How Adjudicators Make Decisions

Chief Justice Noel H. A. GOODRIDGE[1]

[1] Court of Appeal for Newfoundland, St. John's, Newfoundland.

I. PART ONE: R. v. GILES[1]

On June 14, 1986 three off duty policemen and two women departed from a club on George Street which is the heart of night life in downtown St. John's, Newfoundland. One of the policemen, whose name was Day, accompanied by one of the women left in one direction to retrieve a parked car; the other two policemen, named Giles and Ash, went in another direction to fetch their car. The other woman remained outside the club waiting for Giles, her date, to return to the car. As Giles returned, a gentleman by the name of Daniel Fleming made offensive remarks directed at the woman. This angered Giles who confronted Fleming. Ash joined the confrontation and Day followed moments later.

The Crown evidence was that Giles and Ash attacked Fleming physically. The defence evidence was that Fleming attacked Giles, that Ash tried to separate them and that Day tried to prevent another party from interceding. Fleming suffered facial bruises and lacerations and required stitches. Ash and Giles were both charged with assault.

The five Crown witnesses who testified gave an account of what happened that was significantly different from the account given by the defence witnesses. Their evidence, if believed, could have resulted in a guilty verdict.

The trial judge acquitted Ash and Giles. In his decision, he dealt briefly with the law of reasonable force and with the evidence of Giles and Ash and then simply said "I have a reasonable doubt".

The case was appealed to the summary conviction appeal court. The appeal judge overturned the acquittal and substituted a conviction. His reversal was on the basis that the judgment of the trial judge disclosed a lack of appreciation of relevant evidence and, more particularly, a complete disregard of such evidence. He referred to *Harper* v. *The Queen*.[2]

The case was subsequently appealed to the Court of Appeal which reversed the summary conviction appeal judge and reinstated the verdict of acquittal. The appeal court held that it was an error of law for the appeal judge to reassess the evidence and substitute a conviction for an acquittal. There is a companion case to *R.* v. *Giles.* Which is *R.* v. *Sall.*[3] Those two cases were heard by five member panels and the principal issue dealt with the jurisdiction and power of a summary conviction appeal court judge on an appeal from acquittal.

Section 686 deals with the powers of the Court of Appeal on an appeal from acquittal or a conviction on a charge by indictment. This section is made applicable to summary conviction appeals by section 822 of the Criminal Code. Section 822 says that section 686 applies with such modifications as the circumstances require. Section 686(1) provides that, on an appeal from conviction, the conviction may be set aside if it is unreasonable or unsupported by the evidence.

Section 686(4) deals with appeals from acquittals. There is no direction with regard to allowing an appeal from acquittal such as appears in section 686(1) with regard to allowing an appeal from conviction. It provides that on an appeal from acquittal the appeal judge may allow the appeal, set aside the verdict and order a new trial or enter a verdict of guilty with respect to the offence of which, in its opinion, the accused should have been convicted but for the error of law.

It is difficult to apply the same test for allowing an appeal from acquittal that is provided for on an appeal from conviction. It can never be said that a reasonable doubt is unsupported by the evidence and it is difficult to conceive of circumstances when it can be said that what a trial judge considers to be a reasonable doubt is unreasonable. The original appeals in *Ash* and *Giles* and in *Saul* were appeals on questions of fact. In *R.* v. *Antonelli,*[4] the Court of Appeal of British Columbia in applying the *mutatis mutandis* principle suggested that the wording "but for the error in law" appearing in section 686(4) should be deleted when there is a summary conviction appeal on a question of fact. That decision has come into question and it may be that the issue has not yet been finally settled.

That question is not however the main point of this discussion. The discussion is directed towards fact finding by a trial judge. To what extent, if at all, should a trial judge in rendering a decision expressly deal with vital evidence which, if believed, would support a conviction or a reasonable doubt? In a case where there is evidence pointing to one conclusion and the trial judge reaches the opposite conclusion, should the trial judge state either that he has rejected that evidence or that it has not created a reasonable doubt? Should he give reasons for rejecting that evidence? If he does not, has justice been done to the parties?

The problem is highlighted in *Giles* and *Ash* because there was in that case a substantial body of evidence from independent witnesses indicating that the accused persons were guilty. It is true, of course, that the judge must acquit if the defence evidence, although not believed, leaves the judge with a reasonable doubt. In that case, the judge did not mention the evidence which, if believed, could have resulted in a conviction. He simply said that he had a reasonable doubt.

The trial judge in *Giles* and *Ash* might have said that the Crown witnesses were far away or had been drinking or that it was dark or that there were too many people there for a clear view. He might have said that the defence witnesses testified in a forthright manner. He might have showed how he reached that decision. In short, he might have said why he had a reasonable doubt.

If a trial judge fails to show how he has reached a decision, it is most difficult for the parties to determine whether to appeal and for the appeal court to determine whether the appeal should be allowed. This problem is emphasised when there is vital evidence which, if believed, might have lead to a contrary decision but has not been expressly considered by the trial judge.

There does not appear to be any obligation on a trial judge to give reasons. Laskin, C.J. said in *MacDonald* v. *The Queen*:

> *It does not follow, however, that failure of a trial judge to give reasons, not challengeable* per se *as an error of law, will be equally unchallengeable if, having regard to the record,*

> *there is a rational basis for concluding that the trial judge erred in appreciation of a relevant issue or in appreciation of evidence that would affect the propriety of his verdict. When some reasons are given and there is an omission to deal with a relevant issue or to indicate an awareness of evidence that could affect the verdict, it may be easier for an appellate Court* [...] *to conclude that reversible error was committed.*[5]

The failure to indicate an awareness of evidence that could affect the verdict was more or less what happened in *Giles* and *Ash.* In that case, reasons were given but the reasons made no reference to the vital Crown evidence. The difference between *MacDonald* and *Giles* and *Ash* is that the former was an appeal from conviction which can be allowed where the verdict is unreasonable or unsupported by the evidence whereas the latter was an appeal from acquittal where there are no statutory standards. Laskin, C.J. in *MacDonald* also said:

> *Mere failure of a trial judge to give reasons, in the absence of any statutory or common law obligation to give them, does not raise a question of law.*[6]

A trial judge moreover is apparently not obliged to show in the decision that all of the evidence had been considered. Sopinka, J. said in *R.* v. *Morin*:

> *There is, however, no obligation in law on a trial judge to record all or any specific part of the process of deliberation on the facts* [...] *A trial judge must consider all of the evidence in relation to the ultimate issue but unless the reasons demonstrate this was not done, the failure to record the fact of it having been done is not a proper basis for concluding that there was an error in law in this respect.*[7]

Morin was a case not unlike *Giles* and *Ash* where the trial judge entered an acquittal on a charge of dangerous driving. The Alberta Court of Appeal held that the trial judge had not considered all of the evidence and that, if she had, she would have entered a conviction. The Supreme Court of Canada held that there is no obligation in law on a trial judge to record all or any specific part of the process of deliberation on the facts.

The Court distinguished *Harper*, pointing out that that was an appeal from conviction. The trial judge there treated as irrelevant evidence of several witnesses without an adverse finding with respect to their credibility. This was an error of law. In *Harper*, Estey, J. said:

> *An appellate tribunal has neither the duty nor the right to reassess evidence at trial for the purpose of determining guilt or innocence. The duty of the appellate tribunal does, however, include a review of the record below in order to determine whether the trial court has properly directed itself to all the evidence bearing on the relevant issues. Where the record, including the reasons for judgment, discloses a lack of appreciation of relevant evidence and more particularly the complete disregard of such evidence, then it falls upon the reviewing tribunal to intercede*.[8]

MacDonald and *Harper* were both cases that dealt with appeals from conviction. It is difficult, as noted by Sopinka J. in *Morin*, to apply *Harper* to cases of acquittal for which there is no statutory standard of review.

The case of *R.* v. *Roman and Alonso* involved an appeal from acquittal. It was heard initially in the Newfoundland Court of Appeal. The appeal decision is reported in 1987.[9] It was appealed to the Supreme Court of Canada, reported in 1989.[10] The facts in that case are complex. It is not proposed to summarize them. Marshall, J.A. in the Newfoundland Court of Appeal said:

> *There is a distinction between reassessment by an appeal court of evidence for the purpose of weighing its credibility to determine culpability on the one hand and, on the other, reviewing the record to ascertain if there has been an absence of appreciation of relevant evidence. The former requires addressing questions of fact and is placed outside the purview of an appellate tribunal by* [s. 676(1)(a)] *of the Code. The latter inquiry is one of law because, if the proceedings indicate a lack of appreciation of relevant evidence, it becomes a reviewable question of law as to whether this lack precluded the trial judge from effectively interpreting and applying the law.*[11]

The key words are "an absence of appreciation of relevant evidence", a term used by Estey, J. in *Harper*. In *Harper*, the charge was assault causing bodily harm. There were four witnesses

whose evidence might have created a reasonable doubt. The trial judge did not deal specifically with their evidence but noted in general terms that there were no other witnesses who observed the events.

Estey, J. speaking for the majority referred to the principle that the reviewing tribunal must be satisfied that a trial judge has wrongly failed to consider evidence which bears directly on the guilt or innocence of the accused before allowing an appeal.

There appears to be a distinction between the manner in which a trial judge should make findings of fact with respect to a conviction and with respect to an acquittal. This might be exemplified as follows.

Let us assume that a fish merchant is charged with shortchanging fishermen when delivering a hog's head of salt to them. A hog's head in the fishing industry is approximately 200 pounds. Let us assume it is 200 pounds exactly. It was usually delivered by merchants to fishermen in a wheelbarrow for the purpose of salting their catch. The evidence is that the salt is placed in the wheelbarrow provided by the merchant to a level which is recognized as being 200 pounds and is then delivered to the fishermen. There is no doubt that a wheelbarrow filled to the identified level contains a hog's head and the merchant is acquitted.

There was evidence, however, that the wheelbarrow of the merchant had become encrusted with salt over the years and that, when loose salt was poured into the wheelbarrow to the prescribed level, the encrusted salt, which did not fall from the wheelbarrow when the salt was delivered, occupied 10% of the volume. The result was that the fishermen, instead of receiving a hog's head, were receiving only 180 pounds of salt. The trial judge in entering an acquittal makes no finding of fact with respect to the encrusted salt. What happens on a Crown appeal?

Let us change the fact situation. This time the wheelbarrow, similarly encrusted, is provided by the fishermen. The trial judge enters a conviction and makes no finding with respect to the encrusted salt. What happens on appeal?

The evidence of encrusted salt, if believed, could have resulted in a guilty verdict in the first situation and an acquittal in the second situation. An appeal from conviction would almost certainly succeed; a Crown appeal might not.

In *R.* v. *B. (G.),*[12] the Supreme Court of Canada held that an appellate court exceeds its jurisdiction on a Crown appeal if it attempts to reassess the facts in order to determine whether the trial judge's findings were reasonable. An acquittal based on an erroneous conclusion of reasonable doubt constitutes a question of law where the trial judge has made an error as to the legal effect of undisputed or found facts rather than the inferences to be drawn from such facts. A question of law also arises where the trial judge misdirects himself with respect to the relevant evidence or when he fails to consider the evidence in its entirety.

That seems to provide the complete answer. The trial judge must consider the evidence in its totality. That is not really anything new. The problem is how an appeal court is to know whether a trial judge has done that unless he expresses his findings of fact and makes reference at least to the relevant evidence which might, if believed, lead to a conclusion contrary to the conclusion reached by him.

Although the decision of the Newfoundland Court of Appeal in *Roman and Alonso* was overruled by the Supreme Court of Canada, the statement of Marshall, J.A. may, nevertheless, find a place in Canadian jurisprudence. The passage was quoted by Wilson, J. in *R.* v. *B. (G.),*[13] with restrained approval. However, Sopinka, J. in *Morin* writing the decision for the Court said that failure to appreciate the evidence cannot amount to an error of law unless the failure is based on a misapprehension of some legal principle. He pointed out that the decision of Marshall, J.A. had been reversed.

The failure of a trial judge to state his findings of fact and to show thereby that the relevant evidence has been considered creates problems for appeal courts. It is not desirable to require busy trial court judges to make laborious references to all of the evidence and dispose of it on a piecemeal basis. In fact, piecemeal examination of evidence is wrong according to *R.* v. *Morin*,[14] where it was held that the criminal standard was to be applied to the ultimate issues and not in weighing individual pieces of evidence. However, the reasons should show that the individual pieces of relevant evidence have been brought into consideration in the determination of the ultimate issue. This may seem to be what the trial judge did not do in *Giles* and *Ash*. In fact he made no reference to the Crown evidence whatsoever.

According to *Morin*, there is no obligation in law on a trial judge to record all or any specific part of the process of deliberation on the facts. However, in *R.* v. *Anagnostopoulous*[15] the Newfoundland Court of Appeal sent back for a new trial a case in which there had been a conviction for sexual assault. The basis for sending it back was that the trial judge had failed to comment on the several inconsistencies between the evidence of the complainant and one of the other Crown witnesses, and had ignored altogether in his reasons vital evidence of one witness. That was similar to the hog's head case. The trial judge appeared to have disregarded vital evidence.

The Court there relied to some extent on a decision of the Ontario Court of Appeal in *R.* v. *Richardson*.[16] That was an appeal from a conviction for sexual assault. There was evidence before the trial judge which if believed might have resulted in an acquittal. The trial judge had not dealt with it. Carthy, J.A. speaking for the majority said:

> *There is no need that the reasons of a trial judge be as meticulous in attention to detail as a charge to a jury. In moving under pressure from case to case it is expected that oral judgments will contain much less than the complete line of reasoning leading to the result. Nevertheless, if an accused is to be afforded a right of appeal it must not be an illusory right. An appellant must be in a position to look to the record and point to what are arguably legal errors or palpable and overriding errors of fact. If nothing is said on issues that might*

otherwise have brought about an acquittal, then a reviewing court simply cannot make an assessment, and justice is not afforded to the appellant.

That is the case here. The trial judge clearly understood the difficulty arising from the evidence of contact between the parties in the days following May l2th but gave this court no means of judging whether he gave proper consideration to that evidence in reaching his conclusion. Superficially, that evidence appears credible and it certainly supports the position of the appellant. We just do not know what happened to it. For this reason there must be a new trial on count 1.[17]

The evidence referred to is evidence of a gynaecologist who formed the opinion that there had been sexual involvement between the parties on May l9, some seven days after the sexual assault was alleged to have occurred.

Carthy, J.A. also referred to the decisions of the Supreme Court of Canada in *Ungaro* v. *The King* and *Richler* v. *The King*.[18] In *Ungaro*, Rinfret, C.J.C. said:

It is manifest, upon the reasons of the trial judge, that he did not apply his mind to the question whether `the explanation may reasonably be true, though he was not convinced that it was true'. Indeed he did not refer to that explanation at all, despite the fact that the reasonableness of the explanation was the main point to be considered in the case.

I do not mean that a trial judge is obliged in his judgment to give all the reasons which lead him to the conclusion that an accused is guilty. Undoubtedly if he finds one valid reason why he should reach that conclusion it is not necessary that he should also give other reasons. It is imperative, however, that he should give a decision upon all the points raised by the defence which might be of a nature to bring about the acquittal of the accused.

The second paragraph of that passage is significant, particularly the last sentence which provides that a trial judge should give a decision on all points raised by the defence which might be of a nature to bring about the acquittal of the accused.

There is a question, however, as to whether the first paragraph should be taken out of the context in which it appears. Both *Ungaro* and *Richler* dealt with possession of stolen goods. It was provided in *Richler* that such a charge might be successfully defended if the accused offered an explanation which might reasonably be true, whether the trial judge believed it or not.

In *R.* v. *Johnston*,[19] there was a summary conviction appeal from a drunken driving conviction. The Court said that the trial judge elected to determine which of the police witness or the accused had been telling the truth when he should have been considering whether the defence version might reasonably have been true. This view comes from *Richler* and is in my opinion wrong. The test, well known now to all lawyers and judges, is set out by the Supreme Court of Canada in *R.* v. *W. (D.)*.[20] There it is said that to acquit, you must believe the accused or, if you do not believe him, you are left with a reasonable doubt by it or, viewing the evidence as a whole, you have a reasonable doubt as to his guilt.

Support for the school of thought that reasons must be given is to be found in *R.* v. *Barrett*.[21] In that case the appellant was convicted on ten counts of robbery. His conviction was largely sustained on the basis of a statement which the appellant made to police and which the judge ruled as admissible following a *voir dire*, but without giving reasons. The issue on appeal was not so much the guilt or innocence of the accused but whether or not the statement made by him was admissible. Arbour, J.A. gave the majority decision and said that reasons must be given for findings of facts made upon disputed and contradicted evidence and upon which the outcome of the case is largely dependent. She was there addressing a judgment with respect to the admissibility of the statement following a *voir dire*. It may be that her remarks are equally applicable with respect to a final judgment based on questions of fact.

In *R.* v. *Robson*,[22] a decision of Granger, J. of the Ontario Court General Division, there was evidence that the breathalyser might have been wrongly calibrated. The trial judge in his reasons did not refer to that evidence. Granger, J. sitting as a summary conviction appeal court

found that the trial judge did not appreciate the significance of the evidence and ordered a new trial.

Those decisions underline the problems faced by appeal courts when trial judges fail to deal with significant evidence. They were, however, appeals from conviction where, in the absence of reasons, an appeal court may examine the evidence to test the conviction for reasonableness. This cannot be done where there is an appeal from an acquittal.

There seems to be a growing school of jurisprudence that judges should give reasons for their decisions that are sufficiently stated to enable an appellate court to determine that the trial judge has considered all of the relevant evidence in reaching a conclusion. It seems logical that that concept should apply equally to all cases, whether resulting in conviction or acquittal. I would define relevant evidence as evidence which, if believed, might have resulted in a different verdict than that reached by the trial judge.

II. PART TWO: FACT FINDING

A. Issues

The first step in fact finding is for the trial judge to understand the issues. This requires that solicitors in preparing pleadings accept the responsibility for determining what the issues in their clients case are and frame their pleadings accordingly. The evidence can then be directed toward the determination of those issues.

A judge should examine the pleadings before commencing a case to ensure that the issues are clearly stated and that there is no misunderstanding among the judge and the parties as to what the issues are.

B. Facts

The facts are what a judge determines to be the truth of a case after the evidence has been heard. There are three sets of facts - the peripheral facts, the basic facts and the ultimate facts.

The presentation of evidence in a case is somewhat like the painting of a picture. The peripheral facts are the background of the picture showing the setting in which the basic facts occur. They are not essential to the resolution of the issues but they assist the judge in an understanding of the basic facts, just as taking a view does.

The basic facts are the details of the painting. Unlike the background or peripheral facts, the basic facts must be shown with precision and clarity for this is what the picture is all about.

The ultimate fact is what you see when the picture is completed. If a court of appeal does not see the same things that the trial judge sees when the picture is complete, there may be reversible error.

The evidence should be pertinent. A great deal of court time is wasted in the presentation of too much background evidence, irrelevant evidence and evidence of facts that could have been agreed on.

C. Deal with the Evidence

As an appeal judge, I encourage trial judges to deal expressly with all of the evidence which, if believed, would affect the outcome - to indicate that the evidence has been considered and that it is either accepted or rejected, or that it raises or fails to raise a reasonable doubt.

D. Be Patient

Evidence may be initially confusing. Competent counsel may be expected to bring it all together during the progress of a case. They should be allowed to develop their own cases and

should not be pressed to alter their presentation. This may result in evidence being overlooked or receiving more or less attention that it merits. Knowing all the law in the world is of no use unless the facts are known.

E. Credibility

For anyone who has given or heard a jury charge, the tests of credibility will be so familiar that there is no point in repeating them here. It is largely a matter of common sense. A judge will quickly discern whether a witness is telling the truth or lying. In those grey areas where the distinction between truth and falsehood is not immediately apparent, the trial judge must wait until the evidence is complete. At that time there will be generally one or more indicators as to whether the questionable evidence was true or false.

F. The Forgetful Witness

Judges and counsel alike will be familiar with the forgetful witness - the witness who remembers everything on direct examination but forgets the answers to those embarrassing questions that come up on cross-examination. There is not much to be done about it. The answers which the forgetful witness did not provide will generally be provided by other witnesses. Less credit should be given to the forgetful or evasive witness than to witnesses who are completely candid.

G. Accept the Logical Version

Where there is a conflict in the evidence which cannot be resolved by determining which of two witnesses is lying, the rule is generally to accept the evidence that makes the most sense. In a case, for example, where a man alleges that he was struck without provocation and the assailant alleges that he was provoked, it is generally more sensible to accept the evidence of provocation as a person is unlikely to strike another without provocation.

H. Measurements

Most witnesses are notoriously unreliable when it comes to estimating time, speed, distance and frequency. Time, speed and distance can generally be determined with a fair degree of accuracy and the use of common sense. Where measurement is an important feature of a case, solicitors preparing the case should take steps to provide evidence in that respect which is as precise as possible.

Witnesses generally exaggerate the frequency with which certain events such as, for example, sexual assault took place. They will describe something as lasting a minute which only lasted a few seconds. They will say that something that actually happened five years ago happened 10 years ago. They cannot read a survey plan.

It is necessary for solicitors to go over the evidence of dimension with witnesses in advance, to make them think about their testimony. Anything that is capable of being measured should be measured. When giving what is basically opinion evidence to such things as speed or time lapse, they should be made to think about it beforehand. Minor discrepancies do not discredit a witness but matters of dimension are frequently crucial and the evidence must be as accurate as possible.

I. Actuarial Evidence

Actuarial evidence is essential for the determination of lost future income. The old English method was to use a multiplier and a multiplicand - one being lost annual income, the other being the number of years that it was anticipated that the income would be lost. It would be adjusted according to what would frequently be called the vicissitudes of life.

The actuarial method is more accurate but still has to be adjusted according to the vicissitudes of life. There is a relatively simple formula for the determination of the present day value of lost future income.

J. Taking a View

Taking a view was a practice which appears to have fallen into disuse. Sometimes of course it is impractical particularly where great distances are involved. The taking of a view is to assist the judge and the jury, if there is one, in understanding the evidence. It is not evidence in itself but is a valuable tool in fact finding.

K. Photographs

I personally have never received much value out of photographs. More often than not they are polaroid pictures taken the day before the trial. In criminal cases the police generally provide an elaborate set of photographs. I have no criticism of their use but for some reason seldom find them helpful. I much prefer plans.

L. Make the Witness Comfortable

Most witnesses are nervous. Counsel should put them at ease by asking a few simple questions at the outset. The stern judge should soften his or her countenance. A relaxed witness will give more lucid evidence than a nervous one.

Many witnesses have a limited vocabulary. It therefore takes a bit of time to obtain a coherent statement from them.

M. Corroboration

Corroboration is not now generally required. However, in *R.* v. *Vetrovec*[23] corroboration was considered to be a matter of common sense. The court or jury will expect something in the nature of confirmatory evidence before the finder of fact relies upon the evidence of a witness whose testimony occupies a central position in the purported demonstration of guilt and yet may be suspect by reason of the witness being an accomplice, complainant or other disreputable character.

N. Expert Evidence

This is one of the greatest problems that I ever had to face when I was a trial judge. Qualified experts with unimpeachable credentials will give conflicting evidence concerning a central issue in a case. It would be useful to have an assessor to advise the judge in such cases. This as far as I know is not provided for in the rules of court of the provinces of Canada. Without the assistance of an assessor, I can offer no suggestions as to how to resolve different opinions between highly qualified experts. Frequently however there will be other evidence, mathematical or technical evidence, for example, that will put the judge in the right direction.

O. Hearsay Evidence

If what is said by a third party is relevant to an issue before court, it is admissible. If the truth of what is said by a third party is relevant to an issue it is not admissible. This simple rule is frequently misunderstood and counsel will rush to challenge what appears to them to be hearsay evidence. Counsel should not challenge and judges should not exclude hearsay evidence that is simply part of the narrative, part of the peripheral facts, unimportant to the final result or evidence that appears to be but is not really hearsay. Hearsay evidence is now admissible in any event if it is inherently reliable.[24]

P. Questions by the Judge

While a judge should not interrupt the progress of examination or cross-examination, it is sometimes useful to ask counsel to clarify certain points along the way so that the balance of the evidence may be better understood. A judge, during the questioning by counsel, should note the questions that he or she wishes to put and put them to the witness when the examination by counsel is complete. Upon completion of those questions, the judge should generally ask if there are questions arising.

Q. Go with the Flow

A judge should go where the evidence takes him or her. If he or she finds that, when trying to arrive at an anticipated result, there are continually objects in his or her way, he or she is going in the wrong direction. When I found myself in that position I considered that I was swimming upstream. I generally turned and went around the other way and found the going much easier. I went with the flow.

FOOTNOTES

1. *R* v. *Giles* (1990), 54 C.C.C. (3d) 66 (Nfld. C.A.).

2. *Harper* v. *The Queen*, [1982] 1 S.C.R. 2.

3. *R.* v. *Sall* (1990), 54 C.C.C. (3d) 48.

4. *R.* v. *Antonelli* (1978), 38 C.C.C. (3d) 206 (B.C.C.A.).

5. *MacDonald* v. *The Queen*, [1977] 2 S.C.R. 665 at 673.

6. *Ibid.* at 672.

7. *R.* v. *Morin*, [1992] 3 S.C.R. 286 at 296.

8. *Supra* note 2 at 14.

9. *R.* v. *Roman and Alonso* (1987), 38 C.C.C. (3d) 385 (Nfld. C.A.).

10. *R.* v. *Roman and Alonso*, [1989] 1 S.C.R. 230.

11. *Supra* note 9 at 391.

12. *R.* v. *B. (G.)*, [1990] 2 S.C.R. 57.

13. *Ibid.* at 74.

14. *R.* v. *Morin*, [1988] 2 S.C.R. 345.

15. *R.* v. *Anagnostopoulous* (l993), (Nfld. C.A.) [unreported].

16. *R.* v. *Richardson* (l992), 74 C.C.C. (3d) l5 (Ont. C.A.).

17. *Ibid.* at 23.

18. See *Ungaro* v. *The King*, [l950] S.C.R. 430 at 432 and *Richler* v. *The King*, [l939] S.C.R. l0l.

19. *R.* v. *Johnston* (1987), 65 Nfld. & P.E.I.R. 89 (P.E.I. T.D.)

20. *R.* v. *W. (D.)*, [1991] 1 S.C.R. 742.

21. *R.* v. *Barrett* (1993), (Ont. C.A.) [unreported].

22. *R.* v. *Robson* (1993), [unreported].

23. *R.* v. *Vetrovec*, [1982] 1 S.C.R. 811.

24. *R.* v. *Khan*, [1990] 2 S.C.R. 531.