Citation: R v Ostrowski, 2018 MBCA 125 Date: 20181127
Docket: AR14-30-08288

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Holly C. Beard
Mr. Justice William J. Burnett
Madam Justice Jennifer A. Pfuetzner

IN THE MATTER OF: ***Section 696.1 of the Criminal Code, 2002, c. 13, s. 71***

AND IN THE MATTER OF: ***A reference pursuant to section 696.3(3)(a)(ii) of the Criminal Code by the Minister of Justice to the Manitoba Court of Appeal to hear and determine an appeal against the first degree murder conviction of Stanley Frank Ostrowski rendered on May 23, 1987, in Winnipeg, Manitoba.***

B E T W E E N:

HER MAJESTY THE QUEEN	)	***J. W. I. Lockyer***,
	)	***A. M. Libman*** *and*
	)	***D. K. Levy***
Respondent	)	*for the Appellant*
	)	
	)	***R. Schwartz*** *and*
- and -	)	***H. Freeman***
	)	*for the Respondent*
	)	
STANLEY FRANK OSTROWSKI	)	*Appeal heard:*
	)	***May 28, 2018***
	)	
(Accused) Appellant	)	*Judgment delivered:*
	)	***November 27, 2018***

NOTICE OF RESTRICTION ON PUBLICATION: See para 82 of these reasons.

BEARD JA

I. THE ISSUES

[1] This is an appeal from the conviction of the accused on May 23, 1987, for first degree murder. The appeal comes before this Court by way of a reference from the Minister of Justice pursuant to sections 696.1 and 696.3(3)(a)(ii) of the *Criminal Code*, the Minister having been satisfied that there was a reasonable basis to conclude that there was a miscarriage of justice. The parties consented to the calling of new evidence, some of which was filed as documents obtained from other proceedings, but much of which was by way of *viva voce* testimony before this panel.

[2] The Crown on appeal has agreed that the non-disclosure of two important pieces of evidence to the accused at the murder trial violated his right to make full answer and defence, leading to a miscarriage of justice. That evidence, which is explained later in these reasons, has been referred to as the Lovelace deal and the Jacobson report. The Crown also agrees with the accused that the conviction should be set aside and that there should not be a new trial because of the unavailability of some witnesses, the deterioration of evidence in the 32 years since the shooting and, also, because the accused has already served 23 years in prison.

[3] The only issue between the Crown and the accused is that of the appropriate remedy. The Crown's position is that the appropriate remedy is that of an order for a new trial and a judicial stay of those proceedings, while the accused argues that this Court should enter an acquittal.

[4] In my view, the evidence amply supports a finding that important evidence was not disclosed to the accused and that the non-disclosure violated

his right to make full answer and defence, resulting in a miscarriage of justice. Further, I agree with the parties that the conviction should be set aside and that the only issue to be determined by this Court is whether there should be an order for a new trial and a judicial stay of those proceedings, or an acquittal.

II. THE FACTS

[5] In 1987, the accused was convicted by a jury of first degree murder in the shooting death of Robert Nieman (the murder trial). That trial was prosecuted by Manitoba Justice, the senior provincial Crown attorney being George Dangerfield and the junior provincial Crown attorney being Sidney Lerner (the provincial Crowns). The provincial Crowns' position at the murder trial was that the accused had provided a handgun and arranged for others to kill Mr. Nieman because the accused believed that Mr. Nieman had provided information to the police that led to the accused being arrested for drug trafficking. The accused admitted that he was a drug dealer but denied all involvement in the murder.

[6] In the 1980s, the accused was a high-level cocaine trafficker in Winnipeg. He provided drugs to others to sell to the ultimate users. Two of the accused's dealers were Matthew Lovelace and Jim Luzny. Mr. Luzny was arrested and charged with drug trafficking on or about September 9, 1986, and Mr. Lovelace was arrested and charged with cocaine trafficking on September 13, 1986.

[7] On September 14, 1986, the police conducted a search for drugs at the accused's residence, which they found in two hidden compartments. Given that the police obviously knew of the concealed hiding places, the

accused concluded that someone close to him had turned him in to the police, and he appeared to have concluded that the informer was Mr. Nieman.

[8] Immediately upon his arrest, Mr. Lovelace began cooperating with the police by providing them with information as to the accused's drug business. Mr. Lovelace maintained at the murder trial that he did so only for altruistic reasons, stating that his arrest made him realise that he had hit the bottom in his own life. He decided that he had to come clean with the police and change his life. He said that he never asked the police for any consideration in exchange for his information and cooperation, which was confirmed by the police officers with whom he dealt, being Constables McCormick and DeGroot.

[9] Following his arrest on the drug charges, the accused began his own discussions with the police in an effort to negotiate a more favourable outcome regarding those drug charges. He offered to cooperate with the police by providing information as to others involved in the sale of drugs and to set up sales in which the police could arrest other purchasers and dealers. These offers were all rejected by the police.

[10] Late on September 24, 1986 going into early on September 25, 1986, two men entered Mr. Nieman's residence and tied up an occupant, putting him in a back room. When Mr. Nieman came home, he was shot several times. The occupant was able to escape through a window and later provided information about the shooting to the police. Mr. Nieman survived for about a month before succumbing to his injuries. The accused was arrested on September 25, 1986 for having arranged the shooting and, sometime later, Robert Dunkley and Luis Correia were arrested as the persons who carried out the shooting.

[11] Mr. Dunkley was the shooter. He pled guilty to second degree murder on the eve of the murder trial and gave oral and written statements to the police regarding the motive for and the details of the murder. These led to the arrest and charge of Mr. Luzny for the murder, the allegation being that he was the middleman between the accused and Messrs. Dunkley and Correia. When called to testify, Mr. Dunkley changed his statement, which resulted in Mr. Luzny being acquitted on a directed verdict during the trial. The accused and Mr. Correia were both convicted of first degree murder.

[12] Both the accused and Mr. Correia appealed their convictions to this Court. Mr. Correia's appeal was dismissed in a unanimous decision, while the accused's appeal was dismissed with one dissent (see 1989 CarswellMan 105 (CA)). The accused appealed to the Supreme Court of Canada, where his appeal was dismissed (see [1990] 2 SCR 82).

[13] At the murder trial, Mr. Lovelace gave important evidence that tied the accused to the murder. In cross-examination, the defence lawyers challenged his credibility, questioning him at length about whether he had made any deal with the Crown or the police regarding his outstanding drug charges in exchange for his testimony against the accused, or whether he expected any special consideration. Mr. Lovelace insisted that there was no deal.

The Lovelace Deal

[14] Later in the fall of 1986, after Mr. Lovelace had begun cooperating with the police, he retained a lawyer, Hymie Weinstein, to represent him on his drug charges. Although Mr. Weinstein had no involvement in arranging Mr. Lovelace's statements to the police regarding either the accused's drug

charges or the murder, he became aware that Mr. Lovelace was cooperating with them. According to Mr. Weinstein's evidence, he approached the federal Crown's office, which was prosecuting the drug charges but not the murder, and proposed that Mr. Lovelace should get some consideration regarding his drug charges in exchange for his cooperation in the murder case (the Lovelace deal). Mr. Weinstein's evidence was that Mr. Lovelace knew nothing about his discussions with the federal Crown, and he did not want anything disclosed to his client until after the murder trial was over, so as not to taint his evidence. The federal Crown responded that it would consider the request after the murder trial and after speaking to the provincial Crown.

[15] Following the accused's appeal of his murder conviction, Mr. Lovelace's drug charges were set for a preliminary inquiry. At the hearing, the matter proceeded as a trial at which the federal Crown did not call any evidence and provided no explanation to the Court. The drug charges against Mr. Lovelace were dismissed and an acquittal was entered.

[16] The provincial Crowns who were prosecuting the murder trial insisted that they knew nothing about the Lovelace deal, as did Csts. McCormick and DeGroot. It is undisputed that the defence in the murder trial was never advised of Mr. Weinstein's request for consideration for Mr. Lovelace or the federal Crown's favourable response. The provincial Crowns argued the murder trial before the jury on the basis that Mr. Lovelace had received no consideration for his testimony. The failure to disclose the information about the Lovelace deal is one of the bases for the finding that there was a miscarriage of justice.

The Jacobson Report

[17] A few hours before the murder, Mr. Lovelace attempted to speak to his police contacts, who were Csts. McCormick and DeGroot, to report that he was concerned that the accused was going to harm those who he believed had informed on him. Those officers were not available, so he left a message with Sergeant Jacobson. Sergeant Jacobson's personal notes of that conversation and his report (together, the Jacobson report) were not disclosed to the defence prior to the trial, but the content of a note that he left for the other officers was. There were inconsistencies between Mr. Lovelace's testimony about the content of the message that he left with Sgt. Jacobson, the note that Sgt. Jacobson left for the other officers and the Jacobson report that could have been used by the defence to discredit Mr. Lovelace's testimony, had they been disclosed to the defence prior to the murder trial. The failure to disclose the Jacobson report was the second basis for the finding that there had been a miscarriage of justice.

III. REMEDY

[18] The remedies available to an appellate court where a conviction is quashed on appeal were explained by the Ontario Court of Appeal in *Truscott (Re)*, 2007 ONCA 575, as follows (at paras 246-49, 258):

> Where a conviction is quashed on appeal, s. 686(2) of the *Criminal Code* provides two possible remedies: the appeal court may either order an acquittal or a new trial. If the court orders a new trial, the residual power in s. 686(8) permits it to also order a stay of that new trial. A stay is ordered in situations where a new trial, although warranted on the evidence, would be manifestly unfair to the appellant.
>
> Relatively little has been written about the principles guiding the exercise of the remedial discretion in s. 686(2). It is clear that

> if the appeal court is satisfied based on the trial record as augmented by the fresh evidence, that no reasonable jury could convict, the appeal court's discretion must be exercised in favour of ordering an acquittal. An acquittal is the only appropriate order in this circumstance since a conviction following a retrial would presumably be quashed as an unreasonable verdict. An appeal court will not order a new trial to give the Crown an opportunity to make a case against an appellant when, as matters stood at the end of the proceedings in the court of appeal, no reasonable jury could convict.
>
> Apart from those cases where an acquittal is mandatory, the manner in which an appeal court should exercise its remedial discretion is more uncertain. As a general rule, if the appeal court is satisfied that the entirety of the record at the end of the appeal admits of a reasonable possibility of a conviction on a retrial, the appeal court will order a new trial.
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> There are, however, cases where an appeal court has entered an acquittal even in the face of evidence that could reasonably support a conviction on a retrial. For example, acquittals have been entered where an appellant has fully served his or her sentence, or has already been subjected to several trials. These authorities offer little guidance as to when an acquittal should be entered as opposed to ordering a new trial with a direction that the trial be stayed.
>
> . . . In a routine appeal, if a conviction would be a reasonable verdict on a retrial, the court should remit the matter to the trial court for that retrial.

[19] Thus, a court of appeal must take a look at the evidence at trial, together with the new evidence admitted on appeal, to determine whether a conviction would be a reasonable verdict on a retrial. If the answer is yes, then the appellate court should remit the matter to the trial court for a retrial. If the answer is no, then the appellate court should enter an acquittal.

[20] The Court in *Truscott* recognised that there may be cases where the circumstances require a different approach. It explained this as follows (at para 259):

> This approach is not, however, appropriate in all circumstances. Some cases fall outside of the norm. The remedial discretion in s. 686(2) is sufficiently broad to permit resort to a more vigorous review of the evidentiary record in those cases where that approach is required by the interests of justice. For example, in deciding how to exercise our remedial discretion, we think it is significant that no new trial can ever be held in this case. The inability to retry the appellant may justify a more aggressive review of the factual record by this court than would be necessary if the matter could be put to a new jury on a retrial.

[21] The Court found the following features in the *Truscott* case to be sufficiently unique to require the consideration of a different approach: the fresh evidence led to a finding that the conviction constituted a miscarriage of justice; the accused had lived under the burden of that miscarriage of justice for 50 years; the fresh evidence had significantly weakened the Crown's case; and there would never be another forum in a better position to make an assessment of the accused's culpability (see para 260).

[22] It explained the challenge to the interests of justice raised by those features as follows (at para 265-66):

> This is one of those cases where a new trial could result in an acquittal or a conviction. In most cases, that conclusion would lead to an order for a new trial. However, to order a new trial in these circumstances merely because the remaining evidence clears a relatively low evidentiary threshold, knowing full well that a new trial will never be held, would be unfair to the appellant and does a disservice to the public. Nor would an order for a new trial accompanied by a further order staying the new trial be an adequate remedy. It would remove the stigma of the appellant's conviction, but leave in place the stigma that would accompany

> being the subject of an unresolved allegation of a crime as serious as this one.
>
> The appellant, through no fault of his own, will never have the opportunity to stand before a jury of his peers and make full answer and defence to the allegation that he murdered Lynne Harper. He will never have his guilt determined by a jury who knows what this court now knows. . . . Fairness to the appellant dictates that this court should, to the extent that it can within the institutional limits of appellate review, endeavour to bring this matter to a conclusive end.

[23] The Court then set out that new approach as follows (at para 268):

> In the unique circumstances here, we take the following approach in exercising our remedial discretion. While acknowledging the limitations imposed by the appellate forum, the passage of time, and the numerous factual questions that will never be fully answered, we approach the determination of the appropriate remedy by envisioning how a hypothetical new trial of the appellant would proceed in light of the entirety of the information that is now before us. In our view, the appellant should be entitled to an acquittal if we conclude, based on all of the information now available, that it is clearly more probable than not that the appellant would be acquitted at a hypothetical new trial.

[24] This new approach is intended to address the situation where there will be no new trial even though the evidence could lead to either a conviction or an acquittal (see para 265). Without an acquittal or a new trial, the accused is left in the unfair position of having the stigma of the charges hanging over him, yet never being in the position to fully defend himself. The Court in *Truscott* recognised this unfairness and found that it would be best addressed by way of a new evidentiary threshold for determining whether to grant an acquittal, which places the evidence in support of a conviction, and therefore for ordering a new trial, under greater scrutiny.

[25] The principles set out in *Truscott* have been considered and applied in a number of subsequent decisions. I note, for example, *R v Mullins-Johnson*, 2007 ONCA 720; *Walsh (Re)*, 2008 NBCA 33; *R v DRS*, 2013 ABCA 18; *R v Dhillon*, 2014 BCCA 480; and *R v Flynn*, 2018 ABCA 70.

[26] In summary, where a conviction has been quashed based on a finding of a miscarriage of justice, there are two possible remedies available to the appellate court under section 686(2) of the *Criminal Code*—an order for a new trial or the entry of an acquittal. The tests for determining which remedy to grant are as follows:

> (i) the appellate court must enter an acquittal if it is satisfied, based on the trial record as augmented by the fresh evidence, that no reasonable jury could convict;
>
> (ii) the appellate court should order a new trial if a conviction would be a reasonable verdict on a retrial (a relatively low evidentiary threshold); and
>
> (iii) in special circumstances, the appellate court can enter an acquittal if it concludes, based on all of the information then available, that it is clearly more probable than not that the appellant would be acquitted at a hypothetical new trial (a higher evidentiary threshold than for ordering a new trial).

[27] Given that the only issue is whether this Court should enter an acquittal or order a new trial and grant a judicial stay of proceedings, it is helpful to look at examples of the application of these tests in the jurisprudence.

[28] In *R v Hinse*, 1994 CarswellQue 266 (CA), which preceded *Truscott*, Steinberg JA, for the Court, summarized the special circumstances that militated against a new trial as follows (at para 37):

> . . . These include the elapsed time of thirty-three (33) years since the commission of the criminal act, the fact that the principal issue in the trial was the identification of the appellant by the victims, the irregularities in the line-up, the changes that have occurred over the years in the appearance of the appellant and the inevitable weakening in the credibility of the victims attributable to such time passage, the present age of the victims who are in their eighties, and the fact that the appellant served the fifteen year sentence imposed following the original finding of guilt. Proceeding with a second trial of the appellant under these circumstances would be vexatious and oppressive, would violate the community's sense of fair play and decency and, therefore, would constitute an abuse of process.

[29] The Court of Appeal granted a judicial stay of proceedings. The Supreme Court of Canada substituted an acquittal, concluding in brief reasons that "being of the view that the evidence could not allow a reasonable jury properly instructed to find the appellant guilty beyond a reasonable doubt, we are all of the view that the appropriate remedy is an acquittal" ([1997] 1 SCR 3 at para 2).

[30] In *Truscott*, the Ontario Court of Appeal entered an acquittal following an in-depth review of the evidence at trial, as viewed together with the considerable amount of fresh evidence admitted at the appeal. That new evidence was powerful, including evidence that brought into question both the scientific evidence that set the time of death at a time when the accused had almost exclusive opportunity to kill the deceased (see para 306) and medical evidence that found that lesions on the accused's penis were caused by an act of sexual intercourse (see para 613). The Court concluded that, based on the

evidence at trial, when considered in light of the considerable amount of fresh evidence, the fresh evidence had both weakened the four pillars of the Crown's case and blunted the Crown's attack on the defence evidence, thus enhancing the reliability of that evidence (see para 776). It found that, while it could not say that no jury, acting judicially, could reasonably convict, it was satisfied that, if a new trial were possible, an acquittal would clearly be the more likely result (see para 787).

[31] In *Mullins-Johnson*, the Crown sought an acquittal, while the defence argued that the Court should declare the accused innocent. While finding that a declaration of innocence was not an available verdict in Canada (see paras 22-27), the Court did enter an acquittal. The decision was based on new scientific evidence that discredited the scientific evidence led at the trial. The new evidence was described as follows (at para 20):

> . . .
>
> There is no doubt that the new expert opinions in this case are credible and highly cogent. They go to the very core of whether there was an offence committed in this case. The opinions have been provided by some of the leading Canadian and international experts in forensic pathology and pathology. The opinions not only have a profound impact on the reliability of the jury verdict reached at trial, it is submitted that they are dispositive of the result.

[32] The Court found that the fresh evidence was compelling in demonstrating that no crime was committed by the accused, with the result that the accused was entitled to an acquittal (see paras 21-22).

[33] In *Walsh*, the fresh evidence was described as follows (at para 38):

> The undisclosed evidence retrieved from the Archives is substantial in both quantity and quality. The most significant evidence comes from records of police station cell block conversations that were monitored between MacMillan and Walton. Their conversations tended to be inculpatory of MacMillan and exculpatory of Walsh. . . . There were undisclosed statements taken from key Crown witnesses, including MacMillan and Walton, which could have been used to undermine their credibility at trial. Further, the statement of a Joseph Valardo brought into question the Crown's claim that Walsh had purchased Walton's shotgun the night before the shooting. Other evidence in the Archives supported aspects of Walsh's trial testimony, which had been uncorroborated at trial. Finally, there were statements from seven CNR employees (including Maurice McGinnis) in the Archives all of which demonstrated that Walsh had been truthful in his claim to have fled from the beach for help, and proved false the denials of the witnesses, Walton and MacMillan, and the American tourist Thompson, that any such event had occurred.

[34] The Court concluded that the trial record, augmented by the fresh evidence, satisfied it that no reasonable jury, properly instructed, could convict the accused, so it entered an acquittal (see para 98).

[35] In *DRS*, the complainant had recanted his allegations of sexual assault following the accused's conviction, and he maintained that position up to the date of the hearing in the Court of Appeal. The Crown acknowledged that, if a new trial were ordered, it would stay the proceedings, but it took the position that a conviction was a possible outcome, so an acquittal should not be entered (see para 12). The Court of Appeal applied the test in *Truscott* and accepted that it was more probable that the accused would be acquitted at a hypothetical new trial, so it entered an acquittal (see para 19).

[36] Finally, in *Dhillon*, previously undisclosed DNA evidence identified two assailants in a sexual assault, neither of whom was the accused. The Court

found that, although a miscarriage of justice occurred, the fresh evidence was not sufficiently cogent to exclude the reasonable possibility of a conviction, given the complainant's clear identification of the accused as one of her assailants (see para 50). Given that the accused had served his sentence and been deported, the Court granted a judicial stay of proceedings to prevent an abuse of process (see paras 53-54).

IV. THE PARTIES' POSITIONS REGARDING REMEDY

[37] The accused argues that this Court should grant an acquittal. His position is that the Crown's main witness, Mr. Lovelace, is irretrievably tainted, as is the integrity of the police investigation and the Crown prosecution. He argues that the features that led to the application of the more relaxed test in *Truscott* (see para 260) are present in this appeal, such that that test should be applied in this case. His position is that the result in this case, as in *Truscott*, would be a finding that it is more probable than not that he would be acquitted. In that event, he should be granted an acquittal. He argues, alternatively, that this Court can enter an acquittal on the basis that no properly instructed jury could convict him based on the evidence as it stands today.

[38] The Crown's position is that an acquittal is not an appropriate remedy because neither test is met. While acknowledging that the fresh evidence about the Lovelace deal potentially impacts Mr. Lovelace's credibility and that of the police officers, it argues that the ultimate impact is far from certain, and it would be open to the jury to find that Mr. Lovelace, in particular, did not know about that deal.

[39] As regards the Jacobson report, the Crown argues that it would be open for a jury to accept Mr. Lovelace's evidence as to the content of the message that he left regarding Mr. Nieman, notwithstanding the Jacobson report that appears to contradict that evidence.

[40] In summary, the Crown argues that the majority of its case against the accused remains intact notwithstanding the new evidence and that, after considering all of the evidence, this Court cannot either conclude that no reasonable jury could convict the accused or safely predict that an acquittal would clearly be the more probable result of a hypothetical new trial. Thus, it argues that the only verdict that is available is an order for a new trial. It says that, as a result of the nature of the miscarriage of justice, the fact that the accused has already served a sentence of 23 years in prison and the difficulty in holding a new trial 32 years after the events in question, this Court should order a stay of any further proceedings.

V. ANALYSIS

[41] I would agree that this case fits the features set out in *Truscott*, such that the appropriate test to be applied to determine whether to order a new trial or enter an acquittal is that of whether, based on all of the information now available, it is clearly more probable than not that the accused would be acquitted at a hypothetical new trial (see para 268).

[42] In its factum, the Crown set out its case against the accused. Given its length, it is attached as Appendix A to these reasons. The Crown argues that, while Mr. Lovelace's testimony was an important part of the Crown's case against the accused, it was not the only evidence connecting the accused to the shooting, and it points to its review of the evidence (see Appendix A).

The Crown also argues that, due to changes in the law of evidence, a jury in a new trial would have additional evidence that supports that of Mr. Lovelace, being details in the statement of Mr. Dunkley that were not available to the jury in the original trial because of Mr. Dunkley's recantation.

[43] The accused argues that, given what is now known, three important aspects of the evidence against the accused would not be found sufficiently credible in a new trial to support a conviction, those being the testimony of Mr. Lovelace, the testimony of the police officers (particularly Csts. McCormick and DeGroot) and the evidence of Wayne Cory. He states that, even if Mr. Dunkley's original statement were admitted, Mr. Dunkley did not say that the accused identified Mr. Nieman as the informer; rather, Mr. Dunkley made his arrangements related to the shooting with Mr. Luzny.

[44] Mr. Lovelace was an important witness for the Crown in connecting the accused to the murder. Two aspects of the evidence that, during the murder trial, supported Mr. Lovelace's credibility have been brought into question through the new evidence, being the Lovelace deal and the Jacobson report.

The Lovelace Deal

[45] As noted above, the Crown accepts that, by December 1986, there was a deal between Mr. Lovelace's lawyer and the federal Crown that Mr. Lovelace would receive consideration in relation to his drug charges for his testimony against the accused in the murder trial. It further acknowledges that the defence lawyers were asking the provincial Crowns for disclosure of that deal, but they were consistently told that there was no deal.

[46] Two aspects of this evidence remain controversial: whether the provincial Crowns knew about the Lovelace deal with the federal Crown and whether Mr. Lovelace knew about that deal.

- *The Provincial Crowns' Knowledge of the Lovelace Deal*

[47] Both of the provincial Crowns testified before this panel and denied any involvement with, or knowledge of, the Lovelace deal. While documents from the federal drug file indicate that discussions had taken place between the federal Crowns and two police officers, Cst. Haasbeek and Inspector Cherniak, and indicated that a stay of the charges was "subject to confirmation with provincial crown", there was no evidence that anyone actually communicated any information about the Lovelace deal to the provincial Crowns.

[48] The accused argues that it is beyond belief that the Lovelace deal was not revealed to the provincial Crowns. He points out that Mr. Lovelace was a key witness against the accused. Further, the police officers who, according to the documents, had knowledge of the deal (Cst. Haasbeek and Insp. Cherniak) were in close contact with the provincial Crowns before and during the trial. The defence counsel at the trial believed that there was a deal and were pressing the provincial Crowns for confirmation. The accused argues that this Court should find that the provincial Crowns knew of the deal and that they are continuing to mislead the Court in denying that knowledge.

[49] Upon his arrest on the drug charges, Mr. Lovelace began his own discussions with the police about providing information regarding other people in the drug trade. Mr. Lovelace had three meetings with the accused between the accused's arrest and the murder, leading to Mr. Lovelace's

telephone call to the police and the message left with Sgt. Jacobson on September 24, 1986. While Mr. Weinstein represented Mr. Lovelace in relation to his drug charges, he had no involvement in the arrangements to provide information or to testify in the murder trial. Mr. Weinstein communicated with four federal Crown attorneys who had involvement with Mr. Lovelace's drug charges about consideration for the drug charges, but there is no evidence that he had any communication with the provincial Crowns involved in the murder trial.

[50] Mr. Weinstein's early discussions were with Judith Webster, a federal Crown. A file recording dated December 12, 1986, prepared by Ms Webster notes the agreement with Mr. Weinstein and states that it is "subject to confirmation with provincial crown". This wording suggests that the confirmation had not yet occurred.

[51] Peter Kremer, the senior federal Crown at that time, told Ms Webster that discussions about a stay of Mr. Lovelace's drug charges at that time were premature and that "Mr. Weinstein should renew his representations after the murder trial and that we would then make a decision following input from the Vice Division and the provincial Crown." Although Ms Webster testified before this panel, she had little recollection of this matter beyond the information contained in the documents. She left the federal Crown's office in January 1987, which was before the murder trial, and there is no indication that she took any further steps on the file before leaving. In my view, it is reasonably possible that Ms Webster may have intended to delay the consultation with the provincial Crowns until after the murder trial.

[52] Two other federal Crowns were involved with the file, Marley Dash and Pamela Clarke. Mr. Dash testified that he had no substantive involvement

with the file; rather, he dealt only with scheduling and adjournments. There was no evidence indicating otherwise. Ms Clarke, who conducted the proceeding at which Mr. Lovelace was acquitted, was only involved much later and was a junior Crown who was following the directions of the senior federal Crown, Mr. Kremer. Both Mr. Dash and Ms Clarke testified before this panel that they believed that there was a deal but had no involvement in the negotiations, and both testified that they did not have any discussions with the provincial Crowns about the Lovelace deal. There was no evidence to suggest otherwise.

[53] Mr. Kremer stated that he had "no recollection of any communication on this matter with Mr. Weinstein, the Manitoba Justice prosecutors, or anyone else at Manitoba Justice or Winnipeg Police Service members." Likewise, none of the police officers recalled having discussed the Lovelace deal with the provincial Crowns.

[54] Finally, as noted earlier, both of the provincial Crowns denied being informed of any deal with Mr. Lovelace and both denied making any such deals.

[55] In my view, on the evidence before us, it would be reasonably possible for a jury to find that the provincial Crowns having conduct of the murder trial were never advised of the Lovelace deal or that Mr. Weinstein was negotiating with the federal Crowns on behalf of Mr. Lovelace.

- *Mr. Lovelace's Knowledge of the Deal*

[56] The question of whether Mr. Lovelace received any consideration for his testimony was relevant to his credibility in two ways. First, if it could be shown that he knew about the Lovelace deal, his denials in that regard

would be untruthful, which would affect his overall credibility. Further, the fact that he was receiving consideration for his testimony, if known to him, would factor into the credibility of that testimony—it raises the question of whether he was lying about the accused's involvement in the murder in exchange for a deal on his drug charges.

[57] As noted earlier, Mr. Lovelace was aggressively cross-examined during the murder trial on the question of whether he had received, or would be receiving, any consideration on his drug charges in exchange for his testimony in the murder trial, and he denied either asking for, or being offered, anything for his testimony. Thus, this issue was before the jury. Mr. Lovelace's denial of any knowledge of a deal was confirmed by other evidence before us:

- Mr. Weinstein testified that Mr. Lovelace did not ask him to negotiate any deals on the drug charges;

- the documents that relate to the discussions between Mr. Weinstein and Ms Webster indicate that Mr. Weinstein did not want Mr. Lovelace to be aware of the Lovelace deal; and

- the police officers who dealt with Mr. Lovelace at the time of his arrest both testified at the trial that they did not offer him, and he did not ask for, any consideration from the police in exchange for giving them information about the accused's drug trafficking.

[58] The questions of whether Mr. Lovelace knew of the Lovelace deal and how that deal affected the credibility of his testimony would be for a jury to determine. It is not at all clear, however, that a jury would find that Mr. Lovelace knew, before the murder trial, about the deal that Mr. Weinstein

was negotiating with the federal Crowns. In my view, it is reasonably possible that a jury would find that Mr. Lovelace had no knowledge of that deal before he testified.

The Jacobson Report

[59] At the murder trial, Mr. Lovelace testified about a call that he made to Cst. McCormick on September 24, 1986, a few hours before Mr. Nieman was shot. He testified at the murder trial that he was not successful in speaking to Cst. McCormick, so he left a message for him, saying that he had heard that there was going to be a hit or an attempt to kill Robbie Nieman and that he also feared for the life of Dominic Diubaldo. This information was important to his credibility as it was provided hours before Mr. Nieman was shot and, if true, it tied the accused to the shooting.

[60] Constable McCormick was not available, so Sgt. Jacobson took the call and left a note, stating: "Sonny called. He will be at his farm. Apparently Frankie wants to do a hit on his friend." As previously stated, Sgt. Jacobson prepared a written report and also had personal police notes of the call (together, the Jacobson report), neither of which were disclosed to the defence, and Sgt. Jacobson was not called to testify. His personal notes contradict Mr. Lovelace's testimony, in that, according to his notes, the only threat that Mr. Lovelace reported was to the "carpenter", who was Mr. Diubaldo; there was no mention of a threat to Mr. Nieman.

[61] This contradiction was important in two ways:

- first, if a jury accepted that Mr. Lovelace's testimony about the targets of the threat was untruthful, that could affect its assessment of his general credibility; and

- second, Mr. Lovelace testified that his concern was based on his involvement with the accused and threats that he had made about both Messrs. Nieman and Diubaldo, which tied the accused to the Nieman shooting; however, if a jury accepted that there had been no reference to Mr. Nieman in the telephone call, that would make the call irrelevant to the Nieman shooting and it would not support the inference that the accused was involved in it.

[62] Sergeant Jacobson testified before this panel and stated that the call was serious and that, if somebody was at risk, he would have included that in the note that he left for the other officers; there are, however, indications that he did not realise the seriousness of the call at the time. He took no steps to contact the officers, apart from leaving a note on a board at the office to be received the next day. While he said that he would probably have notified a supervisor of the information, there was no documentation to indicate that he had done so. Finally, the only information that he had in his report of the identity of the target, being that he was a carpenter, was not included in the note that he left for the officers.

[63] While the note was evidence that Mr. Lovelace had foreknowledge that the accused was involved in the shooting of Mr. Nieman, there was other independent evidence, apart from the note, that confirmed that foreknowledge and, therefore, Mr. Lovelace's evidence regarding the call.

[64] When Csts. McCormick and DeGroot got the note on September 25, 1986, they went out to see Mr. Lovelace at his farm. At the murder trial, they testified that Mr. Lovelace gave them details about the accused's plan to kill Mr. Nieman and that the accused believed that Mr. Diubaldo was also an informer before they disclosed to him that Mr. Nieman had been shot the night

before. According to the officers' testimony at the trial, it was only after they received that information that they told him that Mr. Nieman had been shot the preceding night. They testified that Mr. Lovelace was genuinely shocked and upset at receiving this information. His reaction was not consistent with the accused's argument that he may have been told of the shooting before the two officers arrived or that they told him of the shooting before discussing the content of his call taken by Sgt. Jacobson.

[65] Further, the accused, himself, reported to the police, days before the shooting, that there were plans to kill Mr. Nieman in a couple of days, indicating that he would be shot. Those predictions, which were consistent with the information provided by Mr. Lovelace, turned out to be accurate.

[66] Counsel for the defence took a different position at the trial regarding the accused's predictions of the shooting. He argued to the jury that the accused's disclosure to the police was evidence that the accused was not the shooter—otherwise, why would he alert the police in advance of the shooting if he was part of it? The provincial Crowns argued, in reply, that it was part of the accused's elaborate scheme to arrange the murder and then obtain favours on his drug charges by offering up evidence of the identity of the killers. It was, and would be, for a jury to weigh the effect of this evidence.

[67] The Jacobson report was relevant evidence and would have provided the defence with new avenues on which to cross-examine Mr. Lovelace and the police officers, and to challenge both the contents of their testimony and their credibility. It would be an issue for a jury to determine what to make of the inconsistency between Sgt. Jacobson's evidence about the content of that call and that of Mr. Lovelace. In my view, however, it is not at all clear that a jury would accept Sgt. Jacobson's

testimony regarding the details in the call over that of Mr. Lovelace, and it would be open to the jury to accept Mr. Lovelace's evidence in that regard.

The Testimony of Mr. Lovelace

[68] The accused argues that this new evidence regarding the Lovelace deal, which he argues must have been known to Mr. Lovelace, and the inconsistency between Mr. Lovelace's version of the content of his call to Sgt. Jacobson and that of Sgt. Jacobson, would lead to Mr. Lovelace's version being rejected. He says it would leave Mr. Lovelace's credibility in tatters, such that his testimony would be rejected by a jury in a new trial. Without this testimony, the accused argues, there would be no case against him.

[69] In reply, the Crown points to evidence independent of Mr. Lovelace that corroborates important parts of his testimony. Attached as Appendix B to these reasons is a table of those parts of Mr. Lovelace's testimony that have been confirmed and the confirmatory evidence.

[70] There is a significant amount of evidence that supports many of the details provided by Mr. Lovelace. As a result of this, in my view, his credibility would not necessarily be "in tatters", as argued by the defence, even if a jury accepted that Mr. Lovelace knew about the Lovelace deal and accepted the Jacobson report over Mr. Lovelace's evidence about his call to Sgt. Jacobson. In my view, it would remain open for a jury to find Mr. Lovelace's testimony credible and to accept his testimony as regards the accused's involvement in the shooting.

The Testimony of Mr. Cory

[71] The accused argues that Mr. Cory was a classic jailhouse informant who had his own charges stayed after he testified against the accused. The accused points out that, in 2001, Manitoba Justice adopted a strict policy recognising the inherent unreliability of the evidence of jailhouse informants and limiting the use of such testimony. He argues that, following that policy, it is unlikely that Mr. Cory's evidence would be used in a new trial, especially given his lengthy record for theft and fraud.

[72] In reply to the accused's argument that Mr. Cory was too unreliable as a witness to be called at a new trial, the Crown states that, in this case, there was a significant amount of independent evidence that supported Mr. Cory's testimony, such that his evidence would not be excluded. Attached as Appendix C to these reasons is a table setting out important parts of Mr. Cory's evidence and the confirmatory evidence that supports it.

[73] In my view, Mr. Cory's evidence would likely be received at a new trial, notwithstanding the fact that he was a "jailhouse informant" with an unsavory criminal record. It would be for a jury to determine the weight to be given to that evidence, after considering both the significant supporting evidence and the evidence that he was a jailhouse informant with an unsavoury criminal record. Further, I am of the view that it would remain open for that jury to find his evidence credible and to rely on it in making its decision on the charge against the accused.

The Statement of Mr. Dunkley

[74] On the eve of the trial, Mr. Dunkley made a deal with the provincial Crown to plead guilty to second degree murder and to testify for the Crown.

His plea was accepted and he was sentenced before testifying. When it was time for him to testify, he presented as a hostile witness and did not confirm many aspects of his statement. As his testimony tied Mr. Luzny to the murder, his refusal to adopt the information in his statement led to the directed verdict of acquittal against Mr. Luzny.

[75] The Crown states that the rules of evidence in 1986 were such that there was no way of having a witness's pre-trial statement entered into evidence if the witness would not or could not confirm the evidence in court. The contents of the statement would have been ruled hearsay and excluded on that basis. It points out that the law has evolved in the intervening 30 years, such that it would be open for the Crown in a new trial to apply to have the statement entered under the necessity and reliability exception to the hearsay rules. (See *R v B (KG)*, [1993] 1 SCR 740.) If admitted, aspects of that statement confirm Mr. Lovelace's testimony regarding the motive for the murder. Mr. Dunkley also recounted a meeting with the accused following the accused's drug charges and before the murder, during which the accused said that he knew who ratted on him. Although not providing a name, the accused apparently gave a description that fit Mr. Nieman.

[76] This evidence, if admitted, would provide further support for details in Mr. Lovelace's evidence about the murder and the accused's role in it.

Conclusion

[77] It is clear, as the Crown has acknowledged, that the failure to disclose the fact of the Lovelace deal and the Jacobson report to the defence impaired the accused's ability to make full answer and defence. That evidence could have been used by the defence to challenge the overall credibility of

Mr. Lovelace and Csts. McCormick and DeGroot and also to challenge the credibility of important details of their testimony regarding Mr. Lovelace's statements to Sgt. Jacobson.

[78] That said, the new evidence is neither exculpatory as regards the charge against the accused, nor does it clearly render Mr. Lovelace's testimony unreliable. A jury would still have to consider Mr. Lovelace's testimony in the context of all of the other evidence, to determine whether his information about the accused was reliable and credible. There is a significant amount of other evidence that supports the details provided by Mr. Lovelace, such that it would remain open to a jury to find his testimony about the accused credible and reliable even in light of the evidence regarding the Lovelace deal and the Jacobson report.

[79] For these reasons, I am of the view that, based on all of the information now available, there is evidence upon which a properly instructed jury could reasonably find the accused guilty. Moreover, applying the approach in *Truscott*, it is not clearly more probable than not that the accused would be acquitted at a hypothetical new trial. As a result, I would set aside the conviction and order a new trial. Both parties argued that, if a new trial is ordered, this Court should also order a judicial stay of the proceedings. Given the length of time that has passed since the events at issue, including the trial, and the significant amount of time that the accused has already spent in custody, I agree that there should be a judicial stay of proceedings regarding the new trial, and I would so order.

VI. FRESH EVIDENCE MOTIONS

[80] There were two motions to present fresh evidence in this appeal. The first motion proceeded by consent and the testimony of a number of witnesses was presented to this panel. Several testified and were cross-examined, while the testimony of others was filed by way of affidavit or transcripts from other proceedings. There was a publication ban in place during the evidentiary portion of the proceeding, to prevent the publication of details of the testimony and the possible contamination of witnesses. With the consent of the parties, that publication ban was lifted as of May 18, 2018.

[81] There was a second motion for fresh evidence related to further information regarding one of the witnesses who had testified before this panel. That fresh evidence was sealed pursuant to the Manitoba, *Court of Appeal Rules*, Man Reg 555/88 R, r 21(4), and there was also a publication ban in place at the beginning of the hearing to prevent the publication of any of the details of that evidence. With the consent of the parties, this Court has reviewed that evidence.

[82] I am of the view that this evidence goes to the issue of whether there was Crown misbehaviour, which was relevant to whether there had been a miscarriage of justice. This has been conceded by the Crown and is no longer at issue. The fresh evidence is not, in my view, of assistance in determining the only issue on appeal, being whether there should be an order for a new trial with a judicial stay of proceedings or an acquittal. Therefore, I am of the view that the evidence is not relevant to the issues to be determined and the motion should be dismissed. I would order that the publication ban regarding this evidence should remain in effect.

VII. DECISION

[83] For the reasons set out herein, I would grant the accused's first motion to admit fresh evidence and admit the evidence referred to in that motion, but I would dismiss his second motion to admit new evidence. I would grant the accused's appeal to the extent of quashing his conviction for first degree murder. I would dismiss his application for an acquittal and, instead, order a new trial. Finally, I would enter a judicial stay of any further proceedings.

Beard JA

I agree: Burnett JA

I agree: Pfuetzner JA

APPENDIX A

The Crown's summary of the evidence against the accused:

1. Motive

There was evidence that the [accused] had a motive to kill Mr. Nieman.

Shortly before Mr. Nieman was shot, the [accused]'s cocaine empire was crippled. The [accused] was Winnipeg's biggest cocaine trafficker. But in the span of five days (September 9-14, 1986), he and two of his dealers, Matthew Lovelace and Jim Luzny, were all arrested and charged with serious drug offences. The charges against the [accused] were particularly grave. When police searched his home, they found upwards of $150,000 worth of cocaine and over $50,000 in cash. As a result of the seizures, the [accused] was deeply indebted to his drug supplier who had fronted the drugs, and he also faced the prospect of a lengthy penitentiary sentence. His life was suddenly in shambles.

. . .

The [accused] quickly concluded that an informer was to blame. The [accused] had taken extraordinary steps to evade detection by the police. When police executed the search warrant at his home, they found cocaine and cash secreted in a hidden compartment in a cabinet and in a concealed chamber under the basement floor, beneath a floor safe. These locations would have been impossible to find without inside information. The [accused] recognized this and said so to the police.

. . .

In subsequent conversations with the police, the [accused] specifically singled out Mr. Nieman as a "rat". Hours later, Mr. Nieman was shot.

. . .

There was evidence that the [accused] made similar statements to Wayne Cory. After the [accused] was arrested in connection with the shooting, he was housed with Mr. Cory at the remand centre. Mr. Cory testified that the [accused] thought that Mr. Nieman was an informer, and explained that "they" had no choice but to kill him because he was bringing down so many people in the "coke ring". Mr. Cory's incriminating testimony is described in more detail below.

2. Proven connections between the accused and the victim

There were proven connections between the [accused] and Mr. Nieman.

The [accused]'s address book contained an entry for Mr. Nieman. And in his police statements, the [accused] acknowledged that he knew Mr. Nieman. Indeed, it appears that he knew him well. The [accused] accurately identified Mr. Nieman's address, even though Mr. Nieman had only been staying there for a couple weeks. The [accused] said that he had recently spoken to Mr. Nieman, and he recounted several conversations with him. He went so far as to say that Mr. Nieman "loved him." He also acknowledged that Mr. Nieman owed him for cocaine.

. . .

3. Proven connections between the accused and the murderers

There were proven connections between the [accused] and the murderers.

Robert Dunkley was the shooter. He pleaded guilty to second degree murder and testified as a hostile witness at the [accused]'s trial. He admitted that he shot Mr. Nieman in the head multiple times with the assistance of Luis Correia. He acknowledged that it was a contract killing. He testified that he was hired to kill Mr. Nieman because Mr. Nieman was an informer.

. . .

When Mr. Dunkley testified, he refused to identify the person who hired him. But in his police statement he implicated his cocaine supplier, Jim Luzny. Mr. Dunkley told police that Mr. Luzny hired him because he (Mr. Luzny) had recently been charged with drug offences and suspected an informer. He also said that before the murder, Mr. Luzny put him in touch with the [accused]. The [accused] met Mr. Dunkley, provided cocaine to him, and identified the informer as "a young guy who wore those cut off Michael Jackson gloves". This description matched Mr. Nieman. When these police statements were put to Mr. Dunkley in cross-examination, he asserted that they were false.

. . .

Aside from Mr. Dunkley's police statements, there was other evidence of Mr. Luzny's connection to Mr. Nieman and motive to kill him. There was evidence that Mr. Luzny met Mr. Nieman shortly before the murder and discussed his recent arrest, and there was evidence that Mr. Luzny thought Mr. Nieman was a "roach".

There was also objective evidence of links among the [accused] and Messrs. Dunkley, Luzny and Correia:

- The [accused]'s address book had an entry for "Bob, Jim's friend" that listed Mr. Dunkley's phone number.

- The [accused]'s address book also had an entry for Jim Luzny.

- As discussed below, after his arrest, the [accused] made arrangements to contact Mr. Luzny through Wayne Cory, an intermediary.

- Mr. Dunkley's address book also had an entry for Mr. Luzny.

- Mr. Correia testified that he bought cocaine from Mr. Luzny and owed him money.

4. Unexplained foreknowledge of the murder

Prior to the shooting, the [accused] knew that efforts were underway to kill Mr. Nieman because he was an informer. He knew that the killing would be in a couple of days, and he gesticulated that a gun would be involved. These predictions were all accurate.

. . .

The [accused] was arrested and charged with the cocaine offences on Sept. 14, 1986. His police statements show that he quickly concluded that an informer was to blame. Mr. Nieman was shot ten days later, around midnight on Sept. 24-25, 1986. During this intervening ten day period, the [accused] told police:

> Robert Nieman is a dead man. He's a rat. He's dead. I'm telling you that in a couple of days, he'll be dead.

He positioned his hand in the form of a gun and pulled the trigger. He said that he knew who was planning the murder and claimed that he had tried to dissuade them.

. . .

In his factum, the [accused] suggests that he would not have alerted the police to Mr. Nieman's pending murder if he were involved in it. But the [accused]'s interactions with the police support the opposite inference. The [accused] was desperate to make a deal with the police to get out from under his drug charges. His disclosure of the plan to kill Mr. Nieman was his final attempt at a deal. Following

his arrest for the cocaine charges, the [accused] persistently called and met the police and relentlessly attempted to work out a deal:

- He asked what he could offer the police to get out from under his charges, but they told him that he was the biggest drug dealer in the city and they were not interested in anyone else.

- He offered to inform on his Montreal supplier, but the police were unenthusiastic.

- He offered to set up other people in the Winnipeg cocaine scene, including judges and doctors, but, again, the police were indifferent.

. . .

His many efforts to bargain-away his drug charges failed. Only then did he disclose the plan to kill Mr. Nieman. He gave police enough information to raise alarm about Mr. Nieman's safety. Then, when the police pressed him to reveal the identity of those plotting the murder, he held out a final offer: "Well, that may be one of my bargaining things for the charges."

. . .

These interactions support the inference that the [accused] was attempting to use the plot to murder Mr. Nieman as a bargaining chip. The plan was no less risky than the other schemes he had proposed. But like the others, in the end it also failed. The police did not take the bait. Mr. Nieman was murdered. And the [accused]'s foreknowledge of the murder became proof of his involvement in it.

To the extent that the [accused] offered innocent explanations for his foreknowledge of the murder, they were inconsistent. He claimed that he had spoken to the murderers, but then also claimed that he did not know their identities. When asked how he knew that the murder would happen in the next day or two (as it did), he claimed to have "E.S.P." He vacillated between inferring that it must have been "the blacks" who killed Mr. Nieman and positively stating that he had spoken to the "coloured guys" about the killing.

. . .

5. Ownership and recent possession of the murder weapon

There was evidence that the [accused] owned the murder weapon and was in possession of it shortly before the murder. In his factum, the [accused] submits that

the evidence placed the gun in his hands 22 months or more before the shooting. In fact, the evidence was more compelling.

. . .

Greg Peyko bought cocaine from the [accused] and borrowed money from him. Sometime around the end of 1985 – a year or less before the shooting – he gave the [accused] a pistol as partial payment for the debt. The pistol was distinctive because Mr. Peyko had personally repaired the firing pin. He identified the murder weapon as the very same pistol.

. . .

The Crown led further evidence of the [accused]'s continued possession of the pistol leading up to the shooting. Mr. Lovelace told police that he saw it in the [accused]'s possession when he was helping the [accused] move from one house to another. One of the movers testified and recalled the same incident. Paul Marion testified that during the move, the [accused] removed a panel from a basement wall and revealed a secret compartment in the wall cavity. In it the [accused] had hidden a pistol that looked similar to the murder weapon. The [accused] put it in a box and they moved it to the new home. The move was in the summer of 1986. Mr. Nieman was shot in late September, 1986. There was no evidence that the [accused] disposed of the pistol in this short intervening period.

. . .

6. Lies and inconsistent statements to the police

The [accused] lied to the police about his connection to those implicated in the murder and gave inconsistent statements about his knowledge of the murder:

- He denied knowing Jim Luzny (but he also contradicted himself and asserted that "Jim" also knew about the plan to murder Mr. Nieman).

- He denied knowing Mr. Nieman (but he also contradicted himself and asserted a close personal and cocaine connection to Mr. Nieman).

- He denied knowing who killed Mr. Nieman (but he also contradicted himself and claimed that he had spoken to the killers about the planned murder).

. . .

The [accused]'s denials were contradicted not only by the [accused] himself, but also by the objective evidence. As indicated earlier, the evidence established

connections between the [accused] and Messrs. Luzny and Nieman. A reasonable jury could infer that the [accused]'s lies and inconsistencies were evidence of his involvement in the murder. At the very least, they were capable of undermining the credibility of his denials.

7. Attempts to access and intimidate witnesses

Wayne Cory was in pre-trial custody with the [accused], looking forward to his imminent release. He testified that the [accused] attempted to use him as a tool to access and intimidate witnesses. In particular, Mr. Cory testified:

- The [accused] was angry at Mr. Lovelace for "framing" him and "exaggerating" to police. He called Mr. Lovelace a "rat" who would probably end up dead like Mr. Nieman. He asked Mr. Cory to intimidate Mr. Lovelace by killing a dog and hanging it at Mr. Lovelace's mother's house, or perhaps setting Mr. Lovelace's truck on fire.

- The [accused] asked Mr. Cory to telephone "Jim" and say that "police are telling Matt (Lovelace) to lie in the statements" and "Matt has turned into a rat. I can prove he's lying…" The phone number that the [accused] gave to Mr. Cory was associated to Jim Luzny's mother.

- The [accused] asked Mr. Cory to go see "Greg" (Peyko) to find out if the police had come to see him and, if so, what he had told them. The [accused] was "really concerned about Greg."

- The [accused] asked Mr. Cory to find Mr. Lovelace's girlfriend and get her contact information so the [accused] could speak to her.

. . .

In return for these favours, the [accused] offered to introduce Mr. Cory to cocaine trafficking, perhaps open a brothel together, or get Mr. Cory a legitimate job working for his brother-in-law.

. . .

In his factum, the [accused] asserts that a defence witness, John Proctor, testified that Mr. Cory's claims were false. This is an overstatement. Mr. Proctor overheard a snippet of a conversation between the [accused] and Mr. Cory about killing a dog. Mr. Proctor remembered Mr. Cory raising the idea, while Mr. Cory asserted that the idea came from the [accused]. On either version there was a conversation about killing a dog. Moreover, Mr. Cory's testimony was corroborated in several

significant ways. The confirmatory evidence is set out at [Appendix C to these reasons].

8. Incriminating statements to Wayne Cory

Mr. Cory testified that the [accused] denied that he was involved in murdering Mr. Nieman. He also testified that the [accused] repeatedly complained that Mr. Lovelace (whose evidence implicated him in the murder) was a "rat" and a "liar" who had "framed" him and "exaggerated" to the police. However, he also testified that the [accused] made incriminating statements to him.

. . .

First, Mr. Cory testified that the [accused] explained why Mr. Nieman had to be killed. He testified that the [accused] said:

> (I)t might have cost him a little bit, but it was ... worth it. ... they had no choice because there was (*sic*) many doors that were opened and there was (*sic*) many other people going down in the coke ring ... because these doors being opened by Nieman.
>
> . . .

Second, Mr. Cory testified that the [accused] made statements about the murder weapon. These statements suggested that the [accused] had detailed knowledge of the murder, which in turn supported the inference that he was involved in it:

- As indicated above, Mr. Cory testified that the [accused] was "really concerned" about the police speaking to Greg Peyko. The [accused]'s concern shows that he knew that the gun he had obtained from Mr. Peyko was the murder weapon, and he knew that if Mr. Peyko spoke to the police, this would implicate him in the murder.

- Mr. Cory testified that the [accused] said that he did not have to worry about the murder charge because the police would never find the gun. At the time that the [accused] made this statement to Mr. Cory, Mr. Dunkley had carefully hidden the gun and had not yet cooperated with the police. Without Mr. Dunkley's cooperation, the police would never have found the gun. The [accused]'s statements to Mr. Cory show that he knew that the gun would not be found at a time that a person unconnected to the murder would not.

The [accused] offered no innocent explanation for his knowledge of the murder weapon or its concealment.

. . .

9. Incriminating statements to Matthew Lovelace

Mr. Lovelace gave direct evidence implicating the [accused] in the murder. He testified that in the ten day period between the [accused]'s arrest (September 14) and the shooting of Mr. Nieman (September 24/25), the [accused] met with him three times (September 17, 19 and 23). The [accused] was preoccupied with unearthing how he had been caught. They discussed electronic surveillance, covert police searches of his home, and informers. The [accused] told Mr. Lovelace that he had concluded that there were at least two informers: Mr. Nieman and Dominic Diubaldo, a carpenter who had done some work at his home (Mr. Diubaldo was also involved in drugs, and the [accused] knew this).

. . .

As for Mr. Nieman, the [accused] told Mr. Lovelace that he had arranged for his murder and had given his pistol to Jim Luzny for the job. As for Mr. Diubaldo, the [accused] proposed that they frame him by alleging that the cocaine seized from the [accused]'s home was his. The [accused] also suggested an alternative plan in which he would pay Mr. Lovelace for confessing falsely that the cocaine was his.

. . .

Mr. Lovelace testified that he became concerned about the safety of Messrs. Nieman and Diubaldo. So he told Mr. Diubaldo about the [accused]'s suspicions and tried to contact his police handlers to tell them about the [accused]'s statements. He could not reach his handlers so he left a message for them stating:

> I had heard that there was going to be a hit or an attempt to kill Robbie Nieman and that I was also in fear for the life of Dominic Diubaldo.
>
> . . .

Hours later, Mr. Nieman was shot.

The next day, officers met Mr. Lovelace and interviewed him about the [accused]'s statements. At the time of these interviews, Mr. Lovelace was not aware that Mr. Nieman had been shot. He felt that the officers were doing routine follow-up of the message he had left the previous night. He gave the officers details about the [accused]'s plan to kill Mr. Nieman, the [accused]'s conclusion that Mr. Diubaldo was also an informer, and the other statements the [accused] had made to him. Only

then did the officers tell Mr. Lovelace about the shooting. Upon hearing the news, Mr. Lovelace was visibly shaken. Cst. DeGroot testified:

> He was very upset. His complexion turned white. There was (*sic*) tears in his eyes. It was almost a state of shock.

Mr. Lovelace immediately told them that he would do anything to assist them.

. . .

Mr. Lovelace was an unsavoury witness whose credibility required careful scrutiny. The jury was so instructed, and directed to look for confirmatory evidence. There was a lot of confirmatory evidence to consider, as virtually all aspects of Mr. Lovelace's testimony fit together with the rest of the evidence. The most significant confirmatory evidence is set out at Appendix B to [these reasons].

[footnotes omitted]

APPENDIX B

Mr. Lovelace's Testimony	Confirmatory Evidence
Prior to the shooting, the [accused] told Mr. Lovelace about the plan to kill Mr. Nieman.	Prior to the shooting, the [accused] told the police that there was a plan to kill Mr. Nieman.
Prior to the shooting, the [accused] told Mr. Lovelace that he thought Mr. Nieman was an informer, and this was why he would be killed.	Prior to the shooting, the [accused] told the police that he thought Mr. Nieman was an informer, and this was why he would be killed.
When the [accused] described the plan to shoot Mr. Nieman, he positioned his hand in the form of a gun and pulled the trigger.	Days later, the [accused] used the same hand gesture when he told the police about the plan to shoot Mr. Nieman.
The [accused] told Mr. Lovelace that he had given the gun to Jim (Luzny) and Jim's friends were going to kill Mr. Nieman.	The [accused] told the police that "Jim" also knew of the plan to kill Mr. Nieman. A gun was used in the attack on Mr. Nieman. There was objective evidence that the [accused] was connected to Jim Luzny. There was objective evidence that Mr. Luzny was connected to the murderers, Messrs. Dunkley and Correia. There was objective evidence that Mr. Luzny was connected to Mr. Nieman, and that he thought he was a "roach".
The [accused] suggested that the gun was the one that Mr. Lovelace had previously seen (this was the gun that the [accused] had received from Greg Peyko).	The murder weapon was the gun that the [accused] had received from Mr. Peyko.

Mr. Lovelace's Testimony	Confirmatory Evidence
Mr. Lovelace was present when the [accused] received the gun.	Greg Peyko testified that someone matching Mr. Lovelace's description was present when he gave the gun to the [accused]. The circumstances of the transfer were precisely as Mr. Lovelace described them.
Mr. Lovelace saw the [accused] in possession of the gun in the summer of 1986, shortly before the murder. He identified Paul Marion as being present and seeing the gun on the same occasion.	Paul Marion testified that he had seen the gun. He confirmed that it was in the summer of 1986, and that the circumstances were precisely as Mr. Lovelace described them.
The [accused] was preoccupied with finding a way out from under his drug charges. He tried to convince Mr. Lovelace to confess falsely that the drugs were his, and he devised a plan to frame Dominic Diubaldo.	The [accused] relentlessly attempted to work out a deal with the police. He offered to work as a police agent, inform on other drug dealers, and set up other people in the drug scene. He also offered information about the plan to kill Mr. Nieman, but only in return for consideration.
The [accused] concluded that he had been arrested as a result of an informer.	Immediately following his arrest, the [accused] inferred that the police had inside information and he said so to the arresting officers.
The [accused] was preoccupied with unearthing precisely how he had been caught. He told Mr. Lovelace that he thought the police had broken into his house, and he discussed the threat of electronic surveillance.	The [accused] questioned the police about how they came to know about him. He asked about electronic surveillance, bugs, wiretaps and cameras. He suspected that a neighbour had set up surveillance on him. He thought that the police had broken into his home. He even left a note for the police warning them against unlawful entries.

Mr. Lovelace's Testimony	Confirmatory Evidence
At the time that Mr. Lovelace gave his police statements recounting the [accused]'s plan to kill Mr. Nieman, he was not aware that Mr. Nieman had been shot.	The police officers who took Mr. Lovelace's statements (Csts. McCormick and DeGroot) both confirmed that they did not tell Mr. Lovelace about the shooting until after he had provided his statements. Mr. Lovelace was visibly shaken by the news.

[footnotes omitted]

APPENDIX C

Mr. Cory's Testimony	Confirmatory Evidence
The [accused] told Mr. Cory the make and model of Mr. Lovelace's truck, which he was to set on fire.	Mr. Lovelace drove a truck.
The [accused] suggested that Mr. Cory intimidate Mr. Lovelace by hanging a dead dog outside of Mr. Lovelace's mother's residence in Winnipeg.	Mr. Lovelace's mother lived in Winnipeg, Mr. Lovelace had a relationship with her, and the [accused] knew where she lived.
The [accused] told Mr. Cory to visit "Greg" and inquire whether the police had spoken to him. The [accused] was "really concerned about Greg."	Greg Peyko was an important witness for the Crown who connected the [accused] to the murder weapon. He would have caused the [accused] concern. At the time that the [accused] dispatched Mr. Cory to find Mr. Peyko, the [accused] would not have known whether the police had spoken to him.
The [accused] told Mr. Cory that "Greg" owed him for cocaine and for a car he had bought.	Mr. Peyko confirmed that he owed the [accused] money for cocaine and that he had borrowed money from him to buy a car.
The [accused] told Mr. Cory that the police would never find the gun.	At the time that the [accused] made this statement to Mr. Cory, Mr. Dunkley had carefully hidden the gun and had not yet cooperated with the police. Without Mr. Dunkley's cooperation, the police would never have found the gun.
The [accused] told Mr. Cory to visit "Jim" and tell him that Mr. Lovelace "had turned into a rat…"	The phone number that the [accused] gave to Mr. Cory was Mr. Luzny's.
The [accused] told Mr. Cory to find Mr. Lovelace's girlfriend, "Cathy".	Mr. Lovelace had a girlfriend and her name was "Cathy".

Mr. Cory's Testimony	Confirmatory Evidence
The [accused] was angry at Mr. Lovelace and called him a "rat" and a "liar" who had "exaggerated" to police.	The defence witness, John Proctor, confirmed that the [accused] was angry at Mr. Lovelace and accused him of lying.
The [accused] gave Mr. Cory various notes describing where he should go and whom he should visit.	The police seized the notes. They are consistent with Mr. Cory's testimony and they contain information that Mr. Cory could only have obtained from the [accused].
The [accused] offered that Mr. Cory could stay with his mother and work with his brother-in-law. The [accused] gave Mr. Cory his mother's address.	The address was accurate. The [accused]'s brother-in-law was in the business described by Mr. Cory.
The [accused] told Mr. Cory about his drug trafficking organization, including his supplier in Montreal.	The [accused] obtained his drugs from a supplier in Montreal.

[footnotes omitted]