2002 NWTTC H12

T-1-YO-2002000374/375/213 T-3-YO-2002000278/268

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

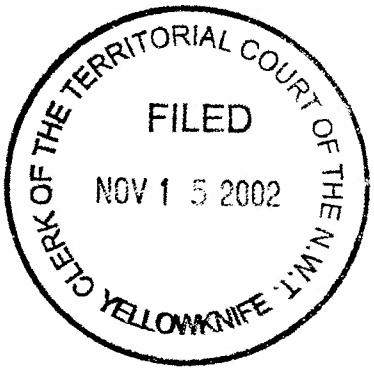
IN THE MATTER OF:

HER MAJESTY THE QUEEN

- v -

L.Y.

(A Young Person)



Transcript of an Excerpt from Proceedings **(Reasons for Judgment re Collateral Attack)** heard before The Honourable Judge B.A. Bruser, in Yellowknife, in the Northwest Territories, on the 23rd day of October, 2002.

APPEARANCES:

Mr. N. Sinclair:	Counsel for the Crown
Mr. G. Watt:	Counsel for the Defence

Charges under ss. 348(1)(b) C.C., 354(1)(a) C.C., 145(5.1)C.C. x 2 and 26 Y.O.A.

THE COURT: The charges before the court are that on or about June 18th of 2002, at the Hamlet of Tulita, this young person did fail without lawful excuse to comply with a condition of an undertaking entered into pursuant to section 499(2) in that he failed to obey a curfew imposed upon him by the peace officer.

There are agreed facts. They are marked as Exhibit 1. The Crown and the defence are in agreement that on June 13th, the young person and three other young people were arrested and charged in Tulita with breaking and entering into the post office. The break-in is said to have occurred at approximately 3 a.m. on June 9th, 2002.

The same day that the young person was arrested, he was released. According to the agreed facts, he was released on an undertaking entered into in Form 11.1. Schedule A, attached to the agreed statement of facts, is a copy of the undertaking.

What schedule A omits is that this undertaking, according to the court records that I have before me, was part of the release authorized by the *Criminal Code* in that the undertaking was in addition to a promise to appear issued by the peace officer. The fact of the existence of the promise to appear, although omitted from the agreed statement of facts, does not appear to be in dispute. Accordingly, I find

that the undertaking was, other issues aside for the moment, a proper one. Had the undertaking been issued without it being part of a promise to appear or without it being part of a recognizance entered into before an officer in charge, the undertaking would not have been validly entered into.

There is no dispute that the young person received a copy of the undertaking at the time it was entered into.

The allegation that the undertaking contained a curfew as alleged in counts 1 and 2 is also not in dispute.

This young person was 12 years of age at the time of the undertaking and at the time of the alleged break and enter.

What gave rise to the two charges is that, as agreed upon, on June 18th, 2002, between 2 a.m. and 2:30 a.m., he was seen at an area in Tulita in the company of several other youths. He was not under the supervision of his grandparents or any other responsible adult.

On the same date at about 4:10 a.m., he was seen near the school in Tulita. Once again, he was in the company of several other young people and again not under the supervision of his grandparents or of any other responsible adult. Accordingly, he was charged with failing to obey the undertaking.

The defence mounts an attack on the condition of the undertaking that requires L. to obey a curfew.

The Crown says that there cannot be such an attack because it would offend the rule against collateral attack.

The starting point is necessarily the *Criminal Code of Canada* and also the *Young Offenders Act*.

The agreed facts, as I have mentioned, specify that the undertaking was in Form 11.1. An undertaking in that form flows from sections 493, 499, and 503 of the *Criminal Code*. Those sections are not exempted or excluded from young offender proceedings by operation of the *Young Offenders Act*.

Section 493 is the definition section.

> Undertaking means an undertaking in Form 11.1 or Form 12.

Section 499 has to do with the release from custody by an officer in charge where an arrest has been made with a warrant.

Section 503 has to do with a release after an arrest with or without a warrant; and in subsection (2) of section 503, if the peace officer or officer in charge is satisfied that the person should be released from custody conditionally, the officer may, and I'll skip over parts that are not relevant, release the person on a promise to appear or upon a person

entering into a recognizance.

Section 503(2.1) sets out the appropriate conditions. They are statutory. A peace officer has to follow the statute; a peace officer has no greater power than that provided by statute.

Under section 499(2), the power is given to the officer in charge to require the person to enter into an undertaking on conditions. Again, the same comments I made earlier apply.

Under 499(2)(h), the officer has the power to require the individual

> ...to comply with any other condition specified in the undertaking that the officer in charge considers necessary to ensure the safety and security of any victim of or witness to the offence.

I have referred to section 499 because it is section 499 that is described in Count 1 and in Count 2.

In section 503(2.1)(h), the wording reads.

> ...to comply with any other condition specified in the undertaking that the peace officer or officer in charge considers necessary to ensure the safety and security of any victim of or witness to the offence.

The difference between the two paragraphs is that under section 503 the words "peace officer" are included in addition to an "officer in charge".

It is admitted in paragraph 3 of the agreed statement of facts that the Corporal who gave the undertaking was an officer in charge, and therefore that officer fits neatly within section 499 and section 503.

I turn my attention now to the rule against collateral attack. What is the rule and what is the reason for it?

At tab 4 of the Crown's book of authorities, page 9, paragraph 14, the Supreme Court of Canada in the *Litchfield* judgment sets out the rule. The rule is that,

> ...a court order, 'made by a court having jurisdiction to make it', may not be attacked 'in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment' (Wilson v. The Queen, [1983] 2 S.C.R. 594, per McIntyre J., at p.599). The lack of jurisdiction which would oust the rule against collateral attack would be a lack of capacity in the court to make the type of order in question, such as a provincial court without the power to issue injunctions. However, where a judge, sitting as a member of a court having the capacity to make the relevant type of order, erroneously exercises that jurisdiction, the rule against collateral attack applies.

More citations given.

It is my conclusion that if the peace officer fits, when issuing an undertaking, under the umbrella

of the rule against collateral attack, then the clause in issue, i.e. the basket clause curfew, cannot be attacked. It could have been varied or otherwise dealt with on application under the applicable provisions of the *Criminal Code*.

The next issue is whether an undertaking issued by a peace officer - in this case an officer in charge - fits within the protection of the rule against collateral attack. Where does the rule come from? Why does it exist?

At paragraph 17 of *Litchfield* there is useful guidance. The court said:

> The rationale behind the rule is powerful: the rule seeks to maintain the rule of law and to preserve the repute of the administration of justice. To allow parties to govern their affairs according to their perception of matters such as the jurisdiction of the court issuing the order would result in uncertainty. Further, 'the orderly and functional administration of justice' requires that court orders be considered final and binding unless they are reversed on appeal.

With that in mind, I refer now to the *Conkin* judgment also found in the Crown's book of authorities; this is at tab 5. I have a copy of *Conkin* from a different source. *Conkin* in the booklet is from the Court of Appeal. The Court of Appeal dismissed the judgment from the court below.

What I did in order to understand *Conkin* better

was to go to the judgment at the first level, and it's the same case as referred to at tab 5, but that of Gilmour, Provincial Court Judge. What I have is his judgment.

That judgment was in 1994. It took until 1998 for it to work its way through to the Court of Appeal.

Here is what I have found noteworthy at the provincial level in *Conkin*.

At paragraph 15, the learned judge referred to other authority. There is the following quote, a reference to *Avery* also found in the Crown's brief of authorities. It's interesting how this develops and I will now read.

> In further argument against the impeachment of the release order, Counsel for the Crown referred me to the case of *R. v. Avery*, and quoting from Kerans JJ.A., P.26;
>
> > The rule was recently restated by Dickson J. In *Wilson v. the Queen*, (1983), 9 C.C.C.(3d) 97 at p.104, 4 D.L.R. (4th) 577, [1984] 1 W.W.R. 481 at p.488 (S.C.C.) Dickson J., for example, said:
> >
> > > I accept the general proposition that a court order, once made, cannot be impeached otherwise than by direct attack, by appeal, by action to set aside, or by one of the prerogative writs.

Then Gilmour J. says as follows:

> In this case the accused could have, and

> did not, seek relief from the original error by appeal if not writ. In the face of his having failed to do so, he must obey the order which he chose to let stand. When he argues now that he should not be convicted for the breach of it because it is bad, he is saying he did not have to obey it. A collateral attack is nothing less than a request for an affirmation of defiance.

(Emphasis added.)

He goes on in referring to the quote from Wilson J. referred to in *Avery* in the Alberta Court of Appeal, as follows:

> The reason for the rule is that the laws must encourage respect for due process by itself respecting it. It is a rule of practical necessity.

The way I see this is that the bulk of the cases that have come before the courts at the provincial, territorial, supreme court levels, courts of appeal and Supreme Court of Canada, arises from judicial orders (orders of a court).

As I said at the very outset to counsel before they began their submissions, there may be a layer to peel back. I have referred to that underlying layer. Laws must encourage respect for due process by itself respecting it. It is a rule of practical necessity, and that is what the rule against collateral attack is about. It is not, in my respectful view, to be limited to orders of a court.

Peace officers have statutory powers given to them by parliament. Those powers may be exercised by a peace officer as part of the lawful process of the administration of justice and, I add, a necessary part of it; otherwise, people such as this young offender would necessarily have to be detained in custody until they could be dealt with before a Justice of the Peace or Judge either by personal attendance or by another means of doing so.

The applicable provisions of section 499 and section 503 were made by parliament so that people like L. could be swiftly released back into the custody of their parents, instead of being detained and brought before a Justice of the Peace or Judge.

Support for this interpretation of the underlying layer is at paragraph 17 of *Litchfield*, to which I have already referred. It is instructive to return to it, however, to tie my reasoning together.

The rationale behind the rule is a powerful one. It serves to maintain the rule of law. It serves to preserve the reputation of the administration of justice. The Supreme Court of Canada has not said that it only preserves the reputation of courts. It has not said that the powerful rationale is only to maintain judicial process. If it had meant that, the Supreme Court of Canada would have said so.

The last case in the book filed by the Crown is

from the Alberta Provincial Court; it is the case of *Skordas*. The court held that the accused could collaterally attack a Form 11.1 undertaking and that it could be attacked to impeach the effectiveness of a condition. The rationale, however, for arriving at that conclusion is not well-developed. This conclusion is reached in the second to last complete paragraph, but the primary reasoning in that case does not lead to that specific conclusion. To any extent that it does, I decline to follow that judgment in the face of the more persuasive authorities that I have been referring to.

In my view, I do not have to reach a conclusion that a peace officer or, as here, an officer in charge is exercising a judicial act. I do not see that this is what this rule is about, nor what the facts of this case are about. It has to do with the powerful rationale mentioned in *Litchfield* and also referred to at the Provincial Court level in *Conkin*.

Accordingly, I conclude that I am led inescapably to a ruling that the umbrella against collateral attack applies to undertakings entered into before peace officers and officers in charge.

Since I have reached that conclusion, the remaining issue of whether the basket clause is an appropriate or lawful one is not something I am allowed by law to consider in this proceeding.

The Crown has proven beyond a reasonable doubt that the events happened June 18th, 2002; that they happened at Tulita; that there was a failure to obey the undertaking because L. was out after curfew and did not fit within the exception to the curfew. There is nothing to indicate any lawful excuse for my consideration. He must, by this analysis, be found guilty as charged of Count 1 and Count 2.

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Certified pursuant to Practice Direction #20 dated December 18, 1987.

A. Wright

Annette Wright, RPR, CSR(A)
Court Reporter