SUPREME COURT OF NOVA SCOTIA

Citation: Canadian Broadcasting Corporation v. Canada (Attorney General) , 2009 NSSC 400

Date: 20091231
Docket: Hfx. No. 315437
Registry: Halifax

Between:

Canadian Broadcasting Corporation

Plaintiff

v.

The Attorney General of Canada

Defendant

Revised Decision: The original decision has been corrected according to the erratum released on January 7, 2010. The text of the erratum is appended to this revised decision.

Judge: The Honourable Justice Arthur J. LeBlanc.

Heard: November 25, 2009, in Halifax, Nova Scotia

Counsel: David G. Coles, Q.C. and Tony Amoud,
for the plaintiff
James C. Martin and Scott McCrossin,
for the defendant

By the Court:

[1] The CBC seeks disclosure of audio and video statements made by Penny Boudreau while under investigation for an eventual charge of first-degree murder. The CBC claims it is entitled to the records under the authority of s. 2(b) of the *Charter of Rights and Freedoms*.

[2] Ms. Boudreau entered a guilty plea to second-degree murder and was sentenced to life imprisonment, without parole eligibility for 20 years, by Justice Margaret Stewart of this Court. At the sentencing hearing, the Crown and the accused filed an Agreed Statement of Facts. The audio and video statements were not introduced as exhibits. The CBC took no steps during the course of the sentencing, or within a short time thereafter, to apply to Stewart, J. to obtain an order directing the Crown to produce the statements.

[3] The RCMP resists the release of the statement, claiming that it was not part of the court record during the proceeding. The RCMP also argues that this Court does not have the jurisdiction to determine the issue. The CBC maintains that the Agreed Statement of Facts references the recorded statements made by Ms. Boudreau, as well as a physical re-enactment on the person of an undercover

operator during a meeting with an undercover agent. She also provided a detailed handwritten account of what occurred. She agreed to travel to the Bridgewater area with the undercover operator to show them where the murder and body-dumping took place. She provided a verbal and visual account of what occurred at that location, and at a location near the LaHave River, where the victim's body had been dumped.

[4] On the morning of June 14, 2008, Ms. Boudreau was arrested and interviewed by the Truth Verification Section of the RCMP. During the interview Ms. Boudreau made no admissions. She was shown a portion of the video/audio of her meeting with the undercover operator on June 11, 2008, in which she told the operator of the killing of her daughter. Ms. Boudreau was visibly shaken, and shortly afterward provided an account of the murder of her daughter. Ms. Boudreau admitted to having murdered her daughter, explained the same details as she previously revealed to the undercover operator and prepared a handwritten letter to her daughter Karissa expressing her feelings.

[5] The CBC has made application for disclosure of the documents under the *Freedom of Information Act*, but the application has been rejected. The CBC has

also sought the release by applying to the RCMP. The official responsible for release of information has denied the request.

[6] The Attorney General argues that this court does not have jurisdiction to rule on the application because the RCMP is a federal institution and any request for documents must therefore be instituted only in the Federal Court of Canada.

Issue

[7] Does this court have jurisdiction to hear the application for disclosure of the audio and video statements?

The Law

[8] The Attorney General maintains that the application is in the wrong court, and that, absent any constitutional challenge to the validity of the relevant legislation, this Court has no jurisdiction to entertain an application seeking any form of relief, including *Charter* relief, where the decision being challenged is a decision of the federal authority made pursuant to federal legislation. The RCMP

first took the position that there was no basis to provide such material in accordance with the process under the *Access to Information Act*, R.S.C. 1985, c. A-1. This decision has been appealed before the Federal Office of the Information Commissioner and the response is pending, although the CBC, in its submission, denies an intention to appeal. The CBC also applied to the Nova Scotia Public Prosecution Service for release of the recording under the *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c. 5. The application was denied and the CBC has filed an application with the review officer pursuant to the Act. The matter comes before me in the form of an application by the Attorney General for an Order striking the application for want of jurisdiction.

[9] The Attorney General maintains the proper approach for the respondent to follow is to seek an order under the *Access to Information Act* because that is the procedure by which an interested party can seek records from Federal government institutions such as the RCMP. Such a request would be considered by the Commissioner, or his delegate. If the request is denied, the application can go to the Information Commissioner. Should the request be denied by the Information Commissioner, the applicant may apply to the Federal Court for review.

[10] The Attorney General maintains that the Supreme Court is only competent to hear a challenge to the constitutionality and validity of Federal legislation. If the challenge is to the exercise of authority under the legislation, then the Federal Court is the appropriate jurisdiction.

[11] In *Mousseau v. Canada (Attorney General)* (1993), 126 N.S.R. (2d) 33 (C.A.), the Nova Scotia Court of Appeal stated, at para. 13:

> There is ... a distinction between jurisdiction to determine the constitutional validity or the applicability of legislation on the one hand and jurisdiction to pass upon the manner in which a board or tribunal functions under such legislation on the other. [Emphasis in original.]

[12] The Attorney General maintains that the RCMP is a Federal institution or tribunal. In effect, the CBC is seeking *mandamus* from this court, directing the RCMP to disclose the video and audio statements.

[13] Although the CBC has specifically requested an order under s. 24(1) of the *Charter*, that is the only basis an order can be issued if there has been a breach of a *Charter* right. Subsection 24(1) permits an individual to seek a remedy from a court of competent jurisdiction for a *Charter* breach. The Attorney General refers

to *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, 1985 CanLII 65, where Wilson J. stated, at para. 78, that s. 24(1) "provides remedial powers to 'a court of competent jurisdiction'. As I understand this phrase, it premises the existence of jurisdiction from a source external to the *Charter* itself." In *Mills v. The Queen*, [1986] 1 S.C.R. 863, 1986 CanLII 17, McIntyre J. stated, at para. 261:

> To begin with, it must be recognized that the jurisdiction of the various courts of Canada is fixed by the Legislatures of the various provinces and by the Parliament of Canada. It is not for the judge to assign jurisdiction in respect of any matters to one court or another. This is wholly beyond the judicial reach. In fact, the jurisdictional boundaries created by Parliament and the Legislatures are for the very purpose of restraining the courts by confining their actions to their alloted spheres. In s. 24(1) of the *Charter* the right has been given, upon the alleged infringement or denial of a *Charter* right, to apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances. The *Charter* has made no attempt to fix or limit the jurisdiction to hear such applications. It merely gives a right to apply in a court which has jurisdiction....

[14] The Attorney General points to s. 18 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, which provides:

> 18. (1) Subject to section 28, the Federal Court has exclusive original jurisdiction
>
> > (a) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and

> (b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

[15] As noted above, the Attorney General relies on *Mousseau v. Canada (Attorney General)*, where the issue was whether a group of status Indians had a right to seek redress for a claim of discrimination under s. 15 of the *Charter*. The Court of Appeal dismissed the application on the grounds of jurisdiction. Chipman J.A. said, at paras. 22-23:

> In my opinion, the issue in this case relates not to whether the legislation under which the appellants functioned infringed the Charter, but whether the manner in which they functioned under that legislation did so. The question is whether in such circumstances this amounts to a constitutional issue over which the Supreme Court has jurisdiction in the face of s. 18 of the *Federal Court Act*. Strong policy considerations exist for answering this question in the negative....
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> In my opinion, the activities of federal agencies pursuant to federal law - as distinct from the law itself - are clearly matters which can be scrutinized under the *Charter* only by a court which is otherwise one of competent jurisdiction within the meaning of s. 24(1) of the *Charter*. The Supreme Court is not such a court....

[16] The Saskatchewan Court of Appeal reached a similar conclusion in *R v. Daniels* (1991), 65 C.C.C. (3d) 366, 1991 CarswellSask 201 (leave to appeal refused, 69 C.C.C. (3d) vi), holding that the impugned action was not the validity of the legislation but the conduct of the Commissioner of Corrections. Such exercise of his authority could only be challenged by resorting to s. 18 of the *Federal Courts Act*. Sherstobitoff, J.A. said, at para. 19:

> [s]ince the order made was directed to the exercise or non-exercise of his powers and duties, it was in the nature of a mandamus or prohibition. Such a remedy directed to a federal tribunal ... is within the exclusive jurisdiction of the Federal Court of Canada under s. 18 of the *Federal Court Act*, or the Federal Court of Appeal under s. 28.... Accordingly, the *Charter* application should have been brought in one of the federal courts, and the judge below should not have entertained the application.

[17] The Attorney General argues that an order compelling the RCMP to act must be based on a federal statute. As such, an order in the nature of *mandamus*, requiring the RCMP to yield the materials sought, is only available by resorting to s. 18 of the *Federal Courts Act*. The applicant further points out that the remedy does not fit within the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, which excludes injunctive relief and makes such a remedy available only under s. 18 of the *Federal Courts Act*.

[18] The Attorney General also claims that it is unlikely that the documents/material could be released under the *Access to Information Act* because disclosure would result in personal information being released. However, for the purpose of this application, I see no need to address this issue.

[19] The CBC's position is that, since Stewart, J. relied upon the Agreed Statement of Facts and the submissions of counsel, there was, in effect, an indirect reliance on the video and audio statements of Ms. Boudreau. The CBC relies on *A.G. (Nova Scotia) v. MacIntyre,* [1982] 1 S.C.R. 175, where Dickson, J. (as he then was) stated, at p. 183:

> By reason of the relatively few judicial decisions it is difficult, and probably unwise, to attempt any comprehensive definition of the right of access to judicial records or delineation of the factors to be taken into account in determining whether access is to be permitted. The question before us is limited to search warrants and informations. The response to that question, it seems to me, should be guided by several broad policy considerations, namely, respect for the privacy of the individual, protection of the administration of justice, implementation of the will of Parliament that a search warrant be an effective aid in the investigation of crime, and finally, a strong public policy in favour of "openness" in respect of judicial acts. The rationale of this last-mentioned consideration has been eloquently expressed by Bentham in these terms:
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> 'In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice.' 'Publicity is the very soul of justice. It is the keenest spur to exertion and the

> surest of all guards against improbity. It keeps the judge himself while trying under trial.'

[20] The CBC says there is no means of assessing the Agreed Statement of Facts – and of assessing "what occurred in this case" – without assessing the original source, i.e. the audio and video containing Ms. Boudreau's statements. Had the intercepts been entered as exhibits in the proceeding, there would be no doubt that the CBC would be entitled to obtain a copy under ordinary rules for release to the press. The CBC wants the court to go a step further and order the production and transfer of the material to the CBC, even though it was not entered as court exhibits.

[21] CBC relies on *CTV v. Ontario Court of Justice* (2002), 59 O. R. (3d) 18, 2002 CarswellOnt 955 (Ont. C.A.), where it was held that the court's jurisdiction over trial exhibits extended to exhibits that had left the possession of the court. The Court ordered the return of the exhibits and that these be made available to the applicant. The Court stated, at paras. 25-27:

> While both in *MacIntyre* and [*Vickery v. Nova Scotia (Prothonotary, Supreme Court)*, [1991] 1 S.C.R. 671] the relevant court records remained in the court's possession, in my view there can be no principled basis for terminating the court's jurisdiction to provide access to exhibits just because they have left the possession of the court. They do not lose their character as exhibits simply

> because they have been physically transferred to the Toronto Police Service. They remain an integral part of the court record in the Lorenz case.
>
> Moreover, the objectives that are served by the presumption of public accessibility — namely, judicial accountability and public understanding of the administration of justice — continue to be important even when possession passes from the court. Fostering judicial accountability in a particular case and enhancing public understanding of that case do not cease when the exhibits are transferred to the police. The policy objectives served by the court's jurisdiction to provide public access to its records thus strongly suggest that, whatever its ultimate reach, this jurisdiction does not end when the records pass out of the court's possession.
>
> As with the proprietary interest in exhibits referred to in *Vickery*, it may be that where they have passed into the control of another, there is a possessory interest to be considered in deciding on public access. In a case like this, however, where the exhibits have simply been returned to the police a few months after the court proceeding and the application for access has been promptly made, that interest would not seem to be significant.

[22] In *Vickery v. Nova Scotia* [1991] 1 S.C.R. 671, a taped confession had been played in court at trial, and the information had been broadcast. However, the Appeal Court had determined that the statement contained in the taped confession was inadmissible. An attempt was made by the media to broadcast it after it had been deemed inadmissible. The Supreme Court determined that the tape could not be released, particularly because the statement had been improperly obtained.

[23] The CBC says courts “regularly grant access to the audio and videotape obtained as a result of this kind of undercover operation.” For instance, in *R. v.*

Black, 2006 BCSC 2040, [2006] B.C.J. No. 3522 (B.C.S.C.), Humphries, J. said, at paras. 35-36:

> ... All the details of the investigation are subject to publication and, in this case, have already been publicized. The important aspect is to protect the identities of the officers. As for the accused, the comments from *Vickery* set out above demonstrate clearly that the rights of privacy of an accused person are surrendered to the judicial process.
>
> There is no restriction on publication of the conversations, and the media has had access to the transcripts. In that sense, the broadcasting of the videotape is of little moment in informing the public of its content. By the same token, however, there is no principled reason to keep the video from being broadcast as long as appropriate measures are taken to safeguard the relevant interests. The same applies to the audiotapes of the intercepted calls connected with the undercover operations.

[24] The recordings in question in *Black* were exhibits tendered at trial. Similarly, in *R. v. Quintal*, 2003 ABPC 79, [2003] A.J. No. 509 (Alta. Prov. Ct.), where the offender sought to have a forensic assessment, which had been used in sentencing and was filed as an exhibit, sealed, the court said, at paras. 154-155:

> The Sun and Journal both seek access to the FACS assessment in order to report on the factors which were relied upon in the imposition of sentence. This report would address the genuine societal interests articulated in the authorities by Wilson J. in [*Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326] (at pg. 1361):
>
> > " . . . (1) to maintain an effective evidentiary process; (2) to ensure a judiciary and juries that behave fairly and that are sensitive to the values espoused by the society; (3) to promote a shared sense that our courts operate with integrity and dispense justice; and (4) to provide an ongoing opportunity for the community to learn how the justice system operates and how the law being applied daily in the courts affects them."

> To the extent that a sentencing judge relies upon a PSR or a FACS assessment in determining a fit and just sentence, it seems clear to me that no meaningful consideration can be undertaken by the public to answer these questions unless the public has access to the material upon which the sentencing court relied. The admonition "trust me" is hollow comfort to the public that the relevant sentencing principles have been considered and applied. Keeping some of the cards closed from public view would only cause uncertainty and concern with respect to the court's process, leading to less respect for the rule of law and the proper working of the justice system.

[25] In *R v. Canadian Broadcasting Corp.*, [2006] O.J. No. 1685 (Ont. S.C.J.), the Court determined that there was no need to release a tape because that had been played in open court and reported upon. The CBC draws a distinction between that case and the present circumstances, on the basis that the video and audio statements in this case have never been played, and their contents have never been reported upon. The CBC maintains that it is necessary for the tapes to be produced in order to determine whether there is anything on the tapes that is different than what was reported in the Agreed Statement of Facts.

[26] The CBC has named the RCMP as the respondent because the force has possession of the video and audio statements. As has been noted, the RCMP argues that this Court does not have jurisdiction to adjudicate on the issue of the release of the audio and video statements. The CBC has also applied to the RCMP’s Access to Information Coordinator, but will not be challenging his

decision; rather, the CBC intends to assert its right to information based upon the sentencing judge's reliance on the Agreed Statement of Facts for the purpose of entering a conviction and sentence.

[27] Despite the fact that the CBC has sought the release of information from various agencies, it maintains that this Court has control over evidence and that its process is an independent basis for release the records to the public. Therefore, it is submitted, this application should not be sidetracked by the attempts to secure the release of this information from the RCMP or from provincial authorities.

[28] The CBC argues against the characterization that the RCMP, in this instance, is a federal board, commission or other tribunal (and therefore the proceeding is subject to the exclusive jurisdiction of the Federal Court), and submits that this Court has concurrent jurisdiction by virtue of s. 21(1) of the *Crown Liability and Proceedings Act*, which provides:

> Concurrent jurisdiction of provincial court
> 21. (1) In all cases where a claim is made against the Crown, except where the Federal Court has exclusive jurisdiction with respect to it, the superior court of the province in which the claim arises has concurrent jurisdiction with respect to the subject-matter of the claim.

[29] The basis of this argument is the CBC's view that the RCMP was not acting as a federal board, commission or tribunal. In conducting a criminal investigation, it is submitted, the RCMP is not exercising jurisdiction conferred by or under an act of Parliament, but rather jurisdiction grounded in common law. Consequently, it cannot be said that, in the context of this investigation, the RCMP is "a federal board, commission or other tribunal". According to the CBC, there is a distinction to be drawn between the RCMP acting in a criminal investigation, and in a case where a federal designate is acting pursuant to legislation. Therefore, the CBC submits, *Mousseau* is distinguishable.

[30] In considering the exclusive jurisdiction of the federal court in *ITO – International Terminal Operators Limited v. Miida Electronics Inc. et al.*, [1986] 1.S.C.R. 752, where McIntyre, J. set out the traditional jurisdiction test, at p. 766:

> 1. There must be a statutory grant of jurisdiction by the federal Parliament.
>
> 2. There must be an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction.
>
> 3. The law on which the case is based must be "a law of Canada" as the phrase is used in s.101 of the *Constitution Act, 1867*.

[31] The CBC argues that the *ITO* test requires the applicant to establish an express or implied grant of jurisdiction authorizing the Federal Court to quash and declare invalid the decisions made by the RCMP. The CBC submits that the RCMP was not "exercising or purporting to exercise jurisdiction or powers conferred by or under an act of Parliament", as described in s. 2(1) of the *Federal Courts Act*, when it denied the request to provide the requested materials. Rather, it is argued, the RCMP was acting in the course of a criminal investigation.

[32] The CBC notes the following provisions of the *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10, at ss. 5 and 9:

> Appointment
> 5. (1) The Governor in Council may appoint an officer, to be known as the Commissioner of the Royal Canadian Mounted Police, who, under the direction of the Minister, has the control and management of the Force and all matters connected therewith.
> ....
>
> Peace officer
> 9. Every officer and every person designated as a peace officer under subsection 7(1) is a peace officer in every part of Canada and has all the powers, authority, protection and privileges that a peace officer has by law until the officer or person is dismissed or discharged from the Force as provided in this Act, the regulations or the Commissioner's standing orders or until the appointment of the officer or person expires or is revoked.

[33] Although it would appear at first blush that the Commissioner controls and manages the Force "in all matters connected therewith", the CBC submits that this

is not determinative, and says it is necessary to consider the functions being carried on by the RCMP at the relevant time.

[34] Reliance is placed on *Canada (Deputy Commissioner, Royal Canadian Mounted Police) v. Canada (Commissioner, Royal Canadian Mounted Police)*, 2007 FC 564, [2008] 1 F.C.R. 752 (F.C.), where the court stated at para. 44:

> ... While I recognize that the powers of peace officers are incorporated into the RCMP Act, nevertheless, it is well established that when peace officers conduct criminal investigations they are acting pursuant to powers which have their foundation in the common law independent of any Act of Parliament or Crown prerogative. In other words, the *RCMP Act* imports and clothes with statutory authority police powers, duties and privileges which remain largely defined by common law: *Doe v. Metropolitan Toronto (Municipality) Commissioners of Police* (1990), 74 O.R. (2d) 225 (Div. Ct.).

[35] In *R. v. Campbell*, [1999] 1 S.C.R. 565, Binnie, J. said, at paras. 27, 33 and 35:

> A police officer investigating a crime is not acting as a government functionary or as an agent of anybody. He or she occupies a public office initially defined by the common law and subsequently set out in various statutes. In the case of the RCMP, one of the relevant statutes is now the Royal Canadian Mounted Police Act....
> ....
>
> While for certain purposes the Commissioner of the RCMP reports to the Solicitor General, the Commissioner is not to be considered a servant or agent of the government while engaged in a criminal investigation. The Commissioner is not subject to political direction. Like every other police officer similarly engaged, he is answerable to the law and, no doubt, to his conscience. As Lord

> Denning put it in relation to the Commissioner of Police in *R. v. Metropolitan Police Comr., Ex parte Blackburn*, [1968] 1 All E.R. 763 (C.A.), at p. 769:
>
> > I have no hesitation, however, in holding that, <u>like every constable in the land, he [the Commissioner of Police] should be, and is, independent of the executive</u>. He is not subject to the orders of the Secretary of State, save that under the *Police Act 1964* the Secretary of State can call on him to give a report, or to retire in the interests of efficiency. I hold it to be the duty of the Commissioner of Police, as it is of every chief constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or not suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought; <u>but in all these things he is not the servant of anyone, save of the law itself</u>. No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that; or that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone. [Emphasis by Binnie J.]
>
> ....
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> ... It would make no sense in either law or policy to hold the police to be agents of the Crown for the purposes of allowing the Crown to shelter the police under its immunity in criminal matters, but to hold the police not to be Crown agents in civil matters to enable the government to resile from liability for police misconduct. The Crown cannot have it both ways.

[36] The CBC maintains that the recordings were made in relation to a criminal investigation, and that the police were therefore not acting pursuant to powers given by an Act of Parliament.

[37] The CBC also cites certain comments of the majority in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9, where it was said, at paras. 27-28:

> ... Courts, while exercising their constitutional functions of judicial review, must be sensitive not only to the need to uphold the rule of law, but also to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures.
>
> By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.

[38] MacTavish, J. reviewed the law as to what constitutes a federal board, commission or other tribunal, and in which situations such entities are acting in that capacity, in *DRL Vacations Ltd. v. Halifax Port Authority*, 2005 FC 860, [2006] 3 F.C.R. 516. After a review of the caselaw, MacTavish, J. said, at para. 48 (citations omitted):

> From this review of the jurisprudence, the following principles can be distilled:
>
> 1. The phrase "powers conferred by or under an Act of Parliament" found in the definition of a "federal board, commission or other tribunal" in subsection 2(1) of the *Federal Courts Act* is "particularly broad" and should be given a liberal interpretation....
>
> 2. The "powers" referred to in subsection 2(1) of the *Federal Courts Act* are not confined to those powers that have to be exercised on a judicial or quasi-judicial basis. However, the phrase "jurisdiction or powers" refers to jurisdiction or powers of a public character....
>
> 3. The powers referred to in subsection 2(1) do not include the private powers exercisable by an ordinary corporation created under a federal statute which are merely incidents of its legal personality or authorized business....

> 4. Although the character of the institution is significant to the analysis, it is the character of the powers being exercised that determines whether the decision maker is a federal board, commission or other tribunal for the purposes of section 18.1 of the *Federal Courts Act*....
>
> 5. The fact that an institution was created to be at arm's length from the government, the discretion conferred on the institution to manage its business, and the government's lack of control over the finances of the institution are all indicators that the institution is not a "federal board, commission or other tribunal"....
>
> 6. The fact that the institution was created by government is not, by itself, determinative of the question....
>
> 7. The mere exercise of statutory powers alone is not sufficient to bring an institution under subsection 2(1) of the *Federal Courts Act*. All of the circumstances of the case have to be considered in order to determine whether, in exercising the powers in issue, the institution was acting as a "federal board, commission or other tribunal"....
>
> 8. While an organization may be a "federal board, commission or other tribunal" for some purposes, it is not necessarily so for all purposes. In determining whether an organization is a "federal board, commission or other tribunal" in a given situation, it is necessary to have regard to the nature of the powers being exercised....

[39] The CBC maintains that the RCMP were acting not pursuant to the provisions of the *RCMP Act* but rather independent of the powers of that statute. In other words, the statute has no power to control the criminal investigation. The CBC further maintains that there are no parallel proceedings; although there was an application for the release of documents under the federal legislation, the CBC does not intend to appeal that decision. Therefore, the CBC submits that there is no basis for the Attorney General to state that the RCMP are acting pursuant to a

federal statute. The police, it is submitted, are independent of government or Parliament in conducting a criminal investigation.

[40] In reply, the Attorney General maintains the position that, absent a constitutional challenge to the validity or applicability of federal legislation, this Court does not have jurisdiction to review a RCMP decision or issue *mandamus*. Rather, the RCMP's actions are only subject to review in the Federal Court.

[41] The Attorney General emphasizes that the video and audio statements in this matter were never part of the court record, were not entered as exhibits and were not referred to directly in the proceeding. Rather, Stewart, J. referred to the Agreed Statement of Facts.

[42] The Attorney General maintains that the RCMP was acting as a Federal board, commission or tribunal when it refused to release the recording to the CBC. This was, it is submitted, an administrative decision governed by the applicable federal legislation, made after the conclusion of the criminal proceeding. It did not pertain to the criminal investigative function.

[43] As to the CBC's reliance on the "open court" doctrine, the Attorney General points out that the video and audio material was never exhibited at trial and therefore it is not subject to the ordinary rules for the release to the media. There is no basis advanced to argue that the open court doctrine provides jurisdiction to compel the production of information not tendered in court. Further, the Attorney General argues against the suggestion that the CBC's "oversight" role entitles it to the material. If that is the case, the Nova Scotia Public Prosecution Service and the defendant should have been named as parties to the proceeding. More generally, the Attorney General submits that the wrong parties have been named: rather than name the RCMP as a party, the action ought to have been against the Provincial Crown and Ms. Boudreau.

[44] The Attorney General maintains that any review of the decision not to release the material in question is within the exclusive jurisdiction of the Federal Court. It admits that in performing an investigative function, the RCMP is not acting as a federal board, commission or the tribunal. However, this is strictly in the context of the conduct criminal investigation or in the course of the criminal investigation itself. Items that the police have recovered, but which do not form part of the proceeding, is not included in any claim for disclosure by the media.

[45] The Attorney General maintains that there is a discretion on the part of the police and prosecutors to conduct the investigation in a fair and effective way. There is no right of the media to interfere with this exercise of discretion. The Attorney General cites *Ochapowace First Nation v. Canada (Attorney General)*, 2007 FC 920, [2008] 3 F.C.R. 571, where the court said, at paras. 46-47:

> Numerous decisions of this Court have applied the concept of prosecutorial discretion and, in keeping with the decisions of the Supreme Court of Canada, have refused to embark on a judicial review of an exercise of that discretion. These decisions recognize that courts should limit rather than extend their supervisory role over police discretion. This is particularly the case when the decision sought to be reviewed is purely discretionary and the statute does not provide any directions or limitations as to when, how and to what extent that discretion should be exercised....
>
> It should be clear by now that the discretion enjoyed by the Crown and the police in the enforcement of the criminal law is nevertheless not absolute. The Supreme Court has made it clear, in all those decisions already referred to, that judges should intervene in cases of flagrant impropriety or malicious prosecution. But the threshold to demonstrate that kind of improper behaviour will be very high.

[46] The position of the Attorney General is that if, in fact, the RCMP decided not to release the material as part of its criminal investigation, then in keeping with the law concerning noninterference with police discretion, the RCMP's decision ought not be reviewed at all. However, the Attorney General concedes that if a review is required, it would be through the Information Commissioner and by way of judicial review in the Federal Court.

[47] The Attorney General argues that Court must consider the question in relation to the specific context in which the use arises. As MacTavish, J. held in *DRO Vacations*, *supra*, at para. 48, "[a]lthough the character of the institution is significant to the analysis, it is the character of the powers being exercised that determines whether the decision maker is a federal board, commission or other tribunal for the purposes of section 18.1 of the *Federal Courts Act*...."

[48] The Attorney General also refers to *Canada (Deputy Commissioner, Royal Canadian Mountain Police) v. Canada (Commissioner, Royal Canadian Mountain Police)*, *supra*, where the Federal Court held that a criminal investigation was not amenable to judicial review for reasons of police independence. The Court stated, at para. 55:

> In contrast to the criminal investigation, there is no serious dispute that the Federal Court has the requisite jurisdiction to review Commissioner Busson's decisions pertaining to the Code of Conduct investigation. Clearly, the Commissioner's powers to suspend officers and to initiate internal administrative investigations into a member's conduct derive from the *RCMP Act* itself and, therefore, are amenable to judicial review under section 18.1 of the *Federal Courts Act*.

[49] The Attorney General says this is the same situation, with the *Access to Information Act* and the *Privacy Act* occupying the relevant place in the law.

[50] The Attorney General further maintains that the information in question is protected by the *Privacy Act*. Admittedly, in some instances, some information is released as an exception to the general provision of the statute, but it has to be a document which is issued by a court having proper jurisdiction. In releasing any document, the RCMP is bound to respect the provisions of the *Privacy Act*.

CONCLUSION

[51] In my view, ordering disclosure of the material requested is not within the jurisdiction of this Court. The materials are in the possession of the RCMP. The investigation has been completed. I also take the view that the RCMP and (in particular) the Crown had a discretion as to whether to put these materials before the court at the time of the sentencing Hearing. The Crown, in the exercise of prosecutorial discretion, opted not to place these recordings before the Court. The CBC did not join the provincial Crown to the proceeding for precisely that reason: the Crown could not be compelled to produce material that had not been part of the

court process. Thus, the CBC would appear to be pursuing disclosure of these materials from the RCMP for precisely the reason that they were not available from the Crown. But naming the RCMP does not entitle the CBC to a result that it could not have achieved by pursuing disclosure of the materials from the Crown.

[52] I am further satisfied that the CBC was obliged to proceed against the RCMP in the Federal Court. I am satisfied that the investigation had concluded, and the RCMP was acting as a federal statute-governed agency in dealing with the request to release the materials, although the materials had their origin in the criminal investigation. As such, I am satisfied that this court does not have jurisdiction to deal with the matter in question. The application is allowed.

[53] The parties can submit their written positions on costs within three weeks from the date of the release of this decision.

J.

Date: 20100107
Docket: Hfx. No. 315437

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Canadian Broadcasting Corporation v. Canada (Attorney General), 2009 NSSC 400

BETWEEN:

Canadian Broadcasting Corporation

Plaintiff

and

The Attorney General of Canada

Defendant

ERRATUM

Revised judgment: The original judgment has been corrected according to this erratum dated **January 7, 2010**

HEARD: At Halifax, Nova Scotia, before the Honourable Justice Arthur J. LeBlanc on November 25, 2009

DECISION: December 31, 2009

COUNSEL: David G. Coles, Q.C. and Tony Amoud,
for the plaintiff
James C. Martin and Scott McCrossin,
for the defendant

Erratum:

(1) At paragraph 10, where it is stated: “The CBC maintains that the Supreme Court is only competent to hear a challenge to the constitutionality and

validity of Federal legislation." It should read: "The Attorney General maintains that the Supreme Court is only competent to hear a challenge to the constitutionality and validity of Federal legislation."

(2) At paragraph 52, second sentence, where it is stated: "I am satisfied that the investigation had concluded, and the CBC was acting as a federal statue-governed agency..." It should read: "I am satisfied that the investigation had concluded, and the RCMP was acting as a federal statute-governed agency...".

J.