R. v. Henkel, 2003 ABCA 23

Date: 20030122
Docket: 0103-0153-A
0103-0154-A
0103-0155-A

IN THE COURT OF APPEAL OF ALBERTA

THE COURT:

THE HONOURABLE MADAM JUSTICE RUSSELL
THE HONOURABLE MR. JUSTICE BERGER
THE HONOURABLE MR. JUSTICE RITTER

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

- and -

JERRY ERNEST HENKEL
EDMOND MICHAEL GUERTIN
NOLAN TIMOTHY SCOTT

Respondents/
Accused

Appeal from the Decision of
THE HONOURABLE MADAM JUSTICE L.D. ACTON
Dated the 3rd day of April, 2001

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE RITTER
CONCURRED IN BY THE HONOURABLE MADAM JUSTICE RUSSELL

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE BERGER
CONCURRING IN THE RESULT

COUNSEL:

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For the Appellant

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For the Respondents/Accused

REASONS FOR JUDGMENT OF
THE HONOURABLE MR. JUSTICE RITTER

[1] This appeal raises two issues. The first is whether the failure to provide timely disclosure by the Crown is, by itself, a breach of section 7 of the ***Canadian Charter of Rights and Freedoms***, Part I of the ***Constitution Act***, *1982*, being Schedule B to the ***Canada Act*** *1982* (U.K.), 1982, c. 11 (the "*Charter*") where there is a finding that the failure did not impair the respondents' ability to make full answer and defence. The issue arises in the context of an appeal from the dismissal of a motion for certiorari based on the alleged lack of jurisdiction of the Provincial Court of Alberta to grant a remedy of costs for a breach of the Crown's obligation to provide timely disclosure to the respondents.

[2] It is my conclusion that there is a discrete section 7 *Charter* right of disclosure. Though at times it may constitute an element of the right of full answer and defence, it also stands on its own, such that it can form the foundation of an appropriate remedy pursuant to section 24(1) of the *Charter*.

[3] The second issue is whether a Queen's Bench Judge can award costs against the Crown on its unsuccessful certiorari application, in the absence of statutory authority to do so. In my view, following the reasoning in ***R.* v. *974649 Ontario Inc.***, *infra*, a Queen's Bench Judge can grant costs.

BACKGROUND

The Stay Application

[4] The three respondents were all charged with impaired driving offences. They were represented by the same counsel who made an early request for specific and detailed disclosure to the Crown's office in Wetaskiwin. When disclosure did not occur in a manner that satisfied counsel for the respondents, the respondents engaged separate counsel and brought an application before Provincial Court Judge Gaede for an order staying the prosecutions. The original counsel then testified about ongoing difficulties that he had been and was experiencing regarding timely disclosure, in the area of Alberta that was serviced by the Crown's Wetaskiwin office.

[5] The Chief Crown counsel for that office also testified at the stay application hearing and described a two stage process of disclosure where certain information was provided at the first court appearance and the balance of information was only provided if the person charged forced a trial by a plea of not guilty. This two stage process was utilized regardless of the information requested by an accused person and regardless of the availability of additional information prior to the first appearance.

[6] The provincial court judge held that the Crown had a broad obligation to disclose all material and information in its possession and that disclosure should occur before an accused being called upon to elect mode of trial or to plead to the charge. He determined that the late disclosure of witness statements in the possession of the police violated the accused's *Charter* rights as set forth in ***R.* v. *Stinchcombe***, [1991] 3 S.C.R. 326, 130 N.R. 277, 68 C.C.C. (3d) 1.

[7] With respect to remedy, he determined that the late disclosure was not so egregious as to warrant a judicial stay. He found that the breach of the obligation of timely disclosure did not impair the ability of the respondents to make full answer and defence. Finally, he decided that the breach of the right of timely disclosure called for a remedy by way of a costs award.

The Certiorari Application

[8] The Crown sought to set aside the costs award through a certiorari application made in the Alberta Court of Queen's Bench. It argued that the Provincial Court lacked jurisdiction because there had to be a breach of section 7 of the *Charter* before the remedial provisions of section 24(1) of the *Charter* could be engaged. The chambers judge dismissed the application, holding that the breach of the obligation of timely disclosure was "a real breach in and of itself" (at para. 5, decision unreported).

[9] She also determined that even if she was wrong in this conclusion, she would exercise her discretion and decline to interfere with the costs award.

ISSUES

[10] The Crown advances two issues in this appeal:

(a) Is the breach of the right of timely disclosure a separate section 7 *Charter* breach which may found a remedy under section 24(1) of the *Charter* even after a finding that the ability to make full answer and defence has not been impaired?

(b) Can an award of costs in an application for a prerogative writ brought by the Crown in criminal proceedings be granted by a Queen's Bench Justice who dismisses that application?

ANALYSIS

[11] The rationale for requiring timely disclosure is set forth by the Supreme Court in ***R.* v. *Stinchcombe***, *supra*, where Sopinka J. for the unanimous Court stated that initial disclosure

should occur before the accused is called upon to elect the mode of trial or to plead. He determined that this process would ensure that accused persons are aware of the Crown's strengths and weaknesses before they are called before the court. It would also foster the resolution of many charges either by withdrawal of charges or by early guilty pleas. I also conclude that this process enables the accused person to obtain the benefit of being able to advise the court that he or she has entered a guilty plea at the first reasonable opportunity.

[12] In ***Stinchcombe***, Sopinka J. also held that the obligation of early disclosure would be triggered by a request by or on behalf of the accused. If the request was timely, it should be complied with so as to give the accused sufficient time before the election or plea to consider the information.

[13] The provincial judge determined that the system in place in the Wetaskiwin area did not comply with the requirement of early disclosure, as the information initially provided did not match that requested by respondent's counsel, whether or not the requested information was available at the time. Also, he referred to specific requests that were made with respect to the three respondents which were not met. Crown counsel did not dispute these findings during this appeal. The Crown acknowledges that there has been a breach of the Crown's obligation to disclose. It argues, however, that the right of disclosure does not exist as a discrete *Charter* right so as to permit the imposition of a remedy under section 24(1) of the *Charter*, as the clear wording of that section provides that remedies may only be afforded where rights and freedoms guaranteed by the *Charter* have been infringed or denied.

[14] I come to a different conclusion, as, in my view, has the Supreme Court on a number of occasions. I conclude that the Crown is attempting to have a two step process amalgamated into one step. By this I mean that the initial enquiry is whether there has been a *Charter* breach. If the answer is yes, then the court needs to consider what, if any, remedy should follow. When the remedy proposed is a stay or the setting aside of a conviction, it is probable that the breach will have to be so serious as to constitute an impairment of the accused's right of full answer and defence. Another possible route to these remedies is where the accused establishes that the failure to provide timely disclosure came about as a result of serious misconduct on the part of the Crown.

[15] However, in the absence of such impairment or misconduct, the accused may still be granted a lesser remedy such as an order requiring disclosure of the information sought, an adjournment, or, less frequently, an award of costs. The former two of these lesser remedies is frequently provided by trial courts. The jurisdiction to grant these remedies arises from the breach of the right of disclosure and not just as a result of the inherent jurisdiction of trial courts to control their own process: see ***R.* v. *Dixon***, *infra.*

[16] This two step process was described by McLachlin C.J. in ***R.* v. *974649 Ontario Inc.***

(2001), 206 D.L.R. (4th) 444, 279 N.R. 345, 159 C.C.C. (3d) 321 (S.C.C.) at para. 14:

> The *Charter* guarantees the fundamental rights and freedoms of all Canadians. It does this through two kinds of provisions. The first are provisions describing the rights and freedoms guaranteed. The second are provisions providing remedies or sanctions for breaches of these rights. If a law is inconsistent with the *Charter*, s. 52 of the *Constitution Act, 1982* provides that it is invalid to the extent of the inconsistency. On the other hand, if a government action is inconsistent with the *Charter*, s. 24 provides remedies for the inconsistency. If the violation produced evidence that the Crown seeks to use against the accused, s. 24(2) provides that the court must exclude the evidence if its admission would bring the administration of justice into disrepute. In other cases, s. 24(1) permits "a court of competent jurisdiction" to provide "such remedy as the court considers appropriate and just in the circumstances". If a remedy is to be had in the instant case, it must issue under s. 24(1).

[17] In ***R.* v. *Dixon***, [1998] 1 S.C.R. 244, 222 N.R. 243, 122 C.C.C. (3d) 1, Cory J. also dealt with the necessary two step analysis when considering matters such as the one that gives rise to this appeal. At para. 31 he stated:

> The right to disclosure is but one component of the right to make full answer and defence. Although the right to disclosure may be violated, the right to make full answer and defence may not be impaired as a result of that violation. Indeed, different principles and standards apply in determining whether disclosure should be made before conviction and in determining the effect of a failure to disclose after conviction. For instance, where the undisclosed material is available for review at trial, the presiding judge will evaluate it in relation to the ***Stinchcombe*** threshold to determine whether the Crown breached its obligation to disclose by withholding the material. If it has, an order for production or perhaps an adjournment will be the appropriate remedy. Obviously, these remedies are no longer available after conviction. At this stage, an appellate court must determine not only whether the undisclosed information meets the ***Stinchcombe*** threshold, but also whether the Crown's failure to disclose impaired the accused's right to make full answer and defence. Where an appellate court finds that the right to make full answer and defence was breached by the Crown's failure to disclose, the appropriate remedy will depend on the extent to which the right was impaired. Where, as here, the accused was tried before a judge alone, the judge has provided thorough reasons for the decision, and the undisclosed evidence is available for review, an appellate court is particularly well placed to assess the impact of the failure to disclose on the accused's ability to make full answer and defence at trial.

[18] From this discussion it can be seen that the initial enquiry as to a *Charter* breach is satisfied when there is a failure to disclose information that meets the ***Stinchcombe*** threshold. Once that threshold is met, then the second part of the analysis will be engaged. Dependant on the timing of the application, the seriousness of the breach, and its effect on trial fairness, the remedy can range from no remedy at all to the imposition of a judicial stay.

[19] The issue of whether the breach of the right of disclosure is a separate section 7 *Charter* right was squarely before the Supreme Court in ***R.* v. *La***, [1997] 2 S.C.R. 680, 148 D.L.R. (4th) 608, 116 C.C.C. (3d) 97, where Sopinka J. rejected the analysis urged by the Crown and which was also that advocated by the minority. He stated at para. 23:

> With all due respect to the opinion expressed by my colleague Justice L'Heureux-Dubé to the effect that the right to disclosure is not a principle of fundamental justice encompassed in s. 7, this matter was settled in ***Stinchcombe***, and confirmed by the decision of this court in ***R.* v. *Carosella*** [*infra*]. In ***Stinchcombe,*** the right to make full answer and defence of which the right to disclosure forms an integral part was specifically recognized as a principle of fundamental justice included in s. 7 of the *Charter*.

[20] The Crown argues that this statement does not clearly state that the right of disclosure is a discrete right and that the application of this principle by the majority led to the result it urges. I agree that the result, being the rejection of the requested relief, a judicial stay, seems to support that analysis. However, this result was achieved only because the requested relief was a judicial stay, which is to be granted only in the clearest of cases where the ability to make full answer and defence has been impaired.

[21] The facts in ***La*** involved the inadvertent loss of evidence by a police officer. This evidence was a tape recording made for purposes other than the criminal investigation. The tape recording was accompanied by a written statement from the same witness and a report from the police officer. There was no intentional misconduct on the part of the officer.

[22] Sopinka J. contrasted these circumstances to those in ***R.* v. *Carosella***, [1997] 1 S.C.R. 80, 142 D.L.R. (4th) 595, 112 C.C.C. (3d) 289, where the evidence in question was deliberately destroyed, was relevant, and was subject to disclosure. ***Carosella*** resulted in a stay; ***La*** did not. Neither case stands for the proposition that the right to disclosure is not a *Charter* right unless it is elevated to an impairment of the ability to make full answer and defence. What they stand for is that a stay, the effect of which is equivalent to a determination of not guilty, will not be granted unless the ability to make full answer and defence has been impaired.

[23] It is noteworthy that the minority in ***La*** parted with the majority only in relation to this

one issue. Both agreed on the result, but the minority would have also rejected the requested stay on the basis advanced by the Crown, that is, there is no discrete *Charter* right of disclosure unless the breach of that right impairs the ability to make full answer and defence.

[24] The Crown argues that a number of decisions come to the opposite conclusion. I am of the view that they do not. Both ***R.* v. *Grimes*** (1998), 59 Alta. L.R. (3d) 210, 122 C.C.C. (3d) 331, 49 C.R.R. (2d) 308 (C.A.) and ***R.* v. *Biscette***, [1996] 3 S.C.R. 599, 203 N.R. 244, 110 C.C.C. (3d) 285 involved a request for a stay in circumstances where the applicant was unable to make out a case of impairment of the ability to make full answer and defence or serious misconduct on the part of the authorities. Also, in ***Biscette*** the record was found to be lacking in the sense that it was far from clear that much of the information alleged to be missing was sought or was not provided.

[25] ***Grimes*** goes so far as to suggest that a distinction must be made between cases where the remedy sought is a stay and cases where "some lesser remedy such as ordering disclosure, granting an adjournment, or a new trial" is that which is sought (at para. 22). Thus, this Court has previously suggested that remedies to the point of ordering a new trial are not fettered by the requirement of demonstration of an impairment of the ability to make full answer and defence.

[26] Another decision cited by the Crown, ***R.* v. *Antinello*** (1995), 165 A.R. 122, 97 C.C.C. (3d) 126, 39 C.R. (4th) 99 (C.A.), involved late disclosure that clearly impaired the ability of the accused to make full answer and defence, as his counsel's ability to prepare for a last minute informant witness was significantly compromised. This resulted in a new trial being directed rather than the imposition of a judicial stay, as by the time the new trial occurred counsel would be in the position to adequately prepare. This decision illustrates circumstances where the remedy of a new trial is appropriate and discussion about that remedy really does not assist in the analysis of whether the right to timely disclosure is a right in itself embraced by section 7 of the *Charter*. I agree that where the remedy sought is a new trial, an accused will have to show that trial fairness is affected. That is not the case where, in pre-trial proceedings, the remedy granted is an order for disclosure, an adjournment, or an award of costs. With respect to the first two remedies, the accused need only show that he or she has met the ***Stinchcombe*** threshold. With respect to an award of costs, the accused may additionally be required to show a level of prosecutorial misconduct: see ***R.* v. *Robinson*** (1999), 75 Alta. L.R. (3d) 117, 250 A.R. 201, 142 C.C.C. (3d) 303 (C.A.) but see also ***R.* v. *974649 Ontario Inc.***, *supra*, *contra*. However, the accused is not required to show that his or her ability to make full answer and defence has been impaired.

[27] The issue of the necessary level of prosecutorial misconduct is not an issue in this appeal, as the Crown restricted its application for certiorari and its notice of appeal to the questions of the Provincial Court's jurisdiction and of the ability of the Queen's Bench judge to

award costs on the failed certiorari application.

[28] With respect to the second ground of appeal advanced by the Crown, I conclude that the chambers judge made no error. In ***R.* v. *974649 Ontario Inc.***, *supra*, the Supreme Court held that s. 24(1) of the *Charter* commands a broad and purposive interpretation and must be construed generously, in a manner that best ensures the attainment of its objects. It also described s. 24(1) as remedial, requiring "large and liberal" interpretation in order to achieve its objectives (at para. 18). Further, its language confers a wide discretion on a court to craft remedial remedies and to do so its language "must be interpreted in a manner that provides a full, effective and meaningful remedy" (at para. 19).

[29] The inherent power of a judge of the Court of Queen's Bench to grant costs against the Crown is not put in issue by the Crown. Rather, it suggests that the jurisprudence makes it clear that such awards should be made only where there has been oppressive conduct by the Crown. The Crown cites the general rule which states that in criminal proceedings, and in the absence of specific authority, the Crown neither receives nor pays costs: see ***R.* v. *Stapledon*** (1999), 214 N.B.R. (2d) 57, 547 A.P.R. 57 (C.A.) and ***R.* v. *Trask***, [1987] 2 S.C.R. 304, 79 N.R. 145, 37 C.C.C. (3d) 92, additional reasons [1985] 1 S.C.R. 655, 59 N.R. 145, 18 C.C.C. (3d) 514.

[30] Here, the Crown proceeded by way of certiorari, alleging that there had been an excess of jurisdiction. It utilized a prerogative writ because the ***Criminal Code***, R.S.C. 1985, c. C-46 does not allow for the direct filing of an appeal. There is no specific provision in the ***Criminal Code*** or other relevant legislation that authorizes the imposition of costs in these circumstances. At the same time, the very issue is that of costs payable when a *Charter* breach occurs.

[31] To limit the ability of the Court of Queen's Bench to grant costs on an appeal couched as a certiorari application would result in the elimination of the remedial effect of the initial costs award. The effectiveness of the remedy of costs would be substantially reduced if the form of appeal utilized by the Crown were to insulate it from an award of costs. Indeed, in many cases, the costs awarded would be more than consumed by the appeal, resulting in no award at all. This could easily result in a chilling effect for those who might seek an order of costs against the Crown as a remedy for failure to disclose. In turn, one "effective and meaningful remedy" would be rendered ineffective.

[32] McLachlin C.J. in ***R.* v. *974649 Ontario Inc.***, *supra*, suggested that the remedial nature of section 24(1) of the *Charter* is core to the enforcement of *Charter* rights and that it should not be eroded by procedural and other technical impediments. At para. 20 she stated:

> … From the outset, this Court has characterized the purpose of s. 24(1) as the

> provision of a "direct remedy" [***R.* v. *Mills***, [1986] 1 S.C.R. 863 at 953, 29 D.L.R. (4th) 161, 26 C.C.C. (3d) 481 per McIntyre J.]. As Lamer J. stated in ***Mills***, "[a] remedy must be easily available and constitutional rights should not be 'smothered in procedural delays and difficulties'" [at 882]. Anything less would undermine the role of s. 24(1) as a cornerstone upon which the rights and freedoms guaranteed by the *Charter* are founded, and a critical means by which they are realized and preserved.

[33] In my view, the effect of allowing the Crown to avoid costs for its unsuccessful certiorari application would smother the original award and render it nugatory. Further, the ability of affected individuals to realize and preserve their *Charter* rights would be reduced. I conclude that where an individual has established a breach of his or her *Charter* rights which results in an award of costs against the Crown, he or she is also entitled to costs of an unsuccessful Crown appeal of that award, regardless of the mechanism utilized by the Crown in advancing that appeal.

CONCLUSION

[34] This appeal is dismissed.

APPEAL HEARD on NOVEMBER 1, 2002

REASONS FILED at EDMONTON, Alberta,
this 22nd day of JANUARY, 2003

_____
RITTER, J.A.

I concur: _____
as authorized by: RUSSELL, J.A.

REASONS FOR JUDGMENT OF
THE HONOURABLE MR. JUSTICE BERGER
CONCURRING IN THE RESULT

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[35] The Crown invoked *certiorari* to challenge an award of costs made by a Provincial Court trial judge pursuant to s. 21(1) of the ***Charter***. I agree with my colleague that to limit the ability of the Court of Queen's Bench to grant costs on the *certiorari* application would derogate from the full remedial effect of the initial costs award. I also agree that an accused is not required to show that his or her ability to make full answer and defence has been impaired in order to obtain the initial costs award.

[36] My colleague's reasons, however, say that the accused may be required to show a level of prosecutorial misconduct such that the underlying award should be made only where there has been oppressive conduct by the Crown. I held otherwise (in dissent) in ***R.* v. *Robinson*** (2000), 142 C.C.C. (3d) 303 (Alta. C.A.). In my respectful view, the majority opinion in ***Robinson*** has now been overruled by the Supreme Court of Canada in ***R.* v. *974649 Ontario Inc.***, [2001] 3 S.C.R. 575.

[37] Chief Justice McLachlin, speaking for a unanimous Court in ***974649 Ontario Inc***. made the following observations (at p. 614):

> "Costs awards to discipline untimely disclosure are integrally connected to the function of the provincial offences court as a quasi-criminal trial court. Costs awards have a long history as a traditional criminal law remedy. Although sparingly used prior to the advent of the *Charter*, superior courts have always possessed the inherent jurisdiction to award costs against the Crown: *R. v. Ouellette*, [1980] 1 S.C.R. 568; *R. v. Pawlowski* (1993), 12 O.R. (3d) 709 (C.A.), at p. 712. In recent years, costs awards have attained more prominence as an effective remedy in criminal cases; in particular, they have assumed a vital role in enforcing the standards of disclosure established by this Court in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326. See, for example: *Pawlowski*, *supra*; *Pang*, *supra*; *R. v. Regan* (1999), 137 C.C.C. (3d) 449 (N.S.C.A.)."

[38] It is, in my opinion, significant that the Chief Justice cited, with approval, the decision of the Ontario Court of Appeal in **R. v. *Pawlowski*, *supra***. The Ontario Court of Appeal panel

in ***R. v. 974649 Ontario Inc***. (1999) 130 C.C.C. (3d) 1 did so as well. O'Connor, J.A. observed (at p. 16):

> "In *R. v. Pawlowski*, the court found that although there had been a *Charter* breach there had been no prosecutorial misconduct. However, Galligan, J.A., for the majority, found that s. 24(1) enlarged the grounds upon which the existing, rarely used power, could be exercised. At pp. 270-71, he said:
>
> > 'There is no statutory authority which authorized the making of this order for costs. It seems well settled, however, that superior courts have the inherent jurisdiction to award costs against the Crown in a criminal case. That power has been exercised only rarely and, before the advent of s. 24(1) of the Charter, could be exercised only where there was serious misconduct on the part of the prosecution: see *R. v. Ouellette* (1980), 52 C.C.C. (2d) 336, 111 D.L.R. (3d) 216, [1980] 1 S.C.R. 568, and *A.-G. Que v. Cronier* (1981), 63 C.C.C. (2d) 437, 23 C.R. (3d) 97 (Que. C.A.). Chadwick J. found that there was no misconduct on the part of the Crown which would justify an award of costs against it based upon pre-Charter jurisprudence.
> >
> > He held, however, that s. 24(1) of the Charter enlarged the grounds upon which a court could exercise its discretion to grant costs. Section 24(1) enables one whose Charter rights have been infringed to apply to a 'court of competent jurisdiction' for such remedy as the court considers appropriate and just in the circumstances. If a superior court of criminal jurisdiction did not have inherent jurisdiction to award costs against the Crown, it would not be a 'court of competent jurisdiction' to grant a costs remedy for the infringement of a Charter right. However, such a court has jurisdiction to award costs against the Crown in a criminal case and, in my opinion, the clear effect of s. 24(1) is to enlarge the grounds

> upon which that jurisdiction can be exercised to include a Charter infringement, along with misconduct by the prosecution."

[39] Speaking for a unanimous Supreme Court, Chief Justice McLachlin in ***974649 Ontario Inc.***, draws a distinction between "flagrant" ***Charter*** violations and those which can be characterized as a "marked and unacceptable departure from the reasonable standards expected of the prosecution." (para. 87) Both may result in a costs award. The reasonable standards to which she refers are, of course, those established by the Supreme Court of Canada in ***R.* v. *Stinchcombe***, [1991] 3 S.C.R. 326.

[40] The foregoing is consistent with the following additional observations of the Supreme Court in ***974649 Ont. Inc***:

1. "To the extent that it is difficult or impossible to obtain remedies for *Charter* breaches, the *Charter* ceases to be an effective instrument for maintaining the rights of Canadians." (Para. 1)

2. "[I]f a government action is inconsistent with the *Charter*, s. 24 provides remedies for the inconsistency." [Emphasis in original] (Para. 14)

3. Section 24(1) "like all *Charter* provisions, commands a broad and purposive interpretation." (Para. 18)

4. Section 24(1) "must be construed generously, in a manner that best ensures the attainment of its objects." (Para. 18)

5. Section 24(1) "is remedial, and hence benefits from the general rule of statutory interpretation that accords remedial statutes a 'large and liberal' interpretation." (Para. 18)

6. "[T]he language [of s. 24(1)] appears to confer the widest possible discretion on a court to craft remedies for violations of *Charter* rights." (Para. 18)

7. "[A] right, no matter how expansive in theory, is only as meaningful as the remedy provided for its breach." (Para. 20)

[41] In my opinion, it is no longer the law that an applicant seeking an order for costs against the Crown need establish "flagrant disregard for the accused's rights" or, in other words, "egregious conduct" on the part of the Crown. That may have been the law prior to the advent of the ***Charter*** but is, in my opinion, no longer so. While untimely disclosure will not invariably give rise to a costs award against the Crown, egregious conduct need not be established. The applicant need only demonstrate a "marked and unacceptable departure from the reasonable standards expected of the prosecution."

APPEAL HEARD on NOVEMBER 1, 2002

REASONS FILED at EDMONTON, Alberta,
this 22nd day of JANUARY, 2003

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BERGER, J.A.