XIV. THE THORNHILL AND MACLEAN CASES

Some suggest there is a double standard at play in the justice system in Nova Scotia. One standard applies to those of influence and power; another to everyone else. In examining the Thornhill and MacLean cases, this Commission has seen how two cases involving Cabinet Ministers of the Provincial Government were handled. From this there will be attempts to point to corruption, abuse of power, favoritism or scandal. Such characterizations are too simplistic to convey the true sense of what happened in these cases.

If dealing with a case differently from the norm is wrong, then the Attorney General's department is responsible. If a failure to adequately communicate instructions is wrong, then the Attorney General's department is responsible. If poor legal research and reasoning is wrong, then these cases, at least to a certain extent, reflect that failure. But, nowhere has any witness stated that as a fact or in his or her opinion any of the actions or decisions of the department were motivated by corruption, abuse of power or favoritism.

No one who dealt with the department, whether he agreed with the decisions that were made or not, suggested the decisions of Messrs. Coles, Gale and Herschorn or their Attorneys General were anything other than their best decisions. They may be criticized for giving confusing instructions or not showing adequate initiative when faced with a task; for failing to follow the advice of a colleague; or for deferring to a poorly

conceived opinion when it may not have been warranted, but there is no evidence to suggest any mala fides by anyone in the department. There is no evidence to show any motivation of personal bias. Some might suggest that the mere fact that Mr. Thornhill's case was handled differently and he was not charged reflects favoritism. We take a different view.

As in many organizations, the Attorney's General department reflected certain weaknesses of a bureaucracy. There was adherence to hierarchy and deference to authority with some distrust to both senior and subordinate colleagues. At times, there a some lack of respect for differing styles of decision-making along with the failure to ask for carefully reasoned views coupled with an intention that they be subjected to critical analysis. It seems there was an inability to speak one's mind when decisions went contrary to one's view. Although not complementary qualities, their existence should not be surprising, especially when considered in light of the department's organization, structure and size.

In Appendix F we have charted the structure of the department in 1971 and 1988. It is trite to say that the complexity of cases, even if only as a result of the Charter has expanded greatly within that time. The number of prosecutors has grown from seven (7) in 1971 to forty-seven (47) at present. The number of cases has grown as is evident from the parallel growth in number of courts and judges. Yet despite this growth, there

has been an increase of only one person on the criminal side of the Attorney General's department.

In 1971 in addition to the Attorney General and Deputy Attorney General there was a Director (Criminal). Today, in addition to the Attorney General and Deputy Attorney General there are two directors - Criminal and Prosecutions. Even with the tremendous growth in the field, there has not been a commensurate growth at the senior levels. While tremendous changes have occurred in the field, commensurate changes have not been reflected in the department itself. When Mr. Gale joined the department in 1966 and Mr. Coles in 1972, the Attorney General's office was small. Mr. Coles witnessed the Department's overall growth but head office resources did not increase adequately to effectively allow the Department to face the inevitable new challenges that would come with larger numbers of prosecutors and courts.

The issue of resources on the prosecution side of the department has been carefully canvassed by Professor Archibald in his paper. In analyzing the evidence heard before this Commission, we urge that consideration be given to the actual facilities available to the department in carrying out its responsibilities.

A review of the job description of Messrs. Gale and Herschorn (Ex. 159 and 148) shows that all managerial responsibilities in Criminal law rest with them. In addition, they dealt with the R.C.M.P. on a regular basis, on individual

cases, and on broader issues of policing up until the creation of the Solicitor General's department. It was their responsibility to create policies and procedures for the Department; and to keep prosecutors, police and Provincial Courts appraised of legislative changes. Mr. Gale also represented the Province in numerous interprovincial and federal provincial meetings and had responsibility for all appeals. This is not intended to be an exhaustive list of their responsibilities but merely reflects the lack of personnel resources within the department on the criminal side.

These limited resources must be considered in any examination of decisions made within the Department. It is the lack of resources that dictates that inevitably some matters may not get the degree of attention they require because personnel are taxed. As we detail below, it is our view that these limited resources compounded any poor judgement that may have been exercised by an individual. Further, this lack of depth of staff meant that certain decisions were not as carefully scrutinized as they might otherwise have been had there been adequate resources to devote to specialized tasks, such as a fraud or commercial crime section. Staff time was simply diverted by other equally pressing responsibilities.

Both Messrs. Gale and Herschorn reported to the Deputy Attorney General, Mr. Coles, who, though not a criminal lawyer, remained the senior officer responsible for criminal law in the department. He had the authority to make decisions, and we know

from the evidence that he did make tough decisions, sometimes accepting the advice of his advisors, sometimes not.

It's worth comparing the size and depth of the Attorney General's Department in Manitoba with that of Nova Scotia. Manitoba is a province of approximate equivalent population size to Nova Scotia and has a bar of approximately the same size. In Appendix G we have copied the relevant departmental descriptions as they appear in the 1988 edition of the Canadian Law List. Although too much ought be inferred from this comparison (and as we all know Manitoba has current difficulties with its justice system) it is certainly evident that there appear to be more extensive resources available in that province than in Nova Scotia.

A. THE THORNHILL CASE

In examining what occurred in Thornhill we remind this Commission that the ultimate decision not to lay a charge is not open for consideration. What occurred here, we suggest, resulted from the best intentions of Attorney General How who perhaps did not understand that in a case involving a political colleague, he could **not** delegate his personal responsibility to make a difficult decision. He should have insisted that the matter be thoroughly scrutinized in the normal course with advice provided to him for an ultimate decision if required.

However, having given instructions to his deputy, Mr. How left it to Mr. Coles to be the law officer responsible for the matter. That decision was the one which meant that the

investigation into alleged wrong doings by Mr. Thornhill was treated "differently" than other matters. Although Mr. How appreciated the sensitivity of the matter, and that great care would ultimately be required, what he did not appreciate was that his instructions to Mr. Coles would be taken literally.

In doing so, Mr. Coles in effect removed from the R.C.M.P. a valuable service - advice to the investigator - and placed the matter in the hands of senior departmental and police personnel before the investigation was complete. Evidence has shown that it is common practice for the police to communicate with the Crown in the course of, or at the end of, an investigation. The Crown's legal advice is routinely provided by the Prosecutor who will have responsibility for carrying the case to the Courts. It is from that perspective that the Prosecutor and the Police review and discuss an investigation.

What Mr. Coles did not appreciate was that this specific role of the Crown is better suited to the field level. By the time cases normally reach the Department, preliminary examination and decisions have already occurred. The Department's role is to review those decisions and either support or reject them. Department personnel are not suited, in light of the work normally done, to initially review and respond to police investigations. It may be unfortunate that is the case, but the evidence of senior officials in the department does support the view that they are better suited to broader ranging

considerations than they are to particular case situations. This is well illustrated by Mr. Herschorn's evidence as follows:

> "Q. I want to ask you a series of questions concerning the role of prosecutors and your views as the Director in connection with some of these matters. First of all, in connection with decisions to prosecute, can you tell me whether or not the run-of-the-mill decision to prosecute would be of the local Crown Prosecutor or whether you would have some involvement with that?
>
> A. Run-of-the-mill? The local Crown Prosecutor.
>
> Q. And more serious matters?
>
> A. The local Crown Prosecutor.
>
> Q. Are there any cases where the decision to prosecute is referred to yourself?
>
> A. It may be primarily by reference from the local prosecuting officer for the county to my office.
>
> Q. In what sorts of circumstances would you expect the decision to prosecute to be referred to yourself?
>
> A. Primarily a circumstance where the prosecuting officer was unsure of what the most appropriate charge, is one example, would be to proceed with. He might consult with me. I would act as a sounding board and attempt to provide whatever assistance I could.
>
> Q. It wouldn't be based on necessarily whether or not it was a serious charge.
>
> A. No.
>
> Q. In other words, a local prosecutor could go ahead and make a decision to prosecute in a murder case.
>
> A. No question about that.

Q. Are there any circumstances where a decision would be made not to prosecute, notwithstanding the fact that there may be prima facie evidence which would, in normal circumstances, tend to lead to a decision to prosecute?

A. There may be exceptional circumstances of that type, but as a general answer, no.

Q. Would it then generally be the policy that if there's sufficient evidence to prosecute, one would expect a prosecution to be initiated?

A. Yes.

Q. Would the sorts of exceptions ;you were talk...What sorts of exceptions can you think of where a decision would be made not to prosecute?

A. One that immediately comes to mind is a circumstance of a charge of sexual assault where the victim may be young, where there may be medical evidence coming to the Crown that the placing of a young victim/witness on the stand might do irreparable harm to that witness. That would be one example."

Nobody appreciated the significance of Mr. Coles' direction that the Prosecutor's office be bypassed in the initial R.C.M.P. investigation of Mr. Thornhill. In assuming the role of Prosecutor for himself, and by only asking for specific information from Mr. Herschorn, Mr. Coles endeavoured to make a global decision as to whether or not charges should be laid, without the benefit of a careful analysis of the R.C.M.P. report. Thus specific questions asked by Cpl. Cyril House went unanswered. The legal opinion of the Deputy was provided

without the benefit of an initial memorandum from another lawyer. The ultimate decision was made without the benefit of "advice up the line", a fact which, on reflection, demonstrated poor judgement.

That decision, whether it was right or wrong, was made public. The public, through the media, was clamouring to know what decision was made. Again because the decision was vested in the Deputy Attorney General, there was no consultation or discussion with the R.C.M.P. at that stage.

A series of events followed: press releases, R.C.M.P. meetings, a review by the Deputy Commissioner, and discussions between the Deputy Attorney General and the R.C.M.P. These events further reflected upon the initial procedures adopted by the department. One can understand the reluctance to change the decision once it was made public. We believe that the initial act of poor judgement, properly conceived but improperly executed, is what lead to the perception that two standards of justice apply in Nova Scotia.

It may be a fact that Mr. Thornhill was treated "differently" than others, but it is naive to think that cases involving any prominent person will not receive a special degree of attention. The mere notoriety of a suspect will dictate a different level of attention because the public interest in the matter, through the media, will be heightened. The R.C.M.P.'s administration manual dealing with release of information reflects this fact (Ex. 111). In fact it was the desire to deal

properly with Mr. Thornhill that lead the system astray, not any corruption or improper motives.

To conclude on this point, we accept that poor judgement was exercised especially by the Attorney General and the Deputy Attorney General in determining that extra-ordinary procedures should be used in the Thornhill case. We reject any suggestion that in the end the R.C.M.P.'s ability to deal with the matter was taken away because a decision had been made. If, upon reflection and review, the R.C.M.P. concluded the case was worthy of additional investigation or a different conclusion, it was their responsibility to make that known. To suggest that they failed to do so because the Attorney General had already announced the decision, is to deny the R.C.M.P. the independence and integrity which both former Deputy Commissioner Quintal and former Commissioner Simmonds referred to in their evidence. They were prepared to make a different decision but the case, the evidence and the facts did not warrant one. No evidence suggests anything other than a scrupulous and thorough review in reaching that decision. We urge this Commission to leave that decision intact.

B. THE MACLEAN CASE

Two faults were suggested with the Crown's involvement in the Billy Joe MacLean case: (1) an undue delay in the initial R.C.M.P. investigation; and (2) agreements made at the time of sentencing.

We have dealt elsewhere with the right of the police to investigate suspected wrong-doing or any breach of the criminal law. It is sufficient here to reiterate that when the Auditor General's office approached the R.C.M.P. in October/November, 1983, they were free to carry out an investigation, without regard to any opinions, views or directions from the Attorney General's department. Their failure to do so, in spite of the views of the Deputy Attorney General and the Attorney General, must rest with them.

The conclusion reached by the Attorney General and Deputy Attorney General based on the information received from the Auditor General, was not ultimately borne out by the facts. The Deputy Attorney General did not accept Mr. Gale's advice. If there was fault in concluding as he did, then responsibility must rest there. Although Mr. Coles did not accurately reflect Mr. Gale's views when he prepared his memo for the Attorney General, he included for the Attorney General, the memo he relied upon, so Mr. Giffin could have come to a different conclusion than that reached by his Deputy (Ex. 173/35). Further, one must keep in mind that the ultimate decision with regard to an investigation was that of the police. Any poor judgement by the Deputy Attorney General could be, and was, eventually corrected.

As to the sentence imposed on Mr. MacLean, it bears repeating that the responsibility for sentencing lies with the Court. Here, the Crown agreed to proceed on four charges of uttering forged documents, and to drop the other charges of

forgery, forging documents and fraud. The Crown also agreed to recommend a range of penalty. Fault appears to have been imputed in the fact that the Crown did not request incarceration.

It was Norman Clair's view, which we believe was supported by the authorities upon which he relied, that in cases of this type a deterrent sentence was required. We need not remind this Commission that deterrence can be achieved by monetary penalties as well as by incarceration. In spite of Mr. Joel Pink's view, Mr. Clair believed that he got "a good deal" for his client. He further believed that the principals of sentencing could be satisfied by disclosing all the facts to the Court and offering a view that a substantial monetary penalty "...at least five thousand dollars" could be imposed "while knowing that the Government would also get restitution from Mr. MacLean" (89/15881). We believe that the procedures followed by Mr. Clair were impeccable, as was his judgement. He was not politically motivated in his approach and advice. We do not believe that any suggestion of wrong doing is borne out by the evidence.

We believe that what occurred in both these cases is a reflection upon a small department with inadequate staff and resources to adequately deal with all matters. It is easy to "blame" Mr. Coles for handling the cases as he did. We believe that this would be a mistaken responsibility. No increase in resources will guarantee good judgment, but additional resources will go far to insure properly trained and experienced people are

exercising their judgment in matters where they are competent. Although the Department must accept responsibility where poor judgments occurred, where legal and factual research was not done as carefully as it might have been, where instructions were not clear or the initiative was not taken and where there was undue deference to a senior official, we urge this Commission to be mindful of the realities of the Department when they draw their conclusions and recommend changes.

The Government recently indicated its favourable view of a Director of Public Prosecutions model for Nova Scotia. We believe that creation of a Director of Public Prosecutions would go far to reassure the people of Nova Scotia that its justice system is removed from political concerns, although in reality we do not think they impacted in these cases. However, any improvements to be made in the administration of criminal law in Nova Scotia must be real and not merely formalistic. We reiterate that at the heart of this is the issue of inadequate resources to insure that well-trained people, with the necessary support services can superintend the use of the Crown's coercive powers. To achieve less will mean that the errors in the Marshall case and the poor judgments in the Thornhill and MacLean cases might be repeated. That would mean this Commission's work was for naught.

XV. SANCTITY OF THE OATH

When Maynard Chant, John Pratico, Patricia Harriss and Donald Marshall, Jr. took the stand they accepted responsibility for the consequences of their statements.

We submit (and based on the frequent references to the evidence which we have previously made) that a full and accurate disclosure by Mr. Marshall of the circumstances surrounding his presence in Wentworth Park may well have made a difference in the attitude and actions of either (or all) the police, his defence lawyers and the jury.

Mr. Simon Khattar, who's in the best position to know, testified before this Commission that the handling of the defence would have been significantly different had Mr Marshall taken MoeRosenblum and him into his confidence and told them the truth. Without it they were labouring under a distinct disadvantage.

Of fundamental importance was the decision whether or not to put Mr. Marshall on the witness stand. Had they known that he and/or Sandy Seale were intent on unlawfully obtaining money from others, they may have quickly decided not to call their client to testify and instead concentrated their efforts on finding witnesses to the episode. Had Mr. Marshall never testified, the critical disadvantages (being such a poor witness, being admonished by counsel on the court, having to show his tattoo and being discredited in the face of other witness testimony) would never have occurred.

Our system of justice has many components. Perhaps the most essential and fundamental tenet is truth. Without a commitment to uphold it, there can be little hope in achieving justice and fairness for all.

It is reasonable to suppose that when the witnesses were sworn to give evidence in November, 1971, they were asked the standard question:

> "Do you swear to tell the truth, the whole truth and nothing but the truth, so help you God?"

After answering "yes", their direct examination began. The authority for administering an oath is found in Section 13 of the Canada Evidence Act. At common law no testimony whatever is receivable, except upon oath (1779), 1 Leach 199, 168 E.R. 202. A useful analysis of sworn testimony may be found in McWilliams, Canadian Criminal Evidence (2nd Ed., 880ff).

The wisdom of the oath as quoted above is found in its simplicity. It imparts to the oath taker a clear message that full and honest disclosure is compelled and any form of concealment or misrepresentation prohibited.

The meanings and importance ascribed to an oath can be found in any dictionary. Extracts from Websters and Blacks Law Dictionary (4th Ed.) may be found at Appendix H to this submission.

The witnesses undertook to honestly and fully answer the questions put to them. It is clear that they breached that obligation then and on other occasions. They cannot now be heard

to complain of the consequences. We resoundingly condemn these witnesses who gave perjury testimony. They must live with the consequences of Mr. Marshall's wrongful conviction and incarceration for the rest of their lives.

As for Mr. Marshall, in proceedings before this Commission he maintained the "robbery" was a fiction and that he simply told this version to Staff Wheaton and Cpl. Carroll believing they had already been told this by Roy Ebsary. To effect his release from Dorchester he felt he would have to be consistent. Mr. Marshall's veracity is questionable in light of notes made by Lawrence O'Neil, assistant to Melinda MacLean, when he interviewed Mr. Marshall almost a year before Mr. Marshall had ever heard of Staff Wheaton or Cpl. Carroll (Ex. 97/16). If, as the evidence discloses, Mr. Marshall was talking to Mr. O'Neil about a "robbery" in the park in which he was implicated, then he simply could not have been telling the truth at this inquiry when he said he had essentially concocted the story when he first met with the R.C.M.P. officers in 1982. This Commission should make a finding on this issue.

To illustrate the importance and sanctity of an oath one need only refer to the seriousness with which the courts treat allegations of perjury. In the case R. v. King (1987), 67 Nfld. & P.E.I.R. 85, Woolridge, J. referred at pages 86-7 to the decision of Steele, D.C.J. (as he then was) in the case of R. v. Noftel (1976), 12 Nfld. & P.E.I.R 1 as follows:

> "A conviction on a charge of perjury is somewhat unique in that it does not involve an offence involving either physical injury to a person nor property damage or loss. Yet, perjury is a very serious offence for by its own definition in Section 120 of the Criminal Code, it amounts to an affront against the court and the judicial system in general." (p. 89)

In the case of R. v. Morgan 19 (1979) Nfld. & P.E.I.R. 176, the Newfoundland Court of Appeal held that the court was "determined to express the disapprobation of society for persons who pervert the course of justice by lying evidence (p. 178)." These principles were applied by His Honour Judge Felix Cacchione in The Queen v. Norman David Crawford (1988), 81 N.S.R. (2d) 88 and affirmed on appeal by the Nova Scotia Court of Appeal.

Chief Justice Clarke quoted with approval from these remarks of Judge Cacchione:

> "Not only is perjury a crime but it is, by its very nature, an insidious and subversive offence against the judicial process; and the judicial process is what our society relies upon for protection." (p. 89)

and then went on to add:

> "The integrity of our system depends upon the honesty of those who are involved in it and the truthfulness of those who testify in its proceedings. No only the appellant but the general public must be deterred from committing the offence of perjury." (p. 89)

XVI. RECOMMENDATIONS

For ease of reference we have set out below, and numbered consecutively, the recommendations identified in the text of our written submission in the same order in which they appeared in argument.

While we did not canvass certain other topics such as the pitfalls in organization of the Sydney Police Department in 1971; the native court worker program; the functions of the Fatality Inquiries Act; new policing initiatives by the Department of the Solicitor General and other equally important matters, we do have specific recommendations to make in these areas. All are hereinafter set forth as miscellaneous recommendations.

A. FROM WRITTEN ARGUMENT

1. We believe policies should be developed to define the responsibilities of the Crown when dealing with the mentally disabled, so as to ensure their fair treatment without undermining rights of an accused to a fair trial.

2. We urge that information be promulgated to psychiatrists regarding their rights and obligations when their patients come in contact with the criminal justice system.

3. We recommend improvement of the swearing-in process by a judge to expand the types of questions asked of children, and that in the exercise of its discretion the court make the child at ease by possibly convening that segment of the trial i.e.

swearing-in of a child, in a semi-private surrounding with only the judge, accused, and counsel present.

4. We recommend this Commission should comment upon techniques that ought to be used by police when interviewing children - be they witnesses or suspects. From minimal protection, such as the presence of a friendly adult, to video recording all interviews with children, the goal must be to insure the natural threat that an adult can be to a child is not allowed to become overbearing, while at the same time being cognizant of the risks of children not telling the truth, for motives unrelated to the presence of an adult.

5. Whenever senior officials in the Department leave their positions, there should be an organized procedure for transfer of responsibility to successors and/or briefing of superiors on current matters.

6. The R.C.M.P. should have guidelines in place for procedures to be followed in reviewing the work/investigation of another police force so that too great a reliance is not placed on the work of the original force to the detriment of the R.C.M.P.'s review.

7. There should be policies to determine what information coming into the Crown's possession subsequent to a conviction merits investigation and/or disclosure to the defence and the means by which this disclosure will occur.

8. We recommend, inter alia, that the lines of communication between a local prosecuting officer and the Attorney General's Department, and the R.C.M.P. (and vice versa) be strictly, and accurately defined; that proper records be kept of written and oral communications transmitted between those agencies; and that the roles and responsibilities of both police and legal officers within the system be delineated, understood and tested to see if they are working properly and are remaining current.

9. We recommend that the R.C.M.P. manual must clearly delineate procedures from communications within the force and with outside agencies. Senior R.C.M.P. officers should be expected to explain all such requirements to the provincial law enforcement agencies to which the force is accountable.

10. The R.C.M.P. should implement stringent amendments to its record-keeping and document dissemination procedures to ensure that reports are directed to proper authorities in a timely manner.

11. If an accused is not represented and does not intend to avail himself of counsel, then it is the Crown's duty to make full disclosure to the Court or to the accused personally.

12. The Crown must fairly and dispassionately exercise its discretion to deny information for the protection of witnesses while at the same time providing the accused with sufficient information to allow for a full answer and defence. In

exercising that discretion, the Crown must be mindful of any reasonable grounds for believing there will be destruction of evidence, intimidation or threats to the well-being of witnesses or excessive stress on victims of certain offenses, which will likely result from disclosure of that witness' statement or particular information in the Crown's file. In that instance, the Crown should provide to the defence sufficient information to allow the defence to know what the evidence will be, while ensuring the protection of witnesses.

13. A system which aspires to the highest level of competence from police and Crown prosecutors cannot condone an attitude which maintains the myth that the police "have something to hide". Both the Attorney General and the Solicitor General must ensure that police reports are thorough and complete without extraneous information and opinions. Consideration should be given to imposition of sanctions if it is determined that police are not completely disclosing to the Crown.

14. If police reports contain extraneous information, the Crown should be at liberty to provide to the defence a detailed review of the contents of the report without disclosing the information which is not properly the subject matter of factual police reports.

15. We assert that an accused should not suffer for the previous sins of his lawyer. Maximum disclosure is the right of <u>every</u> accused.

16. Disclosure should be "as soon as reasonably practical, but in any event prior to the preliminary hearing or trial (in summary matters)". Nonetheless, the obligation to disclose is continuous. Therefore, if new material evidence comes to the Crown's attention, disclosure to the defence should occur as if the information had been in the Crown's file at the outset of the proceeding.

17. If the prosecuting officer refuses to disclose, there should be a meaningful ability to appeal to the Director (Prosecutions) to ensure the original decision is reviewed in a timely manner.

18. If the Crown objectively feels a ruling or direction by the Trial Judge might be erroneous, and that error might reasonably result in the appeal being allowed, then the Crown should raise it.

We recognize that the appellant should decide how it chooses to appeal the case, and therefore the Crown's obligation is to raise the matter first with the appellant's counsel.

19. There may be situations where the Crown believes that an error on the record will be determinative of the case. Then, the Crown has an obligation to bring this error to the Appeal Court's attention and if need be, in light of the applicable law, to argue that the appeal be allowed.

20. What is needed is a clear statement from this Commission as to the clarity of language which is required in

contracts negotiated between the Province(s) and the R.C.M.P., as well as in all policy manuals used by the police and the Attorney General's Office. There should then be no doubt whose responsibility it is to direct and whose function it is to act. Nor should there be any confusion as to the scope of any investigation conducted by the R.C.M.P. into either the workings of another police department or force operating within the province, or a particular case handled or mishandled by that department or an officer thereof.

21. There should be revision of the R.C.M.P./Province of Nova Scotia policing contract so as to clearly delineate the circumstances in which the R.C.M.P. may investigate a municipal police force, and the scope of such an investigation so as to make it clear that the R.C.M.P. are neither expected nor obliged to obtain the approval of the Attorney General's Department before continuing or embarking upon their work.

22. There should be a policy making it clear to police and prosecuting officers throughout the province that the ultimate right to lay a criminal charge (information) lies with the police, subject only to the right of the Crown, in the exercise of its discretion, to withdraw or stay the proceeding.

23. We recommend that in future, every effort be made by the Department to have both the prosecutor who handled the original trial and the department's solicitor responsible for the appeal, act in concert to conduct such appeals as are in the

opinion of the Director so significant as to warrant that kind of treatment.

24. It is our recommendation that to avoid some of the uncertainty evidenced in these proceedings, to clarify the role of the court and responsibilities of counsel, this Commission should consider recommending either a revision of the language of Section 617 or the incorporation of a new subsection (d) to the effect that the Minister of Justice may:

> "refer the matter to the Court of Appeal for a full inquiry into the circumstances of the original conviction, or sentence, or appeal with power to review the record, admit new evidence, give direction as to whether the Crown or the person convicted will have conduct of the inquiry as appellant and consider such other matters as the Court deems relevant and necessary in order to complete its determination."

25. We believe the government should give consideration to reviewing the Freedom of Information Act with a view to amending the appeal procedure contained therein.

26. In light of the experience in this case and the evidence of these hearings, we believe the compensation guidelines contained in Ex. 148 should be further revised to clarify the ambiguities in them and to improve the procedures when claims for compensation are made.

27. The Government recently indicated its favourable view of a Director of Public Prosecutions model for Nova Scotia. We believe that creation of a Director of Public Prosecutions would

go far to reassure the people of Nova Scotia that its justice system is removed from political concerns, although in reality we do not think they impacted in these cases. However, any improvements to be made in the administration of criminal law in Nova Scotia must be real and not merely formalistic. We reiterate that at the heart of this is the issue of inadequate resources to insure that well-trained people, with the necessary support services can superintend the use of the Crown's coercive powers.

B. MISCELLANEOUS RECOMMENDATIONS

27. We welcome the initiative taken by the Department of the Solicitor General in establishing the task force on municipal police training. We urge that the Department and the Nova Scotia Police Commission continue to promote high standards of education and training among all police forces in Nova Scotia with standardized examinations and recognized rules for promotion from rank to rank, and skills training in serious crime investigation techniques, protection of scene and exhibits, statement taking from adults and young offenders, etc. Such initiatives should include guidelines to ensure full briefings by personnel within any police department (to avoid what happened in Sydney where the patrol officers never new what the detectives were doing, embarked on searches for witnesses using conflicting, contradictory descriptions, etc.).

28. We recommend that any municipal force without its own identification section be required to call upon the R.C.M.P. for its expertise in such matters.

Municipal police forces ought to make use of interprovincial and international record information such as CPIC and CIS, etc.

29. We encourage more frequent meetings and seminars among crown prosecutors throughout the province; more active participation in criminal law section activities with the Canadian Bar Association; and encourage greater funding so that crown prosecutors may attend continuing legal education and Bar Society related functions to better enhance an exchange of ideas and maintenance of professional skills.

30. Encourage better communication (perhaps through regular exchanges and meetings between their respective associations) between the Attorney General's Department and the Defense Bar in Nova Scotia.

31. There should be a clear and concise policy statement that where death ensues from violent or suspicious circumstances the Medical Examiner is required to be notified under the Fatality Inquiries Act but that such notification is to be given by the investigating police department (to avoid any suggestion that the prosecuting officer has such a responsibility).

32. Encourage lawyers with the Attorney General's Department and the Department of the Solicitor General to audit

the course at Dalhousie Law School on Aboriginal Rights and Native Law and attend such other courses and conferences as resources will permit.

33. Conduct a study to provide recommendations calling for proportional representation of minorities on juries.

34. Assess current marketing strategy and admission standards to encourage better representation of minorities employed in government departments and on police forces in Nova Scotia.

35. Establish standardized procedures among municipal police forces in record keeping so that previous offenders are logged not only by name but also by m.o., date, circumstances and description, including weapon used (thereby avoiding errors committed by Sydney Police Department with Roy Ebsary and "missing" his background of previous criminal record involving knives).

36. Assign sufficient resources to expand the library and research facilities for local prosecuting officers and provide expenses to attend seminars on issues relating to law reform, evidence, minorities, police practices and new legislation.

37. Make revisions to the Public Inquiries Act which clearly articulate any claims for immunity or privilege which may be recognized by the statute for persons who may be called to appear as witnesses before such Inquiry. Further, consider

whether the statute might provide procedures for applications for standing and the funding of parties who obtain standing.

38. There should be a complete revision of the volume entitled "Advice to Prosecuting Officers" so that it becomes a set of complete instructions which will be sent to the office of every prosecutor or part-time prosecutor in Nova Scotia and also available for purchase or reference through the Nova Scotia Government Book Store.

39. State a policy outlining the circumstances in which local prosecutors would be expected to contact their superiors regarding any particular criminal case in which he is involved or upon which he has been asked to express an opinion. Put simply: When is it a matter which should be brought to the attention of senior officials in Halifax?

40. State a policy outlining the circumstances where a prosecuting officer could withdraw or stay charges in the public interest even where there may be sufficient evidence to obtain a conviction.

41. State a policy establishing guidelines for the process of plea bargaining which will thereby ensure that its purpose is adequately defined (and understood by the public) and that principles of fairness, openness and voluntariness will be achieved.

42. Take steps to ensure that a trial judge, sitting without a jury, in criminal cases is prohibited from reading the transcript of the preliminary inquiry.

43. Both the Attorney General's Department and the Office of the Solicitor General should initiate an information (data) base giving comparative analysis of the involvement of black's, natives and other minorities in the criminal justice system.

44. Support any study undertaken by the MI'KMAQ of Nova Scotia reviewing the relevance and effectiveness of the criminal justice system for their communities.

45. Join with the MI'KMAQ in designing and implementing a MI'KMAQ justice worker program, whose workers will act as liaison between the judicial system and the accused, facilitate retention of counsel, provide support services, arrange for interpretation where ordered by the court, participate as resource personnel, etc.

46. Organize, in conjunction with the Nova Scotia Barristers' Society, Canadian Bar Association, Continuing Legal Education Society and other similar organizations suitable in service education courses for prosecutors, defense counsel and judges in order to increase their understanding of the changing multicultural and multiracial reality of Nova Scotian society.

47. Explore ways for funding of scholarships and bursaries to encourage the post secondary education and legal training of blacks, natives and other minorities so that eventually there

will be greater numbers from whose ranks judges and prosecutors may be appointed.

48. Adopt the fine option programs used in other jurisdictions so that disadvantaged accused persons may avoid incarceration or pecuniary penalty by fulfilling the terms of a court supervised community service order.

Submissions from opposing counsel have not been received prior to the completion of this brief therefore we wish to reserve the opportunity to make further comment, argument or recommendation after hearing the representations of others.

C. CAVEAT

As this brief is being bound we have not yet received submissions from other counsel. Therefore, we reserve the right to present further argument, conclusions, and recommendations on other issues as may arise.

XVII. CONCLUSIONS

If as Daniel Webster said, "Justice is the greatest concern of man on earth", then we hope that our submissions here and throughout these hearings have been of assistance in addressing such concern and achieving a better kind of justice.

It has been a privilege to serve and we thank the Commissioners and all counsel for their dedication and courtesy.

All of which is respectfully submitted at Halifax, Nova Scotia, this 28th day of October, 1988.

JAMIE W. S. SAUNDERS

DARREL I. PINK

XVIII. APPENDICES

A. Legal Opinion on the Duty to Disclose

B. Excerpt from Mental Disability and the Law in Canada

C. Disclosure Guidelines - July 18, 1988

D. Exhibit 81 - Malachi Jones' letter

E. Code Sections 613 and 617

F. Attorney General's Department - Organization Charts 1971 and 1988

G. Excerpt from Canadian Law List

H. Excerpts from Black's Law Dictionary and Webster's New World Dictionary

APPENDIX "A"

LEGAL OBLIGATION ON CROWN PROSECUTORS TO MAKE DISCLOSURE TO DEFENCE COUNSEL, CIRCA 1971

This is a memorandum on the legal obligations of a crown prosecutor to disclose information in his possession to defence counsel. The issue has been addressed in the context of the law as it existed in 1971, and an effort has been made to refer primarily to sources, statutory, common law and secondary, as they existed at that time. We will first examine the general duties and discretionary powers pertaining to the office of crown prosecutor, and then assess the impact of relevant statutes on the question.

1. Crown Discretion and Duties

(a) General

The crown prosecutor is frequently described as a "Minister of Justice": see for example, Henry H. Bull, "The Career Prosecutor of Canada" (1962), 53 Journal of Criminal Law Criminology and Police Science, 89. As a "Minister of Justice", the prosecutor is less an adversary in a criminal setting and more a representative of the state, charged with bringing forth legal truth regardless of which side prevails in the court room. In Canadian law, a prosecution is not to be seen as a contest between two counsel. Rather it is:

> "...a solemn investigation by the State into the question whether the person charged has been guilty of a certain specified offence against the State, in which investigation the trial Judge and prosecuting counsel, as officers of the State have their part to perform; a criminal prosecution is not a contest between the State and the accused in which the State seeks a victory, but being an investigation, it is the duty of prosecuting counsel - as has been authoritatively laid down by this Court - to lay all the facts before the jury, those favourable to the accused as well as those unfavourable to him."
>
> R. v. Chamandy (1934), 61 C.C.C. 224 at p. 225 (Ont.C.A.).

An early description of the prosecutor's role can be found in the English case, R. v. Thursfield (173 E.R. 490). Here, a prisoner charged with murder was acquitted on the bases of evidence brought forward by counsel for the prosecution. The Court held that the prosecutor "has most accurately perceived his duty, which is to be an assistant to the Court in the furtherance of justice, and not to act as counsel for any particular person or party". This means, among other things, that the Crown should maintain some distance from the police, who likely have already made assumptions about the case and who will regard a conviction as the natural outcome of their decision to investigate and charge the accused (see B. Clive Bynoe, case comment on R. v. Dupuis, 3 C.R. (N.S.) 90 at p. 102). This objectivity is necessary, especially when the case has political overtones or has caused outrage in the community (B.C. Bynoe, supra).

The Supreme Court of Canada considered the role of the crown prosecutor in Boucher v. The Queen (1954), 20 C.R. 1. An accused was appealing a conviction for murder on several grounds, one of which was that the prosecutor has used inflammatory language in his address to the jury and had told the jurers that he believed personally in the guilt of the accused. The Court granted the appeal and awarded a new trial. Rand J. held:

> "It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of prosecutor excuses any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility."
>
> Boucher v. The Queen, supra, p. 8

The Quebec Court of Appeal relied upon Boucher when it was faced with a similar issue in Dupuis v. The Queen (1967), 3 C.R. (N.S.) 75. Here the accused was a member of parliament who had been convicted of fraud. The appeal was granted because the crown prosecutor had openly expressed his contempt for the accused and his belief in his guilt:

> "Both by his conduct during the examination of the witnesses and his address to the jury, he sought to render appellant ridiculous and odious in the jurymen's eyes. For this purpose he employed sarcasm, invective and all other resources of a dangerous eloquence." (Dupuis v. The Queen, supra, p. 83).

While the crown prosecutor should conduct himself in a way that reflects his duty to bring forth the truth in Court, whatever the ultimate consequence is, the law has not developed in a way that places a prosecutor in "a legal straight jacket" (B.C. Bynoe, supra, p. 97). The prosecutor retains broad discretion in the conduct of criminal proceedings; over the charges laid, the witnesses called and the evidence adduced:

> "However, the Crown Attorney must be firm while being fair in prosecuting the accused so that the Court will not be duped by defence which are not thoroughly examined in Court. The criminal law leaves to the Crown Attorney many discretions as to whom and what to prosecute, and the conduct of the Crown's case. Our law does not equate a good and fair Crown Attorney with a weak lawyer." (R v. Lalonde, [1972] 1 O.R. 376 (H.C.))

(b) Calling of Witnesses

Canadian Courts have accepted the general proposition that the prosecution is "bound to call all the material witnesses before the Court": R v. Harris, [1927] 2 K.B. 587, but they

have not applied the rule in such a way as to reduce the Crown's discretion to determine which witnesses are material to the case being made out. A binding authority on Canadian Courts was the decision in Adel Muhammed El Dabbah v. The Attorney General for Palastine, [1944] A.C. 156 (J.C.P.C.). Here, the defence appealed from a conviction for murder because the Crown had not called all the witnesses named in the information sworn against the accused. The Lords ruled that while, as a general practice, the prosecutor should call such witnesses so that they may be cross-examined by the defence, such a decision remains in the prosecutor's discretion (El Dabbah v. A.G. Palastine, supra, p. 169).

The Supreme Court of Canada dealt with this issue in Lemay v. The King (1952), 14 C.R. 89. In this case, the appeal by the defence against a conviction for trafficking in narcotics centered on the Crown's failure to produce as a witness an individual known to have been present when the alleged transaction took place. In dismissing the appeal, the Court re-affirmed the prosecutor's discretion to determine who the material witnesses are unless he is influenced by "some oblique motive", such as a desire to hold back evidence that would help the accused (Lemay v. The King, supra, p. 95). Writing for the majority, Rand J., held that:

> "The duty of the prosecutor to see that no unfairness is done to the accused is entirely compatible with discretion as to witnesses; the duty of the Court is to see that the balance between these is not improperly disturbed." (Lemay v. The Queen, supra p. 96)

The Court was influenced in its decision by the fact that the defence had not raised the matter of the absent witness until the trial was over. There was also a suspicion, expressed by Locke J., that the witness in question may have been an accomplice of the accused and his testimony would therefore have been unreliable (Lemay v. The King, supra, p. 106).

(c) Identification of Witnesses

Canadian Courts have found that it remains within the discretion of the Crown Prosecutor to disclose the names of witnesses it intends to call although fair play requires that the prosecution reveal the general thrust of the evidence it expects to adduce. A leading case on this issue is R. v. Bohozuk (1947), 87 C.C.C. 125 (O.S.C.):

> "I am of opinion that there is no rule directing that the names of witnesses which the Crown may call, should be given to the accused or the counsel for the defence. I am, however, of opinion that both the letter and spirit of the authorities is to the effect that the Crown should advise the defence of substantially the evidence which it proposed to adduce at the trial."
>
> (R. v. Bohozuk, supra, p. 126)

The Court in Bohozuk justified its decision to refuse a defence motion that the Crown be ordered to produce a list of witnesses because of the concern for "the proper administration of justice". At least one commentator has criticized the Ontario Supreme Court for its decision because: "it was not prepared to endorse the fundamental premise of our criminal law that the accused is clothed with the presumption of innocence until the Crown proves him guilty"; Howard Shapray, "The Prosecutor as Minister of Justice, A Critical Appraisal", 15 McGill Law Journal 124 at p. 132. In Shapray's view, the only rationale for the decision in Bohozuk was that the disclosure of the names of Crown witnesses "would, by in some way benefiting the defence, weaken its chance of securing a conviction and thereby hamper the efficacious administration of justice" (Shapray, supra). Nevertheless, Bohozuk has been followed by Canadian Courts in holding that the disclosure of the identity of potential Crown witnesses remains within the discretion of the prosecutor (see R. v. Silvester and Trapp (1959), 31 C.R. 190 (B.C.S.C.)).

2. Statutes

(a) Witness Statements - Section 531 of Criminal Code

Having held that the disclosure of the names of witnesses the Crown intended to call was within a prosecutor's discretion, it is not surprising that the Courts have found

a similar discretion concerning the disclosure of written statements witnesses may have given to police before their testimony. Defence counsel have tried to limit that discretion by invoking Section 531 (formerly section 512) of the Criminal Code, which deals with an accused's right to examine certain documents after he has been committed for trial:

> "531. An accused is entitled, after he has been committed for trial or at his trial,
>
> (a) to inspect without charge the indictment, his own statement, the evidence and the exhibits, if any; and
>
> (b) to receive, on payment of a reasonable fee not to exceed ten cents per folio of one hundred words, a copy
>
> (i) of the evidence;
> (ii) of his own statement, if any, and
> (iii) of the indictment;
>
> but the trial shall not be postponed to enable the accused to secure copies unless the court is satisfied that the failure of the accused to secure them before the trial is not attributable to lack of diligence on the part of the accused. 1953-54, c. 51, s. 512."

However, Courts have consistently held that this provision does not create any general obligation upon the Crown to disclose information to the defendant, other than the item specifically delineated (R. v. Silvester and Trapp, supra). In particular, it has been held that the "evidence" referred

to in subsection (b)(i) of the provision does not include the statements of witnesses given to police. Rather, it applies only to the actual evidence presented at a preliminary hearing on the charge against the accused: R. v. Lantos, [1964] 2 C.C.C. 52 (O.C.A.). The decision about whether or not to supply copies of witness statements to defence counsel to assist them in their cross-examinations, remains squarely within the discretion of the Crown Prosecutor.

> "I would add only that, in my opinion, an accused is not entitled, as a matter of right, to have produced to him for his inspection before trial, statements or memoranda of evidence of Crown witnesses or prospective witnesses, whether signed or unsigned. That is a matter within the discretion of the Crown prosecutor who may be expected to exercise his discretion fairly, not only to the accused, but also to the Crown."
>
> (R. v. Lantos, supra, p. 54)

This does not mean that prosecutorial discretion to decide on the disclosure of witness statements is unbridled. Courts have attempted to suggest guidelines for prosecutors to use in deciding whether such disclosure should be made. Disclosure should never be denied "for the purpose of catching the defence by surprise at trial"; R. v. Lalonde, [1972] 1 O.R. 376 at p. 382. If there is any doubt about disclosure, the prosecutor should exercise his discretion in favour of the accused: R v. Finland (1959), 125 C.C.C. 186

(B.C.S.C.). The prosecutor should be firm, but fair in determining to what extent he should disclose his case to the defence before trial: R v. Lalonde, supra, p. 382.

In the view of some commentators, the exercise of this discretion has been motivated more by the nature of the relationship between the particular prosecutor and the particular defence counsel than it has by high principles of fairness and justice:

> "Those defence lawyers who are part of the reciprocating environment, those who are 'trusted', those who are 'safe' will obtain full disclosure of the prosecution's case prior to trial. The defence lawyer is 'safe' if he enters a proportionate number of guilty pleas, does not utilize the evidence obtained in pre-trial disclosure for cross-examination of prosecution witnesses and is likely to enter a guilty plea after an assessment of the prosecution's evidentiary strength."
>
> (Brian A. Grosman, The Role of the Prosecutor - New Adaptations in the Adversarial Concept of Criminal Justice, 11 Canadian Bar Journal, 580 at p. 586).

There is one English case, binding in Canadian law, that stands for the proposition that in particular circumstances disclosure of previous statements by witnesses should be made when it is requested by defence counsel; Mahadeo v. R., [1936] 2 All E.R. 813 (J.C.P.C.). In that case, which involved a charge of murder, solicitors for the accused

wrote the prosecutor before trial requesting any statements made by their client, the other accused, or by the main prosecution witness. The Crown prosecutor denounced the request in Court, claiming it implied the prosecution had supressed relevant information and the trial Judge refused to order disclosure. After the accused was convicted, it was revealed that the prosecution witness had given conflicting statements to the police, one which said the deceased committed suicide and one which which implicated the accused. The House of Lords overturned the conviction and criticized both the prosecutor and the trial Judge for rejecting defence counsel's request:

> "There is no question but that they ought to have been produced, and their Lordships can find no impropriety in the letter asking for their production. It is true that upon cross-examination without the statement Sukraj admitted that he had at first put forward a story of suicide. But it is obvious that counsel defending the appellant was entitled to the benefit of whatever points he could make out of a comparison of the two documents in extenso with the oral evidence given and an examination of the circumstances under which the statements of the witnesses changed their purport." (See Mahadeo v. R, supra, pp. 816-817)

While Mahadeo makes a strong statement in favour of disclosure, it is important to note the limits of the case. It deals with an instance where disclosure had been requested by the defence and refused. It does not create a

positive obligation on the prosecutor to volunteer disclosure without having been asked by the defence counsel.

(b) Section 10 of the Canada Evidence Act

Those who have tried to find legal limits to the prosecutor's discretion over pre-trial disclosure have also relied on the Canada Evidence Act, Section 10(1). The Act gives a Court the power to order production of previous statements by witnesses during a trial:

> "10(1) Upon any trial a witness may be cross-examined as to previous statements made by him in writing, or reduced to writing, relative to the subject-matter of the case, without such writing being shown to him; but, if it is intended to contradict the witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing that are to be used for the purpose of so contradicting him; the judge, at any time during the trial, may require the production of the writing for his inspection, and thereupon make such use of it for the purposes of the trial as he thinks fit."

However the Courts have held that the Canada Evidence Act does not create any rights for an accused. The right lies with the Court to order production of documents and to use them in a way that will further the cause of justice: R. v. Tousigant et al (1963), 133 C.C.C. 270. The process of ordering production of documents may be triggered by a request from the defence; R v. Weigelt (1960), 128 C.C.C.

217, and the Court's power would normally be "exercised if the interests of justice required it"; R. v. Lantos, supra, p. 54. Once production of a written statement has been ordered it remains within the discretion of the Court to turn the documents over to defence counsel to assist in cross-examination. The defence has no right to the documents and the Courts have the power to retain them: R. v. Tousigant et al, supra.

The Supreme Court of Canada has held that the Canada Evidence Act cannot be used to compel the production of statements at a preliminary hearing: Patterson v. The Queen (1970), 9 D.L.R. (3rd) 398. Here, defence counsel had requested production of written statements made by prosecution witnesses when their existence became known during direct testimony at the preliminary hearing. The Magistrate refused to order their production and the Supreme Court agreed that the power of the Court to do so was limited to the trial:

> "This power is given explicitly to a Judge 'at any time during the trial". It is not given to a Magistrate during the conduct of a preliminary hearing. There is a real distinction here. The purpose of a preliminary inquiry is clearly defined by the Criminal Code - to determine whether there is sufficient evidence to put the accused on trial. It is not a trial and should not be allowed to become a trial." (Patterson v. The Queen, supra, pp. 400-401)

In a concurring judgment, Hall J. wrote that there might be circumstances where the production of statements at a preliminary hearing would be justified where it "was essential to the full exercise of the right to cross-examine": Patterson v. The Queen, supra, p. 402, however, this was not one of those instances.

(c) Duke v. The Queen - The Bill of Rights

The Supreme Court of Canada again addressed the issue of an accused's right of access to evidence in the possession of the Crown in Duke v. The Queen (1972), 28 D.L.R. (3rd) 129. The evidence in this case was not a written statement, but a breath sample taken from the accused and analyzed in a breathalyzer to support a charge under the Criminal Code. The defence requested a portion of the breath sample so that it could undertake an independent analysis. The prosecution refused. The defence counsel's assertion that it had a right to the sample was based on the guarantee of a fair trial contained in Section 2(e) of the Canadian Bill of Rights:

> 2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of

> Canada shall be construed or applied so as to
>
> (e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;"

The Court found the Bill of Rights required that a Court "must act fairly, in good faith, without bias and in a judicial temper" and that it must give an accused "the opportunity adequately to state his case" (Duke v. The Queen, supra, p. 134). However, this did not require the production of a breath sample for independent analysis.

Significant to the disposition of this case was the fact that the Crown no longer had the material requested by the defence. The ampule containing the breath sample had been disposed of some days after it was analyzed and the only "evidence" that remained was the read-out from the breathalyzer machine:

> "this is not a case in which the accused has requested information in the possession of the Crown and been refused. Whether or not a refusal of that kind would deprive the accused of a fair trial is not at issue in this case." (Duke v. The Queen, supra, p. 134).

Having made that observation, Fauteux C.J.C., went on to strongly re-affirm the Crown prosecutor's discretionary

right to decide what evidence he should provide to the defence:

> "In my opinion the failure of the Crown to provide evidence to an accused person does not deprive the accused of a fair trial unless, by law, it is required to do so." (Duke v. The Queen, supra, p. 134).

The decision of the Court on the case was unanimous, although Laskin J., and Spence J., carefully reserved judgment on the statement of Fauteux C.J.C., that an accused will only be deprived of a fair trial where the Crown refused to disclose matters it is required to disclose by law.

The decision in Duke has spawned two separate lines of cases. One deals with the handling of breath samples on breathalyzer charges. Courts have used the judgment against the defence whenever a request was made for a sample of the accused's breath (see for example; Re Potma and The Queen (1983), 2 C.C.C. (3d) 383 (Ont.C.A.); R. v. Cregg (1983), 43 A.R. 114 (Alta. Q.B.); R. v. MacDonald (1982), 17 M.V.R. 185 (Ont.C.A.). The case is also used to assist Courts in the determination of what constitutes a fair trial. The definition of a fair trial used by Fauteux C.J.C. was adopted in Howard v. Stoney Mountain Institution (1985), 57 N.R. 280 (F.C.T.D.), and in Singh et al v. The Minister of

Employment and Immigration (1985), 58 N.R. 1 (S.C.C.). The case was used when the denial of the right to cross-examine on affidavits at an immigration hearing was held not to be a denial of natural justice (U.S.A. v. Smith (1984), 2 O.A.C. 1 (O.C.A.)) and when a seven year delay between the laying of the information and the trial was found to be a denial of a fair hearing (R v. Young (1984) 3 O.A.C. 254 (O.C.A.)). However, perhaps because of its particular factual basis, the decision in Duke has rarely been applied to the question of the limits of Crown discretion and the accused's rights to disclosure.

APPENDIX B

Robertson, Gerald B. Carswell, 1987

In some provinces the Mental Health Act provides that no action lies against a psychiatric facility or its employees for a tort committed by a patient.[111] However, the Supreme Court of Canada has held that this provision does not absolve the facility from liability for its own negligence, or the negligence of its employees, in failing to take reasonable care to prevent one patient from injuring another.[112]

(b) Outside the Hospital

If, through the negligence of the hospital or its staff, an involuntary patient escapes and causes injury to someone outside the hospital, the hospital is probably liable if it knows or ought to know of the patient's dangerous propensities.[113] A person or institution having charge of a potentially dangerous individual owes a duty of care to anyone whom it should reasonably foresee might be injured if that individual is allowed to escape.[114]

In principle, liability might extend to the situation where a psychiatrist is negligent in deciding that a patient should be released because he is no longer dangerous.[115] However, in view of the difficulties involved in predicting dangerousness,[116] a plaintiff might well face insurmountable problems in proving that the psychiatrist's decision amounted to negligence as opposed to a reasonable error of clinical judgment.[117]

(c) Duty to Warn Person in Danger

Tarasoff v. Regents of the University of California,[118] a decision of the California Supreme Court in 1976, is one of the most significant cases to have been decided in the field of psychiatric malpractice.[119] The case

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111. R.S.O. 1980, c. 262, s. 63; R.S.N.B. 1973, c. M-10, s. 66(3) R.S.P.E.I. 1974, c. M-9, s. 57; see also R.S.M. 1970, c. M110, s. 94(3) [am. 1980, c. 62, ss. 34, 38(32)].
112. *Wellesley Hospital v. Lawson* (1977), 76 D.L.R. (3d) 688 (S.C.C.).
113. *Holgate v. Lancashire Mental Hospitals Board*, [1937] 4 All E.R. 19; see also the analogous case of *Home Office v. Dorset Yacht Co.*, [1970] A.C. 1004 (H.L.).
114. See Fleming, *The Law of Torts* (6th ed., 1983) 144.
115. This has been the subject of litigation in many cases in the United States: see Klein and Glover, *supra* n. 93 at 153-154; Brakel *et al.*, *The Mentally Disabled and the Law* (3rd ed., 1985) 589-590.
116. See *supra* Chapter 14, notes 135-137 and accompanying text.
117. See Picard, *Legal Liability of Doctors and Hospitals in Canada* (2nd ed., 1984) 239-243. See also *supra* n. 96 and accompanying text.
118. 551 P. 2d 334 (Cal., 1976).
119. As well as causing considerable concern amongst psychiatrists, the *Tarasoff* decision has generated a vast literature. The following is a mere sample: Stone, "The Tarasoff Decision: Suing Psychotherapists to Safeguard Society" (1976) 90 Harv. L. Rev. 358; Schopp and Quattrocchi, "Tarasoff, the Doctrine of Special Relationships, and the Psychotherapist's Duty to Warn" (1984) 12 J. Psych. and Law 13; Kyle, "From Tarasoff

involved a student at the University of California, Prosenjit Poddar, who was under the care of two therapists at the University, a psychologist and a psychiatrist, and who was diagnosed as suffering from acute paranoid schizophrenia. During his last therapy session, Poddar made reference to his intention to kill a fellow student, Tatiana Tarasoff. The psychologist notified the campus police, with a view to having Poddar committed, but after interviewing Poddar the police concluded that civil commitment proceedings would not be justified. The head of the University's department of psychiatry later confirmed that no further action should be taken. A few weeks later, Poddar murdered Miss Tarasoff.

As a result of information disclosed during Poddar's trial for murder, Miss Tarasoff's parents brought an action against the University, the two therapists, and the campus police, alleging that their daughter ought to have been warned of the possible danger to her. The California Supreme Court held, on a preliminary point of law, that the claim against the University and the therapists stated a good cause of action.[120] The court concluded that:[121]

> When a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger. The discharge of this duty may require the therapist to take one or more of various steps, depending upon the nature of the case. Thus, it may call for him to warn the intended victim or others likely to apprise the victim of the danger, to notify the police, or to take whatever other steps are reasonably necessary under the circumstances.

The court also held that neither the difficulties in predicting dangerousness nor the confidential nature of the patient-therapist relationship negated the therapist's duty to warn the potential victim. With respect to the duty of confidentiality, the court observed that the "protective privilege ends where the public peril begins".[122]

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to Bradley: Courts Struggle to Apply the Duty to Control Mental Patients" (1984) 14 Cumberland L. Rev. 165; Greenberg, "The Evolution of Tarasoff" (1984) 12 J. Psych. and Law 315; Givelber *et al.*, "Tarasoff, Myth and Reality: An Empirical Study of Private Law in Action" [1984] Wisconsin L. Rev. 443; Klein and Glover, *supra* n. 93; Brakel, *supra* n. 115 at 582-589; Schiffer, *Psychiatry Behind Bars* (1982) at 69-76.

120. The case was subsequently settled out of court: see Brakel, *supra* n. 115 at 583.

121. *Supra* n. 118 at 340. Note that liability may arise if the therapist knows *or ought to know* that the patient presents a danger to a third party: see also *McIntosh v. Milano*, 403 A. 2d 500 (N.J., 1979); *Mavroudis v. Superior Court of San Mateo County*, 162 Cal. Rptr. 724 (1st Dist., 1980); *Jablonski v. United States*, 712 F.2d 391 (9th Cir., 1983).

122. *Supra* n. 118 at 347. But see *Hopewell v. Adebimpe*, 130 Pitt. L.J. 107 (Pa. Ct. Common Pleas, 1981), referred to in Klein and Glover, *supra* n. 93 at 153, in which a psychiatrist warned the potential victim and was successfully sued by the patient for breach of confidentiality.

The *Tarasoff* decision has given rise to considerable litigation against psychiatrists and psychologists in the United States, based on the duty to warn. Usually, however, liability has been confined to cases where the patient threatens to harm an identified individual.[123]

The *Tarasoff* principle has not yet been tested in Canada. Although some authors have taken the view that the principle is unlikely to be followed in Canada,[124] the Krever Commission expressed the opinion that "[i]t is not entirely clear . . . that our courts would refuse to acknowledge the existence of a duty to warn in the very same circumstances."[125] Moreover, in *Tanner v. Norys*,[126] the Alberta Court of Appeal alluded to the possibility of the *Tarasoff* principle being applied in Canada. The *Tanner* case involved an action for false imprisonment against a psychiatrist who had issued conveyance and examination certificates to have the plaintiff committed.[127] Lieberman, J.A., delivering the judgment of the court, commented that:[128]

> I am mindful of the sanctity of personal liberty but I am also mindful that not only must a psychiatrist be cognizant of a citizen's personal liberty, he must also be cognizant of his duty to the community at large and to the right of all persons to be protected wherever possible from a potentially dangerous person. Our attention has been drawn to a recent decision, from 1976, of a California court, which imposes a duty upon a psychiatrist who has treated a potentially dangerous person to warn persons who may possibly be exposed to that danger: *Tarasoff v. Regents of the University of California* (1976), 551 P. 2d 344 (Cal. S.C.). One might well ask: What would have been the position of the appellant had he after receiving Mrs. Tanner's phone call on 8th June 1976 done nothing and had the respondent in fact have shot Mr. Bews?

The Ontario case of *Re Hendrick and DeMarsh* is also of some relevance in this context. In that case the Ministry of Correctional Services released an inmate (DeMarsh) from a correctional institution, and made arrangements for him to stay at the plaintiffs' boarding house. The Ministry did not warn the plaintiffs of DeMarsh's history of convictions for arson. One month later DeMarsh set fire to the plaintiffs' house. The trial judge[129] found that the Ministry was negligent in failing to warn the plaintiffs of DeMarsh's propensities, but dismissed the action on the ground that it was time-barred. The Ontario Court of Appeal affirmed the decision on the limitation issue, but declined to comment on the trial judge's finding of negligence.[130]

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123. But see *Lipari v. Sears, Roebuck & Co.*, 497 F. Supp. 185 (D. Neb., 1980), where the duty was extended to groups of potential victims, not just identifiable individuals. *Contra Leedy v. Hartnett*, 510 F. Supp. 1125 (M.D. Pa., 1981); *Thompson v. County of Alameda*, 614 P. 2d 728 (Cal., 1980); *Doyle v. United States*, 530 F. Supp. 1278 (C.D. Cal., 1982).
124. See, e.g. Sharpe and Sawyer, *Doctors and the Law* (1978) 201.
125. *Report of the Commission of Inquiry into the Confidentiality of Health Information* (Toronto, 1980), vol. 2 at 432.
126. [1980] 4 W.W.R. 33 (Alta. C.A.), leave to appeal refused 33 N.R. 354n (S.C.C.).
127. See *supra* Chapter 14, notes 334-336 and accompanying text.
128. *Supra* n. 126 at 62.
129. (1984), 6 D.L.R. (4th) 713 (Ont. H.C.).
130. (1986), 26 D.L.R. (4th) 130 (Ont. C.A.).

APPENDIX C

Nova Scotia

Attorney General

Memorandum

From: Hon. Terence R.B. Donahoe, Q.C.
Attorney General

Our File Reference:

To: Prosecuting Officers and
Assistant Prosecuting Officers

Your File Reference:

Subject: DISCLOSURE GUIDELINES

Date: July 18, 1988

It is recognized that there is a general duty upon the Crown to disclose the case in chief for the prosecution to counsel for the accused, and to make defence counsel aware of the existence of all relevant evidence. The Crown, in giving disclosure, must be cognizant of the importance of reviewing information received, prior to disclosure. Matters of opinion expressed or information which on public policy grounds could jeopardize a state or individual interest, should be the subject of careful scrutiny.

The purpose of disclosure by the Crown of the case against the accused is threefold:

(a) to ensure the defence is aware of the case which must be met, and is not taken by surprise and is able to adequately prepare their defence on behalf of their client;

(b) to resolve non-contentious and time-consuming issues in advance of the trial in an effort to ensure more efficient use of court time;

(c) to allow for the entering of guilty pleas at a date early in the proceedings.

The guiding principle should always be full and fair disclosure restricted only by a demonstrable need to protect the integrity of the prosecution.

.. .. / 2

Pursuant to this duty, and bearing in mind the above principles, upon request, the accused is entitled to full disclosure of the case in chief for the Crown and in this context full disclosure shall mean the provision to counsel for the accused, as soon as reasonably practical, but in any event prior to the preliminary inquiry or trial, as the case may be, of the following information:

(a) The circumstances of the offence. This will usually be disclosed by means of the provision of a summary prepared by the investigating police agency of the case as a whole.

(b) Copies of all written statements made by witnesses. ✓

(c) A copy of any statement made by the accused to persons in authority and in the case of verbal statements, a verbatim account of the statement.

(d) A copy of the accused's criminal record.

(e) Copies of medical and laboratory reports.

(f) Access to any exhibits intended to be introduced and where applicable, copies of such exhibits.

(g) A copy of the wording of the charge.

Additional disclosure beyond what is outlined above is to be at the discretion of the prosecutor balancing the principle of full and fair disclosure with the need to prevent endangering the life or safety of witnesses or interference with the administration of justice. Such additional disclosure may include names and addresses of any potential witnesses keeping in mind possible need for protection from intimidation or harassment.

Where an accused is not represented by counsel it is recognized that in order to maintain a proper arms-length relationship with an accused, the method of disclosure of evidence must remain in the discretion of the prosecutor responsible for the prosecution. ✓

.. .. / 3

It is understood that there is a continuing obligation on the prosecution to disclose any new relevant evidence that becomes known to the prosecution without need for a further request for disclosure.

Terence R. B. Donahue

APPENDIX D

Ex 81

Halifax, March 23, 1961.

OC "H" Division, R. C. M. P., Halifax.

Re: H T S (D: - -33)
Louisdale, N. S. - et al -
Conspiracy to Commit Fraud (408-1-d C.C.)
Louisdale, Richmond County, N.S.
(ST. PETERS DETACHMENT CASE)

This will acknowledge receipt of your letter of March 20th. As a number of cases have arisen recently where requests have been made for release of information received as the result of Police inquiries, I believe that it is desirable to outline briefly the general views of the Department on this question.

Co-operation between the Police, the Department and practising Solicitors has always been at a very high level in this Province and needless to say we have every desire that this should continue. Additionally, the Crown has an obligation to assist the Courts in the administration of justice not only in criminal but also in civil cases.

The problem is limited, I think, to statements given to the Police either by a person accused of a crime or by persons having information which may be material to a particular inquiry. These statements can only by used in judicial proceedings in very limited circumstances. In the case of parties to a civil action or the accused in criminal proceedings, statements may be used as admissions of liability or of guilt and, therefore, can be produced as such. Where a person who is not a party to proceedings has given a statement, it can only be used where he gives evidence to the contrary, to show that he has stated something different on a previous occasion. This can be very material, of course, on the issue of credibility.

No sufficient reason of privilege or otherwise can be put forward for refusing the production of any statement in a Court which may be material in determining the issue before the tribunal. Whether any document or statement is material must generally be determined by the courts as arbiter between individual litigants or the Crown and the subject. Even assuming that it

were desirable to withhold information at the complete discretion of the Crown, it is doubtful whether any privilege exists in the Crown to prevent the production of evidence in view of the decision of the Supreme Court of Canada in the case of Regina v. Snider (1954) 4 D.L.R. 483. As pointed out by Rand, J. the privilege against disclosure requires as its essential condition that there be a public interest recognized as overriding the general principle that in a court of justice every person and every fact must be available to the execution of its supreme function. In view of this decision, it is very doubtful whether privilege extends beyond matters affecting a very limited field of government activity such as national defence. While these general observations are particularly applicable to civil actions they also apply in the case of criminal proceedings.

Where a subpoena is received in a civil action by a member of your force, there is no alternative but to comply with the order of the Court. While an order to appear may require the production of reports, I do not believe that any difficulty will be experienced if original statements are kept separate from the reports. The member producing the evidence can explain to the Court that the report only contains, in addition to copies of statements, the observations of the witness as to his own investigation. The report is inadmissible not by reason of any privilege which may be claimed but because it is not a document which a Court will generally accept as evidence of matters therein contained.

In criminal proceedings additional considerations apply because the Crown is a party and accordingly has a greater duty to see that justice is done. In some jurisdictions such as Ontario and in England, it is the practice in many courts for the Crown to make copies of all statements made by witnesses to the Police available to defence counsel. While the courts have not gone so far as to order the Crown to produce statements before trial, I do not think there is any doubt that the Courts have the authority to do so after the arraignment of the accused. While Section 512 has reference to statements obtained under Section 454 (2), it does not refer to statements which have not been produced by the Crown. While the Courts have not ordered the production of documents before trial, they have left little doubt as to what the duty of the Crown is in the exercise of its discretion in this matter or what the consequences will be if the failure to produce leads to a miscarriage of justice.

The duty of the Crown is thus set forth by Richards, C.J., in Regina v. Cunningham 15 C.R. 167 at page 175:

> "' As a measure of fairness and justice the Crown ought to furnish to the accused in some form the names of the witnesses intended to be called in chief in support of the Crown's case. As a general rule this information is sufficiently given by the

depositions taken on the preliminary hearing. Any witness there examined should be made available to the defence if the Crown does not intend to call him unless his evidence is unquestionably immaterial. And the name of any additional witness not examined at the preliminary inquiry which the Crown proposes to call in chief ought, as a matter of fairness at a reasonably early period, at any rate if asked for, to be made known to the accused. But there is no law laying down any definite rule in this matter, which must be left to the presiding judge to deal with in such a way as to give all necessary protection to the accused and to give him a fair opportunity to defend himself against the charge.'"

In his book The Road to Justice, Sir Alfred Denning, L.J., states at page 41:

"The duty of counsel to see that justice is done is, however, best shown by what is expected of prosecuting counsel. If he knows of a credible witness who can speak of facts which go to show the prisoner's innocence, he must himself call that witness. Moreover, if he knows of a material witness who can speak of relevant matters, but whose credibility is in doubt, then although he need not call him himself, he must tell the prisoner's counsel about him so that he can call him."

In Baksh v. The Queen (1958) A.C. 167 the Privy Council ordered a new trial where the Crown failed to give defence counsel statements of witnesses which varied from oral testimony. To the same effect is the decision in Mahadeo vs. R. (1936) 2 A.E.R. 813. From these authorities, it is clear that the Crown must either introduce evidence which is material to the charge whether for or against the Crown or else make the same available to the defence.

Different considerations apply in the case of a statement made by the accused. If the Crown does not consider it desirable to introduce such a statement in evidence, then it may be withheld for the purposes of cross-examination, although even in this case there may be instances where a copy should be given to the defence. Generally, no miscarriage of justice can occur in these circumstances as the accused is in the best position to know the truth so far as his own actions are concerned and accordingly should have nothing to fear from any previous statement which he may have given to the Police.

It is clearly a matter for the Crown to decide, guided by these principles, as to what action should be taken in each particular case. No general proposition prohibiting the production of statements can therefore be safely relied upon in all

cases. This is entirely a matter for the Prosecuting Officers to determine, subject to the instructions of the Attorney General, and should be guided by their advice in each particular case where criminal proceedings have been instituted.

In the present case, the matter should again be referred to the Prosecuting Officer for Richmond County for his instructions.

Malachi C. Jones,
Senior Solicitor.

MCJ:AJH

See also: 1955 Criminal Law Review 739;

Regina vs. Silvester & Troop 31 C.R. 190;

Regina vs. Finland 31 C.R. 364;

R. vs. Summers 2 Criminal Law Quarterly 452;

1953 C.B.R. 509.

APPENDIX E

Powers of the Court of Appeal

POWERS—Order to be made—Substituting verdict—Appeal from acquittal—New trial under Part XVI—Where appeal against verdict of insanity allowed—Appeal court may set aside verdict of insanity and direct acquittal—Additional powers.

613. (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit, on account of insanity, to stand his trial, or against a special verdict of not guilty on account of insanity, the court of appeal

(a) may allow the appeal where it is of the opinion that

(i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,

(ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or

(iii) on any ground there was a miscarriage of justice;

(b) may dismiss the appeal where

(i) the court is of the opinion that the appellant, although he was not properly convicted on a count or part of the indictment, was properly convicted on another count or part of the indictment,

(ii) the appeal is not decided in favour of the appellant on any ground mentioned in paragraph *(a)*, or

(iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph *(a)*(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred;

(c) may refuse to allow the appeal where it is of the opinion that the trial court arrived at a wrong conclusion as to the effect of a special verdict, and may order the conclusion to be recorded that appears to the court to be required by the verdict, and may pass a sentence that is warranted in law in substitution for the sentence passed by the trial court;

(d) may set aside a conviction and find the appellant not guilty on account of insanity and order the appellant to be kept in safe custody to await the pleasure of the lieutenant governor where it is of the opinion that, although the appellant committed the act or made the omission charged against him, he was insane at the time the act was committed or the omission was made, so that he was not criminally responsible for his conduct; or

(e) may set aside the conviction and find the appellant unfit, on account of insanity, to stand his trial and order the appellant to be kept in safe custody to await the pleasure of the lieutenant governor.

(2) Where a court of appeal allows an appeal under paragraph (1)*(a)*, it shall quash the conviction and

(a) direct a judgment or verdict of acquittal to be entered, or

(b) order a new trial.

(3) Where a court of appeal dismisses an appeal under subparagraph (1)*(b)*(i), it may substitute the verdict that in its opinion should have been found and affirm the sentence passed by the trial court or impose a sentence that is warranted in law.

(4) Where an appeal is from an acquittal the court of appeal may

(a) dismiss the appeal; or

(b) allow the appeal, set aside the verdict and

(i) order a new trial, or

(ii) except where the verdict is that of a court composed of a judge and jury, enter a verdict of guilty with respect to the offence of which, in its opinion, the accused should have been found guilty but for the error in law, and pass a sentence that is warranted in law. 1974-75-76, c. 93, s. 75.

(5) Where an appeal is taken in respect of proceedings under Part XVI and the court of appeal orders a new trial under this Part, the following provisions apply, namely,

(a) if the accused, in his notice of appeal or notice of application for leave to appeal, requested that the new trial, if ordered, should be held before a court composed of a judge and jury, the new trial shall be held accordingly;

(b) if the accused, in his notice of appeal or notice of application for leave to appeal, did not request that the new trial, if ordered, should be held before a court composed of a judge and jury, the new trial shall, without further election by the accused, be held before a judge or magistrate, as the case may be, acting under Part XVI, other than a judge or magistrate who tried the accused in the first instance, unless the court of appeal directs that the new trial be held before the judge or magistrate who tried the accused in the first instance;

(c) if the court of appeal orders that the new trial shall be held before a court composed of a judge and jury it is not necessary, in any province of Canada, to prefer a bill of indictment before a grand jury in respect of the charge upon which the new trial was ordered, but it is sufficient if the new trial is commenced by an indictment in writing setting forth the offence with which the accused is charged and in respect of which the new trial was ordered; and

(d) notwithstanding paragraph *(a)*, if the conviction against which the accused appealed was for an offence mentioned in section 483 and was made by a magistrate, the new trial shall be held before a magistrate acting under Part XVI, other than the magistrate who tried the accused in the first instance, unless the court of appeal directs that the new trial be held before the magistrate who tried the accused in the first instance.

(6) Where a court of appeal allows an appeal against a verdict

Section 613—*continued*

that the accused is unfit, on account of insanity, to stand his trial it shall, subject to subsection (7), order a new trial.

(7) Where the verdict that the accused is unfit, on account of insanity, to stand his trial was returned after the close of the case for the prosecution, the court of appeal may, notwithstanding that the verdict is proper, if it is of opinion that the accused should have been acquitted at the close of the case for the prosecution, allow the appeal, set aside the verdict and direct a judgment or verdict of acquittal to be entered.

(8) Where a court of appeal exercises any of the powers conferred by subsection (2), (4), (6) or (7), it may make any order, in addition, that justice requires. 1953-54, c. 51, s. 592; 1960-61, c. 43, s. 26; 1968-69, c. 38, s. 60.

A provincial appellate Court is not obliged as a matter of either law or practice to follow a decision of another provincial appellate court unless it is persuaded that it should do so on its merits or for other independent reasons. The only required uniformity among provincial appellate courts is that which is the result of the decisions of the Supreme Court of Canada: *WOLF v. THE QUEEN* (1974), 17 C.C.C. (2d) 425, 27 C.R.N.S.150 (S.C.C.) (9:0).

Where the Supreme Court of Canada rules on a point, although it was not absolutely necessary to do so in order to dispose of the appeal, the lower Courts are bound to follow that ruling: *SELLARS v. THE QUEEN* (1980), 52 C.C.C. (2d) 345, [1980] 1 S.C.R. 527, 110 D.L.R. (3d) 629 (7:0).

The Court of Appeal is not bound by one of its previous decisions where the liberty of the subject is in issue and the Court is convinced that the prior decision is wrong: *R. v. SANTERAMO* (1976), 32 C.C.C. (2d) 35, 36 C.R.N.S. 1 (Ont. C.A.).

Subsec. (1) (*a*) (*i*). The phrase "unreasonable or cannot be supported by the evidence" allows an appellate Court to exercise its independent judgment to decide whether the evidence was of such a kind, description or character that it would be unsafe to rest a conviction upon it: *R. v. RUSNAK*, [1963] 1 C.C.C.143 (B.C.C.A.).

Where the jury was mistaken in that its deductions from the evidence were illogical or there was a clear error in its appreciation of the evidence there can be no foundation for a verdict of guilty: *R. v. SANGHI* (1971), 6 C.C.C. (2d) 123, 3 N.S.R. (2d) 70 (N.S.S.C.App.Div.).

In the first majority reasons for judgment in *R. v. CAOUETTE* (1972), 9 C.C.C. (2d) 449, 32 D.L.R. (3d) 185 (S.C.C.) it was held *per* Fauteux C.J.C. (Abbott, Judson and Pigeon, JJ., concurring), that if an appellate court is of the opinion that there was an absence or insufficiency of evidence it cannot set aside the jury's conviction before considering whether the evidence permitted the jury to find the accused guilty.

A useful review of the inception of and authorities on subpara. (i) will

be found in the reasons for judgment of Branca, J.A., in *R. v. DHILLON* (1972), 9 C.C.C. (2d) 414, [1973] 1 W.W.R.510 (B.C.C.A.).

The function of an appellate Court on its review of evidence as to whether or not a verdict was unreasonable was the subject of two opinions in *CORBETT v. THE QUEEN* (1973), 14 C.C.C. (2d) 385, 25 C.R.N.S. 296 (S.C.C.). The majority (5:2) held that on this issue the question was not whether the verdict was unjustified, but whether the weight of the evidence was so weak that the verdict of guilty was unreasonable because no reasonable jury acting judicially could have reached it. The minority view was that an appellate Court on this issue had a duty to weigh the evidence to bring its own judgment to bear on the issue as to whether the jury's verdict was unreasonable or could not be supported by the evidence and was quite entitled to substitute its opinion for that of the jury on that issue.

Where the offences were related and pertained to one incident but their essential elements were not identical, the onus is upon the accused to satisfy the appellate Court that a guilty verdict on one offence cannot stand with his acquittal on the other two counts. Inconsistent verdicts will not *per se* quash a conviction unless the verdicts are violently at odds and the same basic ingredients are common to both charges: *R. v. McLAUGHLIN* (1974), 15 C.C.C. (2d) 562, 25 C.R.N.S.362 (Ont.C.A.).

Subsec. (1) (*a*) (iii). Where the evidence adduced is so strongly indicative of guilt that the accused is called upon to give some explanation, his failure to testify or to call evidence, if that would provide an explanation, may be considered by the appellate court in deciding if his conviction was a miscarriage of justice: *R. v. STARR* (1972), 7 C.C.C. (2d) 519, 4 N.B.R. (2d) 654 (N.B.S.C.App.Div.).

While counsel's failure to object to the Judge's charge to the jury does not preclude the allegation of error on appeal it is a circumstance which the appellate Court will consider particularly where the complaint is the trial Judge's failure to place before the jury matters which the party alleges were essential matters to be included in the charge: *IMRICH v. THE QUEEN* (1977), 34 C.C.C. (2d) 143, 75 D.L.R. (3d) 243 (S.C.C.) (8:1).

Subsec. (1) (*b*) (i). Where the Court is of the view that the conviction for the full offence cannot stand but that it should substitute a conviction for an included offence, the proper procedure is to *dismiss* the appeal and substitute such a verdict: *R. v. NANTAIS,* [1966] 4 C.C.C. 108, 48 C.R. 186 (Ont. C.A.).

Subsec. (1) (*b*) (iii). The onus is upon the Crown to satisfy the appellate court that the verdict would necessarily have been the same if the error had not occurred. Even so the appellate court may still choose to allow the appeal if there was any possibility that the jury, properly charged, would have had a reasonable doubt: *COLPITTS v. THE QUEEN,* [1966] 1 C.C.C. 146, 47 C.R. 175 (S.C.C.) (4:3).

In deciding whether to invoke this paragraph the appellate Court may consider the fact that the accused did not testify in the face of inculpatory

Section 613—*continued*

facts: *AVON v. THE QUEEN* (1971), 4 C.C.C. (2d) 357, 21 D.L.R. (3d) 442 (S.C.C.) (5:2).

In *R. v. MILLER and COCKRIELL* (1975), 24 C.C.C. (2d) 401 at p. 457, 33 C.R.N.S. 129 at p. 185 (5:0) (B.C.C.A.), affd 31 C.C.C. (2d) 177, [1977] 2 S.C.R. 680, 70 D.L.R. (3d) 324 (9:0), Robertson, J.A., after considering *COLPITTS v. THE QUEEN, supra,* stated that when asked to apply this provision the Court must consider three questions, each predicated upon the assumption that there had been no misdirection, as follows: "Would the verdicts have necessarily been the same? Could the jury, as reasonable men, have done otherwise than find the appellants guilty? Is there any possibility that they would have had a reasonable doubt as to the guilt of the accused?"

On a trial for murder, the killing allegedly having been committed during the course of a robbery, the Crown tendered evidence of two subsequent robberies committed by the accused. The Court of Appeal in dismissing the accused's appeals held that it was unnecessary to determine the admissibility of this evidence as this subsection could be applied, the accused having admitted their complicity in the robbery of the deceased. On further appeal to the Supreme Court of Canada it was held that if this evidence was inadmissible then this subsection could not be applied to cure the introduction of such grossly prejudicial and inadmissible evidence. However, the Court concluded the evidence was properly admitted as similar act evidence and accordingly there was no need to resort to this subsection: *ALWARD and MOONEY v. THE QUEEN* (1977) 35 C.C.C. (2d) 392, 76 D.L.R. (3d) 577 (S.C.C.) (9:0).

Subsec. (1) (*d*). An appellate Court will not interfere with the decision of a jury properly instructed and acting judicially to set aside a verdict of guilty and make a finding of insanity at the time of the crime: *R. v. PRINCE* (1971), 6 C.C.C. (2d) 183, 16 C.R.N.S.73 (Ont.C.A.). Similarly where a trial judge is sitting alone: *R. v. FISHER* (1973), 12 C.C.C. (2d) 513, 24 C.R.N.S.129 (Alta.S.C.App.Div.).

Although the Code confers no express power to order a new trial where an accused appeals from a special verdict of not guilty on account of insanity, by providing that the accused could appeal from such a verdict, the legislative intent is clear and the Court of Appeal may set aside the special verdict and enter an acquittal or order a new trial: *R. v. SIMPSON* (1977), 35 C.C.C. (2d) 337, 77 D.L.R. (3d) 507 (Ont. C.A.).

In an unusual case the Court of Appeal, on its own motion, ordered that the accused be examined by a psychiatrist, heard the psychiatric evidence and then set aside the accused's conviction for murder and found her not guilty by reason of insanity notwithstanding the defence of insanity was not raised at trial nor raised by the accused on appeal: *R. v. IRWIN* (1977), 36 C.C.C. (2d) 1, (Ont. C.A.).

Subsec. (1) (*e*). In the absence of misdirection or other fault in the trial of the issue as to fitness to stand trial, the issue is properly one to be decided by the jury and, unless the Court of Appeal is satisfied the jury erred in

its finding, the Court cannot substitute its opinion for that of the jury: *R. v. HUBACH*, [1966] 4 C.C.C.114, 48 C.R.252 (3:2) (Alta.S.C.App. Div.).

Subsec. (2). Where a mistrial was found and there was nothing to be gained by ordering a new trial the appellate Court simply set the conviction aside: *R. v. GRANT* (1975), 23 C.C.C. (2d) 317, [1975] W.W.D. 82 (B.C.C.A.).

Where it cannot be said that there was no evidence to go to the jury the proper disposition is to order a new trial: *R. v. WOODWARD* (1975), 23 C.C.C. (2d) 508 (Ont. C.A.).

Service of a portion of an intermittent gaol term prior to a successful appeal is a factor making it appropriate to order that an acquittal be entered: *R. v. DILLABOUGH* (1975), 28 C.C.C. (2d) 482 (Ont. C.A.).

Subsec. (3). An appellate court dismissing an appeal pursuant to subsec. (1) (*b*) (i) has the power to amend the conviction to conform with the evidence: *LAKE v. THE QUEEN*, [1969] 2 C.C.C. 224, 1 D.L.R. (3d) 322 (S.C.C.).

Where the municipal *situs* of the crime was proven to be a municipality other than the one set out in the indictment the appellate Court does not possess the power to amend the indictment to conform with the evidence and, accordingly, a verdict of acquittal must be entered: *R. v. PEARSON* (1972), 6 C.C.C. (2d) 17, 17 C.R.N.S.1 (2:1) (Que.C.A.).

The power of substitution applies to an appeal where the legally defective conviction was for an offence which included a lesser offence for which a conviction would have been proper: *R. v. MORRIS* (1975), 29 C.C.C. (2d) 540, 12 N.B.R. (2d) 568 (S.C. App. Div.).

If the Court, after substituting the conviction, merely affirms the original sentence then that sentence runs from the date of its imposition by the trial Judge. If, however, the Court imposes a new sentence it may provide that the sentence runs from the date of its imposition by the Court of Appeal or, *semble*, from the date of imposition of the original sentence: *R. v. BOYD* (1979), 47 C.C.C. (2d) 369 (Ont. C.A.).

Where the Court of Appeal exercises its jurisdiction under this subsection and substitutes a conviction for second degree murder it may also set the period of parole non-eligibility, which period may exceed the minimum 10 years: *R. v. KJELDSEN* (1980), 53 C.C.C. (2d) 55, [1980] 3 W.W.R. 411 (Alta. C.A.).

Subsec. (4). Since the imposition of sentence is a duty under this subsection primarily placed upon the appeal court it should do so after the accused has had an opportunity to make his submissions: *LOIVRY and LEPPER v. THE QUEEN* (1972), 6 C.C.C. (2d) 531, 26 D.L.R. (3d) 224 (S.C.C.).

It is the duty of the Crown in order to obtain a new trial to satisfy the appellate Court that the verdict would not necessarily have been the same if the trial Judge had properly directed the jury: *VEZEAU v. THE QUEEN* (1976), 28 C.C.C. (2d) 81, 8 N.R. 235 (S.C.C.) (9:0).

Section 613—*continued*

Once an appellate Court has concluded that the trial Judge erred in law, the Crown appellant, before a new trial will be ordered, must discharge the onus of satisfying the appellate Court that had the trial Judge properly instructed himself, his judgment of acquittal would not necessarily have been the same: *R. v. ANTHES BUSINESS FORMS LTD.* (1975), 26 C.C.C. (2d) 349, 10 O.R. (2d) 153 (C.A.).

Where the Court of Appeal orders a new trial under this subsection an accused who has, pursuant to his previous election or re-election, been tried by a magistrate, he has no right to re-elect trial by a Court composed of a Judge and jury on the new trial: *Re R. and SAGLIOCCO* (1979), 45 C.C.C. (2d) 493, 10 C.R. (3d) 62 (B.C.S.C.), affd 51 C.C.C. (2d) 188 (B.C.C.A.).

It is not open to the Crown to seek a new trial following the accused's acquittal in order to submit to the jury a basis of liability not raised at the original trial: *WEXLER v. THE KING* (1939), 72 C.C.C. 1, [1939] S.C.R. 350 (7:0). Similarly, where the appellate Court finds that there is no evidence to support the conviction on the basis of liability relied upon by the Crown at trial, the Court will enter an acquittal rather than order a new trial which would enable the Crown to place before the jury a new theory of liability not relied upon at trial: *SAVARD and LIZOTTE v. THE KING* (1945), 85 C.C.C. 254, 1 C.R. 105, [1946] S.C.R. 20 (5:0).

On the other hand the failure of Crown counsel to object to misdirection at trial will not necessarily preclude an appeal from an acquittal based on such misdirection as where the trial Judge was led into error by defence counsel's address to the jury and the accused did not testify and called no witnesses: *CULLEN v. THE KING* (1949), 94 C.C.C. 337, 8 C.R. 141, [1949] S.C.R. 658 (4:1).

The power of the Court of Appeal to order a new trial means an order for a full new trial and not merely resumption of the original trial before the trial Judge: *GUNN v. THE QUEEN* (1982), 66 C.C.C. (2d) 294 (S.C.C.) (7:0).

Subsec. (5) (*a*). In *R. v. BUDIC (No. 2)* (1977), 35 C.C.C. (2d) 333 (Alta. S.C. App. Div.) the accused was allowed to amend his notice of appeal to request that the new trial be before a Judge and jury, the original trial having been before a Judge alone.

Subsec. (6). Where the accused successfully appeals from a finding of unfitness the Court must order a new trial. An order that the trial Judge simply "proceed with the trial pursuant to section 543 (5)" is a nullity: *R. v. BUDIC (No. 2), supra.*

Subsec. (8). Where the Crown appealed an acquittal by a provincial court judge of a charge of assault with intent to resist lawful arrest, and it transpired that the accused had never been put to his election and accordingly the trial judge had no jurisdiction over him, it was held (2:1) that that was still a matter for appeal within s.605, but the proper order would be to dismiss the appeal and pursuant to subsection (8) quash the proceedings below. Schroeder, J.A., was of the view that as the trial proceedings were a nullity no appeal lay and the Crown's appeal should be quashed for

want of jurisdiction, and no order should be made with respect to the acquittal, leaving the Crown free to proceed again against the accused, who could not successfully plead *autrefois acquit*: *R. v. BROWN* (1970), 2 C.C.C. (2d) 528, [1971] 2 O.R.32 (Ont. C.A.).

An example of an additional just order was in *Reference Re REGINA v. GORECKI (No. 2)* (1976), 32 C.C.C. (2d) 135, 14 O.R. (2d) 218 (C.A.), where at the conclusion of a reference under s. 617 (1) (*b*) a new trial was ordered limiting the accused to raising the defence of insanity.

The combined effect of this subsection and subsec. (4) is to allow the Court of Appeal on a Crown appeal to order a new trial on an amended indictment where the amendment does no more than specify a particular of the offence which had already been charged. This subsection authorizes the Court of Appeal to make any additional order which the ends of justice require whether or not the order for a new trial is itself dependent on the additional order: *ELLIOTT v. THE QUEEN* (1977), 38 C.C.C. (2d) 177, 83 D.L.R. (3d) 16 (S.C.C.) (6:3). *Semble*, however, the Court of Appeal has no power to amend the indictment by substituting one offence for another: *GUNN v. THE QUEEN* (1982), 66 C.C.C. (2d) 294 (S.C.C.) (7:0).

Where on an appeal by the accused the Court of Appeal quashes the conviction and orders a new trial it may also order a new trial on an alternative charge which was dismissed at trial solely because of the application of the doctrine precluding multiple convictions notwithstanding the Crown has not appealed this latter acquittal: *R. v. LETENDRE* (1979), 46 C.C.C. (2d) 398, 7 C.R. (3d) 320 (B.C.C.A.).

Where the Court of Appeal allows a new trial because of misdirection by the trial Judge it may order that the new trial be on an included offence or an attempt where it is of the view that in any event the full offence had not been made out: *R. v. COOK* (1979), 47 C.C.C. (2d) 186, 9 C.R. (3d) 85 (Ont. C.A.).

POWERS OF COURT ON APPEAL AGAINST SENTENCE—Effect of judgment.

614. (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 upon 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.**

(2) A judgment of a court of appeal that varies the sentence of an accused who was convicted has the same force and effect as if it were a sentence passed by the trial court. 1953-54, c. 51, s. 593.

Subsec. (1). The clause "vary the sentence within the limits prescribed by law" plainly fixes the scope of the power of an appellate Court by reference to the maximum prescribed penalty irrespective of the penalty imposed at trial, and accordingly where the Crown has given reasonable notice in its factum an appellate Court may increase the sentence on

Section 615—*continued*

that the accused was competent to instruct counsel based on the evidence that he understood the nature of the proceedings and the function of the persons involved and knew the issues and the possible outcomes notwithstanding he might misinterpret some of the evidence and might not only disagree with his counsel but might not act with good judgment.

Subsec. (4). The term "appellant" is to be construed as equivalent to the accused even though he is the respondent on the appeal: *R. v. KRAWETZ* (1974), 20 C.C.C. (2d) 173, [1975] 2 W.W.R.676 (Man. C.A.).

RESTITUTION OF PROPERTY—Annulling or varying order.

616. (1) Where an order for compensation or for the restitution of property is made by the trial court under section 653, 654 or 655, the operation of the order is suspended

***(a)* until the expiration of the period prescribed by rules of court for the giving of notice of appeal or of notice of application for leave to appeal, unless the accused waives an appeal, and**

***(b)* until the appeal or application for leave to appeal has been determined, where an appeal is taken or application for leave to appeal is made.**

(2) The court of appeal may by order annul or vary an order made by the trial court with respect to compensation or the restitution of property within the limits prescribed by the provision under which the order was made by the trial court, whether or not the conviction is quashed. 1953-54, c. 51, s. 595.

Powers of Minister of Justice

POWERS OF MINISTER OF JUSTICE.

617. The Minister of Justice may, upon an application for the mercy of the Crown by or on behalf of a person who has been convicted in proceedings by indictment or who has been sentenced to preventive detention under Part XXI,

***(a)* direct, by order in writing, a new trial or, in the case of a person under sentence of preventive detention, a new hearing, before any court that he thinks proper, if after inquiry he is satisfied that in the circumstances a new trial or hearing, as the case may be, should be directed;**

***(b)* refer the matter at any time to the court of appeal for hearing and determination by that court as if it were an appeal by the convicted person or the person under sentence of preventive detention, as the case may be; or**

***(c)* refer to the court of appeal at any time, for its opinion, any question upon which he desires the assistance of that court, and the court shall furnish its opinion accordingly. 1968-69, c. 38, s. 62.**

Subsec. (1) (*b*). The rules as to the admissibility of fresh evidence on appeal should be borne in mind on a reference under para. (*b*). The

appellate Court will determine each such situation on its merits and where the circumstances are unusual the appellate Court should not refuse to hear fresh evidence where the interests of justice require that it be heard: *Reference Re REGINA v. GORECKI (No. 2)* (1976), 32 C.C.C. (2d) 135, 14 O.R. (2d) 218 (C.A.).

Appeals to the Supreme Court of Canada

APPEAL FROM CONVICTION—Appeal where acquittal set aside.

618. (1) A person who is convicted of an indictable offence and whose conviction is affirmed by the court of appeal may appeal to the Supreme Court of Canada

(a) **on any question of law on which a judge of the court of appeal dissents, or**

(b) **on any question of law, if leave to appeal is granted by the Supreme Court of Canada within twenty-one days after the judgment appealed from is pronounced or within such extended time as the Supreme Court of Canada or a judge thereof may, for special reasons, allow.**

(2) A person

(a) **who is acquitted of an indictable offence other than by reason of the special verdict of not guilty on account of insanity and whose acquittal is set aside by the court of appeal, or**

(b) **who is tried jointly with a person referred to in paragraph *(a)* and is convicted and whose conviction is sustained by the court of appeal,**

may appeal to the Supreme Court of Canada on a question of law. 1953-54, c. 51, s. 597; 1956, c. 48, s. 19; 1960-61, c. 43, s. 27; 1968-69, c. 38, s. 63; 1974-75-76, c. 105, s. 18.

Subsec. (1) (*a*). A dissent in a provincial appellate Court on the sufficiency of evidence for conviction is a question of fact and not law: *PEARSON v. THE QUEEN* (1959), 123 C.C.C. 271, 30 C.R. 14 (S.C.C.) (5:0).

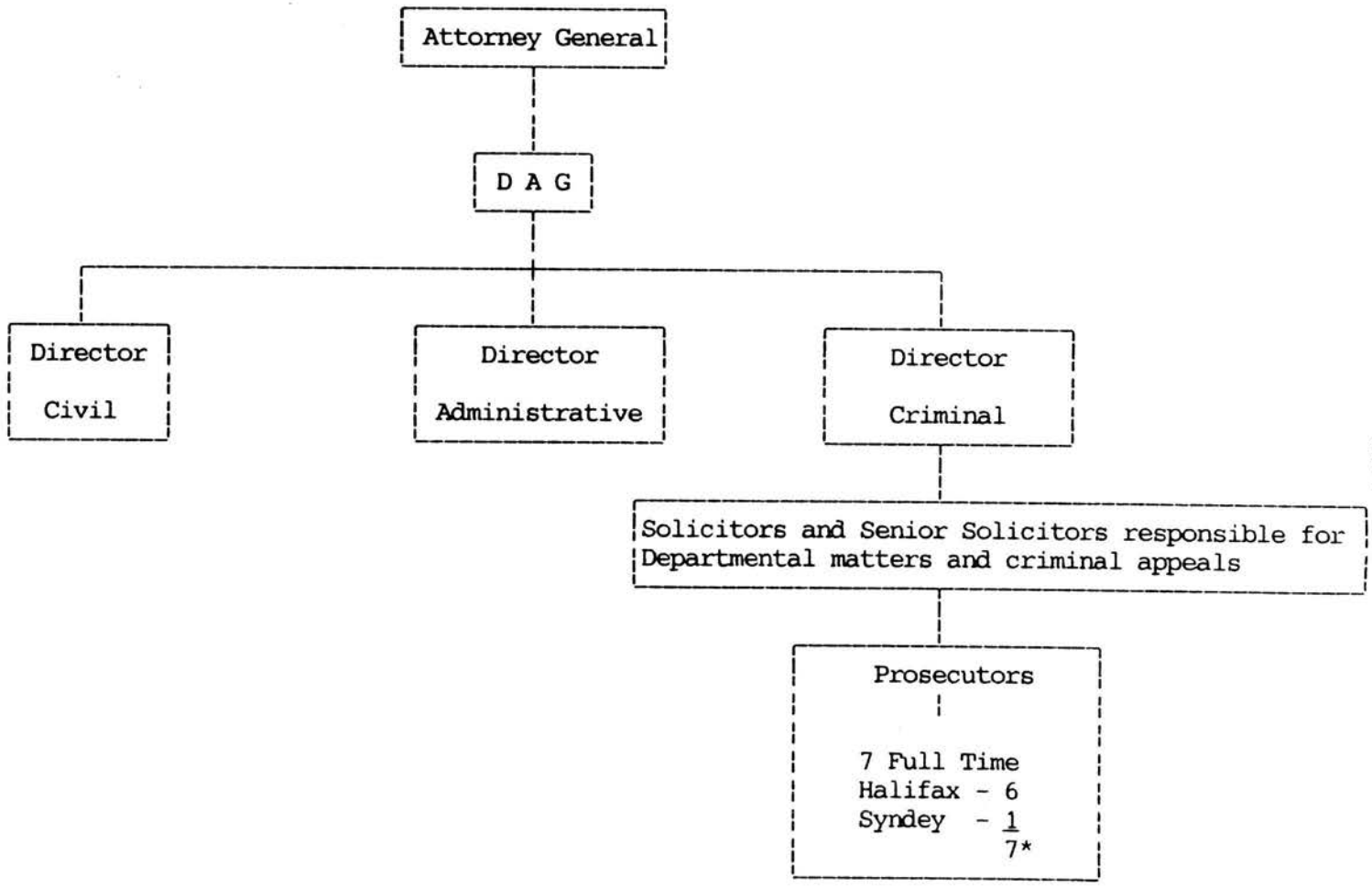
Where one appellate court Judge finds a passage in a charge material and fatally misleading and another Judge holds that it was irrelevant, they are in disagreement on a point in law: *R. v. BROWN* (1962), 132 C.C.C. 59, 37 C.R. 101 (S.C.C.) (3:2).

To proceed under this paragraph there must be a strict question of law, not one of mixed fact and law, which is involved in the *ratio decidendi* and upon which there was a disagreement in the provincial appellate Court: *DEMENOFF v. THE QUEEN*, [1964] 2 C.C.C.305, 41 C.R.407 (S.C.C.) (5:0).

While dissent by a Judge of the Court of Appeal as to the function of the Court of Appeal under s. 613 (1) (*a*) (i) would raise a question of law alone, where the Court has properly interpreted its function under the section but the members of the Court have differed as to its application to the facts of the case the dissent is solely on the application of the law and no appeal lies under this subsection: *CORBETT v. THE QUEEN* (1973), 14 C.C.C. (2d) 385, [1975] 2 S.C.R. 275 (5:2).

APPENDIX F1

The organization of the Attorney General's Department in 1971 is reflected in this chart.

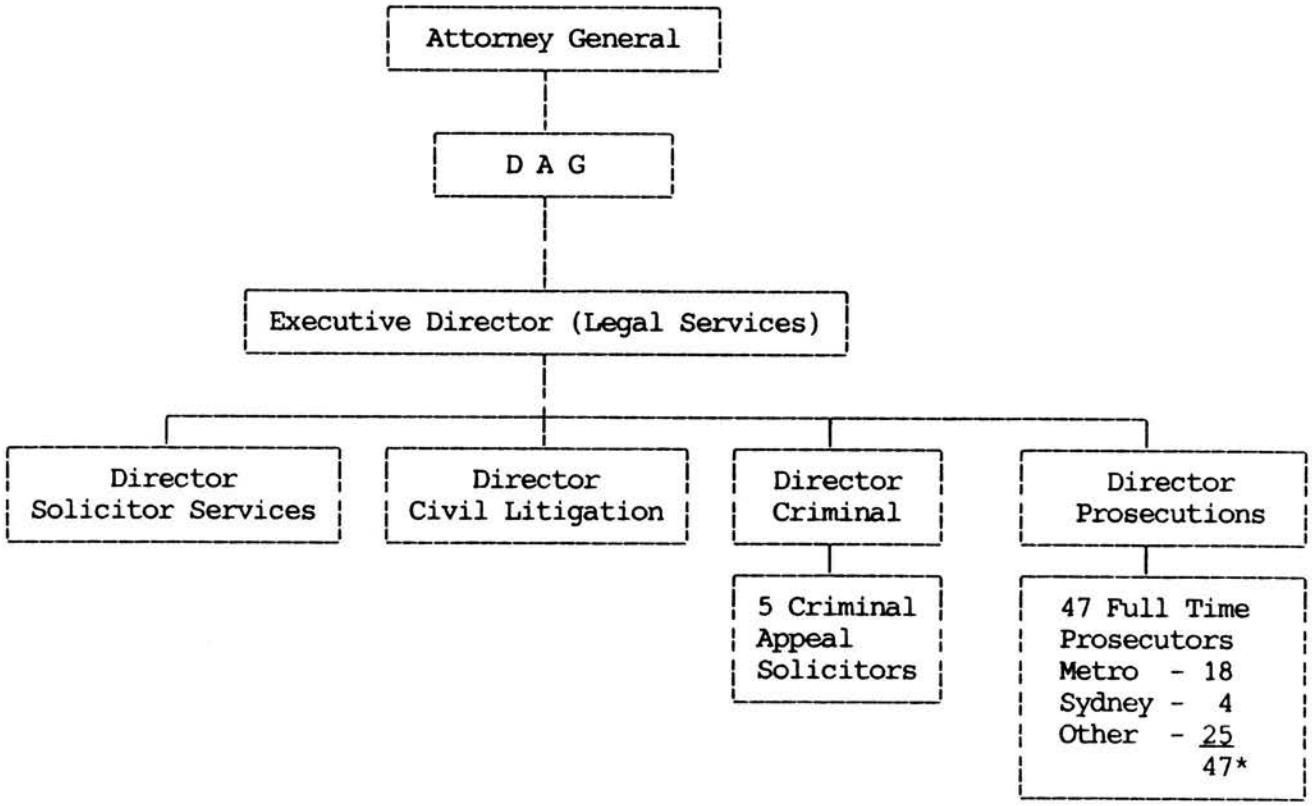


* The remainder of prosecutions were conducted by part-time prosecutors.

In 1978, Martin Herschorn became the Assistant Director (Criminal) with specific responsibility for Criminal appeals.

APPENDIX F2

In 1984, the Department was re-organized. The following chart reflects the present organization on the Criminal side.



* In addition there are 18 part-time prosecutors and a varying number of per diem prosecutors.

APPENDIX G

Government Departments, Boards and Commissions — *Continued*

Attorney-General's Department

Legislative Bldg., Winnipeg. R3C 0V8

Attorney-General ..... Hon. Victor Schroeder, Q.C.
Deputy Attorney-General ..... T. Elton

405 Broadway Ave., Winnipeg. R3C 3L6

Executive Director, Administration & Finance ..... P.J. Sinnott
Assistant Deputy Attorney-General, Criminal Justice ..... J.P. Guy, Q.C.
General Counsel ..... J.D. Montgomery, Q.C.; J.G. Dangerfield, Q.C.
Criminal Prosecutions
- Director, Criminal Prosecutions ..... (Vacant)
- Director, Special Prosecutions ..... W.W. Morton, Q.C.
- Crown Attorneys ..... M. Conklin; N. Cutler; G. de Moissac; R. Gosman; G. Joyal; C. Kopynsky; G. Lawlor; R. Maxwell; B. Mellon; B. Morrison; P. Murdock; M. Pflug; D. Rampersad, Q.C.; P. Schachter; B. Kaplan; T. MacKean; P. Flynn; J. LeMere; R. Saull; R. Wyant; J. Barr; B. Sumerlus

300-151 Princess St. R3B 1L1

Senior Crown Attorney ..... B. Miller
Crown Attorneys ..... R. Finlayson; D. Harvey; S. Lerner; J. Peden; L. Sawiak; D. Slough; L. Kee; G. Lawlor

30-139 Tuxedo Ave. R3N 0H6

Senior Crown Attorney ..... E. Sellick
Crown Attorneys ..... J. St. Hill; R. Ridd; K. Swiderski

227 Provencher Blvd. R2H 0G4

Crown Attorney ..... D. Melnyk
Law Enforcement Services
- Director ..... C.A. Hill
- Chief Medical Examiner ..... Dr. P.H. Markesteyn

Assistant Deputy Attorney-General, Justice ..... R.S. Perozzo
Legal Services Branch
- Director ..... T.G. Hague
- Deputy Director ..... N.D. Shende, Q.C.
- Departmental Solicitors ..... D.D. Blevins; J.G. Donald; I.D. Frost; A.G. Lupton; W.G. McFetridge; G.E. Mildren; J.F. Redgwell; E. Rodin; B.F. Squair, Q.C.; R.P. Winters; A.L. Berg; D. Gisser; V. Mathews-Lemieux; M. Perreault; S.J. Pierce; D.I. Victor, Q.C.; G. Hannon; J. Piché; G. Carnegie; V. Perry; A. Bailey; L. Romeo; D. Paskewitz; D. Lofendale

Constitutional Law
- Director ..... S.J. Whitley
- Legal Counsel ..... V.E. Toews; D.J. Miller; M.J. Smith

Family Law
- Director ..... R.M. Diamond
- Legal Counsel ..... A.C. Everett; C. Chelack; G.A. McLeod

Public Trustee ..... J.D. Raichura, Q.C.
- Solicitors ..... M. Anne Bolton; B. Drever; P.O. Jachetta; J.K. Knowlton

Assistant Deputy Attorney-General, Legislation & Translation (Legislative Counsel) ... M.H. Pepper, Q.C.
Assistant Deputy Attorney-General, Courts ..... M. Bruce
Registrar General Property Rights ..... M.M. Colquhoun

Department of Business Development and Tourism

Rm. 215, Legislative Bldg., Winnipeg. R3C 0V8

Minister ..... Hon. Al Mackling
Deputy Minister ..... B. Bernhard

Executive Council — *Continued*

Deputy Minister ..... L.J. Redmond

Management Board, One Government Place, Box 1619. B3J 2Y3

Chairman ..... Hon. George Moody
Deputy Minister ..... D. Tobin

Intergovernmental Affairs, Province House, Box 726. B3J 2T3

Minister ..... Hon. John M. Buchanan, P.C., Q.C.

Legislative Counsel

Howe Bldg., Box 1116, Halifax. B3J 2L6

Legislative Counsel ..... G.D. Walker, Q.C.
Solicitors ..... A.G.H. Fordham, Q.C.; D.W. MacDonald, Q.C.; G.D. Hebb; G. Johnson; C.A. Mosher; W.A. Sutherland

GOVERNMENT DEPARTMENTS, BOARDS AND COMMISSIONS

Department of Agriculture and Marketing

World Trade & Convention Centre, Box 190, Halifax. B3J 2M4

Minister ..... Hon. Roger S. Bacon
Deputy Minister ..... R. Morehouse

Department of the Attorney General

Bank of Montreal Bldg., Box 7, Halifax. B3J 2L6

Attorney General ..... Hon. Terence R.B. Donahoe, Q.C.
Deputy Attorney General ..... G.F. Coles, Q.C.
Executive Directors
- Correctional Services ..... J.L. Crane
- Courts & Registries ..... R.A. MacDonald
- Legal Services ..... R.G. Conrad, Q.C.

Directors
- Civil Litigation ..... R.M. Endres
- Criminal ..... G. Gale, Q.C.
- Prosecutions ..... M.E. Hershorn
- Solicitor Services ..... B. Davidson, Q.C.

Solicitors ..... Helenanne Carey, Q.C.; G. Evans; W. Wilson; R. Lutes; D. Giovannetti; D. Keefe; K. Fiske; Dana Giovannetti; A. Scott; J. Davies; Louise Poirier; J. Asheley; J. Embree; Marian Tyson
Public Trustee ..... M.H. Bushell, Q.C.
Solicitor ..... Estelle Theriault
Registrar, Joint Stock Companies ..... C.B. Alcorn

Department of Consumer Affairs

5151 Terminal Rd., Box 998, Halifax. B3J 2X3

Minister ..... Hon. Maxine Cochran
Deputy Minister ..... Cathy MacNutt
Amusements Regulation Chairman ..... Rev. D. Trivett
Superintendent of Insurance ..... L.C. Umlah

Department of Culture, Recreation and Fitness

5151 Terminal Rd., Box 864, Halifax. B3J 2V2

Minister ..... Hon. Maxine Cochran
Deputy Minister ..... L. Stephen

O. C.

APPENDIX H

O

O. C. An abbreviation, in the civil law, for *"ope consilio"* (*q. v.*). In American law, these letters are used as an abbreviation for "Orphans' Court."

O. E. O. Office of Economic Opportunity.

O. K. A conventional symbol, of obscure origin much used in commercial practice and occasionally in indorsements on legal documents, signifying "correct," "approved," "accepted," "satisfactory," or "assented to." Getchell & Martin Lumber Co. v. Peterson, 124 Iowa, 599, 100 N.W. 550; Morganton Mfg. Co. v. Ohio River, etc., Ry. Co., 121 N.C. 514, 28 S.E. 474, 61 Am.St.Rep. 679.

O. N. B. An abbreviation for "Old Natura Brevium." See Natura Brevium.

O. NI. It was the course of the English exchequer, as soon as the sheriff entered into and made up his account for issues, amerciaments, etc., to mark upon each head *"O. Ni.,"* which denoted *oneratur, nisi habeat sufficientem exonerationem,* and presently he became the king's debtor, and a *debet* was set upon his head; whereupon the parties *paravaile* became debtors to the sheriff, and were discharged against the king, etc. 4 Inst. 116; Wharton.

O. S. An abbreviation for "Old Style," or "Old Series."

OATH. Any form of attestation by which a person signifies that he is bound in conscience to perform an act faithfully and truthfully. Vaughn v. State, 146 Tex.Cr.R. 586, 177 S.W.2d 59, 60. An affirmation of truth of a statement, which renders one willfully asserting untrue statements punishable for perjury. U. S. v. Klink, D.C.Wyo., 3 F. Supp. 208, 210. An outward pledge by the person taking it that his attestation or promise is made under an immediate sense of responsibility to God. Morrow v. State, 140 Neb. 592, 300 N.W. 843, 845. A solemn appeal to the Supreme Being in attestation of the truth of some statement. State v. Jones, 28 Idaho 428, 154 P. 378, 381; Tyler, Oaths 15. An external pledge or asseveration, made in verification of statements made, or to be made, coupled with an appeal to a sacred or venerated object, in evidence of the serious and reverent state of mind of the party, or with an invocation to a supreme being to witness the words of the party, and to visit him with punishment if they be false. June v. School Dist. No. 11, Southfield Tp., 283 Mich. 533, 278 N.W. 676, 677, 116 A.L.R. 581. In its broadest sense, the term is used to include all forms of attestation by which a party signifies that he is bound in conscience to perform the act faithfully and truly. In a more restricted sense, it excludes all those forms of attestation or promise which are not accompanied by an imprecation.

The term has been variously defined: as, "a solemn invocation of the vengeance of the Deity upon the witness if he do not declare the whole truth, so far as he knows it," 1 Stark.Ev. 22; or, "a religious asseveration by which a person renounces the mercy and imprecates the vengeance of Heaven if he do not speak the truth," 1 Leach 430; or, as "a religious act by which the party invokes God not only to witness the truth and sincerity of his promise, but also to avenge his imposture or violated faith, or, in other words, to punish his perjury if he shall be guilty of it," 10 Toullier, n. 343; Puffendorff, b. 4, c. 2, § 4. The essential idea of an oath would seem to be, however, that of a recognition of God's authority by the party taking it, and an undertaking to accomplish the transaction to which it refers as required by his laws.

See Kissing the Book.

Assertory Oath. One relating to a past or present fact or state of facts, as distinguished from a "promissory" oath which relates to future conduct; particularly, any oath required by law other than in judicial proceedings and upon induction to office, such, for example, as an oath to be made at the custom-house relative to goods imported.

Corporal Oath. See Corporal.

Decisive or Decisory Oath. In the civil law, where one of the parties to a suit, not being able to prove his charge, offered to refer the decision of the cause to the oath of his adversary, which the adversary was bound to accept, or tender the same proposal back again, otherwise the whole was taken as confessed by him. Cod. 4, 1, 12.

Extrajudicial Oath. One not taken in any judicial proceeding, or without any authority or requirement of law, though taken formally before a proper person. State v. Scatena, 84 Minn. 281, 87 N.W. 764.

False Oath. See titles "False Oath" and "Perjury."

Judicial Oath. One taken in some judicial proceeding or in relation to some matter connected with judicial proceedings. One taken before an officer in open court, as distinguished from a "nonjudicial" oath, which is taken before an officer ex parte or out of court. State v. Dreifus, 38 La.Ann. 877.

Official Oath. One taken by an officer when he assumes charge of his office, whereby he declares that he will faithfully discharge the duties of the same, or whatever else may be required by statute in the particular case.

Poor Debtor's Oath. See Poor.

Promissory Oaths. Oaths which bind the party to observe a certain course of conduct, or to fulfill certain duties, in the future, or to demean himself thereafter in a stated manner with reference to specified objects or obligations; such, for example, as the oath taken by a high executive officer, a legislator, a judge, a person seeking naturalization, an attorney at law. Case v. People, 6 Abb. N. C., N.Y., 151. A solemn appeal to God, or, in a wider sense, to some superior sanction or a sacred or revered person in witness of the inviolability of

a promise or undertaking. People ex rel. Bryant v. Zimmerman, 241 N.Y. 405, 150 N.E. 497, 499, 43 A.L.R. 909.

Purgatory Oath. An oath by which a person *purges* or clears himself from presumptions, charges or suspicions standing against him, or from a contempt.

Qualified Oath. One the force of which as an affirmation or denial may be qualified or modified by the circumstances under which it is taken or which necessarily enter into it and constitute a part of it; especially thus used in Scotch law.

Solemn Oath. A corporal oath. Jackson v. State, 1 Ind. 184.

Suppletory Oath. In the civil and ecclesiastical law, the testimony of a single witness to a fact is called "half-proof," on which no sentence can be founded; in order to supply the other half of proof, the party himself (plaintiff or defendant) is admitted to be examined in his own behalf, and the oath administered to him for that purpose is called the "suppletory oath," because it supplies the necessary *quantum* of proof on which to found the sentence. 3 Bl. Comm. 370.

This term, although without application in American law in its original sense, is sometimes used as a designation of a party's oath required to be taken in authentication or support of some piece of documentary evidence which he offers, for example, his books of account.

Voluntary Oath. Such as a person may take in extrajudicial matters, and not regularly in a court of justice, or before an officer invested with authority to administer the same. Brown.

OATH AGAINST BRIBERY. One which could have been administered to a voter at an election for members of parliament. Abolished in 1854. Wharton.

OATH EX OFFICIO. The oath by which a clergyman charged with a criminal offense was formerly allowed to swear himself to be innocent; also the oath by which the compurgators swore that they believed in his innocence. 3 Bl. Comm. 101, 447; Mozley & Whiteley.

OATH IN LITEM. In the civil law, an oath permitted to be taken by the plaintiff, for the purpose of proving the value of the subject-matter in controversy, when there was no other evidence on that point, or when the defendant fraudulently suppressed evidence which might have been available. Greenl. Ev. § 348; 1 Eq. Cas. Abr. 229; Herman v. Drinkwater, 1 Greenl., Me., 27.

OATH OF ALLEGIANCE. An oath by which a person promises and binds himself to bear true allegiance to a particular sovereign or government, *e. g.*, the United States; administered generally to high public officers and to soldiers and sailors, also to aliens applying for naturalization, and, occasionally, to citizens generally as a prerequisite to their suing in the courts or prosecuting claims before government bureaus. Rev.St. U.S. §§ 3478, 31 U.S.C.A. § 204.

OATH OF CALUMNY. In the civil law, an oath which a plaintiff was obliged to take that he was not prompted by malice or trickery in commencing his action, but that he had *bona fide* a good cause of action. Poth. Pand. lib. 5, tt. 16, 17, s. 124.

OATH-RITE. The form used at the taking of an oath.

OB. Lat. On account of; for. Several Latin phrases and maxims, commencing with this word, are more commonly introduced by *"in"* (*q. v.*).

OB CAUSAM ALIQUAM A RE MARITIMA ORTAM. For some cause arising out of a maritime matter. 1 Pet. Adm. 92. Said to be Selden's translation of the French definition of admiralty jurisdiction, *"pour le fait de la mer."* Id.

OB CONTINENTIAM DELICTI. On account of contiguity to the offense, *i. e.*, being contaminated by conjunction with something illegal.

For example, the cargo of a vessel, though not contraband or unlawful, may be condemned in admiralty, along with the vessel, when the vessel has been engaged in some service which renders her liable to seizure and confiscation. The cargo is then said to be condemned *ob continentiam delicti*, because found in company with an unlawful service. 1 Kent, Comm. 152.

OB CONTINGENTIAM. On account of connection; by reason of similarity. In Scotch law, this phrase expresses a ground for the consolidation of actions.

OB FAVOREM MERCATORUM. In favor of merchants. Fleta, lib. 2, c. 63, § 12.

OB INFAMIAM NON SOLET JUXTA LEGEM TERRÆ ALIQUIS PER LEGEM APPARENTEM SE PURGARE, NISI PRIUS CONVICTUS FUERIT VEL CONFESSUS IN CURIA. Glan. lib. 14, c. ii. On account of evil report, it is not usual, according to the law of the land, for any person to purge himself, unless he have been previously convicted, or confessed in court.

OB TURPEM CAUSAM. For an immoral consideration. Dig. 12, 5.

OBÆRATUS. Lat. In Roman law, a debtor who was obliged to serve his creditor till his debt was discharged. Adams, Rom. Ant. 49.

OBEDIENCE. Compliance with a command, prohibition, or known law and rule of duty prescribed; the performance of what is required or enjoined by authority, or the abstaining from what is prohibited, in compliance with the command or prohibition. Webster.

OBEDIENTIA. An office, or the administration of it; a kind of rent; submission; obedience.

OBEDIENTIA EST LEGIS ESSENTIA. 11 Coke, 100. Obedience is the essence of the law.

OBEDIENTIAL OBLIGATION. See Obligation.

OBEDIENTIARIUS; OBEDIENTIARY. A monastic officer. Du Cange; see 1 Poll. & Maitl. 417.

the wild oat. 3. [Obs. or Poetic], a simple musical pipe made of an oat stalk.
feel one's oats, [Slang], 1. to be in high spirits; be frisky. 2. to feel and act important.
oat·cake (ōt′kāk′), *n.* a thin, flat, hard cake made of oatmeal.
oat·en (ōt″n), *adj.* of or made of oats, oatmeal, or oat straw.
Oates, Titus (ōts), 1649–1705; English conspirator who fabricated the Popish Plot, a supposed Roman Catholic plot (1678) to massacre Protestants, burn London, and kill the king; convicted of perjury but later pardoned.
oat grass, any of various oatlike grasses; especially, any wild oat.
oath (ōth), *n.* [*pl.* OATHS (ōthz, ōths)], [ME. *oth;* AS. *āth;* akin to G. *eid;* IE. base **ei-*, to go; basic sense "a going to fulfill a promise"; cf. L. *ire*, to go, *iter*, a journey (cf. ITINERARY), *initium*, a beginning (cf. INITIAL), etc. < the same base]. 1. *a)* a ritualistic declaration, based on an appeal to God or to some revered person or object, that one will speak the truth, keep a promise, remain faithful, etc. *b)* the pattern of words or ritual form used in making such a declaration. *c)* the thing promised or declared in this way. 2. the irreverent or profane use of the name of God or of a sacred thing to express anger or emphasize a statement. 3. a swearword; curse.
take oath, to promise or declare by making an oath; swear solemnly.
oat·meal (ōt′mēl′), *n.* 1. oats crushed into meal or flakes; rolled or ground oats. 2. a porridge made from such oats.
Oa·xa·ca (wä-hä′kä), *n.* 1. a state of southern Mexico, on the Pacific: area, 36,371 sq. mi.; pop., 1,193,000. 2. its capital: pop., 34,000.
Ob (ōb), *n.* a river in western Siberia, flowing into the Gulf of Ob: length, 3,200 mi.
Ob, Gulf of, an arm of the Arctic Ocean, in northwestern Siberia: length, c. 600 mi.
ob- (ob, əb, ōb), [< L. *ob*, prep.], a prefix meaning: 1. *to, toward, before,* as in *object.* 2. *opposed to, against,* as in *obnoxious.* 3. *upon, over,* as in *obfuscate.* 4. *completely, totally,* as in *obsolete.* 5. *inversely, oppositely,* as in *objurgate.* In words of Latin origin, *ob-* assimilates to *oc-* before *c*, as in *occur; of-* before *f*, as in *offer;* and *op-* before *p*, as in *oppress;* it becomes *o-* before *m*, as in *omit.*
ob., 1. [L.], *obiit.* 2. *obiter*, [L.], in passing. 3. oboe.
O.B., 1. Benedictine Order. 2. obstetrics.
O·ba·di·ah (ō′bə-dī′ə), [LL.; Heb. *'ōbadhyah*, lit., servant of the Lord], a masculine name. ‖ *n.* in the *Bible*, 1. one of the minor Hebrew prophets. 2. a book of the Old Testament containing his prophecies. Abbreviated **Ob.**, **Obad.**
ob·bli·ga·to (ob′li-gä′tō), *adj.* [It., lit., obliged; L. *obligatus*, pp. of *obligare;* see OBLIGE], in *music*, not to be left out; indispensable: said of an accompaniment that has its own character and importance and is necessary to the proper performance of a piece: abbreviated **obb.** *n.* [*pl.* OBBLIGATOS (-tōz), OBBLIGATI (-ti)], a musical accompaniment, especially one of this kind. Also spelled **obligato.**
ob·cor·date (ob′kôr′dāt), *adj.* [*ob-* + *cordate*], in *botany*, heart-shaped and joined to the stem at the apex: said of certain leaves.
obdt., obedient.
ob·du·ra·cy (ob′doo-rə-si, ob′dyoo-rə-si), *n.* the quality or state of being obdurate.
ob·du·rate (ob′doo-rit, ob′dyoo-rit), *adj.* [ME.; L. *obduratus*, pp. of *obdurare*, to harden, *ob-*, intens. + *durare*, to harden < *durus*, hard], 1. not easily moved to pity or sympathy; hardhearted. 2. hardened and unrepenting; impenitent. 3. not giving in readily; stubborn; obstinate; inflexible. —*SYN.* see **inflexible.**
o·be·ah (ō′bi-ə), *n.* [of W. Afr. origin], 1. [often O-], a form of witchcraft or magic practiced by some Negroes in Africa, and formerly also in the West Indies. 2. a talisman or fetish used in such witchcraft. Also **obi.**
o·be·di·ence (ō-bē′di-əns, ə-bē′di-əns), *n.* [ME.; OFr.; L. *obedientia* < *obediens*], 1. the state or fact of being obedient; doing what is ordered; submission. 2. in the *Roman Catholic Church*, *a)* the Church's jurisdiction. *b)* all those who submit to this jurisdiction.
o·be·di·ent (ō-bē′di-ənt, ə-bē′di-ənt), *adj.* [ME.; L. *obediens*, ppr. of *obedire;* see OBEY], obeying or willing to obey; docile; tractable: abbreviated **obdt.**
SYN.—**obedient** suggests a giving in to the orders or instructions of one in authority or control (an *obedient* child); **docile** implies a temperament that submits easily to control or that fails to resist domination (a *docile* wife); **tractable** implies ease of management or control but does not connote the submissiveness of **docile** and applies to things as well as people (silver is a *tractable*, i.e., malleable, metal); **compliant** suggests a weakness of character that allows one to yield meekly to another's request or demand (army life had made him *compliant*); **amenable** suggests such amiability or desire to be agreeable as would lead one to submit readily (he is *amenable* to discipline). —*ANT.* disobedient, refractory.
o·bei·sance (ō-bā′s'ns, ō-bē′s'ns), *n.* [ME. *obeisaunce;* OFr. *obeissance* < *obeissant*, ppr. of *obeir*, to obey; cf. OBEY], 1. a gesture of respect or reverence, such as a bow, curtsy, etc. 2. the attitude shown by this; homage; deference: as, they did *obeisance* to him.
o·bei·sant (ō-bā′s'nt, ō-bē′s'nt), *adj.* showing or doing obeisance; respectful.
ob·e·lisk (ob′ə-lisk′), *n.* [L. *obeliscus;* Gr. *obeliskos*, dim. of *obelos;* see OBELUS], 1. a tall, four-sided stone pillar tapering toward its pyramidal top: it often has hieroglyphics on it. 2. an obelus.
ob·e·lize (ob′ə-liz′), *v.t.* [OBELIZED (-izd′), OBELIZING], [Gr. *obelizein*], to mark with an obelus.
ob·e·lus (ob′ə-ləs), *n.* [*pl.* OBELI (-lī′)], [ME.; LL.; Gr. *obelos*, a needle, spit], 1. a mark (– or +) used in ancient manuscripts to indicate questionable passages or readings. 2. in *typography*, a reference mark (†), used to indicate footnotes, etc.; dagger; obelisk.
O·ber·am·mer·gau (ō′bĕr-äm′ĕr-gou′, ō′bĕr-am′ĕr-gou′), *n.* a town in southern Bavaria, Germany, where the Passion play is normally presented every ten years: pop., 2,000.
O·ber·hau·sen (ō′bĕr-hou′z'n), *n.* a city in the Rhine Province, Germany: pop., 174,000 (est. 1946).
O·ber·land (ō′bĕr-länt′), *n.* a mountainous district in central Switzerland.
O·ber·on (ō′bə-rən′, ō′bĕr-ən), *n.* [Fr.; OFr. *Auberon* < Gmc. base of *alf, oaf*], in early folklore, the king of fairyland and husband of Titania.
o·bese (ō-bēs′), *adj.* [L. *obesus*, pp. of *obedere*, to devour; *ob-* (see OB-) + *edere*, to eat], very fat; stout; corpulent.
o·bes·i·ty (ō-bēs′ə-ti, ō-bes′ə-ti), *n.* [Fr. *obésité;* L. *obesitas*], the quality or state of being obese.
o·bey (ō-bā′, ə-bā′), *v.t.* [ME. *obeien;* OFr. *obeir;* L. *obedire*, to obey; OL. *oboedire* < *ob-* (see OB-) + *audire*, to hear], 1. to carry out the instructions or orders of. 2. to carry out (an instruction, order, etc.). 3. to be guided by; submit to the control of: as, *obey* your common sense. *v.i.* to be obedient.
ob·fus·cate (ob-fus′kāt, ob′fəs-kāt′), *v.t.* [OBFUSCATED (-id), OBFUSCATING], [< L. *obfuscatus*, pp. of *obfuscare*, *offuscare*, to darken < *ob-* (see OB-) + *fuscare*, to obscure < *fuscus*, dark], 1. to darken; obscure; hence, 2. to confuse; stupefy; bewilder.
ob·fus·ca·tion (ob′fus-kā′shən), *n.* 1. an obfuscating or being obfuscated. 2. something that obfuscates.
o·bi (ō′bi), *n.* obeah.
o·bi (ō′bi), *n.* [Japan.], a broad sash with a bow in the back, worn by Japanese women and children.
‡ob·i·it (ob′i-it, ō′bi-it), [L.], he (or she) died: abbreviated **ob.**
o·bit (ō′bit, ob′it), *n.* [ME. *obite;* OFr.; L. *obitus*, death < pp. of *obire*, to go down, fall, die; *ob-* (see OB-) + *ire*, to go; cf. OATH], an obituary.
ob·i·ter dic·tum (ob′i-tĕr dik′təm), [*pl.* OBITER DICTA (-tə)], [L.], 1. an incidental opinion expressed by a judge, having no bearing upon the case in question, hence not binding. 2. any incidental remark.
o·bit·u·ar·y (ō-bich′ōō-er′i, ə-bich′ōō-er′i), *n.* [*pl.* OBITUARIES (-iz)], [ML. *obituarius* < L. *obitus;* see OBIT], a notice of someone's death, as in a newspaper, usually with a short biography of the deceased. *adj.* of or recording a death or deaths.
obj., 1. object. 2. objection. 3. objective.
ob·ject (ob′jikt; *for v.*, əb-jekt′, ob-jekt′), *n.* [ME.; ML. *objectum*, something thrown in the way; L. *objectus*, a casting before, that which appears, orig. pp. of *objicere* < *ob-* (see OB-) + *jacere*, to throw], 1. a thing that can be seen or touched; material thing. 2. *a)* a person or thing to which action, thought, or feeling is directed. *b)* [Colloq.], a person or thing that excites pity or ridicule. 3. what is aimed at; purpose; end; goal. 4. in *grammar*, a noun or substantive that directly or indirectly receives the action of a verb, or one that is governed by a preposition. In "Give me the book," *book* is the *direct object* and *me* is the *indirect object.* Abbreviated **obj.** 5. in *philosophy*, anything that can be known or perceived by the mind. *v.t.* 1. formerly, *a)* to oppose. *b)* to thrust in; interpose. *c)* to expose. *d)* to bring forward as a reason, instance, etc.; adduce. 2. to put forward in opposition; state by way of objection: as, it was *objected* that the new tax law was unfair to property owners. *v.i.* 1. to put forward an objection or objections; enter a protest; be opposed. 2. to feel or express disapproval or dislike.
SYN.—**object** implies opposition to something because of strong dislike or disapproval (I *object* to her meddling); **protest** implies the making of strong, formal, often written objection to something (they *protested* the new tax increases); **remonstrate** implies protest and argument in demonstrating to another that