SCC File No: 39006

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE NOVA SCOTIA COURT OF APPEAL)

BETWEEN:

RANDY DESMOND RILEY

APPLICANT
(Appellant)

– and –

HER MAJESTY THE QUEEN

RESPONDENT
(Respondent)

APPLICATION FOR LEAVE TO APPEAL
AND MOTION FOR EXTENSION OF TIME
(Pursuant to section 691(1)(b) of the *Criminal Code,* RSC 1985, c. C-46 and section 59 of the *Supreme Court Act*, RSC 1985, c S-26)

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PART I – OVERVIEW AND FACTS

Overview of Argument

1 The Applicant has already commenced an appeal as of right in Case # 39006. His appeal addresses the propriety of a *Vetrovec* caution against a Crown witness who provided exculpatory evidence in favour of the defence. A majority of the Nova Scotia Court of Appeal upheld the Applicant's convictions for second degree murder and unlawful possession of a firearm.

2 On February 19, 2020, counsel for the Applicant was provided with a USB thumb drive containing a sworn, cautioned, digital video recantation statement by the Crown's key inculpatory witness. If believed, the recantation strongly undermines the convictions. Counsel is thus duty-bound to bring forward a fresh evidence application for judicial consideration.

3 In addition, information contained within the sworn recantation video suggests that there may have been material non-disclosure by the Crown in this case. As a result, the Applicant has made a request to the Crown for additional disclosure to confirm or refute this possibility.

4 The disclosure issue needs to be resolved prior to perfecting a fresh evidence application. The Crown will also require time to inquire into the background circumstances of the recantation and to consider any fresh evidence it may wish to adduce in reply.

5 The as of right appeal hearing is currently scheduled for May 22, 2020. The Appellant's Factum is complete and is being filed on today's date. If the Applicant is successful in his appeal as of right, the recantation and disclosure issues become moot at the appellate level.

6 The Applicant does not seek an adjournment. Instead, he seeks leave to appeal on the following grounds, to be argued at a subsequent hearing held *seriatim* to the May 22 appeal:

1. That the Applicant's convictions should be quashed, and a new trial ordered in this case, in light of the fresh evidence of Mr. Paul Smith.

2. Such further grounds as may become apparent upon receipt of additional Crown disclosure.

7 Alternatively, the Applicant asks that both issues be remanded back to the Nova Scotia Court of Appeal for further proceedings in accordance with s. 43(1.1) of the *Supreme Court Act*.

Concise Statement of Facts

8 Donald Chad Smith (hereinafter Chad Smith) was shot to death while delivering pizza to a residential address in Dartmouth, Nova Scotia, shortly before 9:26 p.m. on October 23, 2010. The Applicant was tried for first degree murder and unlawful possession of a firearm in relation to the death. He was convicted of the lesser included offence of second degree murder as well as the firearm possession charge.

9 The key Crown witness at the Applicant's trial was Paul Smith (no relation to Chad Smith). Paul Smith testified that on October 23, 2010, around 7:00 p.m., he received a phone call. His close friend, the Applicant, was looking for a ride. Paul Smith drove to the Applicant's girlfriend's home on Trinity Avenue, also in the Highfield Park area of Dartmouth. The Applicant was waiting outside with a third party, Nathan Johnson. Upon instructions from the Applicant, Paul Smith drove the Applicant and Nathan Johnson to an apartment building in Dartmouth near the Micmac Hotel – about fifteen minutes away.[1]

10 According to Paul Smith, the Applicant made several admissions to him during the drive about an altercation that occurred "years prior".[2] He testified that the Applicant told him that "years back him and this guy got into a fight or something and the guy ended up beating him up with like an object or something."[3] Smith explained that the Applicant "knew where this guy was working and he was just going to deal with it and he had to get a gun or whatever so."[4] According to Smith, the Applicant said "just that he had to go take care of it really".[5]

11 Paul Smith testified that when they arrived at the apartment building the Applicant exited the vehicle for approximately five minutes. Nathan Johnson stayed in the back seat. Paul Smith described the Applicant as carrying something in his pants and limping slightly upon his return. Paul Smith believed that the Applicant was carrying a gun, though he could not see what it actually was. The Applicant was also wearing a pair of "doctor gloves" when he returned, and gave a

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[1] Trial Transcript, p. 619, line 8 [Appellant's Record "AR", Vol. VI, Tab 40].
[2] Trial Transcript, p. 618, line 5 [AR, Vol. VI, Tab 40].
[3] Trial Transcript, p. 617, lines 20 – 21 – p. 618, line 1 [AR, Vol. VI, Tab 40].
[4] Trial Transcript, p. 617, line 8 [AR, Vol. VI, Tab 40].
[5] Trial Transcript, p. 619, lines 14 – 15 [AR, Vol. VI, Tab 40].

second pair to Nathan Johnson in the back seat. Paul Smith testified that the first thing the Applicant said when he got back in the vehicle was "he was just taking care of this tonight".[6]

12 Paul Smith explained that he then drove back to Highfield Park and dropped off both the Applicant and Johnson at the Highfield Park bus terminal. After that he went home. All of this took "about an hour".[7] Later that night he went out alone to buy cigarettes. He saw a "bunch of police" in the Highfield area and thought "it really happened".[8]

13 Paul Smith testified that he had a telephone conversation with the Applicant the next day. He said that the Applicant "told me that he made… made a call to a pizza place to a phony address to set it up or whatever".[9] According to Smith, the Applicant told him that "[i]t had to be done, he had to deal with it".[10]

14 After his conviction, the Applicant launched an appeal to the Nova Scotia Court of Appeal. He claimed error in the trial judge's *Vetrovec* instructions, among other arguments. A majority of the Court of Appeal dismissed the appeal. Scanlan J.A. dissented on a point of law in relation to the *Vetrovec* charge: *R. v. Riley*, 2019 NSCA 94.[11]

15 The Applicant filed a Notice of Appeal to this Honourable Court on January 6, 2020. The hearing of that appeal, in Case #39006, is scheduled for May 22, 2020. The Applicant's (Appellant's) Factum is being filed on today's date along with this leave application.

16 On February 19, 2020, appeal counsel for the Applicant was presented with a USB stick from the Applicant's former trial counsel, Trevor McGuigan.[12] The USB stick contained a sworn, cautioned, digital video statement made by Paul Smith to a Private Investigator on February 15,

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[6] Trial Transcript, p. 624, line 12 [AR, Vol. VI, Tab 40].
[7] Trial Transcript, p. 632, line 13 [AR, Vol. VI, Tab 40].
[8] Trial Transcript, p. 632, line 20 – p. 633, line 3 [AR, Vol. VI, Tab 40].
[9] Trial Transcript, p. 634, line 19 [AR, Vol. VI, Tab 40].
[10] Trial Transcript, p. 635, line 5 [AR, Vol. VI, Tab 40].
[11] Application for Leave to Appeal at Tab 3C.
[12] Affidavit of Trevor McGuigan, Sworn February 27, 2020, at para. 22 [*McGuigan Affidavit*].

2020.[13] An affidavit sworn by Mr. McGuigan is included in support of this leave application. A transcript of Paul Smith's sworn statement is attached as Exhibit G to Mr. McGuigan's affidavit.[14]

17 Paul Smith's February 15, 2020, sworn cautioned video statement contains numerous material differences from his trial testimony under oath. In particular:

- Paul Smith denies that the Applicant made inculpatory admissions about targeting Chad Smith on the drive to the apartment in Dartmouth. He explained that he was previously aware of a violent history between the two men and added this fact to bolster his story to police:

    - MR. SMITH: "…[W]e didn't really talk about much, you know, it was just an everyday thing."[15]
    - MR. SMITH: "And then, like I said, like, on the drive we just, we never really, never really talked that much, you know, just, you know, everything day, you know, "How's your day going?" You know, "What are you up to?" And stuff like that. And then, yeah, then that, yeah, that's pretty much it."[16]
    - MR. PITT-PAYNE: So then the next area then that, that I want to go to is the conversation in the car. That night, Randy calls you to come and pick him up and you're saying that there was no conversation regarding what was going to happen?

      MR. SMITH: Yeah. That, that is true because, like, obviously I said in my statement before, probably on the drive that, that, like, he had a problem with this guy, but I already, I already knew that there was a problem. There wasn't no problem, it's just I already knew what happened prior to that is just, like, you know, like I said, I kind of just put it in there to make it look better for me, I guess.[17]

- Paul Smith states that both the Applicant and Nathan Johnson left his vehicle when they arrived at the apartment building, not just the Applicant:

    - MR. SMITH: "So you know, I picked him up, took him to this address that I just said. Him and Nathan both went in. They might have been in there for five to, five

[13] *McGuigan Affidavit, supra* at para. 21 and Exhibit E to the affidavit.
[14] *McGuigan Affidavit, supra* at para. 23 and Exhibit G to the affidavit.
[15] *McGuigan Affidavit, supra* at para. 23 and Exhibit G to the affidavit at p. 2, line 20 – p. 3, line 1.
[16] *McGuigan Affidavit, supra* at para. 23 and Exhibit G to the affidavit at p. 3, lines 15 – 18.
[17] *McGuigan Affidavit, supra* at para. 23 and Exhibit G to the affidavit at p. 22, lines 4 – 11.

to ten minutes. Then they, they come back outside and, yeah, they got back in the car."[18]

- Paul Smith states that when the Applicant and Nathan Johnson returned to the vehicle, only Nathan Johnson was wearing gloves, not both men:

    - MR. SMITH: "And then the only thing I really noticed, when they got, we got back, when they got back in the car, just Nathan had, Nathan had gloves on."[19]
    - MR. SMITH: "And then there's, like when, when they said, like, I, like, because I did say when Randy come outside they both had gloves on, which, which isn't true, like, only Nathan come outside with gloves."[20]

- Paul Smith states that upon the Applicant's return from the apartment building, he did not see the Applicant carrying a gun, nor did he see the Applicant limping, nor did he see a bulge in the Applicant's pants suggestive of a gun:

    - MR. SMITH: "…the police were asking me, "Did you see a gun?" "No I never seen a gun." And that is still my statement, I really never did see a gun"[21]
    - MR. SMITH: "Like, I said, yeah, when he come outside I could see something bulking out his pants, which isn't true, I just kind of, I just made that up."[22]
    - MR. SMITH: "So I kind of said in court, you know, I seen him walk with a limp or kind of seen it bulging out of his pants, which wasn't true."[23]

- Paul Smith states that, contrary to his prior testimony, the Applicant did not make any inculpatory admissions to him on the day following the shooting.

    - MR. SMITH: "…Then the next day, and I told pretty much the police that, you know, he, when I talked to him that next day that he said it had to be done and stuff like that but it wasn't true, I just, I just said that because I kind of felt like I was, I was pressured into saying stuff."[24]

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[18] *McGuigan Affidavit, supra* at para. 23 and Exhibit G to the affidavit at p. 3, lines 4 – 6.
[19] *McGuigan Affidavit, supra* at para. 23 and Exhibit G to the affidavit at p. 3, lines 7 – 8.
[20] *McGuigan Affidavit, supra* at para. 23 and Exhibit G to the affidavit at p. 9, lines 5 – 7.
[21] *McGuigan Affidavit, supra* at para. 23 and Exhibit G to the affidavit at p. 9, lines 7 – 9.
[22] *McGuigan Affidavit, supra* at para. 23 and Exhibit G to the affidavit at p. 9, lines 13 – 14.
[23] *McGuigan Affidavit, supra* at para. 23 and Exhibit G to the affidavit at p. 21, lines 11 – 12.
[24] *McGuigan Affidavit, supra* at para. 23 and Exhibit G to the affidavit at p. 4, line 19 – p. 5, line 2.

- MR. SMITH: "And, yeah, I talked to Randy the next day, so, and I, I did kind of make that up, like, where I said that, oh, when we talked on the phone that he had, he had to take care of him or to, to handle it, which wasn't, it wasn't true, I just made that up to just take everything off of me."[25]

18 In addition, Paul Smith's sworn video statement makes mention of receiving approximately $18,000.00 from the police during and/or as a result of his cooperation with the investigation. He states:

- MR. SMITH: "And they helped me, they helped me out. They give me a lump sum of money to move out and after they were pretty much done getting all their evidence and stuff they give, yeah, they give me a lump sum of money to move out and start, start over because, yeah, I was just taken right out of Calgary."[26]
- MR. SMITH: "Yeah, I guess in court I was asked if I've received any, like, I, and I'm not a hundred percent sure, like, exactly what they said, the lawyer that had, his lawyer, Randy's lawyer that asked me if it was, I received any, like, reward money or if it was any money at all but I said no. And, and now to date, like, I did, I did receive money and it was about eight, a little over, like, $18,000 and it was for a kind of, guess, you know, I'm not saying it was for cooperating with them but they took me out of my life, like, because obviously me and my woman at the time with my kid, we were both working, and we haven't worked for however long we were, they had us, and it would have probably been, I don't know if it was like two or three months. So, yeah, they give us a, kind of, yeah, a lump sum of money to start over again in Edmonton."[27]

19 As noted by Smith himself, this contradicts sworn evidence Paul Smith gave at Nathan Johnson's trial:

Q. And I understand that since that time you've been provided with money by the police?

A. No.

Q. Is it not true that you were provided $10,000 by the police in relation to this investigation?

A. No.[28]

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[25] *McGuigan Affidavit, supra* at para. 23 and Exhibit G to the affidavit at p. 9, line 19 – p. 10, line 2.

[26] *McGuigan Affidavit, supra* at para. 23 and Exhibit G to the affidavit at p. 8, lines 10 – 13.

[27] *McGuigan Affidavit, supra* at para. 23 and Exhibit G to the affidavit at p. 19, lines 5 – 14.

[28] *McGuigan Affidavit, supra* at para. 26 and Exhibit H to the affidavit at p. 1047.

20 In light of the new information contained in Mr. Smith's recantation, trial counsel for the Applicant reviewed the Crown disclosure provided to him in the case. Mr. McGuigan confirms that disclosure did not include reference to monetary benefits being paid to Paul Smith by the police.[29]

PART II – QUESTIONS IN ISSUE

21 The *Notice of Application for Leave to Appeal* raises the following issues:

1. Should leave to appeal be granted on the following additional issues:

   (i) That the Applicant's convictions should be quashed, and a new trial ordered in this case, in light of the fresh evidence of Mr. Paul Smith.

   (ii) Such further grounds as may become apparent upon receipt of additional Crown disclosure.

2. Should the additional issues be addressed at a subsequent appeal hearing, held *seriatim* to the current appeal, or, should the matter instead be remanded to the Court of Appeal for further proceedings?

PART III - ARGUMENT

A. The Sworn Cautioned Video Recantation Requires Judicial Consideration

22 It is respectfully submitted that Paul Smith's sworn recantation statement raises legitimate concerns as to the validity of the Applicant's convictions in this case.

23 The recantation statement disavows the inculpatory admissions supposedly made by the Applicant to Paul Smith. It undermines the Crown's central theory that the Applicant killed Chad Smith for revenge. It diminishes the Crown's evidence in relation to how and when the murder

[29] *McGuigan Affidavit, supra* at para. 25.

weapon was obtained. If believed, the recantation is material to the validity of the Applicant's convictions on appeal, as well as the propriety of any further prosecution post-appeal. At the very least, it impeaches the reliability of the core inculpatory evidence presented at the Applicant's trial. There is thus good reason to question whether there has been a miscarriage of justice in this case.

24 The Applicant currently has an appeal scheduled for hearing before this Honourable Court on May 22, 2020. It is Case #39006. The appeal arises as of right from a dissent in the Nova Scotia Court of Appeal on a point of law, in accordance with s. 691(1)(a) of the *Code*. The central question in the appeal is the propriety of a *Vetrovec* jury caution against a Crown witness (not Paul Smith) who provided exculpatory evidence in favour of the defence.

25 Given the potential impact of Paul Smith's recantation, the Applicant seeks leave to address his fresh evidence as a separate stand-alone ground of appeal before this Honourable Court. It will be argued that a miscarriage of justice has occurred in light of the recantation, that it justifies the quashing of the Applicant's convictions, and that it requires the ordering of a new trial. In furtherance of this additional ground of appeal, the Applicant will seek to adduce Paul Smith's sworn, cautioned, recantation video as fresh evidence on appeal.

26 The Applicant is also pursuing a Crown disclosure request as a result of information contained within Paul Smith's recantation statement. The request is intended to determine whether a further ground of appeal is appropriate in relation to material non-disclosure by the Crown. The question of non-disclosure flows from the suggestion within the recantation statement that Paul Smith received approximately $18,000.00 in payments from the police during the course of the criminal investigation into Chad Smith's murder. If true, this new information directly contradicts prior sworn testimony by Paul Smith wherein he denied receiving any monetary benefit from the police. According to the affidavit of the Applicant's trial counsel, Mr. Trevor McGuigan, Crown disclosure made no mention of such police payment(s). If it is confirmed that police payments were indeed made to Paul Smith, and were not disclosed to the defence, the Applicant would also seek leave to appeal upon the free-standing ground of material non-disclosure.

27 The Applicant acknowledges that the recantation and potential non-disclosure issues constitute new grounds of appeal, separate and apart from the *Vetrovec* question. As highlighted

in *R. v. Magoon*,[30] s. 691(1)(b) of the *Criminal Code* governs leave to appeal upon additional legal issues beyond those permitted as of right. That provision states:

> *Appeal from conviction*
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> 691 (1) A person who is convicted of an indictable offence and whose conviction is affirmed by the court of appeal may appeal to the Supreme Court of Canada
>
> (a) on any question of law on which a judge of the court of appeal dissents; or
>
> (b) on any question of law, if leave to appeal is granted by the Supreme Court of Canada. [Emphasis added]

28 In light of this context, the Applicant submits that leave to appeal should be granted for at least four reasons.

29 First, granting leave on the additional issues(s) is in the interests of justice. While the additional issue(s) might not be suggestive of national significance on their face, they raise serious questions as to the validity of a second degree murder conviction and the propriety of its associated life sentence – questions about a potential miscarriage of justice which strike at the heart of the fairness principle underlying our criminal justice system. A fair trial system can appropriately curtail an individual's rights and freedoms through a just judicial determination. A just judicial determination should likewise operate to question a conviction where the underlying facts may have been misrepresented at trial.

30 Second, the Applicant is "in the system" in light of his appeal as of right.[31] Accordingly, this Honourable Court would have the benefit of the trial record in Case #39006 to assist in adjudicating the new issue(s) if leave is granted. From an access to justice and judicial efficiency standpoint, it makes sense to address all of the Applicant's appeal issues in one forum. As noted in a speech delivered by the Honourable Justice Sopinka:

> …If there already is an appeal as of right on some issue – for instance, there is an appeal as of right where the judge in a court of appeal dissents on a point of law and the dissent may be only on one point but there are other issues in the case – we generally speaking are

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[30] *R. v. Magoon*, 2018 SCC 14, at paras. 33, 34, 41.
[31] *R. v. Wigman*, [1987] 1 S.C.R. 246, at 257 – 262.

> more lenient in granting leave if there is already an appeal as of right to this court, especially if the issues are related.[32] [Emphasis added]

31 Third, this Honourable Court stands as the Applicant's only judicial recourse against a potential miscarriage of justice. The jurisprudence confirms that the Applicant has no avenue apart from s. 43(1.1) of the *Supreme Court Act* to re-open his appeal at the Nova Scotia Court of Appeal. As Charron J.A. (as she then was) explained in *R. v. Rhingo*:

> [33] The power to reopen proceedings in the exercise of the court's ancillary or inherent jurisdiction to control its own process cannot, in my view, extend to cases where the appeal has been heard on the merits. Once the appeal has been heard on its merits and finally disposed of by the issuance of an order, the statutory right of appeal has been exhausted. Any subsequent reopening of the same proceeding would involve the creation of further substantive or procedural rights, which only Parliament can enact.[33] [Emphasis added]

32 Finally, this Honourable Court has demonstrated a willingness to adjudicate such important cases, including by way of the reception of fresh evidence which calls into the question the validity of a murder conviction: See *R. v. Hay*, 2013 SCC 61, and *R. v. Hurley*, 2010 SCC 18. It is respectfully submitted that the issues raised by the recantation statement in this case are of such a nature and significance as to warrant this Court's adjudication.

33 Accordingly, the Applicant respectfully requests that leave to appeal be granted to address the following new issue(s) in accordance with s. 691(1)(b) of the *Code*:

(i) That the Applicant's convictions should be quashed, and a new trial ordered in this case, in light of the fresh evidence of Mr. Paul Smith.

(ii) Such further grounds as may become apparent upon receipt of additional Crown disclosure.

B. Additional Work Must Be Done to Perfect the Fresh Evidence Application

34 The Applicant brings this leave application forward at the earliest opportunity after being alerted to the fresh evidence. Nevertheless, it is conceded that more work needs to be done to perfect a fresh evidence application and associated submissions. As such, it is unrealistic for such

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[32] H. Brown, *Supreme Court of Canada Practice, 2017* (Thompson Reuters Canada Ltd.) at p. 15, quoting Sopinka J., "The Supreme Court of Canada" (10 April 1997).

[33] *R. v. Rhingo*, [1997] O.J. No. 1110 (C.A.), at para. 33.

an application to be heard alongside the *Vetrovec* appeal at the May 22, 2020 hearing in Case #39006.

35 The additional work to be done on the file is two-fold.

36 First, as previously discussed, the Applicant has submitted a request to the Crown for additional disclosure. The Applicant understands and accepts that it may legitimately take some time for the Crown to review and respond to the request. The Applicant is of the view that this disclosure process is necessary and must be completed before a fresh evidence application is perfected. The results of the disclosure request will have a significant bearing on whether the Applicant argues that there was material non-disclosure in this case.

37 Second, the Applicant also understands and accepts that the Crown may legitimately need time to investigate the cogency of the recantation statement. The assessment of a recantation's cogency under the *Palmer* test was recently discussed by Justice Laskin in *R. v. Kassa*.[34] He explained:

> [94] When the fresh evidence consists of a recantation by a key Crown witness, typically the appellant will have satisfied the first and third criteria, and the admissibility of the fresh evidence will turn on whether the second criterion, the cogency requirement, has been met. That is the case here. The recantation, the retraction and the evidence surrounding them are admissible under the rules of evidence. Neither the recantation nor the retraction existed until after the trial so they could not, even by due diligence, have been adduced at trial.
>
> [95] Thus, the question on this motion is whether the fresh evidence is sufficiently cogent that it could reasonably be expected to have affected the verdict. [The] recantation can meet this cogency criterion in either of two ways: it may be sufficiently cogent in the sense that it is reasonably capable of belief and therefore admissible as substantive evidence that the appellant was not implicated in [the] murder; or it may be sufficiently cogent in the sense that it can be used to impeach [the] trial testimony. Indeed, even a recantation that is false may, depending on the "totality of the circumstances", have impeachment value: see *Snyder*, at paras. 53-54.[35] [Emphasis added]

38 In *Kassa*, the police conducted additional investigation as a result of the recantation statement, including a re-interview of the recanting witness and a search of her home.[36] It is

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[34] *R. v. Kassa*, 2013 ONCA 140 [*Kassa*].

[35] *Kassa, supra* at paras. 94 – 95.

[36] *Kassa, supra* at para. 81, 85 – 88.

anticipated that the prosecution may likewise wish to take some additional investigative steps in the present case.

39 Similarly, it would not be unexpected for the Crown to seek to adduce its own fresh evidence in response to the recantation. For example, in *R. v. Palmer*, the Crown, faced with a recanting witness, tendered affidavits in reply from Crown counsel as well as several police officers from the Vancouver Police Force.[37] The Applicant thus acknowledges that the Crown in the present case should be provided an opportunity to adduce fresh evidence in response, should it so choose.

40 Accordingly, given the preparatory steps still required on this file, it may realistically be some months before the fresh evidence application can be perfected and the matter scheduled for hearing.

C. A Subsequent *Seriatim* Hearing Or Remand to the Appeal Court is Appropriate

41 To be clear, the Applicant does not seek to adjourn the May 22, 2020 hearing in Case #39006. The Applicant's Factum is completed and filed on the *Vetrovec* issue. If that appeal is successful and a new trial is ordered, the need for leave to appeal on the fresh evidence grounds becomes moot. It is the Applicant's position that the *Vetrovec* appeal should proceed as scheduled, without delay.

42 Instead, the Applicant suggests that the necessary time requirements for perfecting the fresh evidence application can best be dealt with in either of two ways.

43 First, if leave to appeal is granted, the Applicant would suggest that a subsequent appeal hearing on the additional issue(s) be scheduled for a later date, held *seriatim* after the May 22, 2020 hearing in Case #39006.

44 Second and alternatively, this Honourable Court may consider it appropriate to remand the recantation issues back to the Nova Scotia Court of Appeal for further proceedings. Such a procedure is expressly contemplated under s. 43(1.1) of the *Supreme Court Act*, which states:

Applications for leave to appeal

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[37] *Palmer v. The Queen*, 1979 CanLII 8 (SCC), [1980] 1 SCR 759, at p. 766.

> 43 (1) Notwithstanding any other Act of Parliament but subject to subsection (1.2), an application to the Supreme Court for leave to appeal shall be made to the Court in writing and the Court shall
>
> (a) grant the application if it is clear from the written material that it does not warrant an oral hearing and that any question involved is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in the question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it;
>
> (b) dismiss the application if it is clear from the written material that it does not warrant an oral hearing and that there is no question involved as described in paragraph (a); and
>
> (c) order an oral hearing to determine the application, in any other case.
>
> *Remand of case*
>
> (1.1) Notwithstanding subsection (1), the Court may, in its discretion, remand the whole or any part of the case to the court appealed from or the court of original jurisdiction and order any further proceedings that would be just in the circumstances. [Emphasis added]

45 As Abella and Wagner J.J. (as he then was) noted in their dissenting reasons in *Guindon v. Canada*, such a process would permit the creation of a more fulsome evidential record:

> [131] …[T]his Court, where it is of the view that the circumstances require it, can preferably remand the case back to the original court or tribunal where the necessary notice can be given and a full evidentiary record created: s. 43(1.1) of the *Supreme Court Act*, R.S.C. 1985, c. S-26.[38]

46 The remand power under s. 43(1.1) has specifically been employed in relation to fresh evidence cases in the criminal context where there is a real potential for a miscarriage of justice.

47 For example, in *R. v. Marquardt*, [2009] S.C.C.A. No. 17, the Applicant sought leave to appeal on the basis of fresh evidence discrediting the work of disgraced forensic pathologist, Charles Smith. Upon leave to appeal to this Honourable Court, the case was "remanded to the Court of Appeal for Ontario for consideration of fresh evidence and whether the applicant's conviction constitutes a miscarriage of justice."[39]

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[38] *Guindon v. Canada*, 2015 SCC 41, at para. 131.

[39] *R. v. Marquardt*, [2009] S.C.C.A. No. 17. See also: *McArthur v. Ontario (Attorney General)*, 2012 ONSC 5773, at paras. 45 – 47.

48 Similarly, s. 43(1.1) was employed in *R. v. White*, 2010 ONCA 474, where fresh evidence demonstrated that the key prosecution witness had a motive to falsely implicate the appellant. The case was remanded back to the Ontario Court of Appeal by this Honourable Court for consideration of the fresh evidence going to credibility, as well as a claim of ineffective assistance of counsel.[40]

49 The Applicant is just as agreeable to a remand order under s. 43(1.1) as he is to a *seriatim* appeal hearing. His sole and primary concern is that the fresh evidence receives full and careful judicial consideration.

50 Paul Smith's statement was provided under oath, on video, with cautions given as to the penalties for obstruction and perjury. While the ultimate cogency of his recantation remains to be determined, this new information raises legitimate concerns as to the validity of the Applicant's convictions. Under such circumstances, the Applicant respectfully submits that leave to appeal should be granted to ensure that a miscarriage of justice is avoided in this case.

D. <u>A Time Extension on the Leave Application is Appropriate</u>

51 The judgment of the Nova Scotia Court of Appeal was delivered on December 5, 2019. The Applicant filed his Notice of Appeal as of right on January 6, 2020.

52 As noted in Mr. McGuigan's supporting affidavit, Paul Smith provided a Private Investigator with a sworn cautioned digital video recantation on February 15, 2020 in Surrey, British Columbia.[41] A digital copy of that statement was provided to appeal counsel in Halifax, Nova Scotia on February 19, 2020.[42]

53 It is submitted that present leave application was brought forward at the earliest opportunity, once counsel was able to review the fresh evidence, conduct legal research, obtain the necessary transcriptions, and receive client instructions.

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[40] *R. v. White*, [2009] S.C.C.A. No. 394.
[41] *McGuigan Affidavit, supra* at para. 21 and Exhibit E to the affidavit.
[42] *McGuigan Affidavit, supra* at para. 22.

54 Counsel for the Applicant has also canvassed the matter with Crown appeal counsel to alert him of the present application.

55 This Honourable Court has discretion to extend filing deadlines in accordance with Rule 6 of the *Rules of the Supreme Court of Canada*. That provision states:

> *Extension or Abridgment*
>
> 6 (1) The Court, a judge or unless these Rules provide otherwise, the Registrar may, on motion or on their own initiative, extend or abridge a period provided for by these Rules.
>
> (2) The affidavit in support of a motion for an extension or abridgement of time shall set out the reason for the delay or urgency, as the case may be.

56 Given the potential importance of the fresh evidence in this case, as well as the explanation for delay in filing the present leave application, it is in the interests of justice to grant an extension of time to seek leave to appeal.

PART IV - SUBMISSION ON COSTS

57 The Applicant makes no submissions on costs.

PART V - ORDER SOUGHT

58 The Applicant seeks an order permitting leave to appeal from the decision of the Nova Scotia Court of Appeal in *R. v. Riley*, 2019 NSCA 94.

59 Alternatively, the Applicant seeks an order remanding the fresh evidence issue(s) back to the Nova Scotia Court of Appeal in accordance with s. 43(1.1) of the *Supreme Court Act*.

All of which is respectfully submitted this 2nd day of March, 2020.

as agent for

NOVA SCOTIA LEGAL AID
Lee V. Seshagiri
Roger A. Burrill
Counsel for the Applicant,
Randy Desmond Riley

PART VI

TABLE OF AUTHORITIES

Case **Para.**

Books

STATUTORY PROVISIONS

Criminal Code, RSC 1985, c C-46, s. 691(1)(b).

Code criminel, LRC 1985, c C-46, s. 691(1)(b)

Supreme Court Act, RSC 1985, c S-26, s. 43(1.1)

Loi sur la Cour suprême, LRC 1985, c S-26, s. 43(1.1)