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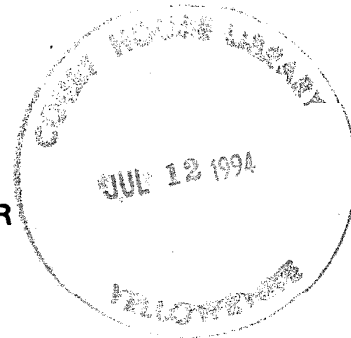
IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

RICHARD DAVID DOSTALER



Ruling on a request for costs against the Crown, following a successful application for a declaration of a mistrial.

Application heard in Hay River on April 21, 1994.

Reasons filed: June 29, 1994

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE J.E. RICHARD

Counsel for accused: Steven Cooper

Counsel for Crown: Shelagh Creagh

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REASONS FOR JUDGMENT

The accused is charged with possession of narcotics for the purpose of trafficking, and another offence. On the third day of his trial I granted his application for Charter relief by declaring a mistrial and directing that there be a new trial before a different trial judge. The circumstances of the Charter breach and the reasons for declaring a mistrial are detailed in the transcript of my remarks delivered on April 21, 1994. At that time the accused sought additional relief under s.24(1) of the Charter, i.e. an award of costs against the Crown. I reserved decision on that aspect of the Charter application pending receipt of written submissions. The within reasons deal solely with this latter issue of costs.

The Court is vested with the power to award costs by virtue of a superior court's inherent jurisdiction to control its proceedings, to penalize abuses and to maintain its authority. Traditionally, the exercise of this power to award costs has only been justified where there has been reprehensible conduct by a party or a serious affront to the authority of the Court or a serious interference with the administration of justice. R. v.

Cronier (1981) 63 C.C.C. (2d) 437 (Que. C.A.).

With the advent of the Charter of Rights & Freedoms in 1982, the grounds on which the Court can exercise its jurisdiction to award costs have been enlarged. R. v. Pawlowski (1993) 20 C.R. (4th) 233 (Ont. C.A.). An infringement or denial of a Charter right or freedom can also, in appropriate circumstances, give rise to the exercise of this special power.

In the present case the circumstances surrounding the Crown's lack of pre-trial disclosure led to a serious interference with the ability of the accused to make full answer and defence.

Defence counsel gave advance notice to the Crown that at trial he wished to contest the validity of the search warrant issued by the justice of the peace. Defence counsel also made specific requests of the Crown for full disclosure of any notes made by the investigating officer. At that time there existed on the police file (unknown to defence counsel) specific notes made by the investigating officer on the evening that he obtained the search warrant from the justice of the peace. Those notes indicated that the investigating officer had prepared a three-page Information to Obtain Search Warrant to present to the justice of the peace; however, the notes also indicated (a portion of the notes made just after the warrant was obtained and executed) that one of the pages of this Information document was missing when it was presented to the justice of the peace, sworn by the investigating officer, and signed by the investigating officer and the justice of the peace. Copies of these notes were not provided to defence counsel prior to trial, nor was their existence disclosed.

On the first day of the trial, the Court held a *voir dire* to determine the validity of the search warrant. The investigating officer testified on the *voir dire*. In his testimony no mention was made of the missing page in the Information sworn before the justice of the peace. The defence lawyer, not being aware of any such discrepancy, made no cross-examination on that topic. At the conclusion of the *voir dire* the Court ruled that the search warrant was validly issued by the justice of the peace.

7 The trial continued, and it was only on the third day of the trial, in the course of pursuing other disclosure items, that defence counsel obtained from the Crown a copy of the above-mentioned notes made on the police file by the investigating officer on the evening that the search warrant was obtained.

8 As I stated in my reasons for declaring a mistrial, the contents of these notes include material information which should have been disclosed to the accused's counsel prior to the application for a ruling on the validity of the search warrant. This was a serious infringement of the accused's right to fundamental justice.

9 The Crown's conduct in failing to disclose this important information until after the ruling on the *voir dire* was more than inadvertence - it was a curious and conscious indifference to the Crown's duty to be fair. It was a clear departure from the normal standards of prosecution, particularly in view of the specific request for disclosure and the subject matter of the *voir dire*.

10 The accused is ordinarily resident in Hinton, Alberta, and was required to travel to Hay River for his trial. He is responsible for paying his counsel for time spent in preparing for, and attending at, the aborted trial. These expenditures - transportation

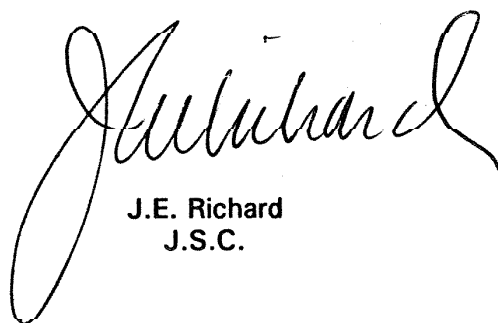
costs and counsel fees - are all for naught, as the accused has yet to appear for his new trial before a different circuit judge in Hay River. In my view, justice demands that he be reimbursed for these wasted expenditures.

11 This is, in my respectful view, one of those clear cases where the Court should exercise its discretion to award costs against the Crown. The following factors, in particular, require it:

- a) there was a serious interference with the accused's right to fundamental justice;
- b) the Crown and police conduct amounted to more than mere inadvertence;
- c) the Court ought to demonstrate its disapproval of this Crown and police conduct;
- d) the accused has a clear compensatory need.

2 I therefore grant the accused a further remedy under s.24(1) Charter by awarding costs against the Crown in the amount of the accused's actual transportation costs to and from the place of trial, and thrown away counsel fees calculated on a solicitor and client basis. If counsel are unable to agree on quantum, they can speak to me in chambers by appointment.

Counsel for accused: Steven Cooper
Counsel for Crown: Shelagh Creagh



J.E. Richard
J.S.C.

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