

CANADA / JUDGMENT

R. v. Badwal

2017 BCSC 1009

COURT

Supreme Court of British Columbia

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2017 BCSC 1009 R. v. Badwal

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Badwal,

2017 BCSC 1009

Date: 20170615

Docket: X79456

Registry: New Westminster

Between:

Regina

v.

Joga Singh Badwal

Restriction on Publication: Pursuant to ss. 486.5(1) and 486.5(9) C.C.C.

Before: The Honourable Madam Justice Duncan

Oral Reasons for Judgment

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Place and Dates of Trial:

New Westminster, B.C.

March 6, 7, 9, 10, 2017

March 13-16, 20 & 23, 2017

Place and Date of Judgment:

Vancouver, B.C.

June 15, 2017

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INTRODUCTION

[1] Joga Singh Badwal is charged with two offences under the Immigration and Refugee Protection Act, S.C., 2001 c. 27 (the IRPA):

Count 1: Joga Singh BADWAL, between the 1st day of May, 2012 and the 15th of October, 2012, at or near the Township of Langley, in the Province of British Columbia, did knowingly organize, induce, aid or abet the coming into Canada of one or more persons, to wit: 10 persons, who were not in possession of a visa, passport or other document required by the Immigration and Refugee Protection Act, thereby committing an offence contrary to section 117(1) of the Immigration and Refugee Protection Act;

Count 2: Joga Singh BADWAL, between the 1st day of May, 2012 and the 15th day of October, 2012, at or near the Township of Langley, in the Province of British Columbia, did knowingly induce, aid or abet, or attempt to induce, aid or abet 10 persons to contravene section 124(1)(a) of the Immigration and Refugee Protection Act, to wit: by failing to appear without delay before an officer at a port of entry for an examination, as required under section 18 of the Act and section 27 of the Immigration and Refugee Protection Regulations, thereby committing an offence contrary to section 131 of the Act.

[2] Count 1 is the offence commonly referred to as human smuggling.

[3] The 10 individuals referred to in both counts were undercover RCMP officers. There is a ban on publication of their names or anything that could identify them, pursuant to ss. 486.5(1) and 486.5(9) of the Criminal Code. There is also a ban on publication of the name of an eleventh undercover officer, Sgt. D.

[4] Mr. Badwal was investigated by the Royal Canadian Mounted Police between May 2011 and October 2012. The RCMP, through its Border Integrity Unit, received information that he was involved in smuggling people across the border between Canada and the United States. The RCMP had Mr. Badwal under surveillance at different times in 2011 and 2012, but he was not observed to be involved in any illegal activity.

- [5] In May 2012 Sgt. D, acting in an undercover capacity, contacted Mr. Badwal by telephone. He spoke in Punjabi and said he was looking for help to bring people into Canada from the U.S. Mr. Badwal said he could help. The two men spoke on the phone and then met in person at Mr. Badwal's home, which also served as a temple, at 264th Street and 3rd Avenue in Aldergrove.
- [6] On July 17, September 11 and October 11, 2012 undercover members of the RCMP travelled into the U.S. to be "smuggled" back into Canada. Sgt. D paid Mr. Badwal varying sums of money to have them covertly transported to an area on the American side of the border where they crossed on foot to the Canadian side. From there the undercover officers were picked up along Zero Avenue by drivers arranged by Mr. Badwal and dropped off at locations several miles north of the border.
- [7] On the second occasion, Mr. Badwal was unable to arrange for a driver to pick up the group in Washington so Sgt. D offered to carry out that task. Before Sgt. D crossed into Washington to pick up his friends, Mr. Badwal drove with him along Zero Avenue, parallel to the U.S. border, and explained where to cross and how to avoid attracting the attention of surveillance cameras. Mr. Badwal subsequently gave Sgt. D a substantial discount on transport fees in recognition of his work on the U.S. side to the border.
- [8] On the third occasion, the driver who picked up the group of undercover officers on Zero Avenue and took them to the drop-off point thought he recognized Sgt. D. Sgt. D realized he had dealt with the driver in different circumstances in his capacity as a police officer and a decision was made to terminate the operation and arrest Mr. Badwal.
- [9] Given that the individuals Mr. Badwal is alleged to have smuggled into the country were undercover officers with pre-clearance to enter Canada rather than undocumented migrants, the Crown's position is that he is guilty of an attempt to commit the offences.
- [10] After Mr. Badwal was charged in the fall of 2012, a group of persons charged with human smuggling challenged the constitutionality of s. 117 of the IRPA. That litigation delayed the start of this trial.
- [11] The constitutional challenge was resolved in *R. v. Appulonappa*, 2015 SCC 59. The Supreme Court of Canada found the reach of s. 117 was unconstitutionally broad and read the provision down to exclude the possibility of prosecuting people who were assisting family members or providing humanitarian or mutual aid to undocumented migrants seeking to enter Canada.
- [12] The version of s. 117 that existed at the time Mr. Badwal was charged has been amended.

THE EVIDENCE

Corporal Bae and the Start of the Investigation

- [13] Cpl. Kyong Bae is a member of the RCMP who worked in the Border Integrity Unit, which focussed on human smuggling and trafficking. He exchanged information with U.S. Homeland Security about Mr. Badwal.
- [14] In September 2011 Cpl. Bae set up surveillance near Mr. Badwal's residence, which also served as a temple, on 264th Street in Aldergrove. The surveillance captured Mr. Badwal doing such mundane things as going to a grocery store and other businesses in Aldergrove and Langley.
- [15] One day in September Cpl. Bae observed Mr. Badwal go to a McDonald's at 264th and Fraser Highway. The restaurant is located a few minutes north of the Canada-U.S. border and slightly north of Highway 1. It figured prominently in the later stages of the investigation.
- [16] Surveillance proved fruitless, so a decision was made to conduct an undercover operation. Cpl. Bae was in contact with the Canadian Border Services Agency and Homeland Security for pre-clearance for his undercover operators to cross into Canada posing as "illegal aliens" in the course of the undercover scenarios. He also advised those agencies when the undercover operations began and ended because they occurred in the jurisdiction of border agencies.

Sgt. Barlow - Cover Officer, Surveillance and Arresting Officer

- [17] In July 2012, Sgt. Barlow (at that time a corporal) assisted as a cover officer to prepare two undercover officers for the first scenario. The role of a cover officer is to manage the undercover operators during a scenario, ensure their safety and work with investigators to clarify the objectives to be achieved by the operation. He provided the undercover officers with a cell phone with an American number. It was a "pay as you go" phone with the number 360-[redacted]. Sgt. Barlow provided that number to Sgt. D on July 12, 2012 and provided the phone itself to Cpl. P before the first scenario on July 17.
- [18] Sgt. Barlow provided cash to Sgt. D to fund the undercover smuggling operations as well as a recording device. On July 13, 2012 he gave \$3,000 USD to Sgt. D. On September 3, 2012, he gave \$5,000 to Sgt. D but could not recall if it was US or Canadian currency.
- [19] On September 11, 2012, Sgt. Barlow acted as the cover officer for the scenario. He met with the undercover operators before they proceeded into the United States. They met with Homeland Security at a strip mall parking lot in Linden, Washington to review the objectives of the operation and brief the American authorities.

- [20] On October 11, 2012, Sgt. Barlow provided \$13,000 in Canadian cash to Sgt. D. On the same day he was the cover officer for the operation on the Canadian side of the border. At about 8:30 that evening Sgt. Barlow learned that the driver who picked the undercover officers up on the Canadian side had "made" Sgt. D as a police officer and the arrest of Mr. Badwal would be effected that night. Sgt. Barlow directed the surveillance team to patrol the area and arrest Mr. Badwal if they found him.

Sgt. D, the Primary Undercover Officer

- [21] Sgt. D was the primary undercover officer in the investigation of Mr. Badwal. He is fluent in the Punjabi language and has utilized it in previous undercover operations. He spoke Punjabi with Mr. Badwal, although frequently the two used English words.
- [22] Some of the communications between Sgt. D and Mr. Badwal were intercepted. The defence admitted the continuity of the intercepted communications and the accuracy of the transcription, translation and identification of voices in the intercepted communications, subject to one exception where an intercepted communication was played for Sgt. D to assist in refreshing his memory about the nuances of the conversation.
- [23] In May 2012, Sgt. D was tasked by Sgt. Barlow to call a number associated to Joga Singh Badwal to try to arrange a meeting with the person who answered the phone in order to facilitate the entry into Canada of some friends or relatives.

First Contact with Mr. Badwal

- [24] On May 22, 2012, Sgt. D called the number Sgt. Barlow gave him. He spoke with a man and asked him about trying to bring some friends over to Canada. The man told Sgt. D he was busy and they agreed to talk later. Sgt. D said he got the man's phone number from a relative in Seattle. The man said he would call back that night. Sgt. D's phone indicated he had missed calls from that number later that same day.
- [25] On May 23, Sgt. D called the number but could not reach anyone. On May 24, he received a call from the number he had called a day earlier and spoke with the same man. He told the man, subsequently identified as Mr. Badwal, that his friends wanted to come over to Canada from the U.S. The friends were currently in New York and Sgt. D asked Mr. Badwal if he could help. Mr. Badwal said he definitely could, but the friends needed to be in Seattle. Mr. Badwal said there was one more person in the California area "waiting to come over" and he liked to bring more than one person at a time.
- [26] I note that while Sgt. D testified in direct examination that he referred to the people in the U.S. as his friends when he spoke with Mr. Badwal, on cross-examination he acknowledged he might have said friends or relatives. Sgt. D acknowledged he used the word "relatives" at the preliminary inquiry but recalled that he used the word "friends" more often than "relatives". Sgt. D confirmed the briefing scenario he received from Cpl. Barlow referred to bringing family members to Canada but it was left up to the undercover officer as to what

precise terms to use.

- [27] Sgt. D asked Mr. Badwal if he wanted to meet. Mr. Badwal said they could talk on the phone. He had "pay as you go" phones which could not be wiretapped. Sgt. D said he preferred to meet in person. Mr. Badwal said Sgt. D should come to his temple in Aldergrove. Sgt. D said he would call before he attended there.
- [28] By this point Sgt. D had not discussed or suggested any methodology as to how his friends would come into Canada or the backgrounds of his friends.
- [29] On May 25, Sgt. D went to 370-264th Street in Aldergrove, the address of Mr. Badwal's home and temple. Nobody answered the door or the phone number for Mr. Badwal, so Sgt. D began to walk away. A young man called out to him and Sgt. D learned that "Baba ji", a word for a priest or an elderly male in Punjabi, was not there but was expected home that evening.
- [30] The next day, May 26, Sgt. D called Mr. Badwal, who explained he had been at a prayer with priests from India the previous day. They agreed to try to arrange another meeting the following day and Mr. Badwal suggested Sgt. D's friends start making their way west to Seattle. Sgt. D said he would rather meet Mr. Badwal in person before he got them to do that so they would not be stuck.
- [31] Sgt. D called Mr. Badwal on May 29 but could not reach him. He went to the temple and met with the same younger male and learned that "Baba ji" was not there. Sgt. D and Mr. Badwal spoke on May 30th and Mr. Badwal explained he was busy with the priests from India. They discussed Mr. Badwal coming to Surrey, where Sgt. D said he lived, but the meeting did not occur.

The Initial Face to Face Meeting between Sgt. D and Mr. Badwal

- [32] On June 9, Sgt. D went to Mr. Badwal's temple again. His objectives were to find out the method to be used to bring his friends to Canada, tell Mr. Badwal the friends had no documents, find out if the temple was used as a staging point in the transactions and find out how much it would cost to have people brought over the border. I use the word "friends" but as noted earlier, Sgt. D also used the word "relatives". While Sgt. D wore a recording device during later meetings with Mr. Badwal, he did not wear one for this particular meeting.
- [33] Mr. Badwal answered the door. The building on the property looked like a house but was set up as a temple. The entrance was at the back, the Sikh holy book was on the main floor and the basement appeared to be a communal kitchen. Sgt. D covered his head as a practicing Sikh and did a prayer. Mr. Badwal asked why he was there. They went outside to talk but before doing so, Mr. Badwal looked through the blinds to the north side of the house where Sgt. D's vehicle was parked.

- [34] Sgt. D said he had come to talk about bringing his friends to Canada from the U.S. He said one of them had a refugee case denied and the other one did not think he was going to win his case, so they wanted to come to Canada. Sgt. D said neither friend had any documents. Mr. Badwal said he was willing to help. The men discussed timing in the range of two or three weeks, as Sgt. D's friends were still in New York.
- [35] Mr. Badwal said he wanted a couple of days' notice and Sgt. D said he would give three or four days' notice once his friends made it to the Seattle area. Mr. Badwal said the Blaine area was too "heaty", which Sgt. D took to mean there would be a greater law enforcement presence. Mr. Badwal also said it was easier to bring at least two people at a time. He said he had helped others come across the border and said his vehicle, a green Ford Explorer, had been given to him by people he had helped get into Canada.
- [36] Sgt. D asked how much it would cost to bring his two friends. Mr. Badwal said it depended on the driver but he estimated about \$3,000 per person. On cross-examination Sgt. D recalled that Mr. Badwal used the term "driver", but was not sure if he said "my driver".
- [37] Mr. Badwal said he used to do the driving himself but he now uses other people, which made the rates variable. Sgt. D asked if his friends would come to the temple but Mr. Badwal said no, it was too close to the border and he expressed concern about being watched or attracting police interest. Mr. Badwal said the friends would be dropped off on the American side of the border and would have to walk across, perhaps a mile or two. He would provide the route. He recommended they not carry anything, especially not backpacks, as border guards were more focussed on drugs coming across than people.
- [38] Mr. Badwal said he would be paid half up front and the other half when the friends were delivered. The upfront portion would go to the person on the American side. Mr. Badwal said he did not answer his phone during prayers but would call Sgt. D when he saw missed calls. There was no specific timeline set to bring Sgt. D's friends in but Sgt. D said he would give Mr. Badwal three or four days' notice. Sgt. D did not suggest the method by which his friends would come to Canada, what country they were from or whether or not they had exhausted immigration possibilities of coming into Canada.

Contact in July

- [39] Sgt. D called Mr. Badwal on Saturday, July 7 but could not reach him. The two played "telephone tag" until Sgt. D made contact with Mr. Badwal and said his friends would be on the west coast on Thursday. Sgt. D had to remind Mr. Badwal who he was by saying they had talked on the phone and at Mr. Badwal's house. He also mentioned payment by instalment to jog Mr. Badwal's memory. Sgt. D said he would deliver the first instalment on Tuesday. Mr. Badwal would then take the money to his people on the U.S. side. The price was going to be \$3,000 to \$4,000, depending on who was driving.

- [40] Mr. Badwal said if Sgt. D wanted his friends brought right up to Zero Avenue, the person who would do that charged \$3,000 for two people in the past. Mr. Badwal said he would contact that particular driver who would go parallel to Zero Avenue. Sgt. D said he wanted his friends over on Thursday and asked Mr. Badwal to call his person.
- [41] On July 9, Mr. Badwal called Sgt. D to ask if his friends had left New York. Sgt. D said they had and would arrive on Thursday. Mr. Badwal said his normal driver was not answering his phone and he had spoken with someone else who was not available until the weekend. Sgt. D said he was worried his friends would be caught and deported in the meantime. Mr. Badwal said he did not require money at that point as he was still arranging things, but he would call back.
- [42] On July 10, Mr. Badwal told Sgt. D he still had trouble locating a driver. On July 11, Mr. Badwal called Sgt. D to say he could do "it" in a couple of days. He recommended a hotel on the American side but Sgt. D said he had relatives his friends could stay with.
- [43] On July 12, Mr. Badwal called Sgt. D but had no update on the timing of the proposed crossing. Sgt. D asked if he could drop off the money. Mr. Badwal asked if he had told Sgt. D the amount. Sgt. D said \$3,000. Mr. Badwal said it would be at least that much per person and Sgt. D agreed.
- [44] Mr. Badwal said border security was very strict. He had a person or driver in the U.S. and "it" would happen over the weekend. Sgt. D said he was away for a few days but the two agreed to meet on July 13 at Mr. Badwal's temple.

The July 13th Meeting

- [45] Sgt. D went to Mr. Badwal's residence on July 13 at 11:55 in the morning. He was wearing an interception device on this occasion and the conversation was recorded and subsequently transcribed into the English language.
- [46] Mr. Badwal said "they" would do it on the weekend, on Sunday, when there is less security. He said there was one more boy in Seattle who wanted to come this way as well and Mr. Badwal was talking to him about when he was going to come across.
- [47] Mr. Badwal referred to people who would drop off people and take their money, whether the work got done or not. In context, it is a fair inference that the work he referred to was getting people across the border undetected.
- [48] Mr. Badwal said he used to do "it" alone. The context of the conversation leads to the inference that he meant driving people to or from the border to facilitate undetected crossings. He told Sgt. D the crossing would be at night as only the "druggy types" do it during the day. Once Sgt. D's people were across, Mr. Badwal would meet him wherever Sgt. D told him. Mr. Badwal said the time fluctuates, sometimes the crossing only takes two minutes and sometimes it takes an hour or two hours longer.

- [49] Mr. Badwal referred to having problems on the other side and that "they" started to follow him. The problems appeared to relate to his transport of a priest to the United States. He referred to "it" being made stricter, a reference to border security. Mr. Badwal referred to being watched by Canadian undercover officers who sat and watched him from their car. He spoke about one occasion when he picked up two boys from Zero Avenue then the authorities came to question him but did not ask to look inside, where the two boys were. Mr. Badwal said God saved him.
- [50] Mr. Badwal referred to "a Chinese guy" and "two East Indian guys" who did surveillance. He said that was why he changed his phone and does not pick up his phone often. The police would need a court order to tap his phone, not like in India.

The First Crossing

- [51] On July 17, just after 8:00 p.m., Mr. Badwal called Sgt. D to say he tried to call Sgt. D's friends but they did not answer. Sgt. D said he would call his friends and tell them to answer. Mr. Badwal said the call would come from 360-[redacted]. Mr. Badwal called Sgt. D back about 15 minutes later, remarking that his friend's Punjabi was not very good and he would call back once the friends got close to "Zero".
- [52] Cpl. P was the lead undercover officer in the first scenario. He was to represent himself as an undocumented migrant Indian living in the U.S. who was seeking access into Canada other than via a land border. Cpl. P has an understanding of Punjabi and speaks it with his mother. He travelled from Canada into the United States with two other undercover officers, Cst. H and S/Sgt. W, and Sgt. Barlow, the cover officer.
- [53] Cpl. P was carrying a cell phone. At 8:15 that evening he received a phone call from the number Mr. Badwal gave Sgt. D. The male caller spoke Punjabi and asked if Cpl. P was the person he was supposed to speak with and whether he was at the hotel. Cpl. P said he had checked out. They agreed to meet at a Costco at 9:15.
- [54] I pause to note that while I have reproduced the gist of conversations that the undercover officers had with individuals on the U.S. and Canadian sides of the border, the words spoken come from unknown individuals and are accordingly hearsay. I have placed no weight in my deliberations on that evidence.
- [55] Cpl. P and Cst. H went to the Costco on Guide Meridian. Shortly after 9:15 Cpl. P received another phone call from the Punjabi-speaking male. He advised Cpl. P that a white male would be arriving in a 2011 silver Dodge pickup and he would drive them towards the Canadian border along Zero Avenue. From there they would get out and run across into Canada where a second white male in a red van would drive them on to their destination.
- [56] Cpl. P asked why white people were involved. The Punjabi-speaking man said it was nothing to worry about, the white driver of the pickup was like a brother to him and he said he would be there in the red van on the Canadian side. The man told Cpl. P to leave Costco and go to

TacoTime across the street. They did so and about 20 minutes later a newer model Dodge truck with a white driver appeared. After the driver nodded at them, Cpl. P and Cst. H got into the truck. The man drove them to a road that turned east and ran adjacent to Zero Avenue. He said he was going to slow down and they would get out as fast as they could and run across the street to the ditch and once they crossed it they would be in Canada.

- [57] Two or three minutes after Cpl. P and Cst. H crossed the ditch they saw a red van coming towards them, westbound, at a high rate of speed. The van stopped and a Caucasian driver shouted at them to get in. Cpl. P got in the front seat and Cst. H got into the back. The van departed the area at a high rate of speed. The driver introduced himself as Randy.
- [58] At 10:05, Mr. Badwal called Sgt. D to report his friends were at the border and arranged to meet at the McDonald's on 264th near Highway 1.
- [59] Meanwhile, the van containing the undercover officers proceeded north to the McDonald's on 264th and Highway 1. A Punjabi male came up to the van and told the undercover officers to wait inside, so they went into the restaurant until the male returned and told them their ride had arrived.
- [60] Sgt. D arrived at the McDonald's at about 10:40 p.m. Mr. Badwal got into his car and advised his friends were inside the restaurant. Sgt D gave Mr. Badwal \$3,000 but reminded him of an earlier offer to cover hotel costs. Mr. Badwal gave back \$200 in cash. There was no discussion between Sgt. D and Mr. Badwal concerning where Sgt. D was taking the officers. Mr. Badwal got out of Sgt. D's vehicle and the undercover officers got in.

Discussions in August

- [61] On August 4, Sgt. D called Mr. Badwal about bringing in more people. Mr. Badwal did not initially seem to remember Sgt. D but after some prompting he remembered and asked about the two men who had been brought from the U.S. Sgt. D said they had moved to Saskatchewan as it was easier to obtain permanent resident status in that province. Mr. Badwal said he would call back in a few days.
- [62] On August 6, the two men talked again about bringing more of Sgt. D's people over. Mr. Badwal referred to an attempt to take people across that failed on the U.S. side. A "white guy", one of Mr. Badwal's people from the July 17 transport, had been caught. Mr. Badwal said they had "five guys", which was too much. He said he used the money from July 17 to pay temple bills and that the previous year he had donated \$30,000 to the temple being built in Surrey. He said he would get back to Sgt. D about another crossing.

- [63] On August 11, the two men spoke. Sgt. D said he wanted four people to come to Canada. Mr. Badwal said they would fit in the car. The next day, however, Mr. Badwal said the original driver would not pick up near the border so he had to find someone new. Several days later, the two spoke again but Mr. Badwal said the only alternative left was an expensive one, somebody who charged \$4,000 per person. Sgt. D agreed that was too much and Mr. Badwal said he would try to see if he would agree to less.
- [64] On August 17, Sgt. D called Mr. Badwal and said there would only be three relatives coming and that they did not want to walk, a reference to seeking a drop off very close to the U.S. side of the border. The next day Mr. Badwal called to say the driver would not reduce what he charged. Ultimately Sgt. D said he would pay \$11,000 and his friends wanted to come over on Tuesday. Mr. Badwal said he had been doing this for 30 years and patience was the best way to do things. He asked for half the money up front and the rest when the work was done.
- [65] On August 18, Mr. Badwal called to say the crossing had to be delayed as there were arrests a few days before and the security at the border was strict. He told Sgt. D he had driven by the border and there were cops around, which was unusual for a Sunday.
- [66] On August 24, Sgt. D called Mr. Badwal for an update. Mr. Badwal said his person was on holidays. They agreed to talk the next day. Four days later, Thursday August 30, they spoke again. Mr. Badwal said he had found another driver who could help on Sunday and he had a motel right at the border. Sgt. D said he would call his friends and confirm their availability.
- [67] On August 31, Sgt. D and Mr. Badwal spoke on the phone. Sgt. D said one of his friends could not come but wanted to send a Chinese friend. Mr. Badwal said that was no problem, anyone can come. Sgt. D's purpose in inquiring about an individual of Chinese ethnicity was to see if Mr. Badwal only arranged to transport people of East Indian descent.

Discussions in September

- [68] Sgt. D went to Mr. Badwal's home/temple on September 3 to pay a deposit. Mr. Badwal identified the younger man at the house as his son who was going to the U.S. to do back to school shopping. Mr. Badwal took \$400 from Sgt. D's \$5,000 deposit and gave it to his son. Mr. Badwal said the white guy who had been arrested in July was being disrespectful with the U.S. authorities. Mr. Badwal said he had been stopped many times by the border authorities but was never disrespectful, saying "I'm doing wrong things, why would I be disrespectful?"
- [69] The next day Sgt. D and Mr. Badwal discussed bringing the people over the border but Mr. Badwal said police were set up there and he thought the U.S. police had installed something in his car. He wanted to delay the transport as he needed to be careful for his driver.

- [70] On September 5, Mr. Badwal gave Sgt. D a new number to call. He said the transport might occur the next day. He said a person got caught "over there" and that person had his old number. The following day, Mr. Badwal said his driver changed his mind and he would work on finding someone else.
- [71] On September 10, Mr. Badwal was still having difficulty finding a driver on the U.S. side. Sgt. D offered to drive his people from the U.S. side, otherwise they would be stuck there. On September 11, the two men met at Mr. Badwal's home/temple. Mr. Badwal gave him directions to get to the border from the U.S. side. The two men drove in Sgt. D's vehicle along Zero Avenue. Mr. Badwal showed Sgt. D three places to cross, where cameras and sensors were located and how the sensors worked. He said he would monitor from the Canadian side.
- [72] Mr. Badwal said he had refunded money in the past when people were caught and could not complete the crossing. He explained that he did the work as or for charity, he did not keep any money. Mr. Badwal would take \$1,000 for his services. He told Sgt. D to keep \$4,000 for his work.

The Second Crossing

- [73] At 8:10 pm on September 11, Sgt. D and three undercover officers (Cpl. B, Sgt. N and Cpl. S) travelled to the U.S. Cpl. B was the lead undercover officer. He was to portray himself as an undocumented East Indian male seeking transport from the U.S. to Canada. Cpl. N was to portray an Asian male and Sgt. S a Fijian male. The trio was briefed before crossing the border with Sgt. D around 9:43 p.m.
- [74] On the instructions of Mr. Badwal, Sgt. D drove the three undercover officers from a convenience store to a location on Bender Road. The undercover officers got out, crossed over to the Canadian side on foot and waited in a ditch. Once on the Canadian side they knew a vehicle would pick them up.
- [75] Cpl. B saw a green Ford sport utility vehicle driving slowly but it continued westbound on Zero Avenue. This is consistent with Mr. Badwal's vehicle and with his comment to Sgt. D that he would be watching from the Canadian side. A moment later Cpl. B saw a white Honda. It stopped and started along Zero Avenue. One of the undercover officers waved it down and it pulled up to them. An East Indian male on the passenger side told Cpl. B in Punjabi to sit down, so he and the other two got into the Honda.
- [76] Once in the Honda, Cpl. B received a phone call from a Punjabi-speaking male who asked if he was in the car. Cpl. B affirmed he was. Moments later he received another call on the phone and the caller asked to speak to the driver. Cpl. B thought it sounded like their driver was lost. They ended up at a McDonald's, but apparently not the correct one as another driver was procured who drove them to the McDonald's at 264th and Highway 1.

- [77] At 10:02 p.m., Sgt. D received a call from Mr. Badwal and learned "his guys" were at the McDonald's rendezvous point. Sgt. D went to McDonald's and spoke with Mr. Badwal, who instructed him to go to the Chevron parking lot to pick up "his guys". Sgt. D gave Mr. Badwal \$1,000. Mr. Badwal went to a white Accord and the three undercover operators got out of it and into Sgt. D's vehicle.
- [78] Sgt. D and Mr. Badwal spoke on September 20. Mr. Badwal asked how it was going and Sgt. D said his friends had gone to Saskatchewan as well, a reference to where he told Mr. Badwal the first group had gone. He said other guys were thinking of coming in about two weeks and he would call Mr. Badwal when his guys were ready.

Discussions in October

- [79] On October 4, Sgt. D and Mr. Badwal spoke on the phone. Sgt. D said his guys were ready to come over and wanted to know if they could do it next week. Mr. Badwal said he had spoken with someone recently who should be able to do it. He called back a few moments later to say he had a driver but if Sgt. D wanted to do it, that worked as well.
- [80] The two men spoke again on October 8. Mr. Badwal said he had guys lined up for the next day and they would drop off right at the border. He referred to them as having done a job near Hope. Sgt. D asked if they could do the transport on October 10 instead of October 9. Mr. Badwal said if the crossing did not happen on the 9th his friends might have to wait a few days.
- [81] On October 9, Mr. Badwal said one of his drivers had been stopped by U.S. Border Patrol for being too close to the border and counselled Sgt. D to be patient.
- [82] On October 10, Sgt. D and Mr. Badwal spoke further about a transport. Sgt. D said the next day worked for him and later that evening Mr. Badwal said "his guys" would be able to do it tomorrow.

The Third and Final Crossing

- [83] On October 11, Sgt. D provided Mr. Badwal the phone number 360-510-4188 to contact his people. The undercover group consisted of Sgt. B, Sgt. H, Sgt. S, S/Sgt. W and Cpl. M. The group travelled from Canada into the U.S. and attended a briefing at the Homeland Security Investigation office in Bellingham at 5:02 p.m. Cpl. Phil Nikiforuk accompanied the undercover officers as a cover and surveillance officer.
- [84] At 6:19 p.m. Sgt. B received a call from an unknown male who spoke Punjabi. The phone number had a 604 area code. The male asked if they would be at Costco in five to seven minutes. Sgt. B replied, "More like 20 minutes" and the male said he could not wait; it would have to be right away. Sgt. B said they would do their best and suggested a meet at a Walmart instead. The male told him to hurry.

- [85] Sgt. B received a call at 6:23 from the same number but did not make contact with the caller. At 6:33 p.m. another call came from the same male who called earlier. He advised that a meet was arranged at the Walmart. At 6:38 p.m., Cpl. Nikiforuk dropped the group off at the Walmart. At 6:45 p.m. Sgt. B called the number back and said they were at the Walmart.
- [86] Sgt. B then received a call from a phone with a 360 area code at 6:49 p.m. Another Punjabi speaking male was on the phone. Sgt. B said they were in the Walmart lot and the male told them to walk towards Meridian. They saw lights go on and off in a Caravan and walked towards it. Sgt. B got in the front passenger seat and the others got in the back.
- [87] Cpl. Nikiforuk noted the van's arrival at 6:57 p.m. At 7:05 p.m. he saw the driver get out. The man was wearing a blue turban, black coat, black pants and white shoes. He had glasses and a beard and was about 6'2", with a stocky build.
- [88] The van remained parked for some time and the driver received several calls. At one point he began driving. Cpl. Nikiforuk noted the time of departure to be 7:10 p.m.
- [89] The driver asked Sgt. B how much "they" paid and Sgt. B said \$4,000. The driver said that was the going rate but it changed with number of people, although the driver always got the same cut.
- [90] At 7:16 that evening, Mr. Badwal called Sgt. D to say his friends were about 10 minutes away from the border.
- [91] Sgt. B said the man drove the undercover officers north on Meridian to Linden. By then it was dark and he pulled over to a side road. He turned off the van engine and lights and appeared to be watching the traffic. After a time he proceeded north on Bender Road. It was approximately 7:48 p.m. He told them they would have 10 seconds to get out and jump across the ditch to Canada. They were to start walking west and another vehicle would pick them up.
- [92] The group got out of the van and crossed the ditch to Zero Avenue. They saw a Caravan with a red light on the dashboard, which turned out to be the driver's cell phone. The Caravan stopped for them and they all got in.
- [93] At 8:01 p.m. Mr. Badwal called Sgt. D to say his friends had come across. Sgt. D proceeded to the usual McDonald's meeting point.
- [94] The driver of the Caravan was an East Indian male. He went east on Zero Avenue to 276th Street then north and ended up at 264th and 62nd Avenue. The drive took about 10 minutes. The van turned onto a dead end street and executed a u-turn. The driver waited for a little while then received a phone call. After a short phone conversation the male crossed westbound onto 264th, made another u-turn and ended up in the Grosvenor Industrial area, in the 5400 block of 268th Street.

- [95] When Sgt. D arrived at McDonald's, he saw Mr. Badwal arrive in a green Ford Explorer and then drive away. Mr. Badwal then called Sgt. D and asked him to meet at another location. It appears Mr. Badwal believed he saw law enforcement in the area of the restaurant.
- [96] Sgt. D met Mr. Badwal on 268th Street and gave him \$13,000 cash towards the \$18,000 transport cost. He said he would pay the balance in the future.
- [97] Mr. Badwal drove away and Sgt. D saw a green van pull up with his five undercover officers. The driver of the van recognized Sgt. D, and Sgt. D realized he had taken a statement from the man in his capacity as a police officer. The operation was terminated.
- [98] Sgt. Barlow arrested Mr. Badwal on 268th Street south of 56th Avenue in a vehicle registered to him shortly after Sgt. D realized he had been "made". Later that evening Sgt. Barlow returned to the area with Cpl Bae and Sgt. W and located \$13,000 in Canadian currency about two blocks away from the scene of the arrest.

CREDIBILITY AND RELIABILITY

- [99] Defence counsel took issue with Sgt. D's reliability and, in some instances, his credibility. The thrust of their submission was that Sgt. D's evidence at the preliminary hearing was in several critical instances different from what it was at trial. One of the areas was whether or not Sgt. D referred to the undercover officers as "his relatives" or "his friends". As noted earlier in these reasons, Sgt. D likely used the terms interchangeably. Another instance was whether Sgt. D used the term "refugee" or referred to "asylum status". He agreed he probably used the word "refugee" but was uncertain about "asylum status".
- [100] The defence also took issue with whether or not Sgt. D called Mr. Badwal "Baba ji" as a religious greeting and whether he used other forms of religious greetings. There did appear to be some question as to whether Sgt. D used "Baba ji" to denote Mr. Badwal's priest status or just because he was an older male.
- [101] I will deal with the effect, if any, of these inconsistencies and others in my discussion of the elements of each offence.

Count 1 - Human Smuggling

The Elements of the Offence

1. Jurisdiction

- [102] The three lead undercover officers testified that they crossed from the U.S. into British Columbia and Sgt. D had his meeting with Mr. Badwal in British Columbia. I am satisfied beyond a reasonable doubt the Crown has proven jurisdiction.

2. Time

[103] All of the police witnesses testified that these events took place on various days encompassed by the Indictment. The Crown has proven this element beyond a reasonable doubt.

3. Identity

[104] There is no question that Mr. Badwal was the individual with whom Sgt. D was dealing, both in person and on the phone. The defence admitted that the transcribed recordings captured the voice of Mr. Badwal. Mr. Badwal was present on the Canadian side where Sgt. D's friends were dropped off, twice at a McDonald's restaurant, and then again in the last scenario where Sgt. D paid Mr. Badwal after the latter moved from the McDonald's restaurant, sensing the presence of police.

4. Organize, Induce, Aid or Abet the Coming into Canada of One or More Persons

[105] Mr. Badwal made the arrangements on each of the three occasions that Sgt. D requested his assistance in bringing people across the border. The evidence of Sgt. D and the transcribed recordings prove Mr. Badwal organized the drivers on the American and Canadian side of the border.

[106] The phone number that Cpl. P received the call from on July 17 was the number Mr. Badwal told Sgt. D the call would come from. The rendezvous point, the McDonald's north of the border, was where the undercover officers were dropped off at Sgt. D's request.

[107] For the September 11 crossing, Mr. Badwal told Sgt. D it would be done like before. He provided Sgt. D with street names and directions and went for a drive with Sgt. D along Zero Avenue. Mr. Badwal showed Sgt. D the safe places to cross and pointed out cameras and explained how the sensors worked. Sgt. D dropped his people off on the U.S. side and called Mr. Badwal to let him know. The rendezvous point of the McDonald's was utilized again.

[108] The same type of arrangements were made between Sgt. D and Mr. Badwal for the October 11 crossing. Once Sgt. D was "made" by the driver on the Canadian side, Mr. Badwal's arrest was effected and the \$13,000 cash retrieved from an area not far from his arrest.

[109] Mr. Badwal told Sgt. D the plan that would be used in all three instances. Drivers in the U.S. would drop the people off near the border, they would cross on foot and a driver would pick them up in Canada. He told Sgt. D that his people should not wear backpacks or carry luggage. Mr. Badwal negotiated the price for each transport event, depending on the driver he could secure for the U.S. side, and gave Sgt. D a discount for doing the work himself on one occasion. Mr. Badwal arranged the drivers and told Sgt. D that while he did the driving himself in the past, he had taken a step back from that and did it from behind.

[110] I am satisfied beyond a reasonable doubt that this element of the offence has been proven.

5. Not in possession of a visa, passport or other document required by the IRPA

[111] An essential element of the offence is proof beyond a reasonable doubt that the people for whom Mr. Badwal was arranging cross-border transport lacked documentation required by the IRPA.

[112] The process of entering Canada is referenced in the IRPA, Part I, Division 3: Entering and Remaining in Canada:

18(1) Every person seeking to enter Canada must appear for an examination to determine whether that person has a right to enter Canada or is or may become authorized to enter and remain in Canada.

[113] The required documentation is referenced in the IRPA Regulations, Part 2, Division 1: Documents Required Before Entry:

6 A foreign national may not enter Canada to remain on a temporary basis without first obtaining a temporary resident visa.

[114] Because the individuals were actually undercover officers who could lawfully cross the border without documents as a result of arrangements with Canada and U.S. border authorities, the full offence cannot be proven and the Crown seeks a conviction on an attempt to commit the offence.

6. Knowledge

[115] The Crown must prove that Mr. Badwal intended to organize, induce, aid or abet the entry into Canada of 10 persons who did not have the documents required under the IRPA. In other words, the Crown must prove beyond a reasonable doubt that Mr. Badwal intended to smuggle undocumented migrants. This is the mens rea requirement of the offence. The Crown can prove mens rea by actual knowledge or by the doctrine of wilful blindness.

[116] In this case, the Crown maintains that Sgt. D clearly and unequivocally told Mr. Badwal that the first two people he wanted transported across the border had no documents. He also referred to them as refugees, or used similar terminology. The Crown submits that the subsequent batches of people Sgt. D wanted to have brought into Canada fell into the same category of undocumented migrants, so it is proven that Mr. Badwal knew they were all undocumented.

[117] I am not satisfied beyond a reasonable doubt that Sgt. D clearly and unequivocally told Mr. Badwal the first two people had no documents. Sgt. D testified that he told Mr. Badwal the first two friends had no documents in examination in chief, but on cross-examination it became apparent that at the preliminary inquiry he was less than certain on that point.

[118] The only time Sgt. D said he explicitly discussed the documentation issue with Mr. Badwal was on June 9. That meeting was not recorded and, as Sgt. D was in an undercover capacity, he was not making contemporaneous notes of his conversation with Mr. Badwal. Nearly five years elapsed between that meeting and this trial.

- [119] Furthermore, while the undercover officers were to pose as undocumented migrants, there is no evidence they discussed their status with anyone during their transport or that Mr. Badwal was aware of their undocumented status directly from any of them.
- [120] The alternative way the Crown can prove the mens rea for the offence is through wilful blindness. In *R. v. Briscoe*, 2010 SCC 13, the Supreme Court of Canada affirmed that wilful blindness can substitute for actual knowledge:
- [21] ... wilful blindness imputes knowledge to an accused whose suspicion is aroused to the point where he or she sees the need for further inquiries, but deliberately chooses not to make those inquiries. See *Sansregret v. The Queen*, [1985] 1 S.C.R. 570, and *R. v. Jorgensen*, [1995] 4 S.C.R. 55. As Sopinka J. succinctly put it in *Jorgensen* (at para. 103), "[a] finding of wilful blindness involves an affirmative answer to the question: Did the accused shut his eyes because he knew or strongly suspected that looking would fix him with knowledge?"
- [22] Courts and commentators have consistently emphasized that wilful blindness is distinct from recklessness. The emphasis bears repeating. As the Court explained in *Sansregret* (at p. 584):
- ... while recklessness involves knowledge of a danger or risk and persistence in a course of conduct which creates a risk that the prohibited result will occur, wilful blindness arises where a person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth. He would prefer to remain ignorant. The culpability in recklessness is justified by consciousness of the risk and by proceeding in the face of it, while in wilful blindness it is justified by the accused's fault in deliberately failing to inquire when he knows there is reason for inquiry. [Emphasis added.]
- [23] It is important to keep the concepts of recklessness and wilful blindness separate. Glanville Williams explains the key restriction on the doctrine:

The rule that wilful blindness is equivalent to knowledge is essential, and is found throughout the criminal law. It is, at the same time, an unstable rule, because judges are apt to forget its very limited scope. A court can properly find wilful blindness only where it can almost be said that the defendant actually knew. He suspected the fact; he realised its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge. This, and this alone, is wilful blindness. It requires in effect a finding that the defendant intended to cheat the administration of justice. Any wider definition would make the doctrine of wilful blindness indistinguishable from the civil doctrine of negligence in not obtaining knowledge. [Emphasis added.]

- [24] Professor Don Stuart makes the useful observation that the expression "deliberate ignorance" seems more descriptive than "wilful blindness", as it connotes "an actual process of suppressing a suspicion". Properly understood in this way, "the concept of wilful blindness is of narrow scope and involves no departure from the subjective focus on the workings of the accused's mind" (*Canadian Criminal Law: A Treatise* (5th ed. 2007), at p.

241). While a failure to inquire may be evidence of recklessness or criminal negligence, as for example, where a failure to inquire is a marked departure from the conduct expected of a reasonable person, wilful blindness is not simply a failure to inquire but, to repeat Professor Stuart's words, "deliberate ignorance".

- [121] The Crown submits that it has proven Mr. Badwal's knowledge that the people for whom he was facilitating surreptitious passage had no documentation through wilful blindness.
- [122] I find that Mr. Badwal's actions speak to an individual who was keenly aware that what he was doing was illegal. He used "pay as you go" phones because he was concerned about police "tapping" his phone. He advised Sgt. D to tell his friends to bring as little as possible with them in order to avoid attracting the attention of border authorities. He referred to an occasion in the July 13 conversation with Sgt. D when he was sitting with a "guy who was 'illegal'" and that someone must have reported the border crossing. On another occasion he said he never said anything disrespectful to the authorities because "I'm doing wrong things".
- [123] Mr. Badwal was savvy about where cameras and sensors were placed along Zero Avenue. He knew when there were extra officers placed to patrol the border. While Sgt. D made references to some of the people he wanted brought across the border as refugees, Mr. Badwal was not operating a humanitarian outreach program for undocumented migrants. He told Sgt. D he had been transporting people back and forth for 30 years and had stepped back from doing the driving himself, which I find was an obvious attempt to cool his profile with border authorities.
- [124] The difficulty with the Crown's case lies with whether the only reasonable inference from the evidence is that Mr. Badwal was wilfully blind that the individuals crossing the border lacked the requisite documents to enter Canada, versus wilfully blind they wanted to cross the border without detection for other unspecified reasons. Proof of the former is an essential element of the offence as the section read at the time these events occurred.
- [125] The application of wilful blindness to proof of the offence in the former version of s. 117 of the IRPA was analyzed in a directed verdict ruling by Madam Justice Molloy of the Ontario Superior Court of Justice in *R. v. Alzehrani*, [2008] O.J. No. 4422. The facts concerned the movement of individuals back and forth across the border between Canada and the United States. The Crown sought to rely on wilful blindness to prove the accused persons had knowledge the individuals they were smuggling across the border had no documents.
- [126] In granting the motion for a directed verdict of acquittal for some of the counts, Molloy J. observed:
- [55] There can be a wide variety of reasons for why a person might want to enter the United States from Canada without scrutiny at a border crossing, even where that person is in possession of a valid passport, visa or other document permitting him to enter the country illegally. The person might have a criminal record that prevents him from entering. He

might be trying to avoid an outstanding warrant for his arrest. He might be subject to court orders such as bail that require him to remain in Canada. He might be planning to commit a crime in the United States and not want any record of his having gone there. He might want to carry some prohibited object, such as a gun or drugs or a large quantity of cash, with him. The mere fact that a person is attempting to sneak across the border without being detected cannot, in my view, support a reasonable inference that he does not have valid travel documents.

- [56] The statute is very explicit about requiring proof that the person being brought into the country does not have appropriate documentation. Parliament could have made it an offence to assist any person to cross the border surreptitiously. If that was the language of the statute, there would be no problem with these 23 counts. However, the statute is not worded that way, and ought not to be interpreted as if it was. The plain meaning of the statute is clear. It is only the assisting of person who do not have passports or similar documents that is the subject matter of this offence.
- [57] Applying the Crown's reasoning, a person being smuggled across the border would, in effect, be deemed to be without the appropriate documents. That interpretation is not consistent with the legislation. Section 31(1)(b) of the IRPA provides that "a person who is outside Canada and does not present a status document indicating permanent resident status is presumed not to have permanent resident status." The fact that Parliament saw fit to create such a presumption with respect to permanent resident status, but not for other bases upon which a person might enter Canada, reinforces my view that something beyond surreptitious entry is required in order to establish a lack of documentation.
- [127] In *R. v. Toor*, [2009] O.J. No. 5982, Mr. Justice Durno followed Molloy J.'s reasoning on the role of wilful blindness in relation to proof of the essential elements of s. 117's former wording. Toor concerned a conspiracy to smuggle immigrants into the United States. Mr. Toor was a taxi driver who was recruited to pick up people and transport them to Windsor, from whence they were smuggled into the U.S. by boat or in the trunks of cars. Durno J. said:
- [159] I have found that I am satisfied beyond a reasonable doubt that he knew he was assisting smugglers in their operation. I am not satisfied beyond a reasonable doubt that his agreement included a belief that the passengers lacked the requisite documents, whatever they are, on this record. Nor is there any evidence that any of the persons he drove did not have documents. Indeed, one had her passport.
- [128] Notwithstanding Mr. Badwal's covert operation to move people back and forth across the border and awareness that what he was doing was wrong, I am not satisfied beyond a reasonable doubt that the Crown has proven the essential element of Count 1 concerning documentation through wilful blindness. Accordingly, I find him not guilty of Count 1.
- [129] As a postscript, s. 117 was amended after Mr. Badwal was charged. It now reads:

117 (1) No person shall organize, induce, aid or abet the coming into Canada of one or more persons knowing that, or being reckless as to whether, their coming into Canada is or would be in contravention of this Act.

[130] The actus reus and mens rea of the offence are more broadly cast now and appear to address the frailties identified in the reasons of Molloy J. and Durno J. The new version of s. 117 would likely have captured Mr. Badwal's conduct, given the express incorporation of the concept of recklessness as sufficient proof of mens rea. The requirement of knowledge of a lack of documentation is no longer an essential element of the offence. A simple contravention of the Act is sufficient.

Count 2 - Inducing, Aiding or Abetting the Contravention of s. 124(1)(a) of the IRPA

The Elements of the Offence

1, 2 and 3 - Identity, Time and Territorial Jurisdiction

[131] The Crown must prove the same elements of identity, time and jurisdiction as are discussed earlier in my reasons in relation to Count 1 beyond a reasonable doubt. For the reasons earlier expressed, I am satisfied those essential elements have been proven.

[132] The actus reus of Count 2 is that Mr. Badwal:

- i. Did induce, aid or abet, or attempt to induce, aid or abet
- ii. persons to contravene s. 124(2) of the IRPA by failing to appear without delay before an officer at a port of entry for examination.

[133] The mens rea is that he did so knowingly.

[134] Mr. Badwal made arrangements with Sgt. D to deliver his people wherever Sgt. D asked. Mr. Badwal had the undercover officers delivered to a McDonald's several miles north of the border on the first two occasions and to an area near the same McDonald's on the last occasion. It was all part of his covert border crossing concierge service to arrange for people to cross the border undetected then continue the deception by arranging a rendezvous point that was not at a port of entry.

[135] It would have been absurd for Mr. Badwal to arrange a surreptitious border crossing for people, then present them without delay at a port of entry for examination. That would have quickly ended his venture, which by his own estimation had lasted 30 years, and it is utterly inconsistent with how he presented himself and his services to Sgt D.

[136] Defence counsel suggests that Mr. Badwal did not have control over whether the individuals he transported presented themselves at a port of entry or that he had knowledge of whether or not that requirement was met. But he did, and he deliberately chose to deliver them to a location that was not a port of entry.

[137] Defence counsel also suggests that Mr. Badwal might have thought the people he brought across went to a port of entry some time after he delivered them, for example when they went to Saskatchewan to make their residency claims. This does not meet the "without delay" requirement and does not leave me with a reasonable doubt in light of all the evidence concerning Mr. Badwal's activities during the timeframe of the Indictment.

[138] I find the Crown has proven Count 2 beyond a reasonable doubt.

[139] Mr. Badwal, please stand. On Count 1 of the Indictment, I find you not guilty. On Count 2, I find you guilty.

"Duncan J."

The Honourable Madam Justice Duncan

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