RIGHT TO COUNSEL AT TRIAL

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Several recent decisions have considered the scope of the right to counsel at trial. In the most significant of these cases, *Re Ewing and Kearney and the Queen*,[1] the British Columbia Court of Appeal held by a three to two majority that indigent accused have no right to have counsel appointed for them at trial when charged by way of summary conviction with possession of cannabis. The decision not only expands the discussion of the right to counsel but also is of more general interest in considering judicial attitudes towards the procedural guarantees of section 2 of the Canadian Bill of Rights.

In the *Ewing* case, two eighteen-year-old accused, applied for legal aid after being charged with two counts of possession of cannabis. The application was rejected, apparently on the ground that a conviction was not likely to lead to a jail sentence or loss of livelihood, the eligibility test used at the time of the hearing by the Legal Aid Society in Vancouver with regard to summary offences.[2] Prior to the date set for trial, the accused brought an action in the Supreme Court of British Columbia for a Writ of Prohibition on the ground that the provincial court exceeded its jurisdiction when it set a trial date without appointing counsel. This petition was denied by MacFarlane J.,[3] and the applicants appealed.

The applicants argued that the right to make full answer and defence, provided by sections 577(3) and 737(1) of the Criminal Code,[4] would be violated if they were forced to represent themselves at trial. It was also alleged that forced self-representation would be contrary to sections 1(a), 1(b), 2(c) (ii) and 2(e) of

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[1] [1974] 5 W.W.R. 232.

[2] *Ibid.*, at p. 238. It has been announced that legal aid will be extended to cover all offences under the Criminal Code, R.S.C., 1970, c. C-34, the Narcotics Control Act, R.S.C., 1970, c. N-1, and the Food and Drug Act, R.S.C., 1970, c. F-27. Vancouver Sun, Sept. 19th, 1974, p. 8, col. 1.

[3] *Re Ewing and Kearney and The Queen* (1973), 15 C.C.C. (2d) 107.

[4] *Supra*, footnote 2.

the Canadian Bill of Rights.[5] Finally, it was argued that the court had inherent power at common law to appoint counsel in such circumstances.

In the decision below,[6] MacFarlane J. conceded that an accused must be given the opportunity to obtain legal assistance and that a restriction of that opportunity would constitute a denial of natural justice. However, he held that sections 737 and 537 of the Criminal Code contemplated that an accused may defend himself, and did not provide for the appointment of counsel. He cited section 611, which provides for the court appointment of counsel in connection with appeal proceedings, and noted the absence of a similar provision with respect to trials. Discussing the Bill of Rights, he held that the right to retain and instruct counsel, provided by section 2(c) (ii), applies to the period of arrest or detention and not to the trial stage. The guarantee in section 2(e) of a fair hearing in accordance with the principles of fundamental justice was held not to include the right to appointment of counsel in all cases.

On appeal, Seaton J. A. rejected the contention that there is a common law right to counsel for the reasons stated by Mr. Justice MacFarlane.[7] This portion of the decision is anomalous since MacFarlane J. did not explicitly discuss the question of a common law right. Mr. Justice Seaton also agreed that the Criminal Code did not provide for the appointment of counsel. He rejected the argument for the application of section 2(e) (ii) of the Bill of Rights, citing an earlier decision of the British Columbia Court of Appeal[8] which had followed a decision of the Manitoba Court of Appeal.[9] Discussing the general applicability of the Bill of Rights, he cited the statement in *The Queen* v. *Burnshine*[10] that it merely declared existing rights and did not create new ones. He said that the United States Bill of Rights has been interpreted in cases[11] as requiring the appointment of counsel only where imprisonment is to be anticipated, a test very similar to that which had been applied by the Legal Aid Society in Vancouver. The suggestion [12] that an unrepresented accused could be put on trial without a proper charge and convicted on the basis of irrelevant

[5] R.S.C., 1970, App. III.

[6] *Supra,* footnote 3.

[7] *Supra,* footnote 1, at p. 238.

[8] *Re Vinarao* (1968), 66 D.L.R. (2d) 736 (B.C.C.A.).

[9] *R.* v. *Piper* (1965), 51 D.L.R. (2d) 534 (Man. C.A.).

[10] (1974), 44 D.L.R. (3d) 584 (S.C.C.).

[11] *Powell* v. *Alabama* (1932), 287 U.S. 45; *Gideon* v. *Wainright* (1963), 372 U.S. 335; *Argersinger* v. *Hamlin* (1972), 407 U.S. 25.

[12] Taken from a quotation in *Powell* v. *Alabama, ibid.,* at p. 69.

and inadmissable evidence was said to have "no application to a trial in this jurisdiction today".[13]

In the final portion of his judgment, Mr. Justice Seaton asserted that trial judges have a duty to ensure a fair trial and might be obliged to suspend proceedings until counsel appeared if the circumstances of the case made it impossible for an accused to adequately defend himself. This *obiter* dictum goes farther than any previous Canadian decision in providing for the right to appointed counsel. However, he rejected the idea that counsel should be appointed for all indigent accused and found nothing to suggest that the case before the court involved special circumstances which would justify the appointment of counsel.[14]

Mr. Justice Taggart concurred with the judgment of Mr. Justice Seaton except that he felt it unnecessary to decide whether a trial should be suspended in the "highly unlikely" event that the Legal Aid Society did not appoint counsel after the trial judge had advised that legal assistance was warranted.

Mr. Justice MacLean adopted the judgment of Mr. Justice MacFarlane below, adding that the application was premature and that no authority had been cited requiring the appointment of counsel.

Chief Justice Farris, with Mr. Justice Branca concurring, dissented in a strongly worded judgment. He characterized the case as follows:[15]

> The issue to be determined is: can these two young people be assured of a fair trial when they have to defend themselves without the assistance of counsel? In my opinion, to ask the question is to answer it, and the answer is an emphatic No.

He then argued that representation by counsel was essential in our adversary system of criminal justice with its complicated rules of procedure and evidence. He said that an adequate defence requires not only a knowledge of legal issues but competence in the art of advocacy and the marshalling of facts. The belief that a fair trial of the accused could be assured in the absence of counsel was characterized as "unrealistic in the extreme".[16] The Chief Justice expressly refused to base his judgment on the provisions of either the Criminal Code or the Canadian Bill of Rights and instead relied on the inherent right to a fair trial.

Both Mr. Justice MacLean and Chief Justice Farris were correct when they stated respectively that no prior decision either

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[13] *Re Ewing and Kearney, supra,* footnote 1, at p. 239.
[14] *Ibid.,* at p. 242.
[15] *Ibid.,* at p. 233.
[16] *Ibid.,* at p. 234.

required or prohibited the result sought by the applicants. They did not disagree on policy grounds, for Mr. Justice MacLean said: "Without doubt it would be desirable that all persons should be represented by Counsel. . . ."[17] However, he placed considerable importance on the fact that ". . . no decision has been cited to us by a court whose decision is binding upon us . . ." which would require a judgment for the applicants.[17a] The Chief Justice, on the other hand, noted: "We have not been referred to any authority binding on this court that precludes us from granting a writ of prohibition in the circumstances of this case."[17b] He seems to view binding authority as a check upon the inherent power of the court to extend a judicial remedy to new circumstances.

The primary advantage of the cumbersome machinery of the common law is its capacity for growth. This benefit is lost if courts are afraid to grant relief in the absence of a binding decision directly in point. The doctrine of precedent does not require such a limitation, and I believe that prior cases, although not determinative, provided at least as much support for the dissenting justices as for the majority. It is true that no Canadian court has required the appointment of counsel for an indigent accused, but, in addition to many dicta concerning the importance of proper representations, judges have used reasoning which supports that result.

In *R.* v. *Johnson*,[18] the British Columbia Court of Appeal considered the problems of an accused who dismissed his counsel on the morning set for trial because of serious differences of opinion. The accused said he was attempting to arrange for other counsel to appear, but the trial judge refused to grant an adjournment to permit him to do so. He was convicted of two counts of attempting to break and enter and sentenced to seven years imprisonment. Bull J. A. (Taggart J. A. concurring) held that the refusal of the adjournment in those circumstances constituted a denial of natural justice and adversely affected the accused's right to make a full answer and defence. Nemetz J. A. (now C.J.S.C.) concurred in a separate judgment.

Re Regina and Dow,[19] involved an application for a writ to prohibit the continuation of a preliminary inquiry after the accused's counsel became ill and could not attend. The trial judge had refused an adjournment on the ground that the Crown was merely attempting that day to prove the commission of the offence, not the identity of the accused, and cross-examination would be of

[17] *Ibid.*, at p. 236.
[17a] *Ibid.*
[17b] *Ibid.*, at p. 234.
[18] (1973), 11 C.C.C. (2d) 101 (B.C.C.A.).
[19] (1972), 8 C.C.C. (2d) 307 (B.C.S.C.).

little value. Mr. Justice Aikins held that the right to make full answer and defence included the right to have counsel decide according to his judgment whether cross-examination was warranted. The refusal of an adjournment was held to violate the right to make a full answer and defence and the right to what was variously termed "natural justice"[20] or "a fundamental principle of justice".[21]

A similar result was reached by the Alberta Supreme Court in *Re Gilberg and The Queen*.[22] A writ was granted prohibiting the continuation of a trial after the Crown had questioned witnesses in the absence of defence counsel. Again, the failure of the trial judge to grant an adjournment was held to be a denial of natural justice and a violation of the right to make a full answer and defence which was said to be guaranteed not only by the Criminal Code but by the common law. The court also held that section 2(c) (ii) of the Canadian Bill of Rights gave the accused the right to appear by counsel.

In *Re Bachinsky and Sawyer*,[23] the Alberta Supreme Court considered an application for a writ to prohibit disciplinary proceedings under the Alberta Police Act after the hearing officer excluded counsel retained by the accused policemen. The Police Act provides that the procedure at such hearings shall be the same as that prescribed for trials under the Criminal Code. The court found that the matter was serious and might affect the petitioners' reputations and livelihood. It was said that there is not yet an absolute right to retain counsel to act in quasi-judicial proceedings. However, after examining the relevant rules of procedure and the other circumstances of the case, the court held that the exclusion of counsel would constitute a denial of natural justice.

Other decisions have reached similar results without relying on the principle of natural justice or the right to make full answer and defence. In *R.* v. *Pickett*[24] the Ontario Court of Appeal ordered a new trial after the trial judge had refused an adjournment when counsel was unavoidably engaged in another court. In *R.* v. *Talbot*,[25] defence counsel withdrew at the beginning of the trial because he had not adequate time to prepare, and the accused's requests during the trial for counsel were denied. The court stated that Canadian courts had not yet gone as far as to hold that lack of representation means *per se* that the accused has been denied

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[20] *Ibid.*, at p. 310.
[21] *Ibid.*, at p. 312.
[22] (1974), 15 C.C.C. (2d) 125 (Alta S.C.).
[23] (1974), 43 D.L.R. (3d) 96 (Alta S.C.).
[24] (1972), 5 C.C.C. (2d) 371 (Ont. C.A.).
[25] [1966] 3 C.C.C. 28 (Que. C.A.).

the right to make full answer and defence. It held, however, that if the charge was serious enough to warrant imprisonment of six months "it was serious enough to warrant that he be allowed the opportunity of being defended by a lawyer if he so wished".[26] Mention might also be made of *R.* v. *Gray*[27] which dealt with the question of the right to counsel before trial but contained *obiter* dicta that the accused has a common law right to the assistance of counsel at trial.[28] Finally, in *R.* v. *Hawke,*[29] the court appointed counsel to represent a Crown witness who had accompanied the accused at the time of the offence. The court stated that neither trial judges nor counsel for the litigants can always adequately protect the rights of a witness and that to provide such protection "it would seem that as a minimum he should have counsel to advise him (which is his right) . . .".[30] The court also relied upon section 2(d) of the Canadian Bill of Rights.[31]

The *Johnson, Dow* and *Gilberg* decisions did not state simply that an accused has a right to speak through counsel who has been retained. The courts relied upon the further ground that the absence of counsel jeopardized the accused's right to make full answer and defence. It was the consequence of the absence of counsel which most concerned the courts. This reasoning necessarily implies a finding that, at least in the circumstances of those cases, the accused could not be considered capable of adequately representing themselves. The reasoning would be equally applicable to cases in which an indigent accused requests the appointment of counsel. The ability of an accused to conduct a defence is unrelated to the cause of the absence of counsel. Indigent accused obviously are no more capable than others of making a full answer and defence. Of course, the reasoning would allow for

[26] *Ibid.*, at p. 31.

[27] (1962), 132 C.C.C. 337 (B.C.Co.Ct).

[28] It has been held in several cases that the denial of the right to consult with counsel while in detention does not constitute a denial of the right to make full answer and defence (See *e.g. O'Connor* v. *The Queen,* [1966] S.C.R. 619), or the right to a fair hearing (see *e.g. R.* v. *Steeves* (1964), 42 D.L.R. (2d) 335 (N.S.S.C.)). Clearly, these cases are distinguishable from the question of the right to counsel at the hearing stage. With regard to pre-trial consultation, one must at least consider the balance of interests as between effective law enforcement and the rights of an arrested person. See B. Donnelly, Right to Counsel (1968-69), 11 Crim. L.Q. 18, at p. 19. With regard to representation at the hearing stage the benefits of representation are not offset by any detriments to the legal system, although the cost of counsel must, of course, be considered. These cases did not discuss the right to appointment of counsel since the arrested persons apparently could afford counsel.

[29] (1974), 3 O.R. (2d) 210 (Ont. H.C.).

[30] *Ibid.*, at p. 230.

[31] *Supra,* footnote 5.

distinctions based upon the complexity of the issues involved in a particular case,[32] but it does not support a broader distinction between cases in which retained counsel cannot appear and those in which the accused cannot retain counsel.

Mr. Justice MacLean argued that earlier cases could be distinguished by the fact that the accused had been unfairly treated in some manner, for instance unjustly denied adjournments, whereas there was no indication of such unfairness in the *Ewing* case.[33] Seaton J. A. made a similar point; he distinguished the cases recognizing the right to retain counsel by saying that "what the appellants here seek is a very significant additional step, that is, the right to have counsel provided".[34] A distinction on these grounds is open to question.

Counsel was not affirmatively excluded from the courtroom or kept apart from the accused in any of the cases which have been cited, with the exception of the *Bachinsky* case, nor did any of the decisions state or imply that the events demonstrated bias on the part of the trial judge. The unfairness in the *Johnson*, *Gilberg* and *Dow* decisions consisted merely of proceeding with the trial at a time when, for various reasons extrinsic to the proceedings, the accused could not secure the presence of counsel. If this description is fair, the reasoning of the cited decisions would also apply to the *Ewing* case.[35]

A similar argument can be made in terms of the principles of natural justice. Those principles have been formulated to ensure a fair hearing, not to measure the culpability of the person conducting the hearing. It is the fairness, not the cause or motive of the alleged unfairness, which matters. Thus, it has been said as a matter of common law that a court must see that evidence is

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[32] The point is discussed *infra.*

[33] *Supra,* footnote 1, at pp. 236-237. Justice Seaton does not discuss these cases.

[34] *Ibid.*, at p. 238.

[35] The applicants sought a writ prohibiting the trial judge from proceeding with the trial "until counsel is appointed for each of the appellants". (Appellant's factum, as quoted in the judgment of Mr. Justice MacLean, *ibid.*, at p. 236). It might be argued that this wording requires affirmative assistance of the trial judge rather than a mere adjournment, and that this factor justifies the distinction made by Mr. Justice MacLean. However, it should be noted that the motion was one of prohibition to prevent the trial from proceeding rather than mandamus to appoint counsel, and the quoted wording need not be read as requiring that counsel be appointed *by the trial judge.* In any event, the majority judgments appear to be based upon broader grounds.

translated for an accused who does not speak English.[36] The fact that the court might have to provide such facilities apparently was considered of little importance.[37] In *Dennis* v. *Minister of Rehabilitation and Social Improvement*,[38] it was held that the indigent plaintiffs were not required to pay certain fees to the Crown in order to commence a civil action. The court cited a 1494 statute of Henry VII[39] which was said to provide not only for a waiver of the normal fees but for free counsel and clerical assistance for indigents. The court cited authority[40] stating that the statute was in affirmation of the common law.

I believe that the principles of natural justice impose an affirmative duty on the tribunal to ensure fairness. Those principles are violated not only when a judge acts unfairly, but when he acquiesces in unfairness from extrinsic sources, whatever the cause. If that conclusion is sound, the finding in the *Johnson, Gilberg* and *Dow* decisions[41] that the unavailability of counsel violated the principles of natural justice, would also apply to the *Ewing* case.[42]

Other than the cases concerning the Canadian Bill of Rights, which will be discussed below, the majority in *Ewing* relied primarily on the case of *Vescio* v. *The King*.[43] In the *Vescio* case, the accused had been represented at trial by counsel appointed by the court. He argued on appeal that the court should have granted an adjournment until the next term so that he could be represented by counsel of his choice. The court held that the accused had impliedly consented to be represented by the appointed counsel and that the right to make full answer and defence had not been violated. Speaking for

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[36] *Rex* v. *Lee Kun*, [1916] 1 K.B. 337, at p. 342 (C.C.A.); *cf. Re Fuld's Estate (No. 2)*, [1965] 1 W.L.R. 1336 (P.); *R.* v. *Merthyr Tydfil J.J. ex p. Jenkins*, [1967] 2 Q.B. 21.

[37] See *R.* v. *Romanick*, [1959] 2 Crim. L. Q. 471 (Ont.Co.Ct), which refused to apply a Criminal Code provision allowing testimony at a preliminary hearing to be admitted at trial when, through no fault of the crown or the court, the witness had left the country permanently and was unavailable for cross-examination. The decision refers to "a fundamental principle of our jurisprudence". *Cf. R.* v. *Waucash* (1966), 1 C.R.N.S. 262 (Ont. S.C.).

[38] August 31st, 1972, not yet reported (B.C.S.C.).

[39] 2 Henry VII, c. 12.

[40] Wharton Law Lexicon (14th ed., 1938), p. 511; Annual Practice (1953), p. 270.

[41] *Supra*, footnotes 18, 22 and 19, respectively.

[42] Also, as noted earlier, the trial judges in the *Johnson* and *Dow* cases, *ibid.*, did not affirmatively exclude counsel. Their error was in conducting the hearing when counsel could not appear. Even if the principles of natural justice apply only to misfeasance, those decisions are not clearly distinguishable from the *Ewing* case.

[43] [1949] S.C.R. 139.

three of the seven justices, Mr. Justice Rand stated that a trial judge had no authority to appoint counsel for an accused without his consent. In this context he made the statement cited by Seaton J. A. in *Ewing* that there is no statutory rule that defence by counsel is a necessary part of the machinery of trial.[44] However, earlier in the same paragraph, Mr. Justice Rand stated:[45]

> 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.

Rand J. does not negate a right to appointed counsel, nor does he imply that most accused can adequately represent themselves. He merely asserts that the desire to see that all accused are adequately represented is sometimes superseded by what the majority judgment describes as "the paramount right of the accused to make his own case to the jury *if he so wishes.*"[46] The right of self-representation can co-exist with the right to appointed counsel just as does the right to remain silent with the right to testify.[47]

No other decision has been found which provides substantial support for the result reached in *Ewing*. The decisions cited by Mr. Justice MacFarlane are distinguishable.[48] *R.* v. *Darlyn*[49]

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[44] *Ibid.*, at p. 147, quoted in judgment of Seaton J. A., *supra*, footnote 1, at p. 240.

[45] *Ibid.*, at p. 147, quoted in judgment of Seaton J. A., *ibid.*

[46] *Vescio* v. *The King*, *ibid.*, at p. 142, emphasis added. Although United States courts have been vigorous in enforcing the right to the assistance of counsel, it appears there is also a constitutional right in the United States to self-representation. See S. A. Brick, Self-Representation in Criminal Trials: The Dilemma of the Pro Se Defendent, (1971), 59 Cal. L. Rev. 1479.

[47] Canada Evidence Act, R.S.C., 1970, c. E-10, s. 4 (1), which makes an accused a competent but not compellable witness. *Spataro* v. *The Queen* (1972), 26 D.L.R. (3d) 625 (S.C.C.), involved facts quite similar to those discussed in the *Vescio* decision and can also be distinguished upon the ground that the accused was represented by counsel and had, by his conduct, agreed to the choice of counsel.

[48] In addition to the cases which follow, Mr. Justice MacFarlane cited *R.* v. *Institutional Head of Beaver Creek Correctional Camp* (1969), 2 D.L.R. (3d) 545 (Ont. C.A.). A passage was quoted which described the principles of natural justice without mentioning the right to counsel. However, the case concerned the amenability of the institutional head to certiorari when acting in his disciplinary capacity, and the petitioner raised no issue concerning a right to counsel. The judgment does not purport to comprehensively define the term natural justice. It does not, for example,

(For footnote 49, see next page)

held that a trial judge should take special care to protect an unrepresented accused, but the court did not discuss a possible right to be represented.[50] As noted earlier, *R.* v. *Talbot* stated that the courts had not held "as yet" that the right to make full answer and defence was violated whenever an accused could not obtain counsel, but it held that the trial judge should have granted the request to be represented in the circumstances of that case.[51] Indeed, some portions of the judgment suggest that there was a right to have counsel appointed.[52]

The strongest support for the majority result in *Ewing* is found in *R.* v. *Piper*,[53] in which the accused appealed to the Manitoba Court of Appeal after pleading guilty to unlawful escape. He had made no request for counsel at the hearing but argued that the judge should have advised him of his right to counsel. The appeal was dismissed. However, the court did not consider the provisions of the Criminal Code concerning the right to make full answer and defence; the judgment primarily concerned section 2(c)(ii) of the Canadian Bill of Rights.[54] Since the accused had not requested counsel, the issue was whether he should have been advised that he had a right to counsel.

By condoning the failure to advise the accused of his right to counsel, the court did not negative the existence of such a right. The right to remain silent during police questioning is well recognized, but it has been held that an arrested person

refer to the right to confront or cross-examine witnesses. It should also be noted that the principles of natural justice may vary with the type of hearing. S.A. de Smith, Judicial Review of Administrative Action (3d ed., 1973), p. 141. Thus, cases excluding counsel at certain types of proceedings before administrative bodies cannot be taken as authority that the principles of natural justice permit such exclusion at a criminal trial.

[49] [1947] 3 D.L.R. 480 (B.C.C.A.), cited in *Re Ewing and Kearney* v. *The Queen*, *supra*, footnote 3, at p. 111.

[50] Chief Justice Farris is clearly correct in stating, *supra*, footnote 1, at p. 234, that the assistance of the trial judge cannot adequately substitute for representation by counsel. Such assistance is severely limited by the judge's competing duty of impartiality.

[51] *Supra*, footnote 25, cited in *Re Ewing and Kearney* v. *The Queen*, *supra*, footnote 3, at p. 111.

[52] The court noted (*R.* v. *Talbot*, *ibid.*, at p. 30) that "The request of the accused that he be defended by a lawyer was refused on the ground that the offence he was charged with was not serious enough to warrant the designation by the court of a lawyer to represent him . . .". The later statement (at p. 31) that the accused should have been "allowed the opportunity of being defended by a lawyer if he so wished", can thus be seen as a finding that a lawyer should have been appointed to represent him.

[53] *Supra*, footnote 9.

[54] The portions of the judgment dealing with the Bill of Rights will be discussed, *infra*.

need not be advised of that right.[55] Similarly, it was stated in *R.* v. *Deleo and Commisso*[56] that the police have no duty to advise an accused of his right to contact counsel although the court recognized that such a right exists.[57] These cases can be criticized as providing inadequate protection to persons ignorant of their rights. However, to interpret them as denying that the rights exist is to let the tail wag the dog.

Mr. Justice Seaton notes that sections 577 and 737 have been in the Criminal Code for many years and have not been interpreted as requiring the appointment of counsel.[58] Also, appellate courts often uphold convictions without reference to the fact that the accused was unrepresented at trial. Such *sub silentio* authority is not strong. In addition to the sound principle that courts should not be deemed to have decided issues which were not raised, one could also note the absence in those many years of any decision holding that an accused does not have the right to appointed counsel. Furthermore, assuming there is a right to the assistance of counsel, that right can be waived like any other right. There is no reason to assume that such a waiver must be express, especially in view of the alternative right of self-representation. Moreover, the significance of the silent jurisprudence before 1960 should at least be reconsidered in the light of the Canadian Bill of Rights.

I again emphasize that the result in the *Ewing* case is not contrary to the ratio of earlier cases. I believe, however, that such judicial authority as existed provided as much support for appellants as for respondents.

The strongest defence of the result in *Ewing* is the argument that the Criminal Code does not require appointment of counsel in trials of summary offences involving relatively minor penalties. As has been noted, Seaton J. A. stated that a fair trial might require the assistance of counsel in some circumstances, leaving open the possibility that there is a right to appointed counsel in trials of more serious offences. Since the two dissenting justices

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[55] *R.* v. *Fitton*, [1956] S.C.R. 958.

[56] (1972) 8 C.C.C. (2d) 264 (Ont. Co. Ct).

[57] *R.* v. *Piper, supra,* footnote 9, was followed by the B.C. Court of Appel in *Re Vinarao, supra,* footnote 8, in which the court refused to quash a deportation order because the special inquiry officer had failed to advise the appellant of the right to be represented by a practising lawyer. The appellant had, in fact, been represented by a layman of her choice and, of course, the provisions of the Criminal Code did not apply. Thus, the decision is of no aid to the interpretation of the right to make full answer and defence, although it is of relevance to the interpretation of section 2(c) (ii) of the Bill of Rights, discussed *infra.*

[58] *Re Ewing and Kearney, supra,* footnote 2, at p. 240.

found a right to appointed counsel in all cases, Mr. Justice Seaton's *obiter*, so far as it goes, can be said to reflect the view of a majority of the court. The recognition of a right, in some cases, to appointed counsel is justified in terms of policy considerations and prior decisions.[59] The question is whether Mr. Justice Seaton's limitation of the right is justified.

Two arguments can be made for limiting the right to appointed counsel to the more serious offences. The first asserts that minor offences usually involve simple issues which can adequately be presented and argued by the average accused. The second argument is that the potential detriment to accused persons in representing themselves in minor offences is so small that the cost of providing counsel is not justified.

If the right 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. It would be better if the courts considered the legal issues which commonly arise in connection with particular offences and determined the ability of the average accused to present such issues. Even this procedure would not take account of complicated evidentiary issues which can arise unexpectedly in a trial for any offence.[60]

Mr. Justice Seaton suggests that the court can make such an evaluation on a case by case basis during the trial. This suggestion would cause practical difficulties, for the trial would have to be recommenced after counsel was appointed or at least adjourned until counsel had time to prepare. The cost of such disruptions should be considered in relation to the cost of the initial appointment of counsel in all criminal cases or in all cases involving particular offences. More importantly, it would often be impossible for the trial judge to determine the potential complexity of the case on the basis of the presentation at trial. Out of ignorance, the unrepresented accused may never refer to facts which would give rise to a complex defence. A trial judge would be even more ignorant of the potential complexity of the case if an unrepresented accused offered to plead guilty.[61] Also, the case by case approach would almost certainly lead

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[59] See *Vescio* v. *The King*, *supra*, footnote 43.

[60] I believe most lawyers would agree that a charge of possession of marijuana often gives rise to issues beyond the competency of the average layman.

[61] Brian Donnelly suggests that section 2(e) of the Bill of Rights requires the assistance of counsel prior to trial to ensure that the case is not

to inconsistencies when applied by different judges attempting the difficult task of putting themselves in the position of laymen. Indeed, it would not be surprising if the issue of the right to counsel itself became too complex to be adequately argued by the average accused.

Turning to the second argument based on the cost of providing counsel, it is not easy to justify this criterion in terms of the wording of the Criminal Code and the Bill of Rights. Fundamental rights should not be limited by a price ceiling. If, however, this test is to be used, the measure should be whether one would advise a person with funds to retain counsel for the trial. I believe that such advice would be given whenever a conviction would involve moral stigma or a risk to the accused's livelihood even though the most likely penalty were a fine.[62] Using that measure, a court would almost certainly find a right to appointed counsel with respect to a summary charge of possession of cannabis.[63]

Seaton J. A. cites the United States decision of *Argersinger* v. *Hamlin*[64] for the proposition that legal assistance must be provided only when imprisonment is to be anticipated, adding that this test is similar to that which was used in granting legal aid in Vancouver. This summary of *Argersinger* is somewhat misleading. The court held that "absent a knowing and intelligent waiver, no person may be imprisoned for any offence . . . unless he was represented by counsel at his trial".[65] In other words, the failure to provide counsel precludes a sentence of imprisonment entirely.[66] Also. the court specifically left open

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lost at that stage, *op. cit.*, footnote 28, at p. 40. It has also been suggested that an accused is almost never able to make full answer and defence without counsel. G. E. Kaiser, Legal Assistance in Canada (1969), 3 Queens Intramural L. J. 65, at p. 69.

[62] A similar test has been proposed by J. M. Junker, The Right to Counsel in Misdemeanor Cases (1968), 43 Wash. L. Rev. 685, at p. 710. Professor Junker agrees that such a test draws the line at about the point at which an accused with funds would choose to retain counsel, thus providing *de facto* equality before the law. (At p. 713).

[63] While attitudes toward this crime have been changing, I believe that a substantial portion of the population would still view it as involving moral stigma. See also, *Re Bachinsky and Sawyer*, *supra*, footnote 23, which held that two policemen had the right to be represented by retained counsel at a quasi-judicial hearing when the maximum penalty was dismissal. The court relied in part on the fact that the charges "may affect their reputations and livelihoods". (At p. 102).

[64] *Supra*, footnote 11, cited in *Re Ewing and Kearney*, *supra*, footnote 1, at p. 240.

[65] *Ibid.*, at p. 37.

[66] See the concurring judgment of Burger C. J., *ibid.*, at p. 42.

the applicability of the right to counsel when there is no prospect of imprisonment.[67] Several American states provide counsel for most offences other than traffic violations.[68]

Since the judgment in the *Ewing* case was delivered, it has been announced that the legal aid programme in British Columbia will be expanded to cover all accused charged with offences under the Criminal Code, the Food and Drug Act and the Narcotic Control Act.[69] Therefore, legal aid will be available in British Columbia to accused charged with possession of cannabis. However, in areas of the country in which the eligibility test for legal aid is more stringent, the *Ewing* decision will remain of practical significance. Its importance will depend upon the willingness of judges to find special circumstances justifying the assistance of counsel. The decision could lead to a gradual expansion of the judicially declared right to counsel until it covered all but the simplest and most trivial cases. Even when the charge is possession of cannabis as in *Ewing*, counsel might be appointed on the basis of Seaton J. A.'s *obiter*; the actual result in *Ewing* could be explained by the fact that no attempt had been made to identify the factors which required counsel. On the other hand, the *obiter* may be ignored or applied only in the most extreme circumstances, especially since it now seems unlikely that the British Columbia Court of Appeal will itself again face the issue.

Considering the lack of binding authority, the provisions of the Canadian Bill of Rights were potentially of considerable importance in the *Ewing* case. Four provisions of the Bill of Rights were arguably relevant: sections 1(a), 1(b), 2(c)(ii), and 2(e).[70] It does not seem to have been seriously argued

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[67] *Ibid.*, at p. 37.

[68] Junker, *op. cit.*, footnote 62, at pp. 732-734.

[69] Vancouver Sun, *op. cit.*, footnote 2.

[70] *Supra*, footnote 5: "1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

(a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;

(b) the right of the individual to equality before the law and protection of the law; . . .

2. Every law of Canada shall . . . be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to . . . .

(c) deprive a person who has been arrested or detained . . .

(ii) of the right to retain and instruct counsel without delay . .;

(e) deprive a person of the right to a fair hearing in accordance with

that any law of Canada should be declared inoperative. Instead, the appellants submitted that the Bill of Rights should be used as an aid in interpreting the relevant provisions of the Criminal Code.[71]

Section 1(a) was not discussed in the *Ewing* decision. Chief Justice Laskin has said that it adds little if anything to the fair hearing guarantees of section 2.[72] Although section 1(a) may provide additional protection in other areas, section 2 is the more obvious source from which to derive a right to counsel. Section 1(a) merely reiterates the same policies in vaguer terms.

Section 1(b) raises more difficult issues. As compared with an accused who is represented by counsel, an unrepresented accused is unequal before the law in a very literal sense. The question is whether any law of Canada is the cause of this inequality. It can be argued that the law provides equality since it gives all accused equal opportunity to attempt to retain counsel. On the other hand, a strong argument can be made that the law compels indigent accused to undergo trial without the protection of safeguards available to more fortunate accused persons.

In practice most laws have different effects on different individuals, and section 1(b) clearly was not intended to abrogate all such laws. It would seem that section 1(b) is violated only when it can be determined prior to the application of a law that it will operate more harshly on an ascertainable group. It is not enough that the law happens to apply more harshly to some individuals who have nothing in common except that the

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the principles of fundamental justice for the determination of his rights and obligations."

[71] The Supreme Court of Canada has not explicitly decided whether a statutory provision can be declared inoperative in some circumstances while remaining effective in others. However, section 2 of the Bill of Rights provides that "no law of Canada shall be construed *or applied*" [emphasis added] so as to deprive a person of the rights which are named. This wording would seem to allow the court to refuse to apply a statute in a particular case without declaring it inoperative for all purposes. It might, for example, declare that a substantive provision of the Criminal Code or Narcotic Control Act should not be applied so as to convict an accused who had been denied a fair hearing. The section would be operative if a fair hearing had been granted. However, courts have been more willing to use the Bill of Rights as an aid to interpretation than as a ground for refusing to apply a statute. (Compare *Brownridge* v. *The Queen*, [1972] S.C.R. 926, with *Curr* v. *The Queen*, [1972] S.C.R. 889). Where, as in the *Ewing* case, a statute exists which can reasonably be interpreted as providing the relief sought, a litigant would seem to have little to gain by arguing that the court should refuse to apply a statutory provision or that it should be declared inoperative.

[72] *Curr* v. *The Queen*, *ibid.*, at p. 898.

law in question was applied to their detriment.[73] The difficulty is in deciding what constitutes an ascertainable group and, in particular, whether "poor accused persons" (or "poor persons") constitute such a group. There is no clear answer.[74]

Considering the difficulties raised by section 1(b), it is understandable that the court and litigants in *Ewing* gave primary attention to the more explicit provisions of section 2. Nevertheless, the reason given by Seaton J. A. for refusing to apply section 1(b) is troublesome. The matter is of considerable importance because the reasoning has the potential to vitiate all provisions of the Bill of Rights.

Mr. Justice Seaton relied upon a statement by Mr. Justice Martland in *The Queen* v. *Burnshine*:[75]

> Section 1 of the Bill declared that six defined human rights and freedoms "have existed" and that they should "continue to exist". All of them had existed and were protected under the common law. The Bill did not purport to define new rights and freedoms. What it did was to declare their existence in a statute, and, further, by s. 2, to protect them from infringement by any federal statute.

Chief Justice Farris cited a similar passage referring to section 2 in refusing to base his dissent upon the Bill of Rights.[76]

The *Burnshine* decision, together with the recent decision in *Attorney General of Canada* v. *Lavell*,[77] have demonstrated the reluctance of the Supreme Court of Canada to give expansive effect to the Bill of Rights, or at least to section 1(b). However, both of those decisions took pains to distinguish and thus preserve the earlier *Drybones* decision.[78] After *Lavell* and *Burnshine*, a cautious attitude on the part of the lower courts is to be expected. But until the *Drybones* decision is overturned, there is an obligation to determine the area in which that decision is still binding authority.

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[73] See J. C. Smith, *Regina* v. *Drybones* and Equality Before the Law (1971), 49 Can. Bar. Rev. 163. However, criteria other than those proposed in the article might be used for determining what constitutes an ascertainable group. *Cf. R.* v. *Natrall* (1972), 9 C.C.C. (2d) 390 (B.C.C.A.).

[74] See Junker, *op. cit.*, footnote 62, at pp. 693-695 who argues that the right to counsel in the United States could be derived from the equal protection clause of the United States Constitution.

[75] *Supra*, footnote 10, judgment of Martland J., at p. 590, quoted in *Re Ewing and Kearney*, *supra*, footnote 1, judgment of Seaton J. A., at p. 241.

[76] "Section 2 did not create new rights. Its purpose was to prevent the infringement of existing rights". *The Queen* v. *Burnshine*, *ibid.*, judgment of Martland J., at p. 592, quoted in *Re Ewing and Kearney*, *ibid.*, judgment of Farris C. J., at p. 235, and Seaton J. A., at p. 241.

[77] (1973), 38 D.L.R. (3d) 481 (S.C.C.).

[78] *R.* v. *Drybones*, [1970] S.C.R. 282.

If the passage quoted from *Burnshine* is read too broadly, it is in direct conflict with the *Drybones* decision. Immediately prior to the enactment of the Bill of Rights, section 94 of the Indian Act set out an offence applicable only to Indians, yet that section was held in *Drybones* to violate the existing right to equality before the law. Thus, the statement in section 1 of the Bill of Rights that the declared rights "have existed" cannot be taken as approval of the exact state of the law as of 1960. As long as *Drybones* remains good law, we cannot assume that the rights are defined by the state of the law at the time of passage of the Bill of Rights.

It is perfectly sensible to find that a right exists even though it is sometimes violated. It exists in the sense that it is generally recognized as a basic part of our governmental system. In this sense, all of the rights and freedoms stated in the Bill of Rights pre-existed that document even though they were sometimes violated either by statute or by acts of public officials. Thus, it can be said that the right to freedom of speech has always existed in Canada despite occasional statutes such as the Alberta Social Credit Act[79] and the Quebec "Padlock Act"[80] which have been said to violate that right. It seems even less reasonable to conclude that a right did not exist because it could not effectively be enforced.[81] Surely the purpose of the Bill of Rights was to make the existing rights more enforceable. Therefore, it is submitted that the Bill of Rights can be used as an aid in interpreting the right stated in the Criminal Code to make full answer and defence, which pre-existed the Bill of Rights, without any conflict with the *Burnshine* decision.[82]

Assuming that section 2 of the Bill of Rights is still of some effect, the various subsections must be examined.

Section 2(c)(ii) provides that no law of Canada shall "deprive a person who has been arrested or detained... of the right to retain and instruct counsel without delay".[83] Seaton J. A. in *Ewing* refused to apply that provision "for the reasons given in *Regina* v. *Piper* (1964), 51 D.L.R.(2d) 534, [Man. C.A.] a decision followed by this court in *Re Vinarao* (1968), 66 D.L.R.

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[79] See *Reference Re Alberta Statutes*, [1938] S.C.R. 100.

[80] See *Switzman* v. *Elbling and A. G. Quebec*, [1957] S.C.R. 285.

[81] *Cf. R.* v. *Steeves*, *supra*, footnote 28.

[82] It is perhaps unfortunate that during the 1960's the United States Supreme Court was in the midst of an activist phase just when Canadian courts were dealing for the first time with the Bill of Rights. The present timidity of the Supreme Court of Canada may reflect an overreaction to the activism of the Warren court.

[83] *Supra*, footnote 5.

(2d) 736".[84] *Piper* was an appeal from a conviction after a guilty plea and *Vinarao* an appeal from a deportation order, both on the ground that the appelant had not been fully advised of the right to counsel. In *Piper*, the court paraphrased section 2(c)(ii) and then stated, "That is as far as the section goes".[85] Unfortunately, that is also about as far as the court's explanation of its reasoning goes. It added only that the accused "was not deprived of the privilege to retain and instruct counsel . . ."[86] and that the matter was one for legislation.[87] This last reason is inapplicable to the *Ewing* decision in which the appellants proposed that the Bill of Rights be considered in interpreting existing legislation.

Section 2(c)(ii) is arguably inapplicable for any of three reasons. The first focuses on the words "the right to retain and instruct". It is said that an accused is afforded this right if given the opportunity to attempt to retain counsel even though the attempt is doomed to failure because of lack of funds.[88] However, it also seems possible to find that the quoted words imply a realistic opportunity to obtain the services of counsel even if affirmative assistance is required. Surely no court would find that the police had complied with section 2(c)(ii) if they offered an arrested person who carried no money the opportunity to use a pay telephone.

A second argument states that the failure to provide counsel for an indigent accused does not *deprive* him of counsel. This argument has considerable strength.[89] However, it is possible to interpret the word "deprive" as meaning "to withhold" as well as "to take away".[90] In other contexts we sometimes say that the poor are "deprived" of things they have never had and without implying that their absence results from any affirmative conduct.

Finally, it can be argued, as does Mr. Justice MacFarlane,[91] that section 2(c)(ii) applies only while an accused is in custody

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[84] *Re Ewing and Kearney*, *supra*, footnote 1, at p. 240.

[85] *R.* v. *Piper*, *supra*, footnote 8, at p. 535.

[86] *Ibid.*

[87] *Ibid.*, at p. 536.

[88] See Donnelly, *op. cit.*, footnote 28, at p. 47; B. A. Grosman, The Right to Counsel in Canada (1967), 10 Can. B. J. 189, at p. 196; W. S. Tarnopolsky, The Lacuna in North American Civil Liberties — The Right to Counsel in Canada (1967-68), 17 Buff. L. Rev. 145, at p. 153.

[89] See *Re Ewing and Kearney*, *supra*, footnote 1, judgment of Seaton J. A., at p. 241. See also W. S. Tarnopolsky, The Canadian Bill of Rights (1966), p. 169. *Cf.* Kaiser, *op. cit.*, footnote 61, at p. 69.

[90] See Webster's Seventh New Collegiate Dictionary (1963).

[91] *Re Ewing and Kearney and the Queen*, *supra*, footnote 3, at p. 110.

and not to the trial itself. Certainly the language of section 2(c) emphasizes the period of police custody.[92] However, several decisions have discussed section 2(c)(ii) with reference to the trial.[93] The policies supporting a right to counsel are generally considered strongest with respect to the hearing itself; it is the question of pre-trial representation that has been controversial. It is hard to believe that in enacting the Bill of Rights, Parliament intended to make inoperative a law which prevented consultation with counsel at the police station but to permit a similar denial in the courtroom. The anomaly could be avoided if section 2(c)(ii) were construed as applying from the time a person is arrested, the reference to arrest or detention determining the commencement, not the duration, of the right.[94] Alternatively, and more persuasively, section 2(e) could be found to incorporate the right to counsel at trial.

Section 2(e) provides "the right to a fair hearing in accordance with the principles of fundamental justice . . .".[95] The interpretation of the section has been left open by Supreme Court of Canada decisions.[96] In *Re Walsh and Jordan*,[97] the Ontario High Court held that section 2(e) did not require representation by professional counsel at a Royal Canadian Mounted Police disciplinary hearing. However, it cannot be assumed that the same standard would have been applied to a court proceeding.[98] Moreover, as was noted earlier, more recent decisions have held that a refusal of an adjournment to allow retained counsel to appear deprives an accused of a fair hearing[99] or a hearing in accordance with the principles of natural or fundamental justice.[100] It can be argued that the trials in those

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[92] Donnelly, *op. cit.*, footnote 28, at p. 39.

[93] *Re Gilberg and The Queen*, *supra*, footnote 22, at p. 130; *R.* v. *Johnson*, *supra*, footnote 18, at p. 112; *cf. R.* v. *Piper*, *supra*, footnote 9; *contra: Re Walsh and Jordan*, [1962] O.R. 88 (Ont. H.C.).

[94] It also might be argued that an accused who has been summonsed is detained during the trial. But see *Re Walsh and Jordan*, *ibid.*

[95] *Supra*, footnote 5. The Supreme Court of Canada has held that it is applicable to criminal, as well as civil, proceedings. *Lowry and Lepper* v. *The Queen*, [1974] S.S.R. 195, at pp. 200-201.

[96] See *Guay* v. *LaFleur*, [1965] S.C.R. 12; *O'Connor* v. *The Queen*, *supra*, footnote 28, held that the refusal of the police to permit an arrested person to contact counsel did not result in a violation of section 2(e), but the court did not discuss the right to counsel at trial.

[97] *Supra*, footnote 93.

[98] See footnote 48.

[99] *R.* v. *Gilberg*, *supra*, footnote 22.

[100] *R.* v. *Johnson*, *supra*, footnote 18; *R.* v. *Dow*, *supra*, footnote 19. The terms natural justice and fundamental justice are synonymous. De Smith, *op. cit.*, footnote 48, p. 135; Tarnopolsky, *op. cit.*, footnote 88, at p. 160.

cases would have been no more fair or just if the absence of counsel had been due to the accused's lack of funds.[101]

A liberal interpretation of section 2(e) is suggested when it is read together with section 2(d), which prohibits a court or tribunal from compelling a person to give evidence "if he is denied *counsel*, protection against self-crimination *or other constitutional safeguards*".[102] Section 2(d) is not directly applicable because an accused person is not compelled to testify at trial.[103] However, it is relevant in that it clearly implies that the right to counsel is a constitutional safeguard.[104] In *R.* v. *Hawke*,[105] the court relied in part on section 2(d) in justifying the appointment of counsel for a Crown witness who was compelled to give evidence.

The importance of counsel is not a new concern or one foreign to Anglo-Canadian legal traditions. In discussing the application of the solicitor-client privilege in 1876, Jessel M. R. stated:

> The object and meaning of the rule is this: that as, by reason of the complexity and difficulty of our law, litigation can only properly be conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have recourse to the assistance of professional lawyers, . . .[106]

The quoted words, which appeared in a civil case, would seem to apply with even greater force to a criminal trial. The majority judgments in the *Ewing* case found that the accused could be expected to receive a fair trial without the assistance of counsel. Such a conclusion implies that there is no significant possibility that legal representation would affect the outcome; the trial could hardly be called fair if the absence of counsel significantly increased the risk of conviction or was likely to affect the sentence. Thus, the result of the decision comes close to implying that lawyers perform no very useful function in the

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[101] Other cases also contain language suggesting that there is a right to be represented by counsel or at least have discussed the right to counsel in terms suggesting that the presence of counsel at least sometimes may be essential to fairness. See *R.* v. *Talbot*, *supra*, footnote 27; *cf. Spataro* v. *The Queen*, *supra*, footnote 47, at p. 629.

[102] *Supra*, footnote 5, emphasis added.

[103] Canada Evidence Act, *supra*, footnote 47, s. 4(1).

[104] In this sense the word "constitutional" is not limited to the provisions of the B.N.A. Act. See Lyon and Atkey, Canadian Constitutional Law in a Modern Perspective (1970), pp. 70-82.

[105] (1974), 3 O.R. (2d) 210 (Ont. H.C.).

[106] *Anderson* v. *Bank of British Columbia* (1876), 2 Ch. D. 644, at p. 649, aff'd at p. 654. See also *Pett* v. *Greyhound Racing Association Ltd.*, [1968] 1 Q.B. 125, at p. 132 (C.A.).

average summary trial for possession of a drug. Yet almost no one with legal training would advise a friend who could afford counsel to go unrepresented if charged with such an offence. Certainly no lawyer would be accused of providing unnecessary legal services in defending such a case. The quality of a defence does significantly affect the chance of conviction, and lawyers are significantly better than laymen at conducting trials, even fairly routine trials involving summary offences. Moreover, it is more difficult for anyone to defend himself or herself than to defend someone else. An accused person is often under severe emotional strain which makes an orderly and complete presentation almost impossible. It follows, I believe, that the right to a fair hearing must include the right to be represented by counsel if the accused wishes. Chief Justice Farris accurately described the trial process as follows:

> The conflict is to be resolved by fighting it out according to fixed, sometimes arbitrary rules .... In such a proceeding there are rules of procedure and rules of evidence that can only be properly understood and applied after years of training and experience. For this reason, the Crown in this case, as it does in most criminal cases, employs counsel who are trained in the law. This means not only trained in the rules of evidence and rules of procedure but knowledgeable in the art of advocacy, in the marshalling of facts and in the case law .... Into such an arena two eighteen year old youths are projected, totally unequipped by experience or education to defend themselves against such a powerful adversary.[107]

Such a process cannot be considered fair.

The reluctance of the court in the *Ewing* case to interpret the Bill of Rights as providing a right to appointed counsel may reflect in part the view that courts should not force legislatures to appropriate additional funds for legal aid.[108] However, in other areas of the law, courts have reached results which required additional public expenditure. For example, recent cases have expanded the tort liability of public bodies.[109] In any event, courts seem to have the inherent power at common law to appoint counsel to represent indigent accused. This power has existed at least since the time of Coke.[110] Such an appointment was

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[107] *Re Eying and Kearney, supra,* footnote 1, at pp. 233-234.

[108] *Cf. R.* v. *Piper, supra,* footnote 9, which stated that the matter was one for legislation.

[109] See, *e.g. Dutton* v. *Bognor Regis Urban District Council,* [1972] 1 Q.B. 373 (C.A.); *Schacht* v. *The Queen in Right of the Province of Ontario* (1973), 30 D.L.R. (3d) 641.

[110] W. M. Beaney, The Right to Counsel in American Courts (1955), p. 12; Heidelbaugh and Becker, Benefit of Counsel in Criminal Cases in the Time of Coke (1952), 6 Miami L.Q. 546, at pp. 552-553; F. L. Waldbillig, Legal Aid — A Basic Right? (1965), 30 Sask. Bar Rev.

approved in *Vescio* v. *The King* without reference to statutory authority.[111] Thus, the declaration of a right to appointed counsel would not necessarily require an expansion of statutory legal aid schemes, although in practice it would probably have that result.[112] It has been argued that section 611 of the Criminal Code empowers a court of appeal to appoint counsel but grants no similar power to trial courts.[113] However, this argument loses force if the section is viewed as an extension of the common law power of the supreme courts to appoint counsel.

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Recent decisions have recognized that the rights of an accused may be violated if a court insists on proceeding with a trial when the accused's counsel is unable to appear. In *Re Ewing and Kearney,* three of the five justices of appeal recognized that the principles of fairness may at least sometimes require the provision of counsel for an accused. These recent cases have begun to fill what Professor Tarnopolsky described in 1968 as a lacuna in North American civil liberties.[114] However, even the recent decisions have demonstrated great caution, and the lacuna, though narrowed, still exists.

The reasons for the reluctance of the courts to expand the right to counsel are not clear, especially since there is almost no disagreement as to the benefits of legal representation. The issue is not one of broad social policy beyond the competence of the judiciary; it concerns matters of procedure pre-eminently within the expert knowledge of the judges. Unlike many of the other civil liberties declared in the Canadian Bill of Rights, the right is capable of precise definition and there is no need to balance it against competing rights or values. The only competing interest is monetary, and the recent expansion of legal aid schemes in Canada suggests that society is willing to sustain the necessary cost.[115] Authority for a broadened right to counsel can be found

(No. 2) 85, at pp. 90-91; *cf. Dennis* v. *Minister of Rehabilitation and Social Improvement, supra,* footnote 38.

[111] *Supra,* footnote 43.

[112] Also, it is significant that the appellants in *Ewing* sought a writ of prohibition rather than mandamus. If the trial had been postponed until the accused had had resonable time to obtain the necessary funds to retain counsel, the requirements of the Criminal Code and the Bill of Rights would have been fulfilled without public expenditure.

[113] *Re Ewing and Kearney and the Queen, supra,* footnote 3, at p. 112.

[114] *Supra,* footnote 88.

[115] See Taman and Zemans, The Future of Legal Services in Canada (1973), 51 Can. Bar Rev. 32, at p. 34.

in the Criminal Code and the common law. The Bill of Rights can be applied purely as an aid to interpretation, avoiding any issue as to the power of the judiciary in relation to legislative bodies.

I suspect that the caution of the courts has little to do with the direct consequences of declaring a broadened right to counsel. Instead, it may reflect an almost automatic reaction against recent demands that Canadian courts assume a more activist role. The question of the relationship between judicial and legislative power in Canada is important and complex. It deserves careful thought. The problem is not capable of a simple answer. However, a blanket presumption against all extension of legal principles would be tragic. There is a danger that the courts will abandon the English tradition of judicial reform in over-reaction to what are viewed as American excesses.