



2007 CarswellSask 354

R. v. Abrey

Her Majesty the Queen, Appellant and Colin Abrey, Respondent

Saskatchewan Court of Queen's Bench

D.P. Ball J.

Judgment: June 20, 2007

Docket: Regina Q.B.G. 1706/06

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Counsel: Tammy E. Pryzyk, for Appellant

Ronald **Piche**, for RespondentSubject: **Criminal**; Constitutional**Criminal** law --- Trial procedure -- **Costs** -- Miscellaneous

Accused was charged with impaired driving and operating motor vehicle while over legal limit -- Accused's counsel requested and received disclosure of evidence including copies of investigating officer's notes -- Accused's counsel complained to Crown that notes were illegible -- Crown did not respond to counsel's repeated requests for typed notes -- On day of scheduled trial, Crown informed accused that officer had accidentally failed to disclose four pages of notes -- Trial judge adjourned trial and ordered Crown to pay accused **costs** in amount of \$5,000 for unnecessary delay caused by poor disclosure -- Crown brought appeal from **costs** award -- Appeal dismissed -- Award of **costs** against Crown was appropriate in circumstances -- Crown offered no justification for what was clear and egregious breach of disclosure obligations -- Order for adjournment with payment by Crown of **costs** thrown away was predictable and in keeping with court's authority to control its own process -- Accused was not required to give notice of application for **costs** on date of trial -- Accused could not be expected to know that Crown's disclosure would be incomplete prior to trial date -- Quantum of award was reasonable enough to avoid interference by appellant court.

Cases considered by D.P. Ball J.:

R. v. Bidyk (2003), 2003 SKPC 124, 2003 CarswellSask 575, 236 Sask. R. 230 (Sask. Prov. Ct.) -- referred to

R. v. Henkel (2003), 102 C.R.R. (2d) 333, 13 Alta. L.R. (4th) 54, 2003 ABCA 23, 2003 CarswellAlta

62, 172 C.C.C. (3d) 387, 320 A.R. 206, 288 W.A.C. 206, [2003] 5 W.W.R. 63 (Alta. C.A.) -- referred to

R. v. Kelln (2003), 2003 CarswellSask 541, 236 Sask. R. 167, 2003 SKQB 348, 110 C.R.R. (2d) 14 (Sask. Q.B.) -- followed

R. v. Kimmie (2006), 2006 SKCA 87, 2006 CarswellSask 546, 285 Sask. R. 186, 378 W.A.C. 186, 212 C.C.C. (3d) 127 (Sask. C.A.) -- followed

R. v. Leduc (2003), 18 C.R. (6th) 167, 108 C.R.R. (2d) 337, 174 O.A.C. 242, 176 C.C.C. (3d) 321, 2003 CarswellOnt 2926, 66 O.R. (3d) 1 (Ont. C.A.) -- considered

R. v. McGillivray (1990), 56 C.C.C. (3d) 304, 107 N.B.R. (2d) 361, 267 A.P.R. 361, 1990 CarswellNB 390 (N.B. C.A.) -- considered

R. v. O'Connor (1995), [1996] 2 W.W.R. 153, 1995 CarswellBC 1098, 1995 CarswellBC 1151, [1995] 4 S.C.R. 411, 44 C.R. (4th) 1, 103 C.C.C. (3d) 1, 130 D.L.R. (4th) 235, 191 N.R. 1, 68 B.C.A.C. 1, 112 W.A.C. 1, 33 C.R.R. (2d) 1 (S.C.C.) -- considered

R. v. Stinchcombe (1991), 18 C.R.R. (2d) 210, 68 C.C.C. (3d) 1, 8 W.A.C. 161, 1991 CarswellAlta 559, 1991 CarswellAlta 192, [1992] 1 W.W.R. 97, [1991] 3 S.C.R. 326, 130 N.R. 277, 83 Alta. L.R. (2d) 193, 120 A.R. 161, 8 C.R. (4th) 277 (S.C.C.) -- followed

Statutes considered:

Canadian **Charter** of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally -- referred to

s. 7 -- referred to

s. 24 -- referred to

s. 24(1) -- considered

Constitutional Questions Act, R.S.S. 1978, c. C-29

Generally -- referred to

s. 8 -- considered

s. 8(1)(b) "remedy" -- considered

s. 8(2) -- considered

s. 8(4) -- considered

s. 8(5) -- considered

Criminal Code, R.S.C. 1985, c. C-46

s. 253(a) -- referred to

s. 253(b) -- referred to

s. 785 "order" -- referred to

s. 830 -- considered

s. 830(1) -- pursuant to

APPEAL by Crown from **costs** award.

D.P. Ball J.:

1 The Attorney General appeals from an order of the Provincial Court requiring the Crown to pay **costs** of \$5,000.00 pursuant to s. 24 of the *Canadian Charter of Rights and Freedoms*, (the "**Charter**").

Facts

2 In March of 2006 the respondent was charged with impaired driving and operating a motor vehicle while over .08 contrary to s. 253(a) and (b) of the *Criminal Code*. He retained counsel in Saskatoon who, by letter dated April 18, 2006, requested disclosure of evidence including copies of the investigating officer's notes. Photocopies of handwritten notes from the officer's notebook were provided. In May of 2006 the respondent's trial was scheduled for September 26, 2006.

3 On September 6, 2006, defence counsel advised the Crown prosecutor that he had found it impossible to read the handwritten notes of the investigating officer. He asked that legible notes be provided. The prosecutor did not reply. On September 20, 2006, defence counsel again wrote to the Crown prosecutor stating in part: "I still have not received notes from Const. Etienne that I can read. I would appreciate receiving a typewritten copy before the end of the week in preparation for trial." In addition, he referred the prosecutor to *R. v. Bidyk*, 2003 SKPC 124, 236 Sask. R. 230 (Sask. Prov. Ct.) in which Whelan P.C.J. ordered the Crown to provide typed copies of an investigating officer's illegible notes. Again, the prosecutor did not reply.

4 On the day of the scheduled trial the prosecutor informed the defence that the investigating officer had forgotten to disclose four pages of his handwritten notes. In addition, she took the position that the Crown was not required to provide the defence with legible copies of any of the officer's notes.

5 When court convened the following exchange occurred between the trial judge and the Crown prosecutor:

THE COURT: Now, Ms. Calvert, with respect to the illegibility of the notes, the Crown I gather has taken the position as a matter of policy, they won't have all of the officer's notes typed and sent as part of a disclosure package, which I understand. Is there a policy that applies where the defence have indicated that they're unable to read the notes and there is -- in the Crown -- individual Crown's view, some merit to that? Is there a Crown policy that applies then?

MS. CALVERT: All I can advise, Your Honour, is that I have looked into this issue with the Crown's office and have been advised that under these particular circumstances that the Crown would not be providing officer notes.

THE COURT: That they, what?

MS. CALVERT: Would not be providing officer notes.

THE COURT: In a typed form.

MS. CALVERT: That's right.

THE COURT: Now, I haven't asked you yet, what's your position with respect to the application for a stay? Are you asking for an adjournment for the notice, proper notice to be given and an opportunity to prepare argument?

MS. CALVERT: Yes, Your Honour, I would be.

THE COURT: Let me tell you where I am right now and you can tell me where you would like us to go from there, all right.

First of all, clearly the Crown has been responsible for this morning's appearance being wasted. It is absolutely crucial that all officers' notes be disclosed to the defence. They were not disclosed and without them, the defence is clearly entitled to an adjournment. Therefore, in my view, the defence is also clearly entitled to be successful in the application for **costs** and I am prepared to -- did you want to address the issue of **costs**, in the amount, I mean?

MS. CALVERT: I don't have any submissions on that, Your Honour.

THE COURT: It's been presented to me that that is the amount that has been wasted. I see no reason to order a lesser amount, so I am prepared to grant that and I'll make an order under s. 24(1) of the *Charter* for payment by the Crown to Mr. Piche in the amount of \$5,000, and I guess that would -- does it have -- do I have to say in trust for your client?

6 The trial judge, having determined that the investigating officer's handwritten notes were not legible, ordered the Crown to provide the defence with an accurate typewritten transcription of the notes and then adjourned the trial so that the defence could give proper notice of an application for a stay of proceedings pursuant to *The Constitutional Questions Act*, R.S.S. 1978, c. C-29.

Issues

7 The parties raise the following issues:

1. Can the award of **costs** be appealed by the Crown at this juncture?
2. Was the respondent required to give notice of an application for **costs** pursuant to s. 8 of The Constitutional Questions Act?
3. Was the award of **costs** against the Crown appropriate in the circumstances?
4. Was the amount of the cost award justified?

Analysis

1. Can the award of costs be appealed by the Crown at this juncture?

8 The Crown has appealed the award of **costs** pursuant to s. 830 of the *Criminal Code*, R.S.C. 1985, c. C-46, which states:

830(1) A party to proceedings to which this Part applies or the Attorney General may appeal against a conviction, judgment, verdict of acquittal or verdict of not criminally responsible on account of mental disorder or of unfit to stand trial or other final order or determination of a summary conviction court on the ground that

(a) it is erroneous in point of law;

(b) it is in excess of jurisdiction; or

(c) it constitutes a refusal or failure to exercise jurisdiction.

...

9 The respondent submits that the Crown is not entitled to appeal the award of **costs** pursuant to s. 830(1) of the *Criminal Code* because it is not a "final order or determination of a summary conviction court". The respondent relies on the settled proposition that **criminal** proceedings should not be fragmented by appeals of interlocutory determinations.

10 For the purpose of an appeal under s. 830 the term "order" is defined by s. 785(1) of the *Code*:

"order" means any order, including an order for the payment of money;

11 In *R. v. Kelln*, 2003 SKQB 348, 236 Sask. R. 167 (Sask. Q.B.) the Crown appealed an award of **costs** made because it had failed to provide the investigating officer's notes in breach of s. 7 of the *Charter*. Kovach J. held that the order appealed from constituted a determination of a summary conviction court and that the appeal was properly before the court.

12 In *R. v. Kimmie*, 2006 SKCA 87, 285 Sask. R. 186 (Sask. C.A.) the Saskatchewan Court of Appeal decided that the appointment of counsel by a Provincial Court was a final order or determination which could properly be appealed. Lane J.A. observed that counsel appointed by the court needed to have certainty that his fees would be paid. This case is analogous to the extent that the accused is entitled to know with some certainty whether the **costs** will be paid by the Crown and available to him in his defence. As in *Kimmie*, the order to pay **costs** in this case was not dependent upon the court's assessment of the evidence or the outcome of the trial. In that sense, it was a "final" determination.

13 For the above reasons I find that the order for payment of **costs** was a "final order or determination" that is appealable pursuant to s. 830 of the *Code*.

2. Was the respondent required to give notice of an application for costs pursuant to s. 8 of The Constitutional Questions Act?

14 Section 24 of the *Charter* provides:

24(1) Anyone whose rights or freedoms, as guaranteed by this **Charter**, have been infringed or

denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(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.

15 Section 8 of *The Constitutional Questions Act*, provides:

8(1) In this section:

...

(b) "**remedy**" means a remedy provided pursuant to section 24 of the *Canadian Charter of Rights and Freedoms* but does not include a remedy of exclusion of evidence or a remedy consequential on exclusion of evidence.

(2) When, in a court of Saskatchewan:

(a) the constitutional validity or constitutional applicability of any law is brought into question;
or

(b) an application is made to obtain a remedy;

the court shall not adjudge the law to be invalid or inapplicable nor shall it grant the remedy until after notice is served on the Attorney General of Canada and on the Attorney General of Saskatchewan in accordance with this section.

...

(4) Subject to subsection (5), a notice mentioned in subsection (2) or (3) is required to be served at least 14 days before the day of argument.

(5) The court may on, an *ex parte* application made for the purpose, order an abridgement of the time for service of a notice mentioned in subsection (2) or (3).

...

16 The Crown submits that the award of **costs** should not have been made under s. 24(1) of the **Charter** in the absence of the formal notices required by s. 8(2) of *The Constitutional Questions Act*.

17 Section 8(2) of *The Constitutional Questions Act* requires 14 days prior notice to be given to the Attorney General of Canada and the Attorney General of Saskatchewan where the constitutional validity or constitutional applicability of any law is brought into question or an application is made to obtain a remedy under s. 24 of the **Charter**. Section 8(1)(b) eliminates the requirement of notice where the remedy sought is the exclusion of evidence, even though that remedy may influence the determination of the guilt or innocence of the accused.

18 Remedies for **Charter** infringement due to non-disclosure are typically a disclosure order and an adjourn-

ment to permit the defence to prepare, to subpoena additional witnesses, or to recall witnesses for examination or cross-examination. In all such cases notice under s. 8(2) of *The Constitutional Questions Act* cannot be given because the breach and the need for a remedy is not foreseeable. In all of them the remedies are necessary and consistent with the court's need to control its own process. In cases where the constitutional validity or application of legislation is in dispute, where the accused's ability to make full answer and defence has been prejudiced, or where the integrity of the justice system is irremediable, an appropriate and just remedy will be a stay of proceedings or the declaration of a mistrial. In those cases, remedy may affect the outcome of the proceedings and notice of the proposed remedy is clearly required.

19 As a general rule, **criminal** courts do not order **costs** to be paid by the Crown. In *R. v. Leduc* (2003), 18 C.R. (6th) 167, 176 C.C.C. (3d) 321 (Ont. C.A.) it was held that although **costs** may be awarded under s. 24(1) of the *Charter* they should be restricted to cases where there are "circumstances of a marked and unacceptable departure from the reasonable standards expected of the prosecution".

20 In *R. v. McGillivray* (1990), 56 C.C.C. (3d) 304 (N.B. C.A.) the New Brunswick Court of Appeal held that if the remedy sought under s. 24(1) of the *Charter* is for **costs** alone, a court of competent jurisdiction may summarily hear, determine and award such a remedy pursuant to an informal oral application at the close of the case.

21 Although issues of **costs** are ordinarily addressed at the conclusion of a trial, in this case the amount awarded did not depend on the facts to be elicited at trial or on the ultimate determination of guilt or innocence. It was, therefore, unnecessary for the trial judge to wait until the conclusion of the trial to set the **costs** to be paid.

22 In *McGillivray, supra*, Lyon J.A. stated at p. 308:

Costs are intended to be compensatory and not punitive. Although discretionary, they abide the event; that is, they are awarded to the successful party and, if not in a nominal amount, must commonly take the form of a sum equivalent to out of pocket expenses, or to a sum on a party-and-party basis derived from a fixed scale, or are calculated on a solicitor-and-client basis. Except as in the case of a nominal sum, all other cases are capable of substantiation in money spent in payment of disbursements or for fees. They are, in effect, the equivalent of special damages.

...

If the remedy sought in a **criminal** law case are **costs** alone, the judge of the Court of Queen's Bench undoubtedly would have jurisdiction to hear and determine any infringement or denial of one's rights or freedoms and to award such remedy as is considered appropriate and just in the circumstances.

23 Prior to the commencement of the trial legible transcriptions of the investigating officer's notes had twice been requested in writing by the defence. It would not have been possible for the defence to anticipate that at the last moment the prosecutor would inform both the defence and the court that the issue had been "looked into" and that the Crown would not be providing the officer's notes in a decipherable form. Accordingly, it would not have been possible for the defence to provide 14 days' notice of its inevitable request for an adjournment and for an award of **costs** thrown away.

24 The remedy of **costs** did not relate to the constitutional validity or applicability of legislation. It did not entail any order, such as an order for the exclusion of evidence, which might affect the outcome of the trial. The trial court's order for an adjournment with payment by the Crown of **costs** thrown away was predictable and in

keeping with the courts authority to control its own process. In my view, notice under s. 8 of *The Constitutional Questions Act* was not required.

25 However, if I am incorrect in that view, then counsel's letters to the Crown prosecutor requesting meaningful disclosure constituted *de facto* notice. The letter of September 6, 2007 satisfied the notice requirement of s. 8(4) of *The Constitutional Questions Act* which, in any event, was subject to an abridgment of the notice period under s. 8(5) of that Act.

3. Was the award of costs against the Crown appropriate in the circumstances?

26 In a written submission the Crown argues that:

- 1) the trial judge failed to review the newly disclosed notes in order to determine if the Crown had engaged in flagrant and unjustified conduct.
- 2) the trial judge did not determine whether the newly disclosed notes contained any substantially new information or that late disclosure had compromised the accused's right to make full answer in defence.
- 3) the trial judge failed to determine that there had been prosecutorial and/or police misconduct. More specifically, the trial judge failed to recognize that the prosecutor had no way of knowing that the investigating officer had forgotten to disclose all of his notes.

27 All of these arguments are predicated on the assumption that the trial judge awarded **costs** against the Crown and adjourned the proceedings because of the investigating officer's inadvertent failure to disclose the four late discovered pages of notes. That clearly was not the case. The adjournment was necessitated by the Crown's considered refusal to provide legible copies of the police officer's notes, which were reviewed by the trial judge and found to be undecipherable. The Crown prosecutor was invited to address the question of **costs**. She did not suggest that she needed time to consider either the Crown's liability for **costs**, or the quantum of **costs** to be paid. Instead, she simply informed the court that she had no representations to make.

28 In *R. v. O'Connor*, [1995] 4 S.C.R. 411 (S.C.C.) the Supreme Court of Canada stated that an appropriate and just remedy for *Charter* infringement based on non-disclosure should reflect whether the Crown has violated fundamental principles of decency and fair play and therefore caused prejudice to the integrity of the judicial system. While the Crown's conduct and intention are very relevant, *mala fides* is not a prerequisite to a finding of flagrant and intentional misconduct.

29 The reasonable standard expected of the prosecution is full disclosure of all relevant information in its possession, as set forth in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 (S.C.C.). By intentionally refusing to provide the defence with legible copies of the investigating officer's notes the Crown demonstrated a marked and unacceptable departure from the reasonable standards expected of the prosecution. The prosecutor offered no justification for what was a clear and egregious breach of the Crown's disclosure obligations. I find that an award of **costs** in those circumstances was appropriate.

4. Was the amount of the cost award justified?

30 The Crown argues that its conduct did not justify a cost award of \$5,000. This appears to be based on the premise that the award had a punitive component, or that it amounted to something more than compensation for actual **costs** thrown away. However, that was not the intention of the trial judge who asked counsel for the re-

spondent to specify the **costs** incurred as a result of the adjournment arising from the Crown's breach of its disclosure obligations. Counsel, who had travelled from Saskatoon to Regina for the trial, responded as follows (Transcript, pp. 19-20):

MR. PICHE: Well, then I won't leave the Court in that position, Your Honour, because we are dealing by way of representations on this and the morning -- my morning in court here, my client's bill will be \$5,000, and that includes GST and that includes PST, that includes the mileage as well. It's a lump sum figure, win, loss, withdraw[sic], whether I have to leave my office or not, that's what the fee is.

THE COURT: Even if there's just an adjournment?

MR. PICHE: Absolutely. Your Honour, I could have been elsewhere earning the same income and that's from my point of view, of course, that doesn't affect the accused on that, filling that court time. I'm not going to get any other work done, if you will, going back at this hour. I could go back to the office, but there's not going to be trial work to[sic] done. So I hope that clarifies that -- this -- the particulars of the fee and you're right, you're absolutely right. Had I done it over again with Judge Green I would have filed -- or I would have represented what I just did on that.

31 Although there is no hard and fast rule for determining **costs** to be awarded as a consequence of a *Charter* breach, as with any other remedy the primary concern must be to achieve the values expressed in the *Charter*. Each case must be decided on its own unique facts. In this case the accused chose to retain defence counsel in Saskatoon and a significant portion of the **costs** incurred appear to have arisen because of the need to travel to Regina for the trial. While that would not normally be approved and although a process for verifying actual **costs** incurred should be followed, I decline to interfere with the court's discretion as to the quantum of the award.

Conclusion

32 For the above reasons, the appeal is dismissed. As well, I accept that the effectiveness of the trial judge's award of **costs** would be nullified if I did not award the respondent his **costs** of this appeal. This is in keeping with the proposition that where an individual has established a breach of his or her *Charter* rights which results in an award of **costs** against the Crown, he or she is also entitled to **costs** of an unsuccessful Crown appeal of that award. See *R. v. Henkel*, 2003 ABCA 23, [2003] 5 W.W.R. 63 (Alta. C.A.); *R. v. Kelln*, *supra*.

33 In summary, the appeal is dismissed with **costs** to the respondent.

Appeal dismissed.

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