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Reprint from Volume 22 Number 18

Sept 30, 2010

Beyond Recall ~ Commentary by Patrick Brown

Given the wear and tear on the term 'recall' over the past couple of months, one would have thought that loyal supporters of BC's provincial Liberal Party would refrain from its use.

But no, the first two witnesses in the Basi-Virk trial, currently underway most days in BC Supreme Court, have used it as a frequent crutch, as in 'I don't recall ...'

It is not clear whether this means, 'I can't recall,' or, 'I won't recall.'

The Participants

In case you missed it, the Basi-Virk trial has started up again after a long summer recess.

The jury trial is ostensibly to reach a decision on whether two ministerial assistants in BC's provincial government leaked information to bidders in the auction of the provincial railway. Dave Basi and Bobby Virk have each been charged with breach of trust and fraud, and Aneal Basi with money laundering, under the Criminal Code.

The judge is Anne MacKenzie, recently appointed to the case, and appointed Associate Chief Justice in May 2010. She replaced Elizabeth Bennett, who oversaw several years of pre-trial maneuverings, and who was then elevated to the Court of Appeal.

The jury arrived on the scene even more recently than Madame Justice MacKenzie. They are prevented by her sweeping publication ban from knowing anything that happened in the pre-trial (before they were appointed), and are removed from the courtroom when legal arguments are made. When the jury is out, a publication ban on court proceedings applies.

The prosecution is led by Special Crown Prosecutor Bill Berardino, appointed under legislation intended to avoid any bias or appearance of bias on the part of the prosecution. However, Berardino is a former law partner of both the Attorney General who appointed him and of

the Deputy Attorney General. Paradoxically, this may have resulted in an appearance of bias.

The defence is led by Michael Bolton and Kevin McCullough, experienced and respected defence attorneys.

That would normally be enough actors for a *Criminal Code* trial. But this one has two other participant groups.

The first is the elected BC Liberal government. This, of course, is the source of apprehended bias on the part of Bill Berardino.

The government, we may be sure, is kept fully informed of what goes on in court—earlier in the pre-trial process, it went so far as to employ a dedicated observer to report to it.

The second is the British Columbia public, as represented in the courtroom by a variety of bloggers and commentators, and a few representatives of the mainstream media.

The general public, of course, has to rely on the media for its understanding of the proceedings. The media, in turn, has been (and continues to be) hampered by the publication ban applying to anything that occurs in court in the absence of the jury.

The Blue Elephant In The Corner

Interestingly, prosecutor Berardino sounds, at times, as if he is defending the government, rather than prosecuting three men for specific crimes. The defence's McCullough, at times, appears to be conducting a broad enquiry into the disposition of BC Rail, rather than defending three men against specific criminal charges. Why is this?

The trial itself is becoming all the more interesting because of the window it provides into the operations and ethics of provincial politicians and their friends.

Particularly, as it turns out, their friends.

The Amnesiac Witnesses So Far

The first witness, Martyn Brown, former Chief of Staff to Premier Campbell, displayed what citizen journalist Robin

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This article was published (Sept 30, 2010) in 'Island Tides'. 'Island Tides' is an independent, regional newspaper distributing 18,000 print copies throughout the Gulf Islands and Vancouver Island from Victoria to Campbell River.

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Mathews termed amnesia—Brown could recall very little of what went on when he held what was a key position in the provincial government, at the time when the sale of BC Rail was being set up. Brown's was a political appointment; he previously held paid positions with the Socreds and the BC Reform Party. His total remuneration in 2002 was \$148,500; in 2007/8 it was \$229,923.

The trial is only on its second witness, of thirty or more who will be called to the stand before the trial winds up, next spring or later; he is Brian Kenning, a longtime director of BC Rail.

Despite the lack of memory, in these first two weeks of the fall session, a pattern of information to be gleaned from witnesses is emerging. Kenning was paid some \$550,000 from 2001-2010 in various government appointments, including Directorships in BC Rail and BC Ferries. BC Rail paid him \$30,000 per year even after the railway had been sold. Kenning can remember remarkably little, except that the entire auction process was 'fair and above board' and that any leaks could do 'irreparable' damage.

For example, Kenning could recall little about Patrick Kinsella, who was paid some \$300,000 between 2001 and 2005 by BC Rail to help management communicate with the government. In Mr Kinsella's spare time he was co-chair of the BC Liberals' 2001 election campaign, and was reported to be a major political strategist for the party in the 2005 election campaign. (CN Rail's Chairman, David McLean, was the chief fundraiser of Gordon Campbell's 1996 election campaign.)

And Kenning was on-scene all the time. In his spare time, he held management and directorship positions with BC Pacific Capital Corporation, Catalyst Paper Corporation, and Brookfield Asset Management; during this time his companies donated some \$238,000 to the BC Liberal Party.

Continuing to keep the public in the dark, with no notice to the public the court failed to sit on Wednesday. No explanation for the court's recess has been announced. On Thursday, September 23, defence attorney McCullough finished his cross-examination of Kenning, and Bolton began his (the court does not sit on Friday).

The Trial so Far

This combination of prosecution witnesses who can't (or won't) 'recall', together with the draconian publication ban, seems bound to frustrate both the jury and the public.

It may be premature to conclude that these witnesses have contracted a particularly severe, and contagious, form of memory loss. If this is so, no conspiracy theory is necessary. It is only necessary to reflect that their careers have, to a great extent, depended on their connections within the current government.

And for individuals with such poor memories, they have been remarkably well paid. ☞

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