Supreme Court Expands Police Powers

On July 6, 2007, the Supreme Court of Canada delivered a unanimous judgment in R. v. Clayton [1]. The case concerned the constitutionality of police conduct that interfered with civil liberties and responded to an Ontario Court of Appeal judgment that reprimanded police for their institutionalized failure to respect the Charter of Rights and Freedoms. At issue was whether a roadblock and search of the two accused, Mr. Clayton and Mr. Farmer, violated their Charter rights under section 9 (arbitrary detention) and section 8 (unreasonable search and seizure).

The case dates back to the early morning of September 24, 1999, when a 911 call was received describing ten "black guys," four with handguns, standing outside a Toronto strip club. Carrying a concealed weapon and possessing a loaded prohibited firearm is contrary to sections 90(1) and 95(1) of the Criminal Code. The 911 caller also identified four vehicles. The police arrived at the scene five minutes after the call was placed and formed a roadblock at both the front and the rear of the club's parking lot. Two officers proceeded to stop a car occupied by Clayton and Farmer, which was driving towards the exit. Their car had not been one of the four identified by the 911 caller. After receiving evasive responses, and Clayton attempting to flee the scene, the police arrested and searched both accused. The searches revealed that both Clayton and Farmer had concealed loaded, prohibited weapons.

The trial judge convicted both Clayton and Farmer, holding that the conduct of the police was in the scope of their power at common law (also referred to as "ancillary police power"). The Ontario Court of Appeal overturned the decision and acquitted both accused, ruling that the roadblock was unlawful because it was not tailored to the vehicles identified by the 911 caller. The Court of Appeal also cited the lack of imminent danger required to justify the roadblock and reprimanded the police for not considering the limits of their ancillary powers. In fact, the Court of Appeal explicitly excluded the evidence, pursuant to s. 24(2) of the Charter, to undermine, in their view, the "institutionally ingrained disregard for individual constitutional rights" in police forces [3]. In their recent decision, the Supreme Court restored the decision of the trial judge and convicted Clayton and Farmer.

Writing on behalf of six of the nine judges, Justice Abella analyzed the case within the framework of the common law. She applied the same two-part legal test as the Ontario Court of Appeal:

1. The Crown must show that the police were acting in the exercise of a lawful duty when they engaged in the conduct in issue; and
2. that the impugned conduct amounted to a justifiable use of police powers associated with that duty. [4].

Justice Abella explained that the second part of the test, the "justification for a police officer's decision to detain," depends on the "totality of the circumstances," namely:

- The nature of the situation;
- the seriousness of the offense;
- the information known to the police about the suspect or the crime;
- the extent to which the detention was reasonably responsive or tailored to the circumstances, including its geographical and temporal scope;
- the seriousness of the risk to public safety; and
- the liberty interests of members of the public [5].

Applying the test to this case, Justice Abella found the initial detention by the police to be constitutional. The caller had identified the presence of ten "black guys" and both Clayton and Farmer were of that ethnicity; the possession of handguns is a serious offense that presented a possibility of risk to the public, and only those leaving the parking lot were restricted in their movement.

Justice Abella also found the searches of Clayton and Farmer to be justified since the police had reasonable grounds to conclude the two occupants of the car were implicated in the crime being investigated: the two men were of the ethnicity identified by the 911 caller, they gave evasive answers to questions posed by the police, and the passenger was wearing gloves, despite the fact that, as the officer observed, it was "not glove weather" [6]. Their section 8 rights were not infringed because the search was incidental to a lawful investigative detention. The remedial provisions of s. 24(2) were not considered because no Charter violations were found.

Justices Binnie, LeBel, and Fish concurred with the majority's results but for different reasons. They argued for the adoption of an explicit Charter analysis to determine common law police powers rather than the two-part test applied by Justice Abella. Under this analysis, the court would consider whether there was a Charter violation. If a violation was found, the court would apply the Oakes test, balancing the competing interests of the police duty and the liberty interests of individuals under section 1 [6]. The Justices argued that the two-part test was outdated since the decision from which it was derived pre-dated the Charter by twenty years. They argued that an explicit Charter analysis would tighten the "growing elasticity of the concept of common law police powers" [7].

Justice Binnie provided several statistics to highlight the dangers of illegal handguns and the societal implications of a "gun culture," such as that which exists in the United States. Indeed, one startling statistic cited that "when the relative number of sworn officers in the two countries is taken into account, a U.S. police officer is seven times more likely to be killed than a Canadian officer" [8].

The Supreme Court did not consider the issue of racial profiling in this case. Although the issue was raised at the Court of Appeal, Justice Doherty dismissed it due to lack of evidence.

Cases

- R. v. Clayton, 2007 SCC 32.
- R. v. Clayton, (2005) 194 C.C.C. (3d) 289 (Ont. C.A).
- R. v. Clayton, [2001] O.J. No. 2392 (QL).
- R. v. Waterfield, [1963] 3 All E.R. 659 (C.A.).

Sources

- "Police roadblock OK in guns case, Supreme Court rules" CBC News (6 July 2007), online: <http://www.cbc.ca/canada/ottawa/story/2007/07/06/scoc-police-070706.html>.
- Kirk Makin, "Police search justified, Supreme Court rules" The Globe and Mail (6 July 2007), online: <http://www.theglobeandmail.com/servlet/story/RTGAM.20070706.wscoc0706/BNStory/National/>.

[1] R. v. Clayton, 2007 SCC 32.
[2] Ibid. at para. 22.
[3] R. v. Clayton, 2005 CanLII 16569 (ON C.A.) at para. 93.
[4] Supra note 1 at para. 22.
[5] Ibid. at para. 31.
[6] Ibid. at para. 44.
[7] Ibid. at para. 69.
[8] Ibid. at para. 59.
[9] Ibid. at para. 110.