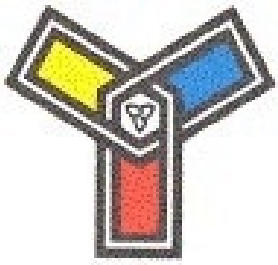

CRIMINAL INTELLIGENCE SERVICE ONTARIO

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MOBILE SURVEILLANCE TRAINING PROGRAM

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PRE-COURSE ASSIGNMENT

CASE LAW

January 2003

ADMINISTRATIVE STATEMENT

The information in this handout is taken directly from the Canada Law Book Inc. and is intended to provide a quick reference for study purposes only. It is to be used in conjunction with other assigned pre-course materials and the various topic and exercise assignments directly related to the C.I.S.O. Training Programs. It is not intended to replace thorough reference and conscientious study of the official volumes of the Canadian Criminal Cases (C.C.C.) or related federal (R.S.C.) or provincial legislation referred to in the cases enumerated.

For accurate references to the Criminal Code and any other related federal and/or provincial statutes, including related case decisions, recourse must be made to the official volumes.

For further information, contact:

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Provincial Bureau
Criminal Intelligence Service Ontario
25 Grosvenor Street, 9th Floor,
Toronto, Ontario
M7A 2H3

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CASE LAW RESEARCH – GENERAL INSTRUCTIONS

1. Each syndicate will be assigned one or more cases which will deal with subjects to be covered throughout this course.

2. Each syndicate is to prepare a brief report for each case outlining the following:

- **The court which heard the case;**
- **The grounds upon which the appeal was based;**
- **A short synopsis of the arguments presented by both sides;**
- **A synopsis of the ruling of the court (wiretap issues only);**
- **The effects of the ruling on police procedures;**
- **The reasoning the court used to arrive at their decision.**

3. Each syndicate is to prepare a written report for each assigned case. One member of the syndicate will be selected by the instructors to present the results of the research the following morning during the first class period and the written report will be handed in.

4. After the presentation to the class, individual members of the syndicate may be called upon to answer specific questions regarding the case. It is suggested that each student research the assigned cases by themselves after which the syndicate should meet to formulate their report.

5. Instructors will be available to assist with any difficulties.

Ka Lam Law, Kam Sun Chang and 2821109 Canada Inc.
v
Her Majesty The Queen

Canadian Charter of Rights and Freedoms - Criminal law - Summary conviction - Stolen property - Privacy - Production of evidence - Motion by the Respondent to have photocopies of documents found in a stolen safe entered as incriminating evidence in a prosecution under the *Excise Tax Act*, R.S.C., 1985, c. E-15 - Evidence unrelated to the investigation of the theft - Was evidence obtained in an abusive manner that would bring the administration of justice into disrepute?

The Appellants Ka Lam Law and Kam Sun Chan, were the managers of the Respondent company, which was running the Fu Lam City, a Moncton restaurant in 1992. The disappearance of a safe was reported to police following a break-in at the restaurant. On October 31, 1993, an open safe was found and the RCMP took possession of it. Checkbooks, a debit record and other documents belonging to the Fu Lam City restaurant were found in the safe. When examining the documents, a police officer noticed that the accounting seemed to reveal transfers of large sums of money to other people. After consulting with Crown Counsel, the officer photocopied the checks, the record of disbursements and the other documents found and contacted Revenue Canada.

On November 8, 1993, a public servant from Revenue Canada examined the original documents and obtained photocopies of the books and records from the police officer. An individual named Ken Law went to the police station in Moncton on November 14, 1993 and recovered all the original documents that were in the safe. On October 30, 1996, the Respondent presented a request to have the photocopied documents entered as incriminating evidence in a summary conviction case against the Appellants pursuant to section 327 of the *Excise Tax Act*, R.S.C., 1985 c. E-15, for having contravened section 238 and part IX of the Act.

The provincial court judge held that the reproduction of documents done in November, 1993, by the police officer amounted to search and seizure without a warrant. As the judge found that the search was abusive and contrary to section 8 of the *Canadian Charter of Rights and Freedoms*, the photocopies were not admissible by virtue of subsection 24(2) of the Charter. The provincial court judge therefore acquitted the Appellants of the charge. In appeal Godin J of the Court of Queen's Bench confirmed the decision of the trial judge. In a majority decision, the Court of Appeal granted the appeal and ordered a new trial.

Origin of the case: New Brunswick File No.: 27870

Judgement of the Court of Appeal: February 25, 2000

Counsel: Eric J. Doiron and Michel C. Léger for the Appellants
Claude LeFrançois for the Respondent

Regina v. Elzein
82 C.C.C. (3d) 455
Leave to appeal to S.C.C. refused 84 C.C.C. (3d) vi
Master Table of Cases
Quebec Court of Appeal
Rothman and Tourigny JJ.A. and Chevalier J. (ad hoc).
May 3, 1993
Court File No. 500-10-000053-908

Charter of Rights -- Search and seizure -- Electronic surveillance

Charter of Rights -- Search and seizure -- Electronic surveillance -- Police using cameras to record persons coming and going from commercial premises -- Videotaping and photographing carried out from outside of premises -- Conduct not infringing right to protection against unreasonable search and seizure -- Person entering or exiting business establishment could not have reasonable expectation of privacy in such activity -- Evidence properly admitted -- Canadian Charter of Rights and Freedoms, s. 8.

[82 C.C.C. (3d) p. 456]

R. v. Wong (1990), 60 C.C.C. (3d) 460, [1990] 3 S.C.R. 36, 1 C.R. (4th) 1, 2 C.R.R. (2d) 277, 45 O.A.C. 250, 120 N.R. 34, 11 W.C.B. (2d) 350 distd;
Cases referred to:
R. v. Duarte (1990), 53 C.C.C. (3d) 1, 65 D.L.R. (4th) 240, [1990] 1 S.C.R. 30, 74 C.R. (3d) 281, 37 O.A.C. 322, 103 N.R. 86, 71 O.R. (2d) 575n, 9 W.C.B. (2d) 230

Charter of Rights -- Enforcement of rights -- Exclusion of evidence -- Unreasonable search and seizure -- Police recording conversations between police agent and accused -- Tape-recording done after police in possession of evidence from agent indicating accused involved in drug trafficking -- Tape-recording done prior to decision of Supreme Court of Canada holding that such recordings violating guarantee to protection against unreasonable search and seizure -- In circumstances, trial judge properly admitting evidence -- Canadian Charter of Rights and Freedoms, ss. 8, 24(2).

Cases referred to:
R. v. Duarte (1990), 53 C.C.C. (3d) 1, 65 D.L.R. (4th) 240, [1990] 1 S.C.R. 30, 74 C.R. (3d) 281, 37 O.A.C. 322, 103 N.R. 86, 71 O.R. (2d) 575n, 9 W.C.B. (2d) 230; R. v. Collins (1987), 33 C.C.C. (3d) 1, 38 D.L.R. (4th) 508, [1987] 1 S.C.R. 265, 56 C.R. (3d) 193, 28 C.R.R. 122, [1987] 3 W.W.R. 699, 13 B.C.L.R. (2d) 1, 74 N.R. 276

Defences -- Entrapment -- Police agent employed by drug trafficker -- Agent meeting accused who supplied drugs to his employer -- Agent then attempting to persuade accused to supply large quantity of cocaine -- During period of time agent involved in various illegal activities including importation of hashish -- Defence of entrapment not made out -- Police having reasonable suspicion accused involved in criminal activity before police agent attempting to have him supply narcotics -- Conduct of police and police agent not going beyond providing accused with opportunity to commit offences -- Appeal by accused from conviction dismissed.

On appeal by the accused from his convictions, held, the appeal should be dismissed.
The defence of entrapment was not made out in this case. Prior to targeting the accused the police

had reasonable grounds to believe that he was involved in narcotics trafficking. It was not necessary to give the accused very much inducement in order to entice him into the criminal acts. The agent did not have to

[82 C.C.C. (3d) p. 457]

make very many attempts in order to persuade the accused to become involved in the transaction. Although there was a series of attempts in this case, the persistence on the part of the agent was not to induce the accused to traffic in narcotics, but to organize the large transaction which the agent was suggesting. From the very beginning, the accused and his associates repeatedly stated that it would be easy for them to do the transaction. It was not shown that any threats were made by the police agent to induce the accused to do the transaction. Nothing showed that the accused was particularly vulnerable. While there was no doubt that during the course of the relationship between the agent and the accused the agent did a number of illegal things; it was apparent that these were essentially done as part of the plan to gain the confidence of the accused. In the context of the relationship between the accused and the agent, it was not out of proportion for the agent to have acted as he did. The actions of the police and their agent did not go beyond providing the accused with an opportunity to commit the offence.

R. v. Mack (1988), 44 C.C.C. (3d) 513, [1988] 2 S.C.R. 903, 67 C.R. (3d) 1, 37 C.R.R. 277, [1989] 1 W.W.R. 577, 90 N.R. 173, 6 W.C.B. (2d) 80 apld;

Statutes referred to:
Canadian Charter of Rights and Freedoms, ss. 7, 8, 11(d), 24(2) Criminal Code, ss. 465(1)(c), 686(1)(b)(iii) [am. R.S.C. 1985, c. 27 (1st Supp.), s. 145] Narcotic Control Act, R.S.C. 1970, c. N-1, s. 4(1), (3) -- now R.S.C. 1985, c. N-1
Appeal by the accused from his conviction on charges of conspiracy to traffic in narcotics and trafficking in narcotics.
M.W. Swinwood, for accused, appellant.
J.L. Brunton, for the Crown, respondent.
The judgment of the court was delivered by

CHEVALIER J. (TRANSLATION)
Chevalier J. (translation): The appellant appeals from a judgment of the court of Quebec, Criminal and Penal Division, which found him guilty of the following two offences:

> 1. In Montreal, District of Montreal, between September 18, 1987 and November 11, 1987, did unlawfully conspire with Souhel Sadek and with other persons hereto unknown, to commit an indictable offence, to wit: to traffic in cocaine contrary to s. 4(1) of the Narcotic Control Act, R.S.C. 1970, c. N-1, and thereby committed the indictable offence set out in s. 423(1)(d) of the Criminal Code.
>
> 2. In Montreal, District of Montreal, on or about the 11th of November 1987, Mounif Elzein did unlawfully traffic in a narcotic, to wit: cocaine, contrary to s. 4(1) of the Narcotic Control Act, R.S.C. 1970, c. N-1, thereby committing the indictable offence set out in s. 4(3) of the said Narcotic Control Act.

The facts:
The prosecution evidence consists of the following: (1) the testimony of an undercover agent; (2) the transcript of wiretapped conversations; (3) police surveillance; (4) audio-visual recordings; (5) photographs. It should be noted that the last two parts of the evidence were not reproduced in the appeal case.

[82 C.C.C. (3d) p. 458]

As related by Claude Vaudrin, the main prosecution witness, the facts in evidence are the following.

At the end of the summer of 1987, Vaudrin, who had provided useful information to the Royal Canadian Mounted Police (R.C.M.P.) in their investigations in return for money for several years, reported to members of this force that he was personally aware of the appellant's involvement in narcotics trafficking. He proposed to "build (that is the expression that the judge used in his judgment) a case of trafficking against him" (A.F., p. 66).

His services were accepted. He was provided with equipment designed to record his conversations and which he was to constantly wear whenever he met with the appellant. A telephone device which he used to communicate with Elzein was also electronically tapped.
In carrying out his mission, Vaudin met the appellant in a Montreal restaurant on September 18, 1987. Their conversation dealt with two subjects in particular: the possibility of jointly trafficking in hashish and cocaine, and the possibility of carrying on a jewellery business. In fact, Vaudrin remitted to Elzein a certain quantity of jewellery which he offered to sell to him. Eventually, the appellant returned them to him.

A second meeting took place on September 22nd, again at a restaurant in the same city. Vaudrin told the appellant that people from Toronto, one of whom he said was his cousin, wanted to purchase 25 kilograms of cocaine per month. It was agreed that, in the beginning, they would be supplied with one kilogram which would cost $43,000. Once they had received the merchandise, they would have it tested and if they said that they were satisfied with it, they would then go on to the desired amount, the 25 kilograms.

On September 25th, that is three days later, on the appellant's instructions, Vaudrin attended at a butcher shop located at the intersection of Villeray and De Normanville Streets in Montreal. The appellant joined him there and told him that one Samir Elzein would bring the cocaine in a couple of minutes. Eventually, this third person showed up and presented the merchandise. Vaudrin took possession of it, and then left the establishment. He went and turned it over to an R.C.M.P. officer who was located a short distance from there. The officer gave him the $43,000. Vaudrin returned to the butcher shop and gave the money to the two Elzeins. The appellant pointed out that only 950 grams had been delivered. At the appellant's request, one of the business's employees gave him a brown-coloured bag into which this same appellant put the money that he had earlier taken from the bag that Vaudrin had brought it in.

[82 C.C.C. (3d) p. 459]

On September 28th, the two confederates again met in a restaurant. When Vaudrin arrived, the appellant was in the company of the co-accused, Souhel Sadek. The latter left almost immediately and did not take part in the conversation that the appellant and Vaudrin had. The undercover agent confirmed that the quality of the product received on September 25th was acceptable. They agreed that the purchase of the 25 kilograms would go ahead and, in order to settle the arrangements, Vaudrin was to meet Elzein the next day, September 26th.

On the agreed day, the meeting took place. Sadek was present. Vaudrin explained how he intended the operation should unfold. It was to be done on September 30th. However, it did not go ahead that day as the appellant reported that the merchandise was not yet available.

On October 2nd, Vaudrin attended at a garage operated by the co-accused, Sadek. The latter informed him that he personally was in contact with a supplier who could supply the 25 kilograms. In fact, on October 12th, he gave him a small quantity of the narcotic for examination. Vaudrin did not take the offer seriously as he was under the impression that Sadek was acting on behalf of the appellant and that his objective was to make him wait.

On October 20th, Elzein met Vaudrin, again in a restaurant. He explained to him that the reason that he had not shown any sign of life was that a group of traffickers had been arrested and that he wanted to lay low in case the police had their eye on him. At the same meeting, he also confirmed that he had obtained the 25 kilograms.

On October 23rd, Vaudrin again saw Elzein. The latter proposed to deliver the cocaine in five-kilogram lots. The undercover agent refused.

On October 29th, the appellant informed him that his suppliers required that he pay $50,000 up front to show that his order was serious. Vaudrin said that he was ready to contribute $25,000 to meet this requirement.

On November 3rd, again at one of these meetings, it was agreed that the unit price per kilogram of cocaine would be $37,000 and that the $50,000 mentioned on October 29th would be paid on November 5th, at which time the agent would receive a small quantity of cocaine so that he could have it tested.

On that date, the appellant announced to Vaudrin that he did not have the small quantity promised. The agent none the less agreed to give him $10,000 instead of the $25,000 promised on the condition that the merchandise, that is the 25 kilograms, be delivered on November 11th.

[82 C.C.C. (3d) p. 460]

On that date, Vaudrin and the appellant met at the latter's store on St-Hubert Street in Montreal. Elzein told him that he could only get 18 kilograms and that in order to pick it up he would have to go to Sadek's garage and that the latter would drive him to the place where he could take delivery of it. Vaudrin went to the garage; Sadek there told him that the merchandise was on the premises and that he could deliver 17 kilograms. In response to the agent who said that, according to Elzein, he was to pick up 18 kilograms, Sadek answered that his information was wrong.

A certain number of vehicles were located on the premises. Two in particular attracted the attention of the police who were keeping a look-out from a certain distance. They saw Sadek go from the first to the second with a bag which he seemed to have carried from the first to the second vehicle. Vaudrin asked Sadek to back the vehicle with the cocaine into the garage so that no one from outside the building could see him perform the test that he intended to carry out before taking delivery. Sadek backed the car into the garage. At the moment that he was ready to take possession of the 17 kilograms in question, two R.C.M.P. officers burst in. They noted the aforementioned quantity of cocaine in the vehicle in the garage. In a second vehicle located on the premises, they found the missing 18th kilogram. Sadek was immediately arrested. The appellant was arrested thereafter at his store. The R.C.M.P. also seized $54,450 in Canadian money there. Seventy-seven $100 bills were found which were identified as the bills which Vaudrin had given to the appellant at the time of the sale of the one kilogram of cocaine to the undercover agent on September 25, 1987, mentioned above.

In defence, the appellant, besides testifying on his own behalf, called:

-- various persons whose evidence went to attack the accuracy and the probative value of the wiretap evidence;

-- one Jean-Guy Laberge, alias "Mr. Peter", mentioned by Vaudrin in his evidence as the person who was the source of his knowledge about the appellant's involvement in narcotics trafficking.

In his testimony, the appellant denied that he had ever trafficked in cocaine with Vaudrin. According to him, the transaction of September 25, 1987, was only between the undercover agent and one Samir Elzein. Similarly, the transaction of November 11, 1987, was only between Sadek and Vaudrin, without any involvement on his part. With respect to the $7,700 found in his store at the time of his arrest and which had previously been photographed by the R.C.M.P., he said that it was the money originally paid to the

[82 C.C.C. (3d) p. 461]

undercover agent in consideration for the jewellery which had been discussed with Vaudrin and which Vaudrin had returned after deciding not to pursue the transaction. Finally, the appellant admitted that on November 11th he was visited by Vaudrin and that he directed him to Sadek's garage, but he explained his actions by saying that it was just a question of doing him a favour and that he had in no manner whatsoever participated in the transaction involving the 17 or 18 kilograms of cocaine which took place that day.

The judgment under appeal

In application of the principle according to which the respondent has the burden of proving the appellant's involvement in the offences with which he was charged beyond a reasonable doubt, the trial judge first analyzed the prosecution evidence. He reviewed in great detail the events reported by Vaudrin, the main witness. From his analysis, he concluded that the undercover agent's version was credible because, according to the judge, his testimony was corroborated, inter alia (judgment, A.F., p. 77):

> ...by the observations of the Royal Canadian Mounted Police, the photographs taken, the videotapes filmed, the marked money seized, the 18 kilograms of cocaine confiscated and, finally, by the two accused who tried to put the blame for the conspiracy on each other.

With respect to the wiretap of the conspirators' conversations, the judgment contains certain comments on its admissibility and on the use that can be made of it. I will deal with this part of the judgment when considering the grounds of appeal raised in this regard by the appellant.

Turning then to the defence's story based on the appellant's testimony, the judge wrote (A.F., p. 71):

> With respect to Mr. Mounif, in his testimony, he went so far as to admit that he had accepted the deposit of $10,000 from Claude Vaudrin only as a favour because Vaudrin had asked him to convey the money which was a deposit for the purchase of cocaine that he was to make from a stranger.
>
> This participation, if the Court were to believe it, would nonetheless constitute the crime of trafficking.
>
> However, it is totally incompatible with the prosecution evidence.
>
> It is quite clear that Mr. Mounif Elzein and Mr. Souhel Sadek conspired together to traffic in this particular case, that they did traffic, and that only the seizure by the Royal Canadian Mounted Police put an end to it.

The grounds of appeal:

Initially, the appellant prepared and filed his own factum. Later, he requested the services of a lawyer who, in a document entitled "Amended Factum", set out the grounds of appeal that he

[82 C.C.C. (3d) p. 462]

specifically intended to develop in the rest of his factum. In the pages which followed and in this regard he submitted:

1. that the audio-visual recordings were illegally received into evidence and should have been declared inadmissible;

2. that certain exhibits received into evidence were illegally admitted;

3. that the wiretap evidence should be excluded in its entirety from the record;

4. that there was entrapment, that because of the illegal actions of the R.C.M.P. the offences charged were committed, and consequently that the relief available to remedy such situation should be granted.

On the very last page of the amended factum, counsel then summarized what he considered were the 14 grounds of appeal set out by the appellant in his own factum. This exercise by counsel was an amazing feat given the confusion that one finds oneself thrown into when reading the 50 pages throughout which the appellant sets out his complaints. The summary reads as follows:

Mounif Elzein From his own factum Grounds

1. Admissions of private communications interpreted by RCMP 1 -- 7
2. Use of the transcripts 1 -- 7
3. Denied full answer and defence -- no translation of Arabic
4. Appreciation and use of testimony provided by defence witness Jolin, Leduc
5. Erred in dismissing the appeal motion seeking separate trials
6. Appeal was reported by counsel on December 12, 13
7. Use of trial judge re: previous Narcotics conviction

Others Grounds:

8. Trial judge did not properly evaluate the credibility of Claude Vaudrin
9. Expert -- C.T. not heard
10. Transcripts disappeared
11. Transcripts of November 30/89 inaccurate
12. Arrest without a warrant
13. Request to hear expert witness at Court of appeal
14. Competence of counsel

At the end of this, one finds the following note: "Each of these issues will be addressed by counsel."

[82 C.C.C. (3d) p. 463]

I would point out that in his oral argument before this court counsel did not deal with any of these grounds except for the first and the second ones, which were dealt with in his aforementioned third ground of appeal. The appellant did not argue orally his grounds of appeal and counsel for the respondent also did not discuss them at the hearing of the appeal. Besides the fact that such grounds were, for the most part, based on statements of fact not in the record and unproven, and for the remainder absolutely lacking in seriousness, the failure of either party to address them orally is an invitation to us to dismiss them outright and to limit our consideration to the four grounds contained in the amended factum.

The three first grounds of appeal:

They must be dealt with together for one obvious reason. If they have merit, that is if, after consideration, the conclusion which necessarily flows is that the evidence of the wiretapped conversations, the audio-visual surveillance, and certain of the exhibits filed at trial, must be

excluded, then the question arises whether the prosecution has met its burden of establishing the appellant's guilt beyond a reasonable doubt on each of the offences with which he was charged.

This preliminary examination of the evidence is more essential in that it is a prerequisite to consideration of the fourth ground of appeal, that is the one dealing with the allegation of entrapment. I would quote in this regard the following extract from the reasons of Lamer J. (now Chief Justice) in R. v. Mack (1988), 44 C.C.C. (3d) 513 at p. 565, [1988] 2 S.C.R. 903, 67 C.R. (3d) 1, where, speaking in respect of a trial before a judge and jury (here the same remarks would be addressed to the judge alone), he wrote:

> Finally, I am of the view that before a judge considers whether a stay of proceedings lies because of entrapment, it must be absolutely clear that the Crown had discharged its burden of proving beyond a reasonable doubt that the accused had committed all the essential elements of the offence. If this is not clear and there is a jury, the guilt or innocence of the accused must be determined apart from evidence which is relevant only to the issue of entrapment. This protects the right of an accused to an acquittal where the circumstances so warrant. If the jury decides the accused has committed all the elements of the crime, it is then open to the judge to stay the proceedings because of entrapment by refusing to register a conviction. It is not necessary nor advisable in this case to expand the details of procedure. Because the guilt or innocence of the accused is not in issue at the time an entrapment claim is to be decided, the right of an accused to the benefit of a jury trial in s. 11(f) of the Charter is in no way infringed.
>
> [82 C.C.C. (3d) p. 464]

The audio-visual evidence:

It should be remembered that an initial sale of cocaine was made on September 25, 1987. That day, Antoine Deschenes, an R.C.M.P. officer, used a video camera and a photo camera to videotape and photograph from a certain distance "the movements of the different people who attended at the place of business ... people who went in or who came out" (his testimony, R.F., p. 512).

Secondly, on November 11, 1987, the day on which the second alleged offence would have been committed, he repeated the same operations recording the activities described by the witness Vaudrin at Sadek's garage during which time the alleged delivery of the narcotics was being made. In his amended factum, counsel for the appellant submits that the trial judge erred in receiving into evidence the audio-visual cassettes and the photographs without first holding a voir dire. He also asks that this evidence be excluded on the basis of R. v. Wong (1990), 60 C.C.C. (3d) 460, [1990] 3 S.C.R. 36, 1 C.R. (4th) 1.

With respect to the first ground of appeal, it does not withstand examination. In his testimony, Deschenes, the operator of the two cameras, identified them by their characteristics and provided all the details necessary to assess his use of them. He identified the type of film used and affirmed that the videotape and photographs had not been altered between the time that they were taken and the time that copies were filed in the court record (R.F., p. 510).

But there is more. I consider that the appellant is not in a good position to complain about what he says is an absence of a voir dire when one looks at his position taken at the time of the trial. In this regard, I would make reference to the following passage of the hearing on October 19, 1988 (A.F., p. 544):

> The Court (Girouard J.)
>
> So counsel Schneider, the discussion is about whether or not we should play the videotapes of counsel Proulx's client at the time of, I don't know, a visit (by the undercover agent) out in front of his place of business or whether if they were to be filed, you would let me look at them during my deliberations.
>
> Counsel Bernard Schneider (counsel for Sadek)

Yes, well in that regard, My Lord, at the present time I've nothing to say. I've no objection to the videotapes.

The Court

O.K. You'll see what counsel Proulx has to say in that case. We'll see what counsel Proulx has to say.

The Crown (counsel Belanger)

I checked, My Lord. It seems that one can locate ...

[82 C.C.C. (3d) p. 465]

The Court

And that is exactly what was seen on the photographs too if I correctly understand; it was in movement that we saw...

Counsel Michel Proulx (Counsel for the appellant)

My Lord, I spoke to my client and we do not believe that it is necessary that the Court view them in the courtroom. I think that the jurisprudence is to the effect that the judge may ...

The Court

View them during his deliberations.

The Defence (counsel Proulx)

... view things during his deliberations or before his deliberations because we know that your deliberations are generally quite quick.

The Court

Han. Han.

The Defence (counsel Proulx)

That is why I had to say before your deliberations.

The Court

You agree that they simply be filed and be at my disposal.

The Defence (counsel Proulx)

Yes, My Lord.

The Court:

And you, counsel Schneider?

The Defence (counsel Schneider)
I have no objection, My Lord.

The Court

Very well. Counsel Belanger you will not have to play them in open court. I will look at them if necessary during my deliberations.

With respect to the second ground of appeal where the appellant argues in essence that taking the photographs and making the videotapes were contrary to s. 8 of the Canadian Charter of Rights and

Freedoms, his reliance on the Wong decision is inappropriate. There the Supreme Court heard a case in which surreptitious video surveillance had been effected, without prior judicial authorization, by the installation of a video camera in a hotel room where certain illegal gambling activities were taking place. In that decision, and by applying the same principles set out previously in R. v. Duarte (1990), 53 C.C.C. (3d) 1, 65 D.L.R. (4th) 240, [1990] 1 S.C.R. 30, the highest court in the land found that the Charter violation resulted from the electronic surveillance by the police which "encroache[d] on a reasonable expectation of privacy" (p. 481). Then speaking of the hotel room which was subject to surveillance from within, La Forest J. wrote:

[82 C.C.C. (3d) p. 466]

> Normally, the very reason we rent such rooms is to obtain a private enclave where we may conduct our activities free of uninvited scrutiny. Accordingly, I can see of no conceivable reason why we should be shorn of our right to be secure from unreasonable searches in these location which may be aptly considered to be our homes away from home.

In the case before us, the situation is quite different. The videotaping and photographing were carried out from outside the areas where certain activities in which the appellant was involved took place, which premises were in addition commercial places and therefore accessible to all who came by. A person who enters or exits from a business establishment cannot reasonably expect that his actions will be protected by the privacy principle and I can not see how the fact that a person, whether or not a police officer, photographs him while he is carrying out this activity infringes the right that he may have to enjoy the privacy of those premises.

I therefore conclude that this video and photograph evidence was admissible, that it was accepted without reservation by the appellant at trial, and that he is not justified in now asking for its exclusion.

The exhibits:

Counsel for the appellant drafted this ground as follows (amended factum, p. 12):

> It is respectfully submitted that the trial judge erred in admitting into evidence Exhibits P-6 through and including P-9B when the continuity of the Exhibits was not properly established.
>
> See: Evidence of Rene Allard in Volume II p. 315 and 321 of Respondent's Factum.

The reference to pp. 315 and 321 is wrong. The mention of ex. P-6 (list of bank notes photocopied "probably" September 24, 1987) only appeared for the first time on p. 326; the mention of exs. P-7A (photocopy of bank notes in 8 1/2 x 14 format) and P-7B (photocopy of bank notes in large format) on p. 342; the mention of ex. P-8 (photocopy of bank notes totalling $25,000 made on November 5, 1987), on p. 350; the mention of exs. P-9A (all the bank notes seized with the exception of the 77 identified notes) and P-9B (the 77 numbered notes) on p. 394.

The testimony of Police Officer Rene Allard reveals that he was the one who took possession, inter alia, of the seized bank notes, who compared them with the photocopies that he had made of them before Vaudrin gave them to the appellant; he was the one who had asked a technician to put their numbers into a computer.

It is true that at the start of his testimony he was not able to affirm whether or not the notes photocopied and described in the computer were those which had been used on September 25th or on November 11th. However, after verification at the request of the

judge, the problem was resolved as can be seen on p. 394 of the respondent's factum.
This ground is therefore without merit. I would note in passing that, unless I am wrong, counsel for the appellant did not deal with this ground in his oral argument, and the manner in which he dealt with it in his amended factum did not impress the undersigned.

The problem of the wiretap evidence:

The factum submitted by the respondent contains the transcript of a certain number of wiretapped conversations. They can be divided into two categories. Twelve of them were wiretapped during meetings in the restaurants, store or garage and involve the parties identified by the transcriber as Vaudrin, the appellant and/or Sadek. Eight others concern telephone calls involving the same persons. They took place between September 18, and November 11, 1987. The most important calls are those on September 12th, the day the traffic in the one kilogram of cocaine would have taken place, and the call of November 11th, the day Vaudrin said, before attending at Sadek's garage, that he had met the appellant at his store which is located at 7604 St-Hubert Street.
In his amended factum, counsel for the appellant submits:

– that the judge failed to hold a voir dire into the admissibility of the wiretap evidence;

– that as a result, he deprived the appellant of the opportunity of attacking the constitutionality of this evidence under ss. 7 and 11(d) of the Canadian Charter of Rights and Freedoms;

– that the wiretap was conducted without the prior consent of the appellant, which made it illegal and inadmissible in evidence pursuant to s. 8 of the Charter;

– that as a result, it should be excluded from the evidence pursuant to s. 24(2) of the Charter.

In support of his argument, the appellant referred to, inter alia, R. v. Duarte, supra, which was rendered between the start of the judge's deliberations and his judgment in the present case.

In his factum, in addition to submitting that the judge had properly applied the principles set out in Duarte and that he had not committed an error in admitting the intercepted conversations, the respondent invites us, in the alternative, to dismiss the appellant's ground of appeal on the ground that it is a case which comes within the curative provision of s. 686(1)(b)(iii) of the Criminal Code. At trial, the respondent had sought to have, and was permitted, to file into the record the tapes containing the recorded conversations as well as the transcript of the tapes.

In reading the judgment, it appears that first, the judge distinguished between the real evidence which the tapes constituted and the transcript made from them. In respect of the transcript, he commented that it was "a little poorly done", that there are things in it "which are not there or which are poorly reported" and that "one must show extreme prudence in using the wiretap" (A.F., pp. 64-5). In light of what follows, it is clear that the judge's comments only relate to the transcript.

It appears that the judge listened to the tapes because, on numerous occasions and throughout his judgment, he indicated that he recognized the voices, in particular the appellant's voice, and that certain conversations that he had had with Vaudrin clearly corroborate Vaudrin's testimony. We should add that the appellant testified at his trial, that the judge was in an excellent position to make

the comparisons that he made and that his conclusion is quite open on the evidence. The other conclusion that he drew from the wiretap evidence, that is that its content corroborate Vaudrin's testimony, can also not be disputed, as the Court of Appeal is not in the privileged position of the judge who heard the voices and the conversations.

Therefore, there remains to be determined whether the judge committed an error of law when he declared the wiretap evidence admissible. The appellant's main, if not the only, criticism in this regard is that the circumstances in which the wiretap was carried out infringed the rules laid down by the Supreme Court of Canada in Duarte. One will remember that it was decided in that case:

– that surreptitious electronic surveillance of an individual by an agent of the state constitutes an unreasonable search and seizure within the meaning of s. 8 of the Charter;

– that the conversation intercepted is inadmissible pursuant to s. 24(2) of the Charter where its use is likely to bring the administration of justice into disrepute;

– that several factors may be taken into account in determining whether the administration of justice could be brought into disrepute; these factors were set out in R. v. Collins (1987), 33 C.C.C. (3d) 1, 38 D.L.R. (4th) 508, [1987] 1 S.C.R. 265.

In his judgment, the trial judge referred to these factors, declared that they were applicable in the present case, and emphasized one of them in particular, that is, that the evidence of the offences charged would have been obtained in any event given that the testimony of the agent Vaudrin was credible and amply corroborated. I previously quoted the extract from his judgment containing this last conclusion.

[82 C.C.C. (3d) p. 469]

In the matter now before us, it is admitted that the wiretap was conducted unbeknownst to, and without the prior consent of, the appellant and that there had been no judicial authorization. One must therefore ask whether, notwithstanding this infringement of s. 8 of the Charter, the circumstances in which it took place and was pursued are such as to bring the administration of justice into disrepute.

The factors referred to in Duarte and Collins are the following:

-- what kind of evidence was obtained?
-- what Charter right was infringed?
-- was the Charter violation serious or was it of a merely technical nature?
-- was it deliberate, wilful or flagrant, or was it inadvertent or committed in good faith?
-- did it occur in circumstances of urgency or necessity?
-- were there other investigatory techniques available?
-- would the evidence have been obtained in any event?
-- is the offence serious?
-- is the evidence essential to substantiate the charge?
-- are there other remedies available?

Surveillance was conducted without judicial authorization and with the consent of only one of the speakers. The case is therefore identical to the present one. This is how the Supreme Court, La Forest J. writing, applied the above-mentioned factors and disposed of the case (p. 23):

> Of cardinal importance in assessing these factors is the fairness of the process, and in particular, its impact on the fairness of the trial. Undoubtedly, the breach infringed upon an important Charter right, and the evidence

> could have been obtained without breaching the Charter. But what strikes one here is that the breach was in no way deliberate, wilful or flagrant. The police officers acted entirely in good faith. They were acting in accordance with what they had good reason to believe was the law -- as it had been for many years before the advent of the Charter. The reasonableness of their action is underscored by the seriousness of the offence. They had reasonable and probable grounds to believe the offence had been committed, and had they properly understood the law, they could have obtained an authorization under the Code to intercept the communication. Indeed, they could have proceeded without resorting to electronic surveillance and relied solely on the evidence of the undercover officer or the informer. In short, the Charter breach stemmed from an entirely reasonable misunderstanding of the law by the police officers who would otherwise have obtained the necessary evidence to convict the accused in any event. Under these circumstances, I hold that the appellant has
>
> [82 C.C.C. (3d) p. 470]
>
> not established that the admission of the evidence would bring the administration of justice into disrepute.

It is true that in his decision, where he says that he is applying the Duarte decision in deciding to admit the wiretap evidence, the trial judge only bases his decision on one specific ground, that is, that "the evidence could have been made with the testimony of the undercover agent Vaudrin alone, corroborated in numerous places...". My reading of the record convinces me that he could also have repeated and applied to the case before him, the comments of La Forest J., quoted above, and which are particularly appropriate in the present case.

In conclusion, I am of the view that the judge did not err in deciding that s. 8 was infringed in circumstances not likely to tarnish the image of justice, that this evidence was admissible and that it corroborated the agent Vaudrin's testimony.

That being the case, it would not be appropriate to deal with the respondent's argument based on s. 686(1)(b)(iii) of the Code.

Entrapment:

In his amended factum, counsel for the appellant submits that the rules laid down by the Supreme Court of Canada in R. v. Mack, supra, must be applied to the present case. He submits that the actions of the undercover agent Vaudrin and the R.C.M.P., which resulted in the alleged commission of the two offences charged, are actions which in Mack were held to constitute entrapment and would have justified the court entering a stay of proceedings even before it had been decided whether or not the appellant had committed the two offences with which he was charged.
Lamer J. wrote in Mack, supra, that there is entrapment when (p. 559):

> (a) the authorities provide a person with an opportunity to commit an offence without acting on a reasonable suspicion that this person is already engaged in criminal activity or pursuant to a bona fide inquiry;
>
> (b) although having such a reasonable suspicion or acting in the course of a bona fide inquiry, they go beyond providing an opportunity and induce the commission of an offence.

The other rules contained in the Mack decision can be stated as follows:

(1) the predisposition of an accused to commit the offence charged or to engage in a criminal activity is only one consideration in deciding whether or not the conduct of the police was justified;

(2) this conduct must be assessed objectively as far as possible in that one must ask oneself what the average non-predisposed person would do following the police actions;

[82 C.C.C. (3d) p. 471]

(3) to determine whether the police have done something other than providing an opportunity, Lamer J. wrote (p. 560):

> ...it is useful to consider any or all of the following factors:
>
> - the type of crime being investigated and the availability of other techniques for the police detection of its commission;
>
> - whether an average person, with both strengths and weaknesses, in the position of the accused would be induced into the commission of a crime;
>
> - the persistence and number of attempts made by the police before the accused agreed to committing the offence;
>
> - the type of inducement used by the police including: deceit, trickery or reward;
>
> - the timing of the police conduct, in particular whether the police have instigated the offence or became involved in ongoing criminal activity;
>
> - whether the police conduct involves an exploitation of human characteristics such as the emotions of compassion, sympathy and friendship;
>
> - whether the police appear to have exploited a particular vulnerability of a person such as a mental handicap or a substance addiction;
>
> - the proportionality between the police involvement, as compared to the accused, including an assessment of the degree of harm caused or risked by the police, as compared to the accused, and the commission of any illegal acts by the police themselves;
>
> - the existence of any threats, implied or express, made to the accused by the police or their agents;
>
> - whether the police conduct is directed at undermining other constitutional values.

(4) Before determining whether there has been entrapment, the judge presiding at the trial must decide whether the Crown has discharged its burden of proving beyond a reasonable doubt that the accused committed all the essential elements of the offence;

(5) (R. v. Mack, supra, at p. 568):

> ... the onus lies on the accused to demonstrate that the police conduct has gone beyond permissible limits to the extent that allowing the prosecution or the entry of a conviction would amount to an abuse of the judicial process by the state. The question is one of mixed law and fact and should be resolved by the trial judge. A stay should be entered in the "clearest of cases" only.

Before reviewing the evidence which must be considered in order to determine whether there has been entrapment in the case before us, it is first necessary to remember that, as was held earlier, the respondent has established beyond a reasonable doubt that the appellant committed the offences charged.

[82 C.C.C. (3d) p. 472]

Secondly, and in order to situate the above-mentioned rules in the context in which they must be considered, it seems to me appropriate to quote the following extract from the reasons of Lamer J. (pp. 567-8):

> ... the claim of entrapment is a very serious allegation against the state. The state must be given substantial room to develop techniques which assist it in its fight against crime in society. It is only when the

police and their agents engage in a conduct which offends basic values of the community that the doctrine of entrapment can apply. To place a lighter onus on the accused would have the result of unnecessarily hampering state action against crime. In my opinion the best way to achieve a balance between the interests of the court as guardian of the administration of justice, and the interests of society in the prevention and detection of crime, is to require an accused to demonstrate by a preponderance of evidence that the prosecution is an abuse of process because of entrapment.

On the issue whether or not the police had reasonable and probable grounds for suspecting that the appellant was already involved in a criminal activity, Vaudrin testified that beginning in 1986, and for one year thereafter, his services had been used by one Peter to carry out tests in order to "determine whether there was synthetic or cut in the coke" (R.F., p. 941), as he had certain knowledge as a "chemist" in the matter.

It was while doing this work that he was introduced to Elzein in Peter's apartment. Between November, 1986, and May, 1987, he estimated that he had met him 15, perhaps even 20 times. He described the purpose of their meetings as follows (R.F., p. 963):

A. ... Peter took me alone when he went to get stuff at the Ali Baba restaurant. Peter took me with him and he picked up the stuff at the restaurant.
Q. (By Counsel Proulx): Yes but Mr. Elzein did not own the restaurant?
A. No, but it was Mr. Elzein who gave it to us.
Q. Who gave it to you, who gave it to Peter who gave it to you ...

(R.F., p. 1570)

Cross-examination by Counsel Massicotte
Q. Because if I understand you correctly, according to you, it was Mounif who supplied the kilo to Peter?
A. Ah that. I didn't say that.
Q. Yes, but when did you become convinced that Mounif could supply huge quantities?
A. Because I was going with Mr. Peter to the restaurant to meet Mr. Mounif, and Mr. Mounif passed quantities to Peter that Peter, that I knew that he had them, I was there.
Q. When was that? Between November and May?
A. Yes.
Q. When did that begin?

[82 C.C.C. (3d) p. 473]

A. Well, when did it begin, I can't tell you in terms of days.
Q. In December, in January?
A. It had begun I believe ... that's right, around January.
Q. Around January. So around January you are sure that Mounif had supplied quite large quantities to Peter. So what did you do in order to infiltrate Mounif, if you did do that?
A. I stuck with Peter ... I had confidence in Peter so that I could go with Peter into Mounif's business establishments, to be there when there were transfers.
Q. This is still between the month of November 1986 and the month of May 1987?
A. That's right.

Besides trafficking in narcotics, Vaudrin testified that to his knowledge Peter and the appellant were interested in acquiring weapons (R.F., p. 968), in dealing in jewellery (R.F., pp. 968-9), and gold (R.F., p. 969). When at some point Peter was arrested and incarcerated, Vaudrin said that he continued to have the same relationship with Elzein. Inter alia (R.F., p. 975):

(By Counsel Proulx)
Q. Did you propose something not right, not nice, something reprehensible, something illegal to Mr. Elzein's manager, namely to steal his car since he ...
The Crown
A. So that he could what?

Counsel Proulx

Q. I want to try and see if you remember anything about that?
A. Yes. I remember.
Q. Then tell the judge what it is?
A. Mr. Mounif had asked me whether I knew a place to get rid of a car, and then I said yes. Yes that I knew a scrap yard and that there was no problem, that I could have it crushed by the crusher.

Finally, still in his testimony, Vaudrin testified (R.F., p. 975):

(Counsel Proulx)

Q. Do you remember anything else?
A. He asked me, he introduced his manager to me. He told me that it was his manager who wanted to get rid of his car.
Q. Did it work?
A. No.
Q. Do you remember anything else, like when I suggest some to you, does it help you to remember?
A. No I don't remember...would you repeat your question...
Q. Is it not true Mr. Vaudrin that at some point in time you succeeded and I am referring you to the preliminary inquiry. I'm calling on your memory. I'm not trying to contradict you. Is it not true that with reference to

[82 C.C.C. (3d) p. 474]

what you told us at the preliminary inquiry that you succeeded in bringing into Canada from the United States an amount, or rather 23 kilograms of a narcotic that you described earlier, and that you asked Mr. Mounif to hide this substance at his place and that he refused?

A. Can I answer ...?
Q. Yes.
A. Yes, it is true that I went and picked up 23 pounds of hashish in the United States at Plattsburg. It was for Mounif Elzein and when I went there one Saturday, it was because I was to meet Mr Sadek there. Mr Mounif Elzein had sent Mr Sadek there. It was, I don't know where exactly, at a place and Mr. Sadek was to join me in Plattsburg on Saturday. He wasn't there; I came back, I went to his restaurant on St-Hubert Street. Mounif came and found me there. I told him that Sadek didn't show up and then Mounif asked me if I wanted to go back the next day, that Sadek would be there with the stuff and that he would give it to me.
Q. Did you inform the R.C.M.P. about these trips?
A. Yes. Yes and in fact the next day I went there and I got the stuff. Mr. Sadek gave it to me. I returned with it and then I had to keep the stuff at my place for 3-4 days because Mounif did not have ... it was supposed to have been sold and it wasn't. I had to keep it and I told the R.C.M.P. that. The R.C.M.P. kept the merchandise under surveillance too. At that time, Mounif called me and told me that he had found a purchaser so I took the merchandise to him.

The facts, related by this witness whom the judge considered credible, therefore leave no doubt that the police suspicions as to the appellant's prior involvement in criminal activity, including and in particular, trafficking in narcotics, were justified and that the first condition laid down by Mack was met.

With respect to the second condition, that is, whether the type of crime being investigated could be dealt with using other techniques than the use of an undercover agent, as Vaudrin's moral rectitude was not, it should be said, "outstanding", I believe it useful to quote the following extract from the reasons of Lamer J. which, in my view, applies in the present case (p. 522):

> One need not be referred to evidence to acknowledge the ubiquitous nature of criminal activity in our society. If the struggle against crime is to be won, the ingenuity of criminals must be matched by that of the police; as crimes become more sophisticated so too must the methods employed to detect their commission. In addition, some crimes are more difficult to detect. As Chief Justice Laskin in R. v. Kirzner (1977), 38 C.C.C. (2d) 131, 81 D.L.R. (3d) 229, [1978] 2 S.C.R. 487 (S.C.C.), explained (at p. 135 C.C.C., pp. 492-3 S.C.R.):

> "Methods of detection of offences and of suspected offences and offenders necessarily differ according to the class of crime. Where, for example, violence or breaking, entering and theft are concerned, there will generally be external evidence of an offence upon which the police can act in tracking down the offenders; the victim or his family or the property owner, as the case may be, may be expected to call in the police and provide some clues for the police to pursue. When "consensual"
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> [82 C.C.C. (3d) p. 475]
>
> crimes are committed, involving willing persons, as is the case in prostitution, illegal gambling and drug offences, ordinary methods of detection will not generally do. The participants, be they deemed victims or not, do not usually complain or seek police aid; that is what they wish to avoid. The police, if they are to respond to the public disapprobation of such offences as reflected in existing law, must take some initiatives."

Third is the question of whether the average person, with his strengths and weaknesses, in the accused's situation, would have been induced to commit the offences with which he was charged. The inducement in question here is undoubtedly one that would succeed in convincing a person to commit an offence that he would not otherwise have committed in the absence of the inducements in question. The answer to this question is easy because trafficking in 18 or 25 kilograms of cocaine with a street value of around $1 million is not an activity in which the average person mentioned above gets involved unless he is not already somewhat predisposed to consider the transaction as normal from his moral perspective. What I mentioned earlier with respect to the appellant's criminal activities prior to the R.C.M.P.'s operation against him shows quite clearly that they did not really need to give him much inducement in order to get him to do the things for which he was charged.

With respect to the fourth factor, the evidence clearly shows that the undercover agent Vaudrin did not have to make a great number of attempts before the appellant agreed to commit the two offences. In this regard, I am in agreement with the comments of the trial judge when he wrote (A.F., p. 73):

> It should be remembered that although there were a series of attempts in the present case, this was because they were needed in order to convince them to traffic in cocaine because from the very beginning these men showed that they were interested in doing it. And the proof is the transaction took place as of September 25.
>
> What required a certain persistence and numerous attempts on the part of the undercover agent was the organization of the sale of the 25 kilograms all at the same time.
>
> From the beginning Mr. Elzein and Mr. Sadek had repeated several times that a sale of several kilos would be easy but that the sale of 25 kilos seemed very difficult to do.

Fifthly, did the undercover agent use "deceit, fraud or trickery"? Of course, when the appellant agreed to provide the drug to Vaudrin, he was convinced that he was doing business with a drug trafficker and in this sense, one can say that the police through their agent used trickery and deceit. These two words must, however, be understood in the specific context of the particular investigation being made. The type of crime being investigated lends itself poorly to other detection techniques than the one used,

[82 C.C.C. (3d) p. 476]

which brings us back to the second question which I answered earlier.

Sixthly, were there threats, implied or express, made to the appellant? From his analysis of the evidence the trial judge concluded (A.F., p. 74):

> Here, despite certain attempts to convince the Court that at a certain point in time the parties would have been threatened, the Court finds absolutely nothing serious or true therein and it is convinced that no threat whatsoever was made to the accused in order to stir up the conspiracy and thereby bring about the successful

completion of the traffick.

My reading of the evidence on this aspect of the events satisfies me that the trial judge did not commit an error in the present case which would justify our intervention.

With respect to the other applicable conditions, nothing in the record shows that the appellant is particularly emotional or vulnerable and that the police would have exploited this in their operation against him.

Finally, if one were to draw up a balance sheet comparing the police's involvement with the appellant's, it is undisputable that, during the course of his relationship with Elzein and Sadek, Vaudrin did an inpressive number of things, some of which were obviously criminal (importation of hashish, providing false identity papers, possession of narcotics) and others were inducements to commit offences (proposition to deal in gold, in jewellery and in counterfeit money and to receive stolen automobiles). It is important to remember, however, that the initiatives in question were undertaken to the knowledge and with the agreement of the R.C.M.P. and that they essentially formed part of the plan of action, which consisted of gaining the confidence of the appellant who, the evidence leaves no doubt in this regard, manifested a certain distrust of Vaudrin. In the context of the relationship between him and the appellant, it was not out of proportion to act in this manner since the objective required that the agent act as he did.

In short, and like the trial judge, I am of the view that the R.C.M.P., through their agent, only set a trap for the appellant after having had serious grounds for suspecting that he was already involved in a criminal activity. In order to put an end to it, they used the classic weapon that one finds in almost all investigations of this type, that is, infiltration of the milieu. The fact that they entrusted the execution of their plan to an individual whose general morality was far from being without reproach and who knew this milieu well, is not condemnable nor unusual in itself.

Finally, and above all, neither the R.C.M.P., by its officers nor its undercover agent, went beyond the confines of its role which was

[82 C.C.C. (3d) p. 477]

to provide the appellant with an opportunity to commit the offences which he was found guilty of.

For these reasons, I would dismiss the appeal and confirm the verdict of guilty. Appeal dismissed.

Stinchcombe v. The Queen
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Master Table of Cases

Supreme Court of Canada

La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ.

November 7, 1991

Charter of Rights -- Fundamental justice -- Full answer and defence -- Discovery of Crown's case--Accused charged with indictable offence entitled to production of all relevant information in possession of Crown--Crown having discretion as to timing of disclosure where early disclosure would prejudice investigation--Crown also having discretion to withhold disclosure to protect informers--Exercise of discretion reviewable by trial judge--Initial determination as to relevancy of information to be made by Crown counsel--Canadian Charter of Rights and Freedoms, s. 7.

Evidence -- Production -- Statements to police -- Accused charged with indictable offence entitled to production of all statements obtained from persons who have provided relevant information to authorities--Duty to provide statements not dependent on whether witness to be called by prosecution--Crown having discretion to withhold disclosure to protect investigation or informers--Exercise of discretion reviewable by trial judge--New trial ordered where Crown counsel refused to produce statements made by potential defence witness to police--Decision not to call witness may have been result of withholding of disclosure--Canadian Charter of Rights and Freedoms, s. 7.

Prosecutor -- Duty on Crown counsel -- Disclosure -- Crown counsel under duty to disclose all relevant information in possession of Crown--Duty extending to statements of persons not intended to be called as witnesses by prosecution--Crown having discretion to withhold disclosure to protect investigation or informer--Duty to make disclosure may be more limited in summary conviction offences--Exercise of discretion reviewable by trial judge.

The accused was charged with several counts of criminal breach of trust, theft and fraud and was tried by a judge alone. It was the theory of the Crown that the accused, a lawyer, had wrongfully appropriated property which he held in trust for one of his clients. It was the theory of the defence that in fact, the accused was not trustee of the property but was the client's business partner. At the preliminary inquiry, the accused's secretary gave evidence which was apparently favourable to the defence. Following the preliminary inquiry, this witness was interviewed by the police and a tape-recorded statement was taken. Crown

counsel informed defence counsel of the existence but not the content of this statement. A request for disclosure prior to trial was refused. Counsel for the accused then applied to the trial judge for an order that the Crown call the witness, that the court call the witness or that the Crown disclose the contents of the statements to the defence. All three applications were dismissed, the trial judge holding that there was no obligation on the Crown to call the witness and there was no obligation on the Crown to disclose the contents of the statements. The accused was found guilty and his appeal to the Alberta Court of Appeal was dismissed.

On further appeal by the accused to the Supreme Court of Canada, held, the appeal should be allowed and a new trial ordered.

The fruits of a police investigation which are in the possession of counsel for the Crown are not the property of the Crown for use in securing a conviction, but the property of the public to be used to ensure that justice is done. The defence, on the other hand, has no obligation to assist the prosecution and is entitled to assume a purely adversarial role towards the prosecution. There is a general duty on the part of the Crown to disclose all material it proposes to use at trial on a charge of an indictable offence and especially, all evidence which may assist the accused even if the Crown does not propose to adduce it. This obligation is not, however, absolute. The Crown has a discretion to withhold information which may be subject to privilege and may delay disclosure so as not to impede an investigation. Further, the Crown need not produce what is clearly irrelevant. The discretion of Crown counsel is reviewable by the trial judge. Counsel for the defence can initiate a review when an issue arises with respect to the exercise of the Crown's discretion. On a review, the Crown must justify its refusal to disclose. In as much as disclosure of all relevant information is the general rule, the Crown must bring itself within an exception of the rule. The general principle is that information ought not to be withheld if there is a reasonable possibility that the withholding of information will impair the right of the accused to make full answer and defence, unless the non-disclosure is justified by the law of privilege. Even then, the trial judge might conclude that recognition of an existing privilege does not constitute a reasonable limit on the constitutional right to make full answer and defence and, thus, require disclosure in spite of the law of privilege. The trial judge may also review the decision of the Crown to withhold or delay production of information by reason of concern for the safety or security of witnesses or persons who have supplied information to the investigation. While leeway must be accorded to the exercise of the discretion by the Crown with respect to the manner and timing of the disclosure, the absolute withholding of information which is relevant to the defence can only be justified on the basis of an existence of a legal privilege which excludes the infromation from disclosure. Counsel for the accused must bring to the attention of the trial judge at the earliest opportunity any failure of the Crown to comply with its duty to disclose. Initial disclosure should occur before the accused is called upon to elect the mode of trial or to plead. The obligation to disclose will be triggered by a request by or on behalf of the accused and may be made at any time after the charge. Provided the request for disclosure has been timely, it should be complied with so as to enable the accused sufficient time before election or plea to consider the information. In cases where the accused is unrepresented, Crown counsel should advise the accused of the right to disclosure and a plea should not be taken unless the trial judge is satisfied that this has been done. At this early stage, the Crown's brief may not be complete and disclosure will be limited by this fact. Nevertheless, the obligation to disclose is a continuing one and disclosure must be completed when additional information is received.

[68 C.C.C. (3d) p. 3]

The Crown must disclose statements made by witnesses, whether or not the Crown proposes to call those witnesses. Where there is no statement but simply notes taken by an investigator, then those notes should be produced. If notes do not exist then a statement summarizing the anticipated evidence should be produced. This obligation extends to all statements obtained from persons who have provided relevant information to the authorities, notwithstanding that they are proposed to be called as Crown witnesses. Where there are no notes then in addition to the name, address and occupation of the witness, all information in the possession of the prosecution relating to any relevant evidence that the person could give should be supplied. While it may be that the duty of disclosure extends to all offences, it was unnecessary to determine the extent of the duty in the prosecution of summary conviction offences.

In this case, Crown counsel misconceived his obligation to disclose the statements. Crown counsel had refused disclosure because in his view, the witness was not worthy of credit. This was not an adequate explanation. The trial judge ought to have examined the statements and erred in holding

that the Crown counsel was not under an obligation to make disclosure of the statements. The failure of the Crown to make disclosure impaired the right of the accused to make full answer and defence. It must be assumed that non-production of statements was an important factor in the decision of the defence not to call the witness. The absence of this evidence might very well have affected the outcome. Accordingly, the appeal must be allowed and a new trial ordered at which the statements should be produced.

Boucher v. The Queen (1955), 110 C.C.C. 263, [1955] S.C.R. 16, 20 C.R. 1; Lemay v. The King (1951), 102 C.C.C. 1, [1952] 1 S.C.R. 232, 14 C.R. 89; R. v. C. (M.H.) (1989), 46 C.C.C. (3d) 142, 6 W.C.B. (2d) 300; revd 63 C.C.C. (3d) 385, 4 C.R. (4th) 1, 12 W.C.B. (2d) 577, 123 N.R. 63 consd;

Cases referred to:
Cunliffe v. Law Society of British Columbia (1984), 13 C.C.C. (3d) 560, 40 C.R. (3d) 67, [1984] 4 W.W.R. 451, 25 A.C.W.S. (2d) 12; R. v. Savion (1980), 52 C.C.C. (2d) 276, 13 C.R. (3d) 259, 4 W.C.B. 239; R. v. Bourget (1987), 35 C.C.C. (3d) 371, 41 D.L.R. (4th) 756, 56 C.R. (3d) 97, 29 C.R.R. 25, 46 M.V.R. 246, 54 Sask. R. 178, 1 W.C.B. (2d) 317; Marks v. Beyfus (1890), 25 Q.B.D. 494; R. v. Scott (1990), 61 C.C.C. (3d) 300, [1990] 3 S.C.R. 979, 2 C.R. (4th) 153, 1 C.R.R. (2d) 82, 43 O.A.C. 277, 116 N.R. 361, 11 W.C.B. (2d) 358; Bisaillon v. Keable (1983), 7 C.C.C. (3d) 385, 2 D.L.R. (4th) 193, [1983] 2 S.C.R. 60, 37 C.R. (3d) 289, 51 N.R. 81, 10 W.C.B. 359; Solicitor-General of Canada v. Royal Commission of Inquiry (Health Records in Ontario) (1980), 62 C.C.C. (2d) 193, 128 D.L.R. (3d) 193, [1981] 2 S.C.R. 494, 23 C.P.C. 99, 23 C.R. 2, 38 N.R. 588; Dersch v. Canada (Attorney-General) (1990), 60 C.C.C. (3d) 132, 77 D.L.R. (4th) 473, [1990] 2 S.C.R. 1505, 80 C.R. (3d) 299, 50 C.R.R. 272, [1991] 1 W.W.R. 231, 51 B.C.L.R. (2d) 145, 43 O.A.C. 256, 36 Q.A.C. 258, 116 N.R. 340, 11 W.C.B. (2d) 354; R. v. Caccamo (1975), 21 C.C.C. (2d) 257, 54 D.L.R. (3d) 685, [1976] 1 S.C.R. 786, 29 C.R.N.S. 78, 4 N.R. 133; Piche v. The Queen, [1970] 4 C.C.C. 27, 11 D.L.R. (3d) 700, [1971] S.C.R. 23, 12 C.R.N.S. 222, 74 W.W.R. 674; R. v. Rothman (1981), 59 C.C.C. (2d) 30, 121 D.L.R. (3d) 578, [1981] 1 S.C.R. 640, 20 C.R. (3d) 97, 35 N.R. 485, 5 W.C.B. 479; McInroy v. The Queen (1978), 42 C.C.C. (2d) 481, 89 D.L.R. (3d) 609, [1979] 1 S.C.R. 588, 5 C.R. (3d) 125, [1978] 6 W.W.R. 585, 23 N.R. 589; R. v. Mannion (1986), 28 C.C.C. (3d) 544, 31 D.L.R. (4th) 712, [1986] 2 S.C.R. 272, 53 C.R. (3d) 193, 25 C.R.R. 182, [1986] 6 W.W.R. 525, 47 Alta. L.R. (2d) 177, 75 A.R. 16, 69 N.R. 189, 17 W.C.B. 369

[68 C.C.C. (3d) p. 4]

Statutes referred to:

Canadian Charter of Rights and Freedoms, s. 7 Criminal Code, R.S.C. 1970, c. C-34, ss. 294(a) [rep. & sub. 1985, c. 19, s. 44], 296, 338(1)(a) -- now R.S.C. 1985, c. 46, ss. 334(a), 336, 380(1)(a)

Appeal by the accused from a judgment of the Alberta Court of Appeal dismissing his appeal from conviction on charges of breach of trust and fraud.

W. Code, Q.C., and J. Phillips, for accused, appellant.

D. McDonald, Q.C., and B. Fraser, Q.C., for the Crown, respondent.

The judgment of the court was delivered by

SOPINKA J.

Sopinka J.: This appeal raises the issue of the Crown's obligation to make disclosure to the defence. A witness who gave evidence at the preliminary inquiry favourable to the accused was subsequently

interviewed by agents for the Crown. Crown counsel decided not to call the witness and would not produce the statements obtained at the interview. The trial judge refused an application by the defence for disclosure on the ground that there was no obligation on the Crown to disclose the statements. The Court of Appeal affirmed the judgment at trial and the case is here with leave of this court.

1. Facts

The appellant was a Calgary lawyer charged with appropriating certain financial instruments from a client, one Jack Abrams. The indictment charged 13 counts of criminal breach of trust contrary to s. 296 of the Criminal Code, R.S.C. 1970, c. C-34 (now s. 336), 13 counts of theft contrary to s. 294(a) (now s. 334(a)) of the Criminal Code, and one count of fraud contrary to s. 338(1)(a) (now s. 380(1)(a)) of the Code. The trial in the Alberta Court of Queen's Bench was before Brennan J. without a jury.

The Crown alleged that the appellant had wrongfully appropriated property which he held in trust for Abrams. The defence did not contest the receipt of funds by the appellant. The defence did contend, however, that despite Stinchcombe's formal status as trustee of the property, Abrams had in fact made Stinchcombe his business partner. Under this theory, Stinchcombe had acted as he was legally entitled to act. At issue, therefore, was the actual, as opposed to the formal, nature of the relationship between the two men.

Patricia Lineham is a former secretary of Mr. Stinchcombe. She was a Crown witness at the preliminary inquiry. There she gave evidence which was, apparently, very favourable to the defence

[68 C.C.C. (3d) p. 5]

regarding the conduct of Abrams. The precise content of this testimony was not before the trial judge and is not in the record. Lineham was not listed on the indictment, but was subpoenaed by the Crown.

After the preliminary inquiry but prior to the trial, Lineham was interviewed by an R.C.M.P. officer. A tape-recorded statement was taken. Crown counsel informed defence counsel of the existence but not the content of this statement. A request for disclosure was refused. Later, during the course of the trial, Lineham was again interviewed by a police officer and a written statement taken. Again, though defence counsel was advised of the existence of the statement, a request for disclosure was refused. Crown counsel also indicated that he would not be calling Lineham as she was not worthy of credit.

It was not until the third day of the trial that defence counsel learned conclusively that Lineham would not be called by the Crown. At this time, he moved before the trial judge for an order that (i) the Crown call the witness, or (ii) the court call the witness, or (iii) the Crown disclose the contents of the statements to the defence. A review of the record makes it clear that defence counsel was pressing for access to, or production of, both the tape- recorded and written statements and was not pressing the alternative requests. In support of this motion, counsel for the defendant indicated that Ms. Lineham refused to speak to him or his staff when they attempted to interview her about the contents of the statements. Crown counsel did not provide any basis for resisting production other than to say that in his view the potential witness was not worthy of credit.

The trial judge dismissed the application. Brennan J. ruled that under the circumstances there was no obligation on the Crown to call the witness and that there was no obligation on the Crown to disclose the contents of the statements. The trial proceeded, and the accused was found guilty of all 27 counts charged. A conditional stay was entered with respect to the 13 theft counts. The Alberta Court of Appeal dismissed the appeal from conviction without issuing reasons. Leave to appeal to this court was granted on the disclosure issue.

During argument before this court, an application was made by the Crown to adduce the statements and the tape as fresh evidence. This application was rejected. The principal basis for the rejection was that at this stage it would be impossible to determine whether the statements would have been material to the defence if produced at trial.

[68 C.C.C. (3d) p. 6]

2. Crown's obligation to disclose

The circumstances which give rise to this case are testimony to the fact that the law with respect to the duty of the Crown to disclose is not settled. A number of cases have addressed some aspects of the subject: see, for example, Cunliffe v. Law Society of British Columbia (1984), 13 C.C.C. (3d) 560, 40 C.R. (3d) 67, [1984] 4 W.W.R. 451 (B.C.C.A.); R. v. Savion (1980), 52 C.C.C. (2d) 276, 13 C.R. (3d) 259, 4 W.C.B. 239 (Ont. C.A.); R. v. Bourget (1987), 35 C.C.C. (3d) 371, 41 D.L.R. (4th) 756, 56 C.R. (3d) 97 (Sask. C.A.). No case in this court has made a comprehensive examination of the subject. The Law Reform Commission of Canada, in a 1974 working paper titled Criminal Procedure: Discovery (the "1974 Working Paper") and a 1984 report titled Disclosure by the Prosecution (the "1984 Report"), recommended comprehensive schemes regulating disclosure by the Crown but no legislative action has been taken implementing the proposals. Apart from the limited legislative response contained in s. 603 of the Criminal Code, R.S.C. 1985, c. C-46, enacted in the 1953-54 overhaul of the Code (which itself condensed pre-existing provisions), legislators have been content to leave the development of the law in this area to the courts.

Production and discovery were foreign to the adversary process of adjudication in its earlier history when the element of surprise was one of the accepted weapons in the arsenal of the adversaries. This applied to both criminal and civil proceedings. Significantly, in civil proceedings this aspect of the adversary process has long since disappeared, and full discovery of documents and oral examination of parties and even witnesses are familiar features of the practice. This change resulted from acceptance of the principle that justice was better served when the element of surprise was eliminated from the trial and the parties were prepared to address issues on the basis of complete information of the case to be met. Surprisingly, in criminal cases in which the liberty of the subject is usually at stake, this aspect of the adversary system has lingered on. While the prosecution bar has generally co-operated in making disclosure on a voluntary basis, there has been considerable resistance to the enactment of comprehensive rules which would make the practice mandatory. This may be attributed to the fact that proposals for reform in this regard do not provide for reciprocal disclosure by the defence; see 1974 Working Paper at pp. 29-31; 1984 Report at pp. 13-5; Marshall Commission Report, infra, vol. 2, at pp. 242-4).

[68 C.C.C. (3d) p. 7]

It is difficult to justify the position which clings to the notion that the Crown has no legal duty to disclose all relevant information. The arguments against the existence of such a duty are groundless while those in favour, are, in my view, overwhelming. The suggestion that the duty should be reciprocal may deserve consideration by this court in the future but is not a valid reason for

absolving the Crown of its duty. The contrary contention fails to take account of the fundamental difference in the respective roles of the prosecution and the defence. In Boucher v. The Queen (1955), 110 C.C.C. 263, [1955] S.C.R. 16, 20 C.R. 1, Rand J. states (at p. 270):

> It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.

I would add that the fruits of the investigation which are in the possession of counsel for the Crown are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done. In contrast, the defence has no obligation to assist the prosecution and is entitled to assume a purely adversarial role toward the prosecution. The absence of a duty to disclose can, therefore, be justified as being consistent with this role.

Other grounds advanced by advocates of the absence of a general duty to disclose all relevant information are that it would impose onerous new obligations on the Crown prosecutors resulting in increased delays in bringing accused persons to trial. This ground is not supported by the material in the record. As I have already observed, disclosure is presently being made on a voluntary basis. The extent of disclosure varies from province to province, from jurisdiction to jurisdiction and from prosecutor to prosecutor. The adoption of uniform, comprehensive rules for disclosure by the Crown would add to the work-load of some Crown counsel but this would be offset by the time saved which is now spent resolving disputes such as this one surrounding the extent of the Crown's obligation and dealing with matters that take the defence by surprise. In the latter case an adjournment is frequently the result of non-disclosure or more time is taken by a defence counsel who is not prepared. There is also compelling

[68 C.C.C. (3d) p. 8]

evidence that much time would be saved and, therefore, delays reduced by reason of the increase in guilty pleas, withdrawal of charges and shortening or waiver of preliminary hearings. The 1984 Report (at pp. 6-9) refers to several experimental projects which were established after the publication of the 1974 Working Paper in order to test the viability of pre-trial disclosure. The result of these experiments, and in particular the Montreal experiment, which was the most exhaustively evaluated, was that there was a significant increase in the number of cases settled and pleas of guilty entered or charges withdrawn.

In England, under the provisions of the Criminal Justice Act, 1967 (U.K.), c. 80, a "packet" of material is furnished to defence counsel. The provision of such material has led to a reduction in the length and number of preliminary hearings in that jurisdiction: Report of the Special Committee on Preliminary Hearings, Bench and Bar Council of Ontario (1982), at pp. 12-5.

Refusal to disclose is also justified on the ground that the material will be used to enable the defence to tailor its evidence to conform with information in the Crown's possession. For example, a witness may change his or her testimony to conform with a previous statement given to the police or counsel for the Crown. I am not impressed with this submission. All forms of discovery are subject to this criticism. There is surely nothing wrong in a witness refreshing his or her memory from a previous statement or document. The witness may even change his or her evidence as a result. This may rob the cross-examiner of a substantial advantage but fairness to the witness may require that a trap not be laid by allowing the witness to testify without the benefit of seeing contradictory writings which

the prosecutor holds close to the vest. The principle has been accepted that the search for truth is advanced rather than retarded by disclosure of all relevant material.

Finally, it is suggested that disclosure may put at risk the security and safety of persons who have provided the prosecution with information. No doubt measures must occasionally be taken to protect the identity of witnesses and informers. Protection of the identity of informers is covered by the rules relating to informer privilege and exceptions thereto (see Marks v. Beyfus (1890), 25 Q.B.D. 494 (C.A.); R. v. Scott (1990), 61 C.C.C. (3d) 300, [1990] 3 S.C.R. 979, 2 C.R. (4th) 153), and any rules with respect to disclosure would be subject to this and other rules of privilege. With respect to witnesses, persons who have information that may be evidence favourable to the accused will have to have their identity disclosed sooner or later. Even the identity of an informer

[68 C.C.C. (3d) p. 9]

is subject to this fact of life by virtue of the "innocence exception" to the informer privilege rule (Marks v. Beyfus, supra, at pp. 498-9; R. v. Scott, supra, at pp. 315-6; Bisaillon v. Keable (1983), 7 C.C.C. (3d) 385 at pp. 411-2, 2 D.L.R. (4th) 193, [1983] 2 S.C.R. 60; Solicitor-General of Canada v. Royal Commission of Inquiry (Health Records in Ontario) (1980), 62 C.C.C. (2d) 193, 128 D.L.R. (3d) 193, [1981] 2 S.C.R. 494). It will, therefore, be a matter of the timing of the disclosure rather than whether disclosure should be made at all. The prosecutor must retain a degree of discretion in respect of these matters. The discretion, which will be subject to review, should extend to such matters as excluding what is clearly irrelevant, withholding the identity of persons to protect them from harassment or injury, or to enforce the privilege relating to informers. The discretion would also extend to the timing of disclosure in order to complete an investigation. I shall return to this subject later in these reasons.

This review of the pros and cons with respect to disclosure by the Crown shows that there is no valid practical reason to support the position of the opponents of a broad duty of disclosure. Apart from the practical advantages to which I have referred, there is the overriding concern that failure to disclose impedes the ability of the accused to make full answer and defence. This common law right has acquired new vigour by virtue of its inclusion in s. 7 of the Canadian Charter of Rights and Freedoms as one of the principles of fundamental justice: see Dersch v. Canada (Attorney-General) (1990), 60 C.C.C. (3d) 132 at pp. 140-1, 77 D.L.R. (4th) 473, [1990] 2 S.C.R. 1505. The right to make full answer and defence is one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted. Recent events have demonstrated that the erosion of this right due to non-disclosure was an important factor in the conviction and incarceration of an innocent person. In the Royal Commission on the Donald Marshall, Jr., Prosecution, vol. 1: Findings and Recommendations (1989) (the "Marshall Commission Report"), the commissioners found that prior inconsistent statements were not disclosed to the defence. This was an important contributing factor in the miscarriage of justice which occurred and led the commission to state that "anything less than complete disclosure by the Crown falls short of decency and fair play" (vol. 1 at p. 238). The commission recommended an extensive regime of disclosure of which the key provisions are as follows (vol. 1 at p. 243):

> 2(1) Without request, the accused is entitled, before being called upon to elect the mode of trial or to plead to the charge of an indictable offence, whichever comes first, and thereafter:
>
> [68 C.C.C. (3d) p. 10]
>
> (a) to receive a copy of his criminal record;
>
> (b) to receive a copy of any statement made by him to a person in authority and recorded in writing or to inspect such a statement if it has been recorded by electronic means; and to be informed of the nature and

content of any verbal statement alleged to have been made by the accused to a person in authority and to be supplied with any memoranda in existence pertaining thereto;

(c) to inspect anything that the prosecutor proposes to introduce as an exhibit and, where practicable, receive copies thereof;

(d) to receive a copy of any statement made by a person whom the prosecutor proposes to call as a witnesses or anyone who may be called as a witness, and recorded in writing or, in the absence of a statement, a written summary of the anticipated testimony of the proposed witness, or anyone who may be called as a witness;

(e) to receive any other material or information known to the Crown and which tends to mitigate or negate the defendant's guilt as to the offence charged, or which would tend to reduce his punishment therefor, notwithstanding that the Crown does not intend to introduce such material or information as evidence;

(f) to inspect the electronic recording of any statement made by a person whom the prosecutor proposes to call as a witness;

(g) to receive a copy of the criminal record of any proposed witness; and

(h) to receive, where not protected from disclosure by the law, the name and address of any other person who may have information useful to the accused, or other details enabling that person to be identified.

2(2) The disclosure contemplated in subsection (1), paragraphs (d), (e) and (h) shall be provided by the Crown and may be limited only where, upon an inter partes application by the prosecutor, supported by evidence showing a likelihood that such disclosure will endanger the life or safety of such person or interfere with the administration of justice, a justice having jurisdiction in the matter deems it just and proper.

In my opinion, there is a wholly natural evolution of the law in favour of disclosure by the Crown of all relevant material. As long ago as 1951, Cartwright J. stated in Lemay v. The King (1951), 102 C.C.C. 1 at p. 23, [1952] 1 S.C.R. 232, 14 C.R. 89:

> I wish to make it perfectly clear that I do not intend to say anything which might be regarded as lessening the duty which rests upon counsel for the Crown to bring forward evidence of every material fact known to the prosecution whether favourable to the accused or otherwise...

(Emphasis added.) This statement may have been in reference to the obligation resting on counsel for the Crown to call evidence rather than to disclose the material to the defence, but I see no reason why this obligation should not be discharged by disclosing the material to the defence rather than obliging the Crown to make it part of the Crown's case. Indeed, some of the information will be in a form that cannot be put in evidence by the Crown but can be used by the defence in cross-examination or otherwise. Production

[68 C.C.C. (3d) p. 11]

to the defence is then the only way in which the injunction of Cartwright J. can be obeyed.

In R. v. C. (M.H.) (1989), 46 C.C.C. (3d) 142 at p. 155, 6 W.C.B. (2d) 300 (B.C.C.A.), McEachern C.J.B.C. after a review of the authorities stated what I respectfully accept as a correct statement of the law. He said that: "there is a general duty on the part of the Crown to disclose all material it proposes to use at trial and especially all evidence which may assist the accused even if the Crown does not propose to adduce it". This passage was cited with approval by McLachlin J. in her reasons on behalf of the court (R. v. C. (M.H.) (1991), 63 C.C.C. (3d) 385, 4 C.R. (4th) 1, 123 N.R. 63). She went on to add (at p. 394): "This court has previously stated that the Crown is under a duty at common law to disclose to the defence all material evidence whether favourable to the accused or not."

As indicated earlier, however, this obligation to disclose is not absolute. It is subject to the discretion of counsel for the Crown. This discretion extends both to the withholding of information and to the timing of disclosure. For example, counsel for the Crown has a duty to respect the rules of privilege. In the case of informers the Crown has a duty to protect their identity. In some cases serious prejudice or even harm may result to a person who has supplied evidence or information to the investigation. While it is a harsh reality of justice that ultimately any person with relevant evidence must appear to testify, the discretion extends to the timing and manner of disclosure in such circumstances. A discretion must also be exercised with respect to the relevance of information. While the Crown must err on the side of inclusion, it need not produce what is clearly irrelevant. The experience to be gained from the civil side of the practice is that counsel, as officers of the court and acting responsibly, can be relied upon not to withhold pertinent information. Transgressions with respect to this duty constitute a very serious breach of legal ethics. The initial obligation to separate "the wheat from the chaff" must, therefore, rest with Crown counsel. There may also be situations in which early disclosure may impede completion of an investigation. Delayed disclosure on this account is not to be encouraged and should be rare. Completion of the investigation before proceeding with the prosecution of a charge or charges is very much within the control of the Crown. Nevertheless, it is not always possible to predict events which may require an investigation to be re-opened and the Crown must have some discretion to delay disclosure in these circumstances.

[68 C.C.C. (3d) p. 12]

The discretion of Crown counsel is, however, reviewable by the trial judge. Counsel for the defence can initiate a review when an issue arises with respect to the exercise of the Crown's discretion. On a review the Crown must justify its refusal to disclose. In as much as disclosure of all relevant information is the general rule, the Crown must bring itself within an exception to that rule.

The trial judge on a review should be guided by the general principle that information ought not to be withheld if there is a reasonable possibility that the withholding of information will impair the right of the accused to make full answer and defence, unless the non-disclosure is justified by the law of privilege. The trial judge might also, in certain circumstances, conclude that the recognition of an existing privilege does not constitute a reasonable limit on the constitutional right to make full answer and defence and, thus, require disclosure in spite of the law of privilege. The trial judge may also review the decision of the Crown to withhold or delay production of information by reason of concern for the security or safety of witnesses or persons who have supplied information to the investigation. In such circumstances, while much leeway must be accorded to the exercise of the discretion of the counsel for the Crown with respect to the manner and timing of the disclosure, the absolute withholding of information which is relevant to the defence can only be justified on the basis of the existence of a legal privilege which excludes the information from disclosure.

The trial judge may also review the Crown's exercise of discretion as to relevance and interference with the investigation to ensure that the right to make full answer and defence is not violated. I am confident that disputes over disclosure will arise infrequently when it is made clear that counsel for the Crown is under a general duty to disclose all relevant information. The tradition of Crown counsel in this country in carrying out their role as "ministers of justice" and not as adversaries has generally been very high. Given this fact, and the obligation on defence counsel as officers of the court to act responsibly, these matters will usually be resolved without the intervention of the trial judge. When they do arise, the trial judge must resolve them. This may require not only submissions but the inspection of statements and other documents and indeed, in some cases, viva voce evidence. A voir dire will frequently be the appropriate procedure in which to deal with these matters.

Counsel for the accused must bring to the attention of the trial judge at the earliest opportunity any failure of the Crown to comply with its duty to disclose of which counsel becomes aware.

[68 C.C.C. (3d) p. 13]

Observance of this rule will enable the trial judge to remedy any prejudice to the accused if possible and, thus, avoid a new trial: see R. v. Caccamo (1975), 21 C.C.C. (2d) 257, 54 D.L.R. (3d) 685, [1976] 1 S.C.R. 786. Failure to do so by counsel for the defence will be an important factor in determining on appeal whether a new trial should be ordered.

These are the general principles that govern the duty of the Crown to make disclosure to the defence. There are many details with respect to their application that remain to be worked out in the context of concrete situations. It would be neither possible nor appropriate to attempt to lay down precise rules here. Although the basic principles of disclosure will apply across the country, the details may vary from province to province and even within a province by reason of special local conditions and practices. It would, therefore, be useful if the under-utilized power conferred by s. 482 of the Criminal Code which empowers superior courts and courts of criminal jurisdiction to enact rules were employed to provide further details with respect to the procedural aspects of disclosure.

The general principles referred to herein arise in the context of indictable offences. While it may be argued that the duty of disclosure extends to all offences, many of the factors which I have canvassed may not apply at all or may apply with less impact in summary conviction offences. Moreover, the content of the right to make full answer and defence entrenched in s. 7 of the Charter may be of a more limited nature. A decision as to the extent to which the general principles of disclosure extend to summary conviction offences should be left to a case in which the issue arises in such proceedings. In view of the number and variety of statutes which create such offences, consideration would have to be given as to where to draw the line. Pending a decision on that issue, the voluntary disclosure which has been taking place through the co-operation of Crown counsel will no doubt continue. Continuation and extension of this practice may eliminate the necessity for a decision on the issue by this court.

There are, however, two additional matters which require further elaboration of the general principles of disclosure outlined above. They are: (1) the timing of disclosure, and (2) what should be disclosed. Some detail with respect to these issues is essential if the duty to disclose is to be meaningful. Moreover, with respect to the second matter, resolution of the dispute over disclosure in this case requires a closer examination of the issue.

With respect to timing, I agree with the recommendation of the Law Reform Commission of Canada in both of its reports that

[68 C.C.C. (3d) p. 14]

initial disclosure should occur before the accused is called upon to elect the mode of trial or to plead. These are crucial steps which the accused must take which affect his or her rights in a fundamental way. It will be of great assistance to the accused to know what are the strengths and weaknesses of the Crown's case before committing on these issues. As I have pointed out above, the system will also profit from early disclosure as it will foster the resolution of many charges without trial, through increased numbers of withdrawals and pleas of guilty. The obligation to disclose will be triggered by a request by or on behalf of the accused. Such a request may be made at any time after the charge. Provided the request for disclosure has been timely, it should be complied with so as to enable the accused sufficient time before election or plea to consider the information. In the rare cases in which the accused is unrepresented, Crown counsel should advise the accused of the right

to disclosure and a plea should not be taken unless the trial judge is satisfied that this has been done. At this stage, the Crown's brief will often not be complete and disclosure will be limited by this fact. Nevertheless, the obligation to disclose is a continuing one and disclosure must be completed when additional information is received.

With respect to what should be disclosed, the general principle to which I have referred is that all relevant information must be disclosed subject to the reviewable discretion of the Crown. The material must include not only that which the Crown intends to introduce into evidence but also that which it does not. No distinction should be made between inculpatory and exculpatory evidence. The attempt to make this distinction in connection with the confession rule proved to be unworkable and was eventually discarded by this court: see Piche v. The Queen, [1970] 4 C.C.C. 27 at p. 37, 11 D.L.R. (3d) 700, [1971] S.C.R. 23; R. v. Rothman (1981), 59 C.C.C. (2d) 30 at pp. 48-9, 121 D.L.R. (3d) 578, [1981] 1 S.C.R. 640. To re-introduce the distinction here would lead to interminable controversy at trial that should be avoided. The Crown must, therefore, disclose relevant material whether it is inculpatory or exculpatory.

A special problem arises in respect to witness statements and is specifically raised in this case. There is virtually no disagreement that statements in the possession of the Crown obtained from witnesses it proposes to call should be produced. In some cases the statement will simply be recorded in notes taken by an investigator, usually a police officer. The notes or copies should be produced. If notes do not exist then a "will say" statement, summarizing the anticipated evidence of the witness, should be produced based on

[68 C.C.C. (3d) p. 15]

the information in the Crown's possession. A more difficult issue is posed with respect to witnesses and other persons whom the Crown does not propose to call. In its 1974 Working Paper, the Law Reform Commission of Canada recommended disclosure of not only the names, addresses and occupations of all "persons who have provided information to investigation or prosecution authorities" (at p. 41), but the statements obtained or, if these did not exist, "a summary of the information provided by those persons not intended to be called at trial, along with a statement of the manner in which the information in each summary has been obtained..." (p. 41). In its 1984 Report, the commission seemed to have changed its mind. It stated (at pp. 27-8):

> With respect to potential witnesses we do not recommend, on a mandatory basis, the type of thorough disclosure that we recommend with respect to proposed witnesses. Complete disclosure would entail not only the identification of such persons, but the disclosure of any statement they made and in some cases their criminal records. In our view a recommendation to this effect would be excessive and disproportionate to the needs of the defence. In many instances these people are of no use, or of marginal use, to the case for either side. Their statements are not evidence, although they may be effectively used by the prosecution for purposes of impeachment in cross-examination in the event the witness is called by the accused. Prosecutors are understandably reluctant to disclose these statements because to do so would imperil their principal utility. It is our view that the interests of the defence are adequately served by the mandatory disclosure of the identity of such persons, although we would not wish our comments to discourage prosecutors from disclosing statements and other relevant information on a voluntary basis.

The Marshall Commission Report recommended disclosure of "any statement made by a person whom the prosecutor proposes to call as a witness or anyone who may be called as a witness". Although not entirely clear, this recommendation appears to extend to anyone who has relevant information and who is either compellable or prepared to testify whether proposed to be called by the Crown or not.

This court, in R. v. C. (M.H.), supra, dealt with the failure to disclose either the identity or statement of a person who provided relevant information to the police but who was not called as a witness.

McLachlin J., speaking for the court, indicated that failure to disclose in such cases could impair the fairness of the trial.

I am of the opinion that, subject to the discretion to which I have referred above, all statements obtained from persons who have provided relevant information to the authorities should be produced notwithstanding that they are not proposed as Crown witnesses. Where statements are not in existence, other information such as notes should be produced, and, if there are no notes, then in addition to the name, address and occupation of the

[68 C.C.C. (3d) p. 16]

witness, all information in the possession of the prosecution relating to any relevant evidence that the person could give should be supplied. I do not find the comments of the commission in its 1984 Report persuasive. If the information is of no use then presumably it is irrelevant and will be excluded in the exercise of the discretion of the Crown. If the information is of some use then it is relevant and the determination as to whether it is sufficiently useful to put into evidence should be made by the defence and not the prosecutor. Moreover, I do not understand the commission's statement that "[t]heir statements are not evidence". That is true of all witness statements. They themselves are not evidence but are produced not because they will be put in evidence in that form but will enable the evidence to be called viva voce. That prosecutors are reluctant to disclose statements because use of them in cross-examination is thereby rendered less effective is understandable. That is an objection to all forms of discovery and disclosure. Tactical advantage must be sacrificed in the interests of fairness and the ascertainment of the true facts of the case.

3. Application to this case:
No request was made in this case for disclosure prior to pleading or electing the mode of trial and this issue does not, therefore, arise. A request for disclosure was made during the trial for the disclosure of two statements taken subsequent to the preliminary hearing. An application for disclosure was dismissed by the trial judge on the ground that there was no obligation on the Crown to disclose the statements.

Applying the above principles, I conclude that the following errors were committed:

(1) counsel for the Crown misconceived his obligation to disclose the statements;

(2) the explanation for refusal that the witness was not worthy of credit was completely inadequate to support the exercise of this discretion on the ground of irrelevance. Whether the witness is credible is for the trial judge to determine after hearing the evidence;

(3) the trial judge ought to have examined the statements. The suggestion that this would have prejudiced the trial judge is without merit. Trial judges are frequently apprised of evidence which is ruled inadmissible. One example is a confession that fails to meet the test of voluntariness. No one would suggest that knowledge of such evidence prejudices the trial judge. We operate on the principle that a judge trained to screen out

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inadmissible evidence will disabuse himself or herself of such evidence;

(4) the trial judge erred in his statement of the duty to disclose on the part of the Crown.

It was submitted that the appellant was not deprived of the opportunity to make full answer and defence because he could have:

(a) interviewed the witness and obtained his own statement;

(b) called the witness, and if her evidence proved adverse, cross-examined on the basis of the preliminary hearing transcript.

With respect to (a), counsel for the appellant pointed out that the witness refused to be interviewed. In any event, even if such an interview took place, what the witness said on two prior occasions could be very material to the defence.

As for (b), counsel for the defence is entitled to know whether the witness s/he is calling will give evidence that will assist the defence or whether the witness will be adverse and necessitate an application to cross-examine on the basis of a prior inconsistent statement. The latter usually creates an undesirable atmosphere at the trial and the most that can be achieved is to impeach or destroy the credibility of the witness: see McInroy v. The Queen (1978), 42 C.C.C. (2d) 481, 89 D.L.R. (3d) 609, [1979] 1 S.C.R. 588, and R. v. Mannion (1986), 28 C.C.C. (3d) 544 at p. 549, 31 D.L.R. (4th) 712, [1986] 2 S.C.R. 272. Most counsel faced with this prospect would likely opt not to call the witness, a matter which bears on the right to make full answer and defence.

What are the legal consequences flowing from the failure to disclose? In my opinion, when a court of appeal is called upon to review a failure to disclose, it must consider whether such failure impaired the right to make full answer and defence. This, in turn, depends on the nature of the information withheld and whether it might have affected the outcome. As McLachlin J. put it in R. v. C. (M.H.), supra (at p. 395):

> Had counsel for the appellant been aware of this statement, he might well have decided to use it in support of the defence that the evidence of the complainant was a fabrication. In my view, that evidence could conceivably have affected the jury's conclusions on the only real issue, the respective credibility of the complainant and the appellant.

In this case, we are told that the witness gave evidence at the preliminary hearing favourable to the defence. The subsequent statements were not produced and, therefore, we have no indication from the trial judge as to whether they were favourable or unfavourable. Examination of the statements, which were tend-

[68 C.C.C. (3d) p. 18]

ered as fresh evidence in this court, should be carried out at trial so that counsel for the defence, in the context of the issues in the case and the other evidence, can explain what use might be made of them by the defence. In the circumstances, we must assume that non-production of the statements was an important factor in the decision not to call the witness. The absence of this evidence might very well have affected the outcome.

Accordingly, I would allow the appeal and direct a new trial at which the statements should be produced.

Appeal allowed; new trial ordered.

REGINA v. WALKER
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Master Table of Cases

Ontario County Court
Zalev, Co. Ct. J.
May 10, 1979

Motor vehicles -- Provincial regulation -- Failing to obey stop sign -- Police officer while proceeding to scene of possible bank robbery going through stop sign -- No statutory exemption for police officer -- Whether officer may be convicted -- Whether officer protected by Criminal Code provision justifying acts which police authorized to do -- Whether defence of necessity applicable -- Highway Traffic Act, R.S.O. 1970, c. 202, s. 88(a) -- Police Act, R.S.O. 1970, c. 351, s. 55 -- Cr. Code, s. 25.

Police -- Duty to obey traffic laws -- Police officer while proceeding to scene of possible bank robbery going through stop sign -- No statutory exemption for police officers -- Whether officer may be convicted -- Whether officer protected by Criminal Code provision justifying acts which police authorized to do -- Whether defence of necessity applicable -- Highway Traffic Act, R.S.O. 1970, c. 202, s. 88(a) -- Police Act, R.S.O. 1970, c. 351, s. 55 -- Cr. Code, s. 25.

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Defences -- Necessity -- Charge against police officer of failing to obey stop sign -- Police officer while proceeding to scene of possible bank robbery going through stop sign -- No statutory exemption for police officers -- Whether defence of necessity applicable -- Highway Traffic Act, R.S.O. 1970, c. 202, s. 88(a) -- Police Act, R.S.O. 1970, c. 351, s. 55 -- Cr. Code, s. 25.

The accused, a police officer, was charged with failing to stop for a stop sign contrary to s. 88(*a*) of the *Highway Traffic Act*, R.S.O. 1970, c. 202. The accused was driving one of two cruisers which had been dispatched to a bank because of a possible robbery. On approaching the intersection his emergency lights were flashing and he slowed to about 10 m.p.h. but collided with another car in the intersection. He was convicted at trial. On appeal by the accused, *held*, the appeal should be dismissed.

While the *Highway Traffic Act* exempts emergency vehicles such as police cars from compliance with speed limits there is no exemption from the other provisions of the *Act* such as s. 88(*a*). The issue then was whether any common law or other statutory defence was available in the circumstances. While s. 88(*a*) creates an offence of absolute liability for which the defence of reasonable mistake of fact or proof of lack of negligence is not available certain other defences could apply. Section 25(1) of the *Criminal Code* provides that everyone who is required or authorized by law to do anything in the administration or enforcement of the law as a peace officer is, if he acts on reasonable and probable grounds, justified in doing what he is required or authorized to do and in using as much force as necessary for that purpose. Assuming that section can apply where the proceedings are under provincial jurisdiction, what must be shown is not that the accused was required to proceed to the scene of the possible robbery without delay but that he was required or authorized by law to disobey the stop sign. The only possible source of such authorization is s. 55 of the *Police Act*, R.S.O. 1970, c. 351, which gives police officers "generally all the powers and privileges ... that belong to constables". The word "constable" refers to the historic position of constable as it was known at common law and statute, but while at common law a police officer may be in the exercise of his duty even though his conduct may be against the law, provided that such conduct is reasonably necessary for the protection of life or property, this does not require or

authorize a police officer to break the law within the meaning of s. 25 of the *Criminal Code* nor is it a defence by virtue of either s. 25 or the common law.

Finally, while the common law defence of necessity would be available there was in this case no evidentiary basis for that defence. A test suggested for such a defence is, "Was the evil averted a lesser evil than the offence committed to avert it, could the evil have been averted by anything short of the offence and was more harm done than necessary for averting the evil?" There was in this case no evidence on any of these factors so as to make the defence a live issue. Even on a more liberal view of the defence it is limited to cases where the harm sought to be avoided is an immediate and physical one and the evidence did not show such circumstances in this case. Finally, it was not open to the Courts to acquit the accused simply on some basis of public policy. Any special privilege in these circumstances must be created by the Legislature not the Courts.

[*Johnson v. Phillips*, [1975] 3 All E.R. 682; *R. v. Hickey* (1976), 29 C.C.C. (2d) 23, 68 D.L.R. (3d) 88, 12 O.R. (2d) 578; revd 30 C.C.C. (2d) 416, 70 D.L.R. (3d) 689, 13 O.R. (2d) 228; *R. v. City of Sault Ste. Marie* (1978), 40 C.C.C. (2d) 353, 85 D.L.R. (3d) 161, [1978] 2 S.C.R. 1299, 3 C.R. (3d) 30, 21 N.R. 295; *Eccles v. Bourque et al.*

[48 C.C.C. (2d) p. 128]

(1974), 19 C.C.C. (2d) 129, 50 D.L.R. (3d) 753, [1975] 2 S.C.R. 739, 27 C.R.N.S. 325, [1975] 1 W.W.R. 609, 3 N.R. 259; *Hoffman v. Thomas*, [1974] 2 All E.R. 233, consd; *R. ex rel. Leach v. Hubbs* (1947), 90 C.C.C. 45, [1945] O.W.N. 802; *Griffith et al. v. Luscombe et al.*, [1951] O.W.N. 181; *Windsor Ambulance Service Co. Ltd. et al. v. Pankevicz et al.*, [1951] O.W.N. 607; *R. v. Kennedy* (1972), 7 C.C.C. (2d) 42, 18 C.R.N.S. 80; *R. v. Breau* (1959), 125 C.C.C. 84, 32 C.R. 13, 45 M.P.R. 367; *R. v. Vickers* (1959), 127 C.C.C. 315, 33 C.R. 182, 44 M.P.R. 345; *Fisher v. Oldham Corp.*, [1930] 2 K.B. 364; *McCleave v. City of Moncton* (1902), 6 C.C.C. 219, 32 S.C.R. 106; *Winterbottom v. London Police Commissioners* (1901), 2 O.L.R. 105*n*; *Reference re Power of Municipal Council, etc.* (1957), 118 C.C.C. 35, 7 D.L.R. (2d) 222, [1957] O.R. 28 *sub nom. Reference re Constitutional Questions Act*; *A.-G. New South Wales v. Perpetual Trustee Co. Ltd. et al.,* [1955] A.C. 457; *Thomas v. Sawkins*, [1935] 2 K.B. 249; *Gaynor v. Allen*, [1959] 2 All E.R. 644; *Morgentaler v. The Queen* (1975), 20 C.C.C. (2d) 449, 53 D.L.R. (3d) 161, [1976] 1 S.C.R. 616; affg 17 C.C.C. (2d) 289, 47 D.L.R. (3d) 211; revg 14 C.C.C. (2d) 459, 42 D.L.R. (3d) 448; *London Borough of Southwark v. Williams et al.*, [1971] 2 All E.R. 175; *Latour v. The King* (1959), 98 C.C.C. 258, [1951] 1 D.L.R. (2d) 834, [1951] S.C.R. 19; *Richardson v. Mellish* (1824), 2 Bing. 229, 130 E.R. 294; *Lilly v. State of West Virginia* (1828), 29 F. 2d 61; *City of Norfolk Virginia v. McFarland* (1956), 145 F. Supp. 258, refd to]

Evidence -- Burden of proof -- Summary conviction offence -- Criminal Code providing that burden of proving that exception, exemption, proviso, excuse or qualification prescribed by law operates in favour of defendant is on defendant -- Provision not applicable to defences such as self-defence or necessity -- Cr. Code, s. 730.

[*R. v. Kennedy* (1972), 7 C.C.C. (2d) 42, 18 C.R.N.S. 80, not folld]

APPEAL by the accused from his conviction on a charge contrary to s. 88(*a*) of the *Highway Traffic Act* (Ont.).

F. Montello, Q.C., for accused, appellant.

D. Harrison, for the Crown, respondent.

ZALEV, CO. CT. J.

ZALEV, CO. CT. J.:--The appellant is a police constable, a member of the City of Windsor Police for over four years. On November 8, 1977, he was driving a police cruiser. He received a radio call

that a bank alarm had gone off at a branch of the Bank of Montreal a few blocks away. He believed that a robbery was in progress. He was aware that at least one other police car was also dispatched to the bank, but did not know which of them was closer. He turned on the siren and roof lights and headed for the bank. As he turned west on Elliott St., he was less than three blocks from the bank and decided to turn off the siren, which he did. He was travelling 30 m.p.h. On approaching the McDougall St. intersection, he slowed down. He had a clear view across a large open field to his right and saw nothing coming. His view to the left was obscured by a large building, so he concentrated his attention to his left. He was aware of a stop sign which required

[48 C.C.C. (2d) p. 129]

him to stop at that intersection. He decided not to stop. He slowed to 10 m.p.h. and entered the intersection without stopping. He collided with a car coming from his right. He was aware of his exemption in the circumstances from the speed provisions of the *Highway Traffic Act*, R.S.O. 1970, c. 202. He knew of no other exemption.

One would have expected that the damages would have been settled by the insurance companies and that would have ended the matter. Unfortunately, the driver of the other car was injured seriously enough to be kept in hospital for 10 days, and so a decision was made to prosecute. Constable Walker was charged with failing to stop for a stop sign, contrary to s. 88(*a*) of the *Highway Traffic Act.* He was convicted and fined $25 and costs. He now appeals to this Court.

It is submitted by the Crown that I am bound by the judgment in *R. ex rel. Leach v. Hubbs* (1947), 90 C.C.C. 45, [1945] O.W.N. 802, and that the appeal must therefore be dismissed.

It is submitted by the defence that the appellant was acting in the execution of his duties under s. 55 of the *Police Act*, R.S.O. 1970, c. 351, that in the circumstances it was necessary for him to get to the bank as quickly as possible to preserve life and property, and that he is exonerated by s. 25 of the *Criminal Code.*

R. v. Hubbs was an appeal by way of stated case on a charge of dangerous driving. Hubbs was the driver of an ambulance which was travelling at about 30 m.p.h. with his siren sounding. Although the reported facts do not so indicate, I think it may be fairly inferred that Hubbs was involved in some emergency. The ambulance approached an intersection governed by traffic lights and as it got near the intersection, the lights were showing both green and amber in its direction. Hubbs could have stopped but did not, and the light changed to red about the time the ambulance entered the intersection. The ambulance collided with a bus travelling on the cross street.

Section 39(2)(*c*) of the *Highway Traffic Act*, R.S.O. 1937, c. 288, required every driver to bring his motor vehicle to a stop in the face of a red light, and s. 39(2)(*d*) required every driver to stop in the face of green and amber lights showing together, unless the driver could not stop in safety before entering the intersection. Section 39(17) of the said Act provided that

> 39(17) the driver of a vehicle, upon the approach of an ambulance, fire or police department vehicle, or public utility emergency vehicle upon which a bell or siren is sounding, shall immediately bring such vehicle to a standstill as near as is practicable to the right-hand curb or edge of the roadway and parallel therewith and clear of any intersection.

[48 C.C.C. (2d) p. 130]

The questions submitted for the opinion of the Court were as follows:

1. Was I right in holding that Section 39(2)(c) does not constitute an absolute prohibition to the movement of an ambulance upon which a siren is sounding?

2. Was I right in holding that Section 39(2)(d) of the Highway Traffic Act did not apply to the movement of an ambulance upon which a siren is sounding?

3. Was I right in holding that Section 39(17) of the Highway Traffic Act qualifies or supersedes Section 39(2)(c) and (d) of the same Act with respect to the movement of an ambulance upon which a siren is sounding?

Smily, J., first dealt with the submission that s. 39(17) overrides the provisions of s. 39(2)(*c*) and (*d*). He disposed of this submission at pp. 49-50 C.C.C, p. 805 O.W.N., of the report as follows:

> In my opinion however, s-s. (17) is not inconsistent with s-s. (2) cl. (*c*). It is quite clear in terms, and only purports to govern the conduct of drivers of motor vehicles other than ambulances, fire or police department vehicles or public utility emergency vehicles, when such latter vehicles are approaching with a bell or siren sounding. In other words, it creates a duty upon drivers of such other vehicles immediately to bring them to a standstill as near as practicable to the right-hand curb or edge of the roadway and parallel therewith and clear of any intersection. It does not purport to, and in my opinion does net, affect or modify in any way the duty of the driver of an ambulance, etc., and it is therefore not inconsistent with the provisions of s-s. (2) cl. (*c*), creating a duty on the driver Of an ambulance, etc., when approaching an intersection where a red signal-light is showing against him.

Counsel for Hubbs then submitted that s. 39(2)(*c*) and (*d*) did not apply to an ambulance which was on an emergency run with its siren sounding. His Lordship rejected that submission and answered each of the three questions "No".

The corresponding sections of the *Highway Traffic Act* now in force are essentially the same except that a flashing red roof light on one of the listed emergency vehicles also requires other drivers to bring their vehicles to a standstill.

The *Highway Traffic Act* provided no exemption whatsoever for any emergency vehicle until 1941 when the Act was amended to provide that speed limits did not apply to fire department vehicles proceeding to a fire or answering a fire alarm call. Although amendments from time to time were made to the section providing for such exemption, it was not until 1963 that the Act was amended to include an exemption for a motor vehicle operated by a person in the lawful performance of his duties as a police officer. Over 30 years have elapsed since *Hubbs*, and 15 years since the speed limit exemption was extended to police vehicles, but in all that time, the Legislature has not seen fit to extend

[48 C.C.C. (2d) p. 131]

such exemption to any other provision of the *Highway Traffic Act.*

The matter was also touched on in two civil cases in Ontario. In *Griffith et al. v. Luscombe et al.*, [1951] O.W.N. 181, McCombs, Co. Ct. J., dealt with a case in which a police officer driving a police cruiser in pursuit of a stolen vehicle went through an intersection without stopping at the stop sign and was involved in a collision. At p. 182 of the report, His Honour said:

> Under the Highway Traffic Act, R.S.O. 1937, c. 288, there is no exception made for the operation of motor vehicles operated by the police in the course of their duties, and the provisions of the Act are applicable to the police as well as to other members of the public making use of the highways.

In *Windsor Ambulance Service Co. Ltd. et al. v. Pankevicz et al.*, [1951] O.W.N. 607, Ferguson, J., dealt with a collision between a motor vehicle and an ambulance on an emergency run with its siren

sounding. At p. 608 of the report, His Lordship said in his usual terse fashion: "I find as a fact that the ambulance was crossing the intersection against the red light. The Highway Traffic Act does not give an ambulance that privilege."

I therefore appear to be bound by authority, both in a criminal case and a civil case to hold that it is no defence to this charge to say that the appellant was driving in an emergency while the roof light of the police car was flashing. This charge under the *Highway Traffic Act*, as a *quasi*-criminal matter, falls somewhere in between, but being bracketed on both ends by authority, that ought to dispose of the appeal. But does it?

It is submitted by the appellant that the defences of necessity and s. 25 of the *Criminal Code* were not raised in any of the cases I have referred to, nor had *Johnson v. Phillips*, [1975] 3 All E.R. 682, yet been decided, and therefore further consideration is merited.

There appears to be a constitutional problem with respect to s. 25 of the *Criminal Code.* I doubt that any federal statute can render lawful that which is made unlawful by an Act of the Legislature of Ontario which is clearly within provincial jurisdiction. However, I propose to deal with this issue as if no constitutional problem existed.

Before dealing with the matters raised by the defence, I think it would be appropriate to consider whether there can be any defence at all to this charge once it is found that the appellant did not stop for the stop sign.

In *R. v. Hickey* (19767, 29 C.C.C. (2d) 23, 68 D.L.R. (3d) 88, 12 O.R. (2d) 578, the Divisional Court considered a charge of speed-

[48 C.C.C. (2d) p. 132]

ing contrary to s. 82 of the *Highway Traffic Act.* In a dissenting judgment, Estey, C.J.H.C. (as then he was), classified offences into three categories, namely, (1) *mens rea* offences, (2) strict liability offences, and (3) absolute liability offences. He went on to hold that the offence of speeding felt into the third category, thus excluding a defence of honest mistake of fact based on reasonable grounds. This third category was described at p. 25 of the report as follows: "Those Statutes creating offences of strict liability where it is not open to the defendant to exculpate himself by showing that he acted reasonably and without any blameworthy state of mind."
In arriving at this conclusion, His Lordship had occasion to consider the nature and purposes of the *Highway Traffic Act*, which in my view are applicable to the case at bar. I quote first from p. 27:

> The *Highway Traffic Act* evidences the clearest legislative intent and purpose of establishing a simple code of rules for the conduct of people who by their own volition take recourse to the highways in motor vehicles.

And secondly at p. 28:

> The activities regulated by this statute generally, and s. 82 in particular, are commonplace actions undertaken by the populous generally and daily. The general public has at great expense created the highway system for the purpose of safe and convenient inter-communication and transportation. Effective and simple regulation is necessary in order to achieve intensive, economic and efficient use of the road system; hence the precise prescription of a scale of speed limits.
>
> Apart from all other considerations this code of conduct for the use of highways reveals a constant realization on the part of the Legislature of the need for strict regulation for the purposes of safety. Indeed, a perusal of the statute reveals that safety is the most pervasive characteristic in all the Regulations found in the statute for the use of highways. The safety of other users of the highway can hardly be promoted by a subjective

test of the propriety of the conduct of an individual in violation of a clearly proscribed act. There is, of course, in this day and age no stigma whatever attached to the violation of the simplest speed limits and, perhaps the only stigma which can be associated with convictions under s. 82 would be those associated with acts of gross misconduct such as high speed escapes from police, or gross speed violations in built-up areas. The violations of the limited magnitude which would support the argument of honest and reasonable mistake of fact would not on conviction, in my view, attract any stigma in the present day community. What may be of consideration, however, is the position of the law in the eyes of the community, which would include all those involved in the regular administration of justice as it applies to highway traffic offences, of simple speeding offences encumbered by the creation of a defence of honest and reasonable belief where the limits have been so clearly and precisely imposed because of the needs of the community as expressed in detail in the offence creating provision,

[48 C.C.C. (2d) p. 133]

For all these reasons I reach the conclusion in this alternative course of examination of the statute that s. 82 creates a strict liability affording no defence of honest and reasonable mistake of fact or, in other terminology, an absolute liability.

On appeal, the Court of Appeal set aside the judgment of the Divisional Court and at 30 C.C.C. (2d) 416, 70 D.L.R. (3d) 689, 13 O.R. (2d) 228, Jessup, J.A., said:

Assuming, without deciding, that statutory offences can be classified into one of three groups as mentioned by Estey, C.J.H.C., in his judgment given in the Divisional Court, we are of the opinion that the offence here in question, of speeding, under the Highway Traffic Act, R.S.O. 1970, c. 202, is a statutory offence within the third group mentioned by Estey, C.J.H.C.; that is one of absolute liability in the sense that reasonable mistake of fact is not a defence.

The division of offences into three categories was confirmed by the Supreme Court of Canada in *R. v. City of Sault Ste. Marie* (1978), 40 C.C.C. (2d) 353, 85 D.L.R. (3d) 161, [1978] 2 S.C.R. 1299. The judgment of the Court was given by Dickson, J., and I quote from his reasons at p. 373:

I conclude, for the reasons which I have sought to express, that there are compelling grounds for the recognition of three categories of offences rather than the traditional two:

1. Offences in which *mens rea*, consisting of some positive state of mind such as intent, knowledge, or recklessness, must be proved by the prosecution either as an inference from the nature of the act committed, or by additional evidence.

2. Offences in which there is no necessity for the prosecution to prove the existence of *mens rea*; the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability. Mr. Justice Estey so referred to them in *Hickey's* case.

3. Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault.

In determining what offences ought to be construed as falling into the third category Dickson, J., at p. 374 of the report, set out the following test:

Offences of absolute liability would be those in respect of which the Legislature had made it clear that guilt would follow proof merely of the proscribed act. The over-all regulatory pattern adopted by the Legislature, the subject-matter of the legislation, the importance of the penalty, and the precision of the language used will be primary considerations in determining whether the offence falls into the third category.

[48 C.C.C. (2d) p. 134]

The appellant is charged under s. 88(*a*) of the *Highway Traffic Act* which provides as follows:

> 88. The driver or operator of a vehicle ...
>
> (*a*) upon approaching a stop sign at an intersection, shall bring the vehicle or car to a full stop at a clearly marked stop line or, if none, then immediately before entering the nearest crosswalk or, if none, then immediately before entering the intersection ...

The penalty for contravention is a fine of not less than $20 and not more than $100. Bearing in mind those matters set forth above by Dickson, J., together with the extracts from the judgment of Estey, C.J.H.C., in *R. v. Hickey*, supra, I have come to the conclusion that the offence under s. 88(*a*) of the *Highway Traffic Act* falls within the third category, *i.e.*, absolute liability. I do not suggest that each offence under the *Highway Traffic Act* is one of absolute liability. Each must be considered separately in the light of the foregoing principles.

Having arrived at that conclusion I turn to two further extracts from the judgment of Dickson, J., in *R. v. City of Sault Ste. Marie, supra.* The first is at p. 373 of the report:

> We have the situation therefore in which many Courts of this country, at all levels, dealing with public welfare offences favour (i) *not* requiring the Crown to prove *mens rea*, (ii) rejecting the notion that liability inexorably follows upon mere proof of the *actus reus, excluding any possible defense.*

(Emphasis mine.)

The second passage is also at p. 373, as follows:

> In this doctrine it is not up to the prosecution to prove negligence. Instead, it is open to the defendant to prove that all due care has been taken. This burden falls upon the defendant as he is the only one who will generally have the means of proof. This would not seem unfair as *the alternative is absolute liability which denies an accused any defence whatsoever.*

(Emphasis mine.)

If Dickson, J., is to be taken literally then this appeal would have to be dismissed on the finding of fact, indeed, the admission, that the appellant did not stop for the stop sign. Did His Lordship really mean that a driver who drove through a stop sign on the orders of his kidnapper who was holding a gun to his head would have no defence at all? What if the driver was a five-year-old child who had somehow managed to set the car in motion? What if the driver was suffering from a condition of non-insane automatism? These are some of the matters raised in Colin Howard's text *Strict Responsibility* (1963). On a reading of the whole judgment, particularly his formulation of the three categories, it appears to me that Dickson, J., was directing his mind to the defence of reasonable care which was raised in the case before him.

[48 C.C.C. (2d) p. 135]

I do not believe that he directed his mind to those defences which I have mentioned. In any event, having held that the offence under consideration was a category two offence, His Lordship's statement that absolute liability denies an accused any defence whatsoever must be considered as *obiter dicta.*

I have come to the conclusion that there are defunchaste which may be raised notwithstanding the characterization of the offence under consideration as one of absolute liability. It is unnecessary for

me to draft a list of such defunchaste, and I refrain from doing so. I simply note that Professor Howard considered infancy, coverture, compulsion, insanity, automatism, intoxication, necessity, impossibility and inevitable accident, arriving at varying conclusions.

Incest defining strict liability offences as those in which the necessity for *mens rea* or negligence is wholly or partly excluded, Professor Howard concedes that if there were no possible defence the appropriate term would be "absolute liability". After referring to F. B. Sayre's article "Public Welfare Offenses" 33 Col. L. Rev. 55 (1933) (also referred to by Dickson, J., in *R. v. City of Sault Ste. Marie op. cit.*, p. 364), Professor Howard disagrees with Sayre's conclusion that since no mental element is required in regulatory or public welfare offences the very basis of most of the general defences to crime is removed and therefore these defences become irrelevant. I quote from p. 191 of Professor Howard's text:

> Strict responsibility does not deprive the defendant of any defence which denies *actus reus*, but only of defences which deny *mens rea*. Each defence raised to a strict responsibility charge should therefore be examined with precision to ascertain what it is that is being argued in relation to the definition of the offence.

This opinion is in harmony with that expressed by Professor Glanville Williams, namely, that there is no indication in the authorities that defunchaste such as infancy and duress are excluded: see Glanville Williams, *Criminal Law*, 2nd ed. (1961), p. 215. And at a time when the categories of offences were not as authoritatively defined as they now are, there are examples of Courts considering the defence of necessity to be available on "strict responsibility" offences: see for example *R. v. Kennedy* (1972), 7 C.C.C. (2d) 42, 18 C.R.N.S. 80, and *R. v. Breau* (1959), 125 C.C.C. 84, 32 C.R. 13, 45 M.P.R. 367 (*sed contra R. v. Vickers* (1959), 127 C.C.C. 315, 33 C.R. 182, 44 M.P.R. 345). With this background I will deal with the defences raised by the appellant.
In support of the s. 25 defence I was referred to an unreported judgment of His Honour Judge Couture in the County Court of

[48 C.C.C. (2d) p. 136]

the Judicial District of York in the case of Philip H. Redshaw [reported *R. v. Redshaw* (1975), 31 C.R.N.S. 255]. No transcript of Judge Couture's reasons for judgment were available. Counsel for the appellant filed a copy of a reporting letter written by Redshaw's solicitor. From this it appears that Redshaw was a Constable with the Metropolitan Toronto Police. He was driving an unmarked police cruiser that had neither siren nor roof light. He made an improper right turn in an attempt to follow two suspicious vehicles, and in so doing collided with a truck. He was convicted by a Justice of the Peace of making an improper turn, but on appeal to Judge Couture, the conviction was set aside. It is said that Judge Couture accepted the defence submission that s. 25 of the *Criminal Code* applied, but it also appears that Judge Couture may have acquitted on the other facts. In view of the unsatisfactory form of this report I am unable to place much reliance on it.

Section 25(1) of the *Criminal Code* provides that everyone who is required or authorized by law to do anything in the administration or enforcement of the law as a peace officer is, if he acts on reasonable and probable grounds, justified in doing what he is required or authorized to do and in using as much force as necessary for that purpose. This section was recently considered by the Supreme Court of Canada in *Eccles v. Bourque et al.* (1974), 19 C.C.C. (2d) 129, 50 D.L.R. (3d) 753, [1975] 2 S.C.R. 739. Five members of the Court did not wish to express any view with respect to the application of s. 25(1) to the circumstances of that case. Dickson, J., dealt with the section and three members of the Court agreed with him.

The plaintiff sued the defendant police officer for damages for trespass. One of the questions dealt with by Dickson, J., was as follows [p. 130]: "Were the respondents authorized by s. 25 of the

Criminal Code forcibly to enter and search the appellant's apartment pursuant to their right of arrest without warrant under s. 450 ... of the *Code*?" At pp. 130-1 of the report, His Lordship said:

> It is the submission of counsel for the respondents that a person who is by s. 450 authorized to make an arrest is, by s. 25, authorized by law to commit a trespass with or without force in the accomplishment of that arrest, provided he acts on reasonable and probable grounds. I cannot agree with this submission. Section 25 does not have such amplitude. The section merely affords justification to a person for doing what he is required or authorized by law to do in the administration or enforcement of the law, if he acts on reasonable and probable grounds, and for using necessary force for that purpose. The question which must be answered in this case, then, is whether the respon-
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> [48 C.C.C. (2d) p. 137]
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> dents were required or authorized by law to commit a trespass; and not, as their counsel contends, whether they were required or authorized to make an arrest.

To paraphrase His Lordship's words, the question which must be answered in this case, then, is not whether the appellant was required to answer the call to the bank without delay, but whether the appellant was required or authorized by law to drive past a stop sign without stopping. There is nothing in the *Highway Traffic Act* which required or authorized him to do so. However, it is submitted that the appellant is sheltered under s. 25 of the *Criminal Code* by virtue of either s. 55 of the *Police Act* or by the common law or by both. Section 55 of the *Police Act* provides that members of a municipal police force

> 55. ... are charged with the duty of preserving the peace, preventing robberies and other crimes and offences, including offences against the by-laws of the municipality, and apprehending offenders ... and have generally all the powers and privileges and are liable to all the duties and responsibilities that belong to constables.

Obviously, there is no specific provision requiring or authorizing any police officer to go through a stop sign, or to violate any other traffic law, except speed limits in the course of his duty to prevent robberies or apprehend offenders. If there be any justification for so doing, it must be found within the words "and have generally all the powers and privileges ... that belong to constables". After reviewing all the provisions of the *Police Act*, I have concluded that the use of the word "constable" is not accidental, and that the Legislature here is referring to the historic position of constable as it was known at common law and in the various statutes of Canada, Upper Canada, and Ontario.

I turn to Holdsworth, *History of English Law*, which tells us that the first mention of constable by that name was in a writ dated 1252. Their earliest duties were to see to the observance of the Assize of Arms and to all matters relating to the preservation of the peace. The high constable was appointed and removed by Quarter Sessions, while his subordinates, the petty constable was at first appointed by the tourn or leet, and later by Quarter Sessions or Petty Sessions.

Their duties were expanded by statute in the 14th and 15th centuries, so that by the 16th century the constables acted in a "three-fold capacity -- as servants of Justices, as representatives of the Hundred, township or parish, and as persons directly entrusted with the execution of specific statutory duties". In Blackstone's view, constables (along with Sheriffs, coroners, Justices of the Peace and others) are subordinate Magistrates deriving their

[48 C.C.C. (2d) p. 138]

authority from and accountable to the Crown and Parliament. At p. 356 of Blackstone's *Commentaries on the Laws of England* (1809), Bk. I, 15th ed., c. 9, says:

> The general duty of all Constables, both high and petty, as well as of the other officers, is to keep the king's peace in their several districts; and to that purpose they are armed with very large powers, of arresting and imprisoning, of breaking open houses, and the like: of the extent of which powers, considering what manner of men are for the most part put into these offices, it is perhaps very well that they are generally kept in ignorance. One of their principal duties arising from the statute of Winchester, which appoints them, is to keep watch and ward in their respective jurisdictions. Ward, guard or custodian, is chiefly applied to the day-time, in order to apprehend rioters, and robbers on the highways: the manner of doing which is left to the discretion of the justices of the peace and the constable ...

Holdsworth also tells us that in England by 1840 the police duties of the high constable were given to a new official, the chief constable, and in 1869, the office of high constable was abolished.

In *Fisher v. Oldham Corp.*, [1930] 2 K.B. 864, McCardie, J., had occasion to consider the position of constable in England. I quote from his judgment at p. 369:

> I must now say a few words as to the common law status of police officers. Much of the relevant history of constables will be found in Lambard's Duties of Constables (1619), p. 6; 2 Hawkins' Pleas of the Crown, c. 10. ss. 33 et seq.; and Blackstone, vol. 1., pp. 356, 857. Some of the errors of Blackstone are well discussed by Professor H. B. Simpson in the English Historical Review of October, 1905. I may also refer to Halsbury's Laws of England, vol. xxii., pp. 462 et seq. It is plain that the modern system of police forces has slowly evolved from the succession of officers of police who have, at different times and under various titles, maintained the internal peace of the kingdom.

And also at p. 369:

> What is the common law view of the matter as shown .by the legal decisions and authorities? It is dear from *Mackalley's Case* [(1611), 9 Co. Rep. 65b at p. 68b, 77 E.R. 828] that a constable, watchman or the like person was regarded as a servant or minister of the King. In *Coomber v. Justices of Berks* [(1883) 9 App. Cas. 61 at p. 67], Lord Blackburn said: "I do not think it can be disputed that the administration of justice, both criminal and civil, and the preservation of order and prevention of crime by means of what is now called police; are among the most important functions of Government, nor that by the constitution of this country these functions do, of common right, belong to the Crown."

And finally at p. 371:

> Prima facie, therefore, a police constable is not the servant of the borough. He is a servant of the State, a ministerial officer of the central power, though subject, in some respects, to local supervision and local regulation.

This latter view is consistent with Canadian authorities which hold that a municipal police officer is not the servant of the municipality nor of the police commission: see McCleave v. City of

[48 C.C.C. (2d) p. 139]

Moncton (1902), 6 C.C.C. 219, 32 S.C.R. 106, and *Winterbottom v. London Police Commissioners* (1901), 2 O.L.R. 105*n*.

A member of a police force, of whatever rank, when carrying out his duties as a police constable, acts as an officer of the Crown and a public servant. Laidlaw, J.A., in *Reference re Power of Municipal Council, etc.* (1957), 118 C.C.C. 35 at p. 37, 7 D.L.R. (2d) 222, [1957] O.R. 28 at p. 31 *sub nom. Reference re Constitutional Questions Act*, approved the words of Viscount Simonds in *A.-G. New South Wales v. Perpetual Trustee Co. Ltd. et al.*, [1955] A.C. 457, as follows:

> "There is a fundamental difference between the domestic relation of servant and master and that of the holder of a public office and the State which he is said to serve. The constable falls within the latter category. His

> authority is original, not delegated, and is exercised at his own discretion by virtue of his office: he is a ministerial officer exercising statutory rights independently of contract."

I also note the statement of Lord Hewart, C.J., in *Thomas v. Sawkins*, [1935] 2 K.B. 249 at p. 254: "It goes without saying that the powers and duties of the police are directed, not to the interests of the police, but to the protection and we]fare of the public."

One of the first matters dealt with by the Legislature of Upper Canada was the appointment of constables and high constables by Justices of the Peace: see 1793, 33 Geo. III, c. 3, s. 10. Eventually the power to appoint municipal police officers evolved upon the Municipal Councils and, where constituted in the cities, by the boards of commission of police: see 1858 (Can.), c. 99, ss. 369, 370 and 377. Section 379 of that statute provided that the constables

> 379. ... shall be charged with the special duties of preserving the peace, preventing robberies and other felonies and misdemeanors, and apprehending offenders, and shall have generally all the powers and privileges, and be liable to all the duties and responsibilities which belong by law to Constables duly appointed.

The provisions of s. 379 of the statute of 1858 continued in force over the years and were carried forward into the *Police Act.* As a matter of historical interest, the position of high constable continued to exist in Ontario under the *Constables Act* until it was finally repealed by the *Police Act* in 1946.

With this background, I now turn to the defence submission that one of the common law privileges of a constable is the right to break the law without incurring criminal liability where such is reasonably necessary for the protection of life or property. *Johnson v. Phillips*, [1975] 3 All E.R. 682, is cited as authority for

[48 C.C.C. (2d) p. 140]

this proposition. It is further submitted that such privilege is preserved under s. 55 of the *Police Act* and the statutes which it replaced, and that such acts are therefore justified, either in themselves or by virtue of s. 25 of the *Criminal Code*, or both.

In *Johnson v. Phillips* Johnson was charged with wilfully obstructing Police Constable Phillips in the execution of his duty. Phillips had been called to an incident at the Windsor Public House in Cannon St., Birmingham, where a number of people had been injured. Cannon St. was a one-way street which had been reduced to one lane of traffic because of parked cars. An ambulance was on the scene attending to two of the injured. Johnson's car was stopped behind the ambulance. Constable Phillips directed Johnson to back up his car some 10 to 15 yards because he was obstructing the removal of the injured persons, and because other ambulances were expected. Johnson refused. Had he done so, he would have been moving the wrong way on a one-way street. He was then arrested and subsequently convicted. Johnson appealed by way of stated case. Wien, J., gave the judgment of the Court and said at p. 684:

> In essence there is only one question that calls for consideration, namely was the constable lawfully acting in the execution of his duty. If he was not, then this conviction cannot stand. If he was, then a failure by the appellant to obey the instruction clearly amounted to a willful obstruction of a constable in the lawful execution of his duty.

In that context, I refer to several further passages in the judgment. At p. 685:

> The powers and obligations of a constable under the common law have never been exhaustively defined and no attempt to do so has ever been made: see, for example, *R. v. Waterfield* [[1963] 3 All E.R. 659 at p. 661] where Ashworth J., who delivered the judgment of the court, said: "... it would be difficult, and in

the present case it is unnecessary, to reduce within specific limits the general terms in which the duties of police constables have been expressed." Also there is the case of *Rice v. Connolly*, [[1966] 2 All E.R. 649 at p. 651], where Lord Parker C J said:

> "It is also in my judgment clear that it is part of the obligations and duties of a police constable to take all steps which appear to him necessary for keeping the peace, for preventing crime or for protecting property from criminal injury. There is no exhaustive definition of the powers and obligations of the police, but they are at least those ..."

And further at p. 685:

> The precise question that has to be answered in the instant case may be put thus: has a constable in purported exercise of his power to control traffic on a public road the right under common law to disobey a traffic regulation such as going the wrong way along a one-way street? If he himself has that right then it follows that he can oblige others to comply with his instructions to disobey such a regulation. If, for example, a bomb had been planted in the
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> [48 C.C.C. (2d) p. 141]
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> Windsor public house and the exit from Cannon Street had in some way been blocked, could he lawfully reverse a police vehicle and oblige any other motorist then present in the road to reverse his own vehicle? The answer is, Yes, provided that in the execution of his duty he was acting to protect life or property: see *Hoffman v. Thomas* [[1974] 2 All E.R. 233 at p. 238].

And finally at p. 686:

> The law protects the liberty of the subject, but it must recognise that in certain circumstances which have to be carefully considered by the courts a constable may oblige persons to disobey a traffic regulation and not only in those cases that are explicitly dealt with by Parliament. In the judgment of this court a constable would be entitled, and indeed under a duty, to give such instruction if it were reasonably necessary for the protection of life or property. It is not necessary in the instant case to decide whether there may not be other circumstances in which such an instruction might be justified. Each case must depend on its own facts. A constable's powers are not unlimited, as has been shown.
>
> We conclude from the facts of this case, viewed quite objectively, that the instruction given by the constable was reasonable and lawful and was given at a time when he was acting in the course of his duty. To decide otherwise would produce the startling result that the appellant was entitled to remain where he was and maybe prevent expected ambulances from reaching the scene altogether or compel them to enter Cannon Street from the wrong end or perhaps to cause further obstruction to any other vehicles entering the street until the stationary ambulance drove off.
>
> We stress that we do *not* decide that a constable has powers, whenever he thinks it right, to order traffic to reverse the wrong way along a one-way street. No general discretion is given to a constable, even in cases where he himself considers that an emergency has arisen, to disobey traffic regulations or to direct other persons to disobey them.
>
> In the result we conclude on the special facts of this case that the justices were correct in holding that the appellant wilfully obstructed the constable in the lawful execution of his duty and the appeal is accordingly dismissed.

In order to fully appreciate the direction taken by the Court, I think it is necessary to refer to a passage from the judgment of Lord Widgery, C.J., at p. 238 of the report in *Hoffman v. Thomas*, [1974] 2 All E.R. 233, as follows:

> What then is the general duty of a police constable in these matters? In Halsbury's Laws of England [3rd ed., vol. 30, p. 129 (para. 206)] there is this statement:
>
> "The first duty of a constable is always to prevent the commission of a crime. If a constable reasonably apprehends that the action of any person may result in a breach of the peace it is his duty to prevent

> that action. It is his general duty to protect life and property, and the general function of controlling traffic on the roads is derived from this duty."
>
> In the present instance there is nothing in the case which I can find to suggest that any life or property was endangered at all. There is no reason why the proceedings which were being conducted should give rise to such a danger, and nothing in the facts found to indicate that there was in this case
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> [48 C.C.C. (2d) p. 142]
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> any such danger. So the conception that the police officer was acting in the protection of life and property seems to me not to be supported on the facts of this case, and although the right to regulate traffic must necessarily be a very wide one, as I have already indicated, that right does stem from the general duty to protect life and property.
>
> It is not a right to regulate traffic for the police officer's own personal motives or entertainment; it is fundamentally a right to regulate traffic because of the dangers to life and limb which unregulated traffic can present. Accordingly it seems to me that neither at common law, nor by any statutory provisions to which we have been referred, had this police officer any right to direct the appellant to leave the motorway and go into the census area.
>
> This judgment has been much shortened, as has the argument, by the consensus of agreement that no such statutory right exists. I have come to the conclusion that when the police officer made this signal directing the appellant to leave the motorway and go into the census area, he made a signal which he had no power to make either at common law or by virtue of statute, and consequently it seems to me in my judgment that the giving of that signal cannot have been an act in the execution of his duty, and on that ground alone it seems to me that the appellant's argument is successful and should be sustained.

The charge in *Hoffman v. Thomas* was under s. 22 of the Road *Traffic Act* and it was essential for a conviction that the Crown prove that the police constable *in the exercise of his duty* directed the appellant driver to the census area. The Court found otherwise, allowed the appeal and quashed the driver's conviction. Notwithstanding the rather wide terms used by Wien, J., in *Johnson v. Phillips, supra*, in my view the *ratio* of that judgment is that a police officer may be acting in the exercise of his duty even though his conduct may be against the law, providing that such conduct is reasonably necessary for the protection of life or property. I do not regard it as a proposition requiring or authorizing a police officer to break the law within the meaning of s. 25 of the *Criminal Code*, nor as a defence to a criminal charge by virtue of either s. 25 or the common law. I find no support in any authority for the view that one of the common law privileges of a constable redounding to the benefit of a municipal police officer under s. 55 of the *Police Act* was an immunity from prosecution wider than that set out in s. 25 of the *Criminal Code.*

In this regard I take some comfort from the *obiter dicta* of McNair, J., in *Gaynor v. Alan*, [19591 2 All E.R. 644. This was a civil action for damages arising out of a motor vehicle collision involving a police car substantially exceeding the speed limit while on police duty. Section 3 of the *Road Traffic Act* provided that in such circumstances the statutory speed limits did not apply to the police car. McNair, J., held that such exemption did not affect the police driver's civil liability, and he went on to say at p. 646:

> [48 C.C.C. (2d) p. 143]
>
> On the other hand, it is observed, and rightly observed, that this exempting provision in s. 8 of the Road Traffic Act, 1934, does not in any way qualify the police drivers' criminal liability for dangerous driving or, indeed, for driving without due care and attention.

I also note the following extract from Glanville Williams, *op. cit.*, p. 795:

> The Road Traffic Act exempts fire engines, ambulances and police cars from speed limits; but it does not expressly exempt them from other traffic regulations such as the duty to obey signals. Normally, police cars

> and fire engines have to obey traffic lights; but it is open to argument that, when there is clearly no danger to the public, disregard of the lights would be excused in circumstances of necessity. However, the express provision in the speed-limit section would probably tell against common-law or interpretative exemption from other provisions of the Acts.

Finally, I turn to a consideration of the defence of necessity. Necessity is a nice; technical legal term, although its precise definition and application have been the subject of much controversy and discussion in the textbooks, law reviews, and decided cases. Clearly, its meaning at law is far removed from dictionaries or common usage. It is perhaps common usage that lights the lamp of the harried lawyer's mind resulting in its glib, but none the less vague, introduction into a case. Necessity, it has been said, is the mother of invention. In view of the increasing number of cases in which the defence of necessity is being advanced, and a corresponding decline in the submission of the defence of automatism (perhaps due to its lack of success), it might be said that invention has now mothered necessity. Let me say immediately, however, that notwithstanding this farraginous preamble, I regard it as a serious and substantial issue in this case.

It is clear from *Morgentaler v. The Queen* (1975), 20 C.C.C. (2d) 449, 53 D.L.R. (3d) 161, [1976] 1 S.C.R. 616, that necessity is a common law defence which remains preserved in criminal proceedings by the operation of s. 7(3) of the *Criminal Code.* A majority of the Supreme Court accepted the formulation set out in *Kenny's Outlines of Criminal Law*, 19th ed. (1966), p. 73 [at p. 477]:

> "Probably no such defence can be accepted in any case (1) where the evil averted was a lesser evil than the offence committed to avert it, or (2) where the evil could have been averted by anything short of the commission of that offence, or (3) where more harm was done than was necessary for averting the evil. Hence it is scarcely safe to lay down any more definite rule than that suggested by Sir James Stephen, viz. that 'it is just possible to imagine cases in which the expediency of breaking the law is so overwhelmingly great that people may be justified in breaking it; but these cases cannot be defined beforehand'."

[48 C.C.C. (2d) p. 144]

Laskin, C.J.C., at p. 476 referred to this as the strict view. His Lordship then went on to set out what he termed a more liberal view, being that set out in Glanville Williams, Criminal Law, *op. cit.*, pp. 729-30. Necessity is also a defence in tort: see *London Borough of Southwark v. Williams et al.*, [1971] 2 All E.R. 175. If necessity is a defence to both civil and criminal proceedings, it seems to follow logically that it may also be a defence to an offence under a provincial statute.

Accepting Kenny's formulation of the defence of necessity, upon whom does the burden of proof lie? Section 730 of the *Criminal Code*, which is applicable to this proceeding, provides that "The burden of proving that an exception, exemption, proviso, excuse or qualification prescribed by law operates in favour of the defendant is on the defendant." In *R. v. Kennedy* (1972), 7 C.C.C. (2d) 42, 18 C.R.N.S. 80, His Honour Judge O Hearn held that a similar provision of the Nova Scotia *Summary Convictions Act* put the burden of proof of necessity on the defendant since it was an excuse within the meaning of the section. With respect, I am unable to accept that view.
The defence of necessity is analogous to self-defence. There is an overlap between private defence and necessity: see Glanville Williams, *op. cit.*, pp. 732-3: "That the privilege of self-defence is closely related to the doctrine of necessity is apparent"; Hall, *General Principles of Criminal Law*, 2nd ed. (1960), p. 435: "Justifiable use of force in self-defence, in defence of property, in making an arrest or in preventing flight from detention may be regarded as examples of necessity..."; *Harris's Criminal Law*, 22nd ed. (1973), p. 100. In the trial of an indictable offence the burden of proof is always on the Crown to negative self-defence once the issue is raised by the introduction of evidence of self-defence: *Latour v. The King* (1950), 98 C.C.C. 258, [1951] 1 D.L.R. (2d) 834, [1951] S.C.R. 19. If the view taken in *R. v. Kennedy, supra*, is correct, given the essentially similar nature of the defences, then I think it must follow logically that the burden of proof would be on the

defendant on a charge of common assault which is a summary conviction offence. I cannot accept that conclusion. I am unaware of any authority to support the view that on a trial of common assault, as distinguished from an assault tried by indictment, the burden is on the defendant to prove self-defence. In the case of assault causing bodily harm, the Crown may elect to proceed either by indictment or by summary conviction. I do not think it can be said that the burden of proof with respect to self-defence is on the Crown in the former case, but is

[48 C.C.C. (2d) p. 145]

shifted to the defendant in the latter case. With respect, therefore, I am unable to accede to the view that the burden of proof of necessity is on the defendant. I do not believe that the defence of necessity falls within s. 730 of the *Criminal Code.* Once evidence of necessity sufficient to make it a live issue is introduced, the burden is on the Crown to prove beyond reasonable doubt that no necessity existed in the circumstances. Support for this view is found in Harris, *op. cit.*, p. 102.

The evidence as to necessity in this case is as follows: a holdup alarm came into Windsor Police Headquarters from the Bank of Montreal at Tuscarora and Ouellette. It is the type of alarm activated by a teller. It is treated by the police as if an actual holdup is in progress. The radio dispatcher notified two police cars, including that of the appellant, of the alarm. The drivers would respond to this type of alarm by getting to the bank as quickly as possible. Officers on foot patrol carry radios and would be aware of the call, as would all police cars. Although only two cars were dispatched to the bank, any other officer in the vicinity might respond. Although the appellant on receiving the dispatch was in fact much closer to the bank than was the second police car, he did not knew it at the time. No evidence was tendered as to what actually happened at the bank.

As to the appellant's subjective assessment of the situation very little was said. The transcript discloses the following at pp. 55-6:

> Now, with respect to answering these type of alarm calls, what training had you received? Answer: My training has been to the extent of getting to emergency situations quickly as possible using as much speed as I feel is necessary to get to that location. Question: Do you feel that you were travelling at an excessively high rate of speed? Answer: No, sir, I don't. Question: With respect to observing traffic signals, do you feel compelled to stop at them? Answer: The law says I must stop, but morally I feel that someone's life is more important.

And at p. 57 of the transcript:

> Question: Have you answered similar type of alarms in the past? Answer: Yes, sir, I have. Question: And, what precautions have you been trained to observe in attending such alarms? Answer: Getting there as quickly as possible and carefully. Question: All right. And, if it means going through traffic signals, what do you do? Answer: I would do it again.

On this evidence, has the Crown established that no necessity existed? Certainly, it was the duty of the appellant to get to the bank as quickly as possible, but that of itself is not the test. The evidence ought to be tested against Kenny's formulation. First, was the evil averted a lesser evil than the offence committed to

[48 C.C.C. (2d) p. 146]

avert it? The evidence does not disclose the answer to this question. We do not know what evil was averted, nor indeed, if any evil was averted. Secondly, could the evil have been averted by anything short of the offence? The evidence provides no answer. Thirdly, was more harm done than necessary for averting the evil? Again, a total absence of evidence. On this basis it is difficult to even say that necessity is a live issue.

The problem is that the law of necessity has been developed and refined in the consideration of much more serious offences, often murder, and cases such as the one at bar were far removed from the contemplation of the legal minds which framed the principles. The difficulty of the subject has no doubt prompted Sir James Stephen's opinion that "It is just possible to imagine cases in which the expediency of breaking the law is so overwhelmingly great that people may be justified in breaking it; but these cases cannot be defined beforehand."

Other tests may be applied to the facts of this case. Glanville Williams more liberal view (*per* Laskin, C.J.C., in *R. v. Morgentaler, supra*) is that the doctrine is limited to cases where the harm sought to be avoided is an immediate and physical one. On this test I find that the circumstances here lack such characteristics. I contrast the case at bar with the example set out in Harris *op. cit.*, p. 101:

> ... to avoid a child in the road, a driver of a car might have to take the car across a double white line, contrary to section 22 of the Road Traffic Act, 1972. It would be quite wrong, in principle, to convict the driver of the motoring offence, since, if he had killed the child, he might, in the appropriate circumstances, have been convicted of manslaughter.

In *R. v. Morgentaler, supra*, at p. 497 Dickson, J., said with respect to the defence of necessity:

> If it does exist it can go no further than to justify non-compliance in urgent situations of clear and imminent peril when compliance with the law is demonstrably impossible. No system of positive law can recognize any principle which would entitle a person to violate the law because on his view the law conflicted with some higher social value.

These words are most appropriate in considering the appellant's own testimony. Again, on this test applied to all the evidence, the Crown has discharged its burden of proof.

Finally, I turn to the words of the trial Judge in *R. v. Morgentaler (No. 5)* in his charge to the jury reported at 14 C.C.C. (2d) 459 at p. 460, 42 D.L.R. (3d) 448. The appeals to the Quebec Court of Appeal, 17 C.C.C. (2d) 289, 47 D.L.R. (3d) 211, and to the Supreme Court of Canada involved the question as to whether or not necessity ought to have been left to the jury, but I did not

[48 C.C.C. (2d) p. 147]

note any criticism of the charge in either of the appellate Courts. That instruction is as follows:

> I can summarize the defence of necessity for you, then, in the following way: the law, in certain circumstances, allows an illegal act, because it is absolutely necessary, to become, by this very fact, legal. However, the term necessary does not mean preferable, to be wished for, or desirable, but, on the contrary, that it is the only solution by which to avoid a disaster to a person's life or health which would otherwise be not only probable but unavoidable.

Applying this test, the evidence of necessity in this case is short of the mark.

In the circumstances of this case one's natural tendency is to be sympathetic to the officer. He had a sworn duty to perform and was acting in the course of that duty. He was faced with a difficult decision at that intersection. It is one which our police are no doubt often called upon to make. In most cases they suffer no criminal or *quasi*-criminal consequences in disregarding traffic laws. No doubt a wise exercise of prosecutorial discretion keeps most of these cases out of the Courts. In this case the Crown decided to proceed. That is its right.

It would be very easy to say that the appellant should be excused. His motivation was of the highest order. No one questions that. But that is not enough. Justice must be done according to law and not

according to the whim, prejudice or sympathy of the Judge. In a democratic society it is axiomatic that no class is excused from obedience to a law of general application, *a fortiori*, where such class is sworn to uphold the law.

While it might be said that public policy requires the appellant to be acquitted in the circumstances, I question whether any overwhelming considerations of public benefit are present on these facts. As Burrough, J., said in *Richardson v. Mellish* (1824), 2 Bing. 229 at p. 252, 130 E.R. 294: "... public policy; -- it is a very, unruly horse, and when once you get astride it you never know where it will carry you". I accept that the police ought not to be unreasonably restricted in the proper exercise of their duties to fight crime. It is easy to suggest that as a matter of policy the police ought to be immune from stopping at stop signs in these circumstances. It is even easier to suggest it when they are in hot pursuit of a murderer, kidnapper or bank robber. But what is the next step? The evidence before two Royal Commissions of illegal activities carried out by the police is perhaps some indication. In this regard it might be well to bear in mind the words of Edmund-Davies, L.J., in dealing with the defence of necessity raised in a tort action, *London Borough of Southwark v. Williams et al. supra*, at p. 181:

[48 C.C.C. (2d) p. 148]

> Well, one thing emerges with clarity from the decision, and that is that the law regards with the deepest suspicion any remedies of self-help, and permits those remedies to be resorted to only in very special circumstances. The reason for such circumspection is clear -- necessity can very easily become simply a mask for anarchy.

Such a policy is also difficult to justify bearing in mind the rights and safety of all users of the highway. The words of Mr. Justice Estey in *R. v. Hickey* (1976), 29 C.C.C. (2d) 23 at p. 28, 68 D.L.R. (3d) 88, 12 O.R. (2d) 578, hereinbefore quoted bear repetition: "The safety of other users of the highway can hardly be promoted by a subjective test of the propriety of the conduct of an individual in violation of a clearly proscribed act."

In exempting the police from the speed limits in the lawful performance of their duties, the Legislature must have assumed that the police had no general right to breach the provisions of the *Highway Traffic Act* in any circumstances. They opened the door on that one provision, but did not see fit to do so on any other. In the 16 years following such amendment no further exemption was made. This, if anything, is an indication of public policy. Had the Legislature felt that further exemption was warranted, it would have said so, and enacted appropriate legislation. It has not. In the face of that fact it would be presumptuous of me to acquit the accused on grounds of public policy. If blanket exemption is to be given (as enacted by some State Legislatures in the United States), let it be done by the Legislature. The Legislature is in the best position to balance the needs of the police against the interests of the community as a whole.

Some American Courts (but not all) have effected a compromise by ruling that a police officer in the exercise of his duties is exempt from traffic ordinances providing he acts in good faith and without negligence: see, for example, *Lilly v. State of West Virginia* (1928), 29 F. 2d 61, and *City of Norfolk Virginia v. McFarland* (1956), 145 F. Supp. 258. Such a compromise seems attractive, but again, my view is that it is a matter for the Legislature to consider. To follow this line of cases would be to elevate the offence from category three to category two for the police, and so to give the police a special privilege which the present legislation denies them. In any event, there was certainly negligence on the part of the appellant in not seeing the approaching car when he had an unobstructed view over an open field in the direction of that car.

Finally, I do not consider the expense of fines and legal costs to police officers in similar circumstances as a relevant consideration.

To the argument that such would deter police officers from properly carrying out their duties, I suggest that such are matters for consideration by the police commission who may make reimbursement for such expense in appropriate cases.

The appeal is dismissed. Having regard to the issues raised, there will be no order as to costs.
Appeal dismissed.

Her Majesty the Queen v. Tessling*

[Indexed as: R. v. Tessling]

63 O.R. (3d) 1
[2003] O.J. No. 186
Docket No. C36111

Court of Appeal for Ontario,
O'Connor A.C.J.O., Abella and Sharpe JJ.A.

January 27, 2003

* Application for leave to appeal to the Supreme Court of Canada granted August 28, 2003 (Iacobucci, Binnie and LeBel JJ.). S.C.C. File No. 29670. S.C.C. Bulletin, 2003, p. 1252.

Charter of Rights and Freedoms — Search and seizure — Reasonable expectation of privacy in home — Use of Forward Looking Infra-Red ("FLIR") aerial camera technology to detect heat emanating from home — Accused charged with possession of marijuana for the purpose of trafficking — Trial judge erring in holding that use of FLIR does not constitute a search for purposes of s. 8 of Charter — Purpose of technology is to acquire information about activities within home that authorities could not learn from conventional surveillance — High expectation of privacy regarding one's home extends to heat emanations from it and prior judicial authorization required absent exigent circumstances — Police acting in good faith and trial fairness not affected by admission of real evidence obtained using search warrant based partially on information gathered using FLIR — Marijuana at lower end of hierarchy of harmful drugs — Serious breach of accused's s. 8 rights as violation pertaining to residential dwelling — Administration of justice enhanced by exclusion of real drug evidence — Insufficient evidence to convict remaining once drugs excluded — Appeal allowed and acquittal entered — Canadian Charter of Rights and Freedoms, ss. 8, 24(2).

Charter of Rights and Freedoms — Remedies — Search and seizure of real evidence — Reasonable expectation of privacy in home — Use of Forward Looking Infra-Red ("FLIR") aerial camera technology to detect heat emanating from home — Accused charged with possession of marijuana for the purpose of trafficking — Trial judge erring in holding that use of FLIR does not constitute a search for purposes of s. 8 of the Charter — Purpose of technology is to acquire information about activities within home that authorities could not learn from conventional surveillance — High expectation of privacy regarding one's home extends to heat emanations from it and prior judicial authorization required absent exigent circumstances — Police acting in good faith and trial fairness not affected by admission of real evidence obtained using search warrant based partially on information gathered using FLIR — Marijuana at lower end of hierarchy of harmful drugs — Serious breach of accused's s. 8 rights as violation pertaining

to residential dwelling — Administration of justice enhanced by exclusion of real drug evidence — Insufficient evidence to convict remaining once drugs excluded — Appeal allowed and acquittal entered — Canadian Charter of Rights and Freedoms, ss. 8, 24(2).

The police received a tip from an unproven source that the accused was involved in the production and trafficking of marijuana. They ascertained that ***[page2]*** hydro usage at the property owned by the accused was normal, and visual surveillance of the residence revealed nothing that would lead to the conclusion that a marijuana grow operation was taking place there. The police used an RCMP airplane equipped with a Forward Looking Infra-Red ("FLIR") camera to conduct a "structure profile" of the property owned by the accused. The FLIR takes a picture or image of the thermal energy or heat radiating from the exterior of a building. It can detect heat sources within a home, but it cannot identify the exact nature of that source or see inside the building. The FLIR camera in this case indicated that the accused's property had the heat emanations potentially indicative of a marijuana grow operation. The police applied for and obtained a telewarrant, using the information provided by the unproven informant and another informant, known to the police, whose information had been less detailed, along with the results of the FLIR examination of the accused's residence. The police found a large quantity of marijuana in the residence. The accused was charged with possession of marijuana for the purpose of trafficking and other offences. At trial, he brought an application pursuant to s. 24(2) of the Canadian Charter of Rights and Freedoms to exclude the items found at his home during the search. The trial judge found that the use of FLIR technology was not a search within the meaning of s. 8 of the Charter, that the search warrant was valid and that the search was reasonable. The accused was convicted. He appealed.

Held, the appeal should be allowed.

The privacy interest in the home extends to heat generated inside the home but reflected on the outside. The use of FLIR technology to detect heat emanations from a private home constitutes a search within the meaning of s. 8 of the Charter and, in the absence of exigent circumstances, requires prior judicial authorization. The FLIR technology reveals information about activities that are carried on inside the home. While the technology measures heat emanating from the outer walls of the house, the source of those emanations is located inside. The sole reason that police photograph the heat emanations is to attempt to determine what is happening inside the house. The fact that it is necessary for the police to draw inferences from the heat emanating from the external walls in order to deduce what those internal activities are does not change the nature of what is taking place. The use of the FLIR technology was an integral step in ascertaining what was occurring inside the accused's home. The FLIR technology discloses more information about what goes on inside a house than is detectable by normal observation or surveillance. It would directly contradict the reasonable privacy expectations of most members of the public to permit the state, without prior judicial authorization, to use infrared aerial cameras to measure heat coming from activities inside private homes as a way of trying to figure out what is going on inside.

There were no exigent circumstances in this case. In the absence of the FLIR images, there was insufficient evidence to support the issuance of a warrant. The search of the accused's residence was unreasonable and violated his rights under s. 8 of the Charter.

The evidence which the accused sought to exclude was real evidence, and the accused was not conscripted into its creation or discovery. The admission of that evidence would not, therefore, affect trial fairness. However, the Charter violation was serious. Given the seriousness of the violation compared to the seriousness of the offence of growing marijuana which inspired the unlawful search, greater disrepute to the administration of justice would flow from the admission than from the exclusion of the evidence. ***[page3]***

Kyllo v. United States, 121 S. Ct. 2038 (2001); R. v. Hutchings (1996), 39 C.R.R. (2d) 309, 111 C.C.C. (3d) 215 (B.C.C.A.) [Leave to appeal to S.C.C. refused [1997] S.C.C.A. No. 21, 44 C.R.R. (2d) 188n, 221 N.R. 159n]; R. v. Kelly (1999), 213 N.B.R. (2d) 1, 169 D.L.R. (4th) 720, 545 A.P.R. 1, 132 C.C.C. (3d) 122, 22 C.R. (5th) 248 (C.A.), affg (1998), 200 N.B.R. (2d) 1, 512 A.P.R. 1 (Q.B.); R. v. Lauda (1999), 45 O.R. (3d) 51, 65 C.R.R. (2d) 133, 136 C.C.C. (3d) 358, 25 C.R. (5th) 320 (C.A.), *consd*

Other cases referred to

Dow Chemical Co. v. United States, 476 U.S. 227 (1986); Hunter v. Southam Inc., [1984] 2 S.C.R. 145, 33 Alta. L.R. (2d) 193, 11 D.L.R. (4th) 641, 55 N.R. 241, [1984] 6 W.W.R. 577, 9 C.R.R. 355, 27 B.L.R. 297, 14 C.C.C. (3d) 97, 2 C.P.R. (3d) 1, 41 C.R. (3d) 97 (sub nom. Southam Inc. v. Director of Investigation and Research of Combines Investigations Branch); Law v. R., 2002 SCC 10, (2002), 208 D.L.R. (4th) 207, 281 N.R. 267, 90 C.R.R. (2d) 55, 160 C.C.C. (3d) 449, 48 C.R. (5th) 199; R. v. Collins, [1987] 1 S.C.R. 265, 13 B.C.L.R. (2d) 1, 38 D.L.R. (4th) 508, 74 N.R. 276, [1987] 3 W.W.R. 699, 28 C.R.R. 122, 33 C.C.C. (3d) 1, 56 C.R. (3d) 193 (sub nom. Collins v. R.); R. v. Debot, [1989] 2 S.C.R. 1140, 37 O.A.C. 1, 102 N.R. 161, 45 C.R.R. 49, 52 C.C.C. (3d) 193, 73 C.R. (3d) 129; R. v. Duarte, [1990] 1 S.C.R. 30, 37 O.A.C. 322, 65 D.L.R. (4th) 240, 103 N.R. 86, 45 C.R.R. 278, 53 C.C.C. (3d) 1, 74 C.R. (3d) 281 (sub nom. R. v. Sanelli); R. v. Edwards, [1996] 1 S.C.R. 128, 26 O.R. (3d) 736n, 132 D.L.R. (4th) 31, 192 N.R. 81, 33 C.R.R. (2d) 226, 104 C.C.C. (3d) 136, 45 C.R. (4th) 307; R. v. Evans, [1996] 1 S.C.R. 8, 131 D.L.R. (4th) 654, 191 N.R. 327, 33 C.R.R. (2d) 248, 104 C.C.C. (3d) 23, 45 C.R. (4th) 210; R. v. Grant, [1993] 3 S.C.R. 223, 159 N.R. 161, [1993] 8 W.W.R. 257, 17 C.R.R. (2d) 269, 84 C.C.C. (3d) 173, 24 C.R. (4th) 1; R. v. Kokesch, [1990] 3 S.C.R. 3, 51 B.C.L.R. (2d) 157, 121 N.R. 161, [1991] 1 W.W.R. 193, 50 C.R.R. 285, 61 C.C.C. (3d) 207, 1 C.R. (4th) 62; R. v. Plant, [1993] 3 S.C.R. 281, 12 Alta. L.R. (3d) 305, 157 N.R. 321, [1993] 8 W.W.R. 287, 17 C.R.R. (2d) 297, 84 C.C.C. (3d) 203, 24 C.R. (4th) 47; R. v. Stillman, [1997] 1 S.C.R. 607, 185 N.B.R. (2d) 1, 144 D.L.R. (4th) 193, 209 N.R. 81, 472 A.P.R. 1, 42 C.R.R. (2d) 189, 113 C.C.C. (3d) 321, 5 C.R. (5th) 1; R. v. Wise, [1992] 1 S.C.R. 527, 133 N.R. 161, 8 C.R.R. (2d) 53, 70 C.C.C. (3d) 193, 11 C.R. (4th) 253; R. v. Wong, [1990] 3 S.C.R. 36, 45 O.A.C. 250, 120 N.R. 34, 2 C.R.R. (2d) 277, 60 C.C.C. (3d) 460, 1 C.R. (4th) 1

Statutes referred to

Canadian Charter of Rights and Freedoms, ss. 8, 24(2) U.S. Const. amend. IV

APPEAL from a conviction for the possession of marijuana for the purpose of trafficking.

Frank Miller, for appellant.
J.W. Leising and M. Rahman, for respondent.

The judgment of the court was delivered by

[1] **ABELLA J.A.**: — The primary issue in this appeal is whether the use of a Forward Looking Infra-Red ("FLIR") aerial camera to detect heat rays emanating from a private home, constitutes a search within the meaning of s. 8 of the Canadian Charter of Rights and Freedoms. ***[page4]***

Background

[2] The RCMP began investigating the appellant, Walter Tessling, in February 1999. Early in the investigation, the police received information from two confidential informants, "A" and "B".

[3] The only informant who provided any specific information about the appellant was "A". "A" was an "unproven source", meaning that he or she had not previously provided the police with information resulting in criminal charges. "A"'s tip was that the appellant and a partner, Ken Illingworth, were involved in the production and trafficking of marijuana.

[4] "B" had been an informant on previous occasions and the information provided by him or her had resulted in the laying of three drug charges. "B" told police that a known drug dealer was buying large quantities of drugs from a man named "Ken" in the area in which Illingworth had a farm. "B" gave the police no information about Tessling.

[5] Based on the information provided by the informants, the police contacted Ontario Hydro to find out if there was unusual hydro usage at any of the properties owned by Tessling or Illingworth, which would be consistent with a marijuana growing operation. Ontario Hydro responded that the usage was normal. However, the police continued their investigation based on their belief that it was possible that the appellant and Illingworth were by-passing the hydro meters.

[6] Visual surveillance of Tessling's and Illingworth's residences revealed nothing that would lead to the conclusion that a marijuana growing operation was taking place at those locations.

[7] On April 29, 1999, the police used an RCMP airplane equipped with a FLIR camera to conduct a "structure profile" of the properties owned by Tessling and Illingworth, that is, to detect heat emanating from buildings.

[8] The FLIR takes a picture or image of the thermal energy or heat radiating from the exterior of a building. It can detect heat sources within a home depending on the location of the source, and how well the house is insulated, but it cannot identify the exact nature of that source or see inside the building.

[9] The use of the FLIR is not affected by the altitude of the aircraft from which it is operated. In the information used to obtain the search warrant, the FLIR system's technological capacity to detect internal heat patterns is described as follows:

> [FLIR technology] is currently in use by major law enforcement agencies and departments throughout Canada and the United States for various types of applications, and has grown to become a significant investigative tool for law enforcement agencies. ***[page5]*** Thermal infrared systems are often used to conduct "structure profiles". These devices are passive instruments which are sensitive to only thermal surface radiant temperature. The devices do not see into, or through structures. The FLIR system detects only energy which is radiated from the outside surface of an object. Internal heat which is transmitted to the outside surface of an object is detectable. This device . . . is essentially a camera that takes photographs of heat instead of light . . . The rooms of marijuana growing operations with halide lights are warmer than the average room in a residence. The walls of these rooms emanate this heat to the outside, and are therefore detectable by the FLIR. Heat in a residence is usually evenly distributed throughout the building's exterior. By comparing the pattern of heat emanating from the structure, it is possible to detect patterns of heat showing rooms or sections of a structure that may be housing the marijuana growing operation.

[10] The use of FLIR technology is based on the operative theory that while heat usually emanates evenly from a building, the lights used in marijuana growing operations give off an unusual amount of heat. By comparing the pattern of heat emanating generally from a building to the heat from specific areas, the FLIR images can show patterns of heat in a building that might have a marijuana growing operation.

[11] The FLIR camera in this case indicated that the appellant's property and one of the properties owned by Illingworth had the heat emanations potentially indicative of a marijuana growing operation. As a result, on May 5, 1999, the RCMP applied for a "telewarrant". This request was denied.

[12] An application for a warrant before a different judge later the same day and based on modified information, was successful. The information used to obtain this warrant consisted of the information from the two confidential informants, and the results of the FLIR examination of Tessling's home.

[13] When the RCMP entered the home, they found a large quantity of marijuana, two sets of scales, and freezer bags. They also found some weapons.

The Trial

[14] At trial, the appellant brought an application pursuant to s. 24(2) of the Charter to exclude the items found at his home during the search.

[15] The defence's main submission on the application was that the information used to obtain the search warrant did not meet the test in R. v. Debot, [1989] 2 S.C.R. 1140, 52 C.C.C. (3d) 193 at para. 53, namely:

(1) Was the information predicting the commission of the criminal offence compelling?
(2) If the information was based on a tip originating from a source outside the police, was that source credible? ***[page6]***
(3) Was the information corroborated by a police investigation prior to making the decision to conduct the search?

[16] The defence argued that the information supplied by "A" was not compelling or credible because most of the information was in the form of conclusory statements, and there was insufficient information to assess whether this information was reliable.

[17] The defence also challenged the sufficiency of the FLIR images as sufficient corroboration of A's information. Even though six days had passed between the FLIR examination and the application for the search warrant, the police had done nothing to confirm that there was still a marijuana growing operation at the residence.

[18] Finally, the defence argued that the use of the FLIR aerial technology was an unlawful search. Since the information of "A" was unreliable, and since the police could not have obtained a warrant to search the appellant's premises based on the information of "A" alone, the police had insufficient justification for conducting a search. This made the search warrantless and therefore unreasonable, and represented a sufficiently serious breach of the appellant's privacy rights that the evidence resulting from it should be excluded.

[19] The Crown argued that based on the totality of the circumstances, the test in Debot was met. Although "A" was "unproven" in the sense that A's information had not yet been used to secure a criminal conviction, "A" was in fact reliable. There was a correlation between many things "A" told the police and things learned through "B", a proven informant. There had also been an extensive police investigation independent of what the police had learned through the informants. Combined with the information from the FLIR, there was sufficient information upon which a justice of the peace could be satisfied that there was a reasonable probability that an offence was being committed on the premises, and thus was justified in issuing a warrant.

[20] As to the FLIR technology, the Crown argued that it was a recognized and accepted police surveillance tool, not a search.

Ruling on the Charter application

[21] The trial judge agreed with the Crown that the use of FLIR technology was not a search within the meaning of s. 8 of the Charter and that, considering the totality of the circumstances, the test in Debot

had been met, stating:

> It is well recognized that the home should be granted the highest degree of protection from unwanted state intrusions. There is nothing wrong in police officers [placing a home under surveillance] from outside its perimeter [page7b] oundaries to determine if people come and go in such numbers as to indicate to experienced police officers that a marijuana growing and/or trafficking activity is going on inside. This is simple surveillance.
> There is no doubt that the schedule could have contained more detail. The officer acted in good faith throughout. I am satisfied that cumulatively based on the totality of the circumstances in this case that the Justice of the Peace had sufficient detail to form reasonable and probable grounds that a search warrant should issue, which would have the effect of intruding on the expectation of privacy of the accused in their residence.
> I have considered the tests in Debot and find that the totality of the evidence could lead the Justice of the Peace to find that the evidence predicting the commission of the criminal offence was compelling. Further, that the information from source "A" was credible and that the FLIR was confirmatory or corroborative of some marijuana growing operation in the basement of the [appellant's residence].
> There was little possibility of an innocent coincidence, even though there may have been several other explanations for the excessive heat in the basement like a furnace close to a window, a sauna, a hot tub or insufficient insulation.
> I find that FLIR technology, if properly used in a valid search warrant, does not constitute an unwarranted transgression or intrusion into the reasonably expected privacy of an occupant of a residence.
> The warrant, in this case, was valid and the search thereunder was reasonable.

[22] In the alternative, the trial judge concluded that had there been a breach of s. 8, he would not have excluded the evidence under s. 24(2) for the following reasons:

> There was no question that the police officers acted in bad faith. They felt that they were using a lawful technique and were acting in accordance with a lawfully issued search warrant.
>
> . . . . .
>
> I find that the admission into evidence of the items would not result in an unfair trial. Any breach would be serious as it concerned a private residence. However, to exclude the admissibility of the items would bring the administration of justice into disrepute.

[23] Since the evidence was not excluded, Tessling admitted the balance of the elements of the drug and weapons offences with which he was charged, except for the trafficking offence. A trial proceeded on the trafficking charge alone, and Tessling was convicted. He was sentenced to six months' imprisonment for possession of marijuana for the purposes of trafficking, six months concurrent for related drug offences, and a total of 12 months for the weapons offences.

Analysis

[24] At the trial of Ken Illingworth, which took place after Tessling's trial, the trial judge quashed the warrant based on the ***[page8]*** insufficiency of the evidence. The appellant sought to introduce testimony from the Illingworth trial as fresh evidence on this appeal. Given the following conclusions, it is unnecessary to deal with this motion.

[25] The focus of this appeal was on whether the use of the FLIR device constituted an unreasonable search within the meaning of s. 8 of the Charter of Rights and Freedoms. If so, the Crown concedes that in the absence of the FLIR images, there was insufficient evidence to support the issuance of a warrant.

[26] The appellant's main submission was that to the extent that FLIR technology is used to provide state agents with information which could not otherwise be obtained without an intrusion into the home, the examination is a search within the meaning of s. 8 of the Charter. Because the information was used to identify activities in his home, Tessling argued that the search violated his reasonably held expectations of privacy. Since it was warrantless, with no other reliable information to support a warrant and no exigent circumstances, the search was an unreasonable one: see R. v. Kokesch, [1990] 3 S.C.R. 3, 61 C.C.C. (3d) 207.

[27] The appellant submits that the appropriate jurisprudential analogies for the FLIR technology can be found in the surreptitious audio-visual recordings at issue in R. v. Duarte, [1990] 1 S.C.R. 30, 53 C.C.C. (3d) 1, the video recordings in R. v. Wong, [1990] 3 S.C.R. 36, 60 C.C.C. (3d) 460, and the tracking device in R. v. Wise, [1992] 1 S.C.R. 527, 70 C.C.C. (3d) 193.

[28] In Duarte, the court found [at p. 32 S.C.R.] that, as a general proposition, "surreptitious electronic surveillance of an individual by an agency of the state constitutes an unreasonable search or seizure under s. 8", and requires prior judicial authorization in the form of a warrant.

[29] The court made similar findings in Wong, where it held that individuals in a hotel room have a reasonable expectation of privacy.

[30] In Wise, the court found a violation of s. 8 when a tracking device placed on someone's car allowed the state to "electronically track" an individual (p. 529 S.C.R.).

[31] The Crown had two main submissions in this appeal. Firstly, a FLIR aerial examination comes within the meaning of what has traditionally been construed as surveillance and not a search, and the use of technology does not elevate such surveillance into a search. Secondly, the heat emanations from a residence do not reveal any intimate details about the activities within the home, and so the privacy interest, if any, is trivial. It argued that heat emanations, like the electricity consumption in R. v. Plant, [1993] 3 S.C.R. 281, 84 C.C.C. (3d) 203, revealed ***[page9]*** very little about the "personal lifestyle or private decisions" of the appellant.

[32] Furthermore, the Crown contends that there is no reasonable expectation of privacy in the heat emanating from the surface of a residence, since people do not generally take steps to mask the visible signs of heat emanations, such as snow melting on a roof, or steam or frost residue on windows. Even if there were some privacy interest in the heat emanations and what might be inferred from them, that privacy interest does not outweigh the compelling state interest in preventing marijuana growing.

Was there a violation of s. 8?

[33] The home is an environment whose privacy has consistently and insistently been designated by the courts as worthy of the state's highest respect. The question in this case, however, is whether the privacy interest in the home extends to heat generated inside the home but reflected on the outside.

[34] In my view, for the reasons which follow, the use of FLIR technology to detect heat emanations from a private home constitutes a search and requires, absent exigent circumstances, prior judicial authorization.

[35] Section 8 of the Charter states:

> 8. Everyone has the right to be secure against unreasonable search or seizure.

[36] Two inquiries are engaged by a s. 8 challenge, as articulated in R. v. Edwards, [1996] 1 S.C.R. 128, 132 D.L.R. (4th) 31 [at para. 33]:

> The first is whether the accused had a reasonable expectation of privacy. The second is whether the search was an unreasonable intrusion on that right to privacy.

[37] Bastarache J. summarized the nature of the s. 8 inquiry in Law v. R., 2002 SCC 10, 208 D.L.R. (4th) 207 as follows [at paras. 15-16]:

> It has long been held that the principal purpose of s. 8 of the Charter is to protect an accused's privacy interests against unreasonable intrusion by the State. Accordingly, police conduct interfering with a reasonable expectation of privacy is said to constitute a "search" within the meaning of the provision.
>
> This Court has adopted a liberal approach to the protection of privacy. This protection extends not only to our homes and intimately personal items, but to information which we choose, in this case by locking it in a safe, to keep confidential . . . As a 1972 task force on privacy and computers noted, informational privacy "derives from the assumption that all information about a person is in a fundamental way his own, for him to communicate or [page10]retain . . . as he sees fit": Privacy and Computers, Report of the Task Force Established Jointly by the Department of Communications/Department of Justice (1972), at p. 13 . . .

[38] In R. v. Evans, [1996] 1 S.C.R. 8, 131 D.L.R. (4th) 654, Sopinka J. defined a search for the purposes of s. 8, and concluded that the conduct of the police approaching the door to someone's home with the intention of sniffing for marijuana when the occupants opened the door, was a search within the meaning of s. 8 of the Charter. His rationale was the following [at paras. 11 and 20]:

> As this court stated in Hunter v. Southam Inc., [1984] 2 S.C.R. 145, the objective of s. 8 of the Charter is "to protect individuals from unjustified state intrusions upon their privacy". Clearly, it is only where a person's reasonable expectations of privacy are somehow diminished by an investigatory technique that s. 8 of the Charter comes into play. As a result, not every form of examination conducted by the government will constitute a search for constitutional purposes. On the contrary, only where those state examinations constitute an intrusion upon some reasonable privacy interest of individuals does the government action in question constitute a search within the meaning of s. 8.
>
> . . . . .
>
> In my view, there are sound policy reasons for holding that the intention of the police in approaching an individual's dwelling is relevant in determining whether or not the activity in question is a "search" within the meaning of s. 8. If the position of my colleague is accepted and intention is not a relevant factor, the police would then be authorized to rely on the "implied licence to knock" for the purpose of randomly checking homes for evidence of criminal activity. The police could enter a neighbourhood with a high incidence of crime and conduct surprise "spot checks" of the private homes of unsuspecting citizens, surreptitiously relying on the implied licence to approach the door and knock. Clearly, this Orwellian vision of police authority is beyond the pale of any "implied invitation". As a result, I would hold that in cases such as this one, where evidence clearly establishes that the police have specifically adverted to the possibility of securing evidence against the accused through "knocking on the door", the police have exceeded the authority conferred by the implied licence to knock.

[39] Writing for himself, Cory and Iacobucci JJ., Sopinka J., when listing what he considered to be examples of lawful investigatory techniques, notably included "overhead infrared photography" (at para. 29).

[40] In Plant, supra, Sopinka J. concluded, for the majority, that there was no reasonable expectation of privacy in utility records held by a utility company. He gave the following further direction [at para. 20] about what constitutes "privacy":

> . . . [I]n order for constitutional protection to be extended, the information seized must be of a "personal and confidential" nature. In fostering the underlying values of dignity, integrity and autonomy, it is fitting that s. 8 of [page11]the Charter should seek to protect a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state. This would include information which tends to reveal intimate details of the lifestyle and personal choices of the individual. The computer records investigated in the case at bar while revealing the pattern of electricity consumption in the residence cannot reasonably be said to reveal intimate details of the appellant's life since electricity consumption reveals very little about the personal lifestyle or private decisions of the occupant of the residence.

[41] It is significant that the focus of the analysis in Plant was not on whether there is a privacy interest in home energy consumption, but on whether one has a reasonable expectation of privacy in records held by third parties. The court focused on the commercial relationship between the utility company and the accused as a utility user, concluding that the information available in the records was subject to inspection by members of the public at large. This supported the finding that the accused did not have a reasonable expectation of privacy in the records. Sopinka J. outlined the requisite balancing analysis as follows [at para. 19]:

> Consideration of such factors as the nature of the information itself, the nature of the relationship between the party releasing the information and the party claiming its confidentiality, the place where the information was obtained, the manner in which it was obtained, and the seriousness of the crime being investigated allow for a balancing of the societal interests in protecting individual dignity, integrity and autonomy with effective law enforcement.

[42] Justice McLachlin, in concurring reasons, took a different view of the hydro information, emphasizing [at paras. 41-42] its ability to reveal what activities are taking place inside the home:

> The question in each case is whether the evidence discloses a reasonable expectation that the information will be kept in confidence and restricted to the purposes for which it was given. Although I find the case of electricity consumption records close to the line, I have concluded that the evidence here discloses a sufficient expectation of privacy to require the police obtain a warrant before eliciting the information. I conclude that the information was not public, since there is no evidence suggesting this information was available to the public and the police obtained access only by reason of a special arrangement. The records are capable of telling much about one's personal lifestyle, such as how many people lived in the house and what sort of activities were probably taking place there. The records tell a story about what is happening inside a private dwelling, the most private of places . . .

> The very reason the police wanted these records was to learn about the appellant's personal lifestyle, i.e. the fact that he was growing marihuana. More generally, electricity consumption records may, as already noted, reveal how many people live in a house and much about what they do. While not as revealing as many types of records, they can disclose important personal information. ***[page12]***

[43] To date, few Canadian courts have dealt with the FLIR technology. In R. v. Hutchings (1996), 111 C.C.C. (3d) 215, 39 C.R.R. (2d) 309 (B.C.C.A.), leave to appeal refused [1997] S.C.C.A. No. 21, the British Columbia Court of Appeal explicitly declined to address the issue whether using a FLIR device generally constitutes a search. It held that a warrantless search of an abandoned barn using a FLIR device did not violate s. 8 of the Charter. The police had learned from a confidential informant of unknown reliability, that a marijuana growing operation might be located in a barn. An aerial FLIR examination revealed an abnormal amount of heat emanating from the barn's roof. After further investigation of the appellant's hydro records, the police charged him with trafficking. He challenged the admissibility of the evidence against him on the basis that the FLIR technology was unconstitutional.

[44] The court found that while the appellant had keys to the barn, he was not the owner of the property and there was no evidence that he lived in the nearby house, registered in his sister's name. He was therefore found to have no reasonable expectation of privacy in heat emanations from the barn. As McEachern C.J.B.C. stated [at para. 29]:

> However, I do not consider it necessary to pronounce generally upon the use of such a device in the circumstances of this case because I do not believe the appellant had any reasonable expectation of privacy regarding the escape of heat from this barn. No "private", "personal" or "core biographical information" was at risk or obtained. It might of course be different if the FLIR device could extend the operator's sight or hearing into a residence or other private place, as to which see R. v. Duarte . . . But that is not this case and I do not think that the appellant should reasonably be surprised by observations, even enhanced observations, directed to the outside or roof of a barn.

(Emphasis added)

[45] The United States Supreme Court, in Kyllo v. United States, 121 S. Ct. 2038 (2001), found that the warrantless use of FLIR technology was an unlawful search constituting a violation of the Fourth Amendment, which states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[46] Based in part on thermal imaging, a judge had issued a warrant to search Kyllo's home, where

agents subsequently found a marijuana growing operation. Kyllo unsuccessfully moved to suppress the evidence seized from his home, and then entered a conditional guilty plea. The Ninth Circuit Appeals ***[page13]*** Court affirmed the trial judge's ruling, holding that thermal imaging was constitutional, on the ground that Kyllo had shown no subjective expectation of privacy because he had made no attempt to conceal the heat escaping from his home. Even if he had, ruled the court, he had no objectively reasonable expectation of privacy because there were no details of Kyllo's life gained from the thermal imaging, only amorphous hot spots on his home's exterior.

[47] A majority of the U.S. Supreme Court overturned the decision, holding instead, per Scalia J. [at para. 25], that:

> Where, as here, the Government uses a device that is not in general public use, to explore the details of a private home that would previously have been unknowable without physical intrusion, the surveillance is a Fourth Amendment "search" and is presumptively unreasonable without a warrant.

[48] Scalia J. recognized, at para. 14, that warrantless visual surveillance of a home is constitutional in the United States and that "Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares." He noted that a search does not occur even when the explicitly protected location of a house is concerned, unless an individual has a subjective expectation of privacy which society is willing to recognize as reasonable.

[49] Nevertheless, Scalia J. found, at para. 16, that thermal imaging "involves officers on a public street engaged in more than naked-eye surveillance of a home". Emphasizing the importance of Fourth Amendment protections for people's homes, he stated [at para. 18]:

> We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical "intrusion into a constitutionally protected area", . . . [citations excluded] constitutes a search -- at least where (as here) the technology in question is not in general public use.

[50] He rejected the government's argument that the thermal imaging was constitutional because it "detected only heat radiating from the external surface of the house" (at para. 6), and that there was a "fundamental difference between what it referred to as 'off-the-wall' observations and 'through-the-wall surveillance'" as follows [at para. 19]:

> But just as a thermal imager captures only heat emanating from a house, so also a powerful directional microphone picks up only sound emanating from a house -- and a satellite capable of scanning from many miles away would pick up only visible light emanating from a house. We rejected such a mechanical interpretation of the Fourth Amendment in Katz, where the eavesdropping device picked up only sound waves that reached the exterior ***[page14]*** of the phone booth. Reversing that approach would leave the homeowner at the mercy of advancing technology -- including imaging technology that could discern all human activity in the home. While the technology used in the present case was relatively crude, the rule we adopt must take account of more sophisticated systems that are already in use or in development.

[51] Scalia J. also rejected the government's arguments that thermal imaging was constitutional because it did not "detect private activities occurring in private areas", and because the court had previously upheld the constitutionality of enhanced aerial photography of an industrial complex in Dow Chemical Co. v. United States, 476 U.S. 227 (1986), by stating [at paras. 20-21]:

> Dow Chemical, however, involved enhanced aerial photography of an industrial complex, which does not share the Fourth Amendment sanctity of the home. The Fourth Amendment's protection of the home has never been tied to measurement of the quality or quantity of the information obtained. In Silverman, for example, we made clear that any physical invasion of the structure of the home, "by even a fraction of an inch" was too much [citations excluded] . . . and there is certainly no exception to the warrant requirement for the officer who barely cracks open the front door and sees nothing but the non-intimate rug on the vestibule floor. In the home, our cases show, all details are intimate details, because the entire area is held safe from prying government eyes . . . These were intimate details because they were details of the home, just as the detail of how warm -- or even how relatively warm -- Kyllo was heating his residence.
>
> Limiting the prohibition of thermal imaging to "intimate details" would not only be wrong in principle, it would be impractical in application, failing to provide a "workable accommodation between the needs of law enforcement and the interests protected by the Fourth Amendment". . . . To begin with there is no necessary connection between the sophistication of the surveillance equipment and the "intimacy" of the details it observes -- which means that one cannot say (and the police cannot be assured) that the use of the relatively crude equipment at issue here will always be lawful. The Agema Thermovision 210 might disclose, for example, at what hour each night the lady of the house takes her daily sauna and bath -- a detail that many would consider "intimate"; and a much more sophisticated system might detect nothing more intimate than the fact that someone left a closet light on. We could not, in other words, develop a rule approving only that through-the-wall surveillance which identifies objects no smaller than 36 by 36 inches, but would have to develop a jurisprudence specifying which home activities are "intimate" and which are not. And when (if ever) that jurisprudence were fully developed, no police officer would be able to know in advance whether his through-the-wall surveillance picks up intimate details -- and thus would be unable to know in advance whether it is constitutional.

[52] Writing for four dissenting judges, including Chief Justice Rehnquist, Stevens J. minimized the intrusiveness of the technology, stating [at paras. 28, 30, 31, 33 and 36]:

> There is, in my judgment, a distinction of constitutional magnitude between "through-the-wall surveillance" that gives the observer or listener direct access to information in a private area on one hand, and the thought ***[page15]*** processes used to draw inferences from information in the public domain, on the other hand. The Court has crafted a rule that purports to deal with direct observations of the inside of the home, but the case before us merely involves indirect deductions from "off-the-wall" surveillance, that is observations of the exterior of the home. Those observations were made with a fairly primitive thermal imager that gathered data exposed on the outside of the petitioner's home but did not invade any constitutionally protected interest in privacy.
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> . . . . .
>
> While the Court "take[s] the long view" and decides this case based largely on the potential of yet-to-be-developed technology that might allow "through-the-wall" surveillance . . . this case involves nothing more than off-the-wall surveillance by law enforcement officers to gather information exposed to the general public from the outside of the petitioner's home. All that the infrared camera did in this case was passively measure heat emitted from the exterior surfaces of the petitioner's home; all that those measurements showed were relative differences in emission levels, vaguely indicating that some areas of the roof and outside walls were warmer than others.
>
> . . . . .
>
> Indeed the ordinary use of the senses might enable a neighbour or passer-by to notice the heat emanating from a building, particularly if it is vented as was the case here. Additionally, any member of the public might notice that some part of a house is warmer than another part or a nearby building if, for example, rainwater evaporates or snow melts at different rates across its surfaces . . . Nor, in my view, does such observation become an unreasonable search if made from a distance with the aid of a device that merely discloses that the exterior of one house, or one area of the house, is much warmer than another. Nothing more occurred in this case.
>
> . . . . .
>
> To be sure, the homeowner has a reasonable expectation of privacy concerning what takes place within the home, and the Fourth Amendment's protection against physical invasions of the home should apply to their functional equivalent. But the equipment in this case did not penetrate the walls of the petitioner's home, and while it did pick up "details of the home" that were exposed to the public . . . it did not obtain "any information regarding the interior of the home".

. . . . .

> Since what was involved in this case was nothing more than drawing inferences from off-the-wall surveillance, rather than any through-the-wall surveillance, the officers' conduct did not amount to a search and was perfectly reasonable.

[53] Stevens J. was also of the view that no new rule was needed to decide this case, since under Fourth Amendment principles searches and seizures inside a home without a warrant are presumptively unreasonable and searches and seizures of property in plain view are presumptively reasonable. ***[page16]***

[54] Although they do not deal with FLIR technology, two Canadian appellate court decisions point out that what constitutes an "unreasonable search" may involve a more textured analysis than simply asking whether the information in issue was accessible to public view.

[55] In R. v. Kelly (1999), 169 D.L.R. (4th) 720, 132 C.C.C. (3d) 122, the New Brunswick Court of Appeal found that low level aerial surveillance of the accused's residential lot was an unreasonable search. No FLIR camera was used. The police had used a helicopter hovering about 30 feet over the accused's garden to determine that he was growing plants which appeared to be marijuana. The garden was shielded from public view by other vegetation. The police subsequently conducted a ground search of the area around the accused's house and seized marijuana plants. The issue was whether the warrantless aerial inspection was an unreasonable search.

[56] In concluding that s. 8 protects against aerial searches, the court noted [at paras. 50-52] that the requirement of a warrant would not unduly hamper law enforcement:

> As a rule, lawful occupants have an expectation of privacy in all open spaces within their residential lots that is qualitatively sufficient to invest them with s. 8 protection against unlawful aerial as well as terrestrial searches.
>
> I am convinced that the recognition of such an expectation of privacy will not unduly hamper law enforcement. It is trite that unlawful searches of private property are not essential to effective law enforcement and that the police have at their disposal a variety of lawful means to efficiently counter marijuana production on residential properties. The delays in obtaining search warrants are minimal. As well, exigent circumstances may dispense with the need for a warrant altogether . . .
>
> Mr. Kelly owned and lived on the property searched from the air. His possession and control was such that he could regulate access to the property. Mr. Kelly definitely had a subjective expectation of privacy with respect to his relatively small residential lot. The remote location of this residential lot and the density of the woods surrounding it merely emphasize the point. Bearing in mind that s. 8 must be broadly and liberally construed, I am satisfied that Mr. Kelly's subjective expectation of privacy is objectively reasonable and that it deserves constitutional protection, not only against unreasonable ground searches but against aerial searches as well.

[57] In R. v. Lauda (1999), 45 O.R. (3d) 51, 136 C.C.C. (3d) 358 (C.A.), the police received an anonymous tip that marijuana was being grown in a cornfield. A police officer went to the location to verify the tip. Because a four-foot-high steel gate barred his entry to a dirt road leading to the property and he could see no cornfield, the officer climbed over the gate and walked up a hill. As he proceeded over the crest of the hill, he saw a cornfield surrounded by a fence. Upon entering the cornfield, he found marijuana ***[page17]*** plants hidden by the corn. The next day, two other officers went to the cornfield to remove the plants. The officers did not have a warrant on either visit. The accused was charged with producing marijuana and possession for the purpose of trafficking. The Crown argued, based on the American "open fields" doctrine, that the usual rules regarding search and seizure did not apply.

[58] After a thorough discussion of the doctrine, Moldaver J.A., for the court, concluded [at p. 71 O.R., para. 16]:

> Having considered both sides of the argument, I am of the view that the open fields doctrine cannot survive s. 8 Charter scrutiny. To be specific, I am unprepared to interpret s. 8 of the Charter in a manner which would, without exception, foreclose property holders from asserting an expectation of privacy in unoccupied lands on the basis that society does not recognize the expectation as reasonable.

[59] Moldaver J.A. noted that persons in lawful possession of unoccupied lands in Canada have the right to exclude members of the public from their property, and that an expectation of privacy which society is prepared to recognize as reasonable, can exist even if the property is visible to the public.

[60] I turn then to the use of FLIR technology in this case. There can be no question that the appellant had a reasonable expectation of privacy in activities carried on within his residence. The central issue in this appeal is whether the use of FLIR technology constitutes an unreasonable intrusion into that privacy interest. In my view, it does for the following reasons.

[61] First, the FLIR technology reveals information about activities that are carried on inside the home. While the technology measures heat emanating from the outer walls of the house, the source of those emanations is located inside. Moreover, the sole reason that police photograph the heat emanations is to attempt to determine what is happening inside the house. The fact that it is necessary for the police to draw inferences from the heat emanating from the external walls in order to deduce what those internal activities are, does not change the nature of what is taking place. The use of the FLIR technology was an integral step in ascertaining what was occurring inside the appellant's home.

[62] The analysis in Evans, supra, where the Supreme Court found that a search had taken place, is helpful. Both the heat rays in this case and the scent of marijuana in Evans emanated from the house. While I accept that technically what is being scrutinized is heat from the surface of a home, it is impossible to ignore the fact that those surface emanations have a direct relationship to what is taking place inside the home.

[63] Secondly, I am satisfied that the FLIR technology discloses more information about what goes on inside a house than is ***[page18]*** detectable by normal observation or surveillance. In my view, there is an important distinction between observations that are made by the naked eye or even by the use of enhanced aids, such as binoculars, which are in common use, and observations which are the product of technology.

[64] In Wong, supra, the Supreme Court was alert to the intrusive capacity of technological surveillance and consequently cautioned [at para. 8]:

> In Duarte, this Court held that unauthorized electronic audio surveillance violates s. 8 of the Charter. It would be wrong to limit the implications of that decision to that particular technology. Rather what the Court said in Duarte must be held to embrace all existing means by which the agencies of the state can electronically intrude on the privacy of the individual, and any means which technology places at the disposal of law enforcement authorities in the future.

[65] In any event, I do not share the Crown's view that the FLIR reveals information that is in plain view and easily observable. A member of the public can walk by a house and observe the snow melting on the roof, or look at the house with binoculars, or see steam rising from the vents. Without FLIR technology, however, that person cannot know that it is hotter than other houses in the area or that one room in particular reveals a very high energy consumption. FLIR technology, in other words, goes beyond observation, disclosing information that would not otherwise be available and tracking the external reflections of what is happening internally.

[66] It is, it seems to me, overly simplistic to characterize the constitutional issue in this case as whether there is a reasonable expectation of privacy in heat emanating from a home. The surface emanations are, on their own, meaningless. But to treat them as having no relationship to what is taking place inside the home, is to ignore the stated purpose of their being photographed, that is, to attempt to determine what is happening inside that home. It would, I think, directly contradict the reasonable privacy expectations of most members of the public to permit the state, without prior judicial authorization, to use infrared aerial cameras to measure heat coming from activities inside private homes as a way of trying to figure out what is going on inside.

[67] An individual's expectation that the state will respect the privacy of information about activities in his or her home, is a manifestly reasonable one. Unlike Plant, where the information sought by the state is already known and in the hands of a third party, namely the utility company, this is information unknowable without the FLIR technology. Like the interests protected in Duarte and ***[page19]*** Wong, the measurement of heat emanations from inside a home is the measurement of inherently private activities which should not be available for state scrutiny without prior judicial authorization.

[68] The FLIR represents a search because it reveals what cannot otherwise be seen and detects activities inside the home that would be undetectable without the aid of sophisticated technology. Since

what is being technologically tracked is the heat generated by activity inside the home, albeit reflected externally, tracking information through FLIR technology is a search within the meaning of s. 8 of the Charter.

[69] Some perfectly innocent internal activities in the home can create the external emanations detected and measured by the FLIR, and many of them, such as taking a bath or using lights at unusual hours, are intensely personal. It seems to me, therefore, that before the state is permitted to use technology that has the capacity for generating information which permits public inferences to be drawn about private activities carried on in a home, it should be required to obtain judicial authorization to ensure that the intrusion is warranted.

[70] This is not to suggest that the FLIR's electronic surveillance technology cannot be used for the enforcement of marijuana offences, only that its use, except in urgent circumstances, be predicated on prior judicial authorization to protect individuals from unwarranted state intrusion on their reasonably held expectations of privacy.

[71] Having concluded that the appellant had a reasonable expectation of privacy in the heat emanating from activities inside his home, the next issue is whether the search was an unreasonable intrusion on the right to privacy. The law is clear that warrantless searches are presumptively unreasonable, absent exigent circumstances (Hunter v. Southam Inc., [1984] 2 S.C.R. 145, 11 D.L.R. (4th) 641; R. v. Collins, [1987] 1 S.C.R. 265, 33 C.C.C. (3d) 1; Evans, supra; and R. v. Grant, [1993] 3 S.C.R. 223, 84 C.C.C. (3d) 173. There were no such circumstances in this case and no other evidence sufficient to rebut the presumption of unreasonableness.

[72] Accordingly, I am satisfied that the use of the FLIR technology to detect heat emanating from the appellant's home was a breach of his rights under s. 8 of the Charter, and the search warrant obtained on the basis of that information was therefore not lawfully obtained.

Should the evidence be excluded under s. 24(2)?

[73] The remaining issue is whether the evidence obtained pursuant to the unlawful search should be excluded pursuant to s. 24(2) of the Charter, which states: ***[page20]***

> 24(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[74] The test for exclusion involves a consideration of the fairness of the trial, the seriousness of the violation, and the effect of excluding the evidence on the administration of justice: see R. v. Collins, supra.

[75] I agree with the trial judge that there is no issue of trial fairness in this case. The evidence which the appellant seeks to have excluded is real evidence and he was not conscripted into either its creation or discovery: see R. v. Stillman, [1997] 1 S.C.R. 607, 144 D.L.R. (4th) 193.

[76] In my view, as the trial judge acknowledged, the breach of the appellant's s. 8 rights must be considered a serious breach. This was state intrusion into a most protected physical zone of privacy -- the home. It can hardly be disputed that technologically enhanced forms of police surveillance expand the state's intrusive capacity and therefore create a qualitatively more significant threat to privacy than surveillance unaided by electronic devices. There is, it seems to me, a critical difference between the surveillance possible without this technology and what is possible with it.

[77] In reaching the conclusion that the breach is serious, I do not impute bad faith to the police. The law on FLIR technology in this country is embryonic, with both a Supreme Court of Canada reference in Evans, albeit fleeting and in obiter, and an appellate court in Hutchings, supra, appearing to cast no doubt on its legality. But Evans did not deal directly with its constitutionality and Hutchings, which did, was carefully crafted to limit its application to the facts of that case, namely the search of a barn, not a home.

[78] As to the suggestion that the information gleaned is limited to heat emanations, causing no more than a technical breach, I would counter that this characterization of the FLIR's capacity is overly technical. It is true that on the continuum of intrusiveness, the FLIR device is less informative than other means of electronic surveillance such as wiretapping. Nonetheless, because it provides to state agents information about activities in the home which could not otherwise be obtained without intrusion, the breach is serious.

[79] The heat emanations measured by the FLIR are not visible to the ordinary viewer and cannot be quantified without the technology. The nature of the intrusiveness is subtle but almost ***[page21]*** Orwellian in its theoretical capacity. Because the FLIR's sensor cannot penetrate walls, it is true that a clear image of what actually transpires inside the home is not made available by the FLIR device. However, it is not the clarity or precision of the image which dictates the potency of the intrusiveness: rather, it is the capacity to obtain information and draw public inferences about private activities originating inside the home based on the heat patterns they externally generate, that renders the breach serious.

[80] I turn then to the effect on the administration of justice of either admitting or excluding the marijuana evidence obtained from the search of the appellant's home. The exercise, in this case, distils into a balancing of the seriousness of the breach with the seriousness of the offence being investigated. In balancing the competing interests, I am of the view that given the seriousness of the violation compared to the seriousness of the offence of marijuana growing which inspired the unlawful search, greater disrepute to the administration of justice would flow from the admissibility than the exclusion of the evidence.

[81] I acknowledge that in 1993, the Supreme Court of Canada in Plant observed that preventing

marijuana growing was a compelling state interest. It is impossible to ignore, however, that since that decision, there has been public, judicial, and political recognition that marijuana is at the lower end of the hierarchy of harmful drugs. This means that in the speculative judicial balancing exercise inherent in determining how best to protect public confidence in the administration of justice under s. 24(2), the weight of this offence is lighter on the scales than other drug-related offences.

[82] The breach of an individual's right to privacy in his or her home, on the other hand, can only be characterized as serious. As between the right of an individual to be assured of protection from the state's unwarranted invasion of privacy in the home, and the state's right to intrude on that privacy to catch marijuana growers, I see public confidence being enhanced more by excluding, rather than admitting, the marijuana evidence in issue.

[83] The Crown did not make any submissions to suggest that the evidence relating to the weapons charges should be treated differently from the marijuana-related evidence. Without the evidence seized from the appellant's residence, the Crown has no admissible evidence to support any of the charges. I would therefore allow the appeal, set the convictions aside, and enter verdicts of acquittal.

Appeal allowed. ***[page22]***

NOTES