Citation: *R. v. Bunbury*, 2005 YKTC 51 Date: 20050624
Docket: 04-00447
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: Her Honour Judge Ruddy

R e g i n a

v.

Glen Douglas Bunbury

Appearances:
Tony Brown Counsel for Crown
James Van Wart Counsel for Defence

DECISION

[1] Glen Bunbury has been tried in relation to offences contrary to s. 253(a) and (b) of the *Criminal Code*. I have before me a defence application seeking leave to raise a *Charter* argument, post trial, in relation to the admissibility of the certificate of analysis.

[2] The circumstances giving rise to the application are as follows:

1. Trial of this matter took place on March 29, 2005 . The Crown called three witnesses, two police officers and a civilian. The defence called one witness, an expert in the use and operation of the BAC Datamaster C.
2. During the course of the trial, the Crown tendered the certificate of analysis through the BAC Datamaster C technician, Cst. Gaetz. The defence raised no objection as to admissibility, and the certificate was admitted into evidence.
3. Upon completion of the trial, counsel for the defence sought an adjournment for the expressed purpose of preparing written

submissions. The application was granted, and both Crown and defence provided submissions in written form.

4. Among other issues, the defence, in its written submissions, raised the issue of whether the officer, Cst. Gaetz, had reasonable and probable grounds to make the breath demand.
5. In raising the argument, the defence did not allege a s. 8 *Charter* violation in its written submissions, nor was a *Charter* violation alleged at any time prior to filing of the written submissions.
6. In reviewing the evidence and the written submissions of both counsel, I became concerned about the absence of a *Charter* argument, and raised the issue with both counsel on the date of the scheduled decision. The matter was further adjourned for consideration by counsel. Subsequently, the defence brought an application for leave to raise a s. 8 *Charter* argument. Crown has opposed the application.
7. It should be noted, for the record, that Mr. Van Wart, who now appears as counsel for Mr. Bunbury and has brought the application on Mr. Bunbury's behalf, was not counsel at Mr. Bunbury's trial.

[3] In relation to the application before me, the defence essentially argues that I should grant leave to ensure fairness and preserve the integrity of the trial. They concede that the *Charter* application should have been made earlier, but that it would be unfair not to hear the application and adjudicate on its merits. The defence further argues that reasonable and probable grounds were canvassed in evidence at trial; therefore, lack of notification is not an issue and the Crown should not be taken off-guard. It is suggested that any prejudice to the Crown can be remedied by an adjournment to prepare argument on the Charter issue or by allowing the Crown to call rebuttal evidence.

[4] The Crown argues that the application should not be granted as the defence failed to provide any notice of a *Charter* application and failed to raise the issue in a timely fashion. In support of its position, the Crown has filed the Alberta Court of Appeal decision in *R. v. Dwernychuk* (1992), 77 C.C.C. (3d) 385. They argue that the circumstances in the *Dwernychuk* case are identical to those in the case at bar, and that I should follow the reasoning of the Alberta Court of Appeal, and deny the application. The Crown further argues that to grant the application would result in real prejudice to the proceedings as the Crown did not

address the issue of reasonable and probable grounds at trial with the thoroughness that they would have had they been given notice.

[5] The leading case in relation to the procedure to be followed in alleging a *Charter* violation and applying for a remedy under s. 24(2) is *R. v. Kutynec* (1992), 7 O.R. (3d) 277, in which the Ontario Court of Appeal stated the following:

> Under the Charter, the burden of having the court reject evidence that is otherwise admissible passes to the defence. The Crown does not have to anticipate that the defence will seek to exclude Crown evidence on the basis of an alleged Charter breach. The defence must make its application for relief under s. 24(2) before the evidence is admitted, not after it has been accepted.
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> …
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> Manifestly, the Charter application by the accused must precede the admission of the evidence. To have it admitted before a jury subject to later exclusion following a successful Charter application would invite a mistrial. The procedure to be followed is not different when a judge is the trier of fact.
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> If these two processes relating to the reception of evidence by the court are not kept conceptually separate, the trial process becomes confused and repetitive. In the interests of conducting an orderly trial, the trial judge is entitled to insist, and should insist, that defence counsel state his or her position on possible Charter issues either before or at the outset of the trial. All issues of notice to the Crown and the sufficiency of disclosure can be sorted out at that time. Failing timely notice, a trial judge, having taken into account all relevant circumstances, is entitled to refuse to entertain an application to assert a Charter remedy. (p. 6)

[6] The case law in this area indicates that there is some scope for exceptions to the general rule set out in *Kutynec*. Indeed, Finlayson J.A., in *Kutynec,* indicated “I do not suggest that a trial judge can never consider, at a later point in the trial, the admissibility of evidence which has been tendered without objection. A trial judge has discretion to allow counsel to challenge evidence already received and will do so where the interests of justice so warrant” (p. 7).

[7] In determining when it is appropriate for the trial judge to exercise discretion in making an exception, I have had regard to the *Dwernychuk* decision, as well as the decisions of *R. v. Luksicek,* [1993] B.C.J. No. 524 (B.C.C.A.) and *R. v. P.D.B*., [1994] Y.J. No. 7 (Y.T.C.).

[8] In *Dwernychuk*, the court noted that:

> Once the evidence has been admitted, the trial judge may entertain an application to exclude the evidence only when, after the admission of the evidence, some event occurs which will entitle, perhaps even require, the judge to entertain a s. 24(2) application, in the interests of justice. When we speak of “some event”, we do not include a situation in which the defence raises a Charter issue in a conscious way for the first time after the Crown has closed its case; what we have in mind, without intending to be exhaustive of the possibilities, is some development in the case which occurred after the close of the Crown’s case – perhaps the acquisition of new information after the close of the Crown’s case, or a fresh appreciation of the implications of known prosecution evidence after the close of the Crown’s case. (p. 12)

[9] Similarly, in *Luksicek*, the B.C. Court of Appeal referred to the need for “special circumstances” to justify a late application to exclude:

> I do not wish to be understood to say that a court trying a criminal case might not be expected, as a debt of justice in special circumstances not present in

> this case, to exclude evidence created or discovered as a consequence of a breach of the Charter even if there were no timely objection. But, absent special circumstances, the general principle is well stated in a number of cases, such as R. v. Kutynec, … namely, that the accused must raise Charter objections to the admissibility of evidence before, not after, it is adduced into evidence…. (paragraph 11) (citation omitted).

[10] In the Yukon decision of *R. v. P.D.B.*, Stuart J. found that:

> Whenever possible, procedural irregularities should not deny getting on with the purpose for the Court hearing; addressing the substantive questions on their merits. This applies with equal force to Charter issues. If procedural irregularities can be rectified without significant prejudice to any party, then such irregularities should not foreclose an evaluation of the merits of a Charter challenge. …The integrity of procedural rules, designed to foster fairness throughout the processing of any case, are important but must bend when exceptions warrant. Remedies that overcome procedural irregularities, without unduly prejudicing either party, should be ardently sought before terminating any issue by according priority to procedural rules…. (paragraph 10) (citation omitted).

[11] These decisions indicate that in considering whether this is an appropriate case to warrant an exception I must be satisfied, firstly, that there are special or exceptional circumstances which could not have been anticipated at the time the evidence was tendered, and, secondly, that an exception can be granted without unduly prejudicing either party or that any prejudice which would flow could effectively be cured through other means.

[12] I find that I am not satisfied with respect to either of these two criteria.

[13] With respect to special circumstances, the defence, in its submissions on this application, made no representations as to the existence of any special or unforeseen circumstances. Furthermore, I would note that a s. 8 *Charter* argument, in the circumstances of this case, would be neither a novel nor a unique argument which one could reasonably expect would have taken experienced defence counsel by surprise.

[14] The accused was represented by experienced counsel. As there has been a change in counsel, there is no information before me as to why defence counsel chose not to raise this issue at an earlier time and I am unable to infer special circumstances from the failure to do so. Indeed, it would be inappropriate for me to second guess defence counsel strategy. That being said, an accused who has the benefit of experienced counsel and due process is not entitled to start his or her trial over again if counsel's original trial strategy appears unlikely to succeed.

[15] In terms of prejudice, I have come to the view that to allow the application would result in undue prejudice to the Crown. As Finlayson J.A. pointed out in *Kutynec*:

> Litigants, including the Crown, are entitled to know when they tender evidence whether the other side takes objection to the reception of that evidence. The orderly and fair operation of the criminal trial process requires that the Crown know before it completes its case whether the evidence it has tendered will be received and considered in determining the guilt of an accused. The ex post facto exclusion of evidence, during the trial, would render the trial process unwieldy at a minimum. In jury trials it could render the process inoperative. (p. 5)

[16] As noted by the Crown, absent notice, the issue of reasonable and probable grounds was not canvassed at trial in the manner nor to the degree

which one would expect of the Crown had they been given notice. It would be highly prejudicial to expect the Crown now to rely on the evidence of reasonable and probable grounds as presented to counter an allegation of a *Charter* breach and an application for exclusion pursuant to s. 24(2).

[17] I am also not satisfied that the prejudice to the Crown can be cured through alternative means. This is not simply a matter in which there is a need for further legal argument. Without notice being given, there are evidentiary deficiencies which would need to be addressed for the Crown and the court to be in a position to fully address the issue. As a result, the only means of overcoming the prejudice at this point would be to reopen the trial of this matter and recall much of the evidence, an option which would be both confusing and unwieldy.

[18] While I might possibly entertain such a drastic option in the face of special circumstances, I am of the view that it would not be appropriate in circumstances such as these where the accused was represented by experienced counsel and no special circumstances have been presented on this application.

[19] The application is denied.

Ruddy T.C.J.