THE RIGHT TO STATE-FUNDED COUNSEL IN THE CRIMINAL CONTEXT: EMERGING ISSUES ON AN EVOLVING ENTITLEMENT

A DISCUSSION PAPER

> [Iraqi Prime Minister Ayad] Allawi said [Saddam] Hussein will be entitled to a lawyer. If he cannot afford a lawyer, Allawi said, smiling, the [Iraqi] government will pay the fees.[1]

I. INTRODUCTION

[1] Chandrasekranan and Barabash, "Iraq Takes Legal Custody of Hussein Wednesday", *Washington Post*, June 29, 2004 (http://www.washingtonpost.com/ac2/wp-dyn/A13900-2004Jun29?language=printer. Site visited: June 30, 2004.)

Saddam Hussein defended at his approaching trial on charges of genocide, war crimes and crimes against humanity by lawyers paid for by the newly installed Government of Iraq! The irony is grotesque. One of the cruellest dictators of the Twentieth Century who amassed a fortune of untold millions plundered from international aid payments to his country and other nefarious activities, obtaining legal representation funded from Iraq's precarious public purse.[2] Nonetheless, in an era where court orders compelling the state to fund the defence of accused persons who apparently are unable to afford private legal representation are common, such a scenario while admittedly exceptional, is plausible. Indeed, a wealthy accused in the Air India bombing prosecution recently applied for court-appointed counsel to represent him for the remainder of that trial. Even though the British Columbia Supreme Court denied his application [3], the Government of British Columbia agreed to fund his legal representation and seek indemnification later so as not to derail a significant criminal trial that had been on-going for many months.

Prior to the proclamation of the *Canadian Charter of Rights and Freedoms*[4], the right of an accused person to legal representation was ill-defined.[5] The common law did not recognize such a right. Over time, however, the harshness of the common law was tempered by statutory provisions

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[2] It is reported that a team of 21 lawyers from various countries have been appointed by Saddam Hussein's wife, Sajida, to represent him. Many are acting *pro bono*, "Saddam's Lawyers Seek Access to client", Associated Press, July 22, 2004. (http://www.ledger-enquirer.com/mld/ledgerenquirer/new/world/9215564.htm?template=contentModules. Site visited: July 22, 2004.)

[3] *R. v. Malik*, [2003] B.C.J. No. 2167 (QL) (S.C.)

[4] Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act*, 1982 (U.K.), 1982, c. 11 (the "*Charter*)

[5] For a brief overview of the situation prior to the *Charter*, see especially: *R. v. Rowbotham* (1988), 41 C.C.C.(3d) 1 (Ont. C.A.), at pp. 62-64.

that permitted accused to have access to legal counsel; however, this access amounted to little more than a right to retain counsel if the accused possessed the means to do so and to receive the benefit of counsel's advice and assistance. Much of the criminal defence work for impecunious accused was undertaken by experienced members of the profession at little or no cost to the accused. In more recent times, provincial governments created legal aid schemes funded from public monies to provide lawyers for indigent persons.

The recent phenomenon of court-appointed publicly funded counsel is tied to two discrete but inextricably linked developments. First, there is a decline in the amount of public monies being dedicated to legal aid services. Second, there is the constitutionalization an accused's right to a fair trial which courts have interpreted to mean that accused individuals who have been denied legal aid may be entitled to the assistance of legal counsel funded by the state in certain circumstances. The travails of chronically underfunded provincial legal aid programmes fall outside the scope of this paper. These have been chronicled at length in numerous studies commissioned by provincial governments, professional bodies, and public interest organizations.[6] For purposes of this paper, it is sufficient to state that applications for state funded legal representation have increased because funding to legal aid has failed to keep pace with the demands placed upon the system. In addition, the tariff of fees authorized to be paid to private counsel under legal aid certificates or appointments have remained static for many years. As a consequence, the failure to enhance the level of public

[6] See e.g.: Report of the Ontario Legal Aid Review, *A Blueprint for Publicly Funded Legal Services*, Volumes I and II (Toronto: Ontario Legal Aid Review, 1997), and Buckley, *The Legal Aid Crisis: Time for Action* (Canadian Bar Association, June 2000).

funding paid to legal aid has meant that many worthy individuals are denied representation under these regimes.[7]

[7] For an extensive discussion of this reality see: Buckley, *ibid*, at pp. 34-48. Ms. Buckley concluded her discussion by noting that the "percentage of criminal accused who receive legal aid is: Ontario (27%); British Columbia (32%); Alberta (21%); Saskatchewan (28%); Manitoba (29%); Quebec (60%); New Brunswick (10%); Prince Edward Island (48%); Newfoundland (37%); Yukon (42%) and NWT (42%)": *id*., at p. 48.

The advent of the *Charter* empowered unrepresented accused to seek court-appointed counsel to represent them at their criminal trials. To be sure, prior to the *Charter* courts occasionally appointed counsel to defend accused persons in matters where it could be demonstrated that the lack of legal representation impaired the individual's right to make full answer and defence, and imperilled a fair trial.[8] In those circumstances, courts invoked their inherent jurisdiction to ensure the fairness of a trial. However, the *Charter* provided a constitutional source for this right. This paper will review the evolution of the right to state funded counsel as a constitutional entitlement. Part II will review the jurisprudence as it has evolved. Part III will identify a number of issues which have emerged from this body of law.

II. THE LAW

A. Relevant Constitutional and Statutory Provisions

1. Relevant Provisions of the *Charter*

Three provisions of the *Charter*, in particular, are relevant to the issue of court-appointed, state-funded counsel. These sections are section 7; section 11(d), and section 24(2). For ease of reference, these provisions are set out below:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
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> 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.

[8] See e.g.: *Re Ewing and Kearney and The Queen* (1974), 18 C.C.C. (2d) 356 (B.C.C.A.), and *Re White and The Queen* (1976), 32 C.C.C. (2d) 478 (Alta. S.C.(T.D.))

> 24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Curiously, section 10(b), the only provision of the *Charter* to reference the right to counsel is not relevant to this issue. Various courts, including the Supreme Court, have stated that this section does not impose upon the state a positive obligation to provide legal counsel to detainees or persons accused of crime.[9] The Ontario Court of Appeal in *Rowbotham* determined that section 10(b) did not "*in terms* constitutionalize the right of an indigent accused to be provided with funded counsel"[10]. The Court reasoned that the Framers of the *Charter* did not believe such a constitutional entitlement was necessary "because they considered, that generally speaking, the provincial legal aid systems were adequate to provide counsel for persons charged with serious crimes who lacked the means to employ counsel"[11].

2. Relevant Statutory Provisions

As the focus of this paper is state-funded counsel in the criminal context, only criminal legislation will be identified.

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[9] See especially: *R. v. Prosper*, [1994] 3 S.C.R. 236, at pp. 265-268, and *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 (Ont. C.A.), at pp. 66-67.

[10] *Rowbotham*, *id*, at p. 66 (emphasis in original).

[11] *Id*.

The *Criminal Code*[12] does not include any provision authorizing a court to appoint counsel at trial. However, section 684 sets out a statutory regime for court appointment in criminal appeals to provincial courts of appeal, while section 694.1 in almost identical terms provides for court appointment in appeals to the Supreme Court of Canada. For convenience, section 684 is set out below:

> 684. (1) A court of appeal or a judge of that court may, at any time, assign counsel to set on behalf of an accused who is a party to an appeal or to proceedings preliminary or incidental to an appeal where, in the opinion of the court of judge, it appears desirable in the interests of justice that the accused should have legal assistance and where it appears that the accused has not sufficient means to obtain that assistance.
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> (2) Where counsel is assigned pursuant to subsection (1) and legal aid is not granted to the accused pursuant to a provincial legal aid program, the fees, disbursements of counsel shall be paid by the Attorney General who is the appellant or respondent, as the case may be, in the appeal.
> (3) Where subsection (2) applies and counsel and the Attorney General cannot agree on fees or disbursements of counsel, the Attorney General or the counsel may apply to the registrar of the court of appeal and the registrar may tax the disputed fees and disbursements.

[12] R.S.C. 1985, c. C-46 as amended.

Finally, section 25(4) of the *Youth Criminal Justice Act*[13] provides that a youth justice court shall direct that any young person who desires to be represented by counsel is entitled to a lawyer. If the youth is not eligible for legal aid, then section 25(5) states that "the Attorney General shall appoint counsel or cause counsel to be appointed, to represent the young person". These provisions replicate sections 11(4) and 11(5) of the former *Young Offenders Act*[14]. While the *Youth Offenders Act* contemplated a youth court ordering counsel for a young person, it did not permit the youth court to appoint a particular lawyer or to set the level remuneration. These are matters to be resolved between potential counsel and the respective provincial or federal Departments of Justice.[15]

B. Four Categories of Orders for State-Funded Counsel

[13] S.C. 2002, c. 1.

[14] R.S.C. 1985, c. Y-1.

[15] See e.g.: *R. v. T.(D.)*, [2002] S.J. No. 70 (QL) (Y.Ct.); aff'd Sask. Q.B., unreported, per McLellan J., and *R. v. P.(J.)*, Sask. Q.B., July 6, 1999, unreported, per Armstrong J.

Generally speaking, orders for state-funded counsel in the criminal process may be categorized in four different ways. These are (1) general orders or "*Rowbotham* Orders" named after the leading case of *R. v. Rowbotham*[16]; (2) specific orders or "*Fisher* Orders" named after the leading case of *R. v. Fisher*[17]; (3) interim cost orders or "*Okanagan Indian Band* Orders" named after the very recent judgment of the Supreme Court of Canada in *British Columbia (Minister of Forests) v. Okanagan Indian Band*[18], and (4) orders respecting court appointments in criminal appeals or "Section 684 Orders" named after the section of the *Criminal Code* authorizing such an order. Although *Okanagan Indian Band* Orders originated in civil litigation, they have now migrated into criminal prosecutions.

1. *Rowbotham* Orders

R. v. Rowbotham[19] is the seminal case on state-funded counsel. This case arose in the context of an extensive appeal from convictions for serious drug offences following a lengthy and difficult trial. One ground of appeal concerned two of the accused who were not represented by counsel at trial. The Court of Appeal directed a new trial in respect of certain of the counts and certain of the accused. In the course of its judgment, the Court in a *per curiam* judgment ruled that the trial judge had erred in not appointing counsel for these accused after the Ontario Legal Aid Plan had ruled them ineligible. The Court found as a constitutional principle that:

> [*I*]*n cases not falling within provincial legal aid plans*, ss. 7 and 11(d) of the *Charter*, which guarantee an accused a fair trial in accordance

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16 *Supra* n. 9.

17 [1997] S.J. No. 530 (QL) (Q.B.) per Milliken J.

18 [2003] 3 S.C.R. 371; 2003 SCC 71.

19 *Supra* n. 9.

with the principles of fundamental justice, require funded counsel to be provided if the accused wishes counsel, but cannot pay a lawyer and representation of the accused is essential to a fair trial.[20]

[20] *Ibid*, at p. 66 (emphasis in original).

The Court also ruled that in circumstances where an accused's fair trial interests are impaired for want of legal representation, "a stay of proceedings until funded counsel is provided is an appropriate remedy under s. 24(1) of the *Charter* where the prosecution insists on proceeding with the trial in breach of the accused's Charter right to a fair trial"[21]. The Court expressly left open the question of whether a trial judge has the jurisdiction to direct either Legal Aid or the appropriate Attorney General to pay the legal fees of defence counsel, as it did not arise in the circumstances of this case.

Numerous courts have reviewed and applied *Rowbotham*. It is now well-established that the analytical framework for establishing an entitlement to state-funded legal representation is three-fold:

- The accused/applicant is ineligible for legal aid and has exhausted all appeals for a reconsideration of his or her eligibility.
- The accused/applicant is indigent and unable to retain private counsel to represent him or her at trial.
- The accused/applicant must demonstrate that his or her right to a fair trial will be impaired if counsel is not appointed.

An essential pre-condition to any application for court appointed counsel is that all avenues to obtain legal aid through a plan funded by a provincial government have been exhausted. To meet this requirement applicants may have to waive any privilege they may enjoy in their communications with legal aid to satisfy government counsel and the court that, indeed, the individual is not qualified to have a criminal defence funded by a provincial legal aid plan. This waiver is appropriate since the applicant is asking to have his or her criminal defence funded out of

[21] *Ibid*, at p. 70.

public monies. A court, not to mention the general public, is entitled to know that this application is not a veiled attempt to circumvent the publicly funded legal aid system.

Once it is determined that an applicant is ineligible for legal aid, the court must be satisfied that he or she is indigent and unable to pay a lawyer out of their own private funds. This often can be difficult to ascertain. To begin, having income which exceeds the maximum limit allowed by legal aid does not disqualify an individual from establishing impecuniosity.[22] However, if an applicant has access to family resources such as business interests[23] or a share in a matrimonial home[24]; or an annuity[25], then most likely the court will dismiss the application on the basis that the applicant is not indigent.

If the applicant satisfies the court that he or she is indigent, then an substantive analysis of the impact impecuniosity may have on the applicant's due process interests must be undertaken. The issue to be determined on this aspect of the application is whether the applicant's right to a fair trial will be infringed if he or she proceeds to trial without the assistance of counsel. A number of factors are relevant to this determination. These may be summarized as follows: "(a) the seriousness of the interests at issue, (b) the length and complexity of the proceedings, and (c) his or her ability to participate alone and effectively at the hearing"[26].

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[22] See e.g.: *R. v. Hopfner* (1996), 146 Sask. R. 35 (Q.B.)

[23] See e.g.: *Hopfner*, *ibid*, and *Malik*, *supra* n. 3.

[24] See e.g.: *Hopfner*, *ibid*, and *R. v. Schafer* (1999), 178 Sask. R. 105 (Q.B.)

[25] See e.g.: *Hopfner*, *ibid*, at p. 39 where Gerein J. (as he then was) ruled that because the applicant as a former member of the Saskatchewan Legislative Assembly had access to a monthly pension of approximately $900, this could be utilized to retain a lawyer.

[26] *Quebec (Attorney General) v. R.C.*, [2003] Q.J. No. 7541 (QL) (C.A.), at para. 175. The New Brunswick Court of Appeal in *R. v. Hayes* (2002), 253 N.B.R. (2d) 299 (C.A.)

identified five criteria for assessing whether an accused's right to a fair trial would be impaired without legal representation. These criteria are: (1) the seriousness of the charge; (2) the complexity of the case; (3) the length of the trial; (4) matters which relate to the accused as a person including his or her level of education, language difficulties and his or her general abilities to conduct his or her defence, and (5) the jeopardy of imprisonment: *ibid*, at para. 14. See also: *R. v. Osborne*, [2003] N.B.J. No. 437 (QL) (C.A.) To similar effect, see: *R. v. Drury*, [2000] M.J. No. 457 (QL) (C.A.), at paras. 23-25.

Typically, applications for court-appointed, state-funded counsel are brought by accused prior to the commencement of the trial. In effect, applications of these kind allege a prospective breach of a *Charter* right, namely the right to a fair trial. The Alberta Court of Appeal in *R. v. Cai*[27] opined that attempting to prove a prospective breach of the *Charter* is at bottom an exercise in conjecture. For this reason, an applicant must satisfy an onerous standard. In order to demonstrate a breach of this nature, an applicant must establish to a high degree of probability that "there is a sufficiently serious risk that the alleged violation will in fact occur"[28]. This task is made more difficult by the fact that an accused can bring such an application forward later in the proceedings if prejudice actually occurs or, at the very least, becomes easier to prove. The obvious rigour of this standard is, arguably, not always enforced by the courts.

[27] (2002), 170 C.C.C. (3d) 1, 2002 ABCA 299.

[28] *Ibid*, at paras. 6-7 quoting from *Phillips v. Westray Mine Inquiry*, [1995] 2 S.C.R. 97, at p. 158 per Cory J.

If the applicant can satisfy this standard and the court determines appointment of counsel is necessary, an order is made directing that the government provide a lawyer. It is generally understood that a *Rowbotham* Order should not designate a particular counsel to act. This is because neither section 7 nor section 11(d) of the *Charter* guarantees to accused persons a right to state funded counsel of choice.[29] However, the Ontario Court of Appeal in *Peterman* did acknowledge that in "some unique circumstances", an applicant may be able to establish to a high degree of probability that he or she "can only obtain a fair trial if represented by a particular counsel"[30]. An example of an "unique" case likely is one where counsel has a long history of representing an accused in related criminal matters, and the cost both in terms of finances and the time involved in educating a new lawyer would be unwarranted.

Peterman also makes it plain that any court order appointing counsel for an indigent accused should be directed to the Attorney General and not to another governmental department or independent agency such as a provincial legal aid plan.[31]

Finally, the order should stay the proceedings unless and until the Attorney General has contracted with a lawyer to represent the accused. The Manitoba Court of Appeal in *Drury* referred to an order of this nature as a "a conditional stay of proceedings until counsel is appointed or the necessary funding of counsel is provided"[32].

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[29] See especially: *R.C.*, *supra* n. 26, at para. 141 (Que. C.A.); *Cai*, *supra* n. 27 (Alta. C.A.); *Osborne*, *supra* n. 26, at para. 14 (N.B.C.A.); *R. v. Ho*, [2004] 2 W.W.R. 590 (B.C.C.A.), and *R. v. Peterman*, [2004] O.J. No. 1758 (QL) (C.A.)

[30] *Ibid*, at para. 29 per Rosenberg J. A.

[31] *Ibid*, at para. 41.

[32] *Drury*, *supra* n. 26, at para. 19 per Steel J.A. citing *Rowbotham*, *supra* n. 9 as

2. *Fisher* Orders

authority for this holding.

The Ontario Court of Appeal in *Rowbotham* expressly left unanswered the question of whether the *Charter* authorizes a court to direct that the Attorney General or another agency pay the fees of the lawyer who agrees to take up the court appointment. In *R. v. Fisher*[33], the Saskatchewan Court of Queen's Bench in a thinly reasoned judgment ruled that not only does the *Charter* authorize a court to appoint a particular lawyer to represent an accused/applicant, it authorizes the court to set the fee schedule.

Fisher arose following the decision of the Supreme Court of Canada in *Reference re Milgaard (Can.)*[34] in which the Court pursuant to section 690 of the *Criminal Code* set aside David Milgaard's conviction for first degree murder in the death of Gail Miller and ordered a new trial. The Government of Saskatchewan decided not to try Mr. Milgaard a second time. Following the results of DNA testing which exonerated him and identified Larry Fisher as the possible killer, the Crown charged Mr. Fisher with murder. Prior to his trial, Mr. Fisher asked the Saskatchewan Legal Aid Commission to appoint Mr. Brian Beresh to represent him. The Commission determined that Mr. Fisher was eligible for legal aid but rejected his request to appoint Mr. Beresh because he did not reside in Saskatchewan. The Commission did offer to provide Mr. Fisher with staff lawyers to defend him, but he declined.

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[33] *Supra* n. 17.

[34] [1992] 1 S.C.R. 866.

An application for court-appointment followed. The issue was not whether Mr. Fisher was indigent; rather the issue was whether he was entitled to court appointed counsel in spite of the fact that he qualified for legal aid, and legal aid was willing to provide counsel to him. Disregarding *Rowbotham* and its progeny, Milliken J. appointed not only Mr. Beresh but also a junior counsel to defend Mr. Fisher, and in addition set the hourly rates for each lawyer. He retained jurisdiction over his order and indicated that once the total bill reached $50,000, the issues could be revisited. Milliken J. identified as the basis for his disposition the unusual facts of this case which he characterized as "unique", together with Mr. Beresh's long-standing legal representation of Mr. Fisher. He concluded that "there would not be a fair trial if Beresh did not conduct the defence of the charges facing Fisher"[35].

Milliken J. asserted that a similar case will not "happen again in this province in another thirty years"[36] and, therefore, his very specific order in *Fisher* would not establish a difficult precedent for the provincial government or the province's legal aid commission. In spite of this sanguine prediction, it did not take long before other courts issued similar orders. For example, in *R. v. W. (L.C.)*[37] two specific counsel were appointed to argue a constitutional challenge to the dangerous offenders' legislation and a hourly rate of $100 established for each lawyer. In another Saskatchewan case, Gunn J. appointed a bilingual lawyer to represent a francophone accused charged with possession for the purposes of trafficking and set a hourly rate of $100.[38] *Fisher*

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[35] *Supra* n. 17, at para. 17.

[36] *Ibid*, at para. 20.

[37] (2000), 191 Sask. R. 69 (Q.B.) The ruling in the dangerous offender application can be found at [2000] 10 W.W.R. 527 (Q.B.)

Orders were not unique to Saskatchewan, however. Courts in other jurisdictions followed suit.[39]

Typically, *Fisher* Orders are comprised of two elements. First, they specify the appointment of a particular lawyer, usually chosen by the accused/applicant. Thus, despite a large body of jurisprudence, *Fisher* Orders extend the right of counsel of choice to an applicant. Second, and far more controversially, *Fisher* Orders establish the fee tariff to which the lawyer is entitled. Disputes about the amounts charged are left to the taxation process.

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[38] *R. v. Wingfield*, [1998] S.J. No. 878 (QL) (Q.B.)

[39] See e.g.: *R. v. Fok*, [2000] A.J. No. 1182 (QL) (Q.B.); *R. v. Rooney*, [1994] P.E.I.J. No. 121 (QL) (S.C.-T.D.), and *R. v. Gero*, [2002] O.J. No. 3409 (QL) (Sup. Ct.)

Turning to the first element, the law is clear that the constitutional entitlement to state-funded counsel does not extend to counsel of choice.[40] Yet, various courts have urged that as much as possible, a court appointment should be compatible with the right of individuals to choose their counsel.[41] Generally, counsel who represent the government in applications for court appointment do not oppose the selection of the lawyer because often it is same lawyer bringing the application on behalf of the accused. However, government counsel will oppose an application seeking the appointment of more than one lawyer. The reality is that governments are more concerned about the court setting the tariff of fees to be paid to the lawyer who takes up the court appointment than they are about who that individual is.

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[40] See especially: *R. v. Rockwood* (1989), 49 C.C.C. (3d) 129 (N.S.C.A.); *R. v. Howell* (1994), 103 C.C.C. (3d) 302 (N.S.C.A.), aff'd [1996] 3 S.C.R. 604; *R. v. R.(P.)* (1998), 132 C.C.C. (3d) 72 (Que. C.A.) per LeBel J.A. (as he then was), and *Drury*, *supra* n. 26, at paras. 52-53. But see further: *Peterman*, *supra* n. 29.

[41] *Cai*, *supra* n. 27, at para. 141. See also: *Peterman*, *supra* n. 29, at para. 27, and *R. v. McCallen* (1999), 131 C.C.C. (3d) 518 (Ont. C.A.)

The second element of a typical *Fisher* Order is the setting of fees. Not surprisingly, this element is controversial because it means the court is dictating to a government or a legislature the amount of public funds it must dedicate to fund the defence to a particular criminal charge. Traditional constitutional doctrine suggests that such an order contravenes the separation of powers between the judiciary and the executive recognized in constitutional system of governance. Indeed, a number of provincial courts of appeal have recently disapproved of such orders[42]. In *Cai*, for example, the Alberta Court of Appeal asserted that courts "are not the best qualified agencies to determine spending priorities for public funds" and "do not set, nor are they asked to set, elevated fees for doctors or other professional"[43]. The Court explained that certain constitutional imperatives militate against the judiciary dictating to governments and to legislatures how to spend public monies as follows:

> A court granting money creates a grave constitutional problem. The *Constitution Act, 1867* gives Canada a constitution "similar in principle" to that of the United Kingdom. The first principle of the British constitution, written in the blood of the Civil War of the 1640s and the Revolution of 1688, is this: The Crown cannot impose taxes or spend money alone. Parliament, especially the Commons, must vote supply...The *Charter* does not override that: Canada's Constitution cannot be unconstitutional. Nor are these trivial or technical parts of the Constitution; they are democracy's key reins over the Executive.[44]

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[42] See in particular: *Ho*, *supra* n. 29 (B.C.C.A.) (Southin J.A. spoke for herself on this point, the majority found it unnecessary to address this issue, *id*, at para. 82; *Cai*, *supra* n. 27 (Alta. C.A.), at paras. 9, 92-96; *R.C.*, *supra* n. 26 (Que. C.A.); *R. v. Savard* (1996), 106 C.C.C. (3d) 130 (Y.T.C.A.)

[43] *Cai*, *id.*, at para. 9 (citations omitted).

[44] *Id*., at para. 93 (citations omitted).

Subsequently, the Quebec Court of Appeal in *R.C.* endorsed the Alberta court's analysis and offered additional reasons why courts should be loathe to set the fees to be paid to court-appointed counsel. The Court stated:

> There are several reasons that justify a finding that the court must not dictate to the government how it should fulfill its constitutional duty and must not indicate the sums that it must spend in order to guarantee this right: (1) the courts do not have institutional jurisdiction to interfere in the allocation of public funds, which explains the flexibility that the government must retain, (2) in most cases, the determination of the fees would be a distorted means of circumventing the LAA [Quebec's legal aid system], (3) in terms of constitutional relief, the order must not encroach upon the legislative areas more than is necessary and it must not accordingly be the least intrusive measure, and (4) finally, since the state retains authority to decide whether or not to continue the proceedings, it is reasonable for the state to be left with room for manoeuvre in order to fulfil its constitutional duty to provide the services of counsel paid from public moneys.[45]

Despite these strong statements of disapproval from appellate courts about the propriety of judicially imposed fee schedules, the practice continues. Not only does it continue, it operates inconsistently not only among courts of different provinces but also among judges on the same court. However, the fact that appellate courts are now allowing appeals from *Fisher* Orders made by lower court orders signals that their issuance should become less frequent.

3. *Okanagan Indian Band* Orders

Okanagan Indian Band Orders are a very recent and potentially troublesome innovation in the criminal law context. They had their genesis in complex aboriginal litigation commenced in British Columbia. Various courts made pre-trial orders directing both the federal and provincial

[45] *R.C.*, *supra* n. 26, at para. 165 (citations omitted).

governments to fund aboriginal groups to enable them to prosecute their law-suits.[46] When making these orders described as "interim costs orders", superior court judges exercised their inherent jurisdiction to award costs prior to trial in circumstances where the plaintiffs are impecunious, advance a meritorious legal claim and raise important public law issues.[47]

[46] See especially: *British Columbia (Minister of Forests) v. Jules*, [2000] B.C.J. No. 1536 (QL), 2000 BCSC 1135; rev'd in part [2001] B.C.J. No. 2279 (QL); 2001 BCCA 647; *Nemiah Valley Indian Band v. Riverside Forest Products Ltd*, [2001] B.C.J. No. 2484 (QL), 2001 BCSC 1641, aff'd *Xeni Gwet'in First Nation v. British Columbia*, [2002] B.C.J. No. 1652 (QL), 2002 BCCA 434, and *Tshilqot-in Nation v. British Columbia*, [2004] B.C.J. No. 937 (QL), 2004 BCSC 610.

[47] See: *British Columbia (Minister of Forests) v. Jules*, *ibid*, (B.C.C.A.)

Very recently in *British Columbia (Minister of Forests) v. Okanagan Indian Band*[48], the Supreme Court of Canada upheld orders of this kind by a narrow margin (5:4). Writing for the majority, LeBel J. agreed with the British Columbia courts that "the power to order interim costs is inherent in the nature of the equitable jurisdiction as to costs, in the exercise of which the court may determine at its discretion, when and by whom costs are to be paid"[49]. However, he underscored that such orders are to be utilized only in rare and exceptional circumstances in public law matters. The majority identified the following three pre-conditions to the issuance of an interim costs order[50]:

- The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial -- in short, the litigation would be unable to proceed if the order were not made.

- The claim to be adjudicated is *prima facie* meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.

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[48] [2003] 3 S.C.R. 371, [2003] S.C.J. No. 76 (QL), 2003 SCC 71, aff'g *Jules*, *ibid*.

[49] *Ibid*, at p. 396, para. 35. The lower British Columbia courts ruled that there was no free-standing constitutional entitlement to a funding order, see: *Jules*, *supra* n. 46, (B.C.C.A.) at paras. 25-36 per Newbury J.A. The issue of a constitutional basis for such orders was abandoned on appeal to the Supreme Court, see: *Okanagan Indian Band*, *ibid*, at p. 387, para. 18.

[50] *Ibid*, at pp. 399-400, para. 40.

- The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.

Justice LeBel emphasized that even if an applicant satisfied these three conditions, it did not follow that an order must be made, rather "that determination is in the discretion of the court"[51]. He elaborated:

[51] *Ibid*, at p. 400, para. 41.

> If all three conditions are established, courts have a narrow jurisdiction to order that the impecunious party's costs be paid prospectively. Such orders should be carefully fashioned and reviewed over the course of the proceedings to ensure that concerns about access to justice are balanced against the need to encourage the reasonable and efficient conduct of litigation, which is also one of the purposes of costs awards. When making these decisions courts must also be mindful of the position of defendants. The award of interim costs must not impose an unfair burden on them.[52]

As governments or other public entities will inevitably be the respondents in such applications, LeBel J.'s tepid caveat is welcome.

Not long after the Supreme Court announced its judgment in *Okanagan Indian Band*, the mechanism of interim costs order began to migrate into other areas of the law. In *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*[53], for example, Bennett J. applied the principles in *Okanagan Indian Band* to administrative law and made an interim costs order against the federal government so that the plaintiff could challenge certain administrative decisions made against it by the Commissioner of Customs and Revenue. She declined, however, to make such an order to underwrite a constitutional challenge to the definition of obscenity set down in *R. v. Butler*[54] because the Supreme Court had earlier dismissed a similar challenge brought by

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[52] *Ibid* (emphasis added).

[53] [2004] B.C.J. No. 1241 (QL), 2004 BCSC 823.

[54] [1992] 1 S.C.R. 452

Little Sisters.[55] Bennett J. also declined to direct how this order should be structured or to establish quantum, directing that further argument was necessary.

[55] *Supra* n. 53, at para. 87. The Supreme Court had dismissed the earlier challenge in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 2000 SCC 69.

More troubling, however, is *R. v. Fournier*[56] where an Ontario Superior Court judge made an *Okanagan Indian Band* Order in a criminal proceeding even though the accused likely would receive funding from Legal Aid Ontario. The accused faced criminal charges related to the sale of allegedly fraudulent native status cards. As part of their defence to these charges, the accused who claimed membership in the League of Indian Nations of North America sought to challenge on constitutional grounds the jurisdiction of the Ontario courts to try them. They asserted that the cost of presenting their case adequately would be approximately $35,000. Legal Aid Ontario tentatively had agreed to give the accused $17,500 so they could advance their constitutional claims. Even so, O'Neill J. found them to be impecunious as they would not be able to pay the balance of the costs involved in prosecuting this challenge. He followed LeBel J.'s analysis in *Okanagan Indian Band* and held that because the issue of the court's jurisdiction was a significant constitutional and public law issue that transcended the interests of the individual accused "an award of interim costs is justified in this criminal case"[57].

As interim costs orders are a very recent development, particularly in the criminal law context, it remains to be seen how widespread their use will become. It is apparent in light of *Fournier* that such orders can be utilized to circumvent *Rowbotham* Orders for state-funded counsel, and provide the issuing court with greater scope for funding orders. For present purposes, two aspects about *Okanagan Indian Band* Orders should be highlighted. First, the jurisdictional source

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[56] [2004] O.J. No. 1136 (QL) (Sup. Ct.)

[57] *Ibid*, at para. 47.

for orders of this kind is not constitutionally grounded. As yet no court has located in section 24(1) of the *Charter* any jurisdiction for making such an order. Second, these orders are equitable in nature and involve an invocation of the court's inherent jurisdiction. This factor is considerably significant for it means that such orders can only be made by superior courts, the only courts that exercise inherent jurisdiction. Provincial courts lack this authority and the *Criminal Code* does not authorize such relief. However, this begs the question whether an application could be made to a superior court for such an order in criminal matters proceeding in provincial courts.

4. Section 684 Orders

Section 684 of the *Criminal Code* is the only section that expressly authorizes a court to appoint a lawyer to represent a criminal defendant. The operation of this section is confined to criminal appeals and gives limited jurisdiction to a single judge of the Court of Appeal to appoint a lawyer to prosecute or to defend a criminal appeal on behalf of an indigent appellant. It is important to observe that an order for court appointment made at trial dies at the conclusion of the proceedings in the trial court. An accused who wishes to appeal must also apply for a court appoint. Generally speaking, appeal courts re-appoint trial counsel provided he or she is willing to act on the appeal.[58]

[58] See e.g.: *R. v. C.(J.C.)*, 2004 PESCAD 14 per Mitchell C.J., and *R. v. Fisher* (2001), 189 Sask. R. 318 (C.A.) per Bayda C.J. in Chambers.

The analysis mandated by the *Criminal Code* is in two stages. First, section 684 requires an applicant to demonstrate that it "appears desirable in the interests of justice that the accused should have legal assistance". Second, the applicant must demonstrate that he or she "has not sufficient means to obtain that assistance". This aspect of the inquiry is typically dealt with first and requires the applicant to demonstrate not only impecuniosity but also that he or she is not eligible to be legally aided.[59]

The courts have identified various factors to be considered when assessing whether the "interests of justice" require the appointment of counsel. These factors include: "the points to be argued on appeal; the complexity of the case; any point of general importance in the appeal; the applicant's competency to present the appeal; the need for counsel to marshal facts, research law or make the argument; the nature and extent of the penalty imposed; and the merits of the appeal"[60].

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[59] See: *International Forest Products Ltd. v. Wolfe*, 2001 BCCA 632, at para. 5.

[60] *Ibid*, at para. 6. See also: *R. v. Baig* (1990), 58 C.C.C. (3d) 156 (B.C.C.A.), and *R. v. Aiwekhoe*, [2000] B.C.J. No. 869 (QL) (C.A.)

Once a court determines that the assistance of legal counsel is required, a general direction is made to appoint counsel. Section 684(2) contemplates that the Attorney General will appoint counsel and pay the requisite fees. As with court appointments at trial, government counsel typically will not oppose the appointment of a particular lawyer to represent the applicant on appeal[61]. Additionally, the presiding judge appears to lack the authority to set the tariff[62]. Instead, section 684(3) contemplates that any disputes about the fees charged should be settled through a taxation before the Registrar of the Court of Appeal.[63]

III. EMERGING ISSUES

As is apparent from the foregoing brief review of the various orders appointing counsel, the general legal principles are well-known, and, for the most part, settled. It would be difficult and

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[61] See e.g.: *Fisher*, *supra* n. 58 where Bayda C.J.S. appointed the trial counsel to act on the appeal. While he concluded that the interests of justice warranted the appointment of only one counsel, Bayda C.J. stated that the designation of one counsel did not preclude that lawyer "using the services of other members of his firm to assist him the preparation of the appeal and charging for those services at a rate proportionate to the quality of the services provided": *ibid*, at para. 3. In reality, more than one counsel was appointed.

[62] *Fisher*, *ibid*, at para. 4. For a different assessment, however, see: *R. v. Cassidy*, [1992] A.J. No. 866 (QL) (C.A.)

[63] See e.g.: *Saskatchewan (Attorney General) v. Williams and McBride*, [1998] S.J. No. 73 (QL) (C.A., Reg.)

likely futile to attempt to limit legislatively the criteria relevant to applications for court appointments as this right is constitutionally inspired. However, various concerns emerge. This Part will highlight some of those issues for purposes of discussion.

A. The Link Between Legal Aid and Court Appointments

It cannot be denied that one of the leading causes for the recent proliferation of court appointment orders is the perceived inadequacy of legal aid tariffs across the country. Indeed, the amounts payable under many provincial tariffs have not increased substantially for a number of years. However, as Rosenberg J.A. asserted in *Peterman* absent a direct constitutional challenge to the legal aid regime, "[a] criminal trial court has no jurisdiction to review [legal aid] policies and having determined that they are unreasonable, impose other arrangements on Legal Aid Ontario"[64]. A reasonable legal aid scheme is presumed to be sufficient for fair trial purposes.[65] Only if it can be established "clearly enough with a high degree of probability that a trial would be unfair even with [legal aid] certificates"[66] will a court appointment be made.

These principles become especially significant in circumstances of "mega-trials". Yet, as *Cai* and *R.C.* make clear the governing principles should not be deviated from or modified in those situations.

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[64] *Supra* n. 29, at para. 21. See also: *R. C.*, *supra* n. 26, at para. 177. For comparative purposes, see: *Nathaniel Lavallee & Others v. Justices in the Hampden Superior Court & Others*, July 28, 2004, SJC-09268 (Supreme Judicial Court of Massachusetts) where the Court unanimously dismissed a number of criminal cases because defence counsel refused to act. The Court unanimously determined that the fees paid to public defenders had not changed in almost 20 years and were constitutionally inadequate.
(http://www.socialaw.com/sjcslip/sjcJuly04k.html. Site visited: July 30, 2004.)

[65] *Cai*, *supra* n. 27, at para. 50.

[66] *Ibid*.

B. Notice and Proper Protocol in Commencing the Applications

Applications for court appointed counsel seek constitutional relief. Since an applicant is alleging a breach of sections 7 and 11(d) of the *Charter*, and desires a remedy under section 24(2), there should be compliance with provincial judicature statutes like *The Constitutional Questions Act* [67] which require notice to the Attorney General in such matters. Even if an applicant is reluctant to comply with a provincial statute in a criminal matter, *Charter* jurisprudence has evolved to require that formal notice be given to the Attorney General of a constitutional challenge together with sufficient particulars so that Crown counsel can respond adequately.[68]

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[67] R.S.S. 1978, c. C-28.1. Lingering doubts remain about whether provincial statutes such as the *Constitutional Questions Act* apply to criminal proceedings. The leading case remains *R. v. Stanger* (1982), 2 D.L.R. (4th) 121, at p. 146 (Alta. C.A.) in which Stevenson J.A. (as he then was) held that provincial judicature legislation was valid legislation under section 92(14) of the *Constitution Act, 1867*. However, the Supreme Court has not resolved this issue authoritatively, and it remains a live one, see very recently: *R. v. Henry*, [2004] A.J. No. 694 (QL) (Q.B.), at para. 15.

[68] See e.g.: *R. v. Kutynec* (1992), 70 C.C.C. (3d) 289 (Ont. C.A.), and *R. v. Dwernychuk* (1993), 77 C.C.C. (3d) 385 (Alta. C.A.)

A more delicate question is who should represent the interests of the Attorney General at the hearing of an application for court-appointment. Should it be the Crown prosecutor or another government lawyer. The Saskatchewan Court of Queen's Bench in *Hopfner* disapproved of the prosecutor in charge of the matter dealing with such an application. Rather, another government lawyer, preferably not a Crown prosecutor, should represent the interests of the Attorney General at these hearings.[69] Contrastingly, the Ontario Court of Appeal in *Pasluska v. Cava*[70] stated in *obiter dicta* that in criminal matters, applications for court appointment "are now common enough that formal notice is likely impliedly waived"[71] and the Crown prosecutor having carriage of the matter can adequately represent the interests of the Attorney General.

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[69] *Hopfner*, *supra* n. 22, at p. 37.

[70] (2002), 212 D.L.R. (4th) 226 (Ont. C.A.)

[71] *Ibid*, at p. 235, per Laskin J.A.

On balance, due process encourages that government counsel other than a prosecutor represent the government at such hearings. In this way, the prosecution service or Crown Attorney's office is not comprised by placing prosecutors in the unseemly position of conducting a prosecution against the accused while at the same time opposing an application for state-funded counsel. This is the usual practice in Saskatchewan and is reflected out in a written protocol endorsed by the Law Society of Saskatchewan[72]. It appears this procedure is also followed in a number of the other provinces. Furthermore, in light of the fact that applications of this kind seek a *Charter* remedy, it is difficult to understand how notice to the Attorney General is impliedly waived in this context as suggested by Laskin J.A. in *Paluska*.

C. Jurisdiction of Provincial Courts

Jurisdictional issues surrounding the issuance of an order for court appointment arise when an application is brought in the provincial court. Since most applications for court appointment invoke the *Charter*, the Provincial Court can make such an order when it acts as a "court of competent jurisdiction" for purposes of section 24(1). This means that when sitting as a trial court under the *Criminal Code* a Provincial Court judge has jurisdiction to appoint counsel to ensure a fair trial. However, when conducting a preliminary inquiry, a Provincial Court judge is not a "court of competent jurisdiction" for *Charter* purposes and, as a consequence, is without authority to grant a constitutional remedy[73], such as appointing counsel to represent an indigent accused.

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[72] See: "Suggested Procedure in Applications for Court Appointed Counsel At A Rate Higher Than The Legal Aid Tariff", dated February 19, 2001. (http://www.lawsociety.sk.ca/newlook/Members/LegalAidTariff.htm. Site visited: July 23, 2004)

[73] See especially: *R. v. Mills*, [1986] 1 S.C.R. 863; *R. v. Seaboyer*, [1991] 2 S.C.R. 577, and *R. v. Hynes*, [2001] 3 S.C.R. 623.

In *R. v. Cote*[74], Gerein C.J.Q.B. determined that in certain circumstances the appointment of state-funded counsel may be done extra-constitutionally. *Cote* involved a request for counsel made by an indigent accused at his preliminary inquiry. The preliminary inquiry justice denied this request citing an absence of jurisdiction. The matter was removed to the Court of Queen's Bench. Gerein C.J.Q.B. concluded that while the *Charter* did not clothe the preliminary inquiry justice with jurisdiction to make such an order, the *Criminal Code* did. He explained:

[74] [2002] 11 W.W.R. 706; 2002 SKQB 333.

> The Provincial Court is charged with conducting the preliminary hearing and the procedure is set out in Part XVIII of the *Criminal Code*. However, the Court has the jurisdiction to determine how it will implement and carry out that procedure. Accordingly, while the court has the authority to conduct the inquiry it also has the duty to do so in a fair manner. It follows that it must have the ancillary power to carry out that duty. If counsel is necessary to ensure fairness, then the Court must have the power to appoint counsel.[75]

Although he found that a preliminary inquiry justice could appoint a lawyer to represent an accused as an incident of the justice's duty to conduct a fair hearing, Gerein C.J.Q.B. concluded that the justice lacked the power to stay proceedings if the Attorney General and counsel could not agree to the terms of the appointment. A stay is a *Charter* remedy. Yet, Gerein C.J.Q.B. found that section 537(1)(a) of the *Criminal Code* permitted the justice to adjourn the hearing until either a lawyer was found or an application was made to the superior court seeking a stay of proceedings.[76]

Cote represents a creative use of the *Criminal Code* to circumvent obvious jurisdictional impediments to the Provincial Court making such orders under the *Charter*. In light of this case, it may be salutary to consider amending the *Criminal Code* to authorize preliminary inquiry justices, for example, to issue such orders in appropriate circumstances, rather than have superior court judges stretching the language found in current provisions to avoid unfairness to accused persons.

D. Appeals and Other Review

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[75] *Ibid*, at para. 14. Gerein C.J.Q.B. cited *Canada (A.G.) v. Garand*, [1992] Y.J. No. 184 (S.C.) in support of this holding.

[76] *Ibid*, at para. 16.

Until recently, orders for court appointment seemed impervious to review when made by a superior court. Generally speaking, orders made by provincial courts for state funded counsel are not amenable to judicial review[77] unless the order made amounts to a jurisdictional error[78]. Court appointments are interlocutory orders and, as such, it seemed, appellate review could be obtained only after complying with the procedure set down in *Dagenais v. Canadian Broadcasting Corporation*[79]. This meant that state funded counsel orders could be appealed in accordance with the provisions of the *Criminal Code* respecting summary conviction appeals; while such orders made by a superior court judge could only be appealed to the Supreme Court of Canada with leave as permitted under section 40 of the *Supreme Court Act*.[80]

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[77] See.: *R. v. Innocente* (2004), 183 C.C.C. (3d) 215 (N.S.C.A.)

[78] See: *P.(J.), supra* n. 15 (Sask. Q.B.)

[79] [1994] 3 S.C.R. 835. See also: *R. v. T.S.*, [1994] 3 S.C.R. 952.

[80] R.S.C. 1985, c. S-26.

R.C. v. Quebec (Attorney General); R. v. Beauchamp[81] clarified uncertainty surrounding the correct appellate mechanism to be adopted respecting orders for court appointments made by a superior court judge. The Court speaking through LeBel J. ruled that the newly enacted section 676.1 of the *Criminal Code* provided the Crown with an appeal from such an order for court-appointment to the provincial court of appeal. Section 676.1, the enactment of which post-dates *Dagenais*, stipulates that any "party who is ordered to pay costs may, with leave of the court of appeal or judge of a court of appeal, appeal the order or the amount of the costs ordered." The Court found that section 676.1 did not distinguish between orders for costs "payable in respect of past services or in consideration of services to be provided in future". As a consequence, a prospective order for costs could be appealed at the outset and did not have to await the conclusion of an impending criminal proceedings prior to review. LeBel J. observed that section 676.1 did create "a right of appeal that will, in practice, benefit only the Attorney General"since "the party against whom a court awards costs for the purposes of a defence will be the Attorney General, representing the state."[82] This reality left open the question of how an accused person could appeal from an order denying the appointment of counsel since 676.1 would not apply in those circumstances.

It is yet to be determined whether section 676.1 allows the Attorney General to appeal from a Section 684 Order. Furthermore, it is clear that there is no mechanism for an accused to appeal from an order denying a court appointment. The *Criminal Code* does not provide for it and it is not possible to invoke provincial legislation such as the *Court of Appeal Act*, as this would offend the

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[81] [2002] 2 S.C.R. 762, 2002 SCC 52.

[82] *Ibid*, at para. 16.

constitutional division of legislative powers.[83] However, a reasonable argument could be advanced that the Attorney General may utilize section 676.1 to appeal from an order made against the government under section 684 either by the Court or the Registrar.

The availability of appellate review for the Attorney General has been greatly enlarged by section 676.1. Accused applicants whose applications for court appointed counsel under section 684 are denied lack any mechanism for appellate review. Perhaps, consideration should be given to rectifying this asymmetry in the mechanisms for appellate review.

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*The views expressed do not necessarily represent the position of the Attorney General for Saskatchewan or his department.

[83] *R. v. Edwards*, [2002] B.C.J. No. 1515 (QL) (C.A.) *Edwards* appears to overrule by implication *Blake, Cassels & Graydon v. British Columbia (Attorney General)*, [1994] B.C.J. No. 2106 (QL) (C.A).