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TAB 2

IN THE SUPREME COURT OF CANADA

(On Appeal from the Court of Appeal for
the Province of Ontario)

BETWEEN:

ACME BUILDING AND CONSTRUCTION LIMITED

APPLICANT
(Plaintiff)

-and-

THE CORPORATION OF THE TOWN OF NEWCASTLE

RESPONDENT
(Defendant)

MEMORANDUM OF THE RESPONDENT ON APPLICATION FOR LEAVE TO APPEAL

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TAB 2

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TAB 2

TAB 3A

(EXTRACT)

FIRST DRAFT

STATEMENT OF FACTS

1. On Thursday, July 1, 1999, the accused, Donna Cora Lawrence, was convicted following trial before a Supreme Court Judge sitting with a Jury of two charges of criminal negligence causing death/bodily harm and two charges of impaired causing death/bodily harm.

2. On May 28, 1997, the Appellant, Donna Cora Lawrence, was involved in a car collision with a motor vehicle driven by Barbara Marie MacRae. The passenger in the MacRae vehicle, Marjorie MacRae, subsequently died of the injuries she suffered in the accident. Barbara MacRae also suffered from injuries amounting to bodily harm. [See Agreed Statement of Facts, Exhibit No. 5, Tab 4, p. 319, lines 2-18; p. 320]

3. The trial commenced in Baddeck, Nova Scotia on June 12, 1999. Crown witness Scott MacLean testified that he came upon a car that was parked across the yellow line just past the Englishtown turnoff and that he had to come to a complete stop [Tab 4, p. 332, Q. 10]. The vehicle blocking his course backed up and Mr. MacLean was able to pass. He observed the vehicle, later identified as the Appellant's vehicle, following behind him and that it was weaving between the yellow line and the white line in its own lane [Tab 4, p. 334, Q. 16; p. 349, Qs. 62-63]. He further testified that it appeared as if the driver was lost and was consulting a road map [Tab 4, p. 350, Qs. 69-70].

4. Crown witness Frank MacRae testified that he was driving behind the vehicle driven by his sister-in-law, Barbara MacRae, and that both vehicles were travelling at approximately 80-90 kilometers an hour [Tab 4, p. 359, Q. 37]. Both the witness's car and Barbara MacRae's car were travelling in the same lane. Just before the St. Ann's turnoff, Mr. MacRae noticed a car coming into their lane [Tab 4, p. 359, Q. 38-40]. Mr. MacRae testified that he had a good view of the oncoming vehicle, that he saw Barbara MacRae swerve from her lane into the opposite lane and that he then noticed that the oncoming vehicle did the exact same thing, returned to her own lane, and the vehicles collided [Tab 4, p. 365, Q. 50, p. 373, Qs. 100-103; p. 374, Qs. 104-108; p. 375, Q. 109; p. 376, Q. 112; p. 377, Qs. 113-116]. He testified that he checked the Lawrence vehicle, that the Appellant did not appear to be injured, and that he did not smell any alcohol emanating from her [Tab 4, p. 378, Qs. 120-123].

5. Barbara MacRae testified that she had no recollection of the accident [Tab 4, p. 385, Q. 17-18]. However, neither could she explain the full bottle of rum in her vehicle [Tab 4, p. 389, Q. 38]. The rum had not been seized by Officer Towle as an exhibit [Tab 4, p. 848, Q. 209; p. 849-850, Qs. 216-222]. Ms. MacRae also testified that the vehicle she had been driving the day of the accident was uninsured [Tab 4, p. 392, Qs. 61-62]. She confirmed that she had not been charged with operating a vehicle without insurance, nor had she been charged with operating a vehicle left of the centre line [Tab 4, p. 395, Qs. 82-86].

(EXTRACT)

MIDDLE DRAFT

PART I – STATEMENT OF FACTS

(a) Test Case

1. This test case is about juror bias and whether the presumption of juror impartiality is rebuttable at law under the current test for determining judicial bias. It is also about lost evidence and the right to counsel; and whether an accused person can be convicted twice for the same delict.

(b) Brief Chronology of Facts

2. A brief chronology of facts are as follows:

- **On Wednesday, May 28, 1997, Donna Lawrence, the Applicant herein, a 47 year-old working mother of two arose at 5:00 a.m. to prepare for her day. As a business development officer with the Economic Department and Tourism Department for the Province of Nova Scotia she was scheduled to give a presentation, at 3:30 p.m., on economic development to more than 100 women at the Gaelic College, St. Ann's Bay, Cape Breton, Nova Scotia. Mrs. Lawrence gave herself at least two hours to make the trip as she had not been to St. Ann's before. Her presentation along with the networking session and dinner to follow meant that she would not return home until 10 p.m. that evening.**

  Ref.: Trial Transcript, pp. 1114-1118, paras 42-62 [Tab E.26]

- **As part of her employment, Mrs. Lawrence was enrolled in a correspondence course with the University of Waterloo and her final paper was due the following day. She worked on her paper at home throughout the morning as her office computer was not functioning. Mrs. Lawrence made several calls to her office to collect messages. She left home around 12:30 p.m. and drove to her office to pick up material for the presentation and proceeded on to the Gaelic College at about**

TAB 3C

(EXTRACT)

S.C.C. No.

FINAL DRAFT

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE NOVA SCOTIA COURT OF APPEAL)

BETWEEN:

DONNA LAWRENCE

Applicant
(Defendant)

-and-

HER MAJESTY THE QUEEN

Respondent
(Crown)

APPLICATION FOR LEAVE TO APPEAL

Pursuant to Section 40 of the *Supreme Court Act*, R.S.C. 1985, c. S-26, as amended

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PART I - STATEMENT OF FACTS

(a) Test Case: Effect of Police Losing Evidence, Right to Counsel, Juror Bias and Duplicitous/Duplicative Charges

1. This test case is about:

- key evidence lost by police
- the right to counsel
- juror bias
- whether a person can be charged and convicted twice for the same delict.

(b) Brief Chronology of Facts

2. A brief chronology of the facts are as follows:

- On Wednesday, May 28, 1997, Donna Lawrence, a 47 year-old married working mother of two woke at 5:00 a.m. to prepare for her day. As a business development officer with the Economic Development Department for the Province of Nova Scotia she was to give a presentation, at 3:30 p.m. that day, on economic development to 100 women at the Gaelic College, St. Ann's Bay, Cape Breton. Donna gave herself at least 2 $^{1}/_{2}$ hours to make the trip as she had never been to St. Ann's before.

  Ref.: Trial Transcript, pp. 1114 -1118, paras 42-62 [Tab 2A]

- Donna is very good at her job, very seldom has a drink, and is highly thought of and respected by supervisors, colleagues and others, as noted below.

- Donna's supervisor in the Nova Scotia Department of Economic Development is Mr. Ron Kennedy, and of the 14 years he knew Donna was her supervisor for the last 9. He says he "is not aware of any alcohol use by [Donna], either during or after work hours, other than on one occasion in fourteen years when she had one glass of wine with a meal."

  Ref.: Presentence Report, p. 4 [Tab 2B]

5. As to difficulty walking/staggering:

- Three days after the accident Donna went to emergency because she still had difficulty walking. Dr. MacLean said she had a painful foot, sore knees and a bruise on her head. X-rays confirmed that Donna's foot was broken in two places and that the particular nature of the breaks would have made walking difficult. The doctor also testified that Donna, still three days later, had a positive neurological sign called the Dabinsky sign indicating an injury to the central nervous system - in layperson's terms, that Donna had suffered a concussion. Dr. MacLean also testified that the doctor who saw her right after the accident may not have been able to diagnose the concussion because that diagnosis is often formed after the fact.

Ref.: Trial Transcript, p. 933, paras. 7-8, p. 934, paras. 11-12, p. 935, paras. 19-21; p. 941, para. 49, p. 948, paras. 92-94 [Tab 2A]

6. In summary:

Who Testified Confused/Disoriented	**Who Testified Difficulty Walking**	**Who Testified No Smell of Alcohol**	**Who Testified Smell of Alcohol**
Osborne Burke	Osborne Burke	Osborne Burke	-
-	-	Ronald Bonnar	Austin MacKenzie
Shane MacFarlane	-	Janet MacCuspic	Shane MacFarlane
Roland Genge	Roland Genge	Frank MacRae	Roland Genge
Duncan MacLean	-	-	Duncan MacLean
-	-	-	-
-	Lynn Dunlop	-	Travis MacNeil
-	Sally MacDonald	-	Lynn Dunlop
-	-	-	Sally MacDonald
Michael Towle	Michael Towle	-	Patricia Nicholson
-	Travis MacNeil	Travis MacNeil (initially)	Michael Towle

7. Donna took the stand in her own defence, and testified:

- She drank no alcohol that day.
- She was not impaired.

Ref.: Trial Transcript, pp. 1130-31, para 125; p.1131, paras 126-127 [Tab 2A]

8. Donna was convicted on all four counts:

- Criminal negligence causing death.
- Causing death in the operation of a motor vehicle.
- Criminal negligence causing bodily harm.
- Causing bodily harm in the operation of a motor vehicle.

9. The day after the trial, Donna's lawyer happened to be in Baddeck near where the trial was, and was approached by a man he happened to know who'd been told what one juror said to another juror in court before the trial started. As a result of that conversation, Donna's lawyer hired an investigator to take statements from persons concerned. Those statements - involving Juror No. 12 - were used as a basis for the Donna's Application under s. 24(1) of the *Charter*. In that Application, Donna's lawyer raised the issue of juror bias and its impact on the *Lawrence* trial.

Ref.: Notice of Motion for Stay of Proceedings re: Jury Bias [Tab 2C];

Trial Transcript at pp. 1374-1382 [Tab 2A]

10. What happened was that before the trial, Juror No.12 told another prospective juror, while both were sitting in the courtroom waiting for the judge to enter: "**I don't know why they would be having a trial over this**, the woman was drunk and on the wrong side of the road". The Court of Appeal said this comment did not give rise to any reasonable apprehension of bias.

Ref.: Reasons of Court of Appeal, at par.97-131 [Tab 3B]

11. Donna said she "feels awful and wishes she had died rather than the victim".

Ref.: Presentence Report, p. 7 [Tab 2B]

12. Donna now lives at home with her (retired) husband. They live on Canada Pension ($800 her, $465 him; their total family income). Their two boys attend local universities (Chris 3rd year, Acadia; Jessie 2nd year U. N. B.). They have a

house worth $120,000, and debts of $125,000). Donna now sees a psychiatrist for depression; and long term disability payments of 70% of her previous income from a previous accident have been cancelled because of this accident. Her husband says "He loves his wife and family very much and the complete family is very close."

Ref.: Presentence Report, pp. 3-5, 7 [Tab 2B]

PART II – POINTS IN ISSUE

13. This case raises the following issues of public importance that warrant the consideration of and guidance of this Honourable Court:

(a) Where Juror Bias at the Very Beginning of the Trial Makes the Trial Unfair

- Is the test for partiality applicable to cases where it is argued that trial fairness has been compromised by juror bias at the outset of the trial?

(b) Jurisdiction of the Superior Court

- Does the judge presiding over an accused's trial before a judge sitting with a jury have the jurisdiction to declare a mistrial, on the basis of juror bias, once the jury has rendered a guilty verdict but before the judge has given sentence?

(c) Key Evidence Lost

- Where the evidence (here mouthwash containing alcohol) is seized by police then lost by police (absolutely critical evidence because the officer at the scene used the apparent smell of alcohol to both arrest and charge) such evidence is pertinent and crucial.

(d) Breach of Right to Counsel is Never of "No Affect"

- A breach of a person's right to counsel at the time of arrest on the basis that the person did not know the full extent of her legal jeopardy, is never of "no affect" as claimed by the Court of Appeal.

(e) Duplicity/Multiplicity of Charges

- Where on the basis of one motor vehicle accident the indictment charges two death-causing charges to one individual (criminal negligence causing death and causing death in the operation of a motor vehicle), and two bodily-harm causing charges to another individual (criminal negligence causing bodily harm, causing bodily harm in the operation of a motor vehicle), is this duplicitous/multiplicitous in that one person has in law been charged (and here, convicted) of killing one person twice, and causing bodily harm to another one person twice?

PART III – STATEMENT OF ARGUMENT

(a) WHERE JUROR BIAS AT THE VERY BEGINNING MAKES THE TRIAL UNFAIR

14. Is the test for partiality applicable to cases where it is argued that fairness has been compromised by juror bias at the outset of the trial?

TAB 4

S.C.C. File No.:

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL OF ONTARIO)

B E T W E E N:

CLAUDE JOHN and ROSE JOHN

Applicants
(Plaintiffs)

- and-

SHAWN FLYNN, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, STATE FARM FIRE AND CASUALTY COMPANY, EATON YALE LTD., ROBERT BLAKE and WALLACEBURG GLASSWORKERS INC.

Respondents
(Defendants)

APPLICATION FOR LEAVE TO APPEAL
Pursuant to Section 40 of the *Supreme Court Act*, R.S.C. 1985, c.S-26, as amended
VOLUME ONE Pages 1-200

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PART I – STATEMENT OF FACTS

(a) TEST CASE: Employer liability for known conduct of employee on premises, causing harm to third party off premises.

1. This test case is about an employer's liability for the actions of its employee that injure a third party, where the employer controls the circumstances leading to the harm, and the harm occurs just after the employee leaves work.

(b) Brief Chronology of Facts

2. A brief chronology of the facts is as follows:

The Company's Control Over The Workplace and Employee

3. Eaton Yale ("the company") operates a leaf spring manufacturing plant in Wallaceburg, Ontario. It is a large, heavy manufacturing facility that makes leaf springs for trucks. It is a multi-national company.

   Ref.: Court of Appeal below, para 3, per Finlayson, J.A. [Tab 4E]

4. Sean Flynn works there since 1984. His job is in the forge, where he operates and sets up the machinery that forms large, heated metal sheets into shapes. Some of the machines are two and three times the height of the operator. His job has multiple steps, some of which are:

   - "Check set up by operating eye machine and punch press, check for proper eye closing, eye size that eyes are parallel…Read detailed prints showing eye size and type centre bolt hole position material necessary."
   - "Training: Know lock out procedure [turning off the machine and then locking]…Identify safety hazards…SPC locking and charts."
   - "Potential Risk: loss of finger or hand…Slips and falling on walking beam."

   Ref.: Court of Appeal below, para 4, per Finlayson, J.A. [Tab 4E]
   Trial Exhibit 91 [Tab 2B]
   Trial Exhibit 3 (excerpts only – index) [Tab 2B]

5. The company imposes safety procedures on its employees, to prevent injuries in the moving equipment and machinery, including

   "safety glasses, safety shoes, ear plugs, long sleeved gloves, shop coats or overalls. Lockout procedures, is a seven-step process, shuts the machine down during repair, setup and like activity."

   Ref.: Trial Exhibit 91 [Tab 2B]
   Trial Exhibit 3 [Tab 2B]

6. The plant is noisy, hot and covers a number of acres. It is divided into sections, each supervised by a foreman. A general foreman is in charge of the entire plant floor operation.

   Ref.: Trial Transcript, p. 568, lines 18-20 [Tab 2A]

7. The company employs 500-600 people, and operates three shifts of 150 employees each, to maximize production. Employees "swing" from – days (7 am to 3 pm) – to afternoons (3 pm to 11 pm) – to nights (11 pm to 7 am) on two-week rotations. Breaks over the night shift are at 1 am, 3 am and 5 am. The company lets employees take their breaks in their cars in the company lot.

   Ref.: Trial Transcript, p. 560, lines 18-24; p. 43, lines 15-20 [Tab 2A]
   Court of Appeal below, para 5, per Finlayson, J.A. [Tab 4E]

8. Flynn works in an area known as the "backend" of the plant. The backend area gives on to the company lot. The Trial Judge found that the "company had absolute control over that work place and the company parking lot."

   Ref.: Trial Transcript, p. 159, lines 16-31; p. 160, lines 1-31; p. 369 lines 13-30 [Tab 2A]
   Trial Exhibit 16 [Tab 2B]
   Decision on Application, para 7, per Donnelly, J. [Tab 4B]

9. The company lot runs the entire length of the plant. At the rear of the lot, opposite the building, it abuts a farm, leased by an employee of the company, Al Bishop. The back of the company lot is "virtually in darkness prior to the installation of those lights" according to the maintenance supervisor, Doug MacLennan.

   Ref.: Trial exhibit 16 [Tab 2B]
   Trial Transcript, p. 170, lines 24-26; p. 819, lines 2-9 [Tab 2A]

10. Drinking in the company lot has gone on since at least 1978, when the company posts a notice to its employees that read:

    > "Apparently, some employees are drinking alcoholic beverages in the parking lot during their lunch and rest breaks – this must cease immediately".

    It did not stop. The company did not stop it. Because they did not, the applicant cannot walk today.

    Ref.: Trial Exhibit 11 [Tab 2B]
    Charge to the Jury by Donnelly J. at p. 863 [Tab 4A]
    Decision on Application, paras 2 and 4, per Donnelly J. [Tab 4B]

11. The company lot drinking is described by forge employee, Mike Paolone:

> "I'd say close to 30 to 40 percent of the work force at the backend would be probably participating in drinking either before work or during work…Well it was pretty…I'd say rampant…"
>
> *Ref.*: Trial Transcript, p. 159, lines 20-31 [Tab 2A]

12. General foreman tells the company about the drinking:

    - Ivan Bilodeau, retired general foreman, speaking of 1980:
      "When I told him [Personnel Manager] about the problem he instructed me and Mr. Bedell to go outside and check this problem out; and he says: Bring me back some evidence. [So what did you do]. I went and got a box…a cardboard box, two feet by a foot and a half by two feet deep…towards the back of the parking lot…I filled the box right up…(with) whisky bottles, beer bottles, gin bottles, rum bottles…just plain alcohol bottles."
    - Mr. Bilodeau concludes that employees must have had a drinking problem: "Well they must have…like, you know…what are all these bottles doing there? Why else would the bottles be there?"
    - Mr. Bilodeau proposes solutions to the problem, like " restricting access to the lot, fencing the lot, increased security, checking lunch pails"

    There is no company response. No restricted access, no fencing, no increased security, no checking lunch pails.

    - Bev Howard, retired general foreman, finds alcohol bottles in the company lot:
      "Well I've seen them myself when I'm out".
    - Mr. Howard reported this to the Personnel Manager.

    No company response.

    Ref.: Trial Transcript, p. 73, lines 13-30, p.74, lines 1-14; p.80 lines 14-29; p.81, lines 1-10; p. 85, lines 14-30; p.86, lines 1-23 p.128, lines 7-10 [Tab 2A]

13. Security personnel hired by the company reported finding evidence of drinking in the company lot. No company response.

14. The current personnel manager, Vincent Vlamink, says this about Bilodeau's concerns and proposed solutions:

    > "If I had a member of management coming forward saying: I think there's incidence of drinking going on…? (yes?) And here are some solutions that I have to address those? That would be something that would have to be taken seriously."

    Even then, no company response.

    Ref.: Trial Transcript, p. 777, lines 17-30, p. 778, lines 1-19 [Tab 2A]

15. Al Bishop, the employee of the company who farms the adjacent lot for 20 years has to clear a case of twenty-four beer bottles and other liquor bottles from the field each spring and fall, when he cultivates his land to avoid fouling his equipment.

    Ref.: Trial Transcript, p. 169, lines 1-31 [Tab 2A]

16. The company rarely patrols the company lot. Security is not responsible to supervise company employees in the company lot or elsewhere. Because the company has not lit its lot, the lot's in darkness, and as a result in darkness along the fence adjacent to the farmer's field. Employees' vehicles at the back of the company lot are not supervised, nor visible.

    Ref.: Trial Transcript, p. 764-8 and 819, lines 2-13 [Tab 2A]

17. The company posts notices, or puts notes in pay envelopes from time to time about not drinking on the premises. Flynn, his co-workers Paolone, and Robert Blake, knew it wasn't allowed.

    Ref.: Trial Exhibit 16 [Tab 2B]
    Trial Transcripts, p.145, lines 8-13; p.164, lines 8-31;
    p.165, lines 1-19; p.427, lines 10-18; p.429, lines 30-430, line 4 [Tab 2A]

18. Flynn, Paolone and Blake said that's why they drink in the back of the company lot, so as not to get caught.

    Ref.: Trial Testimony, p. 162, lines 1-10; p. 166, lines 23-30;
    p. 167, lines 1-9; p. 145, lines 19-28; p. 433, line 7; p. 434
    line 8 [Tab 2A]

19. Ron Beckett is a foreman who supervises Flynn from time to time. He says the company makes it clear that foremen are evaluated according to their production numbers and those numbers are very important. The company makes "it tough on him" to make a decision to send an employee home, even if drinking, since that could reduce production, and reduced production could affect his evaluation and pay raises.

    Ref.: Trial Transcript, p. 595, lines 5-30; p. 596, lines 1-31 [Tab 2A]

20. Beckett agrees

    > "… if Mr. Flynn had been drinking that night, with all that stuff on him [safety glasses, gloves, boots] and all that noise around him the only way you'd have been able to have a chance to pick up on whether he was impaired is if he was staggering".

    Ref.: Trial Transcript, p. 597, lines 12-30 [Tab 2A]

21. The company participates in an Employee Assistance Plan (EAP) directed at and designed to deal with drinking by employees on and off the premises, and having two goals:

    - increase productivity lost by absenteeism due to drinking, and
    - offer assistance to the employee to stop.

    Absenteeism is a "red-flag" of alcohol abuse by an employee.

    Ref.: Trial Exhibit 2 [Tab 2B]

22. Part of the EAP is a "Last Chance Contract" that outlines specific return-to-work requirements for an employee who has been off work because of alcohol abuse. A positive prognosis from a dry-out centre is needed for the employee to go back onto the line and operate machinery.

    Ref.: Trial Exhibit 2 [Tab 2B]

23. The Learned Trial Judge states the company "had a claimed policy of zero tolerance for alcohol in the workplace. It had a policy of intervention to supervise known alcoholics. It gave mouth honour to those policies by sporadic postings on notice boards. In relation to Flynn both policies were disregarded."

    Ref.: Decision on Application, para 4, per Donnelly, J. [Tab 4B]

24. The company toxicologist, Dr. Kalant, says availability of alcohol in the company parking lot, combined with lax enforcement, could actually encourage workplace drinking by an alcoholic.

    Ref.: Trial Transcript, p. 687-90 [Tab 2A]

25. Company policy requires an employee who is caught drunk to be sent home in a taxi, or with a union representative, other than in his own car. Vlamink, the personnel manager says,

    > "Oh, the reason we send them home in a cab is, if we deem them not to be fit for work, we also would take that step to make sure that they get home safely."
    > "They're a safety hazard, possibly to themselves or to other employees".

    Ref.: Trial Transcript, p. 742, lines 23-31; p. 743, lines 1-13 [Tab 2A]

26. Beckett, the foreman agrees the system of leaving the employee's car in the parking lot is a "safe system".

Ref.: Trial Transcript, p. 589, lines 5-16 [Tab 2A]

27. Howard, the general foreman said employees are not sent home in their own cars because:

> "… if anything happened to him on the way home you could be in a lot of trouble [Anything like?] An accident."

Ref.: Trial Transcript, p. 140, lines 2-11 [Tab 2A]

28. None of this happened in Flynn's case, if it did, Claude John wouldn't be in a wheelchair now.

Sean Flynn's History At The Company

29. Flynn lives 20 to 25 minutes from the factory.

Ref.: Trial Transcript, p. 878, line 25; p. 396, lines 6-8 [Tab 2A]
Decision on Application, para 9, per Donnelly, J. [Tab 4B]

30. He has a long-standing pattern of absenteeism and coming in to work late. His absentee record is described as "not very good" by the general foreman, Howard.

Ref.: Trial Exhibit 1 [Tab 2B]
Trial Transcript, p. 131, lines 19-21, 132-143 [Tab 2A]

31. The company knows Flynn is an alcoholic because

- Flynn tells the personnel manager;
- Flynn has long-standing absenteeism problems;
- Flynn participates, with the support of the company, in a dry-out program for 90 days starting on May 15, 1990;
- The dry out program's prognosis given to the company on August 22, 1990 (i.e. three months later) was that **"His chances for continued sobriety are poor"**;
- He does not "graduate" from the dry-out program. He would "have to attend Chatham Brentwood meetings at least three times per week for three months…" in order to graduate. He does not.
- Flynn, the company and a union representative sign a "Last Chance" contract. It has alcohol abstinence requirements;
- The company takes no steps to ensure Flynn doesn't drink on the job or in the company lot after he gets back on the line.

Ref.: Trial Exhibit 1 [Tab 2B]; Trial Transcript, p. 377, lines 23-378, 13;
p. 379, lines 12-26; p. 380, lines 10-382, 19; p.388, lines 25-386, 8;
p. 390, lines 5-7 [Tab 2A]; Trial Exhibit 19 [Tab 2A]

32. After attending the dry-out program so he can return to work (August, 1990), Flynn's absenteeism pattern resumes. The company writes him up twice, the second

time in September of 1992. A written record of absentee problems is preceded by a number of informal and formal verbal "counselling" sessions.

Ref.: Trial Exhibit 1 [Tab 2A]
Trial Transcript, p. 713, lines 28-31; p. 714, lines 1-6 [Tab 2A]
Trial Exhibit 19 [Tab 2B]

33. The September 1992 counselling report states there is room for "100% improvement" and that "if he needed it, there was an Employee Assistance Program available." Flynn does not access it. The company takes no steps to monitor Flynn.

Ref.: Trial Exhibit 2 [Tab 2B]
Decision on Application, para 4, per Donnelly, J. [Tab 4B]

Claude John

34. Claude John is a married man with two children. He and his wife Rose have an 11 year old daughter, Stephanie, and a 6 year old son, Michael. Claude is a former heavy-equipment operator who is unable to work in that capacity since an industrial accident. He continues to do contracting locally and is a wood lot operator and hunting and fishing guide around their home on Walpole Island.

35. In 1992, Rose John is taking a university degree at the University of Windsor as a full-time student, while working full-time in Windsor at the Federal Business Development Bank, over an hour from their home. This leaves Claude with the primary responsibility of caring for their two children, taking them to school, activities, preparing meals, laundry and cleaning. They drive a blue Econoline family van.

Ref.: Trial Transcript, p. 10, line 18 [Tab 2A]

The Last Shift Before The Crash

36. Flynn works the night shift on December 8-9, 1992. By his own evidence, he drives home, sleeps briefly and then drives back to Wallaceburg where he picks up a high school transcript, attends a dental appointment, and drops off the transcript off at the company. He starts drinking at 2:30 that afternoon. He drinks

- five 8-oz beers at the Glassworkers Union Hall which is across the street from the factory;
- three to four 2-oz shots of vodka/Clamato at a friend's home;
- one bottle of beer at home;
- four to six 8-oz beers, ordering two at a time, in the 45 minutes immediately before he reports for work, again at the Union Hall, after parking his pickup truck in the company lot.

$976,046.36. Collateral benefits from the no-fault policy total $355,993.68. The Learned Trial Judge gives equal benefit to both the company and Flynn of a deduction for those benefits from the damages awarded.

Ref.: Reasons of Judgment of Donnelly, J. dated March 16, 2000 [Tab 4C]

56. After hearing literally no evidence, the Court of Appeal reverses the jury, saying "There is no duty of care on the part of [the company] to members of the driving public…and if there was such a duty, it did not extend beyond the point where Flynn left the company premises…any suggestions as to how [the company] could have controlled Flynn's activities beyond that point are hopelessly speculative".

Ref.: Court of Appeal below, para 50, per Finlayson, J.A. [Tab 4E]

PART II – POINTS IN ISSUE

57. This case raises three issues of public importance that warrant the consideration of and guidance of the Honourable Court;

Issue No.1: Is there a general duty of care on employers because of what happens at work?

58. Is there a general duty of care owed by employers to third parties where employers are negligent because of what happened at work, and the work negligence damages someone else within 15 minutes of the end of the shift?

Issue No. 2: Is there a special duty of care because of special workplace knowledge?

59. Is there a special or new duty of care on employers where employers have specific workplace knowledge of problem employees' negative behaviour in the workplace, then do nothing about it?

Issue No. 3: Is a tortfeasor who does not contribute to the collateral benefit scheme entitled to deduct those benefits from damages awarded to the plaintiff?

60. Where one of two tortfeasors does not participate in a provincial no-fault insurance scheme, and the tort victim is given some immediate medical and other care from the

Response to a Leave to Appeal, **First Draft** of Facts
section (------ v. ------, S.C.C. file no. 23937)

MEMORANDUM OF ARGUMENT OF THE RESPONDENT

PART I: STATEMENT OF FACTS

1. The Orders of the Honourable Mr. Justice V.W.M. Smith dated May 25, 1993 under appeal (the "1993 Order") were granted after a lengthy chambers application during which the evidence and authorities were carefully reviewed by the learned Chambers Justice. The Applicant's Appeal was unanimously dismissed by the Honourable Madam Justice C.A. Fraser, Chief Justice of Alberta, Mr. Justice R.P. Kerans and Madam Justice M.J. Trussler (ad hoc) of the Alberta Court of Appeal following two hours of oral argument by the Applicant and a detailed review of the evidence and authorities on the issues.

2. Following the granting of the Decree Nisi on March 10, 1983, the chronology of events is as follows:

a)	January 31, 1986	-	Applicant's Motion to vary support Dismissed without costs August 8, 1986
b)	November 10, 1986	-	Applicant's Motion to vary support Abandoned by Applicant
c)	April 7, 1988	-	Applicant's Motion to vary support Substantially dismissed without costs May 17, 1988
d)	September 8, 1989	-	Parties consent to vary custody and support
e)	December 11, 1991	-	Respondent's Motion for child support Order of the Honourable Mr. Justice D.W. Perras consented to March 23, 1992
g)	February 8, 1993	-	Applicant's Motion to cancel child support and arrears Dismissed with costs May 25, 1993

1395Response to a Leave to Appeal, **Final Draft** of Facts section (------ v. ------, S.C.C. file no. 23937)

MEMORANDUM OF ARGUMENT OF THE RESPONDENT

PART I: STATEMENT OF FACTS

A. Present circumstances of the parties.

1. The Applicant is a Corporal with the R.C.M.P. earning a gross annual income of $53,000.00. The Respondent is a letter carrier with Canada Post earning a gross annual income of approximately $35,000.00. Corporal ------ was required to pay $200.00 per month child support for the one remaining child of the marriage, Raymond, under an Order granted March 23, 1992. In February 1993, Corporal ------ applied to cancel both ongoing child support and arrears.

(Applicant Motion Book, Tab 2, pp. 201-202)

B. Corporal ------'s motion to cancel child support and arrears dismissed.

2. The Orders of the Honourable Mr. Justice V.W.M Smith dated May 25, 1993 under appeal (the "1993 Orders") dismissed Corporal ------'s motion to cancel ongoing child support and arrears. Mr. Justice Smith granted Ms. Banso ------'s cross-application to increase child support for Raymond to $600.00 per month, increasing to $750.00 per month upon the termination of a monthly Canada Pension Plan Disability Benefit of approximately $150.00 now being received by Raymond as Corporal ------'s dependant.

(Applicant Motion Book, Tab 2, pp. 202-203)

C. Corporal ------'s Appeal unanimously dismissed.

3. The 1993 Orders were granted after a lengthy chambers application during which the evidence and authorities were carefully reviewed by the learned Chambers Justice. The Orders of Mr. Justice Smith were upheld by a unanimous Court of Appeal, and Corporal ------'s Appeal was unanimously dismissed by the Honourable Madam Justice

TAB 6

Court File No.:

IN THE SUPREME COURT OF CANADA

(On appeal from the Supreme Court of Newfoundland and Labrador, Court of Appeal)

BETWEEN:

ARCHEAN RESOURCES LTD.

Applicant
(Appellant)

- and -

HER MAJESTY THE QUEEN IN RIGHT OF NEWFOUNDLAND AND LABRADOR, AS REPRESENTED BY THE HONOURABLE THE MINISTER OF FINANCE FOR THE PROVINCE OF NEWFOUNDLAND AND LABRADOR AND HER MAJESTY'S ATTORNEY GENERAL FOR NEWFOUNDLAND AND LABRADOR

Respondents
(Respondents)

APPLICATION FOR LEAVE TO APPEAL
(Archean Resources Ltd., Applicant)
(Pursuant to Section 40 of the *Supreme Court Act*, R.S.C. 1985, c.S-26, as amended)
VOLUME I – Pages 1 - 220

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18. Confusion as how statutes should be interpreted is evident in recent Court of Appeal cases that emanate from different provinces - no consensus exists as to whether the purposive or pragmatic methodology of statutory interpretation should be favoured or whether the plain meaning approach should be applied.

Purposive or Pragmatic Approach	**Plain Meaning Approach**
Approach: • the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament **Court of Appeal below:** • the Court favoured the purposive or pragmatic methodology of statutory interpretation	**Approach:** • statutory language is given its plain ordinary grammatical meaning -in the absence of ambiguity resort to other interpretive devices or principles, or to extrinsic aids, is unnecessary and inappropriate **Court of Appeal of Newfoundland and New Brunswick:** • the Court of Appeal of Newfoundland in *R. v. Wonderland Gifts Ltd.* and the New Brunswick Court of Appeal in *Parlee v. New Brunswick (Workers' Compensation Board)* applied the plain meaning approach. Ref: *R. v. Wonderland Gifts Ltd.* (1996), 140 Nfld. & P.E.I.R. 220 (Nfld. C.A.), para. 28 [TAB 7S] *Parlee v. New Brunswick (Workers' Compensation Board)* (1991), 82 D.L.R (4^{th}) 764 (N.B.C.A.), para. 10 [TAB 7P]

19. The inconsistency in interpretative approach has extended to appellate tax cases. The approach of the Court of Appeal below may be contrasted with the plain meaning approach to the interpretation of a logging tax statute adopted and applied by the British Columbia Court of Appeal in *Slocan Forest Products Ltd. v. British Columbia*.

Reference: *Slocan Forest Products Ltd. v. British Columbia* (2002), 142 B.C.C.A. 315 (C.A.) [TAB 7Y]

(ii) Divergent Interpretation Approaches in this Honourable Court

20. Divergences of views as to the appropriate interpretative approach to statutory interpretation may be found in the decisions of this Honourable Court. In her concurring judgment in *2747-3174 Québec Inc. v. Québec (Regie des permis d'alcool)*, L'Heureux-Dubé J. suggested that this Honourable Court was "wavering at random" between the purposive or pragmatic approach and the plain meaning approach.

Reference: *2747-3147 Québec Inc. v. Québec (Regie des permis d'alcool)*, [1996] S.C.R. 919 at para. 170 [TAB 7A]
Will-Kare Paving & Contracting Ltd. v. R., [2001] 1 S.C.R. 915, per Binnie J. (dissenting) [TAB 7DD]

Purposive or Pragmatic Approach	**Plain Meaning Approach**
• in *Stubart Investments Ltd. v. The Queen* and *Bell Expressvu Limited Partnership v. Rex et al* this Honourable Court cited from *Driedger on Construction of Statutes* : Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. Ref: *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536 at 578 [TAB 7Z] *Bell Expressvu Limited Partnership v. Rex e* 26 [TAB 7C] • the Driedger formulation of principle has also been identified with the plain meaning interpretation approach. Ref: *Canada v. Antosko*, [1994] 2 S.C.R. 312, pp. 326-327 [TAB 7D] *Friesen v. Canada*, [1995] 3 S.C.R. 103 at para. 15 [TAB 7H] *Alberta (Treasury Branches) v. Canada*, [1996] 1 S.C.R. 963, paras. 14 and 15 [TAB 7B]	• in *R. v. Multiform Manufacturing Co*, (which O'Neill J.A. in the Court of Appeal below said might appear to support the Archean argument) this Honourable Court applied the plain meaning rule, as follows: ….When the words used in a statute are clear and unambiguous, no further step is needed to identify the intention of Parliament has clearly expressed its intention in the words it has used in the statute. Ref: *R. v. Multiform Manufacturing Co.*, [1990] 2 S.C.R. 624 at p. 630 [TAB 7R] • the plain meaning rule has also been applied in a number of recent tax cases – in *Shell Canada Ltd. v. Canada*, this Honourable Court stated: …It is well established in this Court's tax jurisprudence that a searching enquiry for either the "economic realities" of a particular transaction or the general object and spirit of the provision at issue can never supplant a court's duty to apply an unambiguous provision of the Act to a taxpayer's transaction.

	Where the provision at issue is clear and unambiguous, its terms must simply be applied…Finding unexpressed legislative intentions under the guise of purposive interpretation runs the risk of upsetting the balance Parliament has attempted to strike in the Act. Ref: *Shell Canada Ltd. v. Canada*, [1999] 3 S.C.R. 622 at paras. 40 and 43 [TAB 7W] *Singleton v. Canada*, [2001] 2 S.C.R. 1046 paras. 24-31 [TAB 7X] *Ludco Enterprises Ltd. v. Canada*, [2001] 2 S.C.R. 1082 paras. 38 and 39 [TAB 7J] *Friesen v. Canada*, [1995] 3 S.C.R. 103 at para. 15 [TAB 7H] *Canada v. Antosko*, [1994] 2 S.C.R. 312 (S.C.C.), pp. 326-327 [TAB 7D]

B. Confusion as to recourse to extrinsic interpretative aids

21. Inconsistency also exists in appellate courts regarding the extent to which there may or may not be recourse to extrinsic interpretative aids in statutory interpretation cases – can interpretive aids be used in all cases or only in cases of ambiguity?

Extrinsic Interpretive Aids All the Time	**Extrinsic Interpretative Aids Only When Necessary**
Court of Appeal below: • the Court of Appeal below applied the purposive or pragmatic interpretative approach: it considered all indicators of legislative meaning, including a 1974 Report of the Royal Commission on Mineral Revenue regarded to be the impetus for the *Mining and Mineral Rights Tax Act*. Ref: Judgment of Court of Appeal below, paras. 27, 45 [TAB 4D]	**Court of Appeal of Saskatchewan and New Brunswick:** • appellate courts from different provinces have held that recourse to extrinsic interpretative aids is appropriate only in cases of ambiguous language • the Saskatchewan Court of Appeal in *Parlee v. New Brunswick (Workers' Compensation Board)*, and in *Sunnyside Nursing Home v. Builders' Contract Management Ltd.*, the Saskatchewan Court of Appeal stated that: …Courts must be guided by the language of the statute to determine the intent of the legislators, and only in the event of ambiguity is there justification for seeking the

TAB 7B

S.C.C. No.

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

JAMES SAPARA

Applicant
(Applicant)

-and-

HER MAJESTY THE QUEEN

Respondent
(Respondent)

APPLICATION FOR LEAVE TO APPEAL

Pursuant to Section 40 of the *Supreme Court Act,* R.S.C. 1985, c. S-26, as amended

---

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Adriana I. Cargnello
Ottawa Agent for the Applicant

TAB 7B

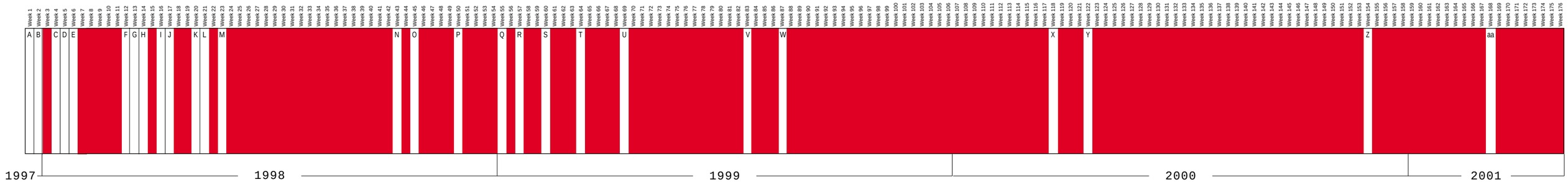
= Nothing happened

= Something happened

Delay Diagram: Procedural History Timeline*

Date Charged
December 17, 1997

Still No Trial
May 2001



Week 1
A. December 17, 1997 - Mr. Sapara charged.

Week 2
B. December 22, 1997 - Counsel for Mr. Sapara requests disclosure.

Week 3
Nothing happened.

Week 4
C. January 7, 1998 - First appearance. Plea entered.

Week 5
D. January 19, 1998 - Counsel for Mr. Sapara requests disclosure.

Week 6
E. January 15, 1998 - Preliminary disclosure.

Weeks 7-11
Nothing happened.

Weeks 12-14
F, G, H. March 5, 13, and 18, 1998 - Counsel for Mr. Sapara requests disclosure.

Week 15
Nothing happened.

Week 16
I. March 30, 1998 - Other co-accused's counsel withdraws.

Week 17
J. April 1998 - Other co-accused finally retains.

Weeks 18-19
Nothing happened.

Week 20
K. April 25, 1998 - Other co-accused and Crown discuss adjourning the Preliminary Inquiry.

Week 21
L. April 29, 1998 - Fixation of new date for Preliminary Inquiry adjourned to May 13, 1998.

Week 22
Nothing happened.

Week 23
M. May 13, 1998 - The Preliminary Inquiry rescheduled for November 2, 1998 and the pre-preliminary conference is set for September 11, 1998.

Weeks 24-42
Nothing happened.

Week 43
N. October 23, 1998 - Counsel for Mr. Sapara requests disclosure.

Week 44
Nothing happened.

Week 45
O. November 2, 3 and 4, 1998 - The Preliminary Inquiry.

Weeks 46-49
Nothing happened.

Week 50
P. December 10 and 16, 1998 - Preliminary inquiry.

Weeks 51-54
Nothing happened.

Week 55
Q. January 5, 6 and 20, 1999 - The Preliminary Inquiry.

Week 56
Nothing happened.

Week 57
R. The other co-accused's counsel withdraws.

Weeks 58-59
Nothing happened.

Week 60
S. February 10, 1999 - First arraignment delayed by a month.

Weeks 61-63
Nothing happened.

Week 64
T. March 10, 1999 - Second Arraignment - Other co-accused is still unrepresented . Matter is adjourned.

Weeks 65-68
Nothing happened.

Week 69
U. April 14, 1999 - Third Arraignment - Other co-accused is still unrepresented . Trial scheduled for September 27, 1999.

Week 70-82
Nothing happened.

Week 83
V. July 19, 1999 - Pre-Trial Conference - Other co-accused is still unrepresented. Sometime after, counsel is appointed for the co-accused. Trial is adjourned. August 11, 1999 set to fix new trial date.

Week 87
W. On August 11, 1999, Fourth Arraignment. Trial is rescheduled to April 3, 2000.

Weeks 88-117
Nothing happened.

Week 118
X. March 10, 2000 - Pre-trial conference.

Weeks 119-121
Nothing happened.

Week 122
Y. April 3, 2000 - Trial. Judicial stay granted for unreasonable delay.

Weeks 123 -153
Nothing happened.

Week 154
Z. November 29, 2000 - Appeal heard.

Weeks 155 -167
Nothing happened.

Week 168
aa. March 5, 2001- Reasons of the Court of Appeal filed.

Weeks 169 -176
Nothing happened.

*All references as to "Nothing Happened/Something Happened" taken from Judicial Stay Hearing or C.A. Reasons, para. 4 of both judicial reasons.

TAB 7A

S.C.C. No.

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

JAMES SAPARA

Applicant
(Applicant)

-and-

HER MAJESTY THE QUEEN

Respondent
(Respondent)

APPLICATION FOR LEAVE TO APPEAL

Pursuant to Section 40 of the *Supreme Court Act,* R.S.C. 1985, c. S-26, as amended

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control over the process and fulfill it's constitutional duty to protect Mr. Sapara's individual rights and to ensure his trial takes place within a reasonable time.

- **Brief Procedural Chronology**

14. The following is a brief chronology of the delays in the proceedings:

- **Day 1** – Mr. Sapara charged December 17, 1997.
- **Day 5** — Counsel for Mr. Sapara requests disclosure on December 22, 1997.
- **Month 1** — First appearance on January 7, 1998. Mr. Sapara enters election and plea without the benefit of disclosure. Counsel for Mr. Sapara again requests disclosure on January 19, 1998. The availability of the other co-accused's counsel causes delay in scheduling the Preliminary Inquiry.
- **Month 1** — January 15, 1998 — Preliminary disclosure sent to defence counsel.
- A series of delays due to the co-accused requesting later court dates.
- **Month 3** — March 5, 13, and 18, 1998, counsel for Mr. Sapara requests disclosure again.
- **Month 3** - March 30, 1998 – The other co-accused's counsel withdraws.
- Counsel for Mr. Sapara continues to express concern over delays and requests advice and direction from the Court.
- **Month 4** — The other co-accused finally retains counsel sometime in April 1998.
- **Month 4** — The other co-accused and Crown discuss adjourning the Preliminary Inquiry on or around April 25, 1998. Mr. Sapara and his counsel, were neither consulted, nor participated in these discussions.
- **Month 4** — April 29, 1998, Counsel for the other co-accused seeks an adjournment, and fixing of a new date adjourned to May 13, 1998.
- **Month 5** — May 13, 1998 – The Preliminary Inquiry finally rescheduled for November 2, 1998 for three days, and the pre-preliminary conference is set for September 11, 1998.
- **Month 10** — October 23, 1998 — Counsel for Mr. Sapara requests further disclosure.
- **Month 11** — November 2, 1998 — The Preliminary Inquiry begins. However, it takes longer than three days because of the complainant's behaviour on the witness stand and because the Crown decides to call more witnesses.
- **Month 12** — Preliminary inquiry continues.

- **Month 13** — The Preliminary Inquiry finally concludes January 20, 1999, more than 13 months after Mr. Sapara was charged.
- **Month 13** —The other co-accused's counsel withdraws.
- **Month 14** — February 10, 1999 – First arraignment delayed by a month.
- **Month 15** — March 10, 1999 — Second Arraignment – The other co-accused is still unrepresented and the matter is adjourned again.
- **Month 16** — April 14, 1999 — Third Arraignment — The other co-accused is still unrepresented and the trial is scheduled for September 27, 1999 and the co-accused is cautioned by the Court to get a lawyer quickly so the lawyer can prepared for trial.
- **Month 19** — July 19, 1999 — Pre-Trial Conference — The other co-accused is still unrepresented despite numerous warnings form the Court.
- **Month 19** — Counsel is finally appointed for the other co-accused after efforts from Mr. Sapara's counsel and the Crown. The trial is adjourned and August 11, 1999, was set to fix a new trial date.
- **Month 20** — More delays — On August 11, 1999, fourth arraignment. Counsel for the other co-accused requests a new trial date. Trial is rescheduled to April 3, 2000, more than 28 months after Mr. Sapara was charged.
- **Month 27** — Pre-trial conference on March 10, 2000.
- **Month 28** — Trial on April 3, 2000. A judicial stay is granted to Mr. Sapara after he brings a *Charter* motion pursuant to s.11(b) of the *Charter* before the Learned Trial Judge who enters a judicial stay of proceedings. The trial judge concludes that the delays were unreasonable which constituted an unjustified violation of Mr. Sapara's constitutional right to a trial within a reasonable time.
- The Crown appeals the stay.
- At the same April 3, 2000 trial, the other co-accused successfully argues section 8 violation of the *Charter* based on the fact the Authorization for interception of private communications was not lawfully obtained as the RCMP had omitted key facts from the affidavit which were never presented to the judge who granted the Authorization. The Trial judge concludes that the Authorization was invalid and all the evidence obtained through it excluded. The Crown calls no further evidence, advising the Court that there

was no reasonable likelihood of conviction without the excluded evidence. And then the Crown appeals this too.

Ref. Judicial Reasons at par. 4 [Tab 3A]
Reasons of Court of Appeal at par. 4 [Tab 3C]
Pull-out Delay Diagram [Tab 2]

15. There was a preriod of approximately 34 months from the time of the arrest and the time the trial would likely conclude.

Ref. Judicial Reasons at par. 35 [Tab 3A]

16. So in other words, through all of 1998, all of 1999, all of 2000, and half of 2001, and the Crown can still not give the applicant a trial. To date, a total of 41 months.

PART II – POINTS IN ISSUE

a) Are serious Delays Caused by a Co-Accused "Neutral" Delays

17. Whether or not delays resulting in denial of an accused person's right to trial within a reasonable time caused by a co-accused's failure to properly instruct and retain counsel, are "neutral delays".

b) What is the Extent of the Crown's Obligation to Bring an Accused Person to Trial Within a Reasonable Time when a Co-Accused Causes Serious Delays in the Proceedings

18. Where multiple accused persons are jointly charged and where one co-accused steadfastly asks the Crown to be tried in a speedy fashion, and another co-accused consistently fails to return and instruct counsel thereby occasioning delays, and the other co-accused consistently fails to retain and instruct counsel, what duty is there on the Crown to protect the 11(b) rights of the co-accused to a trial within a reasonable within time?