

CANADA / JUDGMENT

R. v. Nicholson

2016 BCSC 2413

COURT

Supreme Court of British Columbia

DECIDED

23 December 2016

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2016 BCSC 2413 R. v. Nicholson IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: R. v. Nicholson, 2016 BCSC 2413 Date: 20161223 Docket: 26396 Registry: Vancouver Regina v. Christopher Michael Makoto Nicholson Before: The Honourable Madam Justice B.J. Brown SEALED UNTIL FURTHER ORDER OF THE COURT Reasons for Judgment (Application for Third Party Records- Stage II of O'Connor Application) Counsel for Crown: M. Barrenger Counsel for Christopher Nicholson: P. McGowan Individual Members of the Abbotsford Police Department: K. Woodall Abbotsford Police Department: D. Butcher, Q.C. New Westminster Police Department: J. Doyle Vancouver Police Department: B. Toy Place and Date of Hearing: Vancouver, B.C. November 17, 2016 Place and Date of Judgment: Vancouver, B.C. December 23, 2016

- [1] In my earlier reasons (2016 BCSC 1831), I ordered that Police Act orders for investigation and related statements of the officers, after redaction by the Crown for informer privilege, be produced to me for my review.
- [2] The Crown has provided the materials to me and I invited further submissions from counsel before ordering production of any materials.
- [3] The Crown sets out the background in its submissions:
1. The Nicholson criminal investigation prompted the APD to request an audit of:
 - a. Nicholson's informer handling practices; and
 - b. The Department's overall informer handling practices.
 2. That investigation uncovered some problems with respect to how confidential sources were dealt with by some APD officers. The Office of the Police Complaint Commissioner (OPCC) became involved. The OPCC directed the NWPD to investigate those allegations. The OPCC issued orders for investigation in relation to 16 APD officers including Nicholson. The OPCC's pursuit of these allegations was terminated due to the rulings of the Associate Chief Justice of March 11, 2015, April 20, 2015 and June 1, 2015. The basis for these rulings was informer privilege. The court held that it was not appropriate for NWPD officers to be brought into the circle of privilege. That ruling was upheld by the Court of Appeal and leave was refused by the Supreme Court of Canada. As a result, it is doubtful that these

investigations will proceed. Positions of the Parties

- [4] The Crown says that it must be kept in mind that much of the material requested by Mr. Nicholson engages informer privilege.
- [5] The Crown submits that after production of "likely relevant" third-party records to the court, the court must "assess the true relevancy of the target record in the case against the accused" (R v. McNeil, 2009 SCC 3, at para. 39).
- [6] If the documents are truly relevant, the court must determine whether the salutary benefits of disclosure outweigh the deleterious effects. If the court finds that the documents are truly relevant, balancing will generally, although not invariably, favour production. The court may find it necessary to make a production order subject to redactions or other conditions.
- [7] The Crown and court are both under a duty to protect informer privilege. Many of the third-party documents in this application contain information that is protected by informer privilege.
- [8] The Crown argues that the third-party records in issue fall into three broad categories of documents:
 - 1. Allegations against and statements of officers who will be witnesses at trial and that relate directly to the facts supporting the charges faced by Nicholson;
 - 2. Allegations and statements of officers that indirectly relate to the charges faced by Nicholson in that they reveal practices similar to the subject matter of Nicholson's indictment; and
 - 3. Allegations and statements of officers that have nothing to do with the facts supporting the charges and that have no similarity to Nicholson's conduct.
- [9] The Crown argues that the records that fall within categories one and two are "truly relevant". The Crown takes the view that these records should be disclosed, subject to redactions necessary to protect informer privilege.
- [10] Mr. Nicholson argues that after reviewing the documents, if the claim of likely relevance is borne out by inspection, the accused's right to make full answer and defence will, with few exceptions, tip the balance in favour of production.
- [11] He acknowledges that redaction will be necessary and that there may be orders with respect to disclosure of the produced documents.
- [12] Mr. Woodall, counsel for certain APD officers, argues that if production is ordered, Mr. Nicholson should be ordered to not disclose the documents or their contents to anyone except persons approved by his counsel, that is Messrs. McGowan and Martland.

- [13] Mr. Butcher, counsel for the APD and certain APD officers, argues that the documents must be redacted to protect informer privilege. He argues as well that certain allegations, notably those with respect to officer number five, are dated and therefore not truly relevant.
- [14] After reviewing the documents, I am persuaded that the following documents should be produced to Mr. Nicholson, after redaction to protect informer privilege:
1. Officer subject to 2014-974-03. That officer will be a witness and the allegations are linked to one of the counts faced by Mr. Nicholson;
 2. Officer subject to 2014-9474-05 (allegation number two). That officer will be a witness and the allegation involves practices similar to those of Mr. Nicholson;
 3. Officer subject to 2014-9474-06. That officer will be a witness and the allegation involves practices similar to those of Mr. Nicholson;
 4. Officer subject to 2014-9474-07. That officer will be a witness and some allegations involve practices similar to those of Mr. Nicholson;
 5. Officer subject to 2014-9474-010. That officer will not be a witness but some allegations involve practices similar to those against Mr. Nicholson;
 6. Officer subject to 2014-9474-011. That officer will be a witness and some allegations involve practices similar to those against Mr. Nicholson; and
 7. Officer subject to 2014-9474-013 (allegation number two). That officer will not be a witness but some allegations involve practices similar to those alleged against Mr. Nicholson.
- [15] The following documents are not relevant and will not be produced (in addition to those that I have already indicated to counsel are not relevant):
1. Officer subject to 2014-9474-04. That officer will not be a witness and the allegations are not akin to those made against Mr. Nicholson;
 2. Officer subject to 2014-9474-05 (allegation number one). That officer will be a witness but the allegations are not related to those made against Mr. Nicholson.
 3. Officer subject to 2014-9474-12. The officer will not be a witness and the allegations are not similar.
 4. Officer subject to 2014-9474-013 (allegation number one). That officer will not be a witness and the allegations are not similar.
- [16] Although Mr. Butcher argues that the allegations about certain officers are dated and hence should not be produced, I am not persuaded that they are so dated that they are not relevant in this case.
- [17] There is also a final investigation report that applies to officer subject to 2014-9474-05. The portions of the report that deal with incident number two should be produced.

- [18] As the Crown has noted, it is imperative that these documents be carefully redacted to ensure that confidential informer privilege is maintained. In the event that it is not possible to edit the documents to ensure that confidential informer privilege is maintained, they cannot be produced.
- [19] In addition, I will make the order sought by Mr. Woodall with respect to nondisclosure of documents that are produced pursuant to this order: that is Mr. Nicholson may not disclose the documents or the contents to anyone except persons approved in writing by Mr. McGowan and Mr. Martland. "B. J. Brown J."
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