

**I N S I D E**

4. **Criminal Law – Evidence – Identification of accused**
5. **Corruption – payments made on the understanding that they were intended for police officers – whether sufficient to form basis for offence**
5. **Evidence – reliability of evidence of impinged witness**
6. **Environmental crime – discharge of chlorine causing injury to worker – whether an environmental issue or a safety at work issue.**

Constitutional Law – warrant to obtain bodily substance for DNA analysis under the Criminal Code – whether warrant scheme unconstitutional – Constitution Act 1982 – Criminal Code 1985 sections 487.04 to 487.09 – (Canada)

On March 21, 1996, a "DNA" warrant was issued to seize a bodily sample from the respondent pursuant to s.487.05 of the Criminal Code. On March 29, 1996, before any sample was seized, the respondent (S.F.) made an application for prerogative relief in the Ontario Court of Justice (General Division) seeking to quash the DNA warrant on constitutional grounds. The Attorney-General of Canada applied for and was accorded party status to this motion. S.F. later amended his application to that of a prerogative relief application seeking a declaration that the DNA warrant regime enacted in sections 487.04 to 487.09 of the Code constituted an unreasonable restriction of the rights embodied in sections 7 and 8 of the Canadian Charter of Rights and Freedoms ("Charter").

The trial judge found that s.487.06(1)(a) which authorized the seizure of hair for the purposes of forensic DNA analysis was "per se unreasonable", incompatible with s.8 of the Charter and "of no force and effect and is not saved by s.1" He also held that the ex parte nature of the warrant process was generally justified to avoid the risk of a suspect fleeing but may be read down to require notice in cases where the suspect was in custody.

The Attorney General for Ontario appealed. The respondent cross-appealed alleging that the judge should have declared that the DNA warrant provisions were unconstitutional in their entirety. The respondent was meanwhile acquitted of the charge that gave rise to the issuance of the DNA warrant. However, it was agreed that the court still had jurisdiction to continue to hear the appeal. The Court agreed that the appeal raised serious constitutional issues that needed to be addressed.

The respondent raised the following issues in his cross-appeal:

- (a) whether the judge erred in not finding that s.487.05 of the Criminal Code constitutes an unreasonable restriction on the principle against self-incrimination protected under s.7 of the Charter;
- (b) Whether the judge erred in not finding that the ex parte requirement of s.487.05(1) of the Criminal Code renders the legislation unreasonable under s.8 of the Charter;

The questions raised by the appellants were:

COMMONWEALTH

Produced by the Criminal Law Unit
of the Commonwealth Secretariat as a
service to Member Governments

For further information or copies, please
contact: The Editor, Criminal Law Unit,
Legal & Constitutional Affairs Division (LCAD),
Commonwealth Secretariat,
Marlborough House, Pall Mall,
London SW1Y 5HX, United Kingdom.
Tel: +44 (0)20 7747 6417/6420/6423
Fax: +44 (0)20 7839 3302
E-mail: k.prost@commonwealth.int
v.wright@commonwealth.int

Designed and printed by the Commonwealth Secretariat

- (a) whether the judge erred in finding that s.487.06(1)(a) of the Criminal Code which authorizes the seizure of hair from an individual for the purposes of forensic DNA analysis constitutes an unreasonable seizure under s.8 of the Charter which cannot be reasonably justified under s.1 of the Charter;
- (b) whether the judge erred in reading down s.487.05(1) to include an ex parte hearing unless a hearing on notice is ordered by the court.

● **Held**

1. **Fresh evidence application**

The judge had ruled that s.487.06(1)(a), which authorizes the seizure of hair samples under a DNA warrant, infringed s.8 of the Charter and could not be justified as a reasonable limit under s.1 of the Charter. This conclusion was based on expert testimony given when the DNA Bill was before a Committee of the Senate in Parliament. The expert had testified, based on the technology in use at the time, that in relation to 5-10% of the population, plucked hair will not provide a useable DNA sample. On the basis of this evidence, the judge found that because of the potential for unnecessary seizures in 5-10% of the cases, the seizure of hair samples is unreasonable and contrary to section 8 of the Charter.

On appeal, the Crown introduced fresh evidence to demonstrate that the technology relied upon by the expert at Committee was no longer current. The present generation of DNA profiling techniques, Polymerase Chain Reaction ("PCR") (which replaced the previous technology of Restriction Fragment Length Polymorphism ("RFLP")) can be applied to all plucked hair samples. With the consent of the respondent, the Appeal Court accepted this fresh evidence, with the result that the hearing judge's concerns about unnecessary seizures were no longer relevant and his finding on this basis was overturned.

2. The respondent however maintained that the legislation was still unconstitutional because it violated the protection against self-incrimination, enshrined within s. 7 of the Charter. The respondent's position was that s.7 of the Charter prohibits Parliament from creating legislation, in the criminal context, such as s.487.05 of the Code, which compels an individual to provide a bodily sample, where the predominant purpose of the legislation was to acquire evidence to incriminate the individual.

The Court found that none of the cases reviewed supported the proposition that the principle

against self-incrimination was a free standing constitutional right under the Charter. It was not a constitutional right at all; it was one of a number of the principles of fundamental justice which were qualifiers or modifiers of the rights enshrined in s.7. Section 7 established that everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. The rules of fundamental justice did not prohibit the Crown from compelling the production of evidence, or even compelling the suspect to assist in its production; they control the manner in which this evidence may be obtained. Section 7 of the Charter was the overriding protection to an accused person in a criminal proceeding, ensuring that he or she would not be deprived of fundamental freedoms without due process. Sections 8 through 14 list specific constitutional restrictions on the State where it seeks to deprive the individual of his or her constitutional right to life, liberty and security of the person. One of them is s.8, which states that everyone has the right to be secure against unreasonable search and seizure: *Reference Re Section 94(2) of the Motor Vehicle Act*, (1985), 23 C.C.C. (3d) 289 (S.C.C.)

3. The approach taken by the respondent in challenging the impugned DNA warrant legislation under s.7 as being in violation of the principle of the protection against self-incrimination was misconceived. It was not necessary to decide whether or in what circumstances the principles of fundamental justice constitutionalize a wider or different protection than that afforded by s.8, where the impugned legislation concerns the gathering of evidence. The determination of the issue in this case is governed by *R. v. Mills*, [1999] 3 S.C.R. 668, in which the Supreme Court of Canada stated that:

"Given that s.8 protects a person's privacy by prohibiting unreasonable searches or seizures, and given that s.8 addresses a particular application of the principles of fundamental justice, we can infer that a reasonable search or seizure is consistent with the principles of fundamental justice".

An analysis of the DNA warrant legislation under s.8 is determinative of its constitutionality. If the legislation passes s.8 scrutiny, it is a valid means of gathering evidence. As such, it can hardly be said to be contrary to the principles of fundamental justice under s.7. Accordingly, the analysis of whether the legislation relating to DNA warrants is constitutional, begins and ends with s.8. Since

the respondent was acquitted in this case, there was no issue as to the reasonableness or otherwise of the manner in which the samples were taken.

4. The requirement for authorisation

Because the warrant provisions require prior judicial authorization, the onus is on the state to demonstrate the superiority of its interest to that of the individual. Sections 487.04 to 487.07 mandate a proper showing of objectively reasonable grounds for the warrant. A court, exercising its independent discretion, must be satisfied, after balancing the competing interests, that the issuance of the warrant is in the best interests of the administration of justice. In addition to these traditional safeguards, the scheme for the DNA warrant also contains a number of other protections for the individual. The Court was also of the view that DNA warrants foster a valid government objective in enforcing the criminal law. At the same time, in terms of the suspect, they are minimally intrusive and result only in "de minimis" interference with the body.

The Appeal Court agreed with the trial judge's finding that "the important government justifications of fostering effective crime control, protecting the innocent, enforcing society's criminal laws, and substantially improving the search for truth in the criminal trial process warrant the court-authorized intrusion upon bodily integrity...the DNA warrant legislation is a rational and proportionate response designed to meet these objectives and does not result in any over-reaching or unfair impact upon the individual subject to a DNA warrant seizure."

5. The self-incrimination argument

As noted before, it was not the case that the principle against self-incrimination was a constitutionally protected right under section 7 of the Charter. The Supreme Court of Canada in *R. v. White* (1999), 135 C.C.C. (3d) 257 had held "that the principle against self-incrimination does have the status as an overarching principle does not imply that the principle provides absolute protection for an accused against all uses of information that has been compelled by statute or otherwise. The residual protections provided by the principle against self-incrimination as contained in s.7 are specific, and contextually sensitive.

The contextual analysis that is mandated under s.7 of the Charter is defined and guided by the requirement that a court determine whether a deprivation of life, liberty, or security of the person

has occurred in accordance with the principles of fundamental justice. As this Court has stated, the s.7 analysis involves a balance. Each principle of fundamental justice must be interpreted in light of those other individual and societal interests that are of sufficient importance that they may appropriately be characterized as principles of fundamental justice in Canadian society."

In *R. v. Stillman* (1997), 113 C.C.C. (3d) 321 (SCC), the Court held that a compelled use of the body or bodily substance or the compelled provision of bodily substance in breach of the Charter would be treated as a compelled or conscripted self-incriminating statement. But this was not the same thing as saying that the use of bodily substances was a conscripted source of incriminating evidence. *Stillman* recognised that there were constitutional ways in which such substances could be obtained, and envisaged that the DNA warrant legislation (which was not yet in force at the time of the decision) would meet these constitutional requirements.

6. Although the trial judge's analysis of section 8 was generally correct, in two instances his analysis could be said to amount to an editing of the legislative provisions. Firstly, he found that s. 487.06(1)(a) authorising the plucking of scalp hair even though it would obtain no usable DNA for approximately 5-10% of the population, violated section 8 as an unnecessary invasion of privacy. In the Court's view, and absent the fresh evidence, whether a sample was 80 or 90 % effective for sampling purposes, did not raise concern as to the reasonableness of the authorising statute. Secondly, a constitutional overview of the warrant procedure did not justify a reading down of the statute to allow for service of a notice of hearing in some circumstances. While the legislation permits *ex parte* applications, it is for the judge to determine in each case, what conditions, if any, would have to be met for the order to issue. This concern did not raise a constitutional issue as to the competence of the legislative scheme.

Her Majesty the Queen and S.F., Court of Appeal For Ontario, 19/1/2000 (Internet site: <http://www.ontariocourts.on.ca/appeal.htm>)

Information on the draft U.N. Transnational Organised Crime Convention can be found on the web at:
<http://www.ifs.univie.ac.at/uncjin/uncjin.html>

Criminal Law – Evidence - Identification of accused – Use of Dock Identification as opposed to Identification Parade – Offences Against the Person (Amendment) Act 1992 s. 2- (Jamaica)

The appellants Irvin Goldson and Devon McGlashan were charged with the murder of one Donovan Guthrie. The evidence put forward by the Prosecution was that in the early hours of the 10 of April 1993, the deceased and his girl friend were sleeping in the home of the girl friend when the two accused and a third man broke into the house and shot at them. The girl friend whose name is Claudette Bernard, was shot in the face and she sustained injuries to her jaw for which she was later treated. She lay where she fell with her eyes shut pretending to be dead. She heard further shots being fired and when the gun-men had left she opened her eyes to see that her boyfriend had been killed. She said she knew the gun-men whom she called "Sector" (McGlashan), "Yoogie" (Goldson) and Marlon. No identification parade was held but she was certain she knew the accused as Yoogie and Sector. The person she described as Marlon had died before the investigations were completed. Claudette said that she had known Sector for three years and Yoogie for twelve years. She was able to identify them in the dock during preliminary hearings.

At trial, Claudette was the only witness to connect McGlashan and Goldson with the murder, and the case turned on the correctness of her identification. There was again a dock identification. She explained that she used to see Sector about three times a week in the vicinity where she lived and had spoken to him once. She knew his girlfriend as Ginger. In the case of Yoogie, she had known him for 12 years and they grew up in the same neighbourhood. She knew his mother as Miss Tulloh. McGlashan denied that he was called Sector and that Claudette knew him at all. Goldson did not deny that Claudette knew him.

The pair were convicted of murder and sentenced to death. Their appeal to the Court of Appeal of Jamaica was dismissed and they appealed further to the Privy Council.

Counsel for McGlashan dealing with the appeal against conviction, complained about the fact that there had been no identification parade. He submitted that where an accused is accepted to be

well known to the identifying witness, no parade is required to be held. The witness will naturally pick out the person whom he knows and whom he believes that he saw commit the crime. But where as in the present case, the fact that Claudette knew McGlashan and Goldson was in dispute, an identification parade was necessary. The police by not holding an identification parade, had denied the accused of an opportunity to demonstrate conclusively that Claudette was not telling the truth. On the other hand, if she had picked them out in an identification parade, the prosecution case would have been strengthened.

● **Held:** allowing the appeal in part;

1. Where an identifying witness has not made a previous identification of the accused, a dock identification is unsatisfactory and ought not to be allowed. Unless the witness had provided the police with a complete identification by name or description, so as to enable the police to take the accused into custody, the previous identification should take the form of an identification parade. On the other hand, if the accused is well known to the witness, an identification parade is unnecessary and could, be positively misleading. In the present case, however, the question of whether the identification fell into the one class or the other was itself a question in dispute. Although Counsel was right in stating that an identification parade would have helped to resolve the dispute, the absence of a parade had not resulted in a serious miscarriage of justice.

The normal function of an identification parade is to test the accuracy of the witness's recollection of the person whom he says he saw commit the offence. Although, as experience has shown, it is not by any means a complete safeguard against error, it is at least less likely to be mistaken than a dock identification. But an identification parade in the present case would have been for an altogether different purpose. It would have been to test the honesty of Claudette's assertion that she knew the accused. It is of course true that even if her evidence about knowing them had been truthful, she might still have been mistaken in identifying them as the gunmen. But, that is "not a claim that could be tested by a parade": per Lord Devlin in his *Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases* (26th April 1976) (at page 99 paragraph 4.96).

The principle that "there ought to be an identification parade where it would serve a useful purpose": *Hobhouse L.J. in Reg. v. Popat* [1998] 2 Cr. App. R. 208, 215 is one which ought to be

followed. It follows that, in capital cases such as the present, it is good practice for the police to hold an identification parade unless it was clear that there was no point in doing so. This would have been the case if it had been accepted, or incapable of serious dispute, that the accused persons were known to the identification witness. At least in the case of McGlashan, that does not appear to have been the position.

2. However, the question was whether the failure to hold a parade caused a serious miscarriage of justice. The identification evidence could not be said to be weak. If Claudette was a credible witness, the evidence would have been sufficient to support a conviction. The issue of credibility, as between Claudette and the accused, was left to the jury with appropriate directions and they clearly believed Claudette. This was an issue considered in the trial Court on which their Lordships could not form an opinion. Moreover, the accused persons did not ask for an identification parade.

Therefore, although one may speculate about the possibility that a parade would have destroyed the prosecution's case (as one may about any other evidence which might have been available to damage the credibility of a prosecution witness) it was not possible to say that the absence of a parade made the trial unfair. The judge was entitled to leave the question of credibility to the jury on the evidence before them. And once she was accepted as a credible witness, no criticism was or could be made of the judge's directions that the jury was to be careful about accepting her evidence that the accused were the gunmen.

It was not necessary for the trial judge to give the jury a specific direction about the absence of an identification parade and the dangers of a dock identification.

3. On the question of classification, capital murder, as defined in section 2(1) of the Offences Against the Person (Amendment) Act 1992 is, inter alia, "(d) any murder committed by a person in the course or furtherance of ... (ii) burglary" Section 2(2) adds that -

"If ... two or more persons are guilty of [a murder falling within section 2(1)] it shall be capital murder in the case of any of them who by his own act caused the death of, or inflicted or attempted to inflict grievous bodily harm on, the person murdered, or who himself used violence on that person in the course or furtherance of an attack on that person; but the murder shall not be capital murder in the case of any other of the persons guilty of it."

It was not disputed that the murder was committed in the course of a burglary, but the judge failed to direct the jury on the application of section 2(2) to the facts before them. The witness spoke of the gunmen carrying long and short guns. The evidence of the cartridges and wounds showed that a gun of each kind had been discharged more than once and had caused wounds to the deceased. But the evidence as to who carried which guns was less clear. In this state of the evidence, it was impossible to say how the jury, if instructed on the point, would have resolved the question of who carried what kind of gun, it was therefore, impossible to say which of the three men in the room, with the necessary degree of certainty, had fired a shot at the deceased.

The verdicts of capital murder were therefore substituted with the verdicts of non-capital murder. The question of sentence was remitted to the Court of Appeal.

Irvin Goldson and Devon McGlashan v. The Queen
Privy Council Appeal No. 64 of 1998, 23rd March 2000

Corruption – Corruptly giving gratification – whether payments made by appellant and on the understanding that they were intended for police officers - Prevention of Corruption Act, s. 5 (b)(i)/Evidence – reliability of evidence of impeached witness – Evidence Act s. 147 – (Singapore)

B was charged with corruptly making payments in order that a person named "Allen" would provide tip-offs on impending police raids on his shop. B and PW1 and PW2 sold pirated computer software from B's shop. Due to the illegal nature of their business, the police frequently raided the shop. The tip-offs were to cost the business \$10,000 a month, although eventually this was reduced to \$6,000 a month. PW 4 was the go between for B and Allen. He provided the tip-offs and usually collected the money.

In his defence, the appellant argued, inter alia, that the payments were only for lookout services and that he did not know that any information was to come from police officers. The main prosecution witness was PW4. In statements given to the police before trial, he indicated that he had received payments from the appellant for information on impending police raids and that the appellant made the payments on the

understanding that the information would be coming from police officers. At trial he contradicted those statements testifying, at first, that he and Allen had intended to cheat B by offering to provide information on police raids in return for money even though they did not have any such information. He later changed his evidence and said that they merely posted look-outs for police raids in exchange for money from B. He also said he could not recall precisely what the appellant had been told about the involvement of police officers.

At the end of the case, the trial judge found that PW4's credit had been impeached and rejected his testimony, admitting his prior statements as evidence of the facts stated therein. She found that there were payments made by B in exchange for tip-off information, which B was made to believe, would come through Allen from the police. She therefore convicted B on both charges and sentenced him to two months imprisonment on both counts to run consecutively.

B appealed, contending that the trial judge erred in rejecting PW4's testimony in court and accepting the contents of his statements as evidence of the truth in order to sustain the conviction on both charges. The reliance on these statements provided the only evidence of the alleged payments by B, the nature of the payments via PW4 to Allen and B's intention in making them.

● **Held:** dismissing the appeal in part;

1. Given the various inconsistencies, it was appropriate for the trial judge to reject the evidence given in court by PW4 on certain material points. At the same time, it did not follow automatically that the information in his statement on the same point should not be accepted. The reliability or accuracy of the information in the statements had to be weighed in light of all the requirements of the Evidence Act. In relation to the charge that flowed from the alleged payment in 1996, there was a reasonable doubt as to the reliability of PW4's statement as to the actual transfer of money such that the conviction on that count should be overturned.

2. With respect to the payment in 1998 there was abundant evidence that payment had been made. The central issue was whether the appellant knew or was under the impression that the payments were intended for police officers in exchange for relevant information about the raids. In this instance, a consideration of all the circumstances supported the trial judge's decision to give full weight to PW4's statement.

3. It was clear that when the payments were made to PW4, the intention was that at least some of it would land in the hands of the police in return for them providing information on impending raids on the shop. "The police source was material to the value of the information. This payment was thus intended for the purpose of thwarting the effectiveness of these raids. Such tip-offs would have been improper, in breach of police confidentiality and of the police officers position of trust and responsibility: *PP v. Ong Teck Huat* [1993] 2 SLR 645. There was thus an objectively corrupt element in the transaction when viewed from the perspective of the appellant's intention in making the payment. It was no answer that PW4 and Allen never intended to pass the money on to police officers and that the whole scheme was said to be a fraud on the appellant. ... In these circumstances the appellant must have subjectively known that the payments were corrupt in this sense, as it would be obvious to anyone that the receipt of such payments would be patently inconsistent with a police officers duties." The appellant's conviction on the first charge was therefore properly made.

Tang Teng Boon v. Public Prosecutor [2000] 1 SLR 535

Criminal Law – Environmental Crime – Discharge of contaminant into natural environment causing injury to worker – whether offence committed under Canadian Environmental Legislation – Whether application of Environmental Protection Act precluded by application of Occupational Health and Safety Act – Words and Phrases: “Adverse Effect” – Environmental Protection Act, sections 1, 13 and 14 – (Canada)

The respondent, Dow Chemical Canada Ltd., (“Dow”), was charged with two offences under the Environmental Protection Act, R.S.O. 1980, c. 141 (“EPA”), namely:

(1) discharging a contaminant, namely chlorine gas, into the natural environment, contrary to section 14(1); and (2) failing to report such discharge forthwith contrary to section 15(1).

Sections 14(1) and 15(1) of the EPA provide:

“14(1) Despite any other provision of this Act or the regulations, no person shall discharge a contaminant or cause or permit the discharge of a contaminant into the natural environment that causes or is likely to cause an adverse effect.

15. (1) Every person who discharges a contaminant or causes or permits the discharge of a contaminant into the natural environment out of the normal course of events that causes or is likely to cause an adverse effect shall forthwith notify the Ministry."

The allegations against DOW were that one of its employees, called Frank, was working on the roof of the company's manufacturing plant when an uncontrolled emission of chlorine gas discharged from the plant. The chlorine gas, which is heavier than air, enveloped Frank, blinding and choking him. He got disoriented and found it difficult to get out of the immediate area. He finally got out after a number of falls and sought first aid help and was later hospitalised overnight. The Environmental Protection Act charges were the only charges laid in relation to the incident; no charges were brought under the Occupational Health and Safety Act (OHSA).

The trial court found that the escaped gas was released into the natural environment with a resulting significant effect on the victim. Dow was found guilty as charged.

DOW appealed the summary conviction. The Court of Appeal (General Division) allowed the appeal, holding that no offence had been committed by DOW, under the EPA. The Court drew a distinction between the direct effect of the discharge and a consequential effect of the contaminant. The Court said that the facts established a release of a relatively small amount of contaminant, sufficient to harm the employee, but one that did not amount to a state of pollution of the natural environment that consequently produced his injuries. It held that the Act intends that the "adverse effect" must come from the impairment of the natural environment and not from the release of the contaminant only. What is sought to be prohibited is the impairment or pollution of the natural environment, which pollution or impairment causes or is likely to cause an adverse effect. "The EPA had a larger purview dealing with the adverse effect resulting from or consequential to the pollution or impairment of the natural environment." The court further held that since there was no unlawful discharge, DOW was under no obligation to report to the Ministry pursuant to section 15(1). However, in overturning the convictions, the Court rejected an alternative argument by DOW that because the OHSA required the filing of a report in this case, which was done, it was that statute which was applicable to the facts of the case, to the exclusion of the EPA.

The prosecution appealed against the decision acquitting Dow of the offence of discharging a contaminant. The respondent appealed against the finding of the judge with respect to the application of the OHSA to the exclusion of the EPA.

The issues before the Ontario Court of Appeal were:

- (h) Did the discharge of chlorine at the Respondent's work site constitute a violation of s.14 (1) of the Act;
- (i) On the facts of this case, was the conviction for the offence of discharging a contaminant under the EPA precluded by the scope and operation of the OHSA?

☉ Held: allowing the Crown's appeal

1. Adverse effect is defined in the interpretation section of the EPA to mean any of the following:
 - "(a) impairment of the quality of the natural environment for any use that can be made of it,
 - (b) injury or damage to property or to plant or animal life,
 - (c) harm or material discomfort to any person,
 - (d) an adverse effect on the health of any person,
 - (e) impairment of the safety of any person,
 - (f) rendering any property or plant or animal life unfit for human use,
 - (g) loss of enjoyment of normal use of property, and
 - (h) interference with the normal conduct of business."

Dow did not argue in support of the appeal judge's distinction between direct and consequential adverse effects. Instead Dow agreed that prima facie section 14(1) had been violated but advanced two arguments as to why this should not lead to a conviction, basing the arguments on comments of the Supreme Court of Canada in the earlier case of *R. v. Canadian Pacific Ltd.* [1995] 2 S.C.R. 1031.

2. The first argument was that no offence had been committed because the discharge of the contaminant had only a trivial impact on the natural environment. In responding to these arguments, the Court noted first of all that the distinctions made by the court below between direct and consequential effects had no basis in the Act, nor any support in the case law.

With respect to the triviality argument, it was noted that the Supreme Court in *Canadian Pacific*, had indicated that trivial or minimal impairments of the natural environment are not covered by section

14(1). However, the Court was of the view that on the facts of this case the release of the contaminant could not be classified as a trivial matter. They noted that environmental disasters like *Chernobyl* and *Bhopal* had shown that it would be rare for any discharge of chlorine into the natural environment to be considered "trivial or minimal" provided the discharge causes any of the effects mentioned in the section. Thus, the Court rejected this argument. Applying the provision in accordance with its plain meaning, Dow had discharged a contaminant into the natural environment that had an adverse effect on Frank. The effect on Frank was very serious; the actual discharge of a deadly gas such as chlorine was also very serious.

3. Dow also argued that it was absurd to find it liable under the EPA. In support reference was made to the concerns expressed by the Supreme Court in the CP case that the section should not be applied on a literal basis in all cases as this could result in an absurdity. The example given by the court was using the section to charge persons who put sand down on the sidewalk in the winter to avoid injuries from ice. DOW argued that the application of the section in this case required a similar literal interpretation that should not be applied.

The Court found that on the facts of this case, there was no possibility of an absurd result. It involved the discharge of a dangerous contaminant into the natural environment, which had an immediate and serious consequence on a person who came into direct contact with it. The facts of the case were the paradigmatic facts of an environmental protection case. The absurdity principle allows for the narrowing down of the scope of a provision that is open to two or more interpretations, so as to reject interpretations that lead to negative consequences. The fact that Dow could conjure up examples of potentially absurd results does not detract from the reality that its

conduct and its consequences were the matters that the section precisely intended to address.

4. Dow also argued in the alternative that the provisions of the EPA do not apply to cases in which the adverse effects were limited to a worker in the work place. In such circumstances, Dow argued, the provisions of the Occupational Health and Safety Act (OHSA) should apply exclusively.

The Court found that the overlap between statutes is a very common phenomenon. The EPA and the OHSA are examples of laws that overlap in a perfectly acceptable manner. One, (the EPA) is intended to protect the natural environment and the people who live, work and play in it; while the other (the OHSA) is to protect work sites and workers. Incidents may occur which have implications for both statutes. Thus both statutes could apply to the same events.

Both statutes also have paramountcy provisions that are only relevant where there is a conflict. In this case there was no conflict in the application of the two statutes. There was an overlap or perhaps duplication, but not a conflict. The two laws could stand together and could sometimes apply to the same incident. Given the contaminant (chlorine), the nature and scope of the actual discharge and the fact that a person was seriously injured, the EPA was implicated, as well as the OHSA. Both laws could and did apply.

The Queen v. DOW Chemical Canada Inc., Ontario Court of Appeal, 14/3/2000.
www.ontariocourts.on.ca/appeal.htm

NEW CITATION

DPP v. Scarlet (reported in *Crimewatch* 32) [2000] WLR 515

INTERNATIONAL ECONOMIC CRIME CONFERENCE 2001

The Singapore Police Force is hosting an International Conference on Economic Crime. The topic for the Conference is: 'New Millennium—New Economic Crime Trends—Challenges for Industry and Enforcement'. The Conference will examine issues such as telemarketing fraud, investment scams, etc. and will benefit all whose work relate to economic crime issues.

For information on the Conference, please contact International Economic Crime Conference (IECC) 2001 Secretariat, c/o Conference & Travel Management Associates plc Ltd., 425A Race Course Road, Singapore 218671. Tel: (65) 299 8992; Fax: 299 8983. Website: www.spinnet.gov.sg.