Date: 19981103 Docket: CAC 146191

NOVA SCOTIA COURT OF APPEAL
Cite as: R. v. Simpson, 1998 NSCA 184

Roscoe, Pugsley and Flinn, JJ.A.

BETWEEN:	)	
	)	
HER MAJESTY THE QUEEN	)	Michael A. Paré
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	
JASON SIMPSON	)	R. Malcolm Macleod, Q.C.
	)	for the Respondent
Respondent	)	
	)	
	)	
	)	Appeal Heard:
	)	September 14, 1998
	)	
	)	
	)	Judgment Delivered:
	)	November 3, 1998

THE COURT: The appeal is allowed, the notice of contention is dismissed and the order for costs is set aside as per reasons for judgment of Roscoe, J.A.; Pugsley and Flinn, JJ.A., concurring.

ROSCOE, J.A.:

This is an appeal from a decision of Justice Edward Scanlan of the Supreme Court, in Chambers, in which he ordered Her Majesty the Queen to pay the solicitor/client costs of the respondent's first trial in Provincial Court, and the solicitor/client costs of the summary conviction appeal, which were subsequently taxed in the total amount of $28,056.69. Costs of the application for the costs order in the amount of $400.00 were also awarded.

The respondent was charged with two offences pursuant to the **Fisheries Act**, R.S.C., 1985, c. F-14 and **Regulations** and tried before Judge David Cole of the Provincial Court over three days in July and August, 1996. He was found guilty on both counts. On a summary conviction appeal to Justice Scanlan, heard and decided on March 17, 1997, the convictions were set aside and a new trial ordered, as a result of a finding that there had been a reasonable apprehension of bias shown by Judge Cole. No application for costs or other request for a **Charter** remedy was made at that time. In fact, there was no finding that the respondent's **Charter** rights were infringed. The new trial was subsequently held in October 1997, after which the respondent was acquitted by Judge John MacDougall, who found that there was a reasonable doubt as to the location of the respondent's fishing boat at the relevant time.

By Interlocutory Notice (Application Inter Partes) (**Civil Procedure Rule** 37.02(3)) dated September 8, 1997, the respondent applied in Supreme Court Chambers for "an Order requiring that the Crown pay solicitor and client costs to the Appellant for the original trial, the appeal and the new trial." The notice does not cite any **Rule** or other

legislation as the basis for the application. An amended application sought an amendment to the original order allowing the appeal, apparently pursuant to **Civil Procedure Rule** 15.07. The affidavit of the respondent's counsel, after setting out the history of the proceeding, concluded as follows:

> That I am informed by my client, Jason Simpson, and do verily believe that the cost of a 3-day trial, an appeal, and the prospect of a further 3-day trial poses a heavy financial burden which he cannot easily bear.

No other evidence was presented at the hearing of the application before Justice Scanlan, which was held on January 6, 1998.

In his decision, the Chambers judge determined firstly, that it was inappropriate to deal with the application pursuant to **Rule** 15.07, which allows clerical and accidental errors and omissions in an order to be corrected. He then considered the respondent's argument that there was a "... separate and substantive right pursuant to the **Charter of Rights** wherein the court has the authority to deal with a breach of a **Charter** right and to give such remedy as is appropriate pursuant to Section 24(1) of the **Charter**." The Chambers judge relied on the Supreme Court of Canada decision in **R. v. Curragh Inc.**, [1997] 1 S.C.R 537, particularly paragraph 13 of the majority reasons:

> It only remains to resolve the issue as to costs. The proceedings in the first trial were complex and lengthy. The new trial will be equally difficult. The appellants have suffered and will continue to suffer from the grievous financial burden of legal costs. Ordinarily this is something which must be accepted by those charged with criminal offences. Yet, in this case the delays and much of the legal costs incurred arise from systemic problems that were beyond the control of the appellants. They were to a large extent occasioned by the words and actions of the trial judge which gave rise to an apprehension of bias. This was followed by his refusal to grant the motion for recusal. In these unique circumstances the appellants should recover their reasonable legal costs of the proceedings to

> date. As well they should be paid the reasonable legal costs incurred in the new trial for which they cannot in any way be held responsible.

Although Justice Scanlan did not specifically find that there was a breach of the respondent's **Charter** rights, he said that: "... The presence or reasonable apprehension of bias does give rise to certain rights of an accused ..." In addition, he was satisfied that there was no wrongdoing by the Federal Crown counsel in the carriage of the case. He concluded his decision as follows:

> In most cases if an accused is charged with a criminal offence he must bear the cost of going through that trial process and having the matter adjudicated. When it is the fault of the court in unique circumstances such as exist here society cannot and should not expect the accused alone will bear the expense of having to go through a re-trial. In the majority decision in **Curragh** the court did not require the two accused in that case to bear the costs of their trial alone. This case goes beyond the ordinary. The Applicant should not be left to shoulder the entire cost. He is not entitled to costs on the re-trial because he was basically in the position that any accused is in on the re-trial. He is going to have to bear the costs for that two day trial by himself. I am satisfied it would be inappropriate that he bear the costs of the original trial and the appeal by himself. He has a separate and substantive right under the **Charter** to obtain a remedy for the breach of his rights to a fair trial under s.11(b). I am satisfied that the appropriate remedy in this case under the terms of the **Charter** is to award costs on the original trial and on the appeal and on this application.

There are four issues raised by the appeal:

(1) What is the basis of jurisdiction of this Court on an appeal from an order of costs of this nature?

(2) Did the Chambers judge have the jurisdiction to entertain the application for an order for costs?

(3) If the Chambers judge had the jurisdiction to make the order, was this a proper case in which to exercise that authority?

(4) If an order for costs was appropriate, should they have been on a solicitor/client basis?

In addition, the respondent has filed a Notice of Contention by which it is submitted that Justice Scanlan did have authority to deal with the application for costs pursuant to **Civil Procedure Rule** 15.07, and that the costs awarded should have also included reasonable legal fees expended for preparation and for the re-trial.

1. Appellate Jurisdiction

Before dealing with this issue, it is necessary to determine whether Justice Scanlan was acting as a Summary Conviction Appeal Court judge or as a superior court judge granting a civil remedy for breach of a **Charter** right when the costs order was granted. The Crown acknowledges that if Justice Scanlan was acting in the former capacity, there is no right of appeal. If the order for costs had been made at the same time as the appeal on the grounds of reasonable apprehension of bias, pursuant to s. 826 of the **Criminal Code**, in the capacity of a Summary Conviction Appeal Court judge, the order would not be subject to appeal, because it would not involve a question of law alone.

Section 826, which is contained in Part XXVII of the **Code**, pertaining to Summary Convictions, is as follows:

> 826 Where an appeal is heard and determined or is abandoned or is dismissed for want of prosecution, the appeal court may make any order with respect to costs that it considers just and reasonable.

An appeal to this Court from the Summary Conviction Appeal Court is governed by s. 839:

> 839 (1) An appeal to the court of appeal, as defined in section 673 may, with leave of that court or a judge thereof, be taken on any ground that involves a **question of law alone**, against

> (a) a decision of a court in respect of an appeal under section 822; or
>
> (b) a decision of an appeal court under section 834, except where that court is the court of appeal.

(emphasis added)

I agree with the ruling of the Saskatchewan Court of Appeal in **R. v. Masurak** (1961) 132 C.C.C. 279 where it was held that whether a Summary Conviction Appeal Court judge makes an order for costs pursuant to the antecedent of s. 826 of the **Criminal Code** is a question of discretion for the appeal judge and not a question of law alone.

The respondent argues that the order for costs is not subject to appeal because it was an interlocutory order in a criminal proceeding. The authorities cited in support are **R. v. Mills**, [1986] 1 S.C.R. 863 and **R. v. Druken**, [1998] 1 S.C.R. 978. I disagree with this submission. The costs order was made after the conclusion of the second trial. Although clearly a collateral matter, it was not interlocutory because it was the last step taken before this appeal and regardless of the outcome of this appeal, there will be no further trial proceedings. A final verdict had been entered. The respondent also submits that there is no appeal because the matter before the Chambers judge was a criminal proceeding, and unless specifically authorized by the **Code**, there is no appeal. The problem with this submission is that the proceeding before the Chambers judge was not pursuant to any procedure or jurisdiction contained in or authorized by the **Criminal Code**.

The Crown, on the other hand, submits that the order for costs should be characterized as a civil order made in a separate and distinct application, and therefore appealable pursuant to the **Judicature Act**, R.S.N.S. 1989, c. 240, s.38(1) and subject to

the conditions of s. 39:

> 38 (1) Except where it is otherwise provided by any enactment, an appeal lies to the Court of Appeal from any decision, verdict, judgment or order of the Supreme Court or a judge thereof, whether in court or in chambers.
>
> 39 No order of the Supreme Court made with the consent of the parties is subject to appeal, and no order of the Supreme Court as to costs only that by law are left to the discretion of the Supreme Court is subject to appeal on the ground that the discretion was wrongly exercised or that it was exercised under a misapprehension as to the facts or the law or on any other ground, except by leave of the Court of Appeal.

For the reasons developed below in the analysis of the second issue, it is my view that this was a civil order and is appealable to this Court pursuant to the **Judicature Act**.

2. <u>Did the Chambers judge have the jurisdiction to make the costs order</u>?

By dividing this issue into two parts, the respondent's notice of contention can be considered in conjunction with the appellant's first ground:

A. Was the learned judge *functus officio* as the Summary Conviction Appeal Court judge?

B. If so, was there other jurisdictional authority to make the order for costs?

A. In my view, Justice Scanlan, in his capacity as the Summary Conviction Appeal Court judge, was *functus officio* at the time he made the order that the Crown pay the costs of the respondent.

In **Chandler v. Alberta Association of Architects**, [1989] 2 S.C.R. 848, Sopinka, J. for the majority, sets out the general statement of law respecting *functus officio*

at page 860:

> The general rule that a final decision of a court cannot be reopened derives from the decision of the English Court of Appeal in *In re St. Nazaire Co.* (1879), 12 Ch. D. 88. The basis for it was that the power to rehear was transferred by the *Judicature Acts* to the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions:
>
> 1. where there had been a slip in drawing it up, and,
>
> 2. where there was an error in expressing the manifest intention of the court. See *Paper Machinery Ltd. v. J. O. Ross Engineering Corp.*, [1934] S.C.R. 186.

In criminal matters, the general rule as described by Sopinka, J., is also applicable. See for example **R. v. Conley** (1979), 47 C.C.C. 359 (Alta.CA.), a case in which a Provincial Court judge had declared a mistrial after entering a conviction and passing sentence. Haddad, J.A. for the court said at page 364:

> As I conceive the usual application of the rule of *functus officio* in criminal proceedings, a Judge becomes *functus* when he makes a final pronouncement following a hearing on the merits. He cannot make a fresh adjudication or otherwise interfere with that judgment after finality has been achieved. There must be finality and it is that quality which renders a Judge *functus officio* . . .

This Court has commented on the rule in **R. v. Sarson** (1993), 77 N.S.R. 445 (C.A.) and **R. v. MacDonald** (1991), 107 N.S.R. (2d) 374 (C.A.) where in each case it was determined that a trial judge sitting without a jury is not *functus officio* until sentence has been imposed.

The question of when a criminal appellate judge or panel of judges is *functus* was fully discussed in **R. v. Blaker** (1983), 6 C.C.C. (3d) 385 (B.C.C.A.) and more recently in **R. v. E.F.H.** and **R. v. Rhingo** (1997), 115 C.C.C. (3d) 89 (Ont. C.A.) (leave to appeal

to S.C.C. refused, September 18, 1997).

In **Blaker, supra**, the British Columbia Court of Appeal had dismissed an appeal for want of prosecution because the appellant had not complied with an order to file trial transcripts. A motion was made by new counsel to vary the order dismissing the appeal. Although the court was satisfied, based on the authorities, that the general rule was applicable to criminal cases and appeal courts, it granted the motion. It was held that since the matter had not been dealt with on the merits, and it was in the interests of justice to do so, that the court was not *functus* and had jurisdiction to grant the motion to set aside the dismissal order so that the appeal could be heard on its merits. Craig, J.A. for the court reviewed the general rule, its purpose, and the exceptions to it, beginning at page 387:

> The general rule is that a court or judge has jurisdiction to vary a judgment or order before formal entry of the order but does not have jurisdiction to do so after entry of the order: *Re St. Nazaire Co.* (1879), 12 Ch. D. 88; *Re Suffield and Watts* (1888), 20 Q.B.D. 693. This rule applies even when an order has been obtained by fraud: *Preston Banking Co. v. William Allsup & Sons*, [1895] 1 Ch. 141. The *rationale* of the rule is that for the due and proper administration of justice there must be finality to a proceeding at some point. This was always the rule in common law courts but was not the rule in Chancery courts until the passing of the *Judicature Act* in 1873 amalgamating the High Court of Chancery in the common law courts into the High Court of Justice, creating a Court of Appeal and providing for an appeal to the Court of Appeal: In *Re St. Nazaire Co., supra*. Appellate courts in England, Canada and in other common law jurisdictions have held this rule as applicable also to judgments and orders of an appellate court: *Meier v. Meier*, [1948] P. 89; *Re Barrell Enterprises et al.*, [1972] 3 All E.R. 631; *Craig v. Sinclair* (1944), 61 B.C.R. 253. The Supreme Court of Canada has held that the rule applies to judgments and orders of that court: *Paper Machinery Ltd. et al. v. J.O. Ross Engineering Corp. et al.*, [1934] 2 D.L.R. 239 . . .
>
> . . .
>
> There are several exceptions to the general rule. Some are attributed to the inherent jurisdiction of the court, others to the legislation or rules defining the power of the tribunal. Two common exceptions are:

> (1) where there has been a slip in drawing up the order, or (2) where there has been an error in expressing the manifest intention of the court: *Paper Machinery Ltd. v. J.O. Ross Engineering, supra*, at pp. 240-1 D.L.R. p. 188 S.C.R. Although these two exceptions are often justified under the "slip rule" which appears in most court rules in the common law jurisdictions, I think that they would be justified as exceptions under the inherent jurisdiction of a court. Another exception coming within the inherent jurisdiction of a court would appear to be the power of a court to set aside an order absolute in a foreclosure proceeding: see *Industrial Development Bank v. Thornhill Auto Wreckers Ltd. et al.*, [1974] 2 W.W.R. 57. The rules provide for other exceptions.

In **E.F.H.** and **Rhingo, supra**, the Ontario Court of Appeal dismissed two unrelated applications to have appeals, which had been heard and dismissed on the merits, reopened, one on the ground that the trial counsel was incompetent, the other on the ground that the first appeal was unfair. After a thorough review of the various **Criminal Code** sections providing powers on appeal, Charron, J.A. for the court said at page 101:

> While the authority to reopen an appeal has been authoritatively recognized, the scope of the power has not been clearly defined. As indicated earlier, the Crown contends that a review of the relevant jurisprudence on this point supports its position that the power to reopen an appeal is restricted to cases where the appeal has not been disposed of on its merits. The applicants argue that the case law supports the exercise of a wider jurisdiction. While support for the applicants' position can be found in the case law, it is my view that the weight of authority supports the Crown's position. More importantly, I believe that the Crown's position is the only one that can be supported in principle.
>
> The power to reopen proceedings in the exercise of the court's ancillary or inherent jurisdiction to control its own process cannot, in my view, extend to cases where the appeal has been heard on the merits. Once the appeal has been heard on its merits and finally disposed of by the issuance of an order, the statutory right of appeal has been exhausted. Any subsequent reopening of the same proceeding would involve the creation of further substantive or procedural rights, which only Parliament can enact.

In my view the policy reasons for limiting the power to reopen appeals, noted by Justice Charron in the following passage, are valid not only when the court is asked to

reverse an earlier decision on the merits, but also when it is asked to grant an additional remedy, as in the case under appeal:

> There are sound policy reasons for so limiting the power to reopen appeals. An unlimited discretion to reopen appeals that have been heard on their merits is not only unjustifiable as an ancillary power of the court, but would do significant harm to the criminal justice system. Finality is an important goal of the criminal process. Statutory rights of appeal provide a carefully crafted exception to the general rule that trial decisions are final. By providing broad rights of appellate review in criminal matters, Parliament recognizes that fairness and justice interests require that the accused have a full opportunity to challenge a conviction even though that opportunity will prolong the process. Once those broad appellate rights have been exercised and the merits of the appeal decided, then absent an appeal to a higher court, finality concerns must become paramount. Those affected by the process should be entitled to rely on the appellate decision and conduct themselves accordingly. The appellate process cannot become or even appear to become a never closing revolving door through which appellants come and go whenever they propose to argue a new ground of appeal.

Justice Scanlan, in his capacity as the Summary Conviction Appeal Court judge, had completely discharged his duty as such and made his final pronouncement and disposed of the merits of the appeal on March 17, 1997. There was no other matter outstanding that had not been finalized. No application had been made for costs at the time the appeal from Judge Cole was argued, so there was no slip made in making the order, nor was there any error in expressing his manifest intention. The Chambers judge correctly refused to reopen the appeal on the basis of **Civil Procedure Rule** 15.07. There was no other authority to interfere with or add to the original order allowing the appeal. This case is not, as suggested by the respondent, similar to **Curragh, supra**, where the costs order was made by the Supreme Court of Canada in the course of an appeal from a stay granted by the trial judge. The order by the Chambers judge was not made in the course of an appeal pursuant to the **Code**. No other **Criminal Code** provision has been cited which

would grant jurisdiction to the Supreme Court after the matter had been remitted to the Provincial Court for a retrial. Accordingly, as the Summary Conviction Appeal Court judge, he was *functus officio*.

B. Was there other jurisdictional authority to award costs? The appellant submits that the **Charter** does not create a source of jurisdictional authority to issue a remedy under s. 24(1):

> 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.

Since the learned Chambers judge was *functus* in his capacity as the Summary Conviction Appeal Court judge, in order for the costs award to be valid, there must have been some other source of jurisdiction. There is no suggestion that the Supreme Court was exercising jurisdiction pursuant to Part XXVI of the **Criminal Code** pertaining to the extraordinary remedies of certiorari, mandamus and the like. As well, since the summary conviction matter had been remitted to the Provincial Court for a retrial, there was no other jurisdiction remaining in the Supreme Court pursuant to the **Criminal Code**. Any jurisdiction would therefore have to have been civil in nature.

I agree with the appellant's argument that since there was no *lis* before the Supreme Court, use of an application by Interlocutory Notice under the **Civil Procedure Rules** to commence the matter in the court was improper. **Rule** 1.05(m) defines "interlocutory notice" as "a notice of application in a pending proceeding". There was no pending proceeding in the Supreme Court when the notice was filed on September 8, 1997. Proceedings in the Supreme Court shall be commenced by originating notice according to

Rules 9.01 and 9.02.

Although there are numerous cases where trial judges have assumed jurisdiction to consider an application or motion to order costs against the Crown, in criminal proceedings, either during or after the trial, no precedent has been cited, or found, where a judge of another court not seized with carriage of the case, proceeded by way of application for **Charter** relief pursuant to s.24(1). It must be noted that at the time this application was initially filed, on September 8, 1997, the matter had been sent back to the Provincial Court for retrial. The amended application was filed on November 18, 1997. The record discloses that the trial before Judge MacDougall took place on October 21 and 22, 1997 and his decision was rendered on December 12, 1997. Cases where a trial judge has considered applications for costs against the Crown, either during or immediately following the trial, as a s. 24(1) remedy include:**R. v. Nova Scotia Pharmaceutical Society et al. (No.3)** (1994), 130 N.S.R. (2d) 1 (S.C.); **R. v. Kenny (No. 5)** (1992), 99 Nfld. & P.E.I.R. 107 (Nfld.S.C.T.D.); **R. v. Corkum** (1997), 163 N.S.R. (2d) 192 (S.C.) and **R. v. Pang** (1994), 95 C.C.C.(3d) 60 (Alta.C.A.).

In **R. v. Pawlowski** (1993), C.R.R. (2d) 296 (Ont. C.A.) (application for leave to appeal to the Supreme Court of Canada dismissed September 23, 1993) which is relied on by the respondent, a pre-trial application was made by the Crown for an order to take commission evidence in a case where the accused was charged by way of direct indictment with offences in the nature of war crimes as defined in s. 7(3.76) of the **Code**. The superior court judge who heard the protracted application refused to grant the Crown's request and found that the making of such an order would prejudice the accused's right to a fair trial

guaranteed by s. 7 of the **Charter**. In the order dismissing the application, the issue of the accused's costs of the application was specifically reserved if the parties were unable to agree. When agreement was not reached, an order that the Crown pay the accused's costs was made. The Crown's appeal was quashed on the basis that since there was no appeal from the order dismissing the Crown's application for commission evidence, the order for costs which was integral to it, was also not subject to appeal.

The main difference between **Pawlowski** and the case under appeal, is that the subject matter was within the jurisdiction of the court because of the direct indictment, which gave the superior court exclusive jurisdiction in the matter. Although the trial had not commenced, the Ontario Court (General Division) would have to be the trial court, and therefore obviously a court of competent jurisdiction to order a remedy pursuant to s. 24(1).

In **Rahey v. The Queen** (1987), 33 C.C.C. (3d) 289, Lamer, J., commented at pp. 298-299:

> As was decided in **Mills v. The Queen, supra**, a court of competent jurisdiction for the purposes of s. 24(1) in an extant case is, as a general rule, the trial court. It is the judge sitting at trial who would have jurisdiction over the person and the subject-matter and would have jurisdiction to grant the necessary remedy . . .

Although, **Mills, supra**, also determined that the superior courts have "... constant, complete and concurrent jurisdiction for s. 24(1) applications", that cannot be taken to mean that the process can be taken in the superior court at any time on an interlocutory application.

In several cases, courts have refused to entertain or approve of motions made for s. 24(1) **Charter** relief by way of a summary application: **Lussier v. Collins**, [1985] 1 F.C. 124; **McKenzie v. Canada (Canadian Human Rights Commission)**, [1985]

F.C.J. No. 529) (Q.L.); **Lambert v. Attorney General of Quebec** (1982), 31 C.R. 249 (Q.S.C.) and **R. v. McGillivary** (1990), 56 C.C.C. (3d) 304 (N.B.C.A.).

In **McGillivary, supra**, the Queen's Bench judge dismissed a summary application for both damages and costs against the Crown, arising out of an alleged infringement of the defendant's rights to liberty and security of the person. While indicating that the trial judge would have jurisdiction to consider the costs application as an adjunct of the criminal proceedings, the Court of Appeal held that the damage claim had to be commenced as a civil action by originating notice in accordance with the **Civil Procedure Rules.** Likewise, in this case, if the order under appeal had been made as an adjunct to or as part of the criminal proceeding before the Summary Conviction Appeal Court, there would have been jurisdiction and the order would not have been subject to appeal. However, in my opinion, a claim for a civil remedy pursuant to s. 24(1) must be commenced by way of originating notice.

In **Re Kevork, Balian and Gharakhanian and the Queen** (1985), 21 C.C.C.(3d) 369 (Ont.C.A.), the accused sought to appeal the dismissal of an application for a declaration that the charging section of the **Criminal Code** and the direct indictment on a charge of conspiring to commit murder, were contrary to the **Charter**. Two applications for the same relief were made, one as an interlocutory application in a criminal proceeding, the other purportedly as a civil motion, apparently only for the purpose of ensuring the benefit of a civil appeal. I would adopt and apply the following conclusion of Lacourcier, J.A. :

> Even if declaratory relief of this sort is normally available only in a civil proceeding, we are satisfied that the record below does not disclose the commencement of an appropriate application. The style of cause was as in a criminal proceeding, the application was by the accused and not by a third party as in the *Canadian Newspapers*

> case [17 C.C.C.(3d) 385], and there was no attempt to comply with the Rules of Civil Procedure in order to obtain the desired declaratory relief. These are not mere technical irregularities but defects of substance.

Conclusion

In conclusion, in my opinion, Justice Scanlan had no jurisdiction to order Her Majesty the Queen to pay the solicitor/client costs of the respondent as a remedy pursuant to s. 24(1) of the **Charter**. In summary, to begin with, there was no express finding of a breach of the respondent's **Charter** rights either in the first decision allowing the appeal from Judge Cole, or in the subsequent decision. There was no application made by the respondent for costs either pursuant to s. 826 of the **Criminal Code** or as a s. 24(1) remedy when the matter was before the Summary Conviction Appeal Court. Having completed his mandate and disposed of the matter on the merits, Justice Scanlan was *functus officio*, and therefore lacked jurisdiction as the Summary Conviction Appeal Court judge when the order for costs was made. There was no other **Criminal Code** jurisdiction over the summary offence remaining in the Supreme Court once the matter was remitted to the Provincial Court. Any jurisdiction to grant a **Charter** remedy must have been civil in nature because the Supreme Court had no criminal jurisdiction over the matter. A civil remedy for breach of **Charter** rights brought in a court that does not otherwise have jurisdiction, must be commenced by way of originating notice. There was no existing action in which it could properly be an interlocutory motion.

The first issue herein, that of this Court's jurisdiction, should be resolved by concluding that the order was civil in nature and therefore is appealable to this Court

pursuant to s. 38 of the **Judicature Act**. Since the order was made without jurisdiction, s. 39 of the **Judicature Act** does not apply. It is not necessary to consider the third and fourth issues.

I would allow the appeal, dismiss the notice of contention and set aside the order for costs.

Roscoe, J.A.

Concurred in:

Pugsley, J.A.

Flinn, J.A.