COURT OF APPEAL FOR YUKON TERRITORY

Citation: *H.M.T.Q. v. Waranuk,*
2010 YKCA 5

Date: 20100722
Docket: 08-YU615

Between:

Her Majesty The Queen

Appellant

And

Tim A. Waranuk

Respondent

Before: The Honourable Madam Justice Saunders
The Honourable Madam Justice Bennett
The Honourable Madam Justice Garson

On appeal from: Supreme Court of Yukon, June 19, 2008
(*H.M.T.Q. v. Waranuk*, 2008 YKSC 49)

Counsel for the Appellant:	N. Sinclair
The Respondent:	No appearance
Amicus Curiae:	M.A. Reynolds
Place and Date of Hearing:	Whitehorse, Yukon Territory May 18, 2010
Place and Date of Judgment:	Vancouver, British Columbia July 22, 2010

Written Reasons by:
The Honourable Madam Justice Bennett

Concurred in by:
The Honourable Madam Justice Saunders
The Honourable Madam Justice Garson

VANCOUVER
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COURT OF APPEAL
REGISTRY

Reasons for Judgment of the Honourable Madam Justice Bennett:

[1] The Crown appeals an order for a new trial made June 19, 2008 (2008 YKSC 49). The summary conviction appeal is pursuant to s. 839 of the *Criminal Code* and is limited to questions of law alone. Mr. Waranuk had been found not criminally responsible of a charge of assault by reason of mental disorder. He successfully appealed to the Supreme Court on the basis that he was not provided with a lawyer when the order to have him assessed by a psychiatrist was made under section 672.12 of the *Criminal Code.*

[2] Mr. Waranuk did not appear on the appeal. Mr. Reynolds ably assisted the court and represented Mr. Waranuk's interests as *amicus curiae*.

[3] The issue on appeal is whether the summary conviction appeal court judge erred in finding that section 672.24 mandates the appointment of counsel when the Crown seeks to have an accused assessed for fitness to stand trial or for mental disorder pursuant to s. 672.12 of the *Criminal Code*. This is a question of law. For the reasons that follow, I would grant leave, but dismiss the appeal and confirm the order for a new trial.

Background

[4] Since there will be a new trial, I will not deal with the facts in great detail, other than as is necessary to demonstrate why Mr. Waranuk required counsel. I agree with the conclusion of the summary conviction appeal judge that the failure to appoint counsel for Mr. Waranuk resulted in an unfair trial.

[5] Mr. Waranuk was convicted of assaulting the complainant, Misty Buchanan, a government employee, on December 14, 2006. Mr. Waranuk went to see Ms. Buchanan to obtain assistance with a government application. A confrontation occurred during the meeting and Ms. Buchanan complained that Mr. Waranuk assaulted her.

[6] Mr. Waranuk was self-represented at trial. The trial was very difficult to conduct as Mr. Waranuk was irascible and was easily agitated. Mr. Waranuk became upset during Ms. Buchanan's evidence and the trial judge, who was clearly frustrated by Mr. Waranuk's behaviour, threatened to have him placed into custody.

[7] After the close of the Crown's case, Mr. Waranuk began speaking in a manner somewhat disconnected from the proceedings. The Crown, at the judge's suggestion, made an application to have Mr. Waranuk assessed by a psychiatrist under s. 672.12 of the *Criminal Code*. The order was made without any explanation to Mr. Waranuk with respect to what the order was or why it was being made. He was not given the opportunity to speak to counsel. This occurred May 27, 2007. Mr. Waranuk had told the court that his mother had died that day.

[8] The next appearance was on May 30, 2007. Mr. Waranuk was told he had to see Dr. Heredia for two appointments. The first one was the next day. He was handed the order made by the court, which read as follows:

> IT IS ORDERED that the Respondent Tim WARANUK shall be assessed pursuant to section 672.12 of the *Criminal Code* to determine whether the Respondent is:
>
> a) unfit to stand trial; and,
>
> b) whether the Respondent was, at the time of the commission of the alleged offence, suffering from a mental disorder so as to be exempt from criminal responsibility by virtue of s. 16(1) of the *Criminal Code*.
>
> IT IS ORDERED that this assessment shall be done by Dr. Armando Heredia at #4 Hospital Road, 2nd floor, Whitehorse, Yukon with the first appointment on Friday, June 1, 2007 at 4 p.m., the second appointment on Monday, June 4, 2007 at 4 p.m., and any other appointment as required by Dr. Armando Heredia.
>
> IT IS FURTHER ORDERED that this order shall be in force for a period of not more than thirty (30) days.
>
> IT IS FURTHER ORDERED that the assessment is to be provided in the form of a written report filed with the Clerk of the Court and provided to Counsel for the Applicant and Counsel for the Respondent as soon as practicable and in any event within thirty days of the date of this order.

[9] I note that the order made in court was for an assessment pursuant to s. 672.12(2), to assess fitness for trial. However, the order signed by the judge includes an assessment pursuant to ss. 672.12 (3) and 16(1) of the *Criminal Code* to determine whether he was suffering from a mental disorder at the time of trial.

[10] The following discussion occurred:

> The Accused: This order is that I must see the psychiatrist then?
>
> The Court: Yes.
>
> The Accused: Okay.
>
> The Court: Are you prepared to do that?
>
> The Accused: Well, I shouldn't have to, I'd like to get some legal counsel on this first. I'd like to talk to somebody that is more qualified than me before I ever accept this.

[11] There was further discussion and the judge, again without explaining anything that was unfolding, said he would appoint counsel pursuant to s. 672.24. Mr. Waranuk said he wanted to speak to his own lawyer. The judge concluded, without further explanation to Mr. Waranuk regarding the effect of s. 672.12, s. 672.24 or s. 16, that he was going to make an order requiring Mr. Waranuk to see the psychiatrist the next day. Mr. Waranuk asked what would happen if he did not comply with the order; he was told that he would be arrested. Mr. Waranuk's mother's funeral was apparently on this day. He was not given an opportunity to contact counsel. The order under s. 672.24 was not made.

[12] The next appearance was June 15. It seems Dr. Heredia had sent a letter to the court asking for Mr. Waranuk to consent to release his medical records. The letter does not appear to have been filed as an exhibit. Mr. Waranuk again asked for "a bit of time" so he could consult with a lawyer. This request was refused. Mr. Waranuk was reminded that he had to see Dr. Heredia again on June 20.

[13] An extension to the assessment order was made on July 16, 2007. It does not appear that Mr. Waranuk was in court when this order was made. Dr. Heredia sent a report to the court wherein he opined that Mr. Waranuk was fit to stand trial.

No further hearing was held with respect to fitness. The trial continued and Mr. Waranuk presented his defence.

[14] Mr. Waranuk testified in his own defence. He called a number of witnesses who testified to his good character and to the fact that he was perfectly sane in their opinion.

[15] The trial judge found that Mr. Waranuk committed the acts with which he was charged. He then held a hearing under s. 16 of the *Criminal Code* at which he found Mr. Waranuk not criminally responsible by reason of mental disorder and ordered that the matter be remitted to the Yukon Review Board. This order was stayed pending the appeal to the Supreme Court.

[16] Several issues were raised on appeal in the Supreme Court. By that point, *amicus curiae* had been appointed to represent Mr. Waranuk.

[17] The summary appeal court judge allowed the appeal and ordered a new trial on the basis that s. 672.24 is a mandatory order which required the trial judge to appoint counsel for Mr. Waranuk prior to the hearing of an application for assessment.

Discussion

[18] An assessment order may be made pursuant to s. 672.11 of the *Criminal Code*:

> 672.11 A court having jurisdiction over an accused in respect of an offence may order an assessment of the mental condition of the accused, if it has reasonable grounds to believe that such evidence is necessary to determine
>
> (a) whether the accused is unfit to stand trial;
>
> (b) whether the accused was, at the time of the commission of the alleged offence, suffering from a mental disorder so as to be exempt from criminal responsibility by virtue of subsection 16(1); ...

[19] There are limitations on a prosecutor's application for an assessment if the offence proceeded by way of summary conviction. These are set out in s. 672.12:

> 672.12(1) The court may make an assessment order at any stage of proceedings against the accused of its own motion, on application of the accused or, subject to subsections (2) and (3), on application of the prosecutor.
>
> (2) Where the prosecutor applies for an assessment in order to determine whether the accused is unfit to stand trial for an offence that is prosecuted by way of summary conviction, the court may only order the assessment if
>
> (a) the accused raised the issue of fitness; or
>
> (b) the prosecutor satisfies the court that there are reasonable grounds to doubt that the accused is fit to stand trial.
>
> (3) Where the prosecutor applies for an assessment in order to determine whether the accused was suffering from a mental disorder at the time of the offence so as to be exempt from criminal responsibility, the court may only order the assessment if
>
> (a) the accused puts his or her mental capacity for criminal intent into issue; or
>
> (b) the prosecutor satisfies the court that there are reasonable grounds to doubt that the accused is criminally responsible for the alleged offence, on account of mental disorder. 1991, c. 43, s. 4.

[20] If there are reasonable grounds to believe a person is unfit to stand trial and the person is not represented by counsel, the court shall order that the accused be represented by counsel.

> 672.24(1) Where the court has reasonable grounds to believe that an accused is unfit to stand trial and the accused is not represented by counsel, the court shall order that the accused be represented by counsel.
>
> (2) Where counsel is assigned pursuant to subsection (1) and legal aid is not granted to the accused pursuant to a provincial legal aid program, the fees and disbursements of counsel shall be paid by the Attorney General to the extent that the accused is unable to pay them.
>
> (3) Where counsel and the Attorney General cannot agree on the fees or disbursements of counsel, the Attorney General or the counsel may apply to the registrar of the court and the registrar may tax the disputed fees and disbursements.

[21] The Crown submitted that the mandatory appointment of counsel did not apply because it was not procedurally necessary prior to a fitness hearing. They submitted that the order for an assessment was made pursuant to s. 672.12 and not s. 672.11. The wording differs in that s. 672.11 and s. 672.24 both refer to "reasonable grounds to believe" whereas s. 672.12 refers to "reasonable grounds to

doubt". The final argument was that the failure to appoint counsel does not justify setting aside the verdict.

[22] The summary conviction appeal judge made this finding at paras. 30-34:

> [30] My second concern is that, notwithstanding Mr. Waranuk's expressed intentions of retaining his own counsel at some point in the future, the fact remains that he was not represented by counsel at the stage where the trial judge formed reasonable grounds to believe that he was unfit to stand trial. In my view, it was mandatory that the Court order Mr. Waranuk be represented by counsel before proceeding further with the assessment process. Should Mr. Waranuk have subsequently satisfied the trial judge that he had indeed retained his own counsel, then any counsel ordered to represent him under s. 672.24(1) could have been discharged. However, the important point is that Mr. Waranuk should have had legal advice and representation before proceeding any further through the assessment process. This was especially critical given the timing of the assessment, which was arranged to take place on June 1, 2007, merely one full day after the assessment order was made.
>
> [31] Crown counsel on this appeal argued that the reference in *Mental Disorder in Canadian Criminal Law*, cited above, to the necessity of the accused being represented by counsel at or for "the fitness hearing" is significant, because in this case, once Dr. Heredia's psychiatric report was filed with the Court, expressing his expert opinion that Mr. Waranuk was fit to stand trial, there was no need to proceed with a fitness hearing. Thus, counsel argued that, since there was no fitness hearing, there was no obligation to appoint counsel for Mr. Waranuk. I disagree with this argument for two reasons.
>
> [32] First, there was a form of fitness hearing before the trial judge on August 10, 2007. Although it was extremely summary in nature, and there was no additional evidence beyond the psychiatric report, nor any particular submissions, it was a hearing nevertheless. Sections 672.27 and 672.28 of the *Criminal Code* deal with the trial of the fitness issue and the continuation of the trial where the verdict is that the accused is fit to stand trial. The trial judge made a clear determination that Mr. Waranuk was "indeed fit to stand trial" and that the trial should proceed. In order to render that verdict on fitness, the trial judge had to consider the evidence before him in the form of Dr. Heredia's report. While there was no application to cross-examine Dr. Heredia, or any other application to adduce further evidence, and while the submissions by the Crown on the issue were nominal ("The fitness seems to be settled in the report... It's a non issue for us at this time"), there was nevertheless a notional hearing on the fitness issue at that point in the trial. Indeed, the very section which authorizes the court to render a verdict on the issue of fitness (s. 672.27) presupposes that the court shall try the issue of fitness, and I find that is what occurred.
>
> [33] Second, s. 672.24 does not state that the order for the accused to be represented by counsel should be made just prior to or exclusively for the purpose of the fitness hearing, but rather that the mandatory requirement of

> counsel arises "where the court has reasonable grounds to believe that an accused is unfit to stand trial", which logically precedes both the assessment process itself and the fitness hearing.
>
> [34] Therefore, in my respectful view, the trial judge committed an error of law by failing to order that Mr. Waranuk be represented by counsel upon forming the requisite grounds under s. 672.24(1) of the *Criminal Code*.

[23] In order to determine at what point counsel needs to be appointed, it is helpful to look briefly at the history of the insanity and mental disorder provisions.

[24] The provisions of the *Criminal Code* which dealt with the mentally ill were based on Britain's *Criminal Lunatics Act*, 1800 (U.K.) c. 94, which was drafted in the early 1800s. The provisions were eventually found to be antiquated and unconstitutional in *R. v. Swain*, [1991] 1 S.C.R. 933. The main provisions which allowed the Lieutenant-Governor to issue a warrant to keep an "insane" offender indefinitely in a forensic hospital were struck down by the Supreme Court in *Swain* As a result, in 1992, the entire part of the *Criminal Code* addressing mental disorder (except s. 16) was repealed and replaced by 95 sections that comprehensively addressed the process and procedure when someone might be unfit to stand trial and the effect of being found not criminally responsible by reason of mental disorder. Section 16 was amended accordingly.

[25] One of the provisions repealed was the requirement for the appointment of counsel in s. 615(4):

> 615(4) Where it appears that there is sufficient reason to doubt that the accused is, on account of insanity, capable of conducting his defence, the court, judge or provincial court judge shall, if the accused is not represented by counsel, assign counsel to act on behalf of the accused.

It was replaced with s. 672.24.

[26] The new provisions were constitutionally challenged in *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625. In generally upholding the provisions, McLachlin J., for the majority, said (at paras. 42-43):

> [42] By creating an assessment-treatment alternative for the mentally ill offender to supplant the traditional criminal law conviction-acquittal dichotomy, Parliament has signalled that the NCR accused is to be treated

> with the utmost dignity and afforded the utmost liberty compatible with his or her situation. The NCR accused is not to be punished. Nor is the NCR accused to languish in custody at the pleasure of the Lieutenant Governor, as was once the case. Instead, having regard to the twin goals of protecting the safety of the public and treating the offender fairly, the NCR accused is to receive the disposition "that is the least onerous and least restrictive" one compatible with his or her situation, be it an absolute discharge, a conditional discharge or detention: s. 672.54.
>
> [43] In summary, the purpose of Part XX.1 is to replace the common law regime for the treatment of those who offend while mentally ill with a new approach emphasizing individualized assessment and the provision of opportunities for appropriate treatment. Under Part XX.1, the NCR accused is neither convicted nor acquitted. Instead, he or she is found not criminally responsible by reason of illness at the time of the offence. This is not a finding of dangerousness. It is rather a finding that triggers a balanced assessment of the offender's possible dangerousness and of what treatment-associated measures are required to offset it. Throughout the process the offender is to be treated with dignity and accorded the maximum liberty compatible with Part XX.1's goals of public protection and fairness to the NCR accused.

[27] Thus, the present *Criminal* Code provisions for those who suffer from mental illness provide not only for protection of the public, but also ensure that those who suffer from mental illness are protected procedurally and substantively.

[28] The scope of s. 672.24 has been addressed both by this Court and by the British Columbia Court of Appeal. In *Canada (Attorney General) v. Savard* (1996), 106 C.C.C. (3d) 130 (Y.T.C.A.) the Court was faced with the issue of the scope of s. 672.24 as well as who was obliged to pay a lawyer who was appointed under this provision. I add that the provision has since been amended to provide for payment of counsel.

[29] While the Court did not agree on the scope of the provision to determine who was to pay for counsel, they all agreed on the purpose of s. 672.24 as described by Wood J.A. He referred to the repeal and replacement of s. 615(4), and said this regarding the appointment of counsel, which included the assessment stage, at paras. 44-45:

> [44] When, as part of this process, it repealed s. 615(4) and replaced it with s. 672.24, could Parliament possibly have intended to lessen the availability of counsel to an accused who may be suffering from a mental disorder? I think not. Indeed, when the overall legislative purpose of the

> whole of Part XX.1 is taken into consideration, I am of the view that any difference between the wording of s. 672.24 and its predecessor, s. 615(4), must be viewed as an attempt by Parliament to enhance that availability.
>
> [45] A person who is unfit to stand trial by reason of mental disorder, or whose fitness is uncertain, cannot possibly be guaranteed a constitutionally sufficient standard of procedural fairness without the assistance of counsel. Thus, I am of the view that, when it employed the expression "shall order that the accused be represented by counsel" in s. 672.24, Parliament did so with the express intention of ensuring that such persons would be guaranteed the assistance of counsel and that, in choosing that language instead of "shall...assign counsel to act" which was used in s. 615(4), it did so with the express intention of augmenting the power of the court to ensure such a result. [Emphasis added.]

[30] He said the following at para. 48:

> [48] Keeping Parliament's purpose in mind, I am of the view that it is not only possible, but also necessary, to construe s. 672.24 such that it provides the court before whom a potentially incompetent accused is appearing with the power to ensure that effective legal representation is made available to that person immediately. [Emphasis added.]

[31] This is a strong statement from this Court that s. 672.24 should be construed broadly and to the benefit of the accused. I am strengthened in this view by the decision of the B.C. Court of Appeal in *R. v. Fairholm* (1990), 60 C.C.C. (3d) 289. Here the accused was found not guilty by reason of insanity under s. 16 of the *Criminal Code*. He was self represented at trial. As in this case, it was the Crown, not the accused, who raised the issue of mental disorder. The trial judge did not advise the accused of s. 615(4). Madam Justice Southin, writing for the court, said the following at 295:

> A consideration of this section leads me to the conclusion that Parliament intends that the court shall be extremely careful to ensure that those who may be mentally ill are not prejudiced in their defence by that state. It seems to me that the psychiatrist's evidence given before Judge Collingwood raised the doubt referred to in s-s. (4). If the psychiatrist's diagnosis of the accused's condition was correct, the accused was as ill on the date of trial as he was on the date of the threats.
>
> Although the test of s. 16 is not identical to the test of s. 615, Dr. Lohrasbe's evidence was, in my opinion, such as to require the learned trial judge to conduct the inquiry required by s. 615 despite the earlier psychiatric report and, if the accused did not arrange counsel on his own, to assign counsel to him pursuant to s-s. (4).

[32] In this context, I turn to the arguments here. The first question is whether s. 624.24 is engaged only when fitness is actually tried. The predecessor, s. 615(4), addressed both remands for observation (now called assessments) and fitness hearings. As noted by Wood J.A. above, the new provision was not intended to limit access to counsel more so than the previous provisions.

[33] The protection of those who may be mentally unfit to stand trial is one of the purposes of the mental disorder sections. In order to be consistent with the spirit of the legislation, s. 672.24 must not be limited to fitness hearings, but must also apply to assessment applications.

[34] This conclusion was also reached by Bloom and Schneider in *Mental Disorder and the Law* (Toronto: Irwin Law, 2006) where the learned authors said, at 63:

> Where the court has reasonable grounds to believe that an accused may be unfit to stand trial and the accused is not represented by counsel, the court shall order that the accused be represented by counsel (subsection 672.24(1)). Therefore, counsel should be appointed prior to the making of an assessment order.

[35] The second argument by the Crown is that while counsel shall be appointed under s. 672.11, it does not apply to an order made under s. 672.12 because the wording in the latter section differs. Sections 672.11 and 672.24 refer to "reasonable grounds to believe", whereas s. 672.12 refers to "reasonable grounds to doubt". It is submitted that the two phrases have different meanings. The Crown submits that s. 672.24 requires the standard of "reasonable grounds to believe" in order for the mandatory appointment of counsel to apply.

[36] When the Crown raises the question of fitness in a summary conviction offence, s. 672.12 places a higher onus on the Crown to "<u>satisfy</u> the court that there are reasonable grounds to doubt that the accused is fit to stand trial"(emphasis added). The Crown is under an obligation to demonstrate that the accused's fitness is in doubt. Section 672.12 was drafted to place a higher onus on the Crown when it

was introducing evidence of mental disorder. This is apparent in the heading to the section, which reads:

> WHERE THE COURT MAY ORDER ASSESSMENT / Limitation on prosecutor's application for assessment fitness / Limitation on prosecutor's application for assessment.

[37] This purpose is referred to in *R. v. Wride* (1997), 122 Man. R. (2d) 216 (Man. Q.B.) at para. 12:

> [12] It stands to reason that regarding summary conviction offences, there should be the limitation imposed by ss. 2 of s. 672.12. If the summary conviction offence were of a minor nature and the prosecutor was entitled to apply for an order of assessment without supporting evidence, the order, if granted, may impose greater punishment than the summary conviction warrants. Accordingly the limitation is to ensure, in regards to lesser offences[,] the prosecutor places before the court reasonable grounds to doubt that the accused is fit to stand trial.

[38] The assessment order itself is defined in s. 672.11, where it clearly refers to the court having "reasonable grounds to believe". Therefore, the words, "reason to doubt" in this context cannot place a higher threshold on the test of whether a mandatory order for counsel should be made.

[39] The appointment of counsel occurs when a judge has reasonable grounds to believe a person is unfit to stand trial. Unfit to stand trial is defined in s. 2 of the *Criminal Code* as follows:

> "unfit to stand trial" means unable on account of mental disorder to conduct a defence at any stage of the proceedings before a verdict is rendered or to instruct counsel to do so, and, in particular, unable on account of mental disorder to
>
> (a) understand the nature or object of the proceedings,
> (b) understand the possible consequences of the proceedings, or
> (c) communicate with counsel;

[40] Section 672.24 is a mandatory order to appoint counsel for a person who may be extremely vulnerable. The section applies even when the person does not want counsel's assistance. This is clearly because someone suffering from a mental disorder may not understand the importance of having a lawyer help and guide him or her through the legal system. Further, if the person is found to be unfit, the Crown

has an obligation to return the accused to court every two years to ensure they still have a *prima facie* case: s. 672.33. The accused is entitled to apply to have such a hearing accelerated on the filing of written materials. The assistance of counsel is essential to ensure the fairness of this process.

[41] If an accused has been found fit to stand trial, he or she is entitled to represent himself or herself. A person who is fit to stand trial is fit to decide not to have a lawyer represent him or her: *R. v. Peetpeetch*, 2003 SKCA 76, at para. 56; *Swain* at para. 35; *R. v. Taylor* (1992), 77 C.C.C. (3d) 551 (Ont. C.A.) at para. 51; *R. v. B.K.S.* (1998), 104 B.C.A.C. 149 at para. 23. However, these decisions do not detract from the proposition that a person who may be unfit to stand trial is not entitled to reject the appointment of counsel. He may, as the accused did in *Taylor*, reject the advice given by counsel and refuse to cooperate. However, counsel continued to represent Mr. Taylor despite the difficulties Taylor caused.

[42] Mr. Waranuk was in significant jeopardy when the assessment order was made. It was made for the purpose of assessing both fitness and mental disorder pursuant to s. 16 of the *Code*. Because the two were combined, the trial judge read the report before finding the accused guilty. This was an issue before the summary conviction appeal judge, although not before us. I refer to it as a demonstration of the difficulties which may arise with these reports if defence counsel is not engaged to oversee the process. Section 672.21 sets out the basis on which statements made by the accused during the assessment are protected for the purpose of finding guilt. They are admissible only once guilt has been found and the issue of mental disorder is raised. Having counsel available to give advice on these issues is critical, especially given the ramifications of a verdict of not criminally responsible.

[43] Consultation with a lawyer prior to an assessment and compliance with s. 672.24 may, in some cases, be achieved by consultation with duty counsel. However, there are also cases where, such as here, the need for counsel is crucial.

[44] Mr. Waranuk recognized the implications of being found unfit to stand trial. Several times he raised the damage such a finding would cause to his reputation. He repeatedly indicated his desire to speak to a lawyer.

[45] I agree with the summary conviction judge when he concluded that the failure to appoint counsel impacted trial fairness.

[46] I conclude the learned summary conviction appeal judge was correct in holding that s. 672.24 requires the mandatory appointment of counsel for an accused prior to the hearing of an application for an assessment hearing. Mr. Waranuk clearly wanted the opportunity to consult with counsel. Instead, the assessment order and subsequent orders to see to Dr. Heredia were made without any explanation regarding why they were being made, and over Mr. Waranuk's objection.

[47] It took the Crown two years to have this appeal brought before the Court. Some explanations were offered for the delay and apologies made. Should the Crown decide to pursue a new trial, it will of course be up to the new trial judge to determine whether the explanations are sufficient to satisfy s. 11(b) of the *Charter*.

[48] I would grant leave but dismiss the appeal and sustain the order for a new trial.

The Honourable Madam Justice Bennett

I Agree:

The Honourable Madam Justice Saunders

I Agree:

The Honourable Madam Justice Garson