

Regina (appellant) v. Yan Joseph Marcel Bérubé (respondent)
(CA038839; 2012 BCCA 345)

Indexed As: R. v. Bérubé (Y.J.M.)

British Columbia Court of Appeal
Ryan, Saunders and Groberman, JJ.A.
August 16, 2012.

Summary:

The British Columbia Provincial Court found that the Crown's decision to withdraw from a plea agreement and to lay new charges against the accused constituted an abuse of process and thereby violated the accused's rights under s. 7 of the Charter. As a result, the court directed a judicial stay of proceedings. The Crown appealed, arguing that: (1) the trial judge erred in finding an abuse of process, and (2) even if the Crown's conduct amounted to an abuse of process, the remedy granted by the judge was not an appropriate one.

The British Columbia Court of Appeal allowed the appeal on both arguments, and ordered a new trial.

Civil Rights - Topic 3157.4

Trials - Due process, fundamental justice and fair hearings - Criminal and quasi-criminal proceedings - Abuse of process - The trial judge found that the Crown's decision to withdraw from a plea agreement and to lay new charges constituted an abuse of process - As a result, the court directed a judicial stay of proceedings - The British Columbia Court of Appeal held that the trial judge erred in characterizing the Crown's withdrawal from the plea arrangement as an abuse of process - There was nothing in the case to suggest any prosecutorial misconduct - The accused's right to a fair trial had not been compromised - His guilty pleas on the original charges could not be used as evidence on the new charges - No affidavit had been filed suggesting that the accused suffered any prejudice from cooperating in the preparation of the pre-sentence and psychological reports - If the information derived from those reports was prejudicial to the accused, the appropriate remedy would be to excise the information, rather than to direct a stay of proceedings - See paragraphs 30 to 35.

Civil Rights - Topic 8374

Canadian Charter of Rights and Freedoms - Denial of rights - Remedies - Stay of proceedings - [See second **Criminal Law - Topic 255**].

Courts - Topic 2015

Jurisdiction - General principles - Controlling abuse of its process - [See first **Criminal Law - Topic 255**].

Criminal Law - Topic 26

General principles - Prosecution of crime - Prosecutorial discretion - The accused was charged with four counts under the Criminal Code - Pursuant to a plea agreement, the

accused pled guilty to count 1 (uttering a threat) and count 4 (possession of a restricted weapon (loaded handgun) (s. 91(2)) - The Crown withdrew from the plea agreement (the charge under s. 91(2) was inappropriate, given the definition of "restricted weapon" in s. 84(1)), stayed the original charges and charged the accused with five counts, effectively replacing count 4 with two alternative counts of possession of a restricted firearm (s. 95(1)) - The trial judge found that in repudiating the plea agreement the Crown had abused the process of the court, and directed a judicial stay of proceedings - The British Columbia Court of Appeal, in allowing the Crown's appeal, stated that there was nothing in this case to suggest any prosecutorial misconduct - Once the definition in s. 84(1) of the Code came to the attention of Crown counsel, the Crown could not continue to accept a guilty plea to the offence under s. 91(2) - See paragraph 30.

Criminal Law - Topic 251

General principles - Abuse of process - General principles (incl. time for raising issue) - The accused agreed to plead guilty to two of four charges and to cooperate in the preparation of a pre-sentence and psychological report - The Crown withdrew from the plea agreement and laid new charges - At the invitation of the Crown and the defence, the trial judge purported to enter convictions before hearing argument on abuse of process - The British Columbia Court of Appeal stated that "[t]hat procedure appears to be common in British Columbia, but does not, in my view, represent proper practice. The judge ought simply to have found the accused guilty of the offences, and proceeded to hear the abuse of process argument. A finding of guilt would have been sufficient to allow the court to order a pre-sentence report under s. 721 of the Code, and also to embark in a timely manner on any other preliminary procedures necessary to proceed with sentencing, pursuant to s. 720. It would also have been sufficient, on any view of the law, to set the stage for an abuse of process argument." - See paragraph 43.

Criminal Law - Topic 251

General principles - Abuse of process - General principles (incl. time for raising issue) - The parties in this case were of the view that abuse of process could not be argued until after the accused was found guilty of the charges against him - The British Columbia Court of Appeal stated that "it should be possible, at least in some circumstances, to make an abuse of process argument before the issue of guilt is adjudicated." - See paragraphs 41 and 42 - "In a case such as the one before us ... it is unnecessary, in my view, to go through a trial before the accused makes his application for a stay of proceedings. ... His argument was that the failure of the Crown to live up to their bargain on the first information made it an abuse to go ahead on the second. ... The better procedure in this case then, would have been to apply for the stay of proceedings, and go on to deal with the question of guilt or innocence if the stay had been refused. ... [T]he stay which was granted would have operated as an acquittal and nothing more need have been done before the trial judge." - See paragraphs 60 to 65.

Criminal Law - Topic 255

General principles - Abuse of process - Power of court - Re prevention and remedies - The British Columbia Court of Appeal stated that "[a] stay of proceedings is to be granted as a remedy for abuse of process sparingly. It is only appropriate in cases where two

criteria are satisfied: (1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and (2) no other remedy is reasonably capable of removing that prejudice." - See paragraph 21.

Criminal Law - Topic 255

General principles - Abuse of process - Power of court - Re prevention and remedies - The accused was charged with four counts - He agreed to plead guilty to counts 1 and 4 - The trial judge found that the Crown's decision to withdraw from the plea agreement and to proceed on a new information (five counts) constituted an abuse of process and thereby violated the accused's rights under s. 7 of the Charter - As a remedy, the judge directed a judicial stay of all five charges - The British Columbia Court of Appeal allowed the Crown's appeal in respect of the judicial stay in so far as it purported to affect proceedings on counts 1, 4 and 5 - The trial judge did not comment on why he considered it necessary to direct a judicial stay on all of the counts rather than only on counts 2 and 3 - Counts 1, 4 and 5 were identical to counts contained in the first information - It could not be said that the Crown reneged on any plea deal with respect to them or that the accused suffered any prejudice in facing those counts - See paragraphs 19 to 22.

Criminal Law - Topic 4486

Procedure - Trial - Stay of proceedings - [See second **Criminal Law - Topic 251**].

Criminal Law - Topic 4944

New trials - When available - General - [See first **Criminal Law - Topic 4983**].

Criminal Law - Topic 4983

Appeals - Indictable offences - Powers of Court of Appeal - Power to make any order that justice requires - On this appeal, the Crown argued that the trial judge erred in finding that the Crown's decision to withdraw from a plea agreement and to lay new charges constituted an abuse of process, and that the stay of proceedings was overly broad - The British Columbia Court of Appeal allowed the appeal and set aside the judicial stay - In determining the remedy, the issue was whether the matter should be returned to the Provincial Court for sentencing or for a new trial - The difficulty was that the judge purported to enter convictions before he proceeded with the abuse of process hearing - "It is not clear what authority the Court has to overturn these 'convictions' ... It does not seem to me that overturning convictions would come within the ancillary powers of the Court under s. 686(8) of the Code." - In the end result, the court held that there were, in fact, no properly entered convictions in this case - The court agreed with the Crown's submission that, rather than give effect to the findings of guilt by entering convictions under s. 686(4)(b)(ii), the court use its discretion to order a new trial under s. 686(4)(b)(i) - See paragraphs 36 to 40, 67 to 70.

Criminal Law - Topic 4983

Appeals - Indictable offences - Powers of Court of Appeal - Power to make any order that justice requires - The trial judge purported to enter convictions before he proceeded with the abuse of process hearing - The British Columbia Court of Appeal held that there were, in fact, no properly entered convictions - The entered verdict of guilt caused

procedural difficulties in determining the remedy, given the Crown's success in setting aside the order for a judicial stay - The court noted the distinction between a finding of guilt and a conviction - "A 'conviction', unlike a finding of guilt, is a judgment of the court. 'Conviction' is a technical term in criminal law, and the use of the term has consequences. A conviction can be appealed under s. 675(1) of the Code, cross-examined upon under s. 666 of the Code and s. 12 of the Canada Evidence Act, ... and may be the subject of a record suspension (formerly a pardon) under the Criminal Records Act ... The distinction between a finding of guilt and a conviction is apparent from judgments of the Supreme Court of Canada dealing with defences that are to be considered after a finding of guilt." - See paragraphs 44 to 52, 60.

Practice - Topic 5277.1

Trials - Stay of proceedings - Abuse of process - [See first **Criminal Law - Topic 255**].

Cases Noticed:

- R. v. Remple (W.A.), [1993] B.C.T.C. Uned. 871; 1993 CanLII 201 (S.C.), refd to. [para. 15].
- R. v. O'Connor (H.P.), [1995] 4 S.C.R. 411; 191 N.R. 1; 68 B.C.A.C. 1; 112 W.A.C. 1, refd to. [para. 21].
- Canada (Minister of Citizenship and Immigration) v. Tobiass et al., [1997] 3 S.C.R. 391; 218 N.R. 81, refd to. [para. 21].
- R. v. Nixon (O.) (2011), 417 N.R. 274; 502 A.R. 18; 517 W.A.C. 18; 2011 SCC 34, appld. [para. 24].
- R. v. Bellusci (R.) (2012), 433 N.R. 135; 2012 SCC 44, refd to. [para. 36].
- R. v. Mack, [1988] 2 S.C.R. 903; 90 N.R. 173, refd to. [para. 41].
- R. v. Swain, [1991] 1 S.C.R. 933; 125 N.R. 1; 47 O.A.C. 81, refd to. [para. 46].
- R. v. Pearson (E.), [1998] 3 S.C.R. 620; 233 N.R. 367, refd to. [para. 47].
- R. v. Kienapple, [1975] 1 S.C.R. 729; 1 N.R. 322, refd to. [para. 48].
- R. v. Provo, [1989] 2 S.C.R. 3; 97 N.R. 209; 59 Man.R.(2d) 1, refd to. [para. 48].
- R. v. Olazo (B.C.) (2012), 316 B.C.A.C. 176; 537 W.A.C. 176; 2012 BCCA 59, refd to. [para. 50].
- R. v. Chiang (P.-C.) (2012), 316 B.C.A.C. 238; 537 W.A.C. 238; 2012 BCCA 85, refd to. [para. 51].
- R. v. La (H.K.) et al., [1997] 2 S.C.R. 680; 213 N.R. 1; 200 A.R. 81; 146 W.A.C. 81, refd to. [para. 63].

Statutes Noticed:

Criminal Code, R.S.C., 1985, c. C-46, sect. 686(4) [para. 67].

Counsel:

M.J. DeWitt-Van Oosten, Q.C., for the appellant;
C.M. Tollefson, for the respondent.

This appeal was heard at Victoria, British Columbia, on February 23, 2012, before Ryan, Saunders and Groberman, J.J.A., of the British Columbia Court of Appeal, who delivered the following reasons for judgment and judgment, dated at Vancouver, British Columbia, on August

16, 2012:

Groberman, J.A. - see paragraphs 1 to 54;

Ryan, J.A. - see paragraphs 55 to 70;

Saunders, J.A. - see paragraph 71.

Appeal allowed.

Editor: E. Joanne Oley

Civil Rights - Topic 8374

Canadian Charter of Rights and Freedoms - Denial of rights - Remedies - Stay of proceedings - The accused was charged with four counts - He agreed to plead guilty to counts 1 and 4 - The trial judge found that the Crown's decision to withdraw from the plea agreement and to proceed on a new information (five counts) constituted an abuse of process and thereby violated the accused's rights under s. 7 of the Charter - As a remedy, the judge directed a judicial stay of all five charges - The British Columbia Court of Appeal allowed the Crown's appeal in respect of the judicial stay in so far as it purported to affect proceedings on counts 1, 4 and 5 - The trial judge did not comment on why he considered it necessary to direct a judicial stay on all of the counts rather than only on counts 2 and 3 - Counts 1, 4 and 5 were identical to counts contained in the first information - It could not be said that the Crown reneged on any plea deal with respect to them or that the accused suffered any prejudice in facing those counts - See paragraphs 19 to 22.

Courts - Topic 2015

Jurisdiction - General principles - Controlling abuse of its process - The British Columbia Court of Appeal stated that "[a] stay of proceedings is to be granted as a remedy for abuse of process sparingly. It is only appropriate in cases where two criteria are satisfied: (1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and (2) no other remedy is reasonably capable of removing that prejudice." - See paragraph 21.

Criminal Law - Topic 4486

Procedure - Trial - Stay of proceedings - The parties in this case were of the view that abuse of process could not be argued until after the accused was found guilty of the charges against him - The British Columbia Court of Appeal stated that "it should be possible, at least in some circumstances, to make an abuse of process argument before the issue of guilt is adjudicated." - See paragraphs 41 and 42 - "In a case such as the one before us ... it is unnecessary, in my view, to go through a trial before the accused makes his application for a stay of proceedings. ... His argument was that the failure of the Crown to live up to their bargain on the first information made it an abuse to go ahead on the second. ... The better procedure in this case then, would have been to apply for the stay of proceedings, and go on to deal with the question of guilt or innocence if the stay

had been refused. ... [T]he stay which was granted would have operated as an acquittal and nothing more need have been done before the trial judge." - See paragraphs 60 to 65.

Criminal Law - Topic 4944

New trials - When available - General - On this appeal, the Crown argued that the trial judge erred in finding that the Crown's decision to withdraw from a plea agreement and to lay new charges constituted an abuse of process, and that the stay of proceedings was overly broad - The British Columbia Court of Appeal allowed the appeal and set aside the judicial stay - In determining the remedy, the issue was whether the matter should be returned to the Provincial Court for sentencing or for a new trial - The difficulty was that the judge purported to enter convictions before he proceeded with the abuse of process hearing - "It is not clear what authority the Court has to overturn these 'convictions' ... It does not seem to me that overturning convictions would come within the ancillary powers of the Court under s. 686(8) of the Code." - In the end result, the court held that there were, in fact, no properly entered convictions in this case - The court agreed with the Crown's submission that, rather than give effect to the findings of guilt by entering convictions under s. 686(4)(b)(ii), the court use its discretion to order a new trial under s. 686(4)(b)(i) - See paragraphs 36 to 40, 67 to 70.

Practice - Topic 5277.1

Trials - Stay of proceedings - Abuse of process - The British Columbia Court of Appeal stated that "[a] stay of proceedings is to be granted as a remedy for abuse of process sparingly. It is only appropriate in cases where two criteria are satisfied: (1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and (2) no other remedy is reasonably capable of removing that prejudice." - See paragraph 21.