Date: 19980121
Docket: CC970285
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

REGINA
against
FREDERICK AUSTIN CRESWELL
RULING
OF THE
HONOURABLE MADAM JUSTICE HUMPHRIES

Counsel for the Accused: J. Conroy, Q.C.

Counsel for the Crown: C. Tobias, P. Partridge

Date and Place of Hearing: January 21, 1998, Vancouver, B.C.

[1] HUMPHRIES, J (Oral): On November 28th, 1997, I ruled that the issue of whether the actions by the police in this case were illegal should proceed before I would consider whether to order disclosure of opinions to the RCMP from their legal advisors. These are my reasons on the issue of police illegality, which is the basis upon which the accused intends to argue that the evidence against him should not be admitted pursuant to s. 24(2) of the Charter and that the entire proceedings should be stayed as an abuse of process. If I should find the police conduct to be illegal, the consequences of that finding will be argued at another time, possibly after the disclosure of any relevant legal opinions.

[2] The accused is charged with 22 counts of possessing the proceeds of crime and money laundering, pursuant to ss. 19.1 and 19.2 of the Narcotic Control Act, arising out of transactions at a currency exchange set up and run by the police in downtown Vancouver from 1993 to 1996.

[3] The Crown's case is completed, but not formally closed, and has been conducted within a voir dire as defence has raised a challenge to the admissibility of the evidence based on s. 24(2) of the Charter on the grounds that the police activity was illegal.

[4] The defence admits that if the evidence is admissible and he does not succeed on an abuse of process argument, the accused has committed the offences of possessing proceeds of crime. He does not admit that the Crown has proven that he has laundered money as he wishes to argue the meaning of "conceal or convert" within the meaning of s. 19.2 of the Narcotic Control Act. Following the completion of the Crown's evidence on its own case, but still within the voir dire, the accused embarked on an abuse of process hearing based on alleged illegal activity by the RCMP in themselves knowingly possessing proceeds of crime through the operation of the exchange, failing to comply with the requirements of the Proceeds of Crime (Money Laundering) Act, which I will refer to as the PCMLA in these reasons, encouraging, aiding and abetting the possession of proceeds of crime and then agreeing or conspiring to do all of the above.

[5] Defence adduced evidence on the issue of police illegality through three police officers, Sergeant Litzenberger, Sergeant Vander Graaf and Mr. Bowie, formerly Inspector Bowie. In response on that discrete issue, I allowed the Crown to call the evidence of Mr. Elliot, a forensic accountant. The evidence of Mr. Tario, a former undercover officer who actually operated the exchange, was already before the court in the Crown's case as well as extensive admissions of fact concerning the activity of Mr. Creswell and the police officers relevant to the counts on the indictment.

[6] It was established during the evidence of the three police officers that the currency exchange was set up to concentrate on the use of money in drug transactions. Sergeant Litzenberger explained why this was, in his view, necessary. Whereas traditional investigations centred around the traffickers of the drugs, the money factor, although an essential element of the transactions, was not followed up. The police considered that by becoming involved with the exchange of money, they would be entering the drug circle at a focal point, that is just prior to the purchase of new drugs, and would obtain valuable information about the identity of those involved in the higher levels of drug operations and the extent of those operations. As the people at the higher end kept themselves separated from the street level traffickers and the drugs they sold, they were difficult to catch by concentrating on those aspects. However, they did not separate themselves as completely from the money, and so by focusing on that angle, there would be a direct link by which to discover them.

[7] Sergeant Litzenberger developed the operational plan, code named "Eye Spy", which was eventually approved by various levels of the RCMP, including Staff Sergeant Vander Graaf and Inspector Bowie, which resulted in the officers using fictitious names to form a company properly incorporated, but exempted from reporting pursuant to the Financial Administration Act, to run Pacific Rim International Currency Exchange, or PRICE. This exchange located at 818 Burrard Street with a cover team situated in a field office at a nearby hotel. Surveillance cameras covered the surrounding streets and alleys, and when manpower permitted, foot and vehicle surveillance was employed. The store had two wickets, a small room called a private teller, and a back office. There were two ceiling-mounted cameras in black bubbles, one focusing on the customer across the shoulders of the tellers which could also scan the back office area, and one focused on the private teller door which

could scan the front. The cover team in the field office controlled the cameras.

[8] The police had no specific targets in mind, but they knew, through another operation, that currency exchanges were being used extensively to convert Canadian funds, obtained from the sale of cocaine and heroin in Canada, to U.S. funds for return to the United States for the purchase of more drugs. As well, there were smaller operations involving B.C. grown marihuana which was sold in the States, thereby necessitating the conversion of U.S. funds into Canadian. This latter aspect grew considerably during the three years the exchange was in business, and it is this in which Mr. Creswell, the accused, was involved.

[9] Although not encouraging tourist traffic, the exchange did attract many legitimate customers, and the officers estimated that five percent of the money they dealt with came from 95 percent of their customers, with the remaining 95 percent of the money coming from 5 percent of the customers, that is proceeds of crime.

[10] When the plan was first formulated the PCMLA was not proclaimed, but by the time the exchanged opened, both it and the regulations were in effect. The statute and Regulations required the exchange operator to obtain identification from the customer for transactions of over $1,000 and identification, addresses and occupation of the customer or the third party from whom he acted for transactions of over $10,000. At first the police operational plan called for the undercover members operating the exchange to comply with the statute and Regulations. A subsequent amendment to the operational plan provided for compliance unless the target refused. In fact, by the time the exchange became fully operational, the officers realized that they would attract the clientele they were after only by completely ignoring the requirements, which they did. As well, although they considered separating the money received from transactions which they knew involved proceeds of crime, they decided to use the money in the exchange and to use the profits from all transactions to finance the business.

[11] As for the whole idea behind the exchange, although aware they would be possessing proceeds of crime and essentially laundering money, according to Mr. Tario, Staff Sergeant Vander Graaf and Sergeant Litzenberger, the police were of the view that they had no mens rea to commit a crime and had no other realistic alternative method of investigation. In fact, although starting the operation with no specific targets in mind, they developed approximately 430 targets through voluntary entry into the store to do business and have laid about 60 charges directly out of those dealings. There have been related drug investigations which have resulted in charges, as well.

[12] Only Inspector Bowie was aware of legal advice that might pertain generally to such a situation, but he sought nothing specific for this operation. Sergeant Litzenberger, Staff Sergeant Vander Graaf and Inspector Bowie were aware of case law that was emerging on the legality and appropriateness of reverse stings and money exchanges, but did not interpret any of the cases as definitively prohibiting their activities. They clung steadfastly to the notion that they had no mens rea, although Inspector Bowie and Sergeant Litzenberger admitted the technique was new and they were testing the limits of their police powers. Inspector Bowie said he discussed the concerns respecting possible illegality of this type of operation with the commissioner and prepared a briefing note in general terms for the commissioner to take to the Minister setting out the nature of the operations, but direction in an operations matter would never be sought from or given by the Minister.

[13] When Mr. Creswell entered the exchange for the first time on April 13th, 1995, he asked if he could get the same type of deal as his friend, Wes, a known target, had got. Officer Tario said that would not be a problem and asked Mr. Creswell if he wanted the same rate that he had given Wes. Mr. Creswell said he did and that he liked the way they did business at the exchange. On that occasion, Mr. Creswell produced $2,900 U.S. to be exchanged to Canadian funds. Tario told Mr. Creswell if he had to do more it would not be a problem as numbers did not bother them and they could do as much as he needed to do. Mr. Creswell asked if they could do as much as 70 and was told they could.

[14] On May 16th, 1995, Mr. Creswell brought in U.S. $42,000 for conversion to Canadian funds. On that occasion he was directed to the private teller to do the exchange and the exchanges on subsequent dates took place there. As of that date the police were able to ascertain his identity through surveillance and a motor vehicle check. At no time was the information required to be obtained by the Regulations sought by the police.

[15] On May 23rd, 1995, Mr. Creswell was searched by U.S. Customs Service at the Blaine border crossing, and nine packages of marihuana totalling 2,367.3 grams was found in his car. He also had $22,300 in Canadian funds in a bag. Mr. Creswell did not return to the currency exchange until July 21st, 1995, when he brought in $15,000 U.S. to be exchanged.

[16] On August 22nd, 1995, he brought in $58,700 U.S., and on September 21st, 1995, $83,340 U.S. On this occasion Tario told Creswell that Tario could arrange to pick up money down south and put it into the system for their customers needing U.S. dollars, then they would provide Canadians funds in Vancouver for the people from whom they had done a pickup. He asked if Creswell was interested, and Creswell said he was, as he worked within a co-op.

[17] On September 26th Creswell brought in U.S. $31,500 to be exchanged and arranged a pickup at the Bellis Fair Mall in Bellingham, Washington. This took place on September 27th, 1995, with the cooperation and authority of the DEA and U.S. Customs. Mr. Creswell's brother, Rod, gave Mr. Tario $47,500 and Sergeant Litzenberger brought the funds back to Canada.

[18] On November 9th, 1995, Mr. Creswell exchanged $15,400 U.S. and on November 28th, $19,800 U.S. Two more pickups at the Bellis Fair Mall were arranged in January of 1996, one for $54,960 U.S. and one for $97,020 U.S.

[19] Mr. Creswell was arrested on January 23rd, 1996. Between April 13th, 1995, and January 20, 1996, he had exchanged a total of $468,120 through PRICE.

[20] I am now going to move on to the positions of the parties on the question of police illegality. The accused says the police committed criminal acts, intended to commit them and did them knowingly. The alleged offences range from violation of s. 19.1 (possession of proceeds of crime) and 19.2 (money laundering) of the Narcotic Control Act, to s. 354 (possession of property obtained by crime), and s. 357 (bringing into Canada property obtained by crime) of the Criminal Code, together with aiding and abetting these offences when committed by others and conspiring amongst themselves to commit these offences.

[21] As well, defence alleges the police failed to comply with the reporting requirements of the PCMLA Regulations and failed to comply with the law by video-taping the premises for surveillance purposes without judicial authorization. Mr. Conroy argues that the principle that every official act must be justified by law has long been recognized, see Entick v. Carrington (1765), 95 E.R. 807 (King's Bench), and Roncarelli v. Duplessis (1959), S.C.R. 121 (S.C.C.). A corollary of this principle is that a representative of government has no authority to suspend the operation of law, see Hogg, Constitutional Law of Canada, 1992, third edition, Chapter 31, page 31-5, and R. v. Catagas (1978) 38 C.C.C. (2d) 296.

[22] The courts have not accepted as a valid defence to a criminal charge an assertion by a police officer that he was doing his duty and had no mens rea to commit a crime, see R. v. Petheran (1936), W.W.R. 287, R. v. Walker (1979) 48 C.C.C. (2d) 126 (O.C.C.), R. v. Stevenson and Mclean (1981) 57 C.C.C (2d) 526 (O.C.A.), and R. v. Kirzner (1977) 38 C.C.C. (2d) 131 (S.C.C.). Generally, the belief by the officer that he does not possess the necessary mens rea because he lacks an evil intent is seen as a mistake of law, and ignorance of the law is no excuse.

[23] Mr. Conroy raised many other points which, in my view, go to the ultimate remedy, should I find the police actions to be illegal. For instance, he says that the officers all admitted they knew that an amendment to the Narcotic Control Act was contemplated which would exempt them for the purposes of an investigation or otherwise in the execution of their duties from the operation of the sections relating to the possession of the proceeds of crime and money laundering. Therefore, they must have known what they were doing was unlawful. As well, he argues that Litzenberger and Bowie testified that they read recent cases on various police initiatives, Lore and Matthiessen - and I will give the citations for those later on - and knew that certain actions had been held to be illegal, although the evidence has been ruled admissible and stays had been refused in those cases. Nevertheless, although knowing of the likely illegality of their actions, the officers did not seek specific legal advice for this project.

[24] Mr. Conroy also submits that the report of the MacDonald Commission concerning the activities of the Royal Canadian Mounted Police tabled in 1981 made it clear that the justifications advanced by the police for certain activities, acting in the course of their duties, acting under orders from a superior and lacking the necessary mental element or vicious will for a criminal offence were rejected. As for a claim of Crown immunity, the commission concluded that the RCMP were still bound by provincial and federal laws while carrying out their duties. Without a specific statutory justification, such as s. 25 of the Criminal Code, or an exemption, such as the ones now in effect to allow the police to possess proceeds of crime and launder money in the course of an investigation, the concept of "legal lawlessness" is not recognized in the Canadian system of criminal law. These references to the MacDonald Commission, while providing an interesting analysis, are not binding authority and go more to good or bad faith, rather than the narrow issue of whether the officers could, in the course of an investigation, participate with immunity in activities which would otherwise be criminal.

[25] The Crown says, generally, that the police can take advantage of the concept of Crown immunity and are not bound by the relevant statutes. Alternatively, if they are bound by the statutes, they had no mens rea as all of their actions were done for a public purpose. The Crown also argues with respect to alleged contraventions of the PCMLA that there was substantial compliance by the police with the Regulations.

[26] Ms. Tobias approaches the issue of Crown immunity from the basic position that the actions of the police were not criminal because they were not bound by the relevant statutes in these circumstances. She argues that to say the police conduct was illegal must mean the police officers could be convicted of an offence in respect of their actions in these cases. Starting from the proposition that the Supreme Court of Canada, when considering an application for a judicial stay for abuse of process in R. v. Mack (1988) 44 C.C.C. (3d) 513, refused to lay down an absolute rule prohibiting the involvement of the state in illegal conduct, she says it is conceptually inconsistent to recognize the need for illegal conduct in an investigation, but say an officer can be convicted of that conduct. She argues that the Crown is not bound by statute except to the extent that Parliament expresses an intention to bind the Crown and that a Crown agent, acting within the scope of the public purpose it is statutorily empowered to pursue, is entitled to claim Crown immunity, see R. v. Eldorado Nuclear Limited (1983) 8 C.C.C. (3d) 448.

[27] Ms. Tobias argues that the RCMP are agents of the Crown for the purposes of enforcing the criminal law by virtue of the RCMP Act and Regulations, which requires them to preserve and enforce the laws of Canada. As well, they are paid by the federal government and are directly under the control of a Minister of the Crown. She relies on s. 17 of the Interpretation Act, which requires an express provision to make an act binding upon the Crown, and says there is no such provision in the Narcotic Control Act nor is there an intention to bind the Crown, as the purpose of the Narcotic Control Act would be wholly frustrated if the RCMP, as a government entity entrusted with the responsibility of law enforcement, were bound by its provisions in such a way that would frustrate their abilities to perform their duties.

[28] In the alternative, she says the officers could not have had the necessary mens rea to commit a crime because the courts have traditionally recognized an exception for public duty in cases of possession of the illegal substances. For example, in R. v. Hess (1949), 94 C.C.C. 48 (B.C.C.A.), the Court examined the meaning of possession as including knowledge and control outside public duty. The Court described a situation where a citizen picks up a package of drugs, and after learning what it is, takes it to the police station as a public duty, thereby not being guilty of possession. In fact, this was the example used by at least two of the police officers during testimony to describe a situation where mere physical possession and knowledge would not expose the person to a charge.

[29] As for substantial compliance with the regulations, although the undercover operators did not require identification for transactions over $1,000 or obtain the required information for transactions of over $10,000, in reality the evidence of Mr. Elliot, the forensic accountant, shows that every transaction was recorded and was traceable and the identity and other information of the targets was obtained through other means, mainly surveillance. Therefore, says the Crown, there was substantial compliance with the Regulations.

[30] In fact, Mr. Creswell's identity was known as of May 16th, 1995. Mr. Conroy says this negated the need for continued undercover operations with respect to Mr. Creswell, although, of course, the object of the investigation was to discover the extent of the drug operations in which the targets were involved, and this factor is, once again, relevant to the ultimate remedy, rather than the issue of whether the police conduct was illegal.

[31] I will now quickly review some recent case law. In R. v. Bozid (Q.L. 1993 135 A.R. 329] (Alta. C.A.), a decision of the Alberta Court of Appeal, the accused demanded that an undercover officer traffick to him to prove good faith. The officer did, and at trial the accused put forward the defences of entrapment and abuse of process, but was convicted. The Court of Appeal appears to agree with the trial judge that the act of trafficking was illegal, but considering all the circumstances, refused to find an abuse of process and upheld the conviction. There was little, if any, analysis upon which the conclusion of illegality was based.

[32] In R. v. Matthiessen (Q.L. 172 A.R. 196] (Alta. Q.B.), the accused argued that the RCMP, in a reverse sting operation, acted illegally because the police engaged in laundering money. The Crown argued that the RCMP had no intent to conceal or convert money received from the accused and as well contended that the police were not bound by the Criminal Code or the Narcotic Control Act if they are engaged in a bona fide investigation relying, as does the Crown before me, on Eldorado Nuclear, supra. The trial judge concluded the law of Canada applies to the police in the absence of a specific legislative exemption or grant of immunity and that the police have the required intent to commit the criminal acts.

[33] In R. v. Campbell and Shirose [Q.L. 96 O.A.C. 372], a decision of the Ontario Court of Appeal, the police conducted a reverse sting operation in which they offered large amounts of drugs for sale. The trial judge did not decide whether the conduct was illegal, instead measuring it against the principles enunciated in R. v. mack, supra, and declined to stay the proceedings. The Court of Appeal decided that determination of illegality was a necessary preliminary step and held that the RCMP does not share in Crown immunity from prosecution for breaches of the criminal law as it relates to narcotics. Therefore, its conduct in the circumstances of the case was illegal, but a stay of proceedings was not warranted.

[34] In R. v. Bouchard et al. (22 November, 1995), Montreal 500-01- 001861-951 (Que. S.C.), the Court was asked to consider whether officers who, in the course of operating a currency exchange during a bona fide investigation, converted currencies which they knew to have been derived from criminal activity, were committing the offence of money laundering. Concluding that the word "convert" in s. 19.2 of the Narcotic Control Act means "transformation of a property so as to hide its origin", the Court held that the officers had no intent to obscure the trail of the money's criminal origin. The court then went on to consider the concept of double intent as it arises in the context of a charge of conspiracy and distinguished acts which, by themselves, are indictable offences such as murder, arson, assault, et cetera, from those which, like currency conversion, are not offences in the absence of culpable mens rea. With respect, I am unable to appreciate the basis upon which the acts underlying any of the listed offences would be criminal in the absence of mens rea either,, but this approach was not really necessary as the learned judge had already found that the police did not have the intention to obscure the money's origin and so were not laundering money as he defined it.

[35] Now, I have set out the positions of the parties and the case law, and will go on to my analysis of the issue before me. Mr. Conroy approaches the actions of the police officers as if he were Crown counsel approving a series of charges against individuals. In effect, he looks at the actus reus and the mens rea and says there is substantial likelihood of conviction for charges of possessing the proceeds of crime, conspiracy to possess the proceeds of crime and transporting proceeds of crime across the border.

[36] Ms. Tobias approaches the issue from the point of view of the Crown or the state, characterising the police actions not as those of individuals, but as those of a law enforcement body acting for the public good within the terms of its public purpose. Mr. Conroy opposes such an approach saying that the agents of the state must be bound by the laws as individuals or there will be no restraint on them. If they are allowed to commit what would otherwise be crimes with impunity because they are in the course of an investigation, they could then search illegally, perform unauthorized wiretaps or beat confessions out of people. Ms. Tobias says the check on their actions would be the parameters of "public purpose", and I expect the risk of exclusion of evidence or a stay of proceedings under s. 24(2) of the Charter could also be argued.

[37] The facts before me do not lend themselves easily and completely to an analysis from either point of view, neither is it productive to analyze the situation before me as the equivalent to one where the officers could be charged with an offence. Given the facts, that simply could not have happened within the terms of the operational plan, so to say that the issues of illegality can be equated with whether the officers could be found guilty of a criminal charge begs the question. The officers are not on trial here, and I am considering these issues as general principles only, not as specific allegations against individuals. In a sense, it is artificial to analyze the question of illegality in isolation, and I can understand why the trial judge in Campbell v. Shirose did not do so, simply considering all the circumstances within the parameters of R. v. Mack.

[38] It is possible to look at the police operation here as that of a purely government function cleverly set up and operated and clearly successful in realizing its goals, which was to attract money launderers and facilitate in the investigation of narcotic offences. The facts of this case are as good a basis as could be found for that argument. As the Crown says, none of these officers was off on a frolic of his own. However, the plan was formulated and the decisions were made by individual officers, sanctioned through the police chain of command, the senior officers knowing the operational technique was innovative and legality was not certain. It is difficult to see how these actions should be retroactively sanctioned as state actions and covered by Crown immunity when none of the officers characterised their actions as such and, in fact, simply operated on the assumption that because their motives were laudable, their intent was innocent in the legal sense. [39] This is not a situation like Walker where an individual police officer acted outside his statutory powers and contravened the relevant statute. The officers were acting as a group under a carefully thought-out and complicated operational plan, approved and put into effect by their superior officers. Each officer, particularly the undercover ones, performed what would otherwise be criminal acts on numerous occasions pursuant to that plan.

[40] On the other hand, neither is it a situation like Eldorado Nuclear, supra, where two Crown corporations were charged with violating the Combines Investigation Act. There, the two entities, Eldorado Nuclear and Uranium Canada were each, by statute, expressly an agent of Her Majesty created for a specific purpose. If acting within that purpose, they would be accorded Crown immunity. The corporate functions set out in the company's Letters Patent were to buy and sell uranium. They were charged with conspiring to reduce competition in the production, sale or supply of uranium and the alleged activities were, according to the Supreme Court of Canada, within their powers and purposes. The Court held that the two corporations are not bound by the Combines Investigation Act when acting within authorized purposes so they could

not commit a violation of the Act when so acting. To apply the reasoning in that case to the circumstances before me would mean that individual officers, when deciding to act in contravention of statutes in the course of an investigation for a public purpose, are not bound by those statutes because they are agents of the Crown.

[41] Leaving aside the question of whether illegal activity can be for a public purpose, which I presume would be answered in a circular fashion by saying the activity is not illegal because it is for a public purpose, what is it that makes these officers agents of the Crown and immune from the operation of the law in these circumstances? Is it that they are pursuing a valid investigation? That their superiors approved the plan? That it worked? That they did not physically harm anyone? That their motives were for the public good? That the end justified the means? That each officer was genuinely convinced his actions did not constitute a crime? In my view none of these alone or in combination is enough to justify taking the decision as to what is illegal in this country out of Parliament's hands and putting it into the hands of the officers of the RCMP. None is enough to make this situation analogous to that in Eldorado Nuclear and render the officers immune from the application of the law.

[42] As the Court of Appeal said in Campbell and Shirose, without the necessary statutory authority or greater evidence of de jure control exercised upon them by the Crown, the RCMP cannot share in Crown immunity from prosecution for breach of the criminal law.

[43] The factors set out above may well be enough to ensure that the acts of the officers are not the subject of prosecution and they may well be relevant in determining if the case against Mr. Creswell should be stayed for abuse of process. They may also figure in a s. 1 argument in the analysis of a remedy under s. 24.2 of the Charter, (if s. 1 has relevance to a breach of s. 7 rights and if Mr. Creswell's s. 7 rights were engaged here), but they cannot mean an individual officer, albeit with the approval of superiors, can create circumstances in which he is not subject to the laws of Canada. I note that the Supreme Court of Canada in Mack, although not absolutely prohibiting the use of illegal conduct by the police, still described it as illegal.

[44] In my view, therefore, the police cannot avail themselves of the doctrine of Crown immunity in these circumstances. They knowingly possessed proceeds of crime and agreed to operate in such a way that would necessitate handling those proceeds. Generally, those actions, if done by anyone else, would be criminal acts, although I do not intend to make findings that each element of any particular offence has been proven beyond a reasonable doubt. it is sufficient to say that the police conduct was illegal.

[45] It is a corollary of the above reasoning that it is not sufficient for the police to simply say "our motives are pure, therefore our actions and intent are irrelevant." The criminal law is based upon acts and intent. Without the special status that might attach to an agent with Crown immunity, the police cannot simply decide on their own that their particular type of intent is not a type that is criminal. Their motives and purposes are also best argued and examined in the context of abuse of process, but do not create a class of acts which are lawfully illegal.

[46] The decision in R. v. Hess was concerned with the elements of possession and there is no analysis of how far the concept of public duty is to be taken, but it is, in my view, an unwarranted stretch to compare the type of examples of possession for

a public duty purpose given there to the operational plan and its execution in Eye Spy, where there are continual and repetitive dealings with proceeds of crime over a long period of time. The one situation to which this reasoning could possibly apply, however, is Sergeant Litzenberger's actions in bringing the money received in the United States into Canada. Even there, however, the money was given to the exchange operators for continued use in the storefront.

[47] As for substantial compliance with the PCMLA, as Mr. Bowie testified, once they had decided to go ahead with the project and set up a storefront for money laundering, compliance with the PCMLA was of much lesser concern. The Crown, through Mr. Elliot, led comprehensive evidence of the extent of the records that were kept for each transaction, and each officer who testified mentioned that, although not requiring the information to be provided by the target, the spirit of the legislation was being complied with through the information kept by the cover team.

[48] As for the argument that there was, in fact, substantial compliance with the law, I do not intend to analyze each transaction as to the timing and extent of information gathered to determine whether specific infractions could be proven. There may be specific situations which would be covered by s. 4(4) of the regulations which requires only that information be available from other records and for which no infraction occurred. But, in reality, the officers set up a separate recording system which had no relation to the requirements of the regulatory system. While in many instances they achieved the object of the regulations by keeping more detailed and better information than that required, they deliberately did not comply with the legislative scheme. The failure to observe the legislative requirements did not arise from a belief that they were really complying by other means, but from a recognition that they would not attract customers without purporting to be corrupt exchange operators who were prepared to ignore the regulations. This was a decision based on furthering their investigation and a recognition that compliance was inconsistent with that objective. In this context it cannot be said that they substantially complied with the legislation.

[49] As for the video surveillance issue, in my view this is relevant more to the abuse of procession application if there is an issue there at all, as it is not clear to me that the police actually contravened the law as set out in R. v. Wong where the facts were decidedly different. Unlike the cameras in Wong, where surveillance was conducted of a hotel room through pinholes, the cameras here were visible in that the bubbles were in plain view. Although the purpose of the surveillance went beyond security, I cannot say that one's expectation of privacy in a public store should change significantly once one is, or should be, aware that one is being video-taped. As well, Mr. Creswell went into the back office only once and the transactions in the private teller were not recorded and no video evidence respecting Mr. Creswell has been adduced before me in this trial. If there is an issue respecting the use of the video, generally, it should be addressed in the context of the ultimate remedy.

[50] In summary, then, the actions of the police were illegal in that they cannot, in these circumstances, rely on Crown immunity to exempt themselves from the application of the laws of Canada and they cannot re-characterize intent to decide for themselves whether or not they are acting unlawfully. The significance of these findings to the case against Mr. Creswell will be argued at a future time.

"The Honourable Madam Justice Humphries"