
CANADA / JUDGMENT

R. v. Bruehl

2018 BCSC 1019

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Supreme Court of British Columbia

DECIDED

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2018 BCSC 1019 R. v. Bruehl

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Bruehl,

2018 BCSC 1019

Date: 20180621

Docket: 11364-1

Registry: Fort Nelson

Regina

v.

Hans Peter Bruehl

Before: The Honourable Madam Justice Forth

Reasons for Judgment

On appeal from: An order of the Provincial Court of British Columbia,
dated January 26, 2017 (R. v. Bruehl, FN 11364-1).

Counsel for the Crown:

Geoffrey McDonald

Counsel for the Accused:

Tyler Holte

Place and Date of Hearing:

Fort St. John, B.C.

February 18, 2018

Place and Date of Judgment:

Fort St. John, B.C.

June 21, 2018

Introduction

- [1] In October 2012, the appellant Hans Peter Bruehl killed and harvested a grizzly bear in north-central British Columbia, at or near Toad River. Mr. Bruehl had a licence to harvest the animal in a designated area. Following the kill, the hide and skull of the bear were seized by conservation officers in the area, who alleged that Mr. Bruehl had committed offences under the Wildlife Act, R.S.B.C. 1996, c. 488 [Act].
- [2] Mr. Bruehl applied to Provincial Court, pursuant to s. 97.6(2) of the Act, for the return of the bear hide and skull.
- [3] In reasons for judgment dated January 26, 2017 (Fort Nelson 11364-1), the Provincial Court judge reviewed the evidence and made several findings with respect to Mr. Bruehl's conduct. The judge was satisfied that "the bear was killed legally in Wildlife Management Unit 7-54", which was the location designated in Mr. Bruehl's licence (at para. 27). However, the judge found that Mr. Bruehl had breached s. 38 of the Act, which provides:

Failure to provide information

38 A person who fails, on the request of an officer, to state correctly the locality where and the date on which wildlife or fish in the person's possession was killed, taken or caught by the person or came into his or her possession, commits an offence.

- [4] As a result, the judge concluded at para. 32 that:
- [32] Although he lawfully killed the grizzly bear his failure to comply with the other provisions of the Wildlife Act does not bring him into compliance with s. 2(3) and as such he cannot acquire the right to possess the grizzly's hide and skull. His application for return of those items under s. 97.6(4)(a) is dismissed.
- [5] Mr. Bruehl appeals that decision on error of both fact and law.

Grounds for Appeal

- [6] Mr. Bruehl submits the following grounds for appeal:
1. Was there a palpable and overriding error in the Provincial Court's finding of facts? In particular:

- a. Is it clear that Mr. Bruehl provided further particulars about the location of the kill site beyond marking the Appellant's Map?
 - b. Does the finding referred to in the preceding subparagraph (a) change the overall conclusions regarding entitlement to the bear?
2. What is the correct interpretation and application of the Wildlife Act to the facts of the case?

Discussion

Error of Fact

- [7] Mr. Bruehl submits that the judge made factual errors at paras. 19, 20, and 30 of the reasons for judgment, which state that, para. 29 is also quoted to provide the proper context for para. 30:
- [19] Mr. Bruehl indicated the kill location on a map from his camp, but it was not a very detailed map. When asked by the conservation officers for more particulars he refused, citing his right to silence. Eventually during that interaction the bear skull and hide were seized by the conservation officers.
- [20] The next day, Mr. Bruehl was again stopped by a conservation officer who asked him to identify the kill site on a much larger scale map. After again speaking to his lawyer, Mr. Bruehl refused to indicate on that larger scale map the location, or to provide a statement despite the conservation officer stating to both him and his lawyer that he was not seeking a statement, just a clear indication on the map of a kill site to allow verification to occur.
- [29] he did make an indication on a poor map on the first day. That indication was not sufficient to permit the conservation officers to isolate the location for verification purposes. When asked subsequently to make the indication on a better map he refused.
- [30] The question is, was his single indication on the poor map sufficient compliance with s. 38? The Wildlife Act, like most regulatory regimes, requires a level of due diligence when attempting to comply with it
- [8] An error of fact on appeal requires demonstrating a "palpable and overriding error", which, in other words, is "plainly seen": *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 6, 10.
- [9] Upon reviewing the evidence that was before the judge, I find an error of fact to the extent that the judge concluded that Mr. Bruehl made only a single indication of the kill site on the map from his camp, and did not make other indications to the conservation officers.
- [10] It is clear that Mr. Bruehl made more than one indication of the kill site location to the conservation officers. The document titled "Report to Crown Counsel Detailed Narrative", which is attached as Exhibit A to the affidavits of Conservation Officers Kneller and Smienk, supports this:

Conservation Officer Kneller then asked Bruehl where the kill location was for his Grizzly Bear. Bruehl replied about 10kilometers up the road from the McDonald River. Conservation Officer Kneller stated the road we're on now and Bruehl said yes. Conservation Officer Kneller then brought out the large scale topographic map and asked Bruehl to point out the kill location on the map. Bruehl stated he could not and needed to see his map at his camp.

Bruehl then grabbed his map book and began pointing in the general area of 115 Creek, which is on the north side of Hwy 97 and in WMU 7-54. The scale of the map was very small and not at all specific. Conservation Officer Kneller asked him the specific location a number of times and Bruehl's answers varied from 400meters off the highway to 4 kilometers up the drainage. Conservation Officer Kneller then asked Bruehl to mark the location on two map books belonging to Conservation Officer Kneller which Bruehl did.

[11] Mr. Bruehl submits that this error of fact is overriding, going to the very core of the outcome of this case, and, as a result, the decision should be overturned: *Benhaim v. St-Germain*, 2016 SCC 48 at para. 38.

[12] Before determining whether this error affects the conclusions on the entitlement to the bear skull and hide, I shall first address Mr. Bruehl's second ground for appeal: the correct interpretation of the Act.

Interpretation of the Act

[13] As stated above, s. 38 of the Act provides that:

38 A person who fails, on the request of an officer, to state correctly the locality where and the date on which wildlife or fish in the person's possession was killed, taken or caught by the person or came into his or her possession, commits an offence.

[14] In interpreting s. 38, the judge stated the following:

[30] The Wildlife Act, like most regulatory schemes, requires a level of due diligence when attempting to comply with it and that concept was discussed in a different context in *R. v. Einarson*, 2008 BCPC 318 when Seidemann, PCJ said at paragraph 47:

If I accept that the purpose of the Act is to convey title only to those who comply with the Act, due diligence to so comply should be sufficient for that purpose if the kill is, in fact, lawful.

[31] In my view, the real issue here is did Mr. Bruehl use due diligence in attempting to comply with s. 38? There is nothing in s. 38 or anywhere else in the Act to suggest that a licenced hunter can only be asked to provide the required information once during an investigation. Here, the conservation officers determined the initial map marking did not provide sufficient information to comply with s. 38 and allow the verification of the kill site. The conservation officer obtained a better map the next day to assist in locating the kill site and asked Mr. Bruehl to indicate on it the location. Mr. Bruehl refused. In doing so, he was not acting with due diligence to comply with the Act.

- [15] The judge did not provide further articulation of the test under s. 38, and no cases were provided on this appeal that provide a further explanation.
- [16] Mr. Bruehl submits that the preferred interpretation of s. 38 is the "Single Demand Interpretation", meaning that an officer is empowered to demand information only once during any particular investigation.
- [17] Mr. Bruehl submits that the words of the Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21. Mr. Bruehl asserts that the Act provides for a cooperative relationship between the state and licensees, and that when faced with competing interpretations of the Act, the preferred interpretation is the one that preserves a cooperative relationship between the state and the individual, and one that is consistent with Charter values.
- [18] Mr. Bruehl also relies on the cases *R. v. Fitzpatrick*, [1995] 4 S.C.R. 154 at paras. 35-52 [*Fitzpatrick*], and *R. v. White*, [1999] 2 S.C.R. 417 at paras. 53-66 [*White*]. The issues in *Fitzpatrick* and *White* were the admissibility of representations made by accused parties to authorities in the context of regulatory and criminal offences. Mr. Bruehl submits that four factors from these cases - namely, the nature of the relationship between the regulator and licensee, the degree of coercion, the risk of unreliable confessions from the licensee, and the risk of abuse from the state - should inform the interpretation of the Act.
- [19] I am not persuaded that Mr. Bruehl's suggested interpretation should be accepted.
- [20] Reading the words of the Act in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament, I find no reviewable error in the judge's statement that compliance with s. 38 requires a level of due diligence and that there is nothing in s. 38 or anywhere else in the Act to suggest that a licenced hunter can only be asked once to provide the information during an investigation.
- [21] By Mr. Bruehl's own submission, hunters and the state are somewhat partners under the Act in view of protecting wildlife through conservation measures and by fairly allocating wildlife among those who seek it. He also submits that because s. 38 does not prescribe a certain form or map for the licensee, there is a risk that the information given by licensees to officers may not always be reliable.
- [22] Therefore, to accept Mr. Bruehl's suggested interpretation of s. 38, would be to force reliance on potentially unreliable information, with limited recourse to correct mistakes or clarify directions. This is inconsistent with the harmony of the Act.

- [23] The information provided under s. 38 is not necessarily an end in itself. The information is used by officers to physically locate kill sites for verification. For example, after Mr. Bruehl marked locations in two map books and indicated to Officer Kneller that the location was "from 400 meters off the highway to 4 kilometres up the drainage", Officers Kneller and Smienk were unsuccessful in their search for the carcass. In situations like this, officers should be able to demand further information to clarify their search.
- [24] Furthermore the wording, "state correctly the locality" (emphasis added), implies a certain degree of information accuracy; thus, s. 38 emphasizes not necessarily the quantity of the information, but the quality.
- [25] Applied to the facts at hand, I agree that Mr. Bruehl breached s. 38 of the Act. Although Mr. Bruehl made multiple site indications to the conservation officers, the information was not sufficiently correct and Mr. Bruehl's subsequent refusals were contrary to the diligence required by a licensee under the Act. As such, the factual error made by the judge does not support that the decision should be overturned. Mr. Bruehl has breached s. 38 and accordingly his application for the return of the grizzly hide and skull was lawfully denied.
- [26] Mr. Bruehl lastly submits that a defence of due diligence applies in cases where a hunter is guilty of non-compliance with the Act after an animal is lawfully killed, so that the hunter may retain right of property in the wildlife: *Einarson (Re)*, 2008 BCPC 318 at paras. 30-32, 43.
- [27] As stated in *La Souveraine, Compagnie d'assurance générale v. Autorité des marchés financiers*, 2013 SCC 63 at para. 56 [*La Souveraine*], a due diligence defence requires an accused to demonstrate that either:
- a) he reasonably believed in a mistaken set of facts that, if true, would have rendered this act or omission innocent; or
 - b) he took all reasonable steps to avoid the particular event.
- [28] I reject Mr. Bruehl's submissions that one or both of these conditions are made out in this case. Mr. Bruehl's argument with respect to the first condition closely resembles a mistake of law, which, as stated in *La Souveraine* at para. 57, is not available under the diligence defence:
- [57] However, this defence will not be available if the defendant relies solely on a mistake of law to explain the commission of the offence. Under Canadian law, a mistake of law can ground a valid defence only if the mistake was an officially induced error and if the conditions laid down in *R. v. Jorgensen*, [1995] 4 S.C.R. 55, with respect to the application of such a defence are met. A defendant can therefore gain nothing by showing that it made a reasonable effort to know the law or that it acted in good faith in ignorance of the law, since such evidence cannot exempt it from liability.

- [29] Nonetheless, I am not persuaded that Mr. Bruehl reasonably believed that his conduct complied with the requirements of s. 38. The conservation officers made subsequent direct requests to Mr. Bruehl for further detail with respect to the kill site, and so I am unable to accept Mr. Bruehl's submission that the officers either explicitly or implicitly conveyed to him that he had discharged his obligations under s. 38.
- [30] In addition, it would have been entirely reasonable for Mr. Bruehl to mark the third map tendered by the conservation officer, and therefore I find that he did not take all reasonable steps. This is particularly so when Mr. Bruehl knew that the conservation officers would not locate the bear carcass in the area which he had marked on the maps. The judge found Mr. Bruehl had harvested the bear in Wildlife Management Unit 7-54 but then removed the bear, processed the bear and took the carcass to a different location in Wildlife Management Unit 7-51, see para. 10.
- [31] Moreover, I am not persuaded that a reasonable person would conclude that the demand was an attempt to impeach the licensee's credibility.
- [32] As a result, I reject this ground of appeal.

New Issues on Appeal

- [33] Mr. Bruehl has also brought forward new issues on appeal, which were not argued at the hearing:
1. that he was officially induced into error by the implied representations of the conservation officers; and
 2. that the conservation officers acted in bad faith and abused the authority given to them by s. 38 of the Act by using it to build a case against the appellant based on inconsistent statements instead of verifying compliance with the Act.
- [34] The Crown submits that I should decline to consider new arguments, as an appellate court must only allow new arguments in exceptional cases where there is sufficient factual evidence to decide the issue and the new ground is to prevent an injustice: *R. v. Vidulich*, 1989 CanLii 231 (B.C.C.A.) at p. 11 [Vidulich]; *Kaiman v. Graham*, 2009 ONCA 77 at para. 18.
- [35] The general restriction against new arguments on appeal supports the overarching societal interest in the finality of litigation: *R. v. Warsing*, [1998] 3 S.C.R. 579 at para. 17. Both parties are responsible for ensuring the finality of litigation and an accused has the responsibility of putting forward all available defences at trial: *Vidulich* at p. 11.
- [36] The reluctance against entertaining new issues is based on the unfairness to spring a new argument on a party in circumstances where that party could have led evidence at trial to address the new issue. After balancing the interests of justice as they affect the parties, the appellate court may grant leave to allow a new argument: *Ulmer v. British Columbia Society for the Prevention of Cruelty to Animals*, 2010 BCCA 519 at para. 27 [Ulmer].

[37] There is merit in the position of the Crown that the threshold of an exceptional case has not been met. I will consider the two new issues raised by the appellant so as to assess the balancing of the interests of justice.

Officially Induced Error

[38] Mr. Bruehl concedes that the consideration of this argument is subject to the Court's discretion pursuant to Ulmer.

[39] The defence of an officially induced error is summarized in *Lévis (City) v. Tétreault*, 2006 SCC 12 at para. 26:

26 the accused must prove six elements:

- (1) that an error of law or of mixed law and fact was made;
 - (2) that the person who committed the act considered the legal consequences of his or her actions;
 - (3) that the advice obtained came from an appropriate official;
 - (4) that the advice was reasonable;
 - (5) that the advice was erroneous; and
 - (6) that the person relied on the advice in committing the act.
- [40] Mr. Bruehl submits that all six elements are satisfied in this case. He asserts that the advice he relied upon in choosing not to provide further information to the conservation officers originated from Officer Kneller. Mr. Bruehl submits that Officer Kneller advised his lawyer that the obligation to provide information under s. 38 would be discharged by "marking a map" and that by presenting two maps, Officer Kneller made an implied representation that marking them would be sufficient to discharge his obligations.
- [41] I am not persuaded by Mr. Bruehl's submission. The Report to Crown Counsel Detailed Narrative indicates the following with respect to Officer Kneller's communications with Mr. Bruehl's lawyer:

Bruehl's lawyer asked Conservation Officer Kneller if he was required to physically show the kill location or if pointing it out on a map would be good enough. Conservation Officer Kneller replied he could point out the specific location on a map. Conservation Officer Kneller informed the lawyer it was in his client's best interest to be truthful with his answer

At approximately 1154hrs Conservation Officer Kneller provides Bruehl with his cell phone so he can speak with his lawyer. A short time later Bruehl indicates his lawyer would like to speak with Conservation Officer Kneller. The lawyer states Bruehl will not provide a further statement on the kill location as he already did yesterday and refused to give a statement. Conservation Kneller states "I want to be clear I'm not asking for a statement I need a more specific kill location than what was given, I can't locate it on what I have."

[42] This record does not support that Officer Kneller provided erroneous advice. It merely supports that Officer Kneller advised that s. 38 obligations can be discharged by pointing to a specific location on a map. It does not support that he advised that this is always sufficient to discharge the obligation.

[43] Furthermore, I am not persuaded that the officers' conduct equated to any implied representation that Mr. Bruehl had discharged the s. 38 obligation. The evidence supports that the officers made further explicit requests after Mr. Bruehl had marked the two maps. As noted in the Report to Crown Counsel Detailed Narrative:

Conservation Officer Kneller then asked Bruehl to mark the location on two map books belonging to Conservation Officer Kneller which Bruehl did. Conservation Officer Kneller asked Bruehl, if the location was along the creek, Bruehl was vague with his answers. Conservation Officer Kneller asked Bruehl if he was walking up 115 Creek how far would he have to go to find the carcass and would he be able to locate it along the creek. Bruehl said my lawyer told me all I have to do is point out the location on a map I've done that so I'm not talking anymore.

[44] As a result there is no merit in this further new ground of appeal.

Entrapment

[45] Mr. Bruehl concedes that the consideration of this argument is also subject to the Court's discretion pursuant to Ulmer.

[46] Mr. Bruehl submits that the conservation officers induced his non-compliance by apparent bad faith actions. He contends that he is entitled to property rights in the bear because exculpatory circumstances apply to his non-compliance.

[47] Mr. Bruehl submits that when authorities who act in the course of a bona fide inquiry go beyond providing an opportunity and induce the commission of an offence, it is entrapment: *R v. Mack*, [1988] 2 S.C.R. 903 at paras. 119, 130 [Mack]. Mr. Bruehl provides a number of factors that I should consider when assessing whether police went beyond providing a mere opportunity; these are listed in *Mack*, at para. 133.

[48] In applying the factors from *Mack*, Mr. Bruehl submits that:

- a) The conservation officers were investigating a different offence than section 38 at the time. For their investigation, the conservation officers had the alternative of tendering one map sufficient for their purposes instead of repeatedly tendering different maps to the appellant to mark.
- b) The average person would have concluded that the conservation officers, by putting different maps to the appellant to mark, were trying to induce inconsistent statements to impeach his credibility. This conclusion would have caused an average person to refuse to mark further maps, thus inducing a contravention of section 38.
- c) The conservation officers induced the appellant to commit the offence by forcing him to choose between two implicitly threatening options:
 - i. Mark a third map tendered by the conservation officers, which would likely create inconsistent statements to be used to impeach his credibility in a prosecution of the offence being investigated; and
 - ii. Refuse to comply with the demand and expose himself to a potential offence under section 38 of the Wildlife Act.
- d) The conservation officers' conduct was illegal as being an abuse of process. In particular:
 - i. If the first two maps tendered by the conservation officers were insufficiently detailed to verify compliance with the Wildlife Act, then those maps served no purpose but to be used as inconsistent statements to impeach the appellant's credibility; and
 - ii. The power given to conservation officers under section 38 of the Wildlife Act is for the purpose of verifying compliance with the Wildlife Act. Using that power to induce inconsistent statements is an abuse of process.
- e) The conservation officers' conduct is directed at undermining the constitutional values behind the appellant's right against self-incrimination.

[49] For a number of reasons I am not persuaded by Mr. Bruehl's submissions. The facts and evidence do not support that the conservation officers were trying to induce inconsistent statements to impeach Mr. Bruehl's credibility. Moreover, the facts do not support that they were trying to induce Mr. Bruehl to commit an offence. In my view, the actions taken by the conservation officers are more consistent with good faith attempts to provide Mr. Bruehl several opportunities to comply with s. 38, and he chose not to do so.

[50] As a result there is no merit in this further new ground of appeal.

Conclusion

[51] For the reasons set out above, the appeal is dismissed.

"The Honourable Madam Justice Forth"

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