

**NOVA SCOTIA COURT OF APPEAL**

**Cite as: R. v. Curragh Inc., 1995 NSCA 234**

**BETWEEN:**

HER MAJESTY THE QUEEN	)	David G. Coles
	)	for the Appellant
Appellant	)	
- and -	)	
	)	Gordon R. Kelly and N. Kent Clarke
	)	for the Respondent,
CURRAGH INC., GERALD JAMES	)	Gerald James Phillips
PHILLIPS and ROGER JAMES PARRY	)	
Respondents	)	
	)	Anne M. Malick, Q.C. and
	)	John A. McKinlay
	)	as watching counsel
	)	
	)	
	)	Application Heard:
	)	March 30, 1995
	)	
	)	Decision Delivered:
	)	April 7, 1995

**BEFORE THE HONOURABLE JUSTICE RONALD N. PUGSLEY,  
IN CHAMBERS**

Revised Decision: The text of the original decision has been corrected according to the attached erratum.

**PUGSLEY, J.A.: (in Chambers)**

The trial of Gerald Phillips, and Roger Parry, the former mine manager and underground manager, respectively, at the Westray Coal Mine in Pictou County, Nova Scotia, who were both charged with the offence of manslaughter and criminal negligence arising from the deaths of 26 miners on May 9, 1992, commenced on February 6, 1995.

During the course of the trial, on March 9, 1995, the Crown made a motion that the trial judge disqualify himself from continuing to preside at the trial because of a reasonable apprehension of bias, and to declare a mistrial.

On March 14, 1995, the trial judge, after hearing *viva voce* evidence, and considering submissions, dismissed the recusal motion.

On March 22, 1995, a document entitled "Notice of Appeal" dated March 17, 1995, signed by Mr. Bright, counsel for the Crown, was served on Mr. Kelly, counsel for Mr. Phillips.

The relief sought is that "the appeal be allowed, the judgment of the Honourable Justice N.R. Anderson dismissing the motion for a mistrial set aside, and an order issued declaring a mistrial in this proceeding."

Mr. Bright had not filed the notice of March 17th with the Registrar of the Court, and shortly after service of the document on Mr. Kelly, advised that as a consequence of a change in instructions from his client, the notice would not be filed with the Registrar.

Notwithstanding this advice, Mr. Kelly filed with the Registrar, and served on Mr. Bright, an application for an order quashing Mr. Bright's notice on the ground *inter alia* that no appeal lies to this Court from the decision of a trial judge made in the course of a continuing trial in relation to indictable offences. Mr. Kelly also requests that Mr. Bright's notice be dismissed with costs.

Section 674 of the **Criminal Code**, under the heading "Right of Appeal", provides:

No proceedings other than those authorized by this Part and Part XXVI shall be taken by way of appeal in proceedings in respect of indictable offences.

Part XXVI has no application to the present matter.

Under the heading "RIGHT OF ATTORNEY GENERAL TO APPEAL/Acquittal/Appeal against verdict of unfit to stand trial/Appeal against ineligible parole period", s. 676 provides as follows:

(1) The Attorney General or counsel instructed by him for the purpose may appeal to the court of appeal

- (a) against a judgment or verdict of acquittal of a trial court in proceedings by indictment on any ground of appeal that involves a question of law alone;
- (b) against an order of a superior court of criminal jurisdiction that quashes an indictment or in any manner refuses or fails to exercise jurisdiction on an indictment;
- (c) against an order of a trial court that stays proceedings on an indictment or quashes an indictment; or
- (d) with leave of the court of appeal or a judge thereof, against the sentence passed by a trial court in proceedings by indictment, unless that sentence is one fixed by law.

(2) For the purposes of this section, a judgment or verdict of acquittal includes an acquittal in respect of an offence specifically charged where the accused has, on the trial thereof, been convicted or discharged under section 736 of any other offence.

(3) The Attorney General or counsel instructed by the Attorney General for the purpose may appeal to the court of appeal against a verdict that an accused is unfit to stand trial, on any ground of appeal that involves a question of law alone.

(4) The Attorney General or counsel instructed by him for the purpose may appeal to the court of appeal in respect of a conviction for second degree murder, against the number of years of imprisonment without eligibility for parole, being less than twenty-five, that has been imposed as a result of that conviction.

The Crown's request for relief does not arise from any of the categories enumerated in this section.



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) March 30, 1995  
)  
) Decision Delivered:  
) April 7, 1995

**BEFORE THE HONOURABLE JUSTICE RONALD N. PUGSLEY,  
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**ERRATUM**

Page 1, first paragraph, last line, date of May 10, 1992 should read **May 9, 1992**. Also, pages 3 and 4 should read pages 2 and 3.