S.C.C. No. 02739

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Clarke, C.J.N.S.; Chipman and Roscoe, JJ.A.

Cite as: R. v. Langille, 1992 NSCA 33

BETWEEN:

HER MAJESTY THE QUEEN Appellant - and - ERNEST CECIL LANGILLE Respondent	)	Robert C. Hagell for the Appellant David F. Walker, Q.C. for the Respondent Appeal Heard: December 2, 1992 Judgment Delivered: December 2, 1992

THE COURT: Appeal allowed and acquittal of breathalyzer charge contrary to **Criminal Code** s. 253(b) set aside per oral reasons for judgment of Clarke, C.J.N.S.; Chipman and Roscoe, JJ.A. concurring.

The reasons for judgment of the Court were delivered orally by:

CLARKE, C.J.N.S.:

The issue in this appeal concerns the legal effect of the unproclaimed sections 258(1)(c)(i) and 258(1)(g)(iii)(A) of the **Criminal Code**.

The text of the first provides that each time a sample of breath is taken, pursuant to certain preceding sections, an accused, upon request, shall be given a specimen in an approved container. The second provides that where samples are taken pursuant to s. 254(3) the qualified technician shall certify that the accused was offered a specimen in an approved container, provided it was requested by the accused.

The respondent was charged that on April 21, 1991, at Chester Basin he unlawfully operated a motor vehicle with a concentration in excess of 80 milligrams of alcohol in 100 millilitres of blood, contrary to s. 253(b) of the **Criminal Code**. He pleaded not guilty.

Upon the conclusion of the evidence at the respondent's trial, his counsel sought a declaration that s. 258(c) and (g) as presently proclaimed should be declared inoperative because they infringe his right to make full answer and defence. This was based on the ground that without the container clauses providing the respondent with a statutory right to a sample of his breath, s. 7 of the **Charter of Rights and Freedoms** is violated.

The trial judge agreed. Relying on s. 52(1) of the **Constitution Act** she declared s. 258(1)(c) and (g) of no force and effect. The Crown appealed alleging the trial judge erred. The respondent asserts the trial judge did not err.

We have studied the record and considered the thorough and complete factums which were filed by both counsel and now supplemented by their oral submissions. We have unanimously concluded the appeal should be allowed for the following reasons:

(i) Until proclaimed, the so-called container clauses are not the law in Canada. It is not the function of this court to cause them to be legislated into force.

(ii) It is within the competence of Parliament
   (a) to delay their coming into full force and effect, and
   (b) to delegate to the Executive Branch the authority to determine the appropriate date for their proclamation.

(iii) It is not the function of this court to determine whether containers are available or are feasible or to investigate the cost of providing them or the scientific implications of their design for the appropriate preservation of specimens of breath.

(iv) Until proclaimed, the "container clauses" are not enforceable: they are not the law. They are not subject to a **Charter** challenge. If there is no law requiring containers to be provided the respondent, then there can be no **Charter** challenge for the failure to provide them.

(v) While decisions of the Executive Branch may be subject to review by the courts as indicated by the Supreme Court of Canada in **Kindler v. Canada (Minister of Justice)** (1991), 67 C.C.C. (3d) 1, there is nothing to review, if as here, no decision to proclaim has been made by the Executive or the Governor-in-Council.

(vi) The failure to provide the respondent with a specimen of his breath does not deprive him of his right to make full answer and defence nor does it create a situation of testimonial compulsion. Among others, he has the right to cross-examine the technician, he may call evidence with respect to his consumption of alcohol including experts to interpret what the reading should have been based upon the quantity he consumed, he can challenge the manner by which the breathalyzer was operated and call expert evidence in that respect, on his own volition he can have a specimen of his blood analyzed and provide evidence of the results, and the Crown is obliged to disclose relevant

information to the defence as per **R. v. Stinchcombe** (1991), 68 C.C. C. (3d) 1. This list is not exhaustive: undoubtedly there are other avenues available to a defendant depending upon the particular circumstances of the event.

(vii) In summary, it is our unanimous opinion that the non-proclamation of the "container clauses" does not offend the **Charter** rights of the respondent. The legislation is not inconsistent with the provisions of the Constitution. There is no cause to set it aside pursuant to s. 52(1). In our respectful opinion the trial judge erred in so doing.

(viii) In reaching this decision we have considered numerous judgments of the courts including the following: **Reference Re Proclamation of Section 16 of the Criminal Law Amendment Act, 1968-69** (1970), 10 D.L.R. (3d) 699 (S.C.C.); **R. v. Eagles** (1989), 88 N.S.R. (2d) 337 (N.S.S.C.A.D.); **R. v. Cornell** (1985), 30 M.V.R. 165 (Ont. C.A.); **R. v. Schneider** (1986), 43 M.V.R. 223 (Sask. C.A.); **R. v. Turpin** (1989), 48 C.C.C. (3d) 8 (S.C.C.); **R. v. Alton** (1989), 53 C.C.C. (3d) 252 (Ont. C.A.); **R. v. Ellsworth** (1988), 46 C.C.C. (3d) 442 (Que. C.A.); **R. v. Van Vliet** (1988), 10 M.V.R. (2d) 190 (Ont. C.A.); **R. v. Altseimer** (1982), 1 C.C.C. (3d) 7 (Ont. C.A.); **R. v. Klumpner**, January 16, 1990, unreported, Provincial Court of British Columbia; **The Queen v. Terry Alfred Crowell** (1992), Provincial Court of Nova Scotia, No. PBW - 293138, unreported; and **R. v. Gaff** (1984), 15 C.C.C. (3d) 126 (Sask. C.A.).

Conclusion

We allow the appeal, set aside the verdict of acquittal and remit the matter to Her Honour Judge Crawford for completion.

C.J.N.S.

Concurred in:

Chipman, J.A.

Roscoe, J.A.