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CANADA / JUDGMENT

## R. v. Homeniuk

2019 BCSC 218

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COURT

Supreme Court of British Columbia

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2019 BCSC 218 R. v. Homeniuk

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Homeniuk,

2019 BCSC 218

Date: 20190213

Docket: X081332

Registry: New Westminster

Regina

v.

Curtis Alexander Homeniuk

Before: The Honourable Madam Justice Devlin

Oral Reasons for Judgment

Voir Dire #1 - Application to Exclude Evidence

Counsel for the Crown:

C.P. Pike

Counsel for Accused:

D.M. Melville

Place and Date of Hearing:

New Westminster, B.C.

February 11, 12, 2019

Place and Date of Judgment:

New Westminster, B.C.

February 13, 2019

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[1] THE COURT: This decision was delivered in the form of Oral Reasons. The Reasons have since been edited for publication.

## **I. INTRODUCTION**

[2] In an earlier ruling, I found the accused's s. 8 Charter rights were infringed by the police during events connected to a safety search conducted in response to a 911 call at his residence. The issue before the court at this stage of the voir dire is whether the breach of Mr. Homeniuk's s. 8 right under the Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c.11 [Charter], should lead to the exclusion of evidence pursuant to s. 24(2) of the Charter. These reasons should be read in conjunction with my earlier ruling.

## **II. THE LEGAL FRAMEWORK**

[3] Section 24(2) of the Charter provides:

24(2) 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.

- [4] Both Crown and defence counsel agree with the general legal principles governing the exclusion of evidence. There are two stages in a s. 24(2) analysis, the threshold analysis, which determines whether there is a nexus between the breach of the Charter right and the evidence sought to be excluded, and the second analysis utilizing the framework established in *R. v. Grant*, 2009 SCC 32 [Grant].
- [5] The accused argues that the threshold issue is easily met as there is both a temporal and contextual nexus between the breach of his s. 8 Charter right and the subsequent obtaining of the evidence upon the execution of a search warrant. The defence relies on several cases including *R. v. Wittwer*, 2008 SCC 33 [Wittwer]; and *R. v. Pino*, 2016 ONCA 389 [Pino], he argues that a court must take a generous and broad approach to the "obtained in a manner" requirement. Applying this approach, he says it is clear that there is a temporal and contextual connection to the evidence sought to be excluded as it all occurred as part of the same transaction. Further, given the seriousness of the s. 8 breach and applying the Grant three-part analysis, the defence submits that the evidence should be excluded.
- [6] The Crown opposes this application on the threshold issue. The Crown takes the position that there is neither a temporal nor contextual connection between the s. 8 breach and the evidence sought to be tendered. Essentially, the Crown argues that there were two distinct investigations and the transaction that related to the breach is separate from the investigation that led to the seizure of the evidence. Therefore, the Crown argues the accused cannot satisfy the necessary threshold and his application should be dismissed. Alternatively, if the threshold is met, they maintain the exclusion of the evidence under s. 24(2), rather than its inclusion, would serve to bring the administration of justice into disrepute.
- [7] I will address the threshold issue first.

### III. ISSUES

Issue 1 - Whether the breaches of the accused's Charter rights are sufficiently linked to the evidence sought to be excluded to trigger the application of the second stage of the s. 24(2) analysis?

- [8] The threshold question in the s. 24(2) analysis is to determine whether a Charter violation occurred in the course of obtaining the evidence. The connection between the breach and the evidence may be "temporal, contextual, causal or a combination of the three" Wittwer at para. 21, citing *R. v. Plaha* (2004), 188 C.C.C. (3d) 289 (Ont. C.A.) [Plaha] at para 45.

- [9] Temporal refers to the timing of the breaches in relation to the discovery of the evidence while contextual refers to mean "pertaining to the surroundings or situation to which something happens" (Pino at para. 74). There can be situations where the evidence, though obtained following the breach of a Charter right, will be too remote from the violation to be "obtained in a manner" (R. v. Strachan, [1988] 2 S.C.R. 980 at para. 55 [Strachan]).
- [10] As established in Strachan, this analysis requires a focus on the entire chain of events during which the Charter violations occurred and the evidence was obtained to determine if there was a connection between the events. The approach should be "purposive and generous". The evidence will be "'obtained in a manner' if on review of the entire course of events, the breach and the obtaining of the evidence can be said to be part of the same transaction or course of conduct": Pino at 54 citing Plaha.
- [11] In Pino, the Ontario Court of Appeal set out a list of factors to be taken into account when determining if evidence obtained following a Charter breach meets the "obtained in a manner requirement". Those factors at para. 72, are:
- The approach should be generous, consistent with the purpose of s. 24(2).
  - The court should consider the entire "chain of events" between the accused and the police.
  - The requirement may be met where the evidence and the Charter breach are part of the same transaction or course of conduct.
  - The connection between the evidence and the breach may be causal, temporal or contextual, or any combination of these three connections.
  - The connection cannot be either too tenuous or too remote.
- [12] With those factors in mind, I turn to my analysis.

## Analysis

- [13] The accused argues that the evidence obtained from the execution of the warrant and the breach which occurred earlier that same day are all part of the same transaction. While the police took several hours to obtain the warrant, they had secured the scene and maintained a presence on the perimeter from the time they first entered the residence on the 911 call. In addition, given that the breach related to the items which form the basis for the warrant for possession of stolen property the nexus between the two is neither tenuous nor remote.
- [14] The Crown argues that this is a unique case in that the breaches are not connected to the focus of the investigation. As I understand this argument, the Crown says the focus of the investigation was the forcible confinement resulting from a 911 safety search of a residence. As discussed in my earlier ruling, after the police entered the residence to investigate the 911 call, the police located a beaten and bloody male which the Crown argues then provided them a basis to obtain a search warrant. The evidence the Crown seeks to tender was obtained as a result of the execution of that valid search warrant, which the Crown argues

had no connection to the breach. However, the Crown did concede that the laptop and jackets which were seized during the execution of the search warrant were connected to the s. 8 breach. But they say because the warrant could have been issued on the basis of a search for evidence regarding the matter of forcible confinement, the breach of s. 8 has no connection to the evidence obtained.

- [15] The Crown also argues the initial search in the bedroom and the breach that resulted pertained to the stolen property investigation which they say is severable from the investigation into forcible confinement. The Crown says the search warrant had no connection to the breach.
- [16] In addition, the Crown points out that the execution of the warrant took place several hours after the initial entry to the residence and the events which led to the breach. Relying on the decisions of *R. v. Goldhart*, [1996] 2 S.C.R. 463 [Goldhart]; and *R. v. Hamdan*, 2017 BCSC 867 [Hamdan], the Crown argues the accused cannot establish a temporal or contextual connection between the s. 8 breach and the obtaining of the evidence because they were not part of the same chain of events.
- [17] In my view the Crown is advocating an approach which is neither purposive nor generous. Rather, they urge this Court to treat the investigations as isolated, water-tight compartments separate from each other. The approach advocated by the Crown would prevent this Court from considering the entire chain of events between the accused and the police. I find no support for the Crown's submission that the warrant is not connected to the stolen property which was the subject of the Charter breach. Indeed the warrant identifies three offences - forcible confinement, assault causing bodily harm and possession of stolen property over \$5000. I agree that the warrant could have been issued had the police only encountered the victim of the assault when they entered the residence. But that is not what occurred. Instead, the police located stolen property as a result of their safety check which led to the s. 8 breach. It was this stolen property that provided some of the grounds for the warrant.
- [18] The Crown acknowledged that there is a temporal connection between the breach and some of the evidence they seek to tender at trial - the stolen laptop and jackets. Yet at the same time they maintain that there is no nexus between the breach and the subsequent search. While I accept that not all of the evidence that Crown seeks to tender was subject of the s. 8 breach that does not prohibit the accused from arguing those items should be excluded under s. 24(2). At this threshold stage, I am only concerned with whether the accused can satisfy the threshold to embark upon a 24(2) analysis.
- [19] In this case, I find the sequence of events establishes both a temporal and contextual connection between the Charter infringing conduct and the obtaining of the evidence. The police entered the residence as a result of a 911 call. They were permitted to conduct a safety search which resulted in Cst. Zeshan checking the accused's bedroom. It was during the check of the bedroom belonging to the accused that Cst. Zeshan observed, in plain view, the laptop and jackets in the bedroom closet. At this stage he was authorized to be in the

bedroom to complete the safety search. As discussed in my earlier ruling, the breach occurred when Cst. Zeshan conducted a further investigation into the laptop unrelated to the purpose of his attendance at the residence. The second breach occurred when Cst. Van Leeuwen entered the residence after the safety search was completed and proceeded to take pictures of what he believed to be stolen property. His actions were unrelated to the purpose of the 911 entry, exceeded the time necessary to conduct the safety search, which occurred after the residence was cleared and was not authorized by law.

- [20] Following the 911 entry, the police secured the scene while they obtained a search warrant. Several hours later, the warrant was executed at the residence and the evidence including the laptop and jackets, were seized. When considering this chain of events I do not accept that the passage of time between the initial 911 entry and the execution of the warrant was sufficient to terminate the link between the breach and the search as the Crown suggests. There is nothing that severed their temporal connection. I am satisfied that the events were all part of one transaction and can be contrasted to the events in Goldhart, where the decision of the former co-accused to testify was found to have no nexus to the earlier breach and in Hamdan where the s. 8 breach occurred sometime after the evidence was obtained. In both those cases it was determined that there was no nexus between the breach and the obtaining of the evidence. The same cannot be said with respect to facts in this case. While there may have been different aspects to the police investigation resulting from the 911 entry, this does not alter the fact that there was one continuous chain of events.
- [21] I am satisfied that the accused has met the threshold requirement that the evidence was "obtained in a manner" that infringed the accused's s. 8 Charter right.

Issue 2 - Whether the evidence obtained in breach of the Charter must be excluded under s. 24(2)?

### The Grant Analysis

- [22] In Grant, the Supreme Court of Canada articulated three lines of inquiry for determining whether evidence obtained in a Charter-infringing manner should be excluded under s. 24(2) of the Charter. The factors to consider and weigh are (at para. 71):
- (1) the seriousness of the Charter-infringing state conduct (admission may send the message the justice system condones serious state misconduct),
  - (2) the impact of the breach on the Charter-protected interests of the accused (admission may send the message that individual rights count for little), and
  - (3) society's interest in the adjudication of the case on its merits.
- [23] These factors do not operate as a disjunctive three-part test. There are no particular findings under the three lines of inquiry that mandate particular results, and it "is not simply a question of whether the majority of the relevant factors favour exclusion in a particular case": R. v. Harrison, 2009 SCC 34 at para. 36 [Harrison]. The balancing mandated by s. 24(2)

is "qualitative in nature and therefore not capable of mathematical precision": Grant at para. 140. Rather, the court must weigh its considerations under all three factors to determine whether, on balance and having regard to all the circumstances, admitting the impugned evidence would bring the administration of justice into disrepute in the long-term, from the perspective of a reasonable person: Grant at paras. 68 and 85-86.

- [24] The Grant factors look to the public's overall, long-term faith in the justice system: Grant at para. 68; Harrison at para. 36. Section 24(2) starts from the proposition that damage has already been done to the public's confidence in the administration of justice by the Charter violation or violations that gave rise to the s. 24(2) analysis. The Grant analysis concerns itself with whether further damage will be done by admitting the impugned evidence: Grant at para. 69.
- [25] The phrase "if it is established that " in s. 24(2) places the burden upon the applicant seeking exclusion of the evidence to persuade the court on the balance of probabilities that admission of the evidence would bring disrepute to the justice system: R. v. Collins, [1987] 1 S.C.R. 265 at 280.
- [26] Having set out the analytical framework established in Grant, I will proceed to consider those factors.
- (i) Seriousness of the Charter-infringing state conduct
- [27] This first factor requires the court to consider the gravity of the state's offending conduct and whether the court should dissociate itself from that conduct by excluding the evidence: Grant at paras. 72-73.
- [28] Under this factor, the court must examine both the qualitative seriousness of the state conduct as well as the level of knowledge on the part of the offending state actors. At one end of the spectrum are those breaches that are "technical or trivial": Harrison at para. 3, "inadvertent or minor": Grant at para. 74, or which result from "an understandable mistake": Harrison at para. 22. At the other end of the spectrum are those that can be characterized as "brazen" or "flagrant": Harrison at para. 23, "abusive", "deliberate" or "egregious": Grant at para. 133. Although wilful violations are undoubtedly more serious than unintentional ones, reckless or careless violations that demonstrate insufficient regard for Charter rights also inevitably undermine the public's confidence in the rule of law: Harrison at para. 24; Grant at paras. 74-75.
- [29] With respect to Cst. Zeshan's conduct, I have considered the fact that at the time he was in the bedroom to conduct a safety search in connection to the 911 call, his presence was lawful. He observed the laptop and the other items in plain view inside the bedroom. The seizure of the laptop was justified pursuant to the plain view doctrine. The error Cst. Zeshan made was choosing to conduct a further investigation into the laptop. I found that he exceeded the permissible limits of the plain view doctrine but I do not consider his conduct to be flagrant or egregious. Rather, I find that he made a mistake when he decided to verify

the status of the laptop and the breach falls at the minor end of the spectrum. On the facts, I find that Cst. Zeshan's conduct was not motivated by any bad faith or malice, it was simply a technical overreach of his authority to conduct the search of the serial number on the laptop.

[30] In contrast, I find the breach by Cst. Van Leeuwen to be far more serious. Constable Van Leeuwen appeared to be oblivious to the fact that he was inside a residence without lawful authority. While he testified he was disappointed in the quality of the photographs he expressed no concern over his lack of authority to enter the residence. In fact, he explained that he was there to assist with an investigation into stolen property and he took the pictures to assist with obtaining the warrant. I view Cst. Van Leeuwen's testimony as very troubling. I appreciate that he may have been a relatively inexperienced police officer and thought he was assisting his colleagues but he was not operating in circumstances of legal uncertainty. Even an inexperienced police officer is expected to know what the law is as it relates to the entry onto private property. As Mr. Justice Fitch stated in *R. v. Do*, 2012 BCSC 411 "[i]gnorance of Charter standards ought not to be rewarded, and as a consequence, negligence or wilful blindness cannot be equated with good faith" (at para. 27). Constable Van Leeuwen should have known that his conduct was not Charter compliant. I find his attendance inside a private residence without authority vexing and a serious breach of the accused's reasonable expectation of privacy.

[31] I consider the breach to be serious and militates in favour of exclusion.

(ii) Impact of the breach on the Charter-protected interests of the accused

[32] The second line of inquiry focuses on the seriousness of the state's Charter-infringing conduct from the accused's perspective. Under this head of analysis, the court must examine the interests (Mr. Homeniuk's reasonable expectation of privacy) engaged by the infringed right (the unreasonable search) and the degree to which the Charter infringement impacts or intrudes upon those interests.

[33] Counsel for Mr. Homeniuk argues that the breach of the accused's reasonable expectation privacy within his own home was a serious deprivation of the accused's privacy rights.

[34] I agree with the Crown that the impact of Cst. Zeshan's conduct was minimal. As I have stated, it was a breach resulting from his misunderstanding of the scope of his authority when dealing with items located in plain view during a safety search. The impact of the breach on Mr. Homeniuk's reasonable expectation of privacy in the laptop was minimal, given that the information regarding the source of the laptop which Cst. Zeshan obtained would have eventually been discovered as Cst. Zeshan properly furthered his investigation. Given that Cst. Zeshan had the authority to seize the laptop I consider his conduct to have a minimal impact on the accused's Charter protected privacy interests in the laptop.

[35] In contrast, Cst. Van Leeuwen's unlawful attendance inside the residence to investigate a matter unrelated to the 911 call has a serious impact on the accused's expectation of privacy. The accused was entitled to expect that state actors would not enter his residence without lawful authority. However, considering the circumstances in which his conduct occurred and the fact that the evidence would have been obtained without the infringement pursuant to a valid search warrant, I find this mitigates the impact of the s. 8 breach.

[36] In all of the circumstances, I find that the impact of the breaches on the Charter-protected interests of the accused militates in favour of inclusion.

(iii) Society's interest in the adjudication of the case on its merits

[37] This factor requires the court to consider "whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion": Grant at para. 79. This involves assessing the reliability of the evidence and its importance to the Crown's case. The exclusion of reliable and relevant evidence may render the trial unfair from the public's perspective, thus bringing the administration of justice into disrepute: Grant at para. 81.

[38] However, a court analyzing this factor must be careful not to allow the seriousness of the offence and the reliability of the evidence to overwhelm the s. 24(2) analysis because this would afford lesser Charter protection to those charged with more serious crimes: Harrison at paras. 34, 40. While the public has a heightened interest in seeing a case adjudicated on its merits where the offence charged is serious, the public "also has a vital interest in having a justice system that is above reproach, particularly where the penal stakes for the accused are high": Grant at para. 84. Sometimes, the importance of maintaining Charter standards outweighs the "price paid by society for an acquittal": Harrison at para. 42. Society has an interest in ensuring state actors consistently respect Charter rights, regardless of the context.

[39] In this case, the evidence the Crown seeks to tender at trial is not limited to the laptop and the jackets which were located during the initial 911 entry. The Crown also seeks to tender a sawed off Ruger SR-22 rifle which was located underneath the double mattress on top of the box spring in the bedroom as well as ammunition, identification and credit card data in the name of several other individuals all located during the execution of the warrant.

[40] In my view, the truth seeking function of the trial process would be better served by admission of the evidence. As stated in Grant, the reliability of the evidence in issue is an important consideration. I understand if the evidence is excluded the prosecution cannot proceed with respect to the majority of the counts on the Indictment. I say that because there are three charges pertaining to the possession of a controlled substance that are unrelated to the execution of the warrant.

[41] I am cognizant of the need not to permit the seriousness of the charges to overwhelm the other lines of inquiry. In this case, the evidence would have been discovered independent of the breaches and in a manner that would not otherwise violate the accused's Charter rights.

[42] I find the assessment on the third Grant factor weighs in favour of admission.

#### IV. CONCLUSION

[43] Balancing all the factors, I conclude that, in the long term, the reputation of the administration of justice is best served by not excluding the evidence in this case. When I consider the circumstances I am satisfied that the admission of the evidence would not bring the administration of justice into disrepute. In my view, a reasonable person informed of all of the circumstances would find the admission of the evidence, rather than its exclusion, best serves the long-term interests of the administration of justice and would not lose faith in its operation.

[44] Accordingly, the accused's application to exclude the evidence is dismissed.

"Devlin J."

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