Companies Act is amended as other provinces' companies acts have been to permit a company to purchase its shares if a solvency test is met.

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PROVINCIAL COURT JUDGE'S DUTY TO APPOINT COUNSEL: *REGINA* v. *WHITE*[1]

The case of *R.* v. *White* is the first to declare that a Provincial Court Judge has a discretionary right to appoint counsel. But before those who champion the cause of right to counsel think the battle is won, careful consideration must be given to the case. While perhaps making a step in the right direction, the case cannot be said to give anyone an automatic right to counsel.

Roderick A. White was charged with common assault and assaulting a police officer in the execution of his duty. The Crown elected to try both charges summarily. On the night in question the accused claimed that he had been drinking a great deal and could not recall any of the incidents referred to by the police. He believed he was suffering from an alcoholic seizure and had medical evidence that might have substantiated that claim. Because of his financial position the accused could not find a lawyer who would represent him and because the Crown elected to try the charges summarily, the accused was refused legal aid. The only semblance of legal help that the accused could find was from Student Legal Services who, recognizing the accused's need for a lawyer, decided that it was an opportunity to advance the cause of the indigent's right to counsel.

At his first court appearance, the accused, with a Student Legal Service's representative, appeared before His Honour Judge C. H. Rolf of the Provincial Court. It was requested that the court appoint counsel for the accused, but the request was rejected because, as the charges were mere summary matters, the accused should be able "to stand on his own two feet".[1a] The court made no inquiry into the facts of whether there were any exceptional circumstances that would put it beyond the ability of the accused to argue for himself. The mere fact that it was a summary matter was enough to place it in the accused's domain. Time was granted for the accused to seek counsel. On the next appearance, again with a Student Legal Services' representative, the accused appeared before His Honour Judge Dean Saks. The court answered the request to have counsel appointed by merely stating that it had "no power to appoint counsel".[2]

Before the case came to trial a motion was brought before Mr. Justice D. C. MacDonald of the Supreme Court, seeking an order in the nature of *certiorari* to quash the decisions of the judges of the Provincial Court not to appoint counsel and also seeking an order in the nature of

[1] Alta. L.R. (2d) 292 (Alta. S.C.T.D.).

[1a] *Id.* at 294.

[2] *Id.* at 294.

prohibition to prohibit all judges of the Provincial Court from proceeding with the charges. Alternatively, the accused sought an order in the nature of *mandamus* "requiring the judges to reconsider the accused's application and apply the law as the accused's counsel on the motion submits it is".[3] In order to bring these proceedings it was necessary for Student Legal Services to hire a lawyer to represent the accused.

MacDonald J. held that there should be issued an order in the nature of *mandamus* requiring that the judges of the Provincial Court exercise their discretion to appoint counsel applying the law as was set out in his judgment. Also an order in the nature of *certiorari* was found to be appropriate to quash the previous decisions of the two Provincial Court judges.

This decision is important for three reasons. First, it declares that a Provincial Court judge can appoint counsel. Second, it outlines the factors to be taken into account when deciding whether or not to appoint counsel. Third, it suggests the mechanism by which counsel is to be provided.

The decision that a magistrate may appoint counsel is only a stepping stone on the road to counsel by right. MacDonald J. claims that this right exists as part of the trial judge's duty to ensure that the accused is given a fair hearing. It is important to note at this point that the right does not emanate from any provisions of the Canadian Bill of Rights.[4] The decision accepts the position of the majority in the case of *R.* v. *Ewing and Kearney*[5] and adopts this statement of Macfarlane J.:[6]

> Our law had not required that every accused person be defended by counsel but rather that with or without counsel, he or she be afforded a fair hearing.

Macfarlane J. then goes on to explain:

> Although it is very important in a complicated case that an accused should have counsel, that is not to say that a breach of natural justice will necessarily occur if the accused is not represented by counsel at his trial.

In Canada we have excused ourselves from providing counsel because we feel that the interests of the accused are protected by the trial judge. But whether the trial judge can protect the accused depends largely on how he views his role. In *Powell* v. *Alabama*[7] it was declared:

> . . . left without the aid of counsel he (even the intelligent and educated layman) may be put on trial without a proper charge, and convicted upon incompetent evidence or evidence irrelevant to the issue or otherwise inadmissible. . . .

This seems to suggest that in the United States at least the trial judge takes a rather passive role in protecting the defendant's interests.

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[3] *Id.* at 293.

[4] It has been argued that the procedural guarantees of the Canadian Bill of Rights R.S.C. 1970, App. III, especially ss. 1(a)(b), 2(c)(ii) and 2(e), demand a right to counsel for all accused. MacDonald J. disposed of all such arguments by simply maintaining that his decision did not rely on the Bill of Rights. For a discussion on the right to counsel in reference to the Bill of Rights *see* Black, *Right to Counsel at Trial*, (1976) 53 Can. Bar Rev. 56.

[5] *R.* v. *Ewing and Kearney* 18 C.C.C. (2d) 356; [1974] 5 W.W.R. 232 (B.C.C.A.), reviewing [1974] 1 W.W.R. 57; 25 C.R.N.S. 13; 15 C.C.C. (2d) 107. In this case two youths each eighteen years of age were charged with possession of cannabis and cannabis resin. Although they fell within legal aid economic guidelines, their application was refused because their case was tried summarily and a conviction would not be likely to result in imprisonment or loss of livelihood. After being refused court appointed counsel the accused applied for a writ of prohibition which was refused by Macfarlane J. On appeal the application was again refused by Maclean, Taggart, and Seaton J.J.A. with dissent expressed by Farris C.J.B.C. (Branca J.A. concurring).

[6] *R.* v. *White, supra*, n. 1 at 299, which quotes from *R.* v. *Ewing and Kearney*, [1974] 1 W.W.R. 57 at 62.

[7] *Id.* at 304, quoting from *Powell* v. *Alabama* (1932) 287 U.S. 45 at 68, which is approved in *Gideon* v. *Wainwright* (1963) 372 U.S. 335; 93 A.L.R. 733 at 805.

However, MacDonald J. quotes from *R.* v. *Gibson*[8] which suggests that the trial judge has a duty ". . . to see that only proper evidence was before the jury. . . . (The judge) must take care that the prisoner is not considered on any but legal evidence." According to MacDonald J. this duty exists "even if there is defence counsel and he makes a mistake".[9] However, it would seem almost impossible for the judge as impartial adjudicator of all fact and law to also fill the role of counsel in ensuring that every avenue of defence on behalf of the accused is exploited. If both jobs are attempted one is sure to suffer. It was on this point in particular that Farris C.J. dissented in the *Ewing* case. In his opinion "representation by counsel [is] essential in our adversary system of criminal justice".[10] MacDonald J. does not accept the proposition that in all cases an accused must be represented by counsel; rather he comes to the conclusion that was expressed by Seaton J.A. in *Ewing*:[11]

> I reject the contention that it is always necessary to appoint counsel but it does not follow that it is never necessary to appoint counsel. The trial judge is bound to see that there is a fair trial. Because of the complexity of the case, the accused's lack of competence or other circumstances a trial judge might conclude that defence counsel was essential to a fair trial.

He continues saying:

> To speak through counsel is the privilege of the client, and such an appointment is made in circumstances in which for various reasons the accused, assuming him to be of sufficient understanding, though he desires the benefit of counsel, is not in a position to obtain it; and in the interest of justice counsel should and will be assigned for his assistance.

This very cautious statement on giving a right to counsel in some circumstances was interpreted by Professor Black who said in reference to it: "This *obiter dictum* goes farther than any previous Canadian decision in providing for the right to appointed counsel."[12] The fact that MacDonald J. adopted that *obiter* comment from *Ewing* as the *ratio decidendi* of his decision means that this decision is the most advanced to date in providing a right to counsel.

The decision is also very important in that it sets out the factors that should be considered when determining whether or not counsel should be appointed. The six factors are of paramount importance because the significance and impact of the entire decision depends upon how easy it is for the indigent accused to satisfy these criteria and have counsel appointed for him. While the enumerated factors were not considered to be a closed list, an analysis of them will give us an idea of under what circumstances a court will appoint counsel. Ultimately, the interpretation given them by the judges of the Provincial Court will determine the importance of the decision.

The first factor was consideration of the financial position of the accused. This suggests that the court should consider whether or not the accused is capable financially of retaining counsel. It may require that an accused actually have been refused by a lawyer because of an inability to pay the retainer. In this case an affidavit was sworn by the

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[8] *R.* v. *Gibson* (1887) 18 Q.B.D. 537 at p. 543.

[9] *R.* v. *White, supra*, n. 1 at 305.

[10] Black, *supra*, n. 4 at 58.

[11] *R.* v. *White, supra*, n. 1 at 302, quoting from *R.* v. *Ewing and Kearney* [1974] 5 W.W.R. 232 at 242. *See also Vescio* v. *The Queen* [1949] 1 D.L.R. 170 at 147; [1949] S.C.R. 139; 6 C.R. 433; 92 C.C.C. 161.

[12] Black, *supra*, n. 4 at 58.

accused which stated he had been turned down by three lawyers because of his financial status.

The second factor for consideration was the availability of legal aid. If a case is suitable for legal aid then the accused should be directed to make the appropriate application. It is questionable whether the accused should be required to exploit all avenues of appeal in seeking a legal aid certificate. To require an accused to do so would prejudice his case because of the delay it would cause in bringing the case to trial. In *R.* v. *White* the orders were granted although there was still one appeal that the accused could have made to the Legal Aid Society. There was no mention that the appeal should have been taken up.

The third factor for consideration was the educational level of the accused. An accused, especially one with inadequate language skills, would be at a distinct disadvantage in attempting to defend himself. Poor education is seldom difficult to show. However, the test of whether or not the accused is educated enough to be competent to defend himself is a very subjective evaluation and the Provincial Court judge is left with very wide discretion in this matter.

The fourth consideration mentioned by MacDonald J. was the complexity of the issues of fact and law that are involved. This could easily be the most difficult consideration. In the past the rationale for providing counsel only for indictable offences, or for those likely to result in imprisonment on conviction, seems to be that because the penalty is more serious then the legal issues are bound to be more complex. The fallacy of providing counsel on that criterion is pointed out by Professor Black; he explains:[13]

> If the right [to counsel] depends on the complexity of the case, the severity of the penalty would seem to provide only the roughest of measures. Had the accused in *Ewing* been charged with the same offence by way of indictment, the risk of imprisonment would have been substantially greater, but the substantive legal issues would have been no more complex.

The opinion of Maclean J.A. in *Ewing* was that under these circumstances the application for appointment of counsel was premature, for "we do not even know whether they have a defence or whether they think they have".[14] If what is meant by this fourth factor is that the accused must be able to show that his case is complex and that he has a technical or legal argument, then his chances of having counsel appointed are all but annihilated. The reason an accused needs counsel is to find out whether or not he has a defence; if he is well acquainted with all matters of fact and law and their complexities, what need does he have of counsel? The unfortunate result is explained by Professor Black who commented:

> . . . it would not be surprising if the issue of right to counsel itself became too complex to be adequately argued by the average accused.

The fifth factor mentioned by the court was whether the evidence involved in presenting a case would be more difficult than the accused could be expected to handle. This factor is subject to the same criticism as the preceding one but what MacDonald J. is here contemplating is not requiring that the accused prove his case to be particularly difficult

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[13] *Id.* at 67.

[14] *R.* v. *Ewing and Kearney*, *supra*, n. 5 at 237.

[15] Black, *supra*, n. 7 at 68.

but that the judge himself analyze the situation to see if there is any part of the charge which is beyond the capacity of the accused to understand. If the criteria requires that the accused show his case to be particularly difficult, there will be few accused knowledgeable enough to do so without legal help.

The final point of consideration was whether imprisonment was likely to be the result of a conviction. This could be broad enough to cover many circumstances. If an accused is poor enough that he cannot afford a lawyer then it is likely that any substantial fine would result in imprisonment in default of payment. However, this factor could also be seen to mean that only if a sentence of imprisonment is likely should counsel be provided, but this is ignoring the reality of the situation.

The judgment is not clear as to whether all six factors need to be satisfied or whether only one would be sufficient. It is clear that the judge must consider all the relevant criteria and it seems that any doubt should be decided in favor of the accused. The question to be decided by the judge is whether an accused can have a fair trial having regard to each of these factors independently. If a fair trial is impossible due to its complexity, or because of the inability of the accused to understand, then counsel must be appointed.

The question remains whether a Provincial Court judge can adequately protect the rights of the unrepresented accused? While it is certain that for the most part an accused will receive a fair trial in that no rights will be denied him, it is still true that a person will be at a disadvantage without counsel. Without counsel he will be denied access to an experienced agent in the art of plea-bargaining. Without counsel he may be intimidated by the court room atmosphere. Without counsel he will not know what part of his story is relevant to the court. If, then, it is admitted that an indigent accused is at a disadvantage because he has not been able to retain counsel, then can it not be said that this is unfair? If it is unfair to deny him counsel, how can he have a fair trial without this advantage?

A final aspect of the case concerns the paying of counsel. Before the introduction of the legal aid scheme, the Supreme Court on many occasions exercised its right to appoint counsel, and the members of the Bar never hesitated to honour that appointment. While remunerations for these services was usually made by the Attorney General, it is abundantly clear that such payment was entirely *ex gratia*. The Legal Aid programme has not abrogated that power. If that right was and is available in the Supreme Court then, according to MacDonald J., there is no reason that the Provincial Court should not enjoy the same power. Although counsel could not be assured payment:[16]

> . . . the tradition of the Bar and its willingness to accept the task of representing an accused at the request of the court without the guarantee of the payment of a fee are implicitly recognized by the Code of Professional Conduct adopted by the Council of the Canadian Bar Association in 1974 and since then adopted by the Benchers of the Law Society of Alberta.

MacDonald J. then went on to quote from the aforementioned code:

> The lawyer has a general right to decline particular employment (*except when he has been assigned as counsel by a court*), but it is a right he should be slow to exercise if the probable result would be to make it very difficult to obtain legal advice or representation.

[16] *R.* v. *White*, *supra*, n. 1 at 307.

This manner of appointment relies a great deal on the ethical good will of the Bar and while this in no way can be doubted yet by its very nature it would seem that the courts would not want to exploit it. It follows then that MacDonald J. foresees that such appointment of counsel should be the exception rather than the rule.

Perhaps the final analysis of this case can best be made by briefly considering what happened when the accused Roderick A. White again appeared before His Honour Judge C. H. Rolf. Armed with the decision of MacDonald J., the request for counsel to be appointed was again made. Considering the six factors, the court determined that White should have exploited every avenue of appeal in seeking help from Legal Aid. The court felt there was no reason to think that he would receive anything but a fair hearing even without counsel. In addition, the writer submits, the opinion of the court was that our criminal justice system does not wholly operate on an adversary principle; therefore, counsel was not necessary. This is obviously a very narrow application of the criteria outlined by Justice MacDonald and certainly vitiates all that the case stands for. Hopefully, this will not be the final word on the case.

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COSTS IN FORECLOSURE ACTIONS—WHEN CAN A MORTGAGEE BE DEPRIVED OF ITS COSTS?

NATIONAL TRUST COMPANY v. *NORTH AMERICAN MONTESSORI ACADEMY LTD.*[1]

Almost every mortgage executed in Alberta today contains a clause the same as or similar to the following:

> AND THE MORTGAGOR ALSO COVENANTS AND AGREES WITH THE MORTGAGEE THAT:
>
> (d) All proper Solicitor's, Inspector's, Valuator's and Surveyor's fees and expenses for drawing and registering this Mortgage and for examining the mortgaged premises and the title thereto, and for making or maintaining this mortgage a first charge on the mortgaged premises, together with all sums which the Mortgagee may and does from time to time advance, expend or incur hereunder as principal, insurance premiums, taxes, rates, or in or toward payment of prior liens, charges, encumbrances or claims charged or to be charged against the mortgaged premises, or in maintaining, repairing, restoring or completing the mortgaged premises, and in inspecting, leasing, managing, or improving the mortgaged premises, including the price or value of any goods of any sort or description supplied to be used on the mortgaged premises, and in exercising or enforcing or attempting to enforce or in pursuance of any right, power, remedy or purpose hereunder or subsisting, and legal costs as between solicitor and client, and also an allowance for the time, work, and expenses of the Mortgagee, or any agent, solicitor, or servant of the Mortgagee, for any purpose herein provided for whether such sums are advanced or incurred with the knowledge, consent, concurrence or acquiescence of the Mortgagor, or otherwise, are to be secured hereby and shall be a charge on the mortgaged premises, together with interest thereon at the said rate, and all such moneys, shall be repayable to the Mortgagee on demand, or if not demanded, then with the next ensuing instalment payable hereunder, except as herein otherwise provided, and all such sums together with interest thereon are included in the expression 'the mortgage moneys'.

In the above noted case, foreclosure proceedings were commenced by

[1] [1976] W.W.D. 97; reversed in part [1976] W.W.D. 123.