The Unrepresented Accused : Duties and Obligations of Trial Judges and Crown Counsel, and the Preparation of Petitions for State-Funded Counsel

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The jurisprudence of the 1980's talked about those "exceptional"[1] cases where Legal Aid would be refused to applicants. In stark contrast to the jurisprudence of the earlier decades, the 1980's courts seemed to take for granted that the era when funding for Court-appointed counsel would depend on the possibilities of incarceration, or loss of livelihood, was gone.[2]

Far from being gone, it is back, and back with a vengeance in every district of the country, as Legal Aid budgets are slashed nationwide. The jurisprudence now reflects this dramatic reversal, defining a phenomenon to be dealt with in this decade, and possibly into the next century : that of the unrepresented accused and the criminal trial.[3]

This, perhaps not new but steadily growing, reality raises three fundamental, and not easy, questions which will be dealt with in the following part of this paper.

The first is how much, or how little, is to be expected of trial judges who struggle to ensure the fairness of the trial process when they are faced with unrepresented accused persons?

The second concerns those duties and obligations resting on the shoulders of Crown counsel. These attorneys find themselves in an adversarial position to the unrepresented accused and yet, against this adversarial backdrop, must temper their every move with the duty to act fairly incumbent upon them and their obligations as officers of the court.

Finally, defence counsel will need to be aware that the proceedings to petition courts for the appointment of counsel funded by the state, in cases where an accused is impecunious and the Legal Aid Program has refused funding, are more and more complex. These petitions require specific types of evidence as the courts attempt to sift out those cases where fairness and the interests of justice do not require the provision of state-funded counsel.

I. THE DUTIES AND OBLIGATIONS OF TRIAL JUDGES

A. Duty to Ensure the Fairness of the Proceedings

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1. *R.* v. *Rowbotham et al.* (1988), 41C.C.C. (3d) 1; *Deutsch* v. *The Law Society of Upper Canada Legal Aid Fund, Lawson and Legge* (1985), 48 C.R. (3d) 166.

2. For the earlier perspective, see : *Ewing and Kearney* v. *The Queen*, 18 C.C.C. (2d) 356; *White* v. *The Queen* (1976), 32 C.C.C. (2d) 478.

3. Repeatedly, in recent years, courts refer to this phenomenon. For some examples, see : *R.* v. *Martin*, [1966] O.J. No. 4343 (Ont. Prov. Div.), Stone, P.J.; *R.* v. *Laycock*, [1996] O.J. No. 3846, (Ont. Gen. Div.), Eberhard J., October 21; *R.* v. *Hill*, [1996] O.J. No. 677, (Ont. Prov. Div.), Bentley, P.J., February 16.

It is elementary to state that trial judges have a duty to insure that the trial process is fair.[4] This duty is the basis for the power which permits trial courts to order stays of proceedings conditional on the appointment of state-funded counsel in cases where the trial court believes that the process will be unfair without counsel.[5] This power exists whether the trial court is a federally or provincially appointed court.[6]

But, practically speaking, what does this duty mean? How involved should a trial judge become in the unfolding of the defence when the accused is unrepresented? Too little involvement will, in many situations, result in an appeal invoking the apparent lack of fairness in the trial process. Too much will lead to an appeal based on a reasonable apprehension of bias.[7]

B. Waiver of Right to Counsel

The first duty of the trial judge, and perhaps the most important, is to assure herself that the unrepresented accused does not wish to be represented by counsel.[8] Arguably, this would include advising an accused who wishes to be represented, but who claims to be without financial means, of the availability of Legal Aid. If the accused has already been refused Legal Aid, it may include informing the accused that he has a right to petition the Court to appoint counsel if he believes that without counsel he cannot have a fair trial.[9]

Before concluding that an individual has waived his or her right to be represented by counsel, the trial court should be cautious in remembering that the Supreme Court of Canada has consistently maintained that a waiver from an unrepresented individual must meet the standards set forth in the case of *Korpornay* v. *Canada (A.G.)*. That is, the validity of any waiver is "dependent upon it being clear and unequivocal that the person is waiving the procedural safeguard and is doing so with full knowledge of the rights the procedure was enacted to protect and of the effect the waiver will have on those rights in the process."[10]

In the case of *R*. v. *Mills*, when discussing the question of unreasonable delay, the Supreme Court of Canada stated in 1984 that a waiver from an unrepresented

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4. *R.* v. *McGibbon* (1988), 45 C.C.C. (3d) 334.

5. *R.* v. *Rowbotham, supra* note 1.

6. *White* v. *The Queen, supra* note 2 at 490.

7. *R.* v. *Selkin*, [1994] O.J. No. 2143, (Ont. C.A.), September 20; *R.* v. *Sansone*, [1992] O.J. No. 3728, (Ont. Prov. Div.) Knaza, J., May 19; *R.* v. *Turlon* (1989), 49 C.C.C. (3d) 186 (Ont. C.A.).

8. *R.* v. *Barrette*, 29 C.C.C.(2d) 188.

9. *R.* v. *Krzak*, [1996] O.J. No. 3096; (Ont. Prov. Div.), July 23. Comments of the Court in this case indicated that the Court required evidence to be presented. The question becomes, who will inform the accused of the obligation to present evidence?

10. *Korpornay* v. *Canada (A.G.)*, [1982] 1 S.C.R. 41.

individual would have to meet a higher threshold test than a waiver offered by counsel.[11] There is no reason to believe that this same reasoning will not apply to the determination that an unrepresented accused has made an informed decision not to exercise his right to counsel at trial.

On May 15, 1991, Justice David Watt of the Ontario Court of Justice, General Division, rendered a decision denying the Issuance of a Writ of Prohibition in the case of *R.* v. *Lai*.[12] In support of his motion, the applicant pleaded, amongst other points, that the trial judge violated his rights under sections 7, 10(b) and 11(d) of the *Canadian Charter of Rights and Freedoms* by refusing to allow the applicant to represent himself after he had discharged counsel during trial, and by ordering that the Applicant present himself to Legal Aid in order to seek counsel.

The excerpts from the trial, reprinted in the judgment, make it clear that the accused made several statements to the trial judge indicating not only that he wished to represent himself, but also that his decision was based on financial concerns. It was also unclear from his comments whether or not he understood the legal aid system. Justice Watt wrote :

> [...] *It is scarcely surprising that the learned trial judge directed inquiries to the applicant concerning the question of further legal representation. Indeed, it was incumbent upon him to do so.*
>
> *A review of the record of proceedings of October 22, 1990, discloses that the applicant, initially, expressed a desire to have a lawyer represent his interests at trial. He expressed the view, however, that the "financial burden is so expensive, I don't think I can afford such* [...]. *He denied having gone to Legal Aid, yet said, "they* [Legal Aid] *told me I have to pay after"."*

The learned trial judge, rightly as it seems to me, appears to have concluded that the applicant was under some misapprehension concerning the availability of Legal Aid and had really not fully explored the matter. While it is no doubt accurate to say, as does the applicant, that on several occasions the accused asserted that he wished to represent himself, as it was his perfect right to do, the assertion cannot be viewed devoid of its context. In this case, the context included an expression of desire to have a lawyer, its frustration by inadequate financial means and an apparent lack of understanding of the operation of the provincial Legal Aid program.

It is curious to observe that, had such remarks been made upon arrest, the mandate of *R.* v. *Brydges*[13] would have required investigating officers to apprise the accused of the existence of duty counsel and the ability to apply for Legal Aid, as well as

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11. *R.* v. *Mills*, [1986] 52 C.R. (3d) 1. Such a waiver must be clear, unequivocal, and informed and may not be inferred from silence.

12. *R.* v. *Lai*, [1991] O.J. No. 725.

13. *R.* v. *Brydges* (1990), 53 C.C.C. (3d) 330.

affording him a reasonable opportunity to exercise the right to counsel upon request for such assistance. The obligation on the learned trial judge can scarcely have been any the less in the circumstances.

The submission of the applicant, in my respectful view, mischaracterizes what here occurred. The learned trial judge did not order the applicant to retain counsel in the face of the applicant's stated desire (not wholly unequivocal) to proceed unrepresented. There was here no foreclosure of self-representation. The learned trial judge, cognizant of the various manners in which the applicant could appear to answer the charge, determined that it was in the best interests of the administration of justice that the applicant attend Legal Aid, there to explore the possibility of legal representation. He plainly recognized that self-representation could be the ultimate result, but sought to ensure it only eventualized after full explanation had been made to the applicant of all avenues of legal representation.

The position of the applicant was in no way compromised. He remained able to make full answer and defence on his own behalf or through counsel. He was merely afforded an opportunity to obtain further legal representation. There was no life, liberty or security interest implicated by the decision of the learned trial judge. To afford to one unfamiliar with the availability of Legal Aid the opportunity to determine eligibility, even if by direction, while leaving open the question of self-representation, is the very antithesis of the denial here said to have occurred.[14]

This decision is one of a number that indicates that standards of procedural fairness developed in the interpretation of other sections of the Charter will apply by analogy to the standard of behaviour expected of a trial judge who is attempting to determine whether a valid waiver of a constitutional right has occurred.

C. Acceptable Intervention by Trial Judges

Once the trial judge has determined this point there are numerous other problems which present themselves in the situation where an accused is unrepresented.

The parameters of what will be considered acceptable intervention by the trial judge were canvassed in the case of *R.* v. *Taubler*.[15] Thorson, J.A. of the Ontario Court of Appeal wrote :

> [...] *While it is undoubtedly true that a trial judge has a duty to see that an unrepresented accused person is not denied a fair trial because he is not familiar with court procedure, the duty must necessarily be circumscribed by what is reasonable. Clearly it cannot and does not extend to his providing to the accused at each stage of his trial the kind of advice that counsel could be expected to provide if the accused were represented by counsel. If it did, the trial*

14. *Supra* note 12 at 43.

15. *R.* v. *Taubler* (1987), 20 C.A. 64 at 71.

> *judge would quickly find himself in the impossible position of being both advocate and impartial arbiter at one and the same time.*

The *Criminal Code* contains only one example of a specific legislative provision guiding judges in their treatment of the unrepresented accused. That is section 541(2) which deals with the reading of the statutory caution to an accused prior to the hearing of any defence witnesses at the preliminary inquiry.[16]

Other issues that arise during a preliminary hearing or a trial are not usually provided for by statute, but there is a large, and growing, body of jurisprudence concerning this subject. Trial judges must intervene to insure fairness in the proceedings before them, but they must not act as advocates. Consider this summary from the Ontario Court of Appeal in *R.* v. *McGibbon* :

> [...] *Consistent with the duty to ensure that the accused has a fair trial, the trial judge is required within reason to provide assistance to the unrepresented accused, to aid him in the proper conduct of his defence, and to guide him throughout the trial in such a way that his defence is brought out with its full force and effect. How far the trial judge should go in assisting the accused in such matters as the examination and cross-examination of witnesses must of necessity be a matter of discretion.*[17]

Later in that same decision, Griffiths, J.A. discussed the dilemma existing when the complainant's testimony at trial contradicts elements of his or her testimony at the preliminary inquiry. He wrote :

> [...] *It would have been appropriate to have the above discrepancies drawn to the attention of the complainant in the course of her cross-examination at trial. It seems to me, however, to place far too heavy a burden on the trial judge , where the accused is unrepresented, to expect the trial judge to review the transcript of evidence and to pick out discrepancies in the evidence from that given at trial. A judge is not required to become the advocate for the accused. Moreover, there may be matters contained in the transcript of the preliminary inquiry that the trial judge should not be made aware of.*[18]

It appears clear that judges should not participate in the development of the defence strategy, advise the accused or cross-examine witnesses in the way that counsel might.

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16. *R.* v. *Jenkins*, [1996] O.J. No. 2674; (Ont. Gen. Div.) July 1996.

17. *Supra* note 4 at 347. See also *The New South Wales approach : Evidence, Advocacy and Ethical Practice — A Trial Commentary*, J. Hunter and K. Cronin, (Sydney-Adelaide-Brisbane-Canberra-Melbourne-Perth : Butterworths, 1995) at 56 where the authors state that, "in that country, some jurisprudence shows that the trial judge should prevent the unrepresented accused from presenting evidence which is more prejudicial than probative."

18. *Ibid. McGibbon*, at 349.

The case of *R.* v. *Turlon*, another decision of the Ontario Court of Appeal, resulted in a new trial being ordered after the trial judge proceeded with "extensive cross-examination of the principal Crown witnesses." The Court stated :

> [...] *The learned trial judge went beyond merely assisting the accused and conducted the kind of cross-examination that would have been expected from defence counsel.*[19]

The Quebec Court of Appeal explained its position concerning the role of the trial judge *vis-à-vis* the unrepresented accused in *R.* v. *Sechon* where Rothman, J.A. writing for the majority stated :

> [...] *where an accused, for whatever reason, is not represented by counsel at his trial, it is clear, as well, that the trial judge has a duty to provide reasonable assistance to the accused in the presentation of evidence and in putting his defences before the court.*[20]

The trial judge should remain vigilant in raising Charter issues when the accused is not represented by counsel, and should see to it that the accused's rights are protected.[21]

D. Admissions and *Voir Dires*

Shortcuts, intended to speed up the proceedings, should be approached with great caution. The failure to hold a *voir dire*, and the failure to inform an unrepresented accused that he could be relieved of an agreement to proceed by admission of the testimony of a witness, together led to a reversal on appeal in the case of *R.* v. *Dimmock* from the British Columbia Court of Appeal.[22]

Arguably, absent the type of waiver referred to earlier in this text, the trial judge should hesitate to skip any part of the proceedings or proceed with any admissions. In the

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19. *Turlon*, *supra* note 7 at 191; see also : *R.* v. *Asselin*, [1996] O.J. No. 3863; (Ont. Prov. Div.). In that case, P. Wright, P.J., stated at par. 6 :

    > [...] *It is true that the Court must exercise care and diligence with respect to an unrepresented accused, especially when that individual may show that they are not capable of representing themselves. That was not the case here. The trier of fact cannot become an advocate on behalf of either the prosecution, or the defence, or enter into the fray.*

    R. v. *Darlyn* (1946), 88 C.C.C. 269, 3 C.R. 13; (B.C.C.A.) A trial judge should, however, offer assistance in cross examination.

20. *R.* v. *Sechon* (1995), 104 C.C.C. (3d) 554, (Que. C.A.) at 560.

21. *R.* v. *Arbour* (1990), 4 C.R.R. (2d) 369; *R.* v. *Sansone*, *supra* note 7; *R.* v. *Grey*, 19 C.R. (4th) 363; *R.* v. *Wheelton* (1992), 71 C.C.C. 476 at 488.

22. *R.* v. *Dimmock* 47 C.R. (4th) 120 (B.C.C.A).

case of *R.* v. *H. (B.C.)*[23] the Manitoba Court of Appeal dealt with the fact that a trial judge failed to hold a *voir dire* concerning the admissibility of certain evidence, and, through his comments, led the accused to admit identification rather than obliging the Crown to make that evidence. The appeal was allowed and a new trial ordered. The Court stated :

> [...] *I am sure that, in his attempts to avoid the necessity of requiring the complainant to identify the accused, the learned trial judge was motivated to protect the child witness and that he thought he was being fair to the accused by inquiring if identification was an issue. But the accused's right to require the Crown to prove every aspect of its case cannot, in my view, be circumscribed in the absence of counsel.*[24]

In the same decision the Court questioned the appropriateness of a trial judge deciding to proceed without a *voir dire*. Twaddle, J.A. wrote :

> [...] *But the fact remains that an unrepresented person is unlikely to understand from a brief explanation when a statement can be said to have been voluntarily given. The wisest course, in circumstances such as these, is to hold the voir dire and make a ruling*.[25]

E. Appointing Counsel

It is always open to trial courts to appoint counsel to remedy a perceived lack of fairness in any part of the proceedings.[26] In fact, the *Criminal Code* now foresees this type of procedure in cases referred to in article 486 (2.3).[27] This section permits a trial judge to appoint counsel to proceed with the cross-examination of an alleged victim who is under fourteen years of age and who has requested, and been granted, permission to testify via closed-circuit television.

This addition to the Code was intended to remedy problems such as the third major problem posed in *R.* v. *H (B.C.)*. In that case the Manitoba Court of Appeal expressed its disaccord in a situation where, upon the request of Crown counsel, and without further inquiry, the trial judge obliged the accused to put his questions to the juvenile complainant through a friend of the accused's choosing.

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23. *R.* V. *H. (B.C.)* (1990), 58 C.C.C. (3d) 16.

24. *Ibid.* at 25.

25. *Ibid.*

26. Of interest is the case of *R.* v. *Satov*, [1996] O.J. No. 2500, where the unrepresented accused petitioned the court to appoint State-funded counsel and failed. Given the accused's assertion in this domestic violence case that the situation was tense between himself and the victim, and that this tension would affect his ability to cross-examine adequately, the Court reserved the right to reconsider the motion for the purposes of the cross-examination.

27. On the subject of article 486 (2.3), see 21 C.R.(4th) 365.

With the arrival of the new statutory provision will come a new dilemma for trial judges, that of appointing counsel to accused who do not wish to be represented, even if the appointment is for a limited purpose. In the case of impecunious accused who wish to be represented, the problem will be one of deciding whether or not to stay the proceedings pending the appointment of State-funded counsel.

F. Special Procedures and Postponements

The multiplicity of special procedures provided for in the *Criminal Code* to circumscribe access by the accused to certain types of information also constitute potential difficulties for trial courts. Should a trial judge inform an unrepresented accused of the possibility of petitioning the court for access to medical records which are in the hands of third parties, (a so-called *O'Connor* application), if the judge realizes through the testimony of a Crown witness that these documents may be relevant? Or, advise the accused of the procedure outlined in Section 276 in cases where such an application appears pertinent?

It would seem that this type of vigilance is necessary to the fairness of the trial. If the courts of appeal have stated that trial judges should raise Charter issues when the accused is unrepresented, then it follows that the trial court should also advise the accused of any procedure available to him which may be important to the presentation of a full and complete defence.

Adjournments are, understandably, an area of concern to trial judges as courts attempt to avoid excessive delays in criminal matters. Postponements do not always suit the court or the Crown witnesses. When a case involves an unrepresented accused, the trial or preliminary inquiry judge should postpone the case if there is any chance that the accused, without the benefit of a delay, will be unable to exercise his rights.[28]

It will not, however, constitute an error for the trial judge to refuse a postponement in cases where the unrepresented accused has been given an opportunity to act and has failed to do so.[29]

In fact, patience will be the greatest attribute of the trial judge faced with an unrepresented accused, and few examples of patience are as impressive as the example of Fraser Martin, J.S.C. when faced with the case of *R.* v. *Fabrikant.* The patience paid off, and the Quebec Court of Appeal stated clearly that any assessment of the situation of an unrepresented accused involves a consideration of the behaviour of the accused. In that case, the Court of Appeal refused to intervene, although the Appellant Fabrikant alleged

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28. *James* v. *B.C.* (1987), 59 C.R. (3d) 30; *R.* v. *Barrette, supra* note 8.

29. *R.* v. *Kovacs* (1996), O.J. No. 1553, (Ont. C.A.), May 2.

    Also, it is clear that postponements remain within the discretion of the trial judge : *R.* v. *Barrette, supra* note 8 at 193.

that the presiding Justice had foreclosed him from making a defence, citing the "disruptive and stubbornly defiant" behaviour of the accused as justification for the judge's decision.[30]

Cases involving numerous co-accused persons present other problems, and trial courts may intervene in cases where the fact that one of several accused is not represented threatens the fairness of the trial. With the exception of situations where the trial judge intervenes to remedy a problem of conflict of interest, the intervention concerning the unrepresented co-accused is most likely to involve an attempt to have state-funded counsel enter the file.[31]

While it is true that the trial court has no obligation to inform an accused of the right to be represented by a lawyer if the circumstances are such that it is manifest that the accused does not wish to be represented,[32] in cases where the accused has been refused access to Legal Aid it would arguably be the responsibility of the court to inform the accused of his right to make evidence in support of a petition that the court stay the proceedings until State-funded counsel is appointed.

A judgment of the Ontario Court of Justice, Provincial Division in *R.* v. *Krzak*[33] begs the question, by deciding that an accused who wishes the Court to stay the proceedings until state-funded counsel is appointed must satisfy the court that he was unable to employ counsel and that the matter is sufficiently complex to warrant the Court's intervention. If evidence will be required in order to permit the Court to make a decision, fairness dictates that the Court inform the unrepresented accused of this fact.

A trial judge's explanation of rules applicable to the case must be complete and not misleading whether the explanation is being offered to the unrepresented accused or an agent acting on his or her behalf.[34]

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30. *R.* v. *Fabrikant*, 39 C.R.(4th)1, (Que. C.A.).

31. *Re : Regina and Speid* (1983), 8 C.C.C. 3d 18 (Ont. C.A.); *R.* v. *Silvini* (1991), 9 C.R.(4th) 233; also see *Silvini : Divided Loyalty*; Littlefield, D., (1991), 9 C.R. (4th) 250.

    Problems relating to the notion of conspiracy, including but not limited to the co-conspirator's exception to the hearsay rule, and the admissibility of evidence in a conspiracy trial make conspiracy cases necessarily complex.

32. *Supra* note 4. *Criminal Pleadings & Pratice in Canada*, 2d Edition; E.G. Ewaschuk, (Ottawa : Canada Law Book, (updated to Dec. 1996), Chapter 31, 8825.

See also *R.* v. *Asfaw*, [1996] O.J. No. 2036, where Sedgwick, J., (Ont. Gen. Div.), (May 31), refused to intervene to quash a guilty plea to a speeding offense despite the fact that there was no indication that the accused was advised of his right to counsel, Legal Aid, or an interpreter. The Court decided that, in the circumstances, the file showed no evidence that the plea was not voluntary. It appears that the Court was influenced by the Crown submission that a trial judge need only inform the accused of the right to counsel in complex cases.

33. *R.* v. *Krzak*, *supra* note 9.

34. *R.* v. *Laycock*, *supra* note 3. Here the Court was faced with an accused represented by an agent who was not a barrister or solicitor.

Without being an exhaustive list, what precedes indicates only a few of the problems facing trial courts in cases involving accused persons who decide, for one reason or another, to go it alone.

II. DUTIES AND OBLIGATIONS OF CROWN COUNSEL

A. Duty to Act Fairly

Crown prosecutors, who find themselves opposite an unrepresented accused, also have a very delicate balancing act to carry out. The principles guiding the role of the prosecutor were stated by Rand, J, in the 1955 Supreme Court of Canada decision of *Boucher* v. *The Queen* :

> [...] *It cannot be overemphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before the jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented; it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of the prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.*[35]

The Canadian Bar Association *Code of Professional Conduct*, contains the following paragraph under the heading Duties of Prosecutor :

> [...] *When engaged as a prosecutor, the lawyer's prime duty is not to seek a conviction, but to present before the trial court all available credible evidence relevant to the alleged crime in order that justice may be done through a fair trial upon the merits. The prosecutor exercises a public function involving much discretion and power and must act fairly and dispassionately. The prosecutor should not do anything that might prevent the accused from being represented by counsel or communicating with counsel and, to the extent required by law and accepted practice should make timely disclosure to the accused or defence counsel (or to the court if the accused is not represented) of all relevant facts and known witnesses, whether tending to show guilt or innocence, or that would affect the punishment of the accused.*[36]

The *Quebec Bar Association Code of Ethics* specifically deals with the obligations of any counsel with regard to an unrepresented adversary. Section 3.02.01 states that a lawyer must not :

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35. *Boucher* v. *The Queen* (1955), S.C.R. 16.

36. Canadian Bar Association, *Code of Professional Conduct*, adopted by Council 1987, at 35.

i) agir de façon à induire en erreur la partie adverse non représentée par avocat ou surprendre sa bonne foi.[37]

To what extent does the duty to act fairly require Crown counsel to intervene for the purpose of aiding an unrepresented accused?

B. Disclosure

The area where Crown counsel's obligations are clearest is the area of disclosure of the evidence. Since the Supreme Court of Canada decision in *R.* v. *Stinchcombe*[38] it is not only clear that the Crown has an obligation to disclose information in its possession but that this obligation is a continuing one and it requires the Crown to disclose this same information to the accused who is not represented by counsel.[39]

Not only does the Crown have an obligation to disclose, but in the case of the unrepresented accused, the Crown has an obligation to inform the accused of his or her right to disclosure.[40]

Somewhat amusingly, in the context of the Legal Aid cutbacks nationwide, Justice Sopinka prefaced one of his statements in *R.* v. *Stinchcombe* with an assumption which may now be outdated. He wrote :

> [...] *In the rare cases in which the accused is unrepresented, Crown counsel should advise the accused of the right to disclosure and a plea should not be taken unless the trial judge is satisfied that this has been done.*[41]

Practically, Crown counsel faces the problem of how to ensure that it is on the record that disclosure has been given. Disclosure carried out inside the courtroom can be cumbersome and create unnecessary delays. Disclosure carried out elsewhere may provide the dishonest accused with an opportunity to later claim that disclosure was not made.

Another facet of the problem was well phrased in the *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions*, commonly known as the *Martin Report* :

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37. *Code de déontologie*, Barreau du Québec, *An Act respecting the Barreau du Québec*, R.S.Q. c. B-1, s. 15, *Professional Code*, R.S.Q. c. C-26; article 3.02.01 (i).

38. *R.* v. *Stinchcombe*, [1991] 3 S.C.R. 326. *R.* v. *T.(R.)*, 17 C.R. (4th) 247.

39. *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions*; The Honourable G. Arthur Martin, Q.C., Chair, 1993; Recommendation # 15.

40. *Supra* note 38 at 343. *R.* v. *Vokey* (1992), 14 C.R. (4th) 311 (Nfld. C.A.); *R.* v. *V.(W.J.)* 68 C.C.C. (3d) 1 at 35; 72 C.C.C.(3d) 97.

41. *Supra* note 38 at 343.

There is however, one obvious difference between the represented and the unrepresented accused that has a direct and practical bearing on disclosure. Where an accused is unrepresented, there is no officer of the Court, acting for the defence, who can ensure that the disclosure material is used only to prepare to answer the charge, and not for some other improper purpose [...]

> *The Committee has recommended that, where there is a reasonable basis for concern that leaving disclosure materials with the unrepresented accused would jeopardize the safety, security, privacy interests or result in the harassment of any person, Crown counsel should take such reasonable steps as are necessary to prevent these harms, by providing private access to disclosure materials (or copies thereof) in controlled conditions. It is to be observed that Crown counsel must not arbitrarily treat an unrepresented accused person differently than a represented accused with respect to disclosure. However, where it is necessary to do so, this may be accomplished, for example, by leaving a photocopy of the disclosure materials with an accused in a closed but private room at the Crown Attorney's Office or police station. With respect to an unrepresented, incarcerated accused, the Committee has recommended that such persons are entitled to adequate and private access to disclosure materials under the supervision of custodial authorities. The recommendations also provide that Crown counsel shall inform the unrepresented accused, in writing of the appropriate use and limits upon the use of disclosure materials.*[42]

C. Admissibility of Evidence, Postponements and Special Situations

Admissibility of evidence is another area of concern. An unrepresented accused is unlikely to raise an issue about the admissibility of evidence because he or she is not usually going to be aware of the rules governing these questions. Crown counsel's goal is to prove all of the essential elements of a charge against an individual by means of evidence legally admissible in court. The potential for unfairness is great in requesting that the unrepresented accused make admissions during the course of the trial.

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42. *Supra* note 37 at 218-219.

When faced with the unrepresented accused, it is part of the duty of Crown counsel to be vigilant that the evidence which she is presenting is legally admissible. The Saskatchewan Court of Appeal stated, in the case of *R.* v. *Denys* that :

> [...] *The failure of the unrepresented accused (to object) in no way relieves the Crown of its obligation to prove the essential elements of the charge.*[43]

The explanation of a *voir dire* may be a cumbersome process, but the *voir dire* should not be done away with if the accused is not represented by counsel.[44] Crown counsel should temper objections to the questions of an unrepresented accused so as not to create an atmosphere of unfairness.[45]

The duty to act fairly requires that Crown counsel only object to adjournments in situations where it is clear that the lack of an adjournment will not hinder the accused in the exercise of a fundamental right. Otherwise, in order to insure that the procedure is fair to the accused, the Crown should accept an adjournment whose purpose is not merely dilatory or obstructive.[46]

The problem posed in the case of *R.* v. *McGibbon* is one which may involve the input of Crown counsel. There the Court was dealing with the fact that contradictions in the complainant's testimony, which were evident in the transcripts, should have been brought to the complainant's attention when she testified at trial. The Court of Appeal in *McGibbon* decided that it would be inappropriate for the trial judge to take cognizance of the transcript of the proceedings at the preliminary hearing for the purpose of raising these discrepancies.[47] The Court felt, however, that these discrepancies should have been brought up. The unanswered question remains whether, as part of the duty to act fairly, Crown counsel should indicate these kinds of discrepancies to the Court so that the Court might instruct the unrepresented accused of his or her options relating to cross-examination on these matters.

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43. *R.* v. *Denys*, 41 C.R. (4th) 369 (Sask. C.A.).

44. Re : the necessity for a *voir dire* see *R.* v. *H.(B.C.)* note 23.

45. See *supra* note 23 at 21 :

> [...] *Another complication was the repeated intervention of Crown counsel with objections. Some were valid. Some were not. But none was really material. These interventions, particularly when combined with the manner in which the questions were being repeated, resulted in a transcript which is very difficult to follow in places. What the witness made of the questions, I do not know.*

46. In this way, Crown counsel, as officers of the Court, can help the presiding judge with his or her obligation to insure that the proceedings are fair and that decisions regarding postponements are not arbitrary.

47. *Supra* note 16.

A practical problem which receives little attention in the jurisprudence, is the unrepresented accused who wishes to plea bargain with Crown counsel. This situation places counsel in a potentially impossible situation unless there is a reliable record of the plea bargaining session. What of an accused who accepts a plea bargain and later invokes threats or promises, or false representations, at the Court of Appeal? The situation would not be likely to happen but proceeding with the plea bargain in the presence of a witness, or better yet, as one senior defence counsel suggested to the author of this paper, on video, might provide a response to the uneasiness of Crown counsel.

Once again, these few elements are not an exhaustive list of problems faced by Crown counsel but they do show that potential problem areas are important ones.

III. PETITIONS FOR THE APPOINTMENT OF STATE-FUNDED COUNSEL

The heading to this section is actually a misnomer, as the petition made by the accused or his or her representative will usually request that the proceedings be stayed pending the appointment of state-funded counsel.

This concept crystallized in the case of *R.* v. *Rowbotham*, and there is a growing body of jurisprudence where the *Rowbotham*-type motion is being put forward in summary offence cases.

Drastic Legal Aid cutbacks are responsible for this jurisprudential trend. In most Canadian provinces and territories it is now impossible to obtain Legal Aid services if one is accused of a summary conviction offence and there is no threat of incarceration or loss of livelihood. The applicable criteria vary from district to district, but one thing is clear, refusal of access to Legal Aid is no longer the "exceptional" case, as referred to in *R.* v. *Rowbotham*, *R.* v. *Stinchcombe* and *R.* v. *Deutsch*.

Consequently, *Rowbotham*-type petitions have been made in numerous cases by accused persons acting alone or represented by agents or counsel for the purpose of making the Petition.

These petitions will not necessarily fail because the infraction is a summary one,[48] but there will be no uniform acceptance of the principle for any one type of offence.[49]

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48. For example, see *R.* v. *Rain*, 3 C.R. (5th) 122.

49. See comments in *R.* v. *Hill*, *supra* note 3. At par. 26 the Court states :

> [...] *Does this mean that whenever an indigent accused is charged with an "over-80" offence, and "evidence to the contrary" is argued, then state-funded counsel is mandatory? Surely the answer must be no. It will be an unusual case where the absence of counsel will so fundamentally alter the trial process as to render it unfair. The facts of each case must be measured against the criteria enunciated in the cases discussed here.*

In the case of *R.* v. *Hill* from the Ontario Court of Justice, Provincial Division, the accused petitioned the Court for the appointment of state-funded counsel in a case of driving with more than 80 milligrams of alcohol per 100 millilitres of blood. In fact, the accused requested that the Court order that counsel and a toxicologist be paid by the state. He had been refused Legal Aid because there was no possibility of incarceration upon conviction. Bentley, Prov.J. wrote :

> [...] *This case raises an issue that is becoming increasingly prevalent in the courts of our country. Under what circumstances should the court, faced with an unrepresented accused who is denied legal representation due to financial constraints, intervene and stay a prosecution? Put another way, are there situations when the ability to make full answer and defence will be irreparably harmed without legal representation, thereby requiring judicial intervention?*[50]

Later in that same decision the Court decided that cases can be considered complex when there is an issue of "evidence to the contrary" or when the charge involves a presumption, but that not every case of impaired driving or "over-80" will result in a finding that the case is sufficiently complex to require counsel. The Court granted the petition concerning counsel, but refused to decide whether the fairness of the trial would be compromised by the failure of the state to fund a toxicologist, and decided instead to leave this decision to the trial judge.

In order to succeed with a petition for a stay of proceedings the elements set out in *R.* v. *Rowbotham* will have to be proven by the accused, that is to say, that the accused is without the means to employ counsel, that state funding has been refused and that the case is of such complexity as to warrant the presence of counsel.[51]

A successful application will lead to a stay of proceedings conditional on the appointment of state-funded counsel. The cases do not say if any of these stays were subsequently set aside when counsel was found; and, if so, who actually funded counsel. The stay will not be limited to those cases where incarceration is a probability, the

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50. *Ibid* at para. 2; the Court continued at par. 24 :

> [...] *On the question of whether the case is complex while I have not heard viva voce evidence on the point, I conclude that whenever issues of "evidence to the contrary" and the "presumption" in s. 258 are raised, the trial has the potential to become complex. Certainly Justice Iacobucci's judgment in* R. *v.* St. Pierre *[1995] 3 S.C.R. 791 concerning when the "presumption of identity" in relation to s. 258(1)(c) is applied, is itself complex and beyond the understanding of most non legally trained individuals. Support for this view is provided by reviewing the differing interpretations of this subsection in the Ontario Court of Appeal and the Supreme Court judgments in that case. I would echo the comments of the court in* Campenhout, supra *and only add that where a toxicologist testifies and discusses elimination rates, it is unrealistic to expect most lay people to understand the evidence.*

51. *Supra* note 48; *infra* note 54.

possibility may be enough.[52] Also, the complexity need not always be to the degree seen in *Rowbotham*; that is, a year-long trial involving several accused and numerous complicated legal issues.[53] It will be sufficient for the evidence to demonstrate that the case presents a complexity above and beyond the capacity of this particular accused. In some instances charges of impaired driving and "over-80" will be considered sufficiently complex.[54] Depending on the evidence, domestic violence cases will not necessarily be considered complex enough to warrant the Court's intervention, not even if the accused himself is uneasy about proceeding with the cross-examination of an ex-spouse with whom his relationship is tense.[55]

In *R.* v. *Krzak*, Harris, Prov. J. of the Ontario Court of Justice, Provincial Division, stated :

> *Had counsel not been involved at least in some limited way in presenting this application, in my view, the Court would have had to make specific inquiries of the accused person to determine the issue of complexity.*
>
> *Evidence that could be relevant to the complexity issue may relate to :*
>
> *(1) The accused's educational background.*
>
> *(2) What he or she knows of the charge.*
>
> *(3) What particulars he or she has been able to obtain from the Crown.*
>
> *(4) Whether there is access to a lawyer or agent capable of advising as to how to mount an effective defence. (see* R. *v.* Rain, *157 A. R. 385 (Alta C.A.))*
>
> *(5) Does this case appear to be complex in the sense of raising questions of fact or law in which an accused is likely to be at a significant disadvantage if unrepresented by counsel.*
>
> *(6) Does this case appear to be one raising any question of fact or law as to which, without the benefit of counsel, an accused is likely to find it difficult to marshall relevant evidence. (See* R. *v.* Lewis *unreported 1995 [Terr. Ct. Yukon]).*[56]

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52. *Supra* note 48 at 134.

53. For example, *R.* v. *Zylstra* (1996), 28 O.R. (3d) 452 (Ont. Gen. Div.); Glithero, J. This case involved one count of sexual assault, not the complexity of the one-year trial in *R.* v. *Rowbotham*.

54. *Supra* note 49; *supra* note 48.

55. *R.* v. *Satov*, *supra* note 26.

56. *Supra* note 9 at para. 16.

The refusal to stay the proceedings pending the appointment of state-funded counsel is not final, and may be revisited by the trial judge at any time during the trial.[57]

The recently reported decision of *R.* v. *Rain*, of the Alberta Court of Queen's Bench, provides a good road map to counsel who wish to present this type of petition to the trial court.[58]

In *R.* v. *Rain* the Court cited the Court of Appeal in an earlier decision in the same matter, when the latter outlined the type of evidence which would be required in order for such a petition to succeed. Andrekson, J. wrote :

> [...] *The Court also indicated the type of evidence that would be required to support the merits of such an application. The suggested evidence could include :*
>
> *a) the accused's financial circumstances;*
>
> *b) the accused's educational background;*
>
> *c) what the accused knows of the charge;*
>
> *d) what particulars the accused has obtained from the Crown;*
>
> *e) what efforts the accused has made to obtain Legal Aid and with what result;*
>
> *f) the reasons given by the Legal Aid authorities in denying the application for Legal Aid;*
>
> *g) whether the accused has any other access to a lawyer or an agent capable of giving her an effective defence to the charge; and*
>
> *h) anything else which would help the accused make the argument that he or she cannot fairly meet the charge without counsel.*[59]

In considering the petition, the Court reviewed the criteria set forth in pre-Charter cases where the courts looked at the possible loss of freedom or livelihood. Ironically, these same criteria are now applied in many provinces in the determination of whether or not individuals accused of summary conviction infractions will be eligible for Legal Aid. They will not, however, be the only criteria looked at in order to assess the seriousness or the complexity of the matter.[60]

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57. *Supra* note 56; *supra* note 3.

58. *Supra* note 48.

59. *Ibid.* at 125.

60. Most of the cases cited in this part of the text deal with courts determining which criteria will be considered in deciding whether or not to grant this type of Petition. The criteria being applied are not new, many the same were found in *Re : White and The Queen, supra* note 2.

The overriding concern, in light of the factors mentioned above, will be whether the trial will be fair in the absence of counsel for the accused. This is the same basic principle set forth by the Supreme Court of Canada in 1976 in *Barrette* v. *The Queen*. As Pigeon, J. wrote at that time :

> [...] *It is true that counsel for the prosecution treated the accused with consideration. He did not cross-examine him and did not put in evidence his record of previous convictions. Even if he thus did what was in his power to attenuate the consequences of the situation created by the erroneous decision of the trial Judge, I cannot find that the accused, who was sentenced to a year in prison, had a fair trial.*[61]

Recently, at the Quebec Court of Appeal, the appellant Avramela Sechon saw her appeal rejected because the record at trial did not include evidence to demonstrate that the appellant could not "afford and retain counsel for the trial."[62] Surprisingly for a decision of 1995 the Court stated :

> [...] *With a comprehensive legal aid regime in place in Quebec, albeit one with shrinking resources, most poor people charged with serious offences are able to obtain representation by legal aid counsel or counsel paid by legal aid.*[63]

Even if this is no longer true, no appeal will succeed in these circumstances unless the record at first instance contains evidence illustrating the accused's inability to pay for legal representation.

REFLECTIONS

It is now certain that without a good factual basis established at trial the Courts will refuse to grant petitions requesting that the proceedings be stayed pending the appointment of State-funded counsel. The following are a few of the issues that remain unclear :

— Whether accused persons will be able to request a stay if the state refuses to fund expert witnesses;

— Who will fund counsel in those cases where stays are granted conditional on the funding of counsel;

— Whether the seriousness of the offence criteria will expand to include the strictly subjective seriousness for the particular accused (e.g., a conviction vs. a discharge for an accused who will suffer prejudice from having a criminal record);

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61. *Supra* note 8 at 194.

62. *Supra* note 20 at 561.

63. *Ibid.*

— Whether a probation order, with its accompanying restrictions on the freedom of an individual, will fall into the category of consequences enhancing the seriousness of the offence;

— Whether the possibility of a conditional sentence of imprisonment will be considered identical to the possibility of incarceration;

— Whether representation by agents who are not trained lawyers will be seen as a remedy to the problems of the unrepresented accused.[64]

While the state moves backwards from what was an almost all-encompassing system of representation for the disadvantaged accused, the courts will be faced with the double challenge of insuring the fairness of the trial process to the unrepresented accused, and insuring that no case proceeds without counsel in circumstances where fairness dictates representation.

64. See : *R.* v. *Martin*, *supra* note 3; *R.* v. *Laycock*, *supra* note 3; *R.* v. *Wilson*, [1997] O.J. No. 459 (Ont. Prov. Div.), Stone, Prov. J., January 28.

APPENDIX

This paper was prepared for, and presented to, a study session of the Association des avocats de la défense de Montréal (AADM) in the spring of 1997. It was subsequently presented to a study session of the judges of the Montréal Municipal Court in the fall of 1997.

The notes contained in this appendix attempt to list, in chronological order, certain cases of jurisprudence dealing with related matters which have been decided since the paper was initially prepared.

This update does not purport to be exhaustive, but rather to indicate how courts across the country are approaching this ever more present phenomenon which is the unrepresented accused.

A. Clarification

The text indicates, on page 7, that the *Criminal Code* provides only one "specific legislative provision guiding judges in the treatment of the unrepresented accused." It goes on to cite section 541 (2) of the *Criminal Code*, dealing with the statutory caution to an accused prior to the hearing of witnesses for the defence at the preliminary inquiry.

The *Criminal Code* also contains legislative direction in matters concerning the accused whose fitness to stand trial is in question, and certain situations relating to appeals before the Court of Appeal or the Supreme Court of Canada.

See sections 672.24(1)(2)and(3); 672.5(7)(8)(8.1) and (8.2); and 684, 695 and 822(1) of the *Criminal Code*.

B. Jurisprudence

a) *R.* v. *Grey*, 34 W.C.B. (2d) 48. Ontario Court of Justice, Provincial Division, Blacklock Prov. Div. J., November 6, 1996. On an application by the Crown under section 486 (2.3) of the Criminal Code for the appointment of counsel for the unrepresented accused to cross-examine a child complainant, it was decided that criminal harassment contrary to article 264 of the Criminal Code could fall within the ambit of article 486 (1.1).

b) *R.* v. *Roussel*, 112 C.C.C. (3d) 538. New Brunswick Court of Appeal, December 11, 1996. When, at the time of imposing sentence, the Court relies upon a psychiatric assessment prepared concerning the accused's fitness to stand trial, the trial judge must inform the unrepresented accused of his or her right to challenge the report.

c) *R.* v. *Dorman*, 33 W.C.B. (2d) 282. Nova Scotia Court of Appeal, December 11, 1996. The accused discharged his counsel and then applied for an adjournment to obtain counsel. The request was denied. The trial began, but was adjourned for a period of three months after its commencement. The accused did not reiterate his request for counsel after the adjournment. The accused did not present any evidence to illustrate that he had been refused Legal Aid or, if so, why.

The court decided that the accused had not been prejudiced by the absence of counsel. Also, the accused did not present evidence illustrating attempts to procure Legal Aid assistance in the preparation of his appeal. The criteria of 684 require the Court to consider whether "the accused's case could be properly placed by him before the court of appeal."

d) *R.* v. *Fisher*, 33 W.C.B. (2d) 351. Saskatchewan Court of Queen's Bench, McLellan J., December 31, 1996. The trial judge must assist the unrepresented accused in bringing out elements of his defence. Here, the accused had indicated to the trial judge the fact that his counsel, who had withdrawn from the case on the date at which the trial was scheduled to proceed, had remitted to him copies of letters from an expert witness. The trial judge told the accused that the letters were inadmissible.

The trial judge was obliged to assist the accused in putting forth his defence of "evidence to the contrary" on a charge of "over 80." The Crown should have indicated to the trial judge that it had been agreed with the former counsel for the accused that the letters would be admitted into evidence.

e) *R.* v. *Morin*, 33 W.C.B. (2d)502. Ontario Court of Justice, General Division, Doyle J., February 3, 1997. An application for severance may be granted where one co-accused is represented by counsel and the other is not if the unrepresented accused seeks an adjournment for the purpose of retaining counsel.

f) *R.* v. *Geddes*, 34 W.C.B. (2d) 52. British Columbia Court of Appeal, March 7, 1997 . The criteria to be applied in evaluating the behaviour of the trial judge *vis-à-vis* the unrepresented accused may well be different in the case of judge alone trial than in the case where the trial is by judge and jury. A trial judge's exasperation with an unrepresented accused will not necessarily lead to reversal of the verdict by the Court of Appeal. The Court applied the following test : "whether a reasonable and impartial observer who knew of earlier proceedings on an adjournment application and was present at the whole of the trial, considered that the accused did not have a fair trial by an impartial judge."

The accused's familiarity with the courtroom and with the legal concepts underlying the charges are relevant to the assessment of whether or not the trial was fair. Furthermore, the trial judge's failure to warn the accused of his right to remain silent was unimportant when the evidence demonstrated that the accused had no hope of being acquitted without testifying.

g) *R.* v. *Robson*, 34 W.C.B. (2d) 218. Saskatchewan Court of Queen's Bench, Hrabinsky J., March 14, 1997. The trial judge must assist the unrepresented accused not only in explaining procedures and practices, but also to insure that the defence is brought out in the evidence. The trial judge must be alert to legal issues (here : whether officers had requisite motives to lay charges). When an unrepresented accused claims lack of full disclosure, the trial judge should evaluate the evidence disclosed before rendering a decision.

h) *R.* v. *Keating*, 35 W.C.B. (2d) 183. Nova Scotia Court of Appeal, May 29, 1997. The trial judge has authority to enter a conditional stay of proceedings pending the appointment of state-funded counsel in appropriate circumstances, but the stay of proceedings should be reserved for the clearest of cases. It should only be entered after a full inquiry has demonstrated to the trial judge that the complexity of the case and the accused's financial situation, including steps taken to obtain Legal Aid, and reasons for the refusal of Legal Aid, warrant that a stay be entered. Here, the trial judge should have proceeded first with the prosecution's motion for the appointment of counsel under article 486(2.3) of the Criminal Code. Had this been granted, the Court could then have evaluated whether or not the accused required further assistance.

i) *R.* v. *Perera*, 36 W.C.B. (2d) 95. British Columbia Supreme Court, Leggatt J., September 11, 1997. An adjournment to permit an accused to obtain the services of counsel may be denied where the accused is seeking to delay the proceedings. The trial judge failed to describe to the unrepresented accused the procedure for cross-examining a complainant under section 276 of the *Criminal Code*. The problem was cured by Court's decision to allow that the witness be recalled for questioning should the accused have chosen to be represented by counsel for this purpose.

j) *R.* v. *Johnson*, 36 W.C.B. (2d) 193. Saskatchewan Court of Queen's Bench, Grotsky J., October 6, 1997. An accused who pleads guilty while unrepresented by counsel may have the guilty plea struck if his later assertions make it clear that one of the essential elements of the infraction may not be made out or that the accused has a defence to the charge.

k) *R.* v. *Wilson*, 121 C.C.C. (3d) 92. Nova Scotia Court of Appeal, November 21, 1997. A provincial court judge faced with an accused who has not yet been put to her election lacks the status of a court of competent jurisdiction for the purpose of granting any Charter remedy, and cannot therefore grant a conditional stay of proceedings pending the appointment of state-funded counsel. The Court of Appeal stated that, even if the judge did have the power to make the order, such an order cannot be made without an inquiry into the complexity of the matter and the financial situation of the accused. (Refers back to *R.* v. *Keating, supra* for the list of criteria to be considered).

l) *R.* v. *Romanowicz*, 37 W.C.B. (2d) 71. Ontario Court of Justice, General Division, Hill J., January 6, 1998. The Court must respect the choice of an accused to appear with a paid agent rather than represented by counsel even if it is clearly in the interest of the accused to be represented by counsel. There is "no constitutional right to competent trial representation by a paid non-lawyer agent" and the court is not obliged to conduct an inquiry to determine the agent's level of competency in legal matters.

m) *R.* v. *Stroud*, 37 W.C.B. (2d) 313. Newfoundland Court of Appeal, January 12, 1998. Failure to disclose by the Crown to the unrepresented accused will not necessarily lead to the quashing of a conviction. The consequences of the failure to disclose must be evaluated.

n) *R.* v. *Raymond Lafontaine and Nicole Lafontaine*, Unreported. Québec Superior Court, Criminal Division, Boilard J., February 17 , 1998. The possibility of staying the proceedings pending the appointment of state-funded counsel is exceptional and should not be considered without a full inquiry into the complexity of the case and the accuseds' financial situation. It was inappropriate for the trial judge to raise the specter of a stay of proceedings pending the appointment of state-funded counsel, and then proceed with the stay in the absence of a full inquiry into the criteria set forth in the jurisprudence.

o) *R.* v. *S. (B.K.)*, 37 W.C.B. (2d) 457. British Columbia Court of Appeal, March 9, 1998. The trial judge must aid an unrepresented accused in putting forward his defence and insure that the accused receives a fair trial. An appeal court should only intervene if "a judge proceeded on a wrong principle or if a miscarriage of justice resulted." Fitness was an issue at the outset of the trial in this matter. The trial judge questioned the accused extensively, and determined that he was fit to stand trial. While the trial judge was pronouncing his reasons for judgment, the accused requested counsel stating that, although he was fit to stand trial, he lacked the cognitive ability to permit him to conduct his defence unassisted by counsel. The Court of Appeal rejected this distinction and stated that the trial judge had adequately assisted the accused in this case.

p) *R.* v. *Bohn*, 38 W.C.B. (2d) 153. British Columbia Supreme Court, Hunter J., April 7, 1998. The trial judge must properly inform the unrepresented accused of his right to call evidence. This applies even if the accused has chosen not to be represented by counsel. Here, the accused was aware of witnesses for the defence who were out of the country at the time of the trial. He was not aware of his right to petition the court for an adjournment in order to call these or other witnesses, and the court made no attempt to determine whether or not the accused required an adjournment.

q) *R.* v. *Lee*, 125 C.C.C. (3d) 363. Northwest Territories Supreme Court, Vertes J., May 7, 1998. This decision concerns the appointment of counsel as *amicus curiae* in situations where the Crown consents and accepts the responsibility to pay. Factors to be considered include the complexity of the case, the ability of the accused to understand and express himself (here the accused required the services of an interpreter), the potential penalties and the accused's familiarity with the trial process.

r) *R.* v. *Persaud*, 38 W.C.B. (2d) 399. Ontario Court of Justice, General Division, Hill J., May 20, 1998. Even when a trial record does not display actual bias toward an unrepresented accused, a combination of factors will lead an appeal court to conclude that the record shows a reasonable apprehension of bias. The factors in this case included :

— an absence of inquiry at the outset of the trial concerning the accused's intentions with regards to representation;

— an absence of inquiry to determine whether or not the accused had received full disclosure, despite the accused making it clear that he was unfamiliar with court procedures;

— failure of the trial judge to inform the accused of the basics of criminal procedure;

— failure of the trial judge to inform the accused that a defence of alibi will likely be less credible if the accused testifies after his witnesses;

— allowing the Crown to present inadmissible evidence and to split its case with regards to the alibi defence; and

— failure to call upon the Crown for submissions at the end of the case.