
CRIMINAL FOCUS

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***Criminal Focus* Receives Expanded Circulation (and a fancy binder)**

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This is (still) a free (no charge, complimentary, *gratis*) publication for members of the B.C. legal community with a particular interest in criminal law. It is published quarterly, each issue focussing on one specific topic featured in a recent judgment of the B.C. Court of Appeal. The judgment itself is digested and commented

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A “Necessary Step” No More?—The Court and Included Offences

R. v. Soluk, 2001 BCCA 519, 157 C.C.C. (3d) 473

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On this appeal, the Court was asked by the appellant to agree with him that the Québec Court of Appeal had been wrong when it found, in *R. v. Lucas* (1987), 34 C.C.C. (3d) 28 (Qué. C.A.) (“*Lucas*”), that assault causing bodily harm was a lesser included offence within aggravated assault.

“What?!” you might well ask, “How could it not be included?” Well, actually, the appellant felt that, despite this understandable first impression, a proper and conscientious application of the rule regarding included offences would show that it was not. The Court disagreed, and in the process could be said to have “fine-tuned” the rule enough that there might now be implications for other offence groupings.

Mr. Soluk had thrown ammonia in the face of a complainant, and had thereby caused her bodily harm. He was initially charged with assault causing bodily harm, but on the day of trial Crown counsel had a new indictment sworn, charging unparticularized aggravated assault. Anticipated medical evidence was, however, not

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upon, and tied in to other relevant jurisprudence.

Thus, every issue amounts to a mini “paper” on a topic of substantive law or procedure that you can read and/or tuck away on a shelf in anticipation of the day when the topic in question might just arise in one of your own cases. Now that the newsletter has a binder of its very own, you no longer need the tatty folder, apple box, or whatever you have been using to store it up until now.

One motivation for this endeavour—other than pure altruism—is to bring to the attention of busy criminal trial lawyers on Vancouver Island and around the province the fact that I am actively seeking appellate work. I am happy to accept referrals for criminal appeals, legal aid or private, at any court level. I am also happy to assist in the preparation of appeals, including full transcript evaluation, research and factum drafting services.

Even if you don’t need to retain my services at this moment, I certainly hope you’ll derive some pleasure or utility from the newsletter.

The mailing list has been expanded somewhat with this issue. Starting next issue (January 2002), *Criminal Focus* should also be available in most courthouse libraries, province-wide.

If you are not currently on the mailing list, and would like to be, now would be a great time to drop me a line by mail, fax or e-mail, and I’ll add you. Copies of past issues are available, at a nominal charge.

And of course, your comments, criticism, kudos and catcalls are all (still) welcome. ❖



forthcoming, and the trial judge found that while the Crown had proven an assault and some resulting bodily harm, it had failed to prove wounding, maiming, disfiguring, or endangerment to the life of the victim. That being so, an aggravated assault was not made out, but on the authority of *Lucas* the appellant was convicted of assault causing bodily harm as an uncharged included offence (see offence definitions in sidebar).

On appeal, the appellant relied on a line of judgments that had consistently applied a so-called “necessary step” test for determining when a lesser offence can be said to be included within a greater. In dismissing the appeal, Rowles J.A., writing for the Court, did not expressly reject that test, but she noted that the test had “become the subject of academic criticism” (apparently by just one academic, Kenneth Chasse). It appears from the reasons that the test is no longer to apply, at least not where the definition of the greater offence specifies a variety of ways in which it might be committed.

The Test as it Was

Authority for a court to convict of an “included” offence is found in subsection 662(1) of the *Criminal Code* (see sidebar): *R. v. Morrison* (1991), 66 C.C.C. (3d) 257 (B.C. C.A.). What, then, does it mean to say that an offence is “included” within another?

L’Heureux-Dubé J.A. (as she then was), writing for the Québec court in *Lucas*, considered just that question, and concluded:

The test was set out in *R. v. Springfield* (1969), 53 Cr. App. R. 608: “the included offence must be ‘a necessary step’ in the commission of the more serious offence”. Even though the case of *Luckett v. The Queen* (1980), 50 C.C.C. (2d) 489, 105 D.L.R. (3d) 577, [1980] 1 S.C.R. 1140, in the Supreme Court of Canada, added certain nuances to the test, it remains valid for the purpose of the present case in which we are only concerned with the question whether the offence is included in the offence as charged in the indictment (emphasis added).

In *R. v. Webber* (1995), 102 C.C.C. (3d) 248 at 253-254, Legg J.A. for the B.C. Court of Appeal wrote:

At common law, the general rule was that conviction of a lesser offence than that charged was permissible provided that the definition of the greater offence necessarily included the definition

of the lesser offence: Archbold, Pleading, Evidence and Practice in Criminal Cases, 43rd ed. by S. Mitchell and P.J. Richardson (London: Sweet & Maxwell, 1988), at pp. 602-603, 4-459. ...

There are four situations in which one offence may be included in another:

where the Code expressly prescribes that certain offences are included offences, for example, s. 662(3) provides that manslaughter and infanticide are included within murder;

where the offence as described in the enactment creating it *necessarily includes* the commission of another offence, for example, assault within assault causing bodily harm;

where the description of the offence as charged (worded) in the count includes the commission of another offence;

an attempt of the offence charged or of any included offence, pursuant to ss. 662(1)(b) and 660 (emphasis added).

So, unless we are talking about an attempt, or about one of the special situations where the *Code* actually states that an offence is included within another, the test is—or was—clear: is the lesser offence *necessarily* included within (is it a “necessary step” in the commission of) the greater, either “as described” in the enactment or as particularized in the indictment?

Where the Court could now be said to have refined this test is in regard to the phrase “as described”. The test as it has generally been applied takes the description of an offence as a whole: if it is not necessary to commit the lesser offence in the course of committing the greater, based on the *whole* description, then the test is not met. The new version of the test seems to say that it is sufficient if the lesser offence is a necessary step in commission of the greater, committed in any one or more of the manners described. The description of the greater offence is effectively partitioned into sub-descriptions, or descriptions of alternative modes of commission, and each is treated for these purposes as a separate offence.

This modification of the test flows naturally from the curious case of *R. v. Luckett* (1980), 50 C.C.C. (2d) 489 (S.C.C.) (“*Luckett*”). In *Luckett*, the Supreme Court of Canada had been asked to decide whether common assault was legally included within the offence of robbery. Robbery is defined in section 343 of the *Criminal Code*, which contains four paragraphs, each providing a means by which a person might commit

robbery. At least one of those means, stealing while armed, does not necessarily involve assault.

Chouinard J., writing for the Court, acknowledged the line of cases that seemed to settle the issue, but distinguished robbery as a special case, since the section defining the various means of its commission was laid out in a series of “subsections”, each of which reflected what had earlier been contained in a separate section of the *Code*:

I would therefore conclude that the lesser offence must be included in the offence charged as described in the indictment, albeit not in all the subsections...

Since *Luckett*, then, it might be said that the law has been a little unclear: is the modified rule apparently adopted by the Supreme Court in that case only applicable where the charging section contains a number of subsections, or is the rule now no longer “necessarily included” at all, but rather “possibly included”?

In effect, the B.C. Court in *Soluk* appears to have opted for the latter interpretation. Rowles J.A. accepted that assault causing bodily harm is necessarily included in only three of the four ways in which aggravated assault can be committed (one can endanger the life of another without causing bodily harm, and indeed without even assaulting that person). The Court was also aware, of course, that the statutory definition of aggravated assault does not, unlike the definition of assault causing bodily harm, include the words “in committing an assault”. It concluded, nevertheless, that the offence of assault causing bodily harm is legally included within aggravated assault as a whole so long as it is necessarily included within *any* of the possible means of commission of the greater offence. Just as *Luckett* overruled earlier authority (*R. v. Harmer and Miller* (1976), 33 C.C.C. (2d) 17 at 20 (Ont. C.A.); *R. v. Maika* (1974), 17 C.C.C. (2d) 110 (Ont. C.A.)), it appears that the B.C. Court in *Soluk* has moved away from its own earlier views—and the views of other appellate courts—on this issue.

Earlier appellate decisions had applied consistent reasoning. In *R. v. Manuel* (1960), 128 C.C.C. 383 at 385-386 (B.C. C.A.), a case in which the offence charged was attempted murder, Sheppard J.A. wrote for the Court:

Under s. 569, to determine whether assault is an included offence, regard may be had to s. 210, the

STATUTORY PROVISIONS

Criminal Code Section 662:

(1) A count in an indictment is divisible and where the commission of the offence charged, as described in the enactment creating it or as charged in the count, includes the commission of another offence, whether punishable by indictment or on summary conviction, the accused may be convicted

- (a) of an offence so included that is proved, notwithstanding that the whole offence that is charged is not proved; or
- (b) of an attempt to commit an offence so included.

...

Criminal Code Section 265:

(1) A person commits an assault when

- (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
- (b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or
- (c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.

(2) This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.

...

Criminal Code Section 267:

Every one who, in committing an assault,

- (a) carries, uses or threatens to use a weapon or an imitation thereof, or
 - (b) causes bodily harm to the complainant,
- is guilty of an indictable offence...

Criminal Code Section 268:

enactment creating the offence charged. But s. 210 does not *necessarily* include the offence of assault by reason that under that section the attempt assigned in a particular case may be "by any means", and hence *may be* by means which do not come within "assault" as defined in s. 230. It follows that s. 210 does not make assault such apparent and *essential* constituent of the offence of attempt to murder that the accused in reading the section would be fairly informed in every instance that he would have to meet the offence of assault (emphasis added).

The Alberta Court of Appeal reached a similar conclusion in *R. v. Rinnie*, [1970] 3 C.C.C. 218, and in *R. v. Chichak* (1978), 38 C.C.C. (2d) 489 at 496 it confirmed that assault causing bodily harm is not included within murder itself:

...there are methods of committing murder contained in s. 212 and s. 213 ... that do not *necessarily* involve the intentional application of force, e.g., a person who puts poison in another's drink and thereby causes his death commits murder under s. 212(a) without the elements of assault being present.

The elements creating the offence of assault causing bodily harm are not *necessarily* those involved in the offence of murder and therefore the former is not an included offence of the latter... (emphasis added)

In *R. v. Carey* (1972), 10 C.C.C. (2d) 330 at 334 (Man. C.A.), ruling that driving at an unreasonable rate of speed was not included within careless driving, Freedman C.J.M. wrote:

It is sometimes helpful to an understanding of what a thing is to appreciate what it is not. What is not an included offence is accordingly worthy of attention. A good working rule in that connection was enunciated by P. J. Gloin, thus: "If the whole offence charged can be committed without committing another offence, that other offence is not included." (Vide, article on "Included Offences", 4 *Crim. L.Q.* 160 (1961-62).) For example, in *R. v. Quinton* (1947), 88 C.C.C. 231, [1948] 3 D.L.R. 625, [1947] S.C.R. 234, the trial Judge had instructed the jury that an assault upon a woman occasioning bodily harm was included in a charge of attempted rape. On appeal this was held to be in error, for one may attempt rape without committing an assault which causes bodily harm.

In *R. v. Jarque*, [1980] 1 W.W.R. 183 (Sask. C.A.), the question was whether a conviction for trafficking (based on evidence that the accused transported a narcotic) could be entered where the offence charged was importing. The court ruled that it could not.

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(1) Every one commits an aggravated assault who wounds, maims, disfigures or endangers the life of the complainant.

...

Criminal Code Section 343:

Every one commits robbery who

(a) steals, and for the purpose of extorting whatever is stolen or to prevent or overcome resistance to the stealing, uses violence or threats of violence to a person or property;

(b) steals from any person and, at the time he steals or immediately before or immediately thereafter, wounds, beats, strikes or uses any personal violence to that person;

(c) assaults any person with intent to steal from him; or

(d) steals from any person while armed with an offensive weapon or imitation thereof.

The definition of “trafficking” given by s. 2 of the Narcotic Control Act is in fact provided in a similar format to that currently found in the definition of aggravated assault. It is a list of alternatives in a single sentence, separated by commas, namely: “to manufacture, sell, give, administer, transport, send, deliver or distribute”, or to offer to do any of those things. In *R. v. Shewfelt* (1972), 6 C.C.C. (2d) 304 at 307-308 (B.C. C.A.) (“*Shewfelt*”), Bull J.A. for the B.C. Court stated that the offence of possession was not included within trafficking, since it was possible to commit trafficking by one or more of the listed means without being in possession:

The count here was simple trafficking and there was no allegation of unlawful possession therein, nor was unlawful possession a necessary ingredient to the charge. ... It is sufficient to say, as was said by this Court in *R. v. Vickers* (1963), 41 C.R. 235, 43 W.W.R. 238, sub nom. *R. v. MacDonald et al.*; *R. v. Vickers*, that possession is not an essential ingredient in the offence of trafficking. The fact that evidence at a trial on any charge indicates the commission of another offence, does not make that other offence an included one within the meaning of s. 589(1).

Shewfelt was followed by the New Brunswick Court of Appeal in *R. v. Drysdelle* (1978), 41 C.C.C. (2d) 238.

In *R. v. Powell* (1983), 9 C.C.C. (3d) 442 at 443-445 (B.C. C.A.), the Court was asked whether possession of marijuana was included in the cultivation of that substance. Esson J.A. for the Court stated that it was not. An accused charged simply with cultivation could not be convicted of possession, even if the evidence supported such a conviction:

The enactment [Narcotic Control Act, R.S.C. 1970, c. N-1] creating the offence charged reads as follows:

6(1) No person shall cultivate opium poppy or marihuana except under authority of and in accordance with a licence issued to him under the regulations.

Neither the enactment nor the count makes any express reference to possession. The submission for the Crown is that “possession” is nevertheless described in the enactment and is charged in the count because, in order to cultivate a plant, a person must necessarily have it in his or her possession. ...

... It is no doubt true that, *in most cases*, the person who cultivates will also possess. But that is not enough to meet the requirement of being “described in the enactment”. The one word can be said to be

described by the other only if, in *all* cases of cultivation, there would be an element of possession (emphasis added).

In *R. v. Amabile* (2000), 143 C.C.C. (3d) 270 (B.C. C.A.), the Court ruled that a charge of soliciting an under-age prostitute did not include the general offence of soliciting, because the former could be committed in any place, whereas the latter was only an offence if committed in a public place.

It is difficult to reconcile this well-established case law with either *Luckett* or *Soluk*. Martin J.A. for the Ontario Court of Appeal endeavoured to rationalize the *Luckett* doctrine in *R. v. Simpson (No. 2)* (1981), 58 C.C.C. (2d) 122, at 136-139 (“*Simpson*”):

A long line of authorities has held that an included offence within s. 589(1) of the Code is one which is necessarily included in the offence charged: see *Lafrance v. The Queen* (1973), 13 C.C.C. (2d) 289, 39 D.L.R. (3d) 693, [1975] 2 S.C.R. 201; *R. v. Carey*, supra; *R. v. McDowell* (1976), 32 C.C.C. (2d) 309, [1977] 1 W.W.R. 97, 1 A.R. 579; *R. v. Manuel*, supra; *R. v. Rinnie*, supra; *R. v. Harman and Miller*, supra; *R. v. Taylor and Young* (1923), 40 C.C.C. 307, [1924] 2 D.L.R. 109, 56 N.S.R. 382.

...

Mr. Heather contended, however, that the recent judgment of the Supreme Court of Canada in *Luckett v. The Queen* (1980), 50 C.C.C. (2d) 489, 105 D.L.R. (3d) 577, [1980] 1 S.C.R. 1140, has altered the law as set out in the above cases, and that included offences are not confined to offences necessarily included in the major offence as described in the enactment creating the offence. ...

Apart altogether from the fact that I would not readily be persuaded that the Supreme Court of Canada had departed from the necessarily included test, as enunciated in the many authorities previously referred to, without expressly so stating, I find no intention in *Luckett v. The Queen*, supra, to do so. In my view, that decision merely restated the general rule as it applied to an offence such as robbery which, as described in the enactment creating it, may be committed in the different ways set out in the subsections defining the offence. In the case of an offence such as robbery, which may be committed in the different ways described in a number of subsections, where the indictment charges the offence without reference to a specific subsection, all the ways in which the offence as described in the enactment may be committed are placed in issue, and the accused is put on notice that he must meet the offence as defined in any and all the subsections. In those circumstances, the accused may be convicted of any offence necessarily included in any of the ways in which the offence, as

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described in the enactment, may be committed. To put the matter in another way, each subsection carries with it the offences necessarily included in that subsection, and where the indictment charging robbery under s. 302 makes no reference to a specific subsection, the accused is put on notice that he must meet the included offences contained in any and all the subsections. While common assault is not necessarily included in s. 302(a) and (d), it is necessarily included in s. 302(b) and (c) and, hence, is an included offence in the offence of robbery as described in the enactment: see passage in annotation to *R. v. Maika* by Kenneth L. Chasse (1974), 27 C.R.N.S. 117 at p. 133, quoted and adopted by Farris C.J.B.C. in *R. v. Luckett* (1978), 42 C.C.C. (2d) 390 at p. 396, 3 C.R. (3d) 315.

Simpson was cited with approval by the B.C. Court in *Morrison, supra* (in which careless handling of a firearm was held not to be included within pointing a firearm), at 259. The “necessarily included” test has also been confirmed by the Supreme Court of Canada since *Luckett*, in *R. v. Lafrance* (1978), 13 C.C.C. (2d) 289 at 298:

It would have been open to Parliament to have provided specifically, as it did in relation to the offences defined in s. 221(1) and (4), that an offence under s. 281 should be an included offence under s. 280, but this was not done. In the absence of such specific provision, in my view, it is not an included offence under the provisions of s. 569(1) (now s. 589(1)), because the offence created by s. 281 is not necessarily included in the charge of theft, as defined in s. 269, and it is not included in the count as charged in the present case (emphasis added).

Quite recently, Rosenberg J.A., writing for the Ontario Court of Appeal in *R. v. Beyo* (2000), 144 C.C.C. (3d) 15 at 28, stated:

A way to determine whether one offence is included in another as it is described in the Criminal Code is to ask whether the main offence may be committed without committing the “included” offence. Put another way, does the commission of the main offence as described in the enactment necessarily include the other offence?

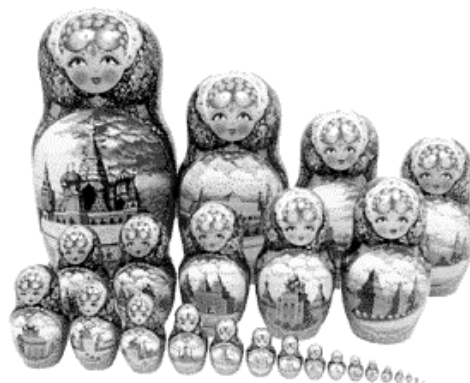
It seems that Martin J.A. was quite correct: the “necessarily included” test is still in effect. *Luckett* did not overrule it, and it should still be applied wherever the charging section is not an amalgamation of different definitions in a list of subsections.

That appears, at any rate, to be the rule in most provinces. The question remains, is B.C. still included?



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