

CANADA / JUDGMENT

R. v. Alkhalil

2020 BCSC 1405

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Supreme Court of British Columbia

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2020 BCSC 1405 R. v. Alkhalil

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Alkhalil,

2020 BCSC 1405

Date: 20200918

Docket: 27393-58

Registry: Vancouver

Regina

v.

Rabih Alkhalil (a.k.a. Robby Alkhalil), Dean Michael Wiwchar and

Larry Ronald Amero

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Supplementary Ruling to R. v. Alkhalil, 2020 BCSC 1256, Docket No. 27393

Before: The Honourable Madam Justice Maisonville

Supplementary Ruling Re Application No. 58 - Non-Disclosure Reports, Emails and Unvetting:
Project Refuge Document

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Place and Date of Hearing:

Vancouver, B.C.

July 15, 2020

Place and Date of Ruling:

Vancouver, B.C.

August 25, 2020

Place and Date of Supplementary Ruling:

Vancouver, B.C.

September 18, 2020

introduction

- [1] This ruling is supplementary to an earlier ruling with respect to Application #s 65 and 58 released August 25, 2020 (indexed as 2020 BCSC 1256).

- [2] The present ruling addresses Part 2 of Application 58 in which the applicants, Larry Amero and Rabih Alkhalil (the "applicants"), seek an order that the Crown conduct an independent assessment of the relevance of all emails in the possession of the Vancouver Police Department ("VPD") that were not provided to the Crown and to provide them with a Laporte inventory.
- [3] The Crown opposes the application.

BACKGROUND AND POSITIONS OF THE PARTIES

- [4] As part of its disclosure management in this case, the Crown provided the applicants (and their co-accused, Dean Michael Wiwchar) with a series of "non-disclosure reports" describing the material that had been reviewed by the Crown but not disclosed. Three such reports were provided between March and August 2019.
- [5] On March 5, 2020, the Crown provided a cumulative non-disclosure report, which was a complete inventory of all items provided to the Crown by the police that had not been disclosed to the defence. The report was lengthy, comprising 4,649 pages and listing 93,381 separate items under four categories of non-disclosure:
- 58,382 duplicates;
 - 34,455 irrelevant documents;
 - 194 privileged documents; and
 - 350 other.
- [6] "Irrelevant materials" included police administrative documents, police work product, investigative reports of third parties, line sheets and wiretap audios with no content, and irrelevant conversations involving third parties.
- [7] On December 17, 2019, Mr. Amero filed Notice of Application #58 in which he sought, inter alia, an order that the Crown disclose all emails in its possession or that of the VPD that are not clearly irrelevant. The Crown reply was that it had disclosed all relevant emails in its possession. However, the applicants highlight a subsequent January 15, 2020 affidavit of Sgt. Hans Dykman, file coordinator for Project Reality, in which he deposed that emails the police deemed irrelevant were not disclosed to the Crown.
- [8] The applicants submit that the Crown has a duty to disclose all emails that are not clearly irrelevant. Further, they argue that it is the duty of the Crown, not the police, to assess the relevance of the emails, and that the Crown has improperly delegated this function to the VPD. In this regard, the applicants cite *R. v. Darling*, 2017 BCSC 2439, where Justice Thompson said the following at para. 10:

The second point for context is that on every manner of case that involves document disclosure, criminal or civil, a lawyer has important professional obligations to take reasonable steps to promote proper disclosure. In criminal cases, Crown counsel plays a critical role in this respect. The Crown must not simply be a passive conduit for transmission of disclosure material from the police to the accused. The Crown has obligations of its own to seek out and obtain relevant material and to generally superintend the disclosure process. While the police and Crown counsel must work together in order for the Crown to comply with its disclosure obligations, the Crown cannot delegate its lawyers' responsibility to vet material for relevance and privilege. As Ryan J.A. put it in *R. v. Arsenault* (1994), 153 N.B.R. (2d) 81 at para. 97 (C.A.), in a passage cited with approval in *R. v. McNeil*, 2009 SCC 3 at para. 49, "[r]elevancy cannot be left to be determined by the uninitiated"; a fortiori, privilege issues cannot be left to be determined by the uninitiated.

[9] Accordingly, the applicants seek an order that the Crown conduct an independent assessment of the relevance of all the emails in question and provide the applicants with a non-disclosure report for the emails as set out in *R. v. Laporte* (1993), 84 C.C.C. (3d) 343 (Sask. C.A.) at para. 18.

[10] The Crown responds that the Court should dismiss the application, as the police are permitted to withhold emails that are clearly irrelevant, including those that are of an administrative or transitory nature. While the Crown has ultimate responsibility for decisions regarding relevance and the disclosure of evidence, it is entitled to rely on information from the police with respect to the relevance of emails in its possession.

DISCUSSION

[11] The Crown's disclosure obligations are well-known. As summarized in *R. v. Bacon*, 2013 BCSC 1970 at para. 89:

The principles of fundamental justice include the right to make full answer and defence. To ensure that this right is protected, the jurisprudence mandates that the Crown is under a general duty to disclose all information, inculpatory or exculpatory, except evidence that is beyond the control of the Crown, clearly irrelevant, or privileged: *Stinchcombe* at para. 17; *R. v. Chaplin*, [1995] 1 S.C.R. 727 at para. 21.

[12] The police have a corresponding duty to disclose to the Crown the fruits of the investigation, which, in turn, is disclosed to the accused: *R. v. Moazami*, 2020 BCCA 3 at para. 36.

[13] The Crown has made voluminous disclosure in this case. With respect to the materials it declines to disclose, its non-disclosure reports, both individual and cumulative, are detailed and for each item set out the document ID, title, document type, non-disclosure reason/comments, task ID, and, in the case of the cumulative report, the individual non-disclosure report in which the item was first referenced. To the extent the applicants seek a Laporte inventory of non-disclosed emails in the Crown's possession, they have that in the non-disclosure reports.

- [14] As I understand their submissions, the applicants primarily take issue with the VPD's role in assessing the relevance of its emails, submitting that that function belongs exclusively to the Crown who has improperly delegated it here to the police.
- [15] As described in Sgt. Dykman's affidavit, Project Reality had a process in place to manage emails created during the investigation. In brief, individual investigators were responsible for the management of their emails, and forwarded investigative or evidentiary emails to the file coordinator together with the associated task and any related documents. Investigators kept emails that did not fall into either category. The file coordinator reviewed the emails sent by the investigators, along with the associated task, and made a further assessment as to whether the email was investigative, evidentiary or clearly irrelevant. Emails that were either investigative or evidentiary were put into an inbox for disclosure to the Crown. Emails that were deemed irrelevant were not disclosed to the Crown.
- [16] The Crown says that it assessed the emails it received for relevance and then vetted and disclosed them to the defence unless they were clearly irrelevant.
- [17] I see nothing inappropriate with that process and do not agree that the Crown has improperly delegated its responsibility to review the emails for relevance to the police. The authorities recognize that the Crown is entitled to rely on the police assessment in this regard.
- [18] This issue was addressed, for example, in *R. v. Siemens*, 1998 ABCA 1 where, as part of its investigation, the RCMP obtained wiretap authorizations and intercepted many hours of telephone conversations. The Crown advised the defence it would not be tendering any of the intercepts into evidence but disclosed 42 conversations which the RCMP determined could be relevant. It also provided logs of all the intercepted conversations that had been prepared by civilian members of the RCMP whose duties were to monitor the interceptions and make detailed summaries of the activity on the telephone lines. RCMP officers testified that they had assessed the conversations from the perspectives of the Crown and defence and had produced any that appeared relevant. The Crown refused defence counsel's request for disclosure of all tapes and transcripts. When defence counsel questioned the accuracy of the logs and the ability of the RCMP to make decisions with respect to relevancy, the trial judge directed Crown counsel to listen to all of the intercepted conversations (300 hours worth) and determine relevance having regard to the defence theory. When the Crown reported that it was unable to comply with the court's direction due to insufficient staff resources, the accused applied for and was granted a stay of proceedings.
- [19] The Court of Appeal granted the Crown's appeal, concluding that there were alternatives to the drastic remedy of a stay on the facts of the case. It observed that defence counsel had not provided any evidence to support his suggestion that the intercept logs were inaccurate, and that it was not a reasonable exercise of discretion to require Crown counsel to listen to and summarize the intercepts. The Court of Appeal in *Siemens* addressed the scope of the Crown's disclosure obligations, beginning at para. 27:

- [27] The issue which we wish to address in more detail is the scope of the obligation of Crown counsel. Disclosure is a duty of the prosecution, which includes Crown counsel, police and other state investigative agencies. Must Crown counsel personally examine and gain knowledge of all evidence before he or she makes a decision as to relevance and disclosure? Or may Crown counsel rely on information presented to him or her by police officers or other civilian employees who have the duty of distilling information and providing it to Crown counsel?
- [30] While it is clear that Crown counsel has ultimate responsibility for decisions regarding relevance and disclosure of evidence in the possession of the Crown, that in our view does not include a requirement that Crown counsel personally examine and catalogue every item of evidence, every statement, every document, etc., that has been gathered by the police in the course of investigation, or which may be held by other state agencies, to fulfil his or her duty to the accused and the Court.
- [31] We recognize that the imposition of such a duty on Crown counsel would create an impossible situation in many cases, such as the present. It is not only in wiretap cases that the Crown must rely on other agencies to make determinations as to relevance of information and provide the Crown with summaries of information which is gathered in the course of an investigation. Police conduct searches, and decide what evidence is to be seized. They provide descriptions of the physical evidence, not the item of evidence itself. In commercial cases, police officers and other staff inspect large volumes of documents and provide resumes to the Crown. They interview witnesses and provide statements, notes or will say outlines. If the current ruling of the trial judge stands and Crown counsel may only make disclosure decisions based on personal inspection and knowledge of all evidence, the system will grind to a halt. All searches, witness interviews and investigations will have to be conducted by Crown lawyers so that they, from their own personal knowledge, can say that all relevant evidence has been disclosed.
- [32] We see no need for Crown counsel to personally spend days or weeks listening to lengthy tapes, or inspecting documents and other evidence to fulfil the duty of disclosure. Crown counsel is entitled to rely on information provided to him or her by police officers and other staff members regarding the content of documents, especially those considered to have no relevance to proceedings. While the law regarding disclosure deals with obligations of the Crown and speaks of breaches of ethical duties for failure to disclose relevant materials, nothing which we have found in the authorities requires that the burden of examining and cataloguing evidence be assumed by a Crown lawyer.
- [20] Similarly, and succinctly, Madam Justice Stromberg-Stein commented in *R. v. Russell*, 2012 BCSC 375 at para. 13 that although the Crown bears ultimate responsibility for full, fair, and frank disclosure, "the Crown is entitled to rely on the police to fulfil their part in the disclosure chain".

- [21] Although the applicants cite para. 10 of *Darling* reproduced earlier, I take Thompson J.'s comments about the role of the Crown in the disclosure process--"the Crown must not simply be a passive conduit for transmission of disclosure material from the police to the accused"--to be in regards the situation where the Crown is put on notice that relevant materials exist beyond those it has been provided by police. The authorities he cited (*R. v. Arsenault* (1994), 153 N.B.R. (2d) 81 (C.A.) and *R. v. McNeil*, 2009 SCC 3) both concerned that type of situation, where the Crown no doubt has an obligation to inquire and take further steps.
- [22] In *Darling*, Crown counsel had taken ill and new counsel assumed conduct of the prosecution. The Crown resisted further disclosure prompting defence counsel to apply for sweeping disclosure orders. At the end of the hearing, the Crown conceded that most of the disclosure sought was appropriate. One of the outstanding items was the RCMP's document management protocol. The RCMP opposed disclosure, arguing that production of the business rules was governed by the O'Connor process. Justice Thompson expressed the view that "bearing in mind the Crown's obligation to seek out and obtain relevant material and superintend the disclosure process, it is not clear to me how the Crown could properly attend to this obligation without knowing the document management rules the police force ha[d] been using" (at para. 12). He also concluded that since the RCMP document management protocols were necessary for the police and Crown to carry out their respective disclosure obligations, they were not the sort of materials that required an O'Connor application.
- [23] In my view, the situation in *Darling* is different from that presented here, where the question is whether the Crown ought to be required to assess every email in the possession of the police to determine relevance. The Court of Appeal's comments in *Siemens* are clear that it is not. As the Court of Appeal stated at para. 32, "Crown counsel is entitled to rely on information provided to him or her by police officers and other staff members regarding the content of documents, especially those considered to have no relevance to proceedings."
- [24] I am satisfied that the Crown in the present case has not improperly delegated its responsibility to review the emails for relevance to the police. Moreover, the applicants have not provided any basis to believe that there are emails that are not clearly irrelevant that the police have failed to disclose to the Crown. Accordingly, I decline to order the Crown to undertake a blanket review of emails the police deemed irrelevant and to provide a Laporte inventory of these emails.
- [25] The applicants are not without recourse. Disclosure is a dynamic process in which the defence also has a role: *R. v. Anderson* 2013 SKCA 92 at para. 88; *Bacon* at para. 104. It is open to the applicants to make particularized requests of the Crown, and the record indicates that the Crown and police have been willing in the past to address them.

[26] For example, in November 2019, counsel for Mr. Amero sought disclosure of certain communications between various officers arising from a review of Sgt. St. Amant's notes and testimony. The Crown forwarded this request to Sgt. Dykman, who responded to the Crown that some of the requested items had been previously disclosed. He attached eight emails that had not previously been disclosed. The Crown then provided a detailed response to Mr. Amero, identifying where the previously disclosed items could be found; providing the additional emails; advising that it had obtained three emails between Sgt. St. Amant and Cst. Proulx but that it would not be disclosing them since they were not relevant in light of one of this Court's rulings; and, advising that it had asked the VPD to look into whether there were any emails between Sgt. St. Amant and Yannick Collins.

[27] The application is dismissed.

"Maisonville J."

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