

CANADA / JUDGMENT

R. v. Chow

2002 BCSC 1936

COURT

Supreme Court of British Columbia

DECIDED

20 June 2002

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2002 BCSC 1936 R. v. Chow Citation: R. v. Chow Date: 20020620 2002 BCSC 1936 Docket: 102982
Registry: Victoria IN THE SUPREME COURT OF BRITISH COLUMBIA Oral Ruling on Voir Dire Re
Validity of Authorizations The Honourable Mr. Justice R.D. Wilson June 20, 2002 HER MAJESTY
THE QUEEN AGAINST SIMON CHOW, WILSON WONG, DAVID AU, VICKER SETO, KWOK CHUNG
TAM, WALL YIP YEUNG, BARRY LIU Counsel for the Crown: B. Jones K. Low C. Fisher Counsel
for Accused Chow: Counsel for Accused Wong: Counsel for Accused Au: Counsel for Accused
Seto: Counsel for Accused Tam: Counsel for Accused Yeung: Counsel for Accused Liu: P. Leask,
Q.C./E. Doricic A. Brooks M. Foster K. Walker A. Tam C. Johnson T. Bulmer

- [1] THE COURT: This is a ruling on a procedural matter during a voir dire inquiring into the validity of eleven authorizations granted, in an investigation into a drug conspiracy matter. On 17 June 2002, I made a determination that the authorizing judge could not have granted the authorization of 23 October 1997 because there was no evidence to prove investigative necessity.
- [2] The next step in this trial is to move on to the next authorization, number P543, granted 19 December 1997. The present question is whether intercepted communications under the October authorization may be used in the inquiry into the validity of the December authorization.
- [3] There were intercepted communications between Mr. Liu and others, and Mr. Au and others, and Mr. Seto and others. For the purposes of the procedure which has been adopted on this voir dire, the prosecution is content that those communications are not to be considered on the review of the December authorization. But, says the prosecution, all other intercepts are to be considered. The accused say all of the intercepts under the October authorization are to be excised on a review of the December authorization.
- [4] I do not mean to do a disservice to counsels' submissions, but essentially the accuseds' arguments are these. The determination of what may be used on the granting of a warrant, or authorization, in this case, is a separate, independent inquiry, not connected with any Charter remedy. As a matter of law, unlawfully obtained evidence cannot be used to obtain a warrant, or authorization. Unlawfully obtained evidence was used to obtain the authorization of 23 October 1997. Therefore, it cannot be considered, by me, and ought not

to have been considered, by the judge granting the authorization in December of 1997. On the other hand, the prosecution says this issue cannot be resolved independently of the Charter.

- [5] When the Criminal Code was amended in 1993, argues the prosecution, the independent analysis sought by counsel for the accused becomes irrelevant. Whether or not there is any remedy, is to be decided entirely within the context of the Charter.
- [6] Among other things, in support of that contention, I have been provided with a copy of the reasons for judgment in *R. v. Spinelli* (1995), 101 C.C.C. (3d) 385. Leave to appeal to the Supreme Court of Canada was refused (reported at 105 C.C.C. (3d) vi).
- [7] The facts in *Spinelli* were these: Mr. Spinelli bought himself a car. He put insurance coverage on the car. He then reported to the police, and to his insurer, that his car had been stolen. His insurer paid him the value of his car and Mr. Spinelli went on his way. Later in time, and coincidentally, a police officer was attending the premises of another person, seeking to return that person's rifle to him, which had been taken into police custody by virtue of some dust-up which had occurred. As the officer was leaving the premises, he observed what, he thought, was a newer model automobile with no licence plates. This intrigued him. He went to this car, which turned out to be Mr. Spinelli's car. The officer looked into the compartment of the car and obtained the vehicle identification number. He then conducted a search of that vehicle identification number and learned that the car had been reported as stolen. He therefore arranged to have the car towed to the detachment office, where the car was broken into. There was found in that car, among other things, a receipt for a meal, which had been had at a restaurant, after the date upon which Mr. Spinelli had received the proceeds of his insurance coverage. On that receipt was a fingerprint, said to have been left by Mr. Spinelli.
- [8] Mr. Spinelli was prosecuted. On his prosecution, the prosecution sought to lead the receipt, with Mr. Spinelli's alleged thumbprint, in evidence. Mr. Spinelli objected to its admissibility. The same argument that has been presented to me, on a section 8 analysis of who may assert a right, was made to the trial judge in *Spinelli* and rejected. The evidence was admitted. Mr. Spinelli was convicted. Mr. Spinelli appealed. The appeal was dismissed.
- [9] There are similarities, if not identical aspects, to the applications made to me, and to those in *Spinelli*. First, the communications device is to the car what the restaurant receipt is to the communications of persons other than Messrs. Liu, Au, and Seto.
- [10] Madam Justice Southin, at page 13 of the computer-generated version, set the syllogism that was put before her, in these words. The first proposition was: All unlawful acts of the police are contrary to fundamental justice. Proposition two: Every breach by the police of a private right, by which I mean an act which cannot be justified, is an "unlawful act." Proposition three: It is immaterial whether the breach of that private right is trivial or whether the person who suffers the breach was in any way distressed by it.

Conclusion:

Therefore, if, by the breach, evidence is obtained against a third person, to admit it at the trial of that person will cause him to be deprived of his liberty not in accordance with the principles of fundamental justice.

- [11] As I understand counsels' submissions, there are similarities in the syllogism they put before me. The first proposition is: all unlawful acts of the police are contrary to the integrity of the prior authorization system for obtaining electronic interceptions. Second proposition: any breach by the police of that prior authorization system is an unlawful act. Therefore, anything obtained through that unauthorized act is not admissible on a further authorization application or a review of that authorization.
- [12] Counsel have sought to distinguish the analysis on a trial, from an analysis at an ex parte hearing for a prior authorization. That is connected, as I understand it, to the whole nugget of this issue as to whether or not the Charter is engaged in this discussion.
- [13] In her reasons for judgment, Madam Justice Southin confirmed the history that was found in the Supreme Court of Canada decision I referred to yesterday that evidence is admissible if it is probative, and, except for certain exceptions defined, it does not matter how the evidence was acquired. That was the situation until the Charter was brought into effect.
- [14] Counsel have not persuaded me that I am not dealing with a question of admissibility. The question is: What information is receivable before a judicial officer to make a determination?
- [15] I am unable to find, on the authorities counsel have presented me, that there is a bright line which distinguishes prior authorization hearings from trials. I take the law as set out in *Spinelli*. I find that on the application for the authorization, unless Messrs. Liu, Au, or Seto are involved, other persons are in the same position as the occupier of the premises upon which Mr. Spinelli's car was found, and therefore Messrs. Seto, Au, and Liu had no basis in law to complain about the admissibility of that evidence before the authorizing judge in December, nor about the admissibility of that information on the review of that authorization.
- [16] There is a similar analysis by Mr. Justice Finch, but the propositions are the same.
- [17] I think the remedy must be found in the Charter. In order to assert a Charter remedy, a person's rights must be engaged. In result, the decision is, that there will be excised from the affidavit in support of the December authorization, all information directly or indirectly connected with interceptions of Mr. Liu's, Mr. Au's, or Mr. Seto's communications. "R.D. Wilson, J." The Honourable Mr. Justice R.D. Wilson

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