

CANADA / JUDGMENT

R. v. Cross

2023 BCSC 2063

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Supreme Court of British Columbia

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Cross,

2023 BCSC 2063

Date: 20231108

Docket: 96951

Registry: Abbotsford

Rex

v.

David Allan Cross

Before: The Honourable Justice Schultes

Oral Reasons for Judgment

re: Application for Certiorari

Counsel for the Crown appearing by videoconference:

S.D. Phillips

Counsel for the Accused appearing by videoconference:

A. Yusuf

Place and Date of Hearing:

Abbotsford, B.C.

September 27 and October 3, 2023

Place and Date of Judgment:

Abbotsford, B.C.

November 8, 2023

Introduction

- [1] This is an application for certiorari arising from the refusal of a provincial court judge to quash a violation ticket that alleged a violation of the federal Quarantine Act. The violation in question was failing to wear a mask at a border crossing on July 5, 2021.
- [2] The ticket described the accused's failure to comply with an order prohibiting or subjecting to any condition the entry into Canada, and referred to s. 58 of the Act, which permits the imposition of such conditions. It did not specify the manner in which the accused was said to have committed the offence. The Crown had previously provided him with disclosure indicating that his failure to wear a mask was the issue.

Proceedings in Provincial Court

- [3] Pursuant to regulation, the majority of the provisions of the Offence Act apply to contraventions of federal statutes. The accused applied to quash the ticket on the basis that it fell short of the requirement imposed by s. 96(3) of the Offence Act, that "an information must contain sufficient detail of the circumstances of the alleged offence to give to the defendant reasonable information with respect to the act or omission to be proved against the defendant, and to identify the transaction referred to." He argued that the ticket was void ab initio as a result, and therefore a nullity.
- [4] The accused drew an analogy to the decision of the Supreme Court of Canada in *R. v. Wis Development Corporation*, [1984] 1 S.C.R. 485, in which a charge of unlawfully operating a commercial air service without particularizing which of the multitude of ways of doing so had been involved in the offence, ran afoul of a then identically-worded provision of the Criminal Code.
- [5] Crucially, at the time that *Wis* was decided the Criminal Code did not permit amendments to cure defects of this nature on an objection raised before a plea. That deficiency was later amended, but the Offence Act still does not contain express language permitting it, only "on" or "at any stage" of the "trial".
- [6] The accused cited *Vancouver (City) v. Laffy-Stadnyk*, 2004 BCPC 439 at para. 25, which held that the absence of an equivalent change to the Offence Act meant that a deficiency of the kind found in *Wis* was incapable of being amended.

- [7] The accused also relied on more recent decisions in this province that had applied the same analysis in *Wis* to find generally-worded informations deficient, although not at the initial stage of a challenge before plea.
- [8] In *R. v. Taylor*, 2002 BCPC 321, the impermissible lack of specificity in the information was "failing to comply with a condition of an instruction of a hunting licence".
- [9] In *Lake Cowichan (Township) v. Arsens*, 2005 BCSC 1722, the deficient information alleged only "unlawful use" of property, along with the bylaw and section number in question.
- [10] The Crown at the application in the present case conceded that the ticket "probably" did not comply with the requirements of s. 96(3). However, they relied on s. 97(2)(c) of the Offence Act, which provides that no information is insufficient "merely because it fails to specify the means by which the alleged offence was committed", as well as the court's ability to order particulars of the offence if necessary, pursuant to s. 97(3).
- [11] The Crown also referred to the ability to amend the information pursuant to s. 100, although, as I have described, that section does not permit amendments to informations pursuant to a challenge made before plea.
- [12] More broadly, the Crown referred the judge to *R. v. Ledcor Industries*, 2004 ABPC 141 at para. 54, which, after an extensive review of the cases following *Wis*, concluded that the law as articulated in *Wis* has been eclipsed by the more recent decisions of the Supreme Court of Canada, with the effect that defective informations (in that case a duplicitous one) should be quashed in only the clearest of cases. Instead of the former approach, consideration should be given to an amendment of the offending language, or the ordering of particulars. However, the Offences Procedure Act, Alberta's version of the Offence Act, incorporated the provisions of the Criminal Code that now permit an amendment at any stage of the proceedings, so the choice facing the judge in the *Ledcor* case was not as stark as the one that the provincial court judge believed he faced in this case.
- [13] Along the same lines, the Crown referred to the decision of the Supreme Court of Canada in *R. v. Moore*, [1988] 1 S.C.R. 1097, which noted the gradual shift away from the requirements that trial judges quash defective informations towards amending them in the vast majority of cases, quashing only absolute nullities that, as the court put it, go "to the very jurisdiction of the judge." Once again of course, this begs the question in the absence of a power to amend before plea under the Offence Act.
- [14] The Crown also referred to the "golden rule" distilled from the authorities in *City of Vancouver v. Wiseberg*, 2005 BCSC 1377 - that the reasonable information provided to the accused with respect to the transaction must provide him with the possibility of a full defence and a fair trial.
- [15] Finally, a recent application of these principles cited by the Crown was *R. v. Koopman*, 2022 BCPC 183, which dealt with an application to quash a ticket alleging a contravention of the COVID-19 Related Measures Act on the basis that it described the violation of an order made

pursuant to that legislation by reference to a section of the legislation that does not exist, rather than the general offence section of the Offence Act, and did not describe how the order made under the legislation was alleged to have been contravened. The judge in that case found that the language in the ticket described the role played by the accused in a manner sufficient to particularize the offence, even though it did not expressly describe which of the three possible ways of contravening the order had occurred. The judge also took into account defence counsel's actual knowledge of the nature of the infringement.

- [16] The provincial court judge ultimately resolved the accused's application in the present case with the following analysis:
- [39] I fully agree that this COVID-19 ticket alleging a "failure to comply with an order prohibiting or subjecting to any condition the entry into Canada" is imprecise. It does not specify in which way Mr. Cross failed to comply with an order, and it does not specify the order in council itself.
- [40] However, there is no dispute Mr. Cross is fully aware through the disclosure that he is being prosecuted for not wearing a mask when entering Canada. The ticket itself specifies the date, time, place and details of the Defendant. It does refer to s. 58 of the Quarantine Act and a failure to comply with an order respecting entry into Canada. The fine of \$5,750 is written in.
- [41] When I look at not only the ticket but also the disclosure, the Defendant should clearly be aware he is being prosecuted for not wearing a mask, contrary to order in council Minimizing the Risk of Exposure to COVID-19 in Canada Order (Quarantine, Isolation and Other Obligations) PC Number 2021-0615, s. 3.5.
- [42] The Wis Developments case, and even the provincial decisions following it, are from a bygone era where form was emphasized over substance. The cases are some 20 to 40 years old. As indicated in Ledcor, the law in Wis Developments has been eclipsed by modern authorities which prevent a judge from quashing an information except in the clearest of cases. The golden rule is to ask whether the accused has been reasonably informed of the transaction against him so as to give him the possibility of a full defence and fair trial.
- [43] I also agree with the Crown that the purpose of the justice system is not to avoid trials on the merits based on technicalities which do not affect trial fairness.
- [44] The lack of sufficient detail in the ticket does not necessarily mean the ticket is a nullity. Section 97(2)(c) of the Offence Act states that an information is not insufficient merely because it does not specify the means by which an alleged offence is committed, and s. 97(3) allows for an order that a particular be provided to a complainant.

- [45] I do agree with defence counsel that there is a distinction between providing sufficient details of the circumstances of the alleged offence under s. 96(1) and specifying the means by which the alleged offence was committed in s. 97(2)(c). For there to be sufficient details, the information must not wholly omit essential averments of the offence.
- [46] However, I find that the COVID-19 ticket here does not omit an essential averment. It describes the time and place of the offence, together with a descriptor of the offence by failing to comply with an order concerning entry into Canada. It simply fails to describe the exact means by which the alleged offence was committed, by not wearing a mask.
- [47] An order for particulars under s. 97(3) is not even required here, because the ticket with the disclosure already provides all the details necessary to inform the Defendant of his alleged transgression.
- [48] Like the court in *Koopman*, I find that the Defendant has been treated fairly here. The wording of the ticket in *Koopman* was also not ideal. In that ticket, the defendant was referred to as an organizer/host, but the ticket did not specify the precise way in which the offence was committed.
- [49] In summary, the COVID-19 ticket here, although not ideal, is sufficient when I consider the disclosure. I am not quashing the information.
- [17] Despite the dismissal of this application to quash it, the ticket was later stayed by the Crown for reasons unrelated to the challenge to its wording. The accused is currently facing another identically-worded ticket for the same alleged offence.

Positions on the Present Application

Accused

- [18] With respect to the issue of mootness in light of the stay of proceedings on this ticket, the accused's counsel points out that the jurisdiction of the judge to proceed on the accused's outstanding ticket information depends on the correctness of the Provincial Court judge's decision in this case, which the present application will resolve.
- [19] Addressing the availability of certiorari in criminal and quasi-criminal cases, which *R. v. Awashish*, 2018 SCC 45, has restricted to jurisdictional error - failing to observe a mandatory provision of a statute or acts in breach of the principles of natural justice - counsel explains that errors that render the charging document a nullity from the outset certainly fall within the ambit of certiorari. He draws an analogy between the present situation and the one in *Bessette v. British Columbia (Attorney General)*, 2019 SCC 31, where the Supreme Court explained that proceeding with a trial that may well prove to be a nullity (in that case a failure to observe a mandatory provision allowing a trial in French) may result in needless additional proceedings if the decision is left to be overturned on appeal.

[20] On the merits of the certiorari application, counsel renews his submission that the information here falls squarely within the scope of the *Wis* decision by its omission of the manner in which the order was breached. As the cases previously cited to the provincial court judge demonstrate, the requirements of s. 96(3) continue to be enforced into the modern era. Counsel does not dispute that the law in this area has evolved since *Wis*, but emphasizes, as the *Laffy-Stadnyk* decision confirmed, that the unavailability of amendments to respond to a challenge before plea under the Offence Act remains the same as under the Criminal Code at the time *Wis* was decided.

Crown

[21] Crown counsel frames the threshold issue as being whether the ticket is an "absolute nullity", as described in *Moore*, which is the only basis on which certiorari can be used to review a provincial court judge's decision concerning the validity of an information. *R. v. Webster*, [1993] 1 S.C.R. 3, described the necessity of resorting to certiorari for this purpose as occurring only in "rare and highly-exceptional circumstances". Otherwise, the validity of the information is a matter within the provincial court judge's jurisdiction: see paras. 17 and 18. As the Court expressed it, "the existence of some charge of an offence known to the law, albeit very imperfectly described, is the basis of the judge's jurisdiction." In reaching this conclusion, the Court in *Webster* adopted the following passage from the dissenting reasons in *Moore*:

If the document gives fair notice of the offence to the accused, it is not a nullity and can be amended under the broad powers of amendment s. 529 [now s. 601] gives to the courts. Only if a charge is so badly drawn up as to fail even to give the accused notice of the charge will it fail the minimum test required by s. 510(2)(c) [now s. 581(2)(c)]. A charge that is this defective would have to be quashed [p.1109]

[22] This modern approach was summarized in *Wiseberg*:

[20] In *Wis*, the allegation that the accused operated a commercial air service covered all of the company's activities such that there was insufficient detail for the accused to know which, of a multitude of activities, were included in the information. This was described by the British Columbia Court of Appeal in *Re MacLean and The Queen* (1988), 45 C.C.C. (3d) 185, 31 B.C.L.R. (2d) 137 (C.A.), leave to appeal to S.C.C. refused, 47 C.C.C. (3d) vii [*Re MacLean*], as an exceptional case where the statute related to diverse and unrelated matters thereby causing prejudice to the accused. The defect must be one of substance, generally a matter essential to be proved (*Wis* at 140). In British Columbia, if the information states the time of the offence, the place, the victim, and the offence in the language of the enactment, it will not be quashed unless there is a possibility of prejudice to the accused (*R. v. B.(G.)*, [1990] 2 S.C.R. 30, 56 C.C.C. (3d) 200 at 212; *Re MacLean* at 188). Further details are in the nature of particulars and the lack of detail will not vitiate an information. Relatively meagre detail will be sufficient provided that it lifts the offence from the general to the particular (*Brodie v. R.*, [1936] S.C.R. 188, 65 C.C.C. 289; *R. v. Fox* [(1986), 50 C.R. (3d) 370 (B.C.C.A.)]; *Re MacLean*).

What constitutes reasonable or adequate information depends on the circumstances of each case, including the nature and legal character of the offence charged (R. v. B.(G.) at 212; R. v. De Jong (2001), 15 M.V.R. (4th) 282, 2001 BCSC 950 at para. 12).

- [21] The count must identify the transaction referred to (R. v. Robinson, [2001] O.J. No. 1072 (28 March 2001), C30519 (Ont. C.A.) at para. 23; R. v. Horsland [(April 28, 1995), Doc. Nanaimo 27914S (B.C. S.C.)] at paras. 8-10). The word "transaction" has no specific meaning and is to be interpreted as the justice of the case demands (R. v. Horsland, *ibid.*).
- [22] Generally, the current approach is to reject insufficiency arguments as overly technical and a holdover from another time (R. v. B.(G.); R. v. Horsland at para. 25).
- [23] The court will not look only at the face or wording of the information but at all the other material in the possession of the accused, including disclosure from the City (R. v. Robinson at para. 23; Re MacLean).
- [23] A further indication of the sufficiency of the present wording, in the Crown's submission, are the regulations that govern the form and content of federal ticket informations. Section 8(7) of the Contraventions Act provides that the use of a short-form description established under the Regulations is sufficient for all purposes to describe the contravention. The description of the offence in the present ticket is prescribed by regulation. The ticket was also in the form prescribed by regulation, and all of its required fields were filled in.
- [24] A judicial justice in Ontario has found that a ticket information that contained this same short-form wording "had no defect apparent on the face of the information, as all the requisite information is included" (R. v. Lauterpacht, 2023 ONCJ 51 at paragraph 8), but it does not appear from the reasons that the Wis-type argument of that was raised here was raised before that judicial justice.
- [25] Finally, the court in Wiseberg reached the crucial conclusion on the availability of amendment in the case of an application to quash an information before plea:
- [30] Section 133 of the Offence Act refers to the applicability of the Criminal Code. It states:
- 133 If, in any proceeding, matter or thing to which this Act applies, express provision has not been made in this Act or only partial provision has been made, the provisions of the Criminal Code relating to offences punishable on summary conviction apply, with the necessary changes and so far as applicable, as if its provisions were enacted in and formed part of this Act.
- [31] In R. v. Sestito [[1998] B.C.J. No. 3267 (B.C. Prov. Ct.)] the court held that section 133 did not assist because express provision had been made in section 100(1) and that there was no basis to conclude that only partial provision had been made when section 100(1) provided for a number of ways to amend an information during the course of trial. The judge concluded that it would be improper given the judgment in Wis to insert a phrase from the Criminal Code that would completely reverse the meaning of section 100(1) of the Offence Act. This case has not been followed on this point in this court. Although the matter was

touched on in *R. v. Kruck*, (2001), 18 M.V.R. (4th) 187, 2001 BCSC 785 (B.C. S.C.), it was not necessary to decide the point for purposes of that case.

[32] Section 100(1) does not provide for amendment prior to commencement of trial based upon the interpretation of a similar provision in the Criminal Code in *Wis*. Leaving aside the possibility that "trial" commences before plea ((*R. v. Sisko* (1977), 8 C.R. (3d) 372, [1977] B.C.J. No. 1003 (B.C. C.A.); *R. v. Lakeview Motors Ltd.* (1982), 66 C.C.C. (2d) 475, 35 B.C.L.R. 142 (B.C. C.A.)) the section should be read contemporarily in view of legislation since *Wis*, section 32 of the Interpretation Act, R.S.B.C. 1996, c. 238, and the determination of our courts to avoid overly technical arguments on insufficiency. Based upon this interpretation, the section, as worded, provides only partial provision for amendment of information because it does not provide for amendment before plea.

[33] Section 32 of the Interpretation Act says:

32 In an enactment a reference to another enactment of the Province or of Canada is a reference to the other enactment as amended, whether amended before or after the commencement of the enactment in which the reference occurs.

[34] In *R. v. Trow*, (1977), 38 C.C.C. (2d) 229, 5 B.C.L.R. 133 an argument had been made that a section similar to section 133 could only refer to an omission at the time of enactment of that statute so that only the provisions of the Criminal Code existing at that time were incorporated. This is the same argument made before me by the respondent. The court rejected that submission based upon the then equivalent of section 32 of the Interpretation Act and concluded that the effect of the section was to refer to the Criminal Code as amended from time to time.

[35] In my view, section 133 of the Offence Act should not be given a static interpretation but should incorporate contemporary sections of the Criminal Code as required. Accordingly, section 100(1) of the Offence Act should incorporate the provisions of section 601(1) of the Criminal Code so that there is power to cure a defect in the information prior to plea through amendment if necessary.

Discussion

[26] First of all, despite the fact that the present ticket has been stayed, I conclude that the relevant factors still weigh in favour of deciding this certiorari application.

[27] If I were to decline to decide it, the provincial court judge who hears a challenge to the remaining outstanding ticket would be bound by horizontal stare decisis to follow the ruling of the provincial court judge in this case, thus requiring a further certiorari application.

[28] Since the matter has now been fully argued in this application, it will be more efficient for me to make the decision now, so that the remaining ticket can proceed in an orderly way. Expressed in the language of *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, there is still an "adversarial context" between the Crown and the accused, as referred to in

para. 32 of that decision, in the form of the outstanding ticket in identical terms, and the court's decision on the issue will have some practical effect on the rights of the parties, notwithstanding that it will not have the effect of determining the specific controversy which gave rise to this application (para. 34).

[29] Turning to the merits of this application, as I read the reasons of the provincial court judge, he found in para. 41 and subsequently that the information, when read together with the disclosure that had been provided, meant that the accused should clearly have been aware of the specific action for which he was being prosecuted, and was sufficient. In other words, the requirements of s. 96(3) of the Offence Act were satisfied by that combination of the information itself and the disclosure.

[30] In this respect, he was ruling in conformance with Wiseberg, which had adopted the reasons of the Ontario Court of Appeal in Robinson at paragraph 23 on this point, that:

In determining whether the transaction has been sufficiently identified, the court will look not just at the wording of the indictment but also at the other material in the possession of the accused, such as Crown disclosure . . .

[31] The correctness of the judge's finding on this point is sufficient to dispose of the application. It is not clear whether he also found, at paras. 44 to 46, that the information merely failed to include the means by which the alleged offence was committed, as contemplated by s. 97(2) (c), and therefore met the requirements of s. 96(3) in itself, but since the Crown did not seek to defend the decision on that additional basis, and since the provincial court judge unquestionably viewed the information combined with the disclosure as being sufficient, it is not necessary to resolve that point.

[32] It may also be helpful to point out that, in accordance with the further conclusion in Wiseberg, that the provisions of the Criminal Code permitting amendments in summary conviction matters are incorporated into the Offence Act, the information in this case, even standing alone, could also have been amended before plea to add the missing details.

[33] Wis relied on the absence of the ability to amend the summary conviction offence before a plea (along with the inability to order particulars which were then also unavailable for such offences) as the reasons why the deficiency in the informations before it, which resemble the present deficiency, could result only in it being quashed. In contrast, an amendment is available here, as are particulars, although the provincial court judge found that the disclosure made them unnecessary.

[34] In addition, it certainly cannot be said that the present information is "so badly drawn up as to fail to give even the accused notice of the charge", so as to amount to an absolute nullity as described in Moore and Webster. Rather, it seems, like any Wis-type deficiency, to be a case of the information showing existence of "some charge of an offence known to law, albeit very imperfectly described". Thus, the provincial court judge's conclusion about its validity would have been a question within his jurisdiction, and not a judicial act carried out in the

absence of jurisdiction that gave rise to review by certiorari.

- [35] This is a very different situation from Bessette, where there was unambiguous non-compliance with a mandatory Code provision that had been incorporated by reference into the Offence Act.
- [36] Consequently, the present application could also have been resolved on the conclusion that the provincial court judge acted within his jurisdiction.
- [37] Because it is not necessary to decide it to resolve this application, I will leave for another day the interesting question of whether the use of language that has been deemed "sufficient for all purposes" by the Contravention Act can thereby insulate a ticket information from review under s. 96(3), as the Crown also argued. My preliminary view is that regardless of such a provision, the question would still be whether the golden rule embodied by s. 96(3) has been complied with. This was helpfully described in *R. v. Lee*, 2007 NLTD 122:
- [6] . . . If the statute specifically authorizes the police officer to describe an offence by using a general word or an expression, then a determination as to the ambiguity or uncertainty would be influenced substantially by the accuracy of the description and whether it did in fact cause an accused to be misled. . . .

In other words, the endorsement of short-form descriptions cannot transcend the ultimate requirement of properly informing the accused. However, definitive resolution of that issue is best left to a case in which it is essential to the outcome.

- [38] In this case, it has not been demonstrated that the provincial court judge proceeded without jurisdiction in declining to quash the information, so the application for certiorari must be dismissed, with my thanks to counsel for their able submissions.

"Schultes J."

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