

COURT OF APPEAL FOR ONTARIO

BORINS, JURIANSZ and LAFORME JJ.A.

B E T W E E N :	)	
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HER MAJESTY THE QUEEN	)	Susan Magotiaux
	)	for the appellant
	)	
Appellant	)	
	)	
- and -	)	
	)	
DEREK CAMERON	)	Peter W.S. Copeland
	)	for the respondent
	)	
Respondent	)	
	)	
	)	Heard: November 18, 2005

On appeal from a costs order made on February 20, 2003 and from acquittal entered on September 11, 2003 by Justice Arthur M. Gans of the Superior Court of Justice.

BORINS J.A.:

I. Introduction

[1] The respondent Derek Cameron was charged that on December 4, 1999 he intentionally or recklessly caused damage by fire to his apartment. On September 11, 2003, he was acquitted by Gans J., presiding without a jury. The Crown appeals against the acquittal on the ground that the trial judge erred in law in excluding the evidence of the Fire Marshall, Robert Young, when illness prevented him from completing his testimony and in precluding the Crown from calling Michael Rochon as its final witness. The Crown also seeks leave to appeal from the trial judge's order that it pay the respondent's costs consequent to the late disclosure of Mr. Rochon's report respecting the cause of fire.

[2] I would grant leave to appeal from, and allow the appeal, from the costs order. As well, I would allow the appeal from the acquittal of the respondent, set aside the judgment of acquittal and order that there be a new trial.

II. Facts

[3] A fire destroyed the respondent's apartment on the evening of December 4, 1999. After the fire was extinguished, police and investigators from the Fire Marshall's Office arrived on the scene in the early morning of December 5th, 1999. Shortly thereafter, adjusters on behalf of both the respondent's insurance company and the landlord's insurance company also came to conduct independent investigations of the cause of the fire.

[4] The respondent was ultimately charged with arson contrary to s. 433 of the *Criminal Code*. While it is not necessary to set out a detailed description of the trial proceedings, it is important to note that the trial was protracted. By the time it was terminated by the respondent's acquittal, the trial had occupied 32 days over about 10 months from November 18, 2002 to September 11, 2003. This time was equally divided between the presentation of evidence by the Crown and legal arguments concerning several issues. The Crown's case included evidence given by police officers, firefighters, neighbours, an insurance adjuster, and the respondent's former wife. The Crown called fifteen witnesses before calling Mr. Robert Young, a certified fire investigator employed by the Fire Marshall's Office, toward the close of its case.

[5] The Crown originally intended to call Mr. Young as its only expert witness. Because he investigated the scene soon after the fire was extinguished, he was a key witness for the Crown. The Crown's case against the respondent turned primarily on his expert evidence regarding the cause of the fire.

[6] During his direct examination, Mr. Young testified that the fire was incendiary. In his view, someone deliberately poured several litres of gasoline at multiple points in the apartment, and ignited the gas accelerant. During his testimony, however, the Crown discovered a pre-existing report prepared by investigative engineers that detailed the origin and cause of the fire. This report was prepared on behalf of the landlord's insurer, and essentially bolstered the Crown's theory of arson.

[7] The report was prepared by Michael Rochon. Mr. Rochon first investigated the scene two days after the fire was extinguished, which was subsequent to Mr. Young's investigation. The Crown discovered the report's existence at this stage of the trial while perusing the file of the landlord's insurance adjuster which had been produced consequent to an application by the respondent. On seeing a brief reference to the report in the file, the Crown asked for, and obtained, a copy of it. The Crown sought to tender the report into evidence on the 19th day of the trial, even though it was not provided to the respondent before trial as required by s. 657(3)(b) of the *Criminal Code*. The Crown also intended to call Mr. Rochon after Mr. Young had completed his testimony to give *viva voce* evidence concerning the report.

[8] The defence was provided with a copy of the "Rochon Report" within hours of its receipt by the Crown. The defence objected to the introduction of the report, and moved to exclude it on the basis that it was either manifestly unfair to tender the report near the

close of the Crown's case or because it infringed the respondent's s. 7 and s. 11(d) *Charter* right to make full answer and defence. In essence, the defence argued that it was prohibited from making full answer and defence by the late discovery of the report.

[9] The trial judge ultimately dismissed the respondent's motion to exclude the Rochon Report. He was satisfied that the Crown was not at fault in respect to the late production of the report, which contained relevant evidence. He was also satisfied that any potential prejudice to the respondent arising from the production of the report at this late stage of the trial would be cured by an adjournment to permit the respondent's expert to reconsider his opinion in light of this new evidence. Although he made no finding of misconduct on the Crown's part, the trial judge awarded costs against the Crown to compensate the defence expert for any changes to his report occasioned by the new evidence. The amount of the costs could not be determined until the defence expert submitted his account.

[10] In his reasons of April 10, 2003 for awarding costs, the trial judge explained:

I am of the view...that an award of costs can be meted out, albeit very rarely, pursuant to s. 24 [of the *Charter*] if the Defence establishes that costs would not have been incurred but for the late disclosure on the part of the Crown. I prefer...the minority decision of Berger J.A. in *R. v. Robinson*, *supra*, where His Lordship held that s. 24 is intended to be restorative in nature and is designed to put the Accused in the same position had the *Charter* breach not taken place.

Accordingly, I am persuaded that the Accused is entitled to be compensated for the incremental costs that would not have been incurred had the disclosure been made before their expert was retained and commenced an analysis on all aspects of the Crown's case now put in issue by the Rochon Report and anticipated in the testimony of the engineer proposed to be called.

The trial judge further explained in a subsequent ruling dated June 25, 2003 that his costs order was "in some measure tied to my finding that the police knew that Rochon Engineering had been retained by the building owner's insurers and were in the process of preparing an analysis of the root cause [of] the fire", a finding that was, in my view, correctly challenged by the Crown on the ground that it was not supported by the evidence.

[11] The trial was adjourned after the April 10, 2003 ruling. Subsequent to this ruling, the Crown proposed to call two or three minor witnesses and Michael Rochon as an additional arson expert before resting. When the trial resumed after a four month delay,

Mr. Young was on sick leave and could not attend for the completion of his cross-examination. Neither the Crown nor the defence was aware that Mr. Young had been suffering from an illness prior to April 2003. Because testifying in court would be considerably detrimental to his health, Mr. Young was unavailable to be cross-examined on issues raised by the newly disclosed Rochon Report. Both the Crown and the defence acknowledged that Mr. Young would be incapable of returning to court for at least a year, and that there was a strong possibility that he would never be able to complete his testimony.

[12] In light of these developments, the respondent sought to exclude both Mr. Young's testimony in its entirety, and to preclude the Crown from introducing the Rochon Report and the *viva voce* testimony of Mr. Rochon. During argument, the Crown urged the trial judge to refrain from excluding Mr. Young's testimony altogether, and to accord it less weight instead. After taking certain factors into consideration that will be discussed more fully below, the trial judge rejected the Crown's argument, and noted the following:

[Crown counsel] first argued that the appropriate ameliorative action in the instant case is for me to exercise my discretion and place less weight on the expert evidence offered by Mr. Young...

Respectfully, that bromide, as it were, doesn't carry the day in a situation of this nature where the evidence is central to the matters in issue...

[T]he Court should be loath to pick and choose the evidence of Mr. Young in the abstract. This exercise would be manifestly unfair to the Accused and in my view might actually create an intended reverse onus. Simply put, the prejudice to the Accused would not be ameliorated by this process.

In my view, the evidence of Mr. Young must be excluded in its entirety.

[13] Following his exclusion of Mr. Young's evidence, the trial judge re-visited his April 10, 2003 ruling permitting the Crown to introduce the Rochon Report through Mr. Rochon, notwithstanding the report's late production. As I understand the trial judge's reasons, he precluded the Crown from tendering Mr. Rochon's expert evidence respecting the cause of the fire because to do so would infringe the respondent's right to a fair trial since the respondent would be unable to cross-examine Mr. Young on the Rochon Report. The trial judge added that to permit the Crown to introduce the Rochon evidence after the exclusion of Mr. Young's evidence would confer a benefit on the Crown. From the trial judge's reasons it appears that he speculated that Mr. Rochon's

evidence could benefit the Crown if it was introduced without the defence being given the opportunity to cross-examine Mr. Young on the Rochon Report. The trial judge appeared to be of the view that Mr. Rochon's prospective testimony as to the fire's cause that would reflect the opinion in the report was much stronger than that of Mr. Young and would be very helpful to the Crown. It is clear from my reading of the trial judge's reasons that he excluded both Mr. Young's and Mr. Rochon's evidence on the basis of his speculation on the impact that the admission of the evidence would have on the ability of the respondent to fairly respond to the Crown's case and, in particular, Mr. Rochon's opinion of the cause of the fire.

[14] The Crown called no further evidence following the trial judge's ruling to exclude both Mr. Young's and Mr. Rochon's expert testimony. The trial judge dismissed the respondent's motion for a directed verdict, but ultimately acquitted the respondent on the basis of reasonable doubt.

III. Issues

[15] I would frame the issues on appeal as follows:

- 1) Did the trial judge err in ordering costs against the Crown?
- 2) Did the trial judge err in excluding Mr. Young's expert evidence in its entirety?
- 3) Did the trial judge err in excluding the Rochon Report from evidence? Did he err in prohibiting Michael Rochon from giving *viva voce* evidence?

IV. Discussion

1) Did the trial judge err in ordering costs against the Crown?

[16] The appellant takes the position that the trial judge applied the wrong standard in imposing costs against the Crown in this criminal matter. The appellant relies on *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575 to argue that a trial judge should decline to award costs against the Crown absent misconduct that includes flagrant and unjustified behaviour. The appellant submits that without a finding of egregious misconduct on the Crown's part, an order requiring the Crown to compensate the respondent for costs incurred to prepare a response to the Rochon Report, constitutes reversible error.

[17] The respondent, on the other hand, emphasizes that the trial judge's costs award was limited only to the cost of preparing a revised expert report, and was appropriate in the circumstances.

[18] It is well-settled that superior courts possess both the inherent jurisdiction and authority under s. 24(1) of the *Charter* to order costs against the Crown in the circumstances involving untimely disclosure: see *R. v. 974649 Ontario Inc.*, *supra*, at paragraph 80 and *R. v. Bhatti* (2006), 204 C.C.C. (3d) 463 at paragraph 19 (B.C.C.A.). On this record, however, I am satisfied that the Crown's conduct in this case did not amount to flagrant and unjustified misconduct such that an order for legal costs was

warranted. The Supreme Court set out a conjunctive test in *974649 Ontario Inc.* – the Crown’s conduct with respect to non-disclosure must be both flagrant *and* unjustified to attract cost sanctions. The trial judge in this case did not characterize the Crown’s failure to disclose the Rochon Report in a timely fashion as “a marked and unacceptable departure from the reasonable standards expected of the prosecution.” The trial judge found as a fact, on originally admitting it, that the Rochon Report’s existence was not made known to the Crown until well into the trial. His determination that his costs order was “in some measure tied to my finding that the police knew that Rochon Engineering had been retained by the building owner’s insurers and were in the process of preparing an analysis of the root cause [of] the fire” had absolutely no bearing on the Crown’s conduct, and should not have been the focus of his analysis.

[19] Further, although the Crown did not comply with the strict requirements of disclosing expert evidence as described under s. 657.3(3)(b), the trial judge was required to consider the relief set out under s. 657.3(4). The most appropriate remedy in this case was to allow an adjournment pursuant to s. 657.3(4)(a), as the trial judge did, to permit the respondent’s expert to reconsider his opinion in light of the Rochon Report. Moreover, while the trial judge made no clear finding that the respondent’s *Charter* rights had been infringed by the late disclosure of the Rochon Report, in awarding costs against the Crown he appears to have granted a remedy under s. 24 of the *Charter*. Accordingly, I would give affect to this ground of appeal, and vacate the costs order.

2) Did the trial judge err in excluding Mr. Young’s expert evidence in its entirety?

[20] Sections 7 and 11(d) of the *Charter* provide an accused with a constitutional right to make full answer and defence. The Supreme Court of Canada in *R. v. Lyttle*, [2004] 1 S.C.R. 193 emphasized the significance of an accused’s right to cross-examine Crown witnesses in an adversarial process at paragraphs 41-44:

As mentioned at the outset, the right of an accused to cross-examine prosecution witnesses without significant and unwarranted constraint is an essential component of the right to make a full answer and defence. See *R. v. Seaboyer*, [1991] 2 S.C.R. 577, per McLachlin J. (as she then was):

The right of the innocent not to be convicted is dependent on the right to present full answer and defence. This, in turn, depends on being able to call the evidence necessary to establish a defence and to *challenge the evidence called by the prosecution....*

In short, the denial of the right to call and *challenge evidence* is tantamount to the denial of the right to rely on a defence to which the law says one is entitled.

In *R. v. Osolin*, [1993] 4 S.C.R. 595, Cory J. reviewed the relevant authorities and, at p. 663, explained why cross-examination plays such an important role in the adversarial process, particularly, though of course not exclusively, in the context of a criminal trial:

There can be no question of the importance of cross-examination. It is of essential importance in determining whether a witness is credible. Even with the most honest witness cross-examination can provide the means to explore the frailties of the testimony. For example, it can demonstrate a witness's weakness of sight or hearing. It can establish that the existing weather conditions may have limited the ability of a witness to observe, or that medication taken by the witness would have distorted vision or hearing. Its importance cannot be denied. It is the ultimate means of demonstrating truth and of testing veracity. Cross-examination must be permitted so that an accused can make full answer and defence. The opportunity to cross-examine witnesses is fundamental to providing a fair trial to an accused. This is an old and well-established principle that is closely linked to the presumption of innocence. See *R. v. Anderson* (1938), 70 C.C.C. 275 (Man. C.A.); *R. v. Rewniak* (1949), 93 C.C.C. 142 (Man. C.A.); *Abel v. The Queen* (1955), 115 C.C.C. 119 (Que. Q.B.); *R. v. Lindlau* (1978), 40 C.C.C. (2d) 47 (Ont. C.A.).

Commensurate with its importance, the right to cross-examine is now recognized as being protected by ss. 7 and 11(d) of the *Canadian Charter of Rights and Freedoms*. See *Osolin*, *supra*, at p. 665.

The right of cross-examination must therefore be jealously protected and broadly construed [emphasis in original].

[21] The right to cross-examine a witness, however, is not absolute or limitless. The seminal authority in this area is *R. v. Hart* (1999), 135 C.C.C. (3d) 377 (N.S.C.A.), leave to appeal to S.C.C. refused, [2000] S.C.C.A. No. 109. The accused in *Hart* was convicted of sexually assaulting and touching for a sexual purpose two young boys. One complainant, who was 12 years old at the time of trial, became unresponsive during questions posed in cross-examination. Based on his unresponsiveness, the defence sought a judicial stay or a directed verdict of acquittal. The trial judge declined to grant this relief, and this decision was upheld on appeal.

[22] Writing for the *Hart* court, Cromwell J.A. carefully reviewed relevant English, American and Canadian authorities, and emphasized that where there has been incomplete cross-examination of a witness, there is no dispositive test in determining whether an accused has been deprived of the right to make full answer and defence or whether an accused's trial has become unfair. Nevertheless, he provided guidance for trial judges and set out three relevant considerations in arriving at this determination, namely (1) the reasons for the witness' unresponsiveness, (2) the impact of the witness' unresponsiveness, and (3) possible ameliorative action. Cromwell J.A. described relevant matters under these three broad headings and cautioned that his comments with respect to each category were neither exhaustive nor definitive. Ultimately, whether a case against an accused may proceed following an incomplete cross-examination of a witness falls within the trial judge's discretion. In the view of Cromwell J.A. this discretion should be exercised with a view to ensuring both fairness to the accused and the pursuit of truth. To this I would add that the discretion should also be exercised with a similar view toward the Crown. This will require the trial judge to consider many factors in balancing trial fairness from the perspective of the Crown and the accused.

[23] Mr. Young was not an unresponsive or reluctant witness like the 12-year-old complainant in *Hart*. On the contrary, Mr. Young answered questions that were put to him in both direct examination and in cross-examination in an open and voluntary manner. Instead, this case involves a situation where the Crown's key expert witness was silenced during cross-examination due to ill health. Though *Hart* was decided in the context of an unresponsive child witness, the discussion in *Hart* is instructive on matters of limited cross-examination of expert witnesses and is applicable to this appeal.

[24] At issue in this appeal is whether the trial judge erred in his assessment of the second and third considerations outlined in *Hart*, *i.e.*, the impact of Mr. Young's limited cross-examination on the respondent's right to a fair trial and the potential ameliorative action that could have been taken by the trial judge. As for the first consideration, it is common ground that Mr. Young's unavailability to be cross-examined could not have been avoided by reasonable action.

[25] The appellant makes four submissions in support of its argument that the trial judge erred in his application of the “impact of limited cross-examination” and “possibilities of ameliorative action factors” as articulated in *Hart*, and hence, erred in the exercise of his discretion by excluding Mr. Young’s expert evidence in its entirety. First, the appellant argues that the trial judge should have entertained testimony from Michael Rochon before speculating on the prejudicial impact it would have had on Mr. Young’s incomplete cross-examination. In other words, the appellant argues that the trial judge’s exclusion of Mr. Young’s evidence was premature.

[26] Second, the appellant argues that the trial judge failed to consider corroborative evidence adduced at trial in assessing the impact of Mr. Young’s limited cross-examination. The appellant points out that Mr. Young’s evidence relating to the presence of gasoline accelerants, the locations of isolated burn spots, the movement of fire within the apartment, and salvage operations was confirmed by the testimony of police officers, firefighters, and neighbours. Third, the appellant contends that the trial judge failed to properly consider the extent of Mr. Young’s cross-examination. In the appellant’s view, Mr. Young’s cross-examination was not curtailed with respect to contentious issues such as the locations of isolated burns, the impact that his movement of debris and furniture would have on the scene for further testing by Mr. Rochon, and his contamination of a sample submitted to the Centre for Forensic Sciences. Finally, the appellant relies on this court’s decision in *R. v. Lovie* (1995), 100 C.C.C. (3d) 68 (Ont. C.A.) and the Alberta Court of Appeal’s decision in *R. v. Yu* (2002), 171 C.C.C. (3d) 90 (Alta. C.A.), leave to appeal to S.C.C. refused, [2005] S.C.C.A. No. 321 for the proposition that in considering a potential ameliorative course of action, the trial judge should have considered admitting Mr. Young’s evidence, albeit with diminished weight. A further potential ameliorative action, the appellant urges, would have been to grant a mistrial.

[27] The respondent, however, submits that it was within the trial judge’s broad discretion to exclude Mr. Young’s evidence on the basis that it affected the fairness of the respondent’s trial, especially when coupled with the late disclosure of the Rochon Report. The argument runs as follows. Mr. Young’s evidence was intricately linked to Mr. Rochon’s evidence because Mr. Young had altered the scene before Rochon Engineering arrived to investigate the cause of the fire. Mr. Young’s partial cross-examination focused solely on his own observations of the scene and his conclusions regarding the cause of the fire. Because Mr. Young was not cross-examined on the state in which he left the apartment, his potential contamination of the scene was not scrutinized. The respondent argues that without Mr. Young’s further cross-examination on this issue, there would be no way of testing the veracity of Mr. Rochon’s evidence respecting the apartment’s state when he first conducted his investigation. The appropriate remedy, therefore, was to exclude Mr. Young’s entire testimony from evidence and to preclude the Crown from introducing the Rochon evidence.

[28] Before addressing these issues, and before undertaking a review of Cromwell J.A.’s useful analysis of the impact of a witness’ limited cross-examination and possible

ameliorative action at pp. 412-413 of *Hart*, it is important to note that the *Hart* case involved different procedural circumstances. In *Hart*, the defence moved for a judicial stay or a directed verdict of acquittal following the close of the Crown's case. In other words, the trial judge in *Hart* was in a good position to assess the impact of the child's incomplete cross-examination in the context of all evidence that had been adduced by the Crown. In the instant appeal, however, the trial judge delivered his ruling regarding the exclusion of Mr. Young's evidence *before* the Crown rested. In his ruling dated June 25, 2003, the trial judge contemplated deferring his decision until Mr. Rochon's testimony was completed, but declined to do so:

At first I thought it might be more advisable to defer a decision on the application until after I had heard the complete evidence of Mr. Rochon, if only to give some context to Mr. Clements' complaints. I was initially inclined to that view since the challenge now mounted speaks to a fight between and perhaps among experts in terms of how, where and by whom the fire that consumed the Cameron apartment started. To deal with the impact issue or the third issue, namely the ameliorative action issue, in the abstract would make the task difficult if not impossible. That being said, Mr. Clements did ultimately outline in more detail some of the issues upon which he intended to cross-examine Mr. Young, putting thereby some context to his argument.

The trial judge went on to describe and consider the areas that the respondent's counsel wished to pursue if continued cross-examination of Mr. Young were possible.

[29] In my opinion, the trial judge should have followed his initial view and should not have ruled on the motion at this stage of the trial. In *R. v. Bero* (2000), 151 C.C.C. (3d) 545 (Ont. C.A.) the accused was charged with impaired driving causing bodily harm and driving "over 80." The accused and the primary Crown witness were thrown from a vehicle and seriously injured. The only issue at trial was the identity of the driver. Unknown to the Crown, the vehicle was sold to an auto wrecker and was destroyed days before the defence requested the vehicle to be retained for further forensic examination. The defence sought a stay of proceedings based on the destruction of crucial evidence, and this motion was dismissed before the trial judge heard any evidence on the trial proper. On appeal, Doherty J.A. ordered a new trial and aptly held that the trial judge erred in ruling on the motion at the outset of trial. He noted:

The trial judge should not have ruled on the motion at the outset of the trial. *This Court has repeatedly indicated that except where the appropriateness of a stay is manifest at the outset of proceedings, a trial judge should reserve on motions such as the motion brought in this case until after the*

*evidence has been heard. The trial judge can more effectively assess issues such as the degree of prejudice caused to an accused by the destruction of evidence at the end of the trial...*The approach favoured by this Court was approved in *R. v. La* (1997), 116 C.C.C. (3d) 97 (S.C.C.) at 107-108. In keeping with that approach, I will consider the appellant's claim that a stay should have been granted in the light of the evidence which was adduced at the trial [emphasis added and citations omitted].

[30] Doherty J.A. reiterated this rule in *R. v. Varga* (2001), 159 C.C.C. (3d) 502 (Ont. C.A.), leave to appeal to S.C.C. refused, [2002] S.C.C.A. No. 278, at paragraph 66. Though the respondent's counsel at trial did not seek a stay of proceedings, his motion to exclude both Mr. Young's and Mr. Rochon's evidence heard on June 5 & 6, 2003 was characterized by the trial judge as "almost as extreme [as] a stay of proceedings." In this situation, the trial judge did not follow the preferred approach articulated in *Bero* and *Varga*. He did not satisfy himself that it was clearly appropriate to make a ruling on the motion at that stage in the trial rather than to reserve on it until after all the evidence had been heard. A review of submissions made on the June 5 & 6 application indicates that the appropriateness of excluding Mr. Young's evidence before the close of the Crown's case was not manifest or obvious. Although the respondent's counsel highlighted areas that he wished to explore if Mr. Young's cross-examination were to continue, the trial judge would have been in a better position to assess the impact that Mr. Young's limited cross-examination would have had to trial fairness after Mr. Rochon's evidence had been heard, as well as any evidence that the respondent introduced. It is helpful to recall that the respondent's cross-examination of Mr. Young was virtually complete, except in regard to the Rochon Report. As Doherty J.A. put it in paragraph 66 of *Varga*, a "trial judge is in a better position to assess prejudice at the end of evidence." The proper procedural course that the trial judge should have followed in the exercise of his discretion was to reserve on the motion until all evidence had been heard.

[31] Even if I am wrong in holding that the trial judge should have reserved his ruling until the conclusion of the Crown's case, in my view, the trial judge erred in his application of the third "ameliorative action" consideration articulated in *Hart*. Before embarking on this analysis, however, it is first necessary to review the trial judge's disposition of the second "impact" factor.

[32] In assessing the impact of a witness' limited cross-examination on the accused's right to a fair trial, Cromwell J.A. in *Hart* underscored the need for trial judges to consider (1) the importance of the evidence to the case, (2) any satisfactory basis upon which a trier of fact can evaluate the evidence, (3) the extent and effect of the cross-examination that has been conducted, and counsel's concerns regarding matters that were

not elicited during cross-examination, and (4) the likely impact that a complete cross-examination would have had on the trial.

[33] In considering the importance of Mr. Young's testimony to the Crown's case, the trial judge acknowledged in his June 25, 2003 ruling that "the more important the evidence to the prosecution's case, the more reluctant the trial judge should be to allow it without full cross-examination and testing." The trial judge cannot be criticized in reasoning that because Mr. Young was originally the Crown's critical expert witness on the cause of the fire, a court should be disinclined to allow his testimony without the benefit of complete cross-examination. He also probed the respondent's counsel about the extent and effect that Mr. Young's curtailed cross-examination would have on the respondent's right to make full answer and defence.

[34] However, I would agree with the appellant's argument that in the exercise of his discretion the trial judge failed to consider corroborative evidence previously adduced in assessing the impact of Mr. Young's limited cross-examination. As Cromwell J.A. was careful to point out at page 412 of his reasons, the two central considerations that a trial judge must make under the "impact of limited cross-examination" heading are 1) the importance of the evidence, and 2) whether there is a satisfactory basis upon which the trier of fact can evaluate the evidence. The record reveals numerous examples of corroborative evidence that could have assisted the trial judge in evaluating Mr. Young's incomplete cross-examination, including evidence from neighbours, a firefighter, and a police officer confirming the presence of gasoline; testimony from two neighbours who attempted to extinguish the fire; and a firefighter's testimony corroborating Mr. Young's evidence regarding isolated burning within the respondent's apartment. Had the trial judge properly considered this additional evidence, he would have concluded that there was a satisfactory basis for evaluating Mr. Young's evidence, rather than concluding, as he did, that his evidence must be evaluated "in the abstract." Moreover, in my view, in considering this issue it would also have been proper for the trial judge to consider the evidence of Mr. Rochon on the assumption that he would be permitted to testify, bearing in mind that the respondent would be able to cross-examine Mr. Rochon on whether his opinion would have been different in light of the alleged weaknesses in Mr. Young's opinion as to the cause of the fire.

[35] The trial judge's analysis of the "possibilities of ameliorative action" is also flawed. In addressing the Crown's argument that he ought to place less weight on Mr. Young's expert evidence, the trial judge stated:

Respectfully, that bromide, as it were, doesn't carry the day in a situation of this nature where the evidence is central to the matters in issue....

[T]he court should be loath to pick and choose the evidence of Mr. Young in the abstract. This exercise would be manifestly unfair to the Accused and in my view might

actually create an unintended reverse onus. Simply put, the prejudice to the Accused would not be ameliorated by this process [emphasis added].

[36] It is not clear whether the trial judge had the benefit of the Alberta Court of Appeal's decision in *Yu*, *supra*. In *Yu*, the accused was convicted of, *inter alia*, kidnapping, intimidation and assault. The Crown's primary witness was a 40-year-old complainant who testified at both the preliminary inquiry and at trial, but died before her cross-examination at trial could be completed. Her testimony was entered into evidence, and Yu's application for a stay of proceedings was dismissed. In considering whether the accused was deprived of a fair trial, and in considering the approach set forth in *Hart*, the *Yu* court at paragraph 13 held that in considering the admissibility of evidence accompanied by an incomplete cross-examination, the issue is the weight to be given to it rather than its inadmissibility:

The preponderance of reported authority supports the conclusion that *viva voce* testimony that is unaccompanied by cross-examination because of the intervening death of a witness, is not rendered inadmissible. See *R. v. Doolin* (1832) 123 C.C. 123; *R. v. Solomon and Thumbler* (1958), 25 W.W.R. 307 at p. 320 (Man. C.A.); *Bank of Montreal v. Drycreek Livestock Enterprises Ltd.* (1981), 9 Man. R. (2d) 352 (Q.B.); *Cook v. Laba* (1986), 52 Alta. L.R. (2d) 187 (Q.B.); *R. v. Hart* (*supra*). Only its weight is undermined. To what extent rests with the trier of fact [emphasis added].

[37] Accordingly, there exists ample authority that supports the proposition that testimony that is not subjected to complete and full cross-examination need not be rendered inadmissible in all instances. The trial judge in this case did not adequately consider the possibility of affording Mr. Young's testimony less weight, but instead, compounded the error by insisting that courts are loath to "pick and choose" evidence in the abstract. With respect, the trial judge was simply called upon to attribute less weight to Mr. Young's opinion in its totality. He was not asked to selectively discount portions of Mr. Young's direct testimony.

[38] Finally, I would reject the appellant's argument that a mistrial was an appropriate remedy following the June 5 & 6 motion to exclude Mr. Young's evidence. Mistrials are more commonly ordered in a jury setting, particularly because it is understood that trial judges are more capable of excluding inadmissible evidence during factual finding deliberations. The *Criminal Code* does not provide a judge with statutory authority to declare a mistrial, with the exception of s. 653, which confers upon a judge the authority to order a mistrial where a jury is unable to agree on a verdict.

[39] Though trial judges possess an inherent discretionary power to declare mistrials, this was not a situation where it would have been prejudicial for the trial judge to have heard Mr. Young's "inadmissible" evidence. Moreover, mistrials are usually ordered in the context of inadvertent statements made in the course of trial, which was not the case here. As the trial judge put it, the Crown "assiduously avoided [a mistrial] application." As such, this remedy was not fitting in the circumstances.

[40] Because I have concluded that the trial judge erred in prematurely deciding the motion to exclude Mr. Young's evidence, and alternatively, in failing to adequately consider the appropriateness of giving less weight to his evidence, it is unnecessary to consider the appellant's further submission that the trial judge erred in excluding Michael Rochon's evidence. This ruling was intimately related to his reasons in excluding Mr. Young's evidence, and hence, was in error.

[41] Even if the trial judge had been correct in excluding Mr. Young's evidence in its entirety rather than in admitting it subject to the weight to be given to it, there was no legal basis on which to exclude Mr. Rochon's evidence. It was relevant and material to the cause of the fire. Notwithstanding its late production, earlier in the trial the trial judge had, in my view, correctly ruled it admissible over the respondent's objection that to do so would require its expert to re-evaluate his opinion and possibly to require a change in the defence strategy. In doing so, the trial judge was satisfied that the respondent's right to a fair trial would not be infringed in ruling that the Rochon Report and Mr. Rochon's testimony were admissible. While it may have been disadvantageous and unfortunate to the respondent that Mr. Rochon's opinion of the cause of the fire was based on sounder methodology than Mr. Young's opinion, this did not provide a proper reason for the exclusion of this relevant evidence when it became impossible to complete Mr. Young's cross-examination.

[42] To this I would add that in the circumstances of this case it was important for the trial judge to consider the stage of the trial at which the issue arose. As I have pointed out, Mr. Young, who was the Crown's sixteenth witness, had virtually completed his testimony. The respondent's counsel had essentially concluded his cross-examination. All that remained was to cross-examine Mr. Young on any matters arising from the Rochon Report. Clearly, at this juncture the parties had a significant investment in completing this protracted trial which, in my view, provided an additional reason for the trial judge to defer his ruling on the respondent's motion until the conclusion of the evidence. In balancing trial fairness from the perspective of the Crown and the accused, it was no doubt obvious to the trial judge that the exclusion of the evidence of Mr. Young and Mr. Rochon would have an adverse impact, as it did, on the ability of the Crown to prove its case. From the perspective of the accused, had the trial judge not excluded the evidence of Mr. Young and Mr. Rochon, the accused would have responded to it with the evidence of his own expert, to whom the trial judge had given the opportunity to reconsider his original opinion in light of the Rochon Report. Moreover, in reconsidering his opinion the expert also had the advantage of having heard Mr. Young's evidence.

Had the trial judge engaged in this balancing analysis, in my view, it should have been clear to him that proper exercise of his discretion required that he defer ruling on the respondent's motion to exclude the testimony of Mr. Young and Mr. Rochon until the end of the trial.

V. Disposition

[43] In my view, had the trial judge in the exercise of his discretion properly instructed himself on the respondent's motion to exclude the expert testimony of Mr. Young and Mr. Rochon and had he considered their testimony in light of the factors that I have reviewed, as well as any defence evidence that may have been presented, he would not necessarily have acquitted the respondent. I would, therefore, set aside the judgment of acquittal and would order that there be a new trial. I would also grant leave to appeal costs and vacate the costs order.

RELEASED: May 16, 2006 ("SB")

"S. Borins J.A."

"I agree R. G. Juriansz J.A."

LaFORME J.A. (Dissenting):

[44] I have had the opportunity to read the comprehensive reasons for decision of my colleague. I agree fully with his decision to allow the appeal on the issue of the ordering of costs against the Crown, however, I respectfully disagree with allowing the appeal in connection with the remaining two issues. Accordingly, while I would allow the appeal on costs, I would dismiss the appeal in connection with the trial judge's treatment of the evidence of Mr. Young and Michael Rochon.

[45] As my colleague notes, in circumstances where the appellant's expert witness, Mr. Young was unable to continue with his evidence due to a serious illness, the trial judge in the exercise of his judicial discretion, ordered that the evidence that had been completed was to be excluded. Additionally, again in the exercise of his discretion, he ruled that the further evidence of another prosecution witness, Michael Rochon of Rochon Engineering, would not be permitted. The trial judge concluded that this remedy was necessary in order for the respondent to receive a fair trial.

[46] The appellant argues that the trial judge erred in ruling prematurely to exclude evidence of Mr. Young and Mr. Rochon. That is, the ruling should have been reserved until after all the evidence had been heard in order to better assess the impact of Mr. Young's limited cross-examination on trial fairness. With respect, I disagree.

[47] The authorities relied on to support the view that the preferred approach would have been for the trial judge to reserve his ruling until after the evidence had been heard involved rulings made at the outset of proceedings, before any evidence had been called. That is not this case.

[48] In this case the trial judge was alive to the fact that it would be inappropriate to rule on the motion "in the abstract"; however, he had the benefit of a detailed outline from defence counsel of the issues upon which he intended to cross-examine Mr. Young and the strategy of using Mr. Young's evidence to undermine Mr. Rochon's evidence, and *vice versa*. Having observed the circumstances of the trial, the trial judge was well positioned to determine that he had sufficient context to assess the impact of Mr. Young's incomplete cross-examination and make his ruling without hearing Mr. Rochon's evidence. It was within his discretion to decide the motion at that stage of the proceeding and I find no error in his exercise of that discretion.

[49] The appellant asserted in oral argument that the defence prepared for and began the trial with an understanding that the Crown would be relying only on the expert evidence of Mr. Young, thus, excluding Mr. Young's evidence and allowing the Rochon evidence would still leave the Crown with only one expert resulting in no prejudice to the defence. The appellant further submits that in ruling to exclude the expert evidence the trial judge failed to consider other basis in the evidence adduced at trial that could assist in evaluating Mr. Young's evidence absent a full cross-examination. For example, the fact that Mr. Young had been extensively cross-examined prior to the Crown's motion to

admit into evidence the Rochon Report, and the possibility that Mr. Young's evidence could be admitted but afforded less weight. In my view, these arguments entirely miss the point upon which the trial judge made his ruling.

[50] The trial judge ruled that in the specific circumstances of this case, it would be unfair to allow the trial to proceed without the right of the defence to complete its cross-examination of Mr. Young in light of the new information obtained from the Rochon report. This conclusion arises out of the following:

- The appellant made a tactical decision during the testimony of Mr. Young to adduce the Rochon report and call the Rochon witness as part of its case ostensibly to reinforce the opinion evidence of Mr. Young. This decision then allowed the defence to adopt a new, and very real defence strategy of pitting the Crown's two experts' findings and evidence against each other.
- After the appellant was permitted by the trial judge, in a separate and previous ruling, to call the Rochon witness, Mr. Young, who had not completed his cross-examination by defence counsel, became seriously ill and was not able to resume his testimony. It was agreed that it was unlikely that Mr. Young would ever be available to resume his evidence. Had Mr. Young not fallen ill, defence counsel would have pursued cross-examination based on information from the Rochon report.
- But for the Crown's decision to call the Rochon evidence, the new strategy of defence would not have been available; rather, it would have been left with the incomplete evidence of Mr. Young, and perhaps another remedy would have been more appropriate.

[51] Having chosen the approach it did the appellant cannot now say that the defence should have been prohibited from advancing this new, and very real defence strategy. The trial judge held that fairness dictated otherwise. I agree.

[52] The experienced trial judge was acutely alive to the appropriate analysis to be applied, namely that set out in *R. v. Hart*, (1999), 135 C.C.C. (3d) 377 (N.S.C.A.). Briefly stated, this analysis provides that where a party has been denied a full opportunity to cross-examine an adverse witness, the court will examine three discrete factors: (i) the reasons for the unresponsiveness of the witness; (ii) the impact of the inability to cross-

examine; and (iii) the possibilities of ameliorative action. The trial judge then fully considered each branch of the analysis and concluded that the expert evidence ought to be excluded. In the context of the case, he concluded that the inability to cross-examine would have a prejudicial impact on trial fairness.

[53] Further, the trial judge reviewed other possible remedies including, admitting Mr. Young's evidence and appropriating weight, or excluding his evidence and allowing the Rochon evidence. He also considered a stay of proceedings, although the Crown did not argue that he consider this remedy, nor did it seek a mistrial. In rejecting these other remedies and ruling as he did, the trial judge in my view properly exercised his discretion in the specific circumstances of this case.

[54] The trial judge, again correctly in my view accepted that Mr. Young's evidence was connected to the Rochon evidence, and the incomplete cross-examination was not directed towards the issues that would be relevant to the Rochon evidence. He found that given the late disclosure of the important Rochon evidence, coupled with the unavailability of Mr. Young, the respondent was prohibited from developing through Mr. Young a basis to undermine the Rochon conclusions. Consequently, fairness required that both Mr. Young's and Rochon's evidence be excluded.

[55] By way of example, the evidence of Mr. Young was directly linked to the proposed Rochon evidence. Mr. Young, who was not a certified fire investigator at the time of his examination, had extensively excavated the scene of the fire two days prior to the attendance by Rochon Engineering. Thus, the defence was precluded from fully exploring issues such as contamination from Mr. Young's work, whether he followed proper procedures, and whether samples for testing had been properly dealt with by him.

[56] This was a case that had many curious twists and turns to it. The trial judge, as is always the case, was distinctively positioned to consider the various issues that arose in the unique circumstances that provide the overall context for his decisions. The trial judge, in my view, considered all the necessary factors in exercising his judicial discretion in highly unusual circumstances and his decision must be accorded deference.

[57] I can find no basis to conclude that he misdirected himself, or that his decision is clearly wrong, or that it amounts to an injustice. Absent such circumstances, this court should not intervene. Accordingly, this portion of the appeal is dismissed.

[58] I would grant leave to appeal costs, allow the appeal and vacate the costs order. I would dismiss the remainder of the appeal.

"H. S. LaForme J.A."