Indexed as:

R. v. Gray

Between
Her Majesty The Queen, and
Robert St. George Gray, Wayne George Goodwill, Derek Thomas McFadden, Donald Gray McKay and Terrance Frederick Watts

[1992] B.C.J. No. 1363

74 C.C.C. (3d) 267

16 W.C.B. (2d) 331

Vancouver Registry No. CC910548

British Columbia Supreme Court
Vancouver, British Columbia

Oppal J.

February 18, 1992

(20 pp.)

Criminal law -- Evidence -- Crown disclosure -- Narcotics offence -- Legal advice given to RCMP -- Solicitor and client privilege, whether applicable -- Prejudice to accused -- Ability to make full answer and defence.

This was an application for disclosure and further particulars of advice given by the government to the RCMP regarding an investigation. The issue was whether solicitor-client privilege existed between Crown counsel and the RCMP. The accuseds were charged with conspiracy to traffic in narcotics. Believing that the accuseds were major drug traffickers, the RCMP devised an elaborate plan which involved a "reverse sting operation" whereby the police posed as sellers of hashish in an attempt to arrest and charge the accused and seize the accused's funds. Two of the accuseds met the RCMP and agreed to purchase 550 pounds of hashish. The accuseds went to a hotel room with $750,000 and were immediately arrested. Prior to that the police had given one pound of hashish to the accuseds. Throughout their investigation the RCMP received advice from the Department of

Justice. Defence counsel submitted that the advice was necessary to make full answer and defence.

HELD: The application was allowed. The legal advice on which the RCMP proceeded was relevant for a determination of the issues raised by the defence. The right of a person to make full answer and defence took precedence over any claim of privilege.

STATUTES, REGULATIONS AND RULES CITED:

Criminal Code, R.S.C. 1985, c. C-46, Part 12. Narcotic Control Act, R.S.C. 1985, c. N-1.

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Counsel for the Accused, Gray: D. Martin.
Counsel for the Accused, Goodwill: M.K. Woodall.
Counsel for the Accused, McFadden: F. Howard.
Counsel for the Accused, McKay: P.M. Bolton.
Counsel for the Accused, Watts: K. Westlake.

OPPAL J. (orally):-- The issue in this application is whether solicitor-client privilege exists in communications between Crown counsel and members of the RCMP. The defence position is that the disclosure of any advice and communications between Crown counsel and the RCMP is necessary generally to make full answer and defence and more particularly on the issues of full disclosure, entrapment, abuse of process and breaches of the Charter.

The application is resisted by the Crown on the basis that solicitor-client privilege exists in respect to such advice and communications.

The background of this application is as follows. The accused are charged with conspiracy to traffic in a narcotic. The police believe the accused to be major drug traffickers. The police devised an elaborate operational plan which involved a so-called "reverse sting operation" whereby the police posed as sellers of hashish.

The objective of the plan appeared to be two-fold: first, to arrest and charge the accused, and second, to seize the accused's funds.

The theory of the Crown is that the accused met with undercover members of the RCMP who posed as traffickers of hashish. It is alleged that the accused agreed to purchase 550 pounds of hashish for approximately $750,000. When two of the accused attended at a room in the Airport Inn in an alleged furtherance of the conspiracy, they are said to have brought with them the sum of $750,000. Other police officers immediately arrested the accused and took custody of the money.

Prior to the accused's arrival at the hotel the police distributed one pound of hashish to the accused. It was never recovered. It was given to the accused upon the apparent belief that it would be eventually sold in Quebec and New York.

The police investigation was conducted pursuant to an operational plan which is an exhibit in these proceedings. The plan makes it clear that the investigation was most extraordinary. The most controversial aspect of the investigation called for the police to distribute the hashish to the accused before the deal could be culminated. The police were obviously concerned about the propriety of such an investigation.

The following are some of the contents from the plan which reflect this concern:

1. That Crown counsel be given only a brief scenario as "I do not feel he should become involved as this is an RCMP decision".
2. That prior agreement was to be obtained from the Department of Justice before the hash sample was given to the accused.
3. That such a plan will require approval from authorities in Ottawa.
4. That such a plan would amount to trafficking under the Narcotic Control Act.
5. In the event the plan is carried out, that members of the RCMP receive immunity from prosecution under the Narcotic Control Act.

It is not in dispute that throughout their investigation the RCMP received advice from members of the Department of Justice. Defence counsel have submitted that the advice is relevant in order to make full answer and defence.

The following are some of the grounds which have been advanced as to the relevance of such evidence. First, it is said that the advice of Crown counsel goes to the issue of good faith both on the part of the police and the Crown. Second, it goes to the issue of whether the conduct of the police was illegal and, if it was, whether the Crown countenanced in the same. Third, it is also argued that the provisions of the Narcotic Control Act do not allow police authorities to provide samples of narcotics to suspected persons. Fourth, it is said that the discussion of immunity is a consciousness of illegality on the part of the RCMP and in any event the granting of such immunity would be unlawful. Fifth, it is further submitted that since a part of the operational plan was to seize the accused's funds the police ought to have proceeded under Part 12 of the Criminal Code which deals with warrants to seize proceeds of crime.

The Crown has agreed that the issue of whether police can pose as drug traffickers is a new issue. However, the Crown strenuously objects to the admissibility of any advice which members of the Department of Justice gave to the police during the course of the investigation, for it is argued that such advice is clothed with solicitor-client privilege. The Crown in its brief has relied upon the classic definition of the rule from Wigmore that reads as follows:

> "Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived." (Wigmore, John Henry, Evidence in Trials at Common Law, McNaughton Revision, Vol. 8, (Boston, Little Brown and Company, 1961), at p. 2292.)

For the most part the Crown relies on the case of Medicine Hat Greenhouses and German v. The Queen (1979), 45 C.C.C. (2d) 27, a decision of the Alberta Court of Appeal. In that case Lieberman J.A. at page 318 stated as follows and approved of the following reasonIng of the trial judge:

> "... There is no doubt that it is a policy of the criminal law that an accused should know the facts alleged against, and very elaborate provisions are contained in the Criminal Code of Canada R.S.C. 1970, c. C-34, to ensure that adequate particulars are furnished to enable an accused to make full answer and defence.
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> There is, however, a very considerable distinction between furnishing facts and particulars, on the one hand, and placing an accused in a direct line of communication between Crown counsel and the investigators who assist him, on the other hand. All manner of opinions or trial tactics may be involved in such a direct line of communication in addition to the facts which could be the basis of particulars.
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> I have considered briefly over the noon hour the various authorities cited to me by counsel, and I am indebted for the assistance given. I have reached the conclusion that, by the report from the special investigator, the Crown was consulting its solicitors in the Department of Justice and was obtaining legal assistance from them.
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> I am further of the view that the report goes forward in the full expectation of confidentiality. In my view, this solicitor-and-client relationship must, under the circumstances such as exist here, be fostered and maintained. I rule that the prosecution report and its attachments are privileged and not admissible."

While the Crown acknowledges that police "report(s) to Crown counsel" have long been provided to defence counsel in this jurisdiction the principle in Medicine Hat Greenhouses is still applicable because police officers receive advice from Crown counsel "in the full expectation of confidentiality". The Crown has also relied on the case of Alfred Crompton Amusement Machines Ltd. v. Customs and Excise Commissioners (No. 2), [1973] 2 Q.B. 102 (C.A.). In that case the

English Court of Appeal held that salaried lawyers employed by government had precisely the same duties and privileges as lawyers in independent practice and that professional privilege and confidence attaches to all their communications with governmental departments and others to whom they give advice.

In this jurisdiction McEachern C.J.S.C. (as he then was) considered this issue in Re Girouard and The Queen (1982), 68 C.C.C. (2d) 261. In that case a conversation between a police officer and Crown counsel was partially overheard. A defence counsel then sought to call Crown counsel as a witness to that conversation. The issue was whether such a conversation was protected by privilege. The Chief Justice at page 264 stated as follows:

> "I do not have to decide whether communications between the Attorney-General and Crown counsel are subject to solicitor-and-client privilege. But I reject the submission that communications about the question of identification between a police officer who is to be a Crown witness and Crown counsel are protected by solicitor-and-client privilege. Such an extension of solicitor-and-client privilege in the criminal context is unsupported by authority and could result in witnesses being able to withhold evidence which may be necessary if justice is to be done. Also, even if there was privilege, it was lost when the conversation was overheard.
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> Secondly, I am not satisfied that a police corporal, or any police officer, is an agent of the Attorney-General. In any event, the suggestion that a solicitor-and-client relationship exists between a police officer and Crown counsel is untenable.
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> The learned provincial court judge, in his ruling on admissibility, did not base his decision upon solicitor-and-client privilege. He said:
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> > 'I am satisfied that it is a matter of public interest that witnesses who may be called to give evidence with respect to an alleged offence be free from the concern that any statement made by them to an agent of the Crown and an officer of the court might be the subject of subsequent disclosure through the mouth of the person to whom they have spoken in confidence. The administration of justice requires that persons, whether peace officers or not, be free to make full and complete disclosure to prosecuting counsel. Were it otherwise, one can, without difficulty, foresee the day when no members of the public would come forward to volunteer information if Crown counsel can be compelled to disclose all that has

> been revealed to him in the pursuit of his duties. For that reason, in the exercise of my discretion, I will not allow this line of questioning to be pursued.'
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> With great respect, there is no such general privilege based upon confidentiality."

It is apparent that the aforementioned authorities are neither reconcilable nor directly on point. The Medicine Hat case, supra, was both pre-Charter and pre-Stinchcombe (R. v. Stinchcombe, [1991] 3 S.C.R. 326; 1991] S.C.J. No. 83, No. 21904, Reasons for Judgment, November 7, 1991 (S.C.C.).) Moreover, the issue in that case concerned the propriety of giving police reports to Crown counsel to the defence, a non-issue in the contemporary era of full disclosure. In the particular facts of Re Girouard, supra, the Chief Justice acknowledged that he did not "have to decide whether communications between the Attorney-General and Crown counsel are subject to solicitor-and-client privilege". However, I find his reasoning both appealing and compellable because of the concern that he expressed about a witness being able to withhold necessary evidence. Furthermore, there is no authority for the proposition that a police officer is a "client" as such. Having said that, it cannot be doubted that when police officers seek the advice of Crown counsel they do so in the expectation of confidentiality.

The right to confidentiality has long been a cornerstone of the criminal law. For it has been often said that the right to communicate in confidence with a legal adviser is a fundamental right which is founded upon a unique relationship of solicitor and client. See Solosky v. The Queen (1979), 50 C.C.C. (2d) 495. While the right to confidentiality or solicitor-client privilege was initially a rule of evidence, it is now clear that it is also a substantive rule of law. For the functioning of an effective criminal justice system cannot be attained without the existence of such a rule. However, such a rule is not absolute. There are well known exception to the rule against the admissibility of communications between solicitor and client. Perhaps the seminal case on this issue is R. v. Cox and Railton (1884), 14 Q.B.D. 153. That case held that "the reason on which the rule is said to rest cannot include the case of communications, criminal in themselves or intended to further any criminal purpose, for the protection of such communications cannot possibly be otherwise than injurious to the interests of justice...". In Descouteaux et al. v. Mierzwinski (1982), 70 C.C.C. (2d) 535, the Supreme Court of Canada held an exception to the principle of confidentiality of solicitor-client communications occurs where those communications are criminal or made with a view to obtaining legal advice to facilitate the commission of a crime.

The case of Rogers v. Bank of Montreal 62 B.C.L.R. 387 is of assistance because it deals with the issue of whether solicitor-client exists when a person relies on the defence that he was acting in good faith based upon the receipt of sound legal advice. In that case the plaintiff sought damages against the defendant bank for the wrongful appointment of a receiver under a debenture. The bank in its defence alleged that it had relied upon professional advice of the receiver respecting

the lawfulness of the appointment and the timing of a demand for payment which had resulted in some losses. The British Columbia Court of Appeal held that by raising the defence of reliance on the legal opinion of the receiver respecting its appointment and the timing of the demand for payment, the bank made its knowledge of the law relevant to the proceedings. Thus the bank's right of solicitor-client privilege respecting the advice it received from its lawyers ought to be removed.

A similar exception to the rule of confidentiality of solicitor-client communications arises where the adherence to the rule of solicitor client privilege will prevent an accused person from making full answer and defence.

In Regina v. Dunbar and Logan (1982), 68 C.C.C. (2d) 13, the Ontario Court of Appeal at page 43 approved of the following reasoning under the heading of:

> "Whether the solicitor-client privilege must yield where the privileged communication might assist an accused to prove his innocence.
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> In R. v. Barton, (1973) 1 W.L.R. 115, Caulfield J. enunciated a broad exception to the solicitor-and-client privilege. He held that the privilege must yield where to uphold the privilege would permit the withholding of evidence from the jury which might enable an accused to establish his innocence or to resist an allegation by the Crown. In that case, the accused was charged with fraudulent conversion and the falsification of accounts alleged to have been committed while employed as a legal executive with a firm of solicitors. The accused served a subpoena on a partner of the firm to give evidence at the trial and to produce certain documents. The solicitor claimed that the documents were protected by the solicitor-client privilege.
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> In ruling that the documents were admissible, Caulfield J. said at page 118:
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> 'I think the correct principle is this, and I think that it must be restricted to these particular facts in a criminal trial, and the principle I am going to enunciate is not supported by any authority that has been cited to me, and I am just working on what I conceive to be the rules of natural justice. If there are documents in the possession or control of a solicitor which, on production, help to further the defence of an accused man, then in my judgment no privilege attaches. I cannot conceive that our law would permit a solicitor or other person to screen from a jury information which, if disclosed to the jury, would perhaps enable a man either to establish his innocence or to resist an allegation made by the Crown. I think that is the principle that should be followed'.

> Sir Rupert Cross, in commenting on the principle enunciated by Caulfield J., states that the merits of the doctrine are obvious but its precise implications and limitations, if any, have not been worked out: see Cross on Evidence, 5th ed., p. 291. This principle would also appear to be accepted by the learned editors of Phipson on Evidence: see Phipson on Evidence, 12th ed., p. 242."

A thread which is common to the authorities is that solicitor-client privilege will yield where it is necessary to obtain justice and where full disclosure is necessary to establish innocence, keeping in mind that it is for the Crown to prove the guilt of the accused.

The Crown has argued that there is no evidence of any wrongdoing or illegality on the part of the Crown. I agree but the defence must surely have the opportunity to adduce such evidence. The accused do not have to prove actual wrongdoing or illegality on the part of the police or the Crown in order to make such an application. I do not think that the defence has to show exceptional circumstances or make out a prima facie case of illegality. The dilemma which these accused would face under such circumstances is not unlike that which was alluded to in Dersch v. Canada (Attorney General), 60 C.C.C. (3d) 132. Sopinka J. at p. 139-40 stated as follows:

> "In R. v. Playford (1987), 40 C.C.C. (3d) 142, at p. 178, Goodman J.A., speaking for himself, Blair and Cory JJ.A., expressed the dilemma in which the accused is placed by the restricted access cases in these words:
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> > '... he cannot gain access to the affidavit unless he can prove on a prima facie basis the grounds for such access and he cannot prove such grounds unless he has access.'
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> I agree that this is an accurate statement as to the position in which the accused is placed by the restricted access cases. As pointed out by Watt J., extrinsic evidence is seldom available to establish the requisite prima facie grounds. The accused is placed in this dilemma in virtually every case. If placing him or her in this dilemma is a denial of the right to make full answer and defence, then in every case in which access is denied, the accused is denied the right to make full answer and defence. Consequently, there would be in every such case a breach of s. 7 of the Charter, which includes among its principles of fundamental justice the right to make full answer and defence. If the restricted access cases are right in their interpretation of the section, then Parliament has authorized a procedure which uniformly results in a breach of the Charter. It follows that either the section is unconstitutional or the interpretation of the restrictive access cases cannot stand. With respect, I agree with the Ontario Court

> of Appeal that the section is constitutional and that the previous interpretation can no longer apply. It is fundamental to this view that the denial of access constitutes a denial to make full answer and defence."

The contents of the operational plan make it apparent that the circumstances of the police investigation were most extraordinary. The police were clearly concerned with the legality of their investigation. It is not necessary in this application to decide the larger issue of whether all conversations between Crown counsel and police are clothed with solicitor-client privilege. I have viewed this application as, in essence, an application for disclosure and further particulars. It is, of course, premature for me to make any findings of illegality on the part of the police or impropriety on the part of the Crown. I do find that the legal advice upon which the police proceeded is relevant for a determination of the issues which have been raised by the defence.

I appreciate that the advice which the RCMP sought was done so in confidence and that confidentiality is essential to ensure that police authorities seek the advice of officers of the Crown. I am also mindful of the fact that in an adversarial system the parties must be free to act in an unfettered manner as is reasonably possible. However, I am guided by the right of a person to make a full answer and defence. That right must take precedence in a judicial system which has as its cornerstone the presumption of innocence. It is for these reasons that the application is allowed and the Crown's right to solicitor-client privilege is removed.

Now, having made that ruling, I must say that the ruling is not made with respect to all of those matters that were contained in Mr. Woodall's brief because there are such matters in there as to policies of the Department of Justice and the RCMP in Ottawa and I had some difficulty when I was going over my material in determining the relevance of all of that. If need be, counsel can argue the relevance of some of those but I have considerable difficulty in concluding that a lot of the matters that are alluded to in Mr. Woodall's written argument are relevant to the issue which I have addressed. I would like to think that counsel can work out these matters as to what ought to be disclosed but what I have in mind really are the general advice which the police received from the Crown and matters such as immunity to prosecution and all those matters which were dealt with by counsel.