## LAW Relied on by the Applicant

### *Alberta Evidence Act, RSA 2000, c. A-18, s. 34.*

**Privileged document**

**34(1)** When a document is in the official possession, custody or power of a member of the Executive Council, or of the head of a department of the public service of Alberta, but a deputy head or other officer has the document in the deputy head's or other officer's personal possession and is called as a witness, the deputy head or other officer, acting by the direction and on behalf of the member of the Executive Council or head of a department, is entitled to object to the production of the document on the ground that it is privileged.

**(2)** The objection may be taken by that deputy head or other officer in the same manner and has the same effect as if the member of the Executive Council or head of a department were personally present and made the objection.

**(3)** A subpoena shall not issue out of a court requiring

(a) the attendance of an employee, or

(b) the production of a document of a Department in the official custody or possession of an employee,

without an order of the court.

**(4)** An employee shall not disclose or be compelled to disclose information obtained by the employee in the employee's official capacity if a member of the Executive Council certifies that in the member's opinion

(a) it is not in the public interest to disclose that information, or

(b) the information cannot be disclosed without prejudice to the interests of persons not concerned in the litigation.

**(5)** The information certified under subsection (4) is privileged.

**(6)** In this section, "employee" means a person employed in the public service of Alberta, whether the employee's employment is permanent or temporary or on a full-time or part-time basis.

### *Criminal Code*, RSC 1985, c. C-46, ss. 698-699.

**Subpoena**

**698 (1)** Where a person is likely to give material evidence in a proceeding to which this Act applies, a subpoena may be issued in accordance with this Part requiring that person to attend to give evidence.

**Warrant in Form 17**

**(2)** Where it is made to appear that a person who is likely to give material evidence

**(a)** will not attend in response to a subpoena if a subpoena is issued, or

**(b)** is evading service of a subpoena,

a court, justice or provincial court judge having power to issue a subpoena to require the attendance of that person to give evidence may issue a warrant in Form 17 to cause that person to be arrested and to be brought to give evidence.

**Subpoena issued first**

**(3)** Except where paragraph (2)(a) applies, a warrant in Form 17 shall not be issued unless a subpoena has first been issued.

**Who may issue**

**699 (1)** If a person is required to attend to give evidence before a superior court of criminal jurisdiction, a court of appeal, an appeal court or a court of criminal jurisdiction other than a provincial court judge acting under Part XIX, a subpoena directed to that person shall be issued out of the court before which the attendance of that person is required.

**Order of judge**

**(2)** If a person is required to attend to give evidence before a provincial court judge acting under Part XIX or a summary conviction court under Part XXVII or in proceedings over which a justice has jurisdiction, a subpoena directed to the person shall be issued

**(a)** by a provincial court judge or a justice, where the person whose attendance is required is within the province in which the proceedings were instituted; or

**(b)** by a provincial court judge or out of a superior court of criminal jurisdiction of the province in which the proceedings were instituted, where the person whose attendance is required is not within the province.

**Order of judge**

**(3)** A subpoena shall not be issued out of a superior court of criminal jurisdiction pursuant to paragraph (2)(b), except pursuant to an order of a judge of the court made on application by a party to the proceedings.

**Seal**

**(4)** A subpoena or warrant that is issued by a court under this Part shall be under the seal of the court and shall be signed by a judge of the court or by the clerk of the court.

**Signature**

**(5)** A subpoena or warrant that is issued by a justice or provincial court judge under this Part must be signed by the justice, provincial court judge or the clerk of the court.

**Sexual offences**

**(5.1)** Despite anything in subsections (1) to (5), in the case of an offence referred to in subsection 278.2(1), a subpoena requiring a witness to bring to the court a record, the production of which is governed by sections 278.1 to 278.91, must be issued by a judge and signed by the judge or the clerk of the court.

**Form of subpoena**

**(6)** Subject to subsection (7), a subpoena issued under this Part may be in Form 16.

**Form of subpoena in sexual offences**

**(7)** In the case of an offence referred to in subsection 278.2(1), a subpoena requiring a witness to bring anything to the court shall be in Form 16.1.

R. v. Gingras
Date: 19920210
Docket: 8903-0332-A / 8903-0268-A



By the Court: A judge and jury convicted the appellant of first degree murder. Evidence of identity depended almost totally on eyewitnesses, and on people who testified that the accused had admitted the crime to them. These witnesses were, for the most part, of very bad character.

The grounds of appeal most argued centred about quashing a defence subpoena. While the trial was going on before one Queen's Bench judge, the defence applied ex parte to a different Queen's Bench judge for an out-of-province subpoena to produce documents. The documents were files kept at a special prison in Saskatoon, respecting a former prisoner who was about to testify for the Crown in this murder trial. The subpoena was issued and served. Thereafter there were a number of discussions and applications before the trial judge. The Crown gave notice of intention to move to quash the subpoena or bar production on the grounds of various kinds of privilege, but that motion never actually proceeded and was not formally made. Instead, the trial judge ultimately quashed the subpoena for lack of relevance. Thereafter the same Crown witness gave his consent to production of his files. The Crown still resisted production of certain reports on the files, but produced approximately 200 sheets of paper from the files to defence counsel in photostat form. The cross-examination of that witness had been held open, and defence counsel thereafter completed his cross-examination of that witness. Indeed in cross-examination the Crown used one of the photostats, being a letter which the witness had written some time before and which he then admitted was a pack of lies. (Its subject matter had nothing to do with the prosecution.)

The first attack is on jurisdiction to quash the subpoena. The defence takes the position that once a subpoena has been issued by a superior court judge, even ex parte, then there is no power on earth to undo it, especially not at the hands of a different superior court judge, not even the trial judge. As it is necessary to give some evidence in order to secure such a subpoena and they are not given for the asking, that seems an extraordinary proposition. We have grave doubts that it is correct, and we incline to the view that any judge of the superior court can quash such a subpoena if it is shown to be an abuse of process: R. v. A, B and C, [1990] 1 S.C.R. 995; 108 N.R. 214; 55 C.C.C.(3d) 564; R. v. Gares

(1989), 80 Sask.R. 241; 53 C.C.C.(3d) 82, 86-87 (Sask. C.A.). That is doubly so because it was given ex parte: R. v. Wilson, [1983] 2 S.C.R. 594; 51 N.R. 321; 26 Man.R.(2d) 124, 607-608; R. v. Garofoli et al. (1988), 27 O.A.C. 1; 41 C.C.C.(3d) 97, 115 (Ont. C.A.); Knox Contracting Ltd. and Knox v. Minister of National Revenue et al., [1990] 2 S.C.R. 338; 110 N.R. 171, 345.

In any event, there was extensive discussion before the trial judge as to who wasthe proper judge to hear the motion. The trial judge repeatedly invited counsel to apply either to the judge who had granted the subpoena, or to one of the regular chambers judges in Queen's Bench. Neither side accepted his suggestions, and counsel for the defence took the position that the accused should be present during any such motion. As he was then being tried for murder, the trial judge ended by hearing the matter. All the judges of the Court of Queen's Bench are judges of that court; it is not a collection of separate courts. If the Court of Queen's Bench had jurisdiction to set aside the subpoena, then the trial judge was no less empowered to do that than any other Queen's Bench judge. He was certainly more conveniently situate.

Assuming for the sake of argument that hearsay could be used to obtain or support such a subpoena, nevertheless we are firmly of the view that the affidavit used here was completely insufficient. No other evidence was ever offered in support of the subpoena, or to resist the motion to quash it. The affidavit is by one of the defence counsel. It recites who she is and who the parties are and says that she is aware that the prison inmate in question will be called as a Crown witness during the trial. Then she deposes "3. I verily believe that the institutional and medical file of this inmate contains information that is material to the defence of Mr. Gingras". She then says that she has spoken to the person named in the draft subpoena, that he is of the Regional Psychiatric Centre in Saskatoon and is its Director of Security and has custody of inmate files. She closes by saying she makes this affidavit in support of an application for a subpoena to that man. That is all she deposed to. The whole affidavit is extremely brief.

The key part quoted is either a mere conclusion or hearsay. If it is hearsay, no ground or source whatever is given for it. Still less is there anything in the affidavit to show that certain documents exist or probably exist, or what they contain, or to give any clue at all as to why they would be relevant.

The governing section of the Criminal Code is s. 698, which calls for evidence that the evidence sought would likely be material. It became obvious during argument at trial that counsel for the defence really die not know any more, and was just hoping that there would be relevant files which would contain something helpful. We do not ever know whether he hoped that something it the files would be itself evidence, or would be put in cross-examination to the inmate when he testified, or would lead to the names of other witnesses who might be subpoenaed themselves to give testimony.

It appears to us that this is a pure fishing expedition and goes far beyond what would be permitted in a civil case, let alone a criminal case, and does not begin to fall within what is called for in s. 698 of the Criminal Code. Therefore, the subpoena should never have been issued, and was properly quashed either on that ground or as an abuse of process. (We need not decide which.)

What is more, the subpoena itself is peculiar, though the affidavit did not ask for this. Presumably it was drafted by counsel for the defence. Just before the date line at the end of the subpoena the statutory form has a blank in which to specify what things are to be produced. There was there typed in "The complete institutional files, including the case management and medical files of [John Smith], and to produce the same to the party calling you subject to any claim of privilege that may exist". We know of no common law or statutory authority for the words "the party calling you". A subpoena must call for testimony or documents to be given to the court. The closing words appear in substance to convert this into something like a civil notice to produce, saying that documents are to be handed over to the defence counsel, not to the court. That would entail a host of dangers, not the least of which would be loss of privilege without any real effective chance to test it. It must be remembered that many forms of privilege were a live issue in this case. It is arguable therefore that the subpoena itself was a nullity and did not need quashing upon its return at trial. If it had any life, it was only on the grounds that an order of a Superior Court stands unless and until it is revoked. If a Superior Court issues an order or similar document which the law does not permit it to issue, we have no doubt that the inherent power of the court allows it to revoke the same upon this being brought to its notice.

Shortly before hearing this appeal, counsel for the appellant accused filed a supplementary factum in which he relied upon traditional authorities. One of these was

Carey v. Ontario et al. (1986), 72 N.R. 81; 20 O.A.C. 81; 35 D.L.R.(4th) 161, 165 (S.C.C.), especially at 189-194. It appears to us that that case is readily distinguishable as it is about privilege, not about relevance. Counsel for the appellant accused submits that the court is obliged to go through the question of privilege, first inspecting the documents. Only then, if necessary, can it get to the question of relevance, he says. We cannot see why that should be, particularly as in so many cases there would not even be a claim of privilege and the only issue would he relevance. Grounds for privilege and various statutory immunities of the Crown from production often involve extremely thorny questions. Why everyone concerned should he forced to plumb those to their depths in a case in which no relevance is shown, or in which the subpoena itself is illegal, escapes us completely. We cannot see anything in the Carey decision which forces the court to enter into such inquiries which are in the end result completely academic.

The other important new authority relied upon is the decision of the Supreme Court of Canada in R. v. Stinchcombe, [1992] 1 W.W.R. 97; 130 N.R. 277; 120 A.R. 161; 8 W.A.C. 161 (S.C.C.). We cannot see that that applies here either. The trial here occurred two and one—half years before the Stinchcombe case was decided. The doctrines recognized and developed in that case were in no sense relied upon by any party at trial, and were not the basis for any of the steps taken before, during or after the issue of the subpoena.

As we read the Stinchcombe decision, it forces the prosecutor to disclose to defence counsel relevant matters which the investigation of the crime has disclosed and which are within the control of the prosecutor. For the sake of argument (without deciding), we suppose that that might extend to matters which the police have uncovered and have not revealed to the prosecutor. None of that has any resemblance to the present case.

This was an ordinary criminal prosecution run by a regular prosecutor in Alberta's Department of the Attorney General. The files in question were held by a federal civil servant in another province. In our view, they were held by a stranger to this prosecution. If the Stinchcombe decision, supra, supported production of these files, then it would presumably support production of files from the Income Tax Department, the telephone company, a bank, or a private hospital.

Counsel for the defence urges that the Crown in Canada is indivisible and that in any event even ordinary prosecutions by a provincial Attorney General must be regarded as being done on behalf of the Crown in the Right of Canada because it is the legislative power of the Parliament of Canada which authorizes prosecutions. No authority was cited for any of those propositions. If that line of reasoning were correct, then in order to meet the tests in Stinchcombe, some months before trial every Crown prosecutor would have to inquire of every department of the Provincial Government and every department of the Federal Government. He would have to ask each whether they had in their possession any records touching each prosecution upcoming. It would be impossible to carry out 1% of that task. It would take many years to bring every case to trial if that were required.

What is worse here, the records sought to be produced had nothing to do with the crime or the matters in issue in the present case. Indeed they had nothing whatever to do with the accused. The hope was presumably that something might be found in the records in question which would bear on the credibility of a prospective Crown witness. There was patently no prospect whatever that the files would contain anything relevant in any way to the issues in the prosecution. The only possible matter would be a collateral one.

That being so, it was almost impossible to know how a prosecutor or anyone else could before trial apply a Stinchcombe duty of disclosure to such matters not even in the hands of the police or the prosecutor. For example, must the Crown before calling each witness check with the Credit Bureau, the Income Tax Department, and C.P.I.C. to see if he has any convictions or other discreditable matters in his past? Must the prosecutor try to get medicare records to see if the witness has ever consulted a psychiatrist? We say no.

Therefore we think that there was nothing improper with this aspect of the trial. Even if we are wrong, it was common ground that most of the witnesses, including this witness, were clearly very unsavoury unreliable people. Crown counsel very frankly told the jury that himself. So did able and experienced defence counsel. Then the trial judge told the jury that repeatedly as well. Even if we are wrong, and there was some error committed with respect to the subpoena, in our view it caused no substantial wrong or miscarriage of justice.

It is convenient now to pass on to another ground of appeal relating to the same witness. The witness was permitted to testify at trial under the name "John Smith" and it was made plain to the jury that that was not his real name. A bit of evidence was also

elicited indicating that "John Smith" was a serving prisoner and had some fears for his safety because of his testimony. It was said that that, coupled with the use of the pseudonym, prejudiced the accused. Whether or not the rights of the media may have been prejudiced by this pseudonym and the accompanying ban on the use of the real name is irrelevant to the case of the prisoner. This inmate witness and the accused were well known to each other and indeed the testimony of the witness was about alleged conversations between the two men while they were both in prison together. The accused and his counsel knew the correct name of the witness. Indeed the subpoena above referred to was sought by counsel for the defence using the real name of the witness.

Defence counsel suggests that the jury would have taken it that the threat to the safety of the witness came from the accused and that that was prejudicial to the accused. But the objection made is to the use of the pseudonym. That pseudonym would not reinforce such a suggestion, but rather counteract it. If the threat *were* from the accused or his friends, then there would be no need for a pseudonym, as the accused knew perfectly well the proper name of the witness, and the testimony of the witness made it abundantly obvious that that was so. The witness did not use the pseudonym as a prisoner, but only when testifying. The only possible use of a pseudonym on the stand would be to protect the prisoner from persons who were ***not*** the accused and were not friends of the accused, and indeed were not in contact with the accused.

Counsel for the accused *suggests* that it is *in* the interests of every accused that every Crown witness testify in his proper name, so that persons who are not present in court but read the newspapers will know who the witness *is* and come forward voluntarily if they spot any inaccuracies in the evidence of the witness. That may be one of the background reasons for promoting *openness* of trials and not routinely having witnesses testify anonymously. But we cannot say that it is a strong enough consideration to bar the use of pseudonym where a witness has a legitimate reason for fearing death or injury if he testifies in his real name. In any event, we again cannot see that any substantial harm was done to the accused.

A number of the Crown witnesses were not merely of bad character; they also had given prior statements which conflicted with their trial testimony on certain points. Counsel for the accused ably brought out those conflicts in cross-examination.

However, the accused now complains that the charge to the jury did not tell the jury that the prior inconsistent statements by those witnesses could ever be evidence in themselves. He says that the impression was left with the jury that such prior inconsistent statements could be used only for credibility. He points out that that is not completely correct where the witness on the stand adopts the previous inconsistent statement.

In our view, the point is very close to being academic here. We have examined the passages said to be adoption of previous inconsistent statements, and doubt that any of them are adoptions. Furthermore, in one case the previous inconsistent statement said to be adopted was merely that the witness had no memory on the point in question. Even if adopted, that would not be evidence of the contrary; it would just be no evidence at all.

The one witness who came closest to adopting a previous inconsistent statement was the witness Ward. Counsel for the accused submits that the jury should have had the opportunity, on their own, with proper instructions, to decide whether or not what Ward said about her previous inconsistent statement was an adoption. It is not suggested that she adopted her whole previous statement, but only one portion of it on one subject (how many men were in the car at a certain time?). Counsel for the defence in his next question on cross-examination asked the witness what her memory was on the same point and got the answer standing on its own two feet as evidence in its own right. Therefore, even if there was an adoption but the jury thought that they should ignore the content of inconsistent statements and not take them as evidence of their contents, it did not matter. The identical facts came out in evidence from the witness seconds later. Plainly no harm has been done if there is any error there.

Counsel for the accused appellant also complains that counsel for the Crown was permitted to speculate before the jury that one of the witnesses had assisted the accused after the shooting to throw the body a few feet into the field where it was later found surrounded by undisturbed grass. There was no direct evidence that that had occurred, and the eyewitness certainly did not say that he had taken that part in disposing the body.

We really see no harm in that. Unless one adopts the fantastic supposition that the body was dropped off a crane or from a helicopter, then the only way it could have got into the undisturbed grass was if someone threw it there. And patently someone of normal strength

would have great trouble in throwing a dead body that weight. Obviously the practical way to do it would be for two or more people to throw it.

What is more, when the trial judge mentioned this point, he specifically pointed out to the jury that "There is no direct evidence to support this theory".

Most criminal juries are required to draw or not draw inferences which are not directly supported by evidence. This inference was not even on a point directly in issue. The charge was murder, not disposition of a body.

It is suggested that there was real significance to the disposition of the body. The pathologist testified that lividity of the body showed that for about 12 hours after death it had been lying on its side. It was then suggested that when the body (some days old) was found in the field it was lying on its face, not on its side. It was then suggested that that cast doubt on the whole eyewitness story that the victim was murdered and left at or near the spot where he was found.

However, those points were made to the jury and the jury was allowed to retire with the exhibits, including the photographs of the body as it was first found. The jury heard argument about whether the body was really lying on its face or partly on its side. The main evidence on that point was the photographs, and the jury were as well situate as anyone else to look at the photographs and see whether the position of the body as the police first found it was inconsistent with the story of the eyewitness and the evidence of the pathologist. No one has suggested to us that the evidence was so clear that the jury could not reasonably have found that the body was found partly on its side. The only track found coming up to the body appeared to be that of an animal. Even if the body for the first 12 hours of death were lying on its side, there was no evidence whether or not animals or gravity or some other natural phenomenon could have caused the body to shift somewhat during the days that elapsed before it was found. It was found by a man out walking his dog. The possibility of shifting is not merely supposition on our part; one of the identification constables testified that he saw certain signs at the scene so that "it appeared as though perhaps the body may have rolled over, trampling the grass on the right hand side". Another identification constable testified to the same effect.

The trial judge pointed out to the jury that these pieces of evidence did raise a difficulty for the Crown, though he suggested that they might conclude that it *was* not an insurmountable one.

The jury were repeatedly shown by evidence, and told by both counsel and the trial judge, how unsavoury and untrustworthy were many of the Crown witnesses, and how often they had lied in the past. That was particularly true of the inmate who testified under the name "John Smith" and whose records in Saskatoon were the subject of the abortive subpoena.

It was for the jury to decide whether part or all of the evidence of these Crown witnesses convinced them beyond a reasonable doubt of the guilt of the accused. The matter was fairly put to them and they obviously were satisfied.

In our view, neither the particular grounds of appeal raised, nor the evidence taken as a whole, show any serious wrong or miscarriage of justice and we have no hesitation in dismissing the appeal and affirming the conviction.

Appeal dismissed.

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## Regina v. Singh

[Indexed as: R. v. Singh]

*Alberta Court of Queen's Bench, Medhurst J. July 24, 1990.*

*M.J. Blain,* for applicant.
*E.C. Wilson,* for the Crown, respondent.

MEDHURST J.: — On October 12, 1989, Staff Sergeant Barrett and Detective Dunn of the City of Calgary police force attended

the residence of the applicant Gurcharan Singh and served him with a subpoena to attend and to give evidence at a preliminary inquiry to be held in Calgary on October 30, 1989. The preliminary inquiry related to four accused persons who had been charged with the August 12, 1982 murder of Gurmeet Singh Waraich.

As a result of discussions with Singh the detectives had reason to believe that he might not attend in response to the subpoena so they arrested him and took him to the main City of Calgary police station. The detectives then made an *ex parte* application under s. 698(2) of the *Criminal Code* before D.G. Ell, justice of the peace, for a warrant in Form 17 for the arrest of Singh.

A judicial interim release hearing took place later the same day. This application was adjourned until the next day due to the unavailability of Crown counsel and the inability of Singh to contact his lawyer. He was detained in custody.

The application on October 13, 1989, proceeded before Provincial Court Judge W.A. Troughton. Representations were made by Crown counsel, Mr. Hagglund, concerning the service of the subpoena on Singh on October 12, 1989, and the *ex parte* order to the effect that Singh was a very close friend of one of the accused charged with the 1982 murder being a man named Boudreault.

Mr. Hagglund asked for the detention of Singh as a material witness under s. 706 of the *Criminal Code*. Duty counsel McLelland spoke for Singh and gave his account of the conversation with the detectives at the time the subpoena was served on October 12, 1989. An order was granted detaining Singh until the conclusion of the preliminary inquiry due to commence October 30, 1989.

On October 18, 1989, an order was granted by Justice W.E. O'Leary of the Court of Queen's Bench for interim judicial release of Singh on the conditions therein set out. Singh was subsequently released after spending approximately six days in detention.

The applicant Singh now seeks to have the Form 17 warrant for witness dated October 12, 1989, and the Form 19 warrants remanding a prisoner dated October 12, 1989, and the warrant for committal issued October 13, 1989, quashed.

It is argued by the applicant that there was non-compliance with the requirements of 698(2) of the *Code* concerning the issuing of the Form 17 witness warrant on October 12, 1989, and accordingly the justice of the peace lacked jurisdiction to issue the arrest warrant. Section 698(2) reads:

> 698(2) Where it is made to appear that *a person who is likely to give material evidence*
>
> (*a*) will not attend in response to a subpoena *if a subpoena is issued*, or
>
> . . . . .
>
> a court, justice or provincial court judge having power to issue a subpoena . . . may issue a warrant in Form 17 to cause that person to be arrested . . .

(Emphasis added.) It is submitted that no evidence was presented in support of this order to the effect that Singh was a person likely to give material evidence. A transcript of this hearing, sworn March 21, 1990, has been filed as ex. "A" to the affidavit of the applicant.

In *R. v. Kinzie*, [1956] O.W.N. 896 (C.A.), the trial judge refused a defence request to issue a bench warrant for the arrest of a witness following service of a subpoena. On that application there was no evidence adduced and no submissions made by counsel showing, or tending to show that such witness was likely to give material evidence. Application for leave to appeal this judgment was refused and at p. 896 Laidlaw J.A. stated:

> The power of the trial judge to issue a bench warrant is found in s. 603 of The Criminal Code, 1953-54 (Can.), c. 51. That section plainly contemplates that there shall be an exercise of judicial discretion on the part of the judge who hears the application. He does not issue a bench warrant, following the issue of a subpoena, as a matter of right for any witness whom an applicant seeks to name; that witness must be a person who is likely to give material evidence and it must be made so to appear to the trial judge.

Crown counsel acknowledges that s. 698(2)(*a*) grants jurisdiction to the justice to issue a witness warrant when it is made to appear that a person likely to give material evidence will not attend in response to a subpoena if a subpoena is issued. Counsel for the Crown however seeks to distinguish *R. v. Kinzie* on the basis that the order sought in that case was for a witness warrant in a proceeding under s. 705 of the *Code*. It must be noted that in both ss. 698(2)(*a*) and 705 there is a requirement that the person sought to be arrested is a person likely to give material evidence.

Further in this regard reference is made to *Foley v. Gares* (1989), 53 C.C.C. (3d) 82, 74 C.R. (3d) 386, 80 Sask. R. 241 (C.A.). In this case an application was made to quash the subpoenas of two witnesses required to attend a preliminary inquiry. The subpoenas were issued by the Chief Clerk of the Provincial Court and not by the presiding justice.

It was conceded that no supporting evidence or material was presented to the justice before he issued the subpoenas. At p. 88

Bayda C.J.S. in dealing with the exercising of judicial discretion by the subpoena issuing justice stated:

> The justice may choose not to insist upon evidence on oath but he may want to conduct an oral examination, if only a cursory one, of some person who has knowledge of the circumstances. The extent of such an examination will depend on the circumstances of each situation. One thing however is certain. If he takes no steps whatever to satisfy himself that the person is likely to give material evidence, the justice is abusing his power and his discretion if he issues the subpoena. His decision to issue the subpoena may be set aside by a superior court on the ground that without making any examination the justice had no jurisdiction to exercise his discretion to issue the subpoena. In short his decision is amenable to *certiorari*.

It may be that there is a doubt concerning the degree of inquiry that must be made about the materiality of the evidence to be given to the justice issuing a subpoena. However, in my view, it is clear that before a warrant can be issued in Form 17 under s. 698(2)(*a*) the justice is required and must ensure that it is made to appear that the person named is likely to give material evidence. He is required to exercise a discretion on the basis of evidence presented to him. In this instance no evidence was presented to the justice of the peace that the applicant Singh was a person likely to give material evidence. The transcript of the *ex parte* hearing is clear.

Counsel for the Crown argued that the production of a subpoena to the justice was sufficient to indicate to him that the person named is likely to give material evidence. In my view the production of a subpoena does not in any way indicate that the person named would satisfy that requirement of the *Criminal Code*.

In *R. v. Dubois* (1986), 25 C.C.C. (3d) 221 at p. 230, 26 D.L.R. (4th) 481, [1986] 1 S.C.R. 366, Estey J. stated: "Jurisdictional error is committed where 'mandatory provisions' of the *Criminal Code* are not followed . . .". This, I believe, is such a mandatory provision. Before the justice can issue a warrant in Form 17 under s. 698(2)(*a*) and in order to acquire jurisdiction there must be some evidence that the person named is likely to give material evidence. In this case no such evidence was presented to the presiding justice. Accordingly he lacked jurisdiction to issue the warrant and the application for *certiorari* to quash the arrest warrant is granted.

It is now necessary to determine the validity of the subsequent actions of the justices of the court in detaining the applicant until his release pursuant to an order of Justice O'Leary. Section 706 of the *Criminal Code* provides:

706. Where a person is brought before a court, judge, justice or provincial court judge *under a warrant issued pursuant to subsection 698(2)* or section 704 or 705, the court, judge, justice or provincial court judge may order that the person

(*a*) be detained in custody, or

(*b*) be released on recognizance in Form 32, with or without sureties, appear and give evidence when required.

(Emphasis added.)

This section refers to a person being before the court under a warrant issued pursuant to s. 698(2) of the court. Inasmuch as this warrant was invalid, the detention orders made pursuant thereto are also invalid. Crown counsel argued that s. 25(2) is an answer to this part of the application. Section 25(2) is justification for a person acting pursuant to an order even though the order might have been granted without or in excess of jurisdiction but it does not make the order itself valid.

The application to quash the detention orders is granted.

*Application granted.*

**Alberta (Director of Child Welfare) v. K.W., 2003 ABQB 712**

Date: 20030815
Action No. 0303 11945

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF EDMONTON

BETWEEN:

DIRECTOR OF CHILD WELFARE

Respondent (Applicant)

- and -

K.W.

Applicant (Respondent)

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REASONS FOR JUDGMENT
of the
HONOURABLE MR. JUSTICE JACK WATSON

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APPEARANCES:

Robert P. Lee,
Barrister and Solicitor,
Old Strathcona Law Office
For the Applicant (Respondent)

Reeva Parker,
Barrister and Solicitor,
Alberta Ministry of Justice
For the Respondent (Applicant)

Kathleen Davies,
Barrister and Solicitor,
*Amicus Curiae* for K.W.

**1. Introduction**

[1] [ORALLY][1]: This matter comes before me in open morning chambers in relation to the case of K.K-W, date of birth November 26, 2001, a child within the meaning of the ***Child Welfare Act***[2]. The particular motion that is before this Court at this time is styled the *Director of Child Welfare and K.W.* and the Court action number is 0303-11945.

[2] The Notice of Motion that was issued on behalf of the Director of Child Welfare was originally returnable on Friday of this week to quash two subpoenas which had apparently been issued on the 2nd of May of 2003 in relation to proceedings pending before the Provincial Court of Alberta in relation to a Permanent Guardianship Order application brought by the Director of Child Welfare in relation to the child K.K-W.

**2. The Procedural Context**

[3] The situation (as I understand it as provided to me by counsel) is that on June 19th of 2003, a pre-trial conference was held before Her Honour Assistant Chief Judge Franklin of the Provincial Court in relation to the proceedings to be conducted in the Provincial Court in relation to the Permanent Guardianship Order application respecting K.W.

[4] What I am told is that on June 19th of 2003, Her Honour Assistant Chief Judge Franklin ruled that she did not have a jurisdiction to quash the subpoenas that had been issued on May the 2nd of 2003 to which I will refer to momentarily.

[5] Her position in relation to that would appear to have been based on the proposition that the actual quashing of a subpoena issued by the Court was a function of the superior court and not a direct function of a trial judge, even a case manager judge, in the Provincial Court.

[6] In connection with that particular point, I certainly agree with her that the jurisdiction of the superior court and that is to say a section 96 Judge[3] in this jurisdiction to quash subpoenas issued before courts of other jurisdictions shall we say - or more relevantly, other statutory jurisdiction - does exist.

[7] A leading case on that particular point is ***Jobin***[4]. Consequently, the application brought by the Director of Child Welfare to quash the subpoenas is, at least legally speaking, properly before this Court within its jurisdiction.

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1 Edited for publication. Headlines and footnotes added.

2 The *Child Welfare Act*, R.S.A. 2000, c. C-12.

3 S. 96 of the *Constitution Act, 1867.*

4 R.v. Jobin (Reinie) et al. [April 13, 1995] 2 S.C.R. 78, 97 C.C.C. (3rd) 97, 169 A.R. 23, 97 W.A.C. 23, 28 Alta. L.R. 305, 27 C.R.R. (2d) 229, 180 N.R. 303 (S.C.C. No. 23190). See paras. 27 to 34 per Lamer C.J.C.

[8] The decision made by Judge Franklin on the other hand, is something that I might mention in passing. Not having the benefit of a transcript of it, I am not able to say at this particular point as to the reasoning upon which Judge Franklin proceeded in that role. It could be that the language that was presented to Judge Franklin at that time may have provided Judge Franklin with a different perspective on how this was being proceeded with. She also may have felt that as a case manager judge rather than being as a trial judge, it was not within her scope to look at the relevance of evidence to be called before her in the nature of a trial.

[9] Off the top of my head, it does seem to me that within the meeting of a decision I gave in ***Song***[5] – which is a decision relative to review the role of a judge at a preliminary inquiry – that there would be a scope of relevance question which a judge, who is actually a trial judge in relation to a Permanent Guardianship Order application, could exercise in determining whether or not subpoenas should or should not issue by that Court in relation to the proceedings before that particular Court.

[10] I take, in that regard, cognizance of the position expressed by counsel for the Director of Child Welfare that Section 34 of the *Alberta Evidence Act*[6] would be considered by a judge as well as other factors.

[11] However, I therefore would summarize this point by saying that if Judge Franklin was ruling that she does not have jurisdiction to quash a subpoena issued by a member of the same Court, she is absolutely correct and it belongs here.

[12] If she was saying that if she were the trial judge, she would not have jurisdiction to withdraw a subpoena issued by the same Court rather than quash it, I do not necessarily agree with that. I have not heard legal argument on that particular point, but it does seem to me possible that Judge Franklin, as a trial judge if that is what she were, exercising such a jurisdiction would have some ability to determine or make adjudication on the question of relevance in terms of withdrawing a subpoena inasmuch as the same Court has to make a similar decision as to relevance in relation to issuing the subpoena in the first place.
[13] Therefore, as I said before, I am not making a decision whether or not Judge Franklin is or is not incorrect in relation to her ruling as to June 19th of 2003, except to say that she was definitely correct on the subject that quashing subpoenas comes here and therefore there is nothing wrong with the Crown, through the Director of Child Welfare, bringing an application to quash the subpoenas.

**3. The Subject of the Subpoenas**

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[5] R.v. Song (Daniel), (July 30, 2001) 296 A.R. 132, [2001] A.J. No. 1056 (QL) (Alta. Q.B. No. 98132-2155-Q1; 2001 ABQB 689).

[6] The *Alberta Evidence Act*, R.S.A. 2000, c. A-18.

[14] I now turn to what the subpoenas are. It was my understanding that the subpoenas had been issued for the Minister of the Crown, Iris Evans, and also for one Jackie Stewart who is the person identified as the Government of Alberta's Manager of Litigation Support with the Ministry of Children's Services.

[15] These two individuals are said by Mr. Lee to be able to offer relevant evidence for the purposes of the Permanent Guardianship Order trial in two general areas.

[16] The first general area, as explained by Mr. Lee to me, was in relation to a risk factor analysis respecting the handling of children by foster parents under the supervision of the Director of Child Welfare.

[17] The second factor of relevance that Mr. Lee put forward was that the Director of Child Welfare or the government at large has a conflict of interest as it were in relation to the handling of children inasmuch as the government, according to his argument, is not showing interest enough in suing both itself and foster parents who misbehave towards children for the remedies that those children might otherwise be entitled to acquire by legal proceedings on their own behalf.

[18] Mr. Lee, in that latter regard, suggests that he would be calling evidence at the Permanent Guardianship Order hearing to suggest that he has had clients who have had their rights shortchanged as it were by government intervention. Likewise, Mr. Lee proposes to me that he would be attempting to lead evidence probably through specifically Ms. Evans and Ms. Stewart (according to his theory on how to call them as witnesses) that would suggest that there is this risk factor in connection with the raising of children as through foster parenting arranged through the Government of Alberta.

[19] The scope of relevance issue on both of those points has been challenged of course by the Director of Child Welfare. It is not strictly speaking before me to determine whether or not the subpoenas that have been issued for such purposes are, in fact, a valid issue for the purposes of the Permanent Guardianship Order. As pointed out before, this Court would have jurisdiction to determine whether or not that is the case on the motion for *certiorari* to quash those particular subpoenas.

[20] The specific question that arises before me at this particular time is whether or not I should permit Mr. Lee to call evidence on the actual hearing of the motion to quash the subpoenas.

[21] It has been explained to me by Mr. Lee that he would not be calling, in fact, either Miss Stewart or Miss Evans as witnesses on that particular application. What in fact he would be doing would be to offer extra evidence, perhaps family members and other types of circumstantial evidence, to support the general nature of the scope of relevance for those two subpoenas.

[22] It appears to me as explained by Mr. Lee that the opportunity that he wishes to put forward to obtain an order to put forward his case in response to the application to quash the subpoena is in effect an opportunity to justify the subpoena in the first place on the scope of relevance that he has proposed.

[23] In other words, Mr. Lee is contending that on an application to quash a subpoena, what should happen is that the person who issued the subpoena should be in a position to call the evidence that they would have formally called to justify the subpoenas in the first place at the time of the motion to quash the subpoena

[24] This is because the challenge is, of course, that the subpoenas should not be issued and that therefore it should be possible, even though it is after the fact - that is to say after the issuance of the subpoenas - for the parties seeking the subpoenas and obtaining the subpoenas to justify their issuance in the first place and thereby resist the motion to quash the subpoenas.

**4. Analysis**

[25] In relation to this particular point and that type of application, I am required, it seems to me, to govern myself by Part 56 and Part 56.1 of the *Rules of Court*[7]. That is because the application to quash subpoenas in a civil matter or quasi civil matter it seems to me are governed by those particular parts.

[26] In relation to Part 56, I will merely read out Rule 738(1.1) which provides as follows:

> 738 (1.1) An order in the nature of *mandamus*, prohibition, *certiorari*, *quo warranto* or *habeas corpus* may be granted upon application for a judicial review under Part 56.1.

[27] I therefore turn to Part 56.1. It goes on to talk about the Court having jurisdiction to grant relief under Rule 753.04 of the *Rules of Court* and so on. I mentioned during the course of argument that in relation to an application of that kind, that Rule 753.19 applies and that rule sets out that as follows:

> 753.19 Except where specially provided in this Part to the general Rules including the originating notice Rules in Part 33 and those relating to abridgment or extension of time, apply to all matters under this Part.

[28] In connection with that particular general application, I therefore drew to the attention of counsel the fact that the affidavit that was offered as it happens by Jackie Stewart, one of the two persons that Mr. Lee would like to call as a witness before the Permanent Guardianship

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[7] The *Alberta Rules of Court*, being the Rules of the Court of Queen's Bench of Alberta are Alberta Regulation 390/68 as amended.

Order Court, is an affidavit which seems to me is governable by Rule 314 of the *Rules of Court*. It therefore would be subject to cross-examination for the purposes of the hearing under the Part 56.1 application for *certiorari* to quash the subpoenas.

[29] Mr. Lee has pointed out and I can understand his position that he does not choose to examine Miss Stewart under Rule 314 because of the litigation risks you might say that might be attendant upon doing so[8]. As I said before, I think Mr. Lee can make his forensic choices as he is -- feels best to do so I certainly am not going to say anything about that. Suffice it to say, however, that that affidavit would still stand as it stands now before the Court as part of the application brought by the Crown.

[30] In relation to the discussion of *other* evidence to be provided in support of the application for the position taken by Mr. Lee relative to supporting the relevance of the subpoenas that were issued in the first place, however, I have to consider myself guided by the general propositions which are contained in the Rules of Court respecting not only Parts 56 and 56.1, but also the general parts in relation to the conduct of civil matters.

[31] It seems to me that Mr. Lee's request for leave to introduce evidence in relation to the Crown's application for *certiorari* to quash the two subpoenas, would, in effect, be an application to have a trial conducted in relation to that particular point.

[32] That is a point that is a matter of exercise of discretion on the part of the Court in relation to jurisdiction and civil matters. While I understand the position taken by Mr. Lee in relation to that, it seems to me it is not something which should be done casually or routinely in relation to *certiorari*. I am not suggesting that Mr. Lee in any way is acting casually or routinely in this respect. I am saying that the position that might occur as a result of my exercising that jurisdiction might be given a too liberal an interpretation if I were to do it incorrectly.

[33] In relation to that particular point, it is my reading of Part 56.1 of the *Rules of Court* relative to judicial review in civil matters, (1) that those judicial reviews should be conducted on a record and (2) that the main theory of those particular provisions of the *Rules of Court* is to have a particular court order or tribunal decision that is made, that is subject to review or setting aside or quashing, be determined or assessed on the basis of the record that existed associated therewith.

[34] If in this instance for instance there is no record that has been provided by the author of the subpoena who issued the subpoenas on May the 2nd of 2003 relative to how they -- the subpoenas were obtained, that is as it is. That author should have provided a return in accordance with the Part 56 approach relative to this particular matter and that is all there is to

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[8] Including the requirement of filing the entirety of the examination on the affidavit and not just selections: Rule 314(3).

it. I am not trying to *mandamus* her to do so or him to do so, whoever that was. If there is no record there is no record. Sometimes there is; sometimes there is not.

[35] However, the point I am attempting to make in relation to the question of the record is simply this: that *certiorari* is intended to work in a retrospective fashion. It is intended to quash a previous decision that might be of a quasi-judicial nature by a tribunal and it is not intended to allow rectification of a previous proceeding in some manner and by some substitute method of having the full hearing that perhaps ought to have occurred on the earlier date, take place in front of a *certiorari* court.

[36] So in that sense then, it is my view that to grant Mr. Lee's request to allow live evidence to be called in relation to the application to quash the subpoenas in this instance, would be in effect to convert the hearing before our Court which is to be limited to judicial review by way of *certiorari* into a retrial of the question of whether or not the subpoenas should or should not have been issued in the first place.

[37] It is true that the issue that is raised by the Director of Child Welfare in relation to the motion to quash the subpoenas has a similar effect to that except that in law it seems to me the application is strictly speaking only an application to quash subpoenas on the basis that they were issued before.

**5. Conclusion**

[38] In other words, the Director of Child Welfare is entitled to come to this Court and say these subpoenas were invalidly issued, they should be quashed.

[39] This would then present Mr. Lee with the position of perhaps applying to the Provincial Court and perhaps the presiding judge, Judge Franklin, for other subpoenas to replace the original subpoenas and then have a proper hearing in front of Judge Franklin on the real scope of the question of relevance.

[40] Judge Franklin would then have the jurisdiction to decide whether or not the subpoenas are relevant, whether or not they are within the scope of the parental -- Permanent Guardianship Order application that is being conducted before her or not.

[41] It may be that as a result of a ruling that she makes on proper submissions and so on, she might or might not issue either or both of the subpoenas. If she does, they might again or might not be subject to a motion for *certiorari* brought to this Court, but at that time the full hearing and a full record with her decision and her consideration of the relevant circumstances would then be before the Court.

[42] So, after that long peroration - a transcript of which I will arrange to have provided to counsel - it is my view that Mr. Lee's application at this time for leave to introduce evidence on the *certiorari* application must, for procedural reasons, be denied. I would also suggest that

if counsel are prepared to expedite this matter, that they offer me the opportunity to quash the subpoenas now so that you can now go back to Judge Franklin –

MR. LEE: I would consent to the subpoenas to be quashed, sir.

MS. PARKER: Thank you.

THE COURT: All right. The subpoenas will be quashed and I urge you to go back to Judge Franklin and as I say a transcript of this will be provided. It will be up to counsel whether or not they want to supply that transcript to Judge Franklin as well.

MS. PARKER: Just for clarification, My Lord, with regard to Judge Franklin, she was the case manager judge, she is not the trial judge. The trial judge as I understand it will be Judge -- presently scheduled to hear the trial is Judge Kvill. Is your direction that this matter go back to the Provincial Court for this application to issue subpoenas or is to go back to the trial judge in the Provincial Court?

THE COURT: I hesitate to micro-manage the Provincial Court in the exercise of its functions although I made the observation during the course of my judgment and it seems to me that the jurisdiction relative to subpoenas really belongs to a trial judge. That is possibly an opinion of law that Judge Franklin might disagree with.

However, I should say this that because the court is a statutory court and Judge Franklin is obviously aware of that and respectful of that, it would seem to me that any initiative jurisdiction relative to something like that would now really rest with a trial judge.

The Court of Appeal in ***Cutforth***[9] a number of years ago ruled that trial judges were the carriers of, you might say, supplemental or additional jurisdiction that is necessarily incidental to the exercise of their authority. Case manager judges are members of the same court helping and I think therefore that to answer your question in a long-winded fashion, Judge Kvill should deal with it.

MS. PARKER: Very good. Thank you, My Lord.

THE COURT: That will be included in the transcript.

MR. LEE: Thank you, My Lord.

MS. PARKER: Thank you.

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[9] R.v. Cutforth (Charles Brian) (September 30, 1987) 61 C.R. (3d) 187, 55 Alta. L.R. (2d) 193, [1988] 1 W.W.R. 274, 81 A.R. 213, 40 C.C.C. (3d) 253, 12 M.V.R. (2d) 248 (Alta. C.A.).

MS. DAVIES: Thank you, sir.

HEARD on the 23rd day of July, 2003.
ORALLY RENDERED on the 23rd of July, 2003.
**DATED** at Edmonton, Alberta this 15th day of August, 2003.

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**J.C.Q.B.A.**