

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *R. v.* [REDACTED]  
2021 BCSC 975

Date: 20210428  
Docket [REDACTED]

Registry: Victoria

**Regina**

**v.**

[REDACTED] [REDACTED] [REDACTED]

Restriction on Publication: Pursuant to s. 486.5(9) of the C.C.C.  
Inherent Jurisdiction

Before: The Honourable Mr. Justice Gaul

## **Oral Reasons for Judgment: Application 15 - Mistrial**

Counsel for the Crown:

K. Henders Miller  
L.T. Phipps

Counsel for the Accused:

R.L. Neary  
A. Van Tine

Place and Date of Trial/Hearing:

Victoria, B.C.  
April 26 - 28, 2021

Place and Date of Judgment:

Victoria, B.C.  
April 28, 2021

[1] **THE COURT:** Thank you Mr. Neary and Ms. Henders Miller for your additional submissions.

[2] We are still in Application Number 15 and so the ban of publication that I have ordered still applies. That ban includes the remarks I am about to make regarding my decision.

[3] I prepared my reasons for judgment yesterday following the close of submissions. I reviewed and completed them this morning prior to receiving the additional materials that were forwarded to me via Trial Division. Those supplemental materials consist of:

- a) the transcript of the 27 April 2021 audio recorded statement of Mr. Gratien David; and
- b) defence counsel's written "Defence supplemental submissions on mistrial application".

[4] I have now heard additional submissions from both the Crown and the defence on the current state of this matter, including the impact of Mr. David's statement and the supplementary documents that have been filed as exhibits this morning.

[5] The submissions and materials that I received this morning have not caused me to change my decision. In my view, the recent development in this case, and here I am talking about the discovery of another firearm associated to Mr. [REDACTED] the Crown's principal witness and the person who the defence says is the actual shooter in this case, has created a situation where I cannot say the accused's trial will be a fair one if his application for a mistrial is denied and he is forced to proceed.

[6] I am, therefore, granting the defence application and ordering a mistrial. I will, in light of the circumstances, and, by this I mean this morning's supplementary submissions and the additional materials that have come to my attention, be adjourning this matter to 2:00 p.m. at which point I will deliver more fulsome reasons

for my decision. I do so because I wish to consider whether I need to amend my reasons to include any references to the submissions I heard this morning and the additional materials that were filed.

[DISCUSSION, DISCHARGE OF JURY, DISCUSSION]  
(PROCEEDINGS ADJOURNED FOR NOON RECESS)  
(PROCEEDINGS RECONVENED)

[7] THE CLERK: Recalling the matter of Her Majesty the Queen v. [REDACTED]  
[REDACTED] My Lord.

[8] THE COURT: Thank you. These are my reasons on Application 15. They supplement what I said this morning when I indicated I was ordering a mistrial.

[9] I remind everyone present in the courtroom as well as anyone who is watching or listening from a remote location via audio or video link, that there is a ban on publication in place and it includes the reasons for judgment that I am about to deliver.

[10] I also want to indicate that these reasons for judgment are subject to editorial revision before the reproduction in final form. Those revisions could include the insertion of additional references to the evidence, the authorities, or the submissions that I have heard. In no manner will the result of my decision be changed.

[11] Earlier this morning, I declared a mistrial in this matter. In doing so, I provided an outline or summary of my reasons and indicated I would provide more comprehensive reasons this afternoon. These are those reasons.

[12] The accused, [REDACTED] [REDACTED] is charged with the first degree murder of Dillon Brown.

[13] The defence does not dispute that a firearm was used to shoot and kill Mr. Brown, nor is it in dispute that the accused was at the location where the shooting took place and that he participated in the disposal of Mr. Brown's body.

[14] The principal issue and focus of the trial will be who shot Mr. Brown. The Crown alleges that it was Mr. [REDACTED]. The defence says Mr. [REDACTED] the Crown's principal witness, was the shooter. At the very least, the defence maintains that the jury ought to be left with a reasonable doubt as to the identity of the shooter.

[15] Mr. [REDACTED] has signed a limited immunity agreement with the police and the Crown in which he has agreed to cooperate and provide evidence for the prosecution at the accused's trial. As a part of that agreement, Mr. [REDACTED] pleaded guilty to being an accessory after the fact to Mr. Brown's murder. In return, the Crown agreed to a joint submission on sentencing that resulted in a sentence of two years' imprisonment being imposed on Mr. [REDACTED]. Mr. [REDACTED] has served that sentence.

[16] Mr. [REDACTED] and his wife are now enrolled in the Federal Witness Protection Program.

[17] The accused's trial started last Monday, April 19th. We have completed the first week of what was scheduled to be a four-week trial.

[18] By notice of application filed 26 April 2021, the defence seeks a mistrial based on the discovery of evidence relating to a handgun Mr. [REDACTED] owned on the date of the murder and the resulting need for further investigation by the police and the defence.

[19] I have no doubt both the Crown and the defence have invested an enormous amount of time and effort in getting prepared for this trial. As proof of that fact, all I need to do is look at Trial Exhibit Number 1, the 15-page comprehensive admissions of fact that both the Crown and the defence agreed to. Those admissions include the following:

[39] Police seized the following firearms from [REDACTED] ("Firearms") on July 12, 2017:

- a. Harrington and Richardson model 922, .22 revolver;
- b. Star Bonifacio Echeverria, 9 mm semi-automatic pistol;
- c. SKS 7.62 rifle;

- d. Mossberg, .308 rifle;
- e. Norinco, .22 rifle; and
- f. Highpoint 9 mm semi-automatic rifle.

[40] The characteristics of the wound to Brown's head are consistent with being produced by a projectile discharged from a firearm with a bore diameter of 7 mm or less.

[41] Of [REDACTED] Firearms, the Norinco .22 and the H & R revolver cannot be eliminated as being capable of producing the wound to Brown's head.

[42] If centrefire ammunition was used, all of [REDACTED] Firearms can be eliminated as being capable of producing the wound to Brown's head.

[20] The Crown's forensic pathology evidence originates from Dr. Matthew Orde. In his report dated 8 September 2016, Dr. Orde indicates that the fatal bullet wound to Mr. Brown's head was "a neat circular 6.5 – 7.0 millimeter defect (external dimension) through the left occipital bone".

[21] The Crown has retained Dean Dahlstrom of Dahlstrom Forensics to provide expert opinion evidence in the area of firearms and ballistics. Based upon a variety of sources of information, including Dr. Orde's autopsy report and the list of firearms noted in paragraph 39 of the admissions of fact, Mr. Dahlstrom opined in his first report dated 8 May 2025 – that must be a mistake, he must have meant 2019:

Damage to the head of the deceased identified as John Dillon Brown, is consistent with having being produced by a projectile discharged from a firearm with a bore diameter of 7 millimetres or less.

There are two firearms identified in the RCMP relinquishment of claim document submitted in the disclosure package, Norinco calibre .22 rimfire rifle, and the Harrington & Richardson Model 922, .22 rimfire calibre revolver, which cannot be eliminated as having been capable of producing damage consistent with that observed on the deceased.

[22] It seems clear that the admissions of fact relating to firearms were made relying upon Mr. Dahlstrom's opinion.

[23] It comes as no surprise to anyone associated with this matter that the credibility and reliability of Mr. [REDACTED] will be one of the most important issues for the jury to determine. The defence has made no secret of the fact that it will

vigorously challenge Mr. [REDACTED] truthfulness, including his version of Mr. Brown's murder, and will suggest that he was the actual shooter and not the accused.

[24] During the early stages of his examination-in-chief, Mr. [REDACTED] testified about the firearms he once owned. The list of firearms that is included in paragraph 39 of the admissions of fact was put to him and, according to my notes, he testified as follows:

- Q. Do you recognize that list of firearms?
- A. Yes, I do.
- Q. What is it?
- A. It's the list of firearms that I owned at the time.
- Q. At which time?
- A. When I left British Columbia.
- Q. Do you recall what year that was?
- A. 2017.
- Q. Are you able to say this is the list of firearms that you owned in March 2016?
- A. I did not have all of them at the time, I don't believe. There's at least one of these that I did not own in March of 2016.
- Q. Which one is that?
- A. I did not own the Harrington & Richardson Model 922 .22 calibre revolver.
- Q. When did you acquire that?
- A. That would have been sometime in -- I believe it would have been June or July of 2017 -- no, sorry, 2016.
- Q. Now, I'm going to ask you again about March of 2016. Did you own any firearms that aren't on this list in 2016, I should ask you?
- A. Sorry, could you repeat the question again?
- Q. Are there any firearms that you owned in March 2016 that are not on this list?
- A. Not that I can recall, no.

[25] Apparently, two of Mr. McIntosh's responses came as surprises to both the Crown and the defence. The first was Mr. [REDACTED] assertion that he acquired the Harrington & Richardson revolver after the March 2016 shooting of Mr. Brown. The

second answer that was troubling to counsel was Mr. [REDACTED] uncertainty about whether he owned any other firearms not noted on the list, in March 2016.

[26] As a result of these answers, counsel began scouring the vast amount of police materials that had been collected during the investigation of Mr. Brown's shooting and disclosed to the defence.

[27] On Sunday, 25 April 2021, counsel for the accused located in the materials the Crown had long ago disclosed to the defence, an RCMP document relating to Mr. [REDACTED] entitled "Transfers and Registrations associated to a Licensee". This document indicates that Mr. [REDACTED] had purchased a Tokarev TT33 7.62 millimetre semiautomatic handgun on 10 February 2015. It also shows an application to transfer ownership of the firearm to Mr. David on 29 April 2016, some seven weeks or so after the murder of Mr. Brown.

[28] As a result of the discovery of this evidence about the Tokarev, the Crown asked the police to obtain a new recorded statement from Mr. [REDACTED]. The Crown also sought and obtained a supplemental opinion from Mr. Dahlstrom. Specifically, the Crown asked him to provide an opinion on:

Whether a Tokarev TT33 7.62 millimetre semiautomatic handgun can be included or excluded as being the firearm used in the offence; and

Whether a Tokarev TT33 7.62 millimetre semiautomatic handgun uses centrefire or rimfire ammunition.

[29] In response to this request, Mr. Dahlstrom provided the following in his report dated 26 April 2021:

The wound characteristics documented on the deceased, are not indicative of damage produced by the passage of a bullet discharged from a commercially loaded 7.62 x 25 Tokarev centre fire cartridge fired from a Tokarev TT33 firearm, however, the firearm cannot be eliminated if the ammunition was altered to discharge a reduced calibre projectile at reduced velocity.

[30] It would appear that Mr. Dahlstrom's opinion went beyond what the Crown had asked of him, in that he comments about the altering of ammunition. This, I accept, is likely because in a telephone call on Sunday, 25 April, defence counsel

had asked him to confirm whether the Tokarev could fire a cartridge that was smaller than 7.62 millimetres. Defence counsel also provided Mr. Dahlstrom with two published articles relating to the size of wounds caused by bullets and the possibility that wounds could be smaller in diameter than the size of the bullet that caused them. For reasons that remain unexplained, Mr. Dahlstrom failed or refused to opine on this aspect of the now increasingly important subject.

[31] The Crown has also obtained an affidavit from Constable Michael L'Heureux, the RCMP file coordinator for the investigation relating to Mr. Brown's death. In his affidavit dated 26 April 2021, Constable L'Heureux explains:

[3] On April 25th, 2021, it came to my attention that Mr. [REDACTED] [REDACTED] had owned a Tokarev TT33 7.62 millimetre pistol in March of 2016 that our unit had inadvertently missed, and which we had not previously investigated or questioned Mr. [REDACTED] about.

[32] This morning, additional information was brought to the court's attention. As a result, I reopened this application, allowed for the filing of three additional exhibits and heard supplementary submissions from counsel.

[33] The first of the new exhibits is the transcript of the audio statement the police obtained from Mr. David on 27 April 2021. In this statement, Mr. David explains how he was surprised when Mr. [REDACTED] offered to sell the firearm in question to him in 2016, because a few months earlier Mr. [REDACTED] had indicated a desire to keep it. Mr. David also explains how the firearm came to him with two magazines for 5.25 millimetre ammunition. Finally, he comments how, in thinking about the timing of the sale of the firearm in relation to the published news about Mr. Brown's death, he became concerned that the firearm might somehow be connected to the killing.

[34] An RCMP document relating to the firearm in question, entitled "Firearm Ownership Report" was also filed with the court this morning. The document indicates that the Tokarev was registered in Mr. David's name on 4 May 2016, some five days or so after the request to the authorities had been made. The document also identifies that the firearm has been sold twice since Mr. David owned it and that it is currently owned by a person who resides on Vancouver Island.

[35] The final exhibit filed this morning is a copy of Cst. L'Heureux' handwritten notes describing the investigative steps he took with regards to this matter on Monday, 26 April 2021.

### **Position of the Defence**

[36] The defence acknowledges that the Crown had disclosed to it the RCMP document that references the Mr. [REDACTED] obtaining the Tokarev in February 2015 and transferring it to Mr. David in April 2016. The defence maintains that both the Crown and the defence overlooked the importance of the document.

[37] Given that the defence is pointing to Mr. [REDACTED] as an alternate suspect in the shooting of Mr. Brown, counsel for Mr. [REDACTED] says the discovery that Mr. [REDACTED] owned a semiautomatic handgun that discharges centrefire ammunition is a critical fact that goes to the heart of the prosecution and the manner in which both the Crown and the defence have been approaching it.

[38] Counsel for the accused has raised a number of issues that he says legitimately need to be addressed prior to the trial continuing and that this work cannot happen "on the fly" during the trial. One of these issue is the defence's need to retain a firearms and ballistics expert of its own so that it can investigate the attributes of a Tokarev handgun and in particular whether it can discharge cartridges that are smaller than 7.62 millimetres. This issue has become even more critical given Mr. David's statement that the Tokarev came to him from Mr. [REDACTED] accompanied by magazines designed to hold 5.25 millimetre cartridges. Counsel for the accused also points out that the defence now needs the opportunity to speak with Mr. David to establish more clearly the timeframe in which he spoke with and eventually purchased the Tokarev from Mr. [REDACTED]

[39] The defence says it also needs to have the wound to Mr. Brown's head re-examined with more precision because the precise size and diameter of the wound is now something that potentially has become more important. Counsel points to the fact that the academic papers that Dr. Orde, the Crown's pathologist, provided to him on 25 April 2021 and that he shared with Mr. Dahlstrom, suggest that bullet entry

wounds can be smaller than the calibre of bullet that caused them. Again, the importance of this avenue of investigation has increased because Mr. David's statement and the fact that the Tokarev arrived with magazines designed for ammunition smaller than 7.62 millimetres.

[40] Counsel for the accused is critical of the fact that he is being asked to make significant tactical decisions regarding the presentation of Mr. [REDACTED] defence "on the fly", including deciding whether the accused will testify, not knowing anything about this new handgun that Mr. [REDACTED] possessed on the day of the killing. I accept that the issues the defence have raised are legitimate and that the defence is entitled to some time to reflect and decide whether any or all of them need to be investigated and pursued further. I also accept that this work cannot realistically be contemplated, let alone completed, during the course of this ongoing trial.

[41] Additionally, the defence maintains that a mistrial must be declared because the admissions of fact that have been made and that the jury has had since the start of the trial are factually wrong and no longer supportable. That is, the Harrington & Richardson .22 calibre revolver cannot still be considered a potential candidate for the weapon used to kill Mr. Brown because it was not acquired by Mr. [REDACTED] until after the shooting. Much more important though, is the fact that the admissions of fact make no reference to the Tokarev that Mr. [REDACTED] owned on the day of the murder and the fact that it cannot be eliminated as the possible murder weapon.

[42] Finally, the defence says further investigation is required not only with respect to the Tokarev itself, but also into how the police investigators inadvertently missed the fact that Mr. [REDACTED] possessed a firearm that could well be the murder weapon and disposed of it only a few weeks after the murder.

### **Position of the Crown**

[43] The Crown submits that a mistrial is not warranted in the current circumstances.

[44] While acknowledging that Mr. [REDACTED] responses to her questions about the firearms he possessed on or around the date of the murder surprised her, as did the discovery that he owned a semiautomatic handgun around the relevant time, Crown counsel asserts that all of the evidence that has been collected over the past three days satisfactorily addresses any trial fairness concerns that might have arisen on account of the discovery of the Tokarev evidence. In other words, any prejudice this newly discovered evidence causes for the accused can be remedied, short of a mistrial.

[45] The Crown submits additional admissions can be made incorporating Mr. Dahlstrom's supplemental opinion so that the jury is aware that around the time of Mr. Brown's murder, Mr. [REDACTED] owned a handgun that cannot be eliminated as the murder weapon. Additionally, the Crown says that an admission can be fashioned to address the issue of the Tokarev being able to discharge ammunition smaller than 7.62 millimetres.

[46] The Crown maintains that the evidence that is said to be new was actually, from an early date, in the possession of the defence and that it was not for the Crown to flag it for the defence as potential evidence to be used in the cross-examination of Mr. [REDACTED] or in the preparation of the defence generally.

[47] Pointing to the public interest in having the prosecution of the accused proceed without any further delay, as well as the not insignificant cost to the Crown, community, and the defence in having to reboot this trial, Crown counsel maintains that the trial can and should continue with the additional proposed admissions addressing the Tokarev as well as leave being granted for the defence to recall any witness who has already testified, for further cross-examination.

### **Discussion**

[48] A mistrial is a remedy of last resort and should not be granted if less extreme corrective measures are capable of preventing a miscarriage of justice. The jurisprudence on this point is clear: *R. v. Muller*, 2013 BCCA 528.

[49] Additionally, the court should exercise its discretion to order a mistrial carefully and only after thoughtful consideration of all of the elements in play. As Mr. Justice Laskin noted in *R. v. Leduc*, [2004] O.J. No. 2974 (C.A.):

[154] New trials should be avoided where possible. The accused, the other participants in the trial, the criminal justice system and the community at large must all suffer the consequences – financial, emotional and otherwise – of going through the proceedings again.

[50] I have taken those words to heart. Having said that, my ultimate task and responsibility as the trial judge, to put it simply, is to ensure the accused's trial is a fair one.

[51] As the Crown correctly notes, this case does not involve an initial failure to disclose, for the document in question that identifies the Tokarev was disclosed to the defence. However, that is not the end of things. In my opinion, what this case does involve is a late discovery by both the Crown and the defence of a potentially critical piece of evidence that goes to the heart of the prosecution of the accused. It involves a potential lack of investigation or failure to investigate what by all accounts is a piece of evidence that, had the Crown and the defence twigged to it at the start of their trial preparations, would have influenced how they prepared and presented their respective cases. This includes how and what admissions would have been made.

[52] The defence submits that this situation amounts to non-disclosure because there likely would have been relevant material that would need to be disclosed to the defence had the police made efforts to investigate, for example, how and why Mr. [REDACTED] sold the firearm in question. I agree that further police investigation of the Tokarev could likely result in relevant information for both the defence and the Crown. It is also not unreasonable to think that the police would make efforts to locate the firearm and have it forensically examined, even with the passage of time since the murder of Mr. Brown. Again, I would think that both the Crown and the defence could have a material interest in the results of that work.

[53] The principal issue for the jury to decide in this case is whether the accused pulled the trigger of the firearm that killed Mr. Brown. The defence says it was not the accused, but Mr. [REDACTED]. The firearm used in the killing has, to date, not been identified. At the risk of repeating myself, I say again that it is not unreasonable to think that the police would make some effort to locate the Tokarev and examine it to determine if it is the murder weapon or even if it is capable of being the murder weapon. The results of those investigative steps could dramatically change the course of this case. What Mr. David has to say about any conversations he has had with Mr. [REDACTED] about the Tokarev might also be reasonably relevant and an avenue of investigation for both the defence and the police.

[54] In my opinion, the discovery of the Tokarev evidence and what I see as an obvious need to investigate its potential relevance to this case creates a situation that raises more than a possible risk to trial fairness. In my view, forcing the defence to continue with this trial when there may be potentially relevant, if not critical, information to be obtained from the recent discovery of the Tokarev, will create an actual trial unfairness and, more specifically, impair the defence's ability to mount a full answer in defence. In this regard, I find the following observations of Mr. Justice Farrar in *R. v. Sandeson*, 2020 NSCA 47 to be helpful:

[66] Trial fairness includes concerns about the integrity of the justice system. In *R. v. Rajalingam*, [2003] O.J. No. 530 (Ont. Sup. Ct. J.), aff'd [2004] O.J. No. 3920 (Ont. C.A.) the court held "[a] breach of section 7 of the *Charter* occurs if the late disclosure either impairs the ability of the accused to make full answer and defence or where the integrity of the administration of justice is threatened by an unfair trial" (para22). A corollary to this is that examining the impact of the late disclosure also includes considering the appearance of fairness (*Bjelland*, para22 citing *R. v. Harrer*, [1995] 3 S.C.R. 562, para45).

...

[69] Finally, defence counsel's diligence in pursuing disclosure is relevant to assessing trial fairness and factors into the determinations of whether there was a breach and, if so, the appropriate remedy. Part of the rationale is to catch non-disclosures as early as possible, with the hope of curing any resulting prejudice without need for a new trial, and to discourage tactical decisions not to pursue disclosure (*Dixon*, para37-38).

[70] Due diligence or lack thereof is not conclusive and, as Cory J. explained in *Dixon*, its significance is negatively correlated with the materiality of the undisclosed evidence:

[39] ... where the materiality of the undisclosed evidence is, on its face, very high, a new trial should be ordered on this basis alone. In these circumstances, it will not be necessary to consider the impact of lost opportunities to garner additional evidence flowing from the failure to disclose. However, where the materiality of the undisclosed information is relatively low, an appellate court will have to determine whether any realistic opportunities were lost to the defence. To that end, the due diligence or lack of due diligence of defence counsel in pursuing disclosure will be a very significant factor in deciding whether to order a new trial. ...

...

[76] ...The right to make full answer and defence includes not only the ability to challenge the Crown's case on the merits but also the ability to advance reasonable *Charter* and/or other process-oriented responses to the charges.

[55] I recognize these comments relate to circumstances that are different from those that are before me, in that the situation in *Sandeson* involved undisclosed evidence. Nevertheless, I find Justice Farrar's remarks about trial fairness, the due diligence or lack thereof of defence counsel, and the materiality of the evidence in question are equally applicable to the present case.

[56] If there is fault for this late discovery of the Tokarev evidence, it can be attributed to the three principal participants, and by that I mean the police, the Crown and the defence. Having said that, I do not find a need to attribute fault as I am satisfied the Crown and the defence genuinely and inadvertently overlooked the importance of the Tokarev evidence. I have little before me beyond the contents of Constable L'Heureux's affidavit regarding the police's knowledge of the Tokarev, so I will say no more at this point about their role in the issue. Even if I were to find there is a more pronounced blame to be laid at the feet of the defence, I am satisfied that the potential materiality of the Tokarev evidence is sufficiently high that it outweighs any lack of diligence on the part of the defence and militates in favour of declaring a mistrial and ordering a new trial.

[57] In my respectful view, the remedial steps proposed by the Crown are insufficient to address the real trial unfairness that has been created by the discovery of the Tokarev evidence. There will need to be significant amendments or additions to the admissions of fact relating to what firearms Mr. [REDACTED] had and did not have at the time of the murder and which of those firearms are potential contenders as the murder weapon. The jurors have had the current admissions of fact since the start of the trial. No doubt some or all of them have looked at those admissions, either as the trial has been proceeding or during the various recesses that we have had, or both. Additionally, they have quite likely considered the testimony they have heard keeping in mind these admissions. I do not accept that amending or supplementing the admissions would sufficiently rectify the problems posed by the discovery of the Tokarev evidence.

[58] The Crown proposes that witnesses who have already testified can be recalled for further cross-examination, if necessary. This would include Mr. Michael Hargreaves, a close associate of Mr. [REDACTED] who according to Mr. [REDACTED] latest statement handled and discharged the Tokarev. This might be an option, but there is no evidence before me to suggest that Mr. Hargreaves is available to testify on short notice. More importantly, I am not convinced there is sufficient time allotted to this jury trial to start recalling witnesses, let alone adding to the list of anticipated witnesses. This latter point was raised by counsel for Mr. [REDACTED] to the extent that he anticipates wanting to cross-examination certain police officers about the Tokarev evidence.

[59] Along the same lines and even more importantly, I do not believe there is sufficient time allocated to this trial for the defence to retain an expert in the area of firearms and ballistics and obtain from them an opinion relating to the Tokarev and the fatal wound to Mr. Brown's head. Given the potential importance of this evidence, I accept that the defence should be given time to pursue it. I also accept that the defence should be given additional time to obtain further particulars from Mr. David relating to Mr. [REDACTED] selling him the firearm in question. The bottom

line is there is additional work that needs to be done in this case and it is not the type of work that can be done "on the fly" while the trial is underway.

### **Conclusion**

[60] I am satisfied that because of the circumstances that have surprisingly developed in this case, through no apparent fault of the Crown or the defence, there is now a real danger to the accused's right to a fair trial. In other words, I find the consequences of the late discovery of a firearm associated to the key Crown witness who the defence points to as an alternate suspect in the shooting, and their real impact on the defence's ability to mount a substantive defence to the charge, are something that cannot be remedied at this point. I also accept that the defence will need time to consider whether, on account of the manner in which the police handled the Tokarev evidence and/or the apparent lack of investigation relating to the firearm, there are possible *Charter* or process-based remedies that need to be pursued in this case.

[61] I am acutely aware of what my decision declaring a mistrial means for everyone involved in this matter. Recommencing this trial will mean the expenditure of additional time and effort by both the Crown and the defence. No doubt this will mean additional expenses for both as well. However, as I have already said, my principal obligation is to ensure the accused's trial is a fair one.

[62] In reaching my decision, I have considered all the submissions of counsel as well as all of the materials that have been filed in this application. Having done so, I am satisfied that there has been irreparable damage to the trial process which cannot be cured by any remedial measures short of an order that the trial be aborted and recommenced.

[63] Overall, I simply do not believe that the accused can have a fair trial at this point, given the developments that have occurred relating to the new firearm. On the contrary, compelling the defence to proceed in light of what has occurred since Friday last would, in my opinion, create an injustice that I cannot permit.

[64] It is for all of these reasons that I have granted the defence application and I have declared a mistrial.

"G.R.J. Gaul, J."