

CANADA / JUDGMENT

R. v. Alkhalil

2020 BCSC 1576

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1576 R. v. Alkhalil IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: R. v. Alkhalil, 2020 BCSC 1576 Date: 20201023 Docket: 27393-29 Registry: Vancouver Regina v. Rabih Alkhalil (a.k.a. Robby Alkhalil), Dean Michael Wiwchar and Larry Ronald Amero Restriction on Publication: A publication ban has been mandatorily imposed under s. 648(1) of the Criminal Code of Canada, restricting the publication, broadcasting or transmission in any way of any portion of the trial at which the jury is not present. This publication ban applies until the jury retires to consider its verdict. Before: The Honourable Madam Justice Maisonville Ruling Re Application No. 29 - Timing of s. 24(2) Argument Counsel for the Crown, appearing by videoconference: D.A. Jardine, Q.C. D. Darby A. La Bar S. Dworkin Counsel for the Accused, Rabih Alkhalil (a.k.a. Robby Alkhalil), appearing by videoconference: K. Blok Counsel for the Accused, Dean Michael Wiwchar, appearing by videoconference: S. Buck Counsel for the Accused, Larry Ronald Amero, appearing by videoconference: M. Rock Place and Dates of Hearing: Vancouver, B.C. September 29, 2020 Place and Date of Judgment: Vancouver, B.C. October 23, 2020

introduction

- [1] This Court concluded in earlier rulings on Application No. 29 that the police infringed the applicant, Rabih Alkhalil's rights under s. 8 of the Charter when they obtained his personal information from Avis Car Rental without prior authorization (2019 BCSC 1801), and that the police conduct was not justified pursuant to the ancillary powers doctrine (2019 BCSC 2225). The Court further found that excision of certain information from the Information to Obtain was necessary as a result of the breach (2020 BCSC 444). As a result of these rulings, the Crown has conceded that several judicial authorizations cannot be supported and that information obtained pursuant to those authorizations infringed the applicant's s. 8 rights. The final stage of Application No. 29 is consideration of whether the unconstitutionally obtained evidence should be excluded under s. 24(2) of the Charter. The parties do not agree when this aspect of the application should proceed.

- [2] The applicant takes the position that the s. 24(2) hearing should occur only after the Court has ruled on all of the Charter applications in these proceedings, as the number and severity of breaches that occurred over the course of the police investigation is a relevant consideration in the s. 24(2) analysis. He submits that this approach is consistent with the law as recently discussed in *R. v. Robertson*, 2019 BCCA 116, as well as in earlier decisions such as *R. v. Bohn*, 2000 BCCA 239 and *R. v. Lauriente*, 2010 BCCA 72. The applicant says that proceeding with an omnibus s. 24(2) hearing ensures that the Court will have a complete picture of the police conduct throughout the investigation and avoids a situation in which the Court will have to revisit its s. 24(2) rulings if further Charter violations are established.
- [3] The Crown takes a contrary position and submits that the Court should proceed immediately with the s. 24(2) hearing. Proceeding in this fashion, it says, would be the most efficient use of court time and also accords with appellate jurisprudence that requires the Court to first consider each individual breach under s. 24(2) before considering their cumulative impact: see, for example, *R. v. Trieu*, 2010 BCCA 540 at para. 81; *R. v. Fan*, 2017 BCCA 99 at paras. 78-79; and *R. v. Schultz*, 2018 ONCA 598 at paras. 11 and 25. The Crown says that different Charter rights protect different interests and that considering them cumulatively without first undertaking an individual analysis risks conflating the s. 24(2) analysis. DISCUSSION
- [4] Section 24(2) of the Charter provides: Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.
- [5] It follows that there are two components to a s. 24(2) analysis. Before excluding evidence under s. 24(2), the court must be satisfied that:
- a) The evidence was obtained in a manner that infringed or denied a Charter right; and
 - b) The admission of the evidence in the proceedings would bring the administration of justice into disrepute.
- [6] In *Robertson*, Justice Fitch, writing for our Court of Appeal, referred to first stage as the "threshold" stage and the second as the "evaluative" stage.
- [7] The evaluative exercise involves an examination of the three lines of inquiry identified in *R. v. Grant*, 2009 SCC 32:
- a) The seriousness of the Charter-infringing state conduct;
 - b) The impact of the breach on the Charter-protected interests of the accused; and
 - c) Society's interest in an adjudication on the merits.

- [8] At the evaluative stage, the cumulative effect of multiple constitutional breaches in the course of an investigation, including those committed in relation to third parties, is also a relevant consideration: Robertson at para. 52. Fitch J.A. then when on to quote from R. v. Fan, 2017 BCCA 99 at paras. 72-73:
- [72] The seriousness of a Charter breach is not determined in a vacuum. On the contrary, the cumulative effect of multiple breaches is a relevant consideration. Where a breach is part of a larger pattern of abuse or disregard for Charter rights, this exacerbates its seriousness: R. v. Bohn, 2000 BCCA 239 (B.C. C.A.) at paras. 45, 47; R. v. Lauriente, 2010 BCCA 72 at para. 27. Accordingly, when evaluating the seriousness of a breach for s. 24(2) purposes, a court should consider the cumulative effect of multiple breaches: [R. v. Spence, 2011 BCCA 280] at para. 51.
- [73] A pattern of breaches tends to support exclusion because courts need to distance themselves from the behaviour: Grant at para. 75. However, a finding of cumulative breaches will not necessarily result in the exclusion of evidence under s. 24(2): R. v. Trieu, 2010 BCCA 540 at para. 93. Each case turns on its own facts.
- [9] I do not understand it to be controversial between the parties that the Court examines Charter breaches both individually and cumulatively under s. 24(2). It is also uncontentious that there is no requirement that the Court hold an omnibus s. 24(2) hearing where there are multiple Charter breaches. The question here is whether the Court should in this case.
- [10] The Crown concedes that the searches of the PGP devices seized from the Montreal Residence were warrantless and, therefore, infringed the applicant's right under s. 8 of the Charter. Accordingly, at a minimum, there will be at least two Charter violations to consider under s. 24(2).
- [11] In arguing that the Court should exercise its discretion to proceed immediately to the s. 24(2) analysis for Application No. 29, the Crown cites R. v. Hamdan, 2017 BCSC 867, and says that there must be some connection between the breaches and the evidence sought to be excluded. Thus, it says, while any Charter breach related to the authorizations may be relevant to the admissibility of the text messages from the PGP devices, the converse does not hold true. The authorizations were issued in June 2012, while the PGP devices were seized in August 2012 and the text messages recovered more than three years later. The Crown submits that what happened a significant time after the Avis Car Rental search should have no bearing on the admissibility of the evidence obtained pursuant to the authorizations.
- [12] However, the applicant answers that the Charter violations relating to the authorizations (in addition to any further Charter violations the Court may find) will be relevant to the s. 24(2) analysis in relation to the warrantless searches of the PGP devices, and vice versa. It is for this reason that an omnibus hearing is to be preferred over the piecemeal approach advocated by the Crown. The applicant also disputes the Crown's submission that a Charter infringement is only relevant to the s. 24(2) analysis where there is a connection between

the infringement and the evidence sought to be excluded, as this is contrary to what the Court held in Robertson.

- [13] In Robertson, the trial judge found three breaches of the accused's Charter rights. She found that the manner in which the search was executed violated the appellant and his wife's rights under s. 8 rights of the Charter in two respects: failure to adhere to the requirements of the knock and announce rule and the over-seizure of items during the search. In addition, the trial judge found that the police violated the appellant's wife's rights under s. 10(b) of the Charter by questioning her at the scene after she had asserted her right to counsel but before she was given an opportunity to exercise that right. In her s. 24(2) analysis with respect to the appellant's wife, the trial judge considered the s. 8 and s. 10(b) breaches, and excluded the evidence seized during the search on the grounds that its admission would bring the administration of justice into disrepute. However, she declined to consider the appellant's wife's s. 10(b) breach when determining whether to exclude the evidence against the appellant on the basis that the "necessary connection" between the appellant and the breach of his wife's s. 10(b) rights did not exist. She did not exclude the evidence against the appellant.
- [14] On appeal, the appellant argued that the trial judge had erred by importing into the evaluative stage of the s. 24(2) inquiry a threshold requirement that there exist a connection between the accused and the breach of the third party's rights. Fitch J.A. agreed, finding that she had erred in declining to factor into her s. 24(2) analysis the s. 10(b) breach committed in relation to the appellant's wife. He wrote:
- [56] As I have explained, the requirement of a connection between the evidence and the Charter breach is unique to, and lies at the heart of, the threshold stage of the s. 24(2) inquiry. The judge erred in incorporating a similar requirement into the evaluative stage. [Emphasis in original.]
- [15] Justice Fitch further elaborated (at paras. 59-61):
- [59] In my respectful view, it is clear from the language of s. 24(2) itself that the question of whether evidence was "obtained in a manner" that infringed a Charter right is confined to the threshold inquiry. At the evaluative stage, the claimant has already met that threshold test. The court's task at this stage is to consider whether admission of the evidence so obtained would bring the administration of justice into disrepute.
- [60] Lauriente and the cases that have followed it recognize that it may be important, at the evaluative stage, to address an individual Charter breach in a broader context to properly determine whether the evidence should be excluded. That contextual inquiry may be relevant in at least two ways. First, where a breach is part of a larger pattern of disregard for Charter rights, its seriousness is exacerbated. Second, the existence of a pattern of breaches may increase the court's concern about distancing itself from the unconstitutional conduct in order to maintain the good reputation of the administration of justice.

- [61] In performing this analysis, judges exercise a broad case-specific discretion. While they are not required to exclude evidence in the face of a pattern of breaches, they are required to consider how such a pattern affects the s. 24(2) analysis.
- [16] The court must consider, accordingly, as part of the contextual inquiry at the evaluative stage whether a pattern exists to assess whether admission of the evidence would bring the administration of justice into disrepute. This being the case, it is my view that, as a practical matter, the Court should proceed to hold the s. 24(2) hearing only after all of the Charter applications have been decided. This will further avoid the situation in which the Court will have to revisit s. 24(2) rulings in the event further infringements of the Charter are found. "Maisonville J."

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