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SCSL-04-15-T
(25820 – 25887)

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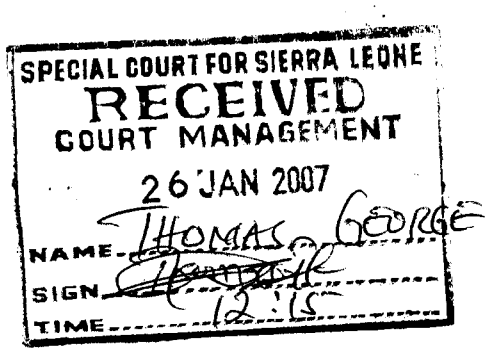
SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone



Before: Judge Bankole Thompson, Presiding Judge
Judge Pierre Boutet
Judge Benjamin Mutanga Itoe

Registrar: Mr. Lovemore G. Munlo S.C.

Date filed: 26 January 2007

THE PROSECUTOR **Against** **ISSA HASSAN SESAY**
MORRIS KALLON
AUGUSTINE GBAO

Case No. SCSL – 2004 – 15 – T

PUBLIC
PROSECUTION RESPONSE TO KALLON DEFENCE MOTION FOR IMMEDIATE PROTECTIVE MEASURES FOR WITNESSES AND VICTIMS AND FOR NON-PUBLIC DISCLOSURE

Office of the Prosecutor:
James C. Johnson
Peter Harrison
Mohamed A. Bangura

Court Appointed Defence Counsel for Sesay
Mr Wayne Jordash
Ms Sareta Ashraph

Court Appointed Defence Counsel for Kallon
Mr Shekou Touray
Mr Charles Taku

Court Appointed Defence Counsel for Gbao
Mr Andreas O'Shea
Mr John Cammegh

I. INTRODUCTION

1. The Prosecution files this Response to the "Public Kallon Defence Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure" ("**Motion**").[1]

2. The Motion seeks many of the protective measures granted by this Trial Chamber in respect of Sesay Defence witnesses in the Sesay Protective Measures Decision,[2] and also seeks measures that were refused in that Decision. The Motion seeks to rely on the material filed in support of the Sesay Protective Measures Motion,[3] and materials filed by the Prosecution in its protective measures application.[4]

3. No evidence was filed in support of the Motion, in particular, no evidentiary basis is advanced as to why the protective measures of the Kallon witnesses should be different from those granted to the Sesay witnesses.

4. The Prosecution submits that the protective measures requested in the Motion that were sought by the Sesay Defence and refused in the Sesay Protective Measures Decision, namely paragraphs 13 and 15 (j) of the Motion, should be dismissed.

5. The Prosecution submits that generally motions without supporting evidence should not be entertained. However, given the recent Sesay Protective Measures

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[1] *Prosecutor v Sesay, Kallon and Gbao*, SCSL-04-15-T-682, "Public Kallon Defence Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure", 18 January 2007.
[2] *Prosecutor v Sesay, Kallon and Gbao*, SCSL-04-15-T-668, "Decision on Sesay Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure" ("**Sesay Protective Measures Decision**"), 30 November 2006.
[3] *Prosecutor v Sesay, Kallon and Gbao*, SCSL-04-15-T-608, "Public Sesay Defence Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure" ("**Sesay Protective Measures Motion**"), 27 July 2006.
[4] *Prosecutor v. Kallon*, SCSL-2003-07-PT-33, "Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure", 23 May 2003.

Decision, the Prosecution does not take strong issue with the application in so far as the relief sought in paragraphs 15 (a) – (i) of the Motion is concerned.

II. ARGUMENTS

General submissions on the requirements of witness protection motions

6. Rule 69 of the Rules of Procedure and Evidence ("**Rules**") states that "in exceptional circumstances" a party may apply to a Judge or the Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk. An application for protective measures must be supported by sufficient evidence which the Trial Chamber can rely upon to make a reasoned assessment of the application and relief sought. In any motion, the facts relied upon by the moving party must be adduced in an affidavit or *viva voce* unless the facts are uncontested.[5]

7. Protective measures can apply equally to Defence as to Prosecution witnesses by virtue of Rules 69 and 75, but the granting of protective measures is not an automatic exercise[6] and unsupported claims of fears expressed by witnesses, without more, does not suffice for this purpose. To meet the Rule 69 test of "exceptional circumstances", the applicant must establish sufficient facts supporting the *subjective* fears of witnesses, but must also provide evidence from other sources indicating an *objective* basis for assessing whether a threat to the witnesses' security exists.[7] The subjective feelings of the witnesses are not the

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[5] *Prosecutor v. Delalić et al.*, IT-96-21-A, "Decision on Motion to Preserve and Provide Evidence" (**Čelebići case**), Appeals Chamber, 22 April 1999, pp. 4-5; the *Separate Opinion of Judge Hunt*, paras. 7-9.

[6] *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-04-14-T, Transcript, 27 October 2005, p. 19, lines 20-23; p. 23, lines 15-21.

[7] *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-04-14-T-274, "Ruling on Motion for Modification of Protective Measures for Witnesses" ("**Ruling on Modification of Protective Measures**"), 18 November 2004, paras. 38 & 40.

only factor to be taken into account,[8] and the subjective feeling of a witness is not in itself conclusive.[9]

Lack of material supporting factual assertions in Motion

8. The Prosecution does not dispute that the current assessment of the level of objective fear remains high and unchanged.[10] However, for the Motion to succeed there must be evidence before the Trial Chamber that there is some danger or risk to the Kallon witnesses. The nation is undergoing constant change, including the security context, and the circumstances of witnesses for a particular accused are subject to ongoing change. Only through current and up-to-date evidence can those circumstances be brought to the attention of the Trial Chamber. Such evidence would enable the Trial Chamber to come to a considered assessment of subjective threats or fears of witnesses that would assist the Trial Chamber in determining which measures to grant. To the extent that such evidence is absent, the Kallon Defence has failed to meet the Rule 69 test.

9. The Motion cites examples of the subjective fear of defence witnesses such as "fear of public condemnation"[11] by witnesses living inside and outside Sierra Leone "for associating with the RUF",[12] because of the "negative portrayal in the national and international media."[13] Reference is made to "social exclusion",[14] "fear of reprisals"[15] by insider witnesses from fellow ex-combatants, "stigmatisation"[16] from the community and "intimidation as a result of being, or thought to be a defence witness for Mr Kallon."[17] The Motion specifically mentions the arrest by Sierra Leone Police of a Kallon defence investigator and a

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[8] Id., para. 38
[9] Id., para. 40.
[10] *Prosecutor v Sesay, Kallon and Gbao*, SCSL-04-15-T-668, "Decision on Sesay Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure", 30 November 2006, *para* 24.
[11] *Motion*, para 8.
[12] *Motion*, para 8.
[13] *Motion*, para 8.
[14] *Motion*, para 8.
[15] *Motion*, para 8.
[16] *Motion*, para 10.
[17] *Motion*, para 10

witness based on "false allegations...by a senior member of the community".[18] However, not one of these examples is supported by evidence. This deprives the Trial Chamber of its capacity to render decisions judicially after assessing the evidence before it. A wholly unsubstantiated accusation that the Sierra Leone Police acted on false allegations by a senior member of a community undermines respect for the Sierra Leone Police and prevents any assessment whatsoever of the merits of the accusation.

10. There is a clear distinction between Prosecution witnesses, who the Prosecution says are at risk from elements within the RUF, an organisation members of which the Prosecution alleges committed war crimes and crimes against humanity, and witnesses who are called by accused persons. What objective evidence exists to show that defence witnesses are in danger or at risk, which type of witness is at risk, and from whom are they at risk? Protective measures should be tailored to the dangers and risks for particular witnesses, and that assessment can only be made on the evidence before the Trial Chamber.

Measures refused in the Sesay Defence Motion for Protective Measures (Category of witnesses)

11. Although the protective measures requested in the Motion are substantially similar to those granted by the Trial Chamber to the Sesay Protective Measures Motion, the present Motion also requests two measures which were requested in the Sesay Protective Measures Motion but denied by the Trial Chamber in the in the Sesay Protective Measures Decision (and in respect of which the Sesay Defence is now seeking leave to appeal[19]). The Motion states that these measures were granted to prosecution witnesses[20] and that the "considerations" upon which they were granted "readily apply to its witnesses".[21]

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[18] *Motion*, para 10
[19] *Prosecutor v Sesay*, SCSL-04-15-T-669, "Application for leave to Appeal the Decision (30th November 2006) on Sesay Defence Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure", 4 December 2006.
[20] *Prosecutor v. Kallon*, SCSL-2003-07-PT-33, "Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure", 23 May 2003.
[21] Motion, para 15(j) and 16.

12. The first of these measures relates to the categories of witnesses for which the application for protective measures is sought. The Motion requests protective measures for four categories of witnesses: i) witnesses who reside in Sierra Leone; ii) witnesses who presently reside in other countries in West Africa; iii) witnesses who reside outside Sierra Leone who have relatives in Sierra Leone; and iv) witnesses who reside outside West Africa.

13. The Prosecution witnesses for whom protective measures were ordered initially included witnesses in all four of these categories, however owing to changed circumstances in the security situation particularly for witnesses residing outside West Africa, some of these measures were considered no longer necessary from about March 2006,[22] and following a Prosecution application the measures were rescinded for certain witnesses.[23] The Prosecution submits that the Trial Chamber was correct in not granting protective measures to this category of witnesses in the Sesay Protective Measures Decision.[24] Evidence has not been tendered by the Kallon Defence on this point and there is no principled reason why the Kallon Defence witnesses should be treated differently from the Sesay Defence witnesses. The application with respect to protective measures for witnesses residing outside of West Africa should be dismissed.

Measures refused in the Sesay Defence Motion for Protective Measures (contacting protected defence witnesses)

14. The Motion requests that the method for contacting protected defence witnesses, by the Prosecution, and by the Sesay and Gbao Defence, should be the same as

[22] *Prosecutor v Sesay, Kallon and Gbao*, SCSL-04-15-T-528, "Order to Review Current Protective Measures", 29 March 2006.
[23] *Prosecutor v Sesay, Kallon and Gbao*, SCSL-04-15-T-556, "Decision on Prosecution Motion to vary Protective Measures for Group I Witnesses TF1-042 and TF1-044", 23 May 2006.
[24] Sesay Protective Measures Decision, para 24 (ii). The Chamber's finding was "that no prima facie showing has been made by the Defence for the issuing of protective measures in respect of potential witnesses resident outside West Africa".

the procedure ordered by the Trial Chamber in the protective measures it ordered in relation to Prosecution witnesses. The Motion requests:[25]

> "An Order that, following disclosure of the Kallon Defence witnesses' names or other identifying data pursuant to order (c) above, the Prosecution, the Defence for the First Accused and the Defence for the Third Accused shall make a written request, if any, to the Trial Chamber or Judge thereof, for permission to contact any protected witnesses or relative of such person and that such request be timely served on the Kallon Defence. At the direction of the Trial Chamber or Judge thereof, the Kallon Defence shall contact the protected person and ask for his or her consent or the parents or guardian of that person if that person is under the age of 19,[26] to an interview by the Prosecution or the Sesay or Gbao Defence and shall undertake the necessary arrangements to facilitate such contact."

15. In the Sesay Protective Measures Decision the Trial Chamber imposed the following procedure for communicating with the Sesay protected witnesses:

> "Upon disclosure of the Witness' names or any other identifying data by the Defence pursuant to order (c) above, the Prosecution, the Defence for the Second Accused Morris Kallon, and the Defence for the Third Accused Augustine Gbao, respectively, shall inform the Witnesses and Victims Section of their intention, if any, to interview a witness listed as a witness for the First Accused, Issa Sesay. The Witness and Victims Section, upon being informed beforehand of the location of the witness, shall contact the witness and inform him or her of any party's intention to interview him or her and of his or her right not to consent to give the interview. Should the witness consent to the interview, the Witnesses and Victims Section shall inform the relevant party as to the location for the interview. Except under exceptional circumstances, any such interview shall not take place at the outset of the witness' testimony in court".[27]

16. No evidence whatsoever has been adduced to demonstrate to the Trial Chamber why Kallon Defence witnesses should be treated differently from Sesay Defence witnesses. If such evidence does exist the applicant must bring it forward in support of his application. The Prosecution reiterates that the circumstances of

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[25] *Motion*, para 15 (j).
[26] The Decision on Prosecution Motion states 18 years, under para (k).
[27] Sesay Protective Measures Decision, para 25 (j).

prosecution witnesses is different from defence witnesses – the Prosecution alleges that the accused committed crimes and were part of a joint criminal enterprise that committed crimes and that persons connected to the joint criminal enterprise were a danger to witnesses – no similar evidence of threat or danger is adduced in the Kallon application.

17. Further the Prosecution's obligations are different from those of defence counsel (for example, Rule 68 applies only to the Prosecution), and it is consistent with the Prosecution's ethical responsibility which is broader than that of defence counsel, to act impartially in seeking a fair trial. We do not wish this to imply any criticism whatsoever of defence counsel, it is simply a statement of the law that the ethical and professional responsibilities of prosecutors are different.[28]

III. **Conclusion**

18. Strict compliance with the law requires that supporting materials be filed to provide an evidentiary basis for assertions made in an application. That has largely been ignored in the Motion. Although the evidentiary record is sparse, the Prosecution acknowledges that the recent Sesay Protective Measures Decision provides some basis for some of the relief sought in the Motion, and for that reason the Prosecution does not take strong issue with the relief sought in paragraphs 15 (a) to (i) of the Motion.

19. In view of the arguments made in paragraphs 11-13 above, the Prosecution submits that the protective measures sought for witnesses who reside outside West Africa should be dismissed. If such measures are to be contemplated, appropriate supporting evidence should be filed by the Kallon Defence, and the determination should be carried out by the Trial Chamber in respect of each individual witness on his or her own merits, rather than order a blanket set of measures applicable to all Kallon Defence witnesses in this category.

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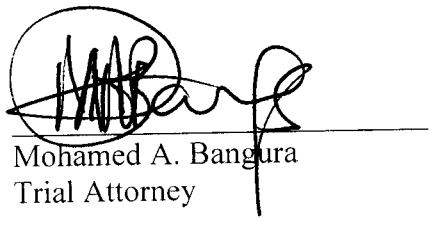
[28] *R v. Stinchcombe*, [1991] 3 S.C.R. 326; *R. v Bain*, [1992] 1 S.C.R. 91. (These two cases are cited in the textbook, "Essentials of Canadian Law – Ethics and Canadian Criminal Law", by Michel Proulx and David Layton – Irwin Law, 2001 – Chapter 12, page 638.

20. As regards the arguments raised in Paragraphs 14 -17 above, the order sought in paragraph 15 (j) should provide for the same as the procedure prescribed in the Sesay Protective Measures Decision.[29]

Filed in Freetown,
26 January 2007
For the Prosecution



Mohamed A. Bangura
Trial Attorney

[29] Sesay Protective Measures Decision, para 25 (j).

Index of Authorities

ORDERS, DECISIONS AND MOTIONS

1. *Prosecutor v. Delalić et al.*, IT-96-21-A, "Decision on Motion to Preserve and Provide Evidence", Case No., 22 April 1999. http://www.un.org/icty/celebici/appeal/decision-e/90422EV37228.htm

2. *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-04-14-T-274, "Ruling on Motion for Modification of Protective Measures for Witnesses", 18 November 2004, ("Ruling on Modification of Protective Measures").

3. *Prosecutor v Sesay, Kallon and Gbao* SCSL-04-15-T-682, "Public Kallon Defence Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure" 18 January 2007.

4. *Prosecutor v Sesay, Kallon and Gbao* SCSL-04-15-T-668, "Decision on Sesay Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure", 30 November 2006.

5. *Prosecutor v. Kallon*, SCSL-2003-07-PT-33, "Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure", 23 May 2003.

6. *Prosecutor v Sesay, Kallon and Gbao* SCSL-04-15-T-608, "Public Sesay Defence Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure" 27 July 2006.

7. *Prosecutor v Sesay* SCSL-04-15-T-669, "Application for leave to Appeal the Decision (30th November 2006) on Sesay Defence Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure", 4 December 2006.

8. *Prosecutor v. Kallon*, SCSL-2003-07-PT-33, "Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure", 23 May 2003.

9. *Prosecutor v Sesay, Kallon and Gbao* SCSL-04-15-T-528, "Order to Review Current Protective Measures", 29 March 2006.

10. *Prosecutor v Sesay, Kallon and Gbao* SCSL-04-15-T-556, "Decision on Prosecution Motion to vary Protective Measures for Group I Witnesses TF1-042 and TF1-044", 23 May 2006.

11. *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-04-14-T, Transcript, 27 October 2005, p. 19, lines 20-23; p. 23, lines 15-21.

12.*R v. Stinchcombe*, [1991] 3 S.C.R. 326

13. *R. v Bain*, [1992] 1 S.C.R. 91.

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Westlaw.

83 Alta. L.R. (2d) 193, 8 C.R. (4th) 277, [1992] 1 W.W.R. 97, 68 C.C.C. (3d) 1, 130 N.R. 277, 120 A.R. 161, 8 W.A.C. 161, [1991] 3 S.C.R. 326, 18 C.R.R. (2d) 210, 14 W.C.B. (2d) 266

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R. v. Stinchcombe

WILLIAM B. STINCHCOMBE v. R.

Supreme Court of Canada

La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ.

Heard: May 2, 1991
Judgment: November 7, 1991
Docket: Doc. 21904

Counsel: William E. Code, Q.C., and John Kingman Phillips, for appellant

Daniel M. McDonald, Q.C., and Bruce R. Fraser, Q.C., for respondent

Subject: Criminal; Evidence

Criminal Law --- Evidence -- Crown evidence -- Disclosure -- Duty to disclose.

Criminal Law --- Evidence -- Evidence at trial -- Witnesses -- Duties of prosecutor -- General.

Criminal law -- Evidence -- Disclosure by Crown -- Evidence favourable to defence -- Police recording prospective witness's statement before trial and taking further written statement during trial -- Crown not calling witness and refusing to produce statements on ground that witness not worthy of credit -- Crown having duty to disclose all material evidence to defence -- Absence of evidence possibly affecting outcome of trial -- Supreme Court of Canada ordering new trial with statements produced.

Criminal law -- Trial -- Full answer and defence -- Police recording prospective witness's statement before trial

83 Alta. L.R. (2d) 193, 8 C.R. (4th) 277, [1992] 1 W.W.R. 97, 68 C.C.C. (3d) 1, 130 N.R. 277, 120 A.R. 161, 8 W.A.C. 161, [1991] 3 S.C.R. 326, 18 C.R.R. (2d) 210, 14 W.C.B. (2d) 266

and taking further written statement during trial -- Crown not calling witness and refusing to produce statements on ground that witness not worthy of credit -- Crown having duty to disclose all material evidence to defence -- Absence of evidence possibly affecting outcome of trial -- Supreme Court of Canada ordering new trial with statements produced.

A lawyer was charged with theft, breach of trust and fraud by appropriating certain financial instruments which he held in trust for his client. The defence contended that despite the lawyer's formal status as trustee of the property, the client had in fact made the lawyer his business partner. Under this theory, the lawyer had acted as he was legally entitled to act. After the lawyer's former secretary testified at the preliminary inquiry, but prior to the trial, the R.C.M.P. took a tape-recorded statement from the secretary. During the trial, the police took a further written statement from the secretary. Defence counsel's request for disclosure of both statements was refused. When defence counsel learned that the Crown would not be calling the secretary, he moved before the trial judge that the Crown disclose the contents of both statements to the defence. The Crown did not provide any basis for resisting production other than saying that the secretary was not worthy of credit. The trial judge dismissed the application on the ground that the Crown had no obligation to disclose the contents of the statements. The lawyer was found guilty and the Alberta Court of Appeal dismissed his appeal from conviction without issuing reasons. Leave to appeal to the Supreme Court of Canada was granted on the disclosure issue.

Held:

Appeal allowed; new trial ordered with statements to be produced.

The Crown is under a duty in indictable offences to disclose to the defence all material evidence whether favourable to the accused or not. Failure to disclose impedes the ability of the accused to make full answer and defence. However, this obligation to disclose is subject to the discretion of Crown counsel both as to the withholding of information and as to the timing of disclosure. For example, the Crown's duty to protect the identity of informers gives it a discretion as to the timing and manner of disclosure. A discretion must also be exercised respecting the relevance of information, although the Crown must err on the side of disclosure. There may also be situations in which early disclosure may impede completion of an investigation. This Crown discretion is reviewable by the trial judge, who should be guided by the general principle that information ought not to be withheld if there is a reasonable possibility that the withholding of information will impair the right of the accused to make full answer and defence. The absolute withholding of relevant information can be justified only by the existence of legal privilege which excludes the information from disclosure. The trial judge might also, in certain circumstances, conclude that an existing privilege is not a reasonable limit on the right to make full answer and defence. Here the Crown's explanation for refusal of production, that the witness was not worthy of credit, was completely inadequate to support its exercise of discretion on the ground of irrelevance. Whether the witness was credible was for the trial judge to determine after hearing the evidence, and he ought to have examined the statements.

Initial disclosure should occur before the accused is called upon to elect the mode of trial or to plead. These are crucial steps which the accused must take which affect his or her rights in a fundamental way. The obligation to disclose is a continuing one and disclosure must be completed when additional information is received. Defence counsel must bring to the attention of the trial judge at the earliest opportunity any Crown failure to comply with its duty to disclose. This may enable the trial judge to remedy any prejudice to the accused, and will be an important factor in determining on appeal whether a new trial should be ordered.

Material produced must include not only that which the Crown intends to introduce into evidence but also that which it does not. No distinction should be made between inculpatory and exculpatory evidence. Statements from proposed witnesses should be produced, including those simply taken in an investigator's notes. If notes do not

83 Alta. L.R. (2d) 193, 8 C.R. (4th) 277, [1992] 1 W.W.R. 97, 68 C.C.C. (3d) 1, 130 N.R. 277, 120 A.R. 161, 8 W.A.C. 161, [1991] 3 S.C.R. 326, 18 C.R.R. (2d) 210, 14 W.C.B. (2d) 266

exist then a summary of the witness's anticipated evidence should be produced. Relevant statements from persons not proposed as Crown witnesses should also be produced, and if there are no statements, then notes, or all available information respecting any relevant evidence that the person could give. Here the court must assume that non-production of the secretary's statements was an important factor in the defence decision not to call that witness. The absence of this evidence might have affected the outcome.

Cases considered:

Bisaillon v. Keable, [1983] 2 S.C.R. 60, 4 Admin. L.R. 205, 37 C.R. (3d) 289, 2 D.L.R. (4th) 193, 51 N.R. 81, 7 C.C.C. (3d) 385 -- referred to

Boucher v. R., [1955] S.C.R. 16, 20 C.R. 1, 110 C.C.C. 263 -- applied

Canada (Solicitor General) v. Ontario (Royal Commission of Inquiry into Confidentiality of Health Records), [1981] 2 S.C.R. 494, 23 C.R. (3d) 338, 23 C.P.C. 99, 128 D.L.R. (3d) 193, 38 N.R. 588, 62 C.C.C. (2d) 193 -- referred to

Cunliffe v. Law Society of British Columbia, [1984] 4 W.W.R. 451, 11 D.L.R. (4th) 280, 13 C.C.C. (3d) 560, 40 C.R. (3d) 67 (B.C.C.A.) -- referred to

Dersch v. Canada (Attorney General), [1990] 2 S.C.R. 1505, [1991] 1 W.W.R. 231, 51 B.C.L.R. (2d) 145, 80 C.R. (3d) 299, 60 C.C.C. (3d) 132, 50 C.R.R. 272, 77 D.L.R. (4th) 473, 36 Q.A.C. 258, 116 N.R. 340, 43 O.A.C. 256 -- referred to

Lemay v. R., [1952] 1 S.C.R. 232, 14 C.R. 89, 102 C.C.C. 1 -- applied

Marks v. Beyfus (1890), 25 Q.B.D. 494 (C.A.) -- referred to

McInroy v. R., [1979] 1 S.C.R. 588, [1978] 6 W.W.R. 585, 5 C.R. (3d) 125, 89 D.L.R. (3d) 609, 42 C.C.C. (2d) 481, 23 N.R. 589 -- referred to

R. v. Bourget (1987), 56 C.R. (3d) 97, 46 M.V.R. 246, 54 Sask. R. 178, 35 C.C.C. (3d) 371, 41 D.L.R. (4th) 756, 29 C.R.R. 25 (C.A.) -- referred to

R. v. C. (M.H.) (1988), 46 C.C.C. (3d) 142, reversed (1991), 4 C.R. (4th) 1, 63 C.C.C. (3d) 384, 123 N.R. 63 (S.C.C.) -- applied

R. v. Caccamo, [1976] 1 S.C.R. 786, 29 C.R.N.S. 78, 4 N.R. 133, 21 C.C.C. (2d) 257, 54 D.L.R. (3d) 685 -- referred to

R. v. Mannion, [1986] 2 S.C.R. 272, [1986] 6 W.W.R. 525, 47 Alta. L.R. (2d) 177, 53 C.R. (3d) 193, 69 N.R. 189, 28 C.C.C. (3d) 544, 31 D.L.R. (4th) 712, 75 A.R. 16, 25 C.R.R. 182referred to

R. v. Piché, [1971] S.C.R. 23, 74 W.W.R. 674, 12 C.R.N.S. 222, 11 D.L.R. (3d) 700, [1970] 4 C.C.C. 27 -- referred to

R. v. Rothman, [1981] 1 S.C.R. 640, 20 C.R. (3d) 97, 59 C.C.C. (2d) 30, 121 D.L.R. (3d) 578, 35 N.R.

83 Alta. L.R. (2d) 193, 8 C.R. (4th) 277, [1992] 1 W.W.R. 97, 68 C.C.C. (3d) 1, 130 N.R. 277, 120 A.R. 161, 8 W.A.C. 161, [1991] 3 S.C.R. 326, 18 C.R.R. (2d) 210, 14 W.C.B. (2d) 266

485 -- referred to

R. v. Scott, [1990] 3 S.C.R. 979, 116 N.R. 361, 2 C.R. (4th) 153, 61 C.C.C. (3d) 300, 43 O.A.C. 277, 1 C.R.R. (2d) 82 -- referred to

Savion v. R. (1980), 13 C.R. (3d) 259, 52 C.C.C. (2d) 276 (Ont. C.A.) -- referred to

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11

s. 7considered

Criminal Code, R.S.C. 1970, c. C-34 [now R.S.C. 1985, c. C-46]

s. 294(a) [now s. 334(a)]pursuant to

s. 296 [now s. 336]pursuant to

s. 338(1)(a) [now s. 380(1)(a)]pursuant to

Criminal Code, R.S.C. 1985, c. C-46

s. 482considered

s. 603referred to

Criminal Justice Act 1967 (U.K.), 1967, c. 80 -- referred to

Appeal by accused from judgment of Alberta Court of Appeal which affirmed judgment of Brennan J. convicting accused of breach of trust and fraud. For related proceedings, see [1990] A.W.L.D. 519.

The judgment of the court was delivered by *Sopinka J.*:

1 This appeal raises the issue of the Crown's obligation to make disclosure to the defence. A witness who gave evidence at the preliminary inquiry favourable to the accused was subsequently interviewed by agents for the Crown. Crown counsel decided not to call the witness and would not produce the statements obtained at the interview. The trial judge refused an application by the defence for disclosure on the ground that there was no obligation on the Crown to disclose the statements. The Court of Appeal affirmed the judgment at trial and the case is here with leave of this court.

I. Facts

2 The appellant was a Calgary lawyer charged with appropriating certain financial instruments from a client, one Jack Abrams. The indictment charged thirteen counts of criminal breach of trust contrary to s. 296 of the *Criminal Code*, R.S.C. 1970, c. C-34 (now s. 336 of R.S.C. 1985, c. C-46), thirteen counts of theft contrary to s. 294(*a*) (now s. 334(*a*) of R.S.C. 1985, c. C-46) of the *Criminal Code*, and one count of fraud contrary to s. 338(1)(*a*) (now

83 Alta. L.R. (2d) 193, 8 C.R. (4th) 277, [1992] 1 W.W.R. 97, 68 C.C.C. (3d) 1, 130 N.R. 277, 120 A.R. 161, 8 W.A.C. 161, [1991] 3 S.C.R. 326, 18 C.R.R. (2d) 210, 14 W.C.B. (2d) 266

s. 380(1)(*a*) of R.S.C. 1985, c. C-46) of the *Criminal Code*. The trial in the Alberta Court of Queen's Bench was before Brennan J. without a jury.

3 The Crown alleged that the appellant had wrongfully appropriated property which he held in trust for Abrams. The defence did not contest the receipt of funds by the appellant. The defence did contend, however, that despite Stinchcombe's formal status as trustee of the property, Abrams had in fact made Stinchcombe his business partner. Under this theory, Stinchcombe had acted as he was legally entitled to act. At issue therefore was the actual, as opposed to the formal, nature of the relationship between the two men.

4 Patricia Lineham is a former secretary of Mr. Stinchcombe. She was a Crown witness at the preliminary inquiry. There, she gave evidence which was apparently very favourable to the defence regarding the conduct of Abrams. The precise content of this testimony was not before the trial judge and is not in the record. Lineham was not listed on the indictment, but was subpoenaed by the Crown.

5 After the preliminary inquiry but prior to the trial, Lineham was interviewed by an R.C.M.P. officer. A tape-recorded statement was taken. Crown counsel informed defence counsel of the existence but not the content of this statement. A request for disclosure was refused. Later, during the course of the trial, Lineham was again interviewed by a police officer and a written statement was taken. Again, though defence counsel was advised of the existence of the statement, a request for disclosure was refused. Crown counsel also indicated that he would not be calling Lineham as she was not worthy of credit.

6 It was not until the third day of the trial that defence counsel learned conclusively that Lineham would not be called by the Crown. At this time, he moved before the trial judge for an order that (i) the Crown call the witness, or (ii) the court call the witness, or (iii) the Crown disclose the contents of the statements to the defence. A review of the record makes it clear that defence counsel was pressing for access to, or production of, both the tape-recorded and written statements and was not pressing the alternative requests. In support of this motion, counsel for the defendant indicated that Lineham refused to speak to him or his staff when they attempted to interview her about the contents of the statements. Crown counsel did not provide any basis for resisting production other than to say that in his view the potential witness was not worthy of credit.

7 The trial judge dismissed the application. Brennan J. ruled that under the circumstances there was no obligation on the Crown to call the witness and that there was no obligation on the Crown to disclose the contents of the statements. The trial proceeded, and the accused was found guilty of all twenty-seven counts charged. A conditional stay was entered with respect to the thirteen theft counts. The Alberta Court of Appeal dismissed the appeal from conviction without issuing reasons. Leave to appeal to this court was granted on the disclosure issue.

8 During argument before this court, an application was made by the Crown to adduce the statements and the tape as fresh evidence. This application was rejected. The principal basis for the rejection was that at this stage it would be impossible to determine whether the statements would have been material to the defence if produced at trial.

II. Crown's Obligation to Disclose

9 The circumstances which give rise to this case are testimony to the fact that the law with respect to the duty of the Crown to disclose is not settled. A number of cases have addressed some aspects of the subject: see, for example, *Cunliffe v. Law Society of British Columbia*, [1984] 4 W.W.R. 451, 11 D.L.R. (4th) 280, 13 C.C.C. (3d) 560, 40 C.R. (3d) 67 (B.C.C.A.); *Savion v. R.* (1980), 13 C.R. (3d) 259, 52 C.C.C. (2d) 276 (Ont. C.A.); *R. v. Bourget* (1987), 56 C.R. (3d) 97, 46 M.V.R. 246, 54 Sask. R. 178, 35 C.C.C. (3d) 371, 41 D.L.R. (4th) 756, 29 C.R.R. 25 (C.A.). No case in this court has made a comprehensive examination of the subject. The Law Reform

83 Alta. L.R. (2d) 193, 8 C.R. (4th) 277, [1992] 1 W.W.R. 97, 68 C.C.C. (3d) 1, 130 N.R. 277, 120 A.R. 161, 8 W.A.C. 161, [1991] 3 S.C.R. 326, 18 C.R.R. (2d) 210, 14 W.C.B. (2d) 266

Commission of Canada, in a 1974 working paper titled *Criminal Procedure: Discovery* (the "1974 working paper"), and a 1984 report titled *Disclosure by the Prosecution* (the "1984 report"), recommended comprehensive schemes regulating disclosure by the Crown but no legislative action has been taken implementing the proposals. Apart from the limited legislative response contained in s. 603 of the *Criminal Code*, R.S.C. 1985, c. C-46, enacted in the 1953-54 overhaul of the *Criminal Code* (which itself condensed pre-existing provisions), legislators have been content to leave the development of the law in this area to the courts.

10 Production and discovery were foreign to the adversary process of adjudication in its earlier history when the element of surprise was one of the accepted weapons in the arsenal of the adversaries. This applied to both criminal and civil proceedings. Significantly, in civil proceedings this aspect of the adversary process has long since disappeared, and full discovery of documents and oral examination of parties and even witnesses are familiar features of the practice. This change resulted from acceptance of the principle that justice was better served when the element of surprise was eliminated from the trial and the parties were prepared to address issues on the basis of complete information of the case to be met. Surprisingly, in criminal cases in which the liberty of the subject is usually at stake, this aspect of the adversary system has lingered on. While the prosecution bar has generally co-operated in making disclosure on a voluntary basis, there has been considerable resistance to the enactment of comprehensive rules which would make the practice mandatory. This may be attributed to the fact that proposals for reform in this regard do not provide for reciprocal disclosure by the defence (see 1974 working paper at pp. 29-31; 1984 report at pp. 13-15; Marshall Commission Report, infra, vol. 2, at pp. 242-44).

11 It is difficult to justify the position which clings to the notion that the Crown has no legal duty to disclose all relevant information. The arguments against the existence of such a duty are groundless while those in favour are, in my view, overwhelming. The suggestion that the duty should be reciprocal may deserve consideration by this court in the future but is not a valid reason for absolving the Crown of its duty. The contrary contention fails to take account of the fundamental difference in the respective roles of the prosecution and the defence. In *Boucher v. R.*, [1955] S.C.R. 16, 20 C.R. 1, 110 C.C.C. 263, Rand J. states (at pp. 23-24) [S.C.R.]:

> It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a 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 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 efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.

12 I would add that the fruits of the investigation which are in the possession of counsel for the Crown are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done. In contrast, the defence has no obligation to assist the prosecution and is entitled to assume a purely adversarial role toward the prosecution. The absence of a duty to disclose can, therefore, be justified as being consistent with this role.

13 Other grounds advanced by advocates of the absence of a general duty to disclose all relevant information are that it would impose onerous new obligations on the Crown prosecutors resulting in increased delays in bringing accused persons to trial. This ground is not supported by the material in the record. As I have already observed, disclosure is presently being made on a voluntary basis. The extent of disclosure varies from province to province, from jurisdiction to jurisdiction and from prosecutor to prosecutor. The adoption of uniform, comprehensive rules for disclosure by the Crown would add to the workload of some Crown counsel but this would be offset by the time saved which is now spent resolving disputes such as this one surrounding the extent of the Crown's obligation and dealing with matters that take the defence by surprise. In the latter case an adjournment is frequently the result of

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non-disclosure or more time is taken by a defence counsel who is not prepared. There is also compelling evidence that much time would be saved and therefore delays reduced by reason of the increase in guilty pleas, withdrawal of charges and shortening or waiver of preliminary hearings. The 1984 report (at pp. 6-9) refers to several experimental projects which were established after the publication of the 1974 working paper in order to test the viability of pre-trial disclosure. The result of these experiments, and in particular the Montreal experiment, which was the most exhaustively evaluated, was that there was a significant increase in the number of cases settled and pleas of guilty entered or charges withdrawn.

14 In England, under the provisions of the *Criminal Justice Act 1967* (U.K.), 1967, c. 80, a "packet" of material is furnished to defence counsel. The provision of such material has led to a reduction in the length and number of preliminary hearings in that jurisdiction: *Report of the Special Committee on Preliminary Hearings*, Bench and Bar Council of Ontario (1982), at pp. 12-15.

15 Refusal to disclose is also justified on the ground that the material will be used to enable the defence to tailor its evidence to conform with information in the Crown's possession. For example, a witness may change his or her testimony to conform with a previous statement given to the police or counsel for the Crown. I am not impressed with this submission. All forms of discovery are subject to this criticism. There is surely nothing wrong in a witness refreshing his or her memory from a previous statement or document. The witness may even change his or her evidence as a result. This may rob the cross-examiner of a substantial advantage but fairness to the witness may require that a trap not be laid by allowing the witness to testify without the benefit of seeing contradic tory writings which the prosecutor holds close to the vest. The principle has been accepted that the search for truth is advanced rather than retarded by disclosure of all relevant material.

16 Finally, it is suggested that disclosure may put at risk the security and safety of persons who have provided the prosecution with information. No doubt measures must occasionally be taken to protect the identity of witnesses and informers. Protection of the identity of informers is covered by the rules relating to informer privilege and exceptions thereto (see *Marks v. Beyfus* (1890), 25 Q.B.D. 494 (C.A.); *R. v. Scott*, [1990] 3 S.C.R. 979, 116 N.R. 361, 2 C.R. (4th) 153, 61 C.C.C. (3d) 300, 43 O.A.C. 277, 1 C.R.R. (2d) 82), and any rules with respect to disclosure would be subject to this and other rules of privilege. With respect to witnesses, persons who have information that may be evidence favourable to the accused will have to have their identity disclosed sooner or later. Even the identity of an informer is subject to this fact of life by virtue of the "innocence exception" to the informer privilege rule (*Marks v. Beyfus*, supra, at pp. 489-99; *R. v. Scott*, supra, at p. 996; *Bisaillon v. Keable*, [1983] 2 S.C.R. 60 at 93, 4 Admin. L.R. 205, 37 C.R. (3d) 289, 2 D.L.R. (4th) 193, 51 N.R. 81, 7 C.C.C. (3d) 385; *Canada (Solicitor General) v. Ontario (Royal Commission of Inquiry into Confidentiality of Health Records)*, [1981] 2 S.C.R. 494, 23 C.R. (3d) 338, 23 C.P.C. 99, 128 D.L.R. (3d) 193, 38 N.R. 588, 62 C.C.C. (2d) 193). It will, therefore, be a matter of the timing of the disclosure rather than whether disclosure should be made at all. The prosecutor must retain a degree of discretion in respect of these matters. The discretion, which will be subject to review, should extend to such matters as excluding what is clearly irrelevant, withholding the identity of persons to protect them from harassment or injury, or to enforce the privilege relating to informers. The discretion would also extend to the timing of disclosure in order to complete an investigation. I shall return to this subject later in these reasons.

17 This review of the pros and cons with respect to disclosure by the Crown shows that there is no valid practical reason to support the position of the opponents of a broad duty of disclosure. Apart from the practical advantages to which I have referred, there is the overriding concern that failure to disclose impedes the ability of the accused to make full answer and defence. This common law right has acquired new vigour by virtue of its inclusion in s. 7 of the *Canadian Charter of Rights and Freedoms* as one of the principles of fundamental justice. (See *Dersch v. Canada (Attorney General)*, [1990] 2 S.C.R. 1505 at 1514, [1991] 1 W.W.R. 231, 80 C.R. (3d) 299, 60 C.C.C. (3d) 132, 51 B.C.L.R. (2d) 145, 50 C.R.R. 272, 77 D.L.R. (4th) 473, 36 Q.A.C. 258, 116 N.R. 340,

83 Alta. L.R. (2d) 193, 8 C.R. (4th) 277, [1992] 1 W.W.R. 97, 68 C.C.C. (3d) 1, 130 N.R. 277, 120 A.R. 161, 8 W.A.C. 161, [1991] 3 S.C.R. 326, 18 C.R.R. (2d) 210, 14 W.C.B. (2d) 266

43 O.A.C. 256 .) The right to make full answer and defence is one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted. Recent events have demonstrated that the erosion of this right due to non-disclosure was an important factor in the conviction and incarceration of an innocent person. In the *Royal Commission on the Donald Marshall, Jr., Prosecution*, vol. 1: Findings and Recommendations (1989) (the "Marshall Commission Report"), the commissioners found that prior inconsistent statements were not disclosed to the defence. This was an important contributing factor in the miscarriage of justice which occurred and led the commission to state that "anything less than complete disclosure by the Crown falls short of decency and fair play" (vol. 1 at p. 238). The commission recommended an extensive regime of disclosure of which the key provisions are as follows (vol. 1 at p. 243):

> 2(1) Without request, the accused is entitled, before being called upon to elect the mode of trial or to plead to the charge of an indictable offence, whichever comes first, and thereafter:
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> (*a*) to receive a copy of his criminal record;
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> (*b*) to receive a copy of any statement made by him to a person in authority and recorded in writing or to inspect such a statement if it has been recorded by electronic means; and to be informed of the nature and content of any verbal statement alleged to have been made by the accused to a person in authority and to be supplied with any memoranda in existence pertaining thereto;
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> (*c*) to inspect anything that the prosecutor proposes to introduce as an exhibit and, where practicable, receive copies thereof;
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> (*d*) to receive a copy of any statement made by a person whom the prosecutor proposes to call as a witness or anyone who may be called as a witness, and recorded in writing or, in the absence of a statement, a written summary of the anticipated testimony of the proposed witness, or anyone who may be called as a witness;
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> (*e*) to receive any other material or information known to the Crown and which tends to mitigate or negate the defendant's guilt as to the offence charged, or which would tend to reduce his punishment therefor, notwithstanding that the Crown does not intend to introduce such material or information as evidence;
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> (*f*) to inspect the electronic recording of any statement made by a person whom the prosecutor proposes to call as a witness;
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> (*g*) to receive a copy of the criminal record of any proposed witness; and
>
> (*h*) to receive, where not protected from disclosure by the law, the name and address of any other person who may have information useful to the accused, or other details enabling that person to be identified.
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> 2(2) The disclosure contemplated in subsection (1), paragraphs (*d*), (*e*) and (*h*) shall be provided by the Crown and may be limited only where, upon an inter partes application by the prosecutor, supported by evidence showing a likelihood that such disclosure will endanger the life or safety of such person or interfere with the administration of justice, a justice having jurisdiction in the matter deems it just and proper.

18 In my opinion there is a wholly natural evolution of the law in favour of disclosure by the Crown of all relevant material. As long ago as 1951, Cartwright J. stated in *Lemay v. R.*, [1952] 1 S.C.R. 232 at 257, 14 C.R. 89,

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102 C.C.C. 1:

> I wish to make it perfectly clear that I do not intend to say anything which might be regarded as lessening *the duty which rests upon counsel for the Crown to bring forward evidence of every material fact known to the prosecution whether favourable to the accused or otherwise* ... [emphasis added]

This statement may have been in reference to the obligation resting on counsel for the Crown to call evidence rather than to disclose the material to the defence, but I see no reason why this obligation should not be discharged by disclosing the material to the defence rather than obliging the Crown to make it part of the Crown's case. Indeed, some of the information will be in a form that cannot be put in evidence by the Crown but can be used by the defence in cross-examination or otherwise. Production to the defence is then the only way in which the injunction of Cartwright J. can be obeyed.

19 In *R. v. C. (M.H.)* (1988), 46 C.C.C. (3d) 142 at 155 (B.C.C.A.), McEachern C.J.B.C. after a review of the authorities stated what I respectfully accept as a correct statement of the law. He said that "there is a general duty on the part of the Crown to disclose all material it proposes to use at trial and especially all evidence which may assist the accused even if the Crown does not propose to adduce it." This passage was cited with approval by McLachlin J. in her reasons on behalf of the court (*R. v. C. (M.H.)* (1991), 4 C.R. (4th) 1, 63 C.C.C. (3d) 385, 123 N.R. 63 (S.C.C.)). She went on to add: "This court has previously stated that the Crown is under a duty at common law to disclose to the defence all material evidence whether favourable to the accused or not" (p. 73) [N.R.].

20 As indicated earlier, however, this obligation to disclose is not absolute. It is subject to the discretion of counsel for the Crown. This discretion extends both to the withholding of information and to the timing of disclosure. For example, counsel for the Crown has a duty to respect the rules of privilege. In the case of informers the Crown has a duty to protect their identity. In some cases serious prejudice or even harm may result to a person who has supplied evidence or information to the investigation. While it is a harsh reality of justice that ultimately any person with relevant evidence must appear to testify, the discretion extends to the timing and manner of disclosure in such circumstances. A discretion must also be exercised with respect to the relevance of information. While the Crown must err on the side of inclusion, it need not produce what is clearly irrelevant. The experience to be gained from the civil side of the practice is that counsel, as officers of the court and acting responsibly, can be relied upon not to withhold pertinent information. Transgressions with respect to this duty constitute a very serious breach of legal ethics. The initial obligation to separate "the wheat from the chaff" must therefore rest with Crown counsel. There may also be situations in which early disclosure may impede completion of an investigation. Delayed disclosure on this account is not to be encouraged and should be rare. Completion of the investigation before proceeding with the prosecution of a charge or charges is very much within the control of the Crown. Nevertheless, it is not always possible to predict events which may require an investigation to be reopened and the Crown must have some discretion to delay disclosure in these circumstances.

21 The discretion of Crown counsel is, however, reviewable by the trial judge. Counsel for the defence can initiate a review when an issue arises with respect to the exercise of the Crown's discretion. On a review the Crown must justify its refusal to disclose. Inasmuch as disclosure of all relevant information is the general rule, the Crown must bring itself within an exception to that rule.

22 The trial judge on a review should be guided by the general principle that information ought not to be withheld if there is a reasonable possibility that the withholding of information will impair the right of the accused to make full answer and defence, unless the non-disclosure is justified by the law of privilege. The trial judge might also, in certain circumstances, conclude that the recognition of an existing privilege does not constitute a reasonable limit on the constitutional right to make full answer and defence and thus require disclosure in spite of the law of privilege. The trial judge may also review the decision of the Crown to withhold or delay production of

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information by reason of concern for the security or safety of witnesses or persons who have supplied information to the investigation. In such circumstances, while much leeway must be accorded to the exercise of the discretion of the counsel for the Crown with respect to the manner and timing of the disclosure, the absolute withholding of information which is relevant to the defence can only be justified on the basis of the existence of a legal privilege which excludes the information from disclosure.

23 The trial judge may also review the Crown's exercise of discretion as to relevance and interference with the investigation to ensure that the right to make full answer and defence is not violated. I am confident that disputes over disclosure will arise infrequently when it is made clear that counsel for the Crown is under a general duty to disclose *all* relevant information. The tradition of Crown counsel in this country in carrying out their role as "ministers of justice" and not as adversaries has generally been very high. Given this fact, and the obligation on defence counsel as officers of the court to act responsibly, these matters will usually be resolved without the intervention of the trial judge. When they do arise, the trial judge must resolve them. This may require not only submissions but the inspection of statements and other documents and indeed, in some cases, viva voce evidence. A voir dire will frequently be the appropriate procedure in which to deal with these matters.

24 Counsel for the accused must bring to the attention of the trial judge at the earliest opportunity any failure of the Crown to comply with its duty to disclose of which counsel becomes aware. Observance of this rule will enable the trial judge to remedy any prejudice to the accused if possible and thus avoid a new trial: see *R. v. Caccamo*, [1976] 1 S.C.R. 786, 29 C.R.N.S. 78, 4 N.R. 133, 21 C.C.C. (2d) 257, 54 D.L.R. (3d) 685. Failure to do so by counsel for the defence will be an important factor in determining on appeal whether a new trial should be ordered.

25 These are the general principles that govern the duty of the Crown to make disclosure to the defence. There are many details with respect to their application that remain to be worked out in the context of concrete situations. It would be neither possible nor appropriate to attempt to lay down precise rules here. Although the basic principles of disclosure will apply across the country, the details may vary from province to province and even within a province by reason of special local conditions and practices. It would, therefore, be useful if the under-utilized power conferred by s. 482 of the *Criminal Code*, R.S.C. 1985, c. C-46, which empowers superior courts and courts of criminal jurisdiction to enact rules were employed to provide further details with respect to the procedural aspects of disclosure.

26 The general principles referred to herein arise in the context of indictable offences. While it may be argued that the duty of disclosure extends to all offences, many of the factors which I have canvassed may not apply at all or may apply with less impact in summary conviction offences. Moreover, the content of the right to make full answer and defence entrenched in s. 7 of the *Charter* may be of a more limited nature. A decision as to the extent to which the general principles of disclosure extend to summary conviction offences should be left to a case in which the issue arises in such proceedings. In view of the number and variety of statutes which create such offences, consideration would have to be given as to where to draw the line. Pending a decision on that issue, the voluntary disclosure which has been taking place through the co-operation of Crown counsel will no doubt continue. Continuation and extension of this practice may eliminate the necessity for a decision on the issue by this court.

27 There are, however, two additional matters which require further elaboration of the general principles of disclosure outlined above. They are: (1) the timing of disclosure, and (2) what should be disclosed. Some detail with respect to these issues is essential if the duty to disclose is to be meaningful. Moreover, with respect to the second matter, resolution of the dispute over disclosure in this case requires a closer examination of the issue.

28 With respect to timing, I agree with the recommendation of the Law Reform Commission of Canada in both of its reports that initial disclosure should occur before the accused is called upon to elect the mode of trial or to

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plead. These are crucial steps which the accused must take which affect his or her rights in a fundamental way. It will be of great assistance to the accused to know what are the strengths and weaknesses of the Crown's case before committing on these issues. As I have pointed out above, the system will also profit from early disclosure as it will foster the resolution of many charges without trial, through increased numbers of withdrawals and pleas of guilty. The obligation to disclose will be triggered by a request by or on behalf of the accused. Such a request may be made at any time after the charge. Provided the request for disclosure has been timely, it should be complied with so as to enable the accused sufficient time before election or plea to consider the information. 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. At this stage, the Crown's brief will often not be complete and disclosure will be limited by this fact. Nevertheless, the obligation to disclose is a continuing one and disclosure must be completed when additional information is received.

29 With respect to what should be disclosed, the general principle to which I have referred is that all relevant information must be disclosed subject to the reviewable discretion of the Crown. The material must include not only that which the Crown intends to introduce into evidence but also that which it does not. No distinction should be made between inculpatory and exculpatory evidence. The attempt to make this distinction in connection with the confession rule proved to be unworkable and was eventually discarded by this court: see *R. v. Piché*, [1971] S.C.R. 23 at 36, 74 W.W.R. 674, 12 C.R.N.S. 222, 11 D.L.R. (3d) 700, [1970] 4 C.C.C. 27; *R. v. Rothman*, [1981] 1 S.C.R. 640 at 645, 20 C.R. (3d) 97, 59 C.C.C. (2d) 30, 121 D.L.R. (3d) 578, 35 N.R. 485. To reintroduce the distinction here would lead to interminable controversy at trial that should be avoided. The Crown must, therefore, disclose relevant material whether it is inculpatory or exculpatory.

30 A special problem arises in respect to witness statements and is specifically raised in this case. There is virtually no disagreement that statements in the possession of the Crown obtained from witnesses it proposes to call should be produced. In some cases the statement will simply be recorded in notes taken by an investigator, usually a police officer. The notes or copies should be produced. If notes do not exist then a "will say" statement, summarizing the anticipated evidence of the witness, should be produced based on the information in the Crown's possession. A more difficult issue is posed with respect to witnesses and other persons whom the Crown does not propose to call. In its 1974 working paper, the Law Reform Commission of Canada recommended disclosure of not only the names, addresses and occupations of all "persons who have provided information to investigation or prosecution authorities" (p. 41), but the statements obtained or, if these did not exist, "a summary of the information provided by those persons not intended to be called at trial, along with a statement of the manner in which the information in each summary has been obtained ..." (p. 41). In its 1984 report, the commission seemed to have changed its mind. It stated (at pp. 27-28):

> With respect to potential witnesses we do not recommend, on a mandatory basis, the type of thorough disclosure that we recommend with respect to proposed witnesses. Complete disclosure would entail not only the identification of such persons, but the disclosure of any statement they made and in some cases their criminal records. In our view a recommendation to this effect would be excessive and disproportionate to the needs of the defence. In many instances these people are of no use, or of marginal use, to the case for either side. Their statements are not evidence, although they may be effectively used by the prosecution for purposes of impeachment in cross-examination in the event the witness is called by the accused. Prosecutors are understandably reluctant to disclose these statements because to do so would imperil their principal utility. It is our view that the interests of the defence are adequately served by the mandatory disclosure of the identity of such persons, although we would not wish our comments to discourage prosecutors from disclosing statements and other relevant information on a voluntary basis.

31 The Marshall Commission Report recommended disclosure of "any statement made by a person whom the prosecutor proposes to call as a witness or anyone who may be called as a witness." Although not entirely clear,

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this recommendation appears to extend to anyone who has relevant information and who is either compellable or prepared to testify whether proposed to be called by the Crown or not.

32 This court, in *R. v. C. (M.H.)*, supra, dealt with the failure to disclose either the identity or statement of a person who provided relevant information to the police but who was not called as a witness. McLachlin J., speaking for the court, indicated that failure to disclose in such cases could impair the fairness of the trial.

33 I am of the opinion that, subject to the discretion to which I have referred above, all statements obtained from persons who have provided relevant information to the authorities should be produced notwithstanding that they are not proposed as Crown witnesses. Where statements are not in existence, other information such as notes should be produced, and, if there are no notes, then in addition to the name, address and occupation of the witness, all information in the possession of the prosecution relating to any relevant evidence that the person could give should be supplied. I do not find the comments of the commission in its 1984 report persuasive. If the information is of no use then presumably it is irrelevant and will be excluded in the exercise of the discretion of the Crown. If the information is of some use then it is relevant and the determination as to whether it is sufficiently useful to put into evidence should be made by the defence and not the prosecutor. Moreover, I do not understand the commission's statement that "their statements are not evidence." That is true of all witness statements. They themselves are not evidence but are produced not because they will be put in evidence in that form but will enable the evidence to be called viva voce. That prosecutors are reluctant to disclose statements because use of them in cross-examination is thereby rendered less effective is understandable. That is an objection to all forms of discovery and disclosure. Tactical advantage must be sacrificed in the interests of fairness and the ascertainment of the true facts of the case.

III. Application to this Case

34 No request was made in this case for disclosure prior to pleading or electing the mode of trial and this issue does not, therefore, arise. A request for disclosure was made during the trial for the disclosure of two statements taken subsequent to the preliminary hearing. An application for disclosure was dismissed by the trial judge on the ground that there was no obligation on the Crown to disclose the statements.

35 Applying the above principles, I conclude that the following errors were committed:

36 (1) Counsel for the Crown misconceived his obligation to disclose the statements;

37 (2) The explanation for refusal that the witness was not worthy of credit was completely inadequate to support the exercise of this discretion on the ground of irrelevance. Whether the witness is credible is for the trial judge to determine after hearing the evidence;

38 (3) The trial judge ought to have examined the statements. The suggestion that this would have prejudiced the trial judge is without merit. Trial judges are frequently apprised of evidence which is ruled inadmissible. One example is a confession that fails to meet the test of voluntariness. No one would suggest that knowledge of such evidence prejudices the trial judge. We operate on the principle that a judge trained to screen out inadmissible evidence will disabuse himself or herself of such evidence;

39 (4) The trial judge erred in his statement of the duty to disclose on the part of the Crown.

40 It was submitted that the appellant was not deprived of the opportunity to make full answer and defence because he could have:

83 Alta. L.R. (2d) 193, 8 C.R. (4th) 277, [1992] 1 W.W.R. 97, 68 C.C.C. (3d) 1, 130 N.R. 277, 120 A.R. 161, 8 W.A.C. 161, [1991] 3 S.C.R. 326, 18 C.R.R. (2d) 210, 14 W.C.B. (2d) 266

41 (a) interviewed the witness and obtained his own statement;

42 (b) called the witness, and if her evidence proved adverse, cross-examined on the basis of the preliminary hearing transcript.

43 With respect to (a), counsel for the appellant pointed out that the witness refused to be interviewed. In any event, even if such an interview took place, what the witness said on two prior occasions could be very material to the defence.

44 As for (b), counsel for the defence is entitled to know whether the witness he or she is calling will give evidence that will assist the defence or whether the witness will be adverse and necessitate an application to cross-examine on the basis of a prior inconsistent statement. The latter usually creates an undesirable atmosphere at the trial and the most that can be achieved is to impeach or destroy the credibility of the witness: see *McInroy v. R.*, [1979] 1 S.C.R. 588, [1978] 6 W.W.R. 585, 5 C.R. (3d) 125, 89 D.L.R. (3d) 609, 42 C.C.C. (2d) 481, 23 N.R. 589 , and *R. v. Mannion*, [1986] 2 S.C.R. 272 at 277-78, [1986] 6 W.W.R. 525, 47 Alta. L.R. (2d) 177, 53 C.R. (3d) 193, 69 N.R. 189, 28 C.C.C. (3d) 544, 31 D.L.R. (4th) 712, 75 A.R. 16, 25 C.R.R. 182. Most counsel faced with this prospect would likely opt not to call the witness, a matter which bears on the right to make full answer and defence.

45 What are the legal consequences flowing from the failure to disclose? In my opinion, when a court of appeal is called upon to review a failure to disclose, it must consider whether such failure impaired the right to make full answer and defence. This in turn depends on the nature of the information withheld and whether it might have affected the outcome. As McLachlin J. put it in *R. v. C. (M.H.)*, supra (at p. 76):

> Had counsel for the appellant been aware of this statement, he might well have decided to use it in support of the defence that the evidence of the complainant was a fabrication. In my view, that evidence could conceivably have affected the jury's conclusions on the only real issue, the respective credibility of the complainant and the appellant.

46 In this case, we are told that the witness gave evidence at the preliminary hearing favourable to the defence. The subsequent statements were not produced and therefore we have no indication from the trial judge as to whether they were favourable or unfavourable. Examination of the statements, which were tendered as fresh evidence in this court, should be carried out at trial so that counsel for the defence, in the context of the issues in the case and the other evidence, can explain what use might be made of them by the defence. In the circumstances, we must assume that non-production of the statements was an important factor in the decision not to call the witness. The absence of this evidence might very well have affected the outcome.

47 Accordingly, I would allow the appeal and direct a new trial at which the statements should be produced.

Appeal allowed; new trial ordered with statements to be produced.

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R. v. Bain

CRAIG ALEXANDER BAIN v. R.; ATTORNEY GENERAL OF CANADA (intervenor)

Supreme Court of Canada

Lamer C.J.C., La Forest, Gonthier, Cory, McLachlin, Stevenson and Iacobucci JJ.

Heard: June 26, 1991
Judgment: January 23, 1992
Docket: Doc. 21401

Counsel: Timothy E. Breen and James C. Fleming, for appellant. Jeff Casey and Elizabeth Rennie, for respondent.

Graham R. Garton, for intervenor.

Subject: Criminal; Constitutional

Criminal Law --- Constitutional issues in criminal law -- Charter of Rights and Freedoms -- Rights and freedoms -- Right to counsel -- Right to retain and instruct counsel without delay.

Criminal Law --- Constitutional issues in criminal law -- Charter of Rights and Freedoms -- Rights and freedoms -- Right to fair and impartial hearing.

Criminal Law --- Trial by indictment -- Selection of jury -- Empanelling jury -- Peremptory challenge.

Criminal Law --- Trial by indictment -- Selection of jury -- Empanelling jury -- Direction to stand aside by Crown.

Charter of Rights and Freedoms -- Independent and impartial tribunal -- Criminal Code provisions providing Crown through peremptory challenges and 48 stand-asides with four times more than number of peremptory challenges permitted to accused -- Provisions violating s. 11(d) of Charter by leading to reasonable apprehension

10 C.R. (4th) 257, [1992] 1 S.C.R. 91, 69 C.C.C. (3d) 481, 87 D.L.R. (4th) 449,
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of bias.

Charter of Rights and Freedoms -- Demonstrably justified reasonable limit -- Proportionality test -- Violation of s. 11(d) by Crown jury selection powers not conceivably saved by s. 1.

Charter of Rights and Freedoms -- Enforcement under Charter -- Remedies -- Declaration of unconstitutionality -- Jury selection procedure violating s. 11(d) to be declared invalid -- Declaration to be suspended for six months to avoid hiatus.

Charter of Rights and Freedoms -- Right to counsel -- Right to be informed -- Police officer neglecting to tell accused that his lawyer had called -- Accused giving statements to police -- Trial judge not erring in excluding statements.

The accused was arrested at his home on a charge of sexual assault and informed of his right to counsel. After telling him not to say anything until he spoke to a lawyer, his father contacted a lawyer, who in turn called the police station where the accused was being detained and spoke to the investigating officer. The officer told him of the circumstances of the investigation, and that the accused would probably be released later that day. The lawyer told the police officer not to take any statement from the accused. The accused later asked the detective if his father had called and was told, accurately, that he had not. The officer did not tell the accused that the lawyer had called, believing that he had no legal obligation to do so. The trial judge held that the officer's failure to inform the accused of this fact amounted to a breach of his right to counsel under s. 10(b) of the Charter. He also found that the statements were made freely and voluntarily.

At trial, the judge granted defence counsel's request for an order that both the Crown and the accused be given an equal number of peremptory challenges and the Crown no stand-asides, on the basis that what are now ss. 633 and 634 of the Criminal Code were unconstitutional. The accused was acquitted by the jury.

The Crown's appeal to the Ontario Court of Appeal succeeded: (1989), 68 C.R. (3d) 50. The Court of Appeal held that the jury selection procedure in the Criminal Code did not violate the Charter, notwithstanding that s. 634 entitles the Crown to 48 stand-asides and four peremptory challenges. The court also held that the police had not been obliged to volunteer the additional information to the accused that the lawyer had telephoned, and that there had been no violation of his s. 10(b) rights. The court set aside the acquittal and ordered a new trial. The accused appealed.

Held:

The appeal was allowed; the acquittal was restored.

Sections 634(1) and (2) of the Criminal Code are inconsistent with s. 11(d) of the Charter, and the violation cannot be justified under s. 1.

Per Cory J. (Lamer C.J.C. and La Forest J. concurring)

Sections 634(1) and (2) are inconsistent with s. 11(d) insofar as they provide the Crown with a combination of peremptory challenges and standbys that is more than four times in excess of the number of peremptory challenges permitted to an accused. The implementation of these provisions would lead a reasonable person, fully apprised of the extensive rights the Crown may exercise in the selection of a jury, to conclude that there was an apprehension of bias. The ideal of absolute equality is not required by the Charter. However, the provisions permitted the Crown to obtain a jury that would at the very least appear to be favourable to its position rather than an unbiased jury. As long as the impugned provisions remained, the whole trial process would be tainted with the appearance of obvious

10 C.R. (4th) 257, [1992] 1 S.C.R. 91, 69 C.C.C. (3d) 481, 87 D.L.R. (4th) 449,
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and overwhelming unfairness. Whenever the Crown is granted statutory power that can be used abusively, then, on occasion, it will indeed be used abusively. The protection of basic rights should not be dependent upon a reliance on the continuous exemplary conduct of the Crown, something that is impossible to monitor or control.

Given the violation of s. 11(d), the section could not conceivably be construed as a reasonable limit justifiable in a free and democratic society.

The section should be declared invalid. In order to avoid a hiatus, the declaration should be suspended for a period of six months. This would provide an opportunity for Parliament to remedy the situation if it considered this appropriate. The suspended declaration would not leave the defence without a remedy during the interim. The accused could always attempt to demonstrate that there had been an abuse of the standby provision by the prosecution.

Per Stevenson J.

The process under the Criminal Code which grants the Crown 48 standbys and four peremptory challenges while the accused is only allowed four, 12 or 20 peremptory challenges infringes the accused's right to be tried by an independent and impartial jury guaranteed by s. 11(d) of the Charter. The test for both judicial independence and impartiality is whether the tribunal may be reasonably perceived as such. It is not necessary to find that juries are actually partial before an infringement of the Charter is found. The informed observer's perception that the system of selecting jurors impairs impartiality is sufficient. Here, the substantial disparity contained in the legislation existed not in a mere procedural rule, but in the role each party had in choosing the jury by which the accused would be tried. The power to stand by jurors in many instances amounted to granting the Crown additional peremptory challenges. A review of the historical origins of the standby illustrated that its basis was suspect and that there was little modern justification for its continued existence.

The Crown had a burden of establishing that a Charter breach was demonstrably justified in a free and democratic society. Here, neither it nor any intervenor had identified any pressing concern which could justify a limitation.

Per Gonthier J. (dissenting) (McLachlin and Iacobucci JJ. concurring)

The disparity between the means of challenge allowed to the accused and the Crown in the jury selection process under the Criminal Code does not violate the constitutional guarantee of an impartial tribunal under s. 11(d) of the Charter. The test is one of a reasonable apprehension of bias held by reasonable and right-minded persons, applying themselves to the question and obtaining the required information. Furthermore, the grounds for the apprehension must be substantial. Here, the accused would have to establish that a well-informed observer would find that Crown peremptory challenges and standbys gave rise to a reasonable apprehension of bias in a substantial number of cases. There would have to be in the normal operation of the Criminal Code, as applied in fact, a serious fear that partial juries would result too often to be explained solely by factors pertaining to each individual situation. The disparity in the method of selection between the accused and the Crown reflects the asymmetry between the roles of the accused, which are limited, going almost to self-preservation in nature, and of the Crown attorney, who must conscientiously discharge the quasi-judicial duties incumbent on his or her public office and who accordingly requires some flexibility. The well-informed observer would consider that this disparity contributed to a better jury by fostering its impartiality, representativeness and competence. He or she would fail to see any clear link between the jury selection process and the impartiality of the jury. When viewed in isolation, the Criminal Code provisions might appear unfair, but when the entire jury selection process was reviewed, the advantage to the Crown -- while present -- was slight, and certainly did not constitute a rule so unfair that it resulted in an unfair trial.

No evidence had been presented of abusive Crown practice. Any abuses could be adequately dealt with on an

10 C.R. (4th) 257, [1992] 1 S.C.R. 91, 69 C.C.C. (3d) 481, 87 D.L.R. (4th) 449,
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individual basis.

While s. 686(1)(b)(iv) of the Criminal Code was intended to limit annulments for jurisdictional grounds to cases where prejudice to the accused had occurred, it could not be used in this case since the power was given only to trial courts. Here, the jury -- and therefore the trial court -- had been improperly constituted. The trial was null.

The trial judge had correctly excluded the statements as having been obtained in violation of s. 10(b) of the Charter.

Per Stevenson J.

The accused had indicated his desire to exercise his right to counsel by asking whether his father had called. Given the circumstances, a literal response by the police was misleading because the obvious intent of the inquiry was to further the objective of communicating with counsel. It was tantamount to an assertion that he wanted counsel, and, in those circumstances, the answer was an evasion which the officers used to continue the questioning in the face of that assertion. The trial judge had the advantage of assessing that inquiry and response in the particular circumstances, and had not erred in law in excluding the subsequent statements.

It was not necessary to rule on the question of whether the right to retain and instruct counsel had been denied at the point of arrest because the police officers had directed the accused to leave before a lawyer had been contacted. The ruling was moot because the accused had been acquitted, notwithstanding the admission of the earlier statement.

Per Gonthier J. (dissenting) (McLachlin and Iacobucci JJ. concurring)

The s. 10(b) issue was best left to the determination of the judge who would hear the new trial. Agreement was expressed with Stevenson J. that the trial judge was in a better position to rule on the admissibility of the statements, that the Court of Appeal should not have interfered with his determination, and that the issue of the admission of the earlier statement was moot.

Cases considered:

Per Cory J. (Lamer C.J.C. and La Forest J. concurring)

R. v. Grover (1991), 67 C.C.C. (3d) 576, 50 O.A.C. 185 (S.C.C.) -- considered

R. v. Logiacco (1984), 2 O.A.C. 219, 56 C.C.C. (3d) 532, 131 N.R. 80 -- considered

R. v. Pizzacalla (1991), 7 C.R. (4th) 294, 5 O.R. (3d) 783, 69 C.C.C. (3d) 115, 50 O.A.C. 161 -- considered

Per Stevenson J.

Committee for Justice & Liberty v. Canada (National Energy Board), [1978] 1 S.C.R. 369, 9 N.R. 115, 68 D.L.R. (3d) 716 -- considered

Lippé c. Charest, (sub nom. R. v. Lippé) [1991] 2 S.C.R. 114, 61 C.C.C. (3d) 127, written reasons at (sub nom. Lippé c. Charest) 5 M.P.L.R. (2d) 113, (sub nom. R. v. Lippé) 64 C.C.C. (3d) 513, 5 C.R.R. (2d) 31, (sub nom. Lippé c. Québec (Procureur général)) 128 N.R. 1, 39 Q.A.C. 241 -- referred to

R. v. Baig, [1987] 2 S.C.R. 537, 61 C.R. (3d) 97, 81 N.R. 87, 25 O.A.C. 81, 45 D.L.R. (4th) 106, 37

10 C.R. (4th) 257, [1992] 1 S.C.R. 91, 69 C.C.C. (3d) 481, 87 D.L.R. (4th) 449, 133 N.R. 1, 51 O.A.C. 161, 7 C.R.R. (2d) 193

C.C.C. (3d) 181, 32 C.R.R. 355 -- applied

R. v. Barrow, [1987] 2 S.C.R. 694, 61 C.R. (3d) 305, 81 N.R. 321, 38 C.C.C. (3d) 193, 87 N.S.R. (2d) 271, 222 A.P.R. 271, 45 D.L.R. (4th) 487 -- considered

R. v. Cecchini (1985), 48 C.R. (3d) 145, 22 C.C.C. (3d) 323, 17 C.R.R. 326 (Ont. H.C.) -- referred to

R. v. Cloutier, [1979] 2 S.C.R. 709, 12 C.R. (3d) 10, 28 N.R. 1, 48 C.C.C. (2d) 1, 99 D.L.R. (3d) 577 -- considered

R. v. Favel (1987), 60 Sask. R. 176, 39 C.C.C. (3d) 378, 33 C.R.R. 182 (C.A.) [leave to appeal to S.C.C. refused (1988), 64 Sask. R. 80 (note), 33 C.R.R. 182n, 41 C.C.C. (3d) vi (note), 87 N.R. 240 (note)] -- not followed

R. v. Greig (1987), 56 C.R. (3d) 229, 26 C.R.R. 136, 33 C.C.C. (3d) 40 (Ont. H.C.) -- considered

R. v. Johnstone (1986), 72 N.S.R. (2d) 76, 173 A.P.R. 76, 26 C.C.C. (3d) 401 (C.A.) -- considered

R. v. Logan (1988), 68 C.R. (3d) 1, 30 O.A.C. 321, 67 O.R. (2d) 87, 46 C.C.C. (3d) 354, 57 D.L.R. (4th) 58, 45 C.R.R. 201 [affirmed [1990] 2 S.C.R. 731, 79 C.R. (3d) 169, 58 C.C.C. (3d) 391, 112 N.R. 144, 73 D.L.R. (4th) 40, 41 O.A.C. 330, 50 C.R.R. 152] -- referred to

R. v. Mason, [1981] Q.B. 881, [1980] 3 All E.R. 777, 71 Cr. App. R. 157 -- considered

R. v. Morin (1890), 18 S.C.R. 407 -- considered

R. v. Piraino (1982), 37 O.R. (2d) 574, 1 C.R.R. 206, 67 C.C.C. (2d) 28, 136 D.L.R. (3d) 83 (H.C.) -- not followed

R. v. Pizzacalla (1991), 7 C.R. (4th) 294, 5 O.R. (3d) 783, 69 C.C.C. (3d) 115, 50 O.A.C. 161 -- considered

R. v. R. (R.M.) (1986), 53 C.R. (3d) 81 (Ont. H.C.) -- not followed

R. v. Rowbotham (1988), 63 C.R. (3d) 113, 25 O.A.C. 321, 41 C.C.C. (3d) 1, 35 C.R.R. 207 -- referred to

R. v. S. (J.R.) (1987), 59 C.R. (3d) 134, 20 O.A.C. 365, 37 C.C.C. (3d) 351, 32 C.R.R. 328 -- referred to

R. v. Valente, [1985] 2 S.C.R. 673, 49 C.R. (3d) 97, 37 M.V.R. 9, 23 C.C.C. (3d) 193, 24 D.L.R. (4th) 161, 19 C.R.R. 354, 64 N.R. 1, 14 O.A.C. 79 -- applied

R. v. Varga (1985), 44 C.R. (3d) 377, 7 O.A.C. 350, 18 C.C.C. (3d) 281, 13 C.R.R. 351, 15 C.R.R. 122 -- referred to

Per Gonthier J. (dissenting) (McLachlin and Iacobucci JJ. concurring)

Batson v. Kentucky, 476 U.S. 79 (1986) -- referred to

10 C.R. (4th) 257, [1992] 1 S.C.R. 91, 69 C.C.C. (3d) 481, 87 D.L.R. (4th) 449, 133 N.R. 1, 51 O.A.C. 161, 7 C.R.R. (2d) 193

Boucher v. R., [1955] S.C.R. 16, 20 C.R. 1, 110 C.C.C. 263 -- considered

Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc., [1984] 2 S.C.R. 145, 41 C.R. (3d) 97, 27 B.L.R. 297, 33 Alta. L.R. (2d) 193, [1984] 6 W.W.R. 577, (sub nom. Hunter v. Southam Inc.) 14 C.C.C. (3d) 97, 55 A.R. 291, 55 N.R. 241, 2 C.P.R. (3d) 1, 9 C.R.R. 355, 11 D.L.R. (4th) 641, 84 D.T.C. 6467 -- referred to

Committee for Justice & Liberty v. Canada (National Energy Board), [1978] 1 S.C.R. 369, 9 N.R. 115, 68 D.L.R. (3d) 716 -- referred to

Danson v. Ontario (Attorney General), [1990] 2 S.C.R. 1086, 43 C.P.C. (2d) 165, 112 N.R. 362, 50 C.R.R. 59, 41 O.A.C. 250, (sub nom. R. v. Danson) 73 D.L.R. (4th) 686 -- considered

Lippé c. Charest, (sub nom. R. v. Lippé) [1991] 2 S.C.R. 114, 61 C.C.C. (3d) 127, written reasons at (sub nom. Lippé c. Charest) 5 M.P.L.R. (2d) 113, (sub nom. R. v. Lippé) 64 C.C.C. (3d) 513, 5 C.R.R. (2d) 31, (sub nom. Lippé c. Québec (Procureur général)) 128 N.R. 1, 39 Q.A.C. 241 -- considered

MacKay v. Manitoba, [1989] 2 S.C.R. 357, [1989] 6 W.W.R. 351, 99 N.R. 116, 61 D.L.R. (4th) 385, 61 Man. R. (2d) 270, 43 C.R.R. 1 -- considered

Mansbridge c. R. (1 octobre 1991), No C.A. Quebec 200-10-000149-851, M. le juge Brossard et Mmes les juges Mailhot et Tourigny, J.E. 91-1653 (C.A. Que.) -- referred to

Mansell v. R. (1857), 8 E. & B. 54, 120 E.R. 20 (K.B.) -- considered

R. v. Barrow, [1987] 2 S.C.R. 694, 61 C.R. (3d) 305, 81 N.R. 321, 38 C.C.C. (3d) 193, 87 N.S.R. (2d) 271, 222 A.P.R. 271, 45 D.L.R. (4th) 487 -- considered

R. v. Bolduc (1986), 4 Q.A.C. 201 [leave to appeal to S.C.C. refused (1987), 5 Q.A.C. 318 (note)]referred to

R. v. Cloutier (1988), 27 O.A.C. 246, 43 C.C.C. (3d) 35 -- considered

R. v. Curtis (1989), 74 Nfld. & P.E.I.R. 227, 231 A.P.R. 227 (Nfld. C.A.) -- referred to

R. v. Foote (1985), 65 N.B.R. (2d) 444, 167 A.P.R. 444 (C.A.) -- referred to

R. v. Johnstone (1986), 72 N.S.R. (2d) 76, 173 A.P.R. 76, 26 C.C.C. (3d) 401 (C.A.) -- referred to

R. v. Piraino (1982), 37 O.R. (2d) 574, 1 C.R.R. 206, 67 C.C.C. (2d) 28, 136 D.L.R. (3d) 83 (H.C.) -- considered

R. v. Pizzacalla (1991), 7 C.R. (4th) 294, 5 O.R. (3d) 783, 69 C.C.C. (3d) 115, 50 O.A.C. 161 -- considered

R. v. R. (R.M.) (1986), 53 C.R. (3d) 81 (Ont. H.C.) -- considered

R. v. S. (J.R.) (1987), 59 C.R. (3d) 134, 20 O.A.C. 365, 37 C.C.C. (3d) 351, 32 C.R.R. 328 -- referred to

10 C.R. (4th) 257, [1992] 1 S.C.R. 91, 69 C.C.C. (3d) 481, 87 D.L.R. (4th) 449, 133 N.R. 1, 51 O.A.C. 161, 7 C.R.R. (2d) 193

R. v. Sherratt, [1991] 1 S.C.R. 509, 3 C.R. (4th) 129, 122 N.R. 241, 63 C.C.C. (3d) 193, 73 Man. R. (2d) 161 -- considered

R. v. Stinchcombe (1991), 8 C.R. (4th) 277, [1992] 1 W.W.R. 97, 83 Alta. L.R. (2d) 193, 68 C.C.C. (3d) 1, 130 N.R. 277 -- referred to

R. v. Valente, [1985] 2 S.C.R. 673, 49 C.R. (3d) 97, 37 M.V.R. 9, 23 C.C.C. (3d) 193, 24 D.L.R. (4th) 161, 19 C.R.R. 354, 64 N.R. 1, 14 O.A.C. 79 -- referred to

Reference re s. 94(2) of the Motor Vehicle Act (British Columbia), [1985] 2 S.C.R. 486, 48 C.R. (3d) 289, 36 M.V.R. 240, [1986] 1 W.W.R. 481, 69 B.C.L.R. 145, 63 N.R. 266, 23 C.C.C. (3d) 289, 24 D.L.R. (4th) 536, 18 C.R.R. 30 -- referred to

Savion v. R. (1980), 13 C.R. (3d) 259, 52 C.C.C. (2d) 276 (Ont. C.A.) -- considered

Texas & Pacific Railway Co. v. Hill, 237 U.S. 208 (1915) -- considered

Statutes considered:

An Act to amend the Criminal Code (respecting jurors), S.C. 1917, c. 13 --

s. 1

An Ordinance for Inquests, 1305 (U.K.), 33 Edw. 1, c. 4.

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11 --

s. 1

s. 7

s. 10(b)

s. 11(d)

s. 11(f)

s. 15

Criminal Code, R.S.C. 1970, c. C-34 [now R.S.C. 1985, c. C-46] --

s. 246.1 [now R.S.C. 1985, c. C-46, s. 271]

s. 558 [now R.S.C. 1985, c. C-46, s. 629]

s. 562 [now R.S.C. 1985, c. C-46, s. 633]

10 C.R. (4th) 257, [1992] 1 S.C.R. 91, 69 C.C.C. (3d) 481, 87 D.L.R. (4th) 449, 133 N.R. 1, 51 O.A.C. 161, 7 C.R.R. (2d) 193

s. 563 [now R.S.C. 1985, c. C-46, s. 634]

s. 567 [now R.S.C. 1985, c. C-46, s. 638]

s. 570 [now R.S.C. 1985, c. C-46, s. 641]

s. 613(1)(b)(iv) [now R.S.C. 1985, c. C-46, s. 686(1)(b)(iv)]

Criminal Code, R.S.C. 1985, c. C-46 --

s. 271

s. 471

s. 536(2)

s. 629

s. 633

s. 634

s. 641

s. 686(1)(b)(iv)

Criminal Code, 1892, The, S.C. 1892, c. 29 --

s. 668¶9

Criminal Justice Act 1988 (U.K.), 1988, c. 33.

Juries Act, R.S.N.S. 1989, c. 242 --

s. 6

Juries Act, R.S.O. 1980, c. 226 [now R.S.O. 1990, c. J.3] --

s. 12

Juries Act, 1825 (U.K.), 6 Geo. 4, c. 50 --

s. 29

Juries Act 1974 (U.K.), 1974, c. 23.

Juries Act, 1981, The, S.S. 1980-81, c. J-4.1 --

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s. 6

Jurors Act, R.S.Q., c. J-2 --

s. 15

Jury Act, R.S.B.C. 1979, c. 210 --

s. 9

Jury Act, R.S.P.E.I. 1988, c. J-5 --

s. 11

Jury Act, S.A. 1982, c. J-2.1 --

s. 7

Jury Act, S.N.B. 1980, c. J-3.1 --

s. 13

Jury Act, The, R.S.M. 1987, c. J30, C.C.S.M., c. J30 --

s. 17

Jury Act, The, S.N. 1980, c. 41 --

s. 17

28 U.S.C. §1866(c)(2)

Annotation

Parliament would do well to enact the long-ignored recommendations of the Law Reform Commission of Canada, Report No. 16, *The Jury* (1982), pp. 46-49.

The recently abolished Commission there recommended that Crown and defence be given equal numbers of peremptory challenges, which would obviate the need for anachronistic Crown standbys. The Commission proposed 20 peremptory challenges for offences carrying a sentence of life imprisonment, and 12 in all other cases. Special provisions were recommended for challenges in the case of trials of multiple accused -- again suggesting an equal number for Crown and defence.

The same Commission report makes numerous other sensible and well-researched proposals to streamline and improve the jury system. One can only hope that Parliament will act, rather than wait to be pushed again by the Supreme Court utilizing its *Charter* power to force change.

Don Stuart

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Appeal from a judgment of the Ontario Court of Appeal, reported at (1989), 68 C.R. (3d) 50, 31 O.A.C. 357, 47 C.C.C. (3d) 250, 45 C.R.R. 193, allowing an appeal from an acquittal on a sexual assault charge.

***Cory J. (Lamer C.J.C.* and *La Forest J.* concurring):**

1 I have had the privilege of reading the reasons of my colleagues Justice Stevenson and Justice Gonthier. Although I agree with the conclusion of Stevenson J., I reach the result in a somewhat different manner. In my view, the implementation of the impugned provisions would lead a reasonable person, fully apprised of the extensiverights the Crown may exercise in the selection of a jury, to conclude that there was an apprehension of bias.

2 At the outset, I would agree that the Crown attorney plays a very responsible and respected role in the criminal justice system, and particularly in the conduct of criminal trials. It is true that the Crown never wins or loses a case. Yet Crown attorneys are mortal. They are subject to all the emotional and psychological pressures that are exerted by individuals and the community. They may act for the best of motives. For example, they may be moved by sympathy for a helpless victim, or by contempt for the cruel and perverted acts of an accused; they may be influenced by the righteous sense of outrage of a community at the commission of a particularly cruel and vicious crime. As a rule, the conduct and competence of Crown attorneys is exemplary. They are models for the bar and the community. Yet they, like all of us, are subject to human frailties and occasional lapses.

3 Crown attorneys have been known to make inflammatory addressesto juries. See *R. v. Grover*, S.C.C., Nov. 12, 1991 [now reported at (1991), 67 C.C.C. (3d) 576, 50 O.A.C. 185], adopting the dissenting reasons in (1990), 38 O.A.C. 219, 56 C.C.C. (3d) 532, 131 N.R. 80. They have been known to conduct unfair cross-examinations of parties and witnesses. See *R. v. Logiacco* (1984), 2 O.A.C. 177, 11 C.C.C. (3d) 374. I do not make these observations in order to be critical of Crown attorneys. Rather, they are made to emphasize the very human frailties that are common to all, no matter what the office held.

4 Apart from challenges for cause, the provisions of the *Criminal Code* provide the Crown with the ability to stand by 48 prospective jurors and to peremptorily challenge four jurors. The accused in this case has but 12 peremptory challenges. I do not suggest that the ideal of absolute equality is required by the *Canadian Charter of Rights and Freedoms*. However, a discrepancy of 4.25 to 1 in favour of the Crown seems to be so unbalanced that it gives an appearance of unfairness or bias against the accused. The impugned provisions permit the Crown to obtain a jury that would at the very least appear to be favourable to its position rather than an unbiased jury.

5 It is suggested that the Crown attorney, as an officer of the court, would never act unfairly in the selection of a jury. Yet the most exemplary Crown might be so overwhelmed by community pressure that just such a step might be taken. In *R. v. Pizzacalla*, (Ont. C.A. Nov. 12, 1991, unreported [now reported at (1991), 7 C.R. (4th) 294, 5 O.R. (3d) 783, 69 C.C.C. (3d) 115, 50 O.A.C. 161]) Morden, A.C.J.O., Lacourcière and Catzman JJ.A., it was conceded that as a result of the use made by the Crown attorney of the stand-by provi sions in the selection of a jury, an apprehension of bias was created. I have cited this case not to illustrate or emphasize a legal principle, but rather for what it demonstrates. Namely, that those acting for the Crown do, on occasion, demonstrate human frailties, and that the impugnedsection is, on occasion, utilized for the improper purpose of obtaining a jury that appears to be favourable to the Crown.

6 A petition is frequently made that we not be led into temptation. The impugned provision of the *Criminal Code* provides the tempting means to obtain a jury that appears to be favourable to the Crown. The section is so heavily weighed in favour of the Crown that, viewed objectively, it must give that legal fictional paragon, the reasonable person, fully apprised of the manner in which a jury may be selected, an apprehension of bias. This must be so since the jury, as a result of the selection process, would appear to be favourable to the Crown. It seems to me that so long as this provision exists, it may be used and on occasion will be used to select a jury that appears to be

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favourable to the Crown.

7 It may well be correct that it would be impossible to prove that a jury selected after the Crown had exercised all its stand-bys and peremptory challenges was in fact biased. Nonetheless, the overwhelming numerical superiority of choice granted to the Crown creates a pervasive air of unfairness in the jury selection procedure. The jury is the ultimate decision-maker. The fate of the accused is in its hands. The jury should not, as a result of the manner of its selection, appear to favour the Crown over the accused. Fairness should be guiding principles of justice and the hallmark of criminal trials. Yet so long as the impugned provision of the Code remains, providing the Crown with the ability to select a jury that appears to be favourable to it, the whole trial process will be tainted with the appearance of obvious and overwhelming unfairness. Members of the community will be left in doubt as to the merits of a process which permits the Crown to have more than four times as many choices as the accused in the selection of the jury.

8 Unfortunately, it would seem that whenever the Crown is granted statutory power that can be used abusively, then, on occasion, it will indeed be used abusively. The protection of basic rights should not be dependent upon a reliance on the continuous exemplary conduct of the Crown, something that is impossible to monitor or control. Rather, the offending statutory provision should be removed.

9 It follows that s. 563(3) of the *Criminal Code*, R.S.C. 1970, c. C-34 (now R.S.C. 1985, c. C-46, s. 634(2)) offends s. 11(*d*) of the *Charter*. Since the not unlikely effect of the provision is to ensure a jury that at the very least appears to be favourable to the Crown, the section could not conceivably be construed as a reasonable limit that can be justified in a free and democratic society. The section is there fore invalid.

10 The declaration of invalidity resolves all future problems. However, in order to avoid a hiatus, the declaration should be suspended for a period of six months. This will provide an opportunity to Parliament to remedy the situation if it considers it appropriate to do so.

11 The suspended declaration does not leave the defence without a remedy during the interim. The accused may always attempt to demonstrate that there has been an abuse of the standby provisions by the prosecution. This was the course successfully followed in *R. v. Pizzacalla*, supra. I would add that neither the fact that relief may be obtained in this way, nor that many juries have in the past been selected without the exercise of any prosecutional abuse, can be accepted as a basis for defeating the constitutional challenge to the section. The fact remains that the impugned section legislates a means of selecting a jury that could appear to be favourable to the Crown. It can never be forgotten that it is the jury that will determine guilt or innocence. To permit by legislation the selection of a jury apparently favourable to the Crown offends not only the *Charter* but a sense of basic fairness.

Disposition

12 I would declare s. 563(2) of the *Criminal Code* (now s. 634(2)) invalid, but suspend the declaration for a period of six months. The appeal should be allowed, the order of the Court of Appeal set aside and the acquittal of the appellant restored.

13 The constitutional questions should be answered as follows:

> 1. Are ss. 633 and 634 of the *Criminal Code*, R.S.C. 1985, c. C-46 [formerly R.S.C. 1970, c. C-34, ss. 562 and 563] inconsistent with ss. 7, 11(*d*) or 15 of the *Canadian Charter of Rights and Freedoms?*
>
> A. Sections 634(1) and (2) (formerly R.S.C. 1970, c. C-34, ss. 563(1) and (2)) are inconsistent with s. 11(*d*) insofar as they provide the Crown with a combination of peremptory challenges and standbys that is more than four times in excess of the number of peremptory challenges permitted to an accused. It is

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unnecessary to consider whether this provision violates s. 7. The allegation of a violation of s. 15 was withdrawn. Sections 633 and 634(3) (formerly ss. 562 and 563(3)) were not challenged.

2. If the answer to Question 1 is affirmative, are ss. 633 and/or 634 [formerly R.S.C. 1970, c. C-34, ss. 562 and/or 563] justified by s. 1 of the *Canadian Charter of Rights and Freedoms* and therefore not inconsistent with the *Constitution Act, 1982*?

A. The violation is not justified under s. 1.

***Stevenson J.*:**

14 This case concerns the constitutional validity of the jury selection process contained in s. 563 of the *Criminal Code*, R.S.C. 1970, c. C-34 (now R.S.C. 1985 c. C-46, s. 634). At issue is whether this process, which grants the Crown 48 standbys and four peremptory challenges while the accused's being allowed only four, 12 or 20 peremptory challenges, infringes the accused's right to be tried by an independent and impartial jury as guaranteed by the *Canadian Charter of Rights and Freedoms*. Also in issue is the admissibilityof certain of the appellant's statements allegedly taken in violation of his right to counsel.

Facts

15 The appellant was charged with sexual assault pursuant to s. 246.1 (now s. 271) of the *Criminal Code*. The charge arises from an incident which occurred in the early morning hours of December 1, 1984.

16 The appellant was arrested later that day. Two police officers attended at his home where he resided with his parents. Upon arrest, the appellant was informed of his right to counsel. Immediately after this, his father, Mr. Bain, told him not to say anything until he had seen a lawyer. While his son got dressed in preparation to accompany the police, Mr. Bain, with the help of one of the police officers, attempted to retain a lawyer by looking through the Yellow Pages. After being unsuccessful with two or three numbers, the police officer gave him a business card with his telephone number on it. He told Mr. Bain that when a lawyer had been retained, the lawyer should call the officer at the number on the card. The appellant then left with the officers.

17 After both officers returned to the car, they drove off with the appellant and parked down the street. The police officers updated their notebooks and were discussing between themselves what had occurred in the house. According to one of the officer's (McIntyre) testimony in chief, the appellant initiated an inculpatory conversation.

18 During his testimony on the voir dire, the appellant denied making some of these statements; in particular, he denied making the inculpatory admissions.

19 Upon arrival at the police station, the appellant was placed alone in an interview room. About 25 minutes later, a lawyer who had been retained by Mr. Bain called for the police officer. McIntyre returned the telephone call 10 minutes later. The lawyer told McIntyre that he had been retained by the appellant's parents on behalf of the appellant. McIntyre informed the lawyer of the circumstances of the investigation and of the alleged sexual assault, and told the lawyer that the appellant would probably be released later that day. The lawyer could not attend at the police station that day, so he simply told McIntyre not to take any statement from the appellant until he, the lawyer, was present. On the stand, the lawyer could not remember whether he had asked to speak to the appellant.

20 Following this telephone conversation, McIntyre (and another officer, Chisholm) went into the interview room with the appellant. According to the appellant's testimony, he asked whether his father had called. McIntyre told him that his father had not called. The appellantsaid that he wanted to contact his father to find out if his father had retained a lawyer. McIntyre told the appellant that he could call his father later. At no time did McIntyre tell

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the appellant about the telephone call from the lawyer. The police officers initiated an interrogation of the appellant.

21 The appellant told the officers that he was very impaired the previous night due to the intake of a considerable amount of alcohol, as well as one "hit" of L.S.D. The officers then questioned the appellant about his prior relationship with the complainant. He was also questioned about his interaction with the complainant on the night in question.

22 On April 21, 1987, the appellant was tried before a judge and jury in Brampton, Ontario, on a charge of sexual assault. Following arraignment, but before the first prospective juror was asked to step forward, appellant's counsel sought a ruling that both the Crown and the defence each be limited to four peremptory challenges and that the Crown be denied the power to stand jurors by. The trial judge made the requested ruling based on his own holdings to the same effect in other cases. He considered himself bound by his own ruling "until the Court of Appeal rules otherwise." The Crown's objection was noted. The jurors were then selected, with both the defence and the Crown exercising their four peremptory challenges.

23 Following a 14-day trial, the jury acquitted the appellant. On January 31, 1989, the Court of Appeal allowed the Crown's appeal ((1989, 47 C.C.C. (3d) 250) and ordered a new trial. The appellant appeals to the Supreme Court of Canada as of right.

Relevant Legislation

Canadian Charter of Rights and Freedoms

24

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> 10. Everyone has the right on arrest or detention
>
> . . . . .
>
> (*b*) to retain and instruct counsel without delay and to be informed of that right; ...
>
> 11. Any person charged with an offence has the right
>
> . . . . .
>
> (*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

Criminal Code, R.S.C. 1970, c. C-34

25

> 562. (1) An accused who is charged with high treason or first degree murder is entitled to challenge twenty jurors peremptorily.
>
> (2) An accused who is charged with an offence, not being high treason or first degree murder, for which

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he may be sentenced to imprisonment for more than five years is entitled to challenge twelve jurors peremptorily.

(3) An accused who is charged with an offence that is not referred to in subsection (1) or (2) is entitled to challenge four jurors peremptorily.

563. (1) The prosecutor is entitled to challenge four jurors peremptorily, and may direct any number of jurors who are not challenged peremptorily by the accused to stand by until all the jurors have been called who are available for the purpose of try ing the indictment.

(2) Notwithstanding subsection (1), the prosecutor may not direct more than forty-eight jurors to stand by unless the presiding judge, for special cause to be shown, so orders.

(3) The accused may be called upon to declare whether he challenges a juror peremptorily or for cause before the prosecutor is called upon to declare whether he requires the juror to stand by, or challenges him peremptorily or for cause.

567. (1) A prosecutor or an accused is entitled to any number of challenges on the ground that

(*a*) the name of a juror does not appear on the panel, but no misnomer or misdescription is a ground of challenge where it appears to the court that the description given on the panel sufficiently designates the person referred to:

(*b*) a juror is not indifferent between the Queen and the accused;

(*c*) a juror has been convicted of an offence for which he was sentenced to death or to a term of imprisonment exceeding twelve months;

(*d*) a juror is an alien;

(*e*) a juror is physically unable to perform properly the duties of a juror; or

(*f*) a juror does not speak the official language of Canada that is the language of the accused ...

(2) No challenge for cause shall be allowed on a ground not mentioned in subsection (1).

570. (1) Where, as a result of challenges and directions to stand by, a full jury has not been sworn and no names remain to be called, the names of those who have been directed to stand by shall be called again in the order in which their names were drawn and they shall be sworn, unless challenged by the accused, or unless the prosecutor challenges them or shows cause why they should not be sworn.

(2) Where, before a juror is sworn pursuant to subsection (1), other jurors in the panel become available, the prosecutor may require the names of those jurors to be put into and drawn from the box in accordance with section 560, and those jurors shall be challenged, ordered to stand by or sworn, as the case may be, before the names of the jurors who were originally ordered to stand by are called again.

Judgments

Voir Dire -- District Court (Kent D.C.J.) (1987), 30 C.R.R. 75

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26 On the voir dire held to determine the admissibility of the utterancesmade by appellant to the police, the trial judge held that only those statements made before McIntyre's conversation with appellant's lawyer were admissible. The police officer knew that counsel had been retained for the appellant as a result of his discussion with the lawyer. The trial judge found failure of the [police officer] to communicate to the appellant the fact that counsel had been retained to be contrary to the spirit of the judgment in *R. v. Greig* (judgment released January 22, 1987, Ontario Supreme Court, per Dupont J [now reported at (1987), 56 C.R. (3d) 229, 26 C.R.R. 136, 33 C.C.C. (3d) 40]). In his opinion, at p. 78 [C.R.R.]:

> The police effectively foreclosed any opportunity that the accused had to consult with counsel retained for him before his interview, by not advising the accused that the lawyer retained for him by his family was on the telephone. Surely that opportunity should not be determined by the retaining of counsel who knows what specific question to ask an investigating officer.

27 The fact that the accused was a "young offender" facing an extremelyserious criminal charge was significant to the trial judge, and constituted special circumstances. Further, the judge noted at p. 78:

> Surely, to suggest that no obligation arises on the part of the investigating officer merely because the family-retained lawyer does not make a request in the specific words that the officer is listening for does not change the picture. Certainly it does not place too high an obligation on the police to pass on to a young alleged offender facing a very serious charge the fact that his father has made a lawyer available for him, as he promised when the accused was removed from his home.

For those reasons, the judge held that the appellant's right to counsel had been breached by the investigating officer. Before continuing, he noted that the oral utterances by the appellant were made freely and voluntarily.

28 He then turned to consider whether the statements should be excluded. The trial judge concluded, at p. 79, that "a reasonable person, dispassionate and fully apprised of the circumstances of this case" would probably conclude that the admission of the appellant's statements made after the officer was aware that counsel had been retained for the appellant would bring the administration of justice into disrepute. Accordingly, all the utterances made by the appellant after the telephone call were held to be inadmissible.

Ontario Court of Appeal (Dubin A.C.J.O., Zuber and Finlayson JJ.A.) (1989), 68 C.R. (3d) 50, 31 O.A.C. 357, 47 C.C.C. (3d) 250, 45 C.R.R. 193

29 Writing the judgment of the court, Finlayson J.A. first considered whether the trial judge erred in ordering that both the Crown and the appellant were to have an equal number of peremptory challenges with no power to the Crown to stand jurors aside as permitted in the *Criminal Code*. In his view, the trial judge clearly erred. Relying on *R. v. Varga* (1985), 44 C.R. (3d) 377, 7 O.A.C. 350, 18 C.C.C. (3d) 281, 13 C.R.R. 351, 15 C.R.R. 122, and *R. v. S. (J.R.)* (1987), 59 C.R. (3d) 134, 20 O.A.C. 365, 37 C.C.C. (3d) 351, 32 C.R.R. 328 (both decisions of the Ontario Court of Appeal), he held that the jury selection procedure does not infringe ss. 7, 11(*d*) or 15 of the *Canadian Charter of Rights and Freedoms*.

30 Relying on *R. v. Rowbotham* (1988), 63 C.R. (3d) 113, 25 O.A.C. 321, 41 C.C.C. (3d) 1, 35 C.R.R. 207, Finlayson J.A. held that the failure to follow the jury selection process in the *Criminal Code* is fatal to the jurisdiction of the trial court, and could not be cured by invoking s. 613(1)(*b*)(iv) (now s. 686(1)(*b*)(iv)) of the *Criminal Code*. Finlayson J.A. held there must be a new trial on that basis alone.

31 He then considered the admissibility of the appellant's utterances. He did not think there would be any helpful information given to the appellant had the officer relayed to him the fact that his lawyer called, since the lawyer did not ask to speak to him or to pass on any message. Relying on *R. v. Logan* (1988), 68 C.R. (3d) 1, 30 O.A.C. 321,

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67 O.R. (2d) 87, 46 C.C.C. (3d) 354, 57 D.L.R. (4th) 58, 45 C.R.R. 201, Finlayson J.A. concluded that the trial judge erred in his ruling on the admissibility of the utterances. He noted that there was to be a new trial on the jury selection issue, and that it is open for the trial judge to take a different view of the evidence. In Finlayson J.A.'s opinion, however, based on Kent D.C.J.'s own findings of fact, Kent D.C.J. was in error. Finlayson J.A. noted at p. 257 [47 C.C.C. (3d), p. 57 68 C.R. (3d)]:

> it is my view that he was in error in fixing the police officer with the responsibility of doing more than answer literally the question put to him by Bain. He was not obliged to volunteer additional information. Bain was entitled under s. 10(*b*) of the Charter to be informed of his right to retain and instruct counsel without delay. That was done. In this case, on the evidence, Detective McIntyre went further and assisted Bain's father in finding a lawyer in the yellow pages of the telephone book.
>
> The detective knew that [counsel] had been retained but he also knew that the solicitor did not propose to come to the police station and had not asked to speak to his client over the telephone. He received no indication of when, if ever, Mr. Munroe was prepared to give legal advice to his client. Surely, this is not enough to bring the police investigation to a dead halt or even deflect their attention from a proper questioning of the respondent.

32 The appeal was allowed and a new trial directed.

Constitutional Questions

33 The following constitutional questions were stated on June 7, 1989:

> 1. Are ss. 633 and 634 of the *Criminal Code*, R.S.C. 1985, c. C-46 [formerly R.S.C. 1970, c. C-34, ss. 562, 563], inconsistent with s. 11(*d*) or 15 of the *Canadian Charter of Rights and Freedoms*?
>
> 2. If the answer to question 1 is affirmative, are ss. 633 and/or 634 [formerly R.S.C. 1970, c. C-34, ss. 562 and/or 563] justified by s. 1 of the *Canadian Charter of Rights and Freedoms* and therefore not inconsistent with the *Constitution Act, 1982*?

Issues

34 Although other provisions and issues were discussed, this case is to be resolved by addressing the following questions:

> 1. Is s. 562 (now s. 634) of the *Criminal Code* inconsistent with s. 11(*d*)?
>
> 2. If so, is it saved by s. 1?
>
> 3. Did the trial judge err in excluding the statements made after the lawyer retained by the father telephoned the police and the appellant inquired whether his father had telephoned?

35 Also argued before this court and below was whether s. 686(1)(*b*) (iv) (formerly s. 613(1)(*b*)(iv)) of the *Criminal Code* could be applied to cure a loss of jurisdiction resulting from the failure of the trial judge to observe s. 563 of the Code. As a result of my conclusion on the first issue, I need not address that question.

Analysis

36

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1. Section 11(d) of the Charter

37 The independence and impartiality of the tribunal by which an accused person is tried is a central feature of our criminal law that has long been recognized. The importance of this right is illustrated by its entrenchment in s. 11(*d*) of the *Charter*. The appellant argues that the system of selecting jurors contained within the *Criminal Code* impairs the appearance of impartiality and is therefore unconstitutional. The appellant's argument is directed at the disproportionate powers the Crown and the accused have to remove potential jurors from the selection process.

38 The *Criminal Code* sets out the following procedures. Each party is allowed unlimited challenges for cause, and s. 567 (now s. 638) of the *Criminal Code* specifies the grounds upon which this can be done. Additionally, each party is allowed to exercise peremptory challenges. A peremptory challenge allows a party to dismiss a person from serving on the jury without providing a reason. The Crown is allotted four such challenges. If charged with murder or high treason, the accused is allowed 20 peremptory challenges. For other offences for which the accused may be sentenced to more than five years' imprisonment, the accused receives 12 peremptory challenges. For all other offences, the accused is allowed four peremptory challenges.

39 In addition to these challenges, however, the Crown is allowed to stand by up to 48 potential jurors under s. 563 (now s. 634). Theoretically, the standby is different from a peremptory challenge. Rather than dismissing the potential juror using a peremptory challenge or challenging for cause, the person is asked to stand by. The following description of the nature of the standby from *R. v. Morin* (1890), 18 S.C.R. 407, is apt. Chief Justice Ritchie explained at p. 421:

> after giving the crown in all criminal trials four peremptory challenges it [the legislation] declares that this shall not be construed to affect the right of the crown to cause any juror to stand aside until the panel has been gone through or to challenge any number of jurors for cause. ... the panel shall be gone through, or perused as it is termed, once on which calling or perusal it was the privilege of the crown to require jurors to stand aside until the list shall be gone through. Having been gone through and a jury not secured the clerk proceeds to go over the panel a second time when the right of the crown to require jurors to stand aside ceased, and the crown was bound, if its officers sought to perfect its challenge, to do so by showing some good and sufficient cause or to challenge peremptorily if the peremptory challenges were not exhausted.

40 The accused does not have this right to stand by jurors. It is this asymmetry that the appellant alleges which produces the appearance of partiality sufficient to amount to an infringement of the *Charter*.

The Appropriate Test

41 As a starting point, s. 11(*d*) of the *Charter* requires that an accused person receive a fair trial by an independent and impartial tribunal. The test for that requirement was set out by Justice Le Dain in *R. v. Valente*, [1985] 2 S.C.R. 673, 49 C.R. (3d) 97, 37 M.V.R. 9, 23 C.C.C. (3d) 193, 24 D.L.R. (4th) 161, 19 C.R.R. 354, 64 N.R. 1, 14 O.A.C. 79 which has most recently been approved by this court in *Lippé c. Charest*, (sub nom. *R. v. Lipp é)* [1991] 2 S.C.R. 114, 61 C.C.C. (3d) 127, written reasons at (sub nom. *Lippé c. Charest)* 5 M.P.L.R. (2d) 113, (sub nom. *R. v. Lippé)* 64 C.C.C. (3d) 513, 5 C.R.R. (2d) 31, (sub nom. *Lippé c. Québec (Procureur général)*) 128 N.R. 1, 39 Q.A.C. 241. Although those cases focused on judicial independence, the test applies to impartiality as well. Le Dain J. framed the test as follows, at p. 689 [[1985] 2 S.C.R., p. 108, 49 C.R. (3d)]:

> I think, that the test for independence for purposes of s. 11(*d*) of the *Charter* should be, as for impartiality, whether the tribunal may be reasonably perceived as independent. Both independenceand impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the

10 C.R. (4th) 257, [1992] 1 S.C.R. 91, 69 C.C.C. (3d) 481, 87 D.L.R. (4th) 449,
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> respect and acceptancethat are essential to its ineffective operation. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception.

42 It is clear from this passage that it is not necessary to find that juries are actually partial before an infringement of the *Charter* is found. The informed observer's perception that the system of selecting jurors impairs impartiality is sufficient. If one party enjoys a greater influence, the observer need only have a reasonable apprehension of partiality. This accords with Le Dain J.'s reference to de Grandpré J.'s comments from *Committee for Justice & Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369, 9 N.R. 115, 68 D.L.R. (3d) 716. At p. 684 [[1985] 2 S.C.R., p. 104, 49 C.R. (3d)] of *Valente*, supra, Le Dain J. reproduced de Grandpré J.'s comments at p. 394 [[1978] 1 S.C.R.]:

> the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- concluded."

Application of the Test

43 In my view, the disparity between the accused's and the Crown's right to challenge jurors cannot meet the test from *Valente*, supra. Briefly, the standby cannot be upheld because the Crown is allowed to have a greater role in fashioning the jury. It may take partisan interests into consideration in carrying out that role. The accused's role in selecting his or her jury of peers is thereby significantly diminished, impairing the appearance that the jury is indifferent as between the Crown and the accused. This offends the *Charter* because the appearance of impartiality is an essential element of the right guaranteed by s. 11(*d*) of the *Charter*.

44 I base my conclusions on the ground that the substantial disparity contained in this legislation exists not in a mere procedure or rule but in the role each party has in choosing the jury by which the accused will be tried.

Numerical Inequality

45 I turn first to the extensive discrepancy between the number of challenges afforded to the Crown and the accused. I emphasize that it is not merely the inequality of the position of the Crown and the accused that leads to an inference of the appearance of partiality. The Crown and the accused are never in a parallel position during the course of a trial. Indeed, there are many procedures, rules, and prac tices contained within the Code and the common law that detract from any symmetry between the Crown and the accused. There is necessarily a difference in the status and power of the Crown and the accused, given the nature of their respective roles in a trial. I do not intend to cast doubt on that reality, but in this case, the substantial difference in the fundamental activity of choosing the jury demands explanation and justification.

46 I proceed upon the basis that the power to stand by jurors in many instances amounts to granting the Crown additional peremptory challenges. The appellant argued that the standby was in fact tantamount to a peremptory challenge. Once a juror is stood by, that person will not be called again to sit on that jury unless the whole panel has been exhausted. In both written and oral argument, the Crown made the important concession that in some cases the standby does amount to a peremptory challenge. Once it is recognized that the standby can and does in fact operate as a peremptory challenge, there can be no obvious justification for granting 52 peremptory challenges (in the form of standbys and statutorily granted peremptory challenges) to the Crown where the accused only enjoys four, 12 or 20.

47 I recognize that in the case of multiple defendants, each accused is entitled to the same number of challenges

10 C.R. (4th) 257, [1992] 1 S.C.R. 91, 69 C.C.C. (3d) 481, 87 D.L.R. (4th) 449,
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as if the accused were being tried separately, whereas the Crown is limited to the amount specified in the Code. For instance, on a charge for a murder where there are three defendants, the accused persons would have a total of 60 peremptory challenges, whereas the Crown would be limited to a total of four peremptory and 48 standbys. Similarly, if there are five or more co-defendants for any other offence which carries the possibility of more than five years' imprisonment, the Crown's number of peremptory challenges and standbys would be equal or less than the total defence peremptory challenges. For offences not carrying more than five years' liability of imprisonment, however, there would have to be 13 or more co-defendants before the Crown would have the equivalent or less combined standby and peremptory challenges than the total of the accused persons' peremptory challenges.

48 The spectre of multiple defendants cannot justify conferring upon the Crown such a substantial advantage in the number of challenges. In most situations, the Crown enjoys far more peremptory challenges in the form of standbys than the accused. The Crown does not have as strong a claim to the concept of challenge without cause as does the accused, and there is no inherent reason why the Crown would need more (or perhaps even as many) challenges as the accused. In any event, I do not think the relative infrequency of the scenarios listed above can serve to justify the more common occurrence of the Crown's possessing a broad numerical advantage.

The Standby and the Peremptory Challenge

49 The Crown argued that the standbys are necessary because they have a purpose beyond their utility as a peremptory challenge. In my opinion, a brief review of the historical origins of the standby illustratesits basis is suspect and there is little modern justification for its continued existence.

50 The English common law originally granted the Crown an unlimited capacity peremptorily to challenge jurors while the accused was only allowed 35 peremptory challenges. This unlimited power led to abuses because the Crown would peremptorily challenge the whole array of jurors without qualifying 12 jurors. The trial was then postponed and the accused kept in custody until the next session. An attempt was made to curtail this abuse in 1305 when a statute containing the following edict was passed (*An Ordinance for Inquests*, 33 Edw. 1, c. 4):

> but if they that sue for the King will challenge any of those Jurors, they shall assign of their Challenge a Cause certain, and the Truth of the same Challenge shall be enquired of according to the Custom of the Court.

51 Despite the fact that the logical reading of this provision seems to indicate that the Crown had no power to challenge except for cause, it was interpreted to mean that the Crown need not assign the cause for its challenge until the panel had been gone through. Presumably the courts felt they could not sanction eliminating the Crown's power to challenge absent cause while accused persons retained that ability. It was thus that the standby was born. Certain attempts were made to impugn this rule, but it survived and was re-enacted in the *Juries Act, 1825*, 6 Geo. 4, c. 50, s. 29, which was interpreted in the same manner as its predecessor.

52 Canada inherited this legacy. Section 668¶9 of *The Criminal Code, 1892*, S.C. 1892, c. 29, granted the Crown an unlimited power to stand by jurors. This was eventually reduced to 48, as now exists, in 1917 (*An Act to amend the Criminal Code (respecting jurors)*, S.C. 1917, c. 13, s. 1). When this legislation was being debated, the Minister of Justice, Hon. C.J. Doherty, noted that:

> Perhaps it may be more correct to say that the more you increase the number of men from whom the Crown can, by this process of elimination, select the twelve that it wants, the more you increase the opportunity for the Crown to find a jury exactly to its liking.

[*House of Commons Debates* (August 9, 1917), at p. 4309.] The twentieth-century justification of the standby was discussed by Hart J.A. in *R. v. Johnstone* (1986), 72 N.S.R. (2d) 76, 173 A.P.R. 76, 26 C.C.C. (3d) 401 (C.A.), as

10 C.R. (4th) 257, [1992] 1 S.C.R. 91, 69 C.C.C. (3d) 481, 87 D.L.R. (4th) 449,
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follows, at p. 412 [C.C.C.]:

> The traditional reason for permitting the Crown to stand aside jurors as they were called to the book to be sworn was the limited size of a jury panel. If both the Crown and the accused had the number of peremptory challenges available to the accused the panel would soon become exhausted and the need for talesmen would arise. To prevent this problem the Crown was permitted to stand aside the juror rather than challenge him at that time, and this would permit the juror to remain on the panel until all of the members have been exhausted and then be recalled if a full jury had not been sworn. Those jurors who had been stood aside would then still be available to complete the jury without the need of talesmen: ...

See also J.F. McEldowney, " 'Stand By For the Crown': An Historical Analysis," [1979] Crim. L.R. 272; Sir W. Blackstone, *Commentaries on the Laws of England*, W.D. Lewis, ed. (Philadelphia: Rees Welsh & Co., 1900), vol.4, pp. 354-356 and pp. 1739-1742 (Lewis's edition); *R. v. Morin*, supra, and *R. v. Cecchini* (1985), 48 C.R. (3d) 145, 22 C.C.C. (3d) 323, 17 C.R.R. 326 (Ont. H.C.). This modern rationale does not justify numerical disparity, nor permitting only one of the adversaries to defer its challenge.

53 I turn now to determine the rationale for peremptory challenges, in order to ascertain the justification for any disparity between the powers of the Crown and the accused.

54 What, then is the basis for the peremptory challenge? I can find no basis other than that expressed by Blackstone, *Commentaries on the Laws of England*, W.D. Lewis, ed., vol.4, at p. 353 and p. 1738 (of Lewis's edition):

> in criminal cases, or at least in capital ones, there is, *in favorem vitae*, allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without showing any cause at all, which is called a *peremptory* challenge; a provision full of that tenderness and humanity to prisoners for which our English laws are justly famous. This is grounded on two reasons. 1. As everyone must be sensible what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another, and how necessary it is that a prisoner (when put to defend his life), should have a good opinion of his jury, the want of which might totally disconcert him, the law wills not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike. 2. Because, upon challenges for cause shown, if the reasons assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke a resentment, to prevent all ill consequences from which the prisoner is still at liberty, if he pleases, peremptorily to set him aside.

55 This passage was quoted in *R. v. Cloutier*, [1979] 2 S.C.R. 709, 12 C.R. (3d) 10, 28 N.R. 1, 48 C.C.C. (2d) 1, 99 D.L.R. (3d) 577, at p. 720 [S.C.R., p. 67 C.R.]. The basis of the peremptory challenge is "purely subjective." In *R. v. Mason*, [1981] Q.B. 881, [1980] 3 All E.R. 777, 71 Cr. App. R. 157 (C.A.), the history of standbys was considered. At pp. 889-890, Lawton L.J. refers to a quotation from Lord Campbell C.J. that a stand-aside is the equivalent of a peremptory challenge which could be exercised until the whole panel had been called. This right may be exercised without valid provable objection. At p. 888, the court gives as an example of the use of the standby an instance where a poacher might properly be stood by where the charge involves wounding a gamekeeper while poaching. The court noted that this juror is unlikely to be impartial. So it is clear that "partiality" may be considered in exercising the power.

56 As no objective showing need be made, it is clear that either side may exercise the right to exclude a juror on considerations of partiality.

57 The Crown, in exercising its standby power, is hoping to achieve a peremptory challenge, deferring its

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challenge for cause, or deferring its peremptory challenge. In any case, it is given greater play in the selection of the jury, in its fashioning, than is permitted to the accused.

58 In argument, counsel for the Crown contended that the standby is a "deferred challenge for cause," and therefore should not be viewed in the same vein as peremptory challenges. I am unable to accept that characterization in the light of the acknowledgment that the standby may be employed as a peremptory challenge and given the reality of large jury panels that ensures that in a great many cases a juror stood by will not be recalled. Informed commentators have no difficulty in concluding that the "standby" gives substantial rights of challenge: R.J. East, "Jury Packing: A Thing of the Past?" (1985) 48 Mod. L.R. 518, at p. 520. McEldowney, " 'Stand by for the Crown': An Historical Analysis," says it "is analogous to the defence's right of peremptory challenge," at p. 272, quoting the Morris Report [United Kingdom] Cmnd 2627 (1965). That the challenge and standby may both be used for partisan reasons was the conclusion of the Roskill Committee, Fraud Trials (HMSO, 1986), para. 7.36 ff., which condemned manipulation and recommended abolition of both the peremptory challenge and the standby. Consequently, the peremptory challenge has been eliminated and the standby substantially circumscribed in England: *Halsbury's Laws of England Annual Abridgment, 1988* (London: Butterworths, 1989), para. 1313.

59 Even if the "standby" is recalled, the Crown may still exercise a peremptory challenge to exclude that person. In this sense, the standby is not necessarily a deferred challenge for cause. That description was appropriate at one time, but the present section (s.641, formerly s. 570) of the *Criminal Code* states that if no names remain to be called and a full jury is not sworn, the names of those stood by are called again and "they shall be sworn, unless challenged by the accused, *or unless the prosecutor challenges them or shows cause why they should not be sworn* ." It is clear, therefore, that a juror stood by can still be peremptorily challenged by the Crown or the accused.

60 The Crown also claims it acts in its quasi-judicial role and uses the standby to exclude those people who are inappropriate but whose objectionability neither fits within the boundaries of s. 567 (now s. 638) nor is egregious enough to warrant the utilization of a peremptory challenge. It also argued that the modern justification for its power to challenge is to provide a balanced selection of jurors. The Crown claimed it uses the challenges only within its quasi-judicial role: it seeks only to secure an impartial jury and not one predisposed towards the Crown's case.

61 In the absence of some control, however, the observer of the process is bound to conclude that the Crown possesses a substantial advantage, and by its uncontrolled exercise may influence the make-up of that jury under partisan considerations.

62 I agree with Professor A.W. Mewett's observation in "The Jury Stand-By" (1988) 30 Crim. L.Q. 385, at p. 386: "But the dividing line between the Crown's legitimate interest in ensuring an impartial jury and any illegitimate interest it may have in packing the jury, if not with favourable jurors then at least with not unfavourable jurors, is not an easy one to draw and even less easy to enforce." In *Cloutier*, supra, at pp. 720-721 [[1979] 2 S.C.R., pp. 67-68, 12 C.R.], this court noted that peremptory challenges were intended to give each party the right to remove individuals "whom he does not believe to be impartial." To a similar effect is the observation, quoted above, of the Minister of Justice in 1917.

63 While I agree that the standby may be used beneficially, I do not think we can rely on professed good intentions to uphold such a disparity. An example of the use of the power to tailor the jury selection is found in the recent case of *R. v. Pizzacalla*, an unreported decision of the Ontario Court of Appeal, November 12, 1991 [now reported at (1991), 7 C.R. (4th) 294, 5 O.R. (3d) 783, 69 C.C.C. (3d) 115, 50 O.A.C. 161]. The Crown acts within an adversarial forum. It is not unreasonable to think that there are times when the Crown's challenges or standbys are motivated by an anxiety to secure a conviction rather than a strictly quasi-judicial interest in the fairness of the trial. It is, indeed, proper for the Crown to use the process to put aside potential jurors who may be partial to the

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accused. In the context of the jury trial, "impartial" means "indifferent," and the peremptory powers enable the parties a limited power to exercise subjective assessmentsof that indifference. What cannot be justified to the observer of the process is granting the Crown a greater opportunity to carry these assessments into the selection process.

64 Would an informed observer perceive an unfairness in the jury selection process that may affect the indifference, real or perceived, of the jury? If the Crown exercises a quasi-judicial function to stand by jurors, its motivation and reasons are unknown. Keeping in mind the fact that the juror stood by is not often recalled, there is an inherent perception that the jury selection process is unbalanced. Regardless of the Crown's motives and reasons for standing by a juror, there remains a clear impression of inequality caused by the marked imbalance between the Crown's and the accused's ability to configure the jury. While the Crown may perform a quasi-judicial function, it is not uninterested in securing convictions of accused persons. Section 563 (now. s. 634) is unconstitutional because it provides for the apparent transformation of this interest into reality. This offends s. 11(*d*) of the *Charter*.

65 As the Crown noted in this case, the constitutional validity of s. 563 (now s. 634) has been examined by many courts before. In many of these cases, the courts recognized the inherent unfairness in the difference between the Crown's and the accused's ability to challenge jurors and yet upheld the section. O'Leary J.'s comments in *R. v. Piraino* (1982), 37 O.R. (2d) 574, 1 C.R.R. 206, 67 C.C.C. (2d) 28, 136 D.L.R. (3d) 83 (H.C.), are typical. At pp. 30-31 [C.C.C.] he stated:

> There is no doubt that the right given the Crown to challenge four jurors peremptorily and to stand aside 48, while the accused on a rape charge can challenge but 12 jurors peremptorily and the requirement that the accused declare first whether he challenges a juror, gives the Crown an unfair advantage in the jury selection process. This does not mean, however, that there is any danger that the jury chosen will not be independent and impartial. It simply means that *the Crown has a much better chance than the defence of selecting out of the entire jury panel a jury it hopes will be most sympathetic to its position.*

[Emphasis added.]

66 In *R. v. Johnstone*, supra, Hart J.A. also discussed the validity of s. 563 (now s. 634). At pp. 412-413 [26 C.C.C. (3d)], he noted:

> *In recent years jury panels have become much larger and there is less need for the Crown to exercise its right to stand individual jurors aside*, but unfortunately a practice has arisen with certain Crown counsel to stand aside large numbers of jurors, and it may be that the time has come to eliminate this process and balance the number of peremptory challenges available to both the Crown and the accused.

[Emphasis added.] Similarly, Dupont J. in *R. v. Cecchini*, supra, noted at p. 326 [22 C.C.C. (3d), pp. 147-148, 48 C.R. (3d)]:

> *the disparity in the rights or challenges as between the Crown and the accused in most cases prevents that vital part of a criminal trial from appearing fair.* This results from the use made by Crowns of their rights to stand aside, which in many cases give them, in the eyes of the public, a major advantage. It can be argued that a jury selected with a marked advantage to one side in its selection will not meet the test of appearing to be impartial.

[Emphasis added.]

67 In *Cecchini*, where the accused was charged with murder, Dupont J. limited the Crown's standbys to 16. See also *R. v. Favel* (1987), 60 Sask. R. 176, 39 C.C.C. (3d) 378, 33 C.R.R. 182 (C.A.); *R. v. S. (J.R.)*, supra, and *R. v.*

10 C.R. (4th) 257, [1992] 1 S.C.R. 91, 69 C.C.C. (3d) 481, 87 D.L.R. (4th) 449, 133 N.R. 1, 51 O.A.C. 161, 7 C.R.R. (2d) 193

R. (R.M.) (1986), 53 C.R. (3d) 81 (Ont. H.C.).

68 In all of these cases (except *Cecchini*), the courts, if asked, have upheld the constitutional validity of s. 563 (now s. 634). In most of those cases, the following reasoning from *Piraino*, supra, was either explicitly or implicitly applied. In his oral judgment, O'Leary J. stated at pp. 29-30 [67 C.C.C. (2d)]:

> The jury selection process is just one step in the trial. The course of a trial is governed and affected by almost countless rules relating to procedure and the admissibility of evidence. Many of those rules when isolated and looked at individually, would appear to favour either the Crown or the accused. Indeed, the same rule may at one point favour the Crown and at another point favour the accused. Others of those rules consistently favour either the Crown or the accused. The requirements; that the Crown prove each element of a charge beyond a reasonable doubt before there can be a conviction; that the accused cannot be required to testify and that the Crown and the trial judge may not comment on the fact that the accused has not testified are examples of rules that favour the accused.
>
> In my view, so far as the issue before me is concerned, the *Canadian Charter of Rights and Freedoms* gives to every citizen the right to a fair trial. It does not assure him the right that every rule that governs that trial, when examined individually,be fair to him. It does, however, assure him that any individual rule that is so unfair that it will result in an unfair trial being had will be struck down.

Potts J.'s comments in *R. v. R. (R.M.)*, supra, reveal a similar viewpoint [at p. 86, 53 C.R. (3d)]:

> When one reviews the entire jury selection process, it becomes clear that the acts complained of as being unfair are at the end of a rather lengthy process designed to ensure randomness and independence and impartiality. Can the Crown's ability to request that a potential juror stand aside be seen to impugn this entire process? I respectfully submit that it cannot. At best, the jury selection carried on in a courtroom by counsel is educated guesswork operating on a sample of strangers carefully chosen in a neutral fashion. Does an individual, chosen at random, who has survived the scrutiny of the accused assume a pro-Crown bias merely because he is not asked by the Crown to stand aside? Does a jury composed of such individuals become something less than 'independent and impartial'? Alternatively, does an individual who is initially asked to stand aside but later recalled assume a pro-accused bias merely because he had first been asked to stand aside? I would respectfully submit that the individual biases of any potential juror are left unaffected by the Crown's request to stand aside or not.

69 With respect, this reasoning fails to recognize that the relative roles of the accused and the Crown in selecting the jury are not comparable to other procedures within the trial process. The jury must be, and be seen to be, impartial. When the Crown enjoys a tactical advantage, as occurs because of the stand-asides, the accused's role in selecting his or her jury is diminished.

70 The peremptory challenge is not, itself, under attack. It may be used under partisan considerations, and so long as the right of exercise is proportionate, neither the Crown nor the accused can be said to have an unconstitutional advantage.

71 I now turn to what I take to be the main theses of the Crown's position.

72 Firstly, the jury should be, and be seen as, impartial, representative and competent. While Canadian law has not adopted a theory of representativeness, I accept that proposition. Then it is acknowledgedthat both parties are granted a limited opportunity to affect jury selection, having regard to these characteristics. It is acknowledgedthat the Crown is given a greater opportunity to affect the selection.

10 C.R. (4th) 257, [1992] 1 S.C.R. 91, 69 C.C.C. (3d) 481, 87 D.L.R. (4th) 449,
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73 This asymmetry is justified on the basis that the Crown has a greater interest than the accused. I fail to see why the accused does not have the same interest in these factors that the Crown possesses. I se no inherent justification for giving the litigants different roles in selecting their jury.

74 Much is made of the quasi-judicial role of the prosecutor. Jury picking would be contrary to this duty. But unlike the case in *Lippé*, supra, there are no effective safeguards in place to ensure that the decisions are all made only in the interest of the fair trial rather than in securing a conviction. The Crown does not need to disclose its reasons for standing by or exercising peremptory challenges.

75 It suggests that it has no adversary interest in jury selection process. I cannot accept that proposition as commending itself to anyone observing the trial process.

76 The apprehension of bias lies in the fact that the Crown has had a greater opportunity to choose jurors to its liking, free to do so under partisan considerations. We are not here concerned about any mere trial rule, but rather the rules governing the selection of the tribunal. The existence of the jurors' oath here is no greater protection than it is in the case of a disqualified member of an administrative tribunal.

77 This perception will arise in the majority of jury cases if equality is not applied from the beginning. Given the absence of any need to justify its powers, the Crown cannot be shown as having taken a partisan advantage on any case-by-case basis.

78 That every accused receive a fair trial in front of an impartial and independent jury is an essential element of the fairness of the trial which s. 11(*d*) of the *Charter* guarantees. In *R. v. Barrow*, [1987] 2 S.C.R. 694, 61 C.R. (3d) 305, 81 N.R. 321, 38 C.C.C. (3d) 193, 87 N.S.R. (2d) 271, 222 A.P.R. 271, 45 D.L.R. (4th) 487, Chief Justice Dickson commented on the accused's right to be present during all stages of his or her jury trial. He stated at p. 710 [S.C.R., p. 316 C.R.]:

> The selection of an impartial jury is crucial to a fair trial. The *Criminal Code* recognizes the importance of the selection process and sets out a detailed procedure to be followed ... Both the Crown and the accused participate in the process,with the right to challenge for cause or peremptorily and, in the case of the Crown, to stand aside potential jurors ... The challenge for cause involves trial of the impartiality of potential jurors, with examination by either side. The accused, the Crown, and the public at large all have the right to be sure that the jury is impartial and the trial fair; on this depends public confidence in the administration of justice. Because of the fundamental importanceof the selection of the jury and because the *Code* gives the accused the right to participate in the process, the jury selection should be considered part of the trial for the purposes of s. 577(1) [now s. 650].

Later, he noted at pp. 714-715 [S.C.R., pp. 319-320 C.R.]:

> the most important aspect of the case, namely, the appearance of justice. Even if the two-stage analysis of the empanelling process is a legally accurate description of the interplay of the *Criminal Code* and the Nova Scotia *Juries Act*, it leaves out of account the effect of the proceedings in this case as they would appear to the average citizen: ...
>
> What of the public perception? This is a case where the public perception of the fairness of the proceedings is crucial.

79 The reasoning revealed in *Piraino* and *R. (R.M)*, supra, that has found s. 563 (now s. 634) valid was partially premised on the need of proof of real or actual partiality of juries. With respect, that rationale is erroneous. What s. 11(*d*) of the *Charter* requires is that there be, at minimum, a reasonable apprehension that juries generated by the

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selection process are impartial. Allowing the accused to have a manifest role in that process confirms that the appearance of fairness and impartiality is maintained. But when the *Criminal Code* allows the Crown to have such substantial advantage in the ability to shape and fashion the jury, that perception is severely impaired. This violates the test for 11(*d*).

2. Section 1 of the Charter

80 Only one party, the intervenor Attorney General of Canada, presented any argument on s. 1. Its submission on this point relied on the arguments it presented on the s. 11(*d*) violation issue. The Crown (Ontario) sought a declaration that s. 563 (now s. 634) does not violate s. 11(*d*) of the *Charter* or, in the alternative, that it is justified by s. 1 of the *Charter*. No written or oral argument, however, was presented on this point.

81 In my view, the violation in this case would be difficult to justify given the nature and scope of that violation, but I need not answer that question. It is a trite statement of the law to say that the Crown has the burden of establishing that a breach of the *Charter* is demonstrably justified in a free and democratic society. Neither the respondent nor the intervenor identified any pressing concern which would justify a limitation. The burden remains unsatisfied. Therefore, I find the infringement of s. 11(*d*) of the *Charter* by s. 563 (now s. 634) is not a reasonable limit.

82 I want to emphasize that I do not intend this finding to be an indication of whether or how a violation of the accused's right to be tried in front of an impartial and independent tribunal could be justified under s. 1 of the *Charter*. That question is let for another day.

3. Admissibility of the Statements

83 The third issue is whether the certain statements allegedly made by the appellant to the investigating officers are admissible. At trial, Kent D.C.J. excluded any statement made by the appellant after the lawyer retained by his father spoke to McIntyre on the telephone. Any statements made before that time were admitted. Because of its view on other issues, the Court of Appeal held that a new trial was necessary. It also stated it was open to the new trial judge to take a different view of the evidence, but in its opinion the trial judge, based on his findings, was in error in excluding the statements taken after the lawyer called the police station.

84 In the Court of Appeal, the appellant apparently argued that the trial judge's ruling was correct because once the lawyer had been retained, any questioning should have ceased. At this court, however, the appellant took a different view of this issue. He now argues that his right to retain and instruct counsel was violated at the point of arrest. In his submission, the police violated his s. 10(*b*) rights once they required him to leave his home before a lawyer had been contacted, and therefore all the statements are inadmissible.

85 In may view, the trial judge was correct about the exclusion of the statements. I am mindful that once an accused is informed of his or her right to counsel (as was found to be the case in this appeal), the accused has the onus of showing he was denied the opportunity to contact counsel. As this court held in *R. v. Baig*, [1987] 2 S.C.R. 537, 61 C.R. (3d) 97, 81 N.R. 87, 25 O.A.C. 81, 45 D.L.R. (4th) 106, 37 C.C.C. (3d) 181, 32 C.R.R. 355, at p. 540 [S.C.R., p. 100 C.R.]:

> We agree with Tarnopolsky J.A. in *R. v. Anderson* (1984), 10 C.C.C. (3d) 417 (Ont. C.A.), wherein he said, at p. 431:
>
> > ... I am of the view that, absent proof of circumstances indicatingthat the accused did not understand his right to retain counsel when the was informed of it, the onus has to be on him to prove that he asked for the right but it was denied or he was denied any opportunity to even ask for it. No such

10 C.R. (4th) 257, [1992] 1 S.C.R. 91, 69 C.C.C. (3d) 481, 87 D.L.R. (4th) 449,
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evidence was put forth in this case.

86 In the present case, the accused did not put forward, nor does the record reveal, any evidence suggesting that he was denied an opportunityto ask for counsel before the inquiry at the police station. Absent such circumstances as that referred to by Tarnopolsky J.A., once the police have complied with s. 10(*b*), by advising the accused without delay of his right to counsel without delay, there are no correlative duties triggered and cast upon them until the accused, if he so chooses, has indicated his desire to exercise his right to counsel.

87 The trial judge referred, at p. 78 [30 C.R.R.] to the "peculiar and special circumstances of this case." The Court of Appeal found error in fixing the police with the responsibility of doing more than answering literally the appellant's question whether his father had called. That question had to be addressed in the context of the evidence. Given the circumstances, a literal response was misleading, because the obvious intent of that inquiry was to further the objective of communicating with counsel. It was tantamount to an assertion by the appellant that he wanted counsel, and in those circumstances, the answer was an evasion which the officers used to continue the questioning in the face of that assertion. The trial judge had the advantage of assessing that inquiry and response in the particular circumstances, and did not err in law in excluding the subsequent statements. On the assumption that first statement was properly admitted (an interesting, but as I am about to show, hypothetical, question), and the right to counsel waived for that purpose, then the trial court correctly found re-assertion of any rights that had been given up in the course of giving the first statement.

88 The appellant did urge that his right to retain and instruct counsel was denied at the point of arrest because police officers directed him to leave before a lawyer was contacted. I do not pass upon this argument because the accused was acquitted notwithstanding the admissionof the statement. The ruling, so far as he is concerned, is now academic, indeed moot.

Remedy

89 For reasons discussed above, I find the portion of s. 563 (now s. 634(1)) and all of s. 563(2) (now s. 634(2)), which, combined, grant the Crown 48 standbys, to infringe s. 11(*d*) of the *Charter*. The Crown's power to peremptorily challenge jurors is preserved. Since none of the parties presented arguments on the validity of s. 563(3) (now s. 634(3)), I refrain from commenting on the constitutionality of that section.

90 Basically, the impugned provisions offend the *Charter* because they impair the fairness of the trial by producing, to an informed observer, a reasonable apprehension of partiality.

Disposition

91 The portion of s. 563(1) (now s. 634(1)) and all of s. 563(2) (now s. 634(2)) of the *Criminal Code*, which confer upon the Crown 48 standbys, is inoperative and of no force because it offends s. 11(*d*) of the *Charter* and is not a reasonable limit demonstrably justified in a free and democratic society. In addition, the trial judge was correct in his ruling on the admissibility of the appellant's statements. The appeal is therefore allowed, the Court of Appeal's direction for a new trial is set aside, and the appellant's acquittal restored.

92 I would permit Parliament six months in which to provide new legislation, otherwise the Code provisions will be invalidated to the extent that they permit the impugned inequality. This decision would, however, apply to any case in which the provision had been challenged and proceedings relating thereto are still on foot.

93 The constitutional questions are answered as follows:

1. Are ss. 633 and 634 of the *Criminal Code*, R.S.C., 1985, c. C-46 [formerly R.S.C. 1970, c. C-34, ss.

10 C.R. (4th) 257, [1992] 1 S.C.R. 91, 69 C.C.C. (3d) 481, 87 D.L.R. (4th) 449,
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562 and 563] inconsistent with ss. 7, 11(*d*) or 15 of the *Canadian Charter of Rights and Freedoms*?

A. Sections 634(1) and (2) (formerly R.S.C. 1970, c. C-34, ss. 562 and 563) are inconsistent with s. 11(*d*) insofar as they provide the Crown with a combination of peremptory challenges and standbys in excess of the number of peremptory challenges permitted to an accused. It is unnecessary to consider whether this provision violates s. 7. The allegation of a violation of s. 15 was withdrawn. Sections 633 and 634(3) (formerly s. 563(3)) were not challenged.

2. If the answer to Question 1 is affirmative, are ss. 633 and/or 634 [formerly R.S.C. 1970, c. C-34, ss. 562 and/or 563] justified by s. 1 of the *Canadian Charter of Rights and Freedoms* and therefore not inconsistent with the *Constitution Act, 1982*?

A. The violation is not justified under s. 1.

***Gonthier J.* (dissenting) (*McLachlin* and *Iacobucci JJ.* concurring):**

94 The appellant raises important questions about a central feature of our criminal law system, the jury, and in particular about the mode of selection of the jury contained in the *Criminal Code*, R.S.C. 1970, c. C-34. He submits that the disparity between the means of challenge allowed to the accused and the Crown in the jury selection process violates the constitutional guarantee of an impartial tribunal contained in s. 11(*d*) of the *Canadian Charter of Rights and Freedoms*. I have had the benefit of reading the reasons of Justice Stevenson and, while I respectfully find myself in disagreement with them, I adopt his statement of the facts and judgments of lower courts.

95 For ease of reference, I reproduce the relevant legislation:

Canadian Charter of Rights and Freedoms

96

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

10. Everyone has the right on arrest or detention

. . . . .

(*b*) to retain and instruct counsel without delay and to be informed of that right; ...

11. Any person charged with an offence has the right

. . . . .

(*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

Criminal Code, R.S.C. 1970, c. C-34

97

10 C.R. (4th) 257, [1992] 1 S.C.R. 91, 69 C.C.C. (3d) 481, 87 D.L.R. (4th) 449,
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562. (1) An accused who is charged with high treason or first degree murder is entitled to challenge twenty jurors peremptorily.

(2) An accused who is charged with an offence, not being high treason or first degree murder, for which he may be sentenced to imprisonment for more than five years is entitled to challenge twelve jurors peremptorily.

(3) An accused who is charged with an offence that is not referred to in subsection (1) or (2) is entitled to challenge four jurors peremptorily.

563. (1) The prosecutor is entitled to challenge four jurors peremptorily, and may direct any number of jurors who are not challenged peremptorily by the accused to stand by until all the jurors have been called who are available for the purpose of trying the indictment.

(2) Notwithstanding subsection (1), the prosecutor may not direct more than forty-eight jurors to stand by unless the presiding judge for special cause to be shown, so orders.

(3) The accused may be called upon to declare whether he challenges a juror peremptorily or for cause before the prosecutor is called upon to declare whether he requires the juror to stand by, or challenges him peremptorily or for cause.

567. (1) A prosecutor or an accused is entitled to any number of challenges on the ground that

(*a*) the name of a juror does not appear on the panel, but no misnomer or misdescription is a ground of challenge where it appears to the court that the description given on the panel sufficiently designates the person referred to;

(*b*) a juror is not indifferent between the Queen and the accused;

(*c*) a juror has been convicted of an offence for which he was sentenced to death or to a term of imprisonment exceeding twelve months;

(*d*) a juror is an alien;

(*e*) a juror is physically unable to perform properly the duties of a juror; or

(*f*) a juror does not speak the official language of Canada that is the language of the accused ...

(2) No challenge for cause shall be allowed on a ground not mentioned in subsection (1).

570. (1) Where, as a result of challenges and directions to stand by, a full jury has not been sworn and no names remain to be called, the names of those who have been directed to stand by shall be called again in the order in which their names were drawn and they shall be sworn, unless challenged by the accused, or unless the prosecutor challenges them or shows cause why they should not be sworn.

(2) Where, before a juror is sworn pursuant to subsection (1), other jurors in the panel become available, the prosecutor may require the names of those jurors to be put into and drawn from the box in accordance with section 560, and those jurors shall be challenged, ordered to stand by or sworn, as the case may be, before the names of the jurors who were originally ordered to stand by are called again.

10 C.R. (4th) 257, [1992] 1 S.C.R. 91, 69 C.C.C. (3d) 481, 87 D.L.R. (4th) 449, 133 N.R. 1, 51 O.A.C. 161, 7 C.R.R. (2d) 193

98 The constitutional questions as they were framed by former Chief Justice Dickson on June 7, 1989, put in issue the constitutionality of s. 562 and s. 563 of the *Criminal Code* (now R.S.C. 1985, c. C-46, ss. 633 and 634) with respect to ss. 7, 11(*d*) and 15 of the *Charter*. The appellant concentrated his argument on ss. 563(1) and (2) of the Code, and did not address the validity of s. 562 and s. 563(3). He did not make any submissions as to s. 15 of the *Charter*, either. The sole issue before us remains, therefore, the consistency of s. 563(1) and (2) of the *Criminal Code* with ss. 7 and 11(*d*) of the *Charter*. In their factums and in argument, the parties did not make any specific arguments under s. 7 of the *Charter*, relying instead on the arguments they had made under s. 11(*d*).

99 I agree with the parties that, as regards independence and impartiality of the tribunal in criminal cases, ss. 7 and 11(*d*) of the *Charter* are congruent. Section 11(*d*) of the *Charter* merely enunciates a particular aspect of the general protection against deprivations of the right to life, liberty and security of the person found in s. 7 of the *Charter*, as had already suggested Lamer J. (as he then was) in *Reference re s. 94(2) of the Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486, 48 C.R. (3d) 289, 36 M.V.R. 240, [1986] 1 W.W.R. 481, 69 B.C.L.R. 145, 63 N.R. 266, 23 C.C.C. (3d) 289, 24 D.L.R. (4th) 536, 18 C.R.R. 30. Arguments made under s. 11(*d*) of the *Charter* apply with equal force to s. 7. As this case was argued under s. 11(*d*) of the *Charter*, I will concentrate on this section in my reasons, for the sake of convenience.

I -- The Constitutionality Of s. 563 Of The Criminal Code With Respect To s. 11(d) Of The Charter

100

The History of the Jury Selection Process of the Criminal Code

101 Stevenson J. has thoroughly explained in his reasons the present system of jury selection and its historical origins. I will only make two brief additional remarks. First of all, the standby as it evolved in English law was indeed a deferred challenge for cause. The 1305 statute (*An Ordinance for Inquests*, 33 Edw. 1, c. 4) that abolished peremptory challenges for the Crown enacted that the Crown shall only challenge for cause. Standbys were created through what establisheditself as the current interpretation of the statute the Crown can only challenge for cause, but it need not show cause before the entire jury panel has been exhausted and a complete jury has not been sworn. The Canadian standby operates slightly otherwise, since the Crown still can exercise peremptory challenges under the *Criminal Code*. The Code, in s. 570(1), acknowledges this by permitting peremptory challenges (even by the accused) to be exercised against a stood-by juror. The Canadian standby could therefore be better qualified as a deferred consideration of the prospective juror.

102 Furthermore, I wish to stress that Parliament, in enacting *An Act to Amend the Criminal Code (respecting jurors)*, S.C. 1917, c. 13, did not eliminate standbys. A maximum of 48 was imposed on the number of standbys that could be directed by the Crown without leave of the court, but Parliament did not see fit to abolish standbys altogether. Some significance must be attached to this, since one of the main reasons why a maximum number was enacted was the fear of abuses by the Crown, even though no record of such abuse was put forward during the House debates. To prevent possible abuses, Parliament *limited* the number of Crown standbys and introduced control by the court of any additional requests, but it certainly saw a beneficial use to them that surpassed the perceived risk for abuse, since they were kept in the *Criminal Code*.

The Relationship Between Peremptory Challenges and Standbys

103 As a preliminary matter, I have one comment on the central assumptionunderpinning the appellant's argument: that Crown standbys are often in effect equivalent to peremptory challenges, since the jury panels are in most jurisdictions so large that they are never exhausted, and the need to recall stood-by jurors is almost never felt. Yet the various provincial Acts either make the size of jury panels discretionary (see, for instance, *Juries Act*, R.S.O. 1980, c. 226, s. 12; *Jury Act*, S.A. 1982, c. J-2.1, s. 7; *Jury Act*, R.S.B.C. 1979, c. 210, s.9; *Jury Act*,

10 C.R. (4th) 257, [1992] 1 S.C.R. 91, 69 C.C.C. (3d) 481, 87 D.L.R. (4th) 449, 133 N.R. 1, 51 O.A.C. 161, 7 C.R.R. (2d) 193

R.S.P.E.I. 1988, c. J-5, s. 11; *The Jury Act*, R.S.M. 1987, c. J30, s. 17; *Jury Act*, S.N.B. 1980, c. J-3.1, s. 13 and *The Jury Act, 1981*, S.S. 1980-81, c. J-4.1, s. 6) or leave some discretion to vary the prescribed number (see, for instance, *Jurors Act*, R.S.Q., c. J-2, s. 15; *The Jury Act*, S.N. 1980, c. 41, s. 17, or *Juries Act*, R.S.N.S. 1989, c. 242, s. 6). The court cannot assess the size of such panels from the statutes themselves, and it certainly may not be assumed to have judicial notice of the size of panels through the judicial districts in Canada. The assertions of the appellant should be supported by at least some evidence. In the case at bar, none of the parties has sought to adduce evidence as to the size of jury panels in Canada and the frequency of challenges and standbys. When the parties present argumentsbased on the *Canadian Charter of Rights and Freedoms*, particularly on issues such as impartiality and independence, a proper factual basis, supported by evidence, is essential. As this court wrote in *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, [1989] 6 W.W.R. 351, 99 N.R. 116, 61 D.L.R. (4th) 385, 61 Man. R. (2d) 270, 43 C.R.R. 1, at p. 361 [S.C.R.]:

> *Charter* decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the *Charter* and inevitably result in ill-considered opinions. The presentation of facts is not ... a mere technicality; rather, it is essential to a proper consideration of *Charter* issues.

This court insisted on the need for facts again in *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086, 43 C.P.C. (2d) 165, 112 N.R. 362, 50 C.R.R. 59, 41 O.A.C. 250, *(*sub nom. *R. v. Danson)* 73 D.L.R. (4th) 686. It is to the advantage of the parties to give this court the means to reach a decision on the issues. Fortunately, these reasons do not depend on whether Crown peremptory challenges and standbys are distinguishable or not in practice, and hence it will be assumed for the sake of argument that they are not.

The Test for Impartiality under the Charter

104 In an inquiry under the *Charter*, the appropriate test for impartiality was set out by this court in *Lippé c. Charest*, *(*sub nom. *R. v. Lippé)* [1991] 2 S.C.R. 114, 61 C.C.C. (3d) 127, written reasons at (sub nom *Lippé c. Charest*) 5 M.P.L.R. (2d) 113, *(*sub nom. *R. v. Lippé)* 64 C.C.C. (3d) 513, 5 C.R.R. (2d) 31, *(*sub nom. *Lippé c. Québec (Procureur général))* 128 N.R. 1, 39 Q.A.C. 241, where the court adopted the test first enunciated by de Grandpré J. in *Committee for Justice & Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369, 9 N.R. 115, 68 D.L.R. (3d) 716, and reaffirmed in *R. v. Valente*, [1985] 2 S.C.R. 673, 49 C.R. (3d) 97, 37 M.V.R. 9, 23 C.C.C. (3d) 193, 24 D.L.R. (4th) 161, 19 C.R.R. 354, 64 N.R. 1, 14 O.A.C. 79. This test states that "the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information" (by de Grandpré J., at p. 394 [[1978] 1 S.C.R.]). De Grandpré J. added in the next paragraph, at p. 395, the "[t]he grounds for this apprehension must, however, be substantial. ..."

105 *Lippé*, supra, also confirmed at p. 140 [[1991] 2 S.C.R.] that "[j]ust as the requirement of judicial independence has both an individual and institutional aspect ... so too must the requirement of judicial impartiality." The applicable test for institutional impartiality was outlined by the Chief Justice in the following terms, at p. 144:

> **Step One:**
>
> Having regard for a number of factors including, but not limited to, the nature of the occupation and the parties who appear before this type of judge, will there be a reasonable apprehension of bias in the mind of a fully informed person in a *substantial number* of cases?
>
> **Step Two:**

10 C.R. (4th) 257, [1992] 1 S.C.R. 91, 69 C.C.C. (3d) 481, 87 D.L.R. (4th) 449,
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> If the answer to that question is no, allegations of an apprehension of bias cannot be brought on an institutional level, but must be dealt with on a case-by-case basis.

[Emphasis in the original.] The appellant claims that s. 563 of the Code violates the *Charter* guarantees of institutional impartiality. In effect, he asserts that a well-informed observer would find that Crown peremptory challenges and standbys give rise to a reasonable apprehension of bias *in a substantial number of cases*. This standard requires more than just a perception of risk: there must be, in the normal operation of s. 563 of the Code, as it is applied in fact, a serious fear that partial juries will result too often to be explained solely by factors pertaining to each individual situation.

106 My aim in placing such emphasis on the meaning of institutional partiality is not to render it nugatory by imposing an insuperable burden on the applicant for *Charter* review. Indeed in *Lippé*, supra, the mere fact that municipal court judges were also practising lawyers would have been a sufficient basis for finding a violation of the guarantees of institutional impartiality but for safeguards provided by the legislation. An allegation of institutional partiality remains, however, a serious one: in its generality, it implies that the legal framework surrounding the institution in question is itself flawed, irrespective of the particular circumstances of the various cases.

107 In the case at bar, it is not sufficient, for a determination under s.11(*d*) of the *Charter*, simply to take notice of the disparity between the Crown and the accused in the jury selection process, and then to conclude that a reasonable apprehension of bias arises. The right-minded observer described in the above paragraph must put his or her mind to the question and acquire some information to enlighten his or her opinion. This observer knows better than the person on the street. He or she reads more than just the headlines. In making up his or her mind about the jury selection process, he or she must be expected to have sought knowledge and to have thought about the formation of jury panels, about the roles the parties play in the jury selection process and about the relationship between the formation of the jury and the trial as a whole.

The Formation of Jury Panels

108 Jury trials are a central element of Anglo-American criminal law. Sometimes lauded, sometimes vilified, trial by jury has withstood the test of time and has acquired such an importance that it has been entrenched in our Constitution through s. 11(*f*) of the *Charter*. Juries give a human side to criminal trials. The many purposes served by jury trials have been canvassed by the Law Reform Commission of Canada in its 1980 Working Paper, *The Jury in Criminal Trials*, and they have been touched upon by this court in *R. v. Sherratt*, [1991] 1 S.C.R. 509, 3 C.R. (4th) 129, 122 N.R. 241, 63 C.C.C. (3d) 193, 73 Man. R. (2d) 161.

109 In *Sherratt*, this court has also elaborated on some of the fundamental characteristics a jury must possess to properly exercise its duty, that is, impartiality and representativeness. On the relationship between them, Justice L'Heureux-Dubé wrote at pp. 525-526 [S.C.R., pp. 141-142 C.R.] of her reasons for judgment:

> Provincial legislation guarantees representativeness, at least in the initial array. The random selection process, coupled with the sources from which this selection is made, ensures the representativeness of Canadian criminal juries. ... Thus, little if any objection can be made regarding this crucial characteristic of juries.
>
> . . . . .
>
> However, the 'in-court' selection procedure, set out in the *Criminal Code*, can impact on the representativeness of the jury in some situations. The impartiality of the jury is controlled in the main through the *Criminal Code* procedure.

10 C.R. (4th) 257, [1992] 1 S.C.R. 91, 69 C.C.C. (3d) 481, 87 D.L.R. (4th) 449,
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110 It could be said that random selection, which favours representativeness, provides as well a certain guarantee that the jury will also be impartial, but this is by no means true in all cases. Randomness is not a panacea. Indeed, in order to bolster the impartiality of the jury, the *Criminal Code* offers to the parties various means of challenging prospective jurors, whether collectively or individually, at ss. 558 (now 629), 562 (now 633), 563 (now 634) and 563 (now 638) of the Code. In *Sherratt*, supra, the majority of this court has recognized that these challenges contribute to the impartiality of the jury and sometimes even improve its representativeness.

111 A further quality of a proper jury that has not been discussed in *Sherratt*, supra, is competence. Jurors should not only be representative and impartial, they should also be able to understand the trial, their role in the trial, the evidence that is presented, the principles they have to apply, among other things. This requirement of competence is not mentioned in relevant legislation, aside from general requirements of mental health and linguistic capability, but it is implicit. Most trials require the same competence as is involved in the daily pursuit of one's affairs, and the ability to speak and understand one of the official languages will suffice. Some trials are more complex and complicated, however, especially in the area of economic crimes, to name only one, and then a tampering with randomness may be appropriate to achieve a minimal ability to understand the evidence and issues.

112 The well-informed observer certainly knows that a jury should be impartial, representative and competent. He or she will also know that the random selection process that leads to the formation of a panel of prospective jurors naturally fosters these three qualities, but that it does not in and of itself guarantee them. Procedures exist through which parties are granted a limited possibility of affecting jury selection to further any of these characteristics. Of these procedures, challenges to the jury panel and challenges for cause are not at issue here.

113 The appellant raises doubts about peremptory challenges and Crown standbys only. The observer would accordingly inquire as to whether any apparent justification for the disparity between the accused and the Crown can be found in the rationales behind these recourses, and whether there is any link, or appearance of link, between the selection process and the impartiality of the jury.

The Rationales for Peremptory Challenges and Standbys

114 The well-informed observer will know about the role of the accused and the Crown in the jury selection process, and he or she can draw inferences about the rationales for their respective recourses therefrom.

The Role of the Accused

115 The accused has a fairly clear and circumscribed role in the trial and in the jury selection process. Nothing more is expected of him or her than trying to avoid conviction and punishment by asserting his or her rights according to law.

116 The accused has no right to a jury of his or her choice, however, as was recognized by the majority of this court in *Sherratt*, supra. As long as the jury selection process produces an impartial jury, the accused has no claim to any greater influence on the jury than is given him or her by this process. He or she cannot positively choose the jury, but the law allows him or her to exclude prospective jurors from it.

117 The *Criminal Code* gives the accused a variable number of peremptory challenges, depending on the seriousness of the offence. These peremptory challenges allow the accused to exclude prospective jurors from the jury. The main rationale for these had already been outlined by Sir W. Blackstone, in his *Commentaries on the Laws of England*, W.D. Lewis, ed. (Philadephia: Rees Welsh & Co., 1900), vol.4, at p. 353 and p. 1738 (of Lewis's edition):

> [The peremptory challenge] is grounded on two reasons. 1. As every one must be sensible what sudden

10 C.R. (4th) 257, [1992] 1 S.C.R. 91, 69 C.C.C. (3d) 481, 87 D.L.R. (4th) 449,
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> impressions and unaccountableprejudices we are apt to conceive upon the bare looks and gestures of another, and how necessary it is that a prisoner (when put to defend his life) should have a good opinion of his jury, the want of which might totally disconcert him, the law wills not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike. 2. Because, upon challenges for cause shown, if the reasons assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke a resentment, to prevent all ill consequences from which the prisoner is still at liberty, if he pleases, peremptorily to set him aside.

118 These are still today the main reasons offered to justify peremptory challenges by the accused. B.A. Babcock, in "Voir Dire: Preserving 'Its Wonderful Power' " (1975) 27 Stan. L. Rev. 545, names them respectively the "didactic" and "shield" functions of the peremptory challenge at pp. 552-555. Professor Babcock develops the didactic function of the challenge further than Blackstone: not only does it allow the accused to summarily dismiss prospective jurors without specific motives, but it also "teaches the litigant, and through him the community, that the jury is a good and proper mode for deciding matters and that its decision should be followed because in a real sense the jury belongs to the litigant" (at p. 552). The "shield" function remains accessory. The Law Reform Commission of Canada, in its 1982 report, *The Jury*, also explained peremptory challenges for the accused along the same lines at p. 46.

The Role of the Crown

119 The role of the Crown in the jury selection process, as in the trial as a whole, is not only different, but also asymmetrical.

In general.

120 In the criminal process, the Crown attorney is not expected to seek conviction above everything else, just like the accused attempts to avoid conviction. He or she has special duties in his or her quality as a public officer. Additional duties are superadded to his or her duties as representative of the prosecution side, duties that will often lead to conflicts with the course of action that another lawyer, acting for an individual party, would take, and that will therefore impose limits on prosecutorial conduct.

121 As H.H. Bull put it, in his address "The Career Prosecutor in Canada" (1962) 53 J. Crim. L.C. & P.S. 89, at p. 95:

> He, then, is the attorney for the people or the State against the accused in a proceeding in which the State dissociates itself from the act of its own member, denunciating his conduct and exhibiting an antagonism in its will against the will of the wrong-doer.
>
> . . . . .
>
> The Crown Attorney however is something more. The Crown embraces the whole of the state including the wrong-doer himself. On the one hand, the monarch ... guarantees that the subject shall enjoy peace -- the Queen's Peace. On the other hand the monarch has repeatedly guaranteed to every subject ... the right of fair trial and due process of law.

The inherent richness and complexity of the prosecutor's role was also brought to the fore in *Savion v. R.* (1980), 13 C.R. (3d) 259, 52 C.C.C. (2d) 276, where the Ontario Court of Appeal held at p. 289 [C.C.C., p. 275 C.R.]:

> By reason of the nature of our adversary [sic] system of trial, a Crown prosecutor is an advocate; he is

10 C.R. (4th) 257, [1992] 1 S.C.R. 91, 69 C.C.C. (3d) 481, 87 D.L.R. (4th) 449,
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> entitled to discharge his duties with industry, skill and vigour. Indeed, the public is entitled to expect excellence in a Crown prosecutor just as an accused person expects excellence in his counsel. But a Crown prosecutor is more than an advocate, he is a public officer engaged in the administration of justice ...

122 With respect to the nature of the duties of Crown prosecutors, the Ontario Court of Appeal in the above case referred to *Boucher v. R.*, [1955] S.C.R. 16, 20 C.R. 1, 110 C.C.C. 263, the seminal pronouncement of this court on the subject. There, Rand J. wrote this oft-quoted passage at pp. 23-24 [S.C.R., p. 8 C.R.]:

> It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a 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 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 efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.
>
> (See also *R. v. Stinchcombe*, S.C.C., November 7, 1991, unreported [now reported at (1991), 8 C.R. (4th) 277, [1992] 1 W.W.R. 97, 83 Alta. L.r. (2d) 193, 68 C.C.C. (3d) 1, 130 N.R. 277].)

Taschereau J. (as he then was) also dealt with the general issue of prosecutorial responsibilities in these terms at p. 21 [S.C.R., p. 6 C.R.]:

> [TRANSLATION]
>
> The position of Crown counsel is not that of counsel in a civil matter. His functions are quasi-judicial. He must not so much try to obtain a conviction as assist the judge and jury so that justice will be fully done. Moderation and impartialitymust always characterize his conduct in court. He will have honestly carried out his duty and will be beyond reproach if, putting aside any appeal to the passions, in a dignified manner appropriate to his role, he presents the evidence to the jury without going beyond what it has revealed.

These words remain every bit as pertinent today as they were then and as they had been before. Since Crown prosecutors play a central role in the proper functioning of our judicial system, and since they are vested with much discretion and subject to few controls, their duties can never be too often reaffirmed. The single-minded pursuit of convictions cannot be compatible with the responsibilities of Crown prosecutors. They must present the case for the prosecution to the best of their ability, always acting in furtherance of the duties entrusted to their office. The examination of the role of Crown attorneys in criminal trials cannot be better concluded than with this passage from Sir M. Hilbery, *Duty and Art in Advocacy* (London: Stevens & Sons, 1946), at p. 13:

> [A prosecutor's duty is] to see to it that every material point is made which supports the prosecution case or destroys the case put forward for the defence. But as prosecuting Counsel he should not regard his task as one of winning the case. He is an officer of justice. He must present the case against the prisoner relentlessly, but with scrupulous fairness. He is not to make merely forensic points or debating scores. There is, perhaps, no occasion when the Barrister is called upon to exhibit a nicer sense of his responsibilities than when prosecuting.

During the jury selection process.

123 In keeping with this quasi-judicial role, the Crown prosecutor in the jury selection process has a duty to ensure that the jury presents the three characteristics outlined above, that is, impartiality, representativeness and

10 C.R. (4th) 257, [1992] 1 S.C.R. 91, 69 C.C.C. (3d) 481, 87 D.L.R. (4th) 449,
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competence. Let it be made clear, however, that these qualities, especially impartiality, must not be sought in light of securing a conviction, but rather in light of selecting the best jury to try the case. Indeed, the Crown attorney should use the means at his or her disposal to exclude prospective jurors that could be biased in favour of the prosecution, even if the defence is not aware of this fact. The "didactic" function that was attached to the peremptory challenge for the accused is absent in the case of the Crown: it does not have to develop any sense of adherence to or acceptance of the trial process through the selection of the jury, and accordingly neither does it have any interest in excluding candidates on the basis of unsupported perceptions. The Crown attorney's only justification for taking part in the jury selection process stems from his or her responsibilities as a public officer.

124 The Crown nevertheless has an important function to fulfil during jury selection. This function can better be understood by comparison with other jurisdictions.

125 In the United States, the trial judge generally retains a wide discretion to excuse prospective jurors at the outset of the trial on grounds deemed by him or her sufficient *(Texas & Pacific Railway Co. v. Hill*, 237 U.S. 208 (1915); in federal procedure, this principle is embodied in 28 U.S.C. § 1866(c)(2)). Afterwards, jury selection involves extensive questioning during a voir dire where jurors can be asked various questions, in order to enable the parties to gain sufficient information for their challenges for cause. Furthermore, the range of causes for which a juror can be excluded is virtually limitless, since U.S. courts have repeatedly held that states cannot limit an accused's constitutional right to a fair trial by purporting to enact a closed list of causes for challenge (the evolution of American law on this issue is discussed in Walter E. Jordan, *Jury Selection* (New York: McGraw-Hill, 1980), at pp. 49-55). A large measure of flexibility can therefore be found both in the discretion given to the trial judge and in the unlimited number of grounds of challenge for cause. This flexibility allows for special cases of juror inaptitude to be dealt with as they arise in particular cases, hence enabling the selection process to produce a jury that conforms to constitutional guarantees.

126 In the United Kingdom, the *Juries Act 1974* (U.K.), 1974, c. 23, gives a designated officer of the court a general power to excuse (at s. 9) or to defer attendance (at s. 9(2)), when jurors put forward a good reason to do so. At trial, the court itself has a power to excuse for good reason prospective jurors from their jury duties (s. 9(4) of the *Juries Act 1974*), and it also retains a common law power to refuse to allow to be sworn prospective jurors who are incapable of duly attending to the evidence (*Mansell v. R.* (1857), 8 E. & B. 54, 120 E.R. 20 (K.B.)). At common law, the grounds for challenge for cause are limited, not unlike in Canada. In the United Kingdom, the flexibility to deal with individual jurors whose qualifications may be problematic comes from these broad powers given to the court officer in charge of constituting the panels and to the trial court. A further element of flexibility comes from Crown standbys, which in English law have been severely curtailed by guidelines from the Attorney General (published at "Practice Note," [1988] 3 All E.R. 1086). These guidelines recognize at para.4 that, given the discretionary powers outlined above, standbys will be necessary only in rare cases. Despite the differences in Canadian law that will be outlined below, it is of the utmost interest to note the underlying principles to Crown standbys, as stated in para.1:

> 1. Although the law has long recognised the right of the Crown to exclude a member of a jury panel from sitting as a juror by the exercise in open court of the right to request a stand by or, if necessary, by challenge for cause, it has been cus tomary for those instructed to prosecute on behalf of the Crown to assert that right only sparingly and in exceptional circumstances. It is generally accepted that the prosecution should not use its right in order to influence the overall composition of a jury or with a view to tactical advantage.

127 In Canada, constitutional considerations intervene. As this court has held in *R. v. Barrow*, [1987] 2 S.C.R. 694, 61 C.R. (3d) 305, 81 N.R. 321, 38 C.C.C. (3d) 193, 87 N.S.R. (2d) 271, 222 A.P.R. 271, 45 D.L.R. (4th) 487, at pp. 712-713 [S.C.R., p. 318 C.R.], "the provincial power for the administration of justice stops and the federal power over criminal procedure begins when the judge's activity is not concerned with the assembly of an array of

10 C.R. (4th) 257, [1992] 1 S.C.R. 91, 69 C.C.C. (3d) 481, 87 D.L.R. (4th) 449,
133 N.R. 1, 51 O.A.C. 161, 7 C.R.R. (2d) 193

eligible citizens, but with the precautions necessary to ensure an impartial jury." The court wrote also at p. 713 [S.C.R., p. 319 C.R.] that "its [the province's] authority over the jury pool is limited to eligibility and personal matters unconnected with the criminal case to be tried." The element of flexibility that was found in American and English law must therefore be found in the provisions of the *Criminal Code*.

128 In the Code, not only is there a list of grounds for challenge for cause in s. 567(1) of the *Criminal Code*, but this list is closed by s. 567(2) of the Code. The scope for challenges for cause is therefore limited, unlike in American law. Furthermore, pre-screening of prospective jurors through direct questioning from the judge is confined to obvious cases where consent of counsel can be presumed, following the strand of case law culminating in *Sherratt*, supra. Canadian law does not give the trial judges powers to excuse of the same breadth as in the United States or the United Kingdom. It does not put this necessary element of flexibility, in dealing with particular prospective jurors in particular cases, in the hands of the court or of court officers.

129 Whereas the United States and the United Kingdom rely on the trial judge's discretion or extensive challenge for cause procedures, the Canadian solution to this problem is to allow the Crown, through means put as its disposal, to exclude a prospective juror from the jury. Therein lies the role of the Crown in the Canadian jury selection process. Through this role, in conformity with its general duties, the Crown addresses the need to be able to exclude prospective jurors who would not fall under any of the statutory grounds of exclusion but whose presence on the jury would nevertheless impair its impartiality, its representativeness or its competence. It provides the element of flexibility.

130 The means provided by the Code for the exercise of Crown duties during jury selection is s. 563, where the prosecutor receives powers of peremptory challenge and standby. As mentioned previously, it is significant that Parliament, when it last addressed the issue of standbys in 1917, did not choose to abolish them, but rather to establish a uniform limit in numbers beyond which judicial authorization is required. Crown standbys (the same reasoning can be applied to peremptory challenges) had then, and still have, a function and an importance of their own in the jury selection process.

131 The relatively large number of challenges and standbys given to the Crown is consistent with the need for flexibility in the process. It is not incumbent upon the court in inquire into the adequacy of the actual numbers contained in the Code.

132 They are the result of historical compromises. The 48 standbys, for instance, represent an average of the number of persons on jury panels in the nine provinces at the time of the enactment of the *Act to amend the Criminal Code (respecting jurors)*. Whether the figure of 48 is properly determined, and whether it is still adequate today, are questions better left for Parliament to decide. Irrespective of the precise number, though, this relatively high figure, and consequently the possibility of a large number of Crown interventions in jury selection, enables the Crown fully to play its role when the situation so requires. The Crown will not exercise all of its four challenges and 48 standbys merely because it holds them. In fact, a proper exercise of its role would call for restraint. Since the Crown plays this important quasi-judicial role and infuses some flexibility into the jury selection process, however, it is only normal that the means of exclusion at its disposal also allow some room for manoeuvre. Moreover, the limit of 48 itself is flexible, since upon judicial authorization it can be increased.

133 As a result, in my view, the well-informed observer, who knows that the accused and the Crown play different roles in the jury selection process, would not hold a reasonable apprehension of bias from the mere fact that a disparity in the number of recourses against jurors exists in the *Criminal Code*. He or she would see in this disparity a reflection of the asymmetry between the roles of the accused, which is limited, going almost to self-preservation in nature, and of the Crown attorney, who must conscientiously discharge the quasi-judicial duties incumbent on his or her public office and who accordingly requires some flexibility in the means available to him or her. He or she might well consider that this disparity contributes to a better jury by fostering its impartiality,

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representativeness and competence. This line of reasoning has been followed by the Ontario Court of Appeal in *R. v. S. (J.R.)* (1987), 59 C.R. (3d) 134, 20 O.A.C. 365, 37 C.C.C. (3d) 351, 32 C.R.R. 328, by the Nova Scotia Court of Appeal in *R. v. Johnstone* (1986), 72 N.S.R. (2d) 76, 173 A.P.R. 76, 26 C.C.C. (3d) 401, and by the Quebec Court of Appeal in *Mansbridge c. R.* (1 octobre 1991), N[o] C.A. Québec 200-10-000149-851, M. le juge Brossard et Mmes les juges Mailhot et Tourigny J.E. 91-1653 (C.A. Qué.).

The Link Between the Selection of the Jury and its Impartiality

134 Furthermore, the observer would fail in my view to see any clear link between the jury selection process and the impartiality of the empanelled jury.

135 The appellant's central tenet is that the verdict of the jury can be influenced at the stage of selection. The parties, by exerting an influenceon who is empanelled on the jury, can fashion a jury to their liking. In this respect, the greater possibility for influence given to the Crown would allow it to model the jury more than could the accused. However, notwithstanding whether they are effective or not, such systematic attempts by the Crown at hand-picking the jury to obtain a conviction would be contrary to its role in the jury selection process and an abuse of its powers. Even for the accused, the kind of deliberate planning involved with such overt jury shaping must be contrasted with the attitude envisioned by the "didactic" rationale mentioned above, where the accused voices his or her sudden perceptions and prejudices.

Factual Basis

136 Many studies have been conducted on the relationship between peremptory challenges and jury verdicts in the United States, but their relevance is very limited, since the American jury selection procedure generally comprises an extensive voir dire where prospective jurors are questioned in order to provide parties with sufficient information for the selection process. Attempts to shape the verdict during selection rest on a sounder scientific basis in the United States, where parties will know after the voir dire how jurors think about certain issues, how they think about the crime with which the accused is charged, among others. Even then, American studies remain fairly divided on the existence of any link between jury selection and verdicts.

137 In Canada, the information available to the parties during the selection process is very limited: aside from apparent features such as gender, race or age, parties are only provided with the names and occupations of prospective jurors. It is not apparent that parties can influence the verdict by challenging or standing by prospective jurors, given this dearth of information.

138 Both parties have cited an English study, which could be taken with caution as the most applicable empirical work. In this study, titled "The Use of Peremptory Challenge and Stand by of Jurors and their Relationship to Trial Outcome," [1988] Crim. L.R. 731, authors Julie Vennard and David Riley tried to determine if the use by defendants of their peremptory challenges could increase their chances of acquittal. A quotation from their conclusions at p. 738 sheds some light on the lack of factual foundation for the appellant's claim:

> the findings do not lend support to the criticism that peremptory challenge gives an unfair advantage to the defence and that juries subjected to challenge are predisposed to acquit. Bearing in mind the uncertainty of peremptory challenge as a means of influencing the composition of the jury to achieve a favourable outcome, the lack of association is, perhaps, to be expected. First, it must be remembered that the pool of potential jurors for each defendant is limited to those members of the public who comprise the jury panel on that day. In addition, any attempt to affect the outcome through challenge relies on subjective judgments about the relationship between a potential juror's age, sex and appearance and his or her propensity to convict or acquit.

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139 Of course, I do not consider that jurors come to their task with a completely blank slate, devoid of any preconceptions and prejudices. Each juror has his or her own particular mindset, and it forms part of his or her representative quality. It must be emphasized, however, that parties who try to fashion the jury through the selection process play the sorcerer's apprentice. The appellant cannot claim that these attempts violate his rights under the *Charter*.

140 The well-informed observer should not be expected to have read the most recent empirical studies on jury selection. Yet he or she will certainly see that there is little practical relation between the excluded jurors and the impartiality of the jury actually selected, and that Crown challenges and standbys serve a legitimate purpose and remain but one part of a criminal trial.

The Excluded Jurors and the Jury Itself

141 This court in *Sherratt*, supra, recognized that tampering with the randomness of the jury roll at the selection stage, through challenges and standbys, was permissible, and did not in and of itself give rise to a reasonable apprehension of bias, as was mentioned above.

142 During the selection process, both parties have at their disposal means to exclude jurors summarily. There is no indication, and the appellant does not contend, that the number of peremptory challenges given to the accused is insufficient as such. The appellant complains only that the Crown has standbys in great numbers in addition to its peremptory challenges. Since in addition to the peremptory chal lenges the accused is unrestricted in challenging for cause, and since the standby procedure is an exclusionary mechanism, even its abuse, while it might result in some qualified and impartial persons being excluded, does not lead to the choice of biased jurors. The 12 jurors finally selected will not appear to be partial to the Crown. It cannot be inferred that those challenged or stood by by the Crown were necessarily favourable to the accused (even if it were so, the accused is not entitled to a favourable jury, as was noted before). Reciprocally, it cannot be concluded that a juror is biased in favour of the Crown simply because the Crown has not exercised a challenge or a standby against him or her.

143 In the end, the 12 members of the jury, who have withstood the selection process, are the ones who matter in examining whether a reasonable apprehension of bias arises. The accused, as well as the Crown, had the opportunity to exclude them somehow as they were called, if they had any doubt on their fitness to serve as jurors. To the observer, this feature of the jury selection process not only does not give rise to an apprehension of bias, but rather increases the perception that the jury is impartial, since the accused and the Crown have had a chance to weed out the jury.

144 In *R. v. R. (R.M.)* (1986), 53 C.R. (3d) 81 (Ont. H.C.), Potts J. adopted the same approach, and he made the following statement at pp. 86-87:

> When one reviews the entire jury selection process, it becomes clear that the acts complained of as being unfair are at the end of a rather lengthy process designed to ensure randomness and independence and impartiality. Can the Crown's ability to request that a potential juror stand aside be seen to impugn this entire process? I respectfully submit that it cannot. At best, the jury selection carried on in a courtroom by counsel is educated guesswork operating on a sample of strangers carefully chosen in a neutral fashion. Does an individual, chosen at random, who has survived the scrutiny of the accused assume a pro-Crown bias merely because he is not asked by the Crown to stand aside? Does a jury composed of such individuals become something less than 'independent and impartial'? Alternatively, does an individual who is initially asked to stand aside but later recalled assume a pro-accused bias merely because he had first been asked to stand aside? I would respectfully submit that the individual biases of any potential juror are left unaffected by the Crown's request to stand aside or not. Therefore, I find that the independence

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> and impartiality of the jury as a whole as it is finally selected are not affected by the number of stand-asides which the Crown has or has elected to use. Although when viewed in isolation the Criminal Code provisions may appear to be unfair, I find that when the entire jury selection process is reviewed the advantage to the Crown, while present, is slight; it certainly does not constitute a rule which is so unfair that it results in an unfair trial of the accused.

I cannot but agree with these words, as did the Ontario Court of Appeal in *R. v. Stoddart*, supra.

Peremptory Challenges and Standbys Within the Criminal Trial

145 Moreover, the likelihood that the impugned disparity had an influence on the jury clashes squarely with other fundamental characteristics of criminal jury trials.

146 For one, the verdict of the jury must be unanimous. According to Lord Devlin, *Trial by Jury* (London: Stevens & Sons, 1966), at p. 48, this rule was established in 1367 and has remained unchanged since. In our criminal law, the jury only exists as a collectivity, and not as a group of individuals. Such a conception is borne out by empiricalfindings as well. In their book *Jury Trials* (Oxford: Clarendon Press, 1979), J. Baldwin and M. McConville conclude at pp. 104-105:

> Having examined the relationship between the characteristics of juries and the verdicts they return, we can confidently state that no single social factor (no, as far as we could detect, any group of factors operating in combination) produced any significant variation in the verdicts returned across the board. This negative conclusion is, to a degree, a surprising one since common sense and a voluminous literature would have suggested the opposite. The contradiction is, however, relatively easily explained.The truth of the matter is that most juries ... were extremely mixed, and it is to be expected that the amalgam of personal and social attributes that make up a jury will produce verdicts which reflect that unique social mix rather than the broad social characteristics of the individuals concerned.

Any attempt to influence the verdict of the jury by hand-picking its members, unless it can be done on such a grand scale as to affect the whole jury, is bound to run against the unanimity requirement, and its efficacy may therefore be highly doubted by the observer.

147 Furthermore, the parties to a criminal trial both try to convince the jury to adopt their conclusions. The criminal trial as a whole is an adversarial process, designed to lay before the jury all the evidence and all the arguments that are relevant to its decision. If the verdict could be determined at the jury selection stage, the trial would serve little purpose. Crown challenges and standbys are part of a larger trial procedure conceived to allow the culpability of the accused to be debated, while remaining fair to the accused. The burden of proof requirements, the evidentiary exclusions and the defences open to the accused all contribute to these objectives. In arguing that a mere disparity in the jury selection process suffices to predetermine the verdict and to render the whole trial unfair, the appellant denies the very essence of the trial.

148 These considerations were behind one of the earliest pronouncements on the issue, found in *R. v. Piraino* (1982), 37 O.R. (2d) 574, 1 C.R.R. 206, 67 C.C.C. (2d) 28, 136 D.L.R. (3d) 83 (H.C.), at pp. 29-30 [C.C.C.]:

> The jury selection process is just one step in the trial. The course of a trial is governed and affected by almost countless rules relating to procedure and the admissibility of evidence. Many of those rules when isolated and looked at individually, would appear to favour either the Crown or the accused. Indeed, the same rule may at one point favour the Crown and at another point favour the accused. The requirements; that the Crown prove each element of a charge beyond a reasonable doubt before there can be a conviction; that the accused cannot be required to testify and that the Crown and the trial judge may not

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> comment on the fact that the accused has not testified are examples of rules that favour the accused.
>
> In my view, so far as the issue before me is concerned, the *Canadian Charter of Rights and Freedoms* gives to every citizen the right to a fair trial. It does not assure him the right that every rule that governs that trial, when examined individually, be fair to him. It does, however, assure him that any individual rule that is so unfair that it will result in an unfair trial being had will be struck down.

The above reasoning has been echoed by the Ontario Court of Appeal in *R. v. Stoddart*, supra, by the Quebec Court of Appeal in *R. v. Bolduc* (1986), 4 Q.A.C. 201, and by the Newfoundland Court of Appeal in *R. v. Curtis* (1989), 74 Nfld. & P.E.I.R. 227, 231 A.P.R. 227 (Nfld. C.A.). I would also adopt it. One must beware, of course, of excusing violations of the *Charter* in criminal procedure on the grounds that our system of criminal trial as a whole is fair. As was said in *Piraino*, supra, some rules may be so unfair that they will be struck down.

149 In the case at bar, however, the well-informed observer, know ing the qualities expected in a good jury (impartiality, representativeness and competence), understands the difference between the roles of the accused and the Crown in the jury selection process, as well as the tenuous relationship of peremptory challenges and standbys with the impartiality of the jury and the fairness of the trial as a whole. Considering these factors, a disparity in the means afforded to the parties does not create in him or her an apprehension that the jury is systematically partial because of the operation of the provisions of the *Criminal Code*.

Institutional and Individual Impartiality

150 Fundamentally, the appellant's position is based on an apprehension of abuse or misuse by the Crown of its powers in a substantial number of cases, which would impinge upon the impartiality of the empanelled jury at the institutional level. I have just outlined my reasons for finding that this submission must fail in the absence of any reasonable apprehension of bias in the eyes of a well-informed observer. Throughout, I remained at the level of pure "apprehension," and I did not consider, apart from the question of whether an apprehensioncould arise on the face of the *Criminal Code* provisions, whether there was any support, judicial, doctrinal or otherwise, for the appellant's alleged apprehension.

151 No evidence has been presented of an abusive Crown practice. It is to be noted, as was mentioned above, that Parliament chose to limit and maintain Crown standbys in 1917, and not to abolish them, amid the fears of abuse expressed by some members. The British Parliament, when it enacted the *Criminal Justice Act 1988* (U.K.), 1988, c. 33, which abolished the peremptory challenges that remained to the accused, also avoided to abolish Crown standbys, on the grounds that they serve a valid purpose, as outlined in the Attorney General's guidelines, supra. Furthermore, but for one trial court case, Canadian courts, in particular at the appellate level, have always upheld s. 563 of the *Criminal Code*. None of them found any substance in allegations of institutional partiality. Finally, at the doctrinal level, but for the slight editorial piece of A.W. Mewett, "The Jury Stand-By" (1988) 30 Crim. L.Q. 385, no Canadian authors of which I am aware have reviewed the issue since the Law Reform Commission of Canada issued its report, *The Jury*, supra, in 1982.

152 The Commission's brief remarks on peremptory challenges and standbys, at p. 47 of its report, show that it did not consider that the Code provisions were unfair to the accused, although it suggested the abolition of standbys, and their replacement by an increased number of peremptory challenges, on the basis that they were obsolete and anachronistic. In the realm of independence and impartiality, however, the *Charter* does not require perfection, as has been mentioned on several occasions by this Court (see *R. v. Valente*, supra, and the recent case of *Lippé c. Charest*, supra; as for s. 563 of the Code, specifically, see *R. v. Foote* (1985), 65 N.B.R. (2d) 444, 167 A.P.R. 444 (C.A.)). The constitutional validity of s. 563 of the *Criminal Code* does not mean that it is exempt from criticism. Many avenues for its reform and the reform of the jury selection process have been proposed. I do not

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wish to comment on them. Absent *Charter* violations, this court has no mandate to engage in law reform.

153 The appellant's arguments amount to suggesting that jury trials conducted under the provisions of the *Criminal Code* have in a substantial number of cases been unfair to the accused or at least given rise to an apprehension of unfairness. Far be it from me to give in to the sheer weight of history, but trial by jury remains such a central and cherished feature of our criminal law that it would seem somewhat incongruous that many juries to date (or at least many of those selected after Crown challenges and standbys were exercised) would be so fundamentally flawed. It would be regrettable to invalidate s. 563 of the Code on the basis of such sweeping assertions, thereby also defeating the legitimate and useful purposes for which it has been enacted.

154 Should the possibility of abuse advanced by the appellant materialize in instant cases, where the Crown rather than fulfilling its duty would misuse or abuse its powers, these could be adequately dealt with on an individual basis.

155 In the United States, it is true, problems have arisen with the use of peremptory challenges by the prosecution to exclude blacks from the jury. In *Batson v. Kentucky*, 476 U.S. 79 (1986), the Supreme Court of the United States has held that in these situations the accused has a recourse against the prosecution if discrimination is proven. Canada has largely been spared these prosecutorial practices, but if they occur, the common law and the *Charter* offer sufficient protection to the accused (see J.C. Hébert, "Le contrôle judiciaire de certains pouvoirs de la couronne," in *Droit pénal -- orientations nouvelles* (Cowansville: Éditions Yvon Blais, 1987), and D.C. Morgan, "Controlling Prosecutorial Powers -- Judicial Review, Abuse of Process and Section 7 of the Charter" (1986) 29 Crim. L.Q. 15). Although the right of the Crown to stand by jurors is not such as to give rise to a reasonable apprehension of partiality in a substantial number of cases, should a case occur in which the use of standbys by the Crown is such as to create a reasonable apprehension of partiality, a court must be mindful that the purpose of the *Charter* is the unremitting protection of individual rights and liberties -- *Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc.*, [1984] 2 S.C.R. 145, 41 C.R. (3d) 97, 27 B.L.R. 297, 33 Alta. L.R. (2d) 193, [1984] 6 W.W.R. 577, (sub nom. *Hunter v. Southam Inc.)* 14 C.C.C. (3d) 97, 55 A.R. 291, 55 N.R. 241, 2 C.P.R. (3d) 1, 9 C.R.R. 355, 11 D.L.R. (4th) 641, 84 D.T.C. 6467 , at p. 155 [S.C.R.]. It will be up to the trial judge to ensure that the prosecution is not abusing its power of standbys, and to allay any apprehension as to impartiality. This was the approach apparently taken by the Ontario Court of Appeal in *R. v. Pizzacalla* (Nov. 15, 1991, unreported [now reported at (1991), 7 C.R. (4th) 294, 5 O.R. (3d) 783, 69 C.C.C. (3d) 115, 50 O.A.C. 161]). In that case, counsel for the Crown used 20 standbys for the admitted purpose of empanelling an all-female jury for the trial of a man accused of sexual assault. The Court of Appeal allowed the appeal from conviction and ordered a new trial.

156 This ruling is limited to ss. 563(1) and (2) (now ss. 634(1) and (2)) of the Code. As they now stand, they do not offend the constitutional guarantees of impartiality secured by ss. 7 and 11(*d*) of the *Charter*. There was therefore no constitutional basis for the ruling made by the trial judge in the instant case, restricting the Crown and the accused to four peremptory challenges and depriving the Crown of its right to stand by prospective jurors.

II -- The Consequences Of The Trial Judge's Ruling On The Validity Of The Trial

157 The appellant submits that s. 686(1)(*b*)(iv) of the *Criminal Code*, R.S.C. 1985, c. C-46, can be used by an appellate court to cure the error that was made by the trial judge in his order.

158 Section 686 of the Code reads as follows:

> 686. (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit, on account of insanity, to stand trial, or against a special verdict of not guilty on account of insanity, the court of appeal

10 C.R. (4th) 257, [1992] 1 S.C.R. 91, 69 C.C.C. (3d) 481, 87 D.L.R. (4th) 449,
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. . . . .

(*b*) may dismiss the appeal where

. . . . .

(iv) notwithstanding any procedural irregularity at trial, the trial court had jurisdiction over the class of offence of which the appellant was convicted and the court of appeal is of the opinion that the appellant suffered no prejudice thereby; ...

159 The appellant relies on *R. v. Cloutier* (1988), 27 O.A.C. 246, 43 C.C.C. (3d) 35, a decision of the Ontario Court of Appeal. There the accused had been excluded from the courtroom in the course of the trial, in violation of s. 577 of the *Criminal Code*, R.S.C. 1970, c. C-34. After having reviewed and distinguished precedents that had been decided before s. 613(1)(*b*)(iv) of the Code (now s. 686(1)(*b*)(iv)) came into force, the Ontario Court of Appeal discussed the intent of Parliament in enacting this section at p. 46 [C.C.C.]:

> It is appropriate to consider at this point, the purpose of the enactment of s. 613(1)(*b*)(iv) [now s. 686(1)(*b*)(iv)]. At the very least Parliament must have intended to give to the Court of Appeal a discretionary power which it did not have previously. It already had under s. 613(1)(*b*)(iii) [now s. 686(1)(*b*)(iii)] the power to dismiss an appeal where a mistake of law had occurred but the court was of the opinion that no substantial wrong or miscarriage of justice had occurred. It was accordingly not necessary to enact a provision to cover errors in the nature of procedural irregularities as they are by their very nature errors of law.
>
> ... where the ground for an appeal was an error of law and that error of law was the contravention of s. 577(1) [now s. 650(1), guaranteeing the right of the accused to be present at the trial], such error resulted in a loss of jurisdiction and the curative provisions of s. 613(1)(*b*)(iii) did not apply even though the error did not result in substantial wrong or miscarriage of justice... *A fortiori*, if the ground of appeal was that the court, in the first instance, had no jurisdiction over the class of offence of which an appellant had been convicted, the Court of Appeal could not rely on the provisions of s. 613(1)(*b*)(iii).
>
> ... the inclusion of the words 'the trial court had jurisdiction over the class of offence of which the appellant was convicted' in s. 613(1)(*b*)(iv) make it quite clear that the new provision was intended to give to the Court of Appeal the discretionary power to dismiss an appeal where a court has jurisdiction in the first instance but has lost jurisdiction as a result of some procedural irregularity.

The Court of Appeal summed up its reasoning at p. 48:

> ... it is necessary to distinguish between (1) errors of substance such as exist in cases where the court has no jurisdiction over the class of offences charged and which are not procedural in nature at all; (2) irregularities in procedure of a relatively minor nature which do not result in a loss of jurisdiction on the part of the trial court, and (3) irregularities in procedure which are so serious in nature that they are deemed to be matters of substance which result in a loss of jurisdiction.
>
> ... the wording of s. 613(1)(*b*)(iv) makes it clear that its curative provisions do not apply to the first type of error. It is equally clear that its curative provisions do apply to the second type of error or irregularity but that type of error could be dealt with under s. 613(1)(*b*)(iii). There would be no point in enacting s. 613(1)(*b*)(iv) for this purpose.
>
> ... the curative provisions do apply to the third type of error or irregularity. Although the third type of

10 C.R. (4th) 257, [1992] 1 S.C.R. 91, 69 C.C.C. (3d) 481, 87 D.L.R. (4th) 449,
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> procedural irregularity is one that is so serious that it is deemed to be fundamental in nature and results in a loss of jurisdiction, it does nevertheless have its origin as a procedural irregularity at trial.

160 I agree with this interpretation of s. 686(1)(*b*)(iv) of the Code. Parliament clearly intended to limit annulments for jurisdictional grounds to cases where prejudice to the accused has occurred, provided the court had jurisdiction over the class of offences in question. In the instant case, the District Court of Ontario had jurisdiction over the offence with which the accused was charged, and therefore the error of the trial judge would come under the third category outlined by the Ontario Court of Appeal in *Cloutier*, supra. The error could be cured if the court found there was no prejudice to the accused.

161 There is one further aspect, however, that justifies annulling the trial, and the Court of Appeal rightly distinguished its *Cloutier* decision, supra, on this basis. Section 686(1)(*b*)(iv) speaks of a "trial court." A trial court, for indictable offences, is defined at s. 471 of the Code:

> 471. Except where otherwise expressly provided by law, every accused who is charged with an indictable offence shall be tried by a court composed of a judge and jury.

This definition is repeated in s. 536(2) of the Code, in the address to the accused for his election.

162 As can be seen from s. 471 of the Code, a jury is more than an incident or a procedural tool in a trial case. The jury *is* the court, together with the trial judge. If the jury is not constituted according to the rules, the court exists no more than if the judge had been unlawfully appointed. In the case at bar, the problem is not one of application of the jury selection rules, which could have been saved by s. 686(1)(*b*)(iv) of the Code. The rules were changed. The jury was selected pursuant to other rules than those set out in the Code. There was therefore no trial court properly constituted, and the appropriate sanction is annulment.

163 This holding does not detract from the classification proposed in *Cloutier*, supra. In order for the saving provisions of s. 686(1)(*b*)(iv) of the Code to find application, not only must the court have jurisdiction over the class of offence, but it must also be a court within the meaning of the Code. Any failure with respect to these conditions constitutes an error falling in the first category outlined in *Cloutier*, supra.

164 The trial was therefore null.

III -- Section 10(b) Of The Charter

165 This issue is better left to the determination of the judge that will hear the new trial in this case. I nevertheless agree with Stevenson J. that the trial judge was in a better position to rule on the admissibility of the statements, that the Court of Appeal should not have interfered with his determination, and that the issue under his disposition of the appeal is moot as to the statement which was admitted.

IV -- Answers

166 I would answer the constitutional questions as follows:

> 1. Are ss. 633 and 634 of the *Criminal Code*, R.S.C. 1985, c. C-46 [formerly R.S.C. 1970, c. C-34, ss. 562 and 563], inconsistent with ss. 7, 11(*d*) or 15 of the *Canadian Charter of Rights and Freedoms*?
>
> A. Section 634(1) and (2) (formerly R.S.C. 1970, c. C-34, s. 563(1) and (2)) of the *Criminal Code* are not inconsistent with ss. 7 and 11(*d*) of the *Canadian Charter of Rights and Freedoms*. The allegation of a violation of s. 15 of the *Charter* was abandoned. Sections 633 and 634(3) of the *Criminal Code* (formerly

10 C.R. (4th) 257, [1992] 1 S.C.R. 91, 69 C.C.C. (3d) 481, 87 D.L.R. (4th) 449,
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ss. 562 and 563(3)) were not challenged.

2. If the answer to question 1 is affirmative, are ss. 633 and/or 634 [formerly R.S.C. 1970, c. C-34, ss. 562 and/or 563] justified by s. 1 of the *Canadian Charter of Rights and Freedoms* and therefore not inconsistent with the *Constitution Act, 1982*?

A. This question does not arise.

V -- Conclusion

167 The trial judge erred in restricting the number of peremptory challenges to four for each side and in depriving the Crown of its right to stand by jurors. I would therefore dismiss the appeal and maintain the setting aside of the acquittal of the appellant and the direction that a new trial be held.

Appeal allowed.

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