

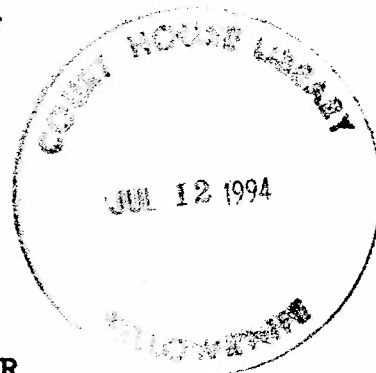
IN THE SUPREME COURT  
OF THE NORTHWEST TERRITORIES

-----

HER MAJESTY THE QUEEN

- and -

RICHARD DAVID DOSTALER



-----

Reasons for Mistrial given by The Honourable Mr.  
Justice J.E. Richard, at Hay River, Northwest  
Territories, on the 21st day of April A.D. 1994

-----

APPEARANCES:

S. Creagh, Ms.,	Appeared for the Crown
S. Cooper, Esq.,	Appeared for the Defence
Cheryl Mendryk, Ms.,	Court Reporter

(Charged under Section 4(2) of the  
Narcotic Control Act and Section 354(1)(a)  
of the Criminal Code)

1 THE COURT: In order to put the Court's  
2 decision on this application in context, a brief  
3 chronology is necessary.

4 The accused is charged with possession of  
5 narcotics for the purpose of trafficking and  
6 another offence. A preliminary inquiry was held  
7 in November 1993 and the accused was committed to  
8 stand trial in this Court. Crown counsel at trial  
9 was Bernadette Schmaltz. Defence counsel was  
10 Steven Cooper.

11 On December 3rd, 1993, Mr. Cooper wrote a  
12 letter to Ms. Schmaltz on the matter of  
13 disclosure. The pertinent portion of that letter  
14 reads as follows, I quote:

15 "Further to the preliminary inquiry held with  
16 respect to the above, I confirm receiving your  
17 undertaking to provide me with a copy of all of  
18 the notes taken by Constable Bancroft regarding  
19 this matter. Please provide copies of these notes  
20 as soon as possible. Please also confirm that all  
21 of the notes have been included. If any notes are  
22 to be excluded, please advise of same to allow us  
23 to make the determination as to whether an  
24 application will be necessary."

25 On January 11th, 1994, Ms. Schmaltz sent  
26 documents to Mr. Cooper in response, and the cover  
27 sheet of that transmission reads: "Please find

*Gabe's*

1 enclosed copies of Corporal Bancroft's notes with  
2 respect to the above." The enclosed copies are  
3 now marked as Exhibit T.

4 On February 3, 1994, Mr. Cooper sent another  
5 letter to Ms. Schmaltz on the subject matter of  
6 the Corporal's notes. The pertinent portion of  
7 that letter reads as follows:

8 "I confirm receipt of your fax transmission of  
9 January 11, 1994 which was received in hard copy  
10 on January 18, 1994. I thank you for forwarding  
11 Corporal Bancroft's notes to our office and wish  
12 to confirm at this stage that the notes forwarded  
13 are the Corporal's notes in their entirety. If  
14 there is any part of his notes that have been  
15 excluded which are in any way connected with this  
16 investigation, please advise us of same in order  
17 to allow us to make a determination as to whether  
18 an application for further disclosure will be  
19 necessary."

20 I should note here that Ms. Creagh, who is  
21 trial counsel for the Crown, indicates to the  
22 Court that she cannot find on the Crown file any  
23 indication that Mr. Cooper's letter of February 3,  
24 1994 was received in the Crown office.

25 A trial date was set for April 19th here in  
26 Hay River. On March 16th, 1994, a pre-trial  
27 conference was held with Crown counsel, Ms.

*Gabe's*

1 Creagh, and Defence counsel, Mr. Cooper, in  
 2 attendance. A memorandum of that pre-trial  
 3 conference prepared by the presiding judge  
 4 indicates that at trial, inter alia, it was  
 5 anticipated that the accused would be raising an  
 6 issue about the validity of the search warrant.

7 The trial commenced two days ago, April 19th,  
 8 with the testimony of the principal investigating  
 9 officer, Corporal Bancroft, of the RCMP. As the  
 10 Corporal was expected to testify, inter alia,  
 11 about certain items that the police had seized  
 12 pursuant to a search warrant, the accused applied  
 13 for a ruling on the validity of the search  
 14 warrant. An inquiry was held with respect to that  
 15 application and a ruling was made by the Court  
 16 yesterday morning, April 20th, the ruling being in  
 17 favor of the validity of the warrant.

18 The trial testimony of Corporal Bancroft  
 19 continued and then a voir dire was commenced to  
 20 determine the admissibility of certain statements  
 21 that the accused had allegedly made to Corporal  
 22 Bancroft. During the testimony of Corporal  
 23 Bancroft on the voir dire, it surfaced that the  
 24 Corporal had made other notes on the RCMP file in  
 25 addition to the notes made in his own notebook;  
 26 that is, in addition to the notes, copies of which  
 27 had been provided to Mr. Cooper, Exhibit T.

*Gabe's*

1 At the conclusion of Corporal Bancroft's  
 2 evidence on the voir dire, the Court took an  
 3 adjournment. I am advised that during the  
 4 adjournment Ms. Creagh provided to Mr. Cooper  
 5 copies of nine pages of the Corporal's notes taken  
 6 from the RCMP file. The pages are numbered, and  
 7 the first page is page number 28. These documents  
 8 are marked as Exhibit S. These documents, the  
 9 Corporal's notes, Exhibit S, do contain additional  
 10 information; that is, additional to that contained  
 11 in Exhibit T, the notes earlier provided to  
 12 Defence counsel on the subject matter of what it  
 13 was the Corporal had just finished testifying  
 14 about; that is, the arrest of the accused and the  
 15 statement made by the accused.

16 When court convened after the adjournment  
 17 yesterday, Mr. Cooper applied for a mistrial. He  
 18 submitted that the accused's right to full  
 19 disclosure pursuant to R. v. Stinchcombe had been  
 20 infringed and that the Court should grant relief  
 21 under Section 24 of the Charter, being a  
 22 declaration of a mistrial, or alternatively, an  
 23 adjournment, and costs against the Crown.

24 Before fully hearing counsels' submissions on  
 25 Mr. Cooper's application under Section 24, the  
 26 Court granted the request of Ms. Creagh for an  
 27 overnight adjournment so that she could review the

*Gabe's*

1 matter, seek instructions, and also review some  
2 recent case law.

3 This morning when court reconvened, Ms.  
4 Creagh advised the Court that she and one or more  
5 RCMP officers had reviewed the entire RCMP file  
6 and that she had concluded that the Crown had not  
7 heretofore made "exhaustive" disclosure to Defence  
8 counsel. She consequently prepared a fresh packet  
9 of what she considered to be full and exhaustive  
10 disclosure from the RCMP file, some of which was  
11 edited by her for reasons not relevant to the  
12 matter presently before the Court.

13 A copy of this new packet, which was handed  
14 to Defence counsel in court this morning, is  
15 marked as Exhibit V. Exhibit V contains the nine  
16 pages, Exhibit S, which were disclosed to Defence  
17 counsel yesterday, but also contains other  
18 information about Corporal Bancroft's  
19 investigation, including the steps leading up to  
20 and the obtaining of the search warrant.

21 After having a brief opportunity during an  
22 adjournment this morning to inspect the contents  
23 of the newly disclosed documents, Exhibit V,  
24 Defence counsel, Mr. Cooper, renewed his  
25 application for Charter relief on the basis of  
26 non-disclosure and late disclosure, but now  
27 expanded his application to also include an

*Gabe's*

1 application for a judicial stay of proceedings  
2 based on the common law doctrine of abuse of  
3 process.

4 I will deal firstly with the application for  
5 relief under Section 24 of the Charter of Rights  
6 and Freedoms. As was stated recently by the  
7 British Columbia Court of Appeal in the O'Connor  
8 case, the right of an accused to full disclosure  
9 by the Crown is an adjunct of the right to make  
10 full answer and defence. It is not itself a  
11 constitutionally protected right. A simple breach  
12 of the accused's right to such disclosure does not  
13 in and of itself constitute a violation of the  
14 Charter such as to entitle one to a remedy under  
15 Section 24. It will not amount to a violation of  
16 the accused's Section 7 right not to be deprived  
17 of liberty, except in accordance with the  
18 principles of fundamental justice, unless the  
19 accused establishes that the non-disclosure has  
20 probably prejudiced or had an adverse effect on  
21 his or her ability to make full answer and  
22 defence.

23 In my view, the accused has met that onus in  
24 this case.

25 I will deal with only one aspect of the newly  
26 disclosed materials, Exhibit V. As I stated  
27 earlier, yesterday's disclosure packet, Exhibit S,

*Gabe's*

1 commenced with page 28 of the Corporal's  
2 handwritten notes. The chronological entries on  
3 page 28 commenced at 21:25 hours on June 11th,  
4 1993.

5 In the newly disclosed packet, Exhibit V,  
6 there is an earlier page which may or may not be  
7 page 27, as it is difficult to read that part of  
8 the photostat copy, but I will refer to it as page  
9 27.

10 There are three chronological entries on page  
11 27, the first one at 21:00 hours, the second one  
12 at 21:10 hours, and the third one at 22:40 hours.  
13 In other words, the third entry is subsequent in  
14 time to the entries on pages 28 and 29.

15 More importantly, this entry on page 27 in  
16 the Corporal's handwriting contains material  
17 information on the subject matter of the obtaining  
18 of the search warrant.

19 In my opinion, it contains material  
20 information which should have been disclosed to  
21 the accused prior to the accused's application for  
22 a ruling on the validity of the search warrant.  
23 That entry suggests that the documentation which  
24 the Corporal placed before the Justice of the  
25 Peace when he obtained the search warrant was not  
26 precisely what the Corporal testified to yesterday  
27 when the validity of the warrant was being

*Gabe's*

1 attacked.

2 This non-disclosure or late disclosure has  
3 clearly had a material effect or adverse effect on  
4 the ability of the accused to make full answer and  
5 defence and constitutes a violation of a  
6 constitutional right. And as the Court has  
7 already adjudicated on the validity of the search  
8 warrant, it is too late for this breach of a  
9 constitutional right to be remedied by a simple  
10 adjournment.

11 In the circumstances, the only appropriate  
12 remedy is to declare a mistrial and to allow the  
13 accused to have a new trial where he can properly  
14 prepare and make full answer and defence, having  
15 now received full disclosure from the Crown.

16 Turning now to that aspect of Mr. Cooper's  
17 application wherein he seeks a judicial stay of  
18 these proceedings against the accused on the basis  
19 of the common law doctrine of abuse of process, it  
20 is my impression that this submission arises  
21 almost spontaneously as events unfolded yesterday  
22 and this morning. I have an initial concern that  
23 the Court has not been provided with a sufficient  
24 evidentiary foundation on which to adjudicate on  
25 this request.

26 An abuse of process leading to a stay of  
27 proceedings is something more than a particular

*Gabe's*

1 violation of one person's constitutional rights.  
 2 It is conduct on the part of the state that is so  
 3 oppressive, vexatious, or unfair as to contravene  
 4 our fundamental notions of justice and thus to  
 5 undermine the very integrity of the judicial  
 6 process. A judicial stay of proceedings is  
 7 granted only in the clearest of cases of abuse of  
 8 process.

9 In these particular submissions, Mr. Cooper  
 10 raises the spectre of bad faith inasmuch as it  
 11 could be inferred, he says, that the additional  
 12 information on page 27 of Exhibit V was  
 13 deliberately excluded from the original disclosure  
 14 in January 1994 and again in the supplemental  
 15 disclosure yesterday during an adjournment.

16 Ms. Creagh, speaking here only to yesterday's  
 17 supplemental disclosure, in which she was  
 18 personally involved, says that the supplemental  
 19 disclosure at that time was only intended to deal  
 20 with the subject matter of the voir dire, as the  
 21 matter of the search warrant had already been  
 22 adjudicated upon by the Court in a final way.

23 No viva voce evidence, in addition to the  
 24 documents that I've referred to, has been  
 25 presented in support of the allegation of abuse of  
 26 process. Neither Corporal Bancroft nor Crown  
 27 counsel, Bernadette Schmaltz, has been asked, nor

*Gabe's*

1 have they given, an explanation of why the  
 2 Corporal's entire notes, or the existence of his  
 3 entire notes, was not disclosed in answer to a  
 4 specific request in that regard on behalf of the  
 5 accused. In my view, it is not appropriate for  
 6 the Court to consider such a serious matter as a  
 7 judicial stay in the absence of such evidence. I  
 8 therefore decline to grant a judicial stay of  
 9 these proceedings against Mr. Dostaler on the  
 10 basis of the common law doctrine of abuse of  
 11 process.

12 In the end result, however, I grant to Mr.  
 13 Dostaler a remedy pursuant to Section 24 of the  
 14 Charter by declaring a mistrial and directing that  
 15 there be a fresh trial started. Counsel will  
 16 apply to the Clerk of the Court at the appropriate  
 17 time for a new trial date before a different trial  
 18 judge.

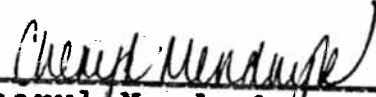
19 I will now hear from counsel on the matter of  
 20 costs.

21 (PROCEEDINGS ADJOURNED)  
 22 -----  
 23  
 24  
 25  
 26  
 27

*Gabe's*

1 I, Cheryl Mendryk, C.S.R.(A), hereby certify  
2 that I attended the above Proceedings and took  
3 faithful and accurate shorthand notes and the  
4 foregoing is a true and accurate transcript of my  
5 shorthand notes to the best of my skill and  
6 ability.

7 Dated at the City of Calgary, Province of  
8 Alberta, this 24th day of April, A.D. 1994.  
9

10  
11   
12 Cheryl Mendryk, Ms.  
13 Court Reporter.  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27

Gabe's