

CANADA / JUDGMENT

R. v. Mossman

2020 BCCA 299

COURT

British Columbia Court of Appeal

DECIDED

29 October 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCCA 299 R. v. Mossman

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Mossman,

2020 BCCA 299

Date: 20201029

Dockets: CA46744; CA46745

Docket: CA46744

Between:

Regina

Respondent

And

Benjamin Mossman

Appellant

- and -

Docket: CA46745

Between:

Regina

Respondent

And

Dirk Meckert

Appellant

Before:

The Honourable Madam Justice Fenlon

(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated

February 11, 2020 (R. v. Banks Island Gold Inc., 2020 BCSC 167,

Prince Rupert Docket 29244-C4).

Counsel for the Appellants, appearing via teleconference:

C.C. Cheng

G.A. Hooper

Counsel for the Respondent, appearing via teleconference:

G.G.R. McDonald

N.K. Farinelli

Place and Date of Hearing:

Vancouver, British Columbia

August 21, 2020

Place and Date of Judgment:

Vancouver, British Columbia

October 29, 2020

Summary:

While senior managers of a gold mine, applicants were charged with various regulatory offences stemming from a spill. At trial, statements made by the applicants during the investigation were excluded, either in part or in full, for having been made in breach of their Charter rights. Mr. Mossman was convicted on two counts; Mr. Meckert was acquitted on all counts. The summary conviction appeal judge vacated the convictions and acquittals and ordered a new trial. The applicants apply for leave to appeal primarily on the basis that the appeal judge erred by applying a contextual framework to Charter breaches in a regulatory context rather than a "point in time" analysis.

Held: Leave to appeal denied. There is no confusion in the lower courts as to the proper framework when assessing Charter compliance in regulatory settings. Regulatory inspections always take place in an adversarial context, and where there is a continuing regulatory purpose, the issue is whether the actions were reasonable in context. While the contextual approach to assessing potential Charter breaches in regulatory settings may be difficult to apply, this should not be confused with uncertainty in the law.

Reasons for Judgment of the Honourable Madam Justice Fenlon:

Introduction

- [1] Benjamin Mossman and Dirk Meckert apply for leave to appeal the decision of a summary conviction appeal judge. As senior managers of a gold mine, they were charged with multiple offences under the Fisheries Act, R.S.C. 1985, c. F-14, Environmental Management Act, S.B.C. 2003, c. 53, and the Water Act, R.S.B.C. 1996, c. 483 (now the Water Sustainability Act, S.B.C. 2014, c. 15), relating to spills that occurred at the mine. The trial judge acquitted Mr. Meckert on all counts and convicted Mr. Mossman on two counts: failing to report a spill under s. 79(5) of the Environmental Management Act and failing to report the deposit of a deleterious substance out of the normal course of events under s. 38(5) of the Fisheries Act.
- [2] The Crown appealed the acquittals to the BC Supreme Court, and Mr. Mossman and Mr. Meckert appealed the convictions. The summary conviction appeal judge vacated the acquittals and convictions and ordered a new trial, finding the trial judge had erred in excluding some portions of evidence and in admitting others.

Test for Granting of Further Appeal

- [3] This Court has jurisdiction to grant leave to appeal the decision of a summary conviction judge if the proposed appeal raises questions of law alone. Because the applicants have already had a right of appeal, leave is to be granted sparingly: *R. v. Gaudaur*, 2010 BCCA 157 at para. 3. The applicants bear the onus of establishing that the questions of law raise matters of importance and that there is a reasonable possibility of success on appeal: *R. v. Winfield*, 2009 YTCA 9 at para. 13; *R. v. Alpha Manufacturing Inc.*, 2009 BCCA 443 at para. 13. The overriding consideration is whether leave is in the interests of justice: *R. v. Harlens Trucking Ltd.*, 2018 BCCA 389 at paras. 11-12.

Background

- [4] In early July 2015, the Ministry of Environment, Ministry of Energy and Mines, and Environment Canada all received an anonymous complaint reporting spills at the Banks Island gold mine, located off the coast of northern British Columbia and accessible only by floatplane or helicopter. The complaint included photographs showing spills at "Discovery" and "Bob," two of the mines' three active sites. The third, "Tel," was not involved. As a result of the complaints, officers from the Ministry of Environment, Ministry of Energy and Mines,

and Environment Canada travelled to the site on July 9. The four officers flew over the Discovery and Bob sites, confirming that spills had occurred at each. After landing, they visited the two sites, obtained samples, and then took a joint statement from Mr. Meckert and Mr. Mossman. The two men were advised of their right to remain silent and told that they were under investigation, but they were also reminded of their duty to provide information to the officers under the regulations. Although there was some initial suggestion that the mine would be shut down, the officers decided on a partial shutdown so that some mining operations could continue.

- [5] The next day, July 10, the Ministry of Environment directed Mr. Mossman to file a report on the spills, a regulatory obligation he had failed to comply with when the spills first occurred (the "Spill Report"). On July 15, the officer from Environment Canada returned to the mine with a colleague from that ministry. The two officers took separate statements from Mr. Mossman and Mr. Meckert.

At Trial

- [6] At the trial in Provincial Court, the applicants sought to exclude evidence based on breaches of the Charter. A voir dire was held to determine whether the observational evidence gathered on the July 9 visit, the Spill Report, and the statements taken on July 9 and 15 should be excluded on the basis that they had been obtained in breach of the applicants' Charter rights under s. 7 (right to life, liberty and security of the person--in particular, the right to be free from compulsion to self-incriminate); s. 8 (unreasonable search and seizure); and s. 10 (right to counsel on detention). The trial judge held that the observational evidence was admissible because the applicants did not have a reasonable expectation of privacy at the mine site, given that it was Crown land and subject to inspection. He found s. 10 did not apply because the applicants had not been detained and concluded the Spill Report was admissible because it was required pursuant to various permits and regulations--and indeed should have been provided to the ministry before the site visit.
- [7] The trial judge expressly rejected the applicants' submission that the admissibility of all of this evidence turned on a "point in time" analysis that required him to identify precisely when the inspection shifted to an investigation into offences under the Acts--in other words, the point at which the relationship between the government and the applicants became adversarial--relying on *R. v. Jarvis*, 2002 SCC 73. The judge instead applied a contextual approach to whether Charter breaches had occurred, consistent with *R. v. Nolet*, 2010 SCC 24. He concluded that the officers conducting the July 9 interview had given Mr. Meckert and Mr. Mossman mixed messages, telling them both that they did not have to say anything while also reminding them that they were required to provide information under the various statutes. The trial judge addressed this breach of the s. 7 protection against self-incrimination by admitting those portions of the July 9 statement that amounted to regulatory fact gathering and excluding those portions which addressed the applicants' state of knowledge and whether they had acted or failed to act with due diligence--inquiries

directed at whether offences had been committed. The judge found the July 15 interviews had been tainted by the earlier interview and excluded them entirely.

On Appeal to BC Supreme Court

- [8] The judge hearing the appeal to the BC Supreme Court agreed with the contextual framework used by the trial judge to assess Charter breaches and found he had correctly admitted the observational evidence and the Spill Report. However, the appeal judge found that the trial judge erred in admitting even portions of the July 9 statement in light of the principles in *R. v. White*, [1999] 2 S.C.R. 417. The appeal judge also found the trial judge's reasons were insufficient to explain his conclusion that the July 15 statements were tainted by the July 9 interview. The appeal judge found the July 15 statements did not suffer from the inadequacies of the July 9 statement and should have been admitted. Therefore, he set aside the convictions and acquittals and remitted the matter for retrial.

Proposed Grounds of Appeal

- [9] The applicants identify three grounds of appeal, contending the appeal judge erred by:
1. Using the Nolet framework for assessing Charter breaches in a regulatory context rather than the Jarvis point in time framework;
 2. Overturning the trial judge's exclusion of the July 15 statement as tainted by the July 9 statement without identifying an error in fact or law; and
 3. Finding that the reasons of the trial judge for excluding the July 15 statements were insufficient for appellate review.
- [10] The Crown concedes that all three proposed grounds of appeal raise questions of law. This application turns, then, on whether the issues raise questions of importance and whether there is sufficient merit to warrant granting leave.

Analysis

1. Did the summary conviction appeal judge err in accepting the trial judge's use of the contextual framework for assessing Charter breaches in a regulatory context?
- [11] The applicants assert that the trial courts in this province are confused about whether to apply a point in time analysis (Jarvis) or a contextual analysis (Nolet). They say the approaches of the trial and appeal judges demonstrate this confusion and that this Court should grant leave in order to clarify that the Jarvis "point in time" analysis applies when the s. 7 right to be free from self-incrimination is invoked in relation to information gathered under regulatory compulsion. The applicants submit that once inspections "cross the Rubicon" (to use the language of Jarvis) and become investigations, all evidence gathered afterwards must strictly comply with the Charter if being used to support a conviction for a regulatory offence. The applicants say, in this case, the Rubicon was crossed during the flyover of Banks Island on July 9 at 12:35 p.m. when the officers realized a spill had occurred

in contravention of multiple statutes.

- [12] This argument has two problems. First, it is based on the unsound premise that Jarvis and Nolet establish different frameworks for assessing Charter compliance. Second, I see no evidence of confusion in the lower courts about the proper framework to be used when assessing Charter compliance in a regulatory setting.
- [13] The cases relied on by the applicants to support a point in time analysis (Jarvis, Nolet, White, and R. v. Fitzpatrick, [1995] 4 S.C.R. 154) all emphasize a contextual approach which "requires that regulatory and criminal offences be treated differently for the purposes of Charter review": R. v. Wholesale, [1991] 3 S.C.R. 154 at 227. The cases establish that, when considering the admissibility of compelled statements in regulatory prosecutions, the accused's interest in being free from self-incrimination has to be balanced against the public's interest in the proper regulation and control of a licensed activity that has the potential to cause harm to people and the environment. In many regulatory settings, such as mining, the individual freely chooses to participate in the industry. Requiring reports and permitting inspections are conditions of that participation. The state's information gathering concerning regulatory offences is, therefore, subject to a lower standard of Charter scrutiny because it engages different interests and a different level of compulsion: Ontario v. Canadian Pacific Ltd., [1995] 2 S.C.R. 1031 at para. 57.
- [14] In Jarvis, the accused had initially been subject to an audit by the Canada Revenue Agency ("CRA"). The auditor obtained various documents and a statement from the taxpayer prior to transferring the file to the Special Investigations Unit. The auditor subsequently obtained further information from the taxpayer through requirement letters. The Supreme Court of Canada held that information obtained after the file had been transferred to the Special Investigations Unit should be excluded, finding that at that point the CRA had "crossed the Rubicon," an adversarial relationship existed, the Charter applied, and search warrants should have been obtained to gather documents after that.
- [15] Although the court in Jarvis identified the point in time at which the relationship became adversarial and Charter rights were engaged, Jarvis does not stand for the drawing of a hard-line "point in time" analysis in all cases. That approach was helpful in the context of a taxpayer subject to a civil audit and potential reassessment. If the CRA reaches a point in the audit where it is of the view that tax evasion has occurred, the relationship between the government and the taxpayer shifts dramatically, with the taxpayer facing potential criminal sanctions. In contrast, regulatory inspections always take place, broadly speaking, in a "penal" or "adversarial" context because the powers of entrance and inspection to ensure compliance with an Act or regulations always raise the spectre of charges under the Act: R. v. Mission Western Developments Ltd., 2012 BCCA 167 at para. 40 (Bennett J.A. in Chambers). I note that Mission Western was also an application for leave to appeal that relied on the same Jarvis/Nolet dichotomy raised by the applicants. Bennett J.A. denied leave in that case, being of the view that the two decisions were not incompatible and that the Supreme Court of Canada had already decided the issue, having stated expressly in Nolet

that it was not overturning Jarvis and the context of the two cases distinguished them: Mission Western at para. 40.

- [16] It is worth emphasizing again that, consistent with their later reasoning in Nolet, the Court in Jarvis endorsed a contextual approach to balancing an individual's interest in limiting self-incrimination and the public interest in compliance with the regulatory scheme: at para. 68.
- [17] Nolet involved a highway traffic stop by an RCMP officer under the Highways and Transportation Act, 1997, S.S. 1997, c. H-3.01. The officer noted several instances of non-compliance with the regulations under the Act and carried out an inspection that uncovered evidence of proceeds of crime and drug offences. Those findings led to criminal charges. In considering whether the regulatory inspection infringed the appellant's s. 8 Charter rights, the Court concluded that the inspection was lawful due to the "continuing regulatory purpose": Nolet at paras. 41 and 45. However, Binnie J. noted that "A valid regulatory purpose, whether predominant or not, would not sanitize or excuse a Charter violation": Nolet at para. 39. Where there is a continuing regulatory purpose to ground the exercise of a regulatory power to inspect, the issue in relation to s. 8 of the Charter is whether the exercise of that power infringed the reasonable expectation of privacy of the accused "having regard to the totality of the circumstances": Nolet at paras. 41 and 45.
- [18] This Court in R. v. Rice, 2009 BCCA 569, considered and rejected the point in time analysis argued for by the applicants for assessing Charter breaches. In that case, a conservation officer stopped the accused and two others to conduct a hunter check under the regulations. The officer asked if they had done any hunting, and the accused responded that they had shot a moose. The officer then asked, "Who shot it?" and the accused responded that he had. The trial judge concluded, and the summary conviction appeal judge affirmed, that the officer had reasonable grounds to believe that an offence had been committed prior to asking who shot the moose and that the officer's question was not part of a regulatory inspection but instead represented the "evidence gathering phase" of an "investigation": Rice at para. 6. Both judges found that ss. 7 and 10(b) had therefore been violated and excluded the statement.
- [19] On appeal, this Court confirmed a contextual application of Charter rights was required, reasoning that to "conclude otherwise would entail conservation officers extending a warning and the right to counsel at all hunter checks," when, in fact, the purpose of the question was "to obtain truthful information about compliance with the Act": Rice at paras. 72 and 74.
- [20] As noted above, I do not agree with the applicants' submission that there is a conflict in the courts of this province over whether to apply Jarvis or Nolet. The cases cited by the applicants as applying Nolet involved evidence gathered during regulatory inspections which were always adversarial in the sense that charges could result: R. v. Dyer, 2017 BCPC 281; R. v. MV Marathassa, 2018 BCPC 125; and R. v. Sidhu and Sweeney, 2018 BCPC 124. It would make no sense for those cases to identify a point in time at which the relationship

became adversarial because it was always so, even at the inspection stage.

- [21] The cases the applicants identify as applying *Jarvis* rather than *Nolet* are either:
- (a) consistent with *Nolet* because they confirm the admissibility of evidence obtained during a valid inspection (*R. v. Piko Foods Ltd. and Paul Peter Zwierzewicz*, 2011 BCSC 204; *R. v. Ocsko*, 2014 ONSC 1781);
 - (b) inapplicable because the issue did not turn on an application of either *Jarvis* or *Nolet* (*R. v. Potter*; *R. v. Colpitts*, 2020 NSCA 9; *R. v. Kalsatos*, 2016 ONCJ 353); or,
 - (c) distinguishable from *Nolet* because they involved investigative steps outside the scope of a valid regulatory inspection (*Workers' Compensation Board of British Columbia v. Skylite Building Maintenance Ltd.*, 2019 BCSC 231; *R. v. Veranski and Bellotti*, 2011 BCSC 1322; *Ontario (Ministry of Labour) v. JR Contracting Property Services et al.*, 2011 ONCJ 316).
- [22] In summary, I see no inconsistency in the approach adopted in *Jarvis* and *Nolet*. Both cases recognize the importance of context in assessing Charter compliance. The point at which an inspection becomes an investigation is but one of many contextual factors that must be considered in determining whether an officer exercised their regulatory inspection powers reasonably. Although the contextual approach to assessing whether a Charter breach has occurred in a regulatory context is admittedly a difficult standard to apply, this should not be confused with uncertainty in the law. In short, the applicable framework is well-settled and was correctly identified by both the trial and appeal judges. Accordingly, this first ground of appeal does not require further consideration by this Court and does not have sufficient merit to warrant the granting of leave.
- [23] Finally, I note that even if a point in time analysis were the correct approach, the facts found by the trial judge do not support July 9 at 12:35 p.m. as the point in time at which the inspection ended and a full investigation began. The appeal judge commented on this point, saying:
- [49] The defendants' position on this issue is not supported by the evidence nor the trial judge's reasons. The characterizations and motivations described by the defendants are inaccurate and do not match the trial judge's findings. Their assertion that the inspectors had concluded early on that offences had occurred and that they then attended for the express purpose of an investigation and that they were directing the defendants to assist in accessing particular locations in order to incriminate themselves is not the evidence. In addition, it is inconsistent with the trial judge's findings that the predominant purpose of the inspection was regulatory. The defendants seek to have this court reassess the facts and to reach conclusions contrary to those of the trial judge where no palpable and overriding error has been shown.

[Emphasis added.]

- [24] I turn now to the final two proposed grounds of appeal, which can be conveniently addressed together.
2. & 3. Did the summary conviction appeal judge err in overturning the judge's exclusion of the July 15 statement and in finding that the judge had provided insufficient reasons to explain his characterization of the July 15 statement as tainted by the first?
- [25] The applicants contend the appeal judge erred in reversing the trial judge's decision to exclude the July 15 statements as tainted. They say he had no basis to do so and effectively overturned findings of fact without identifying any palpable and overriding error.
- [26] The applicants also submit that, in conducting his own assessment of the admissibility of the July 15 statements, the appeal judge departed from the Supreme Court of Canada's direction in *White*, that something more than the standard police warning is required in a regulatory setting. In *White*, the Court emphasized the importance of delineating clearly for the subject the start and end points of the statutorily compellable information: at para. 80. The applicants contend that this issue is important both to the practice and the parties and that the profession requires clarification on what kind of warning must be given in the regulatory context.
- [27] I do not agree with the applicants that the summary conviction appeal judge set aside findings of fact. As I read his reasons for judgment, he accepted the findings of the trial judge but found that he had not assessed the statements in a contextual manner. Therefore, he applied *R. v. Wittwer*, 2008 SCC 33, to the facts as found, concluding that the officers conducting the July 15 interviews had clearly warned the applicants that they were investigating statutory offences and that the applicants were not compelled to speak to them.
- [28] With respect to sufficiency of reasons, the applicants contend the summary conviction appeal judge took too narrow a view of the voir dire reasons, focusing on the following single paragraph of the judgment without considering the entire context of the record and issues:
- [121] I do take into account the separation in time and context between the July 9th statement and the July 15th statement. One concern with the July 9th statement is the presence of various inspectors and investigators as well as both Mr. Mossman and Mr. Meckert at the same time. Certainly the July 15th statement does not include the blended purposes addressed above with respect to July 9th. But there is a certain blurring between the two. In particular, one of the Fisheries Officers is involved in both the July 9th and July 15th statements. One interview is then, in a certain respect, a continuation of the other.

- [29] The appeal judge set out the legal principles guiding an assessment of whether reasons are sufficient: at paras. 136-137. He recognized the need to read the reasons "as a whole, in the context of the evidence, the arguments and the trial": R. v. Vuradin, 2013 SCC 38 at para. 12. He referred to the requirement of a functional reading of the reasons, "read in the context of the evidentiary record and the live issues on which the trial focussed": R. v. R.E.M., 2008 SCC 51 at para. 53.
- [30] In my view, it is apparent from the reasons that the appeal judge reviewed the evidentiary record to understand why the judge excluded the July 15 statements, quoting his reasons at some length: at paras. 89-90, 93, and 99. Having done so, the judge could not ascertain the "why" of the decision, saying, "It may be the tainting issue, the sufficiency of the warnings, or some combination thereof": at para. 138.
- [31] I conclude that the second and third proposed grounds of appeal do not raise issues of importance. Nor do they have sufficient merit to warrant granting leave.

Disposition

- [32] The applications of Mr. Mossman and Mr. Meckert for leave to appeal are denied.

"The Honourable Madam Justice Fenlon"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/ca/20/02/2020BCCA0299.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-mossman-2020>

Prepared on 27 October 2026 · Esheria