

CANADA / JUDGMENT

R. v. Sullivan

2009 BCSC 1769

COURT

Supreme Court of British Columbia

DECIDED

23 December 2009

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2009 BCSC 1769 R. v. Sullivan IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: R. v. Sullivan, 2009 BCSC 1769 Date: 20091223 Docket: X073466 Registry: New Westminster IN THE MATTER of an application pursuant to s. 487.015 of the Criminal Code for an exemption from the requirement to produce the documents or data referred to in a Production Order issued out of the Provincial Court of British Columbia, Surrey Registry and bearing Search Warrant File Number 2009-00911 -and- Between: Her Majesty the Queen Respondent And Anthony Sullivan Applicant Before: The Honourable Madam Justice Hyslop Reasons for Judgment Counsel for the Applicant: J. Winteringham, Q.C. Counsel for the Respondent: G. Stark Place and Date of Hearing: New Westminster, B.C. November 20, 2009 Place and Date of Judgment: New Westminster, B.C. December 23, 2009

- [1] Mr. Anthony Sullivan seeks to be exempt from the requirement to produce documents, data or information referred to in production orders issued by Judicial Justice of the Peace ("J.J.P.") Arlitt on October 7 ("first order") and November 8, 2009 ("second order"). The application is made pursuant to s. 487.015 of the Criminal Code (the "Code").
- [2] At the end of this hearing, I granted the exemption sought by Mr. Sullivan so that the respondent could continue their investigation and production of documents and data.
- [3] Section 487.015 of the Code is as follows: APPLICATION FOR EXEMPTION 487.015(1) A person named in an order made under section 487.012 and a financial institution, person or entity named in an order made under section 487.013 may, before the order expires, apply in writing to the judge who issued the order, or a judge of the same territorial division as the judge or justice who issued the order, for an exemption from the requirement to produce any document, data or information referred to in the order. ...
- (4) The judge may grant the exemption if satisfied that ...
- (b) it is unreasonable to require the applicant to produce the document, data or information; or
- (c) the document, data or information is not in the possession or control of the applicant.

BACKGROUND FACTS

- [4] The background facts are not in dispute other than a conversation that took place between Mr. Sullivan and an RCMP officer. That conversation is not important to this application.
- [5] Mr. Sullivan is a 28-year employee of Telus Communications Inc. ("Telus") and its predecessors. Mr. Sullivan's position with Telus is that of a Manager/Security in Telus' corporate security department.
- [6] Mr. Sullivan supervises employees who are part of the law enforcement agency ("agency") operation of Telus. He does not participate in the day-to-day activities of the agency. He is not an employee who receives production orders from the police. He is only likely to see a production order if an employee has a question about it.
- [7] At the time of Mr. Sullivan swearing his affidavit, Telus had received 1,360 production orders from various law enforcement agencies across Canada. Mr. Sullivan, as a result of the terms of his employment and due to the confidential nature of Telus' data, records, electronic or otherwise, cannot deal with Telus' data and records without Telus' authority. Mr. Sullivan has an express agreement with Telus as to confidentiality of the data and records.
- [8] On October 7, 2009, the first order was made pursuant to s. 487.012 of the Code stating that there were reasonable grounds to believe that there were documents or data in respect of an offence that were suspected to have been committed. In that first order, Mr. Sullivan was identified as the person in possession or control of the documents or data. Telus, when they received the first order, would not process the order as it named Mr. Sullivan.
- [9] The policeman in charge in obtaining the first order claims that Mr. Sullivan told him that he was the person in possession and control of the documents. Mr. Sullivan states a contrary view.
- [10] Another policeman sought to vary the first order before J.J.P. T. Holmes, who did not grant or vary the order deferring that application back to J.J.P. Arlitt.
- [11] A new production order was sought by the police before J.J.P. Arlitt, seeking that Telus produce the documents and the data. Despite this, J.J.P. Arlitt granted the second order in the name of Tony Sullivan or his designate, Telus Communications Company. This second order was post-dated to after the first order was to expire.
- [12] The first and second orders were made ex parte. Mr. Sullivan had no standing to appear before J.J.P. Arlitt and Holmes. The only remedy available to Mr. Sullivan was pursuant to s. 487.015 of the Code.
- [13] In *Tele-Mobile Co. v. Ontario*, [2008] S.C.J. No. 12, the court examined the production order scheme and specifically applications for exemptions. In *Tele-Mobile*, *Tele-Mobile* applied for an exemption order on the grounds that the burden of retrieving archive data was unreasonable without compensation due to the cost of retrieving the data. Madam Justice Abella, speaking for the court, stated:

- [61] The object of an unreasonable production order is not without remedy. It lies in an application for an exemption pursuant to s. 487.015, ...
- [62] The authority given to a judge is limited to granting "an exemption from the requirement to produce any document, data or information referred to in the order". ...
- [14] Mr. Sullivan has the onus of satisfying the court on a balance of probabilities that one or more of s. 487.015(4) apply.
- [15] J.J.P. Holmes was of the view in his handwritten notes that the Code did not define a person or organization, and that it was necessary to identify a person at the corporation to give meaning to possession and control.
- [16] The respondent argues that the section does not apply to a corporation and that it must be directed to a natural person. In this case, the respondent argues that Mr. Sullivan is the gate keeper of the records and the data and, therefore, not entitled to seek such an exemption.
- [17] The respondent argues that the order must be directed to an individual as: The company itself cannot act in its own person, for it has no person; it can only act through directors, and the case is, as regards those directors, merely the ordinary case of principal and agent. [Ferguson v. Wilson, (1866) LR 2 Ch App 77]

ANALYSIS

- [18] The evidence before me is that Mr. Sullivan is a long-time employee of Telus. Telus specifically prohibits him from dealing with their documents and data without their authorization despite his position with Telus. Mr. Sullivan cannot compel Telus to comply with the first and second order. An order directed to Telus is likely to be complied with as it is a common practise for them to receive these orders.
- [19] Contrary to J.J.P. Holmes' belief that a person is not defined in the Code; it is. The Code does provide definitions: "every one", "person" and "owner", and similar expressions, include Her Majesty and an organization; ... "organization" means
- (a) a public body, body corporate, society, company, firm, partnership, trade union or municipality, or
 - (b) an association of persons that
 - (i) is created for a common purpose, (ii) has an operational structure, and (iii) holds itself out to the public as an association of persons;
- [20] A company is a person within the meaning of the Code. A company is capable of possessing documents. In Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*, 2nd Ed. it states: Corporations are capable of possessing documents. Although the case law has arisen mainly in the context of prosecutions for restraint of trade, the issue may arise in both civil and criminal proceedings. [p. 1031]

- [21] Access to documents does not necessarily mean possession.
- [22] In Tele-Mobile, it was a corporation (although this was not the issue before the Supreme Court of Canada) who was subject to the production order; not an employee.
- [23] It would be unreasonable to require Mr. Sullivan to produce these documents as the liability is six months in jail, or a \$250,000.00 fine or both. This penalty cannot be minimized or ignored.
- [24] Mr. Sullivan should not face the risk that he will be named in future orders.
- [25] On a personal level, Mr. Sullivan is away from his office for up to 70 days a year. The risk of being named personally in a production order and it not coming to his attention would result in significant criminal liability.
- [26] Lastly, when a document is in the possession of a company or owned by a company, it would be wrong for the police to apply for, and those who grant the production orders, to expect an employee to take the data and documents that they are not authorized to do by their employer.
- [27] It is for these reasons that I have exempted Mr. Sullivan from the requirement to produce any document, data or information referred to in the production orders issued on October 7, 2009 and November 8, 2009. "H.C. Hyslop J." HYSLOP J.

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