

CANADA / JUDGMENT

R. v. Besler

2022 BCSC 484

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DECIDED

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2022 BCSC 484 R. v. Besler

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Besler,

2022 BCSC 484

Date: 20220325

Docket: 46826-4

Registry: Penticton

Regina

v.

Bradley Harry Besler

and Darren William Wayne Besler

Before: The Honourable Mr. Justice Wilson

On appeal from: Oral Reasons for Judgment of the Provincial Court, dated October 19, 2021 (R. v. Besler, 46826-4-C).

Reasons for Judgment

The Appellants, appearing in person:

B. Besler

D. Besler

Counsel for the Crown:

N. Wiberg

Place and Date of Trial/Hearing:

Kelowna, B.C.

February 4, 2022

Place and Date of Oral Reasons Given:

Kelowna, B.C.

March 25, 2022

Place and Date of Judgment:

Kelowna, B.C.

March 25, 2022

[1] The appellants appeal their convictions for mischief arising out of a dispute between neighbours. The trial occurred over 12 days in February and May 2021. The appellants were charged as follows:

Count 1: Bradley Harry BESLER and Darren William BESLER, from the 2nd day of June, 2019 to the 24th day of June, 2019, inclusive, at or near Summerland, in Province of British Columbia, did commit mischief by wilfully obstructing, interrupting or interfering with the lawful use, enjoyment or operation of the property of Thor Clausen, contrary to Section 430(4) of the Criminal Code.

Count 2: Bradley Harry BESLER and Darren William Wayne BESLER, from the 1st day of June, 2019 to the 1st day of November, 2019, inclusive, at or near Summerland, in the Province of British Columbia, without lawful authority and knowing that another person was harassed or was reckless as to whether the other person was harassed, did engage in conduct that caused the other person, Thor Clausen, to reasonably fear for his safety or the safety of anyone known to him, contrary to Section 264 of the Criminal Code.

[2] The first issue on this appeal is whether mischief is an included offence of criminal harassment. If mischief is not an included offence, the second issue is whether this Court has the jurisdiction to hear Darren Besler's appeal of the conditional stay under Count 1.

Background

[3] The appellants and Mr. Thor Clausen were neighbours with large acreages near Summerland. Mr. Clausen, in addition to running a tree care and pruning company, started a second business on his property, a mushroom production facility called "What the Fungus". Mr. Clausen obtained a bylaw variance from the District of Summerland in order to permit What the Fungus to continue to operate. The variance was granted, albeit after operations had commenced.

- [4] The appellant Darren Besler lived on the neighbouring property along with his mother, and the other appellant, Bradley Besler, lived elsewhere but close by. The Beslers were unhappy about the mushroom farm on the adjacent property. They complained of, amongst other things, noxious odours.
- [5] The events that gave rise to the charges were interactions between the appellants, Mr. Clausen, and employees or associates of Mr. Clausen.
- [6] At trial, following the conclusion of twelve days of evidence but prior to rendering a decision, the trial judge inquired of counsel as to whether mischief was an included offence of a charge of criminal harassment. She sought and received further submissions from the parties on that issue, and provided her decision on October 19, 2021.
- [7] She concluded that the Crown had proven that Darren Besler was guilty of mischief under Count 1, but acquitted Bradley Besler.
- [8] The trial judge went on to conclude that mischief as defined in ss. 430(c) or (d) of the Criminal Code are lesser and included offences of criminal harassment, and that the Crown had proven the elements of the included offence beyond a reasonable doubt with regard to both appellants. Having concluded that mischief was an included offence, she went on to convict both appellants of mischief.
- [9] Based on the principles in *R. v. Kienapple*, 1974 CanLII 14, [1975] 1 S.C.R. 729 [Kienapple], she then entered a stay of proceedings with regard to Count 1 as against Darren Besler.
- [10] The trial judge concluded that the Crown had proven beyond a reasonable doubt that the appellants had done the following:
- a) Each of Bradley Besler and Darren Besler drove their trucks along the property line for no legitimate purpose, on occasion spun their vehicle tires resulting in clouds of dust landing on the Clausen property, and on other occasions honked their vehicle horns;
 - b) erected surveillance cameras which were operating at all times and capable of capturing audio and visual data from the Clausen property;
 - c) constructed an organic compost heap which they termed a maggot farm immediately adjacent to the What the Fungus production area even though the Besler property was very large and there were many other places where they could have chosen to locate that rotting organic material which was not immediately adjacent to the mushroom farm;
 - d) filmed the Clausen property and various occupants with cellular telephones on multiple occasions;
 - e) Darren Besler parked his truck on the fence line and played music at high volume while there were occupants on the Clausen property, until his battery was drained; and

- f) Bradley Besler erected several large white wooden crosses on the Besler property under the cover of darkness at approximately 5:00 am, on August 21, 2019, which were directly facing the Clausen property near to the property line, and readily observable to any and all occupants of the Clausen property from daylight forward. It was not until later that day, after a complaint had been lodged against him by Thor Clausen and Faith Callow to the RCMP that he painted the words "Do Not Trespass" on the horizontal arm of the crosses.
- [11] In her thorough and detailed reasons, the trial judge concluded that the Crown had not proven beyond a reasonable doubt that the conduct caused the complainant to fear for his safety, nor would any such fear, in all of the circumstances, have been objectively reasonable. As such, the Crown could not prove all of the requisite elements of criminal harassment.
- [12] Because the events listed above occurred outside the time period covered by Count 1, it was not open to the trial judge to convict the appellants of mischief for these enumerated instances unless mischief is an included offence of criminal harassment.
- [13] The trial judge concluded that mischief is an included offence of criminal harassment and convicted both of the appellants.
- [14] If I conclude that mischief is not an included offence of criminal harassment, an acquittal would be entered with regard to Count 2 for both accused.
- [15] If mischief is not an included offence, I will go on to consider whether it is appropriate to lift the conditional stay on the charge of mischief under Count 1 and then whether this Court can enter a conviction for Darren Besler under Count 1.

The Appeal

- [16] I will turn now to the primary issue on this appeal, which is whether the offence of mischief, pursuant to s. 430 of the Criminal Code, is an included offence within the offence of criminal harassment pursuant to s. 264 of the Criminal Code. Because this is a pure question of law, the standard of review is correctness.

Trial Decision

- [17] The trial judge referred to s. 662(1) of the Criminal Code that sets out that an accused may be convicted of a lesser and included offence, even if the entire offence that was charged is not proven. Section 662(1) provides as follows:

662 (1) A count in an indictment is divisible and where the commission of the offence charged, as described in the enactment creating it or as charged in the count, includes the commission of another offence, whether punishable by indictment or on summary conviction, the accused may be convicted

- (a) of an offence so included that is proved, notwithstanding that the whole offence that is charged is not proved; or
- (b) of an attempt to commit an offence so included.

[18] The trial judge correctly described the requirements for determining whether an offence is an included offence at para. 33 of the decision, citing the Supreme Court of Canada in *R. v. G.R.*, 2005 SCC 45 at para. 25:

An offence is "included" if its elements are embraced in the offence charged (as described in the enactment creating it or as charged in the count) or if it is expressly stated to be an included offence in the Criminal Code itself. The test is strict. It must "necessarily" be included

[19] The trial judge went on to cite the Court of Appeal for Ontario's decision in *R. v. Tenthorey*, 2021 ONCA 324, which expanded on the issue of included offences, including the more challenging situation where the charged offence may be proven in different ways:

53 Where either the charge itself or the enactment creating the offence provides only one mode of committing the charged offence, it is possible and indeed customary to test whether an offence is embraced by the main charge by asking whether that offence is "necessarily committed in the commission of the principal offence as described in the enactment creating it" (emphasis in original): *R. v. G.R.*, at para. 30, quoting *R. v. Harmer and Miller* (1976), 33 C.C.C. (2d) 17 (Ont. C.A.), at p. 19. This test works where there is only one mode of committing the charged offence because if that one mode of commission cannot be accomplished without also committing the included offence, the accused person will have fair notice that the elements of the included offence are at issue. It is therefore fair or just to convict the accused person of the included offence if the elements of the included offence are proved but the Crown falls short of proving all the elements of the charged offence. The offence of "dangerous driving causing death" provides an example. As I explained in *R. v. Romano*, 2017 ONCA 837, 41 C.R. (7th) 305, at para. 12:

"Dangerous driving" is an included offence in a charge of "dangerous driving causing death" because it is impossible to commit the offence of dangerous driving causing death without satisfying the legal requirements or elements of the offence of dangerous driving. Dangerous driving causing death is an aggravated version of the offence of dangerous driving, distinguishable only by the added legal requirement that the dangerous driving must cause the death of another.

54 Things are somewhat more complicated where there is more than one mode of committing the charged offence. Since the Crown may succeed in proving the charged offence by establishing any one of the available modes of committing the charged offence, an offence will be included if it is necessarily proved by establishing any one of the different ways in which the charged offence can be committed: *Simpson* (No. 2), at p. 139; *Lockett v. The Queen*, [1980] 1 S.C.R. 1140; *R. v. Benoit*, 2014 ONCA 457, [2014] O.J. No. 2770. This is because an accused person, alerted by law that the Crown can succeed in the prosecution by establishing any one of the modes of commission, will have fair notice that the Crown may ultimately prove any offence that is

necessarily proved when establishing any one of those modes of commission.

[20] Both the charge of criminal harassment under s. 264 and mischief under s. 430 of the Criminal Code are offences where there is more than one mode of committing the charged offence.

[21] The charge of criminal harassment is set out in s. 264 of the Criminal Code as follows:

264 (1) No person shall, without lawful authority and knowing that another person is harassed or recklessly as to whether the other person is harassed, engage in conduct referred to in subsection (2) that causes that other person reasonably, in all the circumstances, to fear for their safety or the safety of anyone known to them.

(2) The conduct mentioned in subsection (1) consists of

- (a) repeatedly following from place to place the other person or anyone known to them;
- (b) repeatedly communicating with, either directly or indirectly, the other person or anyone known to them;
- (c) besetting or watching the dwelling-house, or place where the other person, or anyone known to them, resides, works, carries on business or happens to be; or
- (d) engaging in threatening conduct directed at the other person or any member of their family.

[22] The offence of mischief is set out in s. 430(1) of the Criminal Code as follows:

430 (1) Every one commits mischief who wilfully

- (a) destroys or damages property;
- (b) renders property dangerous, useless, inoperative or ineffective;
- (c) obstructs, interrupts or interferes with the lawful use, enjoyment or operation of property; or
- (d) obstructs, interrupts or interferes with any person in the lawful use, enjoyment or operation of property.

[23] The relevant sections for the purpose of this analysis are underlined above.

[24] The trial judge concluded that the intentional conduct of the appellants obstructed or interfered with the lawful use, enjoyment, and operation of Mr. Clausen's property and the people working and living on that property. She concluded that the prohibited conduct in s. 264, repeatedly communicating directly or indirectly with a person or anyone known to them, and besetting or watching the dwelling or place where the other person, resides, works, carries on business, or happens to be are the very acts that constitute obstructing or interfering with the lawful use, enjoyment, and operation of the property and the people living and working on it.

[25] Accordingly, even though she could not conclude that the appellants' conduct caused the complainant to fear for his safety, their conduct had the effect of interfering with the lawful use, enjoyment and operation of the property. She concluded that the offence of mischief was necessarily proven if criminal harassment were proven under either s. 264(b) or (c).

Analysis - Whether Mischief is an Included Offence

[26] There are three ways an offence can be an included offence:

- a) by a description of the charged offence in the statute that includes the commission of another offence;
- b) offences included by statutory enactment; or
- c) by such a description of the offence in the count that it includes the commission of another offence.

[27] The second one does not apply here because mischief is not statutorily an included offence of criminal harassment under the Criminal Code.

[28] The third involves specific wording incorporated in to the count. An example may be found in *R. v. Schizgal*, 2001 BCCA 238. There, the primary count of break and enter specifically referenced the offence of mischief. In that case, the count was worded as follows:

COUNT 4: THAT, at or near the City of Vancouver, Province of British Columbia, on or about the 24th day of December, 1997, he did break and enter a place, a dwelling house, situate at 1133F The Castings, and commit an indictable offence therein, mischief, contrary to Section 348(1)(b) of the Criminal Code of Canada and against the peace of our Lady the Queen her Crown and Dignity [emphasis added].

[29] Here, Count 2 makes no reference to mischief. Therefore, the only possibility that mischief is necessarily included in the offence of criminal harassment is if its essential elements are contained in the offence of criminal harassment as set out in the enactment.

[30] There is no issue as to the appropriate principles for determining whether an offence is an included offence, and it is not disputed that G.R. constitutes the appropriate test. The question is whether proof of criminal harassment under subparagraphs 264(b) and (c) necessarily includes all of the elements required to prove mischief under subparagraphs 430(c) and (d).

[31] Put another way, could criminal harassment be proven pursuant to either section 264(b) or (c) yet not constitute mischief? Are there any elements that would need to be proven in a claim for mischief under 430(c) and (d), but are not required to prove criminal harassment?

- [32] The test for whether an offence is included is a strict one. The justification for the high burden on the part of the Crown is that it is fundamental to a fair trial in a criminal matter that the accused has knowledge of the charges he or she faces. In *R. v. Robitaille*, 2012 ONCJ 155 at para. 4 [Robitaille], Mr. Justice Paciocco described the issue as not one of whether the accused knows of the facts of the case when coming into the courtroom, but rather whether they are aware of the offence or offences they must meet from reading the indictment.
- [33] In this case, the analysis must therefore necessarily focus on whether the included offence will always be proven if the charged offence is proven, without regard for the circumstances of the particular case. It is therefore irrelevant that the proven facts would have supported a conviction for the included offence.
- [34] Criminal harassment is a crime against the person. The charge of criminal harassment is made out if the accused engaged in any of the prohibited behaviours enumerated in 264(2) that caused the complainant to fear for their safety or the safety of someone known to them.
- [35] Mischief is in essence a property offence. Property for the purposes of s. 430 of the Criminal Code includes both real and personal property.
- [36] In determining whether an offence is an included offence, courts have often provided examples to illustrate that an offence is not an included offence. In *R. v. Beyo*, 2000 CanLII 5683, 144 C.C.C. (3d) 15 (O.N.C.A.), ref'd [2000] S.C.C.A. No. 239 [Beyo], the Court of Appeal for Ontario considered whether mischief was an included offence of unlawful entry. To illustrate its finding that it was not, the Court gave the example of someone committing an unlawful entry into a residence that the owner never knew about. Without knowledge of the entry, there is no interference with the use of the property, and the offence of mischief cannot be made out.
- [37] In *Robitaille*, the Court considered whether mischief was an included offence of breaking and entering. In concluding that it was not, Justice Paciocco provided the example of someone who broke into a restaurant and stole a coat belonging to a patron from a common area. He said that if the theft were never reported by the coat owner to the restaurant owner, the break and enter would have no impact on the restaurant owner's enjoyment of his property and therefore mischief would not have been proven.
- [38] In *R. v. Bus*, 2020 BCCA 278 [Bus], the Court of Appeal adopted the same analysis as the Court of Appeal for Ontario in *Beyo*. In *Bus*, the Court considered whether mischief was an included offence of breaking and entering with intent to commit an indictable offence under s. 348(1) of the Criminal Code. Madam Justice Saunders referred to the definition of "break" in s. 321 of the Criminal Code which means:
- (a) to break any part, internal or external, or
 - (b) to open any thing that is used or intended to be used to close or to cover an internal or external opening.

- [39] Madam Justice Saunders held that mischief was not an included offence of breaking and entering with the intent to commit an indictable offence, because although s. 321(a) above would constitute mischief, subsection (b) would not necessarily do so because there may have been no damage or destruction of property, and the description of the charge did not exclude subsection (b). I note that Bus only concerned mischief under s. 430(1)(a) which refers to one who wilfully "destroys or damages property", as opposed to under ss. 430(1)(c) and (d).
- [40] Breaking and entering with the intent to commit an indictable offence is also a property crime, and therefore is a more closely related offence to mischief than criminal harassment.
- [41] I turn now to the two elements of criminal harassment that were referred to by the trial judge, namely 264(2)(b) and (c):
- 264(2) The conduct mentioned in subsection (1) consists of
- ...
- (b) repeatedly communicating with, either directly or indirectly, the other person or anyone known to them;
- (c) besetting or watching the dwelling-house, or place where the other person, or anyone known to them, resides, works, carries on business or happens to be; or . . .
- [42] As for (b), I conclude that mischief cannot be an included offence because no property rights are necessarily affected. As a simple example, repeatedly communicating by telephone with the complainant that causes that person to fear for their safety could constitute criminal harassment, but would not be mischief, because the property element is missing.
- [43] More interesting is s. 264(2)(c) because there is reference to the dwelling house, which constitutes property. However, while the subsection includes reference to the complainant's dwelling-house, it is not so limited. The offence of criminal harassment under the subsection can also be proven if the accused is watching where the complainant works, carries on business, or happens to be. In addition to watching the complainant's dwelling house, the harassment could also include watching the complainant in a public park, shopping mall, or street. In these examples, there could be no mischief because the complainant has no property interest in these locations.
- [44] I acknowledge that there are authorities that find that lawful use and enjoyment of property may be obstructed or interfered with where there is no physical harm to property. The Court of Appeal for Ontario in *R. v. Maddeaux*, 1997 CanLII 1934, [1997] O.J. No. 1184 (C.A.), ref'd [1997] 3 S.C.R. xi, rejected the idea that mischief requires damage. Adopting the dissenting reasons of Mr. Justice Chamberland in *R. v. Drapeau*, 1995 CanLII 5099, 96 C.C.C. (3d) 554 (Q.C.C.A.), the Court stated the following:

12 The charge in the instant case is that Mr. Maddeaux wilfully interfered with the lawful use or operation of property. In my view, the words "use, enjoyment or operation" in s. 430 (1)(c) are to be read ejusdem generis. "Use" of this property would include being present in the apartment for the purposes of cooking, eating, cleaning, resting, sleeping, listening to the radio and watching television. The word "enjoyment" might include any or all of those uses. "Operation" would not normally be employed in connection with a residential property, such as an apartment, but would be used in connection with a commercial, institutional or industrial enterprise as, for instance, a music shop, a grocery store, a library, or a mill.

[45] Similarly, Mr. Justice Cowan of this Court concluded that excessive noise was sufficient for a conviction of mischief in *R. v. T.W.*, 1993 CarswellBC 1992, [1993] B.C.J. No. 2031 (S.C.).

[46] However, in *Beyo*, the Court of Appeal for Ontario rejected the proposition that a criminal conviction for mischief could occur simply because a property owner felt their sense of security had been violated, concluding that a conviction cannot flow from what the Court referred to as an 'abstract concept':

32 The decision in *E. (S.)* depends upon accepting the proposition that any entry into a dwelling house without lawful excuse, even if the resident is not aware of it, detracts from the right to control the property and therefore interferes with the use of the property (para. (1)(c)) or the person's use of the property (para. (1)(d)). I cannot agree with this proposition. It would mean that an accused could be convicted of the mischief offence by application of a wholly abstract concept

33 Wholly abstract notions or feelings of privacy and security and interference with theoretical rights to control access to property, even a dwelling house, cannot be transformed into criminal conduct.

[47] While the authorities suggest that some interference short of actual damage to property, such as noise and smell, can ground a conviction for mischief, something more than an abstract notion of a violation of sanctity or security is required. In the situations of noise or smell, the accused would be causing some noxious or annoying thing to be projected or conveyed onto the property, and therefore interfering with the complainant's enjoyment of the property. If a person is simply watching, nothing is conveyed and it is simply a matter of the complainant's perception.

[48] Because I conclude that a person could criminally harass another without committing mischief, it follows that mischief is not an included offence. I therefore conclude that the trial judge erred in finding that mischief is an included offence of criminal harassment. In so finding, I have relied on the analysis in the decisions in *Bus*, *Beyo*, and *Robitaille*, all of which consider whether mischief was an included offence of other criminal charges, and none of which were brought to the trial judge's attention.

[49] The appellants' appeal of their conviction under Count 2 is allowed, and the accused are therefore entitled to have acquittals entered under that count.

Darren Besler's appeal under Count 1

[50] The appellants also appeal Darren Besler's conviction for mischief under Count 1.

[51] I must consider whether this Court has jurisdiction to hear the matter. Although the trial judge found Mr. Besler guilty of mischief, she then granted a conditional stay of Count 1 based on the principles in *Kienapple*. *Kienapple* stands for the proposition that a person should not be convicted more than once for the same offence.

[52] Summary conviction appeals are governed by s. 813 of the Criminal Code, and 813(a) provides for a defendant's right of appeal as follows:

813 Except where otherwise provided by law,

(a) the defendant in proceedings under this Part may appeal to the appeal court

(i) from a conviction or order made against him,

(ii) against a sentence passed on him, or

(iii) against a verdict of unfit to stand trial or not criminally responsible on account of mental disorder; and . . .

[53] Since a conditional stay was entered, Darren Besler's appeal does not fall within any of the enumerated grounds.

[54] When this appeal was argued before me, both parties expressed to me that it was their understanding that if the accused's appeals under Count 2 were granted, the conditional stay would be set aside and Darren Besler's conviction under Count 1 would be reinstated. On that basis, Darren Besler argued his appeal of the finding of guilt under Count 1.

[55] In *R. v. Provo*, 1989 CanLII 71, [1989] 2 S.C.R. 3 [Provo], the Supreme Court of Canada held that the preferred practice when *Kienapple* applies is to order a conditional stay, as opposed to dismissing the lesser charge. One of the advantages identified with the procedure is that it avoided the need for what would amount to a conditional appeal filed by the Crown in the event that the accused successfully appealed his conviction of the more serious offence.

[56] In *Provo*, the Court held that the appropriate procedure upon dissolving a conditional stay is for the Court of Appeal to refer the matter back to the trial court to preserve the appellant's right to launch an appeal from the lesser offence that was stayed under *Kienapple*. The Court said the following at 22:

In my view, it would have been more appropriate for the Court of Appeal to have remitted the matter back to the trial judge to register a conviction on the sexual assault charge and sentence the appellant for that offence. This is a preferable route to the Court of Appeal or this court itself entering the conviction in that it preserves the appellant's right to launch an appeal from the sexual assault conviction if he so desires. Under [s. 695(1)] of the Criminal Code this court may make any order that the Court of Appeal might have made under its broad powers under [s.

686(8)]. Accordingly, I would remit the matter back to the trial judge for the entry of a conviction on the sexual assault charge and the imposition of sentence on that conviction

[57] I note that the concern about Mr. Besler's opportunity to launch an appeal from the finding of guilt is of limited concern here because both Darren Besler and the Crown argued Darren Besler's appeal of Count 1 presuming that it was properly before me.

[58] In *Provo*, the Supreme Court of Canada held that whenever an appellate court makes an order under s. 686(2) of the Criminal Code, the Court of Appeal can also exercise its supplementary powers under s. 686(8) which provides as follows:

686(8) Where a court of appeal exercises any of the powers conferred by subsection (2), (4), (6) or (7), it may make any order, in addition, that justice requires.

[59] Section 822(1) of the Criminal Code incorporates s. 686. Therefore, a summary conviction appeal court has the same powers under to s. 686(8) as a court of appeal, with the exception of 686(5), which is inapplicable here.

[60] I must therefore decide whether in allowing the appeal on Count 2, I should set aside the conditional stay on Count 1, and decide Darren Besler's appeal on its merits, or whether the matter should be returned to the trial court. The decision turns on whether judicial efficiency and expediency are sufficient to constitute an order 'that justice requires', as contemplated in s. 686(8).

[61] I have concluded that they do not.

[62] From my review of the authorities, I am not satisfied that s. 686(6) gives me the authority to decide Darren Besler's appeal of Count 1.

[63] An appeal under s. 813(a)(i) may only be from a conviction. The differences between a conviction and a finding of guilt were discussed by the Court of Appeal in *R. v. Berube* 2012 BCCA 345. In *Berube*, the trial judge had entered convictions prior to hearing the accused's argument for a judicial stay based on abuse of process. The Court of Appeal distinguished a finding of guilt from a conviction, and after holding that the trial judge ought to have found the accused guilty but not entered a conviction prior to hearing the abuse of process argument, stated the following at para. 44:

[44] A "conviction", unlike a finding of guilt, is a judgment of the court. "Conviction" is a technical term in criminal law, and the use of the term has consequences. A conviction can be appealed under s. 675(1) of the Code, cross-examined upon under s. 666 of the Code and s. 12 of the Canada Evidence Act, R.S.C. 1985, c. C-5, and may be the subject of a record suspension (formerly a pardon) under the Criminal Records Act, R.S.C., 1985, c. C-47. Numerous other statutes provide for consequences of convictions.

- [64] The Court of Appeal then referred to the example of entrapment, where a finding of guilt must precede consideration of any entrapment. If the accused's argument of entrapment is accepted by the judge, the judge will refuse to register a conviction, notwithstanding the finding of guilt.
- [65] The conditional stay of proceedings of Count 1 following the trial occurred after a finding of guilt, but without a conviction being entered under that count. As such, there is no conviction to appeal.
- [66] In so saying, I recognize that by concluding that I cannot decide Darren Besler's appeal, it would seem likely that:
- a) The trial judge will set aside the conditional stay and enter a conviction on Count 1, in light of my decision to allow the appeal under Count 2;
 - b) Darren Besler will appeal his conviction under Count 1; and
 - c) Darren Besler's appeal will likely be re-argued just as it was argued before me, including making specific reference to the appellant's amended statement of argument filed on November 26, 2021, which is a 19-page written submission.
- [67] I note parenthetically that although the Beslers were self-represented at the appeal, the quality of both the oral and written submissions far exceeded what the court will generally see from self-represented parties.
- [68] I do not interpret s. 686(8) as providing a broad discretion to decide Darren Besler's appeal based on judicial efficiency or expediency. While it is likely that the stay will be lifted, there may be other considerations about which I am unaware and I ought not to presuppose what will happen. The Supreme Court of Canada has determined that the appropriate process in such a case is to return the stay to the trial court, and I am unaware of any legal basis to breathe life into an appeal I have no jurisdiction to hear.
- [69] I have concluded that there is no ability to appeal a finding of guilt in the absence of a conviction and it follows that I cannot determine Darren Besler's appeal relating to Count 1.

"Wilson J."

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