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Crown Discretion and the Power to Stay Proceedings

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Cases Considered:

R. v. Powder, 2008 ABQB 579; *R. v. Powder*, 2008 ABCA 568

In what circumstances can Crown prosecutors stay proceedings with impunity? This was the issue in a recent Alberta case, *R. v. Powder*, where the court seemed to disagree with the Crown's actions but also seemed to feel powerless to respond. Given that the Crown may recommence proceedings it has stayed within one year of the stay, this case has implications for how the Crown can deal with a prosecution that has gone off the rails. The case is also of interest because it involves the use of tasers, a law enforcement tool that has come under much criticism lately.

Section 579 of the *Criminal Code*, R.S.C. 1985, c.C-46, provides for the Crown's power to stay proceedings:

> 579(1) The Attorney General or counsel instructed by him for that purpose may, at any time after any proceedings in relation to an accused or a defendant are commenced and before judgment, direct the clerk or other proper officer of the court to make an entry on the record that the proceedings are stayed by his direction, and such entry shall be made forthwith thereafter, whereupon the proceedings shall be stayed accordingly and any recognizance relating to the proceedings is vacated.
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> (2) Proceedings stayed in accordance with subsection (1) may be recommenced, without laying a new information or preferring a new indictment, as the case may be, by the Attorney General or counsel instructed by him for that purpose giving notice of the recommencement to the clerk of the court in which the stay of the proceedings was entered, but where no such notice is given within one year after the entry of the stay of proceedings, or before the expiration of the time within which the proceedings could have been commenced, whichever is the earlier, the proceedings shall be deemed never to have been commenced.

The force of this power was brought home to me in my early days working as a Crown prosecutor. In one of my first trials, I had to deal with a hostile witness who claimed not to recall

the circumstances in which the accused had assaulted her and stolen her money. My application to have the witness declared hostile under s. 9 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5 went sideways, and knowing that without her testimony I could not obtain a conviction, I decided that the best plan was to ask the court to stay the proceedings. As if I had not botched things badly enough already, the judge reminded me that I did not need to ask for anything - it was within my power to direct the court to enter the stay. And so he did. In this case, however, it was clear that there would be no point in recommencing the proceedings at a later date, as even if the witness were to return to the version of events she had told the police after the alleged robbery, her credibility would have been irreparably damaged by her denial at the first trial. It is not as clear that the Crown in the *Powder* case intends to leave that prosecution behind for all time.

In *Powder*, the accused was charged with 5 offences alleged to have occurred over the course of one afternoon and evening in Edmonton in February 2005: two counts of assaulting police officers with intent to resist arrest, assaulting a police officer engaged in the execution of his duties, breaching a recognizance, and taking a weapon (a taser) from a police officer engaged in the execution of his duties. The circumstances leading to these charges are best described in an earlier judgment in the case (*R. v. Powder*, 2007 ABQB 735). Constable Fox had responded to a call from a woman alleging an altercation at her residence. After arriving at the residence, he heard from witnesses that Mr. Powder had been in an argument with the woman that culminated in him attacking her. The woman's son Dallas (who was described by Cst. Fox as Mr. Powder's cousin or brother, making the woman Powder's aunt or mother), intervened and was in turn assaulted by Powder. During Powder's assault on Dallas, the woman hit Powder in the head with the ashtray to stop the attack. Both the woman and Dallas indicated that they did not want to lay charges against Powder or to file witness statements, but they wanted him removed from the premises. Cst. Fox called for backup, and Cst. Leach showed up a short time later. Cst. Fox ran a check on Powder, and determined that he had been designated a high risk offender, and was possibly affiliated with a gang. He asked Powder for his version of the events, and Powder did not want to talk, although he did indicate on a couple of occasions that he was going to get back at Dallas. Based on a number of factors, most importantly the continuing risk to Dallas and the other occupants of the house, Cst. Fox decided to arrest Powder. This set in motion the alleged assaults against himself and Cst. Leach, which will be described below.

A number of preliminary applications were brought before the trial judge, Justice Donald Lee of the Alberta Court of Queen's Bench. The first application dealt with whether there was a breach of s. 9 of the *Charter*, which provides a right against arbitrary detention and imprisonment. In *R. v. Powder*, 2007 ABQB 735, Justice Lee reviewed the police power to arrest without warrant under s. 495 of the *Criminal Code*, which authorizes the arrest of a person "who has committed an indictable offence or who, on reasonable grounds, [the officer] believes has committed or is about to commit an indictable offence." After reviewing relevant case law, dictionary definitions of "about", and authorities on statutory interpretation, Justice Lee found that s. 495(1) "should be read as addressing "imminent" offences" and that in order to arrest without warrant, "there must be no reasonable alternative to avoid a perceived serious and pressing risk of a serious act" (at para. 33). Applying this test to the circumstances of the case, Justice Lee held that Cst. Fox had

reasonable and probable grounds for believing that Powder was "about to" commit the indictable offence of assault against Dallas, and dismissed the *Charter* application.

A second preliminary application concerned the disclosure of material to the defence. More specifically, Powder sought an order pursuant to *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, that the Crown disclose any complaints made to the Edmonton Police Service (EPS) and any civil claims made against the officers involved in his arrest, as well as the officers who witnessed the events surrounding and after his arrest. The police officers in question, Edmonton's Chief of Police and the EPS intervened in this application. Along with the Crown, they argued that this was a case of third party rather than Crown disclosure (and thus that the disclosure procedure and criteria were governed by *R. v. O'Connor*, [1995] 4 S.C.R. 411 rather than *Stinchcombe*) and that the information requested was collateral, irrelevant, inadmissible, and subject to considerations of privacy and the integrity of the justice system. In *R. v. Powder*, 2008 ABQB 407, Justice Lee agreed with the Crown and interveners that the Crown and EPS were divisible, and thus that the records sought were third party records subject to *O'Connor*. The case ends at that point, and there does not appear to be a subsequent decision where the actual disclosure application was considered. Perhaps the defence abandoned this tactic and decided to focus its energies on the next application, which involved an allegation of unreasonable search and seizure contrary to s. 8 of the *Charter*.

Returning to the facts of the case, after the incidents involving Dallas and his mother the police had convinced Powder to leave the residence. Csts. Fox and Leach caught up with him about 40 feet down the sidewalk, and told him he was under arrest. According to Cst. Fox, Powder "absolutely exploded" at this point, and became violent towards the officers (2008 ABCA 568 at para. 9). Cst. Fox shot two taser darts into the back of Powder's jacket, and Powder reacted by grabbing the taser wires and breaking them from the taser, resulting in what Fox testified would have been a "significant shock" (at para. 12). Powder continued to swing at Fox and Leach, and Fox was eventually able to tackle him to the ground, where he once again tasered Powder. It was only after the second tasering on top of Powder's head that it seemed to have any effect, and Fox was able to handcuff Powder. EMS arrived and after Powder was subjected to a "cursory search for officer safety" (at para. 34), he was transported to the EPS North Division detachment. Another pat down search would have been conducted at this point. Cst. Fox met up with Powder at the detachment and advised that he would be "searching" him (meaning a strip search, although it appears that these precise words were not used with Powder). While initially cooperative, after removing his shirt Powder attacked Fox and attempted to grab his weapons. Two other officers came to Fox's assistance, but despite using force against Powder he managed to get the taser from Fox. Fox grabbed the taser and deployed it against Powder, who fell to the floor. Powder was given medical attention for his injuries, and Csts. Fox and Leach had no further contact with him after this incident.

Some time afterwards, Powder was allegedly subjected to a strip search. There was no evidence from the officer who performed the strip search, but the Crown did not dispute that it had occurred. Cst. Leach testified that he would have identified the reasons for the strip search on the arrest approval report, which were: Powder's criminal record, including assault with a weapon

and manslaughter/murder, the fact that was known to the police as "a very violent individual" who had possessed and used weapons in the past, safety reasons, and the struggle during arrest (at para. 31). Cst. Fox added that the strip search was necessary because Powder "could have picked up something in the ambulance" (at para. 22). Nothing was found on Powder during the initial searches or the strip search.

Powder argued that the strip search violated his right under s.8 of the *Charter* to protection against unreasonable search and seizure. In particular, because the initial "pat down" searches had not uncovered anything, and there was no other indication that Powder was armed with a weapon, there were said to be no grounds for the strip search. The Crown responded that the charges against Powder were very serious, and his violent behaviour itself justified the strip search.

Justice Lee cited the Supreme Court decision in *R. v. Golden*, [2001] 3 S.C.R. 679, as authority for the proposition that "a "frisk" or "pat-down" search at the point of arrest will generally suffice for the purposes of determining if the accused has secreted weapons on his person, and the mere possibility that an individual may be concealing evidence or weapons upon his person is not sufficient to justify a strip search" (at para. 41). Further, "by the time the decision to strip search him was made, he had been involved in several altercations during which he had not drawn any weapons, had been partially stripped for medical attention, and had been frisked searched at least twice. There was no indication during these events that he was in possession of a weapon" (at para. 45). On the basis of the applicable law and the facts, Justice Lee concluded that there had been a breach of s.8 of the *Charter*.

The next question was what remedy would be appropriate to cure the s. 8 violation. Justice Lee asked the parties for further submissions on this issue, but indicated some of his preliminary thoughts. Since nothing had been uncovered during the search, this was not a case for a remedy under s.24(2) of the *Charter,* which requires the exclusion of evidence obtained in violation of the *Charter* where the admission of the evidence would bring the administration of justice into disrepute. This left s.24(1) of the *Charter,* which allows a court to determine what remedy would be "appropriate and just in the circumstances." Justice Lee suggested that he was considering a remedy in relation to count 5, which was the only charge faced by Powder related to the unreasonable search. This was the charge of taking a weapon (a taser) from a police officer engaged in the execution of his duties. However, both counsel apparently took the position that all charges against Powder should be automatically stayed by Justice Lee as a consequence of the *Charter* breach.

Two days later the final decision in *Powder* was released (2008 ABQB 579). In this decision Justice Lee made it clear that if it were up to him, he would have granted a stay only in relation to count 5. He seemed to chastise counsel for not having brought forward any authorities in support of their position, noting that "[w]ithin a short time following the adjournment, the Court had been able to locate several cases of assistance dealing with the analysis of factors that should be taken into account with respect to Section 24(1) arising out of illegal strip searches" (at para. 16). After referring to these authorities in detail (see *R. v. A.B.*, [2003] O.J. No. 2010 (Ontario

Superior Court of Justice), *R. v. N.C.*, [2004] O.J. No. 2723 (Ontario Court of Justice - Youth Justice Court), and *R. v. Samuels*, [2008] O.J. No. 786 (Ontario Court of Justice)), Justice Lee noted that "far from being automatic", a judicial stay of proceedings is an exceptional remedy requiring a detailed s.24(1) analysis (at para. 21).

Then came the surprise. Justice Lee revealed that before he could engage in the s. 24(1) analysis, "the Crown advised that it would be entering a stay of proceedings as against the Accused as it was no longer certain whether or not a strip search had actually been conducted by any member of the Edmonton Police Service with respect to Mr. Powder" (at para. 22). As noted by Justice Lee, this uncertainty came in spite of the fact that the Crown had earlier admitted to the Court that a strip search had occurred, and Csts. Fox and Leach had testified that they had understood such a search was conducted as well.

Justice Lee acknowledged that the Crown was not required to give reasons for entering a stay of proceedings, but noted that because it had given reasons here, this was a cause for concern in light of the earlier evidence and admission by the Crown in relation to the strip search. This led Justice Lee to review the authorities on prosecutorial discretion. In *Krieger v. Law Society of Alberta*, [2002] 3 S.C.R. 372, it was established that provided the Crown acts honestly and in good faith, its decisions are protected by the doctrine of prosecutorial discretion. This doctrine is based upon constitutional principles including executive independence, royal prerogative, and the rule of law. Only where there is an abuse of process by the Crown will a court interfere with such discretion (*R. v. D.N.*, [2004] N.J. No. 271, N.L.C.A. 44).

Justice Lee was not prepared to find an abuse of process in *Powder*. Even though he stated that the Crown's decision to direct a stay of proceedings "leaves the Court in a very difficult, if not untenable position", and that "the Court has serious concerns about the decision of the Crown to stay all charges", he noted that "I have found no case or situation where a Court has challenged the Crown's exercise of this discretion on its own initiative" (at para. 30). Because the defence did not object to the Crown's decision to stay proceedings, and even though "the Crown's decision … to stay all charges … may not be in the public interest or for any other good reason" (at para. 30), Justice Lee felt powerless to review the exercise of prosecutorial discretion in this case.

Powder has already resulted in a significant expenditure of the court's resources through the various applications described above. In this respect, it would seem wasteful if the trial does not ultimately proceed. And, as Justice Lee himself stated, "even if the strip search did not occur, this may be further reason for the Crown to proceed in what has already been a lengthy prosecution against the Accused given that the very *Charter* breach that Defence counsel complained about and based their *Charter* application relief on, may never have occurred" (2008 ABQB 579 at para. 23). Could the Crown's concern have been that the credibility of its police witnesses was undermined as a result of the confusion about the strip search? It is hard to see this as the reason for the stay, as the evidence of Csts. Fox and Leach on the alleged strip search was based only on hearsay rather than their actual recollections of the events in question. Unlike my

robbery trial, this does not seem to be a case where it would have been futile for the Crown to proceed (or to recommence proceedings under s. 579 of the *Criminal Code*).

On the other hand, in an earlier decision (*R. v. Powder*, 2007 ABQB 52), Justice Lee had expressed concerns about the delays in getting this matter to trial, which were largely the fault of the defence at that point. Recall that the alleged offences took place in February, 2005, and all of the decisions in Powder to date have been on pre-trial motions. It may be that because of the time lapse, and perhaps also because the charges relate to offences against the state rather than against private individuals, the Crown will decide not to recommence proceedings. That would leave the unreasonable search and seizure without a court-ordered remedy. While the Court would likely have granted a stay in respect of count 5 as its *Charter* remedy, with the same end result for Powder, there is nevertheless a public interest in a judicially granted *Charter* remedy that was sidestepped by the Crown's actions here. Moreover, there is a public interest in having the other charges against Powder heard, particularly given his status as a high risk offender.

Another aspect of the case that merits comment is the conduct of the police in leaving it to the alleged victims to decide whether to pursue charges in this case. As I noted in an earlier post, policies have been adopted in Alberta to counteract this approach, although it is unclear whether these policies are restricted to spousal assaults or apply to family violence more broadly (I am awaiting clarification from the Crown on this point). While it is difficult to prosecute a family violence case with uncooperative witnesses, the simple act of telling victims of violence that the decision to charge and prosecute is not up to them may be sufficient to quell any fears of retaliation. Further, in *Powder* there was corroborating evidence of the assault against Dallas, as Cst. Fox observed his injuries while interviewing him about the incident. The police decision not to charge Powder for the alleged assaults against Dallas and his mother, combined with the Crown decision to stay the proceedings in relation to the other charges, results in no action being taken against Powder for any of the incidents alleged to have occurred in February 2005. Were the interests of justice served in this case?