IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Fong v. British Columbia (Minister of Justice),* 2017 BCSC 1977

Date: 20171017
Docket: S111826
Registry: New Westminster

Between:

Michael Kwok Shuen Fong

Plaintiff

And

Her Majesty the Queen in Right of British Columbia as represented by The Minister of Justice for British Columbia

Defendant

Before: The Honourable Mr. Justice Blok

Oral Ruling re Application to Set Aside Subpoena

Counsel for the Plaintiff:	P.G. Kent-Snowsell M. Stainsby
Counsel for the Defendant:	O. Kowarsky A. Mallek E. Logan, Articled Student
Counsel for the Attorney General of British Columbia and Wendy Stephen Q.C.:	S. Lacusta
Place and Date of Hearing:	New Westminster, B.C. October 16-17, 2017
Place and Date of Judgment:	New Westminster, B.C. October 17, 2017

[1] **THE COURT:** The Attorney General, representing a proposed witness, applies at the outset of this 15-day trial for an order setting aside a subpoena directed to Crown counsel, Wendy Stephen, Q.C.

[2] This civil action was commenced by Michael Fong for injuries he alleges he suffered as a result of certain interactions with RCMP officers in Surrey, B.C., on March 11, 2006. The primary causes of action pleaded in this case are assault, battery, false arrest and false imprisonment. He also makes a claim for breaches of his *Charter* rights and he seeks damages as a result.

[3] Although this was not explicitly set out in the supporting evidence, it is apparent that the incident in question was the subject of a Report to Crown Counsel for a consideration of charges against Mr. Fong. Ms. Stephen, as Crown counsel, performed a charge assessment and concluded that no charges should be approved. She conveyed her decision to one of the RCMP officers, specifically Constable Ward, by way of a memorandum dated June 7, 2006. That memorandum was evidently disclosed to Mr. Fong's counsel in this case, but just how and why that came about is not at all clear from the evidence and counsel did not elaborate on that issue in their submissions.

[4] The applicants – and here I note that both the Attorney General and Ms. Stephen are shown in the notice of application as the applicants – say that the subpoena ought to be set aside because any evidence Ms. Stephen may have is protected by constitutionally-entrenched prosecutorial discretion and, in any event, Ms. Stephen's attendance is unnecessary.

[5] As a result of discussions between counsel prior to trial, Mr. Fong's counsel provided a list of questions he proposed to put to Ms. Stephen. I will not set these out in full, but will set out just the essential ones. By way of brief preliminary explanation, in the questions there are references to Cst. Ward, who appears to have been the officer who forwarded the Report to Crown Counsel. He was also the officer to whom Ms. Stephen replied in her memorandum. Questions 3 to 5, as outlined by Mr. Fong's counsel, may in essence be combined into the question, “Did

you speak to Constable Ward?"; Question 7: "Did Constable Ward press you to lay charges against Mr. Fong?"; Question 8: "Did Constable Ward appear upset, angry, or disappointed when you advised him charges were not going to be laid against Michael Fong?"; Question 9: "Did Constable Ward discuss with you the Oasis Hotel generally as a problem for the police and why charging Mr. Fong would be of assistance to the police in dealing with the hotel?"; Question 10: "Why did you write a memorandum to Constable Ward regarding your decision not to charge Mr. Fong?"; and then combining Questions 18 and 19: "Was it your usual practice at that time to offer explanations to police officers as to why you were not approving charges by way of a memorandum or was this an extraordinary event?"; and Question 19: "If this was out of the ordinary practice to do such a memorandum, why did you deem it necessary to do so in respect to this charge and write to Constable Ward?"

[6] As I have said, those are not all of the questions, but they are what I perceive to be the salient questions that were proposed to be put to Ms. Stephen.

[7] The Attorney General says these questions intrude upon prosecutorial discretion, which the Attorney General says includes not just the charge decision itself but also the means by which the decision came about.

[8] Counsel for Mr. Fong did not disagree with the principles as outlined by the Attorney General, but emphasized he was not seeking to question Ms. Stephen about *why* she declined to approve charges against Mr. Fong. Instead, he maintains there was what he described as a "police agenda" or ulterior motive and he believes Ms. Stephen's evidence may support the plaintiff's contention that the police were encouraging the laying of charges as a means to address a problematic licensed establishment.

[9] I begin my analysis by referring to Supreme Court Civil Rule 12--5(39), which governs applications of this type:

> A person who has been served with a subpoena may apply to the court for an order setting aside the subpoena on the grounds that compliance with it is

> unnecessary or that it would work a hardship on the person, and the court may make any order, as to postponement of the trial or otherwise, it considers will further the object of these *Supreme Court Civil Rules*.

[10] The operative word for present purposes is “unnecessary”. I will leave for the moment the question of prosecutorial discretion which invokes the term “unnecessary” in a substantially different context.

[11] I will say at this point that the basis for the plaintiff's belief Ms. Stephen will have anything of relevance to say is exceedingly thin.

[12] In submissions, counsel for Mr. Fong agreed that certain words in Ms. Stephen's memorandum have caused him to speculate that Cst. Ward may have met with Ms. Stephen and conveyed to her an ulterior motive behind his charge recommendation. As to that, I would say, first, the language in the memorandum is ambiguous as to whether there was any meeting or discussion. It does not say there was such a meeting or discussion. Second, there is nothing in the memorandum that indicates Cst. Ward conveyed some sort of ulterior motive. All of that is speculation. Given that Cst. Ward has been examined for discovery, I would have thought that there would have been at least some evidentiary basis for believing a meeting or other communication did, in fact, take place as speculated by the plaintiff. As matters stand, there is nothing that shows such a meeting or communication even took place. On the face of things, Ms. Stephen's attendance appears unnecessary.

[13] I am mindful, however, of the comments of our Court of Appeal in *De Souza v. Kuntz* (1988), 24 B.C.L.R. (2d) 206 at 214, where the court said, after quoting the iteration of the Rule that was applicable in 1988 and which is largely the same as it is today:

> To this degree, the rule, in my view, extends the authority of the court to control its process, although I would hasten to add that the chambers judge's discretion to set aside a subpoena should be exercised with considerable restraint. The chambers judge must always be acutely aware that he is substituting his view for that of counsel as to the need to subpoena a certain witness and that he will seldom have as complete an appreciation as counsel does of the benefits - both tactical and substantive - that a litigant may derive

> from calling a certain witness. On the other hand, all trial judges have experienced in recent years the failure of counsel to carefully analyze their cases and subpoena only those witnesses essential to proving the same, thereby incurring unnecessary legal costs and unduly extending the duration of trials. Presumably it was to discourage this practice, as well as to protect members of the public from needless inconvenience, that R. 40(39) was enacted. Because of the serious nature of these conflicting concerns, in my view it will only be in a clear case that a chambers judge will exercise his discretion to set aside a subpoena on the ground of necessity.
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> [Emphasis added.]

[14] For those reasons, I will go on to consider the prosecutorial discretion aspect of the application.

[15] The concept of the non-reviewability of prosecutorial discretion has been established and affirmed in decisions of the highest authority. For present purposes, I will start with *Krieger v. Law Society of Alberta*, [2002] 3 S.C.R. 372. There, a complaint was made to the Law Society about a Crown lawyer who allegedly delayed certain important disclosure to the accused. The Supreme Court of Canada had to consider the interplay between prosecutorial discretion and the disciplinary powers of the Law Society. The court reviewed the history and role of the Attorney General, where Crown counsel act as his or her agents, and said the following (and some of these I am not going to read in full due to time constraints, as I indicated at the outset):

> 29 The gravity of the power to bring, manage and terminate prosecutions which lies at the heart of the Attorney General's role has given rise to an expectation that he or she will be in this respect fully independent from the political pressures of the government. …
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> …
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> 31 This side of the Attorney General's independence finds further form in the principle that courts will not interfere with his exercise of executive authority, as reflected in the prosecutorial decision-making process. In *R. v. Power*, [1994] 1 S.C.R. 601, L'Heureux-Dubé J. said, at pp. 621-23:
>
> > It is manifest that, as a matter of principle and policy, courts should not interfere with prosecutorial discretion. This appears clearly to stem from the respect of separation of powers and the rule of law. Under the doctrine of separation of powers, criminal law is in the domain of the executive …
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> 32 The court's acknowledgment of the Attorney General's independence from judicial review in the sphere of prosecutorial discretion has its strongest

> source in the fundamental principle of the rule of law under our Constitution. Subject to the abuse of process doctrine, supervising one litigant's decision-making process - rather than the conduct of litigants before the court - is beyond the legitimate reach of the court. In *Re Hoem and Law Society of British Columbia* (1985), 20 C.C.C. (3d) 239 (B.C.C.A.), Esson J.A. for the court observed, at p. 254, that:
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> > The independence of the Attorney-General, in deciding fairly who should be prosecuted, is also a hallmark of a free society. Just as the independence of the bar within its proper sphere must be respected, so must the independence of the Attorney-General.
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> We agree with these comments. The quasi-judicial function of the Attorney General cannot be subjected to interference from parties who are not as competent to consider the various factors involved in making a decision to prosecute. …

[16] The Supreme Court of Canada revisited the issue in *R. v. Anderson*, [2014] 2 S.C.R. 167. There, in a case involving a charge of impaired driving, Crown counsel served a notice of intent to seek greater punishment by reason of the accused's four previous impaired driving convictions. The trial judge held that Crown counsel breached s. 7 of the *Canadian Charter of Rights and Freedoms* by tendering the notice without considering the accused's Aboriginal status. The case then went on to the Supreme Court of Canada. The court said:

> 32 Apart from the sheer volume of decisions that would be opened up for review, the Crown's decision to seek the mandatory minimum penalty — as we shall see — is a matter of prosecutorial discretion. There has been a long-standing and deeply engrained reluctance to permit routine judicial review of the exercise of that discretion. …
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> ...
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> 37 This Court has repeatedly affirmed that prosecutorial discretion is a necessary part of a properly functioning criminal justice system …
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> 38 Unfortunately, subsequent to this Court's decision in *Krieger v. Law Society of Alberta* … confusion has arisen as to what is meant by "prosecutorial discretion" and the law has become cloudy. The present appeal provides an opportunity for clarification.
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> …
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> 44 In an effort to clarify, I think we should start by recognizing that the term "prosecutorial discretion" is an expansive term that covers <u>all "decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it</u>" … As this Court has repeatedly noted, "[p]rosecutorial discretion refers to the discretion exercised by the Attorney-General <u>in</u>

> matters within his authority in relation to the prosecution of criminal offences" …
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> [First emphasis added; second emphasis in original.]

[17] The B.C. Court of Appeal has also weighed in on the topic in a decision that, in fact, predated *Anderson*, a case called *Picha v. Dolan*, 2009 BCCA 336. There, a coroner's inquest was convened to consider the untimely deaths of a woman, her son and her parents, evidently at the hands of the woman's estranged husband. The husband had been charged in earlier proceedings involving suspected deliberate harm to the family, but ultimately he was released on certain conditions pending trial. The coroner issued subpoenas to two Crown counsel who had been involved in that release decision. A number of questions were proposed for those Crown witnesses, but the trial court and the Court of Appeal concluded that the ultimate question the coroner sought to ask was why the husband was released at all. The Court of Appeal said, at para. 18:

> For all of the very important constitutional and policy reasons adverted to in *Krieger*, compelling Crown counsel to attend and give evidence at the inquest is an improper interference with the independence of the Crown office.

[18] The court quoted, with approval, from the Attorney General's factum in that case:

> 23 At para. 40 of the Attorney General's factum, counsel submits:
>
> > The Appellant's submission that Crown immunity can be respected in this case by "limiting questioning" ignores the mischief created by requiring the individual Crown counsel to testify, thereby obliging their counsel and counsel for the [Criminal Justice Branch] to object to each and every question that is not confined to the limited area of permissible questioning. This, in itself, could lead to a chilling effect, as it leaves the protection of Crown immunity in the hands of an inquisitor and quasi-judicial figure who is "not as competent to consider the various factors involved" or, for that matter, the various issues at stake.
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> 24 We agree with the thrust of this submission in the context of a Coroner's inquest and we distinguish again the case here from that before the Court in *Davies*.

[19] I note that a similar form of limited questioning is proposed in the present case.

[20] Although I realize that this court is much better equipped to consider the various factors involved and the various issues at stake than would a coroner in a coroner's inquest, nonetheless the mischief adverted to by the Court of Appeal in *Picha* is still a relevant concern.

[21] Finally, I refer to *B.C. (Director of Civil Forfeiture) v. Huynh*, 2013 BCSC 87. There, in civil forfeiture proceedings, the defendant sought to subpoena a Crown prosecutor. The defendant had been the subject of drug charges that were ultimately stayed without explanation. The Crown counsel who was the subject of the subpoena argued that he had no relevant admissible evidence to give because the sole purpose of his attendance as a witness was to inquire into his exercise of prosecutorial discretion. Mr. Huynh's counsel argued that the Crown counsel was a witness who had relevant evidence to give on a variety of different issues including whether there had been a potential breach of his client's *Charter* rights. Mr. Justice Ball held, applying both *Krieger* and *Picha*, that Crown counsel cannot be compelled by subpoena for the purpose of giving evidence concerning the conduct of the Crown file.

[22] Both *Picha* and *Huynh* involved arguments similar to those made in the present case, that is, that the ultimate prosecutorial decision was not being challenged and it was merely the circumstances or facts known to the Crown in and about the making of that decision. Those arguments were rejected in *Picha* and *Huynh*.

[23] The situation here is the same. These cases establish that the immunity from review of prosecutorial decisions or discretion extends beyond the mere decision itself and includes the activities and available information leading up to or surrounding that decision. Accordingly, I am satisfied that even if Ms. Stephen had evidence to give along the lines speculated by the plaintiff, this evidence would be inextricably bound with the process and information connected to the prosecutorial decision and, as such, is immune from review or witness compulsion.

[24] For those reasons, the application is allowed and the subpoena directed to Wendy Stephen, Q.C., is ordered to be set aside.

[25] Those are my reasons on the application.

[SUBMISSIONS RE COSTS]

[26] THE COURT: While it is superficially attractive to regard the government as a well-resourced party who hardly needs costs awarded in its favour and is able to absorb the cost associated with its successful application, I note that in other spheres, *impecuniosity* of a person has been said to be an irrelevant factor. The authority for that, if memory serves, is *Brown v. Blacktop Cabs Ltd.* (1997), 43 B.C.L.R. (3d) 76 (C.A.). In matters of this type, I consider that the government is really an ordinary litigant and the plaintiff having attempted unsuccessfully to involve a non-party to this case, I conclude the Attorney General, then, should have costs of this application.

[27] MR. KENT-SNOWSELL: I wonder if Your Lordship is inclined to fix the costs as a set amount? Subject to my learned friend's submissions on that.

[28] MS. LACUSTA: I think setting the costs at a set amount is reasonable, in the situation. Given that it was one appearance, I suggest somewhere in the range of $500 to $1,000 would be suitable.

[29] THE COURT: All right. Costs will be fixed at $500.

"Blok J."