Date: 19980401
Docket: CC970285
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

REGINA

V.

FREDERICK AUSTIN CRESWELL

RULING
OF THE
HONOURABLE MADAM JUSTICE HUMPHRIES

Counsel for the Accused:	J.Conroy, Q.C.
Counsel for the Crown:	C.Tobias, P. Partridge
Date and Place of Hearing:	April 1, 1998 Vancouver, B.C.

[1] (Oral): At the commencement of this case, defence applied for disclosure of certain opinions given to the RCMP by their legal advisors both before the commencement of this operation, that is Eye Spy, and during the course of the operation. Defence also requested disclosure of information respecting the state of knowledge of the RCMP during the relevant time regarding certain pending amendments to legislation, which would exempt them from compliance with the laws regarding proceeds of crime and money laundering.

[2] The Crown took the position that that issue should be dealt with after the court had ruled on the question of whether the police operations in this case were illegal. I agreed with the Crown on the issue of timing and held that the disclosure motion was premature. The Crown's case is now in but not formally closed and defence has admitted that the elements of the charge of proceeds of crime have been proven. An argument with respect to the words "conceal or convert" in the context of money laundering charges remains.

[3] Defence called extensive evidence through RCMP officers in its abuse of process application and I have now ruled that the police conduct was illegal. Defence now renews its application for the legal opinions.

[4] The Crown takes the position that the opinions are covered by solicitor/client privilege which has been neither waived nor vitiated by the ruling on illegality and which is not overcome by the "innocence at stake" exemption to privilege, relying on R. v. Liepert (1997), 112 C.C.C. (3d) 385, and equating solicitor/client privilege to informer privilege. The Crown says privilege survives the right to make full answer and defence except for where innocence is at stake, and at this stage of the trial, where the elements of the offence have been made out, at least with respect to the charge of possessing proceeds of crime, the innocence of the accused is no longer in issue, relying on R. v. Mack (1988), 44 C.C.C. (3d) 513 at page 565.

[5] Defence is willing to concede for the purposes of this application that there is a solicitor/client privilege between the Department of Justice legal advisors and the minister and the commissioner, although he questions privilege at the lower levels of the Force, and as I understand his position, says some of the information may have been confidential but not necessarily privileged. He says, in any event, privilege has been waived, vitiated by the future crime exception, or is overcome by the necessity to present full answer in defence in the context of the abuse of process argument which, if successful, and notwithstanding that the elements of the offence have been made out, would result in the state being disentitled to a conviction. Defence says legal innocence as opposed to factual innocence is enough to trump the privilege.

[6] Defence says the issues to be considered on the abuse of process argument are:

1. Did the police, by illegal conduct in an investigation which resulted in a prosecution which threatens Mr. Creswell's liberty, do so otherwise than in accordance with the principles of fundamental justice;

2. Was there an abuse of process;

3. Was there entrapment?

[7] I will just pause to say here that the Crown takes the position that entrapment cannot be raised at this late stage as it was not contained in the constitutional notice and they led no evidence with respect to that issue. Defence counsel says he means entrapment not in the sense of the authorities having induced the commission of an offence but in the first sense in which it is used in R. v. Mack at page 559, that is, 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, which is part of abuse of process, says defence counsel, and which is an argument that could not have been made until I made my ruling on illegality. This is not an issue to be decided today, but I have set out the dispute as it rose during the last day of argument.

[8] The fourth issue defence says remains to be decided is: if there was an abuse of process or entrapment, should the evidence be excluded under s. 24(2) of the Charter; if not, what is the appropriate and just remedy under s. 24(1).

[9] The onus being on the defence to establish the breach, Mr. Conroy says it is wrong for the Crown to withhold evidence they may have that may be relevant. Defence says the opinions were the basis which led the police to think they could set up this operation, and the opinions are relevant whether they approve or disapprove of the police conduct.

[10] Defence says I could well determine that I have enough before me now to decide that the prosecution is an abuse of process, or that the evidence against Mr. Creswell is all conscriptive evidence pursuant to R. v. Stillman and R. v. Feeney, but if I were not prepared to do so, they should have the opinions so I can properly assess the state's conduct and the seriousness of the violation in context and in full possession of the facts.

[11] Defence also wants all available information respecting the anticipated amendments from the Narcotic Control Act which were passed after this operation and which allowed the police to possess proceeds of crime and launder money in pursuance of an investigation.

[12] Counsel for the Solicitor General filed an affidavit claiming Cabinet privilege, and I gathered during his argument that Mr. Conroy was not so much interested in all the draft legislation and memos that were covered by cabinet privilege as he was in obtaining a specific date when the RCMP were aware of the proposed exemptions and the extent of their knowledge internally at the relevant time.

[13] He was of the opinion that there was a body of internal correspondence within the RCMP that would be relevant to this issue which had not been disclosed to him. Ms. Tobias was unaware of this information and was of the view that she had provided full disclosure.

[14] This is not a solicitor/client issue and it arose at the end of argument last day and was an issue which was extensively cross-examined upon during the testimony of Sergeant Litzenberger and Inspector Bowie. As the issue appeared to be one that was somewhat of a surprise to Ms. Tobias and, as I say, not a solicitor/client issue, I directed Mr. Conroy at the close of argument to address a request to the Crown in respect of further disclosure in that area if he wished, and if he was not satisfied with the reply it would have to be dealt with at another time.

[15] At the outset, I should say I am of the view that there is solicitor/client privilege that arises as between the RCMP and its legal advisors. This is not the situation like R. v. Girouard (1982), 68 C.C.C. (2d) 261, where the relationship is one of prosecutor and investigating policemen. The circumstances in which I am asked to consider the existence of the privilege involved the relationship between representatives of a government body and its legal advisors, a relationship which has been held many times to give rise to the same privilege that arises between a lawyer and client, see Samson Indian Nation and Band v. Canada (1995), 2 Federal Court 763, a decision of the Federal Court of Appeal, Alfred Crompton Amusement Machines Ltd. v. Customs and Excise Commissioners No. 2 (1972), 2 Queen's Bench 102 Court of Appeal; Waterford and Commonwealth of Australia (1987), 71 A.L.R. 673, a decision of the High Court of Australia; Weller v. Canada, Minister of Justice et al. (1991), 46 F.T.R. 163, a decision of the Federal Court Trial Division. I have also considered the Department of Justice Act R.S.C. 1985 Chapter J(2).

[16] I also accept the importance of the privilege and its substantive nature, see Solosky v. R. (1980), 1 S.C.R. 821; Descoteaux et al and Mierzwinski and Attorney General of Quebec et al (1982), 70 C.C.C. (2d) 385, a decision of the Supreme Court of Canada.

[17] In R. v. Campbell and Shirose, a decision of the Ontario Court of Appeal in January 1997, in an application for a judicial stay for abuse of process arising out of a reverse sting operation, the trial court did not order disclosure of the legal opinions, improperly in the opinion of the court of appeal, who proceeded to decide the abuse of process issue on the assumption that either the legal advisors told the police not to engage in the conduct and they did anyway, or the legal advisors told them they could engage in the conduct and thus were part of the illegal conduct themselves.

[18] It is tempting to proceed on those assumptions here, thus

avoiding the necessity of dealing with disclosure, as either assumption is a "best case scenario" for the defence, especially since the officers were mainly relying on their own interpretation of the cases and the law in this instance before me.

[19] However, the assumption method was chosen by the Court of Appeal because it was far more expedient than ordering disclosure and sending the matter back for another trial. It is not a substitute for disclosure if such disclosure is warranted.

[20] Upon a review of the extensive cross-examinations of Sergeant Litzenberger and former Inspector Bowie, who both appeared to me to offer frank and candid explanations of their thoughts and decision-making processes throughout the setting up of this operation, there appears to have been little in the way of legal opinions and advice provided to the RCMP for this specific operation. Certainly, there was nothing specific sought before Operation Eye Spy itself was set up. A similar technique had been used in Montreal and Sergeant Litzenberger, who devised this operational plan, assumed all the legal issues had been cleared at that time.

[21] Generally, Mr. Bowie appears to have reached his own conclusion that the operation was feasible after weighing the seriousness of the problem against the extent and type of illegality in which the police might be participating. He hoped that the courts would affirm and provide guidance for the use of such techniques in bona fide investigations. He was aware of an opinion from Don Christie, former Associate Deputy Attorney General with the Department of Justice which, while very general, confirmed his own belief, he said.

[22] As well, there were two opinions which had been provided for a previous operation, one by Mr. Courteau and one by Mr. Vannesse, to which Mr. Bowie had reference. He also became aware of legal advice regarding reverse stings with some reference to storefront money laundering that had been given by the Deputy Minister of Justice to the Commissioner of the RCMP in 1993 or 1994, although it is not clear from the evidence when this advice became known to him, or the extent to which it was relied on by him. He did testify at the preliminary hearing, however, that issues about the legality of the operation were discussed personally several times with the Commissioner.

[23] Mr. Bowie had discussions with Mr. MacFarlane, Associate Deputy Minister, and Mr. Dambrot, head of National Drug Strategy, while he was in Ottawa, that is prior to November of 1995, when he moved to Vancouver to become head of the Proceeds of Crime Unit there.

[24] Inspector Bowie and Sergeant Litzenberger both relied, as well, on R. v. Lore, a decision from Quebec dated March 8th,

1991, in which a reverse sting was held not to be entrapment and not to warrant a stay for abuse of process. During the course of Eye Spy, the Alberta Court of Queen's Bench decided in R. v. Matthiessen on June 30th, 1995 that the reverse sting operation in which the police laundered money was illegal, but the police conduct did not warrant a stay of proceedings. Inspector Bowie discussed the ramifications of Matthiessen with in-house legal counsel.

[25] In view of these circumstances, I do not consider this a situation where any privilege would be automatically vitiated because of the future crime exception, which provides that where advice is sought f or the purpose of facilitating a crime, privilege does not attach. The facts of this case do not lend themselves to such an analysis because of the lack of advice sought for this project, or the lack of advice dealing specifically with this type of operation.

[26] This is not a situation like R. v. Campbell and Shirose where the relevant officer sought advice from a lawyer throughout the planning stages. In fact, I have no information as to the circumstances under which the relevant written opinions here were generated in the case before me, so I cannot say the officers and their legal advisors were discussing potential criminal behaviour whether they knew it or not, which is one of the bases upon which the court considered disclosure in Campbell and Shirose.

[27] So, this leaves waiver and full answer in defence as possible grounds on which the privilege might be set aside.

[28] Waiver: defence argues that the police have put the content of their legal advice in issue by relying on it, at least partially to support what has now been held to be illegal conduct on their part, and counsel has referred to Rogers et al v. Bank of Montreal (1985), 4 W.W.R. 508, a decision of the B.C. Court of Appeal. As well, he says, the officers expect confidentiality for some time in this context, but once the operation is over the purpose of confidentiality is gone.

[29] Mr. Partridge for the Solicitor General argues that the principle emerging from civil cases where legal advice is pleaded as a defence, thus waiving the privilege, cannot apply to this situation. Here, the Crown has not put the advice in issue. It has proven its case, at least with respect to possession of proceeds of crime, as defence has admitted, and the issue of legal advice has only arisen in response to the defence argument of abuse of process.

[30] There is nothing before me at this point to indicate the Crown intends to defend the abuse of process attack on the basis that the police were told they could act as they did. However, members of the RCMP, particularly Mr. Bowie, have said in their testimony that they relied on the opinions, at least to the

extent that they confirmed what they had already gathered from the cases themselves.

[31] There might well be an argument that defence cannot force the Crown to waive privilege simply by raising the issue of whether any legal advice was obtained for an operation and having the police answer that there was. However, the situation here goes beyond that. Where there has been a ruling, as there has here, that the police conduct was illegal, there is an issue which must be dealt with as to whether the conduct is such as to bring the administration of justice into disrepute or is otherwise an abuse of process.

[32] The reasons for this conduct must be examined in the context of all the surrounding circumstances, and one of those circumstances and one of the reasons the police have given for believing they could set up this operation is that they were confident both on their own research and on the basis of legal opinions that they could do so. The police are entitled to raise this consideration as an indication of their good faith and careful planning. It is relevant to the issues I must decide in this application. However, once it has been raised as having been relied on and, in fact, as confirming their views, the privilege has, in my view, been waived and defence is entitled to disclosure of those opinions.

[33] By relying on those opinions as at least a partial reason for having embarked on this operation, the RCMP have, in my view, waived the privilege in respect of the three opinions which were considered by Inspector Bowie, the opinion given by John Tait to the RCMP Commissioner in 1993 or 1994 which was known to the Commissioner with whom Mr. Bowie discussed this operation, and the oral discussions that occurred during the operation of Eye Spy insofar as they were recorded in any fashion that can be the subject of accurate disclosure at this late date, and insofar as they relate to aspects of the case which have been ruled to be illegal.

[34] Mr. Partridge suggested that the privilege is the government's and is not Inspector Bowie's to waive and this seems to be a distinction without a difference in this context as Inspector Bowie is the one who relied on the advice and approved the operational plan. He had access to the advice because of his official capacity and he acted within that capacity. Unless the government takes the position that he was off on a frolic of his own, which they do not, his waiver is, in my view, a government waiver.

[35] So, in view of my decision based on waiver I do not intend to discuss in detail the issue of full answer in defence and will not deal with the interesting question of whether there is a difference between informer privilege and solicitor/client privilege in this context, and whether "innocence at stake" has

the same force to overcome a privilege at the stage where the offence has been proven and the accused raises an abuse of process argument; that is where the innocence is not "moral innocence", as referred to in R. v. Seaboyer, and where the evidence is not necessary to demonstrate the accused's innocence in the sense of the discussion in Liepert supra.

[36] The Ontario Court of Appeal in Campbell and Shirose decided without analysis that legal opinions should have been produced based on the basis of full answer and defence, although they also had considered, as I mentioned earlier, the future crime exception, saying that the entire jeopardy of the appellants remained an open issue until the stay application was dealt with and the opinions were relevant to the dimensions of the illegal plan that was to be carried forth.

[37] The application for disclosure is predicated on a finding of illegality and my decision on waiver is also predicated on there having been a finding of illegality in the operation. The basis of the decision of the Ontario Court of Appeal, that is a finding of illegality, is the same basis upon which I have dealt with waiver. So, in practical terms, I cannot see that taking that approach would make any difference to my decision and the issue is to be fully dealt with in the Supreme Court of Canada in a couple of months, I understand.

[38] In the meantime, if necessary, I would follow the Ontario Court of Appeal in Campbell and Shirose on that issue and not embark on my own analysis in view of their decision and the fact that it is to be dealt with in the Supreme Court of Canada.

[39] Just to tie up one other matter with respect to video surveillance, I was not satisfied the police had acted illegally in the camera surveillance inside the store. I realize there were cameras outside the premises but heard no evidence of how they related, if at all, to Mr. Creswell that I can recall. But, in any event, I left the issue of the significance, if any, of the extent of surveillance to be argued generally in the abuse of process argument.

[40] So, as I made no finding of illegality on that issue, I cannot see there is any reason to disclose legal advice if there was any that is contained in the documents that Mr. Partridge has put together. I understand that there is a book of the relevant documents and notes of the conversations, but they may contain portions which are still covered by solicitor/client privilege or which are covered by Cabinet privilege.

[41] So, before pronouncing a formal order, other than in the general terms I have set out above, we will now have to discuss whether there are any concerns with respect to the

documents in that book.

"Madam Justice Humphries"