COURT OF APPEAL OF
NEW BRUNSWICK

COUR D'APPEL DU
NOUVEAU-BRUNSWICK

70-13-CA

RODNEY J. GILLIS, Q.C.

APPELLANT

- and -

HER MAJESTY THE QUEEN

RESPONDENT

Gillis v. R., 2014 NBCA 58

CORAM:
The Honourable Chief Justice Drapeau
The Honourable Justice Larlee
The Honourable Justice Deschênes

Appeal from a decision of the Provincial Court:
January 31, 2013

History of Case:

Decision under appeal:
2013 NBPC 3

Preliminary or incidental proceedings:

Court of Appeal:
[2013] N.B.J. No. 181

Appeal heard:
February 27, June 19 and 20, 2014

Judgment rendered and reasons pronounced:
September 9, 2014

Reasons for judgment by:
The Honourable Chief Justice Drapeau

Concurred in by:
The Honourable Justice Larlee
The Honourable Justice Deschênes

RODNEY J. GILLIS, c.r.

APPELANT

- et -

SA MAJESTÉ LA REINE

INTIMÉE

Gillis c. R., 2014 NBCA 58

CORAM :
l'honorable juge en chef Drapeau
l'honorable juge Larlee
l'honorable juge Deschênes

Appel d'une décision de la Cour provinciale :
le 31 janvier 2013

Historique de la cause :

Décision frappée d'appel :
2013 NBCP 3

Procédures préliminaires ou accessoires :

Cour d'appel :
[2013] A.N.-B. n^{o} 181

Appel entendu :
les 27 février, 19 et 20 juin 2014

Jugement rendu et motifs prononcés :
le 9 septembre 2014

Motifs de jugement :
l'honorable juge en chef Drapeau

Souscrivent aux motifs :
l'honorable juge Larlee
l'honorable juge Deschênes

Counsel at hearing:

For the appellant:
Mark J. Sandler

For the respondent:
Peter Craig and
Jennifer A. MacLellan

THE COURT

Leave to appeal, to the extent required, is granted and the appeal from the appellant lawyer's conviction for attempting to obstruct justice is allowed. In the result, the conviction is set aside, a new trial is ordered and the application for leave to appeal sentence (22 months in jail) is moot.

Avocats à l'audience :

Pour l'appelant :
Mark J. Sandler

Pour l'intimée :
Peter Craig et
Jennifer A. MacLellan

LA COUR

L'autorisation d'appel, dans la mesure requise, est accordée et l'appel de la déclaration de culpabilité de l'avocat appelant pour tentative d'entrave à la justice est accueilli. La déclaration de culpabilité est donc annulée, un nouveau procès est ordonné et la demande d'autorisation d'interjeter appel de la peine (un emprisonnement de 22 mois) perd toute portée pratique.

The judgment of the Court was delivered by

DRAPEAU, C.J.N.B.

I. Introduction

[1] The appellant, one of the Province's leading litigation lawyers, stands convicted of the indictable offence of attempting to obstruct, pervert or defeat the course of justice in a judicial proceeding by "attempting to dissuade a person by threats, bribes or other corrupt means from giving evidence". The sustainability of that outcome hinges, at least from a factual standpoint, on the following closely related findings: (1) the testimony of the Crown's key witness attributing to the appellant an incriminating statement was both credible and reliable; and (2) the appellant's denial under oath that he ever made the statement in question was not credible.

[2] While readily acknowledging those findings stand to be reviewed for factual error by the application of a highly deferential standard, and must be left undisturbed in the absence of palpable and overriding error, the appellant contends the record reveals several errors of that magnitude. In that vein, the appellant spotlights features of the detailed reasons for decision in first instance that, he argues, evince a misapprehension of the evidence, particularly his own testimony, pertaining to critical elements of the trial judge's stated rationale for disbelieving him. Not being "true" (see *R. v. Morrissey*, [1995] O.J. No. 639 (C.A.) (QL), at para. 93), the verdict could not be allowed to stand. The appellant relies upon the trial judge's own words to make the case for appellate intervention on that basis.

[3] In addition, the appellant submits the trial judge's findings regarding credibility and reliability are the product of material errors of law. These errors would include legally impermissible imputations of ethical misconduct that were relied upon to conclude the appellant lacked integrity, a factor of significant influence in the trial judge's negative assessment of his credibility. The trial judge would also have fallen into

error in factoring into that assessment a perceived contradiction between the appellant's testimony and his pre-trial statement to the police. It would be so because the "contradiction" was not put to the appellant during cross-examination. That complaint brings into the mix the celebrated case of *Browne v. Dunn* (1893), 6 R. 67 (H.L.).

[4] I respectfully conclude the trial judge committed errors of fact and law that command reversal. Indeed, I incline to the view that several of those errors suffice on their own to warrant appellate intervention. I prefer, however, to dispose of the appeal on the basis that the cumulative effect of those errors operated to deprive the appellant of a fair trial and produced a miscarriage of justice. In the result, I would grant leave, where required, allow the appeal and quash the conviction, without pronouncing a verdict of acquittal. I would order a new trial, and leave the decision to re-try or not where it belongs, namely with the Crown. At any rate, the disposition I propose makes it unnecessary to deal with the merits of the application for leave to appeal sentence.

II. Context

A. *The saga's main players*

[5] The appellant, Rodney Gillis, has been a member of the Law Society of New Brunswick since 1971 and a Queen's Counsel for more than two decades. At all material times, he was a partner in the law firm of Gilbert McGloan Gillis. Although the appellant's book of business was diversified and included criminal defence work, he specialized in civil litigation (mostly personal injury and medical malpractice lawsuits). David Nathan Rogers was also a partner in Gilbert McGloan Gillis. He had more experience in the practice of criminal law.

[6] The **North Shore Forest Products Marketing Board**, like its six counterparts elsewhere in the Province, represents private woodlot owners. The Board's primary objective is to provide its members greater bargaining power with a view to securing the best price for their product. The Board staff includes a General Manager.

[7] The **New Brunswick Forest Products Commission** is a distinct entity. It is charged with oversight of the seven forest products marketing boards in the Province. Under the *Natural Products Act*, S.N.B. 1999, c. N-1.2, the Commission is authorized to carry out the powers of a board, for the purpose of independently investigating its affairs, in the event of allegations of serious misconduct on the part of board officials.

[8] **Frank Branch** is a former Member and Speaker of the Legislative Assembly of New Brunswick. He was appointed General Manager of the Board in late October 1995. Mr. Branch claimed to have subsequently negotiated a ten-year employment contract commencing April 1, 2001. On October 13, 2005, the Commission suspended Mr. Branch, with pay, and on March 8, 2006, the Board terminated his employment for cause. Mr. Branch was subsequently charged with five cause-related offences under the *Criminal Code*. It was Mr. Branch's contention that: he had done nothing wrong, whether civilly or criminally; the conduct relied upon for cause and for the criminal charges was authorized and unobjectionable; his employment had been wrongfully terminated and his reputation unfairly and unjustifiably tarnished by the Commission and the Board; and he was entitled to significant damages for breach of his employment contract and defamation.

[9] **Alain Jean-Paul Landry** took up employment with the Board after Mr. Branch's dismissal. He became its General Manager on February 28, 2007. More importantly, he was so employed on December 10, 2009, and the case for conviction rests upon the credibility and reliability of his testimonial account of a brief conversation he had with the appellant, on that date, in the public hallway outside the courtroom where the preliminary inquiry into the charges against Mr. Branch was taking place. Mr. Landry is neither a lawyer nor an accountant.

[10] **Linda Gould-McDonald** was the Commission's Executive Director during the relevant period. In October 2005, the Commission received a complaint of work-related misconduct on the part of Mr. Branch. The Commission responded by taking control of the Board's operations. It placed Ms. Gould-McDonald in charge, with instructions to get to the bottom of the complaint. In early 2006, the results of the

investigation she co-directed were turned over to the Bathurst City Police. The matter was, in turn, referred to the Fredericton City Police for consideration and action. Sergeant Mark Lord of the FCP took a statement from the appellant in September of 2011. While exculpatory on its face, the statement became a Crown exhibit at trial and played a significant role in the judge's rationale for disbelieving the appellant's testimony on the key issue at trial.

B. *The prelude to the December 10, 2009 event giving rise to the charge of "obstruction of justice"*

[11] In July 2009, Mr. Branch attended, in the company of solicitor Peter Hyslop, at the appellant's law office in Saint John and retained his services for all litigation in which he was then involved: two civil lawsuits involving the Board and the five criminal charges mentioned above. Once those charges were laid, all parties agreed to place the civil lawsuits on hold. That was the prevailing state of affairs at the time of the preliminary inquiry into the five charges against Mr. Branch in December 2009.

(1) Mr. Branch's wrongful dismissal and defamation action against the Commission and the Board

[12] The first of the civil suits was a wrongful dismissal and defamation action brought by Mr. Branch against the Board and the Commission in July 2006. Martin Siscoe, a Bathurst lawyer, was Mr. Branch's first solicitor of record in this suit.

[13] In an Amended Statement of Claim, filed on October 5, 2006, Mr. Branch claimed damages for breach of the ten-year employment contract mentioned above or, alternatively, damages for wrongful dismissal without adequate notice, and, in any event, damages for defamation. Mr. Branch alleged he was not provided reasons for his suspension and termination, and that both occurred without cause. He further alleged post-termination media communications emanating from the Commission and the Board caused serious detriment to his reputation, and prevented him from offering as a

candidate for Member of the Legislative Assembly in the September 2006 Provincial election in the riding of Nepisiguit, an office he had held for nearly thirty years.

[14] The defendants filed separate Statements of Defence in late 2006. The solicitor of record for the Commission was a Department of Justice lawyer, Clyde Spinney, Q.C. The Board's solicitor of record was Basile Chiasson, Q.C., a private practitioner in Bathurst. Both defendants denied the alleged ten-year employment contract was valid, contending it was void or voidable at the discretion of the Board. In any event, the defendants denied any wrongful breach and entitlement to damages, Mr. Branch having been terminated for cause, namely a loss of confidence in his ability to act as General Manager due to several breaches of duty owed to the Board during his tenure. The defendants also stated their post-termination public comments were substantiated, true, and made in good faith, and that there was no legal impediment to Mr. Branch running for office in the 2006 election. They denied any and all liability.

[15] The Board also filed a Counterclaim for damages. It alleged Mr. Branch had: (1) breached implied terms of his employment agreement with the Board; (2) breached the duty of confidence he owed to the Board, as well as legal, equitable, and statutory duties; (3) converted assets and monies of the Board to his own personal use; (4) received a benefit to the detriment of the Board; and (5) induced a breach of duties owed to the Board by its former Chair, while conspiring with him to cause it detriment, prejudice, and harm. I pause to underscore the criminal charges against Mr. Branch were based, to a significant extent, on the same allegations of wrongdoing. In his Defence to Counterclaim, Mr. Branch described the Counterclaim as frivolous and vexatious, and denied all of the allegations of wrongdoing made therein.

[16] By Notice of Change of solicitors filed on February 5, 2008, David Duncan Young formally replaced Mr. Chiasson as solicitor of record for the Board. On the date of the offence specified in the charge against the appellant, December 10, 2009, Mr. Young was, to the knowledge of the appellant, the Board's solicitor.

[17] Though Mr. Siscoe remained solicitor of record for Mr. Branch in the wrongful dismissal and defamation action until March 30, 2011 (at which time he was temporarily replaced by another Bathurst lawyer), and the appellant did not become solicitor of record until October 30, 2011, it is undisputed that his retainer in July of 2009 covered this action and all other litigation involving Mr. Branch.

[18] On December 10, 2009, the appellant printed on a scrap piece of paper and handed to Mr. Landry, the Board General Manager, a broadly worded proposal for settlement (Exhibit C-1) in which he forecast Mr. Branch would recover damages in the order of $300,000 if the wrongful dismissal and defamation action succeeded. The proposal also included the appellant's estimate of the Board's total legal fees for the defence of the action: approximately $200,000.

(2) The Board's action to set aside property conveyances by Mr. Branch, the so-called "*lis pendens*" action

[19] The second civil suit was brought by the Board against Mr. Branch, his wife and three children. In the Statement of Claim, which was filed on July 2, 2009 by Mr. Young on behalf of the Board, it is alleged specified conveyances of real property by Mr. Branch and his wife to their children between May 19, 2006 and October 24, 2008 were not *bona fide*, having been made without sufficient consideration and with the intent to defeat, hinder, defraud or delay Mr. Branch's creditors. It is further averred in the Statement of Claim the conveyances were made while Mr. Branch was insolvent or on the eve of insolvency, or in anticipation of claims that might become judgment debts. It is also asserted that, as a result, the conveyances were void. The prayer for relief includes a request for: (1) an order setting aside the conveyances; and (2) the issuance of a certificate of pending litigation in respect of the lands and premises in question. A Certificate of Pending Litigation (Form 42A) was subsequently issued and registered.

[20] Mr. Hyslop replaced Mr. Siscoe as solicitor of record in the *lis pendens* action on August 17, 2009. In the Amended Statement of Defence filed on Mr. Branch's

behalf on October 23, 2009, it is asserted the conveyances were all *inter vivos* gifts and, as such, did not require consideration. Correlatively, it is suggested the conveyances were made to the children for the purposes of estate planning in a manner consistent with the transfer of Branch family properties in earlier generations. The Amended Statement of Defence also featured: (1) a denial that Mr. Branch was insolvent or on the eve of insolvency; and (2) a claim that he possessed, at all material times, sufficient liquid funds to meet any and all obligations as they became due. The pleading concluded with the claim that the action was frivolous and vexatious, and was designed for the sole purpose of embarrassing Mr. Branch in connection with his action for wrongful dismissal and defamation.

[21] The appellant testified that, although he was not solicitor of record in this action, he was nonetheless Mr. Branch's lawyer and had been retained, *inter alia*, to assist Mr. Hyslop in securing the removal of the Certificate of Pending Litigation.

(3) The criminal proceedings against Mr. Branch

[22] On January 27, 2009, Mr. Branch was charged with five indictable offences under the *Criminal Code*, each having some connection with his employment as General Manager of the Board: breach of trust and fraud exceeding $5,000 against the Province of New Brunswick (ss. 122 and 380(1)(a), respectively); fraud exceeding $5,000 against the Board (s. 380(1)(a)); and two counts of extortion against employees of the Board (s. 346(1.1)(b)). The appellant's un-contradicted testimony provides the following insights into the allegation underlying each charge:

> Two charges related to a period of time, May of 2003 until June of 2005, I believe, whereby it was alleged that he defrauded the North Shore Forest Product Marketing Board in relation to gas receipts for travel expense because he billed at the same time the Legislative Assembly because he was an MLA. The second charge was the reverse of the first whereby he had breached a trust or defrauded the Province by submitting gas receipts for which he had been paid by the North Shore Forest Product Marketing Board, so the first two related to gas for that period of time. The

> third charge was for a different period of time. It was between 1999 and 2003 or 2005 that he obtained building materials or goods on the credit of the Forest Product, North Shore Forest Product Marketing Board for which he had not paid. Those were the first three and the last two were uttering a threat charges or extortion that, between October 2005 and March of 2006 he forced two people to write a letter. That was it.

[23] In sum, the charges of breach of trust and fraud against the Province of New Brunswick were based on the allegation that Mr. Branch had billed both the Province of New Brunswick and the Board for the same travel expenses. As might be expected, proof of these charges would require the testimony of staff at the Legislative Assembly. The charge of fraud against the Board rested on the contention that Mr. Branch had obtained building materials or other goods on the Board's credit and had not reimbursed it. Finally, each charge of "extortion" was founded on the allegation that Mr. Branch forced someone to write a letter on his behalf. Ultimately, four charges were withdrawn and Mr. Branch pled guilty to the charge of defrauding the Board (though this occurred well after the preliminary inquiry).

[24] The Crown was represented throughout by a senior member of the Bar for the province of Quebec. Presumably, it was thought best to hire outside counsel given Mr. Branch's political background.

[25] Mr. Branch was initially represented by Mr. Siscoe, who appeared as his counsel in all proceedings in Provincial Court prior to July of 2009. Those proceedings included Mr. Branch's election to be tried by a judge and jury.

[26] The appellant became Mr. Branch's lawyer in respect of the abovementioned criminal charges as of their meeting at his office in July 2009. Soon thereafter, Mr. Siscoe turned over to the appellant the documentation previously provided by the Crown pursuant to its disclosure obligations.

[27] The preliminary inquiry into the five charges began on Monday, December 7, 2009, and concluded on Friday of that week. The Crown offered the evidence of more than a dozen witnesses, including some Board officials and employees, in support of committal to trial on all charges.

[28] The Crown called Mr. Siscoe as a witness for the sole purpose of shedding light on the employment relationship between Mr. Branch and the Board. Apparently, the appellant cross-examined Mr. Siscoe. However, the transcript of the preliminary inquiry is not part of the record. We do not know what matters were raised during the cross-examination, nor do we know how long it lasted. While Mr. Siscoe was still Mr. Branch's solicitor of record at the time, the action for wrongful dismissal and defamation was dormant, the parties having agreed to put it on hold until the criminal charges were dealt with. Nevertheless, a significant part of Crown counsel's cross-examination of the appellant, in the court below, focused on the suggestion he engaged in unethical behavior in failing to advise the Branch preliminary inquiry judge and the prosecutor, before he began Mr. Siscoe's cross-examination, that he had been retained to represent Mr. Branch in the action for damages. The trial judge adopted that hypothesis and found it demonstrated a lack of integrity that militated against the appellant's credibility. He did so over the appellant's unchallenged sworn recollection that Mr. Siscoe adverted, in his testimony at the Branch preliminary inquiry, to the appellant's professional involvement in the civil action. I re-visit this topic in the discussion pertaining to the trial judge's errors of law.

[29] At any rate, Mr. Branch was committed to stand trial on all charges. Nevertheless, the defence discerned indications that the ultimate outcome at trial might not be favorable to the Crown. Reasons for optimism included: (1) while its witnesses were testifying, the Crown offered to withdraw four of the charges in exchange for a guilty plea on one; (2) the cooperation of potential Crown witnesses was not always evident (e.g.: one of the Board representatives attended the hearing while seemingly under the influence of alcohol); (3) it was not a foregone conclusion that the testimony of staff at the Legislative Assembly would provide the requisite support for the charges of

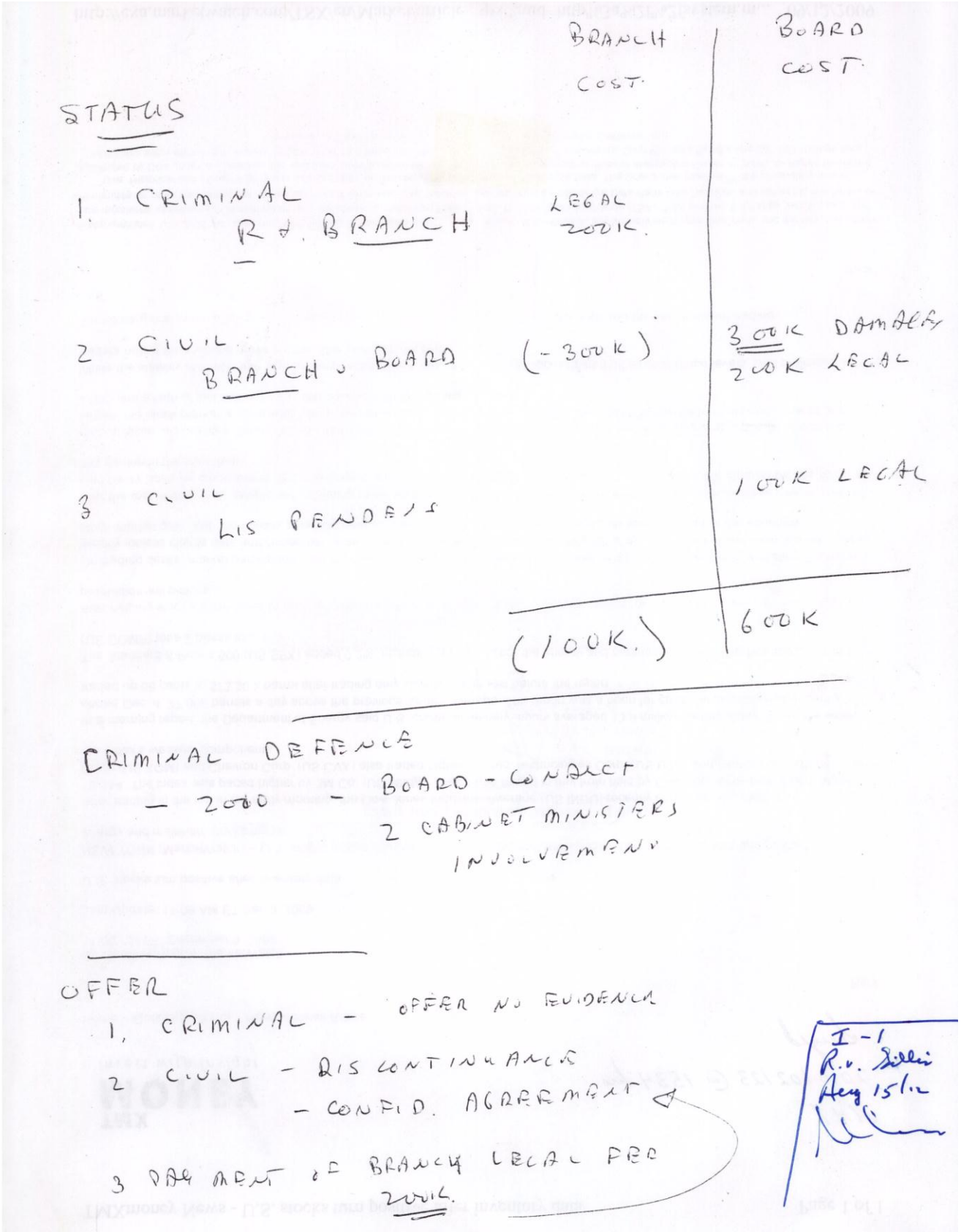
breach of trust and fraud against the Province; and (4) the defence was in possession of cancelled cheques that might, at the very least, raise a reasonable doubt in respect of the charge of fraud against the Board.

[30] Mr. Landry (the Board's General Manager), Mr. Young (the Board's lawyer) and Ms. Gould-McDonald (the Commission's Executive Director) attended most of the preliminary inquiry proceedings as observers. Neither Mr. Landry nor Ms. Gould-McDonald testified. Mr. Young, who was absent on December 10, was expected to return on the following day.

C. *The event underlying the charge of "obstruction" against the appellant: the December 10, 2009 offer of settlement delivered to Mr. Landry*

[31] The appellant and his law partner, David Nathan Rogers, acted as Mr. Branch's counsel at the preliminary inquiry throughout the week of December 7. On Thursday, December 10, 2009, shortly before the afternoon session was to begin, the appellant approached Mr. Landry, with whom he had a passing acquaintance, having collaborated with him briefly, a few years before, in connection with unrelated matters. The appellant asked Mr. Landry if he could have a word. He then reviewed with him C-1 (Item I-1 for identification) in which were adumbrated the core elements of a settlement with the Board that was acceptable to Mr. Branch. I pause to record it is common ground the appellant should have waited for Mr. Young's return and delivered C-1 to him. Rule 2 of Chapter 15 of the *Code of Professional Conduct* of the New Brunswick Law Society is on point. It provides a lawyer "shall not communicate on, or attempt to negotiate or to compromise, a matter with a person represented by a lawyer except through or with the consent of that lawyer". It may be, as the appellant wondered aloud in his testimony, that he would have avoided all criminal jeopardy had he dealt with Mr. Young. It is indeed the case that some rules of professional conduct are designed to serve the best interests of both the client and the lawyer.

[32] C-1 reads as follows:


BRANCH COST
BOARD COST
STATUS
1. CRIMINAL R.A. BRANCH
LEGAL 200K.
2 CIVIL BRANCH v. BOARD
(- 300K)
3 00K DAMAGES
200K LEGAL
3 CIVIL LIS PENDENS
100K LEGAL
(100K.)
600K
CRIMINAL DEFENCE
- 2000 - BOARD - CONDUCT
2 CABINET MINISTERS INVOLVEMENT
OFFER
1, CRIMINAL - OFFER NO EVIDENCE
2 CIVIL - DISCONTINUANCE
- CONFID. AGREEMENT
3 DAMAGES OF BRANCH LEGAL FEE 200K.
I-1
R.v. Sellars
Aug 15/12

[33] To facilitate the reader's understanding, I offer the following typewritten version of C-1:

STATUS	BRANCH COST	BOARD COST
1. CRIMINAL R v. BRANCH	LEGAL 200K	
2. CIVIL BRANCH v. BOARD	(–300K)	300 K DAMAGE 200 K LEGAL
3. CIVIL LIS PENDENS		100 K LEGAL
	(100K)	600 K

CRIMINAL DEFENCE

– 2000 – BOARD – CONDUCT
2 CABINET MINISTERS
INVOLVEMENT

OFFER

1. CRIMINAL – OFFER NO EVIDENCE

2. CIVIL – DISCONTINUANCE
– CONFID. AGREEMENT

3. PAYMENT OF BRANCH LEGAL FEE
200K

[34] As can be seen, C-1 begins with an assessment of Mr. Branch's legal fees for the defence of the criminal charges ($200,000) and a projection of the cost to the Board in the event it was unsuccessful in the civil lawsuits ($300,000 for damages and

another $300,000 for legal fees). C-1 then references part of the criminal defence strategy: it involved calling into question the Board's own conduct and bringing into play the roles played by two provincial cabinet ministers. The document concludes with an offer of settlement, which contemplated a possible termination of the criminal proceedings for want of prosecution ("Offer no evidence"), discontinuances of the civil actions, the execution of a confidentiality agreement and payment by the Board of Mr. Branch's legal fees in the amount of $200,000. The debates in the court below focused primarily on the explanations provided by the appellant immediately before the delivery of C-1 to Mr. Landry, most notably what, if anything, he said by way of clarification for the phrase "Criminal – Offer no evidence".

[35] The Crown's theory at trial was that C-1, understood in the light of the explanations provided by the appellant to Mr. Landry, constituted an attempt to obstruct justice. This was so, it was argued, because the proposal for settlement, as explained by the appellant, involved Mr. Landry taking steps to ensure Board officials and employees that might be subpoenaed by the Crown for trial purposes would fail to attend. The Crown's theory was based entirely on Mr. Landry's testimony, specifically his sworn allegation that the appellant clarified the meaning of the phrase "Criminal – Offer No Evidence" by stating "They're your witnesses, make sure they don't testify and the Crown won't have a case".

[36] The appellant testified that, although unable to recall the exact words he used, years before, to explain C-1, he never made any such statement:

> Q. "They're your witnesses, make sure they don't testify and the Crown won't have a case." What do you say to that Mr. – or, Mr. Gillis?
>
> A. I never said that. Mr. Landry is mistaken.
>
> **[…]**
>
> Q. How do you know you did not say it, Mr. Gillis?

> A. I'm absolutely sure I did not say that. I've practised law for 40 years. I've spent 1,000, 1,500 days in court examining and cross-examining witnesses, I've never said that, ever. And I would remember if I did.

[37] It was the defence's contention throughout the trial that the statement attributed to the appellant, "They're your witnesses, make sure they don't testify and the Crown won't have a case", betrayed such a fundamental misunderstanding of the way the criminal law process operates that no lawyer, let alone a seasoned litigation specialist, would ever make it. In that regard, the defence underscored the following truism: any decision regarding the offer of evidence was not the Board's to make; rather, it fell within the exclusive authority of the Crown, represented, in this case, by an independent prosecutor. Moreover, and according to the defence, a constellation of circumstances demonstrated the unreliability of Mr. Landry's verbatim recollection of the incriminating statement quoted above and the implausibility of the appellant engaging in the crime charged. I will explore these topics in short order.

[38] In his testimony, the appellant described C-1 as "a cost/benefit analysis that [he] had prepared and printed to show the wisdom or not in settling the civil matter" (emphasis added). He testified the phrase "Criminal - Offer No Evidence" was included under the rubric of "Offer" to allay concerns the Board might have in settling the civil actions by paying $200,000, and then facing criticism for that payout if Mr. Branch were ultimately found guilty:

> Q. Why was there a need to include it, sir?
>
> A. Consider you're the Board and I'm saying to you the Board, "This is the financial ramifications of a settlement. This is what it can cost you. This is what it can cost Mr. Branch." And, I go through all of that and you, the Board, look at me and say, "Now, if I pay you the $200,000 Mr. Gillis and the Crown goes ahead with the prosecution and he's convicted our members would question why we've done it. Why we paid $200,000 we didn't have to pay." And, that's why we – or I wrote here what Mr. Rogers and I discussed that we would go – David

> Rogers and I or David Rogers would go to the Crown to see if we can get the Crown to drop the prosecution by offering no evidence. If they did, great, if they didn't, we had the $200,000 to fully fund the criminal defence of Mr. Branch.

[39] The discussion with Mr. Landry took place in the public hallway outside the courtroom, minutes before the resumption of the preliminary inquiry. No stranger to the discussion testified to hearing the appellant say "They're your witnesses, make sure they don't testify and the Crown won't have a case", though Ms. Gould-MacDonald was close by, heard Mr. Landry ask for C-1 and witnessed the appellant hand it over.

[40] Immediately thereafter, the appellant returned to the courtroom for the continuation of proceedings. He did so following Mr. Landry's assurance that the Board would get back to him regarding the settlement proposal. It never did.

D. *The pertinent events following the December 10, 2009 discussion between the appellant and Mr. Landry*

[41] Within days of C-1's delivery, Mr. Landry discussed its contents and the appellant's explanations with Ms. Gould-MacDonald and then the Board's lawyer, Mr. Young. As a result of those discussions, and unbeknownst to the appellant, Mr. Landry made a formal complaint to the Bathurst City Police on December 16, 2009. As will be seen, it was the defence's contention that those discussions might well have shaped what it described as Mr. Landry's mistaken recollection of the appellant's explanations.

[42] Unaware that C-1 and his December 10, 2009 explanatory statements were being investigated by the police, the appellant attended the Saint John Police Station on September 9, 2011, at Sergeant Lord's request. The appellant was arrested on arrival. Soon after, he provided a statement of his recollection of the events of December 10, 2009. Significantly, in his reasons for decision, the trial judge draws support for the view that the appellant was not credible from an inconsistency he detected between his testimony and the statement he gave on September 9, 2011.

[43] On November 25, 2011, the appellant was charged with attempting to obstruct, pervert or defeat the course of justice in a judicial proceeding by attempting to dissuade a person by threats, bribes or other corrupt means from giving evidence, an indictable offence by virtue of s. 139(2). The key parts of s. 139 read as follows:

139 (2) Every one who wilfully attempts in any manner other than a manner described in subsection (1) to obstruct, pervert or defeat the course of justice is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.	**139** (2) Est coupable d'un acte criminel et passible d'un emprisonnement maximal de dix ans quiconque volontairement tente de quelque manière, autre qu'une manière visée au paragraphe (1), d'entraver, de détourner ou de contrecarrer le cours de la justice.
(3) Without restricting the generality of subsection (2), every one shall be deemed willfully to attempt to obstruct, pervert or defeat the course of justice who in a judicial proceeding, existing or proposed,	(3) Sans que soit limitée la portée générale du paragraphe (2), est censé tenter volontairement d'entraver, de détourner ou de contrecarrer le cours de la justice quiconque, dans une procédure judiciaire existante ou projetée, selon le cas :
(*a*) dissuades or attempts to dissuade a person by threats, bribes or other corrupt means from giving evidence;	*a*) dissuade ou tente de dissuader une personne, par des menaces, des pots-de-vin ou d'autres moyens de corruption, de témoigner;
[…]	[…]

E. *The salient features of the trial*

[44] The trial, which began on August 15, 2012, and was adjourned on a few occasions, culminated with the appellant's conviction on January 31, 2013. On June 20, 2013, the appellant was sentenced to jail for 22 months.

[45] The Crown's case consisted of the hand-printed note (C-1), Mr. Landry's testimonial recollection of the appellant's December 10, 2009 clarifications of that document, in the English language, and the appellant's September 9, 2011 statement to Sergeant Lord.

[46] Mr. Landry, a francophone, gave evidence on August 16, 2012, more than 2.5 years after his conversation with the appellant regarding C-1. It may be timely to observe that, on more than one occasion, Mr. Landry revised his testimony, explaining earlier misstatements of the facts as a "poor choice of words". The defence suggested the fact that English was not Mr. Landry's first language might, in conjunction with other factors, such as his lack of legal training, provide an innocent explanation for his mistaken account of the appellant's explanation for the phrase "Criminal - Offer No Evidence".

[47] Be that as it may, Mr. Landry testified he quickly viewed with suspicion the proposal for settlement outlined in C-1. This negative perception arose from his "interpretation" of the proposal as requiring the Board to engage in dishonest bookkeeping, more precisely a "[misrepresentation of] the books":

> Q. Fair enough.
>
> A. They were standing there, and as we went – we were coming up to them, Rod Gillis said to me – he said can I speak to you? So, he took me aside, David Rogers walked away and Linda Gould continued her walk. He showed me the piece of paper.
>
> […]
>
> A. He was standing there. He had a pen in his hand and he showed me a piece of paper or a sheet which was in a notebook and he said I have an offer for you.
>
> […]
>
> A. Now, this – we went through this offer that he had written down. The first part was a summation of numbers –
>
> […]
>
> Q. Okay. If you would please continue, Mr. Landry?
>
> A. What it shows – what's – what this document shows is the top part – are – are numbers in different events and this is what Mr. Gillis went through. Number one was the

criminal which is the legal cost that it would cost Mr. Branch for his criminal trial which was $200,000. The civil Branch versus the Board – I'm gonna go over to the Board cost first. It's gonna cost the Board […] $200,000 in legal and they're gonna gain $300,000 in damages. So, he was telling me that they were going to win the civil and he was going to be awarded $300,000.

[…]

A. So, you take – he was taking the $300,000 from over to the Board and he was putting it in as a negative $300,000 for the civil because it was gonna be […] funds that Mr. Branch was going to be able to recuperate. Number three is the civil – is the *lis pendens* that the Board put on Mr. Branch's properties, he said it was gonna cost the Board another $100,000 legal for the *lis pendens*. So, the total amount of the Board cost was $600,000. And, Branch was going to be recuperating $100,000. Once he paid his $200,000, received the $300,000 he was gonna be $100,000 to the good. It was gonna cost the Board $600,000.

[…]

A. Then, we went down to the criminal defence –

Q. So, what did Mr. Gillis, if anything tell you about that portion of the document?

A. The criminal defence?

Q. Yes.

A. Okay. The criminal defence he said it was gonna be messy. There was two Cabinet Ministers that were involved, but they were gonna be –

[…]

A. But the two Cabinet Ministers were gonna be called to testify for their involvement and that the conduct of the Board was gonna be put into question. So, then he says I have an offer for you.

[…]

> A. Offer Criminal – Offer No Evidence. Number two civil discontinuance of all civil actions plus there would be a confidentiality agreement signed on both parties. Number three that that payment of Branch legal fees in the amount of $200,000.
>
> Q. Okay. So, Mr. Landry, when Mr. Gillis said what you've just described and presented this offer to you, how did you respond?
>
> A. My first response was the payment of the $200,000 – I said to Mr. Gillis – I said – our organization has audited financial statements. I can't cut you a cheque for $200,000. I don't have that power. And, I said – what – what – why, you know – why – why do you propose – he said well, he said what we can do is we can run it through as professional fees – we could run it through our firm as professional fees and you can get away with it that way. You can – but that – that bothered me extremely because here we were dealing in a case of fraud and he was basically asking me to – to – my interpretation is that he was asking me to not really doctor the books but misrepresent the books.
>
> […]
>
> A. Because I have auditors, I have to explain the $200,000 and he would have – he would have – I would have an – an invoice from – from Mr. Gillis's firm for $200,000 in legal where the Board has not approved them as – they have not been hired as lawyers or anything of that nature.

[48] According to the defence, Mr. Landry's suspicion was wholly unjustified. The proposal for settlement did not contemplate the delivery to the Board of an invoice for legal fees from Gilbert McGloan Gillis. That law firm had rendered legal services to Mr. Branch only, and the invoice would be addressed to him, and no one else. It was the appellant's understanding, which was supported by David Harris, *Wrongful Dismissal*, vol. 3 (Toronto: Carswell, 1990) at 8-29, that the legal fees incurred by an employee in the prosecution of a claim for wrongful dismissal, and paid by the employer as part of a settlement, were properly deductible as a business expense.

[49] At any rate, and as mentioned, Mr. Landry swore he could recall word-for-word what the appellant said some 2.5 years before by way of explanation for the phrase "Criminal – Offer No Evidence" found in C-1:

> And, the second part I asked him – I said – the Criminal – Offer No Evidence, what do you mean? I don't have any control over the – the criminal part. And, he said to me, he said […] They're your witnesses, you make sure that they don't testify and the Crown will not have a case.
>
> Q. So, how did you respond to that, Mr. Landry?
>
> A. I said look, I said, I don't have any powers over this. I will consult and I will get back to you. And, he said well, you better hurry because this offer won't be on the table for very long.

[50] The appellant's direct examination took place on September 20, 2012. He testified that, although he did not recall the exact words he used on December 10, 2009 to flesh out C-1 for Mr. Landry's and the Board's benefit, he had definitely not told Mr. Landry: "They're your witnesses, make sure they don't testify and the Crown won't have a case". The appellant's testimony on point bears repeating:

> Q. "They're your witnesses, make sure they don't testify and the Crown won't have a case." What do you say to that Mr. – or, Mr. Gillis?
>
> A. I never said that. Mr. Landry is mistaken.
>
> **[…]**
>
> Q. How do you know you did not say it, Mr. Gillis?
>
> A. I'm absolutely sure I did not say that. I've practised law for 40 years. I've spent 1,000, 1,500 days in court examining and cross-examining witnesses, I've never said that, ever. And I would remember if I did.
>
> [Emphasis added.]

[51] The appellant's understanding of C-1 is detailed in the following excerpt from his examination-in-chief:

> Q. I'd like you if you would, Mr. Gillis, to take some time and explain to His Honour step by step what this sheet documents or purports to document.
>
> A. I was trying to demonstrate graphically to people that I did not know the dollar consequences of all of this litigation. So I have two columns; the left column, what it's gonna cost Mr. Branch; the right column, what it's gonna cost the Board. And thereafter I set out my comment of these dollar figures that we're looking at. The first litigation is the criminal litigation, R. v. Branch. I estimated the legal costs, if we conclude it, would probably be upwards of $200,000, so I have legal, two hundred.
>
> Q. Okay.
>
> A. It's gonna cost Mr. Branch. And the Board cost is zero because they're not involved on that, it's up to the Crown, the legal cost, paying for the lawyer.
>
> Q. Okay.
>
> A. The next item is civil, Branch v. the Board, that's the action, the wrongful dismissal action of 2006 in which the witnesses set the claim's about five hundred thousand. I estimated if we go to trial, whether we get five hundred, we get three hundred thousand, Mr. Branch'd be three hundred thousand to the good and on the right-hand column I said the Board's gonna have to pay not only the three hundred thousand in damages by way of settlement, but upwards of two hundred thousand in legal fees if they went through a full trial. Then the third piece of litigation, civil litigation, the *lis pendens* litigation, that's the July 2009 action tying up his property. There's no money that's gonna flow to Mr. Branch when you get rid of that litigation, he just gets his properties where he wanted for estate purposes, but the Board's gonna have legal cost in pursuing that action of upwards of a hundred thousand dollars. So at the end of the day, I said if we, we continue on Mr. Branch'll be ahead of the game by upwards of a hundred thousand and the Board'll be out of pocket about six hundred thousand. So that's to, to set the tone, what

> their exposure is, and it's not, we're not saying we're gonna get one hundred percent of the five hundred thousand but we're gonna get a large portion of it, so – The middle part of the page, I had to relate to the Board that Mr. Branch wants to question what the Board did and Mr. Branch intended at a trial to summons two cabinet ministers in their involvement in this matter.
>
> […]
>
> A. … The bottom part, I actually get to the offer and I go through the three items again, one, two, three. First item's the criminal, as at the top of the page, criminal, it's a statement, the Crown will offer no evidence, that we'll go to the Crown and try and get them to offer, or David Rogers would, to offer no evidence. Item two, the civil actions, discontinuance, confidentiality agreement. To resolve a civil action you have a consent order for dismissal or discontinuance barring any further action. That's what that's about. A lawyer has to draft it and it has to be consented to by the other lawyer. The confidentiality agreement, in these type of actions there's an agreement where everything remains confidential, again drafted by the lawyers.
>
> Q. How common is that, sir?
>
> A. I would say it's used or I've signed confidentiality agreements involving these type of actions 99 percent of the time. I mean, it's just like a standard release.
>
> Q. Okay.
>
> A. You have a confidentiality agreement. And the last item, payment of Branch's legal fees, two hundred thousand.

[52] The appellant and Mr. Rogers both testified that the phrase "Criminal – Offer No Evidence" in C-1 reflected no more than their intention to approach Crown counsel with a view to securing his agreement to offer no evidence at the opening of the trial against Mr. Branch. Recall that the Crown had been willing to withdraw four of the charges in exchange for one guilty plea. Given that showing of weakness, it was thought Crown counsel might well be willing to fold once confronted with, not only the defence-

friendly settlement of the civil actions, but, as well, cancelled cheques signed by Mr. Branch that the defence contended showed, contrary to the allegation underlying the more serious charges, that he had reimbursed the Board for all expenses charged to its account.

[53] The appellant's examination-in-chief offered the following account of the exchange between himself and Mr. Landry:

> Q. So Mr. Gillis, let's turn to the day of December 10, 2009. What time did you arrive at court that day?
>
> A. Probably shortly before one o'clock.
>
> Q. And who were you with?
>
> A. David Rogers.
>
> Q. And would you please tell us what happened when you got to court that day.
>
> A. Court was going to start at 1:30. We did not wish to be late. We would've gone to the courtroom or I went to the courtroom and put my gown on and then would've sat down and printed out Exhibit 1 or C-1, whatever –
>
> Q. Exhibit C-1, yeah.
>
> A. Exhibit C-1. Mr. Rogers was in or out or to the, to my left, I wasn't paying much attention to him, and then I went out in the hallway. At that point I saw coming down the hall, I think Linda Gould-McDonald and Mr. Landry, those were the two that I remember.
>
> Q. Yes.
>
> A. I asked if I could speak with Mr. Landry for a moment and I turned towards the window and he stood beside me and I went through this piece of paper.
>
> Q. So where are you and Mr. Landry standing?
>
> A. Out in the public hallway.

Q. Were there any private rooms in the area?

A. Oh yes, about eight feet away across the hall there were a number of private meeting rooms if you wanted to meet in private.

Q. And so you asked to speak to Mr. Landry?
A. Yes.

Q. Where was Ms. Gould-McDonald when you asked to speak to him?

A. Well, she was standing beside him when I asked to speak with him. I don't know where she went after that, I wasn't focused on her.

Q. Was she part of the conversation with Mr. Landry?

A. No.

Q. And yourself?

A. No, she wasn't part of the conversation. What I had was some figures with respect to the North Shore Forest Product Marketing Board and somebody had to communicate it to the Board and the Board's lawyer and it wasn't Mrs. Gould-McDonald – or, Ms. Gould-McDonald.

Q. Mr. Landry testified at one point that you sort of pushed Ms. Gould-McDonald away and then he changed that and said you excluded her. Could you comment on that, Mr. Gillis?

A. I – I've never pushed a woman. It's not only the wrong thing to do but you get in trouble. I – I – And I don't even suggest that. So I didn't exclude her intentionally, she had no role to play. This dollar figure had to get back to the Board of Directors and the Board's lawyer.

Q. And so how did Mr. Landry respond to your request to speak to him?

A. He was in, how should I put it, normal good spirit or said sure and we started talking.

Q. Okay. What did you say to Mr. Landry on that day?

A. I had prepared, if you want, my speaking notes, if you call this document C-1 speaking notes, it wasn't that. I don't remember my exact words to Mr. Landry, it was three years ago. I would have gone through the dollar figures here explaining it to try and come up to the conclusion that if you fellows would pay $200,000 we could resolve the civil matter and I would've gone through –

[…]

Q. Using these notes to refresh your memory, sir, can you tell us what you did and what you said to Mr. Landry to the best of your ability?

A. To the best of my ability, what I did is I went through the first two-thirds of this page explaining the dollar figures and the cost benefit analysis and concluded by saying we were willing to settle the matter for $200,000 if you made the payment to Gilbert McGloan Gillis or whatever.

Q. What explanation did you give of those dollar amounts, sir?

A. The explanation is what I've given to you previously, that it could cost the Board upwards of $600,000 with all this litigation and Mr. Branch would come out ahead about a hundred thousand and that we're willing to settle for $200,000 at this time with a discontinuance and confidentiality agreement.

Q. Did you go through each of the items individually?

A. I went through each of the dollar figures on the first two-thirds of this page or first half of this page explaining it because to my way of thinking the Board of Directors have to understand the dollar figures and the rationale to settle a civil action and I wanted to make sure that Mr. Landry, as the messenger to take this back to Mr. Young or the - and the Board, understood the dollar figures. It was just an explanation.

[…]

Q. And how long would it have taken you, sir, to go through this with Mr. Landry that day?

A. It took two to three minutes. I didn't have a lot of time, court was going to recommence at 1:30, it's about 1:15 and I still had to sort a few papers, but I wanted to get the thing, the civil settlement in play as soon as possible.

Q. And how much of the time would've been spent, of the two or three minutes, would've been spent on the top part of the document explaining the numbers?

A. Ninety percent of the time because you have to let them fully appreciate the cost.

[…]

Q. Okay. And so what did you do with this document following your discussion with Mr. Landry?

A. I left it with him. I printed it with the intention that it would be a document that would receive circulation within the North Shore Forest Product Marketing Board of Directors and Mr. Young and perhaps others.

Q. What if any restrictions did you impose on Mr. Landry with respect to your discussions or this piece of paper?

A. Absolutely none and if he had questions I expected he would come back and ask me, Mr. Young had questions he would ask me, somebody would ask questions and we'd have to work out the terms of the minutes of settlement that we talk about here. Or I write about here.

[…]

Q. Mr. Gillis, the last thing I want to ask you, sir, is what were your intentions when you spoke to Mr. Landry that day?

[…]

A. The intentions were to simply resolve or start the process to resolve the civil matter. There was absolutely no intention to resolve the criminal matter with Mr. Landry.

> He had no involvement. There was no conspiracy. There was nothing to do with the criminal matter concerning Mr. Landry and our intention or my intention solely with this piece of paper and my discussion with Mr. Landry was to settle or put in process the settlement of a civil matter.

[54] On cross-examination, Crown counsel focused on what he would later argue were instances of ethical misconduct by the appellant. In that regard, he pointed to the appellant's omission to personally inform the Branch preliminary inquiry judge and the prosecutor in that case, that he was representing Mr. Branch in the wrongful dismissal and defamation action:

> Q. You didn't notify the Court and you didn't notify the prosecutor. Isn't that right?
>
> A. Notify them about what?
>
> Q. About the fact that you were representing Mr. Branch on that civil matter at the time.
>
> A. The prosecutor wasn't concerned about the civil matter because the prosecutor wasn't involved with the civil matter. The Court was concerned with the criminal matter and I was representing Mr. Branch on the criminal matter. Mr. Siscoe, when he testified for the Crown, identified his relationship with Mr. Branch that he was representing Mr. Branch – in they're trying to prove, I believe, the employment contract. So, the people that were in this courtroom knew where the representation was. I have difficulty following what your question is.

[55] The appellant added that, in any event, Mr. Siscoe had testified he (the appellant) represented Mr. Branch in the wrongful dismissal and defamation action:

> Q. Okay. And you didn't tell the Judge?
>
> A. Well, he told the Judge. He said something to the effect, "Mr. Gillis, I believe represents," or whatever the words were, "Mr. Branch and I just realized today I'm still on the – as solicitor of record," or something like that. I forget how it went but as something like that. But if you've got the transcript I could – can tell you exactly.

The appellant's suggestion that the preliminary inquiry transcript be produced to verify Mr. Siscoe's testimony on point went unheeded.

[56] Crown counsel also put into evidence, through the appellant's cross-examination, the text of various provisions of the *Code of Professional Conduct*. Curiously, he instructed the appellant to abstain from commenting on their applicability and possible violation.

[57] As will be seen, in his reasons for decision, the trial judge found the appellant behaved unethically by the "very questionable manner" in which he conducted himself during Mr. Siscoe's cross-examination. He also found the appellant violated three of the several Rules of the *Code of Professional Conduct* referenced by Crown counsel during his cross-examination. In the trial judge's view, those ethical breaches demonstrated a lack of integrity, an important factor in assessing credibility.

F. *The reasons for the trial judge's findings of credibility and reliability, and for conviction*

[58] The trial judge summarized his findings as follows:

> […] With respect to the different versions of what Gillis said to Landry in connection with the possible settlement of the criminal matter, I disbelieve Gillis' evidence. I find Landry very credible and I believe his evidence. Simply put, I am satisfied beyond a reasonable doubt that on the basis of the evidence before me, Gillis said to Landry exactly what Landry alleges, with respect to the proposed settlement of the criminal matter. [para. 83]

[59] Those observations are expanded upon in the trial judge's reasons under "Conclusion":

> It is clear to me, and I say so without hesitation, that Gillis, when speaking to Landry, did have the specific intention of subverting justice, when he asked Landry to make certain that Board employees did not testify against Branch.
>
> Going back to the approach mandated in R.v.W.(D.), supra, I do not believe the evidence of Gillis as to precisely what he said to Landry about the latter stopping Board witnesses from testifying, I am not left in reasonable doubt by Gillis' testimony and on the basis of the evidence which I do accept, I am convinced beyond a reasonable doubt by that evidence, of Gillis' guilt.
>
> I am satisfied that all of the essential elements of this offence have been proven and that the facts taken as a whole prove the guilt of the Accused beyond a reasonable doubt. Therefore, Gillis is found guilty of an attempted obstruction of justice, as charged. [paras. 110-112]

[60] The trial judge's reasons for disbelieving the appellant are set out in his decision under the rubric "Credibility of Rodney J. Gillis": (1) the appellant's testimony differed from "that of Rogers in some important aspects"; (2) the appellant's own testimony was "contradictory on some major issues" and was at odds with the appellant's prior statement to the police; (3) the appellant's "strong denial that he said to Landry the words attributed to him" was not "credible" because his denial that he made the statement could not be squared with his inability to "remember the exact words he used"; (4) the appellant's "own testimony" demonstrated his attempt "to resolve the criminal and civil matters violated" Rule 2 of Chapter 15, Rule 10(ix) of Chapter 8 and Rule 9(b) of Chapter 4 of the *Code of Professional Conduct* of the New Brunswick Law Society; (5) the appellant "acted in a very questionable manner, in not advising the presiding judge [at the Branch preliminary inquiry] and the Crown prosecutor of his exact involvement with Mr. Siscoe, prior to cross-examining him"; (6) the appellant's contention that the Crown "might agree to present no evidence on all five charges merely because the civil litigation between Branch and the Board had been settled lacks the air of reality" [Emphasis added]; and (7) the appellant's testimony was "too often […] vague, indefinite, qualified and non-committal". The appellant "did not appear to be forthright and responsive to questions" and was "often argumentative when being questioned by [Crown counsel]".

His testimony "at times, was neither reasonable nor consistent […] and he did not stand up well under cross-examination".

[61] The trial judge concluded Mr. Rogers, the appellant's law partner and co-counsel for the defence at the Branch preliminary inquiry, could not be believed "on many matters about which he testified". The trial judge added he did not believe "that Rogers gave his testimony in a straightforward, honest and believable manner", adding that "much of his testimony simply did not have the ring of truth to it" and that he "was evasive at times, and, simply, not credible". The trial judge closed his assessment of Mr. Rogers' testimony and credibility by stating: "he did not stand up well under cross-examination and was argumentative not only during cross-examination but in direct, as well".

[62] As for Mr. Landry, the trial judge made the following observations regarding his testimony: "I found him to be a very credible and honest witness. He appeared to be making every effort to relate what happened as precisely as possible, and realized how important accuracy was in all of his testimony. His testimony was direct, never vague, and he held up well to a quite vigorous and thorough cross-examination. He was a credible witness and I am satisfied that his testimony was reliable". The trial judge added that none of the testimonial errors committed by Mr. Landry were "significant or troubling". In the trial judge's view, none of those errors affected Mr. Landry's credibility or "cast any doubt on the reliability of his account of the critical part of his conversation with Gillis".

III. The Case for reversal

[63] The appellant contends in the Notice of Appeal, as amended at the hearing, that the trial judge committed reversible error of fact in relying upon negative characterizations of his testimony that are unsubstantiated by the record and in misapprehending the evidence, particularly his own testimony. The trial judge would have misapprehended the appellant's testimony regarding: (1) the alleged breaches of the

Rules of the *Code of Professional Conduct* of the New Brunswick Law Society; (2) the inevitability of involvement by the Board's lawyer, Mr. Young, in the settlement process initiated by C-1; (3) Mr. Rogers' role in the preparation of C-1; (4) the reason for his (the appellant's) approach to Mr. Landry, rather than Mr. Young; (5) the connection between the civil and criminal matters; (6) the period during which the offer of settlement would remain open for acceptance by the Board; (7) his reasons for believing the Crown might be willing to consider offering no evidence against Mr. Branch; and (8) the reason for mentioning the proposed criminal disposition of the criminal charges in C-1. In addition, the trial judge would have misapprehended other elements of the evidential record: (1) in concluding the appellant's "strong" denial - that he said the words attributed to him by Mr. Landry - was not credible because he admitted to not remembering the exact words he used to explain C-1; and (2) as they pertain to the issues said to impact on Mr. Rogers' credibility.

[64] As well, the Notice of Appeal, as amended, alleges the trial judge committed the following errors, most of which are easily characterized as legal in nature: (1) he misdirected himself as to the relevance of a civil settlement to prosecutorial discretion; (2) he relied upon the appellant's conduct in cross-examining Mr. Siscoe at the Branch preliminary inquiry as evidence of lack of integrity and credibility; (3) he considered perceived inconsistencies between the appellant's statement to the police and his testimony on direct examination despite Crown counsel's failure to raise the issue during cross-examination; (4) he made legally impermissible use of the evidence of weaknesses in the case against Mr. Branch; (5) he failed to appreciate the key basis upon which Mr. Landry's reliability was impugned; (6) he relied on neutral evidence (the wording of C-1) to support the reliability of Mr. Landry's evidence; (7) he erred in his application of *R. v. W.(D.)*, [1991] 1 S.C.R. 742, [1991] S.C.J. No. 26 (QL); and (8) the verdict is unreasonable having regard to the evidence, properly understood.

[65] Finally, in the Appellant's Submission and a mid-hearing brief filed at the Court's request, as well as during the debate on appeal, the appellant argued many of the factors which prompted the trial judge to disbelieve his testimony were never put to him

on cross-examination and that, as a result, he was deprived of a fair opportunity to make full answer and defence. This argument draws its lifeblood from Lord Herschell's speech in *Browne v. Dunn*.

[66] It is acknowledged in the Respondent's Submission that the trial judge misapprehended some of the evidence. However, the respondent contends no reversible error was committed. I agree with that contention insofar as the acknowledged misapprehensions are concerned, and will say nothing more on point.

[67] The respondent also submits the trial judge did not commit any error of law and vigorously argues the appellant is seeking to have this Court engage in a trial *de novo* of the underlying charge. In that regard, the respondent points to the observations I made, writing for the Court, in *E.K.M. v. R.*, 2012 NBCA 64, 391 N.B.R. (2d) 130, and argues those observations apply with equal force to the case at hand:

> In my respectful judgment, there is simply no merit to the appellant's objections to the findings of credibility made in the court below. Stripped to their core, those objections are not sourced in errors of law or principle, but driven solely by a disagreement with the trial judge's adverse findings, which, in my view and contrary to the appellant's submission, flowed from the application of a legally correct framework and are solidly moored to the evidential record. That being so, those findings must stand (see *R. v. R.P.*, 2012 SCC 22, at paras. 10-12). [para. 25]

Our Court has indeed repeatedly recognized its mandate does not include the re-trial of cases, and acted accordingly. That said, the Court is duty bound to intervene where the contested verdict is rooted in significant errors of fact or law.

IV. Analysis and Decision

[68] The constituent elements of the offence, as particularized in the Information, are: (1) a willful attempt to obstruct, pervert or defeat the course of justice; (2) in a judicial proceeding (s. 139(3) provides the proceeding in question may be existing or "proposed"); (3) by attempting to dissuade a person from giving evidence; (4)

by threats, bribes or other corrupt means. Two lines of legal inquiry, both interpretative in nature, arise from the charge as it appears in the Information.

[69] The first concerns item (2). Must the attempt be in relation to a judicial proceeding and, if so, what is the meaning of the expression "proposed", or "projetée" in the French version, of s. 139(3)? At the time the appellant provided explanations for C-1 to Mr. Landry, the only existing proceeding was the preliminary inquiry into the charges against Mr. Branch, and it is common ground that the phrase "Criminal - Offer No Evidence" had nothing to do with the preliminary inquiry: it related to a proceeding (the trial of Mr. Branch) that might, or might not, take place. Hence, this question: does the pursuit of an order committing the accused to trial make it a "proposed" proceeding for s. 139 purposes? Perhaps. Absent binding judicial precedents, the answer to the foregoing questions stands to be ascertained by the application of settled principles of statutory interpretation.

[70] The second line of inquiry focuses on the meaning of the phrase "threats, bribes or other corrupt means". The trial judge found that essential component of the offence as charged was established by the appellant saying to Mr. Landry "if the Branch charges went to trial, the Board's conduct would be put into question and certain cabinet ministers would be called to testify and the matter would become messy". What is the meaning of the term "corrupt" and does it encompass the quoted statement?

[71] None of those issues has been debated in this Court. To be clear, the appellant has not argued the facts as found by the trial judge cannot, as a matter of law, support his conviction for the offence charged. The reasons that follow deal with the appeal as framed and argued.

[72] As the trial judge noted, credibility was "critically important in this case", a state of affairs that brings into play the much-discussed case of *R. v. W.(D.)*, where the Supreme Court of Canada laid out, in step-by-step fashion, the correct approach to adjudication of criminal liability where the accused has testified:

> First, if you believe the evidence of the accused, obviously you must acquit.
>
> Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
>
> Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused. [para. 28]

[73] Focusing exclusively on the features of that approach that are key for our present purposes, the appellant's acquittal was required unless the trial judge: (1) disbelieved his denial under oath that he told Mr. Landry "They're your witnesses, make sure they don't testify and the Crown won't have a case"; and (2) after considering all of the evidence, was not left with a reasonable doubt. The trial judge disbelieved the appellant's denial and, as a result, found his guilt had been established beyond a reasonable doubt. As mentioned, the appellant challenges the trial judge's adverse finding of credibility on the grounds that it is the product of errors of fact and errors of law.

[74] The standard of review for errors of fact is palpable and overriding error. Thus, an appellate court is not at liberty to overturn findings of credibility simply because it would have come to a different conclusion. As was stated in the oft-cited case of *R v. Gagnon*, 2006 SCC 17, [2006] 1 S.C.R. 621:

> There is general agreement on the test applicable to a review of a finding of credibility by a trial judge: the appeal court must defer to the conclusions of the trial judge unless a palpable or overriding error can be shown. It is not enough that there is a difference of opinion with the trial judge (*Schwartz v. Canada*, [1996] 1 S.C.R. 254, at paras. 32-33; *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, 2005 SCC 25, at para. 74). [para. 10]

See, as well, *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41, at paras. 70-73.

[75] The question of appellate review of credibility findings on the basis of allegations of factual error was recently considered in *J.N.C. v. R*, 2013 NBCA 59, 409 N.B.R. (2d) 310, where the Court observed:

> In light of the above, we owe deference to the trial judge's credibility findings unless J.N.C. can show that these are the product of a palpable and overriding error: *R. v. Gagnon*, 2006 SCC 17, [2006] 1 S.C.R. 621, at para. 10.
>
> In *R. v. Arsenault*, 2005 NBCA 110, 295 N.B.R. (2d) 123, at para. 26, and in other cases, including *R. v. Mollins*, 2011 NBCA 62, [2011] N.B.J. No. 237 (QL), at para. 14, this Court has adopted the definition of "palpable and overriding" articulated in *Waxman v. Waxman*, [2004] O.J. No. 1765 (C.A.) (QL):
>
> > The "palpable and overriding" standard addresses both the nature of the factual error and its impact on the result. A "palpable" error is one that is obvious, plain to see or clear: *Housen* at 246. Examples of "palpable" factual errors include findings made in the complete absence of evidence, findings made in conflict with accepted evidence, findings based on a misapprehension of evidence and findings of fact drawn from primary facts that are the result of speculation rather than inference.
> >
> > An "overriding" error is an error that is sufficiently significant to vitiate the challenged finding of fact. Where the challenged finding of fact is based on a constellation of findings, the conclusion that one or more of those findings is founded on a "palpable" error does not automatically mean that the error is also "overriding". The appellant must demonstrate that the error goes to the root of the challenged finding of fact such that the fact cannot safely stand in the face of that error: *Schwartz v. Canada*, [1996] 1 S.C.R. 254 at 281. [paras. 296-97]
>
> […]
>
> With respect, there is simply no correlation between the complainant's description of the boat and her credibility regarding the event she describes as a sexual assault. The

> complainant's knowledge of the boat was not a matter that led to the inescapable conclusion she was being truthful with respect to the acts that form the basis of the charges against the accused. In our view, it was illogical for the judge to have concluded that, because the complainant was able to describe a boat and how she embarked, she must then be telling the truth about everything else, especially when there was evidence that neutralized the value of her descriptions.
>
> Of course, our finding that the trial judge made a palpable error in his assessment of credibility is of no moment unless that error is also an overriding one. In our view, the error falls into that category. The trial judge went to great lengths to explain how he was convinced of the "boat" incident, and thereafter simply stated he concluded the complainant was truthful regarding the other alleged incidents, without any detailed analysis of any testimony regarding these. In the circumstances, it is abundantly clear that the judge's misguided credibility analysis regarding the boat incident affected the balance of his findings. In other words, the judge anchored his entire credibility findings on the complainant's description of the accused's boat. That being a palpable error, it is also, in these circumstances, an overriding one. In the final analysis, the trial judge convicted J.N.C. because he believed the complainant, and he believed her <u>because</u> she could describe the boat. This is a palpable and overriding error in the assessment of credibility.
>
> Of course, as an appellate court, we do not have the advantage of seeing the witnesses. As a result, despite our unease or lurking doubt about the verdict, we have no way of knowing how a credibility analysis, devoid of any palpable and overriding error, might be resolved in this case. This is why, in the final analysis, we allowed both the application for leave to appeal and the appeal, quashed the conviction and ordered a new trial should the Attorney General choose to proceed with one. [paras. 14-19]
>
> [Emphasis in original.]

[76] The standard for appellate intervention on the basis of evidential misapprehension is "stringent": *R. v. Lohrer*, 2004 SCC 80, [2004] 3 S.C.R. 732, at paras. 1-2 and *R. v. C.L.Y.*, 2008 SCC 2, [2008] 1 S.C.R. 5, Abella J., for the majority, at para.

19. In *Lohrer*, the Supreme Court of Canada cautioned against intervention unless the following conditions were met:

> *Morrissey*, it should be emphasized, describes a stringent standard. The misapprehension of the evidence must go to the substance rather than to the detail. It must be material rather than peripheral to the reasoning of the trial judge. Once those hurdles are surmounted, there is the further hurdle (the test is expressed as conjunctive rather than disjunctive) that the errors thus identified must play an essential part not just in the narrative of the judgment but "in the reasoning process resulting in a conviction". [para. 2]

[77] In *C.L.Y.*, the majority concluded the trial judge's bases for disbelieving the accused "rested on misapprehensions of his evidence and played a critical role in the convictions, rendering them insupportable" (see para. 21). I come to the same conclusion regarding the trial judge's multi-faceted basis for disbelieving the appellant. While alive to the "singular perch" occupied by the judge in assessing credibility, I conclude that basis is rooted in misapprehensions of the evidence that played a critical role in shaping the outcome in first instance.

[78] The "stringent" standard referenced in *Lohrer* and *C.L.Y* is drawn from Justice Doherty's oft-quoted reasons for judgment in *Morrissey*:

> In my opinion, on appeals from convictions in indictable proceedings where misapprehension of the evidence is alleged, this court should first consider the reasonableness of the verdict (s. 686(1)(a)(i)). If the appellant succeeds on this ground an acquittal will be entered. If the verdict is not unreasonable, then the court should determine whether the misapprehension of evidence occasioned a miscarriage of justice (s. 686(1)(a)(iii)). If the appellant is able to show that the error resulted in a miscarriage of justice, then the conviction must be quashed and, in most cases, a new trial ordered. Finally, if the appellant cannot show that the verdict was unreasonable or that the error produced a miscarriage of justice, the court must consider the vexing question of whether the misapprehension of evidence

amounted to an error in law (s. 686(1)(a)(ii)). If the error is one of law, the onus will shift to the Crown to demonstrate that it did not result in a miscarriage of justice (s. 686(1)(b)(iii)).

[…]

Fanjoy, like most cases where s. 686(1)(a)(iii) has been invoked, involved prosecutorial or judicial misconduct in the course of the trial: e.g., see *R. v. Stewart* (1991), 62 C.C.C. (3d) 289, 43 O.A.C. 109 (C.A.); R. *v. R. (A.J.)* (1994), 20 O.R. (3d) 405, 94 C.C.C. (3d) 168 (C.A.). Such conduct obviously jeopardizes the fairness of a trial and fits comfortably within the concept of a miscarriage of justice. Nothing in the language of the section, however, suggests that it is limited to any particular type of error. In my view, any error, including one involving a misapprehension of the evidence by the trial judge, must be assessed by reference to its impact on the fairness of the trial. If the error renders the trial unfair, then s. 686(1)(a)(iii) requires that the conviction be quashed.

When will a misapprehension of the evidence render a trial unfair and result in a miscarriage of justice? The nature and extent of the misapprehension and its significance to the trial judge's verdict must be considered in light of the fundamental requirement that a verdict must be based exclusively on the evidence adduced at trial. Where a trial judge is mistaken as to the substance of material parts of the evidence and those errors play an essential part in the reasoning process resulting in a conviction then, in my view, the accused's conviction is not based exclusively on the evidence and is not a "true" verdict. Convictions resting on a misapprehension of the substance of the evidence adduced at trial sit on no firmer foundation than those based on information derived from sources extraneous to the trial. If an appellant can demonstrate that the conviction depends on a misapprehension of the evidence then, in my view, it must follow that the appellant has not received a fair trial, and was the victim of a miscarriage of justice. This is so even if the evidence, as actually adduced at trial, was capable of supporting a conviction. [paras. 88, 92-93]

[Emphasis added.]

[79] Applying the analytical framework in the sequence recommended in *Morrissey*, I turn first to the question of whether the verdict is unreasonable. The test to be applied in determining that question is whether the verdict is one that a properly instructed jury could reasonably have rendered: *R. v. Biniaris,* 2000 SCC 15, [2000] 1 S.C.R. 381, at para. 36. Acquittal is required where a verdict is unreasonable.

[80] The defence position at trial, which was reiterated on appeal, was that Mr. Landry's account of the single relevant conversation between him and the appellant was unreliable, and that he misunderstood what was being proposed. In that regard, the defence made the following points in its comprehensive post-trial brief:

> There are many facts, which it is submitted indicate Mr. Landry is most likely mistaken in what he claims Mr. Gillis said to him. These include the following.
>
> a) It was a very short conversation and Mr. Landry testified he was most interested in the financial aspect of the proposal.
>
> b) Mr. Landry made no notes during the conversation with Mr. Gillis or at any time afterwards.
>
> c) Mr. Landry testified he was "extremely bothered" by how Mr. Gillis indicated the Board could pay Mr. Branch's legal fees. Mr. Landry "interpreted" (not Mr. Gillis said, but Mr. Landry "interpreted"), that he was being asked to misrepresent the books. Mr. Landry was not aware this form of settlement [payment by the employer of the wrongfully dismissed employee's legal fees] is completely acceptable in resolving wrongful dismissal cases. In Harris, *Wrongful Dismissal*, Vol. 3 at page 8- 29 [as it then read], the author states:
>
> > *(d) Payment Directly to Employee's Lawyer*
> >
> > The CRA's administrative practice is generally to permit payments of legal fees by the employer directly to the former employee's lawyer with no source withholding and no tax consequences (except to the lawyer). The effect on the employee will generally be the same as if the amount were

> taxable under para. 56(1)(1.1) and then an offsetting deduction for legal expenses were claimed under paragraph 60(o. l) as discussed above.

Harris [*Wrongful Dismissal*], is cited as recognized authority in numerous decisions at all court levels in wrongful dismissal cases. Additionally exhibit C-1, the written offer itself, clearly spells out for all to see that Mr. Branch's legal fees were to be paid by the Marketing Board. There was no hiding or misrepresenting anything.

d) Mr. Landry also acknowledged he was not aware of a legal practice in criminal law where charges are disposed of by the Crown offering no evidence. Such a practice is well known to the Court.

e) Mr. Landry acted normally during and after the discussion with Mr. Gillis. There was no challenge or inquiry of, "What are you asking me to do?", or any words to that effect. When Mr. Gillis was asked by Mr. Rogers after the discussion with Mr. Landry, "How did it go?", Mr. Gillis told Mr. Rogers, "They will get back to us". Crown counsel was critical of Mr. Gillis for not discussing the matter with Mr. Young on the Friday but the evidence, undisputed, is that "they would get back" to Mr. Gillis.

f) Mr. Landry did not immediately decide to make a criminal complaint. Why would one wait if the words allegedly spoken by Mr. Gillis are as clear as Mr. Landry claims? In cross-examination, Sgt. Lord confirmed his notes document that Mr. Young "works primarily in civil law and wanted someone more experienced in criminal to review the offer" and that "the offer appeared inappropriate", not "was criminal" but appeared "inappropriate". Would there really be any need for Mr. Young to inquire of other lawyers if the words allegedly stated by Mr. Gillis are as clear as Mr. Landry states?

g) The accuracy of a witness' recollection may be influenced by many factors. Mr. Landry discussed the conversation he had with Mr. Gillis with several other people many times between December 10th and December 16th. Only after which did he decide to make a criminal complaint. Mr. Landry again discussed the conversation many times between December 16th and February 23rd

when he provided the first recorded statement to Sgt. Lord. There were at least l0 discussions, as follows:

Landry - Gould-Macdonald (Mr. Landry stated 10 min, then 5-10 min, then 10 min.)	December 10/09
Landry - Young (phone) (up to 15 minutes)	December 10/09
Landry - Young (length not disclosed)	December 11/09
Landry - Young, Gould-MacDonald (length not disclosed)	December 11/09
Landry - Young; Gould-MacDonald (off and on all day)	December 11/09
Landry-Young (length not disclosed)	December 16/09
Landry - Gould MacDonald (length not disclosed)	December 16/09
Landry - Cst. Comeau, Bathurst Police (length not disclosed)	December 16/09
Landry to his Board of Directors (length not disclosed)	
Landry and Young (length not disclosed)	February 23/10

While not intentional, it is well known that such discussions can affect or taint the quality and accuracy of one's recollection.

h) Mr. Landry testified he observed a lot of animosity between Mr. Young and Mr. Gillis. This was not described by Mr. Landry as one-sided as suggested by the Crown in submissions. It was apparent in the manner and tone of Mr. Young's evidence. It was especially apparent in the rather indignant tone in responding to the last question asked of Mr. Young on cross-examination, being whether he contacted Mr. Gillis to clarify the offer. His reply was a very curt, "No". Several of Mr. Landry's conversations were with Mr. Young. It is submitted that, even unwittingly or unintentionally, animosity can influence impressions and color discussions about what was said or meant in an earlier conversation.

i) Sgt. Lord made it clear he wanted no discussions with Mr. Landry before the recorded statement so as not to taint or influence Mr. Landry in anyway. Sgt. Lord testified "statements are something of a specialty of his", which he designs to ensure he does not contaminate the flow of information or provide leading questions or innuendo during the interview. Yet Mr. Landry had already spoken to many people about the matter several times. It is very possible during these many discussions that Mr. Landry's recollection of the conversation, which makes no practical sense, was affected.

j) Mr. Landry testified he was surprised when Mr. Gillis approached him.

k) No clarification of the offer was sought by anyone.

1) Mr. Landry testified he remembered additional details of the conversation with Mr. Gillis when he was preparing for trial in July 2012, two years, seven months after the event.

m) Mr. Landry then testified to remembering even more additional details for the first time at the trial when giving his testimony in August, 2012. Yet, Mr. Landry had confirmed that when he gave his initial statement on February 23rd, 2010, he knew the statement had to be complete and include all important information because of the seriousness of the charge.

n) Mr. Landry explained this new recollection of details on the basis that he was intimidated giving his statement to the police officer in 2010, an officer who specializes in taking statements, but apparently not intimidated in giving evidence in Court. The defence submits that Mr. Landry did not appear to be someone who would be easily intimidated. In fact he was, it is submitted, aggressive during cross-examination.

o) Mr. Landry was clearly mistaken on what, the offer to settle was written. It was written on the back of a single sheet of paper with a news story on the other side dated December 9, 2009. It was not on a notepad or part of any notebook. On the voir dire, which was admitted at trial, Mr. Landry testified:

BEAULIEU: The original offer of settlement, he took it from what I recall from your statement, from a pad, he ripped it off a pad? Correct?

LANDRY: Yes

BEAULIEU: So those are the pads that you know like we use in Court today, these note pads that you just rip off, you write something down

LANDRY: Well, it was a leatherette pad of some sort

BEAULIEU: A leatherette pad?

LANDRY: Well, I mean it had a leatherette case on it, he ripped it out

BEAULIEU: OK, so a notepad was within a leatherette case? Is that what you are saying?

LANDRY: Yes

On direct examination the next day Mr. Landry testified, "he ripped it out or took it out of his notebook". On cross-examination, when confronted with the fact it was a single piece of paper with a newsletter on the back, he changed his testimony and said Mr. Gillis had it in a folder or took it out of a folder. Yet in his statement to the police he specifically denied there was a folder and confirmed to the officer that:

"it was a pad, he pulled it off the top, there was no folder he ripped it out of his book and he gave me a copy"

Mr. Landry then revised his evidence again on cross-examination and said, "he frigged around with the top and pulled it out". Mr. Landry conceded at the end of this exchange that he had used a "bad choice of words". He then stated, as an explanation "tu es française?" to Ms. Beaulieu, "are you French?"

Perhaps this too is part of the reason Mr. Landry misunderstood Mr. Gillis in the first place.

p) Mr. Landry agreed his testimony that Mr. Gillis "sort of pushed Ms. Gould-MacDonald away", was also not accurate and a "bad choice of words".

q) Mr. Landry agreed his testimony that Mr. Branch was dismissed in October, 2005, was also mistaken, it was actually March, 2006.

r) Mr. Landry acknowledged he was mistaken and gave incorrect information regarding Robert Brimsacle, one of many names thrown out by Crown. Mr. Landry realized later he thought the Crown had meant Austin Brimsacle. This demonstrates how easily mistakes and misunderstandings in conversations can occur. On this point, consider how would a lawyer, correctly and completely innocently, explain to a non-lawyer the criminal practice of resolving a charge by having the Crown offer no evidence? Might the explanation include a statement to the affect that the witnesses don't testify? Might the explanation also include a statement to the affect that the Crown recognizes it does not have a case? How easily might such an explanation be misheard or misunderstood?

s) Mr. Landry testified there were up to 30 witnesses at the preliminary; there were in fact 13 according to Mr. Gillis' testimony.

t) Mr. Landry said Linda Gould-MacDonald was twenty feet away during the conversation with Mr. Gillis. Ms. Gould-MacDonald said she was three feet away.

u) Ms. Linda Gould-MacDonald said she was not close enough to hear any conversation, yet she heard at least part of the conversation when Mr. Landry asked for the paper the offer was written on. She was apparently that close when Mr. Gillis is allegedly counseling a criminal offence.

v) Ms. Linda Gould-MacDonald said she saw Mr. Gillis writing during the conversation with Mr. Landry. Mr. Landry said Mr. Gillis did not write anything, the offer was all pre-prepared.

w) Mr. Landry appears to have had an extensive personal interest in the charge against Mr. Gillis. The evidence confirms numerous calls and emails to the police

> and even a reference to Mr. Gillis in one email as "our mutual friend".

[81] In addition, the defence post-trial brief made the case for a reasonable doubt based upon the appellant's testimony:

> 19. Additionally, Mr. Gillis chose to take the stand and testified under oath that he did not say the words alleged. He did not commit any criminal act. He testified as follows.
>
> a) The point of giving exhibit C-1 to Mr. Landry was to try and resolve the civil dispute so that defence counsel could go to the Crown with the civil dispute with the Board resolved, highlight the weaknesses in the Crown's case, show the Crown the additional cheques they had and see if they could get the Crown to agree to offer no evidence on the charges.
>
> b) There was at the start of the preliminary a proposal from one of the police officers for a plea bargain, that is for a plea of guilty to any one charge.
>
> c) He and Mr. Rogers were both of the opinion the Crown's case had problems. At the end of the day four of five charges were withdrawn against Mr. Branch and no one knows what the outcome would have been if Mr. Gillis and Mr. Rogers had continued as defence counsel.
>
> d) It was never his intention to obstruct justice.
>
> e) It was never his intention for Mr. Landry to have any role or influence with witnesses.
>
> f) He did not tell Mr. Landry, "the witnesses are 'your' witnesses and just make sure they don't testify". This denial is the testimony of Mr. Gillis that must be assessed against Mr. Landry's testimony of the [words] allegedly spoken, in the *W (D.)* analysis. Additionally, Mr. Gillis testified he is well aware the witnesses were not Mr. Landry's witnesses and that only the Crown has the ability to offer no evidence.
>
> g) He delivered an offer exhibit C-1 for the Board of Directors and their legal counsel through Mr. Landry.

h) It was intended for Mr. Landry to deliver this offer to the Board and to legal counsel.

i) He knew the offer would have to go to the Board and legal counsel for any decision to be made and to finalize any settlement documents.

j) He had the authority from Mr. Branch to settle the civil actions as outlined.

20. Mr. Gillis' testimony on these key aspects was not impeached on cross examination. His evidence at the very least raises reasonable doubt as to guilt under the *R. v. W (D.)*, Supreme Court of Canada instruction.

21. The Crown went on at some length about the alleged significance in civil practice of being the "solicitor of record". With respect, the Crown offered no evidence of "civil practice" for the Court to assess any significance in this regard. The only evidence of civil practice was from Mr. Gillis himself. He explained that the "solicitor of record" may not be the only solicitor involved in a case and that one does not need to be the solicitor of record to have authority to settle a case. There is no evidentiary base to criticize Mr. Gillis in how he proceeded, despite the Crown spending extensive time with previously undisclosed documents, establishing Mr. Gillis was not yet the solicitor of record on the documents filed in the Court.

22. The Crown introduced on cross-examination three chapters from the New Brunswick Law Society, *Code of Ethics*. With respect, alleged breaches of the *Code* are not relevant to the alleged criminal behavior this Court must assess. Nevertheless, it is noted:

(i) Chapter 4, item 9(b) under the title, "Threatening suit forbidden", referred to by the Crown, provides that a lawyer is not to seek the withdrawal of a criminal prosecution in exchange for the payment of money or transfer of property. There is no evidence of the threatening of any suit or the offering of any money or property by Mr. Gillis to anyone for the withdrawal of a criminal prosecution. There is no basis to suggest that this code was breached.

(ii) Chapter 8, item 10(iv), referred to by the Crown provides that the lawyer is not to attempt to influence the decision or actions of the court except by open persuasion as an advocate. There is no evidence to suggest this code was breached.

(iii) Chapter 8, item 10(ix) referred to, which provides that a lawyer is not to dissuade a material witness. Although there is no evidence related to a material witness, this is the criminal act alleged and the Court must determine whether such an act has been proven beyond a reasonable doubt. The *Code of Ethics* adds nothing to the Court's deliberations on this issue.

(iv) The Crown also referred to chapter 15, item 2(i), which deals with the noting of a party in default. It has no application to this case whatsoever.

(v) Chapter 15, item 2(ii) referenced, provides that a lawyer is not to communicate on a matter with a person represented by a lawyer except with the consent of that lawyer. While delivering an offer to an employee in order that it be communicated to a party, in this case a Board of Directors and legal counsel for the Board of Directors, may be a breach of item 2(ii), however, as the Crown concedes, it is not a criminal offence. Nor is it relevant to what this Court must ultimately decide as the alleged criminal act under section 139 of the *Criminal Code*.

In *R. v. Kirkham* [1998] S.J. No. 458, the Court made it clear at paragraphs 21, 23 and 33 of that decision, that professional conduct of an ethical nature was not relevant to the Court's assessment of alleged criminal obstruction. In that case a lawyer was charged with obstruction related to allegations of inappropriate contact with jurors.

23. The Defence maintains that the Crown's submission that Mr. Gillis did this alleged criminal act, "because of his own hate and disregard for rules and patent disregard for the rules of procedure" is unsubstantiated, nonsensical, and has no factual basis. Such a broad character assassination made by the Crown, based on Mr. Gillis delivering an offer to an employee for it to be delivered to the Board of Directors, legal counsel and whoever else may be necessary or desired, is unfair, unwarranted and inappropriate.

> 24. Mr. Gillis testified on direct examination of his regret that the offer was made to Mr. Landry and he recognized, in retrospect, had he made the offer to Mr. Young he would not be in the position he is in today. On cross-examination, Mr. Gillis again expressed his regret that he had not chosen a different means to deliver the offer than through Mr. Landry. Such an act however, is in no way a criminal offence nor does it justify discrediting Mr. Gillis' evidence. The fact of the matter is no complaint was ever made to the Law Society of New Brunswick and no finding has been made by the Law Society that Mr. Gillis breached any *Code of Ethics*.
>
> [Emphasis added.]

[82] The post-trial brief delved, as well, into the circumstances that, in the defence's submission, demonstrated the improbability and implausibility of the appellant having told Mr. Landry "They're your witnesses, make sure they don't testify and the Crown won't have a case":

> It is submitted that the alleged instruction to Mr. Landry is improbable, illogical and could not be effective in any event, for the following reasons.
>
> a) The conversation between Mr. Gillis and Mr. Landry was 3-4 minutes long, according to Mr. Landry, 5 at the most and focused primarily on a cost-benefit analysis for the Marketing Board to settle a civil dispute. If Mr. Gillis is given the benefit of the more favorable evidence from Mr. Landry, a 3-minute conversation, given all that was said, the discussion relating to "criminal - offer no evidence" had to be no more than seconds.
>
> b) <u>The conversation took place in a public hallway in the court house even though private rooms were available</u>.
>
> c) Mr. Landry had met Mr. Gillis only 3 times before, when Mr. Landry had assisted with French-English translation for a client of Mr. Gillis', whom Mr. Landry knew. <u>It is unreasonable to think Mr. Gillis is going to suggest criminal behaviour to a person he barely knew, someone he had met as a translator three times</u>.

d) Mr. Gillis without question, and without any hesitation, gave Mr. Landry the written offer and invited him to discuss it with whomever he needed or wished. Verbatim, the exchange on cross-examination on this point was as follows:

"BEAULIEU: You had received the offer and you reported it to the Board

LANDRY: Yes

BEAULIEU: Because that is your role, correct?

LANDRY: Yes

BEAULIEU: And Mr. Gillis acknowledged that it was OK to bring it to the Board and to discuss it with Mrs. Gould-MacDonald, right?

LANDRY: Yes

BEAULIEU: He invited you to do that?

LANDRY: Yes

BEAULIEU: After he gave you the offer

LANDRY: Yes

BEAULIEU: He said "feel free discuss with who you need to"

LANDRY: Yes

BEAULIEU: Openly

LANDRY: Yes

BEAULIEU: He did not restrict in any way shape or form don't talk about a certain portion of it, did he?

LANDRY: No

BEAULIEU: He said everything

LANDRY: Yes

BEAULIEU: And I will also say he did not even take the time to think about it, he offered you to discuss with them without hesitation, those are your words in this statement, without hesitation Mr. Rod Gillis gave me the piece of paper, ripped it out of his pad and told me to talk to the Board, right?

LANDRY: Yes

e) In point of fact, the Crown already had all the evidence the Crown believed was needed to proceed with the charges against Mr. Branch; as the old saying goes "the horse was long out of the barn", with respect to anything Mr. Landry or anyone else except the Crown could do to stop the charges.

f) The Crown had video statements for all or virtually all the witnesses. The defence was well aware of that as part of the disclosure package and, in fact, some of those video statements were used by the Crown at the Branch preliminary. The Crown would also have had the ability to use all the evidence taken at the preliminary inquiry against un-cooperative witnesses.

g) The Crown has the power of subpoena and can obtain warrants of arrest for witnesses who fail to obey a subpoena.

h) There was no discussion between Mr. Gillis and Mr. Landry whatsoever about any particular witness, or even if Mr. Landry knew who the Crown witnesses were to be. In point of fact, in Mr. Landry's testimony, he acknowledged he did not know who the witnesses for the trial were, he testified "he was not involved".

i) Mr. Landry testified on cross-examination as follows:

"BEAULIEU: Now at the preliminary hearing sir, there were numerous witnesses that were called, correct? Numerous means a lot.

LANDRY: Yes

BEAULIEU: And I would suggest to you sir that the trial anticipated probably 30 or more witnesses potentially?, you knew that?

JUDGE: You are talking about the preliminary?

BEAULIEU: The trial

LANDRY: The trial?

BEAULIEU: The trial, the trial for Mr. Branch

LANDRY: Oh, I don't know

BEAULIEU: But, OK, so your understanding for the prelim could have been as many as 30 witnesses

LANDRY: Yup

BEAULIEU: And for the trial, potentially more, you don't know

LANDRY: No, I wasn't involved"

j) Without any real explanation as to their relevance the Crown presented 30 or so names to Mr. Landry in Mr. Landry's direct examination. The Crown failed to prove what role, if any, 23 of those people had in the prosecution. The Crown just stated their name. Seven of the 30 names were identified by Mr. Landry as witnesses at the preliminary, 2 of those Mr. Landry said he did not know at all, 1, Mr. Steve Martin, Mr. Landry said he had heard of him and met him at the preliminary, 3 had been former employees for whom or when, we do not know. Nor do we know what role they had as witnesses or what knowledge, connection if any, let alone influence, Mr. Landry may have had on them. The last of the seven identified witnesses from the preliminary was an expert witness, an engineer.

k) In cross-examination of Mr. Gillis the Crown referred Mr. Gillis to the same 30 names of which Mr. Gillis recognized 9 as having been witnesses or on a witness list. No effort was made to establish who had testified up to December 10, 2009, the point in time the

> offer to settle was made and no evidence was called as to the significance of any of these individuals.
>
> l) In all of the cases cited as authority by the Crown, there was an attempt to dissuade a single, identified person involved in the prosecution. In this prosecution the Crown has not provided any evidence of who was actually to be dissuaded. Is it being suggested that without specific instructions, Mr. Landry was being counseled to dissuade some 30 people from testifying? This is not sensible. Surely, for this allegation to have any air of reality, let alone be proven beyond a reasonable doubt, the evidence should establish who realistically the witnesses were who were being targeted and over whom, it was known Mr. Landry had influence. Such evidence was not called by the Crown.
>
> m) Mr. Landry was not himself a witness and had only become the manager of the Marketing Board in February, 2007. The Branch charges with respect to the Marketing Board related to periods years earlier, between 1999 and 2005. Mr. Landry was not Mr. Branch's replacement as suggested by the Crown. Mr. Landry testified Mr. Branch was replaced by Mr. Rod O'Connell then by Mr. Yannick Sirois, then Mr. Landry took over. Mr. Landry was well removed in time and person from Mr. Branch and there was no discussion between Mr. Gillis and Mr. Landry about what, if anything, Mr. Landry knew or could influence.
>
> n) The Crown has suggested the Court should just infer Mr. Gillis knew Mr. Landry had influence and intended for him to use such influence to thwart the Crown's case. Mr. Gillis' unchallenged evidence in the statement to Sgt. Lord is that if he was going to try and influence someone it would not be Mr. Landry who Mr. Gillis saw as having no influence. There is no evidentiary base to infer influence as the Crown contends and the onus of proof remains with the Crown.
>
> [Emphasis added.]

[83] The purpose of reproducing those admittedly lengthy excerpts of the defence post-trial brief is simply to showcase the manifold arguments against conviction and their relative seriousness. Nevertheless, given the record at our disposal, a directed verdict of acquittal, while possible, would not be mandatory. Indeed, it is at least arguable

that a properly instructed trier of fact could reasonably render a verdict of guilty on the basis of Mr. Landry's testimony alone. That being so, it cannot be said that the verdict is unreasonable or that it cannot be supported by the evidence within the meaning of s. 686(1)(a)(*i*). However, as indicated, the record reveals significant errors of fact and law that operated, cumulatively, to deprive the appellant of a fair trial and bring about a miscarriage of justice.

A. *Errors of fact: the misapprehensions of the evidence*

[84] The guilty verdict in Provincial Court rests on two pillars: the first is a finding that the Crown's key witness, Mr. Landry, was both credible and reliable; the second is a finding that the appellant was not credible.

[85] The trial judge's reasons for disbelieving the appellant, which are set out in paragraph 60 hereinabove, bear repeating, if only for the sake of convenience: (1) the appellant's testimony differed from "that of Rogers in some important aspects"; (2) the appellant's own testimony was "contradictory on some major issues" and was at odds with the appellant's prior statement to the police; (3) the appellant's "strong denial that he said to Landry the words attributed to him" was not "credible" because his denial that he made the statement could not be squared with his inability to "remember the exact words he used"; (4) the appellant's "own testimony" demonstrated his attempt "to resolve the criminal and civil matters violated" Rule 2 of Chapter 15, Rule 10(ix) of Chapter 8 and Rule 9(b) of Chapter 4 of the *Code of Professional Conduct* of the New Brunswick Law Society; (5) the appellant "acted in a very questionable manner, in not advising the presiding judge [at the Branch preliminary inquiry] and the Crown prosecutor of his exact involvement with Mr. Siscoe, prior to cross-examining him"; (6) the appellant's contention that the Crown "might agree to present no evidence on all five charges merely because the civil litigation between Branch and the Board had been settled lacks the air of reality" (emphasis added); and (7) the appellant's testimony was "too often […] vague, indefinite, qualified and non-committal". The appellant "did not appear to be forthright and responsive to questions" and was "often argumentative when being questioned by

[Crown counsel]". His testimony "at times, was neither reasonable nor consistent […] and he did not stand up well under cross-examination".

[86] I begin with the misapprehensions underlying the finding of a violation of three Rules under the *Code of Professional Conduct*. Here are the trial judge's observations on point:

> As I mentioned earlier, one of the factors to be considered when assessing the credibility of a witness is that person's integrity. It is obvious from Gillis' own testimony that the manner in which he attempted to resolve the criminal and civil matters violated a number of rules of the *Code of Conduct* of the New Brunswick Law Society. It is also obvious from Gillis' testimony that he was aware of these rules. Some examples of these violations:
>
> > 1- Chapter 15, Rule 2 (Exhibit C-27) provides that when a lawyer knows that another lawyer has been consulted in a matter, the lawyer "shall not communicate on, or attempt to negotiate or to compromise, a matter with a person represented by a lawyer except through or with the consent of that lawyer". By presenting to, and discussing with, Landry the offer of settlement, Gillis was obviously violating this rule.
> >
> > 2-Chapter 8, Rule 10(ix) (Exhibit C-26) prohibits a lawyer, representing a client in a matter, from dissuading "a material witness from giving evidence," or from advising "such a witness to be absent from proceedings". This rule, too, was violated by Gillis.
> >
> > 3-Chapter 4, Rule 9(b) (Exhibit C-25) stipulates that a lawyer "shall not advise, seek or procure the withdrawal of a criminal prosecution to or for the benefit of the client of the lawyer in consideration of the payment of money or transfer of property". Gillis obviously violated this rule with his offer of settlement, which involved a payment of $200,000.
>
> Despite the fact that it was occasionally somewhat unclear exactly which lawyer was representing Branch on the civil

> matters at any given time, on August 17, 2009, solicitor Martin Siscoe ("Siscoe") filed a Notice of Change of Solicitor in the civil action involving the lis pendens, designating solicitor G. Peter Hyslop ("Hyslop") as his replacement. However, prior to this, in late July, 2009, Branch and solicitor Hyslop had visited Gillis and Branch had asked Gillis to represent him on all civil and criminal matter, with Hyslop assisting Gillis with the lis pendens matter. Thus, in December, 2009, both Gillis (through Hyslop) and Siscoe were involved with Branch's civil suits. However, Gillis admitted that at Branch's Preliminary Inquiry, during which he, Gillis, cross-examined solicitor Martin Siscoe, he failed to advise either the presiding judge or the Crown Prosecutor that he and Siscoe were working on these files. In fact, Gillis admitted that he had not even told Siscoe that he was assisting Branch on some files. However, Gillis claims that Siscoe knew this already and mentioned it while testifying.
>
> In my opinion, Gillis acted in a very questionable manner, in not advising the presiding judge and the Crown Prosecutor of his exact involvement with Siscoe, prior to cross-examining him.
>
> Gillis testified, and I accept, that no complaints were filed against him with the New Brunswick Law Society because of any or all of the breaches of the Code of Conduct previously alluded to. And, certainly, these breaches do not constitute criminal conduct. <u>However, Gillis has raised the issue of his own character and integrity, as did his counsel in her closing arguments, by describing Gillis as a highly sought after lawyer who was not likely to commit the offence charged</u>. And, 3 of these breaches are intractably involved with the actions of Gillis which give rise to this charge. <u>Thus, the court can certainly consider these breaches in assessing his general integrity and credibility. These breaches are not denied by Gillis</u>. [paras. 73-76]
>
> [Emphasis added.]

[87] In my view, the trial judge misapprehended the record in concluding the appellant and his counsel raised the issue of his own character and integrity. The appellant, in his testimony, and defence counsel, in her closing argument, simply put forward the following proposition: the statement "They're your witnesses, make sure they don't testify and the Crown won't have a case" reflects such a basic misunderstanding of

the criminal process that the court could, and should, find it unlikely, nay implausible, that a lawyer, particularly one with the appellant's litigation experience, would make it. The proposition had nothing to do with the appellant's character and integrity, and everything to do with his knowledge of the legal process and professional experience. In that regard, it is surely with a view to avoiding any debate over the issue that the appellant filed a c.v. stripped of any reference to matters (e.g. community involvement and charitable works) that might be relied upon to argue he had put his character and integrity in issue.

[88] In any event, the trial judge clearly misapprehended the appellant's testimony when he stated "it is obvious from Gillis' own testimony that the manner in which he attempted to resolve the criminal and civil matters violated a number of Rules of the *Code of Professional Conduct*" (emphasis added). While it is true the appellant's testimony revealed conduct the Law Society might find violated Rule 2 of Chapter 15 (presenting to and discussing with Mr. Landry the offer of settlement in C-1, while the Board was represented by Mr. Young), his testimony did not acknowledge, let alone make "obvious" he violated Rule 10(ix) in Chapter 8 and Rule 9(b) in Chapter 4. The appellant's plea of not guilty and his testimony constitute a clear and unequivocal denial of any violation of those Rules. In addition, the trial judge's statement that "these breaches are not denied by Gillis" is unreasonable having regard to his plea of not guilty, his testimony and Crown counsel's instruction that he not comment on the applicability of the Rules put to him during his cross-examination. As will be seen, the finding that the appellant engaged in ethical misconduct is also tethered to errors of law.

[89] The respondent counters with the submission that those errors of fact and law are inconsequential because of this assertion by the trial judge: "even were I not to take into consideration these ethical breaches in assessing Gillis' credibility, I would still arrive at the same conclusion, regarding his credibility". With respect, I cannot imagine how the trial judge could approach the question of credibility with an open mind once he determined the appellant had engaged in multifarious professional misconduct. In the judge's view, that misconduct involved at least four instances of unethical behavior, three

of which were "intractably involved with the actions of Gillis which give rise to this charge", and all of which demonstrated he was a person without integrity and who, for that reason, should be disbelieved. In this regard, I make mine the observations on point in the Appellant's Submission:

> It is no answer to the errors in dealing with the appellant's purported ethical breaches that the trial judge said (at page 21) that he would still arrive at the same conclusion regarding credibility if he were not to take these breaches into consideration. First, this is not the typical situation in which a trial judge correctly apprehends admissible evidence and arguably inadmissible evidence, but reflects, in considering the latter, that it was not necessary to his/her decision. Here, the trial judge has misapprehended the appellant's evidence. By definition, he cannot say that he would have arrived at the same conclusion had he correctly apprehended what the appellant had to say. Second, as the trial judge himself reflected in his description of the Crown's position, the ethical breaches were the most prominent feature of the Crown's submissions; they purportedly explained why the appellant committed the offence. An error in evaluating these submissions must, with respect, constitute reversible error. [para. 56]
>
> [Emphasis added.]

[90] At any rate, reversible error taints several of the constituent elements of the trial judge's fallback rationale for disbelieving the appellant's testimony.

(1) The appellant's testimony differed from "that of Rogers in some important aspects"

[91] With respect, once the trial judge found Mr. Rogers' testimony was not credible on any material issue, the fact of differences between his testimony and that of the appellant on any such issue could not, logically, tilt the balance against the defence. In other words, the trial judge could not, in one breath, find Mr. Rogers' testimony was not credible on material topics and, in the next breath, find the appellant's testimony on

the very same points should be disbelieved because it differed from Mr. Rogers' rejected testimony.

(2) The appellant's own testimony was "contradictory on some major issues" and was at odds with the appellant's prior statement to the police

[92] The trial judge may well be right in stating the appellant's testimony was occasionally contradictory. There may be, as well, a contradiction between his statement to the police and his testimony. Those contradictions or inconsistencies may be real, or they may simply be, to borrow Mr. Landry's phrase, a reflection of a "bad choice of words".

[93] In any case, the trial judge placed particular reliance on what he perceived was a significant contradiction between the appellant's testimony and his pre-trial statement to Sergeant Lord. In my view, that "contradiction" is far from palpable. It certainly escaped the notice of both Crown and defence counsel. I will return to this issue in connection with the trial judge's errors of law.

(3) The appellant's "strong denial that he said to Landry the words attributed to him" was not "credible" because his denial that he made the statement could not be squared with his inability to "remember the exact words he used"

[94] The trial judge's complete observations on point are as follows:

> Another aspect of Gillis' testimony which is not credible is his strong denial that he said to Landry the words attributed to him, with respect to making sure that the Board employees did not testify. In one breath, Gillis denies making this statement. Yet in another, he testified that this happened three years ago and he does not remember the exact words he used.
>
> "Q. What did you say to Mr. Landry on that day?

> A. I had prepared if you want my speaking notes, if you call this document C-1 speaking notes, it wasn't that. I don't remember my exact words to Mr. Landry it was three years ago."(underlining mine).
>
> I would also point out that if, in fact, Gillis knew nothing of the police investigation of this matter until first being interviewed by Sgt. Lord, then he would have had no reason to attempt to recollect exactly what he had said to Landry, almost two years before. [paras. 71-72]

With respect, there is absolutely nothing in those observations that could rationally support a finding of lack of credibility on the appellant's part.

[95] Rather, if anything, the appellant's inability to recall the exact words he used to explain C-1 should weigh in the balance as an indicator of truthfulness. After all, and as the trial judge acknowledged, before being summoned to the Saint John police station on September 9, 2011, the appellant would have had no reason to recollect exactly what he said to Mr. Landry on December 10, 2009. Indeed, had he claimed at trial to recollect *verbatim* what he said, nearly four years before, one might be forgiven for doubting the appellant's credibility. Moreover, one would expect the appellant to forcefully assert, as he did, that although he didn't remember his exact words, he definitely did not say to Mr. Landry "They're your witnesses, make sure they don't testify and the Crown won't have a case". In my respectful judgment, there is no conflict between those two assertions by the appellant.

[96] At the hearing, I put forward, for debate, the following hypothesis: the trial judge may have misstated his finding in the excerpt reproduced immediately above, his intention being perhaps to refer to the lack of reliability of the appellant's account, not his credibility. Upon reflection, that hypothesis cannot be squared with the trial judge's assertion that credibility and reliability are distinct concepts, and that it was important for him to distinguish between the credibility of a witness and the reliability of his or her evidence. Indeed, the judge cited with evident approval the approach to the assessment of credibility proposed in *R. v. Williams*, [2012] O.J. No. 4666 (QL):

> When assessing credibility of a witness and the reliability of their testimony, the court must approach the testimony of each witness with scrutiny. A witness' testimony must be examined critically and analyzed rationally. I must consider whether the evidence is reasonable in and of itself and whether it is reasonable having regard to the admitted facts or other credible evidence. Inconsistencies and weaknesses of material issues are capable of undermining the reliability of the witness' evidence and his or her credibility. Contradictions in the evidence are important issues and may also be considered in deciding the weight to be given to the evidence.
>
> I can accept some, all or none of the witness' testimony in arriving at my conclusions. It is important for me to distinguish between credibility of a witness and the reliability of their evidence. The court needs to scrutinize each witness' testimony to decide if he or she is trying to be truthful in giving evidence.
>
> It is also important to assess the reliability of each witness' evidence. A witness may be credible but for any number of reasons the factual accuracy of what the witness says is questionable and cannot be relied upon. Therefore, concluding evidence is credible in accepting a witness' account in deciding the material facts in this case I must find the witness is trying to be truthful and his or her account is reliable. [paras. 200-202]
>
> [Emphasis added.]

(4) The appellant's contention that the Crown "might agree to present no evidence on all five charges merely because the civil litigation between Branch and the Board had been settled lacks the air of reality"

[97] In his reasons for decision, the trial judge relies upon the following understanding of the appellant's evidence to disbelieve his denial that he said "They're your witnesses, make sure they don't testify and the Crown won't have a case":

> Gillis' contention that the Crown might agree to present no evidence on all 5 charges merely because the civil litigation between Branch and the Board had been settled lacks the air of reality. It is inconceivable to me that the Crown

> would back off on all 5 serious criminal charges involving a high-profile New Brunswicker, a former member of the New Brunswick legislature, simply because the parties had come to a resolution of the civil matters, a settlement which would involve a $200,000 payment to the Gillis firm, apparently to assist with Branch's legal fees? Why would the Crown have any interest whatsoever in whether or not the civil actions between the parties had been settled? [para. 78]
>
> [Emphasis added.]

[98] In my view, these observations unjustifiably trivialize the likely impact of the settlement of the wrongful dismissal action on the Crown's determination to proceed with the criminal charges. After all, and as noted, those charges were grounded, to a significant extent, on the allegations of wrongdoing underlying the Board's defence in the civil action. If the Board folded and paid $200,000 in settlement of that action, Crown counsel might well foresee difficulties in persuading a jury of Mr. Branch's guilt. That said, what is significant for our present purposes is that the statements in question reflect a significant misapprehension of the appellant's evidence.

[99] The appellant did not testify he thought "the Crown might agree to present no evidence on all 5 charges merely because the civil litigation between Branch and the Board had been settled" (emphasis added). Nor did he testify he believed "the Crown would back off on all 5 serious criminal charges involving a high profile New Brunswicker, a former member of the New Brunswick Legislature, simply because the parties had come to a resolution of the civil matters" (emphasis added). Rather, the appellant testified he and his client hoped the Crown would agree to "offer no evidence" because other materially important circumstances would be in play, in addition to the settlement of the civil actions.

[100] First, the defence believed the Crown realized its case rested on a weak foundation. It was thought this was manifested by the offer to withdraw four of the charges in exchange for a guilty plea on one. Moreover, the defence was satisfied there was a reasonable chance staff at the Legislative Assembly would not provide testimony

supportive of the allegation of breach of trust and fraud against the Province. As well, and as mentioned, one of the Crown witnesses had attended the preliminary inquiry while seemingly under the influence of alcohol, hardly a harbinger of future cooperation and reliability.

[101] Second, the defence was in possession of cancelled cheques, signed by Mr. Branch, which arguably established payments to the Board that exceeded the amount the Crown claimed Mr. Branch had spent on the Board's credit.

[102] The use of the words "merely" and "simply" shows the trial judge misapprehended the appellant's testimony in a very significant way.

> (5) The appellant's testimony was "too often […] vague, indefinite, qualified and non-committal". The appellant "did not appear to be forthright and responsive to questions" and was "often argumentative when being questioned by [Crown counsel]". His testimony "at times, was neither reasonable nor consistent […] and he did not stand up well under cross-examination"

[103] The appellant describes those characterizations of his testimony as perverse. I disagree for the simple reason that nothing in the record suggests the trial judge was animated by improper considerations. That said, I am satisfied those characterizations are unreasonable.

[104] Like my colleagues, I have come to that view after reading very closely the transcript of the evidence at trial and listening attentively to the appellant's direct examination and cross-examination. Significantly, all of the negative characterizations of the appellant's testimony are anchored to its substance and none are traceable to a trial judge's well-recognized advantage in visually assessing the demeanor of witnesses. With respect, none of those characterizations are supported by anything in the record, whether written or audio.

[105] Moreover, the trial judge's evidential misapprehensions extend beyond the appellant's testimony. Indeed, he misapprehended C-1 in finding it confirmed "much of Mr. Landry's testimony". C-1 did not confirm Mr. Landry's testimony any more than it confirmed the appellant's. It certainly did not corroborate Mr. Landry's testimony that the appellant told him "They're your witnesses, make sure they don't testify and the Crown won't have a case". Viewed in the light most favourable to the Crown's case, C-1 was neutral with respect to whether or not the appellant made this critical statement. I conclude the discussion of this topic with a concern over what is omitted from the trial judge's reasons for decision.

[106] It is settled law that reasons for decision need not deal with every defence argument advanced at trial. However, those reasons rightly become a source of heightened concern when they fail to address issues that are central to testimonial reliability in a case such as the present one. I am indeed troubled by the trial judge's failure to address a number of issues that bear upon the reliability of Mr. Landry's unconfirmed assertion that the appellant made the statement upon which his conviction rests. Those issues, which, admittedly, must be appreciated in the full context of the points made in both post-trial briefs, include the fact that Ms. Gould-McDonald, although close enough that she heard parts of the December 10, 2009 conversation between Mr. Landry and the appellant, did not hear the latter make the incriminating statement. They also include the matters identified in the following excerpt from the Appellant's Submission:

> (a) Landry misunderstood the accepted legal practice of paying a dismissed employee's legal fees in wrongful dismissal claims. He erroneously interpreted this as "misrepresenting the books." What could be more important to the assessment of Landry's reliability than consideration of how his interpretation of the offer may have been coloured by his belief that the appellant was making a fraudulent suggestion as to how the transaction should be documented?
>
> (b) Landry was unaware that it is perfectly proper for the Crown to be asked to offer no evidence. This, too, was

> of great importance to the assessment of Landry's reliability since, again, it permitted an inference that he assumed the worse from his misunderstanding of this language.
>
> (c) Both the appellant and Landry expected the offer to be presented to the Board and Young, and the appellant willingly provided Exhibit C-1 to Landry and encouraged him to share it with the others. While the trial judge did refer to some of this evidence (and in one instance, misstated it), he never addressed how one could reconcile it with an attempt to circumvent Young or attempt to obstruct justice.
>
> (d) The appellant never discussed specific witnesses with Landry. As well, the undisputed evidence was that, to the appellant's knowledge, the prosecution had videotaped statements from its witnesses and was in a position to compel them to testify and rely on their videotaped statements if recalcitrant. The trial judge never addressed this important evidence and how one could reconcile Landry's evidence and the position of the Crown with it.

B. *Errors of Law*

[107] In the Appellant's Submission and a mid-hearing brief filed at the Court's request, as well as during the debate on appeal, the appellant argued many of the factors which prompted the trial judge to disbelieve his testimony were never put to him on cross-examination and that, as a result, he was deprived of a fair opportunity to make full answer and defence. The factors in question are: (1) the contradictory evidence provided by the appellant and Mr. Rogers; (2) the perceived inconsistency between the appellant's testimony and his pre-trial statement to Sergeant Lord; (3) the perceived contradiction between, on the one hand, the "impression" fostered by the appellant's testimony that there was no rush for the Board to respond to C-1 and, on the other, Mr. Landry's testimony to the contrary; (4) the contradiction between Mr. Landry's claim that the appellant told him "They're your witnesses, make sure they don't testify and the Crown won't have a case" and the appellant's denial; (5) the finding of a violation of two of the three Rules of the *Code of Professional Conduct* that, in the trial judge's opinion,

demonstrated lack of integrity and credibility on the part of the appellant; and (6) the theory that weaknesses in the Crown's case against Mr. Branch helped explain why the appellant would have counselled Mr. Landry to dissuade witnesses from testifying at trial.

[108] In *Browne v. Dunn*, Lord Herschell articulated the following explanation for the context-dependent requirement that a cross-examiner confront the witness with any extrinsic evidence to be used to impeach his or her credibility:

> Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses. Sometimes reflections have been made upon excessive cross-examination of witnesses, and it has been complained of as undue; but it seems to me that a cross-examination of a witness which errs in the direction of excess may be far more fair to him than to leave him without cross-examination, and afterwards to suggest that he is not a witness of truth, I mean upon a point on which it is not otherwise perfectly clear that he has had full notice beforehand that there is an intention to impeach the credibility of the story which he is telling. [pp. 70-71]

[109] In *R. v. Christensen*, 2001 BCSC 1196, [2001] B.C.J. No. 1697 (QL), a conviction was set aside where the defence-establishing testimony of the accused was rejected even though it was not challenged on cross-examination. In allowing the appeal,

Justice Oppal quoted with approval Stewart J.'s observations in *R v. Tyrell*, February 20, 1991, CC 90194 Vancouver Registry (B.C.S.C.):

> ... It is common ground between counsel that at no point during the cross-examination of the accused was a pointed question put to him to the effect that even looking upon the times he had given as mere estimates, there was a 'missing' (as I put it) hour and just what did he have to say about that? the Crown never cross-examined the accused in such a way as to give him an opportunity to wrestle with the problem and, perhaps, overcome it. The Crown just did not do it.
>
> Putting the circumstances of this particular case and the proceedings in this particular trial, together with the Supreme Court of Canada's observations in *Palmer v. The Queen* set out above, the test to be applied by me as the appellate court as set out in *Harper v. The Queen*, [1982] 1 S.C.R. 2, (supra), and *Regina v. Chin* (supra), I am satisfied that in convicting this accused the trial court judge either lost sight of the fact that there had been no pointed cross-examination of the "missing hour", or was aware of the absence of pointed cross-examination on that point but failed to take into account the significance of the fact that there was no specific pointed cross-examination on that problem. And in the "circumstances of (this particular) case (*Palmer v. The Queen (supra)* page 210, line 23), absent pointed cross-examination which gave the accused a chance to wrestle with the problem, it would be wrong to ground a decision to reject the accused's evidence on the question of the "missing hour".... [paras. 21-22]
>
> [Emphasis added.]

See, as well, Justice MacAdam's thorough discussion of the rule and its limits in *Browne v. Dunn* in *R. v. Bennett*, 2002 NSSC 271, [2002] N.S.J. No. 549 (QL), and the discussion regarding curative measures in *R. v. Melnick*, 2005 ABPC 220, [2005] A.J. No. 1036 (QL) (Allen, Prov. Ct. Judge). Given the right circumstances, those measures might include affording the discharged witness an opportunity to return and speak to the problem from the witness stand (see *R. v. McNeill*, [2000] O.J. No. 1357 (C.A.) (QL), at paras. 47-50, per Moldaver J.A., as he then was).

[110] Applying the principles developed in the jurisprudence, I am not persuaded the trial judge erred in law in taking into account each and every factor of influence in assessing the appellant's credibility that was not put to him during cross-examination. Some of those factors would have been fairly evident to the appellant and his counsel. However, the same cannot be said for the perceived issue-specific contradiction between the appellant's answers to the trial judge's questions and the statement he gave to the police. That "contradiction" was not obvious to anyone. Not only did Crown counsel fail to raise it on cross-examination, he did not address it by way of questions arising from the judge's examination of the appellant. Nor did he mention it in his post-trial brief (see para. 3 at p. 3 of the December 5, 2012 post-trial brief) or in his oral submission (see transcript of proceedings of November 13, 2012, at p. 78). Likewise, defence counsel did not make any reference to this issue in their detailed post-trial brief and oral submission. Finally, at no time did the trial judge alert the defence to any concern he harbored regarding a possible inconsistency between the appellant's answers to his questions and the pre-trial statement to the police, let alone provide the appellant with an opportunity to return to the witness stand for the purpose of addressing any such concern.

[111] The rule in *Browne v. Dunn* is "designed to accord fairness to witnesses and the parties". The rule is not absolute and "the extent and manner of its application will be determined by the trial judge in all the circumstances of the case": John Sopinka, Sidney N. Ledermen, & Alan Bryant, *The Law of Evidence in Canada*, 2d ed. (Toronto: Butterworths & Company (Canada) Limited, 1999) at para. 16.148. In the case at bar, the trial judge did not direct his mind to the possible unfairness of disbelieving the appellant on the basis of a contradiction that he was not given a chance to explain while testifying. I have no doubt that, had he directed his mind to this issue, the trial judge would have given the appellant an opportunity to return to the witness stand to deal with the perceived contradiction, or would have simply disregarded it. In my judgment, absent a fair opportunity to address the problem in a meaningful way, the fairness-driven rule in *Browne v. Dunn* operated to render inappropriate a consideration of the "contradiction"

and, in the result, the trial judge erred in law in allowing it to influence his assessment of the appellant's credibility. I now turn to the trial judge's second important error of law.

[112] As noted, Mr. Siscoe was still solicitor of record in the wrongful dismissal and defamation action when he was called as a Crown witness at the Branch preliminary inquiry in December 2009. The appellant conceded at trial he cross-examined Mr. Siscoe without advising beforehand the presiding judge and the crown prosecutor he had been consulted and retained by Mr. Branch to represent him in that action. It was Crown counsel's contention that this omission constituted unethical behavior of the gravest sort. The trial judge agreed with that hypothesis and found the appellant's "questionable" conduct at the Branch preliminary inquiry showed a lack of integrity, which weighed in the balance against his credibility. In my view, this finding constitutes a material error of law for the following reasons.

[113] First, the appellant was ethically bound by the Confidentiality Rule (Chapter 5 of the *Code of Professional Conduct*) not to disclose he had been consulted and retained by Mr. Branch to represent him in the wrongful dismissal and defamation action. The third commentary in Chapter 5 makes plain that the fact of consultation by a client is subject to the duty of confidentiality. It states: "Subject to the exceptions set out in the Rule in this chapter, the lawyer shall not disclose that the lawyer has been consulted by a person". The second commentary under Chapter 5 posits that the ethical rule articulated therein "is broader than the evidential rule of lawyer-client privilege respecting oral and written communications passing between the lawyer and the client". The commentary goes on to point out that the Confidentiality Rule applies "without regard to the source or the nature of the information or to the fact that others may share the knowledge". Thus, the fact of the appellant's consultation and retainer in connection with the wrongful dismissal and defamation action remained confidential <u>from his perspective</u>, even though Mr. Siscoe and others may have been privy to that information. In short, it would have been improper for the appellant to personally disclose that information to the Branch preliminary inquiry judge or the Crown prosecutor.

[114] Second, none of the exceptions referenced in the third commentary under Chapter 5 is in play, and no un-codified ethical principle required the appellant, as counsel for the defence, to disclose the information in question to the Branch preliminary inquiry judge, let alone the prosecutor. No case law imposing such an obligation was cited by the trial judge and the respondent was unable to identify any supporting jurisprudence when challenged at the hearing. That brings me to the trial judge's third material error of law.

[115] The trial judge found the appellant violated Rule 9(b) of Chapter 4 "with his offer of settlement, which involved a payment of $200,000". Rule 9(b) prohibits any attempt at securing the withdrawal of a criminal charge by the payment of money or the provision of other valuable consideration. The evidence is unambiguous: the appellant did not offer the sum of $200,000 to secure the withdrawal of the charges against Mr. Branch. Rather, what C-1 makes plain is that the Board was called upon to pay that sum to Mr. Branch. The trial judge erred in law in finding the appellant violated Rule 9(b). I now address the fourth and final material error of law.

[116] In my respectful opinion, the trial judge committed reversible error in allowing his finding of a violation of Rule 10(ix) to weigh in the balance against the appellant's credibility on the key question, which, I repeat, was whether the appellant told Mr. Landry "They're your witnesses, make sure they don't testify and the Crown won't have a case". Rule 10(ix) provides that a lawyer who represents a client in a matter must refrain from dissuading "a material witness from giving evidence" or from advising "such a witness to be absent from proceedings". It is beyond dispute that the trial judge could not find the appellant violated Rule 10(ix) without disbelieving his denial that he made the quoted statement. That being so, the trial judge's chain of reasoning cannot withstand scrutiny: the proposition (the appellant violated Rule 10(ix)) cannot be used to establish the conclusion (the appellant's denial lacked credibility) because the former results from the latter. In other words, if B is the result of A, A cannot be the result of B. That brings me to a more general concern about the appropriateness of resorting to specific instances of ethical misconduct as a basis for concluding the appellant lacked integrity, a factor that weighed heavily in the trial judge's unfavorable assessment of his credibility.

C. *Food for thought over the use of the* Code of Professional Conduct *to impugn a lawyer's testimonial credibility*

[117] The trial judge states in his reasons for decision that "one of the factors to be considered when assessing the credibility of a witness is that person's integrity". That is not precisely what the jurisprudence teaches us. What is relevant in assessing the credibility of a witness is that person's "general integrity" (see *R. v. White*, [1947] S.C.R. 268), which is arguably different from what specific violations of the *Code of Professional Conduct* might tell us about an accused lawyer's character and integrity. As noted, I am of the view the trial judge erred in concluding the appellant put his character and integrity in issue. After all, the appellant's assertion was simply that he did not make the statement attributed to him by Mr. Landry, and that he had never made any such statement in his 40-year career as a litigation lawyer. Those were statements of fact and it is difficult to see how they could operate to put the appellant's character and integrity in issue. But there are more general problems with the reasoning process adopted in first instance, all of which cause me to question its wisdom.

[118] While my concern is with the use of ethical misconduct to establish the accused lawyer's lack of integrity, which can then be relied upon to conclude his or her testimony lacks credibility, some observations are warranted regarding cross-examination in relation to any such misconduct. An accused person may be cross-examined on prior convictions, but not regarding previous criminal acts for which no conviction has been entered unless the acts in question "are connected with the offence charged and tend to prove it […] or unless they show a system or a particular intention" (see *R v. Koufis*, [1941] S.C.R. 481). The appellant has not been found guilty of professional misconduct by the Law Society for any of the instances of misconduct relied upon by the trial judge to conclude he was a person without integrity. Should there be a consistent approach as between prior criminal convictions and prior formal findings of professional misconduct? I fail to see why that question should not be answered in the affirmative. Perhaps a process akin to the one adopted in *R. v. Corbett*, [1988] 1 S.C.R. 670, [1988] S.C.J. No.

40 (QL), might be applied in cases where there has been a formal finding of professional misconduct by the Law Society. But, my concern is even more fundamental.

[119] The *Code of Professional Conduct* adopted by the Law Society requires the utmost integrity from its members in a wide array of activities. Virtually all criminal charges against lawyers involve conduct disharmonious with their integrity-related obligations as members of the Law Society. Thus, if the approach adopted in first instance were to prevail, every lawyer who takes the stand in his or her defence would be cross-examinable regarding this or that Rule of the *Code of Professional Conduct*, and the trier of fact would have to accept that any breach of the *Code* showed a lack of integrity, which, in turn, would weigh against finding the lawyer to be credible. In any case like the present one that pits the accused lawyer's testimony against that of a single witness, the scales of justice would not reflect the presumption of innocence for very long. The analysis might begin with lip service paid to that sacred tenet of criminal law, but, almost instantaneously, the trier of fact would be faced with a situation where, unlike the lay accuser, the accused lawyer stood before the court as a person lacking integrity and whose testimony, as a result, might not be worthy of belief. In plain-speak, there seems to be something radically wrong with that picture. The problem is magnified on the facts of the present case.

[120] It is trite law that an accused person is required to answer no more than the charge set out in the Information or the Indictment and that the "evidence must be limited to matters relating to the transaction which forms the subject of [the charging document]": *Maxwell v. Director of Public Prosecutions*, [1935] A.C. 309. As the Supreme Court of Canada explained in *R. v. Koufis*, a failure to follow those elementary principles may cause a loss of focus on the real issue, and generate "an atmosphere of guilt […] which would indeed prejudice the accused". The appellant stood trial on a charge with the following essential component: attempting to dissuade a person from giving evidence in a judicial proceeding. Recall, once more, that the Crown's case on that issue rested entirely on Mr. Landry's recollection that the appellant told him "They're your witnesses, make sure they don't testify and the Crown won't have a case". The trial

judge found the appellant violated Rule 10(ix) of Chapter 8, which prohibits a lawyer, representing a client in a matter, from dissuading a material witness from giving evidence and from advising such a witness to be absent from proceedings. Once the trial judge made the finding of a violation of Rule 10(ix), which demonstrated, in his mind, a lack of integrity and credibility on the appellant's part, what room was there for his apparent consideration of the second and third steps in *R. v. W.(D.)*? Those two steps are:

> Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
>
> Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused. [para. 28]

[121] A focused and informed debate on all of these points would, no doubt, be beneficial.

V. Conclusion and Disposition

[122] The sustainability of the appellant lawyer's conviction for "obstruction of justice" turns on two closely related findings: (1) the testimony of the Crown's key witness attributing to the appellant an incriminating statement ("They're your witnesses, make sure they don't testify and the Crown won't have a case") was both credible and reliable; and (2) the appellant's denial under oath that he ever made the statement in question was not credible. The reasons for conviction feature important misapprehensions of the evidence, particularly the appellant's testimony with respect to essential components of the trial judge's stated rationale for disbelieving him. As well, material errors of law played a key role in the analysis that led to the trial judge's credibility and reliability findings. In my view, the trial judge's errors of fact and law combined to deprive the appellant of a fair trial, and have resulted in a miscarriage of justice.

[123] For the reasons summarized hereinabove and fleshed out in the preceding text, I would grant leave, where required under s. 675(1)(*a*)(ii) of the *Criminal Code*, allow the appeal and quash the conviction. I would, however, reject the appellant's request for an acquittal, and simply order a new trial before another judge, leaving the decision to re-try or not where it belongs, namely with the Crown. Of course, the judge on any re-trial must totally disregard the findings made in the court below. The interests of justice command no less.

[124] I close the curtains on the proceedings at this level with a statement of the obvious: the disposition I propose makes it unnecessary to deal with the merits of the application for leave to appeal sentence.