

R. v. Chan, 2002 ABQB 866

Date: 20021002
Action No. 0003-2182-C5

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

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and -

ALEX HANG CHAN, MAN KIT CHAN, DONALD CHEUNG, SAI MING FOK,
TIEN LAI LAM, WILLY T. LAU, HIEP QUANG LE, THI HOANG LE,
JAMES EDWARD MAH, HELEN HOANG NGUYEN, JERRY NGUYEN,
LONG NGUYEN, PHUC DUC NGUYEN, ANH LE TRAN, BAO MINH TRAN,
PHONG HUY TRAN, TRUNG QUOC TRAN, VU HANG TRINH,
ADRIAN TIBURICO VERGARA AND JOSEPHINE SOO YUN VOON

Applicants
(Accused)

REASONS FOR DECISION
of the
HONOURABLE MADAM JUSTICE D. SULYMA

APPEARANCES:

R.J. Wilkins, Q.C., C. Bond, R.W. Short and S. Dej
for the Respondent

Larry Ross, Marrion Bryant, Marvin Bloos, Larry Fleming,
Naeem Rauf, Kevin Moore, Richard Cairns, Ravi Prithipaul,
Jake Chadi, Scott Pittman, Paul Moreau, Hersh Wolch,
D.H. Abbey, Tom Engel, Scott Park, Keith Groves,
David Scorgie, Jim Braiden, Murray Stone, Paul Solotki,
Rick Stoppel, Marshall Hopkins, Mac Walker, Steve Fix,
Alicia Wendel, Howard Poon, Bob Hrycan, David Paull,
G. Turcin, Angus Boyd, Clayton Rice, Wendy Bouwman
and Greg Worobec
for the Applicants

NATURE OF THE APPLICATION

[1] On September 4, 2002, in the course of *voir dire* proceedings relating to the Crown's disclosure obligation, I held a brief *ex parte* hearing in the absence of the accused and their counsel. The purpose of this hearing was for the Court to obtain information from the Crown concerning facts discussed in a memorandum over which it had claimed solicitor-client privilege in order to assess whether a judicial summary need be provided. The clerk's notes, videotape and transcript of this hearing were sealed. The accused subsequently submitted that I lost jurisdiction as a result of this *ex parte* hearing. Having considered the submissions of the Defence and Crown and after indicating that I intended to unseal the clerk's notes and an edited version of the videotape and transcript of that hearing, I gave an oral decision on September 13, 2002 in which I advised that I was of the view that this Court has not lost jurisdiction. The following are my Reasons for that decision.

BACKGROUND

[2] This motion is brought on behalf of the 11 accused in this matter, each of whom is charged with one count of conspiracy to traffic in cocaine. These accused and 25 others originally were charged by way of an information sworn on September 24, 1999 with a total of 21 drug related offences. A new information was laid on February 25, 2000 charging 37 individuals, including the accused in this trial, with a total of 34 offences. Approximately two months later, a new information was sworn against the 37 accused, charging them with a total of 41 offences. A direct indictment against 35 of the accused was signed on August 18, 2000 charging them with 39 counts. A second direct indictment was issued around October 2000.

[3] Mr. Justice Binder was assigned as trial judge and commenced hearing motions and *voir dire*s in November of 2000. The accused were arraigned on November 21, 2000. In March of 2001 I was assigned to hear motions relating to some of the accused and some of the charges. A

severance of certain of the counts and accused was granted by Binder J that month. The Crown withdrew all of the charges against 21 of the accused, save a charge of conspiracy to traffic in cocaine. I was assigned as the trial judge to hear the matter involving these 21 accused on an amended indictment dated April 23, 2001. Since commencing these proceedings, some of the accused have entered pleas and the Crown has entered stays against other accused. As a result, by September 4, 2002, only eleven accused remained.

[4] Since March of 2001 I have heard and determined motions and conducted *voir dire* proceedings. To date, there has been no *viva voce* evidence heard by me in these various *voir dire* proceedings and a jury has not as yet been impaneled.

[5] Various accused have applied on many occasions to be excused from the *voir dire* proceedings. Such excusals have almost invariably been granted by me. Given the length of the *voir dire* proceedings on the various motions, the accused applied collectively in February of 2002, pursuant to s. 650(2)(b) of the ***Criminal Code***, to be excused until *voir dire* proceedings have been completed and the trial is at the stage of impaneling a jury. No issue was raised at the time as to whether the *voir dire* proceedings should be considered part of the trial proper. However, I was concerned about maintaining jurisdiction over the accused and in my Order of March 6, 2002 directed that, despite their excusal, the accused appear periodically on dates set by me. Those dates have roughly been at four to six weeks intervals and on each of those occasions all of the accused have been present. The most recent date for the required presence of the accused was September 3, 2002.

[6] Because the accused were to be excused when the Court was involved in *voir dire* proceedings, save for their ordered periodic appearances, I directed that on every occasion that the Court convene each accused be represented by way counsel and that counsel sign in as being present and representing a particular accused. A daily sign-in sheet was used for this purpose. The record will indicate that on numerous occasions, at the commencement of a sitting, the sheet was not signed for a particular accused and that this was brought to my attention by Court staff and remedied. Interestingly, the most recent occasion on which this occurred was the morning of Monday, September 9th in regard to the accused Sai Ming Fok. The Defence by that date were considering whether to proceed with the current motion.

[7] The present *voir dire* relates to disclosure and the Crown's claim that certain relevant materials located by it or which came into its possession since September 1, 2001 are privileged. The materials in issue (Items 1-143 in the consolidated inventory marked as Exhibit 78A) were provided to me by the Crown and over the past several months have been reviewed by me.

[8] By letters dated April 24 and May 3, 2002, copies of which were provided to the Defence, I requested that the Crown provide better descriptions of certain of the documents and that it review its position on relevance and privilege in relation to other specified documents. One of the documents referred to in my correspondence was Exhibit 28, p. 10 (Item No. 6 in Exhibit 78A). On May 31, 2002 the Crown responded in writing to my request that it review its position on this document by stating: "The Crown maintains its assertion of solicitor-client privilege. The Crown will further argue its position at the *voir dire*."

[9] The Crown did not make any further submissions regarding Exhibit 28, p. 10 during the *voir dire* except to indicate that the document contains legal advice concerning a prosecution issue and that it would want to have input if I decided that a judicial summary should be provided. The Defence presented its position on the issue of solicitor-client privilege in relation to the documents in question. In the course of the Crown's rebuttal on September 4, 2002, I determined that I required additional information from the Crown concerning facts discussed in Exhibit 28, p. 10 in order to assess whether a judicial summary was necessary. The document in issue is a memorandum from Donna Tomljanovic, Department of Justice counsel, to Jenny Ariano, Rod Beck, Bill Newton, and Bill Retoff. The latter three individuals are all officers with either the Edmonton Police Service or the R.C.M.P. involved in the investigation of the charges before me.

[10] I was concerned that privilege might inadvertently be breached if I made my request for further information in open court. Trial courts have been given very little guidance as to the proper procedure to follow when faced with a situation such as this where the judge feels that additional information is required or certain inquiries are justified but is concerned that privilege may be breached by virtue of the inquiry itself. In the case of Exhibit 28, p. 10, the privilege claimed was solicitor-client, which has been recognized by the Supreme Court of Canada to be a pillar of the Canadian justice system (*R. v. McClure* [2001] 1 S.C.R. 445 at para. 2).

[11] I advised counsel that I was under the impression that Mr. Justice Binder in the sister trial of *R. v. Trang* had had occasion to have *in camera* hearings with the Crown. Crown counsel agreed that such a procedure had been employed. I now know that we were mistaken. Mr. Justice Binder on no occasion had *in camera* or *ex parte* hearings with the Crown. I have been advised by counsel that apparently he did request information from the Crown by way of letter, copied to the Defence, and that a portion of the Crown's response was not provided to the Defence. In addition, he had occasion to have *ex parte in camera* hearings with Defence counsel. These proceedings apparently occurred before the accused in that trial were arraigned.

[12] Without inviting submissions from the Crown or Defence counsel on the process, I advised all counsel that I wished to have *ex parte* discussions with the Crown to seek further information regarding the facts set out in Exhibit 28, p. 10 with a view to determining whether a judicial summary was necessary. I directed that Defence counsel leave the courtroom but remain just outside and further directed that the transcripts and videotape of the proceedings be sealed and the clerk's notes in relation to the *in camera ex parte* discussions be sealed. Defence counsel did not object to this procedure.

[13] The *ex parte* communications occurred between 9:06:39 and 9:10:41 at which time the Crown left the courtroom to obtain information. The *ex parte* proceedings resumed at 9:30:30 and continued until 9:43:57. Thus, the total time involved was approximately 17 minutes.

[14] On the morning of Thursday, September 5, 2002, Mr. Short, counsel for the Crown, advised in open court, in the presence of Defence counsel, that in response to my request for information he had made inquiries, reviewed disclosure and interviewed certain of the personnel

involved. He proceeded to provide the information which I sought, albeit in what was referred to by one of the Defence counsel as a very cryptic fashion. For example, he indicated that what was proposed in the second sentence of the memo was exactly what had occurred and that the third sentence mirrored reality.

[15] Mr. Short also brought the Ontario Court of Appeal case of *R. v. Laws* (1998), 128 C.C.C. (3d) 516 to my attention. The court in that case held that *ex parte* meetings between a trial judge and Crown which occurred during part of an accused's trial and for which there was no transcript amounted to an error that was not curable by s. 686(1)(b)(iv) of the Code. In response to a request from the Defence, I adjourned the proceedings to allow the parties to consider their positions. When we resumed on September 9, 2002, Defence counsel advised that the accused collectively took the position that this Court had infringed their right under s. 650(1) of the *Criminal Code* to be present during the whole of their trial and that accordingly the Court had lost jurisdiction over the accused.

[16] On September 13, 2002, before rendering oral judgment on this matter, I indicated to counsel that I intended to unseal the clerk's notes and an edited version of the videotape and transcript of the hearing which took place on September 4th. The sole editing is of my reference to the actual legal advice in issue. I then rendered my decision, indicating that I was of the view that the Court had not lost jurisdiction. I advised that written Reasons would follow.

ARGUMENT OF THE DEFENCE

[17] The Defence argued that a breach of s. 650(1) of the *Criminal Code* has occurred, which has resulted in a loss of jurisdiction and that this Court is unable to remedy the loss. *R. v. Meunier* (1965) 48 C.R. 14 (Que. C.A.), aff'd [1966] S.C.R. was cited as authority that a loss of jurisdiction occurs when there has been a breach of the accused's right to be present for the whole of his or her trial. According to Casey J., for the majority in that case, it is this loss of jurisdiction which distinguishes a breach of what is now s. 650 from errors that, while they may affect the right of the accused to a free and unbiased verdict, are committed while the Court is acting within its jurisdiction. Errors of the last sort are those contemplated by what is now s. 686(1)(b)(iii), which permits a Court of Appeal to dismiss an appeal if it is satisfied that no substantial wrong or miscarriage of justice has occurred.

[18] Mr. Cairns for the Defence argued that the only situations in which a trial court can regain jurisdiction once that jurisdiction is lost are those outlined in s. 485 of the Criminal Code, which do not apply here.

[19] Mr. Cairns also referred to *R. v. Hertrich et. al.* (1982) 67 C.C.C. (2d) 510 at 537 (Ont. C.A.), leave to appeal ref'd [1982] 2 S.C.R. x in which Martin J.A. suggested that whether a proceeding is one which is part of a trial for purposes of what is now s. 650(1) depends upon whether the exclusion of the accused from the proceeding affects his or her right to have direct knowledge of anything that transpires in the course of the trial which could involve his or her vital interests. This test subsequently was endorsed by the Supreme Court of Canada in *Vézina v.*

The Queen, [1986] 1 S.C.R. 2 and in *Barrow v. The Queen*, [1987] 2 S.C.R. 694. Martin J.A. in *Hertrich* stated at p. 527:

Generally, speaking, the trial of an accused does not commence until after plea: see *Giroux v. The King* (1917), 29 C.C.C. 258 at p. 268. However, “trial” for the purpose of the principle that an accused is entitled to be present at his trial clearly includes proceedings which are part of the normal trial process for determining the guilt or innocence of the accused such as arraignment and plea, the empanelling of the jury, the reception of evidence (including *voir dire* proceedings with respect to the admissibility of evidence), rulings on evidence, arguments of counsel, addresses of counsel to the jury, the judge’s charge, including requests by the jury for further instructions, the reception of the verdict and the imposition of sentence if the accused is found guilty.

[20] Mr. Cairns compared the facts in the present case where the *ex parte* hearing concerned a claim of privilege to that in *Laws* where the editing of a wiretap affidavit was in issue and submitted that both proceedings dealt with the question of whether the accused should receive additional disclosure. According to Mr. Cairns, such a question is a matter that affects the vital interests of the accused as the court in *Stinchcombe*, [1995] 1 S.C.R. 754 has advised that proper disclosure is essential to a fair trial.

[21] Mr. Cairns suggested that s. 686(1)(b)(iv) is a curative provision which can be applied at the discretion of an appellate court to preserve a conviction in the face of an error where jurisdiction is lost so long as the appellate court is satisfied that there has been no prejudice to the accused. This discretion cannot be exercised by the trial court. Mr. Cairns maintained that s. 686(1)(b)(iv) is not a method by which a trial court can self-remedy a loss of jurisdiction.

[22] Mr. Cairns also argued that the interests which are protected by s. 650 of the *Criminal Code* are *Charter* values, citing in support of this contention the dissent of Fraser C.J.A. in *R. v. Smith (R.C.)* (1995), 169 A.R. 321 (C.A.), and in particular the following passage from para. 42 of her decision:

An accused’s right to a fair trial, now constitutionally enshrined in the *Charter* under both ss. 7 and 11(d), is part of the bedrock on which our criminal justice system rests. Subsumed within this right are matters of process and procedure, including the right to have the case decided in public in accordance with accepted procedures - the appearance of justice test - as well as the right to be present at one’s trial. A number of these procedural rights, which the common law cast under the heading of a fair trial, are now expressly guaranteed by statute: see s. 11(d) of the *Charter* and s. 650 of the *Criminal Code*.

[23] Mr. Cairns maintained that once a procedural error of a jurisdictional nature is made, even without proof of prejudice, the trial is over if the error is brought to the attention of the trial court. He did, however, admit that he was astounded that a trial court does not have the power to

rectify the error and reacquire jurisdiction , particularly in lengthy and complex proceedings such as these.

[24] Mr. Cairns distinguished *R. v. Pilotte* (2002), 163 C.C.C. (3d) 225 (Ont. C.A.) from the present case on the basis that the court in *Pilotte* was concerned with a matter which fell under s. 37 of the *Canada Evidence Act*.

[25] Mr. Hopkins, for the accused Trung Quoc Tran, adopted the submissions made by Mr. Cairns and emphasized that in many of the cases referred to the accused was excluded but defence counsel was not. Both he and Mr. Bloos, who was acting as agent for counsel for the accused Sai Ming Fok, argued that the Court should not take into consideration that defence counsel in the present case failed to object to their exclusion in determining whether a loss of jurisdiction occurred as their failure to object did not amount to consent.

[26] Mr. Hopkins noted that the public has a deep and profound interest in open justice. He expressed concern that while the accused and defence counsel were excluded from the proceedings on September 4th, no steps were taken to ensure that the public was similarly excluded. Mr. Bloos emphasized that trial fairness must be apparent and argued that prejudice need not be established in order for the Court of Appeal to order a new trial. In this regard, he cited *R. v. McCallen* (1999), 131 C.C.C. (3d) 518 (Ont. C.A.), in which O'Connor J.A. for the court stated at para. 86:

There are cases, such as *Tran*, where the breach itself is such that, even absent a demonstration of actual prejudice, a new trial is required to protect and vindicate the right that has been breached and to ensure the perception of fairness of the proceeding. This reasoning is consistent with the rationale that has been applied in cases in which this court has refused to apply the curative proviso in s. 686(1)(b)(iii) and (iv) of the *Criminal Code*, and ordered new trials because there has been an appearance of unfairness...

[27] O'Connor J. referred at para. 87 to *Laws* and the court's comment in that case at p. 332 that:

The perceived fairness of the criminal justice system is its most vital characteristic. Public confidence requires public scrutiny wherever possible. Private trials which exclude the accused are antithetical to this core value. Where the circumstances of the exclusion of the accused are such as to inflict significant damage on the appearance of justice, the question is not whether there is prejudice to the accused. Rather, the issue is the harm to the criminal justice system itself. In such cases the court should refuse to apply this proviso. [The curative proviso -- s. 686(1)(b)(iv) of the *Criminal Code*.]

[28] At para. 89 O'Connor J. endorsed the test set out in *R. v. Valley* (1986), 26 C.C.C. (3d) 207 at 232 (Ont. C.A.), leave to appeal ref'd [1986] 1 S.C.R. xiii as the test to be applied by an appellate court under s. 686(1)(b)(iv):

The ultimate question to be answered is not whether the accused was in fact prejudiced by the interventions but whether he might reasonably consider that he had not had a fair trial or whether a reasonably minded person who had been present throughout the trial would consider that the accused had not had a fair trial . . .

POSITION OF THE CROWN

[29] The Crown argued that for purposes of s. 650(1) of *the Criminal Code* we were not in “trial” when the *ex parte* proceedings took place. The triers of fact were not present as a jury has not yet been empaneled. The accused did not consider the proceedings to be of such vital importance that their personal attendance was necessary. No evidence was called. No submissions were made as to the admissibility of evidence. No decision was reached by the Court. The Court had made a preliminary determination that a particular memorandum was subject to solicitor-client privilege. During the *ex parte* proceedings, the Court inquired whether the underlying facts in the memorandum had been disclosed to the Defence. I had indicated in open court that if the facts had not been disclosed, I was entertaining the possibility of issuing a judicial summary of those facts. The Crown suggested that if the proceedings had occurred in open court, the discussion between the Court and Crown would have been so guarded as virtually to have excluded the Defence.

[30] Mr. Short, for the Crown, compared the situation that occurred here with the situation in *Vézina v. The Queen* [1986], 1 S.C.R. 2 where the trial judge, in the absence of the accused and counsel, questioned two jurors who had sent a note indicating that they doubted the impartiality of certain other jurors. Lamer J. (as he then was), who delivered the judgment of the court, stated at para. 16 that the question to be addressed was whether the presence of the accused was required when the judge was determining if there was an issue involving the vital interests of the accused, or only as of the moment when that issue, having been found to exist, was being determined. At para. 19 Lamer J. concluded that:

... if on the facts of a case it is uncertain whether the accused’s vital interests are involved, the judge may, in the absence of the accused, investigate the matter. This would include questioning the jurors and, if the judge determines that these vital interests of the accused are not in issue that ends the matter, subject of course to a record being kept of the proceedings in order to determine whether he erred as regards there being uncertainty of what was in issue at the outset and as regards his final determination of the matter. This is what occurred in the *Hertrich* case. But as of the moment it appears those vital interests are in issue, the issue must be determined in the presence of the accused.

[31] The Crown submitted that during the *ex parte* proceedings this Court was merely involved in preliminary investigations to ascertain if the vital interests of the accused were engaged. While vital interests may well have been at stake in terms of the disclosure *voir dire*,

they were not an issue in the *ex parte* proceedings, given the limited ambit of the inquiries to be made in those proceedings. As a result, s. 650 did not apply.

[32] The Crown contended that, even if the vital interests of the accused were at stake, the s. 650 right of the accused to be present at their trial is not unqualified but rather can and should be modified where privilege is in issue. According to the Crown, *in camera* proceedings are permitted in these circumstances, as indicated in **R. v. Chaplin**, [1995] 1 S.C.R. 727 and as illustrated in **R. v. Guess** (2000), 148 C.C.C. (3d) 321 (B.C.C.A.), leave to appeal to S.C.C. dismissed; **Pilote** and **Fisk** (1996), 108 C.C.C. (3d) 63 (B.C.C.A.). The court in **Chaplin** suggested at para. 25 that: “Justification of non-disclosure on the grounds of public interest privilege or other privilege may involve certain special procedures such as the procedure referred to in Section 37(2) of the **Canada Evidence Act**, R.S.C. 1985, c. C-5 to protect the confidentiality of the evidence.” At para. 33 the court made specific reference to an *in camera* hearing. In **R. v. Meukon** (1990), 57 C.C.C. (3d) 193, the British Columbia Court of Appeal accepted that in a s. 37 proceeding the trial judge may hear information in the absence of the parties, their counsel and the public, where appropriate.

[33] The Crown further argued that the accused, through their counsel, waived their right to be present during the *ex parte* proceedings as no objection was made at the time to their exclusion. In addition, the Crown suggested that the right of an accused under s. 650 to be present for the whole of his or her trial is protected by the **Charter** and therefore the Court should be entitled to fashion a remedy under s. 24 of the **Charter** in the event of a breach.

ANALYSIS

[34] Section 650(1) of the Criminal Code provides that an accused “shall be present in court during the whole of the accused’s trial” subject to certain exceptions. One of the exceptions is excusal of the accused on such conditions as the court considers proper, which has occurred in this trial. However, that excusal did not apply to my direction that counsel for the accused leave the courtroom while I held *ex parte* discussions with Crown counsel.

[35] Not only are accused required to be present at their trial, they are entitled to be present. The right of the accused to be present is a fundamental right: **Barrow v. The Queen**, [1987] 2 S.C.R. 694 at para. 38. Chief Justice Dickson, in speaking for the majority in **Barrow**, recognized that there are two important principles underlying what is now s. 650(1). First, an accused is present to hear the case he or she faces and therefore is able to put forward a defence. Second, the accused sees the entire process by which he or she is tried and is able to see that the correct procedure is followed and that the trial is fair.

[36] The test to determine whether s. 650 applies to a particular proceeding was articulated in **Hertrich** at p. 537 by Mr. Justice Martin. That test, in turn, was accepted by the Supreme Court of Canada in **Vézina** where Mr. Justice Lamer, speaking for the majority, stated at p. 487:

Until *Hertrich* (*supra*) the courts considered that the test as to the scope of s. 577 [now . 650] was to be found in the words of judgment of Casey, J. in *Meunier v. The Queen* (1965), 48 C.R. 14, [1966] Que. Q.B. 94; affirmed by this Court [1966] S.C.R. 399, 50 C.R. 75, where he said, at p. 17:

“Our problem is whether the court proceeded, whether it did anything of a nature to advance the case, in the absence of the appellant. If it did not, the appellant’s argument must be rejected; if it did, the conviction must be quashed”.

In *R. v. Grimbra* (*supra*) Zuber, J.A. questioned whether the words “of a nature to advance the case [were] intended to be definitive” [p. 574 C.C.C., p. 744 D.L.R.]. In my view, they were not. The question as put by Casey, J. was befitting the issue and the facts of that case. I think the proper test is to be found in Martin J.A.’s judgment in *Hertrich* (*supra*).

[37] Mr. Justice Martin indicated in *Hertrich* that the accused’s right to be present at his trial means that he has the right to “have direct knowledge of anything that transpires in the course of his trial which could involve his vital interests”. This test has been applied by the Alberta Court of Appeal in *R. v. Mulligan* (2000), 250 A.R. 264, leave to appeal denied [2000] S.C.C.A. 94 and in *R. v. Rosebush* (1992) 131 A.R. 282 (C.A.), leave to appeal denied [1993] 2 S.C.R. x. The court commented in the latter case that vital interests include any inquiry that might affect the fairness of the trial.

[38] Section 650(1) is triggered whenever the "vital interests" of the accused are at stake or when a decision bears on the substantive conduct of the trial (*Barrow* at paras. 21 and 62). The question to be determined here is whether the *ex parte* proceedings involved or could have involved the vital interests of the accused.

[39] Before entering into the *ex parte* proceeding, I advised counsel in open court that my intention was to seek information from the Crown concerning the facts set out in Exhibit 28, p. 10 with a view to determining whether a judicial summary of the document was warranted. The facts in issue concerned the status of a particular aspect of disclosure at the time. If the Defence was aware of the facts, there was no need for a judicial summary. I agree with the Crown that the vital interests of the accused were not engaged nor could have been engaged by this proceeding. No evidence was heard and, unlike the situation in *Laws*, no submissions of substance were made and no decision was reached. The Crown was asked to confirm whether the Defence was aware of the facts set out in the document. It was unable to do so at the time but later provided the information sought in open court. I did not ask for nor receive submissions from the Crown as to whether the facts reflected in the document should be disclosed, if the Defence did not already have access to those facts.

[40] In my view, I was engaged in the type of preliminary investigation found acceptable by the courts in *Vézina* and in *R. v. Guess* (2000), 148 C.C.C. (3d) 321 (B.C.C.A.), app’n for leave to appeal dism’d [2000] S.C.C.A. 628. The trial judge in *Guess* gave an order which allowed

defence counsel supervised access to materials that had not previously been disclosed to the defence, but defence counsel was ordered not to discuss or disclose anything about these documents to the accused without the Crown's consent or further order of the court. A *voir dire* relating to disclosure of certain of the materials was then held *in camera*, in the absence of the accused. At one point, even Crown counsel was excluded as defence counsel was apprehensive that his submissions might disclose a line of defence. At para. 19, Hall J.A., with whom Esson J.A. agreed, stated:

I very much doubt that what occurred here could be said to have occurred during the trial process as that terminology is employed in the cases of *Hertrich, Dunbar* and *Vézina, supra*. These were preliminary matters relating to the possible admissibility of evidence or perhaps more properly, the possible relevance of certain material and it cannot be suggested with any air of reality that what occurred in any way affected any "vital interests" of the appellant. I do not consider the judge to have infringed s. 650 when he made the order and rulings that are at issue here. Neither am I of the opinion that what occurred here resulted in any breach of the provisions of Section 11 and 7 of the *Charter*. As I earlier observed, the procedure adopted by the trial judge was designed to ensure that the defence would have the most complete disclosure of any potentially relevant material.

[41] Esson J.A. commented at paras. 38 to 40:

That part, which the Crown in my view correctly characterized as "pre-trial", is of a kind which was practically unknown when cases like *R. v. Hertrich* and *R. v. Dunbar and Logan* which are cited in para. 10 of the reasons of Hall J.A. were decided. As a result of *Charter*-based decisions creating extensive rights of disclosure in wiretap proceedings and in criminal proceedings generally, judges must now deal with applications which often seek disclosure of vast amounts of material. Such applications involve unique difficulties in that they affect rights not only of the Crown and the accused but of complainants, witnesses, and people who have no interest in the litigation but who may be damaged by disclosure.

Such proceedings impose upon the judge an obligation to balance all of those interests as best he or she can, having regard to the sometimes conflicting and confusing principles laid down by court decisions and legislation.

In many cases, it is inevitable that the judge can achieve that balancing only by crafting procedures for which there may be no precedent but which are required to meet the exigencies of the case.

[42] As Martin J.A. stated in *Hertrich* at p. 529:

. . . during the course of the trial things may occur that, although in one sense part of the trial, cannot reasonably be considered to be a part of the trial for the

purpose of the present principle, because they cannot reasonably be said to have a bearing on the substantive conduct of the trial, or the issue of guilt or innocence.

[43] The *ex parte* proceedings in issue here were concerned not with the admissibility of evidence but rather with the status of disclosure and whether the Defence had been provided with the facts set out in the memorandum. As in *Guess*, it cannot be suggested with any air of reality that what occurred in any way affected or could have affected any "vital interests" of the accused.

[44] The Crown equated the procedure which I followed here with the procedure that may apply when s. 37 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5 is invoked. The Court in *Pilotte* concluded that the s. 37 procedure is separate and apart from the trial and accordingly s. 650(1) does not apply. Charron J.A., who delivered the judgment of the court in *Pilotte*, looked to *R. v. Parmar* (1987), 34 C.C.C. (3d) 260 (Ont. H.C.) for guidance as to the appropriate procedure to follow on a s. 37 application. *Parmar* was not concerned with s. 37 but rather involved an assertion by the Crown of privilege on an application by the defence for access to the sealed packet containing an affidavit submitted on an application for interception of a communication. With the concurrence of counsel, the initial application in *Parmar* was held *in camera*, in the presence of both counsel but in the absence of the accused. Without elaborating, Crown counsel indicated that there were passages which should be edited and outlined his grounds for concern. The trial judge then proposed that, as a preliminary step, he would edit the material by himself to remove any privileged information. He would then present the edited affidavit to Crown counsel, who would be given an opportunity to make submissions in open court on further editing that should take place.

[45] In *Pilotte*, the defence made a pre-trial application for disclosure of all contacts between a Crown witness and the R.C.M.P. in connection with an unrelated investigation. With the concurrence of defence counsel, the applications judge met in private chambers with the federal Crown and the investigating officer. He referred to the procedure followed as being parallel to the procedure discussed by Watt J. in *Parmar*. Given the consent of counsel for the accused, the Ontario Court of Appeal found no error in the procedure, although it did suggest that it would have been preferable if the proceedings had been recorded or if they had not been held in private.

[46] In *Guess*, Hall J.A. for the British Columbia Court of Appeal stated at para. 21:

... where a judge perceives a real risk that an undertaking would not suffice to protect sensitive information, then the court ought to have the power to make the requisite order for non-disclosure by counsel, or to order *in camera* proceedings as was done here. I believe the judge in this case was entitled to make the order that he did because there was a real risk that confidentiality could have been breached. In my view, no error has been demonstrated in the methodology adopted by the judge in dealing with these evidentiary issues and I would not give effect to the arguments advanced on behalf of the appellant under this head of appeal.

[47] As acknowledged in *Guess*, circumstances may dictate that *in camera* proceedings be held where privilege is asserted. In the present case, not only was solicitor-client privilege in issue, but it had not yet been established that the vital interests of the accused were at stake.

[48] I do not agree with the Crown's assertion that the accused in this case, through their counsel, waived any s. 650(1) right that they might have to be present as no objection was taken to the exclusion of defence counsel. Waiver in these circumstances must be express, not implied.

[49] Prior to 1985, a breach of what is now s. 650(1) resulted in a loss of jurisdiction, was fatal and could not be remedied by an appellate court applying the curative provisions which existed in the *Code* at the time. In 1985, Parliament enacted what is now s. 686(1)(b)(iv) of the *Criminal Code*, which provides that:

686(1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or [is] not criminally responsible on account of mental disorder, the court of appeal

(b) may dismiss the appeal where

(iv) notwithstanding any procedural irregularity at trial, the trial court had jurisdiction over the class of offence of which the appellant was convicted and the court of appeal is of the opinion that the appellant suffered no prejudice thereby.

[50] The legislative history and limitations of s. 686(1)(b)(iv) are canvassed in *R. v. Cloutier* (1988), 43 C.C.C. (3d) 35 (Ont. C.A.), app'n for leave dismissed [1989] 2 SCR vi. The trial judge in that case asked the accused, who was in the course of being cross-examined by the Crown, to withdraw while the propriety of a question asked by the Crown and the need to direct a mistrial were argued. Goodman J.A., who delivered the judgment of the Appeal Court, noted at p. 41 that the record did not disclose nor did counsel submit on the appeal that anyone called to the trial judge's attention the impropriety of excluding the appellant from the courtroom during his trial. The appellant in *Cloutier* submitted, as does the Defence in this case, that the exclusion of the accused during the course of the trial proceedings constituted a jurisdictional error that must result in the ordering of a new trial. At pp. 42-43 Goodman J.A. referred to some of the leading cases which have considered the effect of non-compliance with what is now s. 650 of the *Criminal Code*, stating:

Although the more recent cases (*Vézina*, *Hertrich* and *Barrow*, *supra*) have been largely concerned with the question of what proceedings should be included within the meaning of the word "trial" as used in s. 577(1), this line of cases lays down the following clear and unequivocal principles.

(1) An accused has an absolute right to be present in court during the whole of his trial.

(2) A trial judge has the discretion to cause the accused to be removed from or permit him to be out of court only in the circumstances provided for by s. 577(2) (which are not applicable on the facts of the case at bar).

(3) The infringement of this right is an error that destroys jurisdiction without the necessity of the accused showing he has suffered prejudice: see **R. v. Meunier**, *supra*.

(4) The reason the accused is entitled to be present at his trial is

(a) that he may hear the case made out against him and, having heard it, have the opportunity of answering it and,

(b) even more important, "Fairness and openness are fundamental values in our criminal justice system. The presence of the accused at all stages of his trial affords him the opportunity of acquiring first-hand knowledge of the proceedings leading to the eventual result of the trial. The denial of that opportunity to an accused may well leave him with a justifiable sense of injustice": see **R. v. Hertrich**, *supra*, per Martin J.A. at p. 537 approved by Dickson C.J.C. in **Barrow v. The Queen**, *supra*, at p. 12 [p. 202 C.C.C.] of his reasons.

(5) The exclusion of an accused from the court by the presiding judge during argument with respect to the asking of a question during the examination of the accused contravenes s. 577(1): see **R. v. Meunier**, *supra*, and **R. v. Dunbar and Logan**, *supra*.

(6) "The denial to an accused of his right under s. 577 is 'fundamental', requiring the setting aside of the conviction. The curative provisions of s. 613(1)(b)(iii) are innately inapplicable: **Meunier v. The Queen** (1965), 48 C.R. 14 (Que. Q.B.), affirmed [1966] S.C.R. 399. Since the decision in **Meunier**, it has been the rule that no breach of the right to be present can be cured by s. 613(1)(b)(iii) as the absence of the accused deprives the court of all jurisdiction": see **Barrow v. The Queen**, *supra*, per Dickson C.J.C. in his reasons at pp. 24-5 [pp. 211-2 C.C.C.].

[51] Goodman J.A. recognized that these principles were enunciated in cases decided prior to the proclamation on December 4, 1985 of what is now s. 686(1)(b)(iv). He commented that the first five principles could not be affected by the new provision. The question to be addressed by the appellate court was whether these principles could ever be applied where an accused has been denied his right to be present in court during the whole of his trial and, if so, could the court dismiss the appeal having regard to the circumstances of the case. Mr. Justice Goodman suggested that one might speculate that the new provision was enacted in response to the expression of judicial frustration with the lack of availability of curative provisions in the **Criminal Code** for technical errors which result in no actual prejudice to an accused.

[52] Interestingly, Goodman J. referred to *R. v. Joinson* (1987), 32 C.C.C. (3d) 542 (B.C.C.A.), a case which is similar in many respects to the present one. The accused in that case inadvertently was absent when the trial judge gave his reasons for conviction. Counsel for the accused subsequently brought to the court's attention his client's absence. When the accused returned to court several days later for sentencing, he explained his prior absence to the satisfaction of the court. The trial judge then read from the transcript of what had occurred in the absence of the accused. On appeal, McFarlane J.A., for the court, commented at para. 17 that what is now s. 686(1)(b)(iv) is a curative provision which appears to apply to appeals involving procedural errors resulting in a loss of jurisdiction. In response to the appellant's argument that the subsection ought not to be construed as applying to errors of substance, he proceeded to define the difference between matters of substantive law and those involving criminal procedure, concluding at paras. 20 - 21:

Substantive criminal law is concerned with the creation of offences (including a definition of the elements necessary to constitute an offence in criminal law), the recognition of defences, including exemptions, justifications and excuses.

Criminal procedure is concerned with the conduct of a criminal trial, as well as with pre-trial and post trial procedures. Criminal procedure is designed also to achieve certainty, stability and equality of treatment. Sloppy practice to the prejudice of the accused cannot be disregarded. At the heart of criminal procedure is the desire to ensure that justice be done, and be seen to be done. No one should leave a criminal trial with a justifiable sense of injustice, and no error in procedure should be to the prejudice of an accused.

[53] At para. 25 he commented:

Section 613(1)(b)(iv) has a similar purpose to s. 440.1 of the *Criminal Code*. It is designed to provide a cure for procedural irregularities, and to do substantial justice. In s. 440.1, Parliament has sought to preserve the jurisdiction of a trial court which has failed to act at the appropriate time in the exercise of that jurisdiction, or has failed to comply with the mandatory provisions of the code respecting adjournments or remands. Section 613(1)(b)(iv) empowers a Court of Appeal to excuse procedural errors. In either case the interests of justice, including the interests of the accused in being treated fairly, are recognized. If the error can be remedied without prejudice to the accused then Parliament has said that the case may be determined as if no error had occurred. [emphasis added]

[54] He concluded at paras. 26 - 27:

In the case at bar, the trial court clearly had jurisdiction over the class of offence of which the appellant was convicted. The appellant did not suffer any prejudice. He was not arrested, and he appeared voluntarily before the judge on the day set for sentencing. When he explained what had happened it was apparent that

neither the judge nor the accused had intentionally brought about a breach of s. 577. The judge was careful to recognize the rights of the accused and to read to him the whole of what had occurred in his absence. Once that was done the appellant was in the same position as if he had been present when the judgment had been rendered. He could not justifiably have any sense of injustice.

I am persuaded that s. 613(1)(b)(iv) was designed to accommodate procedural problems of this type, and I would exercise my discretion under that sub-section and dismiss the appeal.

[55] Having reviewed *Joinson*, Goodman J.A. in *Cloutier* concluded that what is now s. 686(1)(b)(iv) gives an appellate court the discretionary power to dismiss an appeal where the trial court had jurisdiction over the class of offence of which the appellant was convicted notwithstanding the fact that an error of law was made by a procedural irregularity which was so serious as to cause a loss of jurisdiction, provided the appellate court is of the opinion that the appellant suffered no prejudice as a result.

[56] Arbour J., for the majority in *R. v. Khan*, 2001 S.C.C. 86, 160 C.C.C. (3d) 1, agreed with Goodman J.A.'s analysis of the scope of s. 686(1)(b)(iv) and confirmed at para. 11 that the subsection:

...expands the remedial powers of courts of appeal by permitting the dismissal of appeals in case of any procedural irregularity previously perceived as having caused a loss of jurisdiction at trial, as long as the accused suffers no prejudice and as long as the trial court maintained its jurisdiction "over the class of offence[s]." [emphasis added]

[57] As noted by Arbour J., s. 686(1)(b)(iv) was first introduced in the House seven days after the decision of the British Columbia Court of Appeal in *R. v. Fenton* (1984), 11 C.C.C. (3d) 109. Craig J.A. in that case lamented that there were no curative provisions in the *Code* for jurisdictional errors, errors which Arbour J. described at para. 11 as "those caused by the accused having been even inadvertently excluded from small and sometimes uneventful portions of his trial." Arbour J. held at para. 12 that: "The real focus of the enactment of s. 686(1)(b)(iv) in 1985 seems to have been to put an end to the jurisprudence holding that procedural errors having caused a loss of jurisdiction in the trial courts could not be cured, even on appeal."

[58] At para. 18, Madam Justice Arbour summarized her conclusions as to the application of s. 686 when an error or irregularity of a procedural nature has occurred at trial:

- * If the procedural irregularity amounts to or is based on an error of law, it falls under s. 686(1)(a)(ii) and (1)(b) (iii).
- * If the procedural irregularity was previously (before 1985) classified as an irregularity causing a loss of jurisdiction: s. 686(1)(b)(iv) provides that this is no

longer fatal to the conviction, and an analysis of prejudice must be undertaken, in accordance with the principles set out in s. 686(1)(b)(iii).

- * If the procedural error did not amount to, or originate in an error of law, which is rare, s. 686(1)(a)(iii) applies and the reviewing court must determine whether a miscarriage of justice occurred. If so, there are no remedial provisions in s. 686(1)(b) that can cure such a defect, and the appeal must be allowed and either an acquittal entered or a new trial ordered.

[59] Arbour J. indicated that a procedural irregularity, which previously would have been classified as causing a loss of jurisdiction, is no longer necessarily fatal to a conviction. This statement and common sense suggest that the trial court can proceed in the face of such an irregularity. Indeed, the section must contemplate that a trial court can do so as s. 686(1)(b)(iv) is available only in the event of a conviction. It is for the appellate court to determine whether there has been actual prejudice to the accused as a result of the procedural irregularity and whether the circumstances are such that it should exercise its discretion to dismiss the appeal. The following comments of LeBel J. (at paras. 100 - 101), who wrote a concurring decision in *Khan*, are of assistance:

...Even though many procedural errors fall under s. 686(1)(b)(iii), the flexible provision of s. 686(1)(b)(iv) may also cover situations where a serious breach of a rule of procedure has occurred. In order to apply s. 686(1)(b)(iv), the court of appeal does not have to inquire whether or not it resulted in a loss of jurisdiction, or whether it will cause (within the technical sense of the word) such a loss of jurisdiction or to extend the meaning of the concept of a loss of jurisdiction in order to cure it. (See Deyardin, *supra*, pp. 371-372.) Even if the error is significant, the clause allows the court of appeal to focus on the core issues of the trial, whether it took place in conformity with the principles of the criminal law and justice and in essential fairness to the accused. On the other hand, it will not remedy a failure of justice or an error of law which may affect the verdict in a significant matter or in the absence of jurisdiction.

Attempts at classifying errors arising out of the interplay of several actors in the criminal trial as errors of law for the purpose of s. 686(1)(b)(iii) fail to catch the complexity of such situations. Such an approach may try to bring these cases under s. 686(1)(b)(iii), in a roundabout way by focusing the analysis entirely on the decision or action the presiding judge took or failed to take in respect of a particular problem. A broader and more flexible application of s. 686(1)(b)(iv) will better reflect the nature of those situations, as it acknowledges their often complex nature which may require consideration of the behaviour of other actors in the criminal trial, and not only of the judge. What is at stake in these cases is not only the legal assessment of the validity of the legal decision of the court, but also an evaluation of the conduct of all the actors in particular incidents during the course of a criminal trial. Section 686(1)(b)(iv) is designed to safeguard the essential requirements of substantive justice within the criminal trial system,

while at the same time protecting trials and verdicts against the impact of technical mistakes in the conduct of a trial, such as procedural irregularities or errors of law which do not result in a miscarriage of justice, cause no prejudice to the accused or do not have any significant impact on the legality of the verdict.

[60] As I indicated above, I am of the view that the *ex parte* proceeding which occurred did not involve the vital interests of the accused and therefore s. 650(1) was not engaged. If I am wrong, however, I note that a superior court has original jurisdiction in all criminal matters unless its jurisdiction is expressly ousted by statute (*MacMillan Bloedel v. Simpson Ltd.*, [1995] 4 S.C.R. 725). A superior court also has inherent jurisdiction to remedy procedural unfairness that arises during a trial (*R. v. Rose*, [1998] 3 S.C.R. 262). With the provision of the clerk's notes and edited version of the transcript and videotape, the accused no longer lack knowledge of what occurred in their absence. The accused and their counsel are now in the same position they would have been in had they not been excluded.

[61] Although there was an exclusion and an absence, this has been remedied. In my view, the comments of the courts in *Joinson*, *Cloutier* and *Khan* suggest that this is not an issue of jurisdiction, but rather one of trial fairness. Our Court of Appeal appears to be of a similar view. In *R. v. Rosebush* (1992) 131 A.R. 282 (C.A.), leave to appeal ref'd [1993] 2 S.C.R. x a jury officer reported to the trial judge that a juror had said that she overheard a comment made by one of the accused about another juror. The trial judge did nothing about this report. The juror then asked to speak with the trial judge privately at which time she confirmed her report. On appeal, the accused argued that their right to be present at all of their trial was breached by this private meeting. After discussing the principles set out in *Hertrich* and *Vézina*, the court determined that no breach had occurred of the accused's right to be present during an inquiry about a matter that might affect the fairness of the trial as the trial judge was merely involved in an initial inquiry or investigation to assess whether the vital interests of the accused were engaged as authorized in *Vézina*. If wrong in this regard, the court invoked s. 686(1)(b)(iv) without any mention being made of jurisdiction.

[62] In *R. v. Smith* (1995), 169 A.R. 321 the appellant argued that his s. 650(1) right to be present during the whole of his trial had been violated when the trial judge had a private discussion in his office with counsel in the absence of the appellant. No record was kept of the discussion. Côté J.A., for the majority, stated at para. 26:

I agree with the two suggestions of Kerans J.A. (also made out of a courtroom). The first is that there should not be a new trial unless the proceedings which the accused did not see and hear created a serious irregularity. The second is that it can bring the administration of justice into disrepute to order new trials for trivial and technical breaches of s. 650: Kerans, *Standards of Review Employed by Appellate Courts* [(Edmonton, Juriliber, 1994)] 189-90 (1994).

And further at para. 31:

Parliament enacted s. 686(1)(b)(iv) to end the public spectacle and waste of new trials (or acquittals) created by harmless procedural flaws. In a civil case, this kind of procedural flaw would scarcely be worth mentioning, and a host of slip Rules would instantly cure it. Modern criminal procedure should focus on real problems, not formalism. It may seem harmless to order a new trial, but there is harm in doing so without good reason. That includes long delays and possible difficulty of proof after a gap of years, expense, inconvenience to witnesses, and the public perception that our criminal courts work much as Dickens described Chancery...

[63] Fraser, C.J.A., dissenting in part, suggested that the proper inquiry was whether the private discussions between counsel and the trial judge had affected the accused's fair trial interest. She indicated that matters of process and procedure are subsumed within the accused's right to a fair trial. These include the right to have the case decided in public in accordance with accepted procedures as well as the right of the accused to be present at his or her trial. The common law casts these procedural rights under the heading of the right to a fair trial. They have now been guaranteed by s. 11(d) of the *Charter* and s. 650 of the *Criminal Code*. Fraser C.J.A. concluded in that case that because no record was made of the discussions and because counsel had diverging views on what took place, an appearance of unfairness resulted which could only be corrected by a new trial. She differed from the majority in finding that what had occurred in private chambers influenced the trial to the detriment of the appellant. As a result, the appellant had suffered prejudice.

[64] The Ontario Court of Appeal in *R. v. Valeanu* (1995) 97 C.C.C. (3d) 338 has also considered whether s. 686(1)(b)(iv) should be invoked in a situation where an accused has been excluded from trial. The trial judge in that case, at the request of defence counsel, excluded the accused during the course of his cross-examination by the Crown so that defence counsel could voice his concerns about the ability of his client to understand English. Arbour J.A., for the court, expressed the view at p. 343 that the error was a procedural error of a jurisdictional nature. However, she was not prepared to exercise the court's discretion to decline to order a new trial as she could not conclude that the appellant had not been prejudiced by the error.

[65] I note distinguishing facts between the circumstances of this case and *Laws*. In *Laws* the trial judge met *ex parte* with Crown counsel alone in private chambers on three occasions. No transcript or record was kept of those meetings. Submissions were made by Crown counsel in that case regarding editing of the wiretap affidavit and a judicial summary of edited portions of that affidavit. The defence application for additional disclosure of the affidavit was refused.

[66] The Ontario Court of Appeal noted that there was no transcript of the meetings and therefore it was impossible to know what submissions were made or the basis on which the trial judge reached his decision in relation to editing of the affidavit. The Court found that it was impossible to conclude that the improper exclusion of the edited material did not prejudice the accused. The circumstances were such as to inflict significant damage on the appearance of justice (*Laws*, paras. 96-97).

[67] In the present case, a transcript of the *ex parte* communications was kept by the court reporter, as were clerk's notes, and a videotape. The *ex parte* proceedings were intended to furnish the Court with additional information concerning the status of disclosure. They were not directed at the receipt of submissions or argument by the Crown.

[68] The Defence is correct when it argues that I am unable to invoke s. 686(1)(b)(iv). It is for the Court of Appeal to determine whether to exercise its discretion under that subsection. My role is to ensure trial fairness. I have done so by unsealing the clerk's notes and the edited version of the transcript and videotape of the *ex parte* proceedings. In my view, this alleviates any concern of compromise to the fair trial interest of the accused.

CONCLUSIONS

[69] The *ex parte* proceedings did not involve and could not have involved the vital interests of the accused. As a result, their s. 650(1) right to be present was not triggered. Even if they did have such a right in the circumstances, their exclusion was at worst a procedural irregularity which does not go to the jurisdiction of this superior court of criminal jurisdiction. There has been no loss of jurisdiction. To the extent that there was a procedural irregularity, this has been corrected and essential trial fairness maintained.

HEARD on the 11th day of September, 2002.

DATED at Edmonton, Alberta this 2nd day of October, 2002.

J.C.Q.B.A.