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R. v. Poole

Between
Her Majesty The Queen, and
Larry V. Poole

Ontario Judgments: [1991] O.J. No. 1567

Ontario Court of Justice - Provincial Division
Toronto, Ontario
Harris Prov. Div. J.

August 28, 1991
(37 pp.)

Charge: Fail to stop at accident.

M. Hurman, for the Crown.

L. Miller, for the Accused.

HARRIS PROV. DIV. J.:—

MS. HURMAN: Counsel is here on the Poole matter and prepared to deal with that now, if Your Honour Wishes.

THE COURT: Yes. Maybe we can address that matter now.

MS. HURMAN: I believe that on Monday, Your Honour, that my friend had finished his submissions in this matter and that I was to respond to them, at which point I asked for an adjournment.

THE COURT: Yes. I dismissed the application to quash the information, based on the principle of abusive Process.

MS. HURMAN: Yes, Your Honour.

THE COURT: We are now still left with the application to stay proceedings, because of the breach of the Charter Rights of the accused.

MS. HURMAN: Yes, Your Honour.

Your Honour, it would be my submission to Your Honour that this is a situation where the Crown, or the office of the Crown admittedly, has not been as diligent as they, maybe, should have been in providing disclosure. For Your Honour's information, defence now has disclosure and in that sense, has been rectified so far.

It would be my submission to Your Honour - I have a case here by the name of Bennett, which is the Ontario Court of Appeal decision. It's a recent date, I think it's about a month old.

THE COURT: I believe, July.

MS. HURMAN: May 31st, 1991, I believe it was released.

THE COURT: It came out that early? Madam Justice Arbour's decision.

MS. HURMAN: Yes, Your Honour, and the only part of that case which I'd like to draw to Your Honour's attention, obviously Your Honour has read the case, is that a court should not make a stay - at page 8 of Justice Arbour's reasons. The judgment's a little bit confusing, because it's numbered from one on and then it starts from one on, again. So, I folded it for Your Honour.

Justice Arbour, in that decision, indicates that a stay is something that should be strongly considered by a judge before it's done, as opposed to something that should be almost a normal course of business, which, in relation to the Askov cases and cases relating to the delay, it had become almost a matter of course that if a case was a certain amount of time old, they'd be automatically stayed.

THE COURT: Well, I believe in the Chief Justice's remarks, almost like a -

MS. HURMAN: Administrative function.

THE COURT: - prescription period passes.

MS. HURMAN: Yes, Your Honour.

THE COURT: But that's in relation to delay.

MS. HURMAN: That's true, Your Honour. However, it would be my submission that a judicial stay should be considered - the principle, Your Honour, is relevant in any event, to judicial stays at large.

THE COURT: to? Whereabouts on page 8 are you referring me

MS. HURMAN: Well, Your Honour, it actually starts at the bottom of page 7 and it indicates the fact that a stay of proceedings is the minimum remedy for an infringement of 11.b, does not change its nature. A judicial stay is a declaration of disentitlement to adjudication. For all its legitimacy, it remains a judicially created impediment to the completion of the process by which society resolves some of its conflicts.

It goes on to indicate that if the alleged infringement of the right to be tried within a reasonable time, the judiciary is called upon to act as a Constitutional arbiter. In such a case, the granting of a judicial stay of proceedings, because of an infringement of 11.b of the Charter cannot, therefore, be reduced to an administrative task, another step in case management, the end of the assembly line for processing cases.

It calls for the exercise of judgment by the individual judge who orders the stay.

Now, the only point that I'd like to make out of that is that it's something for Your Honour to consider. My friend has indicated that it's a remedy that's available and I am indicating to Your Honour that it should be the last remedy available.

This is a situation where this particular offence, in the Poole matter, occurred on the 26th of March, 1991. I have made inquiries of both my office and the police department, to determine what's occurred in this matter, to find out why disclosure was not given earlier.

My friend, on Monday, indicated to myself that he did, in fact, have a copy of the synopsis, but that he didn't have the full statements, anticipated evidence, as he required to prove his case.

In making inquiries, Your Honour, the trail of paper, as it is, seems to end on June 19th, or June 24, at the Crown's office. The police officer in this matter, Constable Weippert, indicated that he didn't receive the request and in the Crown's office, there doesn't seem to be any indication that there is anything subsequent to the first

request having been put in. That, having been said, Your Honour, I have made attempts to locate what happened. It would be my submission to Your Honour that it, probably, was an administrative loss in our office. I don't - given the number of cases, it doesn't happen very often, but it appears that in this case, it's disappeared.

There is no indication of any subsequent request. My friend has provided Your Honour with a letter.

THE COURT: Well, it may not be an administrative problem in your office. It may have been beyond your office.

MS. HURMAN: Well, Your Honour, it may have been, except that generally, when requests are put in to our office, everything is - the letters are all kept, there are forms filled out and everything is there. If you ask for information on whether a case - disclosure has been requested, it's all filed alphabetically and the information is all there as to when it was requested and who requested it and what was requested.

Mr. Miller has presented a letter to Your Honour indicating that he wrote a letter on August 13th.

THE COURT: This is the second time he's up for trial on the matter.

MS. HURMAN: Yes, Your Honour.

THE COURT: The first time was - trial date was, I believe, July 10th.

MS. HURMAN: Yes, Your Honour.

THE COURT: And by July 5th, he didn't have disclosure, and so an application was made for an adjournment by him, right?

MS. HURMAN: That's correct, Your Honour.

THE COURT: And, of course, the trial was ultimately adjourned on July 10th to August 26th.

MS. HURMAN: Yes, Your Honour.

THE COURT: And that was on Monday and the Friday before, he still didn't have disclosure and he faxed the application, which he could have made verbally, I suppose, but he did it in writing, returnable on Monday, August 26th, before me and - which was the trial date and, of course, at that stage of the game, you still had no knowledge of what had been transpiring and you asked for the adjournment to today, in order to investigate the matter.

MS. HURMAN: Yes, Your Honour, and I have done that.

THE COURT: And you are telling me it's an administrative error from what you can see.

MS. HURMAN: From what I can understand, Your Honour, when I first made inquiries, the information I received was that there had been no request, but on following that up further, the indication was, as indicated in Mr. Miller's letter that's attached to his affidavit, or his office's affidavit, that on June 19th, Detective Bone, who is presently with the Crown's office, had called his office to cancel the disclosure meeting and after that, the trail ends. There doesn't seem to be anything after that. And it was subsequent to that that the first adjournment motion was brought in this matter.

Your Honour, I find myself in the position that I am conceding to some degree that there was, certainly - the Crown didn't do everything it was entitled to do. Having said that -

THE COURT: Entitled to do? Obligated to do.

MS. HURMAN: Obligated to do.

THE COURT: The Crown did nothing that it was obligated to do.

MS. HURMAN: Yes, Your Honour.

THE COURT: That's, I think, putting it fairly.

MS. HURMAN: That's probably putting it generously, Your Honour, but this is a situation -

THE COURT: And on the other side of it, the accused did nothing wrong.

MS. HURMAN: No, Your Honour, the accused did nothing wrong. However, it would be my submission to Your Honour that Your Honour has no evidence that the accused has been prejudiced in this matter. This is not an unreasonable delay, by any means. It's a situation where the efforts were made, as are the standard or standard practice. The defence counsel made a request to the Crown's office.

The defence counsel, from my information and from what he's indicated to me, had a copy of the synopsis which indicates what the charge was and the day on which the charge was - occurred, where the charge occurred and the substance of the offence. Generally, what Your Honour hears is a regular course when there is a guilty plea.

Subsequent to that, Your Honour, the accused, or defence counsel received no further information from the Crown's office.

However, Your Honour, the situation - it would be my submission to Your Honour, the situation here would be that the accused would have to show that he was, in some way, prejudiced or in some way denied his ability to make full answer n defense. And, Your Honour, I am not certain that given the information I have, that the accused can show that to Your Honour.

It's true that the witness willsays have not been provided, but Your Honour, it would still be my submission that given the synopsis and the information in the synopsis, that the accused could make full answer in defense, or could undertake to - or could, in some way, follow up - could make follow up, in his own - through due diligence, to contact the people involved, contact the officer involved and to find out any further information.

It's true that generally, the practice is that the Crown just hands this information over to defence counsel upon a request. However, in this particular situation, that didn't happen and it would be my submission to Your Honour that given that it didn't happen, the defence counsel, or the accused could have contacted the officer in charge and made some inquiries of him and through their own due diligence, could have received what they required, if they required anything further than what they had already received.

THE COURT: I think that last portion of what you said is highly speculative.

MS. HURMAN: Sorry, Your Honour, which portion?

THE COURT: Where you just start with from the last time you began. You began by saying, by receiving the synopsis -

MS. HURMAN: Yes, Your Honour.

THE COURT: - it was not prejudiced and could have done this, that, or the other thing and could have made full answer in defense. I question that I think that's highly speculative on your part. I see the charge here is one, and I haven't indicated which way that I am going to rule on this, but the charge is one of, with intent to escape civil or criminal liability, failed to stop his vehicle I would think in a case like this, the Crown would have to produce several witnesses, wouldn't you?

MS. HURMAN: Well, Your Honour, the Crown has three witnesses which it intends to produce.

THE COURT: All right. How many police officers?

MS. HURMAN: One, Your Honour.

THE COURT: All right. Two civilian witnesses?

MS. HURMAN: Yes, Your Honour.

THE COURT: Don't you think that maybe, just maybe, that an accused person would like to find out something about the evidence that those witnesses may give? The name of the witness might not be given. The address of the witness might not be given. The telephone number of the witness might not be given. But other information might be given to the accused, whereby the accused could determine some of that information and then, perhaps, interview the witnesses and obtain a statement that might be totally contrary to the statement that the witness provided for the Crown. So, I think full answer in defense might be impeded but not having that information in advance. This may be speculation, of course, but just as speculative as what you're saying.

MS. HURMAN: Oh, no, Your Honour.

THE COURT: You're saying that he could have gone on with that summary.

MS. HURMAN: No, Your Honour.

THE COURT: It wouldn't affect full answer in defense and I am disagreeing with that.

MS. HURMAN: No, Your Honour, sorry. If I have misstated what I meant, I apologize to Your Honour. I didn't indicate that he could make full answer in defense, necessarily, from the synopsis, although he might be able to. But what I indicated was that he could go on from that synopsis. He could have called the officer in charge. The officer in charge could have given him any of the information that was required.

THE COURT: You know and I know, as a result of the Charter, he now doesn't have to do that. The obligation is on the Crown. And you also know and if you don't know, I'm telling you that calling the officer in charge, the officer in charge has absolutely no obligation, whatsoever in the world, to either return the phone call of defence counsel, or even speak to defence counsel.

MS. HURMAN: Well, Your Honour, I mean -

THE COURT: Unless things have changed in the last six years.

MS. HURMAN: Like, this sounds - I guess that sounds somewhat malicious on the part of the police officer.

THE COURT: I am not suggesting anything of the sort. I'm just talking practicalities. Be reasonable about this. Does he have to talk to defence counsel?

MS. HURMAN: Well, no, Your Honour, he doesn't have to.

THE COURT: Well, of course not.

MS. HURMAN: But in a situation like this, if the defence counsel indicated to the police officer that he didn't get disclosure - when I spoke to the officer, Your Honour, his indication to me was that he had no indication there had been a request for disclosure. Now, one phone call from defence counsel -

THE COURT: Excuse me. No request for a disclosure through the office of the Crown, the administrative machinery way.

MS. HURMAN: Oh, exactly.

THE COURT: Yes.

MS. HURMAN: That's all I'm saying. I am indicating that there was an administrative machinery foul up and I am admitting that, Your Honour. But what I am indicating is that if there had've been any further actions by the defence counsel, that the officer in charge would have been in a position to respond to that and would have, at least, had some notice.

THE COURT: Does the profession have some knowledge of this procedure that you're talking about now?

MS. HURMAN: I'm sorry, Your Honour?

THE COURT: Does the profession, that's the legal profession, have some knowledge of this procedure that you're talking about? I mean, can you assure the profession that this is the way it's done?

MS. HURMAN: Sorry, Your Honour, it's probably myself. But you're indicating - you're asking me if the legal profession, defence counsel know about this procedure that I'm suggesting?

THE COURT: Yes, that it's an appropriate procedure to go ahead and do it. Is this something that's common?

MS. HURMAN: To contact - well, Your Honour, from my own personal experience, generally, when police officers attend at the Crown's office, they've generally had far more discussions with defence counsel regarding a case than I have. So, it's something that is very common.

Now, it's not necessarily done in cases of lesser charges, but there's absolutely no reason that it couldn't be done. If the situation -

THE COURT: So, what you're saying is, that Mr. Miller is, really, the one that's at fault for this whole thing, because he didn't pick up the phone and communicate with the investigating and arresting police officer and contact him, or her and get the information from him, or her that he is required to, at least, have in order to adequately defend his client. That's just the way you're putting it to me.

MS. HURMAN: No, Your Honour.

THE COURT: Well, I'm misreading it then. I'm sorry.

MS. HURMAN: Okay. That's - no, Your Honour, I have indicated from the beginning this morning, that it's my position that the Crown's administrative machinery in regards to disclosure, messed up. There's no doubt about that. And I have admitted that from the beginning, I think,

THE COURT: All right. First of all, may I just ask you this question. Mr. Miller, in his material and in his verbal submissions, has indicated that his client's section 7 Charter right had been breached.

MS. HURMAN: Yes, Your Honour,

THE COURT: What position do you take in relation to that? Just dealing with that aspect of it, first.

MS. HURMAN: Well, Your Honour, it's my position that in regards to any of the Charter breaches and any of the arguments in relation to the Charter breaches in this particular case, well, in any case, that there has to be - in order for a remedy to be granted, there has to be some - some harm done.

Now, in this particular situation, the harm that's been done is that the case has been somewhat delayed. Disclosure was not -

THE COURT: Excuse me for interrupting you. Try to answer my question. Just try and answer my question, first of all. Leave the remedy out of it.

MS. HURMAN: Well, Your Honour's question is quite broad. I am assuming that Your Honour's question is aimed at him - life, liberty and security of the person being denied by not being able to make full answer in defense.

THE COURT: On the trial date, right.

MS. HURMAN: On the trial date.

THE COURT: What's your view of that? On both charges.

MS. HURMAN: Well, it never came up for trial the first time, Your Honour, I don't believe. It was adjourned -

THE COURT: Because he didn't have disclosure in time.

MS. HURMAN: Right. It was adjourned five days before the trial date.

In regards to that, Your Honour, it's my submission that he does have the right to make full answer in defense. There's no doubt about that. However, in this particular case, he was given a certain amount of information in regards to this case. It's true that he wasn't handed the willsays. However, it would be my submission to Your Honour that he could have made full answer in defense had he had taken that one extra step and made - put some due diligence in to contact the officer to get disclosure.

THE COURT: Anything further?

MS. HURMAN: Well, yes, Your Honour. That's in relation to your question. Did you - nothing further in relation to your question. If there's - I do have some submissions to make in regards to the remedy.

THE COURT: Go ahead.

MS. HURMAN: In regards to the remedy, Your Honour, it would be my submission that in order for Your Honour to find a remedy, such as a stay under Section 24 of the Charter, that there needs to be some prejudice, or some harm meted out to the accused if you're going to order a judicial stay. A stay is an extreme procedure in which you feel that the prosecution of this trial is not warranted, given the extreme harm that it has caused to the defendant.

In this particular case, Your Honour, it would be my submission that the natural remedy would be disclosure to be ordered. Disclosure to be given and it would be my submission that the Crown could remedy the delay that's happened up until now by having a quick trial date early next week and dealing with the matter of a delay that's been occasioned to the accused in that way.

Those would be my submissions, Your Honour.

THE COURT: In the matter of Larry Poole, Mr. Poole is charged with the criminal offence of failing to remain at the scene of an accident, in colloquial terms, on March 26th, 1991, and charged contrary to the Criminal Code. The information was laid on the 18th of April, 1991.

His first appearance in court was April 24th. He was thereupon - on April 24th, he was being represented by Mr. Miller. He thereupon appeared May 1st and May 8th and the trial date of the 10th of July was set on May 8th, 1991, for trial in 124 Court, at 10:00 a.m.

On July 5th, or as of that date, counsel had requested disclosure in a very formal way, i.e., by letter to the Crown, but disclosure had not been received and an application for an adjournment was permitted on July 5th,

1991.

When the matter was returnable on July 10th, 1991, the trial date was put over to August 26th, 1991, for trial in 124 Court, at 10:00 a.m.

On the 23rd of August, 1991, counsel, at approximately four o'clock in the afternoon, faxed an application to the Crown, returnable on the trial date on August 26th, 1991. The gist of the application was that he was seeking to quash the information for an abuse of process and/or seeking judicial stay, alleging a breach of his client's section 7 Charter - Canadian Charter of Rights and Freedoms right.

I heard Mr. Miller's submissions on August 26th and at the end of the day, I dismissed his application to quash the information for an abuse of process.

Crown counsel, who is Crown counsel today, was in charge of the prosecution and she requested an adjournment, which I thought was reasonable in order to determine where, or what foul-up had occurred. I am accepting the fact that counsel required the material in question, because - in order to adequately defend his client.

Counsel for the Crown advises me that between August 26th and today's date, which is August 28th, that disclosure has been provided to Mr. Miller.

Counsel for the Crown argues against a stay and I don't intend reviewing the submissions that she makes insofar as the ultimate request is concerned, but there is some suggestion by counsel for the Crown that Mr. Miller received a copy of the summary of the case that the Crown has in their file at an earlier occasion and if Mr. Miller had wished to pursue the matter, he could have called the police officer in charge of this case and could have obtained further information from him and could have adequately made full answer in defense without the disclosure.

This is a case in which there is not only one police officer, but two civilian witnesses. I think it can be taken as fact that if, in fact, Mr. Miller saw fit to call the police officer, or any police officer, there is absolutely no obligation resting on the police officer to discuss the case with defence counsel, or anyone else. And to characterize the submission for the Grown, I can only refer to it - and this is a compliment - as having absolutely no merit, whatsoever.

Ever since this Charter came into being, certain persons have certain obligations. One of those persons, or bodies, whichever you may wish to call it, is the Crown and I, for one, will not accept some argument by the Crown that everything shifts to the defence and the defence has to do certain things.

The defence in this case did what the defence was obliged to do and that is, make the request for the disclosure and make it as adequately as the defence could.

I asked the Crown one simple question, or so I thought it was simple, and that was whether, as of the both trial dates, and especially the last trial date, whether, in fact, she was prepared to concede that the accused's section 7 right had been breached. Because as I see it, that's the first step.

As on now, I'm really uncertain as to her answer. Insofar as the evidentiary burden that rests upon the defence to show on a balance of probabilities that that right has been breached, I am satisfied that the right has been breached. In fact, it's crystal clear and how you can look at it any other way, I don't know, especially in view of the fact, when you consider everything that Mr. Miller has done in order to effect disclosure.

Now then, as everyone knows, that's just one aspect of it. Once I make that finding, then I am obliged to move to section 24 of the Charter and, most specifically, section 24.1, insofar as a remedy is concerned.

I am mindful of the comments of Madam Justice Arbour in the case of R. v. Bennett, which I believe is very recently reported in the Ontario Reports, the citation of which escapes me, but which was released by the Court

of Appeal, May 31st, 1991. I do believe, Miss Hurman, that it has been reported now, has it not, to your knowledge?

MS. HURMAN: I didn't realize it had been, Your Honour, or I would have brought the reported copy.

THE COURT: I think it might have been in the Ontario Reports, but that doesn't matter.

MS. HURMAN: Okay, sorry.

THE COURT: Insofar as that particular aspect is concerned, I am very interested in the comments of Crown counsel relating to prejudice. It may well be that the stay that defence counsel is requesting, might be the last line that you go to and, of course, should not be granted and I agree with this wholeheartedly on a wholesale basis, because really, what that does is really, as the Chief Justice says in his majority judgment, and I quote from page 2 of the case that I have before me:

> "The staying of so many charges has had a serious impact on the administration of justice in this province and the rear has eroded the public's confidence in the administration of justice. While the judgment of the Supreme Court of Canada in Askov must be followed, I do not read the reasons for judgment of the majority of the court requires such a Draconian result."

Of course, he is dealing there with the aspect of delay in Askov.

> "I accept the Crown's position insofar as the law is concerned in relation to how and when stays are granted and it really is quite apparent that the power to stay a prosecution is denied the right of the Crown to proceed on trial, is a power that must be exercised judicially and with restraint."

Those are also comments made by the Chief Justice and reported in the case of Keyowski, K-E-Y-O-W-S-K-I, v. The Queen, on page 2 of his judgment.

When you talk about prejudice in this particular case, if not the time - I am not going to concern myself with that, because that hasn't been raised - I can see prejudice that hasn't even been put forward yet. I can see this kind of prejudice, of financial prejudice and a significant financial prejudice. Counsel is obliged to attend here on two separate occasions, plus prepare all sorts of paperwork, in order to get what he is entitled to. Surely to goodness, counsel isn't doing this for the good of his health.

Notwithstanding that he is a member of a significant profession, he still, in order to practice in that profession, must assess fees to client. And in order to get what he is entitled to get, I feel relatively certain, unless I have missed something significant along the way, that he has assessed his client's fees for attending in court on - this being at least the third occasion, wanting to go ahead.

One of the remedies, of course, is to order disclosure. But if it isn't available, how can you order it and what difference does it make if it is a judge's order or not?

The next remedy is the alternative put to me by defence counsel when he made his submissions originally, i.e., the request for the adjournment.

However, I feel in this case, that that's the appropriate way to go as part of the remedy. Disclosure has now been given. The next aspect and the next part of the remedy is to grant an adjournment. This is not really an adjournment at the request of the defence counsel, this is the adjournment, because of necessity, because the Crown could not proceed on both occasions.

To order a stay would probably fall within that comment of the Chief Justice that might result into a Draconian result and it might erode public confidence in the administration of justice. But in order to overcome

the prejudice that the accused has suffered, I fully intend, as part of the remedy under section 24.1, to order costs against the Crown.

At the present time, I am prepared to fix costs if counsel can agree and I feel it's appropriate, the figure that they put forward to me. If not, I am prepared to hear submissions as to costs. Of course, if I may err in granting this remedy, I feel that Crown counsel could take the appropriate steps hereafter to show my error. In the meantime, though, this is what I intend doing.

MR. MILLER: When does Your Honour wish to hear us on the issue of costs?

THE COURT: Anytime. Right after lunch.

MR. MILLER: Thank you, Your Honour. I suppose, in fact, I should discuss this with my friend and see if there is such a thing as a range.

THE COURT: You understand, I am not obliged to award costs as a Taxing Master might.

MR. MILLER: Yes, Your Honour.

THE COURT: Or what do you call them? An Assessment Officer.

MR. MILLER: Well, I am trying to consider whether Your Honour would -

THE COURT: And I am not obliged to consider the party and party costs, or solicitor and client costs, or solicitor and his own client costs.

MR. MILLER: I am trying to determine in my mind, before I discuss this with my friend, what sort of a scale Your Honour thinks to be an appropriate one to discuss.

THE COURT: I am prepared to hear you, and Crown counsel on the scale.

Recess for lunch.

On Resuming: 2:30 p.m.

MS. HURMAN: Your Honour, in the Poole matter, if we can continue with that matter.

THE COURT: In the Poole matter, I have already found that the defence has satisfied the burden resting upon it to show a breach of the accused's section 7 Charter rights.

In addition to that, the defence has also satisfied the burden of persuasion that also rests upon it, in my view, to satisfy the court that a remedy should be ordered and as part of that remedy, the disclosure has been made.

I ordered that the case be adjourned and I indicated prior to recess that I intend making an award of costs.

Now, then.

MS. HURMAN: Yes, Your Honour, in relation to your order, the defence did not apply for costs in this case and having heard Your Honour's order prior to lunch, approximately an hour ago, I made some inquiries as to what costs were available.

It's my understanding, Your Honour, that the jurisdiction in this matter for Your Honour is under 24.1. However, it's my understanding and, unfortunately, I have been unable to receive a - to obtain a copy over the lunch hour, of the case of Mills, that Mills sets out the jurisdiction Your Honour has with regards to the remedies allowable.

It's my submission, Your Honour, that costs in this particular matter are not appropriate, given that costs are generally awarded as a punishment and the application was made for a stay and Your Honour saw fit that a stay was not the appropriate remedy in this matter. Crown has offered an early trial date to somewhat compensate the accused for his - any inconvenience that may have been had. However, Your Honour indicated earlier that you were considering costs.

It's my submission to Your Honour that costs are, generally, awarded for high-handed or malicious behaviour. In my submission to Your Honour, this is not a situation where the Crown has been high-handed or malicious. Your Honour hasn't found that in any way the Crown intended to harm the accused, or was malicious in their behaviour. There was an inadvertence, an administrative inadvertence which caused the accused to come to trial on Monday, not having received disclosure.

It's my submission, Your Honour, that costs are not appropriate. However, if Your Honour is going to award costs, it's my submission that Your Honour's jurisdiction to award costs falls under section 840 of the Code. It falls under section 809 of the Code, subsection l and follows from 840 of the Code.

THE COURT: It does?

MS. HURMAN: Yes, Your Honour.

THE COURT: My jurisdiction is under the Code to award costs?

MS. HURMAN: it I believe so, Your Honour. As I understand
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THE COURT: I am not awarding costs under the Code. The criteria, in my respectful view, which you put forward, i.e., high-handed or malicious behaviour, I don't even have to consider. I am awarding this under the Charter and, of course, although counsel for the accused has not requested, in his application, an adjournment, you say that he hasn't requested costs as a remedy. Although he hasn't requested an adjournment, should I give him an adjournment, as well, for trial? You see, I haven't forced him on, so to speak.

MS. HURMAN: I don't believe, my understanding from -

THE COURT: I am not - in my respectful view, in view of the fact I have given you the opportunity to oppose the costs, or speak to costs, I am not confined, in my respectful view, to just what counsel is asking for. I see that, in effect, he is asking, generally, for relief under section 24.1 and I believe he indicated that last day when I put that to him. However, that's - you're talking about costs and my jurisdiction.

MS. HURMAN: Yes, Your Honour. My understanding is that - and it comes from the case of Mills, which unfortunately, I have been unable to get a copy of, in the short break which we had - it is my understanding the decision in Mills indicates that Your Honour has jurisdiction to award remedies which are normally available to Your Honour to award and in this situation, those costs come under section 840.

THE COURT: With the greatest of respect, I disagree. Firstly, section 840 are the fees and allowances that may be charged by Summary Conviction Courts and Justices. Right now, I have before me, an indictable offence. Off the top of my head -

MS. HURMAN: I believe I have elected, Your Honour.

THE COURT: Oh, have you?

MS. HURMAN: It's an indictable offence. It's my understanding that you don't have jurisdiction to order costs.

THE COURT: By what authority? I am not talking about the Criminal Code. I am talking about the Charter.

MS. HURMAN: I am talking about the case in Mills, Your Honour, which unfortunately, I have been unable to get a copy of. If Your Honour would allow me -

THE COURT: Do you share that view?

MR. MILLER: Is my friend talking about the case of Mills and The Queen, Supreme Court of Canada, Mr. Justice Lamer's decision? Is that what you are referring to?

MS. HURMAN: I am referring to the case of Mills v. The Queen, yes.

MR. MILLER: Yes. I haven't got the case here, Your Honour. It has been a little while since I've read it, but to my recollection, Mr. Justice Lamer didn't say that a court in granting remedies is restricted to remedies a court ordinarily grants, whatever it may be. In my respectful submission, with all due respect to my friend, Lamer was talking about what are appropriate remedies that can be granted under 24.1, where the issue is undue delay and he came to the conclusion, as I recall, that where an appropriate case has been made out for an abuse of the accused's rights under section 11.b of the Charter, that the only reasonable remedy that could be considered, was to order a stay.

I don't think, by any stretch of the imagination, Mr. Justice Lamer said that the court is prevented from granting other remedies. In fact, other remedies were recommended by the crown, I believe, in submissions, but Mr. Justice Lamer said in that particular kind of case, the only one that was reasonable was a stay. I don't think, as I recall the judgment, and I would certainly be happy to be corrected if I am wrong, that he said anything about the fact that a court can't grant costs or any other remedy.

THE COURT: I tend to accept your version of it, but I am subject to be corrected, as well. It's, of course, ludicrous that I follow this fee schedule in section 840 and I don't intend to propose to follow it, because it has no criteria for what we are dealing with here, of course.

MR. MILLER: I don't think I can qualify under any of the headings, Your Honour. I am not a police officer, I am not delivering a prisoner, I am not a Justice of the Peace, so I don't think I can qualify under that.

THE COURT: I am trying to say maybe the mileage -

MR. MILLER: Pardon?

THE COURT: Maybe the mileage category might apply, I don't know.

But in any event, let me put it to you this way. First of all, on July 5th you attended to speak at the motion?

MR. MILLER: That's correct.

THE COURT: July 10th, the motion for the adjournment was granted. You appeared for the adjournment?

MR. MILLER: That's correct.

THE COURT: And here again, on August 26th, you made preparation to speak to the motion.

MR. MILLER: Yes.

THE COURT: Which is, in effect, the full motion?

MR. MILLER: Yes, Your Honour.

THE COURT: And on August 28th, you were obliged to return, because the Crown wanted to review the matter and sought an adjournment, which I granted.

MR. MILLER: That's correct, Your Honour. And I certainly wish to say that with respect to August 26th, although the motion was put forward, I had to come to court, as best as I could, prepared to have to defend my client, even under inadequate disclosure, because I could not presume what the decision of the trial judge would be. I didn't ask for an adjournment, because I didn't think that was a reasonable request, the second time around.

THE COURT: And I must say that insofar as the motion is concerned, I am prepared to rule that the motion was opposed all along the way.

MR. MILLER: Yes, Your Honour.

THE COURT: You didn't obtain your remedy insofar as the application to quash, which I find is without merit, but certainly, insofar as the stay is concerned, was with merit. The application to stay was with merit.

Now, I don't propose, as I say, to - I am not governed by any of the - by what a Taxing, or an Assessment Officer may award. I would like to, where possible - this is not going to compensate - not intended to compensate your client and put him into the position he might have been in, had this not been the situation. It may be something between symbolic and realistic, but what I am proposing right now is to consider applying the tariff set out in the Ontario Legal Aid Plan, mutatis mutandis, which under the circumstances, might be the fairest way to deal with it.

Now, as I understand it, there is no 25 percent reduction in fees anymore?

MR. MILLER: No, Your Honour, there is a 25 percent increase to me, on the Legal Aid Plan. Seniority, I am saying -

THE COURT: Yes, but there is no reduction anymore?

MR. MILLER: There is a five percent reduction, which I submit should not be given here, because this is not a contribution to the Plan.

THE COURT: I am not going to make it exactly the Legal Aid Plan, but that's my guide. What is the fee permitted for an adjournment, if, in fact, the matter is an indictable offence?

MR. MILLER: If it's an adjournment, I am embarrassed to say it's twenty-seven dollars, plus 25 percent.

THE COURT: And in an application, say, originally, Notice of Motion in matrimonial matters? I'll hear from the Crown.

MR. MILLER: That, I can't comment on. I am only familiar -

THE COURT: What is the counsel fee?

MR. MILLER: The counsel fee on the - Your Honour doesn't wish to know block fee for counsel fees, is that correct? Depending on the scale -

THE COURT: Yes.

MR. MILLER: - and I suppose we should treat this as Crown elected as opposed to - there are certain levels. There are two levels.

THE COURT: The Crown has elected.

MR. MILLER: Yes. So, I would think we would have to treat this at the lower level of counsel fees, in all honesty, to the court, which is, I believe, if memory serves, four hundred and seventeen dollars per day.

THE COURT: What about half days?

MR. MILLER: Half of that. Two hundred and eight, fifty.

THE COURT: Two hundred?

MR. MILLER: And eight, fifty.

THE COURT: And you're saying you're entitled to something 25 percent on that?

MR. MILLER: Twenty-five percent increase on that. There is also, of course, preparation time allowed, which I take it, is obviously not the case here.

THE COURT: Well, there is separation, preparing the documents on both occasions, the Notice of Motion and the Affidavit.

MR. MILLER: Well, the Legal Aid hourly rate is sixty-seven dollars per hour, plus of course, 25 percent on top of that.

THE COURT: How much is the hourly rate?

MR. MILLER: Sixty-seven per hour and, of course, 25 percent increase, what I am entitled to, per hour.

THE COURT: Thank you,

Yes, Miss Hurman?

MS. HURMAN: Yes, Your Honour, the only additional comment that I would like to make is that considering these costs are being awarded in the assumption that Legal Aid is not, originally, paying for this, or the money will be reimbursed to Legal Aid if -

MR. MILLER: There is no Legal Aid and let me just make it very clear. This is not a case that is funded by Legal Aid.

THE COURT: I would have thought that at the end of all this that if, in fact, it was Legal Aid, that Mr. Miller would have applied it against what he might have billed the Legal Aid, if in fact, he receives the costs from our government.

In the alternative, I am also expecting him to apply this to his solicitor and client billing costs, which is only the appropriate way to go.

MR. MILLER: I would also inform the court, had it been a Legal Aid case, how I was being paid, so that the court could be cognizant. I would have thought the circumstances appropriate.

THE COURT: I didn't ask whether it was.

MR. MILLER: I know.

THE COURT: I just felt that that's the appropriate way to go on this, because it's not exactly an everyday type of an award, or decision,

MR. MILLER: I assure Your Honour it is not.

THE COURT: Insofar as the remedy relative to costs is concerned, as I have indicated, I am attempting to set a figure that represents something between what's realistic in today's world and symbolic. I don't propose to be an Assessment Officer.

I feel the appropriate way to go is to apply the Ontario Legal Aid Plan tariff as fees mutatis mutandis, as opposed to what might be awarded in civil actions in front of Assessment Officers. And I feel that the appropriate fee is the sum of 575 dollars made up as follows: preparation, 75 dollars; adjournments, there were two of them that had to be addressed by counsel for the accused and he was present on both of them. Is that not so?

MR. MILLER: I believe so, Your Honour. I would like to check to make sure.

THE COURT: July 5th and July 10th.

MR. MILLER: I know I was here on the 10th.

THE COURT: You had to be here on the 5th in order to argue the motion, did you not?

MR. MILLER: You are quite correct, Your Honour.

THE COURT: And you were here on the 10th, were you?

MR. MILLER: I was here on the 10th, yes.

THE COURT: The cost of each adjournment I have assessed at 50 dollars. There was no big discussion that had to be entered into and it was a rather consent situation as I recall it, on both occasions.

MR. MILLER: The only comment is, there had to be an affidavit prepared with attachments in support of that application.

THE COURT: Thank you. And the total for those two appearances is 100 dollars.

I think that counsel should be entitled to a counsel fee for the appearance before me on August 26th and I assess that - to argue the motion and to put the motion forward and it was for one-half day. I have assessed that at 250 dollars and -

MR. MILLER: I'm here a whole day today, Your Honour. Well, no, that's not true. I -

THE COURT: Excuse me. Let me just go ahead, please.

MR. MILLER: I'm sorry, Your Honour.

THE COURT: Thank you.

MR. MILLER: That's not correct. I better correct that. I didn't arrive till after court had started. I will let you continue. I'm sorry.

THE COURT: Thank you.

I have set counsel fee, as I indicated, for the 26th of August, at 250 dollars and the counsel fee today, August 28th, at 150 dollars, for a total of 575 dollars.

I have considered the Notice of Motion and it's, indeed, sparse. In it the word 'Charter', is not even mentioned, but leaving it at that, it's sparse. A great deal of preparation, in my view, did not have to go into it, especially by experienced counsel and the affidavit consists of a page and about a quarter. A very simple affidavit prepared by a secretary, or law clerk who is employed with the counsel for the accused and the three exhibits attached to it, so that material, in my view, very little preparation would be required.

Did you wish to add something? I didn't know if you were going to stand up, or sit down.

MS. HURMAN: I have nothing to add, Your Honour.

THE COURT: Thank you.

MS. HURMAN: I don't agree, but ...

THE COURT: When do you want to appear in 111 Court to set a new trial date?

MR. MILLER: May I just consult my diary, Your Honour?

THE COURT: What date?

MR. MILLER: September 3rd, then, Your Honour, to set a date?

THE COURT: All right. September 3rd, 111 Court, 9;00 a.m., to set a date. Thank you.

CLERK OF THE COURT: Mr. Poole, here is a reminder for you, sir.

MR. MILLER: I suppose the real challenge would be, Your Honour, to find how to collect it.

THE COURT: Well, in my respectful view, we've always had honourable governments in this community and in this province and in this country and surely to goodness, if the government finds themselves refusing to pay, subject of course, to any other proceeding that might intervene, they might well be contempt of a judge's order. But that's something that you're going to have to concern yourself with, it seems to me. Thank you.

MR. MILLER: I appreciate it. The challenge is now in my court. Thank you, Your Honour.