NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Herritt*, 2019 NSCA 92

Date: 20191203
Docket: CAC 482969
Registry: Halifax

Between:

Anthony Robert Herritt

Appellant

v.

Her Majesty the Queen

Respondent

Judge: The Honourable Justice Duncan R. Beveridge;

Appeal Heard: May 14, 2019, in Halifax, Nova Scotia

Subject: Criminal law: appeal of a trial judge's interlocutory ruling; process to resolve potential solicitor-client privilege.

Summary: The appellant faced charges of possession of cocaine for the purpose of trafficking. The police examined pursuant to warrant the appellant's cell phone that had been seized from him on arrest. The Crown discovered photographs of unrelated legal correspondence on the phone. The Crown sealed the phone's contents. The police produced an extraction report that restricted data to text messages for the week prior to the appellant's arrest on charges of possession of cocaine for the purpose of trafficking. The Crown asked the trial judge to order the appellant's trial counsel to take possession of the extraction report and determine if his client wished to assert privilege over any of the text messages. Appellant's trial counsel objected. The trial judge granted the relief requested. Rather than comply, the appellant announced a plea resolution had been reached that involved another criminal charge in Dartmouth and a joint recommendation on sentence, said to be conditional on the appellant keeping his right of appeal from the trial judge's order.

A detailed Agreed Statement of Facts set out very specific admissions, including that the appellant had the cocaine in his possession for the purpose of trafficking. Conviction followed. The judge accepted the jointly recommended sentence. The appellant claimed the trial judge erred in admitting the text messages found in the extraction report

Issues:

(1) Should the Court entertain the appeal?
(2) Did the trial judge commit reversible error?
(3) What is the appropriate remedy?

Result:

The appeal was moot. There was no causal connection between the trial judge's interlocutory order to determine if the appellant asserted solicitor-client privilege and the conviction. Even if not moot, the trial judge enjoys a wide latitude to manage the trial process. The wording of the order could have been better, but in the circumstances of this case, it did not amount to reversible error. The interlocutory order is moot, and the only appropriate remedy is to dismiss the appeal.

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Judges:	Beveridge, Saunders and Derrick, JJ.A.
Appeal Heard:	May 14, 2019, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Beveridge, J.A.; Saunders and Derrick, JJ.A. concurring
Counsel:	Lee Seshagiri and Joshua Nodelman, for the appellant David Schermbrucker and Rachel Furey, for the respondent

INTRODUCTION

[1] The appellant challenges a trial judge's order that defence counsel review materials to determine if solicitor-client privilege protected any of the materials found on his cell phone.

[2] Rather than comply with the order, plea negotiations resulted in a resolution of the present charge along with an outstanding charge in Dartmouth Provincial Court.

[3] An Agreed Statement of Facts was presented to the trial judge. Defence counsel invited conviction. The judge obliged and subsequently imposed the jointly recommended two-year sentence of imprisonment.

[4] Trial counsel asserted that the resolution was subject to the appellant preserving his right to appeal from the trial judge's order.

[5] Trial judges should be afforded considerable latitude in determining the best procedure to resolve potential claims of solicitor-client privilege. The trial judge's decision and order are less than ideal but not reversible.

[6] Despite serious misgivings whether this Court should entertain this appeal, I would dismiss the appeal on its merits.

[7] To understand my misgivings and the result, I need to set out the facts and the procedural events before and after the impugned order.

THE FACTS AND PROCESS

[8] On May 31, 2017, the police were called to the Sunnyside Mall in Bedford about a liquor violation. The appellant displayed obvious signs of intoxication. He had glassy eyes, slurred speech and made nonsensical remarks. Sgt. Martin arrested him for public intoxication. The appellant had a backpack in his possession at the time of arrest.

[9] Sgt. Martin began to search the backpack incident to that arrest. Two females arrived. One of them was a minor, K.P. She claimed the backpack was hers. Beer and liquor were found in the pack. The pack was temporarily returned to her, minus the alcohol.

[10] The police ended up arresting K.P. for causing a disturbance. A more thorough search of the backpack turned up 67.8 grams of cocaine and score sheets.

[11] When the police completed a search of the appellant, they found $940, mostly in $20 denominations, in his front pants pocket, and a Samsung cell phone.

[12] Both K.P. and the appellant were separately charged with possession of cocaine for the purpose of trafficking, contrary to s. 5(2) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19. Because K.P. was a youth, her proceedings took place in Youth Court, while the appellant elected trial by Supreme Court judge, without a jury.

[13] The police obtained a search warrant to permit the RCMP Tech Crime Unit to examine the contents of the Samsung cell phone. The Unit produced an extraction report on a disk. It contained 34,000 items. The Crown duly disclosed the extraction report to counsel for K.P. and the appellant.

[14] A Provincial Court judge committed the appellant to stand trial at the end of a Preliminary Inquiry. The appellant appeared in Supreme Court on February 1, 2018. He pled not guilty.

[15] The parties returned for a pre-trial conference which led to May 7, 2018 as the date first set for trial.

[16] Joshua Nodelman, of Nova Scotia Legal Aid, acted throughout for the appellant. He gave notice of his intention to bring a *Charter* motion to exclude the fruits of the searches on the basis of alleged violations of ss. 8 and 9 of the *Charter*.

[17] Intervening events prevented the trial from proceeding on May 7, 2018. The defence did not yet have the Preliminary Inquiry transcript. The Crown discovered an issue with the 34,000 item extraction report it had disclosed to K.P. and the appellant.

[18] The extraction report issue arose on February 22, 2018. Crown counsel started to review the disk of 34,000 items. He found photographs of letters forwarded to the appellant from a lawyer at Nova Scotia Legal Aid. The letters were about an unrelated case. Crown counsel sealed the extraction report and secured the return of the copies that had been provided to the defence.

[19] These developments led to the release of the May 7 trial date. Initially, the Crown filed an application to have a Supreme Court justice review the 34,000 items on the disk to determine whether any of its contents were protected by solicitor-client privilege. This process is often referred to as a *Lavallee* application. In a nutshell, it requires a judge or court-appointed arbiter to decide if materials are protected by privilege. I will explain later why the process has that label and what it typically involves.

[20] There was no *Lavallee* hearing. The parties set September 21, 2018 as the trial date. The Crown intended to bring a pre-trial application in advance of trial to resolve the solicitor-client problem. It mused that it may try to narrow the data captured by the extraction report to make the process more manageable.

[21] The Crown filed an application with an affidavit of September 5, 2018. It attached a new extraction report as Exhibit "A" in a spreadsheet format that just reproduced text messages for the period May 24-31, 2017. The spreadsheet detailing those messages came to 500 pages. Exhibit "A" was sealed. Neither the police nor the Crown had viewed the messages.

[22] The Crown's application asked the trial judge, the Honourable Justice James Chipman, to order Mr. Nodelman to receive and review the 500-page document and report back to the Court whether the appellant claimed that any of the messages were protected by solicitor-client privilege.

[23] Mr. Nodelman resisted. He argued that to require him to look at the text messages would be to conscript defence counsel to assist the Crown in the prosecution of his client. There were just two options open to the Crown: return the entirety of the material to the appellant or proceed with a *Lavallee* application. There should be no short-cuts.

[24] The Crown's application was heard by Chipman J. on September 13, 2018. I will set out further details of the hearing, as it may help explain why the trial judge's order was not ideal.

September 13 Hearing

[25] Both the Crown and the appellant notified the Nova Scotia Barristers' Society of the pre-trial application about solicitor-client privilege. The notification included the proposed method of resolution. The Society declined to intervene.

[26] The Crown's position was simple: direct Mr. Nodelman to take possession of the 500-page report and review it with his client to determine if the appellant asserted privilege over any of the text messages. Crown counsel suggested that he had no reason to think there were solicitor-client communications in the one week of text messages. Despite the "extremely low" risk of there being a privileged text communication, the Crown was being cautious.

[27] In terms of process, if there were no privileged material, then subject to a successful *Charter* application to exclude the fruits of the search, the Crown could introduce the relevant text messages, if any. If Mr. Nodelman did identify texts over which the appellant claimed privilege, Mr. Nodelman would black out the text on his copy. The Crown assured Justice Chipman that he could 99% guarantee the Crown would accept the assertion of privilege.

[28] The Crown said it was not asking the Court to conscript Mr. Nodelman into assisting the Crown in the prosecution of the appellant. Mr. Nodelman, as defence counsel, would ordinarily see and review the very material in question as part of Crown disclosure. Although it is the appellant's privilege, he had no legal training and would need to rely on counsel's advice about what material might be protected.

[29] Mr. Nodelman reiterated his concerns: he had a duty of loyalty to his client and should not be looking at materials that may be protected by solicitor-client privilege as it is his client's privilege. It would be different, he said, if the solicitor-client communication involved a lawyer from the same Legal Aid office. To force him to look at the texts would cause him to be privy to solicitor-client information that he should not see and place him in a position of divided loyalty. He argued:

> I mean, for instance, My Lord, I have a duty of loyalty to my client. Now, I've – hypothetically I haven't seen the contents of this – this – and I might have skimmed over a little bit and then put it away, and then I was notified by the crown and told to hand in my CD, which I did immediately. But what if there are hypothetically communications that would tend to go to the crown's case in that he's – my client is accused of being in possession of narcotics for the purpose of trafficking. This is an interesting question. I mean Mr. Schermbrucker is saying, well, we'll trust you. Well, like I say, I mean I'm in a – in a – I'm in a dangerous place is what I would say as a lawyer as far as my – my – I have duties as an officer of the court, but I have a duty of loyalty and advocacy to my client. What if I over-redact? I mean I don't think I'm going to do it, My Lord, but if we're going to set that as a precedent, that's a – you are placing the defence part in a

> very dangerous position if you're going to make an order that says it's – that you're going to put me in a position that almost strains at my – at – at two different kinds of loyalty I have, and says – well, you're saying, well, we trust you're going to conduct yourself as an officer of the court, which means that you're going to comport yourself in a way that's fair to the crown. And I – the road to perdition for some counsel, My Lord, I would suggest would lie there.

[30] At the end of submissions, the trial judge announced he would deliver an oral decision, with written reasons to follow. The relevant parts of his oral reasons are as follows:

> [1] THE COURT: My decision is that I am going to direct Mr. Nodelman to review the entirety of the affidavit, inclusive of Exhibit A, so as to determine what is privilege[d] from a solicitor-client standpoint. And of course, as we all know, it's Mr. Herritt's privilege. And to identify and redact any such solicitor-client privilege.
>
> [2] Then to provide the redactions to both the crown – or the entirety of the Exhibit A to the crown and the court, but that the court would then review the redactions, whereas the crown would not see them, the court would, and the court would then have a supervisory role, if you will, in respect of those claims for solicitor-client privilege, if any.

The Order and Written Reasons

[31] The trial judge's September 18, 2018 order directed:

> 1. Counsel for the respondent, Dr. Joshua Nodelman, shall receive the original copy of Exhibit A to the affidavit of Anna-Marie Castellarin, and shall review it in order to determine whether any of its contents are protected by solicitor-client privilege; and
>
> 2. After his review, Dr. Joshua Nodelman shall then return the original of Exhibit A to this Court; and
>
> 3. If Dr. Nodelman has identified any material within Exhibit A that he believes is protected by solicitor-client privilege he shall redact that material on a copy of Exhibit A and shall return that redacted copy to this Court, for further consideration by this Court.

[32] The oral decision and subsequent order are, unfortunately, somewhat confusing. The Crown did not ask the trial judge to direct defence counsel to determine whether any of the texts were protected by solicitor-client privilege—only whether his client wished to assert privilege over any of the text messages.

[33] However, the September 18 Order appeared to direct appellant's trial counsel to make that determination. That is patently not counsel's decision to make. It is up to the Court to determine if communications or other materials are protected by solicitor-client privilege.

[34] Perhaps the trial judge meant that Mr. Nodelman was to review the text messages with his client to determine if the appellant wished to *assert* solicitor-client privilege on any of the contents. Then, if the Crown contested the privilege claim, the trial judge would *decide* the issue, if necessary.

[35] There is some support for this interpretation in the third paragraph of the September 18 Order. It required the redacted copy to be returned to the trial judge for "further consideration".

[36] Written reasons were released on September 24, 2018 (2018 NSSC 229). The trial judge wrote:

> [1] On September 13, 2018, I heard the Crown's application seeking a pre-trial ruling as to whether the Crown may use in evidence the forensic analysis of the contents of a Smartphone seized from the accused at the time of his arrest. Having reviewed the written and oral submissions, authorities and affidavits, I ruled in favor of the Crown, promising written reasons to follow. These are my reasons.

[37] The Crown did not ask the trial judge to rule if it could use the forensic phone analysis. As I have already emphasized, it asked the judge to direct appellant's trial counsel to review the narrowed extraction report with his client and *advise* the Crown and the Court which texts, if any, the appellant *asserts* are privileged.

[38] The rest of the written decision did nothing to diminish the confusion. The judge referred to some of the leading cases and authorities about solicitor-client privilege. He set out the order he had arrived at, and then explained why he had chosen that process:

> [18] As Justice Boudreau makes clear in *Rudolph* (para. 68), solicitor-client privilege is the privilege of the client, not the lawyer. Since the information does not belong to the lawyer, it is not for the lawyer to give. Nevertheless, on the facts of this case, it is surely for Mr. Herritt <u>in consultation with his current counsel</u> to decide what is solicitor-client privileged. To my mind the above approach offers, in the words of Justice Boudreau, a "clear and safe road map" for all concerned. In fashioning this solution I specifically considered but declined defence counsel's invitation to have one of various others review Exhibit A, including

> another Justice, a designated independent lawyer or Mr. Herritt's (former) NSLA lawyer. In all of the circumstances I felt it best for Mr. Herritt that his current counsel, retained to defend him on the criminal charge before the Court, determine if the impugned material should be deemed solicitor-client privileged, thus exempt from review by the Crown and kept confidential at the trial.
>
> …
>
> [20] In the result I grant the motion sought by the Crown. The Crown may use in evidence the forensic analysis of the contents of the accused's Smartphone seized at the time of his arrest, subject to items identified as solicitor-client privileged. Mr. Herritt's current counsel shall carry out the review in consultation with his client. The Court will maintain its supervisory role by reviewing any redactions identified by defence counsel.
>
> [Emphasis in original]

[39] I will return later to what should have been ordered.

[40] At the September 13 hearing, dates were set for pre-trial briefs on the appellant's *Charter* motion and for a pre-trial conference on September 19, 2018.

[41] The trial did not proceed on September 21. On September 19, appellant's trial counsel appeared without the appellant and requested an adjournment because he had missed the deadline to file his *Charter* motion materials.

[42] The parties apparently anticipated that the trial would go ahead with the Crown calling its evidence within the structure of a *voir dire* to determine the validity of the defence's *Charter* motion to exclude the fruits of the police searches incident to arrest. The outcome of the *Charter* motion would be dispositive.

[43] October 31, 2018 became the new trial date. New dates were set for the *Charter* briefs. They were not filed. There would be no trial. The parties reached a resolution.

[44] On October 11, 2018, defence counsel appeared before Justice Timothy Gabriel to release the October 31 trial date and set in motion the arrangements to re-appear before Justice Chipman to invite conviction and obtain a Pre-Sentence Report. Mr. Nodelman described it as a complicated resolution, a four-way deal between two defence lawyers, two Crowns and an outstanding charge in the Dartmouth Provincial Court. He purported to maintain the appellant's right of appeal:

> **MR. NODELMAN:** Good morning, My Lord. For the record Josh Nodelman appearing with Anthony Herritt who's present. My friend Rachel Furey is present for Her Majesty. I had corresponded with the court. I don't know if Your Lordship had the letter we faxed in, if not I'll be brief. The matter is set for trial on October 31st before Justice Rosinski. There has been a resolution reached. It's a complicated resolution in that it's actually a four-way deal between two defence lawyers and two crowns, and it resolves this matter, and also a matter running in Dartmouth Provincial Court. There will eventually be a joint recommendation as to sentence.
>
> It also – the resolution also depends on the Defence maintaining its right of appeal to a pre-trial ruling made by Justice Chipman.

[45] The parties appeared before Justice Chipman on October 24, 2018. A few more details emerged about the resolution. Mr. Nodelman repeated his comments about the four-way deal and his reservation of what he said was his client's right to appeal the pre-trial ruling.

[46] The resolution involved a guilty plea to break and enter into a residence in Dartmouth with the Provincial Crown and Federal Crown agreement to a global sentence of 3.5 years. Counsel suggested that both offences would attract a sentence of three years' incarceration, so the jointly recommended sentence would be appropriate in light of his youth, lack of significant prior record, and the appellant's "total acceptance of responsibility of both matters before – before trial".

[47] The Crown tendered an Agreed Statement of Facts as an exhibit. The full contents are as follows:

> On May 31, 2017, at 3:08 in the afternoon, the HRP responded to a call about a liquor offence at 1597 Bedford Highway, HRM. The location identified in the complaint was at the Sunnyside Mall in Bedford.
>
> Sgt Martin arrested Anthony Herritt at the scene for public intoxication. Mr. Herritt was obviously under the influence of alcohol and/or drugs, his speech was slurred, his eyes were glossy, and he was saying things that didn't make sense. **Mr. Herritt had a black and grey backpack in his possession.** Sgt Martin began to search the backpack incident to arrest, at which point Mr Herritt questioned the police authority to search the backpack.
>
> Around the same time two females arrived on the scene. The first one, later identified as KP, said the backpack belonged to her and she also asked about the police authority to search the backpack. Sgt Martin removed a can of beer and a bottle of liquor from the backpack. KP then became belligerent with the police. Sgt Martin told the females to move away or they'd be arrested for obstruction.

> They went across the hall but gradually moved back towards the police. Cst Head was by now assisting Sgt Martin.
>
> Cst Head stayed with Mr Herritt while Sgt Martin spoke to KP about the ownership of the backpack and alcohol since she was under 18. She insisted the backpack was hers. Mr Herritt said the alcohol belonged to him. At some point the backpack was given to KP by the police.
>
> Cst Rubarth arrived on the scene and he and Cst Head escorted Mr Herritt to the police vehicle and searched him incident to arrest. They located $940 cash in Mr Herritt's left front pocket, mostly in $20 denominations. They also located a Samsung cell phone in Mr Herritt's left sweater pocket.
>
> The females then came outside to where the police were searching Mr Herritt and KP again became belligerent. Cst Head told her to leave or she'd be arrested for breach of the peace. The two females began to walk away and KP started kicking the steel railing and sign outside a bar. Cst Head arrested her for causing a disturbance.
>
> The backpack was further searched, incident to KP's arrest. KP was screaming profanity, kicking, and yelling**. Inside the backpack, Cst. Head found a zip lock bag containing 67.8 grams of cocaine and scoresheets.**
>
> **The cell phone located on Mr Herritt was his personal phone and contained text messages indicative of recent cocaine trafficking.**
>
> **The 67.8 grams of cocaine was in Mr Herritt's possession on May 31, 2017 for the purpose of trafficking**.
>
> [Emphasis added]

[48] I have bolded the more consequential admissions. I will return to these later.

[49] Appellant's trial counsel immediately said this:

> My Lord, indicate [*sic*] on behalf of the Defence, I've received full disclosure, have full opportunity to review it with Mr. Herritt, and I've also – I received that statement of facts, was able to email it to Mr. Herritt yesterday who was able to review it as worded by the Crown. Mr. Herritt admits those underlying facts, invites Your Lordship to convict him on the offence under Section 5(2) of the **Controlled Drugs and Substances Act**.

[50] The trial judge, in light of the Agreed Statement of Facts (Ex. #1), found the elements of the offence made out and entered a conviction. January 9, 2019 was set as the date for sentence.

[51] Defence counsel suggested the September 18 Order was moot given the Crown did not need the text message evidence to get a conviction. The trial judge agreed to stay the Order, at least until sentencing.

[52] The judge ordered a Pre-Sentence Report. Written briefs were filed in advance of January 9, 2019. There is no transcript of the sentence hearing. The trial judge issued written reasons, reported as 2019 NSSC 13. I will refer to some of the details later when I explain why, even if the trial judge erred, it would not be appropriate to provide appellate relief.

ISSUES

[53] The appellant's sole ground of appeal is:

> That the learned Trial Judge erred in admitting the Crown's forensic smartphone analysis by way of the solicitor-client privilege vetting order dated September 18, 2018.

[54] The appellant's actual complaint cannot be about the admissibility of evidence. The trial judge made no such determination. The trial judge's decision of September 13 and consequent September 18 order only addressed the process to be followed to protect solicitor-client privilege.

[55] I would reframe the issues to be addressed as follows:

1. Should the Court entertain this appeal?
2. Did the trial judge's procedural order amount to reversible error?
3. If yes, what is the appropriate remedy?

Should the Court entertain this appeal

[56] It is well settled that absent statutory authority, there is no avenue of appeal. The *Criminal Code* does not permit interlocutory appeals (see: *Mills v. The Queen*, [1986] 1 S.C.R. 863; *Kourtessis v. M.N.R.*, [1993] 2 S.C.R. 53; *R. v. Dee*, 2008 NBCA 10).

[57] An appeal by an accused can only be taken as of right from conviction on a question of law alone or with leave from legal and factual determinations and sentence:

> 674. No proceedings other than those authorized by this Part and Part XXVI shall be taken by way of appeal in proceedings in respect of indictable offences.
>
> 675. (1) A person who is convicted by a trial court in proceedings by indictment may appeal to the court of appeal
>
> (a) against his conviction
>
> (i) on any ground of appeal that involves a question of law alone,
>
> (ii) on any ground of appeal that involves a question of fact or a question of mixed law and fact, with leave of the court of appeal or a judge thereof or on the certificate of the trial judge that the case is a proper case for appeal, or
>
> (iii) on any ground of appeal not mentioned in subparagraph (i) or (ii) that appears to the court of appeal to be a sufficient ground of appeal, with leave of the court of appeal; or
>
> (b) against the sentence passed by the trial court, with leave of the court of appeal or a judge thereof unless that sentence is one fixed by law.

[58] That does not mean that rulings made by a trial judge during the course of trial proceedings are immune from review. Far from it. If a judge errs in law in the course of a trial, the accused is entitled to appellate relief unless the Crown can demonstrate that the error was harmless.

[59] If the error did not prejudice trial fairness, the error may be excused if harmless on its face or in its effect, or where the case against the appellant is so strong that a jury would inevitably have convicted (see: *R. v. Van*, 2009 SCC 22 at paras. 34-36).

[60] The powers of an appeal court are set out in s. 686(1) of the *Criminal Code* as follows:

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

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

[61] The appellant does not suggest the verdict is unreasonable or amounts to a miscarriage of justice. He says the trial judge committed legal error.

[62] Initially, the respondent's factum took the position that the alleged error had no impact on the verdict. Absent a link, there was no reason to entertain the appeal. Merely because the appellant, with the respondent's apparent concurrence, voiced his desire to appeal the trial judge's order did not confer jurisdiction.

[63] The appellant cried foul. He threatened proceedings to expunge the Crown's argument on the basis of abuse of process; there had been a resolution of the proceedings that required the appellant to waive his right to trial and his outstanding *Charter* application to exclude evidence, followed by a jointly recommended sentence of two years' incarceration.

[64] In other words, the Crown's appeal position amounted to a repudiation of the resolution agreement. The Crown demurred and disavowed the argument.

[65] Just as jurisdiction cannot be conferred by consent, nor can a viable right of appeal.

[66] It is beyond dispute that sometimes the outcome of a *Charter* motion or admissibility decision can be dispositive. If against the Crown, it must decide if it will soldier on with what is left of its case or offer no further evidence and later advance an appeal (see: *R. v. Banas* (1982), 65 C.C.C. (2d) 224 (Ont. C.A.) at paras. 13-14; *United States v. Fafalios*, 2012 ONCA 365 at paras. 44, 46-48; *R. v. Wilcox*, 2001 NSCA 45; *R. v. Power*, [1994] 1 S.C.R. 601).

[67] If a trial judge rules against an accused on a critical or dispositive issue, then they must decide if they will change their plea to guilty. If they do so, it may deprive them of their right to appeal conviction, unless their plea was invalid (see: *R. v. Davidson* (1992), 110 N.S.R. (2d) 307 (C.A.); *R. v. Fegan* (1993), 62 O.A.C. 146; *R. v. Duong*, 2006 BCCA 325; *R. v. Faulkner*, 2018 ONCA 174).

[68] However, there are ways to shorten trial proceedings without loss of the ability to challenge an adverse interlocutory decision. Trotter J.A., writing for the Court in *R. v. Lopez-Restrepo*, 2018 ONCA 887, described the process, first suggested in *Fegan, supra*, as follows:

> [25] Moreover, there is a way to preserve a right to appeal short of having a full-blown trial. In *Faulkner*, Watt J.A. commended the procedure discussed in *Fegan*, whereby an accused person pleads not guilty, accepts the case for the Crown (perhaps based on an Agreed Statement of Facts), and calls no defence evidence. A finding of guilt inevitably follows. As Watt J.A. said in *Faulkner*, at para. 92: "This procedure would preserve the accused's right of appeal against conviction on the real issue in dispute without imposing the additional burden of setting aside the guilty plea."
>
> [26] This procedure is utilized regularly in Ontario. With appropriate safeguards, it is an efficient method of dealing with cases in which *Charter* issues play a crucial, if not determinative, role in a prosecution: see *R. v. Tran*, 2017 ONCA 329; *R. v. G. (D.M.)*, 2011 ONCA 343; and *R. v. P. (R.)*, 2013 ONCA 53. See also the helpful discussion of this issue in Michael Shortt, "Preserving Appeal Rights When Your Client's Only Defence is a (Failed) *Charter* Motion" (2018), 65 C.L.Q. 443.
>
> [27] This procedure is not without its potential hazards. Before going down this path, a trial judge should engage in an exercise approximating a plea-comprehension inquiry to confirm that the accused person understands precisely what is at stake by participating in this procedure: *P. (R.)*, at para. 60.

[69] There is no shortage of caselaw that illustrate an accused's successful maintenance of a right of appeal where a failed *Charter* motion or adverse evidentiary decision led to: some form of agreed statement of facts; no submission on guilt or innocence or agreement that a conviction should be entered (see for example: *R. v. Brown*, 2019 BCCA 346; *R. v. Price*, 2010 NBCA 84; *R. v. Lam*, 2017 ONCA 329; *R. v. Bergauer-Free*, 2009 ONCA 610).

[70] In those situations, it is easy to understand how the appeal from conviction is not moot. If the trial judge committed a reversible error in his interlocutory *Charter* or evidentiary decision then the appellant could still be acquitted due to

the lack of evidence to establish guilt beyond a reasonable doubt or charges stayed due to a *Charter* violation. There would still be a live controversy.

[71] In this case, there was no adverse ruling on a dispositive or critical *Charter* motion or admissibility issue. The trial judge made an interlocutory ruling about the process to determine if the appellant asserted privilege over any of the May 24-31 text messages.

[72] Appellant's trial counsel, unhappy with the process, negotiated a plea resolution for two very serious criminal charges. The appellant's trial counsel formally admitted on behalf of the appellant:

1. Mr. Herritt possessed a backpack that contained 67.8 grams of cocaine and score sheets.
2. The cell phone located on Mr. Herritt was his personal phone and contained text messages indicative of recent cocaine trafficking.
3. The 67.8 grams of cocaine was in Mr. Herritt's possession on May 31, 2017 for the purpose of trafficking.

[73] Although counsel did not mention s. 655 of the *Criminal Code*, the admissions set out in the Agreed Statement of Facts and marked as a trial exhibit, must have been tendered pursuant to that statutory authority.

[74] I say this because the common law does not permit an accused charged with a felony (in modern parlance, an indictable offence) to make admissions at or during their trial other than to plead guilty (see: *R. v. Castellani*, [1970] S.C.R. 310; *R. v. Falconer*, 2016 NSCA 22). Neither is there such a thing as a plea of *nolo contendere* (I am unwilling or I do not wish to contend) in Canadian criminal procedure (see: *R. v. G. (D.M.)*, 2011 ONCA 343; *R. v. R.P.*, 2013 ONCA 53 at para. 38 *et seq.*).

[75] But Canada's *Criminal Code* has, since its inception (S.C. 1892, c. 29, s. 690), permitted an accused to make admissions.

[76] The section is now numbered s. 655. It provides:

> 655. Where an accused is on trial for an indictable offence, he or his counsel may admit any fact alleged against him for the purpose of dispensing with proof thereof.

[77] The appellant through his counsel admitted not just facts that would permit a finding of guilt, but formally admitted the commission of the offence. Formal admissions under s. 655 of the *Criminal Code* are conclusive for the trier of fact. Subject to relief being granted from the consequence of the admission, the fact admitted is conclusively established. It is not open to challenge.

[78] The legal consequences of formal and informal admissions in civil and criminal cases were helpfully reviewed by Hill J. in *R. v. Baksh* (2005), 199 C.C.C. (3d) 201. He wrote:

> 84 An admission validly made in the context of s. 655 of the *Code* is an acknowledgement that some fact alleged by the prosecution is true. Such an admission dispenses with proof of that fact by testimony or ordinary exhibit and the accused is not entitled to set up competing contradictory evidence in an attempt to disprove the judicial or formal admission. In other words, the formal admission is conclusive of the admitted fact. Assuming that parties in a criminal trial, as occurred in the earlier trial, can agree to waive the necessity of testimonial proof on certain matters in issue by jointly tendering an agreed statement of facts going beyond the narrow scope of s. 655 of the *Code*, such a statement, in my view, also amounts to a solemn, formal or judicial admission and is conclusive against contradiction by both parties.
>
> 85 Though the weight of a declaration or admission will vary with the circumstances, its weight "will, no doubt, be greater if against interest at the time, than the contrary", and the weight to be afforded an admission generally "increases with the knowledge and deliberation of the speaker, or the solemnity of the occasion on which it was made": *Phipson on Evidence*, at pp. 709, 712-3.
>
> 86 As well, in the civil context, formal admissions, for example, "an agreed statement of facts filed at the trial", is considered conclusive in the original proceeding as described in *The Law of Evidence* (2nd ed.), Sopinka et al., at para. § 19.1:
>
> > A formal admission in civil proceedings is a concession made by a party to the proceedings that a certain fact or issue is not in dispute. Formal admissions made for the purpose of dispensing with proof at trial are conclusive as to the matters admitted. As to these matters, other evidence is precluded as being irrelevant but, if such evidence is adduced, the court is bound to act on the admission even if the evidence contradicts it. A formal admission should be distinguished from an informal admission. The latter is admitted into evidence as an exception to the hearsay rule and does not bind the party making it, if it is overcome by other evidence. (footnotes omitted)
> >
> > See also Wigmore, at §1064.

[79] After a thorough canvass of American, English and Canadian authorities, Justice Hill ruled that the formal agreed statement of facts tendered in an earlier aborted trial was admissible as ordinary admissions in the re-trial[1].

[80] In my view, the admissions made by the appellant here were conclusive in these criminal proceedings. They were not informal admissions. They were set out in an exhibit and not qualified in any way. Recall what appellant's trial counsel said about them:

> My Lord, indicate [*sic*] on behalf of the Defence, I've received full disclosure, have full opportunity to review it with Mr. Herritt, and I've also – I received that statement of facts, was able to email it to Mr. Herritt yesterday who was able to review it as worded by the Crown. Mr. Herritt admits those underlying facts, invites Your Lordship to convict him on the offence under Section 5(2) of the *Controlled Drugs and Substances Act*.

[81] The admissions, obviating the need for a trial, and the appellant's remorse were cited by appellant's trial counsel as mitigating factors in support of the trial judge's acceptance of the jointly recommended sentence.

[82] Appellant trial counsel's December 31, 2018 sentence brief referred to Mr. Herritt's "voluntarily invited conviction". In support of the joint recommendation, he wrote:

> **Full acceptance of responsibility prior to trial**. Although there was initially a not-guilty plea and a preliminary inquiry (in which committal to trial was not contested) in the herein proceeding, Mr. Herritt invited conviction on an Agreed Statement of Facts prior to a motion to exclude evidence under the *Charter*. Moreover, as the Crown points out, as part of a larger negotiated resolution Mr. Herritt is also taking responsibility for a serious offence in Dartmouth prior to trial in Provincial Court there.
>
> **Honest expression of remorse.** Mr. Herritt makes the following powerful comments in his Pre-Sentence Report: " I feel horrible about it. I feel horrible for the people who got addicted, for the people I used to get money from. I was purposely getting people addicted so I could support my addictions, basically putting people down so I could get ahead."
>
> [Emphasis in original]

[1] [1] The accused was subsequently convicted ([2005] O.J. No. 5399). The Ontario Court of Appeal approved Justice Hill's approach to this issue (2008 ONCA 116; leave ref'ed [2008] S.C.C.A No. 155).

[83] The trial judge relied on these, and other mitigating factors, in his reasons why he accepted the jointly recommended sentence (2019 NSSC 13):

> [10] In assessing the joint recommendation I have reviewed the ASF, PSR, briefs, cases and oral submissions along with Mr. Herritt's remarks. In my view the parties' submissions are sound and in keeping with *R. v. Anthony-Cook*, 2016 SCC 43 (see, especially paras. 32 to 34), I hereby adopt their joint recommendation. In doing so**, I am particularly mindful of the nature of the offence and the following mitigating and related circumstances as emphasized by the Defence:**
>
> - Non-violent circumstances of the offence
> - Mr. Herritt's relative youth and lack of a significant prior record
> - **His acceptance of responsibility such that a trial was avoided**
> - **Mr. Herritt's sincere expression of remorse**
> - The strong prospects of rehabilitation for the offender
> - Family support and encouragement
>
> [Emphasis added]

[84] Not only is there no causal connection between the putative legal error and the conviction, the appellant put forward his acceptance of responsibility as a mitigating factor in sentence, yet by this appeal seeks to resile from that benefit and obtain a new trial.

[85] I therefore find it difficult to accept that it is even appropriate to entertain this appeal. In light of the formal admissions set out in Ex. # 1, the appeal is moot. Nevertheless, I will address the merits of the appellant's complaint about the trial judge's order.

The trial judge's procedural order

[86] The parties did not spend much time on the issue of the applicable standard of review.

[87] The appellant suggests no deference is owed to the trial judge because the appropriate standard of review for determination of solicitor-client privilege and admissibility of evidence is correctness. The respondent accurately identifies the accepted principles: generally, the standard of review for questions of law is correctness; for underlying factual determinations, palpable and overriding error; and the same for questions of mixed law and fact, absent an extricable legal error.

[88] The Crown suggests, without authority in support, that the question whether the trial judge erred in this case is a question of law, reviewable by this Court on a standard of correctness.

[89] First, the trial judge made no determination of solicitor-client privilege, nor ruled on the admissibility of evidence. Second, even if he had, although for jurisdictional purposes the questions are ones of law, the standard of review may be more nuanced than bald correctness (see: *R. v. West*, 2010 NSCA 16 at para. 155; *Sable Mary Seismic Inc. v. Geophysical Services Inc.*, 2012 NSCA 33 at para. 116, leave to appeal to SCC refused, [2012] S.C.C.A. No. 245; *Clarke v. Halifax Herald Ltd.*, 2019 NSCA 31 at para. 37).

[90] I cannot endorse the wording of the Order, nor some phrases found in the trial judge's decision, but I am not convinced that the trial judge committed reversible error. I say this because the trial judge was called on to exercise his discretion about how to manage the trial process and did not delegate the privilege determination to appellant's trial counsel.

[91] Absent an extricable legal error or manifest injustice, we afford deference to trial judges' case management decisions (*R. v. West*, *supra* at para. 220; *R. v. Auclair*, 2013 QCCA 671, aff'd 2014 SCC 6; *R. v. Jordan*, 2016 SCC 27 at para. 139).

[92] In addition, properly interpreted, the trial judge simply gave to the appellant the opportunity to assert solicitor-client privilege over the text messages. If there were a contest, the trial judge would then determine if privilege precluded disclosure and admissibility.

[93] Solicitor-client privilege is fundamental to the proper functioning of our legal system. It has evolved from its roots as a rule of evidence to not just one of substance but also a principle of fundamental justice (*Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 at paras. 9-10; *Minister of National Revenue v. Thompson*, 2016 SCC 21 at para. 17). Except for limited exceptions, all information protected by solicitor-client privilege is out of reach of the state. Absent waiver, it cannot be forcibly discovered or disclosed and is inadmissible in court.

[94] But that does not mean potential solicitor-client privileged material need be handled as if it were nuclear waste, forever contaminating all who dare come near it. This was not a case of flagrant and deliberate disregard of an accused's right to

keep confidential their communications with defence counsel. Such violations may well have consequences beyond mere inadmissibility of the privileged information, particularly if the information were relevant to the accused's defence of the charges under prosecution and compromised trial fairness (see: *R. v. Desjardins* (1991), 88 Nfld. & P.E.I.R. 149 (NLSC); *R. v. Morris* (1992), 117 N.S.R. (2d) 60 (Co. Ct.); *R. v. Bruce Power Inc.*, 2009 ONCA 573).

[95] In this case, if any of the information found in the text messages were in fact protected by solicitor-client privilege then the Crown would not be entitled to see the information and perforce the texts would be inadmissible, even if somehow relevant.

[96] The appellant appropriately labelled the Crown's approach upon discovery of potential solicitor-client information on the phone as honourable and appropriate. To eliminate the risk of being further exposed to information potentially protected by privilege, the new extraction report narrowed the production to just the week of text messages. The uncontradicted evidence was that the new report contained no photographs nor emails—only text messages.

[97] The Crown argued to the trial judge that he had no reason to think that there were solicitor-client communications in the one week of text messages. The appellant did not suggest otherwise.

[98] On appeal, the appellant advances two arguments that he says required the trial judge to review the new extraction report or appoint an independent third party to do so. First, he says that there existed a presumption of privilege by virtue of Crown counsel, Timothy McLaughlin's April 12, 2018 affidavit that he believed it "necessary to have the text messages and the electronic report reviewed and vetted to protect any solicitor-client privilege." [emphasis added by appellant]. The second is the submission that the appellant had already asserted privilege over the text messages.

[99] I am not persuaded by either. As to Mr. McLaughlin's affidavit, some context is required. It was sworn April 12 in relation to the entire record of the cell phone data. It appears that the disk had been given to appellant's trial counsel who had started to review it. Mr. McLaughlin described what happened to raise the concern about solicitor-client privilege:

> 3. On February 22, 2018, after speaking with defence counsel, **I reviewed the disk with respect to certain text messages that he thought were relevant to**

> **the trial**. I opened the disk, opened a folder within the disk, and immediately reviewed several photographs. Upon closer inspection of the photographs I determined they were photographic images of correspondence forwarded to Mr. Herritt from his counsel at Nova Scotia Legal Aid regarding an unrelated case.
>
> [Emphasis added]

[100] Mr. McLaughlin then expressed his view:

> 5. I believe it is necessary to have the text messages and the electronic report reviewed and vetted to protect any solicitor-client privilege. I also believe that it would be prudent to extract only the text messages and email messages from the disk given the nature of the alleged offence. The remaining information is, in my opinion, not relevant to the prosecution of this case.

[101] At that point, only the photographs contained what may or may not have been communications protected by solicitor-client privilege. The Crown narrowed the police extraction report to exclude photographs and emails, only capturing text messages for the week of May 24-31, 2017. There is no evidence of any realistic prospect that those texts were between the appellant and any lawyer, let alone a communication that might be truly protected by solicitor-client privilege.

[102] It is useful to recall what is protected by solicitor-client privilege. Major J., writing on behalf of the full court in *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31 defined the scope of the privilege:

> [14] Solicitor-client privilege describes the privilege that exists between a client and his or her lawyer. Clients must feel free and protected to be frank and candid with their lawyers with respect to their affairs so that the legal system, as we have recognized it, may properly function: see *Smith v. Jones*, [1999] 1 S.C.R. 455, at para. 46.
>
> [15] Dickson J. outlined the required criteria to establish solicitor-client privilege in *Solosky v. The Queen*, [1980] 1 S.C.R. 821, at p. 837, as: **"(i) a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice; and (iii) which is intended to be confidential by the parties". Though at one time restricted to communications exchanged in the course of litigation, the privilege has been extended to cover any consultation for legal advice, whether litigious or not**: see *Solosky*, at p. 834.
>
> [16] Generally, solicitor-client privilege will apply as long as the communication falls within the usual and ordinary scope of the professional relationship. The privilege, once established, is considerably broad and all-encompassing. In *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, the scope of the privilege was described, at p. 893, as attaching "to all communications made within the

> framework of the solicitor-client relationship, which arises as soon as the potential client takes the first steps, and consequently even before the formal retainer is established". The scope of **the privilege does not extend to communications: (1) where legal advice is not sought or offered; (2) where it is not intended to be confidential; or (3) that have the purpose of furthering unlawful conduct:** see *Solosky*, *supra*, at p. 835.
>
> [Emphasis added]

[103] Although not everything that passes between a lawyer and a client will be protected by privilege, there is a presumption that absent evidence to the contrary, it is protected (*Minister of National Revenue v. Thompson*, *supra* at para. 19).

[104] Often it will not be foreseeable if solicitor-client privileged material will be swept up by the police exercising common law or statutory search powers. Sometimes it is. Parliament enacted s. 488.1(originally 444.1) of the *Criminal Code* (S.C. 1985, c. 19, s. 72) to provide a procedure to deal with resolution of solicitor-client privilege over documents to be or which have been seized from a law office pursuant to statutory search powers.

[105] Many appellate courts found s. 488.1 constitutionally infirm. The Supreme Court of Canada heard three appeals together. The decision is reported as *Lavallee, Rackel & Heintz v. Canada (Attorney General)*; *White, Ottenheimer & Baker v. Canada (Attorney General)*; *R. v. Fink*, 2002 SCC 61. The case is usually just referred to as *Lavallee.*

[106] As I observed earlier, the appellant stresses that the process outlined in *Lavallee* was the one that the trial judge should have followed. It is therefore appropriate to spend a little time with what *Lavallee* decided and why I am not persuaded the trial judge erred.

[107] Arbour J. wrote the majority reasons for judgment that found s. 488.1 infringed s. 8 of the *Canadian Charter of Rights and Freedoms* and was of no force and effect. Justice Arbour observed that although s. 488.1 represented Parliament's attempt to respect solicitor-client privilege, it did not minimally impair that privilege. Of note were her conclusions that s. 488.1 was deficient because:

- Privilege could be violated by the mere failure of counsel to act, without instruction or communication from the client, and hence without the client having an opportunity to be heard (para. 39);

- The scheme put the burden on the lawyer to assert privilege, when the privilege in law belongs to the client who may not even be aware of the threat to their privilege due to the lack of notification provisions (para. 40);

- The provisions did not permit a judge to exercise their discretion to preclude Crown access to documents due to a timely assertion of privilege (para. 43);

- The Crown could access seized documents whenever the judge is of the opinion that it would materially assist the determination whether the document is privileged (para. 44).

[108] Justice Arbour summarized her analysis as follows:

> [45] **In short, in my opinion, s. 488.1 fails to ensure that clients are given a reasonable opportunity to exercise their constitutional prerogative to assert or waive their privilege. Far from upholding solicitor-client confidentiality, s. 488.1 permits the privilege to fall through the interstices of its inadequate procedure. The possible automatic loss of protection against unreasonable search and seizure through the normal operation of the law cannot be reasonable**. Nor can the provision be infused with reasonableness in a constitutional sense on the basis of an assumption that the prosecution will behave honourably and, for instance, initiate a review under s. 488.1(3), if neither the client nor the lawyer has done so, or refrain from exercising the right to inspect the sealed documents, even though authorized to do so by the reviewing judge, as contemplated by s. 488.1(4)(b). As Cory J. observed in *R. v. Bain*, [1992] 1 S.C.R. 91, at pp. 103-4: "Unfortunately it would seem that whenever the Crown is granted statutory power that can be used abusively then, on occasion, it will indeed be used abusively. The protection of basic rights should not be dependent upon a reliance on the continuous exemplary conduct of the Crown, something that is impossible to monitor or control." Even more so, I would add that the constitutionality of a statutory provision cannot rest on an expectation that the Crown will refrain from doing what it is permitted to do.
>
> [Emphasis added]

[109] With s. 488.1 of no force and effect, Justice Arbour set out the common law principles that govern the legality of law office searches until Parliament, should it choose to do so, re-enacts legislation to address the issue. She set out ten guiding principles. Most are not germane here. I will emphasize those that are:

> [49] In the interim, I will articulate the general principles that govern the legality of searches of law offices as a matter of common law until Parliament, if it sees fit, re-enacts legislation on the issue. These general principles should also guide

the legislative options that Parliament may want to address in that respect. Much like those formulated in *Descôteaux*, *supra*, the following guidelines are meant to reflect the present-day constitutional imperatives for the protection of solicitor-client privilege, and to govern both the search authorization process and the general manner in which the search must be carried out; in this connection, however, they are not intended to select any particular procedural method of meeting these standards. Finally, it bears repeating that, should Parliament once again decide to enact a procedural regime that is restricted in its application to the actual carrying out of law office searches, justices of the peace will accordingly remain charged with the obligation to protect solicitor-client privilege through application of the following principles that are related to the issuance of search warrants:

1. No search warrant can be issued with regards to documents that are known to be protected by solicitor-client privilege.

2. Before searching a law office, the investigative authorities must satisfy the issuing justice that there exists no other reasonable alternative to the search.

3. When allowing a law office to be searched, the issuing justice must be rigorously demanding so to afford maximum protection of solicitor-client confidentiality.

4. Except when the warrant specifically authorizes the immediate examination, copying and seizure of an identified document, all documents in possession of a lawyer must be sealed before being examined or removed from the lawyer's possession.

5. Every effort must be made to contact the lawyer and the client at the time of the execution of the search warrant. Where the lawyer or the client cannot be contacted, a representative of the Bar should be allowed to oversee the sealing and seizure of documents.

6. **The investigative officer executing the warrant should report to the justice of the peace the efforts made to contact all potential privilege holders, who should then be given a reasonable opportunity to assert a claim of privilege and, if that claim is contested, to have the issue judicially decided**.

7. **If notification of potential privilege holders is not possible, the lawyer who had custody of the documents seized, or another lawyer appointed either by the Law Society or by the court, should examine the documents to determine whether a claim of privilege should be asserted, and should be given a reasonable opportunity to do so.**

8. The Attorney General may make submissions on the issue of privilege, but should not be permitted to inspect the documents

> beforehand. The prosecuting authority can only inspect the documents if and when it is determined by a judge that the documents are not privileged.
>
> 9. Where sealed documents are found not to be privileged, they may be used in the normal course of the investigation.
>
> 10. Where documents are found to be privileged, they are to be returned immediately to the holder of the privilege, or to a person designated by the court.
>
> [Emphasis added]

[110] Here, the police did not search a law office or other premises in the control of a lawyer. If any of the text messages were privileged, it was the appellant who held that privilege. He was given the opportunity, in consultation with his lawyer, to assert privilege. Rather than claim privilege over any or all the text messages, he demurred and entered into a plea resolution.

[111] The appellant contends that he had, through counsel, already asserted privilege. He points to his pre-hearing written submissions of September 11, 2018:

> The Crown states (at para. 9) that "Mr. Anthony Herritt has not yet claimed any of the contents of the Samsung smartphone in question are protected by solicitor client privilege." With respect, this statement is factually incorrect: Mr. Herritt asserted precisely this claim through counsel on this Honourable Court's record during an appearance on May 7th, 2018.
>
> In any event, even were this assertion not to have been made, the Crown's argument is this regard would have no legal relevance. The Supreme Court of Canada's central finding in *Lavallee* was that (at para. 39) "[p] rivilege does not come into being by an assertion of a privilege claim; it exists independently." Mr. Herritt would not have had to make any claim of solicitor-client privilege for said privilege to apply to the communications in question.

[112] The sole assertion of privilege on May 7, 2018 was appellant's trial counsel comment:

> I should just say – I don't think I need to say it but I'm going to say it out of an abundance of caution **– my client does assert privilege over any communications that may have been recovered that would have involve[d] him and a former solicitor, or other current solicitor**. And so the question, from my view, I think nominally, My Lord, I just agree with the Crown. There has to be a process, and again, I'm in the same class of people as the Crown is, people who should not have access to the communications in question.
>
> [Emphasis added]

[113] As can be seen, the assertion of privilege was in relation to communications that may have been between the appellant and a former or current solicitor. Those communications were *prima facie* protected by privilege. The Crown eschewed any interest in accessing their contents or contesting their privileged status.

[114] The Crown wanted to know if the appellant had any basis to assert privilege over the text messages for the week prior to the appellant being found in possession of almost two-and-a-half ounces of cocaine, score sheets and a substantial amount of cash. It did what the *Lavallee* common law principles suggest: it gave the appellant a reasonable opportunity to assert privilege.

[115] The sole basis for a complaint of legal error is that the trial judge's decision and order directed trial counsel to personally receive and review the text messages to determine of any of them are protected by privilege. The privilege belongs to the client. It is up to them to assert or waive privilege. In other words, the appellant's complaint disappears if the trial judge had ordered that the *appellant* receive a copy of the text messages and the opportunity to assert privilege.

[116] The preferred order for the appellant would then have been:

> 1. The accused shall receive a copy of Exhibit A to the affidavit of Anna-Marie Castellarin, and shall review it in order to determine whether he asserts any of its contents are protected by solicitor-client privilege; and
>
> 2. If the accused has identified any material within Exhibit A that he believes is protected by solicitor-client privilege, he shall redact that material on a copy of Exhibit A and shall return that redacted copy to the Court;
>
> 3. A redacted copy of Exhibit A will be provided to the Crown. If it accepts the assertion of privilege, Exhibit A will remain redacted. If the Crown disputes the assertion of privilege, the Court will hear from the parties further before determination of the issue.

[117] But the trial judge here envisaged the appellant would consult with defence counsel to determine if he should assert privilege:

> [18] As Justice Boudreau makes clear in *Rudolph* (para. 68), solicitor-client privilege is the privilege of the client, not the lawyer. Since the information does not belong to the lawyer, it is not for the lawyer to give. Nevertheless, it is surely for Mr. Herritt <u>in consultation with his current counsel</u> to decide what is solicitor-client privileged. …
>
> [Emphasis in original]

[118] With respect, the appellant's complaint has a pedantic quality to it, creating a problem that centers on formalism rather than a pragmatic solution. Trial counsel's statement that he is just the class of people that should not have access to privileged material puts the cart before the horse and is a position divorced from the record.

[119] No one had determined if the text messages were between the appellant and a lawyer, let alone amounted to privileged communications. Nor is there any evidence that the appellant objected to his trial counsel accessing the text messages.

[120] What may be protected by solicitor-client privilege is a legal construct. The appellant, like most laypeople, lacks legal training. He would need to be guided by legal advice. His options would be to hire another lawyer or rely on advice from his current counsel who had already been briefed on the live legal and factual issues.

[121] The trial judge recognized that it was the appellant's privilege:

> [18] As Justice Boudreau makes clear in *Rudolph* (para. 68), solicitor-client privilege is the privilege of the client, not the lawyer. Since the information does not belong to the lawyer, it is not for the lawyer to give. Nevertheless, on the facts of this case, **it is surely for Mr. Herritt in consultation with his current counsel to decide what is solicitor-client privileged**. To my mind the above approach offers, in the words of Justice Boudreau, a "clear and safe road map" for all concerned. In fashioning this solution I specifically considered but declined defence counsel's invitation to have one of various others review Exhibit A, including another Justice, a designated independent lawyer or Mr. Herritt's (former) NSLA lawyer. In all of the circumstances **I felt it best for Mr. Herritt that his current counsel, retained to defend him on the criminal charge before the Court, determine if the impugned material should be deemed solicitor-client privileged**, thus exempt from review by the Crown and kept confidential at the trial.
>
> [Underlining in original, bold emphasis added]

[122] Of course, it is not up to Mr. Herritt, with or without input from counsel, or counsel on their own to *decide* or *determine* what is privileged. The court decides or determines if the material is protected by privilege after the assertion is made.

[123] Reliance on current counsel to assert privilege was the solution in *R. v. Shah*, 2015 ONSC 4853. The police investigated Mr. Shah for possession of firearms and drug trafficking. They obtained tracking warrants and a DNR warrant to

obtain telephone numbers to and from a cell phone linked to Shah. On arrest, cell phones were seized. Warrants were obtained to examine their contents.

[124] However, on arrest, Mr. Shah said his lawyer was one Simon King. Mr. King's business card was found in Shah's truck. Mr. King initially acted for Mr. Shah. Prior to execution of the search warrants on the phone, the police realized that there were dozens of contacts, mostly texts, between Shah's cell phone and that of Simon King.

[125] The Crown sought directions from the Ontario Superior Court prior to warrant execution. New defence counsel assumed carriage of Mr. Shah's defence. The Crown suggested its application was out of an abundance of caution, and they should have access to the phone absent an affidavit from Shah asserting the presence of privileged communications on the phone.

[126] The Court set out what Mr. Shah's counsel suggested:

> 16 Counsel for Mr. Shah asserts that there is a possibility that the examination of the phone will result in a breach of solicitor-client privilege. However, without actually examining the records, counsel is unable to say whether that privilege does in fact arise. Defence counsel submits that a copy should be made of the contents of the phone and that copy should be provided to the defence before it is seen by the police or the Crown. If no privilege is asserted, that is the end of the matter and the police can proceed to examine the phone. If privilege is asserted with respect to any of the communications on the phone, a decision would then be made by the Court as to whether privilege is established.

[127] Molloy J. agreed. She reasoned that because of the acknowledged solicitor-client relationship between Mr. Shah and Mr. King, care had to be taken to ensure any privilege would be protected. Hence, the phone should not be examined in first instance by the police or the Crown. Instead, the Crown would engage an independent expert to make copies of the phone's contents. The defence would then have 30 days to advise the Crown and the Court whether solicitor-client privilege is asserted for any portion of the material on the phone.

[128] The appellant says that *Shah* is distinguishable because it is evident that the accused consented to his counsel's intended examination of the phone's possibly confidential contents (*Shah* at para. 24). I accept that in *Shah*, the accused through counsel's submissions either consented or at least had no objection to his current counsel's proposed examination of the phone to determine if privilege should be asserted.

[129] In this case, there was no evidence from the appellant, or even a representation by counsel, that the appellant had any objection to Mr. Nodelman's examination of the text messages. If there were communications that the appellant had a legitimate basis to keep confidential from Mr. Nodelman due to solicitor-client privilege, he could have advanced such an objection. In which case, the task would have fallen personally to the appellant to review the texts and identify those over which he wished to assert privilege.

[130] The appellant further argues that the trial judge's order to have appellant's trial counsel vet presumptively privileged materials creates a variety of serious risks to lawyers, clients and the broader administration of justice. With respect, I am unable to agree with that characterization and consequent concerns.

[131] The one week of texts were not presumptively privileged materials. Furthermore, the trial judge's order created no situation of divided loyalty for appellant's trial counsel nor unnecessary risks to counsel, clients or the administration of justice.

[132] The trial judge's order, properly interpreted, did not require appellant's trial counsel to vet the materials to decide what was or was not privileged—only to identify, in consultation with his client, and acting as his counsel, which texts, if any, his client asserted were privileged. Hence there would be no divided loyalty. He could act as his client's advocate and be as partisan as he wished.

[133] It may well have been very likely that the Crown would have accepted any proposed redactions identified by appellant's trial counsel. In any event, the trial judge would then have exercised his supervisory role to determine if he accepted the proposed redactions based on assertion of privilege.

[134] The trial judge had procedural options open to him. I see nothing untoward in first requiring the appellant to determine if there are any communications which he wishes to assert are protected by solicitor-client privilege. The trial judge committed no reversible error.

The remedy

[135] If the trial judge erred, the appellant asks this Court to quash the conviction and order a new trial. The parties say that they have agreed that if the trial judge erred in law, the Court should not invoke the s. 686(1)(*b*)(iii) curative *proviso* to uphold the conviction.

[136] Because I have concluded that the trial judge did not commit legal error, I need not make any definitive pronouncements on the availability of the *proviso*. However, and with all due respect, even if I were convinced that the trial judge erred, in these circumstances, I would not have quashed the conviction and ordered a new trial.

[137] Courts must be mindful of the administration of justice's repute. To entertain the notion that a new trial in these circumstances is an appropriate remedy is to invite disrepute.

[138] There is certainly authority that suggests the Court cannot on its motion dismiss an appeal by reliance on the *proviso* absent a specific request by the Crown. This proposition apparently first arose in *R. v. Pétel*, [1994] 1 S.C.R. 3. Lamer C.J.C, writing for the majority, agreed that the trial judge had erred in law in his jury instructions, but observed that the Court could not raise the applicability of the *proviso* on its own motion:

> VI. Conclusion
>
> The undisputed evidence that Edsell, her alleged attacker, handed over his weapon and asked his future victim to hide it, conduct that is odd to say the least for someone intending to kill, must have had a clear effect on the jury, indeed on any jury composed of reasonable individuals. In the Court of Appeal and in this Court, however, counsel for the Crown did not argue that, given the evidence in this case, no substantial wrong or miscarriage of justice occurred, and that s. 686(1)(b)(iii) of the *Criminal Code* should thus be applied. The Crown has the burden of showing that this provision is applicable: *Colpitts v. R.*, [1965] S.C.R. 739. **This Court cannot apply it *proprio motu*.** Having found an error of law in the judge's answer to the question by the jury, I must accordingly dismiss the appeal and affirm the order for a new trial.
>
> p. 17 [Emphasis added]

(See also: *R. v. McMaster*, [1996] 1 S.C.R. 740 at para. 37)

[139] However, there is nothing in the language of the *Criminal Code* that suggests the Crown must specifically request the court to rely on the *proviso* to uphold a conviction despite legal error. The court need only be satisfied that the error is harmless in effect or harmless because conviction would be inevitable.

[140] Section 686 of the *Criminal Code* empowers an appellate court to dismiss an appeal notwithstanding that "the appeal might be decided in favour of the appellant" because of an error of law if the court is of the opinion that "no

substantial wrong or miscarriage of justice has occurred". The relevant provisions of s. 686 are

> 686. (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal
>
> (a) may allow the appeal where it is of the opinion that
>
> ...
>
> (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law,
>
> ...
>
> (b) may dismiss the appeal where
>
> ...
>
> (iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (a)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred;

[141] A more nuanced approach to the *proviso* can be found in *R. v. Jolivet*, 2000 SCC 29. The Crown did not seek to rely on the *proviso*, but the Court of Appeal raised the issue in oral argument. The unanimous decision by the Supreme Court found that *Pétel* and *McMaster* did not preclude reliance on the *proviso*. Binnie J., wrote as follows:

> 45 In its written submissions to the Quebec Court of Appeal, the Crown defended the rulings of the trial judge on their merits and did not raise the curative proviso as an alternative submission. The possibility of its application was raised in oral argument by that court, and belatedly pursued by the Crown. The respondent contends that, in these circumstances, the Court of Appeal did not have the authority to apply s. 686(1)(b)(iii). He relies primarily on two recent decisions of this Court: *R. v. Pétel*, [1994] 1 S.C.R. 3, and *R. v. McMaster*, [1996] 1 S.C.R. 740. In the *Pétel* case, Lamer C.J. found that the trial judge had erred in the answer he provided to a question from the jury and declined to apply the curative proviso of the *Criminal Code*, stating, at p. 17:
>
> > In the Court of Appeal and in this Court, however, counsel for the Crown did not argue that, given the evidence in this case, no substantial wrong or miscarriage of justice occurred, and that s. 686(1)(b)(iii) of the Criminal Code should thus be applied. The Crown has the burden of showing that this provision is applicable: *Colpitts v. The Queen*, [1965] S.C.R. 739. This Court cannot apply it *proprio motu*. Having found an error of law in

> the judge's answer to the question by the jury, I must accordingly dismiss the appeal and affirm the order for a new trial. [Emphasis added.]

In the *McMaster* appeal, Lamer C.J. relied on the above passage and ordered a new trial for both appellants. Again, the Crown had not raised s. 686(1)(b)(iii) of the *Code* in argument.

> 46 This aspect of the respondent's argument must be rejected. The onus rests upon the Crown to satisfy the court that there is no reasonable possibility that the verdict would have been different had the trial judge not committed an error of law. It is true that if the Crown does not offer the court oral or written submissions with respect to the application of this statutory provision, the court will not second-guess that exercise of the prosecutor's discretion. That being said, Lamer C.J. did not suggest in *Pétel* or *McMaster* that it would be wrong for a Court of Appeal to raise the issue of the curative proviso, and leave the ultimate decision up to the Crown. The Court would be failing its institutional responsibilities by withholding such a suggestion in circumstances where it thought the issue ought at least to be considered. Ordering a new trial raises significant issues for the administration of justice and the proper allocation of resources. Where the evidence against an accused is powerful and there is no realistic possibility that a new trial would produce a different verdict, it is manifestly in the public interest to avoid the cost and delay of further proceedings. Parliament has so provided.

[142] I have no doubt that it is the Crown's burden to satisfy a court that the requirements of the *proviso* have been met, but Parliament has given to appeal courts the power to uphold a conviction in the face of legal error if it were of the opinion that no substantial wrong or miscarriage of justice resulted. It may well be a rare case that an appeal court would be inclined to invoke the *proviso* in the absence of a Crown request. I need not decide the issue, but in my view, so long as the parties have had an opportunity to address the applicability of the *proviso*, an appeal court need not defer to the Crown's approach to the issue.

[143] This is one of those rare cases where I would not feel constrained by the Crown's position. As I have already detailed, the trial judge made no critical or dispositive *Charter* or admissibility decision adverse to the appellant. He directed the appellant to review the text messages and identify which texts, if any, over which he wished to assert privilege.

[144] Rather than comply, some weeks later the appellant returned to Court with a complicated voluntary plea resolution to the very serious charges of possession of a substantial quantity of cocaine for the purpose of trafficking and break and enter into a dwelling together with a joint sentence recommendation.

[145] In support of the plea resolution, trial counsel, with the appellant's instructions, expressly admitted he had committed the offence. The appellant repeated that admission to the probation officer in the course of expressions of remorse.

[146] Counsel then relied on the early termination of the trial proceedings and genuine expressions of remorse to convince the trial judge to accept the joint sentence recommendation.

[147] Two points arise from these basic uncontested facts. First, the appellant cannot point to any prejudice he may have suffered and there is no causal connection between the putative legal error and the conviction. Hence, the error is harmless in its effect.

[148] Second, the facially strong circumstantial case against the appellant became insurmountable with the admissions set out in Ex. #1 and to the probation officer. What would be the point of ordering a new trial? Conviction would be inevitable. The applicable principles were set out by LeBel J. in *R. v. Van, supra*:

> [36] An appellate court can also uphold a conviction under s. 686(1)(b)(iii) in the event of an error that was *not* minor and that *cannot* be said to have caused no prejudice to the accused, if the case against the accused was so overwhelming that a reasonable and properly instructed jury would inevitably have convicted (*Khan*, at para. 31). The ability to uphold a conviction in the face of a serious error at trial was aptly expressed by Sopinka J. in *R. v. S. (P.L.)*, [1991] 1 S.C.R. 909, who wrote that "depriving the accused of a proper trial is justified on the ground that the deprivation is minimal when the invariable result would be another conviction" (p. 916, affirmed in *Khan*, at para. 31). The high standard of an invariable or inevitable conviction is understandable, given the difficult task for an appellate court of evaluating the strength of the Crown's case retroactively, without the benefit of hearing the witnesses' testimony and experiencing the trial as it unfolded (*Trochym*, at para. 82). It is thus necessary to afford any possible measure of doubt concerning the strength of the Crown's case to the benefit of the accused person. The rationale for upholding a conviction in these circumstances is persuasive; in the words of Binnie J. in *R. v. Jolivet*, 2000 SCC 29, [2000] 1 S.C.R. 751, at para. 46:
>
> > Where the evidence against an accused is powerful and there is no realistic possibility that a new trial would produce a different verdict, it is manifestly in the public interest to avoid the cost and delay of further proceedings. Parliament has so provided.
>
> This reasoning was echoed in my concurring reasons in *Khan* (at para. 90). Thus, an appellate court is justified in refusing to allow an appeal against a conviction in

> the event of minor errors that could not possibly have affected the verdict and more serious errors that were committed in the face of an overwhelming case against the accused, since the underlying question is always whether the verdict would have been the same if the error had not been committed: *R. v. Bevan*, [1993] 2 S.C.R. 599.
>
> [Emphasis in original]

[149] Any reasonable, informed member of the public would have to wonder what is going on where an appellant suffers no prejudice by an impugned interlocutory order, voluntarily admits he committed an offence and gets the benefit of a plea resolution, but the appeal court, if error were found, must quash the conviction and order a new trial solely because the Crown submits the court should not rely on the *proviso*.

[150] In these circumstances, the appeal is moot and could be declined to be heard. In light of the fact that it was fully argued, I have considered the merits and would dismiss the appeal.

[151] My colleague, Bryson J.A., by consent order, stayed the trial judge's September 18, 2018 interlocutory order. That order became moot no later than the pronouncement of sentence. It is no longer extant. There is no remedy to be granted other than an order to dismiss the appeal.

Beveridge, J.A.

Concurred in:

Saunders, J.A.

Derrick, J.A.