

CANADA / JUDGMENT

R. v. Violette

2008 BCSC 185

COURT

Supreme Court of British Columbia

DECIDED

19 February 2008

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2008 BCSC 185 R. v. Violette

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Violette,

2008 BCSC 185

Date: 20080219

Docket: 23500

Registry: Vancouver

Regina

v.

Jean Joseph Violette, Ronaldo Lising,

Randall Richard Potts and John Virgil Punko

BAN ON PUBLICATION

Pursuant to the inherent jurisdiction of the Court, there is a ban on publication, including on television, radio, Internet, or other form of media, of any and all within proceedings, including all voir dire and trial proceedings, until the ban is lifted by this Court.

Corrected Judgment: The publication ban on the front page of the ruling was changed on May 5, 2008.

Before: The Honourable Mr. Justice S.R. Romilly

Ruling on a Voir Dire

Application for Particulars

Counsel for the Crown

Mark K. Levitz

Geordie C. Proulx

Carol Fleischhaker

David Sim

The Accused Jean Joseph Violette

In Person

Counsel for the Accused Ronaldo Lising

Gregory P. DelBigio

Lisa M. Sturgess

Counsel for the Accused Randall Richard Potts

Bonnie Craig

Patrick Doherty

John Esson

Counsel for the Accused John Virgil Punko

Richard Cairns, Q.C.

Larry Fleming

Date and Place of Hearing:

December 12, 2007

Vancouver, B.C.

Nature of Application

[1] This is an application for an order, pursuant to s. 587(1) of the Criminal Code, R.S. 1985, c. C-46, requiring the prosecutor to furnish particulars in relation to Counts 2, 3, 5, 7, 9, 10, 14, 15, 17, 19, 21, 23 and 25 of Indictment 23500, on the grounds that it is necessary for a fair trial. In particular, the applicant Ronaldo Lising requests that the prosecutor be ordered to furnish:

- (i) the names of those individuals alleged by the Crown to make up the East End Hells Angels;
- (ii) if the Crown does not specifically advance the allegation of "benefit", "direction" or "association" on any of the counts, that it particularize whether it is "benefit", "direction" or "association" that is relied upon;

- (iii) if the Crown relies upon "benefit", that the Crown particularize the benefit or benefits in question and the persons in question who received or enjoyed the benefit(s);
 - (iv) if the Crown relies upon "association", that the Crown particularize the person or persons with whom there was an association, or the manner of association that is otherwise alleged;
 - (v) where the Crown alleges that an extortion was committed in relation to either a s. 467.12 or 467.13 offence, that the Crown particularize the person(s) alleged to have been extorted;
 - (vi) where the Crown alleges that a firearm was possessed in relation to either a s. 467.12 or 467.13 offence, that the Crown particularize the firearm(s) alleged to have been possessed;
 - (vii) where the Crown alleges that a threat was uttered in relation to a s. 467.12 offence, that the Crown particularize the person(s) against whom the threat was directed; and
 - (viii) in that the definition of criminal organization under s. 467.1 of the Criminal Code includes that the group has as one of its main purposes or main activities the facilitation or commission of one or more serious offences that, if committed, would likely result in the direct or indirect receipt of a material benefit, including financial benefit, by the group or by any of the persons who constitute the group: the defence seeks that the Crown particularize, within the context of the criminal organization definition:
 - (a) what are the serious offences committed and by whom?
 - (b) what is the material benefit received, or likely to have been received?
 - (c) who received the material benefit?
- [2] For the reasons stated below, the application is denied.

The Counts in the Indictment

- [3] The current direct indictment contains a total of 28 counts against the four remaining accused. The substantive offences charged include: counselling mischief, possession of explosives, possession of firearms, uttering threats, using explosives, and extortion. The legal and factual nexus between the counts is that each accused is charged with committing offences for the benefit of, at the direction of, or in association with the alleged criminal organization, the East End Charter of the Hells Angels. The trial of the four accused is scheduled to commence on May 15, 2008 before a judge and jury, and is estimated to take 12 months.
- [4] The relevant counts with which the accused are charged are as follows:

Count 2

Ronaldo LISING, between the 18th day of April, 2004 and the 9th day of September, 2004 at or near Vancouver, Kelowna, Hope and elsewhere in the Province of British Columbia, committed the indictable offence of extortion contrary to Section 346(1.1)(b) of the Criminal Code, for the benefit of, at the direction of, or in association with a criminal organization, to wit the East End Charter of the Hells Angels, contrary to Section 467.12 of the Criminal Code.

Count 3

Ronaldo LISING, between the 18th day of April, 2004 and the 9th day of September, 2004 at or near Vancouver, Kelowna, Hope and elsewhere in the Province of British Columbia, being one of the persons who constitute a criminal organization, to wit the East End Charter of the Hells Angels, knowingly instructed, directly or indirectly, Michael Plante to commit the indictable offence of extortion contrary to Section 346(1.1)(b) of the Criminal Code, for the benefit of, at the direction of, or in association with the said criminal organization, contrary to Section 467.13 of the Criminal Code.

Count 5

John Virgil PUNKO, on or about the 26th day of May, 2004 at or near Vancouver, Surrey, Burnaby and elsewhere in the Province of British Columbia, being one of the persons who constitute a criminal organization, to wit the East End Charter of the Hells Angels, knowingly instructed, directly or indirectly, Michael Plante to commit the indictable offence of mischief, to wit to wilfully destroy or damage property contrary to Section 430 of the Criminal Code, for the benefit of, at the direction of, or in association with the said criminal organization, contrary to Section 467.13 of the Criminal Code.

Count 7

John Virgil PUNKO, Ronaldo LISING and Leroy Serra PEREIRA, between the 7th day of February, 2004 and the 16th day of July, 2005 at or near Vancouver, Surrey, Burnaby and elsewhere in the Province of British Columbia, committed the indictable offence of conspiracy to commit extortion contrary to sections 346(1.1)(b) and 465(1)(c) of the Criminal Code, for the benefit of, at the direction of, or in association with a criminal organization, to wit the East End Charter of the Hells Angels, contrary to Section 467.12 of the Criminal Code.

Count 9

Randall Richard POTTS, between the 1st day of October, 2004 and the 1st day of April, 2005 at or near Surrey and elsewhere in the Province of British Columbia without lawful excuse did have under his care and control an explosive substance, to wit grenades, for the benefit of, at the direction of, or in association with a criminal organization, to wit the East End Charter of the Hells Angels, contrary to Section 82(2) of the Criminal Code.

Count 10

Randall Richard POTTS, on or about the 11th day of October, 2004 at or near Surrey and elsewhere in the Province of British Columbia, being one of the persons who constitute a criminal organization, to wit the East End Charter of the Hells Angels, knowingly instructed, directly or indirectly, Michael Plante to commit the indictable offence of possession of explosive substances contrary to Section 82(1) of the Criminal Code, for the benefit of, at the direction of, or in association with the said criminal organization, contrary to Section 467.13 of the Criminal Code.

Count 14

Randall Richard POTTS, between the 1st day of October, 2004 and the 1st day of April, 2005 at or near Surrey and elsewhere in the Province of British Columbia committed the indictable offence of possession of firearms contrary to section 92(1) of the Criminal Code, for the benefit of, at the direction of, or in association with a criminal organization, to wit the East End Charter of the Hells Angels, contrary to Section 467.12 of the Criminal Code.

Count 15

Randall Richard POTTS, on or about the 11th day of October, 2004 at or near Surrey and elsewhere in the Province of British Columbia, being one of the persons who constitute a criminal organization, to wit the East End Charter of the Hells Angels, knowingly instructed, directly or indirectly, Michael Plante to commit the indictable offence of possession of firearms contrary to Section 91(1) of the Criminal Code, for the benefit of, at the direction of, or in association with the said criminal organization, contrary to Section 467.13 of the Criminal Code.

Count 17

Randall Richard POTTS, on or about the 20th day of January, 2005 at or near Surrey in the Province of British Columbia committed the indictable offence of extortion contrary to section 346(1.1)(b) of the Criminal Code, for the benefit of, at the direction of, or in association with a criminal organization, to wit the East End Charter of the Hells Angels, contrary to Section 467.12 of the Criminal Code.

Count 19

Jean Joseph VIOLETTE, between the 17th day of January, 2005 and the 21st day of January, 2005 at or near Burnaby in the Province of British Columbia, committed the indictable offence of extortion contrary to section 346(1.1)(b) of the Criminal Code, for the benefit of, at the direction of, or in association with a criminal organization, to wit the East End Charter of the Hells Angels, contrary to Section 467.12 of the Criminal Code.

Count 21

John Virgil PUNKO, between the 22nd day of January, 2005 and the 9th day of March, 2005 at or near Burnaby and elsewhere in the Province of British Columbia, committed the indictable offence of threatening contrary to section 264.1(1) of the Criminal Code, for the benefit of, at the direction of, or in association with a criminal organization, to wit the East End Charter of the Hells Angels, contrary to Section 467.12 of the Criminal Code.

Count 23

Randall Richard POTTS, on or about the 31st day of March, 2005 at or near Vancouver and elsewhere in the Province of British Columbia, committed the indictable offence of threatening contrary to section 264.1(1) of the Criminal Code, for the benefit of, at the direction of, or in association with a criminal organization, to wit the East End Charter of the Hells Angels, contrary to Section 467.12 of the Criminal Code.

Count 25

Randall Richard POTTS, between the 27th day of October, 2004 and the 17th day of December, 2004 at or near Langley and elsewhere in the Province of British Columbia committed the indictable offence of extortion contrary to section 346(1.1)(b) of the Criminal Code, for the benefit of, at the direction of, or in association with a criminal organization, to wit the East End Charter of the Hells Angels, contrary to Section 467.12 of the Criminal Code.

Position of the Defence

- [5] The defence states that they make this application against the factual background as has been established through the materials filed in previous applications, including the Crown's (Respondent) Brief of Argument filed in relation to the Violette application for severance, and the Crown brief entitled "Summary of Crown's Case - Criminal Organization".
- [6] Defence counsel argue that passages from the Crown's Brief on severance illustrate the breadth of the evidence and the lack of specificity in relation to that evidence, which it intends to lead in relation to the criminal organization counts. For example, they submit that the Crown stated that, to prove that the East End Hells Angels has as one of its main purposes or activities the facilitation of serious offences, which benefit its members, it will lead evidence of the actions of East End Hells Angels members and its associates. As stated in the Brief, "[t]his is evidenced by a variety and quantity of crimes committed by some of its members, ranging from drug trafficking, extortions, threats, firearms and explosive offences."

- [7] Defence counsel submit that in order to lift an offence from the general to the particular, an indictment must particularize beyond the section of the Criminal Code that charges the offence, so the accused has further information as to what the Crown intends to prove against him. Thus, they argue, the function of particulars is not just to define the general offence charged, but to "define the factual transaction that the prosecution must prove to support a conviction"; *R. v. Krymowski*, 2005 SCC 7, [2005] 1 S.C.R. 101 at para. 18.
- [8] Defence counsel argue that, in the case at bar, vagueness or uncertainty arises from factors that include: the dearth of jurisprudence in relation to the criminal organization provisions of the Criminal Code and the consequent uncertainty as to its interpretation; that the investigation was vast in terms of the number of individuals who were targeted and the conduct that could be characterized as unlawful, and that; the "main purposes or main activities" component of the s. 467.1 definition of criminal organization may allow the Crown to lead evidence of criminal activity which goes far beyond a single transaction identified by the wording of the indictment.
- [9] One of the noteworthy difficulties of this case, defence counsel submit, is the need to sort through hundreds of thousands of intercepted communications, thousands of exhibits, and hundreds of thousands of pages of disclosure in order to discern the case to be met.
- [10] Defence counsel further submit that the actual circumstances of the case ought to be considered, when assessing whether an order for particulars is required, to ensure trial fairness. In this case, they submit that the following factors dictate the need for particularization:
- (i) The sheer volume of disclosure may operate, unintentionally, to obscure the case to be met. In the present case, the disclosure includes hundred of thousands of pages of disclosure, hundreds of thousands of intercepted communications, hundreds of hours of audio of intercepted communications, and thousands of exhibits. Further, the disclosure relates both to the present indictment, as well as to other indictments being prosecuted by the DPP. (*Armour Pharmaceutical* (2006), 205 C.C.C. (3d) 97 (Ont. Sup. Ct. J.) at para. 22);
 - (ii) The disclosure is currently ongoing with the expectation that perhaps 150,000 intercepted communications have yet to be disclosed;
 - (iii) There was no preliminary inquiry (*Armour Pharmaceutical* at para. 22);
 - (iv) There is an unrepresented accused;
 - (v) This trial addresses relatively new and complicated legislation and there is little jurisprudence to assist counsel or the unrepresented accused to anticipate the case to be met. To illustrate the uncertainty or complexity, s. 467.1 (b) refers to "benefit" as: "direct or indirect receipt of a material benefit including a financial benefit, by the group or any of the persons who constitute the group." Sections 467.12 and 467.13 both refer to "benefit", but it is undefined. Even if a proper interpretation of the statutory provisions results in "benefit" as it is used in sections 467.12 and 467.13, being interpreted as it is defined in s. 467.1(b), that

leaves unanswered whether for each of the offences charged the Crown alleges whether: (a) the benefit was received or only likely would have been received; (b) whether the benefit was direct or indirect; (c) whether the benefit was received by the group or only some members of the group; (d) if received by some members, which members received, or were likely to have received the benefit.

(vi) Some elements of the offences charged (for example, "main purposes or main activities", "direct or indirect receipt of a material benefit", "benefit of", "in association with") are capable of being completed by an indefinite number of acts and/or means; and

(vii) To the extent that the timely disposition of pre-trial motions is desired, further particularization would assist counsel and the Court in addressing issues relating to the admissibility of evidence and severance. (*R. v. Imperial Tobacco* (1940), 73 C.C.C. 18 (Alta. S.C.) at 31; *R. v. Cominco Ltd.* (1978), 41 C.C.C. (2d) 514 (Alta. S.C.T.D.).

[11] Defence counsel further submit that, as the criminal organization provisions are new, they have as yet received limited jurisprudential scrutiny and have only been prosecuted a few times in the context of a jury trial. Therefore, though the Crown may urge a particular interpretation of the legislation upon the court, or may be guided by an interpretation of the legislation in advancing its case, it does not follow that the interpretation is correct.

[12] Defence counsel submit that particulars, in the context of this case, would enable defence counsel and Mr. Violette to prepare their respective defences and are necessary to ensure the accused persons have a fair trial. For instance, the defence seeks an order for the particulars identifying what serious offences the Crown says the East End Hells Angels facilitate or commit as "one of its main purposes or main activities" so as to assist in determining issues of relevance in relation to the 700 intercepted communications for which the Crown has given s. 189(5) notice.

[13] They further point out that under the former criminal organization legislative scheme, the Crown did specify the main purpose or activity of the criminal organization it prosecuted in *R. v. Couture*, 2007 QCCA 1609, [2007] J.Q. No. 13091, in the participation charge (contrary to the former s. 467.1(1) of the Criminal Code), since the Quebec Court of Appeal indicated the appellants had been convicted of this charge. Defence counsel cited the following passage from *Couture*, at para. 4, and provided the attached translation:

participation aux activités d'un gang, tout en sachant que certains de ses membres commettent ou ont commis le trafic de substances prohibées au profit ou sous la direction d'un gang ou en association avec lui, contrairement à l'article 467.1 du Code criminel, entre le 14 mai 1997 et le 27 mars 2001.

[approximate translation : participation in the activities of a gang, knowing that certain members were committing or had committed trafficking in prohibited substances for the benefit of, at the direction of, or in association with a gang, contrary to s. 467.1 of the Criminal Code between May 14, 1997 and March 27, 2001.]

- [14] Finally, defence counsel submit that the statutory wording of the participation charge did not include specification of the criminal activities the gang was alleged to be engaged in, yet in Couture this was specified in the charge.

Position of the Crown

- [15] The Crown submits that the present indictment number 23500-20 sufficiently particularizes the offences such that the accused are reasonably informed of the transactions alleged against them, and thus, that they can make full answer and defence and have a fair trial in accordance with s. 11(d) of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11. Given the nature of the offences and circumstances of the case, the Crown submits that this indictment accords with the principles of particularization in the Criminal Code as well as the common law.
- [16] In short, the Crown argues, an order for further particulars is not necessary for a fair trial and may well be contrary to the proper administration of justice in that particulars would fetter prosecutorial discretion. It is further suggested by the Crown that since the Supreme Court of Canada's decision in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, an order for particulars has rarely been made, and in the circumstances of this case, such an order is not necessary for a fair trial due to the exceptional amount and organization of materials disclosed.
- [17] The Crown opposes the application of the accused for particulars, and submits that further particulars are not necessary for a fair trial. In its submissions, the Crown provides the following list of reasons that further particulars are not necessary:
- (a) The extensive, detailed and highly organized "Report to Crown Counsel" in the form of an updated electronic "hard drive" which includes detailed narratives (with witnesses) of all counts including those charged pursuant to sections 467.12 and 467.13;
 - (b) The comprehensive "Summary of Crown's Case - Criminal Organization" dated November 13, 2007 previously provided to all accused and the Court which details the evidence that the Crown will lead to prove that the East End Chapter of the Hells Angels is a criminal organization;
 - (c) The Crown's response to the accused Violette's severance application dated June 26, 2007 including Appendix previously provided to all accused and the Court which summarizes the evidence with respect to all the charges on the indictment as it then stood;
 - (d) The expert notice provided by the Crown to the accused;
 - (e) The detailed s. 189 wiretap notice which particularizes which counts, including the 'criminal organization' counts, individual intercepts will be tendered to prove;
 - (f) The "many" volumes containing admissions sought; and

- (g) The "comprehensive" document notice provided.
- [18] The position of the Crown is that the above mentioned materials are not only more than sufficient to enable all accused to be reasonably informed of the transactions alleged against them, but also fully detail the bodies of evidence the Crown will rely upon to establish all elements of the offences charged, including that the East End Charter of the Hells Angels is a criminal organization as alleged in Counts 2, 3, 5, 7, 9, 10, 14, 15, 17, 19, 21, 23 and 25.
- [19] The Crown's submissions continue:
- (h) The indictment fully complies with the legislative policy set out in the Criminal Code;
 - (i) An order for particulars would fetter the prosecution by limiting the modes by which the prosecution can prove, and the jury can find that the underlying offences were committed "in connection with" the criminal organization;
 - (j) The applicant has failed to establish any prejudice to his defence by the alleged lack of particulars;
 - (k) The application is ill-founded in that, fundamentally, it seeks particularization of the evidence by which the Crown is intending to establish an element of an offence charged (that is to say, that the East End Hells Angels is a criminal organization), rather than seeking particularization of the transactions said to constitute the offence charged;
 - (l) The application is inherently flawed in that counsel on behalf of the accused, through particularization, seeks to bind the Crown to strictly prove "those offences alleged to have been one of the main purposes or activities of the EEHA" yet all counsel challenge the admissibility of the evidence which would prove one of the important elements of those very offences; and
 - (m) The present indictment accords with section 11 of the Charter.
- [20] In order to deal with the issues raised on this application it would be prudent for me to first canvass the law on the subject.

Relevant sections of the Criminal Code

- [21] Section 587 of Criminal Code states:
- (1) A court may, where it is satisfied that it is necessary for a fair trial, order the prosecutor to furnish particulars and, without restricting the generality of the foregoing, may order the prosecutor to furnish particulars
 - (a) of what is relied on in support of a charge of perjury, the making of a false oath or a false statement, fabricating evidence or counselling the commission of any of those offences;
 - (b) of any false pretence or fraud that is alleged;
 - (c) of any alleged attempt or conspiracy by fraudulent means;

- (d) setting out the passages in a book, pamphlet, newspaper or other printing or writing that are relied on in support of a charge of selling or exhibiting an obscene book, pamphlet, newspaper, printing or writing;
 - (e) further describing any writing or words that are the subject of a charge;
 - (f) further describing the means by which an offence is alleged to have been committed; or
 - (g) further describing a person, place or thing referred to in an indictment.
- (2) For the purpose of determining whether or not a particular is required, the court may give consideration to any evidence that has been taken.
- (3) Where a particular is delivered pursuant to this section,
- (a) a copy shall be given without charge to the accused or his counsel,
 - (b) the particular shall be entered in the record, and
 - (c) the trial shall proceed in all respects as if the indictment had been amended to conform with the particular.

[22] Section 581 of the Criminal Code states:

- (1) Each count in an indictment shall in general apply to a single transaction and shall contain in substance a statement that the accused or defendant committed an offence therein specified.
- (2) The statement referred to in subsection (1) may be
 - (a) in popular language without technical averments or allegations of matters that are not essential to be proved;
 - (b) in the words of the enactment that describes the offence or declares the matters charged to be an indictable offence; or
 - (c) in words that are sufficient to give to the accused notice of the offence with which he is charged.
- (3) A count shall contain sufficient detail of the circumstances of the alleged offence to give to the accused reasonable information with respect to the act or omission to be proved against him and to identify the transaction referred to, but otherwise the absence or insufficiency of details does not vitiate the count.
- (4) Where an accused is charged with an offence under section 47 or sections 49 to 53, every overt act that is to be relied on shall be stated in the indictment.
- (5) A count may refer to any section, subsection, paragraph or subparagraph of the enactment that creates the offence charged, and for the purpose of determining whether a count is sufficient, consideration shall be given to any such reference.

- (6) Nothing in this Part relating to matters that do not render a count insufficient shall be deemed to restrict or limit the application of this section.

[23] Section 583 of the Criminal Code states:

No count in an indictment is insufficient by reason of the absence of details where, in the opinion of the court, the count otherwise fulfils the requirements of section 581 and, without restricting the generality of the foregoing, no count in an indictment is insufficient by reason only that

- (a) it does not name the person injured or intended or attempted to be injured;
- (b) it does not name the person who owns or has a special property or interest in property mentioned in the count;
- (c) it charges an intent to defraud without naming or describing the person whom it was intended to defraud;
- (d) it does not set out any writing that is the subject of the charge;
- (e) it does not set out the words used where words that are alleged to have been used are the subject of the charge;
- (f) it does not specify the means by which the alleged offence was committed;
- (g) it does not name or describe with precision any person, place or thing; or
- (h) it does not, where the consent of a person, official or authority is required before proceedings may be instituted for an offence, state that the consent has been obtained.

The Sufficiency Argument

[24] The sufficiency argument in relation to the wording of criminal charges has considerable jurisprudential history. Prior to the 1985 Criminal Code amendments, which included the present day s. 581, informations were more often struck down by Canadian courts for failing to provide the accused with reasonable information to identify the transaction alleged to constitute the criminal offence. The classic statement of law was set out by the Supreme Court of Canada in 1936 in *Brodie v. The King*, [1936] S.C.R. 188 at 196-198, where Rinfret J., delivering the reasons for the court, said:

It must contain, in substance, a statement of the specific act which is charged, although it is not necessary that it should "specify the means" by which the act was committed, or that it should name, or describe, "with precision" any person, place or thing.

Applying the above principles to the present appeal, it follows that the indictment must be found insufficient. It is not the case where an offence is imperfectly stated; it is a case where essential averments were wholly omitted. The so-called indictment contains defects in matters of substance. To use the apt words of counsel for the appellants: "it does not describe the offence in such a way as to lift it from the general to the particular".

[Emphasis added]

[25] In interpreting s. 581 of the Criminal Code it is sufficient to refer to the decision of the Supreme Court of Canada in *R. v. Douglas*, [1991] 1 S.C.R. 301, for a summary of the current approach. In *Douglas*, Cory J., delivering the judgment of the Court, stated at p. 312:

Thus, the Code provides that the indictment must contain sufficient details of the circumstances of the alleged offence to give the accused reasonable information with respect to the act or omission to be proved against him and to identify the transaction referred to. In cases where confusion exists as to the indictment, a provision is made for the accused person to obtain particulars. The indictment can and should be expressed in clear and simple language.

After reviewing a number of cases Cory J. continued at p. 314:

From these cases it can be seen that an indictment is adequate if it contains sufficient details to give the accused reasonable information with respect to the charge and to enable the accused to identify the transaction so as to permit the adequate preparation of the defence. Whether an indictment is sufficient will depend on the offence charged and the facts of the case.

[26] The legal requirements for proper criminal pleadings are set out in s. 581 of the Criminal Code. Each count in an indictment must meet the requirements of s. 581 to be legally sufficient: See, David Watt & Michelle Fuerst, *The 2004 Annotated Tremeeear's Criminal Code* (Toronto: Carswell, 2003) at 1014, and E.G. Ewaschuk, *Criminal Pleadings and Practice in Canada*, looseleaf, 2nd ed., Vol. 1 (Aurora, Ont.: Canada Law Book Inc., 2004) at para. 9:1220. The modern approach to defective indictments is to avoid giving too much weight to technical matters and to allow an amendment whenever substantial compliance is present. See *R. v. Clunas*, [1992] 1 S.C.R. 595.

[27] The broad powers of amendment at either the trial or the appeal stage provided for in s. 601 of the Criminal Code support this approach (see *R. v. Callocchia* (2000), 149 C.C.C. (3d) 215, 39 C.R. (5th) 374, (Que. C.A.)). However, this approach does not foreclose a finding of nullity in appropriate cases. A material defect in an information or indictment may still result in an incurable nullity. See, Ewaschuk at para. 9:1235.

The Golden Rule

[28] The information must give the accused fair notice of the offence. In *R. v. Côté*, [1978] 1 S.C.R. 8 at 13, de Grandpré J. said:

I agree with that submission; the golden rule is for the accused to be reasonably informed of the transaction alleged against him, thus giving him the possibility of a full defence and a fair trial. When as in the present case, the information recites all the facts and relates to a definite offence identified by the relevant section of the Code, it is impossible for the accused to be misled. To hold otherwise would be to revert to the extreme technicality of the old procedure.

[29] In *R. v. G.R.*, 2005 SCC 45, [2005] 2 S.C.R. 371, Binnie J., for the majority, wrote at paras. 11-12:

An important function of an indictment is to put the accused on formal notice of his or her potential legal jeopardy. It is equally important, of course, that if the Crown can establish some but not all of the facts described in the indictment or set out in the statutory definition of the offence, and such partial proof satisfies the constituent elements of a lesser and included offence, that the result be not an acquittal but a conviction on the included offence. As Professor Glanville Williams wrote, "an included offence is one that is made out of bits of the offence charged" ("Included Offences" (1991), 55 J. Crim. L. 234, at p. 234). Any other outcome would result in a waste of the resources expended on the trial.

The Crown's argument in this appeal triggers the notice issue. An accused is entitled to be properly apprised of the charge or charges he or she is required to meet: *R. v. Guérin*, [1996] Q.J. No. 3746 (QL) (C.A.), at para. 36 .

The True Function of Particulars

[30] The true function of particulars has been expressed in several cases. In *R. v. Buck* (1932), 57 C.C.C. 290, [1932] 3 D.L.R. 97 (Ont. C.A.) [cited to C.C.C.] at 293, Mulock C.J.O. stated that the true function of particulars is to give further information to the accused of what is intended to be proved against them, so that he or she may have a fair trial. The Ontario High Court in *R. v. Canadian General Electric Co. Ltd. et al* (No.1) (1974), 17 C.C.C. (2d) 433, 16 C.P.R. (2d) 175, (Ont. H.C.J.) [cited to C.C.C.] at 443, added the following:

Primarily their function is to give such exact and reasonable information to the accused respecting the charge against him as will enable him to establish fully his defence. The second purpose is to facilitate the administration of justice.

The court further explained:

When a conspiracy count involves an alleged widespread complicated conspiracy for the accomplishment of a purpose going beyond the performance of individual acts, the particulars furnished will assist the Judge in ruling on the relevancy of the evidence. To adopt a homely form of words, a trial circumscribed by particulars will not wander all over the shop and will foreclose an unreal controversy.

[31] An information only states the legal character of the offence. In *R. v. Colgan* (1986), 30 C.C.C. (3d) 183, 54 C.R. (3d) 167 (Man. C.A.) [cited to C.C.C.] at 188; *aff'd* [1987] 2 S.C.R. 686, Monnin C.J.M. stated:

In fact and in practice an information or an indictment only states the legal character of the offence and does not supply the details or the particulars of that offence. If details or particulars are requested, the Crown will have to provide them.

[32] In *R. v. Govedarov* (1974), 3 O.R. (2d) 23, 16 C.C.C. (2d) 238 (C.A.) [cited to C.C.C.], Martin J.A. made it clear that the Crown's theory can be distinguished from the particulars and that the Crown is bound to prove only the essential elements of the indictment (including particulars, if provided). The Crown is not bound to prove its theory. He stated at pp. 269-70:

Clearly, the purpose of the application for particulars was not to require the prosecution to provide the accused with additional details with respect to matters referred to in the indictment in order that the accused might be more fully informed of the act or omission charged against them but was to restrict the prosecution to reliance on a part only of the definition of murder contained in the Criminal Code.

[33] In *Govedarov*, counsel for the accused had moved for particulars at the opening of the trial and requested to know, specifically, which offence under s. 213 the Crown intended to rely upon. After some oral discussion, the Crown conceded that it would be relying on the burglary portion of the section. Martin J.A. reaffirmed that while oral particulars may also be binding on the Crown, particulars must be viewed in light of their purpose in the trial process: that being to provide the accused with reasonable information to enable a full and fair defence. In reaching the conclusion that the Crown was not bound to prove burglary, Martin J.A. stated at p. 271:

The accused in the instant case were charged with murder. The crown was entitled to rely upon any part or parts of the definition of murder which were applicable to the facts which it was open to the jury to find were proved. The statement of Crown counsel that he relied on the provisions of s. 213 with respect to burglary was, at most, merely an announcement of the theory upon which he intended to proceed and did not constitute the furnishing of particulars having the effect of limiting the charge contained in the indictment. Moreover, it does not appear that the accused were in any relevant sense misled or prejudiced by the enlargement of that theory to include the offence of robbery if there was evidence to support an application of ss. 213 and 21(2) to that offence.

[34] Similarly in *R. v. Thatcher*, [1987] 1 S.C.R. 652, the Court held that there was sufficient evidence to go to the jury in relation to the Crown's theory that the accused either killed the victim himself or had her killed by someone else. See also, *R. v. Stapylton et al* (1857), 8 Cox. C.C. 69 at 72; *R. v. Horsland* (4 May 1995), Nanaimo 27914S (B.C.S.C.); *R. v. Groot* (1998), 41 O.R. (3d) 280, 129 C.C.C. (3d) 293 (C.A.)

[35] While the Crown may be bound to prove formal particulars (subject to the surplage rule), it is not obliged to prove a specific theory of its case: *Groot*.

Request for Particulars in an Information Alleging Conspiracy

[36] In the case of a conspiracy information or indictment the task of giving particulars is extremely onerous. Since proof of a conspiracy is generally a matter of inference from overt acts, it is generally impossible to give particulars other than by a lengthy recital of the overt acts. This lengthy recital of the overt act would become incorporated into the information

pursuant to s. 587(3)(c) of the Criminal Code. The ordering by the court of particulars on conspiracy informations or indictments could have the effect of placing the Crown in the conundrum of having to prove those particulars, as it was in *R. v. Daemore*, (28 September 1990), Vancouver CA010406 (B.C.C.A.).

[37] In *R. v. McGavin Bakeries* (1950), 99 C.C.C. 330, 11 C.R. 227 (Alta. S.C.) [cited to C.C.C.], McBride J. made the following astute observations about the ordering by the court of particulars. At p. 340 he stated:

Some of the specific particulars demanded in the motion now require mention. Paragraph 1 asks that the Crown be required to state the specific date or dates on which each of the accused is alleged to have conspired. This I refuse. In the great majority of cases conspiracy is inferred from the cumulative effect of a number of acts and omissions. In the language of Lord Chief Justice Lawrence, speaking for the majority in *R. v. Pepper & Platt* (1921), 16 Cr.App. R.12 and p.19:

"It was further sought to tie the prosecution down by asking them to define the exact moment at which the conspiracy began, and the exact act which marked its inception. We think it is a fallacy and not permissible to divide a case of this sort up into a number of facts and to deal with and consider each fact separately without reference to or consideration of the bearing of other indictments and facts upon it."

See also, *Horsland*.

Offence as Particularized in Charge Must Be Proved

[38] In *R. v. Saunders* (sub nom. *R. v. Rooke*), [1990] 1 S.C.R. 1020, the accused were charged with conspiracy to import a narcotic, specifically heroin. During the course of the trial, evidence was given of an earlier conspiracy to import cocaine. One of the accused took the stand and testified that while he had been involved in a conspiracy to import other drugs, he was not involved in the conspiracy to import heroin in the manner alleged. The trial judge decided that it was sufficient if the jury found that the accused had conspired to import a narcotic of any kind and so charged the jury. The accused was then convicted. The British Columbia Court of Appeal allowed an appeal by the accused on the ground that the Crown, having charged the accused with conspiracy to import heroin, must prove that conspiracy. The Supreme Court of Canada agreed and stated at 1023:

It is a fundamental principle of criminal law that the offence, as particularized in the charge, must be proved. In *Morozuk v. The Queen*, [1986] 1 S.C.R. 31 at p. 37, this Court decided that once the Crown has particularized the narcotic in a charge, the accused cannot be convicted if a narcotic other than the one specified is proved.

[39] However, in *R. v. A.D.*, 2003 BCCA 106, the British Columbia Court of Appeal states at para. 30:

It is well established that non-essential averments in charges need not be strictly proved if there is no prejudice to the accused: see for example *R. v. Vezina*; *R. v. Cote*, [1986] 1 S.C.R. 2; Ewaschuk, *Criminal Pleadings & Practice in Canada*, 2d ed., Vol 1 (Aurora: Canada Law Book Inc., 2002) at 9-45.

[40] In *R. v. A.D.*, the information in question alleged that the accused "did, using a firearm, commit robbery". It was held that the charge did not particularize a specific mode of robbery. The proof of the use of a firearm is not an essential element of the offence of robbery. The court also found that the accused had sufficient knowledge of the circumstances of the offence alleged in the charge and that there was no prejudice to the accused.

[41] In *R. v. Khan* (1982), 66 C.C.C. (2d) 32 (Ont. C.A.), the court considered ss. 306(1)(a) and 306(2)(a) of the Criminal Code (now ss. 348(1)(a) and 348(2)), and held at paragraph 11 that an indictment need not particularize the specific indictable offence alleged to be intended to be committed. However, if the charge specifies the indictable offence intended to be committed, then the Crown must prove that particular.

[42] In *R. v. Winters* (1989), Vancouver CA008462 (B.C.C.A.), Seaton J.A. pointed out that several cases had stated that:

... knowledge of the evidence the Crown proposes to call is of consequence in determining whether an accused was prejudiced by an indictment that seemed on its face to be too broad.

[43] The defence may wish to seek further particulars. That is clearly the approach that must be taken as is made clear in *R. v. McKenzie*, [1972] S.C.R. 409. There, the offence as charged was the simple theft of money. The evidence disclosed that it was theft by conversion and the charge had been laid as theft, referring to the section that stated theft to be an indictable offence. The Supreme Court held that the charge was valid, given that it was framed in the words declaring the matter charged to be an indictable offence, and the fact that there were several ways in which the offence could be committed, as defined in different Criminal Code sections, instead of by several clauses in the same section. In delivering the reasons of the Court, Ritchie J. stated at p. 415:

If there had been any genuine doubt as to the conduct to which the charge related, further particulars describing the means by which the offence was alleged to have been committed could have been sought under s. 497(1)(f) [now s. 516(1)(f)] of the Code, but this was not the course which was followed.

[44] In *R. v. G.R.*, Binnie J., for the majority, wrote at para. 15:

It is important not to confuse the requirement to specify the charge with the need to provide sufficient supporting detail of the underlying transaction or circumstances. In *Brodie v. The King*, [1936] S.C.R. 188, cited by my colleague, the charge of seditious conspiracy was clearly made in the indictment, but the transaction that gave rise to the charge was not sufficiently identified. The Court accepted as correct "the apt words of counsel for the appellants: 'it does not

describe the offence in such a way as to lift it from the general to the particular" (p. 198). Since Brodie, the courts, encouraged by amendments to the Criminal Code, have taken a broader view of sufficiency and of the exercise of the courts' powers of amendment, but such a relaxation has nothing to do with the fundamental requirement that the accused be able clearly to ascertain from the offence charged (as described in the enactment creating it or as charged in the count or as expressly stated to be an included offence in the Criminal Code itself), the charges for which he or she risks conviction. In the more recent case of *R. v. Douglas*, [1991] 1 S.C.R. 301, for example, there was no question but that the charge was specified in the indictment. The question was whether the underlying transaction was identified in sufficient detail to permit a full answer and defence. In my view, it is important to keep separate and distinct the different issues of the offence(s) charged and the sufficiency of notice of the underlying circumstances or transaction to which the charge(s) relate. It is on this point, it seems, that my colleague Abella J. and I find ourselves in disagreement.

Particularization Ought Not to Fetter the Prosecution

- [45] The applicant seeks an order that the Crown specify which of the three ways ("for the benefit of", "at the direction of", "or in association with") it alleges that the accused Mr. Lising committed the offences under ss. 467.12 and 467.13.
- [46] The Crown need not specify whether the predicate offence was committed "in association with", "for the benefit of", or "at the direction of" a criminal organization. The offences in this regard can be proven by alternative modes or methods, and the Crown need not specify in the indictment which way the offence is connected to the criminal organization. On the evidence, the jury may be satisfied of Mr. Lising's guilt on all three bases, not just one or two. Alternatively, some jurors may be satisfied of Mr. Lising's guilt on one basis and the rest of the jurors on a separate basis, and they can still be unanimous as to his guilt.
- [47] In *R. v. Pangman*, [1999] M.J. No. 396, 143 Man. R. (2d) 161, (Q.B.) [cited to QL], a complex drug trafficking case, the court denied the accused's motion to particularize the counts because the particulars sought by the accused would fetter the prosecution by limiting the definition of "traffic." In its analysis, the court reviewed the approaches of other courts in arriving at its conclusion, and stated the following at paras. 17-25:

I have reviewed with care the decision of Maher J. in *Thatcher* (1984) 42 C.R. (3d) 259 (Sask Q.B.), *affd.* (1987) 32 C.C.C. (3d) 481 (S.C.C.), relied upon by the Crown and the decision of Salhany J. in *Dickson* [1996] O.J. No. 4493, relied upon by the defence. I consider it to be significant that there is no apparent difference between the positions taken by Maher J. in *Thatcher* and that taken by Salhany J. in *Dickson*. Salhany J. did not require particularization of any aspects of the charge other than those in which the indictment as laid failed to conform to the evidence as disclosed and intended to be adduced.

In Dickson the accused was charged with conspiring with certain named individuals and certain unknown individuals. Disclosure by the Crown related only to the named individuals. The Crown admitted in argument before Salhany J. that there were no other persons involved in the conspiracy other than the named individuals. Commenting on this Salhany J. stated, at para 28:

However, if there are no other conspirators involved, then the Crown should be required to say this. Surely the defense is entitled to know whether the Crown intends to lead evidence of other conspirators, justifying such last minute evidence on the basis that there is an allegation "of other persons unknown" in the count, when in fact none are known at this time.

In Dickson the accused were charged with conspiring "at the City of Kitchener, in the said region and elsewhere in the Regional Municipality of Waterloo, the Regional Municipality of Waterloo, the Regional Municipality of Niagara and elsewhere in the Province of Ontario". Commenting on that Salhany J. stated, at paras 29 and 30:

29. However, the Crown's memorandum referred to earlier makes no reference to the parties conspiring anywhere other than in the Regional Municipality of Waterloo and the Regional Municipality of Niagara. If the memorandum is the basis of the Crown's case, then I see no reason why the Crown should not say so.
30. During the course of argument, I had the impression that the Crown's theory is not that the parties conspired (ie., the agreement) in the named regions and elsewhere in the Province of Ontario but rather conspired to traffic (ie., the object of the agreement) in the named regions and elsewhere in the Province of Ontario. Again, if this is the basis of the Crown's case, then they should be required to specify it.

Salhany J. did make an order for particulars. His order was limited to the identity of the conspirators, the place or places where the conspirators are alleged to have conspired, and the place or places where they are alleged to have conspired to traffic in methamphetamine. The order, in other words, was limited to those aspects of the charge where confusion and potential prejudice could result.

In the case before me there is no suggestion that the charge on its face is vague or confusing. There is no suggestion that the charge on its face does not correspond to the disclosure made by the Crown.

In Thatcher, *supra*, the accused was charged with murder. Evidence led at the preliminary inquiry was open to argument either that the accused killed his wife or that the accused was a party to the killing of his wife by another. The defence sought particulars of the means of the commission of the offence in order to know the case it had to meet. Section 587(1)(f) of the Code specifically empowers the court to order particulars of the means by which an offence is alleged to have been committed. Maher J. refused the application for particulars, stating at p. 265 of the decision:

If there is evidence upon which a properly instructed jury could find that the accused committed the offence or that he was a party to the commission of an offence by a person or persons unknown, it must be left to the jury to make either of such findings and their right to do so may not be restricted by an order for particulars.

Mahe J. relied upon certain appellate decisions in coming to that conclusion. Of particular relevance is the decision of the Ontario Court of Appeal (Gale C.J.O., Jessup, Dubin and Martin J.J.A., Schroeder J.A. dissenting in part) in *Govedarov*, supra. In that case the accused were convicted of murder arising out of the death of a restaurant worker during a break and enter. The jury were instructed on what was then s. 213 of the Code, the constructive murder section. There were two relevant alternate means by which constructive murder could have been committed - either in the course of a robbery or in the course of a burglary. One of the grounds of appeal from conviction related to the failure of the trial judge to order particulars as to which of the two means the Crown relied upon. The Court of Appeal rejected that ground, per Martin J.A. at 269-70:

The indictment had been preceded by a preliminary hearing lasting several days. Clearly, the purpose of the application for particulars was not to require the prosecution to provide the accused with additional details with respect to matters referred to in the indictment in order that the accused might be more fully informed of the act or omission charged against them but was to restrict the prosecution to reliance on a part only of the definition of murder contained in the Criminal Code.

(The italics are mine)

He concluded, at p. 271:

The accused in the instant case were charged with murder. The Crown was entitled to rely upon any part or parts of the definition of murder which were applicable to the facts which it was open to the jury to find were proved.

I find that the Crown is entitled to rely upon any part or parts of the definition of "traffic" which is applicable to the facts which it may be open to the jury to find as proved. To require that the crown particularize the names of purchasers is to limit the definition of "traffic". To require that the Crown particularize the dates of sales is to limit the definition of "traffic". To require that the Crown choose between trafficking in cocaine and trafficking in a substance held out to be cocaine is to limit the definition of "traffic".

The situation presented by this charge is not similar to that confronted by Salhany J. in *Dickson*, supra. The particulars sought by the defence would have the effect of fettering the prosecution by depriving them of the right to rely upon the whole of the definition of "traffic" that is applicable to the facts which may be open to the jury to find as proved. Accordingly, the application for particulars is denied.

[Emphasis in original]

[48] In *R. v. Poon*, 2006 BCSC 683, [2006] B.C.J. No. 1660 at para. 25, the court enunciated the nature of, and necessity for, prosecutorial discretion:

Trials are a fluid and dynamic process. The Crown must be free to conduct its case in response to the variables and uncertainties that occur during trial. The Crown's duty to disclose does not extend to a duty to elect to call specific evidence in advance of the close of the Crown's case. To hold otherwise would in fringe on prosecutorial discretion in an adversarial setting.

[49] In *R. v. Cook*, [1997] 1 S.C.R. 1113, the Supreme Court of Canada addressed whether the Crown has a mandatory duty to call certain witnesses as part of its case. In concluding that it does not, the Court discussed prosecutorial discretion in the adversarial process at paras. 19-21:

At the outset of the analysis, I believe it is helpful to place the issue in its proper context. In essence, the rule suggested by the respondent would force the Crown to call certain witnesses (assuming they were available and competent), regardless of their truthfulness, desire to testify, or of their ultimate effect on the trial. It is immediately apparent that such a duty, if it were to be established, would have a major impact upon the Crown's ability to conduct its own case. It would be a clear interference with the broad discretionary powers which are said to be within the purview of the Crown attorney, and which are at the very heart of the adversarial process. As a general principle, we have recognized that for our system of criminal justice to function well, the Crown must possess a fair deal of discretion. Moreover, this discretion extends to all aspects of the criminal justice system. As I stated for a unanimous court in *R. v. T. (V.)*, [1992] 1 S.C.R. 749, at pp. 758-62:

There is no doubt that the Crown acting through the Attorney General, and in turn through his or her prosecutors, has a wide amount of discretion in the carriage of criminal cases.

...

... in the context of the Canadian Charter of Rights and Freedoms, this Court had occasion to consider whether such discretion constituted an affront to the principles of fundamental justice. In *R. v. Beare*, [1988] 2 S.C.R. 387, at p. 410, La Forest J., speaking for the Court, states:

The existence of the discretion conferred by the statutory provisions does not, in my view, offend principles of fundamental justice. Discretion is an essential feature of the criminal justice system. A system that attempted to eliminate discretion would be unworkably complex and rigid. Police necessarily exercise discretion in deciding when to lay charges, to arrest and to conduct incidental searches, as prosecutors do in deciding whether or not to withdraw a charge, enter a stay, consent to an adjournment, proceed by way of indictment or summary conviction, launch an appeal and so on.

...

I also wish to refer to the judgment of Giesbrecht Prov. Ct. J. in *R. v. Poirier*, Man. Prov. Ct., June 7, 1989, unreported, at pp. 11-12:

In the criminal law process prosecutorial discretion exists throughout the entire process, from the initial investigation stage through to the conclusion of the trial.

...

I wish to be clear, however, that while the principle of prosecutorial discretion is an important precept in our criminal law, and exists for good reason, it is by no means absolute in its operation. It is now apparent, for example, that a stay of proceedings is available to prevent violations of the principles of fundamental justice and abuse of the court's process. [Emphasis added.]

See also: *Smythe v. The Queen*, [1971] S.C.R. 680; *R. v. Verrette*, [1978] 2 S.C.R. 838; *R. v. Power*, [1994] 1 S.C.R. 601; *United States of America v. Leon*, [1996] 1 S.C.R. 888.

By the same token, however, as I stated in *T. (V.)*, this discretion is not an absolute one. On the contrary, as this Court has stated on more than one occasion, the improper exercise of prosecutorial discretion can result in the finding of an abuse of process. This misconduct can take many different forms, and will often engage the rights set out in the Canadian Charter of Rights and Freedoms, although the exact manner in which this occurs will depend on the particular circumstances in the case: *R. v. O'Connor*, [1995] 4 S.C.R. 411.

Nevertheless, while it is without question that the Crown performs a special function in ensuring that justice is served and cannot adopt a purely adversarial role towards the defence (*Boucher v. The Queen*, [1955] S.C.R. 16; *Power*, supra, at p. 616), it is well recognized that the adversarial process is an important part of our judicial system and an accepted tool in our search for the truth: see, for example, *R. v. Gruenke*, [1991] 3 S.C.R. 263, at p. 295, per L'Heureux-Dubé J. Nor should it be assumed that the Crown cannot act as a strong advocate within this adversarial process. In that regard, it is both permissible and desirable that it vigorously pursue a legitimate result to the best of its ability. Indeed, this is a critical element of this country's criminal law mechanism: *R. v. Bain*, [1992] 1 S.C.R. 91; *R. v. Jones*, [1994] 2 S.C.R. 229; *Boucher*, supra. In this sense, within the boundaries outlined above, the Crown must be allowed to perform the function with which it has been entrusted; discretion in pursuing justice remains an important part of that function.

[Emphasis added].

Analysis and Conclusion

[50] After reviewing the law as enunciated above, I am satisfied that the indictment contains sufficient detail of the circumstances of the alleged offences to identify the transactions referred to, and as such, the provisions of s. 581(3) are satisfied. As for the particulars requested, I am satisfied that the defence has already received these particulars in the massive organized disclosure that has already been made by the Crown in this case. Thus, the fairness of the trial and the ability to mount a proper defence are not in any way at stake in this application.

[51] The defence application for particulars is dismissed.

"Romilly J."

The Honourable Mr. Justice S.R. Romilly

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/SC/08/01/2008BCSC0185cor1.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-violette-2008-bcsc-185>

Prepared on 28 October 2026 · Esheria