



**IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR**

Citation: *R. v. Billiard*, 2021 NLCA 44

Date: July 15, 2021

Docket Number: 202001H0039

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT

AND:

CHRISTOPHER BILLIARD

RESPONDENT

Coram: Fry C.J.N.L., Welsh and O'Brien JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
General Division 201804G0247
(2020 NLSC 61)

Appeal Heard: May 17, 2021

Judgment Rendered: July 15, 2021

Reasons for Judgment by: Welsh J.A.

Concurred in by: Fry C.J.N.L. and O'Brien J.A.

Counsel for the Appellant: Kathleen M. O'Reilly

Counsel for the Respondent: Shannon Gunn Emery

Authorities Cited:

CASES CITED: *R. v. Martin and Kennedy*, 2021 NLCA 16; *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575; *R. v. Fercan Developments Inc.*, 2016 ONCA 269; *R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992; *R. v. Chung*, 2020 SCC 8; *R. v. MacKenzie*, 2013 SCC 50, [2013] 3 S.C.R. 250; *R. v. Connolly*, 2007 NLCA 5, 262 Nfld. & P.E.I.R. 281; *R. v. Furlong*, 2012 NLCA 29, 323 Nfld. & P.E.I.R. 77; *R. v. Trask*, [1987] 2 S.C.R. 304; *R. v. Garcia* (2005), 194 C.C.C. (3d) 361 (ONCA).

STATUTES CONSIDERED:

Criminal Code, sections 253(1)(a) and (b) (now sections 320.14(1)(a) and (b)), 676.1, 839, 826.

Canadian Charter of Rights and Freedoms, section 24(1).

Welsh J.A.:

[1] On July 6, 2016, Christopher Billiard was charged with operating a motor vehicle while impaired by alcohol and while having a blood alcohol content exceeding 80 mg of alcohol in 100 ml of blood, contrary to sections 253(1)(a) and (b) of the *Criminal Code* (now sections 320.14(1)(a) and (b)). Ultimately, the Crown decided not to call any evidence on the basis that it was no longer in the public interest to proceed, and the charges were dismissed. Upon application by Mr. Billiard, the trial judge and the summary conviction appeal judge (the “appellate judge”) ordered the Crown to pay costs to Mr. Billiard.

[2] The Crown seeks leave to appeal and, if granted, appeals the orders for costs.

BACKGROUND

[3] The decision of the Crown not to proceed with the charges relates to the disclosure of historical maintenance and calibration records for the instrument used to assess the driver’s blood alcohol content. The records for 2016 were provided, but Mr. Billiard also requested the records for 2015. At the time, the law regarding the Crown’s responsibility for such disclosure was unclear. The trial judge ordered the Crown to provide the 2015 information within ten days,

that is, by November 16, 2017. The Crown sent a request to the RCMP, and on November 26th, a Sunday, received a response indicating that the records were not available. The Crown provided that information to Mr. Billiard on November 27th. A trial date had been set for December 8, 2017.

[4] On December 7, 2017, Crown counsel advised counsel for Mr. Billiard that the Crown would not be calling evidence at the trial, and that counsel, who resided in Alberta, could appear by telephone. However, Mr. Billiard, who was working in Alberta, and his counsel had already departed for Newfoundland.

[5] The trial judge ordered the Crown to pay costs to Mr. Billiard in the amount of \$6,688.88. The summary conviction appeal judge dismissed the Crown's appeal, and ordered the Crown to pay costs of \$9,406.08 in respect of the summary conviction appeal. Mr. Billiard seeks dismissal of this appeal and, in that event, costs in the amount of \$8,273.00.

ISSUES

[6] If leave to appeal is granted, the issue on appeal is whether the appellate judge erred in dismissing the appeal against the costs order made by the trial judge and in awarding costs of the appeal. At the heart of the appeal is the application of the legal standard that applies to an order for costs against the Crown.

ANALYSIS

Leave to Appeal

[7] Because the Crown proceeded by way of summary conviction, the appeal to this Court is governed by section 839 of the *Criminal Code*. Regarding costs, section 676.1 of the *Code*, which addresses costs in indictable matters, would apply (section 839(2) of the *Code*). Section 676.1 provides:

A party who is ordered to pay costs may, with leave of the court of appeal or a judge of a court of appeal, appeal the order or the amount of costs ordered.

[8] In determining whether leave should be granted in these circumstances, the appropriate analytical approach is discussed in *R. v. Martin and Kennedy*, 2021 NLCA 16:

[6] Section 839 of the *Criminal Code*, which addresses appeals to this Court from the summary conviction appeal court, specifically requires leave in order to proceed with an appeal which is restricted to a question of law. The test to be applied in

determining whether leave should be granted is set out in *Newfoundland Recycling Ltd. v. Newfoundland and Labrador (Attorney General)*, 2009 NLCA 28, 284 Nfld. & P.E.I.R. 153:

[9] Thus, to obtain leave to appeal pursuant to s. 839(1):

(a) the appeal must “be taken on a ground that involves a question of law alone”, and

(b) the ground(s) of appeal must be such that

(i) either the ground of appeal has a “reasonable possibility of success”, or

(ii) “the proposed question of law [has significance] to the administration of justice”.

[9] These requirements are satisfied in this case. As discussed below, application of the legal standard that is engaged in awarding costs against the Crown is a question of law. Further, the question has significance to the administration of justice, particularly given the limited circumstances when costs may be awarded against the Crown in a criminal matter. While that is sufficient to satisfy the test, I would add that the alternate factor under part (b) of the test is also met; that is, the ground of appeal has a reasonable possibility of success.

[10] Accordingly, I would grant leave to appeal.

The Appeal

[11] In *R. v. Fercan Developments Inc.*, 2016 ONCA 269, the Court commented on the circumstances when costs may be ordered against the Crown in a criminal matter:

[37] Although they are rare, cost awards have a long and established history as a criminal law remedy: *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575, at para. 80 (“*Dunedin*”). In *Canada (Attorney General) v. Foster* (2006), 215 C.C.C. (3d) 59 [Ont. C.A.], at paras. 62-69, this court outlined three circumstances where costs may be awarded against the Crown: (i) where there has been a *Charter* violation; (ii) where there has been Crown misconduct; and (iii) where there are exceptional circumstances.

Costs under the Charter

[12] Pursuant to section 24(1) of the *Canadian Charter of Rights and Freedoms*, costs may be ordered as a remedy against the Crown for the breach of a *Charter* right. Section 24(1) provides:

Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

The remedy may include, in appropriate circumstances, an award of costs (*R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575, at paragraph 4).

[13] However, in this case the appellate judge concluded that the trial judge did not rely on a breach of the *Charter* in making the award of costs (2020 NLSC 61):

[81] The trial judge made her decision to award costs not on the basis of a *Charter* violation but on the basis of the overall conduct of the [Crown] throughout the prosecution of the charges against [Mr. Billiard]. ...

[14] It follows that, in this case, breach of a *Charter* right does not provide a basis on which to order costs against the Crown.

Conduct of the Crown

[15] As referenced above, appeals from orders for costs against the Crown are governed by section 676.1 of the *Criminal Code*. Pursuant to section 826 of the *Code*, an appellate court “may make any order with respect to costs that it considers just and reasonable.” Whether an order for costs is made by the trial judge or is reviewed or ordered by the court on appeal, where the order is based on conduct of the Crown, the same test applies.

[16] In particular, in determining whether costs may be ordered against the Crown in a criminal matter based on conduct of the Crown, the standard to be applied is set out in *974649 Ontario*:

[87] Neither is there any indication that the Crown will be subjected to such awards unfairly or arbitrarily. Crown counsel is not held to a standard of perfection, and costs awards will not flow from every failure to disclose in a timely fashion. Rather, the developing jurisprudence uniformly restricts such awards, at a minimum, to

circumstances of a marked and unacceptable departure from the reasonable standards expected of the prosecution. ...

(Emphasis added.)

[17] The application of that standard is a question of law. The distinction between findings of fact, which are entitled to deference on appeal, and application of the law to those facts, which is a question of law, is referenced in *R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992. LeBel J., for the Court, concluded:

[18] ... The interpretation of a legal standard has always been recognized as a question of law: *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, at para. 21. Moreover, our Court has recently recognized that if a question is about the application of a legal standard, that is enough to make it a question of law: *R. v. Biniaris*, [2000] 1 S.C.R. 381, 2000 SCC 15, at para. 23. ...

[18] Similarly, in *R. v. Chung*, 2020 SCC 8:

[11] ... These two types of errors are somewhat similar; they both address errors where the trial judge's application of the legal principles to the evidence demonstrates an erroneous understanding of the law, either because the trial judge finds all the facts necessary to meet the test but errs in law in its application, or assesses the evidence in a way that otherwise indicates a misapprehension of the law.

See also *R. v. MacKenzie*, 2013 SCC 50, [2013] 3 S.C.R. 250, at paragraph 54.

[19] In this case, based on the facts as determined by the trial judge, whether the conduct of the Crown amounts to a marked and unacceptable departure from the reasonable standards expected of the prosecution is a question of law. While both the trial and appellate judges referenced the correct legal standard, it is the application of that standard that is the focus of this appeal.

[20] A marked and unacceptable departure from the reasonable standards expected of the prosecution would engage language such as abuse of process, improper motive, bad faith, egregious misconduct, and oppressive, vexatious or reckless conduct (see, for example, *R. v. Connolly*, 2007 NLCA 5, 262 Nfld. & P.E.I.R. 281, at paragraph 61).

[21] In *R. v. Furlong*, 2012 NLCA 29, 323 Nfld. & P.E.I.R. 77, at paragraph 17, the Court referred to “reprehensible or unfair Crown conduct, or very unique circumstances” on which to justify an order for costs against the Crown in a criminal matter.

[22] Unique or special circumstances when costs may be ordered against the Crown are discussed in *R. v. Trask*, [1987] 2 S.C.R. 304. At pages 307 to 308, McIntyre J., for the Court, explained:

... The Court, from time to time, when the Crown wishes to appeal a summary conviction matter in order to settle a point of law, will require the Crown to pay the respondent's costs. This is because it is the public-at-large who are the beneficiaries of such a step and it is not considered just that one individual should be put to substantial expense when it is the Crown that seeks to effect a valid social purpose by taking the appeal. That is not the situation before us now and the same logic does not apply. There is nothing remarkable about this case, no oppressive or improper conduct is alleged against the Crown, and it was the appellant, not the Crown, who brought the matter to this Court. ...

[23] Reliance on special circumstances as a basis for ordering costs against the Crown is also discussed in *R. v. Garcia* (2005), 194 C.C.C. (3d) 361 (ONCA). Doherty J.A., for the Court, characterized the issue as “akin to a test case in that the Crown appeal raised a controversial and important legal issue transcending the particular circumstances of the individual respondent” (paragraph 17). And further:

[22] I agree with Crown counsel's submission that the mere fact that a Crown appeal raises a legal issue of general importance whose resolution will affect other cases cannot suffice to make the appeal an “exceptional” case warranting a costs order against the Crown. Were that the law, costs orders would be commonplace, certainly in this court and the Supreme Court of Canada where most Crown appeals in summary conviction matters raise legal issues that potentially impact on many other cases.

[24] I agree with this position and would emphasize that, even in appeals taken by the Crown, it can be expected that only in rare circumstances will it be “the public-at-large who are the beneficiaries” of the Crown's appeal. The facts in this appeal clearly do not fall within the special or unique circumstances that would warrant a costs order against the Crown on that basis.

[25] Turning, then, to the question of the Crown's conduct, the decision in *Connolly* is an example of circumstances when costs may be ordered against the Crown. At issue was forfeiture of the matrimonial home in which Ms. Connolly and her three children were residing following charges, not against Ms. Connolly, but against her husband for possession of the proceeds of crime:

[60] It is unusual for the court to order the Crown to pay costs in the *Criminal Code* context. However, in determining whether the applications judge erred in awarding costs in this case, two factors, in particular must be considered: (1) the conduct of the

Crown, first in failing to advise the court that Ms. Connolly was a person to whom notice of the forfeiture application should have been given, and second, in selling the house when the forfeiture order was suspended by operation of the legislation, and (2) the quasi-civil nature of the application which is made by an innocent third party.

[26] The Court found that the Crown's conduct constituted a marked and unacceptable departure from the reasonable standards expected of the Crown because, as a result of the Crown's failure to comply with the requirements of the legislation, the court was deprived of "the opportunity to balance the competing interests [between the accused and an innocent third party] in the manner directed by the forfeiture provisions" (*Connolly*, at paragraph 64).

[27] In this case, Mr. Billiard submits that the Crown failed to comply with a court order insofar as the requested information was not provided within the designated ten-day period. While the deadline should have been met, but was missed by ten days, the Crown did provide the information within a reasonable period and in sufficient time prior to the scheduled trial. There was no evidence that Crown counsel acted in bad faith or with an improper motive, or that court orders were not taken seriously. The failure in the circumstances could not be characterized as a marked and unacceptable departure from the reasonable standards expected of the prosecution.

[28] Mr. Billiard also submits that Crown counsel failed to meet the standard of reasonable conduct because he and his counsel were not advised until the day before the scheduled trial that the Crown intended not to call any evidence. This would not ordinarily have been unusual or problematic. A final review of the evidence and law by Crown counsel just prior to trial is to be expected, and may lead to a conclusion by counsel "on the steps of the courthouse" not to proceed with the charges. While this may cause inconvenience for the accused and the court, and may result in what turns out to be unnecessary expense to be incurred by the accused, in the absence of some special consideration such as bad faith, this could not be said to constitute a departure from reasonable standards expected of the Crown.

[29] The issue was exacerbated in this case because Mr. Billiard, who was working in Alberta, had chosen to be represented by counsel located in Alberta. That choice resulted in time and expenses related to travel. Indeed, as noted in the Agreed Statement of Facts attached as Schedule A to the appellate judge's decision:

[48] ...

10. Defence counsel would have foregone the application for costs were it not for the fact that they were obliged to travel to Newfoundland for the trial continuation (146/15-17 [of the transcript]).

[30] Had Mr. Billiard chosen to be represented by local counsel, the issue would not have arisen. His choice was, of course, open to him, but cannot form the basis for a conclusion that the Crown should be responsible for those costs absent a marked and unacceptable departure from the reasonable standards expected of the prosecution.

[31] Both the trial and appellate judges erred in the application of the legal standard to the facts. Their conclusions demonstrate a misapprehension of the law, which sets a high threshold before an order for costs may be made against the Crown in a criminal matter.

SUMMARY AND DISPOSITION

[32] In summary, the application of the legal standard to the Crown's conduct is a question of law which is properly considered by this Court with the result that leave to appeal should be granted.

[33] I am satisfied that the appellate judge misapprehended the law as it applied in this case with the result that he erred in concluding that the Crown's conduct would meet the threshold for ordering costs against the Crown in a criminal matter.

[34] Accordingly, I would grant leave to appeal and allow the appeal.

B. G. Welsh J.A.

I concur: _____
D. E. Fry C.J.N.L.

I concur: _____
F. P. O'Brien J.A.