

CANADA / JUDGMENT

R. v. Bryfogle

2023 BCSC 2060

COURT

Supreme Court of British Columbia

DECIDED

25 October 2023

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2023 BCSC 2060 R. v. Bryfogle

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Bryfogle,

2023 BCSC 2060

Date: 20231025

Docket: 113416

Registry: Kamloops

Rex

v.

Charles Bryfogle

Before: The Honourable Justice Girn

Oral Reasons for Judgment

Counsel for the Crown:

M. Cissell

Counsel for the Attorney General of Canada:

V. Young

The Accused, appeared on his own behalf:

C. Bryfogle

Place and Date of Hearing:

Kamloops, B.C.

September 15, 2023

Place and Date of Judgment:

Kamloops, B.C.

October 25, 2023

- [1] These reasons for judgment were delivered orally. They have since been edited for style and grammar, to insert defined terms, and to include citations for case law and statutes that I referred to, but the substance of my decision has not changed.

Introduction

- [2] There are two inter related applications before me.
- [3] The applicant, R. Charles Bryfogle ("Mr. Bryfogle") brings an application for mandamus relief. In his application, he asks the Court to compel responses from a number of provincial and federal employees and politicians and federal entities.
- [4] The Notice of Application was filed on July 19, 2023. Mr. Bryfogle also filed what he has referred to as an "Application for Process to Facilitate the 774 Mandamus Application" on July 27, 2023 as well as an amended "Application for Process to Facilitate the 774 Mandamus Application" on August 21, 2023.
- [5] The Respondents, Provincial Crown and Attorney General of Canada ("respondents") oppose Mr. Bryfogle's application on the basis that the application is frivolous, vexatious and an abuse of court.
- [6] Although the respondents have similar responses, they do differ in some respects. As such, in these reasons I will refer to them as the Provincial Crown and Federal Crown.
- [7] In a separate application, the two respondents ask the Court to strike Mr. Bryfogle's application on the basis that the court file under which Mr. Bryfogle seeks mandamus relief is a nullity and/or otherwise beyond the Court's jurisdiction.
- [8] In the alternative, they submit that even if the Court has jurisdiction to hear the application, Mr. Bryfogle has not discharged his burden of demonstrating an entitlement to mandamus relief in the circumstances of this case and must be dismissed. Mr. Bryfogle disagrees.
- [9] Accordingly, there are two issues before the Court:
- Does this court have jurisdiction to entertain a mandamus application?
 - If the Court has jurisdiction, has Mr. Bryfogle met the test for an entitlement to mandamus relief in the circumstances of this case?

History of Proceedings

- [10] Some background on the history of the various proceedings in our Court involving Mr. Bryfogle is required because it is relevant to the issues I must determine.
- [11] There are currently two active files in the Kamloops Criminal Registry: 105679 and 113416. I will provide details for each court file later in these reasons.
- [12] As well, there is an active order from March 9, 2015 made by Associate Chief Justice Cullen, as then was ("Justice Cullen order"). It is what is commonly referred to as a Houweling Order.
- [13] The relevant terms of this order state, in part:
- R. Charles Bryfogle must not, except with prior leave of the court, initiate any legal proceedings in any court;
 - any document or process filed in contravention of this order is a nullity, including any document or process that a court registry has inadvertently filed or received; and
 - no person is obliged to respond to any process that is filed in contravention of this order, including any document or process that a court registry has inadvertently filed or received.

Court File 105679

- [14] This file originated in the Provincial Court in Kamloops.
- [15] On May 23, 2018, Mr. Bryfogle was charged with breaching a probation order that prohibited him from involving himself in any proceeding or legal matter on behalf of or relating to Zsuzsanna Holland.
- [16] The probation order in question was a result of Mr. Bryfogle having been found in contempt of court arising out of an order prohibiting him from providing legal services: *Law Society of British Columbia v. Bryfogle*, 2016 BCSC 2188.
- [17] Mr. Bryfogle brought a number of disclosure applications in relation to the charge which were all dismissed. Each of these applications in Provincial Court were dismissed primarily on the basis of relevancy.
- [18] On October 21, 2019 Mr. Bryfogle was convicted after a six-day trial. He has appealed that conviction. The summary conviction appeal is being case managed by Mr. Justice Hori but has yet to be heard.
- [19] Mr. Bryfogle made a similar disclosure application before Justice Hori seeking essentially the same materials he sought in Provincial Court.

- [20] On October 31, 2022 Justice Hori dismissed Mr. Bryfogle's disclosure application on the basis of relevancy and because the disclosure of information sought by Mr. Bryfogle should not be made in advance of the hearing of the appeal on its merits: *R. v. Bryfogle*, 2022 BCSC 1898 at paras. 55-57.
- [21] On April 19, 2023, during a case management conference, Mr. Bryfogle renewed his application for disclosure along with a number of other applications including that the Crown counsel assigned to the summary conviction appeal be replaced. He also asked for a hearing to determine whether Crown counsel should be found in contempt of court.
- [22] Mr. Bryfogle also sought subpoenas for witnesses to testify on the summary conviction appeal. Finally, he sought an order to compel the Crown to respond to all of his 16 interrogatory applications for relief sought in conjunction with the appeal.
- [23] Justice Hori declined to make the orders sought by Mr. Bryfogle.
- [24] On May 11, 2023, Mr. Bryfogle filed an application for mandamus ("Mandamus #1") for relief that is identical to what seeks on this application. Mandamus #1 has not been heard by Justice Hori nor is it scheduled for a hearing.
- [25] On June 1, 2023, Mr. Bryfogle appealed Justice Hori's ruling of April 19, 2023 asking the Court of Appeal for certiorari review of Justice Hori's decision.
- [26] On July 14, 2023, the Court of Appeal quashed the appeal for want of jurisdiction noting that certiorari relief is not available against a superior court, citing *Holzbauer v. British Columbia (Attorney General)*, 2021 BCCA 458 at para. 17, citing *R. v. Holland*, 2019 BCCA 417 at para. 14 and *R. v. Lena*, 2003 BCCA 167 at para. 7.
- [27] The Court noted at para 18:
- Certiorari is an extraordinary form of relief available from the Supreme Court of British Columbia for jurisdictional errors committed by a provincial court judge. An appeal with respect to certiorari will only lie to this Court where the Supreme Court has first granted or dismissed an application for certiorari: *Holzbauer* at paras.19-20.
- [28] Justice Fitch writing for the Court outlined the history of the matter, which in my view is relevant:
- [8] I pause to note that in 2007, the appellant was declared a vexatious litigant in the Supreme Court: *Bryfogle v. School District No. 49 et al.*, 2007 BCSC 457, *aff'd* 2009 BCCA 256. The Supreme Court described his activities before the courts as follows: "Mr. Bryfogle's relentless involvement in legal matters and causes, which either have no merit or no connection to him, seems almost pathological in nature": *Law Society of British Columbia v. Bryfogle*, 2016 BCSC 2188 at para. 16.

- [9] The appellant filed a notice of appeal to this Court on June 1, 2023 requesting "certiorari review" of Justice Hori's decision to deny: (1) his request for a contempt hearing against Crown counsel; (2) his request for a hearing against Crown counsel for alleged intimidation of a participant in a judicial proceeding; (3) his request that Crown counsel assigned to the appeal be "replaced"; and (4) his request that subpoenas be issued for the appeal hearing.
- [10] The appellant asserts that the summary conviction appeal judge committed jurisdictional error in ruling or failing to rule on each of these issues. The appeal is said to be premised on s. 784(1) of the Criminal Code, R.S.C. 1985, c. C-46 [Code] which provides that an appeal lies to a provincial appellate court from a decision granting or refusing relief sought in proceedings by way of mandamus, certiorari or prohibition.
- [11] By memorandum dated June 7, 2023, the Registrar advised the appellant that his appeal would be referred to this Court for possible summary determination under s. 685(1) of the Code. This provision authorizes the summary dismissal of frivolous appeals without the need for a full hearing: *R. v. Verma*, 2016 BCCA 307 at para. 26.
- [12] In conjunction with the referral, the Registrar informed the appellant that s. 784 of the Code does not create a stand-alone right to appeal interlocutory rulings of the kind made in the case at bar by way of certiorari in this Court. Rather, s. 784 of the Code provides for a right of appeal from a decision made by a Supreme Court judge granting or refusing relief in proceedings initiated by certiorari, mandamus or prohibition. No such decision was made by the Supreme Court in this case.
- [29] Prior to the release of the Court of Appeal decision, on June 20 and 22, 2023, Justice Hori in his capacity as the case management judge, heard another application by Mr. Bryfogle in regards to recusal of Justice Hori and disqualification of Crown counsel.
- [30] Mr. Bryfogle argued that the Provincial and Federal crown ought to be removed because they have wilfully denied document disclosure, because they are the subject of a mandamus application, and refuse to talk or communicate with Mr. Bryfogle. He also sought to have Justice Hori recused. Justice Hori found that there was no basis for the Provincial and Federal Crown counsel to be removed. Justice Hori also found there were no grounds upon which he should recuse himself from the appeal: *R. v. Bryfogle*, 2023 BCSC 1492.

Court File 113416

- [31] Despite Justice Cullen's order, on July 19, 2023, Mr. Bryfogle managed to file what he refers to as "an Application for 774 Mandamus Relief" under a new court file ("Mandamus #2").
- [32] The Notice of Application sets out the relief sought as follows:
- "to compel specific state actors to perform duties which they are required by law to do and did not do; and
 - those named for contempt of court may be found to be without audience of the court".

- [33] The various state actors include Crown counsel who have been involved in proceedings against Mr. Bryfogle both past and current in court file 105679.
- [34] As well, various federal employees and entities are named.
- [35] Mr. Bryfogle also asks the Court to compel responses from various elected officials including British Columbia Premier David Eby, British Columbia Attorney General Niki Sharma and former Attorney General of Canada, David Lametti.
- [36] I will now reproduce below the specifics of the mandamus relief Mr. Bryfogle seeks:
1. To compel response from whomsoever appears for the contemptors, of continuing contempt of court, given notice between 2020 and 2022, as to how it will be cured; and as a matter whether the contemptors, in person or by representations, have audience before the court before the contempt is cured. State actors named as contemptors are Crown Counsel Bouchard, Wiberg and Cissell.
 2. To compel response from whomsoever appears for Crown Counsel Bouchard, Wiberg, Cissell, and federal Crown Young, as to when, or how at this late date, each one of them will respond to applications filed in KA105679; or who with lawful authority will respond to the filed applications, in the name of the state, binding the state; explaining why in each instance the state, through their agent, failed to comply with law, to respond to a filed application served upon them.
 3. To compel response from Crown Counsel Wiberg, Cissell and Federal Crown Young to criminal charges lodged against them for intimidation of a participant in a judicial proceeding, in violation of s. 423.1(1)(b) of the Criminal Code.
 4. To compel response from Crown Counsel Cissell and Federal Crown Young as to and by what authority they breached rule and law by not recusing themselves from KA105679, after being charged with a criminal violations relating to KA105679.
 5. To compel response from Crown Counsel Bouchard, Wiberg, Cissell and Federal Crown Young, as to and by what authority they refused to communicate with applicant's e-mails and letters [with one or two exceptions], in violation of rule and law, over a 2-1/2 year period.
 6. To compel response, from BC Attorney General Sharma and Attorney General of Canada Lametti, as to what authority they violated rule and law, by authorizing, or allowing crown counsel acting for the state in KA105679, to aid and abet state actors charged with a crime; lodged by draft indictment.
 7. To compel response from former BCAG Eby, Crown Counsel Livingston and Wiberg, to respond to charge(s) of prospective misuse of public funds in the use of public funds for litigation assistance in a US District Court proceeding, and

8. To compel BC Attorney General Sharma and Attorney General of Canada Lametti to cease and desist forthwith any and all defences for any state actor charged with a crime, as set down by draft indictment, lodged in KA105679.
- [37] Mr. Bryfogle alleges that the Federal and Provincial crown along with the RCMP and FBI have "suppressed evidence proving absolute proof that the Mr. Bryfogle was illegally arrested, prosecuted, sentenced and jailed". Although he does not state with clarity, I surmise this is in relation to court file 105679.
- [38] Mr. Bryfogle makes reference to a draft Indictment which alleges charges against various federal and provincial actors and asks the Court to compel them to respond to these alleged charges.
- [39] Finally, he asks the court to compel Attorney General Niki Sharma and former Attorney General David Lametti to respond to allegations of aiding and abetting and to cease and desist any defences against those alleged to have been charged in the draft Indictment. Once again, I can only surmise this is in relation to court file 105679.
- [40] On July 27, 2023, Mr. Bryfogle also filed what he refers to as an "Application for Process to Facilitate the 774 Mandamus Application under court file 113416". A number of provincial and federal Crown counsel along provincial and federal politicians are named as defendants in the application.
- [41] This Notice of Application also states that the purpose of the application is to set a date for appearance of defendants to "facilitate resolution of issues set forth for mandamus relief" and to "answer to the charges set down in the mandamus".
- [42] On August 21, 2023, Mr. Bryfogle filed what he refers to as an "Amended Application for Process to Facilitate the 774 Mandamus Application". I found it to be convoluted and incomprehensible.
- [43] In light of this, I was able to decipher that he seeks to examine some of the individuals listed in the Amended Notice of Application for Mandamus Relief on why they have refused service of his application and to make an appearance. He also asks the Court to find them in contempt of court. Mr. Bryfogle makes reference to various charges but I am unable to comprehend how these charges originated. I will address this issue later on in these reasons.

Legal Framework

Writ of Mandamus

- [44] The writ of mandamus is an extraordinary remedy used to compel the performance of a public duty: *Rogers Communication Inc. v British Columbia*, 2022 BCSC 1688 at para. 38. As a discretionary remedy, mandamus does not issue as of right: *R. v. Vasarhelyi*, 2011 ONCA 397 at para. 50. The remedy "is appropriate to overcome the inaction or misconduct of persons charged with the performance of duties of a public nature": *Karavos v. Toronto (City)* (1947), [1948] 3 D.L.R. 294 at 297, 1947 CanLII 326 (O.N.C.A.).
- [45] The writ is only available to cure an inferior body's refusal to exercise jurisdiction, it "cannot dictate how the jurisdiction will be exercised to arrive at a given result, only that proper consideration is given in exercising its discretion": *R. v. M.P.S.*, 2013 BCSC 525 at para.12. In other words, the writ "has to do with the authority to decide an issue or perform a duty, not the nature or correctness of the decision made": *Vasarhelyi* at para. 52. Even where requisite conditions are met, mandamus will not be granted where it will serve no useful purpose: *M.P.S.* at para.13.
- [46] In *Paldi Khalsa Diwan Society v. Cowichan Valley (Regional District)*, 2014 BCCA 335 at para. 56, leave to appeal to SCC refused, 36133 (19 February 2015), Justice Levine summarized the applicable principles for granting mandamus relief:
1. There must be a public legal duty to act.
 2. The duty must be owed to the applicant.
 3. There is a clear right to performance of that duty, in particular:
 - (a) the applicant has satisfied all conditions precedent giving rise to the duty;
 - (b) there was (i) a prior demand for performance of the duty; (ii) a reasonable time to comply with the demand unless refused outright; and (iii) a subsequent refusal which be either expressed or implied, e.g. unreasonable delay;
 4. Where the duty sought to be enforced is discretionary, the following rules apply:
 - (a) in exercising a discretion, the decision-maker must not act in a manner which can be characterized as "unfair", "oppressive" or demonstrate "flagrant impropriety" or "bad faith";
 - (b) mandamus is unavailable if the decision-maker's discretion is characterized as being "unqualified", "absolute", "permissive" or "unfettered";
 - (c) in the exercise of a "fettered" discretion, the decision-maker must act upon "relevant", as opposed to "irrelevant", considerations;
 - (d) mandamus is unavailable to compel the exercise of a "fettered discretion" in a particular way; and

- (e) mandamus is only available when the decision-maker's discretion is "spent"; i.e., the applicant has a vested right to the performance of the duty.
- 5. No other adequate remedy is available to the applicant.
- 6. The order sought will be of some practical value or effect.
- 7. The Court in the exercise of its discretion finds no equitable bar to the relief sought.
- 8. On a "balance of convenience" an order in the nature of mandamus should (or should not) issue.

Discussion

Does the Court have Jurisdiction to Hear the Mandamus Application

- [47] Mr. Bryfogle argues that the Court has jurisdiction to hear his application for mandamus relief. He submits that the application is brought in compliance with procedures set down in 2022 by the Office of the Chief Justice of Supreme Court of British Columbia.
- [48] He further argues the application has been brought in a criminal proceeding, first before the court in which mandamus issues arose (105679) and then transferred to a separate proceeding (113416).
- [49] Relying on *Holland v. British Columbia (Attorney General)*, 2020 BCCA 304, Mr. Bryfogle says Justice Cullen's order is not applicable as it only applies to civil but not criminal proceedings.
- [50] The Respondents submit that court file 113416 in which the mandamus application is heard is a nullity and therefore the Court has no jurisdiction to hear this application.
- [51] Their position is premised on the fact that there does not exist any corresponding information or Indictment and there no active prosecution on this court file.
- [52] Given that there is no active criminal proceeding, aside from court file 105679, the Respondents submit that Justice Cullen's order prevents the filing of any civil claim by Mr. Bryfogle without prior approval of the Court, which Mr. Bryfogle has not been granted. Even if the Notice of Application was inadvertently received by the court registry, they argue that it is nevertheless a nullity.
- [53] The Respondents also argue that the relief sought in the mandamus application relates directly to issues that have arisen in the active summary conviction appeal involving same parties and same issues and not separate stand-alone issues.
- [54] I will now address the issue of nullity.
- [55] In *Rubbert v. Boxrud*, 2014 SKQB 221, the court explained the characteristics of a nullity:

- [14] As the term implies, a nullity exists where the relevant proceeding has no legal form or effect. Typically, this arises when the proceeding lacks an essential precondition or requirement, usually prescribed by statute. Where a nullity is found, the proceeding is void ab initio and is regarded as if it never existed. Further, without statutory authority or permission, the court has no power to amend or correct the nullifying deficiency or deficiencies. Rather, the court's power is limited to declaring the matter a nullity, and dismissing it.
- [15] It must also be remembered that a nullity differs substantively from a proceeding that is merely irregular. An irregularity exists where the flaw in the proceeding does not affect its essential validity and can be corrected. Such proceedings are not void from the outset, but they may well be voidable if left uncorrected.
- [56] In his "Mandamus Memorandum of Points and Authorities", Mr. Bryfogle references himself as the "prosecutor" and the various state actors as "defendants" in a "draft indictment". In my view, there is simply no basis for these assertions.
- [57] Mr. Bryfogle seems to suggest that he has initiated "criminal proceedings". I am unable to agree. I accept the Respondents' position that there is no corresponding information or Indictment and no active prosecution relating to court file 113416.
- [58] As such, the mandamus application lacks an essential precondition or requirement.
- [59] Not only is there is no criminal proceeding initiated on this court file, none of the various steps required before criminal proceedings can be initiated by a private citizen such as Mr. Bryfogle have been undertaken.
- [60] To begin with, there are two stages involved in commencing a prosecution: the laying of an information and the issuing process.
- [61] Section 504 of the Criminal Code applies to both public and private prosecutions:
504. Any one who, on reasonable grounds, believes that a person has committed an indictable offence may lay an information in writing and under oath before a justice, and the justice shall receive the information, where it is alleged
- (a) that the person has committed, anywhere, an indictable offence that may be tried in the province in which the justice resides, and that the person
- (i) is or is believed to be, or
- (ii) resides or is believed to reside,
- within the territorial jurisdiction of the justice; [or]
- (b) that the person, wherever he may be, has committed an indictable offence within the territorial jurisdiction of the justice;

[62] Section 507.1 sets out the procedure in relation to private informations:

Conditions for issuance

- (3) The judge or designated justice may issue a summons or warrant only if he or she
 - (a) has heard and considered the allegations of the informant and the evidence of witnesses;
 - (b) is satisfied that the Attorney General has received a copy of the information;
 - (c) is satisfied that the Attorney General has received reasonable notice of the hearing under paragraph (a); and
 - (d) has given the Attorney General an opportunity to attend the hearing under paragraph (a) and to cross-examine and call witnesses and to present any relevant evidence at the hearing.

Appearance of Attorney General

- (4) The Attorney General may appear at the hearing held under paragraph (3)(a) without being deemed to intervene in the proceeding.

Information deemed not to have been laid

- (5) If the judge or designated justice does not issue a summons or warrant under subsection (2), he or she shall endorse the information with a statement to that effect. Unless the informant, not later than six months after the endorsement, commences proceedings to compel the judge or designated justice to issue a summons or warrant, the information is deemed never to have been laid.

Information deemed not to have been laid -- proceedings commenced

- (6) If proceedings are commenced under subsection (5) and a summons or warrant is not issued as a result of those proceedings, the information is deemed never to have been laid.

New evidence required for new hearing

- (7) If a hearing in respect of an offence has been held under paragraph (3)(a) and the judge or designated justice has not issued a summons or a warrant, no other hearings may be held under that paragraph with respect to the offence or an included offence unless there is new evidence in support of the allegation in respect of which the hearing is sought to be held.

Subsections 507(2) to (8) to apply

- (8) Subsections 507(2) to (8) apply to proceedings under this section.

Non-application -- informations laid under sections 810 and 810.1

- (9) Subsections (1) to (8) do not apply in respect of an information laid under section 810 or 810.1.

Definition of designated justice(10) In this section, designated justice means a justice designated for the purpose by the chief judge of the provincial court having jurisdiction in the matter or, in Quebec, a justice designated by the chief judge of the Court of Quebec.

Meaning of Attorney General

- (11) In this section, Attorney General includes the Attorney General of Canada and his or her lawful deputy in respect of proceedings that could have been commenced at the instance of the Government of Canada and conducted by or on behalf of that Government.

[Emphasis added]

- [63] If the alleged offence is known to law and facially complies with the requirements of s. 504 of the Code, the justice must receive the information: *Ambrosi v. British Columbia (Attorney General)*, 2014 BCCA 123 [*Ambrosi BCCA*] at para. 20, leave to appeal to SCC ref'd [2014] S.C.C.A. No. 320.
- [64] Following receipt of the information, a pre-enquete is held before a judge or a designated justice to determine whether process should issue in the form of a summons or a warrant. Notice must be given to the Attorney General, and the Attorney General is permitted to participate, cross-examine and call witnesses and present evidence.
- [65] These additional safeguards ensure that "spurious allegations, vexatious claims, and frivolous complaints barren of evidentiary support or legal validity will not carry forward into a prosecution: *R. v. McHale*, 2010 ONCA 361 at para. 43, leave to appeal ref'd [2010] S.C.C.A. No. 290.
- [66] A "criminal prosecution" commences when process is issued: *Ambrosi* at para. 20. Once process is issued, the Attorney General has the right to step in and take over the prosecution and either stay the proceedings or continue with the prosecution: s. 571 of the Code.
- [67] To be clear, none of these steps have taken place for the commencement of a "criminal prosecution".
- [68] I will also address Mr. Bryfogle's submission that the mandamus application has been brought in compliance with procedures set out in correspondence by legal counsel from the Supreme Court of British Columbia in 2022. In my view, this argument must also fail.
- [69] Mr. Bryfogle included correspondence from the Court in his application record. I will not produce the entirety of this letter other than to summarize what Mr. Bryfogle was advised. The letter states that if he wishes to commence a private prosecution by preferring a direct Indictment in the Supreme Court, he must commence a new proceeding under s. 577(b) of the Code by filing a notice of application in Supreme Court Criminal Registry, to be set for hearing before the Associate Chief Justice and that he must provide notice to the Attorney General. There is no evidence to suggest that Mr. Bryfogle took any of these steps and proceeded in this manner and appeared before the Associate Chief Justice.

- [70] As I have noted above, in May 2023, Mr. Bryfogle filed an identical application for mandamus relief under the summary conviction appeal file 105679 but did not pursue it. This is despite the nature of the relief being sought in this application directly relates to the summary conviction appeal. In fact, every other application that Mr. Bryfogle has filed and arguments advanced in the Courts have all been filed under court file 105679.
- [71] Mr. Bryfogle has not undertaken any of the steps required by the Code in order for a criminal prosecution to commence either in provincial or supreme court. I agree with the Respondents that by virtue of there being no active criminal proceedings underlying court file 113416, Mr. Bryfogle has not established a positive entitlement to anything including mandamus relief under this court file number. Accordingly, I conclude there is no basis for the matter to proceed under court file 113416 as a standalone application and therefore I declare court file 113416 a nullity.
- [72] I will also address the Court's jurisdiction to hear an application for mandamus relief as it relates to the federal actors named in the application. Federal Crown argues that the Federal Court has exclusive jurisdiction to issue writs of mandamus.
- [73] The Federal Crown points to section 18 of the Federal Courts Act, R.S.C. 1985, c. F-7 [FCA], which gives the Federal Court exclusive original jurisdiction to, among other things, issue a writ of mandamus against any "federal board, commission or other tribunal":
- 18 (1) Subject to section 28, the Federal Court has exclusive original jurisdiction
- (a) to issue an injunction, writ of certiorari, writ of prohibition, writ of mandamus or writ of quo warranto, or grant declaratory relief, against any federal board, commission or other tribunal; and
 - (b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.
- [74] Section 2 of the FCA defines a "federal board, commission or other tribunal" as:

any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made under a prerogative of the Crown, other than the Tax Court of Canada or any of its judges or associate judges, any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the Constitution Act, 1867

[emphasis added]

[75] The effect of s. 18 is that the FCA precludes Mr. Bryfogle's mandamus application against the various individuals and entities from being heard in this Court. Accordingly, the Federal Court has exclusive original jurisdiction to issue a writ of mandamus against the Federal Crown, Ms. Young; Attorney General of Canada; Minister David Lametti and the RCMP.

[76] In support of their position, the Federal Crown relies on *Canadian Broadcasting Corporation v. Canada (A.G.)*, 2009 NSSC 400 at para. 44, aff'd 2010 NSCA 99 in which the CBC sought disclosure of an accused's statements to the police, one that had not been tendered as an exhibit at trial. The Nova Scotia Supreme Court dismissed the CBC's application in concluding that it was not within the jurisdiction of the Court to order disclosure of materials which were within the possession of the RCMP after the investigation had been completed. At para. 52, the Court held:

52 I am further satisfied that the CBC was obliged to proceed against the RCMP in the Federal Court. I am satisfied that the investigation had concluded, and the RCMP was acting as a federal statute-governed agency in dealing with the request to release the materials, although the materials had their origin in the criminal investigation. As such, I am satisfied that this court does not have jurisdiction to deal with the matter in question. The application is allowed.

[77] See also: *R. v. West*, 2012 NSCA 112 at para. 25.

[78] I adopt the same reasoning. I agree with the Federal Crown that Mr. Bryfogle cannot use this parallel proceeding to gain access to materials in the possession of the police, in this case the RCMP, which is a federal entity.

[79] Under the circumstances, I find that court file 113416 is a nullity and void ab initio.

[80] As well, as against the federal actors named in the relief sought, the Federal Court has exclusive original jurisdiction to issue writ of mandamus. Accordingly, I have no jurisdiction to entertain mandamus relief as sought by Mr. Bryfogle.

If the Court has jurisdiction, has Mr. Bryfogle met the test for an entitlement to mandamus in the circumstances of this case?

[81] While I have found that the Court has no jurisdiction to hear the mandamus application, I will nonetheless address whether Mr. Bryfogle has met the test for mandamus relief.

[82] This part of my analysis only applies to individuals who are provincial employees and politicians from whom Mr. Bryfogle seeks responses. I have already determined that mandamus relief for federal employees and entities is only available in the Federal Court.

[83] I will conduct my analysis based on principles as set out in *Paldi Khalsa Diwan Society*.

[84] To begin with there must be a public duty to act. The Provincial Crown argues that although the application is dressed as a mandamus application the substance and relief sought by Mr. Bryfogle is not one that is offered by a prerogative writ in the same level of court.

- [85] I agree with the Provincial Crown that there is no omission or action by public authorities who owe a legal duty to Mr. Bryfogle.
- [86] There has been no decision by a public official or body that needs to be considered. The Provincial Crown says what Mr. Bryfogle seeks is for the Court to exercise its power to issue subpoenas to compel individuals to respond to Mr. Bryfogle's convoluted sense of legal processes.
- [87] I note that the individuals except for the elected officials were either witnesses or Crown counsel involved in the criminal prosecution of Mr. Bryfogle in court file 105679.
- [88] I reiterate that mandamus is an extraordinary remedy, to be granted to enforce a clear statutory duty to be exercised where there is a refusal in the part of the office holder to do so or where the discretion has not been exercised for extraneous reasons. A mandamus order is to compel the performance of a duty and not to direct the exercise of a statutory discretion in a particular way.
- [89] I agree with the Provincial Crown that the remedy being sought by Mr. Bryfogle is in fact a collateral attack on the finding of guilt in file 105679, which is currently under appeal.
- [90] The Crown points out that extraordinary remedies must not be used as a substitution for an appeal relying on s. 776 of the Code. Mr. Bryfogle is an appellant in a criminal summary conviction appeal. That appeal has not yet been heard. Accordingly, it cannot be said there are no other remedies available to Mr. Bryfogle nor am I able to find any practical value or effect of the orders Mr. Bryfogle seeks.
- [91] Another principle key to a claim of mandamus relief is whether there is a clear right to performance of that duty and whether the applicant satisfied all conditions precedent giving rise to the duty. In my view, there is not one.
- [92] The Provincial Crown submits that unlike in *Paldi Khalsa Diwan Society* where the Court held that the Cowichan Valley Regional District had a legal duty to perform its obligation, the Crown has no legal duty to respond to Mr. Bryfogle's various requests.
- [93] In fact, the Crown points out that neither the Criminal Code or the Crown Counsel Act impose such a requirement.
- [94] I am inclined to agree with the Provincial Crown that before the remedy can be given, Mr. Bryfogle must show "a clear legal right to have the thing sought to be done and done in the manner and by the person he seeks to coerce". In my view, Mr. Bryfogle has not pointed to anything that supports his position.
- [95] Relevant to this discussion is the Crown Counsel Act, R.S.B.C. 1996, c. 87. Section 1 sets out the responsibilities of Crown counsel.

- [96] Specifically, under the Crown Counsel Act, Crown are authorized to represent the Crown before all courts in relation to the prosecution of offences and further subject to the directions of the Assistant Deputy Attorney General ("ADAG") or another Crown counsel designated by the ADAG, each Crown is authorized to:
- a. Examine all relevant information and documents and, following the examination, to approve for prosecution any offence or offences that the Crown considers appropriate,
 - b. Conduct the prosecutions approved, and
 - c. Supervise prosecutions of offences that are being initiated or conducted by individuals who are not Crown counsel and, if the interests of justice require, to intervene and to conduct those prosecutions.
- [97] The discretionary portion of the legislation contained in s. 4(4) of the Crown Counsel Act states that the Attorney General may establish an appeal process under which law enforcement officials may appeal the determination of any Crown counsel or special prosecutor not to approve a prosecution.
- [98] I am of the view that there is no duty or obligation in the legislation to "provide responses" to Mr. Bryfogle that he asks the Court to compel. Accordingly, I find that the various Crown counsel from whom Mr. Bryfogle seeks the Court to compel responses are under no duty to provide responses in the criminal appeal or in this application.
- [99] As well, I am unable to see how elected officials are also under any duty to compel any public official to respond to Mr. Bryfogle.
- [100] Accordingly, Mr. Bryfogle has not met the test for an entitlement to mandamus in the circumstances of this case.

Conclusion

- [101] I conclude that court file 113416 is a nullity and void ab initio.
- [102] As well, I conclude this Court has no jurisdiction to entertain mandamus relief as sought by Mr. Bryfogle.
- [103] Finally, even if the Court had jurisdiction, I conclude that Mr. Bryfogle has not met the test for an entitlement of mandamus relief.
- [104] To be clear, I order that no further applications under this Court file will be accepted by the court registry.
- [105] If one is accepted inadvertently, it nevertheless is deemed to be a nullity.

"Girn J."

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