

CANADA / JUDGMENT

R. v. Bryfogle

2022 BCSC 1898

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 1898 R. v. Bryfogle

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Bryfogle,

2022 BCSC 1898

Date: 20221031

Docket: 105679

Registry: Kamloops

Rex

v.

Roy Charles Bryfogle

Before: The Honourable Mr. Justice Hori

On appeal from: An order of the Provincial Court dated October 21, 2019

Reasons for Judgment re Document Disclosure

Counsel for the Crown:

M. Cissell

Appearing on his own behalf:

R.C. Bryfogle

Counsel for the Attorney General of Canada:

V. Young

Place and Date of Hearing:

Kamloops, B.C.

June 8, 2022

Place and Date of Judgment:

Kamloops, B.C.

October 31, 2022

Introduction

- [1] This proceeding is Mr. Bryfogle's appeal of a conviction in the Provincial Court on a charge of breach of probation. These reasons relate to an application brought by Mr. Bryfogle in the appeal for disclosure of documents from both the Provincial Crown and the Federal Crown.
- [2] In order to give this application and these reasons the proper context an explanation of the circumstances that led Mr. Bryfogle to this appeal is important.

History of Proceedings

- [3] In a petition action brought by the Law Society of British Columbia, the Law Society sought to restrain Mr. Bryfogle from engaging in activities that constitute the practice of law. On June 9, 2006, in a decision found at *Law Society (British Columbia) v. Bryfogle*, 2006 BCSC 1092, Justice Groberman (as he then was) ordered that Mr. Bryfogle was prohibited and enjoined from providing legal services.
- [4] The Court of Appeal upheld Groberman J.'s decision in *Law Society (British Columbia) v. Bryfogle*, 2007 BCCA 511.
- [5] On July 15, 2016, Associate Chief Justice Cullen (as he then was) held Mr. Bryfogle in contempt of the June 9, 2006 order of Groberman J. The basis for the contempt order by Cullen A.C.J. was that Mr. Bryfogle involved himself in proceedings related to the Chilcotin National Congress and Zsuzsanna Hegedus (now known as Zsuzsanna Holland). The contempt decision of Cullen A.C.J. is found at *Law Society of British Columbia v. Bryfogle*, 2016 BCSC 2188.
- [6] The penalty for Mr. Bryfogle's contempt conviction by Cullen A.C.J. was a conditional sentence order for 12 months followed by a period of probation for a further year. The probation order imposed upon Mr. Bryfogle included the following terms:
 - a) That Mr. Bryfogle not involve himself in any proceeding or legal matter in any manner whatsoever on behalf of or relating to the Chilcotin Nation and its members, including those who identify with the Chilcotin National Congress; and

- b) That Mr. Bryfogle not involve himself in any proceeding or legal matter whatsoever on behalf of or relating to Zsuzsanna Hegedus, except as to appear as a witness under subpoena to a criminal proceeding brought against Ms. Hegedus.
- [7] It was a breach of the aforesaid probation order that resulted in charges against Mr. Bryfogle.
- [8] Mr. Bryfogle faced two counts on an amended information arising from the breach of probation:

Count 1

Roy Charles BRYFOGLE, on or about the 1st day of May, 2018, at or near Langley, Surrey and/or Victoria, in the Province of British Columbia, while bound by a probation order made by The Honourable Associate Chief Justice Cullen, on July 15, 2016, did without reasonable excuse fail to comply with such order by involving himself in a proceeding or legal matter on behalf of or relating to Zsuzsanna Holland, also known as Zsuzsanna Hegedus, while not a witness under subpoena to a criminal proceeding brought against Zsuzsanna Holland, also known as Zsuzsanna Hegedus, contrary to Section 733.1(1) of the Criminal Code.

Count 2

Roy Charles BRYFOGLE, on or about the 1st day of May, 2018, at or near Langley, Surrey and/or Victoria, in the Province of British Columbia, without lawful excuse did disobey a lawful order of the Court, an order made by the Honourable Associate Chief Justice Cullen dated July 15, 2016, by involving himself in a proceeding or legal matter on behalf of or relating to Zsuzsanna Holland, also known as Zsuzsanna Hegedus, while not a witness under subpoena to a criminal proceeding brought against Zsuzsanna Holland, also known as Zsuzsanna Hegedus, contrary to Section 127(1) of the Criminal Code.

- [9] The trial on the two-count information proceeded for six days between April and August 2019. On August 21, 2019, the Provincial Court convicted Mr. Bryfogle on both counts in the information. However, Count 2 of the information, which relates to disobeying a court order, was stayed by the Crown upon the completion of sentencing. The Crown stayed Count 2 in accordance with the principle, established by *R. v. Kienapple*, [1975] 1 S.C.R. 729, that an accused must not be convicted of multiple offences that arise out of the same act.
- [10] It is the conviction on Count 1 of the Information, relating to Mr. Bryfogle's breach of probation, that is the subject of Mr. Bryfogle's appeal in this proceeding.
- [11] During the trial, Mr. Bryfogle made two applications for disclosure of documents. Both applications were heard in voir dire and the court dismissed both disclosure applications.

- [12] The first disclosure application sought the disclosure of documents related to an investigation of Zsuzsanna Holland for kidnapping offences. The investigation of Ms. Holland occurred in 2017 and 2018, and involved Mr. Bryfogle for a period of time as another suspect.
- [13] After conducting the voir dire, the Provincial Court Judge concluded that the "Holland investigation" was not relevant to the proceedings before the court. As a result, the court denied the application.
- [14] The second voir dire was Mr. Bryfogle's application for disclosure of the following information:
- 1) report to crown counsel;
 - 2) wire taps and invasions of privacy;
 - 3) RCMP documents and evidence in 105848 (the Holland investigation) relating to Bryfogle;
 - 4) RCMP general order or guidelines in effect 01 May 2018;
 - 5) RCMP/Crown Prosecution Service/BC Attorney General records;
 - 6) May-August 2018 fabrication of false charges, abuse of process by Tim A. Livingston and Sgt Popat, subsequent perjury by Sgt Meham, suborning of perjury by Tim A. Livingston, and obstruction of justice by Tim A. Livingston;
 - 7) Unredacted files of Tim A. Livingston, as investigator and prosecutor, jointly in 105848 Kamloops and 105679 Kamloops, 01 May to 29 August 2018;
 - 8) Other evidence arising from proceedings 09 and 10 April 2019, and 22 May 2019, and Bryfogle affidavit #1 [04 October 2018].
- [15] After hearing the second voir dire, the Provincial Court again dismissed Mr. Bryfogle's application for disclosure. The Provincial Court held that Mr. Bryfogle had received full disclosure and that he had not established a basis upon which the requested information could be relevant to Mr. Bryfogle's defence.
- [16] Mr. Bryfogle appeals his conviction for breach of probation on the following grounds:
1. Absence of Provincial Court Jurisdiction, based on appellant's 12 March 2019 Brief [challenging] provincial court jurisdiction to hear alleged breach of a Supreme Court civil contempt order without a requisition for and direction of the Supreme Court; and that neither Crown nor Court addressed this issue at hearing, trial or by ruling.
 2. Abuse of Process, alleged by the appellant 09 October 2018; at issue since then.
 3. Denial of Disclosure for Full Answer and Defence raised 10 April 2019, and denial of all disclosure requests and denial of all subpoenas and subpoenas duces [tecum].

- [17] It is of some significance that the Court of Appeal upheld the order of Groberman J. pronounced June 9, 2006. It is also of significance that Mr. Bryfogle did not challenge the orders of Cullen A.C.J. made July 15, 2016. As a result, the orders of Groberman J. and Cullen A.C.J. could not be challenged at the trial nor can they be challenged on this appeal. Therefore, the purpose of this document disclosure application cannot be to challenge the orders of Groberman J. or Cullen A.C.J.
- [18] Mr. Bryfogle applies, in the context of this appeal, for disclosure of numerous documents from both the Provincial Crown and the Federal Crown. Mr. Bryfogle describes the documents in broad and wide-sweeping terms. However, at the hearing of this application, Mr. Bryfogle separated the documents into the following categories:
1. Documents related to the Holland investigation;
 2. RCMP documents related to a "Big Man" sting and wiretap evidence of Mr. Bryfogle, both in Arizona and Canada in 2017;
 3. Documents from the Federal Bureau of Investigation (the "FBI") from 2017 related to the investigation of Ms. Holland for kidnapping;
 4. Documents related to Mr. Bryfogle's arrest in May 2013;
 5. Documents that might establish that Mr. Bryfogle was illegally arrested and jailed which Mr. Bryfogle alleges were ordered to be disclosed by the Provincial Court Judge who convicted him; and
 6. RCMP correspondence with the B.C. Prosecution Service.
- [19] Both the Federal Crown and Provincial Crown oppose Mr. Bryfogle's application. Their position is that the documents are not relevant to the appeal and that they are third party records, publicly available or not in their possession.

Legal Principles

- [20] The Crown with conduct of the prosecution of the accused has disclosure obligations with respect to first party records under the regime established by *R. v. Stinchcombe*, [1991] 3 S.C.R. 326. First party records are those containing relevant, non-privileged, information in the possession or control of the prosecuting Crown, and include police files directly related to that particular investigation of the accused.
- [21] The records that are in the control or possession of third parties, including Crown agencies that are not involved in the prosecution of the accused, are third party records. For example, third party records include police records that are not "obviously relevant", such as police operational records and background information. The accused is entitled to disclosure of third party records under the regime established by *R. v. O'Connor*, [1995] 4 S.C.R. 411.

- [22] The disclosure application by Mr. Bryfogle involves the disclosure of both first party and third party records.
- [23] In *R. v. Johnston*, 2019 BCCA 107, at para. 47, citing *R. v. McNeil*, 2009 SCC 3, the Court of Appeal confirmed that in either case, the accused's entitlement to disclosure continues during the appeal process:
- [47] The law is clear that the disclosure regimes for first party records and third party records survive trial and continue during the appeal process: *McNeil*.
- [24] Whether the records are first party or third party records, the accused's entitlement to disclosure applies to those records that are broadly referenced as "relevant". However, the test for determining relevance is different in the appeal process than the test applicable in the pre-trial phase.
- [25] In the pre-trial phase, the Crown is obliged to disclose any information that has a reasonable possibility of assisting the accused in preserving the presumption of innocence and the accused's right to make full answer and defence. As explained in *R. v. Trotta*, [2004] O.J. No. 2439 (C.A.) at para. 23, the analysis of what is relevant must change in the appeal process because once the accused is convicted, the accused is no longer presumed innocent and the accused has exhausted the right to make full answer and defence.
- [26] The Court of Appeal in *Johnston* distinguished between relevance in the pre-trial phase and relevance in the appeal process on the basis of what use is to be made of the information contained in the records. At para. 61 of *Johnston*, the Court of Appeal stated:
- [61] In my view, relevance must be viewed in the context of the possible use of information contained in the records in a particular proceeding. The context for the possible use of the records at trial relates to the accused's right to make full answer and defence. That context informs broad disclosure on the part of the Crown. On appeal, the context is different and focuses on the accused's appeal rights.
- [27] The Court of Appeal went on, at para. 80 of *Johnston*, to find that, in the appeal process, the test for relevance is whether there is a reasonable possibility the records might assist the appellant in prosecuting the appeal, including whether the appellant may use the newly sought information to support a fresh evidence application.
- [28] The rationale for setting limits on disclosure is explained by Griffin J.A. at paras. 64-65 of *Johnston*:
- [64] The leading authorities attempt to put some reasonable parameters around the obligations of disclosure. They do so to ensure that the justice system does not become disproportionately overburdened in dealing with disclosure and grind to a halt or suffer delay in addressing more important issues. This is an important policy reason for subjecting applications for production of records to a relevance test, as noted repeatedly in the authorities, including *Gubbins* at para. 26, citing *O'Connor*; *McNeil* at paras. 28-29; and

World Bank Group at paras. 130, 133.

- [65] For these reasons, the determination of what documents are relevant for production purposes in an appeal proceeding should take into account the context that appeals are generally brought based on the trial record and there is limited scope for the introduction of fresh or new evidence.

The Holland Investigation

- [29] Mr. Bryfogle once again seeks disclosure of documents related to the investigation of Zsuzsanna Holland. Mr. Bryfogle made the same application during the trial of these charges. The Provincial Court Judge rejected Mr. Bryfogle's application for disclosure.
- [30] Since one of the grounds upon which Mr. Bryfogle appeals the conviction is that the Provincial Court Judge erred in denying Mr. Bryfogle disclosure of the documents he sought, it is inappropriate to order disclosure of the Holland investigation documents without first hearing the appeal. At the moment, the order of the Provincial Court denying disclosure of those documents remains in effect.
- [31] Accordingly, an order for the disclosure of the Holland investigation documents should not be made in advance of the disposition of the appeal.
- [32] In *Canadian Imperial Bank of Commerce v. Maitland*, [1986] B.C.W.L.D. 179, the Court of Appeal dealt with a similar issue in a civil action. In *Canadian Imperial Bank of Commerce*, the appellant appealed an order appointing a receiver under the Bankruptcy Act. At the receivership hearing, the appellant sought disclosure of certain documents in the possession of the respondent bank. However, the chambers judge who issued the receivership order denied the disclosure application.
- [33] One of the issues on the appeal was whether the court should have ordered disclosure of the documents sought by the appellant.
- [34] After filing the appeal of the receivership order, the appellant made application, in the appeal, for disclosure of the same documents that the appellant sought in the receivership hearing. The Court of Appeal dismissed this disclosure application on the basis that the Court was limited to decisions incidental to the appeal and must not, at the application stage, decide the appeal itself. Therefore, Seaton, J.A. (as he then was) held that he could not decide that the documents were relevant, contrary to the decision of the chambers judge.
- [35] I similarly find that it is inappropriate for me to assess the relevance of the Holland investigation documents at this stage.
- [36] Additionally, Mr. Bryfogle claims that:
- a) Previous Crown counsel with conduct of this appeal agreed to the disclosure of the Holland investigation documents;

- b) The previous case management judge on this appeal ordered the disclosure of the Holland investigation documents; and
- c) The Provincial Court Judge, after convicting Mr. Bryfogle, reversed his previous decision denying disclosure of the documents.

[37] Mr. Bryfogle presented no filed orders of either the case management judge or the Provincial Court Judge ordering disclosure of the Holland investigation documents. If there were such orders Mr. Bryfogle ought to have filed them and produced copies of the orders in this application. In the absence of independent evidence of those orders, I am not prepared to rely on Mr. Bryfogle's representations.

[38] Whether previous Crown counsel agreed to the disclosure of the Holland investigation documents is not determinative of this issue. It is ultimately the court's jurisdiction to determine whether it is appropriate to disclose these documents.

[39] Based on the foregoing, I deny Mr. Bryfogle's application for disclosure of the Holland investigation documents.

RCMP Documents Related to the "Big Man" Sting and Wiretap Evidence

[40] Mr. Bryfogle applies for disclosure of RCMP documents related to the "Big Man" sting and wiretap evidence.

[41] It is my understanding that the documents under this category are related to the Holland investigation. Therefore, I deny this application for the same reasons that I denied the application to disclose the Holland investigation documents.

Federal Bureau of Investigation Documents

[42] Mr. Bryfogle seeks disclosure of documents from the FBI. I understand that the FBI documents sought by Mr. Bryfogle are those that are in the possession of the Federal or Provincial Crown.

[43] It is my understanding these documents are also related to the Holland investigation. Therefore, I am not prepared to order disclosure of these documents for the same reasons as above.

Documents Related to Arrest in May 2013

[44] Mr. Bryfogle applies for production of documents related to an arrest in May 2013. Mr. Bryfogle has adduced little or no information related to that arrest.

[45] I am not persuaded that documents related to an arrest in May 2013 would assist Mr. Bryfogle in prosecuting the appeal. The arrest appears to have occurred years before Cullen A.C.J. placed Mr. Bryfogle on probation for contempt of court. These documents therefore do not meet the relevance test as set out in Johnston.

[46] Therefore, I dismiss the application for disclosure of documents related to an arrest in May 2013.

Documents Related to an Illegal Arrest

[47] Mr. Bryfogle claims that the Provincial Court Judge ordered the disclosure of any evidence that might address whether he was illegally arrested and jailed.

[48] Notwithstanding his claim that the Provincial Court Judge made such an order, Mr. Bryfogle has tendered no independent evidence of any such order of the Provincial Court. Therefore, Mr. Bryfogle has failed to establish that such an order exists.

[49] In addition, there is nothing in Mr. Bryfogle's submissions that establish even a prima facie case that the documents he seeks under this category exist.

[50] Accordingly, I must dismiss the application for disclosure as it relates to these documents.

RCMP Correspondence with B.C. Prosecution Service

[51] Mr. Bryfogle applies for disclosure of correspondence between the RCMP and the B.C. Prosecution Service.

[52] Once again, Mr. Bryfogle has presented no information about how this correspondence might assist him in prosecuting the appeal, and thus has not established relevance.

[53] Furthermore, it is difficult to conceive of a circumstance in which the correspondence between the RCMP and the Prosecution service would not be covered by solicitor-client privilege.

[54] Therefore, the application for disclosure of these documents is also denied.

Conclusion

[55] Mr. Bryfogle's application for disclosure of records is denied.

[56] The records that are not related to the Holland Investigation have no relevance in that they will not assist Mr. Bryfogle in prosecuting this appeal.

[57] It is not appropriate for me to assess the relevance of the Holland Investigation records without hearing the appeal on its merits.

"D.K. Hori J."

HORI J.

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