

COURT OF APPEAL FOR ONTARIO

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

AND

ROBERT STEWART

Applicant/Appellant

APPELLANT'S FACTUM RESPECTING FRESH EVIDENCE

PART I: STATEMENT OF THE CASE

1. This is an application seeking to admit the fresh evidence of Ms. Linda Beland in support of Mr. Stewart's appeal against convictions on two counts of first degree murder dated February 2, 2000.¹ Specifically, Mr. Stewart seeks to admit the affidavit of Ms. Beland sworn on July 6th, 2005 and the exhibits contained therein. The affidavit, exhibits and the cross-examination, have been compiled in a joint Further Evidence Record.²

2. On May 26, 2006 Ms. Beland was cross-examined on this affidavit by Crown counsel pursuant to an Order made by this Honourable Court under s. 683(1)(b)(ii) of the *Criminal Code*.

¹This application for fresh evidence is brought by Mr. Stewart. *Amicus* has agreed to assist Mr. Stewart and the Court by preparing this factum. This ground of appeal is not being advanced by *amicus*.

² Affidavit of Linda Beland, Further Evidence Record, v. 1, tab 2.

PART II: SUMMARY OF THE FACTS**I. OVERVIEW**

3. Denis Gaudreault testified that after Mr. Giroux and Ms. Bourdeau were murdered, he, James Sauve, Rick Trudel and Richard Mallory returned to Mr. Stewart's home in Orleans. Upon arriving at Mr. Stewart's residence, Mr. Gaudreault testified that at the direction of Mr. Stewart he put the murder weapon in the back seat of Ms. Beland's vehicle. It was contained in a garbage bag with other guns. The three accused entered the home first, with Mr. Gaudreault entering last. Mr. Stewart called out for Ms. Beland to drive Mr. Gaudreault home and she emerged from a hallway. Mr. Gaudreault testified that Ms. Beland drove him home during which time they talked about bingo. At trial, Ms. Beland testified about a myriad of issues including the abuse Mr. Stewart inflicted upon her, intimate details of their relationship and Mr. Stewart's drug business. The only direct evidence that Ms. Beland could provide regarding the homicides was whether she drove Mr. Gaudreault home in January 1990.

4. At trial, Ms. Beland testified that she could not remember if she ever drove Mr. Gaudreault home. She recanted that portion of her evidence in a taped conversation with Mr. Stewart shortly after she testified while the trial was still ongoing. She re-affirmed this recantation in a sworn video taped statement to *amicus* on March 3, 2005. On July 6, 2005, Ms. Beland swore the affidavit that forms the subject matter of this fresh application.

5. If, *in fact*, Ms. Beland drove Mr. Gaudreault home on January 16, 1990, this would provide strong corroboration of Mr. Gaudreault's testimony. If, on the other hand, Ms. Beland did not drive Mr. Gaudreault home, Mr. Stewart, Mr. Trudel, Mr. Mallory and Mr. Sauve are arguably innocent. At the very least this evidence would directly contradict Mr. Gaudreault on an important aspect of his testimony.

II. DENNIS GAUDREULT AND THE DRIVE HOME

6. Denis Gaudreault is a self admitted liar, perjurer and con artist. Corroboration of Mr. Gaudreault was essential to securing a conviction against the applicant. The history of Mr. Gaudreault lies and evolution of his evidence in this trial and that of *R. v. Trudel and Sauve* is set out in the factum of the Appellant Mallory and need not be repeated here. Instead, the Applicant will summarize the evidence of Mr. Gaudreault regarding the purported involvement of Ms. Beland in the events immediately following the homicides.

7. Mr. Gaudreault testified that after the murders were committed they returned back to the Stewart residence. Upon arriving at the Stewart home, Mr. Gaudreault attempted to park behind Ms. Beland's car. Mr. Stewart said "No, no, park beside because I'm gonna get Linda to give you a ride."³ Mr. Stewart then instructed Mr. Gaudreault to put the weapons that they had taken with them and put them in the back of her, car and then clean them for prints.⁴

³ *Transcript of Proceedings*, November 4, 1998, Volume 19 at p. 2077, lines 25-31

⁴ *Transcript of Proceedings*, November 4, 1998, Volume 19 at p. 2078, lines 4-10.

8. The four then entered the home, with Mr. Gaudreault entering last. As they were walking in, Rick Trudel was talking to Mr. Stewart and said:

“Yeah, the t.v. was left on. No problem. He got it by the “something” he got it twice and the bitch got done in the back” and something about – again t.v. being left on. So by that time Rob turns around, he looks at me and he says “Linda”, then he started yelling “Linda, go give Denis a ride home.” The she just got out and Rob told me to go outside, he tossed me the keys to the car.”⁵

9. Mr. Gaudreault further testified that when he entered the residence, Trudel was “running like a little boy all happy, like a chicken with his head cut-off”.⁶

10. Mr. Stewart seemed to be surprised by Mr. Gaudreault entry into the home. Mr. Stewart told Mr. Gaudreault to take a couple of thousand off his bill and then to pay Jack Trudel \$ 10,000.00. Mr. Gaudreault testified that “Like then I went, Linda got outside and got in the car and we started driving down to my house...”⁷

11. Mr. Gaudreault testified that he was in the Stewart home for about 3 minutes and when he entered:

“...he [Stewart] started yelling right away “Linda”, “Linda” and I guess she was at the end of the hall because there’s something, bedrooms or washrooms in the there at the end of the hall, and he just yelled back “Give Denis a ride home”, Go give him a ride home right now, get out of there”.⁸

⁵ Transcript of Proceedings, November 4th, 1998, v. 19, page 2078, lines 9-15.

⁶ Transcript of Proceedings, November 4th, 1998, v. 19, page 2089, lines 1-5.

⁷ Transcript of Proceedings, November 4th, 1998, v. 19, page 2079, lines 3-10.

⁸ Transcript of Proceedings, November 4th, 1998, v. 19, page 2093, lines 13-25.

12. Mr. Gaudreault was not cross-examined by either counsel for Mr. Stewart or Mr. Mallory as to *where* Ms. Beland was in the home when the four entered the home or when Rick Trudel made the comments set out above in paragraphs 8 and 9.

III. LINDA BELAND

13. At the time of the murders, Ms. Beland had been married to the Applicant for some 7 years. After Mr. Stewart was arrested Ms. Beland initially refused to speak with the police. Eventually, this changed. Between 1993 and 2000, she had over 70 contacts with the police and provided 8 formal statements. Many of her statements gradually disclosed abuse visited upon her by Mr. Stewart, her own drug use and virtually every intimate detail of their relationship. Ms. Beland also testified under oath on four separate occasions.⁹

14. Despite all of information provided by Ms. Beland in her statements to the police and the trial of Mr. Stewart one of the most significant aspects of Ms. Beland's evidence is whether she drove Mr. Gaudreault home on January 16, 1990 at the direction of Mr. Stewart as testified to by Gaudreault.

⁹(i) At a deposition on August 15, 1995 when the Applicant was still co-accused with Messrs. Trudel and Sauve; (ii) On April 15, 1996 at the *Trudel and Sauve* trial where she was called by the defence; (iii) On April 15, 16, 27 and 28, 1999 at the *Stewart and Mallory* trial where she was called by the Crown and, (iv) Under cross-examination by Crown counsel on May 29, 2006 on the affidavit forming the subject matter of this application.

a) Linda Beland - The First Statement to the Police

15. The first statement Ms. Beland gave to the police was at her home on October 18, 1993. It was taken by Sgt. Ian Davidson and Cst. Christine Benson. After questioning Ms. Beland about Mr. Stewart's drug business, his debts and his associations with Richard Mallory and Rick Trudel she was asked the following questions about the murders:

Q. Do you remember what you were doing the day of the murders.

A. No, if that was the day of the meeting at the beauty salon, it was the second Tuesday in January [sic] we were all there. Lynn Fong didn't recall when I asked her.

Q. Did he ever tell you anything about the victims ?

A. He said he did not know then and his is being framed, but if he is innocent why is he so afraid of me talking to the police ?

Q. Why do you think he is worried ?

A. First of all, there must be something, he tells me you got ways to make people talk to say things [sic] I didn't say.

Q. Has he ever told you to talk to the police so they can prove he is innocent ?

A. No, he told me not to talk to the police cause they would twist things around.

Q. Have you ever talked about this case to any one else ?

A. Rick Trudels wife in the jail. I'm <> the name, maybe Christine, the second time she had another name ?

Q. Did she or anyone else say co-operate with the police so they can prove they are innocent ?

A. No, she said don't talk to the O.P.P. they got ways of putting things.

Q. Did you ever discuss the car used in the murder ?

A. I was trying to find out. Why ?

Q. Did Rob ever own a white Cadillac ?

A. I don't know if he ever owned it, but he had one for a while. One night I was out with Carole, Rob as already at O'Tooles, the car disappeared, apparently the O.P.P. had it for investigation.

Q. Do you know who he has it with ?

- A. No, we left and went to Hull because Rob (showed head butt) but she is afraid to say that.
- Q. Do you know where the Cadillac came from ?
- A. I think from Rick Trudel or someone Rick knew.
- Q. Did Rob every own a red Dodge Dakota pick-up ?
- A. Yes he did. He bought that truck off a <> place on industrial. We were living Hochelaga when he got it. He had it a few months but I don't know what happened to it.
- Q. Did he put the vehicle in his own name ?
- A. No, he didn't put vehicles in his own name.
- Q. What about properties ?
- A. Well, I don't like to say, it all laundered money; he had a cottage and apartment on Blake. There were in his Wendy's name. He said it was better. I guess if he got caught he would lose it all.
- Q. Did Rob ever discuss the case ?
- A. Ya at jail he showed that I drove Denis home the night of the murder. I never drove him home.
- Q. Have you ever been in a car with Mr. Gaudreault ?
- A. Never that I remember.
- Q. Have you ever been in your house when the four accused were present ?
- A. No, just the three of them, Rick Mallory, Rick Trudel and Rob ... but James was not there. But that was a few times, I don't know if it was at the time of the murder.¹⁰

b) Evidence at the Deposition – August 15, 1994

16. On August 15, 1994 Ms. Beland was examined at deposition during the preliminary inquiry of all four accused. Mr. Barnes, counsel for Mr. Trudel asked her the following questions:

Q....the first statement you give is the 18th of October 19993 – the written statement that I have. An in that one, what the police seem to be interested in finding out from you is did you ever drive Denis Gaudreault anywhere ?

¹⁰ Further Evidence Record, Volume 2, Tab 1. The Crown cross examined Ms. Beland extensively on subsequent statements she made to the police wherein she indicated that she could not remember if she ever drove Mr. Gaudreault home. See below at para. 20.

A. No, not that I recall.

Q. And that's something that they asked you many times over the course of the years, hasn't it?

A. No.

Q. They asked you that in the last set of interview too, though, didn't they? In the ones that were audio-taped in the end of – end of June.

A. It was mentioned, yes.

Q. And all the way through, you've always told them right from the beginning to the end,, that "Look I don't ever remember driving Denis Gaudreault anywhere."

A. That's right.

Q. Also, back in the first interview on the 18th of October, 1993, you tell them that you don't know anything about the Cumberland murder.

A. I don't.¹¹

17. Crown counsel had no questions for Ms. Beland at the deposition.

c) Evidence at Trudel and Sauve

18. On April 15, 1996, Ms. Beland was called as a witness by the defence at the trial of Trudel and Sauve. She was examined in chief by Mr. Barnes who was counsel to Mr. Trudel. The relevant portion of her evidence was as follows:

Q. How many times would you have been to his [Gaudreault] house?

A. Approximately maybe four, four or five around there.

Q. And where were you living at the time you went to Mr. Gaudreault house?

A. Three, four house from his house.

Q. And what street would that be on?

A. Hochelaga

¹¹ Deposition Hearing of Linda Beland, August 15, 1994, at p. 7 lines 19-32; p. 8, lines 1-9. Further Evidence Record, v. iv Tab 11, pages 7 - 8.

- Q. Do you know when you moved away from Hochelaga ? Do you know what month, what year you moved out of Hochelaga ?
- A. In '89.
- Q. After you moved out of Hochelaga, did you ever go to Denis Gaudreault house ?
- A. Not that I recall.
- Q. Now have you ever driven Denis Gaudreault anywhere in an automobile ?
- A. I don't think so, but I'm not 100% sure.
- Q. Okay. Back in the end of 1989, beginning in 1990, what kind of car were you driving yourself ?
- A. A blue Camaro.
- Q. Okay, did you ever drive Denis Gaudreault...When you moved out of Hochelaga and where did you move to ?
- A. St. Joseph in Orleans.
- Q. St. Joseph Boulevard ?
- A. Yeah.
- Q. Do you ever recall driving Denis Gaudreault from your home on St. Joseph Boulevard back to Hochelaga.
- A. No, no.
- Q. Now ma'am, do you know anything about the Cumberland murder ?
- A. No.¹²

19. Counsel for *Sauve* asked no questions.

20. Crown counsel cross-examined Ms. Beland at about her faulty memory and¹³ Mr. Stewart's involvement in the drug business.¹⁴ She then took Ms. Beland through some of her statements to the police and asked Ms. Beland the following about whether she ever drove Gaudreault home:

¹² *Transcript of Proceedings*, April 15, 1994, *Trudel and Sauve Trial*, pages 7-8. Further Evidence Record, v. iii, Tab 1, pp. 7-8.

¹³ *Transcript of Proceedings*, April 15, 1994, *Trudel and Sauve Trial*, pages 27-28.

¹⁴ *Transcript of Proceedings*, April 15, 1994, *Trudel and Sauve Trial*, page 38.

- Q. The first time that you were asked by the police about whether you remembered driving Denis Gaudreault anywhere was in October 1993. Does that seem about right?
- A. Yes.
- Q. So that's three years after January of '90?
- A. Yes.
- Q. More than that actually. And that's the first time you're asked to remember. The way it went is that you didn't remember, when you were first asked, right?
- A. Right.
- Q. But, that wasn't the last time you were asked.
- A. No.
- Q. On the 6th of December, 1993, Sergeant Davidson and Chris Benson came to see you and you had an interview. Do you remember that.
- A. Yes.
- Q. And what you told Inspector Davidson was, as far as driving Denis Gaudreault, I can't remember driving him. As far as I'm concerned I did not.
- A. That's right.
- Q. That still wasn't the end of it. On the 27th of February, 1994, you're still thinking about it, aren't you?
- A. Yes.
- Q. And you said you tried to think of driving Denis, but you don't remember driving him.
- A. No.
- Q. And on the 14th of March of '94, you're still trying to remember.
- A. Yes.
- Q. You tell Chris Benson you tried to remember driving but you can't.
- A. Right.
- Q. The 11th of May you're still thinking about it, you don't remember driving that guy.
- A. Correct.
- Q. But you were still trying; right?
- A. That's right.
- Q. And those are all the conversations with Chris Benson. And then the 15th of June of 1994 you had just been to see Rob Stewart at the RDC at Innis Road. And you had a conversation with

him there, where Rob told you that they were saying at the preliminary hearing that Denis was driven by you. Do you remember that ?

A. Yes.

Q. And what you said to Chris Benson that day, when she asked you, did you drive Denis Gaudreault anywhere, anytime, was no, I'm pretty sure I did not. Do you remember that ?

A. Yes.

Q. But you also said to her, Rob never asked me to drive any of his friends anywhere, so I'd have to say, no. It was so long ago I really can't remember.

A. That's right.

Q. And that's what it comes down to, isn't it ? You really can't remember.

A. No.

Q. Now if you were absolutely sure of it when they asked you in October, '93, you didn't have to keep thinking and thinking and thinking, and trying to bring stuff into your memory for months after. You would just know for sure.

A. That's right.

Q. But you simply can't remember do it.

A. That's right.

Q. You can't say one hundred percent that it didn't happen.

A. Exactly. Exactly.¹⁵

21. Under re-examination, counsel for Mr. Trudel asked whether "...you have ever seen Denis Gaudreault, Richard Trudel, James Sauve, Rob Stewart and Richard Malloy together at your house."¹⁶ The Crown objected on the basis that this was improper re-examination and the Court ruled that, "It's there. Let's leave it. Go ahead."¹⁷

¹⁵ *Transcript of Proceedings*, April 15, 1996, *Trudel and Sauve Trial*, pages 20-22.

¹⁶ *Transcript of Proceedings*, April 15, 1996, *Trudel and Sauve Trial*, page 81.

¹⁷ *Transcript of Proceedings*, April 15, 1996, *Trudel and Sauve Trial*, page 82.

d) Evidence at the Trial of Stewart and Mallory

22. Ms. Beland was called by the Crown at the trial of Mr. Stewart. She testified for four a total of four days: three days in chief and one day in cross-examination.

(i) Evidence in Chief

23. In her examination in chief Ms. Beland testified about her relationship and marriage to Mr. Stewart, the abuse she suffered and what she knew about his drug business and associates. Generally speaking, her evidence was not helpful to Mr. Stewart. Indeed, whatever may be said about the admissibility of much of Ms. Beland's evidence, it is clear that by the end of her evidence, following re-examination by the Crown, the jury was given the clear impression that she thought Mr. Stewart was guilty.¹⁸

24. With respect to whether Ms. Beland ever drove Mr. Gaudreault home, she was asked the following question during her evidence in chief:

- Q. Let's deal with this issue of driving Denis Gaudreault. Do you remember driving Denis Gaudreault ?
- A. No I don't.
- Q. Are you saying that you did not drive him ?
- A. I'm not saying I did not drive him, I just don't remember driving that guy.
- Q. Okay.
- A. I don't want to say yes and I don't want to say no because I really don't remember driving him.

¹⁸ *Transcript of Proceedings*, v. 99, April 28, 1999, at page 1911, lines 1-30; page 1912, lines 1-20; page 1929, lines 1-11. The Crown argued that Ms. Beland's opinion was relevant to her state of mind when she received the exculpatory statements from Mr. Stewart: *Transcript of Proceedings*, April 28, 1999, v. 99, page 11912, at lines 5-20.

- Q. Okay. Have you tried ?
- A. Yes I have.
- Q. And you don't.
- A. No.
- Q. Does it get any higher than that ?
- A. Pardon me ?
- Q. Does it get any firmer that that, any more firm than that---
- A. No.
- Q. ---you don't remember ?
- A. No.¹⁹

(ii) Cross-Examination

25. Ms. Mulligan asked Ms. Beland about whether she ever drove Gaudreault home in cross-examination.²⁰ Ultimately, Ms. Beland maintained that she "...can't say a hundred percent sure [sic] that I did or that I did not."²¹

26. Later in her cross-examination, Ms. Mulligan wanted to put the entire scenario of the four accused entering the Stewart home with Mr. Stewart directing her to drive Mr. Gaudreault home on a school night while the other accused were in their residence. Ms. Mulligan asked the following questions and there was an objection by the Crown. The relevant passages are as follows:

Q. Let's go back to driving Mr. Gaudreault. I want to put a number of propositions to you and have you comment at the end as to whether you believe that it's a likely scenario, a possible scenario, all right? So I'm going to give you a number of factors to consider.

A. I don't understand what you mean.

¹⁹ *Transcript of Proceedings*, April 16, 1999, v. 96, page 11547, lines 25-31; page 11548, l. 1-14.

²⁰ *Transcript of Proceedings*, April 28, 1999, v. 99, page 11799-1180.

²¹ *Transcript of Proceedings*, April 28, 1999, v. 99, page 11800, lines 25-30; page 11801, line 1.

Q. Okay. Well, I think you will when I start putting it to you.

A. Okay.

Q. Okay?

A. M'hmm-hmm.

Q. You know obviously -- well you had read I guess and been told by Mr. Stewart early on that Mr. Gaudreault said you had driven him home after these murders.

A. He showed me in the transcript, yeah.

Q. And you had also, I take it, read the news- paper accounts more recently of Denis Gaudreault's testimony that he said you had driven him home.

A. I couldn't tell you because I haven't read them recently.

Q. You haven't read anything during this trial about that?

A. No, I stopped doing that a long time ago.

Q. Okay. So that suggestion certainly hasn't upset you at all because you don't even know whether you drove him or not, right?

A. That's right.

Q. It doesn't upset you.

A. Pardon me?

Q. It doesn't upset you.

A. What?

Q. The suggestion that maybe you did drive Mr. Gaudreault.

A. No, it doesn't.

Q. With respect to that suggestion, first of all January 16th, 1990 I'd like you to think about as a date possible when you drove Mr. Gaudreault, okay? January 16th, 1990 it's wintertime obviously, it's a foggy night, ---

MS. BAIR: With respect.

THE WITNESS: How would I know?

MS. MULLIGAN: No, I'm putting a ---

MS. BAIR: A hypothetical to the expert?

MS. MULLIGAN: No.

THE WITNESS: No but, Ms. Mulligan, you're asking me things that I cannot answer you. I don't know what it was like that day. I don't even remember that day, what I did that day.

MS. MULLIGAN: Your Honour, what I'm trying to put to the witness is all the factors that are being alleged to see if it helps refresh her memory or not.

THE WITNESS: Well I can tell you something, Ms. Mulligan, I do remember when I went to the salon at Lynn Fong's house what kind of weather it was that night.

MS. MULLIGAN: Well that's not my question. Your, Honour, ---

THE WITNESS: Bien, I'm sorry, I'm just ---

THE COURT: Well let's not have the debate in front of the jury and I'll see if we can get to these likely or possible scenarios, okay? Members of the jury. I don't think fast enough for these lawyers.²²

26. The jury was excused. Trial counsel explained what she proposed to ask Ms. Beland as follows:

MS. MULLIGAN: I can tell Your Honour exactly what I propose and then Ms. Bair can make her objection.

THE COURT: All right.

MS. MULLIGAN: It seems to me only fair, since it's never been done with this witness in any interview or any transcript that I've read, to put all the surrounding facts about this drive, driving Mr. Gaudreault, to her to see if she can either remember doing it, whether it's impossible she did it, whether in the circumstances surrounding she doesn't believe she did it. I think I'm entitled to do that and what I intended to do was explain to her that the allegation or the suggestion is it's January 16th, 1990, it was a foggy night, that's the evidence from the Crown's forensic climatologist; the roads were slippery, that's from Denis Gaudreault; home that night in her house, that's Denis Gaudreault, when they drive by "the bitch is home" and then she's home again to drive him.

THE COURT: No, that's the evidence of you client saying "the bitch is home". Maybe the lights were on.

MS MULLIGAN: Well it's not the evidence of my client, Your Honour, it's the evidence that Denis Gaudreault gives regarding what he says my client said.

THE COURT: Oh. Right. I'm sorry. Yes. The source is your client, allegedly.

MS. MULLIGAN: Denis Gaudreault also says however she's home when they get back to the house because of course he says she drove him home. I was going to put to her the approximate time being 10:30, give or take a half-hour on the Crown's theory and the Crown's evidence, that Rob Stewart, Rick Trudel, Rick Mallory and James Sauve and Denis Gaudreault all attend at her home. They arrive in a white Cadillac and all of the initially enter the home, according to the evidence of Denis Gaudreault. They have some discussions and Rob yells to "Hurry up and drive Denis Gaudreault home", "take Denis Gaudreault home." according to the evidence of Denis Gaudreault. She goes out to the her Camaro, Denis says he's already started it because Rob has thrown him the keys, and she drives him to Hochelaga. At that approximate

²² Transcript of Proceedings, April 28th, 1999, v. 99 p. 11872 lines 9-31; pages 11873-1874.

time on a Tuesday night I would ask her in the circumstances if she's home, whether her children were always home when she was home or not, whether she had any practice in relation to that. I would put to her that Mr. Gaudreault then leaves the car and takes from the back seat a garbage bag with something inside it and then she leaves and presumably drives the distance back to Orleans from Hochelaga, although we don't know that for sure but presumably she does, on the same roads.

Having put all the surrounding circumstances to her I want to know whether that's possible, that is something that could have possibly happened in her life at that time, that she would take Mr. Gaudreault home at that time of night in those road conditions in her car and leave these four men in her house perhaps with her children, and I think that that should fairly be put and squarely to the witness. That is what the Crown is suggesting. They're not just suggesting that one time maybe she drove Mr. Gaudreault somewhere and they're giving no details to her, no one ever has. I think she's entitled to hear the details of the suggestions...²³

27. The Trial Judge interrupted and advised that in his 23 years of experience he had never heard of such questions being asked and that ultimately "...what does it matter whether she thinks it's likely."²⁴

28. Crown counsel indicated that any such questions would have to be phrased carefully because there was no evidence as to where Ms. Beland was there when all four accused were purported to be in the house.²⁵ McWilliam J. did not make a ruling, but suggested to counsel that, in light of the frailties of Ms. Beland's memory:

THE COURT: Perhaps you'll reflect on the virtue of having ten do not remembers in front of the jury.²⁶

29. The Court then broke for a recess. Upon returning, Ms. Mulligan indicated that "I'm not going back to driving Mr. Gaudreault."²⁷

²³ *Transcript of Proceedings*, April 28th, 1999, v. 99, pages 11875-11877.

²⁴ *Transcript of Proceedings*, April 28, 1999, v. 99, page 11877, lines 15-25

²⁵ *Transcript of Proceedings*, April 18, 1999, v. 99, page 11879. This is correct. Mr. Gaudreault was never asked by either counsel for Mr. Stewart or Mr. Mallory where Ms. Beland was when the Appellant's were have said to entered the house.

²⁶ *Transcript of Proceedings*, April 28th, 1999, v. 99, page 11881, lines 22-23.

²⁷ *Transcript of Proceedings*, April 28th, 1999, v. 99, page 11882, lines 5-10.

30. In re-examination by the Crown, Ms. Beland again was asked whether she drove Mr. Gaudreault home. Ultimately, she answered: "What I'm sure of is that I'm a hundred percent not sure if I drove him or if I did drove home."²⁸ She agreed with the suggestion that there was no point in time that she would have said that she was "absolutely certain that I did not drive him and stop asking me."²⁹

(IV) THE JURY ADDRESSES AND THE DRIVE HOME

31. Counsel for Mr. Mallory made no mention of whether Mr. Beland drove Mr. Gaudreault home in his address to the jury.

a) Counsel for Mr. Stewart

32. Ms. Mulligan made the following submissions to the jury on this issue:

You can consider some other things. You can consider Gaudreault second version to the police about how they go back to the house after allegedly having committed these homicides, they go back to Rob's house, and what does he tell them originally? "Rob tossed me the keys to the Firebird and I go back to the back, he said he'd pick it up tomorrow." **Nothing about Linda, nothing about Linda Béland driving him anywhere. Later on she becomes the driver, an event she just can't recall and she's tried and she's tried and she's tried, she denied it vehemently at one time that she ever drove Denis Gaudreault anywhere, but the more, I suggest to you, she came to resent her ex-husband the more willing she was to be wishy-washy at least on the topic "I can't say I did", "I can't say I didn't."** It's an event that only ever happened once, she only drove this guy one time with this bag of guns in the back seat and I suggest she'd remember, she'd remember, despite her memory problems she'd remember leaving all these men in her house late at night, the roads are slippery, she's taken the white Cadillac, she's driving Denis and the garbage bag back to Hochelaga and leaving her children there with these men. It didn't happen. If it happened Denis would've been consistent on that point, I submit.³⁰

²⁸ Transcript of Proceedings, April 28th, 1999, v. 99, page 11896 (no line references).

²⁹ Transcript of Proceedings, April 28th, 1999, v. 99, page 11909.

³⁰ Transcript of Proceedings, January 6th, 2000, v. <>, page 22352.

b) Crown Counsel

33. The Crown relied heavily on Ms. Beland to corroborate Mr. Gaudreault. During her address to the jury, she argued:

- That while Gaudreault did not initially mention Ms. Beland's purported involvement in his statements to the police, it made no sense that he would later add Ms. Beland, if he was lying, because he would be creating a witness who could contradict him;³¹
- That at no time did Ms. Beland vehemently deny driving Gaudreault home;³²
- That she had a poor memory and as such it was understandable that she would not remember such an innocuous event;³³
- That the only real memory she had was of Mr. Stewart telling her that she did not drive Gaudreault home;³⁴
- That any statements to the contrary were the result of either her initial loyalty to Mr. Stewart or from pressure he put on her.³⁵

(V) THE "RECONTATIONS"**(v.i) The Call with Robert Stewart – After L. Beland Testifies**

34. A couple of weeks after Ms. Beland testified, she had a telephone conversation with Mr. Stewart. He recorded it. That tape was provided to Ms. Mulligan by Mr. Stewart's father while the trial was ongoing.

³¹ *Transcript of Proceedings*, January 14th, 2000 v. 192, page 22604.

³² *Transcript of Proceedings*, January 14th, 2000, v. 192, pages 23087-23088

³³ *Transcript of Proceedings*, January 14th, 2000 v. 192, page 23089.

³⁴ *Transcript of Proceedings*, January 14th, 2000 v. 192, page 23090 and page 23104.

³⁵ *Transcript of Proceedings*, January 14th, 2000 v. 192, pages 23102 – 23103.

35. The tape does not contain the entire conversation between Mr. Stewart and Ms. Beland. A transcript of the conversation is contained in the Joint Evidence Record.³⁶ In that conversation [which the Applicant would like to play for the Court], he puts the scenarios that Ms. Mulligan sought to put to Ms. Beland but chose not to do so. The relevant passages of this conversation are as follows:

011	Robert	Okay but I have never told you any of this other because I didn't want to destroy you as a witness. Okay, but now that you are finished I can tell you the whole scenario. What you were supposed to have seen and we wanted to tell you this on the stand but the judge wouldn't allow it. He...
016	Linda	Well I think I deserve to fucking know and I think I deserve to ... to ... to hear or to see because you know, why not, after everything I am fucking going through I think I have the right to know
020	Robert	I think you should have. Well why didn't the police on the hundred times they have been with you bring out the whole story
022	Linda	Well because they are not allowed to talk to me about it until this is...
023	Robert	Yes they can
	Linda	No because I was a wit... I was on the stand
	Robert	No no no no but listen, even before that all the times they meet you they can say well so and so said this
025	Linda	No they weren't allowed to say that
026	Robert	Yes
	Linda	Eh now
	Robert	They brought stories to you that so and so said something and you've said no that never happened. Right?
028	Linda	Well
029	Robert	You've had that lots of times. But see the problem with the police you never went past that thing about driving Dennis. You said that never happened. You never went past that. But if they had gotten into other stories about people come running into your house and ...
034	Linda	Well they did ask me if you were, if the five of you were ever in my house

³⁶ Further Evidence Record, Volume ii, Tab 11 (Transcript of Sealed Micro-cassette).

035	Robert	Oh yeah they did?
	Linda	They did ask me that
	Robert	Yeah
036	Linda	And I told them I said no. I said, I said you ... you ... they have been there specifically but I have never seen the five of you in my house
037	Robert	Yeah
038	Linda	Specifically late like that. 'Cause they said it was late at night. Never.
039	Robert	Oh so they did ask you about...
	Linda	Oh yeah they asked me that
040	Robert	But you didn't say Ricky Trudel was running around like a chicken with a head cut off
041	Linda	No, no.
	Robert	The guy was shot in the head, chest...
042	Linda	No
	Robert	Dennis has you...
043	Linda	But they did ask me if I have ever seen the five of them, of your guys together in my house and I told them I never did because I didn't. I don't lie. I tell the truth.
046	Robert	But you would leave the house, and get in the car and not say a word
047	Linda	No...no and I also said that on the stand and you were right there. They asked me that and I said no fucking way man. I didn't want no body in my house
050	Robert	You would have had more...
	Linda	I never wanted anybody in my house... ³⁷

And further:

	Robert	Yeah but you sure would've remembered a bunch of guys coming back to your house
	Linda	Fucking right. Because I remembered that thing with Dennis...
266	Robert	Yeah. That's what...
	Linda	Like I told them listen if I knew anything about that fucking murder trust me I would fucking remember okay

³⁷ *Ibid.*, at 011-050.

267	Robert	You would have told them wouldn't you
	Linda	First of all I would never kept that. Trust me they would have found out
268	Robert	Oh...
	Linda	I would never be able to keep that
	Robert	No you'd tell them. ... ³⁸

(v.ii) The Taped Conversation on May 22, 2003.

36. On May 22, 2003, Mr. Stewart taped another conversation with Ms. Beland. The relevant portions of that conversation are as follows

Robert: Okay, No I'm sitting there, Did you ever... Okay yea. Have you ever been told by Heather Lamarche or Vicki Bair whether 5 people came running into your house on a school night.

Linda: Not that I recall... No

Robert: Okay.... Did that every happened

Linda: No ha... Not that I now ha.ha. No.

Robert: Okay... ah. Running like chickens with there head's cut off an...

Linda: No

Robert: No that would have been 2 months after Denis Roy.

Linda: No. I don't think so. Ha

Robert: You think you would have remembered that"

Linda: Well yea cause I remember very much what happened at our house at St. Joseph. Yea.

Robert: Yea.

Linda: This is something you don't forget...³⁹

The conversation continues:

³⁸ *Ibid.*, at 265-269.

³⁹ Further Evidence Record, v. ii, tab 11, pp.2

Robert: Yea, I think if 2 months later 5 guys come running back into your house running around.

Linda: I would freak.

Robert Ha. Ha

Linda: I would have lost it.

Robert: Yes I think you would have.

Linda: Ya.

Robert: Ya, you wouldn't have driven Mr. Gaudreault back home talking about bingo or

Linda: First of all I never drove whatever friends, except Mallory probably once maybe twice I don't remember we're talking many years ago.

Robert: Yea

Linda: But I know that guy I've never drove any friend to our house once and that was when I was coming back from bingo he was with his girl and she was pregnant at the time. That was the only time I saw that Gaudreault at our house, and I never drove him.

Robert: No.

Linda: No.

Robert: Okay, yea, that would be like ah...

Linda: No I know that I never drove that guy.

Robert: Because you would have left the house. With your kids in the house on a school night. To drive...

Linda: I don't think so....First of all I wouldn't have driven at night....ah...no.

Robert: Yea, but you have never been told this by Heather Lamarche or Miss Vicki Bair.

Linda: They had mentioned it yea. They asked me that. But like I said

Robert: When did they ask you that.

Linda: But I never drove I never drove that guy. They mention that he said that. That he said that I drove and they ask me if I remember. No I never drove the guy you can't get blood of out of a rock. Right ?

Robert: Yea did they ever mention 5 guys come running into your house on a school night.

Linda: I don't think so.

Robert: No.

Linda: Not that I recall, No.⁴⁰

⁴⁰ *Ibid.*, at p. 3.

And further,

Linda: No, no have never been around that guy for him to do that. I saw him once in my house in Orleans and that was it he was never in my house after that or before that unless if I wasn't there if he did.

Robert: Okay.

Linda: But for me no. That Gaudreault was in my house once.

Robert: Okay, I'm going to tell you things and Okay. And this is what he says:

"They eliminate the guy, okay, they shot him once in the body, once in the head. After that they heard the T.V. in the room. I'll tell you the room was at the other end of the living room. They heard a T.V. They though there wasn't anyone else, because there were going to take the furniture and thinks like that, you know, check for Monday. The cunt was sleeping in the bed, and they shot he in the head while she slept"

Linda: Ah... Who is saying all that ?

Robert: Mr. Gaudreault.

Linda: Ah

Robert: And he claimed, that he got that information in front of you.

Linda: Linda....my god no. Are you well. I would have fucken freaked. No way.

Robert: And the police have never told you this ?

Linda: No

Robert: No.

Linda: No and first of all if that guy had ever done something like that you know me better I would have went right to the police right away. No, no, no,....ah no.⁴¹

(v.iii) The Sworn Statement to *Amicus* and the Affidavit of July 6, 2005

37. *Amicus* took a sworn video taped statement from Ms. Ms. Beland on March 3, 2005.

Mr. Stewart prepared questions that he requested be put to her. They were as follows:

LS: Okay and have you ever been interviewed by a defence lawyer?

LB: No

⁴¹ *Ibid.*, pp. 4-5.

LS: Okay. Were you asked at any time during your interviews by the police or during your trial testimony or prior to your trial testimony the five people including Denis Gaudreault who came running into your house in Orleans at 10PM on a school night?

LB: Not in those words

LS: Okay. Did that ever happen?

LB: No

LS: Were you ever asked at any time in any of the statements you have given to the police or testimony if Rick Trudel was "running around like a chicken with his head cut off" in your house in Orleans at 10PM on a school night?

LB: No

LS: Did that ever happen?

LB: No

LS: Were you ever asked at any time in those interviews or testimony if you ever heard in your house in Orleans at 10PM on a school night, Rick Trudel who while running around...running into your house saying "he got it twice and the bitch got done in the back"?

LB: No

LS: Did that ever happen?

LB: No

LS: Were you ever asked at any time in those interviews that you had before you or your testimony if Rick Mallory was sweating at your kitchen table in your house in Orleans at 10PM on a school night

LB: No

LS: Did that ever happen?

LB: No

LS: I am going to pose a hypothetical here to you. If five people came running into your house on a school night and Rob Stewart told you drive Denis Gaudreault home, would you have done this?

LB: No

LS: Would you have done this at night?

LB: No especially not at night

LS: Would you have done it on a foggy evening?

LB: No

LS: Would you have done this without asking Mr. Stewart any questions about that?

LB: No

LS: Would you have don this and gotten into your car and only talk to Mr. Gaudreault about Rhonda, about taking Rhonda to bingo ?

LB: No

LS: What would your reaction have been or actions if you had seen Mr. Gaudreault grab a bag of guns out of the backseat of your car?

LB: I would have panicked. Got upset

LS: Did you ever observe that happen?

LB: No

LS: If such a thing happened, would you have forgotten about it?

LB: No⁴²

38. In her statement to *amicus*, Ms. Beland further explained that at the trial of Mr. Stewart she kept saying that she did not remember because that is what she was told to say by the police and crown counsel. As a result, on July 5, 2006, Ms. Beland swore an affidavit deposing:

- That she is absolutely certain that she never drove Denis Gaudreault home from her home in Orleans;
- That she is certain that she never observed the following:
 - Mr. Gaudreault entering her home accompanied by Mr. Sauve, Mr. Trudel, Mr. Mallory and the Applicant at 10:00p.m. on a school night;
 - Mr. Trudel running around the house "like a chicken with his dead cut off", saying "he got it twice and the bitch got done in the back";
 - Mr. Mallory sweating at the kitchen table; and
 - Mr. Gaudreault retrieving a bag of guns from the back seat of her car.⁴³

39. On May 31, 2006, Ms. Beland was cross-examined by crown counsel on this affidavit, her evidence over the years and the various statements she has made to the police.⁴⁴

⁴² Further Evidence Record, v. 1, Tab 5, pp. 5-7.

⁴³ Affidavit of Linda Beland, July 6, 2005, para. 15: Further Evidence Record, v. 1, tab 2.

PART III: ISSUES AND THE LAW

(I) THE LAW RESPECTING THE ADMISSION OF FRESH EVIDENCE ON APPEAL

40. In *Palmer and Palmer v. The Queen*, the Supreme Court set out a four prong test for the admissibility of fresh evidence on appeal:

- 1) The evidence should generally not be admitted, if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in a civil case;
- 2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue at trial;
- 3) The evidence must be credible in the sense that it is reasonably capable of belief, and
- 4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.⁴⁵

(i) Due Diligence

41. While an important consideration, due diligence is not a condition precedent to the admissibility of fresh evidence.⁴⁶ As Doherty J.A. explained in *R. v. M.(P.S.)*, while the latter three criteria of the *Palmer* test are conditions precedent, the due diligence requirement focuses on the integrity of the trial process, the need for finality and the limited scope of Appellate review. While not determinative, it must be accorded due weight in assessing the admissibility of fresh evidence.⁴⁷

⁴⁴ Deposition of Linda Beland, Ottawa, May 29, 2006: Further Evidence Record, v. 1, Tab 3.

⁴⁵ *Palmer and Palmer v. The Queen* (1979), 50 C.C.C. (2d) 193 at 205 (S.C.C.); *R. v. Warsing* (1998), 130 C.C.C. (3d) 259 at 284-84; *R. v. Levesque* (2001), 148 C.C.C. (3d) (SCC) 193 at 202-203; *R. v. Smith* (2002), 161 C.C.C. (3d) 1 (Ont. C.A.) at 24-25.

⁴⁶ *R. v. Warsing*, *supra*, at 286; *R. v. Levesque*, *supra*, at 202; *R. v. M.(P.S.)*, (1992), 77 C.C.C. (3d) 402 (Ont. C.A.); *R. v. Smith*, *supra*, at p. 25, para. 71.

⁴⁷ *R. v. M.(P.S.)*, *supra*, at p 410, referred to with approval by the Supreme Court in *R. v. Levesque*, *supra*, at para. 14.

42. Due diligence does become particularly important when the evidence was available at trial and was not introduced as a matter of trial strategy - unless incompetence of counsel can be demonstrated or a miscarriage of justice has occurred.⁴⁸ Speaking for this Court in *R. v. Smith Simmons* J.A. held that:

Absent incompetence, tactical decisions not to present evidence, or not to pursue remedies for obtaining evidence at trial must generally preclude satisfaction of the first *Palmer* criterion. The interest of justice in finality in criminal process requires that such decisions weigh significantly against admission of the same evidence. Nevertheless, where a decision was made not to pursue a remedy for obtaining evidence at trial, "assessment of the totality of circumstances" may involve consideration of both the realistic likelihood of obtaining the evidence at trial and the strength of the proposed evidence.⁴⁹

43. Ultimately, as Carthy J.A. put it, in *R. v. C. (R.)* a failure to meet the due diligence requirement should not "override accomplishing a just result".⁵⁰

44. The due diligence consideration is intertwined with the Applicant's allegation that Ms. Mulligan was incompetent.⁵¹ As indicated above, shortly after Ms. Beland testified, Mr. Stewart surreptitiously recorded a conversation he had with her while his trial was ongoing. In that conversation, Ms. Beland states that she never drove Mr. Gaudreault home. That tape was provided to trial counsel by Mr. Stewart's father and was thus available for use at Mr. Stewart's trial.

45. It is the position of Mr. Stewart that Ms. Mulligan, having come into possession of the tape, should have recalled Ms. Beland to the stand. Mr. Stewart will submit that Ms.

⁴⁸ *R. v. B.(G.D.)* (2000), 143 C.C.C. (3d) 289 (S.C.C.) at 297 (paras. 21-22).

⁴⁹ *R. v. Smith* (2002) 161 C.C.C. (3d) 1 (Ont. C.A.) at 25-26. See also *R. v. B.(D.G.)* (1997), 133 C.C.C. (3d) 309 (Alta. C.A.) p. 325 (para. 34) affirmed by the Supreme Court of Canada, *R. v. B.(G.D.)*, (2000), 143 C.C.C. (3d) 289 (S.C.C.) at p. 297 (para. 21).

⁵⁰ *R. v. C.(R)* (1989), 47 C.C.C. (3d) 84 (Ont. C.A.) at p. 87,

⁵¹ This issue is also being advanced by Mr. Stewart as a distinct ground of appeal.

Mulligan's failure to either introduce the tape into evidence or recall Ms. Beland to the stand establishes:

- (i) That Ms. Mulligan was ineffective in her defence of Mr. Stewart; and
- (ii) That Ms. Mulligan was part of a conspiracy to frame Mr. Stewart for a murder he did not commit so that Mr. Lockyer could secure a lucrative legal appeal certificate;⁵²

46. Irrespective of whether the Applicant can establish ineffective assistance of counsel, he further submits that the due diligence criteria must nonetheless be considered in relationship to the *cogency* of the proposed fresh evidence in order to determine whether it is "in the interests of justice" pursuant to s. 683(1)(d) of the *Criminal Code* that it be received in support of his appeal.

(ii) Relevance

47. As Rosenberg J.A., explained in *R. v. Babinski*, in cases where an important Crown witness has recanted their evidence after trial, there are two potential aspects in which the proposed fresh evidence may be relevant. The first relates to the recantation itself in that an assertion made by the witness and relied upon by the Crown at trial has been repudiated.⁵³ In other words, the incriminating evidence has ceased to exist. The second area is the credibility of the witness. A witness who does not remain consistent is often of

⁵² *Amicus* has followed the ineffective assistance protocol established by the Court following *R. v. Elliott*. Ms. Mulligan responded to Mr. Stewart's allegations of ineffective assistance of counsel in a letter dated March 6, 2006. While crown counsel has not obtained an affidavit from Ms. Mulligan Mr. Stewart has advised *amicus* that he wishes that letter of Ms. Mulligan be put before this Honourable Court. As a result, the "Elliott" letters from Mr. Di Luca to Ms. Ms. Mulligan are contained in Further Evidence Record at Volume iv, Tabs 15, 16 and 17. Ms. Mulligan's response is contained at Tab 18.

⁵³ This case is somewhat different from *Babinski* and *Trudel and Sauve* because the witness in this case has not resiled from the recantation. As a result, the Applicant submits that the Court does not have to assess the *reliability* of the circumstances in which the initial recantation was made. The issue thus falls to be determined on either due diligence considerations or the *credibility* of Ms. Beland's post trial testimony statements to Mr. Stewart and *amicus*.

questionable credibility. As a result, the recantation creates a new reason, not apparent to the trier of fact at trial, to doubt the witnesses word.⁵⁴

(iii) Credibility

48. The issue of credibility is also a two-pronged inquiry. The court must first consider whether the evidence that the witness recanted (i.e. the evidence of the person to whom the recantation is made, where the declarant has resiled from the recantation) is credible. If the circumstances are reliable the Court must go on to consider whether the substance of the recantation is credible, that is, whether the recantation is true.⁵⁵ In this case, Mr. Stewart submits that the *credibility* and *truth* of the recantation is established for the following reasons:

- (1) Ms. Beland recanted to him in a transcribed and recorded telephone conversation shortly after she testified;
- (2) She further recanted during another conversation with Mr. Stewart in 2003;
- (3) She provided a KGB statement to *amicus* affirming this recantation;
- (4) She has executed two affidavit affidavits affirming the recantation;
- (5) She was cross-examined on this recantation by Crown counsel on May 29, 2006 confirming her recantation.

49. In this case, it must be borne in mind that *Palmer* only requires that that appellant demonstrate that the proposed fresh evidence is *reasonably capable* of belief. As Rosenberg J.A. explained in *Babinski*,

⁵⁴ *R. v. Babinski* (1999), 135 C.C.C. (3d) 1 (Ont. C.A.) at pp. 22-23. See also *R. v. Travenor*, [2001] O.J. No 207 at para. 26 (Ont. C.A.) where the threat of recantation was relevant to the witnesses credibility.

⁵⁵ *R. v. Babinski*, at p. 23-25.

In some cases, the court of appeal may be satisfied, based on its own assessment of the proposed fresh evidence, that it is truthful and reliable. On the other hand, in many cases, the court, while unable to make that determination, may also be unable to reject the evidence as not credible. Such evidence is, in my view, reasonably capable of belief within the meaning of the third Palmer requirement. It would not be rejected at the credibility stage, since evidence that is not rejected as incredible is still capable of affecting a verdict in a criminal case.

50. Since a court of appeal is not well situated to determine issues of credibility, where it is open to a trier of fact to come to a conclusion either way, that assessment is best left to that forum.⁵⁶ Mr. Stewart submits that the evidence is reasonably capable of belief because:

- 1) The recantations have been recorded and or have been under oath;
- 2) Ms. Beland has now been told all of the circumstances in which her involvement was described by Mr. Gaudreault and has denied that it occurred or that it was possible that she would do such a thing;
- 3) Her recantation is consistent with the first statement to the police in October, 1993 that she never drove Gaudreault home;
- 4) There is no reason for her to fabricate her recantation as she is no longer married to Mr. Stewart and he has been in custody for some 16 years.

e) The Effect on the Verdict

51. In a trial by jury, it is difficult to know what weight a jury placed on any particular piece of evidence. It is therefore appropriate, when considering the effect of fresh evidence on the verdict, to look to the charge to the jury and the addresses of counsel in order to evaluate the prominence of the trial evidence that is affected by the fresh evidence.⁵⁷

⁵⁶ *Babinski*, at pp. 26-27; *R. v. Druken* [1997] N.J. No. 183 at para. 11-13 (C.A.); *R. v. P.P.*, [1992] O.J. No. 1799 (C.A.); *R. v. Poléra* [1994] O.J. No. 1234 at para. 5 (Ont. C.A.).

⁵⁷ *Babinski*, *supra*, at 32.

Indeed, fresh evidence need not be determinative of guilt or innocence to be admitted, it need only “conceivably have affected the jury’s conclusion” on the credibility of an important witness, in the language of McLachlin J. (as she then was in *R. v. C.(M.H.)*).⁵⁸

52. In this case, if Mr. Gaudreault is to be believed, Ms. Beland was wittingly or unwittingly an accessory after the fact to a double homicide. She is the only witness (other than Jamie Declare, whose own evidence is subject to its frailties) who can corroborate, Denis Gaudreault’s testimony about the events following the murders. Indeed, the Crown described her as a very valuable witness in her address to the jury.

53. The Applicant submits that it is clear from the jury addresses that his counsel sought to minimize the impact of Ms. Beland’s evidence on this issue. In short, she argued that Ms. Beland would remember such an event if it actually occurred. Counsel for Mr. Mallory did not mention it whatsoever.

54. The Crown on the other hand relied heavily on the evidence of Ms. Beland to corroborate Mr. Gaudreault. She reminded the jury repeated during her address that it would not make sense to introduce a witness who could contradict Mr. Gaudreault on a material point, that Mr. Stewart had manipulated Ms. Beland in her earlier statements about whether she drove Mr. Gaudreault home, that in any event it was an innocuous event one that was probable she would not remember.

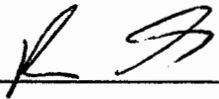
⁵⁸ *R. v. C.(M.H.)* (1991), 63 C.C.C. (3d) 385 at 395-396; *R. v. Yanover and Gerol* (1985) 20 C.C.C. (3d) 300 at 317-319; *R. v. Stolar* (1988), 40 C.C.C. (3d) 1 at 10 (S.C.C.); *R. v. Thomson* (1995), 102 C.C.C. (3d) 350 at 356-57, 361-362; *R. v. Roy* (1989), 73 C.R. (3d) 291 at 300-304 (Que. C.A.).

55. The Appellant submits that the evidence of Ms. Beland was crucial corroborative evidence. That evidence no longer exists. As a result, Mr. Stewart submits that the affidavit of Linda Beland sworn July 6, 2006 be received by this Honourable Court in support of his appeal.

**PART IV
ORDER REQUESTED**

56. The Applicant requests that pursuant to s. 683(1)(c)-(d) of the *Criminal Code* that this application be allowed and the fresh evidence be received by the Court in support of the Appellant's conviction appeal.

DATED AT MILLHAVEN ONTARIO THIS THE 12 DAY OF OCTOBER, 2006.



ROBERT STEWART

THE APPLICANT REQUESTS

FOR ARGUMENT OF THIS APPLICATION

**APPENDIX “A”
CASES TO BE CITED**

1. *Palmer and Palmer v. The Queen* (1979), 50 C.C.C. (2d) 193 (S.C.C.)
2. *R. v. Warsing* (1998), 130 C.C.C. (3d) 259 (S.C.C.)
3. *R. v. Levesque* (2001), 148 C.C.C. (3d) 193 (SCC)
4. *R. v. Smith* (2002), 161 C.C.C. (3d) 1 (Ont. C.A.)
5. *R. v. M.(P.S.)*, (1992), 77 C.C.C. (3d) 402 (Ont. C.A.)
6. *R. v. B.(G.D.)* (2000), 143 C.C.C. (3d) 289 (S.C.C.)
7. *R. v. C.(R)* (1989), 47 C.C.C. (3d) 84 (Ont. C.A.)
8. *R. v. B.(D.G.)* (1997), 133 C.C.C. (3d) 309 (Alta. C.A.)
9. *R. v. Babinski* (1999), 135 C.C.C. (3d) 1 (Ont. C.A.)
10. *R. v. Travenor*, [2001] O.J. No 207 (Ont. C.A.)
11. *R. v. Druken* [1997] N.J. No. 183 (Nfld. C.A.)
12. *R. v. P.P.*, [1992] O.J. No. 1799 (Ont. C.A.)
13. *R. v. Polera* [1994] O.J. No. 1234 (Ont. C.A.)
14. *R. v. C.(M.H.)* (1991), 63 C.C.C. (3d) 385 (S.C.C.)
15. *R. v. Yanover and Gerol* (1985) 20 C.C.C. (3d) 300 (Ont. C.A.)
16. *R. v. Stolar* (1988), 40 C.C.C. (3d) 1 (S.C.C.)
17. *R. v. Thomson* (1995), 102 C.C.C. (3d) 350 (Ont. C.A.)
18. *R. v. Roy* (1989), 73 C.R. (3d) 291 at 300-304 (Que. C.A.)

SCHEDULE “B”

RELEVANT LEGISLATIVE PROVISIONS

POWERS OF COURT OF APPEAL

683. (1) For the purposes of an appeal under this Part, the court of appeal may, where it considers it in the interests of justice,

.....

(c) admit, as evidence an examination that is taken under subparagraph (b)(ii);

(d) receive the evidence, if tendered of any witness, including the appellant, who is a competent but not compellable witness.