

11/07; [2007] VSC 2

SUPREME COURT OF VICTORIA

R v WILLIAMS

King J

1, 20 December 2006; 15 January 2007 — (2007) 16 VR 168

PRACTICE AND PROCEDURE – ADJOURNMENT OF TRIAL APPLICATION – COUNSEL OF CHOICE – APPLICABILITY OF THE *CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES ACT 2006* TO THE APPLICATION – DISCRETION OF TRIAL JUDGE – FACTORS TO BE CONSIDERED IN THE EXERCISE OF DISCRETION – TRANSITIONAL PROVISIONS OF CHARTER – CHARTER APPLIES TO PROCEEDINGS COMMENCED AFTER 1 JANUARY 2008 – CHARTER HAS NO RELEVANCE TO APPLICATION – APPLICATION REFUSED: *CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES ACT 2006*, ss6, 7, 24, 25, 49(2).

W. who had been committed for trial for serious offences, sought an adjournment of his trial to a date to be fixed at least for six months on the ground that a particular member of Counsel would be available by that date. The statute *Charter of Human Rights and Responsibilities Act 2006* ('Charter') was enacted with commencement in part on 1 January 2007 and the balance to commence on 1 January 2008. One of the provisions of the Charter dealing with the Courts does not apply until 1 January 2008.

HELD: Application refused.

1. The Charter distinguishes between criminal and civil proceedings and hearings or trials as demonstrated in section 24(1) and has elected in s49(2) to declare that the Charter does not affect any legal proceedings commenced before the commencement of Part 2 on 1 January 2008. Accordingly, the Charter has no relevance to the application for an adjournment made on behalf of W. as a result of the proceedings in relation to this matter having commenced prior to the introduction, proclamation or commencement of the Charter and more particularly Part 2.

2. *Obiter.*

(a) A Judge or magistrate is not acting in "an administrative capacity" when he or she is hearing an application for adjournment of a trial which has already been listed by the listings section of the Court, for the purposes of the Charter, and does not fall within the definition of "Public Authority" contained therein. Members of the listing section of the Supreme Court and other Courts may well be acting in an administrative capacity when listing trials. But it is clear that the decision to fix a trial date, or to adjourn a trial date already fixed, is discretionary and that in determining those matters a court must act judicially and balance a number of factors including, but not limited to, matters such as the availability of counsel, the availability of witnesses and the proper availability and allocation of court time.

(b) The intention of Parliament is for the Courts to become actively involved in the interpretation of the Charter and human rights after 1 January 2008. The rights as declared, at the least in s25, would be rights that the Court would be bound to take into account in ensuring that a fair trial was conducted pursuant to section 24.

(c) Whilst the Court can and will do all they can to accommodate counsel of choice for accused persons, it cannot be that they are entitled to select a counsel who will not be available for a lengthy period and thereby compel the court to adjourn matters that are capable of being heard. In considering all relevant matters together with the desirability of W. being represented, not only for himself, but in relation to the problems that it will create for the Crown and the court in providing the necessary assistance that must be provided to W. and the relationship that it is said Counsel enjoys with W. and the confidence that he has in Counsel, on balance, it is not in the interests of justice to adjourn this trial for a period of at least six months, on the expectation that W. may brief particular Counsel to conduct his trial.

KING J:

Application

1. This is an application for an adjournment of a trial which is listed to commence on 29 January 2007. This trial was originally listed to commence on 27 February 2006.

[Paragraphs 2 to 21 have been removed from this edited version.]

The Submissions

22. The initial submissions of counsel for Williams were, in summary, that:

(1) The accused has a right to a fair trial at common law^[1] That right is now enshrined in statute in the *Charter of Human Rights and Responsibilities Act 2006*.^[2]

(2) All the human rights in criminal proceedings granted by the Charter to a person, pursuant to section 25, must be the foundation of what constitutes a fair hearing in a criminal proceeding.

(3) The rights granted in section 25 are stated in the Charter to be minimum guarantees. The trial Judge is prevented from limiting in any way Williams' right to counsel of choice, as the rights are absolute rights guaranteed under the Charter

(4) The rights listed in section 25, particularly 25(2)(d) of the Charter, are rights that are in force, as and from 1 January 2007, and by which the court is bound, as the court is acting in "an administrative capacity" when it is listing trials, and for the purposes of the Charter, falls within the definition of "Public Authority" contained therein..

(5) The DPP is a public authority under the Charter and is obliged to act in a manner that is compatible with the exercise of the human rights of Williams and should not therefore oppose the application for the adjournment.

23. The DPP provided an initial response to the submissions that in summary submitted:

(1) The Charter had no application to the adjournment application due to the commencement date of the Charter, in that enforcement mechanisms provided for in the Charter, that may have some relevance to the Court, do not commence until 1 January 2008.

(2) S25(2)(d) of the Charter provides three alternatives for a person to defend themselves. First personally, second by choosing a lawyer and third through Victoria Legal Aid. The accused has elected to seek legal aid and the court has ordered legal aid to be provided. Therefore there is no breach of the relevant section.

(3) A Judge hearing an application for an adjournment is not performing an administrative action but is exercising the judicial discretion that reposes in the court.

(4) The Charter does not apply to the Courts until 1 January 2008.

(5) The rights as listed in section 25 of the charter are not absolute rights but are limited as stated in section 7(2) of the Charter. The issue for the Court is to balance all of the competing interests including the public interest, and determine what is required for the accused person to receive a fair trial.

24. There were further submissions made by counsel for the DPP and Williams and some oral argument. Those submissions and arguments related to the interpretation of sections 24 and 25 of the Charter, the meaning and limitations related to counsel of choice and commencement of the Charter particularly with respect to the role of the Courts. Counsel for the defence further submitted that the Charter was operative upon the Court as a consequence of legislative recognition of the rights set out in ss8 – 27 which created legal rights for all citizens of Victoria and by which the Court is bound. The DPP further submitted that the transition provisions in s49(2) of the Charter determined that the charter had no application to the case before the Court. Counsel were also asked to provide submissions on the meaning and application of section 6 of the Charter.

The Legislation

25. This application for an adjournment relies upon the *Charter of Human Rights and Responsibility Act* of 2006 ("the Charter"). This Charter commenced, in part, on 1 January 2007 with the balance to commence on 1 January 2008.

26. Accordingly, there have been no decisions under this Charter and more particularly in relation to the sections of the Charter upon which Williams relies.

27. I heard the argument and delivered my decision in advance of the commencement date

of the Charter, as counsel for Williams stated that he would reapply immediately upon the commencement of the Charter, and all parties agreed to the application taking place in this manner. I informed the parties of my decision on 20 December 2006 and said I would publish my reasons on 15 January 2007. This was done to permit all parties to know whether the trial would proceed and if it was to proceed to allow Williams to avail himself of counsel and ensure that counsel would have sufficient time to prepare for the trial if Williams determined to utilise the services of counsel.

28. As the Charter is a new Act it is important to set out the relevant parts of the Act upon which reliance is placed.

"Preamble

On behalf of the people of Victoria the Parliament enacts this Charter, recognising that all people are born free and equal in dignity and rights.

This charter is founded on the following principles—

- Human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom;
- Human rights belong to all people without discrimination, and the diversity of the people of Victoria enhances our community;
- Human rights come with responsibilities and must be exercised in a way that respects the human rights of others;
- Human rights have a special importance to the Aboriginal people of Victoria, as descendants of Australia's first people, with their diverse spiritual, social, cultural and economic relationship with their traditional land and waters."

29. The commencement section reads:

"2. Commencement.

(1) This Charter (except Divisions 3 and 4 of Part 3) comes into operation on 1 January 2007.

(2) Divisions 3 and 4 of Part 3 come into operation on 1 January 2008."

30. The purpose of this charter is set out within the charter and states:

PART 1 – PRELIMINARY

(1) Purpose and Citation

(1) This Act may be referred to as the Charter of Human Rights and Responsibilities and is so referred to in this Act.

(2) The main purpose of this Charter is to protect and promote human rights by—

- (a) setting out the human rights that Parliament specifically seeks to protect and promote; and
- (b) ensuring that all statutory provisions, whenever enacted, are interpreted so far as is possible in a way that is compatible with human rights; and
- (c) imposing an obligation on all public authorities to act in a way that is compatible with human rights; and
- (d) requiring statements of compatibility with human rights to be prepared in respect of all Bills introduced into Parliament and enabling the scrutiny of Acts and Regulations Committee to report on such compatibility; and
- (e) conferring jurisdiction on the Supreme Court to declare that a statutory provision cannot be interpreted consistently with a human right and requiring the relevant Minister to respond to that declaration.

(3) In addition this Charter—

- (a) enables Parliament, in exceptional circumstances, to override the application of the Charter to a statutory provision; and
- (b) renames the Equal Opportunity Commission as the Victorian Equal Opportunity and Human Rights Commission and confers additional functions on it; and
- (c) makes consequential amendments to certain Acts.

31. These sections were referred to by all parties as establishing the purpose of the Charter, what is sought to be protected and the manner in which the Charter seeks to provide that protection.

32. There are a number of sections that it is submitted are particularly relevant to the decision

that this Court must make in relation to the application. First, the definition of Court as contained in s3(1) which is defined as meaning the Supreme Court, the County Court, the Magistrates' Court or the Children's Court.

33. Second, the definition of public authority which has the meaning given in s4:

"4. What is a public Authority?"

(1) For the purposes of this Charter a public authority is—

- (a) a public official within the meaning of the *Public Administration Act* 2004; or (note omitted)
- (b) an entity established by a statutory provision that has functions of a public nature; or (notes omitted)
- (c) an entity whose functions are or include functions of a public nature, when it is exercising those functions on behalf of the State or a public authority (whether under contract or otherwise); or (note and example omitted)
- (d) Victoria Police; or
- (e) a council within the meaning of the *Local Government Act* of 1989 and councils and members of council staff within the meaning of that Act; or
- (f) a Minister; or
- (g) members of the Parliamentary Committee when the Committee is acting in an administrative capacity; or
- (h) an entity declared by the Regulations to be a public authority for the purposes of this Charter but does not include—
- (i) Parliament or a person exercising functions in connection with proceedings in Parliament; or
- (j) a court or tribunal except when it is acting in an administrative capacity; or

Note: committal proceedings and the issuing of warrants by a court or tribunal are examples of when a court or tribunal is acting in an administrative capacity. A court or tribunal also acts in an administrative capacity when, for example, listing cases or adopting practices and procedures.

(k) an entity declared by the Regulations not to be a public authority for the purposes of this Charter.

(2) In determining if a function is of a public nature the factors that may be taken into account include—

- (a) that the function is conferred on the entity by or under a statutory provision; (example omitted)
- (b) that the function is connected to or generally identified with functions of government; (example omitted)
- (c) that the function is of a regularity nature;
- (d) that the entity is publicly funded to perform the function;
- (e) that the entity that performs the function is a company (within the meaning of the *Corporations Act*) all of the shares in which are held by or on behalf of the State. (example omitted)

(3) To avoid doubt—

- (a) the factors listed in sub-s.(2) are not exhaustive of the factors that may be taken into account in determining if a function is of a public nature; and
 - (b) the fact that one or more of the factors set out in sub-s.(2) are present in relation to a function does not necessarily result in the function being of a public nature.
- (4) For the purposes of sub-s.(1)(c) an entity may be acting on behalf of the State or a public authority even if there is no agency relationship between the entity and the State or public authority.
- (5) For the purposes of sub-s.(1)(c) the fact that an entity is publicly funded to perform a function does not necessarily mean that it is exercising that function on behalf of the State or a public authority.

34. Third, the application of the Charter to the Courts:

Section 6. Application.

(1) Only persons have human rights. All persons have the human rights set out in Part 2.

(2) This Charter applies to—

- (a) the Parliament, to the extent that the Parliament has functions under Divisions 1 and 2 of Part 3; and
- (b) Courts and Tribunals, to the extent that they have functions under Part 2 and Division 3 of Part 3; and
- (c) public authorities, to the extent that they have functions under Division 4 of Part 3.

(3) Sub-section (2) does not take away from or limit—

- (a) any other function conferred by this Charter on an entity specified in sub-s.(2); or
- (b) any function conferred on any other entity by this Charter.

(4) This Charter binds the Crown in right of Victoria and, so far as the legislative power of the Parliament permits, the Crown in all its other capacities.

35. In determining the meaning of this Act I am obliged, pursuant to the *Interpretation of Legislation Act* 1984, to have regard to certain aspects of the legislation and surrounding material. Section 35 of the *Interpretation of Legislation Act* 1984 states:

Principles of and aids to interpretation.

35. In the interpretation of a provision of an Act or subordinate instrument—

(a) a construction that would promote the purpose or object underlying the Act or subordinate instrument (whether or not that purpose or object is expressly stated in the Act or subordinate instrument) shall be preferred to a construction that would not promote that purpose or object; and

(b) consideration may be given to any matter or document that is relevant including but not limited to
(i) all indications provided by the Act or subordinate instrument as printed by authority, including punctuation;

(ii) reports of proceedings in any House of the Parliament;

(iii) explanatory memoranda or other documents laid before or otherwise presented to any House of the Parliament; and

(iv) reports of Royal Commissions, Parliamentary committees, Law Reform Commissioners and commissions, boards of inquiry or other similar bodies.

36. Equally S32 of the Charter is relevant:

32. Interpretation

(1) So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.

(2) International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.

37. In the written submissions by counsel for Williams it was argued that the Charter applies to this adjournment application as the human rights listed in Part 2 of the Charter will be in force as and from 1 January 2007. Those rights, it was submitted, have application to this Court. Part 2 of the Charter of Human Rights and Responsibilities, within sections 7 to 27, contain the rights that Parliament specifically seeks to protect and promote and includes two particular sections upon which the defence relied, being ss24 and 25, which read, in the relevant parts:

"24. Fair hearing

(1) A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

38. Section 25 lists the rights provided to persons who are charged with criminal offences.

"25. Rights in criminal proceedings

(1) A person charged with a criminal offence has the right to be presumed innocent until proven guilty according to law.

(2) A person charged with a criminal offence is entitled without discrimination to the following minimum guarantees—

(a) to be informed promptly and in detail of the nature and reason for the charge in a language or if necessary, a type of communication that he or she speaks or understands; and

(b) to have adequate time and facilities to prepare his or her defence and to communicate with a lawyer or adviser chose by him or her; and

(c) to be tried without unreasonable delay; and

(d) to be tried in person, and to defend himself or herself personally or through legal assistance chosen by him or her or, if eligible, through legal aid provided by Victorian Legal Aid under the *Legal Aid Act* 1978; and

(e) to be told, if he or she does not have legal assistance, about the right, if eligible, to legal aid under the *Legal Aid Act* 1978; and

(f) to have legal aid provided if the interests of justice require it, without any cost payable by him or her if he or she meets the eligibility criteria set out in the *Legal Aid Act* 1978

(g) to examine, or have examined, witnesses against him or her, unless otherwise provided for by law; and

(h) to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses for the prosecution; and

(i) to have the free assistance of an interpreter if he or she cannot understand or speak English; and

- (j) to have the free assistance of assistants and specialised communication tools and technology if he or she has communication or speech difficulties that require such assistance; and
- (k) not to be compelled to testify against himself or herself or to confess guilt.

(3) A child charged with a criminal offence has the right to a procedure that takes account of his or her age and the desirability of promoting the child's rehabilitation.

(4) Any person convicted of a criminal offence has the right to have the conviction and any sentence imposed in respect of it reviewed by a higher court in accordance with law.

39. Section 49 of the Charter contains the transitional provisions—

Section 49 Transitional Provisions

(1) This Charter extends and applies to all acts, whether passed before or after the commencement of Part 2, and to all subordinate instruments, whether made before or after that commencement.

(2) This Charter does not affect any proceedings commenced or concluded before the commencement of Part 2.

(3) Division 4 of Part 3 does not apply to any act or decision made by a public authority before the commencement of that Division.

40. The accused man was charged with these offences on 14 December 2004, he has undergone a committal proceeding and was committed to stand his trial in the Supreme Court of Victoria on 10 March 2005. A presentment was laid in 2005. The trial was listed for hearing in February 2006. There have been adjournments granted at the request of both the crown and the defence as I have outlined earlier.

The Decision

41. The first matter that I will deal with is the issue of the transitional provisions. The Crown submit that the transition provisions contained in S49(2) of the Charter mean that the Court in this case is not subject to the provisions of the Charter, as the proceedings have already commenced. The defence contend that this has no application as the hearing of the trial has not yet commenced.

42. Section 49(2) refers to "any proceeding commenced or concluded" before the commencement of Part 2. Part 2 contains the rights that are protected under the Charter. Proceeding is not defined in the Charter. The rights as conferred by Part 2 are many and relate to matters that go beyond the conduct of a trial or hearing, and include recognition and equality before the law, the right to life, freedom from forced work, freedom of movement, freedom of expression, right to liberty and security of person, humane treatment when deprived of liberty, right to a fair hearing, rights in criminal proceedings and numerous other rights.

43. When section 25 is examined it can be seen that the rights stated to be protected as 'rights in a criminal proceeding' are rights that do not affect only the hearing of any charges which may arise, but provide a prohibition on arbitrary arrest or detention, on the deprivation of liberty, except on proper grounds and in accordance with procedures established by law, it establishes a right to be informed if arrested or detained of the reason for the arrest or detention and about any proceedings to be brought, the section establishes a number of procedural rights for persons arrested or detained on a criminal charge, and establishes a number of procedural rights for persons awaiting trial. It also establishes certain rights in relation to a criminal hearing. As can be seen a number of these rights arise at the time of arrest or charging of the person and are referred to in the Charter as rights in criminal proceedings.

44. Section 24 of the Act has the heading 'Fair hearing' and gives the person charged with a criminal offence or a party to a civil proceeding the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing. This section thus equates the rights of a person charged with a criminal offence to the rights of a person who is a party to a civil proceeding. A civil proceeding is commenced by the issue of a writ or originating process and a person becomes a party to that process when the writ or originating motion is served upon them.^[3] A person is charged with a criminal offence either by way of arrest and information or by summons which is then served upon the person. At either of those stages a person becomes charged with a criminal offence.

45. It is not in dispute that Williams was charged on 14 December 2004 and committed for trial in this court on the 10 March 2005. A draft presentment was before the court in July of 2005 and a presentment was filed on 12 December 2005, with the trial originally listed for February 2006. A 'Basha' hearing was held in 2006. It is clear that Williams is a person charged with a criminal offence in relation to this trial and has been so since 14 December 2004.

46. In the explanatory memorandum for the legislation in relation to what became section 49(2) of the Charter it states:

Clause 49 makes transitional provisions. Sub-clause (1) establishes that the Charter applies to all Victorian Acts and subordinate instruments regardless of when they commenced. Sub-clause (2) restricts the application of the Charter to legal proceedings commenced after 1 January 2008. This means that the Charter may not be relied on in any legal proceedings commenced before that date. Sub-clause (3) provides that the obligations on public authorities in the Charter do not apply to any act or decision made by a public authority before 1 January 2008.^[4]

47. And when referring to the rights as listed under section 25 of the Charter the explanatory memorandum states:

Clause 25 provides for various rights in criminal proceedings. Sub-clause (1) establishes the right of a person charged with a criminal offence to be presumed innocent until proved guilty according to law. This sub-clause should be read together with clause 49(2) which provides that the Charter does not affect any proceedings commenced or concluded before the commencement of Part 2.^[5]

48. Such an explanation is consistent with the Crown submission and with my interpretation of the relevant sections of the Charter relating to commencement of proceedings. The Charter distinguishes between criminal and civil proceedings and hearings or trials as demonstrated in section 24(1) and has elected in s49(2) to declare that the Charter does not affect any legal proceedings commenced before the commencement of Part 2.

49. Accordingly I am of the view that the *Charter of Human Rights and Responsibilities Act* 2006 has no relevance to the application for an adjournment made on behalf of the accused man Williams, as a result of the proceedings in relation to this matter having commenced prior to the introduction, proclamation or commencement of the Charter and more particularly Part 2.

Other Issues

50. Whilst not entirely necessary to do so there is a need, in my view, for clarification of some of the matters advanced on behalf of Williams relating to the Charter, as it may be some time before any determination may be required of this Court on certain aspects of the Charter.

51. First, a Judge is not acting in "an administrative capacity" when he or she is hearing an application for adjournment of a trial which has already been listed by the listings section of the Court, for the purposes of the Charter, and does not fall within the definition of "Public Authority" contained therein^[6]. It is my view that members of the listing section of the Supreme Court and other Courts may well be acting in an administrative capacity when listing trials. But it is clear that the decision to fix a trial date, or to adjourn a trial date already fixed, is discretionary and that in determining those matters a court must act judicially and balance a number of factors including, but not limited to, matters such as the availability of counsel, the availability of witnesses and the proper availability and allocation of court time.^[7]

52. Second, from my reading of the Charter I am of the view that the intention of Parliament was for the Courts to become actively involved in the interpretation of the Charter and human rights after 1 January 2008. However, the legislation is capable of different interpretation, although I have found it unnecessary to determine the interpretation in this application. The interpretation is one that would mean that the rights as declared, at the least in s25, would be rights that the Court would be bound to take into account in ensuring that a fair trial was conducted pursuant to section 24.

53. The argument is that Section 6(2) of the Charter establishes that the Charter applies to courts and tribunals, to the extent that they have functions under Part 2. Section 3(2) defines function as including a reference to a power, authority and duty; and that a reference to the

exercise of a function includes, where the function is a duty, a reference to the performance of the duty.

54. Section 24 grants the right to every person charged with a criminal offence to have the charge decided by a competent, independent and impartial court or tribunal after a fair and public hearing. That may well be considered a duty under the Charter, the duty to conduct a fair hearing. In my view that is a right that already exists at common law.

55. Section 25 then sets out the rights granted to persons charged with a criminal offence and includes within it rights that are applicable to a hearing, such as the right for an accused person to examine witnesses or have witnesses examined on his or her behalf, to have legal aid provided if eligible, or to defend themselves personally or through legal assistance chosen by them, to not be compelled to testify against themselves or confess guilt.

56. When a Court is determining what would constitute a fair hearing in respect of a criminal trial it would be difficult to imagine that the rights referred to as minimum guarantees in criminal proceedings would not form, in addition to any common law and other statutory requirements, the basis of what constitutes a fair hearing.

57. This may be what Parliament intended, but as indicated after reading all of the materials, including the Law Reform Commission Reports, the explanatory memorandum, and numerous overseas authorities, I am not convinced that is what Parliament intended to be the result of the combination of ss6, 24 and 25 of the Charter. It is unnecessary for me to determine that issue, but I draw the Parliament's attention to this possible interpretation of the legislation.

58. Third, the rights established within part 2 of the Charter are not absolute rights, as has been submitted by the defence, but are rights that may be limited by the general limitation established in section 7 of the Charter. In the second reading Speech the Honourable, the Attorney-General stated:

"Part 2 reflects that rights should not generally be seen as absolute but must be balanced against each other and against other competing public interests. Clause 7 is a general limitations clause that lists the factors that need to be taken into account in the balancing process. It will assist courts and government in deciding when a limitation arising under the law is reasonable and demonstrably justified in a free and democratic society. Where a right is so limited, then action taken in accordance with that limitation will not be prohibited under the charter, and is not incompatible with the right."^[8]

59. Further in the explanatory memorandum under the heading Part 2 – Human rights, it is stated:

The Charter provides a general limitation clause in clause 7. It is described in further detail below. It is one of the key provisions in the Charter. This clause recognises that no right is absolute and that there may be various limitations imposed on any right. In addition, specific limitations sometimes apply in relation to a particular right, as provided in the specific clause outlining the right to be protected.^[9]

and when referring to clause 25, being rights in criminal proceedings, the memorandum further stated:

In addition the rights in this clause may be subject under law to such reasonable limitations as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom (see clause 7)^[10]

The common law position on counsel of choice

60. Counsel for Williams correctly stated in his submissions:

"8. The principle in *Dietrich* [1992] HCA 57; (1992) 177 CLR 292; (1992) 109 ALR 385; (1992) 67 ALJR 1; 64 A Crim R 176 is that, in serious criminal trials, an accused has no right to counsel at public expense, but as he is entitled to a fair trial, a trial without representation would, in the absence of exceptional circumstances, be stayed or adjourned until representation was obtained. This is all at the discretion of the trial Judge. This is a very narrow principle.

9. it follows (as a matter of logic) that if there is no "right to counsel" then there is no right to counsel of choice. At Common Law, all these matters are protected by the discretion of the trial Judge and her obligation to ensure a fair trial."^[11]

61. In this case I agree with counsel, the protection relies upon the discretion of the trial Judge. These are serious charges, and accordingly when application was made on behalf of Williams for a grant of legal aid, an application for aid having already been refused, I directed, pursuant to s360A of the *Crimes Act*, that aid would be granted. I further recommended that due to the serious nature of the charges which Williams faced that the Victoria Legal Aid should provide aid for both senior and junior counsel. That was done and initially Mr Heliotis QC and a junior were briefed. Issues arose between Mr Heliotis and Williams and Dr Lyons SC and a junior were briefed and when Dr Lyons realised he was conflicted, Mr Faris QC and Mr Tyrrell were briefed.

62. When Mr Faris appeared for Williams he made it clear that he would be able to do this trial only if it proceeded at the time it was listed as he had a 'window of opportunity' due to the inability of another trial in which he held a long standing brief to proceed. I informed all concerned that the unavailability of particular counsel would not be an appropriate basis for an adjournment when the trial was able to proceed.

63. Williams and his counsel have known since September of 2006 that the date for the trial would, in all likelihood, be February 2007. It was a date chosen by the Court, the crown were given strict timelines for the provision of additional statements with which they had to comply, or they would not be permitted to call certain witnesses in the trial of Williams.

64. The whole purpose of this procedure was to ensure that the trial commenced on time. The court has been dealing with the matter of Williams and his co-offenders for a period in excess of 18 months. There is a co-offender in respect of a further charge upon which Williams has not yet been tried, and that co-offender will have been in custody for a period of three years in February 2007. That trial cannot proceed in place of this trial as the issue of counsel appearing for Williams confronts the same problems that are apparent in this trial.

65. The law recognises that the accused, witnesses, families of the victims and family of the accused need to have matters determined so that there can be a finality to the process of the criminal law. It is appropriate to have witnesses give their evidence whilst it remains a matter they are capable of recalling, the same applies to the accused and any witnesses that he may wish to call. The longer it is before a witness is asked to recall an event the less likely they will be able to recall that event clearly.

66. The Court has always done what it could to attempt to accommodate counsel of choice, as can be seen by the delay granted to counsel for a co-offender of some 4 weeks to allow him to complete medical treatment. The court has however kept control of the listing process and not permitted counsel, including counsel for the crown, to control when a matter should be heard.

67. Here the request is to adjourn the trial *sine die*, at least until July of this year. That would mean that the trial would not be heard for at least 18 months from the original listed date of trial. The crown have been compelled to produce to the defence the statements witnesses at a time when there were legitimate public interest immunity issues involved in a number of those statements. This has been directed by the court to ensure that the trial is able to proceed as expeditiously as possible under the circumstances. Such expedition cannot be totally one sided. In this case Mr Faris has been involved in the preparation of this trial for a period of one month, he has done no other work upon the trial and has indicated that even if the matter in which he is currently briefed that of *R v Selway* were not to proceed in February 2007 he would not be available to conduct this trial on behalf of Williams, as he holds no brief to appear on the trial in February of this year. There does not appear to be any form of guarantee that Mr Faris will in fact be available to conduct the trial on behalf of Williams if the matter is adjourned, but I will make my decision on the basis that he would appear for Williams on the trial if it was adjourned until July of 2007.

68. Finally I have urged Williams to obtain counsel, and have given him opportunities to do so, none of which he has taken. He has expressed the view through his counsel that he will have Mr Faris or no one. That I cannot prevent, no matter how desirable it would be for Williams to be represented. Mr Faris indicated that he prepared the trial in a matter of 4 weeks and from that stage spent no further time preparing the matter. Counsel could have been briefed in December, ready to start this trial in February, but Williams refuses to brief anyone other than Mr Faris to appear on his behalf. These are serious matters and I urge that counsel be briefed – Senior counsel was

available in December of 2006 according to Williams instructing solicitor, but Williams declined to use their services saying that he did not find any of those counsel suitable.

69. I have considered all of those matters together with the desirability of Williams being represented, not only for himself, but in relation to the problems that it will create for the crown and the court in providing the necessary assistance that must be provided to Williams. I have considered the relationship that it is said Mr Faris enjoys with Williams and the confidence that he has in Mr Faris, but on balance, I do not accept that it is in the interests of justice to adjourn this trial for a period of at least six months, on the expectation that Williams may brief Mr Faris to conduct his trial.

70. I wish to add that even if the Charter had been operative, my decision would have been the same. Whilst the Court can and will do all they can to accommodate counsel of choice for accused persons, it cannot be that they are entitled to select a counsel who will not be available for a lengthy period and thereby compel the court to adjourn matters that are capable of being heard. This matter has been the subject of decisions in other countries and I will refer only to one, that of the Canadian decision of *R v McCallen*^[12] a decision of the Ontario Court of Appeal which stated:

"Many of the same factors come into play in decisions whether to adjourn a trial date in order to permit an accused's counsel of choice to be available. The emphasis is on the reasonableness of the delay involved in accommodating the accused's choice; if the counsel of choice is not available within a reasonable time, then the rights of the accused must give way to other considerations and the accused will be required, if he or she chooses to be represented, to retain another counsel who is available within a reasonable period of time; see *R v Lai*; *Barette v R* and *R v Smith*.

46. In determining what is a reasonable period of time, the court will balance many factors including the reason counsel is not available sooner, the previous involvement of the particular counsel in the case, the public interest in having criminal cases disposed of in an expeditious manner, the age and history of the case, the availability of judicial resources and the best use of courtroom facilities, the availability of the complainant the witnesses, the availability and use of Crown counsel and law enforcement officers and the potential impact of the scheduling decision on the rights of an accused under s11(b) of the Charter guaranteeing a trial within a reasonable period of time.

47. There is no formula that can be rigidly applied in balancing these different factors and what is reasonable in one case may not be reasonable in another. Rigid rules defeat the very nature of the discretionary decision that is required. However, guidelines are helpful because they bring a measure of predictability to scheduling decisions that will assist the various participants in the process. It is the trial courts that are in the best position to assess and balance the circumstances and resources that are available in a particular region and to develop guidelines that make the most sense for that region."

71. Accordingly the application for an adjournment of the trial to a date to be fixed is refused.

^[1] *Dietrich v R* [1992] HCA 57; (1992) 177 CLR 292; (1992) 109 ALR 385; (1992) 67 ALJR 1; 64 A Crim R 176.

^[2] s24(1) the *Charter of Human rights and Responsibilities Act* 2006.

^[3] Supreme court Rules, Order 4 and following.

^[4] Explanatory Memorandum to the *Charter of human Rights and Responsibilities Act* 2006.

^[5] Explanatory Memorandum to the *Charter of Human Rights and Responsibilities Act* 2006 page 18 Clause 25.

^[6] see also Explanatory Memorandum to the *Charter of Human Rights and Responsibilities Act* 2006 p3 Clause 4 .

^[7] *R v McCallen* [1999] CanLII 3685 (ON), para 45; [1999] CanLII 3685; (1999) 43 OR 3d 56; 131 CCC (3d) 518.

^[8] *Hansard* Thursday, 4 May 2006 page 1291.

^[9] Explanatory memorandum to the *Charter of Human Rights and Responsibilities Act* 2006 page 8 clause 7 .

^[10] Explanatory memorandum to the *Charter of Human Rights and Responsibilities Act* 2006 page 19 clause 25.

^[11] Submission 10 November 2006 page 5 – paras 8 and 9

^[12] 43 OR (3d) 56; 131 CCC (3d) 518; 1999 CanLII 3685 (ON C.A.) paras 45-47.

APPEARANCES: For the Crown: Mr J Fagenbaum QC with Ms K Judd, Mr G Horgan SC with Mr A Tinney, counsel. Ms A Cannon, Solicitor for Public Prosecutions. For the accused Williams: Mr P Faris QC with Mr S Tyrrell, counsel. Lethbridges, solicitors.