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<b>CO URT OF APPE AL</b>			
CANADA			
PROVI NCE OF QUEBEC			
REGIST RY OF		MONTREAL	
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DATE:	S E P T E M B E R 1 3 R O O 4		

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A P P E L L A N T - Pr os ec utr ix			
V.			
M. V.			

R E S P O N D E N T- Ac cu se d			
JUDGME NT			

[1] THE COURT, on appeal from a judgment rendered on May 20, 2003 by the Honourable Jean-Paul Braun (Court of Quebec, Youth Division, District of Montreal) acquitting the respondent of the charges of aggravated assault and assault with a weapon;

[2] After having examined the file, heard the parties and on the whole deliberated;

[3] For the reasons of Dalphond, J.A., with which Morin, J.A. agrees;

[4] **ALLOWS** the appeal, quashes the verdict of acquittal and remands the case to the Court of Quebec (Youth Division) for trial.

[5] For his part, and for other reasons, Hilton, J.A. would dismiss the appeal.

		BENOÎT MORIN J.A.	

		PIERRE J. DALPHOND J.A.	
		ALLAN R. HILTON J.A.	
Mtre Jacques Blais Mtre Patrick Michel			
Department of Justice			
For the Appellant			
M. V.			
In person			
Date of hearing:	June 18, 2004		
REASONS OF DALPHOND, J.A.			

[6] The respondent, a minor, was accused of aggravated assault and assault with a weapon on E. T., another minor. On the date set for the trial, the victim was absent and the Crown asked for a postponement. The judge refused and then acquitted the respondent.

[7] As pointed out by my colleague Hilton, the sole issue in this appeal is whether a judge sitting in the Youth Division of the Court of Quebec erred when he denied a request for the postponement of the trial and acquitted the respondent.

[8] This case in the Court of Quebec involved the same attorneys as in that of *R. v. C. G.* and was heard by the same trial judge a few minutes after his judgment in the other file where he pronounced an acquittal. In a majority judgment released concurrently in the *C. G.* file (C.A.M. 500-08-000204-034), this Court quashes that acquittal and remands the matter to the Court of Quebec for trial.

[9] In my opinion, although the circumstances surrounding the absence of the complainant in the present case were different, the trial judge should have granted a postponement to the Crown.

I

[10] It is undisputed that whether an adjournment or a postponement should be granted or not is a discretionary matter for the trial judge (*Manhas v. The Queen*, [1980] 1 S.C.R. 591 ; *R. v. Barrette*, [1977] 2 S.C.R. 121 ; *R. v. Darville*, (1956) 116 C.C.C. 113 (S.C.C.); *R. v. MacDonald*, [1998] N.J. No. 340 (NFDL C.A.)).

[11] Such judicial discretion can however be reviewed on appeal if it has not been exercised judicially (*R. v. Darville, supra*; *R. v. Ash*, [1993] N.S.J. No. 395 (N.S.C.A.); *R. v. C. G., supra*). The test for appellate review is whether the trial judge has given sufficient weight to all relevant considerations (*Reza v. Canada*, [1994] 2 S.C.R. 394 ). Of course, if the judgment is based on reasons that are not well founded in law, a court of appeal may intervene.

[12] On the elements to be considered by a judge when asked to grant an adjournment of a criminal trial due to the absence of a witness, the Supreme Court of Canada provided some guidelines in 1956 in *R. v. Darville, supra*. They can be summarized as follows:

- (a) That the absent witness is a material witness in the case;
- (b) That the party applying for an adjournment has been guilty of no laches or neglect in omitting to endeavour to procure the attendance of this witness; and
- (c) That there is a reasonable expectation that the witness can be procured at the future time to which it is sought to put off the trial.

[13] Moreover, as pointed out by Cartwright, J. in his concurring opinion in *Darville*, a trial judge errs in law by refusing a request for an adjournment without having given the party seeking it an opportunity to demonstrate that the conditions described above are met. I agree with this principle of law, which has been applied by numerous courts of appeal (see for examples: *Regina v. A.T.* (1991), 69 C.C.C. (3d) 107 (Alb. Q.B.); *R. v. Ash*, [1993] N.S.J. No. 395 (N.S.C.A.); *R. v. Casey*, [1987] N.S.J. No. 340 (N.S.C.A.); *R. v. Fahey*, [2003] B.C.J. No. 2331 (B.C.C.A.); *R. v. MacDonald*, [1998] N.J. No. 340 (Nfld. C.A.)). In other words, before concluding that a party has been negligent, the trial judge must give that party an opportunity to establish all the relevant facts.

[14] Finally, I believe that it is proper for a trial judge when asked for a postponement to consider other relevant circumstances such as the gravity of the charges, the number of previous postponements and the consequences of a postponement for the accused.

[15] Briefly stated, the decision whether or not to grant an adjournment must be made in the light of the realities of each case and must be consistent with the

interests of justice.

## II

[16] There is no doubt that the first criterion suggested in *Darville* was met here. The witness who did not appear was the complainant in the case. His presence was critical to establish the case against the respondent.

[17] I deal now with the second criterion: was the Crown negligent? This has to be decided according to the evidence before the trial judge after an opportunity has been given to the Crown to establish all the relevant facts.

[18] According to the brief representations made before the trial judge by the Crown when seeking a postponement:

- The victim suffered serious fractures to the nose and parts of the face following an altercation with the respondent;
- The victim is a young boy, active in his community, playing hockey, without any past record with the youth judicial system; there was no indication that the victim did not want to proceed;
- Before the trial, the Crown arranged for the presence of two witnesses: the victim and a medical archives employee (the former was absent but the latter was present in Court);
- A subpoena was sent by ordinary mail to the complainant, at the address of his parents at the time of the complaint;
- On the day of the trial, in light of the absence of the complainant, it asked a police officer to call his parents' home, who reported that there was no service at the telephone number indicated in the file;
- No attempt to contact the victim by telephone was made before the trial contrary to the *C.* case.

[19] Once these facts were reported, the defence attorney said that he was told by the parents of his client some time ago that the family of the victim had moved to a new unknown address.

[20] With such a factual background, three options were possible:

- (1) the subpoena was received by the complainant or his parents before they moved, but they neglected to follow up or were unable to attend;
- (2) the subpoena was mailed to an invalid address since the family had moved before; or
- (3) the subpoena was never sent in fact. At the time the motion for postponement was made, the Crown admitted that it could not affirm which of these three options was most likely: "This the problem we have, it's when it's sent by mail, your Honour, how do you want us to keep track of them?"

[21] In such circumstances, if the judge did not want to postpone the trial, he should have granted an adjournment to provide the Crown an opportunity to establish the relevant facts (for example, to retrieve the parents and find out from them if the subpoena was received and if so, why the complainant was absent). To force the Crown to proceed and then to acquit the respondent was the first error of law of the trial judge. Let us imagine that an adjournment was granted and that the Crown had found out that the complainant did not appear because he had received death threats from the accused or because he was hospitalized, could anyone then justify the acquittal?

[22] In my opinion, when a party alleges that an absent key witness was subpoenaed, the trial judge has the legal obligation at least to grant an adjournment to allow such party to find out why the witness did not appear before proceeding with the trial.

[23] Moreover, no one can seriously challenge that the Crown acts in accordance with the law when it sends a subpoena by ordinary mail in accordance with section 20.1 of the *Code of Penal Procedure*. Thus there ought to be no presumption either that such a manner of service constituted neglect or that it did not.

[24] After having heard brief representations by both counsel, during which the defence attorney described the consequences of a postponement for the accused (he had been released on conditions, his witnesses were present, his mother missed work to attend the trial, his attorney had devoted some considerable time to prepare), the trial judge rendered the following oral judgment:

I have no problem with Mr. E. T. (sic), the alleged victim. I have no problem with you. I have a problem with the fact that witnesses being served by mail, this does not, to me, meet the requirements of the *Darvil* case, because you cannot establish that likely the person will come the next time or that all efforts were made in order to summon the witness. I refuse the postponement. I'm very sorry. And I will – I will render the decision according, as follows, and order a transcription of the reasoning.

Today, Me Corsi informed the Court that the main witness for the Crown is a person by the name of E. T. (sic), who is the alleged victim of an assault by the accused on January the eleventh (11<sup>th</sup>).

The case came pro forma on February the twenty-seventh (27<sup>th</sup>) and was postponed for trial until this date and half a day was reserved to hear the trial.

It was the presiding judge who presided the pro forma hearing on the twenty-seventh (27<sup>th</sup>) of February, and as usual, the Court notes the language chosen by the accused, that was English, and an interpreter French – English was called and she reported in person this morning.

Today, the Court is informed that E. T. (sic) is not present, but that

following a ruling by the Ministry of Justice, E. T. (sic) was assigned just by mail and not served with a subpoena by the bailiff. So, that Me Corsi today cannot know if the person is still living around even is still alive. The detective verified the phone number he had and the phone number is no good anymore.

In order to be able for the Court to grant a postponement, the Supreme Court in the Darvil case established three conditions. Maybe they will have to be reviewed one day, but for now, they apply. The Court has no hesitation to declare that when the Crown decides – when the Crown's office decides to serve a witness by mail for a trial of this importance, and that the time of the Court is reserved for half a day, that this is not a regular procedure to assign the witnesses, because the Crown office cannot demonstrate that sufficient efforts were made in order to make sure that the witness would come to the Court.

For these reasons, the postponement, the request for postponement is refused. Do you have any other witnesses, Me Corsi?

Me MARIA GIUSTINA CORSI :

No, for this morning, no, Your Honour. I would have had one more, but I needed my victim.

THE COURT:

Mr. V., you're acquitted.

(Emphasis added)

[25] Contrary to what the trial judge said twice in his judgment, service of a subpoena by ordinary mail is a valid procedure to summon a witness in criminal proceedings. In my opinion, these comments of the trial judge are indicative of a bias against this manner of service which he described as "not a regular procedure to assign (sic) the witnesses"; this is another error of law.

[26] However, such method of service is effective only when the subpoena is delivered to the witness. In the present case, if the evidence gathered during the adjournment had shown that the subpoena was mailed after the complainant's family had moved, then the trial judge could have concluded that the Crown had not endeavoured to procure the attendance of the complainant. The second criterion would not then be met.

[27] As for the third criterion, it seems to have been satisfied.

### III

[28] This being said, even if the evidence had shown that the subpoena was not received by the complainant or his parents, I am of the view that in the present case, a postponement to a proximate date would better serve the interests of justice than an acquittal considering the nature of the charges (aggravated assault and assault with a weapon) and the fact that there had been no prior postponement of the trial.

**IV**

[29] Before concluding, I urge the Crown office to reconsider the procedure it uses to secure the attendance of key witnesses before trial. Serving a subpoena by ordinary mail may represent a significant cost reduction but it has inherent limits, as this case shows, which call for additional follow up procedures in order to avoid acquittals and appeals. Failure to improve the current procedure could be considered in the future as a form of institutional negligence by the Crown office.

**V**

[30] For these reasons, I would allow the appeal, quash the verdict of acquittal and remand the case to the Court of Quebec for trial.

	PIERRE J. DALPHOND, J.A.

REASONS OF HILTON, J.A.

[31] The trial in this case occurred later on the same day and before the same judge of the Court of Quebec (Youth Division) as the trial in the case of *R. v. C. G.* The circumstances and the outcome were the same. The Crown was unable to establish that the victim had received a subpoena sent by ordinary mail. The trial judge refused an adjournment given the absence of the victim to testify, and in light of the Crown not offering any evidence, he acquitted the accused.

[32] The same issues are presented for consideration relating to whether or not the trial judge properly exercised his discretion, albeit in a somewhat different factual context.

[33] The Crown's appeal against the verdict of acquittal was heard after the Court heard its appeal in the case of *C. G.* in which judgment is also being rendered today. Unlike the latter case, however, the accused was not represented by counsel before our Court, and he did not file a factum. He was present during the argument of the appeal in the *C. G.* case, and in light of the circumstances, the Court requested counsel for *C. G.* to explain to him what had transpired and to inquire whether there were any representations he wished to have made on his behalf. We were informed that he had none.

[34] The accused was 16 years old at the time of the events for which he was charged with the following counts :

1. On or about January 11, 2003 in Montréal, district of Montréal, in committing an assault on E. T., did wound, maim, disfigure, committing thereby the indictable offence provided by section 268 of the Criminal Code.
2. On or about January 11, 2003 in Montréal, district of Montréal, in committing an assault on E. T., did carry a weapon, committing thereby the indictable offence provided by section 267a) of the Criminal Code.

(Transcribed as written)

[35] In order to fully appreciate the reasons that led to the denial of the request for a postponement and the acquittal of the accused, it is necessary to set out at length the entirety of the discussion that took place before the trial

judge, in which it will be seen that there are copious references to what had transpired earlier that day in the C. G. case. Here is what was said :

Me MARIA GIUSTINA CORSI :

So, again, Your Honour, in this file, the victim isn't present this morning. This is a victim that had had serious fractures to the nose and parts of the face following an altercation. And the subpoena has been sent, Your Honour. I believe my sergeant-detective, who is here this morning, has made a verification. However, it would seem that the subpoena was sent by mail, that the accused would have had moved, Your Honour. We don't have the same phone number anymore. The sergeant-detective is here present and found this out this morning, I believe, Mr. Bureau ?

Mr. BUREAU :

Yes.

Me MARIA GIUSTINA CORSI :

So, we have been trying to locate this person this morning. It is the first time that it comes to trial. Also, the medical archive personnel is here present, Your Honour, because we had assignment to be here this morning, because the report, the medical report that we have is ineligible to a regular person, Your Honour, to any regular person. However, the information that we have this morning is that the victim would have had moved, is no longer at the address that we have on the witness sheet, Your Honour. We could not have done, contrary to trying and locate this person, to have this person here this morning. We have never had any other information that the victim did not want to proceed. We never had any information contrary to that fact. We have not had any information. This is a young person that is active in his community, playing hockey. It is not a person that is known in the services, Your Honour. He's a young victim also. So, for these matters, for this particular case, Your Honour, the Crown will ask you to postpone the trial to a date that would convene to the Defence.

Me EMILE BENAMOR :

I thought this was even more serious than the last one, My Lord. My client got arrested on the eleventh (11<sup>th</sup>) of January, appeared detained. Was locked up on the fourteenth (14<sup>th</sup>). We came back the twenty-seventh (27<sup>th</sup>) of February because the conditions were

very tough and made it fast. We set the trial date three months. I met the parents at least three or four times, at my office, prepared the case. I got information that the victim moved out of town, is no longer here. Now, since the twenty-seventh (27<sup>th</sup>) of February, I'm sorry, but when we set a date, why do I have to do all the work as a Defence lawyer and make sure my witnesses are here and everybody is here and the Crown, the (inaudible) can say well, we went to see at the house and the person moved. Now, somewhere along, the line, the Crown has to respect what the jurisprudence says and has to be able to demonstrate that this person would come to testify and you don't have this proof. We don't know where he is. We don't know where he has moved. We have no information. Did somebody pick up the phone last week and tried to call him or the week before or a month ago ? And this way, would have done a postponement ? I have the mother miss work, I had other people come to Court in this case, My Lord. So, I submit to you respectfully, I find this one more serious than the other one. I mean, the person moved. Don't we take the time to call ? My cases are prepared months before and then we come the morning of and we're told : *Well, the person wasn't there*. If he didn't come this morning, there would be a warrant for his arrest. You agree with me ? If I hadn't done my work, there would be a warrant for his arrest and he had a ton of conditions which have been respected.

Me MARIA GIUSTINA CORSI :

I believe my colleague was telling you that he verified that the victim was out of town. It would have been nice to have that information, but we don't have this information. Also, Your Honour, for all we know, this is the information that we have, that there is a probability of him having moved because my sergeant-detective tells me the phone number is no longer in service and so, of what he understands, he assumed that he has moved, Your Honour. Moves can be done over weekends, like moves can be done overnight, like people can have accident or be sick. We know nothing of this, Your Honour.

THE COURT :

You know, we come here to a problem that I was not made aware before. I thought that all the witnesses were subpoenaed with a subpoena.

Me MARIA GIUSTINA CORSI :

Well, not by (inaudible), Your Honour, it's by mail. This is the problem we have, it's when it's sent by mail, Your Honour, how do

you want us to keep track of them ?

THE COURT :

Exactly. You come to the roots of the problem. You know, it's not the Court who is in charge of serving the witnesses, it's not the Defence. If they have to serve a witness, they will serve it with a bailiff. I don't understand why is that that witnesses are not served with bailiff. So, we don't know. I don't see how you can meet the requirements of the *Darvil* case without being able to say to the Court look, the person moved and we made all efforts to trace him. The bailiff came to three addresses and apparently we cannot locate him. You have to issue a warrant for his arrest or he is escaping or he is – so, we have no evidence. I think it's – that's the basis of the problem is the way the Crown's office has decided to proceed is the summon of the witnesses.

Me MARIA GIUSTINA CORSI :

Directives that we have received long ago from the Ministry, Your Honour. Aside from this, Your Honour, the only other thing I can say to you is that contrary to the other file, where we knew in the other file that the young victim was a person that had a particular background, in this file we have information that the young victim is an exemplary victim, Your Honour, that is not a person –

THE COURT :

I have no problem with Mr. E. T., the alleged victim. I have no problem with you. I have a problem with the fact that witnesses being served by mail, this does not, to me, meet the requirements of the *Darvil* case, because you cannot establish that likely the person will come the next time or that all efforts were made in order to summon the witness. I refuse the postponement. I'm very sorry. And I will – I will render the decision according, as follows, and order a transcription of the reasoning.

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this morning.

Today, the Court is informed that E. T. is not present, but that following a ruling by the Ministry of Justice, E. T. was assigned just by mail and not served with a subpoena by the bailiff. So, that Me Corsi today cannot know if the person is still living around, even is still alive. The detective verified the phone number he had and the phone number is no good anymore.

In order to be able for the Court to grant a postponement, three conditions were established by the Supreme Court in the *Darvil* case. Maybe they will have to be reviewed one day, but for now, they apply. The Court has no hesitation to declare that when the Crown decides – when the Crown's office decides to serve a witness by mail for a trial of this importance, and that the time of the Court is reserved for half a day, that this is not a regular procedure to assign the witnesses, because the Crown office cannot demonstrate that sufficient efforts were made in order to make sure that the witness would come to the Court.

For these reasons, the postponement, the request for postponement is refused. Do you have any other witnesses, Me Corsi ?

Me MARIA GIUSTINA CORSI :

No, for this morning, no, Your Honour. I would have had one more, but I needed my victim.

THE COURT :

Mr. V., you're acquitted.

(Transcribed as written)

[36] It will be seen that the Crown once again had no objective evidence that a subpoena actually had been sent to the victim, and if so, when and by whom, and whether he had in fact ever received it. Once again, even the minimal requirements of section 66.1 of the *Code of Penal Procedure* were not satisfied, which would have at least allowed the Crown to establish when and by whom the subpoena was sent by ordinary mail, if indeed it was sent by ordinary mail. There was no suggestion during the hearing of the appeal that it could have done so even if an adjournment or postponement had been granted. And yet again, the Crown took no heed of the adverse result to it in *R. v. Bissonnette*[1] in which the very same shoddy practice was criticized by Bellavance, J. of the Superior Court in *certiorari* proceedings in 2000.

[37] Unlike the victim in the *C. G.* case, however, the victim in this case seems to have had a more conventional lifestyle, but according to what counsel for the

Crown informed the trial judge, he appears to have moved, and did not have the same telephone number as previously was the case. Defence counsel also had information to the effect that the victim had moved, but he elected not to share that information with Crown counsel.

[38] Since the Crown was unable to demonstrate as a question of fact that it had actually sent a subpoena to the victim, and further made no effort to confirm the victim's receipt of the subpoena on a timely basis, the factors that distinguish the lifestyle of the victim in this case from that of the victim in *C. G.* are really of no assistance to the Crown in its effort to challenge the manner in which the trial judge exercised his discretion. Similarly, had the Crown made appropriate inquiries earlier than shortly before the trial as to the whereabouts of the victim, it might have been able to glean more information about the victim and react accordingly instead of waiting until the proverbial last minute.

[39] I therefore find no basis on which to differentiate the result in this case from that which I explained at greater length in my reasons in *C. G.*. I would dismiss the appeal.

	ALLAN R. HILTON, J.A.

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[1] AZ-00026365 , B.E. 2000BE-790 (S.C.).