Date: 20010216
Docket: CAC 150706

NOVA SCOTIA COURT OF APPEAL

[Cite as: R. v. Wood, 2001 NSCA 38]

Roscoe, Hallett and Cromwell, JJ.A.

BETWEEN:

JOHN DOUGLAS WOOD

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT

Counsel:	Appellant in person William D. Delaney for the Respondent
Appeal Heard:	December 6, 2000
Judgment Delivered:	February 16, 2001

THE COURT: The appeal from conviction is dismissed; leave to appeal the sentence is granted, but the appeal is dismissed as per reasons for judgment of Roscoe, Hallett and Cromwell, JJ.A.

BY THE COURT:

INTRODUCTION

[1] Following a 30 day jury trial in the Supreme Court, convictions were entered against the appellant on nine counts of theft of amounts exceeding five thousand dollars contrary to s. 334(a) of the **Criminal Code**. He was sentenced to five years incarceration in a federal institution. He appeals his conviction and applies for leave to appeal his sentence.

[2] Each of the charges relates to money that the appellant, a former barrister, either held in trust for his clients or to which he had access by way of power of attorney. The allegations are that he wrongfully converted those funds either to his own use or the use of others without the consent of the owners of the funds. The Crown led evidence to support its theory that over a period of four years the appellant transferred funds belonging to the clients from the trust funds of one to another and to his own use. The Crown alleged that, in total, an amount in excess of $450,000 was involved in the transactions, and that in the final analysis, approximately $243,000 was not restored to the clients. The Crown called two witnesses qualified as experts, one accountant and one who offered opinion evidence respecting altered documents. In addition to several of the clients whose trust funds were alleged to have been improperly appropriated, the Crown called the appellant's bookkeeper and other lawyers and witnesses from various financial institutions who identified documents. The Indictment contained one charge of theft and one charge of fraud in respect of each of nine clients. The jury returned guilty verdicts on all 18 charges and the nine fraud charges were stayed further to the **Kienapple** principle.

PROCEDURAL BACKGROUND

[3] The Information was sworn on November 23, 1995. On February 4, 1997, after numerous appearances in Provincial Court, the details of which will be provided as necessary hereafter, the appellant waived the right to a preliminary inquiry. After many more appearances, applications, pre-trial conferences and adjournments, the trial in the Supreme Court finally commenced on April 27, 1998, before Justice David Gruchy. A jury was selected and the appellant was arraigned

before the jury. The following day the appellant made several **Charter** motions alleging a denial of the right to be tried within a reasonable time, and infringements of his rights under sections 7 and 11(c). As well, he made applications for severance of counts and for a declaration of a mistrial on the basis that the jury selection process was flawed. These applications were all dismissed. Later that day, the Crown agreed with the appellant that there had been a flaw in the jury selection process and that as a result, there should be a mistrial.

[4] Gruchy, J. declared a mistrial, dismissed the jury and adjourned the matter to May 12,1998. On May 4th, the appellant brought two applications for a further adjournment and a recusal application with respect to Justice Gruchy. These applications were dismissed. On May 6th, the appellant made another application for an adjournment because of media coverage of the mistrial, which was likewise dismissed.

[5] On May 12th, after two more applications by the appellant, another jury was selected and the appellant was placed in its charge. The following day, Gruchy, J. dismissed an application by the appellant for the declaration of another mistrial. The first witness was called on May 13th. On Tuesday, May 19th, Associate Chief Justice Kennedy, as he then was, adjourned the trial to Monday, May 25th due to the sudden illness of Justice Gruchy. On May 22nd, Kennedy, A.C.J., determined that because of the seriousness of Justice Gruchy's illness, he was "unable to continue" the trial pursuant to s. 669.2 of the **Criminal Code**. Although no objection was taken to that ruling, the appellant was opposed to the substitution of Kennedy, A.C.J., as the trial judge on the basis that the appellant held a reasonable apprehension of bias. Kennedy, A.C.J., dismissed the application for recusal.

[6] On May 25th, after motions relating to disclosure, the trial recommenced before the jury. On June 27th, the jury returned its guilty verdicts. On September 1, 1998, the appellant was sentenced to 10 months imprisonment with respect to each of counts 1, 13 and 17. On the remaining six counts, he was sentenced to five months imprisonment on each count, all periods to be served consecutively, for a total of five years imprisonment. In addition, a restitution order in the amount of $196,094.15 was made in favour of the Nova Scotia Barristers' Society.

GROUNDS OF APPEAL

[7] In the notice of appeal dated September 29, 1998, the appellant stated the following grounds of appeal:

1. THAT the finding of the jury that the Appellant John Douglas Wood was guilty of: is perverse, wrong in law and against the weight of the evidence;

2. THAT the learned Justice Michael MacDonald erred in law in refusing the Appellant a stay in proceedings until state funded legal counsel could be provided to the Appellant in the conduct of his criminal jury trial;

3. THAT the learned Justice David W. Gruchy erred in law in dismissing the Appellant's challenge to the array of jurors and permitting a new jury to be drawn from Jury Panel X which had already been dismissed by virtue of the earlier jury selection;

4. THAT the learned Justice David W. Gruchy erred in law in allowing a flawed jury selection process to occur whereby the Appellant was forced to have a jury with which the Appellant was not content;

5. THAT the learned Justice David W. Gruchy erred in law in failing to exercise his jurisdiction properly by granting the Appellant a reasonable adjournment because of the extreme adverse publicity given to the trial through the media; in particular the issue of FRANK magazine number 272 which contained an editorial challenging Justice David W. Gruchy's statements and the offensive personal attacks on the Appellant which made it highly improbable to obtain an unbiased jury and a fair trial for the Appellant;

6. THAT the learned Justice David W. Gruchy erred in law in admitting certain copies of banking documents into evidence at the Appellant's trial;

7. THAT the learned Justice David W. Gruchy erred in law in denying the Appellant an adjournment and a stay of proceedings pending the appointment of state funded legal counsel for the Appellant John Douglas Wood;

8. THAT the learned Justice David W. Gruchy erred in law in finding that the Appellants Charter Rights pursuant to Sections 7, 11, 24(1) had not been abridged or violated;

9. THAT the learned Associate Chief Justice Joseph Kennedy erred in law in dismissing the motion of the Appellant for the appointment of another

justice to preside over the Appellant's trial, whereby the Appellant's Charter Rights under Section 11 were violated or abridged;

10. THAT the learned Associate Chief Justice Joseph Kennedy erred in law in admitting copies of cheques and banking documents pursuant to Section 24 of the Canada Evidence Act;

11. THAT the learned Associate Chief Justice Joseph Kennedy erred in law in allowing Scott Brookfield to give expert evidence in forensic accounting;

12. THAT the learned Associate Chief Justice Joseph Kennedy erred in law in dismissing the motion of the Appellant for a mistrial because the Appellant's trial was not continuous and was interrupted and recessed for days for reasons not connected in any way with the trial, the crown or the accused;

13. THAT the learned Associate Chief Justice Joseph Kennedy erred in law in allowing the Crown to give the jury large three ring binders with copies of Crown exhibits highlighted with yellow marker to refer to while the Crown expert witness Scott Brookfield gave his testimony. During the testimony of the Crown's expert witness Scott Brookfield the jury were referred to the copies of yellow highlighted exhibits in the three ringed binders instead of being shown original unhighlighted exhibits;

14. THAT the learned Associate Chief Justice Joseph Kennedy erred in law in allowing the records which the Appellant John Douglas Wood delivered to Scott Brookfield by the authorization that Scott Brookfield held pursuant to the regulations of the Barristers and Solicitors Act to be admitted into evidence. The Appellant's Charter Rights under Sections 8 and 24(1) and 24(2) were thereby violated or abridged;

15. THAT the learned Associate Chief Justice Joseph Kennedy erred in law in admitting documents seized pursuant to search warrants as documents found in possession and thereby deemed admissible;

16. THAT the learned Associate Chief Justice Joseph Kennedy erred in law in ruling that copies of purported client ledger cards seized under search warrant from the offices of Coopers Lybrand would be admitted into evidence;

17. THAT the learned Associate Chief Justice Joseph Kennedy erred in law by allowing the Crown Prosecutor to ask questions of Crown witnesses based on facts not in evidence or proved;

18. THAT the Appellant was deprived of his right to a fair trial by being denied state funded legal counsel and thereby his Charter Rights under Section 7 and Section 11 were violated or abridged;

19. THAT the Appellant was denied his right to be tried within a reasonable time in violation of his Charter Rights under Section 11;

20. THAT the Appellant was deprived of his right to a fair trial and denied his right to remain silent by being forced to conduct his own legal defence, without legal counsel, before a jury and thereby his Charter Rights under Section 7 of the Canadian Charter of Rights and Freedoms were violated or abridged;

21. THAT the learned Associate Chief Justice Joseph Kennedy erred in law by permitting the Crown to call and present six new witnesses without proper notice to the accused and which witnesses were not disclosed to the accused;

22. THAT the learned Associate Chief Justice Joseph Kennedy erred in law by interrupting the trial and breaking up the summation of the defence and the crown from the charge to the jury so that the defence's summation to the jury was completed two days before the charge to the jury was given;

23. THAT the learned Associate Chief Justice Joseph Kennedy erred in law in his charge to the jury by failing to instruct the jury not to consider or disregard that the Nova Scotia Barristers' Society had reimbursed two of the alleged victims of the Appellant and further erred by instructing the jury, without adequate explanation, to ignore the Appellant's request in summation to send a message to whatever authorities regarding the provision of legal counsel for accused persons in jury trials;

24. THAT the learned Associate Chief Justice Joseph Kennedy erred in law by allowing evidence before the jury that the Appellant had been disbarred by the Nova Scotia Barristers' Society for matters relating to the Appellant's alleged victims and in the same manner erred in law in permitting evidence to be put before the jury that two of the Appellant's alleged victims had been reimbursed by the Nova Scotia Barristers' Society for losses occasioned by the actions of the Appellant;

25. THAT the learned Associate Chief Justice Joseph Kennedy erred in law in his charge to the jury by telling the jury that: the dates of the alleged offences extended to March 31, 1995; the offences relating to John Ross could mean either the father John Ross or the son John Ross; and that there were two estates as alleged victims;

26. THAT the learned Associate Chief Justice Joseph Kennedy erred in law by failing to grant the motion of the Appellant to sever the counts on the indictment;

27. THAT the learned Associate Chief Justice Joseph Kennedy erred in law in his charge to the jury by following the outline of alleged offences as set out in the flow chart prepared by Grant Shaw, which flow chart was not admitted in evidence and objected to by the Appellant;

28. THAT the learned Associate Chief Justice Joseph Kennedy erred in law by admitting into evidence photocopies of cheques and other documents instead of original documents which were available but not produced at trial;

29. Such other grounds as may appear once the transcript is received and reviewed.

30. THAT the learned Chief Justice Joseph Kennedy erred in law in allowing a Crown address to the jury which was improper prejudicial and which misstated the facts and the evidence.

[8] In addition, in his factum the appellant listed three grounds of appeal relating to sentence:

31. Did the learned Chief Justice Joseph Kennedy err in law in sentencing the Appellant to consecutive terms of imprisonment when he earlier in the trial had refused to sever the counts in the indictment so that whatever sentences which were imposed on the Appellant ought then to have been concurrent?;

32. Did the learned Chief Justice Joseph Kennedy err in law in sentencing the Appellant to a lengthy prison term by failing to properly apply the principles of sentencing and over emphasizing the principle of deterrence?;

33. Did the learned Chief Justice Joseph Kennedy err in law by making an order for restitution against the Appellant contrary to any authority to make such an order under the Criminal Code of Canada and without any factual basis to support the order for restitution which he made?

[9] We will deal with these issues under the following subject headings:

1. Charter Issues:

(a) delay
(b) right to counsel
(c) right to remain silent
(d) other trial fairness issues:
    (i) bias
    (ii) jury selection
    (iii) pre-trial publicity
    (iv) expert witness
    (v) disclosure

2. Documentary Evidence Issues:

(a) the documents before the jury
(b) banking documents
(c) investigative documents
    (i) compelled production
    (ii) documents found in possession

3. Miscellaneous Issues:

(a) unreasonable verdict
(b) continuous trial
(c) improper questions
(d) jury charge
(e) evidence of disbarment and reimbursement by the Barristers' Society
(f) severance of counts
(g) Crown address to the jury

4. The Sentence Appeal

ANALYSIS

1. Charter Issues

(a) delay

[10] Section 11(b) of the **Charter** states:

> 11. Any person charged with an offence has the right
>
> . . .
>
> (b) to be tried within a reasonable time;

[11] At the commencement of the trial, the appellant made an application before Gruchy, J. seeking a stay of proceedings as a remedy for a breach of his right to be tried within a reasonable time. Justice Gruchy found:

> . . . I have concluded that there is absolutely no evidence before me of systemic delay attributable to the Crown or, in fact, attributable to the system.
>
> The Crown has been ready to proceed to trial and we are now once again in that position. It is clear that the accused initially tried [sic] to be tried by judge and jury, carrying with it the election of the right to a preliminary -- carrying with that election, the right to a preliminary inquiry. It's clear that within days of that preliminary inquiry, the accused waived his right to it. That created a delay.
>
> There then followed a series of adjournments as the accused had no counsel. Mr. Wood was given every opportunity to obtain counsel. He has been unable to obtain counsel, and that may, in certain circumstances, warrant a further adjournment. In this case, however, as I have already found, Mr. Wood is a lawyer, a trained lawyer, and is quite capable of defending himself as he has amply, ably demonstrated in the last two days.
>
> There has been no extraordinary systemic delay attributable to any cause in this particular case . . .

[12] The appellant submits that his right to be tried within a reasonable time as provided for by s. 11(b) of the **Charter** was infringed. He says that the inordinate delay between the laying of the charges and the trial, a period of two and one-half years, was not his fault and he was prejudiced thereby because as a result of the delay, original documents and witnesses were not available for trial. He does not specify which documents or witnesses.

[13] The Crown, in response, concedes that the delay of 29½ months from the laying of the charges to the commencement of the trial is of a sufficient length to warrant an inquiry into the reasons for the delay, whether there was waiver of any

of the time periods and whether there was prejudice to the appellant as proposed by the Supreme Court of Canada in **R. v. Morin** (1992), 71 C.C.C.(3d) 1.

[14] In **Morin**, Sopinka, J. for the majority of the court, set out an approach to determining whether an individual's right to be tried within a reasonable time has been infringed commencing at p. 13:

> The general approach to a determination as to whether the right has been denied is not by the application of a mathematical or administrative formula but rather by a judicial determination balancing the interests which the section is designed to protect against factors which either inevitably lead to delay or are otherwise the cause of delay. As I noted in **Smith**, ***supra,*** "[i]t is axiomatic that some delay is inevitable. The question is, at what point does the delay become unreasonable?" (p. 105). While the court has at times indicated otherwise, it is now accepted that the factors to be considered in analyzing how long is too long may be listed as follows:
>
> 1. the length of the delay;
>
> 2. waiver of time periods;
>
> 3. the reasons for the delay, including
>
>   (a) inherent time requirements of the case;
>   (b) actions of the accused;
>   (c) actions of the Crown;
>   (d) limits on institutional resources, and
>   (e) other reasons for delay, and
>
> 4. prejudice to the accused.
>
> These factors are substantially the same as those discussed by this court in **Smith,** ***supra***, at pp. 105-6, and in **Askov**, ***supra***, at pp. 483- 4.
>
> The judicial process referred to as "balancing" requires an examination of the length of the delay and its evaluation in light of the other factors. A judicial determination is then made as to whether the period of delay is unreasonable. In coming to this conclusion, account must be taken of the interests which s. 11(b) is designed to protect. Leaving aside the question of delay on appeal, the period to be scrutinized is the time elapsed from the date of the charge to the end of the trial: see **R. v. Kalanj** (1989), 48 C.C.C. (3d) 459, [1989] 1 S.C.R. 1594, 70 C.R. (3d) 260. **The length of this period may be shortened by subtracting**

> **periods of delay that have been waived**. It must then be determined whether this period is unreasonable having regard to the interests s.11(b) seeks to protect, the explanation for the delay and the prejudice to the accused. (at pp.13-14)
>
> (emphasis added)

[15] In **R. v. Smith** (1989), 52 C.C.C. (3d) 97, referred to by Sopinka, J., in the passage above, he indicated with respect to waiver by the accused that:

> . . . Agreement by an accused to a future date will in most circumstances give rise to an inference that the accused waives his right to subsequently allege that an unreasonable delay has occurred. While silence cannot constitute waiver, agreeing to a future date for a trial or a preliminary inquiry would generally be characterized as more than silence. Therefore, absent other factors, waiver of the appellant's s.11(b) rights might be inferred based on the foregoing circumstances. (at p. 109)

[16] The time periods involved in this case can be categorized as follows:

1	from the laying of the charges to the first appearance	1 month
2	from the first appearance to the scheduling of the preliminary	9 months
3	adjournments of the preliminary at the appellant's request	5 months
4	from the date the preliminary was waived to the first appearance in Supreme Court	9 days
5	from first appearance in Supreme Court to the date the trial was scheduled to commence	7 months
6	further adjournments at the request of the appellant	7 months

[17] Although the initial one month delay may have been more for the convenience of the Crown than for any other purpose, it is clear from the record that the second delay of nine months was required because of a combination of the then defence counsel's prior commitments and the Provincial Court docket. The nine month adjournment was made at the joint request of the Crown and defence counsel. The preliminary that had been scheduled to begin on September 3, 1996, was adjourned at the appellant's request because he changed legal counsel. The Crown consented to the adjournment for a period of two weeks so that new counsel could advise the court of his available dates. When new defence counsel appeared, he requested that the preliminary be adjourned to February, 1997. The third period

of delay of a total of five months was therefore also at the request of the appellant.

[18] Nine days after the preliminary was waived by the appellant, the parties appeared in the Supreme Court to set a date for trial. At that appearance, defence counsel advised that the first date he was available for the three weeks thought necessary for trial would be in September. Therefore, with the consent of both Crown and defence, the matter was scheduled for trial to commence on September 8, 1997. The sixth period of delay, the final seven months was necessary because the appellant lost his Legal Aid funding a few weeks earlier and was then self-represented. The trial did not go ahead on September 8th because the appellant was not ready to proceed on his own and requested more time to prepare for trial. It is clear that the appellant agreed to the further adjournment of the trial to April 27, 1998.

[19] Of the total delay of 30 months, all adjournments were expressly requested by or consented to by the appellant or his counsel, except for the first period of one month and the fourth period of nine days. In the absence of any evidence giving rise to any other inference, we conclude that the appellant waived all time periods other than 40 days. When the period of time that has been waived is subtracted from the total, there is obviously no unreasonable delay. Furthermore, there was absolutely no evidence of any prejudice to the appellant as a result of the delay. There was no error of law in failing to find a breach of the right to be tried within a reasonable time.

(b) right to counsel

[20] The appellant submits that Justice Michael MacDonald, as he then was, and Justice Gruchy erred in denying separate applications made by him for a stay of proceedings pending the appointment of state-funded counsel, and that his right to a fair trial and his right to remain silent were infringed as a result of having to conduct his own trial. As well, he argues that his performance as a self-represented accused at trial was so deficient that he was deprived of the right to make a full answer and defence.

[21] In August 1997, the appellant and his then counsel, Mr. Newton, appeared before Justice Michael MacDonald for a pre-trial conference and advised that the

Legal Aid funding for Mr. Newton had ceased because a condition of the funding had not been either met or waived. The nature of the condition was not revealed on the record. Justice MacDonald permitted the withdrawal of Mr. Newton from the case. The appellant then made an application for a stay which was heard the following week on September 5, 1997. The application was dismissed. Relying on this court's decision in **R. v. Keating** (1997), 159 N.S.R. (2d) 357, MacDonald, J., indicated that there is no constitutional right to state-funded counsel, and concluded that because the appellant was legally trained and had received full disclosure, he could, with the assistance of the trial judge, receive a fair trial without counsel. The trial was adjourned to April 27, 1998 in order to allow the appellant more time to prepare.

[22] The appellant made a further application for a stay pending appointment of state-funded counsel before Justice Gruchy on April 22, 1998. After a lengthy inquiry as to the nature of the case and the appellant's experience as a former barrister and solicitor, Gruchy, J. concluded that although the trial may be complex in the sense that there would be much material to be processed and examined, the material would not be such that the appellant would not be able to deal with it. He considered that the law with respect to fraud and theft was not so complex and that the appellant, with his background, should be able to deal with it.

[23] On May 14, 1998, after the first witness testified, the appellant again made an application for a stay pending the appointment of state-funded counsel. Again, Gruchy, J. dismissed the application, and after referring back to his earlier decision, said:

> . . . I concluded that Mr. Wood should have no difficulty understanding the necessary concepts and I remarked as well that the documents basically are either of his own making or of his own books and that consequently he should have no difficulty with them.
>
> Mr. Wood, I had to say very candidly to you, you've proven me to be correct. You're very capable of handling your own defence. Far different than the average case when we're looking at a man who has virtually no education but because he has some experience in criminal law and some criminal record, we deem that he's quite able to take care of himself in trials. In your case, you've proven me to be absolutely correct. You're able to handle yourself remarkably well. If half the lawyers who appear before me were doing as well I'd be very pleased. But it isn't the case. You're doing a wonderful job. So anyway the application for stay will

> be refused and we will proceed.

[24] Both judges were correct in stating that there is no constitutional right to be provided with trial counsel at the expense of the state. (See **Keating**, **supra**, and **R. v. Rowbotham**, **et al.** (1988), 41 C.C.C. (3d) 1 (Ont.C.A.)) The only exception is in the rare case where representation by counsel is essential to a fair trial. If, in exceptional circumstances, because of the seriousness and complexity of the case, the accused is incapable of representing himself, the trial judge could determine that a stay is the appropriate remedy. As noted in **R. v. Wilson** (1997), 163 N.S.R. (2d) 206 (C.A.):

> . . . That determination must include at the minimum, an inquiry into: (a) the personal abilities of the accused such as her educational and employment background and whether she is able to read, understand the language, and make herself understood; (b) the complexities of the evidence and the law on which the Crown proposes to rely and; (c) whether there are likely to be any complicated trial procedures such as a voir dire. The assessment should be undertaken in the knowledge that it is the duty of the Crown to disclose its case to the accused and the duty of the trial judge to assist an unrepresented accused. (See **R. v. Keating (K.K.)** (1997), 159 N.S.R. (2d) 357; 468 A.P.R. 357 (C.A.).

[25] In this case, both judges made the appropriate inquiries. They determined that the appellant, a law school graduate with more than 20 years experience as a barrister and as a civil litigator, was capable of understanding the case against him and of conducting his defence. The evidence consisted mainly of documents from his legal office which he either personally created or signed and that he had a statutory duty to maintain. As well, Justice MacDonald granted an eight month adjournment in order to allow the appellant more time to prepare for trial after Mr. Newton was released. There was no error made by either MacDonald, J. or Gruchy, J. in denying the applications for a stay of proceedings.

[26] The appellant also submits that the record now proves that he was incompetent as counsel and he is therefore entitled to some **Charter** remedy. In **Schofield v. The Queen** (1996), 148 N.S.R. (2d) 175, a case in which the appellant alleged that there was a miscarriage of justice resulting from the ineffective assistance of counsel, Chipman, J.A., for the court, said at p. 179:

> Allegations by convicted persons that a miscarriage of justice has resulted from ineffective assistance of counsel are often made. The subject was canvassed

by this court in **R. v. Boudreau** (1991), 105 N.S.R. (2d) 15.; . . . Dealing with the appellant's criticism of his counsel, Macdonald, J.A., said at p. 18:

> It is an accepted constitutional principle in the United States that the right of an accused to "have the assistance of counsel for his defence" guaranteed by the Sixth Amendment, is to have the effective assistance of counsel. Where, however, the defendant alleges that the incompetence of counsel deprived him of the effective assistance of counsel, the defendant must show, in addition to the lack of competence on the part of defence counsel, that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different . . .
>
> . . . In **Strickland v. Washington**, 104 S.Ct. 2052 (1984), Justice O'Connor, speaking for the court, said in part (p. 2068):
>
> . . . The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

In **R. v. Rockwood** (1989), 91 N.S.R.(2d) 305; 233 A.P.R. 305 (C.A.) this court stated at p. 309 that in order to render the Charter rights conferred by ss. 7 and 11(d) meaningful, where an accused is entitled to have counsel, such counsel must be sufficiently qualified to deal with the matter at issue with a reasonable degree of skill. See also **R. v. Joanisse (R.)** (1995), 85 O.A.C. 186; 102 C.C.C.(3d) 35 (Ont. C.A.). The appellant who contends that he has not received this protection must therefore establish: (a) that counsel at the trial lacked competence, and (b) that it is reasonably probable that but for such lack of competence, the result of the proceedings would have been different.

[27] Recently, the Supreme Court of Canada considered this issue in **R. v. G.D.B.,** [2000] 1 S.C.R. 520, where Justice Major, for the court, said:

> ¶ 26 The approach to an ineffectiveness claim is explained in **Strickland v. Washington**, 466 U.S. 668 (1984), per O'Connor J. The reasons contain a performance component and a prejudice component. For an appeal to succeed, it must be established, first, that counsel's acts or omissions constituted incompetence and second, that a miscarriage of justice resulted.
>
> ¶ 27 Incompetence is determined by a reasonableness standard. The analysis proceeds upon a strong presumption that counsel's conduct fell within the wide

> range of reasonable professional assistance. The onus is on the appellant to establish the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The wisdom of hindsight has no place in this assessment.
>
> ¶ 28 Miscarriages of justice may take many forms in this context. In some instances, counsel's performance may have resulted in procedural unfairness. In others, the reliability of the trial's result may have been compromised.
>
> ¶ 29 In those cases where it is apparent that no prejudice has occurred, it will usually be undesirable for appellate courts to consider the performance component of the analysis. The object of an ineffectiveness claim is not to grade counsel's performance or professional conduct. The latter is left to the profession's self-governing body. If it is appropriate to dispose of an ineffectiveness claim on the ground of no prejudice having occurred, that is the course to follow (**Strickland, supra**, at p. 697).

[28] Of course, in these cases, the appellants had been represented by counsel at the trial. Often, where the ineffective assistance of counsel is alleged, the appellant will claim that trial counsel did not follow his instructions, or did not call a particular witness, or did not advise of the right to testify or to elect trial by another method, or some similar failing. Here, the appellant does not specify how his own representation was deficient, other than pointing to the fact that he was convicted. The appellant presented a vigorous defence with detailed and effective cross-examinations of the witnesses. While choosing not to testify himself, he presented the evidence of eight witnesses. He made numerous motions both pre-trial and during the trial. The ability of the appellant to advance his defence is evident from the following example, an excerpt of a sophisticated submission made by the appellant on a **voir dire** initiated by him, just prior to the Crown calling Mr. Scott Brookfield, the accountant, as a witness:

> SUBMISSION - MR. WOOD (Voir Dire)
>
> MR. WOOD Yes, My Lord. My concerns are that this material -- all the material that was turned over to -- as the Crown says, that was turned over to Mr. Brookfield by myself in the matter of his investigation for the Nova Scotia Barristers' Society, it is the view of the defence that that material is not properly before the Court. It was obtained for these proceedings, according to my recollection, by Cpl. Manthorne from the offices of Deloitte Touche by virtue of a search warrant.
>
> The defence has not seen the search warrant. I've obtained the statements

and directives of the Minister of Justice and the Attorney General for the Province of Nova Scotia regarding disclosure by the Crown in criminal cases; also from the Department of Justice in Canada, the pre-trial disclosure statements, and in there, it says that the defence is to be provided with a copy of any search warrant --

THE COURT Your difficulty is that you haven't seen the search warrant?

MR. WOOD Haven't seen the search warrant. That's one thing, My Lord.

The other thing, My Lord, is this. The documents or any materials turned over to Scott Brookfield would have been turned over to Scott Brookfield in compliance with provincial legislation, the provincial legislation with the Nova Scotia Barristers and Solicitors Act and the regulations thereto. Under Regulation 48(1) and (2), sub-one and two, I would have been required by provincial law to turn these documents over to Mr. Brookfield for the express purpose as contained in the regulations for the investigation of the books and records of the solicitor for the purposes of investigating the barrister and for maybe the report -- or any report may be made the basis of disciplinary proceedings.

So my point here is that in compliance with provincial legislation, this material may have been turned over to Mr. Brookfield for one purpose and one purpose only. Later, unbeknownst to me, a search warrant was executed on Deloitte Touche. Mr. Brookfield had this material. I had no opportunity to challenge the search warrant.

The material was given to Mr. Brookfield in compliance with provincial legislation. I had no alternative but to comply with the provincial legislation. The federal legislation, the Criminal Code, regarding search warrants was a different matter. The opportunity was not there for me to challenge that search warrant, I was not informed of it, and the material was seized from Mr. Brookfield without any notice to me whatsoever.

There are situations where material is seized from law offices regarding a lawyer's client, and there is solicitor/client privilege claimed and the material is sealed. And then you go before a judge and you find out whether or not the material should be used. There are all kinds of safeguards built into the system to deal with such things. But in my particular case, in compliance with provincial legislation, material was turned over to Mr. Brookfield, and then this material really ended up in the hands of the RCMP with a search warrant, with no opportunity for me to challenge it whatsoever.

Now if that's allowed to stand, My Lord, what happens is you have a back door for the police to obtain material that they might have more difficulty in obtaining by way of a search warrant, because in compliance with provincial

> legislation, a person could comply with provincial legislation and then, unbeknownst to them --

[29] We are satisfied from a review of the transcript that the appellant conducted an effective defence on his own behalf. Our review of the record does not reveal any specific mistakes made by, or general ineffectiveness of, the appellant that would cause us to suspect that, but for such lack of competence, the result of the proceedings would have been different.

[30] In cases where an accused is self-represented the trial judge has a duty to assist him. The extent of assistance required of the trial judge is described by Griffiths, J.A. in **R. v. McGibbon** (1988), 45 C.C.C. (3d) 334, (Ont. C.A.) at p. 347:

> Consistent with the duty to ensure that the accused has a fair trial, the trial judge is required within reason to provide assistance to the unrepresented accused, to aid him in the proper conduct of his defence, and to guide him throughout the trial in such a way that his defence is brought out with its full force and effect. How far the trial judge should go in assisting the accused in such matters as the examination and cross-examination of witnesses must of necessity be a matter of discretion.

[31] In this case, both trial judges, Gruchy, J. and Kennedy, A.C.J. were steadfast and meticulous in their observation of that duty to assist. For example, at the last of the pre-trial conferences, Justice Gruchy provided the following advice concerning the trial by jury process generally:

> Now then, that being the case, I'm going to tell you now and I almost say this apologetically, Mr. Wood, but the law is clear that I must treat you, although you are a former lawyer, I must treat you as though you were any other litigant before the court. So rather than go through the embarrassment of going through this with the jury present, and as if we had never met, I'm going to say some things to you now for the record, so that we won't have to go through it with the jury and the public present.
>
> You do, in fact, have the right and in this case even the obligation to defend yourself. In so doing, you must obey my instructions as to the procedure of the trial. In doing so, I will do my utmost to see that you receive a fair trial. When you come into the courtroom, the courtroom will be pretty full, as you can imagine. And eventually, after we go through the jury process, and I'll be going through that with you in a few minutes, ultimately the charges will be read to you.

As the various counts are read, as each count is read, you may plead guilty or not guilty to each of the counts. They won't be bulked, lumped together. They'll be read individually. You may not use any other words other than "guilty" or "not guilty".

Having gone through that process, the clerk will probably ask you to confirm your pleas. If you plead "not guilty", a jury will be empanelled. For this, you will -- at all times you will be seated at counsel table, and I would suggest -- I'm not sure that it will be this room. It probably will not be. But you take a seat in the front row, because as I said, you tend to speak with your head down. And these are large rooms so that sound doesn't carry. Get yourself in a position where the jury can see you and hear you. And we don't have prisoner's boxes or benches here, as you know. You will be in court at all times.

The jurors' names will be called, and I'll be going through some of that with you in a few minutes. And the jury will be selected. You may accept a juror by saying "content", or you may reject the juror by saying " challenge". In which case the juror will not serve on your case. That's the peremptory challenges. You and the Crown have 12 peremptory challenges each. Am I correct in that --

MS. MACDONALD Yes, My Lord.

THE COURT You may challenge any number of jurors for cause. That is, if the name of the juror does not appear on the panel list, if the juror is not indifferent between you and the Crown, that is impartial as between you and the Crown, if the juror has been convicted of a criminal offence and sentenced, and I'm not sure just what that stipulation is. Do you remember, Ms. Macdonald, what the --

MS. MACDONALD I'm sorry, My Lord?

THE COURT What's the stipulation about the criminal offence of a juror?

MS. MACDONALD You mean if the juror has a criminal record?

THE COURT Yes.

MS. MACDONALD That person usually is --

THE COURT There's a stipulation as to when it applies and when it doesn't apply and I've forgotten, now, just what it is. It doesn't really matter. If a juror is not a citizen of Canada or if the juror is physically unable to perform a juror's duty, you can challenge for cause. There's a procedure, and if you want to challenge for cause you will state it to me. You must persuade me that there is a reason to challenge for cause. And then there is a procedure which we will

follow.

If I direct that the challenge for cause will be allowed, then a trial consisting of a trial of that particular juror will be conducted by two triers, selected from the jury panel in accordance with the code. You must remember that you only have 12 peremptory challenges for which no reason is given. Once these are used up, you are restricted to challenges for cause.

The right to challenge peremptorily alternates between you and the Crown. You will have the first right with the first juror called, and then the right to challenge will then alternate between you and the Crown. The clerks will be keeping track of it, of your challenges. I will, too, but I find that I usually get them mixed up. The clerk is so much better at it than I am.

Once a juror has been accepted, then the juror will remain in the box and be sworn. When 12 jurors have been accepted by you and the Crown, they will constitute the jury.

I presume, Mr. Wood, that you'll want exclusion of witnesses.

MR. WOOD Yes, My Lord.

THE COURT And if I don't do that automatically at the beginning of the trial, please remind me. And I want to ask you, you do understand the distinction between the peremptory challenges and the challenges for cause?

MR. WOOD Yes, My Lord.

THE COURT Thank you. I will first address the jury. Now, I'm going to -- there's some exceptions that I'm going to make in this case, and I'll explain those to you in a few minutes. Amongst other things, I'm going to give them binders, but I will address the jury first. Once I address the jury, Crown counsel will outline to the jury the case that she hopes to prove. Of course, as you know, you must not interrupt during her initial presentation. The Crown will then call its witnesses and of course, I don't need to remind you that you don't interrupt except for a proper objection.

You are, of course, familiar with the method of making an objection. You simply stand and say, My Lord, I object, or something to that effect. You state your objection. I may hear counsel on the matter. And in any event, I will rule whether the question may be asked. Both you and the Crown are bound by my rulings.

After Crown counsel has examined each witness, you may or may not,

depending on what your desire is, question that witness on the evidence that has been given. And you may bring out any evidence the witness may be able to give in your favour. You may make suggestions to the witness and invite the witness to agree. In other words, cross-examination.

When the Crown has called all its witnesses, I will ask you if you propose to call evidence. You may do so, if you wish, if you decide to do so. You may decide not to do so. That's entirely up to you. You are not required to do so. You may also give evidence yourself. But you have a right not to do so, if you wish.

If you decide to give evidence or to give evidence, yourself, you will be permitted to address the jury before doing so. You may only outline to them the nature of your defence and the evidence you intend to call. Your witnesses and you, if you decide to give evidence, can be cross-examined by the Crown counsel. If you have a criminal -- you don't have a criminal record.

MR. WOOD No, My Lord.

THE COURT When the evidence has been given, you and the Crown will be permitted to sum up to the jury. It's my function to control the proceedings. You must, therefore, obey my instructions. I cannot conduct your defence for you any more than I can prosecute the case against you. I will do everything possible to guide you in matters of procedure and to see that you have a fair trial. You on your part, and I have no doubt that you will, must conduct yourself in an orderly manner. I know that you will. As I say, I'm almost apologetic for having said those things to you.

Now, ordinarily there is a roll call of the jurors. That's a long, time-consuming, and frustrating experience. I have developed, and some other judges have developed the method of having the jurors ticked off as they enter the courtroom. I shouldn't say "ticked off". Maybe that's the wrong expression. Checked off as they enter the courtroom. And then when all are assembled, it is announced to me who is not present, who did not respond.

I would like to do that in this case, because there is a large jury panel. By the way, do you have your list?

MR. WOOD Yes, My Lord.

THE COURT It's being brought up to date. I'm having various applications to be excused funnelled through me on a daily basis. It's really just part of the preparation of the list process. But by Monday, it should be in final form. I would expect that there will be a large number still won't turn up. Is that

> satisfactory to you, Mr. Wood, that method of role call satisfactory to you?
>
> MR. WOOD Yes, My Lord. I don't know if it's appropriate to mention it now, but I've looked at the list and I can see two former clients of mine on the list and my son's school teacher on the list.
>
> THE COURT Would you make those known to Ms. Macdonald, and if you're agreed I'll excuse them or to exempt them without requiring any use of challenges. Would you remind me of that when we open trial on Monday.
>
> I want to give you each a copy of the binder that I've prepared. And I want your comments on them. I intend to go through them now. Tab 1 is, of course, the copy of the indictment. And Tab 2 are definitions of theft and fraud taken directly from the code, but without quoting the code . . .

[32] That discussion continued for 20 more pages of transcript and then ended on the following note:

> THE COURT All right. Anything further, Mr. Wood? If at any time during the trial you feel that you need assistance, other than counsel which I can't give you, or if you need some explanation, simply say so to me and we will put the jury out. Within the next two days, I'll be here. For the next two days I'll be here and available. If there's anything bothering you, let me know. And even at this point, if there's any change between you, if you come to any agreement with respect to any matter, and in particular with respect to the mode of trial, let me know . . .

[33] We are satisfied that the trial judges in this case offered significant assistance to the appellant as and when required, and that the trial was not unfair as a result of the appellant having to represent himself.

(c) right to remain silent

[34] The appellant also submits that since he did not have counsel, he was not entitled to the benefit of his constitutional right to remain silent. He was required to speak, in the course of defending himself, by addressing the jury, cross-examining witnesses and asking questions of his own witnesses. If he had been represented by counsel, he would have been able to sit quietly without saying anything. This is a novel argument.

[35] The relevant sections of the **Charter** are:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> . . .
>
> 11. Any person charged with an offence has the right
>
> . . .
>
> (c) not to be compelled to be a witness in proceedings against that person in respect of the offence;
>
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
>
> . . .
>
> 13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

[36] Section 7 of the **Charter** includes a right to remain silent. (See **R. v. Hebert,** [1990] 2 S.C.R.151). Generally, the right to remain silent is thought to be a pre-trial right, while its counterparts providing **Charter** protection during trial are the rights against self-incrimination (s. 13), and the right not to be compelled as a witness against oneself (s.11(c)). (See **Hebert**, **supra**, and Hogg, Constitutional Law of Canada (3rd Ed. looseleaf) at pp. 44-49 et seq.)

[37] In **R. v. Jones,** [1994] 2 S.C.R. 229, Lamer, C.J., reviewed the rationale of the principle against self-incrimination. Although in dissent on the applicability of the principles to that case, his statements of principle have since been adopted by the majority of the court in **R. v. White,** [1999] 2 S.C.R. 97. At p. 250 of **Jones**, the Chief Justice stated that:

> The modern-day rationale for the principle against self-incrimination is found in the two fundamental purposes for the principle that have been recognized by this Court: (1) protection against unreliable confessions; and (2) protection against the abuse of power by the state. Wilson J., dissenting, elaborated on the latter purpose in *Thomson Newspapers*, *supra*, at p. 480:
>
> > Having reviewed the historical origins of the rights against compellability and self-incrimination and the policy justifications

> advanced in favour of their retention in more modern times, I conclude that their preservation is prompted by a concern that the privacy and personal autonomy and dignity of the individual be respected by the state. The state must have some justification for interfering with the individual and cannot rely on the individual to produce the justification out of his own mouth. Were it otherwise, our justice system would be on a slippery slope towards the creation of a police state.
>
> . . .
>
> As Michael Hor noted in "The Privilege against Self-Incrimination and Fairness to the Accused", [1993] *Singapore J. Legal Stud.* 35, at p. 35:
>
> > Conceptually, it would seem that if there is any single organizing principle in the criminal process, it is the right of the accused to resist any effort to force him to assist in his own prosecution. It provides substance to the common law ideal of a fair trial through an adversarial or accusatorial process. The parties to a criminal prosecution are seen as competitors and the trial the competition. The prosecution is to use its own resources to gather and marshal the evidence without the unwilling assistance of the accused, and the accused is left to defend himself if the prosecution succeeds in making out a case against him. It is thought to be behind key principles of criminal justice like the voluntariness rule for confessions, the discretion to exclude improperly obtained evidence and the presumption of innocence.

[38] Lamer, C.J. then lists specific rules, rights and privileges that are grounded in the right against self-incrimination:

1. the confessions rule prohibiting the admission into evidence of improperly obtained confessions;
2. the privilege against being compelled to testify against oneself;
3. the pre-trial right to silence, which includes the right not to have agents of the police solicit admissions from a detainee who has expressly stated he does not wish to speak to police;

4. the specific **Charter** rights in sections 10(b), 11(c), and 13 which are all designed to protect against self-incrimination;
5. the right not to have illegally obtained evidence which conscripts the accused used against him, as developed in the s.24(2) jurisprudence; and,
6. whatever residual self-incrimination content is found to exist on a case-by-case basis in the s. 7 protection.

[39] If there is any **Charter** protection of the type the appellant seeks in this case, that is, protection from having to speak during trial while acting as one's own counsel, it would be found in the residual s. 7 protection last enumerated by Lamer, C.J. in **Jones**, **supra**. None of the other rights, privileges or rules is pertinent. Here, there is no confession, no compulsion or coercion to testify against himself, no admission obtained by police agents, no attempt to use evidence given by the appellant in a previous case, no statement obtained from the appellant before he was advised of or given the opportunity to exercise his right to counsel; and, no illegally obtained conscripted or derivative evidence. The appellant was not forced to give evidence or to even cross-examine witnesses or make submissions to the jury. The words spoken by him in court were not evidence used against him, and the jury was so instructed, both in the opening charge on May 13:

> There are several matters that are not evidence. They include, as I've said, the addresses of counsel and the accused, the objections and questions by counsel, evidence that I tell you to disregard, anything which you may see or hear when you are not in your jury box even if it is said or done by a party or a witness, and the indictment.

and in the final charge to the jury on June 26:

> You are by now, I would expect, aware that what counsel said to you, what Crown counsel may have said from her position in this courtroom and what John Wood said from his position, that is not evidence. That may have been their view of the evidence or their opinion of the evidence but that is not evidence. Evidence is what you heard under oath on the stand and what you are given by way of the extensive documentation that has been produced in this matter.

[40] Assistance in answering the question of whether the residual self-incrimination content of the s. 7 principles of fundamental justice should be extended to the words spoken by the appellant, as he asked questions and made submissions, can be gleaned from two recent Supreme Court of Canada cases: **White**, **supra**, and **R. v. Darrach** (2000), 148 C.C.C.(3d) 97. In **White**, Iacobucci, J., for the majority, described the principle as follows:

> 44 The jurisprudence of this Court is clear that the principle against self-incrimination is an overarching principle within our criminal justice system, from which a number of specific common law and *Charter* rules emanate, such as the confessions rule, and the right to silence, among many others. The principle can also be the source of new rules in appropriate circumstances. Within the *Charter*, the principle against self-incrimination is embodied in several of the more specific procedural protections such as, for example, the right to counsel in s. 10(b), the right to non-compellability in s. 11(c), and the right to use immunity set out in s. 13. The *Charter* also provides residual protection to the principle through s. 7.
>
> (2) The Importance of Context
>
> 45 That the principle against self-incrimination does have the status as an overarching principle does not imply that the principle provides absolute protection for an accused against all uses of information that has been compelled by statute or otherwise. The residual protections provided by the principle against self-incrimination as contained in s. 7 are specific, and contextually-sensitive. This point was made in *Jones*, *supra*, at p. 257, *per* Lamer C.J., and in *S. (R.J.)*, *supra*, at paras. 96-100, *per* Iacobucci J., where it was explained that the parameters of the right to liberty can be affected by the context in which the right is asserted. The principle against self-incrimination demands different things at different times, with the task in every case being to determine exactly what the principle demands, if anything, within the particular context at issue. See also *R. v. Lyons*, [1987] 2 S.C.R. 309, at p. 361, *per* La Forest J.

[41] In his analysis of the context to determine whether statements given to police pursuant to a requirement in the **Motor Vehicle Act** to report an accident, were admissible against the accused in a criminal trial, Justice Iacobucci examined the existence of coercion, the adversarial relationship at the time the statements were made, the prospect of an unreliable confession and whether the use of the statements would likely increase abusive conduct by the state.

[42] In **Darrach**, **supra**, the Supreme Court of Canada dealt with the constitutionality of sections 276, 276.1 and 276.2, the so-called rape shield provisions of the **Criminal Code**, and specifically, whether the provisions infringed the accused's rights not to be compelled to testify against himself and his right to a fair trial. The accused objected to the necessity of providing an affidavit, upon which he could be cross-examined by the Crown in a **voir dire**, setting out his evidence in support of an application to introduce evidence of the complainant's prior sexual activity. Gonthier, J., for the court indicated, at § 24:

> . . . that while the right to make a full answer and defence and the principle against self-incrimination are certainly core principles of fundamental justice, they can be respected without the accused being entitled to "the most favourable procedures that could possibly be imagined . . .

[43] Of particular relevance to this case is the passage commencing at § 47:

> [47] The Court has not yet pronounced on whether a *voir dire* is an evidentiary proceeding and not a proceeding against the accused to which s. 11(c) applies. The issue was not argued in this case. In any event, the particular *voir dire* required by s. 276 does not offend the principle against self-incrimination because the requirement that the accused establish a legitimate use for evidence of sexual activity does not compel him to testify. As the Ontario Court of Appeal found in *R. v. Boss* (1988), 30 O.A.C. 184 at p.198, 46 C.C.C. (3d) 523:
>
> > the tactical obligation which an accused may feel to testify does not constitute a legal obligation or compulsion to testify. The use of the word "compelled" in s. 11(c) indicates to me that the section is referring to a legal compulsion.... The decision whether or not to testify remains with the accused free of any legal compulsion.
>
> [48] The distinction between tactical and legal compulsion is consistent with the definition of a compellable witness as "one who may be forced by means of a subpoena to give evidence in court under the threat of contempt proceedings" (J. Sopinka, S.N. Lederman and A.W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at para. 13.46). Such was the case of the young offender in *R. v. S. (R.J.)*, [1995] 1 S.C.R. 451, 96 C.C.C. (3d) 1, 121 D.L.R. (4th) 589, who was subpoenaed to testify at his co-accused's trial. Although compelled, his s. 11(c) right was not engaged because the proceedings were not against him (at para. 14). His broader s. 7 privilege against self-incrimination was protected because he received evidentiary immunity (at para. 204).
>
> [49] The accused is not forced to testify by s. 276. Nor is he coerced by the

state in any way that engages *Charter* protection. Coercion to testify violates the principle against self-incrimination, but as Lamer C.J. defined it, "[c]oercion ... means the denial of free and informed consent" (*R. v. Jones*, [1994] 2 S.C.R. 229 at p. 249, 89 C.C.C. (3d) 353, 114 D.L.R. (4th) 645, cited in *White*, *supra*, at para. 42). In *White*, supra, at para. 76, Iacobucci J. found that "[i]f a declarant gives an accident report freely, without believing or being influenced by the fact that he or she is required by law to do so, then it cannot be said that the statute is the cause of the declarant's statements". In applications under s. 276, there is free and informed consent when the accused participates in order to exculpate himself. He knows that he is not required to do so.

[50] There is an important difference between a burden of proof with regard to an offence or an evidentiary burden, and the tactical need to respond when the Crown establishes a *prima facie* case, in order to raise a reasonable doubt about it. "[T]he criminal law does not allocate an evidential burden to the accused to refute the Crown's case and he or she may decline to adduce any evidence. Nevertheless, if the accused decides not to call any evidence, he or she runs the risk of being convicted" (Sopinka et al., *supra*, at para. 3.17). Where there is neither a legal obligation nor an evidentiary burden on the accused, the mere tactical pressure on the accused to participate in the trial does not offend the principle against self-incrimination (s. 11(c)) or the right to a fair trial (s. 11(d)).

[51] The tactical pressure on the accused to testify at the *voir dire* under s. 276 is neither a burden of proof nor an evidentiary burden. It derives from his desire to raise a reasonable doubt about the Crown's case by adducing evidence of the complainant's prior sexual activity. The sole purpose of this *voir dire* is to establish the admissibility of the evidence he proposes to call. As Dickson J. (as he then was) put it, "[i]t is axiomatic that the *voir dire* and the trial itself have distinct functions. The function of the *voir dire* is to determine admissibility of evidence" (*Erven v. The Queen*,[1979]1 S.C.R. 926 at p. 931, 44 C.C.C. (2d) 76, 92 D.L.R. (3d) 507). If the evidence is found to be admissible under s. 276, it may then serve to satisfy the evidentiary burden of adducing a factual basis for a defence (such as honest but mistaken belief in consent) or to raise a reasonable doubt about an element of the offence, but that is a different matter altogether.

[52] Nothing in s. 276 obviates the Crown's basic duty to establish all the elements of a sexual offence beyond a reasonable doubt. This burden of proof on the Crown and the fact that the trial must be fair are the essence of the presumption of innocence...

(emphasis added)

[44] An application of these principles to the specific novel argument raised by the appellant leads to the conclusion that there has been no infringement of his rights to remain silent, to have a fair trial and to be free from self-incrimination. To begin with, there is no effort by the state to have the appellant assist in his own prosecution. The Crown's duty to lead the evidence to establish all the elements of each offence beyond a reasonable doubt is not alleviated as a consequence of the accused being self-represented. The accused is not compelled or coerced in any way to participate or assist the Crown in its case. As indicated above, his participation did not create evidence which was used against him. Although the words spoken by the appellant at issue here were expressed in the context of an adversarial proceeding, they were not coerced and there is no suggestion that the words resulted in a confession or admission, unreliable or otherwise.

[45] As declared by Iacobucci, J. in **White**, the right against self-incrimination is not absolute. If the appellant's argument were to succeed, the effect would be that, every person would have a constitutional right to state-funded counsel in cases where their liberty interests were at stake. This would be allowing entitlement to the most favourable procedures that could be imagined, which **Darragh** says is not required. Given the overriding duty of the trial judge to ensure trial fairness, and to assist the accused, as set out above, there is little prospect that allowing an accused to be self-represented will increase abusive conduct by the state.

[46] The tactical obligation that the appellant may have felt to cross-examine the Crown's witnesses and make a submission to the jury, did not, as affirmed in **Boss**, **supra**, constitute any legal obligation or compulsion, or an obligation to testify. His decision to do so was not forced by the state in any way. It was, as in **Darragh**, a participation in the process in order to exculpate himself. He knew he was not required to do so. He was responding to a tactical need to do so, not an evidentiary burden or burden of proof. To repeat:

> . . . Where there is neither a legal obligation nor an evidentiary burden on the accused, the mere tactical pressure on the accused to participate in the trial does not offend the principle against self-incrimination (s. 11(c)) or the right to a fair trial (s. 11(d)).

[47] We think that the issues raised by this ground of appeal are better considered as an aspect of whether provision of counsel was required to have a fair trial. As indicated, the appellant's self-representation did not result in an unfair trial.

(d) other trial fairness issues

(i) bias

[48] As the ninth ground of appeal, the appellant submits that Kennedy, A.C.J. should not have been the judge selected to preside over the balance of his trial after Gruchy, J. was unable to continue. The appellant indicates that there were two reasons which gave rise to an apprehension of bias. In his submissions made during the recusal application on May 22, 1998, the appellant described his concerns as follows:

> The information that I have which I've confirmed again in telephone conversation this week was with a Justice of the Peace who worked in the Court in Dartmouth at the time that Your Lordship was a Provincial Magistrate there. My matter came up and was in the media in relation to Bar Society proceedings. This individual was present and informed me at the time that when my name came up some individuals and Your Lordship was present at the time and made the comment that in so far as what was going on with me in the Bar Society was that -- well, it was good that the Bar Society was getting rid of the bad apple. Now this was not said to this individual. This individual was present with some other individuals. He's a Justice of the Peace. He's a senior tax auditor with the Province of Nova Scotia. And Tuesday I confirmed my recollection of that with him and he's -- I know he was certainly reluctant for me to raise it. I was going to raise the other issue about the executive assistant to Chief Justice Glube. So in my mind that creates a reasonable apprehension of bias. Also, in addition, the unusual situation of having the executive assistant to Chief Justice Glube as a Crown witness. And I expect that Your Lordship has some dealings with her from time to time. So I think there are certainly enough Judges available that perhaps another Judge can be assigned. And I'm an unrepresented person and I think that creates another unusual situation. I don't know of any other situation like this. I've tried to find out whether or not anybody else has been forced to represent themselves in a jury trial in indictable offenses like this and I can't find any. Thank you.

[49] Kennedy, A.C.J., in dismissing the application said:

> Thank you, Mr. Wood. Let me deal with -- Mr. Wood is raising what amounts to a suggestion of reasonable apprehension of bias should I continue to hear this matter or take over the matter. The first concern that he has, as I understand it, is that he's been told by a Justice of the Peace that a conversation

was had in my presence that the Justice of Peace was privy to in which Mr. Wood was described as a bad apple and that it was good that the Bar was getting rid of a bad apple. Something to that effect.

Firstly, if the Justice of the Peace that you speak of is Mr. Khan, and I believe that you mentioned that name during the telephone conversation, I did have contact with Mr. Khan on two or three occasions when I was doing the educational process for the Justices of the Peace two or three years ago. It seems to me that he participated as an experienced Justice so that it is possible that I would have had conversation with him or a conversation of that nature may have been had in my presence. I know that on one occasion, at least, he was with a group of other people involved in the educational process who had dinner -- we had dinner at a restaurant in Sydney so that it is correct that I would have been in his presence and perhaps -- I have no idea whether anything of that nature was said, quite frankly. Firstly, I did not know Mr. Wood -- of you at the time. I had no knowledge of you one way or the other. And, secondly, I do not remember a conversation of that nature at all.

Having said that, you have expressed a concern that I understand. I respect the concern but I will say to you that I do not consider that suggestion to create a reasonable apprehension of bias. I have no opinion whatsoever in relation to your functioning as a lawyer and whether it was a good idea or a bad idea for the Bar Society to have taken the action that they did. If somebody said that in my presence it was unfortunate. I don't know if they did but I would not have joined in the opinion at all. I had no knowledge whatsoever. And certainly if the opinion was expressed it would not effect my ability to provide a fair trial at this stage.

The second issue raised is specific to the executive assistant to the Chief Justice who I anticipate will be a witness in this matter, Kerry Oliver. It is my understanding that Kerry Oliver and Mr. Wood at one time had a relationship. It is correct that I have some contact with Kerry Oliver. But Kerry Oliver reports to the Chief Justice, not to me, and my contact with her, and I want it on the record, is no more than any Justice of this Court would have in that she determines rota. By that I mean that she schedules Judges various places. Having said that, I will put on the record that she does not schedule me into this case. Whether I take this case over or not is a determination that I make and is based on availability and background rather than any determination of Kerry Oliver. So that I do have some contact with her, as do all Judges of this Court, let the record reflect. But my contact with her is no more than any other -- or, at least, has been no more than any other Justice of this Court would have. She has direct contact with the Chief Justice and the Chief Justice, let nobody misunderstand, runs this Court.

So that again I would -- I respect your raising that issue. I can only

> respond as I have truthfully, that I believe that my contact with Kerry Oliver would not cause me in any way to be biased in this matter. I certainly have never discussed Mr. Wood with her. I only know of the situation as a result of what people tend to know, I guess. I don't even know how I would have ever discovered that.
>
> I want to put on the record that I've been 20 years in this business and it is my job, it is my function to provide fair trials in which the presumption of innocence is absolutely paramount and in which accused persons get every proper opportunity to make full answer and defence. I've been doing it for 20 years now. I do not anticipate that this trial will be any different than the 6,000 or so that I've done to date. I can say this that were I to believe that I were the least biased in this matter I simply would not try it. I would not preside over the jury that will determine ultimately guilt or non-guilt in relation to the matter. I do respect Mr. Wood's concerns. He has expressed them openly. I'm glad they're expressed at the beginning of the process. But after having heard those concerns, my determination is that there is no actual bias and there should not be any reasonably perceived bias. No reasonably perceived bias in relation to this matter. I will be prepared to sit and re-commence the trial on Monday morning. Thank you, Mr. Wood. Thank you, Crown.

[50] The only case relied upon by the appellant to support his submission that Kennedy, A.C.J. erred in law in refusing to allow the recusal motion in this manner is **R. v. R.D.S.**, [1997] 3 S.C.R. 484. In that case, Cory, J., for the majority of the Court, set out the test for bias and commented upon its application, commencing at § 111:

> The manner in which the test for bias should be applied was set out with great clarity by de Grandpré J. in his dissenting reasons in **Committee for Justice and Liberty v. National Energy Board**, [1978] 1. S.C.R. 369, at p. 394:
>
> > [T]he apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. . . . [The] test is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. . . ."
>
> This test has been adopted and applied for the past two decades. It contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. See *Bertram, supra*, at pp. 54-55; *Gushman, supra*, at

para. 31. Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including "the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold": *R. v. Elrick*, [1983] O.J. No. 515 (H.C.), at para. 14. See also *Stark, supra*, at para. 74; *R. v. Lin*, [1995] B.C.J. No. 982 (S.C.), at para. 34. To that I would add that the reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgement of the prevalence of racism or gender bias in a particular community.

The appellant submitted that the test requires a demonstration of "real likelihood" of bias, in the sense that bias is probable, rather than a "mere suspicion". This submission appears to be unnecessary in light of the sound observations of de Grandpré J. in *Committee for Justice and Liberty*, supra, at pp. 394-95:

> I can see no real difference between the expressions found in the decided cases, be they 'reasonable apprehension of bias', 'reasonable suspicion of bias', or 'real likelihood of bias'. The grounds for this apprehension must, however, be substantial and I entirely agree with the Federal Court of Appeal which refused to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience".
>
> (emphasis in original)

Nonetheless the English and Canadian case law does properly support the appellant's contention that **a real likelihood or probability of bias must be demonstrated, and that a mere suspicion is not enough**. [citations omitted]

Regardless of the precise words used to describe the test, the object of the different formulations is to emphasize that **the threshold for a finding of real or perceived bias is high.** It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice. See *Stark, supra*, at paras. 19-20. Where reasonable grounds to make such an allegation arise, counsel must be free to fearlessly raise such allegations. Yet, this is a serious step that should not be undertaken lightly.

The onus of demonstrating bias lies with the person who is alleging its

> **existence**: *Bertram*, *supra*, at p. 28; *Lin*, *supra*, at para. 30. Further, whether a reasonable apprehension of bias arises will depend entirely on the facts of the case.
>
> . . .
>
> Courts have rightly recognized that there is a presumption that judges will carry out their oath of office. See *R. v. Smith & Whiteway Fisheries Ltd.* (1994), 133 N.S.R. (2d) 50 (C.A.), and *Lin, supra*.This is one of the reasons why the threshold for a successful allegation of perceived judicial bias is high. However, despite this high threshold, the presumption can be displaced with "cogent evidence" that demonstrates that something the judge has done gives rise to a reasonable apprehension of bias. See *Smith & Whiteway*, *supra*, at para. 64; *Lin, supra*, at para. 37. The presumption of judicial integrity can never relieve a judge from the sworn duty to be impartial.
>
> (emphasis added)

[51] In applying that test to this case, it is abundantly clear that the appellant has not met the threshold of presenting cogent or substantial evidence required to establish a real likelihood of a reasonable apprehension of bias. There was nothing but mere suggestion that the trial judge had made the alleged comment and that it referred to the appellant, and bare speculation that the trial judge's acquaintance with one of the Crown witnesses would have had any effect on his impartiality and ability to preside fairly and impartially over this jury trial. There was no error requiring the intervention of this court.

(ii) jury selection

[52] In the third and fourth grounds of appeal, it is submitted that the jury selection process was flawed as a result of selecting the jury from the same array of potential jurors that was used for the selection of the jury for the mistrial. The appellant says that he was not content with the jury that judged him and that as a result of the flawed selection process, his right to a fair trial by an impartial tribunal was infringed.

[53] During the selection of the jury for the trial that was ultimately aborted, the appellant's request to challenge a legal secretary for cause was denied by Justice Gruchy, which led to the Crown later agreeing that there should be a mistrial. After the mistrial was declared, the trial was adjourned from April 28th to May

12th, the next date that the original panel of jurors had been previously ordered to return. On May 12th, the appellant challenged the array, saying:

> As far as the challenge to the array is concerned, this jury panel has lost its characteristic of randomness, it having been sitting here before while I was arraigned before it. These are the same people that were here on the 27th of April, so it is not a random selection. These jurors have sat here and they, in fact, have heard me arraigned twice on the same charges, which is highly unusual. This panel was already dismissed before, and now they're reconstituted here for a retrial.
>
> My main thrust of argument here is that there is a problem with partiality in this jury panel in that they have already been here before in this case and very much would suggest that the random nature of the selection of a jury panel has been impaired in this situation since this jury panel has already been involved in this case and dismissed. And that's what I have to say on the challenge to array.

[54] Justice Gruchy dismissed the application, indicating that the appellant had not shown a **prima facie** case of any of the three criteria of s. 629(1) of the **Criminal Code** which states:

> 629 (1) The accused or the prosecutor may challenge the jury panel only on the ground of partiality, fraud or wilful misconduct on the part of the sheriff or other officer by whom the panel was returned.
>
> (2) A challenge under subsection (1) shall be in writing and shall state that the person who returned the panel was partial or fraudulent or that he wilfully misconducted himself, as the case may be.
>
> (3) A challenge under this section may be in Form 40.

[4] There was no evidence or submission suggesting that the method used to choose the specific persons to form the panel was flawed in any sense; rather the appellant argues that, since the earlier panel heard his initial arraignment, a new panel was required to ensure impartiality. Section 629(1) precludes challenges for reasons other than partiality, fraud or misconduct on the part of the person by whom the panel was returned, and there is no other basis or authority cited to support a challenge to the whole array. The third ground of appeal is therefore dismissed.

[5] The appellant also submits that Gruchy, J. erred in law in allowing him to be

tried by a jury with which he was not content. This argument is based on the fact that the name of the same juror that the appellant wished to challenge for cause on April 27th was drawn by the clerk on May 12th. Previously, at a pre-trial conference held after the mistrial, Justice Gruchy had agreed that each juror drawn would be subjected to a challenge for cause on the basis that he or she may not be impartial because of pre-trial publicity. In addition, the 12 former jurors were excused from the panel. When the legal secretary was called, she was questioned by the trial judge in the same manner as each other juror was, as to where she worked, whether she had read anything about the trial, whether she had obtained information from any other source and whether she thought she could judge the case fairly and impartially. On the basis of her evidence, the two triers, appointed pursuant to the procedure authorized by s. 640 of the **Code**, found her to be impartial. The appellant then exercised a peremptory challenge and she was thus excused. Although in his factum the appellant indicates that he "was forced to use his last remaining challenge to reject this potential juror", he is mistaken in that respect. The transcript reveals that it was in fact his seventh challenge. He still had five more challenges left at that point.

[6] The appellant renewed his objections respecting the jury panel and the selection process after the full jury was chosen. His application for an adjournment to obtain a new panel was once again dismissed.

[7] After considering the submissions made on this point, we are satisfied that there was no unfairness in the selection of the jury. The appellant has not submitted that the procedure used to conduct the challenge for cause was defective. Nor has he suggested that the finding of the triers with respect to the impartiality of any juror was suspect. The appellant provides no authority for the proposition that selecting the jury from the same panel that was used to select the first jury was an error in procedure or law. We agree with the Crown that the general challenge for cause with respect to impartiality ensured the impartiality of the resulting jury. The fourth ground of appeal is dismissed.

(iii) pre-trial publicity

[59] The appellant submits that in addition to the normal adverse publicity surrounding a trial of this nature, he was subjected to an unprecedented and unacceptable level of prejudice as a result of articles which he says were designed

to “bait and taunt Justice Gruchy” and “calculated to do the utmost damage to [him] and his trial”, contained in the then recently published “FRANK” magazine, issue 272. It is submitted that Justice Gruchy erred in not granting his request, made on May 4, 1998, for an adjournment of the trial and that the result was that it was “impossible to obtain an unbiased, untainted jury and a fair and impartial trial...”.

[60] In the decision dismissing the application for an adjournment, Gruchy, J. referred to an earlier request for an adjournment because of pre-trial publicity as follows:

> I concluded then that the publicity may not be so pervasive or adverse that the empanelling of an impartial jury would be impossible. The appropriate use of a challenge for cause procedure would, in my opinion, result in a fair and impartial jury. In forming that opinion, I examined cases and procedures adopted and/or referred to in such notorious trials or cases as the Bernardo/Holmolka trials, the Mount Cashell trials and the case of R. v. Phillips referred to by the Crown and also referred to -- in the text to which the Crown referred and as well in Ewaschuk.
>
> I also referred to the process and procedure I adopted and followed in R. v. MacNeil, a notorious murder arising -- or a trial arising from a robbery of a McDonald's restaurant when despite certain bans of publication, the publicity prior to and during the trial was continuous and relentless.

[61] Then, specifically in relation to the new request for an adjournment because of the FRANK magazine articles, he continued:

> . . . The accused requested a further opportunity to apply to adjourn the trial because of the pre-trial publicity, particularly in relation to Frank. The Crown agreed to my hearing the application today. I have now reviewed the publication and questioned him.
>
> It is firstly important to put Frank in it's own sort of context. It appears to be a scandal sheet replete with what seems to me to be rumours, insinuations and innuendo. A fair minded person would, assuming such a person would read the publication, put in the article into that context. The particular edition has a headline on its front page concerning the accused together with a photograph -- a facial photograph of the accused and his brother. The headline is insulting. The article in question -- the articles in question are on pages 8 and 9. The article seems to be based on some sort of an incomprehensible hatefulness and spite.

> The articles are hurtful and scandalous. I cannot imagine what would be the motivation of such articles. I do not know what the circulation of Frank is.
>
> The accused has said that it's available in virtually all coffee shops and supermarkets within the city and I accept that statement.
>
> I have considered what is the cumulative effect of Frank's article taken together with the reports I had previously considered. I have considered that the effect of these articles considered by themselves in their totality and their cumulative effect can be overcome by a correct jury selection process. I will continue the vetting process by addressing the jury panel as a whole and effectively repeating to each juror the invitation for applications to be excused. That process will be followed by the specific challenge for cause based in part on the publicity. Finally, the Crown and the accused may exercise their peremptory challenges. These processes are all in addition to my right to excuse jurors pursuant to Section 632 of the Code and, in particular, for personal interest, relationship with various persons named in this action and for personal hardship. I've already suggested to the Crown and to the accused certain questions to be put to the prospective jurors on the challenge for cause.
>
> A further question or questions may be added related to Frank, if that is the wish of counsel. Subject, of course, to my overriding authority. The application for adjournment will be refused. I also decline to reconsider my previous decisions on the matter of stay and adjournments . . .

[62] As outlined above in part 1(d)(ii), each potential juror was subjected to a challenge for cause pursuant to s. 638(1)(b) on the basis that she may not be indifferent and was asked the following questions:

> . . . have you read, heard or seen anything about this case in any of the media, newspapers, radio, television, magazines or any other publications?
>
> . . .
>
> Have you obtained information about this case from anywhere else?
>
> . . .
>
> Have you formed an opinion of the guilt or innocence of John Wood, the accused?
>
> . . .

> Is there any reason you could not judge this case fairly and impartially according to the evidence heard at trial and in accordance with my directions as to the law?

[63] These questions were drafted in consultation with the Crown and the appellant during a pre-trial conference held on May 8, 1998. The appellant appeared content with the form of the questions.

[64] As well, the trial judge's opening address to the jury, immediately after they were all selected, included the following instruction:

> Sometimes criminal trials receive coverage in newspapers, or on radio, or on television or in magazines. Do not read about the case in the newspaper or watch or listen to television or radio reports about it. I know that you're human. If it's on television or if it's on the radio go over and turn it off or go out of the room. Your decision on this case must be made solely on the evidence that you see and hear presented at trial. There is no other source of information.
>
> I want to repeat the warning in relation to this case. During jury selection process you were questioned about the publication or dissemination of news reports about this case. If you have seen or heard anything about this case or if during trial you see or hear anything about this case through the news media you are to ignore it, put it out of your mind. The only evidence you are to consider will be that which is produced here in this courtroom during this trial.

[65] The next morning the jury received the same instructions as well as the usual opening instructions respecting the presumption of innocence and the burden and standard of proof.

[66] The extensive challenge for cause procedure and the numerous cautions provided to the jury, were sufficient to ensure an impartial jury and the trial could not, in these circumstances, be found to be unfair on the basis of pre-trial publicity. We are satisfied that the trial judge properly exercised his discretion in refusing the request for an adjournment and that there was no injustice as a result.

(iv) expert witness

[67] In his 11th ground of appeal, the appellant argues that Mr. Scott Brookfield should not have been allowed to give expert testimony in forensic accounting. He submits that there was nothing in the documentary evidence introduced which required expert opinion because it was not complicated, and furthermore, that Mr.

Brookfield's association with the Nova Scotia Barristers' Society should have precluded him from testifying for the Crown. The appellant explains his position on this point, in his factum, as follows:

> . . . The testimony of Mr. Brookfield confirmed that he was not in court merely as an expert witness. Contrary to instructions given by Justice Gruchy early in the trial Mr. Brookfield added prejudicial comment to his evidence in relation to the Appellant. At one point in his testimony Mr. Brookfield deliberately blurted out before the jury that two of the Appellant's clients had been reimbursed by the Nova Scotia Barrister's Society. By agreement reached before Justice Gruchy no information or comment regarding matters between the Nova Scotia Barrister's Society and the Appellant were to be divulged to the jury. Mr. Brookfield proved to be an adversarial, hostile witness who became an advocate for his frequent employer in the matter of re-imbursement to the Nova Scotia Barrister's Society. Mr. Brookfield's testimony went beyond that of an expert witness and was deliberately calculated to prejudice the Appellant before the jury.

[68] Mr. Brookfield was examined and extensively cross-examined as to his qualifications in a **voir dire** for that purpose and after hearing submissions from counsel, Kennedy, A.C.J. concluded his ruling as follows:

> I am satisfied on the basis of the background, professional and educational background, and, just as significantly, the experience of the witness, which has been extensive in relation to investigations of the nature, that apparently he's about [to] testify to in this matter -- I am satisfied based on his combination of his educational background and work experience that he is an expert primarily in the field of accounting and that he has devoted substantial period of his career to the more specialized area of the investigation of barristers, lawyers, for his client, the Barristers' Society, and also has done considerable work in relation to other groups such as insurance companies and corporations with respect to the question of whether fraud has been committed.
>
> I'm satisfied that clearly Mr. Brookfield is an expert in the area of accounting. More particularly, I guess, if we have to use the term " forensic accounting" -- that is, accounting that is specific to the investigation as to whether or not a criminal act has taken place -- and of course whether an act is criminal or not is not for the accountant. They produce the evidence and it is for persons legally trained to determine whether that evidence satisfies the criteria of criminal specific to any provisions of the Criminal Code. In this instance, I'm satisfied that he can testify as an expert in the area of accounting and specifically and I'll use the term "forensic accounting."

[69] After that ruling, the appellant objected to the admissibility of Mr. Brookfield's evidence on the two bases that he now argues, that is, that expert evidence was not necessary, and that Mr. Brookfield was not an independent and impartial witness. Kennedy, A.C.J., ruled as follows:

> Mr. Brookfield is not a pure expert in the sense that -- Mr. Brookfield is an investigator in this matter.
>
> . . .
>
> His use is the same use as the Bar Society would have paid his fees for; that is, to take all of the banking documentation and information and pull it all together and follow the trail, follow the money. That's what accountants regularly are required to do, part of why we hire them, and even though we may know what bank drafts are and even though we may know what a deposit slip looks like, we nevertheless regularly retain accountants to pull it all together for us.
>
> So that Mr. Scott Brookfield is not the same kind of an expert, for instance, that comes before the Court because somebody found his name in a magazine and flies him in from Los Angeles. Mr. Scott Brookfield apparently investigated this matter on behalf of the Barristers' Society of the Province of Nova Scotia but investigated it as an accountant. As an accountant, so that in the process of testifying as to his investigation and what he found in the course of that investigation, he will no doubt wish to express some opinion evidence that would be the kind of information that an expert, a professional accountant could provide that a lawyer couldn't or a lay person could not provide.
>
> That will be, I presume, incidental to his primary function as a witness, and that is as an investigator of this matter just as surely relevant to the allegations made before this court as a police officer investigating a murder would be. To the extent that that police officer might have specific ballistic training, for instance, might express opinions as to some ballistic specifics of the testimony, but, nevertheless, whether he was involved in the expression of opinion or not, would be a witness in the sense that he had participated in the investigation.
>
> It is my response to the motion made by Mr. Wood that, firstly, Mr. Brookfield is not the classic expert witness that Mohan contemplates, but to the extent that he may express -- may express opinion evidence collateral to his evidence that would be better characterized as investigatory evidence, that that evidence would be relevant -- has the potentiality of being both relevant and necessary in the process of explaining his investigation of the matter. It may well be that when he attempts to express an opinion in relation to some specific, that I may find it neither relevant or necessary. I'll deal with that on an ad hoc specific

> basis. I do not see that the testimony of the witness, Scott Brookfield, is in any way compromised as an accountant, as an expert accountant, is in any way compromised by the criteria set out in Mohan.

[70] In **R. v. Mohan** (1994), 89 C.C.C. (3d) 402, the Supreme Court of Canada reviewed the principles guiding the receipt of expert evidence. Sopinka, J., writing for the Court restated the general criteria applicable at § 17:

> Admission of expert evidence depends on the application of the following criteria:
>
> (a) relevance; (b) necessity in assisting the trier of fact; (c) the absence of any exclusionary rule; (d) a properly qualified expert.

[71] As to the necessity factor in issue here, Sopinka, J. elaborated at § 21:

> In R. v. Abbey, supra, Dickson J., as he then was, stated, at p. 42:
>
> > With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate. "An expert's opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary" (Turner (1974), 60 Crim. App. R. 80, at p. 83, per Lawton L.J.)
>
> This pre-condition is often expressed in terms as to whether the evidence would be helpful to the trier of fact. The word "helpful" is not quite appropriate and sets too low a standard. However, I would not judge necessity by too strict a standard. What is required is that the opinion be necessary in the sense that it provide information "which is likely to be outside the experience and knowledge of a judge or jury": as quoted by Dickson J. in R. v. Abbey, supra . . .

[72] Recently, in **R. v. D.D.**, 2000 S.C.C. 43, Major, J., for the majority, emphasized the dangers inherent in expert evidence and elaborated further on the necessity requirement at § 47:

> I agree with the Chief Justice that some degree of deference is owed to the trial judge's discretionary determination of whether the *Mohan* requirements have been met on the facts of a particular case, but that discretion cannot be used erroneously to dilute the requirement of necessity. *Mohan* expressly states that mere helpfulness is too low a standard to warrant accepting the dangers inherent in the admission of expert evidence. *A fortiori*, a finding that some aspects of the evidence "might reasonably have assisted the jury" is not enough. As stated by Sopinka et al.,
>
> > expert evidence must be necessary in order to allow the fact finder: (1) to appreciate the facts due to their technical nature, or; (2) to form a correct judgment on a matter if ordinary persons are unlikely to do so without the assistance of persons with special knowledge.
>
> (J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at p. 620, citing *Mohan, supra*, at p. 23.)

[73] The following excerpt of the direct evidence of Mr. Brookfield is indicative of the type of assistance he provided to the fact finders, which would have allowed them to appreciate the facts which may not have been obvious to a lay person:

> Q. And then if you would look at Exhibit 120 and 119, what happened on February 28th in relation to Dr. Jha’s money?
>
> A. Perhaps 118 is -- Exhibit 118 is the best way to summarize what happened. The $44,000 came in. There was just a small balance in the trust account before Dr. Jha’s money arrived, $37.96.
>
> And then immediately after it had arrived, a cheque, number 1849 which is Exhibit number 120, was written by Mr. Wood to reimburse the Phillips for their funds. So right off the bat $20,671 of Dr. Jha’s funds were used for a purpose other than for his own.
>
> Q. And then looking at Exhibit 120, is that the cheque that represents that cheque -- or is that the cheque on the bank statement of the trust account, Exhibit 119?
>
> A. It is.

> Q. So therefore, what in summary happened to Dr. Jha's money, Mr. Brookfield?
>
> A. In summary, what happened is that it was used almost in its entire -- 20,671 of it was used to finance a cheque required for the Phillips that left a balance in the trust account of 23,366.80. So at the moment that that balance was in there of 23,000 in the trust account, some of Dr. Jha's funds had been inappropriately removed.

[74] We agree with the respondent's submission that while the jurors may have been familiar with cheques, bank statements and deposit books, they were probably unfamiliar with lawyers' trust accounts and client ledgers. The expert's evidence was necessary to draw their attention to the details and provide the inferences not readily apparent to an ordinary observer. Mr. Brookfield's evidence was almost entirely of the nature quoted above. His assistance to the jury was as a guide through the morass of paper pointing out the trail of funds. The trail, parts of which had been concealed and lost, was so tangled and intricate that without the guidance of an experienced accountant, tracing the monies belonging to the nine clients would have been almost impossible. We agree with the trial judge's ruling that the evidence of Mr. Brookfield met the necessity threshold.

[75] With respect to the independence of the expert witness, Justice Major, in **D.D**. did recognize the danger that can arise if an expert moves "from the impartiality generally associated with professionals" to being an advocate for one of the parties. In this case, the appellant says that the witness was adversarial and hostile and became an advocate for the Barristers' Society. After carefully reviewing the evidence of Mr. Brookfield, we are not satisfied that the appellant's characterization of it is accurate. Associate Chief Justice Kennedy carefully, thoroughly and correctly instructed the jury as to their role in assessing the expert witnesses' testimony in the following passages:

> A witness may give some testimony which is true and then by reason of poor powers of observation or faulty recollection or poor memory, defective memory or, in some cases I suppose, a desire to hide the truth, they may give other testimony that is false or not accurate. So that it is possible that you might believe some of what a witness says but not all of what a witness says. That sometimes happens.

When reviewing the evidence of the various witnesses, you should consider what real opportunity did the witness have to observe the events to know about the events that he or she testified about. Has the witness any interest in the outcome of the trial or any motive for either favouring or injuring the accused? Is the witnesses' testimony reasonable and consistent within itself? By consistent within itself, I mean does it stack up, does it make sense?

So really what I am saying to you, I guess, is that you may wish to accept some parts of a witnesses' testimony and reject others. Because witnesses do make mistakes sometimes and sometimes they have no desire to tell the truth.

By comparing one witness with another and by your powers of observation of their conduct, their demeanour and their apparent consistency or inconsistency in their testimony, you will be able to decide how much of the testimony of these witnesses you will believe and how much weight you will give to any particular part of that evidence.

In other words, I am asking you to apply your everyday good common sense, your everyday experiences in judging people. We do it every day. We judge people every day. I am paid to do it, other people do it as a hobby, I guess. We judge people every day. We are pretty good at doing that. We are normal, reasonable people . We are pretty good at assessing people.

Common sense is what juries bring to the justice system. That is why we involve juries in the justice system because they bring good, reasonable common sense. If you have a reasonable doubt as to the accuracy of the evidence given by a witness or to the weight that you should give to such evidence, you must give, of course, the benefit of that doubt to the accused, John Wood, and not to the Crown. The benefit of doubt to the accused.

Let me say something about experts, because we had some expert testimony. I mentioned during the course of the trial, and perhaps Justice Gruchy did also, that ordinarily witnesses are permitted to give evidence only of the facts which they themselves have seen, heard or otherwise perceived by their senses. They are not allowed to express opinions when testifying.

There is an exception to that rule. The exception being duly qualified experts. People who I have qualified as experts so that they can express opinions within their field of expertise before you. They are permitted to give opinions on matters in dispute at trial.

We had two experts, to my recollection, in relation to this matter. Two people who were qualified as expert witnesses. One being the chartered accountant, Scott Brookfield, with his experience particularly in the area of forensic accounting, and the other being Gil Poulin, you remember was the document expert from the RCMP lab. Both were qualified as experts within their fields, within their areas, and both were permitted to give opinion evidence.

When you consider the opinion evidence of experts, the evidence of experts generally, you do so in the same manner that you deal with evidence of other witnesses. It is for you to determine the weight you should give to their testimony. You may accept all of their evidence, you may accept part of it, and you may reject it entirely. It is possible to reject entirely the testimony of experts.

Over the years I have heard many experts testify in my Court, some of whom I consider gave very valuable and important opinions, some of whom I did not pay any attention to. That is notwithstanding the fact that they had been qualified as experts. I thought their opinions were baloney, frankly. You have the same power when you are triers of fact. You can make your own decision in relation to the opinions of experts. You are not bound to accept what they say. It is your position that counts.

One of the things, perhaps, that you will consider in relation to experts is the qualifications of those people, consider their training and experience, ask yourself whether those qualifications add to or perhaps even detract from their opinions. You think about those opinions and you decide whether you believe them, whether you find them valuable to you in the course of determining this matter.

. . .

In winding up my statement in relation to the evidence, let me say some things generally about the evidence. Clearly, the chartered accountant, Scott Brookfield, is central to the Crown's case against John Wood. He is the one that the Crown has used to pull all of the information together. You had lots of opportunity to assess the credibility of the accountant, Brookfield, and to assess his competence as an accountant.

You will remember that he not only testified to cheques and ledgers and numbers but also to John Wood's behaviour in dealing with him during the spot audit and as the investigation progressed. You will remember that he

characterized John Wood's actions in this matter as taking from Peter to pay Paul. He used that oft-used phrase and compared the situation that John Wood had developed, to use the analogy, as a game of musical chairs.

He said that when the music stopped, meaning that when John Wood no longer had access to funds, then somebody was going to be out money. He said in this case when the music stopped, the Blanche Jewers estate and the Carolyn Ross beneficiary, John Michael Ross, were the people who were out the money. These were the people you heard, both of whom were reimbursed by the Nova Scotia Barristers' Society.

. . .

Jury, two things that I want to speak to you about that are specific and unique to this trial. Firstly, you have heard in evidence that, as a result of the Barristers' Society investigation into the actions of John Wood, that he was disbarred, that his privilege of practicing law in this province was taken from him. You heard that in evidence more than once. This information is to have absolutely no affect or influence on your decision on these 18 criminal charges. You are to ignore that information completely in determining this matter.

You do not know what information was before the Bar Society when they made their decision. You do not know what criteria or proof was used by the Bar Society, but you can rest assure that they did not use proof beyond a reasonable doubt, which is the highest standard of proof that is used in criminal matters and the standard of proof that you must apply to the evidence that is before you. You do not know what went on at the Bar Society.

It would be unfair, it would be unjust to this accused, to John Wood, if you were to allow your knowledge of his disbarment to in any way influence your decision at this trial. So I am imploring you, I am directing you, ignore that information, please. Blank it from your mind in the process of determining this matter.

[76] The jury was properly instructed. This ground of appeal is dismissed.

(v) disclosure

[77] As to the 21st ground of appeal, the appellant alleges that Kennedy, A.C.J., erred in law by permitting the Crown to call and present six new witnesses without proper notice to him.

[78] The background to this issue is that on May 15th, Gruchy, J., heard the evidence of Gurdeep Brar, an employee of Canada Trust, in a **voir dire** with respect to several banking documents that the Crown proposed to tender pursuant to s. 29 of the **Canada Evidence Act**. Gruchy, J. ruled that since Ms. Brar was not able to say with respect to some of the documents that they were true copies, they were inadmissible, "on the present evidence".

[79] Later, when the trial resumed before Kennedy, A.C.J., the Crown provided the appellant with an updated witness list which included the names of six witnesses for which he argues he did not have either notice or disclosure. The appellant brought the issue before Kennedy, A.C.J and submitted that:

> And now, Friday morning before the Monday morning I'm told that there are six additional banking witnesses. I don't know that I have any will-say statements. I think I have some will-say statements from a couple of these people because originally these people were on a list because of continuity of evidence. Now again, not being represented and I was advised about this continuity business. And I was told, well, it would be more expedient and things would move faster if we could dispense with a number of these witnesses who are just going to come in here and say, "We had custody of these documents at a certain time and they just ended up filtering down through the investigating officer." So these people were originally put forward -- they were just going to be continuity witnesses.
>
> . . .
>
> . . . It impacts on the jury, these delays to deal with these matters. And I'm sure that the prosecutor is going to indicate that, well, it was necessary after Justice Gruchy's rulings on the evidence of the Canada Trust witness that these additional witnesses be brought forward.
>
> . . .

> . . . But nonetheless I'm here now today faced with a list of six additional banking witnesses and my position is that it's manifestly unfair for those witnesses now to be allowed to be called by the Crown. I have not had full and complete and timely disclosure by the Crown . . .

[80] Kennedy, A.C.J. ruled as follows:

> . . . as to the argument that there has not been full disclosure and therefore Mr. Wood is compromised by the production of bank witnesses today that were only -- by full disclosure I mean timely disclosure, that were only first mentioned to him as recently as last Friday, let me be specific for the nature of the evidence that we're dealing with, that is bank records. Mr. Wood, even unrepresented would reasonably have anticipated that having had those records disclosed to him that the Crown would be producing witnesses from the bank -- from the various institutions to attempt to prove those records. I do not consider, given the specific nature of the evidence that we're speaking of, that the names of those witnesses are so significant, given the obvious testimony or type of testimony that they would be involved with -- type of evidence that they would be giving as to put Mr. Wood at a disadvantage, notwithstanding the relative proximity of the disclosure of those names and what institutions they were involved with.
>
> One again would have anticipated -- reasonably anticipated, even unrepresented, that the Crown would be producing witnesses that would attempt to prove the records in question.
>
> As the use of copies, counsel, Mr. Wood, the best evidence rule is a dodo. It's gone in the way of the dodo bird. It's reliability that counts in relation -- and relevance that counts in relation to evidence coming before the Courts in this age. Specifically when we're dealing with bank records. True copies, if demonstrated to be true copies, are just as admissible as the actual documents themselves. As long as they satisfy those criteria, firstly reliability and secondly relevance, and whether I'm dealing with a true copy or we have a true copy or the original document is not particularly significant. So that copies are going to be as admissible as long as -- as admissible as original documents as long as the criteria, of course, is established and we've already had that situation addressed by Justice Gruchy in relation to documents produced prior hereto.

[81] The appellant now submits that Kennedy, A.C.J. erred in allowing the Crown to call “surprise” witnesses and that his right to a fair trial was thereby

prejudiced. In response to this ground of appeal, the Crown sought to introduce as fresh evidence on the appeal, an affidavit of Bernadette Macdonald, Crown counsel at trial. After hearing submissions on the admissibility of the affidavit, we received the proposed evidence and reserved decision as to its admissibility pending the hearing of the appeal. This is the procedural approach set out in **R. v. Stolar**, [1988] 1 S.C.R. 480 and **R. v. Palmer**, [1980] 1 S.C.R. 759.

[82] In **R. v. Dixon** (1997), 156 N.S.R. (2d) 81, (upheld on appeal to the Supreme Court of Canada, [1998] 1 S.C.R. 244), Chipman, J.A., for the majority, noted at § 22 that test for admission of new evidence in a situation such as exists in this case, is different from the usual **Palmer** test:

> The court received the affidavits because they are relevant to the issue of nondisclosure. The stringent **Palmer** criteria, applicable to an application to place before an appellate court additional material relevant to factual or legal determinations made at trial, are not relevant here. I refer to the passage from the decision of Doherty, J.A., on behalf of the Ontario Court of Appeal in **R. v. W.W. and I.W.** (1995), 84 O.A.C. 241; 100 C.C.C. (3d) 225 (C.A.), at 232 which was quoted by Pugsley, J.A., in **Cole**, supra. The subject is further discussed by Osborne, J. A., on behalf of the Ontario Court of Appeal in **R. v. Peterson (B.)** (1996), 89 O.A.C. 60; 106 C.C.C. (3d) 64 (C.A.), at 79 where he said:
>
> > The fresh evidence that counsel agreed we should review is relevant to the issue of nondisclosure. The appellant seeks to establish through the fresh evidence and the trial record that the Crown breached its disclosure obligations and that the failure to make the required disclosure impaired the appellant's right to make full answer and defence.
> >
> > In my view, the somewhat exacting standards for the admission of fresh evidence, as set out in **Palmer and Palmer v. The Queen** (1979), 50 C.C.C. (2d) 193; 106 D.L.R. (3d) 212; [1980] 1 S.C.R. 759, and **R. v. Stolar** (1988), 40 C.C.C. (3d) 1; [1988] 1 S.C.R. 480; 62 C.R. (3d) 313, do not determine whether the tendered fresh evidence should be admitted. It seems to me that, consistent with s. 683, it is in "the interests of justice" that the tendered fresh evidence be admitted.

> The fresh evidence establishes and explains the Crown's failure to make full disclosure. It is also relevant to the extent to which the nondisclosure affected the appellant's right to make full answer and defence. In this case, without the fresh evidence, it would not be possible to consider the nondisclosure issue in an appropriate context: see **R. v. W.(W.)**, released August 15, 1995 (Ont. C.A.) [now reported 100 C.C.C. (3d) 225; 43 C.R. (4th) 26; 25 O.R. (3d) 161], and **R. v. Joanisse**, released October 3, 1995 (Ont. C.A.) [now reported 102 C.C.C. (3d) 35; 44 C.R. (4th) 364; 85 O.A.C. 186]. I do not accept, in circumstances such as exist here, that to be admitted the court must be of the opinion that, if believed and taken with the other evidence, the fresh evidence might have altered the result at trial. Thus, the admission of the fresh evidence does not in these circumstances inevitably lead to an order that there be a new trial: see **R. v. Stolar**.

[83] We are satisfied that the affidavit of Ms. Macdonald meets the criteria for admission established by these cases; that is, that it is pertinent to the validity of the trial process and should therefore be admitted on the appeal. In the affidavit, Ms. Macdonald indicated that on October 2, 1997, she provided “can say” statements of four of the witnesses concerned, which summarized the evidence expected to be adduced through those witnesses. The names, work addresses and telephone numbers of the other bank witnesses were given to the appellant on May 19, 1998. These people testified on May 25th as to procedures at their respective institutions and at the data centre where cheques were processed.

[84] The appellant does not specify how the reception of the evidence of these people impaired his right to a fair trial. However, as stated by Cory, J. for the court, in **R. v. Dixon**, **supra**, at § 32 et seq., he has the burden of showing not only that his right to full and timely disclosure was breached, but also that the lack of proper disclosure has some identifiable impact:

> At this point, something should also be said about the standard to be met by an accused who asserts that the right to make full answer and defence was impaired. It is trite but worth repeating that in all cases where a person claims that a *Charter* right has been violated, he or she must prove on a balance of probabilities that the violation occurred. Thus, before granting any sort of remedy under s. 24(1), it must be found that it was more likely than not that the *Charte*r right in question was infringed or denied. See *R. v. Collins*, [1987] 1 S.C.R. 265,

at p. 277.

> The evidence required to meet this burden and the factors to be considered will differ according to the particular right at issue and the particular remedy sought. For example, where a court is persuaded that undisclosed information meets the *Stinchcombe* threshold, an accused has met his burden to establish a violation of his *Charter* right to disclosure. As noted above, the appropriate remedy for such a violation is, at trial, an order for production or an adjournment. Where non-disclosure is raised on an appeal from a conviction, an accused must, as a threshold matter, establish a violation of the right to disclosure. Further, the accused bears the additional burden of demonstrating on a balance of probabilities that the right to make full answer and defence was impaired as a result of the failure to disclose.
>
> This burden is discharged where an accused demonstrates that there is a reasonable possibility the non-disclosure affected the outcome at trial or the overall fairness of the trial process. See *R. v. C. (M.H.)*, [1991] 1 S.C.R. 763, at p. 776; *Stinchcombe*, *supra*, at p. 348. Imposing a test based on a reasonable possibility strikes a fair balance between an accused's interest in a fair trial and the public's interest in the efficient administration of justice. It recognizes the difficulty of reconstructing accurately the trial process, and avoids the undesirable effect of undermining the Crown's disclosure obligations. This would be the result if the Crown were placed in a better position by withholding rather than disclosing information of relatively low probative value. However, the reasonable possibility to be shown under this test must not be entirely speculative. It must be based on reasonably possible uses of the non-disclosed evidence or reasonably possible avenues of investigation that were closed to the accused as a result of the non-disclosure. If this possibility is shown to exist, then the right to make full answer and defence was impaired.

[85] With respect to the witnesses for which the appellant received the “can say” statements, there was timely disclosure. With respect to the others, even assuming without deciding that the disclosure was not timely, given the nature of the impugned evidence, there is no reasonable possibility that any untimeliness affected the outcome of the trial or the fairness of the trial process. The appellant has not met the burden of establishing that the trial judge erred in permitting the witnesses to testify.

2. Documentary Evidence Issues

[86] In this section, we will address the issues relating to documentary evidence set out in grounds 6, 10, 13 to 16 and 28. It will be convenient to consider these grounds of appeal under three main headings. Ground 13 relates to the provision to the jury of highlighted copies of exhibits. We will consider this issue under the heading "the documents before the jury". Grounds 6, 10 and 28 deal mainly with banking documents. We will address these issues under the heading "banking documents". Grounds 14 to 16 deal mainly with documents which formed part of the Barristers' Society investigation and which were ultimately seized by the police pursuant to search warrant. We will consider these grounds under the heading "investigation documents".

(a) the documents before the jury

[87] The relevant ground of appeal is as follows:

> 13. THAT the learned Associate Chief Justice Joseph Kennedy erred in law in allowing the Crown to give the jury large three ring binders with copies of Crown exhibits highlighted with yellow marker to refer to while the Crown expert witness Scott Brookfield gave his testimony. During the testimony of the Crown's expert witness Scott Brookfield the jury were referred to the copies of yellow highlighted exhibits in the three ringed binders instead of being shown original unhighlighted exhibits;

[88] Each juror, with leave of the judge, was provided with a binder containing copies of the exhibits. The portions of the documents alleged by the Crown to be relevant were highlighted. For example, where an exhibit, such as a bank statement, referred to numerous transactions, the ones alleged by the Crown to be relevant to the case were highlighted. The appellant objected to this on the grounds that the jurors should have access only to the original exhibits and that the highlighting was prejudicial.

[89] The judge permitted the binders to be given to the jurors. He gave a mid-trial instruction with respect to this issue as follows:

> ... Jury, let me talk to you about those binders for a moment. You may remember that when I took over the case I said that what you would have with you when you went back to the jury room was the original documentation and that

documentation only. I've changed my mind. And as a result of the Crown having produced these binders that contain only admissible documents, only admissible documents -- we could not have produced the binders -- the Crown could not have produced the binders, more accurately, much sooner in the process, at any rate, because we had to determine the admissibility of that documentation before you could get it. So now it seems to me that it makes some sense that -- some real sense that you have copies of the documentation that you can make reference to.

There is a concern that I have, though, that you will forget that it is the original documentation that is everything. Those binders are not evidence. It is the original documentation that is the evidence. So that when you go and you deliberate this matter, when you go to the jury room, remember that the documentation that has been produced, shown to the witnesses and identified by the witnesses and found to be admissible in this matter, that original documentation is of the essence. These are only binders, copies of that documentation designed to assist you when you are in the process of trying to put this matter together.

Also, it is most important for me to point out that in those binders the Crown has highlighted, I think with yellow marker, some of the aspects of the various documents. That highlighting was done by the Crown in order to, I guess, draw your attention to what the Crown considers significant and what the Crown will talk about when they finally address you at the end of the calling of the evidence in this matter.

But that highlighting does not exist on the originals. That highlighting is not part of the evidence. It may very well be of little significance to you when you ultimately determine the matter. And it is your own view of the documentation that will be final. Not the Crown's view, not my view, not Mr. Wood's view, your view, your opinion, your determination as to what's important on that documentation.

So the highlighting is just something that the Crown did in order to assist you in understanding their argument. I guess that's a good way to put it to you. To assist you in understanding the Crown's argument that will be made at the end of the process.

Again, I stress those are copies, not the originals. The originals are what's important. But to the extent that they can assist you in understanding the evidence that's being produced, then so be it, that's good. We're trying to make the matter as simple as the matter is capable of being. Thank you. Madam Crown?

[90] In this court, the appellant essentially adopted the arguments he made to the

trial judge. These arguments have no merit and the trial judge was right to reject them. It was obviously sensible to give the jurors copies of the multitude of documents admitted into evidence and to highlight the relevant entries. Any risk of prejudice, small as it might have been, was properly addressed by the judge's mid-trial instruction.

(b) banking documents

[91] These issues relate to Grounds of Appeal 6, 10 and 28 which are as follows:

> 6. THAT the learned Justice David W. Gruchy erred in law in admitting certain copies of banking documents into evidence at the Appellant's trial;
>
> . . .
>
> 10. THAT the learned Associate Chief Justice Joseph Kennedy erred in law in admitting copies of cheques and banking documents pursuant to Section 24 of the Canada Evidence Act;
>
> . . .
>
> 28. THAT the learned Associate Chief Justice Joseph Kennedy erred in law by admitting into evidence photocopies of cheques and other documents instead of original documents which were available but not produced at trial;

[92] The first of these grounds relates to the admission of copies of banking documents by Gruchy, J. He admitted some banking documents and refused to admit others based on his analysis of the requirements of s. 29(1) and (2) of the **Canada Evidence Act**, R.S.C. 1985, c. C-5. Those sections provide:

> 29. (1) Subject to this section, a copy of any entry in any book or record kept in any financial institution shall in all legal proceedings be admitted in evidence as proof, in the absence of evidence to the contrary, of the entry and of the matters, transactions and accounts therein recorded.
>
> (2) A copy of an entry in the book or record described in subsection (1) shall not be admitted in evidence under this section unless it is first proved that the book or record was, at the time of the making of the entry, one of the

> ordinary books or records of the financial institution, that the entry was made in the usual and ordinary course of business, that the book or record is in the custody or control of the financial institution and that the copy is a true copy of it, and such proof may be given by any person employed by the financial institution who has knowledge of the book or record or the manager or accountant of the financial institution, and may be given orally or by affidavit sworn before any commissioner or other person authorized to take affidavits.

[93] The section expressly provides for the admissibility of copies of entries. There is, therefore, no merit in Mr. Wood's argument that copies should not have been admitted.

[94] The second of these grounds (Ground 10) relates to the admission by Kennedy, A.C.J., of copies of cheques and banking documents pursuant to s. 24 of the **Canada Evidence Act**. That section was not relied on by the Crown in seeking admission of the relevant documents or by the judge in admitting them. There is, therefore, no merit in this ground of appeal.

[95] The third of these grounds (Ground 28) relates to the admission by Kennedy, A.C.J., of copies of cheques and documents instead of originals. The appellant gives no indication of which documents he says were improperly admitted on this basis. To the extent that copies were admitted pursuant to s. 29 of the **Canada Evidence Act**, copies are specifically permitted. The admissibility of copies of other documents will be addressed in the next section.

(c) investigation documents

[96] The relevant grounds of appeal are 14 - 16 which we set out for convenience:

> 14. THAT the learned Associate Chief Justice Joseph Kennedy erred in law in allowing the records which the Appellant John Douglas Wood delivered to Scott Brookfield by the authorization that Scott Brookfield held pursuant to the regulations of the Barristers and Solicitors Act to be admitted into evidence. The Appellant's Charter Rights under Sections 8 and 24(1) and 24(2) were thereby violated or abridged;
>
> 15. THAT the learned Associate Chief Justice Joseph Kennedy erred in law in admitting documents seized pursuant to search warrants as documents

found in possession and thereby deemed admissible;

16. THAT the learned Associate Chief Justice Joseph Kennedy erred in law in ruling that copies of purported client ledger cards seized under search warrant from the offices of Coopers Lybrand would be admitted into evidence;

[97] These grounds raise two main issues. The first concerns documents provided by Mr. Wood to the Barristers' Society investigator, Mr. Brookfield. The appellant's position is that his rights under s. 8 of the **Charter** were infringed, although the precise nature of the alleged violation is not clear. The second relates to whether the principles relating to documents found in the possession of the accused were properly applied. We will address these grounds of appeal under those two headings. Although there is reference to seizure by search warrant, the warrants were lawful and there could be no argument that the ensuing searches were conducted in anything but a reasonable manner.

(i) compelled production

[98] The essence of the appellant's submission is that he was compelled by the **Barristers and Solicitors Act**, R.S.N.S. 1989, c. 30 and Regulations to deliver records concerning his practice to Mr. Brookfield and that subsequent use of these documents at the criminal trial offended the appellant's **Charter** rights.

[99] Scott Brookfield was a chartered accountant and a partner in the firm Deloitte Touche. As noted earlier, he was qualified as an expert witness and permitted to give opinion evidence. He was directed by a discipline committee of the Barristers' Society to do a "spot audit" of Mr. Wood's practice pursuant to s. 48(1) and (2) of the Nova Scotia Barristers' Society Regulations. It will be helpful to set out the relevant portions of s. 48 of the Regulations as it read at the time of Mr. Brookfield's investigation:

> 48 (1) The Discipline Committee may at any time direct an investigation to be made by a chartered accountant or other person designated by the Committee (called, in this Regulation, the "investigator") of the books, records and accounts of a barrister or barristers, for the purpose of ascertaining and reporting whether the Regulations respecting accounts have been and are being complied with by the barrister or barristers.

> (2) The barrister or barristers shall produce for the investigator all the books, records, vouchers, papers and evidence which the investigator requires for the purpose of the investigation.
>
> (3) The investigation, where practicable, shall be made in the office of the barrister or barristers whose accounts are the subject of investigation.

[100] Mr. Brookfield testified that he was directed to conduct the audit at the conclusion of a Barristers' Society hearing on March 3, 1995 and immediately began his work by meeting with Mr. Wood and attempting to obtain from him financial records including bank statements and books of account. He noted in his evidence that a lawyer is required to keep all the bank statements and returned cheques, to write the books up on a monthly basis in journals which would show all the cash going in and out and to maintain a record which shows the balance for each client. His evidence is consistent with sections 47A and 47B of the Regulations.

[101] Some documents were obtained by Mr. Brookfield directly from Mr. Wood. These documents were subsequently seized from Mr. Brookfield's office by the police acting under search warrant and adduced in evidence by the Crown at the trial. Mr. Wood, as noted in § 27 above, at the trial, objected to the admissibility of these documents on the basis, essentially, that what had occurred was a "back door" for the police to obtain material that they might otherwise have had more difficulty obtaining by way of a search warrant.

[102] The trial judge rejected this argument:

> Mr. Wood had raised the interesting argument that that documentation that had been seized from the forensic accountant retained by the Bar Association should not be admissible against him because had he not been subject to a statutory imperative, that is, the Barristers and Solicitors Act, he would not have had to turn the documentation over to the accountant; it would not have been in the hands of the accountant and available to be seized by the process that the Crown tells this Court was accomplished.
>
> My response to that ultimately is that we go back to basics, and that is that whether that documentation was in the hands of Mr. Wood or in the hands of the forensic accountant, it was seizable by search warrant. Seizable by a search warrant. A search warrant was served on the accountant because that happened to be where the stuff was. But that search warrant and the information to obtain

> those search warrants -- warrants, I guess, plural -- would have been just as effective had they been served upon, executed against Mr. Wood in relation to the documentation in his possession. So that while the statutory imperative explains why the documentation was in the hands of the forensic accountant at the time of the warrant process, it does not in any way compromise Mr. Wood's Charter rights or otherwise in relation to its admissibility before this Court, and I so determine.
>
> . . .
>
> ... The same stringent Criminal Code search-warrant process was used to obtain the documentation from the accountant that would have been used to obtain the documentation had it remained in your possession. And the fact that the search warrant was served on the accountant rather than upon yourself only reflects the fact that at the time that the police, the investigatory process had reached that stage, the documentation was in the hands of the accountant as a result of the Barristers and Solicitors Act rather than yourself.
>
> So that it does not appear to me that in this instance a less stringent, less onerous, process was used in order to seize the documentation for purposes of this criminal proceeding; rather, the same process was used but executed against another individual simply reflecting the fact that by the time that process was ready to be accomplished, the documentation had been taken into the possession of the forensic accountant as a result of the statutory authority that the Barristers' Society has pursuant to the Barristers and Solicitors Act. So the case is not, I find, directly applicable, or applicable at all, to the present situation.

[103] The argument advanced relates only to the various records. The appellant's submission on this issue, which was not significantly elaborated upon in oral argument, is as set out on p. 25 of his factum:

> The learned Associate Chief Justice Joseph Kennedy erred in law in allowing records which the Appellant delivered to Scott Brookfield by virtue of the authorization that Scott Brookfield held pursuant to the regulations of the Barristers and Solicitors Act to be admitted into evidence. Mr. Brookfield was a person in authority in relation to the Appellant and by virtue of Nova Scotia provincial law, the Appellant was required to deliver these records to Mr. Brookfield. The Appellant was not warned or advised that these records would be used against him in a criminal prosecution. The Appellant's Charter Rights under Sections 8 and 24(1) and 24(2) were accordingly abridged or violated. The effect of these violations was to deny the Appellant a fair trial.

[104] There is no challenge before the Court to the Regulations requiring

production of a lawyer's records to an investigator. In this respect, the present case is different than decisions such as **British Columbia Securities Commission v. Branch**, [1995] 2 S.C.R. 3, **Comité paritaire de l'industrie de la chemise v. Selection Milton**, [1994] 2 S.C.R. 406 and **Delzotto v. Canada**, [1999] 1 S.C.R. 3 in which statutory provisions granting power to compel testimony or produce documents were themselves challenged under sections 7 and/or 8 of the **Charter**.

[105] In this case, the documents produced under compulsion to the Barristers' Society investigator were not, in turn, simply turned over to the police. As the trial judge noted in his reasons, the police seized the documents pursuant to a search warrant from the Bar Society investigator, Mr. Brookfield. The case is in that respect (as well as several others) very different than **R. v. Colarusso**, [1994] 1 S.C.R 20 on which Mr. Wood relied at trial. In that case, after the accused had been charged with impaired driving, blood and urine samples were obtained with the accused's consent for medical purposes. A coroner, acting under provincial legislation, obtained the samples and then immediately turned them over to the police. Although the court did not exclude the evidence of the analysis of the samples, the majority found that the samples had been obtained by an unreasonable seizure. This holding turned in large part on the conclusion that the police had, through the coroner, effectively seized the samples and that they had done so without a warrant. LaForest, J., writing for the majority on this point said as follows at pp. 61 - 62:

> Given the conclusion that the police seized the blood and urine samples from the appellant, does the police seizure violate s. 8 of the *Charter*? In my opinion, it is readily apparent that the actions of the police violated the right of the appellant to be secure against unreasonable seizures. ... I can see no basis for holding that, at least in relation to the use of evidence for criminal law purposes, the reasonable expectation of privacy in one's own bodily fluids guaranteed by s. 8 of the *Charter* is diminished merely because a coroner chooses to exercise his or her power to seize evidence under s. 16(2) of the *Coroners Act*. As such, the intervention by the coroner does not alter the fact that the police must comply with the *Hunter* requirement of prior judicial authorization before seizing a bodily fluid sample which was initially taken from an impaired driving suspect for medical purposes.
>
> In this case, the police obtained no such warrant prior to seizing the blood and urine samples. ...
>
> In the result, I would conclude that the actions of the police officers amount to a

> warrantless seizure of bodily fluids for use in a criminal prosecution and so violate the guarantee against unreasonable search and seizure in s. 8 of the *Charter*.

[106] Putting aside the significant fact that the present case concerns financial records rather than bodily fluids as in **Colarusso**, the police in Mr. Wood's case obtained a warrant to seize the documents and there is no evidence of any sort of improper collusion between Mr. Brookfield and the police. Accordingly, the reasoning of LaForest, J., in **Colarusso** has no application. Even if it did and a s. 8 violation were to be found, the records would not be excluded under s. 24(2) in any case. In **Colarusso**, bodily fluids obtained for medical purposes after the accused had been charged were found to have been obtained illegally yet the evidence was admitted. The present case concerns financial records which a lawyer is required by law to maintain and produce on demand and which were brought into existence for the purposes of carrying on practice before the investigation began or charges were laid. The exclusion, not the admission, of such evidence would bring the administration of justice into disrepute.

[107] Although the focus of Mr. Wood's argument in relation to this issue has been s. 8 of the **Charter**, Mr. Delaney, for the Crown, very fairly noted in his factum that s. 7 could also be considered relevant to this part of the appeal. We have considered the relevant authorities but find that none of them assists the appellant in this case. For example, **R. v. Fitzpatrick**, [1995] 4 S.C.R. 154 concerned compelled self-reporting documents in a regulatory prosecution: see LaForest, J. at § 24. There, the reports made to the government regulator were used against the accused in a prosecution. There was no intervention of a lawful search pursuant to warrant as there was in this case, but the Court found that the use of these documents in evidence did not limit the accused's rights under s. 7 of the **Charter**.

[108] When the relevant considerations identified in **Fitzpatrick** by LaForest, J. at § 53 - 66 are examined and applied to the facts of the present case, any argument which could be advanced by the appellant under s. 7 of the **Charter** in this appeal is considerably weaker than the one rejected by the Supreme Court of Canada in **Fitzpatrick**. The records in issue here are financial in nature and have nothing of the character of a confession. There was nothing about the requirement to maintain or produce these records which increased the possibility that they would be false. Quite the reverse. They are business records required to be maintained as a

condition of engaging in the practice of law and in which there could be little, if any, reasonable expectation of privacy. The transactions evidenced by the records took place before there was any adversarial relationship between the appellant and either the Barristers' Society or the Crown. There is nothing that happened here that has the potential to increase the likelihood of abuse of state power.

[109] Nothing in the decision of the Supreme Court in **R. v. White**, [1999] 2 S.C.R. 417, and, in particular, its discussion of the relevant contextual factors identified in **Fitzpatrick**, causes us to think that there was any infringement of s. 7 of the **Charter** in this case.

[110] We therefore dismiss ground 14 of the appeal.

(ii) documents found in possession

[111] For convenience, we set out the relevant grounds of appeal, followed by the appellant's submissions in his factum in relation to them:

> 15. THAT the learned Associate Chief Justice Joseph Kennedy erred in law in admitting documents seized pursuant to search warrants as documents found in possession and thereby deemed admissible;
>
> 16. THAT the learned Associate Chief Justice Joseph Kennedy erred in law in ruling that copies of purported client ledger cards seized under search warrant from the offices of Coopers Lybrand would be admitted into evidence;
>
> . . .
>
> ... the learned Associate Chief Justice Kennedy erred in law in admitting documents seized pursuant to search warrants as documents found in possession and thereby deemed admissible.
>
> There was also no evidentiary basis for Associate Chief Justice Kennedy ruling that copies of purported client ledger cards seized under search warrant from the offices of Coopers Lybrand would be admitted into evidence. There was no evidence that any such copies were in fact true copies of original documents.

[112] Mr. Brookfield obtained a number of documents directly from the appellant. For ease of reference, I will refer to these as the "category 1" documents. The question is whether they were properly admitted for the truth of their contents

under the doctrine of documents in the possession of the accused.

[113] A frequently cited description of this doctrine is from M.N. Howard et al. (eds.) *Phipson on Evidence* (15th, 2000) at § 30-10:

> Documents which are, or have been, in the possession of a party will, as we have seen, generally be admissible against him as *original (circumstantial) evidence* to show his knowledge of their contents, his connection with, or complicity in, the transactions to which they relate, or his state of mind with reference thereto. They will further be receivable against him as *admissions* (i.e. exceptions to the hearsay rule) to prove the *truth* of their contents if he has in any way *recognised, adopted* or *acted* upon them. So, as we have seen, documents which a party has *caused to be made* or *knowingly used as true* in a judicial proceeding to prove a particular fact, are admissible against him in subsequent proceedings to prove the same fact, even on behalf of strangers. Documents furnished by persons specifically *referred* to for information are evidence against the referrer; though a mere general reference will not have this effect. (citations omitted)
>
> (emphasis in original)

[114] There are three elements of the doctrine. First, it must be shown that the document was actually or constructively in the possession of the accused. Second, if such possession is established, the document will be admissible to show the accused's knowledge of its contents, his connection with and state of mind with respect to the transaction to which it relates. Third, if it is established that the accused has recognized, adopted or acted on the document, it becomes admissible for the truth of its contents under the admissions exception to the hearsay rule. The first and third of these elements are most relevant for the purposes of this appeal.

[115] With respect to the category 1 documents (that is, documents obtained by Mr. Brookfield directly from Mr. Wood), actual possession by Mr. Wood was established by the fact that they were records he was obliged to maintain by law and which he personally produced and supplied to Mr. Brookfield as such pursuant to Mr. Brookfield's request.

[116] The next question is whether these documents were admissible for the truth of their contents on the basis that the appellant "recognized, adopted or acted on" the documents. The documents in issue were ones Mr. Wood was obliged by law to keep and to produce on demand to Mr. Brookfield. By personally handing the

documents to Mr. Brookfield pursuant to his demand, the appellant recognized and adopted them: see **R. v. d'Eon** (1988), 83 N.S.R. (2d) 142 (S.C.A.D.) . They were records kept under the direction of the appellant and their meaning and purpose was explained by the legal requirements to maintain them and by Mr. Brookfield's testimony. They were, thus, admissible as evidence of their truth: see **R. v. Smart and Young** (1931), 55 C.C.C. 310 (Ont. S.C. A.D.).

[117] These category 1 documents were, therefore, admissible for the truth of their contents and the judge did not err in so ruling.

[118] Other documents, which I will call the "category 2" documents, were obtained by Mr. Brookfield from files at offices of the accounting firm Coopers and Lybrand pursuant to permission in writing given by the appellant. Mr. Wood had given the documents to Coopers for their use in carrying out the required annual review of his trust account. Mr. Brookfield testified as follows concerning this authorization:

> A. ... This particular card was obtained from our review of the Coopers & Lybrand firm, which is a firm of chartered accountants who carried out Mr. Wood's annual required review of his trust account ledgers. And they happened to keep some copies. Mr. Wood had given us permission in writing to ask Coopers for any information that they may have because he was missing a lot of records himself. And that's where that came from.

[119] The first question with respect to these documents is whether they were in Mr. Wood's possession for the purposes of the documents in possession doctrine. In **Caccamo v. The Queen**, [1976] 1 S.C.R. 786, one of the issues was whether a certain document was admissible on the basis that it was discovered in a cupboard in the accused's house and, therefore, in his possession. Both the majority and dissenting judges referred to the definition of "possession" found in what is now s. 4(3) of the **Criminal Code**, R.S.C. 1985, c. C-46. In relevant part, that section states that "... a person has anything in possession when he ... knowingly has it in the actual possession or custody of another person."

[120] Applying that test for possession here, we conclude that these documents were in Mr. Wood's possession. The documents were, as a result of Mr. Wood's

actions and to his knowledge, in the actual possession or custody of the accounting firm.

[121] Did Mr. Wood recognize, adopt or act upon these documents so as to make them admissible for the truth of their contents? In our view he did. Mr. Wood authorized the release of these documents to Mr. Brookfield. Mr. Wood did this to satisfy his legal obligation to maintain and produce financial records relating to his practice. In this respect, the documents are in the same position as those which the appellant personally gave to Mr. Brookfield. The authorization effectively made the accounting firm Mr. Wood's agents for the purposes of responding to Mr. Brookfield's requirements and, in that sense, the firm's acts in turning the documents over to Mr. Brookfield on Mr. Wood's instructions are, in fact, Mr. Wood's acts.

[122] It is clear on the record that Mr. Brookfield examined the Coopers files and was able to testify that the copies of documents he had obtained were, in fact, copies of documents he had reviewed at Coopers' offices and which had been given to him in response to Mr. Wood's instructions. For example, in relation to Exhibit 83, Mr. Brookfield testified as follows:

> Q. And then Exhibit 83, could you identify that.
>
> A. Yes, Exhibit 83 is a subledger card on John Ross's behalf. And there were a number of cards in his name, and if you'd like, I would just check to see if that – where the location of that card came from. Would you like me to do that now?
>
> Q. Yes, if you need to refer to your notes to confirm that.
>
> A. Yes, I would like to because what I did is I kept a copy of all the information we received from Coopers separately. So I would like to just double-check that if that's okay.
>
> Okay, let me see. Yes, this is definitely a copy of a subledger card that Coopers had in their files and that we took copies of, as mentioned earlier with the permission of Mr. Wood.

[123] The documents obtained from Coopers at Mr. Wood's direction stand in the same position as those obtained directly from him and are, therefore, admissible for the truth of their contents.

[124] At trial and on appeal, arguments were advanced in relation to whether the testimony of Susan Wood was adequate to support the admissibility of copies of certain client ledger cards obtained from Coopers and Lybrand. As we have indicated, there was adequate evidence upon which the judge could find them to be admissible quite apart from the evidence of Ms. Wood.

[125] That leaves for consideration Exhibits 139 to 142. The Crown concedes that there is no evidentiary basis to support their admissibility as documents found in possession of the accused. The documents relate to counts 1 and 2 of the Indictment alleging theft and fraud against the Estate of Blanche Jewers. They are copies of Canada Trust statements of the account of the Estate of Blanche Jewers and some of the information contained in the statements was relied on by Mr. Brookfield in connection with his review of Mr. Wood's practice.

[126] The Crown submits that these documents were admissible under either the common law business records exception or under the principled approach to hearsay evidence. We agree. Even if they were not, there was a mountain of other admissible evidence capable of sustaining the conclusion that the estate's money had been diverted to Mr. Wood's own use.

[127] Mr. Jewers, the executor of the estate testified that, along with Mr. Wood, he opened an account at Canada Trust to pay the estate's bills and that he provided Mr. Wood, at his request, with signed, blank cheques. Mr. Jewers said that he was relying on Mr. Wood to pay whatever bills there were owing by the estate and to act on the sale of the deceased's house. Mr. Jewers was shown a number of cheques, totalling roughly $52,000 on which he identified his signature. All were cheques payable either to Mr. Wood or Mr. Wood in trust and in relation to which the executor testified Mr. Wood had no permission to divert estate funds to himself and of which Mr. Jewers had no knowledge.

[128] In most of the transactions at Canada Trust on which the Crown relied, references to withdrawals in the account statements were supported by the cheques on that account payable to Mr. Wood (or Mr. Wood in trust) and endorsed by him. In three transactions, totalling just over $27,000, the account statements appear to have been the only evidence of withdrawal from the account. In other words, in all but three instances, the withdrawals from the Jewers' estate account at Canada Trust were supported by the cheques themselves. In these instances, there was

ample other evidence apart from the account statements to support the conclusion that in excess of $5,000 had been stolen from the estate by Mr. Wood.

[129] Quite apart from the Canada Trust transactions relating the Jewers' estate, Mr. Wood's own trust account ledger for his trust account at the Bank of Nova Scotia was in evidence. It, in the context of the other admissible evidence, supported a conclusion that over $46,000 had been stolen by Mr. Wood from his own trust account for the Jewers' estate.

[130] In other words, even if all the transactions recorded on the Canada Trust account statements were ignored (and on any reasonable assessment of the record, the inadmissibility of these exhibits could only put at risk proof of three of the transactions) there was ample evidence to sustain the conviction for theft and fraud over $ 5,000. Exclusion of the Canada Trust account statements could not possibly have altered the outcome of the trial of these counts.

[131] The only possible impact of exclusion of the account statements could have been with respect to the amount of the restitution order. However, Mr. Wood, in submissions advanced on his behalf on sentencing did not in any way question the amount put forward by the Crown.

[132] We conclude that even if the Canada Trust account statements should not have been admitted, this error could not possibly have affected the result of the trial on Counts 1 and 2 or the amount of the restitution order.

3. Miscellaneous Issues

[133] The appellant raised several other issues. We advised the Crown at the hearing of the appeal that it would not be necessary to respond to them. We will address them briefly in this section of our reasons.

(a) unreasonable verdict

[134] In his notice of appeal, Mr. Wood says the verdicts were "... perverse, wrong in law and against the weight of the evidence." This ground was not pursued in the appellant's factum. There was ample evidence upon which a properly instructed jury could reasonably have found the appellant guilty of the offences charged.

(b) continuous trial

[135] Mr. Wood complains that the trial was adjourned from Tuesday, June 2 to Monday, June 8 to permit the judge, who had unexpectedly taken over the conduct of the trial due to the illness of the original trial judge, to honour a commitment to participate in a judicial education conference. The effect was that three (Wednesday to Friday) regular sitting days were missed. Mr. Wood further complains that his summation took place on June 24, the Crown's on June 25 and the judge's directions were given on June 26 with the result that Mr. Wood's summation to the jury was completed two days before the charge was given. He claims that his trial was not continuous as required by s. 645(1) of the **Criminal Code**.

[136] The trial judge has discretion to adjourn the trial as is recognized by s. 645(1). The decision to do so is discretionary and the judge made no error in principle in exercising it as he did in the context of this multi-week trial. His decisions in this regard caused no injustice. There is, therefore, no basis for appellate interference.

(c) improper questions

[137] The appellant submits that the judge erred by permitting the Crown to ask questions of Crown witnesses based on facts not in evidence and not proved. We assume that the appellant is referring to the evidence of Percy Jewers, Edward Gillis, David Conrad, Umesh Jha and John Ross, each of whom was asked whether they had given Mr. Wood permission to carry out certain transactions in relation to trust money. In each case, the judge carefully directed the jury that it would be for them to determine, on the basis of admissible evidence, whether any of the underlying transactions had actually taken place and that the Crown referring to them in questions was not evidence. The appellant has not identified any such questions in relation to which an instruction of this type was not given. There was no error on the part of the trial judge in permitting these questions to be asked in the circumstances here and his mid-trial directions would have made it clear to the jury that they must make findings on the evidence, not on the assumptions on which the questions were based.

(d) jury charge

[138] The appellant advanced the following grounds of appeal in relation to the jury charge:

> 23. THAT the learned Associate Chief Justice Kennedy erred in law in his charge to the jury by failing to instruct the jury not to consider or disregard that the Nova Scotia Barrister's Society had reimbursed two of the alleged victims of the Appellant and further erred by instructing the jury, without adequate explanation, to ignore the Appellant's request in summation to send a message to whatever authorities regarding the provision of legal counsel for accused persons in jury trials;
>
> 25. THAT the learned Associate Chief Justice Joseph Kennedy erred in law in his charge to the jury by telling the jury that: the dates of the alleged offences extended to March 31, 1995; the offences relating to John Ross could mean either the father John Ross or the son John Ross; and that there were two estates as alleged victims;
>
> 27. THAT the learned Associate Chief Justice Joseph Kennedy erred in law in his charge to the jury by following the outline of alleged offences as set out in the flow chart prepared by Grant Shaw, which flow chart was not admitted in evidence and objected to by the Appellant;

[139] It will be convenient to consider the charge in relation to the appellant's disbarment and the reimbursement of former clients in the next section where the admission of evidence in relation to these two matters is addressed. With respect to the other issues raised by these grounds, we find that they have no merit. The judge did not err in telling the jury to ignore Mr. Wood's request that their verdict should "send a message" regarding the provision of legal counsel for accused persons in jury trials. That was not the jury's function as the judge made clear to them. In relation to the review of the evidence in the charge, the judge, in our respectful view, succinctly and fairly placed before the jury the essentials of the evidence. This was a multi-count indictment with many individual transactions and a multitude of documents. In a case of this nature, the jury inevitably looks to the judge for assistance in making sense of the large volume of evidence. Their expectations were not disappointed in this case. Whatever outline the judge may have followed in organizing his charge, the appellant has not identified any specific problem with his review of the evidence and we see none.

[140] The other points raised within these grounds complain of alleged minor misstatements of the evidence. The judge clearly and properly instructed the jury that they were not bound by his review of the evidence and that they should rely on their own recollection of the evidence. In relation to the direction concerning whether the Indictment referred to Mr. Ross, Sr. or Mr. Ross, Jr., we do not accept the interpretation of this direction advanced by the appellant and find no error with respect to it.

(e) evidence of disbarment and reimbursement

[141] We will address here both the admission of this evidence as challenged in ground 24 as well as the appellant's complaints with respect to the judge's charge in relation to the reimbursement issue as raised in ground 23.

[142] With respect to evidence of disbarment, this was elicited in passing in the appellant's cross-examination of Mr. Brookfield. It was dealt with by a full and strong instruction by the trial judge that this finding was irrelevant to the matters before the jury and must be ignored by them in reaching their verdicts. As for evidence of reimbursement of the alleged victims by the Bar Society, exclusion of this evidence might well have been more prejudicial to the accused than its admission as it might have left the impression with the jury that the appellant's clients had not been reimbursed for the very significant losses about which the jury had heard extensive evidence. The judge did not err by not addressing the reimbursement issue in his charge.

(f) severance of counts

[143] This issue is raised in ground 26 of the notice of appeal. Severance is a discretionary decision for the trial judge. There were strong factual and legal connections among these counts and severance would have lead to a multiplicity of proceedings and considerable duplication of evidence. We see no basis upon which we should or could interfere with the exercise of the trial judge's discretion.

(g) Crown address to the jury

[144] This issue is raised in Ground 30 of the notice of appeal. The appellant has not identified any objectionable passages and we do not see any aspect of Crown

counsel's address that would justify appellate intervention.

Conclusion on Appeal from Conviction

[145] For these reasons, we dismiss the appeal against conviction.

4. The Sentence Appeal

[146] The appellant was convicted of nine counts of stealing from his clients and nine counts of defrauding his clients. Applying the **Kienapple** principle, the trial judge did not enter convictions on the related fraud counts. He imposed consecutive sentences totalling five years on the nine theft counts. The breakdown of the consecutive sentences was as follows: (a) 10 months each for stealing a sum exceeding $5,000 from each of the estate of Blanche Jewers, James Phillips and John Ross; and (b) five months each for stealing a sum exceeding $5,000 from each of Marion Conrad Voigt, Alan Dauphinee, Bruce Pettipas, Janet Ellen Rafters, Umesh Jha and David Roback.

[147] Kennedy, C.J. (as of July 1, 1998) also ordered the appellant to pay restitution to the Nova Scotia Barristers' Society in the amount of $196,094.00 to compensate it for the sums paid out to the appellant's clients by the Bar Society. He did not express his reasons for making the restitution order.

[148] At the outset of the sentencing hearing on September 1st, 1998, Kennedy, C.J. stated that he had read the pre-sentence report and the information that had been provided to him from clients, relatives and others in support of the appellant.

[149] Counsel for the Crown sought a term of imprisonment of between five and eight years and a restitution order to reimburse the Barristers' Society for the amounts paid to clients from whom the appellant had stolen trust monies. It should be noted that while the appellant had taken monies from the trust accounts of all the persons referred to in the Indictment, with the exception of the Estate of Blanche Jewers and John Ross, the monies were restored to the respective accounts from time to time by thefts from other victims' accounts. The only ultimate losers were the Jewers' estate and John Ross.

[150] Prior to counsel for the appellant making his submissions on sentence, the

appellant publicly apologized. He stated:

> Thank you, My Lord. My Lord, I have made my own private apology and so there is no misunderstanding or omission today, I want to apologize in public to my clients, to my former colleague, to my family, and to this Court, and to the Crown and to my friends who supported me.
>
> I can't undo what has been done. I do feel guilt and remorse about this. I've caused a tremendous amount of harm to many people and not just the people who were listed as victims in this case. That's only the tip of the iceberg. All the lawyers in this province, the judicial system, and friends, and relatives, and it's not just the consequences to me personally.
>
> I have learned over the last three years – since it started on March 3rd, 1995, I have learned that my actions just do not affect me and they have been devastating to myself personally but even more devastating for people I care about.

[151] In both written and oral submissions to Chief Justice Kennedy, counsel for the appellant suggested that a sentence of between two and two and one-half years would be appropriate. With respect to the issue of the restitution order, counsel for the appellant stated:

> ... Mr. Wood has also mentioned to me that he is prepared to enter into, voluntarily, any stand-alone restitution order this Court may order. ... Mr. Wood has told me that it is his intention, when he gets back on his feet to pay back any monies which former clients are out and he would voluntarily enter into the restitution order.

The Sentencing Judge's Remarks

[152] In passing sentence on the appellant, Kennedy, C.J. commented:

(i) that he recognized the obvious fact that the appellant had suffered significantly as a result of his disbarment and that he would not be able to practice law again;

(ii) that every lawyer knows that there are significant penal consequences if the lawyer steals from clients' trust accounts;

(iii) that a lawyer knows that it is "almost inevitable" that the

consequences are “federal time”;

(iv) that he was aware of the appellant’s personal situation being [financially] responsible for not only children of his marriage but also for his two year old child born to the female with whom he had had a common law relationship for several years;

(v) that he considered the appellant’s principal submission that specific deterrence in particular was not necessary as the appellant will not be able to again practice law;

(vi) that general deterrence, in the appellant’s case, was an appropriate consideration so as to bring home to lawyers the consequences of stealing from their clients;

(vii) that he considered the sentences imposed on the Nova Scotian lawyers - Delaney (4½ years plus restitution) and Calder - (2 years). With respect to the two year sentence he imposed on Calder when he was provincial court judge, Chief Justice Kennedy contrasted the circumstances that gave rise to that sentence with that of the appellant. He stated:

> Mr. Calder’s situation differed markedly. He had made full restitution. He had through his counsel, as indicated, contacted the police and cooperated fully in the process of the investigation in the matter. He came before the Court and demonstrated what I was satisfied at the time was true and obvious remorse, and accepted what he knew was going to be a term in a federal institution. I remember being impressed by Mr. Calder, at least at the time of sentencing. He stood up and took what he knew was going to happen to him, because he was a lawyer and he knew what the consequences are.

(viii) that this was not a simple case of “taking from Peter to pay Paul” as regularly money ended up in the appellant’s pocket;

(ix) that with respect to the Estates of Blanche Jewers and Carolyn Ross, the appellant’s actions constituted “systematic looting over a period of years”.

[153] Kennedy, C.J. concluded his sentencing remarks as follows:

> . . . I've considered the general deterrent aspect of sentencing, I have considered the individual, the human being who is present before this Court today and what his obligations are, and the fact that whatever happens to him, other people will be victimized.
>
> I have considered the victims of the offences that have been committed. I have considered the totality principle and the totality principle is everything in relation to this matter. And I want that stressed because I will be accomplishing a totality through consecutive sentencing on the nine counts, but I do not want people to make too much of the individual consecutive sentences. It is the totality that I am trying to accomplish, and once totality is reached, the individual sentencing often becomes no more than mathematics.

[154] Chief Justice Kennedy then imposed consecutive sentences totalling five years and made the restitution order.

Appellant's Submissions on the Appeal

[155] The appellant submits that: (a) the sentence does not accord with the sentencing regime created by Parliament with the enactment of the new Part XXIII of the **Criminal Code** which came into force on September 3rd, 1996 ; (b) five years imprisonment is harsh and excessive; (c) the sentencing judge over emphasized general deterrence; (d) the sentence is out of line with recent sentences imposed in **Calder**, unreported, **Saunders**, unreported and **Bunn**, [2000] 1 S.C.R. 183; (e) the sentencing judge did not have jurisdiction to make a restitution order and that there was no factual basis for making the same; and (f) the sentences imposed should have been concurrent rather than consecutive as the trial judge had refused to sever the counts at the outset of the trial.

Disposition of the Appeal

[156] We have been advised that the appellant was conditionally released on parole after serving approximately one year of his sentence. He had been sentenced on September 1st, 1998. He was living in a community based residential facility when he was granted bail by this court on October 26th, 1999; the Order released him from custody pending the determination of this appeal.

[157] Section 687 of the **Criminal Code** governs appeals taken against sentence:

> **687. (1)** Where an appeal is taken against sentence, the court of appeal shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against, and may on such evidence, if any, as it thinks fit to require or to receive,
>
> (a) vary the sentence within the limits prescribed by law for the offence of which the accused was convicted; or
>
> (b) dismiss the appeal.

[158] The standard of review to be applied by this court is as stated in **R. v. Shropshire**, [1995] 4 S.C.R. 227 and **R. v. M. (C.A.)**, [1996] 1 S.C.R. 500. In short, our function, in considering the fitness of the sentence appealed against, is to determine whether there was an error in principle by the sentencing judge, that is, a failure to consider a relevant factor or an over-emphasis of an appropriate factor or absent such error in principle, whether the sentence imposed is demonstrably unfit. An appeal court must bear in mind that sentencing is a matter for the discretion of the sentencing judge and that an appeal court ought to give appropriate deference to the conclusions of the sentencing judge. When an appeal court is considering the length of a sentence, it ought not to interfere if the sentence is within an acceptable range considering sentences imposed for similar offences by like offenders. It must also be borne in mind that in each case the circumstances of the offence and the circumstances of each offender invariably have factual differences. The sentencing judge and a court of appeal, in reviewing sentences, must also be mindful that Part XXIII of the **Criminal Code** in force since September 3rd, 1996, has expanded the sentencing options available to a sentencing judge and in particular bear in mind that the creation of the conditional sentence suggests a desire of Parliament to lessen the use of incarceration (**R. v. Gladue**, [1999] 1 S.C.R. 688 at § 40).

[159] The appellant submits that five years imprisonment is harsh and excessive as it exceeds the sentences imposed, in particular on lawyers Calder, Saunders and Bunn who had each stolen money from their clients. In our opinion, these cases are readily distinguishable.

[160] Calder, upon his actions being discovered, co-operated with the police, paid restitution and pleaded guilty. These are mitigating factors. Chief Justice Kennedy also observed that Calder was genuinely remorseful with respect to what he had done. Kennedy, C.J. did not express an opinion as to the genuineness of the appellant's remorse. The appellant did not plead guilty nor did he reimburse his

clients or the Bar Society.

[161] With respect to the conditional sentence imposed on Edmund Saunders just a few months ago, the most relevant factor in the sentencing judge's mind was that Mr. Saunders was an 82 year old lawyer who was not in good health. In addition, Saunders had fully reimbursed his clients. The Crown did not seek a sentence of two years or more. It is quite understandable that under these circumstances the trial judge gave consideration to a conditional sentence that would imprison Saunders in his own house.

[162] **Bunn** had converted trust money from his trust account to his general account. The amount involved was approximately $86,000.00 and the money was taken over a three and one-half year period and involved some 145 separate transfers of funds. Bunn was sentenced to two years imprisonment prior to the passage of the new sentencing regime that created conditional sentences. The Saskatchewan Court of Appeal varied the sentence by imposing a conditional sentence of two years less a day. The Supreme Court of Canada divided on the appeal. The majority stated that, in reviewing the Court of Appeal sentence, the Court should accord it some deference. The majority concluded that the effect of sections 718.2(e) and 718 (e) and (f) of the **Criminal Code** were sufficient to warrant the reduction of the sentence. The Supreme Court of Canada was satisfied that the Saskatchewan Court of Appeal reasonably concluded that the ruin and humiliation that the accused had brought down upon himself and his family together with the loss of his professional status could provide sufficient denunciation and deterrence when coupled with a conditional sentence of two years less a day with house arrest. The majority also made reference to the fact that the Saskatchewan Court of Appeal properly took into consideration the important mitigating circumstances that the accused was the sole provider and caregiver for both his disabled wife and their daughter.

[163] The real issue in **Bunn** dealt with what ought to be done when the law changes between the date the sentence is imposed on an offender and the date the appeal is heard. We do not have that issue in this appeal. At the time the appellant was sentenced, the conditional sentencing regime was in effect. What is most significant is that the Supreme Court of Canada accorded deference to the provincial appellate court which had taken into consideration the new sentencing principles embodied in Part XXIII of the **Criminal Code** recognizing that these

provisions were not available at the time the two year sentence was initially imposed.

[164] The appellant has also referred us to two other sentence decisions relating to Nova Scotia lawyers. In **R. v. Power** (1986), 72 N.S.R. (2d) 253 (N.S.S.C.A.D.), the lawyer was found guilty of eleven counts of fraud and theft arising out of the activities of an investment firm which the lawyer directed. The sentence of four years in a federal institution was undisturbed on appeal.

[165] In **R. v Delaney**, unreported, the lawyer pleaded guilty before the preliminary inquiry. The sentence judge took into consideration the fact that the lawyer had just started practising and sentenced him to four years.

[166] The Crown referred us to other sentences imposed on lawyers who had stolen from their clients. While the facts vary from case to case, the names of the cases and the sentences imposed are as follows: **R. v. Gruson,** [1963] 1 C.C.C. 240 (Ont. C.A.): 9 years; **R. v .Scherer** (1984), 42 C.R. (3d) 376 (Ont. C.A.): 7 years; **R. v. Gilhooly**, [1986] B.C.J. No. 743 (B.C.C.A.): 4 years; **R. v. Shandro**, [1985] A.J. No. 578 (Alta. C.A.): 3½ years; **R. v. Bowes**, [1994] N.B.J. No. 472 (N.B.C.A.): 4½ years; **R. v. Klynkiw** (1980), 53 C.C.C. (2d) 350 (Man. C.A.): 2 years; and **R. v. John Errol Farr** (1983), 9 W.C.B. 323 (Ont. C.A.): 5 years.

[167] All the sentence decisions to which the Crown has made reference were imposed before the new sentencing regime came into force.

[168] The appellant submits that the offences he committed were property offences, that he is a first time offender and that the sentence of a period of 5 years in the penitentiary did not reflect the principle that " all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, ... "(s. 718.2(e)).

[169] At the sentence hearing before Chief Justice Kennedy, the appellant's counsel did not submit that a conditional sentence ought to be imposed rather than a penitentiary term. In fact, he suggested a term of imprisonment of between 2 and 2½ years, which term would rule out a conditional sentence.

[170] The pre-sentence report discloses that the appellant was 49 years of age at the time of the sentencing, that he has two university degrees, a B.A. and a B.Sc.,

in addition to his law degree. He is the oldest of seven children and grew up in a somewhat dysfunctional environment in that his father was an alcoholic. The appellant married in 1971. He has two children of that union, aged 14 and 11 at the time of the sentencing. He was divorced in 1996. Since 1995, the appellant has had a relationship with Ms. Susan Hutchinson. They have a two year old child. Susan Hutchinson is very supportive of him. At the time of the sentencing hearing she was taking a PhD. in the State of Georgia. Ms. Hutchinson wrote in a submission made to Kennedy, C.J., prior to the sentencing hearing that the appellant was the primary caregiver of the two year old and of the 14 year old son of his marriage. Ms. Hutchinson suggested house arrest. She wrote a compelling letter outlining the devastating effect imprisonment would have on the appellant's children. As previously noted, counsel for the appellant did not make a submission to the trial judge that a conditional sentence would be appropriate. It is quite clear that Chief Justice Kennedy did not expressly consider this possibility. We would infer from his remarks that he was firmly of the view that the offences required a substantial period of incarceration because the appellant abused a position of trust. That is an aggravating circumstance that Parliament has directed should increase a sentence (**Criminal Code**, s. 718.2(a)(iii)).

[171] In **R. v. Proulx** (2000), 140 C.C.C. (3d) 449 (S.C.C.), the Court stated that a conditional sentence will generally be more effective than incarceration to achieve the restorative objectives of rehabilitation because the sentence will be served in the community. However, it is quite obvious that such a sentence may not adequately achieve the objectives of denunciation and deterrence which are relevant factors to be considered in sentencing lawyers who steal from their clients' trust accounts. It is clear from Chief Justice Kennedy's decision that he considered the principles of denunciation and deterrence in imposing a significant period of incarceration on the appellant. In **Proulx,** the Supreme Court has expressed the view that Parliament has mandated that an expanded use be made of restorative principles because of the general failure of incarceration to rehabilitate offenders. In our opinion, the prospect of a significant period of incarceration should a lawyer steal trust funds from his clients is a strong deterrent that protects society from such acts by lawyers, and contributes to respect for the law and the maintenance of a just, peaceful and safe society (s.718).

[172] Chief Justice Kennedy did not err in failing to impose a conditional sentence on the appellant.

[173] The sentence imposed by Chief Justice Kennedy accords with the principles of sentencing for the following reasons: (i) the sentence reflects the principle of denunciation and deterrence (s. 718(a) and (b)); the sentence promotes a sense of responsibility in the offender (s. 718(f)); (iii) the sentence reflects the aggravating circumstance that the appellant abused a position of trust (s. 718.2(iii)); and, (iv) the sentence reflects the principle that a sentence should be "similar to sentences imposed on similar offenders for similar offences committed in similar circumstances" (s. 718.2(b)).

[174] While one may have sympathy and concern for the appellant's children, his common law wife and the appellant himself who is suffering from depression, Chief Justice Kennedy was aware of all of these facts and of the submissions made on the appellant's behalf. We are satisfied that Chief Justice Kennedy did not over-emphasize general deterrence nor did he overlook relevant factors. Emphasis on general deterrence is quite appropriate when sentencing lawyers who steal trust funds from their clients. Chief Justice Kennedy felt it appropriate that he remind members of the Bar of the serious consequences of stealing trust funds. This was not an error in principle considering the length of time over which the appellant committed these offences, the extent of his deception, and the large sums involved. Denunciation and deterrence are express objectives that may be applied with the hope of achieving the fundamental purpose of sentencing as defined in s. 718 of the **Criminal Code**.

[175] The sentence of imprisonment was not inconsistent with the purposes and principles of sentencing as provided for in the **Criminal Code**. The sentence of five years imprisonment, considering the varying circumstances and varying sentences imposed on like offenders (lawyers) for similar offences (theft from clients' trust accounts), cannot be said to be demonstrably unfit for this offender for these offences.

[176] In short, considering all the circumstances of the offences and the offender and the purpose and principles of sentencing, as well as the deference owed by appeal courts to sentences imposed by trial judges, the five year term of imprisonment imposed on the appellant is within an acceptable range and ought not to be disturbed.

[177] Whether sentences are to be served concurrently or consecutively is in the discretion of the sentencing judge (**MacDonell v. The Queen** (1997), 114 C.C.C. (3d) 436 (S.C.C.). The fact that the trial judge would not sever the counts is of insignificant relevance as Chief Justice Kennedy recognized that the totality of the sentences was what was critical in the exercise of his discretion. This was an appropriate case in which to impose consecutive sentences.

The Restitution Order

[178] On appeal the appellant submits that there should not have been an order for restitution as the sentencing judge did not have jurisdiction to make such an order nor was there a factual basis for making the order he did. With respect, we disagree with both submissions except to the extent of reducing the amount of restitution to be paid from $196,094.15 to $182,245.00 in order to correct a mathematical error, as proposed by the Crown.

[179] Section 738(1)(a) of the **Criminal Code** provides:

> **738. (1)** Where an offender is convicted or discharged under section 730 of an offence, the court imposing sentence on or discharging the offender may, on application of the Attorney General or on its own motion, in addition to any other measure imposed on the offender, order that the offender make restitution to another person as follows:
>
> (a) in the case of damage to, or the loss or destruction of, the property of any person as a result of the commission of the offence or the arrest or attempted replacement value of the property as of the date the order is imposed, less the value of any part of the property that is returned to that person as of the date it is returned, where the amount is readily ascertainable;
>
> . . .

[180] Section 39 of the **Barristers' and Solicitors' Act**, R.S.N.S. 1989, c. 30, provides that where a payment is made from the reimbursement Fund of the Barristers' Society to cover theft by a member from a client of the member that the Fund is subrogated to the rights and remedies to which the client was entitled as against the member of the Bar Society.

[181] In **R. v. Fitzgibbon**, [1990] 1 S.C.R. 1005; (1990), 55 C.C.C. (3d) 449, the Supreme Court of Canada had occasion to consider the meaning and effect of s. 653 of the **Criminal Code**, R.S.C. 1970, c. C-34 (a predecessor to s. 738), and to consider provisions of the **Law Society Act of Ontario** similar to s. 39 of the Nova Scotia **Barristers' and Solicitors' Act**.

[182] Section 653 was worded as follows:

> 653 (1) A court that convicts an accused of an indictable offence may, upon the application of a person aggrieved, at the time sentence is imposed, order the accused to pay to that person an amount by way of satisfaction or compensation for loss of or damage to property suffered by the applicant as a result of the commission of the offence of which the accused is convicted.
>
> (2) Where an amount that is ordered to be paid under subsection (1) is not paid forthwith the applicant may, by filing the order, enter as a judgment, in the superior court of the province in which the trial was held, the amount ordered to be paid, and that judgment is enforceable against the accused in the same manner as if it were a judgment rendered against the accused in that court in civil proceedings.

[183] We have compared s. 653 to s. 738(1)(a) and we are satisfied that the provisions of s. 738(1)(a) are broader in scope than s. 653 considered in **Fitzgibbon**. We are also satisfied that the reasoning of the Court in **Fitzgibbon**, relevant to the jurisdictional issue, and the reasoning as to what circumstances warrant the making of a restitution order are applicable in considering whether such an order ought to be made pursuant to s. 738(1)(a).

[184] With respect to the jurisdictional issue, this question is fully answered by reference to s. 738(1)(a) of the **Criminal Code,** s. 39 of the **Barristers' and Solicitors' Act** and the decision of the Supreme Court of Canada in **Fitzgibbon, supra**. Clearly, Chief Justice Kennedy had jurisdiction to make a restitution order in favour of the Barristers' Society provided the facts before the Court were sufficient to readily prove the amount of the loss and warranted the making of such order.

[185] We are satisfied that both the Jewers' estate and John Ross are persons who had lost property as a result of the commission of offences by the appellant and would be entitled to an amount not exceeding the replacement value of the

property lost. Mr. Brookfield, in his trial evidence, quantified the loss to the Jewers' estate at $121,747.70 and that 75% of this loss was reimbursed by the Barristers' Society to the Jewers' estate. Mr. Brookfield's evidence also shows that the loss to John Ross totalled $121,500.29 and that he had been reimbursed by the Barristers Society to the extent of 75%. These amounts were not challenged by Mr. Wood at the sentencing hearing. The evidence supports a finding that the Barristers' Society would have paid out $182,435.99 to the appellant's clients. The Barristers' Society is subrogated to their rights without further proof and without the need to commence civil proceedings (s. 39 **Barristers' and Solicitors' Act, supra**, and **Fitzgibbon**).

[186] As is clear from **Fitzgibbon**, **supra**, the power to make a concurrent order for restitution as part of the sentencing process is discretionary.

[187] As a general rule, the ability to pay is a factor to be considered by a sentencing judge who is contemplating making a restitution order **(R. v. Zelensky**, [1978] 2 S.C.R. 940; 41 C.C.C. (2d) 97; 86 D.L.R. (3d) 179). There is no evidence as to the ability of the appellant to pay the restitution order. However, it is a reasonable inference that his ability to comply with the order is doubtful. That said, the Supreme Court of Canada in **Fitzgibbon** clearly states that ability to pay, with respect to a lawyer who has stolen from his clients, is not the paramount consideration. The Court stated at 55 C.C.C. (3d) 456:

> The appellant was a lawyer who defrauded his clients. He used his position to defraud the very persons who had every reason to trust and rely upon him. The fraudulent acts of a lawyer directed against his own clients warranted the imposition of a compensation order even though the lawyer's means at the time of sentencing were minimal. The claims of the victims of fraudulent acts should be paramount. This seems to be recognized by s. 148 (now s. 178) of the *Bankruptcy Act*. That section provides that the discharge of a bankrupt does not release him from any debt or liability arising out of a fraudulent act committed by him while acting in a fiduciary capacity.
>
> (emphasis added)

[188] In view of the foregoing authority, it cannot be said that Chief Justice Kennedy erred in granting the restitution order.

[189] We have been advised that the Barristers' Society has now fully reimbursed

the Blanche Jewers' Estate and John Ross. Apart from the appellant's submissions, which we have rejected, there has not been any submission to us that the order be varied other than to correct the amount of restitution ordered ($196,094.15), to $182,425.00.

Conclusion

[190] The appellant stole from his clients. Chief Justice Kennedy's decision to impose a five year term of imprisonment plus ordering restitution speaks to the need to stress denunciation and deterrence in the sentencing of lawyers who steal from their clients. The sentence is not demonstrably unfit. It is entitled to deference from this court. Accordingly, this court shall not interfere with the exercise of the sentencing judge's discretion, either with respect to the length of the penitentiary term or the making of the restitution order, with the exception of varying that order to reduce the amount ordered to be paid by the appellant from $196, 094.15 to $182,425.99.

[191] Leave to appeal is granted. The amount of the restitution order is varied to $182,425.99. In all other respects the appeal from sentence is dismissed.

Roscoe, J.A

Hallett, J.A.

Cromwell, J.A.