# GEARED TO CONVICT

## A Legal Memoir

**Angelique Codina**

# GEARED TO CONVICT

## Introduction

***"You can always judge a society by the way it treats its women and its prisoners."***

***Leon Trotsky***

The truth of this statement has always resonated with me and history has shown that oppression of any group is most often legislated into action through the institutions or structures of society. This is what gives persecution and oppression their legitimacy.

The common belief is that violence is present when a government maintains its own domestic power by a police force or army that liquidates the opposition through an ongoing reign of terror. In corporate terms, this practice of overt physical assault becomes institutionalized overt physical assault.

What most people fail to understand, however, is the other form of violence known as personal covert violence which can become institutionalized hidden violence. This occurs when the institutions or structures of society violate the personhood of society's members.

This basic form of violence does not necessarily do direct physical harm and for this reason it is the most difficult and the most crucial "structural violence" to discern in the contemporary world. It has structural forms built into the apparently peaceful operations of society. It is the violence that is hidden within the life of society and often equated with the concept of "injustice."

It is of course not covert at all to those who are its victims but because it does not comprise overt physical expressions it is less likely to be acknowledged. The condescension and subtle forms of discrimination with which the criminal law process and the judicial system often treat those accused of crime are a part of it.

It is not my intent, however, to turn this legal memoir into an academic essay. What is reflected here is my personal experience in the criminal justice system and as an accused. What I hope to show is that the justice scale is tipped highly against both defence lawyers and defendants,

alike. And, once one is caught in the net of the criminal justice system it becomes almost impossible to get disentangled from it.

# CHAPTER 1

## The Weakest Link

***For a criminal defendant the truth will rarely set you free.***

I practiced law for twenty years as a member of the bar of Ontario and during those twenty years I had the opportunity to act as defence counsel in a number of criminal matters where I observed firsthand the operations of the criminal process in a developed capitalist democratic country with a tradition rooted in the common law and civil law systems of law.

I would like to begin by saying that for the general public and those who have no legal background, the legal system and the courts of law are truly a frightening prospect. I would describe them as a labyrinth.

Kafka, a major literary figure who wrote *The Trial* and who had legal background, set out the plot in his novel outlining how the protagonist who had been charged with a crime was doomed from the start – he could not make head or tail of the crime of which he had been charged and notwithstanding his efforts to comprehend and clear himself of the charges, he was eventually executed. Hence, the term *Kafkaesque* that has come to identify this labyrinthine process.

Even as a lawyer, it took me many years on both sides of the law before I learned how to navigate the system. But understanding the knots and bolts of the process is insufficient because the problem is not with the process *per se* but in how the process is applied by the prosecution and the authorities, whether the police, the crown or the courts.

The vast majority of criminal defence lawyers fail to explore or to challenge the manner in which the procedures are applied by the authorities and this is the reason why it becomes almost impossible to beat the system even when you know you are wrongfully accused of something you did not do or that is not illegal. The reality is that as a criminal defendant, the truth will rarely set you free.

I have worked with some of the most distinguished and experienced criminal attorneys and always am astounded at their conceptual limitations when it comes to the issue of jurisdiction or

the lack of authority in charging, prosecuting or trying someone. Authority is always presumed and rarely questioned, although it is the legal Achilles heel.

My experience has shown that it is primarily the improper application of the legal process that is conducive to the institution of unlawful prosecutions and not the existence or absence of evidence. Lawyers, however, always look at the evidence and not the procedure. The focus is to show that there is insufficient evidence to prove the accused, as the saying goes, "guilty beyond a reasonable doubt," which is essentially a question of fact to be determined by the jury or the trial judge after the hearing of the trial evidence.

Here, I think it would be useful to define the two cornerstone terms of the legal system: substance and process. All court cases, whether criminal or non-criminal, are based on the application and interpretation of procedural law and substantive law. The provisions of law that apply to a particular case are found in the applicable statute, which in a democratic society is passed by a democratically-elected Parliament. A statute always includes provisions both as to process and substance.

In Canada criminal offences are found in the *Criminal Code of Canada,* although there are certain other statutes that can also include criminal penalties for specific breaches or violations of those particular statutes. Some Canadian examples include the *Controlled Drugs and Substances Act*, the *Firearms Act*, the *Income Tax Act*, the *Customs and Excise Act*, and the *Immigration and Refugee Protection Act*, among others. All statutes, including those named here, comprise provisions which outline how an individual is to be processed through the criminal justice system.

For example, there are sections of the *Criminal Code* that explain (1) how the police can arrest or search without a warrant; (2) how a police officer is to apply to a justice of the peace for a search warrant or a warrant for arrest; (3) what an officer must do to charge someone with a criminal offence (this involves the issuance of an information or the accusatory document that starts the criminal process); or (4) how someone arrested is to be brought before the court to be released on bail pending trial.

These are but a few of the provisions that apply to the actions of the police. Then there are sections that apply to the prosecutor and others that describe the duties and functions of the judge. For example, there are the sections that discuss how the prosecutor is required to provide defence

counsel with full disclosure of the evidence it has against the accused and the sections that explain what orders a judge can make and when the judge can allow or refuse to admit evidence against an accused.

All of the sections discussed so far concern procedure and involve procedural law. Some procedural errors can be cured but often the errors are fatal. The errors that cannot be cured concern jurisdictional issues. This means errors that go to the underlying authority of the prosecuting agency or party enforcing or conducting the prosecution. For example, if the prosecutor lacks statutory authority to conduct a prosecution the trial judge is without authority to try the offences. Consequently, the proceedings are a nullity and the charges must be dropped.

The same is true in civil or non-criminal cases. The authority to start a lawsuit against someone is laid out in a statute or law that permits the individual to file the claim. If that statutory authority does not exist or the plaintiff has misinterpreted the application of the law, the claim has to be dismissed.

However, in the civil or non-criminal context, the plaintiff or person who files the lawsuit has to set out in their statement of claim the section of the law pursuant to which they are filing the lawsuit. Thus, if there is a question regarding the lack of authority to sue, the issue can be raised at the very beginning of the proceedings, and, in some instances, the error is caught at the filing stage by the registrar even before the claim is issued by the court. Unfortunately, that is not the case in criminal law.

In the criminal context, the only statutory provision that appears in the accusatory document known as the Information or Indictment is the section of the law under which the person is charged. This is the offence provision which sets out the elements of the offence. So, in example, if someone is charged with kidnapping under the current section 279 of the *Criminal Code of Canada*, the charging document would refer to this provision which simply defines the crime of kidnapping as follows:

> 279. KIDNAPPING – (1) Every person commits an offence who kidnaps a person with **intent**
>
> **(a)** to **cause** the person to be **confined** or **imprisoned against the person's will**;

(b) to **cause** the person to be **unlawfully sent** or **transported out of Canada against the person's will**; or

**(c)** to **hold** the person for **ransom** or to **service against the person's will**.

The provisions of the law, which describe the individual crimes such as section 279 with the offence of kidnapping, are referred to as "substantive law" because each one of the sections or enactments sets out the elements of the particular offence of which the accused is charged. These sections do not concern the process in bringing the case to trial and do not put into question the actions of the authorities. Everything turns on evidence and whether or not the prosecutor can prove each element of the crime.

In this example, the prosecutor has to prove a number of elements which I have emphasized in bold. First and foremost, in each of the scenarios listed in section 279, the prosecutor has to show that the accused had the *intent* to commit the crime. This is the first element that carries forward in each of the subsequent three paragraphs (a) - (c).

Next, the prosecution has to prove the additional elements shown in at least one of the three paragraphs charged under this section. In the accusatory document, the charge would include the section charged as s. 279(1)(a) or 279(1)(b) or 279(1)(c) or a combination of any of these paragraphs depending on the facts of the case. However, the element of *intent* has to be proved under each of these paragraphs.

Most criminal offences require proof beyond a reasonable doubt of a 'fault element' – also known as a mental element – such as **intent, knowledge, recklessness or negligence**, before they can be established. In most cases, an act is a crime because the person committing it intended to do something that the State has determined is wrong, also known as criminal intent. This mental state is generally referred to as "**mens rea**," Latin for "guilty mind".

Three types of criminal intent exist: (1) general intent, which is presumed from the act of commission (such as speeding); (2) specific intent, which requires preplanning and predisposition (such as kidnapping or burglary); and (3) constructive intent, the unintentional results of an act (such as a pedestrian death resulting from being hit by a car).

A person may not be convicted of a crime unless each element of the crime is proved by the State beyond a reasonable doubt. "Element of the crime" means the forbidden conduct; the attendant circumstances specified in the definition of the crime; the intention, knowledge, recklessness or negligence as may be required; and any required result.

In general, every crime involves four elements: first, **the act or conduct** (“actus reus”); second, the individual's **mental state** at the time of the act (“mens rea”); third, the **causation** between the act and the effect (typically either "proximate causation" or "but-for causation"); and fourth, the **concurrence** between the guilty mental state and the guilty act. This means that both elements must occur at the same time, or at essentially same time. In a criminal trial, the prosecution must prove that the defendant's guilty mental state coincided with his or her criminal action (the guilty act).

**Causation** means the act committed must have caused the event that led to the crime. Causation is the "**causal relationship between the defendant's conduct and end result**". In criminal law, it is defined as the *actus reus* (an action) from which the specific injury or other effect arose and is combined with *mens rea* (a state of mind) to comprise the elements of guilt. In order to prove factual causation, **the prosecutor must show that “but for” the defendant's act, the result would not have happened as it did or when it did**. Please note that the prosecution does not have to prove that the defendant's action was the only thing that brought about the result.

In example, in the first scenario in s. 279(1)(a), the prosecutor has to prove all four elements of the offence: (1) that the accused had the **intention** to confine the person (**mental state** – ***mens rea***); (2) that the accused **confined** or **imprisoned** the person **against their will** (**conduct** – ***actus reus***); (3) that the actions of the accused **caused** the person to be confined (**causation**); and (4) that the guilty act of confining or kidnapping the person **coincided** with the accused’s guilty state of mind (**concurrence**). If the prosecution fails to prove any one of these elements, the accused must be acquitted. So, for example, if the evidence shows that the person voluntarily agreed to go or to remain with the accused and was not taken by force or kept against their will, the case against the accused will be dismissed.

In the second scenario in s. 279(1)(b), the prosecutor has to prove the following four elements of the offence: (1) that the accused had the **intention** to unlawfully send or transport the

person out of Canada (**mental state** – ***mens rea***); (2) that the accused had the person **unlawfully sent** or **transported out of Canada** **against the person's will** (**conduct** – ***actus reus***); (3) that the actions of the accused **caused** the person to be sent or transported out of Canada (**causation**); and (4) ) that the guilty act of unlawfully sending or transporting the person out of Canada against their will **coincided** with the accused's guilty state of mind (**concurrence**). This is often the paragraph used to charge a parent in a custody dispute who takes the child out of the country without the consent of the other parent or the court.

In the third scenario in s. 279(1)(c), the prosecutor has to prove the following four elements of the offence: (1) that the accused had the **intention** to hold the person as hostage for ransom or services (**mental state** – ***mens rea***); (2) that the accused **held the person for ransom** or **held the person to services** **against the person's will** (**conduct** – ***actus reus***); (3) that the actions of the accused resulted in the person being **held** in this fashion (**causation**); and (4) that the accused's guilty act **coincided** with his or her guilty state of mind (**concurrence**). In this instance, the prosecutor has to prove that the accused intentionally asked for money or other exchange to release the victim (ransom) or held the victim captive requiring forced services while kept in captivity or in exchange for the promise of future release from indenture.

Since defence lawyers try to knock off the charge, they always focus on the elements of the crime (statutory law) as explained here. They go straight to the evidence or facts and try to persuade the judge or the jury that the evidence is insufficient to make out the crime. Rarely, if ever, do they question the techniques used or the procedures put into place to institute the proceedings. However, analyzing and attacking the process, in my opinion, is the most conducive route to find an exit from the *Kafkaesque* labyrinth of the criminal justice system that consumes the individual.

Analyzing the evidence, on the other hand, involves a circuitous route that will in the vast majority of cases only keep the individual confined within the criminal justice system, unable to find a way out because as I indicated earlier, for a criminal defendant the truth will rarely set one free. In challenging only the evidence, defence counsel implicitly acknowledges the framework of the criminal justice system because there is always evidence of something that prompted the authorities to lay the charges – whereby the term "trumped up charges" has been coined.

When someone is first charged with a crime, the person is presumed guilty notwithstanding that there is no verdict as yet. We all adhere to the saying, "where there is smoke, there is fire". So even when a person is acquitted or cleared of criminal charges, a cloud of suspicion always hangs over their head. The authorities control the process, whether before, during or after trial. Consequently, to defend someone becomes a herculean task. After having practiced for a number of years as defence counsel, most criminal lawyers are burnt out and cynical. They do not trust the criminal justice system, know that the process will sink most defendants and are frightened into coping guilty pleas as the best option for their clients.

As for the general public, it tries its best to avoid any type of entanglement with the law. The average person knows instinctively not to trust the legal system. In reality, the law is inaccessible to most citizens. Access to the courts, either to litigate or to defend a case, has become economically impossible for the vast majority of the public. Only the wealthy and well-to-do can afford to hire lawyers and unlike the United States where counsel is appointed by the court in all unrepresented cases, in Canada legal aid funding to retain counsel is not automatically secured.

There are many defendants who are denied access to legal aid counsel, particularly at the appeal stages, on the grounds that the appeal lacks merit. These are decisions often made by bureaucratic legal aid staff without the benefit of supporting materials such as transcripts of the evidence and even when counsel provides a positive opinion letter on the merits of their client's case. These bureaucrats have the final say as to whether public funding is justified in a case, and therefore pre-judge the merits of the case although they are not judges or triers of fact. This is the current state of our criminal system of law.

# CHAPTER 2

## On The Law Society Radar

***"If you value your right to practice law,***
***you won't have anything to do with this man."***

***Steve Sherriff, Senior Discipline Counsel***
***Law Society of Upper Canada***

My first foray into the legal process as adversarial territory began with the Law Society of Upper Canada – the organization that regulates and licenses lawyers in the province of Ontario. The practice of law in Canada falls under provincial legislation and state law in the United States. In Canada, these provincial regulatory bodies are known as law societies and in the United States they consist of bar associations. A lawyer, for example, becomes licensed as a member of the Law Society of British Columbia or the New York State Bar Association.

These regulatory bodies have tremendous power over someone's right to earn a living as a lawyer and in Canada there are less safeguards than in the United States because the law societies are self-regulated organizations that are not accountable to anyone. The result is that they operate very much as private boys clubs since discipline hearings to revoke a lawyer's license are administrative proceedings held before a panel of three benchers (these are elected members from within the legal profession who are responsible for the operations of the law society).

As administrative proceedings, these discipline hearings are subject to less exacting standards of proof and rules of evidence. By comparison, in the United States discipline proceedings are instituted in the courts and adjudicated by a judge applying the more stringent judicial safeguards. We often hear of systemic and institutional bias in the historic treatment of certain racial or social groups. I personally came to understand the term "institutional bias" in my first dealings with the Law Society of Upper Canada.

Once I finished law school and completed my apprenticeship term, I had to write a set of provincial bar exams to be called to the bar of Ontario. Upon successful completion of these exams in 1983, I became licensed to practice law in the province of Ontario as a member of the Law

Society of Upper Canada. During this time I had resided in the city of Ottawa where I attended law school at the University of Ottawa and held a number of positions including working with the Office of Parliamentary Counsel.

My work-related experience in Ottawa included working in the legal department of the Canadian Transport Commission, and as liaison officer at the first World Economic Summit. I also did legal research for the Department of Justice and various judges including a future Chief Justice of the Supreme Court of Canada. Ottawa, however, was a typical government town and did not have the allure of a major cosmopolitan centre of the world. I was drawn to cities such as Paris and New York. Montreal would have been my Canadian city of preference but since I was licensed in Ontario I had to satisfy myself with the city of Toronto.

In Toronto I was offered shared office space on Bay Street with three other lawyers in exchange for doing research for a book on non-profit corporations that was to be published by J. M. Wainberg, Q.C., a well-known corporate lawyer and legal author. Wainberg is known for publishing the nominal legal text, *Company Meetings Including Rules of Order,* and *Wainberg's Society Meetings Including Rules of Order,* which he co-authored with his son Mark I. Wainberg.

One of the three lawyers in the shared office space on Bay Street was Harry Kopyto, a renowned legal advocate and gadfly who was a thorn in the side of the legal establishment. As a human rights and civil rights lawyer, Harry fought cases against the legal establishment, the institutions and the authorities and advocated for the downtrodden, the dispossessed, the marginalized and those violated and deprived of their rights by impersonal and bureaucratic social institutions and unjust laws.

Harry Kopyto was politically progressive, and he and I soon realized that we were very compatible in our ideological outlook and world view. We both championed law reform although my pursuit had been primarily academic. Whereas Harry's legal practice was politically charged, I practiced law largely as a trade or a means to earning a living. I, however, did have occasion to participate in some of Harry's high profile legal cases and this is how I came on the radar of the Law Society.

At the time when I began to practice law, lawyers were not permitted to advertise. It was considered undignified. As I spoke six languages, I had expanded my legal services in the various

ethnic communities in Toronto and had placed a few advertisements in the local community newspapers. Some lawyer reported me to the Law Society and I was sent an invitation letter to attend at their offices to discuss the matter.

The letter had been sent as a form of warning as it did not concern a disciplinary proceeding. The invitation was in fact a form of veiled threat or intimidation tactic. Obviously for a recent member of the bar, it was somewhat daunting to be called out by the Law Society in this manner. Unfamiliar with the territory, I asked Harry to accompany me. When we arrived at the Law Society offices, we were met by Steve Sherriff who was at the time the head of the Law Society's discipline department.

I later learned from Harry that he and Steve Sherriff had attended law school together and had graduated from the bar in the same year. Sherriff, therefore, would have been familiar with Harry's political activism as a youth and prior to him becoming a lawyer. And, as legal professionals they practiced on opposite sides of the law. Before Sherriff began working as chief discipline counsel with the Law Society, he had worked as a crown prosecutor. Harry, on the other hand, worked as a criminal defence attorney. So at the end of the day it seemed to me that Sherriff had a personal ax to grind with Harry.

I do not recollect the content of our conversation but I do remember Sherriff being upset at Harry and blaming him for my placing the newspaper advertisements when Harry had absolutely nothing to do with my actions. I also vividly recollect him saying to me, "If you value your right to practice law, you will not have anything to do with this man." This threat made by Sherriff left such a deep impression on me that it still resonates with me to this day.

Indeed, the statement revealed to me the extent of antagonism held by the legal establishment not only for someone like Harry but also for anyone who might wish to challenge the legal authorities. Dissent, in other words, was not going to be tolerated. Interestingly enough, a few years later the advertising prohibitions were lifted and one might say that I was the precursor in bringing about that change.

Although Harry was the most prominent legal dissident in Canada at the time, there were a few others as well. Charles Roach was among these. He and Harry were friends of course but Charles was more widely known and regarded in his community. He was originally from Trinidad

and Tobego and was well-known in the Caribbean and broader black community circles in Toronto for whom he advocated. Indeed, he was one of the founders of the original Caribana festival, which would become an internationally known event.

Charles Roach played an important role in creating civilian oversight of the Toronto police and co-founded the Black Action Defence Committee with Dudley Laws, Sherona Hall and Lennox Farrell. He was also appointed lead defence counsel at the International Criminal Tribunal for Rwanda, from 1998 to 2005. As a legal activist, he too was harassed by the Law Society. They had initiated proceedings against him on several occasions but he fought these publicly with the support of the black community and this forced the Law Society to relent.

Unquestionably, public pressure can and often does impact on institutional decision-making. Unfortunately, I did not have the level of community involvement or the type of personality to spur public support to politicize my struggles. My approach was to be more technical. I was an intellectual by nature and just as the authorities abused the system for their own gain, I was to turn the system against them to my advantage. Indeed, it was this approach that led to the discovery of the exceeding misuse of the criminal process by the prosecution.

I indicated earlier that criminal lawyers view the facts or evidence as the bread and butter of a criminal case. Analyzing the procedure is considered somewhat esoteric, whereas often the procedural error touches upon the very authority of the prosecution to institute the proceedings and is thus crucial to the jurisdiction of the court to try the case. Time and again this proved to be the case with me.

We should note that ultimately it is individuals who decide whether or not to charge someone, though it may be an institution or organization that lays the official charge. Institutions have a process in place that is to be followed by their investigative staff, and which may culminate in the laying of charges. If a person's name is red-flagged by a particular institution, the investigator who receives the complaint will be more likely to run with the file and to make a case out of it. Facts have to be interpreted and the discretion involved in the process of interpretation is not neutral, whence the concept of "institutional bias".

We see this often with individuals who have criminal records. Any prior involvement with the law will automatically make the person a target if their name comes up in the course of an

investigation though they may be perfectly innocent. The same holds true for those who may have differing political views or who are known to the authorities or to a particular institution or organization for their support of a specific cause such as the environment or abortion rights, etc.

It is in these types of cases where there is a prior history of some sort connected with the institution that leads to the person becoming the target of institutional aggression. And so it was for me and Harry with the Law Society. Once we were red-flagged, the powers that be actively pursued discipline action against us with the aim of removing us from the legal profession.

# CHAPTER 3

## The Crazy Glue Comment

***"The courts and the police are stuck together so closely, you would think they were stuck together with crazy glue."***

***Harry Kopyto, Civil Rights Activist/Lawyer***

These were Harry's famous words that got him charged with scandalizing the courts. This was in 1985 when the common law offence of scandalizing the court was a criminal offence of which a person could be charged and convicted. There had been in fact several prominent individuals including a Quebec Minister who had been charged and convicted of this offence previously.

All of the Canadian provinces other than Quebec operate under a common law system of law inherited from England. The province of Quebec has the civil law system inherited from France. The common law is the English system of law. It is based on case law, as distinct from statute law and the system of jurisprudence known as civil law whose juridical principles have been derived from the Justinian treatises of Roman law and which forms the basis of the law of European countries.

A system of law such as the common law, which is founded on usage and custom or case law, depends on rulings by judges and the courts of law. In short, principles of law have developed over the course of centuries through case law precedents. This means that a person can rely on earlier court decisions to support an argument on a point of law. The higher the decision of the court, the more weight it will carry. For example, a ruling from the Supreme Court of Canada will carry the most weight throughout the country because it applies nationally.

In comparison, however, a ruling from a provincial court of appeal, which is the highest court in the province, will have more precedential weight in a lower court of that province than a ruling from another provincial court of appeal. So if a case is being heard in Ontario, a decision from the Ontario Court of Appeal will have more weight before an Ontario Superior Court than

let's say a decision from the British Columbia Court of Appeal. This means that unless the Supreme Court of Canada or the United States has ruled on an issue, the provincial or state appellate court remains the binding authority in a provincial or state court decision.

Most people do not realize that there is a difference between civil and criminal contempt. Civil contempt consists essentially of disobeying the order of a court in civil proceedings. Criminal contempt in general consists of conduct likely to interfere or obstruct or discredit the administration of justice. It consists of contempt in the face of the court and contempt out of the face of the court.

The former involves conduct in court, such as disruption of proceedings, counsel's failure to attend, or witness conduct such as refusing to be sworn or testify. The latter consists of three general categories: publication of material likely to prejudice a fair trial, obstruction of justice such as interference with a witness, counsel or juror, and scandalizing the court by contemptuous criticism.[1]

Harry was charged with the scandalizing form of contempt for allegedly making contemptuous remarks about the judicial system outside the court in the press. The entire saga originated from certain comments he made to the press outside the courthouse after he had lost his case.

The matter involved an action in the Toronto small claims court seeking damages from the RCMP[2] for illegal actions it perpetrated against a political group in the 1960s. Harry was representing Ross Dawson, the head of the now defunct organization known as the Socialist League of Action which was active in the 1960s. The RCMP had infiltrated this group clandestinely, posing as members and operating what is known as a dirty tricks campaign.

[1] I am much indebted to Mr. Alan Gold's practice notes in section 9 of the *Criminal Code of Canada*, R.S.C. 1983, c. C-46, for the definitional clarification noted here.

[2] The RCMP stands for the Royal Canadian Mounted Police which is the federal police force in Canada responsible for enforcement of federal statutes. It shares jurisdiction with the local police forces in the provinces, whic enforce primarily offences under the *Criminal Code of Canada.*

The RCMP's objective was to break the group apart, and wreak havoc and dissension among its members. Some of the acts they perpetrated included writing false letters, (get more details from Harry to complete this paragraph).

These illegal activities were discovered only years later after obtaining disclosure from privacy law legislation using the *Freedom of Information Act*. Once the evidence was secured, Harry unsuccessfully attempted to have the RCMP charged criminally by appearing before a Justice of the Peace to ask that charges be laid. He was impeded or blocked on the grounds that (more information needed from Harry).

The only option left was to seek civil redress by suing in civil court for damages through monetary compensation. No one cared about the money. It was merely a question of principle. However, in order to proceed a plaintiff was needed and Dawson was the natural choice since he had been the head of the group and could sue as its representative.

Dawson was not a lawyer and did not appreciate the subtleties and intricacies of the law. He did not understand how relative and malleable evidence can be and how one's testimony could work to support the legal argument advanced by counsel or effectively destroy it. I was not present in the courtroom to hear Dawson testify but I recollect Harry commenting to me afterwards that Dawson had not made the best witness.

The case against the RCMP was dismissed by the court and when Harry came out of the courtroom he spoke to the media making the following comments: "This decision stinks to high hell. It is a travesty of justice. The courts and the police are stuck together so closely you would think they were stuck together with crazy glue." These comments were published in the press and eventually led to Harry being charged for the common law offence of scandalizing the courts.

There was much publicity surrounding Harry's case. Charles Roach represented him in the trial court and a group of supporters had formed to protest the charge. It ultimately amounted to a question of freedom of expression, which is a fundamental freedom protected constitutionally under s. 2(b) of the *Canadian Charter of Rights and Freedom*. The issue then was whether the common law offence of contempt by scandalizing the court was unconstitutional. If it was found to be unconstitutional, the charge against Harry would be dismissed.

The issue was raised at the trial level but the trial judge ruled that the offence was constitutional and found Harry guilty of contempt of court. Harry was fined but he appealed the ruling to the Court of Appeal for Ontario. Since the issue was one of public importance, the Criminal Lawyers Association applied to intervene as a party in the proceedings to argue that this offence violated the fundamental freedom of expression preserved by the constitution. The application was accepted and the Association was granted intervener status by the Court of Appeal to argue alongside counsel for Harry.

David Doherty was retained by the Criminal Lawyers' Association to represent the Association at Harry's appeal. Doherty had been a former crown attorney or prosecutor but by this time had moved on to the private sector. I think he prided himself as a constitutional law advocate but in the legal profession those who practice constitutional law are typically non-traditional, liberal lawyers who advocate for defendants.

Doherty, however, was working by then with a large law firm in Toronto and these types of firms do not commonly practice criminal law, as they do not wish to associate with a criminal law clientele. This meant that Doherty's opportunities to take on major constitutional challenges would have been slim. Likewise, his previous practice as a prosecutor would not have given him much opportunity to challenge the laws constitutionally as his function would entail enforcement of the law and not its repeal.

As compared to the practice of civil law, the practice of criminal law is more conducive to constitutional challenges because many of the rights and freedoms protected by the constitution touch upon such matters as the life, liberty and security of the person, searches and seizures, detention or imprisonment, proceedings in criminal and penal matters, and treatment or punishment, issues which concern and are relevant to the criminal process.

David Doherty's previous employment as a prosecutor, however, placed him on the conservative spectrum of the criminal law as a law enforcement type and not a constitutional civil rights adherent. He did nonetheless advocate forcefully in Harry's appeal to have the offence of contempt of court by scandalizing the court declared unconstitutional and this left me with the impression that Doherty was a civil libertarian – an impression I held throughout the years until very recently.

The appeal panel that heard Harry's appeal was comprised of five Judges. An appellate panel usually consists of three judges but because the case involved an important constitutional challenge, five judges were appointed to hear the matter. Charles Roach and I acted as co-counsel on the appeal. As between the prosecutor and Doherty there was no contest. The prosecutor did not exude or project a strong presence in the courtroom and his elocution faltered. He appeared weak as a speaker and as a result his argument suffered. Doherty, on the other hand, was eloquent and self-assured, articulating clearly and forcefully his legal argument.

I was frankly impressed with Doherty and went over afterwards and thanked him for his assistance. I believe he was surprised by my move. I had not known at the time of his background as a crown attorney but I did observe during the course of the hearing that he fraternized with the prosecutor. During the lunch break he had lunch with the prosecutor in the barristers' dining room and although he was supposed to be supporting Harry in his constitutional challenge, in the courtroom he kept his distance from Charles Roach and me, and sat next to the prosecutor.

Finally when he completed his argument, he formally distanced himself from Harry by telling the judges that he did not condone Harry's actions and that he was only appearing because of the importance of the constitutional issue. Afterwards when I thanked him, he did not answer or respond to me but instead turned around and commented to the prosecutor, seemingly surprised that I would express any kind of positive reception.

Thirty-three years later I had occasion to cross paths with Doherty again. By this time, he had been a judge on the bench for approximately twenty-five years. In 1993 he was appointed a judge to the Court of Appeal for Ontario and as I report in another chapter here, he presided over one of my appeals. I could see from that ruling how the system had corrupted him. Being on the bench had turned him into a sterile, unimaginative, sanctimonious zealot who wrote judgments endorsing and preserving the legal status quo.

In his role as a judge, he upheld the constitutionality of dubious laws and the errors of lower court judges. However, he wasn't unique in this respect. Ninety percent of the judges hearing criminal cases are former crown attorneys. Rarely is a defence attorney appointed to the bench and perhaps this is one of the reasons "the courts and the police are stuck together so closely you would think they were stuck together with crazy glue," as Harry famously stated.

I personally have always found it objectionable that a judge who had previously worked as a crown attorney should preside over a criminal trial or appeal. There would be a natural inclination for such a judge to identify with the prosecution even if not consciously wishing to do so. The difficulty of course is that a judge who does not have a background in the practice of criminal law will be less familiar with the application of the criminal process.

However, it would be preferable in my opinion to appoint in such case more criminal defence attorneys to the bench as the onus is on the prosecution to prove its case and not the defence. By having a former prosecutor sit as a judge, the onus reverses unintentionally to the defence as a result of the judge's legal background. This is compounded by the fact that there is a presumption of procedural regularity, which renders the actions of the prosecution indisputable and any challenge by the defence doubtful in the eyes of the court.

The ruling in Harry's contempt appeal resulted in the contempt law being declared unconstitutional. After everyone argued at the hearing, the appeal court reserved its decision and when it was eventually released, a majority of the panel consisting of three judges out of five ruled in favour of Harry, declaring the law to be unconstitutional.[3] This was a major victory. As at present, under section 2(b) of the *Charter* which includes the "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication," there are only two *Criminal Code* provisions that have been struck down as unconstitutional.

Harry's case was the first one in 1987, where the common law offence of contempt by scandalizing the court was declared unconstitutional under section 2(b) of the *Charter*. The second one was the *Zundel* case in 1992, where the Supreme Court of Canada declared the offence of spreading false news contrary to section 181 of the *Criminal Code of Canada* to be unconstitutional.[4] Both of these offences have been struck down and no one can be charged for these crimes any longer.

The reason these rulings are significant is because even though a law may be found to breach the constitution, the courts can still rule that the breach is a reasonable and demonstrably justified limitation in a free and democratic society and uphold or save the law under section 1 of

---

[3] The ruling is reported in *R. v. Kopyto*, [1987] O.J. No. 1052.
[44] The *Zundel* case is reported at *R v. Zundel* (1992), 75 C.C.C. (3d) 449, 16 C.R. ($4^{th}$) 1, [1992 S.C.J. No. 70 (S.C.C.).

the *Charter*. Indeed, there are a number of other *Criminal Code* provisions that have been challenged and found to violate section 2(b) and yet saved by section 1 of the *Charter*.

The courts have found the breach in those cases to constitute a limitation that is reasonable and demonstrably justified in a free and democratic society and upheld those criminal offences.[5] So for the scandalizing the court offence not to be saved by section 1 of the *Charter* was a major coup. However, the legal establishment was not to let Harry off the hook so easily. One of the judges on the panel suggested that they should pursue Harry through the Law Society. And, it is exactly what they did. Picking up on the suggestion, the legal establishment pursued Harry relentlessly like hounds pursuing their prey until they killed it.

[5] The following provisions have been found to violate s. 2(b), although they were saved by s. 1 of the Charter (list here all the various sections).