C.A.C. Nos. 109631 & 109896

NOVA SCOTIA COURT OF APPEAL

Hallett, Chipman and Pugsley, JJ.A.

Cite as: R. v. Howell, 1995 NSCA 219

BETWEEN:

DAVID MICHAEL HOWELL Appellant	)	Jerome Kennedy for the Appellant
- and -	)	
HER MAJESTY THE QUEEN Respondent	)	Marian Fortune-Stone and Michael A. Madden for the Respondent
	)	Appeal Heard: October 2, 1995
	)	Judgment Delivered: November 16, 1995

THE COURT: The appeal is dismissed as per reasons for judgment of Chipman, J.A.; Hallett, J.A. concurring and Pugsley, J.A., dissenting in part by separate reasons on the ground that the trial judge erred in refusing to permit the appellant to make a "**Garofoli**" application at the trial.

CHIPMAN, J.A.:

The appellant was convicted following a jury trial in Supreme Court at Sydney of unlawfully conspiring to commit an indictable offence (trafficking in a narcotic) contrary to s. 465(1)(c) of the **Criminal Code**. He was sentenced to twelve years incarceration in a federal institution. He appeals his conviction and applies for leave to appeal his sentence. The Crown also applies for leave to appeal the sentence.

The conspiracy in which the appellant participated involved the landing of 27.7 tons of cannabis resin with a street value of between $300,000,000 and $500,000,000 at Baleine near Louisburg, N.S.

In early July 1990, members of the Royal Canadian Mounted Police (R.C.M.P.) received information with respect to the possible off-load of narcotics in the area of Louisburg. Investigation was undertaken which involved the activities of the appellant and others in Newfoundland, New Brunswick, Quebec and Nova Scotia. The investigation revealed that one Mills purchased the motor vessel "Scotian Maid" for $200,000 in cash from Loran Smith in Yarmouth, N.S. These funds were delivered in cash to the office of Smith's lawyer. The "Scotian Maid" was at the time tied up in Trepassey, Newfoundland. The R.C.M.P. had a number of persons under surveillance in Newfoundland who, it was believed, would be using the "Scotian Maid" to off-load the drugs. Through surveillance and intercepted communications, Melvin Kenny was identified as having been recruited by the appellant as captain of the vessel for the off-load. Intercepted telephone communications indicated that Mr. Kenny, who had no previous record, was very reluctant to get involved but that the appellant very skillfully persuaded him to succumb to the temptation of the riches that would accrue from this venture. The appellant kept in close touch with other members of the conspiracy, including his uncle William Howell in Montreal. The appellant was seen going into a hotel in Newfoundland where other co-conspirators from Montreal and New Brunswick

were staying. While the vessel was in Trepassey, Florien Despres and Daniel Oakey were identified as being involved in preparing it for the voyage. Mills had previously advised Smith that he would send Oakey to meet him in Newfoundland. Other members of the conspiracy in Newfoundland at the time Kenny was recruited were Gerald McLennan, also known as Robert Rosignol, Alain Charron, Emery Martin, Michael Breaker and William Howell. They were staying at the Best Western Motor Inn in St. John's and some were seen travelling towards Trepassey in rented vehicles.

On July 16, 1990, the "Scotian Maid" left Trepassey with Kenny acting as skipper.

On July 24, 1990, an R.C.M.P. surveillance team was sent to Shediac, New Brunswick. They followed a motor home from Shediac to North Sydney. Further surveillance in and around motels in North Sydney and Sydney identified Jacques Martin, Alain Charron, Gerald McLennan, Aris Belzile, Andre Dumont, Real Nadeau, Chester Albert and Wesley Michaud as persons using rented vehicles including two five-ton trucks and two tractor-trailers. The surveillance continued until July 30, 1990. On July 29, 1990, the five-ton trucks were seen heading towards Louisburg and turning down the road leading to Baleine, an isolated coastal community. The trucks were later seen returning to the North Star Inn in North Sydney. One of the five-ton trucks and one of the tractor-trailers were seen back to back. On July 30th one of the tractor-trailers and a grey Pontiac 6000 left North Sydney. They were followed as they travelled together to Quebec where they were stopped on the highway near Joliette. At that time Alain Charron and Chester Albert were arrested, the vehicle seized and several tons of cannabis resin recovered from the tractor-trailer.

On the night of July 30, 1990 and early in the morning of July 31st, the R.C.M.P. arrested the following persons at the wharf in Baleine: Raymond Mills, Gerald McLennan, Emery Martin, Real Nadeau, Aris Belzile, Andre Dumont, Michael Breaker,

William Howell, Florent Despres, Raymond Barter and Wallace Barter. Several tons of cannabis were seized on the wharf and in a vessel, the "False Bay", tied up along side. This vessel was registered in the name of Mills. That same night one of the five-ton trucks which had been under surveillance was stopped and Wesley Michaud was arrested. Several tons of cannabis resin were recovered from the truck.

Jacques Martin was arrested at Keddy's Motel in Sydney. He was behind the wheel of another five-ton truck which had been under surveillance. Daniel Oakey and Melvin Kenny were arrested on July 31, 1990 on board the "Scotian Maid" off the coast of Louisburg. On the same day the appellant was arrested in St. John's, Newfoundland.

This brief sketch is sufficient to describe the appellant's role in one of the largest conspiracies ever to import drugs through the Nova Scotia coast.

The appellant and 17 others were charged with the offences of conspiracy to traffic contrary to s. 465(1)(c) of the **Code** and possession for the purpose of trafficking contrary to s. 4(2) of the **Narcotic Control Act**.

The appellant elected trial by judge and jury. The preliminary inquiry commenced in February of 1991 and after a seven week hearing, the appellant was committed to stand trial. He was represented at the preliminary inquiry and until January 1993 by private counsel, Guy LaFosse of Sydney. In January 1993, LaFosse withdrew from representation of the appellant.

The appellant was represented from March 1993 to October 1993 by Pierre Morneau, private counsel from Montreal. Morneau withdrew in October 1993, citing the appellant's failure to follow legal advice and the appellant's preference to have other counsel represent him. At that time the trial, which had commenced in April of 1993 in Halifax, was in progress. That trial ended in a mistrial on November 22, 1993, about seven months after it started. The appellant was then directly indicted on the two

charges along with Mills, Oakey and McLennan and their trial by jury was set for Sydney on April 5, 1994. This trial was preceded by a number of pre-trial applications. On April 25, 1994, the Crown entered a stay with respect to the charge of possession for the purpose of trafficking and proceeded with the charge of conspiracy to traffic only.

During the course of the second trial and the pre-trial conferences leading up to it, the appellant was represented from time to time by four different lawyers: Kevin Burke, counsel from Halifax, Gerald MacDonald, counsel from Sydney, David Campbell, counsel from Sydney, and Warren Zimmer, counsel from Halifax. It is also known that he sought legal advice from at least two other lawyers during that time, William Burchell from Sydney and Jerome Kennedy from Newfoundland.

On June 3, 1994 the jury rendered a verdict of guilty on the indictment. The appellant was sentenced on September 9, 1994 to twelve years incarceration.

On the conviction and sentence appeals the following issues are raised.

1) whether the trial judge erred in refusing the appellant's application to conduct a **"Garofoli"** ***voir dire***;

2) whether the appellant was denied his right to make full answer and defence by reason of not having legal counsel;

3) whether the trial judge conducted the trial in such a manner as to raise a reasonable apprehension of bias;

4) whether the preferring of a direct indictment constituted an abuse of process;

5) whether the trial judge erred in his charge to the jury;

6) whether the sentence was a fit one.

Issue One - "Garofoli" *Voir Dire*

In order to deal with this issue, a further narrative relating to the refusal by the trial judge on May 19, 1994, to entertain this **Charter** application is necessary. It should be noted on the outset that the only significant evidence implicating the appellant in the conspiracy consisted of wiretaps of telephone conversations between the appellant and Kenny. Appellant's counsel conceded on the argument before us that if such wiretaps were properly admitted the verdict of the jury was a reasonable one. It is equally clear that if the wiretaps were not properly admitted there was insufficient evidence of the appellant's guilt of participation in the conspiracy.

At a pre-trial conference held in Halifax on December 9, 1993, the trial judge was advised that Nova Scotia Legal Aid had refused to grant certificates for any of the accused in the new trial. The appellant advised the trial judge that he had previously contacted 35 lawyers but had been unable to secure representation. He did not wish to be unrepresented.

At another pre-trial hearing on December 17, 1993, it appeared that the position of Nova Scotia Legal Aid had not changed. Counsel for the Crown indicated that a trial would probably last ten to 12 weeks. The trial judge scheduled a hearing for January 17, 1994, at which he ordered Nova Scotia Legal Aid to provide coverage for the upcoming trial.

On March 2, 1994, another pre-trial hearing was held. Kevin Burke, an experienced practitioner in criminal law appeared on behalf of the appellant. He indicated that since January 18th he had spent some 20 - 25 hours on the appellant's behalf. He suggested that it would be the logical course for Legal Aid to get somebody in its Sydney Office to deal with the matter. It appeared that Nova Scotia Legal Aid would pay for legal counsel but would not pay transportation and accommodation costs for counsel to travel from Halifax to Sydney for the appellant. They were, however, prepared to pay such expenses for Oakey's counsel because that counsel had

represented Oakey at the first trial, and presumably there would be a sufficient off-setting of costs by reason of his familiarity with the matter to justify these expenses. The trial was scheduled for April 5th. The position of the trial judge with respect to the appellant was that he should endeavour to obtain counsel in Cape Breton who would not have travel expenses.

On March 11, 1994, another pre-trial hearing was held in Sydney at which Gerald MacDonald, a local lawyer, appeared for the appellant, indicating that he had been contacted the previous day on his behalf. He was unable to state with certainty that he had been retained. At this hearing the trial judge refused a request for a 60 day adjournment from counsel representing the appellant's co-accused, Mills. At this hearing the Crown stated that the main issue involving the appellant was the admissibility of wiretap evidence.

On March 23rd another pre-trial hearing was held. Gerald MacDonald, appearing on behalf of the appellant, indicated that as the appellant wished representation from Halifax, he considered that his services were not the preferred services. He stated that he was therefore withdrawing. He was given leave to do so. During this hearing the appellant made the statement that he felt that he was being railroaded. The trial judge reminded him that he had a very competent lawyer who was willing to take his case and had ample opportunity to review the issues with him. He stated that he had the distinct impression that the appellant was employing delaying tactics and advised the appellant that if he was planning to make a **Charter** application, it would be necessary to give adequate notice to the Crown thereof. Counsel for the Crown advised the trial judge that a **"Garofoli"** application had been made at the previous trial by counsel on behalf of the appellant. The hearing took two or three days and the application had been dismissed by the previous trial judge. The trial judge postponed the trial from April 5th to April 18th.

On April 7, 1994, the appellant was brought before the trial judge to determine what progress he had made in getting counsel. The trial judge referred to a letter he had received from the appellant indicating that as of March 31st he had not succeeded in obtaining counsel, and that he required transcripts of testimony of Corporal Fred Hildebrand on whose affidavit the wiretap order had been granted by a judge of the Supreme Court of Newfoundland. Crown counsel indicated that the transcript would be supplied to the appellant.

When asked by the trial judge what efforts he had made since March 23rd to get a lawyer, the appellant replied that he had phoned several lawyers. When the trial judge asked him who he phoned and when, the response was "I can't remember". At this point the trial judge reminded him that he had not availed himself of the services of Mr. Gerald MacDonald who was a fine lawyer. He told the appellant that quite frankly he thought he was playing games with the court. The trial would proceed on April 18th as scheduled.

On April 18th jury selection took place and the trial commenced with the trial judge's opening comments on April 19th. The calling of evidence was delayed until April 25th at the request of counsel for Mills.

On April 25th the appellant's co-accused, Oakey, stated through counsel that he intended to plead guilty and a date was set for his sentencing. Again, the appellant stated that he was in need of a lawyer. The trial judge referred to the pre-trial discussions and his ruling that the appellant had already had ample opportunity to retain a lawyer. In particular, the trial judge referred to the fact that the appellant had counsel in Newfoundland who could have assisted him in obtaining local counsel, that he could have had the services of Gerald MacDonald paid for through Legal Aid, but that instead he wanted Kevin Burke whose expenses would not be paid by Legal Aid. He had had other opportunities to make calls from the Correctional Centre. The matter

would proceed with or without a lawyer representing the appellant. A similar exchange between the appellant and the trial judge occurred on the second day of the trial. On the third day of the trial the appellant asked for time to review testimony from a previous trial before commencing cross-examination. He was granted a 15 minute recess by the trial judge for that purpose.

On the same day, the Crown commenced playing the tapes of the appellant's incriminating conversations.

On the following day, April 28, 1994, the appellant requested a lawyer to enable him to make the **"Garofoli"** application. The trial judge again reminded him that he had not availed himself of the services of Gerald MacDonald and the trial judge ruled that as no notice of a **Charter** challenge was given, the interceptions were deemed to have been made pursuant to a lawful authorization. Upon being asked by the appellant why he could not at that time make a challenge as Mr. Zimmer had done for him in the first trial, he was advised that it was now too late to make the application.

On May 2, 1994, the trial judge stated that after reflecting on the discussions on Friday, April 29th, he had decided to allow the appellant to make his **"Garofoli"** motion. He considered that the appellant had not been specifically asked respecting his intention to make the motion. He had stated such an intention at the first trial and had retained legal counsel who conducted the application on his behalf. The **Charter** motion was heard in the absence of the jury at the first trial and the trial judge then dismissed it. It had become clear during the appellant's cross-examination of Corporal Hildebrand that he considered himself able to challenge the lawfulness of the interceptions. It was clear that he did not have a lawyer's appreciation of what could and could not be dealt with in the jury's presence. The appellant considered it central to his defence to challenge the admissibility of the tapes. Generally, accused persons were required to give notice of intention to make a **Charter** challenge. Here the

appellant had made a challenge before and the Crown should not be surprised that he would want to do so again. Although some of the tapes had been played, it was not too late to rectify the situation because if the motion were dismissed the evidence was properly before the jury, and if allowed, a directed verdict might result. On the matter of scheduling the motion, the trial judge raised with counsel for the Crown the possibility that Mr. Burchell, practicing in the Sydney area, or counsel in Newfoundland who had represented the appellant, could be contacted to see if they would assist him in the application. Crown counsel indicated a willingness to contact these persons and the trial judge raised the possibility of contacting the local Legal Aid office should this not prove successful. Crown counsel then said that she had heard of a lawyer by the name of David Campbell in the local area. He apparently was a former Crown prosecutor. The following exchange took place between the trial judge and the appellant:

> "THE COURT: I see. Sounds like just the type of guy that might be of some help to you, Mr. Howell.
>
> MR. HOWELL: Please, God."

On May 9th, David Campbell appeared as counsel for the appellant. On May 10th, the trial judge spoke to counsel in the absence of the jury. He mentioned that inasmuch as Mr. Campbell was now representing the appellant all accused were represented by counsel. A lot of the issues relating to continuity of evidence could be disposed of whereas previously it would be difficult with the appellant representing himself, not having sufficient understanding of the process to make that kind of agreement. Mr. Campbell indicated a willingness to meet with Crown counsel to attempt to achieve some agreement. Mr. Campbell also indicated to the court that he would soon advise about the timing of the **Charter** motion.

On May 11th the trial judge indicated that he would start the trial one-half hour later in the morning because, among other reasons, it would give counsel an

opportunity to consider making concessions that could be made without prejudice to the accused. An unrepresented accused could not make an informed decision about the continuity of exhibits, whereas experienced counsel could make concessions that would facilitate the flow of evidence without prejudicing the accused. Counsel, including Mr. Campbell, indicated they had no problem with that. The trial judge again repeated the desirability of avoiding needless evidence. When the jury was called back in, the trial judge told them that he had reasonable assurance from counsel that the additional one-half hour in the morning could be productively used to facilitate the flow of evidence so that the court would not have to unnecessarily get into matters of continuity and needless repetition.

At the end of the day on May 11th, the trial judge again raised the question of continuity and wondered whether a lot of evidence about the guarding of the vehicles and the bales of cannabis would be necessary. He wondered whether there was a reasonable possibility that among counsel they might be able to satisfy themselves that there was no contamination of the evidence. Crown counsel stated that she understood from other counsel that the continuity of the alleged narcotics was not in issue. Mr. Campbell responded:

> "I have no reason at this point in time or no instructions to believe that there was contamination, interference or anything else with the packages and whatever they contain, so basically my position is that until I see the contrary, I'm prepared to say that it was regularly handled by the R.C.M.P."

Mr. Campbell then stated that he thought there could be some sort of agreed statement of facts on the subject. The court suggested counsel explore this further and counsel agreed.

On the morning of May 12th, Mr. Campbell requested a break to have discussion with his client. Following a one-half hour adjournment, Mr. Campbell advised the court that the purpose of the break was to discuss with his client some of the arrangements

he had made on his behalf with respect to what he considered to be really nonessential repetitive evidence. The appellant had concerns about discussions Mr. Campbell might have had with Crown counsel concerning this and he now understood that it was the appellant's desire that all evidence be presented in its entirety. Mr. Campbell went on to say that it was not what he thought his understanding with the appellant was. He thought he was entitled to make arrangements with the Crown to put in non-repetitive, essentially non-contentious items in terms of continuity. The trial judge interjected that this was normally done. Mr. Campbell responded that he was getting into a position where he might be in conflict with his client and if he could not, in good conscience, make arrangements with the Crown that he could back up, then there was no purpose in him remaining before the court. Mr. Campbell considered himself to be a professional person but his client had his own rights and ideas and if they came in conflict he would have no alternative but to ask to withdraw.

The court asked the appellant if he wished to say anything. The appellant stated that he did not wish to be without a lawyer. He stated that he was a little confused. One day he did not have a lawyer, and the next day he had one only for the wiretap and then for the entire trial. He was asked by the trial judge if he would not prefer to have a lawyer for the entire trial as well as the wiretap to which he agreed.

The trial judge explained to the appellant that it was routine where all parties are represented by lawyers that they dispense with proof of continuity and the trial judge took pains to give examples such as routine matters where the lawyer, by reason of his expertise and training, would know what he could agree to without prejudicing the client. A discussion between Mr. Campbell and Crown counsel ensued in open court about what might be done each morning prior to the presentation of evidence.

Mr. Campbell suggested to Crown counsel that each morning they would basically go over what the witnesses were expected to say and there could be dialogue

as needed. Counsel for Mills then commented upon the difficulty of reviewing the extensive evidence in advance. In response to a question from the court whether they could proceed that day, Mr. Campbell stated he thought that they could proceed throughout. He did not think there was a major breaking point beyond which he would be going at this time and he was prepared if the appellant was prepared. In response to this the appellant nodded affirmatively and said he was. Mr. Campbell emphasized that he did not want to get into the position of having his client say that he did not agree with what counsel was doing. The court then granted a short adjournment so that Campbell and the appellant could consult with Mills and his counsel. Following this, both counsel indicated that they were prepared to proceed. The agreement respecting the evidence that day related to guard duty on the trucks. Mills' counsel stated that he would require the recalling of guards who attended on the "Scotian Maid" immediately after it was transferred to the Coastguard College. The jury was then called in and evidence commenced for the day. At the end of the day court adjourned to Tuesday, May 17th.

On May 17, 1994, the trial resumed. Witnesses called by the Crown were cross-examined by counsel for the appellant on that day and on May 18th. During the morning of May 18th, Mr. Campbell made a small concession regarding service of documents. Mr. Campbell continued to cross-examine or decline to exercise his right to do so as witnesses were called. At the end of the day on May 18th counsel for the Crown stated that three more witnesses would be called the following morning, May 19th. Discussion between the court and counsel resulted in the court stating that it would only sit for the morning of the next day. On the following Tuesday the Crown planned to call its last two witnesses, subject to matters to be dealt with in the jury's absence. The trial judge then told the jury:

> "We are approaching the end, apparently a lot faster than anyone had anticipated. So as you heard, there's a matter that I have to make a ruling on in your absence and the outcome of that ruling will determine whether or not there's more evidence that you would hear. . . . the procedure after that, I'm going to meet with counsel in your absence to discuss some points regarding my charge to you on the law."

Court opened the following day, May 19th, in the absence of the jury. ***Voir dire*** evidence was heard with respect to employment difficulty being experienced by one of the jurors. At the conclusion of that, Mr. Campbell addressed the court:

> "My Lord, this morning before we came into these proceedings, I was informed by my client that continuity is a issue in this trial. As you may well recall when we had some – what we thought was a disagreement before, I mentioned in open court in the presence of my client and everybody else that at any time my client felt that I was going against his instructions, he was to inform the court of such.
>
> Now I have informed Ms. Fortune-Stone this morning, what my client said, and in view of those instructions and in view of what I had been doing these past few days with what I presumed and assumed and thought I had every reason to believe was the consent of my client, I think I'm in the position where I have no option but to ask leave of the court to withdraw as counsel in this matter."

The court asked the appellant for his position whereupon he responded that he never agreed to waive continuity of the exhibits. The court referred to a discussion the other day when the issue of Mr. Campbell's continued involvement came up and the court had told the appellant he would have to trust his professional judgment. The appellant thereupon denied that he had this discussion and Campbell said that there was one. The appellant continued to deny having agreed to waive continuity of exhibits. The court asked the appellant what agreement made by his counsel caused concern. The appellant stated that he did not understand the question.

The court then referred to a specific instance where continuity of some rental agreements was agreed upon the previous day. The appellant's response was that his objection to continuity was to the overall continuity of exhibits, not just one in particular, but all of them. The court again indicated that continuity is a matter routinely agreed

to; otherwise the trial is needlessly extended and made needlessly tedious for the court and for the jury in particular. The appellant said that he was never informed of it. The exchange continued:

> "THE COURT: And we had the discussion right in court, as he said.
>
> MR. HOWELL: I never found out until we come to court and then I was sitting down and I asked Ray Mills, I said, "Did you hear about this meeting?" And he said no, the same thing. None of us heard about it. I never. In my case, I can't speak for Ray, but I never heard about it.
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> MR. CAMPBELL: This meeting was the lawyers getting together one evening after court to discuss the evidence, the upcoming evidence.
>
> MR. HOWELL: Yes, My Lord.
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> MR. CAMPBELL: Yes, I would think that you would have a big complaint if your lawyer wasn't having such meetings. If your lawyer wasn't having such meetings, he wouldn't be doing his job. He wouldn't be getting properly prepared.
>
> MR. HOWELL: Well, if you informed me, it would be nice too, but, you know, when I'm not informed is when I come to the conclusion such as this.
>
> THE COURT: Yes, Mr. Campbell, do you wish to say something?
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> MR. CAMPBELL: My Lord, the meeting he's referring to was held over at Ms. Fortune-Stone's chambers in the Cambridge Suites. At approximately 9 o'clock that evening after I returned from that meeting, I called Mr. Mills at the Cape Breton correctional institution --
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> THE COURT: Mr. Howell, you mean?
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> MR. CAMPBELL: Or Mr. Howell, I'm sorry, at the Cape Breton correctional institution. I'm sorry, I'm in the position where I think my client has lost confidence in me and I think I've lost confidence in my client. I think the relationship is not one of trust anymore and not one that really enables me to carry on in full confidence as counsel in this matter. I'm sorry for any inconvenience that it's caused the Crown, that it's caused the court, and that may have caused my client, but that's my position. Once the relationship is threatened, as it appears to be now, my usefulness is essentially over.
>
> THE COURT: Is that your position, Mr. Howell, that you've lost confidence in Mr. Campbell?
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> MR. HOWELL: I'm not sure what it is, My Lord. I know I just reached this conclusion by giving it a lot of thought and I've given it a lot of thought

since last week, and that's a fact. I mean, I can't be no more honest than what I am to you now. I'm telling you the exact way I feel inside and that's the way I feel.

THE COURT: After all the machinations we've gone through to get you a lawyer and to make sure that you were represented, and to give you an opportunity to make your **Charter** application later on in this trial, and now, quite frankly, you come out with this nonsense about being concerned about continuity. Sit down, Mr. Howell. I'll hear from the Crown. Does the Crown have anything to say in this?

MS. FORTUNE-STONE: Yes, I do, My Lord. I'm somewhat stunned by this, actually. There was an open discussion on the record, and if I can recall Mr. Howell's words correctly, he stood up before this court and he said, "I'm just confused. I"m not sure I know what continuity means and if I could have a bit more time," words to this effect, "with my lawyer, perhaps it could be explained better to me."

As I recall, we adjourned at that time for Mr. Campbell to meet once again with Mr. Howell. They came back into this court and it was advised, Mr. Howell and Mr. Campbell -- Mr. Howell had advised Mr. Campbell that that issue was now resolved. And as I understood, he was no longer confused as to what continuity meant.

We are in the 11th hour of this trial, Mr. Lord, and with the greatest of respect to Mr. Howell, the Crown can only at this point step back, having heard over the last few days that we're coming to an end, that this appears to be not a genuine request of this court or of the Crown to start re-calling witnesses at the cost and the time to start proving continuity of everything, as Mr. Howell says.

This is an issue that has been repeatedly -- and yesterday, maybe it's a gut feeling of the Crown of what went on or what was going on when Your Lordship made the comment, you just can't help yourself. Well, sometimes that experience is a good teacher. And with no reflection on Mr. Campbell whatsoever, who has cooperated and the Crown has cooperated with him, and I thought Mr. Howell, to the extent that disclosure has been made repeatedly, that this can only appear to be an 11th hour stall.

. . .

My Lord, Mr. Howell, I think, has made very unfortunate comments here today with respect to his relationship with Mr. Campbell. From the Crown's perspective, I think Mr. Campbell has done an excellent job, coming in at the time that he came in, and it would be unfortunate and of concern to the Crown to the extent that this matter will now be delayed and stalled once again with this type of request coming forward, when, as the Crown has said, My Lord, the time has passed for such an objection.

My friend makes a good comment. He has just commented to me. What would have happened? We're talking today two witnesses. We thought we had three but it turns out Tuesday we have three, because one of our witnesses has to fly in from Ottawa and we couldn't get him in. On Tuesday, the Crown wrapped up its case subject to Mr. Howell's motion. We played the tapes and suddenly Mr. Howell then rises before this jury in another two or three days and said continuity is an issue. I mean, this can't continue. So the Crown questions the ***bona fide*** of what's happening here. Mr. Howell has been through this at a prelim where continuity was shown. He has been through this for seven months where continuity was shown. He cannot continue to be confused and stands up this morning and speaks quite well on the issue of continuity as to what is happening in this court. . . ."

The court then said:

"Stand up, Mr. Howell, Mr. Howell, if I do release Mr. Campbell, how do you intend to make your **Charter** motion? Are you prepared to do that yourself? Do you know how to properly examine and cross-examine the witnesses on such a motion? Are you prepared to make legal argument after evidence is heard? Have you thought that through when you were thinking this over so carefully during the last week?

MR. HOWELL: I thought about a lot of things, My Lord, and this is why I've come to the conclusion today.

THE COURT: Well, tell me what your thoughts were on your **Charter** motion, how you intended to put that forward in a coherent fashion without a lawyer? Have you satisfied yourself you're able to do that?

MR. HOWELL: No, not really.

THE COURT: Is it still your intention to make a **Charter** motion?

MR. HOWELL: Yes, My Lord, it is.

THE COURT: How?

MR. HOWELL: Well --

THE COURT: Do you intend to call witnesses on it?

MR. HOWELL: Yeah.

THE COURT: Who?

MR. HOWELL: I'm not quite certain as to who yet, but I'm seriously considering calling witnesses on it, yes. I haven't decided who and exactly who, but --

THE COURT: Anything further?

MR. HOWELL: Yes, just to the comments that Ms. Fortune-Stone made. She was the one that told me, when the issues of the Garofoli came up pertaining to the ***voir dire***, and that if I was to get a lawyer, you're only getting him -- and she said this specifically to me -- you're only getting him or you're only getting a lawyer just for the ***voir dire*** only and that's it. Well, you did say it. I mean -- and then why would I say it if it wasn't said to me? I mean.

MR. CAMPBELL: My Lord, with respect, when I was here in mufti on the Thursday or the Friday, you might recall that we discussed in the presence of Mr. Howell that depending on legal --

THE COURT: Whether it would be --

MR. CAMPBELL: Depending on Legal Aid's opinion, I would be starting full-time on counsel on the Monday, which I got that permission. I started as full-time counsel. I don't think he can honestly say that Ms. Fortune-Stone chose the terms of any arrangement between us.

THE COURT: Ms. Fortune-Stone, did you tell Mr. Howell he could only have a lawyer for the --

MS. FORTUNE-STONE: How could I control what he would have a lawyer for?"

At this point the trial judge called the jury back in to explain that there was a delay. After they retired the court ruled:

"After hearing the submissions made this morning by Mr. Campbell, and after hearing from Mr. Howell and the Crown, I have decided to allow Mr. Campbell to withdraw as counsel for Mr. Howell. I find that Mr. Campbell's position has become untenable in that an appropriate solicitor-client relationship no longer exists between he and Mr. Howell. I want to extend the court's appreciation to Mr. Campbell for having the courage and sense of professional responsibility to take on Mr. Howell's defence at the stage that he did. And it is clear that he's been giving Mr. Howell maximum effort since he took this case on.

. . .

As I was saying, I am satisfied that Mr. Howell had no legitimate reason to lose confidence in his counsel. I do not accept that he was confused about the action of his counsel. I believe, and I suppose this is in keeping with the submission made by the Crown, that this trial has gone faster than Mr. Howell would have liked and the end of the trial is fast approaching. I believe that his confusion, and I put that in quotation marks, is concocted in order to slow the proceedings down. In short, I find that Mr. Howell is being deliberately obstructive in these proceedings. Accordingly, any agreements made on Mr. Howell's behalf by Mr.

> Campbell will stand. There's no doubt in my mind that Mr. Howell understood exactly what was being done on his behalf.
>
> As far as the **Charter** motion is concerned, I am now satisfied that Mr. Howell neither has the ability nor the desire to make a ***bona fide*** **Charter** application. I have given him every opportunity to do so, including having transcripts of the evidence and submissions made during a similar application at the first trial prepared and provided. It is now clear that the intended **Charter** motion is no more than another stalling tactic.
>
> The Crown may therefore proceed on the basis that the relevant intercepts were lawful."

(emphasis added)

On May 24th, the trial judge elaborated upon his ruling of May 19th. He said **inter alia**:

> "It is difficult to imagine how even an astute and experienced counsel could have done more this time around. It is obvious that to allow Mr. Howell to attempt it alone would result in a complete fiasco. As far as Mr.Howell's desire to make a ***bona fide*** application is concerned I know that he realizes his best chance of doing so was with the assistance of counsel. Yet he feigned confusion about his counsel's terms of reference and caused a complete breakdown in a viable solicitor-client relationship. I seriously question whether Mr. Howell ever had the slightest intention of cooperating with Mr. Campbell.
>
> It is interesting to note that Mr. Howell did not find Mr. Campbell but Mr. Campbell found him. Mr. Campbell had made his interest in taking the case on known to the Crown who, in turn, passed the information along to Mr. Howell and the court.
>
> In those circumstances, Mr. Howell could no longer maintain the fiction that he could not find a lawyer. He accepted Mr. Campbell's offer of assistance but it was not long before he came up with an excuse to get rid of him. The situation is similar to that which existed in March of 1994 when Mr. Howell was represented by Mr. Gerald MacDonald. It is clear that Mr. Howell deliberately poisoned that relationship by telling Mr. MacDonald that he preferred to be represented by Mr. Kevin Burke. He did this knowing that the Kevin Burke issue had already been decided. He also acknowledged that he had had no further discussion with Mr. Burke about his availability.
>
> I recognize that it is important to ensure that an accused gets a fair trial and is made to feel that he's getting a fair trial. But Mr. Howell obviously wants none of it. His only interest, in my opinion, is in derailing the process that he might stop or delay the trial.

To fire the lawyer or force the lawyer to quit scenario is becoming a popular delay tactic. I've no doubt that Mr. Howell is alert to this tactic and is attempting to employ it to maximum effect." (emphasis added)

I agree with counsel for the appellant that the issue is very clear. Did the trial judge err when, having reversed himself on May 2nd and permitted the appellant to make a **"Garofoli"** application, he then on May 19th once again reversed himself and denied the appellant this right? To my mind the answer to this question lies in determining whether the trial judge was correct in his finding that the appellant did not have the ability or the desire to make a ***bona fide*** **Charter** application. That is all that needs to be decided in order to resolve this ground of appeal.

The right to make a **Charter** application respecting the admissibility of evidence is not unqualified. In **R. v. Kutynec** (1992), 70 C.C.C. (3d) 289 (Ont. C.A.) Finlayson, J.A. reviewed the procedure recommended by Borins, D.C.J. in the court below respecting **Charter** applications. He said at p. 295:

"Litigants, including the Crown, are entitled to know when they tender evidence whether the other side takes objection to the reception of that evidence. The orderly and fair operation of the criminal trial process requires that the Crown know before it completes its case whether the evidence it has tendered will be received and considered in determining the guilt of an accused. The ***ex post facto*** exclusion of evidence, during the trial, would render the trial process unwieldy at a minimum. In jury trials it could render the process inoperative.

. . .

As a basic proposition, an accused person asserting a **Charter** remedy bears both the initial burden of presenting evidence that his or her **Charter** rights or freedoms have been infringed or denied, and the ultimate burden of persuasion that there has been a **Charter** violation. If the evidence does not establish whether or not the accused's rights were infringed, the court must conclude that they were not: see **R. v. Collins** (1987), 33 C.C.C. (3d) 1 at pp. 13-4, 38 D.L.R. (4th) 508, [1987] 1 S.C.R. 265 (S.C.C.). It is obvious that counsel for the accused is not entitled to sit back, as he did in this instance, and hope that something will emerge from the Crown's case to create a **Charter** argument or assist him in one he is already prepared to make. The onus is on the accused to demonstrate on a balance of probabilities that he is entitled to a **Charter** remedy and he must assert that entitlement at the earliest possible point in the trial. Otherwise, the

> Crown and the court are entitled to proceed on the basis that no **Charter** issue is involved in the case."

And at p. 296:

> "Manifestly, the **Charter** application by the accused must precede the admission of the evidence. To have it admitted before a jury subject to later exclusion following a successful **Charter** application, would invite a mistrial. The procedure to be followed is no different when a judge is the trier of fact.
>
> . . .
>
> I do not suggest that a trial judge can never consider, at a later point in the trial, the admissibility of evidence which has been tendered without objection. A trial judge has a discretion to allow counsel to challenge evidence already received and will do so where the interests of justice so warrant. For example, as in **R. v. Arbour**, a judgment of the Court of Appeal for Ontario, released July 28, 1990 [since reported 4 C.R.R. (2d) 369, 10 W.C.B. (2d) 426], a question as to the admissibility of evidence already before the trier of fact may arise from evidence given at a subsequent point in the proceedings. In such cases, a trial judge may well be obliged to consider the question of the admissibility of the earlier evidence and, if the circumstances warrant it, allow counsel to reopen the issue."

It is apparent to me that the discretion to relax the rigours of the rule calling for an early and timely **Charter** application is particularly significant in cases where an accused is unrepresented. See also **R. v. Drew** (1991), 104 N.S.R. (2d) 115 at 121-124. A late **Charter** application can be entertained in appropriate cases. It will be recalled that in this case the trial judge recognized the problems which arose by reason of the fact that the intercepts had already been played to the jury. However, in view of the fact the intercepts constituted the only significant evidence implicating the appellant, it was clear that upon the resolution of a late **Charter** application the case could be resolved either on the basis of proceeding with the evidence before the jury or by directing a verdict. The initial refusal of the trial judge to permit the appellant to make a **Charter** application arose out of the appellant's failure to accept the services of Gerald MacDonald. It is not necessary, in my opinion, to decide

whether he was correct in this ruling because his reversal of it on May 2nd, followed by the continued presence of Campbell as counsel for the appellant, gave the latter an opportunity to make the **"Garofoli"** application with the benefit of legal counsel just as he had been able to do at the first trial.

The sole issue is whether the trial judge was correct in reversing himself again on May 19th.

I have set out extensively the history of the trial from May 2nd to May 19th. The trial judge has made the pivotal finding that the appellant had neither the ability nor the desire to make a ***bona fide*** **Charter** application.

The appellant did not have the ability to make a ***bona fide*** **Charter** application because of his deliberate and successful attempt to get rid of Mr. Campbell. The trial judge found, and the record amply confirms, that the appellant had no legitimate reason to lose confidence in him. Witness, among other things, his criticism of counsel attending a meeting with counsel for the Crown and his suggestion that Crown counsel had somehow chosen the terms of Mr. Campbell's engagement. The progress of the trial up to May 19th clearly indicates that Campbell thought that he had the agreement of his client to waive continuity as to various pieces of evidence as the trial went along. On the morning of May 19th as it became apparent that the trial was coming to a close, the appellant suddenly took the position that he would insist on proof of continuity of everything. In the entire context of this trial, this supports the trial judge's finding that in so doing he was effectively getting rid of his counsel and thereby compromising his ability to make the motion. The appellant cannot now seriously contend that his disability was anything but self-imposed.

The appellant had no desire to make a ***bona fide*** **Charter** motion. Having already had the benefit of hearing a "**Garofoli**" application by counsel on his behalf

at the first trial and having the advice of at least four lawyers up to the point when he was asked about his intentions respecting the motion, he professed not to have the slightest idea of how he was going to go about it, or the identity of the witnesses he would call. His response to the trial judge about the thought he had given to the motion in view of the fact that he was driving out his counsel and his statement about witnesses demonstrates the soundness of the trial judge's key finding.

In **R. v. Garofoli** (1990), 60 C.C.C. (3d) 161, Sopinka, J. said at p. 198:

> ". . . Leave must be obtained to cross-examine. The granting of leave must be left to the exercise of the discretion of the trial judge. Leave should be granted when the trial judge is satisfied that cross-examination is necessary to enable the accused to make full answer and defence. <u>A basis must be shown by the accused for the view that the cross-examination will elicit testimony tending to discredit the existence of one of the pre-conditions to the authorization, as for example the existence of reasonable and probable grounds</u>.
>
> . . .
>
> The discretion of the trial judge should not be interfered with on appeal except in cases in which it has not been judicially exercised. While leave to cross-examine is not the general rule, it is justified in these circumstances in order to prevent an abuse of what is essentially a ruling on the admissibility of evidence."

In **Kutynec, supra**, Finlayson, J.A. said at p. 301:

> ". . . I see no difficulty in a trial judge asking counsel what evidence will be called on the application to exclude evidence and what witnesses will be called. Direct answers to these simple questions will often quickly determine the need for an evidentiary inquiry and will assist in deciding the format and timing of that inquiry."

I appreciate that here the appellant was without the benefit of counsel when he was asked if he intended to call witnesses on his **Charter** motion and who they would be. As I have said, and I repeat, that was a situation of his own choosing. Considering, however, that he already had a "**Garofoli**" application made on his behalf by counsel in the first trial and considering that he had already had the advice of four lawyers and was planning through Mr. Campbell to make such an application,

the appellant's response that he was not "quite certain" as to what witnesses he was calling cannot be taken as other than support for the conclusion that there was no ***bona fide*** intention on his part to make a **Charter** application.

On reviewing the record, I am satisfied that the trial judge's finding was correct.

Before leaving this subject, I simply want to say that the many safeguards built into the criminal justice system for an accused, particularly an unrepresented one, cannot be allowed to give rise to a right in an accused person to disrupt the orderly process of a trial. I believe that is what the appellant was doing here. I can do no better than refer to the decision of Proulx, J.A. in **R. v. Fabrikant** (1995), 39 C.R. (4th) 1 where he said at p. 14:

> "The governing principle which underlies the legitimacy of an order of exclusion was enunciated by the United States Supreme Court in 1899, in **Falk v. United States**, 15 App. D.C. 446 (1899), as quoted by Justice Brennan in **Illinois v. Allen, *supra***:
>
>> 'The question is one of broad public policy, whether an accused person, placed upon trial for crime and protected by all the safeguards with which the humanity of our present criminal law sedulously surrounds him, can with impunity defy the processes of the law, paralyse the proceedings of courts and juries and turn them into a solemn farce, and ultimately compel society, for his own safety, to restrict the operation of the principle of personal liberty. **Neither in criminal nor in civil cases will the law allow a person to take advantage of his own wrong** (pp. 349, 350)'."

By analogy, when an accused makes an insincere attempt to assert a right, he cannot be permitted to do so indefinitely. It is apparent that, as the trial judge found, the appellant's principal aim was not to assert his rights but to obstruct or abort the trial. That finding was at the heart of the judge's discretion not to permit cross-examination of the deponent of the affidavit in support of the application to intercept. No basis was shown by the appellant to warrant the exercise of the

discretion in his favour. On the contrary, the appellant's behaviour and the trial judge's finding support the conclusion that there was no basis. In the absence of a clear error by the trial judge in the exercise of his discretion, we must not interfere.

I would dismiss this ground of appeal.

Issue Two - Full Answer and Defence

The appellant contends that he was denied the right to make full answer and defence because he was denied his right to counsel.

In general, an accused person has the constitutional right to the effective assistance of counsel under s. 7, s. 10(b) and s. 11(d) of the **Charter.** See **R. v. Garofoli** (1988), 41 C.C.C. (3d) 97 (Ont. C.A.) per Martin, J.A. at pp. 150-152; **R. v. Newman** (1993), 79 C.C.C. (3d) 394 (Ont. C.A.) at pp. 400-404; **R. v. Munroe** (1990), 59 C.C.C. (3d) 446 (N.S.C.A.) at p. 448; **R. v. Rockwood** (1989), 49 C.C.C. (3d) 129 (N.S.C.A.) at p. 134. The appellant is not entitled to publicly funded counsel of his choice but at the highest, competent publicly funded counsel. The burden lies on him to prove that there was a breach of such **Charter** right.

I have already set out the narrative dealing with the legal advice which had been available to the appellant from the time of his preliminary inquiry until his conviction at the end of the second trial. In addition to such advice he twice had the opportunity in his trial to have counsel funded by Legal Aid. The first counsel, Gerald MacDonald, was not his counsel of choice. He has failed to demonstrate, however, that he was not competent counsel. Indeed, the trial judge referred to him on one occasion as "fine counsel".

In my opinion, nothing can be made of the fact that Legal Aid elected to pay the travel and lodging expenses of Halifax counsel to appear in Sydney on behalf of Oakey. That counsel had appeared at the first trial for a period of seven months and it is a reasonable inference that Legal Aid considered that the additional expense in

sending him to Sydney would be offset by the savings in preparation time over that which would be required for new counsel. The appellant claims that he wanted Kevin Burke, but Burke had not represented him at the previous trial as had counsel representing Oakey.

The appellant has failed to demonstrate that the availability of Gerald MacDonald was not the provision of competent counsel for the case at hand. From the appellant's perspective, the sole issue of importance in his defence was the admissibility of the wiretaps. Granted that MacDonald came in at the last minute and would not have familiarity with the vast amount of evidence offered at the first seven month trial. There is no indication, however, that he would not have had ample time to prepare for the **"Garofoli"** application.

Although the appellant declined counsel available to him at the commencement of the trial, he secured a second chance when an experienced criminal law lawyer in the person of Campbell was located. While Campbell came into the trial in midstream, he was afforded an opportunity to make the **"Garofoli"** application at a late stage. The trial judge clearly outlined how this could be done notwithstanding that wiretap evidence had already been heard. Again the appellant has failed to show that Campbell was not willing and competent to handle this application.

As I have already concluded, the appellant decided to get rid of Mr. Campbell because he had no sincere intention of putting forward a **"Garofoli"** application. The application made in Halifax by experienced counsel failed. We do not know what advice the appellant may have received from Mr. Campbell but it can be presumed he received competent advice. His obvious desire to oust Mr. Campbell to delay smooth passage of the trial as it approached its end is evidence that he considered

Campbell was of no use to him. That choice is his prerogative but he cannot now offer it in support of his contention that he was denied counsel.

Finally, at the end of the trial the appellant received advice from Mr. Zimmer and Newfoundland counsel respecting the motion for a mistrial. Mr. Zimmer came to Sydney and reviewed tapes of portions of the trial. Having no doubt been advised by his counsel, the appellant elected not to proceed with the motion for a mistrial.

This ground of appeal stands on exactly the same footing as the first. It fails for exactly the same reason. The appellant simply did not want counsel. He wanted to obstruct at all costs.

Issue Three - Bias

The appellant contends that the trial judge's conduct throughout the trial gave rise to a reasonable apprehension of bias so as to result in a miscarriage of justice.

The test to be applied in dealing with such a submission is an objective one related to the perception of a reasonable and informed observer. In **Bain v. The Queen** (1992), 69 C.C.C. (3d) 481 the Supreme Court of Canada at p. 491 stated it in the following terms:

> "In an inquiry under the **Charter**, the appropriate test for impartiality was set out by this court in **R. v. Lippé** (1991), 64 C.C.C. (3d) 513, [1991] 2 S.C.R. 114, 5 C.R.R. (2d) 31, where the court adopted the test first enunciated by de Grandpré J. in **Committee for Justice and Liberty v. Canada (National Energy Board)** (1976), 68 D.L.R. (3d) 716, [1978] 1 S.C.R. 369, 9 N.R. 115, and reaffirmed in **R. v. Valente** (1985), 23 C.C.C. (3d) 193, 24 D.L.R. (4th) 161, [1985] 2 S.C.R. 673. 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. 735). De Grandpré J. added in the next paragraph, at p. 736, that '[t]he ground for this apprehension must, however, be substantial . . .'."

Counsel for the appellant agrees that this is the test. He recognized too the gravity of questioning the fairness of a trial judge, as it amounts to a serious

challenge to the ability and integrity of a judge presiding in court. He asserts the following specific instances:

A. The reversal of his decision to allow a **"Garofoli"** application after Campbell had been given leave to withdraw

I have already set out in detail the circumstances under which the trial judge reversed himself on this point. It is clear he reversed himself because the appellant demonstrated that he had no ***bona fide*** intention to make the **"Garofoli"** application. He was stalling for time. A judge has an obligation to ensure that a trial proceeds expeditiously and is not disrupted. I have already found that the trial judge's finding that the appellant was attempting to obstruct the trial has not shown to be wrong. I am unable to accept the appellant's submission on this point.

B. Continuous displays of impatience by the trial judge with the appellant

I have reviewed the record. I agree that, on a few occasions, including in the extracts I have quoted, the trial judge displayed some impatience. The provocation by the appellant at such points was immense, and called for a stern and preemptory response from the court. A review of the record also shows throughout the entire trial the court frequently intervened to assist the appellant in the cross-examination of witnesses, in the use of exhibits and notes, and in the granting of extreme latitude on cross-examination. The trial judge ensured that the appellant had adequate time to consider objections and submissions throughout. As I have pointed out, he requested the Crown to seek counsel for him. He ordered that the appellant be furnished with counsel at one of the pre-trial conferences.

C. The alleged failure to consider the appellant's request for a mistrial

This arises out of an exchange which took place on April 28th before the trial judge decided on May 2nd to allow the appellant's **"Garofoli"** application after all.

During the exchange the trial judge twice told the appellant it was too late to make the **"Garofoli"** application and when asked if he could seek a mistrial because the tapes were played in court, he told him he was too late to make that application.

Little turns on this because the trial judge reversed the stand that he thereby took. In any case, I am satisfied that if any error occurred here it was just that - an error in making a ruling. It was not evidence of bias against the appellant.

D. Bullying and berating of the appellant

While, as I have said, the trial judge was obliged to speak sharply to the appellant at times, the record does not disclose bullying and berating.

E. Accusations towards the appellant that he was trying to derail the process and delay the inevitable

I have already referred to this. I have concluded that that is exactly what the appellant was trying to do and that the appellant has failed to show that the clear finding by the trial judge to this effect was wrong. The fact that the trial judge was forced to reach this finding because of the appellant's conduct does not furnish evidence of bias.

F. Refusal by the trial judge to appoint counsel

The trial judge did not accede to the appellant's request to appoint the counsel of his choice. He accepted the position of Legal Aid that it would not furnish travel expenses from Halifax. This, in effect, forced the appellant to accept funded counsel living in the Sydney area. It has not been shown that counsel falling in this category and, in particular, the two counsel who were ready and able to act for the appellant, were not competent. I would reject this submission.

G. The trial judge's revocation of bail after hearing evidence of an allegation of drug trafficking and then proceeding with the trial

During the course of the trial it became apparent that the appellant, who was on bail, had been charged with another drug offence in Newfoundland. Crown counsel made an application to revoke his bail. Under s. 523(2) of the **Code** the trial judge is permitted to conduct a bail hearing. On March 2, 1994, the issue of a hearing under s. 523 was raised by the Crown. The appellant had been in custody in Newfoundland relating to a narcotic offence since February 14, 1994. He had retained counsel in Newfoundland respecting that charge. On March 2, 1994, he was represented by Kevin Burke on the charge. On that date, all parties were given notice by the Crown of an intention to conduct a bail hearing. No objection was raised at any time regarding the matter being heard before the trial judge. The bail review came on for hearing on March 11th in Sydney. Gerald MacDonald was in court on behalf of the appellant and the hearing was adjourned as he was new to the case. The matter was finally disposed of on March 23rd while the appellant was still seeking to have Kevin Burke represent him, as a result of which Mr. MacDonald sought leave to withdraw.

On the argument before us, the appellant did not seriously press this point. I reject it.

Issue Four - Preferring a Direct Indictment

This issue was not raised at the trial notwithstanding that the appellant had the advice of five lawyers between the time the direct indictment was preferred and the jury found him guilty.

The appellant does not challenge the authority of the Attorney General to prefer the direct indictment. He submits however that the preferring of the indictment after the declaration of the mistrial in Halifax amounted to an abuse of process in the circumstances - that it was oppressive and vexatious. The

submission is that the Crown knew or ought to have known that the appellant had little chance of obtaining counsel for a trial in Sydney. By separating him from the French speaking accused who are to be tried in Jolliette, Quebec, he lost the opportunity to have availed himself of the representation of the French speaking accused who were defended by competent and experienced counsel such as, it is said, took place in Halifax.

A stay of proceedings as a remedy for an abuse of process can only be granted in the clearest of cases. See **R. v. Power** (1994), 89 C.C.C. (3d) 1 (S.C.C.).

I have already found the appellant declined two opportunities to be represented by competent counsel in Sydney. I do not accept the submission now made on his behalf that the average Canadian citizen would be appalled at the "oppressive conduct of the Crown in preferring the indictment". This is far from one of those "clearest of cases" which would warrant consideration of granting a stay of proceedings, even if this point had been raised in a timely manner at the trial.

Issue Five - The judge's charge to the jury

The appellant raised a number of objections to the trial judge's charge and recharges following submission by the Crown and an inquiry by the jury. The charge and the second recharge were lengthy. I have reviewed all of the charges carefully and I am satisfied that they were correct, balanced and fair. In particular, the trial judge correctly charged the jury regarding the two step process which it must apply in considering the acts and declarations of co-conspirators in a conspiracy charge. See **R. v. Carter** (1982), 67 C.C.C. (2d) 568 (S.C.C.).

The trial judge also repeatedly emphasized the burden upon the Crown to prove its case beyond a reasonable doubt and the presumption of innocence. I would reject the appellant's arguments on this issue.

In summary, I would dismiss the conviction appeal.

Issue Six - Sentence

The appellant seeks leave to appeal the sentence of 12 years imprisonment on the ground that it was manifestly excessive and that the trial judge failed to properly apply the principles of sentencing, including the disparity principle. The Crown seeks leave to appeal from the sentence on the ground that the trial judge failed to give due emphasis to the principles of deterrence and protection of the public.

At the beginning of his sentencing remarks, the trial judge referred to the background which he had outlined at the sentencing of the appellant's co-conspirator Raymond Mills. It was Mills who had arranged the purchase of the "Scotian Maid" while it was berthed at the Government Wharf at Trepassey. Mills sent Oakey, Florian Dupres and two others to make the "Scotian Maid" ready for its mission. The trial judge was of the opinion that Mills played a key role in the transshipment of the drugs from the "Scotian Maid" to the Baleine Wharf. The trial judge described the conspiracy:

> "This was an extensive, well-organized and relatively sophisticated operation requiring the co-ordination of efforts in four, possibly five provinces, if we take into consideration one of the tractors was rented in Prince Edward Island. The 'Scotian Maid' was secured, provisioned and crewed in Newfoundland. The drug off-load was organized and executed in Nova Scotia. Transportation for the off-loaded drugs was organized in New Brunswick, Nova Scotia and the Province of Quebec. Two large tractor-trailers were rented, one in New Brunswick and one in P.E.I. - and two smaller five- ton transports rented in New Brunswick. The latter were used to transfer the drugs from the wharf to the tractor-trailers which waited at a location near North Sydney. The tractor-trailers were then used to transport the drugs to Montreal; one of them, in fact, was seized with its illicit cargo near Joliette, Quebec, on July 31st, 1990. It had approximately 13 tons of hashish aboard it at the time.

. . .

Obviously, the conspiracy required a huge sum of money to finance it. Unfortunately and typically, the financiers or all of them are probably not among those arrested."

The trial judge considered Mills a key organizer. He had one prior conviction for a related offence - possession of a narcotic for the purposes of trafficking. Since the conviction was some nine years old at the time of Mills' involvement, the trial judge attached no weight to it. After briefly reviewing the case law, the trial judge sentenced Mills to 14 years incarceration.

In dealing with the appellant, the trial judge observed that he became involved in the conspiracy to import this massive load of hashish just two days before the "Scotian Maid" was to leave Trepassey for her rendezvous with the mother ship. The length of time a person is involved in a conspiracy is, however, but one consideration. The trial judge found that this was overshadowed by the fact that at the 11th hour the conspirators found themselves without a skipper qualified to take on this key role in the mission:

"In any event, the conspiracy likely would have come to a halt or at least have been indefinitely postponed were it not for the recruitment of Melvin Kenny by David Howell."

The trial judge pointed out that the taped conversations introduced at trial disclosed that the appellant did a masterful job of doing a hard sell on a reluctant Mr. Kenny. In addition to the recorded telephone conversations, the appellant personally met with Kenny on July 15th to provide details that he was not prepared to give on the telephone. He also kept in close contact with other members of the conspiracy during this time:

"I find David Howell's involvement in this conspiracy particularly despicable. He used his considerable powers of persuasion and intimate knowledge of the conspiracy to ensnare a decent individual with no prior criminal record. I'm not in any way excusing Melvin Kenny; he is an adult who has to take, and probably has taken, responsibility for his own conduct. He did receive an eight-year sentence."

The trial judge then traced the appellant's knowledge of the conspiracy and the role of the "Scotian Maid" and its captain therein. It was clear that the appellant had a large stake in the success of the operation.

> ". . . In this case, the evidence provides a clear insight into the presssure brought to bear by David Howell on his reluctant and last-minute conscript, Melvin Kenny."

The trial judge then turned to the appellant's record:

(1)	March 3, 1983	-	Breach of s. 306 Criminal Code (break and entry)
		-	suspended sentence and probation
(2)	March 25, 1985	-	Breaches of s. 118 and s. 246 Criminal Code (resisting arrest and assault)
		-	$100. fine
(3)	January 8, 1988	-	causing a disturbance
		-	$300. fine
(4)	October 23, 1990	-	assault causing bodily harm
		-	2 months' imprisonment
(5)	April 24, 1991	-	3 breaches of recognizance
		-	30 days' imprisonment
(6)	November 2, 1990	-	2 breaches of s. 4(1) N.C.A. which occurred on November 30, 1988 and January 10, 1989
		-	16 months' imprisonment on each count (concurrent)"

The trial judge considered it significant that the appellant was awaiting trial on the last two matters at the time he committed the subject offence.

The presentence report described a 28 year old single, unemployed male with a grade school education and some adult upgrading. He had a drug abuse problem but apparently was then living drug free. He had a sporadic employment history. The trial judge said:

> ". . . there is no doubt in my mind that David Howell is not experiencing any trace of remorse. He is a manipulative individual who sees himself as a victim. And this was obvious from his conduct throughout the trial

> of this matter. The prospects for his rehabilitation are remote. He will likely reintegrate into the drug culture upon release."

The trial judge concluded that the appellant required a sentence designed to specifically deter him.

Finally, the trial judge took into account the fact that the appellant had been incarcerated for six months before his conviction in fixing the period of 12 years in a federal institution.

On these two applications for leave to appeal the sentence we are governed by s. 687(1) of the **Code** which provides:

> "687 (1) Where an appeal is taken against sentence the court of appeal shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against, and may on such evidence, if any, as it thinks fit to require or to receive,
>
> (a) vary the sentence within the limits prescribed by law for the offence of which the accused was convicted; or
>
> (b) dismiss the appeal."

At the sentencing, the appellant sought to introduce correspondence between the Crown and the defence in a previous plea negotiation involving the appellant during the first trial. Correspondence dated May 13, 1993 and marked "without prejudice" was forwarded by Robert Crosby, agent of the Attorney General, to Michael Cooke, a lawyer who had approached the Crown to enter into plea negotiations during the course of the first trial. At that time, Cooke was representing Raymond Mills. The letter stated in part that on a "without prejudice" basis the Crown would agree to a joint submission should the appellant wish to enter a plea of guilty. The change of plea would save some time during the trial and, "given many other factors, some of which have been discussed this morning", the Crown was prepared to make representations that the appellant serve six years. The letter required the appellant's decision that same day and concluded with a statement that

the letter was not to be taken to bind the Crown by the offer should the trial of the appellant continue. Obviously, the proposed deal never materialized.

The trial judge rejected an argument that the correspondence was privileged, as the public should not be kept in the dark about the fact that such negotiations go on. On the question of relevancy, however, he was satisfied that the letter was not relevant to the decision that he was called to make following a complete trial before him. In his view the appropriate sentence for the appellant must be determined solely on the basis of the facts before the court. The letter, he said, was inadmissible on the sentencing.

I agree with the trial judge. It has long been recognized that the Crown frequently offers leniency in return for a plea of guilty. Clearly, the effectiveness of the administration of the criminal law depends upon a large number of guilty pleas. Just as in civil cases, compromise ought to be encouraged. Accordingly, in my view, when a proposal of settlement is not accepted by an accused who elects instead to proceed to a full trial, previous negotiations are irrelevant. See **R. v. Pabani** (1994), 29 C.R. (4th) 364 (Ont.C.A., leave to appeal to Supreme Court of Canada denied 33 C.C.R. (4th) 405); **R. v. White** (1982), 39 Nfld. and P.E.I. R. 197 (Nfld. C.A.).

In my opinion, this Court must assess the fitness of the sentence by reviewing the circumstances of the offence and the offender as disclosed to the trial judge and by the application of the proper principles of sentencing. Nothing would be gained by attempting to investigate submissions made at an earlier time in circumstances not fully known to us.

The appellant suggests that the disparity principle is relevant here because other accused in this same conspiracy have, with the exception of Raymond Mills, received lesser sentences. The difficulty with this submission is simply that the other accused had pled guilty and did not play such a significant part in the

conspiracy as did the appellant. The appellant's role was a major one, nearly as great as that of Raymond Mills. I reject this contention.

I have outlined the circumstances of the offence and the offender. The principles of sentencing are clear. See **R. v. Grady** (1973), 5 N.S.R. (2d) 264. It is also clear that, as mandated in **R. v. Cormier** (1974), 9 N.S.R. (2d) 687, we should not interfere with the sentence unless the trial judge has committed error in principle or the sentence is clearly inadequate or excessive.

Long sentences such as that which were imposed here have been held by this Court to be appropriate for major players in the drug trade. See in particular **R. v. Devanney** (1993), 126 N.S.R. (2d) 362 (N.S.C.A.) and **R. v. Whitehead** (1993), 127 N.S.R. (2d) 389 (N.S.C.A.).

If anything, the gravity of the appellant's offence might well have warranted a greater sentence than that imposed by the trial judge. However, the **Cormier** principle must be kept in mind and upon the application of it, I am satisfied that in crafting this particular sentence, the trial judge made no error in principle and that the sentence was neither clearly inadequate nor clearly excessive.

I would grant leave to both the appellant and the Crown but dismiss their sentence appeals respectively.

Chipman, J.A.

Concurred in:

Hallett, J.A.

PUGSLEY, J.A.: (dissenting, in part)

I have had the benefit of reasons of Justice Chipman.

I am in agreement with his conclusion to dismiss the appeal respecting issues two to five inclusive.

I respectfully disagree with his conclusions respecting issue one. In my opinion, the trial judge erred when, on April 19th, he reversed his earlier decision allowing Mr. Howell's application to conduct a "Garofoli" *voir dire*. In view of my intended disposition, I do not propose to comment on issue six respecting sentence.

It is helpful to review the chronology of events concerning the Garofoli motion:

— On April 28th, the trial judge determined that the interceptions would be admitted because Mr. Howell had not given notice of a charter application;

— The trial judge reversed his position on the afternoon of April 29th when he advised counsel, and Mr. Howell, by letter, that he would "permit Mr. Howell to make a charter motion regarding the lawfulness of the interceptions". He concluded that had Mr. Howell been asked whether he intended to make a charter motion, his answer would have been "emphatically affirmative". He went on to say that if he ruled the tapes inadmissible "then the jury will be told to give a directed verdict of not guilty (unless the Crown has other evidence implicating Mr. Howell)";

— On May 2nd, the trial judge, in open court, expanded on the reasons given in his letter. He acknowledged that "once the tapes are admitted, the jury may have little difficulty in deciding his fate, which is another way of saying that the contents of the tapes are obviously very prejudicial to Mr. Howell's defence. I do not think he is trying to deceive the Court when he says he was counting upon challenging the lawfulness of the intercepts and, therefore, their admissibility..." The

trial judge also advised that he would allow Mr. Howell to cross-examine Corporal Hildebrand on his affidavit as edited.

— After Mr. Campbell was granted permission to withdraw on May 19th, the trial judge addressed the following questions to Mr. Howell:

The Court: Is it still your intention to make a charter motion?

Mr. Howell: Yes My Lord it is.

The Court: How?

Mr. Howell: Well...

The Court: Do you intend to call witnesses on it?

Mr. Howell: Yeah.

The Court: Who?

Mr. Howell: I'm not quite certain as to who yet but I'm seriously considering calling witnesses on it yes. I haven't decided who and exactly who.

— Shortly thereafter, the trial judge determined that Mr. Howell neither "has the ability nor the desire to make a *bona fide* charter application... it is now clear that the intended charter motion is no more than another stalling tactic. The Crown may therefore proceed on the basis that the relevant intercepts were lawful".

— On May 24th, the judge elaborated on the reasons he gave on May 19th for denying Mr. Howell an opportunity to challenge the validity of the authorization. He said:

"Prior to my remarks (i.e., on May 11th I had reviewed the affidavit in support of the application for an authorization... the affidavit which is also dated May 25, 1990 is 147 pages in length. I've also reviewed the extensive cross-examination of Corporal Hildebrand, which was conducted in June, 1993... I also reviewed the submissions of counsel made before Justice Boudreau at that time.

Based on that review, it is clear that Justice Boudreau had abundant evidence before him to conclude that the statutory pre-conditions for the granting of an authorization existed. In my opinion, the challenge to the validity of this authorization, based upon the evidence put before Justice Boudreau, was totally without merit."

— Later on, in the afternoon of the 24th, the trial judge advised that he had omitted reading the following paragraph from his prepared remarks delivered that morning:

"The transcripts from the previous application were treated by me as notice of the intended application by Mr. Howell. By saying that the previous challenge is without merit, I am, in effect, stating that the cross-examination of the affiant is not necessary for Mr. Howell to make full answer and defence. There is no right to such cross-examination, the material does not satisfy me that Mr. Howell could show any basis that cross-examination of Corporal Hildebrand would elicit testimony tending to discredit the existence of one of the pre-conditions to the authorization."

A review of the transcript would suggest that the following matters were critical in the decision to reverse the permission granted respecting the charter motion.

a. Mr. Howell did not have the ability to make the charter application;

b. Mr. Howell did not have the desire to make a *bona fide* charter application, i.e., the intended motion is no more than "another stalling tactic";

c. After reviewing Corporal Hildebrand's 147-page affidavit as well as the submissions of counsel before Justice Boudreau, the trial judge determined the challenge was without merit and leave to cross-examine Corporal Hildebrand would be denied.

It is helpful to review each of these considerations in turn.

I. Ability to Make the Application

On the afternoon of April 29th, the trial judge determined that Mr. Howell, then unrepresented, could make the application. The trial judge took steps to ensure that he, as well as Mr. Howell, would have the transcripts of the cross-examination of

Corporal Hildebrand as well as the arguments of counsel before Justice Boudreau, so that Mr. Howell would have an opportunity to present his defence.

While the trial judge, on May 19th, was in a better position to assess the complexity of the motion after he read the submissions of counsel before Justice Boudreau and the transcript of the cross-examination of Corporal Hildebrand, before Justice Boudreau, in my respectful opinion, the fact an accused is unrepresented should not play a part in the decision to deprive him of the opportunity of making a charter motion, even if he was instrumental in causing counsel to withdraw.

2. No *bona fide* Desire

Mr. Howell was not required to consent to the Crown being relieved of the obligation of proving continuity of exhibits. Once given, he was entitled to revoke that consent, with the risk of resulting consequences. He had the right to control his own defence (**R. v. Swain** (1990), 63 C.C.C. (3d) 481 (S.C.C.)).

One consequence was the withdrawal of his counsel, Mr. Campbell.

Another consequence was the trial judge's determination that the withdrawal did not invalidate the consent respecting exhibits introduced prior to the change in instructions.

These results could have been, and perhaps were, anticipated by Mr. Howell.

The additional penalty of losing the right to advance the charter motion without the opportunity to make full and informed submission, in my opinion, could not have been reasonably anticipated and was not warranted in the circumstances, nor necessary to preserve the integrity of the trial.

The motion could have been made by Mr. Howell, personally, as was contemplated on April 29th, with minimal delay to the ultimate disposition of the trial.

It is of interest that the withdrawal of consent respecting continuity does not appear to have unduly prolonged the trial. The balance of the evidence, as well as submissions to the jury, were concluded in less than four court days after the ruling of May 19th.

In December, 1993, Crown counsel (who had the benefit of conducting the Crown's case from May, 1993 to November 25, 1993, before Mr.Justice Boudreau) advised the Court that she estimated the forthcoming retrial would take ten to twelve weeks.

The evidence commenced on April25, 1994.

On April 28th, Crown counsel advised the Court that "based on the last trial we're about six weeks ahead of schedule at this point".

The jury's verdict was rendered on June 3rd, after only twelve full days and five one-half days of sitting.

Mr. Howell was represented by Mr.Campbell, from May 9th to May 19th, for six of the full days. Hence, Mr. Howell conducted his own defence for six days and five one-half days.

A review of the transcript does not disclose a prolixity of meritless motions advanced by Mr. Howell, or excessively lengthy cross-examinations by him.

While Mr. Howell may have sought avenues to delay the proceedings, it is clear that he was not successful even to a limited degree. His apparent reversal of instructions to Mr. Campbell, respecting agreement on continuity, was appropriately and effectively handled by the trial judge by declaring that "any agreements made on Mr. Howell's behalf by Mr. Campbell will stand".

This tactic was apparently the "last straw" for the trial judge, but to conclude it was simply "another delaying tactic", and should result in reversing an earlier

decision permitting a critical charter motion to be made was, in my respectful opinion, unwarranted and constitutes error.

While a trial judge has a right to control the court process, matters had not deteriorated to the extent that prompted the intervention in **R. v. Fabrikant** (1995), 39 C.R. (4th) 1 (Qué. C.A.) or in **R. v. Pawliw** (1985), 23 C.C.C. (3d) 14 (B.C.S.C.). The trial judge, at all times, maintained effective control, and the trial was not unduly lengthened by any actions taken by Mr. Howell.

It may be assumed that Mr. Howell understood that the chance of a successful charter motion would be lessened if he took a position that could result in losing Mr. Campbell's services. Mr. Howell, however, should not be taken to have considered that he would lose all opportunity in making the motion if he withdrew his earlier consent to continuity of exhibits.

Mr. Howell knew the motion was critical to a successful defence. The trial judge had advised that he thought it was critical as well, and, after all, was prepared to permit Mr. Howell to cross-examine Corporal Hildebrand and make submissions on the motion, while unrepresented by counsel.

It must have been patent to everyone connected with the case that Mr. Howell had no chance of an acquittal unless he was successful in keeping out the intercepts. While he may have withdrawn instructions to counsel to agree on continuity of exhibits, in the hope that the Crown might slip up in proving its case, it was not, in my opinion, reasonable to conclude he was not *bona fide* in his desire for the application to proceed.

2. Materials in the Mistrial

The trial judge, in my respectful opinion, erred when he concluded, on the basis of the "materials" in the previous trial, that cross-examination of Corporal

Hildebrand was not necessary to enable Mr.Howell to make full answer and defence.

The conclusion was reached, without any explanation to Mr. Howell by the trial judge, that he was considering reversing his April 29th ruling, permitting the charter application. Mr. Howell should have been called upon to make submissions on that issue.

The conclusion was reached without considering that Mr. Howell wished to call witnesses, not heard at the previous trial, on the application. The trial judge noted that with respect to Corporal Hildebrand "the questions won't be identical, I suppose".

The conclusion ignores the Crown's agreement to Mr. Howell conducting cross-examination of Corporal Hildebrand. It should be noted that the consent arose after the trial judge decided to permit the charter motion to be made.

The conclusion ignores the trial judge's comments in open court on at least two prior occasions that as a consequence of the mistrial "the slate is wiped clean and he (i.e., Mr. Howell) is entitled to start over again".

The trial judge would appear to be on sound footing when he expressed such an opinion (see the comments of Lamer, J. on behalf of the Court in considering whether a finding on a *voir dire* at a preliminary was binding at the trial level in **Duhamel v. The Queen** (1984), 15 C.C.C. (3d) 491 (S.C.C.)).

Chief Justice Porter stated, in **Regina v. Hilson** (1958), 121 C.C.C. 139 (Ont. C.A.) at 142:

> "The ruling of the trial judge at this trial that the statement was admissible, must not be taken in any sense to be binding upon the trial judge at a new trial of this accused. The trial judge of the new trial must decide any such issue that may then be raised, solely upon the evidence adduced before him at that time." (See also MacDonald, J.A. in **R. v. Owen** (1983) 4 C.C.C. (3d) 538 (N.S.C.A.)). [emphasis added]

A trial judge must be satisfied that there is some basis on which intercepts could be excluded before a charter motion is permitted to proceed (**R. v. Kutynec** (1992), 78 C.C.C. (3d) 289 (Ont. C.A.)). This issue was not specifically addressed at trial although the trial judge had indicated in his letter of April 29th that the intercepts were critical to the Crown's case. He was of course aware that Justice Boudreau had permitted the charter motion to proceed. The trial judge also declared that there was "no doubt in my mind that Mr. Howell himself had never let go of the idea that he was going to challenge these authorizations".

A trial judge must also be satisfied that cross-examination of the affiant on the affidavit filed in support of the authorization is necessary in order for the accused to make full answer and defence (**R. v. Garofoli** (1990), 60 C.C.C. (3d) 161 at 198 (S.C.C.)). Crown counsel pointed out to the trial judge, citing **Garofoli**, (*supra*) that while cross-examination in such cases is not automatic, the trial judge could conclude the test had been met in view of Justice Boudreau's permission to Mr. Howell's counsel to cross-examine Corporal Hildebrand.

The trial judge, without detailing any reasons, determined that "surely that would be just a further waste of time to spend time deciding whether or not he should be cross-examined. So, you know. I'll take my chances. We're going to cut right to the chase on that and Mr. Howell is going to be permitted to cross-examine Corporal Hildebrand".

The threshold issues, therefore, had presumably been met when the ruling of April 29th was issued.

In my respectful opinion, the three reasons advanced by the trial judge are not sufficiently cogent to cause a reversal of the ruling of April 29th, and it was in error, so to rule.

With respect to the appropriate remedy, I would follow the procedure provided in s. 683(1)(b) of the **Criminal Code**.

It provides:

683(1) For the purposes of an appeal under this Part, the court of appeal may, where it considers it in the interests of justice, ...

(b) order any witness who would have been a compellable witness at the trial, whether or not he was called at the trial;

(i) to attend and be examined before the court of appeal, or

(ii) to be examined in the manner provided by rules of court before a judge of the court of appeal, or before any officer of the court of appeal or justice of the peace or other person appointed by the court of appeal for the purpose.

(c) admit, as evidence, an examination that is taken under subparagraph (b)(ii).

I would order that the cross-examination of Corporal Hildebrand by Mr. Howell and/or his counsel, together with the examination by Mr. Howell and/or counsel of any other relevant witnesses take place before a person designated by the Chief Justice of Nova Scotia, at a date to be determined by the Chief Justice, ordering that the transcript of the examination be filed with the present panel, permitting the parties to file additional submissions within thirty(30) days thereafter, counsel then to apply for a date for hearing before the present panel.

[See procedure followed in **R. v. Hiscock** (1991), 68 C.C.C. (3d) 183.]

Pugsley, J.A.