviction on the basis that he was denied effective assistance of counsel when in fact what he is really attempting to do is blame Mr. Jeffcock for doing precisely what the law required: that is provide his client with proper legal advice; determine whether the client intended to accept that advice or proceed against counsel's

advice; find out whether their differences had become irreconcilable such that their solicitor/client relationship had been compromised; and then honour his ethical obligations by seeking to withdraw from the case in a timely fashion.

[282] For all of these reasons this ground of appeal is dismissed.

#12 Error by trial judge in denying the appellant access to privileged communications between Crown and police

[283] Here the appellant raises a point which is not found among the many grounds listed in his Notice of Appeal dated April 26, 2008. At the top of p. 194 of his factum, the appellant simply writes:

> GROUND OF APPEAL [if privileged correspondence]

immediately followed by an extract from a recognized text on criminal evidence which the appellant then relies upon in support of his argument that:

> **Police DO NOT enjoyed (sic) "solicitor/client" privilege when receiving legal advice relating to police duties.**

[284] This particular allegation is different than the appellant's complaint concerning the November 30, 1999 package of documents (already disposed of in our analysis at [149] *ff.*). Rather, Mr. West's complaint here seems to blame the Crown, or the police, or both for "failing" to divulge legal advice that may have passed between the two offices concerning the validity of the first comparison of the appellant's DNA (which of course was rendered moot when the appellant was ultimately convicted for the Mahone Bay bank robbery, which in turn led to a court ordered DNA sample, which then linked Mr. West to the Bass River armed robbery).

[285] The appellant's submission is without merit. The Crown indicated on the record at the pre-trial hearings its rationale for withdrawing the first Information against Mr. West (see Second Supplemental Appeal Book at pp. 286-291). Otherwise the Crown properly claimed privilege over communications between the police and other Crown attorneys regarding advice sought and given. The solicitor-

client privilege that exists between the Crown and the police in the context of seeking legal advice throughout the course of criminal investigations is well recognized. See, for example, **R. v. Campbell**, [1999] 1 S.C.R. 565.

[286] In any event, it was not the police (as in **Campbell, supra**) who asserted their own good faith to support a claim of privilege over the legal advice they received. The withdrawal of charges is not a police function. In Nova Scotia it is a function within the discretion of the Public Prosecution Service. That discretion was exercised in this case and was thoroughly explained to Justice Coady by the Crown when the parties appeared before him on January 4, 2007.

[287] Not only did the Crown candidly outline the rationale for exercising its discretion, but the appellant failed to raise any evidentiary basis by which one might go behind the Crown's representation. We would also reject the appellant's implicit attempt to blame the trial judge for "failing to order" the Crown and the RCMP to provide copies of their correspondence on this issue.

[288] This ground of appeal is dismissed.

#13 Unreasonable Verdict

[289] While this is not listed as a discrete ground of appeal in the appellant's Notice of Appeal, we will now consider any implicit assertion by the appellant that the jury's verdict is unreasonable.

[290] The principles to be applied when considering the reasonableness of a jury verdict are well known. A verdict is unreasonable where a properly instructed jury, acting judicially, could not reasonably have rendered it. The inquiry is based upon a review of whether findings of fact essential to the verdict are "demonstrably incompatible" with uncontradicted, accepted evidence. See for example **R. v. Abourached**, 2007 NSCA 109.

[291] With a jury trial we do not have reasons to explain how the jury arrived at its conclusion. We do have the benefit of the trial judge's recitation of the facts at the sentencing hearing pursuant to s. 724 of the **Criminal Code**. We are satisfied the judge's summary of the facts is perfectly reasonable based upon the evidence. On appeal we are also entitled to consider the fact that the appellant did not testify.

[292] Essential to the Crown's case was the presence of the appellant's blood on the bottom left-hand corner of a filing cabinet adjacent to a hole cut into the wall of the Bass River Credit Union. This hole was the means by which the perpetrator gained access to that part of the bank which was not protected by the security alarm and motion detectors. Witnesses testified to having seen a person matching the physical description of the appellant, driving away from the Bass River area shortly after the robbery, in a vehicle which appeared to be very similar to that in which the appellant was subsequently stopped by the Amherst police.

[293] While the appellant did not completely match the physical description of the robber as recited by the two bank employees, and while the car in which he was found did not contain any evidence connected to the robbery, these features do not render the verdict unreasonable. As to identity, the perpetrator's disguise may have been more elaborate than the outfit described by the two victims. As well, there was ample time for the vehicle to have been cleaned, and the evidence and proceeds of the robbery disposed of, prior to Mr. West's detention.

[294] In any event, the jury was not obliged to reconstruct exactly what had occurred. Their task was to decide whether the Crown had proven the essential elements of the offence beyond a reasonable doubt. See for example **R. v. Pittiman**, 2006 SCC 9; **R. v. Mah**, 2002 NSCA 99.

[295] A jury need not be unanimous with respect to its view of the evidence, so long as the ultimate verdict is unanimous. Moreover, a jury is not bound by the theories advanced by the Crown or the defence in determining the ultimate verdict. See **Pittiman, supra**, **R. v. Groot**, [1998] O.J. No. 3674 (Q.L.), aff'd [1999] 3 S.C.R. 664.

[296] In this case it was reasonable for the jury to conclude that either Mr. West carried out the robbery himself or, if someone else physically took the money, then based on the location of the blood, and all of the other circumstances, the appellant was involved in the robbery as a party. Regardless of the Crown theory, if the jurors were convinced of the appellant's ultimate guilt, there need not have been unanimity with respect to which particular reasoning pathway led them to that conclusion. The presence of the appellant's DNA inside the bank together with the

other circumstantial evidence connecting him to the scene, clearly support the reasonableness of the jury's verdict.

[297] In conclusion, had the appellant challenged the reasonableness of the jury's verdict we would have dismissed such a ground of appeal.

VI. Conclusion

[298] But for the limited exception of the materials described in ¶ [59], **supra**, the appellant's application to admit fresh evidence under s. 683(1) of the **Criminal Code** is dismissed. The appeal is dismissed.

Per Curiam:

Saunders, J.A.

Fichaud, J.A.

Beveridge, J.A.