Prejudicial Consequences of a "Non-Conviction" in Canada

by John W Conroy QC

Introduction

26 years ago**,** a majority of the Supreme Court of Canada held in ***Gridic v. The Queen*** [1985] 1 S.C.R. 810 as follows:

> "There are not different kinds of acquittals and, on that point, I share the view that "as a matter of fundamental policy in the administration of the criminal law it must be accepted by the Crown in a subsequent criminal proceeding that an acquittal is the equivalent to a finding of innocence" (see Friedland, *Double Jeopardy* (1969), at p.129; also Chitty i, 648; *R. v. Plummer*, [1902] 2 K.B. 339 at p.349). To reach behind the acquittal, to qualify it, is in effect to introduce the verdict of "not proven", which is not, has never been, and should not be part of our law."

While the topic for discussion in this paper is not about the consequences of an 'acquittal'**,** although Corrections officials and some members of the National Parole Board have on occasion attempted to go behind such**,** the concern here is with the consequences to an individual after a charge has been laid in accordance with Crown Counsel policy (a substantial likelihood or at least a reasonable prospect of conviction) and is then terminated by the Crown before any adjudication by a Court on the merits has taken place and often without explanation, at least on the record, of the reason for the termination, and the subsequent consequences arising by virtue of the records kept in relation to those proceedings, either by a prospective employer, at a foreign border or if one is incarcerated.

We are all familiar with the sentencing options and usual consequences post conviction, as well as the collateral consequences such as the resulting" criminal record" that ensues upon conviction for an offense pursuant to a Federal statute, such as the Criminal Code or the Controlled Drugs and Substances Act. This paper attempts to address the problems and consequences arising when a charge has been approved but is then terminated or dropped, either by way of a stay of proceedings, withdrawal or a consent dismissal and the record kept of such a disposition on CPIC and perhaps other computer databases.

It is beyond the scope of this paper to address the collateral consequences of a conviction pursuant to a provincial statute, not considered to be a "criminal offense" pursuant to the Federal" Criminal Law" power and the many different databases that might keep track of such matters.

While preparing this paper yet another method of discontinuing proceedings was brought to my attention namely, a decision by the Crown to ‘proceed with a new information’ or having the original file ‘PNI’ d’. Apparently when this is done a member of

the public can access the Justin database and see what the original charge was whereas they cannot do so for an SOP or at least when entered, it will not disclose the original charge on the online database.

Clearly some thought needs to be given to regulate public access to such things or at least what can be made of them by the public, prospective employers, border guards and police and corrections officials, to prevent prejudice to persons affected in the absence of a conviction for the matter in question.

The primary concern addressed is the impact of the entry of a 'stay of proceedings'(SOP), by the Crown pursuant to s. 579 of Criminal Code of Canada as the means of terminating a proceeding, as opposed to withdrawing the "information" or "indictment" or consenting to the dismissal of the charges, when a final disposition of the matter is intended. It is this author's understanding that while the Crown can enter a stay of proceedings in relation to charges at any time during the proceedings and can withdraw the charge prior to the accused being placed in jeopardy, only the Court can dismiss (or give permission to withdraw) the charges once the accused has been placed in jeopardy. Consequently a 'Consent Dismissal Order' involves the Crown calling no evidence and inviting the Court to dismiss. Apparently, in practice, while the Crown can 'withdraw' the matter at any time, consent of the Court is required if the Crown intends to do so after an 'arraignment hearing' has taken place pursuant to the Provincial Court Criminal Case Flow Management Rules. While the author has been unable to find anything addressing this specifically in those rules, he has been advised by Regional Crown Counsel that this is the practice and that therefore the stay of proceedings option which does not require the court's approval is the preferred method of termination. Those rules can be found online at:

> <http://www.provincialcourt.bc.ca/aboutthecourt/criminalandyouthmatters/criminalcaseflowmanagementrules/index.html>

While there is no specific statutory provision with respect to the 'withdrawal' of charges, that appears to be the method chosen to terminate proceedings in a number of provinces, not including British Columbia. If the 'withdrawal' is to take place after the accused has been placed in jeopardy then presumably leave of the Court to withdraw is required as in the case of a consent dismissal.

The 'stay of proceedings', which is the chosen method in British Columbia, is governed by **section 579 of the Criminal Code** which provides as follows:

> **Attorney General may direct stay**
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> **579.** (1) The Attorney General or counsel instructed by him for that purpose may, at any time after any proceedings in relation to an accused or a defendant are commenced and before judgment, direct the clerk or other proper officer of the court to make an entry on the record that the proceedings are stayed by his

direction, and such entry shall be made forthwith thereafter, whereupon the proceedings shall be stayed accordingly and any recognizance relating to the proceedings is vacated.

Recommencement of proceedings

(2) Proceedings stayed in accordance with subsection (1) may be recommenced, without laying a new information or preferring a new indictment, as the case may be, by the Attorney General or counsel instructed by him for that purpose giving notice of the recommencement to the clerk of the court in which the stay of the proceedings was entered, but where no such notice is given within one year after the entry of the stay of proceedings, or before the expiration of the time within which the proceedings could have been commenced, whichever is the earlier, the proceedings shall be deemed never to have been commenced. R.S., 1985, c. C-46, s. 579; R.S., 1985, c. 27 (1st Supp.), s. 117.

While subsection (2) provides for the re-initiation of the proceedings within one year, given the absence of any statute of limitations in relation to indictable offenses in Canada, there is of course nothing to prevent the Crown from initiating separate or additional proceedings for the same matter, in the absence of a dismissal of the charges which would render the matter 'res judicata". Significantly however, subsection (2), provides that if the proceedings are not re-initiated within the one-year, **"the proceedings shall be deemed never to have been commenced".** If that is so then the question arises as to why any publicly accessible record is kept of the existence of the charge once the year has expired and the charges not reinitiated?

According to the BC Court of Appeal in ***R v. Smith*** (1992), 79 C.C.C. (3d) 70 (BCCA) once a stay has been entered a judge is *functus* and without jurisdiction to proceed. Further that the discretion that the Atty. Gen. has is beyond direction or control of that judge. According to the New Brunswick Court of Appeal in ***R v. Carr*** (1984), 58 N.B.R. (2d) 99 (NBCA) the prosecution has a right of withdrawal that is separate and distinct from the right to stay proceedings and the matter can be withdrawn after a plea of not guilty. Further, according to the Ontario Court of Appeal in ***Campbell v, Ontario (A.G)*** (1987) 35 C.C.C. (3d) 480 (Ont. CA) the exercise of this discussion is not subject to review by a court, except possibly where there is a flagrant impropriety on the part of the Attorney General. In the absence of proof of abuse of process the prosecutor has an untrammeled discretion in this regard. See also ***R v. (D)*** (2004) 188 C.C.C. (3d) 89 (NLCA)**.** However, the case of ***Chartrand v. Quebec (Min. of Justice)*** (1987) 40 C.C.C. (3d) 270 (Que.C.A.) is authority that the entry of the stay is subject to judicial review under the Charter and cannot be used to override the rights guaranteed by the Charter although no such violation was found on facts relating to section 15 Charter in the circumstances.

According to the annotations in relation to section 579 in the latest **Tremeear's Criminal Code** 2012 edition, the powers that the prosecutor has under this section has

no impact on the prosecutors other authority to withdraw charges prior to arraignment and plea, nor the authority of the Court to stay proceedings for an abuse of process or Charter infringement. The Criminal Code makes no provision for the withdrawal of an information by the prosecution.

In the author's experience, a record of a 'stay of proceedings' can have prejudicial consequences to an individual in seeking employment, at the USA and perhaps other borders and if imprisoned, when questioned about the underlying circumstances by corrections officials in their assessment of risk for security and placement purposes and conditional release and by the National Parole Board in their assessment of risk of recidivism for purposes of parole.

The practice of entering stays of proceedings as the accepted method of terminating proceedings in British Columbia both by Federal and Provincial Crown Counsel, compared to most other Canadian jurisdictions, has apparently existed since 1950 and has been the subject of previous comment and concern by the British Columbia Civil Liberties Association. In a paper dated June 1975 that organization points out that in 1971 a total of 2,863 indictable offense charges were stayed in Canada whereas in British Columbia 1,836 charges were stayed out of a total of 19,455 charges, whereas in Ontario only 70 charges were stayed out of a total of 49,790 charges. By 1973, 3,646 stays were entered in BC and by 1974, 3,753 charges were stayed, a significant increase since 1971. The BC Civil Liberties Association identified four areas of concern in the use of such stays of proceedings, as follows:

> "First, when a stay is entered the accused person is denied his or her "day in court" and, indeed, will likely never have a public determination of his or her guilt or innocence. At the same time, the judge is denied the right to hear a case which lower level judicial officers, for example justices of the peace, have legally determined should be brought before the courts. Both the accused and society are, therefore, denied the traditional benefits of the adversary system of justice.
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> Second, legal authorities support the proposition that the entry of a stay impairs the rights of the accused person to his or her civil remedies if he or she feels that they were wrongly brought before the courts.
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> Third, substantial comment has come from a number of Provincial court judges to the effect that stays are used to frustrate the proper exercise of judicial discretion. For example, it is the acknowledged practice of prosecutors in Vancouver to use a stay when they have been denied an adjournment. From the point of view of both the accused person and the system of justice as a whole, this is of vital significance since the decision of a Provincial court judge is always subject to the review of a higher court while the discretion to stay proceedings, exercised by the prosecutor, cannot be reviewed or appealed.
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> Finally, the extensive use of stays is dangerous because there is no requirement

> that reasons for the termination of proceedings appear on the court record. In fact, stays are often entered out of court. The procedure, being both clandestine and arbitrary, fosters secrecy and suspicion about the nature of the judicial system. The stay is uniquely suited to disguise favouritism and discrimination in the criminal law system in that the true reasons for suppressing particular proceedings are virtually unascertainable by the courts, or anyone outside of the prosecution."

The complete article can be found at: <http://www.bccla.org/positions/dueprocess/75stays.html> and kudos to Rita Sidhu of the TLABC Criminal Defence litigation group for bringing this to our attention on the TLABC Criminal Law list and who in so doing noted how little has changed in the last 36 years!

The Criminal Records Act RSC 1985 c C-47

While this Act deals primarily with the authority of the National Parole Board Clemency Division to grant pardon's after certain waiting periods in relation to both indictable and summary offenses, and governs the custody of the records in relation thereto, including provisions relating to nondisclosure of a record in an employment application and including the provision for the process for revocation of pardons, it also deals with the circumstances when an Absolute or Conditional Discharge pursuant to section 736 of Criminal Code is imposed as a sentence. Importantly when one receives such a discharge the Court, notwithstanding the guilty plea or finding of guilt, **"instead of convicting the accused…"** directs that the accused be discharged absolutely or on conditions and subsection (3) expressly provides that an offender so discharged **"… shall be deemed not to have been convicted of the offense…".** In relation to these types of dispositions the Criminal Records Act provides as follows, including a specific purging section:

Discharges

> **6.1** (1) No record of a discharge under section 730 of the *Criminal Code* that is in the custody of the Commissioner or of any department or agency of the Government of Canada shall be disclosed to any person, nor shall the existence of the record or the fact of the discharge be disclosed to any person, without the prior approval of the Minister, if (*a*) more than one year has elapsed since the offender was discharged absolutely; or (*b*) more than three years have elapsed since the offender was discharged on the conditions prescribed in a probation order.

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Purging C.P.I.C.

> (2) The Commissioner shall remove all references to a discharge under section 730 of the *Criminal Code* from the automated criminal conviction records retrieval

system maintained by the Royal Canadian Mounted Police on the expiration of the relevant period referred to in subsection (1). 1992, c. 22, s. 6; 1995, c. 22, s. 17(E).

Disclosure to police forces

6.2 Notwithstanding sections 6 and 6.1, the name, date of birth and last known address of a person who has received a pardon or a discharge referred to in section 6.1 may be disclosed to a police force if a fingerprint, identified as that of the person, is found (*a*) at the scene of a crime during an investigation of the crime; or (*b*) during an attempt to identify a deceased person or a person suffering from amnesia. 1992, c. 22, s. 6.

It is this author's understanding that the officials at the USA border will treat an "absolute discharge" as tantamount to an acquittal and certainly better than a "stay of proceedings" but they still have concerns about "conditional discharges". Further, the National Parole Board takes the position that it is not a "… department or agency of the Government of Canada…" so that they can refer to such dispositions in assessing risk to reoffend and are not bound by the non-disclosure provisions.

Significantly, there is no provision in this Act governing the records kept of 'stays of proceedings, nor any provision for their expungement. Consequently in some cases one may be better off to plead guilty and get an absolute discharge than to obtain a stay of proceedings!

Further, this Act does not address the many other databases that now exist besides CPIC, such as PRIME and others that are shared with the USA, nor of the problem that may exist if the record is shared with the foreign country during the waiting periods and what should occur thereafter in the absence of any way to practically expunge the record in the foreign country in such circumstances.

Federal and Provincial Crown Policy

The general Federal Crown policy (the Federal Prosecution Service DESKBOOK – Public Prosecution Service of Canada) can be found at <http://www.ppsc-sppc.gc.ca/eng/fps-sfp/fpd/index.html> . While a reference is made to "stays of proceedings" at various places in the 'Deskbook' there does not appear to be any specific section that addresses when to "withdraw" or to "stay" or "consent dismiss". This author has been previously advised by Federal Crown that it is their policy to enter 'stays of proceedings' before trial as opposed to 'withdrawals' and to 'consent to a dismissal if at trial.

It is perhaps relevant to note the Crown policy in relation to a decision to prosecute as requiring not only sufficient evidence to justify the institution or continuation of proceedings but also that the public interest requires a prosecution to be pursued. The evidence must demonstrate that there is *"a reasonable prospect of conviction".*(See

Part V Proceedings at Trial and on Appeal Chapter 15).

The general Provincial Crown policy (the Crown Counsel Policy Manual – Criminal Justice Branch, Ministry of Atty. Gen. British Columbia can be found at:

<http://www.ag.gov.bc.ca/prosecution-service/policy-man/index.htm> .

Similarly, while references is made to the use of 'stays proceedings', the policy does not appear to expressly address the question as to when or whether a 'withdrawal' or 'stay of proceedings' should be entered nor when it is appropriate to agree to a 'consent dismissal'. There is a section entitled "Resolution Discussions and Stays of Proceedings" but the focus of the policy set out in that chapter does not deal with the question here in issue but simply indicates that a stay of certain charges may take place as part of resolution discussions and decisions. This author has been advised by Regional Crown that the 'stay of proceedings' is the preferred route to terminate proceedings as it does not require any involvement by the Court.

The Apparent Consequences and potential remedies or solutions

At the USA Border or otherwise - In this author's experience, US Homeland Security border officials have a broad discretion to deny entry to anyone whether they have a criminal record or not. These officials appear to have difficulty with the term "stay of proceedings" because it clearly indicates that the proceedings can be reinitiated, in contrast with a dismissal or withdrawal. As set out above, the same is true with respect to a "conditional discharge" because it is conditional, as opposed to an absolute discharge. The concern appears to be with the lack of finality of the proceedings. However, while the USA does not have a "stay of proceedings" power so named, the procedure followed in the US is to either dismiss the case without prejudice to the government to re-initiate, which seems to be the equivalent of a stay, or to dismiss the case with prejudice to the government, which would be equivalent to our consent dismissal order.

Recently an old client, previously charged with production and possession of the purpose of trafficking of cannabis who subsequently obtained an authorization to possess and a personal production license through the Medical Marijuana Access Regulations and in the result was successful in obtaining a stay of proceedings in relation to the charges, approached me wanting to enter the United States to participate in a marathon. Anticipating US border problems over the meaning of the word "stay", I was successful in obtaining a letter from the Federal Prosecutor to the effect that the stay was intended as a final disposition. I then contacted a representative of US Homeland security that I had met in another case involving a client who had to be escorted by them from the border to a court in Seattle for sentencing and return to Canada who had appeared somewhat sympathetic to the situation. I sent him the information and asked him if she could be preapproved. Unfortunately he subsequently advised that there was nothing he could do as it was up to the discretion of the

uniformed officer at the border at the time of entry. Ultimately when she attempted to enter she was turned away, not because of the stay for the drug charges but because she had two very old shoplifting convictions that she had not disclosed to me and did not disclose them at the border and the border guard had them on his screen. She now has to go through an inadmissibility hearing.

Certainly, being untruthful with the border representative about such matters, if questioned in relation thereto, will result in being held inadmissible.

This author recently had occasion to discuss this problem at an International Conference with Jeffrey E. Ellis, National Program Manager, Homeland Security Investigations, Human Smuggling and Trafficking Unit, with the US Immigration and Customs Enforcement (ICE) from Washington DC. He appeared to appreciate the problem and I propose to communicate with him in the future and provide him with a set of definitions of our terms that can be referenced by the uniformed personnel at border crossings.

In the long-term a solution has to be made in Canada and will hopefully include limits to the Crown's power to stay proceedings or at least to the disclosure of that information as part of a criminal record or other databases. Educating American border guards us to our terminology is only the beginning.

In ***La v. Canada (Minister of Citizenship and Immigration)*** 2003 FCCT 476 a citizen of Vietnam with permanent resident status in Canada as a Convention Refugee was ordered deported because he had been convicted in 1997 of possessing cocaine for the purpose of trafficking and sentenced to a three month conditional sentence order. The deportation order was then stayed. An opinion was then expressed that he had breached the terms of the stay of the deportation order and that he constituted a danger to the public. This would have enabled his removal to Vietnam, the country he fled because of his fear of persecution. The opinion of the Ministers delegate relied upon the Applicants criminality and likelihood of recidivism. He had a 1995 conviction for possession of cocaine for which he received one year's probation as well as the 1997 conviction mention above, and a 2001 conviction for production of marijuana for which he received a six-month term in prison. The material before the Ministers delegate also referred to two outstanding charges in Ontario, one for production of marijuana and one for possession of marijuana for the purpose of trafficking. He denied involvement in the Ontario I matters which involved a house he owned that was rented to others. He submitted that charges for which he had not been convicted were an irrelevant consideration.

Lemieux J. quashed the decision and noted that by its very nature an outstanding charge cannot be evidence of recidivism – a likelihood of reoffending. He held that to do so would equate a charge to a conviction without trial (para 21). In this regard he referred to ***Dokmajian v. Canada (Minister of Citizenship and Immigration)*** [2003] FCT 85, ***Hinds v. Canada (Minister of Citizenship and Immigration)*** [1996] F.C.J. No.

1544 and ***Kumar Canada(Minister of Employment and Immigration)*** [1984] F.C.J. No.1046 (FCA) among other decisions to support this proposition.

These decisions are hard to reconcile with the decisions of the court in relation to the National Parole Board decisions considering recidivism, referred to below.

In Seeking Employment - The author has recently received a referral from other counsel of a case where a man was convicted at trial (BCPC) of a sexual assault and then on appeal (BCSC) a new trial was ordered. The Crown then determined that it was not in the public interest to proceed and entered a stay of proceedings. The individual was working in a "practicum" situation and at the conclusion of that period sought full employment with the organization as the employers had expressed great pleasure with his performance up to that time. Unfortunately the job required a "criminal record check" which revealed the "stay of proceedings" and upon being questioned in relation thereto and having answered truthfully but maintaining his innocence, the employer advised that he could not be hired because he had been charged and refused to provide confirmation to that effect in writing. This individual has now experienced this same consequence on several occasions in relation to several job applications. Not only did the information on the provincial "Justin" database cause him serious problems that he was able to ultimately rectify but even after he persuaded the RCMP to remove the stay entry from CPIC, he continued to run into the same problem because RCMP policy requires that when a criminal record check is conducted "box 4" has to be checked to indicate that a police file does exist and was opened and their policy requires this information to be kept something like 25 years. This of course leads the prospective employer to inquire as to the nature of the file and the circumstances and usually results in the employer declining to employ the individual.

It appears that even if one persuaded the Crown to re-initiate such a proceeding and to consent to a dismissal thereby removing the stay and substituting a dismissal on the criminal record, "Box 4" will still be checked indicating a file was opened by the RCMP or a police force and similar prejudice can still occur, due to the RCMP policy. The mere existence of a stay of proceedings is indicative that at some earlier point in time a charge was approved by the Crown and a file opened and this can have prejudicial consequences, whether the matter has proceeded to trial or not. Arguably this would still occur in the event of a dismissal due to the RCMP policy and therefore it needs to be modified as well in that regard, to prevent such prejudice.

Ultimately the solution in this regard probably requires a legislative amendment either to the ***Criminal Records Act*** or the ***Privacy Act*** to prevent prospective employers from being able to access anything on a record that is short of an actual conviction. If a person is "deemed never to have been charged" why should a record of such a charge be available to persons outside the police force or corrections branch?

In the Federal Prison System - As indicated above, when an individual is imprisoned federally the Correctional Service of Canada (CSC) representatives responsible for the

reception and classification of prisoners is required to obtain information from various sources and obviously the criminal record of the individual is of considerable importance. (See **s. 23 through 26 of the *Corrections and Conditional Release Act*)** Consequently they receive such information including references to any stays of proceedings, whether as part of a plea arrangement or otherwise. The CSC will often obtain the actual police reports underlying the matters set out in the person's record. In this author's experience they will then accept that information to be accurate and true despite the Crown's decision to enter a stay, without any reasons for the stay being given, and will treat the individual as having been convicted of the matter and will take it into account in reception, placement and security decisions.

S. 24(2) Of the ***Corrections and Conditional Release Act*** provides a form of remedy to an offender to correct any errors or omissions in the information gathered by the correctional service. In this day and age one needs to ensure that correction or at least the notation of the effort to have something corrected is not only on the prisoners paper file but also on the Offender Management System (OMS) which is the digital database that most corrections officials and parole boards now refer to.

In ***Tehrahkari v. CSC*** (2000) 188 F.T.R 206 Lemieux J. of the FCTD granted judicial review quashing a decision of the Commissioner of Corrections refusing to alter certain information on a prisoners file. The prisoner had complained about information on this file alleging that he had assaulted another inmate as well as allegations of attempted escape. He had denied the assault and was found not guilty when the prison guards didn't show up for the hearing. It was therefore not accurate to assert as a fact that he had assaulted the other inmate. The information referring to an escape related to an escape from a prison in Iran and was misleading because it was incomplete and didn't specify that he escaped because he was tortured. It was therefore not accurate to assert, as the files did, that he had attempted to escape from a particular Canadian institution. The prisoner satisfied the court on the balance of probabilities that the material complained of in his files did not meet the standards required by section 24 the Act and found a number of reviewable errors by the Commissioner in exercising his discretion not to correct the information. The matter was referred to the case management officer to review the files and determine which corrections were to be made in accordance with the courts reasons.

In ***Russell v.AG CANADA*** (2006) 301 F.T.R.95, von Finklestein J. allow an application for judicial review in part ordering the CSC to amend its Offender Management System (OMS) to note that the applicant had not been convicted of charges of sexual assault and sexual assault weapon against one JS, that had been withdrawn by the Crown after Mr. Russell had pled guilty to second-degree murder of JW and the forcible confinement of JS. He further ordered that the CSC assessment for decision was to be amended to read that "according to the police report" the applicant had forced sexual intercourse on the victim. The CSC had refused to remove these references from his file and a psychological report stated that he had committed the sexual acts as a matter of fact rather than as an allegation. The court held that the decision to refuse to correct the

information failed to take into account the fact that police reports could lead to false conclusions and had actually done so in the case of psychological assessment which mixed up allegations and facts.
The National Parole Board (now renamed the Parole Board of Canada) will question prospective parolees in relation to such matters and will take them into account in assessing one's risk to reoffend, as if the matters were proved to be true.

In 1991, the Federal Court Trial Division had occasion to consider this question in ***Prasad v. Canada (National Parole Board)*** (1991), 51 F.T.R. 300. The prisoner applied for prohibition to prevent the Board from considering material containing reports of criminal activities unsupported by a conviction at an upcoming detention hearing. He asserted that it would be a breach of the duty to act fairly to consider such material as well as a breach of ss7, 9 and 11 of the Charter. The applicant was 32 years old and was serving a seven-year sentence for sexual assault and robbery of an 86-year-old woman. He had been released on mandatory supervision (now called statutory release) but a few months later, was charged with assault and robbery of two prostitutes. Those charges were dropped. The robbery charge was withdrawn because the alleged victim did not show up for trial. The assault charge was withdrawn because the victim did not wish to give evidence. The applicant posted a $500.00 peace bond with undertakings not to have any contact with the complainant. His mandatory supervision had been suspended and at a post-suspension hearing, was revoked with no re-credit of remission. That decision was affirmed by the Appeal Division. When his new mandatory date was reached, he was referred for a detention review. He objected to the inclusion of certain documents referring to crimes and activities of which he was never convicted and, in particular, referring to the charges that were dropped. He conceded that previous convictions constituted reliable information but argued that information with regards to offences for which a conviction was never entered do not. The court dismissed the application. The court distinguished ***Okeynan v Warden of Prince Albert Penitentiary*** (1988), 20 FTA 270 (FCTD) as the information in the Progress Summary report in that case was not admissible because it was not specific and would not have given the applicant there sufficient information so that he could adequately prepare himself. It was not suggested that the information was unreliable. Here, the information was specific enough to enable the applicant to prepare his case and to allow its use would not put the fairness of the process into question. The Board is not determining guilt or innocence at a detention hearing. The issue is whether or not there are grounds upon which the Board could determine that the applicant, if released prior to the expiry of his sentence, would pose an undue risk to the public. The court held that **Information with respect to the charges was relevant insofar as it was indicative of the applicant's lifestyle and associations.** The Board also distinguished ***Cardinal v Canada (National Parole Board)*** (1990) 46 Admin LA 45; 61 CCC 185 holding that it was satisfied that the applicant was aware of the Board's concerns when he was given a chance to make submissions at the post-suspension hearing and, therefore, his s.7 *Charter* rights had not been violated. (emphasis added)

A few years later, in ***Mooring v. Canada (National Parole Board)***, [1996] 1 S.C.R. 75 the Supreme Court of Canada held as follows in describing the functions of the National Parole Board:

> "25 The Parole Board acts in neither a judicial nor a quasi-judicial manner: *Mitchell v. The Queen*, [1976] 2 S.C.R. 570, at p. 593. The elements of a parole hearing are described by David Cole and Allan Manson in *Release from Imprisonment* (1990). The authors point out that several elements of the hearing distinguish Parole Board proceedings from those which take place before a traditional court. For example, counsel appearing before the Parole Board serve an extremely limited function. According to Cole and Manson (at p. 428):
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> > Although counsel is present as an advocate, since the hearing is inquisitorial there is no one against whom counsel can act as an adversary. Indeed, counsel should recall throughout that as far as the Board is concerned, the only occasion on which he may speak, as outlined in the Regulation, is at the end of the hearing when he is given an opportunity to address the Board on behalf of the client.
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> In addition, the traditional rules of proof and evidence do not apply in post-suspension proceedings before the Board. As Cole and Manson point out (at p. 431):
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> > While the Board will consider legal defences or mitigating circumstances where a new charge has been laid, in the post-suspension hearing context Board members do not regard themselves as constrained by the formal rules of the criminal law respecting the admissibility of evidence, the presumption of innocence, or the necessity for proof beyond a reasonable doubt.
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> Other differences between parole hearings and more traditional court proceedings include (1) the Board lacks the power to issue subpoenas, (2) "evidence" is not presented under oath, and (3) the panel presiding over the hearing may have no legal training.
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> 26 In the decision currently under review, the Appeal Division of the Board described its function in the following terms:
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> > The function of the Board at a post-suspension review is quite distinct from that of the courts. The Board must decide whether the risk to society of [the respondent's] continued conditional release is undue. In making that determination, the Board will review all information available to it, including any information indicating a return to criminal activity in the community. This applies whether or not the charges in court have been withdrawn, stayed or dismissed.

Clearly then, the Parole Board does not hear and assess evidence, but instead acts on information. The Parole Board acts in an inquisitorial capacity without contending parties -- the state's interests are not represented by counsel, and the parolee is not faced with a formal "case to meet". From a practical perspective, neither the Board itself nor the proceedings in which it engages have been designed to engage in the balancing of factors that s. 24(2) demands.

27 In the risk assessment function of the Board, the factors which predominate are those which concern the protection of society. The protection of the accused to ensure a fair trial and maintain the repute of the administration of justice which weighs so heavily in the application of s. 24(2) is overborne by the overriding societal interest. In assessing the risk to society, the emphasis is on ensuring that all reliable information is considered provided it has not been obtained improperly. As stated by Dickson J., as he then was, in *R. v. Gardiner*, [1982] 2 S.C.R. 368, at p. 414, in relation to sentencing proceedings:

> One of the hardest tasks confronting a trial judge is sentencing. The stakes are high for society and for the individual. Sentencing is the critical stage of the criminal justice system, and it is manifest that the judge should not be denied an opportunity to obtain relevant information by the imposition of all the restrictive evidential rules common to a trial. Yet the obtaining and weighing of such evidence should be fair. A substantial liberty interest of the offender is involved and the information obtained should be accurate and reliable.

28 These principles apply *a fortiori* to proceedings before the Parole Board in which the subject has already been tried, convicted and sentenced..."

In ***Canada (Atty. Gen.) v. Coscia*** 2005 FCA 132, the Federal Court of Appeal upheld a decision of Phelan J. setting aside a decision of the NPB on the basis of a breach of the duty of procedural fairness by insisting on asking questions that had a double meaning (being a member of or participating in activities of organized crime) without appreciating or understanding the difficult position this presented for the prisoner. While the Board was not concerned with establishing that the prisoner was a member of organized crime and participating in a criminal organization to expose the prisoner to the criminal code charge or conviction or to being found to be a member of a criminal organization pursuant to the Correctional Service of Canada Directive 568-3 that deems such membership to be a significant risk factor, the Board had no power to grant immunity and did not do so but found the prisoner was evasive in responding believing that an affirmative response could be used against him by others. The Board found his evasiveness to indicate a failure to assume responsibility. The Court was of the view that while it was open to the Board to make such inquiries it should avoid the use of terms which, if acknowledged, can give rise to an admission that a criminal offense has been committed with respect to which no conviction has been obtained or at least be mindful of the difficulty which its choice of words poses. There was nothing to prevent the board from exploring all aspects of the prisoner's previous convictions and ongoing

relations without using ambiguous terms. The Board's insistence on using the terms shows they did not hear the prisoner's response to that line of questioning and this was fundamentally unfair.

On October 25, 2010, the Parole Board of Canada Appeal Division, in the case of one **Sean Doak**, ordered a new hearing having found that the panel below failed to act fairly and exceeded its jurisdiction by presuming his guilt on an outstanding US indictment. The Appeal Division stated that the Board has no jurisdiction to find one guilty or innocent of outstanding charges. The Appeal Division referred to the case law that the board may consider such information or allegations as relevant insofar as it is indicative of an offender's lifestyle and associations, citing ***Prasad***, supra but not to conduct a criminal trial and determine guilt or innocence. In addition the panel below presumed Mr. Doak to be guilty of yet another offense (importing radio scanners) that he might be charged with in the future, and revoked his parole on that basis. The appeal division found that the board below failed to adequately test and verify the allegations against him at the hearing in relation to both the outstanding US charge and the importation of radio scanners possible charge, so as to ensure that the allegations were reliable and persuasive (citing ***Mooring*** 1996 SCC and ***Zarzour*** 2000 FCA). While very probing questions were asked there was little or no analysis in the boards reasons as to how they assessed the value of the allegations other than to presume him guilty.

Most recently, in ***Fernandez v. The Atty. Gen. of Canada*** 2011 FC 275 Mosley J. reviewed the law in this regard and held that it was open to the National Parole Board to question an offender about past conduct that could have, in theory at least, supported the prosecution for a criminal organization offense for which he was not charged, in the circumstances of the particular case.

Mr. Fernandez was a Spanish citizen who came to Canada as a child and had a lengthy history commencing in 1975 of conflicts with the law beginning in his adolescence and continuing in adulthood. He had a previous conviction for manslaughter and spent much of his life in prison and had an extensive institutional record. The government view was that he had long been considered by the police and correctional authorities to be affiliated with organized crime. He had been deported twice and had re-entered illegally. In 1995 while serving a sentence for manslaughter he was convicted of possession of narcotics for the purpose of trafficking and was detained until warrant expiry by the National Parole Board. In 1998 he was convicted of conspiring, while in custody, with another inmate to import narcotic. The 2004 he pled guilty to a variety of offenses including counselling to commit an indictable offense (murder), conspiring to import cocaine, possession of a forged passport, a stolen credit card, fraud over $5000 and illegal entry into Canada. He was sentenced to 12 years which after a presentence custody credit resulted in a sentence of approximately 8 years. The year before his statutory release he was referred once again to the board for detention on the grounds that they believed he would commit a serious drug offense before warrant expiry. The applicant was seeking full parole by way of deportation to Spain. The detention was recommended by the CSC on the ground that there was no viable plan for supervision

and that he could not be supervised if deported to Spain. He was detained by the board and parole was denied, so he appealed to the National Parole Board appeal division which affirmed the decision below. He then filed judicial review. The main ground was that the board erred in failing to observe natural justice by repeatedly questioning the applicant about his involvement in criminal organizations and erred in relying on inaccurate information provided by CSC regarding the likelihood that he would commit a serious drug offense after warrant expiry.

After reviewing the legislation, and specifically the detention powers of the board, the Court referred to ***Mooring*****, supra** and pointed out that the board may take into account all available and relevant information provided it has not been obtained improperly. Also that it must act fairly and ensure that the information upon which it acts is reliable and persuasive. It is up to the offender to challenge any inaccuracy in the CSC information via the grievance procedure (citing ***Latham***) or to challenge it before the board. The board may choose not to rely on information contained in the CSC files if it considers it to be inaccurate or unreliable. The court noted the decision of the Federal Court of Appeal in ***Zarzour v Canada*** (2000), 196 FTR 320 to the effect that confronting the person affected by allegations enabled them to comment and rebut them is a significant method of verification (paragraph 38).

At paragraph 26 the Court expressly said:

> [26] The information the Board relies upon may include information about criminal charges that have not resulted in convictions: *Mooring*, above, at para. 26; *Prasad v. Canada (National Parole Board)* (1991), 51 F.T.R. 300, 5 Admin. L.R. (2d) 251; *Yussuf v. Canada (Attorney General)*, 2004 FC 907; *Lepage v. Canada (Attorney General)*, 2007 QCCA 567; *R. v. Antoine*, 2008 SKCA 25, 310 Sask. R. 246; *Normand v. Canada (National Parole Board)* (1996), 124 F.T.R. 114, 34 W.C.B. (2d) 173, citing at paragraph 24 several decisions denying *habeas corpus* applications on this ground, approved by the Supreme Court of Canada in *Martin v. Beaudry*, [1996] 1 S.C.R. 898.

Fernandez complained about being questioned with respect to conduct that did not result in criminal charges, arguing Coscia, supra, that he was questioned about actions that could support a charge of participating in the activities of a criminal organization. He denied being part of any criminal organization but acknowledged having sold drugs to such and having associated with such. He also admitted that his offense of counselling to commit murder involved collecting funds for organized crime figures. The court also referred to extensive references by the trial and sentencing judge to Mr. Fernandez deriving income through his participation in organized crime and admitting to being involved with organized activity of a high level and dealt with criminal organizations. Consequently, in the circumstances it was not unreasonable for the board to make these inquiries in this case.

Apparently Mr. Fernandez was on remand for a long time after sentencing to deal with an outstanding obstruction charge but that charge was ultimately withdrawn with the

crown attorney advising that that was done because he had already been sentenced to a significant period of time and would likely have only received a concurrent additional term in prison. In this regard the court held as follows paragraph 43:

> [43] As these charges had been withdrawn prior to the hearing, the applicant was no longer in jeopardy of prosecution for the alleged offences when he was asked about them. Nor could the Crown have reinstituted the charges without facing an abuse of process argument. In any event, as I will discuss below, any information given by the applicant to the Board about these matters could not have been used against him as evidence in any subsequent trial for these or other offences. But the information that such charges had been laid against the applicant, and the circumstances in which they arose, was relevant to the Board's mandate to protect the public interest. In my view, there was no breach of fairness in asking him about them.

With respect to the questions about being in a criminal organization and the argument based on Coscia, supra, the court again noted that Mr. Fernandez had long been identified as an associate of members of criminal organizations and the court concluded that Mr. Fernandez could not have been in any jeopardy from any determination by the board as such a determination had been made many years before. The court also noted that protections against self-incrimination were not referred to by the court of appeal in Coscia and concluded as follows:

> [53] It does not appear from the reasons for judgment in *Coscia* that the protections afforded against self-incrimination by the *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act*, 1982, Being Schedule B to the Canada Act, 1982 (U.K.), 1982, c.11 (the "*Charter*") were cited by either party in their submissions to the Court of Appeal. They were in this case. These protections are set out in sections 11 (c) and 13 of the *Charter*.
>
> [54] Section 11 (c) provides that any person charged with an offence has the right not to be compelled to be a witness in proceedings against that person in respect of the offence. Its application is limited to persons charged with public offences involving punitive sanctions, that is, criminal, quasi-criminal and regulatory offences: *Martineau v. Canada (Minister of National Revenue)*, 2004 SCC 81, [2004] 3 S.C.R. 737 at paras. 19 and 67. Proceedings of an administrative nature, such as those before the Board, are not penal in nature: *Martineau,* at paras. 22 – 23. In this case, the applicant could not have claimed the protection of section 11 (c) and refused to answer questions about his criminal activity which were not supported by a conviction: *Prasad,* above; *Giroux v. Canada (National Parole Board)* (1994), 89 F.T.R. 307, 51 A.C.W.S. (3d) 1057; *R. v. Davis* [1996] B.C.J. No. 2119 (B.C.S.C.) (QL). This is because, as Justice Donna McGillis discussed at paragraph 20 of *Giroux*, the applicant was not in any jeopardy with respect to potential criminal charges in the detention review

before the Board.

[55] These proceedings are administrative in nature and, in conducting the review, the Board is required to consider any factor relevant to the determination of the likelihood of the commission of a serious drug offence. As in *Giroux*, the information respecting criminal offences alleged to have been committed by the applicant was a highly relevant factor to be considered by the Board regardless of whether he had been convicted of those offences: see also *Mooring, Prasad, Yussuf, Lepage, Antoine* and *Normand* cited above.

[56] To the extent that an offender requires protection against the use of any potentially incriminating evidence he may provide during a Board hearing in subsequent criminal proceedings that protection is afforded by section 13 of the *Charter*. Section 13 compels the testimony of all witnesses, generally, except an accused charged before a criminal court. It provides the witness with "subsequent use immunity" at other proceedings. It states:

> A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

[57] It is well-settled that section 13 of the *Charter* prevents the use of any testimony obtained at an administrative hearing or other civil proceeding as evidence in subsequent penal proceedings against offenders, except for perjury or for giving contradictory evidence: *R. v. Carlson* (1984), 47 C.R. (3d) 46 (B.C.S.C.); *R. v. Tyhurst*, [1993] B.C.J. No. 2615 (B.C.S.C) (QL); *R. v. Sicurella* (1997), 120 C.C.C. (3d) 403, 47 C.R.R. (2d) 317 at paras.47-49 (O.C.J.); *Donald v. Law Society of British Columbia* (1984), 48 B.C.L.R. 210, 2 D.L.R. (4^{th}) 385 (B.C.C.A.); *Gillis v. Eagleson* (1995), 23 O.R. (3d) 164 at p. 167, 37 C.P.C. (3d) 252 (Gen. Div.); *Royal Trust Corp. of Canada v. Fisherman* (2000), 49 O.R. (3d) 187 (S.C.J.). The applicant could not be prosecuted for perjury or for giving contradictory evidence as the information he provided was not under oath before a court.

[58] In addition to the express protection afforded by s. 13, section 7 of the *Charter* has been held to provide witnesses with "derivative use immunity". Derivative use immunity protects against the use of any evidence obtained as a result of compelled testimony. This is part of the right against self-incrimination: *R .v S. (R.J.)*, [1995] 1 S.C.R. 451; *British Columbia (Securities Commission) v. Branch*, [1995] 2 S.C.R. 3 at p. 14, 123 D.L.R. (4th) 462. While the applicant was not under oath at the hearing and was not before a court, the circumstances under which the hearing was conducted effectively compelled him to answer the Board's questions. The information he provided was not volunteered and, in my view, could not be used by the authorities to uncover other inculpatory evidence

to be used against him in a subsequent criminal proceeding.

[59] In other words, any admission that the applicant may have made in these proceedings about his involvement in criminal organizations could not have been used against him as evidence in any prosecution for the offence of participation in a criminal organization or any other substantive offence of which he may be suspected.

[60] The decision whether or not to charge the applicant with the offence of participation in a criminal organization rested with the police and Crown Attorneys. They had that opportunity when the applicant was arrested in 2003 and chose not to exercise it for reasons that are unknown to this Court and are not, in any case, material. The enforcement authorities could not now revisit that decision on the basis of anything learned from the offender during his detention review hearing. As discussed above, they could not re-open the plea arrangements that were entered into between the Crown and the applicant, and approved by the Ontario Superior Court, that led to the withdrawal of charges at the time of his plea. No unfairness relating to possible jeopardy resulted from asking the offender about these matters in 2009.

[61] In reaching this conclusion, I am mindful that the principle of *stare decisis* dictates that a court is normally bound to follow any case decided by a court above it in the hierarchy. This is to ensure certainty, predictability and consistency in the law: *Segnitz v. Royal & Sun Alliance Co. of Canada* (2005), 76 O.R. (3d) 161, 255 D.L.R. (4th) 633 (O.C.A.). However, *stare decisis* is no longer as rigid as it formerly was: *Lefebvre c. Québec (Commission des Affaires Sociales)* [1991] R.J.Q. 1864, 39 Q.A.C. 206 (Q.C.A.). Inferior courts are not bound by propositions of law incorporated into the *ratio decidendi* of a higher court's decision which had merely been assumed to be correct without argument. This also applies to expressions of opinion that do not form part of the *ratio*: *Baker v. The Queen*, [1975] A.C. 774, [1975] 3 All ER 55; *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609 at para. 57.

[62] In my view, the comments of the majority of the Federal Court of Appeal at paragraphs 34-36 of *Coscia* were not intended to set down a binding proposition of law but were rather offered as words of guidance to the Board to assist it to avoid entering into confusing ambiguity that would deny an applicant the right to a fair hearing. Those remarks were intended to be helpful but do not form part of the *ratio decidendi* of the decision. The *ratio* in *Coscia* turned on the particular facts of that case.

[63] The offender in *Coscia* was attempting to regain conditional release. In doing so, he denied the implication that he was in some way associated with traditional organized crime. The Board, in attempting to elicit answers from him about his criminal behaviour, did not allow him to explain the distinction he wished to make. At paragraph 35, the Court of Appeal notes that counsel

attempted to draw the Board's attention to this without success. In the result, the majority found that the respondent was denied a fair hearing. In the instant case, the applicant was given several opportunities to deny any association with organized crime and explain his criminal history.

[64] There appears to have been no submissions to the Federal Court of Appeal in *Coscia* similar to those which have been presented to this Court with respect to the application of the protections against self-incrimination or discussion of the principles respecting plea negotiations and abuse of process that would prevent an offender being placed in jeopardy by reason of the Board's questions. Accordingly, I do not consider the views expressed in paragraphs 34-36 of *Coscia* to be dispositive of this case.

[65] I note that in *Allaire v. Canada (Attorney General)* 2010 FC 132, my colleague Justice Michel Shore observed that *Coscia* placed the Board in a very difficult position with respect to the nature and scope of questioning available to it. Nonetheless, he considered himself bound by the cited passages. Having read my colleague's reasons closely, it does not appear that the considerations I have discussed above were argued before him. For that reason, judicial comity does not compel me to reach a similar conclusion. I agree, however, with his observations about the difficulties that would flow from a too rigid interpretation of *Coscia*. In this case, for example, it might have prevented the Board from inquiring into matters that go directly to the heart of the offender's criminal history and the risk he presents to society. That cannot have been the Court of Appeal's intention.

The Court referred to the argument of the Crown Respondent as to the role illicit drugs played in Mr. Fernandez history, including acquittals and withdrawals, and concluded, on the evidence as a whole and taking into account the factors in the governing legislation, that the Board did not make an unreasonable finding in the circumstances.

Conclusions

s.7 of The ***Canadian Charter of Rights and Freedoms*** forming part of the Constitution of Canada provides that one has the right to life, liberty and the security of one's person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The records kept of these "non-convictions" can often lead to prejudice to a person's liberty and the security of one's person. As they are "non-convictions", where liberty or the security of the person is affected, they are not convictions obtained in accordance with the principles of fundamental justice. If the actions of the government in maintaining these records results in an impact upon liberty or the security of the person, does this not amount to a violation of section 7 in that the impact is not in accordance with principles of fundamental justice?

As indicated above I am not sure that there is much that can be done with respect to the

consequences of these non-convictions at foreign borders, in employment prospects or during the course of the sentence, in the absence of amendments to the Criminal Records Act and the Privacy Act's both federal and provincial to preclude access by the general public at least and limiting the use that can be made of them by police, corrections and by parole authorities.

Obviously when a prospective employer questions you about a criminal record and you don't have one because the charge was dismissed or stayed but nevertheless a file was opened and there is a note of the non-conviction, the inquiries by the employer are an effort to determine whether or not the event or events took place and an attempt to go behind the notation. This would also seem to be the case at a border when questioned to determine admissibility. Also any attempt by corrections officials or parole board members to inquire into the matter to determine its reliability and to then rely upon it in assessing one's risk to reoffend involves a trying of the issues resulting in an opinion as to whether one should have been convicted or not or at least was involved in the conduct under consideration and this will be used to prejudice one's placement or chances for conditional release. At a minimum the position expressed by Lemieux J. in **La, supra**, in relation to outstanding charges, should apply equally to any entries in any databases that do not amount to convictions. Namely they ought not to be able to be used as evidence of conviction for purposes of assessing risk for recidivism, nor to prejudice employment prospects or entry into a foreign country.

Finally, if the use of such information results in a Charter violation then the individual whose rights were violated is entitled to an appropriate and just remedy under section 24 (1) of the Charter. The author is unaware of any such actions for a personal remedy to date.

It is the author's opinion, based on section 7 of the Charter, that any record of anything short of a conviction should not be accessible by the general public so as to be used in a decision that may impact upon the life, liberty or security of the person and that access by others such as the police and corrections officials should be limited to use for intelligence purposes only and not in relation to decisions that impact on section 7 or other Charter rights.