Indexed as:

R. v. Stromberg

Between Regina, appellant, and Linda Stromberg, Blair Down and World Project Management Inc., respondents

[1999] B.C.J. No. 80

1999 BCCA 17

118 B.C.A.C. 182

131 C.C.C. (3d) 546

41 W.C.B. (2d) 15

1999 BCCA 0017

Vancouver Registry No. CA023689

British Columbia Court of Appeal Vancouver, British Columbia

Lambert, Donald and Braidwood JJ.A.

Oral judgment: January 13, 1999.

(10 pp.)

Criminal law -- Gaming and betting -- Lotteries -- Procedure -- Information or indictment, charge or count, indictable offences -- Validity -- Form and content -- Quashing or objection to, procedure.

Appeal by the Crown from the quashing of an information on the basis that the offence provision was unconstitutionally vague. The accused had been charged with various offences relating to foreign lotteries. The Provincial Court Judge found that section 206(7) of the Criminal Code, relating to the advertising and selling of tickets or shares of tickets in foreign lotteries, was unconstitutionally vague. However, the Judge upheld the constitutional validity of sections 206(1)

and 207(1) (h) of the Code.

HELD: Appeal allowed. The information was referred for a new trial in the Provincial Court. Apart from the reference to a foreign lottery, the words of the indictment were clearly covered by section 206(1)(b) of the Code. The fact that the information was to apply to a foreign lottery was clearly indicated by the words in section 206(7) of the Code. The wording of the subsection clearly applied to the sale of a share in a ticket. The argument that the use of the word share in subsection (7) could refer to a share in the underlying lottery scheme, and not to a share in the ticket, was fanciful.

Statutes, Regulations and Rules Cited:

Criminal Code, ss. 206(1), 206(1)(a), 206(1)(b), 206(1)(c), 206(7), 207(1)(h).

Counsel:

G.H. Copley, Q.C. and P. Ewert, Q.C., for the (Crown) appellant.

P.M. Bolton, Q.C., for Linda Stromberg.

I. Donaldson, Q.C., for Blair Down.

D.J. Martin, for World Project Management Inc.

The judgment of the Court was delivered by

1 BRAIDWOOD J.A. (orally):-- This is an appeal from the judgment of the Honourable Judge Baird Ellan of the Provincial Court of British Columbia pronounced on 20 August 1997, [1997] B.C.J. No. 2435.

BACKGROUND

- 2 Linda Stromberg, Blair Down and World Project Management (the "Respondents") were charged with a number of offences relating to foreign lotteries. The Crown alleges that the Respondents were involved in the sale of tickets or chances in foreign lotteries, sending out sales literature relating to foreign lotteries, and printing or publishing activities related to tickets or chances in foreign lotteries. The Crown theorized that the Respondents purchased tickets in legal lotteries run by governments in foreign countries such as Australia and Spain. It was the Crown's position that the Respondents aided in the purchase of tickets (or shares in these tickets) for foreigners, primarily Americans.
- 3 The Respondents were charged by Information sworn 7 February 1997 that they did:
 - a. sell or offer to sell tickets or chances or a share in tickets or chances in a foreign

- lottery for the giving or disposing of money by mode of chance, contrary to s. 206(1)(b) of the Criminal Code;
- b. cause or aid and assist in the sale of tickets or chances or a share in tickets or chances in a foreign lottery for the giving or disposing of money by mode of chance, contrary to s. 206(1)(b) of the Criminal Code;
- c. knowingly send, transmit or mail articles that were to be used or intended for use in carrying out a scheme, proposal or plan for the giving or disposing of money by mode of chance, contrary to s. 206(1)(c) of the Criminal Code;
- d. cause to be printed or published a scheme, proposal or plan for the giving or disposal of money by any ticket or chance in a foreign lottery, or any share of a ticket or chance in a foreign lottery, contrary to s. 206(1)(a) of the Criminal Code.
- 4 The Respondents made a number of pre-trial applications, two of which were:
 - a. an application to have the Information quashed for failure to disclose offences known to law; and
 - b. an application to have ss. 206(1), 206(7), and 207(1)(h) of the Criminal Code declared unconstitutional for vagueness.
- 5 In her ruling of 20 August 1997 Baird Ellan P.C.J. upheld the constitutional validity of the provisions in ss. 206(1) and 207(1)(h) of the Criminal Code, but declared that s. 206(7) was null and void on the basis that it was unconstitutionally vague and as such the information was quashed in its entirety. She also stated, in obiter, that if s. 206(7) was valid, that she would in any event have quashed counts 2 and 3 and that counts 1 and 4 required amendments in order to be valid.
- 6 The Crown concedes that counts 2 and 3 are not supported by the legislation, and does not seek to overturn the Provincial Court findings on these two counts.

ISSUES

- 7 It is submitted by the Crown appellant that the learned Provincial Court Judge erred in law in:
 - a. applying the wrong test by failing to exhaust her interpretive role before asking herself whether s. 206(7) of the Criminal Code is unconstitutionally vague;
 - b. concluding that s. 206(7) of the Criminal Code is unconstitutionally vague; and
 - c. amending counts 1 and 4 of the Information 04471DC by deleting the words "or any share of any ticket or chances in a foreign lottery" from count 1 and in deleting the words "for the giving or disposal of money by any ticket or chance in a foreign lottery, or any share of any ticket or chance" from count 4.

DISCUSSION

- 8 Since the decision of the Provincial Court in this case, the precise points raised there and now in this Court, have recently been addressed by His Honour Judge Fairgrieve in his decision in R. v. World Media Brokers Inc. (1998), 125 C.C.C. (3d) 193, which judgment was rendered on 5 May 1998.
- **9** With the greatest of deference to Judge Baird Ellan, I am in substantial agreement with Judge Fairgrieve and accordingly I am of the opinion that this appeal should be allowed.
- 10 The judgment in R. v. World Media Brokers Inc. sets out in detail an analysis of all of the points involved and accordingly I see no need to repeat them here.
- I would add that after the case went to trial, His Honour rendered further reasons for judgment at [1998] O.J. No. 4049 (Q.L.), which were rendered on 13 October 1998. I respectfully agree in substance with his analysis of the unreported Ontario Court of Appeal's decision in R. v. Austin and Auen, [1979] O.J. No. 823 (Q.L.), decided on 3 April 1979 and discussed in paragraphs 16 to 22 inclusive of his judgment.
- 12 It is, however, necessary to relate that discussion to the precise counts before us.
- 13 For the purposes of the analysis certain words, if they do not bear directly on the count under consideration, can be left out for ease of interpretation so long as the omission of such words does not impact on the analysis.

COUNT 1

14 Count 1 reads:

... sell or offer to sell tickets or chances or any share of any tickets or chances in a foreign lottery for the giving or disposing of money by mode of chance, contrary to s. 206(1)(b) of the Criminal Code;

- 15 Section 206(1), for the purposes of this analysis, may be said to read as follows:
 - 206.(1) Everyone is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years who
 - (b) sells ... or offers for sale ... any ticket or other means or device for ... selling or otherwise disposing of any property by ... any mode of chance whatever;
- **16** Section 206(7) for this purpose reads:

This section applies

[to] any foreign lottery, and the sale or offer for sale of any ticket, chance or share in any such lottery ...

- Apart from the reference to a foreign lottery, the words of the indictment are clearly covered by s. 206(1)(b), and that it should apply to a foreign lottery is clearly covered by the words in s-s. 7 where it indicates this section applies to the sale or offer for sale of any ticket, chance or share in any such lottery.
- 18 It will be noted upon a reading of s-s. 7 that it is not all of the provisions of s. 206 that apply to foreign lotteries. Further, by adding the words "chance" or "share" in s-s. 7, it is ensuring that a share in the ticket is included in the law.
- 19 This is in accord with the inclusion of the words "or other means or device for advancing" found in s. 206(1)(b) and would include a share. Certainly, another means of advancing, or a device for advancing the disposing of property by tickets or any mode of chance, would be the sale of a share in the ticket.
- 20 It was submitted to us that the word "share" as found in s-s. 7 may reasonably refer to a share in the underlying lottery scheme and not a share in a ticket. I find that argument to be fanciful. This certainly is a possible literal interpretation, but hardly one that advances the meaning Parliament intended.
- 21 From the above, then, I conclude that count 1 should stand.

COUNT 4

22 Count 4 reads:

... cause to be printed or published a scheme, proposal or plan for the giving or disposal of money by any ticket or chance in a foreign lottery, or any share of a ticket or chance in a foreign lottery, contrary to s. 206(1)(a) of the Criminal Code.

23 Once again, s. 206(1)(a) would read:

206(1)Everyone is guilty of an indictable offence ... who

(a) ... prints, advertises or publishes ... any proposal, scheme or plan for ... in any way disposing of any property by ... tickets or any mode of chance whatever ...

- 24 If it were not a foreign lottery, count 4 would be covered by s. 206(a).
- 25 Subsection 7 reads:

This section applies to the printing or publishing of any proposal or plan of any foreign lottery.

- **26** I am of the opinion that s-s. 7 specifically refers to the activity described in count 4, and accordingly, this count is supported by the legislation.
- 27 It was argued that s. 206(1)(a) does not refer to a share of a ticket.
- 28 But I cannot see that that argument is supported, for s. 206(1) refers to disposing of property by any mode of chance whatever, which must include a share of a ticket.
- 29 These points were specifically considered by Judge Fairgrieve in the World Media case above referred to. There, count 1 referred to "printing a scheme for the disposal of property, to wit, money or money's worth by chances or shares of tickets in a foreign lottery"; and count 3 referred to "unlawfully did publish a scheme for the disposal of property, to wit, money or money's worth by chances or shares of tickets in a foreign lottery". To isolate one part of his judgment, he held at p. 208 the following:
 - ... Again, applying the presumption that the two provisions will fit together and operate as part of the same intended legislative scheme, I see no room for any uncertainty as to whether the statute was meant to prohibit advertising a scheme for disposing of property by chance, with the mode of chance specified and shares of tickets in a Spanish lottery, the allegation made in Count 2. I also do not see any unintelligible result arising from the differing references to a "scheme" in s. 206(1) and to the sale of "tickets, chances or shares of a foreign lottery" in s. 206(7). There is no inconsistency, in my view, which prevents the two provisions from being read together to ensure that Parliament's obvious purpose is attained.
- 30 Accordingly, I am of the opinion that the appeal should be allowed as it relates to counts 1 and 4. To this extent, the order of the Honourable Provincial Court judge should be set aside, and Information 04471DC, as it relates to counts 1 and 4, should be referred for a new trial in the Vancouver Provincial Court.
- 31 Counsel were in agreement that if the sections were not found to be unconstitutional for vagueness, then counts 1 and 4 should be referred for a new trial as originally sworn and not as later modified.

BRAIDWOOD J.A.

- 32 LAMBERT J.A.:-- I agree.
- 33 DONALD J.A.:-- I agree.
- **34** LAMBERT J.A.:-- Counts 1 and 4 are remitted to the Provincial Court as set out in the reasons of Mr. Justice Braidwood.

cp/d/lmt