

CANADA / JUDGMENT

Holland v. British Columbia (Attorney General)

2020 BCCA 304

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 304 Holland v. British Columbia (Attorney General)

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Holland v. British Columbia (Attorney General),

2020 BCCA 304

Date: 20201106

Docket: CA46715

Between:

Zsuzsanna Holland

Appellant

(Petitioner)

And

Oliver Fleck, A/Regional Crown Counsel;

David Eby, Attorney General for British Columbia

Respondent

(Respondent)

Before:

The Honourable Chief Justice Bauman

The Honourable Mr. Justice Harris

The Honourable Mr. Justice Butler

On appeal from: An order of the Supreme Court of British Columbia,

dated January 16, 2020 (Holland (Re), 2020 BCSC 77,

Williams Lake Docket 19-17352).

The Appellant, appearing in person

(via videoconference):

Z. Holland

Counsel for the Respondents

(via videoconference):

F. Zaltz

Counsel appearing as Amicus Curiae

(via videoconference):

S. Wright

Place and Date of Hearing:

Vancouver, British Columbia

September 11, 2020

Place and Date of Judgment:

Vancouver, British Columbia

November 6, 2020

Written Reasons by:

The Honourable Mr. Justice Harris

Concurred in by:

The Honourable Chief Justice Bauman

The Honourable Mr. Justice Butler

Summary:

The appellant appeals an order dismissing an application for leave to bring a petition challenging the decision of Crown counsel to stay a private prosecution. This Court was referred the question of whether two vexatious litigant orders to which the appellant is subject apply in the context of a petition seeking to challenge a stay of proceedings entered pursuant to the Criminal Code. Held: Leave to appeal granted, appeal allowed, and order below set aside without prejudice to the

appellant's right to begin the proceedings anew by way of application for certiorari. The proceedings below ought to have been quashed at the outset. A challenge to a stay of proceedings entered pursuant to the Criminal Code is a criminal matter properly brought as an application for an extraordinary remedy, not as a petition for judicial review, to which vexatious litigant orders issued under provincial statutory authority do not apply.

Reasons for Judgment of the Honourable Mr. Justice Harris:

Introduction

[1] The question before the Court, referred to it by a single justice, is:

Do vexatious litigant orders made in civil proceedings under s. 18 of the Supreme Court Act or s. 29 of the Court of Appeal Act apply in the context of a petition seeking to challenge a stay of proceedings entered by the Crown pursuant to s. 579 of the Criminal Code?

[2] The petition referred to in the question is a petition brought pursuant to the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241 [JRPA], a provincial statute. The proceeding in issue is not an application for certiorari, prohibition or another extraordinary remedy to which Part XXVI of the Criminal Code, R.S.C. 1985, c. C-46 applies. In this province, proceedings in criminal matters by way of an extraordinary remedy must be commenced by application in accordance with the Criminal Rules of the Supreme Court of British Columbia, S.I./97-140 [Criminal Rules], which were enacted pursuant to the rule-making power of superior courts conferred by s. 482 of the Code.

[3] It is apparent that the challenge to a stay of a private prosecution ordered pursuant to s. 579 of the Code ought to have been brought by way of an application for certiorari according to the Criminal Rules and not by petition pursuant to the JRPA. Ms. Holland relied on the wrong procedure to challenge the stay. By doing so, she injected a complexity into the issues which ought not to have arisen. Accordingly, I propose to restate the question slightly to capture what I take to be the real issue, which is whether vexatious litigant orders pronounced pursuant to provincial legislation apply to properly brought challenges to a stay of proceedings entered by the Crown. If they do, then leave would be required before commencing a challenge to such a stay. If they do not, then leave is not required. To the extent necessary, I will address the complications arising from Ms. Holland's use of the wrong procedure later in these reasons.

[4] The vexatious litigant orders mentioned in the question were made in the Supreme Court and this Court, respectively. The orders were made pursuant to provincial statutes. The courts did not rely on inherent jurisdiction as a source of jurisdiction to make the orders. Accordingly, I will not address a potential issue; namely, whether a vexatious litigant order relying on the court's inherent jurisdiction and made in relation to civil proceedings might have application to a criminal proceeding.

- [5] For the reasons that follow, in my opinion, vexatious litigant orders pronounced under the authority of provincial statutes do not apply to criminal matters proceeding properly as applications for certiorari under the Criminal Rules.
- [6] Before turning to explain these conclusions, it will be helpful to set out some background to put the issues raised by the question into context.

Background

- [7] Ms. Holland is subject to vexatious litigant orders in both the Supreme Court and this Court. Those orders, as already noted, were pronounced pursuant to s. 18 of the Supreme Court Act, R.S.B.C. 1996, c. 443 [SCA] and s. 29 of the Court of Appeal Act, R.S.B.C. 1996, c. 77 [CAA]. Section 18 of the SCA reads:

18 If, on application by any person, the court is satisfied that a person has habitually, persistently and without reasonable grounds, instituted vexatious legal proceedings in the Supreme Court or in the Provincial Court against the same or different persons, the court may, after hearing that person or giving him or her an opportunity to be heard, order that a legal proceeding must not, without leave of the court, be instituted by that person in any court.

- [8] Section 29 of the CAA is substantially the same:

29 If, on the application of any person, a justice is satisfied that a person has habitually, persistently and without reasonable cause commenced vexatious proceedings in the court, the justice may, after hearing that person or giving that person an opportunity to be heard, order that proceedings must not be brought or commenced in the court without leave of a justice.

- [9] On August 8, 2019, Ms. Holland swore a private information before a justice of the peace. On August 13, 2019, Crown counsel advised the Provincial Court that the Crown was assuming conduct of the proceedings and directing a stay of proceedings under s. 579 of the Code. On August 15, 2019, Ms. Holland filed an application in the Provincial Court seeking to reinstate the proceedings and requesting a process hearing. On August 30, 2019, Brecknell P.C.J. explained that the Provincial Court did not have jurisdiction over the application given the Crown's direction to stay the proceedings. The court informed Ms. Holland that her only available remedy would lie in the Supreme Court.
- [10] On September 6, 2019, Ms. Holland attempted to file a petition in Form 66 in the Supreme Court relying on the British Columbia Supreme Court Civil Rules, B.C. Reg. 168/2009. Ms. Holland sought an order setting aside the stay of the private information, leave to continue conducting the private prosecution, and costs against the Attorney General and the Regional Crown. Her asserted jurisdictional foundation for the orders she sought was the JRPA.

- [11] Ms. Holland, having been advised of the implications of the vexatious litigant order issued against her in the Supreme Court, then filed a requisition on September 10, 2019 seeking leave to file the petition and an affidavit. A Supreme Court judge directed that the application for leave be heard on notice to the Crown.
- [12] The application for leave was heard and dismissed on the basis that the grounds alleged in the petition had no merit. The judge in her reasons accepted the Crown's submission that the vexatious litigant order applies to all proceedings in the Supreme Court, whether civil or criminal in nature. It is only fair to say that the judge was, on this point, led into error by the Crown's argument. The Crown now, having reconsidered the issue, takes the position that vexatious litigant orders pronounced pursuant to provincial legislation do not apply to a properly brought application to challenge an order that deals with criminal procedure.
- [13] I will not comment on the judge's reasons for concluding that the grounds alleged in the judicial review petition were, as a matter of substance, without merit. We have not received any submissions on the point. Nor does the judge's reasoning arise out of the question that has been posed.
- [14] Following the dismissal of her application for leave, Ms. Holland filed in this Court, on February 18, 2020, an affidavit followed, on February 27, 2020, by an unfiled notice of application for leave to appeal. Justice Frankel then directed the question set out above to a division of the Court.

Analysis

- [15] The issue underlying the question referred to us arises out of this Court's decision in *R. v. Verma*, 2016 BCCA 307 at para. 28, where this Court said: "we have left for another day the question of whether an order made in a civil case that precludes a person from filing any process in this Court's registry can preclude that person from filing process in a criminal case." I observe that, as indicated by this comment, the question is an open one in this province. Neither s. 18 of the SCA nor s. 29 of the CAA expressly say whether an order made pursuant to those provisions applies to both civil proceedings and criminal proceedings.
- [16] The Court has received the assistance of *amicus curiae* on this point, for which it is grateful.
- [17] As it turns out, Crown counsel, *amicus*, and Ms. Holland substantially agree about the appropriate analysis necessary to answer the question. They argue that applying orders rooted in provincial jurisdiction to a criminal proceeding would offend the doctrine of federal paramountcy.
- [18] I agree with the conclusion of the parties, but I do not think the doctrine of paramountcy best captures the issue. The doctrine of paramountcy calls for a conflict between otherwise valid provincial and federal laws. I do not think that provincial legislation intended to regulate criminal procedure would be constitutionally valid. Parliament has exclusive jurisdiction over criminal law and criminal procedure by virtue of s. 91(27) of the

Constitution Act, 1867. I think it clear that this is a criminal matter, regulated as a matter of procedure by the Code and the Criminal Rules. As a matter of criminal procedure, the regulation of such applications falls within the exclusive jurisdiction of Parliament.

- [19] In my view, the straightforward answer is that the Legislature, in passing vexatious litigant legislation, did not intend to regulate criminal procedure. I begin first by explaining why the challenge to the stay is a criminal proceeding. I will then turn to interpreting the provincial legislation within the applicable constitutional framework.
- [20] Applications to challenge or review decisions of the kind before us are criminal in nature, and must be started by application pursuant to the Criminal Rules.
- [21] Section 579 of the Code authorizes the Attorney General, or a counsel on behalf of the Attorney General, to direct a stay of a private prosecution despite the wishes of the informant. That is not in issue.
- [22] The jurisdictional foundation for prerogative writs is the inherent jurisdiction of the superior courts. However, the procedure which regulates criminal matters proceeding by way of a prerogative writ is derived from the combined operation of ss. 482 and 774 of the Code.
- [23] Section 774 provides that Part XXVI "applies to proceedings in criminal matters by way of certiorari, habeas corpus, mandamus, procedendo and prohibition." A challenge to a direction to stay a proceeding, including a private prosecution, is both a criminal matter and a proceeding by way of certiorari and perhaps prohibition. It is therefore captured by Part XXVI.
- [24] Section 482(1) of the Code empowers every superior court of criminal jurisdiction to make rules of court to regulate proceedings instituted in relation to criminal matters. Section 482(3)(c) provides that one purpose of such rules may be "to regulate the pleading, practice and procedure" of criminal proceedings by way of an extraordinary remedy. A challenge in the nature of matters captured by s. 774 contemplates an application brought pursuant to the rules of court in force in the province.
- [25] The Criminal Rules, which were enacted pursuant to the rule-making authority found in s. 482 of the Code, regulate these proceedings. Rule 1 stipulates that the Rules apply to all criminal proceedings within the jurisdiction of the Supreme Court. Rule 2(1) mandates that all pre-trial applications be commenced by a notice of application in a specified form. Rule 4(1) contemplates that proceedings for mandamus, certiorari, habeas corpus, and prohibition be commenced by application. The effect of Rules 2(1) and 4(1) is that a challenge, such as the one brought by Ms. Holland, is to be brought by application for certiorari under the Criminal Rules and not by petition for judicial review under the JRPA.

- [26] As I view the matter, the Code and the Criminal Rules mandate one proper procedure to challenge a direction under s. 579. Any attempt to rely on the JRPA to challenge such a direction is inconsistent with that procedure and frustrates the process mandated by the Code and the Criminal Rules. This also reflects the approach of Nordheimer J.A. in *Zreik v. Ontario (Attorney General)*, 2019 ONCA 89 at para. 17:
- [17] The proper analytical approach begins with s. 774 of the Criminal Code. Where criminal matters are concerned and are the subject of an application for an extraordinary remedy, the Criminal Code applies to those applications, not a provincial statute such as the JRPA. The process to then be followed flows from the Criminal Code. On the other hand, if the application is fundamentally concerned with non-criminal matters, then the application falls within provincial jurisdiction such that the JRPA would apply.
- [27] I recognize that there are examples of cases relying on civil provincial judicial review proceedings to challenge decisions made in criminal cases. It may be that, in those cases, no attention was paid to the correct procedure. In my view, there is no reason why that should occur again in this province.
- [28] Given that a challenge to a stay of proceedings is a criminal proceeding regulated by the Code and the Criminal Rules, the question is then whether there is anything in either the SCA or the CAA that evinces an intention to authorize vexatious litigant orders regulating criminal proceedings.
- [29] Where language in a statute is open to competing plausible interpretations, courts presume constitutional legislative intent and choose an interpretation that supports the law's validity: *Reference re The Farm Products Marketing Act*, [1957] S.C.R. 198 at 255; *Siemens v. Manitoba (Attorney General)*, 2003 SCC 3 at para. 33. Along the same lines, it is presumed that general language in a statute is not intended to extend the law's application beyond the powers of its enacting body: *Reference re Farm Products* at 255.
- [30] In *Foy v. Foy (No. 2)* (1979), 26 O.R. (2d) 220, the Ontario Supreme Court, Appellate Division had to consider, as one among many issues, whether vexatious litigant orders rooted in provincial jurisdiction applied to criminal proceedings. The provincial legislation under consideration was, as in our case, silent on that question. Chief Justice Howland had this to say at 228-29:

Having considered the meaning of the word "vexatious", it is also necessary to consider whether the "legal proceedings" referred to in s. 1(1) of the Act include criminal proceedings, and whether the word "instituted" applies to interlocutory proceedings and to appeals.

Section 1(1) of the Act can apply to proceedings between husband and wife, as it applies to vexatious legal proceedings against the same person. However, does it apply to criminal proceedings? The majority of the Court of Appeal in *Re Boaler*, supra, concluded that s. 1 of the Vexatious Actions Act, 1896 did not apply to criminal proceedings. There an order had been made under the Act and consequently leave had to be obtained to institute legal proceedings. While the

words "legal proceedings" were broad enough to include both criminal and civil proceedings, the majority of the Court considered that, in the context, it did not seem reasonable to conclude that the Legislature intended that a person must get leave before commencing criminal proceedings against a wrongdoer. The Legislature should have used express words if it intended to take away the right of a person to such redress. Scrutton J., also felt that the word "institute" was far more applicable to civil than criminal proceedings, as the private prosecutor can do nothing to harm the accused unless a public body or officer allows the proceedings to go on.

In *Mortimer v. Barrisove*, [1977] 6 W.W.R. 383, Hutcheon J., of the British Columbia Supreme Court, had to deal with an application under s. 84 of the Supreme Court Act, R.S.B.C. 1960, c. 374, which is similar to s. 1(1) of the Act with which we are here concerned. He concluded that there was no jurisdiction under that section to make an order preventing a person from using whatever procedures are open to him in criminal matters, for example, laying an information before a Justice pursuant to s. 455. 1 of the Criminal Code, and that it was for the Justice to determine whether or not to issue a summons. In his opinion s. 84 was never intended to interfere with that process, or with the discretion conferred upon the Justice of the Peace. He noted that s. 83 of the Supreme Court Act seemed to support his view as it provided:

83. Nothing in this Act shall be deemed to affect the practice or procedure in criminal matters.

Under s. 91(27) of the British North America Act, 1867, the Parliament of Canada has exclusive jurisdiction over the criminal law, including the procedure in criminal matters. Under s. 92(14) the Legislature of Ontario has exclusive jurisdiction over the administration of justice in the Province, including the constitution of Courts, civil and criminal, and including procedure in civil matters in those Courts. There is a presumption that a legislative body does not exceed its powers under the constitution: Driedger, *The Construction of Statutes* (1974), at p. 167. More specifically, the "reading down" doctrine requires that general language in a statute be construed more narrowly so as to keep it within the permissible scope of legislative power: Hogg, *Constitutional Law of Canada* (1977), at p. 90. In my opinion the words "legal proceedings" in s. 1(1) of the Act do not include criminal proceedings, and the seven charges of assault laid by the husband against the wife should not have been considered in the application under s. 1(1) of the Act. I am fortified in this conclusion by the reasons of Hutcheon J., in *Mortimer v. Barrisove*, *supra*, that the proceedings are not really initiated by the private prosecutor, but rather the justice determines whether a summons will be issued. I am also cognizant of the powers of Crown counsel to intervene in private prosecutions as discussed in *Re Bradley et al. and The Queen* (1975), 9 O.R. (2d) 161, 24 C.C.C. (2d) 482, 35 C.R.N.S. 192.

[31] I find the analysis in the final paragraph compelling and dispositive of the issue before us. It appears to me that, properly interpreted, vexatious litigant orders authorized by the SCA and the CAA apply only to matters falling within s. 92(14) "including procedure in civil matters" I do not think the statutes can be interpreted as authorizing vexatious litigant orders that apply to applications for extraordinary relief under the Code. To interpret the legislation as authorizing such a result would be to conclude that the Legislature aimed at regulating criminal procedure. I see nothing in the legislation to indicate such an intention. To the

extent that the general language of s. 18 of the SCA and s. 29 of the CAA leaves those provisions open to an interpretation that would permit the regulation of criminal procedure, I would 'read down' their scope as only authorizing orders which apply to matters within provincial legislative authority.

- [32] As is apparent from the passage just cited, Mr. Justice Hutcheon (as he then was) had reached the same conclusion in *Mortimer v. Barrisove*, [1977] 6 W.W.R. 383 (B.C.S.C.). Mr. Justice Grauer (as he then was) also turned his mind to the issue in *Parchment v. British Columbia*, 2015 BCSC 1006, although he did not ultimately have to decide the question. Grauer J. identified the concern:
- [44] First, there is a constitutional issue. Criminal law is within the exclusive jurisdiction of Parliament. The Criminal Code provides for the laying of an information by any person, subject only to the requirement of a reasonable belief concerning the commitment of an indictable offence. In such circumstances, the justice "shall" receive the information. The Supreme Court Act is a provincial statute, and arguably, an interpretation of section 18 that would extend to prohibiting the laying of an information under the Criminal Code would offend the doctrine of paramountcy by intruding into the realm of criminal procedure.
- [33] While I agree that provincial regulation of criminal procedure would be constitutionally infirm, I do not think, as I previously indicated, that any infirmity arises here from offending the doctrine of paramountcy, as the question at hand can be resolved purely through an exercise of statutory interpretation.

The Appropriate Disposition of the Appeal

- [34] The parties agree that, in the interests of judicial economy, the Court should deal with the continuing status of this appeal to clear the decks so that a proper procedure can be followed. Ms. Holland acknowledged that these proceedings could be brought to an end, but requested that the matter be returned to the Supreme Court so that she could file her application in the proper form. The Crown submitted that this proceeding should come to an end and no further steps be required in it. Reluctantly, the Crown acknowledged that in consequence of the error below, Ms. Holland would be entitled to bring an application in proper form.
- [35] In this case, Ms. Holland invoked a civil procedure under provincial legislation to challenge a criminal decision. She says she did so as a result of a comment by the provincial court judge, although she understood that she was challenging a criminal order. Procedurally, the effect of the civil vexatious litigant orders required her to seek leave to start a proceeding regulated by provincial authority. Had it been recognized at the time that she had invoked an improper procedure, the judge on the leave application should have quashed the petition, without prejudice to Ms. Holland's right to bring an application under Part XXVI.

- [36] Instead, the application for leave was heard and dismissed. Ms. Holland then submitted an unfiled application for leave to appeal to this Court the order pronounced below. In my view, the appeal of the order dismissing her leave application is arguably procedurally a civil matter because it is an attempt to appeal from the dismissal of her application for leave to file a petition. Accordingly, Ms. Holland needs leave to appeal in light of the vexatious litigant orders to which she is subject.
- [37] The Crown and Ms. Holland accept that these proceedings should be brought to an end without prejudice to Ms. Holland's right to start over with a proper application which can then be addressed on its merits. I agree that that is the right outcome in the circumstances. To accomplish that end, I think the following order from this Court is necessary. I would direct the unfiled application for leave to appeal be filed, grant leave to appeal, and allow the appeal setting aside the order below and quashing the petition, without prejudice to Ms. Holland's right to bring a proper application under the Criminal Rules to challenge the direction to stay.
- [38] This proceeding and appeal has arisen only because Ms. Holland pursued an erroneous approach to challenge the Crown's decision to stay her private prosecution and the Crown did not identify the error. Accordingly, I would not make any order for costs.

"The Honourable Mr. Justice Harris"

I agree:

"The Honourable Chief Justice Bauman"

I agree:

"The Honourable Mr. Justice Butler"

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