Court File No: CV-08-087733-00

ONTARIO
SUPERIOR COURT OF JUSTICE

THE HONOURABLE) THURSDAY, THE 15TH DAY
)
JUSTICE Mark) OF MAY, 2008.

B E T W E E N:

CANADIAN NATIONAL RAILWAY COMPANY

Applicant

and

THE REGIONAL MUNICIPALITY OF YORK

Respondent

O R D E R

THIS APPLICATION made to me this day for a Declaration that Canadian National Railway Police Constables, appointed under Section 44(1) of the *Railway Safety Act*, R.S.C. 1985, c.32 as amended and any predecessor legislation are "Provincial Offences Officers" under Section 1(1) of the *Provincial Offences Act*, R.S.O. 1990, c.P.33 and for other relief was heard by me this day at the Court House, 50 Eagle Street West, Newmarket, Ontario, L3Y 6B1.

UPON READING the Affidavit of Frank Morgan, the Notice of Application and the grounds set forth therein:

1. **THIS COURT DECLARES** that Canadian National Railway Police Constables appointed under Section 44(1) of the *Railway Safety Act*, R.S.C. 1985, c.32 as amended and any predecessor legislation are "Provincial Offences Officers" under Section 1(1) of the *Provincial Offences Act*, R.S.O. 1990, c.P.33.

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Ontario

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Pursuant to subsection 1(3) of the Provincial Offences Act, R.S.O. 1990, c. P. 33, I hereby designate all persons who are employed by Canadian National Railway Company and appointed as constables under subsection 425(1) of the Railway Act, R.S.C. 1985 chapter R-3, and who are appointed as special constables under section 53 of the Police Services Act, R.S.O. 1990, c. P. 15, as Provincial Offences Officers for the purposes of:

(1) all offences under the Commuter Services Act and the regulations made thereunder;

(2) all offences under the Highway Traffic Act and the regulations made thereunder;

(3) all offences under the Liquor Licence Act and the regulations made thereunder;

(4) all offences under the Motorized Snow Vehicles Act and the regulations made thereunder;

(5) all offences under the Toronto Area Transit Operating Authority Act and the regulations made thereunder;

(6) all offences under the Trespass to Property Act.

(7) all parking infractions (within the meaning of Part II of the Provincial Offences Act) under the by-laws of any municipality.

Dated at Toronto this 24th day of February, 1994.

David Christopherson, MPP
Hamilton Centre
Solicitor General and
Minister of Correctional Services

The law vests a "peace officer" with a number of powers and immunities, including the powers relating to detention, arrest, search, and seizure.

Statutory Definition

"Peace Officer" is defined under s. 2:

2

...

"peace officer" includes

> (a) a mayor, warden, reeve, sheriff, deputy sheriff, sheriff's officer and justice of the peace,
> (b) a member of the Correctional Service of Canada who is designated as a peace officer pursuant to Part I of the Corrections and Conditional Release Act, and a warden, deputy warden, instructor, keeper, jailer, guard and any other officer or permanent employee of a prison other than a penitentiary as defined in Part I of the Corrections and Conditional Release Act,
> (c) a police officer, police constable, bailiff, constable, or other person employed for the preservation and maintenance of the public peace or for the service or execution of civil process,
> (c.1) a designated officer as defined in section 2 of the Integrated Cross-border Law Enforcement Operations Act, when
> (i) participating in an integrated cross-border operation, as defined in section 2 of that Act, or
> (ii) engaging in an activity incidental to such an operation, including travel for the purpose of participating in the operation and appearances in court arising from the operation,
> (d) an officer within the meaning of the Customs Act, the Excise Act or the Excise Act, 2001, or a person having the powers of such an officer, when performing any duty in the administration of any of those Acts,
> (d.1) an officer authorized under subsection 138(1) of the Immigration and Refugee Protection Act,
> (e) a person designated as a fishery guardian under the Fisheries Act when performing any duties or functions under that Act and a person designated as a fishery officer under the Fisheries Act when performing any duties or functions under that Act or the Coastal Fisheries Protection Act,
> (f) the pilot in command of an aircraft
> (i) registered in Canada under regulations made under the Aeronautics Act, or
> (ii) leased without crew and operated by a person who is qualified under regulations made under the Aeronautics Act to be registered as owner of an aircraft registered in Canada under those regulations,
> while the aircraft is in flight, and
> (g) officers and non-commissioned members of the Canadian Forces who are
> (i) appointed for the purposes of section 156 of the National Defence Act, or

(ii) employed on duties that the Governor in Council, in regulations made under the National Defence Act for the purposes of this paragraph, has prescribed to be of such a kind as to necessitate that the officers and non-commissioned members performing them have the powers of peace officers;

...
R.S., 1985, c. C-46, s. 2; ... 2003, c. 21, s. 1; 2004, c. 3, s. 1; 2005, c. 10, s. 34, c. 38, s. 58, c. 40, ss. 1, 7; 2006, c. 14, s. 1; 2007, c. 13, s. 1; 2012, c.1, s. 160, c. 19, s. 371; 2013, c. 13, s. 2; 2014, c. 17, s. 1, c. 23, s. 2, c. 25, s. 2; 2015, c. 3, s. 44, c. 13, s. 3, c. 20, s. 15.

– CCC

The definition of "peace officer" within the Code "serves only to grant additional powers to enforce the criminal law to persons who must otherwise operate within the limits of their statutory or common law sources of authority".[1]

The list in s. 2 is not comprehensive and can include other persons not listed in the section.

Professions That are Not Peace Officers
Peace officers do not include:

- a private bailiff[2]
- municipal by-law enforcement officer[3]
- an off-duty young offender corrections officer[4]

This does not mean that these professions cannot be peace officers. It only means that unless they are specifically made peace officers under other legislation they will not be definition fit into the definition of "peace officer" under s. 2 of the Code.

Provincial and federal acts will appoint persons to be "peace officers" within the meaning of the Criminal Code. In these cases, this designation will be limited to Criminal Code peace officer powers while the officer is in execution of duties under the enabling Act and not pursuant to Criminal Code offences.[5] When doing anything outside of the enabling legislation they are considered civilians.[6]

1. Jump up ↑ R v Nolan, 1987 CanLII 66 (SCC), [1987] 1 SCR 1212 at para 20 per Dickson CJ
2. Jump up ↑ R v Burns, 2002 MBCA 161 (CanLII) at paras 8 to 10
   R c Boisseau, 1981 CanLII 2538 (QC CM), [1981] R.L. 155 - superior court bailiff
3. Jump up ↑ R v Laramee (1972), 9 CCC (2d) 433 (N.W.T. Mag. Ct.)(*no link) cited in Parsons, 2001 ABQB 42 (CanLII), at para 14
4. Jump up ↑ R v Pillipow, 2003 SKQB 49 (CanLII),
5. Jump up ↑ see e.g. R v Beaman, [1963] SCR 445, 1963 CanLII 73 (SCC)
   Wright v The Queen, 1973 CanLII 858 (SK QB), [1973] 6 W.W.R. 687 (Sask.)

R v Ingram, 1974 CanLII 985 (SK CA), 1974 CarswellSask 79, [1974] 5 W.W.R. 759, 18 CCC (2d) 200
R v Laramee, [1972] 6 W.W.R. 30, 9 CCC (2d) 433 (N.W.T.)(*no link)

6. Jump up ↑ R v Thibeault, 2007 NBCA 67 (CanLII) at para 15

Federal Agencies

A customs officer or excise officer is a peace officer under s. 2(d) when conducting duties under the Customs Act.[1] Sections 163.4 and 163.5 of the Customs Act authorizes customs officers to have the same powers as a peace officer under the Criminal Code in a limited context.[2]

1. Jump up ↑ Thibeault v R., 2007 NBCA 67 (CanLII) at para 15
2. Jump up ↑ see Customs Act s. 163.4 and 163.5

Other Members of Law Enforcement Agencies

A traffic patrol officer can be a peace officer.[1]

A police constable under s. 44 of the Railway Safety Act is a peace officer.[2]

A "special constable" is a peace officer only for the limited purpose of their mandate.[3]

1. Jump up ↑ R v McCloy, 1987 CanLII 4476 (SK QB), (1987), 2 M.V.R. (2d) 293, 64 Sack. R. 166, Noble J. (Q.B.)
2. Jump up ↑ R v Lord, 2010 BCSC 1046 (CanLII)
3. Jump up ↑ R v Semeniuk, 2007 BCCA 399 (CanLII), at para 15

Other Members of Municipal Organizations

A pound-keeper can be a peace officer.[1]

An animal control officer is only an officer for the limited purpose of "enforcing animal control legislation".[2]

1. Jump up ↑ R v Moore, [1983] 5 W.W.R. 176(*no link)
2. Jump up ↑ R v Jones and Huber, [1975] 5 W.W.R. 97, (Yukon Mag. Ct.)(*no link)

Wildlife Officers

Across many provinces, game wardens, conservation officers and wildlife officers can be a peace officer within the meaning of s. 2(c) of the Code when enforcing enabling provincial legislation.[1]

1. Jump up ↑ R v Beaman, [1963] SCR 445, 1963 CanLII 73 (SCC) - a game warden under the Game Act (NB)
R v Jones, [1975] 5 W.W.R. 97, 30 C.R.N.S. 127 (Y.T.)(*no link) - peace officer under s.

2(c)
R v Rutt, 1981 CanLII 2083 (SK CA), (1981), 59 CCC (2d) 147 - conservation officer under the Wildlife Act (Sask)
R v Rushton, (1981), 62 CCC (2d) 403 (N.B.C.A.)(*no link) - game warden
R v Goy (1969), 5 C.R.N.S. 385, 67 W.W.R. 375(*no link) - wardens appointed under the wildlife act is a peace officer
R v Cook, 2006 SKPC 41 (CanLII)

Military Officers

Under s. 2(g) a military police officer is a peace officer.[1]

A military police officer does not have authority outside of the base to deal with civilians.[2]

1. Jump up ↑ R v Bryden, 1995 CanLII 4542 (NS SC), (1995), 13 M.V.R. (3d) 89, 139 N.S.R. (2d) 131, 397 A.P.R. 131
   R v Nolan, [1987] 1 SCR 1212, 1987 CanLII 66 (SCC)
   R v Haynes, 1994 CanLII 4160 (NS CA)
   R v Harvey, 1979 ABCA 275 (CanLII)
   R v Smith, 1982 CanLII 358 (BC CA)
   R v Cogswell (1979), 2 M.V.R. 34, [1979] NBJ No. 31 (N.B.C.A.)(*no link)
2. Jump up ↑ Harvey, *supra*

Aboriginal and First Nations Officers

Aboriginal police are governed by provincial police acts.[1]

A special constable appointed under the Police Act to serve as a band constable.[2]

A first nations constable have authorization out side of the territorial limits of the reserve.[3]

First nations peacekeepers[4] and first nations constables (in limited circumstances) [5] are not peace officers.

1. Jump up ↑ s. 87 of the Police Act (NS)
   s. 38 of the Police Act (NB)
2. Jump up ↑ R v Whiskeyjack, 1984 ABCA 336 (CanLII)
   R v Stephens, 1995 CanLII 626 (ON CA)
3. Jump up ↑ R v Decorte, 2003 CanLII 57434 (ON CA), [2005] 1 SCR 133, 2005 SCC 9 (CanLII)
4. Jump up ↑ R v Suggashie, 2012 ONSC 2292 (CanLII) at paras 22 to 29
5. Jump up ↑ R v Decorte, [2005] 1 SCR 133, 2005 SCC 9 (CanLII)

1919 CarswellAlta 53
Alberta Supreme Court [Appellate Division]

R. v. O'Brien

1919 CarswellAlta 53, [1919] 3 W.W.R. 469, 15 Alta. L.R. 64, 25 C.R.C. 282, 32 C.C.C. 46

Rex v. O'Brien

Harvey, C.J., Stuart, Simmons and McCarthy, JJ.

Judgment: October 17, 1919

Counsel: *J. R. Palmer*, for accused, appellant.
G. A. Walker, K.C., for Crown, respondent.

Subject: Criminal; Public

Headnote

Criminal Law — Offences against administration of justice — Corruption — Bribery of officers — Nature and elements of offence

Police — Particular police and security forces — Railway police — General

Criminal Law — Bribery of Peace Officer — Whether Railway Constable a Peace Officer within S. 157, Criminal Code — Extent of Authority of Railway Constables — S. 301, Railway Act (Dom.).

Constables appointed under sec. 301 of *The Railway Act*, R.S.C., 1906, ch. 37, are peace officers within the meaning of that term in sec. 157 of *The Criminal Code*. They are a sort of general Dominion police with authority throughout the Dominion wherever the railway at whose nomination they are appointed runs and within its immediate neighbourhood.

Quaere whether the words "or other local jurisdiction within which he was appointed," in sec. 301(*b*) of *The Railway Act* are of themselves wide enough to include a province other than that in which the constable was appointed (per Stuart, J.).

A case reserved by His Honour John A. Jackson, Judge of the District Court for the Judicial District of Lethbridge, during the trial of the accused for bribing a peace officer, contrary to sec. 157 of *The Criminal Code*, on his ruling that one McCone was not a peace officer within the meaning of that section. Appeal allowed.

The case was argued before HARVEY, C.J., STUART, SIMMONS and MCCARTHY, JJ.

The judgment of the Court was delivered by *Stuart, J.*:

1 This is a case reserved by his Honour Judge Jackson during the trial of an accused for bribing a peace officer contrary to sec. 157 of *The Code*. He was of opinion that McCone was not a peace officer within the meaning of that section and so ruled, but we understand that he did not acquit but that the trial was postponed until our opinion could be obtained.

2 After some hesitation I have concluded that the learned Judge was in error in the opinion he formed.

3 I do not, indeed, think the words "or other local jurisdiction within which he was appointed" as used in sec. 301(*b*) of *The Railway Act*, R.S.C., 1906, ch. 37, are of themselves wide enough to cover another province, because in sec. 304, where they are repeated, it is obvious that they cannot cover a province for the reason that there is not in any province of Canada, I believe, such a person as a clerk of the peace for the province. There are other provisions which suggested very strongly to my mind that the intention of Parliament was simply to give the railway constables power to act anywhere in the province in which they were appointed, particularly the clause setting forth how they may be appointed and dismissed and the clause referring to the registration of their appointments and dismissals. It seemed to me particularly to be unlikely that Parliament intended to force a person, who under sec. 305 might want to enquire into the validity of the appointment of any particular constable acting in their neighbourhood, to go to the other end of the Dominion to discover the facts which he desired to learn. But upon the whole I see no good ground upon which the Court would be entitled to cut down the very plain meaning of sec. 301 (*a*) and (*c*) which enacts in substance that a constable once legally appointed under the Act may act "on such railway and on any of the works belonging thereto" and "in all places not more than a quarter of a mile distant from such railway." It might be possible to contend that the phrase "or in any other place through which such railway passes" as used in sec. 301 (*b*), should be limited by the *ejusdem generis* rule to places of the same nature as a "county, city, town, parish, district or other local jurisdiction," the last expression not including, for the reasons I have given, a whole province. But subclauses (*a*) and (*c*) cannot, in any case, I think, be made subject to any such rule. Obviously the intention was to create a sort of Dominion police. They are to be appointed on the nomination of the railway authorities and doubtless must be paid by them but when appointed they are public constables just as much as in the case of constables appointed and paid by municipalities. They are officers of the law and probably in no sense agents of the railway company, though it is not neces sary to speak definitely as to this. In such circumstances there would seem to be no reason why Parliament may not have intended them to be, as I have said, a sort of general Dominion police with authority throughout the Dominion wherever the Dominion railway runs and in its immediate neighbourhood. Under sec. 301 they are to protect not merely the railway property and the railway officials but the public generally, both in person and property. Sec. 301 (*a*) and (*c*) is very wide, plain and definite in its terms, and I therefore think that the constable in question in this case, though appointed in Manitoba, had power to act in Alberta within the topographical limit prescribed by that section.

4 The appeal against the learned Judge's ruling will therefore be allowed, but as the trial has not yet been concluded it does not seem necessary to make any formal order as the learned Judge on giving judgment will doubtless follow the view we have adopted.

5 I may add that the other members of the Court did not share the doubt which I at first entertained.

Appeal allowed.

Solicitors of record:
G. A. Walker, K.C., solicitor for the Attorney-General of Alberta.
J. R. Palmer, solicitor for accused, appellant.

Case Name:

R. v. Koekebakker

Between
Her Majesty the Queen, and
Brian Koekebakker

[2013] O.J. No. 3981

Information No. 9471902B

Ontario Court of Justice
Burlington, Ontario

P.J. Macphail J.P.

Oral judgment: June 13, 2013.

(41 paras.)

Professional responsibility -- Regulated occupations -- Occupations -- Police officers -- Jurisdiction -- Application by defendant to quash certificate of offence dismissed and sentencing of defendant who pleaded guilty to speeding -- While off railway property, railway officer recorded defendant travelling 87 kph in 60 kph zone -- Railway Safety Act s. 44 did not limit officer's authority to act only while on railway property -- Officer was vested with statutory authority to enforce Highway Traffic Act via designations under both Railway Safety Act and Provincial Offences Act -- As defendant pleaded guilty to speeding of 75 kph in 60 kph zone, he was sentenced to statutory penalty of $45 fine plus victim surcharge.

Transportation law -- Motor vehicles and highway traffic -- Liability -- Speeding and radar -- Application by defendant to quash certificate of offence dismissed and sentencing of defendant who pleaded guilty to speeding -- While off railway property, railway officer recorded defendant travelling 87 kph in 60 kph zone -- Railway Safety Act s. 44 did not limit officer's authority to act only while on railway property -- Officer was vested with statutory authority to enforce Highway Traffic Act via designations under both Railway Safety Act and Provincial Offences Act -- As defendant pleaded guilty to speeding of 75 kph in 60 kph zone, he was sentenced to statutory penalty of $45 fine plus victim surcharge.

Application by the defendant to quash the certificate of offence and sentencing of the defendant who pleaded guilty to speeding. A Canadian National Railway police officer recorded the defendant travelling 87 kph in a 60 kph zone. The officer obtained the speed reading on his speed measurement device while stationed at a position that was not on land owned by the railway. The traffic stop was completed before the defendant entered on to the portion of the roadway that formed party of the railway property. The defendant sought to quash the certificate of offence alleging that the officer lacked authority to enforce the Highway Traffic Act in the location where the speed enforcement activity occurred. If unsuccessful, the Crown consented to the defendant's guilty plea to a reduced rate of speeding, being 75 kph in a 60 kph zone.

HELD: Application dismissed. The language of s. 44 of the Railway Safety Act did not limit the officer's authority to act only while within the boundary of railway property. The officer was vested with statutory authority to enforce the Highway Traffic Act via designations under both the Railway Safety Act and the Provincial Offences Act. As the defendant pleaded guilty to speeding of 75 kph in a 60 kph zone, he was sentenced to the statutory penalty of a $45 fine plus a victim surcharge.

Statutes, Regulations and Rules Cited:

Highway Traffic Act, R.S.O. 1990, c. H.8, s. 128

Police Services Act, R.S.O. 1990, c. P.15, s. 19(2), s. 42(2)

Provincial Offences Act, R.S.O. 1990, c. P33, s. 1, s. 1(1), s. 1(2), s. 1(3)

Railway Act, R.S.C. 1906, s. 301, s. 301(a), s. 301(b)

Railway Act, R.S.C. 1970,

Railway Safety Act, R.S.C. 1995, c. 3, s. 44, s. 44(1), s. 44(2), s. 44(3)

Charges: s. 128 -- Highway Traffic Act - Speeding

Counsel:

G. Larson, Municipal Prosecutor.

D. Morton and L. Carter Agents for the Defendant.

REASONS FOR RULING

1 **P.J. MACPHAIL J.P.** (orally):-- Brian Koekebakker is charged with speeding; 87 kilometres per hour in a 60 kilometre per hour zone. Contrary to section 128 of the *Highway Traffic Act*, alleged to have occurred on Winston Churchill Boulevard, in the Town of Halton Hills on April 15th 2012.

2 Officer William Bijl of the Canadian National Railway Police was the charging officer. It is agreed that Officer Bijl obtained the speed reading on his speed measurement device while stationed at a position that was not on land owned by Canadian National Railway. And that the traffic stop that Mr. Koekebakker was completed before the defendant entered onto that portion of the roadway that forms part of C.N.R. property.

3 At the commencement of the proceeding a defence motion was advanced asking the Court to quash the Certificate of Offence asserting that Officer Bijl lacked the authority to enforce the *Highway Traffic Act* in the location where the speed enforcement activity occurred. In that application and following a hearing there were a number of other facts acknowledged or agreed as follows: one; Officer Eiji is a police constable appointed pursuant to section 44(1) of the *Railway Safety Act*. Two; C.N. Railway constables appointed pursuant to the provisions of the Railway Act revised statutes of Canada 1970, this was the prior legislation. Were designated to be Provincial Offences officers pursuant to section 1(2) of the *Provincial Offences Act* by the Honourable Steven Offer the Solicitor General for Ontario on March 8 1990. Three; by declaration of the 15th of May 2008, Mr. Justice Jenkins of the Ontario Superior Court of Justice declared that the Canadian National Railway police constables appointed under section 44(1) of the *Railway Safety Act* Revised Statutes Canada 1995 as amended, chapter 3, or any predecessor legislation, are Provincial Offences officers, under section 1(1) of the *Provincial Offences Act* Revised Statutes of Ontario 1990 chapter P33.

4 Section 44(1) of the *Railway Safety Act* state,

> "A judge of a Superior Court may appoint a person as a police constable for the enforcement of Part III of the Canada Transportation Act and for the enforcement for the laws of Canada or a province in so far as their enforcement relates to the protection property owned, possessed or administered by a railway company, and the protection to persons or property on that property."

5 Section 44(3) of that same Act states,

> "The police constable has jurisdiction on the property under the administration of the railway company and in any place within 500 metres of the property, that the railway company owns, possesses, or administers."

6 Officer Bijl testified in the motion proceeding. He stated that he had been appointed pursuant to section 44(1) as a police constable and an appointment made by a judge of the Saskatchewan Superior Court of Justice. His duties include traffic enforcement off of C.N. Rail property for the purposes of preventing collisions at railway crossings. He stated that speed was a main contributing factor to such collisions and that when such collision occur the effect is a delay of transit on the main line tracks.

7 Defence position can be summarized as follows: While Officer Bijl is a police constable under the *Railway Safety Act* and a Provincial Offences officer pursuant to section 1 of the *Provincial Offences Act*, his legal authority to enforce the *Highway Traffic Act* exists only while within the boundary of rail property. The predecessor legislation, the Railway Act revised statutes of Canada 1906 and specifically section 301(a)(b), implied language that combined the jurisdiction and the ability to enforce. Section 44 of the current Act appears to speak separately to the issues of enforcement in jurisdiction. With the enforcement limited by subsection 1, and the jurisdiction limited by subsection 2.

8 The Court was asked to consider the principle of implied exclusion in interpreting the breadth of authority created by section 44. Mr. Morton's premise, as I understood it, was that the legislature intended to give authority to a police constable to enforce its statutory jurisdiction within 500 metres of the railway property. That if - I apologize, that if the legislature had intended to give authority to a police constable to enforce the statutory jurisdiction within 500 metres of railway property, it would have expressly done so in clear language. The lack of specific inclusion must lead to the inference that the failure to include this was a deliberate exclusion. In support the reasons of Mr. Justice Ledressay's, in his decision, Her Majesty the Queen v. Balbir Ghai of the 8th of September 2008, were referred to in support and illustration of this doctrine.

9 In the case Justice Ledressay referred to a passage from the fifth of edition of Sullivan on Construction of Statutes, where the author in turn quotes Justice Laskin's description of the principle.

10 In Justice Laskin's words,

> "The legislative exclusion can be implied when an expressed reference is expected but absent."

11 The author in Sullivan went on to state,

> "The force of the implication depends on the strength and the legitimacy of the expectation of the expressed reference. The better the reason for anticipating expressed reference for a thing, the more telling the silence of the legislation."

12 Defence also referred to the Police Services Act an illustration of the explicit description of territorial jurisdiction granted to a police officer in that Act. Section 42(2) of that Act states, "That a police officer has authority to act as such throughout Ontario." Section 19(2) provides a limitation on the responsibilities of Ontario Provincial Police and that responsibility regarding Municipal By-laws are dependent on and subject to certain agreements made.

13 Defence submitted that the Court could not simply assume that the charging officer had authority to act as and where he did in laying this charge. And that it was not possible to simply rely upon the presumption of regularity regarding this authority. The decision in Her Majesty the Queen and Trevor Joseph Coward, citation 2009, Saskatchewan Queens Bench 331 was provided and referred to. The Court in that case found that the crown was not entitled to rely on the presumption of regularity with regard to the territorial jurisdiction of C.N.R. constables, and that this was a fact capable of proof. The Court went on to state that proof was important due to the restricted jurisdiction of C.N. Railway police to enforce Provincial statutes.

14 Defence reminded the Court of the direction set out in the modern or purposive approach to statutory interpretation, and referenced the decision in R. v. Kazemi, [2012] O.J. No. 2826, in support. Particular reference was made to page 87 of Driedger's Construction of Statutes the edition of that text was not stated however, where Driedger describes or explains the approach as follows:

> "Today there is only one principle or approach; mainly the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the objection - the objects of the Act and the intention of Parliament."

15 The decision in Prince Edward Island v. Egan, [1941] S.C.R. 396, was referred to in support of the proposition that the Constitutional Division of powers establishes the right of buildings and the maintaining of highways to be wholly within the jurisdiction of Provincial Governments.

16 The summary of the prosecution's position is as follows: the prosecutor submits that section 44 is to be read in its entirety in determining the purpose and scope. Note was made of the language of section 1(3) of the *Provincial Offences Act*, particularly regarding the words, "For the purposes of all or any class of offences." The Court was asked to consider the ultimate finding in the Coward decision relied upon by defence, particularly the language in paragraphs 21 to 24. In that case it was agreed that the offence was not alleged to have been committed while on railway property. The Court was satisfied that it occurred on land sufficiently adjacent to be within the boundary of the charging officer's territorial jurisdiction. The prosecutor argued that the Egan case not be considered as there was no dispute or challenge as to Provincial jurisdiction.

17 The case of R. v. Lord, 2010 BCSC 1046, was cited and relied upon, particularly with regard to whether the C.N. Railway police constable in that case was a peace officer. While that issue was not challenged in the case before this Court, certain language in the Lorre decision was helpful to this proceeding. In paragraphs 35 and 36 Mr. Justice Butler considered the intent of section 301 of the predecessor legislation, the Railway Act. In the appointment of constables, Mr. Justice Butler referred with apparent approval to the findings of Mr. Justice Stewart in a much earlier decision, R. v. O'Brien, [1919] 3 W.W.R. 469. Justice Stewart found that the intent of section 301 of the Railway Act was to create in his words, "A sort of dominion police." And that despite the point of body being a railroad such constable were, again, in his words, "Public constables, and were officers of the law and probably in no sense agents of the railway company." Section 301 provided authority to protect not merely the railway property and the railroad officials but the public generally.

18 In paragraph 37 of the Lord decision, Justice Butler made the following finding,

> "The current statutory provision is very similar in intent. Once a constable is validly appointed according to the statutory provisions he or she has jurisdiction to act as such anywhere the railway owns, possesses or administers lands. Accordingly Constable Brasard[sic] appointed in Alberta may enforce the laws of Canada or any province in so far as their enforcement relates to the protection of the property owned, possessed or administered by C.N. or the protection of persons or property on or within 500 metres of C.N. property."

19 So, that was the evidence and the arguments the Court had to consider in reaching a decision on the matter today.

20 This is the Courts finding:

21 The Court cannot accept the defence premise that the language of section 44 of the *Railway Safety Act* limited Officer Eiji_ authority to act as submitted. No basis was found to accept the premise that the Act somehow severs jurisdiction from the enforceability once the officer crosses out of railway property but remains within 500 metres of such property. The principle of implied exclusion cannot be applied as submitted. The combined language of section 44(1)and(3) raise no discernible expectation in the reader, that explicit language ought to be included or found confirming that Officer Eiji possessed enforcement authority with regard to speeding offences that occur on a roadway within the 500 metre boundary established in subsection 3 of section 44. The Court cannot agree that the modern or purposive approach to statutory interpretation serves the defendant position in this instance. The defence interpretation of section 44 does not appear to be consistent with the scheme of the Act, the objects of the Act and the intention of Parliament. Instead the interpretation significantly hobbles the apparent intent of section 44. The Court accepts the analysis in finding of the intention of Parliament to be that as concluded by Mr. Justice Butler in paragraph 37 of R. v. Lord referred to earlier in this decision.

22 The Police Services Act analogies offered by defence are not persuasive. Section 44(2) speaks to the expanse of jurisdiction to the police authority, not any limitation. Section 19(2) sets other condition precedent to a specific authority rather than a prohibition.

23 Officer Bijl is vested to statutory authority to invest or enforce the Ontario *Highway Traffic Act* via designations under both the *Railway Safety Act*, federal legislation, and the *Provincial Offences Act* of Ontario. This dual appointment would appear to resolve any ambiguity with regard to Constitutional Authority to enforce the *Highway Traffic Act.*

24 The *Provincial Offences Act* authority was reviewed and considered by Mr. Justice Jenkins in 2008. It is obvious that he would have had the language of section 44 of the *Railway Safety Act* before him as he considered the matter. The subsequent declaration that C.N.R. police are Provincial Offences officers could have included limitations of this authority of such C.N.R. police in the enforcement of Ontario Provincial Offences. However no limiting language appears in his declaration of May 15 2008.

25 The defence motion seeking to quash the certificate of offence due to the lack of authority of Constable Bijl to enforce the *Highway Traffic Act* while within 500 metres of the land owned, possessed, or administered by the railway but not within that land itself is dismissed. And Mr. Morton I'd like to thank you as you Mr. Prosecutor for your arguments and materials. It was a lot to consider there.

26 MR. MORTON: Thank you, Your Worship.

27 MR. LARSON: Thank you, Your Worship.

28 MR. MORTON: We believe it was an important issue to fair it out.

29 MR. LARSON: Thank you, Your Worship, and in light of the dismissal of the application I believe the prosecution is going to be consenting to a guilty plea to a reduced rate of speed, that of 75 in a 60.

30 MS. CARTER: That amendment is on consent, Your Worship. For the record it is Carter, initial 'L'. It is an informed plea, waiving his right to a trial and understands the consequences of doing so.

31 THE COURT: Thank you, certificate 9-7, I'm sorry, 9-4-7-1-9-0-2-B is amended on consent to allege speeding; 75 in a 60 kilometre per hour zone.

32 COURT CLERK: Brian Koekebakker, stands accused that on the 15th day of April 2012, at southbound Winston Churchill Boulevard by C.N.R. level crossing in the Town of Halton Hills, did commit the offence of speeding; 75 kilometres per hour in a 60 kilometre per hour zone, contrary to the *Highway Traffic Act*, section 128. To that charge sir on behalf of the defendant how do you plead?

33 MS. CARTER: Guilty, satisfied with the facts as stated.

34 THE COURT: Thank you, anything in addition?

35 MR. LARSON: No, Your Worship, thank you.

36 THE COURT: The plea is accepted as amended and a conviction will register.

37 MR. LARSON: And statutory penalty, $45.00 please.

38 MS. CARTER: That is agreeable, 30 days please. And the address remains the same.

39 THE COURT: $45.00 fine imposed plus court costs and Victim surcharge, thirty days for payment.

40 MR. LARSON: Thank you.

41 MS. CARTER: Thank you.

qp/s/qljel/qlrdp/qlced

Regina v. Pile

(1982), 37 O.R. (2d) 18

ONTARIO

High Court of Justice

Callaghan J.

February 11, 1982.

Criminal law -- Definitions -- Peace officer -- Criminal Code, R.S.C. 1970, c. C-34, s. 2 -- Power and duties of military policeman appointed under regulations of National Defence Act -- National defence act, s. 134 -- Order-in-council P.C. 1976-1799 -- Defence Establishment, Trespass Regulations, C.R.C., c. 1047, s. 2, s. 28(1) -- Whether officers and men of Canadian Armed Forces may execute powers of peace officers with respect to civilians off a military base as result of conduct on base -- National Defence Act, R.S.C. 1970, c. N-4, s. 134.

The accused was observed by Corporal C. erratically driving a motor vehicle on a military base. Corporal C. pursued the accused to a place some two miles outside the base, where the accused stopped. Corporal C. placed the accused under arrest for impaired driving. The accused continued to resist arrest and in a scuffle kicked Corporal C. The accused was handcuffed, placed in the military vehicle and a breath demand was given. The accused was taken to Military Headquarters where two further demands were made. The accused refused to comply. The accused was charged with the assault of a peace officer contrary to s. 246(2)(a) of the Criminal Code, R.S.C. 1970, c. C-34, and with the failure to comply with a demand for a breath sample contrary to s. 235(2) of the Criminal Code. The trial judge acquitted the accused and found that the accused was not a person subject to the Code of Service of discipline, and when the corporal sought to arrest the accused he was not engaged in the performance of duties under s. 134 of the National Defence Act, R.S.C. 1970, c. N-4, and therefore not a "peace officer" lawfully engaged in the execution of his duty, and that Corporal C. was not a "peace officer" in respect of the accused with the power to require compliance by the accused with the provisions of s. 235(1) of the Criminal Code.

The Crown appealed by way of stated case.

Held: the appeal should be allowed, the accused convicted of each offence charged and the case remitted to the Provincial Court for sentence.

The jurisdiction of Corporal C. as a peace officer was defined by s. 134 of the National Defence Act, the terms of which are incorporated by reference into the definition of a peace officer in s. 2 of the Criminal Code.

The introduction of cl. (ii) of para. (f) of s. 2 by the Criminal Law amendment Act, 1972 (Can.), c. 13, extended the authority of officers and men of the Canadian Forces as peace officers

beyond those persons subject to the Code of Service Discipline. The jurisdiction defined by the terms of s. 134 (am. 1972, c. 13, s. 73.1) of the National Defence Act is limited to such persons whereas that under s. 2(f)(ii) of the Criminal Code is clearly not subject to such limitation. The accused was a civilian driving a motor vehicle erratically on a military base. When Corporal C. made his observations he was employed on duties prescribed by the Governor in Council and regulations made under the National Defence Act for the purposes of para. (f)(ii) of s. 2 of the Criminal Code. Any doubt was resolved by the defence Establishment Trespass Regulations, ss. 2 and 28(1) which apply to any person and indicates that "security by guard", as defined by s. 2, includes a military policeman who can arrest any person found committing any criminal offence on any defence establishment. Corporal C. was not deprived of his authority once he left the base in pursuit of the accused. His powers arose from performing duties on the base in respect of persons on the base in relation to an incident which took place on the base. The National Defence Act and the regulations do not limit the police powers territorally. The vital element is the existence of a nexus between the actus reus for the alleged offence and the defence establishment which was clearly established.

Appeal by the Crown by way of stated case from acquittal of accused.

[Harvey v. The Queen (1979), 5 M.V.R. 41, 18 A.R. 382; R. v. Huff 1979 ABCA 234 (CanLII), (1979), 50 C.C.C. (2d) 324, 17 A.R. 449, dist]

J. Casey, for appellant.

R.M. Goldman, for respondent.

Callaghan J.: This is an application by way of appeal on behalf of the Attorney-General for the Province of Ontario for a determination of questions of law arising in a case stated on July 10, 1981, by His Honour Judge N.J. Nadeau, pursuant to s. 762 of the Criminal Code, R.S.C. 1970, c. C-34 ("Code"). The questions raised by the case stated are as follows:

> 1. Did I err in law in holding that there was no evidence that Corporal Collins was a Security Guard within the meaning of the Defence Establishment Trespass Regulations, Revised Regulations of Canada, Chapter 1047?
>
> 2. Did I err in law in holding that because Corporal Collins was not engaged in the performance of duties under Section 134 of the National Defence Act, when he sought to effect the arrest of Stephen J. Pile he was not a peace officer lawfully engaged in the execution of his duty?
>
> 3. Did I err in law in holding that there was no evidence that at the relevant times Corporal Collins was a Peace Officer as defined by Section 2 of the Criminal Code of Canada with the power to require compliance by the accused with the provisions of Section 235(1) of the Criminal Code?

The questions submitted arise out of the prosecution of the respondent on charges pursuant to ss. 246(2)(a) and 235(1) of the Code. The facts giving rise to this application are set forth in the case stated, as follows:

> 1. The accused was charged that on or about the 29th day of February, 1980 at the Township of Essa in the said County, did assault Cpl. Collins, a peace officer, to wit a Military Policeman for the Base of Borden engaged in the execution of his duty contrary to Section 246(2)(a) of the Criminal Code of Canada. He is further charged that on or about the 29th day of February, 1980 at the Defence Establishment of Base Borden in the said County, unlawfully did without reasonable excuse, fail or refuse to comply with a demand made to him by a peace officer under Section 235(1) of the Criminal Code of Canada in the circumstances therein mentioned to provide then or as soon thereafter as practicable a sample of his breath suitable to enable an analysis to be made in order to determine the proportion, if any, of alcohol in his blood, contrary to Section 235(2) of the Criminal Code of Canada.
>
> 2. On the 19th of November, 1980 the accused appeared before me at Barrie for his trial. At that time he was arraigned on the above charges, and the accused entered a plea of not guilty.
>
> 3. Following the calling of evidence I found as facts the following:
>
> > i) The accused was observed, at the time and place set out in the informations, by Corporal Ronald Collins, operating a motor vehicle within the confines of a military base known as Base Borden.
> >
> > ii) By reason of what Corporal Collins believed to be erratic driving and weaving, he activated the emergency lights upon the military vehicle he was operating, and took pursuit of the accused's vehicle.
> >
> > iii) The vehicle driven by the accused left the base followed by the military vehicle and after travelling over various roads, eventually reached the Village of Angus, a distance of some two miles from the military base. The passenger in the accused's vehicle was looking out the rear window and making gestures towards the occcupants of the military vehicle which could be decribed as discourteous, if not obscene.
> >
> > iv) Eventually, the accused's vehicle stopped in a private driveway in Angus and the military vehicle pulled in behind it. As Corporal Collins approached the accused, he was met with yells of obscenities from the accused and representations that he, Corporal Collins, was on private property and therefore without authority.
> >
> > v) Corporal Collins at this time noticed the accused to be unsteady on his feet and detected an odour of alcohol upon his breath. He place his hand on the accused's left arm and informed him that he was under arrest for impaired driving.

vi) The accused continued to resist and was physically restrained by Corporal Collins. Shortly following this, the accused broke away and he and Corporal Collins' companion Corporal Morris, who was assisting in the arrest, fell over a fence. In the course of this, the accused kicked Corporal Collins on three occasions in the left leg, causing a rather large bruise.

vii) The accused was then handcuffed, placed in the military vehicle and breath demand pursuant to the Criminal Code given to him by Corporal Collins. The accused was then taken to Military Headquarters where he refused to identify himself. He was at that time given a further demand and answered "This is what I think of your demand", flipping a service hat from the chair onto the floor.

viii) Again a third demand was given and this time in the presence of an Ontario Provincial Police Officer, whereupon the accused again refused to comply.

ix) Several witnesses were called by the defence who testified to the alcoholic consumption by the accused and his condition on the evening in question.

4. Judgment was reserved until December 9th, 1980, at which time I held that I was not satisfied beyond a reasonable doubt that the accused's condition, at the time, was such that his ability to operate a motor vehicle was impaired by alcohol, I however found that Corporal Collins as he observed the operation of the vehicle both on the base and off the base, had reasonable and probable grounds to believe that the ability of the operator to operate the vehicle was impaired by alcohol.

5. Both Corporals Collins and Morris referred to themselves as "Military Policemen" and were in a military vehicle bearing the markings of "Military Police". The identification card carried by Corporal Collins has the words "Military Police" at the top of the same and sets out that he is "a Peace Officer with special powers under the National Defence Act". Also contained on the back portion of that card is a statement as follows:

"Peace Officer includes -- Officers and men of the Canadian Forces who are appointed for the purpose of Section 134 of the National Defence Act -- R.S.C. 1970 Code S.S.2."

6. I found as a fact that Corporal Collins was a person appointed under the Regulations to the National Defence act for the purposes of Section 134 of that Act.

7. I also found as a fact that the accused was not a person who is subject to the Code of Service of Discipline.

8. I held that Corporal Collins was, as he sought to effect the arrest of the accused, not engaged in the performance of duties under Section 134 of the National Defence Act and was therefore not a "Peace Officer" lawfully engaged in the execution of his duty.

9. I also held that Corporal Collins was not at material times, and in respect of the accused, a "Peace Officer" with the power to require compliance by the accused with the provisions of Section 235(1) of the Criminal Code.

Section 2 [am. 1972, c. 13, s. 2] of the Code provides, in part, as follows:

"Peace officer" includes

. . . . .

(c) a police officer, police constable, bailiff, constable, or other person employed for the preservation and maintenance of the public peace or for the service or execution of civil process,

. . . . .

(f) officers and men of the Canadian Forces who are

(i) appointed for the purposes of section 134 of the National Defence Act, or

(ii) employed on duties that the Governor in Council, in regulations made under the National Defence Act for the purposes of this paragraph, has prescribed to be of such a kind as to necessitate that the officers and men performing them have the powers of peace officers;

The jurisdiction of Corporal Collins as a peace officer is defined by the terms of s. 134 [am. 1972, c. 13, s. 73.1] of the National Defence Act, R.S.C. 1970, c. N-4 ("Act"). The terms of s. 134 and the regulations passed under the Act are incorporated by reference into the definition of a peace officer as set forth in s. 2 of the Code.

Section 134 of the National Defence Act is in these terms:

134. Such officers and men as are appointed under regulations for the purposes of this section may

(a) detain or arrest without a warrant any person who is subject to the Code of Service Discipline, regardless of the rank or status of that person, who has committed, is found committing, is suspected of being about to commit, or is suspected of or charged under this Act with having committed a service offence;

(b) [rep. 1973 (Can.), c. 13, s. 73.1]; and

(c) exercise such other powers for carrying out the Code of Service Discipline as are prescribed in regulations made by the Governor in Council.

It is to be noted that s. 134(b) of the Act was repealed consequential upon the introduction into the Criminal Code of para. (f), of s. 2 by the Criminal Law Amendment Act, 1972 (Can.), c. 13, s. 2. In my view, the introduction of cl. (ii) of para. (f) of s. 2 extended the authority of officers and men of the Canadian Forces as peace officers beyond those persons subject to the Code of Service Discipline. The jurisdiction defined by the terms of s. 134 of the Act is limited to such persons whereas that under s. 2(f)(ii) is clearly not subject to such limitation.

It is clear that the provincial judge has found that Corporal Collins was appointed under the regulations for the purposes of s. 134 of the Act. It is also clear that the respondent herein was a civilian person and not subject to the Code of Service Discipline (paras. 6 and 7 case stated, supra). The learned provincial judge also found that Corporal Collins, as a result of observations of the operation of the motor vehicle by the respondent on the Base, had reasonable and probable grounds to believe that the ability of the operator was impaired by alcohol (para. 4, supra). These findings establish a nexus between the alleged offence of the accused, a civilian, and the Armed Forces Base. The pivotal issue is whether or not the officers and men of the Canadian Armed Forces, while executing the powers of peace officers, may do so with reference to civilian personnel off the Base as a result of conduct which took place on the Base.

While on the Base Corporal Collins was charged with the responsibility when acting as a peace officer for the maintenance of law and order and the protection of property and persons. These duties were prescribed pursuant to The Queen's Regulations and Orders for the Canadian Forces passed by the Governor General in Council, pursuant to s. 12(1) of the Act. Article 22.01, as amended by Order-in-Council P.C. 1976-1799, July 13, 1976, provides, in part, as follows:

22.01

. . . . .

> (2) For the purposes of subparagraph (f)(ii) of the definiton of "peace officer" in section 2 of the Criminal Code, it is hereby prescribed that any lawful duties performed as a result of a specific order or established military custom or practice, that are related to any of the following matters are of such a kind as to necessitate that the officers and men performing them have the powers of peace officers:
>
> (a) the maintenance or restoration of law and order;
>
> (b) the protection of property;
>
> (c) the protection of persons;
>
> (d) the arrest or custody of persons;
>
> (e) the apprehension of persons who have escaped from lawful custody or confinement;

Accordingly, when Corporal Collins observed the operation of the respondent's vehicle on the Base and reacted thereto, on reasonable and probable gounds, he was at that time employed on duties prescribed by the Governor in Council and regulations made under the National Defence Act for the purposes of para. (f)(ii) of s. 2 of the Code. If there is any question that the powers of military policemen as peace officers do not extend to civilians for acts done on the defence establishment it is finalized, in my view, by the Defence Establishment Trespass Regulations, C.R.C., c. 1047. Section 2 of the aroresaid regulation defines a security guard as follows:

2.

. . . . .

> "security guard" means any peace officer, security policeman, provost, military policeman or member of the Corps of Commissionaries, and includes any officer or man of the Canadian Forces or employee of the Department of National Defence or of the Defence Research Board who has been assigned duties relating to the enforcement of these Regulations...
>
> 3. These Regulations do not apply to any person who is subject to the Code of Civil Discipline, but apply to all other persons...

By s. 28 it is provided as follows:

> 28(1) Every security guard is authorized to arrest without warrant any person found committing any criminal offence or infraction of these Regulations on or with respect to any defence establishment or whom on reasonable and probable ground he believes to have committed such offence or such infraction.

It is clear that Corporal Collins, a military policeman, fell within the definition of security guard while performing the duties as described in the case stated on February 29, 1980, and that the duties being performed by him on that occasion fell within the description of those set forth in art. 22.01 of the Queen's Regulations and Orders for Canadian Forces (supra). That having reasonable and probable grounds to believe that the respondent had committed a criminal offence "on or with respect to" the defence establishment, it follows he had authority to arrest without warrant the respondent.

In Harvey v. The Queen (1979), 5 M.V.R. 41, 18 A.R. 382, Mr. Justice Clement stated [at p. 46 M.V.R.]:

> There are several categories of persons defined by s. 2 as police officers, for which there is an underlying rationale. Customs and excise officers are police officers when performing their duties under the Customs Act, R.S.C. 1970, c. C-40 or the Excise Act, R.S.C. 1970, c. E-12. Their powers as police officers are not limited territorially, but are restrained functionally to the exercise of such powers as may be necessary in the performance of duties in administering those Acts. The same applies to fishery officers under the Fisheries Act, R.S.C. 1970, c. F-14, and to the pilot in command of an aircraft. None of these is empowered by the definition

section or otherwise to act as a police officer for the purposes of the Criminal Code except in relation to specified duties. Outside of those duties they are civilians. In my opinion, so it is with the military police.

Mr. Justice Clement went on to hold that the powers of a military policeman acting as a peace officer under the Criminal Code arises when he is performing the duties under s. 134 of the Act and such duties only arise in respect to persons subject to the Code of Service Discipline. While I am of the view that the powers of such officers are not limited territorially, I must respectfully decline to follow the view that such officers' powers are limited to personnel subject to the Code of Service Discipline. As mentioned above, the introduction of cl. (ii) of para. (f) of s. 2 of the Code, combined with the consequent repeal of s. 134(b) of the Act, manifests a clear intention on the part of Parliament not to so limit the authority of the officers and men of the Canadian Armed Forces when acting as peace officers. The regulations under s. 12 of the Act, clearly envisage the discharge of such responsibility in relation to civilian personnel. It seems logical that if a defence establishment is to maintain law and order then those charged with that responsibility must have the authority of a peace officer in relation to the civilian personnel. In my view, that was the manifest intention of the 1973 amendment to s. 2 of the Code and s. 134 of the Act.

Corporal Collins, in my view, was not deprived of his authority once he left the Base in pursuit of the respondent. His powers arose from performing duties on the Base in respect of persons who are on the Base in relation to an incident which took place on the Base. Those duties were clearly within his function as a peace officer defined by the Code, s. 2. Attempting to arrest the respondent and in making a demand under s. 235(1) of the Code, he was in the course of the discharge of his duties as a peace officer. The limitations on a peace officer's powers come not only from the Criminal Code, but also from the statutes from which those persons, who are defined by s. 2 of the Code to be peace officers, derive their powers; for example, the Police Acts of the various provinces and the National Defence Act. In the case of R. v. Huff 1979 ABCA 234 (CanLII), (1979), 50 C.C.C. (2d) 324, 17 A.R. 499, the court held that the relevant limitation on the police officer was the Police Act, 1973 (Alta.), c. 44 [now R.S.A. 1980, c. P-12]. That Act provides that a policeman only has jurisdiction inside of the municipality which he is employed by and outside of that municipality with respect to an offence committed within the municipality. In that case the accused had committed an offence outside of the municipality of the arresting officer and the court held that the police officer was without jurisdiction and was not therefore acting as a peace officer. The case at bar is quite different for two reasons. The offence in question was committed within the Base of the arresting military policeman (para. 4, stated case). Secondly, as I have stated above, the National Defence Act and the regulations thereto do not limit either the military police or the security guard's powers territorially, except that the security guard only has powers with respect to offences committed on or with respect to the Base.

The fact that the incident giving rise to the charge under s. 246(2)(a) of the Code took place in the Township of Essa off the defence establishment of Base Borden does not, in my view, affect the power of a peace officer. The right to arrest is a necessary incident of the authority of a peace officer in the execution of his duty. When the right to arrest arises as a result of incidents on the Base, that right prevails until the arrest is effected anywhere within Canada. A military policeman, while acting as a peace officer and exercising authority or duties conferred upon him

by the Act, is not subject to municipal or provincial territorial restraint so long as his actions arise as a result of incidents which took place on or in respect to the defence establishment. The vital element is the existence of a nexus between the actus reus of the alleged criminal offence and the defence establishment. The nexus was clearly established in the facts as found in the case stated. Accordingly, each of the aforesaid questions must be answered in the affirmative.

It was urged upon me that because certain portion of the aforesaid regulations and provisions f the Act were not drawn to the attention of the learned provincial judge that this matter should be remitted to him for a new trial. In my view, the facts as found, together with the aforesaid answers, dictate that a conviction be entered with reference to the offences charged and the matter should be remitted to the provincial judge for the purposes of sentence only and it is so ordered.

Crown appeal by way of case stated allowed.

R. v. Lord, 2010 BCSC 1046 (CanLII)

Date: 2010-06-24

Court of Appeal

R. v. Lord, 2011 BCCA 295 (CanLII) - 2011-06-28

Legislation cited (available on CanLII)

Canada Transportation Act, SC 1996, c 10 — 158

Constitution Act, 1867, The, 30 & 31 Vict, c 3 — 92(14)

Constitutional Question Act, RSBC 1996, c 68 — 8

Corrections and Conditional Release Act, SC 1992, c 20

Criminal Code, RSC 1985, c C-46 — 2; 34(1); 129; 270(1)

Customs Act, RSC 1985, c 1 (2nd Supp)

Motor Vehicle Act, RSBC 1996, c 318

Railway Safety Act, RSC 1985, c 32 (4th Supp) — 44; 44(1)

Railway Safety Act, SBC 2004, c 8 — 44; 44(1); 44(3)

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Mackay v. Manitoba, 1989 CanLII 26 (SCC)

R. v. Booker, 2007 BCSC 456 (CanLII)

R. v. O'Brien, reflex

R. v. Shropshire, 1995 CanLII 47 (SCC)

R. v. Yebes, 1987 CanLII 17 (SCC)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: R. v. Lord,

2010 BCSC 1046

Date: 20100624

Docket: 25264

Registry: Vancouver

Between:

Regina

Respondent

And

David William Lord

Appellant

Before: The Honourable Mr. Justice Butler

On appeal from the Provincial Court of British Columbia:
conviction September 17, 2009 and sentence November 26, 2009
R. v. Lord, Richmond Registry No. 53201

Oral Reasons for Judgment

Counsel for the Crown (Respondent):	L. Falloon
The Accused (Appellant) David William Lord:	Appearing In Person
Place and Date of Hearing:	Vancouver, B.C. June 4, 2010
Place and Date of Judgment:	Vancouver, B.C. June 24, 2010

[1] THE COURT: The appellant, David Lord, appeals his conviction on three counts:

1) Assault of a peace officer, Constable J.M. Michaud, engaged in the execution of his duty, contrary to s. 270(1)(a) of the Criminal Code;

2) Resisting a peace officer, Patrick Brisard, in the execution of his duty, contrary to s. 129(a) of the Criminal Code; and

3) Assault of Constable Michaud with intent to resist the lawful arrest of himself, contrary to s. 270(1)(b) of the Criminal Code.

[2] Mr. Lord was found guilty by the Honourable Judge Chen on September 17, 2009 following two days of evidence and two days of argument.

[3] Mr. Lord is representing himself on this appeal. He submitted a very lengthy written argument which raises numerous issues. He advises the argument took hundreds and perhaps thousands of hours to prepare. It contains references to many cases, texts, and legal publications. The issues raised by him fall into five categories (I should note before describing the categories that the language I have used here is mine, not Mr. Lord's):

(a) Criticism of the findings of fact made by Judge Chen;

(b) Criticism of the legislation, and underlying policy, which permits the appointment of railway police;

(c) Arguments that the CN Police constables are not peace officers based on interpretation of the language in the Criminal Code, R.S.C. 1985, c. C-46, the Canada Transportation Act, S.C. 1996, c. 10 and the Railway Safety Act, R.S.C. 1985, c. 32 (4th Supp.);

(d) Constitutional arguments based on the division of powers; and

(e) Various constitutional and Charter arguments raised on appeal for the first time.

[4] I will consider each of these categories of argument separately.

(a) Criticism of the findings of fact made by Judge Chen.

[5] The background facts are not in dispute. Constable Michaud was sworn in as a member of the Canadian National Railway Police Force on August 25, 2004. The charges arise out of an incident that occurred on March 5, 2008. Constable Michaud was patrolling at a CN railway crossing in Richmond, B.C. He saw an individual driving a van who did not stop his vehicle at the crossing. Constable Michaud followed the vehicle and pulled it over so he could ticket Mr. Yip, the offending motorist.

[6] Mr. Lord was monitoring the crossing. He is of the view that the CN Police do not have the jurisdiction to issue traffic tickets to motorists in British Columbia who are using provincial roadways. He also holds the opinion that the crossing in question should have proper traffic signals. He approached Mr. Yip's vehicle when Constable Michaud was writing up a ticket. He advised Mr. Yip that the CN constable did not have the authority or jurisdiction to issue a ticket. The evidence regarding what occurred after Mr. Lord approached Constable Michaud was highly controversial at trial.

[7] Constable Michaud testified that Mr. Lord attempted to interfere with his duties as a police constable. He said he asked Mr. Lord to stand back and allow him to carry out his duties. He testified that Mr. Lord refused to step back, swore at Constable Michaud, and pushed him. Constable Michaud said that he then purported to arrest Mr. Lord for obstructing and assaulting a peace officer. A struggle ensued between Mr. Lord and Constable Michaud. In the course of that struggle, Constable Michaud or someone on his behalf called Constable Brisard, another CN police officer, who attended and assisted with the arrest of Mr. Lord. Mr. Lord was handcuffed while he was on the ground. Constable Brisard gave evidence at trial regarding the confrontation with Mr. Lord. His evidence was generally in accord with the evidence of Constable Michaud.

[8] Mr. Lord testified at trial. He contradicted the evidence given by the two CN officers. He denied being loud or aggressive. He testified that Constable Michaud grabbed him and that he only tried to get Constable Michaud to let go of him. He denied that he provoked the assault from Constable Michaud, and Mr. Lord also testified that Constable Brisard assaulted him without provocation when he arrived at the scene.

[9] A number of independent witnesses who saw some or all of the incident testified, including Mr. Nguyen, Ms. Bendix-Pedersen and Mr. Yip. I need not repeat their evidence except to say that Judge Chen found that their evidence supported the version of events given by Constables Michaud and Brisard.

[10] Judge Chen reviewed the evidence and ultimately accepted the evidence of the officers and the independent witnesses in preference to that of Mr. Lord. He gave detailed reasons regarding his concerns with Mr. Lord's evidence. Judge Chen accepted evidence of the independent witnesses, who described Mr. Lord as angry, uncooperative, confrontational and belligerent. He said that none of their evidence supported Mr. Lord's assertion that Constable Michaud was the aggressor. Judge Chen also found that Mr. Lord initiated the incident. This was based on Mr. Lord's evidence that he had been angry for some time about CN police ticketing motorists at that crossing. Mr. Lord also indicated in cross-examination that he had no respect for the CN police or for authority in general. Judge Chen concluded that the findings of fact were sufficient to support guilty verdicts on the three counts.

[11] On appeal, Mr. Lord argues that there were inaccuracies in the evidence of Constable Michaud and the other witnesses that indicate they were lying. For example, he noted that Constable Michaud said that Mr. Lord's vehicle was impounded after the incident, but Mr. Lord testified and advised this court that it was not. He says this is a deliberate lie that calls into question the balance of

Constable Michaud's evidence. He also says that his version of the incident, if accepted, is sufficient to establish the defence of self-defence based on s. 34(1) of the Criminal Code.

[12] Mr. Lord's arguments raise questions of fact. He asserts that Judge Chen made errors in his findings of fact. He says that the trial judge should have rejected the evidence of the CN constables and accepted his evidence. He says that Judge Chen should have found that Mr. Lord used no more force than was necessary when he was assaulted by Constable Michaud without having provoked that assault.

[13] The test to be applied when an appellant raises issues of fact is not controversial. A judge of this court, sitting on a summary conviction appeal, cannot review the evidence and retry the case. An appeal judge cannot make findings of fact or credibility. The standard I must apply is not whether I would have convicted Mr. Lord based on the same evidence. The test is whether the verdict is one that a properly instructed trier of fact, acting judicially, could reasonably have rendered: R. v. Yebes, 1987 CanLII 17 (SCC), [1987] 2 S.C.R. 168.

[14] There was ample evidence upon which Judge Chen could rely to arrive at the conclusions he reached. I cannot interfere with the findings of fact made by Judge Chen. The evidence was not so weak as to make the convictions unreasonable. This ground of appeal is dismissed.

(b) Criticism of the legislation, and underlying policy, which permits the appointment of railway police

[15] Mr. Lord's argument reviews some of the history of the legislation regarding railway police in Canada. He acknowledges that in the past there may have been some rationale for a policy that enabled the appointment of police constables to enforce laws regarding the security of railway property and the safety of persons and property on railway premises. However, he says there is now no reason to give special treatment to railway corporations and their security departments. He argues that the law should change with the times, and that the time to change this law is long overdue. With regard to CN Rail, he notes that the company was privatized in 1995 and is now a private corporation listed on the New York Stock Exchange. He says that it is an anachronism or anomaly to have legislation that enables a private corporation to have its own security guards appointed as police constables to enforce federal or provincial laws.

[16] Mr. Lord evidently feels very strongly about this issue. He presented his argument forcefully and with conviction. He noted that he is not alone in his views. The Canada Transportation Act Review Panel issued a report in 2001 which contains detailed recommendations. Recommendation 19.7 reads as follows:

The Panel recommends that the provisions of the Canada Transportation Act allowing railways to appoint police constables be repealed and that responsibility for policy questions on railway police issues be transferred to the appropriate government department.

[17] Some of Mr. Lord's arguments as to why the law relating to appointment of police constables by railways should be changed have merit. For example, he notes that railway police constables do not receive the same amount of training as other peace officers but have to enforce the same laws.

However, as I indicated to Mr. Lord during argument, I do not have the ability to interpret legislation by substituting my view of proper policy choices for those set out in legislation. I cannot rely on reports such as the report of the Canada Transportation Act Review Panel to fashion a decision in this case. Rather, I must interpret the legislation as it is written and apply it to the facts of the case. Mr. Lord's arguments regarding railway policing policy would be better directed to Parliament than to the courts.

[18] Accordingly, I must dismiss Mr. Lord's appeal insofar as it is based on policy grounds.

c) Arguments that the CN Police constables are not peace officers based on interpretation of the language in the Criminal Code, the Canada Transportation Act, and the Railway Safety Act

[19] There are two main aspects to this argument. First, Mr. Lord says that the definition of a peace officer in the Criminal Code is too vague to enforce. Second, he argues that Constable Brisard, who was appointed under the Canada Transportation Act by a justice of the Superior Court of Alberta, cannot enforce laws in the Province of British Columbia. I will consider these arguments separately.

1) The definition of "peace officer" is vague

[20] The definition of "peace officer" in s. 2 of the Criminal Code has a number of subsections. The relevant part of the definition for this appeal is as follows:

"peace officer" includes

...

(c) a police officer, police constable, bailiff, constable, or other person employed for the preservation and maintenance of the public peace or for the service or execution of civil process[.]

[21] Constables Michaud and Brisard were both appointed pursuant to s. 158 of the Canada Transportation Act. Constables appointed under that Act are now deemed to be appointed under s. 44 of the Railway Safety Act. The provisions of those two sections are nearly identical. Section 44 of the Railway Safety Act provides:

44. (1) A judge of a superior court may appoint a person as a police constable for the enforcement of Part III of the Canada Transportation Act and for the enforcement of the laws of Canada or a province in so far as their enforcement relates to the protection of property owned, possessed or administered by a railway company and the protection of persons and property on that property.

(2) The appointment may only be made on the application of a railway company that owns, possesses or administers property located within the judge's jurisdiction.

(3) The police constable has jurisdiction on property under the administration of the railway company and in any place within 500 m of property that the railway company owns, possesses or administers.

(4) The police constable may take a person charged with an offence under Part III of the Canada Transportation Act, or any law referred to in subsection (1), before a court that has jurisdiction in such

cases over any area where property owned, possessed or administered by the railway company is located, whether or not the person was arrested, or the offence occurred or is alleged to have occurred, within that area.

(5) The court must deal with the person as though the person had been arrested, and the offence had occurred, within the area of the court's jurisdiction, but the court may not deal with the person if the offence is alleged to have occurred outside the province in which the court is sitting.

[22] The evidence before the trial court included Certificates of Constable's Oath sworn by both constables. Constable Brisard swore his oath before Judge Wachowich of the Superior Court in Alberta on November 26, 1999. Constable Michaud swore his oath before Justice Rice of this court.

[23] Mr. Lord argues that the definition of "peace officer" violates a fundamental principle of Canadian law. He says that the definition is overbroad and vague. He refers to a number of authorities for the proposition that any limit on the rights and freedoms of an individual expressed in legislative language that is vague, ambiguous, uncertain, or subject to discretionary determination is unreasonable. He says that the definition of a peace officer in s. 2 of the Criminal Code is so broad that it is difficult for a citizen to know who may or may not be a peace officer. He says that it is important for a citizen to be able to instantly identify an agent of the state who is authorized to be a peace officer because peace officers possess a significant amount of power over citizens.

[24] There is no question that the definition of "peace officer" is very broad. As Mr. Lord noted, the definition includes such individuals as a mayor, a reeve, a pilot in command of an aircraft, and officers acting under the Customs Act, R.S.C. 1985, c. 1 (2nd Supp.) and the Corrections and Conditional Release Act, S.C. 1992, c. 20. Subsection (c) does not make reference to other statutes but includes a large number of individuals who are appointed or "employed for the preservation and maintenance of the public peace or for the service or execution of civil process".

[25] Although this definition is very broad, that does not make it vague or unenforceable. The question with regard to the facts of this case, or indeed the facts in any case where someone is charged with assaulting a peace officer or resisting a peace officer in the execution of his duty, is whether the individual in question falls within the definition of "peace officer". Here, there is no doubt that Constables Michaud and Brisard were police constables at the time of the incident. They were duly appointed as such pursuant to the provisions of the Canada Transportation Act. It does not matter that the Act is not specifically mentioned in the definition in the Criminal Code. What matters is that the two constables were appointed as police constables and were "employed for the preservation and maintenance of the public peace". This was proved by the evidence led at trial, and as a result they fall within the definition of "peace officer" in s. 2 of the Criminal Code.

[26] It is clear that Parliament intended the definition of "peace officer" to be broad. Our society requires that many individuals be employed for the preservation and maintenance of the public peace. Parliament intended that individuals who are appointed as police officers, police constables, bailiffs, constables, or other persons who carry out the important task of preserving the public peace have the powers and protections given to peace officers in the Criminal Code.

[27] Mr. Lord's argument that a citizen should be able to instantly identify a peace officer is not a legal argument; rather, it is his personal view. There is no such requirement in the legislation. There is nothing in the definition in the Criminal Code that requires a peace officer to be immediately recognizable as such. In any event, this question does not arise in this case. Constables Michaud and Brisard, as CN Police constables, wore uniforms that clearly identified them as such, they drove vehicles that were clearly marked or identified as vehicles belonging to the CN Police force. Mr. Lord knew at all times that Constables Michaud and Brisard were police constables.

2) The appointment of Constable Brisard in Alberta

[28] On first blush, it seems unusual that a justice of the Superior Court in Alberta could appoint a police constable to enforce the laws of the Province of British Columbia. However, a careful reading of the language in the two Acts, the Canada Transportation Act and the Railway Safety Act, leads to that conclusion. Section 44(1) of the Railway Safety Act allows a judge of a superior court to:

... appoint a person as a police constable for the enforcement ... of the laws of Canada or a province in so far as their enforcement relates to the protection of property owned, possessed or administered by a railway company and the protection of persons and property on that property.

Such a judge may only appoint such a police constable "... on the application of a railway company that owns, possesses or administers property located within the judge's jurisdiction." (s. 44(2)).

[29] CN Rail owns, possesses, or administers property both in British Columbia and in Alberta, thereby giving a judge of the Superior Court of either province jurisdiction to appoint a CN constable. Mr. Michaud was appointed by a judge of a superior court in B.C. and Mr. Brisard by a judge of a superior court in Alberta. But for the province of the appointing judge, the wording of their oaths is identical.

[30] Any police constable appointed under s. 44 has jurisdiction "on property under the administration of the railway company and in any place within 500 m of property that the railway company owns, possesses or administers." (s. 44(3)). In this case, Judge Chen found that the altercation giving rise to the charges against Mr. Lord took place within that 500 metre radius.

[31] Any police constable appointed under s. 44 may bring a person charged with an offence under any law referred to in s. 44(1), including any federal or provincial law, before a court that has jurisdiction over any area where a railway owns, possesses, or administers property (s. 44(4)). However, a court "may not deal with the person if the offence is alleged to have occurred outside the province in which the court is sitting." (s. 44(5)).

[32] In summary, a judge of the superior court of any province may appoint a police constable on the application by a railway that owns, possesses, or administers property located within that judge's jurisdiction. By virtue of the appointment, such a police constable is empowered to enforce the laws of Canada or a province on property that is administered by the railway and within 500 metres of that

property insofar as enforcement relates to the protection of the railway's property or persons or property on the railway's property.

[33] After a person is charged with an offence under any such law, he may be brought before any court having jurisdiction over any area where property owned, possessed, or administered by the railway is located. However, if the offence is alleged to have taken place outside the province in which the court sits, the court may not deal with the person. Therefore, a judge of a superior court in the province of Alberta may indeed appoint a police constable under s. 44(1) of the Railway Safety Act who, while working for CN Rail in B.C., is empowered to enforce the laws of Canada and the Province of B.C. on and within 500 metres of CN property, insofar as that enforcement relates to the protection of CN property or the protection of persons and property on CN property.

[34] In this case, Constable Michaud and Constable Brisard are both police constables appointed under s. 44 of the Railway Safety Act upon CN's application. Even though they were appointed in different provinces, they were engaged in enforcing the laws of a province (the Motor Vehicle Act, R.S.B.C. 1996, c. 318 of British Columbia, relating to railway crossings) and the laws of Canada (the Criminal Code) within 500 metres of CN property, for the protection of persons or property.

[35] I find support for this conclusion in the decision in R. v. O'Brien, reflex, [1919] 3 W.W.R. 469 (Alta. S.C. (App. Div.)). In that case, the court considered the provisions of s. 301 of the Railway Act, R.S.C. 1906 c. 37, a predecessor to s. 44 of the Railway Safety Act. That section provides as follows:

Every constable so appointed, who has taken such oath or made such declaration, may act as a constable for the preservation of the peace and for the security of persons and property against unlawful acts,

(a) on such railway and on any of the works belonging thereto;

(b) on and about any trains, roads, wharfs, quays, landing places, warehouses, lands and premises belonging to such company, whether the same are in the county, city, town, parish, district, or other local jurisdiction within which he was appointed, or in any other place through which such railway passes or in which the same terminates, or through or to which any railway passes which is worked or leased by such company; and,

(c) in all places not more than a quarter of a mile distant from such railway.

[36] Mr. Justice Stuart stated as follows at 470:

... Obviously the intention was to create a sort of Dominion police. They are to be appointed on the nomination of the railway authorities and doubtless must be paid by them but when appointed they are public constables just as much as in the case of constables appointed and paid by municipalities. They are officers of the law and probably in no sense agents of the railway company, though it is not necessary to speak definitely as to this. In such circumstances there would seem to be no reason why Parliament may not have intended them to be, as I have said, a sort of general Dominion police with authority throughout the Dominion wherever the Dominion railway runs and in its immediate

neighbourhood. Under sec. 301 they are to protect not merely the railway property and the railway officials but the public generally, both in person and property. Sec. 301 (a) and (c) is very wide, plain and definite in its terms, and I therefore think that the constable in question in this case, though appointed in Manitoba, had power to act in Alberta within the topographical limit prescribed by that section.

[37] The current statutory provision is very similar in intent. Once a constable is validly appointed according to the statutory provisions, he or she has jurisdiction to act as such anywhere the railway owns, possesses, or administers property. Accordingly, Constable Brisard, although appointed in Alberta, may enforce the laws of Canada or any province insofar as their enforcement relates to the protection of property owned, possessed, or administered by CN or the protection of persons or property on or within 500 metres of CN property.

[38] In summary, I dismiss the grounds of appeal based on whether or not the definition of "peace officer" applies to the circumstances of this case.

d) Constitutional arguments based on division of powers

[39] Mr. Lord argued that s. 44(3) of the Railway Safety Act is ultra vires the federal government as an encroachment on provincial powers over policing, pursuant to s. 92(14) of the Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3. This issue was raised during argument at trial for the first time. Pursuant to s. 8 of the Constitutional Question Act, R.S.B.C. 1996, c. 68, notice of the constitutional challenge should have been served on the Attorneys General of Canada and British Columbia. Mr. Lord did not serve notice as required. Judge Chen therefore refused to consider the argument.

[40] There is no question that notice pursuant to the Constitutional Question Act is mandatory and goes to the jurisdiction of the court to entertain the challenge: Donas v. B.C. Securities Commission (1995), 10 C.C.L.S. 1 (B.C.C.A.). Any adjudication of a constitutional question made in violation of the mandatory notice is a nullity and the presence or absence of prejudice is irrelevant: Eaton v. Brant County Board of Education, 1997 CanLII 366 (SCC), [1997] 1 S.C.R. 241.

[41] In summary, Judge Chen correctly refused to consider the constitutional argument advanced in the court below.

e) Various constitutional and Charter arguments raised for the first time on appeal

[42] Mr. Lord has raised numerous constitutional questions and has argued that the statutory provisions in question, the actions of the CN constables, the prosecutor, and the Provincial Court all violated his Charter rights. Specifically, he alleges that his freedom of expression and association were violated by the CN constables, his right to life, liberty, and security of person was violated by the trial judge because he was not allowed to make full answer and defence, and his right to life, liberty, and security of the person was violated by the CN constables who were acting outside of their jurisdiction. Mr. Lord also alleges that Judge Chen violated ss. 7, 12, and 15 of the Charter when he did not permit Mr. Lord to raise his constitutional and Charter arguments.

[43] Mr. Lord has now filed a notice of constitutional question. No one has appeared on behalf of either the provincial or federal Attorney General. The Crown argues that Mr. Lord should not be permitted to raise the constitutional and Charter arguments on appeal. It says that there was a complete absence of an evidentiary foundation for the trial judge to conduct a constitutional analysis. Accordingly, this court, sitting on appeal, would be deprived both of relevant evidence and the analysis of the trial judge. The Crown says that by its very nature constitutional analysis involves a balancing of competing interests and that there was no evidence in this case that would permit such a balancing to take place.

[44] I have reviewed the constitutional and Charter arguments made by Mr. Lord in his lengthy factum. The arguments are difficult to follow, as they assert infringement of his rights without setting forth the kind of factual analysis that is normally required to consider such issues. I agree with the submissions of the Crown that it would be extremely difficult to attempt any proper consideration of Charter or constitutional issues on appeal in this case.

[45] The Supreme Court of Canada emphasized the importance of a proper factual basis for such arguments in MacKay v. Manitoba, 1989 CanLII 26 (SCC), [1989] 2 S.C.R. 357 at 361:

Charter decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the Charter and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of Charter issues.

[46] The Crown also argues that I should not grant leave to Mr. Lord to advance Charter arguments for the first time on appeal. In R. v. Booker, 2007 BCSC 456 (CanLII), 2007 BCSC 456, Ballance J. summarized the law relating to the granting of leave on appeal:

[17] The authorities establish that permission to raise new issues on appeal will not be granted lightly. An obvious rationale frequently expressed in the cases is the legitimate societal interest in the finality of litigation. The fact that the issue raised on appeal is a question of law is not, of itself, sufficiently compelling. ...[L]eave will only be given in "exceptional" cases meaning rare and extraordinary cases where balancing the interests of justice to all parties leads to the conclusion that an injustice has been done. It will ordinarily not be granted where the defence could have raised the issue at trial and chose not to or where the necessary evidence to rule on the issue is not before the Court.

[47] In this case, both of those factors come into question or come into play. Mr. Lord could have raised the issues he now argues on appeal at trial. The issues have been raised now only because he has spent a great deal of time contemplating the conviction, which he regards as a serious injustice. Further, the arguments he raises are difficult for me to understand, in part because of the absence of any factual basis for them.

[48] In the circumstances of this case, it is not appropriate to grant leave to Mr. Lord to raise these arguments on appeal. Accordingly, I dismiss these grounds of appeal.

Sentence Appeal

[49] Mr. Lord has also appealed the sentence granted by Judge Chen. He was sentenced to 30 days' imprisonment followed by two years of probation. Although he appeals the sentence, he did not advance any oral argument on sentence during the hearing of this appeal. In his written argument, he alleges that the sentence was cruel and unusual punishment.

[50] At the time of sentencing, Judge Chen took into account the circumstances of the offence and the offender, including Mr. Lord's record. He applied the appropriate sentencing principles. In my view, there is no reason to vary the sentence as it is not demonstrably unfit. In other words, it does not fall outside of the appropriate range, given the circumstances of the offence and the offender: R. v. Shropshire, 1995 CanLII 47 (SCC), [1995] 4 S.C.R. 227.

[51] In summary, I am dismissing Mr. Lord's summary conviction appeal and the sentence appeal.

"Butler J."

Supreme Court Judgments

R. v. Decorte

Collection:	Supreme Court Judgments
Date:	2005-02-25
Neutral citation:	2005 SCC 9
Report:	[2005] 1 SCR 133
Case number:	30081
Judges:	McLachlin, Beverley; Major, John C.; Bastarache, Michel; Binnie, William Ian Corneil; LeBel, Louis; Deschamps, Marie; Fish, Morris J.
On appeal from:	Ontario
Subjects:	Constitutional law Criminal law
Notes:	SCC Case Information: 30081

SUPREME COURT OF CANADA

CITATION: R. *v.* Decorte, [2005] 1 S.C.R. 133, 2005 SCC 9 **DATE:** 20050225

DOCKET: 30081

BETWEEN:

Cecil Decorte
Appellant
v.
Her Majesty the Queen
Respondent

CORAM: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps and Fish JJ.

REASONS FOR JUDGMENT: (paras. 1 to 31) Fish J. (McLachlin C.J. and Major, Bastarache, Binnie, LeBel and Deschamps JJ. concurring)

APPEAL HEARD AND JUDGMENT RENDERED: December 10, 2004

REASONS DELIVERED: February 25, 2005

R. *v.* Decorte, [2005] 1 S.C.R. 133, 2005 SCC 9

Cecil Decorte *Appellant*

v.

Her Majesty The Queen *Respondent*

Indexed as: R. *v.* Decorte

Neutral citation: 2005 SCC 9.

File No.: 30081.

Hearing and judgment: December 10, 2004.

Reasons delivered: February 25, 2005.

Present: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps and Fish JJ.

on appeal from the court of appeal for ontario

Criminal law — Police — Powers of First Nations Constables — Whether First Nations Constables may set up R.I.D.E. operations just outside reserves they are engaged primarily to serve — Whether First Nations Constables then remain "peace officers" within meaning of Criminal Code

— Criminal Code, R.S.C. 1985, c. C-46, ss. 2 "peace officer" (c), 145(3), 254(5) — Highway Traffic Act, R.S.O. 1990, c. H.8, s. 48 — Police Services Act, R.S.O. 1990, c. P.15, ss. 42(1), 54(3).

Constitutional law — Charter of Rights — Arbitrary detention — First Nations Constables setting up R.I.D.E. operations just outside reserves they are engaged primarily to serve — Accused stopped, arrested and charged with two offences under Criminal Code — Whether accused arbitrarily detained by First Nations Constables — Canadian Charter of Rights and Freedoms, s. 9.

The accused was stopped by two First Nations Constables, both members of the Anishinabek Police Service, just outside the Fort William Reserve in Ontario. They had mounted a "R.I.D.E." operation at an intersection through which motorists pass on their way to and from the reserve. The accused was charged with refusal to comply with a breathalyzer demand and failure to comply with a recognizance. He was convicted of the latter offence after the trial judge held that the First Nations Constables could set up R.I.D.E. operations just outside the Reserve and therefore did not arbitrarily detain the accused. The Court of Appeal upheld the accused's conviction.

Held: The appeal should be dismissed.

Section 48 of the *Highway Traffic Act* empowers police officers in Ontario to conduct roadside stops for R.I.D.E. purposes. Although First Nations Constables are not "police officers" within the meaning of the *Police Services Act* ("*P.S.A.*"), s. 54(3) *P.S.A.* nonetheless expressly attributes them with "the powers of a police officer" for the purpose of carrying out their "specified duties". The "specified duties" of these First Nations Constables, set out in art. 12.2 of the *Anishinabek Police Service Agreement 1999-2004*, correspond in substance to those vested in police officers by s. 42(1) *P.S.A.*, thereby also empowering them to conduct roadside stops for R.I.D.E. purposes. The "territorial jurisdiction" of the members of the Anishinabek Police Service is not

confined to the territorial limits of that community; rather, it is determined by relevant statutes and regulations, by agreements to which they are subject and by the terms of their appointment or engagement, and these sources of authority empower them to act "in and for the Province of Ontario". Finally, all members of the Anishinabek Police Service are "peace officers" within the meaning of para. (*c*) of that definition in s. 2 of the *Criminal Code* and these First Nations Constables were therefore empowered by s. 254(3) to demand a breath sample and arrest the accused for failing to comply with the demand. Since the accused was detained pursuant to the lawful exercise by the First Nations Constables of their power to set up a R.I.D.E. operation just outside the Reserve, the evidence upon which he was convicted was obtained in a manner that did not infringe his right under s. 9 of the *Canadian Charter of Rights and Freedoms* "not to be arbitrarily detained or imprisoned". [14-29]

Cases Cited

Approved: *R. v. Stephens* (1995), 102 C.C.C. (3d) 416; **referred to:** *Dedman v. The Queen*, [1985] 2 S.C.R. 2; *R. v. Hufsky*, [1988] 1 S.C.R. 621.

Statutes and Regulations Cited

Anishinabek Police Service Agreement 1999–2004, preamble, arts. 2.1, 5.2(c), 12.2.

Canadian Charter of Rights and Freedoms, ss. 9, 24(2).

Criminal Code, R.S.C. 1985, c. C-46, ss. 2 "peace officer" (*c*), 145(3), 254.

Highway Traffic Act, R.S.O. 1990, c. H.8, s. 48.

Police Services Act, R.S.O. 1990, c. P.15, ss. 42(1), 54(1) to (3).

Authors Cited

Canada. Solicitor General of Canada. *First Nations Policing Policy*. Ottawa: The Ministry, 1996.

APPEAL from a judgment of the Ontario Court of Appeal (Catzman, Abella and Gillese JJ.A.) [2003] O.J. No. 3497 (QL), upholding the accused's conviction for failing to comply with a recognizance, [2002] O.J. No. 1995 (QL), [2002] O.T.C. 346. Appeal dismissed.

Irwin Koziebrocki, for the appellant.

Michal Fairburn, for the respondent.

The judgment of the Court was delivered by

FISH J. —

I

1 Cecil Decorte, driving a black Chevrolet, was stopped shortly before 1 a.m. on November 25, 2000, by two First Nations Constables just outside the Fort William Reserve, which abuts the City of Thunder Bay, in Ontario.

2 The constables, Murray Pelletier and Derek Johnson, were both members of the Anishinabek Police Service. They had mounted a "R.I.D.E." operation at an intersection through which motorists pass on their way to and from the Reserve. "R.I.D.E." has become an acronym for "Reduce Impaired Driving Everywhere". The "E" in "R.I.D.E." initially stood for "Etobicoke",

where this police procedure was introduced, in the early 1980s: *Dedman v. The Queen*, [1985] 2 S.C.R. 2.

3 R.I.D.E. programmes are authorized in Ontario by s. 48 of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 ("*H.T.A.*"), which permits police officers to randomly stop drivers "for the purpose of determining whether or not there is evidence to justify making a [breath sample, or 'breathalyzer'] demand under section 254 of the *Criminal Code*". Random stops of this sort pass constitutional muster: *R. v. Hufsky*, [1988] 1 S.C.R. 621.

4 Mr. Decorte refused to comply with a breathalyzer demand made by Officer Johnson and he was charged for that reason under s. 254(5) of the *Criminal Code*, R.S.C. 1985, c. C-46. He was charged as well, under s. 145(3) of the *Code*, with failure to comply with a recognizance: At the time of his arrest, Mr. Decorte was bound by a recognizance, entered into some six months earlier, to refrain from consuming alcohol and to remain in an alcohol-free residence between 4:00 p.m. and 10:00 a.m. He was stopped at the wheel of his car, with alcohol on his breath, in breach of the curfew.

5 For reasons that do not concern us here, Mr. Decorte was acquitted of the breathalyzer offence. He was convicted, however, for having failed to comply with the recognizance ([2002] O.J. No. 1995 (QL)) and his conviction was affirmed by the Court of Appeal for Ontario ([2003] O.J. No. 3497 (QL)).

6 There is no question that Mr. Decorte's conviction is fully supported by the evidence. The issue is whether that evidence ought to have been excluded by the trial judge under s. 24(2) of the *Canadian Charter of Rights and Freedoms*. Essentially, Mr. Decorte submits that the evidence ought to have been excluded on the ground that he was "arbitrarily detained", within the meaning of s. 9 of the *Charter*, by the First Nations Constables who stopped, arrested and charged him.

7 That depends on whether First Nations Constables may set up R.I.D.E. operations just outside the reserves they are engaged primarily to serve and whether they then remain "peace officers" within the meaning of s. 254 of the *Criminal Code*.

8 After examining the materials placed before us and hearing the parties, we were all satisfied that these two questions were correctly answered in the affirmative by the trial judge ([2002] O.J. No. 5511 (QL) (*voir dire*)) and the Court of Appeal, both relying on the earlier decision of the Court of Appeal in *R. v. Stephens* (1995), 102 C.C.C. (3d) 416.

9 We therefore dismissed the appeal, with reasons to follow.

10 These are our reasons.

II

11 Mr. Decorte, as mentioned earlier, was stopped just outside the Fort William Reserve at a R.I.D.E. checkstop operated by Murray Pelletier and Derek Johnson, two First Nations Constables employed by the Anishinabek Police Service.

12 The Anishinabek Police Service was established pursuant to a First Nations Policing Policy introduced by the Government of Canada in 1991. Under its auspices, tripartite agreements between federal, provincial or territorial and First Nations authorities have been negotiated across Canada. Their objective is to "improve the administration of justice for First Nations through the establishment of First Nations police services that are professional, effective, and responsive to the particular needs of the community" (*First Nations Policing Policy* (1996), at p. 2).

13 These agreements are meant to afford First Nations communities professional, well-trained and culturally sensitive police officers with "the same responsibilities . . . as other police officers in Canada . . . [and] the authority to enforce applicable provincial and federal laws (including the *Criminal Code*), as well as Band by-laws" (*id.*, at p. 4).

14 In Ontario, the statutory underpinning for the appointment of First Nations Constables is found in s. 54 of the *Police Services Act*, R.S.O. 1990, c. P.15 ("*P.S.A.*"), which provides:

> **54.**—(1) With the Commission's approval, the Commissioner may appoint a First Nations Constable to perform specified duties.
>
> (2) If the specified duties of a First Nations Constable relate to a reserve as defined in the *Indian Act* (Canada), the appointment also requires the approval of the reserve's police governing authority or band council.
>
> (3) The appointment of a First Nations Constable confers on him or her the powers of a police officer for the purpose of carrying out his or her specified duties.

. . .

15 For reasons that are irrelevant here, First Nations Constables are not "police officers" within the meaning of the *P.S.A.*; s. 54(3), as we have just seen, nonetheless expressly attributes to them "the powers of a police officer" for the purpose of carrying out their "specified duties" (unless otherwise indicated, the emphasis throughout is mine).

16 When Mr. Decorte was stopped and arrested, the "specified duties" of Officers Pelletier and Johnson were set out in art. 12.2 of the *Anishinabek Police Service Agreement 1999-2004*, which was entered into by 17 First Nations, including the Fort William First Nation. These duties included but were not limited to:

> (a) preserving the peace and order and public safety;
>
> . . .
>
> (c) preventing crimes and providing assistance and encouragement to other persons in their prevention of crime;
>
> (d) accident prevention through the promotion of the safe use of vehicles and vessels;
>
> . . .
>
> (i) apprehending alleged offenders and others who may lawfully be taken into custody;
>
> (j) laying charges and participating in prosecutions;
>
> . . .

17 The "specified duties" of Officers Pelletier and Johnson relevant to this case thus corresponded in substance to those vested in police officers in Ontario by s. 42(1) of the *P.S.A.*

18 Moreover, there is no dispute that police officers in Ontario were empowered by s. 48 (1) of the *H.T.A.* to establish the kind of R.I.D.E. operation which led Officers Pelletier and Johnson to intercept and detain Mr. Decorte and to lay the charge that concerns us here.

19 Officers Pelletier and Johnson thus shared the specified duties of police officers — and, in virtue of s. 54(3) of the *P.S.A.* — the powers of police officers to establish the kind of random roadside stop that resulted in Mr. Decorte's detention, arrest and conviction.

20 Like other regional and municipal police officers, members of the Anishinabek Police Service are appointed to serve their own community in the absence of specific agreements to the contrary. But they are not confined in the discharge of their duties to the territorial limits of that community. Their "territorial jurisdiction" is determined instead by relevant statutes and regulations, by agreements to which they are subject and by the terms of their appointment or engagement.

21 Finally, all members of the Anishinabek Police Service are "peace officers" within the meaning of para. (*c*) of that definition in s. 2 of the *Criminal Code*. As a "peace officer", Officer Johnson was therefore empowered by s. 254(3) of the *Code* to demand that Mr. Decorte provide a breath sample and, with Officer Pelletier, to arrest Mr. Decorte for failing to comply with that demand.

22 It follows inexorably that Officers Pelletier and Johnson were authorized by the combined effect of s. 48(1) of the *H.T.A.* and s. 54(3) of the *P.S.A.* to set up the roadside checkstop

that netted Mr. Decorte — unless, as Mr. Decorte contends, their power to do so could only be exercised within the perimeter of the Fort William Reserve.

23 I turn now to that issue.

III

24 As I mentioned earlier, s. 54 of the *P.S.A.* is the statutory source of the authority exercised by First Nations Constables in Ontario. Section 54(1) provides that First Nations Constables are appointed, with the approval of the Police Commission, by the Commissioner of the Ontario Provincial Police (the "Commissioner").

25 Officers Pelletier and Johnson were both appointed by the Commissioner "to act as a First Nations Constable for the Province of Ontario . . . for the purpose of performing law enforcement functions in Ontario while acting as a First Nations Constable pursuant to First Nations Policing Agreements . . .". (Ministry of the Solicitor General, Ontario Civilian Commission on Police Services, *First Nations Constable Appointment* (pursuant to the provisions of s. 54 of the *P.S.A.*))

26 Article 2.1 of the *Anishinabek Police Service Agreement 1999-2004*, which concerns us here, provides that a member of the Anishinabek Police Service "exercises the powers of a police officer in and for the Province of Ontario . . .".

27 The oath of office taken by Officers Pelletier and Johnson refers to the "discharge [of their] duties as a Police Officer with the Anishinabek Police Service in the Province of Ontario". And, in each instance, the Identification Certificate provided to them by the Commissioner states that they are empowered to exercise their authority "in the Province of Ontario".

28 The preamble of the *Anishinabek Police Service Agreement 1999-2004* reflects the manifest intention of the parties to it: The Anishinabek Police Service was established "to serve the policing needs of the Member Nations" and, generally, to discharge its duties on the "Anishinabek Territory" — which includes the Fort William Reserve. But its members are plainly empowered by the sources of their authority, including their formal appointments, to discharge their policing duties outside that Territory, anywhere in Ontario, in relation to the First Nations communities they are employed primarily to serve. I say "primarily" because art. 5.2(c) of the *Anishinabek Police Service Agreement 1999-2004* expressly includes, as a "goal" of the Anishinabek Police Service, to provide police services, upon request, "to non-aboriginal communities in Ontario, when possible or when resources permit".

29 Mr. Decorte was detained pursuant to the lawful exercise by Officers Johnson and Pelletier of their power to set up a R.I.D.E. operation just outside the Fort William Reserve. Since he was not "arbitrarily detained or imprisoned", the evidence upon which he was convicted was obtained in a manner that did not infringe his right under s. 9 of the *Canadian Charter of Rights and Freedoms*. His application to exclude that evidence under s. 24(2) of the *Charter* was therefore properly dismissed by the trial judge.

IV

Conclusion

30 There are two issues in this case. The first is whether the officers who stopped and detained the appellant, Cecil Decorte, were authorized by law to set up a R.I.D.E. operation just outside the Fort William Reserve. The second is whether they were then "peace officers" within the meaning of s. 254 of the *Criminal Code*.

31 As mentioned at the outset, we were all of the view at the conclusion of the hearing that both questions should be answered in the affirmative and it is for these reasons that the appeal was dismissed.

Appeal dismissed.

Solicitor for the appellant: Irwin Koziebrocki, Toronto.

Solicitor for the respondent: Ministry of the Attorney General of Ontario, Toronto.

COURT OF APPEAL OF
NEW BRUNSWICK

20/07/CA

JOHN MICHAEL THIBEAULT
APPELLANT

- and -

HER MAJESTY THE QUEEN
RESPONDENT

Thibeault v. R., 2007 NBCA 67

CORAM:
The Honourable Chief Justice Drapeau
The Honourable Justice Larlee
The Honourable Justice Richard

Appeal from a decision of the Court of Queen's Bench:
January 16, 2007

History of Case:

Decision under appeal:
2007 NBQB 25

Preliminary or incidental proceedings:
Provincial Court:
[2006] N.B.J. No. 593

Appeal heard:
June 13, 2007

Judgment rendered:
September 27, 2007

Reasons for judgment by:
The Honourable Chief Justice Drapeau

Concurred in by:
The Honourable Justice Larlee
The Honourable Justice Richard

Counsel at hearing:

For the appellant:
Gilles C. Thibodeau, Q.C.

JOHN MICHAEL THIBEAULT
APPELANT

- et -

SA MAJESTÉ LA REINE
INTIMÉE

Thibeault c. R., 2007 NBCA 67

CORAM :
L'honorable juge en chef Drapeau
L'honorable juge Larlee
L'honorable juge Richard

Appel d'une décision de la Cour du Banc de la Reine :
Le 16 janvier 2007

Historique de la cause :

Décision frappée d'appel :
2007 NBBR 25

Procédures préliminaires ou accessoires :
Cour provinciale :
[2006] A.N.-B. no 593

Appel entendu :
Le 13 juin 2007

Jugement rendu :
Le 27 septembre 2007

Motifs de jugement :
L'honorable juge en chef Drapeau

Souscrivent aux motifs :
L'honorable juge Larlee
L'honorable juge Richard

Avocats à l'audience :

Pour l'appelant :
Gilles C. Thibodeau, c.r.

For the respondent:
René E. Dumaresq

THE COURT

The motion for leave to appeal and the appeal are allowed. The conviction at trial which was confirmed by the Court of Queen's Bench is set aside and the appellant is acquitted.

Pour l'intimée :
René E. Dumaresq

LA COUR

Accueille la demande en autorisation d'appel ainsi que l'appel. La déclaration de culpabilité prononcée au procès et confirmée par la Cour du Banc de la Reine est écartée et l'appelant est acquitté.

English version of the judgment of the Court delivered by

DRAPEAU, C.J.N.B.

I. Introduction

[1] Relying on the certificate of a qualified technician stating that the appellant John Michael Thibeault's blood alcohol level exceeded 80 milligrams of alcohol in 100 millilitres of blood, a judge of the Provincial Court found him guilty of the offence set out in s. 253(*b*) of the *Criminal Code*. According to the text of s. 258(1)(*g*), such a certificate is evidence of that essential element of the offence "where samples of the breath of the accused have been taken pursuant to a demand made under subsection 254(3)". However, only a "peace officer" is authorized to make such a demand, as is the case for a demand under s. 254(2) requiring a breath sample for screening by means of an approved screening device ("ASD").

[2] In the present case, it is a customs officer, namely Rodrigue Daniel Godin, who ordered Mr. Thibeault to provide the breath samples which, upon analysis, revealed a blood alcohol level exceeding the legal limit. Furthermore, officer Godin had previously ordered Mr. Thibeault to provide a breath sample for screening by means of an ASD, and it is common ground that without the screening results, there were no "reasonable and probable grounds" within the meaning of s. 254(3) and the certificate of analysis on which the conviction under s. 253(*b*) is based would be inadmissible (see *R. v. Woods*, [2005] 2 S.C.R. 205, [2005] S.C.J. No. 42 (QL), 2005 SCC 42, paras. 3, 7 and 8, and *R. v. Arsenault (D.J.)* (2005), 295 N.B.R. (2d) 123, [2005] N.B.J. No. 529 (QL), 2005 NBCA 110, paras. 33-38, where Deschênes J.A., writing for the Court, conducts an analysis under s. 24(2) of the *Canadian Charter of Rights and Freedoms* in a context which, for all intents and purposes, is identical to that of the case at bar).

[3] In this regard, I hasten to point out, if only to avoid any misunderstanding as to the focus of the debate on appeal, that the respondent does not claim that the

certificate of the qualified technician might still be admissible should it turn out that officer Godin was not a "peace officer" for the purposes of s. 254. According to the respondent, the only outstanding issue is whether officer Godin, *qua* regular customs officer, was a "peace officer" within the meaning of s. 2 of the *Criminal Code* and, if he was not, then the conviction entered at trial cannot stand. The Crown readily acknowledges that it did not establish at trial that officer Godin was a "designated" customs officer under s. 163.4(1) of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.). Section 163.5(2) of the *Act* provides that a "designated" officer who is performing his or her normal duties at a customs office has the powers of a peace officer under section 254 of the *Criminal Code*.

[4] The trial judge found that officer Godin was a "peace officer" under s. 254 even if he was not a "designated" customs officer. According to the judge, officer Godin's sworn statement that he was a customs officer created a "presumption" that he was a "peace officer" for the purposes of the *Criminal Code* (see [2006] N.B.J. No. 593 (QL), para. 7). It followed, in the judge's view, that there was no bar to the admissibility of the qualified technician's certificate which, as I indicated previously, states that Mr. Thibeault's blood alcohol level exceeded 80 milligrams of alcohol in 100 millilitres of blood.

[5] Mr. Thibeault's appeal to the Court of Queen's Bench proved unsuccessful. The appeal judge was of the opinion that the trial judge's conclusion that officer Godin was a "peace officer" was, having regard to the evidential record, a reasonable finding of fact (see (2007), 312 N.B.R. (2d) 207, [2007] N.B.J. No. 11 (QL), 2007 NBQB 25, paras. 49-52). With respect, that conclusion is the product of a flawed interpretation of the definition of "peace officer" in s. 2 of the *Criminal Code* and it is, therefore, founded upon an error of law.

[6] After having heard the parties, we allowed the motion for leave to appeal as well as the appeal, all with a view to setting aside the conviction ordered at trial and

entering the verdict that should have been rendered to begin with, namely an acquittal. At that time, we indicated that brief reasons would follow. Here are those reasons.

II. The legislative context

[7] The relevant legislative provisions are attached as Appendix "A".

III. The factual context

[8] The essential facts are not in dispute.

[9] On February 26, 2005, customs officer Godin was working at the border crossing at Edmundston when he conducted a search of a motor vehicle operated by Mr. Thibeault. After finding a mug containing an alcoholic beverage and detecting a smell of alcohol on Mr. Thibeault's breath, the customs officer ordered Mr. Thibeault to provide a breath sample for screening by means of an ASD.

[10] Mr. Thibeault blew into the device four times before providing a suitable sample. A positive reading resulted.

[11] Officer Godin then ordered Mr. Thibeault to provide breath samples for a breathalyzer analysis in order to determine the amount of alcohol in his blood and to determine if his blood alcohol level exceeded the legal limit. Officer Godin called upon the Edmundston Police Force to obtain the required breath samples.

[12] Mr. Thibeault provided two breath samples. An analysis of these samples showed that his blood alcohol level exceeded the legal limit. A qualified technician's certificate setting out the results of this analysis was admitted into evidence at trial and is the sole item of proof showing that, at the relevant time, Mr. Thibeault's blood alcohol level exceeded the legal limit.

[13] Officer Godin testified at trial that he was a customs officer and, consequently, a "peace officer" for the purposes of the *Criminal Code*. He did not claim to be a "designated" customs officer nor did the Crown even attempt to establish that he was. In its written submission, the Crown concedes that it did not establish at trial that officer Godin was a "designated" customs officer.

IV. The crux of the matter

[14] Mr. Thibeault submits that only customs officers designated under the terms of s. 163.4 of the *Customs Act* are "peace officers" for the purposes of s. 254 of the *Criminal Code* and that he could only be convicted of the offence under s. 253(*b*) if the evidence established that customs officer Godin was indeed a "designated" officer when he ordered him to provide breath samples. Despite vigorously claiming the opposite at trial and currently rejecting, at least formally, Mr. Thibeault's position, the respondent does admit to no longer knowing [TRANSLATION] "whether the appellant is right or whether the position taken by the respondent, the trial court and the court of appeal (C.Q.B.N.B.) is the correct approach" (see the respondent's written submission, para. 11).

V. Analysis and decision

[15] A customs officer is a "peace officer" for the purposes of the *Criminal Code* when performing any duty in the administration of the *Customs Act* (see para. (d) of the definition of "peace officer" in s. 2 of the *Criminal Code*). In *R. v. Harvey* (1979), 18 A.R. 382 (C.A.), [1979] A.J. No. 626 (QL), the Court defines, at para. 7, the scope of the powers of customs officers as follows:

> There are several categories of persons defined by s. 2 as police officers, for which there is an underlying rationale. Customs and excise officers are police officers when performing their duties under the *Custom Act* or the *Excise Act*. Their powers as police officers are not limited territorially, but are restrained functionally to the exercise of such powers as may be necessary in the performance of duties in administering those Acts. The same applies to

> fishery officers under the *Fisheries Act*, and to the pilot in command of an aircraft. None of these is empowered by the definition section or otherwise to act as a police officer for the purposes of the *Criminal Code* except in relation to specified duties. Outside of those duties they are civilians.

[16] It follows that the trial judge erred in law when he held that the issue of whether officer Godin was a "peace officer" stood to be decided without regard to the provisions of the *Customs Act* (see paras. 3 and 7 of his reasons for judgment). The definition of "peace officer" in s. 2 of the *Criminal Code* refers, in the clearest of terms, to the provisions of the *Customs Act* which, in turn, determine the scope of a customs officer's duties.

[17] Sections 163.4 and 163.5 were added to the *Customs Act* when Bill C-18 ("*An Act to amend the Customs Act and the Criminal Code*") was given Royal Assent on May 12, 1998. Obviously, the purpose of this statutory amendment was to confer upon "designated" officers certain duties and powers which the *Customs Act* did not attribute to regular customs officers. As mentioned, s. 163.5(2) provides that an officer designated under s. 163.4(1) has, in performing the normal duties of a customs officer at a customs office, the powers of a "peace officer" under section 254 of the *Criminal Code*. Section 163.5(2) also provides that a designated officer "may, on demanding samples of a person's [...] breath under subsection 254(3) [of the *Criminal Code*], require that the person accompany the officer, or a peace officer referred to in paragraph *(c)* of the definition of "peace officer" in section 2 of [the *Criminal Code*], for the purpose of taking the samples".

[18] If customs officers who have not been designated under s. 163.4 had the powers of a "peace officer" under s. 254 to demand that a person provide breath samples for screening purposes, s. 163.5(2) of the *Customs Act* would be completely redundant. In *Bill C-18: An Act to amend the Customs Act and the Criminal Code*, prepared by Mary C. Hurley of the Law and Government Division, LS-303E (October 31, 1997), online: <http://dsp-psd.pwgsc.gc.ca/Collection-R/LoPBdP/LS/361/c18-e.htm>, the following observations are made regarding the context within which that provision was adopted:

At present, the enforcement powers of customs officers, set out in Part VI of the *Customs Act* ("the Act"), describe customs functions involving the monitor and control of the flow of goods imported into, or exported from, Canada. These include searches of the person for evidence of contravention of the Act or for goods the importation or exportation of which is prohibited under federal law, as well as search, examination, detention or seizure of goods. They do not provide for the enforcement of the *Criminal Code* ("the Code") or other federal laws at points of entry into Canada.

Although the Code defines "peace officer" to include "an officer or person having the powers of a customs ... officer when performing any duty in the administration of the *Customs Act* ...," customs officers act as "peace officers" within the Code definition and for Code purposes only when fulfilling their functions as set out in the Act. As a result, a customs officer may, on the one hand - under circumstances set out in the Code - exercise the power of a "peace officer" to arrest without warrant in relation to offences under the Act, since, in so doing, she or he would be performing a duty in the administration of the Act. On the other hand, under the existing law customs officers may not act as "peace officers" within the terms of Code enforcement provisions relating to Code offences. These provisions include, for example, those describing the authority of a "peace officer" in relation to impaired driving offences.

For some time, various directly or indirectly interested groups have argued that customs officers should be authorized to enforce the criminal law at points of entry into Canada. Concerns have focused largely, but not exclusively, on safety implications arising from the officers' inability to detain impaired drivers at the border. In 1995, a study into the matter cited over 4,000 incidents purportedly warranting some form of criminal law enforcement at 160 air and highway ports of entry over a 17-month period. Most involved suspected impaired driving offences. The study surveyed a number of options for the enhancement of enforcement capabilities at border crossings, and concluded that the most viable would be to extend customs officers' powers under the Act to include criminal offences. It suggested that this approach would enable bridging of the "enforcement gap" between

detection of Code offences at the border and police response, with only a limited impact on the primary mandate of customs officers. Furthermore, amending the Act rather than the Code would "provide for legislative clarity," "eliminate potential confusion among officers" and "respect the government's objective to limit the attribution of peace officer status."

Bill C-18 reflects the conclusion of this 1995 report as to the choice of means to address perceived enforcement needs.

DESCRIPTION AND ANALYSIS

Bill C-18 contains four clauses. Clause 1 would effect substantive modifications to the Act and is the bill's key provision. Clauses 2 and 3 would make minor consequential amendments to two provisions of the Code. Clause 4 is a standard "coming into force" provision. Clauses 2 to 4 will not be referred to further.

Clause 1

Bill C-18 would add an additional enforcement heading to the Act. Proposed Part VI.I, consisting of sections 163.4 and 163.5, would be entitled "Enforcement of Criminal Offences other than Offences under this Act." [...]

A. Proposed Section 163.4

This provision would authorize, but not require, the Minister of National Revenue to designate customs officers for the purposes of implementing new Part VI.I; upon exercise of that authority, the Minister would be required to provide certificates of designation. The proposed provision does not identify which officers would be designated or otherwise set out criteria related to designated status. According to Revenue Canada documentation, only non-student customs officers at points of entry into Canada would be involved. Those officers number between 2,000 and 2,500. Revenue Canada officials indicate that other criteria relevant to designation are being developed as policy guidelines rather than through the regulatory process.

B. Proposed Section 163.5

1. Section 163.5(1)

Proposed section 163.5(1) would invest a "designated" officer with the powers and obligations of a peace officer under sections 495 through 497 of the Code in relation to a criminal offence under any other federal statute.

From an enforcement perspective, section 495 is the most significant of these Code provisions. It authorizes - but does not oblige - a peace officer to arrest without warrant a person who has committed, or is believed on reasonable grounds to have committed or to be about to commit, an indictable offence, or a person whom the peace officer finds committing a criminal offence, or in respect of whom the peace officer has reasonable grounds to believe an arrest warrant is outstanding. This arrest authority is not absolute. Section 495 also provides that it "shall not" be exercised in prescribed contexts unless it is reasonably believed that such exercise would be in the public interest, in order, for instance, to establish identity or secure evidence. Under section 497, where an arrest without warrant is made in such cases, a peace officer is required to release the person arrested "as soon as practicable," unless there are reasonable grounds to believe that continued detention is necessary in the public interest or to ensure attendance in court.

The effect of proposed section 163.5(1) would be to extend a designated customs officer's section 495 "peace officer" authority to arrest without warrant, hitherto limited to enforcing provisions of the Act, not only to the Code, but also to provisions creating criminal offences in other federal statutes. Bill C-18 would not, however, confer additional "peace officer" status or jurisdiction for purposes other than those specifically set out in the bill. Proposed section 163.5(1) would state explicitly that the expanded powers and obligations under Code sections 495-497 would come into play only when a designated officer was at a customs office - in this case a point of entry into Canada - and performing her or his normal duties. That is, any off-duty, off-limits "peace officer" activity by designated officers would not be authorized by Part VI.I. Such activity would in any event prove constitutionally and practically problematic, in light of the "administration of justice" jurisdiction of provincial law enforcement authorities.

In this respect, it is worth noting that the approach of Bill C-18 would not alter the definition of "peace officer" at section 2 of the Code. Designated officers acting under the expanded enforcement authority of proposed Part VI.I of the Act would continue to fall within that definition as officers "performing any duty in the administration of the *Customs Act*." The extension to designated customs officers of "peace officer" powers to arrest would not affect the authority of provincial authorities to prosecute those arrested for Code offences at the border.

2. Section 163.5(2)

In addition to the arrest authority conferred by proposed section 163.5(1) in relation to criminal offences generally, this provision would give designated customs officers the specific powers and obligations of peace officers under sections 254 and 256 of the Code. Both describe enforcement measures relating to impaired driving.

Under section 254(2), a "peace officer" who reasonably suspects that a person operating or having care and control of a motor vehicle has alcohol in her or his body may demand that the person provide a sample of breath for screening "forthwith." A "peace officer" having reasonable grounds to believe that a person is committing or has committed an impaired driving offence under section 253 may, by virtue of section 254(3), also demand that a breath sample or, under certain circumstances, a blood sample, be provided. Section 256 provides for the issuance of a judicial warrant, under prescribed circumstances relating to more serious instances of suspected impaired driving, authorizing a peace officer to require the taking of blood samples to determine blood alcohol levels.

Proposed section 163.5(2) would also specify that a designated officer might require a person from whom she or he had demanded a sample under section 254(3), to accompany her or him, or a police officer, for the purpose of taking the samples. Revenue Canada documentation indicates that designated customs officers "would administer the preliminary roadside screening test [section 254(2)]. Individuals who registered high would be turned over to the police for administration of a breathalyzer test." Revenue Canada officials confirm that this is the intent of the provision. Furthermore, as previously discussed, the

> powers and obligations conferred by proposed section 163.5(2) might only be exercised at a customs office during the course of a designated officer's normal duties.
>
> [Citations omitted.]
> [Underlining in original.]

In my opinion, this text does no more than state the obvious.

[19] In order for the certificate of the qualified technician to constitute proof that Mr. Thibeault's blood alcohol level exceeded 80 milligrams of alcohol per 100 millilitres of blood, the Crown was required to establish that these breath samples had been provided "pursuant to a demand made under subsection 254(3)" (see s. 258(1)*(g)* of the *Criminal Code*). However, a demand under s. 254(3) can only be made by a "peace officer" who has the required "reasonable and probable grounds" and only "designated" customs officers have the power to make such a demand. The same applies to a demand under s. 254(2).

[20] The trial judge erred in law in proceeding on the basis that officer Godin's sworn statement that he was a customs officer gave rise to a presumption that he was a "peace officer". Officer Godin did not testify that he was a "designated" officer, despite having had ample opportunity to do so. Had he been a "designated" officer, officer Godin would have been provided with a certificate of designation (see s. 163.4(1) of the *Customs Act*) and this document, once admitted into evidence, would have been proof of his designation (see s. 163.4(2)). As conceded at para. 8 of the respondent's written submission, the Crown did not establish that officer Godin was a "designated" officer:

> [TRANSLATION]
> [...] at no time did the respondent prove or intend to prove that the customs officer was a designated officer under s. 163.4(1) of the *Customs Act*. The respondent did not make any effort to have this designation admitted in evidence given that the respondent's position was, and remains, that this designation was not necessary to establish that officer Godin was a peace officer. The respondent relied solely on the provisions of s. 2 of the *Criminal Code*

> to establish that the customs officer was a peace officer while performing his duties as a customs officer.

[21] For the reasons outlined above, I am of the opinion that only "designated" officers are "peace officers" for the purposes of s. 254 of the *Criminal Code*. Given that the Crown did not establish that officer Godin was a "designated" officer, none of Mr. Thibeault's breath samples were provided as a result of a valid demand and, consequently, the certificate of the qualified technician is inadmissible (see *R. v. Woods* and *R. v. Arsenault*).

VI. Conclusion and Disposition

[22] The Crown did not establish that the customs officer who ordered the appellant to provide breath samples was a "designated" officer within the meaning of s. 163.4 of the *Customs Act* and, therefore, a "peace officer" for the purposes of s. 254. It follows that the certificate of the qualified technician containing the statement that the appellant's blood alcohol level exceeded the legal limit under the *Criminal Code* is inadmissible. Since there was no other evidence to establish this essential element of the offence set out in s. 253*(b)*, the Court allowed the appeal and acquitted the appellant immediately following the parties' oral submissions.

J. Ernest Drapeau,
Juge en chef du Nouveau-Brunswick

NOUS SOUSCRIVONS À L'AVIS :

M.E.L. Larlee, j.c.a.

J.C. Marc Richard, j.c.a.

APPENDIX "A"

Customs Act, R.S.C. 1985, c. 1 (2nd Supp.)

163.4 (1) The President may designate any officer for the purposes of this Part and shall provide the officer with a certificate of designation.	163.4 (1) Le président peut désigner des agents des douanes pour l'application de la présente partie; il leur remet alors un certificat attestant leur qualité.
(2) A certificate of designation is admissible in evidence as proof of an officer's designation without proof of the signature or official character of the person appearing to have signed it.	(2) Le certificat de désignation d'un agent des douanes désigné est admissible en preuve et fait foi de la désignation sans qu'il soit nécessaire de prouver l'authenticité de la signature qui y est apposée ou la qualité officielle du signataire.
163.5 (1) In addition to the powers conferred on an officer for the enforcement of this Act, a designated officer who is at a customs office and is performing the normal duties of an officer or is acting in accordance with section 99.1 has, in relation to a criminal offence under any other Act of Parliament, the powers and obligations of a peace officer under sections 495 to 497 of the *Criminal Code*, and subsections 495(3) and 497(3) of that Act apply to the designated officer as if he or she were a peace officer.	163.5 (1) Dans le cadre de l'exercice normal de ses attributions à un bureau de douane ou s'il agit en conformité avec l'article 99.1, l'agent des douanes désigné, en plus des pouvoirs conférés aux agents des douanes pour l'application de la présente loi, a les pouvoirs et obligations que les articles 495 à 497 du *Code criminel* confèrent à un agent de la paix à l'égard d'une infraction criminelle à toute autre loi fédérale; les paragraphes 495(3) et 497(3) du *Code criminel* lui sont alors applicables comme s'il était un agent de la paix.
(2) A designated officer who is at a customs office and is performing the normal duties of an officer or is acting in accordance with section 99.1 has the powers and obligations of a peace officer under sections 254 and 256 of the *Criminal Code* and may, on demanding samples of a person's blood or breath under subsection 254(3) of that Act, require that the person accompany the officer, or a peace officer referred to in paragraph (*c*) of the definition "peace officer" in section 2 of that Act, for the purpose of taking the samples.	(2) L'agent des douanes désigné a, dans le cadre de l'exercice normal de ses attributions à un bureau de douane ou s'il agit en conformité avec l'article 99.1, les pouvoirs et obligations que les articles 254 et 256 du *Code criminel* confèrent à un agent de la paix; il peut, dans le cas où, en vertu du paragraphe 254(3) de cette loi, il ordonne à une personne de fournir des échantillons d'haleine ou de sang pour permettre de déterminer son alcoolémie, lui ordonner, à cette fin, de le suivre ou de suivre un agent de la paix visé à l'alinéa *c*)

de la définition de « agent de la paix » à l'article 2 de la même loi.

(3) A designated officer who arrests a person in the exercise of the powers conferred under subsection (1) may detain the person until the person can be placed in the custody of a peace officer referred to in paragraph (*c*) of the definition "peace officer" in section 2 of the *Criminal Code*.

(3) L'agent des douanes désigné qui arrête une personne en vertu des pouvoirs que le paragraphe (1) lui confère peut la détenir jusqu'à ce qu'elle soit confiée à la garde d'un agent de la paix visé à l'alinéa *c*) de la définition de « agent de la paix » à l'article 2 du *Code criminel*.

(4) A designated officer may not use any power conferred on the officer for the enforcement of this Act for the sole purpose of looking for evidence of a criminal offence under any other Act of Parliament.

(4) L'agent des douanes désigné ne peut recourir à ses pouvoirs d'application de la présente loi uniquement pour rechercher des éléments de preuve d'infraction criminelle à une autre loi fédérale.

Criminal Code of Canada, R.S.C. 1985, c. C-46

2. In this Act,

2. Les définitions qui suivent s'appliquent à la présente loi.

[...]

[...]

"peace officer" includes

« agent de la paix »

[...]

[...]

(*d*) an officer within the meaning of the *Customs Act*, the *Excise Act* or the *Excise Act, 2001*, or a person having the powers of such an officer, when performing any duty in the administration of any of those Acts,

d) tout fonctionnaire ou personne possédant les pouvoirs d'un agent sous le régime de la *Loi sur les douanes* ou d'un préposé sous le régime de la *Loi sur l'accise* ou de la *Loi de 2001 sur l'accise* lorsqu'il exerce une fonction en application d'une de ces lois;

[...]

[...]

253. Every one commits an offence who operates [...] or has the care or control of a motor vehicle [...],

253. Commet une infraction quiconque conduit [...] ou a la garde ou le contrôle d'un véhicule à moteur [...], dans les cas suivants :

[...]

[...]

(*b*) having consumed alcohol in such a quantity that the concentration in the person's blood exceeds eighty milligrams of alcohol in one hundred millilitres of blood.

b) lorsqu'il a consommé une quantité d'alcool telle que son alcoolémie dépasse quatre-vingts milligrammes d'alcool par cent millilitres de sang.

[...]

[...]

254.(2) Where a peace officer reasonably suspects that a person who is operating a motor vehicle or vessel or operating or assisting in the operation of an aircraft or of railway equipment or who has the care or control of a motor vehicle, vessel or aircraft or of railway equipment, whether it is in motion or not, has alcohol in the person's body, the peace officer may, by demand made to that person, require the person to provide forthwith such a sample of breath as in the opinion of the peace officer is necessary to enable a proper analysis of the breath to be made by means of an approved screening device and, where necessary, to accompany the peace officer for the purpose of enabling such a sample of breath to be taken.

254.(2) L'agent de la paix qui a des raisons de soupçonner la présence d'alcool dans l'organisme de la personne qui conduit un véhicule à moteur, un bateau, un aéronef ou du matériel ferroviaire, ou aide à conduire un aéronef ou du matériel ferroviaire, ou a la garde ou le contrôle d'un véhicule à moteur, d'un bateau, d'un aéronef ou de matériel ferroviaire, que ceux-ci soient en mouvement ou non, peut lui ordonner de lui fournir, immédiatement, l'échantillon d'haleine qu'il estime nécessaire pour l'analyser à l'aide d'un appareil de détection approuvé et de le suivre, si nécessaire, pour permettre de prélever cet échantillon.

(3) Where a peace officer believes on reasonable and probable grounds that a person is committing, or at any time within the preceding three hours has committed, as a result of the consumption of alcohol, an offence under section 253, the peace officer may, by demand made to that person forthwith or as soon as practicable, require that person to provide then or as soon thereafter as is practicable

(3) L'agent de la paix qui a des motifs raisonnables de croire qu'une personne est en train de commettre, ou a commis au cours des trois heures précédentes, par suite d'absorption d'alcool, une infraction à l'article 253 peut lui ordonner immédiatement ou dès que possible de lui fournir immédiatement ou dès que possible les échantillons suivants :

(*a*) such samples of the person's breath as in the opinion of a qualified technician [...] are necessary to enable proper analysis to be made in order to determine the concentration, if any, of alcohol in the person's blood [...]

a) soit les échantillons d'haleine qui de l'avis d'un technicien qualifié sont nécessaires à une analyse convenable pour permettre de déterminer son alcoolémie, [...]

258. (1) In any proceedings under subsection 255(1) in respect of an offence committed under section 253 or in any proceedings under subsection 255(2) or (3),

[...]

(*g*) where samples of the breath of the accused have been taken pursuant to a demand made under subsection 254(3), a certificate of a qualified technician stating

(i) that the analysis of each of the samples has been made by means of an approved instrument operated by the technician and ascertained by the technician to be in proper working order by means of an alcohol standard, identified in the certificate, that is suitable for use with an approved instrument,

(ii) the results of the analyses so made, and

(iii) if the samples were taken by the technician,

(A) [Not in force]

(B) the time when and place where each sample and any specimen described in clause (A) was taken, and

(C) that each sample was received from the accused directly into an approved

258. (1) Dans des poursuites engagées en vertu du paragraphe 255(1) à l'égard d'une infraction prévue à l'article 253 ou dans des poursuites engagées en vertu des paragraphes 255(2) ou (3) :

[...]

g) lorsque des échantillons de l'haleine de l'accusé ont été prélevés conformément à une demande faite en vertu du paragraphe 254(3), le certificat d'un technicien qualifié fait preuve des faits allégués dans le certificat sans qu'il soit nécessaire de prouver la signature ou la qualité officielle du signataire, si le certificat du technicien qualifié contient :

(i) la mention que l'analyse de chacun des échantillons a été faite à l'aide d'un alcootest approuvé, manipulé par lui et dont il s'est assuré du bon fonctionnement au moyen d'un alcool type identifié dans le certificat, comme se prêtant bien à l'utilisation avec cet alcootest approuvé,

(ii) la mention des résultats des analyses ainsi faites,

(iii) la mention, dans le cas où il a lui-même prélevé les échantillons :

(A) [Non en vigueur]

(B) du temps et du lieu où chaque échantillon et un spécimen quelconque mentionné dans la division (A) ont été prélevés,

(C) que chaque échantillon a été reçu directement de l'accusé dans un contenant approuvé ou dans un

container or into an approved instrument operated by the technician,

is evidence of the facts alleged in the certificate without proof of the signature or the official character of the person appearing to have signed the certificate [.]

alcootest approuvé, manipulé par lui [.]