QBCA 5/11
Info. No.: 30391500

IN THE COURT OF QUEEN'S BENCH FOR SASKATCHEWAN
JUDICIAL CENTRE OF SASKATOON

REPORT ON CRIMINAL APPEAL

SANDRA FINLEY VS THE QUEEN

BEFORE: THE HONOURABLE MR. JUSTICE D. B. KONKIN

OFFENCE: Section 31(B) of the Statistics Act

INFORMANT: Assistant Regional Director, Statistics Canada

CONVICTED BY: The Honourable Judge S.P. Whelan, Judge of the Provincial Court

AT: Provincial Court, Saskatoon, Saskatchewan ON: January 13, 2011

OFFENCE COMMITTED ON AND AT: between the 14th day of July, A.D. 2006 and the 11th day of October, A.D. 2006 at or near Saskatoon, Saskatchewan

SENTENCE: Larry Deters, Absolute Discharge entered on January 20, 2011

DATE OF FILING NOTICE OF APPEAL: January 28, 2011

APPEAL FROM: Found guilty of a charge pursuant to s. 31(b) of the *Statistics Act.*

DATE OF HEARING: October 19, 2011

PLACE OF HEARING: Court of Queen's Bench, Saskatoon, Saskatchewan

DATE OF JUDGMENT: February 1, 2012

RESULT: Appeal dismissed

Deputy Local Registrar

cc: Appellant: Sandra Finley c/o Steve Seiferling
Respondent: Barrie G. Miller and Catherine A. Galligan, Crown
Director of Public Prosecutions
Larry Deters, Assistant Regional Director, Statistics Canada, Regina, SK
Provincial Court
The Honourable Judge S.P. Whelan, Judge of the Provincial Court

QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2012 SKQB 55**

Date: **2012 02 01**
Docket: Q.B.C.A. No. 5/2011
Judicial Centre: Saskatoon

BETWEEN:

SANDRA FINLEY,

Appellant
(Applicant)

- and -

HER MAJESTY THE QUEEN,

Respondent
(Respondent)

Counsel:

Steven J.R. Seiferling — for the appellant
Barrie G. Miller and Catherine A. Galligan — for the respondent Crown

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JUDGMENT
February 1, 2012

KONKIN J.

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[1] Ms. Finley appeals the decision of Provincial Court Judge Whelan issued on the January 13, 2011. In that decision, the learned Provincial Court judge found Ms. Finley guilty of a charge pursuant to s. 31(b) of the *Statistics Act*, R.S.C. 1985, c. S-19. This charge arose from the refusal of Ms. Finley to fill in and return any of the long-form census form in 2006.

[2] The grounds of appeal from the notice of appeal, as modified by the written brief of the appellant, are:

(a) Did the trial judge err in law by failing to apply the proper test for information privacy pursuant to s. 8 of the *Canadian Charter of Rights and Freedoms*, or by failing to consider whether Ms. Finley had a lawful excuse pursuant to s. 31 of the *Statistics Act*?

(b) Did the trial judge err in law by failing to analyse the nature of the information sought by the census to determine whether it contained personal information as contemplated in *R. v. Plant*, [1993] 3 S.C.R. 281?

(c) Did the trial judge err in law by focusing on the potential use and disclosure of information that was already in the hands of government, rather than on the legal issues surrounding the collection of information?

Position of the Parties

[3] The appellant agrees with the trial judge when she concluded that there was a certain procedure pursuant to s. 8 of the *Charter*. However, the appellant argues that the trial judge failed to consider all of the factors in the appropriate test having regard to the nature of the statute and the penalties for non-compliance. The appellant goes on to argue that the trial judge erred in failing to properly analyse the purpose of the collection of the census data and the nature of the data collected by Statistics Canada. Finally, the appellant argues that the judge misfocused herself when she discussed the use of the information to be collected by Statistics Canada but not the collection of the information and an analysis of the nature and purpose of the information sought to be collected by

Statistics Canada.

[4] The respondent argues that, in fact, s. 8 of the *Charter* was not engaged as "the thing to be searched for or discovered during a search must exist at the time of the search and be capable of being seized by or for the state." The respondent argues that, in fact, as the answers have not been formulated by the appellant until she answers the questions, there is nothing to be seized and s. 8 would not apply. The respondent argues that s. 7 might be engaged where a person is required to create a statement or document, but not s. 8.

[5] The respondent argues that even if there is something to be searched, the Court must then look at the privacy interest to determine whether or not it warrants s. 8 protection. The respondent argues that even if s. 8 was engaged, the resulting search and seizure was reasonable and, therefore, there was no breach of s. 8, and the requested relief of finding s. 31 of the *Statistics Act* unconstitutional is not available.

Analysis

[6] The respondent seeks to have the Court make a distinction between what might happen under s. 7 of the *Charter* and what would happen under s. 8. In paragraph 38 of the respondent's brief, they argue a distinction between s. 7 and s. 8 as follows:

> 38. ... Section 8 is engaged where the statement or document pre-exists compulsion and is capable of being searched and seized through for example a wiretap authorization or a search warrant. Section 7 is engaged where statutory authority requires a person to create the statement or the document through testimony or the completion of the census form.

[7] Taking the example of the wiretap authorization for a moment, one might

argue that the information gathered by the wiretap authorization is not, in fact, in existence at the time of the authorization but is created as the conversations are carried out after the authorization and the wiretap is in place. Before the Crown starts listening, there is no evidence in existence. In addition, case law suggests that there is less of a distinction between s. 7 and s. 8 than the Crown here might be arguing. In *Reference re Motor Vehicle Act (British Columbia) S 94(2)*, [1985] 2 S.C.R. 486, the Supreme Court of Canada held at paragraph 28 that s. 8 is a more specific right within, or derivative of, the s. 7 right to "life, liberty and security", where it stated:

> 28 Sections 8 to 14 are illustrative of deprivations of those rights to life, liberty and security of the person.... [T]hey are examples of instances in which the "right" to life, liberty and security of the person would be violated in a manner which is not in accordance with the principles of fundamental justice. To put matters in a different way, ss. 7 to 14 could have been fused into one section, with inserted between the words of s. 7 and the rest of those sections the oft utilised provision in our statutes, "and, without limiting the generality of the foregoing (s. 7) the following shall be deemed to be in violation of a person's rights under this section". ...

[8] It would seem from that case that s. 7 is engaged in any violation of a right under ss. 8 through 14. In her reasoning in this case, the Provincial Court judge refers to *R. v. McKinley Transport*, [1990] 1 S.C.R. 1020. In that paragraph of her decision, she states:

> [52] ... The appellants had been served with demands pursuant to s.231(3) that they furnish information and produce documents. Wilson J. characterized the demands pursuant to s. 231 as a "seizure"; albeit not one which violated s. 8 of the *Charter* having regard to the purpose of the impugned provisions. At paragraph 22 Wilson J. wrote:
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> > 22. ... Thus compelled production reaches beyond the strict filing and maintenance requirements of the Act and may well extend to information and documents in which the taxpayer has a privacy interest in need of protection under s. 8 of the Charter although it may not be as vital an interest as that obtaining in a criminal or quasi-criminal context. I would therefore conclude that the application of s. 231(3) of the Income Tax

> Act to the appellants constitutes a "seizure" since it infringes on their expectations of privacy.
>
> ...

[9] I find that the Provincial Court judge rightly concluded that the requests under s. 31 of the *Statistics Act* engages s. 8 of the *Charter*.

[10] This brings us to the appellant's arguments 1 and 2 in her appeal. Cut to their essence, the appellant argues that due to the ultimate penalties that can be applied under the *Statistics Act*, that being a fine or imprisonment, the information gathered under that Act is much closer to a criminal or quasi-criminal gathering than a mere regulatory gathering of information.

[11] In his article "Distinguishing *Charter* Rights in Criminal and Regulatory Investigations: What's the Purpose of Analyzing Purpose?" (2010), 48 Alta. L. Rev. 93, Christopher Sherrin sought to clarify the distinction between criminal and regulatory investigations for the purpose of determining the availability of *Charter* protections. He uses existing case law and commentary to argue that the *Charter* rights with regard to self-incrimination and right to privacy apply whenever someone is being investigated for the purpose of determining penal liability and are lessened whenever the purpose is merely regulatory or to enforce compliance with regulations. At paragraph 42 of his article, he states:

> 42 The distinction between regulatory enforcement and criminal enforcement seems to run on overall enforcement strategy. Regulatory enforcement is thought to be more proactive and only exceptionally interested in prosecuting offenders. Information is collected, but the initial intent is not to use the information as evidence in a legal proceeding; it is, rather, to educate offenders (and non-offenders) and correct and prevent problems. Criminal enforcement, on the other hand, is thought to be more reactive and acutely focused on prosecution as a response to wrongdoing. Information is collected in order to be used as evidence. Comparing a compliance strategy of enforcement (typical of

regulatory enforcement) and a "sanctioning" strategy (more typical of criminal enforcement), Bridget Hutter [*The Reasonable Arm of the Law? The Law Enforcement Procedures of Environmental Health Officers* (Oxford: Clarendon Press, 1988) at 6-7] described the difference as follows:

> [A compliance strategy of enforcement] is co-operative and conciliatory in style and its aim is to secure compliance through the remedy of existing problems and, above all, the prevention of others. Where compliance is less than complete the preferred methods of achieving full compliance are persuasive and educative. The use of formal legal methods, especially prosecution, is regarded as a last resort.... Another characteristic of such a [strategy] is that it allows for compliance over a period of time; instant remedy is not necessarily sought or considered possible.
>
> ...
>
> The sanctioning strategy is basically a punitive approach to law enforcement. Its objective is to prohibit certain activities and where this fails to seek out offenders and punish them for their wrongdoing. Compliance may be a consequence of such a strategy but it is not a central rationale for enforcement. Prosecution, however, is an important ingredient of a sanctioning strategy.... Essentially this is an accusatory enforcement style which is geared to catching out those who break the law with the objective of punishing them, most particularly through the use of formal legal methods, such as prosecution.
>
> ...

[12] Sherrin reviewed the justification for treating regulatory investigations differently from criminal investigations at paragraph 33, where he states:

> 33 ... It has been argued ... that regulated individuals effectively consent to invasions of their rights against self-incrimination and to privacy, that there is an inherent difference between true crimes and regulatory offences, and that regulatory laws could not be effectively enforced without the powers to compel statements and conduct warrantless intrusions. Arguably the primary justification, however, has been based on the suggestion that there is a different purpose behind regulatory intrusions and inquiries. They are intended to ensure compliance with the law, not to gather evidence in support of a prosecution. It is criminal investigations that are intended to do the latter and thus it is in criminal investigations that the rights against self-incrimination and to privacy should receive added protection. ...

[13] Conversely, where a statute is more regulatory in nature, a person's

expectation of privacy is much diminished.

[14] In criminal investigations, a person is being compelled to produce evidence of an offence which engages s. 8 and the safeguards it provides. In regulatory investigations such as this, a person is not being compelled to give evidence of a offence. Ms. Finley is being compelled to produce evidence under threat of committing an offence, but not evidence of an offence. This differentiates it from the criminal investigation. As such, under statutes like the *Statistics Act*, an individual may be compelled to answer and not receive the protections under s. 8 of the *Charter*.

[15] In *R. v. Holman* (1983), 28 Alta. L.R. (2d) 35 (Alta. Prov. Ct.), the Alberta Provincial Court determined that the demand for information in a census taken under the *Statistics Act* does constitute a search within the meaning of s. 8 of the *Charter*. However, the Provincial Court also determined that the demand was reasonable and did not infringe the rights guaranteed under s. 8.

[16] In *R. v. Gill*, [1995] 7 W.W.R. 61 (Man. Q.B.), the Manitoba Court of Queen's Bench sided with *Holman*. In paragraphs 34-36, Clearwater J. explains:

> 34 With due respect to the decision of Judge Hogarth in *Otto* [(1984), 16 C.C.C. (3d) 289 (B.C. Co. Ct.)] and the submissions of the accused before me, I prefer the reasoning of Mr. Justice Meyer in *Regina v. Churchill* [(1978), 45 C.C.C. (2d) 312 (Que. Sup. Ct.)] and of Judge Oliver of the Alberta Provincial Court in *R. v. Holman* (1983), 28 Alta. L.R. (2d) 35. In *Otto* it appears that the only evidence before Judge Hogarth as to the reasonableness of, or necessity for, the government collecting and compiling the statistical information in question was to be found in the wording of the "guide" (part of the form) and, of course, what appears self-evident from the wording of the *Statistics Act* and some of the questions themselves.
>
> 35 In the case before me the Crown called the witness Sheridan who was well qualified to testify on the issues in question and, in particular, on the specific reasons or rationale for the collection of the information requested in Form 2B. His evidence was not challenged either by any direct evidence or by any particular cross-examination directed to the

government's need and reasons for compiling this information. The accused testified at trial. His position was simple and can be found in his evidence as follows:

> "I felt the form was quite a large invasion of my privacy. The questions as far as I am concerned in census only are counting people, not what your religion is, or where you go to school, or when you went to school, or what education you have, or, you know, whether you own your home or don't own your home. Those are personal questions, and as far as I am concerned they don't belong on a census form." ...

Essentially the accused provided only his name and address and took the position that the rest of the information was confidential. He also testified that he did not trust the mechanisms provided in the statute by the government to keep the information confidential.

36 In this case, unlike in *Otto*, the Crown led evidence (through the witness Sheridan) that clearly explains the government's rationale and use of the statistical information it was attempting to compile. Moreover, I am satisfied in the absence of any specific evidence to the contrary, that the mechanisms put in place by the government pursuant to the *Statistics Act* and other relevant statutes, are reasonable in terms of keeping this information confidential. Moreover, although many of the questions are "personal" in nature, the information is collected and put into "statistics" where the individual is not named or otherwise identified. The purpose is, according to the evidence before me, reasonable in a democratic society. am satisfied that the exercise is not a breach of the accused's reasonable expectation of privacy. Contrary to the position taken by Judge Hogarth in *Otto* (*supra*), I decline to proceed on the assumption that the means and methods of keeping this information confidential (from the police or any other agencies) are not reasonable, notwithstanding that other information may have, in other times and in other contexts, become available to the authorities when it should not have (e.g. the reference to Justice Krever's 1980 report on confidentiality in the Ontario health system). In my opinion, based on the evidence led by the Crown in this case, the collection and compilation of the statistical information is reasonably necessary and, although there is always some risk of breach of the confidentiality sections of the *Statistics Act* and other legislation, there is no evidence to suggest that this is a real likelihood. Moreover, proceeding on the assumption that the collection and compilation of the information is necessary for the development of future government policy, as testified to by the witness Sheridan, any subsequent breaches of confidentiality should be dealt with if and when they actually occur. Citizens have been afforded the right to claim damages for breaches of privacy where any damage or loss occurs and can be proven. Moreover, a citizen may well have a right to an injunction in the face of a threatened breach of the confidentiality provisions of the legislation and it is at that point,

> in any particular instance or case, that the citizen's right should be considered and weighed against the reason or need to disclose what is otherwise confidential information and which would not otherwise be disclosed.

[17] The facts in the instant case are very similar to the facts in *Gill*. In *Gill*, the person provided only his name and address on the census form and no other information. In this case, Ms. Finley provided nothing and refused to provide anything, not even her name. In this case, as in *Gill*, the Crown called the detailed evidence relating to the collection, use, storage and protection of census information. In this case, they called Mr. Arora, who testified about the need and handling of the specific information. He gave details of the collection, storage, handling and security of the information provided by respondents. Ms. Finley was not able to seriously question any of those details. As such, I am in agreement with the reasoning of Clearwater J. in the *Gill* case and with Judge Whelan when she concluded that while s. 8 of the *Charter* was engaged, there was no breach and, therefore, no remedy for Ms. Finley. While counsel for Ms. Finley raised issue with some of the considerations that Judge Whelan used in concluding that there was no breach, I find that given the reasoning she employed and the fact that the purpose for the collection of the census data is regulatory and not criminal, her conclusion is not assailable.

[18] As there is no breach, there is no remedy, and the appeal is dismissed.

J.

D.B. Konkin