IVAN HENRY: SELF-REPRESENTED ACCUSED AND THE TRIAL JUDGE'S DUTY TO ASSIST

By Joan McEwen

In 1983, Ivan Henry represented himself at his trial and was convicted on ten counts of sexual assault. In 2010, the British Columbia Court of Appeal substituted acquittals for the guilty verdicts.[1] While the outcome was positive for Mr. Henry—exoneration after serving 27 years' imprisonment as a dangerous sex offender—the court rejected his argument that the trial judge, the late Mr. Justice John Bouck, failed in his *duty to assist* the accused.

Early on in his reasons for allowing the appeal, Low J.A. said:

> It is a common experience of judges that self-represented accused persons are at a substantial disadvantage. This is particularly so where, as here, the defence is that the wrong person has been charged. These circumstances imposed a duty on the trial judge to fully inform the appellant of his rights and his options, and to instruct the jury correctly and completely, particularly with respect to the law that applied to the element of identification and the evidence that related to that issue.[2]

However, and notwithstanding the finding that the trial judge failed, *inter alia*, to properly instruct the jury on identification, the court rejected the "duty to assist" argument in a single sentence:

> It is my view that the judge did render adequate assistance in explaining to the appellant the trial process and what options were available to him from time to time.[3]

In a very recent decision, *R. v. Ryan*, the Newfoundland Court of Appeal elaborated on the applicable principles as follows:

> [128] The fundamental duty of a trial judge to see that an accused receives a fair trial means that the judge must take steps to provide assistance to an unrepresented accused to enable his or her defence, or any defence that the proceeding may reasonably disclose, is brought to the attention of the jury with full force and effect: *R. v. Darlyn*, [1947] 3 D.L.R. 480 (B.C.C.A.), per O'Halloran J.A. at para. 7; *R. v. McGibbon*, per Griffiths J.A. at p. 347…
>
> [129] The trial judge's duty does not go as far as providing the same degree of assistance as would be provided by counsel if the accused were represented…Otherwise he or she would become an advocate for the accused, thereby compromising judicial impartiality. There is no set formula of instruction that can ritualistically be used in each case. The advice and instruction must be tailored to

the particular circumstances. As stated by Fruman J.A. in *R. v. Phillips*, 2003 ABCA 4, 172 C.C.C. (3d) 284, aff'd [2003] 2 S.C.R. 623:

> [22]…[T]rials involving unrepresented accused are rarely consistent or simple. Their need for guidance varies depending on the crime, the facts, the defences raised and the accused's sophistication. The judge's advice must be interactive, tailored to the circumstances of the offence and the offender, with appropriate instruction at each stage of a trial.
>
> [23] How far a trial judge should go in assisting an accused is therefore a matter of judicial discretion…*The overriding duty is to ensure that the unrepresented accused has a fair trial.*[4]

In *Ryan*, the accused, like Henry, had refused to be assisted by a legal aid lawyer. Whenever the trial judge suggested that a mistrial be declared so that he could obtain counsel, he resisted the suggestion.

The Newfoundland Court of Appeal concluded as follows:

> [156]…[W]here in the course of a trial, the presiding judge comes to the conclusion, based on the seriousness and complexity of the charges, the circumstances of the accused, and his or her actual performance at trial, that,
>
> (a) the level of the accused's advocacy is so deficient that it is analogous to the type of actions or inaction of incompetent counsel that could be regarded as a miscarriage of justice;
>
> (b) the judge is not able to assist the accused further in making full answer and defence in a manner consistent with the judge's obligation of impartiality;
>
> (c) there is a realistic possibility that the reliability of the trial's result will be compromised if nothing further is done; and
>
> (d) the accused is acting in good faith and has not placed him or herself in the position he or she is in as a result of engaging in tactics calculated to obstruct or delay the trial or otherwise abuse court process,
>
> the judge should consider whether other steps, such as, (i) appointing counsel for the remainder of the trial (if the accused does not oppose it); (ii) appointing *amicus curiae* (even if the accused does oppose appointment of counsel); (iii) adjourning or slowing down the trial to enable the accused to prepare properly; or (iv) declaring a mistrial, could prevent a miscarriage of justice and, if so, then grant an appropriate remedy. Failure to do so constitutes error.

In the result, the majority of the court ordered a new trial.

Though those very same criteria obtained in the *Henry* case, the trial judge did nothing about it. To the contrary, the Court of Appeal's conclusion that he made four egregious errors of law—any one of which could have resulted in a mistrial—raises a disturbing question: Had Mr. Henry been represented by counsel, would the same mistakes have been made?

At the time of the trial in 1983, Mr. Justice Bouck had been on the bench for ten years. He was the co-author of several publications, including *British*

Columbia Annual Practice and *British Columbia Annual Criminal Practice*. His two-volume text *Criminal Jury Instructions* was relied on by Superior Court judges throughout Canada.

While it is true that, 30 years ago, judges faced neither the volume of unrepresented accused nor the maze of protections now afforded by the *Charter*, an accused's right to a fair trial was well recognized. Mr. Justice Bouck acknowledged as much in the blog he wrote after the Court of Appeal's decision in 2009 to reopen Mr. Henry's appeal:

> The Attorney-General criticized my handling of the case. I admit that Mr. Henry did not get a perfect trial or a perfect dangerous offender hearing. Nobody does. Trials are conducted and decided by imperfect human beings applying imperfect laws. The most the criminal justice system can offer is a fair trial. Mr. Henry got both a fair trial and a fair dangerous offender hearing.

With respect, I do not agree.

BACKGROUND AS OUTLINED BY THE COURT

On March 15, 1983, the jury convicted Henry on ten counts of sexual assault, involving eight complainants. The only issue at trial was identity.

Because the attacks occurred in the middle of the night and the attacker was a stranger to the complainants, the Crown's task was difficult. No complainant made a reliable pre-court identification of Henry, nor was there forensic or other evidence linking him to any complainant or crime scene. Given that the Crown's case depended on in-court identification, it was decidedly not a strong case.

The appellant represented himself at trial—without any consideration of the appointment of *amicus curiae*. On November 23, 1983, he was declared a dangerous offender and sentenced to an indefinite period of incarceration.

Forty-nine days after sentencing, the Court of Appeal, dismissing Henry's appeal for want of prosecution, noted that he had not ordered appeal books and that he had refused to do so. As Seaton J.A. put it (Carrothers and Anderson JJ.A. concurring), the appellant had "expressed an intention not to proceed with these appeals in accordance with the only way in which they can be dealt with".

In 1997, the Court of Appeal ruled against Henry's application to reopen his appeal and appoint counsel. It said that, because fresh allegations of perjury against Vancouver Police Department ("VPD") witnesses in connection with the lineup photograph involved questions of fact, not law, the court was without jurisdiction.

In 2002, the VPD, in an undertaking called "Project Smallman", reinvestigated 25 unsolved sexual assaults committed between April 1983 and July 1988. In May 2005, a man with the initials D.M. (his name is subject to a

publication ban) was linked to three of those offences through DNA. After pleading guilty, he received a five-year sentence.

Noting similarities between the *Henry* and *Project Smallman* cases, prosecutors in the Vancouver regional office notified the Attorney General. A special prosecutor was appointed, and in March 2008 he recommended that the Crown not oppose any application brought by Henry to reopen his appeal.

BREACH OF DUTY TO ASSIST

Errors in Law

Instruction regarding consciousness of guilt

When Henry refused to participate in the physical lineup, three police officers forced him into it by means of a headlock. Six of the eight trial complainants viewed the lineup. Henry struggled and shouted and was restrained. Most of the foils were plainclothes police officers. During the three-minute lineup, the accused was very unco-operative. Still in the chokehold, his head was forced up by a uniformed constable, while another officer took a photograph.

In charging the jury, the judge commented as follows:

> Had the Crown attempted to lead the evidence of the photograph with respect to the lineup, I would probably have rejected the testimony and ruled it inadmissible. However the accused apparently had some reason to place the photograph in front of you. I assume the inference he wishes you to draw is that any identification of him at that time is a farce, since he is the only one being restrained by the three police officers. On the other hand, the Crown suggests his obvious reluctance to participate in the lineup leads to an inference of consciousness of guilt on his part.
>
> It is for you to draw the proper inference upon considering all of the evidence.[5]

The Court of Appeal said that, because a suspect is not required to participate in a lineup, the judge erred in instructing the jury as to "consciousness of guilt" and that this error "would irretrievably taint the verdicts". As well, the court criticized the judge for failing to mention Henry's reasons for refusing to participate—one of which was that he would be the only redhead.[6]

Instruction regarding identification

Notwithstanding the complexity of the case—ten counts, eight complainants—the trial judge's instruction on identification lasted less than ten minutes:

> Identification may be proved by direct or circumstantial evidence, or a combination of both. When it comes to examining the complainants' evidence, you should look at it with special care. Experience shows that some of the greatest

miscarriages of justice occur through mistaken identification. This is particularly so where a witness has never before seen the accused. When deciding upon the reliability of identification evidence, you should consider amongst other things the following:

> What outstanding features or characteristics did the purported criminal possess so as to make subsequent identification free from reasonable doubt?…
>
> Under what circumstances were those observations made by a witness? Was the witness able to see the person clearly, or was her ability to identify the person hampered by other factors?
>
> What care and trouble did each complainant take in observing the characteristics of the individual at the time of the incident?
>
> What method was used by the witness to refresh her memory of the identification of the accused? Was she coached or improperly guided in her reaching her conclusion that the accused was the guilty man, or did she form her opinion as a result of her own observations?

There have been a number of instances in the past where responsible witnesses whose honesty was not in question and whose opportunity for observation was adequate in positive identification of police lineups or through photographs, and that identification subsequently turned out to be erroneous. But if, after careful examination of such evidence in light of all the circumstances and with due regard to all the other testimony in this case, you feel satisfied beyond a reasonable doubt of the accuracy of the identification of the accused Henry, you are at liberty to act on it…

Besides a description of physical characteristics, the witnesses identified the accused from his voice. Again you must remember that voice identification by itself is subject to error. All of us have been mistaken at one time or another about a voice on the phone. Nonetheless, you may act on such evidence by itself, or together with other evidence, if you are satisfied beyond a reasonable doubt that Henry is the correct person.[7]

In ruling that the trial judge failed to point out that the identification evidence was weak and replete with difficulties, and that "this error by itself would give rise to the ordering of a new trial", the Court of Appeal reasoned as follows:

> There was no connection between the warning about the frailties of eyewitness identification and the specific weaknesses in the identification evidence on each count…
>
> To give some examples, the charge did not remind the jurors of specific concerns, such as: poor lighting; limited opportunity to see and remember the features of the assailant; steps taken by the assailant to hide his identity; the emotional stress of the situation including focus on a weapon held by the assailant; the absence of needed eyewear; problems with the conduct of both lineups; the failure to identify the assailant pre-court, either at all or more than tentatively; the passage of time between the assault and the opportunities to identify the assailant; and, perhaps of most significance, the complete absence of evidence capable of confirming eyewitness identification.[8]

Severance

At the outset of the trial, Crown counsel Michael Luchenko argued "similar fact evidence"—namely, that *modus operandi* evidence relevant in one crime is relevant in all the others:

> It is the Crown's theory that in each of these instances the man who stealthily came into these various premises, and who perpetrated these crimes, had to be the same man, and that man is Ivan Henry.[9]

Both during the defence evidence and after the defence closed its case, Mr. Luchenko confirmed that the Crown would be seeking "similar fact" jury instruction. Submissions were made—the Crown, for the better part of an hour, Henry for all of four minutes—but, before the judge ruled on the point the Crown withdrew its application. Ruling that the trial judge at that point should have declared a mistrial on his own motion, the Court of Appeal said:

> As the law stands today, where there is no compelling reason for having a joint trial, it is a reversible error not to sever multiple counts of sexual offences as they relate to multiple complainants where each count turns on the reliability of eye-witness identification and where there is no basis for the evidence to be admissible from count to count.
>
> By failing to declare a mistrial when the Crown withdrew its similar fact evidence application, there was a high risk of count-to-count prohibited reasoning by the jury resulting in prejudice to the appellant and rendering the trial unfair—
>
> Accordingly, I would also give effect to this ground of appeal.[10]

Unreasonable verdict

The Court of Appeal found that, given the weaknesses in the identification evidence, as well as the absence of independent evidence, the verdicts reached were unreasonable.

> The Crown's case on the element of identification rests entirely on the in-court identification made by the complainants at the preliminary hearing and at trial. Pre-court identification was fraught with problems…[11]

For example, the lineup was so flawed as to cause a lead detective to testify at the trial: "I felt we may well lose the case, and everyone would have been through that for nothing."[12]

However, six of the eight trial complainants had attended that flawed lineup. Of them, the Court of Appeal said:

> There is no telling what influence the prominent display of the appellant by the police officers during that event ultimately had on the six complainants when they were asked in court if they could identify the assailant. Police investigators should have prepared a proper and fair photographic lineup instead of forcing the appellant to participate in the physical lineup…[13]

The seventh complainant's identification was strictly "in-court", and the eighth, an American student, had been hypnotized before being shown a photo array, which included a picture of Henry standing in front of bars:

> This complainant was hypnotized by a police detective who did not testify at the trial. She said she was hypnotized, or there was an attempt to hypnotize her, and that "I found it to be rather an emotional experience because it brought back a lot of feelings of the event…"
>
> The following day, police showed this witness a folder of photographs, including a photograph of the appellant taken while he was in custody in May. There were head and shoulder photographs of six other men included in the array.
>
> In my opinion, the photographic lineup was unfair. In particular, the photograph of the appellant, from the waist up, shows him standing in front of a jail cell with the arm of a uniformed police officer in the foreground…[14]

Concluding that the process of identification was so "polluted" as to render in-court identification highly questionable and unreliable, the court held the verdicts to be "unsafe"—nothing that a properly instructed jury, acting judicially, could reasonably have rendered.

Summary

I submit that, on the basis of these four errors alone, the trial judge breached his duty to accord Henry a fair trial. In so doing, and in finding him to be a dangerous offender because he would not admit to his crimes, he as good as locked him up and threw away the key.

Conduct of the Trial

Instead of providing the accused with a fair trial, the trial judge allowed his growing antipathy toward Henry to tilt the playing field more sharply than it already was. For example, he responded abruptly and derisively whenever Henry suggested, during cross-examination, that a complainant might not actually have been attacked. From Henry's perspective, the inquiry was germane—the women were saying he was their attacker; he knew he wasn't; therefore, they must be making up the whole thing. By discounting the possibility of innocence, the judge dismissed any notion that, as difficult as it for a sexual assault victim to be cross-examined by her assailant, it must also be difficult for an innocent man to cross-examine a complainant convinced of his guilt.

On several occasions, instead of requiring the Crown to produce documents, medical reports and so on necessary for the accuse to mount his defence, the judge belittled the request. One of many exchanges, occurring after Henry's latest plea had been turned down, serves to illustrate the point:

> THE COURT: Anything to say about that, Mr. Henry?
>
> MR. HENRY: I don't know what's the excuse. All I know is that I'm sitting here, and I keep coming here every day, for what reason? They could be bringing any charges…Where are the people? She doesn't know me. I don't know her from a hole in the head. She knows that, but if you guys want me, fuck, kill me, it doesn't matter. I mean you are doing it to my heart every day.

> MR. LUCHENKO: My Lord, I wonder if the witness should be present while this is going on.
>
> THE COURT: Well, it is all over now so far as I'm concerned. There's nothing I can do about those things. He has been supplied with the evidence…(Just be quiet now.) I don't know anything about any alleged conspiracy. I have to have some evidence about that, rather than your allegations.
>
> MR. HENRY: I will get some.[15]

The transcript is replete with examples wherein the judge both afforded the Crown preferential treatment and disparaged the accused in the presence of the jury. For example, on the brink of catching a complainant in an almost certain fabrication, Henry was interrupted by a spurious objection on the part of the Crown. Rather than admonishing the Crown, the judge metaphorically rolled his eyes:

> If it is against him, that's his burden that he has to carry. I can't interrupt his cross-examination.[16]

Too little, too late. Once again, Henry had lost his train of thought; forgotten the questions he'd been wanting so desperately to put to the witness.

When Henry called certain police officers in the mistaken belief that they might help his case, the judge upbraided him every time he asked a leading question. Conversely, the judge as good as gave the Crown *carte blanche* to in effect channel the prosecution case through cross-examination. In so doing, he acted contrary to the well-established principle that, where a witness is demonstrably unsympathetic to the calling party and/or partisan to the position of the cross-examining party, the trial judge may *reverse*, in the interests of justice, the usual rule against asking leading questions.[17]

Lest they not compromise the appearance of impartiality, judges must, and do, work hard to overcome any antipathy they might feel toward persons appearing before them. A careful review of the transcript reveals that the trial judge, while paying lip-service to the concept of "innocent until proven guilty", let his true feelings come out all too often. For example, in charging the jury, he frequently substituted the word "accused" for "attacker"—for example, instead of saying "the *attacker* came through the patio door", he would say, "the *accused* came through the patio door".

Further examples of the judge's failure to assist are as follows.

Identification evidence

Having failed, at the outset, to explain factors bearing on the reliability of identification evidence, the judge—faced later with Mr. Henry's complaint that he was out of his depth and in need of help—told him a lawyer could do him no good. Instead, on the eve of submissions to the jury, he directed the Crown to provide the accused with an excerpt from a textbook on the subject.

Once again, too little, too late. Had the judge taken the time to spell out the factors at the outset of the trial, Henry would have had the benefit of a checklist to inform his cross-examination.

Evidence of off-indictment offence

Contrary to the rule against "propensity evidence", the trial judge did nothing to block evidence pertaining to Henry's off-indictment sexual assault charges. Similarly, he failed to instruct the jury not to use such information in its assessment of guilt.

It is trite law that propensity evidence holds the potential for serious prejudice to the accused, and that the risk is especially high where (1) there exists substantial public disapproval *vis-à-vis* the extrinsic act and the offence charged; and (2) the jury is presented with evidence of a large mass of bad acts, none of which has been the subject of a prior conviction.[18]

Fingerprint evidence

Though no fingerprints were found linking Henry to the ten crimes, the judge did not refer to this fact in his charge. Instead, he dismissed as irrelevant evidence from a fingerprint expert that two "identifiable prints" had been recovered from a broken glass located at one of the crime scenes. Despite an effort to match them with six sets of known prints, they remained unidentified.

Surely the judge should have underscored to the jury the exculpatory nature of that evidence; should have made it clear that the prints were located in circumstances where they might have belonged to the perpetrator and, further, that they were not those of the accused.

Medical reports

Notwithstanding the accused's repeated requests for medical evidence that might "take the charges away from me", the trial judge acceded to the Crown's argument that, because it wasn't relying on such as part of its case, such reports need not be produced. As Henry said in his submission to the jury:

> My defence is reality. In reality, I never really needed to prove I was innocent…The mistakes my learned friends made was the lack of real proof that these women had been raped and assaulted. When no doctors are called, I again suspect they're trying to make me wear this.
>
> My learned friend can argue the point 'til he's blue in the face, and my answer to him is that the proof is taken away from me in—by taking the medical evidence and not giving it to me.[19]

Though DNA testing was not yet available in 1983, semen having been recovered in at least some of the assaults, serology testing held the potential to exclude the accused as the perpetrator in at least those cases. By the time,

years later, the special prosecutor sought to obtain such semen samples and medical records, he was told they had been lost.

Alibi evidence

The law requires that an "alibi statement"—a statement filed in advance of the trial as to the accused's whereabouts at the time of the offence—be both adequate ("sufficient particularization") and timely so as to permit the Crown to conduct a meaningful investigation.[20]

Though Henry produced such a statement, including detailed contact information—no easy feat from behind bars—the Crown, for reasons not explained, declined to investigate. Instead, cross-examination highlighted Mr. Henry's inability to prove where he was at the exact moment of each crime. At no point did the judge instruct the jury as to the relative *plausibility* of Mr. Henry's account *versus* the theories put forward by the Crown; at no point did he instruct the jury that accused persons need not "prove" a thing.

Quite the opposite. In his charge to the jury, the judge failed to link the alibi evidence regarding each offence to the offence itself. For example, Mr. Henry said that, at the time of a Mount Pleasant assault, he was staying most weeknights in West Vancouver, in a house he was helping to build. His car was out-of-service (he provided the Crown with supporting auto-repair shop documents), and a Vancouver bus-strike was in effect. On those occasions when he did not overnight in West Vancouver, the owner drove him to his home on Canada Way in Burnaby, then picked him up the next morning. Instead of explaining to the jury the implausibility of Henry being the perpetrator of a crime in the heart of Vancouver, the judge jumbled the evidence so badly that it was impossible to make sense of it.

In *R. v. Blackmore*, Gale J.A. stressed the importance of a judge presenting alibi evidence in some logical manner, "thus juxtaposing the evidence for and against the accused's alibi":

> It is always the responsibility of the trial Judge to ferret out the important pieces of evidence and present them in a logical manner so that the jury will be equipped to reach a judicial decision on each issue.
>
> To my way of thinking, the presentation of all the evidence given at trial in a chronological fashion will frequently fall short of properly emphasizing the information available both for and against the case of the Crown and the case of the accused.[21]

Summary

Not only did the trial judge in the *Henry* case demonstrate preferential treatment toward the Crown and disparaging treatment of the accused, he:

- failed to provide the accused, at the outset of the trial, with a basic checklist of identification requirements;

- failed to instruct the jury to ignore evidence of off-indictment charges;
- failed to make comments favourable to the accused regarding fingerprint evidence;
- failed to require the Crown to produce relevant, possibly exculpatory, medical reports; and
- failed to connect the alibi evidence with the offences charged.

Amicus Curiae

In the course of a pretrial conference regarding publication bans, the subject of *amicus curiae* was raised. "During our pretrial interview before Chief Justice McEachern," Crown counsel told the trial judge, "there was discussion as to whether the lawyer would be attending as *amicus curiae*, or whether Mr. Henry would be appearing on his own."

Though not raised in Mr. Henry's factum, counsel for the respondent addressed the matter as follows:

> Mr. Henry qualified for legal aid, but he refused counsel. The Court cannot force counsel upon the accused…
>
> [In retrospect, however], it is apparent that Mr. Henry required legal counsel to advocate legal positions on his behalf, to examine witnesses, and to fully bring out to the court the basis for viable defences, unencumbered by Mr. Henry's theories and tactics.[22]

Of note in this regard is our own Court of Appeal's decision in *R. v. W. (P.H.L.)*.[23] On the appeal from the conviction of an elderly unrepresented person, the court held that as the trial progressed it became clear that the accused was incapable of defending himself effectively. He frequently brought up matters that the trial judge warned him were prejudicial to his case, he declined to cross-examine the complainants and he eventually abandoned his closing address after objections that he was trying to adduce new evidence. The court held that the accused could not receive a fair trial without the assistance of counsel and that the trial judge should have either entertained a fresh *Rowbotham* application or should have appointed *amicus curiae*.

It is regrettable that the trial judge never considered the appointment of *amicus* as per the reasoning in both the *Ryan* and *W. (P.H.L.)* cases. Instead, he never missed an opportunity to taunt Henry for choosing to represent himself.

CONCLUSION

For the reasons discussed above, I believe that the trial judge in the *Henry* case breached his duty to assist, and that our Court of Appeal failed to clarify the law on this important subject.

While the Court of Appeal stopped short of declaring Mr. Henry's *factual* innocence, at least they overturned the guilty verdicts. However, in terms of the larger legal issues at stake, the court missed an invaluable opportunity to elaborate on the duty owed to obstreperous, self-represented accused. Fortunately, the Newfoundland Court of Appeal has covered the point in a way that should be treated as persuasive authority by trial judges in B.C.

On the surface, the 2010 decision in *Henry* appears irreconcilable with that in *Ryan*. For the time being at least, the decisions in the two cases remain at odds regarding the scope and extent of a judge's "duty to assist". This is unfortunate.

It is hoped that the highest court in our province will take the first opportunity that presents itself to clarify the length and breadth of the obligations of a trial judge when faced with an unrepresented accused. It is further hoped that, when it does, it will see fit to follow the *Ryan* decision.

ENDNOTES

1. *R v Henry*, 2010 BCCA 462.
2. *Ibid* at para 6.
3. *Ibid* at para 38.
4. 2012 NLCA 9.
5. Trial transcript, March 15, 1983, at 66.
6. *R v Henry*, *supra* note 1 at paras 46, 65 and 67.
7. Trial transcript, March 15, 1983, at 64 and 65.
8. *R v Henry*, *supra* note 1 at paras 76 and 77.
9. Trial transcript, March 2, 1983, at 16.
10. *R v Henry*, *supra* note 1 at para 85.
11. *Ibid* at para 109.
12. *Ibid* at para 110.
13. *Ibid* at para 139.
14. *Ibid* at paras 133, 134, 135.
15. Trial transcript, March 3, 1983, at 2.
16. *Ibid* at 64.
17. *R v Feldman* (1994), 42 BCAC 31 at 34–35 and 66, affirmed 93 CCC (3d) 575 (SCC); *R v Clancy*, [1992] OJ No 3968 at para 12.
18. *R v Handy* (2002), 164 CCC (3d) 481 at paras 38–39 (SCC); *R v Bailey*, [1924] 2 KB 300 at 305 (CA).
19. Trial transcript, March 14, 1983, at 1.
20. *R v Cleghorn*, [1995] 3 SCR 175.
21. [1971] 2 OR 21.
22. Respondent's factum, para 199.
23. 2004 BCCA 522.