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## **Justice and Politics** Commentary by Patrick Brown

It is now close to five years since a raid on the legislative offices in Victoria by the RCMP yielded many boxes of documents said to have a bearing on the sale of BC Rail to CN Rail. It is now close to four years since Dave Basi and Bob Virk were formally charged with influence peddling in connection with the sale. It is now years since the prosecution was first ordered to disclose its evidence to the defence, and many months since the first trial date was set.

In the meantime, one provincial election has gone by, and we are now closing in on another one: an election preceded by two months during which 'third parties' are not to be permitted to advertise.

### **Who's Who**

It is worthwhile identifying the parties to this criminal prosecution. The Special Prosecutor, Mr William Berardino, represents the Crown. The defendants are represented by Mr Michael Bolton and Mr Kevin McCullough. The provincial Cabinet, in putting conditions on publication of evidence, is being represented by Mr George Copley. For the purposes of this proceeding, all are officers of the Court, and all are duty bound to ensure that justice is not only done, but that it is seen to be done. In the final analysis, this duty trumps their duty to their clients.

### **Secret Hearings and Secret Documents**

Most recently, the Special Prosecutor Berardino sought permission to hold secret hearings with an unidentified witness who, it is claimed, may, in the course of his testimony, inadvertently identify a secret informant. Madame Justice Elizabeth Bennett, hearing the case, denied this, and the Berardino's appeal to the BC Appeal Court was similarly denied; he now intends to appeal this bizarre request to the Supreme court of Canada. This maneuver, even if carried out expeditiously, will result in further delays, bringing the trial date close to or beyond the next provincial election.

Meanwhile, the court is still entangled in procedural wrangling over what documents may not be revealed to the defense or to the public, because they are claimed to be subject to either 'cabinet privilege' or 'solicitor-client privilege.'

Mr Copley, counsel to the Cabinet, argues for a publication

ban on documents which Madame Justice Elizabeth Bennett appears to agree are relevant to the case; the effect would be to allow defence counsel access to them, and to use them in argument, but not to let the public know what they say. This defies logic; it appears impossible in practice; but most importantly it denies the public the opportunity to form its opinions on the case. Hardly, as the premier has often promised, 'open and transparent'.

Madame Justice Bennett appears to have decided that these documents should be made available to the court as a moral responsibility of Cabinet, but not as a legal obligation.

Mr Copley is likely to ask for a publication ban should Cabinet decide to present the documents. This may be opposed by the press, represented by Mr Roger McConchie, counsel for the *Globe & Mail*, another intervenor, which, in this case, might be said to be representing the public interest.

### **How was the CN Rail Decision Made?**

Despite the early declaration by the RCMP that charges will not be made against any elected officials, it is hard to believe that Dave Basi and Bob Virk, acting on their own and now charged with influence peddling, made the CN Rail decision on their own, without the involvement of cabinet and the premier.

Clearly, in order to understand how much and what kind of influence it is alleged they might have been peddling, and how relevant were the documents involved, we must understand how the decision was made. How was the public interest considered? (Not, we hope, in the same way as the recent government decision to remove Western Forest Products lands from the TFL, a decision roundly criticized by the provincial Auditor-General.)

The Cabinet appears to be representing its own interests (rather than those of the public) and, by their continuing actions to prevent the publication of relevant documents, we might conclude that they feel that these documents might reflect unflatteringly on the government. The actual contract with CN Rail has, of course, never been published.

### **There Must be a Trial, Promptly**

But the public interest will never be served unless there is a trial. The charter rights of the accused demand a prompt resolution. Yet the Special Prosecutor, Mr Berardino, has, amazingly, used

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the possibility that the prosecution might be abandoned altogether as a threat to enforce his version of procedures on the court.

Surely, if he resigned, it should be regarded as contempt of the court? And, by extension, if the trial were delayed beyond the next election, would this not be contempt of the public? And should this contempt not be laid at the feet of the cabinet and the premier?

Mr Berardino should immediately abandon his appeal to the Supreme Court of Canada, and allow Madame Justice Bennett to get on with the trial. And the trial should not be delayed with arguments about the publication of evidence. The public interest is that justice be done, and that it be seen to be done, and that public interest is more important than any 'privileges' that the officers of the court may claim for themselves or their clients. ✍