CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

NO: 500-36-000603-932

S U P E R I O R C O U R T

January, 26, 1993

PRESIDING: THE HONOURABLE MR. JUSTICE J. FRASER MARTIN, J.S.C.

VALERY FABRIKANT,

APPELLANT,

c.

LEGAL AID CORPORATION,

RESPONDENT,

J U D G E M E N T R E N D E R E D O R A L L Y

The Court is seized of a proceeding entitled "Application for Remedy" pursuant ostensibly to the Quebec Charter of Rights and Freedoms L.Q. Ch. C-12 and the Legal Aid Act L.R.Q. ch. A-14. It may be useful to summarize the allegations set out therein.

In substance the accused's application relates that much preparatory work requires to be done in view of his upcoming trial and that the conditions at Parthenais Detention Centre are not conducive to the carrying out of this work. The

accused recounts his intention to appeal from a decision of my colleague Biron J. rendered on December 14th last dismissing the accused's request for judicial interim release and the production of documents. He alleges that the deposit of the said appeal is being unduly delayed by Me Johanne DesLongchamps, the Director for Professional Services of the respondent. The application complains again of his conditions of detention and more particularly of restrictions on his telephone calls. Finally it invokes articles 34 and 35 of the Quebec Charter of Rights and Freedoms pertaining to a full and complete defence and to his right to legal representation and assistance.

The conclusions which the accused seeks are as follows:

> "Therefore may it please the Court:
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> MAINTAIN the motion;
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> ORDER stay of proceedings till appeal are decided;
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> ORDER Me DesLongchamps to stop interfering with my defence to deposit immediately petitioner's appeal in the Appeal Court;
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> APPOINT a lawyer to assist me in my defence."

First of all the scope of the remedy contemplated by the Quebec Charter of Rights and Freedoms in section 49, in my view is not wide enough to encompass the relief sought. It strikes me that the accused ought also to have invoked the Canadian Charter of Rights and Freedoms notably sections 7 and 24. In my view, it is there where the appropriate

recourse lies at least insofar as the conclusions concerning a stay of proceedings are concerned. In substance however the accused, in his argument, referred to the principles governing a stay of proceeding in the context of Canadian Charter of Rights and Freedoms. I will therefore take it that the petition also is based upon and invokes the applicable Federal Legislation.

It will be appropriate to commence with the accused's second conclusion which is two-fold. On one hand he seeks to enjoin Me DesLongchamps from interfering with his defence and on the other seeks an order that his appeal from Biron J.'s decision of December 14th, 1992 be filed forthwith.

In support of these conclusions the accused chose to have heard, in addition to himself, three witnesses, namely Ruth Léveillé, Liaison Officer in the employ of the respondent, Me Johanne DesLongchamps to whom I have already referred and Me Bernard Lamarche, a lawyer in the employ of the respondent.

Léveillé in her capacity as a Liaison Officer provides a channel of communication between detainees at Parthenais and the Legal Aid Corporation. She is called upon as such to deal with some 20 to 40 detainees per day. The accused referred to a number of memos submitted by him to Mme Léveillé relating to his case. These memos are set out on preprinted Government of Quebec forms and do not emanate from respondent corporation as such. They are the basis for his contention that his requests for assistance were unanswered.

The accused's examination of Mme Léveillé related in particular to the period from December 17th to December 23rd, 1992 and to January 5th, 1993. The thrust of his questions was to suggest that Mme Léveillé, ostensibly acting on instructions from her superiors had participated willingly in the systematic sabotaging of the exercise of the proposed appeal. He alleges that Mme Leveillé, acting on instructions from Me DesLongchamps, declined in her capacity as a Commissioner for Oaths to receive the accused's signature on an affidavit. He sees in this further evidence of duplicity, trickery and sabotage.

The truth of the matter of course resides in the particular situation in which the accused finds himself. Since the 8th of December 1992, when, to use his word, he "fired" Me Jocelyne Paul, the accused has acted on his own behalf. He takes the position however that the respondent, an administrative organism as such has nevertheless the obligation to carry out his every instruction and to be at his beck and call. He stubbornly refuses, because intellectually he is perfectly capable of doing so, to recognise the distinction between the administrative arm of the respondent corporation which administers the Legal Aid program and the services normally rendered by an advocate either in the service of corporation or in private practice but authorized by the corporation to act.

As further evidence of the respondent's alleged perfidy the accused invokes what he refers to as the selective execution of his instructions on the part of the Legal Aid Corporation. In effect, the corporation has, from time to time, executed in part the accused's instructions. It filed for

example the petition presentable on December 14th before Biron J. A further example is the present petition which the corporation undertook to file on his behalf. It has however declined to issue certain subpoenas destined for two Ministers of State. It will suffice to underline that the respondent's position is comprehensible in the circumstances. Its actions and in certain instances its refusal to act cannot, in my view, on an objective appreciation, be taken as evidence either of sabotage or disloyalty. The respondent, in my view, has on the balance gone beyond what it was legally obliged to do in the interest of the accused.

The accused complained that in a series of memos to which I have already alluded requests for meetings went unanswered. This is contradicted by Léveillé's testimony to the effect that she met the accused on the 17th and 18th and on either the 21st or 22nd of December. She was absent from December 24th to January 4th but was replaced by another Liaison Officer during this period. Her replacement was not called or heard from.

Petitioner complained that numerous phone calls addressed to DesLongchamps also went unanswered. This is denied by DesLongchamps who conceded nevertheless that the accused called her every day. It should be underlined that the subject which was, at that point in time, under study was the viability of the accused's right of appeal from the decision of my colleague of December 14th. Notwithstanding the accused's refusal to fulfill an administrative requirement this study was undertaken and an answer was given to the accused on the 6th January 1993. If indeed the accused called DesLongchamps

every day I should observe that I find it curious that the list of telephone calls filed as Exhibit R-5 contains no indication of any of them. This document ostensibly spans the period from December 15th, 1992 to January 12th, 1993. Whether it is incomplete or not I do not know.

The accused points also to the conduct of Me Bernard Lamarche as further evidence of sabotage. The role of Me Lamarche maybe summarized as follows: In view of the fact that public funds are involved the Act and Regulations of the respondent corporation require that any proposed appeal be studied to ensure that it is based upon a viable legal right. Me Lamarche proceeded over the holiday period to study the accused's notice of appeal from the decision of Biron J. dismissing his petition which he had entitled "Petition in Habeas Corpus". In addition, Me Lamarche consulted for some 40 minutes by telephone with the accused and on January 6th, forwarded to him a written opinion concluding that the appeal had no basis in law. In that opinion Me Lamarche underlines, in substance, that on the basis of recent jurisprudence emanating from Supreme Court of Canada habeas corpus was inappropriate since the Criminal Code provides a specific vehicle for those seeking judicial interim release under section 515 and following of the Criminal Code. Habeas corpus Me Lamarche opined only lies where the accused elects to challenge the constitutional validity of one or other of the operative bail provisions set out in the Code. According to Me Lamarche such was not the case and consequently, in his opinion, the appeal could not succeed. While it is not for me to comment upon Me Lamarche's opinion a reading of the motion leads me to believe that it was purely and simply an

attempt to vary the conditions of the accused's detention.

Dissatisfied with Me Lamarche's conclusion the accused cries "foul". He accuses Me Lamarche of contempt of court by purposely misleading him. He cites Sec. 784.3 Cr. Code which, of course, permits an appeal, as of a right, to the Court of Appeal in the face of the dismissal of the proceedings of a petition for habeas corpus. What the accused refuses to understand and declines to accept is that his proceeding stands to be measured by what it contains rather that how it is labelled. One may label a can opener, if you will forgive me a ridiculous example, one may label a can opener a centrifuge but the label will not, by itself, transform the can opener into anything but what it already is.

While it is true that the accused may find himself in a difficult position that is the inevitable consequence of his choosing to represent himself and his subsequent dismissal of every attorney who has acted for him thus far. I should add that the difficulties which he has elected to impose upon himself cannot in turn constitute a springboard or the justification of a change in the conditions of his detention. While the conclusions in the present motion do not raise this question it was nevertheless brought to the fore by the accused in the course of both his testimony and argument.

Me DesLongchamps and Me Lamarche are on the basis of the facts which I have related nevertheless impugned as saboteurs. The word plays an exaggerated role in the accused's vocabulary and is the recurring theme in his current complaints. The

evidence simply does not support the accused claims. The accused has been granted Legal Aid and through it the services of numerous lawyers. Unfortunately for him, he has not deemed these services to be satisfactory and had chosen to terminate the mandates of the respective lawyers of his own volition. Notwithstanding this situation, the respondent corporation has, from time to time, filed his proceedings on an "ad hoc" basis with one recent exception.

Accusations of contempt of court and sabotage against lawyers in the execution of their functions are perhaps amongst the most serious which one can make. I wonder whether, the accused has reflected fully upon what he said in the course of the last sitting. From where I sit, I can't come to no other conclusion but that Me Lamarche and Me Des-Longchamps have acquitted themselves very well indeed in the circumstances.

The accused complains of restrictions in his access to a telephone. Despite his complaints I hardly think that the instructions set out in Me DesLongchamps's letter can be construed as interference in the preparation of his defence. He has not cited a single example of a telephone call being refused. In addition, it may be well to remember that the purpose of his access to a telephone is to enable him to prepare his case. A review of the telephone log indicates that he has been allowed to make calls to various International Human Rights Agencies in London, Geneva and to the United Nations in New York. This sort of thing may make good copy but I would venture to suggest that it will not advance his defence preparation very far.

It follows from the foregoing that there will be no order in relation to any interference in the accused's defence preparation for the simple reason that, to my mind, no interference has been established. Quite to the contrary.

By the same token there will be no order in relation to the deposit of the accused's appeal. First of all that question is now academic. The accused has sought review of the decision of the respondent not to underwrite the costs of his appeal. On receipt of that request for review, the corporation filed the accused's appeal so as not to see his position prejudiced. I have been at pains throughout to draw a distinction between the obligation of the corporation to provide for legal services as opposed to its obligation to furnish them itself. The corporation is not, in my opinion, obliged to deposit any proceeding for the accused nor is it responsible as such for the sending of subpoenas in relation to his various petitions.

I pass now to the first conclusion of the petition which reads as follows:

> "Order stay of proceedings till appeals are decided."

From the wording, one may be excused for concluding that what the accused seeks, is the suspension of proceedings pending appeal. He is adamant in assuring me that, that is not the case. What he seeks, he says, is a permanent stay. He adds that once such a stay is granted, he would, of course, return voluntarily to stand trial for murder. He insists that, there exists a situation of systematic

suppression of and trammeling upon his rights through a mammoth conspiracy orchestrated principally by Concordia University, to sabotage his defence and in which prosecutors, Legal Aid and all lawyers concerned are willing participants. This state of affairs adds up he argues an abuse of process and violation of the principles of fundamental justice and community standards of fair play. Profound words indeed. But in the context of the case at bar they are totally inapplicable.

In what circumstances, may a Court order a stay of proceedings as a remedy. Mr. Justice E.G. Ewaschuk, in his text[1] at 31:8520 summarizes the case of R. v. Young,[2] a decision of Ontario Court of Appeal, as follows:

> "The principles of fundamental justice include the power of a trial court to stay proceedings in exceptional circumstances and in the clearest of cases where the conduct of the police or Crown is so flagrant and shocking as to constitute an abuse of the court's process."

The remedy then is available where the proceedings are "oppressive and vexatious" but such power can only be exercised in the "clearest of cases" according to the Supreme Court of Canada in Keyowski v. R.[3]

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[1] Criminal Pleadings and Practice in Canada-Second edition Canada Law Book 1992

[2] 13 C.C.C. (3rd) p.1

[3] (1988) 1 S.C.R. 657 also reported at 40 C.C.C. (3d) 481

A court will stay a prosecution where it is tainted to such a degree that to allow it to proceed would tarnish the integrity of the Court but only where the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases. R. v. Conway[4] and also R. v. MacDonald [5].

Furthermore, it is clear, that the cause of the unfairness must relate to executive misconduct or unfairness by the Crown, police or other government agents and not by private persons. I would add to private persons the category of private institutions. R. v. Miles of Music Ltd. [6] and R. v. Conway [7].

Conduct of the Crown or police which prevents an accused from making a full answer and defence may constitute an abuse of process. R. v. Livingstone[8].

Where, in a context of the case at bar, is the proof of exceptional circumstances. Where is the proof of a conspiracy headed by the Concordia University and which officers of the Crown, Legal Aid and members of the Bar are willing participants. Where is the proof of flagrant and shocking misconduct? There is nothing which I can find in the evidence

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[4] (1989) 1 S.C.R. 1659, 49 C.C.C. (3d) 289, 70 C.R. (3d) 209

[5] (1990) 54 C.C.C. (3d) 97 (Ont. C.A.)

[6] (1989) 48 C.C.C. (3d) 96,

[7] (1989) 1 S.C.R. 1659, 49 C.C.C. (3rd) 289

[8] (1990), 57 C.C.C. (3d) 449 (B.C.S.C.)

which supports any of these arguments or which justifies any consideration of a stay of proceedings in this case. Let us remember that in seeking a Charter remedy the burden of proof rests squarely upon the applicant. That has been a law of this country since 1982 and has not changed. See Federal Republic of Germany v. Rauca[9].

I have stated that on a fair reading of the first conclusion I was at first inclined to conclude that what the accused sought was a suspension of proceedings pending the decision of the Court of Appeal. That appeal, of course, is intimately related to his conditions of detention. Indeed the recurring theme blended into all of the accused's arguments is that he cannot adequately prepare given his detention at Parthenais.

First of all, this question was dealt with by my colleague Paul J. The Court of Appeal declined to hear an appeal from his decision. The question is again alluded to in the decision of Biron J. and in the letter of opinion addressed to the accused by Me Lamarche. It is also in issue indirectly in these proceedings in relation to a stay, if one interpretes the first conclusion on its face value as seeking a suspension pending the outcome of the accused's appeal.

It may well be that the accused's appeal will be dealt with expeditiously by the Court of Appeal. At this juncture, on the basis of the situation as I understand it, I, for my part, am not prepared to order a suspension of proceedings pending

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[9] 1983, 4 C.C.C. (3rd) p. 385 (Ont. C.A.)

the outcome of the accused's appeal. I will come back at the completion of this judgment to the steps which I have taken with regard to the question of representation or assistance. It appears to me that if the question of representation or assistance can be palliated, many of these difficulties, if difficulties they are, will become illusory. It is a matter which I propose to address later to-day.

I pass now to the third conclusion relating to the appointment of an attorney. The third conclusion reads as follows:

> "APPOINT a lawyer to assist me in my defence."

The accused has to date terminated the services of at least four of some seven lawyers who from time to time have represented him. He states, quite candidly, that he has done so because counsel have declined to follow his instructions. In the course of hearing, he wished to parade his former attorneys before me presumably to undergo some sort of inquisition which would ostensibly establish or demonstrate not only that they had refused to follow his instructions but that they had sabotaged his defence. I declined this request because first of all I am prepared to assume, for the purposes of this petition, that the accused's statement is accurate when he contends that counsel declined to follow his orders and instructions. Secondly, on the strength of what I have heard, I can see no basis for the accused's claim of sabotage. Whether in his mind that is the situation is another matter but I am far from sure at this juncture that that is so.

The accused's right to be represented or assisted by counsel is affirmed in the Charters, both provincial and federal and is refined and defined in the jurisprudence both pursuant to the Charters and in large measure in the jurisprudence which prevailed long before the Charters saw the light of day. It is not a new concept. The principles applicable in the case of bar may be summarized as follows:

Firstly: An accused person has the right to control and direct his own defence R. c. Swain[10], a decision of the Supreme Court of Canada at pages 505 to 506. As the Chief Justice of Canada put it:

> "An accused person has control over the decision of whether to have counsel, whether to testify on his or her own behalf and what witnesses to call. This is a reflection of our society's traditional respect for individual autonomy within the adversarial system."

Secondly in R. v. Taylor[11], a very recent unreported decision of the Ontario Court of Appeal, rendered on November 13th, 1992 and cited by Fish J.A. in the recent decision of Brigham v. R.[12], Mr. Justice Lacourcière put it as follows:

> "An accused who has not been found unfit to stand trial must be permitted to conduct his own defence even if this means the

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[10] 63 C.C.C. (3rd) 481

[11] Presently unreported C.A.Q.

[12] 500-10-000078-897, December 22nd, 1992

> accused may act to his detriment doing so. The autonomy of the accused in the adversarial system requires that the accused should be able to make such fundamental decisions and assume the risks involved.

As Fish, J.A. stated at page 39 of Brigham (supra):

> "An accused is not constitutionally protected against acting contrary to his own best interests, he is, however, protected against deprivation of his right to make full answer and defence."

Thirdly, should the accused elect to be represented or assisted by counsel, he is entitled to effective representation by competent counsel.

Principles are all very well. It is however the putting of them into practice, which is sometimes much more problematical. This is because the coin has an other side to it. Counsel for his or her part, and, this is a matter of professional conscience, must remain free to accept or refuse a mandate where he or she cannot reconcile his views as to the manner in which the defence is to be conducted with those of the accused.

Agreement to represent a client and agreement to be represented by a lawyer is after all, you will forgive me the "legalese", a consensual bilateral contract. I cannot order representation in that context. What I may do, indeed what I am obliged to do, is to ensure that a mechanism for representation is in place in order to ensure that the accused, to borrow the words of Fish, J.A., (cited above) is "protected against deprivation of his right to make

full answer and defence." That is where the right to counsel resides.

What then is the situation in the case at the bar? Me Larivière, in his representations to the Court, has gone on record as affirming that the accused is entitled to the assistance of Legal Aid and to that end is the holder of a certificate of eligibility. His eligibility as such is not in issue whether in relation to the services of a permanent employee of the Corporation or a lawyer in private practice who agrees to represent the accused under a Legal Aid mandate. In addition, Me Larivière stated that the corporation is prepared to underwrite the costs of either representation or assistance as the case may be.

As the Ontario Court of Appeal observed in R. v. Rowbotham[13], a certificate of eligibility is really equivalent to a credit note having a certain monetary value which one may redeem at the office of a lawyer in return for legal services. It follows, that there is in actual fact a means in place for the accused to benefit from the assistance of or representation by counsel through the Legal Aid plan.

The question, as I have said, was recently canvassed in Rowbotham (supra) where the general rule applying to all citizens was set out at page 64 in the following terms and it is as applicable in Quebec as in Ontario:

> "As a matter of common sense, an accused who is able to pay the

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[13] 41 C.C.C. (3rd) p.1

> costs of his or her defence is not entitled to take the position that he or she will not use personal funds, but still to require Legal Aid to bear the cost of his or her defence. A person who has the means to pay the costs of his or her defence but refuses to retain counsel may properly be considered to have chosen to defend himself or herself."

Given the issuance of a certificate, which is equivalent to a credit note, the beneficiary of the services of the Legal Aid plan is in precisely the same position.

In the case at bar it is not therefore necessary to consider the question of a stay until the means to remunerate counsel are provided since, as I have said, the accused is covered by a valid and subsisting certificate of eligibility.

The accused holds a certificate. He has a list of the members of the Bar. He has declined to make any further effort to retain counsel preferring to stand firm and cite, out of context, the constitutional guarantees which I have discussed above all with a view, in my opinion to frustrating the orderly holding of his trial. It makes no sense that an accused through the setting of conditions which competent counsel apparently find it impossible to work under may indefinitely postpone his trial when the public interest commands that the said trial be held within a reasonable time.

FOR THESE REASONS:

The petition is dismissed.

J.S.C.

J. Fraser Martin, J.S.C.

JFM/gl
JM0822
Me Jean-Marie Larivière for the Respondent
Me Jean Lecours for the Crown
Mr. Valery Fabrikant