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Another Bad Press-Law Decision And Canadian Publishers Finally Act

This is the second in Bimonthly Reports' press-law series.

After reserving judgment on the case for almost a year, the Supreme Court of Canada has issued a decision that further seriously restricts the availability of the defence of fair comment to libel actions, and newspaper publishers across Canada are actively seeking legislation to remedy the effects of the decision. In its judgment, the Supreme Court found the publisher of the Saskatoon Star-Phoenix libelled Saskatoon alderman and lawyer Morris Cherneskey in publishing a "letter to the editor" referring to him. The crux of the court's decision was the the newspaper, in publishing such a letter, must actually agree with the contents of the letter—as well as proving that it is the letter-writer's honest opinion—in order to plead fair comment as a successful defence to a libel action.

What the decision means is that any publisher of a "fair comment" must actually agree with the comment in order to have the defence available to him in a defamation action. For example, if a newspaper contributor writes in a restaurant review that the food is terrible, the newspaper will not be able to plead fair comment — the usual legal basis of such reviews — unless, it seems, newspaper management has actually tasted the food and agrees that it is terrible. Likewise any publication by a journalist of a statement thought to be fair comment would have to represent not only the views of the person who made the comment, but also of the journalist. And if the journalist is not an employee but a freelancer or a contributor, the newspaper would have to independently agree with it as well.

The decision represents a serious alteration in the traditional idea of the role of fair comment, and it has caused consternation in press circles.

Members of the Canadian Daily Newspaper Publishers Association are in the process of approaching the ten provincial governments as the first step in a plan to try to amend the provincial Libel and Slander Acts, on what they hope can be a uniform basis. A spokesman said it is possible the proposal will also include areas other than those raised by the Cherneskey decision. Such activity by Canadian publishers is unprecedented, and it apparently reflects concern not only about the recent decision, but about the general direction taken in judicial interpretations of the press-law.

The decision, written by Justice Ritchie on behalf of the court, was accompanied by an exceptionally strong dissent by Justice Dickson on behalf of himself and two other judges.

The elements of fair comment are that the words must be comment and not statements of fact, the comment must be "fair," and it must be on a matter of public interest. In this case, which concerned a letter written to the Saskatoon paper in 1973, no evidence was heard from the writers of the letter, and newspaper officials said they themselves didn't agree with it.

Justice Ritchie said one of the ingredients of the fair comment plea "is that the person writing the material complained of must have an honest belief in the opinions expressed, and it will be seen that, in my view, the same considerations apply to each publisher of that material" — that is, to the newspaper as well as to the writers of the letter. Ritchie said "honest belief" is part of proving the comment "fiar," and the burden of proving it therefore lies with the defendant.

The dissenting judges took issue with Ritchie's "honest belief" doctrine, and they said the decision would lead to a new kind of press censorship and the stifling of public debate.

Dickson wrote: "It does not require any great perception to envisage the effect of such a rule upon the position of a newspaper in the publication of letters to the editor. An editor receiving a letter containing matter which might be defamatory would have a defence of fair comment if he shares the views expressed, but defenceless if he did not hold those views. As the columns devoted to letters to the editor are intended to stimulate uninhibited debate on every public issue, the editor's task would be an unenviable one if he were limited to publishing only those letters with which he agreed. He would be engaged in a sort of press censorship, antithetical to a free press. . . . If editors are faced with the choice of publishing only those letters which espouse their own particular ideology, or being without defence if sued for defamation, democratic dialogue will be stifled."

Ritchie attempted to meet that objection in his decision. He wrote in conclusion: "This does not mean that freedom of the press to publish its views is in any way affected, nor does it mean that a newspaper cannot publish letters expressing views with which it may strongly disagree. Moreover, nothing that is here said should be construed as meaning that a newspaper is in any way restricted in publishing two diametrically opposite views of the opinion and conduct of a public figure. On the contrary, I adopt as descriptive of the conclusion which I have reached by language used by (Saskachewan Court of Appeal Judge Brownridge): 'What it does mean is that a newspaper cannot publish a libellous letter and then disclaim any responsibility by saying that it was published as fair comment on a matter of public interest but it does not represent the honest opinion of the newspaper.'"

In effect, Ritchie says his decision doesn't affect the freedom of the press, because it only applies to publications that are defamatory. Judge Dickson, for his part, points out that the meaning of defamation makes its scope extremely wide, and the defences to defamation suits are the very substance of freedom of speech. A defamation, he notes, is a statement whose "words tend to lower the plaintiff in the estimation of right-thinking members of society generally," or, according to another definition, "Everything printed or written, which reflects on the character of another." "It is apparent, Dickson writes, "that the scope of defamatory statements is very wide indeed. In particular, a great deal of what is printed in the Letters to the Editor columns of newspapers unquestionably has the effect of lowering the subject's reputation in the estimation of right-thinking people generally. In all cases, nevertheless, the statement is not actionable if it is the truth, or fair comment, or protected by privilge. This is the reason why most defamation actions centre on the defences of justification, fair comment, or privilege. It is these defences which give substance to the principle of freedom of speech."

Dickson based his dissent on this approach to the question of "honest belief." "There is in some cases," he wrote, "confusion between the requirement that a comment be 'fair' and that it not be made with malice. In fact, these two requirements are quite distinct. Shortly stated, the test of whether a comment is 'fair comment' in law is an 'objective' test, i.e., is the comment one that an honest, albeit prejudiced, person might make in the circumstances? . . . If a defendant raises the defence of fair comment, he has the burden of establishing that the facts on which it is based are true and that it is objectively fair; if he discharges this burden he will, nevertheless, lose the defence if the plaintiff proves that the comment was published maliciously. It is this second stage of analysis which raises the subjective issue of the defendant's state of mind or motive." In

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Sorting Out the Books In an E. D. Sassoon Stock Deal

Stock-fraud charges against Howard Ray and money-lender Melvin Feder were heard in December by County Court Judge Garth Moore, and his decision was issued in late January. Ray and Feder were convicted of conspiracy to defraud Beaver Mining Corporation, a public company listed on the Montreal Stock Exchange, and of conspiracy to make false statements to the Quebec Securities Commission, during 1973-74.

Burcal Mines Ltd, a private company owned by Ray, had a Northern Ontario calcite prospect and some equipment, and there was a proposal in 1974 to combine Burcal with public company Beaver Mining Corporation, whose president and controlling shareholder was construction engineer Michael Sokalsky. Melvin Feder's cousin. The crown said Beaver and Sokalsky were fronts for Feder.

Quebec Securities Commission clearance was needed to carry out the deal. For selling Burcal to Beaver, Ray was to get two blocks of Beaver Mining Corporation stock. One was a block of 100,000 "free" shares, being shares that could then be sold to the public. The other was a block of escrowed Beaver stock. A major question was how much of this escrowed stock the QSC would allow to be "freed" to be available to sell to the public in addition to the 100,000 share block.

The crown said accounting entries and representations to the QSC were part of a conspiracy by Feder and Ray, involving Beaver and Burcal, to deceive the QSC and get approval for freeing the escrowed stock. The defendants said these were arms-length transactions, involving no deception.

False documents were used, according to the crown, including financial statements audited by David Title of the firm of Perlmutter and Orenstein, to convince the QSC to release more of this stock for sale than the regulatory body would otherwise have done. The crown did not allege that Title or his firm were part of the conspiracy, but rather that false documents were presented to him in the course of his audit. Crown attorney Norman Chorney did observe, however, that the auditor "did not probe too deeply."

The case is not an easy one to explain. The QSC was in due course convinced that Burcal owed Ray the sum of $447,000, and it therefore authorized the freeing of 131,000 of the escrowed shares, whose expected sale was to be compensation to Ray for his supposed advances to the company.

Ray's stock, both the 100,000 block and the 131,000 block, was sold to the public in 1974 for prices around $2, and the proceeds found their way to an offshore account controlled by Feder at the E. D. Sassoon Bank and Trust International Ltd, Nassau. Ray and Feder realized about $450,000 from these sales, the crown said.

What wasn't disclosed to the QSC or the public, according to the crown's case, was that actual payments to third parties in connection with the Beaver-Burcal deal — and in connection with the alleged Burcal-Ray debt of $447,000 — were less than $80,000. In other words, the only payments made, apart from payments between Ray and Feder, were $80,000, and yet the alleged debt created was $447,000. A lawyer's trust account and another front company were used, the crown said, to "launder or disguise" payments between Ray and Feder to substantiate the figures given to the QSC and make them look like payments to third parties. Subtracting the $80,000 from the $450,000 realized on stock sales, the crown alleged a net profit on this branch of the deal of $370,000.

Three particular items were detailed in the crown's case:

(1) Feder had paid $25,000 to third parties for a chattel mortgage and note owing by Burcal to the third parties. The face value of the debt was $150,000, and the books showed Burcal owed Ray the $150,000.

(2) Equipment was bought by Ray from another third party for $17,500. Its subsequent sale to Burcal resulted in Burcal's books showing about $50,000 owing to Ray.

(3) Ray's earlier purchase of the Burcal company had included some equipment valued at $8000. Invoices shown to the auditor resulted in $91,700 shown as owing by Burcal to Ray in respect to this equipment.

These and other amounts, to a total of $447,000, were shown as owing by Burcal to Ray in the audited financial statements shown to the QSC. Clearance of the deal, including the freeing of the 131,000 escrowed shares, was obtained on May 1, 1974.

Within ten days of the QSC approval, the crown said, Ray had sold through various Toronto brokers all of the first block of 100,000 shares, and most of the proceeds wound up in Feder's E. D. Sassoon account in Nassau. How it got there, the crown said, relates back to the Feder/Ray/Burcal bookkeeping.

Burcal's financial records showed that the three higher figures—$150,000 for the chattel mortgage, and $50,000 and $91,700 for the equipment — were originally debt owed by Burcal to accounts controlled by Feder. The chattel mortgage, bought by Feder, was held by lawyer Bernard Kamin in trust for Barclay Securities Ltd, which had the Sassoon bank account on which Feder gave instructions. The equipment figures were shown as owing to something called Dexter Equipment Company, a sole proprietorship in the name of Robert Beaumont, an elderly securities messenger on Bay Street. Kamin testified Feder told him Beaumont and Dexter Equipment would be acting "up front for Feder." So through Kamin and Dexter Equipment, the debt was initially owing to Feder-controlled entitites, the crown said.

Then shortly before the audit, the crown said, documentation was prepared showing this debt was now held by Ray, instead of the Feder entities, presumably as a result of the payment of the amounts by Ray to Feder. In other words, the documents showed Ray had stepped into the shoes of the Feder entities as Burcal's creditor. In fact, approximately $200,000 represented by the first two items, was paid to Feder's entities by Ray only after the audit and the QSC approval, and it was paid out of the proceeds of the stock-sales. The crown said the accounts of Kamin in trust and Dexter Equipment Company were used to launder or disguise the payments so they would appear to substantiate payments of the "inflated amounts" as being payments to the independent third parties.

Crown attorney Chorney summarized: "There is no doubt from the sequence of events that their object was to get approval of the QSC by selling it a plausible story supported by the audit, in order to do what they did. And that is to sell part of the control block of Beaver Mining Corporation to the public and get the proceeds out of the country. That was their object and they succeeded completely."

John Robinette acted for Ray, and Robert Murray for Feder. Both lawyers said Ray was making a genuine attempt to get the Burcal calcite property into production, and that Feder was an independent, arms-length party in these dealings. They said all the transactions were consistent with Feder being a lender to Burcal and Ray in the financing of the project. They said as well that the chattel mortgage had to be removed — the Burcal-to-Ray debt being substituted — in order to have clear title to the property in anticipation of bank financing.

As for the chattel mortgage, Robinette said Feder "got an exceptionally good deal" in purchasing the $150,000 debt for only $25,000. But Feder was entitled, Robinette said, to demand payment from Burcal for the full face amount of $150,000. Consequently, he said, there was nothing irregular in Ray's paying off Feder and stepping into Feder's shoes as the $150,000 creditor of Burcal.

As for the second amount, the $50,000 debt resulting from the $17,500 equipment purchase, documents seized by the RCMP in their investigation and placed in evidence appear to show a purchase of the equipment by Dexter Equipment Company and resale by Dexter to Burcal. One of those documents, the crown said, is clearly a forgery. Both Robinette and Murray said those documents weren't intended to be used, and Dexter didn't really purchase the equipment and resell it to Burcal. Robinette suggested the transaction represented a loan by Feder to Burcal to purchase the equipment from Ray. "For some reason," Robinette said, "someone wanted it shown not as a loan but as a sale of equipment." In any event, Dexter was shown as being owed the money, and Ray, after the QSC approval, paid off Dexter with funds that went to Feder's E.D. Sassoon account, just as was done with the first, $150,000 amount. "Ray was entitled," Robinette said, "to stand in the shoes of Dexter, and rank as an ordinary creditor of Burcal," just as he was in respect to the first amount.

As for the third amount of $91,700, this was documented as a sale of further equipment by Dexter to Burcal. In fact, the equipment already belonged to Burcal, as the defence lawyers apparently admitted, and it was assigned a total value of $8000 in the original sale of the company to Ray. Robinette said this transaction too is

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The AG and the Law Society
Politics of Clinical Funding

For the second time in four years, a Supreme Court of Ontario judge inquiring into aspects of the legal aid system has recommended alterations that would diminish the role of the Law Society of Upper Canada, which by statute has absolute control of the Ontario Legal Aid Plan. And likewise for the second time, it appears that Ontario Attorney General Roy McMurtry may well decline to implement the key recommendation, in order to avoid an eventual confrontation with the Law Society.

In 1974, a commission of inquiry into the legal aid plan under Justice John Osler recommended control of the entire plan be removed from the Law Society and placed with a committee made up about equally by nominees of the Law Society and nominees of the government. The Law Society was opposed and it was not done.

The report released last month is of an inquiry into the Clinical Funding program of the legal aid plan, carried out by Justice Samuel Grange. Community legal clinics have been funded by the Ontario government since 1976 through an "interim" body called the Clinical Funding Committee. That committee is made up of two appointees of the Law Society and one appointee of the Attorney General. Grange recommends that funding of the clinics be in the hands of a 5-member committee, to be composed of two persons representing the Law Society, two representing the clinics, and one representing the Attorney General, with all five in effect to be appointed by the Attorney General. Once again the Law Society is firmly opposed to the recommendation, and McMurtry has said that the proposed appointment and composition of a new Clinical Funding Committee "will need some further examination before a final position can be taken."

The current annual budget of Ontario's 31 community legal clinics is $2.5 million — up from $1 million for 13 clinics in 1976 — but the political importance of the movement is far greater than its budget would indicate. The clinics represent the only significant departure from the fee-for-service legal system in Ontario, and they are treated with suspicion by senior officials of the Law Society. The importance attached by McMurtry to the clinics is reflected in his appointments to the Clinical Funding Committee, which were first Archie Campbell, who is his closest political and administrative adviser, and then Graham Scott, who is now Associate Secretary of Cabinet and still the Attorney General's representative on the Clinical Funding Committee.

There is no clear statutory basis for the "clinical delivery system," as it is called, in the Legal Aid Act, and it is apparently agreed between the Attorney General and the Law Society that the program should not be exposed to debate in Cabinet and in the House. Such debate would expose the program to attack from the right wing of McMurtry's own government, something he fears, and on the other hand it would expose the Law Society to an anti-lawyer attack from the opposition. Consequently, Justice Grange was asked to make recommendations for a new regulation under the Legal Aid Act, and not to recommend regularizing the program by statute.

Grange treated the question of statutory basis delicately. He observed: "There is concern on the part of some that the clinical delivery system and its funding do not clearly come within the scheme of the Act." Clinics are now funded by the Clinical Funding Committee under a so-called "clinical certificate" providing for their annual budgets, on the analogy of the certificate an individual gets for his individual case. Grange says, "It could, of course, be fairly argued that a 'clinical certificate' is not a 'certificate' as defined by the statute and that a broader definition of that word is required. These matters are not before me and I make no finding on them. They are raised only to suggest that it might be appropriate at some future date to eliminate any doubt concerning the statutory basis for clinical funding."

McMurtry has said he has a strong personal commitment to the clinics, but it is not a commitment he wishes to expose to the legislative process.

As for the bar itself, in spite of authoritative statements to the contrary, there is no doubt that the Law Society, if there were no intervention by the Attorney General, would eventually strangle the clinics. And it is the Law Society which has statutory control of the legal aid plan, of which the clinical funding system is a part. So the problem, since the province started funding the clinics in 1976, has been to work out accommodations that would allow McMurtry to maintain a high-profile identification with the clinics, without challenging the Law Society's control of the plan.

A confrontation of sorts occurred earlier this year with the "defunding" of a Toronto clinic called People and Law, and that led McMurtry, at the request of the Clinical Funding Committee, to set up the Grange Commission.

The People and Law decision was seen by some of the clinics as an indication the Clinical Funding Committee, with its Law Society majority, was discriminating against clinics involved in law reform activities, and the clinic appealed both to the Attorney General and to the Law Society's Legal Aid Committee. The Law Society had its own concern, as Treasurer George Finlayson explained to me, "We were not sure of the ambit of our authority, and we were having difficulty getting clarification from the Attorney General." More bluntly, the Law Society felt the lack of a clear appeal procedure would be a cause of continuing embarrassment in controversial funding — or defunding — decisions.

After hearing representations from most of the clinics and from the Law Society, Grange recommended, among other things: (1) that the Clinical Funding Committee should be expanded to include two representatives of the clinics; (2) that funding decisions should be made in the first instance by the Committee's staff, with appeals to the Committee itself; and (3) that the Committee should set policy on what types of clinics should and should not be funded, rather than writing a detailed funding policy into the Regulation.

With respect to the ultimate control by the Law Society, Grange had this to say. "Convocation is the governing body of the Law Society and as such has the ultimate control of all legal aid matters. In that role Convocation receives all recommendations of the Committee and acts upon them as it sees fit. In practice, all recommendations have been approved and confirmed except for the reservation referred to above on People and Law. There is no question that Convocation can reject a recommendation or on its own motion raise any matter, but the subject is a very delicate one and I am sure Convocation will continue to exercise its admirable restraint. The Law Society in its brief has specifically asked that there be no further appeal from any appellate decision of the Committee. I am happy to concur in that recommendation."

But it is clear that the Law Society wanted to take Convocation out of the firing line only on the assumption that the Law Society would continue to control the Clinical Funding Committee and ultimately the Committee's staff. So the Grange proposal was not at all what they had in mind.

Indications are that the recommendation is also opposed within the Attorney General's ministry because — as explained to me by Graham Scott, the Attorney General's appointee on the Clinical Funding Committee — "there is concern that as long as Legal Aid remains an operation that is, so to speak, 'contracted out to the Law Society,' it's inappropriate for the Attorney General to make the Committee appointments for a job that is the responsibility of the Law Society."

Translated, that appears to mean that the Attorney General fears he would be visibly responsible for the program, a role he doesn't want any more than Convocation does.

Scott and George Finlayson of the Law Society both said they think the present composition of the Clinical Funding Committee is just right.

Among the implied criticisms of the program as it has been run, Grange says that clinic salaries are uncompetitive with comparable jobs elsewhere, and that the annual budget applications by the Committee are made as a result of a friendly understanding about what is politically available, rather than being based on what is needed. His expressions of these criticisms are models of judicial clarity. On salaries and funding he says this:

"As I have said before, the only bar to the expansion of clinics is the lack of funds. I suppose it is only realistic to concede there will never be enough funds, and that the clinics being dependent on the public purse must always be subject to consideration of political priorities. Nevertheless, there are certain propositions that to me seem self-evident and certain questions which, if asked, must appear rhetorical. The need for clinics has been demonstrated, if only by the volume of business generated each time one is opened; and if the need is there why should a large part of the province go unserved? Moreover, those who are served must be served properly. The lawyers and para-legals working in clinics are generally speaking dedicated people committed to the service of the poor, but because of this must they serve for less reward than their colleagues in government or the private bar? Will this not inevitably lead to turnover and inefficiency? Must they who litigate often against the government or persons represented by the private bar do so in many cases without the facilities of the other side? I think these questions answer themselves. There may have been some justification at the beginning for the inadequacy of equipment and salary, but surely as the movement develops we must try to reduce the disparity.

"The brief of the Metro Tenants Legal Services provided a chart drawn from the Public Accounts since the commencement of clinical funding in 1975/76.... They show that the funds

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Proceedings at Osgoode Hall
The Roach Case and Others

Recent criticism of the Law Society of Upper Canada's disciplinary procedures has come from a variety of sources: civil rights lawyers, mostly from the US, the Soviet newspaper Pravda, *and a Supreme Court of Ontario judge. This is a report of a current case involving black civil rights lawyer Charles Roach and a recent disbarment order against lawyer Robert Stoangi.*

Osgoode Hall hearings in December were attended at times by 200 to 300 interested spectators, probably a record in modern times. It was the Law Society of Upper Canada Discipline Committee panel chaired by North Bay lawyer George Wallace, inquiring into formal charges of "touting" against Toronto lawyers Charles Roach and Michael Smith. Accused of actively seeking a client, Roach and Smith, who are both active in civil rights organizations, were merely attempting to offer assistance, in circumstances of some racial tension, to a black man accused of murder in Windsor. The charges were dismissed after prosecutor Claude Thomson presented the Law Society's case. The committee ruled there was no evidence to support the charge and no defence was necessary. A charge of something called "sharp practice" is still pending against Roach alone, but the hearings have been adjourned. The committee refused Roach's request to see his file and Roach said he would apply to the Divisional Court to review the Discipline Committee's proceedings against him.

Toronto lawyer David Humphrey, in an unusual interview following the adjournment, attempted to justify the handling of the touting charges, and he said the sharp practice charge "looks like pretty picayune stuff."

Roach, Smith and their counsel, along with US civil rights lawyers who attended the hearings, said the arcane nature and flimsy basis of the charges had all the earmarks of an attempt to silence and intimidate activist lawyers — something with which the US lawyers said they are already familiar in their country. Roach in particular had incurred the anger of at least one prominent Toronto lawyer, before the time of the touting allegations.

In denying Roach access to his file, panel chairman Wallace said, "The Discipline Committee has not jurisdiction to adjudicate on the motives or policy of the people responsible for laying the charges."

Complaints — which the Law Society staff receives at an average rate of about 1400 a year — are normally handled in this way. Law Society Secretary Kenneth Jarvis and his staff sort them and most are dealt with by a letter to the solicitor concerned, normally followed by a satisfactory reply. At the other end of the spectrum, cases involving trust accounts or some other alleged dishonesty are turned over to the Law Society's accounting staff or others for investigation, which is in many cases followed by formal charges and a Discipline Committee hearing.

There are two intermediary types of procedure, Law Society Treasurer George Finlayson explains. One is a kind of blue-ribbon panel composed of former Law Society Treasurers, and before them appear lawyers whose problem is that they are feuding, and the normal courtesies and communication have broken down. Presumably the weight and authority of the panel helps create an atmosphere of reconciliation. Secondly, there is the "Invitation to Appear" before a panel of the Discipline Committee for an informal and voluntary discussion of some complaint, and this too culminates in some "fatherly advice." According to an article in the Law Society Gazette by Clive Bynoe, in which he was assisted by Kenneth Jarvis, the matters discussed during an appearance by "Invitation" cannot then be the basis of formal charges.

In other words, formal charges before a Discipline Committee panel are normally the result of a serious charge being made, followed by a staff investigation.

In the Roach/Smith case, Windsor lawyer Harvey Strosberg wrote to the Law Society in February 1977 to complain that Roach and Smith had in January attempted to visit his client Clarence Talbot in the Windsor jail. Talbot was a black man accused of shooting a white union official. The incident had created some racial tension in Windsor. Strosberg implied — but did not assert — that Roach and Smith were there seeking Talbot for a client.

Roach and Smith replied to the Law Society as follows: "We belong to organizations which take a humanitarian interest in Mr Talbot's case and we are, therefore, eager to assist Mr Talbot and his family with moral and material support, if necessary. Before attending at the jail in Windsor we attempted to determine what assistance our organization could give to Mr Talbot by contacting his family and a solicitor who was known to have acted for him previously. However, these attempts did not lead us to the family or the solicitor actually retained. Therefore it was necessary to attend personally on Mr Talbot."

Then in October 1977, Roach and Smith were issued an "Invitation to Appear" before a Discipline Committee panel. But when they appeared, they were told by panel chairman David Humphrey that the complaint would in fact be the basis of a formal charge, and that led to the December 1978 proceedings which concluded there was no evidence to support the charges. Humphrey was not a member of the December 1978 hearing panel, but he appeared outside the hearing following the adjournment, where he spoke to Roach's counsel, University of Toronto mathematics professor Peter Rosenthal, and others, including myself.

Humphrey said his October 1977 panel — he couldn't remember the names of its other two members — had before it only the Strosberg and the Roach/Smith letters. He said the Strosberg letter "fairly led to an inference" of touting, and as for the explanatory letter, he said, "You can't judge credibility on the basis of a letter — there had to be some kind of a hearing." Math professor Rosenthal, incredulous, said that with all the real touting and "scooping" that is going on, "They pick two guys interested in fighting racism, who aren't looking for clients . . ."

"Scooping" occurs when criminal lawyers with little expertise and little business fight to obtain the business of unsophisticated defendants on legal aid. Humphrey said as far as he knows "There's a fair amount of it going on," but no disciplinary cases. "The Law Society doesn't go out and investigate in that sense." Finlayson confirmed there are no disciplinary cases involving scooping, and he said it would be costly to investigate.

Not only US civil rights lawyers, but readers in the Soviet Union as well heard about the case. Ottawa correspondent Nicolai Bragin wrote a commentary in *Pravda,* which he began this way: "Canada is an example of yet another brutal act of suppression of the civil liberties of those whose political convictions and actions are not in accord with those of the ruling elite." Citing the *Globe and Mail,* Bragin added, "Even some organs of the right-wing bourgeois press felt unable to hush up this scandalous affair . . ." The article erroneously suggested that the charges against Talbot were themselves fabricated.

The essence of the "sharp practice" charge, initiated by a complaint from lawyer Donald Catalano, was that Roach had disbursed funds to his client, in a matrimonial dispute, contrary to an alleged agreement with Catalano that the funds would be held. After Rosenthal's cross-examination of Catalano, Law Society counsel Claude Thomson admitted that in fact there was no such agreement or understanding. However, he said that if you define "sharp practice" as a breach of the solicitor's obligation to behave "with courtesy and good faith" toward another solicitor, and if you interpret all the Roach/Catalano correspondence together, the evidence would still support a prima facie case of sharp practice. The panel agreed, Roach moved for the production of his file, and the adjournment followed.

The brief of documents filed by the Law Society in the sharp practice matter omitted two letters from Catalano to Roach, in which Catalano said unless a cheque was forthcoming from Roach in the amount suggested, his instructions were to report the matter to the Law Society. Rosenthal asked Catalano if he thought that constituted, for want of a better word, a form of extortion, and Catalano replied, "I didn't give it a lot of thought."

It seems the Discipline Committee, in denying Roach access to his file, either overlooked or ignored a report by its own Policy Section that was adopted by Convocation in 1977. That report said: "Subject to the general rule (of confidentiality) the Chairman or Vice-Chairman of the Discipline Committee or the Treasurer should be empowered, in their discretion, to provide information from the records of the Society to a person having a legitmate interest in receiving such information. . . . These might include the member of the Society . . . to whom the records relate . . . and counsel representing other solicitors charged with disciplinary offences."

Recollection of this report, which is contained in the minutes of Convocation for February 1977, surfaced in January, and it may be that the full solemnity of a Divisional Court hearing can be avoided.

Toronto lawyer Robert Stoangi, 31, has appealed to the Divisional Court from a disbarment order made by the Law Society December 22. What was in issue is $9000 in trust funds, belonging to a development company that had "engineered a scheme," a Law Society committee said, to deceive the mortgage-lender in the company's house-sales program. The development company was the complainant against Stoangi, who was acting for purchasers. The Discipline Committee said Stoangi "knew or ought to have known" what it said the scheme

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was, but it didn't call any evidence from the development company. It recommended a 6-month suspension for Stoangi, but the Law Society governing body voted to disbar him, giving no reasons. Justice Robert Reid suspended the order for three months and said, "Surely (giving reasons) is not too much to expect from the governors of the legal profession, whose members are daily engaged in securing justice for their clients." Stoangi's appeal is pending.

The Discipline Committee panel was chaired by land-use and development lawyer James Carthy, who signed the committee report. It outlined the facts this way:

"Hearley Building Corporation Ltd was selling houses in a subdivision and was using Kinross Mortgage Corporation for mortgage financing. These were National Housing Act loans, and it was a requirement that the purchaser have a down payment of 5% of the purchase price from his or her own resources. Kinross would accept a letter from a solicitor as satisfactory proof of this resource."

Stoangi's law-clerk, Sam Roda, testified that a Hearley representative "came into the office and asked for a letter 'concerning the amount of money to be put up by the purchaser,' " according to the committee's summary. The clerk said he checked with Stoangi, and Stoangi "insisted they should not give a letter unless the money was actually received." Hearley paid the necessary money into Stoangi's trust account and a letter was issued in this form: "To whom it may concern: I am acting on behalf of (the purchaser) and I have in trust (the amount of money) with regards to (the property in question). If any further information is required please contact me. Robert J. Stoangi: per Sam Roda."

The letter was signed by Roda on Stoangi's letterhead, and the Committee said it "ended up in the files of Kinross who extended the mortgage on the strength of it." The purchasers, the Committee said, "had been told by Hearley's representatives that a smaller downpayment would suffice together with a second mortgage back to Hearley. The Hearley Corporation clearly engineered the scheme with the obvious purpose of selling houses to purchasers even though they lacked the necessary downpayment. A second mortgage did not meet the National Housing Act requirements for purchaser's equity."

The Committee wound up its summary this way. "Each transaction, from the builder's point of view, contemplated a second mortgage back to the vendor. The monies which had been delivered to the solicitor (Stoangi) in return for the equity letters were retained by him in his trust account — a total of approximately $9,500.... At the time of the first closing the solicitor tendered the money received from the builder. The builder's solicitor said he had no instructions to receive it and Mr Stoangi retained the money in his trust account. No demand for the return of the money was made by Hearley until the spring of 1977." At that time Stoangi didn't have it, as a result of a transaction in which a client, a close friend of Stoangi's father, paid money directly to the father for a real estate closing, and some of the money went astray. The Hearley trust monies were used to cover the deficiency. However, "by the autumn of 1977 the money was repaid," the Committee said, adding, "It was the complaint of Hearley to the Law Society which led to this hearing." Actually, the complaint was sent in by Hearley's solicitors. The Committee didn't say exactly what their complaint was.

Evidence wasn't heard from the Hearley representative who had all the dealings with the purchasers and with Stoangi's office. His name is Mudd — Chris Mudd — and the Committee said, "He was not called, it being stated that he was not within the jurisdiction." No one else from Hearley was called.

The Committee found Stoangi guilty of professional misconduct in receiving the trust monies and issuing the so-called "equity letters." The Committee said, "The apparent purpose of the 'equity letter' was to induce the recipient of the same to believe that (the money) would be used toward the purchase price of the said premises. The Solicitor knew or ought to have known that it was not to be so used, but had to be returned to Hearley."

Schemes or "incentives" to defeat the 5% equity requirement were widespread at the time. In fact, in February 1977, Central Mortgage and Housing Corporation issued a statement to its approved lenders in which it said: "Lagging sales in some market areas have led to builders offering a variety of incentives to prospective purchasers as sales inducements. The effect of such inducements can be to reduce the level of equity required, to maintain prices that could otherwise have been reduced, and to inflate the level of Assisted Home Ownership Plan support those units warrant. Lenders are reminded that a purchaser providing equity of less than 5% of the purchase price is not an acceptable purchaser...."

The Committee also made a finding of professional misconduct in the transaction involving Stoangi's father and his father's friend. The Committee said Stoangi misappropriated the Hearley trust monies to cover the monies he couldn't recover from his father. "The sole issue of contention," the Committee said, was whether the Solicitor knew on December 16, 1976 that the monies would not be forthcoming from the possession of his father (to whom the client had given the money) or mother to meet the requireemtns of Mr Deluca's closing." The report is somewhat confusing on the point.

The Committee recommended a suspension of Stoangi's right to practice law for a period of six months. Convocation — which is the governing body of the Law Society, made up of its 40 Benchers — voted on December 22 to disbar him.

Stoangi has appealed the decision to the Divisional Court. He says the disbarment order "is not a reasonable exercise of the discretionary jurisdiction of Convocation," and that "the order made in this case exceeds in severity and is inconsistent with penalties imposed in previous similar cases."

Justice Robert Reid ordered the disbarment order suspended for three months to enable Stoangi to look after his existing clients, pending a decision on his appeal. Reid noted that Convocation gave no reasons for its decision, and he said, "It is true that there is no legal obligation upon Convocation to give reasons for an order of disbarment. In the circumstances of this case, however, where Convocation's decision is so much more severe than the recommendation of the Committee, one might expect some reasons, even brief reasons, in explanation. Surely this is not too much to expect from the governors of the legal profession, whose members are daily engaged in securing justice for their clients." □

Sassoon

Continued from page 2

consistent with a loan by Feder to Burcal, not for the purchase of the equipment, but for general production purposes. Robinette said for some reason it too was documented as a sale rather than as a loan, perhaps, he suggested, for tax purposes. He admitted there may have been irregularities in the documentation, but he admitted no dishonesty.

The crown said Feder and Ray then went on to loot the treasury of Beaver. One of the terms of the deal cleared by the QSC was that Beaver was to loan monies in its treasury to Burcal to carry out the development program, in order to get the Burcal calcite property into production. "But what in fact do they do with it," said Chorney in his summation. "With not even a fake invoice this time," $30,000 is paid out by Burcal to Dexter Equipment Company, which was really Feder himself. Then in August, 1974, Burcal paid out $50,000 to a construction company to build a mill. But the mill wasn't for Burcal, but for Devon Resources Ltd, a public company the crown said was also controlled by Feder, through another front man, Charles Blidner. Blidner, the crown said, testified he was to get $5000 "for every company act he put on for Feder," but he said all he ever got was $1400.

The lawyer Bernard Kamin testified he prepared a $100,000 chattel mortgage for the Devon company. Chorney said in his summation, "This came to a sudden end about the time the RCMP started their investigation of the Beaver/Burcal transactions. There can be little doubt that Devon was to be the next in Feder's series of public company manipulations."

In any event, Chorney said the $30,000 and the $50,000 amounts paid out by Burcal represented a fraud on Beaver.

In addition to these items, and not part of the charges against the accused, Chorney said Ray received additional funds as a profit in the trading of Beaver shares between May and September 1974. This, he said, was in addition to the proceeds of the blocks of stock he sold, and it was in the course of "what the police call 'running the market,' and what the stock salesmen call 'maintaining an orderly market.' "

A stock salesman at Brown Baldwin Nisker testified Feder opened a trading account in the name of Dexter Equipment Company which traded shares of Devon Resources and of Equitable Mines Ltd, another company of which Blidner was the president. He said the trading was directed by Feder, even though the sole proprietor of Dexter was Robert Beaumont. That testimony was significant, the crown said, because there was evidence by Beaumont that he was given some money by Feder to leave Canada for a while during the investigation. Beaumont was later rigged up with a tape recorder on his person by the RCMP and he went to see Feder. According to a transcript of that conversation filed in evidence, Feder repeatedly told Beaumont to tell the RCMP the truth, but at the end of the conversation, in what appeared to be a whisper, he said, "If they ask you if you opened up an account for Dexter, say you did." Chorney said Feder was attempting to get Beaumont to falsify his story to the RCMP and it was evidence of "consciousness of guilt" on the part of Feder.

Sentencing of Feder and Ray has been set for February 26. □

Mortgages in the News

Alliance

Whitehall Development Corporation Ltd, a private Ontario developer, says it and associated companies were suckered into paying $2.4 million for 100 acres in Oakville—a sum "much in excess of their fair market value"—by public company Alliance Building Corporation Ltd and other companies, just one week before the April 1974 imposition of the Ontario Land Speculation Tax. Whitehall says its purchase was preceded, starting in the winter of 1973, by two "sham purchases" between "conspirators", which were "designed to inflate artificially the apparent market value of the lands." Whitehall says Alliance and the other companies "had secret information... that the Ontario government would be introducing in April 1974, legislation designed to affect the market value of these lands, namely the Land Speculation Tax Act and the Land Transfer Tax Amendment Act."

The allegations are contained in a Statement of Claim filed in December by Whitehall's lawyers, Merrick, Young. The plaintiffs are seeking an order rescinding the sale and the mortgages held by the defendants and their assignees, and an injunction to prevent the exercise of any power of sale proceedings under any of the mortgages. Alternatively, they ask for $3.5 million "for fraudulent misrepresentation and conspiracy to defraud the plaintiffs."

Alliance Building Corporation president Ron Graham said the claim is merely a device to stall legal action that has been taken by Alliance to collect the interest arrears on its mortgage.

Whitehall says the false representations were: (1) that the preceding purchases were bona fide arms length transactions; (2) "that adjacent lands owned by the Ontario Housing Corporation were to be developed and serviced shortly and that these lands would be serviced before the lands of OHC; (3) a representation with respect to a new sewage treatment plant; (4) "that adjacent lands owned by Abbey Glen Development Corporation, a major land developer, were to be developed within one year; (5) "that the lands offered for sale could be developed for housing within three years;" (6) "that Markborough Properties Ltd, a large and substantial real estate developer, desired to purchase the lands at the same price that it was being offered to the plaintiffs,... but these plaintiffs could purchase the lands instead of Markborough provided they did purchase the lands by the beginning of April, 1974." □

Kiting Allegation

An allegation of an extensive cheque-kiting scheme will be the subject of a preliminary inquiry in Dundas, Ontario starting March 5, involving seven accused: Peggy Wiebe, Edward Luck, Christopher VanAlebeek, John Finlay, David Abraham, Ronald Foxcroft, and Jackson Grant Clark. They were involved in land-development projects.

An Ontario Provincial Police anti-rackets squad officer alleges "A scheme wherein cheques would be issued on bank accounts controlled by the accused, transferring bank credits amongst the accounts, thereby allowing funds to be drawn from the accounts on the basis of that credit, while at the same time the said accounts taken together held insufficient funds to honour all the outstanding cheques drawn thereon."

The charge is they defrauded a Hamilton branch of the Bank of Montreal, the Jet Power Credit Union of Streetsville, and a Waterloo branch of the Royal Bank of Canada, of a total of almost $1 million.

The chartered accountancy firm of Lindquist, Holmes, which specializes in "forensic accounting," has analyzed the financial records on behalf of the OPP. □

Interegion Fraud

A real estate development partnership, cash-poor but active in the rising speculative market of 1973-4, has led to a fraud conviction against Toronto lawyer Joel Wagman QC, in a County Court trial in November before Judge Frank Callahan. Wagman was a 50/50 partner with Edward D'Angelo, who said his role in the partnership was public relations, making contacts for mortgage financing, and construction, while Wagman handled the office work. Wagman and D'Angelo had been introduced in 1972 by Leo Andy Solobay, a self-described business and financial consultant. Solobay said he advises "firms, individuals, groups — if they're partners like — you know," on topics like "real estate, building — like building land, like that type of financial."

A lawyer employed by Wagman, an architect who said he was entitled to 10% of the partnership's eventual profits, Wagman's accountant, and others, testified they signed agreements to purchase houses the partnership was building in Cobourg, Ontario. Judge Callahan said these documents were not intended—either by the "purchaser" or in any event by Wagman—to be bona fide agreements to purchase. They were signed and produced to the Toronto branch of City Savings and Trust Company in order to get authorization for the full advance on a mortgage commitment for the project.

The mortgage company had stipulated that if the houses were not completed and sold to approved purchasers by a certain date, City could close off the loan at the amount then advanced, which apparently could not be more than 75% of the commitment. The houses weren't sold, the partnership needed money, these agreements were signed, and the balance of the funds was advanced. Callahan said the purchase agreements were either false documents or in any event Wagman didn't consider tham to be binding. Their production to City to get the final advance constituted a fraud on the mortgage company, the judge said.

Ontario mortgage manager for City Savings was Kenneth Morris. He said the operation was new and very aggressive, and he said his company would accept offers to purchase from persons known to be related to the development company, for the purpose of approving the final mortgage advance. He said the company wouldn't object, either, if the purchasers were speculators and planned to resell the property prior to closing. However, he said they had to be bona fide offers from persons "of reasonable strength and integrity."

Judge Callahan said Morris and his assistant Roy Deeks were "less than responsible" in accepting the offers without checking the supporting information, a lot of which was bogus. But he said they in fact accepted the offers as bona fide, and City Savings was consequently defrauded. Morris was fired by City Savings in late 1977, apparently over something unrelated to the Wagman deal. Before being at City, Morris was Ontario mortgage manager for Laurentide Financial Corp.

Toronto lawyer Peter Junger said he signed one of the offers to purchase, not intending it to be valid, but to assist Wagman in obtaining the final mortgage advance. He also said he or Wagman prepared another document form, an acknowledgement that the "purchaser" didn't expect to acquire the house, and the development company could sell it to someone else. Junger said "it was obvious from the atmosphere" that Ken Morris knew most of the names on the offers as being connected with the development company in some way.

Junger said he was really Wagman's employee, although he was listed on the letterhead as an "associate." He said he was called an associate at his own request "for income tax deductions."

Architect Norman Wright said he was introduced to Wagman by D'Angelo, who is Wright's uncle. He said he did architectural work for the partnership, and he had a "document or letter" giving him 10% of the profits of Interegion Investments Inc., which was the Wagman/D'Angelo partnership holding company, but he didn't receive any profits. The company went bankrupt in 1976. Wright said he intended his offer to purchase to be valid. Monies were owing to him for professional services, he said, and payments were to be made on the house on his behalf. That too wasn't done.

Business consultant Leo Solobay said he to intended his offer to purchase to be a valid agreement, but he said he agreed if Wagman could later get a higher price for the house he could go ahead and sell it.

Accountant Bernard Faibish said he started working for Wagman full-time in 1973 when the development operation started. He said a great deal of his time was spent on the phone trying to pacify the creditors. "There was an extreme cash-flow problem, and one had to go to another project to finance the previous one." He said the mortgage draws on the Cobourg project were used to make payments on earlier projects, and "that just mushroomed." Faibish said he signed an offer to purchase without intending it to be valid. He said he signed it on the instructions of Wagman. "I was in the habit of signing documents when requested by Wagman," Faibish said.

City Savings later began foreclosure actions on some of the houses, but the judge said ultimately the mortgage company suffered no economic loss. Citing the recent Supreme Court of Canada case of Olan, Hudson and Hartnett, Judge Callahan said the law now is that actual economic loss is not a necessary ingredient for a conviction for fraud.

Wagman was sentenced to one year. He has appealed his conviction.

Disciplinary proceedings against Wagman by the Law Society of Upper Canada are still pending. □

Apology

Bimonthly Reports apologizes to Robert and Doreen Scolnick. The November issue reported they were charged with stock-trading offences, but in fact the charges against them were withdrawn October 30 during a preliminary inquiry in Sessions Court in Montreal. A preliminary inquiry into charges against the other defendants in the Whiterock Estates Ltd case is continuing. The crown apologized and said the Scolnicks were innocent. □

Clinical Funding

Continued from page 3

provided for clinical funding have indeed increased (not surprisingly when one considers that the number of clinics funded has increased in 2½ years from 8 to 31), but also show that the Attorney General's share of the total provincial budget has not increased and is still slightly less than 1% of the total, and that the total Legal Aid portion of that budget has similarly not increased and is still less than 20% of the Attorney General's share. Finally, the funds provided for clinics are still not 10% of the total Legal Aid allotment.

"Perhaps I venture too far into a foreign field but I commend these figures to those concerned with political spending priorities. I have stated before (and it was probably not original then) that it is sometimes easier to tolerate a splitting headache than an abiding sense of injustice. When priorities of government spending are being considered, I can only hope that this expanding field to which the government is committed (and in my view rightly so) will be one of the first."

On the constitution of the Committee, Grange said there are certain deficiencies in the present set-up, and he described the first one as follows:

"There is no member of the committee whom the clinics see as representative of their interest. One might well doubt that any member should be representative of any interest at all, but I have come to the conclusion that this is a legitimate concern. The clinics (some of them) still see the benchers and the government, if not as the enemy itself, as the protectors of those opposed to their clients' interests, the landlords, the finance companies, the government agencies.... With some clinics, there is such a perception of the Committee as now constituted. We should try to reconstitute the Committee to eradicate it."

Law Society Treasurer George Finlayson, on the other hand, put it to me this way in discussing one of the recommendations: "I have never in my life heard of an organization that gives you a right of appeal when you are asking for charity money."

Finlayson said, "I don't agree with the recommendation" on the constitution of the Committee, "and the Attorney General doesn't agree with it either."

On the other hand, a government official said, "How on earth can he leave the Clinical Funding Committee the way it is, contrary to the whole thrust of the Grange inquiry?" □

Lumsden Building

The Supreme Court of Ontario has refused to intervene in the latest takeover attempt by The Lumsden Building Corporation, a company thought to be controlled by Toronto real estate dealer Mark Stein. Lumsden, a company with consistent losses in the operation and ownership of heavily-mortgaged Toronto real estate, has already taken over a series of cash-rich junior mining companies (Bimonthly Reports No. 6). The current bid is a share-exchange offer to shareholders of Forefront Consolidated Explorations Ltd, a company with about $140,000 in its treasury. Litigation is continuing for control of an earlier Stein take-over target, Mount Pleasant Mines Ltd, which now has two competing boards of directors, one representing the Stein interests and the other apparently representing prior management.

Justice William Anderson, in refusing an application for an injunction prohibiting the takeover, said, "I also have in mind the exposure of the offer to the Ontario Securities Commission, and that the Commission has not seen fit to act in the matter." The judge said the Ontario Securities act is designed to regulate this type of case, and the courts should therefore be reluctant to intervene. □

Press-Law

Continued from page 1

other words, according to Dickson, the question of "honest belief" is for the plaintiff to disprove in proving malice, and not for the defendant to prove in showing the comment was fair. Dickson said Ritchie's test "does not work at all" in cases where the writer and a subsequent publisher are different entities.

Not all senior newspaper officials are upset by the Supreme Court decision. Echoing Justice Ritchie, *Toronto Star* senior editor and columnist Borden Spears wrote: "It is extravagant to suggest that letters pages must be purged of their traditionally vigorous, disputations and even bigoted contributions. The issue here is not the free expression of opinion but the publication of a libel." More precisely, Spears presumably meant the publication of a defamation. And a defamation, for example an unfavourable restaurant review or other fair comment, is not a libel if one of the defences is available. Spear appears to mean that restrictions to defences to defamation suits — which Dickson said "give substance to the principle of freedom of speech" — are something different from what he calls "the free expression of opinion."

Until now, Canadian publishers and editors have refrained from any kind of activism in the press law. The Cherneskey decision forced their hand, and it remains to be seen whether anything new will be proposed, other than rolling back the effects of that particular case. □

Next: Contempt of Court

Khan Bank

Continued from page 8

— Yes, all this I'm doing from Canada. The Canadian technicians, the Canadian goods to be exported from here and the Canadian architects are being used for this.

— So, the facilities and other expertise is from this country.

— Exactly, all because I live here. This is my country now, sir.

Khan's lawyer produced a drawing of the project and Khan explained it to the judge. "And this, Your Honour, this is the complex which I've presented them. This is one hotel, this is another hotel, this is casino, shopping area. Is all covered right here so they can walk through, sir. There are tennis courts, golf clubs behind, swimming pools and this is not to be here. This is marina, make on one side, Your Honour, here. This is the beach."

Khan said he is negotiating with Canadian Pacific.

He also said he has got the ball rolling on importing molasses.

Khan said he is the producer of a Saturday morning show on Global television, and also a radio program.

As for the bank, the first English charge alleged "deception, namely... false representations that the bank was an honest and genuine business carried on in an honest and genuine manner," and that the bank would be able to meet its liabilities. Zaccardelli, on information from the Scotland Yard, said, "There was an accountant who prepared the balance sheets for the International Bank and Trust Company of the Middle East. He prepared the balance sheets for the year end, 31st of March, 1977. The information which was contained in those balance sheets was provided by Mr Khan. The investigation has revealed that there was assets totalling approximately twelve and a half million dollars which listed as assets of the bank and which the investigation has shown that the assets were never, in fact, paid for....

— The bank, in fact, did not have have any assets. Is that what you're saying?

— Yes, that's correct.

— Where were the assets said to be?

— These assets apparently consisted of two hotels in Spain and they also consisted on certain properties of a company called Pan Islamic Company.

Zaccardelli said he is informed that the FBI is investigating the chairman of a company called Azmath (or Azmat) Development Company, who "was trying to pass a Certificate of Deposit for $100,000. Now, this Certificate of Deposit was drawn on the International Bank and Trust of the Middle East, Mr Khan's bank in London." The certificate allegedly had no value.

Khan said he has no knowledge of such a Certificate of Deposit. He said a client of the bank was considering loaning money to this man, and Khan was asked by the client to check over this man's assets, in the prospect of the client making him a loan. Khan said he wanted nothing to do with this man.

Zaccardelli was questioned about "a group of Arab emissaries," who, according to his information, "had approximately 100,000 pounds on deposit with the bank. Those funds, of course, are not in the bank right now, and the investigation into that matter is being continued." Zaccardelli said.

Khan said that apart from the charges that are before the court, he is not aware of other people making claims. "No one has approached me. No one has told me," he said.

On cross-examination by the federal crown attorney, Khan appeared to say that the money deposited in the bank was loaned back to the same persons who were the depositors.

—Where did you invest the money that you customers deposited in the bank, in what areas?

— The money which was deposited, it was again given back to the same customers who were the clients, and the business, the small businessmen, the small shopkeepers. I never invested money outside anywhere. I never took any money from the bank either.

— So monies deposited in your bank were lent out to people?

— To the people who were clients at the bank.

— I find that difficult to understand.

— To the best of my ability sir I am trying to explain....

— At the time you did business in London, none of the monies invested by customers in the bank were ever invested, they were always kept in cash?

— No it was invested to the people who were clients, clients of the bank and whenever they wanted we had to advance them and give them our draft. This is how the draft of the bank existed. □

Khan's International Bank Court Charges are Kept Secret

A Provincial Court judge has barred access to charges and other documents that were filed in Toronto Provincial Court last September. Although the documents were filed in open court as the basis of an arrest warrant under the extradition laws, the judge who now has the documents says he is denying public access to them because there is a motion to prohibit him from holding the extradition hearing. Consequently, Judge A. W. Davidson told me, the documents haven't officially been filed before him.

International Bank and Trust Company of the Middle East Ltd was incorporated in St Vincent in 1973, and operated out of London, England between 1975 and 1977. Mohammed Farooq Khan, the bank's owner and chairman, became a landed immigrant in Canada in 1977, and he is now fighting extradition to England where he is wanted to face theft charges relating to the operation of his bank. Khan said at a bail hearing last summer he has business interests in Canada, and he said the bank had an account at a Toronto branch of the Royal Bank of Canada, which handled, he said, a cheque representing funds of Moise Tshmobe, president of Zaire. It isn't known whether any of the Canadian activities figure in the UK charges.

The extradition hearing is adjourned indefinitely. Khan, now represented by Clay Powell, moved in Federal Court to prohibit the Provincial Court judge from holding the hearing. The federal Court application was scheduled for January 15, but it too has been postponed because a transcript of the argument before Judge Davidson wasn't ready.

After Khan was first arrested last July, and while he was still in custody, the Royal Bank obtained a default judgment against him — meaning that he had failed to file a defence — on a $40,000 promissory note. Now represented by Bryan Finlay of Weir and Foulds in that matter, Khan has had the bank's default judgment set aside and has entered a defence.

Khan, 52, and something of a financial mystery man, testified before Provincial Court Judge S. J. Nottingham in bail proceedings last summer. He said he was born in Pakistan and left in 1969 after about 20 years in business there, mainly importing and exporting. He also said he was "general secretary of the ruling party for a long time," but in spite of encouragement to run for office, he "gave up politics and went into business." He said he left Pakistan in 1969 "because of political problems." Asked to explain a charge of violating the Pakistani monetary exchange controls, Khan said, "I had the business jealousies and rivalries because I had almost a monopoly for ten years." He said on a recent visit to Pakistan, his first since 1969, he spoke to his friend the Attorney General, and tried to see another friend, a High Court judge.

Khan then moved to England, Germany, Morocco, Spain and Kentucky, before being granted landed immigrant status in Canada in 1977. He said when he left Pakistan "I had some money in Germany. I had some money in London. Also a little, not much, but I had in Switzerland." He was in the tourist business in Kentucky when he saw a bank advertised for sale in a newspaper. It was the International Bank and Trust Company of the Middle East Ltd. He bought the bank, which had no financial records—"there were no books, only the papers"—for a price he said he can't remember, from "a lawyer in Miami." The bank wasn't allowed to operate in St Vincent, and Khan opened his one and only branch office in London in 1975.

The bank did business in England for less than two years. There was an investigation by police and the Department of Trade. The bank was wound up, Khan says, on an application by one of the directors.

Khan was first arrested in Toronto on what is called a "provisional warrant" last July, and later rearrested on the basis of the specific English charges. On December 11, before Judge Davidson, Clay Powell on behalf of Khan argued that the judge was without jurisdiction to proceed because of the procedural defect at the "provisional warrant" stage. The judge rejected the motion, but adjourned the hearing to allow Powell to appeal the decision in Federal Court.

Khan was initially denied bail by Judge Nottingham in July, but he was ordered released on $100,000 bail after a Supreme Court of Ontario bail review hearing. Khan said he has various business enterprises in Canada.

Judge Nottingham made an order under section 457.2 of the Criminal Code, which enables a judge to order that bail hearings "shall not be published in any newspaper or broadcast," until either the accused is discharged after a preliminary hearing, or the trial is over. The Code defines "newspaper" as something that is published "at intervals not exceeding 31 days," so it is a specific prohibition and not a general one as is sometimes thought.

Khan, in the hearing before Nottingham, said he was the bank's chairman. One of the directors, he said, was the ambassador of the United Arab Emirates to Zaire, whom Khan visited on one occasion when he was escorting a shipment of electronic equipment to Zaire. In London, Khan said, he met the president of Zaire, Moise Tshombe. Khan's bank had an account at the Bloor and Yonge branch of the Royal Bank of Canada, and Tshombe, Khan said, "deposited a cheque of $70,000 which was desposited in the bank account of Royal Bank of Canada which was never cashed... I have got a letter from Royal Bank that the amount was not paid." Tshombe, Khan said, "deposited the money for investment of six months or one year." He said the cheque was "drawn on Chicago."

Corporal Giuliano Zaccardelli of the RCMP commercial crime section was questioned by the federal prosecutor, apparently about the same incident.

— I understand that enquiries from the British turned up the name Jerome Hubbard?

— Yes, again, my information is that Mr Jerome Hubbard from Chicago who apparently is the president of a bank in Zaire.

— A bank in Zaire?

— That is correct and the Bank of Kinshasa, Zaire, he had apparently been convinced by Mr Khan to transfer $75,000 from his bank in Chicago to Mr Khan's bank in England. The funds were transferred from Chicago to the Royal Bank here in Toronto. I believe it was the branch at Bloor and Yonge and before Mr Hubbard attempted to put a stop to the transfer of the funds, but apparently $40,000 of the $70,000 did get through to Mr Khan's bank.

Zaccardelli said he couldn't find out too much about Khan's current business activities in Canada. "I believe," he said, "he is a businessman who is trying to generate some kind of business through this company called Credit Middle E. . . .We couldn't find out any information indicating that he was involved in any kind of business. When we first apprehended him he stated that he was in some kind of trading business but we haven't been able, to this day, to come up with any exact knowledge as to what that trading business is."

Khan said since he has been in Canada he was approached by Bangladesh authorities to coordinate a hotel/casino/shopping center development in Dacca. He was asked:

— Are you coordinating this from Canada?

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A senior Provincial Courts administrator told me, "I wouldn't think even exhibits in a court proceeding are public property or subject to scrutiny by anyone." When I told him I was surprised he would say they are not subject to scrutiny, he added, "I may be wrong." A promised follow-up phone call never materialized. The official, A. K. MacKay is responsible for the Provincial Courts under what is called the Inspector of Legal Offices — with statutory authority to supervise courts administration on behalf of the Attorney General.

According to the traditional theory that the record of public proceedings, including exhibits and other material filed, are themselves public, such documents are subject to inspection by the public. However, it is not always a well-established operating principle of Toronto court officials.

A senior official agreed it isn't always easy to see what one is entitled to see, but he didn't hold out any prospect for reform. Undoubtedly it is not a "priority."